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.
HON. WILLIAM M. ROBINSON,	AROOSTOOK COUNTY.*

ATTORNEY GENERAL.

HON. ORVILLE D. BAKER.

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* Established March 4, 1885, by chapter 324, statutes 1885.

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

C. W. HUSSEY *vs.* GEORGE O. DANFORTH and others.

Kennebec. Opinion October 28, 1884.*

Bond. Poor debtor. Insolvency. R. S., c. 113, § 24. R. S., c. 70, § 51.

A debtor, arrested on execution issued upon a judgment recovered upon a debt provable in insolvency, who, while in custody, files his petition in insolvency, and thereafter executes a bond in accordance with the provisions of R. S., c. 113, § 24, to obtain his release from arrest, is not relieved from the bond on account of his proceedings in insolvency, even though he obtain his discharge within the six months from the time of the arrest.

The arrest upon execution, having been made prior to the filing of the petition in insolvency, is not vacated by the institution of proceedings in insolvency; and the bond having been executed in accordance with the provisions of the statutes subsequently to the arrest and commencement of proceedings in insolvency, is not affected by any discharge which the debtor afterwards obtains.

Where the debtor delivers himself into the custody of the keeper of the jail to which he is liable to be committed under the execution, and is received into jail by the jailer within the six months named in the bond, the penalty of the bond is saved, although he is afterwards released by the jailer.

ON REPORT.

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* Received by the Reporter January 13, 1885.

Debt against the principal and his sureties on a poor debtor's six months bond. The material facts are sufficiently stated in the opinion.

Brown and Carver, for the plaintiff, contended that there was not a complete surrender of the debtor in the manner contemplated by the statute — such a surrender as would give the creditor the right to a disclosure from him. The debtor went to the jailer with no copy of the execution or bond and induced the jailer to lock him up; then he showed the jailer his discharge in insolvency, and said: "You must look up the law for me, and if I am not released from that bond by my insolvency proceedings I will remain with you; but if I am, I demand my release." There the jailer was with this man, having no paper except the discharge in insolvency, demanding his right to go instead of expressing his willingness to surrender himself absolutely. The jailer with propriety did not regard it as a case requiring him to keep the man; he took counsel and concluded to let the man go. What was done, considering all the acts together, did not constitute a surrender and shows that the debtor did not intend to surrender.

F. A. Waldron, for the defendants, cited: *Ryan* v. *Watson*, 2 Maine, 382; *Pease* v. *Norton*, 6 Maine, 229; *Rollins* v. *Dow*, 24 Maine, 123; *White* v. *Estes*, 44 Maine, 21.

FOSTER, J. The defendant, Danforth, was arrested September 18, 1882, on execution; the next day, September 19, filed his petition in insolvency; and two days later, on the twenty-first of September, gave the bond in suit to procure his release from arrest. He obtained his discharge from the court of insolvency, March 14, 1883.

The regularity of the proceedings in the court in which judgment was rendered and execution issued, as well as of those in the court of insolvency, and that the bond is a regular statute bond duly executed, is admitted.

The defense sets up, (1) that the debt, represented by the judgment and execution on which the defendant was taken into

custody, originated since the insolvent law of 1878 went into effect, and although the arrest on the execution was legal, the commencement of proceedings in insolvency by the debtor during the time he was in custody, and before the bond in suit was given, vacated the arrest, legally entitled him to a release from the custody of the officer, and that the bond which he afterwards gave for his release was executed under duress; (2) that the debt on which the execution was obtained has been discharged by proceedings in insolvency, and that the bond, although executed after the arrest and after the filing of the petition in insolvency, must fall with the debt; (3) that he has performed one of the conditions named in said bond by delivering himself into the custody of the keeper of the jail to which he was liable to be committed under said execution.

I. Upon the first and second propositions set up in defense, the defendant cannot prevail. To what extent the privilege of exemption from arrest may be lawfully claimed by a debtor who has been legally arrested on execution prior to filing his petition in insolvency, so far as we have been able to learn, has never been determined by any decision of the court in this State.

By the common law, the creditor had the absolute right to arrest his debtor upon an execution for debt. When the debtor was committed on execution in a civil action, he could not be discharged without paying the debt, even on taking the poor debtor's oath, if his creditor would pay for his support in jail. 3 Bl. Com. 416; Anc. Chart. 650.

While the common law was modified by statutory enactment as early as 1787, c. 29, in the commonwealth of Massachusetts, in relation to discharge from imprisonment, yet to the present time, under the various changes which the law has undergone, the debtor has always in this State been liable to arrest upon execution. As the statutes now stand, provision is made for the arrest and imprisonment upon execution of the debtor for the purpose of obtaining a discovery of his property wherewith to satisfy the execution on which he is arrested. Provision is likewise made whereby he may obtain his release by complying with certain conditions,—in this day generally well understood by

those who, with sincere motives, have occasion to resort for protection thereto, as by those who thereby have like occasion to lament the loss of honest debts. One of those conditions is in executing a bond like the one in suit.

This debtor was arrested in accordance with the provisions of law, and while in custody, filed his voluntary petition in insolvency. Was he thereby entitled to release from arrest? We think not.

So much of § 47 of the insolvent act of 1878 (R. S., c. 70, § 51) as relates to this question provides that . . . "no debtor against whom a warrant of insolvency has been issued shall be liable to arrest on mesne process or execution, where the claim was provable in insolvency during the pendency of the insolvency proceedings, unless the same shall be unreasonably protracted by the fault or neglect of such debtor."

This provision is very nearly identical with the general bankrupt act of 1867, § 26, (U. S. R. S., § 5107) which was in force at the time of the enactment of the present insolvent law. The language of both, in the provision referred to, taken in connection with the objects to be attained, possesses that degree of similarity by which a construction given to one would equally apply to the other. And it has been decided by other courts, that this section of the general bankrupt law would not relieve from arrest one who was in lawful custody when the petition was filed, though for a debt provable and dischargable under the act; that it applied only to arrests that were made after the commencement of proceedings in bankruptcy; and if the arrest had been made before that time, the bankrupt was not entitled to a release by virtue of any provision of the bankrupt law. Bump, (7th ed.) c. X, pp. 166, 606; Hamlin's Insolvent Law, 70; *In re Walker*, 1 Lowell, 222; *In re Devoe*, *id.* 251; *Hazelton*, v. *Valentine*, *id.* 270; *Minon* v. *Van Nostrand*, *id.* 458; *Stockwell* v. *Silloway*, 100 Mass. 298. And see, *Storer* v. *Haynes*, 67 Maine, 422; *Wilmarth* v. *Burt*, 7 Met. 257, 261.

The arrest contemplated by the statute, and to which no debtor "shall be liable," is manifestly a new arrest for the benefit of the creditor, as was held by GRAY, J., in *Stockwell* v. *Silloway*,

supra, where he says: "And this very section has been adjudged by the district court of the United States in this district not to extend to the case of a debtor who, before the commencement of bankruptcy proceedings, had been arrested on mesne process, giving bail, and surrendered himself in discharge of his bail, and was charged on an *alias* execution taken out after his bankruptcy; upon the ground that this act of the creditor was not in law or fact a new arrest during the pendency of the proceedings, but only a lawful continuation of the old arrest according to the terms and for the purposes for which it was originally made."

In the case at bar the officer was in the faithful performance of his duty, at the time the arrest was made, obeying the mandate of a court whose jurisdiction in relation to the matter was unquestioned, and in the execution of that duty he was bound only to see that the process, which he was called upon to execute, was in due and regular form, emanating from a court having jurisdiction of the subject. He was justified in obeying his precept, and it is highly necessary to the due, prompt, faithful and energetic execution of the mandates of the law that he should be thus protected. No action of trespass could lie against him in the faithful execution of that duty while thus obeying a precept regular upon its face. *Wilmarth* v. *Burt*, 7 Met. 257; *Clarke* v. *May*, 2 Gray, 413; *Conner* v. *Long*, 104 U. S. 238.

II. The bond in suit having been executed and delivered after the debtor had instituted proceedings in insolvency, was properly given, and is not affected by any discharge which he has since obtained. *Corliss* v. *Shepherd*, 28 Maine, 551, 552. The arrest having been legally made, and the bond given while the debtor was in the custody of the officer, in accordance with the statutes of this State, the rights of the creditor for further proceedings for the purpose of obtaining a discovery of the debtor's property had attached before the filing of his petition, and that provision of the insolvent law relating to exemption from arrest does not apply to the case at bar, whatever may have been the effect of the debtor's discharge upon the debt represented in the execution. It is a new contract entered into by the parties defendant, and in accordance with the provisions of the statute, after the com-

mencement of insolvency proceedings, and can not therefore be affected by those proceedings. Treating the debt as effectually discharged, and the remedy of the creditor, existing at the time the discharge was granted to recover his debt by suit as forever barred, the debt can not be said to be paid, but discharged. The moral obligation of the insolvent to pay it remains. It is due in conscience although discharged in law, and this moral obligation, uniting with a subsequent promise in writing by the insolvent to pay the debt would form a sufficient consideration, even though the promise be not under seal, and would support a right of action upon such promise. *Dusenbury* v. *Hoyt*, 53 N. Y. 523; *Corliss* v. *Shepherd*, 28 Maine, 552; *Otis* v. *Gazlin*, 31 Maine, 568.

III. But this bond is not a promise to pay the debt absolutely. It is subject to three conditions, defeasible upon the performance of either, and the only remaining inquiry relates to the question of performance.

These conditions are in the alternative, and the debtor must show that he has performed one of them within the six months, if he would expect protection to himself and his sureties. Here the defense, assuming the burden, claims performance of the last condition by "delivering himself into the custody of the keeper of the jail," March 14, 1883. If he has done that he has performed what he obligated himself to do, and his defense is sustained. *Rollins* v. *Dow*, 24 Maine, 124; *White* v. *Estes*, 44 Maine, 21; *Jones* v. *Emerson*, 71 Maine, 405.

We are satisfied from the testimony as reported that the debtor delivered himself into the custody of the jailer within the time.

His purpose was, as he testifies, to release his bondsmen. He says he presented himself to the jailer sometime in the forenoon, was locked in, but "did not remain in jail but a little while, an hour or so; I could not really tell whether it was afternoon when I was released; I don't remember the time; the jailer released me upon the presentation of that paper; he put me into the jail and turned the key, and I paid him for it." "I paid the turnkey's fee in going in and coming out; he asked me forty cents and I gave him half a dollar." The testimony of the debtor

is corroborated by that of the jailer himself who says he "could not give the hour he came there; sometime in the forenoon; he was discharged sometime in the afternoon." The jailer's entry upon the jail register, made at the time, confirms the statement of the witnesses; it is this: "Surrendered to jail, March 14, 1883, to save conditions of a six months' poor debtor's bond, dated September 21, A. D. 1882. Released March 14, 1883, on presenting discharge from court of insolvency."

This evidence is not only uncontradicted, but is supported by the other facts in the case.

The plaintiff, however, interposes objections which relate to the validity of the surrender. It is claimed that the debtor, as soon as he delivered himself up and was committed, exhibited his discharge in insolvency and demanded his release; that he produced no copy of the bond or execution when he surrendered himself to the jailer; and that inasmuch as his intention was to be released upon his discharge in insolvency when he entered, it was not such a delivery into custody as is contemplated by the statutes.

But the conditions of the bond relate to the acts rather than the intention of the party. If the debtor in fact delivered himself into the custody of the jailer, whatever may have been his intention or expectation as to his release, or as to the manner in which it was to be effected, we should not be warranted in saying that the intention should overrule the act and that he had not complied with the condition named in the bond.

Moreover, upon this question the testimony standing uncontradicted shows that his intention in delivering himself up was to comply with one of the conditions of the bond and release his sureties. He so informed the jailer; and the paper which he handed him before he was committed sets forth the amount of the judgment, the court at which it was rendered, date of the execution, the arrest, the date of the bond, and the object of delivering himself into custody. This was accepted and filed by the jailer.

It has been the practice for the debtor to deliver to the jailer, when he surrenders himself into custody, either an attested copy of the execution and return thereon, or of the bond, and he

would not be obliged to receive him without one or the other, but there is no statute requiring these as prerequisites, as in the case of bail surrendering their principal before a trial justice, and in commitment after judgment in such cases, (R. S., c. 85, § 15) or, as when the delinquent tax-payer is committed to jail for non-payment of his tax (R. S., c. 6, § 171); the production of this attested copy of the execution and return, or of the bond, may be waived, and if the jailer receives the debtor without either, or upon the production of such data as may be satisfactory to him, the delivery is undoubtedly sufficient. *Jones* v. *Emerson*, 71 Maine, 407.

Having submitted himself to the control of the jailer, and gone into actual confinement, as the evidence shows, he had done all that was in his power, and the penalty of the bond was saved. He had done what was incumbent upon him to do, and whether the jailer upon any representations of the debtor or otherwise, after his custody had commenced, neglected the performance of his duties, or, with no intention of neglect on his part, improperly discharged the debtor, is not before us for our consideration. *Rollins* v. *Dow*, 24 Maine, 124; *White* v. *Estes*, 44 Maine, 24; *Ryan* v. *Watson*, 2 Maine, 382.

The learned counsel for the plaintiff has called our attention to the case of *Jones* v. *Emerson*, *supra*. But it will be noticed that the facts in that case differ considerably from those here. There, all that the debtor did was to "offer to deliver himself to the jailer," and asked for information, but was not received into custody or committed; here, he not only offered himself, but was actually received into custody and committed to jail, and after remaining therein for some time was released by the jailer who received his fees for commitment and release.

In accordance with the stipulation in the report the entry should be,

Judgment for defendants.

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

JUDSON E. FRIEND, in equity,

vs.

ABRAM G. GARCELON and others.

Penobscot. Opinion January 5, 1885.

Pension money. Exemptions. U. S. R. S., § 4747.

By the statutes of the United States, the money due a pensioner is exempted from attachment or seizure upon legal process while it remains with the pension office or any officer or agent thereof, or is in course of transmission from such officer or agent to the pensioner, but not after the money has come to the pensioner's hands; when the money is actually in the possession of the pensioner the protection ceases.

ON REPORT.

Bill in equity. Heard on bill and answer.

The bill seeks to obtain the collection of an execution against Abram G. Garcelon, out of the properties in the name of his wife and son-in-law, paid for in whole, or in part, by the money of Garcelon, received by him as pension money from the United States. The question arose whether Garcelon could or not give away, or dispose of such money, as he pleased, as against those who were his creditors prior to obtaining the pension money.

It is alleged that a portion of the money went to pay an incumbrance on his wife's real estate, and a portion went to buy land deeded to a son-in-law, who holds the title in secret verbal trust for the pensioner. If the pensioner could legally, as against such creditors, make such an appropriation of his pension money, the report provided that the bill should be dismissed with costs. If not, the case was to go back for the settlement of the disputed facts.

Davis and Bailey, for the plaintiff, cited, *Spelman* v. *Aldrich*, 126 Mass. 117.

A. J. Merrill, for the defendants.

The statute provides that pension money "shall enure wholly to the benefit of such pensioner." He can get no "benefit" from it until he receives it and uses it. It is not a chose in action upon which he may create any liability or receive any benefit until the check comes to his hand. If exempt from attachment when it comes to the pensioner's hand, it will certainly follow that such money is exempt as long as its identity remains; and if exempt from attachment as long as the identity of the pension money remains, the pensioner may then dispose of it in such manner as he sees fit without prejudice to existing creditors. *Legro* v. *Lord*, 10 Maine, 161.

PETERS, C. J. The section of the R. S., U. S., (§ 4747) affecting the case is this: "No sum of money due or to become due to any pensioner, shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the pension office or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall enure wholly to the benefit of such pensioner."

The question is, whether this provision furnishes any protection to or exemption of the money after it comes into the pensioner's hands? A careful examination inclines us to the conclusion that it does not. The meaning of the section seems to be that the protection is extended so long as the money remains in the pension office or its agencies, or is in course of transmission to the pensioner. It is money "due" or to "become due," and not money collected, that is protected by the law. By another provision of the federal statutes a pensioner is not allowed to pledge or sell any right or interest in his pension. The extent of all the interference of the government seems to be, to ensure the actual reception of its bounty by the person entitled to it. When the money is actually in the possession of the pensioner the protection is gone.

With the money in his hands as his own unencumbered property, the pensioner stands upon the same footing for its protection as would any other man. He may, no doubt, purchase

with his money any property which our state laws exempt from attachment, and hold it as such. Further than that the guardianship does not extend. He is accountable to his creditors precisely as any other debtor possessing money would be. The counsel for the defendants contend that it does not defraud a creditor for his debtor to give away property which the creditor cannot attach. There can be no doubt of that proposition. The answer is, that the money is exempted from attachment before it is received and not afterwards.

Nor would it be very practicable to extend a protection further than before indicated. Certainly, the money could not be protected in its transitions from property to property. The moment its identification is gone, the protection confessedly ceases. If the money goes into attachable real estate, such estate may be taken for the pensioner's debts. See *Knapp* v. *Beattie*, 70 Maine, 410. There would surely be some ground for saying that there might be an unfairness in extending the protection to the limit contended for. If the money be exempted against any debts, it would be against all attachments and all debts. And the pensioner may have obtained credit from the very fact of the possession of property acquired in this way.

There are decisions favoring our view of the question. The Iowa court has twice affirmed the same view. *Triplett* v. *Graham*, 58 Iowa, 136. In *Webb* v. *Holt*, 57 Iowa, 712, it was said that "the exemption applies only to money due the pensioner, while in course of transmission to him, and that there is no exemption after it comes into his possession." In *Jardain* v. *Fairton Saving Fund Ass'n*, 44 N. J. (Law) 376, the same conclusion was reached, where it is said by the court: "The fund is not placed in the hands of a pensioner as a trust, but it is to enure wholly to his benefit. When it comes to him in hand or personal control, it is his money as effectually and for all purposes as the proceeds of his work or labor would be, and whether he expends it in new contracts, or it be taken to pay the consideration due from him for those of the past, it equally enures to his benefit." In 126 Mass. 113 *(Spelman* v. *Aldrich)*, it was held that "even if, by the laws of the United States, the

pension was exempt from attachment while it remained in the form of a pension check, the exemption ceased after the money was drawn upon the check." *Cranz* v. *White*, 27 Kan. 319, is to the same effect. See S. C. 41 Amer. Rep. 408 and note. In 50 Vt. 612 (*Hayward* v. *Clark*), a case not directly calling for a decision of the question, a different view is intimated.

It follows that the bill may be sustained upon either of the grounds named in the report.

Case to stand for hearing.

DANFORTH, VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

INHABITANTS OF FAYETTE *vs.* INHABITANTS OF CHESTERVILLE.

Kennebec. Opinion January 6, 1885.

Paupers. Sanity. Mental capacity. Experts. Physician. Evidence.

A child is capable of gaining a settlement for himself when he arrives at the age of twenty-one years, if he has intelligence enough to form and retain an intention in respect to his dwelling-place, mind sound enough to give him will and volition, and sufficient power and control over his mind and his action to enable him to choose a home for himself. He must have mental capacity to enable him to act with some degree of intelligence in choosing a new home.

Whether a physician, called in a case, is qualified to testify as an expert upon questions of insanity, is a question of fact for the presiding judge to decide, and his decision is usually final. In extreme cases where a serious mistake has been committed, through some accident, inadvertence or misconception, his action may be reviewed.

Skillful and reputable physicians, although not experts upon the subject, may testify to the mental condition of their patients when they have adequate opportunity of observing and judging of their mental qualities. But this does not embrace a case where a single examination was made by a physician to qualify himself as a witness in a pending litigation.

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

Assumpsit for pauper supplies furnished by the plaintiff town to Fred J. Fales from January to May, 1882, whose pauper settlement was alleged to be in the defendant town.

At the trial it was admitted that the father of the pauper had his settlement in Chesterville at the time the pauper became of age, December 20, 1877. And an important question in the case was, whether the pauper had mental capacity sufficient to acquire a settlement of his own; his father, with whom he continued to reside, having acquired a new settlement in Fayette.

The verdict was for the defendants.

The plaintiffs requested the several instructions following, none of which were given except as appears in the charge.

"IV. That if the jury find that Fred J. Fales, when he became twenty-one, had such control of himself and of his mind, that he was capable of free volition and had power to choose his home, then he had such capacity to acquire a settlement as the statute requires.

"V. That to this end a lower degree of intelligence is required than in the making of a contract.

"VI. That if the pauper, when he became twenty-one, had sufficient *capacity* to choose a residence and to form an intention to remain in it, that would constitute a capacity to acquire a settlement within the meaning of the statute, though he did not actually leave his father's home.

"VII. That the law does not require that he should have actually *exercised* his capacity of acquiring a settlement or of forming an intention, but simply that he should have such capacity.

"VIII. That the law does not require that the pauper should *have actually formed* any fixed intention with regard to a home, or should have *actually* chosen any new home, if he had sufficient mental *capacity* so to do under the rules already given."

The presiding justice instructed the jury as follows:

"But there is also another rule fixed by the legislature with reference to the settlement of paupers, and that is, that a child shall have the settlement of his father, if he has any in the state, if not, of his mother, but not of either after he becomes of age and has capacity to acquire one for himself. He does not have the settlement of either the father or the mother acquired after he has become of age and has capacity to acquire one for himself.

"Now you have already observed from the arguments of counsel and from the character of the testimony, that has been admitted here, that it is important to determine what may fairly and reasonably be supposed to have been in the contemplation of the legislature in using this phrase, "capacity to acquire one for himself." That is, capacity to acquire a settlement. It seems to me, in the first place, that the legislature must have referred solely to the mental capacity. It seems to me that any other rule would be extremely unsatisfactory, unsafe and fallacious. It seems to me that bodily infirmities, bodily disease, could not be a safe and a reliable test to determine the capacity to acquire a settlement.

"Suppose, for instance, that a beloved daughter were afflicted with pulmonary consumption at the moment she arrived at the age of twenty-one years, and should suffer from that disease for several years thereafter, and by reason of that should remain with her parents, apparently subject to their control and authority, and receives her support from them just as she did just prior to her arriving at that age. It would not, I apprehend, be contended for a moment, and has not, I may properly say here, been contended by the counsel for the defence, that in such a case there would be an incapacity, within the meaning of this statute, to acquire a settlement. And so suppose a son had returned from the army, having lost both arms, having lost the physical capacity to earn his living. It might be said that there was a moral fitness and propriety, flowing from considerations of sentiment and family affection, in his remaining in the family, apparently subject to the control and authority of the parents, and receiving his support from them, yielding the same kind of subjection and dependence as prior to his arriving at the age of twenty-one years. It would be an extremely unsatisfactory and fallacious test to say that by reason of his physical infirmities, his incompetency to earn his livelihood, he hadn't capacity to acquire a settlement for himself, and therefore must be considered as a child after he arrived at the age of twenty-one years as before, if that feebleness or incompetency was, by reason of physical infirmity, prolonged into the maturer years.

"I say to you, therefore, that the bodily diseases, the physical infirmities of a person are not the test by which to determine the capacity to acquire a settlement under this particular clause in the statute. They are admissible and material evidence only so far as they tend to throw light upon the mental condition."

The remainder of the charge upon the question to which the requests relate, and other material facts are stated in the opinion.

Baker, Baker and Cornish, for the plaintiffs.

We submit that the exclusion of the question to Dr. Martin was plainly wrong, and so far as we can find, stands unsupported by a single authority in England or the United States.

The law of England has been conclusively shown to be uniform in admitting even non-professional witnesses to give their opinion on a question of mental condition.

Opinion of DOE, J., in *State* v. *Pike*, 49 N. H. 408; *Hardy* v. *Merrill*, 56 N. H. 227; see *Robinson* v. *Adams*, 62 Maine, 410; *Hathorn* v. *King*, 8 Mass. 371; *Dickinson* v. *Barber*, 9 Mass. 225; *Com.* v. *Rich*, 14 Gray, 337; *Hastings* v. *Rider*, 99 Mass. 622; *Lewis* v. *Mason*, 109 Mass. 175; *Heald* v. *Thing*, 45 Maine, 392.

By R. S., c. 24, § 1, par. 6, "a person of age, having his home in a town for five successive years without receiving supplies as a pauper, directly or indirectly, has a settlement therein."

What is necessary to constitute a "home" under the statute? The unvarying answer of the decisions is—residence coupled with intention. *Warren* v. *Thomaston*, 43 Maine, 406; *Gardiner* v. *Farmingdale*, 45 Maine, 537.

If the pauper then on coming of age has capacity to form and retain an intention as to his home, his place of residence, he has that capacity to acquire a settlement which the statute demands.

Such a rule should have been given to the jury in a simple form and such is the import of the requests. But the charge added new and complicated elements to these simple requirements of the statute, especially in the clause, "that he must be able to perform with some degree of intelligence the simple and common kinds of business usually and ordinarily involved in the act of

taking up a new residence." Counsel cited: *Taunton* v. *Middleboro*, 12 Met. 37; *Townsend* v. *Pepperell*, 99 Mass. 40.

Herbert M. Heath, for the defendants.

PETERS, C. J. Whether the pauper had mental soundness sufficient to render him capable of being emancipated from parental control by arriving at the age of twenty-one years, and of acquiring a settlement for himself after that time, was one of the questions at the trial of the cause to the jury. No doubt, it should be mental soundness amounting to sanity,—sanity in respect to the matter to be investigated. The test must be one peculiar to the question to be decided. It is adaptable to circumstances.

The judge submitted to the jury this test: "To find that a person has capacity to acquire a settlement, within the meaning of the statute, you must find in the first place, that he had intelligence enough to form and retain an intention with respect to his dwelling-place; that he had a mind sound enough to give him will and volition of his own, and such power and control over his mind and his action as to enable him to choose a home for himself; that he must have mental capacity sufficient to act with some degree of intelligence and some intelligent understanding with respect to the choice of his dwelling-place, and to form some rational judgment in relation to it." Different judges may give different definitions, varying in the letter — in substance the same. We do not see why the rule framed by the judge in the present case is not a correct one.

It was further said by the judge: "And he must be able to perform with some degree of intelligence the simple and common kinds of business usually and ordinarily involved in the act of taking up a new residence." This additional explanation of the test is well enough, and certainly is not exceptionable.

The plaintiffs were not entitled, upon their requests, to any other or more favorable instructions than those given.

An exception is taken to the exclusion of this question proposed by the plaintiffs to their witness, Dr. Martin: "From your

examination at that time what in your judgment was his (the pauper's) mental condition?" From the manner in which the point is presented to us by the case, we think the ruling must stand.

We infer that the witness was not allowed to answer the question for the reason that the judge did not think him qualified to testify as an expert. Such must be the implication of the refusal, unaccompanied with explanation. Undoubtedly many physicians are qualified to testify as experts upon questions of insanity. They may not be, as a rule, of the most eminent class of experts. Whether this witness was qualified to testify as an expert, was a question of fact for the presiding judge, and his decision of such a question is usually final. In extreme cases, where a serious mistake has been committed through some accident, inadvertence, or misconception, his action may be reviewed. This is not such an instance.

The plaintiffs contend that, if not admitted as a professional or practical expert, the witness should have been allowed to express his opinion as a physician who had made a personal examination. The rule excluding persons not experts from testifying to their opinions upon questions where insanity is alleged, has admitted, either as an illustration of the rule itself or as an exception to it, skillful and reputable physicians to testify to the mental condition of their patients when they have had adequate opportunity of observing and judging of their mental qualities. That is not this case. Here Dr. Martin was not an attending physician. He made a single examination, *pendente lite*, in order to inform himself as a witness. He stood in a position to be tempted to participate in the prejudices of the party calling him as a witness. See *Gardiner* v. *Farmingdale*, 45 Maine, 537.

Finally, it is contended that the rule which excludes opinion evidence by witnesses acquainted with the person whose sanity is questioned, should be abrogated altogether. We are not prepared to admit the propriety of so radical a change in the practice of our courts, although we are aware that many courts

are at the present day inclined that way. It is easy to see, and experience teaches us, that there are advantages upon either side of the question — to either mode of practice. It is correctly said by those who advocate the admission of such evidence, that witnesses who have not some aptitude in narrating events, an ability for describing details and particulars, although possessing good judgment in forming estimates and conclusions, are very often not fairly appreciated; that it is not easy to draw a line between matters of observation and what is a matter of judgment founded on observation.

On the other hand, such evidence is exceedingly apt to carry a force and impression which the real facts are not deserving of. Opinions are easily, and unconsciously to the possessors of them, colored by feeling and prejudice. Every judge experienced at *nisi prius* knows how common a thing it is to see a cloud of witnesses arrayed at the witness-stand to testify in a matter of opinion, and how difficult it is to contend against the pressure, however ill-founded the testimony may be. Where it is a collateral question, or where a plain case, the objection to such testimony is not so meritorious, and in such circumstances the objection is not often interposed. But where the issue — sanity or insanity — is directly raised, and the question is a doubtful one, the rule which excludes the opinions of non-professional witnesses, works favorably. The issue is not generally simple enough for a witness to pass his judgment upon. There are various forms and kinds of insanity or mental unsoundness, many of which cannot be easily or accurately defined, the subject itself in some of its aspects being beyond the reach of human investigation. The popular sentiment upon the subject of insanity differs from the legal standard in most cases.

The tendency in our practice has been to allow witnesses who are not experts a good deal of latitude in the expression of opinion, short of declaring their judgments upon the point mainly and directly in issue. As was said by KENT, J., in *Robinson* v. *Adams*, 62 Maine, at p. 410: "Certainly nothing less than a distinct expression of the opinion of the witness, given as such opinion directly, comes within our rule." A witness under the

direction of the court, may be permitted to describe peculiarities, conditions and situations, conduct and changes. In *Robinson* v. *Adams*, *supra*, it was deemed not objectionable for a witness to say that she did not observe any failure of mind and nothing peculiar in a person. In *Stacy* v. *Port. Pub. Co.* 68 Maine, 279, it was held admissible for a witness to testify that a person was intoxicated at a time named.

The motion cannot justly be sustained. There is much to show that the pauper was a man in body and a child in mind.

Motion and exceptions overruled.

WALTON, DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

CHARLES H. DOUGLASS *vs.* CHARLES F. TRASK.

Kennebec. Opinion January 6, 1885.

Jury. Instruction. Practice.

An instruction which authorizes a jury, in determining an issue presented to them, to infer what was the fact from the evidence, "or from such personal knowledge as you may have in relation to matters of this kind," is erroneous.

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

The opinion states the case.

The verdict was for seventy-two dollars and thirty cents, and the defendant moved to set it aside and alleged exceptions to the instruction recited in the opinion.

Clay and Clay, for the plaintiff.

John H. Potter, for the defendant.

LIBBEY, J. This is an action for breach of warranty of the soundness of a horse bought by the plaintiff of the defendant, May 1, 1883. The alleged unsoundness was a curb which caused the horse to be lame.

The plaintiff introduced evidence tending to prove, that, on the next day after the purchase, the horse showed some lameness,

and had an enlargement on its hind leg, which proved to be a curb. The defendant contended that the horse was sound at the time of the sale, and introduced evidence tending to prove that it had shown no lameness, and had no enlargement on its leg prior to and at the time of the sale; so that the real issue was, not whether a curb was an unsoundness, but whether the unsoundness existed at the time of the making of the warranty, or came upon the horse afterwards.

This made it material to enquire into the nature and cause of a curb, and the length of time in which the enlargement and lameness would appear, after the injury which caused it was received; and upon this point witnesses, who were experts in such matters, were called by the parties and testified in regard to them.

Upon this point the judge instructed the jury as follows:

"Now, then, upon the evidence of these experts and such explanations as you have had from counsel, what is a curb? You may infer from this evidence, or from such personal knowledge as you may have in relation to matters of this kind, which, in cases of this character you are obviously authorized to apply to the investigation, that such an injury is a result of a sprain or wrench of the ligaments binding the tendon of the joint, or it may be a mechanical injury to the covering, known as the sheath of the tendon around that joint, which results in an enlargement which impairs the free action of the joint, (which has been described to you by the witnesses as being, *primarily*, somewhat soft), and you may infer, therefore, that some deposit has taken place."

This instruction authorized the jury to find the nature, cause, and time of developement of a curb from such personal knowledge as they might have in relation to matters of that kind. We think this was error. The judge may have intended to tell the jury that, in considering the evidence, they might bring to its consideration, in determining the weight to be given to it, such general practical knowledge as they might have upon the subject, which would not transgress the rule of law applicable to the case, but he failed to do so. The subject under consideration was not

one of general knowledge and observation, but one of science, upon which no witness, not specially qualified as an expert, could testify. It does not appear that any juror upon the panel was qualified as an expert to testify or give his opinion upon the subject under consideration; and still each juror may have thought he was, and under the instruction given, may have based his conclusion solely upon what he thought his personal knowledge was, disregarding the evidence submitted by the parties. The verdict thus given would not be "according to the evidence given" them, but according to their own personal knowledge of the subject matter under consideration.

We think the case is clearly within the authority of *State* v. *Bartlett*, 47 Maine, 388, and *Schmidt* v. *N. Y. U. M. F. Ins. Company*, 1 Gray, 529.

It is unnecessary to consider the motion to set aside the verdict.

Exceptions sustained.

PETERS, C. J., WALTON, DANFORTH, EMERY and FOSTER, JJ., concurred.

FRANCIS LOW, appellant, *vs.* JAMES LOW.

Kennebec. Opinion January 6, 1885.

Will. Contract. Estoppel. Ademption of legacy.

A testator in his lifetime gave to a son, named as a legatee in his will, the sum of fifteen thousand dollars and took from him the following paper: "Whereas my father, Francis Low, of Clinton, in the county of Kennebec, on the first day of July, A. D. 1871, made and executed his last will and testament in the presence of E. L. Getchell, F. E. Heath and Solyman Heath, and whereas said Francis Low, in said will gave, devised and bequeathed to me certain property. Now, therefore, in consideration of fifteen thousand dollars, paid to me and for me by said Francis Low during his life-time, the receipt whereof I hereby acknowledge, (and which said sum is my full share and more of my father's estate) do for myself, my heirs, executors and administrators, hereby remise, release and discharge, my said father, his executor or administrator, or legal representatives, from paying the legacy named in said will to me, or from paying to me any sum of money or property under any other will of my said father, and I release all my right, claim and title as heir to any and all estate and property which my said father may die seized or possessed of, and I will make no claim for any

portion of the same, and I consent that all his estate may go as he has or may will it, or in any manner as he may wish to dispose of the same, or may dispose of the same." (Duly executed.) *Held*, That there was an ademption of all the legacies in the will to the son, and he was estopped from claiming anything more under the will.

ON REPORT.

Appeal from the decree of the judge of probate in allowing the account of James Low, as executor of the last will and testament of Francis Low, late of Clinton.

The opinion states the facts.

Brown and Carver, for the appellant.

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

LIBBEY, J. Francis Low, the appellant's father, made his will July 1, 1871, by which, after providing for the maintenance of his wife and giving her a legacy of five thousand dollars, he gave to each of his four children a general legacy, and the rest, residue and remainder of his estate, if any, after payment of his debts and the legacies, was given to his four children, or such of them as might survive him, and to the legal representatives of any deceased child, to be shared in equal portions.

August 2, 1879, the appellant, wishing to receive his share of his father's estate in anticipation of his death, made a settlement with his father, by which, with the advancements previously made to him, he received fifteen thousand dollars, and gave him the instrument which is in evidence.

The only question for the decision of the court is whether that instrument or release is sufficient, or furnishes sufficient evidence, to bar the appellant from recovering any portion of the estate of his father under his will. It is admitted by his counsel that the legacy of four thousand dollars to the appellant is adeemed or satisfied by the payment and release; but it is claimed that the terms of the instrument are not sufficiently comprehensive to embrace his interest under the residuary clause of the will. We think they are. In ascertaining the meaning of the parties as expressed in the instrument all of its language is to be considered

together, in the light of the subject matter to which it applies, and the situation of the parties, their surroundings and relation to each other, so far, at least, as they are disclosed by the instrument itself. It refers to the will of the father by its date.

The more important clauses to be considered in deciding the question are as follows: "Whereas said Francis Low, in said will, gave, devised and bequeathed to me certain property; now therefore, in consideration of fifteen thousand dollars, paid to me and for me by said Francis Low during his lifetime, the receipt whereof I hereby acknowledge, (and which said sum is my full share and more, of my father's estate,) do for myself, my heirs, executors and administrators, hereby remise, release and discharge my said father, his executor, or administrator, or legal representatives, from paying the legacy named in said will to me; . . . . and I release all my right, claim and title, as heir, to any and all estate and property which my said father may die seized or possessed of, *and I will make no claim for any portion of the same.*"

It is claimed that the meaning of the words "legacy named in said will" is fully answered by applying them to the general legacy of four thousand dollars; that the word "legacy" is in the singular, and does not embrace both the general legacy and that under the residuary clause.

It is a general rule for the interpretation of contracts, as well as statutes, that the singular may be read as plural, and the plural as singular, when the context requires it. Here the purpose of the testator appears to have been to anticipate his death by paying to his son his full share of his estate that would go to him under his will, [and by the settlement of the estate in probate it appears much more than his share] in extinguishment and satisfaction of the provisions which he had made for him therein; and this purpose was fully participated in by the son. Among other things, he agreed in his release, under seal, to make no claim to any portion of the estate of which his father might die seized and possessed. Considering this clause in connection with the preceding, we think the words, "the legacy named in said will" should be held to include all the provisions

of the will in favor of the appellant, and that they were fully adeemed and satisfied. *Allen* v. *Allen*, 13 S. C. 512.

While the instrument in evidence cannot be treated as a technical release of the appellant's interest in his father's estate for the reason that, when given, there was no existing legal right or interest to be released, (*Fitch* v. *Fitch*, 8 Pick. 480; *Trull* v. *Eastman*, 3 Met. 121;) still having obtained more than his share by it, he is estopped by his covenant in it from claiming anything more under the will. *Quarles* v. *Quarles*, 4 Mass. 680; *Kenny* v. *Tucker*, 8 Mass. 143.

The same result would be reached by treating the fifteen thousand dollars as an advancement by the father.

Decree of the judge of probate affirmed with costs.

PETERS, C. J., WALTON, DANFORTH, EMERY and FOSTER, JJ., concurred.

SWIFT RIVER AND BLACK BROOK IMPROVEMENT COMPANY

vs.

FRANK BROWN AND JOHN B. STAPLES.

Androscoggin. Opinion January 8, 1885.

Practice. Pleadings. General issue. Tolls. Waters. Corporations.

The general issue admits the plaintiff's capacity to sue, but denies all other facts necessary to sustain the action.

Assumpsit lies for the recovery of tolls on logs authorized by law even though a lien exists, upon the lumber driven, to secure the same.

Where a charter authorizes a corporation to make such improvements upon a stream as will facilitate the transportation of lumber down that stream, and, upon the completion and maintenance of which, to demand tolls, it must prove that the improvements made by it do thus facilitate the transportation of lumber before it can demand and recover the tolls.

ON REPORT.

The opinion states the case.

A. R. Savage, for the plaintiff.

H. A. Randall, for the defendants.

HASKELL, J. Assumpsit, to recover on account annexed, "toll on 316,000 feet of logs, $79.00." The plea of "never promised" was interposed with a brief statement of special matter of defense. This plea admitted the capacity of the plaintiff corporation to sue, *Penobscot R. R. Co.* v. *Mayo*, 60 Maine, 306, but, put in issue all other facts necessary to sustain the action. *Nye et als.* v. *Spencer*, 41 Maine, 272; *Moore* v. *Knowles et als.* 65 Maine, 493; *Endicott* v. *Morgan*, 66 Maine, 456. To recover, the plaintiff must prove, either an express promise, or facts from which the law will imply a promise from the defendants to pay the debt sued for. It is not contended that an express promise has been shown, but if the defendants were liable to pay the toll demanded for driving the river, and did drive the river, the law in this state implies a promise upon their part to pay the established tolls, even though the plaintiff's charter created a lien upon the lumber to secure them, and the action of assumpsit may well be maintained. *The Bear Camp River Co.* v. *Woodman*, 2 Maine, 404; *The Central Bridge Corporation* v. *Abbott*, 4 Cush. 473.

The plaintiff's right to demand tolls depends upon the authority with which it is clothed under its charter from the legislature, approved March 8, 1864, c. 343. The powers and privileges thereby granted are in derogation of the public right, and must receive a strict construction. *Sprague* v. *Birdsall*, 2 Cowen, 419; *Cayuga Bridge Co.* v. *Strout*, 7 Cowen, 33. Ordinary charters, granting to individuals, or corporations, the right to demand tolls from all persons using a public stream, suppose that substantial benefit is to be accorded from improvements specified in the charter, that will facilitate and benefit the public use of the stream, and thereby work a consideration for the toll that may be exacted.

The plaintiff's charter is silent, as to where upon the stream the improvements are to be made, but empowers the plaintiff to "construct and maintain dams and side dams, with side booms and sluices, and all other improvements on Swift river and Black brook and their branches, *which facilitate* the transportation of logs and other lumber down said river and brook," and provides

that the plaintiff, "from and after it shall have constructed the dams, side booms, side dams, sluices and other improvements *contemplated by this act*, may demand and receive a toll" of twenty-five cents per thousand, "for all logs and lumber that shall pass over, or by, its dams and improvements," and shall have a lien to secure it.

The improvements authorized by this charter are those, *which facilitate* the transportation of logs and lumber, and these are to be constructed and maintained as a condition upon which toll can be demanded. They are of interest to every one who has occasion to float lumber upon the stream. The legislature could never have intended, that toll should be exacted without the performance of those acts by the plaintiff, which must have been deemed a consideration for the enjoyment of its franchise. If duties imposed by law upon a corporation are merely directory, an individual cannot dispute the enjoyment of its franchise by reason of their being disregarded or violated. So it was held, that where a corporation was required to build its toll bridge of a specified width, and built it narrower, the traveler could not avoid the payment of toll for that reason. *Southwest Bend Bridge* v. *Hahn*, 28 Maine, 300; *Middle Bridge Prop's* v. *Brooks*, 13 Maine, 391; *Kellogg et al.* v. *Union Co.* 12 Conn. 7.

But, if the violation of the provisions of the charter be of such a character, that the individual called upon to recognize the validity of the franchise is injured, or deprived of any right, which he might demand, then he may dispute the demand made upon him, on the ground that no liability attached until those rights, which the charter accorded him, have been provided, as a traveller is not bound to pay toll, unless the rates of toll are exposed to his view, as required by the charter of the company demanding it. *Bridge* v. *Hahn*, 28 Maine, 300; *Bridge Props.* v. *Brooks*, 13 Maine, 391. So the plaintiff is not entitled to demand of the defendants toll, unless it has provided them with the facilities for the driving of the river contemplated by its charter. Upon a careful consideration of the evidence, it appears that the plaintiff, prior to 1869, made certain improvements upon Swift river; but to what amount, and of what cost, the evidence fails

to give any very clear information. It is conclusively shown, that in the year 1869 all the improvements, made by the plaintiff upon that part of Swift river driven over by the defendants, so far as the same were structures of any kind, were carried away by the freshet, and have never been rebuilt, or replaced. That, at the time defendants drove their logs, the only improvements of the plaintiffs, passed by the drive, were a side dam at "Kimball's," made with logs, laid up very high with poles put across, so that the water would run through it, and a few sticks put across the entrance of an old starch factory flume lower down the river, all at a cost of about fifty dollars. That the plaintiff has not pretended to demand toll from the public using the river, and that the improvements made were of no use, and did not facilitate the transportation of logs upon the stream. The plaintiff fails to show such an improvement of the river, as the legislature must have intended to require, as a consideration to the public, for the exercise and enjoyment of the right to demand tolls. Its charter imposes as a condition to the enjoyment of tolls, that the improvements authorized should facilitate the transportation of lumber, and the burden rests upon the plaintiff to show, that the improvements made are sufficient to comply with the condition upon which toll may be demanded. In this case, the evidence fails to prove that the plaintiff has constructed and did maintain, at the time when defendants drove their logs, any improvements that facilitated the transportation of the logs down the river, and, therefore, it must fail. In accordance with the agreement of the parties, there must be,

Judgment for defendants.

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

SARAH A. MORSE *vs.* INHABITANTS OF BELFAST.

Waldo. Opinion January 10, 1885.

Ways. Defects. Due care. Law and fact.

A town is not required to render a way passable for the entire width of the whole located limits.

In determining the question whether a way is safe and convenient within the meaning of the statute, it is enough that the way is safe and convenient in view of such casualties as might reasonably be expected to happen to travellers.

The law has not prescribed what imperfections in a way will be considered as constituting a defect or want of repair, so as to render a town liable if an injury is occasioned thereby. These are questions of fact, generally, for the jury to settle, under proper instructions.

In an action for personal injuries received by reason of a defect in a way the question, whether the plaintiff, or driver, was in the exercise of ordinary care, is proper for the jury to consider and determine.

ON motion to set aside the verdict.

An action to recover damages for personal injuries received by the plaintiff October 14, 1882, by reason of an alleged defect in a way. The writ was dated February 15, 1883. The plea was the general issue. The verdict was for defendants.

A. P. Gould and Wm. H. Fogler, for the plaintiff.

Thompson and Dunton, for the defendants.

FOSTER, J. The statute upon which this action is founded provides that a person receiving any bodily injury or suffering damage in his property, "through any defect or want of repair or sufficient railing, in any highway, townway, causeway or bridge, may recover for the same in a special action on the case," etc.

The court is asked to set aside the verdict in this case, which was for the defendants, as being against law and evidence.

That the plaintiff received an injury while travelling over the highway in question is not denied. The defence to this action at the trial, was, that the way was not defective, and that a want

of due care on the part of the person who was driving the plaintiff's horse contributed to the accident.

The road was one leading from Belfast to Searsport; the place where the accident occurred was about a mile from the city, where the road passes by what is known as the "stock farm," and at that place it was smooth, very nearly level, and the surface of the wrought portion at the narrowest point was seventeen feet, and at the place of the accident nineteen feet in width, with shoulders at the sides sloping off somewhat abruptly and forming ditches about two and one-half feet deep.

Over this way the plaintiff was riding with two other persons in the carriage, which was a piano-box top buggy with end springs, about ten o'clock in the evening of October 14, 1882. The night was very dark and foggy, the horse was trotting, and at this place the plaintiff's carriage passed another team coming in the opposite direction having a light in front of the dasher, and in passing, the plaintiff's carriage bore so strongly to the right that the off wheels, leaving the level portion of the way, passed out over the edge of the shoulder and along and part way down the same, and after having proceeded a distance of sixty-four feet, the carriage, with its occupants, was overturned into the ditch on the southerly side, causing the injuries of which the plaintiff complains and for which this action was brought.

It is not denied that the entire surface and travelled portion of the road was smooth, and nearly level, but it is claimed that it was of insufficient width, and it is alleged that the injury complained of arose from the want of sufficient railing along the sides of this way.

The road at the place of accident was of sufficient width for three such teams to pass each other with safety and convenience, under ordinary circumstances, if driven with proper care.

It has been held by this court, and such has been the law for many years, that towns are not required to render a road passable for the entire width of the whole located limits, but that when it has prepared a way of sufficient width, smooth and convenient for travellers, the duty of the town was accomplished. *Johnson* v. *Whitefield*, 18 Maine, 286; *Perkins* v. *Fayette*, 68 Maine,

152; *Farrell* v. *Oldtown*, 69 Maine, 72. And in determining the question whether a way is safe and convenient within the meaning of the statute, we must say, as has been said before, that it is enough that the way is safe and convenient in view of such casualties as might reasonably be expected to happen to travellers. But the law has not prescribed what imperfections in a road will be construed as constituting a defect or want of repair, such as the statute refers to, so as to render a town liable if an injury is occasioned thereby. These are questions of fact, generally, for the jury to settle under proper instructions in reference to the particular circumstances of every given case.

The same may be said in regard to what constitutes due care. The law is unquestioned that in actions of this kind the jury must be satisfied as an affirmative fact to be established by the plaintiff, and as a necessary part of his case, that at the time of the accident the party, or, as in this case, the driver was in the exercise of ordinary care.

In this case the evidence before us shows that Dr. Pierce, one of the occupants of the carriage and who was driving the plaintiff's horse at the time, had frequently passed over this road and was well acquainted with its location and condition. He saw the light from the carriage which was coming from the opposite direction some time before the carriages passed, but "supposed it was a light in a house" till the carriages were very near each other. The night was extremely dark and foggy,— so dark that one witness testifies he could not see his horse's head,— and it appears that the plaintiff's horse was driven at a trot, and this continued from the time the light was first seen till the carriage was overturned. Whether, under all the circumstances of the case as developed in evidence, the party driving the plaintiff's horse was at the time in the exercise of due care, owing to the darkness of the night, the liability of meeting other teams, the degree of speed, the nature of the vehicle and the number of persons it contained, was a question proper for the jury to consider and determine.

At the trial the jury had a view of the way. To be sure, it was a year from the time of the accident, but the testimony shows

that there had been no material change in it since that time. Whether the way was of insufficient width, or there was want of "sufficient railing" at the place, was also a question which was properly addressed to the judgment of the jury and under proper instructions from the court. The plaintiff's carriage required but five and one-half feet space upon this way which was nineteen feet in width; and while the defect complained of is not only the want of sufficient railing, but also the ditches at the sides of the way, it may be proper to notice the fact uncontradicted in evidence that the wheels upon one side of the carriage were only a part of the way down the bank at the time the accident occurred. It can not, therefore, be reasonably claimed that the remaining depth of the ditch outside and below the wheels contributed to the overturning of the carriage.

Our statutes require that highways shall be made reasonably safe and convenient for travellers. But in the construction of such ways it oftentimes becomes necessary, as well as proper, to construct ditches along their sides, and when this is properly done it is not the province of the court to declare them defects. This is in accordance with the principle laid down in *Macomber* v. *Taunton*, 100 Mass. 256, in which CHAPMAN, C. J., says: "On each side of this way there may be ditches. These are so necessary for the proper drainage of the carriage-way that they are held not to be defects, if properly constructed, though travellers may be liable to fall into them in the dark."

The plaintiff also claims there should have been a railing between these ditches and the travelled way. If it were necessary in this instance for the purpose of rendering the road reasonably safe and convenient, we have no doubt there are very few roads, then, in our State which would not require it. As remarked by PETERS, J., in the recent case of *Spaulding* v. *Winslow*, 74 Maine, 537: "There are many thousands of such places within this State. If railings were required for them, towns would have extraordinary burdens to maintain their roads."

To justify setting aside the verdict in this case the court must feel that it is clearly, manifestly wrong. We can not assume that the jury have acted dishonestly or perversely, or have been

governed in their conclusions by such bias or prejudice as would warrant us in disturbing the verdict. Experience teaches us they would be as liable to be influenced in favor of the plaintiff in this case, as they would in favor of the defendants. Nor can we say that the verdict is so clearly, manifestly wrong, either in respect to the alleged defects, or the exercise of due care on the part of the driver, that we should be justified in setting it aside.

Motion overruled. Judgment on the verdict.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

JOHN R. BANTON

vs.

GEORGE A. SHOREY AND FRANK A. PORTER.

Penobscot. Opinion January 10, 1885.

Mortgage. Record. Growing timber, contracts for sale of. Statute of frauds.

A mortgagor sold growing timber upon the mortgaged premises and gave the purchaser the following written permit: "Alton, Sept. 24th, 1882. This is to certify that Frank Porter has bought four hundred knees, more or less, of me, Hatcil Gott, on Lot No. 25, and has paid me in full ($70) seventy dollars. Hatcil Gott." "And this is to certify that I, Hatcil Gott, do defend the above writing. Hatcil Gott." The knees were severed from the soil and removed from the land and the stipulated price paid by the permittee before the mortgage was recorded or the permittee had notice thereof. *Held,* in an action of replevin by the mortgagee against the permittee that the title to the knees was in the defendant.

Parol or simple contracts for the sale of growing timber to be cut and severed from the land by the vendee do not convey any interest in lands, and are not therefore within the statute of frauds.

ON REPORT.

Replevin of a lot of knees. The report provided that the law court should determine which party had the better title to the property and enter judgment accordingly.

The opinion states the facts.

Davis and Bailey, for the plaintiff.

The permit conveyed no interest in the land. *Drake* v. *Wells*, 11 Allen, 142; *Claflin* v. *Carpenter*, 4 Met. 580; *Giles* v. *Simonds*, 15 Gray, 441; 1 Greenl. Ev. § 271; *Pease* v. *Gibson*, 6 Maine, 81; *Trull* v. *Fuller*, 28 Maine, 548.

While Gott by proper deed might have given an innocent purchaser a title to the land or to the trees, he could not himself, as against the mortgagee, cut one of the trees in question. How can he then give a license to another to do that which he himself cannot do? Counsel further cited: *Boggs* v. *Anderson*, 50 Maine, 161; *Marshall* v. *Fisk*, 6 Mass. 30; *Blood* v. *Blood*, 23 Pick. 80; 17 Pick. 364; 13 Gray, 502; 6 N. H. 250; R. S., c. 73, § 8; *Dunlop* v. *Avery*, 89 N. Y. 599; *Stowell* v. *Pike*, 2 Maine, 387; *Hammatt* v. *Sawyer*, 12 Maine, 426; *Bussey* v. *Page*, 14 Maine, 132; *Frothingham* v. *McKusick*, 24 Maine, 403; 32 Maine, 167.

John Varney, for the defendants.

FOSTER, J. This is an action of replevin in which the plaintiff claims title to the property in dispute as mortgagee under a mortgage of real estate from one Hatcil Gott, dated November 10, 1881, but not recorded till January 12, 1883.

The defendants claim title to the same property from said Gott by virtue of an instrument, or writing, in the following words:

"Alton, September 24, 1882.

"This is to certify that Frank Porter, of Alton, has bought four hundred knees, more or less, of me, Hatcil Gott, on Lot No. 25, and has paid me in full, $70.00 (seventy dollars).

Hatcil Gott.

"And this is to certify that I, Hatcil Gott, do defend the above writing. Hatcil Gott."

It is admitted that the knees therein named had been severed from the soil, removed from the land, and the stipulated price paid for them by these defendants, before the plaintiff's mortgage was recorded, and before they had any notice of the same.

As both parties claim title from the same source, the one who has the superior right must prevail.

The defendants claim to be purchasers without notice of any adverse interest in any other party till long after their title had become perfected by means of the above writing and by the severance and removal of the knees from the land, and payment of the price stipulated; and they invoke, as against the plaintiff's asserted title, the following provision of the statute (R. S., c. 73, § 8,): "No conveyance of an estate in fee simple, fee tail, or for life, or lease for more than seven years, is effectual against any person, except the grantor, his heirs and devisees, and persons having actual notice thereof, unless the deed is recorded as herein provided."

On the other hand, the plaintiff says that the defendants have obtained no title to the knees, inasmuch as the trees from which they were taken were a part of the realty; that the defendants' writing was not such an instrument as would convey any interest in real estate, and that while the statute would protect an innocent purchaser of the land, or any interest in it, it is no protection to those who purchase as in this case.

We are not prepared to admit this doctrine as correct either upon principle or authority. The language of the statute is plain and positive, and has been regarded as prohibitory. *Houghton* v. *Davenport*, 74 Maine, 593. "The provisions of the statute for registering conveyances is to prevent fraud, by giving notoriety to alienations." *Norcross* v. *Widgery*, 2 Mass. 508. The record of a mortgage is constructive notice of its contents to all subsequent purchasers. As to them the mortgage takes effect, not because of its prior execution, but by reason of its prior record. "The whole object of the registry acts is to protect subsequent purchasers and incumbrancers against previous conveyances which are not recorded, and to deprive the holder of previous unregistered conveyances of his right of priority, which he would have at common law." 1 Jones, Mort. § § 557, 576; *Curtis* v. *Deering*, 12 Maine, 499.

The statute is for the benefit and protection of all persons who have any interest in examining the record title to property to

which they may thereafter become owner, either in whole or in part, absolutely or otherwise.

The court in Massachusetts, in considering the provisions of a similar statute, in a recent case, says: "But for the protection of *bona fide* creditors and purchasers, the rule has been established, that although an unrecorded deed is binding upon the grantor, his heirs and devisees, and also upon all persons having actual notice of it, it is not valid and effectual as against any other persons. As to all such other persons, the unrecorded deed is a mere nullity. So far as they are concerned, it is no conveyance or transfer which the statute recognizes as binding on them, or as having any capacity to affect their rights, as purchasers or attaching creditors. As to them, the person who appears of record to be the owner is to be taken as the true and actual owner, and his apparent seizin is not divested or affected by any unknown and unrecorded deed that he may have made." *Earle* v. *Fiske*, 103 Mass. 492.

It appears that the record title of the premises, from which this timber was taken, at the time of the purchase and removal by these defendants, was in Hatcil Gott. They had a right to look to the record for their protection as against any outstanding title.

It is a principle too well settled to need any citation of authorities, that standing trees, and such as were the subject of purchase in this case, are part and parcel of the real estate. Yet they may be, and very frequently are, the subject of sale and removal as distinct from the remaining parts of the realty, and title thereto may be obtained otherwise than by deed, when the same have, in connection with an executory contract of sale, been severed from the soil and removed by the vendee.

And the rule, as settled by modern decisions in reference to this question, is this,—that parol or simple contracts for the sale of growing timber, to be cut and severed from the freehold by the vendee, with reference to the statute of frauds, and to give effect to them, have been construed as not intended by the parties to convey any interest in land, and, therefore, not within the statute of frauds. They are held to be executory contracts for

the sale of chattels, as they may be afterwards severed from the real estate, with a license to enter on the land for the purpose of removal. *White* v. *Foster*, 102 Mass. 378; *Claflin* v. *Carpenter*, 4 Met. 583; *Poor* v. *Oakman*, 104 Mass. 316; *Parsons* v. *Smith*, 5 Allen, 578; *Erskine* v. *Plummer*, 7 Maine, 451; *Davis* v. *Emery*, 61 Maine, 141; *Freeman* v. *Underwood*, 66 Maine, 233; 1 Wash. R. P. 3* § 7; Benj. on Sales, § 126, note, and cases there cited; *Marshall* v. *Greene*, 1 L. R. C. P. Div. 44; *Nettleton* v. *Sikes*, 8 Met. 35; *Ellis* v. *Clark*, 110 Mass. 391.

In this case the defendants, it is true, entered under an executory contract for the sale of growing timber, and which, in accordance therewith, they severed from the land and carried away, paying the consideration named. As to such timber thus cut and removed the contract became executed, and the title to which vested in the defendants as soon as it was severed from the land. *Erskine* v. *Plummer*, 7 Maine, 451; *Buck* v. *Pickwell*, 27 Vt. 157. They became purchasers, then, and so far as any record title at that time disclosed, there was nothing to indicate that Gott was not the real owner. Nor can it make any difference with the plaintiff whether their title to the timber which was cut and removed by them came to them by this executed contract, or by deed. They became purchasers of it as much in the one case as they would have in the other, and had the same right to the protection of record title. The contract was no longer executory, but executed. A severance, in fact, had been made by the vendees in the cutting and removal. Supposing, instead thereof, Gott had executed a deed of the timber to these defendants. The counsel for the plaintiff in that case assumes that the defendants would have obtained title to the timber and been protected as purchasers by the statute hereinbefore named in relation to recording titles. There are very respectable authorities that hold a conveyance by deed of growing trees to be a severance in law from the land, so that they become personal property without an actual severance. Upon this doctrine Prof. Washburn (1 R. P. 3,* § 7) remarks, in speaking of title derived from an executed contract: "The same effect, however, of passing property in trees may be accomplished by conveyance

of them by deed as growing trees, if done by the owner of the freehold. It is so far considered a severance of the property in the trees from that in the soil, that the vendee may, after that, sell and pass title to them by a mere writing, though they have not been actually severed from the soil." *Kingsley* v. *Holbrook*, 45 N. H. 322; *Gooding* v. *Riley*, 50 N. H. 407; *Hoit* v. *Stratton Mills*, 54 N. H. 110; *Warren* v. *Leland*, 2 Barb. 613. However this may be, it does not become material here, for in this case the severance was actual, and we can see no reason why the vendees did not obtain the same title as they would have by a deed. If the record would protect them in one case, it certainly ought to in the other.

As between the vendor, the party in whom the title of record appeared, and the vendees of this timber, the title thereto became vested in them when it was severed from the soil; to be sure, as to so much as might remain uncut, the seller had the right, at any time before severance, to revoke the license to enter, sever and remove it, and thereby prevent the vesting of the title to such as might remain uncut; but as to this timber which had been cut, or severed from the soil, the contract had been executed, the license irrevocable, and the purchasers' title thereto valid. As to such they were more than mere licensees; they were purchasers of property, with license incidental to an executed contract. *Giles* v. *Simonds*, 15 Gray, 443. In speaking of the rights of purchasers in reference to contracts of this nature, the court, in the last case, says that the license "is subsidiary to this right of property;" and that this right in the property "is not derived from the license, but exists in the owner by virtue of a distinct and separate title."

The authorities cited by the counsel for the plaintiff, defining the rights and liabilities between mortgagor and mortgagee, do not conflict with any principles of law herein stated. It will be found that those cases were decided upon facts entirely different from these in the case at bar; there, the mortgages had been properly recorded prior to the acts complained of, and the mortgagor was either the primary agent or efficient hand in the commission of the injury against the estate of the mortgagee.

Here, the mortgagee could have protected himself as against any and all parties, whether as purchasers or *tort feasors*, by complying with the provisions of the statute before the rights of other parties intervened.

In accordance with the stipulation in the report we are of the opinion that the defendants have the better title to the property in question, and that the entry should be,

Judgment for defendants.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

JOSEPH PARKS *vs.* WARREN CRESSEY.

Penobscot. Opinion January 10, 1885.

Suit for taxes. Demand. R. S., c. 6, § 141.

In order for a collector of taxes to maintain an action under R. S., c. 6, § 141, he must show that he made a demand on the defendant for his taxes, so formal and explicit that the defendant would know that a suit might follow if he neglected to comply with the demand.

ON REPORT.

An action by the collector of taxes of the town of Glenburn to recover the taxes assessed against the defendant, a resident of that town, for the years 1874, 1875 and 1876.

The writ was dated December 20, 1881.

The plaintiff was appointed collector December 10, 1881, to complete the collection of the 1875 taxes in the place of William B. Elliott who had deceased. The case showed that the former collector, Elliott, arrested the defendant on the warrant for the 1875 taxes and he was committed and discharged under the poor debtor law.

A. L. Simpson, for the plaintiff, contended that an arrest of the defendant by a former collector, who had deceased, upon his warrant was a sufficient demand and notice to the defendant, to comply with the statute, and that the new collector, this

plaintiff, commenced where the former collector left off, and the demand by the former enured to the benefit of the new collector and enabled him to maintain this suit.

Davis and Bailey, for the defendant.

PETERS, C. J. Only the tax of 1875 is now involved in this case. The other taxes sued for are disposed of in another suit. The plaintiff must fail for want of proof of a demand of the tax. The statute (R. S., c. 6, § 141) authorizes any collector, after due notice, to sue for a tax. We think a special demand was intended by the legislature. The design was to prevent the indulgence of a temptation to make costs. The idea of notice is, that by reason of the demand the tax-payer may know that by a refusal or neglect to pay the taxes he may be sued for them. The collector need not inform him that he will be sued if he does not pay. Still, the demand should be so formal and explicit that he would know that a suit might follow for his omission to comply with the demand. A written request mailed to the person taxed is not sufficient. It should be a personal demand, made by the collector or some authorized agent, unless such a demand be excused by the absence of the debtor from home or by some other good reason. It is not shown that any such notice was given.

Plaintiff nonsuit.

DANFORTH, VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

HENRY C. SNOW *vs.* PENOBSCOT RIVER ICE COMPANY.

Penobscot. Opinion January 15, 1885.

Exceptions. Instructions. Practice.

To entitle one to have a requested instruction given, it must be wholly correct, and the evidence must warrant the jury in finding such facts as to make it applicable to the case.

ON exceptions and motion to set aside the verdict.

Assumpsit to recover five per cent commission on two sales of ice of five thousand tons each for one dollar and twenty-five cents a ton. The verdict was for the plaintiff and the defendant alleged exceptions which are sufficiently stated in the opinion. The defendant also moved to set aside the verdict and for a new trial.

Charles P. Stetson, for the plaintiff.

Barker, Vose and Barker, for the defendant.

HASKELL, J. Assumpsit to recover commissions for the sale of defendant's ice.

The plaintiff was employed to purchase, and was authorized to receive from the vendor, a commission of five per cent on the purchase money. Equipped with this authority, he purchased for his principal ten thousand tons of ice from the defendant, who agreed to pay the plaintiff a commission of five per cent, for the recovery of which this action is brought. At the trial, the presiding justice was requested by defendant to charge the jury, "that if the plaintiff as agent had discretionary powers to deal with these parties, or with any other ice dealers as he saw fit, and to fix the price at which the ice should be purchased, and that the commissions are claimed as a consideration for awarding, or giving this contract to the defendant in preference to other competitors, the contract is void as against public policy." The request was denied; and exceptions present the question, whether the denial was error. A requested instruction must be wholly correct. *Grand Trunk Railway Co.* v. *Latham*, 63 Maine, 177. The evidence must warrant the jury in finding such facts as to make the requested instruction applicable to the case. *Penobscot Railroad Co.* v. *White*, 41 Maine, 512; *Lord* v. *Inh'b'ts of Kennebunkport*, 61 Maine, 462. The instruction was properly withheld, for the evidence does not prove, that the commissions are claimed as a consideration for awarding the contract to the defendant in preference to other competitors; on the contrary, it appears that the commissions had nothing to do with so awarding the contract. The plaintiff was authorized to purchase ice for his principal, and to receive from the vendor a

stated commission of five per cent; that is, the vendor was required to pay a commission of five per cent from the purchase money. The plaintiff would receive the same advantage from whomsoever the purchase might be made. The commissions were no uncertain factor to induce the plaintiff to award his principal's contracts, where the plaintiff would receive the greatest benefit to himself. It was substantially the same, as if the plaintiff had received his compensation directly from his principal, for in that event, the purchase money could have been correspondingly reduced, and the vendors would have received the same price for their merchandise; so that, whether the requested instruction is correct as an abstract rule of law becomes wholly immaterial, and its discussion would be fruitless.

The defendant asks that the verdict be set aside as against both law and evidence.

The contract to pay commissions is not denied, but it is claimed to be invalid as against public policy. The numerous cases cited by the counsellors for the defendant in their elaborate brief clearly establish the rule, that the strictest fidelity is required from those persons acting in a fiduciary capacity, and that an agent clothed with discretionary powers shall not receive from those benefited by the exercise of that discretion any value or thing. The agent's duty is to faithfully perform that service with which he is charged, and for his reward, the principal alone is responsible. The plaintiff's claim does no violence to these rules of law. It is not grounded upon such facts as bring it within their scope. Here the principal says, purchase for me at a stipulated compensation, but for convenience, you may receive directly from the vendor the amount agreed to between us, which he may add to his purchase money that I am to pay. The very nature of the transaction required the plaintiff to disclose his agency to the defendant. Indeed, the contract for the sale of the ice was signed by the plaintiff as agent for his principal, and no concealment, or fraud, was practiced upon the defendant. He acted with a full knowledge of the plaintiff's agency, and the contract to pay commissions was made between the parties with a full understanding of the relations of each other to the subject

matter of it. True, the interests of buyer and seller are adverse. *Farebrother* v. *Simmons*, 5 Barn. & Ald. 333. And it would be a fraud for one person to secretly act as the agent of both. So a broker, effecting the exchange of stocks for real estate, who has concealed his employment by one party from the other, cannot recover his promised commissions from the party who had full knowledge of the broker's employment, because the agreement tempted the broker to deal unjustly, and was against public policy. *Rice* v. *Wood*, 113 Mass. 133. *A fortiori*, he can not recover the same of the party from whom the employment was concealed. *Walker* v. *Osgood*, 98 Mass. 348; *Farnsworth* v. *Hemmer*, 1 Allen, 494. The facts of this case do not come within the rules of law adjudged by these authorities, for there was no concealment of the employment, no fraud, no unfair dealing, no temptation for the agent to deal unjustly with his principal, by awarding the contracts to whomsoever would pay the highest commissions. Everything was honest, straightforward and above board, and the contract for commissions is in no way subversive of public interest. In *Bunker* v. *Miles*, 30 Maine, 431, an agent was provided with eighty dollars, with which to purchase a horse upon the best terms he could at a fixed compensation of one dollar. The horse was purchased for seventy-two dollars and fifty cents, and the court held the agent liable to account to his principal for what remained of the eighty dollars above the price actually paid for the horse and the agent's agreed compensation. Would it have been fraud, for the agent to have paid seventy-three dollars and fifty cents for the horse, and to have taken the vendor's note to himself for one dollar? and in that case would the note have been void between the parties to it?

It is claimed, that the contract for the sale of the ice was obtained by the false and fraudulent representations of the plaintiff, as to his principal's financial ability, but after plenary instructions from the court, the jury found otherwise, and it is not perceived that the verdict is so manifestly against the weight of evidence as to require the court to interpose.

It is claimed, that the plaintiff's demand had been settled before action brought, but in this behalf the jury, under instruc-

tions to which no exception is taken, found otherwise, and it is by no means clear that their finding was erroneous. So, too, the defendant claims an estoppel upon the plaintiff from insisting upon his commissions, but the evidence fails in this particular also.

Let the defendant abide its contract, knowingly made without concealment, or fraud, or other illegal taint.

Motion and exceptions overruled.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and FOSTER, JJ., concurred.

DANIEL CRANE *vs.* INHABITANTS OF LINNEUS.

Aroostook. Opinion January 17, 1885.

U. S. pension. U. S., R. S., § § *4745, 4747, 5485.*

One who loans money to a pension claimant to enable him to establish his claim, and to be repaid when the pension money is received, is not debarred from recovering back his loan by U. S., R. S., § 5485.

A verbal promise by a pension claimant, to pay a debt, when he receives his pension, or out of his pension, is not such a pledge, mortgage, assignment, transfer, or sale of the pension claim, as is forbidden by U. S., R. S. § 4745.

When the pension check has come into the hands of the pensioner, it is then at his free disposal, and its proceeds are liable to attachment, unaffected by U. S., R. S. § 4747.

ON REPORT upon an agreed statement.

Assumpsit for money had and received, amounting to three hundred twenty-three dollars and thirty-four cents, which the plaintiff paid the selectmen of the defendant town, April 27, 1881, in settlement of a suit against him by these defendants, wherein they trusteed the proceeds of the plaintiff's pension check, which he had deposited with Almon H. Fogg & Co. of Houlton. That suit was for supplies furnished him by the town of Linneus, and money to aid him in procuring evidence to prove his claim to a pension, upon his promise to repay all the same upon the receipt of his pension. By the agreed statement it appears that at the time of the service of the trustee writ upon Mr. Fogg, he was about to pay the plaintiff five hundred dollars

of the pension money, the whole amount of the pension check being twelve hundred and twenty-five dollars.

"Mr. Fogg asked why he was trusteed. A selectman of Linneus recounted the circumstances of furnishing the money and goods and said that they trusteed the money so it would stay there till the court passed on it, so they would know if they were entitled to it or not. Crane said, 'By jiminetty! that is using me too bad; I wanted the money to use.' The selectmen told him that he had refused to pay them and that they were driven into this; that they did not want to injure him and wanted to get what belonged to them. They talked some time. Mr. Fogg said after a while, 'Why can't you settle now?' The selectman expressed his willingness to settle if Mr. Crane would pay. Mr. Fogg said, 'Hadn't you better settle and pay the town, Mr. Crane, and take your balance?' Mr. Crane said, 'I don't know but I'll have to.' The selectmen talked about what the bill would be, and wanted Mr. Crane to pay the cost. Mr. Fogg said, 'Pay your own cost, take the face of your bill, and let him give you an order, and settle that way. He is quite a poor man.' The selectmen consulted outside and concluded to take the face of the account and told Mr. Fogg so. Mr. Fogg wrote an order in favor of Linneus. Mr. Crane signed it and handed it to the selectman."

W. M. Robinson and F. A. Powers, for the plaintiff, contended that the case of *Smart* v. *White*, 73 Maine, 332, was decisive of this. That the agreement of the plaintiff to pay the town out of his pension money was void, and that the attachment of the money by trustee process was in contravention of the law, citing the several statutes referred to in the opinion. The counsel also contended that the circumstances of the payment by the plaintiff to the selectmen show that it was not the voluntary act of the plaintiff; that the defendants were using the delay of the law to enforce an illegal contract and wrest from the plaintiff the proceeds of his pension check which he stated he wanted to use. Counsel further cited: *Eckert* v. *McKee*, 9 Bush, 355; and *Hayward* v. *Clark*, 50 Vt. 617, and contended that *Spelman* v. *Aldrich*, 126 Mass. 113, was decided upon the authority

of *Kellogg* v. *Waite*, 12 Allen, 529, which was before the passage of the law.

Madigan and Donworth, for the defendants, cited: *Fellows* v. *School District*, 39 Maine, 559; *Kelley* v. *Merrill*, 14 Maine, 228.

EMERY, J. In *Smart* v. *White*, 73 Maine, 332, cited by plaintiff, "the defendant, an overseer of the town, assisted her (the plaintiff) to obtain her pension, under a verbal agreement with her, he said, that whatever back pay might be received should be applied towards her indebtedness to the town for her support." The verdict found the fact that the defendant got the back pay from her under and by force of the contract. The defendant was to assist her in getting the pension, and she was to make compensation for such assistance by turning the back pay over to the town for which the defendant was acting. It was held that the contract itself, and the reception of the money under it were forbidden by § 5485, U. S., R. S., and that the money could be recovered back.

In the case now at bar, neither the town nor its officers undertook to assist in obtaining the plaintiff's pension. There was no agreement to assist, and no agreement for compensation for assistance. The money was not paid under any such agreement. It was paid after an attachment by suit, and to settle the suit. The case, therefore, does not fall within the principle of *Smart* v. *White*, and the payment by the plaintiff of his debt to the town was not forbidden by § 5485.

The plaintiff, however, invokes § 4745, U. S., R. S., which forbids "any pledge, mortgage, assignment, transfer or sale" of the pension claim. The case, however, does not show any such. The town furnished the plaintiff with pauper supplies, as it was by law obliged to. It also advanced him money to procure evidence to obtain his pension. The plaintiff promised to repay the town when he obtained his pension. The question of the town's authority to advance the money is immaterial, as plaintiff cannot recover back on that ground. There was nothing in this transaction that tends to secure to the town any special privilege

in the pension claim, or any control over it. Such a promise was no pledge nor mortgage. The town was only a creditor of the plaintiff, without regarding the statute. It had no more legal interest in the pension claim, and no more control over it than his other creditors. It did not receive the money under any alleged pledge. It brought its action as a general creditor and attached the plaintiff's property. Thereupon the plaintiff paid his admitted debt. Such payment was not forbidden by § 4745.

The plaintiff also invokes § 4747, U. S., R. S., which declares that no sum of money due, or to become due to any pensioner, shall be liable to attachment. This money was not due him as a pensioner. It had been collected, and had come into his possession and had been entrusted by him to the trustee. The reasons and authorities for holding money, the proceeds of a pension check, in this situation, to be attachable, are clearly and fully stated in *Friend in Eq.* v. *Garcelon*, 77 Maine, 25. The principle there enunciated governs this case on this point.

There was no duress. The defendants desired to collect an admitted debt. They used the common method of attachment. The plaintiff thereupon paid his debt and no more, as the costs were forgiven him. It was his duty to pay it, and it was the town's right to receive it.

Judgment for defendants.

PETERS, C. J. DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

MARTHA P. CHASE, Administratrix,

vs.

MAINE CENTRAL RAILROAD COMPANY.

Sagadahoc. Opinion January 19, 1885.

Railroads. Crossing. Negligence. Evidence.

In an action for personal injuries received by a collision at a railroad crossing, evidence will not be received to show the general character and habits of the traveler for carefulness, as bearing upon the question of due care on

his part, though the injuries occasioned death before he could tell how the accident happened, and no one saw him at the time of the collision.

In such a case the natural instinct for self-preservation does not afford proof of the absence of contributory negligence on the part of the traveler. It may give character or force to facts already proved, but it does not of itself add or create proof.

On exceptions, and motion to set aside the verdict and for a new trial.

An action by the administratrix of Edwin F. Chase, for personal injuries received in a collision with a train of cars controlled by the servants of the defendant at a private crossing in Richmond, February 24, 1882.

The writ was dated July 3, 1882. The plea was the general issue. The verdict was for three thousand seven hundred eight dollars and thirty-three cents.

The opinion states the material facts.

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

The evidence tending to show that the deceased was a cautious man was properly admitted in this case, because his acts were not seen by any one. The precise act or omission was not shown by any witness. In most of the cases cited by the counsel, where evidence showing the habits as to care or the want of it was rejected, the reports show, that there was testimony of witnesses who saw the act, and in no one of the cases does the report disclose as an affirmative fact that the act itself was not witnessed,— not seen by any witness who testified in the case. Where the act is shown it speaks for itself, and evidence of character or reputation for care will not and ought not to be received to contradict the unmistakable language of the act itself. When the act is not seen then resort must be had to the next best evidence.

The evidence objected to was admitted because it was the best and only evidence bearing upon that branch of the case. It is only to be resorted to when that is the case. "When the precise act or omission of a defendant is proved, the question whether it is actionable negligence is to be decided by the character of that act or omission, and not by the character for care and caution that the defendant may sustain." *Tenney* v. *Tuttle*, 1 Allen, 185.

But when the precise act or omission is not shown then you must go to the circumstances, and here character and reputation afford no little nor uncertain light. It rests upon the rule that, "The habit of an individual being proved, he is presumed to act in a particular case in accordance with that habit." 28 Alb. Law J. 327, citing as illustrations: *Eureka Ins. Co.* v. *Robinson*, 56 Pa. St. 256; *Hine* v. *Pomeroy*, 39 Vt. 211; *Vaughan* v. *Railroad Co.* 63 N. C. 11; *Kershaw* v. *Wright*, 115 Mass. 361; *Meighen* v. *Bank*, 25 Pa. St. 288; *Smith* v. *Clark*, 12 Iowa, 32; *Ashe* v. *DeRossett*, 8 Jones (L.) 240; *Shove* v. *Wiley*, 18 Pick. 558; *Union Bank* v. *Stone*, 50 Maine, 595; *Cookendorfer* v. *Preston*, 4 How. 317.

In *Thomas* v. *Del. &c. R. R. Co.* 12 The Reporter, 739, WALLACE, J., said that "the natural instincts of self-preservation in the case of a sober and prudent man stands in the place of positive evidence. *Johnson* v. *Hudson River R. R. Co.* 20 N. Y. 65." See, also, *Shaw* v. *Jewett*, 6 Am. & Eng. R. R. Cas. 113 and authorities cited.

Drummond and Drummond, for the defendant, cited upon the questions considered in the opinion: *Allyn* v. *B. & A. R. R. Co.* 105 Mass. 77; *Dunham* v. *Rackliff*, 71 Maine, 345; *Robinson* v. *F. & W. R. R. Co.* 7 Gray, 92; *Tenney* v. *Tuttle*, 1 Allen, 185; 1 Greenl. Ev. § 84; *Gahagan* v. *B. & L. R. R. Co.* 1 Allen, 187; *Wentworth* v. *Smith*, 44 N. H. 419; *Morris* v. *East Haven*, 41 Conn. 252; Abbott, Trial Ev. 597; 2 Thompson, Neg. 1179; *Gay* v. *Winter*, 34 Cal. 153.

PETERS, C. J. The intestate's sleigh collided with a train at a railroad crossing. He thereby received an injury and very soon afterwards died. He never was conscious enough after the injury to tell how the accident happened. No one was with him at the time. No one saw him at the moment of the collision. As evidence that he could not have been guilty of any negligence which contributed to the accident, witnesses who had been his neighbors for some time were permitted to testify to their opinion of his general character for carefulness. We think this was overstepping the limit allowed to collateral evidence in this State.

We dare not abide by it. Our belief is that such a rule would be fraught with much more evil than good.

It was said in *Eaton* v. *Telegraph Co.* 68 Maine, 63, 67, that "the best authorities clearly sustain the doctrine that the fact of a person having once or many times in his life done a particular act in a particular way, does not prove that he has done the same thing in the same way upon another and different occasion." See cases there cited. If in civil cases a person's character proves carefulness in one instance, why not in all instances? Where and how can a true line of distinction be drawn? If by such proof a plaintiff can be shown to have been careful in one case, why not by the same mode of proof show that a person acted carefully or carelessly in any case — in all cases? In many litigations, under such a test, there would arise a wager of character which would as unfairly settle the dispute as did formerly the wager of battle. If the intestate's general character for care be in issue, why not that of the engineer and of every man concerned in the management of the train? If a man who is customarily careful were always so, there would be reason for admitting the evidence. But the issue is, whether the intestate was careful in this particular instance,— a fact to be, either directly or circumstantially, affirmatively proved. The objection to such a method of proof is augmented by the fact that the testimony consisted of merely the opinions of neighbors,— one generality proving another. But upon what tests or what definition of care are their opinions grounded? The question was not whether the intestate managed his farm, or his shop, or his horses, carefully, but whether he used due care in attempting to cross a railroad track at the very moment when a regular train was due at the crossing. The law imperatively demands that a traveler look and listen before crossing if there is any opportunity to do so. What did these farmer witnesses know about the intestate's habitual care in that respect. It is not a ground for the admission of this evidence that the plaintiff can produce no other. It is neither of primary nor secondary importance,— it is not evidence at all. 1 Greenl. Ev. § 84.

The question is not a new one in this court. The sole question considered in the case of *Scott* v. *Hale*, 16 Maine, 326 was, whether similar evidence was admissible. The defendant there was sued for damages for the loss of a building by fire, the allegation being that the fire was occasioned by the negligence of the defendant. In that case the same arguments were presented as here. The evidence received in that case came nearer the point at issue than the evidence here. At the trial the court permitted witnesses to testify that the defendant was very careful with fire, and that they never discovered any carelessness in him about taking care of his fires during the time they were at his house just before the event complained of. It was held that the evidence was inadmissible, and the verdict was set aside. The same rule has been maintained in subsequent cases. *Lawrence* v. *Mt. Vernon*, 35 Maine, 100; *Dunham* v. *Rackliff*, 71 Maine, 345. The case of *Morris* v. *East Haven*, 41 Conn. 252, cited by the defendant, is an especially pertinent and sustaining decision. See *Baldwin* v. *Railroad*, 4 Gray, 333.

Exception is taken to the judge charging the jury to take into consideration, upon the question of the intestate's care upon the occasion of the injury, the knowledge of the jury "of the habits of thought and mind, and the natural instincts of men," to preserve themselves from injury. Following, as no doubt it did, an impressive argument of counsel that a man would not be so unwise as to rush into danger when it was avoidable,— we are inclined to think the idea intended was presented to the jury too prominently.

Such a consideration is by no means evidence, for if it were so a jury might accept it as conclusive evidence. It is no more than an accompaniment or an appurtenance of evidence. It may have some influence upon the interpretation of facts affirmatively presented. It pertains, as said by defendant's counsel, to those natural laws in connection with which all evidence may be weighed. It belongs to the class of slight presumptions, described by Mr. Best, which, "taken singly, do not either constitute proof or shift the burden of proof." 1 Best, Ev. § 319. It may give character or force to facts already proved. But it

does not of itself add or create proof. It is rather an argument or mode of reasoning upon evidence. Practically speaking, it is no more than that a person's motive may be taken into consideration in relation to any act done by such person. It would be reasonable to say that a man would be naturally stimulated to avoid rather than to rush into dangerous situations. He would be impelled by strong motives to do so. But this would apply to the engineer or fireman or brakeman on a train as well as to the traveler, although perhaps not generally in the same degree.

But the weakness of the plaintiff's position lies in the fact that this motive for personal safety does not operate upon the minds of men until they can clearly see that they are endangered by their carelessness. It does not keep them from careless acts. The danger is often not seen until too late to be extricated from it. The careless act usually precedes the moment when the natural instincts for self-preservation are aroused. And a man is quite prone to take risks. And a man is careless to take a risk in crossing a railroad in advance of a coming train. We all know that he often does it. There is no doubt that the intestate was impelled by all his instincts and love of life to save himself when he saw that the horrible danger was upon him. But how the unfortunate man got into the awful situation no one seems to know and no evidence explains to us. It seems to be an unexplained catastrophe.

Other questions are discussed which may be properly passed. A good deal of discussion is elicited by the ruling that the plaintiff's intestate had a right of passage across the railroad. Perhaps the point may be avoided upon the ground of a license or permission from the defendant company to the public, as was the case in *Barry* v. *Railroad*, 92 N. Y. 289.

Exceptions sustained.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

JOHN L. WOODBURY, in equity,

vs.

ELIZA GARDNER and another.

Somerset. Opinion January 26, 1885.

Equity. Parol contracts for the conveyance of real estate. Stat. 1874, c. 175. R. S., c. 77, § 6.

Ever since the enactment of stat 1874, c. 175, this court has had jurisdiction for the enforcement of a parol agreement for the conveyance of land.

The re-enactment of stat. 1874, c. 175, in the R. S., of 1883, c. 77, § 6, was not intended to be limited in effect by reason of its being accompanied by a re-enactment of the various restricted provisions of former statutory provisions.

A parol agreement for the conveyance of land may be enforced in equity in behalf of the vendee whose partial performance has been such that fraud would result to him unless the vendor be compelled to perform on his part.

Thus, where the the vendee, with the assent of the vendor, took open, actual possession of the premises in pursuance of the agreement, made permanent erections thereon, promptly paid the taxes assessed thereon to him by direction of the vendor and substantially performed his agreement, specific performance was decreed against the vendor's sole devisee.

BILL IN EQUITY.

Heard on bill, answer and proofs. The opinion states the material facts found by the court.

D. D. Stewart, for the plaintiff, cited: *Wilton* v. *Harwood*, 23 Maine, 133; *Rowell* v. *Jewett*, 69 Maine, 303; *Lewis* v. *Small*, 71 Maine, 552; *Ash* v. *Hare*, 73 Maine, 403; *Potter* v. *Jacobs*, 111 Mass. 36; *Somerby* v. *Buntin*, 118 Mass. 287; *Malins* v. *Brown*, 4 Comstock, 403; *Parkhurst* v. *Van Cortland*, 14 Johns. 15; *Caton* v. *Caton*, L. R. 1 Ch. App. Cas. 148; *Crook* v. *Corp. of Seaford*, L. R. 6 Ch. App. Cases 553; *Pain* v. *Coombs*, 1 DeG. and J. 34; *Coles* v. *Pilkington*, L. R. 19 Eq. 174; Pomeroy Spec. Perf. § § 115, 117; *Lester* v. *Foxcroft*, Colles' P. C. 108.

James Wright, for the defendants.

There is no pretense of any written contract, or deed, or legal title, or mortgage of the Gardner farm in this case. In *Rowell*

v. *Jewett*, 69 Maine, 293, the court hold that unfilial conduct and neglect are sufficient to break the conditions of an existing mortgage given to secure the support of a parent; and I submit that if such causes as are disclosed by that case are sufficient to forfeit a claim under a deed, how much more will the treatment disclosed by this report suggest the injustice of the plaintiff's claim to have a deed. The testimony of John L. Woodbury and wife should not be received. 59 Maine, 361.

VIRGIN, J. Bill in equity to enforce specific performance of an alleged oral agreement for the conveyance of a farm, brought against the sole devisee of the vendor and also against one claiming as assignee of a mortgage thereon. Among other defences the statute of frauds is interposed.

When a party to an agreement, fair and just in its terms, understandingly entered into and concluded, is injured, without default on his own part, by its non-fulfilment of the other party, the most direct and satisfactory remedy which he instinctively seeks is specific performance. This practical result he cannot obtain by the common law, for that measures all losses by money; but equity comes in to supply this more complete justice, and has laid down certain rules of relief by which, when its circumstances bring it within them, every contract susceptible of substantial enjoyment, may be enforced.

In this state, the early equity jurisdiction of the court was limited to a very few subjects. It was gradually from time to time extended to others, until 1874, when the legislature conferred "full equity jurisdiction according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate and complete remedy at law." St. 1874, c. 175. And notwithstanding the clause — "in all other cases," the re-enactment of this statute in R. S., (1883) c. 77, § 6, was not intended to be limited in effect by reason of its being accompanied by a re-enactment of the various restricted provisions of the former statutes. *Glass* v. *Hulbert*, 102 Mass. 33; *Somerby* v. *Buntin*, 118 Mass. 287.

Until the St. 1874, c. 175 took effect, this court, on account of limited equity jurisdiction, could not decree specific perform-

ance of unwritten agreements for the conveyance of land, under any circumstances. *Stearns* v. *Hubbard*, 8 Maine, 320; *Wilton* v. *Harwood*, 23 Maine, 131; *Bubier* v. *Bubier*, 24 Maine, 42; *Farnham* v. *Clements*, 51 Maine, 426. But now that this broad, general power is conferred, jurisdiction extends to the enforcement of all oral agreements when the parties have not a "plain, adequate and complete remedy at law," and the circumstances are such as bring them within the established rules of equity governing such matters.

As this is the first case of the kind which has come before this court since the enactment of the above statute, it may be excusable to remark that it has long been held in England that part performance of an unwritten contract to convey land may authorize a court of equity to compel specific performance by the other party in contradiction to the positive terms of the statute of frauds. *Foxcroft* v. *Lester*, 2 Vern. 456; *Bond* v. *Hopkins*, 1 Sch. & Lef. 433; *Coles* v. *Pilkington*, L. R. 19 Eq. 174. And the same doctrine has been adopted by all (save three or four) of the states of the Union (Pom. Eq. Jur. § 1409), some of them making it an express exception to the statute of frauds. Wat. Sp. Per. § 257.

The ground of the remedy is an equitable estoppel based on an equitable fraud. After having induced or knowingly permitted another to perform in part an agreement, on the faith of its full performance by both parties and for which he could not well be compensated except by specific performance, the other shall not insist that the agreement is void. *Morphett* v. *Jones*, 1 Swan. 181; *Buck* v. *Harrop*, 7 Ves. 346; *Potter* v. *Jacobs*, 111 Mass. 32, 37. In other words, the statute of frauds having been enacted for the purpose of preventing frauds should not be used fraudulently. *Mestaer* v. *Gillespie*, 11 Ves. 621, 627; *Whitebread* v. *Brochurst*, 1 Bro. C. C. 417; *Ash* v. *Hare*, 73 Maine, 403; Pom. Eq. Jur. § 921.

Compensation in damages for the breach of an agreement to convey land is not regarded as adequate relief (*Jones* v. *Robbins*, 29 Maine, 351; *Foss* v. *Haynes*, 31 Maine, 81; *Snowman* v. *Harford*, 55 Maine, 199), hence parties thereto may resort to equity.

To be enforceable, the agreement must be concluded, unambiguous, founded on a valuable consideration, fair and just in all its parts, and such that its specific performance will not be harsh or oppressive upon the party against whom it is sought. Pom. Eq. Jur. § 1405 and cases in notes; and proved to the satisfaction of the court. *Parkhurst* v. *Van Cortland*, 1 Paige Ch. 273; *Neale* v. *Neales*, 9 Wall. 1, 12.

To exclude the operation of the statute of frauds, the acts of performance must be such as have unequivocal reference to the agreement sought to be enforced, show that they were done in pursuance and execution of it; that damages recoverable in law would not adequately compensate the plaintiff, and that fraud and injustice would result to him if the agreement be held inoperative. Wat. Sp. Per. § 261, and cases in note 3; White & T. L. Cas. 516; *Williams* v. *Morris*, 95 U. S. 457. In other words, partial performance is such a carrying out of the agreement by one party thereto, that fraud would result to him, unless the other party be compelled to perform his part of it. *Tilton* v. *Tilton*, 9 N. H. 390; *Ash* v. *Hare*, 73 Maine, 403.

The taking of open, actual possession of the premises by the vendee, with the assent of the vendor, pursuant to, and in execution of an agreement for their sale, has always been considered an act of performance. *Morphett* v. *Jones*, *supra; Knickerbacker* v. *Harris*, 1 Paige Ch. 209; *Potter* v. *Jacobs*, 111 Mass. 32; *Wharton* v. *Stoutenburgh*, 35 N. J. Eq. 266; Wat. Sp. Per. § § 272–277; and when combined with the making of valuable improvements by way of permanent erections thereon, or by skill and labor bestowed in cultivation, whereby the land was greatly enhanced in value, they all become important and pregnant acts which can be reasonably referred only to an agreement for a substantial interest in the property. *Lester* v. *Foxcroft*, *supra; Surcome* v. *Penninger*, 3 De G. M. & G. 571; *Parkhurst* v. *Van Cortland*, 14 Johns. 15; *Freeman* v. *Freeman*, 43 N. Y. 34; *King's Heirs* v. *Thompson*, 9 Pet. 204; *Neale* v. *Neales*, *supra*. And the case is peculiarly strengthened when it also appears that the land has been, by direction of the vendor, assessed to the vendee ever since possession taken, and that he

has promptly paid the taxes. Wat. Sp. Per. citing *Miranville* v. *Silverthorn*, 1 Gr. (Pa.) 410.

This doctrine applies to gifts from parent to children. *Lobdell* v. *Lobdell*, 36 N. Y. 327. Accordingly, where a step-father agreed with his step-son, just of age and about to leave home, that if he would work the farm and take care of the family, he should have a deed of one-half of the farm, on substantial performance by the son the court decreed specific performance. *Twiss* v. *George*, 33 Mich. 253. So, in the absence of such relationship, where a husband and wife accepted the offer of an aged person in poor health, that if they would give himself and nurse lodging and board in a certain house and take care of him until his death, he would convey the house to his wife; and they fulfilled their agreement and expended two hundred dollars in repairs, specific performance was decreed against his heirs. *Watson* v. *Mahan*, 20 Ind. 223; see also *Hiatt* v. *Williams*, 72 Mo. 214; *Bohanan* v. *Bohanan*, 96 Ill. 591; *Littlefield* v. *Littlefield*, 51 Wis. 23.

The following facts are fully substantiated by the proofs and make out a strong case within the rules above mentioned.

J. O. Gardner, some seventy years of age, together with his wife, a few years his junior, resided on their homestead farm, in Canaan. The plaintiff, rising fifty years of age, together with his wife (daughter of the Gardners) resided on his farm, in Pittsfield. During the summer of 1877, Gardner frequently importuned the plaintiff to sell his property in Pittsfield, move on to his homestead in Canaan, support him and his wife during their respective lives and have the homestead. Finally, in September following, Gardner and the plaintiff made an oral agreement, that the plaintiff should sell his farm, farming tools, etc. in Pittsfield, remove with his wife and family on to the homestead, carry on the farm, maintain Gardner and his wife during life by furnishing them such support as they might need, keep Gardner's horse and carriage for their convenience, but the plaintiff to have the use of it on the farm; Gardner and wife to pay their own doctor's bills, furnish their own clothing, and from choice to do their own house work so long as they were able and

Gardner to work only when he pleased. That Gardner should convey the farm to the plaintiff taking back a mortgage thereof conditioned for the support of himself and wife as above stipulated.

Thereupon the plaintiff, assisted by Gardner, sold and conveyed his farm and some personal property in Pittsfield, for twenty-six hundred dollars, with which he paid outstanding debts amounting to some eighteen hundred or nineteen hundred dollars; and on October 4, 1877, removed with his family to Canaan, when on delivery thereof by Gardner, he entered into full possession of the homestead in strict pursuance and execution of the agreement, and for no other purpose, occupying the whole premises, except two or three rooms which Gardner and his wife occupied.

The plaintiff took with him to the homestead rising one thousand dollars worth of personal property, comprising neat stock, horse, farming tools, wagons, grain, etc. Finding the farm, as previously informed by Gardner, somewhat run down, the plaintiff purchased and expended on it, during the first two years, forty tons of hay, fifteen dollars worth of yard manure, thirteen hundred pounds of phosphates, and five hundred pounds of plaster, cleared the bushes from the pasture, re-set more than one hundred rods of fence, cultivated new land, and with other lumber and timber added to some already there — one-half of which he purchased of a former tenant — erected a new stable, at an expense of two hundred and fifty dollars, and caused all of the buildings to be insured; all with the full knowledge and consent of Gardner. He also paid the taxes upon the homestead and personal property for the next and every succeeding year since, the same having, by direction of Gardner, been assessed to him.

Soon afterward, the plaintiff and Gardner went to an attorney at law to execute the deed and mortgage. The attorney advised them, and they consented, to postpone their execution, until after the trial of a pending action against the plaintiff by the holder on a note of ten or eleven hundred dollars, given for a patent right, as it might involve the homestead.

Subsequently, some unpleasantness arose between the parties; and although Gardner and his wife continued to reside and be

supported by the plaintiff on the homestead until Gardner's decease in April, 1882, he frequently refused to convey according to his agreement. Immediately after the burial of Gardner, his widow (one of the defendants) left, and has since resided with the other daughter (the other defendant) and has constantly refused to be supported by the plaintiff, and to give a deed and take a mortgage for her support, as her husband, with full knowledge on her part had agreed, although the legal title to the premises is in her as sole devisee of her husband.

We have said that the facts are fully substantiated, which is emphatically true upon the direct testimony and admissions of both parties; and on no other theory than that established by the direct testimony, are the undisputed acts and conduct of the parties to the agreement reconcilable. *Neale* v. *Neales*, 9 Wall. 1, 10. But we do not mean to intimate that there is not some conflicting testimony relating to minor matters, yet the main facts stand uncontradicted. Nor is there any doubt that considerable bad blood was manifested by the exchange of cross words and abusive epithets, between the parties some time before the decease of Mr. Gardner, and had this been all on one side we should long hesitate before sustaining the bill. But in this respect, this case is like many others of like nature. In the language of Mr. Justice DAVIS, in *Neale* v. *Neales*, last cited, 'it is to be regretted that the contest over this property, like all contests between near relations, has elements of bitterness in it." But they did not grow out of any alleged non-fulfilment of the agreement on the part of the plaintiff, for the declarations of Mr. Gardner, testified to by several disinterested witnesses, all admit that he never called upon the plaintiff in vain for support. Nor is there wanting evidence from the same reliable sources showing that it was far from an easy matter to "get along pleasantly" with the elder parties. Moreover, the testimony contains more than a mere suggestion that they were exposed to bad influences, ill-conceived advice. It is utterly incredible that Mr. Gardner would have voluntarily resorted to the gross fraud of attempting to put the mortgage, set up by one of the defendants, upon the homestead. Neither can we believe that this defendant understood the allegations in her answer relating thereto when she

made oath to them, they are so inconsistent with the facts fully proved as also by her own deposition.

The mortgage cannot be upheld. Its fraudulent character is fully exposed. It was instigated as a fraud upon this plaintiff, and it limped with fraud every step it took, the defendant assignee being fully cognizant of it. *Lewis* v. *Small*, 71 Maine, 552; *Ash* v. *Hare*, 73 Maine, 401.

There was no waiver. The parties undertook to settle their troubles by reference, which proved abortive. The plaintiff has continued in full possession, and has surrendered no claim which he seeks to enforce. The nonsuit of his action was no bar to this suit.

Neither is there any legal objection to the competency of the plaintiff as a witness, he not coming within any exception to R. S., c. 82, § 93, enumerated in § 98.

Mrs. Gardner being sole devisee of the homestead is the proper party. It is a fundamental maxim that, "Equity looks upon things which ought to be done, as actually performed;" consequently, when a contract is made for the sale of an estate, equity considers the vendor as the trustee of the vendee, holding the vendee's legal estate on a naked trust. *Linscott* v. *Buck*, 33 Maine, 530; Sug. Vend. (Perkins' ed.) c. 5, § 1; Pom. Eq. Jur. § § 364 *et seq*. The equitable title changes when the contract is completed. The consequences of this doctrine follow. As the vendee's legal estate is held on a naked trust by the vendor, this trust, impressed upon the land, follows it in the hands of his heirs and devisees, and his grantees with notice. *Cotter* v. *Layer*, 2 P. Wms. 332, 623; *Vawser* v. *Jeffrey*, 16 Ves. 519; Pom. Eq. Jur. 368 and notes.

There is no intimation in the case that any debts exist against the estate. *Hayes* v. *Cemetery*, 108 Mass. 400, 403.

Unless the agreement be performed, this plaintiff will be greatly damnified, and we have no hesitation in decreeing its specific performance. Decree accordingly.

Bill sustained, with costs.

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

JOSEPH CHANDLER *vs.* VINAL B. WILSON.

Aroostook. Opinion January 26, 1885.

R. S., c. 5, § 5. Deeds from commonwealth of Massachusetts. Office copies. Identity of party named in a deed. Massachusetts resolve, 1828, giving land to revolutionarg soldiers. Tax title from State. Title by prescription to wild lands.

By R. S., c. 5, § 5, copies of deeds from the commonwealth of Massachusetts, of land in Maine, may be certified by the land agent of Maine to the registry of deeds where the land is situated, and certified copies from such registry may be used in evidence whenever the original deeds could be.

The demandant claims land in Aroostook county under Samuel Cook, late of Houlton, deceased. Massachusetts conveyed the land to Samuel Cook, the deed not naming his place of residence. But she conveyed other land in the same township to Samuel Cook, of Houlton; the defendant does not claim under any Samuel Cook. *Held*, These facts *prima facie* establish the identity of Samuel Cook of Houlton, as the grantee in the first named deed.

The resolve of Massachusetts, passed in 1828, which granted lots of land in Maine to revolutionary soldiers, "and to their heirs and assigns," should be construed, in the light of previous legislation, not as passing a fee to such soldiers upon their receiving certificates of lots drawn by them, but as contemplating a deed to be given to the soldier if alive, to his heirs if he was dead, and to his assignee if his certificate had been assigned by him.

A deed was made in 1837 by George W. Coffin, land agent of the commonwealth, to Samuel Cook as assignee of a soldier's certificate; the only evidence of the assignment to Cook, is the recital of the fact in Coffin's deed. As against the defendant, who claims neither under the soldier nor the commonwealth, the recital is *prima facie* proof of the fact recited.

Where land is forfeited to the State for the non-payment of taxes assessed upon it, and the State fails to convey the title to a purchaser for the reason of illegality in its proceedings of sale, the original owner has a better claim of title to the land than the purchaser has, and he may maintain an action against the purchaser therefor.

A person having for over twenty years a recorded deed of a township of mainly wild land, during the time lumbering on some portions of it and cultivating other portions, does not thereby divest the true owner of his title of certain lots within the township, such lots not having been occupied during that period of time.

A person who obtains the title of three of the five heirs of an owner of land, deceased, can recover only three undivided fifths of the land of a person in possession, although the latter person does not occupy under the other heirs; the demandant has no seizin of more than three-fifths of the land.

ON REPORT.

Writ of entry to recover possession of lots fifty-eight and fifty-nine in Mars Hill. The opinion states the facts.

Powers and Powers, for the plaintiff, cited: *Ward* v. *Bartholomew*, 23 Mass. 414; *Sargent* v. *Simpson*, 8 Maine, 148; *Blaisdell* v. *Morse*, 75 Maine, 542; *Clark* v. *Pratt*, 47 Maine, 55; Abbott's Trial Ev. 101; *Hatcher* v. *Rocheleau*, 18 N. Y. 86; *Tolman* v. *Hobbs*, 68 Maine, 316; *Elwell* v. *Shaw*, 1 Maine, 339; *Hodgdon* v. *Burleigh*, Law Rep. Nov. 16, 1880; *Hodgdon* v. *Wight*, 36 Maine, 338.

Wilson and Spear, and *John P. Donworth*, for the defendant.

The demandant must recover on the strength of his own title and not on the weakness of that of the defendant. *Chaplin* v. *Barker*, 53 Maine, 275; *Poor* v. *Larrabee*, 58 Maine, 554.

The copies of the deeds of the land agent of Massachusetts were not admissible in evidence because the certificate of the land agent here was not in compliance with the law of 1883, c. 125 (R. S., c. 5, § 5), which authorized the record in the registry of deeds of such certified copy. The law requires the certificate to the fact that it is a true copy of the record,— the certificate in fact is that the paper is a true copy of a deed recorded in his office. He does not send a true copy of his record. The record might contain additional statements. It might disclose evidence of alterations or other circumstances affecting the validity of the deed. 15 Maine, 147; 22 Maine, 230; 60 Maine, 250; *Hammatt* v. *Emerson*, 27 Maine, 308.

There is no evidence that Samuel Cook was the father of plaintiff's grantors. The burden is upon the plaintiff to prove the identity. Amos P. Cook, one of the grantors, testified that he "did not take any stock in it;" "That he did not know that his father owned any land." Houlton was only twenty-six miles distance from the land and yet plaintiff could prove no acts showing possession or ownership from 1837 to date of his deed in 1881. Samuel Cook died in 1861,— more than twenty years before this action was brought. The right of entry of the Cook heirs commenced at his death; that right was lost by lapse of time. R. S., c. 105, § § 3, 5; 57 Maine, 343.

The deed of the agent of Massachusetts to Cook conveyed nothing because the land passed to the soldiers by the original resolve of March 5, 1801. The intention of the legislature is clear. The language used is, "Resolved that there be and *hereby is* granted to each non-commissioned officer and soldier," &c. There is no provision for any further conveyance. The terms of the resolve were sufficient to convey the fee. *Sargent* v. *Simpson*, 8 Maine, 148; *Mayo* v. *Libby*, 12 Mass. 339; *Cary* v. *Whitney*, 48 Maine, 526; 8 Met. 584; 16 Mass. 497; 16 Maine, 343; 3 Wash. Real. Prop. 190, 191, 192.

The resolve of 1828 released the soldiers of their settling duties and confirmed them in their title, and nothing but a deed from them or their heirs could give title to the demandant. He must show title and seizin. *Hunter* v. *Heath*, 67 Maine, 507; *Chaplin* v. *Barker*, 53 Maine, 275.

Counsel further contended that the land was forfeited to the State for taxes, citing *Adams* v. *Larrabee*, 46 Maine, 516.

PETERS, C. J. The demandant, to prove his title to lots fifty-eight and fifty-nine in the town of Mars Hill, produces a deed of quitclaim to himself, dated in 1881, of the lots from three of the five heirs of Samuel Cook, who deceased in 1861. He also produces from the office of the land agent in this state certified copies of deeds of those lots from George W. Coffin, agent of the commonwealth of Massachusetts, to Samuel Cook, dated in 1837.

Several objections to this title are presented by the defendant:

1. That the land agent's certificate from the office in Maine is not within the provision authorizing the use of copies of Massachusetts deeds in the courts of this state. It seems to us that it falls clearly within the statutory limit. R. S., c. 5, § 5. No objection is made of a want of record in Aroostook county where the land lies.

2. The form of the certificate is objected to, in that it does not certify that the deed is a true copy of the record, as required. The land agent says as much, however, and virtually the same

thing, when he says the copy is a true copy of a deed recorded in his office.

3. The defendant denies that there is evidence that Samuel Cook, father of plaintiff's grantors, is the Samuel Cook to whom the commonwealth conveyed. We are satisfied that this issue should be decided for the plaintiff. Samuel Cook, under whom plaintiff claims, lived in Houlton. The commonwealth's deeds of 1837 did not describe him as a resident of any place. But another deed from the same grantors to Samuel Cook, given in 1836, of another lot in the same township, does describe him as of Houlton. There is no suggestion that any other Samuel Cook ever lived there. The defendant does not himself claim under any Samuel Cook. This Samuel Cook had in his possession a plan of the town, with some marks of his own upon it. The defendant urges upon our attention that Samuel Cook of Houlton, never took possession of the land or attempted to. But no person of the name ever occupied the lots. This man was for a time, longer or shorter, in California, and there is an intimation that he was not always sane.

4. The point evidently most relied on by the counsel for the defendant is that the deeds from Coffin, as land agent, were not authorized by any law. The deeds run to Cook as assignee of certain revolutionary soldiers who had received certificates for lots of land from the commonwealth. The question involves a construction of a resolve of that state passed in 1828. The plaintiff contends that that act contemplated a deed to be given to an assignee of a certificate; the defendant denies it. The defendant further contends that the resolve, *proprio vigore*, carried the title to the soldier, making no provision for any assignee. The resolve is this:

"*Resolved:* That there be, and hereby is, granted to each non-commissioned officer and soldier who enlisted into the American army to serve during the Revolutionary war with Great Britain, and who was returned as a part of this state's quota of said army, and who did actually serve in said army the full term of three years, and who was honorably discharged, and to their heirs and assigns, two hundred acres of land, to be held in fee simple from

the date hereof; those who have heretofore drawn lots to retain the lots they have severally drawn, and those who have not yet drawn lots are hereby permitted to draw the same from the undrawn lots remaining in said Mars Hill township, any time within five years from the date hereof, any provisions or conditions in the former resolves on this subject to the contrary, notwithstanding."

Our opinion is, that the act, when examined in the light of previous legislation and the attendant facts, is correctly construed by the plaintiff. The question turns on the meaning of the words, "and to their heirs and assigns." The plaintiff's construction is that the words mean, "or to their heirs or assigns;" the word assigns meaning assignees. The defendant contends that the words are descriptive of the amount of estate to be conveyed,—descriptive of a fee — and that, the certificates of these lots having been previous to that time issued, the title went directly to the soldiers and could not be afterwards conveyed by the commonwealth to an assignee.

The literal reading is the principal argument for the defendant, and of course there is force in it. But there are several considerations that make strongly the other way. The report of the committee that reported the resolve is furnished us. It speaks of "soldiers or the heirs and *representatives* of soldiers" as the petitioners for the resolve. Again, it speaks of the petitioners as "the above named persons, or *those they represent.*" It also speaks of the "advanced age of many of the soldiers at the end of the war." The use of the phrase, "and 'to' their heirs and assigns," instead of the phrase with the word "to" omitted therefrom is a small indication worth throwing into the scales. Further, if the words are used to express a fee, why were the words, "to be held in fee simple" afterwards unnecessarily added. It is an uncommon thing to find the words, "to his heirs and assigns," inserted in a resolve,— an argument that heirs and assignees, as well as soldiers, were intended.

Confirmation of this view is obtained by an examination of the "former resolves" alluded to in this resolve. This resolve grew out of those. The resolve of 1801 gave two hundred acres (or

$20 money) "to each non-commissioned officer and soldier. . . and unto the children, if any there be, if not, to the widow of such." Another resolve provides that, if the officer or soldier had deceased or shall decease before he obtains his pension in land, "his children or widow as aforesaid shall be entitled to the same." The resolve of 1804 continues that of 1801, and speaks of "the children or widow" of soldiers. The resolve of 1820 appoints George W. Coffin, an agent, to make conveyances for the commonwealth. The certificates assigned to Cook were issued by the secretary of the commonwealth in 1806.

It may be observed that, if the resolve of 1828 made provision for the soldier only, the heirs were neglected in instances where the soldier was deceased. And in 1828, very many of the soldiers of the revolution were not living. It would seem that Mr. Coffin interpreted the resolve as allowing him to convey to an assignee of a soldier's claim, and he made many such conveyances. In *Sargent* v. *Simpson*, 8 Maine, 148, a Massachusetts resolve of 1804, authorizing a release of land to a person or persons, "and to his or their heirs and assigns," was construed as properly reading, "*or* to his or their heirs and assigns;" an authority bearing strongly upon the question in the case before us.

5. The defendant contends that the assignment to Cook is not proved, except by recital. Considering, however, that the defendant does not claim under the soldiers to whom the certificates were issued, nor under the commonwealth, as far as appears, we think the deed by Coffin, as a public officer, made as long ago as 1837, and recorded in the public archives of the two states, is satisfactory evidence that the plaintiff fairly holds the title which Massachusetts had. The official act of itself has some force. It is helped by the presumption of correctness that attaches to official proceedings. The following authorities amply support this conclusion. *Stockbridge* v. *West Stockbridge*, 14 Mass. p. 261; *Marr* v. *Given*, 23 Maine, 55; *Cabot* v. *Given*, 45 Maine, 144; *Blaisdell* v. *Morse*, 75 Maine, 542; 2 Whar. Ev. § § 1313, 1315.

6. Another objection is urged against the plaintiff's right to recover. The defendant claims under a tax-title of the land from

the state. The law declares that lands shall be forfeited to the state for non-payment of taxes after the assessment has been advertised for a given period. But after that there must be proceedings by the state for the sale of the lands forfeited, the owner still having an interest in the proceeds derived from the sale, and having an after-right of redemption from the state and from the purchaser.

It is correctly admitted by the defendant that the proceedings were not valid to transfer any title from the state to the purchaser, but he contends that the plaintiff cannot recover if the forfeited title remains in the state, invoking the rule that a demandant must recover upon his own seizin and not upon that of another. It seems to be admitted by the plaintiff that the proceedings were regular enough to create a forfeiture to the state.

A demandant must recover upon the strength of his own title and not on the weakness of the tenant's. Still, a demandant may recover if he has merely a better title than the tenant. In such case he does recover upon the strength of his own title, because his title is the strongest. He may not have what is called the true title — a title good against the world — but if he has a good title as against the tenant, he may recover. A bare possession is the first degree of title, and any degree is better than no degree of title. So that the question is which party is the better entitled to the possession, the demandant or the defendant.

Properly understood, it amounts to this, that a demandant, in order to prevail, must show that he has the title — or a better or higher evidence of title than the tenant. *Tebbetts* v. *Estes*, 52 Maine, 566; *Hubbard* v. *Little*, 9 Cush. 475; *Hunt* v. *Hunt*, 3 Metc. 175.

An application of this doctrine shows that the point taken by the defendant, that the plaintiff cannot recover because the state and not the plaintiff has the title, is not tenable. In such case the state has the land, not to keep — not to use — but to sell for the taxes. The state, in view of all the statutory requirements, has but a lien upon the land. There can be no doubt that as between these parties, the defendant not gaining a title under the state, the plaintiff has the title, or a title better than the defendant's title.

7. The defendant's claim by an adverse possession of twenty years, needs but a passing word. It is not well founded — the lots are wild land and were never personally possessed by anybody. Having a deed of a township and lumbering on it, and cultivating some portions of it, will not and ought not divest an owner's title of premises situated as these are.

The plaintiff can recover for only three-fifths of the land demanded. He shows title to no more. The defendant is in possession under deeds of warranty, which is a better title to the remaining two-fifths than the plaintiff has. "*Non constat* that the other co-heirs are not as willing that the tenant should occupy their land, as that the demandant should," said PARKER, C. J., in *Dewey* v. *Brown*, 2 Pick. 387, a case in point. *Somes* v. *Skinner*, 3 Pick. 52; 1 Wash. Re. Pr. 421; *Bruce* v. *Mitchell*, 39 Maine, 390.

Judgment for demandant for three-fifths undivided of the premises demanded.

DANFORTH, VIRGIN, EMERY and FOSTER, JJ., concurred.

HASKELL, J. I concur in the result reached by the opinion of the court, but I do not think that a forfeiture to the State of the lands demanded has been proved or is admitted. If the lands had been forfeited, surely the demandant's title thereto was lost. The tenant's possession is stronger than the demandant's original title, if that has been forfeited and lost. I do not think the tax proceedings have worked a forfeiture of demandant's title; because the land was sold by the State, for the non-payment of a legal state tax and an illegal county tax, and the demandant could not redeem from the one and not from the other. *Elwell* v. *Shaw*, 1 Maine, 339. It is admitted that the county tax was invalid. The notice of sale was insufficient. *Tolman* v. *Hobbs*, 68 Maine, 316. It follows, that the sale was irregular and invalid. The demandant's right to redeem did not expire until one year after the sale, R. S., 1871, c. 6, § 48; that is, a valid sale, made in compliance with law. Forfeiture cannot be said to be complete, until all right of redemption has become fore-

closed. The owner of land should not be required to pay an invalid tax, to save the estate from forfeiture, for the non-payment of a valid tax; nor should he be required to redeem from an illegal and invalid sale. *Hodgdon* v. *Burleigh*, 4 Fed. Reporter, 111. As the sale in this case was illegal, the title of the demandant did not become forfeited and lost and should prevail against the naked possession of the tenant.

JOSEPH CHANDLER *vs.* CYRUS SHAW.

Aroostook. Opinion January 26, 1885.

Betterments.

A divisional share of betterments upon a lot of land may be assessed in a real action in which the demandant recovers an undivided portion of the land.

ON REPORT.

Real action to recover possession of lot sixty-six in Mars Hill.

Powers and Powers, for the plaintiff.

Wilson and Spear and *John P. Donworth*, for the defendant.

PETERS, C. J. This case, with the exception of the question of betterments, is entirely disposed of in the opinion in the case of *Chandler* v. *Wilson*, *ante*. Two resolves not in that case, one of 1829 and one of 1831, are introduced, which merely extend the operation of the resolves already discussed. There is this immaterial difference between the two cases. At the foot of the soldier's certificate in this case is a minute, "Deeded to Ephraim Bailey's heirs." The deed shows the minute to be erroneous. The word "heirs" should be "assignee."

In this case the balance of the evidence authorizes the allowance of betterments. We cannot take the space in a legal opinion to record at an extended length our reasons for a conclusion in matters merely of fact. Suffice it to say, all things considered, a jury might properly, and probably would, allow betterments. In these matters of fact, we exercise jury powers.

A question arises whether a divisional share of the betterments may be assessed when a demandant recovers only an undivided share of the estate. We do not find that the point has ever been passed upon in any decided case in our own state. Betterments in such a case are recoverable in Massachusetts. *Backus* v. *Chapman*, 111 Mass. 386. We see no objection to it.

The writ demands lot sixty-six in Mars Hill. The defendant makes no claim to the south half, although no disclaimer is filed. The demandant is entitled to recover three-fifths of the whole lot. The defendant is entitled to three-fifths of betterments on the north half. Betterments on the north half, *in toto*, to be reckoned at two hundred dollars. The value of the whole north half, without betterments, one hundred dollars.

Judgment accordingly.

DANFORTH, VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

ALBERT A. LESAN *vs.* MAINE CENTRAL RAILROAD COMPANY.

Waldo. Opinion January 26, 1885.

Railroad. Crossing. Flagman. Negligence. Law and fact.

To entitle a plaintiff to recover against a railroad corporation for an injury caused by a collision with its train at a crossing, while he was driving with horse and wagon upon a highway across the track, he must show that the defendant's negligence caused the injury. In order to show that, he must show that he was not himself, at the time, guilty of any negligence that helped to cause it. If this does not appear in the circumstances of the accident, it must be otherwise proved.

The rule is established in this State, that it is negligence *per se*, for a person to cross a railroad track without first looking and listening for a coming train, if there is a chance for doing so.

The railroad company and the traveler have equal rights at the intersection of the track with the highway. But in exercising those rights a moving train has the right of way; the traveler must keep out of its way; it cannot be required to stop except in cases of apparent danger not otherwise avoidable; the proper warnings must be given to the traveler to keep out of its way; and the persons running a train have the right to rely upon the supposition that a traveler will obey the law of the road if he can do so.

A plaintiff need not allege in his declaration that the cause of negligence was that the railroad company had no flagman at the crossing, in order to

be permitted to show such omission as evidence of negligence, if none be required either by statutory or municipal regulation.

It is not a question of law, except in extreme cases, whether the necessities of the public travel require the presence of a flagman at a particular railroad crossing, although the facts touching the question are undisputed. If different intelligent and honest minds might exercise different judgments upon the undisputed facts, it is usually a question for the jury.

On exceptions and motion to set aside the verdict and for a new trial.

An action to recover damages for personal injuries, and damage to carriage, by reason of the alleged negligence of the servants of the defendant corporation in running and managing a locomotive and tender, causing a collision with the plaintiff's carriage at Bridge street crossing in Belfast, February 17, 1882. The writ was dated March 15, 1882. The plea was not guilty. The verdict was for the plaintiff for one thousand one hundred eighty-one dollars and thirty-one cents. The defendant moved to set aside the verdict and for new trial; the defendant also alleged exceptions.

The material facts are sufficiently stated in the opinion.

Thompson and Dunton, for the plaintiff, cited: *Whitney* v. *Cumberland*, 64 Maine, 541; *Webb* v. *R. R. Co.* 57 Maine, 117; *Stuart* v. *Machiasport*, 48 Maine, 487; *Cunningham* v. *Horton*, 57 Maine, 420; *Patterson* v. *Wallace*, 28 Eng. Law and Eq. 48; *Norton* v. *R. R. Co.* 113 Mass. 366; *Carleton* v. *Lewis*, 67 Maine, 76; *Plummer* v. *R. R. Co.* 73 Maine, 591; *Ernst* v. *R. R. Co.* 35 N. Y. 9; *Dascomb* v. *R. R. Co.* 27 Barb. (N. Y.) 221; Sherman, Neg. 556, 31; *Strong* v. *R. R. Co.* Rep. Nov. 1, 1882, p. 558; *Larrabee* v. *Sewall*, 66 Maine, 376; *Buel* v. *R. R. Co.* 31 N. Y. 314; *R. R. Co.* v. *Yarwood*, 17 Ill. 509; *O'Brien* v. *McGlinchy*, 68 Maine, 557; *Bigelow* v. *Reed*, 51 Maine, 325; *Baker* v. *Portland*, 58 Maine, 199; *Garmon* v. *Bangor*, 38 Maine, 443; *Keith* v. *Pinkham*, 43 Maine, 501; *Norris* v. *Litchfield*, 35 N. H. 271; *Morris* v. *R. R. Co.* 45 Iowa, 29; *Weymire* v. *Wolfe*, 52 Iowa, 533; *Brown* v. *R. R. Co.* 50 Mo. 461; S. C. 51 Mo. 420.

Drummond and Drummond, for the defendant, cited: *Continental Imp. Co.* v. *Stead*, 95 U. S. 161; *Grows* v. *R. R. Co.*

67 Maine, 100; *Beisiegel* v. *R. R. Co.* 40 N. Y. 9; *Weber* v. *R. R. Co.* 58 N. Y. 451; *Dyer* v. *R. R. Co.* 71 N. Y. 228; *Houghkirk* v. *Canal Co.* 92 N. Y. 219 (44 Am. R. 370); *Haas* v. *R. R. Co.* 47 Mich. 401.

PETERS, C. J. To entitle the plaintiff to recover, he must show, first, that the defendants were guilty of negligence; the injury itself does not import negligence.

Secondly, he must show that their negligence caused the accident. There must be a visible connection of cause and effect. It is not enough to show that the defendants' negligence was adequate and sufficient to cause it — that it might have caused it — he must show that it did cause it; that it was the predominating efficient cause of the accident and injury.

If the accident was caused partly by the plaintiff's own negligence, then it was not, in a legal sense, caused by the negligence of the defendants. In such case, it was caused by both parties. If the result was produced by a commingling of the negligences of the two parties, the plaintiff cannot recover.

Therefore, thirdly, the plaintiff must produce affirmative proof, directly or indirectly, that he was not himself guilty of any negligence which helped cause the accident. Sometimes this is impliedly shown by the proof of the manner of the injury. That is, by proving the defendants' negligence, the same proof may exculpate the plaintiff from any charge of negligence. It may be inferred that a plaintiff was, at the time of an accident, using due care, from the absence of all appearance of fault upon his part in the circumstances under which the accident happened. To state the requirement more precisely, the plaintiff must show affirmatively, or it must affirmatively appear, that he was himself in the use of due care. If it so appears from a full account of the circumstances attending the occurrence, whether the evidence be put in for one purpose or another, then he does affirmatively sustain the burden obligatory upon him.

To illustrate the idea: By the negligence of a railroad company a train of cars runs off the track, whereby passengers are injured. In such a case the passenger, ordinarily situated in

the car, who sues for damages for his injury, would not be required to show any fact further than the occurrence itself. Proof of the accident tells all that can be told,—is, *prima facie* at least, the whole story. *Res ipsa loquitur*. *Stevens* v. *Railway*, 66 Maine, 74. The injured party is passive in such a case. In the case, however, of a collision between a railroad train and the wagon of a traveler, the traveler plays usually an active part disconnected with or independent of the acts of others, and the acts of the two parties conjunctively produce a collision. In such case not much can be based upon inference and presumption. The prosecuting party must make it distinctly appear that his own remissness did not contribute in causing the injury.

The present case is of the latter description. With the burden of proof on the plaintiff, we think the verdict in his favor should not stand. His conduct seems to have been in no view defensible. He knew the situation of the crossing; was aware that an engine was likely at any time to be upon the track; could have both seen and heard the movement of the engine seasonably to enable him to save himself from injury, and testifies that he does not know whether he did either or not; was driving rapidly upon a descending grade to the crossing, passing another team on the way; and, when it was too late for either party to avoid the predicament, met with the accident. It was the repetition of an experiment too often made, of taking narrow chances in passing in front of an advancing train. Our very strong belief is, that the absence of whistling or bell-ringing or of signalling of any kind played no material part in causing the accident. When the agents of the company saw that a collision was impending they were helpless to prevent it.

The rule is now firmly established in this state, as well as by courts generally, that it is negligence *per se*, for a person to cross a railroad track without first looking and listening for a coming train if there is a chance for doing so. *State* v. *Maine Central*, 76 Maine, 357. "No neglect of duty on the part of a railroad company will excuse any one approaching such a crossing from using the senses of sight and hearing where these may be available." 1 Thomp. Neg. p. 426, and cases in notes. Experi-

ence has taught men that there are and can be no safeguards against injuries at railway crossings nearly as efficacious as to look and listen for an approaching train.

The counsel for the plaintiff in an able argument upon the facts of the case, places too much reliance upon his view of the relative rights of the parties in the use of the highway at its crossing with the railroad. At the place of intersection there are, no doubt, concurrent rights. Neither has an exclusive right of passage. They have equal rights. But the manner of exercising those rights is quite another thing. A railroad company would not have the right to occupy the way in a manner or to an extent that would unreasonably delay the public travel or render it dangerous; nor to start a train at an instant when it would be likely to produce collision. But when a train is under way it has the first right of the road. Its right may then be first exercised. It cannot be required to stop except in cases of apparent danger not otherwise avoidable. The traveler must stop for the train. For that purpose are the requirements of signals and gates and the like to warn the traveler to keep out of the way. There must be a uniform and certain rule to regulate the matter or dire confusion would ensue. The persons running a train have the right of relying upon the supposition that a traveler intends to wait for the passing of the train, unless it appears that he has not a chance to do so.

In *Continental Improvement Co.* v. *Stead*, 95 U. S. 161, the law of the road is expressed as follows: "Of course, these mutual rights (of railroad and traveler) have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning of its approach — so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way." In Pierce on Railroads, 342, it is said: "The obligations of the company and of the traveler

are mutual and reciprocal, and the same degree of care to avoid a collision is incumbent on each. It is its duty to give the warnings required by statute, or in the exercise of ordinary care; and it is his duty to have his attention alive to them, and to heed them. The company, having a fixed place of movement and a peculiar momentum, has the right of precedence in crossing highways; and he must wait till the train, the coming of which he knows or ought to know, has passed." In *Whitney* v. *Railroad*, 69 Maine, 208, VIRGIN, J., says: "On account of the motive power used by railroads, and the difficulties attending its management, and the noises incident thereto, the statute has prescribed means particularly adapted to give notice of the approach of a train, the object being to warn all persons of such approach in season to enable them to stop at a safe distance, and thus avoid the risk not only of collision but also of alarm to horses."

For the defense it is contended that the plaintiff could not give in evidence the fact of a failure to station a flagman at the crossing because no such ground of recovery is alleged in the writ. It need not be alleged. Neither the statute nor any municipal proceedings imposed such a requirement at the place in question. Therefore a failure in that regard would not constitute negligence *per se* — negligence in law. If the jury found that such a caution was indispensable, its omission would be at most only evidence of negligence,— one circumstance to be taken in connection with all other circumstances upon the main or central question whether the defendants at the particular time and place prudently managed their road. 1 Thom. Neg. 419, and cases. *McGrath* v. *Railroad*, 63 N. Y. 528; *Com.* v. *Railroad*, 101 Mass. 201; *Houghkirk* v. *Canal Co.* 92 N. Y. 219.

It was contended by the defense that it is a question of law and not of fact, whether the exigencies in any given case require the presence of a flagman at a railroad crossing. Of course, there may be extreme cases where a judge would be justified in giving an absolute direction upon the question. But generally it must be an issue for the jury. It is said, the jury are not a very competent tribunal for the settlement of such a dispute. The

court should inform and aid the jury. It is also said that when the facts respecting the situation are undisputed the conclusion must be one of law. But undisputed facts may weigh against one another. One person may give the dominant weight to one fact and another person to another. Usually such questions present an exigency to be judged of. Even though the facts are undisputed, if they are of such a nature or pertain to such a matter, that different intelligent and honest minds might exercise different judgments upon them, the question to be decided belongs to the jury. It is plainly observable that the tendency is to multiply the instances in which the court will take negligence cases from the jury and decide them as matters of law, but the advancement of the law in such respects has not extended to the limit assigned for it in the argument for the defendants. See *Cumberland Valley R. R.* v. *Mangans*, 23 Am. Law Reg. N. S. 518, and note.

Motion sustained.

DANFORTH, VIRGIN, FOSTER, EMERY and HASKELL, JJ., concurred.

SUSAN L. DOUGLASS, in equity, *vs.* JOHN M. SNOW and another.

Hancock. Opinion January 26, 1885.

Equity. Stat. 1874, c. 175. Statute of frauds. Pleadings. Witness.

Since stat. 1874, c. 175, went into effect, the Supreme Judicial Court has had jurisdiction as a court of equity to compel specific performance of parol agreements for the conveyance of land.

In a bill for specific performance of a parol agreement for the conveyance of land, if the defendant would rely on the statute of frauds at the hearing, he must raise the question by demurrer, plea, or answer.

To render a complainant incompetent as a witness for the reason that one of the defendants is an administrator of a deceased person's estate, the pleadings must show him to be such.

BILL IN EQUITY.

Heard on bill, answer and proofs.

H. A. Tripp, for the plaintiff, cited: 1 Story, Eq. Jur. § 755 and authorities cited, § 765; *Wilton* v. *Harwood*, 23 Maine, 133;

Pulsifer v. *Waterman*, 73 Maine, 244; *Brown* v. *Lord*, 19 Alb. Law J. 460; 16 Alb. Law J. 37; 17 Alb. Law J. 109; *Kurtz* v. *Hibner*, 8 Am. R. 665 (55 Ill. 514); *O'Brien* v. *Elliot*, 15 Maine, 127; *Buck* v. *Swazey*, 35 Maine, 53; *Gilmore* v. *Patterson*, 36 Maine, 549.

A. P. Wiswell, for the defendants.

The defendants rely upon R. S., c. 111, § 1, and upon the unbroken line of decisions in this State from *Stearns* v. *Hubbard*, 8 Maine, 320, to the present, excepting the dictum in *Pulsifer* v. *Waterman*, 73 Maine, 233. The court must overrule the very recent case of *Jellison* v. *Jordan*, 68 Maine, 373, before it can order specific performance of an oral contract to convey real estate. The testimony of the plaintiff was inadmissible, one of the defendants being an administrator. R. S., c. 82, § 98; *Trowbridge* v. *Holden*, 58 Maine, 117; *Burleigh* v. *White*, 64 Maine, 23; *Smith* v. *Smith*, 1 Allen, 231.

If it be said that this case does not come within the rule because Chase was not declared against as an administrator, then in a large number of cases the rule would be valueless and absurd. Every time an administrator is sued for holding personal property the plaintiff could in all cases let in his own testimony by not suing the administrator as such. Upon the question of resulting trusts, counsel cited: *Farnham* v. *Clements*, 51 Maine, 426; *Dudley* v. *Bachelder*, 53 Maine, 403; *Gerry* v. *Stimson*, 60 Maine, 189.

VIRGIN, J. The plaintiff seeks the specific performance of an alleged "verbal contract," whereby, as she avers, the defendant Snow agreed with her son and alleged agent to convey to her, by a good and sufficient deed, certain land known as the "red store," on payment of four hundred and twenty-five dollars; and makes the defendant Chase a party to whom Snow subsequently conveyed the property.

The only partial performance which is alleged in the bill, is the payment of three hundred and fifty dollars of the purchase money. Such payment, as held by the more modern authorities, is not sufficient of itself as part performance, to take the case

out of the statute of frauds, for the money may be recovered at law. 4 Kent, 451; *Kidder* v. *Bar*, 35 N. H. 235; *Glass* v. *Hulbert*, 102 Mass. 23; *Purull* v. *Miner*, 4 Wall. 513; Wat. Sp. Per. § 268, and cases in note 4.

But the defendants have admitted the contract so far as its terms are concerned and have not raised the question of the statute of frauds by demurrer, plea or answer; and not having claimed the benefit of it they cannot now set it up. *Newton* v. *Swazey*, 8 N. H. 13; *Ridgeway* v. *Wharton*, 3 De G. M. and G. (Am. ed.) 677, and cases in note 2; 1 Dan. Chan. (5th ed.) 656, 657; Story's Eq. Pl. (8th ed.) 763; for having admitted an agreement valid at common law, and thereby avoided the mischief against which the statute was directed, no evidence of its terms is necessary. *Cozine* v. *Graham*, 2 Paige's Ch. 181; *Newton* v. *Swazey*, *supra;* and the court might decree performance, so far as Snow at least is concerned, provided the evidence reasonably satisfies us that the plaintiff was the real vendee.

It is objected that the plaintiff is not a competent witness. She is unless she comes within some of the exceptions to the provisions of R. S., c. 82, § 93. It is claimed that Chase is administrator of the estate of the plaintiff's son, who, it is claimed, is the equitable vendee of the premises. But the mere fact that he is such administrator is not sufficient. He must be a party in his official character and appear as such. He is not sued as such. He is joined in the bill simply as an individual to whom the premises were conveyed by the plaintiff's alleged equitable vendor. Neither by his answer does he appear in that capacity. His signature intimates no official character. If his allegations in the answer are true he holds the land in his individual and not his representative character. At most he is the trustee of the plaintiff's son so far as this case is concerned, holding the property by a resulting trust. Our opinion, therefore, is that she is a competent witness.

Her testimony is positive and direct; that she authorized her son to make the purchase for her and furnished the money for the two payments; that she furnished the money for the policy and subsequently assigned it; that on the death of her son in

October following, she appointed Limeburner as agent to pay the balance and take the deed. These facts are not disputed except by Snow's answer, but they are corroborated by the testimony of several witnesses, some of which squarely contradicts the allegations in the answer and tends to establish the fact that Snow understood her son to be the plaintiff's agent in making the uncontradicted agreement.

1. The policy of insurance on the store was issued to her, as is expressly testified to by the insurance agent, and was transferred by her to Snow within a few days thereafter. Unless she was understood by Snow to be the real purchaser, he was accepting the transfer of a policy issued to one known to him to have no insurable interest. If she was the real party to the agreement, she became the vendee immediately on its completion; for "equity looking upon that as done which ought to be done," (Pom. Eq. Jur. § 363–4) the equitable title passed and she then might insure as well as convey it, § 368. He does not deny these facts, but does not produce the policy nor account for it (although shown to be in him), except by saying it is not in his possession and that he does not know where it is.

Limeburner who succeeded her son as agent is also dead. But Storer, a disinterested witness so far as this case discloses, testifies that he heard Snow say that the son had paid three hundred and fifty dollars for the plaintiff and that she was to have a deed when the balance was paid; that Snow directed Limeburner to go to Tripp's office, and he (Snow) would go and get the mortgage discharged and "go in then and fix it up." Although afterward, in explaining why he did not come back, said he "did not know the plaintiff in the trade," which is inconsistent with the proved facts.

Snow does not absolutely deny these admissions either in his answer or testimony, only testifying that he "*thinks* he told Storer of the payments, but not that they were paid for the plaintiff." But he admits that Limeburner several times asked him for a deed, and he then, in addition to the balance of purchase money, demanded sixty-five dollars for goods alleged to have been sold to the son, but made no such claim to Chase, so far as the testimony shows.

2. The testimony of Tripp is also unqualified and directly in point: That Limeburner and Snow came together to his office in December and said that the plaintiff was to pay the seventy-five dollars; that Snow claimed interest for delay which Tripp computed, and produced his figures at the hearing; that Snow was to accept the balance and interest (seventy-nine dollars and thirty-seven cents), give the plaintiff a deed and authorized Tripp to make it, handing to him another containing the correct description of the premises; that Snow remained until the deed was completed and then went out with the avowed purpose of obtaining a discharge of the mortgage and then to return to execute the deed; but did not return. These facts are not denied in his testimony though some of them are, in his answer. So he denied any personal knowledge that the policy was issued to the plaintiff, although it was transferred by her to him and he does not show it out of his possession to our satisfaction.

Our opinion, therefore, is that the plaintiff's case is satisfactorily proved. *Neale* v. *Neales*, 9 Wall. 1, 12. We are satisfied that the son acted in behalf of his mother, and that Snow so understood it. Notice to Chase was not necessary. From his own standpoint he claims to hold all, except the amount he advanced from his individual funds, in trust for the son's estate, and shall turn it over to that estate when he sells the property and deducts the amount which he advanced.

The defendants' counsel challenge the power of the court to decree specific performance of agreements for the conveyance of land. But this cannot be seriously questioned, even if he had regularly insisted upon the benefit of the statute of frauds. St. 1874, c. 175; R. S., c. 77, § 6, cl. XI; *Wilton* v. *Harwood*, 23 Maine, 131; *Ash* v. *Hare*, 73 Maine, 401; *Pulsifer* v. *Waterman*, 73 Maine, 244–5. The incidental remarks found in the opinion in *Jellison* v. *Jordan*, 68 Maine, 373 (which was an action at law), could not have been intended to apply to equity.

Let a decree be drawn directing the defendant Chase to convey the premises to the plaintiff on payment of the balance of the purchase money (seventy-five dollars) with interest thereon until

payment, and payment to be made within thirty days after the announcement of this opinion on the county docket.

Bill sustained; but with costs against Snow only.

PETERS, C. J., DANFORTH, FOSTER and HASKELL, JJ., concurred.

EMERY, J., did not sit.

LUTHER PERKINS *vs.* CYRUS L. ALDRICH.

Androscoggin. Opinion January 28, 1885.

Deeds. Construction.

When a deed of land excepts a building standing upon it, "and one rod of land equal distance around it," the exterior lines of the lot reserved are to correspond in outline with the lines of the building; and if the building is rectangular in form, the lot of land reserved must be rectangular in form, although small portions of the land at the extreme corners of the lot may be more than a rod distant from the building.

ON EXCEPTIONS.

Trespass *quare clausum*, in which the only issue considered by the court was as to the construction of the words of reservation recited in the opinion which were contained in a deed from the defendant to the plaintiff, dated October, 6, 1870. The plea was the general issue. At the trial the court ordered a nonsuit and to this ruling the plaintiff alleged exceptions.

George C. and Charles E. Wing, for the plaintiff.

We respectfully submit that the order of nonsuit was erroneous because the defendant could not justify the trespass under the deed without pleading it specially. This position we believe to be in accordance with legal usage, and the laws of pleading as established and lived up to from time immemorial, and one that cannot be overlooked or winked out of sight. We believe our position here to be such as not to require any further discussion of the case or consideration as to the other point as to the construction of the deed in the case, but inasmuch as the deed is very novel in form we make the following suggestion to the court touching its construction. Was the piece reserved rectangular or circular. If rectangular it would require more area to satisfy

its call than if circular, and if more land were taken, then a greater hardship would be imposed upon the grantee by such a construction, and to this point we cite: *Adams* v. *Frothingham*, 3 Mass. 361; *Johnson* v. *Jordan*, 2 Met. 240; *Saltonstall et als.* v. *Proprietors of Long Wharf*, 7 Cush. 201.

Savage and Oaks, for the defendant.

WALTON, J. A grant of land contained this exception:

"*Excepting the Free Chapel and one rod of land equal distance around it.*"

The only question is in relation to the exterior lines of the land excepted. The plaintiff claims that the corners of the lot must be rounded, so that no portion of the land reserved shall be more than one rod distant from the chapel. The defendant contends that the language of the deed, when applied to the subject matter of the exception, and fairly interpreted, according to the manifest intention of the parties, reserved a piece of land in form like the chapel; that is, bounded on its four sides by straight lines, and having angles at its corners corresponding to the angles of the building; and the judge presiding at the trial so ruled. We think the ruling was correct. Of course a building lot with rounded corners may be reserved or conveyed. But such lots are not common. And when, as in this case, the lines are to be run at a certain distance from a rectangular building, like an ordinary church or school house, and there is nothing in the deed or the situation of the land to indicate the contrary, we think it is fair to presume that the parties intended that the exterior lines should be run so as to correspond with the lines of the building, although by so doing small portions of land in the angles at the extreme corners of the lot may be more than the distance named from the building. We can not resist the conviction that such was the intention of the parties in this case.

Exceptions overruled. Nonsuit confirmed.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

DANIEL W. FESSENDEN, executor, appellant from the decree of the JUDGE OF PROBATE.

Cumberland. Opinion January 28, 1885.

Executors and administrators. Insolvent estates. Taxes on real estate. Practice.

Taxes assessed upon real estate prior to its sale by an executor of an insolvent estate for the production of assets for the payment of debts, are chargeable to the rents of the land accruing after the testator's decease, rather than to the proceeds of sale received by the executor.

In an extreme case only, and not under ordinary circumstances, does the law court interfere with the decision of questions of fact or of discretion made by a judge at *nisi prius*.

ON EXCEPTIONS.

An appeal from the decree of the judge of probate upon the executor's account in the estate of Daniel Brown, late of Portland, deceased, wherein the following items in the account were disallowed:

"Item No. 20. Oct. 14, 1881, paid taxes on North St. property for 1880 and 1881, - - - - - - - - - -	$113 98
"Item No. 23. Oct. 28, 1881, paid taxes on Congress St. property for 1880 and 1881, - - - - - - - - -	149 10
"Item No. 36. Paid Mrs. Austin's bill of expenses of last sickness (of deceased), - - - - - - - - - - Disallowed in part, viz.: for $136.75.	206 75
"Item No. 47. To commissions on $5272,31, - - - - - Disallowed in part, viz.: $82.43.	263 10

The presiding justice ruled as a matter of law, after a hearing, that the appeal was not sustained and ordered the decree of the judge of probate affirmed. The appellant alleged exceptions.

Woodman and Thompson, for the appellant.

P. J. Larrabee, for the appellee.

PETERS, C. J. The appellant was devisee in trust and executor under Daniel Brown's will. The estate proving insolvent, certain real estate of the testator was sold for the production of assets

to be applied to the payment of debts. The appellant presents for allowance in his account as executor the amount of the taxes assessed upon such real estate prior to its sale. The claim was properly disallowed.

Heirs and devisees have the rents of real estate until it is sold by an administrator or executor for the payment of debts, and for that reason they should pay the taxes. The taxes are a charge upon the rents. The technicality which gives to heirs and devisees the rents of an insolvent estate is an extreme doctrine against creditors, and the severity of requiring creditors to pay the taxes while others reap the rents should not be superadded. *Kimball* v. *Sumner*, 62 Maine, 305; *Lucy* v. *Lucy*, 55 N. H. 9; *Palmer* v. *Palmer*, 13 Gray, 328; Schoul. Executors, § 510, note.

There may be exceptions to the rule. There may be occasions when it would be reasonable and right for such a charge to appear in an administration account. But the appellant does not show the necessity for the charge. The burden is upon him to do so. The indications are the other way. The estates sold were rentable properties. The rents accruing after the testator's death and before the sale must have greatly exceeded the taxes. It looks as if the taxes were paid by the right person out of a wrong pocket.

Complaint is made that the court of probate unreasonably reduced the appellant's bill for fees, and cut down an account paid by him for the services of an attendant during the last sickness of the testator. Those are questions, either of fact or of discretion, that should be finally settled by a single judge, unless he sees fit to report them to the full court for its decision. In only an extreme case, but not under any ordinary circumstances, would the law court interfere with a decision of such questions, made by a judge at *nisi prius*. *Crocker* v. *Crocker*, 43 Maine, 561.

Exceptions overruled.

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

HASKELL, J., did not sit.

THOMAS E. BRASTOW and others *vs.* ROCKPORT ICE COMPANY.

Knox. Opinion January 28, 1885.

Great ponds. Ice.

In this State, all ponds containing more than ten acres are public ponds, and the right to cut ice upon them is a public right, free to all. In this particular, the owners of the shores have no greater rights than other persons who can reach the ponds without trespassing upon the lands of others.

BILL IN EQUITY.

Heard on bill, answer and proof.

Baker, Baker and Cornish, in an elaborate argument contended that the plaintiffs had the exclusive right to cut the ice on Lily pond, though it contained more than ten acres, in front of their land. By the English common law the right of property *jus privatum*, both in soil and water, existed in tidal and fresh waters. In tidal waters it was *prima facie* in the crown. In fresh waters it was *prima facie* in the individual, but in all navigable waters the right of property, whether in the individual or the sovereign, was subject to the public right. Gould, Waters, § § 17, 42; *Nichols* v. *Boston*, 98 Mass. 41; *Com.* v. *Alger*, 7 Cush. 53; Hale, *DeJure Maris*, chap. v. c. 1, 3; *Murphy* v. *Ryan*, Ir. R. 2 C. L. 143; *Adams* v. *Pease*, 2 Conn. 481; *Mill River Co.* v. *Smith*, 34 Conn. 463; *McFarlin* v. *Essex Co.* 10 Cush. 309; *Nichols* v. *Suncook Co.* 34 N. H. 345; *Bradford* v. *Cressey*, 45 Maine, 9; *Granger* v. *Avery*, 64 Maine, 292; *Providence Co.* v. *Steamship Co.* 20 Alb. Law J. 302; *Colchester* v. *Brooke*, 7 Q. B. 339; *Free Fishers* v. *Gann*, 20 C. B. N. S. 1; *Gann* v. *Free Fishers*, 11 Ho. of L. 192.

Waters not navigable, whether still water or streams, were held by unconditional title. *State* v. *Pottmeyer*, 33 Ind. 402 (5 Am. R. 227); Coulson and Forbes, Waters 98, 101, 369; Bell's Law of Scotland, 171; Hunt, Boundaries and Fences, 19; Gould, Waters, § § 80, 81; *McKenzie* v. *Banks*, 3 H. of L. 1324; *Marshall* v. *Navigation Co.* 3 B. & S. 732; *Bristow* v.

Cormican, 3 App. Cas. 641; *Bloomfield* v. *Johnson*, Ir. R. 8 C. L. 89; *Bristow* v. *Cormican*, Ir. R. 10 C. L. 434.

The great body of American courts have abolished the tidal test of navigability and adopted the fact as the criterion. Gould, Waters, § § 47, 52, 54; *The Daniel Ball*, 10 Wall. 557; *Genesee Chief* v. *Fitzhugh*, 12 How. 443; *Barney* v. *Keokuk*, 94 U. S. 324.

In Massachusetts and Maine the cases both of title and boundary have all been provably or admittedly subject to the ordinance. In no case has an outstanding private title in a pond, prior to the ordinance, been shown or its effect decided. *Bradley* v. *Rice*, 13 Maine, 198; *Lowell* v. *Robinson*, 16 Maine, 357; *Robinson* v. *White*, 42 Maine, 209; *Hathorn* v. *Stinson*, 10 Maine, 224; *Mansur* v. *Blake*, 62 Maine, 38.

In other states it is only the great inland lakes which are navigable and highways of inland communication and trade where the boundary stops at high or low water, while in the small unnavigable ponds the riparian bound is the centre. *Champlain Co.* v. *Valentine*, 19 Barb. 484; *Fletcher* v. *Phelps*, 28 Vt. 257; *Austin* v. *Railroad Company* 45 Vermont, 215; *State* v. *Gilmanton*, 9 New Hampshire, 461; *State* v. *Franklin Falls Co.* 49 New Hampshire, 240 (6 Am. R. 513); *Sloan* v. *Beimiller*, 34 Ohio St. 492; *Delaplaine* v. *R. R.* 42 Wis. 214 (24 Am. R. 386); *Seaman* v. *Smith*, 24 Ill. 521; *Ledyard* v. *Ten Eyck*, 36 Barb. 102; *Cobb* v. *Davenport*, 32 N. J. L. 369; *Ridgway* v. *Ludlow*, 58 Ind. 248; *Edwards* v. *Ogle*, 76 Ind. 302; *Forsyth* v. *Smale*, 7 Biss. 201; *Marsh* v. *Colby*, 39 Mich. 626 (33 Am. R. 439); *Rice* v. *Ruddiman*, 10 Mich. 125.

Now in America the title to both land and water was originally in the crown by right of discovery. Gould, Waters, § 30; *Com.* *Roxbury*, 9 Gray, 451; 1 Black. Com. 107; *Bogardus* v. *Trinity Church*, 4 Paige, 178.

Thus the title was in King James I as sovereign of England in 1620, and the grant, patent or charter of 1620, to the council of Plymouth did convey the *jus privatum* in all the territory within its limits, and as such is the foundation of all titles in

New England. Lily Pond is within the limits of the Plymouth charter. It is non-navigable in fact. Of this the court will take judicial notice. *Ross* v. *Faust*, 54 Ind. 471; *Mossman* v. *Forest*, 27 Ind. 233; *Neaderhouser* v. *State*, 28 Ind. 257; *Wood* v. *Fowler*, 26 Kan. 682 (40 Am. R. 330).

In 1629 this pond was conveyed by feoffment to Beauchamp and Leverett and it then stood as private property subject to no public use. It thus stood at the time of the colony ordinance of 1641–7. It will be noted that this ordinance is not declarative of the common law but wholly subversive of it, both as to flats and ponds. The appropriation of private property for public use is one of the highest powers and even ambiguous grants or statutes will not be so construed. The presumption is against it. *Glover* v. *Boston*, 14 Gray, 282; *Wilson* v. *Lynn*, 119 Mass. 174; *Queen* v. *Robertson*, 6 Can. Sup. Ct. 52.

The Massachusetts cases uniformly recognize the exception of all lands previously appropriated to private persons. *Tudor* v. *Water Works*, 1 Allen, 164; *W. Roxbury* v. *Stoddard*, 7 Allen, 158; *Berry* v. *Roddin*, 11 Allen, 577; *Hittinger* v. *Eames*, 121 Mass. 539.

Private property can be taken for public use only by eminent domain in a public exigency and on condition of compensation. 3 Kent's Com. 339; *Sinnickson* v. *Johnson*, 2 Harr. (N. J.) 129; *Gardner* v. *Newburgh*, 2 Johns. Ch. 162; *Pumpelly* v. *Green Bay Co.* 13 Wall. 178; Vattel's Law of Nations, 112.

Thus existing private titles to ponds within the colony were exempt from the operation of the ordinance: (1) By its express terms; (2) By the fundamental limitations of legislative power.

The case of a title ante-dating the ordinance as in this case has never been decided but is of new impression and the court is therefore free to decide this case according to the very right.

Lily pond being held by private title free from the ordinance, title in it could be gained by prescription. *Prop. Ken. Pur.* v. *Laboree*, 2 Maine, 275; *Robison* v. *Swett*, 3 Maine, 316; *Gookin* v. *Whittier*, 4 Maine, 16; *Ross* v. *Gould*, 5 Maine, 204; *Foxcroft* v. *Barnes*, 29 Maine, 128; *Putnam's School* v. *Fisher*, 30 Maine, 523; *Robinson* v. *Brown*, 32 Maine, 578; *Nichols* v. *Suncook Manufacturing Co.* 34 N. H. 345.

And if the ordinance applied in full force, still title may be acquired against the public by prescription, either to the soil, fishing, or ice. Gould, Waters, § 22 and note, § 37, note 5; *Carter* v. *Murcot*, 4 Burrows, 2162; *Randolph* v. *Braintree*, 4 Mass. 315; *Proctor* v. *Wells*, 103 Mass. 216; *Moulton* v. *Libbey*, 37 Maine, 472; *Preble* v. *Brown*, 47 Maine, 284; *W. Roxbury* v. *Stoddard*, 7 Allen, 158; *Hittinger* v. *Eames*, 121 Mass. 539; *Ridgway* v. *Ludlow*, 58 Indiana, 248; *Jackson* v. *Bowen*, 1 Caines, 358.

A. P. Gould, for the defendant, cited: *Barrows* v. *McDermott*, 73 Maine, 441; 12 Maine, 229; 1 Winthrop's History of New Eng. 322; 7 Allen, 166; *Paine* v. *Woods*, 108 Mass. 160; *Barker* v. *Bates*, 13 Pick. 258; *Storer* v. *Freeman*, 6 Mass. 435; Washburn, Easements [411], (492, 2d ed.); *Marshall* v. *Steam Nav. Co.* 113 E. C. L. 732; Angell, Watercourses, § 94; *Mayor, &c.* v. *Spring Garden*, 7 Burr. 348; 111 Mass. 464; *Moor* v. *Veazie*, 32 Maine, 356; *Moulton* v. *Libbey*, 37 Maine, 472; *U. S.* v. *Hoar*, 2 Mason, 311; *Knox* v. *Chaloner*, 42 Maine, 150; *Berry* v. *Carle*, 3 Maine, 269; *Wadsworth* v. *Smith*, 11 Maine, 278; *Brown* v. *Chadbourne*, 31 Maine, 9; *Dyer* v. *Curtis*, 72 Maine, 181; *Stoughton* v. *Baker*, 4 Mass. 522; *West Roxbury* v. *Stoddard*, 7 Allen, 158; *Cottrill* v. *Myrick*, 12 Maine, 222; *Chalker* v. *Dickinson*, 1 Conn. 382; *Thomas* v. *Marshfield*, 13 Pick. 240; *Com.* v. *Vincent*, 108 Mass. 441; *Fay* v. *Danvers Aq. Co.* 111 Mass. 27; *Rowell* v. *Doyle*, 131 Mass. 474; *Gage* v. *Steinkrauss*, 131 Mass. 222.

WALTON, J. In this State, ponds containing more than ten acres are public; and the right to cut ice upon them is a public right, free to all. In this particular, the right of a riparian owner is no greater than that of every other citizen. And the exercise of the right by a riparian proprietor, although continued for more than twenty years, will not enlarge his right. It will still be no more than a right in common. It will not thereby be changed from a common to an exclusive right. The exercise of such a right is in no respect adverse or aggressive, and prescription can not be predicated upon its exercise, however long continued. The right to take ice from a public pond, like all

public rights, must be exercised in a reasonable manner, and with a due regard to the equal rights of others, as the right to boat, to fish, to dig clams and oysters, must be exercised in our bays and harbors, and on the sea itself. And it is the opinion of the court that the right of the parties to this litigation to cut ice on Lily Pond is equal; that neither has a right superior to, or to the exclusion of, the other. True, the defendants are a corporation, and their charter authorizes them to cut ice on Lily Pond. But there is nothing in the charter to indicate that the right was intended to be exclusive. And it is the opinion of the court that it is not exclusive; that both parties must exercise the right in a reasonable manner, and with a due regard to the rights of each other, and of all others who may wish to take ice from the pond. The claim of the plaintiffs to an exclusive right to cut ice on Lily Pond opposite to so much of the shore as they own or have leases of, can not be sustained. Lily Pond, it is admitted, contains more than ten acres. It is, therefore, a "great pond," within the meaning of the ordinance of 1641–7; and by the principles of that ordinance (which have been too many times recognized, sanctioned, and declared to be a part of the common law of this State, to be now disregarded) it is a public pond, and the use of it free to all, who can reach it without trespassing upon the lands of others. *Barrows* v. *McDermott*, 73 Maine, 441; *West Roxbury* v. *Stoddard*, 7 Allen, 158; *Hittinger* v. *Eames*, 121 Mass. 539.

Such being the law, of course the plaintiffs' bill, in which they ask that the defendants may be enjoined from cutting ice "between the shores under their (the plaintiffs') ownership or control and the center of the pond in front of the same," can not be sustained. But, as the principal question is a new one in this State, and there is evidence that the defendants as well as the plaintiffs have claimed greater rights than they are entitled to, and it was equally important to both parties to have their rights judicially determined, we think the bill should be dismissed without costs.

Bill dismissed. No costs.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

WILLIAM E. CASWELL *vs.* JAMES FULLER.

Waldo. Opinion January 31, 1885.

Estoppel. Arrest.

A debtor is estopped from holding a creditor chargeable for a false oath, upon a writ whereon the debtor was arrested, when it appears that the creditor made the oath upon information given him by the debtor, believing the same to be true.

ON EXCEPTIONS.

Joseph Williamson, for the plaintiff.

William H. Fogler, for the defendant.

HASKELL, J. The plaintiff sues for damages suffered from an alleged illegal arrest, grounded upon the false oath of the defendant, that at least ten dollars were due upon the debt sued and were unpaid, when in fact it had been discharged in bankruptcy.

The defense is, that the plaintiff, by his own statement when he contracted the debt, led the defendant to believe, that he, the plaintiff, had already been adjudged a bankrupt, and wanted to borrow the money to help himself through bankruptcy; that, relying upon the truth of this statement, the defendant loaned the money, and after it became due and payable made the oath believing that it was true.

The presiding justice ruled, that this defense, if proved, would in law bar the plaintiff's action. To this ruling the plaintiff alleged exception, the verdict being for the defendant.

Estoppels *in pais* have long been regarded by courts as wise and salutary. That a man should be allowed by his own speech and conduct to lead another astray, and thereby take substantial benefit from the error of which he was the cause is subversive of natural justice.

The plaintiff induced a loan from the defendant upon the false representation, that he had already been adjudged a bankrupt, and needed funds to carry him through the bankruptcy proceed-

ings. The defendant, failing to receive payment of the loan when due, made the oath required by statute as a prerequisite to arrest on mesne process on contract, and caused the plaintiff's arrest upon a writ, wherein the loan was sued for. It is not pretended that any part of the oath was false, beside that stating the debt sued, or at least ten dollars of it, to be due and payable. To show the oath false in this particular, the plaintiff relies upon his discharge in bankruptcy, which would not have discharged the defendant's loan had the plaintiff's representations when he procured it, relative to his bankrupt proceedings, been true. Having availed himself of false representations to procure the loan, the plaintiff cannot deny their truth for the purpose of charging the defendant with a false oath, made upon the belief that the false statements of the plaintiff were true. By reason of the false representations of the plaintiff, the defendant parted with his money, and equitable estoppel precludes the plaintiff from gaining advantage from his own falsehood. *Stanwood* v. *McLellan*, 48 Maine, 275; *Piper* v. *Gilmore*, 49 Maine, 149; *Wood* v. *Pennell*, 51 Maine, 52.

This defense is fatal to the plaintiff's case, and the other exceptions become immaterial.

Exceptions overruled.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and FOSTER, JJ., concurred.

MOSES KING, JUNIOR, *vs.* FRED B. JEFFREY.

Androscoggin. Opinion February 2, 1885.

Audita querela. Pleadings. Practice.

The declaration in a writ of *audita querela* is defective when it avers that the writ in the original action was seasonably served by summons left at the last and usual place of abode of the defendant therein named, "in said county," and does not aver that he did not live there.

The temporary absence from the State of the defendant in an action does not require a stay of the execution, or that a bond should have been filed before the same issued.

ON EXCEPTIONS.

Audita querela to vacate a judgment by default on a promissory note, rendered by this court in Androscoggin county, February 6, 1883, for eighty-four dollars and sixty-eight cents debt or damage and nine dollars and ninety-eight cents costs of suit, and for damages alleged to be five thousand dollars for the arrest and imprisonment of the plaintiff upon the execution issued upon that judgment.

The declaration averred that the original writ was dated October 30, 1882, and that the officer, November 15, 1882, "left a summons of said writ at the last and usual place of abode of said King in said county." . . . "And the plaintiff further says, that on the thirtieth day of October, A. D. 1882, and for a long time previous thereto, he was, and ever since has been, an inhabitant of the State of Maine; that on the first day of November, A. D. 1882, he temporarily left the State of Maine, and did not return thereto, and was absent therefrom until the twentieth day of April, A. D. 1883; that he had no actual notice of the pendency of said suit against him, until after the rendition of said judgment therein; and that both of said executions against him, as aforesaid, were illegally issued, the said Jeffrey well knowing when the same were issued that the said King had had no actual notice of the pendency of said action, until after judgment was rendered therein as aforesaid, and in that the said Jeffrey gave no bond to the plaintiff, as required by law, before, in such case, an execution could lawfully issue on said judgment."

On demurrer the declaration was adjudged bad by the presiding justice and the plaintiff alleged exceptions.

Frank W. Dana, (*W. F. Estey* with him,) for the plaintiff, cited: *Folan* v. *Folan*, 59 Maine, 566; *Staples* v. *Wellington*, 62 Maine, 13; *Bryant* v. *Johnson*, 24 Maine, 304; *Barker* v. *Walsh*, 14 Allen, 172; *Merritt* v. *Marshall*, 100 Mass. 244; *Foss* v. *Witham*, 9 Allen, 572; *White* v. *Clapp*, 8 Allen, 283; *Hawley* v. *Mead*, 52 Vt. 343; *Fairbanks* v. *Devereaux*, 2 Law & Eq. Rep. 386; *Marvin* v. *Wilkins*, 1 Aik. 107; *Weston* v. *Blake*, 61 Maine, 452; *Laughton* v. *Harden*, 68 Maine, 210; *Little* v. *Cook*, 1 Aik. 363; 10 Mass. 103; 17 Mass. 159;

Penobscot R. R. Co. v. *Weeks*, 52 Maine, 458; *Creeps* v. *Burden*, 1 Smith's L. Cas. 833.

N. and J. A. Morrill, for the defendant, cited: R. S., c. 81, § 17; c. 82, § § 3, 6; *Jackson* v. *Gould*, 72 Maine, 341; *White* v. *Clapp*, 8 Allen, 283; *Sanborn* v. *Stickney*, 69 Maine, 343; *Bryant* v. *Johnson*, 24 Maine, 306; 3 Bl. Com. 406; Jacob's Law Dict. Tit. *Audita Querela;* Bac. Abr. Tit. *Audita Querela;* Com. Dig. Tit. *Audita Querela; Lovejoy* v. *Webber*, 10 Mass. 101.

HASKELL, J. *Audita querela*, seeking to vacate a judgment of this court and to annul an execution issued upon it, whereon the plaintiff has been imprisoned, and to recover damages suffered thereby.

This writ alleges the plaintiff and defendant both to be of Lewiston in the county of Androscoggin. The declaration states, that the officer's return on the original writ shows, that it was served by attachment of real estate and summons seasonably left, "at the last and usual place of abode of the said King," this plaintiff, "in said county," meaning the county of Androscoggin, and that, at the time of suing out the same and of the service thereof, this plaintiff, the defendant in that action, was an inhabitant of the State. It does not aver that he was not an inhabitant of the county of Androscoggin, or that he did not live there. His counsel does not suggest that the summons was not seasonably left at his domicil in that county. It follows therefore that the declaration fails to show, but that the original judgment, sought to be vacated, was rendered upon actual notice to the defendant in the original action, that is, legal service, seasonably made as required by statute. *Sanborn* v. *Stickney*, 69 Maine, 343. The temporary absence of the defendant in the original action from the State did not require a stay of execution, or that a bond should have been filed before the same issued. *Jackson* v. *Gould*, 72 Maine, 341.

The declaration therefore is fatally defective in substance, in that it does not show, but that the defendant in the original action was arrested upon a valid precept, properly issued upon a

valid judgment, rendered upon legal process duly served, by a court having complete jurisdiction of the parties and of the subject matter of the suit. The plaintiff fails to show, but that he has been imprisoned by due process of law, for the non-payment of a debt, to which he does not pretend to have any defense, legal, or equitable.

Exceptions overruled.

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

INHABITANTS OF MACHIASPORT *vs.* SAMUEL SMALL and others.

Washington. Opinion February 11, 1885.

Debt on bond. Burden of proof. Pleading. Practice. Tax.

In debt upon a collector's bond, before the defendant is put to proof of a plea of performance, the plaintiff must show, either that the collector has been clothed with legal authority to collect taxes, or that he actually did collect them.

When such authority is shown, or the collector has been proved to have collected taxes, the burden under such plea rests upon the defendants to prove that the collector has performed the condition of his bond, by having faithfully performed all the duties of his office, or by having legally disposed of the taxes which he is shown to have collected.

In such action, on such issue, if the defendant fails to support the plea, the penalty of the bond is forfeit, and judgment should be entered therefor.

After judgment for the penalty of a bond of defeasance, on motion of the defendant, the penalty thereof may be chancered as the equitable rights of the parties may require, and execution should issue for the sum fixed by the court.

To reach this result the court may send the cause to an auditor to hear the parties and report the facts to the court.

When the penalty of a bond of defeasance is sued for, and breaches are not assigned in the declaration, the defendant may have oyer of the bond, and if it have a condition, the court on motion will order the plaintiff to assign the breaches upon which he relies, and the defendant may interpose his defense by way of brief statement under the general issue.

Two assessors are not authorized to assess a tax when a third assessor has not been qualified.

An assessor's warrant failing to show what year's state tax was included in the assessment, and the precise date of the town meeting at which the town tax was voted, and when the collector should account to the state and

county treasurers respectively for the state and county taxes, and authorizing a distress immediately, without waiting twelve days, and not authorizing the arrest of a tax-payer if he is possessed of "tools, implements, and articles of furniture which are by law exempt from attachment for debt," is invalid.

ON REPORT.

Debt upon a tax collector's bond.

The facts are stated in the opinion.

John C. Talbot, for the plaintiffs.

McNichol and Sargent, for the defendants.

HASKELL, J. Debt upon the bond of a collector of taxes for the town of Machiasport, conditioned for the faithful performance of his duty for the year 1876.

The plea was *non est factum* with a brief statement of performance.

The plaintiffs read in evidence the bond, the record of the assessment of the tax for the year 1876, the commitment of the same to the collector and the warrant to him for the collection of the tax. It was admitted that defendant Small was collector of taxes for the plaintiffs for that year. There was no other evidence showing a breach of the bond. The case comes forward on report.

Had the taxes been legally assessed, and the commitment and warrant been in legal form, the collector would have been chargeable under his bond for the taxes so committed to him for collection, *Inh'b'ts of Trescott* v. *Moan*, 50 Maine, 347, and the plaintiffs would have made out a *prima facie* case. The burden would then have rested upon the collector to substantiate his plea of performance by showing a faithful discharge of the duties of his office. This he is not required to do, until the plaintiffs have shown him legally bound to perform those duties. The law did not require him to execute a precept that could afford him no protection, nor to collect a tax illegally assessed. Until he is shown to be legally bound to perform official duty, he is not called upon to justify its performance. Under a plea of performance to a suit upon an official bond, the defendant is not required to justify, until he is

shown to be legally bound to perform faithfully some particular duty, or to be chargeable with some particular property. In this case, the defendant Small is not chargeable with the collection of any tax, until he is shown legally bound to collect it, that is, until he has been provided with a sufficient precept, giving him lawful authority so to do.

Much confusion has arisen as to when proof is required to support a plea of performance to a suit upon a bond. This is largely due to the relaxation of the common law rules and methods of pleading. When a special plea of performance is interposed in such cases, the plaintiff is required to make replication assigning the breach relied upon, and if the bond is for the performance of covenants and agreements, several breaches may be assigned, and the jury must assess the damages, when on issue framed to them, they find the condition broken. R. S., c. 82, § § 20, 32.

After replication the defendant must either demur or rejoin; and if the rejoinder is a traverse, then on issue taken the burden rests upon the plaintiff to prove the breaches assigned, and if the bond be one for the performance of covenants and agreements, to prove the damages. *Philbrook* v. *Burgess*, 52 Maine, 271; *McGrogory* v. *Prescott*, 5 Cush. 67; see *Bailey* v. *Rogers*, 1 Maine, 186; but if the rejoinder is an affirmative plea supporting a plea of performance the burden rests upon the defendant to maintain the truth of his plea, unless the bond is conditioned for the performance of covenants and agreements, when the burden rests upon the plaintiff to prove both the breach of it and his damages. *Philbrook* v. *Burgess*, *supra*, and cases cited.

So when performance is pleaded by brief statement to a suit upon a bond, if it be conditioned for the performance of covenants and agreements, the burden rests upon the plaintiff to prove its breach and the damages; but if the bond is simply a bond of defeasance, then the burden is upon the defendant to prove performance as alleged in his brief statement, and the issue is, for the jury to find, whether the condition has been broken, and if they find that it has, then judgment goes for the penalty of the bond, and on motion that the penalty be chancered as the equita-

ble rights of the parties may require, the court, with the aid of necessary auditing officers, fixes the amount for which execution should issue.

The bond in this case is of the latter class. It is conditioned to be void upon the faithful performance of official duty. If it is suggested that no further proof is required under the rule above stated than for the plaintiffs to read in evidence their bond, a sufficient reply is, that the bond when so put in evidence shows an official duty upon the performance of which the bond is to be void. The law does not cast that duty upon the collector until the plaintiffs show him legally chargeable therewith. That is, until a condition of things appears upon which the bond becomes effective, the defendant has no performance required of him. So, if the plaintiffs are unable to charge the defendant Small with a legal duty to perform, for want of a legal tax, a legal commitment, or a legal warrant to collect the tax, they must prove that he actually received taxes, that is money, touching which the bond can operate, and then he is put to proof of his plea of performance. If he fails upon the issue, the penalty of the bond is forfeit, and the court will award execution for the actual damages sustained. *Philbrook* v. *Burgess*, *supra*; *Clifford* v. *Kimball*, 39 Maine, 413. The same burden would rest upon the plaintiffs if the issue had been reached after a special plea of performance, for in that method of procedure, after plea of "*omnia performavit*" the plaintiffs would reply, either a legal tax, a legal commitment and a sufficient warrant, or that the collector received certain monies in the discharge of his office for which he had not accounted; and then, if the defendants denied either the sufficiency of the tax, or of the commitment, or of the warrant, or that any such documents existed, or that the collector received the monies specified, it would be a negative plea, either raising an issue of law, or fact, which the plaintiffs must sustain and prove; but if the defendants confessed these issues, and rejoined that the collector had performed his duty under his warrant, or had accounted for the monies with which the plaintiffs had charged him, then they would have tendered an affirmative plea, and if the plaintiffs took issue thereon, the burden would rest upon the defend-

ants to prove performance. So in suit upon a bond of defeasance, where the penalty is sued for, if breaches are not assigned in the declaration, the defendant may have oyer of the bond and an order from the court that the plaintiff specify the breaches upon which he relies, and then the defendant by way of brief statement can state his defense, showing how many of the affirmative facts alleged by the plaintiff he denies, and how far he takes upon himself the burden of proving his own performance of the conditions of his bond. This latter method is one that has been adopted in some of the important causes of this nature recently tried in this state.

The assessment, commitment and warrant, in this case appear to be signed by only two assessors. It does not appear that the plaintiffs elected, or had another assessor duly qualified to act during the year 1876. "Two assessors are not authorized to assess a tax when they alone have been qualified." *Inhabitants of Williamsburg* v. *Lord*, 51 Maine, 599. Nor can they issue a warrant, *Sanfason* v. *Martin*, 55 Maine, 110. The warrant fails to show what year's State tax was included in the assessment; also, the precise date of the town meeting at which the town tax was voted; also, when the collector should account to the State and county treasurers for the State and county taxes respectively. It authorizes the arrest of tax-payers for want of property whereon to make distress immediately, without waiting twelve days as required by statute. Nor does it authorize the arrest of any tax-payer if he is possessed of "tools, implements and articles of furniture, which are by law exempt from attachment for debt." It is so unsound, that a discussion of its merits would be idle. *Inhabitants of Orneville* v. *Pearson et als.* 61 Maine, 552; *Pearson* v. *Canney*, 64 Maine, 188; *Inh'b'ts of Harpswell* v. *Orr*, 69 Maine, 333.

The plaintiffs have failed to make out a *prima facie* case from the insufficient authority with which they clothed their collector to perform his duty, and he is chargeable under his bond, only for the taxes which he has actually received, and for which he has failed to account.

The agreement of the parties does not stipulate what disposition shall be made of the case under the conclusions of this opinion, therefore to afford complete justice to both parties it is ordered, that

The action stand for trial.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and FOSTER, JJ., concurred.

WILLIAM RANDLETTE and another *vs.* HENRY E. JUDKINS.

Sagadahoc. Opinion February 13, 1885.

Pleadings. Railroad conductor.

A declaration in an action of trespass or case for the taking of, or injury to personal property, which does not contain a description of the property taken or injured, is bad on demurrer.

A railroad conductor, who permits a passenger to travel on his train, taking with him stolen goods, known by the conductor to have been stolen, is not liable to an action by the owner of the goods, therefor.

ON EXCEPTIONS.

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

If the property stolen should have been set out with particularity then we ask to amend. Counsel cited: *Greenland* v. *Chaplin*, 5 Exch. 243; *Carew* v. *Rutherford*, 106 Mass. 10, 11; *Lake* v. *Milliken*, 62 Maine, 243 and cases; *Kay* v. *Penn. R. Co.* 65 Pa. St. 269; Shear. and Red. Neg. 10 *et seq.*; Burlamaqui on Law, 262; 1 Hil. Torts, 72; *Boston & W. R. R. Co.* v. *Dana*, 1 Gray, 83; *Riddle* v. *Proprietors, etc.* 7 Mass. 169; *Lincoln* v. *Hapgood*, 11 Mass. 350.

Drummond and Drummond, for the defendant, cited: Whart. Neg. § 24; *Bank* v. *Mott*, 17 Wend. 554; *Davidson* v. *Nichols*, 11 Allen, 514; *McDonald* v. *Snelling*, 14 Allen, 290; *Putnam* v. *Broadway R. R. Co.* 6 Am. Ry. Rep. 40; 4 Am. & Eng. R. R. Cas. 210; 4 W. & N. (Penn.) 552; *Moulton* v. *Sanford*, 51 Maine, 127; *Bigelow* v. *Reed*, 51 Maine, 325.

LIBBEY, J. The declaration in this case is clearly bad for want of a description of the property for the loss of which the

action is brought. In trespass or case for the loss of or injury to personal property, the thing taken or injured must be described with reasonable certainty. 1 Ch. Pl. 327; Oliver's Prec. 493, note. Here there is no description. The word "property," the only designation is the most general that can be used, and it embraces every thing susceptible of ownership. But this defect may be cured by amendment.

The great question to be determined is, the liability of the defendant, assuming the property to be sufficiently described. The averments in the declaration are, in substance, that the defendant, on the twenty-first day of January, 1883, was in the employ of the Maine Central Railroad Company as conductor of the night passenger train from Bangor to Portland; that on the night of that day four men boarded said train, run by the defendant as conductor, at Richmond, taking and carrying with them on board said train a large amount of stolen property, of the value of five hundred dollars, which was the property of the plaintiffs; that the defendant, knowing said property to be stolen, did wilfully, corruptly, negligently and unlawfully permit said men to ride on said train, and convey and escape with said property; and that the defendant unlawfully took a portion of said stolen property in payment of their fares. It is not alleged that the four passengers had stolen the property, or that they were unlawfully in possession of it, or that the defendant knew that it was the property of the plaintiffs.

Assuming that the property consisted of chattels, the title to which would not pass by a delivery from a trespasser or thief to one taking for value without notice, does the declaration present a case of liability of the defendant?

If the defendant took a part of the chattels in payment of the fares of the passengers he is liable as a trespasser to that extent; but that is a small matter. The main question is, whether the defendant is liable for permitting the four men to travel over the road with the property as their luggage, upon the facts averred in the declaration. If liable, upon what grounds does the liability rest? It is not claimed that there was a privity of contract between the plaintiffs and defendant, by reason of which the

defendant owed any duty to the plaintiffs. Did the defendant owe the plaintiffs any duty as conductor of the train or otherwise? If not he cannot be liable for a negligent performance or omission of it. "A legal duty is that which the law requires to be done or forborne, to a determinate person, or to the public." Wharton on Negligence, § 24. No such duty on the part of the defendant is averred, unless the law implies it from the facts alleged.

The defendant was conductor of the train. As such it was his duty to direct and control the running of the train, in accordance with the regulations prescribed by the corporation and the requirements of law. The railroad is a public highway, over which all members of the public, who are in a proper condition to travel in a public car, who pay the established fare, and conduct themselves properly, have a legal right to travel with their luggage. It is the legal duty of the conductor to permit all such persons to enter the cars and travel over the road. For sufficient cause he may stop the train and eject a traveller from the train. He owes no legal duty to the public to stop his train and eject a traveller who is guilty of a felony; or to arrest such traveller, and hold him as a prisoner, and seize the property he may have in his possession. As a citizen he may have the right, if he see fit, to arrest a traveller guilty of a felony, and hold him till he can be properly prosecuted; but not being an officer, charged with the duty, and having no legal warrant therefor, he is under no legal duty to do so, and thereby take upon himself the burden and hazard of justifying his act. Nor does he owe any duty to any members of the public to arrest a thief and seize and hold the stolen goods he may have in his possession; or to seize and hold for the owner, whoever he may be, goods which a traveller on the road may have taken and is carrying away as a trespasser. At most, under the plaintiffs' averments in this case, the four men were mere trespassers, carrying away the plaintiffs' property, the defendant having no authority from the plaintiffs to interfere with the property in any way. The defendant was not only under no legal duty to take the property, but he had no legal right to do so; for the possession of a trespasser is sufficient to give him the legal right to resist the taking by one having no

authority from the true owner. The fact that the defendant took a part of the property for the fares of the passengers created no duty on his part towards the plaintiffs. It makes him liable only for the portion taken.

We have discussed the question involved upon principle, there being no authorities, directly in point, cited by the learned counsel on either side; and it is said there are none. If so the inference is pretty strong that the common law will not sustain an action against a railroad conductor on the facts alleged in this case.

Exceptions sustained. Demurrer sustained. Declaration bad.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

ISRAEL LEAVITT *vs.* LEVI EASTMAN and others.

Cumberland. Opinion February 14, 1885.

School-house lot. Mortgage. Trespass. Notice.

A mortgagee not in possession may maintain an action of trespass *quare clausum* against a stranger for an injury to the freehold.

In taking land under the power of eminent domain, the notice given should indicate correctly the authority invoked, and the proceedings intended.

ON report from the superior court.

Trespass *quare clausum* for entering plaintiff's premises and committing certain acts of trespass therein. The writ was dated November 17, 1882. The plea was the general issue and brief statement, justifying their acts as building committee of school-district number nineteen, town of Harpswell, and claiming that the premises had been lawfully taken as a part of a school-house lot for the erection of a new school-house by the district.

John J. Perry and *D. A. Meaher*, for the plaintiff, cited: R. S., c. 11, § § 16, 19, 33; *Collins* v. *School Dist. Liberty*, 52 Maine, 522; *Tucker* v. *Wentworth*, 35 Maine, 393; *Windsor* v. *China*, 4 Maine, 298; *Moore* v. *Bond*, 18 Maine, 142; *Rand* v. *Rand*, 4 N. H. 267; *Flint* v. *Sawyer*, 30 Maine, 226;

Fletcher v. *Lincolnville*, 20 Maine, 442; *Simmons* v. *Jacob*, 52 Maine, 147; *Bigelow* v. *Wilson*, 1 Pick. 485; *Jordan* v. *School Dist.* 38 *Maine*, 170; *Moor* v. *Newfield*, 4 Maine, 44; *Chapman* v. *Limerick*, 56 Maine, 390; *Haines* v. *School Dist.* 41 Maine, 246; 2 Greenl. Ev. § § 601, 602, 605; *Reed* v. *Woodman*, 17 Maine, 43; *Marshall* v. *Wing*, 50 Maine, 62; *Pillsbury* v. *Willoughby*, 61 Maine, 274; *Moore* v. *Moore*, 21 Maine, 350; *Look* v. *Norton*, 55 Maine, 103; *Hunt* v. *Rich*, 38 Maine, 195; *Kilborn* v. *Rewee*, 8 Gray, 415; *Maxwell* v. *Mitchell*, 61 Maine, 106; *Norton* v. *Perry*, 65 Maine, 183.

P. J. Larrabee and *Strout and Holmes*, for the defendants.

At the time of the entry of the defendants upon the premises the plaintiff was mortgagee out of possession. The cases where the continuance of an erection made on the land of another without his consent has been held to be trespass, have been where the owner of the land specially required removal. Such was the case in the cases cited by the plaintiff. 63 Maine, 203; *Holmes* v. *Wilson*, 10 Ad. & El. 161; *Esty* v. *Baker*, 48 Maine, 495; *Bowyer* v. *Cook*, 4 M. G. & S. (56 E. C. L.), 236.

In cases where a mortgagee has been allowed to recover for trespass, there has been some special reason as where condition of the mortgage has been broken. *Page* v. *Robinson*, 10 Cush. 99; or the mortgagee has entered before the suit, *Stowell* v. *Pike*, 2 Maine, 387; or had judgment for possession, *Smith* v. *Goodwin*, 2 Maine, 173; or where the possession was not put in issue, *Blaney* v. *Bearce*, 2 Maine, 132; or timber cut under a contract, *Frothingham* v. *McKusick*, 24 Maine, 403. As to all the world but the mortgagee, the mortgagor is the owner. *Hatch* v. *Dwight*, 17 Mass. 289. Unless mortgagee's security is impaired he cannot maintain trespass. *Fernald* v. *Linscott*, 6 Maine, 234; *Hewes* v. *Bickford*, 49 Maine, 71.

Counsel further contended that all of the acts of the defendant were authorized by law, citing: *Soper* v. *Livermore*, 28 Maine, 203; *Whitman* v. *Granite Church*, 24 Maine, 236; *Emery* v. *Legro*, 63 Maine, 357; *Hooper* v. *Goodwin*, 48 Maine, 79; *Belfast* v. *Morrill*, 65 Maine, 580; *Bliss* v. *Day*, 68 Maine,

201; *Woodbury* v. *Knox*, 74 Maine, 462; *Hooper* v. *Bridgewater*, 102 Mass. 512; *Rutland* v. *Co. Com.* 20 Pick. 80; *Jordan* v. *Haskell*, 63 Maine, 193; *Limerick, Petitioners*, 18 Maine, 183; 2 Pars. Contr. 643, n. (i.); Chit. Contr. (10th ed.) 890; *Hazard* v. *Loring*, 10 Cush. 269.

EMERY, J. At the time of the alleged trespass, the plaintiff was mortgagee of the locus, with at least the right of possession. The defendants entered, removed a part of the fence enclosing the lot, and built on the lot a school-house. This was an injury to the realty, for which, if a trespass, the mortgagee under our law, can maintain the action of trespass *quare clausum*, the legal title being in him; *Smith* v. *Goodwin*, 2 Maine, 173; *Stowell* v. *Pike*, 2 Maine, 387; *Frothingham* v. *McKusick*, 24 Maine, 403; *Cole* v. *Stewart*, 11 Cush. 181. Had it been an injury to the possession merely, not affecting the mortgagee's security, this action might not have been maintainable; *Hewes* v. *Bickford*, 49 Maine, 71; but we think the removal of the fence and the disturbance of the surface, and soil, bring this case within the principle of the cases before cited.

The defendants justify as the committee of the school-district which had essayed to take this land for a school-house lot under statute proceedings. The validity of these proceedings for taking the lot is the only remaining issue.

The district at one of its meetings, by a two-thirds vote, had voted to locate its school-house lot on land of which the locus was a part. Alleging the owner's refusal to sell, application was made to the municipal officers to lay out a lot thereon, and appraise the damages to the owner. There are two contingencies in which application can be made by a district to the municipal officers for action in relation to school-house lots. One is when the district cannot agree by a two-thirds vote upon a location. Then the municipal officers are, in effect, to call a district meeting, hear the contending parties, and "decide where the school-house shall be placed." R. S., c. 11, § 56. The other contingency is when the location has been made, and no agreement can be made with the owner. Then the municipal officers are to

determine, not the location, but the size and shape of the lot to be taken and the damage caused by such taking. "They may lay out a school-house lot, not exceeding one hundred square rods, and appraise the damages." They are to proceed, "as is provided for laying out town ways, and appraising damages therefor." R. S., c. 11, § 57. Both these statute provisions were substantially in force at the date of these proceedings. The application in this case was clearly and admittedly of the latter kind. Under it, the municipal officers were not to locate a lot, but to stake out a lot in a location already made. This last they actually did, and appraised the damages.

The notice they gave however was as follows: "To the inhabitants of school-district number nineteen, in the town of Harpswell. Application in writing having been made to the undersigned as selectmen of the town of Harpswell by . . , committee of said district for the location and erection of a school-house, to call a meeting of the qualified voters thereof, for the purpose hereinafter named; you are hereby notified and warned to meet at the Union House, within said district on the fifth day of June next at two o'clock in the afternoon, for the purpose of hearing the inhabitants of said district on the subject of their disagreement respecting a suitable place to be selected for the erection of a school-house in said district, and of deciding where such school-house shall be located and lay out the same. Given," &c. This notice was evidently applicable to a case within the former contingency. Was it sufficient notice of the application actually made, and of the proceedings that actually followed?

It is common learning that where private property is sought to be taken against the will of the owner, under statute authority, all the statute requirements must be fully and strictly complied with. In the procedure no step, however unimportant, seemingly, must be omitted, nor will the substitution of other steps, in the place of those named in the statute be sufficient. To deprive the citizen of his property requires the whole statute, and nothing in the place of the statute. If there be any degrees in the importance of the requirements, that of notice of the intended proceedings, would be the chief. The right of being seasonably

informed of just what is intended in such cases has always been regarded as indefeasable, even where the statute makes no provision. *Harlow* v. *Pike*, 3 Maine, 438. The notice should clearly indicate to all parties interested, what the application is, and what proceedings are intended. If the application is authorized, and the proceedings indicated, are such as the statute provides to follow such an application, the land owner may choose to appear and contest. If either the application or the indicated proceedings are unauthorized, or if the proposed proceedings are inapplicable the land owner may disregard them, and the notice of them. He cannot be bound by the notice, unless it notify him of an authorized application, to be followed by appropriate proceedings provided by statute for such a case.

The notice in this case informed the public of an application in a case of a disagreement about a location, and of the intention of the municipal officers at a named time and place, to hear the inhabitants of the district on the subject of their disagreement, and to decide where the school-house should be located. In this question, the land owner may have felt no interest. He may have been willing for the location to be made on his land, and only desired to be heard on the extent of the lot, or the damages. He could assume that a new application must be made for these purposes in case of disagreement as to price, and so disregard the proceedings in which he did not care to be heard. We do not think the notice was sufficient to conclude the owner as to the extent of the lot, or the amount of damages, and consequently the proceedings were invalid. *Harris* v. *Marblehead*, 10 Gray, 40; *Fitchburg R. R. Co.* v. *Fitchburg*, 121 Mass. 132.

The defendants' counsel calls our attention to the words, "lay out the same," at the end of the notice, and contends that these words gave the owner sufficient notice. We think the notice, as a whole, is unmistakably of an intention to decide a question of disagreement about a location, and not of an intention to lay out a lot and appraise damages therefor. Under such an application as the notice stated, there was no authority to lay out a lot, and the owner might properly disregard the words, "to lay out the same."

The defendants also contend that the return of the municipal officers reciting that a proper notice was given, is conclusive. No authority is cited for the proposition. In *Harlow* v. *Pike*, 3 Maine, 438, such return was not regarded even as evidence of a notice. In *Cool* v. *Crommet*, 13 Maine, 250, and in the *Limerick* case, 18 Maine, 183, it is spoken of only as *prima facie* evidence. In this case the notice actually given is in evidence before us, and we cannot disregard it in passing upon the plaintiff's rights.

It is also urged that the plaintiff must have known of the various proceedings of the school-district, and so have known what the application really was, and that the notice did not, in fact, mislead him. However that may be the legal transfer of the land requires the full observance of all the statute formalities. The rule is general and the land owner may rest upon it securely. There is in the case no sufficient evidence of waiver of any formality.

There is no need to consider any other objections to the proceedings. The justification fails for want of sufficient notice of the intention to take the land.

Judgment for plaintiff for one dollar damages.

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

HENRY D. HALL, administrator, in equity,

vs.

JOHN H. OTIS and others.

Androscoggin. Opinion February 16, 1885.

Trust funds. Presumption. Evidence. Executors and administrators.

Where one draws against a fund composed partly of his own money and partly of the money of another, the presumption is that the draft is from his own money, whatever were the relative dates of the deposit.

Where an administrator testifies to any fact happening before the death of his decedent, the adverse party is confined in his testimony to the same facts.

If it appears that the evidence excluded by a master at the hearing of a cause could have no legal weight to change the result, exceptions to the exclusion will not be sustained.

ON EXCEPTIONS.

Bill in equity to obtain a construction of the will of Daniel E. Hall and to obtain the property belonging to that estate.

The case has been before considered by the law court and is reported in 71 Maine, 326, where may be found a copy of the will and the construction placed upon it by the court. The case was then sent to a master, A. R. Savage, Esq. and the exceptions are to portions of his report and are sufficiently stated in the opinion.

Bolster and Watson, for the plaintiff, cited: Stat. 1873, c. 145; *Burleigh* v. *White*, 64 Maine, 25; *McLean* v. *Weeks*, 65 Maine, 424; *White* v. *Brown*, 67 Maine, 197; *Holmes* v. *Brooks*, 68 Maine, 416; *Berry* v. *Stevens*, 69 Maine, 290.

N. and J. A. Morrill, for the defendants, contended that the ruling of the master upon the bank account was erroneous. It was a continuous account of several items. The various deposits constituted the bank, the debtor of Annie E. Hall, and the several sums paid on her checks became payments on account of that indebtedness; hence the rule applicable to all running accounts between debtor and creditor applies. Where there is no appropriation the first payment goes in liquidation of the oldest indebtedness. *McKenzie* v. *Nevius*, 22 Maine, 148; *Miller* v. *Miller*, 23 Maine, 22; *Cushing* v. *Wyman*, 44 Maine, 121; *Hersey* v. *Bennett*, 41 Am. R. 274.

Here the earliest indebtedness was for a deposit of funds which the master found were a portion of the estate of Daniel E. Hall. The checks were, therefore, from that fund and the money was received and used by Mrs. Hall in her lifetime.

The master erred in excluding portions of the deposition of Martha Jane Clark. The statute provides that when the representative party testifies to any facts legally admissible upon the general rules of evidence happening before the death of the party he represents, "the adverse party shall neither be excluded nor excused from testifying as to such facts." It seems to us that the phrase "such facts" relates to "facts legally admissible . . . happening before the death," as a class, and not to the bare facts testified to by the representative party. Otherwise the rule

would work injustice when, as in this case, Mrs. Clark had no knowledge of the facts testified to by the plaintiff, but did have knowledge of other facts happening before the death of Daniel E. Hall and legally admissible upon the general rules of evidence, which tended to support the defendant's case.

EMERY, J. This case has once been before the court, and an opinion given construing the will in 71 Maine, 326. The case was then sent to a master, to whose report exceptions are taken, and the case is again reported to the law court to dispose of the exceptions, and make some further orders in the case.

I. Annie E. Hall, legatee under the will of Daniel E. Hall, (see former report of the case) had a right to consume the estate of Daniel E. Hall, but what she did not consume was to go over. She, after the death of Daniel E. Hall, made deposits of money from time to time in an Auburn bank.

The master's report finds that the earlier deposits were from funds of the estate of Daniel E. Hall, but that the later deposits were not. Subsequently she drew out a portion of the total deposit, leaving a portion still in the bank, where it remained at the time of her death. If what she drew out were funds of the estate of Daniel E. Hall, they were consumed by her, and the funds of that estate were reduced that much. If what she drew out were her own funds, then the funds of the estate of Daniel E. Hall remaining unconsumed, were so much more.

There was no evidence as to which fund was drawn against, and the master fell back upon the presumption, and ruled that the amount so drawn out was to be considered as drawn from her own funds, and not from funds of the estate of Daniel. The respondents excepted to this ruling. Their position is, that the bank became indebted to Mrs. Hall for each deposit as soon as it was made, and that it made a payment on account each time it paid her check. The respondents claim that the payment made by the bank was to be considered a payment on the older item of indebtedness, or the older deposit. If this were a case between the bank and Mrs. Hall, such might be the applicable rule, but the bank is not a party here. This is not a case of

payment between debtor and creditor, as Daniel E. Hall was not a creditor of Mrs. Hall, and the presumptions as to such payments do not apply here. The question here is, what is the presumption when one makes a draft from a fund composed partly of his own money, and partly of money of another? We think the presumption is, the draft was intended to be made, and was made from the drawer's own funds. Of course the presumption can be overturned by evidence, but where there is no evidence, we think such is the presumption. The master does not expressly find that the deposits, not of funds of the estate of Daniel E. Hall, were of the funds of Mrs. Hall, but she deposited them in her own name, and nothing else appearing, they are to be presumed to be her own funds; we may regard them as such in passing upon this question. The master acted upon a correct presumption, and his report, so far, is not objectionable.

II. The complainant, the administrator upon the estate of Daniel E. Hall, testified before the master as to some facts happening before the death of Hall. The respondents offered the testimony (in a deposition) of Martha J. Clark, one of the respondents, as to other facts happening before the death of Hall. Such parts of her deposition as related solely to other facts happening before the death but not testified about by the administrator, were excluded, and were not considered by the master. This exclusion is another objection made to the report by the respondent.

At common law, Martha J. Clark, being a party and interested, could not have testified at all. The first act admitting parties to testify still wholly excluded a party from testifying, where the adverse party was the representative of a deceased party. That act, therefore, did not admit any part of Mrs. Clark's testimony. The next statute upon the subject, that of 1862, c. 109, only applied to matters after the death of the decedent.

The excluded testimony must be admitted, if at all under the statute of 1866, c. 9, now R. S., c. 82, § 98, p. 11. This statute provided that the representative party may offer himself as a witness, and testify to any facts legally admissible upon the

general rules of evidence, happening before the death of the decedent, and that when he does so, the adverse party shall neither be excluded, nor excused from testifying in reference to such facts. There is some difference in the wording of the two statutes which may be noticed. The former after permitting the representative party to "testify to any *facts*" happening after the death of the decedent, declares that, "in reference to such *matters*" the adverse party may testify. In the latter statute the opposite party is only permitted to testify "in reference to such *facts*." In the former statute, the representative may testify to any "facts" happening after the death. The adverse party may testify to "matters." In the latter statute, the adverse party is confined to certain *facts*, "such facts." What facts? We think the legislature meant to confine the adverse party to such facts, as the representative party had testified to. We do not think it was intended to permit the adverse party to go over all matters in his testimony, giving his own version without fear of contradiction, upon all the issues of the case, where the representative party has perhaps only testified to a conversation with such adverse party.

The representative party, under the general rules of evidence, could not give statements of his decedent, could not give the deceased party's version of the case upon any issue. That version is silenced by death. The version of the adverse party is silenced by law, that death may give him no advantage and present no temptation. There may be one or more facts happening before the death of which the representative has personal knowledge. He is allowed to testify as to those. It becomes fair then, that the adverse party should be permitted to testify as to those facts. It becomes fair, that the case should have even his unwilling testimony upon those facts. The statute so provides. Fairness requires no more. The statute is not clearly worded, but in view of that difference of the phraseology already noticed, and of the undue advantage which the opposite interpretation might give an adverse party, and the temptation it might subject him to, we think the correct interpretation of the latter statute is that the adverse party is confined to the specific facts testified to by the representative party.

III. Some portions of the deposition of Mrs. Clark, in reference to some matters happening after the death of Hall it is claimed were excluded by the master, and that exclusion is made another ground of objection to the report. We have carefully studied the deposition and the case, and we cannot see how the testimony of Mrs. Clark as to such matters could affect the result. They did not have sufficient bearing on any issue to be of any value. The respondents were not injured by the exclusion, and therefore there is no occasion to determine its correctness.

This disposes of the objections to the report, which we think should be accepted.

The respondent, Otis, as administrator of Annie E. Hall, claims an allowance out of the property in his hands belonging to the estate of Daniel E. Hall, (represented by the complainant,) for disbursements, services, &c. incurred by reason of the bringing of this bill. The bill was brought not only to obtain a construction of the will, but to obtain property alleged to belong to the estate of Daniel E. Hall. The process is adversary in its nature.

In the former decree, 71 Maine, 326, it was ordered that no costs should be taxed for, nor against, the respondents. The proceedings since that decree have been hostile. The complainant has been pursuing his remedy to recover property, and the respondent has been resisting, and resisting strenuously. We think the estate he represents should pay the expenses of that resistance, and that the estate represented by the complainant should not be charged with the expense of the efforts made to diminish it. If the respondent estate is not required to pay costs, that is the utmost its representative could expect, after the contest he has made. We think the claim should not be allowed.

The master's report is to be accepted, and final decree made at nisi prius, in accordance with the report, and this opinion.

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

INHABITANTS OF ACTON, Appellants,

vs.

COUNTY COMMISSIONERS OF YORK COUNTY.

York. Opinion February 16, 1885.

Ways. Grading. Cattle passes. Stat. 1875, c. 25.

Where all the members of a committee appointed on appeal, to revise the proceedings of county commissioners in the location of a highway, participate in their action a majority may decide.

The power given to county commissioners by stat. 1875, c. 25, to "grade hills in any such way," authorizes them to require that valleys shall be filled as well as hills cut down.

The county commissioners have no power to require cattle passes to be constructed in a highway located by them, and where such requirement is a part of their adjudication of location it renders their proceedings bad.

The description of the way prayed for in a petition to the county commissioners of York county was as follows: "Beginning at the terminus of the new road now building in Newfield to Balch Mills, thence in a western direction to the N. H. line;" *Held*, sufficient to give the commissioners jurisdiction.

ON EXCEPTIONS.

An appeal from the decision of the county commissioners of York county in laying out a highway in Acton. The exceptions were to the ruling of the court in accepting the report of the committee, appointed by this court, against the written objections of the appellants.

R. P. Tapley, for the appellants.

The petition does not set out a case within the jurisdiction of the county commissioners, nor does the record of location. The way asked for in the petition, and the one laid out by the commissioners was wholly within the town of Acton. This record does not disclose in positive and direct terms a jurisdiction in the commissioners to do what they did do, and nothing is to be left to inference in such cases. *Goodwin* v. *Co. Com.* 60 Maine, 328; *Pettengill* v. *Co. Com.* 21 Maine, 382; *North Berwick* v. *Co. Com.* 25 Maine, 69; *Pownal* v. *Co. Com.* 8 Maine, 271; *Bethel* v. *Co. Com.* 42 Maine, 478; *State* v. *Oxford*, 65

Maine, 210; *Scarboro* v. *Co. Com.* 41 Maine, 604; *Plummer* v. *Waterville*, 32 Maine, 566; R. S., c. 18, § 1.

The commissioners exceeded their authority in requiring fills. If they can fill one "hollow" they can require a road to be made level the entire length. They had no authority to require cattle guards. A majority of the committee cannot decide. The whole body must act. It would not be competent for two to proceed in the absence of the other, and determine the questions raised. It is not a case like those decided. 39 Maine, 223; 48 Maine, 358; 62 Maine, 519; 63 Maine, 265; 64 Maine, 262.

It is not a case within R. S., c. 1, § 6, cl. III, if it was there would be no necessity of the provision of the statute requiring the appointment of a person to supply a vacancy occurring by death, resignation or by becoming interested.

Luther S. Moore and *Harry V. Moore*, for the petitioners, cited: *Harkness* v. *Co. Com.* 26 Maine, 353; *Windham* v. *Co. Com.* 26 Maine, 406; *Minot* v. *Co. Com.* 28 Maine, 121; *Com.* v. *West Boston Bridge*, 13 Pick. 195.

LIBBEY, J. When the report of the committee was presented for acceptance, two objections were taken to it.

1. That, where all of the committee acted, it was not competent for two of the committee to decide questions before it, the third not agreeing with them.

2. That the county commissioners, in their proceeding, requiring the way to be graded and cattle passes to be built, exceeded their powers, and that the action of the committee affirming such proceedings is without authority.

As to the first objection, the committee derives its powers from the statute, and act under its authority. While the statute provides that the county commissioners may act by majority, it is silent as to the committee, which, on appeal, is appointed to revise their proceedings. But the R. S., c. 1, § 6, cl. III, provides that, "words, giving authority to three or more persons, authorize a majority to act, when the enactment does not otherwise determine."

We think the case is clearly within this rule, and that the objection is untenable.

Under the second objection it is claimed that the county commissioners and the committee exceeded their powers in requiring the way to be graded in the manner specified in their report. The learned counsel for the appellants claims that, while the commissioners have power to require hills to be cut down, they have no power to require the earth taken from the cut, to be filled in the valleys between the hills.

Prior to 1875, the county commissioners had no power to require the way, or any portion of it, to be graded; but in that year, by c. 25 of the public acts, such power was conferred upon them. By the first section, section 1 of the R. S., c. 18, was amended so as to give the commissioners power "to grade hills in any such way." It is contended that this language gives the power to require hills in the way to be cut down, but no power to require a fill. We think this construction is too narrow. To grade, means "to reduce to a certain degree of ascent or descent." This embraces fills in the valleys as well as cuts in the hills. The grade may be made by a cut in the hill or a fill in the valley, or, as is more usually the case, by both combined. If there could be any doubt as to the power of the commissioners, under this section, to require the earth taken from the cut in the hill to be filled in the valley, it is removed by section 7 of the same act, which gives them the "power to direct the amount of such grading, which shall be stated in their return."

But the action of the commissioners requiring several cattle passes to be constructed in the way at different points, presents a more difficult question. By the statute, the commissioners have power to locate a way, require it to be graded, and to fix the time, not exceeding three years, within which it shall be constructed and opened for public travel by the town; but it gives them no power to prescribe and direct the manner in which it shall be constructed, except as to grading. The duty is cast upon the town to so construct it that it shall be safe and convenient for travellers; but the manner of constructing it is for the determination of the town, and it is responsible for it.

The county commissioners derive all their powers over ways from the statutes, but no power is given them to require the construction of cattle passes in a way.

It is contended, however, by the counsel for the petitioners, that, admitting the commissioners had no such power, still their requirement in this respect in excess of their powers, may be rejected, and the rest of their proceedings affirmed. Upon this point we think the rule is correctly stated by SHAW, C. J., in *Commonwealth* v. *West Boston Bridge Co.* 13 Pick. 195: "If the proceedings are so independent of, and disconnected with each other, that a part may be quashed, and leave the remainder, an entire, beneficial and available judgment, to the purpose for which it was intended, the court may quash that which is erroneous, and affirm the remainder." But here the proceedings were all had at one time, relate to the same subject matter, to location of the way, and are an entirety. The part requiring the cattle passes cannot be separated from the rest. If that be done, the way will not remain such as was located. The court cannot say that the commissioners would have made the location, and appraised the land damage as they did, without the requirement of the cattle passes. How much influence that may have had upon their judgment cannot be known. In this respect the case is like *Braintree* v. *Co. Com'rs*, 8 Cush. 546. The report must be recommitted to the committee. *Shattuck* v. *Co. Com'rs*, 76 Maine, 167.

Another question, not directly presented by the exceptions, has been elaborately argued, and as it is vital to any further proceedings in the case, it is proper that we should decide it now. It is contended that the original petition is not sufficient to give the county commissioners jurisdiction to act in the matter, inasmuch as it does not appear that the way prayed for extends from town to town. The description of the way in the petition is as follows: "Beginning at the terminus of the new road now building in Newfield, to Balch Mills, thence in a western direction to the N. H. line." It is said that the way described lies wholly in Acton, but it connects with a way leading into Newfield. We think that the jurisdiction of the

county commissioners is fully sustained by *King* v. *Lewiston*, 70 Maine, 406, and cases there cited.

Case recommitted to the committee for further proceedings, in accordance with this opinion.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

WILLIAM R. FOUNTAIN *vs.* HENRY WHELPLEY.

Washington. Opinion February 16, 1885.

Estoppel. Officer.

In an action against an attaching officer, it appeared, that on the day of the attachment, the plaintiff, being asked by the attorney who made the original writ, and by the defendant, who owned the property, answered that R owned it and had a bill of sale of it. He was not informed before he made the answer that any demand existed against R, or that the attorney or officer had any intention of attaching it as the property of R. On receiving plaintiff's answer the officer informed him that he attached the property on a writ against R, and within ten minutes thereafter the plaintiff notified the officer of his title, demanded the property and attempted to take it, but was prevented by the officer. *Held*, that the plaintiff was not estopped from showing the title in himself.

ON REPORT.

Trespass against a deputy sheriff for taking and carrying away plaintiff's boat, September 30, 1882. The writ was dated October 21, 1882. The plea was general issue, and brief statement alleging that the boat was attached and held by the defendant on a writ against Thomas Richardson of Deer Island, N. B. and was the property of Richardson.

The opinion states the facts.

Bates and French, for the plaintiff, cited: 4 Mass. 108; 9 Pick. 527; 4 Mass. 273; 4 Met. 381; *Stanwood* v. *McLellan*, 48 Maine, 275; *Hunter* v. *Heath*, 67 Maine, 507.

A. McNichol, for the defendant.

The plaintiff led the plaintiff in the original suit to commence proceedings, and led the officer to make the attachment. He

ought not to be allowed to allege his own wrongs, if they were such, and come into court with unclean hands and succeed, when such wrong operates to the injury of others. *Piper* v. *Gilman*, 49 Maine, 149; *Chase* v. *Deming*, 48 N. H. 274; *Stanwood* v. *McLellan*, 48 Maine, 275.

LIBBEY, J. This case comes before this court on a report of the evidence. From the report we find the facts material to the determination of the case as follows: September 13, 1882, the plaintiff was the owner of the boat in suit. He bought her of Thos. Richardson about two years before, paying a part of the price agreed, and gave Richardson a bill of sale of the boat to secure the payment of the balance, which had been fully paid prior to September 13, but the bill of sale had not been given up by Richardson. And that day the attorney for the attaching creditor asked the plaintiff who owned the boat, and he told him Thomas Richardson owned her, had a bill of sale of her. The attorney told him he had no demand against him, but did not tell him he held a demand against Richardson, and gave him no intimation that he intended to attach her as Richardson's. On the same day the attorney made the writ on which the boat was attached, and gave it to the defendant for service. The defendant went with it to the wharf where the boat lay and there found the plaintiff, and asked him who owned the boat, and he gave him the same answer which he gave the attorney. The question and answer were repeated. The defendant then informed the plaintiff that he attached her on a writ against Richardson, and on request of the plaintiff exhibited to him the writ. The plaintiff left the wharf, but within ten minutes returned, before the defendant had taken *actual* possession of the boat, and informed the plaintiff of his title, demanded the boat and attempted to move her, but was prevented from doing so, by the defendant. The defendant gave the plaintiff no intimation that he intended to attach the boat till after his declarations that she was the property of Richardson.

The only question is whether the plaintiff is estopped from denying Richardson's title and asserting his own. We think it clear that he is not. The case of *Morton, Exc.* v. *Hodgdon*, 32

Maine, 127, is precisely in point. The facts in that case were quite as strongly against the plaintiff as in this. In discussing the point involved WELLS, J., says: "But before one can be conclusively bound by a declaration made in relation to his interest in property, such declaration must be designed to influence the conduct of the person to whom it is addressed, and must have that effect. Morton had no knowledge of any intention on the part of Jenness or his attorney to attach the oxen as the property of Clark, and could not therefore have designed to influence him in that respect. If it had been communicated to him he might have then stated the existence of the mortgage, and the particular provisions of it. There could have been no wilful purpose to mislead Jenness, or his attorney, for he did not know that Jenness had any demand against Clark, nor that Jenness needed, or had any occasion for information on the subject."

So here, the plaintiff had no knowledge that the attorney had a demand against Richardson, or that there was any intention on the part of the attorney or the defendant to attach the boat as his when he made the declarations. Up to that time it did not appear that they had any interest in knowing the truth about the title, and the plaintiff owed them no duty to state it. Within a reasonable time after he was informed of the purpose to attach the boat as the property of Richardson, he did inform the defendant of the true state of the title and demanded her. This was all the law required of him. *Piper* v. *Gilmore*, 49 Maine, 149; *Sullivan* v. *Park*, 33 Maine, 438; *Allum* v. *Perry*, 68 Maine, 232; *Pierce* v. *Andrews*, 6 Cush. 4.

The value of the boat when taken by the defendant is variously estimated by the witness from two hundred and twenty-five dollars to one hundred and twenty-five dollars. She was sold in the fall after she was attached for one hundred and twenty-five dollars. Upon the whole, we think a fair estimate of the damages is one hundred and seventy-five dollars.

Judgment for the plaintiff for one hundred and seventy-five dollars damages.

PETERS, C. J., VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

FRANK B. KELLEY *vs.* JONES S. KELLEY and logs.

JOHN J. KELLEY *vs.* same.

Penobscot. Opinion February 17, 1885.

Lien on logs. R. S., c. 91, § 38.

A person who labors at hauling logs has a lien thereon for his personal services, and the services performed by his team if he has the rightful possession and control of the team, and is entitled to its earnings during the time the services were rendered, though he may not own the same.

When it appears that the services of the person, or that of his team, have in no way been performed upon the logs upon which he seeks to enforce his lien; or that the claim for services is so mingled and intermixed with other claims for which he is entitled to no lien, that it is impossible to distinguish between the two kinds; then no valid judgment *in rem* can be rendered.

ON REPORT.

The opinion states the cases and material facts.

John Varney, for the plaintiffs.

A. W. Paine, for the State of Maine Spool Wood Company.

FOSTER, J. These are actions of assumpsit on account annexed for labor alleged to have been performed by the plaintiffs, who seek to secure a lien for their personal services, and for the services of their teams, under R. S., c. 91, § 38.

The father of the plaintiffs, the principal defendant in these suits, by whom they were employed and for whom the labor was performed, makes no appearance or defence, but the State of Maine Spool Wood Company, as owner of the lumber, appears and defends, contesting, upon several grounds, the right of these plaintiffs to any lien.

It appears that the defendant was employed under a contract in writing with said company, to operate in cutting and hauling spool wood and other lumber in the winter season of 1883-4.

That the plaintiffs labored for the defendant in the operation, does not seem to be denied, and the principal ground of defence set up to the first action, in which Frank B. Kelley is plaintiff,

is to the amount of labor performed by him and his team, consisting of two horses, and for which he claims to recover a balance of seventy-seven dollars and sixteen cents, the amount due for sixty-three and one-half days' work at the stipulated price of forty dollars a month, after deducting a credit of twenty dollars and seventy-five cents. It is not denied that he was to receive the sum of forty dollars a month for himself and team, as this appears to have been the price agreed upon at the commencement of the service.

It is claimed on the part of the company that inasmuch as the legal title to the horses employed by the plaintiff was not in him, but was in one Crooker, he can not recover for the services of the same.

We do not think this defence is tenable. The plaintiff had bargained for the horses, agreeing to pay one hundred and fifty dollars, and had in fact paid ninety dollars to the party of whom he purchased them, and there remained but sixty dollars more to be paid. It is in evidence also that the right of control and possession of the horses was in the plaintiff, and that he had the right to their services during the time in which this labor was performed, and, so far as anything to the contrary appears from the testimony in the case, such is the fact. It is no defence, therefore, that the legal title was in a third party, against whom the owners of the lumber have no cause of complaint.

Furthermore, it is urged that one of the horses was lame and unable to work during a portion of the time. But the evidence, uncontradicted, shows that the plaintiff, after the first month's service and prior to the time of the alleged lameness, had exchanged one of the horses, replacing it by another, and that the pair thus "matched" were driven by him the remainder of the time for which he claims pay for "his personal services, and the services performed by his team." Here, too, the possession and control were rightfully in the plaintiff, who was entitled to the services and earnings of the team, and whatever loss of service arose on account of the lameness of the horse exchanged, must have been borne by the defendant, the party with whom the exchange was made.

The plaintiff, as against the defendant in this suit, would be entitled to recover for his services and for the services of the team which he employed in hauling the lumber, and over which he had personal superintendence, notwithstanding the fact that the legal title to one or both of the horses might not have become vested in himself. It could make no difference in law that he might be only a bailee, so long as he was the person entitled to the compensation for their labor.

Nor is there, as against these claimants of the lumber, any valid reason why the plaintiff in this case, so far as the question of title to the horses is involved, should not be entitled to the benefit of the statute relating to lien claims. To hold otherwise would be doing violence to the spirit, if not to the letter, of a statute remedial in it objects, and calculated to make certain the payment for the labor which has actually gone to increase the value of the timber. *Oliver* v. *Woodman*, 66 Maine, 57, 58; *Spofford* v. *True*, 33 Maine, 291; *Hale* v. *Brown*, 59 N. H. 558.

When we come to consider the second suit, the plaintiff, John J. Kelley, stands in a more unfavorable light. He claims to recover one hundred and seventeen dollars and seventy-three cents, for eighty-five days' work of himself and horse at a stipulated price of thirty-six dollars a month, and for an account of twelve dollars, making in all one hundred and twenty-nine dollars and seventy-three cents, and for which a credit of fifty-two dollars and twenty-nine cents is given, leaving a balance of seventy-seven dollars and forty-four cents.

The argument in defence of this suit is founded upon the alleged fact that the plaintiff has no claim to the benefit of the statute, inasmuch as the services for which this suit is brought were not of that character for which the timber should be holden by virtue of any lien thereon. It is also urged that, notwithstanding the plaintiff may have some claim against the defendant, by whom he was employed, yet the labor was not in any way performed in cutting or hauling the timber, and that whatever services were by him rendered were done in and about the camp, filing saws, repairing sleds, keeping the time, acting as clerk, and, in his own language, rendering himself "generally useful."

With the view of the case which we have taken, it is not deemed necessary to consider these propositions to any great extent. We can very properly say, however, that one of the misfortunes of the plaintiff's case is the fact that from the evidence it is impossible to discover that the horse ever performed any services upon the lumber drawn that season. On the contrary, it appears that this horse was not used by the plaintiff, but by the defendant as occasion required in doing general work, hauling supplies, going to Bangor and elsewhere.

And so far as relates to the services of the plaintiff, we have carefully examined the testimony in the case, and find it contradictory from beginning to end, and although we may feel satisfied that he may have performed more or less labor in one way and another, and may possibly have rendered service to some extent for which he might have been entitled to a lien had he not so mingled it with that for which he is entitled to none, (*Jones* v. *Keen*, 115 Mass. 185; *Brainard* v. *Shannon*, 60 Maine, 344,) yet, from his own testimony, as was said by DANFORTH, J., in *Baker* v. *Fessenden*, 71 Maine, 293, "he has so intermixed and interwoven it with that for which he has shown none, that it is utterly impossible for the court, and probably for the parties, to make any such distinction between the two kinds as to authorize a lien judgment for any definite amount."

The charge of twelve dollars, account for labor of Edward Barrows, should be stricken from the plaintiff's account sued, and judgment rendered for balance of sixty-five dollars and forty-four cents, with interest from date of the writ, against the personal defendant, but not against the logs.

In the first suit, wherein Frank B. Kelley is plaintiff, there should be judgment against the personal defendant for the sum of seventy-seven dollars and sixteen cents, and interest thereon from the date of the writ, and a judgment *in rem* against the logs attached for the same amount.

Judgment accordingly.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

GRANVILLE HUBBARD, in equity,

vs.

HOLMAN JOHNSON and others.

Kennebec. Opinion February 20, 1885.

Specific performance. Bond. Equity. Practice.

When a bill in equity for the specific performance of a bond for the conveyance of certain land has been inserted in a writ on which an attachment has been made prior to the decease of the sole defendant, the administrator with the will annexed, the heirs of the testator and the residuary devisee may be brought in by a revivor although no service had been made upon the testator prior to his decease.

Whether this should be done by a supplemental bill, or an original bill, in the nature of a revivor, *quere.*

Where the testator died possessed of a large amount of real estate other than that embraced in the testator's bond, and his widow is a residuary devisee, the complainant may bring in the heirs of the testator together with the residuary devisee.

When the heirs, by their answer, disclaim all interest in the land sought to be conveyed, and allege the residuary devisee holds the entire interest, the bill may be dismissed as to them.

Compensation in damages for not conveying land in accordance with the obligations in a bond, is not regarded as adequate relief, and the obligee may maintain a bill for specific performance.

When such a bill prays for an accounting between the original parties, the administrator with will annexed is made a proper party; and the case will be sent to a master to state the accounts between them.

The bill must contain an offer to pay any balance found due by the complainant.

The plaintiff and his wife are incompetent witnesses to any matter which happened before the decease of the defendant, unless the administrator first testifies in relation thereto; but if the deceased party's account books or other memoranda are used in evidence by the administrator, then the complainant and his wife may testify in relation thereto.

BILL IN EQUITY.

J. H. Potter, for the plaintiff.

Bean and Beane, for the defendants.

VIRGIN, J. In the original bill, the plaintiff, as obligee, sought against the obligor, specific performance of his bond for

the conveyance of three certain parcels of real estate. The bill was inserted in a writ of attachment and an attachment of the obligor's real estate was made; but before service was made on the obligor he died. Thereupon a supplemental bill in the nature of a revivor was filed making the obligor's heirs, administrator with the will annexed, and the residuary devisee, parties defendant and service was made on them.

The general rule in equity is, that strictly speaking, there is no cause in court as against a defendant, until his appearance. 2 Dan. Ch. (5th ed.) 1523. But in this state, since a bill may be inserted in a writ of attachment (R. S., c. 77, § 11) as this was, and a suit is commenced when the writ is actually made with intention of service (R. S., c. 81, § 95) an executor may be brought in by a revivor, although no service has been made on the testator. *Heard* v. *March*, 12 Cush. 580.

All of the parties defendant, save three minor grandchildren of the obligor, have answered, alleging *inter alia* that all of the real estate in controversy, was devised to the widow of the obligor, that the will has been duly probated and that the heirs have no interest in it. Still we think the plaintiff was warranted by the circumstances in making them parties; for the testate died possessed of a large property including real estate other than that devised to his widow and now in controversy; and the question might have arisen whether that in question passed by the devise to her. The probate of the will did not determine that question. "The probate of a will," said Mr. Justice STORY, "is conclusive only as to the sanity of the testator, his competency to make it, and its actual lawful execution. As to the construction of its terms, the estate devised by it, and the parties to whom they are devised, these are questions which the probate does not assume to decide; but they remain open for contestation whenever put in issue." *Slack* v. *Walcott*, 3 Mason, 508,514. By being made parties their rights will be concluded by the decree.

Whether or not an original rather than a supplemental bill, in the nature of a revivor, should have been filed, inasmuch as the title was transmitted by devise and not by law, (*Slack* v. *Wal-*

cott, *supra*; *Pingree* v. *Coffin*, 12 Gray, 288, 317, 18,) we shall not attempt to decide as the parties have not thought fit to raise it, and they are all before us. R. S., c. 82, § 36; see R. S., c. 111, §§ 8 and *seq.*

It is objected, however, that the penal sum of the bond affords ample remedy at law. But compensation in damages in such a case is not regarded as adequate relief, (*Jones* v. *Robbins*, 29 Maine, 351; *Foss* v. *Haynes*, 31 Maine, 81; *Snowman* v. *Harford*, 55 Maine, 199;) hence courts of equity act upon such a bond as an agreement, and will not suffer the party thereto to escape from a specific performance by offering to pay the penalty. *Fisher* v. *Shaw*, 42 Maine, 32, 40.

The testator took the title from the original holders at the request, and for the accommodation of the plaintiff in order to give him time for making the payment. Time has never been considered by the original parties to the bond as of the essence of the contract, (*Snowman* v. *Harford*, 55 Maine, 197; *Jones* v. *Robbins*, 29 Maine, 351; *Hull* v. *Noble*, 40 Maine, 459;) the testator agreeing, as appears from the answers, to accept labor, merchandise, etc., from time to time, as well as money in payment.

There is no question that the devisee can be held to convey the land in controversy. The fundamental maxim in equity, "Equity looks upon things which ought to be done as actually performed," considers the vendor as the trustee of the vendee, holding the vendee's legal estate on a naked trust. *Linscott* v. *Buck*, 33 Maine, 530; Sug. Vend. (Perk. Ed.) c. 5, §1, Pom. Eq. Jur. §§ 364, *et seq.* The equitable title changes when the contract is completed. The consequences follow. As the vendee's legal estate is held on a naked trust by the vendor, this trust, impressed upon the land, follows it in the hands of his heirs and devisees. *Woodbury* v. *Gardner*, 77 Maine, 68, and cases there cited.

The plaintiff alleges that he has fully paid the stipulated price and prays for an accounting between the original parties. This will necessitate the sending of the case to a master to ascertain the facts and state the accounts between them; and the administrator is a necessary party.

If the report shall show full payment by the plaintiff, the devisee will be decreed to convey. If it shall appear that a balance is still due and unpaid, the bill must be amended to meet this exigency as it contains no offer to pay any such balance.

As the answers of the heirs disclaim all interest in the land but allege the title to be in their mother by virtue of the devise, the bill must be dismissed as to them, with a single bill of costs, each taxing for his answer; and sustained as to the administrator and devisee. But before final decree, the plaintiff must make the guardian *ad litem* of the minor grandchildren party, although it is quite apparent from the answers of the other heirs that it will be a mere matter of form. *Scribner* v. *Adams*, 73 Maine, 542.

The testimony of the plaintiff and his wife relating to any matters which happened before the decease of the testator, is incompetent unless the administrator testifies or puts in the testator's books, when they may testify in relation thereto.

Case to be sent to a master to hear and state the accounts between the plaintiff and the late Holman Johnson.

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

AMBROSE C. SEGAR, administrator, *vs.* MERRILL N. LUFKIN.

Oxford. Opinion March 4, 1885.

Administrators. Witness. Evidence.

An administrator brought an action against two defendants and discontinued as to one of them by reason of his insolvency. *Held*, that such person, after the discontinuance, was a competent witness in behalf of the other defendant.

A witness testified to the payment by him to a party since deceased, of a sum of money on a note, and that on the same day he saw the deceased purchase a barrel of flour at a neighboring store. *Held*, that it was competent, as tending to contradict the witness in relation to the payment of the money, to show that the deceased did not purchase any flour at the time and place named by the witness.

ON EXCEPTIONS.

Assumpsit by the administrator of the estate of John E. Segar, deceased, on a promissory note for three hundred and fifty dollars, given the deceased by Nathan S. Farnum and the defendant.

The action was brought against both promisors and at the return term the plaintiff suggested the insolvency of Farnum and discontinued as to him.

The verdict was for ninety-seven dollars and seventy-seven cents, and the plaintiff alleged exceptions to certain rulings of the presiding justice, which are sufficiently indicated in the opinion.

John P. Swasey, for the plaintiff.

James S. Wright, for the defendant.

The testimony offered by the plaintiff to contradict Farnum was upon a collateral point drawn out by plaintiff's counsel on cross-examination of Farnum. The plaintiff was bound by Farnum's testimony upon that collateral issue.

Exceptions to the exclusion of testimony offered cannot be sustained, unless the materiality to some issue in the case is shown. 56 Maine, 204; 15 Maine, 67; 56 Maine, 535; 63 Maine, 410.

HASKELL, J. Farnum was not a defendant to the action after the discontinuance was entered as to him. The action then stood the same as though it had been brought against the other defendant alone, upon his several promise. Parties only are excluded by statute from testifying in causes, where the adverse party is an administrator. In such cases, persons not parties, although directly interested in the result of the suit, are competent witnesses. Their interest does not exclude them from being witnesses, but goes to affect their testimony. Farnum was a competent witness, and rightfully allowed to testify. *Haskell, Adm'r*, v. *Hervey*, 74 Maine, 192 and cases cited.

The issue tried was, whether Farnum had paid the plaintiff's intestate a part of the note in suit. Farnum, in behalf of the defendant, testified to making the payment at his own store, upon a day when the plaintiff's intestate waited there for some flour, that he, Farnum, had sent his boy to the railroad for.

Upon pertinent cross-examination Farnum testified that he did not furnish the plaintiff's intestate with the flour, but saw him, afterwards, load a barrel of flour into his wagon on the same afternoon, at a neighbor's store.

The neighbor was called by the plaintiff to prove that the plaintiff's intestate did not procure and load flour on, or near, the day testified to by Farnum. To the exclusion of this evidence the plaintiff has exception.

Farnum testified to a transaction with a deceased person, who cannot give his version of it. As a part of the same transaction he testified to a fact, fixing the time when the payment was made. The disproving of that fact would tend to show the absence of the plaintiff's intestate at the store of Farnum, when he says the payment was made, and ought to have been considered by the jury.

Exceptions sustained.

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

ELIPHALET F. PACKARD and another

vs.

DORCHESTER MUTUAL FIRE INSURANCE COMPANY.

Androscoggin. Opinion March 5, 1885.

Insurance. Agency.

The plaintiffs made their application through an insurance agent, believing him to be the defendant's agent; he assumed to act as its agent, wrote the application, sent it to the company with his name as agent upon it; the company received and acted upon it, issued the policy in pursuance of it, wrote the name of the assumed agent upon it and sent it to him and received the premium through him; *Held*, that the plaintiffs might well construe these facts as an official recognition on the part of the company, of the assumed agency.

In the absence of any known restriction of such agent's authority, he may bind his principal by waiving written assent to material alterations in the property insured.

ON REPORT.

Assumpsit to recover the sum of three thousand dollars for a total loss by fire, November 22, 1882, of plaintiffs' frame building situated on the corner of Pine and Lisbon streets in Lewiston, Maine, under the defendant's policy of insurance for that sum, written upon such building November 14, 1881, for the term of three years, and delivered to the plaintiffs by D. H. Holman.

The report discloses that after the plaintiffs' evidence was out the presiding justice made the following rulings:

"Court: If Packard & Scruton applied to Mr. Holman as an insurance agent, and supposing that he was an agent for this company made their application through him, and he assumed to act as their agent, and wrote the application, sent it to the company with his name upon it as their agent, they received it, acted upon it and issued a policy in pursuance of that application, and wrote Mr. Holman's name upon the back of it, sent it to him for delivery and received the premium and the premium note through him — I rule that he was their agent.

"Mr. Savage: Those facts are not controverted.

"Defendant offers to prove: That D. H. Holman was not at the time this insurance was applied for, nor has he since been, in fact, the agent of defendant company; that is to say, that he had no power of attorney, or authorization, in writing or otherwise, to transact business for it, unless the company is estopped to deny the same by reason of the facts in reference to the application and policy; that though said Holman had requested to be appointed as such, said company had declined so to do.

"That the name of D. H. Holman was placed upon the policy in suit by defendant's clerk simply as a matter of office convenience, that the person whose duty it was to mail the policy might know to whom to send it.

"That the difference in occupancy of the building insured as described in the application and as it existed in fact was such that the latter would have constituted a different class of risk, than the former, and for which a higher rate of premium would have been demanded, and that it materially increased the risk.

"That the difference in situation of building insured as to exposure and contiguity to other buildings as described in the application and as it existed in fact, was such that the latter would have constituted a different class of risk than the former, and that a higher rate of premium would have been demanded.

"That defendant company would not have accepted the risk at all had it known that the building contained a billiard saloon.

"That the change or alteration of the occupancy of the building after the policy issued so as to change one store into a restaurant materially increased the risk, contributed to the loss, constituted the building a different class of risk; and had insurance been sought on the building as altered, a higher rate of premium would have been demanded than was demanded on the building as actually insured.

"That the occupancy of a portion of the building as a billiard saloon contributed to the loss.

"That the fire originated either in the billiard saloon, not described in the application or policy, or in the restaurant; and if in the restaurant, in a place and from causes which would not have originated the fire had the change or alteration not been made.

"Court: If Mr. Holman wrote the application himself, and knew of the misdescriptions which it contained, and if the alterations were made with his knowledge and consent, then I rule this evidence you offer immaterial.

"Admitted that the facts hypothetically assumed in the Judge's rulings are all true.

"Defendant offers to prove that such assent was not in writing, as provided on the policy.

"Court: Notwithstanding by the terms of the policy, any consent to a change by the agent was required to be in writing, I rule that if he knew of it and did consent verbally, it would be obligatory upon the company all the same, under our statute."

Thereupon the defendant, by consent, was defaulted; and it was agreed that the case should be reported to the Law Court.

If the Law Court is of the opinion that the foregoing rulings are correct, judgment is to be rendered for the plaintiff on the default, interest to commence January 22, 1883; otherwise the default is to be taken off and the action stand for trial.

William P. Frye, *John B. Cotton*, *Wallace H. White*, *Seth M. Carter*, for the plaintiffs cited: *Insurance Co.* v. *McCain*, 6 Otto, 84; Story on Agency, § 127; *Planters' Ins. Co.* v. *Myers*, 30 Am. R. 521 and note; *Insurance Company* v. *Wilkinson*, 13 Wall. 222; *Ins. Co.* v. *Eddy*, 55 Ill. 213; *Hornthal* v. *West. Ins. Co.* 88 N. C. 71; (Reported in Alb. Law Jour. Sept. 22, 1883, page 240); *Ins. Co.* v. *Mahone*, 21 Wall. 152. See also, *Woodbury, &c., Bank* v. *Charter Oak Ins. Co.* 31 Conn. 517–526; *Peck* v. *N. L. Ins. Co.* 22 Conn. 575; *Rowley* v. *Empire Ins. Co.* 36 N. Y. 550; *Franklin's case*, 42 Mo. 457; *Beal* v. *Park Ins. Co.* 16 Wis. 257; *Ins. Co.* v. *McLanathan*, 11 Kan. 533; *Dryden* v. *G. T. Railway*, 60 Maine, 512; *Ehrman* v. *Teutonia Fire Ins. Co.* 1 McCreary; S. C. 123, (cited in U. S. Digest. vol. XII, N. S. 1881, p. 456;) *St. Louis* v. *Ferry Co.* 11 Wall. 429; R. S. 1871, c. 49, § § 18, 19, and 20; *Thayer* v. *Ins. Co.* 70 Maine, 539; *Waterhouse* v. *Ins. Co.* 69 Maine, 410; *Emery* v. *Ins. Co.* 52 Maine, 322; *Palmer* v. *Ins. Co.* 44 Wis. 201; *Blood* v. *Hardy*, 15 Maine, 61; *Adams* v. *McFarlane*, 65 Maine, 152; *Wiggin* v. *Goodwin*, 63 Maine, 389.

A. R. Savage and H. W Oakes, for the defendant.

As to third parties, one person may bind another by his acts as agent:

1st. When he has actual authority, to do such acts.

2d. When, not having such authority, he is allowed by another to act in such a manner that the third party may reasonably suppose him to have authority. This carries the law of implied agency to its fullest extent. Parsons on Contracts, vol. I, page 40; Story, Agency, § 127; 61 Maine, 539.

Holman certainly did not have actual authority to act as agent of the defendant.

The public laws of 1862, c. 115, § 1, incorporated without change in the revisions of 1871 and 1883, provide that "an

agent authorized by an insurance company, whose name shall be borne on the policy, shall be deemed the agent of the company in all matters of insurance," &c.

In this action the name of the broker, D. Horace Holman, appears on the back of the policy — nowhere else — not as a countersign in the body of the policy — with nothing, so far as the evidence shows, to indicate that it was placed there as the name of the agent of the company — indeed the defendant offers to show that it was not there for that purpose, but merely as a matter of office convenience.

Supposing for the purpose of this inquiry, that this is sufficient to bring the endorsement within the meaning of the statute, still the statute refers not to any person "whose name shall be borne on the policy," but to "an agent authorized by an insurance company, whose name," &c.

As we have said, Holman was not an "authorized agent."

Are we then to conclude that the words "authorized by an insurance company" are a part of the definition of the word "agent," intended by the legislators creating the statute, or are we to reject these words entirely, and consider only the words "whose name shall be borne on the policy?" 22 Pick. 571-573.

By this section, the person who may bind a company by his acts was:

1st. An agent authorized by an insurance company "to receive applications for insurance."

2d. One authorized "to receive payments of premiums."

3d. One "whose name shall be borne on the policy."

We claim that all of these conditions must exist in order to establish the extraordinary liability put upon a company by our law. 1 Pick. 45; 4 Mass. 473; 5 Cushing, 461; 59 Maine, 433; 61 Maine, 539; 36 Mich. 131; Story's Agency, § 73; 9 Peters, U. S., 607; 12 Hun. 321; 57 Maine, 138; 80 N. Y. 39; *Walsh* v. *Hartford Fire Ins. Co.* 73 N. Y. 5; 212 L. C. Jurist, 274; 12 Md. Law Rec. 123.

VIRGIN, J. The policy stipulated that it "shall be void if any material fact or circumstance stated in writing has not been

fairly represented by the insured, . . or if without the assent in writing of the company, the situation of circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks."

The testimony showed that the application contained a misrepresentation as to the contiguity of other buildings; and that an alteration of the building insured was subsequently made, causing a material increase of the risk.

It was not controverted that the plaintiffs made their application through one Holman, an insurance agent, believing him to be the agent of the company; that he assumed to act as its agent, wrote the application, sent it to the company with his name as its agent upon it; that the company received it, acted upon it, issued the policy in pursuance of it, wrote Holman's name upon the back of it, sent it to him for delivery and received the premium through him. Thereupon the presiding justice ruled that Holman was the agent of the company.

It was admitted that Holman knew of the misdescriptions in the application written by him, and that the alterations were made with his knowledge and consent. Whereupon the presiding justice ruled that, notwithstanding the misdescriptions, the company was bound; and that Holman's verbal consent to the alterations were obligatory upon the company, under the statute.

We perceive no error in these rulings. To be sure, the mere fact that Holman signed the application as agent, was not enough to show him to be the company's agent. *Campbell* v. *Man. F. Ins. Co.* 59 Maine, 430. The defendant could not prevent such an act on his part done in its absence. But that fact carried home to the company's knowledge by sending to it the application with his assumed official signature thereon, combined with its subsequent acts, including the indorsing his name on the policy, might well be construed by the plaintiffs as an official recognition of his assumed character at common law, but also to bring his authorization within R. S., c. 49, § 18. *Dunn* v. *G. T. Railway*, 58 Maine, 187; *Ins. Co.* v. *McCain*, 6 Otto, 84.

The company could doubtless waive written assent to the material alterations. *Adams* v. *McFarlane*, 65 Maine, 152; *Wood* v. *Poughkeepsie Ins. Co.* 32 N. Y. 619. In the absence of any known restrictions of authority, the agent could do the same. It is common knowledge that the authority of an agent comprises not what is expressly conferred, but also, as to third persons, what he is held out as possessing. Hence the principal is frequently bound by the act of his agent, performed in excess, or even in abuse of his actual authority; but this is only true as between the principal and third persons, who, believing, and having a right to believe, that the agent was acting within the scope of his authority, would be prejudiced if the act was not considered that of the principal. *Barnard* v. *Wheeler*, 24 Maine, 412, 418; *Clark* v. *Metropolitan Bank*, 3 Duer, 248. This doctrine is established to prevent fraud and proceeds upon the ground that when one of two innocent persons must suffer from the act of a third, he shall sustain the loss who has enabled the third person to do the injury. Story, Ag. § 127.

Of course when restriction of authority is brought home to the knowledge of those with whom the agent deals, his acts in excess of such restricted authority will not bind the principal. *Ins. Co.* v. *Wilkenson*, 13 Wall. 222. Thus where one of the express conditions of a policy was that "no officer, agent, or representative of a company shall be held to have waived any of the terms and conditions of the policy, unless such waiver shall be indorsed hereon in writing," it was held that this limitation of power of the agent to waive the conditions was brought to the knowledge of the insured by the policy itself, and any attempted waiver otherwise than therein stipulated, was not binding upon the company. *Walsh* v. *Hartford F. Ins. Co.* 73 N. Y. 5, 9. There is no such clause in the policy now before us.

According to the stipulation in the bill of exceptions, the entry must be,

Defendant defaulted. Interest to be added from January 22, 1883.

PETERS, C. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

CATHERINE E. CURTIS *vs.* PORTLAND SAVINGS BANK.

Cumberland. Opinion March 5, 1885.

Savings bank deposits. Gift.

The plaintiff, by direction of her aunt four days before her death, took a key from her bureau drawer, unlocked her trunk and took therefrom her savings bank book, and thereupon the aunt said to the plaintiff: "Now keep this and if anything happens to me, bury me decently and put a headstone over me, and anything that is left is yours." *Held*, a *donatio causa mortis*, coupled with the trust indicated.

ON REPORT.

Assumpsit for money had and received.

The writ was dated September 6, 1883. The plea was the general issue.

The plaintiff is the niece of Mrs. Jane McCue, deceased, and brings this action to recover the balance due on the deposit made by Mrs. McCue in her lifetime, in the defendant bank. The plaintiff went with Mrs. McCue to the bank in March, 1878, when, by her aunt's direction, an officer of the bank made this memorandum on the deposit book, "Sub. also to Cath. E. Curtis." Mrs. McCue retained possession of the deposit book and subsequently on various occasions both deposited and drew out money on the deposit.

The plaintiff testified that "about noon on the 30th of May, 1883, a year ago. She [Mrs. McCue] called me to her and asked me if we were alone; I told her yes. She said, 'Go to the bureau drawer and get the key.' I went to the bureau drawer and got the key. She had two. She said, 'Take that key and unlock the trunk.' I unlocked the trunk and took the book to her. She said, 'Now, keep this and if anything happens to me bury me decently and put a headstone over me, and anything that is left is yours.' . . .

"Cross examined. Q. If I understand you, you say your aunt said to you, 'Take this book and if anything happens to me bury me, pay my debts and whatever there is left is yours?' A. Yes."

The plaintiff then took the book and kept it, and her aunt died June 4, 1883.

J. and E. M. Rand, for the plaintiff, cited: *Davis* v. *Ney*, 125 Mass. 590; *Pierce* v. *Sav. Bank*, 129 Mass. 425; *Hill* v. *Stevenson*, 63 Maine, 367; 3 Redf. Wills. c. 12; *Parish* v. *Stone*, 14 Pick. 198.

Ardon W. Coombs, for the defendant.

The law requires clear and unmistakable proof of the following facts to sustain a gift *causa mortis:* 1. An intention on the part of the donor accompanied by evidence, that this intention has been perfected by an actual gift. 2. Delivery to the donee, who must retain possession until after the decease of the donor. 3. The donor must part with all interest in the property and dominion over it, subject only to revocation if death does not ensue. 4. The donation must be made in contemplation of near approach of death. 5. The gift must be so complete in form that no other act is required to be done. *Allen* v. *Polereczky*, 31 Maine, 339; *Northrop* v. *Hale*, 73 Maine, 66; *Dole* v. *Lincoln*, 31 Maine, 422; *Hatch* v. *Atkinson*, 56 Maine, 324.

In the case at bar there was no "clear and unmistakable proof" of an intention to give the funds represented by the pass book. Indeed the debts, funeral expenses, &c. of Mrs. McCue was first to be paid. She retained an interest inconsistent with an intention to make a gift.

VIRGIN, J. When the plaintiff, by direction of her aunt, took the key from the bureau drawer, unlocked the trunk and took therefrom the savings bank book, her aunt said: "Now keep this, and if anything happens to me, bury me decently and put a headstone over me, and anything that is left is yours." This, in our opinion, constituted a gift *causa mortis.*

The former entry of, "subject also to Cath. E. Curtis," which the depositor caused the bank officer to make in March, 1878, in her savings bank book, and also in the book of the bank, showed that she then had in contemplation a gift to the plaintiff, but it was not completed by delivery. *Northrup* v. *Hale*, 73 Maine,

66. But on May 30, 1883, only four days before her death, the declaration above quoted, accompanied by the manual delivery of the deposit book, rendered unmistakable her intention. The delivery was sufficient. *Hill* v. *Stevenson*, 63 Maine, 364; *Pierce* v. *Five Cents Sav. Bank*, 129 Mass. 425; *Tillinghast* v. *Wheaton*, 8 R. I. 536.

Nor did the special qualification annexed to the gift defeat it. This was only coupling the gift with the trust that the donee should provide for the funeral of the donor. 2 Sch. Per. Prop. (2d ed.) § 195; *Hills* v. *Hills*, 8 M. & W. is precisely in point, and has been approved by the court in *Clough* v. *Clough*, 117 Mass. 85. See also *Davis* v. *Ney*, 125 Mass. 590. If there are any debts, the plaintiff must see them paid. *Pierce* v. *Five Cents Sav. Bank*, *supra*.

Judgment for the plaintiff for the amount due on bank book.

PETERS, C. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

GEORGE A. SMITH and others, executors,

vs.

PATRICK MCGLINCHY.

Cumberland. Opinion March 6, 1885.

Promissory notes. Illegal consideration.

The rule that the parties to a negotiable note are not competent witnesses to prove that the note was given for an illegal consideration, is not applicable to suits between the immediate parties to an illegal contract. The rule is for the protection of innocent parties only. It is not applicable to a suit by an indorsee against his immediate indorser, when the contract between them is for an illegal consideration, nor to suits between their personal representatives.

On exceptions from superior court.

Assumpsit by the executors of the indorsee against the indorser of a promissory note of $400, dated at Lewiston, February 23, 1878, payable in three months, signed by M. A. Ward and Henry Hines.

The plea was the general issue, with brief statement, that the consideration of the claim sued was for intoxicating liquor sold in violation of law, and to be sold in this state in violation of law.

At the trial, the testimony of the makers of the note was admitted, tending to show, that the consideration for the note, and the consideration for the indorsement from the defendant to the plaintiff's executor, was intoxicating liquor to be sold in this state in violation of law. To the admission of this testimony the plaintiffs alleged exceptions.

Snow and Payson, for the plaintiffs.

It is no defense to an action on a promissory note, that it was given for illegal consideration, when the action is brought by an indorsee who is the holder of the note for value and without notice of the illegality. R. S., c. 27, § 56; *Hapgood* v. *Needham*, 59 Maine, 443.

An indorsee is presumed to be a holder for value without notice. *Baxter* v. *Ellis*, 57 Maine, 180; *Kellogg* v. *Curtis*, 69 Maine, 212; *Collins* v. *Gilbert*, 94 U. S. 753.

The makers of the note are not competent witnesses to overcome this presumption. It is well settled that no man who is a party to a note shall be permitted by his own testimony to invalidate it. *U. S.* v. *Dunn*. 6 Pet. 51; *Davis* v. *Brown*, 94 U. S. 426; *Bank* v. *Jones*, 8 Pet. 12; *Henderson* v. *Anderson*, 3 How. 73; *Saltmarsh* v. *Tuthill*, 13 How. 229; *Lincoln* v. *Fitch*, 42 Maine, 468; 2 Dan'l Neg. Insts. (3 ed.) 247; 1 Greenl. Ev. (13 ed.) 438, 439. See also *Goodman* v. *Simonds*, 20 How. 365; *Farrell* v. *Lovett*, 68 Maine, 326.

John J. Perry and *D. A. Meaher*, for the defendant.

WALTON, J. The exceptions must be overruled. The rule that the parties to a negotiable note are not competent witnesses to prove that it was given for an illegal consideration is not applicable to suits between the immediate parties to an illegal contract. It is for the protection of innocent parties only. Thus, in *Fox* v. *Whitney*, 16 Mass. 118, in an action between the personal representatives of the parties to a note, the court held

that a surety on the note was a competent witness to prove the note usurious, because the action was between the personal representatives of the immediate parties to the illegal contract. And this limitation of the rule was sanctioned in *Thayer* v. *Crossman*, 1 Met. 416, and the further limitation deduced from it, that the rule does not apply when the note is not negotiated till after it is overdue; the reasoning being that, inasmuch as the indorsee of an overdue note obtains no rights except such as were possessed by the payee, and the rule not being applicable to a suit by the payee, it could not be applicable to a suit by his indorsee.

In this case, the action is not based upon the contract created by the note itself. It is upon the contract created by the negotiation and transfer of it. It is an action against an indorser. And the true defense is, not that the note was given originally for intoxicating liquors (although such seems to have been the fact), but that it was negotiated and transferred to the plaintiff's testate for a like illegal consideration; and it is the latter illegality, and not the former, that constitutes the true defense to the action. And in such an action, so defended, the rule of exclusion does not apply. Consequently, the objection to the testimony of the makers of the note was not well founded, and the exceptions must be overruled.

Exceptions overruled.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

CHARLES H. HODSDON AND WIFE *vs.* LIBERTY KILGORE.

Oxford. Opinion March 6, 1885.

Trespass. Sheep.

In trespass for damage done by the defendant's sheep to the plaintiff's close, if it is admitted that the sheep were upon the plaintiff's land, the burden is upon the defendant to show some justification or excuse; and if they entered from the highway, and no justification or excuse is shown for their being in the highway, the plaintiff is entitled to damages.

ON REPORT.

Trespass *quare clausum* for damage done to plaintiffs close in Waterford, in the month of April, 1882, by the defend-

ant's sheep. Damages claimed, fifteen dollars. The facts as found by the court are sufficiently stated in the opinion.

Seward S. Stearns, for the plaintiffs.

C. A. Chaplin, for the defendant.

WALTON, J. It being an admitted fact that the defendant's sheep were several times upon the plaintiff's land within the time mentioned in the declaration, the burden of proof is upon the defendant to show some justification or excuse for their being there. This he attempts to do by evidence that they escaped from his own close into the plaintiff's through a defective partition fence which it was the duty of the plaintiff to maintain. The evidence upon this point is conflicting, and it is difficult to say on which side it preponderates. There is no doubt that the sheep sometimes entered upon the plaintiff's close through the piece of fence in question; but whether it was the duty of the plaintiff or the defendant to keep that piece of fence in repair is not so easily decided. And we do not find it necessary to decide it; for we think the evidence fairly preponderates in favor of the proposition that one or more times the sheep entered upon the plaintiff's premises from the highway; and for these entries no justification or excuse is shown. True, it may be, as contended by the defendant's counsel, that in these instances the sheep first entered upon the plaintiff's close through the piece of fence in dispute, and then strayed from there into the highway, and then back into the plaintiff's close, so that, if it was the duty of the plaintiff to keep this piece of fence in repair, it was his fault that they were in the highway. But of this we are not satisfied. We think the evidence fairly preponderates in favor of the proposition that the sheep were first in the highway through the defendant's fault, and then entered upon the plaintiff's close from the highway; and, for such an entry, as already stated, there seems to be no justification or excuse. Our conclusion therefore is that the action is maintained, and that the plaintiff is entitled to recover some damages.

Judgment for plaintiff for ten dollars damages.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

RICHARD A. FRYE, Judge of Probate,

vs.

NATHANIEL B. CROCKETT and another.

Oxford. March 6, 1885.

Executor's bond. R. S., c. 64, § 9. Probate practice.

An executor's bond which omits to require the principal to account upon oath within one year is not conformable to statute.*

An action upon an executor's bond which is not conformable to statute, cannot be maintained in the name of the successor of the judge to whom it was given.

ON REPORT.

An action in the name of the judge of probate on a bond given to his predecessor in office, the condition of which was as follows:

"The condition of this obligation is such, that if the above bounden Nathaniel B. Crockett, executor of the last will and testament of Asa S. H. Wardwell, late of Rumford, in said county of Oxford, deceased, shall make, or cause to be made, a true inventory of all the real estate, and all the goods, chattels, rights and credits of the testator, which are by law to be administered, which have, or shall come to his possession or knowledge,

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* Revised Statutes, c. 64, § 9, reads as follows:—

Sec. 9. Every executor before entering on the execution of his trust shall give bond, except when otherwise provided in the will, with sufficient sureties resident in the state, in such sum as the judge orders payable to him or his successors conditioned in substance as follows:

I. To make and return to the probate court, within three months, a true inventory of all the real estate, and all the goods, chattels, rights and credits of the testator, which are by law to be administered, and which come to his possession or knowledge.

II. To administer, according to law and the will of the testator, all his goods, chattels, rights and credits.

III. To render, upon oath, a just and true account of his administration within one year, and at any other times, when required by the judge of probate.

IV. To account, in case the estate should be represented insolvent, for three times the amount of any injury done to the real estate of the deceased by him, or with his consent, between such representation and the sale of such real estate for the payment of debts, by waste or trespass committed on any building thereon, or any trees standing and growing thereon, except as necessary for repairs or fuel for the family of the deceased; or by waste or trespass of any other kind; and for such damages as he recovers for the like waste or trespass committed thereon.

and return the same so made under oath, into the probate court for said county of Oxford, within three months from the date hereof, and shall administer according to law, and to the will of the said testator, the same goods and chattels, rights and credits, and all other goods and chattels, rights and credits of the said deceased at the time of his death, or which at any time after shall come to the possession or knowledge of the said executor; And shall also pay, or cause to be paid, all the debts and legacies of the said testator, unless the estate of said testator from some unexpected event, should prove insufficient for the payment of the same, in which event the said executor shall render upon oath a just and true account of his administration and of his proceedings therein within the time required by law, and at any other times when required by the judge of probate for the time being, for said county of Oxford, and pay and deliver any balance, or any goods and chattels, rights and credits remaining in his hands upon the settlement of said accounts of administration, to such person or persons as the said judge of probate by his decree or sentence pursuant to law shall direct; and shall also account, in case the estate should be represented insolvent, for three times the amount of any injury done to the real estate of the deceased by him or with his consent, between the time of the representation of insolvency and the sale of such real estate for the payment of debts by waste or trespass committed on any building thereon, or on any trees standing and growing thereon, except as may be necessary for repairs, or fuel for the family of the said deceased, or by waste or trespass of any other kind, and also for such damages as he may recover from any heir or devisee of the estate, or other person, for the like waste or trespass committed on any such real estate. Then the foregoing obligation shall be void and of no effect, or otherwise shall abide and remain in full force and virtue.

Nathaniel B. Crockett. [Seal.]
Samuel R. Chapman. [Seal.]
Sylvanus S. Akers. [Seal.]

"Signed, sealed and delivered in presence of J. L. Chapman.

"At a court of probate held at Paris, within and for the county

of Oxford, on the third Tuesday of July, in the year of our Lord eighteen hundred and sixty-three.

"The above bond is examined, approved, and ordered to be recorded and filed.

E. W. Woodbury, Judge.

Recorded by J. S. Hobbs, Register."

H. C. Davis, for the plaintiff, contended that the bond in suit contains the conditions of an executor's bond. R. S., c. 64, § 9. It contains other conditions — that where the executor is residuary legatee, § 10, and a condition applicable to administrators, § 19.

There is no condition in the bond in suit which is more prejudicial to the obligors than the particular form prescribed by statute, or but that may be rejected as surplusage.

Enoch Foster, for the defendants, cited: *Probate* v. *Adams*, 49 N. H. 152; R. S., c. 64, § 9; *Hall* v. *Cushing*, 9 Pick. 403; *Prop'rs Union Wharf* v. *Mussey*, 48 Maine, 311; *Lord* v. *Lancey*, 21 Maine, 468; *Cleaves* v. *Dockray*, 67 Maine, 124; *Potter* v. *Titcomb*, 7 Maine, 311.

WALTON, J. This is an action against one of the sureties upon an executor's bond, the other surety being dead, and the action against the principal having been discontinued. One objection to the maintenance of the suit is that it is brought in the name of the wrong person; and, upon examination, we are satisfied that this objection must be sustained.

It is settled law that an action upon an executor's bond, not conformable to statute, can be maintained only in the name of the judge to whom it was given. Such a bond, being good only at common law, can not be sued in the name of a successor. The bond in suit, in this case, is not conformable to statute. It contains omissions and additions. The principal in the bond was not an administrator, nor a residuary legatee. He was the executor named in the will, but no legacy was therein given to him, residuary or otherwise. The bond required of such an executor differs from that which is required of an executor who

is a residuary legatee; and it differs from that which is required of an administrator. And the statute is precise with respect to the form of each of these three kinds of bonds. And yet the bond in this case does not conform to either of them. It omits one important condition required of ordinary executors — namely, that which requires them to account upon oath within one year — and substitutes others which are applicable only to administrators and executors who are residuary legatees. This will appear upon inspection of the bond, and by comparing it with the requirements of the statute. How such a form for a bond came into existence, it is difficult to conceive. Very clearly, it is not a statute bond; and a suit upon it, if maintainable at all, can be maintained only in the name of the judge to whom it was given. This suit is not in the name of the judge to whom the bond was given. It is in the name of a successor. Such an action is not maintainable. *Cleaves* v. *Dockray*, 67 Maine, 118, and cases there cited.

Plaintiff nonsuit.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

FRANCES J. G. THOMPSON

vs.

WILLIAM T. HALL, Judge of Probate.

Same *vs.* ISAAC P. TIBBETTS.

Sagadahoc. Opinion March 6, 1885.

Probate practice. Guardian. Non compos. Certiorari. Prohibition.

A petition, addressed to the judge of probate, which alleges that the petitioner is a friend of a person who has been adjudged by that court to be of unsound mind and incompetent to manage his own affairs, or to protect his rights, and that the person who was appointed guardian had refused to qualify for that trust, will give the probate court jurisdiction and authorize the judge, after notice and hearing, to appoint another person as guardian of the *non compos.*

ON EXCEPTIONS and report.

The first case is a petition for a writ of *certiorari* to a judge of probate to bring in the records of that court relating to the

appointment of a guardian for the petitioner, and that the same be quashed. The presiding justice ruled as a matter of law that the writ could not be issued and dismissed the petition. To this ruling the petitioner alleged exceptions.

The second case is a petition for a writ of prohibition in which it is asked that the person appointed her guardian may be prohibited from acting as such. This case comes up on report.

The following is the petition to the probate court and the action of that court thereon:

"To the honorable judge of the probate court for the county of Sagadahoc, next to be holden at Bath, on the first Tuesday of January, A. D. 1882.

"Joseph M. Trott respectfully represents that he is a friend of Frances J. G. Thompson of said Bath who has been adjudged by the honorable court to be of unsound mind and incompetent to manage her own affairs, or to protect her rights, and that Orville A. Robinson who was appointed guardian of the said Frances has refused to qualify for said trust.

"Wherefore he prays that letters of guardianship may issue to Isaac P. Tibbetts, of Topsham, in said county, he being a suitable person to act as guardian aforesaid.

Joseph M. Trott."

"State of Maine. Sagadahoc, ss. Probate court, January term, A. D. 1882.

"On the foregoing petition, it is ordered, that the said Frances J. G. Thompson be cited to appear at a probate court to be held at Bath, within and for said county, on the first Tuesday of February, 1882, at ten o'clock in the forenoon, and show cause, if any she has, why the prayer of said petitioner should not be granted, by serving her with a true and attested copy of the foregoing petition, with this order thereon, fourteen days prior to the holding of said court.

Wm. T. Hall, Judge."

[Service was duly made and proved.]

"State of Maine. Sagadahoc, ss. Probate court, February term, A. D. 1882.

"On the foregoing petition, it is decreed that the said Frances J. G. Thompson is of unsound mind and incompetent to manage her own estate or to protect her rights; and it is also decreed, that Isaac P. Tibbetts, of Topsham, be appointed guardian of said Frances J. G. Thompson, and that he give the bond required by law in the sum of one thousand dollars before entering on the execution of said trust.

[Seal.] W. T. Hall, Judge."

"A true copy. Attest,

Cyrus W. Longley, Register."

W. Gilbert, for the petitioner.

The petition of Trott does not recite the previous proceedings, or claim to engraft itself upon them. It undertakes to state a cause why the court should take jurisdiction and appoint. But it fails to make any case of jurisdiction under the statute. R. S., 1871, c. 67 § 4; *Overseers* v. *Gullifer*, 49 Maine, 360.

Such being the case, the petitioner, who in point of fact, though ignorant of law and legal rights, is no more *non compos* than three quarters of the people, petitions to quash the record by *certiorari*.

In this she is met by an opinion of Chief Justice SHAW, in *Peters* v. *Peters*, 8 Cush. 529. In view of the great ability of that learned judge, we may fairly impute the labored argument of the opinion to a desire to defend the court against all possible imputation of error in a matter, where the court evidently had no power of relief from erroneous adjudication. Certainly it needed no labor of argument to show that in a case of probate jurisdiction, an error in allowing a will which ought to have been rejected cannot be corrected by this process.

Counsel further cited: R. S., c. 77, § 5; *Harriman* v. *Co. Com'rs*, 53 Maine, 88; *Bishop of Chichester* v. *Harward*, 1 T. R. 650.

C. W. Larrabee and *A. N. Williams*, for the respondents, cited: *Cooper, Petitioner*, 19 Maine, 260; Constitution, Art. 6, § 7; *Sturtevant* v. *Tallman*, 27 Maine, 82; 3 Bl. Com. 66, 67, 112; *Peters* v. *Peters*, 8 Cush. 529; *Simpson* v. *Norton*,

45 Maine, 281; *Pierce* v. *Irish*, 31 Maine, 254; *Clark* v. *Pishon*, 31 Maine, 503; *McLean* v. *Weeks*, 65 Maine, 411; *Roderigas* v. *East River Sav. Inst.* 63 N. Y. 460; 1 Bouvier's Law Dict. 391; *Washburn* v. *Phillips*, 2 Met. 296; *Grant* v. *Gould*, 2 H. Bl. 100; *The People* v. *Seward*, 7 Wend. 518.

DANFORTH, J. The first named case is a petition for a writ of *certiorari* to issue to the probate court for the county of Sagadahoc asking that its records relating to the appointment of a guardian for Frances J. G. Thompson be quashed.

The second case is a petition that the guardian so appointed be prohibited from the further exercise of his duties as such.

In *Peters* v. *Peters*, 8 Cush. 529, SHAW, C. J., in a very able and exhaustive opinion held that the supreme court of Massachusetts was not authorized under the statutes of that commonwealth to issue a writ of *certiorari* to the probate court in any case. The reasoning of that opinion will apply equally well to the law of this state and seems to be conclusive in favor of the conclusion there reached. It is true that the case then under consideration differed materially from that now before this court, and the authority of the court to issue such a writ was not necessary to the disposal of the case, yet the argument is none the less convincing.

But if the court were authorized to issue such a writ we are satisfied that there is no such error in the records in question as to require it.

The objection raised here is that the record of the proceedings under which the guardian was appointed does not show jurisdiction in the court so appointing. Were the petition of Joseph M. Trott the initiative of the proceedings complained of the objection would be, clearly, well founded. *Overseers* v. *Gullifer*, 49 Maine, 360. But such is not the case. It is true that the previous proceedings are not incorporated into this petition. Nor is that necessary. It does refer to them. It is addressed to the "judge of probate for the county of Sagadahoc." It alleges that the petitioner is a "friend of Frances J. G. Thompson who has been adjudged by the honorable court to be of unsound mind and incompetent to manage her own affairs, or to protect

her rights, and that Orville A. Robinson who was appointed guardian of said Frances has refused to qualify for said trust." Here is a direct reference to the prior proceedings of the court, and to proceedings which were unfinished and still upon the docket of the court, for they could not be finally disposed of until the appointee had not only accepted but qualified by giving the required bond. Here was a sufficient description to enable the court to identify its own unfinished record and to the respondent notice of the adjudication of the unsoundness relied upon. The petition of Trott was not therefore the commencement of a new process, but the continuation of one already pending. Upon examining these prior proceedings no defect is found in them, none has been pointed out or claimed to exist. Both sides rely somewhat upon R. S., 1871, c. 67, § 23, revision of 1883, c. 67, § 26, giving the probate court authority to appoint a new guardian in case of the death, resignation, or removal of the guardian, "without further intervention of the municipal officers." But this section is not applicable. Here is neither a death, resignation or removal. That could be only after the guardian had been legally qualified and the proceedings finished. Here was a refusal to accept, leaving the proceedings unfinished, the purpose in view unaccomplished. If Robinson had been present and declined the appointment when made, there can be no doubt that the respondent being present, the court could have appointed another person. It can make no difference that this case was continued one or more terms to await the result, except perhaps the necessity of giving a new notice, as was done here, for it would be proper that the respondent should be heard as to the person to be appointed as well as upon the question of the necessity of appointing any one. In either case the decree as to unsoundness already made is the foundation of the appointment.

It is true that the last decree is informal and of itself insufficient. So far as it relates to the unsoundness of the respondent, it is unauthorized by the petition. That does not ask for any inquiry into that question. It simply alleges that she has already been decreed unsound in the language of the statute

authorizing the appointment of a guardian; that the attempted appointment had failed by reason of non acceptance, and asks that the work may be completed by the appointment of another. That part of the decree which is in conformity with the petition, and which has a legal basis to rest upon, cannot be made invalid by another part which is not authorized, and which is not necessary to a disposition of the case.

The result is, the records of the probate court taken as a whole so far as they relate to this case, show that the guardian has been legally appointed, and therefore neither the writ of *certiorari* nor prohibition can be granted.

Exceptions in petition for certiorari overruled.
Petition for prohibition denied.

PETERS, C. J., WALTON, LIBBEY, EMERY and FOSTER, JJ., concurred.

LEMUEL COOLBROTH *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion March 7, 1885.

Master and servant.

It is the well settled law that a servant of mature age and common intelligence, when he engages to serve a master, undertakes, as between himself and master, to run all the ordinary and apparent risks of the service.

ON exceptions to the ruling of the court in overruling defendant's demurrer to the plaintiff's declaration.

S. C. Strout, H. W. Gage and F. S. Strout, and *N. and H. B. Cleaves*, for the plaintiff.

The question presented by this writ and demurrer, is whether the master, who has full knowledge of the perils of a service, and orders his servant to dangerous work, of the danger of which he is ignorant, both from inexperience and from reliance upon the superior knowledge of the master, is liable for an injury received by the servant in such employment, when he is without fault, and acting carefully.

This court say, in *Buzzell* v. *Laconia Man. Co.* 48 Maine, 116: "The superior intelligence and determining will of the

master demand vigilance on his part that his servants shall neither wantonly nor negligently be exposed to needless and unnecessary peril. The servant has no general control. He is the actor. The master is the director. The one commands, the other obeys." "His service is compulsory from the pressure of want." "He has a right to presume that all proper attention shall be given to his safety, and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation."

These remarks apply to the case at bar.

It has been held that an employer who takes an inexperienced man into a dangerous place without apprising him of the risks of the employment, and without warning him of his danger, is liable in case of injury. *Parkhurst* v. *Johnson*, (Mich.) reported in 16 Reporter, 19.

The same doctrine is held in *Union Man. Co.* v. *Morrissey*, (Ohio), 22 Amer. Law Reg. 574; *Miller* v. *R. R.* 17 Fed. Rep. 67; *Elmer* v. *Locke*, 135 Mass. 579; *Ryan* v. *Tarbox*, 135 Mass. 207.

It is a question for the jury, not matter of law, whether the master is negligent when the risk was incurred by direction of the master to do the act in a manner unnecessarily dangerous, as in this case. *Clarke* v. *Holmes*, 7 Hurl. & N. 949; *Greenleaf* v. *R. R. Co.* 29 Iowa, 14; *Patterson* v. *R. R. Co.* 76 Penn. St. 389; *Ford* v. *R. R.* 110 Mass. 240; *Hough* v. *R. R.* 100 U. S. 215; *Mulvey* v. *R. R. Locomotive Co.* 14 R. I. 204.

Upon the facts alleged, we are entitled to the judgment of the jury, whether negligence is imputable to the defendants, and whether, under all the circumstances, the plaintiff was in the exercise of due care. *Ryan* v. *Tarbox*, 135 Mass. 207; *Snow* v. *R. R.* 8 Allen, 441; *Huddleston* v. *Lowell Machine Shop*, 106 Mass. 282; *Whittaker* v. *Boylston*, 97 Mass. 273; *Coombs* v. *Cordage Co.* 102 Mass. 572; *Hough* v. *R. R.* 100 U. S. 215.

It follows that the demurrer is not well taken.

Drummond and Drummond, for the defendant, cited: *Gavett* v. *M. & L. R. R. Co.* 16 Gray, 501; *Todd* v. *O. C.*

R. R. Co. 3 Allen, 18; *Gahagan* v. *B. & L. R. R. Co.* 1 Allen, 187; *Grows* v. *M. C. R. R. Co.* 67 Maine, 100; *Lawler* v. *A. R. R. Co.* 62 Maine, 463; *Day* v. *S. & D. R. R. Co.* 42 Mich. 523, (2 A. & E. cas. 126); *L. R. R. R. Co.* v. *Duffey*, 35 Ark. 602, (4 A. & E. Cas. 637); *G. & C. R. R. Co.* v. *Bresmer*, 94 Penn. 103, (4 A. & E. Cas. 647); *L. S. R. R. Co.* v. *McCormick*, 74 Ind. 440, (5 A. & E. Cas. 474); *Ballou* v. *C. & N. R. R. Co.* (Wis.) 5 A. & E. Cas. 480; *P. R. R. Co.* v. *Sentmeyer*, 92 Penn. 276, (5 A. & E. Cas. 508); *Howland* v. *M. R. R. Co.* (Wis.) 5 A. & E. Cas. 578; *G. R. R. Co.* v. *Lempe*, (Texas) 11 A. & E. Cas. 201; *Coombs* v. *N. B. Cordage Co.* 102 Mass. 572; *Cayzer* v. *Taylor*, 10 Gray, 274; *Huddleston* v. *Lowell M. Works*, 106 Mass. 282; *Arkerson* v. *Dennison*, 117 Mass. 407; *Buzzell* v. *Laconia M'f'g Co.* 48 Maine, 113; *Shanny* v. *Androscoggin Mills*, 66 Maine, 427; *M. R. R. Co.* v. *Haley*, 25 Kansas, 35, (5 A. & E. Cas. 594); *Snow* v. *H. R. R. Co.* 8 Allen, 441; *Kenney* v. *Shaw*, 133 Mass. 501; *Sullivan* v. *India Co.* 113 Mass. 396; *Hill* v. *Gust*, 55 Ind. 45; *St Louis* v. *Valirius*, 56 Ind. 511; *Thompson* v. *C. R. R. Co.* 18 Fed. Rep. 239; 2 Thompson, Neg. 994, 1009; *Hathaway* v. *M. C. R. R. Co.* 12 Am. & Eng. R. R. Cas. 249, see note; *I. B. & W. R.* v. *Flanigan*, 77 Ill. 365; *F. W. R. R. Co.* v. *Gildersleeve*, 33 Mich. 133; *Walsh* v. *St. P. & D. R. R. Co.* 2 Am. & Eng. R. R. Cas. 144.

LIBBEY, J. It is the well settled law that a servant of mature age and common intelligence, when he engages to serve a master, undertakes as between himself and master, to run all the ordinary and *apparent* risks of the service. This rule is so well and uniformly settled that no citation of authorities is needed.

There are exceptions to this general rule, but the facts averred in the plaintiff's declaration do not take the case out of it. The allegations are, in substance, that on the fifteenth day of October, 1879, he was, and for a long time prior thereto had been, in the employment of the defendants, and for three weeks prior thereto had been stationed at the transfer station near

Portland, and required to throw into the train of the defendants going east by said station, mail bags, while the train was in motion, "which service, as was well known to the defendants and not well known to the plaintiff, was a dangerous service," and on said fifteenth day of October, while in the performance of that service in carefully attempting to throw the mail bags into the mail car while the train was in motion passing said station, he was thrown down under the train and was injured.

Here are no allegations of any unusual or extraordinary occurrences on that occasion, or of any unusual danger that caused the plaintiff to fall, but at best for him his fall and injury were caused by the ordinary and apparent dangers of the service — apparent to any man of ordinary capacity for such service. True, it is alleged that the service "as was well known to the defendants and not well known to the plaintiff, was a dangerous service," but it is not alleged that the defendants did not inform the plaintiff that the service was dangerous — such an allegation is necessary to show the defendants in fault. The fact cannot be implied from the allegation that the dangers were not well known to the plaintiff. But we feel clear that in this case such an allegation would not help the plaintiff. The dangers were as apparent to the plaintiff as to the defendants. If the plaintiff did not understand them when he commenced the service, he had been performing it for three weeks, with all the dangers apparent every time he threw the bags into the car, without protest or complaint; and by so doing must be held to have taken upon himself the hazards which caused his injury. *Shanny* v. *And. Mills*, 66 Maine, 420; *Yeaton* v. *Boston & L. R. Company*, 135 Mass. 418; *Hathaway* v. *Mich. Cen. R. R. Co.* 12 A. & E. R. R. Cases, 249; Thompson on Neg. p. 976, § 7.

Exceptions sustained. Demurrer sustained. Declaration bad.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

SAMUEL F. MOSHER *vs.* JOHN VEHUE.

Franklin. Opinion March 9, 1885.

Timber cut on mortgaged premises. Replevin.

Timber trees wrongfully cut by the mortgagor, or a stranger, may be taken and held by the mortgagee, or any one claiming under him; and neither the one who cut the trees, nor one who has purchased the trees of him, can maintain replevin for them.

ON EXCEPTIONS.

Replevin for a quantity of peeled hemlock logs.

The trees were cut and peeled by the husband of the mortgagor of the land in possession, and sold to the plaintiff. The mortgagee gave no permission for cutting the timber and subsequently assigned the mortgage and mortgage debt to the defendant.

The presiding justice ruled that the assignment of the mortgage carried with it the lumber in controversy, and that this action could not be maintained and directed a verdict for the defendent.

To this ruling the plaintiff alleged exceptions.

H. L. Whitcomb, for the plaintiff contended, that the assignment of the mortgage to the defendant did not pass the title to the logs in controversy. That the mortgagee could maintain trespass against the mortgagor for the value of the trees cut or he could recover the property; and that the assignment of the mortgage took the real estate as it then existed, and did not assign any right of action for a trespass previously committed. Counsel cited: *Gore* v. *Jenness*, 19 Maine, 53; *Savings Bank* v. *Barrett*, 122 Mass. 172; *Merritt* v. *Harris*, 102 Mass, 326; *Durgin* v. *Busfield*, 114 Mass. 492.

S. Clifford Belcher, for the defendant, cited: *Hills* v. *Eliot*, 12 Mass. 26.

WALTON, J. We think the ruling in this case was correct. There can be no doubt that when timber trees are wrongfully cut

upon mortgaged premises by the mortgagor or a stranger, without the consent of the mortgagee, the latter is entitled to take and hold possession of them. And we think it is equally clear that if the mortgagee assigns his mortgage, the assignee has the same right in this particular which the mortgagee before had; and that, as against the mortgagee or his assignee, neither the wrong doer, nor a purchaser from him, can maintain replevin for timber so cut. Such in effect was the ruling in this case. We think the ruling was correct. *Smith* v. *Goodwin*, 2 Maine, 173; *Gore* v. *Jenness*, 19 Maine, 53; *Page* v. *Robinson*, 10 Cush. 99.

Exceptions overruled. Judgment on the verdict.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

HERBERT BLAKE *vs.* A. E. WING.

Kennebec. Opinion March 12, 1885.

Writs returnable at superior court. R. S., c. 77, § 69.

A writ dated August 22, 1883, was made returnable at the February term, 1884, of the superior court, Kennebec county. *Held*, that it should have been made returnable at the September or December terms, 1883, of that court, under R. S., c. 77, § 69.

ON EXCEPTIONS from superior court.

Debt to recover from the defendant a penalty of five hundred dollars for his failure to publish the statement required of him as treasurer of Oakland Manufacturing Company by the provisions of R. S., 1871, c. 48, § 8.

The opinion states the facts.

J. H. Potter, for the plaintiff.

A. C. Stilphen, for the defendant.

PER CURIAM. By the act of 1878, c. 10, § 6, now R. S., c. 77, § 69, "actions (in the superior court for Kennebec county) shall

be made returnable at one of the next two terms, begun and held after the commencement thereof." This action was commenced August 22, 1883. The next two terms of the superior court thereafter were begun and held in September and December, 1883. The action should have been made returnable at one of those two terms. It was made returnable to the February term, 1884. This was against the command of the statute, and the action should have been dismissed according to defendant's motion filed on the first day of the return term.

Exceptions sustained. Action to be dismissed.

JAMES LOW, in equity, *vs.* FRANCIS LOW and others.

Kennebec. Opinion March 17, 1885.

Will. Legacy. Conditions.

Where a testatrix in her will gave to a son one undivided tenth of her estate with this provision, "the same to be endorsed on a note given by him to my daughter Emily aforesaid, in the year 1878." *Held*, that it was the duty of the executor to appropriate the legacy to the payment of such note, and pay the residue only, if any, to the legatee.

ON APPEAL.

Bill of interpleader by the executor of the will of Mary Jane Low of Clinton against Francis Low, James W. Sylvester and Emily L. Chase, to obtain the instruction of the court to whom he shall pay the legacy and bequest to said Francis Low. James W. Sylvester claimed it by virtue of an assignment from the legatee dated December 20th, 1881, and he and Emily L. Chase, had each demanded of the executor the amount of the legacy.

Francis Low and James W. Sylvester, on the one side, and Emily L. Chase, on the other, were ordered and decreed to interplead, and thereupon filed their several pleas claiming the fund. The case was heard on the pleadings and proof; and a decree was entered by the court in favor of Low and Sylvester. From this decree Emily L. Chase appealed to the law court.

Other material facts stated in the opinion.

Edmund F. Webb and *Appleton Webb*, for Emily L. Chase, appellant, cited: *Swasey* v. *American Bible Soc.* 57 Maine, 524; *Tappan* v. *Deblois*, 45 Maine, 122; *Nason* v. *First Church*, 66 Maine, 105; *Richardson* v. *Knight*, 69 Maine, 288; *Pettingill* v. *Pettingill*, 60 Maine, 412; *Nutter* v. *Vickery*, 64 Maine, 490; *Paul* v. *Compton*, 8 Ves. 379; *Dashwood* v. *Peyton*, 18 Ves. 41; 2 Pomeroy's Eq. § § 1014, 1013, 1048, 1051, 1058, 1080; 1 Perry, Trusts, § § 112, 223; *Harding* v. *Glyn*, 1 Atkyns, 469; *Pushman* v. *Filliter*, 3 Ves. 9; *Brunson* v. *Hunter*, 2 Hill, Ch. (S. C.) 490; *McRee* v. *Means*, 34 Ala. 349; *Dresser* v. *Dresser*, 46 Maine, 48; *Erickson Willard*, 1 N. H. 217; *Cruwys* v. *Colman*, 9 Ves. 320; *Rogers* v. *Jones*, 8 N. H. 264; *Farnsworth* v. *Childs*, 4 Mass. 637.

Brown and Carver, for appellees.

It will be noticed that this note has matured into a judgment and it is therefore *functus officio*. Hence the language of the will cannot be complied with and produce any good. It would be an idle ceremony to indorse said legacy upon a note which has passed into a judgment. Another suggestion,— in appellant's name a suit was brought on this note against Francis Low in which James was summoned as trustee. The theory then was that James held this legacy as belonging to Francis and not to her. Did she not waive her right to this fund under the will by bringing that suit?

Now as to the construction of the bequest. To give anything to a person *ex vi terimini* carries with it the right to have and enjoy it. To hold an object of gift up before a person and say, "I give this to you," and then inform that person that he cannot have or enjoy it, but that it shall be received and enjoyed exclusively by another cannot be called a gift. A gift must contemplate some enjoyment of the subject of the gift by the donee.

Hence if his mother intended to make Francis a gift of any portion of her estate, she intended that he should receive and enjoy it. She could not have intended to tantalize him. The only purpose of testatrix by the provision to endorse the same on the note was to suggest to the legatee the use to which she desired he should put the legacy. If she intended it as

mandatory on the legatee she would have made use of apt words to make her intention plainer. 4 Kent's Com. 145.

If intended to be mandatory it would be repugnant to the gift and void. *Blackstone Bank* v. *Davis*, 21 Pick. 42; *Gleason* v. *Fayerweather*, 4 Gray, 348; 2 Dane's Abr. 22; 5 Ves. 460; 10 Ves. 265; 1 Ves. 286; 3 Ves. 324; 4 Kent, Com. 131–143; 4 Simons, 141; Coke on Lit. 227 *a*; 18 Ves. 56; 1 Denio, 450; Bacon's Abr. Tit. "Conditions;" 4 Sandf. 36; 2 Ohio, 380; 38 Maine, 18; 2 Redf. Wills, 228 and notes; 29 Mich. 82; 2 East. 147.

EMERY, J. In order to ascertain what a testator intended by any clause in his will, courts will place themselves so far as practicable, in his position, and look at matters as they appeared to him. They will endeavor to discern his probable motives, objects and desires, and so ascertain what he was thinking to effectuate by his will. His leading purpose, as indicated by his words construed with reference to all the attending circumstances, is to have sway unless some rule of law forbids.

Without giving our analysis of the testimony which is rarely advisable in a judicial opinion, we gather from the testimony and the will, the following facts. The testatrix and her husband had four children. One of these, Francis Low, Jr. was something of a spendthrift, and was in a chronic state of indebtedness. He had received many advances from his father, amounting, according to his written acknowledgment to at least fifteen thousand dollars. In 1878 he applied to his father for a gift of five hundred dollars, but was refused on the ground he already had more than his share. His sister Emily then loaned him five hundred dollars and took his note therefor. Francis claims the money really came from his father, and was not Emily's, but we regard this as immaterial. He received five hundred dollars, and gave his note for it. It was a debt he owed, and was represented by that note, no matter who was the real creditor. In 1879, the father bought his peace of Francis and took a sealed release of all claims upon his estate. We think the above facts were known to the testatrix, when she made her will in February, 1880, and

that the five hundred dollar note appeared to her as a debt due to Emily from Francis. The father died May, 1881.

In her will the testatrix, Mary Jane Low, of Clinton, gave to her "beloved son, George Low," five-tenths of her estate; to her "beloved son, James Low," two undivided tenths; to her "beloved daughter, Emily Chase," two undivided tenths, and to her "beloved son, Francis Low, Jr. of Clinton, aforesaid, one undivided tenth of my estate, the same to be endorsed on a note given by him to my daughter Emily, aforesaid, in the year 1878." This one-tenth, as the bill alleges, amounted to about five hundred dollars, the face of the note. She gave nine-tenths to the other three children, two of them residing in distant states. She gave only one-tenth to Francis who lived in the same town with her, and whose natural share would have been more than twice as much. She gave the nine-tenths absolutely. She gave the one-tenth for a specific purpose, to be endorsed on a note given by the legatee. She evidently thought, from past experience, it would be of little use to leave any property to Francis. It would soon be spent or taken by his creditors. She wanted the debt to her daughter to be paid however. That was her leading purpose. A subsidiary purpose was to give Francis the benefit of the surplus, if any.

It is the duty of the executor to effectuate that purpose. The executor is not only to administer the estate, but to execute the will of the deceased, when that will is ascertained. Were the devise to Francis, with the added direction that the amount be paid into a bank to his credit, the executor could pay it into the bank and thereby discharge himself. Were there a similar devise with the added direction that the amount be converted into U. S. bonds, the executor could so do. Here the command is that the amount be paid on the note — that is, paid to the holder of the debt to the credit of Francis. That would be a payment to Francis. He would have the benefit of it. It would be a meritorious disposition, and the disposition intended by the testatrix.

We know no rule of law that forbids the executor to carry out this purpose of the testatrix. The counsel for Francis contends

that the devise is in fee and that any limitation is void. It is true that a proviso that the property shall not be aliened, or shall not be liable for the devisee's debts, has been often held void, as inconsistent and contrary to public policy. Here there is no such restraint. The devise is not unconditional in the first instance, with a subsequent illegal restriction. The testatrix has not undertaken to tie up the property from alienation, nor to devote it to any illegal purpose. The authorities cited do not apply.

There are more than precatory words in the devise, though such words from one having power to command what shall be done with his property, amount to a command that should be obeyed. *Dashwood* v. *Peyton*, 18 Ves. 41; *Pushman* v. *Filliter*, 3 Ves. 8. In *Erickson* v. *Willard*, 1 N. H. 217, there was a devise of all the estate in fee to J. W., the executor, with this clause, "I desire that the said J. W. should, at his discretion, appropriate a part of my estate aforesaid, not exceeding fifty dollars a year, to the support of the widow, M. E.," &c. Assumpsit was brought against the legatee, who was also executor, and recovery was had upon the ground there was a trust for M. E.

Our conclusion in this case is, that the amount of the note should be paid by the executor to the owner of the note, or the judgment recovered thereon, that being the intent of the testatrix. The costs in the suit on the note have been added since the death and are not to be paid by the executor. The balance of the one-tenth, if any, is to be paid to Sylvester, the assignee, who can stand no better than his assignor. The complainant's costs are to be paid out of the estate of the testatrix.

Decree of interpleader affirmed. Decree in favor of Sylvester reversed. Decree to be made in accordance with this opinion.

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

ABBY C. PHILBROOK *vs.* HIRAM CLARK.

Kennebec. Opinion March 17, 1885.

Mortgage debt. Presumption of payment.

The presumption of payment of a mortgage debt, arising from the possession of the mortgaged premises by the mortgagor, or his assigns, for more than twenty years after the maturity of the debt, may be rebutted.

Where the holder of the mortgage permitted his mother, who was the mortgagor, and his sister, to whom the mother conveyed the equity, to occupy the premises for more than twenty years, and he testified without contradiction that the mortgage debt had not been paid, and that he permitted such occupancy by his mother and sister because of the relationship. *Held*, that the proof to rebut the presumption of payment was ample and explicit.

ON REPORT.

An action to foreclose a mortgage on a lot of land in Augusta.

W. P. Young, for the plaintiff.

S. and L. Titcomb, for the defendant.

EMERY, J. The demandant's title is based on the mortgage from Sarah Ladd to Nathan Weston, dated October 18, 1858, to secure two notes of the same date, on one and two years respectively. The tenant claims the mortgage debt is paid and relies upon the presumption of payment, arising from the lapse of more than twenty years from the maturity of the mortgage, to wit. October 18, 1860, the writ being dated September 27, 1883. The demandant offered evidence to rebut the presumption and claims that it is rebutted.

The demandant was assignee of the mortgage, through mesne assignments, and he put in evidence, the mortgage and both notes secured thereby. George W. Ladd, a son of the mortgagor, testified that he bought the mortgage of Weston, August 29, 1862, and held the mortgage and notes as his own till he assigned them to his nephew in 1877, that he then held them for his nephew till 1879, when they were assigned to the demandant, his daughter, that he has been his daughter's agent,

and as such kept the mortgage and notes till produced at the trial, that nothing has ever been paid on the notes, that his mother lived on the premises till her death in 1874 or 1875, and after her death his sister Mary lived on them, that he permitted them so to do because they were his mother and sister. The tenant claims under Mary. This testimony is uncontradicted, and there was no other material testimony on this point. One ground of presumption of payment growing out of lapse of time, is that a man is always ready to enjoy his own. Whatever will repel this, will take away the presumption of payment, and for this purpose it has been held sufficient, that the party was insolvent, or a near relation. *Wanamaker* v. *Buskirk*, Saxton, (N. J.) 685; 23 Am. Dec. 755. Here the holder of the mortgage from 1862, was the son of the mortgagor and the brother of Mary. The son seems to have had control of the matter, and he says the mortgage has not been paid, and that he permitted his mother and sister to occupy the homestead without enforcing payment. The proof to rebut the presumption should always be ample and explicit. We think it is so in this case.

The tax title is not valid. The tax was assessed to "Estate of Sarah Ladd." *Fairfield* v. *Woodman*, 76 Maine, 549. Indeed the claim by tax title is not insisted on.

Judgment for demandant.

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

INHABITANTS OF BRIGHTON *vs.* INHABITANTS OF ST. ALBANS.

Somerset. Opinion March 17, 1885.

Evidence. Paupers.

A casual remark, or expression of opinion of an overseer of the poor, not connected directly with some official act, is not admissible evidence against his town, upon the question of a pauper settlement.

ON EXCEPTIONS.

Assumpsit for supplies furnished one Joseph Cooley as a pauper. The only question was the settlement of the pauper.

At the trial Levi E. Judkins, a witness for the plaintiffs, testified that he was one of the overseers of the poor of Cornville in 1869, and he met John L. Field, one of the overseers of St. Albans, at a county convention held at Skowhegan, in the summer of 1869, and complained to him of Lothrop's (chairman of the overseers of St. Albans) treatment of him in the matter of the supplies to Cooley, and complained that Lothrop refused to give him any receipt for such supplies; that Field replied "it was all right, that they were in hopes to get rid of Cooley sometime." To the admission of this testimony as well as to other rulings which it is not necessary to state, the defendants alleged exceptions.

Walton and Walton, for the plaintiffs, cited: *Weld* v. *Farmington*, 68 Maine, 301; *Norridgewock* v. *Madison*, 70 Maine, 174.

D. D. Stewart, for the defendants, cited: *Corinna* v. *Exeter*, 13 Maine, 321; *Fairfield* v. *Oldtown*, 73 Maine, 573; *New Bedford* v. *Taunton*, 9 Allen, 207.

EMERY, J. The act of Sullivan Lothrop, one of the overseers of the poor of St. Albans, in paying, or allowing to Cornville a bill for supplies furnished the pauper, assuming him to have been acting for the board, was properly admitted as evidence tending to show the pauper's settlement in St. Albans, though it was by no means conclusive. *Weld* v. *Farmington*, 68 Maine, 301; *Fairfield* v. *Oldtown*, 73 Maine, 573. But the casual remark of John L. Field, another overseer of the poor of St. Albans, unconnected with any act, is not within the principle of those cases. It is the acts, and not the words of the overseers, that are evidence. Their words are only admissible evidence, when accompanying their acts, and as part of their acts. *Corinna* v. *Exeter*, 13 Maine, 321. The letter which was admitted in *Fairfield* v. *Oldtown*, *supra*, was written in the course of official correspondence. Its statements were *res gestae* made while transacting official business and as part of the business. It was in the nature of a document.

In the case before us there was no talk with Field about official business. The meeting with him was casual in a distant town. Judkins did not accost him to talk about the business. He only complained of Lothrop's treatment of him, and of the refusal to give him a receipt. He did not ask anything of Field. Field did not assume to do anything. The business had been done. He only answered Judkin's remark about his treatment. He said "it (the treatment, the not giving the receipt) was all right, that they were in hopes of getting rid of Cooley sometime." This was the merest casual remark, unofficial, and unconnected with any act. It was simple opinion, and hearsay at that. No authority has been cited for its admissibility, and we think its admission was an error, harmful to the defendant town of St. Albans.

Exceptions sustained.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

JAMES WRIGHT

vs.

COLUMBIA HUNTRESS and J. F. HOLMAN, trustee.

Somerset. Opinion March 17, 1885.

Trustee process. Insolvent law.

An assignment by the judge of the court of insolvency, of the insolvent debtor's property to the assignee, dissolves all attachments made within four months prior to the commencement of insolvent proceedings, even though the property would not come to the assignee in insolvency, and the proceedings were instigated by an adverse claimant for the express purpose of dissolving the attachment.

ON REPORT as to the liability of trustee.

The opinion states the material facts.

James Wright, for the plaintiff.

S. S. Brown, for the trustee.

EMERY, J. The attachment by this trustee process was made August 13, 1881. The defendant filed his petition to be ad-

judged an insolvent, October 4, 1881. He was adjudged an insolvent. An assignee was appointed, and a deed of assignment to him in due form according to § 68 of the insolvent law, now R. S., c. 70, § 33, was made by the judge, November 1, 1881. By the express provision of that section, such an assignment dissolved any attachment made within four months before the commencement of the proceedings, and of course dissolved an attachment made August 13, 1881. Attachment by trustee process is dissolved as well as any other. *Wilmarth* v. *Richmond*, 11 Cush. 463. The fact that the property attached would not, upon dissolution of the attachment, pass to the assignee, but to some adverse claimant, will not save the attachment. *Grant* v. *Lyman*, 4 Met. 470.

The plaintiff urges that the insolvency proceedings were instigated by the trustee, and were begun for the express purpose of depriving him of his attachment, and so are void as to him, on the ground of fraud. Whatever the motive, the proceedings will have the same effect. Insolvency proceedings are usually begun for the express purpose of dissolving attachments. Indeed, that was the purpose of the insolvent law, to break up attachments and other liens, and secure equal distribution.

Trustee discharged.

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

SAMUEL WEBB *vs.* COUNTY COMMISSIONERS.

Waldo. Opinion March 17, 1885.

Ways. Increase of damages. Report of committee. R. S., 1871, c. 18, § 8.

The committee appointed under R. S., 1871, c. 18, § 8, to appraise damages in case of location of ways are not required to make their report at the first term of the Supreme Judicial Court next after appointment.

The report may be presented to the court when it is finally completed.

ON EXCEPTIONS.

Petition for increase of damages for land taken for a highway, located by county commissioners, filed at the December term, 1882.

At the April term, 1883, of the commissioners, a committee of three was agreed upon and a warrant was issued to them. At the October term, 1883, of the Supreme Judicial Court, a return was filed with the clerk, signed by two of the committee. The return remained in the hands of the clerk, signed by but two of that committee, until the April term, 1884.

At that term, the presiding judge, against the respondents' objections, allowed the other member of the committee to sign the return. After the return had been signed by the third member of the committee, the case was entered upon the docket, and the presiding judge ordered the report accepted.

To the ruling allowing the return to be signed by the third member of the committee, and to the acceptance of the return by the presiding judge, the respondents alleged exceptions.

Philo Hersey, for the plaintiff.

Wm. H. Fogler and *George E. Wallace*, for the defendants.

No report having been filed at the October term, 1883, the court at that term, or at any subsequent term, should have ordered the appeal dismissed.

A report filed at a subsequent term is void and cannot be accepted. *Belfast* v. *Co. Com.* 53 Maine, 431; *Windham, Pet'rs*, 32 Maine, 452.

"The legislature has not seen fit to make the prompt decision of these appeals in any manner dependent upon the caprice, carelessness or procrastinating disposition" of any committee or party. The court has no authority to depart from the express provisions of the statute, to give effect to unauthorized proceedings. *French* v. *Co. Com.* 64 Maine, 583.

EMERY, J. The question is whether the committee agreed upon under R. S., 1871, c. 18, § 8, upon petition for increase of damages for land taken for roads, must make their report to this court at the term next after their appointment, or at the term next after their final decision. By § 13 of the same chapter, the jury, (if no committee was agreed upon) were to view the premises, hear the testimony and the arguments of the

parties and their counsel, and render a verdict signed by all of them, which was to be enclosed in an envelope with an endorsement thereon stating the contents, and delivered to the officer having charge of them, "who is to return it to the Supreme Judicial Court at the next term thereof to be held in the same county." The officer clearly was to return it to the next term after he received it, and the term meant is the term next after the verdict is signed and sealed up.

After detailing what is to be done with the verdict in court after it is returned, the same section provides, "If the matter is determined by a committee, as provided in this chapter, their report shall be made to the next term of said court held in the same county." The committee's report was to be made no earlier than the jury's verdict was to be returned. We think the language of the statute does not require either to be done at the first term after the appointment.

In the matter of a committee appointed by the Supreme Judicial Court in road cases, under § 38, the legislature expressly stipulated in words that the report should be made "at the next or second term after their appointment." In providing, in the same chapter, for the report of the committee appointed by the court of county commissioners, the words "after their appointment" are omitted. The difference in the language is noticeable, and we think there is an equal difference in the intent.

Exceptions overruled.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

GARDNER F. DANFORTH *vs.* RUEL S. CUSHING.

Penobscot. Opinion March 17, 1875.

Deceit. Fraudulent representation. Action.

An action for deceit is not maintainable without proof of some actual loss resulting from the deceit.

A representation that the plaintiff was to have the same right in a store that a prior tenant had enjoyed, the prior tenant having occupied the store for

years under an oral letting, is simply a representation that the plaintiff was to have a tenancy at will; and the fact, that the owner ejected him after thirty days notice, gives him no right of action against the party making the representation.

ON REPORT.

Action for deceit. The opinion states the material facts.

H. L. Mitchell, for the plaintiff, cited: *Nowlan* v. *Cain*, 3 Allen, 261; *Watson* v. *Poulson*, 7 Eng. L. & Eq. 585; *White* v. *Merritt*, 3 Seld. 352; *Lewis* v. *Eagle Ins. Co.* 10 Gray, 512; *Sharp* v. *Mayor*, 40 Barb. 256; *Milne* v. *Norwood*, 28 Eng. L. & Eq. 373; *Weatherford* v. *Fishback*, 3 Sum. 170; *Pasley* v. *Freeman*, 3 T. R. 51; *Phillips* v. *Bush*, 15 Iowa, 64; *Randall* v. *Trim*, 37 Eng. L. & Eq. 275; *Wright* v. *Roach*, 57 Maine, 600.

Barker, Vose and Barker, for the defendant.

EMERY, J. The evidence put in by the plaintiff makes out a case briefly stated as follows: For years prior to April, 1881, Daniel White had been carrying on a jewelry and fancy goods business, as tenant at will only, in a store owned by Hollis Bowman. Cushing, the defendant, had a small business in the same store, as tenant under White. In March, 1881, Cushing asked Danforth, the plaintiff, to help him buy out White, telling him it was a grand good place for business, and they could make some money there. They agreed with White to buy him out at an appraisal. It was first proposed to take the business as partners, but at the time of the purchase, they made a division of the store, and the goods for a separate business. When they came to the point of the payment to White, Danforth wanted the lease of the store made certain, and proposed to go to Bowman for a lease. Cushing told him, Bowman would not give a written lease, but that he had seen Bowman and Bowman had agreed they should have the same rights there as White. White, upon being appealed to said all the occupants in the block owned by Bowman were tenants at will only, and that Bowman's word was as good as a written lease. Thereupon, Danforth relying upon Cushing's assurance, that the matter of the lease was fixed all

right, paid over his money, and took his share of the goods. Danforth understood as Cushing knew, that Cushing had spoken to Bowman in behalf of the two, and that they were to be tenants in common to Bowman. In fact, however, Cushing had only spoken for himself, and intended that Danforth should be his tenant. Cushing and Danforth took possession of their respective portions of the store about April 1. Soon trouble arose, and Danforth applied to Bowman for a lease to him, or to him and Cushing and was refused. Cushing verbally requested Danforth to leave, but Danforth refused to go. July 1, following, Cushing procured Bowman to give his father, James N. Cushing, a written lease till April 1, 1882. Proceedings were then begun in the name of James, but for the benefit of defendant, to eject Danforth which failed (76 Maine, 114). Danforth remained in the store a little over a year, when he was put out by an officer on a writ of possession in favor of Bowman, against James N. Cushing. Danforth offered to pay rent to Bowman who refused to receive it, as he looked to Cushing only. Danforth refused to pay Cushing after the first month, and has not paid any rent since. Danforth's business was broken up, and he became insolvent immediately after the ejectment. The defendant's evidence made out an entirely different case, but we have need only to consider the plaintiff's case.

The action is deceit, and the deceit mainly alleged, and relied upon is the representation by Cushing that he had arranged with Bowman for the two to have the same rights as White, to wit. those of a tenant at will, whereas he had only arranged for himself to have those rights. The representation in legal effect was as to what estate in the store, Danforth was to have.

All the estate the plaintiff would have acquired had the representation been true, was a tenancy at will, and he did obtain a tenancy at will as it was. Upon the facts, as claimed by the plaintiff, Cushing was a trustee of the estate for the plaintiff. He held the tenancy in trust for the plaintiff as well as himself. He was estopped from denying plaintiff's tenancy. *Cushing* v. *Danforth*, 76 Maine, 114. The plaintiff's estate was of the same legal value, whether he held directly of Bowman, or inter-

mediately through Cushing, trustee. The extent of that estate in either or any event, was thirty days. Had the representation been true, the plaintiff would have had no legal assurance of anything more. Bowman might have changed his mind at any time. The plaintiff, in fact, had the use of the store for a year after the first month, without paying any rent, and was finally ejected by Bowman. He certainly obtained all he could have recovered in law, had the representation been true. He therefore suffered from the misrepresentation no such loss as the law can weigh, and hence cannot maintain this action of deceit therefor. *Pasley* v. *Freeman*, 3 T. R. 51. If the after misfortunes of the plaintiff were the direct result of his ejectment by Bowman, they were very remote from the misrepresentation of Cushing, made over a year before. Bowman had a right to eject the plaintiff upon a proper process, had the representation been true. The truth or falsity of that representation did not affect Bowman's nor the plaintiff's legal rights in the store. That Cushing induced Bowman to eject the plaintiff does not save this action, which is only for the original deceit. If that ejectment was illegal, the plaintiff must resort to other remedies, and he has already sued the officer therefor. *Danforth* v. *Stratton*, 77 Maine, 200.

The business proved unprofitable, but we do not understand the plaintiff's counsel to claim that Cushing's statements, that the business could be bought at a bargain; that it was a good place for business; that money could be made there, are actionable. These were Cushing's opinions only, and Danforth could have seen White's books, the case shows, and examined for himself. *Martin* v. *Jordan*, 60 Maine, 532; *Farrell* v. *Lovett*, 68 Maine, 326.

Plaintiff nonsuit.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

SAMUEL W. LUQUES and others, executors,

vs.

INHABITANTS OF DRESDEN and others.

Kennebec. Opinion March 17, 1885.

Wills. Devise.

A will contained a devise in these words: "Item. I give, bequeath, and devise unto the town of Dresden, in the county of Lincoln, to have and to hold forever in trust, and upon the conditions hereinafter stated, all my real estate, situated in said town of Dresden, and all my meeting house property in said town owned by me; also in addition to the above the sum of five thousand dollars ($5000), provided that the said town of Dresden shall create and establish a fund of three thousand dollars ($3000), to be known as the Lithgow Pine Grove Cemetery Fund, to be kept in trust, and held in trust by said town. The interest of which shall be paid annually to the owners or proprietors of such cemetery forever, to be by them applied to keeping the same in good order and condition, with a good fence around the whole lot. Provided further, also, that twelve dollars ($12) of said interest shall be expended annually for the purpose of decorating with flowers, &c. for putting and keeping in perfect order and condition forever, the small lot owned and occupied by my brother, Alfred G. Lithgow, and myself in said cemetery. This legacy and devise, if accepted by said town of Dresden, upon the conditions aforesaid, a copy of the vote of acceptance shall be filed with my executors, on or before two years from the time of my decease. Should any one of the aforesaid devisees or legatees refuse to accept the devised estate upon the conditions named in said devise, then such part together with the remainder of my estate, I then give, bequeath and devise one-half to the said town of Dresden, and the remaining half to the city of Augusta. *Held:*

1. That the testator intended to establish a fund of eight thousand dollars and the real estate given, the income of which was to be appropriated to the use of the cemetery named.

2. That the rejection of the real estate by the town of Dresden was a rejection of the whole devise.

3. That the condition was one which could not legally have been performed, for a town cannot, at its own expense, raise a fund even in part, the income of which is to be appropriated as a gratuity to individuals, or a private corporation.

4. The amount of this devise falls into the residuum which is to be equally divided between the city of Augusta and town of Dresden.

5. The residuary legatees take the real estate as tenants in common and the personal property in severalty.

Bill in equity by the executors of the will of Llewellyn Lithgow, late of Augusta, to obtain a construction of the will.

S. W. Luques and *S. and L. Titcomb*, for the executors, contended that the town of Dresden had failed to accept the devise for the benefit of the cemetery upon the conditions named, and that, therefore, that devise, together with the residuum of the estate, remained undisposed of by the will.

For the residuary clause was contingent upon the rejection by some legatee of a provision in his favor, and there has been no refusal to accept, in the sense in which those words are used in the residuary clause. Therefore the devise and legacy to Dresden, together with the residuary of the estate, belongs to the estate of Alfred G. Lithgow, a brother who survived the testator and was his sole heir, and should be paid to the executor of the Alfred G. Lithgow estate, and be by him passed over to Pauline C. Lithgow, as residuary legatee under the will of Alfred G. Lithgow.

J. W. Spaulding and *F. J. Buker*, for the inhabitants of Dresden.

W. S. Choate, city solicitor, and *E. S. Fogg*, city solictor, for the city of Augusta.

J. W. Bradbury, for the trustees of the Lithgow library and reading room.

As the library has a substantial interest in the questions arising in this case, under an authorized arrangement, by which it is to be the recipient of such sums as shall be found coming to Augusta under the residuary clause, I take the liberty in its behalf to submit the following brief suggestions for the consideration of the court:

I. The will of Mr. Lithgow discloses the intention to dispose of his entire property, and to make Augusta and Dresden his residuary legatees.

He first provides for his wife and brother and other relatives of the family, and then manifestly intends that all the residue of his property shall go to Dresden, the place of his birth, and Augusta, where he had spent the larger portion of his active life and accumulated the most of his estate.

He first makes to these towns certain specific bequests, and then constitutes them his residuary legatees. In making these bequests, it was his desire that a portion of them should be applied to certain cherished objects. He wished that a public library and reading room should be established in Augusta, on such solid basis as would make it a permanent memorial to his memory and a blessing to the citizens; and that the cemetery in Dresden, where his ancestors reposed and where he expected to lie, should be cared for and kept in order through all coming time. These were objects worthy of the man and are entitled to be respected. To secure these cherished objects, the will provides in effect a penalty in case of refusal to comply with the prescribed conditions, that either town so refusing shall forfeit the full benefit of such legacy, and only receive a moiety thereof as one of the residuary legatees. The testator undoubtedly believed that this penalty would secure the accomplishment of his purpose.

II. No refusal to comply with any of these conditions was necessary to make the towns residuary legatees. They are made such unconditionally. It would be an unreasonable and unwarrantable construction of the will to hold that the rejection of some of the specific bequests was necessary to entitle the towns to the residuary property. It would be to hold that the intended legatees must refuse to comply with the expressed wish of the testator to entitle them to his bounty; and that if they did comply, he would cut them off. It would be making him say to them: If you carry out my desires, you shall not be my residuary legatees; but if you will thwart them you shall. There is nothing in the language of the will that forces such an unreasonable constructioa.

The residuary clause reads thus: "Should any one of the aforesaid devisees or legatees refuse to accept the devised estate upon the conditions named in the devise, then such parts, together with the remainder of my estate, I give, bequeath and devise one-half to the said town of Dresden, and the remaining half to the city of Augusta."

To transpose the sentence, or to supply the ellipsis, would give the intention of the testator more clearly; yet it is sufficiently apparent that it was his purpose to add any rejected devise to the residuary fund, and that this, constituting the remainder of his estate, was to go to Dresden and Augusta as his residuary legatees. As a careful consideration of the language and manifest purpose of the will, cannot fail, it is believed, to lead to the above conclusion, I do not think it necessary to elaborate the points to which I have thus briefly alluded.

III. The bequest is of the "remainder of the estate," embracing real and personal property without distinction. It is not a devise of a specified parcel of land, half to A and half to B, but of many unspecified parcels, together with the residue of the personal property; and there would seem to be a propriety, as well as a convenience, if the executors could sell the real estate and make division of the proceeds, with the personal property, according to the will. They are in all respects well adapted to the successful discharge of such duty, and it would be agreeable to those I represent, to have them do it, if the court shall feel authorized to give such constructions to the law. R. S., c. 68, § § 11, 14.

DANFORTH, J. The answers to the first three questions propounded in this bill, depend upon the construction of the item in the will which is as follows: "I give, bequeath and devise unto the town of Dresden, in the county of Lincoln, to have and to hold forever in trust, and upon the conditions hereafter stated, all my real estate situated in the town of Dresden, and all meeting house property in said town owned by me. Also in addition to the above, the sum of five thousand dollars, provided that the said town of Dresden shall create and establish a fund of three thousand dollars, to be known as the Lithgow Pine Grove cemetery fund, to be kept in trust, and held (in trust) by said town, the interest of which shall be paid annually to the owners or proprietors of said cemetery forever, to be by them applied to keeping the same in good order and condition, with a good fence around the whole lot. Provided further, also that

twelve dollars of said interest shall be expended annually, for the purpose of decorating with flowers, &c., for putting and for keeping in perfect order and condition forever, the small lot owned and occupied by my brother, Alfred G. Lithgow, and myself, in said cemetery. This legacy and devise, if accepted by said town of Dresden, upon the conditions aforesaid, a copy of the vote of acceptance shall be filed with my executors, on or before two years from the time of my decease." A further provision is that "should any one of the aforesaid devisees or legatees refuse to accept the devised estate upon the conditions named in said devise, then such parts, together with the remainder of my estate, I then give, bequeath and devise one-half to the said town of Dresden, and the remaining half to the city of Augusta."

That the testator intended by the above named legacy and devise, to secure the establishment of a fund, the income of which was to be appropriated to the repair of Pine Grove cemetery, is clearly enough expressed; the amount of that fund is left in uncertainty. On the one hand, it is claimed that it was to be the real estate with the five thousand and three thousand dollars, and on the other, that it was but three thousand dollars. There are serious difficulties in either view. If the former is correct, then the town has rejected the legacy. The acceptance of the "legacy and devise" in the manner designated in the will, is a condition precedent, without the performance of which, the town would not be entitled to receive it. There was an attempted performance, but the vote of the town filed distinctly rejected the "devise" of real estate. If that constituted a part of the fund from which the income was to come, whether much or little, it was a virtual rejection of the legacy given. It certainly was not an acceptance as required by the condition. The town could not elect a part to accept and a part to reject, but must treat it as a whole. This might be doubtful perhaps, if the real estate was not a part of the fund, for in that case its rejection would not diminish the income, and the testator, or his intended beneficiaries would have no cause of complaint.

Was it then a part of the legacy given to the town upon the condition named? In other words did the testator intend that

the land and five thousand dollars should be a part of the fund to be established to which the three thousand dollars were to be added by the town, or was the three thousand to be the whole fund which the town might establish from the five thousand dollars and the land? The latter view is clearly sustained by the language used in the will in the immediate connection with the establishment of the fund. But the whole item in the will must be taken together. The land and the money must be treated as one, as given upon the same trust and the same conditions. Both were given in trust and both upon a condition. That trust was to continue forever. This was recognized by the town for it was on that ground that the land was rejected, that the trust imposed burdens too heavy to be borne. Hence the land would be inalienable, the money must be kept for all time. Whatever is to be done with the income the town could receive no benefit from it, for that which is given in trust is not for the use of the trustee but for that of the *cestui que trust*, and here no *cestui que trust* is named except the cemetery. It could not therefore have been given to operate as an inducement, upon the town to create or establish a fund of three thousand dollars, for that which produces no benefit can be no inducement. Besides no apt words to show such an intention on the part of the testator are used. To enable that inference to be drawn there must be something to show that the trust as to the legacy must cease when the fund was established.

The language used imposing the burden upon the town tends to the same conclusion. It is that the town shall "create and establish a fund of three thousand dollars to be known," &c. If the fund was to be taken from the legacy it would be the creation of the legacy rather than that of the town. Certainly the town could in no proper sense be said to have created and established a fund which was given to it by another.

It is true that with this construction of the will the legacy was one which the town could not legally accept and perform the condition attached.

It will be noticed that the income of the fund is to be "paid to the owners or proprietors of said cemetery." Hence we must

infer, and this inference is confirmed by the answer of the town, that the cemetery is not the property of the town, but of individuals, or a private corporation. Although a cemetery may be one of those things which a town may provide at its own expense, it cannot for that purpose make an assessment for the benefit of one over which it has no control and which operates as a gratuity for the benefit of individuals who may or may not be inhabitants of the town. So too, while the statute R. S., c. 15, § 14, authorizes a town to accept and hold forever a legacy for the benefit of any burial lot or ground, it does not authorize the town to create a fund or a part of a fund for any such purpose.

It may seem incredible that any person of so much intelligence, as was the testator in this case, should have made a legacy, not only with conditions which could not legally be complied with, but also such, as in this case, to make it more profitable for the legatee to reject than to accept, and thereby hold out a strong temptation to the legatee to thwart his intention by a refusal to accept. But we are not to construe this, or any other written instrument, in accordance with what we might think it proper to be done, but the intention must be learned from the language used, and if we are to give this will any other construction than that above indicated, we must omit words that are used and insert others of a very different import. If the testator had intended that the three thousand dollars was to be taken from the five thousand dollars and be the limit of the fund in amount, it would certainly have been easy to have used apt words to express that intention. But he has not done so, and we cannot disregard the language used, and impute to him an intention he has not expressed.

It is, however, creditable to the town that at the risk of a considerable pecuniary sacrifice it has made all the efforts possible to accept the legacy, and carry out the known wishes of the testator so far as the law will allow.

Under this conclusion that the town has rejected a legacy which it could not legally accept, the next question is what is to be done with the property so devised? Upon this point we find no difficulty. The legacy having failed, whether from rejection or illegality is immaterial, the property so devised falls into the

residuum. It is clear that the testator intended to dispose of all his property by his will, and that which failed of disposition in any other item must, of necessity be included in the residuary clause.

That the residuary devise does not depend upon the acceptance or rejection of any legacy is apparent from the reading of the will. That condition applies only to the legacy rejected, and settles the question as to whether that shall go into the residuum. While, therefore, it may affect the amount disposed of by the residuary devise, it does not affect the validity or force of that devise. The result is, that the city of Augusta and the town of Dresden are the residuary legatees under the will, and are entitled to all the residue including the devise and legacy referred to in the first three questions.

As we find no authority given in the will to sell any real estate, the fourth question must be answered in the negative. The two legatees become tenants in common of the real estate disposed of by the residuary clause, and take the personal property in severalty.

Decree accordingly. Costs to be a charge upon the estate.

PETERS, C. J., WALTON, LIBBEY, EMERY and FOSTER, JJ., concurred.

JOSEPH RUMILL *vs.* BYRON H. ROBBINS.

Hancock. Opinion March 18, 1885.

Ways. Ways from necessity, location of.

The location of ways arising from necessity may be made and changed by the concurrence of the parties. Such location or change need not be in writing nor formally agreed to. It may be inferred from the acts or acquiescence of the parties.

ON REPORT.

Trespass to land, the object of the litigation being to settle the legal rights of the parties. A referee was appointed by the

court to determine the facts and report them, with a plan, as a part of the case to the law court. If the defendant had a right of way over the plaintiff's land at the place claimed by him, plaintiff was to be nonsuited, otherwise, the defendant was to be defaulted for nominal damages.

The material facts are sufficiently stated in the opinion.

George P. Dutton, for the plaintiff.

Wiswell and King, for the defendant, cited: *Bass* v. *Edwards*, 126 Mass. 445; *Bowen* v. *Conner*, 6 Cush. 135; *Bingham* v. *Smith*, 64 Maine, 288; 3 Kent, Com. 420; *Nichols* v. *Luce*, 24 Pick. 104; *Russell* v. *Jackson*, 2 Pick. 578; *Com.* v. *Coombs*, 2 Mass. 490; *Pembroke* v. *Plymouth*, 12 Cush. 351; *Hall* v. *Co. Com.* 62 Maine, 327.

EMERY, J. The only right of way claimed is that arising from necessity. In such cases, the owner of the servient estate has the first right to locate the way, and if he refuse to do so upon request, the owner of the dominant estate may locate the way. The location by either must be reasonable, Wash. on Easements, 167. The parties may agree to a location, and can change any location by mutual arrangement. Such arrangement, need not be in writing, but can be inferred from the words or conduct of the parties; *Smith* v. *Lee*, 14 Gray, 480. However the way may be located, the right remains one of necessity only.

In this case, at least two roads had been used indifferently for many years by the occupants of the defendant's lot. It does not appear that the defendant requested the plaintiff to locate the way to be used, or that the plaintiff did locate it. For four years after his purchase of the land from the plaintiff, the defendant used the road in dispute without objection. Whether he used this road exclusively does not appear. He was then forbidden by the plaintiff to use it. The objection was to the use of that particular road. No objection was made to the use of the other road, which was equally convenient for the defendant.

In 1879 the defendant and nine others applied to the municipal officers to lay out a way over this other road. The municipal

officers met at the dwelling house of the plaintiff on the servient estate, after due notice of their intention to meet there, and laid out a way over the old road, as prayed for. The plaintiff waived damages for crossing his land, and the town accepted the way. The defendant now claims that the way was not legally laid out. We think that is immaterial. If it be a statute way, the right of way by necessity is thereby ended. Wash. on Easements, 165. If it be not a statute way, no one but the plaintiff could prevent the use of it, and we think he would be estopped. The conduct of both parties shows a mutual designation of this, as the route the defendant was thereafter to take over the plaintiff's land. The defendant procured it to be defined. The plaintiff had forbidden the use of the other road. He knew of the defendant's proceedings for the location of another way. He assented to it, by waiving damages. He expected this way to be thereafter used. He brings this suit for the using the other road. He cannot now question the defendant's right to this road, if there be a necessity for a way. No one has questioned it, so far as appears, and although not formally opened, it is a traveled road, safe and convenient. The defendant should now be confined to it.

Defendant defaulted for one dollar damages.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

EMMA H. AYER

vs.

OLIVER BROWN, and HARVEY D. HADLOCK, alleged trustee.

Cumberland. Opinion March 18, 1885.

Trustee process. Wages of a seaman.

The wages of a seaman engaged in the coasting trade, when collected by, and remaining in the hands of his attorney, a proctor in the admiralty court, are not for that reason exempt from attachment by trustee process.

ON exceptions from superior court.

The trustee disclosed.

"On the twenty-first day of November, A. D., 1883, I was attorney for Oliver Brown, the principal defendant, in this action to collect by process in admiralty, wages due said Brown as a seaman on board the schooner M. M. Chase, and for that purpose I filed a libel in behalf of said Brown in the United States district court for the district of Maine, and process was duly issued against said schooner, made returnable in said district court on the twenty-second day of November, A. D. 1883, at ten o'clock in the forenoon, and said schooner was duly attached on said process; that on the said twenty-first day of said November, after said attachment had been made the sum of forty dollars and thirty-five cents was paid to me as the amount of wages due said Brown, for his services on board said schooner, M. M. Chase, from which amount I deducted the sum of fifteen dollars as my fees for services, and while I was at the U. S. Marshal's office for the purpose of discharging said schooner from the attachment aforesaid, I was served with process in this action, and at the time of said service I had in my possession the sum of twenty-five dollars and thirty-five cents as balance to be paid said Brown as wages as seaman on board said schooner, M. M. Chase."

Upon this disclosure the trustee was charged for $25.35, less his costs, and to this ruling he alleged exceptions.

C. P. Mattocks and *W. K. Neal*, for plaintiff.

H. D. Hadlock, for the defendant, cited: *McCarty* v. *St. Propellor City of New Bedford*, 4 Fed. Rep. 824; *Ross* v. *Bourne*, 14 Fed. Rep. 858; S. C. 17 Fed. Rep. 703; U. S. R. S., § § 4530, 4546, 4547; *Hutchinson* v. *Coombs*, 1 Ware, 65; *The Brig Planet*, 1 Sprague, 11; *Earl Gray*, 1 Spink, 180.

EMERY, J. The trustee claims that a seaman's wages, though earned in the coasting trade, are not attachable by trustee process, and cites the opinion of Judge Benedict, in *McCarty* v. *Steamer New Bedford*, 4 Fed. Rep. The contrary has been expressly held in Massachusetts. *Eddy* v. *O'Hara*, 132 Mass. 56; *White* v. *Dunn*, 134 Mass. 271.

The reasons given by Judge Benedict, however, do not apply here. In this case the owners had paid the wages to the seaman's own attorney, who was impliedly authorized by the seaman to receive it. There was no longer any claim against the vessel, nor the owners, nor the master. The money was not paid into court. The attorney did not hold it as an officer of the court, but as the agent of his client. His being a proctor in an admiralty court, imposed on him certain duties to that court, but did not free him from any obligations to his client, or his client's creditors. The defendant had in effect collected his wages, and intrusted and deposited the money with his attorney. We think it was then liable to attachment. *Staples* v. *Staples*, 4 Maine, 532.

Exceptions overruled.

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

L. S. STRICKLAND, Judge of Probate,

vs.

JAMES HOLMES and others.

Aroostook. Opinion March 18, 1885.

Probate bond. Liability of heirs of a deceased surety. R. S., c. 87, § 16.

The heirs of a deceased surety on a guardian's bond are not liable under R. S., c. 87, § 16, jointly with the principal on the bond.

Whether the claim against such heirs, as among themselves, is joint, *quere.*

REPORT on facts agreed.

Debt on the official bond of James Holmes, guardian of Emma H. Pierce, minor. The action is brought in the name of the judge of probate, for the benefit of the ward.

The material facts are stated in the opinion.

C. B. Roberts, for the plaintiff.

Powers and Powers, for the defendants.

DANFORTH, J. The bond in suit in this case was given by the defendant, Holmes, as principal and guardian of Emma H.

Pierce, a minor, and was signed by Nathan Perry as surety. There has been a breach, and the amount of damages has been fixed by a decree of the judge of probate. Holmes interposes no defence.

It appears that Perry, the surety, died, and his estate was administered upon more than two years before this right of action accrued. As there can be no remedy against his administratrix, the plaintiff has joined the other defendants in the suit as heirs of the surety, claiming the right to do so under the provisions of R. S., c. 87, § 16, which reads as follows: "When such claim has not been filed in the probate office within said two years, the claimant may have a remedy against the heirs or devisees of the estate within one year after it becomes due, and not against the executor or administrator."

The context shows that the extent of the liability of each heir or devisee is measured by the amount of assets individually received from the estate. Hence there should be an allegation in the declaration, not only that assets were received, but of the amount. There are no such allegations in this writ. It is therefore defective in that respect. But if there were no other difficulties in the way, this might perhaps be removed as to all but one, by an amendment, for the agreed facts show that the heirs collectively have received their distributive share, which share is sufficient to pay the plaintiff's claim. The facts, however, show that one defendant, Ann H. Perry, is the widow of Nathan, and therefore not an heir. Nor can she be a devisee, for no will appears to have been made. As to her, the action must fail.

The serious question in this case is, can this action be maintained against the heirs jointly with the principal in the bond? Certainly the liability is not a joint one. The bond is a contract and the rights and liability of the parties to it must depend upon its terms and conditions alone. The liability of the heirs rests upon the statute. In a suit against them, the bond and proceedings in the probate court become material and must be a part of the declaration, as showing the amount of the plaintiff's claim. But that is not sufficient to maintain the suit against the heirs. There must be, to do that, the necessary allegations to bring the

case within the statute, for that determines their liability. Hence, if both are combined in one suit, there must be two counts in the writ, of different import, one applicable to one set of defendants, and another to a different set, or there must be allegations in one count which are not applicable to all the defendants alike, which could not be the case if the claim were joint. It may admit of a grave doubt whether the claim against the heirs as among themselves, depending as it does upon the different amount of assets which each may receive, is not rather several than joint. *Sampson* v. *Sampson*, 63 Maine, 335. But, however this may be, they can not be liable jointly with the signer of the contract, as they do not become parties to it. Their liabilities are created solely by statute.

Another consideration tending to the same result, is found in the fact that under the statute, "the claimant may have a remedy against the heirs." This is an independent and additional remedy to that authorized upon the bond. While the plaintiff must pursue the legal course to fix the amount of his claim under the bond, when that is done, the statute gives him this remedy which, without it, would not exist. This remedy is not in the control of the probate judge. He may give or withhold his consent to a prosecution on the bond, and having given it, no costs can be recovered by the defendants if they prevail. But this remedy is to be pursued at the option of the claimant, and at his risk. It must, therefore, be by such a process as will give the defendants a right to costs, if they prevail. No exception to the general rule in this respect, is made by the statute.

Judgment against the defendant, Holmes, for $202.43 and interest from the date of the decree of the probate court, September term, 1881, and in favor of the other defendants.

PETERS, C. J., VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

GARDINER F. DANFORTH *vs.* LEWIS F. STRATTON.

Penobscot. Opinion March 18, 1885.

Writ of possession. Officer. Trespass. Lease. Tenant.

C held a written lease of real estate as trustee of F who was in possession. At the expiration of the lease the landlord brought an action of forcible entry and detainer against C, and obtained a writ of possession under which the officer removed F's goods from the premises, and F sued the officer in trespass for that act. *Held*, that the officer had the right and it was his duty, in serving the writ of possession, to remove F and his goods from the premises.

ON motion to set aside the verdict, and exceptions.

Trespass against the sheriff for the act of his deputy, George W. Brown, in removing the plaintiff's goods and merchandise from a store in Bangor. James N. Cushing held a written lease of the store from the landlord and it was decided in *Cushing* v. *Danforth*, 76 Maine, 114, that he held the lease as passive trustee for Danforth for so much of the store as Danforth occupied.

At the expiration of the Cushing lease the landlord brought forcible entry and detainer against Cushing and obtained judgment and writ of possession. In serving this writ of possession the officer removed the plaintiff's goods from the store but did not remove the other occupant, or his goods. The verdict was for the plaintiff for $330 and the defendant moved to set that verdict aside as being against law and evidence, and the weight of evidence, and as excessive.

Charles P. Stetson and *H. L. Mitchell*, for the plaintiff.

The plaintiff was no party to the proceedings of forcible entry and detainer, and the writ of possession did not run against him. It therefore did not authorize the officer to remove him.

He was entitled to be heard and have his day in court before he should be removed.

He had acquired rights, by the circumstances of his entry and his continuance there which could not be taken from him except by

due process of law, by proceedings against him in which he would have a right to be heard.

Under the circumstances the plaintiff was a tenant at will of Bowman. The proceedings in the forcible entry and detainer case, *Bowman* v. *James N. Cushing*, were collusive, and fraudulent in law, and the judgment thereon was a nullity as against him.

Barker, Vose and Barker and *A. G. Wakefield*, for the defendant.

DANFORTH, J. Motion for a new trial. The action is against the sheriff for the alleged wrong-doing of his deputy in the service of a writ of possession issued in an action of forcible entry and detainer. The judgment was obtained and the writ issued against James N. Cushing. The plaintiff's goods were removed from the premises described in the writ and this is the act complained of in the present suit.

That the premises had for some time been occupied by the plaintiff and one Ruel J. Cushing, each occupying a specific portion agreed upon between them, is not in dispute. The plaintiff claims to have been a tenant at will under Hollis Bowman, the owner. This is denied on the part of the defendant who contends that Cushing was tenant of the whole premises and that the plaintiff was tenant under him. After this occupation had continued for about two months Bowman gave a written lease to James N. Cushing for ten months and at or within seven days after its expiration commenced the action in which the writ in question was issued. The plaintiff had continued to occupy until his goods were removed at the time of the service of this writ.

Hence the nature of the plaintiff's occupation became a material question which was submitted to the jury. If he was a tenant under Bowman it is evident that his goods were wrongfully removed for such tenancy had never been terminated as the statute required and the jury must have so found.

It is unquestionable that no man can become the tenant of another without his consent. In this case the decided prepon-

derance of evidence shows that Bowman never did consent to the plaintiff's becoming his tenant, that he never received or recognized him as such before the written lease, and after that he could not. What then were the plaintiff's rights in the premises?

In a former action in which this plaintiff was defendant and James N. Cushing was plaintiff, it was decided by the court that the written lease was held by Cushing in trust for this plaintiff and upon that ground he succeeded in that action, *Cushing* v. *Danforth*, 76 Maine, 114. If the question were now open the testimony in this case would lead to the same conclusion. Thus the right and only right which this plaintiff had in the premises was through and under James N. Cushing, as his *cestui que trust*. He had no direct claims as tenant, upon Bowman, and Bowman none upon him. He was not responsible under the lease to deliver up the premises to the lessor at its expiration, but at that time all his rights under it would cease and if he remained it would be only as a tenant at sufferance. Hence a judgment against Cushing would be a judgment against him and the writ of possession would authorize the officer not only to remove Cushing but all others whose rights there were dependent upon him or were in without right. As Cushing was the contracting party and his lease and its expiration laid the foundation of the process, the action was properly begun against him alone. *Howe* v. *Butterfield*, 4 Cush. 302.

But this defendant justifies further. In his brief statement of defence he says, "That all and every act his said deputy did in the premises, he did under and by virtue of his said precept, and also as the servant and agent of Hollis Bowman."

As already seen after the expiration of the lease the plaintiff, as against Bowman, had no rights whatever in the premises. His tenancy whatever it was had ceased and it was competent for Bowman by himself or servant to remove him and his goods with or without process, if done in a peaceable way and orderly manner, after due notice. The testimony shows that whatever was done in this respect was done under the direction and by the order of Bowman, and that the plaintiff had due notice. If it

was not done peaceably and orderly, of which there is no proof, Bowman or the servant might be liable but not this defendant as sheriff, as the writ was not served by him but by a deputy. *Stearns et al* v. *Sampson*, 59 Maine, 568.

Motion sustained.

PETERS, C. J., VIRGIN, FOSTER and HASKELL, JJ., concurred.

EMERY, J. concurred in the result.

LUCRETIA KENNEY *vs.* HOWARD WENTWORTH.

Penobscot. Opinion March 18, 1885.

Life lease. Two lessees.

A lease of a farm to two lessees provided that it should continue "for and during their natural life." *Held*, that the lease continued during the life of each.

ON EXCEPTIONS.

Forcible entry and detainer, begun in the police court of Bangor, January 27, 1883, to recover possession of a farm in Orrington. The action came to this court at the request of the defendant, upon the pleading and brief statement, as involving the title to real estate.

The plaintiff claimed possession under the following lease:

"Know all men by these presents, that I, Howard Wentworth, of Orrington, in Penobscot county and state of Maine, in consideration of four hundred dollars paid by Lucretia Kenney and Eber Ring, of Orrington, aforesaid, the receipt whereof is hereby acknowledged, do hereby demise, lease and let, to the said Lucretia Kenney and Eber Ring, a certain tract or parcel of land, together with the buildings thereon, situate in said Orrington, . . . To have and to hold the aforesaid premises, with the privileges and appurtenances thereto belonging, to the said Lucretia Kenney and Eber Ring, for and during the term of their natural life.

"And the said Howard Wentworth agrees with said Lucretia Kenney and Eber Ring, that said Lucretia Kenney shall peace-

ably possess the said premises during said term, without the lawful interruption or eviction of any person whatsoever.

"In witness whereof, I, the said Howard Wentworth, have hereunto set my hand and seal, this twenty-third day of March, in the year of our Lord one thousand eight hundred and seventy-seven."

Duly executed, acknowledged and delivered.

Eber Ring died in June, 1880.

The court instructed the jury in substance, that the lease survived the death of Mr. Ring, and that after his death, plaintiff, so long as she lived, was entitled under the lease to the sole possession and use of the premises, and that they should bring in a verdict for the plaintiff, which they did do.

To these rulings, defendant alleged exceptions.

J. W. Donnigan, for the plaintiff.

Jasper Hutchings, for the defendant, contended that the lease terminated at the death of Ring, and if not, Mrs. Kenney was entitled to but one undivided half, that she and Ring were tenants in common. R. S., c. 73, §7. The lease was to continue during the term, not of his or her life, but of their natural life — not lives. That is, the life of both. The holding is by both, for one and the same term. But both can not hold after the death of one.

The granting part of a deed is the controlling part. The covenants and habendum are subordinate to the grant. *Congregational Society* v. *Stark*, 34 Vt. 243; *Flagg* v. *Eames*, 40 Vt. 16; *Manning* v. *Smith*, 6 Conn. 289; *Allen* v. *Holton*, 20 Pick. 458; *Corbin* v. *Healy*, 20 Pick. 514; *Cushing* v. *Aylwin*, 12 Met. 169; *Coe* v. *Persons unknown*, 43 Maine, 432; *Ballard* v. *Child*, 46 Maine, 152.

DANFORTH, J. The single question involved in this case, is the duration of the right of possession of the plaintiff to the premises in question. The lease, in language too clear to admit of doubt, gives it to her "for and during said term." The "said term" is defined but once in the lease, and then in a previous sentence, as being "for and during their natural life." The

lessees are two. The pronoun is in the plural and must include both of them. The noun life is in the singular, and refers to the life of the one as much as to the other, and must, therefore, be taken separately rather than jointly. If the lease is to terminate upon the death of one only, the full meaning of the language has not been exhausted. There is still one life included in the word "their" which has not ceased, and it must, therefore, follow that the lease has not terminated.

There is no intimation in this, or any other part of the lease, that it was to be terminated as to one before the other. It provides for one single term, whole and undivided. It can not cease as to one until it does as to both, and can not as to both until the whole life included in the plural pronoun has ceased.

If there were any doubt about this interpretation from the language used, it would be removed when we consider the circumstances under which the lease was made, and especially the object to be accomplished by it. The plaintiff was the original owner of the land, and under some contract obligation to support her co-lessee. In consideration of the conveyance, the defendant agreed to support both lessees, not during the life of one, but that of both, and the object of the lease clearly is to secure the performance of that obligation. But if it ceases at the death of one, it fails to perform the purpose for which it was given, and instead, becomes an instrument of injustice, if not of fraud.

Exceptions overruled.

PETERS, C. J., VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

CULLEN C. CHAPMAN

vs.

DENNISON PAPER MANUFACTURING COMPANY.

Cumberland. Opinion March 20, 1885.

Contract. Composition. Laches. Tender.

The plaintiff, having in his possession certain notes given by the defendant, the ownership of which was before the court for adjudication, agreed in writing with the defendant to accept in full thereof twenty-five per cent of

their amount, to be paid in cash whenever the court should decide him to be the owner. July 7, the plaintiff by letter notified the defendant's treasurer that the court had decided him to be the owner and that he was ready to settle as by his agreement. The treasurer replied he would arrange the matter the following week; but no payment being made or attempted, the plaintiff sued the notes on September 8, and the defendant made tender of the twenty-five per cent on November 19. *Held*, that the tender was not made within a reasonable time; that the agreement was forfeited, and the original cause of action revived.

On report from the superior court.

Assumpsit on three promissory notes dated June 27, 1879, for $1000, $1500 and $1200 respectively.

The plea was general issue and following brief statement:

"And for a brief statement of special matter of defence to be given in evidence under the general issue above pleaded the defendant further says: That on the seventh day of November in the year of our Lord one thousand eight hundred and seventy-nine, for a valuable consideration the said plaintiff entered into an agreement in writing with the said defendant under his hand and seal of that date in the words and figures following, that is to say: 'In case it shall hereafter appear by legal adjudication, reference or otherwise, that I am the true owner of three certain notes of the Dennison Paper Manufacturing Company, dated June 27, 1879, for $1,000, $1,500, $1,200 respectively, the transfer of which to me I claim is vitiated by fraud, I hereby agree to and with the said Dennison Paper Manufacturing Company, to accept of said company in full of said notes twenty-five (25 per cent.) per cent. of the amount due on said notes on the first day of July last, said amount to be paid in cash whenever the above question is decided and with interest if later than July 1st, next.'

"'Dated at Portland, Maine, the 7th day of November, A. D. 1879.

"'In presence of C. F. Libby.

C. C. Chapman, [L. S.]'

"And the defendant further says that the notes described in said agreement are the same declared on in this suit, and that said defendant has always been ready to fulfil and perform said

agreement on their part within a reasonable time, and that on the nineteenth day of November, A. D. 1883, after the commencement of this suit the said defendant tendered and offered to pay to the plaintiff the said amount of twenty-five per cent. of the amount of said notes with interest as provided by said agreement, and all the costs of the plaintiff in this action then commenced to wit: the sum of one thousand one hundred and ninety dollars in lawful gold coin of the United States, which the plaintiff then and there refused to accept or receive, and the defendant brings the same here into court thereafterwards on the same day with this its plea in said cause, and the said sum being the full amount to which the plaintiff is entitled under said notes and agreement and in this suit, the defendant says that he ought not to further have or maintain said suit."

S. C. Strout, *H. W. Gage* and *F. S. Strout*, for the plaintiff, cited: *Young* v. *Jones*, 64 Maine, 563; *Miller* v. *Hatch*, 72 Maine, 481; *Weber* v. *Couch*, 134 Mass. 26; 22 Law Reg. 747, 682; *Bailey* v. *Day*, 26 Maine, 88; *White* v. *Jordan*, 27 Maine, 378; 32 Maine, 253; *Perkins* v. *Lockwood*, 100 Mass. 249; *Jenners* v. *Lane*, 26 Maine, 480; *Cushing* v. *Wyman*, 44 Maine, 121; *Mansur* v. *Keaton*, 46 Maine, 346; *Bragg*, v. *Pierce*, 53 Maine, 65; *White* v. *Gray*, 68 Maine, 579; *Dudley* v. *Kennedy*, 63 Maine, 467; *Clifton* v. *Litchfield*, 106 Mass. 34; *Blake* v. *Blake*, 110 Mass. 202; *Turner* v. *Comer*, 6 Gray, 530; *Partridge* v. *Messer*, 14 Gray, 180; 107 U. S. 325; 19 Wall. 561; *Goodwin* v. *Davenport*, 47 Maine, 117; *Attwood* v. *Clark*, 2 Maine, 249; 14 Maine, 57; 15 Maine, 350; 16 Maine, 164; 24 Maine, 13; *Saunders* v. *Curtis*, 75 Maine, 496; *Howe* v. *Huntington*, 15 Maine, 350; 5 Mass. 494; 21 Pick. 193.

Strout and Holmes, for the defendant.

We are aware that there are cases in this state which hold that a mere agreement of a creditor to discharge his debt upon the performance of something which is not a payment in cash of the full amount unconnected with any other transactions, is an accord without satisfaction and cannot be pleaded in defence

to a suit upon the debt. *Young* v. *Jones*, 64 Maine, 563; *White* v. *Gray*, 68 Maine, 579.

These cases are put upon the ground that an accord without satisfaction is no defence. But where different creditors of a debtor agreed together with him to accept a different payment from that provided by his existing indebtedness, the court said:

"It certainly appears that this was not an accord and satisfaction, strictly so called, but it was a consent by the parties signing the agreement to forbear enforcing their demands in consideration of their own mutual engagement of forbearance. . . . Then is not this a case where each creditor is bound in consequence of the agreement of the rest? It appears to me that it is so both on principle and the authority of the cases in which it has been held, that a creditor shall not bring an action where others have been induced to join him in a composition with the debtor, each party giving the rest reason to believe that, in consequence of such engage ment, his demand will not be enforced. This is, in fact, a new agreement, substituted for the original contract with the debtor; the consideration to each creditor being the engagement of the others, and the verdict for the defendant was sustained and the rule for a new trial discharged." *Good* v. *Cheeseman*, 2 B. & A. 328 (22 E. C. L. 89); *Anstey* v. *Marden*, 4 Bos. & Pul. 124; *Bradley* v. *Gregory*, 2 Camp. 383; *Butler* v. *Rhodes*, 1 Esp. 236; *Steinman* v. *Magnus*, 11 East, 390.

Now the doctrine of the cases, fully established in the courts of England, has been adopted as fully by those of this country. *Eaton* v. *Lincoln*, 13 Mass. 424; *Perkins* v. *Lockwood*, 100 Mass. 249; *Farrington* v. *Hodgdon*, 119 Mass. 453; *Paddleford* v. *Thacher*, 48 Vermont, 574; *Browne* v. *Stackpole*, 9 N. H. 478; *Chemical Bank* v. *Kohner*, 85 N. Y. 189; *Baxter* v. *Bell*, 86 N. Y. 195; *Cutter* v. *Reynolds*, 8 B. Mon. 596; *Mellen* v. *Goldsmith*, 47 Wis. 573; *Norman* v. *Thompson*, 4 Exch. 755; *Chase* v. *Bailey*, 49 Vt. 71; *Devou* v. *Ham*, 17 Ind. 472; *Murray* v. *Snow*, 37 Iowa, 410; *Strickland* v. *Harger*, 23 Hun. 465; *Falconbury* v. *Kendall*, 76 Ind. 260.

There was no delay in the payment to affect the rights of the parties. Plaintiff wrote to the defendant July 7, 1883. To

this defendant's president answered July 14, 1883, showing that the first letter was not mailed so as to go on the day it bore date, and then the plaintiff was to be away for a week. It appears that the parties met after this in Portland, and that they did not have the same understanding about the amount due, for plaintiff writes under date of July 23, 1883, that, "I make the amount due on your notes July 25, inst. $1,150.70."

Inasmuch as there was no fixed time within which the payment should be made, and as the agreement provided compensation for any time that should elapse after July 1, 1880, before payment, under the circumstances it seems impossible to say under any question of time, the plaintiff can repudiate his contract.

VIRGIN, J. The plaintiff's agreement of November 7, 1879, cannot bar this action on the ground of accord and satisfaction, for it has never been fully executed. *Heathcote* v. *Crookshank*, 2 Term, 24; *Bragg* v. *Pierce*, 53 Maine, 65; *Miller* v. *Hatch*, 72 Maine, 481.

Assuming (without deciding) that it was made upon sufficient consideration; that a composition had been entered into by all of the defendant's creditors save two; and that the defendant, in the absence of any stipulation in the composition agreement requiring the assent of all, might lawfully settle with those who did not sign it on such terms as he and they might agree, without thereby releasing those who did sign, then the agreement alone which the plaintiff signed, in the absence of any reference therein to the general composition agreement, is the only one that can affect him. We must look, therefore, at the terms of his agreement in order to ascertain what is to operate as a satisfaction or discharge of his original debt. *McKenzie* v. *McKenzie*, 16 Ves. 372.

There is a familiar class of cases wherein by the agreement a debtor's promise is received by his creditors in satisfaction of his debts; and there is another class where the performance and not the promise is intended to operate as satisfaction. 1 Sm. L. Cas. (6 Am. ed) 554; 2 Sm. L. Cas. 24; *Evans* v. *Powis*, 1

Exch. 599, 606; *Richardson* v. *Cooper*, 25 Maine, 450, 452. In the former class, the new promise is given as a substitution for or satisfaction of the debt. *Good* v. *Cheeseman*, 2 B. & Ad. 328. Where the composition deed contained an absolute and immediate release of the debtor, with a covenant on his part to pay the composition money in instalments, without any proviso declaring it void unless paid, the non-payment was held not to remit the creditor to their original debts for the reason that they were discharged, and that the creditors' remedy was upon the covenant. *Lay* v. *Mottram*, 19 C. B. (N. S.) 479, 484. But if, instead of a release, the composition agreement contain a mere stipulation that the creditors will accept a certain sum, or percentage of their respective debts in full satisfaction thereof, the debtor must punctually pay to entitle him to a discharge. *Cranley* v. *Hillary*, 2 M. & S. 120. For the creditor, not being obliged to enter into any composition agreement, has the sole right of modifying his first contract and of prescribing the conditions of its discharge; and if the debtor fail to pay, the condition to accept a part is broken, the new contract is thereby forfeited and is no bar to the original cause of action. *Sewall* v. *Musson*, 1 Vern. 210; *Clarke* v. *White*, 12 Pet. 178, 191. Still, while such a composition agreement is in force, and before any infraction thereof on the part of the debtor, the remedy on the original debts being suspended thereby, they cannot be the subject of an action. *Cranley* v. *Hillary*, *supra*; *Chemical N. Bank* v. *Kohner*, 85 N. Y. 189.

The plaintiff's agreement comes within this rule; and the question arises, was it in force when the defendant first moved to perform on his part on November 19, 1883. By its terms the plaintiff agreed to accept twenty-five per cent of the amount due on the notes on July 1, 1879, to be paid in cash "whenever the question" of their ownership "is decided."

A composition agreement is an act of favor and indulgence on the part of creditors. But when it is signed and delivered, favor ceases, and the debtor, in the absence of any waiver by the creditors, is remanded again to the law, which requires of him a strict compliance if he would avail himself of its advantages,

visiting upon him, for his default, no harsher penalty than a renewed liability to pay the debt which he already owes. When money is to be paid by him within a specified time, the debtor must pay or tender it, at the time stipulated. *Evans* v. *Powis*, *supra; Fessard* v. *Mugnier*, 18 C. B. (N. S.) 286; *Cranly* v. *Hillary*, *supra*. And if no definite time is fixed, the law imposes upon him the obligation to pay within a reasonable time. *Attwood* v. *Clark*, 2 Maine, 249; *Saunders* v. *Curtis*, 75 Maine, 493, 495; *Wilder* v. *Sprague*, 50 Maine, 354; *Bowen* v. *Holly*, 38 Vt. 574. And whether this question is one of law or fact, we need not discuss it here, as the case comes before us on report, and the court is to decide it on so much of the evidence as is legally admissible.

By the terms of the agreement, the defendant was to pay in cash, "*whenever* the ownership of the notes is decided." The most favorable construction which the defendant can ask, is that he was thereby required to pay within a reasonable time after that decision was made known to him.

What is a reasonable time in a given case, depends upon a consideration of all of its circumstances. This court has declared that a reasonable time is such time as is necessary conveniently to do what the contract requires should be done. *Howe* v. *Huntington*, 15 Maine, 350; *Saunders* v. *Curtis*, 75 Maine, 493.

In this case, nothing but money was to be paid. The defendant had obtained a like agreement with the other contingent owner of the notes, so that the money was to be ready at all hazards. The parties resided within forty miles of each other, and there was railroad communication twice daily between their places of business. The defendant's treasurer was in Portland (plaintiff's place of business) very often during the months of July, August and September, 1883. He was notified July 7, 1883, by letter, that the court had settled the ownership of the notes in the plaintiff, that they were then in his possession, and that he was ready to settle, as by his agreement. On July 14, the plaintiff was notified by letter that the defendant would meet him in Portland the ensuing week and "arrange the matter." On July 23, the plaintiff notified the defendant of the "amount

which he made due on the notes." The plaintiff waited until September 8, and then sued out this action, returnable on first Tuesday in November, and no offer of payment was made, or excuse for the delay was offered, until November 19. "This long delay, which the defendant has not seen fit to explain, we think is unreasonable." *Saunders* v. *Curtis*, *supra*; *Kingsley* v. *Wallis*, 14 Maine, 57.

Judgment for the plaintiff for the amount of the notes.

PETERS, C. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

GEORGE L. EAMES *vs.* SARAH S. SAVAGE.

Same *vs.* SAMUEL A. BICKFORD.

Somerset. Opinion March 20, 1885.

Executions against towns. R. S., c. 84, § 30. XIV amendment to U. S. constitution. Constitutional law. Audita querela.

R. S., c. 84, § 30, authorizing executions upon judgments against towns to be issued against and levied upon the goods and chattels of the inhabitants, is constitutional.

The process provided in that section is "due process of law," and is not in conflict with the fourteenth amendment of the constitution of the United States.

ON REPORT.

The first action is *audita querela* against a judgment creditor of the town of Embden for wrongfully causing her execution against the inhabitants of the town of Embden to be levied upon the goods and chattels of the plaintiff, who was at that time, and had been since August 15, 1881, one of the inhabitants of that town.

The second action is trespass against the sheriff for the acts of his deputy, N. F. Clapp, in serving the execution and levying the same upon the plaintiff's property.

The original writ of *Sarah J. Savage* v. *Inhabitants of Embden*, was dated July 12, 1882, and was to recover the amount of certain coupons, due and unpaid, cut from town of Embden

bonds. Judgment was rendered thereon on default on the third Tuesday of December, 1882. That writ was not served upon this plaintiff, but was duly served upon the town clerk. The execution issued on that judgment January 5, 1883, and alias execution, August 6, 1883. Damages three hundred twenty-four dollars and thirty-three cents; costs, twelve dollars and seventy-five cents.

J. J. Parlin and *Strout and Holmes*, for the plaintiff.

Under the law of this country the property of an individual member of an ordinary corporation cannot be taken until he has been called upon to answer in a suit for that purpose. In most states of this Union process of the sort found by this case cannot issue under these circumstances. *Rees* v. *Watertown*, 19 Wall. 107; *Meriwether* v. *Garrett*, 102 U. S. 472.

It now remains to be inquired whether the same doctrine, which is held in the cases above cited, applies to municipal corporations, such as exist in this state. It is admitted that the practice has been to the contrary for perhaps two hundred years, but "it is not too late to go back to the true construction, and for the practice, if wrong, to be corrected." *Merchants' Bank* v. *Cook*, 4 Pick. 415; *Gross* v. *Rice*, 71 Maine, 251.

The English cases cited by the Massachusetts court as the foundation of the right to take property in this way, upon examination, do not appear to afford the authority which they have been supposed to. See *Russell* v. *Men of Devon*, 2 T. R. 667; *King* v. *Woburn*, 10 East, 395; *King* v. *Hardwick*, 11 East, 578; *Attorney General* v. *Exeter*, 2 Russ. 45; *Horner* v. *Dellinger*, 18 Fed. Rep. 495.

Another reason given for the adoption of this remedy, that towns have no common fund from which to satisfy judgments (*Riddle* v. *Prop'rs*, 7 Mass. 169,) is not true, in fact, as to most towns now. It is also said to rest on immemorial custom (*Chase* v. *Merrimack Bank*, 19 Pick. 564; *Hill* v. *Boston*, 122 Mass. 344; *Fernald* v. *Lewis*, 6 Maine, 264).

But that practice arose before towns were corporate bodies, and before the adoption of the constitution. And a custom

which is in conflict with the fundamental law must give way to it. See *Randall* v. *Smith*, 63 Maine, 105; *Taber* v. *Ins. Co.* 131 Mass. 239; *U. S.* v. *Buchanan*, 8 How. 83; *Walker* v. *Transportation Co.* 3 Wall. 150; *Thompson* v. *Riggs*, 5 Wall. 663.

This question has never been discussed in Massachusetts or Maine, upon its merits, as affected by the constitution of the United States. In Connecticut it rests upon the ground that towns are not corporations. *Beardsley* v. *Smith*, 16 Conn. 368; *Starr* v. *Starr*, 2 Root, 303; *Barkhamsted* v. *Parsons*, 3 Conn. 1; *McLoud* v. *Selby*, 10 Conn. 390; *Jewett* v. *Thames Bank*, 16 Conn. 511; *Union* v. *Crawford*, 19 Conn. 331; see also *Piper* v. *Moulton*, 72 Maine, 155; *State* v. *Stuart*, 23 Maine, 111; *State* v. *Woodward*, 34 Maine, 293; *Lufkin* v. *Haskell*, 3 Pick. 356; *Odiorne* v. *Wade*, 8 Pick. 518; *Hawkes* v. *Kennebeck*, 7 Mass. 461; *Brewer* v. *New Gloucester*, 14 Mass. 216; *Littlefield* v. *Greenfield*, 69 Maine, 86; *San Mateo Co.* v. *S. P. R. R. Co.* 13 Fed. Rep. 722 (8 Am. & Eng. R. R. Cas. 1); *Santa Clara Co.* v. *Same*, 18 Fed. Rep. 395 (13 Am. & Eng. R. R. Cas. 182).

Due process of law requires an orderly proceeding, adapted to the nature of the case, in which a citizen has an opportunity to be heard, to attend in court and defend his rights. This is absolutely essential. Same cases and *Green* v. *Briggs*, 1 Curt. C. C. 311; *Stuart* v. *Palmer*, 74 N. Y. 191.

The law does not afford any method for the inhabitant whose property lies exposed to this process to pay voluntarily and then recover of the town. *Crafts* v. *Elliotsville*, 47 Maine, 141; *Spencer* v. *Brighton*, 49 Maine, 326.

The system against which we are objecting is not a classification of property. It is not an excise upon any business, as in *Jones* v. *Savings Bank*, 66 Bank, 242; *State* v. *Tel. Co.* 73 Maine, 518; *State* v. *M. C. R. R.* 74 Maine, 376.

A. H. Ware and *D. D. Stewart*, for the defendants, cited: *Ross* v. *Watertown*, 19 Wall. 122; *Murray* v. *Hoboken L. & I. Co.* 18 How. 276; 5 Dane's Abr. 158, 561; *Keith* v. *Cong.*

Parish, 21 Pick. 261; *Riddle* v. *Prop'rs*, 7 Mass. 187; *Hawkes* v. *Kennebeck*, 7 Mass. 463; *Rumford* v. *Wood*, 13 Mass. 198; *Brewer* v. *New Gloucester*, 14 Mass. 216; *Mercy* v. *Clark*, 17 Mass. 330; *Merchants' Bank* v. *Cook*, 4 Pick. 414; *Chase* v. *Merrimack Bank*, 19 Pick. 568; *Gaskill* v. *Dudley*, 6 Met. 546; *Adams* v. *Wiscasset Bank*, 1 Maine, 361; *Fernald* v. *Lewis*, 6 Maine, 268; *Baileyville* v. *Lowell*, 20 Maine, 178; *Spencer* v. *Brighton*, 49 Maine, 326; *Hayford* v. *Everett*, 68 Maine, 507; *Beers* v. *Botsford*, 3 Day, (Conn.) 159; *Beardsley* v. *Smith*, 16 Conn. 368; *Hill* v. *Boston*, 122 Mass. 344; *Davidson* v. *N. O.* 96 U. S. 101; *Caldwell* v. *Blake*, 69 Maine, 458; *Piscataquis* v, *Kingsbury*, 73 Maine, 327; *Hathorn* v. *Calef*, 2 Wall. 10; *Ochiltree* v. *R. R. Co.* 21 Wall. 249; *Curran* v. *Arkansas*, 15 How. 304; *Leland* v. *Marsh*, 16 Mass. 391; *Child* v. *Coffin*, 17 Mass. 64; *Stedman* v. *Eveleth*, 6 Met. 115; *Coffin* v. *Rich*, 45 Maine, 507; *Pollard* v. *Bailey*, 20 Wall. 521; *Terry* v. *Little*, 101 U. S. 216; *Penniman's case*, 103 U. S. 714; *Wayman* v. *Southard*, 10 Wheat. 1; *Bank of U. S.* v. *Halstead*, 10 Wheat. 55; *Beers* v. *Haughton*, 9 Pet. 362; *Ross* v. *Duval*, 13 Pet. 45; *U. S.* v. *Knight*, 14 Pet. 301; *Amis* v. *Smith*, 16 Pet. 303; *U. S.* v. *Knight*, 3 Sumner, 366; *Supervisors* v. *Rogers*, 7 Wall. 180; *Riggs* v. *Johnson Co.* 6 Wall. 191; *Kelly* v. *Pittsburgh*, 104 U. S. 79; *Barkley* v. *Com'rs*, 93 U. S. 265; 2 Dillon Mun. Corp. § § 686, 672; 2 Kent's Com. 274.

EMERY, J. The plaintiff was an inhabitant of the town of Embden, at the time Sarah J. Savage began suit, and recovered judgment against that town in this court. The execution upon that judgment was issued, and was levied upon the plaintiff's goods, pursuant to R. S. of 1871, c. 84, § 29, now R. S., c. 84, § 30, which expressly provides that executions against towns shall be issued against the goods and chattels of the inhabitants thereof, and shall be levied upon such goods and chattels. The plaintiff, however, claims that the statute is forbidden, and made null by the last clause of § 6, of the Maine Bill of Rights, which declares that a person accused shall not "be deprived of his life,

liberty, property or privileges, but by the judgment of his peers, or by the law of the land," and also by that clause in § 1, of the fourteenth amendment to the constitution of the United States, which declares that no state shall "deprive any person of life, liberty, or property, without due process of law."

The presumption is the other way, in favor of the validity of the statute, and it is a presumption of great strength. All the judges and writers agree upon this. Chief Justice MARSHALL, in *Fletcher* v. *Peck*, 6 Cranch, 87, says that to overturn this presumption, the judges must be convinced, and "the conviction must be clear and strong." Judge WASHINGTON, in *Ogden* v. *Saunders*, 12 Wheat. 270, declared that if he rested his opinion on no other ground than a doubt, that alone would be a satisfactory vindication of an opinion in favor of the constitutionality of a statute. Chief Justice MELLEN, in *Lunt's case*, 6 Maine, 413, said, "The court will never pronounce a statute to be otherwise (than constitutional) unless in a case where the point is free from *all* doubt." This strong presumption is to be constantly borne in mind, in considering the question here presented.

The statute itself, in this case, has existed for half a century, since February 27, 1833, but it introduced no new principle or rule in the jurisprudence of this state. It merely affirmed a well known custom or law that had long before existed. The practice of bringing suits against a political division, or municipal organization, and collecting the judgment from the individuals composing it, is believed to have existed in England, and to have been brought thence to New England. Actions against "the hundred," were known as far back as Edw. I. Stat. 13, Edw. I, c. 2; 3 Comyn's Dig. Hundred, c. 2. As "the hundred" had no property, except that of individuals, the judgments must have been collected from the individuals. In *Russell* v. *Men of Devon*, 2 T. R. 667, Lord KENYON said, that indictments against counties were sanctioned by the common law, though they would be levied on the men of the county. In *Att'y Gen.* v. *Exeter*, 2 Russ. 45, the chancellor said: "If the fee farm was charged on the whole place called Exeter, he who was entitled to the

rent might have demanded it from any one who had a part of, or in the city, leaving the person who was thus called on, to obtain contributions from the other inhabitants as best he could." In New England, the practice obtained from the earliest times, without any statute. "About the year 1790, one Gatehill was imprisoned on an execution against the town of Marblehead, for a debt the town owned." 5 Dane's Ab. c. 143, Art. 5, § § 10, 11, p. 158. Mr. Dane, as early as his Abridgement, said the practice was justified "by immemorial usage." *Ibid.* Such an imprisonment so soon after the revolution, when the principles of liberty were so freshly vindicated, would never have been permitted, had it not then been a familiar practice. The practice has been regarded as settled law in Massachusetts, and has been repeatedly alluded to in the opinions of the courts, as sanctioned by immemorial usage. *Riddle* v. *Proprietors on Merrimack River*, 7 Mass. 187; *Hawkes* v. *Kennebunk*, 7 Mass. 463; *Sch. Dist. in Rumford* v. *Wood*, 13 Mass. 198; *Brewer* v. *New Gloucester*, 14 Mass. 216; *Marcy* v. *Clark*, 17 Mass. 330, 335; *Merchants' Bank* v. *Cook*, 4 Pick. 414; *Chase* v. *Merrimack Bank*, 19 Pick. 568; *Gaskill* v. *Dudley*, 6 Met. 546; *Hill* v. *Boston*, 122 Mass. 344. The constitutionality of the law does not seem to have been really questioned till the case of *Chase* v. *Bank*, 19 Pick. 568, as late as 1837, and its constitutionality was there said to be so well established as not to be an open question. The people of Maine, while a part of Massachusetts, were familiar with the law and the practice. The Maine courts have repeatedly recognized it as long established, and as in harmony with the state constitution. *Adams* v. *Wiscasset Bank*, 1 Maine, 361; *Fernald* v. *Lewis*, 6 Maine, 268; *Baileyville* v. *Lowell*, 20 Maine, 178, 181; *Spencer* v. *Brighton*, 49 Maine, 326; *Hayford* v. *Everett*, 68 Maine, 507. Its constitutionality does not seem to have been questioned by the profession till *Shurtleff* v. *Wiscasset*, 74 Maine, 130. In Connecticut also, the antiquity and constitutionality of the law have been repeatedly affirmed. *Beers* v. *Botsford*, 3 Day, 159; *Beardsley* v. *Smith*, 16 Conn. 368.

That a statute, or rule of law, or custom, has so long existed, unquestioned, and has been so often invoked, and universally approved, and has become ingrained like this in the jurisprudence of a state, is a strong, if not conclusive reason, for pronouncing it constitutional, and a part of the "law of the land." *State* v. *Allen*, 2 McCord, 56; *Sears* v. *Cottrell*, 5 Mich. 251.

The plaintiff urges that such a method of enforcing executions against towns, arose out of the early theory that all the inhabitants were parties to the suit, and could appear personally and be heard. It is claimed that when New England towns were first formed, they did not have their present corporate character, that they were an aggregation of individuals, generally owning a large amount of territory in common, and with common rights and common liabilities in respect thereto. These individuals would necessarily be parties in any suit affecting their common liabilities, and execution must have issued against them as individuals. In the progress of time, such inhabitants were by statute made "bodies politic and corporate." (Mass. Laws of 1786.) Though they continued to be sued by the name of "the inhabitants of the town of —," the individuals no longer appeared in court, but the defence was conducted by the town as a unit, through its officers. The argument is, that the town having been made a corporation, and the individual inhabitant debarred from defending personally, he is entitled to his day in court, through some appropriate mesne process, before final process of execution can issue against his private property. It is claimed that a method of enforcing judgments against the inhabitants, which might not have been unjust, when such inhabitants were really parties, has become so, and therefore unconstitutional, since such inhabitants can defend only through a corporate organization. Towns, however, are not full corporations. They have no capital stock, and no shares. They are only quasi corporations, — created solely for political and municipal purposes, and given a quasi corporate character for convenience only. They remain still an aggregation of individuals dwelling within certain territorial limits, and under the direct jurisdiction of the legislature.

But legislatures, in creating purely private corporations, have an unquestioned power to prescribe the personal liability of a stockholder therein for corporate debts, and the method of enforcing it. They can limit this liability to the amount of his stock, or to his proportionate share, or can make him liable without limit. Morawetz on Corp. § 606, *et seq.*; *Pollard* v. *Bailey*, 20 Wall. 520; *Hathorn* v. *Calef*, 2 Wall. 10. The common method of enforcement is by first recovering judgment against the corporation, and then bringing some specified process against the stockholder. But under such proceedings against him, the stockholder can not question the judgment against the corporation except for fraud. He is bound by such judgment until reversed. Morawetz on Corp. § 619; *Marsh* v. *Burroughs*, 1 Woods, 470; *Milliken* v. *Whitehouse*, 49 Maine, 527.

The proceedings against the person alleged to be stockholder, are to establish the fact that he is a stockholder, within the statute liability. In some instances, the statutes have permitted a judgment creditor of a corporation to determine for himself at his peril, (of course indemnifying the officer) what persons are stockholders liable for the debt, and to levy the execution directly on the property of such person, without any intermediate process. The question of liability as stockholder, would then be tried in a suit against the officer. This latter mode of enforcement, though perhaps harsher than the other, has been repeatedly held to be constitutional and we do not know of any case holding otherwise. Morawetz on Corp. § § 618, 619 and notes; *Leland* v. *Marsh*, 16 Mass. 391; *Marcy* v. *Clark*, 17 Mass. 330; *Stedman* v. *Eveleth*, 6 Met. 115, 124 and 125; *Gray* v. *Coffin*, 9 Cush. 205; *Holyoke Bank* v. *Goodman Paper Co.* 9 Cush. 576. See also, *Merrill* v. *Suffolk Bank*, 31 Maine, 57; *Came* v. *Brigham*, 39 Maine, 35. In *Penniman's case*, 103 U. S. 714, the statute of Rhode Island, authorized the arrest of a stockholder, on an execution against the corporation. The constitutionality of the statute was directly affirmed by the state court and was assumed without question by the U. S. Supreme Court. The principle is analogous to that which permits a creditor holding an execution against A at his

peril to levy directly upon certain goods as the goods of A without first instituting any process to determine their ownership. If B's goods be taken, he has a remedy against the officer or can successfully resist him. A is not injured in either event. If the person whose goods are sought to be taken on an execution against a corporation is liable as stockholder for the debt, he is not injured thereby. If he is not liable, he has the same rights and remedies as B.

But the plaintiff urges, that whatever may have been the adjudications heretofore, upon this method of enforcing a judgment against a municipal or other corporation, by levying upon the property of any member, it is now forbidden by that clause of the fourteenth amendment to the United States constitution already quoted. He claims that "due process of law" as there used, requires a notice to him personally, and an opportunity for him to be heard in court, before execution issues against his property. The general proposition would be, that "due process of law" means judicial process with *judex*, *actor* and *rens*. This proposition may seem to be supported by some general remarks of judges, and writers, but no case in point is cited, nor indeed any direct assertion.

The phrase "due process of law" in the United States constitution, and in the constitutions of many of the states, and the phrase "law of the land," in the constitutions of others of the states including Maine, have long had the same meaning. 2 Coke's Inst. 50, 51. English political history is full of the strife between the crown and the people, the crown seeking to enlarge its irresponsible prerogatives, and the people insisting on fixed, and certain laws. The Magna Charta, and the various bills of rights, in which these phrases were used, were demanded from the kings, as safeguards against arbitrary action, against partial, or unequal decrees.

The barons and people, insisted on general laws, *legum terrae*, on uniformity, "due process of law." They insisted on law however harsh, as better security than the prerogative however indulgent. These phrases did not mean merciful, nor even just laws, but they did mean equal and general laws, fixed and certain.

The solicitude was to preserve the property of the subject from the inundation of the prerogative, Broom's Court, Law. 228. The English colonies in America were familiar with the conflict between customary law, and arbitrary prerogative, and claimed the protection of those charters. When they came to form independent governments, they sought to guard against arbitrary or unequal governmental action by inserting the same phrases in their constitutions.

They insisted that all proceedings against the individual or his property, should be uniform, and by general law. They put the same limitation upon the federal government in the fifth constitutional amendment. In commenting on these phrases Mr. Cooley cites with approval the language of Mr. Justice JOHNSON in *Bank of Columbia* v. *Otely*, 4 Wheat. 235. "As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has settled down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of govenment, unrestrained by the established principles of private rights and distributive justice." Cooley on Const. Lim. 355. Judge GREEN in *Bank* v. *Cooper*, 2 Yerger, 599, (24 Am. Dec. 523) said: "By 'law of the land' is meant, a general and public law, operating equally on every individual in the community." He also said that such was the opinion of the distinguished Judge CATRON, and of Lord COKE. Chief Justice HEMPHILL, in *Janes* v. *Reynolds*, 2 Texas, 251, said, "the terms 'law of the land' . . . are now in their most usual acceptation regarded as public laws, binding upon all the members of the community under all circumstances, and not partial or private laws." O'NEIL, J., in *State* v. *Simons*, 2 Speers, 767, said: "The words mean the common law, and the statute law existing in the state at the time of the adoption of the constitution."

But it has been expressly decided, that due process of law does not always mean judicial process. The individual's property is often taken for taxes without his being first warned and heard, and it is nowhere contended now that such summary process is

not due process of law. It is the fixed, certain process, applicable to all, and not partial, nor unequal. *McMillen* v. *Anderson*, 95 U. S. 37. Mr. Justice MILLER in the opinion said: "By summary is not meant arbitrary, or unequal, or illegal. It (the collection of the tax) must, under our constitution, be lawfully done. But that does not mean, nor does the phrase "due process of law" mean, by a judicial proceeding. In *Murray* v. *Hoboken Land Company* 18 Howard, 272, a warrant of distress was issued by the solicitor of the treasury against the collector of New York, upon a certificate of the first comptroller, that the collector was indebted to the treasury. The collector had not been notified nor heard so far as appears. The statute authorizing such a process, was held constitutional. Judge CURTIS, on page 276, said: "The constitution contains no description of those processes, which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process." See also *Davidson* v. *New Orleans*, 96 U. S. 97; *Walker* v. *Sauvinet*, 92 U. S. 90.

It does not follow that every statute is the "law of the land," nor that every process authorized by a legislature is "due process of law." It must not offend against "the established principles of private rights and distributive justice." This statute does not. It does not transfer A's property to B. It only makes A's property liable to be taken for a debt, he in common with others, owes to B. A can save his property by paying the judgment against his town, which judgment binds him and all the other inhabitants, and is a judgment he, and each of the others ought to pay. Whether he pay or let his property be sold, he can recover full damages of the town, and have the same final process for the collection of his debt. In the end he only pays his rateable share of the common debt. The statute is general, and is uniform in its application, to every town, and every inhabitant. It may not be in theoretical harmony with other methods of procedure, but it accomplishes its laudable purpose, of compelling towns to pay their debts, without doing any injustice. Towns readily obtain credit at low rates of interest upon the strength of it, and to now pronounce it void, would destroy their credit and

work wide spread disaster among those who have so confidently invested their savings in loans to towns.

The words "due process of law" in the fourteenth amendment do not have any enlarged, nor different meaning, from that heretofore ascribed to them. The amendment does not make federal law, and federal process of law, the "law of the land," and "due process of law" in each state. Whatever was due process of law in any state before the amendment, is due process of law in that state since the amendment. Before the amendment, the final determination of the question whether a state statute was according to the law of the land, rested with the courts of the state. Since the amendment it rests with the Supreme Court of the United States. It is through this operation of the amendment, that the citizen receives additional protection against unequal and partial laws.

The United States Supreme Court, in considering and determining such a question, will look mainly at the fundamental law, and general jurisprudence of the state. If the statute or process is found to be of ancient origin, to have been fully acquiesced in, to be general in its character, and impartial in its application, and interwoven with the business of the people, that court will not pronounce against it, because it is anomalous or has not been adopted elsewhere. The plaintiff cites *Rees* v. *Watertown*, 19 Wall. 107, and *Meriwether* v. *Garrett*, 102 U. S. 472, not as decisive or applicable authorities, but for some general observations in the opinions, upon "due process of law." In neither case was there a comparison of a state statute with the fourteenth amendment, and in both cases (19 Wall. 122, and 102 U. S. 519) the New England method of enforcing judgments against municipalities is expressly noticed as an exception to the application of the general observations quoted by plaintiff, and is not even incidentally condemned. Elsewhere in the opinions of the same court, this method has been alluded to, as actual, existing and binding law, and nowhere has it even by implication been declared contrary to the New England law of the land, or the fourteenth amendment. *Riggs* v. *Johnson County*, 6 Wall. 191;

Supervisor v. *Rogers*, 7 Wall. 180; *Barkley* v. *Levee Comr's*, 93 U. S. 295.

The statute in question must be held to be constitutional and unaffected by the fourteenth amendment.

Judgment for the defendant in each case.

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

BENJAMIN F. ANDREWS, petitioner,

vs.

MARQUIS F. KING, Mayor, and others.

Cumberland. Opinion March 24, 1885.

Certiorari. Removal of city marshal of Portland by mayor and aldermen. Practice. Special stats. 1877, c. 346; 1878, c. 16.

Where an officer is "subject after hearing to removal by the mayor, by and with the advice and consent of the aldermen," the hearing must be by the "board of mayor and aldermen." A hearing by the aldermen alone is not sufficient, even if by the officer's consent.

Where an officer is removable in the manner above stated for "inefficiency or other cause," the mayor and aldermen must find sufficient cause to exist as matter of fact, and so adjudicate, before a valid order of removal can be made. An omission to pass upon the truth of the charges, invalidates the order of removal.

Where upon a hearing of a petition for a writ of certiorari the presiding judge, with the consent of the parties, rules *pro forma* only, that the petition be dismissed, without exercising his own judgment, the law court may entertain exceptions, and upon them, determine whether the writ should issue.

ON EXCEPTIONS.

Petition for certiorari to quash the proceedings of the mayor and aldermen of Portland in removing the petitioner from the office of city marshal on the first day of May, 1884. The petition was dated June 17, 1884.

(Return of the respondents.)

"In addition to the records, which the said petitioner has made part of his petition in the present case, and a copy of which is also hereunto annexed, of the proceedings before the

mayor and the aldermen of the city of Portland at the hearing relating to the removal of the petitioner from the office of city marshal of said city on charges duly preferred against him — the same hearing referred to in said petition of Benjamin F. Andrews to this honorable court for the writ of certiorari — the said respondents hereby respectfully certify and return that the following proceedings were had by and before them and the following facts were found by them:—

"First. That no further specification of either of the charges preferred was requested by said Andrews or his counsel, at said hearing before the mayor and the aldermen, but on the contrary at the opening of the hearing, the counsel for the present petitioner waived all objection to the charges, as being general or indefinite in their character, except as that consideration was urged as ground for delay of the proceedings to give time and opportunity to meet them.

"Second. That the question how one of the witnesses voted at the last municipal election, which appears in the record, was excluded as in the judgment of the mayor and the aldermen of no importance and wholly immaterial upon any issue legally arising under the charges preferred.

"Third. That in reference to the form or method of proceeding — the mayor retiring from the chair after reading the charges, calling the chairman of the aldermen to preside, and first hearing the testimony before making the removal and asking the advice and consent of the aldermen — the counsel for the present petitioner expressly stated at the hearing that he made no complaint about it, and was not sure that it was not upon the whole the most becoming method. The mayor remained in attendance during the whole hearing.

"Fourth. That it was the judgment of the mayor upon the evidence introduced at said hearing that the several charges preferred against said Benjamin F. Andrews as set forth in said record were all of them proved, and it was upon that judgment he acted in removing the said Andrews from said office of city marshal.

"And the same judgment was formed upon the evidence by the aldermen who voted to advise and consent to said removal, and it was upon that judgment they acted in giving such advice and consent.

"Fifth. That there was a full hearing before the mayor and the aldermen upon all the charges preferred, as they are set forth in said record.

"And now these respondents respectfully submit that this honorable court will not canvass the evidence laid before the mayor and the aldermen of said city, with the view of drawing inferences and determining facts therefrom, but will regard the facts found by them from the evidence as established, and this their return and certificate of the proceedings before them, together with the records annexed to said petition, as final and conclusive of the same. They further respectfully submit that their doings, findings and judgments were in all respects just and without error, and within their jurisdiction under the special laws of 1878 cited in said petition, and that the petitioner shows no cause entitling him to the writ of certiorari as prayed for."

Subscribed and sworn to.

The presiding justice ruled *pro forma*, that the petition be dismissed and the writ be denied, and the petitioner alleged exceptions.

William L. Putnam and *C. W. Goddard*, for the plaintiff, cited: R. S., c. 77, § 5; *Bath B. & T. Co.* v. *Magoun*, 8 Maine, 293; *N. Berwick* v. *York*, 25 Maine, 73; *Waterville, Petr's*, 31 Maine, 506; *Cornville* v. *Co. Com.* 33 Maine, 238; *Dyer* v. *Lowell*, 33 Maine, 261; *Detroit* v. *Co. Com.* 35 Maine, 379; *West Bath* v. *County Commissioners* 36 Maine, 77; *Furbush* v. *Cunningham*, 56 Maine, 186; *Hopkins* v. *Fogler*, 60 Maine, 268; *Bethel* v. *County Commissioners*, 60 Maine, 538; *Dresden* v. *Co. Com'rs*, 62 Maine, 367; *Fairfield* v. *Co. Com'rs*, 66 Maine, 387; *Spofford* v. *R. R. Co.* 66 Maine, 48; *White* v. *Co. Com.* 70 Maine, 326; *Cushing* v. *Gay*, 23 Maine, 9; 2 Dill. Mun. Corp. § § 925, 929, 927; R. S., c. 102, § 13; *Dow* v. *True*, 19 Maine, 48; *Banks, App't*, 29

Maine, 291; *Lewiston* v. *Co. Com.* 30 Maine, 24; *Smith* v. *Co. Com.* 42 Maine, 400; *Wayne and Fayette* v. *Co. Com.* 37 Maine, 560; *McPheters* v. *Morrill*, 66 Maine, 126; *Vassalboro, Petr's*, 19 Maine, 338; *Minot* v. *Co. Com.* 28 Maine, 121; *Windham, Pet'rs*, 32 Maine, 454; *Pingree* v. *Co. Com.* 30 Maine, 354; *Harkness* v. *Co. Com.* 26 Maine, 356; *Strong* v. *Co. Com.* 31 Maine, 580; *Winslow* v. *Co. Com.* 37 Maine, 562; *Bangor* v. *Co. Com.* 30 Maine, 273; *Levant* v. *Co. Com.* 67 Maine, 433; *Orono* v. *Co Com.* 30 Maine, 305; *Pike* v. *Harriman*, 39 Maine, 53; *Hayward, Pet'r*, 10 Pick. 358; *State* v. *Rochester*, 6 Wend. 564; *Ledden* v. *Hanson*, 39 Maine, 359; *Emery* v. *Brann*, 67 Maine, 44; *Ross* v. *Ellsworth*, 49 Maine, 418; *Oxford* v. *County Commissioners*, 43 Maine, 257; Special Statutes, 1878, c. 16; *People* v. *Nichols*, 79 New York, 588; *People* v. *Fire Commissioners*, 72 New York, 449; *Osgood* v. *Nelson*, 5 Appeal Cases, Law Reports, 636; *Farmington R. W. P. Co.* v. *County Commissioners*, 112 Mass. 206; *Tewksbury* v. *Co. Com.* 117 Mass. 564; *Murdock, App't*, 7 Pick. 312.

Charles F. Libby, for the defendants.

There is no provision of law authorizing exceptions to the decision of a judge at *nisi prius* on a petition for certiorari. This court has jurisdiction only of questions arising on the writ of certiorari. The granting of the petition is matter of discretion, not of right. No exceptions lie to the refusal of a judge to grant the writ, and therefore none to his rulings at the hearing upon the petition. The language of the statute (R. S., c. 77, § 42) seems explicit in this point. It is confined to "questions arising on writs of . . . certiorari, when the facts are agreed on, or are ascertained and reported by a justice." If no writ is granted there is no provision of law for bringing the matter before the law court. Here the facts are not "agreed on" nor "reported by a justice;" it is a petition and not a writ.

The final vote, as recorded by the city clerk, does not specifically mention the charges, but when taken in connection with the rest of the record leaves no reasonable doubt as to the basis

of the aldermen's action. We submit that this is not a case where the action of the court is to be governed by a strained construction of the record of a municipal body, not acting according to the course of the common law, and not accustomed or to be expected to make up its record with the fullness and accuracy with which the record of a judgment of a court of law would be made up. On the contrary, this is a case when the petitioner is bound to show that he is, in fact, actually aggrieved, not that the record is capable of a construction, which renders it possible to argue that he was so aggrieved.

If such a course was to be accepted, no records of municipal officers could stand, as they furnish at the best a mere outline of the proceedings. As said by Judge DEVENS in *Fairbanks* v. *Aldermen of Fitchburg*, 132 Mass. 47 : " In cases of this character it is particularly desirable to deal with the substantial justice of the case, untrammelled by defects in the records or in the pleadings."

The only question which any court would consider, when asked to set aside these proceedings, would be, what was in fact the judgment of that tribunal upon these charges — were they sustained or not — not merely does the record show it fully, but what was the fact.

Upon this question the answer of these respondents is conclusive. They say, whatever the record may or may not show, our judgment was upon the evidence that these charges were sustained, and that the petitioner was guilty of taking bribes as well as of the other acts specified, and upon that judgment they acted in voting to remove him. What claim, then, has the petitioner for the favorable action of this court?

" The court cannot, upon a writ of certiorari, examine into the merits of a case and set aside the verdict as being against evidence." *Johnson* v. *Ames*, 11 Pick. 173; *Fay and al. Petitioners*, 15 Pick. 243.

The reasons which have led the courts to hold that the record as first made up is not conclusive, but may be supplemented by a further return, are apparent. If this were not the case, inexperienced recording officers might place in jeopardy important

public interests and delay indefinitely important action on matters of great moment. The proceedings of municipal boards would be hedged in by technicalities, which would destroy the efficiency and defeat the objects for which they are established. The strictness of ordinary legal proceedings cannot be expected in the record of their action. Some allowance must be made for their inexperience and lack of legal knowledge, when it does not touch the merits of their action. For this reason the courts have held that when the record does not show all the steps in the proceedings or the grounds of their action, they may make a return, setting out such additional matter as shows that the action taken by them was legal; as stated by GRAY, C. J., in *Farmington River Water Company* v. *County Commissioners*, 112 Mass. 206: "To a petition for certiorari to quash the proceedings of county commissioners, the commissioners may file an answer stating in detail their findings at the hearing before them, if not stated in their record; and the petitioners cannot control it in matter of fact by intrinsic evidence." See also pp. 216, 217. "A return in writing by the county commissioners of their findings, which cannot be disputed in matter of fact." *Tewksbury* v. *County Commissioners*, 117 Mass. 563; *Mendon* v. *Co. Comrs*, 5 Allen, 13; *Worcester & Nashua R. R.* v. *Railroad Comrs.* 118 Mass. 564; *Chase* v. *Aldermen of Springfield*, 119 Mass. 556; *Grace* v. *Board of Health*, 135 Mass. 497, 498. Also citing *Gloucerster Co. Com'rs*, 116 Mass. 581; *Fairbanks* v. *Mayor and Alderman of Fitchburg*, 132 Mass. 42.

But the practice in this respect has been so fully and closely stated in a late opinion of this court, that further citation of authorities is unnecessary.

"The answer of the county commissioners to a petition for certiorari should contain a full, detailed statement of the facts proved and the rulings thereon, so far as the points complained of in the petition are concerned. The answer, when completed, signed and sworn to, is conclusive on all matters of fact within their jurisdiction." *Levant* v. *County Commissioners*, 67 Maine, 429.

Petitioner's counsel complain that the return of respondents uses the word "judgment" in place of finding, and say that it is an evasion of liability and an attempt to deprive them of the remedy they would have in case the word "finding" had been used. We submit that the objection is hypercritical and unreasonable. The word "judgment" involves a finding. See "Finding" in Burrill's Law Dict. The language of the return is "it was the judgment of the mayor upon the evidence," . . "and the same judgment was formed upon the evidence by the aldermen who voted to advise and consent to said removal," "and it was upon that judgment they acted," etc.

There can be no question as to what these words mean. They include a finding of fact, a conclusion reached by means of evidence. To complain of the form of the statement is to cavil about words, and ignore their real significance. What element that goes to make up a valid judgment and legal action of the board is wanting, when the mayor and aldermen certify that upon the evidence their judgment was that the petitioner was guilty of the charges preferred, and that upon that judgment, so formed, they acted in removing and in advising and consenting to the removal.

EMERY, J. The office of city marshal is not a corporate, nor even a municipal office. While the appointment of the incumbent is usually delegated to the municipal government, it is competent for the legislature to intrust it to the governor. Cases are not uncommon in large American cities where the state has taken to itself the appointment and government of the police force of the city. The city marshal has other than municipal duties. He has to preserve the public peace, the peace of the state. He has to enforce the laws of the state. He is essentially a state officer, and the people of the whole state are interested to have such legislation, and judicial interpretation, as to his appointment, tenure, and removal, as will secure the most efficient administration of his office. Dillon on Mun. Corp. (3 ed.) § § 58, 60, 210; *Farrel* v. *Bridgeport*, 45 Conn. 191; *Cobb* v. *Portland*, 55 Maine, 381. The court, therefore, in passing upon the

questions here presented, must regard the rights and interests of the people, as well as those of the parties. It is a question of public, as well as of private right.

Formerly, the city marshal of Portland was appointed by the mayor and aldermen, annually, subject to removal for good cause. This practically gave the mayor and aldermen power to remove at will, at the end of the year, by merely not re-appointing. By the act of 1877, c. 346, and the amendatory act of 1878, c. 16, the legislature provided that the marshal should "hold office during good behavior, subject, however, after hearing, to removal at any time by the mayor, by and with the advice and consent of the aldermen, for inefficiency or other cause." The tenure of the office was made to be during good behavior, a tenure as long as that of the justices of the Supreme Court of the United States. We must assume that this important change in tenure was made advisedly. We must assume that the legislature investigated and deliberated sufficiently. We must assume that its action herein was expedient and necessary, and so unhesitatingly give it full scope and effect.

A power of removal is always necessary to ensure good behavior; and in this case, a power of removal was vested in the mayor and aldermen, to be exercised, however, only when there was "inefficiency or other cause" existing, and then only after hearing. The discretionary power of annual removals by not re-appointing, was taken away. Removals were now to be made only when necessary, for causes affecting the administration of the office, and only after examination and deliberation. In these proceedings for removal, the public, for whose benefit the legislation was enacted, and the incumbent himself, have a direct interest.

While the incumbent of a legislative office has no vested right to his office, as against the state; while he has no such property in it as can be conveyed, yet his right or title to the office and its emoluments has always been recognized by the courts as a valuable interest; as a privilege entitled to the protection of the law. He ought not to be deprived of it, "but by the judgment of his peers, or by the law of the land."

In view of the importance to the public, as well as to the parties, of the principles which must govern the decision of this case, we deem it advisable to consider at some length, the various requirements of the statute, for a valid removal. The removal can only be for cause, but the statute does not specify in detail what the causes are, which will justify a removal. "Inefficiency or other cause," however, must mean substantial cause. In determining the meaning of these words, they should be considered in connection with the preceding words, declaring the tenure of the office to be "during good behavior." We think they embrace any act of nonfeasance or malfeasance in office, from corruptness, as well as nonfeasance or misfeasance from inefficiency. They may also be fairly held to embrace the commission of an infamous crime while in office, or a conviction of a misdemeanor and sentence to imprisonment for a term which will prevent the officer from discharging the duties of his office.

The composition and character of the tribunal constituted by the statute for hearing and determining the causes, should also be considered. The legislature, it must be assumed, intended it to be disinterested and impartial. In this case, as is usual, the mayor and aldermen are constituted the tribunal. In proceeding under the statute, they do not act as municipal officers, nor as agents of the city, but, *pro tempore*, as judges. It has been held, that when sitting as judges to try charges against an officer, municipal officers must be specially sworn for that purpose. *Tompert* v. *Lithgow*, 1 Bush. (Ky.) 176. We doubt if such a special oath is necessary, but the case cited illustrates and supports our proposition, that the mayor and aldermen act under this statute, apart from their mere municipal duties, and in a judicial capacity. The act of hearing and deciding is always a judicial act. It should always be done, deliberately and without bias.

The statute provides that the mayor shall take the initiative in passing an order of removal, and that the aldermen shall have power to negative the order. The mayor, however, can not exercise his initiative until after the hearing. The language is, "subject after hearing, to removal by the mayor," &c. The

statute does not expressly declare before whom the hearing shall be, whether before the mayor alone, or the aldermen alone, or the mayor first and the aldermen afterward, or before the mayor and aldermen together. Only one hearing seems to be contemplated however, and yet, the concurrence of both the mayor and the aldermen is required for vote of removal.

The inference would be that the hearing should be by both, and by both together. In the statutes, and in the city charter of Portland, as in all city charters, certain powers and duties are vested in the mayor; certain others are vested in the aldermen, while the general administrative powers of the city, including the administration of the police, are vested in "the mayor and aldermen." The mayor and aldermen constitute a board distinct from the board of aldermen. The mayor is required to preside at all meetings of the mayor and aldermen, (city charter, § 3,) but the aldermen select their own chairman when in session by themselves. When anything in municipal matters is to be done by the mayor and aldermen, it is done in a session of that board. The mayor and the aldermen in such cases, sit together in the considering of municipal affairs, and while their final action may be concurrent, their hearings and deliberations are in common. In the absence of any declaration to the contrary, we think that when the legislature provided for a hearing before removal, it intended that both the mayor and the aldermen should hear the matter, and should hear it as they hear other matters, sitting as a board of mayor and aldermen, with the mayor in the chair. This view is supported by the subsequent legislative provision, that "the mayor and aldermen" (of Portland) should have power to send for persons and papers, and compel the attendance of witnesses, "at any meeting of *said board of mayor and aldermen*," at which a hearing is to be had. (Special laws of 1881, c. 86.)

The tribunal is composed of two factors, whose concurrence is necessary to a valid sentence. The public, and the respondent, are entitled to the unbiased judgment of each, after hearing, and as the result of the hearing. It is a part of the "law of the land," that the authority which strikes must hear.

The proceedings before this tribunal should be according to

"the law of the land," which is the common law wherever the statute is silent. Specifications of the alleged causes should therefore be formulated with such reasonable detail and precision as shall inform the people and the incumbent of what dereliction is urged against him. The charges should be specifically stated with substantial certainty, though the technical nicety required in indictments is not necessary. Dillon on Mun. Corp. (3 ed.) 255. They may be presented by any one. It is not improper for the mayor, as the chief executive magistrate of the city, required to be vigilant and active in causing the laws of the state to be enforced, to formulate the charges, even *suo motu*. In his supervision over the conduct of officers, it may be his duty to do so. But he should not prejudge the case; he should not act as prosecutor at the hearing; there, he should divest himself of his executive functions and assume the judicial; he should suspend his own judgment till the hearing is completed, that it may be the result of the hearing, and not of a preconceived opinion.

The incumbent should have reasonable notice of the charges, as formulated, and of the time and place of the hearing. At the hearing, he should be allowed to cross-examine the witnesses against him, within the rules of evidence. His own testimony and that of the witnesses for the defence, should be fully heard within the same rules. The hearing should be full and fair, and by a patient, unprejudiced tribunal. The proceeding is adversary or judicial in its character, and where the statute is silent, the substantial principles of the common law must be observed. Dillon on Mun. Corp. (3 ed.) 253; *Murdock* v. *Phillips' Academy*, 7 Pick. 303; 12 Pick. 244.

After hearing and before sentence, (for the order of removal is a quasi sentence, though we use the word for purpose of illustration merely,) there should be an adjudication upon the truth or falsity of the charges as matters of fact; for upon such adjudication the sentence is based. This adjudication must be by the tribunal that hears the evidence, here, the board of mayor and aldermen. The removal can not be made, unless the alleged cause in fact exists, and such existence should be ascertained and declared, as the legal basis for the sentence of removal. Such is

the immemorial practice in prosecutions in the common law courts. We do not refer to civil proceedings. No sentence is there pronounced until the respondent has been found and declared guilty of the particular charge alleged. The records of the higher courts recite first the fact that the respondent is found guilty, by verdict, or plea, and "*therefore* it is considered," &c., or "*whereupon* it is ordered," &c. At the preliminary hearing before a magistrate, where there is a plea of "not guilty," the record always shows, that upon hearing, the respondent is adjudged guilty or not guilty, as the case may be, and that the sentence or order is based on such finding of fact.

In special courts, established for the trial of officers alleged to be unfaithful, such as courts of impeachments and courts martial, we believe it is the universal practice for the court to pass first upon the truth or falsity of each charge, before passing sentence.

This must needs be the course, otherwise the court might pronounce sentence, where no one charge was believed by a majority of the court. There might be as many charges as there were members of the court, and no one charge receive the assent of more than one member, yet that member vote to sentence, on account of his belief in the truth of that one charge, which all his associates believed to be false.

If each member did so, there would be sentence, without conviction, and without guilt. Such a result would be monstrous, and hence the practice of first ascertaining and declaring whether the court agrees, or concurs, upon any one charge as proved.

We think it may be assumed in the absence of specific directions, that the legislature intended this special tribunal should follow the course so long, and generally followed by the common law courts, and special courts charged with similar duties. The same reasons for such a course certainly exist.

In this case now before us, are seven different charges. The mayor might be convinced of the truth of one only, and think it his duty to remove for that cause. The aldermen might be unanimous in the belief that the particular charge relied upon by the mayor was not proved, and yet be of the opinion some other charge was true. The mayor might remove upon his belief, and

the aldermen consent upon their belief, and the officer be thus removed without any concurrence of belief. Again, no one charge might be proved to the satisfaction of more than one alderman, while each one of the seven aldermen might be satisfied with the proof of one of the charges, and consent to the removal for that charge. There might be, in this way a unanimous vote for removal, where six-sevenths of the board believed every charge to be false. Again, the mayor and aldermen might believe in the truth of such charges only, as are not legal cause for removal, and disbelieve the others, and yet vote to remove, and the incumbent thus be deprived of his office against the evident will of the people. The evil and unjust results, that might follow from an omission of the tribunal, to first ascertain and declare the facts as to the charges, before considering the sentence are cogent arguments that such ascertainment and declaration must be an essential part of the procedure, for a valid removal. No course of procedure of an inferior tribunal, that could so nullify the intent of the statute, and so elude the supervisory power of the Supreme Court over such tribunals, can be according to "the law of the land."

If any charge be found true by the concurrent finding of the mayor, and aldermen, substantially in the manner above indicated, and the officer's removal be thought advisable, there must then be an order of removal. The adjudication upon the facts, and that upon the advisability of removal are distinct acts. The latter cannot precede nor be co-incident with the former, but must follow it. Though the board of mayor and aldermen may find some of the charges proved, *non constat* that the mayor will remove, or the aldermen consent. Repentance, reparation, or other considerations may induce a suspension of sentence. If removal be determined upon, by the mayor, he should make an order to that effect, and if the aldermen consent, that consent should be formally expressed. We do not mean that these things are to be done with stateliness of manner, nor that the record is to be minutely formal. The manner may be familiar, and the record brief. The finding of the facts, and the consequent order may be expressed simply, and in condensed form.

All that is necessary is, a substantial observance of the essentials, and some expression thereof, in some intelligible form.

In the absence of any statute provision, the procedure above out lined appears to us upon principle and analogy to be that required by "the law of the land," according to which the officer must be deprived of his office, if at all.

Now, let us, in the light of the principles above stated, examine the proceedings of the mayor, of the aldermen, and of the board of mayor and aldermen, and see wherein they are erroneous, if there be any error. They are generally regular. Two at least of the charges, the fourth and fifth, were sufficient in form and substance. There are two matters, however, that seem to us irregular, and if not sufficiently cured, erroneous, in substance.

1. There was no hearing before the mayor, nor before the board of mayor and aldermen. The mayor evidently did not consider himself a part, or member of the tribunal that was to hear and afterward determine. From his letter to the marshal of April 21, 1884, it would seem he did not understand that he was to give a hearing, but rather that the marshal could be heard before the board of aldermen on the question presumably of their concurrence in the predetermination of the mayor to remove. At the hearing he did not preside, as he was by law bound to do, at all meetings of the mayor and aldermen, and although he remained in attendance, it was only as a spectator or prosecutor. The official hearing was by the aldermen alone. For the reasons heretofore stated, we do not think that such a hearing was sufficient basis for sentence of removal. The respondent and the people were entitled to the judgment of the mayor, and that, after hearing, and as the results of the hearing. They were entitled to be heard by him as a judge before he should pass sentence. There has been no hearing by the statute tribunal, if we have correctly assumed that the statute intended a hearing by the mayor as well as by the aldermen.

2. At the conclusion of the hearing, the mayor took his seat, as mayor and presiding officer, (the board of mayor and aldermen being thereby in session) and without stating what charges

he found proved, or upon which of them he based his action, without putting to the board the question of guilt or innocence, without any finding of facts by either factor of the board, upon either charge, he passed sentence of removal. He then put the question whether the aldermen would advise and consent thereto.

The aldermen did not pass upon the truth or falsity of any charge. There was no ascertainment nor declaration of any facts. Their only vote or act was that of sentence. We cannot know from the record that a majority of the aldermen believed in any one charge, nor whether the removal was upon a sufficient, or insufficient charge. The record does not disclose what was the basis for the sentence, nor that there was any basis. According to the principles of law heretofore stated, this want of a proper basis renders the sentence of removal invalid.

The first named irregularity was an abuse of jurisdiction. The court constituted by the statute did not sit. The mayor, an essential factor of that court, abdicated his judicial functions. The board of aldermen assumed to themselves the power that was only to be exercised by the board of mayor and aldermen.

The second named irregularity was an error in procedure. They are both within the superintending power of this court, which "has general superintendence of all inferior courts, for the prevention and correction of errors and abuses, where the law does not expressly provide a remedy." R. S., c. 77, § 3. This jurisdiction is broad enough to include a superintendence of the mayor and aldermen where they are sitting in any judicial capacity. Such power has been repeatedly exercised in England and in this country, and in cases of removal of officers of private corporations as well as of public officers. It does not extend to a re-trial of the facts, nor to a review of the evidence, nor to a revision of any matter of discretion. It does extend to an examination of the grounds of the proceedings, and of the course of the procedure, to determine whether the inferior court kept within its jurisdiction, and proceeded according to law. Whether the inferior court is legally constituted; whether the allegations made to it are sufficient in form and substance to authorize it to proceed; whether its procedure is correct, and whether its

sentence is lawful are questions for this court to determine. If abuse or error be found in any of these matters, this court can by proper process annul the whole proceeding, where no other mode of correction is provided. The foregoing proposition as to the extent of the supervisory power of this court, and that it comprehends cases of attempted removal of officers for cause, is well established by authority. *People* v. *Fire Commissioners*, 72 N. Y. 245; *People* v. *Nichols*, 79 N. Y. 582; *People* v. *Campbell*, 82 N. Y. 247; *State* v. *Lufton*, 64 Mo. 415; *Rex* v. *Richardson*, 1 Bun. 517; Dillon on Mun. Corp. (3 ed.) 250, 251 and notes. In an English case *Osgood* v. *Nelson*, L. R. Q. B. 41, 329 and 5 App. Cas. L. R. 636, the statute authorized the mayor, aldermen, and council to remove the registrar for "inability, misbehavior, or for any other cause which *may appear reasonable to them*." The court of Queen's Bench and the House of Lords on appeal, considered, and determined for themselves the reasonableness of the alleged causes. They decided that habitual non-attendance was a reasonable cause, but they did so upon their own judgment, and not upon that of the mayor, aldermen and council.

The respondent before the mayor and aldermen, comes to this court as a petitioner for the writ of certiorari, which the court has the power to issue in the furtherance of justice. R. S., c. 77, § 5. This writ is the usual and suitable remedy as its effect is to annul the proceedings of the inferior court, if found to be erroneous. In accordance with the approved practice in this state, the mayor and aldermen, the respondents to the petition, not only sent up their records, but also an answer on oath alleging other proceedings and matters that do not appear in the record.

They claim that their answer is conclusive as to all matters of fact alleged therein, and that these show, that the seeming irregularities did not really occur or were waived, or that the petitioner was not prejudiced thereby. *Levant* v. *Com'rs*, 67 Maine, 429. The answer, however, is not conclusive of the legal effect of the facts alleged, and the sufficiency of the allegations for their purpose is next to be considered. We need only to consider allegations relating to the two errors already indicated; that of

the mayor's omitting to sit officially at the hearing; and that of the mayor and aldermen omitting to adjudicate upon any of the charges.

As to the first, the respondents' answer, (see item 3, of the answer) that the mayor was in attendance and heard the testimony. We do not understand them to mean that the mayor attended, and heard officially as a judge. The record shows that the hearing was before the board of aldermen only, and that the mayor was present as a spectator or prosecutor. An answer is not to be construed as contradicting the record, but rather as supplementing it. The respondents also answer that the counsel for the present petitioner, expressly stated he made no complaint about the mayor leaving the chair, and was not sure it was not, upon the whole, the most becoming method. The argument of course is, there was a waiver of the mayor's performance of his judicial duty in the matter, and that it was competent for the petitioner to waive it, and so give jurisdiction to the board of aldermen alone.

If it were matter of form, or of practice, or even of procedure only, it was, perhaps, competent for the then respondent to waive it, and be bound by the waiver. But this matter involves the composition of the tribunal; indeed its very authority and existence, in which the people have a manifest interest. As before stated, the statute contemplated a hearing by the mayor and aldermen sitting as a board, the mayor in his place as mayor and presiding officer. The incumbent of the mayoralty was not simply an individual member of the tribunal who might be absent and yet leave a quorum. He was an essential factor. There could be no board of mayor and aldermen without an acting mayor. There could be no legal hearing under this statute, without the mayor or his vice being present, sitting in his place as mayor, as one branch of the tribunal composed of two branches. There could be no sentence without a prior legal hearing. The city marshal might have resigned his office, or have confessed the charges, but he could not confer on the board of aldermen alone, the jurisdiction to hear, nor upon the mayor the jurisdiction to sentence without hearing, or confession. Neither branch could

exercise by consent a jurisdiction it did not have by statute. It is a familiar principle that consent will not confer jurisdiction on an inferior court.

A superior common law court when trying questions of fact is composed of two factors, a judge and a jury. Both must be present and hear. In civil causes the statute permits the parties to waive the jury, and submit the case to the judge. In criminal causes however, which are more analogous to this proceeding, there is no provision for the waiver of a jury. If a respondent while adhering to his plea of not guilty, should verbally offer to submit to a hearing by the judge alone, such offer or waiver would not authorize the judge to dispense with the jury, and proceed to hear and sentence. This would be very apparent in the case of the graver offences where the penalty might be long imprisonment, or even death. The principle however, would be the same in the case of all offences. If then a superior court, will not eliminate or suppress one of its factors upon the verbal consent of a respondent pleading not guilty, it would seem that an inferior and limited tribunal cannot do it. It must not be forgotten that the people as well as the respondent, are interested, in the proceedings.

As to the second error, the respondents' answer, (see item 4) that it was the judgment of the mayor, and of those aldermen voting for removal, upon the evidence at the hearing, that all the charges were proved, and that the sentence and consent thereto, were based on that judgment. Reading this answer in the light of the record, the meaning seems to be, that the evidence induced in the mind of the mayor, and in the mind of each aldermen voting with him, a belief in the truth of all the charges. The most that the answer and record taken together indicate, was a mental status in certain individuals. By their use of the term "judgment" in their answer we do not understand the respondents to assert, that their individual mental beliefs, were formulated into an expressed judgment of the tribunal, in the technical law sense of the term. Individual members of this

court, may in relation to a case, have certain views, or opinions induced by the arguments. Each member may have the same opinion in his own mind. But such individual opinions do not constitute a judgment of the court, upon which further proceedings could be had. These opinions must be formulated, and expressed officially to become a court judgment. It is only after such formulating and expression that the consequences of a judgment can follow. We have said there should be an adjudication upon the facts. That adjudication is something more than a mental process, or conclusion in individual minds. It is an expression, a giving out by the tribunal, of the resultant of the opinions of its members, such expression being an open act, a step in the procedure. It should properly appear on the record; but if the recording officer omitted it, and such expression was actually made, the record may be amended, or the fact can be shown in answer to a petition for certiorari, (67 Maine, 429). We do not however, understand the answer in this case, to assert there was any such expression, any such formal articulation of judgment. Indeed the record expressly declares that the board of aldermen was requested to make it by one of its members, and refused. The answer is not sufficient to cure the second error.

The respondents however, further argue, that the granting of the writ of certiorari, does not necessarily follow from their omission to show regular proceedings. The granting of the writ is a matter of judicial discretion, and they urge that, even if these particular proceedings are erroneous, new ones can at once be instituted, from which the same result must follow, and therefore these may well be permitted to stand. The great majority of cases in which the writ is asked for, are purely civil proceedings, such as those about taxes, roads, etc., and in such cases, the writ is always granted, if there be an excess of jurisdiction by the inferior court, or any unauthorized step, or omission in the procedure, which may work an injustice. This proceeding before the mayor and aldermen, however, is somewhat akin to a criminal prosecution. It charges the petitioner with offenses. It may result in his condemnation and disgrace, as well as in the

loss of some privilege. It has been said that in such cases, the injured party is entitled to the writ *ex debito justitiae*. Dillon on Mun. Corp. (3 ed.) 925.

It is also suggested in the argument that the proceedings of a special court, unlearned in the law, are not required to be so regular, nor its records so full and accurate as those of a superior court. The court is reminded of the indulgence shown to the records and proceedings of municipal bodies. The courts will labor to discover and give effect to the real intention of these bodies, in all municipal matters, as expressed in any votes or proceedings, however informal. But even in such matters, the court can not supply votes that were not passed, nor overlook the illegality of the votes that were passed. In such adversary proceedings as these, moreover, distinct from, and more solemn than, those in municipal matters; in proceedings so summary, affecting the character of a citizen and the peace of the state, the proceedings and record should be reasonably regular and precise. No intendments can be indulged as to the jurisdiction and regularity of the procedure of the mayor and aldermen in such cases. *State* v. *Lupton*, 64 Mo. 415.

This case is brought before us, upon exceptions to various rulings of the presiding judge at the hearing on the petition, and it is contended that the law court has no jurisdiction over questions arising on the petition, but only over those arising on the writ itself. In the enumeration of the cases that may come before the law court, in § 42, c. 77, R. S., the last case named is, "questions arising on *writs* of . . . certiorari." Early in the same list, however, is named, "bills of exceptions." Again in § 51, of c. 77, it is provided that "a party, aggrieved by any opinion, direction, or judgment of the presiding judge," may have a bill of exceptions to the law court. There would seem to be sufficient authority for this court to determine this bill of exceptions. The exceptions present questions of law solely. If it be suggested that the final ruling dismissing the petition was a matter of judicial discretion, not reviewable by this court, it may be answered that the presiding judge did not exercise any such discretion. He heard no evidence. He looked at the petition,

record and answer only. They presented a grave and delicate question. He made a *pro forma* ruling only, with the apparent consent of the parties, and with the evident intention of thereby bringing the whole case before us for more full consideration. The case might properly have come up upon report, or agreed statement, but the form in which it comes is not essential. BARROWS, J., in *Collins* v. *Chase*, 71 Maine, 435.

We have only considered the principal question, that presented by the final ruling dismissing the petition, as the result we have arrived at, renders any consideration of the minor rulings unnecessary. We have discussed, and passed upon two errors in the proceedings of the inferior court, when perhaps one was sufficiently decisive of this particular case. We have thought it advisable, however, to state at some length, the legal principles we deem applicable to the case. It is highly important that all inferior tribunals, especially those vested with a jurisdiction to deprive a person of his property, and condemn him to disgrace, should keep within their jurisdiction, perform their whole duty, and proceed according to law. Our somewhat lengthy discussion may serve as a guide to such tribunals, who, we are glad to assume, desire to act impartially and lawfully, and who only err, as in this case, from a misapprehension of their duty.

We think the errors noted are substantial, — that they are not cured by the answer, and that they are of such a nature as requires the writ to issue.

Exceptions sustained. Writ to issue.

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

STATE OF MAINE *vs.* MAINE CENTRAL RAILROAD COMPANY.

Kennebec. Opinion April 6, 1885.

Indictment. Nolle prosequi. Practice.

The statutory indictment against a railroad corporation to recover damages for the loss of the life of a person alleged to have been killed by the negligent management of a train under the control of such corporation, partakes in all practical respects so much of the nature of a civil proceeding that it may be, with leave of court, discontinued by a *nolle prosequi*, entered by the

prosecutor whilst the cause is on trial before the jury, the defendant resisting the entry and claiming the right to have a verdict rendered.

ON EXCEPTIONS from superior court.

Indictment against defendant corporation for alleged negligence in the running of a locomotive engine, in Hallowell, June 17, 1884, whereby one Henry M. C. Benner, was instantly killed.

After the cause had been opened to the jury, and evidence put in on the part of the government, but not concluded, the prosecuting attorneys were allowed to enter a *nolle prosequi* against the defendant's objection, and the defendant alleged exception.

W. T. Haines, county attorney, for the state.

Baker, Baker & Cornish, and *G. C. Vose*, for the defendant.

PETERS, C. J. Whilst the trial was going on under this indictment, the evidence being partially in, the prosecutor was permitted by the presiding judge to discontinue the indictment by entering a *nolle prosequi*. The discontinuance was entered according to the civil, and also according to the criminal form, of procedure. If the proceeding is a civil suit, the nonsuit was allowable. But otherwise, if a criminal prosecution, for at such stage of the trial, the alleged criminal, if he demanded it, would have the right to have a verdict rendered. *State* v. *Smith*, 67 Maine, 328.

We think the proceeding is essentially civil in its nature, — in form a criminal prosecution, — in fact a suit. It is for reasons a privileged proceeding. It has the rights incident to a civil suit, and something more. It would have a less right than belongs to a civil action, if the prosecutor can not, the court assenting to the act, become nonsuit before the cause be committed to the jury. Our opinion is that the prosecutor had such right, and that it could be done by nonsuit or *nolle prosequi*, although *nolle prosequi* would be the more formal and accurate entry. *State* v. *Railroad*, 58 Maine, 176; *State* v. *Railroad*, 67 Maine, 479; *State* v. *Railroad*, 76 Maine, 357.

Exceptions overruled.

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

ARCHIBALD MCNICHOL, administrator, *vs.* HENRY F. EATON.

Washington. Opinion April 7, 1885.

Administrators. Trespass and waste. Insolvent estates. R. S., 1871, c. 66, § 20, c. 95, § 12. Cutting timber from wild lands.

In order that an administrator may sustain an action under R. S., 1871, c. 66, § 20, for trespass or waste upon the real estate of his intestate, he must show that the estate he represents is actually insolvent.

Where the last domicil of an intestate was in New Brunswick, it is presumed that the principal assets and principal administration would be there; and the actual insolvency of the estate could be proved only by the aid of the records of the court having jurisdiction of such administration.

An administrator is bound to know the last domicil of his intestate, the place where the assets are presumed to be, and where the principal administration should be.

The cutting of timber from wild lands in a careful and prudent manner, keeping in view the future value of the land as well as the present income, is not waste within the meaning of R. S., 1871, c. 66, § 20, or c. 95, § 12.

ON REPORT.

Trespass, by the administrator of the estate of Monroe Hill, for cutting and carrying away timber from the timber lands of the intestate by one holding a conveyance of the same from the heirs of the intestate. The writ was dated April 7, 1881.

The material facts are sufficiently stated in the opinion.

A. McNichol, for the plaintiff.

In *Bates* v. *Avery*, 59 Maine, 354, the court say an administrator may recover damages in an action of trespass of a person committing waste or trespass on the lands of the deceased when the estate is insolvent. R. S., c. 66, § 20. This action is based upon precisely the same facts as existed in that case. In that case, and in this, trespass was committed after the death of the intestate and before the appointment of the administrator.

It is contended that insolvency is not proved in this case because no administration is shown in New Brunswick. The obvious reason is that there was nothing to administer. Surely the plaintiff is not bound to prove a negative nor was any one bound to administer in New Brunswick when no representation

could be made that the deceased left estate there. It would have been a useless expense.

The records of the probate court under which the plaintiff derives his anthority are surely conclusive evidence as to the insolvency of the estate. *Bates* v. *Avery*, 59 Maine, 354.

Harvey and Gardner, for the defendant.

DANFORTH, J. If this action is maintainable it must be by virtue of R. S., 1871, c. 66, § 20, which provides that, "when an administrator commits waste or trespass . . on real estate of his intestate insolvent, he is liable to account for treble the amount of damage. He may recover damages, in an action of trespass, of a person committing the same, to be accounted for as assets, although such person is heir or devisee of the estate." In ch. 95, § 12 of the same revision it is provided that when an heir after the estate is represented insolvent and before the real estate is sold for payment of debts, or before all the debts are paid, "removes or injures any buildings or trees, except what is needed for fuel or repairs, or commits any strip or waste on such estate, he shall forfeit treble the amount of damages, to be recovered by the executor or administrator in an action of trespass." Both of these sections had their origin in ch. 191, § 4, of the acts of 1835. Before the passage of the last named act the administrator had no claim in or control over the real estate of his intestate except the right to sell under a license when necessary to pay debts. No liability for waste rested upon the heir and when any was committed, the right of action vested in him alone. *Fuller* v. *Young*, 10 Maine, 365; *Moody* v. *Moody*, 15 Maine, 205. Hence, the statute being in derogation of the common law, its meaning cannot be extended beyond what a fair construction of its terms requires.

The title of the plaintiff's intestate to the real estate upon which the alleged trespass or waste was committed is not questioned. The defendant in what he did justifies under a license from the owner whose title is derived from the heir of the intestate; therefore he stands in the place of and represents the heir. But for the statute he has all the rights of an owner except the

naked right to sell existing in the administrator. The burden of proof rests upon the plaintiff to bring his case within the provisions of the statute.

The first question raised is whether the defendant is liable for waste committed before the estate was represented insolvent. By the act of 1835 the heirs were in express terms made liable only for waste committed after a representation of insolvency and before the land was sold for the payment of debts, or the debts actually paid, and then only in case the estate should be "absolutely insolvent" and they were liable for treble damages. By the revision of 1841, this section was divided. In ch. 109, § 37, the executor or administrator, whether an heir or devisee or not, if he shall commit such waste or trespass upon any real estate, as is described ch. 129, § 15, is made liable to treble damage and is given authority to prosecute actions of trespass against any persons committing such waste, whether they be heirs, or devisees or not, and the damages so recovered shall be accounted for as assets. In c. 129, § 15, we find the same provision as in the first act as to the time of committing the waste. "If the heirs or devisees shall between the time of the respresentation of insolvency and the sale or payment of the debts commit waste such as is there described he shall forfeit and pay treble the value thereof." In the subsequent revision these sections though slightly changed in phraseology remain the same in meaning unless changed by the omission in the earlier section in the revision of 1841, of the reference to the later one. It would seem that in the case of an heir or devisee the waste must be after the representation of insolvency and very good reasons may be given why it should be so. But upon this point we make no decision as it is not necessary to the case.

In any event the heir can only be liable in case the estate is proved to be insolvent. This term is frequently, perhaps commonly applied to estates in process of settlement under a representation of insolvency either by an administrator, or in the hands of an assignee without regard to the final result as to its ability to pay all its debts, or otherwise. But we may well suppose that under the statute upon which this action rests the

word is used in its more literal and perhaps more correct meaning, an absolute insufficiency to pay all its debts. In this case it is immaterial in which sense it is used; for, if in the former the action must fail for at the time of the alleged waste the estate had not been represented insolvent and was not therefore in that sense an insolvent estate. If in the latter sense as we hold it is, the action must equally fail for there is no proof of such insolvency. In *Bates* v. *Avery*, 59 Maine, 354, in the opinion of the court WALTON, J., says the action may be maintained "if the estate is, *in fact*, insolvent." A mere representation, then, is not enough. In the same case it was held that the documentary evidence from the probate office is the only proper evidence of insolvency. Here we have no other, no admission as in that case. From the probate office we have the inventory of the appraisers, the representation of insolvency, the appointment and return of the commissioners to adjudicate upon the several claims presented. We have also the proper evidence of an appeal from the allowance of the only two claims which were allowed and so far as appears neither of those appeals have as yet been disposed of. There have then been no debts proved against the estate and of course no certainty that any ever will be. We have no decree of insolvency from the court for in the present state of the case there could be none. Upon the appointment of commissioners it was decreed that the estate was apparently insolvent.

Further, from the evidence in this case it is apparent that the court here under any circumstances could not furnish the proper, or any evidence of the actual insolvency of this estate. The evidence in the case leaves no doubt that the intestate died in New Brusnwick and that at the time of his death his domicil was there. That was therefore the place where the principal administration should be granted and where we should look to ascertain the real condition of his affairs. The judge of probate here had a right to appoint an administrator who could and should administer such property and pay such debts as might be found here. It does not appear whether any administration has been had under the foreign government but until it shall be had

or it is in some proper way shown that there are no assets there, there is no way perceived in which it can be shown that the estate is really insolvent. The court here may so far as this jurisdiction goes show that the estate here is insufficient to pay the creditors here and for the purpose of paying debts here may authorize the sale of the real estate, as in *Fowle* v. *Coe*, 63 Maine, 245. It may even furnish the proof that the estate is insolvent here, but that will not show it insolvent there, or as a whole. We do not mean to say that the administrator must look the world over to discover assets, but he is bound to know the last domicil of his intestate, the place where his assets are presumed to be and where the principal administration should be and if he would sustain an action of waste against the heir, be prepared to show, what the statute requires, an actual insolvency. The duties of administrators of the same estate in different localities, especially in their relations to each other may be found in the following cases. *Fay* v. *Haven*, 3 Met. 109; *Livermore* v. *Haven*, 23 Pick. 116; *Dawes* v. *Head*, 3 Pick. 128, 143; *Boston* v. *Boylston*, 2 Mass. 384; *Davis* v. *Estey*, 8 Pick. 475; and many others of the like kind. The necessary inference from the principles enunciated in these cases, is that an estate cannot be known to be insolvent unless it so appears at the last domicil of the intestate, and if as held in *Bates* v. *Avery*, *supra*, it is to be proved from the records of the court, it would seem necessary that there should first be an administration there. As held in *Livermore* v. *Haven*, *supra*, the heir is not to be deprived of his inheritance until the general assets are exhausted; and the waste in question, is as much the inheritance of the heir as the land from which it was taken.

We are not unmindful of the fact that the letters of administration in this case, represent the intestate as late of Calais, in the county of Washington; nor do we overlook R. S., c. 63, § 7, in which it is provided that "the jurisdiction assumed in any case, except in cases of fraud, so far as it depends upon the residence of any person, . . . shall not be contested in any proceeding whatever, except on an appeal from the probate court in the original case, or when the want of jurisdiction appears on

the same record;" or the case of *Record* v. *Howard*, 58 Maine, 225, the soundness of which we do not question. But this action is not a proceeding in the probate court, nor will it be made any part of the record of that court, or in any way interfere with the jurisdiction which it has assumed. It may still go on and settle the estate. But because it has assumed jurisdiction, does not change the fact which is fully proved as to the domicil of the intestate, or its effect upon the liability of the defendant, or change into assets that which would otherwise not be such, or relieve the burden of proof which rests and must rest upon the plaintiff wherever the estate is settled.

Another fatal objection to the maintenance of this action is that no trespass or waste has been proved. Since the statute, as well as before, as held in *Kimball* v. *Sumner*, 62 Maine, 305, the heir, or devisee, is entitled to the rents and profits of the real estate of the testator or intestate, whether insolvent or otherwise, until it is sold for the payment of the debts, and for this reason he is entitled to the immediate possession, to the entire exclusion of the executor or administrator. The statute gives no definition of the waste intended, except as found in R. S., c. 95, § 12, which applies only to waste committed after a representation of insolvency, and to improved, rather than wild lands; such as have buildings upon them and those in occupation have occasion to cut wood and lumber for fuel and repairs. We must, therefore, resort to the common law as understood in this state, for the meaning of the term waste as used in this statute, as applied to wild lands.

The statute uses the words "trespass or waste." But trespass must be used as nearly or quite synonymous with waste, for under the principles above stated and settled in *Kimball* v. *Sumner*, *supra*, no act upon land so situated would be trespass, unless it resulted in a permanent injury to the freehold. The meaning must therefore depend somewhat upon the nature of the land to which it is applied. That which would be waste upon improved land, or woodland used in connection with improved land, might not be so upon wild, or such as is used exclusively for the lumber which it produces. The land here in question

was occupied for the latter purpose, and the only income which could be obtained from it, would be the value of the lumber taken. Much of the land in this state is kept for that purpose. This may be stripped or wasted, but there is a use of it by which profit may be obtained, without either strip or waste. There is a natural growth, a liability to fire or wind by which the timber may become a burden to the land, so that a removal would be a benefit rather than an injury. Certainly it can not be that the legislature intended that the heir should wait twenty years, the time in which an administrator might be appointed, before he could remove such timber, lest he might be liable for waste. Further than this, something must be left to the judgment, fairly and honestly exercised, as to what timber, dead or living, should be removed consistently with a careful and prudent use of the land, keeping in view its value for future production, as well as a present income. These views are sustained by *Drown* v. *Smith*, 52 Maine, 142, and cases cited, approved with considerable emphasis in *Abbott* v. *Holway*, 72 Maine, 308. If then, the defendant used this land in the application of these principles as an owner of common care and prudence would use his own, we think he would not be guilty of waste. He would be receiving that, and only that, to which the heir would be entitled.

Applying these principles to the testimony and we find no evidence of waste. It cannot be in taking off the down lumber, for that was no injury to the realty; nor in cutting that which had been burned for that, as the evidence shows would soon have become worthless. Nor does it appear that the cutting of that portion which was green, was not, from its interference with other and younger growth, or from its own condition, or for some other reason, an act of prudence, and not such a permanent injury to the freehold as would amount to trespass or waste. There is, in fact, no evidence as to the condition of the land at the decease of the intestate, or at any time since, before or after, the cutting complained of, nothing to show whether any injury has been done.

The action can not be maintained upon the second count in the writ, for it does not appear that the intestate ever owned the

down lumber, except as a part of the realty. It would, therefore, belong to the heir, unless the cutting of it was waste, and in that case, the liability would be for the cutting, for which no claim is made upon this defendant.

Judgment for defendant.

PETERS, C. J., WALTON, VIRGIN, EMERY and FOSTER, JJ., concurred.

ABRAHAM MERRITT and another *vs.* HENRY W. BUCKNAM.

Washington. Opinion April 8, 1885.

Will. Devise. Perpetuities.

A devise was as follows: "I give and bequeath unto Hiram Coffin, his heirs, &c. the remainder of my homestead farm, . . upon conditions as follows, viz: That he pay annually the sum of fifty dollars to the M. E. church in Columbia village, for the support of preaching, or if the said Hiram choose to pay the principal of which the above sum is the interest, all at one time, or in payments within,—then my executors hereinafter named, shall give a good and sufficient deed to the said Hiram Coffin, his heirs, &c. which shall be as good and binding as if given by me, . . . But if said Hiram or his heirs fail in any way to perform the conditions above named, then I give and bequeath the farm before named to the said M. E. church. *Held:*

1. That as the contingency upon which the devise to the church was to vest, might not happen within a life in being and twenty-one years, the devise was void, as offending the rule against perpetuities.

2. That the option given the first taker to extinguish the condition and perfect his own title, did not remove the uncertainty of the time of the vesting of the devise over, and hence did not take the devise out of the rule.

3. That the first taker was not made a trustee for the second contingent devisee, but held in fee subject to the conditions.

4. That whatever rights the demandants representing the church have in equity, they have not the legal title accompanied by a present right of entry.

ON REPORT.

Writ of entry dated December 15, 1882, to recover possession of certain land in Columbia Falls.

The plaintiffs are trustees under the will of Louisa J. Bucknam, and claim title to the *locus* under the fifth paragraph of the will, which reads as follows: "Fifth. I give and bequeath unto Hiram Coffin, his heirs, &c., the remainder of my homestead farm, all my right, title and interest in the same, upon conditions as follows, viz.: That he pay, annually, the sum of fifty dollars

to the Methodist E. church, in Columbia village, for the support of preaching the gospel, or, if the said Hiram choose to pay the principal of which the above sum is the interest, all at one time, or in payments within —— ——, then my executors hereinafter named shall give a good and sufficient deed to the said Hiram Coffin, his heirs, &c., which shall be as good and binding as if given by me, and the principal, if paid by the said Hiram, shall be placed in the hands of trustees hereinafter named, who shall put the same at interest as a fund forever, and the interest accruing from the same shall be expended for the support of preaching the gospel in the village of Columbia, as before requested. But if the said Hiram, or his heirs, fail in any way to perform the conditions above named, then I give and bequeath the farm before named to the M. E. church, in Columbia village, to go into the hands of trustees hereinafter named, and their successors, who are to dispose of the same, and put the proceeds at interest as a fund forever, and the interest of said fund, only, shall be expended for the support of the gospel, as before named."

The will was probated in November, 1853, and Hiram Coffin, the devisee named, went into possession, and occupied and paid the fifty dollars annually, in accordance with the terms of the will, until October 4, 1880, when he sold and conveyed the premises to the defendant, who has occupied the same since that time, without paying the fifty dollars annually, and he claims to hold the title free from conditions and restrictions.

Davis and Bailey, for the plaintiffs.

On failure of Coffin to perform the conditions, the title would vest in the trustees named or their successors, and not in the church or its officers as a distinct body. *Stanly* v. *Colt*, 5 Wall. 119; *Blake* v. *Dexter*, 12 Cush. 559; *Braman* v. *Stiles*, 2 Pick. 460; *Brewster* v. *Striker*, 2 Comst. 19.

Does this devise create a perpetuity obnoxious to the law? A perpetuity has been variously defined. The following are some of the definitions given in the books:

"An estate inalienable, though all mankind should join in the conveyance." *Scatterwood* v. *Edge*, 1 Salk. 229.

"A limitation which is not destructible by the persons for the time being entitled to the property, except with the concurrence of the individual interested under that limitation." Lewis on Perp. 164.

"A future limitation restraining the owner of the estate from alienating the fee simple of the property discharged of said future use or estate, before the event is determined or the period is arrived when such future use or estate is to arise. If that period is within the bound prescribed by law, it is not a perpetuity." Saunders on Uses and Trusts, 204.

"If any case the limitation be in such a manner that all who have an interest by joining in the conveyance, can not pass or bar their interest, it will be a perpetuity." Com. Dig. Chan. 4 G. 3.

From these definitions, the inference is irresistible that whenever it is in the power of the holder of the estate, either by himself alone or conjointly with others interested therein, to convey the entire estate, it involves no perpetuity. Turning now to the case at bar, and for the time being leaving out of consideration the charitable character of the church as a beneficiary, and we make from the facts presented, the following deductions:

1. The devise to Coffin and his heirs, is upon a condition with an alternative, which he could perform at his option.

2. The church took a vested interest in the estate at the death of the testatrix, capable of being released, which with Coffin's interest, constituted the entire estate, both legal and equitable.

That both of these are inconsistent with a perpetuity, would seem to be hardly debatable.

In *Brattle Square Church* v. *Grant*, 3 Gray, 142, a perpetuity was declared to exist, and it is stated by BIGELOW, J., on page 153, to be a leading consideration in the result there reached, that the event upon which the prior estate was to determine, "is not dependent upon any act or omission of the devisees over which they might exercise a control." From which, it may be fairly inferred, that no such result is possible where the converse

of that statement is true, as it certainly is in the case under consideration. Here an estate is devised upon a condition, with an alternative possible for the devisee to perform. How, except by his "omission" to perform it, is a semblance of a perpetuity possible?

He has the option (in effect) to pay eight hundred and thirty-three dollars and thirty-three cents to the Methodist Episcopal church, and thereby make an absolute title in himself, or, if he prefers, to pay the interest of that sum at six per cent. annually. Can he seriously say that the limitation of his estate is beyond his control, and that he is perpetually bound to the annual payment? The reasons for the rule against perpetuities as stated by BIGELOW, J., in the case last cited, 3 Gray, 156, "when a party has granted or devised an estate, he shall not be allowed to fetter or defeat it by annexing thereto impossible, illegal, or repugnant conditions or limitations," would require modification if the grantee or devisee had any hand in clogging the estate so granted or devised. See *Caulfield* v. *Sullivan*, 85 N. Y. 159; *Glen* v. *Fisher*, 6 Johns. Ch. 33; *Blake* v. *Bunbury*, 1 Ves. Jr. 523.

Whichever way we look at this devise — whether we regard the gift to the church with an alternative aspect, or simply as a gift of an annual sum of fifty dollars, it presents the common case of a legacy chargeable on the estate devised. *Merrill* v. *Bickford*, 65 Maine, 118; *Bugbee* v. *Sargent*, 23 Maine, 269; *Perry* v. *Hale*, 44 N. H. 363.

An annuity is but a legacy, both being universally treated on the same footing. Hill on Trustees, *362; *Stokes* v. *Heron*, 12 Cl. & F. 161; *Hedges* v. *Harper*, 3 DeG. & J. 131; *Potter* v. *Baker*, 2 Eng. L. & Eq. 92; *Bent* v. *Cullen*, L. R. 6 Ch. App. 238; *Watson* v. *Hayes*, 5 My. & Cr. 125, 133; *Fox* v. *Fox*, L. R. 19 Eq. Cas. 286; *Hellman* v. *Hellman*, 4 Rawle, 440; *Birdsall* v. *Hewlett*, 1 Paige, 32; 2 Jarman on Wills, 5 Am. Ed. *834; *Loder* v. *Hatfield*, 71 N. Y. 92, 99; *Fuller* v. *Winthrop*, 3 Allen, 51; *Veazey* v. *Whitehouse*, 10 N. H. 409; Perry on Trusts, § 576; *Stanly* v. *Colt*, 5 Wall. 119; *Wright* v. *Wilkins*, 2 B. & S. 232; *Kirk* v. *Kirk*, L. R. 21

Ch. Div. 437; *Bugbee* v. *Sargent*, 23 Maine, 269; *Sands* v. *Champlin*, 1 Story, 376; Perry on Trusts, § § 121, 568; *Fosdick* v. *Fosdick*, 6 Allen, 43.

But the paramount consideration in this case, and that which most effectually disposes of this question of a perpetuity, is the charitable nature of the beneficiary. Perry on Trusts, § 737; *Piper* v. *Moulton*, 72 Maine, 155; *Mills* v. *Farmer*, 1 Mer. 99; *Attorney Gen.* v. *Price*, 17 Ves. 371; *Gillam* v. *Taylor*, L. R. 16 Eq. Cas. 581.

In *Odell* v. *Odell*, 10 Allen, 6, the reason why a remote gift over to a charity after an individual taker is invalid, is said to be "not because the charity could not take at the remote period, but because it tends to create a perpetuity in the first taker." But here the first taker is exempted from the rule, charity being of the substance of his estate. *Christ's Hosp.* v. *Grainger*, 16 Sim. 83; S. C. 1 Mac. & G. 459; *Atty. Gen.* v. *Wax Chandlers' Co.* L. R. 8 Eq. Cas. 452, affirmed L. R. 5 Ch. App. 503; *Merchant Taylors' Co.* v. *Atty. Gen.* L. R. 11 Eq. 35, affirmed L. R. 6 Ch. App. 512; 2 Bl. Com. 155; *Brown* v. *Higgs*, 8 Ves. 574; *Lloyd* v. *Branton*, 3 Mer. 117; *Hollinrake* v. *Lister*, 1 Russ. 568; *Waite* v. *Delesdernier*, 15 Maine, 146; *Pickering* v. *Pickering*, 6 N. H. 120; *Harris* v. *Fly*, 7 Paige, 421; *Bugbee* v. *Sargent*, 23 Maine, 269; *Perry* v. *Hale*, 44 N. H. 363; *Scott* v. *Patchin*, 54 Vt. 253.

Charles A. Bucknam, for the defendant, cited: *Stearns* v. *Godfrey*, 16 Maine, 158; *Brattle Sq. Church* v. *Grant*, 3 Gray, 142; 2 Greenl. Cruise, * 238; *Taft* v. *Morse*, 4 Met. 523; *Gardner* v. *Gardner*, 3 Mason, 215; *Bailey* v. *Elkins*, 7 Ves. 323; *Bryant* v. *Erskine*, 55 Maine, 153; *Smith* v. *Durell*, 16 N. H. 346; *Fosdick* v. *Fosdick*, 6 Allen, 41; *Sears* v. *Putnam*, 102 Mass. 5; *Sears* v. *Putnam*, 8 Gray, 86; *Donohue* v. *McNichol*, 61 Pa. St. 73; *Miles* v. *Fisher*, 10 Ohio, 1; *Wells* v. *Heath*, 10 Gray, 25; *Welsh* v. *Foster*, 12 Mass. 97; *Jocelyn* v. *Nott*, 44 Conn. 54; *Jackson* v. *Phillips*, 14 Allen, 572; *Pewterere* v. *Christ's Hospital*, 1 Vern. 161; *Slade* v. *Patten*,

68 Maine, 380; *Fiske* v. *Keene*, 35 Maine, 350; *Webster* v. *Hill*, 38 Maine, 78; *Thayer* v. *McClellan*, 23 Maine, 417; *Hunter* v. *Heath*, 67 Maine, 507; *Derby* v. *Jones*, 27 Maine, 357; R. S., c. 73, § 14.

EMERY, J. Whatever may be the equitable interests of the demandants in the demanded land, or whatever interest or title they might acquire therein, through appropriate equity proceedings, they can not recover judgment in this real action, unless at the date of their writ, December 15, 1882, they had then vested in themselves, the legal title, and immediate right of possession.

Their only claim of title is under the fifth clause of the will of Louise J. Bucknam, which is stated in full in report of the case. The demandants are the trustees referred to in said clause. The tenant claiming under said Coffin, had ceased to pay said annual sum of fifty dollars, and the alternative condition named in the will has not been performed.

It may be admitted that the legal title the testatrix intended to confer on the demandants, on the happening of the contingency, is a fee. It is equally clear we think, that whatever equitable rights the testatrix intended to confer on the demandants, she did not intend them to take any legal title until the contingency happened. She first devised the land "to Hiram Coffin, his heirs," etc., upon conditions. "But if," (to quote from the will,) "the said Hiram, or his heirs, fail in any way to perform the conditions above named, *then* I give and bequeath the farm to the M. E. church," etc. The devise to "Hiram Coffin, his heirs," etc., was, in effect, a fee, though charged with certain burdens and conditions.

The devise over was of the fee, but clearly the devise over of the legal title to the land itself, was not to be, unless and until the failure of the first devisee, or his heirs, to perform the conditions. Whatever equitable interest the second devisees might have in the land, whatever rights they might have against it, to enforce the payment of the annuity, their legal title, their fee could not be in existence until the time when there should be a failure to perform the conditions.

That date was wholly uncertain. It might have been immediately after the death of the testatrix. It might not have been until long after the lapse of a life time and twenty-one years. Such a devise is an executory devise, and to be valid, it must take effect, the fee must vest, the contingency occur, within a life in being and twenty-one years, reckoning from the death of the testator. The contingency *must* happen. It must be such that it will *necessarily* happen within the time of a life in being and twenty-one years. If the contingency be such that possibly it may not happen within the prescribed time, the devise over is void.

This is the old, well known, inflexible rule, established long ago in the common law, to guard against perpetuties. Whatever may be the intention of a testator, no effect can be given to it, if it violate that rule. It may seem an arbitrary rule, but it is a wise rule, and one that must be enforced. A full and clear exposition of this whole subject of the nature of executory devises, the scope of the rule against perpetuities and its effect on executory devises may be found in *Brattle Square Church* v. *Grant*, 3 Gray, 142; *Fosdick* v. *Fosdick*, 6 Allen, 41; *Odell* v. *Odell*, 10 Allen, 1.

The authorities are there fully and correctly cited, and we refer to those cases, rather than consume space by quoting from them or other authorities, see also the late case, *Theological Education Soc.* v. *The Attorney General*, 135 Mass. 285, also, *Slade* v. *Patten*, 68 Maine, 380. The devise over in this case, under which the demandant claims depends upon a contingency which might not happen until after the period prescribed by law. The conditions might not have been performed until after such lapse. The devise therefore, offends against the rule, and cannot be sustained. The testatrix's attempt to create an estate in the demandants in that contingency failed, as not being permitted by law, and the demandants, whatever other rights they may have, did not acquire under the will the legal estate necessary to entitle them to judgment in this action.

The demandants' counsel claim that there are some matters, or provisions connected with the devise of the farm, which will

uphold the devise to the demandants, as not offending against the rule above named. They say that the devise to Coffin and his heirs, is upon a condition with an alternative, which he could perform at his option. The alternative was the right to free himself from the condition by paying a gross sum at once. The argument is, that he could make an absolute title in himself, free from any condition, by paying a gross sum, that the limitation of the estate is within his control, that he should be held to sustain all the devises, and should not be allowed to defeat the devise over, and thereby enlarge his own estate by neglecting to either perform, or commute the condition.

We have no occasion to consider the estate rights, or duties of Coffin, or of those claiming under him. Whatever duties they may owe in relation to this land, can perhaps be enforced against them, or the land by proper proceedings. This case stands or falls on the legal title of the demandants under the will. The time of the vesting that title has been shown to be too uncertain, and possibly too remote. The addition of the alternative to the condition does not remove the uncertainty, nor abridge the possible remoteness of the time. The contingency of the failure to perform both alternatives might not happen until after the lapse of the time prescribed by law. Whatever may be the rights or duties of the first taker, the inflexible rule of law will not recognize any estate attempted to be vested in a second taker so long as there is any chance that it may not vest until after the prescribed time. The ingenuity of the able counsel has not removed that chance from their clients claim.

Again it is contended, that the church took at the death of the testatrix a present vested interest of some kind, capable of being released, and that a conveyance by the church and by Coffin would convey the whole estate, free from condition thus removing the objection of a perpetuity.

But the church took no legal estate in the land. It was not entitled to all the rents, or income. It only took a right to a specified sum as an annuity. It could in no way interfere with the land, its title or possession by its own act. It could not

maintain any process in relation to it, so long as the annuity was paid. The annuity could not be assigned by the church, and Coffin need not have paid it to any one else but the church. The testatrix's bounty was intended for the support of the preaching of the gospel, presumably in that church. That bounty could not be diverted. If that church would not administer it, trustees would be appointed by the court, that the benevolent intent of the testatrix might not fail. The cases cited by the demandants' counsel appear to be cases where it was sought to reach the land by process in equity, to charge it with the payment of a legacy, or annuity.

The cases cited may declare that such a legatee has a vested interest in the payment of the annuity, but we think none of them go farther, than to declare a lien on the land for such payment, enforceable in equity. We find no case in which it is declared that such a legatee has a legal estate in the land, independent of a court of equity. We do not need to discuss further, the interest of the church, nor the estate of Coffin, or the tenant under him. Whatever the testatrix may have intended to give Coffin, or give the church, she gave a fee, a legal estate to the church trustees only upon a contingency uncertain as to time. No view of the church's interest that has been presented, removes that uncertainty.

The main reliance of the demandants however, is upon the charitable nature of the devise to them. They claim that the rule against perpetuities does not apply to such devises, and that this devise being to a charity, is valid notwithstanding. It may be admitted that the devise over is to a charity, and that a devise to a charity may lawfully be made perpetual.

Indeed, charities are of lasting benefit to humanity, and their perpetuity is desirable, and intentions of donors to make their gifts perpetual are readily inferred, and upheld. *Odell* v. *Odell*, 10 Allen, 6, and cases cited. But it is not the perpetuity of the estate intended to be given to the church trustees, that breaks against the rule. It is the possible perpetuity of the estate given the first taker, the possibility that the estate given to the charity may not begin in time. It is well settled

that if a gift is made in the first instance to an individual, and then over to a charity upon a contingency which may not happen within the prescribed limit, the gift to the charity is void. Perry on Trusts, § 736, (1st ed.) and cases there cited. *Odell* v. *Odell*, 10 Allen, 7; *Brattle Square Church* v. *Grant*, 3 Gray, 154. The cases of *Commissioners of Charitable Donations* v. *De Clifford*, 1 Dru. & War. 240, 253, seems to be a leading case on this point. There, the testator devised lands, to trustees. He directed that the yearly rents, to a certain amount be appropriated to certain charities. He then provided that, if an increase of rents was obtained, the surplus over the amount first appropriated, should go to such persons of certain families, as should be lords of Down Patrick manor. He further provided that in case said families became extinct, or did not protect the charities established by the will, then the surplus rents should go to the first charities to whom the first rent was given. It was held that the gift over of the surplus rent, although to a charity, was too remote, as the contingency upon which it was to take effect was not restricted within proper limits. This case is quoted with approval in the *Brattle Square Church* case and in *Odell* v. *Odell*, *supra*, and seems analogous to the present case.

The demandants' counsel cites *Christ's Hospital* v. *Grainger*, 16 Sim. 83, (S. C. on appeal, 1 Mac. & G. 459) where property was given to one charity, to go over to another on a certain event, and was allowed to vest in the second charity, after two hundred years. The devise of the legal estate was to charities in each instance, and could properly have been perpetual in either. There was no more perpetuity in both charities than in one. The takers of the legal estate were simple trustees. The Lord Chancellor on appeal said in effect that the substance of the provision in the will, was a substitution of one trust for another, rather than a forfeiture of one estate, and creation of another. In the case at bar, Coffin, the first taker, was not a trustee. He did not hold the land for the church, but for himself, it being charged with a fixed annuity. The case cited does not apply.

The demandants also quote from the language of the Master of

Rolls, and the Lord Chancellor, in the *Wax Chandlers' Co.* case, L. R. 8 Eq. Cas. 452; S. C. on appeal, L. R. 5 Ch. App. 503, and the *Merchant Taylors' Co.* case, L. R. 11 Eq. 35; S. C. on appeal, L. R. 6 Ch. App. 512. But in both those cases, the first takers were held to be trustees to a certain extent, for a charity, and the process was by the attorney general to direct the application of the income. The devisees under the devises over, were not parties, and made no claim. The validity of the devise over was not a question, and could not have been a question. We do not think those cases are compelling authorities in support of the demandants' proposition.

We do not undertake to pass upon the legal rights or estate of the tenant, or to say whether he has any estate. We do not mean to conclude any rights of the church, or its trustees to the annuity or any of its equitable rights in the land. We only decide that so far as now appears, the legal estate, which demandants say was devised to them, does not exist for the reason that the contingency fixed for its beginning was not fixed within the legal limits.

Demandants nonsuit.

PETERS, C. J., WALTON, VIRGIN, FOSTER and HASKELL, JJ., concurred.

THE DEXTER SAVINGS BANK *vs.* SAMUEL COPELAND, executor.

Penobscot. Opinion April 9, 1885.

Promissory notes. Consideration. Assignment.

The treasurer of a savings bank made his note for two thousand dollars, running to the bank, and secured it by an assignment of a life insurance policy on his own life, for the purpose of making up to the bank a loss on loans for which he was neither morally nor legally responsible. After his death the trustees of the bank found the note and policy, which was the first knowledge they had of the existence of either, and they applied the insurance money first to the payment of the note, and the balance they delivered to the executor of the deceased treasurer. *Held:*

1. That the note was without consideration and void.
2. That the assignment of the policy was void for want of a delivery.
3. That the amount applied by the trustees towards the payment of the note should be allowed as a credit in an action by the bank against the

executor to recover any balance that may have been due from the treasurer to the bank.

ON REPORT.

The case was submitted to the law court on the writ and pleadings, and auditor's report, the material portion of which is as follows:

"We accordingly find a balance due from Mr. Barron's estate to the plaintiff bank, including interest to October 1, 1883, of $2,011.38.

"We do not feel called upon to form any opinion upon the question of murder or suicide, because we are satisfied from the evidence that there was substantially no money in the bank at the time of Mr. Barron's death, and whether Mr. Barron came to his death by murder or otherwise, the amount of money in his possession in the bank at the time was so inconsiderable as not to materially affect the situation of these parties litigant, or change the result of our conclusion.

"We allow no credits other than those herein before specified, but we report to the court the facts connected with another transaction, as follows:

"It appeared in evidence that a note for $2,000, designed as a gift to the bank by Mr. Barron, dated July 2, 1877, and payable in five years after date, was found by the officers of the bank after Mr. Barron's death, among the other papers of the bank, the officers having no previous knowledge of the existence of any such note. The note was secured by an assignment of a policy of insurance on Mr. Barron's life for $5,000; to the note was attached a memorandum stating the purpose and object of giving it.

"The note and endorsement thereon and copy of the memorandum and assignment are hereto annexed, marked 'L,' also a statement (in print) of the officers of the bank relating to the same, put in evidence by the defendant and the same is hereto annexed marked 'M.' It appears by endorsement on said note, and by said memorandum, and also by the testimony that this note was professedly given to the bank by Mr. Barron on account of a considerable loss on the Leavitt loan, so called, and had no other consideration.

"We find as matter of fact that Mr. Barron was in no way legally or otherwise liable on account of said loss and under no obligation to make good any part of said loss.

"The defendant also put in the cash book of the bank showing an entry under date of July 16, 1878, after Mr. Barron's death, showing a debit to cash of $2,075.44, collected on this note, the same being the payment of the amount of this note, principal and interest.

"The aforesaid entry on the cash book was:

Dr.	Cash.	
1878.	(Loan.)	(Earnings.)
July 16, J. W. Barron, Col.	$2,000	$75.44.

"The result of this entry was a debit to cash of $2,075.44, and a credit to loan of $2,000 and to earnings of $75.44, or in other words, it shows that Mr. Barron's note thus presented by him to the bank was paid, principal and interest, July 16, 1878, and it was admitted by the officers of the bank that they collected the $5,000 life insurance money on or before said July 16, 1878, and retained enough to pay said note and interest ($2,075.44, as aforesaid) and paid over the balance to the defendant, as executor of Mr. Barron. This note purports to have been given to the bank, in the manner aforesaid, July 2, 1877, but no entry of the transaction was made in the cash book, as is usual when a note is taken. But on November 17, 1877, it was entered on the ledger to debit of "loans on collaterals" without any posting marks as it had never been entered on the cash book. It was also entered to the credit of reserved fund on the ledger as of July 1, 1877, but probably on November 17, 1877, in this manner; the reserved fund had stood on July 1, 1877, $720.18. These figures (720.18) were recorded in ink, and Mr. Barron, to add the $2,000 to this fund, had written with pencil the figure '2' before the figures $720.18, thus increasing the amount to $2,720.18.

"The Leavitt loan, on account of which this note purported to have been given, had previously been reduced by the sum of $2,662.20 by charging the same to profit and loss. The effect of these two entries connected with the $2,000 note was to force up

the loan account and the reserved fund account on the ledger each by the sum of $2,000. . . .

"Upon this branch of the defence we merely report the facts and claims of the parties thereon to the court and submit the matter wholly to their decision.

"The amount of said $2,075.44 including interest from July 16, 1878, the date of payment to the bank, to October 1, 1883, date of this report is $2,723.67."

("L" Memorandum.)

"This policy of life insurance was obtained by me for the following reasons and purpose: I know not how long I may live and I desire if I should die suddenly or in any way be incapacitated from transacting or closing up my business that some way may be provided to make good any possible or probable loss to the bank by reason of any neglect of mine or occurring under my administration during my term of office. I know that there will be a loss to the bank on the loan we made the Leavitts of Cambridge on their farms and lumber, and there may be on some other loans. I do not at this time know of a single thing unless it may be some of our bonds, on which we shall lose a single dollar, and I would be willing now to take the property of the bank and pay all its liabilities. I do not regard myself as being the cause of the Leavitt loss any more than the trustees; we were all of us deceived in that transaction; still they have no pay for their services and I have, and so far as I am able I mean that the bank shall never lose anything while I am its treasurer. I mean if I live long enough to make good to the bank this Leavitt loss which must reach, including interest to as much as $2,500 or perhaps $3,000. This policy of insurance will pay the loss in case I die, and if I live I can sometime make it good, although I can not do so now without trouble to my family. I desire strict and exact justice in the execution of this trust and for this purpose I ask the trustees to do this: Let them appoint A. F. Bradbury and Job Abbott if they be living, to make a thorough examination of all the notes held by the bank secured by mortgages or collaterals, including the Leavitts, and calculate as nearly as possible any loss likely to occur, and if in their

judgment there shall be anything left of the insurance, to pay the remainder over to my family. I do this trusting to their honor, not having bound them in any way. I have not notified the company of this assignment as I did not think it necessary, for if the insurance company do not recognize the assignment my executor can adjust the business and pay it over to the trustees. I ask further that if I make good this loss that they shall relieve my family of all liability on account of the warrantee deeds I have given of the Leavitt property against the woman's right of dower.

(Signed) J. W. Barron."

Josiah Crosby and *J. H. Drummond*, for the plaintiff.

D. D. Stewart and *T. H. B. Pierce*, for the defendant.

DANFORTH, J. This case having been submitted to auditors comes before this court upon their report with the documents and evidence attached, with the provision that if in the "opinion of the court the plaintiff has made out a *prima facie* case for any balance, the action is to stand for trial upon such items as the court shall find the plaintiff has made a legal *prima facie* case to sustain, otherwise, judgment for the defendant shall be rendered in accordance with the law of the case."

Under this report the first question that arises is whether the plaintiff has made out a *prima facie* case for "any balance" in its favor. The report of the auditors shows a balance for the plaintiff and so far perhaps a *prima facie* case for that balance. But from the terms of the report as well as from the course pursued by the counsel in the argument we do not understand that the balance so found is sufficient, or that the parties so understood it, but rather that the decision shall rest upon the facts reported.

The auditors have not made a full report of the evidence upon which their conclusions are based, but have reported what certainly appears to be a full, fair and clear report of the facts upon which their statement of the account was made up. Relying upon these facts there are several items allowed by the auditors to which the defendant objects and some credit dis-

allowed which he claims should have been allowed. On the other hand it does not appear that any item of charge has been omitted which the plaintiff claims should have been allowed, or credit allowed which should have been rejected.

There is one item claimed by the defendant as credit, the money received by the bank upon the testator's note for two thousand dollars, upon which the auditors have reported the facts but which they have neither allowed nor rejected; leaving it to the decision of the court. Assuming the account as stated by the auditors to be correct as far as it goes, if this item should be allowed, it changes the balance, and upon this question depends the result of this case in its present stage.

Ought the proceeds of this note to be allowed the defendant as a credit? From the facts as they appear in the report we think they should be. The note was in fact never delivered to the bank. It remained under the maker's control so long as he lived, was payable by its terms only from an insurance upon his life except at his option, and it does not appear that during his life he elected to pay it in any other way, nor was it in his lifetime accepted by the bank for its officers had no knowledge of its existence until after his death.

But independent of these considerations by an indorsement upon the back of the note which became a part of it, it was given to make up in part for a loss for which the maker was neither legally nor morally responsible. The note was therefore without consideration and not valid or binding upon the maker even as a gift as is universally conceded, certainly since the case of *Parish* v. *Stone*, 14 Pick. 198. It could not therefore have been collected by any legal process and the appropriation of the money received upon the insurance policy to its payment was without authority, or validity.

The note itself, as well as the indorsement upon the back, shows that it was secured upon a life insurance policy. The policy shows an absolute assignment to the bank, except so far as it was limited by a separate, but accompanying writing. This assignment, like the note, was not delivered or accepted, nor was it intended to operate during the assignor's lifetime.

It being, therefore, in the nature of a testamentary disposition of his property, was a void instrument, either with or without the note. But under the accompanying memorandum, the trustees of the bank, though having no legal rights to the proceeds of the insurance, unlike the note, had a color of authority for collecting the money and appropriating it as directed. This memorandum explained more fully the reasons for, and purpose of, obtaining the insurance, and what was to be done with it in case of the death of the insured. At the beginning, after recognizing the liability to sudden death or incapacity to transact business, the insured declares his purpose to be, "that some way may be provided to make good any possible loss to the bank, by reason of any neglect of mine, or occurring under my administration, during my term of office." He refers to the Leavitt loss, and of his intention, if he *lives long enough*, to make good to the bank that loss. He then says, "I desire strict and exact justice in the execution of this *trust*," and names certain persons he desires to have appointed by the trustees of the bank to examine the securities, calculate the probable losses, and pay the balance, if any, to his family. At the close, he adds a request which amounts to a condition that if he made good the loss, his family should be indemnified against all liability for dower under deeds of warranty he had given of the Leavitt property. Here then, was an instrument intended to impose a trust upon the officers of the bank to receive the money upon the policy, and after pursuing the course pointed out to ascertain the losses to the bank, both those for which the insured was liable, as well as those for which he was not, and after making such losses good, pay the balance to his family. Without following the directions, the trustees have appropriated sufficient of the money to pay the note and call it a gift to the bank. This money has gone into the funds of the bank; it has been entered upon its books. This suit is, in effect, to recover a deficit as shown by the books. This is as much a credit as any other sum credited upon the books, and in making up the deficit, should be taken into consideration precisely as the other sums were; and there is no more need of filing it in set-off than of the others. The appro-

priation was an illegal one. Making the disposition of it they did, the trustees can not complain if it is treated as a credit, and if so treated, the defendant has the right to say it shall be first applied to losses for which his testator was liable, and by making that claim in this action, it follows that the amount necessary and used to make good such losses, he can not recover in this or another action. He can not recover for the excess in this action, for no account in set-off has been filed. Whether he can do so in any other, we have no occasion now to decide.

There is, therefore, from the facts reported, no *prima facie* balance in favor of the plaintiff, and under the provisions of the report, the court must render "such judgment for the defendant as shall be in accordance with the law of the case."

That judgment can not be for any balance, for the reason already given, that no account has been filed in set-off, nor can any specific balance be made, for at most under this report, we can only decide whether any item is *prima facie* sustained by the facts, and can not decide its validity as upon a full hearing upon its merits. Therefore, no judgment should be entered which will preclude the plaintiff from a further hearing upon these items in another action, so far as they may be available in defence of a suit to recover the money paid upon the note or otherwise. For these reasons the entry must be,

Plaintiff nonsuit.

PETERS, C. J., VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

GEORGE A. BIRD *vs.* CHARLES C. KELLER and another.

Waldo. Opinion April 13, 1885.

Mortgage. Foreclosure. Redemption. Limitations. Stat. 1849, c. 105.

Stat. 1849, c. 105, relating to the foreclosure of mortgages, applied to mortgages in existence at the time of its enactment, and under it a foreclosure is ineffectual when there is an omission to have recorded "an abstract of the writ of possession with the time of obtaining the possession."

The right of redemption is not lost by lapse of time when the mortgagor remains in possession of the premises and occupies for himself and not for the mortgagee.

When the interest of a deceased person in real estate is that of mortgagee it passes to his administrator as assets, and his widow and heirs can convey no title except through the administrator.

ON REPORT.

Writ of entry wherein is demanded the possession of the homestead lately occupied by Thomas T. Moody, in Isleboro.

The material facts are stated in the opinion.

Thompson and Dunton, for the plaintiff, contended that the mortgage was legally foreclosed under the statutes in force at the time of its execution. R. S., 1841, c. 125, § 3, and that those statutes controlled. Jones, Mortgages, § § 1321, 1258; *Bronson* v. *Kinzie*, 1 How. 311.

Joseph Williamson, for the defendants, cited: *K. & P. R. R. Co.* v. *P. & K. R. R. Co.* 59 Maine, 40; *Hatch* v. *Bates*, 54 Maine, 136; R. S., c. 90, § 11; 1 Hill, Mort. 189; *Smith* v. *Dyer*, 16 Mass. 18; *Dewey* v. *Van Deusen*, 4 Pick. 19; *Fay* v. *Cheney*, 14 Pick. 404; *Taft* v. *Stevens*, 3 Gray, 504; *Webster* v. *Calden*, 56 Maine, 204; *Haskins* v. *Hawkes*, 108 Mass. 379; *Jarvis* v. *Albro*, 67 Maine, 313; *Cheever* v. *Perley*, 11 Allen, 587; *Derby* v. *Jones*, 27 Maine, 357.

DANFORTH, J. October 7, 1847, Stephen P. Moody and Thomas T. Moody, having title to the premises in dispute, conveyed them in mortgage to Jacob Moody. There was a breach of the condition and January 16, 1856, Jacob recovered judgment as of mortgage, upon which a writ of possession was issued March 31, 1856. Before that writ was served Jacob conveyed the premises, by deed of warranty dated May 13, 1856, to John Payne who died October 8, 1857. His widow conveyed her interest to Thomas P. Moody, May 14, 1880, and Mary Payne, the widow of Miller, a son of John and Virginia, the sole surviving heir of John, conveyed their interest to the same grantee by quit claim deed dated February 3, 1883. The plaintiff claims by deed of warranty from Thomas P. Moody.

Thus it appears that the plaintiff traces his title through mesne conveyances to the mortgage of Stephen P. and Thomas T.

Moody to Jacob Moody; one of the links in this chain being the deeds from the widow and heir of John Payne. If this title fails he must fail in his suit. The objection to it is twofold. First, that the attempted foreclosure was not a valid or completed one and second in any event under the undisputed facts in this case the widow and heir of John Payne never had any title under the mortgage and therefore could convey none. Was the foreclosure a valid one? There was an attempt to foreclose by the service of the writ of possession sometime in 1856, and as the law was at the date of the mortgage perhaps all the steps necessary to begin the foreclosure were taken. But some years before the commencement of the action to recover possession the act of 1849, c. 105, was passed which as an amendment to the statutes previously in force, provides that "when the foreclosure is by an action at law an abstract of the writ of possession, with the time of obtaining possession, certified by the clerk of the courts where judgment was rendered, shall be recorded within thirty days after possession is obtained, in the registry of deeds in which the mortgage is or ought to be recorded." This act was incorporated into the subsequent revision of the statutes and has been in force ever since.

This act was not complied with in this case. That it is material and its omission fatal, when applicable is settled in *Hatch* v. *Bates*, 54 Maine, 136–141. That by its terms it is applicable in this case there can be no doubt. It was in force before the attempted foreclosure, is general in its provisions and makes no exception of mortgages previously executed. It is however, claimed that as it was not in force at the date of the mortgage, if applied it is unconstitutional as impairing the obligation of a contract.

That there is a distinction between the contract and the remedy is too well settled to need discussion. That this act relates to the remedy would seem to be equally clear. It in no respect alters or modifies a single provision of the contract. In its terms it remains the same as before. It only provides for a single step in the particular process resorted to for enforcing its obligations. True there are cases where an alteration of the remedy has been held to be within the constitutional prohibition.

But that is only where the change necessarily affects the obligation of the contract, taking from it somewhat of its force and efficiency, rendering it of less value to the party who is to receive its benefits. That is not this case. No part of it is rendered any less efficient by the act; it is of no less value to the mortgagee as a security for his debt under the law than without it. It may be even more valuable, for taking the whole act, it provides that the "certificate of the register shall be received as *prima facie* evidence of entry . . and sheriff's return;" a valuable provision in case of the loss of the writ of possession as in this case. The object of the record is to give better notice of the entry and preserve the evidence of it; a provision apparently as much for the benefit of the mortgagee as the mortgagor. The principle here involved has been fully discussed in *Bronson* v. *Kinzie*, 1 Howard, 311, and *K. & P. R. R. Co.* v. *P. & K. R. R. Co.* 59 Maine, 9, leading to to the conclusion that the act in question is applicable and does not come within the constitutional prohibition.

It is, however, claimed that the right of redemption was barred by lapse of time, which, under a certain state of facts, might occur. So a lapse of time of sufficient length would raise a presumption of payment. But both these facts can not exist in relation to the same mortgage at the same time. Whether the one or the other will prevail, must depend upon the possession. If the mortgagor were in possession for twenty years after the debt became payable, the presumption of payment would follow. Perhaps the same result might follow if the mortgagee were not in possession. But if the mortgagee were in possession for the same length of time, there would be a presumption of foreclosure. From the report in this case, it appears that at the attempted service of the writ of possession, one of the mortgagors was in possession, and at that time, with perhaps some doubt and uncertainty, Payne, then the assignee of the mortgage, was put into possession. But it appears that the mortgagor was not ousted, that he did not become the tenant of Payne, or in any way agree to hold the premises for him, and that Payne, instead

of continuing in the possession as the law requires, in order to complete the foreclosure, left the mortgagor there, who continued to hold and occupy as before; taking the rents and profits without accounting for them or paying rent, or being called upon to do either, and on one occasion at least, exercising the right of an absolute owner by giving a mortgage under which the defendants claim to hold. Thus for more than twenty years after the attempted foreclosure, the premises were in the actual possession of one of the mortgagors, which would not only prevent the completion of the foreclosure, but raise the presumption of payment.

But it is claimed that the possession of the mortgagor is that of the mortgagee. If this were true without qualification, the presumption of payment could seldom, if ever, arise. While it may be true in some cases and for some purposes, it is not so for others. A mortgagor in possession is undoubtedly bound in the exercise of good faith under his contract to hold the property in accordance with that contract, and preserve the property as security for the debt, with all due subjection and regard to the rights and interests of the mortgagee. So far, his possession is the possession of the mortgagee, and no farther. When it comes to the foreclosure, it is another matter. This to be sure, is a right which accrues to the mortgagee from the mortgage, but it is a right which he may exercise or omit at his option. If he chooses to put it in force, he does so by himself, or by his authority, and in doing it, he becomes antagonistic to the mortgagor. The mortgagor has no duty to perform in this respect, and herein their relations become such that the possession of the one is not the possession of the other, but antagonistic to it. It is true that the mortgagor may assume new relations to the mortgagee; he may become his tenant, as any other person might; he may agree to hold the property under and in subordination to the control of the mortgagee. Then his possession would, in respect to the foreclosure, become the possession of the mortgagee. But this would be by virtue of a new contract; one outside of and in addition to that evidenced by the mortgage. No such contract, but the opposite, is shown by the report in this case.

It thus appearing that the attempted foreclosure of the mortgage did not accomplish its purpose, there still remains a right of redemption, unless the title has become absolute in the mortgagor by a presumption of payment. In either case, the title of the plaintiff must fail, and there is no occasion for examining the second objection to it.

If the mortgage had been paid, then Payne's heirs could derive no title to the premises. If it has not been paid, his attempted foreclosure, as we have seen, being ineffectual, it would become assets in the hands of his administrator. His estate was represented insolvent and proved to be so. As the creditors had the prior right after the widow's allowance, it was the duty of the administrator to appropriate it to the widow, or creditors, or both. The title was in him for this purpose, and the heirs or widow could convey no title. Thus the plaintiff's title, coming from the widow and heirs, failing, it is unnecessary to examine that of the defendants.

Judgment for the defendants.

PETERS, C. J., VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

Ex parte NATHAN B. CONANT.

In re CYRUS N. FOGLER.

Knox. Opinion April 13, 1885.

Insolvent law. Discharge. "Merchant or trader."

An insolvent debtor, during a period of about a year, bought and sold mining stocks from time to time amounting in all to about thirty-five hundred dollars. These transactions were casual, and outside and independent of his established business. *Held:* That this did not constitute him a "merchant or trader" within the meaning of the insolvent law.

ON EXCEPTIONS.

An appeal from the decree of the judge of the court of insolvency, granting a discharge to Cyrus N. Fogler, insolvent debtor.

The material facts are stated in the opinion.

C. E. Littlefield, for the creditor, contended that the insolvent was a "merchant or trader," and kept no cash book.

The fact that the trading in mining stocks was a separate and independent business, does not of itself have any tendency to exclude such trading from the penalties of the law. "He must buy and sell as a business, not necessarily as his only business. The same person may engage in many kinds of business." *Groves* v. *Kilgore*, 72 Maine, 491.

The controling principle underlying and determining all trade, the principle that makes men "traders," is the desire for gain. A buying and selling for profit. Bouvier's Law Dict. "Trader."

The only American case that I have been able to find that discusses any part of this question, is that in matter of *Marston*, 5 Ben. 314. It is not in point, however. The words of the statute were, "merchant or tradesman," and the case turns upon the fact that the insolvent did none of the business himself, and what was done was by a broker, in a broker's name, and with the broker's funds, and the insolvent did not buy or sell, or deal in a single share of stock, — while here, not a share was bought or sold through a broker.

In re Cote, 14 N. B. R. 505, the court said, "I am of the opinion that 'tradesman' can not fairly be stretched to mean 'trader,' in the larger sense of the old bankrupt law."

J. E. Hanly, for the insolvent debtor, cited: *Groves* v. *Kilgore*, 72 Maine, 489; *Ex parte Phipps*, 2 Deac. 487; *Ex parte Edwards*, 1 Mont. D. & D. 3, 4 Jur. 153; *In re Cote*, 14 N. B. R. 503; *Ex parte Patterson*, 1 Rose, 402; *Ex parte Maginnis*, 1 Rose, 84; *Putnam* v. *Vaughan*, 1 T. R. 572; *Colt* v. *Netterville*, 2 P. Wms. 304; *In re Cleland*, 2 L. R. Ch. 466; *In re Woodward*, 8 Ben. 563.

LIBBEY, J. The creditor objected to the insolvent debtor's discharge, on the ground that he was a merchant or trader, and did not keep a cash book. The judge of the court of insolvency found that the debtor was entitled to a discharge, and decreed accordingly. The creditor appealed to the Supreme Judicial Court, and the case was heard by the presiding judge at *nisi*

prius, who affirmed the decree below. The case comes here on exceptions to the rulings of the judge in matters of law.

To sustain his objection that the debtor was a trader, the objecting creditor proved that, during a period of about a year, the debtor, from time to time, bought and sold mining stocks, amounting in all to about three thousand five hundred dollars. These transactions were casual, outside of his established business and independent of it. The judge who heard the case held that these facts did not constitute the debtor a trader, within the meaning of R. S., c. 70, § 46. The main question for determination is whether that ruling is correct. We think it is.

One who makes it his business, or a part of his business, to buy and sell goods, merchandise, or commodities, is undoubtedly a trader, within the meaning of the statute. *Groves* v. *Kilgore*, 72 Maine, 491; *Sylvester v. Edgcomb*, 76 Maine, 499. But we find no authorities that hold that speculating in stocks constitutes one a trader. The authorities cited by the counsel, and those which we have been able to find, hold the other way. A trader is defined to be "one who makes it his business to buy merchandise or goods and chattels, and to sell the same for the purpose of making a profit." Bouv. Law Dic. 594. Shares in stocks are neither merchandise, goods, or chattels. *In re Cleland*, 2 L. R. Ch. 466, it was held that buying and selling stocks did not constitute one a dealer in "goods or commodities" within the meaning of the English bankrupt act, so as to subject him to its provisions.

In re Marston, 5 Benedict, 313, it was held that speculating in stocks did not render the bankrupt a "merchant or tradesman" within the meaning of the U. S. bankruptcy act, which denied a discharge to the bankrupt, "if, being a merchant or tradesman, he has not, subsequently to the passage of this act, kept proper books of account." BLATCHFORD, J., in his opinion, says, "Although, according to the lexicons, one who is engaged in the business of buying and selling for gain, may be called a merchant, and also a tradesman, yet I do not think it would ever occur to any one to speak of a person carrying on the business which the bankrupt carried on, in the way in which he carried it on, as a

merchant, or as a tradesman, nor do I think that those words, as used in the 29th section, embrace such a person." "A clergyman, or a physician, or lawyer, might carry on the same business in the same way, in addition to his regular professional business, and no one would call him in consequence, a merchant or a tradesman. If not, the bankrupt can not be so called." It appeared that speculating in stocks, was the bankrupt's only business.

The same rule was fully affirmed in *In re Woodward*, 8 Benedict, 563. In this case, the sole business of the bankrupt was that of a speculator in stocks and a stock broker. He was a member of the board of brokers, kept an office, and bought and sold to a very large amount, his liabilities, when he was declared a bankrupt, reaching nearly three million dollars. In his opinion, BENEDICT, J., says: "Upon these facts, the court has been urged to hold that the bankrupt was a merchant or tradesman, and to refuse the discharge because of his failure to keep proper books of account. But my opinion is that the bankrupt can not be held to have been a merchant or tradesman, within the meaning of the bankrupt law. The words merchant and tradesman, involve the idea of dealing with merchandise in some form or other. In their ordinary and natural signification, they do not include one who makes profits by buying and selling of shares on speculation, whether for himself or for others. Such a person, in ordinary parlance, can not be said to be engaged in trade. No case has been cited which furnishes authority for extending the meaning of these words, so as to include the occupation of this bankrupt. The adjudged cases look the other way. The case of *Marston*, (5 Ben. 313,) is quite in point. It is supposed that the present case differs from the case of *Marston* in that the dealings of this baukrupt were not casual, that he had an office, made contracts in his own name as well as for others, and acquired by his dealings a credit that enabled him to make extensive purchases of stocks. But these circumstances, assuming them to be proved, do not bring him within the statute, for they do not disclose the characteristic feature of the occupation

of a merchant or tradesman, namely, a trading in goods, wares, or merchandise."

Our insolvency law was enacted to take the place of the bankrupt law, on its repeal, and we think the words "merchant or *trader*" are used with the same meaning as the words "merchant or *tradesman*" in the bankrupt law.

It becomes unnecessary to consider the other point discussed by counsel, whether the debtor kept a cash book of his stock transactions, or its equivalent.

Exceptions overruled.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

STEPHEN FOSTER and others *vs.* OBED FOSS and others.

Penobscot. Opinion April 14, 1885.

Deed. Description. Words, "northerly and easterly."

A deed contained the following reservation: "But reserving all the lumber on the northerly and easterly side of the bog on said lot, and meaning to convey all the lumber on the southerly and westerly side of said bog." The easterly line of the bog intersected the east line of the lot. *Held*, That the reservation covers only the timber upon that part of the lot which lies northerly and easterly of the boundary line of the bog, leading from the northerly point of the bog to where it strikes the east line of the lot, and extending westerly to a line running north from the northerly point of the bog to the north line of the lot.

The words, "northerly and easterly" in the description in a deed where there is no object to direct their course, must be taken to mean due north and east; but when there are monuments to which they are applicable they may have their legitimate meaning and full force, and yet the course incline either way, any distance, so long as it tends toward the north and east.

ON REPORT.

Trespass for cutting timber on plaintiffs' land in La Grange. The case was reported to the law court to determine the true construction of the reservation in defendants' deed to plaintiffs, recited in the opinion, the case to be sent "back to be tried upon the principles determined by the court."

Davis and Bailey, for the plaintiffs.

Jasper Hutchings, for the defendants.

DANFORTH, J. The only question raised in this case is the proper construction of a clause following the description in a deed from the defendants to the plaintiffs which reads as follows: "But reserving for two years all the lumber on the northerly and easterly side of the bog on said lot and meaning to convey all the lumber on the southerly and westerly side of said bog."

The latter part of this clause relating to the conveyance, is not material except as it may throw light upon the construction of that part making the reservation. All the lumber was conveyed by the deed except that reserved and none was reserved except such as was on the lot lying northerly and easterly of the bog. The question then to be settled is, what part of the lot did so lie. Here is no latent ambiguity to be explained, for the matter to which the language is to be applied, is free from doubt. Hence much of the evidence reported, some of which has been used in the course of argument is inadmissible and can render no aid in ascertaining the meaning of the parties. There is however, a portion of the testimony, that which shows the circumstances surrounding the parties and the purpose they had in view, which is admissible, not to change to any extent the words used, but the better to enable the court to understand the meaning to be attached to such language as is used. This testimony we think may be of considerable value in this case. But this will not enable the court to correct any mistakes as to the facts under which the grantors acted, of which it is quite probable there were some. In the absence of fraud, of which there is no suggestion here, they must abide by the language of their deed. We are also to bear in mind the fact that the words to be construed are those of the grantors, a reservation in a deed, and in case of doubt and uncertainity, are to be strictly construed against the party using them.

The words "northerly and easterly" may be more comprehensive in their meaning than north and east, depending very largely for that meaning upon the facts to which they are applied. Where there is no object to direct the course, they must, at least in the description in a deed, be taken to indicate a direction due north or east; but when there are monuments upon the face

of the earth to which they are applicable they may have their legitimate meaning and full force and yet the course incline either way to any distance, so long as it tends toward the north or east, and in connection with these facts retain a definite and unmistakable meaning. The course will still retain its characteristic as northerly, or easterly, or both. *Brandt* v. *Ogden*, 1 Johns. 156; *Garvin* v. *Dean*, 115 Mass. 577.

The bog to which these words "northerly and easterly" are applied has no distinctly north side bounded by a straight or nearly straight line. In running that line beginning at point C as claimed by the defendants, following the bog which is made a monument, we pursue a northerly course tending to the east until we arive at point A which if not the head of the bog is sufficiently near it to answer the purposes of this case. Leaving point A still following the line of the bog our course is easterly, tending on the whole southerly until we arrive at the point where the bog crosses the east line of the lot, and for the purposes of this case we have no occasion to trace the line farther.

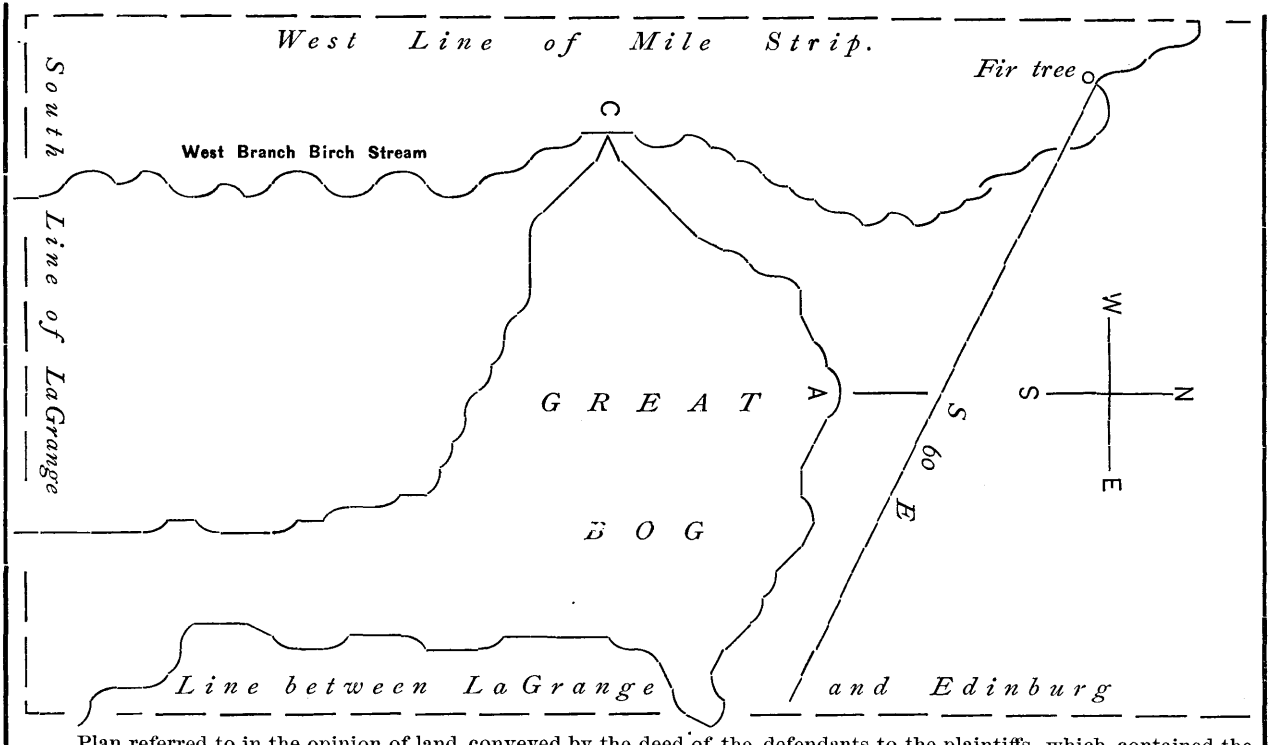
The words "northerly and easterly" as used in the reservation are connected by a copulative conjunction; both are adjectives and both qualify the word "side," which is in the singular number. We have then one side in the reservation, and that side to answer the description must be both northerly and easterly. With this explanation applying the language of the reservation to the face of the earth, we have an exact description of that part of the lot reserved. That portion which adjoins the line running easterly and southerly must necessarily be northerly and easterly of it.

The defendants claim that the word northerly, includes that part of the lot which adjoins the line from C to A. So it would if that qualifying word were used alone. But it is not, and by no fair interpretation can we describe it by the words "northerly and easterly," for in fact it lies northerly and westerly of the bog. Hence to sustain the defendants' view we must eliminate the word easterly as without meaning. Or if we are to give the words "northerly and easterly" distinct meanings as applicable to different sides, then we must do the same with

the words "southerly and westerly" used in the grant. By this method that part of the lot in question lies as much westerly of the bog as northerly and would be described by the one word as well as the other. This would leave it uncertain whether it would be included in the reservation or grant; in which case upon the familiar principle of interpretation already referred to, it must be included in the latter.

If we adopt the conclusion contended for, that the grantors, in the reservation and grant, intended to cover the whole lot, it would not change the result, for then the portion of the lot in dispute would be included in the grant rather than in the reservation.

But while the grantors probably intended to convey or reserve all the timber upon the lot, we see no evidence tending to show that under the clause in question they intended to cover the whole lot. Certainly there is no phrase in it which by a fair construction will include the northwest corner of the lot. The testimony which is admissible leads us to the conclusion that the parties, especially the grantor who was principally instrumental in the sale, at the time, supposed there was no lumber upon that part which he cared to reserve. When running the northerly line the point of starting at the west end was fixed upon by him when he was upon the ground, with a view to running the line so far south as to leave such lumber as he wanted to the north of it while conveying as much of the bog as possible. Fearing that a line due east would not save to him the lumber he wanted on the easterly part of the lot, he suggested a line tending to the south and after some discussion it was agreed that the variation should be thirty degrees south. Subsequently fearing that this variation might not be sufficient to save his desired lumber at the east end, so far as appears not doubting the sufficiency of the starting point, out of an abundant caution he puts in this reservation which, as we have seen is in apt words to reserve his lumber upon the northeast corner of the lot, the very object he had in view, and not upon the northwest where he supposed there was none of the kind he wanted. Thus he accomplished the purpose he had in view. That the defendants subsequently



Plan referred to in the opinion of land conveyed by the deed of the defendants to the plaintiffs, which contained the resevation recited in the opinion.

found the mistake in regard to the lumber on the northwest corner, if it was a mistake, is not material. If there is any remedy it is not in the course they have taken to secure their alleged rights, nor can it be found in a defence to this action. In the absence of any allegations of fraud they must abide the language of their deed.

Our conlusion is that the reservation covers only the timber upon that part of the lot conveyed which lies northerly and easterly of the boundry line of the bog leading from point A to where it strikes the east line of the lot and extending westerly to a line running from A to the north line of the lot.

Action to stand for trial.

PETERS, C. J., VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

GEORGE W. DILLINGHAM, in equity, *vs.* TOBIAS L. ROBERTS.

Hancock. Opinion April 16, 1885.

Equity. Practice.. Waters.

The plaintiff in a bill of complaint, prayed for an injunction to restrain the defendant from constructing his wharf on the ground, that if constructed as proposed, it will lie directly in front of the plaintiff's lot, and materially obstruct the access to it by water. These alleged facts being denied in the answer. *Held*, the burden is on the plaintiff to prove them.

ON REPORT.

Bill in equity to restrain the defendant from building a certain wharf at Bar Harbor, on the ground that it will lie directly in front of the plaintiff's land and materially obstruct the access to it by water.

Tobias Lord formerly owned the land now owned by each of the parties to this suit. He conveyed the defendant's lot December 27, 1869, by deed containing the following description: "A certain lot or parcel of land situated in Eden aforesaid, and bounded and described as follows, to wit: Commencing at a birch tree seventy feet south of the steamboat wharf; thence south fifty-one degrees west, to the northeast corner of the Martin house, one hundred and sixty feet; thence south, nine

degrees west, to a stake, forty feet; thence north eighty-eight degrees east, one hundred and twenty-seven feet at two birch trees; thence north, forty-four degrees east, seventy feet to a birch tree on the bank; thence following the shore to the point of beginning — including all the privilege of the shore to low water mark, containing one-half of an acre more or less."

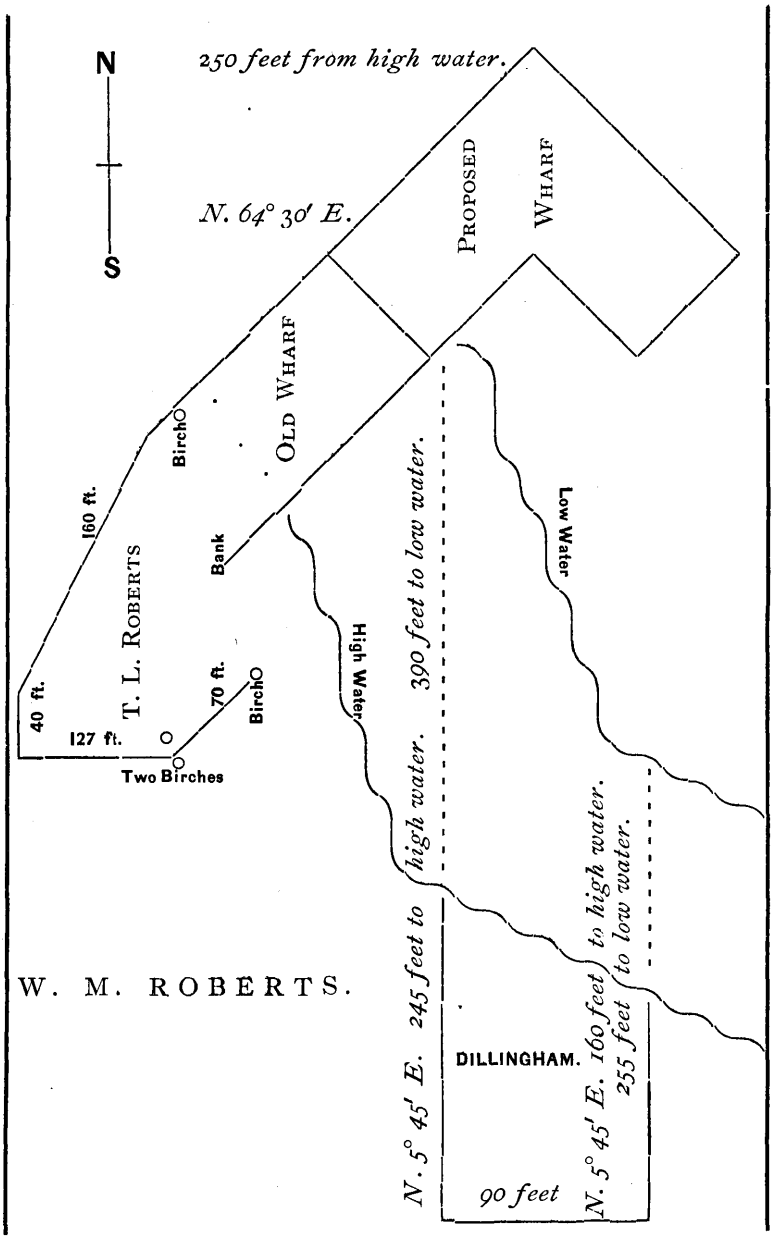
He conveyed the plaintiff's lot by deed dated August 14, 1875, and containing the following description: "A certain lot of land, situate in said Eden, at Bar Harbor village, so called, and bounded as follows, viz: Southerly by land of Stephen Higgins; northerly by the sea or ocean; easterly by land this day conveyed by me to Alfred Veazie; and westerly by a line running parallel with said Veazie's westerly line, and ninety feet westerly therefrom, which last named line is a straight line running from a point ninety feet westerly of said Veazie's southwest corner, in the line of said Higgins' lot; thence northerly parallel with said Veazie land and ninety feet distant therefrom, without any angle or diversion, to and across the flats or shore to low water mark of the sea, together with right of way to said premises from the road, along the present travelled path, the same as now used, for all purposes, this deed being subject to the same right of way across the premises aforesaid."

The plan referred to in the opinion is given on the page following this.

H. E. Hamlin, for the plaintiff.

A. P. Wiswell and *L. B. Deasy*, for the defendant.

LIBBEY, J. Assuming that, if the defendant is constructing his wharf below low water in front of the plaintiff's lot in a manner to obstruct or impair access to his lot by water, the plaintiff may maintain his bill in equity for the injunction prayed for, (but on this point we express no opinion) still, the facts being in issue it is incumbent upon the plaintiff to prove them. The plaintiff alleges in his bill, that all of the wharf below low water mark, if completed, would lay directly in front of his lot. The defendant, in his answer, denies this allegation. The burden is on the plaintiff to prove it.


N
S
250 feet from high water.
N. 64° 30′ E.
Proposed Wharf
Old Wharf
Birch
160 ft.
Bank
T. L. Roberts
40 ft.
127 ft.
70 ft.
Birch
Two Birches
High Water
390 feet to low water.
Low Water
W. M. ROBERTS.
N. 5° 45′ E. 245 feet to high water.
DILLINGHAM.
90 feet
N. 5° 45′ E. 160 feet to high water.
255 feet to low water.

The only evidence in the case is the deeds to the parties, and the plan, which are made a part of the case.

The construction of the defendant's deed was before this court in *Dillingham* v. *Roberts*, 75 Maine, 469, and it was held that it embraced the flats in front of the upland, extending the land conveyed to low water mark. The lines across the flats must be located by the rules laid down in *Emerson* v. *Taylor*, 9 Maine, 42. The plaintiff's deed, by its terms, extends his west line, without an angle, to low water mark, but the defendant's deed was prior to the plaintiff's, and when the plaintiff's line called for by his deed strikes the defendant's line on the flats it must stop; and from that point to low water, his line is co-incident with the defendant's.

Applying these rules to the plan, we are not satisfied that any portion of the wharf can be said to be in front of the plaintiff's land. The location of the lines across the flats cannot be determined by the plan with accuracy, but may be approximately, and thus determined, if the defendant's line across the flats should be extended below low water as far as the wharf extends, it does not appear that any material portion of the wharf will extend over that line.

Nor does it appear, by any evidence in the case, that the wharf will materially affect the access by water to the plaintiff's land.

The decree must be,

Bill dismissed without prejudice.
Costs for defendant.

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

EMERY, J., did not sit.

WARREN ALDRICH *vs.* INHABITANTS OF GORHAM.

Cumberland. Opinion April 20, 1885.

Ways. Defects. Proximate cause. Horse suddenly shying.

In order to render a town or city liable on account of an accident happening on a highway, it must appear that the defect in the way was the sole cause of the injury.

If any other efficient, independent cause, for which the town is not responsible, contributes directly to produce such injury, the town or city is not liable.

Whether the fright or misconduct of the horse is such as to be regarded as the true and proximate cause of the injury, in any given case, is to be governed by the extent of such misconduct.

If a horse well broken and adapted to the road, while being properly driven, suddenly swerves or shies from the direct course, he is not in any just sense to be considered as escaping from the control of the driver, or becoming unmanageable, if he is, in fact, only momentarily not controlled.

If while thus momentarily swerving or shying he is brought in contact with a defect in the road and an injury is thereby sustained, such conduct of the horse will not be considered as the proximate cause of the accident.

On exceptions from the superior court.

An action to recover for personal injuries received by reason of a defect in a way. The verdict was for the defendants and the plaintiff alleged exceptions. The material facts are well stated in the opinion.

S. C. Strout and *F. M. Ray*, for the plaintiff.

Strout and Holmes, for the defendants.

Foster, J. This case is before the court upon exceptions and a motion to set aside the verdict, rendered for the defendants, accompanied by a full report of the evidence.

The plaintiff with horse and open express wagon was traveling from Buxton to Saccarappa, and at about four o'clock in the morning in September, was passing over a bridge in the town of Gorham, when, as he claims, his horse suddenly shied to the left, and in so doing broke through the bridge, struggled, and together with the wagon went over the railing into the stream below; that at the moment the horse broke through, on account of the sudden stopping of the carriage, he was thrown forward from his seat over the bridge, and fell near the foot of the abutment, sustaining severe personal injuries, in which situation, he was found in a nearly unconscious condition, and for the injuries thus received this action was brought.

The bridge over which the plaintiff was passing, and near the easterly end of which this accident is alleged to have occurred, was about twenty feet in length by eighteen in width, twelve

feet above the bed of the stream, having a railing upon each side, and covered with one thickness of plank, thereby rendering the surface uniform the entire width between the rails.

That the plaintiff received severe bodily injury, and that the bridge was defective by reason of the covering having become badly decayed and rotten at the place where it is alleged the horse shied and broke through, there can be little reason to doubt, if we are to judge from the testimony in the case.

One of the principal positions relied upon in defense was, that, taking the plaintiff's statement to be true, if the way was defective at that particular point, and the injury was received by the plaintiff as claimed, such injury was not occasioned by the defect alone, but by some other cause contributing to produce it; in other words, that it was produced by the shying of the plaintiff's horse, occasioned by the movement of a bird in the bushes which caused the horse to shy or jump several feet from the usually travelled part of the bridge, and, coming upon the weakened and defective place in the covering, floundered and went over the railing.

Assuming this to be true, and the fact to be as claimed by the plaintiff, the shying was momentary, followed the next instant by the accident. The testimony discloses no want of care on the part of the plaintiff up to the very moment when the horse shied; moreover the plaintiff testifies that the horse was under his control. With no premonition of what was to occur, "all of a sudden he jumped to one side," and in so doing came in contact with the defect in the bridge of which the proper officers had sufficient notice.

It is undoubtedly the law of this state, as settled in a line of decisions from *Moore* v. *Abbot*, 32 Maine, 46, to the present time, that in order to render a town or city liable on account of an accident happening on a highway, it must appear that the defect in the way was the sole cause of the injury. If any other efficient, independent cause, for which the town is not responsible, contributes directly to produce such injury, the town or city is not liable. Some portion of the harness, or

carriage, may be defective and unsafe, and the accident may be the combined result of the defect in the harness or carriage, and the defect in the way; in such case there is an efficient co-operating cause, in connection with the defect in the way, that produces the injury, and the town is not rendered liable. The same principle applies where a horse, becoming frightened at an object for which the town is not responsible, breaks away from his driver and escapes from all control, while traveling on the way, and afterwards, while thus free from the management and control of the driver, meets with an injury through a defect in the way. *Davis* v. *Dudley*, 4 Allen, 557; *Moulton* v. *Sanford*, 51 Maine, 127. Where such is the fact it can not be said that the defect in the way is the sole cause of the injury. There are other efficient, co-operating causes which combine to produce the accident, and which may be regarded as much the true and real cause of the accident as the defect in the way.

But whether the fright or misconduct of the horse is such as to be regarded as the true and proximate cause of the injury, in any given case, is to be governed by the extent of such misconduct. It may in some remote degree even bear upon or influence, though not in any legal sense be said to cause it. "Everything which induces or influences an accident," says Chief Justice PETERS, in the very recent case of *Spaulding* v. *Winslow*, 74 Maine, 534, "does not necessarily and legally cause it." And not only is it the doctrine of the court in our own state, but also in Massachusetts, that if a horse well broken and adapted to the road, while being properly driven, suddenly swerves or shies from the direct course, he is not in any just sense to be considered as escaping from the control of the driver, or becoming unmanageable, if he is in fact only momentarily not controlled; and that if while thus momentarily swerving or shying he is brought in contact with a defect in the road and an injury is thereby sustained, such conduct of the horse will not be considered as the proximate cause of the accident, though it may be one of agencies or mediums through which it was produced, and a recovery may be had for such injury. This doctrine is not at variance with that laid down in *Moulton* v. *Sanford*, 51 Maine,

127, or *Perkins* v. *Fayette*, 68 Maine, 152, in both of which there were two independent, efficient, proximate causes of the accident; and it is in harmony with that of *Spaulding* v. *Winslow*, *supra*, and with the decisions of the Massachusetts court. *Titus* v. *Northbridge*, 97 Mass. 258; *Stone* v. *Hubbardston*, 100 Mass. 55; *Bemis* v. *Arlington*, 114 Mass. 508; *Wright* v. *Templeton*, 132 Mass. 50.

While these principles may be regarded as well established, the difficulty which sometimes arises is in their application to the circumstances of particular cases; especially true is this when the occurrences out of which the accident arose, as in this case, are almost instantaneous.

The plaintiff's exceptions, in the case at bar, relate to that portion of the charge in which the court speaks of the fright and shying of the horse; and herein we think the plaintiff's rights before the jury were more or less prejudiced. The instructions which they received were, in substance, that if the plaintiff's horse frightened at some bird or animal, for which the town was not responsible, without fault of the driver, shied from the regular line of travel, and went over the bridge, or into a hole, and an injury was thereby received, the town was not liable, on the ground that the primary cause of the accident was not the defect in the way.

This statement, without qualification, we think was too broad. It was not qualified either in reference to whether the shying was sudden, momentary, or otherwise, or as to the distance of such shying or swerving from the regular line of travel, but was absolute and unqualified that the town would not be liable, and that it would be a primary cause of the accident. Whereas, it is not every sudden, momentary starting or shying of a horse, properly driven, or momentary loss of control by the driver, that will constitute a primary or proximate *cause* of accident, when a defect in the way is thereby, at the same moment encountered and an accident happens. The evidence in the case upon which the instructions were based was not such as to show that the horse had broken away and escaped from the management and control of the driver previous to coming in

contact with the defect, and as CHAPMAN, J., said in *Titus* v. *Northbridge*, *supra* "a horse is not to be considered as uncontrollable that merely shies or starts, or is momentarily not controlled by the driver." Though possibly swerving a few feet from the line of travel, the horse, at the point where he broke through, was nevertheless upon that portion of the bridge equally as inviting and accessible to travel as any part of it.

In the opinion of the court in *Spaulding* v. *Winslow*, *supra*, which had not been announced at the time of the trial in this case this principle is expressed thus: "If, however, the horse while being properly driven, upon sight of the hole suddenly started or shied, and swerved or sheared a few feet from the direct line of travel, and, through only a momentary loss of control by the driver, threw the wagon into the ditch on account of the want of a railing, and the road was defective for the want of a railing, in such case the misadventure of the horse should not be considered as causing the accident." See also, as in accordance with what is here expressed, *Wright* v. *Templeton*, 132 Mass. 50.

This portion of the charge, taken in the connection in which it is found, is not aided by the preceding hypotheses wherein the term "manageable," as applied to the horse at the time of the shying, was not explained or defined fully in accordance with the principles of law applicable in cases of this kind. The jury may have inferred that want of control even momentarily, was such unmanageableness as would exempt the town from liability. We think that the instructions were not such as to enable the jury to decide the case understandingly.

Exceptions sustained.

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

JOSEPH S. RICKER, in equity, *vs.* GEORGE MOORE and others.

Cumberland. Opinion April 20, 1885.

Equity. Trusts. Agreement to sell real estate. Mortgage of equitable estate. Attachment. Assignment.

It is a fundamental rule in equity that "what ought to be done is considered as done."

When one executes and delivers to another an agreement to convey land to him, for a fixed price payable at certain future day, he thereby transmits an equitable estate; and the equitable vendor thereupon becomes the trustee of the estate for the equitable vendee, retaining the legal title as security for the purchase money, and the vendee, the trustee of the purchase money for the vendor.

Such an equitable interest the vendee may incumber by a mortgage which the mortgagee may assign; and when the assignee gives to the vendor notice of the mortgage and of the assignment, the latter thereupon becomes the trustee of the assignee and liable to convey the property to him on seasonable payment or tender of the agreed purchase price.

Where the assignee, after seasonable tender of the purchase price, brought a bill against the vendor for a conveyance, making a creditor of the vendee (who had attached the latter's interest under the agreement in an action still pending) a party defendant; such defendant not having tendered the purchase price, cannot set up that the mortgage and assignment were fraudulent as to creditors.

BILL in equity. Heard on bill, answer and proof.

The bill alleges that on the fifth of January, 1880, William A. Worster was the owner in fee simple of certain real estate situated in Berwick, which was subject to certain mortgages to the Somersworth savings bank, which had been foreclosed; and on that day, by an arrangement between the bank, Worster and George Moore, Moore advanced to the bank the sum of forty-nine hundred dollars, and the bank conveyed the real estate to Moore, who agreed, by his writing under seal, with Worster, to convey the real estate to him upon the payment by Worster to Moore, within one year, of that sum and interest; on the eleventh day of November following, a payment was made reducing the amount due to thirty-one hundred and forty-one dollars and eighty-nine cents, and Moore then agreed, by his writing under seal, with Worster, to extend the time of payment of that balance to the fifth day of January, 1882. The bill further alleges that Worster, on the seventh day of January, 1880, and again on the third day of April, same year, mortgaged the real estate to Abby D. Niles, to secure sums amounting to over six thousand dollars, and on the thirtieth day of December, 1881, Abby D. Niles assigned the mortgages and debts thereby secured to the plaintiff; and that on the third day of January, 1882, the plaintiff tendered to Moore the balance with interest then due him on his agreement

with Worster, and demanded a deed. And the bill further alleges that on the same fifth of January, Moore mortgaged the property to the bank, subject to the rights of Worster for forty-nine hundred dollars, and the bank claimed the amount due on the Moore contract.

The bill asked for a conveyance from Moore and the bank, and that they be enjoined from interfering with the plaintiff's possession.

A supplemental bill alleged that the bank, on the fifth of January, 1880, had a judgment against Worster for another sum, that judgment was assigned to William B. Lyman, of Dover, N. H., a levy was made which proved ineffectual, and thereupon, in December, 1880, Lyman brought *scire facias* against Worster, in the name of the bank, and attached the interest of Worster in all this real estate, and Lyman, with others not necessary now to refer to, were made parties respondent.

Other material facts are stated in the opinion.

William L. Putnam, for the plaintiff.

Copeland and Edgerly, for the defendants, Moore and Lyman.

VIRGIN, J. According to the fundamental rule in equity, "What ought to be done, is considered as done," when Moore executed and delivered his agreement of January 5, 1880, to W. A. Worster, therein promising to convey his interest in the property described, he thereby transmitted an equitable estate to Worster, who was then regarded as clothed with the same ultimate interest in the property which he would receive and hold if Moore had actually fulfilled his agreement. Moore then became the trustee of the estate for Worster, retaining the legal title as security for the purchase money, and Worster the trustee of the purchase money for Moore. *Linscott* v. *Buck*, 33 Maine, 530; *Green* v. *Smith*, 1 Atk. 572; *Broome* v. *Monck*, 10 Ves. 597; *Hadley* v. *Bank*, 3 DeG. J. & S. 63; Pom. Eq. § § 368 *et seq.*; *Rose* v. *Watson*, 10 H. L. Cas. 672, 678; *Lysaght* v. *Edwards*, L. R. 2 Ch. Div. 499, 506. The estate of Worster, under this agreement, was of such a

substantial character that he could sell, charge or encumber it by mortgage, as he did do to Mrs. Niles, before the conveyance from Moore. *Seton* v. *Slade*, 7 Ves. 265; *Champion* v. *Brown*, 6 Johns. Ch. 398, 403. And notice thereof to Moore would constitute him the trustee of Mrs. Niles. Story, Eq. § 789.

And the same principle would apply if the agreement, coupled with the anterior proceedings between Worster and the bank and Moore, be regarded as security for the payment of the balance of the six thousand one hundred and fifty dollar note, and therefore an equitable mortgage. For "equity regards the right of a mortgagor as the beneficial ownership of the land, subject, however, to the lien created by the mortgage as a security to the mortgagee for the payment of his demand. The mortgagor's equitable property is, in this respect, exactly analogous to the equitable estate of a vendee subject to a lien in favor of the vendor, as security for the payment of the purchase price." Pom. Eq. § § 162, 163, 376. And while there are many facts and circumstances in this case tending to show that the negotiations by the bank, Moore and Worster, which resulted in the execution of the agreement of January 5, constituted a mortgage, still we have concluded to consider it as a conditional sale.

In his letter, Moore declined to release to any one claiming under Worster, on the ground that the agreement ran to Worster alone, and not to him and his assigns. And when the tender was made in behalf of this complainant, he declined it. Moore's counsel now contend that Worster had a right, in his own behalf, to demand and receive a conveyance on tender of the balance due under the agreement; but that if Moore had conveyed to the complainant, he would thereafter be liable to Worster. We do not so understand the rules in equity. To be sure in law, before our late statute, such an agreement could not be assigned so as to allow the assignee to bring an action thereon in his own name. But an assignment of a thing in action, though nugatory as a transfer at common law, is regarded in equity as clothing the assignee with all the rights of his assignor, and to be enforced at the suit of the assignee. Pom.

Eq. § § 168, 369. And still, to hold Moore as the trustee of Worster's assignee, notice to him was essential, in order that he might shape his course according thereto. For Moore had a substantial interest in the property, and a right to protect and assert it. And still he was bound to convey, not to Worster alone, but to whomsoever Worster might assign his interest, provided that assignee should seasonably pay or tender the sum due under the terms of the agreement. If instead of an executed mortgage or assignment, the negotiations between Worster and Mrs. Niles had taken on the form of an agreement to assign, then notice of such an agreement would not have bound Moore to her, but he might, under that state of facts, convey to Worster, notwithstanding such an agreement. *McCreight* v. *Foster*, L. R. 5 Ch. 604, 610; S. C. *sub nom.*; *Shaw* v. *Foster*, L. R. 5 H. L. 321, 333, 338, where Lords CHELMSFORD and CAIRNS elaborately discuss the subject.

In the case at bar, the notice given to Moore on January 3, was seasonable and ample, including copies of the mortgages and assignments, together with the dates of their respective registration.

So far as Moore is concerned, we perceive no reason why he should not be decreed to release the unsold land described in his agreement to the complainant.

The defendant, Lyman, however, alleges that the mortgages of Worster to Niles are fraudulent as to him, as creditor of Worster; and that he, in December, 1880, in an action still pending, attached Worster's right under the agreement of January 5. There is no doubt that he had the right and authority to attach it. R. S., c. 81, § 56. But to avail himself of any such attachment, either he or Worster should have seasonably paid or tendered to Moore, the amount due under the agreement. If, as alleged, the mortgages to Niles are void, and the assignment of them to the complainant are, for the same reason, also void, then the tender to Moore was made by one having no right to the conveyance, and therefore of no avail, and the land has consequently been forfeited and the attachment has become valueless. We think, therefore, that Lyman can not set up that defence here.

Neither has the bank any reason to defend. The money tendered belongs to the bank under Moore's mortgage, which seems to have been purposely left unrecorded, until a long while after the registration of the Niles mortgages.

Whatever may be the rights of the parties, can be determined hereafter, the principal object being now to prevent a forfeiture of the land under the agreement of January 5.

Our opinion is that the bill should be sustained, that Moore, on the payment of the sum tendered January 3, should release to the complainant the unsold land described in his agreement of January 5, the complainant to hold the same in trust for the equitable owners of the property, in accordance with their respective priorities and claims to be hereafter determined.

Bill sustained with costs. Decree according to the opinion.

PETERS, C. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

THE LOCKWOOD COMPANY, in equity,

vs.

EDWARD J. LAWRENCE and others.

Kennebec. Opinion April 22, 1885.

Waters. Waste from saw mills thrown into the river. Multifariousness. Equity. Riparian owners. Reasonable use. Prescription.

Where several respondents, though acting independently of each other, deposit the refuse material and debris arising from the operation of their mills into the same stream, whence, by the natural current of the water, it is carried down the river and commingles into one indistinguishable mass before reaching the complainant's premises. *Held*, upon a bill in equity for perpetual injunction:

1. That this commingling of the waste, thus thrown into the stream, and which, after thus uniting and commingling, is precipitated by the current upon the premises of the complainant, creating the nuisance and inflicting the injuries of which he complains, is the natural and necessary consequence of the several and independent action of the respondents.

2. Whatever may have been the act of these different respondents, either in the operation of their several mills or in the depositing of the waste and debris, arising from such operations, into the stream, there is a co-operation in fact, in the production of the nuisance.

3. The claim thus to discharge the waste and debris from their mills into the stream constitutes one common interest, though not a joint right.

4. The acts of the respondents may be independent and several, but the result of these several acts combines to produce whatever damage or injury the complainant suffers, and in equity constitutes but one cause of action, and all the respondents may be joined in the same bill to restrain the nuisance.

5. It is otherwise in an action at law where damages are sought to be recovered.

Where the same relief is asked against all claiming a common right, and the same general acts are alleged and proved against all as contributing to the same nuisance; and where the object of the bill is single, to establish and obtain relief for one claim, in which all the respondents may be interested, it is not multifarious, although the respondents may have different and separate interests.

Nuisances and injuries affecting waters, including the obstruction, diversion, or pollution of streams, afford sufficient ground for equitable interference, on the ground of restraining irreparable mischief.

This is true when the acts complained of are of such a character that irreparable injury will result without such interference, or the necessity is imperious, or where adequate compensation for the injury arising therefrom may not be obtained at law, or, if continued, would lead to a multiplicity of suits.

Such a case forms an exception to the general rule, requiring that where a nuisance is claimed to exist, the fact of its existence should, ordinarily, be established by a suit at law before a court of equity will interfere.

The rights of riparian proprietors upon a natural stream are not absolute but qualified, and each party must exercise his own reasonable use of the water, as it flows past or through his land, with a just regard to the like reasonable use by all others who may be affected by his acts.

The law does not lay down any fixed rule for determining what is a reasonable use of the water of a stream by a riparian proprietor.

The reasonable use depends upon the circumstances of each particular case.

In order to establish a prescriptive right or easement in the land or water of another person, the enjoyment of such right must have been uninterrupted, adverse, under claim of right, and with the knowledge of the owner, or with such acts that knowledge will be presumed.

The prescriptive right to the use of a stream beyond the general right of reasonable use, as against other riparian owners, is governed by the same principles as those in relation to easements in land, and in order to establish such right there must be a perceptible amount of injury throughout the period necessary to gain such right.

BILL IN EQUITY.

Heard on bill, answers and proof.

Washington B. Bragg, one of the respondents filed no answer and entered no appearance, but there was no motion to take the bill *pro confesso* as to him.

The defendants, Lawrence, Phillips and Company, Fairfield Furniture Company, J. A. Cilley and Company, The Maine Manufacturing Company, E. Totman and Company, N. Totman and Sons, Stephen A. Nye, and A. H. and C. E. Duren, joined in one answer.

Weston and Brainard filed a separate answer.

The material facts are stated in the opinion.

Edmund F. Webb and *Appleton Webb*, for the plaintiff, cited: *Woodruff* v. *No. Bloomfield, &c. Co.* 8 Sawyer C. C. 628; *Blaisdell* v. *Stephens*, 14 Nev. 17; 3 Pom. Eq. Jur. § 1351; *Coe* v. *Company*, 37 N. H. 265; *Mayor of York* v. *Pilkington*, 1 Atkyns, 282; *Chipman* v. *Palmer*, 77 N. Y. 51; *Wood* v. *Sutcliffe*, 8 Eng. L. & E. 217; *Railroad & Coal Co.* v. *Richards*, 57 Penn. 142; *Seely* v. *Alden*, 61 Penn. 302; *Bard* v. *Yohn*, 26 Penn. 482; 1 Pom. Eq. Jur. 251; *Parker* v. *Cotton Co.* 2 Black, 545; 16 Ves. 342; *Eastman* v. *Company*, 47 N. H. 71; *People* v. *Chicago*, 53 Ill. 424; *Armstrong* v. *Gilchrist*, 2 John Cas. 424; *Jesus College* v. *Bloom*, 3 Atkyns, 262; *Lawson* v. *Menasha*, (Wis. January, 1884); *Clark* v. *Stewart*, 56 Wis. 154; *Garwood* v. *N. Y. C. R. R. Co.* 84 N. Y. 404; Gould, Waters, § § 562, 564, 508, 214, 511, 512; *Ingraham* v. *Dunnell*, 4 Met. 118; *Sprague* v. *Rhodes*, 4 R. I. 301; *Parker* v. *Company*, 2 How. 551; *Varney* v. *Pope*, 60 Maine, 195; *Porter* v. *Witham*, 17 Maine, 292; *Burnham* v. *Kempton*, 44 N. H. 94; 2 Story, Eq. 925; Eden, Injunctions, 286; *Lyon* v. *McLaughlin*, 32 Vermont, 423; *Wilson* v. *Mineral Point*, 39 Wisconsin, 160; *Webber* v. *Gage*, 39 New Hampshire, 186; *Campbell* v. *Seaman*, 63 New York, 568; *Atchinson* v. *Peterson*, 20 Wol. 511; *Tyler* v. *Wilkinson*, 4 Nason, 379; 3 Kent's Commentaries, 439, 215, 442; *Gerrish* v. *Brown*, 51 Maine, 262; *Dwinell* v. *Veazie*, 50 Maine, 479; *Wadsworth* v. *Tillotson*, 15 Conn. 366; *Twiss* v. *Baldwin*, 9 Conn. 305; *Platt* v. *Johnson*, 15 Johns. Rep. 213; *Red River Roller Mills* v. *Wright*, 30 Minn. 249; *Prentice* v. *Geiger*, 74 N. Y. 343; *Gould* v. *Boston Duck Co.* 13 Gray, 442; *Hayes* v. *Waldron*, 44 N. H. 580; *Snow* v. *Parsons*, 28 Vt. 459; *Parker* v. *Hotchkiss*, 25 Conn. 321; 4

Black. Com. 166, 167; 3 Black. Com. 215; *Crosby* v. *Bessey*, 49 Maine, 539; *Cooper* v. *Barber*, 3 Taunt. 99; *Thurber* v. *Martin*, 2 Gray, 394; *Gilmore* v. *Driscoll*, 122 Mass. 207; *Heath* v. *Williams*, 25 Maine, 211; *Taylor* v. *People*, 6 Park, Cr. 353; *Com.* v. *Upton*, 6 Gray, 473; *People* v. *Cunningham*, 1 Denio, 536; Wash. Easements, 346; *Underwood* v. *Scythe Co.* 41 Maine, 292; Wood, Nuisances, § 435–802; *Richmond M'f'g Co.* v. *Atlantic De L. Co.* 10 R. I. 110; *Fletcher* v. *Ryland*, L. R. 1 Ex. 265; *Beardmore* v. *Tredwell*, 7 L. T. 207; *Boynton* v. *Gill*, 1 Rolle's Abr. 140; *Res Publica* v. *Caldwell*, 1 Dallas, 150; *Gile* v. *Stevens*, 13 Gray, 146; *Francis* v. *Schoellkopf*, 53 N. Y. 152; *Merrifield* v. *Lombard*, 13 Allen, 16; *Belknap* v. *Trimble*, 3 Paige, 601; *Rowell* v. *Jewett*, 69 Maine, 303; *Lewis* v. *Small*, 71 Maine, 554; *Stinchfield* v. *Milliken*, 71 Maine, 570; *Pulsifer* v. *Waterman*, 73 Maine, 244; *Hayden* v. *Whitmore*, 74 Maine, 234; *Taylor* v. *Taylor*, 74 Maine, 588; *Washburn* v. *Gilman*, 64 Maine, 164; *Bemis* v. *Upham*, 13 Pick. 169; *Boston W. P. Co.* v. *B. & W. R. R. Co.* 16 Pick. 512; *Ballou* v. *Hopkinton*, 4 Gray, 324; Hilliard, Injunctions, 16; *Canfield* v. *Andrews*, 54 Vt. 1.

Brown and Carver, for the Fairfield mill-owners, respondents.

A bill in equity should contain a clear and explicit statement of the plaintiff's case. Rules of Court, VI; 102 U. S. 418; 3 Wheat. 258; Heard's Eq. Pl. 30; 129 Mass. 382; 21 Pick. 526; 22 Pick. 55.

The bill alleges: "Plaintiffs are informed and believe and therefore aver that at the time of the erections of said manufactories they were and still are entitled to the natural flow of the water in said river to and through said land, and to have said water come to their said manufactories, flumes, ponds, raceways, and wheels in their natural purity." This is the statement of the plaintiff's right. It is made on information and belief, and leaves the court to determine it. But it is not the province of the court to determine the plaintiff's right. It is to protect a right after it has been determined. 1 Pom. Eq. § § 95–112. Then the only complaint against the defendants, alleged in the bill,

is that they severally owned and operated certain mills "by means of which the refuse material . . . arising therefrom are discharged, cast, carried and deposited into said river." It is only by implication and inference that any defendant is charged with doing anything except to operate his mill. 121 Mass. 148; Heard, Eq. Pl. 31, 36, 44; 3 Drew, 735; Dewey, Eq. Pl. 17.

This bill is bad for multifariousness. Each defendant's interest and ownership in mills is separate, independent and distinct. Each defendant should have the privilege of defending himself by showing in his answer the particular circumstances pertaining to his case. Story, Eq. Pl. § § 272, 530, 531, 538, 541; Cooper, Eq. Pl. 182; 2 Dick. R. 677; 1 Madd. R. 88. Where there is no privity between defendants and each injures a single right of the plaintiff, but by different means, the plaintiff should bring separate bills against each defendant. 2 Ves. Jr. 486, 328; 6 Johns. Ch. 155; 5 Paige, 160; 18 Ves. 72; 2 Mason, 201; 2 Sanford, 344; Mitf'd, Pl. 181; 2 Aust. 469; 5 Gill, 381; 2 Sch. and Lefr. 371; 5 Paige, 65. Where the plaintiff seeks to establish a claim growing out of one general right and the defendants may justify their several acts on dissimilar grounds, separate bills must be filed against each. 2 Ves. 487, 323; Hardv. 337; 2 Austr. 476; 8 Peters, 128; 1 Younge, 373; 1 Mylne & Cr. 618; 6 Johns. Ch. 139; 4 Cowan, 682; 8 Georgia, 238; 8 Clark and Fin. 435; 4 Younge, 444. See also *Pointon* v. *Pointon*, L. R. 12 Eq. 552; Heard, Pl. 36, 39; 5 Madd. 138; 6 Dana, 186; 7 J. J. Marsh, 37; 20 Pick. 368; 1 Pom. Eq. § 418; 1 Allen, 166; 10 Cush. 252.

Large interests are involved on both sides in this case. The plaintiff is located at one point, employing its labor and capital at Waterville. The defendants employ their labor and capital through the whole valley of the upper Kennebec and its tributaries. A blow aimed at the lumbering interests affects more people than would be affected by interfering with almost any other interest in this section of the state. These mills have been in operation many years. The plaintiff corporation only about eight years.

Counsel further discussed in an able argument, the questions arising in the case, citing: High. Injunctions, § § 8, 505; *Varney* v. *Pope*, 60 Maine, 192; *Porter* v. *Witham*, 17, Maine, 292: 42 Maine, 119; 47 N. H. 71; *Fuller* v. *Melrose*, 1 Allen, 166; *Tash* v. *Adams*, 10 Cush. 252; Pom. Eq. Jur. § 418; *Birmingham Can. Co.* v. *Lloyd*, 18 Ves. 515; *Weller* v. *Smarton*, 1 Cox, 102; *Reid* v. *Gifford*, 6 Johns. Ch. 19; *Irwin* v. *Dixion*, 9 How. 10; *Eastman* v. *Amoskeag Co.* 47 N. H. 71; *Mohawk, &c.* v. *Utica, &c.* 6 Paige, 554.

J. W. Spaulding and *F. J. Baker*, for the respondents, *Weston and Brainard.*

FOSTER, J. The bill alleges in substance that the complainants are the owners and in possession of a large amount of real and personal estate, consisting of lands, dams and water power, including mills and machinery employed in manufacturing cotton into fabrics, situated at Waterville, on both banks of the Kennebec river, not navigable for vessels or boats at that place, their dams extending across said river; that in 1874, they built a manufactory of thirty-four thousand spindles, and in 1882, another of fifty-five thousand spindles, both of which have been in use since their erection, and that in said business they have a capital of two million two hundred thousand dollars, employing more than one thousand persons, with a pay roll of about two thousand five hundred dollars each day, and an annual production of one million three hundred thousand dollars; that they are entitled to the natural flow of the water in said river, and to have it come to their manufactories in its natural purity. And they allege that the respondents, during the past six years, have severally owned and operated large saw mills, containing shingle, clapboard and other manufacturing machines, and planing mills, and shovel handle mills, situated above the complainants on said river, between and including Skowhegan and Fairfield, which they are respectively and separately operating, by means of which the refuse material, sawdust, edgings, shavings, refuse wood and other debris arising therefrom, are discharged therefrom into said river, and vast quantities are carried by the current down

the river, and before reaching the complainants' premises, it commingles into one indistinguishable mass, and thus uniting, flows along said river into their ponds, raceways, racks and wheels, filling the same and thereby stopping the wheels and retarding and preventing the running and operating of their manufactories, whereby they lose the benefit, advantage and profits of the same, rendering it necessary to expend large sums of money in removing this waste and debris, causing great damage, constituting a great nuisance, which is rapidly increasing and becoming more intolerable, which operations are still continued and will be continued, and that a destruction of complainants' profits and irreparable injury will result, unless the respondents are restrained by injunction; that each respondent is independently working his own mill, without any conspiracy or preconcert of understanding or action with the others, and it is impossible to distinguish what particular share of damage each has inflicted or will inflict, but that each has contributed, and is now contributing to constitute the nuisance, making an unreasonable use of the water of said river, destroying its value, illegally interrupting the complainants in its use, and rendering it unfit for manufacturing purposes; and that they have no remedy, except in equity.

The prayer is for a perpetual injunction, restraining the respondents from depositing waste, enumerated in the bill, in said river.

The answer substantially sets forth admission of title and possession of the premises of the parties as alleged, and claiming that the respondents were severally operating such mills, manufactories and machinery as alleged, which are used to manufacture lumber owned by most of the respondents, and cut near the head waters of the Kennebec; that most of the respondents own large tracts of timber land situate in the northern part of the state, and have invested in said lumbering business large amounts of money, and employ annually a large number of men in cutting, hauling, driving, booming, and sawing said lumber, their business having continued for more than thirty years, and having become of very large proportions, furnishing

employment for a large proportion of the laboring men living on the Kennebec river; that said mills and manufactories were all located where they now are more than thirty years ago, having been operated during all that period in the same places and manner as now, and that there have always, during said time, been thrown into said river whatever refuse materials the occupiers of said mills saw fit, consisting of slabs, edgings, shavings, and all other refuse materials of various kinds evolved from said operations, but with much less quantity during the past six years, and only so much as, with proper care and caution on the part of complainants to protect their manufactories, would do no injury to them, and that the respondents have acquired a prescriptive right to use said river as they have heretofore done; they deny that, during the past six years, any refuse or waste from their mills have been unlawfully deposited in the said river, or unlawfully interfered with the complainants' rights, and that whatever damage or annoyance they have suffered is attributable to the improper construction of their dams, flumes, racks, wheels and other apparatus used in carrying on their manufactories; that the granting of the prayer of complainants as set forth, will prevent the respondents from operating their mills, and destroy their lumbering business. They also deny that the allegations of the bill entitle the complainants to equitable relief, and, claiming all benefit of demurrer in their answer to this part of the bill, say that it can not be maintained against these respondents jointly, they being, as therein alleged, engaged independently of each other in operating their several mills, manufactories and machinery, and with no conspiracy or preconcert of understanding or action with each other.

I. The case is one of importance, as it embraces the rights of parties in property of great value on each side, and in the lawful management and enjoyment of which each party is entitled to protection by law. It is one, also, that in its proper consideration is not entirely free from difficulties. The parties have interests which, in the management and enjoyment of their property, are conflicting; and while it becomes the duty of the court to settle their respective rights, we must be governed by the established

rules and principles of equity, and which in their general operation are just and salutary.

1. The question to be first considered is the objection raised in the answer, with the force of a demurrer, to the joinder of these several respondents in this bill. It is insisted that the cause of action is distinct and several as against each of the respondents, and that neither they, nor the several causes of action, can be joined in the same bill, and that the objection by demurrer is fatal on account of misjoinder and multifariousness.

While it is true that the allegations in the bill set forth that each respondent is independently working his own mill, and machinery, without any conspiracy or preconcert of understanding or action with the others, it also appears that the refuse material, sawdust, edgings, shavings, refuse wood and other debris arising from operating said mills, cast and deposited into the river, are carried down by the current, and before reaching the complainants, commingles into one indistinguishable mass, and thence are carried down into the ponds, raceways, racks and wheels of the complainants' manufactories, inflicting the injury of which they complain; and that it is impossible to distinguish what particular share of damage each respondent has inflicted, or will inflict, but that each has contributed and now is contributing to constitute the said nuisance. In considering the questions thus raised by the pleadings upon this branch of the case, and assuming the facts set forth by the allegations in the bill to be true, no other conclusion can be reached than that the respondents, though acting independently of each other as alleged, all deposit the refuse material and debris arising from the operation of their mills into the same stream, whence, by the natural current of the water, it is carried down the river and commingles before reaching the complainants' ponds, raceways, racks and wheels, where the nuisance complained of is committed. This commingling of the waste thus thrown into the stream, and which, after thus uniting and commingling, is precipitated by the current upon the premises of these complainants, creating the nuisance and inflicting the injuries of which they complain, is the

natural and necessary consequence of the several and independent action of these respondents. It is the combined action of this waste from the different mills, uniting and mingling, and thence drifting down upon the complainants, which creates the nuisance, and produces the injuries complained of.

Whatever, then, may have been the act of these different respondents, either in the operation of their several mills, or in the depositing of the waste and debris arising from such operations, into the stream, there is a co-operation in fact in the production of the nuisance. They all claim a right to discharge the waste and debris from their mills into this river, and in this, their claim constitutes one common interest, though not a joint right. The acts of the respondents may be independent and several, but the result of these several acts combines to produce whatever damage or injury these complainants suffer, and in equity constitutes but one cause of action. It is otherwise in law where damages are sought to be recovered. There, only those parties can be joined who have acted jointly in the commission of the act. There must be concert of action and co-operation to make several persons jointly liable in an action at law. "There is a very great difference," says the court in *Woodruff* v. *North Bloomfield Gravel Mining Co.*, 8 Sawyer, (U. S. C. C.) 628, "between seeking to recover damages at law, for an injury already inflicted by several parties acting independently of each other, and restraining parties from committing a nuisance in the future. In equity, the court is not tied down to one particular form of judgment. It can adapt its decrees to the circumstances in each case, and give the proper relief as against each party, without reference to the action of others, and without injury to either. Each is dealt with, with respect to his own acts, either as affected or unaffected by the acts of the others. It is not necessary for the prevention of future injury, to ascertain what particular share of the damages each defendant has inflicted in the past, or is about to inflict in the future. It is enough to know that he has contributed, and is continuing to contribute to a nuisance, without ascertaining to what extent, and to restrain him from contributing at all."

This question has recently been before the court in California in the case of *Keyes* v. *Little York Gold Washing Co.*, 53 Cal. 724, where a different doctrine was laid down, and in support of that claimed by the counsel for the respondents. But that case may be considered as substantially overruled by the more recent decision of *Hillman* v. *Newington*, 57 Cal. 56, a case in the same court, sustaining the views which we entertain in the case before us.

Again the same question arose in that state and was decided as late as 1883, in the circuit court of the United States, in the case of *Woodruff* v. *North Bloomfield Gravel Mining Co.*, 8 Sawyer, (U. S. C. C.) 628. In that case, the complainant was the owner of lands situated on the Yuba and Feather rivers; the respondents were miners severally and independently engaged in hydraulic mining at points above on the Yuba river and its affluents, and by means of which large quantities of gravel, waste, earth and other debris arising therefrom, were discharged into the several streams on which the mines were situated, and by the rapid currents of the water, were carried down the various streams into the Yuba river, where they commingled before reaching the valley, and after thus uniting, flowed along the main Yuba river, and were deposited upon the complainant's lands. An injunction was sought to restrain the several respondents from depositing the debris of their mines where it would be swept into the river. The respondents demurred to the bill. In that case, as in this, no damages were sought, but equitable relief to restrain future action — future contribution by each to the alleged nuisance. Judge SAWYER held that the bill could be filed against all the respondents who contributed to produce the injury by depositing debris in the stream above, and denied the doctrine of *Keyes* v. *Little York Gold Washing Co.*, as not being "in accordance with the principles of equity jurisprudence in England, or generally, in the United States, as established by the authorities."

Another recent case is that of *Blaisdell* v. *Stephens*, 14 Nev. 17, which was a combined suit at law, to recover damages which had already resulted from a nuisance, and, in equity, for an

injunction to restrain its continuance. There were two respondents, who each, separately and independently of the other, allowed water to run from his land upon the land of the complainant, and from the combined action of which the complainant's ditch was injured, which constituted the nuisance complained of. There was a joint judgment for the damages, and an injunction, from which an appeal was taken to the Supreme Court, where it was held that the acts of each party being independent of the other, there was no joint liability for the damages, reversed the judgment and ordered a new trial. Upon a rehearing it was claimed that, even if the judgment at law for damages could not be maintained, it was a proper case for equitable relief, and the court held, in accordance with the authorities, that there could be no joint recovery at law for damages, but that it was a proper case for an injunction; the case was remanded, with directions that if the damages which had been recovered at law should be remitted within fifteen days, the decree for injunction should stand. In that case, the principle is clearly recognized and adopted that parties, who, by their several and independent acts, contribute to the production of a nuisance, although they can not properly be joined in an action at law for damages, may be rightfully joined in a suit in equity for injunction to restrain a future contribution by each to the nuisance.

"There is a common interest," says SAWYER, J., in *Woodruff v. North Bloomfield Gravel Mining Co.*, *supra*, "a common, though not a joint right claimed; and the action on the part of all defendants is the same, in contributing to the common nuisance. The rights of all involve and depend upon identically the same question, both of law and fact. It is one of the class of cases, like bills of peace, and bills founded on analogous principles, where a single individual may bring a suit against numerous defendants, where is no joint interest, or title, but where the questions at issue, and the evidence to establish the rights of the parties, and the relief demanded are identical."

Professor Pomeroy, in his recent work, (Pom. Eq. Jur. § § 269, 1394,) after an exhaustive examination of the authorities

in the American courts, sustains the doctrine on the ground of prevention of multiplicity of suits, in bills of this nature, which are not technically "bills of peace," but "are analogous to," or "within the principle of" such bills. "Courts of the highest standing and ability," says the learned writer, "have repeatedly interfered and exercised this jurisdiction, where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy."

The same principle is expressly recognized in *Chipman* v. *Palmer*, 77 N. Y. 56, where the court say that "an equitable action will lie to restrain parties who severally contribute to a nuisance," while it holds that they cannot be joined in an action at law. To the same point are *Duke of Buccleugh* v. *Coman*, 5 Macph. 214; *Crossley* v. *Lightowler*, 3 L. R. Eq. 279; *Thorpe* v. *Brumfitt*, 8 L. R. Ch. App. 650.

In the last case a bill was sustained, and a decree granting a perpetual injunction affirmed, against several persons acting individually and severally in obstructing the passage to an inn by loading and unloading wagons. Lord Justice JAMES said: "Then it was said, that the plaintiff alleges an obstruction, caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose a person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person, entitled to use the way, has a right to prevent; and it is no defense to any one person among the hundred to say, that what he does causes no damage to the complainant."

In the case at bar, it may be that the act of any one respondent alone might not be sufficient cause for any well grounded

action on the part of the complainants; but when the individual acts of the several respondents, through the combined results of these individual acts, produce appreciable and serious injury, it is a single result, not traceable perhaps to any particular one of these respondents, but a result for which they may be liable in equity as contributing to the common nuisance, as we have before stated. Hence there can be no well founded objection, either upon principle or authority, against this bill upon the ground of misjoinder.

2. The same may be said in relation to the objection urged on account of multifariousness. Here the same relief is asked against all; the same common right is claimed; the same general acts are alleged against all as contributing to the same nuisance. When the object of the bill is single, to establish and obtain relief for one claim, in which all the respondents may be interested, it is not multifarious although the respondents may have different and separate interests. *Bugbee* v. *Sargent*, 23 Maine, 269; *Brinkerhoff* v. *Brown*, 6 Johns. Ch. 157. If the matters are in any material degree blended, so that directly or indirectly they concern all the respondents, the bill is not multifarious. Drewry, Eq. Plead. 42. In *Campbell* v. *Mackay*, 1 M. & C. 543, Lord COTTENHAM, held that where the plaintiffs have a common interest against all the defendants in a suit as to one or more of the questions raised by it, so as to make them all necessary parties for the purpose of enforcing that common interest, the circumstances of some of the defendants being subject to distinct liabilities, in respect to the different branches of the subject matter, will not render the bill multifarious. Also, *Gaines* v. *Chew*, 2 How. 642.

Therefore, whether the case before us, as disclosed by the allegations may or may not be exactly like any other that has come before the courts, we are satisfied that it falls within the principles of equity enunciated in the cases to which we have referred, and which are not only salutary, but in accordance with reason, and that the bill is not objectionable, on account of misjoinder of respondents, or multifariousness.

3. The next objection urged is that upon the allegations set forth in the bill the complainants show no sufficient grounds to entitle them to equitable relief.

The relief granted by a court of equity is either remedial or preventive. In this case the complainants' prayer is for preventive relief only. It may well be assumed that the facts stated are sufficient to constitute the case of a private nuisance, and to give this court, *prima facie*, jurisdiction over the subject matter and the parties. It is well settled that private nuisances may, under some circumstances, fall within the jurisdiction of a court of equity in reference to obtaining relief from further molestation by restraining the acts which constitute the nuisance.

Nuisances and injuries affecting waters, including the obstruction, diversion or pollution of streams, afford frequent ground for equitable interference, on the principle of restraining irreparable mischief. The jurisdiction of equity in this class of cases may be regarded as ancient and well established. Especially is this true when the acts complained of are of such a character that irreparable injury will result to the complainant without such interference, or when adequate compensation for the injury arising thereform may not be obtained at law, or, if continued, would lead to a multiplicity of suits. Whenever this is admitted, or established by proof, a court of equity may, by injunction, restrain the continuance of such acts. *Canfield* v. *Andrew*, 54 Vt. 1.

It is true that "it is not every case which would furnish a right of action against a party for a nuisance which will justify the interposition of a court of equity to redress the injury or remove the annoyance." Story, Eq. Jur. § 925. And the general rule, as claimed by the learned counsel for the respondents, is, that where a nuisance is claimed to exist the fact of its existence should, ordinarily, be established by a suit at law before a court of equity will interfere. This rule, however, is not without exceptions. The ground upon which equity takes jurisdiction is that the injury complained of is irreparable, or of such a nature that there is no adequate remedy at law. An examination of the cases which sustain the doctrine of the neces-

sity of the prior interposition of an action at law, admit that in cases of pressing or imperious necessity, or where the right is in danger of being injured or destroyed, or there is no adequate remedy at law, equity will intervene. *Varney* v. *Pope*, 60 Maine, 195; *Porter* v. *Whitham*, 17 Maine, 294; *Morse* v. *Machias Water Power Co.* 42 Maine, 127, 128; *Parker* v. *Winnipiseogee Lake Co.* 2 Black, 552; *Coe* v. *Winnepisiogee, M'f'g Co.* 37 N. H. 263; Gould on Waters, § 506 and cases cited.

As stated by Chancellor KENT in *Gardner* v. *Newburgh*, 2 Johns. Ch. 165: "The foundation of jurisdiction in such a case is the necessity of a preventive remedy when great and immediate mischief, or material injury would arise to the comfort and enjoyment of property." The fact that the complainant has not established his right at law is no ground for demurrer to the bill. *Soltan* v. *De Held*, 2 Sim. N. S. 133; *Robeson* v. *Pittenger*, 1 Green Ch. 57; *Holsman* v. *Boiling Spring Co.* 1 McCarter, 335; *Olmsted* v. *Loomis*, 9 N. Y. 432.

And by irreparable injury, is meant one for which there is no adequate remedy at law. Gould on Waters, § 508. "To deprive a plaintiff of the aid of equity by injunction it must also appear that the remedy at law is plain and adequate; in other words, that it is as practical and efficient to secure the ends of justice and its proper and prompt administration as is the remedy in equity. And unless this is shown, a court of equity may lend its extraordinary aid by injunction notwithstanding the existence of a remedy at law." 1 High on Inj. § 30; *Boyce's Ex'r's* v. *Grundy*, 3 Pet. 215. Especially is this the case where the injury is of such a nature as from its continuance or permanent mischief, must cause a constantly recurring grievance, which cannot otherwise be prevented. Adams, Eq. 211; *Belknap* v. *Trimble*, 3 Paige, 601; *Webber* v. *Gage*, 39 N. H. 186, 187; *Merrifield* v. *Lombard*, 13 Allen, 18; *Cadigan* v. *Brown*, 120 Mass. 494. In such case an action at law affords no adequate remedy, and vexatious litigation and multiplicity of suits, which equity seeks to avoid, would afford just grounds for equitable interference. *Clark* v. *Stewart*, 56 Wis. 154. The very

difficulty of obtaining substantial damages was stated to be a ground for relief by injunction in *Clowes* v. *Staffordshire Potteries Co.* 8 L. R. Ch. Ap. 125. With still greater force does this apply in a case where the injury is caused by so many, and in such a way, that it would be difficult if not impossible to apportion the damage, or say how far any one may have contributed to the result, and so damages would be but nominal, and repeated actions, without any substantial benefit, might be the result.

In *Lyon* v. *McLaughlin*, 32 Vt. 423, the court say: "When the invasion of a right in this kind of property is threatened and intended which is necessarily to be continuing and operate prospectively and indefinitely, and the extent of the injurious consequences is contingent and doubtful of estimation, the writ of injunction is not only permissible, but is the most appropriate means of remedy. It affords in fact the only adequate and sure remedy. The very doubtfulness as to the extent of the prospective injury and the impossibility of ascertaining the measure of just reparation render such an injury irreparable in the sense of the law relating to this subject."

The court in Massachusetts has very recently had occasion to allude to this question in a case relating to the rights of riparian owners where the waters in a natural stream were polluted, in which case the court say: "The defendant contends that, according to the general principles of the common law, the plaintiff has a complete remedy upon the facts alleged by him, and that he should be compelled to resort to his action at law before seeking relief in equity. But it is quite clear that a bill in equity may be maintained by a riparian owner to restrain another from polluting the stream to the plaintiffs' material injury. *Merrifield* v. *Lombard*, 13 Allen, 16; *Woodward* v. *Worcester*, 121 Mass. 245. The acts of the defendant, as alleged, tend to create a nuisance of a continuous nature, for which an action at law can furnish no adequate relief." *Harris* v. *Mackintosh*, 133 Mass. 230.

Equity, as well as the common law, has growth. It is said that prior to Lord ELDON's time injunctions were rarely issued

by courts of equity, but that with the development of equity jurisprudence it has become of frequent use. In the earlier history of the jurisprudence relating to this branch of the law, it was rarely issued in the case of a private nuisance until the plaintiff's right had been established in a suit at law. "But now," say the court in *Campbell* v. *Seaman*, 63 N. Y. 582, "a suit at law is no longer a preliminary, and the right to an injunction, in a proper case, in England and most of the states, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits."

II. It remains, then, to be determined from the pleadings and proof whether the allegations are so far supported by the testimony as to entitle the complainants to equitable relief.

A large mass of testimony has been taken in support of the claims set up in the bill, and particularly in reference to the amount of waste that has been discharged into the river from the respondents' mills, and which to a greater or less extent has lodged in the ponds, racks, wheels and raceways of the complainants' mills, thereby causing damage and injury to their property and business, and of which they complain. Much of this testimony is uncontradicted, and fully sustains the allegations in reference to the amount and kind of waste from the respondents' mills, — situated at Fairfield and Somerset Mills, — and with which the water coming into the complainants' ponds is polluted. It is unnecessary to enumerate all the facts established by the testimony. The proof shows that the canal or pond which is about seven hundred feet long, ninety feet in width, and from fifteen to twenty feet deep, situated at the westerly end of the complainants' dam, was so filled with waste, during the space of about six weeks preceding the taking of this testimony, — March 25th to May 12th, — that the complainants were obliged to clear it out from six to eight times, and that several hundred cords were thus removed during that time besides the large quantities that had accumulated and obstructed the raceways. It also shows that they were thus continually troubled with it, and were obliged to shut down their mills on account of

it from one to sixteen times a day, and at times whole days, and to employ from ten to forty and sometimes fifty men in clearing the racks and removing this waste, at an expense for that alone, during the time named, of more than two thousand dollars; occasioning a loss to the employees in their mills, during the month of April, of eight thousand dollars on account of the loss of time resulting from the frequent shutting down of the mills, thereby causing trouble and dissatisfaction. That this had been troubling them every year in the same way since commencing operations in 1876, more at some seasons of the year than other times, but that it had continued each year, notwithstanding they had requested the respondents to cease throwing their waste into the river, and had obtained an act from the legislature prohibiting the throwing of waste and debris into this river, and that they had already on account of this waste been damaged between forty and fifty thousand dollars, and that it was continuing and liable to continue in the future, with increasing damage each year.

The proof further shows that the waste which causes this trouble consists of great quantities of refuse material, sawdust, edgings, shavings, and other debris arising from the operating of respondents' mills, in the manufacture of more than twenty-five millions of lumber annually, besides various other manufactures. It is cast and discharged into the river, and before reaching the complainants' premises commingles and is carried by the action of the water down into their ponds, racks, raceways and wheels, causing the nuisance complained of.

It appears in proof also, that the respondents, and those preceding them, have been accustomed to discharge the waste from their mills into this river for many years, and although they do not strenously controvert the fact of the great damage to the complainants, they claim that what they do in thus disposing of their waste is but a reasonable use of this river; and if not, then that they have a prescriptive right so to do, and that the complainants contribute to the production of such injury by improperly constructed dams, canals, racks, etc.

From a very careful examination of the testimony we are satisfied that neither of these propositions can be supported by it.

1. These parties are riparian proprietors. They represent the great and important manufacturing industries of our state. While the complainants have a capital of more than two million two hundred thousand dollars invested in the manufacture of cotton, producing one million five hundred thousand dollars annually, the respondents have invested above them upon the same river in the manufacture of lumber, more than two hundred fifty thousand dollars, and whose annual production is more than six hundred thousand dollars.

However great these industries, or however important to either may be the result of this suit, the rights of the parties to the use of the water in that river are established by well settled principles.

Every proprietor upon a natural stream is entitled to the reasonable use and enjoyment of such stream as it flows through or along his own land, taking into consideration a like reasonable use of such stream by all other proprietors above or below him. The rights of the owners are not absolute but qualified, and each party must exercise his own reasonable use with a just regard to the like reasonable use by all others who may be affected by his acts. Any diversion or obstruction which substantially and materially diminishes the quantity of water, so that it does not flow as it has been accustomed to, or which defiles and corrupts it so as to essentially impair its purity, thereby preventing the use of it for any of the reasonable and proper purposes to which it is usually applied, is an infringement of the rights of other owners of land through which the stream flows, and creates a nuisance for which those thereby injured are entitled to a remedy. *Merrifield* v. *Lombard*, 13 Allen, 17.

It is laid down by the courts that the general principles governing the use of running streams in respect to the diversion, obstruction, or detention of water, must also govern in respect to the amount of waste resulting from the process of manufacture. The reasonable use in such cases depends upon the circumstances of each particular case. The law does not lay down any fixed

rule for determining what is a reasonable use of the water of a stream by a riparian proprietor. For domestic, agricultural and manufacturing purposes, to which every riparian owner is entitled, there may be, consistently with that right, some diminution, retardation or acceleration of the natural flow. So in regard to the use of the stream for manufacturing purposes, there must necessarily be more or less waste which it would be impossible to exclude from it, and which by no ordinary care or prudence, could be prevented from falling into the stream. The reasonableness of such use of the water must determine the right, and this must be governed by the extent of detriment received by the riparian proprietors below. See *Hayes* v. *Waldron*, 44 N. H. 580. In the recent case of *Red River Roller Mills* v. *Wright*, 30 Minn. 249, (44 Am. R. 194,) the court say: "In determining what is a reasonable use, regard must be had to the subject matter of the use; the occasion and manner of its application; the object, extent, necessity and duration of the use; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party, and the extent of the injury to the other party; the state of improvement of the country in regard to mills and machinery, and the use of water as a propelling power; the general and established usages of the country in similar cases; and all the other and ever varying circumstances of each particular case, bearing upon the question of the fitness and propriety of the use of the water under consideration."

This case is before us upon report, and it becomes the duty of the court to determine this question of use. All the evidence upon the question of reasonable use, together with all the various circumstances connected with the use of this river by these riparian proprietors, in operating their different mills and manufactories, becomes important in the determination of their respective rights. It is claimed on the part of the respondents that the deposit of a great portion of the waste and refuse material arising from the different manufactures at their mills, into the river, is necessary to their successful operation, and that

the expense and inconvenience to which they would necessarily be put in otherwise disposing of it, would necessitate the shutting down of their mills, and result in a suspension of their business in the manufacture of lumber and other materials. On the other hand, the complainants, as lower proprietors upon the same river, claim an equal right in the use of the water, and from the evidence, show that they are and have been greatly injured in the use of their property, on account of this same waste and refuse material deposited above them by these respondents.

The evidence is such as to leave no doubt in our minds that the use which the respondents have made and are making of this river in reference to the rights of these complainants, is other than a reasonable use of it. What may have been a reasonable use at one time, may not be said to be a reasonable use now. The state of the country, the state of improvement in regard to mills and machinery, and the use of this river as a propelling power, were once far different from what they are to-day. And so in considering the reasonableness of suffering this waste to be deposited in the current above, much must depend upon the use to which the stream below is applied, and the detriment caused to those whose rights, as riparian proprietors, are entitled to just consideration.

The complainants' cotton mills were built, one in 1874, and the other in 1882, where formerly was a saw and grist mill, and at one time a tannery. The racks and wheels which are now connected with these cotton mills, as the proof shows, are of standard and approved construction, and yet very different from those that formerly existed there. The old mills gave way to the advance in manufacturing interests, and to the improvement in the propelling power and machinery necessarily incident to such manufactures.

The vast quantities of debris and waste brought into the complainants' canal, and which they are obliged to remove, thereby seriously interfering with the profitable use of their mills, causing frequent suspension of operations, and occasioning the damage and annoyance to which we have before alluded, justifies us in the conclusion that such is not a reasonable use of this

river by the respondents. And we are equally satisfied that, while it is of great convenience for them thus to dispose of their waste, and considerable expense and great inconvenience would be occasioned by any other disposition of it, it is not absolutely necessary to the operation of their mills that it should be thus deposited in the stream. Other manufacturers of lumber, not only on the Penobscot, but on other principal rivers in this state, dispose of their waste in other ways than by allowing it to pass into the streams. It was otherwise at one time. But the state of improvement of the country, and the springing into existence of other industries, have each had a qualifying influence in determining the reasonable use of such waters.

2. Again. The respondents, claiming a special right to the use of this river, more beneficial to themselves and more burdensome to the riparian proprietors below, than the natural right to the reasonable use of it, must establish such right, either by grant or prescription.

They do not claim it by grant. Have they established such right by prescription? The answer to this does not depend entirely upon proof of the manner in which the respondents have conducted in reference to the operation of their mills, and the disposition of the waste therefrom. In connection with that fact must be considered the situation of the parties, against whom such right is claimed, during the time necessary to the establishment of such right. For it is well settled that in order to establish the presumption of a right or easement in the land or waters of another person, the enjoyment of such right must have been uninterrupted, adverse, under claim of right, and with the knowledge of the owner, or with such acts that knowledge will be presumed. *Parker* v. *Foote*, 19 Wend. 313; *Smith* v. *Miller*, 11 Gray, 149; *Flora* v. *Carbeau*, 38 N. Y. 115; *Gilford* v. *The Winnipiseogee Lake Co.*, 52 N. H. 262; Gould on Waters, § § 334, 341; Angell on Wat. § 219. And it must have been inconsistent with or contrary to the interest of the owner, and of such a nature that it is difficult or impossible to account for it, except on the presumption of a grant from him, otherwise no such presumption arises. *Morse* v. *Williams*, 62

Maine, 445; *Brace* v. *Yale*, 10 Allen, 444; Gould on Waters, § 334. The prescriptive right to the use of a stream beyond the general right of reasonable use, as against other riparian owners, is governed by the same principles as those in relation to easements in land, and in order to establish such right there must be a perceptible amount of injury throughout the period necessary to gain such right. *Crosby* v. *Bessey*, 49 Maine, 539; *Donnell* v. *Clark*, 19 Maine, 174; *Murgatroyd* v. *Robinson*, 7 El. & Bk. 391, (90 E. C. L. 391); Gould on Waters, § 346. Nor does the period of limitation begin to run against the owner until there has been an actionable invasion or infringement of a right.

In *Holsman* v. *Boiling Spring Bleaching Co.*, 1 McCarter, 335, the court say: "The defendants have a right to use the water upon their own soil in such manner as they may deem for their interest, provided they discharge it upon the soil of the plaintiffs, in its accustomed channel, pure and unpolluted. They can, therefore, acquire no right by prescription, until they show that the acts which are claimed to constitute the adverse user injured the plaintiffs, and gave to them, or those under whom they claim title, a right of action. The very ground of title by adverse enjoyment, is that the party against whom it is set up, has so long permitted the adverse enjoyment and failed to indicate his rights, that the presumption of a grant is raised. But there can be no such presumption, and consequently no title by adverse enjoyment, where no violation of a right is shown to exist." See *Pratt* v. *Lamson*, 2 Allen, 288.

And in this case, although the proof establishes the fact that these respondents and those under whom they claim, for more than thirty years have been accustomed to use the waters of this river as a receptacle for the waste from their mills, yet it fails to establish any prescriptive right as against these complainants, or those under whom they claim. The mills now in existence were erected less than ten years prior to the commencement of this suit. Soon after they were built, trouble arose in regard to this waste, and in 1878, these complainants appeared before the legislature and obtained an act to prevent the throwing of refuse

material into the Kennebec river, and which, it appears, these respondents have disregarded.

The use of the water and privilege at Waterville, where these mills are located, prior to 1874, was very different from what it has been since. In 1866, the Ticonic Water Power and Manufacturing Company was organized, and two years later a dam was built at a cost of twenty-three thousand dollars, which is one of those now owned and used by the complainants. In 1869, a saw mill was built and the next year the old grist mill was repaired. Many years prior to that, there had existed a grist mill and saw mill, and a tannery. But prior to the erection of the saw mill in 1869, it does not appear that any trouble had ever been experienced on account of this waste. The testimony of Emery, who built the new dam and who had known the old canal for many years, having worked in the old mills more than forty years ago, is, that "this drift stuff didn't trouble the racks, at the time I worked there, that I remember of." The present canal is shown to be three or four times as large as the old one was. Although it appears that the old one, at the time the new one was built, was more or less filled at the lower end with logs, slabs and mill waste, it does not appear whether it came from the mills once standing there, or from what source.

There appears to have been no complaint made, or injury proved to have been sustained, by any parties owning or operating there, till within a very few years prior to the time when these complainants purchased. The dam and canal, as well as the mills, which formerly existed at that place, were not the same as those of to-day. There could have been no adverse right so long as there was no perceptible amount of injury sustained. What might at the present time occasion not only great inconvenience and annoyance, but also very serious injury, may have been, in the past, of not the slightest detriment to those engaged in other manufactures, with different machinery and more simply constructed appliances with which to utilize the water as a propelling power. In the latter case, no prescriptive right could be gained without the proof of other elements of such right.

Hence, the facts do not establish any right by prescription, or adverse use, by virtue of which the respondents can claim the use of this river otherwise than as riparian owners, entitled to the natural rights and reasonable use thereof legally belonging to them as such.

From a full consideration of this case, it is clear that they have been guilty of an infraction of the complainants' rights; and that from the allegations in the bill, and the proof in support of the same, the latter are entitled to equitable relief. This relief, however, should be against those parties who are shown to have contributed to the injury.

We are not satisfied that the three respondents whose mills are situated at Skowhegan have contributed to the injury complained of. There is some testimony relating to the nature and amount of waste produced at their mills. The quantity is small, however, compared with that which is produced by the other respondents. Furthermore, it would have to pass over a distance of twenty miles in the waters of the Kennebec before reaching the complainants' premises, and the proof is insufficient to satisfy us of the liability of these parties. This fact can be ascertained much better after the mills of the other respondents at Fairfield have ceased depositing their waste in the river, and subsequent experience may make this question more certain; and the complainants should not be prejudiced against enforcing their remedy in relation to them in the future whenever the fact may be established that they contribute to the production of the nuisance.

As against the other respondents a perpetual injunction should issue, in accordance with the prayer in the bill, enjoining them from casting or depositing in the Kennebec river, above the complainants' dams and manufactories, any refuse materials, edgings, shavings, debris, wood refuse and what is denominated long sawdust, — not including, however, common sawdust. In regard to common sawdust, we do not feel satisfied that, at this time, it should be held to be productive of the nuisance; nor should the complainants be prejudiced as to any future action

concerning that under other circumstances, or upon other evidence.

Neither should this injunction issue immediately. The respondents must have a reasonable time in which to prepare for the disposal of such waste as is inhibited from going into the river.

Bill dismissed as to Washington B. Bragg, Levi B. Weston and Charles M. Brainard, without prejudice, and without costs for them. Bill sustained as against all the other respondents named therein, with costs, and against whom perpetual injunction is to issue, in accordance with this opinion at the end of four months from the time the rescript in this case shall be received by the clerk of the district in which this suit is pending. Costs to be equally apportioned between the eight different firms represented by the sixteen respondents.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

OLIVER H. P. ROGERS *vs.* FREDERIC SHEERER.

Knox. Opinion April 22, 1885.

Shipping. Master.

Whether a contract entered into between two of several part-owners of a vessel, wherein they mutually stipulate that each shall sail the vessel as master alternate years, is void as against public policy — *quere.*

Assuming such a contract to be valid, the true construction of it is, that each shall sail the vessel alternate years, only so long as he performs the high and responsible duties of master with that degree of care, attention, prudence and fidelity which the law demands; and when he fails to do that, he can no longer invoke the aid of the contract against the other.

ON REPORT.

The opinion states the case and material facts.

C. E. Littlefield, for the plaintiff.

That construction which would make the contract legal is

preferred. 2 Parsons, Contr. 500, 505; *Higgins* v. *Wasgatt*, 34 Maine, 305.

The contract was not against public policy. It does not pretend or attempt to bind any one but Sheerer and Rogers. This precise question was decided in *Moore* v. *Curry*, 106 Mass. 409, cited and referred to with approval in *Loring* v. *Loring*, 64 Maine, 561, and was before the court again in Massachusetts in 112 Mass. 13. Nor was the contract limited to the duration of only two years, nor to any other term short of the lifetime of the vessel. *Holbrook* v. *Tobey*, 66 Maine, 412; *Pierce* v. *Fuller*, 8 Mass. 223; *Dean* v. *Emerson*, 102 Mass. 481; *Pemberton* v. *Vaughn*, 10 Q. B. 87; *Allen* v. *Parker*, 27 Maine, 532.

Counsel further contended, in an able argument, that the allegations of the defendant, that the plaintiff was not qualified and competent to perform the duties of master because he failed to pay over to the owners the earnings, because he neglected the vessel and because of his excessive use of intoxicating liquors, were not true in fact, nor supported by the testimony; that such matters could not be set up by the defendant as a defense to this suit and excuse his non-performance of his contract; that if such charges were to be made they were matters between the plaintiff and general owners and should be heard only in such matters and could not be brought into any controversy between the plaintiff and defendant.

A. P. Gould, for the defendant.

VIRGIN, J. Assumpsit to recover damages for depriving the plaintiff of his alleged right, under a contract between the parties, to sail and navigate, as master, the schooner E. H. Potter.

The report discloses that on October 2, 1871, the plaintiff, defendant and several others contracted with one Bean to build for them a schooner, of about three hundred and fifty tons, according to certain written specifications, to be launched in the following April.

On October 5, 1871, the plaintiff and defendant executed an agreement therein "mutually stipulating that O. H. P. Rogers is

to sail the vessel as master for the first year and Fred Sheerer the second year, and then to alternate from year to year." Accordingly the plaintiff sailed her the first year commencing September 1, 1872, and the defendant the second, the parties alternating from year to year until May 1, 1877, when on demand, at Portland, the defendant refused to surrender to the plaintiff although he had been in charge since January 11, 1876. Whereupon this action was brought for breach of the above agreement.

The contract was executed by these parties alone and was not intended to be signed by any other owners.

There is strong reason and high authority for declaring such a contract void as against public policy, based upon the vast power and authority of a master of a vessel, the important nature of the trust imposed in him, the corresponding duty of exercising the utmost circumspection in his choice and appointment and the great importance that the exercise of this duty shall be by an unfettered judgment, as declared by Lord TENTERDEN, in *Card* v. *Hope*, 2 Barn. and Cr. 661, 674, 675.

Judge STORY, speaking of the authority of the major part-owners to appoint and displace the master, says: "But, then, this authority must be exercised by a free and impartial judgment. . . Any contract, therefore, made by some of the part-owners only, which is calculated to have the effect of fettering their judgment and of binding them to appoint, or concur in the appointment of, particular persons as master and officers is a violation of that duty. . . Such a contract is, therefore, utterly void, as against public policy and the true interest of commerce and navigation. . . Upon this ground a contract made by two part-owners who were the ship's husbands, with a third to sell him a part of their shares, and to be appointed master (they holding the majority of interest) and they to be continued as the ship's husbands and he or they to have the appointment of his successor, as master, has been held utterly void." Sto. Part. § 432.

The same doctrine is laid down in Fland. Sh. § 370.

Mr. Maclachlan, in his treatise on the law of Merchant Ship-

ping, speaking of the appointment of master, says: "In appointing to an office of such importance, the owners, or those of them with whom the appointment lies, being usually a majority in interest, are bound by a regard to their own advantage and much more by their duty to others, to proceed circumspectly in the exercise of a free and impartial judgment; and any contract which destroys that impartiality, *e. g.* by obligating them or some of them to concur in a particular appointment at the peril of an action is illegal and void." Macl. Sh. (2d ed.) 123. See also, Coll. Part. (Perk. ed.) § 1211; Abb. Sh. (Sto. and Perk. ed.) 136; *Ward* v. *Ruckman*, 36 N. Y. 26, 30.

However we do not place the decision of this case upon this ground, but upon its more immediate merits.

There are a very few contracts which expressly contain all of the intentions of the parties; hence they are to be construed with reference to their subject matter. In construing the contract sued on, we are not limited strictly to its express terms. It would be absurd for either party to contend that he was entitled to sail the vessel alternate years at all hazards; or that nothing short of the destruction of the vessel or of his own life could legally intervene. There are implied conditions along with which the express terms must be read in order to obtain the real intentions of the parties. The great power and authority of a master necessarily impose upon him commensurate duties and responsibilities, to perform which care, attention, prudence and fidility are exacted of him by the law. In other words the parties intended that each should sail the vessel alternate years so long and only so long as he performed the high and responsible duties of master with that degree of care, attention, prudence and fidelity which the law demands; and when he failed to do that he should no longer invoke the aid of the contract which he had broken.

It is fully proved and not denied that the plaintiff became a defaulter at the time of his last settlement with the general agents, in January 1876, to the amount of seven hundred and thirty dollars; no part of which has he ever paid and that he has not had any attachable property since then, but conveyed away, his

only share in the vessel at that time. This has been decided in admiralty to be sufficient cause for removal, as master, even though a part-owner. Fland. Sh. § 371.

Again the testimony is overwhelming that his habits of intemperance, especially during his last year, rendered him unfit to discharge his duties as master; and the general agents directed the defendant not to deliver the vessel over to his charge. Our opinion therefore, is that under the stipulation in the report, there must be,

Judgment for the defendant.

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

JARVIS PATTEN *vs.* NATHANIEL E. PERCY.

Sagadahoc. Opinion May 1, 1885.

Shipping. Earnings. Action by part owner against master.

An action for money had and received cannot be maintained by a part owner (not the ship's husband), for his share of the freight money, against the master, who collected and remitted the same to the ship's husband after receiving a written notice from such part owner to remit his share to him.

ON REPORT.

Assumpsit for money had and received.

The opinion states the material facts.

Adams and Coombs, for the plaintiff.

The relation of part owners of a vessel is that of tenants in common, and not that of joint tenants; and when the master, as agent of the owners, has in his hands money which he holds as the net earnings of the vessel, after having deducted all his disbursements, each of the owners has a separate interest in such money, and each is entitled to receive from the master his share, unless he has authorized some other owner, or some other person, to receive it for him. The master in such case, is the debtor to each owner. See *Thorndike* v. *De Wolf*, 6 Pick. 120. True that it is a custom for the ship's husband to receive the freight money from the master and distribute it among the owners. But here, any implied authority from such a custom was expressly

revoked by plaintiff's letters to defendant. And it further appeared in this case, that the agency and authority of ship's husband had terminated by the dissolution of the firm of George F. Patten's Sons. It is a familiar principle that when an agency is held by a firm, the dissolution of the firm terminates the agency. *Martine* v. *International Life Ass. So.* 5 Lans. 535.

C. W. Larrabee, for the defendant, cited: Story, Agency, § § 35, 45; *Low* v. *De Wolf*, 8 Pick. 101.

DANFORTH, J. The plaintiff was a part owner in the ship "Transit," of which the defendant was master, and had been from 1869 up to June, 1878. He was engaged as master by George F. Patten, the ship's husband, or managing owner. Mr. Patten continued as such until his death, and was succeeded by his sons, under the name of George F. Patten's Sons, who continued as such until near the beginning of the year 1878, when the firm was dissolved, and James T. Patten, one of the members of the firm, acted and was recognized as such until the sale of the ship. To George F. Patten's Sons, the defendant had remitted all the freight money belonging to the owners without objection from any one until 1877, when the plaintiff, by a letter which is in the case, requested the defendant to remit his "one-fourth" of the freight then due the owners, to his credit; and after another voyage, wrote another more urgent letter to the same effect. Neither of the requests or demands were obeyed; hence this action. The defendant acknowledges having received these letters, but whether before or after the remittances to which they refer, he is not sure. Assuming that it was before, what are the rights of the parties?

This money was received for freight. It was, therefore, a part of the earnings of the ship. As such, it was the joint property of the owners. "Although part owners are tenants in common of the ship, they are jointly interested in her use and employment, and the law as to her earnings, whether as *freight*, cargo, or otherwise, follows the law of partnership." 3 Kent, (12 ed.) 155, note; Story on Part. § 442, note 2. The ship's husband is the agent of all the owners and represents this money,

not as belonging to the part owners as tenants in common, but as partnership property. His duties necessarily involve the expenditure of more or less money as well as receiving it. He has the care of the ship, must procure its outfits, enter into charter parties, procure and collect freights, adjust contracts, and for these and such like purposes, disburse as well as receive money. "His acts for these purposes are considered to be the acts of all the owners, who are liable for all contracts entered into by him for the conduct of their common concern—the employment of the ship." Abbott on Shipping, (7 Am. ed.) 140; Story on Agency, § 35, note. To secure him for his liability for these expenditures, he has a lien upon the freight money. Flanders on Shipping, § 388; Collyer on Part. § 1214; Story on Part. § 443.

Thus it will be seen that until the accounts of the managing owner are settled, it will be impossible to ascertain what portion of the earnings of the ship is due to the several part owners, or any one of them. Over these accounts the master has no control. He is hired by and amenable to, the ship's husband. The master, in many instances, must first receive the freight from necessity. He may undoubtedly deduct from it his own proper expenses, but can go no further. He may not know the expenses of the ship's husband, or if he does, he can have no authority to adjust them so as to divide the net proceeds among the several owners. It is said there were in this case, no expenses of the ship's husband to be adjusted, but it appears that the plaintiff, after the settlement of the accounts, claims a very much smaller sum than would have been his share of the earnings remitted by the master. Nor can the master know the share in the ship of any particular owner, except from the register, and that, as in this case, does not always speak the truth.

From these principles, it follows that the master, if not required, was authorized to remit to the managing owner, as he had before done, with the knowledge of, and without objection from, the plaintiff; and in the notices for a change of the remittances to himself, there is no intimation of any change in, or revocation of authority of the ship's husband, but a subsequent

as well as a prior recognition of it. *Grant* v. *Carver*, 75 Maine, 524.

Judgment for defendant.

PETERS, C. J., WALTON, LIBBEY, EMERY and FOSTER, JJ., concurred.

INHABITANTS OF MILFORD *vs.* INHABITANTS OF GREENBUSH.

Penobscot. Opinion May 4, 1885.

Town clerk's records. Evidence. Abatement of taxes. Adjutant general's reports. Paupers.

Where a town clerk records upon the town records a document which he is not by law required to record, such record is not evidence that it is a copy of the original, nor does the fact that the town clerk is deceased make such record admissible as a copy, upon proof of the handwriting.

The fact that a municipal tax against a person has not been abated, is no evidence that it has been paid.

The appendices to the state adjutant general's reports, printed by the state printer and purporting to be copies of the official returns made to that officer, are admissible as such copies without further proof.

ON EXCEPTIONS.

This was an action for pauper supplies — the issue being whether the pauper had his home in defendant town for five successive years. Verdict was for the defendants.

The plaintiffs offered in evidence the books of the town of Greenbush, containing what purported to be copies of the lists of voters of the town, for the years 1857, 1858, 1859, 1860, 1862 and 1864 to 1869 inclusive, and purporting to be attested by the town clerks, for the purpose of showing the pauper's name on those copies; being objected to by defendants, the presiding judge excluded the same, except the copy of the list of voters for the year 1869, in the book, which James C. Scott, formerly one of the selectmen of the town, testified he wrote in the book; the persons or officers making the other copies of the lists were not living; it also appeared by the evidence of Scott, and one Comstock, one of the selectmen of the town, that so far as they knew, the original lists of voters for these years, were not in existence and lost; evidence was offered that the

hand writing of the copies of the lists, was that of town clerks, and it appeared that the book was a book of records of town clerks, from 1847 to present time, and that these copies appeared to be made from time to time, at or near the times named.

Other material facts alleged in the exceptions are sufficiently stated in the opinion.

Davis and Bailey, for the plaintiffs.

The fact that the pauper's name was on the voting lists of the defendant town for successive years was pertinent to the issue. The loss of the original lists was satisfactorily shown. It would be morally impossible to find witnesses who from memory could swear to the name of the pauper being on the list. The town clerk's books of that town did show a complete and regular record of these lists, made as though they were properly matters of record, and duly attested by the clerk who made them as true copies. The clerk has died. Under the circumstances it is contended that these copies should be admitted as evidence, upon proof of the hand writing, not as matters of record — there was no law requiring such records — but because they were the best attainable evidence of the facts sought to be proved. See Wharton, Ev. § 647; *Thornton* v. *Campton*, 18 N. H. 20.

Charles P. Stetson and *J. A. Blanchard*, for the defendants, cited: 1 Greenl. Ev. § § 485, *n* 3, 493; Wharton, Ev. § § 643, 639, *n.* 7; *Douglass* v. *Shumway*, 13 Gray, 498; *Hammatt* v. *Emerson*, 27 Maine, 308; *Evanston* v. *Gunn*, 99 U. S. 666; *Whiton* v. *Albany Ins. Co.* 109 Mass. 30; *Post* v. *Supervisor*, 105 U. S. 667; *Bryan* v. *Forsyth*, 19 How. 338; *Watkins* v. *Holman*, 16 Peters, 58.

EMERY, J. I. The voting lists of the town were shown to be lost, and the plaintiffs offered in their stead what they alleged to be copies of those lists. These alleged copies were found apparently recorded from year to year upon the book of town records, and in the hand writing of the successive clerks of the town. Proof that they were in fact copies of the originals was

essential to their admission in evidence. It was no part of the duty of the town clerk to copy such lists upon the town records. Such work would have been purely voluntary and unauthorized. Hence the alleged copies were not admissible as official copies or records. The plaintiffs do not contend that they were.

As to the alleged copy of the list for the year 1869, the plaintiffs were able to prove, and did prove it to be a copy, by the testimony of the man who made it, and it was admitted as a copy. As to the other alleged copies, there was no evidence from any one who could say that he made them, or saw them made, or had compared them with the originals, or that they were according to his recollection of the originals. Evidence that the man who made the writings was dead was no proof that he made true copies. The fact that he was town clerk at the time and had interjected these unauthorized writings into the town records gave them no evidential value. The plaintiffs simply found some writings in the hand writing of one deceased which they believe to be copies of the papers lost, but which they were unable to prove to be copies. Their only witness was dead. It was their misfortune.

The authorities cited by the plaintiffs' counsel are not applicable. This is not a question of the admissibility of a record, or of an entry, where the maker is dead. It is a question of the sufficiency of the evidence that a certain writing was a copy of a lost document. We think the evidence was not sufficient.

II. Upon the issue, whether the pauper had paid any of the taxes assessed against him for several years in the defendant town, the plaintiffs offered the assessors' books of the defendant town, containing what purported to be a list of the abatements for those years, in which the name of the pauper did not appear. We think it was incompetent. The assessors have nothing to do with the collection of the taxes. The collector's accounts might afford evidence upon that issue, but the assessors' list of abatements do not. *Non-constat* that every tax is paid or abated. The collector often fails to collect where there is no abatement. His own neglect, the insufficiency of his warrant, the poverty of the person taxed, may be the cause of non-collection.

III. The pauper was a private in a Maine regiment during the war of the rebellion. The captain of his company made in each of the years of 1861 and 1862 an official return to the state adjutant general, of the members of his company, with dates, places of residence, and enlistment, &c. That these returns, or duly proved copies of them might be evidence of any fact properly stated therein, the plaintiffs do not now dispute, but they contend that what were offered as copies, were not admissible as such without further proof. The offered papers were the printed reports of the adjutant general for those years, with the usual accompanying appendices in which appear what purport to be copies of all such returns from all the Maine regiments. The reports with the appendices were made to the governor, and we may assume were by him laid before the legislature. The printed books purport to be printed by the state printer, under legislative authority. The real value of the reports was in the appendices. All else was merely general statement and comment. The actual and desired facts and data to promulgate which the reports were made and printed, were in the annexed papers. These were in effect a part of the reports.

Being printed by the official printer, under official supervision, they are presumably compared and correct copies of the originals. They thus became *prima facie* copies, and we think are within the principle, admitting printed public documents, in evidence as copies of the original documents. *King* v. *Holt*, 5 T. R. 436; *Radcliff* v. *United Insurance Co.* 7 Johns. 38; *Bryan* v. *Forsyth*, 19 How. 338; *Watkins* v. *Holman*, 16 Pet. 58; *Whiton* v. *Albany Ins. Co.* 109 Mass. 30.

The legislature has not superseded the use of these printed copies of the records and files in the adjutant general's office as evidence. Section 113 of chap. 82, R. S., referred to by the plaintiffs' counsel does not specify any mode of making or proving copies of such papers. It does not require that all copies used in evidence shall be certified by the adjutant general. It only provides that certain particular facts may be certified by the adjutant general as found upon the records, without the whole

record being copied. There is no prohibition against using a full copy if a party desires it.

Exceptions overruled.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

JOHN M. FLETCHER *vs.* INHABITANTS OF BELFAST.

Waldo. Opinion May 4, 1885.

City physician of Belfast. Compensation for services. When an action for money had and received will lie.

A city ordinance provided that there should be elected annually a city physician, and that it should "be the duty of the said physician to attend upon all sick paupers whether permanent or temporary;" that in addition to a stipulated salary he should "receive, when collected, all sums for medical services rendered by him for paupers of other cities and towns." The city recovered for such services of the town liable in an action for pauper supplies, and the money collected upon the judgment was paid over by the officer, in whose hands the execution had been placed, to a party with whom the city had contracted for the support of the poor. *Held:*

1. That an action for money had and received would lie by said physician against the city for the money thus collected.

2. That the want of plenary proof of the qualification of the physician, under R. S., c. 13, § 9, could not be invoked as a defence to this action.

ON REPORT.

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

Philo Hersey, for the plaintiff.

Thompson and Dunton, for the defendants.

FOSTER, J. Assumpsit for money had and received by the defendants to the plaintiff's use. In actions of this kind, the remedy is equitable, and lies in favor of one person against another, when that other person has received money, or what is treated as money, either from the plaintiff himself, or from some third person, under such circumstances that in equity and good conscience he ought not to retain the same, but which *ex æquo et bono* belongs to the plaintiff. In this case, the plaintiff claims to maintain his action on the ground that the defendants have received money that equitably belongs to him.

In March, 1876, the plaintiff was elected city physician, under the ordinances of the city of Belfast, for the ensuing municipal year. One of those ordinances provided that there should be elected annually a city physician, and that it should "be the duty of the said physician . . . to attend upon all sick paupers, whether permanent or temporary." Section second of the same ordinance provided that "the city physician shall be paid thirty dollars, which shall be in full for all services for which the city is properly chargeable, and he shall receive, when collected, all sums for medical services [rendered] by him for paupers of other cities and towns, and said salary shall be paid annually."

In the fall of that year the plaintiff was called upon by the overseers of the poor of Belfast, to attend one Solomon McFarland, a person found destitute in Belfast, and having no settlement therein. The services thus rendered amounted to twenty-three dollars.

Subsequently, an action was brought by the city of Belfast against the town of Knox, where the said McFarland had his settlement, for supplies furnished, and judgment was recovered by Belfast in 1883. From the evidence before us, we are satisfied that Belfast, in that judgment, recovered for the services of this plaintiff the above named sum, together with the sum of seven dollars and seventy-four cents witness fees of this plaintiff attendant upon the trial in said action. The execution which issued upon that judgment, was placed in the hands of an officer, who collected the full amount of the judgment and paid it over to one Harrison Hayford, with whom the city of Belfast had contracted for the support of the poor in 1876, and each year since that time.

One of the grounds of defense in this action is, that the defendants have not received the money — that it was paid over to said Hayford and not to the defendants, and that, therefore, they are not liable to the plaintiff in this form of action. But by the terms of the contract which was thus made with the said Hayford, Belfast was to furnish all medicines and medical aid to the paupers, without expense or cost to him; and as a part of the consideration named in the agreement for the support of the

poor, he was to receive "all sums of money received and collected by said city of Belfast from any other city or town, for the relief or support of any pauper." And while, by the same contract, the question of the necessity for supplies lay with the overseers of the poor, and such supplies were to be furnished by said Hayford under the direction of said overseers, it was also therein provided that he was authorized to have suit brought in the name of the city, and to recover pay for such supplies of the cities or towns liable to the city of Belfast.

Therefore, whether the money collected on the judgment against the town of Knox was received by the city directly and then passed over to Harrison Hayford, or was received by him with the sanction and approval of the city, and appropriated as a part of that consideration to which he was entitled by virtue of his contract with the city, can make no difference. In either case, it would inure to the benefit of the defendants, as the actual parties benefitted by the payment of their contract liability. The suit upon which the money was collected, was brought by the city of Belfast. It was authorized to be brought by the contract of which we have spoken. The judgment was collected. The money was paid, and, from all that we can gather in the case, appears to have been applied in accordance with the contract which the city had made with the party who was to take care of the poor, and who received the money from the officer.

The ordinance which measures the duties of these defendants to the plaintiff, stipulated that the plaintiff was to receive, "when collected," all sums for medical services rendered by him for paupers belonging to other cities and towns. It was the sums "collected" which the plaintiff was to receive. It was in the nature of a portion of his salary. The defendants have collected, and received the benefit of that money which was to go to this plaintiff. The payment over to the plaintiff was postponed till collected from the town liable, under the statute, to these defendants; and that they have, by contract with a third person subsequent to the ordinance aforesaid, seen fit to appropriate it to other uses, is no defense to this action.

Nor do we think the facts authorize the defendants in invoking, as a defense, the want of plenary proof of the qualification of the plaintiff as a physician, under R. S., c. 13, § 9. The defendants have collected the money due this plaintiff in a suit against another town. They availed themselves in that suit of his bill for services rendered. This action is not a suit for medical services, as such, but is to recover the money which has been received by these defendants, and which in equity and good conscience they ought not to retain.

The plaintiff should receive interest on the amount legally due him only from the time the same was collected by the defendants.

Judgment for plaintiff for thirty-three dollars and fifty cents.

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

LEWISTON STEAM MILL COMPANY

vs.

RICHARDSON LAKE DAM COMPANY.

Androscoggin. Opinion May 15, 1885.

Waters. Improvement company. Driving logs. Streams. Dams.

A corporation was chartered by the legislature and authorized to make such improvement to the upper Androscoggin river, and the chain of lakes and their connecting streams as would "facilitate and render more convenient the drifting, or driving of logs, masts, spars and other timber, by removing obstructions, building dams, wing dams, gates, piers, booms and so forth;" and it was further authorized to demand and receive a specified toll upon every log that should pass its dam at the outlet of Big lake, and an additional toll for passing the dam at the outlet of Richardson lake. *Held,*

1. That the company was bound to grant and render, in a reasonable manner, to any one paying such tolls, all the facilities that it has acquired and controls in derogation of the common right, by authority of its charter.

2. That the wants, desires or demands of a particular share-holder in such company cannot abridge or modify the duties and obligations of the company to the log owners.

3. That it is not material who are the owners of the lands upon which the dams are built so long as the company maintains them for the purposes expressed in its charter.

ON EXCEPTIONS.

An action on the case to recover damages for the failure of the defendant corporation to perform its corporate duties and liabilities for the years 1879, 1880, 1882, by reason of which large quantities of the plaintiff's logs, upon which it had paid toll to the defendant, in each of these yesrs, failed to come to market and were lost to the plaintiff. The plea was the general issue. The verdict was for the plaintiff for five thousand one hundred and twenty-five dollars. The defendant moved to set the verdict aside, and alleged certain exceptions which are stated in the opinion.

Strout and Holmes and *Savaye and Oakes*, for the plaintiff.

Josiah G. Abbott and *Frye, Cotton and White*, for the defendant.

HASKELL, J. Prior to the date of the defendant's charter, the Androscoggin river and the chain of lakes and their connecting streams, from which that river takes its rise, were navigable by the usual methods of lumbering, and had been so used for many years. The distance by these waters from Big lake to the Topsham boom is more than one hundred seventy miles, and the usual time required to accomplish a drive their entire length was four years.

To facilitate the lumber navigation of these waters, the legislature chartered the defendant company by special act, approved March 22, 1853. It was authorized to make such improvement in them as would "facilitate and render more convenient the drifting, or driving of logs, masts, spars and other timber, by removing obstructions, building dams, wing dams, gates, piers, booms and so forth," and to take and hold real and personal estate for the purpose to an amount not exceeding ten thousand dollars. It was authorized to demand and receive a specified toll upon every log that should pass its dam at the outlet of Big lake and an additional toll for passing the dam at the outlet of Richardson lake. The purpose of these dams is to store water for aid in the driving of shallow and rocky places below them. They make it possible to deliver a boom of logs from Big

lake into the Topsham boom in one season, that ordinarily, without them, it would require four seasons to accomplish.

The object, scope and purpose of this corporation is, to facilitate navigation for the benefit of lumbermen, from whom it may demand and receive its tolls. Its functions are, to benefit the lumbering industry from whence its revenues are to come. It can exact tolls, and in return is bound by law to grant and render in a reasonable manner to the industry burdened by them, all the facilities, that it has acquired and controls, in derogation of the common right, by authority of its charter. Of course it cannot be required to discharge so great a flood of water, as to endanger other interests lawfully existing below its dams on the Androscoggin waters, nor can it withhold water so as to diminish the natural flow, that each riparian owner has a lawful right to enjoy.

The plaintiff drove these waters in the years 1879, 1880 and 1882, and paid to the defendant tolls amounting to two thousand six hundred twenty-six dollars and thirty-two cents. The plaintiff claims, that the defendant by virtue of its charter, was required to give such facilities for the driving of lumber during those years, as its resources afforded. The defendant on the other hand contends, that other interests than those of lumbermen were to be considered in determining what were the reasonable facilities that it was required by law to afford the plaintiff. It claims that the mills at Lewiston were interested in retaining a store of water in the lakes by means of its dams, and that such interests ought to be considered in fixing the amount of water that the plaintiff could lawfully demand; and in order that such consideration might be weighed and considered by the jury, it offered in evidence proof, that another corporation, organized for the benefit of the mill owners at Lewiston, by authority of law had acquired and owned all the stock of the defendant company, and the land upon which its dams at the outlets of Big and Richardson lakes, respectively, are built. To the exclusion of this evidence the defendant has exception.

No authority has been cited at the bar showing the admissibility of the evidence excluded. Under its charter the defendant

corporation is authorized and required by law, in consideration for the receiving of tolls, to confer increased facilities in the enjoyment of a common right. To this purpose and end its functions go. So long as it gathers from the public a toll for the navigation of a public stream, just so long must it contribute an equivalent to those burdened with the toll. They have a right to demand and receive from the defendant, the full advantage of whatever it can reasonably give them from the resources, that it has been allowed by law to accumulate and retain. The wants, desires or demands of a particular shareholder in a corporation, charged by law with duties and obligations to the public, cannot abridge, or modify such duties, or obligations. They are fixed by law, and the corporation, so long as it assumes to perform the functions authorized by its charter, must respond, regardless of the private interest of any one, or all of its shareholders. Suppose a large manufacturer should acquire the major part of the stock of a railway company, would it be competent for the company in a suit against it for the denial of proper transportation facilities, to show in defense, that this manufacturer was an owner of the controling portion of its stock, and thereby had a right in furtherance of his own purposes to deny such reasonable facilities for transportation as the law requires? Would the fact that he was a stockholder, either increase, or diminish the liability of the corporation to the public? If not, then the fact would be wholly immaterial. The law gives to each shareholder an equal right with others to the uses and benefits the railway can afford, regardless of his interest in the stock of the company, and that fact could have no bearing upon the liabilitiy of the corporation to others.

So in the case at bar, it is of no consequence, who are the shareholders in the defendant company, whatever liability the law casts upon it towards the public can neither be increased nor diminished at the will or desire of any shareholder. Its functions are to faciliate the lumber navigation of the Androscoggin waters, and as an equivalent for the collecting of tolls it must yield its whole resources to that end and purpose.

Nor is it material, who are the owners of the lands upon which

the dams are built, so long as the defendant company maintains them for the purposes expressed in its charter. If in order to acquire the right to maintain the dams, the defendant became under obligations modifying its full and complete control and use of the water for the purposes expressed in its charter, such obligations might have to be regarded, because its tenure would be subject to such limited use. No evidence of this sort has been excluded. The defendant simply offered in this behalf to show that another was the owner of the land upon which its dams are built. That naked fact has no bearing upon the issue decided by the jury. The evidence excluded does not tend to prove any material fact in defense of the plaintiff's case.

That the Union water power company was authorized by the legislature to acquire and hold the stock of defendant company does not in any degree modify, or change the functions of the corporation. Its duties and obligations continue the same that its charter under the law originally imposed; and so long as it continues to exercise corporate functions under its charter, it must do so in accordance with its terms, burdened with those duties and obligations which the law imposes.

True it is, that the mill owners below, as riparian proprietors, may require of the defendant the natural flow of the waters of the stream as they may need them, but the defendant owes them no duty to retain and store up waters for their use in times of drought.

A careful consideration of the evidence fails to show, that the jury has erred in its verdict. The defendant manifestly had means to afford the plaintiff greater facilities in the driving of its logs during the years 1879, 1880 and 1882, than it accorded to it. It had a right to demand from the defendant more water than it received during each of those years. The denial to it of this use was an injury for which the law gives damages. A careful, lengthy trial, with plenary instructions and rulings in matters of law, to which no exceptions, other than those noticed in this opinion, were taken, resulted in a verdict for the plaintiff. It is hard to say, whether the measure of damages fixed by the jury is precisely commensurate with the plaintiff's injury, but it

does not appear from the evidence that the jury were misled, or influenced by any improper motive, or consideration in reaching their verdict; nor is it clear that a new trial would end in a more satisfactory result.

Motion and exceptions overruled.

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

SANFORD M. PLACE *vs.* LEROY M. BRANN.

Lincoln. May 29, 1885.

Pleadings. Trespass. Amendment. R. S., c. 82, §§ 10, 15.

The statute abolishing the distinction between actions of trespass and trespass on the case relates to the distinction in form only. Where the distinction is really of substance, the declaration should contain allegations appropriate to the action to which it properly belongs.

Where a demurrer has been filed to a writ and disposed of by the court, an amendment is allowable, in the discretion of the court, under R. S., c. 82, § 10.

ON EXCEPTIONS.

The defendant demurred to the declaration which was as follows: "In a plea of the case, for that the said defendant on the eighteenth day of February, A. D. 1884, with force and arms broke and entered the plaintiff's close, situate in said Whitefield, bounded and described as follows, to wit: northerly by land occupied by Peter Dunton and land of Russell Place; easterly by land of Russell Place and land of William Cookson; southerly by road leading to Samuel Cookson and land occupied by Danforth Place; westerly by Sheepscot river,— being the homestead place of the late Thomas Brann, and stayed on said premises without the license of said plaintiff, continuing there for a long time, to wit: for the space of eight days, and during that time greatly disturbed the plaintiff in his quiet possession of the same, and expelled and ejected him therefrom for a long space of time, to wit: from thence hitherto, whereby the plaintiff during all that time hath lost and will hereafter lose and be deprived of the free and entire use and occupation of said close and other wrongs."

The court overruled the demurrer and adjudged the declaration good. The plaintiff then moved to amend his writ by inserting

"trespass" and striking out "case," the motion was granted and the amendment was allowed.

To these rulings the defendant alleged exceptions.

S. C. Whitmore, for the plaintiff, cited: R. S., c. 82, § § 10, 15; *Hathorne* v. *Eaton*, 70 Maine, 220; *Tukey* v. *Gerry*, 63 Maine, 153; *Cameron* v. *Tyler*, 71 Maine, 27; *Achorn* v. *Matthews*, 38 Maine, 173; *Cummings* v. *Buckfield B. R. R. Co.* 35 Maine, 478; *Brewer* v. *East Machias*, 27 Maine, 489; *Solon* v. *Perry*, 54 Maine, 493; *Bean* v. *Ayer*, 67 Maine, 490.

L. M. Staples, for the defendant, cited: *Farmer* v. *Portland*, 63 Maine, 46; *Rand* v. *Webber*, 64 Maine, 191.

FOSTER, J. The declaration, in this case, was for an alleged breaking and entering the plaintiff's close; the action may be properly termed one of trespass *quare clausum fregit.*

As first drawn, the writ commanded the defendant to answer unto the plaintiff in a "plea of the case." The defendant, believing the plaintiff had misconceived his form of action, and that the command should have been to answer in a plea of trespass *quare clausum*, filed a special demurrer to the plaintiff's writ. The court overruled the demurrer, and we think properly.

It will be noticed that the declaration in itself was correct, and alleged a breaking and entering the plaintiff's close. The demurrer related not to any matter of substance, but merely to form; and this is not available to the defendant even upon special demurrer. The statute has abolished the distinction between actions of trespass and trespass on the case. This relates to the distinction in form only. In cases where the distinction is really of substance, the provision of statute is inapplicable. *Sawyer* v. *Goodwin*, 34 Maine, 419; *Kelly* v. *Bragg*, 76 Maine, 207.

Nor was there error in allowing the amendment after the demurrer was disposed of. If the amendment was regarded as proper, it was allowable under R. S., c. 82, § 10, in the discretion of the presiding judge; and on such terms as he saw fit to impose, or without any, as justice might require. *Kelly* v. *Bragg*, *supra*, which is decisive of this case. To the exercise

of this judicial discretion, exceptions do not lie. *Bolster* v. *China*, 67 Maine, 551; *Cameron* v. *Tyler*, 71 Maine, 28; *Solon* v. *Perry*, 54 Maine, 493.

By this amendment, no new cause of action was introduced, as was the case in *Farmer* v. *Portland*, 63 Maine, 46, cited by the counsel for the defendant. It was an amendment in matter of form only, and clearly such as was contemplated by the statute relating to amendments, "when the person and case can be rightly understood." *Harvey* v. *Cutts*, 51 Maine, 607.

Exceptions overruled.

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

WILLIAM WASHBURN *vs.* S. H. ALLEN and another.

Kennebec. Opinion June 1, 1885.

Nonsuit. Practice.

After the evidence was closed upon both sides, the plaintiff stated that he voluntarily became nonsuit, and the court ruled as a matter of law that he could not become nonsuit against the defendants' objection. *Held*, error.

Before opening his case the plaintiff may become nonsuit as a matter of right. After the case is opened, and before verdict he may have leave to become nonsuit in the discretion of the court; after verdict there can be no nonsuit.

ON EXCEPTIONS from superior court.

The opinion states the case.

G. C. Vose and G. W. Heselton, for the plaintiff, cited: Howe's Practice, 268; Chitty, Pr. 910; 1 Arch. Pr. Com. Pl. 173–188; 2 Arch. Pr. Com. Pl. 251; 5 B. & Cr. 178; 1 B. & Cr. 110; 3 Bing. 290; 2 H. Bl. 374; 2 Esp. 482, (note); 7 D. & E. 372; Watterman, Set-off, 749; *Gale* v. *Hoysradt*, 7 Hill, 179; *Wooster* v. *Burr*, 2 Wend. 295; *Dana* v. *Gill*, 20 Am. Dec. 255; *Merchants' Bank* v. *Rawls*, 50 Am. Dec. 394; *Haskell* v. *Whitney*, 12 Mass. 47; *Locke* v. *Wood*, 16 Mass. 317; *Shaw* v. *Boland*, 15 Gray, 571; *Lowell* v. *Merrimack M'f'g Co.* 11 Gray, 382; *Truro* v. *Atkins*, 122 Mass. 418.

Baker, Baker and Cornish, for the defendants.

The plaintiff may voluntarily become nonsuit as a matter of right, without the consent of the defendant, on leave of court. *Haskell* v. *Whitney*, 12 Mass. 47; *Burbank* v. *Woodward*, 124 Mass. 357. But after a cause has been opened to a jury and evidence offered, the plaintiff can not become nonsuit as a matter of right.

At common law, the plaintiff could become nonsuit at any time before verdict. 7 Watts, 496; 9 Watts & Serg., cited in *Theobald* v. *Colby*, 35 Maine, 179. But the courts of Massachusetts and Maine hold otherwise. *Haskell* v. *Whitney*, *supra*; *Locke* v. *Wood*, 16 Mass. 517; *Means* v. *Welles*, 12 Met. 361; *Shaw* v. *Boland*, 15 Gray, 571. The case last cited would seem to be conclusive upon the point in issue. The case at bar is much stronger for the defendants than that, because in that case the defendant had offered no evidence whatever, while in this case, the defendants' evidence had been put in, and the evidence on both sides closed.

The court, in this state, has never expressly decided the question, so far as we have been able to learn. But as intimating the view of our court, we would call attention to *Lyon* v. *Sibley*, 32 Maine, 576, where the principle was recognized by these words: "After evidence on both sides, the defendant has a right to insist that a verdict be rendered."

There is one modification of the rule. It is this: Where, in the course of a trial, by reason of some accident or surprise, injustice would otherwise be done the plaintiff, the court may grant a nonsuit, not as a matter of right, but in its discretion for good cause shown. Com. Dig. Pleading, *w*, 5; *Phelps* v. *Echard*, Cro. Jac. 35; *Means* v. *Welles*, *supra*. But that modification does not arise in this case, because no occasion had arisen to call for its application, the plaintiff's counsel did not claim a nonsuit on such ground, and if it had been thus claimed, and the court refused it, no exception would lie to such a ruling, it being within the discretionary power of the court. *Ricker* v. *Joy*, 72 Maine, 106.

FOSTER, J. This action was tried before the presiding justice, without the intervention of a jury. The parties upon both sides

had introduced their evidence, and at this stage of the trial, the plaintiff claimed to become nonsuit, to which the defendant objected; thereupon the court ruled, as a matter of law, that the plaintiff could not become nonsuit against the defendants' objection.

Before proceeding to consider the authorities that bear upon this question, it may be remarked that nonsuits may be classed under two divisions. (1.) Involuntary; as when ordered by the court against the plaintiff's objection. (2.) Voluntary; when allowed by the court on the plaintiff's own motion. Into the one or the other of the two classes the decided cases fall. The case under consideration comes within the last, and brings us to consider the rule of practice applicable in such cases.

The English practice differs somewhat from that of our own courts. At common law, as early practiced in the English courts, upon every continuance, or day given over before judgment, the plaintiff was demandable, and upon his non appearance might have been nonsuit. Bacon's Abr. Nonsuit, D; Co. Litt. 139, b. And no verdict could be returned and given, unless in his presence, or that of his counsel, but the plaintiff was said to be *nonsuit*. Therefore it was usual for a plaintiff, when he or his counsel perceived that he had not given evidence sufficient to maintain his issue, to withdraw himself and be voluntarily nonsuited. 3 Black. Com. * 376; *Murphey* v. *Donlan*, 5 B. & C. 178, (11 Eng. Com. Law, 195.) And whenever the plaintiff ought to appear in court, he was at liberty to withdraw. Co. Litt. 138, b, 139, a; *Robinson* v. *Lawrence*, 7 Exch. 123. The plaintiff had a right to be nonsuited at any stage of the proceedings he might prefer, and thereby reserve to himself the power of bringing a fresh action for the same subject matter; and this right continued to the last moment of the trial, even till after verdict rendered, or, where the case was tried by the court without the intervention of a jury, until the judge had pronounced his judgment. *Outhwaite* v. *Hudson*, 7 Exch. 380. Consequently, if he was not satisfied with the damages given by the jury, he might become nonsuit. Bacon's Abr. Nonsuit, D; *Keat* v. *Barker*, 5 Modern, 208.

But by statute, 2 Henry IV, c. 7, (A. D. 1400,) it was ordained and established, that if the verdict passed against the plaintiff, he should not be nonsuited, which before that time was otherwise at common law.

Notwithstanding this statute, which was an amendment of the common law, it was held that the plaintiff might be nonsuited after the finding of a special verdict, and the reason of this would seem to be that a special verdict is in the nature of a statement of facts; and also after a demurrer and argument thereon, and a rule for judgment for defendant, though it could not be done at the same term. Bacon's Abr. Nonsuit, D; *Alderly* v. *Alderly*, Cro. Jac. 35. And this statute was afterwards construed as applying only to cases where the jury had passed upon the whole matter. *Earl of Oxford* v. *Waterhouse*, Cro. Jac. 575; Com. Dig. Pleader, *w*, 5. Except in the cases above stated, the plaintiff could always become nonsuit upon any continuance.

In 1740, the English practice was further regulated by statute of 14 Geo. II, c. 17, which provides "that where issue is, or shall be, joined in any action or suit at law in any of his Majesty's courts of record, and the plaintiff or plaintiffs, in any such action or suit, hath or have neglected, or shall neglect, to bring such issue on to be tried according to the course and practice of the said courts respectively, it shall and may be lawful for the judge or judges of the said courts respectively, at any time after such neglect, upon motion made in open court, (due notice thereof having first been given,) to give the like judgment for the defendant or defendants in every such action or suit, as in the case of nonsuit."

It would seem that the practice in England, under the common law, as well as since the more modern statutes, has been perhaps more liberal in favor of allowing nonsuits to plaintiffs as matter of right, than is prescribed in this country. According to the practice there, as appears by the decisions of their courts, a plaintiff could not be nonsuited on the trial against his assent, but might insist, as matter of *right*, on the cause going to the jury, and thus take his chance of a verdict. *Dewar* v. *Purday*, 4 A. & E. 633.

In New York, there are but two cases, and those among the early decisions of that state, so far as we have been able to find, that incline towards the English practice. In one, where a verdict was received without the assent of the plaintiff, the court set it aside, remarking that it was the right of a plaintiff to submit to a nonsuit. *The People* v. *The Mayor's Court of Albany*, 1 Wend. 36. In the other, it was held that a plaintiff has the right to submit to a nonsuit on the coming in of a jury, although they are prepared to render a balance in favor of the defendant, in an action of assumpsit, and where a notice of set-off had been given. *Wooster* v. *Burr*, 2 Wend. 295.

Whatever may be the practice elsewhere, the courts of Massachusetts and New Hampshire have never adopted the early English practice, but, on the contrary, have declared that, after a cause has been opened to the jury, the plaintiff cannot become nonsuit, as a matter of legal right, but the court might allow it, at that stage of the case, in its discretion. In *Haskell* v. *Whitney*, 12 Mass. 47, JACKSON, J., in pronouncing the opinion of the court, says: "The plaintiff, or demandant, may, in various modes, become nonsuit, or discontinue his suit, at his pleasure. At the beginning of every term, at which he is *demandable*, he may neglect or refuse to appear. If the pleadings are not closed, he may refuse to reply, or to join an issue tendered; or, after issue joined, he may decline to open his cause to the jury. The court also may, upon sufficient cause shown, allow him to discontinue, even when it can not be claimed as a right; as after the cause is opened, and the evidence submitted to the jury."

Also in *Locke* v. *Wood*, 16 Mass. 317, the court were of opinion "that there was no such right; and that after a cause is opened to the jury, and begun to be proceeded in before them, the parties are entitled to a verdict, unless the court should, in its discretion, allow a nonsuit or discontinuance."

These cases, decided in the early history of the jurisprudence of this country, and which are cited as leading decisions upon this subject by the courts of several states, were first referred to by the court in *Means* v. *Wells*, 12 Met. 361, decided more than thirty years later, and in which the principle decided by

them, defining the distinction between the plaintiff's *right*, and the *discretion of the court*, is there clearly recognized and affirmed.

And in another case, the court says: "A party may become nonsuit before going to a jury." *City of Lowell* v. *Merrimack M'f'g Co.* 11 Gray, 382.

Again in *Shaw* v. *Boland*, 15 Gray, 572, METCALF, J., in beginning the opinion of the court, says: "These exceptions must be overruled on the authority of *Locke* v. *Wood*, 16 Mass. 317. In that case, it was decided that after a cause is opened to the jury, and is begun to be proceeded in before them, the plaintiff has not a right, of his mere pleasure, to discontinue his suit, or to become nonsuit. Mr. Justice JACKSON had previously expressed an opinion to the like effect in *Haskell* v. *Whitney*, 12 Mass. 48. Such, therefore, is now the law of this commonwealth, whatever it may be elsewhere, or may have been here under the colonial ordinance of 1641, which is found in Anc. Chart. 46. And this law seems to us to be eminently just. As a nonsuit is no bar to another suit for the same cause of action, a plaintiff might harass a defendant by unlimited litigation, if the court had no authority, in any case, to prevent a nonsuit."

In a still later case in the same court Chief Justice GRAY affirms the doctrine that a plaintiff has the right to become nonsuit at any time before trial, but after the trial has begun, he can not become nonsuit, except by the leave and at the discretion of the court. *Inhab. of Truro* v. *Atkins*, 122 Mass. 418; *Burbank* v. *Woodward*, 124 Mass. 358.

New Hampshire has followed the decisions of Massachusetts, notwithstanding the court there, in the earliest decision on this question, fully recognized what had been the practice under the common law in the English courts. Chief Justice PARKER, in delivering the opinion of the court, states the rule of law as follows: "At any time before the plaintiff opens his case to the jury, he may become nonsuit, as a matter of right. The entry of his action does not oblige him to proceed with it. Even if issue be joined, this does not entitle the defendant to a verdict if he elect to abandon his action. *Haskell* v. *Whitney*, 12 Mass.

47. After the plaintiff has proceeded to open his case to the jury, he can no longer become nonsuit, as a matter of right. The court may require that the case shall proceed; and, if the plaintiff do not put in his evidence, may direct the jury to return a verdict against him. But the court, in the exercise of its discretion, may permit him to become nonsuit at any time before the return of a verdict; and ordinarily does so, if it appear that no injustice will thereby be done to the adverse party. *Locke* v. *Wood*, 16 Mass. 317; Howe's Practice, 268." *Judge of Probate* v. *Abbot*, 13 N. H. 21. And the court further remark that a party ought not to be permitted to lie by, take the chance of success, and then deprive the other party of the benefit of his verdict by a nonsuit.

The same court in a more recent opinion adheres to the rule established in the last case, and states that "it may now be assumed to be the general practice in the courts of law in this country, that a plaintiff may, at his own pleasure, or by right, either discontinue his suit, or become nonsuit, at any time before his cause is opened to the jury." *Wright* v. *Bartlett*, 45 N. H. 290; *Judge of Probate* v. *Abbot*, 13 N. H. 22; *Pollard* v. *Moore*, 51 N. H. 191; *Fulford* v. *Converse*, 54 N. H. 544; *Parker* v. *Burns*, 57 N. H. 602; *Farr* v. *Cate*, 58 N. H. 367; *West* v. *Furbish*, 5 Reporter, 235.

In our own state the question has never been directly before the court, but it would seem that the doctrine enunciated by the decisions of Massachusetts, before our separation, and by those of New Hampshire, has been admitted and recognized in several cases.

The first of these was *Prop. of Kennebec Purchase* v. *Davis*, 2 Maine, 356, wherein Chief Justice MELLEN, in speaking of the demandants' rights, in a writ of entry, to accept the offer of the tenants, says: "They certainly are not bound to proceed any further in a course of judicial investigation; they have a right to become nonsuit at any time before the cause be opened to the jury or the trial commenced, *Locke* v. *Wood*, 16 Mass. 317."

So, in the case of *Theobald* v. *Colby*, 35 Maine, 180. In that case, before the plaintiff had offered any testimony, the

defendant moved in writing for leave to withdraw his account in set-off, which was objected to by the plaintiff, the motion refused and the full court sustained exceptions, saying: "The right of a defendant in such a case is similar to a plaintiff's right to become nonsuit. *Muirhead* v. *Kirkpatrick*, 5 Watts and Serg. 506. And the plaintiff may become nonsuit, as of right, at any time before trial, *Haskell* v. *Whitney*, 12 Mass. 47. At common law, he might become nonsuit at any time before the verdict."

So far as we have been able to discover, this is the only intimation given by our court in the decisions upon this question of voluntary nonsuit, as to the extent of the plaintiff's *legal right as such*, aside from that exercise of *judicial discretion* in granting it, which is everywhere recognized, and which should not be here confounded.

That at any time before the cause is committed to the jury, it is discretionary with the presiding judge to permit the plaintiff to become nonsuit, on motion and for cause shown, where a nonsuit or discontinuance is not a matter of right, will not be doubted; and this has been the state of the law for a long period, both in England and in this country. *Philips* v. *Echard*, Cro. Jac. 35; *Means* v. *Wells*, 12 Met. 362.

But that after verdict for the defendant a nonsuit will not be allowed as of right, or in the discretion of the court, was settled in our own court in *Larrabee* v. *Rideout*, 45 Maine, 205.

We have carefully examined not only the authorities cited, but many others, in support of the extension of the rule to authorize a nonsuit, as matter of right, up to the time of verdict, but we are not satisfied that, as against the decisions of our own courts, the English practice, or the old common law doctrine should prevail. In the cases to which we have referred, our courts have fully recognized, though they have not seen fit to follow, the ancient common law as laid down many years ago in England. Many of the customs of our courts are different from those existing at that time, when no verdict could be returned for or against a plaintiff unless he or his counsel was present in court, and to avoid which, or, if in his favor, and the damages

were not satisfactory to him, he might withdraw himself and become nonsuit. "*Cessante ratione legis, cessat ipsa lex.*"

Hence, not only upon principle, but authority, we may safely found this rule: That the plaintiff, before opening his case to jury, or to the court, when tried before the court without the intervention of a jury, may become nonsuit as a matter of right; after the case is opened, and before verdict, leave to become nonsuit is within the discretion of the court; after verdict there can be no nonsuit.

The reason of the rule is apparent, and needs no discussion. It is founded upon principle. If there were no place at which a party defendant could have any rights, save as to costs, till after verdict, great injustice might ofentimes result, with no power in the court to correct or restrain it. As a nonsuit is no bar to a future action for the same cause, a plaintiff, if so disposed, might harass the opposing party, whose residence or situation might be such as to necessitate great expense in the preparation or defense of a cause, with continued litigation, and the costs recoverable would be absolutely inadequate to compensate him for either. Courts of law are instituted for the administration of justice, and in so doing must be governed by wise and salutary rules that will neither afford improper advantage to one party nor work injustice to the other.

In this case both parties had introduced their evidence. The plaintiff thereupon stated that he voluntarily became nonsuit. The defendants objected. The court then ruled, as matter of law, that the plaintiff could not become nonsuit against the defendants' objection, and ordered judgment for defendants.

This we think was error. It was in effect, expressly denying that the trial court had the power, in the exercise of its discretion, to grant the nonsuit asked for by the plaintiff, and which, as we have stated, could have been done, in the discretion of the court, at that stage of the case.

Exceptions sustained.

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

WILLIAM H. TITCOMB, in equity,

vs.

JOHN MCALLISTER and others.

Knox. Opinion June 3, 1885.

Shipping. Mortgage of vessel. Foreclosure. Contribution from co-surety. Equity.

A maker of a promissory note gave to a surety on the same, as collateral security, a bill of sale of a sixteenth of a barkentine, and took from the surety an agreement that he would re-convey the sixteenth when the maker paid the note. *Held*, that this constituted a mortgage of the sixteenth, which should be foreclosed by the statute mode and not by a decree in equity.

Held further, that such a surety has a plain, adequate and complete remedy at law against a co-surety for contribution, for any excess of the note over the amount received from the property mortgaged.

BILL IN EQUITY.

Heard on bill, answer and proof.

The opinion states the material facts.

C. E. Littlefield, for the plaintiff.

The bill of sale of the vessel and the agreement to re-transfer did not constitute a mortgage. The title to the vessel was to remain in Titcomb until he should re-transfer the same to Williams and Dean. The estate was not to revest in them upon the payment by them of the notes. It was to be transferred to them. "The conveyance was not to be void" upon payment "of the note which is one of the essential elements of a mortgage." *Goddard* v. *Coe*, 55 Maine, 388.

We have a right to be released from all obligations that we may be under to Williams and Dean, under the contract, before we can be asked to appropriate this security for any purpose, and we can obtain a discharge of that agreement only in equity.

To the general proposition that sureties may proceed in equity for contribution we cite: *Scribner* v. *Adams*, 73 Maine, 541; Brandt, Suretyship, § 253; *Broughton* v. *Wimberly*, 65 Ala. 549.

Assuming the transaction to have been a mortgage, now that the court has general equity jurisdiction, we had the right to bring this bill for the purpose of foreclosing it specially where a co-surety claims rights in the security, which are undefined and depend wholly on equitable rights, and are peculiarly for the determination of a court of equity. Jones, Chat. Mort. § § 776–9, and cases cited in notes; *Merchants Nat. Bank* v. *Thompson*, 133 Mass. 484.

Rice and Hall, for the defendant, McAllister, cited: *Rollins* v. *Taber*, 25 Maine, 144; *Bachelder* v. *Fisk*, 17 Mass. 463; *Odlin* v. *Greenleaf*, 3 N. H. 270; *Davis* v. *Emerson*, 17 Maine, 64; *Howard* v. *Miner*, 20 Maine, 325; *Stevens* v. *Record*, 56 Maine, 488; *Jones* v. *Newhall*, 115 Mass. 244; *Baker* v. *Briggs*, 8 Pick. 121.

EMERY, J. From the bill, answer and proof the following facts appear. The complainant Titcomb, on the 20th day of April, 1877, was surety for Williams and Dean, upon two notes described in the instrument below recited, and upon the last named note, that for one thousand six hundred dollars the respondent McAllister, was also surety for Williams and Dean. McAllister was not upon the first named note. In this state of affairs, on that day, Williams and Dean, conveyed to the complainant Titcomb, by absolute bill of sale, one-sixteenth of a barkentine, and received back on the same day and as a part of the same transaction, the following writing:

"In consideration of two notes signed by Williams and Dean and endorsed by me as follows, one note signed by Williams and Dean, payable to C. S. Smith, dated June 23, 1876, payable in one year from date for one thousand dollars and interest. Also one note signed by Williams and Dean payable to Alfred Sleeper, dated February 24, 1877, payable on demand for sixteen hundred dollars and interest, — I have this day received a bill of sale for one-sixteenth (1-16) of the barkentine Addie E. Sleeper as collateral security for the payment of said two notes, and the said Williams and Dean hereby agree to pay the principal and interest of the said two notes and also to keep the

said 1-16 of said vessel insured for the protection of said Titcomb in case he shall be obliged to pay said notes, and when said Williams and Dean shall have paid said two notes and interest I, the said W. H. Titcomb, hereby agree to re-transfer the said one-sixteenth of said barkentine to said Williams and Dean or their assigns. (Signed) W. H. Titcomb."

"Rockland, April 20, 1877,

Witness. C. W. Mayo."

Williams and Dean did not pay either of said notes, and the complainant, Titcomb, was obliged to pay, and did pay both of the notes. McAllister did not pay anything. Williams and Dean are insolvent.

The first and preliminary prayer for relief in the bill is, "that the said security, (the 1-16 of the vessel) may be sold under the order of court, and that Williams and Dean may be required to cancel and discharge said writing.

If the transaction of April 20, 1877, left Williams and Dean without any interest in the one-sixteenth of the vessel; if they had no right in the thing, but only a right of action on the contract, as was held in *Goddard* v. *Coe*, 55 Maine, 385, cited by complainant's counsel, then the complainant acquired an unembarrassed legal title, and could have sold the vessel at once, and given a good title. Williams and Dean could not have followed the vessel, nor troubled it, but must have been content with the right of action against Titcomb personally. In such case Titcomb would need no order of court to make a sale. Such an order would be superfluous, and should not be granted.

If however, Titcomb's title was encumbered by some remaining right of Williams and Dean in the property itself, then the transaction evidently constituted a mortgage, and Williams and Dean have the rights of a mortgagor. It was not a pledge for the legal title was transferred. Such a transaction has been often held to be a mortgage. Jones on Chattel Mortgages, § 19, *Bartels* v. *Harris*, 4 Maine, 146; *Winslow* v. *Tarbox*, 18 Maine, 132; *Carpenter* v. *Snelling*, 97 Mass. 452. The rights of a mortgagor in a chattel mortgage after condition broken are created and defined by the statute. R. S., chap. 91, § 3, pro-

vides that "when the condition of a mortgage of personal property is broken, the mortgagor . . . may redeem it at any time . . . . before the right of redemption is foreclosed, as hereinafter provided." The mode of foreclosure referred to in the third section, is specified in detail in the fourth and fifth sections. In the sixth section it is provided that the right to redeem shall be forfeited, if the condition in the mortgage is not performed within sixty days after the specified notice of foreclosure is recorded. In effect, the statute gives the mortgagor for redemption, sixty days after the mortgagee has performed a certain specific act of foreclosure. Can the court, even with full equity powers, take away from the mortgagor, that statute right? Can the court substitute any other mode of foreclosure for that established by the statute?

It has been held in this state, in *Chase* v. *Palmer*, 25 Maine, 345, that the statute having provided specific modes for foreclosing mortgages of real estate, the jurisdiction of the court over bills to foreclose was thereby taken away. At that time, the general statute specifying the powers of the court as a court of equity, included the foreclosure of mortgages. It now only specifies the "redemption of estates mortgaged," dropping the other. See also *Shaw* v. *Gray*, 23 Maine, 174; *K. & P. R. R. Co.* v. *P. & K. R. R. Co.* 59 Maine, 35–37. The same reasoning would apply all the more conclusively to chattel mortgages. There was no right of redemption, nor duty of foreclosure of chattel mortgages before the statute, as there was in the case of real estate mortgages. Courts of equity once had jurisdiction over bills to foreclose real estate mortgages, until it was taken away by the statute providing other modes. In the case of chattel mortgages, the statute mode was the first and only mode of foreclosure. It was said by VIRGIN, J., in *Ramsdell* v. *Tewksbury*, 73 Maine, 199, that the only mode by which a mortgagee, (in a chattel mortgage,) can acquire an absolute title, is by the statute foreclosure. The Massachusetts Supreme Court dismissed a bill to foreclose a chattel mortgage. *Boston & Fairhaven Iron Works* v. *Montague*, 108 Mass. 248. We know of no case where, with a statute like ours, a bill to

foreclose a chattel mortgage has been sustained. This case, to be sure, is that of a mortgage of a vessel which need not be, and we presume was not, recorded in any town, (*Wood* v. *Stockwell*, 55 Maine, 76,) but the United States statute only controls the place of record. All other rights of mortgagor and mortgagee, are left to the state statute. The right of redemption and duty of foreclosure, and the mode of foreclosure, remain the same. That the mortgage was not recorded in any town clerk's office, does not prevent a foreclosure in the statute mode. If there be no place to record the notice of foreclosure, it need not be recorded. This matter of the foreclosure of a mortgage of a vessel, was fully considered in *Taber* v. *Hamlin*, 97 Mass. 489, with a similar statute, and we think the reasoning and conclusion of the court in that case, satisfactory. The foreclosure, according to statute, without recording, was held valid. There may be instances of chattel mortgages where the statute mode of foreclosure would not be applicable, or would not provide a plain, adequate and complete remedy for the mortgagee. In such instances, the court might afford relief in equity. In this case, however, we think the statute mode is applicable and sufficient, and should be followed.

The main prayer in the bill is for a valuation of the property, for a specified appropriation of it, and for a decree against the co-surety, McAllister, for contribution. The equity power of the court is ample for this purpose, if this be the proper remedy, but the first inquiry in an equity proceeding must always be, whether there is a sufficient remedy at law. The legislature, in conferring equity powers on the court, enacted that these equity powers shall not be resorted to, nor exercised, in cases where there is a plain, adequate and complete remedy at law. If there be such a legal remedy, there is no occasion for invoking the equity powers of the court. Legal remedies are enlarged and multiplied from time to time, by legislative enactments and judicial construction, and it was the evident intention of the legislature, that these legal remedies should be sought where sufficient. Legal and equitable remedies are not concurrent. As the legal remedies become more efficacious, there is less

occasion for equitable remedies, and the equity powers of the court become more limited. *Jones* v. *Newhall*, 115 Mass. 244; *Hayden* v. *Whitmore*, 74 Maine, 234; *Frue* v. *Loring*, 120 Mass. 507.

Sureties seeking contribution from co-sureties, formerly were obliged to resort to equity courts, but it is now well settled that assumpsit may be maintained in such case. (*Bachelder* v. *Fisk*, 17 Mass. 464; *Davis* v. *Emerson*, 17 Maine, 64.) The case of *Bachelder* v. *Fisk*, would seem to be a good precedent for this case. That was an action against a co-surety for contribution, by a surety who had taken security to himself from the principal. The principal was insolvent, the same as in this case. It was held that the plaintiff could recover one-half of the balance, after deducting the value or the proceeds of the security. In *Scribner* v. *Adams*, 73 Maine, 541, cited by complainant, there were other interests and questions involved than those between the sureties. The respondent co-surety was insolvent, and the complainant sureties were endeavoring to reach the property given as indemnity by the principal to the respondent co-surety. Other parties claimed an interest in the property, or fund. It was necessary to call them all before the court.

We do not see why all the questions in this case can not be determined in an action of assumpsit. Williams and Dean have no claim until they pay the debt, which payment will end all litigation. The accounts of the vessel, if necessary to be gone into, can be stated as well by an auditor as by a master. The value of the vessel, and its proper appropriation, can be made by a jury under proper instructions from the court. Cases of this kind, for contribution between co-sureties, may arise, where, from the nature of the transactions, the situation of the parties, or other circumstances, as where more than an aliquot share is demanded, the remedy at law would not be plain, adequate and complete. Equitable remedies may then be successfully sought. In this case, however, we think a verdict and judgment at law could be obtained as readily, and would be as efficacious as a decree in equity, and hence the desired decree should be denied.

As our decision is only as to the remedy, and there was much

doubt as to the proper remedy, and the respondent has not suffered thus far, we do not think costs should be awarded.

Bill dismissed without costs.

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

ELIZA C. NOBLE *vs.* CHARLES MILLIKEN.

Kennebec. Opinion June 3, 1885.

Innkeeper. R. S., c. 27, § 7.

A guest at a hotel lost from her trunk a gold watch, a pair of gold bracelets, a gold thimble, three gold rings and a gold neck-pin, all of which she had taken along for her personal use. *Held*, that these articles were within the exception in R. S., c. 27, § 7, and the innkeeper was liable for their value.

ON REPORT from the superior court.

This was an action under the statute against the defendant as an innkeeper for the loss of the articles enumerated in the head-note on the tenth of September, 1880, while the plaintiff was a guest at the defendant's house, Augusta House. The plea was the general issue with a brief statement that the property lost was not of such a character as to impose any liability upon the defendant.

S. and L. Titcomb, for the plaintiff.

G. C. Vose, for the defendant.

By R. S., c. 27, § 8, an innholder against whom a claim is made for loss sustained by a guest, may, in all cases, show that such loss is attributable to the negligence of the guest.

We submit that the plaintiff was guilty of what in law is to be (under the circumstances of this case) regarded as negligence in carrying in an ordinary trunk, such property as that, for the alleged loss of which compensation is claimed in this action.

In *Fowler* v. *Dorlon*, 24 Barb. 384 and *Trieber* v. *Burrows*, 27 Md. 130, the court held that if a guest carries a large sum of money in his valise, and conceals the fact from the innkeeper, and allows the valise to be treated as mere baggage, he is guilty of gross negligence.

Again sec. 7 of the same chapter provides as follows, viz.: "Innholders are not liable for losses sustained by their guests, except for wearing apparel, articles worn or carried upon the person to a reasonable amount, personal baggage, and money necessary for traveling expenses and personal use, unless upon delivery or offer of delivery, by such guests, of their money, jewelry, or other property, to the innholder, his agent or servants, for safe custody."

The articles lost cannot be considered wearing apparel. Nor as articles worn or carried upon the person. They might be so worn, it is true, but it is just this the plaintiff did not do. Had she done so they would not have been lost. The defendant is liable for such property worn or carried upon the person, but not when carried as in this case. Neither as personal baggage nor money necessary for traveling expenses. A proper sum of money is classed as personal baggage by this court in 74 Maine, 225.

EMERY, J. In section 7, of chap. 27, R. S., limiting the liability of an innholder for losses sustained by his guest, there are specified the following exceptions: "Wearing apparel, articles worn or carried upon the person to a reasonable amount, personal baggage and money necessary for traveling expenses and personal use." The plaintiff lost from her trunk at the defendant's inn, among other articles the following, one gold watch, valued at fifty dollars; one pair of gold bracelets, valued at sixty-five dollars; one gold thimble valued at eight dollars; one gold ring valued at twenty dollars; one gold ring valued at five dollars; one hair ring (gold mounted) valued at eight dollars and one gold neck-pin valued at two dollars. The only question is whether the articles enumerated are within the exception in the statute.

From the case it seems that all these articles were taken along by the plaintiff for her personal use, and for no other purpose. They were not merchandise, nor business articles. They were not taken along simply for transportation of them. They were such articles as she might properly use daily, while traveling, or resting. The amount does not appear to be unreasonable in view

of the plaintiff's situation. Such articles we think are within the exception. *Macrow* v. *Great Western R. R. Co.* L. R. 6 Q. B. 612; *Bruty* v. *Grand Trunk R. R. Co.* 32 Upper Canada, 66 and cases there cited.

The plaintiff's trunk, and pocket-book were damaged to the amount of five dollars.

Judgment for plaintiff for one hundred and sixty-three dollars and interest from date of the writ.

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

SERENA L. POWERS *vs.* THOMAS MITCHELL.

Sagadahoc. Opinion June 3, 1885.

Practice. Exceptions. Evidence. Expert testimony. Physicians.

If counsel think his client's rights are being prejudiced, by the opposing counsel exceeding the proper license of an advocate in the closing argument to the jury, he should then interpose an objection. The objection comes too late after verdict.

A plaintiff cannot complain that she was required on cross-examination to answer questions to show that she commenced the action and attached the defendant's property without first notifying him of her claim for damages.

Exceptions cannot be sustained to the admission of a question, alleged to embrace, hypothetically, facts not in evidence, when the exceptions and evidence reported do not show that there was no evidence in the case tending to prove these facts.

A question, calling for the opinion of a physician as to the effect of an injury to a female in view of "the character of her health as she described it, and as you know it to be before the injury," is objectionable when it does not appear that the physician heard the testimony of the female, nor what personal knowledge, if any, he had of her health.

Exceptions cannot be sustained to the exclusion of admissible testimony when it appears that the excepting party was not thereby aggrieved.

It is admissible to call for the opinion of physicians and show by them that they should expect a greater injury from a direct blow than from a glancing one.

It is clearly proper for a medical expert to be asked what is the tendency of modern medical science upon the subject of concussion of the spine, whether it is to enlarge or restrict.

ON motion to set aside the verdict and on exceptions.

This was an action of the case for damages for a personal injury sustained on the twenty-ninth day of December, 1879, by

a collision with the defendant's horse and sleigh, driven by him on State street, in Augusta. The case has been at the law court before, and is reported in 75 Maine, 364.

The verdict, at the last trial, was for the defendant, and the plaintiff alleged exceptions to the following admissions and exclusions of testimony, the exceptions being numbered in parentheses:

Serena L. Powers, plaintiff, on cross-examination by O. D. Baker, Esq., counsel for defendant, was asked: . .

(No. 1.) Ques. Was the attachment of Captain Mitchell's cow and horses and all the rest of the property, made by your direction in this suit?

To which question plaintiff's counsel objected, but the court overruled the objection, and she answered.

Ans. It was.

. . . . . .

Defendant's counsel then proceeded to ask plaintiff:

(No. 2.) Ques. After that interview in which Captain Mitchell sent this gentlemanly, kind message to Mr. Sanborn, and after you say you had no knowledge that he knew that you claimed in any way to be injured; — after that time and before putting on this attachment for ten thousand dollars, did you in any way communicate to him, or cause to be communicated to him, that you claimed any injury?

Objected to by plaintiff's counsel and admitted, subject to the objection of plaintiff.

Ans. I didn't.

. . . . . .

Dr. Israel T. Dana, called by plaintiff, on cross-examination, was asked:

. . . . . .

(No. 3.) Ques. If a lady were engaged for substantially eight years; in the neighborhood of eight hours a day; substantially losing no time in that period, in the employment of the needle, and more or less of the sewing machine; would or not, that tend directly to the development of dyspeptic symptoms; — predispose a person to dyspepsia?

Objected to by the plaintiff and admitted by the court, subject to the objection of the plaintiff.

Ans. I would say with regard to that, that I should qualify the statement "tend directly." The only way in which it would tend to dyspepsia, would be just as it would tend to a dozen other diseases, — by weakening the state of the system.

On re-direct examination, Dr. Dana was asked by counsel for plaintiff:

. . . . . .

Ques. I understood you to say in reply to Mr. Baker on cross-examination, that whether all the symptoms which you found in this case, might not arise from some disorder which would produce reflex or sympathetic trouble of the spine? Your answer was that you thought, when you raise the question of bare *possibility*, you would say, *yes*. Whether the symptoms which were described to you by the patient, might not arise from a disorder which would produce reflex or sympathetic trouble of the spine; might they not possibly take place; might not they result from sympathetic irritation?

Ans. Yes, sir; they might.

Ques. Would it be probable?

Ans. In the case of two conditions so much alike as those in their symptoms, one would be governed in the choice by the existence or not of any obvious cause, and what cause it was.

Ques. Assuming that the symptoms described to you by the patient, did follow a blow of the nature I have described to you, would you say it was possible that they might all have been produced by the coincidence of the sympathetic or reflex irritation of the spine, irrespective of the blow?

Ans. I would say that if that set of symptoms are admitted to have existed, and to come into existence after the blow, — speedily after the blow, as has been described, that it would be vastly more probable that they resulted from the blow, than from any coincident reflex spinal irritation.

(No. 4.) Ques. Will you state the degree of probability or improbability of this condition of things which are described, being brought about in the case of a woman just as she described

herself to be; the character of her health as she described it, and as you know it to be, prior to the injury, — *not* assuming her to be a perfectly healthy woman; — by the injury?

Objected to by defendant's counsel, and excluded by the court, subject to the objection of the plaintiff. [Plaintiff noted exception.]

. . . . . .

Rowena C. M. Goddard, called by plaintiff, on direct examination, testified that plaintiff was in her employment as cook and as seamstress, for four years from June, 1872, to 1876; also at intervals from 1876 until a few days before the accident, but never afterwards. She was then asked by plaintiff's counsel:

. . . . . .

(No. 5.) Ques. While she was in your employment, did she, to your recollection, complain either of headache, cold feet, pain in the back, neck or arms, restlessness, bad dreams or disturbed sleep, irregularities, weakness of the eyes, prickling or creeping sensations in the flesh, throbbing or beating in the back, loss of appetite, pain and difficulty in bending the spine or neck, or numbness of the arms or legs?

Objected to by the defendant's counsel and excluded. Plaintiff's objection, to the exclusion, noted.

Dr. Charles A. Packard, called by the defendant's counsel, was asked on direct examination:

. . . . . .

(No. 6.) Ques. If a person were in a sedentary life, pursued for eight years consecutively, where the person worked at sewing and a part of the time upon the sewing machine, for some eight hours a day; going out sometimes only once in one or two weeks; sometimes two or three times in a week. Would or not, that be a sufficient cause to produce dyspeptic troubles in the patient?

Objected to and admitted. Exception of plaintiff noted.

Ans. I think it would be likely to produce dyspepsia.

. . . . . .

(No. 7.) Ques. Suppose a patient had this spinal irritation, produced by a dyspeptic cause, or by that, in combination with

a scrofulous tendency, would you expect sleeplessness and restlessness to be a symptom or indication of that disease; and how commonly?

Objected to and admitted, subject to the objection. Plaintiff's objection noted.

Ans. I should expect it to be found under those conditions.

. . . . . .

(No. 8.) Ques. Would you expect a material difference in the medical results of a blow, — of two blows; one of which was such as I have described in a previous question, by the forward end of the thill, a direct blow; the second of which was produced, not by the end of the thill at all, but by the under side of the thill of the advancing sleigh, glancing at an angle over the extreme left hand corner of the other sleigh, having no effect or shock of any kind upon the person in the advancing sleigh?

Objected to by plaintiff's counsel, and admitted, subject to the objection. Plaintiff's objection noted.

Ans. I should expect a direct blow to be productive of much more serious consequences than the glancing blow described.

(No. 9.) Ques. Would you expect such a glancing blow on the corner of the sleigh, as I have indicated in my last question, to produce in the person sitting in the sleigh struck, a concussion of the spine?

Objected to and admitted, subject to the objection. Plaintiff's objection and exception noted.

Ans. I shouldn't expect it to produce so severe an injury.

. . . . . .

Re-direct Examination.

(No. 10.) Ques. Is the tendency of the latest medical science, and since Erricson's publication, to enlarge, or greatly restrict those injuries called "concussion of the spine?"

Objected to and admitted, subject to the objection. Plaintiff's objection noted.

Ans. I never read Erricson. My impression is from the general knowledge I have on the subject that the investigations that have been made since that time, have tended to throw out a

great many cases of, so called, concussion of the spine; — to restrict the matter to a more scientific basis.

. . . . . .

Dr. A. J. Fuller, called by defendant, testified, on direct examination:

. . . . . .

(No. 11.) Ques. If the patient rode from the place of accident, two miles, then got out of her sleigh, went into the house, went up stairs, came down to tea as usual, took breakfast next morning, what would you think that indicated as to the person having received concussion of the spine?

Objected to and admitted. Plaintiff's objection noted.

Ans. If she were a patient of mine, I should think the concussion of the spine had been very slight, if any; and should feel highly gratified that she was able to get on so well.

. . . . . .

(No. 12.) Ques. Supposing the blow were not of the direct nature we have spoken of, but were produced by the under side of the thill, glancing at an angle over the extreme left hand corner of the sleigh, so as not to stop the advancing sleigh in its course, or communicate any shock to the occupant of the advancing sleigh; would you expect a glancing blow of that kind to be able to produce concussion of the spine in the person sitting in the sleigh that was struck, if no part of her person were touched by the advancing sleigh?

Objected to and admitted. Plaintiff's objection noted.

Ans. I shouldn't consider the chance of an injury to be nearly as much from a glancing blow, as it would by a direct blow.

. . . . . .

Dr. George E. Brickett, called by defendant, testified on direct examination:

. . . . . .

(No. 13.) Ques. With what confidence would you entertain that opinion, assuming those facts to be true?

Objected to and admitted, subject to the objection of plaintiff.

Ans. When I say there was no concussion whatever, it is to my mind positive that she did not have any.

. . . . . .

(No. 14.) Ques. Will you tell the jury your judgment as a medical man, with reference to whether there would be a difference, and in what respects, in the medical results, between striking a blow with the end of the thill such as we have spoken of, and a glancing blow with the under side of the thill over the left hand corner, not coming in contact with the person of the plaintiff?

Objected to and admitted, subject to the objection of plaintiff. Plaintiff's exceptions noted.

Ans. In a general way, it seems to me there is a great difference between a direct blow in the back, and the glancing blow you have spoken of. There is a very great difference.

. . . . . .

(No. 15.) Ques. What is the tendency of modern science, medical science, upon this subject of concussion of the spine; is it to enlarge or restrict?

Objected to and admitted, subject to the objection of plaintiff. Plaintiff's exception noted.

Ans. The tendency is, by the best authorities and experience and observation, to eliminate all these cases of slight causes of concussion, and the result is to bring them down as near as possible, to the symptoms that indicate no other disease, so that the symptoms of spinal concussion and the symptoms of spinal irritation, almost any physician can distinguish the one from the other. It is getting to be well understood, and it is in accordance with my experience, (which may not be good for anything.) I have observed these things for a good many years, by the examination of men who come to obtain pensions, — of nervous spinal disease.

Objected to and admitted. Plaintiff excepted to the ruling.

Wit. There is a great deal better narrowing down to a more narrow limit in the symptoms, to what it used to be. Years ago, spinal irritation and spinal troubles covered a multitude of symptoms. The tendency is to make the thing understood by

physicians of common observation, by the symptoms presented, to know reasonably whether there is a spinal irritation, or disease of the spine.

C. W. Goddard and A. M. Spear, for the plaintiff.

Baker, Baker and Cornish, (*E. W. Whitehouse*, with them,) for the defendant.

LIBBEY, J. This case comes up on motion and exceptions.

The ground insisted on in support of the motion is the misconduct of the defendant's counsel in his closing argument, in asserting facts not in evidence, and not competent evidence if offered, and arguing thereon. The motion cannot be sustained. If the defendant's counsel, as claimed by the plaintiff, exceeded the proper license of an advocate in his argument to the jury, it was the duty of the plaintiff's counsel, if he thought his client's rights were being prejudiced, to interpose objection; and then if the judge declined to interfere the plaintiff might have exceptions. *Rolfe* v. *Rumford*, 66 Maine, 564. And if the judge stopped counsel and required him to desist and retract, and he refused to do so, the plaintiff might have his remedy by motion. But by electing to interpose no objection and rely upon the advantage he might have by counter assertion and argument in reply, he waived his right to exception or motion. *Learned* v. *Hall*, 133 Mass. 417. The case is similar in principle to a case of disqualification or misconduct of a juror. If known to a party during the trial, and he wishes to take advantage of it, he must interpose his objection. He cannot elect to take his chance of a verdict in his favor and if he fails then raise the objection.

Several exceptions were taken to the admission and exclusion of evidence. Those relied on will be examined in the order in which they are presented by the plaintiff's counsel. 1 and 2 relate to the conduct of the plaintiff in causing the action to be commenced before notifying the defendant of her claim for damages, and causing his property to be attached. The officers' return of the attachment was in the case. The questions were put to the plaintiff on cross ex-amination. She cannot complain that she was required to answer them.

3 and 6 are similar in principle. The objection to the questions urged by the learned counsel is that they embraced hypothetically, facts not in evidence. It is sufficient to say that the exceptions and the evidence reported do not show that there was no evidence in the case tending to prove those facts. Nor does it appear that the objections to the questions were for that cause. To lay the foundation for exceptions on that ground the attention of the judge should have been called to the specific objection, so that he could determine, as he must in the first instance, whether there was sufficient evidence tending to prove the facts stated to authorize the questions.

4. The question put to Dr. Dana and excluded, was objectionable because it does not appear that he had heard all the testimony of the plaintiff, nor does it appear what personal knowledge he had, if any, of her health.

5. We are inclined to the opinion that the question put to Mrs. Goddard, and excluded, was competent on the question of damages; but if so the plaintiff is not aggrieved, as the jury found the defendant not guilty, and the question of damages became of no importance.

8, 9, 12 and 14 are alike in principle and may be considered together. They call for the opinion of the physicians as to the physical effects, upon the person of blows received in the manner specified. Their answers were, in substance, that they should expect a greater injury from a direct blow than from a glancing one. We think the subject was within the range of the experience of medical experts, accustomed to observe the effect of blows upon the human body, and that the evidence was competent.

10 and 15. The subject to which the questions put to Dr. Packard and Dr. Brickett relate is clearly a proper one for the opinion of medical experts. No question is made as to their qualifications as such. The questions and answers were competent.

The case has been four times tried to the jury with two disagreements, and two verdicts for the defendant. The litigation

should not be further prolonged without some substantial reason. Upon a careful examination of the whole case as presented, we see no good cause for disturbing the verdict.

Motion and exceptions overruled.

PETERS, C. J., DANFORTH, EMERY and FOSTER JJ., concurred.

SKOWHEGAN AND ATHENS RAILROAD COMPANY

vs.

JOSEPH C. KINSMAN.

Somerset. Opinion June 3, 1885.

Subscription to stock. Corporations.

Where, in a subscription to the stock of a corporation, a subscriber promises, without any condition, to take and pay for a certain number of shares at the par value therein named, the promise is binding, even though the amount of the capital stock was not fixed and the minimum number of shares named in the charter were not subscribed for.

ON REPORT.

Assumpsit on subscription to stock in the plaintiff corporation. The opinion states the material facts.

D. D. Stewart, for the plaintiff, cited: *K. & P. R. R. Co.* v. *Jarvis*, 34 Maine, 360; *Same* v. *Palmer*, 34 Maine, 366; *Same* v. *Waters*, 34 Maine, 369; *Somerset R. R. Co.* v. *Clarke*, 61 Maine, 379; *Penobscot R. R. Co.* v. *Dummer*, 40 Maine, 172; *P. & K. R. R. Co.* v. *Dunn*, 39 Maine, 587; *Same* v. *Bartlett*, 12 Gray, 244.

H. and W. J. Knowlton and *E. F. Webb*, for the defendant. Before this action can be maintained the plaintiff must show that the number of shares have been legally fixed, and that the number so fixed have been subscribed for by responsible parties in good faith. *S. & K. R. R. Co.* v. *Cushing*, 45 Maine, 524; *W. & N. R. R. Co.* v. *Hinds*, 8 Cush. 110 and cases.

EMERY, J. A person by simply subscribing for shares in a corporation, without words of promise to pay, assumes only the

obligations imposed by law on such subscriber. He is understood to have agreed to assume a certain percentage of the responsibility of the enterprise, on condition that the amount of the responsibility be made certain and the remaining percentage be assumed by responsible parties. He can require that the full amount of capital agreed upon or established by the charter as necessary for success, shall be engaged before he pays in his part. He is only obliged to pay legal assessments, and where the capital has not been fixed, or when fixed, has not been subscribed for, there can be no legal assessment, unless the charter otherwise provide. *Som. & Ken. R. R. Co.* v. *Cushing*, 45 Maine, 524; *Somerset R. R. Co.* v. *Clarke*, 61 Maine, 379.

But a person may in his subscription, voluntarily assume any other obligations not forbidden by law. He may waive any and all of the conditions implied by law in a naked subscription. He may impose other conditions, or he may promise payment for his shares without any condition. His promise, once made will be binding, there being in such cases sufficient consideration in the obligation of the company to deliver the shares. *Ken. & Port. R. R. Co.* v. *Jarvis*, 34 Maine, 360; *Bucksport & Bangor R. R. Co.* v. *Buck*, 65 Maine, 537; *City Hotel* v. *Dickinson*, 6 Gray, 586; *Lexington & West Cambridge R. R. Co.* v. *Chandler*, 13 Met. 311; *Pen. & Ken. R. R. Co.* v. *Bartlett*, 12 Gray, 244; *Boston, Barre & Gardiner R. R. Co.* v. *Wellington*, 113 Mass. 79. In such cases, the express promise is to be enforced by an action thereon, and not by an action on a promise implied by law only.

In this case, it was first proposed to organize the company under the general law, and certain subscriptions were made to the stock of the proposed company. Subsequently the company was chartered by the legislature.* The capital stock was to be not less than seven hundred and fifty shares of fifty dollars each. The corporators met pursuant to the charter, accepted the charter, and chose officers under it. After this organization,

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[*Special Laws, 1881, c. 94. Reporter.]

and before the amount of the stock was fixed by the directors, the defendant with others made the following contract with the company.

"Skowhegan and Athens Railroad Company.

Subscription List.

"We the undersigned, hereby agree to take, and hereby subscribe for the number of shares of stock in said railroad company, hereunto by each of us placed opposite our names in the following list, said shares to be fifty dollars each. *And* we agree to pay the par value of the same. And all who shall subscribe for as many shares in the following subscription, as they have subscribed for in former subscription lists, are hereby released from all former subscriptions to said company."

"Athens, May 30, 1881."

The defendant claims he is not liable to pay for the shares he thus subscribed for, because the amount of the capital stock was not fixed, and the minimun number of shares named in the charter were not subscribed for. He might not be liable to pay in such case, if he were a mere subscriber for stock, or if this action were for legal assessments, but he, in addition to his subscription for shares, expressly promised to pay fifty dollars each for them, and this action is on his express promise to pay, and not on any promise merely implied by law. His promise was unconditional, and he cannot now invoke conditions. In *Ken. & Port. R. R. Co.* v. *Jarvis*, 34 Maine, 360, above cited, the capital stock was fixed by the directors at twelve thousand shares with right of increase to twenty thousand shares. The shares subscribed for were never so many as twelve thousand, and the defendant invoked that omission in defence. The court expressly overruled that defence, and held him liable, on the ground he had expressly promised to pay, (not legal assessments, but,) "at such times, to such persons, and in such instalments, as shall be hereafter required by a vote of said company." That case is decisive of this. In the cases cited by the defendant, it will be found, there was no express promise to pay, or only a promise to pay legal assessments, or that the action was only on an implied promise, as for legal assessments. In such cases the conditions implied by

law must be shown to have been fulfilled. In this case those conditions were waived by the express promise to pay absolutely.

We think the organization of the company was sufficiently regular to enable it to maintain this action, the defendant having recognized it as an existing corporation by his subscription. *Chubb* v. *Upton*, 95 U. S. 667. The defendant did not stipulate for a demand, prior to suit, but we think it sufficiently appears he was requested to pay.

We find no averment nor evidence of a readiness to deliver the shares, but as the point was not made in argument, and the case must be again heard, we do not notice it here.

Action to stand for trial.

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

MARY C. STRATTON *vs.* ROBERT F. STRATTON, administrator.

Kennebec. Opinion June 3, 1885.

Divorce. Alimony. Sequestration of real estate.

Cross libels for divorce were filed between husband and wife. While the libel of the husband was pending, and before proceedings were commenced on the part of the wife, the parties voluntarily entered into an agreement in writing, that in case a divorce should be decreed upon the husband's libel, two referees named should determine what the wife should receive from the husband, in what way and manner, how it should be secured to her, how she should receive it, and that the report of the referees should be made a part of the decree of the court, be binding on the parties, and enforced as such. The court entered a decree of divorce in each case at the same time, and, in the proceedings on the part of the husband, ordered that alimony be paid to the wife in accordance with the award of the referees. *Held*, that the judgment of the court was valid.

Where the decree expressly states that alimony is to continue during the natural life of the wife, it will so continue even after the husband's death, and during the entire life of the wife.

Real estate cannot be sequestered for the payment of alimony, so as to secure a lien thereon, without a description in terms definite enough to identify the particular estate designated.

ON REPORT.

The opinion states the case and material facts.

W. P. Young, for the plaintiff.

Baker, Baker and Cornish, for the defendant.

The decree of alimony is void *in toto*.

The jurisdiction and powers of the court in matters of divorce, are derived solely from the statutes, and limited and controlled by them. *Henderson* v. *Henderson*, 64 Maine, 419; *Stratton* v. *Stratton*, 73 Maine, 481; *Bacon* v. *Bacon*, 43 Wis. 197; *Barker* v. *Dayton*, 28 Wis. 367.

The decree making a charge on the real estate of the husband, for the payment of the annuity, is unauthorized by the statute. (R. S., 1857, c. 60, § 6.)

But the point fatal to this decree is that there is no authority found in the statutes for granting alimony to the wife upon a libel in favor of the husband.

Section six of chapter sixty of the Revised Statutes of 1857, under which this divorce was granted, provides for the granting of alimony to the wife, in case she obtains a divorce for the fault of the husband. To that single instance it is limited.

And such has been the construction of this statute by our court. *Stilphen* v. *Stilphen*, 58 Maine, 515; *Stilphen* v. *Houdlette*, 60 Maine, 447; *Henderson* v. *Henderson*, 64 Maine, 419. See also *McIntire* v. *McIntire*, 18 Central Law Journal, 236.

The decree is void in so far as it grants alimony for a longer period than the life of the husband.

It will be observed that the award terms the sum granted an "annuity." It says that the libelant shall pay to the libelee "an annuity of two hundred and fifty dollars," that the real estate of the libelant shall "stand charged with the payment of this annuity," and that the libelant may give bond "to pay the annuity above awarded."

It would seem then, that the referees, who were men learned in the law and familiar with its technical terms, deemed this an annuity.

If so considered, its life was co-existent with the life of the grantor, the libelant, and on his death became also dead.

The principle is stated by Chancellor KENT, in these words: "Unless the grantor grants the annuity for himself and his heirs, the heirs of the grantor are not bound, for the law presumes, by

the omission to name them, that he did not intend to include them in the obligation." 3 Kent's Com. 460; Co. Litt. 144 b.

No decree for the support of a divorced wife can continue longer than the obligation of the husband to support his wife continues. That obligation ceases with his life, and if she outlives him, the decree ceases. 2 Bish. on Mar. and Div. § 428.

"A demand for alimony, being personal, dies with the husband." Fonbl. Eq. 3d. Am. Ed. 62; *Lockridge* v. *Lockridge*, 3 Dana, (Ky.) 28; *Wallingsford* v. *Wallingsford*, 6 Har. and Johns. 485–8.

In the very recent case of *Lennahan* v. *O'Keefe*, 107 Ill. 620, decided November, 1883, (see 29 Alb. Law J. 157,) the supreme court of Illinois, in an elaborate opinion, held that in the absence of language in a decree giving a wife alimony, showing unequivocally an intention to bind the heir of the husband after his death, the allowance of alimony will terminate with the life of the husband.

The supreme court of Massachusetts have recently passed upon the same question in *Knapp* v. *Knapp*, 134 Mass. 353.

FOSTER, J. In 1860, at the March term of this court for the county of Kennebec, cross libels for divorce were pending between this plaintiff and her husband. During the pendency of the husband's libel, and prior to said term of court, the parties thereto entered into an agreement in writing, signed by each of them, that in case a divorce should be decreed upon said libel, two referees named in said agreement, should determine what the libelee should receive from the libelant, in what way and manner, how it should be secured to her, and how she should receive it. It was also agreed that the report of the referees should be made a part of the decree of the court, and should be binding on the parties, and enforced as such. The referees, accordingly, heard the parties, and made their report to the court. Their award, which, together with said agreement, was extended upon the records and made a part of the proceedings in said action, provided, among other things, that the said libelant should pay to the libelee — the present plaintiff — "during her natural life, an annuity of two hundred and fifty

dollars, to be paid quarterly in advance," etc. Upon the same day of the said March term, a divorce was decreed to each libelant in each of said actions; in that wherein the husband was libelant, the court "ordered that alimony, according to the award of Nathan Western and Lot M. Morrill on file, be received and paid as therein provided."

From that time forward, till April 2, 1881, the plaintiff received the sum thus awarded, and ordered by the court to be paid; since which time, nothing has been paid to her. William M. Stratton died August 6, 1883, and this action of debt upon judgment, is brought against the administrator of his estate, to recover the installments accruing since the last payment, both prior to and since the death of said William M. Stratton.

The defence set up is two fold; *first*, that the court had no jurisdiction to grant alimony, and, therefore, that the judgment is void; and *second*, that the court had no authority to grant alimony beyond the lifetime of said William M. Stratton, and that said judgment became inoperative and void at his decease.

I. We are not satisfied that the defence here set up, should prevail. Both parties were in court as petitioners in separate proceedings, and, from anything that appears to the contrary, the court entered its decrees in each case, not only on the same day, but at the same time. While the libel of the husband was pending, and before proceedings commenced on the part of the wife, the parties voluntarily entered into the agreement hereinbefore named, submitting to referees the question of what sum the libelee should receive from the libelant, and agreeing that their award should be made a part of the decree of the court, and should be binding on the parties.

Such agreements, where there is no collusion for procuring a divorce, have been sanctioned by the courts, not only in this, but in other states. *Snow* v. *Gould*, 74 Maine, 544; *Carter* v. *Carter*, 109 Mass. 309. The agreement and award related to the proceedings in which the husband was libelant and the wife was libelee. The court, as well as the parties, must have so understood it, and acted upon it, as it has been spread upon the records of the court in that action, and in express terms refers

to it. Was the judgment of the court rendered void by incorporating into it the award of referees, mutually agreed upon by the parties, and which, by that agreement, was to be made a part of its decree?

The objection raised is, that it was beyond the jurisdiction of the court to allow alimony to the wife on the libel of the husband.

This is undoubtedly true in cases where there is no waiver by the husband of his strict legal rights, and the decree is made in opposition to his will. It may be conceded to be settled in this state that the jurisdiction and authority of the court, in matters pertaining to divorce, are derived from the provisions of the statute, *Henderson* v. *Henderson*, 64 Maine, 419. But the court, being invested with jurisdiction in reference to alimony, there is nothing whereby parties are prohibited from entering into a proper agreement in reference thereto, or the court from rendering judgment in accordance with the agreement of the parties, which they have seen fit to make, as in other cases. In relation to such judgments, the court, in *Fletcher* v. *Holmes*, 25 Ind. 458, says: "It is well settled that a judgment by agreement of a court of general jurisdiction, having power in a proper case to render such judgment, and having the parties before it, will bind the parties, notwithstanding proceedings in a contested case would not authorize such judgment."

And by this, it should not be understood that we mean to hold that the consent of parties can give the court jurisdiction of the subject matter in controversy, where *no* jurisdiction has been conferred upon it by the legislature. But that when the court has jurisdiction of the general subject matter in controversy, — "power to adjudge concerning the general question involved," as said by FOLGER, J., in *Hunt* v. *Hunt*, 72 N. Y. 217, then the consent of the parties may authorize the court to render a valid judgment, in accordance with such agreement.

In the case at bar, so much of the judgment or decree as relates to the question of alimony was rendered in accordance with the agreement and consent of the parties, upon the award and report of the referees mutually chosen by them. A divorce

was decreed in favor of the wife on her libel as well as in favor of the husband on his, and at the same time. The court had jurisdiction to award alimony on the wife's libel; but if the husband preferred that such decree should be made on his libel instead of hers, it was perfectly competent for him to so agree as a condition on which a divorce should be decreed to him, and having so agreed, and the court having so decreed, it is binding upon him and his legal representatives. If the defence relied upon is to prevail, then the plaintiff was prejudiced by the action of her husband in entering into that agreement with her relating to the amount he was to pay her, in case a divorce should be obtained upon his libel. She desired a decree for alimony. Divorce was decreed to her — as well as to her husband — and for his fault. She might have obtained such a decree in the case in which she was plaintiff, where its validity would not have been questioned, had not the husband agreed that such decree should be made in the action commenced by himself, and be "binding on the parties." Relying upon that agreement, she accepted the decree as made. The husband's rights were not violated; nor was he in any way prejudiced by the entry of the decree for alimony, in strict accordance with his own agreement, in the one case rather than in the other. His acts in accordance with that decree for more than twenty-one years thereafter are strongly indicative of this fact.

And the facts in this case clearly distinguish it from those in which it is held that alimony can be granted only upon a libel in favor of the wife, as in *Stilphen* v. *Stilphen*, 58 Maine, 515; *Stilphen* v. *Houdlette*, 60 Maine, 447 and *Henderson* v. *Henderson*, 64 Maine, 419. In those cases the court was called upon to decide as to the strict legal rights of the parties and where there had been no waiver, or agreement, as in the case at bar.

But assuming that the decree was irregular, it was at most but error, and the husband being in court and represented by counsel might have excepted, and not having excepted, he may be considered as having waived the error or irregularity. *Conway Ins. Co.* v. *Sewall*, 54 Maine, 357; *Prescott* v. *Prescott*, 59 Maine, 153.

Furthermore, whenever from the record a want of jurisdiction is not apparent, and a judgment remains unreversed, it is conclusive upon the parties and those in privity with them whenever any question arises in reference to it before any judicial tribunal. And "where a want of jurisdiction actually exists in a domestic tribunal of general jurisdiction," says WHITMAN, C. J., in *Granger* v. *Clark*, 22 Maine, 130, "and is not apparent upon the record, there must be some appropriate mode of ascertaining it. This mode is by writ of error. And until such appropriate mode has been resorted to, and has proved effectual, the judgment must be considered as conclusive, and importing absolute verity."

II. The court, in adopting the award of the referees as a part of its decree, gave alimony to the wife "during her natural life." That the court has the power so to do, where it may be granted at all, seems to be very strongly implied by the terms of the statute which provide that the court may order so much of the husband's real estate, or the rents and profits thereof as is necessary, to be assigned and set out to the wife for life. Moreover, where the language of the decree expressly states that it is to continue after the death of the husband, the authorities hold that it will so continue, *Miller* v. *Miller*, 64 Maine, 489; Bishop, Mar. and Div. § 601. In *Burr* v. *Burr*, 10 Paige, 20, in the chancellor's court, and afterwards affirmed in the court of errors, 7 Hill, 207, it was held that alimony could be decreed to continue after the husband's death, during the entire life of the wife. And in *Carson* v. *Murray*, 3 Paige, 483, the husband and wife agreed to separate, and in the agreement was a provision for the payment of an annuity of one hundred and seventy-five dollars to the wife yearly, as alimony, during her life, and the court held that it did not cease at the death of the husband.

The Supreme Court of Iowa in *O'Hagan* v. *O'Hagan*, 4 Iowa, 509, say: "In decreeing her sums of money in the first instance, or in making the proper and equitable order in relation to this property and her maintenance, the decree may provide for the payment thereof from year to year for a specific period, or may provide even that it shall continue during her life."

The authorities cited by the defendant's counsel do not support the position claimed by him. When examined they will be found to relate to cases wherein the court did not in express terms provide for the payment of alimony during the life of the wife. Thus in the case of *Lennahan* v. *O'Keefe*, 107 Ill. 620, the court, referring to *O'Hagan* v. *O'Hagan*, *supra*, hold that in the *absence* of language in the decree, showing an intention to bind the heir of the husband after his death, the allowance of alimony will terminate with the life of the husband.

In *Knapp* v. *Knapp*, 134 Mass. 353, there was no provision in the decree that the alimony should continue during the life of the wife; the decree was for alimony, with no words expressive of any intention for its continuance beyond the life of the husband.

III. But in the decree in the case before us, even adopting the language of the award, there is no sufficient designation of the real estate upon which any lien for alimony can attach. The estate is not set out or described in terms that give sufficient identification. *Hills* v. *Hills*, 76 Maine, 488.

In accordance with the stipulation in the report of the case, the decision of the court is that the action is maintainable, not only for the installments due before, but subsequent to, the death of William M. Stratton.

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

STATE *vs.* OLIVER C. ROLLINS.

Kennebec. Opinion June 4, 1885.

Indictment. Intoxicating liquors. Cross-examination of witness. Practice. Instructing the jury.

An indictment, which charges that the defendant, at Gardiner, during a time named, "unlawfully did keep a drinking house and tippling shop, against the peace of the state," &c. is sufficient.

The extent to which a cross-examination, relating to collateral matters, may be carried, is within the discretion of the presiding justice.

By whom a witness for the government, in a liquor case, was employed to act as a detective, is entirely irrelevant to the issue being tried.

It is not error for the presiding justice to recall the jury into court, after they had considered a case submitted to them for some time, and endeavor to impress upon them the importance of agreeing upon a verdict.

ON EXCEPTIONS from superior court.

Indictment for keeping a drinking house and tippling shop. The respondent seasonably before trial, moved for a bill of particulars. The motion was overruled.

At the trial the state introduced the following evidence: that on or about May 1, 1883, the respondent paid to the United States, the special tax required of retail liquor dealers, for the period extending from May 1, 1883, to April 30, 1884, and that the respondent during the time covered by the indictment, had been proprietor of the Evans House, at Gardiner, Maine, and had run the same during that period. One Edward P. Harrington testified, in substance, that he was a resident of Boston, Mass., and connected with the private detective agency of one T. F. McClaughlin of that city. That in February, 1884, he was employed to come to Gardiner, and by personal purchases to make himself a witness against liquor dealers in that city. That he boarded at the Evans House, and while there made some ten purchases of intoxicating liquors, whiskey, whiskey punch, rum, gin cocktails, &c. That he bought the same of the clerks of the respondent, and drank all the liquor so bought, on the premises of the respondent. That his compensation was five dollars a day and expenses. When asked by the respondent's counsel to give the name of the person who employed him, the presiding judge excluded the question.

After the jury had taken the case and had been in the jury room for two hours, or thereabouts, the court sent to them a message by the sheriff, inquiring if the jury desired further instructions. The sheriff reported that the jury were unable to agree whether they desired further instructions or not. Thereupon the presiding justice ordered the jury brought into court and further instructed them as follows:

"I simply called you in for the purpose of impressing upon your minds the importance of agreeing, and to give you some observations that I usually incorporate into the first charge,

which I omitted in this case, adopted from the Supreme Court of Massachusetts."

After giving the observations as to the importance of agreeing, the judge repeated a portion of his instructions when the case was first committed to the jury.

The jury again retired and soon returned with a verdict of guilty.

W. T. Haines, county attorney for the state, cited: Wharton, Crim. Law, (7th ed.) § § 291, 3156; *Com.* v. *Giles*, 1 Gray, 466; *Com.* v. *Wood*, 4 Gray, 11; *Gardner* v. *Gardner*, 2 Gray, 434; *Harrington* v. *Harrington*, 107 Mass. 329; *State* v. *Collins*, 48 Maine, 217; *State* v. *Casey*, 45 Maine, 435; *State* v. *McNally*, 34 Maine, 210; *State* v. *Soper*, 16 Maine, 293; *Nichols* v. *Munsel*, 115 Mass. 567; *Com.* v. *Snelling*, 15 Pick. 321; *Nelson* v. *Dodge*, 116 Mass. 367; 110 Mass. 70; *Kellogg* v. *French*, 15 Gray, 354; *Lathrop* v. *Sharon*, 12 Pick. 171; *Raymond* v. *Nye*, 5 Met. 151;

Herbert M. Heath, for the defendant. I am aware that in *State* v. *Collins*, 48 Maine, 217, this form of indictment, though in plain violation of every principle of logic, reason and pleading, has been held sufficient. If it is to stand it should be supplemented by the further decision that under it, respondents shall be entitled, as of right to a bill of particulars, on motion, 3 Wharton, Crim. Law, § 3156. True it has been held that the allowance of bills of particulars is within the discretion of the presiding justice, *Com.* v. *Wood*, 4 Gray, 11. "Yet whenever a bill of particulars is a substitute for special averments in an indictment, error should be entertained." Wharton, Crim. Law, § 3158.

Counsel contended that the question put to the detective witness, on cross-examination, calling for the name of his employer was admissible. The name of the person might have been material in many ways. We might have shown that he entertained malice towards the defendant, that he had entered into a conspiracy to convict whether guilty or innocent.

By R. S., c. 82, § 86, the presiding justice may, in his discretion, recharge the jury when they return into court and

announce that they cannot agree. But there was no such announcement here.

Counsel further cited: *Com.* v. *Downing*, 4 Gray, 29; *Speres* v. *Parker*, 1 D. & E. 141; *Smith* v. *Moore*, 6 Greenl. 278; *State* v. *Gove*, 34 N. H. 510; *Howe* v. *Com.* 5 Grat. 664; *State* v. *Foster*, 3 McCord, 442; *Morse* v. *State*, 6 Conn. 9; Chitty, Crim. Law, 281, 283 and cases; *State* v. *Cotton*, 4 Foster, 143; 5 B. Monroe, 263.

WALTON, J. We think the exceptions in this case must be overruled.

The indictment is sufficient. *State* v. *Collins*, 48 Maine, 217; *State* v. *Casey*, 45 Maine, 435.

The exclusion of the question put to the government witness (Harrington) on cross-examination was not erroneous. The extent to which a cross-examination relating to collateral matters may be carried is within the discretion of the presiding judge. By whom the witness was employed to act as a detective was entirely irrelevant to the issue being tried; and upon principles of public policy as well as in the exercise of the discretionary powers of a presiding judge, such a question may properly be excluded. The employment of detectives is not in all cases discreditable. In many cases it is the only way of bringing the offenders to justice. It is as important that laws should be enforced as it is that they should be enacted. If it is commendable in the legislature to enact laws prohibiting the sale of intoxicating liquors, or of diseased meat, or other unwholsome food, it is equally commendable on the part of the community to endeavor to enforce them; and persons who are willing to spend their time or money in efforts to enforce such laws, should not be unnecessarily exposed to the ill-will of the persons whose crimes are thereby detected. We think the presiding judge committed no error in excluding the proposed question.

Nor was there any error on the part of the judge in calling the jury into court and endeavoring to impress upon them the importance of an agreement. Nor do we discover anything in

the remarks made by the judge to the jury which we can say as matter of law it was illegal for him to say. A judge's style and manner are his own. We have no more right to dictate to the judge of the superior court what the style or manner of his address to a jury shall be than he has to dictate to us what ours shall be. It is enough for us to say that we find nothing illegal in the course pursued by the presiding judge in this case.

Exceptions overruled.

PETERS, C. J., WALTON, DANFORTH, EMERY and FOSTER, JJ., concurred.

BRIDGET WELCH and another *vs.* CITY OF PORTLAND.

Cumberland. Opinion June 4, 1885.

Ways. Defects. Street commissioner. Notice.

When a street commissioner is informed that there is a defect on a certain street in his town, there is a presumption that he performs the duty of going or sending to look it up and remedy it. This presumption added to the information given him, may be sufficient to authorize the jury to find that he had actual notice of the particular defect.

ON EXCEPTION from the superior court.

An action to recover damages for personal injuries received by Bridget Welch, the female plaintiff, by reason of a defect in Cotton street, Portland.

The verdict was for the defendant.

The opinion states the material facts disclosed by the exceptions.

B. Bradbury, for the plaintiffs, cited: *Larkin* v. *Boston*, 128 Mass. 521; *Rogers* v. *Shirley*, 74 Maine, 147; *Porter* v. *Sevey*, 43 Maine, 519; *Hubbard* v. *Fayette*, 70 Maine, 121.

William H. Looney, for the defendant.

The statute requires twenty-four hours actual notice. Stat. 1877, c. 206, amending R. S., 1871, c. 18, § 65. The cases cited by the learned counsel are dead against his position. In *Larkin* v. *Boston*, the notice was identical to that given by Heffron to Barrett, and the court there declared it insufficient. So in the cases *Rogers* v. *Shirley*, and *Hubbard* v. *Fayette*, the court in each case held the notice to be insufficient. In the

latter case, LIBBEY, J., said the notice "should have been sufficiently specific to call the attention of the municipal officers to the particular defect complained of." Counsel for the plaintiffs contends that a notice of a defect on a street an eighth of a mile in length, upon which there are situated twenty-five houses, is a notice of a particular defect in front of one of those houses. To say that an indefinite notice of a defect on Cotton street is an actual notice of a defect in front of one of the houses on Cotton street, is to torture and distort the evident meaning of the language of the statute.

EMERY, J. The defect complained of was a hole in Cotton street, near the sidewalk in front of Newman's house, Cotton street being a short street, less than forty rods in length, connecting Fore and Free streets. The plaintiffs' evidence of previous notice of the defect to the street commissioners, was that one Mariner, employed by the city on the streets, informed one Heffron, another employee on the streets, of this particular defect, — that Heffron told the street commissioner there was a hole reported to him on Cotton street, near the sidewalk, that ought to be fixed, — that the street commissioner asked him to report it to one of the men, if he should see him first, — that Heffron himself went soon afterward, and partially repaired this defect. The judge instructed the jury in effect, that the evidence did not amount to proof of knowledge in the street commissioner, of the particular hole in front of Newman's house, and that such knowledge must be shown, before the plaintiffs could recover.

If to the evidence above stated, be added the presumption that the street commissioner did his duty by going or sending at once to Cotton street, to find and repair the defect so reported to him, there would seem to be some reason to believe that from his information and subsequent inspection, he acquired actual notice of the defect. At least, there was evidence enough to go to the jury. We think it was to be presumed that the officer did what was so plainly his duty, and that such presumption was

proper evidence for the plaintiffs, and in connection with the other evidence, and particularly the small length of the street, might warrant the jury in finding that the commissioner had actual notice of the particular defect.

It is urged that the notice did not specify the exact location of the defect. It was stated approximately enough to prevent any danger of the defect being overlooked by an officer acting in good faith upon the notice.

Exceptions sustained.

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

DAVID A. GORHAM and another, in equity,

vs.

SIMON S. BILLINGS and another.

Oxford. June 7, 1885.

Will. Life-estate.

The will of a testator, by apt and proper expression gave to his widow a life-estate in all the property of which he died seized. It gave her full power to consume and dispose of so much thereof as her comfort and convenience might require. *Held;*

1. The income and increase of the estate became absolutely her own, but the estate did not vest in her, beyond the uses and necessities mentioned in the will. All that remained of it at her decease, whether in the same specific form, as she received it, or in any new or changed aspect, resulting from sale, exchange or re-investment, remains a constituent part of the testator's estate and should be distributed according to his will. Those articles suitable for consumption that the widow received and consumed, either by her own fire, or at her table, or as food for the stock were disposed of by her as she had a right to do by the terms of the will. She is not chargeable therefor and like articles cannot be retained from her estate in their place and stead.

2. Whatever debts of the testator or charges of his funeral and burial his widow paid from her own means, should be allowed from his estate. Her own debts should be paid from her estate.

BILL IN EQUITY. Heard on bill, answer and proof.

The bill is by the executors and residuary legatees and devisees of Timothy W. Gorham, late of Norway, deceased, testate, against the administrator of the estate of Emily C. Gorham, widow of Timothy W. Gorham, she having deceased.

The bill requested the instructions of the court:

"1. Whether any, and what debts contracted by said Emily shall be paid by said executors.

"2. Whether any, and if so what chattels or property gained by purchase with, or exchange for, the profits, income or proceeds of said estate or any part thereof, has become the property of said Emily or her estate.

"3. In what manner and methods your orators, said executors, shall proceed to fulfil and discharge their trust."

A copy of the material portion of the will and other essential facts are stated in the opinion.

Strout and Holmes, and *George A. Wilson*, for the plaintiffs, cited: *Nason* v. *First Church*, 66 Maine, 100; *Cotton* v. *Smithwick*, 66 Maine, 360; 1 Redf. Wills, 496; *Deering* v. *Adams*, 37 Maine, 264; *Shaw* v. *Hussey*, 41 Maine, 495; *Morton* v. *Barrett*, 22 Maine, 257; *Quinby* v. *Frost*, 61 Maine, 77; *Copeland* v. *Barron*, 72 Maine, 211; R. S., c. 64, § § 42, 47; *Hall* v. *Otis*, 71 Maine, 330; *Stuart* v. *Walker*, 72 Maine, 154.

Enoch Foster and *Addison E. Herrick*, for the defendants, cited: 4 Kent's Com. *73 (2); Taylor's Land. and Ten. § § 534, 535; 1 Wash. R. E. 102 (8), 106 (21), *91, § 13; *Dennett* v. *Hopkinson*, 63 Maine, 353; 1 Wms. Ex'rs, *710; Bouvier's Inst. Art. 4, § 1719; Broom's Legal Maxims, *360, *361; *Miller* v. *Delamater*, 12 Wend. 433; 3 Redf. Wills, *154 (3); *Hecht* v. *Dittman*, (note) 20 Law, Reg. 617; *Rand* v. *Hubbell*, 115 Mass. 473; Ferrard, Law of Fixtures, *133; *Jackson* v. *Van Hoesen*, 4 Cow. 325; *Hathorn* v. *Eaton*, 70 Maine, 221; *Warren* v. *Webb*, 68 Maine, 135; *Nason* v. *First Church*, 66 Maine, 105; *Cotton* v. *Smithwick*, 66 Maine, 367; *Burleigh* v. *Clough*, 52 N. H. 267; *Johnson* v. *Battelle*, 125 Mass. 454; *Stuart* v. *Walker*, 72 Maine, 152; *Copeland* v. *Barron*, 72 Maine, 209; *Bamforth* v. *Bamforth*, 123 Mass. 282; *Ayer* v. *Ayer*, 128 Mass. 577; *Healey* v. *Toppan*, 45 N. H. 260; 2 Kent's Com. 353*; *Minot* v. *Paine*, 99 Mass. 108; *Leland* v. *Hayden*, 102 Mass. 550; *Howe* v. *Earl of Dart*, 7 Ves. 137; *Sampson* v. *Randall*, 72

Maine, 112; *Weeks* v. *Weeks*, 5 N. H. 327; *Succession of Alexander*, 18 La. Ann. 337.

HASKELL, J. This cause is reported to the law court to be heard on bill, answer and proofs, wherein the true construction of the will of Timothy W. Gorham is sought.

The will provides, "It is my will that my debts and funeral charges be paid out of my estate."

"I give, bequeath and devise to my beloved wife Emily C. Gorham, the rest and residue of my estate, real, personal and mixed; to have and to hold for and during her natural life, and to use and consume so much of the same as may be requisite for her comfort and convenience, giving her hereby full power and authority to sell, dispose of and convey any, or all of my said estate, as may be most for her comfort and convenience."

"I give and bequeath out of my estate which may remain at the decease of my said wife to each of her brothers J. D. and Simon S. Billings, the sum of two hundred dollars." "The residue and remainder of my estate . . . at the decease of my said wife, I give, bequeath and devise, after the above bequests shall be paid, to my brothers David A. and Benjamin F. and to my sisters Lois A. and Julia A. to be divided among them equally share and share alike. To my other sisters I give nothing."

The testator and his wife at the time of his decease lived upon a small farm, furnished, stocked and equipped as farms of its quality usually are. The farm and its equipments and a small sum of money constituted his entire estate. At his decease the widow received and entered into the possession and enjoyment of the same and held it for about five years until her death, when his executors entered and took possession of the farm and certain of the chattels thereon, including the harvested crops as a part of the testator's estate, and with others of like interest with themselves bring this bill against the administrator of the widow's estate and her heirs, asking a construction of the will and that they be enjoined from disturbing the orators' possession pending this suit.

The will of Timothy W. Gorham, by apt and proper expression, gave to his widow a life estate in all the property of which he died seized. It gave her full power to consume and dispose of so much thereof as her comfort and convenience might require. The income and increase of the estate became absolutely her own; but the estate did not vest in her, beyond the uses and necessities mentioned in the will. All that remained of it at her decease, whether in the same specific form as she received it, or in any new or changed aspect, resulting from sale, exchange or re-investment, remains a constituent part of the testator's estate, and should be distributed according to his will. Those articles suitable for consumption that the widow received and consumed, either by her own fire, or at her table, or as food for the stock, were disposed of by her as she had a right to do by the terms of the will. She is not chargeable therefor, and like articles can not be retained from her estate in their place and stead. Such construction should be given to wills, that the real intention of the testator may prevail. The will, by express terms, creates a life estate, coupled with a power of disposal, and devises the remainder. That passes under the devise. *Hall* v. *Otis*, 71 Maine, 330. Had the will, as in *Stuart* v. *Walker*, 72 Maine, 145, shown an intention of the testator to limit the life estate to both the principal and income, then all that remained of either should go under the devise over, but such is not the terms of the will and the manifest intention of the testator. He was a farmer of small means, and meant to secure to his widow a support suited to her station in life. To this end, he gave her the whole income of his estate, so long as she should live, and fearful lest this should not be sufficient, as he could not foresee the number of her days, and the health and strength she might retain, he gave her authority to consume and dispose of so much of his estate, as necessary to secure the fulfillment of his intentions. His wishes have been accomplished, and whatever remains of the estate that he left, whether in the same form that he left it, or in changed aspect, must be distributed under his will. But whatever income, increase, or profit therefrom, his widow may have saved belonged to her, a reward for her own toil and thrift,

and has been wrongfully withheld from the administrator of her estate. Whatever debts of the testator, or charges of his funeral and burial his widow paid from her own means, should be allowed from his estate. Her own debts should be paid from her estate. All questions submitted germane to the will, have been answered.

Decree accordingly to be entered at nisi prius. Defendants to recover costs to be paid from testator's estate.

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

ALTON RICHARDSON *vs.* CYRUS S. NOBLE and another.

Somerset. Opinion June 9, 1885.

Sales. False representations of vendor. Mortgage. Assignment. Delivery.

The court adheres to the rule, acted upon in this state, that it is not an actionable fraud for a vendor to falsely represent to a vendee the price paid for property sold. Still, the rule should be carefully construed and applied, and may admit of exceptions.

The holder of a note who, without binding consideration, promises the maker to surrender the note to him, but does not surrender it, is not estopped to enforce a mortgage securing the note upon land purchased by a third person of the maker of the note, although such person placed reliance upon such promise when he afterwards purchased the property.

A writ of entry was prosecuted in the name of an assignee for the benefit of an assignor of a mortgage. *Held*, that, in the absence of other evidence, the production of the assignment at the trial by the attorney of record appearing for the plaintiff, is *prima facie* evidence of a delivery of the assignment from assignor to assignee.

ON EXCEPTIONS.

Writ of entry to recover possession of certain real estate in Pittsfield. The plaintiff claimed under a mortgage given by Cyrus S. Noble to James F. Connor, April 7, 1866, to secure a note of five hundred dollars, payable in one year. The mortgage was assigned to the plaintiff July 1, 1866, but it was admitted that the suit was brought for the benefit of Connor, who was the real party in interest. The mortgage note was given for a certain interest in oil lands in Canada. The defence was that the note and mortgage were obtained by fraud and misrepresentation, and were without consideration, that there had been a failure of

consideration, and that as to one defendant, William A. Noble, Connor was estopped by his own acts and declarations made to him, (William A. Noble,) before the latter purchased the property of Cyrus S. Noble. The defendants also contended that there was no sufficient evidence of the assignment, or delivery of it, from Connor to the nominal plaintiff. The exceptions were by the defendants, and the other material facts are sufficiently stated in the opinion.

Cyrus S. Noble disclaimed all interest in the premises.

Baker, Baker and Cornish, and *C. A. Farwell*, for the plaintiff, cited: *Holbrook* v. *Connor*, 60 Maine, 578; *Jordan* v. *Money*, 5 H. of L. Cas. 185; *Jackson* v. *Allen*, 120 Mass. 79; *Brightman* v. *Hicks*, 108 Mass. 246; *Langdon* v. *Doud*, 10 Allen, 432; Bigelow on Estoppel, 438; *Plumer* v. *Lord*, 9 Allen, 458; *Langdon* v. *Doud*, 10 Allen, 432; *Turner* v. *Coffin*, 12 Allen, 401; *Howard* v. *Hudson*, 2 Ell. and Bl. p. 1, and cases cited in note; *Preble* v. *Conger*, 66 Ill. 370; *Flower* v. *Elwood*, 66 Ill. 438; *Hefner* v. *Vandolate*, 57 Ill. 520; *Kinney* v. *Farnsworth*, 17 Conn. 355; *Copeland* v. *Copeland*, 28 Maine, 525; *Andrews* v. *Lyons*, 11 Allen, 349–351.

D. D. Stewart, for the defendants, contended that the testimony showing the false representations of Connor as to the price paid for the oil lands were admissible, and constituted a full legal, as well as equitable defence, and cited: *Stebbins* v. *Eddy*, 4 Mason, 422; *Simar* v. *Canaday*, 53 N. Y. 298; *Smith* v. *Countryman*, 30 N. Y. 655; 2 Pars. Contr. 267; *Daggatt* v. *Emerson*, 3 Story, 733; *Van Epps* v. *Harrison*, 5 Hill, 63; *Sanford* v. *Handy*, 23 Wend. 268; *Page* v. *Parker*, 43 N. H. 369; *Powers* v. *Hale*, 25 N. H. 153; *Pasley* v. *Freeman*, 3 T. R. 51; *Polhill* v. *Walter*, 3 B. & Ad. 114; *Clarke* v. *Dickson*, 6 C. B. (N. S.) 453; *Bagshaw* v. *Seymour*, 4 C. B. (N. S.) 873; *Bedford* v. *Bagshaw*, 4 Hurl. & Nor. 538; *Brown* v. *Castles*, 11 Cush. 349; *Bradley* v. *Poole*, 98 Mass. 182; *Somes* v. *Richards*, 46 Vt. 170; *Ives* v. *Carter*, 24 Conn. 403; *Stover* v. *Wood*, 11 C. E. Green, (N. J.) 417; *Neil* v. *Cummings*, 75 Ill. 170; *Kennar* v. *Harding*, 85 Ill. 264;

McClellan v. *Scott*, 24 Wis. 81; *Davis* v. *Jackson*, 22 Ind. 233; *Bryon* v. *Hitchcock*, 43 Mo. 527; *Gifford* v. *Carvill*, 29 Cal. 589; *Teague* v. *Irwin*, 127 Mass. 217; 1 Wharton, Contr. § 260.

Against this mass of legal authority, we have *Holbrook* v. *Connor*, 60 Maine, 578, and cases referring to it in this state; and *Medbury*, v. *Watson*, 6 Met. 246, and cases referring to it in Massachusetts. The former was decided by a divided court, — equally divided until a new judge came upon the bench, and thus it was virtually decided by a judge who was not present at the argument. And all there was in the latter case, (*Medbury* v. *Watson*,) upon the subject, were mere *dicta*.

Counsel further argued the other questions arising in the case, citing upon the question of the delivery of the assignment of the mortgage: *Johnson* v. *Leonards*, 68 Maine, 239; *Dwinel* v. *Holmes*, 33 Maine, 172; *Rhodes* v. *Gardiner*, 30 Maine, 110; *Parker* v. *Hill*, 8 Met. 450; *Hatch* v. *Haskins*, 17 Maine, 397.

PETERS, C. J. Defendants' counsel urgently asks our re-consideration of the rule acted upon in this state, that it is not an actionable fraud for a vendor to falsely represent to his vendee the price paid by himself for the property sold. *Holbrook* v. *Connor*, 60 Maine, 578; *Bishop* v. *Small*, 63 Maine, 12; *State* v. *Paul*, 69 Maine, 215.

It is to be admitted that much may be said on either side of the question. No better evidence of that can exist than the fact that courts have differed among themselves about the expediency of the rule. In many cases the rule may operate harshly. But generally, the effect of it is rather salutary. We do not feel that we should upset a rule so recently resolved upon after careful argument and consideration.

The very fact, however, that the rule is disagreed to by reputable courts, is a reason why it should be strictly, rather than liberally, construed. Its application should be properly guarded. And there may be exceptions to the rule. The present case, however, seems to be one of the common instances where the principle is applicable.

The point that the note is invalid for failure of consideration, is not good. The maker was to have a certain share represented by equitable ownership in real estate. The deed to the trustee provides for such ownership.

Nor can the point taken prevail that the owner of the note became estopped by a representation that he would give the note up. The purchaser of the land mortgaged should not rely upon a promise made without consideration to do something in the future. The defendant contends that the proof amounts to an admission that the mortgage note was worthless, and that the real plaintiff is estopped from recovering the land against an after purchaser, before whom the admission was made. But no such admission was made. On the contrary, what was said was a clear affirmation that the note was due, but that for personal reasons, the holder would probably surrender it to the maker.

The action is a writ of entry in the name of an assignee of a mortgage, but prosecuted, it is admitted, wholly for the benefit of the assignor. There was no evidence of any delivery of the assignment to the assignee, except that the plaintiff's attorney of record produced the mortgage and the assignment thereon at the trial. It is the opinion of a majority of the court that the attorney's possession of the papers is *prima facie* evidence of delivery from the assignor to the assignee, notwithstanding the admission that the assignor is the real party in interest in the suit.

Exceptions overruled.

DANFORTH, VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

JOHN J. PERRY *vs.* MOSES CHESLEY.

Cumberland. Opinion June 15, 1885.

Mutual accounts. R. S., c. 81, § § 87, 97. Statute of limitations. Auditor.

An item in an account annexed which has been paid and receipt given and accepted therefor cannot be considered an "unsettled item" within R. S., c. 81, § 87.

An item in a mutual account which accrued within six years of the date of the writ cannot save from the operation of the statute of limitations any other

items in the account if there be none within six years of the date of the former.

An auditor has no authority to pass upon the account laid before him by the defendant, unless it was filed in set-off in the court.

A promise in a letter, in reference to the state of the accounts between the parties, to "talk it over when we meet," and expressing the belief that the other party is indebted to the writer, is no such promise or acknowledgment as to bring the case within the provisions of R. S., c. 81, § 97.

ON REPORT.

Assumpsit on the account annexed.

The following is a copy of the letter of the defendant referred to in the opinion.

"Oxford, March 2, 1876.

"Mr. Perry, Dear Sir:—I have neglected to write you before, as I have been looking over your account, that I might know about our affairs. I find that you have charged in your account a number of bills of costs, where we recovered damages and some of them of considerable amount, that you have received. After making some deductions for irregularity, I find my account more than yours. I have other accounts that I ought to have allowed, besides my sheriff bill. I think on a fair settlement you would be owing me more than one hundred dollars. When we meet we will talk it over.

Yours truly, Moses Chesley."

John J. Perry, for the plaintiff.

S. C. Strout, H. W. Gage and F. S. Strout and *David Dunn*, for the defendant.

VIRGIN, J. By his writ dated in November, 1881, the plaintiff sued the defendant on an account annexed, the debit side of which comprised two hundred and thirty-one items commencing in March, 1848, and ending in March, 1878. From the first item of March, 1848, the account ran on from year to year to the item of March, 1865, when there was an interval of more than twelve years in the account, the next succeeding item being dated, September, 1877.

All of the items on the credit side of the account annexed were dated in 1862 and prior thereto, with the exception of one dated September, 1877.

The case went to an auditor who disallowed all of the debit items of the plaintiff's account which were dated after March, 1862, except that of "Sept. term, 1877, to services in trying Yeaton's case, $25," which he allowed. But it is admitted in the agreed statement that this last mentioned item was paid at the time in cash by the defendant and a receipt given therefor. This payment of cash is the same as the one mentioned on the credit side of the account, and therefore neither the charge nor the credit should appear in the account; the item having been settled by the parties it was no longer an "unsettled item." R. S., 1871, c. 81, § 87; *Lancey* v. *M. C. R. R.* 72 Maine, 38; *Penniman* v. *Rotch*, 3 Met. 216, 223.

Under this state of facts the action is barred by R. S., 1871, c. 81, § 84.

The plaintiff strenuously contends, however, that the item of twenty-five dollars cash was in the defendant's account together with another cash payment of five dollars, and both being dated in September, 1877, and both allowed by the auditor, they or either of them take the whole account, including those items which ante-date the twelve years of non-dealing between the parties. But assuming these two items of credit to be properly allowed and that, in the language of the statute, "the cause of action shall be deemed to have accrued at the time of the last item proved," we do not understand that those items within six years next before the date of the writ can save from the operation of the statute any other items in the account if there be none within six years of their own date. This precise question was settled in *Lancey* v. *Me. C. R. R. sup.* and we see no occasion for disturbing that decision.

We are aware that statements may be found in the opinions of courts, several of which are quoted in the plaintiff's brief, which, if considered as abstract propositions, might seem to aid the plaintiff; but when they are applied to the facts then under consideration, they sustain no such view.

There is another answer to the five dollars cash item taken from the defendant's account. The defendant's account was never filed in set-off. It was only conditionally considered by the auditor. It is no part of the case, it never having "been ordered by the court" or "expressly embraced in the order," R. S., c. 82, § 69.

The auditor does not find that the parties agreed that the defendant's account should be allowed in payment of the plaintiff's; but he makes an alternative report based upon the court's finding as to that fact; and no evidence is found in the case bearing upon that point.

It is urged that the defendant's letter of March 2, 1876, brings the case within the provisions of R. S, c. 81, § 97. But we find no "promise" therein save to "talk it over when the parties meet;" and no acknowledgment except that the plaintiff owes the defendant "more than $100." *Lunt* v. *Stevens*, 24 Maine, 538; *Weston* v. *Hodgkins*, 136 Mass. 326.

Judgment for the defendant.

PETERS, C. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

JOHN WHITE *vs.* INHABITANTS OF LEVANT.

Penobscot. Opinion June 16, 1885.

U. S. pension. Town officer. Fees for service of subpœnas. Constable.

Where a person while holding the offices of selectman, overseer of the poor, and town agent, obtained a United States pension for one of his town's paupers, and in pursuance of a previous agreement with the pensioner, appropriated the back pay towards the pensioner's indebtedness to the town for past support, which sum, the pensioner, by an action at law, subsequently recovered from the officer. *Held*, that the officer cannot maintain an action against the town for services, expenses and disbursements in defending the action against him by the pensioner, nor in successfully defending an indictment in the Uuited States court for the taking such money in violation of U. S. R. S., § 5485.

A party cannot charge fees for serving subpœnas on witnesses.

A constable cannot charge fees for serving subpœnas on witnesses outside of his town.

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

Assumpsit on account annexed which embraced many items of services and disbursements, aggregating seven hundred fifty-one dollars and twenty-three cents, and they were thus classified at the trial: Amount relating to the "Morey case," one hundred thirty-two dollars and three cents, this sum embraced the fees of the plaintiff as a constable of Levant for summoning witnesses, twenty-four dollars eighty cents, a part of whom resided in other towns. Amount relating to the case of "*Smart* v. *White*," two hundred forty-nine dollars fifty-eight cents; and amount relating to "*U. S. by indictment* v. *White*," three hundred sixty-nine dollars and sixty-two cents. The presiding justice ruled and instructed the jury, that the last named sum could not be recovered in this action and to this ruling the plaintiff alleged exceptions. The verdict was for the plaintiff in the sum of three hundred forty-six dollars and fifty-two cents, and the defendants moved to set that verdict aside as against law. The defendants also alleged exceptions to certain rulings and instructions.

The opinion states the material facts.

Barker, Vose and Barker, for the plaintiff, cited upon the first class of items (the Morey case): *Dennett* v. *Nevers*, 7 Maine, 399; *Industry* v. *Starks*, 65 Maine, 167; *Portland* v. *Bangor*, 42 Maine, 403.

As bearing on the Smart case: *Clinton* v. *Benton*, 49 Maine, 550; *Foxcroft* v. *Corinth*, 61 Maine, 559; *Fayette* v. *Livermore*, 62 Maine, 229; *Gregory* v. *Bridgeport*, 19 Am. R. 485; *State* v. *Hammonton*, 20 Am. R. 405; *Bancroft* v. *Lynnfield*, 18 Pick. 566; *Fuller* v. *Groton*, 11 Gray, 340; *Hadsell* v. *Hancock*, 3 Gray, 527; *Augusta* v. *Leadbetter*, 16 Maine, 45; *Woodcock* v. *Calais*, 66 Maine, 234; 21 Vt. 129; 129 Mass. 558.

In support of plaintiff's exceptions, counsel contended that the criminal prosecution against the plaintiff in the United States court was for the purpose of obtaining the money which was sought to be recovered in the civil suit, and was defended in the interests of the town since that money was in the town treasury. That all these expenditures were reported to the

town year after year by the selectmen, and if the town had any objection to offer or criticism to make they should have then made it known, and their silence must be deemed a ratification, a unaminous ratification.

"There may be occasion when a town should act or speak, or when it does speak by force of circumstances," *Otis* v. *Stockton*, 76 Maine, 506.

Jasper Hutchins and *Charles Hamlin*, for the defendants, cited upon the question raised by the plaintiff's exceptions: *Butler* v. *Milwankie*, 15 Wis. 493; *Gove* v. *Epping*. 41 N. H. 539, and upon the questions raised by defendants' motion and exceptions, *Smart* v. *White*, 73 Maine, 332; *Walcott* v. *Frissell*, 134 Mass. 1; *Denny* v. *Dana*, 2 Cush. 160; U. S. R. S., § § 4745, 4747, 4768, 4769, 4785, 4786, 5485; *Stebbins* v. *Leowolf*, 3 Cush. 137; Story's Agency, § 346; *Wadsworth* v. *Heumker*, 35 N. H. 189; Dillon, Mun. Corp. § § 770, 772; *Small* v. *Danville*, 51 Maine, 359; *Buttrick* v. *Lowell*, 1 Allen, 172; *Mitchell* v. *Rockland*, 52 Maine, 118; *New Bedford* v. *Taunton*, 9 Allen, 209; *Woodcock* v. *Calais*, 66 Maine, 234; *Hill* v. *Boston*, 122 Mass. 344; *Herzo* v. *San Francisco*, 33 Cal. 134; Freeman, Judgments, § § 253, 259; Wharton, Ev. § 836; *Fox* v. *New Orleans*, 12 La. Ann. 154.

VIRGIN, J. While chairman of the boards of selectmen and overseers of the poor, and agent of Levant, the plaintiff assisted one Mrs. Smart (for many years supported as a pauper by the defendants) in obtaining her pension, under an agreement with her that the back pay which might be recovered should be appropriated toward her indebtment for support. When the pension check came, the pensioner at first repudiated the agreement; but finally accepted fifty dollars as an inducement to appropriate the balance of the back pay as originally agreed.

On July 5, 1880, the plaintiff paid the balance of the pension money ($164.42) into the town treasury to the credit of the pauper fund, from which there were subsequently drawn, on town orders, ten dollars by the attorney who prosecuted the

pension claim, two dollars by the justice and fifty-six dollars by this plaintiff.

On July 12, 1880, the pensioner sued the plaintiff for the recovery of her pension money and at the April term 1881, obtained a verdict therefor. The case went to the law court on motion and exceptions which were overruled (73 Maine, 332). The execution which issued on the judgment ($193.46) was paid on May 15, 1882, by a town order, but without any vote of the town.

The plaintiff now seeks, *inter alia*, to recover from the town payment for his personal services and expenses, summoning witnesses and fees paid them and for fees paid to his counsel, in the action of Mrs. Smart against him; and the jury, under the instructions of the presiding justice, rendered a verdict therefor which the defendants now move may be set aside as being against law.

Our opinion is that so much of the verdict as includes fees for the plaintiff personally serving subpœnas on witnesses is without authority of law. There is no statute authority for a party personally to serve a subpœna on his own witnesses or to charge fees for such service.

Again the action of *Smart* v. *White*, was for the recovery of money obtained from U. S. pensioner in violation of a penal statute. This court has adjudged that the money was illegally in this plaintiff's hands; that the rule of *respondeat superior* did not apply; that this plaintiff was the active and efficient party in perpetrating the wrong; and that the fact that before the action was brought he paid the money to the town would not screen him.

We are of the opinion also that the plaintiff cannot recover for any services rendered or money paid in the defence of that action.

This case does not come within the rule of that class of cases which hold that a town may expressly indemnify its officers against liabilities incurred by them in the *bona fide* discharge of their official duties, as in the case of an assessor in the assessment of taxes (*Nelson* v. *Milford*, 7 Pick. 18); or of a surveyor in

repairing a highway (*Bancroft* v. *Lynnfield*, 18 Pick. 568); or of a committee, against a judgment in favor of a pew-owner, for removing a meeting-house and out of its materials constructing a town-house (*Hadsell* v. *Hancock*, 3 Gray, 527); or a school-committee for expenses in successfully defending an action for libel alleged to be contained in an official report made by them in good faith (*Fuller* v. *Groton*, 11 Gray, 340); or of a school committee in defending an action for an alleged seizure and asportation of certain school registers (*Babbitt* v. *Savoy*, 3 Cush. 530); or of a collector of taxes for costs and expenses in defending actions against him for acts done in the *bona fide* performance of his official duties (*Pike* v. *Middleton*, 12 N. H. 278); for the defendants never voted any indemnity, and the services were rendered and expenses incurred in defending acts entirely foreign from any discharge of official duties.

This case comes rather within the class of cases which hold that a "town, in its corporate capacity will not be bound, even by an express vote of a majority, to the performance of contracts or other legal duties not coming within the scope of the objects and purpose for which it is incorporated." *Anthony* v. *Adams*, 1 Met. 284; *Vincent* v. *Nantucket*, 12 Cush. 103; *Minot* v. *W. Roxbury*, 112 Mass. 5; *Westbrook* v. *Deering*, 63 Maine, 231. It is no part of the duty of towns or town officers to obtain pensions for its paupers. And if town officers see fit to indulge in such an avocation for the ultimate purpose of securing an appropriation of the pension money to the pauper's indebtment to the town, and thereby involve themselves in law suits, the law will not allow them to involve the town to recover for the services and expenses of such an unsuccessful speculation.

We think, therefore, that the verdict is against law so far as it includes anything charged for the Smart case, and also for anything by way of fees for serving subpœnas out of the town of Levant in the Morey case.

The plaintiff's exception to the ruling of the presiding justice instructing the jury not to consider the items of the plaintiff's bills charged in connection with the criminal prosecution, must be overruled. *Gove* v. *Epping*, 41 N. H. 539; *Merrill* v. *Plainfield*, 45 N. H. 126.

Therefore unless the plaintiff remit so much of the verdict as the parties agree comprise the illegal items mentioned in this opinion, the motion must be sustained and a new trial granted. Otherwise motion and exceptions overruled.

PETERS, C. J., DANFORTH, EMERY, FOSTER and HASKELL, JJ., concurred.

JOHN W. HOBART, Receiver of Newport Savings Bank, in equity,

vs.

PRESTON L. BENNETT.

Penobscot. Opinion June 22, 1885.

Savings banks. Receiver. Practice. Officer's sale. Amendment of return. R. S., c. 81, § 23.

Receivers of savings banks may maintain suits in their own names as receivers, or in the name of the bank; it is immaterial which.

If a writ is entered in court without any other service than the attachment of property, as provided in R. S., c. 81, § 23, the attachment will not be invalidated if the order of notice on the defendant is not obtained or served, till a subsequent term.

An officer's return on an execution that he had given the notice required by law of the intended sale is conclusive evidence of that fact, and he cannot be allowed to amend his return so as to show that, in fact, such a notice was not given.

It is not illegal for a receiver to purchase property at an officer's sale on an execution in favor of the estate which he represents.

A sale upon an execution of a right in equity to redeem a parcel of real estate, on which there are two or more mortgages, at the same time and for a gross sum, is not illegal or void.

ON REPORT.

Bill in equity brought for the redemption of two mortgages held by the defendant. The plaintiff claims the right to redeem by virtue of a deed under an officer's sale on execution to the Newport Savings Bank, April 10, 1880. The bill was brought in the name of the receiver, as receiver. The defendant claimed to impeach the judgment upon which the execution issued, upon which the sale was made, on the ground that the original writ was in favor of the Newport Savings Bank, and was returnable

at the April term, 1876, and then entered, without any service other than attachment of property, and continued from term to term till January term, 1877, when personal notice was ordered, which notice was served March 19, 1877, and returnable at the April term, 1877. The defendant, on March 23, 1877, without notice of the service of the notice, bought the property and paid the record owner and took a deed from him of the same. This deed was recorded about three years before the sale on execution.

The officer's deed and return on the execution stated that he had published a notice of the sale for three weeks successively in the Newport Times, and the defendant claimed that the notice was published but two weeks, and that the officer was willing and desirous to correct the error by an amendment of his return to conform to the fact.

The two mortgages were executed at different times and for different amounts. The sale was of both equities at the same time *in solido*, for the sum of five hundred dollars, that being the bid of the receiver, and the highest bid offered.

Upon these facts the report propounded the questions answered in the opinion.

Wilson and Woodward, for the plaintiff, cited upon the first question: R. S., c. 47, § 67; *American Bank* v. *Cooper*, 54 Maine, 438.

To the second question: R. S., c. 81, § 21; *Steward* v. *Walker*, 58 Maine, 300.

To the third question: *Sykes* v. *Keating*, 118 Mass. 517.

To the fourth question: High on Receivers, (ed. 1876,) § 176.

To the fifth question: *Bartlett* v. *Stearns*, 73 Maine, 17.

D. D. Stewart, for the defendant.

1. See Edwards on Receivers, 12, and cases there cited. The general scope of these authorities seems to show that a receiver, who has no assignment or conveyance from the plaintiff or defendant, can not maintain a suit in his own name, unless the power is given by statute provision. None such exists in relation to receivers of savings banks. The decisions

in this state cited by the learned counsel for the plaintiff, are grounded upon a statute provision applicable to national banks, but not to savings banks.

2. Prior to the statute of 1860, a failure to leave a summons rendered a previous attachment a nullity, and the court had no power to order further notice. R. S., 1841, c. 114, § 48; R. S., 1857, c. 81, § 25; *Briggs* v. *Davis*, 34 Maine, 158; *Hodge* v. *Swasey*, 30 Maine, 162. The only practical construction of the present statute requires that the plaintiff should apply for his order of notice at the return term, and if he neglects to take the proper steps at that term to have the service completed, he must be presumed, as a matter of law, to have abandoned his attachment.

3. The receiver has no other nor greater right than the bank. *Cutting* v. *Damrell*, 88 N. Y. 411; *Savage* v. *Medbury*, 19 N. Y. 32. The bank was the judgment creditor in the execution upon which the sale was made and it was the purchaser. It is well settled law that an execution creditor who purchases under a sale upon his own execution, is not a *bona fide* purchaser for value, and entitled to protection against any errors or mistakes in the proceedings, but is held to have full notice of all such errors, and is bound by them. "When the plaintiff in the judgment and execution purchases at an execution sale, he is presumed to have notice of all defects in the record and proceedings, and will not be protected as a *bona fide* purchaser, if the notice of the sale was insufficient." *Collins* v. *Smith*, 57 Wis., reported in Alb. L. J. of June 16, 1883, and Am. L. Reg. of August, 1883. This seems to be sufficient to defeat the plaintiff's title, without any amendment of the officer's return. But the officer should be allowed to amend his return so as to conform to the facts. *Pickering* v. *Reynolds*, 111 Mass. 83; *Chenery* v. *Stevens*, 97 Mass. 84; *Smith* v. *Dow*, 51 Maine, 28.

WALTON, J. We will answer the questions presented for the determination of the law court, in the order in which they are stated in the report.

1. Receivers of savings banks may commence suits in the name of the bank, or in their own names, as receivers. It is

immaterial which. Suits may be so commenced by the receivers of banks of discount, and no reason is perceived why the same rule should not apply to the receivers of savings banks. R. S., c. 47, § 62.

2. If a writ is entered in court without any other service than the attachment of property, as provided in R. S., c. 81, § 23, the attachment will not be held to have been abandoned or invalidated, although the order of notice on the defendant is not obtained or served till a subsequent term. The statute authorizing notice in such cases contains no limitation as to the time within which the order shall be obtained or served, or that the attachment shall be lost if the order of notice is not obtained or served within a given time; and we do not think the court would be justified in fixing such a limitation. If such delays cause inconvenience, the legislature, and not the court, must provide the remedy.

3. Amendments of officers' returns, by which the title to property is to be affected, should be allowed with great caution. And in no case should such an amendment be allowed, unless the court can see clearly that it will be in the furtherance of justice. The court does not see clearly that the amendment proposed in this case, (the effect of which would be to defeat the title of a savings bank and vest it in one who purchased of a debtor pending a suit against him in which the property was attached,) would be in the furtherance of justice. Consequently, the amendment is not allowed. The officer's return is conclusive evidence of the facts therein stated, and can not be contradicted. And in the application of this rule, it can make no difference whether the property sold by the officer on an execution is purchased by the judgment creditor or a stranger. Whoever the purchaser may be, in defense of his title he has a right to rely upon the officer's return as conclusive evidence of the facts therein stated. By "facts therein stated," we, of course, mean such facts only as relate to the doings of the officer, and are, therefore, properly stated in the return. The fact that he has given due notice of an intended sale, is one proper to be stated in a return, and his statement that he has given such notice, can

not be contradicted. If the statement is false, the remedy of one thereby injured, is an action against the officer for a false return. The statement can not be contradicted for the purpose of defeating the title of one who purchased the property at a sale made by the officer, although the purchaser was the judgment creditor in the execution on which the property was sold. In this particular, we think he is entitled to the same protection as any other purchaser.

4. If a receiver improperly purchases property sold on an execution in favor of the estate which he represents, the proper remedy is to hold him responsible for the injury, if any, which the estate thereby sustains. It would be the poorest of all remedies to hold the purchase void, and thus, perhaps, lose to the estate both the property and the debt, to secure which, the purchase was made. In bidding off the equity of redemption which had been attached on the writ, the receiver probably did what he believed would be for the interest of the bank which he represented. But whether he acted wisely or unwisely, is a question that will not be considered in this suit. It is sufficient to say that the court declines to declare the purchase void.

5. A sale upon an execution of a right in equity to redeem a parcel of real estate, on which there are two or more mortgages, at the same time, and for a gross sum, is not illegal or void. So decided in *Bartlett* v. *Stearns*, 73 Maine, 17. The sale in this case was not, therefore, void on that account.

We have now answered all the questions of law presented in the report, and the entry must be,

Case to stand for trial on the questions of fact put in issue by the answer.

PETERS, C. J., DANFORTH, LIBBEY, EMERY and HASKELL, JJ., concurred.

ELVIRA FARRINGTON *vs.* INHABITANTS OF ANSON.

Somerset. Opinion July 27, 1885.

Paupers. Overseers of the poor. Towns.

To enable a person to recover of a town for supplies furnished a pauper he must show that they were furnished as pauper supplies by virtue of a con-

tract with the overseers of the poor, when there is no count in the writ founded upon a statute liability.

The overseers of the poor do not act as agents of the town in the performance of the duty imposed on them by statute in binding out a pauper during his minority. The town can not interfere to dictate the terms of the contract, or to prevent it. It is not, therefore, responsible for an error or omission in the papers.

ON REPORT.

Assumpsit on account annexed for boarding, clothing and caring for John Hutchinson, an alleged pauper. There was also a general count of indebitatus assumpsit.

The opinion recites the material facts.

Merrill and Coffin, for the plaintiff.

The plaintiff contends that the overseers of the defendant town agreed to bind the pauper to her till he was twenty-one. The paper they gave her had no validity; it was void and avoided after the plaintiff had supported the pauper four years. The paper was made by the defendants; they are the party in fault; they did not do as they agreed.

Again, if the special contract under which partial service is performed be void, or voidable and voided, or from the fault of the defendants it is impossible to be performed, it cannot be set up to defeat the plaintiff's *quantum meruit*. 2 Smith L. Cas. 61; *Moses* v. *Stevens*, 2 Pick. 336; *Fitch* v. *Casey*, 2 Iowa, 307; *Thompson* v. *Gould*, 20 Pick. 134; *Canada* v, *Canada*, 6 Cush. 15; *Lakeman* v. *Pollard*, 43 Maine, 467; 14 Maine, 474; *Brittan* v. *Turner*, 6 N. H. 481; Chitty, Contr. 622; *Spring* v. *Coffin*, 10 Mass. 31; *Claflin* v. *Godfrey*, 21 Pick. 1.

J. J. Parlin, for the defendants, cited: *Mitchell* v. *Rockland*, 52 Maine, 123; *Riddle* v. *Proprietors of L. & Canals*, 7 Mass. 169; *Brown* v. *Vinalhaven*, 65 Maine, 402; *Clinton* v. *Benton*, 49 Maine, 554; *Smithfield* v. *Waterville*, 64 Maine, 412; *Boothby* v. *Troy*, 48 Maine, 560.

DANFORTH, J. The plaintiff seeks to recover for aid rendered an alleged pauper. There is no count in the writ founded upon a statute liability — no pretence that any such exists. The

supposed pauper has his settlement in the defendant town; the plaintiff lives, and rendered the services for which she claims pay, in another town. It is, therefore, evident that to succeed, she must show that she furnished the support by virtue of some arrangement, some contract with the overseers of the poor, and that it was furnished as pauper supplies. This she fails to do.

The case shows that previous to October 1, 1879, the plaintiff had supported the child as a pauper, under an express agreement with the overseers, for which she has been paid. At that date, another and a different agreement was made, by which she was to take the child as her own and save the town harmless from all expense on his account until he had reached his majority. As a consideration for this, the overseers were to pay her the sum of sixty dollars, and by indentures, bind the child to her during his minority. Subsequently, the contract was reduced to writing and the sixty dollars were paid. Under this agreement, the plaintiff furnished the support for which she claims to recover in this action. But under this contract, the child had ceased to be a pauper. The plaintiff so understood it and so did the overseers. The former agreement had ceased, the child was relieved from the disabilities of a pauper, and the town from liability until a new necessity occurred and a new notice given.

But it is said that this last agreement was void, and therefore did not interrupt the former. It is true that at the end of about four years, legal process was commenced in behalf of the child, and the court discharged him from his indentures. But this does not change the fact that for the time he was not a pauper, that the town was relieved of his support, and was entitled to the necessary statute proceedings before it could again become liable. *Oldtown* v. *Falmouth*, 40 Maine, 108.

It is further claimed that the plaintiff is entitled to recover for services rendered in the partial performance of the contract by reason of having been prevented from its full performance by the fault of the other party. The same reply may be made here as before. These services were not rendered to a pauper, nor in fact to the town. The town was not a party to the later contract, nor in any legal sense did it receive any benefit under it upon

which an implied promise could rest. It was only that benefit which accrues in all cases where the town is relieved from the support of one who has been a pauper. It is true that both contracts were made by the overseers of the poor. The former by them as the legal agents or servants of the town, in which they had the power to and did bind the town to its performance. But the latter was made by them in their official capacity, in pursuance of a duty imposed upon them by statute, for which they alone are responsible, and to the performance of which they could not bind the town. The town had no authority in the matter. It could not interfere to dictate the terms of the contract, or to prevent it. It was not, therefore, responsible for an error or omission in the papers, and wherever the responsibility of such error or omission may rest, whether upon the plaintiff or the overseers, it certainly can not upon the town; nor can it impose any liability upon the town for services rendered under the contract. *Mitchell* v. *Rockland*, 52 Maine, 118; *Brown* v. *Vinalhaven*, 65 Maine, 402.

Judgment for the defendants.

PETERS, C. J., WALTON, LIBBEY, EMERY and FOSTER, JJ., concurred.

SAMUEL S. CARLTON and others, in equity, *vs.* EBEN NEWMAN.

Franklin. Opinion August 6, 1885.

Taxes. School-district. School-house. R. S., c. 11, § 56. Constitutional law.

The collection of an entire school-district tax, assessed without authority of law, may be perpetually enjoined, on a bill brought by all the tax payers of the district jointly, or by any number thereof on behalf of themselves and all the others.

Such a bill is maintainable upon the ground of the inherent jurisdiction of equity to interpose for the purpose of preventing a multiplicity of suits.

When municipal officers proceed to erect a school-house for a district under the provisions of R. S. c., 11, § 56, they can legally expend therefor so much money only as the district have voted for that purpose.

A special act of the legislature purporting to authorize an assessment of an excess of money expended by the municipal officers above the sum voted by the district, must be construed strictly.

The legislature cannot constitutionally authorize the assessment upon the polls and estates of a school-district of an excess of money expended by the

municipal officers above the sum voted by the district for the erection of a school-house, in the absence of any vote by the district to raise such excess.

On report of bill, answer and agreed statement of facts.

Bill in equity by ten inhabitants and tax payers of school district No. 5, in the town of Weld, against the collector of taxes to restrain him from collecting a school-district tax.

The district voted to build a new school-house and voted to raise five hundred dollars for that purpose. A disagreement arose as to the location, occasioning an appeal to the municipal officers who located and erected a school-house at an expense of eight hundred twenty-five dollars and fifty-six cents, exceeding the district assessment by three hundred two dollars and sixty-six cents. This sum was claimed to be due the town from the district. In 1883 the legislature passed an act (special statute, c. 348,) to authorize the municipal officers of the town to assess a tax on the district, and in October following the assessment was made upon the district for two hundred seventy-seven dollars and sixty-five cents by the assessors. It is the collection of this tax that the bill is brought to restrain.

Drummond and Drummond and *Joseph C. Holman*, for the plaintiffs, cited: *Powers* v. *Sanford*, 39 Maine, 183; *Knowles* v. *School District*, 63 Maine, 261; *Harris* v. *School District*, 28 N. H. 58; *Wilson* v. *School District*, 32 N. H. 118; *Junkins* v. *Union School District*, 39 Maine, 220; Story, Eq. Jur. § § 64 k, 457, 469, 492, 493, 495, 497; High, Injunctions, § § 12, 53, 329, 459; Kerr, Injunctions, c. 4, § 49; Burroughs, Taxation, c. 18, § 126, c. 21, § 143; *Olmstead* v. *Board*, 24 Iowa, 33; *Dows* v. *Chicago*, 11 Wall. 108; State Railroad Tax cases, 92 U. S. 574, 614; *Cummings* v. *National Bank*, 101 U. S. 153;

E. O. Greenleaf, for the defendant, contended that, as the town has advanced a sum of money in excess of the tax, the district ought to pay whether legally liable or not. Injunctions are discretionary and are granted in aid of justice and not to defeat it. Justice in this case can only be done by requiring the district to reimburse the town.

Again the plaintiffs must show that their rights were interfered with in some way before they can seek relief by injunction. *Pratt* v. *Lamson*, 6 Allen, 457.

VIRGIN, J. While the defendant admits the facts he denies that equity can enjoin the collection of the pretended tax even on the assumption that it was assessed without the authority of law and therefore void; and he contends that the only remedies open to the plaintiffs and all the other tax-payers on whose polls and estates the tax has been assessed are simply such as the law affords, viz.: each to defend the action of debt against himself, provided the collector shall proceed to enforce the collection by such action under the provisions of R. S., c. 6, § 141; or, in case the collector shall resort to the more usual mode, of seizing their individual property under the other statutory provisions for the collection of taxes, then for each tax-payer whose property shall be taken to bring an action for damages, or recover back the money when collected; and these remedies are said to be "plain, adequate and complete."

If a tax against an individual be illegal simply by reason of some irregularity in its assessment, as for instance on account of over-valuation, or if laid on property which the tax-payer did not own at the time, he would then have ample remedy therefor by a seasonable application for an abatement. R. S., c. 6, § § 68, 69; *Gilpatrick* v. *Saco*, 57 Maine, 277. Moreover, it is generally held that a bill to restrain the collection of a tax cannot be maintained on the sole ground of its illegality. *Greene* v. *Mumford*, 5 R. I. 472; *Sherman* v. *Leonard*, 10 R. I. 469; *Guest* v. *Brooklyn*, 69 N. Y. 506; *Loud* v. *Charlestown*, 99 Mass. 208; *Whiting* v. *Boston*, 106 Mass. 89, 93; *Hunnewell* v. *Charlestown*, 106 Mass. 350. There must be some allegation presenting a case of equity jurisdiction. *Dows* v. *Chicago*, 11 Wall. 108; *Hunnewinkle* v. *Georgetown*, 15 Wall. 547; *State R. R. Tax Cas.* 92 U. S. 575, 614. Cases cited 2 Dest, Tax. 676–7. In *Hunnewell* v. *Charlestown*, *supra*, brought by a single plaintiff, the court add: "The question is not affected by the fact that there are others, whether few or many, who are

subjected to a like assessment by the same proceedings of the city council and who propose to contest their liability."

But we are of opinion that when it appears that an entire school-district tax is illegal because assessed without authority of law, a bill to enjoin its collection brought by all of the tax-payers of the district jointly on whose polls and estates the tax has been assessed, or by any number thereof on behalf of themselves and all the others similarly situated, may be sustained upon the ground of the inherent jurisdiction of equity to interpose for the purpose of preventing a multiplicity of suits; that although each tax-payer has some legal remedy, it is grossly inadequate when compared with the comprehensive and complete relief afforded by a single decree.

The general doctrine coeval with equity proceedings, asserted in a multitude of decisions, that in certain cases where parties have some remedy, equity may interpose and take cognizance for the purpose of preventing a multiplicity of suits, was declared by Chan. KENT to be "a favorite object with a court of equity," *Brinkerhoff* v. *Brown*, 6 Johns. Ch. 151; and the number of parties and the multiplicity of actual or threatened suits, as stated by COMSTOCK, J., sometimes justify a resort to equity when the subject is not at all of an equitable character and there is no other element of equity juri diction. *N. Y. & N. H. R. R.* v. *Schuyler*, 17 N. Y. 608. And yet the precise extent and limitations of the doctrine are still unsettled, the decisions being quite inharmonious even as to its fundamental grounds. It is said that "bills of peace" were founded upon this ground — to quiet unnecessary litigation as to titles and where one person claimed or defended a right against many or many against one. Sto. Eq. § 864. In these bills originally, whether brought by or in behalf of many against one, or by one against or on behalf of many, "chancery confined its jurisdiction to cases wherein there was some common interest in the subject matter of the controversy, or a common title from which all their separate claims and all the questions at issue arose; it not being enough that the claims of each individual being separate and distinct, there was a community of interest merely in the question of law

or fact involved, or in the kind and form of remedy demanded and obtained by or against each individual." Pom. Eq. § 268. But at an early day the limitations began to yield and the jurisdiction to extend. Thus in *York* v. *Pilkington*, 1 Atk. 282, Lord Chan. HARDWICKE at first intimated that the bill would not be maintained for want of any general right or privity among the parties and because the nature of the defendants' claims was different and that therefore injunction would not quiet the possession as other persons not parties might likewise claim a right. But after argument he changed his opinion saying bills might be maintained although there were no privity between the plaintiffs and defendants nor any general right on the part of the defendants and when many more might be concerned than those before the court.

This jurisdiction has continued to extend until it comprises a great variety of cases which do not come strictly within bills of peace but which courts have declared to be analogous thereto and within the principles thereof and in which there was no common title or community of interest in anything save the question at issue and the remedy sought. Thus in a recent case where the owner of lands on a river sought by a bill against them jointly to restrain several owners of mines from depositing the debris thereof in the river and its tributaries whereby it floated down and was deposited upon the plaintiff's lands, on demurrer, SAWYER, J., sustained the bill, saying: "The rights of all involved depend upon identically the same question, both of law and fact. It is one of the class of cases, like bills of peace, and bills founded on analogous principles, where a single individual may bring a suit against numerous defendants, where there is no joint interest or title, but where the questions at issue and the evidence to establish the rights of the parties and the relief demanded are identical." *Woodruff* v. *North B. G. M. Co.* 8 Saw. U. S. C. C. 628. This case has been cited and approved by this court in the very recent case of like nature, *Lockwood* v. *Lawrence*, 77 Maine 297.

So in a late English case: The bursting of the plaintiff's reservoir occasioned an inundation which damaged the property

of many persons. The statute commissioners issued certificates to such as satisfactorily proved their damages and entitled them to costs and could be enforced by action at law. Fifteen hundred of the certificates were alleged to be invalid; and to avoid a multiplicity of suits against itself the bill was brought by the plaintiff against five holders of the certificates "on behalf of themselves and all other the persons named in any of certain pretended certificates." On demurrer, the bill was sustained first by V. C. KINDERSLER; and on appeal by Ld. Ch. CHELMSFORD who said: "Perhaps, strictly speaking, this is not a bill of peace, as the rights of the claimants under the alleged certificates are not identical; but it appears to me to be within the principle of bills of this description. The rights of the numerous claimants all depend upon the same question." And after remarking that if the certificates had no validity, the executions could not be set aside until considerable expense had been incurred by many, he concluded: "It seems to me to be a very fit case by analogy, at least, to a bill of peace, for a court of equity to interpose and prevent the unnecessary expense and litigation which would be thus occasioned and to decide once for all the validity or invalidity of the certificates upon which the claims of all the parties depend." *Sheffield Waterworks* v. *Yeomans*, L. R. 2 Ch. Ap. 8, 12. See also *N. Y. & N. H. R. R.* v. *Schuylor*, *supra*; *Board Sup.* v. *Deyoe*, 77 N. Y. 219.

In *Brinkerhoff* v. *Brown*, *supra*, a bill by various distinct judgment creditors to render effectual their executions against their debtor was sustained in order to prevent a multiplicity of suits, although their only community of interest was in the relief demanded. See also *Cadigan* v. *Brown*, 120 Mass. 493 and *Ballou* v. *Hopkinton*, 4 Gray, 324, wherein one of the reasons assigned for holding jurisdiction in equity was that at law each owner must bring a separate action to obtain a remedy for his particular injury and equity prevents a multiplicity of suits.

After an exhaustive examination of the subject both upon principle and authority, an eminent legal author sums up his conclusions as follows: "Under the greatest diversity of circumstances and the greatest variety of claims arising from

unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against a numerous body, although there is no "common title," nor "community of right" or of "interest in the subject matter," among these individuals; but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body. . . The same overwhelming weight of authority effectually disposes of the rule laid down by some judges as a test, that equity will never exercise its jurisdiction to prevent a multiplicity of suits, unless the plaintiff or each of the plaintiffs, is himself the person who would necessarily and contrary to his own will be exposed to numerous actions or vexatious litigation. This position is opposed to the whole course of decision in suits of the third and fourth classes from the earliest period down to the present time." Pom. Eq. § 269.

These principles apply to the case at bar. They have been applied to a large number like this. Each of the plaintiffs has, of course, some remedy at law, or else equity could not interpose upon the ground mentioned. But at law he must wait and suffer the wrong before he can begin his action for redress, and when his legal remedy is exhausted, it is not much else than nominal when viewed in contrast with the full relief in equity, which decides in advance of actual litigation, once for all, the validity or invalidity of the tax.

The court, in R. I., although they in *Greene* v. *Mumford*, 5 R. I. 472, and in *Sherman* v. *Leonard*, 10 R. I. 469, referred the complainants therein to their remedies at law, (the validity of the assessment in each case on the complainants only being involved,) nevertheless declared the court would enjoin the collection of a tax where the question involves the validity of the whole tax. *Sherman* v. *Benford*, 10 R. I. 559.

So the U. S. Supreme court, although they had denied jurisdiction in suits brought by a single plaintiff in the cases already cited, they also disavowed in the State R. R. Tax Cas. *supra*, any purpose of fixing any absolute limitation in restraining the collection of illegal taxes; and in *Cummings* v. *Nat'l Bank*, 101 U. S. 157, say: "We are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and violate a fundamental principle of the constitution, and when this rule is applied not solely to one individual, but to a large class, that equity may interpose to restrain the operation of this unconstitutional exercise of power."

That our opinion is sustained by the weight of judicial authority to-day, see Dill. Mun. Corp. § § 731–736; Bur. Tax. § 143, and cases; Pom. Eq. § § 258–260, 1343, and cases in notes

Was the tax assessed by authority of law? If any part is illegal, the whole is, therefore the provisions of R. S., c. 11, § 78, and c. 6, § 142, do not apply.

1. Under the general statutory provisions. It is common knowledge that political sub-divisions, such as towns, created for the more efficient administration of the affairs of the state, have only such power of taxation as is delegated to them by the state. In the provisions of R. S., c. 11, defining the duties and obligations of towns and school districts in relation to education, we find no authority for assessing a tax on a school district for the purpose of building a school-house, unless: (1.) The district, at a legal meeting thereof called for the purpose, vote to raise the money therefor, (c. 11, § 48,) or to borrow it, (§ § 81, 83); or (2.) The town, on application of five voters of the district, under a proper article, deeming the sum voted by the district insufficient, vote a larger sum. (§ 51; *Powers* v. *Sanf'*, 39 Maine, 183); or (3.) The town, on the written opinion of the school committee that the district unreasonably neglects or refuses to raise money for a school-house, such as the wants of the district require, shall vote a sum, § 52. No action was ever taken under § § 51 or 52, but the district, under § 48, voted to

raise by assessment, five hundred dollars. There is no general statutory warrant for the tax, unless it is found in § 56.

The authority of the municipal officers to build a school-house for a school district, is derived solely from § 56. When they had "decided where the school-house should be placed," and seasonably certified "their determination to the clerk of the district," their authority ceased *pro hac*. Then it became the duty of the district to "proceed to erect the house as if determined by a sufficient majority of" its voters. But when the district had neglected "for sixty days to carry such determination into effect," then it became the duty of the municipal officers, "at the expense of the district, if need be, to purchase a lot for said house, and cause it to be erected." § 56.

What house were the municipal officers directed by the statute to "cause to be erected?" "Said house" for which they might "purchase a lot;" "the house" which the statute directed the district to "proceed to erect" on the location fixed by the municipal officers; the house which it might build under its vote, viz: a five hundred dollar house. The building committee of the district could not bind the district by expending more money than the district voted. *Wilson* v. *School District*, 32 N. H. 118, recognized in *Junkins* v. *Union Sch. Dist.* 39 Maine, 220. The legislature could not have intended to confer on the municipal officers unlimited power as to the "expense" to which they might subject the district; for the decision of that question is rightfully vested in the discretion of the tax-payers, except in the two instances coming under § § 51 and 52, when all the voters of the town take part in the decision. It is very evident, therefore, that the municipal officers transcended their authority and could not bind the district by thus virtually undertaking to hire money on the district's credit; nor could the payment by the treasurer, of the orders drawn by them for the expenditure in excess of the sum voted by the district, create any liability or debt of the district to the town. The relation of creditor and debtor the law does not allow to be created in that manner. *Brunswick* v. *Litchfield*, 2 Maine, 32; *Hampshire* v. *Franklin*, 16 Mass. 84. We find no authority for the tax in the general statutes.

Did the special act of 1883, c. 348 afford a legal foundation for it? We think not. Assuming that the legislature might constitutionally confer authority for assessing on the district the excess mentioned, did the act answer the object? Giving to it that strict construction which well established rules of law require to be put upon statutes affecting the property of the citizen, and by which it may be taken from him, as by taxation (*Merritt* v. *Village of Portchester*, 71 N. Y. 309 and cases therein cited; Burr. Tax, § 128; 1 Dest. Tax, 257), the assessment was without legal authority, it having been made, not by the "municipal officers," as provided in the act, but by the "assessors," an entirely different and distinct board of officers. R. S., c. 3, § 12. Moreover, the act authorized the tax to be assessed for the purpose of reimbursing the town "for making repairs on the school-house," and not for building a school-house, as the fact was. No money was paid by the town for "making repairs" on the district's school-house. Districts may raise money for both purposes, § 48; and the school agent may appropriate a certain per cent of the school money to "repairs," but not to building, § 93. They are considered by statute distinct matters. Courts can give effect to legislative enactments only to the extent to which they may be made operative by legal construction of the language in which they are expressed; and cannot make defective enactments carry out fully the purposes which may have occasioned them. *Swift* v. *Luce*, 27 Maine, 285.

Moreover the last clause in the act satisfies us that the legislature must have supposed that the object of the act was the very common one of validating a former assessment which was defective for some irregularity therein; for, as said by MELLEN, C. J., "we cannot, without disrespect to the legislature, presume they intended, *ipso facto*, to create a debt from one man or corporation to another," *Brunswick* v. *Litchfield*, *supra;* and in that of PARKER, C. J., "It certainly must be admitted that, by the principles of every free government, and of our constitution in particular, it is not in the power of the legislature to create a debt from one person to another, or from one corporation to

another, without the consent, express or implied, of the party to be charged." *Hampshire* v. *Franklin*, *supra*.

Bill sustained. Collection of the tax perpetually enjoined.

WALTON, DANFORTH, LIBBEY, FOSTER and HASKELL, JJ., concurred.

HARRISON PARKER

vs.

DAVID WILLIAMS and another, and certain logs.

Franklin. Opinion August 6, 1885.

Liens on logs. Pleadings. Attachment. Plantations. R. S., c. 81, § 26. "Unincorporated place."

In an action to enforce a lien on logs it is not necessary to allege in the writ the ownership of the logs, or that the owner was unknown.

An officer attached a lot of logs containing three million feet, and in his return estimated the logs at six hundred thousand feet. *Held*, the error was one of judgment which did not invalidate the attachment.

Where the owner of logs upon which there is a lien so intermingles them with other logs of the same mark that the former cannot be distinguished, it is the duty of the officer, in serving a writ brought to enforce the lien, to attach the whole lot.

Attachments of personal property that may be preserved by recording as provided by R. S., c. 81, § 26, when made in a plantation, which is organized and has a clerk's office, should be there recorded.

A plantation which has a clerk and other plantation officers is not an unincorporated place within the meaning of R. S., c. 81, § 26.

ON REPORT.

Assumpsit to enforce a lien claim, for the personal labor of the plaintiff performed for the defendants, amounting to sixty-three dollars and thirty-one cents, on certain logs.

P. A. Sawyer, for the plaintiff.

Savage and Oakes, for Lewiston Steam Mill Company, claimants.

We claim that plaintiff has no lien, because it is not alleged in the writ and declaration that the logs were, or were supposed to be, logs of claimants, or that the owner was unknown. This point seems never to have been raised in any case in this state;

but we think it worthy of consideration. How can the court know from this writ whether judgment is to be *in rem* or *in personam*, for there is nothing to show that the logs belonged to any third party, or did not belong to Williams and Parker, the defendants. As the very foundation of a notice, general or special, to the owner of the logs, we think there should be some allegation of ownership. If the mandate was defective in this respect, the order and all subsequent proceedings have been nugatory. *Campbell* v. *Smith*, 47 Maine, 143.

It is a general rule that the logs attached must be the identical ones upon which the labor was performed, which has been enlarged to give a laborer a lien upon the logs on which his whole crew worked, or when by the negligence or carelessness of the owner — the several lots of lumber become intermixed, so that the respective lots can not be distinguished, the respective liens are upon the whole mass. In this case, there was no negligence or carelessness of the owners. From the very necessities of the business, these logs which were to be driven down the lakes, must be collected together.

The officer was commanded to attach logs to the value of one hundred and twenty dollars. He returned an attachment of six hundred M., valued at twenty-four hundred dollars, and the referee reports that all of the logs were attached, and put in charge of a keeper, by which is meant, so far as acts of the officer are concerned, and not his return. There were more than three million feet thus attached and put under a keeper. No logs were removed from the place where they were found, and none were selected by the officer or keeper. If the attachment was valid as to one log, it was just as valid as to all the rest, for no distinction was made in the attachment. But the officer returns that he attached only six hundred M., and therefore he did not attach the rest. He goes to a pile of logs containing three million, and assumes to attach an undivided and unselected six hundred M. That could not be done. An attachment must be of property which is certain and definite; in this case, of separate individual logs.

Now if the lien did not attach to the mass, of course this

attachment fails. If the lien did attach to the mass, the officer had a right to attach one hundred and twenty dollars worth of any logs in the mass, but he must attach specific logs to that amount. There is no pretense that he did so, and the lien fails for that cause.

This is not a case where an officer would have a right to detain the whole mass by reason of a confusion or intermingling of goods, for we are now arguing on the assumption that the lien attached to the whole mass and rendered each separate piece liable to a valid attachment.

"When the attachment is made in an unincorporated place, such copy shall be filed and recorded in the office of the clerk of the oldest adjoining town in the county." This attachment was made in an unincorporated place, and the copy was not filed and recorded in the office of the clerk of the oldest adjoining town in the county of Franklin; but was filed and recorded in Rangely Plantation.

Some discussion was had before the referee, as to whether the attachment was made in Township Letter D, or in Rangely Plantation, for no accurate map of the region has ever been made that we are aware of. And if it should become important to distinguish which, the burden should be upon the plaintiff to show that the officer complied with the law. But for the purposes of our present discussion, it is immaterial in which place the attachment was made. We contend that either is an "unincorporated place." The word incorporate implies the use of the enacting and creating power of the legislative branch of the government. Towns and cities are incorporated by direct legislative enactment. There is no general law under which municipal corporations can be formed. Our statutes recognize three grades of political organization. The word township is used where there is no organization; a plantation has some political powers and is said to be organized; a town which has the highest political power known in the sub-divisions of the state, is said to be incorporated.

WALTON, J. This is an action to secure a laborer's lien on logs. It is before the law court on a statement of facts found

and reported by a referee. The Lewiston Steam Mill company appears as claimant of the logs, and objects to a judgment against them for several reasons.

1. It is claimed that the plaintiff has no lien, because it is not alleged in the writ that the logs were, or were supposed to be, logs of the claimant, or that the owner was unknown. We think such an allegation is not necessary. The writ must show that the suit is brought to enforce the lien; but the statute giving a lien on logs expressly declares that all the other forms and proceedings therein shall be the same as in ordinary actions of assumpsit. R. S., c. 91, § 42.

2. It is insisted that the attachment was invalid, because the officer went to a pile of logs containing three million, and undertook to attach six hundred thousand, without selecting or separating the portion attached from those which were not attached. It is a sufficient answer to this objection to say that there is no evidence that the officer undertook to attach a quantity less than the whole. The referee has found as a fact that all the logs were attached. True, the officer in his return, estimated the logs attached at six hundred thousand; but the fact is that he attached the whole pile, and the only error was one of judgment in estimating the amount in the pile. Such an error will not invalidate an attachment.

3. It is next insisted, if the whole pile was attached, that the attachment was invalid, because it included logs on which the plaintiff had performed no labor. It is true that more logs were attached than those upon which the plaintiff had performed labor. But this was because the Steam Mill company had so intermingled the logs on which the plaintiff had labored with other logs, all being marked alike, that the former could not be distinguished from the latter; and in such a case, it is not only the right, but it is the duty of the officer to attach the whole. It is conceded that such is the law when the intermingling is carelessly or fraudulently done. And we think it is equally true that such is the law when, without the consent of the plaintiff, the intermingling has been designedly done. So held in *Spofford* v. *True*, 33 Maine, 283, where the question was ably argued by counsel and fully considered by the court.

4. It is next claimed that if there was a valid attachment, it has been lost, because the officer did not take and retain possession of the logs, nor legally record his attachment. It is not denied that the officer recorded his attachment, but it is denied that he recorded it in the right place. It is claimed that it should have been recorded in the oldest adjoining town, instead of the plantation where the attachment was made. We think the attachment was properly recorded. Attachments made in towns are to be there recorded. R. S., c. 81, § 26. But the word "town," when used in a public statute, includes cities and plantations, unless otherwise expressed or implied. R. S., c. 1, § 6. Rule 17. We do not think it is otherwise expressed or implied in the statute providing for the recording of attachments. On the contrary, it seems to us that the same reasons exist for having attachments made in plantations there recorded, when the plantation is organized and has a clerk's office in which they can be recorded, as exist for having them recorded in the towns in which they are made. True, another provision in the same statute declares that when an attachment is made in an "unincorporated place," it shall be recorded in the oldest adjoining town in the county. But we do not think an organized plantation which has a clerk and other plantation officers, is an "unincorporated place," within the meaning of this statute. We think it refers to places in which there is no clerk or clerk's office in which attachments can be filed or recorded. Rangely Plantation is not such a "place." It is an organized plantation, having a clerk and other plantation officers, and we think attachments there made should be there recorded. The attachment in this case was there made, (the referee expressly so finds,) and it was there recorded; and it is the opinion of the court that it was properly recorded. Consequently, it is of no importance whether the officer took and retained possession of the logs attached or not; for the attachment, being legally recorded, would be valid without such possession. Still, it is a fact that the officer did take possession of the logs, (such possession as he could and the nature of the property would permit,) and, through the agency of a keeper, retained it, till he

was wrongfully deprived of it by the steam mill company. Such a dispossession of an officer does not dissolve an attachment. He may pursue the property and retake it by a writ of replevin, or he may maintain trespass or trover for its value. *Lovejoy* v. *Hutchins*, 23 Maine, 272; *Brownell* v. *Manchester*, 1 Pick. 232.

It is the opinion of the court that, upon the whole case as reported by the referee, the plaintiff is entitled to recover of the defendants, Williams and Parker, the sum of sixty-three dollars and thirty-one cents; and that he is entitled to a judgment against the logs attached on his writ, with costs, as awarded by the referee.

Judgment for plaintiff against Williams and Parker, and against the logs attached on his writ, sixty-three dollars and thirty-one cents with costs, as awarded by the referee.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

JOHN H. MITCHELL and others *vs.* WELLINGTON B. MORSE.

Franklin. Opinion August 6, 1885.

Will. Devise. Life-estate. Remainder.

A devise was in these words: "I give and devise to my wife, Sarah F. T. Mitchell, all the rest and residue of my real estate. But, on her decease, the remainder thereof, I give and devise to my said children, or their heirs respectively, to be divided in equal shares between them." *Held*, that the widow took an estate in fee simple, and that the devise over, of the remainder, was void.

ON REPORT.

Real action to recover the possession of certain premises in Chesterville.

The opinion states the material facts.

H. L. Whitcomb, for the plaintiffs.

The word "remainder," as used in the will, has a well settled legal signification, viz: "A remnant of an estate in land, depending upon a particular prior estate, created at the same time, and

by the same instrument, and limited to arise immediately on the termination of that estate, and not in abridgement of it." 4 Kent. Com. 197. "An estate limited to take effect and be enjoyed after another estate is ended." 2 Black. Com. 163, 164.

But if the testator meant by the word "remainder" what part of the estate the widow should not convey in her lifetime, then we say, the true interpretation is that part of the estate which she could not legally sell for the payment of legacies and debts. *Hamilton* v. *Wentworth*, 58 Maine, 101; *Pratt* v. *Leadbetter*, 38 Maine, 9; *Stevens* v. *Winship*, 1 Pick, 318; *Larned* v. *Bridge*, 17 Pick. 339.

S. Clifford Belcher, for the defendant.

WALTON, J. This is a real action, and the only question is whether John Mitchell, by his last will and testament, gave his wife a fee simple estate in the demanded premises, or only an estate for life.

It is the opinion of the court that he gave her a fee simple estate. A devise of real estate without words of limitation vests in the devisee an estate in fee simple; and this result is not defeated by a devise over of the remainder. If a life estate only is given, a devise over of the remainder is good. But when by the terms of the devise an estate in fee simple is given, the addition of a devise over of a remainder is void, because, the whole estate having already been disposed of, there is nothing for it to act upon. The argument usually urged against this conclusion is that the devise over ought to be allowed to cut down or reduce the estate previously given to a life estate, upon the ground that such must have been the intention of the devisor. And in a few cases this argument has prevailed. But in a large majority of the cases, both in England and in this country, it is held that a mere devise over of a remainder, will not cut down the estate given to the first taker. *Jones* v. *Bacon*, 68 Maine, 34; *Stuart* v. *Walker*, 72 Maine, 145.

In this case, the testator first gives a few small legacies to his children. He then gives the residue of his personal property to

his wife. He then declares that if the personal property is not sufficient to pay the legacies and the expenses of his last sickness, enough of his real estate may be sold to supply the deficiency. He then adds this clause:

"I give and devise to my wife, Sarah F. T. Mitchell, all the rest and residue of my real estate. But, on her decease, the remainder thereof, I give and devise to my said children, or their heirs respectively, to be divided in equal shares between them."

It will be noticed that in this devise there are no words of limitation. The gift is direct, positive, and absolute. And but for the devise over of a remainder, no one would doubt that under our statute (R. S., c. 74, § 16) the terms used are sufficient to convey an estate in fee simple. The devise over is also direct and simple. It has no qualifying words or conditions whatever annexed to it. We thus have, first, a devise of a fee simple estate, and then a devise over of a remainder. The two can not co-exist. It is settled law in this state, as will be seen by the cases cited, that the latter must yield. The question is *res judicata* in this state, and will not be further discussed here.

The plaintiffs are the children mentioned in the secondary devise. The defendant has a warranty-deed from the primary devisee. His is the better title.

Judgment for defendant.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

HUMPHREY P. THOMPSON and another

vs.

JAMES T. REED and trustees.

Sagadahoc. Opinion August 6, 1885.

Trustee process. Assignment of funds. Claimant of funds.

If the assignee of funds trusteed appears, upon notice, and claims the funds, and is examined as a witness, it is his duty to state fully and clearly the circumstances connected with the assignment, and the consideration for which it was made; and if he refuses to do so, and gives only vague, indefinite and sweeping answers, his claim may be justly viewed with suspicion and declared invalid.

ON REPORT.

Assumpsit on a promissory note. The case has been once before considered by the law court and is reported in 75 Maine, 407. The question presented by the present report relates to the charging of the alleged trustess. The trustees are the executors of the will of Thomas M. Reed, late of Bath, deceased. The principal defendant had a legacy in the will of one thousand dollars. The trustees disclosed an assignment made by the defendant to Henry D. Manson of New York. Notice was ordered on the assignee and he appeared by counsel and claimed the funds in the possession of the trustees. Other material facts are stated in the opinion.

William L. Putnam, for the plaintiffs.

C. W. Larrabee, for the trustees and claimant.

We have the evidence of the assignment, and the reason why it was made, more than twenty days before the service of plaintiff's writ on the executors. So far, the evidence is conclusive of the sale and transfer, as valid, between the parties in New York.

The *situs* of the claim is where the owner is. A contract, valid by the law of the place where the owner is, is valid everywhere. 2 Kent. 454. Plaintiff in foreign attachment has no more nor better rights than his debtor. The court of one state is bound to give the same effect to the assignment as it has in the state where made. (Story's Conflict of Laws, § 397.) If James T. Reed had sold and assigned his interest in his uncle's estate on the 20th day of April, 1882, the executors had no rights or property in their hands belonging to him on the 12th of May following, and they should be discharged. Whatever the consideration was, it was a valuable one. The assignment was valid and binding on the assignor. It transferred his property rights. He had no further claim on the executors, and a payment by them to assignee would have been conclusive.

In essence, the case is not materially different from where a workman anticipates his wages to be earned, by assigning them for the benefit of his family. See *Taylor* v. *Lynch*, 5 Gray, 49. Also *Emery* v. *Lawrence*, 8 Cushing, 151, where the

assignment was for "monies previously advanced, and to be advanced," and was held good. *Brackett* v. *Blake*, 7 Met. 335; *Weed* v. *Jewett*, 2 Met. 608. In the last case, letters of attorney, with the addition "this is an assignment," were held good to convey not only the money earned, but the future wages of the constituent debtor.

There was no occasion for Manson to keep account with defendant. The facts in *Whitney* v. *Kelly*, 67 Maine, 377, cited by plaintiff, are entirely different from those in the case at the bar.

WALTON, J. This is a trustee suit. The fund attached is a legacy of a thousand dollars given to the defendant by the will of his uncle. The executors disclose an assignment of the legacy and the assignee has become a party to the suit for the purpose of sustaining his claim. Our conclusion is that the claim is not sustained. A just regard for the rights of creditors requires trustees to make full, true, and explicit answers to all questions propounded to them touching their indebtedness to the principal defendant in the suit. And the same rule applies to assignees who claim the funds sought to be held by the attachment. If examined as a witness, it is the duty of an assignee to state fully and clearly the circumstances connected with the assignment, and the consideration for which it was made; and if he refuses to do so, and gives only vague, indefinite, and sweeping answers, his claim may be justly viewed with suspicion and declared invalid. *Barker* v. *Osborne*, 71 Maine, 69.

In this case, the assignee has not complied with this rule. In fact, it would be difficult to conceive of answers more indefinite and unsatisfactory. Being asked what the real consideration for the assignment to him was, he answered. "security and gift; I was advised the seal was sufficient consideration at the time." Being asked if he actually paid any value for the assignment, and if so, what and how much, he answered. "Extended favors before and after the assignment." Being asked how they were able to fix a value upon the defendant's interest in his uncle's estate before the will had been probated, he answered, "security

and gift." Being asked to state what part of the consideration had been restored to him, and to give the dates and amounts, and all other details, he answered, "been returned and others advanced; it is a running security." Being asked what his then actual interest under the assignment was, and to explain it in full, he answered, "security and gift of the whole."

The claimant was twice examined through a commissioner appointed by the court; but all his answers upon every material point where equally evasive, vague and, indefinite. "Security and gift" was all the information that could be obtained in relation to the purpose and consideration of the assignment, except that in one of his answers he says that he was "advised" that the seal was sufficient consideration. Why he was so "advised" is not stated; but the inference which naturally suggests itself is not favorable to the honesty of the claim. A contract or promise under seal may be binding upon the parties to it without proof of any other consideration than that which the seal imports; but when an assignment or a conveyance is attacked upon the ground that it was made to defraud creditors, the fact that the instrument by which it was made has a seal upon it is of no significance. Such assignments or conveyances are quite as likely to be made by instruments under seal as by instruments not having a seal upon them. When the honesty of the transaction is in issue, the seal has no significance. "Security and gift." The absurdity of this answer, by which it is claimed that the assignment was in part at least a gift, will appear when it is contrasted with the letter of the defendant to the executors, which is made a part of their disclosure. The defendant there states that it had become necessary for him to realize the small benefit provided for him in his uncle's will, and had therefore transferred, not only the bequest of one thousand dollars, but also all his interest in said estate, to Harry D. Manson, "who had kindly aided him to anticipate the receipt of said bequest," and the writer expressed his hope that the executors would soon be able to reimburse his friend for his kind accommodation. Surely, so far as the transfer was a gift, and so far as it was security for past "favors" (as stated in answer to interrogatory 8,) the

willingness of his friend to accept it was not of a very extraordinary character. And, for aught that appears in the answers of the assignee, the security may have been to the extent of only one dollar, while the gift was of the remaining nine hundred and ninety-nine, with the defendant's contingent interest in his uncle's estate thrown in.

This case strongly resembles the case of *Barker* v. *Osborne and trustee*, 71 Maine, 69, already cited. In that case property, presumably worth twelve thousand dollars, had been assigned to the trustee, as he claimed, partly in payment of a debt owing to him, and partly as a gift; and he asserted over and over again that he was the absolute owner of the property; but the court held that such doubtful, indefinite, and sweeping statements, could not be allowed to supply the omission of details and particulars, and charged him. In this case, the answers of the assignee are more "doubtful, indefinite, and sweeping," than the answers of the assignee in that case; and they are not such as a just regard for the rights of the plaintiff required him to make. They are such as would be likely to come from a fraudulent transferee of property; but they are not such as would be likely to come from an honest one.

Assignee's claim adjudged invalid.
Trustees charged for $1000.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

GEORGE L. SNOW *vs.* LEANDER WEEKS.

Knox. Opinion August 6, 1885.

Taxes. Interest. R. S., 1871, c. 6, § 93. Stat. 1876, c. 92.

Without a distinct vote determining when taxes should be payable, the payment of interest on taxes cannot lawfully be enforced. A vote declaring that interest shall be collected after a time named is not sufficient, under R. S., 1871, c. 6, § 93 and stat. 1876, c. 92.

As treasurer and collector of taxes, who issues his warrant to the sheriff, or his deputy, for the collection of a tax, "with interest thereon" from a date named, is liable in damages to the person arrested upon such warrant, if the payment of interest could not be lawfully enforced.

ON REPORT. The case has once before been at the law court and is reported 75 Maine, 105.

Trespass against the treasurer and collector of taxes for the city of Rockland. The opinion states the material facts. The report provided that if the plaintiff was entitled to recover, the defendant should be defaulted and the damages be assessed by a jury.

A. P. Gould, for the plaintiff.

D. N. Mortland, for the defendant.

The opening clause of the stat. 1876, c. 92: "Whenever a city or town has fixed a time," etc., was simply an introductory phrase, to be followed by the gist of the matter — the rate per cent. of interest to be charged. The stat. was loosely drafted, and when taken in connection with R. S., 1871, c. 6, § 93, as it then stood, shows plainly that it was passed merely to regulate the rate per cent. of interest and nothing more.

It is obvious that one vote, declaring that after a certain time interest shall be charged at a given rate, is all that the statutes require. That is the construction the legislature itself has placed on these statutes. See R. S., 1883, c. 6, § § 120, 121.

To hold that two votes are necessary would be to declare that nine-tenths, if not all the towns in the state, have illegally charged interest and collected it by distress on property, or arrest of the person, and thereby subject them to innumerable actions at law similar to this now before the court. It would be a dangerous precedent to establish, and one that would make it extremely difficult to find men who would be willing to take the risk attending upon any town office, if this court should hold that town officers must at their peril construe a statute which is so blind that the legislative committee on revision of the statute, composed of eleven of the ablest lawyers of this state, failed properly to interpret.

"The law seeks to uphold official acts. In all reasonable cases, it presumes that officials have acted legally. It affords ample aid and encouragement to an official who is honestly endeavoring to execute a public trust." *Snow* v. *Weeks*, 75 Maine, 105.

Counsel further cited: *Caldwell* v. *Hawkins*, 40 Maine, 528; *Judkins* v. *Reed*, 48 Maine, 386; *Bethel* v. *Mason*, 55 Maine,

503; *Ford* v. *Clough*, 8 Maine, 342; *Kingsley* v. *Hall*, 9 N. H. 190; *Erskine* v. *Hornbach*, 14 Wall. 613; *Nowell* v. *Tripp*, 61 Maine, 431; *Seekins* v. *Goodale*, 61 Maine, 404.

WALTON, J. The plaintiff, having been arrested on a warrant issued by the defendant, as treasurer and collector of taxes of the city of Rockland, claims that the arrest was illegal, and brings this action to recover the damages which he says he thereby sustained.

The city counsel of Rockland had voted that the collector be instructed to allow a discount of eight per cent on all taxes paid during the month of August, and four per cent on all taxes paid during the month of September, and that, "on all taxes unpaid after the last day of December, interest must be collected." But there was no distinct vote by the city council determining when the taxes should be payable; and the question is whether without such a vote, the payment of interest could lawfully be enforced. We think it could not. The statutes authorizing the collection of interest are explicit, and make it a condition precedent, that the town or city shall first fix the time when the taxes are payable.

The Revised Statutes of 1871, c. 6, § 93, declare that "towns, at their annual meetings, may determine when their taxes shall be payable, and that interest shall be collected after that time," and the act of 1876, c. 92, extending this power in terms to cities as well as towns, and limiting the amount of interest, declares that "whenever a city or town has fixed a time within which taxes assessed therein shall be paid, such city, by its city council, and such town, at the meeting when money is appropriated or raised, may vote that on all taxes remaining unpaid after a certain time, interest shall be paid at a specified rate, not exceeding one per centum per month; and the interest accruing under such vote or votes, shall be added to and be a part of such taxes."

We think it is clear that under a fair interpretation of these statutes, a compulsatory collection of interest can not be justified, without a definite and distinct vote fixing the time when the taxes are payable. A vote declaring that interest shall be

collected after a certain time named, is not sufficient. Interest may, and generally does, commence to run before the principal is payable; and a vote declaring when interest shall commence, is by no means equivalent to a vote fixing a time when the principal shall be payable.

Such being the law, we are forced to the conclusion that the warrant issued by the defendant for the arrest of the plaintiff, was illegal. It directed the sheriff or his deputy to collect interest, as well as the principal, remaining due upon the plaintiff's taxes. We think an arrest upon such a warrant would be an actionable wrong. No justification is found in the defendant's warrant from the assessors, for that did not direct him to collect interest. It directed him to collect the taxes actually assessed, but it did not direct him to collect interest. It made no mention of interest. And no justification is found in the vote of the city council, for that is defective and insufficient upon its face. If the warrant from the assessors had contained such a recital of facts as would justify a collection of interest, and also a direction to the defendant to collect interest, then, being an instrument legal upon its face, and coming from competent authority, the defendant could justify under it, although the recitals were not in fact true. But the warrant from the assessors to the defendant contained no such recitals, and the principle invoked in his defense, and the authorities cited in support of it, do not apply.

When this case was before the law court on a former occasion, the court held that inasmuch as the warrant which the defendant issued to the sheriff contained an averment of a vote by the city of Rockland, fixing a time when its taxes should be payable, this averment should be deemed to be true, unless the contrary should be proved. In other words, that such a recital by a sworn officer is *prima facie* evidence of the fact. But the contrary is now proved. An inspection of the city records, and the testimony of the clerk, show that no such vote was passed. Consequently, the averment must be disregarded, and the truth allowed to prevail.

The result is that the defendant must be defaulted, and the damages assessed by a jury, as agreed in the report.

Defendant to be defaulted. Damages to be assessed by a jury.

DANFORTH, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

PETERS, C. J., did not concur.

GEORGE C. BRAGDON *vs.* CHARLES B. HATCH and another.

York. Opinion August 6, 1885.

Forcible entry and detainer. Mortgages. Foreclosure. R. S., c. 90, § 5, cl. 2.

A mortgagee, before foreclosure, cannot maintain forcible entry and detainer against the mortgagor, or those claiming under him.

Evidence that a notice of foreclosure was published in a newspaper "published" in the county, is not a sufficient compliance with the statute requiring such notice to be published in a newspaper "printed" in the county.

R. S., c. 90, § 5, cl. 2, makes the certificate of the register of deeds *prima facie* evidence of the publication of a notice of foreclosure; the certificate of the mortgagee is not competent evidence of such publication.

ON REPORT.

Forcible entry and detainer commenced in the municipal court of Biddeford and brought to this court on the pleadings.

The plaintiff claims title from a mortgage by Alice E. Hatch to William G. Getchell, dated February 6, 1879, which Getchell proceeded to foreclose March 1, 1882. The mortgage contained the one year foreclosure clause. April 16, 1883, Getchell conveyed the premises by warranty deed to the plaintiff. The defendants are the children and sole heirs of Alice E. Hatch, who had deceased. The only evidence of the foreclosure of the Hatch mortgage is stated in the opinion.

Nathaniel Hobbs, for the plaintiff.

Bourne and Son, for the defendants.

WALTON, J. A mortgagee's title will not support a complaint for forcible entry and detainer against the mortgagor, or those

claiming under him, unless the mortgage has been foreclosed. *Jewett* v. *Mitchell*, 72 Maine, 28, and cases there cited.

The evidence of foreclosure in this case is not sufficient. The only evidence of the facts necessary to constitute a foreclosure, is a certificate of the mortgagee. He certifies that he published a notice of foreclosure in the Sanford Weekly News, *published* weekly in Sanford, in said county; but he does not say that the Weekly News was *printed* in Sanford, or within the county. In *Blake* v. *Dennett*, 49 Maine, 102, such a certificate was held to be defective; for the statute requires the notice to be published in a newspaper *printed* in the county; and a newspaper may be published in a county, and yet not be printed there; and when the foreclosure of a mortgage is claimed, a strict compliance with the provisions of the statute must be shown.

Besides, we do not think a certificate of the mortgagee is competent evidence. The act of 1849, c. 105, (R. S., c. 90, § 5, clause 2,) makes the certificate of the register of deeds *prima facie* evidence of the publication of a notice of foreclosure; but there is no statute or rule of evidence that makes the certificate of the mortgagee evidence of the fact; and we think it is not competent evidence.

Judgment for defendants.

VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

PETERS, C. J., concurred in the result.

JOANNA WOODS *vs.* MARY ANN WOODS.

Kennebec. Opinion August 6, 1885.

Dower.

A married woman received from her husband one thousand dollars and some other property, in consideration of which she agreed in writing, under her hand and seal, that the property so received should be in full discharge of all claim, right or interest, upon him and upon his property, for her support and maintenance, by way of dower, or otherwise. *Held*, the husband having died, that the agreement was a bar to the widow's right of dower in his estate.

ON REPORT.

Action of dower. The following is the agreement referred to in the opinion:

[Agreement.]

"U. S. revenue Stamp, 5 cents. Whereas, a libel for divorce from bed and board, Joanna Woods, Libellant, *vs.* her husband, Samuel Woods, is now pending in the Supreme Judicial Court, Kennebec County. It is hereby agreed between said Samuel Woods and Joanna Woods, as follow: 1. Said Samuel Woods has deposited in the hands of Samuel Titcomb, one thousand dollars, for the use and benefit of said Joanna Woods. 2. Said Samuel Woods also agrees to deliver to said Joanna Woods, the cow selected by her. 3. Four good sound sheep to be selected from his flock by William Stone, Jr., if either of said parties shall require it. 4. The beds, bedding and all household furniture now in the house occupied by her. 5. All firewood now at the door of, and in said house for the same. 6. One barrel of good flour. 7. One good sound ham of bacon. 8. To allow said Joanna to occupy the house she now lives in for the term of not exceeding two months. 9. To keep said sheep and cow one week without charge. 10. To pay the Colburn and Faught debt.

"Said Joanna, hereby agrees to receive the above property under the above named conditions in full discharge of all claim, right or interest upon said Samuel Woods, and upon his property for her support and maintenance by way of dower or otherwise. And it is hereby further agreed, that by consent of said court, the prayer of said libel shall be granted, and a decree, pursuant to the above agreement shall be made by said court, at the next August term of said court, and that each party shall pay their own costs of court respectively, in said court."

"Dated at Augusta, this 19th day of April, 1864.

"Attest: S. T. Mrs. Joanna Woods. [Seal.]"

"Received the one thousand dollars, and all the specific articles named in the above agreement, and I hereby acknowledge the full and complete performance of the said agreement in all respects, on the part of the said Samuel Woods.

"Attest: S. T. Mrs. Joanna Woods. [Seal.]"

S. and L. Titcomb, for the plaintiff.

A *feme covert* cannot bar her right of dower by any release

made to the husband during coverture. *Rowe* v. *Hamilton*, 3 Maine, 63; *Shaw* v. *Russ*, 14 Maine, 432; *Vance* v. *Vance*, 21 Maine, 371; *Carson* v. *Murray*, 3 Paige, 483; *Martin* v. *Martin*, 22 Ala. 86; *Townsend* v. *Townsend*, 36 Barbour, 410; 2 Scribner on Dower, 290; *Townsend* v. *Townsend*, 2 Sandf. 711; *Walsh* v. *Kelley*, 34 Pa. St. 84.

If the agreement could be construed as a jointure or pecuniary provision made after marriage with the same effect under § 9, c. 103, R. S., as is provided by § 8, (and clearly it cannot be so construed) it would be no bar because the agreement is not and does not purport to be a "freehold estate in lands for the life of the wife to take effect immediately on the husband's death," as provided by § 7, nor is it such jointure or provision made after marriage, as provided by § 9, as would require any waiver or election within six months relative to the provisions of a will in which no negotiation of or provision for the wife is made.

The pecuniary provision as provided by § 8 must be instead of dower and consented to as provided in § 7, and by § 7 the provision must be by jointure consisting of a freehold estate in land for the life of the wife at least, and "she must express her consent by becoming a party to the conveyance" and the jointure or provision by § 9 must be "such" as the prior sections prescribe.

Neither of these three sections in terms or by implication contains the essential and requisite elements to constitute a bar.

The agreement of the demandant is not a jointure — is not a conveyance to which she has become a party, is not "such" a pecuniary provision consented to by her — and is not to take effect immediately on the husband's death.

It is simply an agreement between husband and wife during coverture for her partial support. It does not affect the rights of the wife at common law and these rights under the agreement are not changed by statute.

G. C. Vose, for the defendant, cited: *French* v. *Peters*, 33 Maine, 396; *Littlefield* v. *Paul*, 69 Maine, 527.

WALTON, J. A married woman may be barred of dower in her husband's lands by a pecuniary provision made for her

instead of dower with her consent; and without her consent, unless within six months after her husband's death she waives such provision, and files the same in writing in the probate office. R. S., c. 103, § § 7, 8, 9.

In this case, while her husband was alive, the plaintiff received from him one thousand dollars in money, and some other property, in consideration of which she agreed in writing, under her hand and seal, that the property so received should be in full discharge of all claim, right or interest upon him and upon his property, for her support and maintenance, by way of dower or otherwise. Her husband is now dead, and the question is whether this agreement bars her right to dower. We think it does. That her husband intended that the provision so made for her should be in lieu of dower, and that she deliberately and advisedly accepted it as such, there can be no doubt. The express wording of the agreement will admit of no other interpretation. We think she must abide by the agreement she then made.

Judgment for defendant.

PETERS, C. J., DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

WESTBROOK MANUFACTURING COMPANY

vs.

LEWIS P. WARREN and others.

Cumberland. Opinion August 6, 1885.

Waters. Mill owners. Irreparable injury. Injunction.

A bill in equity by one mill owner to enjoin other mill owners, upon the opposite side of the stream at the same power, from using more than one-half of the water, complained that the defendants had, within ten days, commenced to use, and were continuing to use, and threatening to use in the future more water than they were lawfully entitled to, thereby depriving the plaintiff of sufficient water to run its mill, some portions of which had to be shut down throwing out of employment some two hundred persons. *Held*, that the injury claimed did not appear to be of that permanent or irreparable character necessary to justify or require the interposition of a court of equity by way of injunction. *Held* further, that the bill, charging that all the defendants together used more than one-half of the water, and not stating which of

the defendants was using more water than he was entitled to, is too indefinite and general in its averments to found a decree for an injunction upon.

On report of the presiding judge.

Bill in equity, heard on bill and demurrer.

(Averments of the bill.)

"And thereupon sayeth unto your honors: your orator is the owner and occupant of the shores and upland of the easterly side of the Presumpscot river, and of the easterly half of the bed of said river, and of one-half of the water and power of said river, at the upper falls, at Saccarappa, in said town of Westbrook, upon which easterly shore and easterly half of the bed of said river, there has been, as your orator is informed and believes, from time immemorial, a mill or mills, and a dam or dams, for the purpose of furnishing water power to said mill or mills; and which power has, as your orator is informed and believes, from time immemorial been used as appurtenant to said mill or mills; of which shore, bank, easterly half of the bed of said river, half of the water of said river, mill or mills, dam, water power, and the appurtenant use thereof, as aforesaid, have belonged and been enjoyed by your orator and its predecessors in title, from time immemorial; and your orator now owns, occupies and has upon said bank, a cotton mill operated and intended to be operated in connection with the dam aforesaid, and by the power aforesaid, and which can not be operated successfully, nor except at great expense disproportionate to and inconsistent with its successful operation, unless in connection with said dam and power, and unless your orator receives for the purpose of such operation, the half of the water and power of said river, to which your orator is entitled as aforesaid.

"And your orator further complaining, showeth unto your honors, that said mill has twelve thousand spindles, and the number of persons employed in and about said mill is about three hundred, and that your orator, by law and by right, is entitled to one-half of the flow, power and use of the water of said river, for the operation of said mill, and that your orator would be irremediably damaged and injured by deprivation of

the use of such share of said water and power, and would suffer thereby great damage in the operation of said mill, including loss of profits, diminution in the quantity and quality of goods manufactured, controversies with the persons employed in and about said mill, and other losses and injuries; and that such damages are of a kind not capable of being estimated, and for which adequate and complete compensation could not be recovered by any action at law.

"And your orator further complaining, showeth unto your honors, that the said Lewis, Charles H. Towle, John, Woodbury, Frank, Freedom, George, Charles F. Warren and William, and their agents, and servants, are owners and occupants of the westerly shore and bank of said river at the falls aforesaid, and are entitled, as such, to the use of one-half of the water and power of said river, and no more; and yet have lately, to wit, within ten days last past, commenced to use, and are now using, more than the said half of said power and water; and thereby on the twenty-first day of the current month, at about three o'clock, afternoon, they used and had used so much more than their share of said water and power, as to compel complainant to shut down the greater portion of the said mill, so that complainant, in consequence thereof, did shut down the greater portion of said mill, and was compelled to keep and did keep the same shut down, and was unable to run the same for the remainder of the day, and thereby threw out of employment about two hundred persons employed as aforesaid by your complainant in the mill aforesaid, to the great damage, loss and injury of the complainant.

"And your orator, further complaining, showeth unto your honors, that said Lewis, Freedom, Charles H. Towle, John, George, Charles L. Warren, William, Woodbury, and Frank, although requested to desist from using more than their share of water and power as aforesaid, refuse and decline to so desist, and threaten to continue, and are continuing, to use more than their said share; and have thus compelled complainant to shut down the greater part of its mill, in manner aforesaid, several times since said twenty-first day of November.

"And your orator further showeth unto your honors, that while your orator uses upon its side of the river and in connection with its own mill, only four (4) Knowlton wheels of sixty (60) inches diameter, three under twelve feet "head," and one under ten feet "head," the said owners and occupants of said west side of the river, their agents and servants, are using and running as aforesaid, in connection with their mills upon their side of said river, and for the purpose of using the water and power of the river at the falls aforesaid, one Knowlton wheel, sixty (60) inches in diameter, one Chase wheel, thirty-six (36) inches diameter, said two wheels being used by said Woodbury K. Dana and Frank J. Dana, in the mill owned by said George, Charles L. Warren, and William; also one Knowlton wheel, sixty (60) inches diameter, in use by said John W. Warren in the mill owned by said Lewis P. Warren; also one Tuttle wheel forty-eight (48) inches in diameter, in the mill occupied by said John W. Warren and Charles H. Towle, and owned by said Lewis P. Warren; also two (2) double Kidder saw mill wheels and two (2) small wheels in the mill occupied by said Freedom Meserve, and owned by said Lewis P. Warren, all of the above wheels being under twelve (12) feet head; that the owners and occupants of said west side of said river have been running, and threaten, and are continuing to run all or nearly all said wheels simultaneously; that said wheels so run on said west side of said river, when in operation together, draw and use more than twice as much water as the said wheels of your orator upon the east side of said river; and that the water of said river and power thereof, is not sufficient to drive all of said wheels, so run by said owners and occupants of said west side of said river, including those of your orator.

"And your orator, further complaining, showeth unto your honors, that it has several times requested said Lewis, Freedom, Charles H. Towle, John, George, Charles F. Warren, William, Woodbury, and Frank, to desist from the use of more than their share of the power and water aforesaid; but they neglect and refuse so to desist."

William L. Putnam for the plaintiff.

The complainant's right to enjoy one-half of the power of the stream, is alleged to have been in use from time immemorial, and under the demurrer is not disputed; and also that the respondents are using more than their share of the stream is to be taken as admitted.

The complainant sets out fully the nature of its mill, alleging that it is a cotton mill, operating twelve thousand spindles and employing about three hundred persons; and that it would be irremediably damaged and injured by diverting the use of its share of the water and power, and would "suffer thereby great damage in the operation of said mill, including loss of profits, diminution in the quantity and quality of goods manufactured, controversies with persons employed in and about said mill, and other losses and injuries; and that said damages are of a kind not capable of being estimated, and for which adequate and full compensation can not be recovered by any action at law."

Even without these allegations the court might well assume, from the nature of complainant's mill, that its regular operation for want of sufficient water would lead to results of the character set out in the bill, which cannot be estimated or covered by damages at law, and that such results would cause a very serious and irremediable injury to the owner of the mill.

In this respect the case is one eminently calling for the interposition of a court of equity, and of a class upon which the equity courts have looked with great favor. Angell on Water-courses, § 445.

Upon the demurrer defendants have no right to claim that there is any controversy whatever between the parties as to the right, or that anything remains except to prevent and remedy the injury, to do which successfully requires the admeasurement of the water and a proper division of it between the parties to the privilege, which is entirely beyond the power of a jury to accomplish.

If driven to law, the verdict of a jury would establish no right, because upon the pleadings the right is admitted, but would only assess damages for an injury to the right, thus leaving a verdict which would in no way enable the parties to make a

proper division of the water, while a court of equity with the aid of a master could, among all the wheels run by the respondents, ascertain and determine to what extent and at what times each of the respondents could run their several wheels, and how many of them they could run together.

There is all the necessity of taking this case from the jury and sending it to a master that there is for settling, according to the practice of the English chancery, general averages upon marine losses or any other matters requiring nice and complicated computations.

Indeed upon the admitted allegations of the bill, and we believe this will be found to be the same when the answer and proofs are in, this is nothing more than a case of equitable partition of water; and the question is not one of right, but of adjustment and division of admitted rights.

In *Ballou* v. *Hopkinton*, 4 Gray, p. 324, Chief Justice SHAW says on p. 328: "In regulating the rights of mill owners and all others in the use of a stream wherein numbers of persons are interested, equity is able by one decree to regulate their respective rights, to fix the time and manner in which water may be drawn and within what limits it shall or shall not be drawn by all parties respectively; and thus it is peculiarly adapted to the relief sought against such alleged nuisance and disturbance, and affords a more complete and adequate remedy than can be afforded by one or many suits at law."

In that case there had been no suit at law to establish the title, and so far as can be seen from the allegations of the bill, the nature of the threatened injury was the same as that of the case at bar to the extent that the complainants in each case were owners of mills for the manufacture of cotton goods; and the court fully considered the question of jurisdiction to proceed to an injunction in equity and sustained it.

Counsel further cited: Angell on Water-courses, § § 445, 447; *Burnham* v. *Kempton*, 44 N. H. 78; *Belknap* v. *Trimble*, 3 Paige, 601; *Olmstead* v. *Loomis*, 5 Seld. 423; *Lyon* v. *McLaughlin*, 32 Vt. 423; *Ranlet* v. *Cook*, 44 N. H. 512; *Bean* v. *Coleman*, 44 N. H. pp. 539 and 542; *Imperial Gas Light &*

Coke Company v. *Broadbent*, 7 House Lords Cases, *601; *Moor* v. *Veazie*, 31 Maine, 377; *Porter* v. *Witham*, 17 Maine, 294; *Van Bergen* v. *Van Bergen*, 3 Johns. Ch. R. 287; High Injunctions, (2 ed.) § 740; Gould Waters § § 506, 510; *Parker* v. *Winnipiseogee Lake Cotton and Woollen Co.* 2 Black, 551, in enumerating cases where the injury would be irreparable, names "loss of trade."

We presume, however, it will be claimed that the cases in this state sustain the demurrer. We desire to remark that none of them contained the element involved in this case unless it be *Jordan* v. *Woodward*, which we shall hereafter cite. That is, none of them relate to the practical measuring or adjusting of rights among co-tenants.

Jordan v. *Woodward*, 38 Maine, 424, as the facts appear in the opinion, we believe not to be in harmony with the law, nor indeed in harmony with the expressions contained in the opinion itself.

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

WALTON, J. We do not think the injunction prayed for in this case can be rightfully granted.

The unlawful diversion of the water of a stream is a nuisance, for which one thereby injured may maintain an action at law. And in some cases, such an invasion of one's right may be restrained by an injunction issued by a court of equity. But, as a general rule, a remedy by injunction is obtainable only when the right is clear, and the invasion of it, actual or threatened, is such as will result in permanent or irreparable injury. In all other cases the injured party must be content with such redress as is afforded by an action at law. The wrong complained of in this case is that the defendants had, within ten days, commenced to use, and were continuing to use, and threatening to use in the future, more water than they were lawfully entitled to; thereby depriving the plaintiffs of sufficient water to run their mill, and obliging them to shut down portions of it, and thus throwing out of employment some two hundred persons.

The injury claimed to have been thus received is considerable. But it does not appear to be of that permanent or irreparable character necessary to justify or require the interposition of a court of equity by way of injunction. It is not like the building of a dam or the digging of a ditch, by which the water would be permanently diverted from the plaintiffs' mill. It seems to be no more than a temporary invasion of the plaintiffs' right, and not likely to be continued, unless the defendants claim that they are entitled to the amount of water thus taken from the plaintiffs, in which case, the right should he tried and determined in an action at law before application is made for an injunction. *Denison Man. Co.* v. *Robinson Man. Co.* 74 Maine, 116; *Jordan* v. *Woodward*, 38 Maine, 423.

And there is another difficulty in this case. The defendants are not joint owners or occupants of the mills on the westerly side of the river; and, for aught that appears in the bill the wrong complained of may have been committed wholly by the owners or occupants of only one of these mills, the owners or occupants of the other mills being entirely innocent of using or threatening to use more water than they are lawfully entitled to. And yet the court has no means of distinguishing between the innocent and the guilty. The bill charges that all the defendants, in the aggregate, are using more than half the water in the river. But it does not charge that each one of them is using more than he is entitled to. The effect of such an averment is to make it certain that some one of the defendants is guilty of using more than his share of the water, but not that each and every one of them is. Consequently, if the court should grant the injunction prayed for, it is by no means certain that innocent parties might not be enjoined, and be required to pay a portion of the costs of the suit. Surely, the court ought not to be required to take such a risk as that. In this particular, it is the opinion of the court that the bill is too indefinite or general in its averments to found a decree for an injunction upon.

Demurrer sustained. Bill dismissed with costs.

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

HASKELL, J., having been of counsel did not sit.

BELFAST AND MOOSEHEAD LAKE RAILROAD COMPANY, in equity,

vs.

CITY OF BELFAST and others.

Waldo. Opinion August 6, 1885.

Railroads. Stock subscriptions. Preferred stockholders. "Net earnings." Dividends. Equity.

A railroad corporation, at its organization, adopted a by-law, that its net earnings should be divided semi-annually amongst its stockholders, first paying upon the preferred stock an amount per annum not exceeding six per cent. and then, if a surplus, as much upon the non-preferred stock, and dividing any remaining surplus amongst all stockholders alike. After this, preferred stock was subscribed for in general terms. *Held:* That the subscribers for preferred stock took their shares upon the conditions named in the by-law as a contract between themselves and the corporation.

There was a stipulation in the contract of subscription that there should be no assessment on shares until the full amount be subscribed sufficient to build the road, thereby avoiding the necessity of ever placing a mortgage upon it. But, without dissent by any party, debts were incurred and the road mortgaged, to obtain funds for its completion. *Held:* That this change in the policy of the company did not require that all such indebtedness should be paid before preferred dividends be declared.

The preferred stockholder is not a creditor; nor is a dividend guaranteed to him; he is entitled thereto by the by-law, provided there are net earnings; a deficiency of dividend for one year, for want of net earnings of that year, is not to be made up from the net earnings of another year; the by-law implies that all net earnings are to be wholly distributed each year.

The term "net earnings," in the by-law, means such as are applicable to dividends. These would be the gross receipts less the expenses of operating the road. and less also interest on such of the company's indebtedness as it is prudent and proper to keep in a permanent form, and less also any floating or temporary liabilities which good judgment would require to be presently paid, and less also an annual contribution to a sinking fund for the payment of debts, whenever expedient and proper to provide such a fund.

As a rule, officers of the corporation are the sole judges of the propriety of declaring dividends. But they are not allowed to act illegally, wantonly or oppressively. And when the right to a dividend is clear, and there are funds from which it can properly be made, a court of equity will compel the company to declare it.

The company was incorporated in 1867; completed the construction of its road in 1870, the same costing one million dollars; the stock subscriptions were about $650,000; it leased its road, in 1870, for fifty years, for $36,000 per annum, lessees assuming all expenses, taxes and risks during the term; at date of this bill, November, 1882, the company from its receipts of rent had

paid off $150,000 of floating indebtedness; owed $150,000 of bonded mortgage debt, contracted in 1870, maturing in 1890; owed the city of Belfast, its principal stockholder, $88,000 (about) for money borrowed in 1870, payable in November, 1885; and, after the payment of all interest due on its obligations, had about $37,000 money in hand. The road has not a prospect of earning more than its operating expenses after its lease expires in 1920. *Held*: That the directors would be justified in refusing to declare a dividend until there are means enough on hand with which to pay the debt to Belfast. And it is the opinion of the court that, after that, some reasonable provision should be made for the final extinguishment of the mortgage debt by reserving, for such purpose, in a sinking fund, a portion of the rent to be received, and dividing the balance among stockholders; renewing the debt or some portion of it when it becomes due in 1890; but assuring the payment of all indebtedness by or before the expiration of the lease.

ON REPORT.

Bill of interpleader against the city of Belfast and the other preferred stockholders of the plaintiff corporation.

An interlocutory decree was made, directing that the city of Belfast interplead with the other defendants, named in the bill; and that the case proceed upon the bill and answer of the city of Belfast, taken as a bill, and the answer of the other defendants, taken as an answer, the city of Belfast having, by its answer, substantially adopted the allegations of the bill.

The case was then reported to the law court on bill, answer and agreed statement.

The opinion states the facts.

Drummond and Drummond and *R. F. Dunton*, city solicitor, for the city of Belfast, cited: *Bates* v. *And. & Ken. R. R. Co.* 49 Maine, 491; *B. & M. L. R. R. Co.* v. *Unity*, 62 Maine, 148; *Revere* v. *Boston Copper Co.* 15 Pick. 363; *Lockhart* v. *Van Alstyne*, 31 Mich. 76; *Taft* v. *Railroad Co.* 8 R. I. 310; *Williston* v. *M. S. & N. I. R. Co.* 13 Allen, 400; *St. John* v. *Erie R'y Co.* 22 Wall. 136; *Union Pacific R. R. case*, 99 U. S. 402; *Sioux City & Pacific R. R. Co. in error* v. *United States*, decided in the United States Supreme Court, January 21, 1884.

Counsel concluded: We think we have established the following proposition:.

1. That the preferred stockholders are merely stockholders in the corporation and not creditors of the corporation, and, there-

fore, the rights of creditors to the property of the corporation are superior to the rights of the preferred stockholders as fully as they are superior to the rights of the common stockholders.

2. That as between the two classes of stockholders, the debt is a burden equally upon both classes; that neither can throw the burden of the debt upon the other; but that both must contribute to its payment.

3. That dividends can be made to the preferred stockholders only when they can be made to both classes, provided the net earnings are sufficient; that is to say, the preferred stockholders cannot have a dividend and at the same time require that the portion of the earnings which would go to the common stock if there was no debt, be applied to the payment of the debt.

4. That a dividend can be made from the net earnings only when there are net earnings which can properly be applied to a dividend on stock, without regard to whether it is preferred or non-preferred stock.

5. That the city as a holder of stock has a right to object to the claim of the preferred stockholders to have dividends made to them and the balance of the earnings carried to the sinking fund; and has the right to require that all the net earnings shall be carried to the sinking fund until the debt shall be paid.

II. But if the city has no right as a holder of common stock, to object to this claim of the preferred stockholders to have the net earnings paid to them in dividends, we hold that it has such right as a creditor.

We have already shown that all the net earnings will be required to make a fund sufficient to pay the debt of the city when it becomes due.

There can be no doubt that the city, as a creditor, has the right to be paid even though no dividends are paid; its rights as a creditor are superior to those of any stockholder as a stockholder. The city then has the right to resist the claim of the preferred stockholders, and to demand that the action of the directors, in making provision for the payment of the debt to the city when it matures, shall be sustained.

S. C. Strout, *H. W. Gage* and *F. S. Strout*, for the preferred stockholders, cited: *B. & M. Railroad* v. *Brooks*, 60 Maine, 577; *A. & M. Turnpike Corp.* v. *Gould*, 6 Mass. 40; *K. & P. R. R. Co.* v. *Kendall*, 31 Maine, 474; *B. & M. Railroad Co.* v. *Moore*, 60 Maine, 567; Am. L. Review, January, 1884, p. 50; *Taft* v. *H. P. & F. R. R. Co.* 8 R. I. 310; *Thompson* v. *Erie Railroad*, 42 How. (N. Y.) Pr. Rep. 93; *In re Bangor, &c. Slab Co.* L. R. 20 Eq. 59; *Burt* v. *Rattle*, 31 Ohio St. 116; *Davis* v. *Prop'rs Church in Lowell*, 8 Met. 321; *Lewey's I. R. R. Co.* v. *Bolton*, 48 Maine, 455; Redf. Railways, § 237; *March* v. *Eastern R. R. Co.* 43 N. H. 515; *Oldtown & L. R. R. Co.* v. *Veazie*, 39 Maine, 577; 2 Story's Eq. § 1231; *Nickals* v. *N. Y. L. E. & W. R. R.* 15 Fed. Rep. 579; *Union Pacific R. R.* v. *U. S.* 99 U. S. 496; *St. John* v. *Erie Ry.* 10 Blatch. 279; S. C. 22 Wall. 148; 31 Mich. 79; Morawetz, Corporations, § 405; *Henry* v. *Great Northern R. R.* 1 DeG. & J. 606; *Sturge* v. *Eastern Union R. R.* 7 DeG. M. & G. 158; *Williston* v. *Michigan Southern*, 13 Allen, 405; Green's Brice's *Ultra Vires*, 164, 173; *Bates* v. *And. R. R.* 49 Maine, 503; *Corry* v. *Londonderry R. R.* 29 Beav. 263, (30 L. J. (Ch.) 290); Jones, Railroad Securities, § 620 and cases; *Matthews* v. *Great Northern R. R.* 5 Jurist. N. S. 284; *Webb* v. *Earle*, 20 Law Rep. 556; *W. C. & P. R. R.* v. *Jackson*, 77 Pa. St. 325; 1 Lindley, Partnership, (2 ed.) 781; *Barnard* v. *Vt. & Mass. R. R.* 7 Allen, 521; *Pratt* v. *Pratt*, 33 Conn. 446.

Counsel concluded: We think we have established the right of the preferred stockholders to a six per cent dividend while the Maine Central lease is in force, and that they are entitled to a decree of this court, as prayed for in their answer that a semi-annual dividend of three per cent be paid from the rental received in November, 1882, now in possession of the corporation, and a like semi-annual dividend from the rental, as and when received by the corporation, pending said Maine Central lease and the existing indebtedness of the corporation, be borne and paid by the corporation, without burden upon the preferred stockholders.

PETERS, C. J. The plaintiffs were incorporated as a railroad company in 1867, the charter authorizing the issuing of preferred and non-preferred stock. The company was organized and by-laws were established prior to opening the books for the subscription of shares. The eighteenth by-law was this: "Dividends on the preferred stock shall first be made semi-annually from the net earnings of said road, not exceeding six per centum per annum, after which dividend, if there shall remain a surplus, a dividend shall be made upon the non-preferred stock up to a like per cent per annum; and should a surplus then remain of net earnings, after both of said dividends, in any one year, the same shall be divided *pro rata* on all the stock."

The first question is, whether those who subscribed for preferred stock became entitled to it according to the terms of the by-law. We have no doubt of it. There was nothing else anywhere to indicate what the preferred stock was to be. Subscribers merely agreed to take preferred stock, others subscribing for common stock. The by-law, or the terms stated in it, must be regarded as a part of the contract entered into by the corporation and the subscribers. The by-law describes and identifies the stock. *Davis* v. *Proprietors*, 8 Met. 321.

Other questions in the case are involved in the following facts: It appears that, in the early days of the enterprise, a policy was resolved upon to build the road wholly from subscriptions to stock. In the first place the city of Belfast, through its government, expressed its view that the construction of the road should not be commenced until stock enough should be subscribed to secure its completion, and that no mortgage should ever be put upon the road. After that, the railroad company, by its vote, committed itself to the same policy. And, after that vote, the company adopted this by-law: "Nor shall any assessment whatever be made upon any shares, or any portion thereof, until the full amount of the estimated cost of the road . . . shall have been subscribed by responsible parties in accordance with the rules and regulations of the directors," &c., &c. One of those rules, made a part of the subscription paper, reiterated the

idea before expressed, with these words added thereto, "thereby avoiding the necessity of any mortgage or encumbrance being ever contracted by this corporation."

Thereupon subscriptions were made for both kinds of stock. Without wading through the historical details which caused the departure, it is enough to say that the original theory of the company was not adhered to. Without the fault of the company, unforeseen exigencies arose, imperatively requiring a large amount of indebtedness to be created. The collected subscriptions amounted to $648,100; while the cost of the road exceeded a million dollars. Stock was issued for those shares in 1870, after fully paid for, and no other shares were ever issued. To avert the disaster that would have fallen upon them without it, the corporation was compelled to obtain means, to finish the construction of the road, in several ways. On May 15, 1870, a bonded indebtedness for $150,000 was created, payable in twenty years, with interest semi-annually, secured by mortgage upon the road. The company also borrowed of the city of Belfast, its principal stockholder, and gave its note therefor, dated November 16, 1871, the sum of $101,900, payable, with annual interest, on November 16, 1885. Besides these amounts, the company incurred a miscellaneous floating indebtedness of about $150,000 more. It being admitted that these debts were all legally incurred, a discussion of the difficulties which were encountered in obtaining the credits, would not be material to the issue.

In April, 1870, the company leased its road to the Maine Central Railroad Company for a term of fifty years, from May 10, 1870, at a rent of $36,000 per annum, payable one-half thereof on the tenth days of May and November, in each year during said term, the lessee to operate the road, keep it in repair, and pay all taxes assessed thereon. The road has been possessed and operated by the lessee ever since. When this lease terminates, it is not probable that the road will be able to earn much more, if anything, than its operating expenses. By means of the rent received, the company had paid off all of its floating or miscellaneous liabilities, and something on the city debt, so that on

November 10, 1882, after receiving the November rent, the financial standing of the company was substantially as follows: It owed $150,000 in bonds, maturing in May, 1890. It owed the city of Belfast $87,900. Its sinking fund amounted to $26,033.24. And it had in its possession $10,863, remaining after paying interest then due upon the note and bonds.

Out of the payments of rent received from November, 1878, to May, 1882, both inclusive, the company paid semi-annual dividends, of two and one-quarter per cent each, to the holders of the preferred stock, but paid nothing upon the common stock, and has refused to declare any further dividends. A dispute arising between the two classes of stockholders whether the preferred stockholders were entitled to any dividend from the surplus on hand of $10,863, this bill was filed in order to determine the question.

Upon these facts, affected somewhat by other incidental facts which will appear, the position is taken, by the counsel for the city, that the preferred stockholders, as between themselves and the common stockholders, are not entitled to any dividends until the entire indebtedness of the company is paid; that, inasmuch as the subscriptions to both classes of stock were made when the declared policy of the corporation was not to create a corporate debt, with the then full expectation by all parties that none would be created, and inasmuch as the debts were unavoidably incurred for the common benefit of all stockholders, the burden of removing the debts should be borne by all the shares alike, and not fall exclusively upon the common stock. The city contends that the favored class were to be preferred stockholders only upon the condition that there should be no debts, that there was an implied contract to that effect; or, if not a contract, that such a result is demanded by a natural and necessary equity which flows from the relation of the parties.

We think such a position is not tenable, as a claim either in law or equity. The subscribers must have known, if they reflected at all about it, that corporate indebtedness might become necessary in spite of the strongest pledges to the contrary. In fact, the twelfth by-law implies that debts might be incurred.

It is said that the holders of the preferred stock favored a bonded debt. But it was not upon any condition that they should surrender any right thereby. All stockholders favored it. There was no voice against it. If A has the first and B the second mortgage on a vessel, taking their securities at the same time, anticipating no disaster to the vessel, and a disaster comes, requiring a bottomry bond upon the property, the payment of such bond is not a burden common to the two mortgages. The illustration may not be inapt.

The main question of the case is whether, in November, 1882, the financial condition of the company was such that the preferred stockholder was then legally entitled to a dividend.

No such claim could have been made upon the ground that he is a creditor of the company; he is not such. Preferred stockholders, ordinarily, are not creditors. That is the common doctrine of the authorities. *Chaffee* v. *Railroad*, 55 Vt. 110, and numerous cases cited.

It was not intended in the present instance to guarantee a dividend. If a dividend is prevented in any one year by a deficit of earnings, it can not be made up from the earnings of succeeding years. A six per centum dividend is not assured by the contract of subscription. It may be less. The implication of the by-law is clear that there is to be no surplus of profits to be carried from one year to another. The net earnings are to be wholly distributed each year. The language of the by-law is really the language of the general law. It promises dividends whenever there are net earnings from which to make them.

The difficulty is in deciding what should be considered as net earnings; that is, net earnings such as are applicable to dividends. In a general sense, net earnings are the gross receipts less the expenses of operating the road to earn such receipts. But several kinds of charges must first come out of net earnings before dividends are declared. The creditor comes in for consideration before the stockholder. The property of a corporation is a trust fund pledged for the payment of its debts. Therefore, if there is a bonded, funded, permanent or standing debt, the interest on it must be reckoned out of net earnings. If there is a floating

debt, which it is not wise and prudent to place in the form of a funded debt, or to postpone for later payment, that should also be paid. If the financial situation of the company is such as to render it expedient to commence or continue the scheme of a sinking fund for the extinguishment of the company's indebtedness some day or other, an annual contribution out of the net earnings for that purpose would be reasonable. These deductions made from the net earnings, the balance will be the profits of the company distributable among stockholders. In Pierce on Railroads, 125, it is said: "The dividends on preferred stock are payable only out of net earnings which are applicable to the payment of dividends; and the interest on the bonded or other interest bearing debt, even though contracted after the issue of the preferred stock, and the rent upon leases made after the issue thereof, shall be first paid." The definition of net earnings, above given, is supported by the authorities. *Chaffee* v. *Railroad*, *supra*, and cases cited; *Taft* v. *Railroad*, 8 R. I. 310; *St. John* v. *Erie Railway Co.* 10 Blatch. 271; S. C. 22 Wall. 136; *Union Pacific R. R.* v. *United States*, 99 U. S. 496.

But it does not necessarily follow that debts should be first wholly paid, before a declaration of dividends, merely because they are of a floating character. It may be that it would be reasonable and proper to convert such liabilities into a funded debt. Nor does it follow that all of the income of a road may not be needed for the payment of its funded or standing debt. All depends upon the financial resources and abilities of the corporation and the prospects of its road. Where it can be safely done, considering the interests of the company's creditors and of all persons concerned, the general practice of railroads has been to include with expenses chargeable to capital those which are incurred in the original construction of the road. And the courts have admitted the reasonableness of the rule. The idea is that the capital paid in and the capital borrowed unitedly produce the earnings, and that a share of the same should be accorded to each. The distinction between expenses for construction and ordinary expenses is maintained in the leading cases. See cases *supra*. *Corry* v. *Railroad Co.* 29 Beav. 263;

Bouch v. *Railroad Co.* L. R. 4 Ex. Div. 133. *Mills* v. *Northern R. Co.* L. R. 5 Ch. App. 621; Pierce R. R. 125, and cases in notes. In the case last cited (*Mills* v. *Railroad Co.*) Lord HATHERLY, L. C., said, "Mr. Dickinson started a very curious theory, which, I apprehend, never found its way into any mercantile arrangement — that there never can be any available income, or any profit, so long as there is any debt remaining unpaid. If that be so, I suppose there is hardly a railway in the kingdom which could pay any dividends at all to their stockholders." "The whole scheme of railway arrangements, as I understand them, has always been this, that the companies are authorized to raise part of their capital by shares, and to raise further capital by means of borrowing to the amount of one-third of the whole capital."

In the case before us the company has no ordinary expenses beyond a small sum necessary to support its organization. What sum then shall be taken from its earnings to be paid to or be set aside for its creditors. One side says, all its earnings; and the other side says, set aside annually a sum which with accumulations will insure the payment of all the corporate indebtedness by 1920, the date of the end of the lease.

As a general rule, the officers of a corporation are the sole judges as to the propriety of declaring dividends, and the courts will not intefere with a proper exercise of their discretion. The company usually establishes its financial policy for itself. Yet when the right to a dividend is clear, and there are funds from which it can properly be made, a court of equity will interfere to compel the company to declare it. Directors are not allowed to use their power illegally, wantonly or oppressively. See cases *supra*. Also *Williston* v. *Railroad Co.* 13 Allen, 400; *Boardman* v. *Railroad*, 84 N. Y. 157; *Jermain* v. *Railroad*, 91 N. Y. 483. In the present case we are by all the parties invited to accept jurisdiction; the facts are agreed; and all technicalities are waived. We may adopt such a standard of judgment, in determining the question, as we think would and should regulate the exercise of the sound discretion of directors, acting in good faith, in deciding the same question. *Barnard* v. *Railroad*, 7 Allen, 512, 521.

Two facts are very much relied upon by the preferred stockholders as favoring their contention. One is an amendment to the 18th by-law, passed by the corporation in July, 1879, which is this: "The words 'net earnings,' as used in this section (by-laws), shall be construed to mean all the surplus remaining after the payment of the necessary incidental charges and expenses, the interest on the mortgage and funded debt, and such provision for payment of the maturing obligations of the corporation as in the judgment of the directors may be necessary; and for this latter purpose, the directors shall establish a sinking fund, to be maintained in such form and manner as they may deem for the best interest and safety of the corporation." This in 1882 was repealed.

The other fact is, that when the subscribers for preferred stock, not including the city of Belfast, paid their subscriptions, not being under strict legal obligation to do so, they were induced to make the payment, by the corporation securing to them semi-annual six per cent dividends, and the final payment of their stock, by means of bonds with coupons, covered by a second mortgage on the road, — which bonds and coupons were taken as collateral to the stock and dividends. This mortgage was, however, afterwards cancelled for prudential reasons and with the consent of all parties interested.

The counsel for the city contends that those proceedings, afterwards annulled, are to have no more effect upon the present question than if never existing. We do not concur in that position fully. We think as admissions, as expressions of a policy inaugurated and for a long time acted upon by the company, they serve to impress upon the claim of the preferred stockholders at least an appearance of equity.

After a full consideration of all the evidence and theories presented to us, we incline to the conclusion that the directors would be justified in refusing to make any further dividends, until enough money has been accumulated, from the rent and the sinking fund, to pay the note to the city of Belfast. When the company receives from its lessee the rent due in May, 1885, it will have money enough with which to pay the note, and a few thousands more.

There are quite significant reasons for drawing a line at the point indicated. The note may well be considered as given for temporary purposes, in anticipation of rents receivable. The company really has no credit which would enable it to renew the note, inasmuch as its outstanding mortgage covers all its property. It looks as if the note represents a sort of forced loan from the city, and as given for money that could not have been obtained from any other source, the city borrowing it for the purpose of loaning it, being induced to do so on account of her immense interests involved as a shareholder. She now asks for her money, being unwilling to renew the note, and she is entitled to its payment. The corporation would find it difficult to borrow it elsewhere. It would look like borrowing money to pay dividends.

There are much more forcible reasons for the corporation to hold its moneyed resources in reserve until the note to the city is paid than there are for afterwards continuing the same policy until the debt of $150,000, due in 1890, is paid. The two debts stand upon a different footing. The latter is a bonded mortgage debt, no part of which is due, and which undoubtedly can be wholly or partially renewed when it becomes due. It fairly represents a part of the original cost of constructing the road. The company has thirty-five years or more of assured rent with which it can pay the amount. It has no other debt, after paying the note to the city, present or prospective. It has evidently regarded that amount as a permanent or standing, interest bearing indebtedness. To renew the mortgage or a portion of it, when it becomes due, we think would be regarded in a mercantile sense as a reasonable, safe and conservative calculation. The preferred stockholders were to have semi-annual dividends, if earned. They should have them, if they can be declared without the least peril to the company or any of its creditors. Belfast herself owns all the preferred stock but about $100,000, there being over $380,000 of it in all. We think that, after the note is paid, the directors may well make some reasonable provision for the final extinguishment of the mortgage debt by reserving therefor a portion of the rent to be received under the lease, and divide the balance among stockholders.

A scheme could be perfected by an expert in such matters, by which there may be a yearly contribution to a sinking fund, which, with its accumulations, will discharge all the indebtedness within a reasonable time before the lease expires, and pay more or less dividends in the meantime; or, before or by the year 1890, a new bond could be put upon the market, a certain portion to be paid annually, such portion to be designated by lot or in some other way, which might accomplish the same end as effectually.

We need not be minute in any details inasmuch as our observations in this respect are not intended as anything more than illustration or argument. The bill commits to us power over only the sum of $10,863, which came from a payment of rent in November, 1882, and that sum, as already indicated, may properly be applied by the company upon its debt.

Under the circumstances of the case, no costs to be recovered by any party.

Decree according to the opinion.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

AMOS W. DOWNING and others

vs.

JOSEPH H. DEARBORN and others.

York. Opinion August 6, 1885.

Sales. Warranty. Caveat emptor.

A sale of leather by the manufacturer to a manufacturer of shoes for the specific purpose of being manufactured into shoes, carries an implied warranty, that the leather is sound, suited for the purpose for which it was bought.

The doctrine of *caveat emptor* does not apply when the defect is latent.

Such sale by a dealer carries the same warranty when a latent defect is known to and concealed by him. After such sale, when the defect becomes known, the purchaser may elect to sue for breach of warranty or for deceit, or may repudiate the sale and restore the articles purchased and reclaim the price paid.

ON REPORT.

The opinion states the case and material facts as found by the court.

Moody and Bartlett and *W. M. Bradley*, for the plaintiffs.

R. P. Tapley, for the defendants.

HASKELL, J. Assumpsit upon account annexed for goods sold and delivered. Plea, the general issue. The plaintiffs were manufacturers of various kinds of leather. The defendants were manufacturers of shoes, and had purchased of the plaintiffs leather to be so manufactured for a series of years. A current account had been kept between the parties running from September 15, 1880, to June 22, 1883, prior to the date of plaintiffs' writ in August of that year. It had been customary for the defendants to remit the amount of purchases as they fell due, and to receive credit for the same, and also credit for leather returned at various times, that was not suitable for their use. July 24, 1882, the defendants purchased of the plaintiffs a quantity of kid amounting to two thousand nine hundred twenty-one dollars and fifty-one cents, and subsequently remitted to the plaintiffs the full price thereof and received credit for the same. A part of this kid the defendants manufactured, but when put to the test of actual wear, it proved unsound and rotten, and unsuited for manufacture into shoes; thereupon the defendants returned the balance of the purchase, and demanded credit for the purchase money paid for the kid returned. Whether they are entitled to this credit comes before the court on report. The evidence touching the terms of the July purchase is conflicting, but it does appear, that the defendants believed, that they were purchasing sound leather, suited to manufacture into shoes, and that the plaintiffs well knew the use for which the purchase was made and sold the leather to be applied accordingly.

From the terms of the sale, the law implies a warranty, that the leather sold should be reasonably fit for the purposes for which it was bought. That is, that it should be sound, suited for shoes. *French* v. *Vining*, 102 Mass. 132; *Jones* v. *Just*, L. R. 3 Q. B. 197; *Hight* v. *Bacon*, 126 Mass. 11; *Pease* v. *Sabin*, 38 Vt. 432; *Jones* v. *Bright*, 5 Berg. 533.

If it be said that the doctrine of *caveat emptor* applies inasmuch as the defendants inspected the leather before purchase,

and have not shown that the plaintiffs manufactured it, it is sufficient to note, that it was sold for a specific use, and that the defect was latent and known to the plaintiffs and concealed by them from the defendants at the time the sale was made. Silence in such case was fraud.

When the latent defect became known to the defendants, they could elect, whether to retain the goods, and seek their remedy for breach of warranty, or for the deceit, or to repudiate the sale and restore the articles purchased. *Marston* v. *Knight*, 29 Maine, 341. They chose the latter course, and returned so much of the leather as had not been actually manufactured, and demanded credit for the purchase money. No objection is made that the leather was not seasonably returned, nor that all of it was not returned, so that these questions, need not be considered but are waived.

Although the plaintiffs have only sued such items in their account as accrued since the July purchase, yet as that purchase was repudiated in part before this suit was begun, leaving the price of the goods returned in the plaintiffs' hands, the defendants have a right to insist, that the same shall be applied in part payment of their account, and that judgment shall be entered against them for the balance only.

Judgment for plaintiffs for $367.04 with interest from June 2, 1883.

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

VIRGIN, J, concurred in the result.

GEORGE F. PLAISTED *vs.* WILSON M. WALKER.

York. Opinion August 6, 1885.

Practice. Demurrer. Amendment. Apothecary. R. S., c. 28.

At the first term the defendant demurred specially to the declaration which contained but one count. The demurrer was sustained, the declaration was adjudged bad and no exception was taken. Under leave to amend the plaintiff

filed fifty-two new counts which were allowed, and the defendant filed a new special demurrer. *Held:*

1. That the adjudication upon the first demurrer was final and conclusive as to the original count.
2. That the court had power to allow the amendment.
3. That the second demurrer applied to the new counts only.

An action of debt provided by R. S., c. 28, against one for engaging in the business of an apothecary, without having been granted a certificate and registration by the commissioners of pharmacy, is a local action, and the declaration must allege that the defendant thus engaged in such business for one week in some place in the county in which the action is brought.

On exception to the ruling of the court, in overruling the second demurrer mentioned in the head note.

The writ was dated February 25, 1884. *Ad damnum* $10,000.

[Original declaration.]

"In a plea of debt for that the said defendant at said York, on the first day of January, 1879, and on diverse days and times since said date and continuously hitherto, did engage in and carry on the business of an apothecary, and the said defendant was not then and there first examined by the commissioners of pharmacy for the state of Maine, and then and there did not first present to the said commissioners satisfactory evidence that he had been an apprentice, or that he had been employed in an apothecary store where physicians' prescriptions were compounded, at least three years, or that he had graduated from some regularly established medical school or college of pharmacy, and that he was competent for the business, and the said commissioners then and there did not first grant to him the certificate and registration required by law, and the said defendant then and there was not a physician putting up his own prescriptions and then and there the sales made by said defendant in the course of the said business were other than sales of proprietary medicines, and the said defendant was not engaged in said business on the ninth day of February, 1877, nor within thirty days of the date of the dissolution of the session of the legislature for the year 1877, contrary to the form of the statute in this case made and provided, whereby an action hath accrued to the plaintiff to have and recover to his own use the sum of fifty

dollars for each week since said first day of January, 1879, during which the defendant did so continue in such business which the plaintiff avers was for and during each and every week since said last mentioned date hitherto.

"Yet the said defendant, though requested, has not paid the same, but neglects so to do."

[One of the fifty-two new counts of the amended declaration.]

"Also for that said defendant, at said York, on the 25th day of February, 1883, did engage in and carry on the business of an apothecary, then and there, not having been granted a certificate and registration by the commissioners of pharmacy, as provided by law, and not having been engaged in said business on the eleventh day of March, 1877, and not being a physician putting up his own prescriptions, and said business being other than the sale of proprietary medicines, and did continue so to engage in and carry on said business for and during the week beginning on the day first above mentioned and ending on the third day of March, 1883, contrary to the form of the statute in this case made and provided, whereby an action hath accrued to the plaintiff to have and recover to his own use the sum of fifty dollars."

G. C. Yeaton, for the plaintiff.

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

LIBBEY, J. The declaration originally contained one count to which the defendant demurred specially at the first term. The demurrer was sustained and the declaration adjudged bad, and no exception was taken. This adjudication is final and conclusive as to that count. R. S., c. 82, § 23.

The plaintiff had leave to amend and filed fifty-two new counts. Exceptions were taken to the allowance of these amendments, but we think the court had power to allow them. The original count was not amended. The defendant again filed a special demurrer. It must be confined to the new counts. *Bean* v. *Ayers*, 69 Maine, 122.

The new counts are all alike except as to the time covered by each. The action is brought to recover the penalties alleged to have been incurred by the defendant for violation of the act of 1877, c. 204 (R. S., c. 28). By R. S., c. 81, § 14, the action is local and the declaration must allege that the offence was committed in the county where it is brought. The penalty is incurred by engaging and continuing in the business of an apothecary one week. The declaration should allege that the defendant continued the business at some place in the county of York at least one week. This is material and cannot be left to inference. The new counts do not so allege. They merely allege that the defendant "at said York, did engage in and carry on the business of an apothecary, then and there not having been granted a certificate and registration by the commissioners of pharmacy . . . and did continue so to engage in and carry on said business for and during the week," &c. Here is no allegation that the defendant continued to carry on the business at said York for the week named. The word "so" must be held to refer to the *manner* of carrying on the business, and not to the *place* where it was carried on. For this reason the declaration is bad.

Other questions are raised by the demurrer, but we do not deem it necessary nor important to consider them.

Whether the furtherance of justice will require that the plaintiff shall be allowed to further amend his declaration, if he shall ask it, must be determined by the court at *nisi prius*.

Exceptions sustained. Demurrer sustained.
Declaration bad.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

CHARLES E. GOODWIN *vs.* CITY OF BATH.

York. Opinion August 6, 1885.

Municipal bonds. Coupons. Discrepancy.

In case of a discrepancy in the amount of interest named in a bond and coupon attached, the amount named in the bond controls.

The holder of such coupon, after its severance from the bond, cannot recover

the sum named in the coupon, if larger than that named in the bond as the interest, without showing that he or some prior holder of the severed coupon, acquired the same in good faith, before maturity and without notice of the error.

On report of facts agreed.

Assumpsit on the following coupon:

CITY OF BATH

BOND No. 77 LOAN COUPON No. 44

THE CITY OF BATH will pay Thirty Dollars on this Coupon on the 1 day of *Jan'y, 1883*, in Boston.

$ 3. A. R. MITCHELL, Treasurer

The plaintiff was cashier of the Biddeford National bank, and received the coupon from a stranger across the bank counter and paid thirty dollars for it. He noticed at that time the figures "$3." upon the lower left hand corner, but relied upon the printed word "Thirty" in the body of the coupon, as indicating the true amount payable thereon. He had no other notice of any error in the amount actually payable thereon. Other material facts stated in the opinion.

W. F. Lunt, for the plaintiff.

Francis Adams, for the defendant.

Emery, J. The writing declared upon in this suit is a coupon for the forty-fourth installment of interest upon a bond for one hundred dollars issued by the defendant city. It is not the original contract for the interest. The original, fundamental undertaking to pay the interest, is found in the bond itself. The bond expresses the original real contract for both principal and interest. The coupon is an incident of the bond. It is of the nature of a check or ticket for the interest. It is issued rather for convenience, than to express the original obligation to pay interest. It is designed to pass from hand to hand, like a baggage check, and the lawful holder is entitled to the interest it represents. When taken up, it is a convenient voucher for the officer paying the interest. It represents that interest promised in the bond, and no other nor different interest.

Arents v. *Commonwealth*, 18 Gratt. 764; *City* v. *Lamson*, 9 Wall. 482; *McCoy* v. *Washington County*, 7 Am. Law Reg. 196, cited in 4 Myers, Fed. Dec. 876.

So clearly is the coupon an incident of the bond, and not an original, independent undertaking, that actions upon it, though it be without seal, are not barred by any lapse of time, short of that required to bar an action upon the bond itself. The coupon draws its life from the bond, lives as long as the bond, and dies with the bond. *Clark* v. *Iowa City*, 20 Wall. 583.

In this case, the city of Bath was authorized to issue its obligations, "with coupons for interest attached, payable semi-annually." Special laws of 1860, chap. 450, § 2. In the one hundred dollar bond to which this coupon was attached, the stipulation was to pay six per cent interest, which would make the forty-fourth installment one for three dollars only. At the time of the issue of this bond, the statute against usury was in force. The city could not lawfully stipulate in the bond for more interest, nor lawfully attach to the bond a coupon for more. The sum of three dollars, the amount of the installment promised in the bond, is what the lawful holder of the coupon is entitled to, and is as much as the city was authorized to pay, or to promise to pay.

The plaintiff, however, urges that whatever may be the nature of the coupon while attached to the bond, when it is separated from the bond, it becomes a separate and a negotiable instrument.

This coupon was separated from the bond when purchased by the plaintiff, and he claims that he, as the holder of the separated coupon, is not affected by any mistakes or excess of authority in the issue, but can recover the sum named in the coupon, whatever was the sum promised in the bond.

The case, as made up by the mutual admissions, without any objection to their legal admissibility, shows that there was not a full consideration for such a coupon, and that the coupon was issued by mistake for a sum larger than that authorized by law and by the terms of the bond. Such facts legally appearing, it is incumbent on the holder, if he would avoid them, to show that he, or some prior holder, whose rights he has succeeded to,

acquired the coupon in good faith, before maturity, and without notice of the true state of affairs. *Roberts* v. *Lane*, 64 Maine, 111. Does the case show this? The bond with coupon attached was delivered to the Androscoggin Railroad Company, by whom it was put on the market. That company, holding both bond and coupon, must be held to have known the discrepancy, and to have known the true amount of the forty-fourth installment of interest. Every subsequent holder of both bond and coupon, would be chargeable with similar notice. There is no evidence of any separate ownership of coupon from bond, until the plaintiff acquired the coupon. There is a presumption that there was no such severance, and that the holder of the coupon was also owner of the bond. *McCoy* v. *Washington County*, 3 Wall. jr. C. C. 381; *Deming* v. *Houlton*, 64 Maine, 261. The plaintiff, the first one shown to have a separate ownership of the coupon, acquired it *after* maturity, on January 10th. From the facts stated, there is no evidence nor presumption that the plaintiff, or any prior holder, acquired the coupon, both before maturity and without notice. Whatever be the negotiable nature or immunities of the coupon, the plaintiff is not in a situation to invoke them. The coupon, upon its face, shows that it was a ticket for the forty-fourth installment of interest due on bond No. 77, which installment was three dollars. There is in the writ a general omnibus money count, broad enough to include the plaintiff's claim for that installment. He can not recover the amount named in the coupon. He can recover the amount named in the bond. He only claims interest upon the installment from the date of his demand, January 15.

Judgment for plaintiff for three dollars with interest from January 10th, 1883.

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

WILLIAM H. BAXTER *vs.* GALEN C. MOSES and others.

Cumberland. August 8, 1885.

Equity. "Judgment creditor." Nulla bona. R. S., c. 46, § 52. Statute of limitations. Corporations. Directors. Trusts.

When a creditor seeks by a process in equity to reach equitable interests,

choses in action, or the avails of property fraudulently conveyed, for the payment of debts, (not by virtue of the R. S., c. 77, § 6, part 10,) the bill should state that execution has been taken out on a judgment against the debtor and *nulla bona* returned thereon.

The official return on the execution is the only sufficient evidence that a debt cannot be legally collected, and a demurrer to a bill, which alleges the insolvency of the debtor, is not a waiver of a right to ask for a production of such evidence.

No chancery jurisdiction, however enlarged takes upon itself the collection of legal debts before legal remedies are exhausted.

The words "judgment creditor" in R. S., c. 46, § 52, mean a judgment creditor who has first exhausted all legal remedy. In a creditor's bill against a corporation, in which its officers are made parties only in their representative character, discovery may be had from them, but relief cannot be had against them; the decree for relief goes against the corporation.

Upon legal titles and legal demands courts of equity adopt and apply statutes of limitations acting upon them by analogy to law.

The directors of a corporation hold the corporate property under an implied or constructive trust for the benefit of creditors. It is not an express trust, not a purely equitable trust, but something which the law for equitable purpose construes to be a trust.

One who is not actually a trustee, but upon whom that character is forced by a court of equity, may avail himself of the statute of limitation.

On appeal and exceptions.

Bill in equity to collect certain bonds issued by the Androscoggin Railroad Company and certain judgments against that company.

The presiding justice sustained a demurrer to the bill, and ordered that the bill be dismissed with costs; to this order and ruling the complainant appealed and alleged exception.

[Bill.]

"State of Maine. Cumberland, ss. William H. Baxter, of Deering, in the county of Cumberland, aforesaid, complains against: Oliver Moses, Galen C. Moses, John H. Kimball, Charles Russell and James D. Robinson, of Bath, in the county of Sagadahoc, and William P. Frye, of Lewiston, in the county of Androscoggin, and Edwin Plummer, of Lisbon, in said county of Androscoggin, and the Androscoggin Railroad Company, a corporation duly chartered by law and doing business in said county of Cumberland, and represents and avers:

"1. That prior to the first day of January, A. D. 1858, the said Androscoggin Railroad Company was duly chartered and organ-

ized under the laws of this state and operated a railroad, by it constructed under the provisions of their charter from a point near Leeds Junction, on the railroad, then known as the Androscoggin and Kennebec Railroad, in the county of Androscoggin, to the town of Farmington, in the county of Franklin.

"2. That subsequent to said period of time, said Androscoggin Railroad Company contracted and operated an extension of said railroad, from said point on said Androscoggin and Kennebec railroad to the town of Brunswick, in said county of Cumberland, and to the city of Lewiston, in said county of Androscoggin, and still operate the same through the said company or their lessees.

"3. That upon said first day of January, A. D. 1858, the said Androscoggin Railroad Company duly issued its bonds, to the amount of two hundred thousand dollars, in several denominations, by the provisions of which the principal was payable at the office of the treasurer of said company, on the first day of January, A. D. 1870, in the stock of the company, at par, and the interest thereon was payable semi-annually, on the first day of January and July, in each and every year after said date of January 1, 1858, and annexed to said bonds coupons, to the amount of the several semi-annual interest sums coming due thereon. Said bonds were payable to S. H. Read, or bearer, and issued under the seal of said company.

"4. That said bonds remain unpaid and undischarged in principal and interest to the extent hereinafter described, to wit: . . . [18 bonds of $500 each; 13 bonds of $200 each; 111 bonds of $100 each; a large number of coupons annexed to each bond.]

"5. That your complainant is the legal owner of said bonds and coupons, and the amounts due upon them are due to him, the said complainant.

"6. That said Oliver Moses, Galen C. Moses, John H. Kimball, Charles Russell, James D. Robinson, William P. Frye and Edwin Plummer, are directors of said Androscoggin Railroad Company. That said John H. Kimball is president and said Galen C. Moses is treasurer of said company.

"7. That said persons have held said offices and trusts for a long time heretofore, and as such trustees and officers have taken the income and profits of said railroad, and now hold large amounts of money on account of and belonging to said railroad company.

"8. That said railroad company hold no other property than that so as aforesaid taken and held by said persons.

"9. That said complainant is a creditor of said Androscoggin Railroad Company, beyond and beside the amount of said bonds and coupons, upon and to the amount of the following described claims, viz: . . . [seven judgments.]

"That the said complainant has demanded of the said Androscoggin Railroad Company, and said directors and treasurer, at the office of the treasurer of said company, the payment of said bonds and coupons, according to the terms and conditions of said instrument, and offered to surrender said bonds and coupons as required by the terms therein recited, and the payment of the other claims held by your complainant, herein before described, and payment of each and every and all of said bonds and coupons and other claims, was by said company, directors and treasurer refused, and have never been paid, or otherwise discharged, to the time of the making of this complaint, but now remains in full force, and due to your complainant.

"That said directors and treasurer have received large amounts of money belonging to said company, and have unlawfully and fraudulently distributed the same among themselves, and are still holding the same, to an amount more than sufficient to pay the claims of your complainant herein before described, and all other lawful claims against said company, in fraud of your complainant's rights in the premises; that he can not reach said funds, by attachment, or any process in the courts of law granted, or practiced, and is in danger of losing his whole claim and demand against said company by the fraudulent and unlawful acts and practices of said directors and treasurer, without such relief as your honors may grant him in equity.

"And your complainant is informed and believes and therefore charges that the said directors and treasurer have received from

the Maine Central Railroad Company, a corporation existing under the laws of this state, a large sum of money for the use and lease of said railroad of said Androscoggin Railroad Company, to wit: the sum of two hundred and sixty-three thousand dollars, and now hold the same; that the particular days and times when so received, and the particular individuals of said board of officers to whom said sum was paid, he is unable now to give information to the court, but does charge and inform the court that said sum was received by the directors of said Androscoggin Railroad Company, from said Maine Central Railroad Company, and is now held by said respondents.

"And the complainant is informed and believes, and therefore charges, that said respondents received from the Maine Central Railroad Company, on account of a lease of said Androscoggin Railroad, executed A. D. 1871, to wit: on the twenty-ninth day of June, A. D. 1871, the sum of thirty-three thousand thirty-three hundred and thirty-three dollars and thirty-three cents, and scrip of said Maine Central Railroad Company to the amount and value of one hundred and ten thousand dollars, and two thousand shares of the capital stock of said Maine Central Railroad Company of the value of one hundred and twenty thousand dollars, and all of the value of two hundred and sixty-three thousand three hundred and thirty-three dollars and thirty-three cents, and that said directors have fraudulently and without lawful authority, distributed the proceeds of the same among themselves, and now withhold the same from the creditors of said Androscoggin Railroad Company, and in fraud of their rights in the premises.

"And your complainant avers that the said Oliver Moses, Galen C. Moses, John H. Kimball, Charles Russell, James D. Robinson, William P. Frye and Edwin Plummer, hold in their own names and under their control, nearly all the stock of the said Androscoggin Railroad Company, to wit, a much greater number than a majority in number of said shares, the exact number of which is to your complainant unknown, and that they control the action of said company in their own interests and fraudulently combine against the interests of the creditors of said

company, to withhold all the property so as aforesaid received, from the creditors of said company, and neglect and refuse to make any report or return of their doings and actings as said officers, and have so neglected for more than ten years last past, or to give any information of the financial condition of said company, although your complainant has sought such information through process of this court, and that he can not, by reason of their fraudulent and unlawful practices, obtain a satisfaction of his claims of the said company.

"And your complainant further represents that he brings this bill in behalf of himself and all other unsatisfied creditors of said Androscoggin Railroad Company, who shall come in and join in this bill, and by leave of court become parties thereto.

"And now your complainant seeks relief in the premises of this court sitting in equity, and prays that said respondents, each and all of them severally, be required to make full answer upon their several oaths to all the matters herein alleged, and for general relief in the premises, as well as for the special relief hereinafter prayed for.

"And for special relief he prays that said directors may be held to account for all monies and property by them or either of them received for and on account of said Androscoggin Railroad Company, since the twentieth day of June, A. D. 1871, and for all monies and property belonging to said company, by them or either of them held on said twentieth day of June, A. D. 1871, to the end that the same may be turned over to a receiver for such disbursement to the creditors of the company as they are entitled to have in the payment and extinguishment of their claims and demands, and,

"That your honors will appoint a receiver to receive and dispose such monies and property and make such orders and decrees as shall be necessary to determine the manner and amount of disbursements to be made, and,

"That your honors will appoint a master to determine the amount due such creditors as may become parties to this bill."

The case was twice argued to the law court.

R. P. Tapley, for the plaintiff.

The plaintiff being a creditor of the corporation is entitled to some remedy to enforce payment of his debt. He has no adequate remedy at law. The funds, held by the directors and treasurer, are all the property possessed by the corporation, and is money held on their person. Their possession of it is the possession of the corporation. The plaintiff cannot reach these funds by an action at law. They cannot be attached in specie, nor reached under the process of foreign attachment. *Pettingill* v. *And. R. R. Co.* 51 Maine, 370; *Sprague* v. *Steam Nav. Co.* 52 Maine, 592; *Bowker* v. *Hill*, 60 Maine, 172; *Donnell* v. *Railroad Co.* 73 Maine, 567.

There is no privity of contract between the officers and the corporation. *Skowhegan Bank* v. *Farrar*, 46 Maine, 295.

One director may hold all the funds, or each a part, and it is still the possession of the corporation. Holding, they are still directors and responsible to the corporation as directors. They owe the corporation nothing. They hold as directors the funds which came into their hands as directors. They cannot absolve themselves from the liabilities and duties devolving upon them as trustees and directors. *McLarren* v. *Brewer*, 51 Maine, 405.

It is their duty to pay the lawful demands against the corporation, when they have the means. They hold, as to creditors, the relation of trustees. Being in possession of trust funds they are charged with a knowledge of the trust and bound to account therefor to those beneficially interested. Creditors first and shareholders afterwards. Story, Eq. Jur. § 1252; Thompson's, Officers and Agents of Corporations, 395–398; *Wood* v. *Dummer*, 3 Mason, 308; *Curran* v. *Arkansas*, 15 How. 305; *Railroad* v. *Howard*, 7 Wall. 409; *Lyman* v. *Benney*, 101 Mass. 562.

The duty being cast upon the directors to pay the debts of the corporation from the funds of the corporation, the law will secure to the creditor the performance of that duty in some manner. It can only do this through the channels of the equity powers of the court, and unless it can thus be done creditors in such case are remediless.

This court has ample power in the premises, having general

equity powers. It can afford ample and adequate remedy in the premises, and require the application of the funds of this corporation to the payment of the plaintiff's claims, and it cannot do it in any other way than by this process. *Webster* v. *Clark*, 25 Maine, 316; *Wiggin* v. *Heywood*, 118 Mass. 514; Story, Eq. Jur. § § 1216, 1252; *Frost* v. *Belmont*, 6 Allen, 152; *Gordon* v. *Lowell*, 21 Maine, 257; *Vose* v. *Grant*, 15 Mass. 521; *Spear* v. *Grant*, 16 Mass. 15; *Carver* v. *Peck*, 131 Mass. 293; *Case* v. *Beauregard*, 101 U. S. 691.

It is said the bill does not aver the issue of execution and the return of *nulla bona* as to the judgment set out in the bill, and *Howe* v. *Whitney*, 66 Maine, 17, is cited. This was a decision of the court acting under a limited jurisdiction, as a part of the requirement that the complainant must exhaust his remedy at law.

A court having general and unlimited equity jurisdiction may afford relief concurrently with the common law courts, if the remedy is more speedy, less onerous to the parties more perfect in its results. See *Jones* v. *Newhall*, 115 Mass. 244.

But we have no occasion in this case to discuss the question, in answer to the objections raised. The case of *Howe* v. *Whitney*, *supra*, differs essentially from the case at bar. In that case the plaintiff was seeking payment from property of his debtor that had been conveyed to another. His proceeding was against that other and not the debtor. So are all the cases cited in the opinion of the court in that case clearly distinguishable from the case at bar. The reason of the requirement is plain. No such reason exists here. The case at bar is against the debtor alone. It seeks to reach funds in the hands of the debtor, for the possession of the directors is the possession of the corporation debtor. They hold as directors. They are *quo ad hoc* the debtor.

Courts of equity do not require useless proceedings. It ill becomes equity to make such requirement. It is not equity to do it, but the reverse. In *Corey* v. *Greene*, 51 Maine, 116, a levy was held "unnecessary because it would be nugatory." "The creditor exhausts her remedy at law without it." See

also, *Richards* v. *Allen*, 17 Maine, 299; *McCarthy* v. *Mansfield*, 56 Maine, 541; *Lawrence* v. *Rokes*, 61 Maine, 44; *Case* v. *Beauregard*, 101 U. S. 688.

The only object in obtaining judgment and issuing execution thereon is to show that there is no remedy at law. It is only evidential as to the matter of jurisdiction. The fact may be shown by any other evidence. There is nothing talismanic about a return of *nulla bona*. The case here shows by admission that there was nothing to be taken on execution.

It is argued that the plaintiff's claims were stale. This cannot in any sense apply to the judgments, being the judgments of the highest judicial tribunal in this state.

The position is a novel one. With whatever of propriety a debtor may meet an honest claim in that way, before it has received the confirmation of the court, we think it can never be imposed as a bar in an equity suit during the period which the law allows the creditor to enforce it. Until some statutory limitation intervenes, the character and impress, the court has given the claim, remains unchanged. It is said that we have delayed too long, that we have been too indulgent. It must be remembered that it is the creditor who is saying this.

There is no laches in this state between a promisor and a promisee, or debtor and creditor until the period, the law has fixed as a limitation, has elapsed.

The laches which affects a party in both law and equity, is lapse of time in asserting a claim. *Lansdale* v. *Smith*, 106 U. S. 392; Story's Eq. § 1520; *Farnam* v. *Brooks*, 9 Pick. 242; *Dodge* v. *Essex Ins. Co.* 12 Gray, 65; Wood, Lim. of Actions, § § 58, 62.

Frye, Cotton and White and *William L. Putnam*, for the respondents, cited: *Piscataqua F. & M. Ins. Co.* v. *Hill*, 60 Maine, 178; *Stevens* v. *Moore*, 73 Maine, 559; Story, Eq. Pl. § § 251, 484; *Munday* v. *Knight*, 3 Hare, 497; *Mooers* v. *K. & P. R. R. Co.* 58 Maine, 279; Angell, Lim. § § 174–178; *Carroll* v. *Green*, 92 U. S. 509; *Baker* v. *Atlas Bank*, 9 Met. 182; *Taylor* v. *Bowker*, 111 U. S. 110; *Hughes* v. *Farrar*, 45 Maine, 72; *Burbank* v. *Bethel Steam Mill Co.* 75 Maine,

373; *Webster* v. *Clark*, 25 Maine, 313; *Webster* v. *Withey*, 25 Maine, 326; *Corey* v. *Greene*, 51 Maine, 114; *Hartshorn* v. *Eames*, 31 Maine, 93; *Griffin* v. *Nitcher*, 57 Maine, 270; *Howe* v. *Whitney*, 66 Maine, 17; *Jones* v. *Green*, 1 Wall. 330.

PETERS, C. J. This is a creditors' bill to collect certain debts, principally judgments, which are due from the Androscoggin railroad company; and is before us on demurrer.

It is not claimed that the bill is maintainable under part 10, § 6 of ch. 77 of the R. S. That provides a remedy for a single creditor, by an attachment in equity of some specific property, without asking for a discovery under the bill. *Chapman* v. *Publishers' Co.* 128 Mass. 478; *Insurance Co.* v. *Abbott*, 127 Mass. 558; *Donnell* v. *Railroad*, 73 Maine, 567. This is a materially different bill, but one common to the practice of courts of chancery.

It is not an answer to this mode of remedy that another remedy exists by means of the process of foreign attachment either of legal or equitable assets. Those remedies are partial and limited, while this is much more adequate and complete. Besides, the present form of proceeding, although always existing in modern equity procedure, is expressly allowed by the statutes of our state. R. S., ch. 46, § 52. Either remedy does not exclude the other.

The first objection urged by the respondents against the bill, is a want of jurisdiction in the court to act, because the bill contains no allegation that an execution was taken out upon any judgment and *nulla bona* returned thereon. This defense must prevail, and for the reason stated by SHEPLEY, J., in *Webster* v. *Clark*, 25 Maine, 313, who says, "courts of equity are not tribunals for the collection of debts; and yet they afford their aid to enable creditors to obtain payment, when their legal remedies have proved to be inadequate. It is only by the exhibition of such facts, as show, that these have been exhausted, that their jurisdiction attaches. Hence it is, that when an attempt is made by a process in equity to reach equitable interests, choses in action, or the avails of property fraudulently

conveyed, the bill should state, that judgment has been obtained, and that execution has been issued, and that it has been returned by an officer without satisfaction." Such has certainly become the settled rule in this state. It has been unhesitatingly affirmed in a series of cases. *Hartshorn* v. *Eames*, 31 Maine, 93; *Dana* v. *Haskell*, 41 Maine, 25; *Dockray* v. *Mason*, 48 Maine, 178; *Corey* v. *Greene*, 51 Maine, 115; *Griffin* v. *Nitcher*, 57 Maine, 270; *Howe* v. *Whitney*, 66 Maine, 17.

Our decisions do not stand alone upon the question. The decided preponderance of authority is the same way. Mr. Bump, in his work on Fraudulent Conveyances, at page 514, gleans the rule from all the cases of the country, and states it in these explicit terms: "The creditor's right to relief in such case depends upon the fact of his having exhausted his legal remedies without being able to obtain satisfaction. The *best* and the *only* evidence of this is the actual return of an execution unsatisfied. The creditor must obtain judgment, issue an execution, and procure a return of *nulla bona*, before he can file a bill in equity to obtain satisfaction out of the property of the debtor which cannot be reached at law." In Pom, Eq. Jur. § 1415, it is said, "The general rule is, that a judgment must be obtained, and certain steps taken towards enforcing or perfecting such judgment, before a party is entitled to institute a suit of this character. In this there is an uniformity of opinion, but the difficulty arises in determining exactly how far a plaintiff should proceed after he has obtained his judgment." In a note, the author explains: "Much of the conflict doubtless results from the effect judgments and writs of execution have in different states. The rule seems to be sustained by the weight of authority that before a creditor's suit can be brought to reach choses in action and *personal* property in such a shape or form or under such conditions that no levy can be made at law, execution must have been issued and a return of *nulla bona* made." The cases show that, in those states where a judgment is itself a lien upon land, an execution need not issue. In such case equity will proceed to make the lien effectual. Among the cases sustaining the rule as promulgated in our own state, are the following: *Tappan* v.

Evans, 11 N. H. 311; *Smith* v. *Millett*, 12 R. I. 59; *Adee* v. *Bigler*, 81 N. Y. 349; *Adsit* v. *Butler*, 87 N. Y. 585. See also, *Idem*, 637; *Suydam* v. *Insurance Co.* 51 Pa. St. 394; *Dormueil* v. *Ward*, 108 Ill. 216; *Brown* v. *Bank*, 31 Miss. 454; *Scott* v. *Ware*, 64 Ala. 174.

The rule has been sustained by the Federal Supreme Court in several cases, and in too strong terms to suppose that it can be considered as reversed by that court by the observations of Mr. Justice STRONG, in relation to it, in the case of *Case* v. *Beauregard*, 101 U. S. p. 688, a case cited for the complainant. See *Jones* v. *Green*, 1 Wall. 330; *Taylor* v. *Bowker*, 111 U. S. 110.

We think that, outside of the authorities, the rule is a reasonable one. It should not be in the power of a creditor to institute such an extraordinary remedy against his debtor, for no other reason than that his debt is overdue. A debtor may be able to relieve himself from threatening insolvency by the time an execution is obtained and demanded of him. His inability or unwillingness to pay should be established by some certain rule. What more reasonable one could be devised than that there shall be a judgment, an execution, and a return of *nulla bona*? And to remove all uncertainty the official return is conclusive evidence that the creditor has exhausted all legal remedy without succeeding in collecting his debt. It is a beneficent rule for both parties.

The counsel for complainant contends that the demurrer admits the insolvency, and that the admission obviates the necessity of a return of *nulla bona*. The official return being the only sufficient evidence that the debt can not be legally collected, the demurrer is not a waiver of a right to ask for a production of such evidence. It complains of the insufficiency of the bill, because it does not allege that such evidence exists.

It is contended for the complainant that the rule held to in the cases in this state, before cited, was adopted when we had quite limited powers of chancery, and that with our equitable jurisdiction enlarged, as it now is, the rule should be different. No such excuse was ever given for the rule in its early days. No

chancery jurisdiction, however enlarged, takes upon itself the collection of legal debts before legal remedies are exhausted.

Nor is there force, to our minds, in the distinction seen by counsel, that in our own cases, referred to before, the bill complained against the principal debtor together with some third party, while the present bill complains against the debtor only. The distinction does not appear to have been before taken. Many of the cases, where a return of *nulla bona* was required, were against debtors alone, and one of the New York cases, before cited, involved the insolvency of a corporation very much as this case does. There is more reason for an application of the rule to the debtor than to parties associated in a bill with him. It is especially for his protection that the rule exists. It is his business that the creditor's bill usually winds up. The forms of creditors' bills in the books are of both descriptions, and the rule is the same.

It does not vary the case, that the statute allows the remedy pursued in this case, to a "judgment creditor." See R. S., c. 46, § 52. It means a judgment creditor who has first exhausted all legal remedy. The original act of 1848, from which the present provision came by revision, but not by legislative alteration, virtually so declared. (See ch. 64, Laws of 1848.) What was at first expressed is now implied. The change in words was to condense the enactment into a more concise expression. There has been no attempt to change the policy of the law, so long understood and adhered to. This view of our statutory provision was taken in the case of *Taylor* v. *Bowker*, 111 U. S. 110.

No doubt, there may be exceptions to the rule requiring a return of *nulla bona*. Where the common law means can not for exceptional causes be made to apply, there are cases which decide that equity may do what the law would do if it could apply. *Wiggin* v. *Heywood*, 118 Mass. 514; *Merchants' Bank* v. *Paine*, 13 R. I. 592. But we have no opinion to express upon any exceptional and hypothetical case at this time. Here there were judgments for many years existing, and no excuse is suggested or appears why further steps were not taken to enforce them.

Another question is whether the statute of limitations applies. This defense may be taken on demurrer where the bill on its face shows its application. *Mooers* v. *Railroad*, 58 Maine, 279; Story, Eq. Pl. § § 484, 751.

Although the doctrine of equitable limitations lacks somewhat in definiteness, adapting itself, as it does, a good deal to circumstances, still it is well settled, that upon legal titles and legal demands, courts of equity adopt and apply statutes of limitations, acting upon them by analogy to the law. This rule applies to most questions in equity. It does not generally apply in cases of express trust. It may, however, apply in cases arising out of express trusts, where the trust has been repudiated by the trustee, and he assumes a position of hostility to it. Besides applying the legal doctrine of limitations, equity has a favorite doctrine of its own which allows a defense to be based on a mere lapse of time and the staleness of a claim, denominated laches, if the delay has been of a passive character, and acquiescence under other circumstances. The defence of laches or acquiescence, is independent of the statutory rules of limitation, and where no statute directly governs the case, may be founded on a delay, either longer or shorter than the statutory period. And so the defendants in the present case set up both the legal and the equitable defense. Story, Eq. Jur. § 1520, *et seq.*

Before making an application of these principles to the case at bar, it is necessary to know just what facts are alleged. Opposite counsel widely differ as to the meaning of the bill. The bill seems to be in some respects uncertain and contradictory.

The complainant's counsel insists that the bill makes the officers of the company official and not individual defendants, and that it is really a proceeding against the corporation only. There could be such a bill, that is, one against the corporation only, making the officers of the corporation parties, only for the purpose of obtaining from them a discovery. Such a practice, although anomalous and never much encouraged, grew up at an early period when a person interested in a cause was incompetent to testify. Story, Eq. Jur. § 1501; Story, Eq. Pl. § 235; 1 Dan. Ch. 179. But relief should not be prayed for in the bill,

and, if it is, demurrer lies. Not general demurrer, however. The defendant should answer as to the discovery, and demur as to the relief. But after a general demurrer is overruled, the defendant may demur *ore tenus* to the prayer for relief; as there is no other way of properly removing the inconsistency from the bill. *Many* v. *Beekman Iron Co.* 9 Paige, 188; *Wright* v. *Dame*, 1 Met. 237. But we do not see how it is possible to avoid the conclusion that the officers are made personal parties to this bill. They are charged with malversation in the company's affairs, and the bill asks for special relief against them for money and property alleged to be in their hands.

If it were a bill against the company only, charging that the company now has assets in its hands, or, what would be the same thing, assets held by agents for the company, it is evident enough that the statute would not be a bar. The complainant has debts and is entitled to collect them if the company has property. And a lien established upon any property of the company, attaches to the property, although in its agents' and servants' hands, if held by them for the company.

But it is altogether another and different thing to charge that the company did have funds or assets some ten to fifteen years ago, which at that time were wrongfully converted by its agents to their own use. A bill against the company for such acts of its officers would be valueless to creditors, unless the officers are made personally and individually parties thereto. A judgment against the company would not be a judgment against them. It is not an *in rem* judgment that is obtainable. And here again we are at a loss to know exactly what the bill means. It alleges fraud, but does not recite whether it was practiced by the officers upon the company or creditors. It alleges conversion, but does not intimate whether assented to by the company or not. The complainant does not narrate his grievance frankly. There is a hidden meaning.

If it is sought to reach funds which the officers of the company actually received from or for the company and converted to their own use in 1871, we think the complainant's claim against the officers is barred by the statute of limitations, and also by

his laches; or, if it is possible that the statute would not begin to run until a return of *nulla bona*, then by his laches in the long delay before obtaining a return of *nulla bona* and prosecuting this suit. The bill was commenced in 1881. All of the judgments produced were recovered as early as 1866, except one recovered in 1879, and that was merely the renewal of another judgment recovered in 1867, a fact upon our own records of which we can take judicial notice. Of course, there may be causes or excuses preventing the operation of the statute. None are suggested or appear here.

There is no doubt that the property of a corporation is a trust fund pledged to the payment of its debts, and that directors hold the same under an implied or constructive trust for the benefit of creditors. It is not an express trust; not a purely equitable trust; not such a trust as exists between the directors and the company, (and even that relation is perhaps not a trust in a strict technical sense) it is a trust *sub modo* — in some respects analogous to a trust — something which the law for equitable purposes construes to be a trust. It is a charge *on* property rather than any right or interest *in* it. There is no contract obligation, no direct privity, between stockholders and the creditors of a company. See Perry, Trusts (3rd ed.), § 166. It is an equitable lien to aid in the enforcement of a legal right; to aid in collecting a debt. Story says: (Eq. Jur. § 1252) "Perhaps, to this same head of implied trusts upon presumed intention, although it might well be deemed to fall under the head of constructive trusts by operation of law, we may refer that class of cases, where the stock and other property of private corporations is deemed a trust fund for the payment of the debts of the corporation." Mr. Thompson, a writer on the liability of directors of corporations, says: "The directors of a corporation are not trustees for its creditors in the same sense in which an agent is the trustee of his principal. In this sense they are the trustees of the shareholders, who have elected them to act as such, and not trustees of strangers to the shareholders." 6 Sou. Law Rev. (N. S.) 403. In *Poole's case*, 9 Ch. Div. 322, Jessel, M. R. says the same thing. In Pom. Eq. Jur. § 1047, the directors'

liability to creditors of the company is classified with constructive trusts, although the author doubts the propriety of calling it as much of a trust as even that. Pom. Eq. Jur. § 1044, *et seq.*

Constructive trusts, and all trusts, save purely equitable or express trusts, are in equity subject to the statute of limitations. Wood, Limitations, § 58, and cases in note. It is there said: "With respect to the operation of the statute of limitations upon cases of trusts in equity, the distinction is, if the trust be constituted by act of the parties, the possession of the trustee is the possession of the *cestui qui trust*, and no length of such possession will bar; but if a party is to be constituted a trustee by the decree of a court of equity, founded on fraud, or the like, his possession is adverse, and the statute of limitations will run from the time that the circumstances of the fraud were discovered." Again, the author (§ 215) expresses the same proposition in these other words: "One who is not actually a trustee, but upon whom that character is forced by a court of equity, only for the purpose of a remedy, may avail himself of the statute." The doctrine could not be more satisfactorily stated. The authorities support this principle with great unanimity. A few only need be cited, those more especially of the class of constructive trust cases to which the present case belongs. *Baker* v. *Bank*, 9 Met. 182; *Peabody* v. *Flint*, 6 Allen, 52; *Farnam* v. *Brooks*, 9 Pick. 212; *Kane* v. *Bloodgood*, 7 John. Ch. 90; *Stringer's case*, 4 Ch. App. 475; *In re Alexandra Palace Co.* 21 Ch. Div. 149; *Carrol* v. *Green*, 92 U. S. 509.

It is not inferable from the bill that the acts of the directors in 1871 were of a character such as to constitute a breach of trust, existing between them and the company, which would not be barred by the statute. But if it were so, it is not perceived that it would make the creditors' claim better. The acts might be without the statute as to the company, and within it as to creditors. The right of the one is distinct from the right of the other and independent of it. Directors may be liable to creditors without any liability to the company or its stockholders. We do not see how the creditors' claim is enlarged or lessened

by any claim of the company against the stockholders. They are not the same. Shel. Subrogation, and cases. *Smith* v. *Hurd*, 12 Met. 371; *Hersey* v. *Veazie*, 24 Maine, 9; *Smith* v. *Poor*, 40 Maine, 415. It may be otherwise, under the English statutes providing for winding up the business of public companies, under which the liquidator represents shareholders and creditors alike. *In re National Funds Assurance Co.* 10 Ch. Div. 118; *Flitcroft's case*, 21 Ch. Div. 519. But under our practice the remedy is nothing more than an assistant and collateral proceeding in equity employed by a creditor to collect a legal debt.

Although there is serious question as to the meaning of the bill so far as bearing upon the question of laches or limitation, there can be no doubt upon the first point discussed by us, and therefore the conclusion must be,

Demurrer sustained.

WALTON, LIBBEY, EMERY, FOSTER and HASKELL, JJ., concurred.

ARTHUR BERRY *vs.* EDWIN R. CLARY AND WIFE.

Kennebec. Opinion August 25, 1885.

Contracts made on Sunday. R. S., c. 82, § 116. Construction of statutes. Constitutional law.

Revised Statutes, c. 82, § 116, providing that no party, who receives any money or valuable thing as a consideration for a contract made and entered into on Sunday, shall be permitted to defend any action upon such contract until such consideration has been restored, applies to actions arising before as well as after its enactment..

In construing such statutes the court may consider the nature and reason of the remedy, and give effect to the intention of the legislature if that can be ascertained.

A statute may be retroactive and yet not retrospective within the legal meaning of the word.

Retroactive laws, remedial in their nature, are not unconstitutional unless they impair vested rights, or create personal liabilities.

ON exceptions from superior court.

Assumpsit on the promissory note of the defendants for one hundred and twenty-five dollars, dated November 26, 1876, payable in six months.

The note was given for a horse which the defendant took of the plaintiff on the day of the date of the note. It was admitted that November 26, 1876, was Sunday, and the defendant, Edwin R. Clary, testified that the note was written, signed and delivered on the day of its date. And he testified to other facts tending to show that the transaction was at the request of the plaintiff to prevent the horse from being taken for debt. And that the plaintiff assured him that the note given on that day, being Sunday, could not be collected. It was admitted that the consideration received for the note had not been restored.

The court ruled that the foregoing evidence constituted no defence, and ordered a verdict for the plaintiff. To this ruling the defendants alleged exception.

A. G. Andrews, for the plaintiff, cited: *Lord* v. *Chadbourne*, 42 Maine, 429; *Atkinson* v. *Dunlap*, 50 Maine, 111; *Coffin* v. *Rich*, 45 Maine, 507; *Reed* v. *Frankfort Bank*, 23 Maine, 318; *Bank* v. *Freeze*, 18 Maine, 109: *Thayer* v. *Seavey*, 11 Maine, 288.

Herbert M. Heath, for the defendants.

Had the legislature intended the law to be retrospective it would have read "No person who has received or receives," &c. But the law excludes the idea of past time, or past transactions. It is well settled that to ascertain the meaning of the statute the court will not go beyond the words of the statute. Statutes are to be considered as prospective unless the intention to give a retrospective operation is clearly expressed. *Hastings* v. *Lane*, 15 Maine, 134; *Given* v. *Marr*, 27 Maine, 212; *Rogers* v. *Greenbush*, 58 Maine, 395.

When made the contract was void. Contracts prohibited by law are void, not voidable but void. 2 Parson's Contr. (5th ed.) 746, 753. See, *Marshall* v. *B. & O. R. R.* 16 How. 314; *Ball* v. *Gilbert*, 12 Metc. 397; *Drury* v. *Defontaine*, 1 Taunt. 131; *Deering* v. *Chapman*, 22 Maine, 491; *Towle* v. *Larrabee*, 26 Maine, 464; *Nason* v. *Dinsmore*, 34 Maine, 391; *Hilton* v. *Houghton*, 35 Maine, 143; *Benson* v. *Drake*, 55 Maine, 557; *Tillock* v. *Webb*, 56 Maine, 101; *Parker* v. *Latner*, 60 Maine, 528; *Pope* v. *Linn*, 50 Maine, 83.

In the various decisions of other courts the use of the word "void" is general. The legislature uses the word. R. S., c. 82, § 115.

If the contract is illegal in its inception and void between the parties, it will, as between them, forever remain void. They cannot make it legal by ratification or in any other way. *Pope* v. *Linn*, *supra*.

Much less could any subsequent act of the legislature give validity to a contract that was void at its inception. *Banchor* v. *Mansel*, 47 Maine, 62; *Hathaway* v. *Moran*, 44 Maine, 67; *Milne* v. *Huber*, 3 McLean, 212; *West* v. *Roby*, 4 N. H. 285; 2 Parson's Contr. 674; *Jacques* v. *Withey*, 1 H. Bl. 65; *Mayo* v. *Williams*, 27 Ala. 267; *Fivaz* v. *Nichols*, 2 M. & G. S. 500; *Smith* v. *Bean*, 15 N. H. 577; *Rockport* v. *Walden*, 54 N. H. 167; *Loring* v. *Boston*, 12 Gray, 209; *Kinsman* v. *Cambridge*, 121 Mass. 558; *Rich* v. *Flanders*, 39 N. H. 304; *Willard* v. *Howey*, 24 N. H. 357; *Springfield Bank* v. *Merrick*, 14 Mass. 322; *Morton* v. *Rutherford*, 18 Wis. 298; *Mitchell* v. *Daggett*, 1 Fla. 371.

FOSTER, J. The note in suit was made and delivered on Sunday. The defendant, therefore, must prevail unless ch. 194, Pub. Laws of 1880 (R. S., c. 82, § 116) passed nearly four years after the date of the note, is retroactive and precludes the defense set up in this suit. The statute provides that "no person who receives any money, or valuable thing, as the consideration for a contract, express or implied, made and entered into on Sunday, shall be permitted to defend any action upon such contract on the ground that it was so made and entered into on Sunday, until he shall restore such consideration so received; *provided* that nothing herein contained shall apply to any action now pending."

It is admitted that the consideration received for the note has not been restored.

We are satisfied that the language of the statute in question is sufficiently comprehensive to apply to transactions arising not only after its enactment, but also to those previously existing,

with the exception therein named of actions pending at the date of its passage. In construing a statute like this the court must consider the nature and reason of the remedy, and, from the language used, give effect to the intention of the legislature if that can be ascertained. "And such a construction ought to be put upon a statute as may best answer the intention which the makers had in view." Bac. Ab. I. 5. This intention is to be sought for by a careful examination and consideration of all its parts, and not from any particular word or phrase that may be contained in it. This is the guiding star in the construction of every statute.

What was the object to be accomplished by this statute? Undoubtedly to make a party defendant to a Sunday contract do equity.

While it is true that the verb "receives" is in the present tense, yet it is common knowledge that such forms of expression are oftentimes used in statutes, and when applied to the remedy are as appropriate to suits on past as future transactions. And while the proviso, excluding its operations from pending suits, if taken alone may not be sufficient of itself to embrace suits afterwards commenced on past contracts, nevertheless it should be considered with the other parts of the statute in ascertaining its meaning. For if we were inclined to view the statute as applicable to and embracing only actions upon future contracts, then we should be met by the very suggestive as well as pertinent fact that there certainly could be no occasion for a proviso excluding pending suits, having for their basis contracts existing prior to the statute.

Neither can the objection prevail, when construed as applicable alike to past as well as future contracts, that this statute is retrospective in its operation and affects vested rights. It may be retroactive, and yet not retrospective within the legal meaning of the word.

It affects the remedy only, and not the rights of property or obligation of the contract. Retroactive laws, remedial in their nature, are not obnoxious to the objection of being in contravention of the constitution, unless they impair vested rights, or

create personal liabilities. *Coffin* v. *Rich*, 45 Maine, 507; *Read* v. *Frankfort Bank*, 23 Maine, 318; *Oriental Bank* v. *Freeze*, 18 Maine, 109. There is no vested right in any particular remedy. Previous to the statute in question, a defendant sued upon a contract made on Sunday could avail himself of the defense that it was a Sunday contract; but the fact that such a statutory defense existed gave him no vested right, and therefore in this case no vested right has been impaired by the statute. It in no way operates upon the contract, or renders it valid. It exists precisely as it did before. The statute applies only to future remedies, and merely requires the defendant to restore the consideration received by him in the participation of an unlawful act as a condition upon which he may make his defense. *Holmes* v. *French*, 68 Maine, 529.

Exceptions overruled.

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

STATE *vs.* MARY VIOLA BEAN.

Franklin. Opinion August 28, 1885.

Indictment, nolle prosequi as to part. Arson. Intent.

Any part of a count, in an indictment, which in its nature is separable from the rest, may be removed by *nolle prosequi*, and the remainder stand, although the discontinuance is not assented to by the accused.

Where a count charges the burning of a dwelling-house and a barn, a *nolle prosequi* may be entered as to the barn.

In an indictment for arson the intention to burn and destroy is sufficiently alleged by the averment that the act was done "feloniously, wilfully and maliciously."

ON REPORT.

Indictment charging that the defendant did feloniously, wilfully and maliciously set fire to and burn a dwelling house and barn.

By consent of the parties the case was reported to the law court. If the *nol pros.* (sufficiently stated in the opinion) was properly allowed and the indictment was sufficient, then it was to stand for trial, otherwise it was to be quashed.

Joseph C. Holman, county attorney, for the state, cited: Maine Civil Officer, 460; 71 Maine, 354; 67 Maine, 328; *Com.* v. *Tuck*, 20 Pick. 356.

H. L. Whitcomb, for the defendant.

The indictment as drawn described two separate and distinct offenses in the same count. Such an indictment can not be sustained. *Com.* v. *Symonds*, 2 Mass. 163; 1 Archibald, 95 and note, (7th ed. page 313); 35 Maine, 9; *State* v. *Nelson*, 8 N. H. 163; *People* v. *Wright*, 9 Wend. 196; *U. S.* v. *Sharp*, 1 Peters, C. C. 131 or 118.

There is no offense charged in the indictment. There is no crime unless the fire is set "with intent to burn such dwelling house." R. S., c. 119, § 1. In this indictment there is no allegation of an "intent to burn."

PETERS, C. J. In a single count the defendant was charged with burning a dwelling house and a barn. An objection was interposed, before the jury was impaneled to try the case, that the indictment was bad for duplicity. Thereupon, the prosecuting officer, with leave of court, but against the defendant's consent, entered a *nolle prosequi* to so much of the indictment as charged the burning of the barn. The defendant's counsel denies the right of dividing a count by entering a discontinuance to a part of it.

It was held in *State* v. *Burke*, 38 Maine, 574, that a *nolle prosequi* may be entered as to any part of a count whereby the charge is made less criminal. We think it may be entered, at proper time, to the whole indictment, or to any count or counts in it, or to any person or persons named in it, or to any part of a count. Such has been the common practice in our courts. Any part of a count, which is in its nature separable from the rest, may be removed by *nolle prosequi*, and the remainder stand. The defendant is not injured by the removal of superfluous or double allegations. He thus gets rid of the embarrassment he complains of. *Jennings* v. *Commonwealth*, 105 Mass. 586; *Commonwealth* v. *Dean*, 109 Mass. 349; *Commonwealth* v. *Tuck*, 20 Pick. 356; 1 Bish. Cr. Proc. (3 ed.) § 1391; Heard Cr. Pl. 128.

It is objected to the count that it does not declare that the defendant set fire to the building with an intent to burn and destroy it. The intent is fully alleged in the averment that the defendant "feloniously, wilfully and maliciously" did the act. The criminal act alleged in the indictment can not be committed without an evil intent. Alleging the commission of the act, alleges the intent. The other points made by the defense, do not require refutation. Shorn of the unnecessary and separable matter touching the burning of the barn, the count is in the common form and unobjectionable.

Case to stand for trial.

DANFORTH, VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

STATE OF MAINE *vs.* J. FRANK WALKER.

Somerset. Opinion August 31, 1885.

Evidence. Declarations. Res gestæ.

Where evidence of an act done by a party is admissible, his declarations made at the time, having a tendency to elucidate or give character to the act, and which may derive a degree of credit from the act itself, are also admissible as a part of the *res gestæ*.

The declaration becomes important as forming a part of the transaction itself, on the ground that what is said at the time affords a legitimate means of ascertaining the character of the act, and as a part of the circumstances to be given in evidence with the principal fact.

ON EXCEPTIONS.

The opinion states the case and material facts.

Orville D. Baker, attorney general, for the state, contended that the defendant's offer to prove what he, himself, said in reply to his father, is wholly inadmissible.

(1.) It is the declaration of the prisoner offered in his own behalf. (2.) It does not appear to have been, in any view, material. It was not admissible merely because it was a reply to the father's injunction not to fire, for it was still the prisoner's declaration, and there is nothing apparent in the question asked by the counsel, to show that the reply, in any way, served to characterize the act of shooting.

Walton and Walton, and *J. J. Parlin*, for the defendant, cited: *State* v. *Abbott*, 8 W. Va. 741; *Hamilton* v. *State*, 36 Ind. 281; *Little* v. *Commonwealth*, 25 Gratt. (Va.) 921; *Comfort* v. *The People*, 54 Ill. 404; *Baker* v. *Gansin*, 76 Ind. 317; *Castner* v. *Sliker*, 33 N. J. L. 95; *Mitchum* v. *State*, 11 Ga. 621; *Reed* v. *N. Y. Cent. R. R. Co.* 56 Barb. 493; *Preston* v. *State*, 4 Texas App. 186; *People* v. *Williams*, 18 Cal. 187.

FOSTER, J. The prisoner was indicted for murder, and the jury returned a verdict of murder in the second degree. The case is before the law court on exceptions.

At the time of the shooting, which was not far from nine o'clock in the evening, the deceased was in front of the respondent's house, either upon the piazza or in the yard very near to it. A party of eighteen persons had assembled for the alleged purpose, as claimed by the prosecution, of serenading the respondent, who had been recently married, and upon entering his grounds, the party commenced blowing horns, firing guns, ringing bells and making other noises, both in the yard and on the piazza of the house. The respondent, with his wife and father and two other persons, was in the house at the time. All had retired for the night, and no lights were burning. It was claimed by the respondent and his witnesses that after these demonstrations had continued at intervals for nearly an hour, some of the party outside made an assault upon the door and tried to burst it in, threatening to take the respondent's wife out into the yard, and making other threats against the respondent and his wife. The witnesses for the government denied that any assault was made upon the house, or that such threats were used or any provocation given for violence to be used against them by the persons in the house. The testimony of the respondent and his wife was that upon the first discharge of the guns, the wife became unconscious and so remained when the respondent left her in the bed-room shortly before he fired. The respondent stated that he took his pistol from the place where he had been in the habit of keeping it, on the table in his bed-room, and

placing it in his hip pocket, passed from the bed-room through the kitchen, through the entry, and across to the further side of the wash-room, and fired it first out of a window in an upward course, for the purpose of frightening away the party outside; that returning toward his bed-room, as he passed through the entry, hearing an assault made at that instant upon the house, accompanied by threats of violence toward himself and his wife, whom he then supposed to be lying insensible in her bed, under the excitement of the moment incident to such assault and threats, he discharged his pistol through the sidelight, but claimed it was not his pistol that did the killing. And he furthermore claimed that, if it was his pistol that did the killing, the excitement incident to the circumstances under which he was placed, at the moment of discharging it, was such as to justify the act, and if not a justification, that he should then be adjudged only guilty of manslaughter. While upon the other hand the government's position was, that, in any view of the case, the fatal shot was fired under such circumstances of motive, purpose and intent as constituted murder on the part of this respondent.

It appeared in evidence that Leonard H. Walker, father of the respondent, met him in the entry just at the moment the respondent discharged his pistol through the sidelight. In answer to the question "what, if anything, did you find or hear," propounded by the respondent's counsel, he said: "At that time they were rattling the door; they were trying to get into the ell door, and when I got to the entry door, I met Frank there, and they were trying at that time to get into the door, and Frank seemed to be frightened, and I put my arm on him and he was all of a tremble, and Frank spoke and —." At this point, objection was interposed by the counsel for the state, to any statement by the witness as to what the respondent said, and the declaration was excluded, to which exception was taken by the respondent's counsel.

From the materially different standpoints taken by the government and the respondent in relation to the circumstances under which the fatal shot was fired, it became important to ascertain what those circumstances were; why the shot was

fired; in what condition of mind the respondent was at the time he discharged his pistol; whether the act was done with deliberation, or under such sudden excitement of fear, passion or provocation, as would reduce the offence of killing from murder to manslaughter. It was the province of the jury to determine these questions from the evidence before them. It lay in their power to find the respondent guilty of murder in the first or second degree; or they might find him guilty of manslaughter only. The motive with which the act of killing was done would necessarily be an important factor in governing their determination into which of the three grades of homicide this crime would fall. The principal fact was in evidence, and was material in the proper investigation of the case. Were the declarations of the respondent, accompanying the act, admissible in evidence? We are clearly of opinion they were, and should have been admitted in evidence as a part of the *res gestæ*.

"Where evidence of an act done by a party is admissible, his declarations made at the time, having a tendency to elucidate or give character to the act, and which may derive a degree of credit from the act itself, are also admissible as a part of the *res gestæ*." *Sessions* v. *Little*, 9 N. H. 271. If the declaration is made by a party while doing an act, the nature, object or motive of which is the subject of inquiry, and serves to explain it, then such declaration is admissible in evidence. And it is generally in this class of cases, where either the nature, object or motive of the act is material, that this rule receives its broadest application. The declaration becomes important as forming a part of the transaction itself, on the ground that what is said at the time, affords a legitimate means of ascertaining the character of the act, and as a part of the circumstances to be given in evidence with the principal fact. As a learned author has expressed it, such declarations are admitted, "not to prove their own truth, but to exhibit the attitude of the parties, and to show the transaction in all its aspects." 2 Whart. Ev. § 1102. Nor are such declarations said to be received as hearsay, but they are distinguished from it by their connection with the principal fact under investigation and which they serve to elucidate and explain.

In the case before us, the answer given by the father of the respondent, so far as it had proceeded at the time when the objection was raised, related to the circumstances immediately surrounding a principal fact which was then the subject of investigation — the firing of the fatal shot. The witness described the situation of the parties at the moment the shot was fired, and the appearance of the respondent as frightened and trembling; but when he attempted to state the respondent's declaration which accompanied the act, it was excluded. Such declaration was only a verbal act, and as competent as other testimony. Its weight was for the jury. *Insurance Co.* v. *Mosley*, 8 Wall. 408. Being excluded, the presumption is that such exclusion was detrimental to the interest of the party in whose behalf it was offered. *People* v. *Williams*, 18 Cal. 187. What bearing it might have had on the minds of the jury, had the evidence been admitted, is not a question for our consideration. The respondent was on trial for his life. He was entitled to the benefit of whatever legitimate evidence he could produce. It becomes unnecessary to consider the remaining exceptions.

Exceptions sustained. New trial granted.

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

HERBERT BLAKE *vs.* R. S. RUSSELL.

Penobscot. Opinion September 19, 1885.

Pleading.

Where an action for a statute penalty is founded on two separate statutes, the declaration will not be adjudged bad, because of the allegations "by force of the statutes," and "contrary to the form of the statutes,"—using the plural form of the word "statute."

ON EXCEPTIONS.

Debt against the treasurer of the Dexter Woolen Mills under stat. 1881, c. 79, § 4, which is in these words: "If any officer of a corporation charged by law with the duty of making and causing to be published any statement in regard to such corporation, shall neglect so to do, such officer, in addition to the penalties already provided, shall forfeit the sum of five hundred

dollars, to be recovered by action of debt, or action on the case, to the use of the person suing therefor."

Revised Statute, 1871, c. 48, § 8 (repealed by stat. 1883, c. 195,) required treasurers of certain corporations to publish semi-annually statements of the condition of the corporation.

The defendant demurred to the declaration and the court overruled the demurrer and ordered a *respondeat ouster*. The defendant alleged exceptions to this ruling.

Morrill Sprague, for the plaintiff.

Josiah Crosby, for the defendant, contended that the demurrer should have been sustained. The action is for a violation of R. S., 1871, c. 48, § 8, and the allegation in the declaration is, "against the form of the statutes" — using "statute" in the plural. That is bad. *Penley* v. *Whitney*, 48 Maine, 351; 2 East. 333; *Butman case*, 8 Gr. 113; *Morrison* v. *Witham*, 10 Maine, 421; Hawkins, Pleas of the Crown, 3117; Oliver's Prec. 450; 3 Jacob's Fisher's Digest, 3685.

The counsel further ably argued against the constitutionality of the law creating the offense, and that giving the action *qui tam* to the plaintiff.

VIRGIN, J. The plaintiff seeks to recover a forfeiture provided by stat. 1881, c. 79, § 4. His cause of action is founded on and described in the provisions of two separate and distinct statutes. The offence consists in neglecting certain statutory requirements. The requirements are enumerated and defined in R. S., of 1871, c. 48, § 8; while the supplement of the offence, viz: the neglect, together with the forfeiture and the remedy, is prescribed in St. 1881, c. 79, § 4. Neither statute alone creates the offence. The allegations in the declaration, "by force of the statutes," etc., and "contrary to the form of the statutes," etc., are literally and technically correct. As the provisions of R. S., c. 48, § 8, have been long since repealed, and none of the penalties therein prescribed were sought to be recovered in this action, we do not consider it our duty to examine the constitutionality of its provisions. *Exceptions overruled.*

PETERS, C. J., DANFORTH, EMERY, FOSTER and HASKELL, JJ., concurred.

NELLIE BIRMINGHAM and others, in equity,

vs.

ALBERT A. LESAN.

Penobscot. Opinion October 15, 1885.

Will. Devise. Condition subsequent. Equity. Amendment. Practice. Chancery rules XXXIX. R. S., c. 77, § 11.

M. devised his farm to his wife for life, "the said real estate to go to J. M. at her death, if any remains, providing J. M. maintains and provides for her decently from the proceeds of the farm or otherwise; and providing the said J. M. fails to provide for her, then she is empowered to call on selectmen to provide for her in her own house." The will also provided that J. M. be allowed to use the place for the purpose of maintaining himself and the widow of the testator by farming the same. *Held,* that J. M. took upon a condition subsequent; and that J. M. having failed to perform the condition, the heirs of the devisor had the right to create a forfeiture by an entry therefor, although the will contained no clause to that purport.

When one holds title upon condition subsequent, it remains in him as if no condition ever existed, until defeated by entry for breach.

Equity does not lend its aid to devest an estate for a breach of a condition subsequent, and thereby enforce a forfeiture.

An original bill cannot be amended by incorporating therein anything which arose subsequent to the commencement of the suit; it can only be done by a supplemental bill.

A party who has no cause of action when his original bill is filed, cannot by supplemental bill maintain his suit upon a cause of action that accrued after the filing of the original bill.

Neither Chan. Rule XXXIX, nor R. S., c. 77, § 11, allows an event which occurred since the filing of the original bill to be engrafted by way of amendment; but a new bill is the remedy.

BILL IN EQUITY. Heard on bill, answer and proof. The case has been once before at the law court and is reported 76 Maine, 482.

The plaintiffs claim title to the real estate of which James McDermott died seized, as his heirs; the defendant claims title to the same under a mortgage from Catherine McDermott, and John Mehan devisees by the will of the said James McDermott. The following are the essential provisions of the will:

"Article 1. I will that after the payment of my just debts, I give and bequeath to my wife Catherine McDermott, all the

personal property of every name and description, that I may own and possess at the time of my decease, said Catherine to use a certain portion of the same for putting a head stone to my grave, and defraying my funeral expenses.

"Article. 2. 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.

"Article. 3. I give and devise to my wife, Catherine, one-half of the lower part of my dwelling house, west side, during her natural life, the other half of said house to be used by John Mehan, if he wishes but not to sub-let.

"Article 4. I will that the said Mehan be allowed to use the place for the purpose of maintaining himself and my wife by farming the same; the said Mehan to put a head stone at said Catherine's grave, and if Mehan fails to do so, I will that the selectmen do so from the proceeds of the estate."

The opinion states other material facts.

Barker, Vose and Barker, for the plaintiffs.

Mehan took the estate upon conditions subsequent, *Gray* v. *Blanchard*, 8 Pick. 291. And he did not perform the condition.

The bill is brought to obtain the construction of the will. The amendment is not necessary to the final and equitable determination by the court. But the amendment is permissible in the discretion of the court. R. S., c. 77, § 11; Rules of Court, XXXIV. *Byers* v. *Franklin Coal Co.* 106 Mass. 141.

The rights of the defendant are not prejudiced by the amendment, and if the amendment should be found necessary, "it will promote justice and prevent litigation and delay."

Charles P. Stetson, for the defendant.

Mehan took by the will an estate which he could convey.

He took a fee after the life-estate of Catherine, the language

of the will does not create an estate upon condition, or an estate to be defeated by the heirs, there are no words giving estate to heirs, no words giving them right of re-entry, or declaring a forfeiture. *Loberee* v. *Carleton*, 53 Maine, 211; *Rawson* v. *Inhs. of S. District*, 7 Allen, 125; *Stark* v. *Smiley*, 25 Maine, 201. The language "if said Mehan fails to provide for the said Catherine, then said Catherine is empowered to call upon the selectmen to provide for her, in her own house," show that the intention was not to create a condition of the estates resting in him, but only a trust or direction to him how to use the proceeds of the farm. 2 Washburn on Real Estate, *446.

"If one makes a feoffment in fee *in intentione ad effectum*, &c., that the feoffer shall do or not do such an act, these words do not make the estate conditional but it is absolute notwithstanding." The 4th article of the will also sustains this view, the intention being that they (Mrs. McDermott and Mehan) should have joint occupancy of premises for the purpose of maintaining themselves from the proceeds of the farm. If it was the intention that the town or selectmen should have the right to take and sell the real estate, then the town or selectmen should be made party to the bill. There has been no entry by the heirs, no action can be maintained by heirs unless there be an entry previous to action. *Marwick* v. *Andrews*, 25 Maine, 525, 530.

The entry made after this case was made up is of no avail. If the heirs claim title against Lesan's title by mortgage, a writ of entry would be the proper remedy, and an adequate remedy at law. Equity is not a proper remedy. *Smith* v. *Jewett*, 40 N. H. 530; 2 Jarman on Wills, 526. Bill to remove cloud upon complainant's title cannot be sustained in such a case. *Briggs* v. *Johnson*, 71 Maine, 235.

VIRGIN, J. It has already been adjudged that the testator's widow took a life-estate in the farm of which he died seized, 76 Maine, 482.

And now upon careful consideration of all the terms of the will we have concluded that the devise to Mehan was upon

condition. It is very plain that the testator did not intend that he should take an absolute fee by implication in the remainder with a charge upon him personally to support the life-tenant; nor a life-estate in the remainder with a like charge upon the estate devised. *McLellan* v. *Turner*, 15 Maine, 438 and cases there cited; 3 Green, Cruise, 283–4 and cases in note; *Taft* v. *Morse*, 4 Met. 523; *Gardner* v. *Gardner*, 3 Mas. 179, 207; for only what "remains at her death" is devised to him.

Was it a condition precedent or subsequent? As there are no technical words which distinguish them (4 Kent, 125), whether it be one or the other depends upon whether the testator intended that a compliance with the requisition annexed to the estate devised should be a condition of its acquisition, or merely of its retention, 2 Jar. Wills. (R. & T. ed.), 509.

It cannot be deemed a condition precedent, because Mehan is authorized by the express terms of the will to provide for the life-tenant "from the proceeds of the farm." And while "proceeds" may mean "produce" or "income," it also signifies "money or other things of value obtained from the sale of property," Web. Dict.; and the testator must have intended to use it in the latter sense, inasmuch as the real estate was to go to Mehan, at the widow's death, "if any remained," and he could not sell any of it for her support, unless he had at least a title on condition subsequent.

The devise to him, together with the next succeeding provision that in case he failed "to provide for" her "then she is empowered to call on the selectmen," &c., cannot be considered a conditional limitation, as in *Stearns* v. *Godfrey*, 16 Maine, 158 and *Brattle Sq. Church* v. *Grant*, 3 Gray, 143, because the limitation over is too indefinite, no third person being named. 4 Kent, 127.

Considering the whole will together we are of opinion that the devise to Mehan was upon a condition subsequent. *Stark* v. *Smiley*, 25 Maine, 201; *Marwick* v. *Andrews*, 25 Maine, 525; *Thomas* v. *Record*, 47 Maine, 500.

Mehan having failed to perform the condition, the heirs of the

devisor had the right to create a forfeiture by an entry therefor, although there was no clause in the will to that purport. *Thomas* v. *Record*, *supra;* 4 Kent, 123. But no such entry was made before this suit was commenced. And while equity will, under well recognized circumstances, relieve a party from a forfeiture a court of equity does not lend its aid to devest an estate for a breach of a condition subsequent and thereby enforce a forfeiture. 4 Kent, 131; Sto. Eq. § 1319; *Smith* v. *Jewett*, 40 N. H. 534.

Moreover the title passed to Mehan subject only to be defeated on breach of the condition; and until an entry for the breach, it remained in him as if no condition ever existed. The complainants, therefore, at the commencement of this suit, placed themselves in the attitude of praying for the removal of a cloud from a title which they did not hold, by the cancellation of a mortgage upon a farm of which they had no possession. *West* v. *Schnebley*, 54 Ill. 523; Sto. Eq. § 705, note 4; Pom. Eq. § 1399, note 4.

But since the filing of their bill, viz.: on June 1, 1885, the plaintiffs made an entry for breach of the condition and they have amended their bill accordingly. In the absence of any statutory provision or general rule of court authorizing it, an original bill cannot be amended by incorporating therein anything which arose subsequent to the commencement of the suit; it can only be done by a supplemental bill. *Stafford* v. *Howlett*, 1 Paige, 200; *Campbell* v. *Bowne*, 5 Paige, 34; *Downer* v. *Wilson*, 33 Vt. 1. Moreover, generally, matters which have occurred since the filing of the original bill and which are material to perfect the plaintiff's case, may be introduced into the record by supplemental bill. *Greenleaf* v. *Queen*, 1 Pet. 148; *Candler* v. *Pettit*, 1 Paige, 168; *Pinch* v. *Anthony*, 10 Allen, 470. But in the language of the court in the last named case, "we know of no case that goes so far as to authorize a party who has no cause of action at the time of filing his original bill, to file a supplemental bill in order to maintain his suit upon a cause of action that accrued after the original bill was filed, even though it arose out of the same transaction that was the subject of the original bill."

Neither does Chan. Rule XXXIX authorize this new fact of entry to be brought into the record by way of amendment, inasmuch as the "circumstances of the case are not such as to require a supplemental bill."

Nor does the last clause of R. S., c. 77, § 11, allow an event which occurred since the filing of the bill to be engrafted therein by amendment or reforming the bill. A statute intended to make such a radical change in the practice should be express and plain in its terms.

Our opinion therefore is that a new bill is essential. And now that the complainants are in possession they cannot try the title by writ of entry, but may maintain a proper bill to remove the cloud from it (*Davis* v. *Boston*, 129 Mass. 379), especially since they have revested the title in themselves by an entry for breach on the part of Mehan.

Bill dismissed with costs.

PETERS, C. J., DANFORTH, FOSTER and HASKELL, JJ., concurred.

EMERY, J., concurred in the result, but thought the proper remedy was under R. S., c. 104, § § 47 and 48.

ADONIRUM J. BIRD *vs.* MARY M. BIRD, Administratrix.

SAME, in equity, *vs.* SAME and another.

Knox. Opinion November 16, 1885.

Partnership, claim of, against insolvent estate of deceased partner.

A surviving partner may recover from the estate of a deceased partner any indebtedness due from the deceased to the firm, where the partnership is insolvent, for the benefit of the firm creditors, in an action at law. But for this purpose he has no preference over any other creditor of the estate, and if the estate is insolvent, and the action was not pending at the time of the representation of the insolvency it cannot be maintained, the only remedy being before the commissioners of insolvency appointed by the probate court.

ON REPORT of facts agreed.

The first case is by the surviving partner of the firm of D. N. Bird & Co., against the administratrix of the estate of Hanson G. Bird, deceased partner of that firm, in assumpsit to recover four

thousand five hundred and two dollars and two cents, being the balance and interest shown by the firm books to be due from the deceased to the firm. The second suit was in equity by the same plaintiff against the same defendant and Caleb G. Moffit, assignee in insolvency of the estate of David N. Bird, who was also a member of that firm, and it was for the recovery of the same sum. The report shows that the plaintiff had paid from his own funds the sum of nineteen thousand four hundred forty-four dollars and sixty cents in discharge of the liabilities of the firm.

C. E. Littlefield, for the plaintiff.

The claim or account against Hanson G. Bird, it is clear, is an asset of the firm of D. N. Bird & Co., and that this surviving partner is entitled to recover the amount in full of the insolvent administratrix, is determined in the affirmative in *Welby* v. *Phinney*, 15 Mass. 124, which is precisely in point. That was assumpsit. It proceeds upon the equitable lien for re-imbursement upon common law principles applicable to partnership, and is independent of any statute. The partnership can follow its assets in the hands of the insolvent partners, when needed for partnership purposes as here.

True P. Pierce, for the defendants.

DANFORTH, J. By the statement of facts agreed upon in these cases, it appears that previous to May 10, 1882, there was a partnership in business consisting of the plaintiff, Hanson G. Bird and David N. Bird. On that date, Hanson G. Bird died, and the defendant was duly appointed and qualified as his administratrix. Subsequently, the plaintiff gave bond as surviving partner, and was duly qualified to settle the partnership affairs. It further appears that said firm is largely insolvent and that the plaintiff has, in paying its debts, exhausted all its assets except the claim now in question, besides paying from his own funds a sum much larger than this claim. The estate of Hanson G. Bird has been rendered and is insolvent, and commissioners appointed and qualified.

The claim in suit is for a private indebtedness of the defendant's intestate to the firm, as found upon its books at his decease.

The defence is that the plaintiff should have proved his claim before the commissioners of insolvency, and shared in the distribution of the estate as other creditors, under the provisions of R. S., c. 66, § 1.

That the claim in suit is a part of the assets of the firm upon which the creditors, as well as the individual members of the firm, who have paid more than their share of its liabilities, or received less than their share of its effects, have a lien, may be conceded. As such, it belongs to the partnership, and it becomes the duty of the plaintiff as surviving partner, to turn it into money for the settlement of the partnership affairs.

If the firm were solvent, a portion of this claim would have belonged to the intestate, liable to his private debts, and the plaintiff and administratrix would have held it as tenants in common. But as the firm is insolvent, the joint creditors having a preference, the whole of this claim becomes a fund for their payment and thereby belongs exclusively to the plaintiff, and necessarily a debt against the estate. As such debt, the plaintiff seeks to recover it in these actions, and but for the representation of insolvency, the action at law might have been maintained. Such debts it is the duty of the administratrix to pay, but she must pay them in the way pointed out by the law. She had the right to interpose insolvency as she has done, and having interposed it, by the express terms of the statute, she is exempt from actions for any debt except in a few specified instances, and these suits, both of which are for the same cause of action, come within none of the exceptions named. In fact, it is not claimed that they do, or that they were pending at the time the representation of insolvency was made and prosecuted to ascertain the amount due as evidence to be given the commissioners, or that the amount ascertained may be added to the report of the commissioners; but they are prosecuted independent of the commissioners, not only for judgment, but for execution, not only to ascertain the amount due, but that the whole amount shall be paid. This is done not under or in pursuance of any provision of the statute, but in spite of it, relying "upon the equitable lien for re-imbursement upon common law principles.

applicable to partnerships independent of any statute." While there is such a lien at common law where the statute does not apply, when it does, the common law, if in conflict, must yield. But in this case there is no conflict. Strictly speaking, the firm have something more than a lien upon the claim in suit; it has the ownership of it. But whether lien or ownership, it does not change the nature of the thing, or increase or diminish its value. In either view, it is a debt against the intestate created by contract, and is worth what can be collected upon it by the proper legal process. In law or equity, no reason is apparent why one contract creditor in such a case, should have any preference over another.

If we consider this an action to indemnify the plaintiff for the excess above his share, paid by him for partnership debts, the result must be the same, except perhaps in that case the action should have been in the name of the plaintiff as an individual under his specific contract of indemnity with the intestate, and not as surviving partner. The case shows an express contract between the plaintiff and intestate, by which the latter was to re-imburse the former one-half of such excess. Thus this liability rests upon the personal contract of the intestate, and must stand upon the same ground as other indebtedness arising from personal contracts.

Thus, in any view we can take of this case, the liability to be enforced is one against the intestate as an individual, growing out of the fact that he was a member of the firm, but nevertheless depending upon his personal contract.

The plaintiff relies with much confidence upon *Welby* v. *Phinney*, Adm'r, 15 Mass. 124, to sustain his action. It is true that that case is substantially like the present one, and that the statute relating to the settlement of insolvent estates then in force in Massachusetts, was the same as ours in all respects material to the question at issue. How that case came into the court, whether by appeal or consent, or was commenced before the representation of insolvency, does not appear. But it was presented to the law court upon a report of referees, which in effect is the same as upon a statement of facts as in this

case. The questions there presented were whether the action could be sustained at all, as it depended upon the settlement of partnership affairs, and if so, for what amount, as the loss which the plaintiff would finally sustain by means of the partnership was uncertain, the referees having fixed it, up to the time of making the report. The court decided that the action could be maintained, and fixed the amount to be recovered as reported by the referees. But what is important in its bearing upon this case, is that the amount was subject to revision by subsequent proceedings, and one of those proceedings was the amount which might be paid upon a distribution of the deceased partner's estate. In alluding to the amount the court say: "It is true that we can not now say that he will eventually be entitled to retain the whole *dividend*, which may be decreed to be paid him in the distribution of *Harrison's* estate; for that may be so considerable as to pay more than *Harrison's* just proportion of the debts of the firm." Again on page 125 the court say: "The plaintiff may hereafter be compelled to pay the outstanding debts, which have been represented as of considerable amount; and *after the distribution of Harrison's estate*, he can have no relief." Thus it appears that under the decision of the court, the amount to be recovered was not necessarily the amount to be paid by the administrator, as this would depend upon the decree of distribution of the estate. In other words, no execution was to issue upon the judgment, but it was to be added to the commissioner's report for its distributive share of the estate, and this was the only remedy which the plaintiff could have.

It is, therefore, apparent that the case cited is not only not in conflict with the conclusion to which we have come, but is an authority for it.

In *Johnson* v. *Ames*, 6 Pick. 330, an action very similar to the one at bar, it was held that insolvency of the estate of the deceased partner, decreed before the commencement of the suit, was a bar to its maintenance, no notice of appeal having been given, although there was a surplus of assets after the distribution among creditors who had proved their claims. It was then suggested that there might be a remedy in equity applicable to the surplus only.

As in this case no surplus appears, *Johnson* v. *Ames* must be considered an authority for the conclusion in the case at bar that the plaintiff's remedy is before the commissioners of insolvency.

In the equity suit, the entry must be,

Bill dismissed without costs.

In the suit at law,

Plaintiff nonsuit.

PETERS, C. J., WALTON, LIBBEY, EMERY and FOSTER, JJ., concurred.

INHABITANTS OF SEARSMONT *vs.* INHABITANTS OF THORNDIKE.

Waldo. Opinion November 16, 1885.

Pauper. Settlement. Emancipation. Continued residence.

That a minor daughter should depart from home for temporary employment, leaving such articles of clothing and bedding as she did not require for use, even though she receive the wages for her labor for her own use, is not so uncommon an occurrence as to authorize an inference of such a change in the parental and filial ties as to constitute emancipation.

When the home of a person is once established in a town it requires less proof to show continuance there than would be necessary to show both the establishment and continuance. Bodily presence at all times is not necessary to show continuance. The departure for a purpose in its nature temporary, leaving behind articles not required for immediate use, expressing an intention to return, and returning to visit, and to repair wardrobe, and on account of sickness are sufficient evidence of the continuance.

ON REPORT.

Assumpsit for pauper supplies to the amount of twenty-seven dollars furnished Sybil Ryan whose settlement was alleged to be in the defendant town.

The opinion states the material facts.

Wm. H. Fogler and *R. F. Dunton*, for the plaintiffs, cited: *Sumner* v. *Sebec*, 3 Maine, 223; *Lowell* v. *Newport*, 66 Maine, 78; *Parsonsfield* v. *Kennebunkport*, 4 Maine, 47; *Knox* v. *Waldoboro*, 3 Maine, 455; *Fayette* v. *Livermore*, 62 Maine, 229; *Brewer* v. *Linnæus*, 36 Maine, 428; *Chicopee* v. *Whately*, 6 Allen, 509; *Ripley* v. *Hebron*, 60 Maine, 395.

Brown and Carver and *George E. Johnson*, for the defendants.

When the pauper went to Massachusetts in 1866 or 1867 her father surrendered all right to the care and custody of her, and never afterwards claimed any of her earnings, nor attempted to control her conduct in any manner; in fact he relinquished all his parental rights and authority over her and from that time treated her the same as though she was of full age, which makes a clear case of emancipation under *West Gardiner* v. *Manchester*, 72 Maine, 509; *Lowell* v. *Newport*, 66 Maine, 78.

October 23, 1870, the pauper was twenty-one years old, and whether emancipated or not, her settlement was in Waldo, as her father had not acquired one since he moved from that town. R. S., c. 24, § 1, p. 2.

To establish a settlement in Thorndike plaintiffs must prove that subsequent to October 23, 1870, and prior to November 6, 1883, the pauper resided in Thorndike five years in succession. R. S., c. 24, § 1, p. VI. The law does not allow any of the years of his (pauper's) residence while under age to be tacked to those after age, to make up the requisite number. *No. Yarmouth* v. *Portland*, 73 Maine, 110–111; *Brooksville* v. *Bucksport*, 73 Maine, 111.

To establish a residence within the meaning of the statute, there must be personal presence, with the design, and the right, on the part of the pauper, to make her father's house her home, coupled with his consent. *Corinth* v. *Lincoln*, 34 Maine, 314; *Warren* v. *Thomaston*, 43 Maine, 418; *Fayette* v. *Livermore*, 62 Maine, 229; *North Yarmouth* v. *West Gardner*, 58 Maine, pp. 211, 212, 215.

Neither the pauper, her father, nor Mrs. Ryan, considered or understood that pauper's home was in Thorndike from the time he moved to Thorndike, in 1869, till after her return, in July, 1879.

When the pauper went away in 1872 or 1873, she left no property in Thorndike "except some few little things that she gave" her step-mother. At that time, Mrs. Ryan testifies, "I asked her to come and see us again; and she said she would."

Daniel C. Ryan, pauper's father, in his answer to question, "I told her I should buy a farm in a year or two, and when I

did she could come home." This he told her when she went away in 1877 or 1878, and is equivalent to saying, you have no home here and we don't want you to come home again till after I buy a farm; not what a father would have said to an invalid daughter, if his house was her home.

In *Corinth* v. *Lincoln*, *supra*, the court says: "In order to constitute a settlement in the town by a residence of five years together, it must appear that she had her home at her father's house. . . . Home, when restricted to the house of a person's residence, must be the place where he has the design and the right for the time being, to abide, connected with actual residence. This necessarily involves the idea of a voluntary intention to occupy the place on the part of the inmate and a voluntary consent to that occupation, on the part of the one who has the control."

DANFORTH, J. An action to recover for supplies furnished a pauper, and the only question raised is whether the pauper had a settlement in the defendant town. The case is before the court upon a report. The witnesses are the father and step-mother of the pauper, and though there are some verbal differences in their statements of the facts, there is no real conflict in their testimony.

It appears that the father had lived in the town of Waldo for fifty years previous to 1869, when he removed to the defendant town and remained there until 1879, and then moved with his family into the plaintiff town where he has ever since remained.

The daughter, who is the pauper, lived with her father in Waldo until 1867 when she was eighteen years old. She then went to Massachusetts for employment to earn something for herself, saying she should return in two or three years, leaving behind her some articles of apparel and bedding, being all the goods she had except what she took with her for use while she was absent. She did return but not until after her majority. So far as appears, after she left and while she was a minor, the father received none of her earnings, nor did he contribute anything to her support, but it does appear that he provided her with clothing to take with her.

Under these circumstances it is claimed that the daughter was emancipated and no longer followed, or had her home with her father. But we fail to see any evidence which tends to such an inference. That a daughter should leave home for temporary employment, even though she might receive the proceeds for her own use, is not so uncommon an occurrence as to authorize an inference of any change in the parental and filial ties. It is the father alone who can emancipate the child. Here is no relinquishment on his part of the right of control over, or repudiation of his parental obligations to the child; simply an assent to a particular course of life on her part for the time being. Nothing inconsistent with his right to recall her, or claim her earnings at any time in the future. Hence there is an entire failure to sustain an emancipation as defined by the authorities. *Lowell* v. *Newport*, 66 Maine, 89, 90 and cases cited.

Hence though absent when the father moved to Thorndike, the daughter's home, she being a minor, went with him. She then had a home derived from her father, established in the defendant town, and that was her home when she became of age in October, 1870 and to that home she returned in 1872 or 1873. Her absence while a minor for the purpose as shown by the evidence, be that absence longer or shorter would not interrupt that home. *Parsonsfield* v. *Kennebunkport*, 4 Maine, 47.

As the father did not gain a settlement in Thorndike before the pauper arrived at her majority, it becomes necessary to ascertain whether she gained one there herself by a five years' residence after she became of age. As at the beginning of that period, or at the time when she became of age, she had an established home in Thorndike, the only remaining question is, whether that home continued for the required time. Having been once fixed, if its continuance is not to be presumed until an interruption is shown, as held in *Brewer* v. *Linnaeus*, 36 Maine, 430, and *Chicopee* v. *Whately*, 6 Allen, 508, it would at least require less proof than it would to show both its establishment and continuance. The only evidence relied upon to show the interruption of this home, is the several absences of the pauper.

These, in the absence of any explanation, would hardly lead

to any inference either way. It is clear enough that continued presence is not necessary to retain a home, or residence. It is also quite obvious that it is in most cases difficult to find an instance of absence without some connecting circumstances explanatory of its purpose. In *North Yarmouth* v. *West Gardiner*, 58 Maine, 207, and *Ripley* v. *Hebron*, 60 Maine, 393, it is held that "when a pauper leaves a town where he has resided, having no family, leaving no house or place therein to which he has any right to return, and having no effects save the clothes he wears, the law does not presume that he intends a temporary absence, and has a continuing purpose to retain a home in such town, and return to it at some future period." The effect of these decisions is at most, that when an absence is proved without the presence of certain circumstances understood to be indicative of an intention to return and to retain the home left for a time, the law will not presume that intention, but will leave it as a question of fact with the burden upon the party relying upon it. In the case at bar, the absences are admitted, but the plaintiff proves all or nearly all the circumstances which are named, and by implication if not expressly, assumed as proof of a temporary absence and an intention to return. The case shows clearly that each time the pauper left, it was for a purpose in its nature temporary, that she left behind wearing apparel and bedding, all the property she had except what was necessary for her immediate use, that she expressed an intention to and did in fact return, first, perhaps, in part for a visit, as her purpose was not fully performed, but also as a home for the repairing of her wardrobe, afterwards on account of sickness, and finally and before the removal of her father from Thorndike, when sickness had become too severe for labor, permanently. In all this time, there is no pretence that she had established any other home, and there is an entire want of proof of any abandonment of that she had with her father. It is, however, claimed that her father's consent was wanting, and without that, as she had no home in Thorndike except at her father's house, she could not gain a settlement in Thorndike, and much stress is laid upon the remark he made to her when she left the last time, "that he

should buy a farm in a year or two, and when he did, she could come home." It is claimed that this was a virtual denial of a home to the daughter until the farm was bought. We do not understand such to be the proper interpretation of the language used. The daughter was then in poor health. She had then, on that account, been at home nearly one year. The father had received, and so far as appears, treated her as a daughter, providing for her as her necessities required, and making his home hers. He did not say that when the farm was bought he would, as a matter of the future, give her a home, but, apparently lamenting the necessity, in her then condition, of going away at all, he, recognizing that she then had a home with him, says, to that home you may then come, meaning, evidently, to remain permanently. Such we might expect from the ordinary feelings of a father, and such we deem the proper and fair construction of the language, and the most in accordance with his subsequent conduct. She did come home before the purchase of the farm, was received and cared for without objection, and has remained ever since.

It is argued that personal presence, as well as intention, is necessary in order to constitute a home. Be it so. There is no specified time in which the personal presence must continue. It may be longer or shorter, as the absences may be longer or shorter, without interrupting it. A home may be established or abandoned in one day. In 1872 or 1873, the case finds that she returned to her home, then in Thorndike. True, she did not then expect to and did not long remain. But her then acts and words, as well as her previous and subsequent conduct, show that she came to it as her home, and that it was not subsequently abandoned, but remained in the defendant town until she removed with her father from there in 1879, giving more than the five years necessary, even if we reckon from 1873.

Defendants defaulted.

PETERS, C. J., VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

JOSEPH B. PEAKS *vs.* WILLIAM D. BLETHEN and another.

Piscataquis. Opinion November 16, 1885.

Real action. Pleadings. Lease. Owners of a second story of a building.

Where the defendants in a real action plead *nul disseizin* and under a brief statement disclaim a portion of the demanded premises, and the plaintiff by counter brief statement alleges that the defendants before and since the commencement of the action were in possession of the premises and claimed a right, title and interest in them, the issue is, in whom is the better title to the portion not disclaimed, and did the defendants at the date of the writ claim title to or occupy the portion disclaimed.

Certain persons were permitted to build a public hall as a second story of a new school-house, and an agent, authorized by the district, leased that second story to the builders of it, with necessary easements of ingress and egress, and with equitable provisions as to the use, repair of the building, etc. "so long as the building shall stand." The building in its several parts were occupied in accordance with the agreement for nearly thirty years, when the district voted "to sell the school-house and lot under" the hall, and by deed their agent conveyed all their interest in the lot and building thereon. In a real action by the grantee against the occupants of the hall, *Held:*

1. That the title to the hall was never in the district, it accrued to the builders before the execution of the instrument, called a lease, by virtue of their having built it under a license from the district, and the purpose of the paper was to regulate the use and manner of using the hall.

2. That these regulations applying to the use, were not conditions of a grant, for there was no grant, hence the remedy for a breach would not be a forfeiture.

3. That there could be no forfeiture without an entry, and the deed from the district conveyed no such right, nor had the district made any such entry.

4. That the vote to sell did not authorize a conveyance of the hall, and the deed could go no further than the authority.

5. That the defendants, having disclaimed all but the hall with its easements, and being in possession of that, have a color of title, and the plaintiff had failed to show a better one.

ON REPORT.

The case, pleadings and material facts, are stated in the opinion.

The following is the paper referred to in the opinion as called a lease:

"This indenture made this 20th day of December, A. D. 1852, between the inhabitants of School District No. one, (1,) in

Dover, in the county of Piscataquis, by James S. Wiley of said Dover, agent of said district, especially authorized for the purpose by a vote of the said inhabitants, at a meeting of said district, held at their school-house, on the 14th day of February, 1852, on the one part, and Thomas S. Pullen, Samuel Palmer and Abijah B. Chase, all of said Dover, on the other part, witnesseth, that whereas the inhabitants of said district No. 1, did, on the 16th day of February, A. D. 1852, by and through their building committee, by them appointed and authorized for the purpose, contract with and engage, by agreement in writing of that date, Judah M. Hackett of said Dover, joiner, to build a school-house for said district, according to a certain plan and specifications referred to in said agreement, and whereas the said Pullen, Palmer and Chase, did, on the said 16th day of February, 1852, agree with the said Hackett that he should erect and build for them, said Pullen, Palmer and Chase, a second story over and above the said school-house, to be erected as aforesaid, according to a plan and specifications agreed upon between the parties, the said inhabitants, in a meeting of said district, held on the 24th day of January, 1852, having permitted and licensed the said Pullen, Palmer and Chase so to do, with their associates and assigns, said upper story to be used and occupied by them exclusively and apart from said school-room as and for a public hall, and whereas the said school-house, together with said second story and the hall therein, having been built and finished according to said agreements. Now, in consideration of the agreements and conditions hereinafter named to be performed by the said Pullen, Palmer and Chase, their associates, executors, administrators or assigns, the said inhabitants by their agent aforesaid, do hereby demise, lease and let unto the said Pullen, Palmer and Chase, their associates, executors, administrators and assigns, the said upper story of said school-house, now finished into a hall, and ante-room, to be used and occupied as a public hall, together with such privileges and appurtenances as may be necessary and proper for the convenient occupation of said upper story for the purposes aforesaid, with the perfect right and privilege at all times of ingress, egress and regress to and from said hall, by and

through the northerly door in said building, leading to said school-room, through the northly entry, over the flight of stairs to said upper story or hall. To hold to them, the said Pullen, Palmer and Chase, their associates, executors, administrators or assigns, for the term of so many years as said building shall stand, or until the parties shall mutually agree to devote the same to some other purpose. And in consideration of the conditions and agreements to be performed by said inhabitants, the said Pullen, Palmer and Chase, their associates, executors, administrators or assigns, agree to contribute to the repair of said building as follows, to wit: To paint the said upper story or so much thereof as pertains to said hall and ante-rooms, so often as shall be necessary for the good repair of the same and to repair their own windows and stairs leading to said hall. The roof of said building and the gable ends and all other parts of the building to be kept in repair at the expense of said district, said hall not to be occupied for any kind of stores, warehouses, workshops, nor for any purposes except as and for a public hall, for religious, scientific and literary lectures and addresses, and for any purposes for which such halls are usually and generally occupied. And it is further agreed that in case the parties should conclude to break up and take down said building, each is to share in proportion to the value of the parts of the same respectively owned and occupied by each party in the proceeds of the same, unless the parties can agree upon some other mode of distribution. And should any disagreement arise between the parties as to the necessity of any repairs, after notice thereof from the one to the other, the question shall be referred to the selectmen of Dover for the time being, whose decision as to the necessity of such repairs is to be binding upon the parties and final. It is also agreed that neither part of said building is to be occupied for any other purposes than those for which they are devoted, without the consent of the party adversely interested, in writing first had and obtained."

Duly executed, acknowledged and recorded.

C. A. Everett, for the plaintiff.

In 1852, the district voted in substance that Mr. Wiley be an

agent to execute a good and sufficient lease to Pullen and others to add a second story to the school-house about to be erected and hold the same, and whether the second story was lawfully built or not, it was built and it then became real estate, nothing else, and was the property of the owner of the soil, the school district. 4 Mass. 576; 2 N. H. 12; 8 Mass. 417. It is entirely different from what it would have been if the builders had, by consent of the district, erected an entire building on the face of the earth on land of the district.

The district recognized the rights of Pullen and others under the lease. This plaintiff recognized the lease. The paper itself, after reciting the doings up to that time, says the district "doth demise, lease and let" the second story. "Demise" and "lease" mean "the letting of lands, rents, common or any hereditament, unto another, for a lesser time than he that doth let it hath in it." Shepherd's Touchstone, c. 7, Lib. 1, notes; Taylor's Landlord and Tenant, § 14, n. 2. The words "demise, lease and let," are apt and appropriate to convey a fee, if the words "to hold to his heirs," &c., had been in the habendum. *Jamaica Pond A. Co.* v. *Chandler*, 9 Allen, 159. In this lease what estate was conveyed? There is nothing which indicates any number of years, or any event by which time may be reckoned, or which must happen in the life of either of the lessees. Therefore it is not a lease for years. Shep. Touch. 267, 272; 1 Cooley's Blackstone, book 2, 139, 142. The interest of a lessee at his death goes to his executor or administrator. *Hollenbeck* v. *McDonald*, 112 Mass. 247; 5 Mass. 419.

Not being a lease for years, what is it? A lease for so many years as J. S. shall live is void. The word "heirs" not being in the lease, and the time being uncertain and undefined, it operates as a life-estate. *Hurd* v. *Cushing*, 7 Pick. 174; *Sedgwick* v. *Laflin*, 10 Allen, 430; *Buffum* v. *Hutchinson*, 1 Allen, 60; *Gould* v. *Lamb*, 11 Met. 84; *Farrar* v. *Cooper*, 34 Maine, 394.

The vote of the district to sell the house and lot under Odd Fellows' hall, was not restrictive as to the property to be sold.

The words used were simply descriptive. And the vote meant to sell all the property the district had in the land and building. At all events, the defendants can not complain. They are trespassers, whether the district or Peaks is the owner of the property. *Goodenow* v. *Kilby*, 24 Maine, 425; *Clark* v. *Pratt*, 47 Maine, 55; *Brown* v. *Pinkham*, 18 Pick. 174; *Williston* v. *Morse*, 10 Met. 24; *Morse* v. *Sleeper*, 58 Maine, 329. As the estate granted by this lease expired upon the death of Pullen, who was the last of the three lessees to die.

E. Flint, *A. G. Lebroke*, and *W. E. Parsons*, for the defendants, cited: *School Dist. in Dresden* v. *Ætna Ins. Co.* 54 Maine, 509; *Abbott* v. *Abbott*, 51 Maine, 584; *Ricker* v. *Hibbard*, 73 Maine, 107; *Barker* v. *Salmon*, 2 Met. 32; *Brown* v. *King*, 5 Met. 173; *Ashley* v. *Ashley*, 4 Gray, 197; *Bolivar M'f'g Co.* v. *Neponsit M'f'g Co.* 16 Pick. 241; 3 Wash. R. P. 120; *Tallman* v. *Snow*, 35 Maine, 342; *Jenks* v. *Walton*, 64 Maine, 97; *Hooper* v. *Cummings*, 45 Maine, 359; 104 Mass. 7; *Trask* v. *Wheeler*, 7 Allen, 109; *Nash* v. *Bean*, 74 Maine, 340; *Adams* v. *Cuddy*, 13 Pick. 460; *Coe* v. *Persons Unknown*, 43 Maine, 432; *Walker* v. *Lincoln*, 45 Maine, 67; *Putnam Free School* v. *Fisher*, 38 Maine, 326; *Peters* v. *Foss*, 5 Maine, 184; *Savage* v. *Holyoke*, 59 Maine, 345; *Estes* v. *Cook*, 22 Pickering, 296; *Gibson* v. *Savings Bank*, 69 Maine, 579; *Chaplin* v. *Barker*, 53 Maine, 275; *Jewett* v. *Hussey*, 70 Maine, 433; *Sumner* v. *Stevens*, 6 Metcalf, 337; *Clapp* v. *Bromagham*, 9 Cowan, 530; *Webster* v. *Holland*, 58 Maine, 168; *Pejepscot Proprietors* v. *Nichols*, 10 Maine, 261; *Moore* v. *Knowles*, 65 Maine, 493; *Granite State Bank* v. *Otis*, 53 Maine, 133; *Clark* v. *Foxcroft*, 6 Maine, 296; *Osgood* v. *Howard*, 6 Maine, 452; *Aldrich* v. *Parsons*, 6 New Hampshire, 555; *Doty* v. *Gorham*, 5 Pick. 487; *Ashmun* v. *Williams*, 8 Pick. 402; *Tobey* v. *Webster*, 3 Johns. 461; *Fuller* v. *Tabor*, 39 Maine, 519; 1 Wash. R. P. 2, 9, 399, 403; *H. & E. Iron Co.* v. *Black*, 70 Maine, 479; *Lapham* v. *Norton*, 71 Maine, 83; *Sanborn* v. *Hoyt*, 24 Maine, 118; *Morse* v. *Copeland*, 2 Gray, 305; *Howard* v. *Wadsworth*, 3 Maine, 471; *Boston Water P. Co.* v. *B. & W. Railroad*, 16 Pick. 512; *Harback*

v. *Boston*, 10 Cush. 297; *Morgan* v. *Moore*, 3 Gray, 322; *Hancock* v. *Wentworth*, 5 Met. 446; Wash. Easements, 8; *Kingman* v. *Kingman*, 121 Mass. 251; *Dore* v. *Wood*, 2 B. & A. 724; *Jameson* v. *Milleman*, 3 Duer, 355; *Barnes* v. *Barnes*, 6 Vt. 388; *Proprietors Locks & Canals* v. *N. & L. Railroad Company*, 104 Massachusetts, 9; *Ayer* v. *Phillips*, 69 Maine, 52; *Richardson* v. *Wheatland*, 7 Metcalf, 169; *Daggett* v. *Slack*, 8 Met. 450; *Mace* v. *Cushman*, 45 Maine. 260; *Morton* v. *Barrett*, 22 Maine, 257; *Sweet* v. *Dutton*, 109 Mass. 592; *Tillinghast* v. *Cook*, 9 Met. 143; *Houghton* v. *Kendall*, 7 Allen, 75; *Haley* v. *Boston*, 108 Mass. 576; *Childs* v. *Russell*, 11 Met. 16.

DANFORTH, J. This is a real action and comes to the law court with the stipulation that judgment shall be rendered "upon the facts and so much of the testimony as is legally admissible." No question is raised as to the competency of any of the testimony, no suggestion of any fact in dispute.

The defence is the general issue with a brief statement under which the defendants claim certain rights in the premises which are specifically described, and disclaim the residue. No objection is made as to the time when this disclaimer was filed. To it the plaintiff files a counter brief statement, alleging in substance, that at the date of the writ, and before and since, the defendants did claim right, title and interest in said premises, and were in the possession and occupation of the same, Thus is raised the real issue between the parties, and that is the title to the property described in the defendants' brief statement, and whether the defendants were in possession of, or claiming title to that part disclaimed.

It may be that the brief statement on either side is not technically accurate. But if, under the stipulations in the report, any pleadings are required, these are sufficient to direct the attention of the court to the real issue, and lay the foundation in the record for the proper judgment.

The case shows that in February, 1852, school district number one, in Dover, acquired an undoubted title to the lot of land

described in the plaintiff's writ and subsequently built a school-house thereon. The defendants disclaim any title to this lot and the building except the second story, which was finished as a hall and ante-rooms, with certain privileges or appurtenances connected with it. To this second story consisting of the hall and ante-rooms they, in substance allege a title and the remainder of the brief statement sets out certain easements which are in fact privileges or appurtenances connected with and belonging to the hall.

At a meeting holden in January, 1852, the district voted to build a school-house and purchase a lot for the same. At an adjournment of the same meeting, with the subject matter of building a school-house still under consideration, it was "voted that the building committee be authorized to permit any person, or persons, desiring to do so, to put into said school-house a second story to be used by them as a public hall, provided that such person or persons shall pay the extra expense of the same, the expense to be ascertained by said committee in contracting for the erection and completion of said house."

At a subsequent meeting in February, 1852, under an article in the warrant as follows, viz.; "To see if the district will vote to authorize some person, or persons, to execute a sufficient lease of the upper story of the contemplated school-house, to the *proprietors* of the same," it was "voted that James S. Wiley be a committee in behalf of the district to execute a good and sufficient lease to Thomas S. Pullen and others to add a second story to the school-house about to be erected in this district, with a right to finish said second story into a hall and *to hold the same as proprietors thereof* so long as said school-house shall stand, and that said committee be instructed to insert in said lease such provisions as he shall deem equitable in regard to keeping said building in repair, its occupancy," &c.

In pursuance of this vote and after the school-house with the hall was finished, Mr. Wiley in behalf of the district entered into a written contract with Thomas S. Pullen, Samuel Palmer and A. B. Chase, dated December 20, 1852. By this instrument it appears that Pullen, Palmer and Chase, under the permission

given in the vote of the district had built the hall at their own expense for their own use. In it they are recognized as the owners, they, their associates, executors, administrators and assigns, are given permission to use it when it was built so long as the house shall stand, and when that is taken down provision is made for the division of the material in proportion to the value of the parts of the same "owned and occupied by each party." It further gives the rights of ingress and egress as appurtenances to the hall and provides for the uses to which it may be put.

Much stress is laid upon this instrument by the plaintiff as confirmatory, if not the foundation, of his title, claiming that it is a lease and that as it is not for a certain number of years, no definite period for its termination being fixed, it cannot be a lease for years, and as there are no words of inheritance it can only be a lease for the life of the three persons for whose benefit it was made, and as they are all dead the lease itself has ceased to be. It is true that it was called a lease, and that the words, "demise, lease and let," are used. But it is equally true that other words are used and that whatever it may be called, it is to be construed like other written instruments as a whole, taking into consideration all its parts, as well as the circumstances under which it was made and the purposes to be accomplised. *Jamaica Pond Aq. Co.* v. *Chandler*, 9 Allen, 159–167. A very important fact in this connection is, that the title to this hall was never in the district. It accrued to Pullen, Palmer and Chase before the execution of the instrument called a lease, by virtue of their having built it under a license from the district. This fact is recognized in the instrument itself, and it cannot therefore be a violation of its terms to set up a title in accordance with what is so distinctly recognized in it. We can hardly presume that the parties intended to make any change of ownership by a lease of a piece of property to the owners of it, but in a case like this, when that property was to be so connected with other property that its use to some extent would involve the use of the latter, it is but natural and proper that a contract should be made between the different owners regulating that use. In this case

it is evident that the use of the hall might be of some benefit to the district and to the school. It could be of no injury if used for proper purposes and at proper times. It is also evident that parties would not be willing to put their money into the hall without the assurance of the necessary easements to enable them to enjoy its use and for such a time as would make it profitable. Hence the use of the words "demise, lease and let" are fully justified by the easements conveyed and all the other provisions may have their full force consistently with the construction put upon the instrument by the parties, that the title to the hall was in the lessees and the purpose of the paper was to regulate the use and give the easements. A construction very largely for the benefit of the district.

In this view the fact that there are no words of inheritance in the contract is of no importance, for it contains no grant of the hall whether it is real or personal property, and the grant of the easements is only incidental to the hall and would probably have gone with it without the lease, with the exception perhaps of the length of time it was to be occupied and that could only be terminated if at all by notice, which has never been given.

In accordance with this construction of the lease, have been the acts of the parties since, showing that they so understood it. For about thirty years the district occupied its part of the premises recognizing the right of the other party and at the end of that time in its sale to the plaintiff still recognized it. The vote of the district under which the conveyance was made was as follows: "Chose C. H. B. Woodbury, agent to sell the school-house and lot under Odd Fellows' hall and convey the same." Thus authorizing the sale only of the premises less the hall, the easements, as privileges and appurtenances, going with the hall. On the other hand the builders of the hall with their successors and assigns have remained in unmolested possession of it for the same length of time.

This possession is not only confirmatory of the construction now given the contract, but is confirmatory of, and would be sufficient in itself, to establish a title in the defendants. This is not a possession of the hall by virtue of a license from and

under the district, but under a claim of title, which claim is recognized by the district, The possession is not hostile for the district sets up no claim in opposition to it; both parties, in fact, claim and concede the title to be in the possessor, which is equally efficient in establishing it, as when there are opposite and conflicting claims.

The sale has another and an important bearing upon the result in this case. As already seen the agent by the vote of the district was authorized to sell only the "lot and school-house under Odd Fellows' hall." The school-house and hall were begun and recognized all the way through, including this vote, as two separate and distinct pieces of property, though physically joined together. The meaning of the vote cannot therefore be misunderstood. It did not authorize a conveyance of the hall. The deed could go no farther than the authority and though a release of all the interest which the district had in the premises, it would convey no title to the hall; more especially as the district never had or claimed any such title.

It is however, contended that the hall was forfeited by a breach of the conditions under which it was occupied. But these were conditions, or manner of occupation only and not of grant, and to whom would the hall go if forfeited? Not to the district because it was not conveyed by the district. Besides it could not be forfeited without an entry; and none has been made and since the conveyance none can be made. *Hooper* v. *Cummings*, 45 Maine, 366.

The plaintiff in further maintenance of his title introduces a deed from Emma P. Dennett, one of the heirs of Thomas S. Pullen, dated December 20, 1882, duly recorded. But the defendants have a prior deed from the same person though unrecorded. The later deed is a mere naked release and as the grantor had already parted with all her interest, it had no effect whatever even as against an unrecorded deed, even if the hall had been real estate. *Nash* v. *Bean*, 74 Maine, 340; *Adams* v. *Cuddy*, 13 Pick. 463; *Jamaica Pond Cor.* v. *Chandler*, 9 Allen, 169.

It therefore clearly appears that the plaintiff has no title to

that portion of the premises described in the defendant's brief statement. The case shows quite as clearly that at the date of the plaintiff's writ, or before, or afterwards, the defendants were not in possession of, and made no claim to any part of that to which a disclaimer has been filed. The only evidence to prove the fact of a claim of title is the record copy of the deed from Jonathan A. Smith to these defendants dated December 20, 1882, which describes a portion of these premises. Smith long before this time had parted with all his interest in the lot, which through direct or mesne conveyances, came to the district. There is no proof that this deed was ever delivered, or that possession was taken or claim made under it, but the contrary.

Some objections are made to the title of the defendants under Pullen, Palmer and Chase. But we have no occasion to examine them for they have at least a color of title which is sufficient until the plaintiff shows a better one which he has failed to do.

Judgment for defendants.

PETERS, C. J., VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

WILLIAM H. VIRGIE *vs.* SARAH A. STETSON.

Lincoln. Opinion November 21, 1885.

Levy. Married woman. R. S., 1871, c. 61, § 1.

A levy upon the land of a debtor is not void, because it embraces other land not belonging to the debtor.

The statute prohibiting conveyances by the wife, without the joinder of her husband, of such real estate as has been directly or indirectly conveyed to her by her husband, does not include transfers by attachment and levy for the satisfaction of her debts. Such real estate is liable to attachment and levy by her creditors.

ON EXCEPTIONS.

Writ of entry to recover possession of certain parcels of land in Damariscotta levied upon by the plaintiff as the property of the defendant.

At the trial the defendant's counsel asked that the following instructions be given to the jury:

"1. That the levy is informal and void.

"2. That it is void for the reason that it embraces land other than land of the defendant, which other land was appraised with land of the debtor, if the jury believe from the evidence that other land is embraced in the levy and appraised.

"3. That if the jury believe from the evidence that the title to any part of the premises demanded was derived from defendant's husband during coverture, the levy is void as to so much of the premises.'

The requested instructions were not given, and the defendant alleged exceptions.

A. P. Gould and *J. E. Moore*, for the plaintiff, cited: *Foss* v. *Stickney*, 5 Maine, 390; *Grover* v. *Howard*, 31 Maine, 546; *Rice* v. *Cook*, 75 Maine, 45; *Ware* v. *Pike*, 12 Maine, 303; *Greene* v. *Hatch*, 12 Mass. 195; *French* v. *Holmes*, 67 Maine, 186; *Call* v. *Perkins*, 65 Maine, 439; 2 Kent's Com. *152, *130, *131; *Moore* v. *Richardson*, 37 Maine, 438; *Fox* v. *Hatch*, 14 Vt. 340; Schouler, Domestic Relations, § 158; *Willard* v. *Eastham*, 15 Gray, 328.

W. Gilbert, for the defendant.

The statute denies to the wife the power to convey an estate derived from the husband without his joinder. A levy is a statutory conveyance, so held by all elementary writers and jurists. That process or means by which a title passes from one to the other is called a conveyance, the same as the transportation of a person or a commodity is called a conveyance. And it is none the less a conveyance because it is done by force of law; as a conveyance through the instrumentality of a deed is made only by the force of the law. Law, alone, gives it validity.

And although the conveyance by levy may be *in invitum*, it is none the less a conveyance of the holder of the title. No other can convey. The debtor voluntarily puts in motion the force which results in a conveyance by levy, and thereby causes the conveyance, to be made — in other words, upon familiar principles, makes it herself. The final act may be compulsory, but the initial motion which compelled it was voluntary. And *qui*

facit per alium, facit per se. The law is the vital force, the officer and other chosen agents of the law are the instrumentalities through which it acts, and the original voluntary act of the debtor is the moving cause. This moving cause therefore has its origin in the will of the debtor, which operates to convey.

So we say that the statutory conveyance by levy is the conveyance of the debtor. We are not at liberty to suppose that the legislature made a law, framed to defeat its own purpose, a statute containing in itself the seeds of its own destruction. But unless we hold that the denial of the power to convey without the joinder of the husband applies to conveyances by levy, as well as by deed, the wife has the power to defeat the operation of the statute at will. All she need to do is to give her note payable on demand for the amount of the purchase money and suffer judgment on the note; thereupon execution issues, levy is made, the title passes, the purchaser has his estate, the recusant wife has her money, and the wronged husband finds his home—the fruits of his anxious toils—which he had in the days of his prosperity and of mutual confidence provided as a harbor of refuge for himself and wife from the storms of life, ruthlessly taken from under his feet—the loved roof tree which the legislature had intended to protect taken from over his head.

The statute was made to protect the husband in cases of disagreement. So long as the husband and wife are in harmony the statute is needless.

Counsel reviewed the legislation of this state affecting the rights of married women and contended that this review disclosed the intention of the legislature. It had two objects. One of them is to secure the wife in case she survives the husband, not according to the old practice making her an underling in her own house, which her thrift and frugality have helped to purchase, and turning her off with the poorest cow, a feather bed, six cups and saucers, a snuff-box, mustard pot and sauce pan. The other object is, in the days of vigor and prosperity to provide a port of refuge from the storms of fate, where in the years of decline and in the vicissitudes of life the weary and wayworn heart may repose in safety. It is a worthy object. It harms nobody; it helps everybody.

And as an aid to construction I implore the court to consider the sanctity of home. "The foxes have their holes and the birds of the air have their nests, but the son of man hath not where to lay his head," said the founder of our religion in alluding to the great sacrifices involved in his ministry.

> "The sea-fowl has gone to her nest,
> The beast has laid down in his lair;
> Even here is a season of rest,
> And I to my cabin repair."

Even the castaway in solitude, cut off from the pleasures of "society, friendship and love," separated from kindred and the sympathies of human society, in common with even the brute creation, finds yet a solace in retirement to his solitary home to enjoy his season of rest.

It was nothing less than to protect the most sacred of our institutions which the legislature did undertake. The question is whether the legislative will shall be defeated and their statutes practically abrogated because they said "convey" when a word of more general signification might have been employed to express their will.

Counsel then cited many rules of construction from 1 Bl. Com. "Rules of Interpretation;" 1 Kent's Com. (9th ed.) 517, 518 and cases cited; Sedgwick on Construction, &c. (2 ed.) 193, 195, 196, 197, 198, 200, 201, 221, 309, 310, 312, 359.

DANFORTH, J. This is a real action in which the plaintiff claims title by virtue of a levy upon an execution against the defendant. The defence is the insufficiency of the levy, the objections to which are embodied in the several requests for instructions which were refused.

The first is general in its terms and is not relied upon.

The second is founded upon the fact that land not belonging to the debtor is included in the levy and appraisal, thereby increasing the amount to be allowed on the execution and to be paid for redemption. But it diminishes the debt in the same proportion. The effect is the same as if the debtor's land was appraised too high, an error of which she could hardly be expected to complain. It is not however, a process for redemption. If it

were so and the error found injurious to the debtor, doubtless a remedy could be found. This same question was before the court in Massachusetts in *Atkins* v. *Bean*, 14 Mass. 404 and the levy sustained. That case was cited with approval in *Grover* v. *Howard*, 31 Maine, 549 and in *Rice* v. *Cook*, 75 Maine, 46, the doctrine is recognized as well settled law.

The third objection is, that as the title to a portion of the premises in question was derived by the defendant from her husband during coverture, such portion was not liable to be taken by levy in satisfaction of her debts.

It is claimed on behalf of the plaintiff, that the case shows no evidence upon which such an objection can rest. While on the other hand a motion is made in behalf of the defendant, alleging that at the trial such evidence was introduced, but omitted in making up the case and asking for a new trial that the omission may be supplied. We have no occasion to consider this motion; for whatever the omission, that which is reported is plenary to establish the fact that the defendant's title came from her husband during coverture. The deed under which she claims is in the case and is the only evidence of her title. This is something more than the mere declaration of the grantor that at that time the grantee was his wife; it is the act of both parties, the grantor in giving and the grantee in receiving, recognizing the relationship of husband and wife as an existing fact and qualifying the title accordingly. Certainly the deed, in the absence of any contradictory evidence taken in connection with other corroborative testimony in the case and especially with the fact that the ruling does not appear to have been founded upon any want of evidence in this respect, is sufficient proof of the coverture at its date.

Thus the question is directly presented, whether real estate conveyed by the husband to the wife can be attached and levied upon by a creditor to pay her debts. This depends upon the construction to be given to R. S., 1871, c. 61, § 1, under which this levy was made. The statute provides that a married woman may not only acquire property in her own right, but "may manage, sell, convey and devise the same by will, without the joinder or assent of her husband; but real estate, directly or

indirectly, conveyed to her by her husband, or paid for by him, or given or devised to her by his relatives, can not be conveyed *by her* without the joinder of her husband in such conveyance."

In this prohibition, did the legislature refer to such conveyances as were voluntary on the part of the wife, the result of contracts to which she should be a party, receiving their force and effect from her consent alone, or was it intended to go still further and exempt such real estate from attachment and levy in satisfaction of her debts? If we look at the language alone, we can have no hesitation in giving it the narrower limitation. Such at least is the ordinary use of the term conveyance; and besides, we find the conveyance prohibited, one to be made "by her," which can only be one in which she is the moving cause, one of the contracting parties; while a transfer by extent of an execution, is, on the part of the debtor, an involuntary, unwilling one.

It is, however, contended in the very able and elaborate argument in behalf of the defendant, that, in order to carry out the intention of the legislature, a broader meaning should be given to the word conveyance, a meaning which shall include a transfer by levy as well as by deed. In the argument, certain rules for the interpretation of statutes are clearly stated and fully sustained by the authorities cited. These rules we recognize as sound and binding, so far as they render aid in ascertaining the meaning of the legislature in the language used, which is the great and perhaps the only object to be sought.

The subject matter of the statute is the regulation of the rights and disabilities of a married woman in regard to her own property. Prior to 1856, her well established disabilities at common law had been abrogated, and she was left to her own discretion as to its disposition, including the right to convey. In that year a statute was passed, as said in *Call* v. *Perkins*, 65 Maine, 444, to meet a custom which had arisen where, "in numerous instances, the title of real estate of married men in embarrassed circumstances was transferred to their respective wives, and thence to third persons, thereby clogging the proof of fraudulent conveyances by this other remove from the original fraudulent grantor." This statute of 1856, c. 250, leaving the

power of the wife over her own property in its full force in all other respects, limits it only in the power of sale of that real estate which was derived directly or indirectly from the husband or his relatives. If the protection of the husband's creditors as above stated, is not the true purpose of this limitation, it would be difficult to say what is. It can not be that it was to preserve any rights which the husband might have, for after an absolute conveyance he has none. In the deed, such rights as he desired might be reserved to him without the aid of the law. If none is so reserved, the law gives the wife the entire control over it in every respect, except the power of sale, and even if it be a homestead, he can occupy only by her consent; and if the wife becomes "recusant," the sanctity of the home is gone, with or without the sale. Hence the broader construction gives the husband no better protection than the narrower. We are not prepared to admit that under the latter interpretation, the wife could receive the price under an agreement with a purchaser, submit to a judgment for the amount, for the purpose of having the execution levied upon the land. Such a levy would be a conveyance under a contract resting upon the consent of the wife, as much a conveyance "by her" as though accomplished by deed.

But the section of the statute now under consideration, does not purport to act upon, or regulate the rights of the creditors of the wife. If it affects creditors at all, it is only those of the husband and for their protection. Other sections of the same chapter, and other chapters, regulate the rights of creditors. The wife is made competent to contract debts. She may in all cases be sued alone, and her property is made attachable the same as that of any other debtor, subject to the same exemptions and none other. The law carefully enumerates all that is exempt either by statute or common law. This enumeration, by a well known principle of construction, excludes all others. The land in question is not among the exemptions, but is, by clear and unquestioned law, made attachable. But it is said that the general law of attachment must be so construed as not to interfere with this prohibition. It is true that two inconsistent laws can

not stand together. One or the other must give way, and in some cases it may be a difficult question to decide which. But we are not to make them inconsistent except by necessity. No such necessity exists here. Giving the exception or prohibitory clause the full force required by its language and the purpose to be accomplished by the legislature, and there is no inconsistency. If we give it the broader construction, there is an inconsistency which no possible construction which can be given the attachment law, can reconcile.

It may seem somewhat of an anomaly that land which can not be sold by the debtor, which she can not voluntarily turn out in payment of her debt, may yet be taken in execution by the creditor, and yet it was so under the common law disability of the wife. *Moore* v. *Richardson*, 37 Maine, 438. In this case, the wife is under the disability of the common law only as to the conveyance of the land.

Exceptions and motion overruled.

PETERS, C. J., WALTON, LIBBEY, EMERY and FOSTER, JJ., concurred.

CHARLES B. VARNEY and another *vs.* ALBERT R. CONERY.

Cumberland. Opinion November 24, 1885.

Accord and satisfaction. Compromise settlement. Payment.

If a debtor gives and the creditor receives, in full satisfaction of the debt, a note indorsed by a third person for a less sum than the amount of the debt, it is a good accord and satisfaction to bar a subsequent suit by the creditor to recover the balance of the debt.

ON motion to set aside the verdict.

Assumpsit on account annexed for sixty-five dollars and fifty cents.

The defence was that the claim had been settled; and the defendant, (who was a trader at Bluehill,) and his father testified, in substance, that the plaintiff's agent, Hiram A. Hobbs, called upon him to pay for a bill of merchandise bought of the plaintiffs amounting to about two hundred and sixty-five dollars, and on being informed by the defendant that he could not pay his debts

in full, after some talk, Mr. Hobbs agreed to discharge the claim if the defendant would give him two notes of one hundred dollars each, endorsed by the defendant's father, which was done. This was denied by the plaintiffs and their agent, who claimed that the notes were received on account.

Mr. Hobbs was a witness for the plaintiffs and testified:

"Ques. Did C. B. Varney or any member of the firm ever authorize you to receive these notes in full payment of this account?

Ans. They did not.

Ques. Did they ever authorize you to make any composition of that account whatever?

Ans. They did not.

By the court: Did they put it into your hands to collect?

Ans. I am selling and collecting all the time.

Ques. Did you mean taking moneys on account that may be paid you by these customers?

Ans. Yes.

Ques. And notes?

Ans. Yes.

By the court: Did you have authority to give time to customers?

Ans. Yes.

Ques. What about cases where a composition was to be made?

Ans. Anything very important, something I didn't feel like taking the responsibility of, I referred it to the house and when I came in we talked it over and I abided by their instructions in these matters.

By the court: Rather than let a debtor fail on your hands you would settle for less, would you not?

Ans. I should work for the interests of my firm and if I thought it was for their interest to do so, I should do it."

Cross examination.

"I have been in the employ of the plaintiffs nearly three years. And during that time I have been on the road more or less, and have dealt with a great many customers in the eastern part of the state. I have taken orders and collected money.

Ques. Where you can not get money you take a note?

Ans. If I see fit, I do.

Ques. Do your employers authorize you to use your own discretion in these matters?

Ans. Yes, to a certain extent. Of course, if there is any particular point that I don't wish to take the responsibility of, I refer it to the concern.

Ques. Certainly, but they authorize you to use your own discretion in these matters?

Ans. I don't think anything was ever said in regard to that, they place me on the road as a travelling salesman to sell for them; if I have a point, I refer it to them and ask them what and how I shall do it.

Ques. Do they leave the matters to your own discretion?

Ans. I don't understand.

Ques. You know what discretion means?

Ans. I am employed by them to work for their interests and they may know many things about customers that I do not, and many times on large and important bills, I should prefer to consult them before taking any notes or making any decisive point. If I choose to settle with a customer, I settle with him."

The verdict was for the defendant.

E. S. Ridlon, for the plaintiffs.

An agent employed to sell goods and receive payment, is not, unless some special authority is given him, clothed with authority to compound the debt or release it on composition. Story on Agency, (9th ed.) 111, 112; *Pratt* v. *The United States*, 3 Nott & Hunt, 106.

There was no evidence in this case that Hobbs had authority to compromise this claim. The defendant, having set up a compromise settlement with the agent, the burden is on him to show the authority of the agent. Both of the plaintiffs testify that they gave Hobbs no authority to compromise this claim. Mr. Hobbs, on cross examination, testified, "if I chose to settle with a customer, I settle with him," but he does not say he had

any authority to do that, and he expressly testified that he had no authority to compromise with the defendant.

H. A. Tripp, for the defendant.

VIRGIN, J. If a debtor gives, and the creditor receives, in full satisfaction of the debt, a note indorsed by a third person for a less sum than the amount of the debt, it is a good accord and satisfaction to bar a subsequent suit by the creditor to recover the balance of the debt. *Boyd* v. *Hitchcock*, 20 Johns. 76; *Dolvear* v. *Arnold*, 10 How. Pr. 529; *Brooks* v. *White*, 2 Met. 283; S. C. 37 Am. Dec. & note, 98. And a subsequent promise to pay the balance is not binding. *Phelps* v. *Dennett*, 57 Maine, 491. So that even if the case does not come within the provisions of R. S., c. 82, § 45, the verdict is not for that reason against law.

Under proper instructions, the jury found that the plaintiff's runner, through whom all the dealings between the parties had been negotiated, had the authority of the plaintiffs to compromise the claim; and we think the runner's own testimony is a sufficient warrant for such finding.

That the notes were given and accepted in full satisfaction of the whole debt, the testimony of the defendant, and of his father, who indorsed them, is express, although denied by the plaintiffs' agent.

Motion overruled.

PETERS, C. J., WALTON, LIBBEY, FOSTER and HASKELL, JJ., concurred.

INHABITANTS OF CAMDEN *vs.* CAMDEN VILLAGE CORPORATION.

Knox. Opinion December 1, 1885.

Taxation.

Buildings and other property owned by municipal corporations and appropriated to public uses, are but the means and instrumentalities used for municipal and governmental purposes, and are, therefore, exempt from general taxation, not by express statutory prohibition but by necessary implication.

A village corporation was authorized by its charter to raise money to defray the expenses of a night watch, police force, fire department, etc. and also to erect a hall. The building thus erected contained a public hall, police court

room, assessors' office, lock-up, etc. and, when not in use for meetings and for purposes of the corporation, the hall and other rooms were let for hire, and the money received therefrom was used towards paying the expenses of the corporation. *Held*, That the building and lot were not liable to taxation by the town in which they were situated.

ON REPORT upon agreed statement of facts.

The opinion states the case and material facts.

A. P. Gould, for the plaintiffs.

Revised Statutes, c. 6, § 2, expressly declares that "all real property within the state is subject to taxation, as hereinafter provided." Section 6, declares what the exceptions shall be, specifically naming them. The real estate of subordinate municipal corporations is not excepted. In this case the rule, *expressio unius exclusio alterius*, applies. Nothing is left to construction. The legislature has declared what exceptions shall be made by the assessors; and they cannot be enlarged.

Counsel contended that the building and lot of the defendant corporation, upon which the tax was assessed, could be levied upon to satisfy a judgment in favor of a creditor of the corporation, and cited: Dillon Mun. Corp. § 446; *Meriwether* v. *Garrett*, 102 U. S. 472.

Numerous authorities sustain the position that property held by municipal corporations, which is used for profit, and which was not wholly constructed for municipal purposes, is taxable. If part of a building is constructed and used for municipal purposes, and another part is constructed with special reference to other uses, and is let for profit, such other part is taxable. And the land on which the building stands is taxable.

In *Young Men's Christian Asso'n* v. *Donohugh*, 13 Phila. 12, it was held, "that the part of a building belonging to a public charitable association, which is used for the association, is exempt from taxation; otherwise as to that part leased to others, though the rent is applied in charity." In *State* v. *Assessors*, 34 La. Ann. 574, it was held, that property belonging to charitable institutions which was leased or used for income, was not exempt from taxation. Under N. Y. Laws of 1846, c. 330, exempting from taxation the real and personal estate of the

Brooklyn Benevolent Society, it was held "that lots of its land leased to parties who were to erect buildings thereon, with privilege of perpetual renewal, were not exempt." *People* v. *Brooklyn Assessors*, 27 Hun. (N. Y.) 559.

Under Iowa Code, § 797, exempting from taxation the "buildings of literary and religious institutions and societies devoted solely to the appropriate objects of these institutions," it was held that "a building owned by a benevolent society and leased for pecuniary profit, is taxable." *Fort Des Moines Lodge*, v. *Polk Co.* 56 Iowa, 34. Counsel further cited on this point: *Chadwick* v. *Maginnes*, 94 Pa. St. 117; *Cleveland Library Ass'n* v. *Pelton*, 36 Ohio St. 253.

In *New Orleans* v. *St. Anna's Asylum*, 31 La. Ann. 292, it was held that "the fact that the rents and revenues of property owned by a charitable corporation are devoted to the charitable purposes for which the corporation was organized, will not exempt such property from taxation. The property is exempt only when itself actually and directly so used." Counsel further cited: *Baltimore* v. *Grand Lodge*, 60 Md. 280; *Oliver* v. *Worcester*, 102 Mass. 489; *Bailey* v. *New York*, 3 Hill, 531; *Eastman* v. *Meredith*, 36 N. H. 295.

It is nowhere held that one municipality cannot tax the property of another muncipality located within its boundaries and jurisdiction. No one would doubt the power of a town to tax the property of another town situated within its boundaries — such as a farm, store, house of entertainment or amusement— although the town which owned the property would be compelled to assess its inhabitants to pay the tax. We can see no distincton between the power of a town over property of another municipality which exists outside of its territory, and its power over a municipality existing within it. In each case, the property taxed exists for the benefit of the corporation which owns it, and not for the benefit of the town which taxes it. The only reason given in the reported cases for the non-taxability, by a municipal corporation, of its own property, is, that it would be obliged to assess a tax upon its inhabitants to pay the tax upon its property; so that taxation would be useless.

T. R. Simonton, for the defendant, cited: 2 Kent Com. (6th ed.) 275; 2 Dillon, Mun. Corp. 615, 715, 717; Burrows, Taxation, 505; *Osborne* v. *Bank of U. S.* 9 Wheaton, 738; 1 Kent Com. 426, 427, 428; *Meriwether* v. *Garrett*, 102 U. S. 511.

FOSTER, J. The defendant corporation, by special authority from the legislature, together with other powers and privileges particularly enumerated in the act of incorporation, was authorized to build a village hall at a cost of not more than eight thousand dollars. Thereafter a lot was purchased and a building erected thereon by the defendants, known as "Megunticook Hall." This building is sixty feet long, fifty feet wide, and two stories high. The upper portion is finished into a hall with galleries, platform and two small ante-rooms. The lower story contains a hall somewhat smaller than the one above, a lock-up, assessors' room, cook and furnace room. The upper hall is used for the annual and other meetings of the corporation,—the lower one for a police court room; and when not in use by the corporation, both halls are let, as occasion requires, for lectures and other public entertainments, with an income of from three to five hundred dollars a year which is appropriated in defraying the annual expenses of the corporation.

The plaintiff town in which the defendant corporation is situated, claiming that this property is subject to taxation under the general statutes, like other real estate, has assessed a tax thereon, and this action is brought to recover the same.

The plaintiffs' claim is that this corporation is limited in its extent of territory, is partly private and partly public, in which the inhabitants of much the largest portion of the town have no pecuniary interest, and that this building, being adapted to and used in part for other than corporate purposes, is owned by the defendants in their social or commercial capacity and for pecuniary profit, and is therefore neither expressly nor impliedly exempt from taxation.

As against this proposition the defence set up is, that the corporation is of a public nature, and that the property upon which this tax is sought to be imposed is held by the defendants

for public uses, necessarily incident to the objects of the corporation, and as such exempt from taxation.

For a correct determination of this question it becomes necessary to consider the nature and character of such corporations, the objects they are intended to accomplish, and their connection with the government of the state. It is laid down by the authorities that such corporations are public, and while they "are allowed to assume to themselves some of the duties of the state in a partial or detailed form, but having neither property nor power for personal aggrandizement, they can be considered in no other light than as auxiliaries of the government." *United States* v. *Railroad Company*, 17 Wall. 328.

Being intended as agencies in the administration of civil government, they are regarded as public, and partaking the nature of municipal corporations in their incidents. Being purely creatures of legislative enactment, they owe their creation to the particular statute which gives them their existence; this statute, together with the general provisions of law applicable to them, confers upon them the powers they possess, and, like other municipal corporations, imposes upon them certain public duties which they owe to the state in the administration of its local government. Likewise towns are public corporations created for similar public purposes in the due administration of the government of the state. As incident to their existence and the objects of their creation they are allowed to purchase or build town-houses, school-houses, poor-houses and police stations, these being among the "recognized functions of government," and as such exempted by implication from the general provisions of the statute in relation to taxation, as property appropriated to public uses. *Worcester* v. *Western Railroad*, 4 Met. 567; *Wayland* v. *County Commissioners*, 4 Gray, 501; *Worcester County* v. *Worcester*, 116 Mass. 193; *Portland* v. *Water Company*, 67 Maine, 137; *Boston and Maine Railroad* v. *Cambridge*, 8 Cush. 239.

This doctrine is thus laid down by a learned writer and jurist (Dillon, Municip. Corp. § 614). "The general statutes of the state upon the subject of taxing property undoubtedly refer to

private property, and not to that owned by the state; and in view of the public nature of municipalities, and the purposes for which they are established, heretofore explained, the author is of opinion that such enactments do not by implication, extend to any property owned by them,— certainly to none owned by them for public uses." In accordance with these views the Court of Appeals in Kentucky, in the case of *Louisville* v. *Commonwealth*, 1 Duvall, 294, held that whatever property was used and held by the city for carrying on its municipal government, or was necessary or useful for that purpose, was not taxable by the state, and this would include public buildings, prisons and property dedicated to charity.

The courts of other states furnish ample authority in support of exempting, by implication, from taxation, property of the character above named. *People* v. *Doe*, 36 Cal. 222, was a case where a writ of assistance was asked by the plaintiff to put him in possession of land which he claimed to have acquired by tax title, being a portion of the city cemetery in the city of Sacramento. The court denied the writ as to that on the ground that the land was public property and therefore not taxable. SANDERSON, J., said: "The constitution and laws upon the subject of taxing property are, therefore, to be understood as referring to private property and persons, and not including public property and the state, or any subordinate part of the state government, such as counties, towns, and municipal corporations."

Speaking of the South Park Commissioners as a corporation, and of the park property, BREESE, C. J., in *People* v. *Salomon*, 51 Ill. 52, says: "But holding it, they hold it as a public corporation for public purposes, and was it ever heard, that the property, real or personal of a public municipal corporation, was subject to taxation?" And Pennsylvania maintains the same doctrine.

"No exemption law is needed for any public property, held as such." *Directors of Poor* v. *School Directors*, 42 Penn. St. 25.

To entitle it to exemption, however, it must be public in its nature. There is a distinction between property held and owned

for profit by a municipal corporation like a private individual, charged with no public trust or use, which is private in its nature, and that which it holds in general or special trust for purposes germane to the objects of the corporation. In the former case it is the legitimate subject of taxation, and no reason exists why it should be exempt from the general rule; while in the latter case, such property, forming a part of the means and instrumentalities of the corporation called into use in the administration of government, is held to be exempt upon principle as well as upon authority. Taxation is a sovereign right, essential to the existence of government, and as a rule attaching upon all property within the jurisdiction of the state. But in our system of government, both state and national, there are limitations as well as exceptions to the rule. The federal government can not tax the the public means and instrumentalities of the state, nor the state the public means and instrumentalities of the national government, so as to interfere or impair their efficiency in performing the functions by which they are designed to serve that government. *Nat. Bank* v. *Commonwealth*, 9 Wall. 362; *Thomson* v. *Pacific Railroad*, *id.* 591; Burroughs Tax, 505. There is no express constitutional prohibition upon the state against taxing the means and instrumentalities of the general government, but it is held to be prohibited by necessary implication. *Collector* v. *Day*, 11 Wall. 123. Court-houses, jails, town-houses, school-houses, poor-houses and other buildings appropriated to public uses, owned by municipal corporations and incident to such corporations, are but the means and instrumentalities used for municipal and governmental purposes, and are therefore exempt from general taxation, not by express statutory prohibition, but, as we have seen, by necessary implication. Hence, it has been held, upon principles quite analogous, that public property is by implication exempted from lien statutes as much as from general tax laws, and for the same reasons. *Foster* v. *Fowler*, 60 Penn. St. 27; *Frank* v. *Freeholders*, 39 N. J. L. 347; *Board of Education* v. *Neidenberger*, 78 Ill. 58; *Bouton* v. *McDonough Co.* 84 Ill. 384; *Loring* v. *Small*, 50 Iowa, 271. The consequences of either process might result

in a sale of the property for the purposes of enforcing the claim, thereby destroying its public character. In *Frank* v. *Freeholders*, *supra*, the court say that "when the buildings are those of a municipal corporation, a fundamental rule of public policy compels the courts to arrest the proceedings before the buildings are touched." It is said that "the power to tax involves the power to destroy, and the power to destroy might defeat and render useless the power to create." 1 Kent. Com. *426.

Consequently, if this implied exemption exists as between the state and the public buildings, or property of the town or city, created by its own legislature, *a fortiori*, the town can not tax the public means and instrumentalities of a village corporation, an auxiliary of the state, deriving its existence from the same legislative source.

The charter of the defendant corporation, when examined, will be found to contain many of those incidents of a public character usually pertaining to other municipal corporations; among which this corporation is authorized and vested with power to raise money to defray the expenses of a night watch, a police force, a fire department, and all other necessary measures for the better security of life and property, and for the promotion of good order and quiet within its limits. Thus the powers with which it is invested, and the objects for which it was created, are similar in many respects, to those which belong to towns, cities, and other municipal corporations. In addition to the powers and privileges above enumerated, bestowed upon this corporation, express authority is given by the sovereign power of the state to erect this hall. And from a careful examination of the facts in the case, and in view of the public nature of this corporation, and the purposes for which it was created, we are led to no other conclusion than that this building, authorized by legislative sanction, is owned by the corporation for public uses, rather than in its "social or commercial capacity." The letting of those parts of the building which are not in actual use by the corporation, are incidental and subsidiary to the objects for which it was created, and do not take away its character as a

public building, or render it liable to taxation by the town, as it would be were this a private corporation, and its building erected for private purposes. Many city and town halls in this state are so constructed that when not in use for strictly municipal purposes, they may be let for any proper use. Such fitting up and letting for hire, are the incidents, and not the primary objects of such public buildings.

The authorities to which our attention has been called by the learned counsel for the plaintiffs, upon examination, will be found to apply to property owned, not by public municipal corporations and appropriated to public uses, but by private corporations or associations, and where express statutory exemption was claimed. In such cases of express exemption, statutes are to be construed with strictness, and the exemption should be denied unless so clearly granted as to be free from doubt. Dillon Mun. Corp. § 616.

In accordance with the stipulation in the report of the case, the entry should be,

Plaintiffs nonsuit.

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

STATE OF MAINE by Indictment,

vs.

MAINE CENTRAL RAILROAD COMPANY.

Kennebec. Opinion December 1, 1885.

Railroads. Crossing. Negligence.

In order to entitle a recovery against a railroad corporation on account of an injury, or death, caused by a collision with its train at a crossing, whether the action be in form civil or criminal, it must affirmatively appear:

1. That the defendant corporation was guilty of negligence.
2. That its negligence was the cause of the accident.
3. That the injured party was in the exercise of due care and diligence at the time of the injury, or, at least, that the want of such care on his part in no way contributed to produce it.

It is not enough to show that the defendant was negligent.

It is incumbent on the prosecuting party to go further and, directly or indirectly, by affirmative proof satisfy the jury that no want of due care on the part of the injured party, helped to produce the accident.

It is negligence to attempt to cross the track of a railroad without looking and listening to ascertain if a train is approaching: and ordinary sense, prudence and discretion require this of a traveller so far as he has an opportunity so to do.

It is still greater negligence for one seeing and hearing a train approaching at ordinary speed to attempt to cross directly in front of it.

On motion to set aside the verdict by the defendant, from the superior court.

The opinion states the case and material facts.

W. T. Haines, county attorney, for the state.

There is no similarity in the facts of the case at bar and those shown in *State* v. *M. C. R. R. Co.* 76 Maine 357. In that case, the negligence of the defendant was not made out. In this, it is beyond reasonable controversy. In that case, Dr. Pickard could see the track before he came to it, for a long distance, both ways. In this case, it could not be seen until within ten feet of it. In that case, he could have heard the whistle, had he listened. In this case, no one heard it, until the danger signals were given, and the situation of Benner was such, from the surrounding mills, that he could not hear it. It is not negligence, nor negligence per se, not to stop one's team and then look and listen before going on to a railroad crossing. *Plummer* v. *R. R. Co.* 73 Maine, 591, and in *Kellogg* v. *N. Y. C. & H. R. R. R. Co.* 79 N. Y. 72, the court says: that, "a traveller approaching a railroad crossing is not obliged, as a matter of law, to rise up in his wagon, or to get out and go to the track and make observations."

In cases of instant death, the best witness of due care and diligence exercised by the person killed, is lost, and it must be one of conjecture, under the circumstances, perhaps, never to be correctly known.

The rule of placing the burden of proof upon the prosecution to free itself from contributory negligence is hard, and when the negligence of the defendant is clearly established, the court will be careful and give the prosecution the full benefit of the facts and circumstances in the case, in coming to the question of contributory negligence.

Slight evidence of due care and diligence of the person killed, in cases of instant death, I understand to be the rule of law, even in those states, where the courts hold that the burden is upon the prosecution to show this.

In cases where contributory negligence is urged, as a defence, that I have examined, great stress is laid upon the fact that the injured party was facing the approaching train. Such is not this case, but the contrary. The age, family, health and occupation of Benner, all argue against his carelessness. Where there is no positive evidence that a person did not look and listen, it will not be presumed that he did not do so. 64 N. Y. 524. The presumption is that the traveller does look and listen, if there is any presumption about it.

The love of life and instinct of preservation will not stand for proof of care, until the contrary appears, yet, under the circumstances in this case, and the facts proved, it seems to me these must go for something. I understand it to be well settled that the circumstances alone may show that there was no contributory negligence of the injured party.

Leslie C. Cornish, (*G. C. Vose* with him,) for the defendant, cited: *Allyn* v. *R. R. Co.* 105 Mass. 77; *Hinckley* v. *R. R. Co.* 120 Mass. 257; *Gleason* v. *Bremen*, 50 Maine, 222; *State* v. *Grand Trunk R'y*, 58 Maine, 176; *State* v. *Me. Cen. R. R. Co.* 76 Malne, 358; *Cordell* v. *N. Y. C. & H. R. R.* 75 N. Y. 330; *Gaynor* v. *O. C. & Newport R'y Co.* 100 Mass. 208; *Butterfield* v. *Western R. R. Co.* 10 Allen, 532; *R. R. Co.* v. *Houston*, 95 U. S. 697; *Grows* v. *Me. Cen. R. R. Co.* 67 Maine, 100; *Haas* v. *R. R. Co.* 47 Mich. 401; *Chicago & A. R. R. Co.* v. *Jacobs*, 63 Ill. 178; *Wilds* v. *Hudson River R. R. Co.* 29 N. Y. 315; *Connelly* v. *R. R. Co.* 88 N. Y. 346; *Kelley* v. *Hannibal & St. J. R'y Co.* 75 Mo. 138; *Daniel* v. *Metropolitan R'y Co.* L. R. 3 C. B. 591; *Spencer* v. *Utica R. R. Co.* 5 Barb. 337; *Salter* v. *Utica R. R. Co.* 75 N. Y. 273; *Central R. R. Co.* v. *Feller*, 84 Pa. St. 226.

FOSTER, J. The indictment in this case is against the Maine Central Railroad Company for negligently causing the death of one Henry McBenner, on the 17th day of June, 1884, at

Greenville street crossing, in the city of Hallowell. About four o'clock in the afternoon of that day, the deceased was passing up Greenville street, seated upon the body of a four wheel empty dump-cart, hauled by one horse, and in attempting to cross the railroad, was struck by the regular afternoon passenger train and nstantly killed. A trial has been had, a verdict of guilty returned by the jury against the railroad, and the case now comes before this court on motion to set aside the verdict as against evidence. And from a careful examination of the case, we have no doubt that the verdict is wrong, and can not be sustained by the evidence, and must, therefore, be set aside.

The principles of law pertaining to actions of this nature have been so recently discussed and laid down by this court in *State* v. *Maine Central Railroad Company*, 76 Maine, 357, and *Lesan* v. *same*, 77 Maine, 85, that it is hardly necessary to recur to them at this time. It is now the established law, not only of this court, but of the highest courts in this country, that in order to entitle a recovery in this class of actions, whether in form civil or criminal, it must be affirmatively shown that the defendants were guilty of negligence, that their negligence was the cause of the accident, and that the injured party was in the exercise of due care and diligence at the time of the injury, or, at least, that the want of such care on his part in no way contributed to produce it. It is not enough to show that the defendants were negligent. That may be true; and at the same time the injured party may have been negligent, and by such negligence on his part may have contributed to produce the injury complained of. In such case the law affords no redress. It is incumbent on the prosecuting party to go further and, directly or indirectly, by affirmative proof, satisfy the jury that no want of due care on the part of the injured party, who seeks to recover compensation, helped to produce the accident.

Applying these rules of law to the case under consideration, and from an examination of the evidence before us, we do not find the mere want of proof on the part of the prosecution to establish due care, but on the contrary, the evidence overwhelmingly preponderates in affirmatively establishing contributory

negligence, amounting even to sheer recklessness, on the part of the deceased.

This is not a case where evidence is wanting as to the circumstances attending the accident, or the manner in which it happened. It is conclusively shown that the deceased was entirely familiar with the crossing and its surroundings, and had been for six months prior to the accident. Living in the immediate vicinity, he had been accustomed to cross and re-cross the railroad at that point several times each day, and at the time of the accident and for three days prior thereto, he was engaged in hauling dirt from a bank about seventy-five rods west of the crossing to a place about the same distance east of it, and passing over it quite frequently. At the time of the accident, the deceased was riding upon an empty dump-cart fastened to the axle of the hind wheels, the front of which came up to within about three and one-half feet of the forward axle, so that there was a considerable space between himself and the horse he was driving.

The evidence is conclusive and uncontradicted that the whistle was sounded at the regular whistling post, about one hundred rods below the Greenville street crossing, and that the bell was rung continuously from that point to the crossing where the accident occurred and beyond. There were at least three witnesses to the accident, aside from those upon the moving train. Collins, one of the witnesses who was present and within a few feet of the deceased at the time of the accident, and who had walked up from Water street by the side of the team, testifies that Benner had been talking with him all the way up towards the crossing, and when about half way up the hill Benner said "there comes the train," and Collins asked if that was the Augusta train, and he said it was; that he was part of the time leaning over partly looking towards him; and that when he said the train was coming he looked the other way and commenced to pull on the reins of his horse; and when the alarm signals from the engine were given, Collins then being a little in advance of the horse, which was within about four feet of the track, threw up his hands, and Benner stopped two or three seconds, and

then commenced sawing on the reins and said "I guess I can make it," and drove directly on to the track in front of the advancing train.

The witnesses for the state who saw these parties at the time of the accident, strongly corroborate the testimony of Collins as to the position of the deceased, the situation of the team, and the distance it was from the track at the time the danger signals were given. Blake, one of the witnesses for the state, who was near by at the time, says that when he first saw Benner he was sitting in a stooping position, facing towards the north, apparently talking with the man walking by his side, and when the alarm whistles were given he looked round to the south towards the engine, and then turned back and hallooed "get up" to his horse and began to fish on the reins; he was going very slowly if he was going at all; he was not trotting the horse any way.

The evidence overwhelmingly preponderates in favor of the fact that the deceased was aware of the approach of that train before he drove upon the crossing. It was in broad day light. The horse was one which might with propriety be termed gentle, not afraid of the cars, and going only at a walk. And it is appropriate to say here, as was said by Mr. Justice WALTON, in *State* v. *Maine Central Railroad*, *supra*: "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 evidence offered fails to furnish any satisfactory excuse for the act of the deceased in this case.

It is claimed by the prosecution that there were embankments and other obstacles obstructing the view of approaching trains, and that it was the duty of the railroad company on account of this to exercise greater caution in approaching this crossing. Assuming that such obstacles existed, it may be true; but at the same time such a state of facts, with the knowledge of them such as the deceased must have had, would impose on him a corresponding duty of special caution also.

The established doctrine by the great weight of authority, and by numerous decisions, is, that it is negligence to attempt to cross the track of a railroad without looking and listening to ascertain if a train is approaching, and that ordinary sense, prudence, and discretion require this of a traveller so far as he has an opportunity so to do. If the experiment is made without such precaution, the party acts at his peril, and in the event of an injury received by collision with a passing train, where such precaution is wanting, the traveller must be held to have so far contributed to the catastrophe as to preclude any recovery by him against the company. This precaution is not only reasonable and proper on the part of the traveller for his own safety, but it is equally necessary for the safety of the multitude of passengers upon railroad trains liable to be killed by collision with obstacles, even of an animate nature, upon the track. As remarked by PAXSON, J., in *Philadelphia W. & B. Railroad* v. *Stinger*, 78 Pa. St. 219, "The right of a man to risk his own life, and that of his horse may be conceded; but not the right, by an act of negligence, if not of recklessness, to place in peril the lives of hundreds of others who may happen to be traveling in a train of cars." Public welfare, as well as private danger to the individual, requires the enforcement of this rule, and consequently courts have been strict and rigid in adhering to it.

But if it is negligence to attempt to cross the track of a railroad without calling into use the senses of seeing and hearing, it is still greater negligence for one seeing and hearing a train approaching at ordinary speed to make such attempt. It is recklessness.

In *Railroad Company* v. *Houston*, 95 U. S. 697, the court hold that if a person using his senses, sees the train coming, and yet undertakes to cross the track instead of waiting for the train to pass, and is thereby injured, the consequences of such mistake and temerity can not be cast upon the company; that no railroad company can be held for a failure of experiments of that kind; and if one chooses in such a position to take risks, he must bear the consequences of failure.

Numerous cases might be cited sustaining like views, but we

do not deem it necessary. From the evidence before us we can arrive at no other conclusion, than that if the deceased did not observe the train before reaching the crossing, it was by reason of his negligence; and if he did observe it, then his proceeding on and attempting to cross in front of the approaching train was an act of gross carelessness, and in either event the verdict can not be sustained.

And if, as claimed by the prosecution, the train at the time was running at a higher rate of speed than six miles an hour, in violation of the statute, it may be conceded that such running would be evidence of negligence on the part of the railroad company, and might subject it to the penalty prescribed by statute. Nevertheless, the plaintiff's case would still fail of being made out unless it appeared that the injury was occasioned by such unauthorized speed of the train, without any direct contributory negligence on the part of the deceased himself. The relation of cause and effect would be wanting. And upon this branch of the case the evidence is absolutely insufficient upon which to found a verdict. By agreement of counsel filed with the case the decision of this court was to make a final disposition of it; therefore the entry must be,

Motion sustained and verdict set aside.
Judgment for defendant.

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

WILLIAM R. BURRILL *vs.* W. T. DAGGETT.

Somerset. Opinion December 1, 1885.

Bond. Penal sum. Liquidated damages. Barber-shop.

Where a bond in the usual form was given in the sum of five hundred dollars, conditioned that the obligor should never open and keep a barber-shop within a certain town, the sum named will be regarded as a penalty and not as liquidated damages.

In such cases the intention of the parties is to govern, and for that purpose it is necessary,

1. To look at the whole instrument.
2. Its subject matter.
3. The ease or difficulty in measuring the breach in damages.

4. The magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach.

ON REPORT on agreed statement of facts.

Debt on bond of five hundred dollars.

The condition of the bond was in the following words:

"Whereas, the above bounden W. T. Daggett, has this day sold to the said Burrill his furniture, fixtures, tools of trade, etc., now in the room formerly occupied by said Daggett as a barber-shop, and has agreed and does hereby agree never at any time after this date to open and run a barber-shop in said Fairfield.

"Now the condition of this obligation is such that, if the said Daggett shall well and truly keep his said agreement, and never open and keep a barber shop in said Fairfield, then this obligation shall be void, otherwise it shall remain in full force and effect."

The opinion states other material facts.

Potter and Lancaster, for the plaintiff, on the question of the validity of the bond, cited: 2 Chitty, Contr. 982, 984; *Whitney* v. *Slayton*, 40 Maine, 229; *Warren* v. *Jones*, 51 Maine, 146; *Caswell* v. *Johnson*, 58 Maine, 164; *Holbrook* v. *Tobey*, 66 Maine, 410; *Pierce* v. *Woodward*, 6 Pick. 206; *Perkins* v. *Lyman*, 9 Mass. 522; *Pierce* v. *Fuller*, 8 Mass. 223.

The counsel contended that the penal sum named in the bond should be considered as the liquidated damages. The case of *Holbrook* v. *Tobey*, *supra*, is almost identical with the case at bar. It differs only in the names of parties and kind of business. It fully sustains our view. No stronger argument or longer array of authorities in support of our position can be found than in that case.

Brown and Carver, for the defendant.

The bond being in restraint of trade and business should be carefully scrutinized and limited in its application to such purposes and object only as are clearly and unmistakably expressed in its terms. The law does not favor forfeitures.

Applying the rules of construction and interpretation to the

bond in suit, the purpose is fully ascertained. It was to prevent the obligor from opening a new barber-shop in a village where there already was three, and as many as the place would support. That this was the intention and understanding of the parties is evident not only from the circumstances under which the bond was given and the facts then existing, but also from the peculiar language used in the bond itself. It did not prohibit the defendant from working as a journeymen in the shop of another, of running and managing a shop for another, or of buying out another shop already opened. Only that he could not "open and run" another shop.

On the question of damages if there had been a breach, counsel cited: Sedgwick, Damages, (5 ed.) 456; 52 Maine, 271; *Henry* v. *Davis*, 123 Mass. 345; *Whitney* v. *Slayton*, 40 Maine, 224; *Philbrook* v. *Burgess*, 52 Maine, 271; *Caswell* v. *Johnson*, 58 Maine, 164; *Stearns* v. *Barrett*, 1 Pick. 443; 4 Pick. 178; 11 Mass. 76; 15 Mass. 488; 23 Pick. 455; 1 Mass. 191; 5 Met. 61; 11 Allen, 133; 13 Allen, 19; 9 Pick. 534; 4 Cush. 381; 14 Gray, 165; 99 Mass. 388; 4 N. H. 376; 19 Cal. 380; 50 Ill. 491; 11 Gray, 212; 25 Penn. 424; 41 Penn. 206; 24 Wend. 244; 26 Wend. 630; 5 Cowan, 144; 1 Denio, 464; 7 Wheaton, 13; 11 Texas, 273; 14 Ark. 315; 42 Mo. 545; 17 Barb. 260; 54 Penn. St. 326; 30 Am. R. 26, 607; 32 Am. R. 457; 32 Am. R. 150; 2 Greenl. Ev. § 257–8.

FOSTER, J. On the day of the date of the bond in suit the defendant sold to the plaintiff his barber-shop, tools, fixtures, furniture, stock and good will of trade in said shop, for the sum of three hundred dollars. As a part of the consideration of the purchase he gave the plaintiff the bond in suit in the penal sum of five hundred dollars, conditioned, among other things, never to open and keep a barber-shop in the town of Fairfield. Nearly two years after the sale and the giving of this bond, the defendant bought out a barber-shop in an adjoining building, and since that time has continued the business of barbering, working at the barbers' trade in said shop.

The only questions in controversy are whether there has been a breach of this bond, and if there has been, whether the sum

mentioned is to be regarded as a penalty, or as liquidated damages.

The plaintiff contends that there has been a breach of the bond, and that he is entitled to recover the above named sum of five hundred dollars as liquidated damages. The defendant denies that there has been any such breach, and claims that his purchase of another barber-shop, which was in operation at the time, and his continuation of the barbering business therein, working himself at his trade, is not opening and keeping a barber's shop, and therefore not within the engagement.

We are not inclined to adopt the defendant's view of this question. Although there may not have been more than two other shops of the kind in the village, as the case shows, at the time the defendant sold to the plaintiff, it may well be inferred that it was the understanding of the parties, from the language of the bond, viewed in the light of the attendant circumstances as disclosed in the case, that the defendant was not again to engage in the business by keeping a barber-shop. He sold to the plaintiff not only his shop, tools, etc., but also his good will in the business. It was against the competition of the defendant that the plaintiff intended to provide; and whether the defendant bought out and kept another barber-shop, or opened and kept one independently of any in operation at the time, still continuing the business and working at his trade, it would be a violation of the condition of the bond.

The remaining question, then is whether the five hundred dollars shall be regarded as liquidated damages, or only security for the damages actually sustained. And whether the sum named in instruments of this nature is to be regarded as penalty or liquidated damages, is not always free from difficulty. It must rest, however, upon the construction to be given to the language used, and there are certain principles that may be resorted to in most cases to aid in determining this question.

The bond is in the usual form, and the general rule and preference of the law, in such cases, is that the penal sum therein named is to be regarded as a penalty, and not as liquidated damages. *Smith* v. *Wedgwood*, 74 Maine, 459; *Cushing* v. *Drew*,

97 Mass. 446; *Henry* v. *Davis*, 123 Mass. 346. Yet courts endeavor to learn the real intent of the parties to the contract, and if that can be ascertained, will be governed by it. "It is always a question of construction, on which, as in other cases where the meaning of the parties in a contract provable by a written instrument arises, the court may take some aid to themselves from circumstances extraneous to the writing. In order to determine upon the words used, there may be an inquiry into the subject matter of the contract, the situation of the parties, the usages to which they may be understood to refer, as well as other facts and circumstances of their conduct." *Perkins* v. *Lyman*, 11 Mass. 81. This is not done for the purpose of modifying or controlling the language used, but the more clearly to interpret the true meaning of that language, aided by the circumstances that gave birth to it. To determine whether the sum named is intended as a penalty or as liquidated damages, the court in Pennsylvania, in *Streeper* v. *Williams*, 12 Wright, 454, say that it is necessary to look at the whole instrument, its subject matter, the ease or difficulty in measuring the breach in damages, and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach.

In accordance with these principles our own court, in the case of *Holbrook* v. *Tobey*, 66 Maine, 414, has adhered to the same doctrine. Mr. Justice WALTON, after stating that if a party binds himself in a certain sum not to carry on any particular kind of business within a certain territory, or within a certain time, the sum mentioned will, in general, be regarded as liquidated damages, says: "Of course, if the sum named should be out of all proportion to any possible damage which the plaintiff could sustain, the court would hold otherwise, upon the very reasonable presumption that the parties never could have intended that the sum named should be regarded as liquidated damages."

In the case at bar there is no express agreement in the bond that the sum named shall be regarded as liquidated damages. Nor are we able to find anything in the language of the bond, the subject matter of the contract, or the nature of the case,

that would justify a conclusion that this sum was intended by the parties to be the stipulated and ascertained damages in case of a breach. We may properly consider the fact that the parties were negotiating in reference to a business of not very great magnitude, and that the whole consideration paid for the subject matter of the purchase was much less than the sum named in the bond. And when we further take into consideration the situation of the parties, as well as the proportion that this sum bears to the probable consequences of a breach, we can arrive at no other conclusion than that it was the intention of the parties that the sum named should be considered only as security for whatever damages might be sustained upon breach of the bond.

The case of *Caswell* v. *Johnson*, 58 Maine, 165, is very similar to this, and the language of the two instruments so nearly identical that no extended reference to it is necessary; and in that case the court arrived at the same conclusion as in this. In accordance with the stipulation in the report the entry may be,

Case sent back for trial on the damages.

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

ANDREW N. STOWE *vs.* BETSEY MERRILL.

Oxford. Opinion December 7, 1885.

Bond. Mortgage. Foreclosure. R. S., c. 90, § § 1, 5. Promissory notes. Notice. Dower.

A bond from the grantee to the grantor, executed three years after the delivery of the absolute deed, conditioned to convey to the grantor the same land, does not constitute an instrument of defeasance within the provisions of R. S., c. 90, § 1.

A note payable "in one ——— after date" may be identified as one payable in one "year" after date to correspond with the one described in the mortgage given to secure it.

An agreement limiting the time of redeeming a mortgage on real estate to one year and inserted in the mortgage will bind the mortgagee without his signature to the mortgage.

An agreement limiting the time of redeeming a mortgage on real estate need not be inserted in the notice of foreclosure.

A notice of foreclosure published in three consecutive weekly issues of the newspaper and recorded the next day after the last publication is a compliance with the provisions of R. S., c. 90, § 5.

A judgment for dower is not binding on one who was not a party or privy.

ON REPORT.

Real action to recover possession of certain land in Bethel, known as the Joseph L. Merrill farm.

The report shows the following conveyances, etc., affecting the title to the demanded premises:

1. A deed of warranty from Joseph L. Merrill to Ball B. Willis, July 31, 1862; recorded August 1, 1862.

2. A bond from Ball B. Willis to Joseph L. Merrill, August, 1865, to convey the premises on payment prior to October 1, 1866, of seven hundred and twenty-five dollars; not recorded.

3. A bond from Ball B. Willis to Joseph L. Merrill, July 1, 1868, to convey the premises on payment within two weeks of eleven hundred and seventy dollars; not recorded.

4. A deed from Ball B. Willis to John Philbrook, November 27, 1868; recorded December 2, 1868.

5. A bond from John M. Philbrook to Betsey Merrill, December 2, 1869, to convey the premises on her payment of sixteen hundred and two dollars and sixty-one cents within six months; not recorded.

6. A deed from John M. Philbrook to Samuel B. Twitchell, April 5, 1871; recorded April 6, 1871.

7. A bond from Samuel B. Twitchell and John M. Philbrook to John W. Merrill, December 14, 1872, to convey the premises on payment of certain sums of money within certain periods of time; not recorded.

8. Deed of Samuel B. Twitchell to John M. Philbrook, December 14, 1872, of one-half; recorded December 16, 1872.

9. Deed of same to same of one-half, February 23, 1874; recorded March 26, 1874.

10. Deed, John M. Philbrook to John W. Merrill, November 25, 1876; recorded November 28, 1876.

11. Mortgage, John W. Merrill to Mary F. Smith, July 24, 1879; recorded same day.

12. Assignment of mortgage, Mary F. Smith to the plaintiff, November 11, 1880; recorded November 12, 1880.

13. Notice of foreclosure recited below.

14. Writ of dower, *Betsey Merrill* v. *John W. Merrill*, October 16, 1883, and officer's return thereon.

[Notice of foreclosure.]

"Whereas, John W. Merrill of Bethel, in the county of Oxford, and state of Maine, by his mortgage deed, dated the twenty-fourth day of July, A. D. 1879, and recorded in the Oxford Registry of Deeds, book 183, page 456, conveyed to Mary F. Smith of Newry, a certain parcel of real estate situated in said Bethel, on the north side of the Androscoggin river, and being the Joseph L. Merrill farm, so called, and the same farm deeded to John W. Merrill by John M. Philbrook by deed dated November 25, A. D. 1876, and whereas the said Mary F. Smith has assigned the said mortgage and notes thereby secured to me, the undersigned, by her assignment dated the 11th day of November, A. D. 1880, recorded in the Oxford Registry of Deeds, book 191, page 178, and whereas the condition of said mortgage has been broken, now therefore, by reason of the breach of the condition thereof, I claim a foreclosure of said mortgage.

March 2d, 1883. Andrew N. Stowe."

R. A. Frye, for the plaintiff, cited: Martindale on Conv. § 470; *Johnson* v. *Leonards*, 68 Maine, 237; *Mitchell* v. *Burnham*, 44 Maine, 286; *Bailey* v. *Myrick*, 50 Maine, 174; *Reed* v. *Elwell*, 46 Maine, 270; *Chase* v. *McLellan*, 49 Maine, 375; *Chase* v. *Savage*, 55 Maine, 543; *Blake* v. *Dennett*, 49 Maine, 102; *Blaney* v. *Bearce*, 2 Maine, 135; *Shaw* v. *Erskine*, 43 Maine, 373; *Warren* v. *Lovis*, 53 Maine, 464; *McLaughlin* v. *Shepherd*, 32 Maine, 147; *Treat* v. *Strickland*, 23 Maine, 234; *Usher* v. *Richardson*, 29 Maine, 415; Bigelow, Estoppel, 340; Schou. Hus. & Wife, § 441; *Stearns* v. *Swift*, 8 Pick. 532; Greenl. Ev. § 501; Freeman, Judgments, § 407.

S. F. Gibson, for the defendant, contended that the mortgage assigned to the plaintiff by Mary F. Smith was not sufficient to

pass title for the reason that it describes a note for which the same was given, as being payable in one year. Referring to the note itself, it is entirely different and has no time of payment in it; and there is no proof offered by the plaintiff identifying this note. A mortgage is a conveyance of property for the security of a debt. *Goddard* v. *Coe*, 55 Maine, 385. It has for its basis the contract to be secured, and ceases to have validity by the discharge of that contract. *Patch* v. *King*, 29 Maine, 448.

The mortgage, if valid, was never legally foreclosed. R. S., c. 90, § 5, cl. I, requires that the notice of foreclosure shall describe the premises intelligibly, name the date of the mortgage and state that the condition has been broken, &c. The notice should also state the time of redemption. There was an agreement inserted in the mortgage — the one year clause — under the act of 1876, c. 113, but the mortgage was not signed by both parties. It should be signed by both to bind both. The acceptance of the mortgage by mortgagee was not enough. The letter and spirit of the act requires an agreement, inserted and signed by both parties.

The publication of the notice of foreclosure was not sufficient. It must be published three weeks successively, then recorded. The certificate shows that it was recorded in seventeen days after its date, therefore it could not have been published for three weeks successively.

VIRGIN, J. Writ of entry. Both parties claim title from Joseph L. Merrill; the plaintiff, as assignee of an alleged foreclosed mortgage of the demanded premises, given by J. W. Merrill, (son of Joseph L.) who derived his title through several mesne conveyances from his father; and the defendant, (formerly the wife and now the widow of Joseph L. Merrill,) by virtue of an alleged assignment of dower set out to her on a writ of seizin issued October 16, 1883, on a judgment for dower recovered on default against her son at the preceding September term.

1. Willis' bond to his grantor, Joseph L. Merrill, executed more than three years after the delivery of Merrill's absolute

deed to him, can not be considered an instrument of defeasance, and thereby render the conveyance a mortgage, the bond not having been "executed at the same time with the deed or as a part of the same transaction." R. S., c. 90, § 1. And the fact that the defendant took a similar bond from Philbrook to herself more than a year after Willis conveyed to him, shows that she also so understood it. And were it otherwise, the bond never having been recorded, it would not have operated as a defeasance as against the subsequent grantees, Philbrook or Twitchell. R. S., (1871,) c. 73, § 9.

2. While the mortgage under which the plaintiff claims describes the note secured thereby as one payable in "one year," and the note produced has a blank space therein after the words "in one," and before the words "after date," the identity is established by the recital in the case that the "execution and delivery of the deed of assignment, also the note secured and unpaid, are admitted." Moreover, if no such admission had been made, the note itself with the attending circumstances, satisfy us, in the absence of any counter testimony, that the word "year" was intended by the parties to fill the blank. *Nichols* v. *Frothingham*, 45 Maine, 220, and cases cited in the opinion of the court.

3. It is contended that the agreement limiting the time of redemption to one year, as authorized by St. 1876, c. 113, (now R. S., c. 90, § 6,) although it was "inserted in the mortgage" as the statute requires, it was not signed by the mortgagee, which the statute does not require. But both parties are not required to sign a deed of this character in order that its stipulations shall be binding on them; being a deed poll, on acceptance by the grantee it became the mutual act of both parties thereto, and therefore binding on them. *Newell* v. *Hill*, 2 Met. 181.

4. Neither does the statute require such agreement to be incorporated in the notice of foreclosure. The notice contains everything required by R. S., c. 90, § 5, viz.: the claim by mortgage of premises so intelligibly described as to inform the party entitled to redeem with reasonable certainty what premises

are intended (*Chase* v. *McLellan*, 49 Maine, 375); mention of the date of the mortgage; and an allegation of a breach of its conditions, together with a claim of foreclosure by reason thereof.

5. The law does not require publication of the notice twenty-one days before record. "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." *Wilson* v. *Page*, 76 Maine, 281.

6. It is contended that the transactions between J. L. Merrill and Willis, constituted a mortgage; that the conveyance of November 27, 1868, from Willis to Philbrook operated an assignment of that mortgage which was paid and thereby discharged April 5, 1871. The only evidence urged in support of such contention is the nominal receipt of that date from Philbrook to Merrill. But, as already seen, the deed and bond did not constitute a mortgage; and the giving of another bond in 1868 shows the parties understood the former was no instrument of defeasance. Moreover, as late as December 14, 1872, J. W. Merrill, son of J. L. Merrill and of this defendant, took a bond of the premises from Philbrook and Twitchell (Willis' successors in title) whereby they obligated themselves to convey to him on payment of six hundred and fifty dollars at the various times therein specified; which he would not be likely to do, if the parties understood the title was one of mortgage and that discharged.

We are of opinion, therefore, that the plaintiff has proved a regular chain of title from Willis to whom this defendant released her right of dower which she now sets up in defence; which title became absolute in one year after the first publication of his notice of foreclosure. To be sure the defendant recovered judgment for dower against her son (who once held the title) four years after he had conveyed it to the plaintiff's assignor; but assuming (without deciding) that the commissioners selected to set out the dower were legally sworn by the deputy sheriff who held the writ of seizin, that judgment cannot bind this

plaintiff who was neither party nor privy thereto; and hence there must be,

Judgment for the plaintiff.

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

INHABITANTS OF MONMOUTH *vs.* ELIAS PLIMPTON and others.

WILBERT WOODBURY and another *vs.* SAME.

Kennebec. Opinion December 7, 1885.

Deed. Mill-dam.

A deed, wherein the grantor gives, grants, bargains, sells and conveys unto the grantee, his heirs and assigns forever, the right of having, building and maintaining, and repairing and keeping in repair a dam on certain premises, with the right to so much of the premises as may be necessary on which to build and maintain the dam with its wings, conveys a fee in the land upon which the dam stands.

ON REPORT.

The same question is presented in each case, and is fully stated in the opinion.

Potter and Lancaster, for the plaintiffs, in the first action.

A. M. Spear, for the plaintiffs, in the second action.

The counsel for plaintiffs cited: *Reed* v. *Reed*, 9 Mass. 372; *Andrews* v. *Boyd*, 5 Maine, 199; *Butterfield* v. *Haskins*, 33 Maine, 395; *Gleason* v. *Fayerweather*, 4 Gray, 348; *Reed* v. *Proprietors*, 8 How. (N. Y.) 274; *Mason* v. *White*, 11 Barb. 173; *Harvey* v. *Mitchell*, 31 N. H. 575; *Bosworth* v. *Sturtevant*, 2 Cush. 392; *Stone* v. *Stone*, 116 Mass. 279; *Hoffman* v. *Riehl*, 27 Mo. 554; *Andrews* v. *Murphy*, 12 Ga. 431; *Pike* v. *Munroe*, 36 Maine, 309; *Littlefield* v. *Winslow*, 19 Maine, 394; *Robinson* v. *Fiske*, 25 Maine, 401; *Philbrook* v. *N. E. M'f'g Co.* 37 Maine, 137; *Winnipisseogee Co.* v. *Perley*, 46 N. H. 83; *Mills* v. *Catlin*, 22 Vt. 98; *Collins* v. *Lavelle*, 44 Vt. 230; *Allen* v. *Holton*, 20 Pick. 463; *Rutherford* v. *Tracy*, 48 Mo. 325; S. C. 8 Am. Rep. 104; *Mulford* v. *LeFranc*, 26 Cal. 88; *Abbott* v. *Abbott*, 53 Maine, 356;

Lincoln v. *Wilder*, 29 Maine, 169; 3 Wash. Real Property, 398 (4th ed.); *Waters* v. *Breden*, 70 Penn. 238; *Farrar* v. *Cooper*, 34 Maine, 394; *Dillingham* v. *Roberts*, 75 Maine, 469.

Clay and Clay, for the defendants, contended that the deed conveyed nothing but a qualified or determinable fee, an estate which passes subject to a reverter, and will continue no longer than the estate is used and occupied for a dam. *Moulton v. Trafton*, 64 Maine, 218.

The clause, "with the right to so much of said premises as may be necessary on which to build and maintain said dam with its wings," when considered in connection with other parts of the deed and the purposes of the conveyance, can mean nothing more than the use of the premises so long as the dam is used or occupied.

The deed conveys no mill, or mill privilege, or mill dam, only the right to build and maintain a dam upon the land of the grantor. The true test of ownership of the land on which the dam stands, is to whom would it revert if the dam should be carried away and the defendants should decline or neglect to re-build, or should abandon the premises for twenty years. Counsel cited: *Pratt* v. *Sweetser*, 68 Maine, 344; *Bates* v. *Foster*, 59 Maine, 157; *Stinchfield* v. *Gerry*, 64 Maine, 200; *Morgan* v. *Boyes*, 65 Maine, 124.

FOSTER, J. This is a complaint for flowage. It is a statutory proceeding. To be entitled to maintain it, the complainant must show that the conditions of the statute have been complied with. The only condition concerning which there is any controversy, and the only question involved in this case, is whether the dam which causes the flowing is erected and maintained on land of the defendants.

It is admitted that defendants own a mill, mill privilege and dam, on the stream some ways below the one in question, which is a reservoir dam built and maintained by the defendants for the purpose of supplying water to their mills below. That such a dam is protected by the provisions of the statute, if erected and maintained on land of the defendants, there can be no question.

Nelson v. *Butterfield*, 21 Maine, 231; *Dingley* v. *Gardiner*, 73 Maine, 66. "Any man may, on his own land, erect and maintain a water mill and dams to raise water for working it, upon and across any stream not navigable." R. S., c. 92, § 1.

Whatever rights the defendants have in relation to this reservoir dam, were derived by warranty deed from one John G. Robie, who was the owner of the land where the dam is situated. In that deed he says: "I . . do hereby give, grant, bargain, sell and convey unto the said E. Plimpton and sons, their heirs and assigns forever, the right of having, building, and maintaining and repairing and keeping in repair, a dam across Purgatory stream, on premises conveyed to me by C. F. Dunn, at, on or near where the dam now is, *with the right to so much* of said premises as may be necessary on which to build and maintain said dam with its wings." The same deed conveys to the defendants certain easements over the land of the grantor, such as the right to pass to and from said dam from the road, the right to flow to a certain height, and to remove obstructions from the stream, etc. The habendum in said deed is in these words: "To have and to hold the aforegranted and bargained premises and rights with all the privileges and appurtenances thereto belonging, to them the said E. Plimpton and sons, their heirs and assigns, to their use and behoof forever," and following which are the usual covenants of warranty.

The question is whether by this deed the defendants obtained a fee to so much of the land as is covered by this dam. We think they did.

Professor Washburn, (Vol. II, *622,) speaking of forms of conveyance by private grant, says that it is not necessary "that the deed should, in terms, convey the land or thing intended to be granted, if such grant is implied from what is described. Thus, a grant of the rents, issues and profits of a tract of land, is the grant of the land itself. If the grant be of the uses of, and dominion over land, it carries the land itself."

"Such designation and description, though usual, are not always essential. Land will often pass by other terms." *Sheets* v. *Selden*, 2 Wall. 187.

The same is true in regard to devises, where the following words have been held to convey an estate in the land, equivalent to a devise of the land itself, either in fee or for life, according to the limitation expressed in the devise: The income of land, (*Reed* v. *Reed*, 9 Mass. 374; *Andrews* v. *Boyd*, 5 Maine, 202); the income and interest of land, (*Blanchard* v. *Brooks*, 12 Pick. 63; *Fay* v. *Fay*, 1 Cush. 101); rents and profits, (*South* v. *Alliene*, 1 Salk. 228); improvement, use and benefit, (*Gleason* v. *Fayerweather*, 4 Gray, 351); all my right and benefit, (*Newkerk* v. *Newkerk*, 2 Caines, 351.)

In *Farrar* v. *Cooper*, 34 Maine, 397, the court held that a deed of "an undivided moity forever of the *privilege* of a mill yard" conveyed a fee in the mill yard. And in the same deed a moity of a double saw mill was conveyed, "with the *privilege* of forever having and keeping a saw mill on the same plat of ground, whereon the same conveyed moity now stands;" and these words were held to convey a fee; "for," as SHEPLEY, C. J., remarked, "a conveyance of the 'use of land forever,' is equivalent to a conveyance of the land." This case is cited and approved in *Dillingham* v. *Roberts*, 75 Maine, 471, where a deed conveying a parcel of land bounded on one side by the shore of the sea at high water mark, contained the following words: "including all the *privilege* of the shore to low water mark;" and the court held that the fee in the land between high and low water mark passed to the grantee.

In *Caldwell* v. *Fulton*, 31 Pa. St. 475, the grantor conveyed the full right, title and privilege of digging and taking away stone coal to any extent the grantee might think proper to do, or cause to be done, under any of the land owned or occupied by the grantor, and the court there held that such an interest in the mines under the grantor's lands passed as to distinguish it from a right of easement in the land.

Examining the language of the deed before us, we find that the grantor not only says that he does "give, grant, bargain, sell and convey unto the" grantees "their heirs and assigns forever, the right of having, building and maintaining and repairing and keeping in repair, a dam" on certain premises, but he also

in the same clause conveys "*the right to so much* of said premises as may be necessary on which to build and maintain said dam with its wings."

If there is any doubt as to the meaning of the language used, it must be taken most strongly against the grantor and in favor of the grantees. He conveys the "right" to a definite parcel of land. The extent of that parcel is that which "may be necessary on which to build and maintain said dam with its wings." Webster defines "right" to be "just claim, legal title, ownership." Had the grantor conveyed all his right, title and interest in the parcel thus described to the grantees, their heirs and assigns forever, the fee would undoubtedly have passed. Here he conveys his right, which, in this connection, is equivalent to title. "It can hardly be doubted," says LIVINGSTON, J., in *Newkerk* v. *Newkerk*, 2 Caines, 351, "that a devise of a man's right in land will pass all his estate and interest therein, and of course a fee, if he himself have one. Right is equivalent to all right; and if all his right be devised, what is there left for others?" Here, the right is to so much of the premises as may be necessary on which to build and maintain a dam with its wings; and this right is not repugnant to, but rather expressive of, the right previously named,— that of having, building, and maintaining and repairing and keeping in repair a dam upon that particular spot. It is something more than the mere right to do an act or a series of acts upon this parcel of land, and herein lies the distinction between the grant of a fee, and an easement therein. The conveyance was of the entire beneficial occupation of such parcel, strongly indicative of a fee, and not for uses which might be only intermittent and occasional,— uses sometimes denominated "non-continuous."

And when we apply the rule of construction, that in determining the meaning of the parties recourse may be had to the whole instrument, our conclusions are sustained by the language of the habendum where the "aforegranted and bargained premises and rights" are named. The parties evidently, from a fair construction of the language used, recognized the distinction between the title or estate in fee which was granted, and the

easements subsequently named in the deed, such as the right to flow, to pass and repass, and to enter and remove obstructions, etc.

Furthermore, whatever estate was conveyed was one of inheritance. The deed is one of warranty, with covenants warranting and defending the premises to the defendants, their heirs and assigns forever.

It is claimed, however, that the estate was not one in fee simple, but a qualified or determinable fee, and that it will continue no longer than the land may be occupied and used for a dam. Granting the conclusion thus claimed by the learned counsel for the defendants, nevertheless such an estate would pass subject to a reverter, and would continue until the qualification or limitation annexed to it is at an end. It would constitute an estate both descendible and assignable. *Moulton* v. *Trafton*, 64 Maine, 222. And consequently, whether the estate granted be one in fee simple, or a base, qualified or determinable fee, is not important here, inasmuch as in either case the defendants would be possessed of a title sufficient for the maintenance of this action.

Judgment for complainants. Commissioners to be appointed at nisi prius.

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

STATE OF MAINE *vs.* GEORGE A. LYNDE.

Knox. Opinion December 9, 1885.

Public records. Sworn copy. Evidence.

The contents of a public record may be proved by the production of the record itself, or by a copy duly certified by the proper officer, or by an examined copy sworn to by an unofficial witness who made the examination.

ON EXCEPTIONS.

Indictment for keeping a liquor nuisance.

At the trial, George S. Winn, a clerk in the office of the collector of internal revenue, testified that he had the custody of

the records and had made a true copy therefrom of certain names. This copy was admitted to show that the defendant had procured a license as retail liquor dealer, and the defendant alleged exceptions.

True P. Pierce, county attorney, for the state, cited: *State* v. *Gorham*, 65 Maine, 270.

D. N. Mortland and *J. E. Hanley*, for the defendant.

We think it is a well settled rule that the record itself or a copy attested by the proper officer is the only evidence admissible of such a record. 1 Greenl. Ev. 483, 484; *Hammatt* v. *Emerson*, 27 Maine, 308; *State* v. *Gray*, 39 Maine, 353.

The fact that the clerk testified that the paper was a true copy of the record did not make the paper admissible; neither was it competent for the clerk to testify, it was nothing more nor less than allowing a person to testify what the record was without producing it. The production of a paper made by himself and which he certified to be a true copy was simply allowing him to testify from a memorandum what the record contained. The collector, himself, could not be permitted to give such testimony while an authentic copy made by him might be evidence. *McGuire* v. *Sayward*, 22 Maine, 230; *Owen* v. *Boyle*, 15 Maine, 147; *Atwood* v. *Winterport*, 60 Maine, 250.

PETERS, C. J. The original record of payments for licenses, kept in the office of the collector of internal revenue, would have been proper evidence. And a copy of the same, certified by the collector himself would have been. A copy of the record authenticated merely by a clerk in the collector's office, an unofficial person, standing without other proof, would be neither sufficient nor admissible. But it was in this case supported by the testimony of the clerk as a witness, who swears that he personally examined the record and made a true copy. The copy sustained by his oath, was admissible, if the mode of proof styled "sworn copies," or "examined copies," is allowable by the practice in this state. *State* v. *Gorham*, 65 Maine, 270.

Examined copies are, in England, resorted to as the most usual mode of proving records. Whar. Ev. § 94. The mode

is explained and commended in Best's work on evidence, § 468. It seems to have prevailed in many of the states, including Pennsylvania and New York. It was at an early date adopted in some of the federal circuit courts. 4 Dall. 412 (*U. S.* v. *Johns*). It is not an unknown mode of proof in New England. It is spoken of as a well settled doctrine in New Hampshire. *Whitehouse* v. *Bickford*, 29 N. H. 471. In *Spaulding* v. *Vincent*, 24 Vt. 501, it is said: "The more usual method" (of proving a discharge in a foreign court of bankruptcy) "is a sworn copy." Mr. Greenleaf says (1 Ev. § 485), "Where the proof is by copy, an examined copy, duly made and sworn to by any competent witness, is always admissible." In *Atwood* v. *Winterport*, 60 Maine, 250, the rule is casually approved, APPLETON, C. J., there saying, whilst speaking of the mode of proving an army record, "A sworn copy is admissible or a copy certified by the proper certifying officer."

Why not admissible? The evidence is as satisfactory certainly as a certified copy. In the latter case we depend upon the honor and integrity of an official, and in the former upon the oath of a competent witness. In either case, an error or a fraud is easily detectable. Probably, the reason why such a mode of proof has not been much known, if known at all, in our practice, is that it is cheaper and handier to produce copies, and if a witness comes instead, it is more satisfactory to have the officer who controls the records bring them into court. In some jurisdictions certified copies are not admitted in all cases, but only from special necessity. We think the evidence was properly admitted.

Exceptions overruled.

WALTON, DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

WILLIAM B. PINKHAM *vs.* JEFFERSON CROCKER.

Penobscot. Opinion December 8, 1885.

Factors. Sales.

A factor to whom goods are consigned to sell, may sell them on credit, in his own name, and the principal is bound by the sale, unless it be shown that the sale was contrary to usage or to instructions.

If the factor fails to use due care and diligence in making the sale to responsible persons, or is guilty of inattention to his principal's interest after the sale is made, he is liable to the principal for any loss occasioned by his neglect.

ON REPORT.

Assumpsit on an account annexed for sixteen sacks of wool — two thousand two hundred sixty eight and one-half pounds at twenty seven cents a pound — six hundred twelve dollars and fifty cents; also for money had and received.

The wool was sold by the defendant in his own name with other wool belonging to him to the Sebec Woolen Company on sixty days' time and the purchaser failed before the payment was due and paid twenty-five cents on a dollar. The opinion states other material facts.

Charles P. Stetson and *John F. Robinson*, for the plaintiff, contended that the defendant was liable for the value of the plaintiff's wool because he did not authorize the defendant to sell on credit, and because the defendant settled with the purchaser without authority and thus released the buyer from plaintiff's claim and right of action.

The authorities are conflicting upon the right of an agent to sell goods, consigned to him for sale, on credit. *Greely* v. *Bartlett*, 1 Maine, 172, sustains the position of the defendant, as also, do some cases in Massachusetts. But there are authorities to the contrary. 2 Kent, Com. (12th ed.) 622 says: "a factor or merchant who buys or sells for commission, or as an agent for others for a certain allowance, may, under certain circumstances sell on credit; without any special authority for that purpose, though as a general rule, an agent for sale must sell for cash, unless he has an express authority to sell on credit." See also 1 Parsons, Contr. 58; *Bradley* v. *Richardson*, 23 Vt. 732; *School District* v. *Aetna Ins. Co.* 62 Maine, 330.

The defendant is liable because he settled with the Woolen Company without authority from the plaintiff. 1 Parsons, Contr. 94; *Higgins* v. *Moore*, 34 N. Y. 417; *Brown* v. *Arrott*, 6 Watts & S. 402; *Blackman* v. *Green*, 24 Vt. 17.

John Varney, for the defendant, cited: *Greely* v. *Bartlett*, 1 Maine, 172; *Goodenow* v. *Tyler*, 7 Mass. 36; *Dwight* v. *Whitney*, 15 Pick. 179; *Vail* v. *Durant*, 7 Allen, 408; *Bartlett* v. *Hamilton*, 46 Maine, 435; *Hapgood* v. *Batcheller*, 4 Met. 573; *Gorman* v. *Wheeler*, 10 Gray, 362.

PETERS, C. J. The defendant, as a factor, no instructions being imposed upon him, sold the plaintiff's wool at the plaintiff's risk, upon credit; the purchaser failing before the debt became due. The defendant exercised due care in taking the risk, if he was justified in so selling the goods. Does the law authorize a factor to sell his principal's goods on credit?

It was held in an early case in this state that a factor has such authority. *Greely* v. *Bartlett*, 1 Maine, 172. It was the doctrine of the Massachusetts court when our own state was a portion of that commonwealth. *Goodenow* v. *Tyler*, 7 Mass. 36. It is the general doctrine. Story, Ag. § § 60, 110 and cases there cited.

We do not think it necessary for the defendant to show that it is a usage of trade to sell wool upon credit. Of course, if the sale was made in defiance of a usage which forbids a sale on credit, the defense fails. But it is fair to presume that a usage exists which permits such a sale unless the contrary be shown. We know that, as far as most descriptions of goods are concerned, it is not unusual to sell on credit. The factor often sells his own goods on credit, and it is to be presumed that he is clothed with as much discretion when he sells goods belonging to others. It is not unreasonable to suppose that the principal would have sold the goods on credit had the sale been made by him without the aid of a factor. Should it be necessary, however, to appeal to the evidence for the defendant's justification, we should not hesitate to declare that, in our opinion, such a usage as the defendant invokes is affirmatively proved.

The plaintiff contends that the defendant made himself personally liable for the goods because he was guilty of negligence in not seasonably apprising the plaintiff of the circumstances of the sale, and in not using more diligence than he did use to

collect the debt. The evidence does not support the contention. If a factor exposes his principal to risk of loss by any want of information which the principal is entitled to from him, or by any inattention to his principal's interests, he is responsible for all the natural consequences of the neglect. The law requires diligence and a lively interest on his part in his employer's affairs. But what better action could have been taken than was taken by the defendant after the purchaser failed? His own wool was covered by the same sale. He took the same percentage in settlement with the purchaser that all other creditors received. The plaintiff evidently intended, after the purchaser failed, to cast the loss upon the defendant, if he could, and he seems to have been unwilling to participate in the responsibility of any settlement of the debt either by word or act. The cases cited upon the brief submitted for the plaintiff are not applicable to these facts. The case cited upon the brief for the defense, *Gorman* v. *Wheeler*, 10 Gray, 362, is in point.

The plaintiff is entitled to recover, under the money count, the amount which the defendant received from the purchaser on his account.

Defendant defaulted accordingly.

DANFORTH, VIRGIN, EMERY, FOSTER and ASKELL, JJ., concurred.

SANFORD STEVENS AND ROBERT W. GILMORE, in equity,

vs.

CHARLES SHAW.

Penobscot. Opinion December 8, 1885.

Assignee. Indorsement of Writs. R. S., c. 82, § § 128, 129. Equity practice.

The provision of the statute requiring an assignee of a claim in suit to indorse the writ or process, does not apply to a bill in equity, even if the bill is inserted in a writ.

The law court, as a rule, does not entertain preliminary questions in equity until final hearing; but will do so where postponement might unjustly defeat the end sought to be gained by the preliminary proceeding.

ON EXCEPTIONS.

Bill in equity inserted in a writ. The defendant made a motion in writing that Nathaniel Dustin, assignee of Robert W. Gilmore, one of the plaintiffs, have his name and place of residence indorsed on the writ in this action. The exceptions were to the ruling of the court in overruling that motion.

Thomas H. B. Pierce, for the plaintiff, cited: *McGee* v. *McCann*, 69 Maine, 82.

Josiah Crosby, (*V. A. Sprague*, with him,) for the defendant, cited: R. S., c. 81, § 6, and c. 82, § 128; *Staples* v. *Wellington*, 62 Maine, 9; *Simpson* v. *Bibber*, 59 Maine, 196; 2 Story's Eq. § 1040; *Rice* v. *Stone*, 1 Allen, 569; *Ware* v. *Bucksport & Bangor R. R. Co.* 69 Maine, 97.

PETERS, C. J. We regard the ruling as correct. We do not see that the statutory provision, which requires an assignee to indorse his name on a writ or process, was intended for bills in equity. R. S., c. 82, § § 128, 129. There would be an incongruity in it. The statute requires judgment for costs to go against the assignee and the assignor jointly, if the other side prevails. But whether costs shall be awarded or not in a case in equity, is for the court to determine, as a matter in its discretion. An assignee can be included as a party in a bill in equity when he could not be in an action at law. There is a plausibility in the defendant's position, still we think the motion should be denied.

A question arises whether a bill of exceptions can be heard in this court before a case in equity comes up for a final hearing. Generally, it would be an irregular proceeding. But as the peculiar character of the present question hardly admits of postponement, if any benefit is to be derived from it by the moving party, we think it would not be an infraction of the rules usually regulating equity proceedings, to give these exceptions a privileged position on the docket. It is authorized by the example furnished in the case of *Spaulding* v. *Farwell*, 62 Maine, 319. *Exceptions overruled.*

DANFORTH, VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

EDMUND F. WEBB, administrator, in equity,

vs.

EDMUND A. FULLER and another.

Waldo. Opinion December 8, 1885.

Equity.

Equity is a proper remedy where a mother for a long period intrusted the possession and management of her property, consisting of bonds, stocks and money, to her two sons, who have changed its form from time to time, and refuse, after her death, to account therefor with her administrator.

ON exceptions to the ruling of the court in overruling the defendants' demurrer to the bill.

The opinion states the material facts.

Appleton Webb, for the plaintiff, cited: R. S., c. 77, § 13; 1 Pom. Eq. Jur. § § 82, 83, 191, 176, 112, 114, 115, 201, 159, 157, 155, 130; *Rathbone* v. *Warren*, 10 Johns. 587; *King* v. *Baldwin*, 17 Johns. 384; *Bromley* v. *Holland*, 7 Ves. 19; *East India Co.* v. *Boddam*, 9 Ves. 464; 1 Perry, Trusts, § 166; *Ryan* v. *Dox*, 34 N. Y. 307; 2 Pom. Eq. Jur. § § 947, 951–955, 956, 959, 960; *Sprague* v. *Rhodes*, 4 R. I. 301; *Dike* v. *Greene*, 4 R. I. 285.

There was no argument for defendants at law court.

PETERS, C. J. Roundly stated, the complainant's grievance is that the defendants, sons of the deceased intestate, were intrusted, for some years in her lifetime, with a complete possession and control of her property, consisting of bonds, stocks and money; that they managed the property as they pleased, and in the end converted the same to their own use; that the mother was weak and infirm, and that by means of her infirmities, the sons fraudulently obtained her signature to releases and assignments and pretended settlements; and the complainant asks for discovery and relief.

The defendants demur to so much of the bill as calls for an account of any money, stocks or other property, or any interest

and dividends thereon, or for the restoration of any property or its proceeds. Being without a brief from the defendants' side of the case, we can only infer that the objection to this part of the bill is that a legal remedy would be sufficient. No doubt, an action at law would lie, but we believe that the equitable will be a more expeditious and adequate remedy.

It is to be admitted that the equitable remedy can not be appealed to in all cases where the relation of principal and agency exists, or where accounts should be rendered, — in some cases it may be. Any general rule of distinction between the classes of cases falling on different sides of the line, would be difficult to ascertain. Mr. Pomeroy discusses the origin of the equitable jurisdiction in suits for an accounting, (3 Eq. Jur. § 1421, and notes,) and says that the jurisdiction is extended to cases where there are circumstances of great complication, or difficulties in the way of adequate relief at law, even if the accounts are all on one side; and especially if any sort of a fiduciary relation exists between the parties. In a note to the section cited, it is said: "But where the relation is such that a confidence is reposed by the principal in his agent, and the matters for which an accounting is sought are peculiarly within the knowledge of the latter, equity will assume jurisdiction." To this, numerous cases are cited. That equity should not hesitate to give a helping hand in the circumstances of the case before us, we have no doubt.

Demurrer overruled.

DANFORTH, VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

SAMUEL E. SHEPHERD *vs.* MARY E. HALL and another.

Knox. Opinion December 9, 1885.

Officer's receipt. Demand. Action.

A sheriff attached personal property on a writ, took a receipt therefor, and went out of office while the action was pending in court. The receipt was never legally nor equitably assigned by the sheriff to the creditor. *Held*, that an action could not be maintained in the name of the ex-sheriff against the receiptors for the benefit of the creditor, unless the property was

demanded of such ex-sheriff by an officer, holding the execution, within thirty days from the date of the judgment in the first suit; a demand on the receiptors is not sufficient.

ON REPORT.

An action on an officer's receipt.

The material facts are stated in the opinion.

J. E. Hanley, for the plaintiff, cited: *Hunter* v. *Peaks*, 74 Maine, 367; *Moulton* v. *Chapin*, 28 Maine, 505.

Rice and Hall, for the defendant, cited: R. S., c. 81, § 67; *Humphrey* v. *Cobb*, 22 Maine, 380; *Norris* v. *Bridgham*, 14 Maine, 429; *Sawyer* v. *Mason*, 19 Maine, 49; *Bradbury* v. *Taylor*, 8 Maine, 130.

PETERS, C. J. This is an action by an ex-sheriff upon an accountable receipt given for property which he attached. An execution, issued in the suit in which the attachment was made, was delivered to the plaintiff's successor in office within thirty days after judgment was recovered, and he made a demand on the receiptors, but no demand is shown to have been made on the present plaintiff within the thirty days.

The liability of a receiptor is contingent. Unless the officer is liable to either the creditor or the debtor for the production of the property attached, the receiptor is not liable to the officer. The officer has no personal interest in the property or its possession. He holds it merely for the purposes of the law. The creditor's lien continues for thirty days only after judgment, unless steps are taken within that time to retain or perfect the lien. In this case the debtor had no claim upon the officer, for the property had returned into his possession; nor has the creditor any claim upon him, because he failed to assert his claim by a demand within the thirty days. Any claim upon either officer or receiptor, is lost. *Bradbury* v. *Taylor*, 8 Maine, 129; *Norris* v. *Bridgham*, 14 Maine, 429; *Humphreys* v. *Cobb*, 22 Maine, 380; *Moulton* v. *Chapin*, 28 Maine, 505.

It is readily seen that a demand upon the receiptor is not an excuse for the want of a demand upon the officer. The receiptor

is under no obligation to the creditor. His agreement is not with him. There is no privity between them. The officer is responsible to the creditor whether the receiptor is liable to him or not. The receipt is for the officer's protection,— not for the creditor's. *Phillips* v. *Bridge*, 11 Mass. p. 247; *Pearsons* v. *Tinker*, 36 Maine, 384. In the present case an unnecessary demand was made upon the receiptors, and a necessary demand upon the officer was omitted.

We do not mean to say that there may not be a case where a receiptor would be liable without a demand upon a retiring officer to whom the receipt was given. We have been speaking of the usual relation, such as appears to have existed in the case in hand. An exception exists where the receipt has been assigned by officer to creditor. It may be an equitable assignment. It has been held that such an assignment arises where an officer takes a receipt at the instance of the creditor, upon his approval, and at his risk, the creditor by agreement relying upon the receipt and not upon the obligation of the officer. In such case the creditor is substituted for the officer. He owns the right. He need make no demand upon the officer. He is acting in his behalf in calling upon the receiptor. A demand on the officer is implied — or waived. *Hapgood* v. *Fisher*, 30 Maine, 502; *Lawrence* v. *Rice*, 12 Metc. 527; *Moore* v. *Fargo*, 112 Mass. 254.

Plaintiff nonsuit.

WALTON, DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

HENRY K. WHITE and another *vs.* O. M. KILGORE and trustee.

Somerset. Opinion December 9, 1885.

Trustee process. Chose in action, assignment of. Oral assignment.

To make an oral assignment of a debt due on account valid, as against creditors, or between parties even, there must be a valuable consideration therefor, and at least a symbolical or constructive delivery; although the delivery may be evidenced by a less significant act than is required for the assignment of a chose in action which is capable of manual delivery like an execution, note or bond.

An oral assignment of an account may be made for collateral security merely, and it will be so regarded, if the facts disclose that such was the intention of the parties, whatever may be the form of the transaction or however named.

F owed K on account, and K owed H on account and desired further credit; the three agreed that what F owed K should be paid by him to H on K's account, and then H trusted K on further account. This was an oral assignment to H of K's debt against F; the consideration was the mutuality of the agreement and the new goods; and the transaction was also a constructive delivery, sufficient to satisfy the policy of the law. Such an assignment could as properly be for collateral security as to be an absolute transfer.

ON EXCEPTIONS.

Assumpsit on an account annexed; Joseph T. Flanders was summoned as trustee. The trustee disclosed an assignment of the funds in his hands to Hussey and Conant, who appeared and claimed the funds. The exceptions were to the ruling of the court in favor of the claimants for the full amount in the hands of the trustee.

The report of the evidence, which was made a part of the exceptions, shows that at the time of the assignment, (July 28, 1883,) the trustee was owing the defendant sixty dollars and fifty-three cents, and the defendant was owing the claimants sixty-two dollars and thirty-nine cents, a part of which was for merchandise delivered at that time; that subsequent to that time and before the service of the writ on the trustee, (September 3, 1883,) the defendant had other goods of the claimants, amounting to twenty-four dollars and ninety-four cents, and paid them during that time on account sixty-two dollars and eighty-nine cents, and thus was owing them at the time of the service of the writ, twenty-four dollars and forty-four cents; and the account during all that time stood on the claimants' books in the name of the defendant.

Other material facts are stated in the opinion.

Danforth and *Walton and Walton*, for the plaintiffs, contended that the trustee should be charged for the full amount, because the claimants never released their claim, or any part of it, against Kilgore at the time of the alleged assignment, and Kilgore had actually paid them on account after the date of the assignment

and before the service of the trustee writ, all and more than he owed them at the time of the assignment.

Counsel also claimed that the assignment, if made, was void as being within the statute of frauds, citing: *Stewart* v. *Campbell*, 58 Maine, 439; *Hilton* v. *Dinsmore*, 21 Maine, 410; *Rowe* v. *Whittier*, 21 Maine, 545; *Whittemore* v. *Wentworth*, 76 Maine, 20; 130 Mass. 437; 58 Iowa, 610.

C. A. Harrington, for the claimants, cited: Cushing, Trustee Process, 74; *Ford* v. *Stuart*, 19 Johns. 342; *Sprague* v. *Frankfort*, 60 Maine, 253; *Curtis* v. *Norris*, 8 Pick. 280; *Jones* v. *Witter*, 13 Mass. 304; *Dunn* v. *Snell*, 15 Mass. 485; *Crocker* v. *Whitney*, 10 Mass. 316; *Vose* v. *Handy*, 2 Maine, 322; *Titcomb* v. *Thomas*, 5 Maine, 282; *Exchange Bank* v. *McLoon*, 73 Maine, 498; *Simpson* v. *Bibber*, 59 Maine, 196.

PETERS, C. J. It is a sufficient statement of the facts of the case, to say that the trustee, (Flanders,) owed the defendant, (Kilgore,) on account, and the defendant owed the claimants, (Hussey and Conant,) on account; that there was a verbal agreement between the parties that Flanders should pay to Hussey and Conant what he owed Kilgore towards a satisfaction of their debt against Kilgore; that Flanders promised to send a check to Hussey and Conant, but was trusteed in this suit before the check was sent.

Which party has the better claim upon the fund in the trustee's hands? The claimants contend that the defendant assigned his account against the trustee to them, — that the transaction amounted to an equitable assignment, made orally. The plaintiffs contend otherwise.

The ground taken by the plaintiffs is, that there was not an assignment for two reasons: First, that there was no consideration. Second, that there was no delivery of the debt, or thing assigned.

The doctrine of equitable assignments of choses in action, was at an early date adopted by the law; and it has been an expanding, growing doctrine. The general rule of courts has been, that to establish a mere oral or unwritten assignment of a chose in action, both a consideration and a delivery must be proved, —

not only as against creditors and subsequent purchasers, but as between the parties themselves. If it be asked why there should be more particularity of the requirement of delivery in equitable than in legal sales, the answer is that from the nature of things, there is nothing else to indicate that it is an executed rather than an executory contract, — nothing to clearly mark the intention of the parties. There would be too much uncertainty and misunderstanding in such equitable contracts, unless the rule respecting consideration and delivery be adhered to. Equity, in its liberality, invented the doctrine, and at the same time, in its caution, provided certain requirements to be observed in its application, While equity dispenses with some forms, it insists upon others.

The element of valuable consideration has been quite rigidly adhered to. Our own cases have uniformly required it. "The presence of a valuable consideratiou becomes the essential and necessary element of an equitable assignment." *Tallman* v. *Hoey*, 89 N. Y. 537. A delivery is just as essential an element as the presence of a valuable consideration. It is said by REDFIELD, J., in *Whittle* v. *Skinner*, 23 Vt. 531, "We know of no case where an agreement to assign a chose in action, without even a symbolical delivery, has been held valid, between the parties even." While, however, delivery or its equivalent is necessary in these cases of "imperfect transfer," rather insignificant acts have been in many instances allowed to answer the requirement. Various circumstances and situations of parties have been construed as tantamount to delivery. And especially is this so in respect to verbal assignments of debts which are not evidenced by any writing, and therefore not susceptible of manual or visible delivery.

In *Robbins* v. *Bacon*, 3 Maine, 346, MELLEN, C. J., said, "A bond or note may be assigned upon valuable consideration by mere delivery to the assignee for his use. In those cases, the bond or note is evidence of the debt due. When the debt is due on book merely, as a man can not deliver over to an assignee of such debt his general book of accounts, a copy of the account taken from the book, with an order on the debtor, may well be

considered as a delivery." In subsequent cases not as much was required. In *Porter* v. *Bullard*, 26 Maine, 448, it was a sufficient delivery that a copy of an account was handed over, and it was there held that a receipt from the assignee to the assignor admitting a transfer to himself was sufficient evidence of a delivery. In *Garnsey* v. *Gardner*, 49 Maine, 167, the court held that the assignment of a debt might be made by parol, and might be inferred from the conduct and acts of the parties. In *Sprague* v. *Frankfort*, 60 Maine, 253, it appeared that a person volunteered for the war, as a substitute for an enrolled man, for the sum of six hundred dollars, verbally agreeing that any future bounties payable to him, should belong to the person whose place he took; and this was held to be a parol assignment. In that case there was nothing to deliver, — and might never be. The assignment was a part of the original agreement and a part of the consideration therefor. The parties acted under it. *Simpson* v. *Bibber*, 59 Maine, 196, is a still more radical case, perhaps. But in that case there was more than merely spoken words to constitute an assignment, — there were circumstances. The assignee had an equitable lien for his repairs.

There should undoubtedly be something more than words to constitute sale and delivery, — there must be some act. "Any order, writing or act, which makes an appropriation of a fund, amounts to an equitable assignment of that fund." Stor. Eq. Jur. § 1047. A constructive delivery may be evidenced by conduct indicating that the assignor relinquishes, and the assignee assumes, control of the chose in action. *Brewer* v. *Franklin Mills*, 42 N. H. 292; *Williams* v. *Ingersoll*, 89 N. Y. 508.

In accordance with this view of the law, we think that the claimants are entitled to a portion of the fund. There was a consideration for the assignment. The claimants let a portion of their goods go upon the strength of the assignment. The agreement to buy the debt was a consideration for its sale. The acts of the three parties, one selling, another buying, and the third agreeing to account to the buyer — done contemporaneously — amounted to at least a constructive delivery. It was enough to "satisfy the reason and policy of the law."

The assignees can not hold all of the fund. Only twenty-four dollars and forty-four cents was due them when the writ was served, while the debt assigned was sixty dollars and fifty-three cents. The transaction has evidently resolved itself into a matter of security. Says STORY, J., in *Flagg* v. *Mann*, 2 Sumner, 486, "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." The fund should be divided as before indicated. Any other view would cast a fraudulent shadow over the original assignment. Such an assignment could as properly be for collateral security as to be absolute. *Taft v. Bowker*, 132 Mass. 277.

Exceptions sustained. Claimants to have $24.44 only of the fund.

WALTON, DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

CELIA C. STINSON *vs.* JOSEPH L. FERNALD.

Knox. Opinion December 9, 1885.

Shipping. Earnings. Actions by part owners.

Tenants in common must join in an action to recover the earnings of their vessel, unless there is an excuse for a severance of the claim; but bankruptcy of one owner is not an excuse; in such case the assignee of the owner who is in bankruptcy must be joined with the solvent owners, or, if an assignee has not been appointed when the suit is commenced, an action may be supported in the names of the bankrupt and other owners until an assignee comes in.

ON REPORT.

Assumpsit on account annexed for use of one-half schooner, Robert Ripley, her tackle and furniture, from January 1, 1878, to May, 1878, $200.

The opinion states the material facts.

J. H. Montgomery, for the plaintiff, cited: *Smith* v. *Marsh*, 2 Dane's Abr. 228, 449; *Kimball* v. *Sumner*, 62 Maine, 310; *Stanley* v. *Ayers*, 3 Ves. 444; 1 Parson's Sh. & Adm. 117; *Hopkins* v. *Forsyth*, 14 Pa. 34; *Lyman* v. *Boston & Maine*

R. R. Co. 58 N. H. 384; Chitty Contracts, 124; *Baker* v. *Jewell*, 6 Mass. 460.

C. E. Littlefield, for the plaintiff, cited: *White* v. *Curtis*, 35 Maine, 534; *Hall* v. *Gray*, 54 Maine, 230; *Hampton* v. *Rouse*, 11 B. R. 472; 22 Wall. 263.

PETERS, C. J. The plaintiff sues the master of a vessel for one-half of her use for a certain time. The vessel was let as a whole, the plaintiff owning but one-half of her. The defense set up is non-joinder; the defendant contending, under the general issue, that all the owners should be joined as plaintiffs.

Such is the general rule; and the rule governs unless there be some excuse for disregarding it. Tenants in common of personal property have a single claim, and not separate claims, for the use of the common property. One tenant in common, of course, can lease his own interest separately by some special agreement. And a severance may be created, by the debtor's making a settlement with one owner for his share or interest in the common earnings; after which the other owner may sue for his share separately. The case in hand does not come within the permitted exceptions. *Moody* v. *Sewall*, 14 Maine, 295; *White* v. *Curtis*, 35 Maine, 534.

It is contended that the other owner could not be joined as a plaintiff in the present case because he had been declared a bankrupt. That does not operate as a severance. The assignee should have been joined. All competent parties must unite, whoever they may be. The bankrupt law provides that the assignee shall have the like remedy to recover all debts as the debtor would have had if there had been no decree of bankruptcy. R. S., U. S., § 5046, 5047. Such has been the practice in this country and in England, Add. Con. § 477; Dic. Par. 160; *Thomason* v. *Frere*, 10 East, 418; *Kelley* v. *Smith*, 1 Blatch. 290; *Murray* v. *Murray*, 5 Johns. Ch. 60; *Willink* v. *Renwick*, 23 Wend. 63; *Fuller* v. *Benjamin*, 23 Maine, 255.

To this it is replied that there had been no assignee appointed

for the owner who was in bankruptcy. The case is indefinite in this particular. But if it be so, it calls for no qualification of the rule. Some party representing the ownership should be joined. Either the owner or his assignee should be. The name of the bankrupt could be used until an assignee got into court, and the defendant could not object to the proceeding. *Mayhew* v. *Pentecost*, 129 Mass. 332; *Reed* v. *Paul*, 131 Mass. 129; *Ramsey* v. *Fellows*, 58 N. H. 607.

The plaintiff should be allowed, upon payment of costs, to amend the writ by inserting an additional plaintiff, if she desires to; otherwise to be non-suit. R. S., ch. 82, § 11.

WALTON, DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

DAVIS W. COOLIDGE *vs.* CHARLES W. GODDARD.

Cumberland. Opinion December 9, 1885.

Sales. Misrepresentation.

Four hundred and ten shares of the stock of an electric light company recently organized were paid for to the company, by its stockholders, at the rate of one-third of the par value of one hundred dollars a share. The plaintiff sold five of his shares, thus paid for, to the defendant at par, representing that all stockholders had paid for their shares at par. *Held:* That the plaintiff's statement was a misrepresentation of a material fact; that the defendant would have the right to infer from the representation that the company had assets of forty-one thousand dollars, instead of assets of only one-third of that amount.

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

Assumpsit for the recovery of the price of five shares of stock of the Arnoux Electric Light and Power Company of Maine.

At the trial the defendant seasonably requested the presiding justice to give the following instruction to the jury:

"If the jury find that the plaintiff, being the president of the Arnoux Electric Light and Power Company of Maine and in a position to have superior knowledge as to the financial standing of the company, at his first conversation with the defendant on Middle street stated to the defendant in substance, as a matter of fact, that every one who was interested in the stock of that

company had paid par value for it and that the defendant could have it on the same terms as all others had received it upon, and if this statement was made by the plaintiff to induce the defendant to make the purchase of stock and was believed and relied upon by the defendant, and was untrue, and if the jury further find that within a reasonable time after discovery of said untruth the defendant returned, or offered to return the certificate of stock to the plaintiff, or his attorney, in rescission of the trade, then the plaintiff is not entitled to recover in this action."

But the presiding justice declined to give the requested instruction, and ruled as matter of law that if all the fraudulent representations alleged were proved to have been made by the plaintiff, they were in themselves, even if the defence were sustained in all other essential particulars, mere statements of value or matters of opinion and not such as the law deems material and actionable; that such proof would afford no defence to the action, and the jury should pay no attention to that branch of the defence which was based upon the allegation of fraud.

The verdict being for the plaintiff for five hundred sixty-four dollars and ninety cents, the defendant alleged exceptions.

Other material facts are stated in the opinion.

George E. Bird, for the plaintiff.

The statements of the plaintiff, construed in the most favorable light for the defendant, were statements of value, statements of prices paid by plaintiff or by others, mere "dealer's talk," such representations afford no ground for an action of deceit, nor do they constitute a defence to an action for the price and cases cited; see also: *Long* v. *Woodman*, 58 Maine, 52; *Martin* v. *Jordan*, 60 Maine, 532; *Holbrook* v. *Connor*, *Ib.* 580; *Bishop* v. *Small*, 63 Maine, 12; *Bowen* v. *Davis*, 76 Maine, 225; *Ellis* v. *Andrews*, 56 N. Y. 85; *Brown* v. *Castles*, 11 Cushing, 350.

At the trial in the superior court, the defendant relied upon the following cases: *Litchfield* v. *Hutchinson*, 117 Mass. 195; *Savage* v. *Stevens*, 126 Mass. 208; *Teague* v. *Irwin*, 127 Mass. 217; *Bannister* v. *Alderman*, 111 Mass. 263; *Fisher* v.

Mellen, 103 Mass. 506; *Fogg* v. *Pew*, 10 Gray, 409; *Hubbell Meiggs*, 50 N. Y. 490.

In the cases in 117, 126, 127 and 111 Mass. the representations were of some material fact, as to the character, or situation or quality of the property, and not statements of value or of prices paid. It is not seen that either *Fisher* v. *Mellen* or *Fogg* v. *Pew*, are at all applicable to this case, while the only similarity between the facts in *Hubbell* v. *Meiggs*, and this case is that the subject of the contract of sale is stock.

Symonds and Libby, for the defendant, cited: *Lawton* v. *Kittredge*, 30 N. H. 500; Bigelow on Fraud, 20, 21, 24, 60, 71. See *Fogg* v. *Pew*, 10 Gray, 409; *Manning* v. *Albee*, 11 Allen, 522; *Bradley* v. *Poole*, 98 Mass. 179; *Litchfield* v. *Hutchinson*, 117 Mass. 195; *Teague* v. *Irwin*, 127 Mass. 218; *Sharp* v. *Ponce*, 74 Maine, 470; *Campbell* v. *Fleming*, 1 Adolf. & Ellis, 40; Cooley on Torts, 494–495; See *Cargill* v. *Bower*, L. R. 10 Chan. Div. 502; Benjamin on Sales, 4th Am. ed. 521, 523; *Bedford* v. *Bagshaw*, 4 Hurl. & Norm. 538; *Eaglesfield* v. *Marquis of Londonderry*, L. R. 4 Chan. Div. 693; *Morgan* v. *Skiddy*, 62 N. Y. 326; *Bishop* v. *Small*, 63 Maine, 13.

PETERS, C. J. In February, 1882, an electric light company was formed in Portland, with two thousand shares, of a par value of one hundred dollars each share, making two hundred thousand dollars of capital stock. The plaintiff was the president of the company, its principal manager, and the owner of a majority of its stock. In June, 1882, he contracted to sell to the defendant five shares for five hundred dollars. At that time there had been taken or purchased from the company four hundred and ten shares and the money therefor paid into its treasury, one thousand five hundred and ninety shares remaining unsold, and the company had voted to sell no more. When the plaintiff made the sale to the defendant, he represented that he was selling to him at the same price which all others had paid who were interested in the stock.

Paid to whom? It must have been to the company, the seller

of the stock. The clear and irresistible implication of this positive assertion was that the company had forty-one thousand dollars in its hands. The defendant was undoubtedly induced to believe that the company had a working capital of one hundred times as many dollars as it had issued shares. The statement amounted to a representation to that effect. But the company had only about one-third of that amount of working capital or of money. The defendant, instead of getting stock which represented about one-eightieth of the working assets of the company, got stock which represented only one-two hundred and fortieth of such assets.

Was not this an assertion of an important fact? Suppose that nothing had been paid in, but that the stock, as is sometimes the case in those speculations, had been given by the company to the holders. In such case, what would the defendant have got for his money? Suppose the plaintiff had said to defendant, "I will sell you five shares for five hundred dollars, but all others received their shares at the rate of one-third as much." Would the defendant have purchased? The plaintiff voluntarily and artfully represented the working assets of the company to be forty-one thousand dollars; they were only about fourteen thousand dollars. To be sure, it may be said that the defendant was not told how many shares had been issued. The answer to that is that he undoubtedly supposed, if he did not know, and would have a right to suppose, that some substantial amount of capital had been paid in. It is urged in extenuation by the plaintiff that the defendant offered himself as a purchaser. The affirmation complained of is none the truer on that account. Undoubtedly the case is near the line which marks the distinction between actionable and non-actionable representations. However near to it, the facts place the plaintiff upon the wrong side. It is often a narrow line which separates right from wrong.

We feel well assured that the requested instruction, or its equivalent, should have been given. The learned judge evidently had not at the moment in mind the distinction between what the plaintiff had paid, and what the company had actually received,

for the stock. In any view, there was at least a question for the jury. We think that the exceptions and the motion should be sustained. *Sharp* v. *Ponce*, 74 Maine, 470.

Motion and exceptions sustained.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

MARTHA A. HATHORN *vs.* DAVID H. CORSON and another.

Somerset. Opinion December 9, 1885.

Levy. Pleadings.

A levy is not void for taking, at the same time as one act, two parcels of a farm, the parcels lying side by side, at separate instead of joint appraisal.

A defendant who pleads non-tenure in bar, and on demurrer thereto, loses his plea because not pleaded in abatement instead of bar, cannot (without leave of court) plead anew. He must present all his defenses of the same grade at the same time. Pleading non-tenure and nothing else in bar, he is supposed to have no other defense.

ON EXCEPTIONS.

This was a real action. The material facts upon the question presented by the exceptions are sufficiently stated in the opinion.

D. D. Stewart, for the plaintiff, upon the validity of the levy, cited: R. S., 1871, c. 76, § 4; *Pride* v. *Lunt*, 19 Maine, 115; *Morton* v. *Chandler*, 6 Maine, 143; *Pierce* v. *Strickland*, 26 Maine, 278; *Foss* v. *Stickney*, 5 Maine, 390; *Bond* v. *Bond*, 2 Pick. 385; *Peabody* v. *Minot*, 24 Pick. 334.

Upon the question of pleadings, counsel cited: R. S., 1871, c. 104, § 6; *Wyman* v. *Brown*, 50 Maine, 139; *Colburn* v. *Grover*, 44 Maine, 47; *Otis* v. *Warren*, 14 Mass. 239; Jackson, Real Actions, 91, 92, 93; *Putnam Free School* v. *Fisher*, 38 Maine, 327; *Fogg* v. *Fogg*, 31 Maine, 302; Stephen's Pl. 405, 406, 394, 395; Gould's Pl. 270–275; 1 Chitty Pl. 460; *Nowlan* v. *Geddes*, 1 East, 635; *Schoonmaker* v. *Elmendorf*, 10 Johns. 49.

Brown and Carver, for the defendants.

In this case, Greenlief Corson, by his counsel, Mr. Willard, filed his disclaimer in which he, on the second day of the first

term, informed the plaintiff that he made no claim to the land, and that so far as he was concerned, the plaintiff might have it. We contend that this was all that the demandant was entitled to. But the counsel insisted that the answer filed by Greenlief Corson was a plea in bar. It may be in form a good plea in bar, but it was intended as a disclaimer. After the court ruled that this was no answer, the defendant offered to file the general issue, and this we contend he should have been allowed to do, but the court refused to allow him to do so. If it be claimed that the allowance of the privilege rested in the discretion of the presiding judge, we say such discretion must be reasonably exercised, otherwise it is open to exception. The right to plead anew, for which defendant contended, seems to be recognized in *State* v. *Inness*, 53 Maine, 541; *Furbish* v. *Robertson*, 67 Maine, 38.

The levy upon which demandant's title rests is not good. Separate appraisals of two parcels of land, lying side by side, and taken by the same levy, can not be upheld. Great injustice could thus be done. Each separate parcel appraised by itself, might be of little value, while it would be of great value when joined with the other. One is a mere brook with no land of any amount connected with it; it is, therefore, almost worthless. The other is a dry pasture with no water in it, and, for that reason, of small value. But when united by the completion of the levy, the creditor has a nice pasture with a running brook through it.

PETERS, C. J. The levy, under which the demandant claims, took at the same time as one act, two parcels of a farm, the parcels lying side by side, at separate appraisals. It is contended that this is an irregularity which renders the levy void. The argument is, that the two parts would not be likely to be in the aggregate valued so much by the appraisers as they would be as a whole. It is apparent that such a scheme of appraisal might be prejudicial to the debtor. But we see no remedy for it beyond the right to redeem. By § 4, c. 76, R. S., when several parcels of land are taken, they may be appraised separately or together. By same section, the creditor may take parcels at different times and have different sets of appraisers. This creditor could have

accomplished the same end by takings at different times. There was nothing to prevent his taking a portion of the farm in such form as he pleased, however irregular. Even if the land taken is grossly undervalued, there is no help for it but to redeem. We think it results from these privileges accorded to the creditor, that the objection in the present case can not avail the defendants. The theory of the law is expressed in the case of *Bond* v. *Bond*, 2 Pick. 385, where it is said: "The object of the statute is not that the land should be taken in payment of the debt, but that the levy on it might coerce the debtor to pay the debt."

Greenlief Corson, one of the defendants, pleaded non-tenure in bar, when the plea should have been in abatement. Upon demurrer to the plea because it was in bar, judgment was given in chief against the pleader. This was according to the precedents. The defendant had pleaded his chief defense, and that being lost to him upon a question of law, the natural deduction would be that he had no other. The law presumes that he would not have pleaded a single defense in bar if other defenses were at the same time open to him. If a defendant had the right to plead anew as often as a prior plea of the same grade be disposed of, the litigation might be prolonged beyond endurance. Hence the rule that all defenses upon the merits should be presented at the same time. The defendant had his day, and logically acknowledged that his only defense was a technical one, not very much favored, and in that he was worsted.

He claims that he should have been permitted to plead the general issue. It was, no doubt, a matter of discretion with the judge whether he would relieve the pleader of his dilemma or not, by allowing a withdrawal or an amendment of the first plea. But it was so inconsistent for a defendant to plead no title in himself, and with the next stroke of the pen to plead that he had title, the judge thought it would not be in the furtherance of justice to allow the motion to replead. It is also clear from the facts of the case, inasmuch as the levy is held to be good, that this defendant, as well as the associate defendant, had no possible defense under the general issue. *Exceptions overruled.*

DANFORTH, VIRGIN, EMERY, FOSTER and HASKELL, JJ., concurred.

THOMAS M. OLIVER *vs.* WILLIAM H. LOOK.

Franklin. Opinion December 9, 1885.

R. S., c. 104, § § 47, 48. Petition for claimant of real estate to bring an action.

A petition under R. S., c. 104, § § 47, 48, praying that the respondent be summoned into court to show cause why he should not bring an action to try his alleged title to real estate, should contain a description of the real estate sufficiently definite to give notice to the defendant to what land the petition refers. It is not required to be as particular and definite as the description in a writ of entry, dower or partition.

ON exceptions to the decree of the court upon the following petition, requiring that the defendant bring and prosecute his action respecting the title to the real estate claimed by him.

[Petition.]

"To the honorable justices of our Supreme Judicial Court, next to be holden at Farmington within and for the county of Franklin, on the first Tuesday of March, A. D., 1884.

"Respectfully represents Thomas M. Oliver of Industry in said county of Franklin, that he is the possessor and owner in fee simple of the following described real estate, to wit: Two tracts of land situate in said town of Industry, the one containing eighty acres more or less, and being the same conveyed to Addison H. Chase, deceased, by Benjamin G. Eveleth by deed dated April 4, 1855, and recorded in the Franklin county registry of deeds, volume 31, page 47, said tract of land being described as follows: a certain tract of land, situate in said town of Industry being the south part of lot numbered twenty according to plan made by Cornelius Norton, Esq., and is the same farm formerly occupied by Benjamin G. Eveleth, bounded north by land now or formerly of Obed Norton and land formerly owned by Royal Roach, south by land formerly owned by Valentine Look, west by land now or formerly owned by Moses M. Luce, and east by land now or formerly of Obed Norton and land formerly owned by said Royal Roach, and is the same land conveyed to Benjamin G. Eveleth by Moses Shackley by deed dated October 7, A. D. 1851, containing eighty acres more or less.

"The other tract being the same conveyed to said Addison H. Chase by said Benjamin G. Eveleth by deed dated May 2, 1885, and recorded in said registry of deeds, volume 31, page 212, said tract of land being described as follows: a certain piece or parcel of land situate in said Industry in said county, it being seven-eighths of the south part of lot numbered eight (8) in the second (2) range of lots in that part of Industry that was formerly a part of New Vineyard, containing one hundred and fifteen acres more or less in the whole lot, it being seven-eighths of the same lot deeded by Jacob G. Remick to Fobes Ford and being the same land conveyed by Harriet C. Chase, administratrix, to Charles H. B. True of Industry, April 14, A. D. 1863.

"He further avers that he is credibly informed and believes that William H. Look, lately of New Vineyard, in said county of Franklin and now residing without the limits of the state of Maine, makes some claim adverse to his estate, to wit: that he claims to hold said land in mortgage. Wherefore he prays this honorable court that the said William H. Look may be summoned to show cause why he should not bring an action to try his alleged title."

S. Clifford Belcher, for the plaintiff.

H. L. Whitcomb, for the defendant.

The land is not sufficiently described in the petition, to give the defendant proper notice of the land in question especially such is the case in relation to the second piece described. "Seven-eighths of the south part of lot numbered eight," &c., is no description of any particular or specific part of the lot, *Orono* v. *Veazie*, 61 Maine, 431; *Brigham* v. *Smith*, 64 Maine, 450; *Larrabee* v. *Hodgkins*, 58 Maine, 412; *Miller* v. *Miller*, 16 Pick. 215.

FOSTER, J. The petition in this case is sufficiently formal for the purposes of the statute upon which it is based. It alleges the petitioner's possession and an estate in fee of certain real estate, together with an averment of his information and belief

that the defendant makes a claim adverse to said estate by way of mortgage upon the same, and praying that he be summoned to show cause why he should not bring an action to try his alleged title.

The only objection raised, about which there can be any question, is in relation to the sufficiency of the description of the real estate set out in the petition. It is claimed that this is not so definitely described as to give the defendant proper notice of the land in question. This objection can not prevail. The answer which the defendant filed to the petition discloses no such objection as that now raised, but states that the defendant has an interest "in the premises described in the petition." It would seem, therefore, that the description therein contained was sufficiently definite to give notice to the defendant to what land the petition referred.

We see no reason for saying that, in this proceeding, which is preliminary in its nature to any action that may be brought by the party claiming title adverse to the petitioner, the premises are not sufficiently described. The description of lands in a demand for dower may be sufficient, and yet not as definite as would be required in a writ for its recovery. All that is required in such demand, says WILD, J., in *Atwood* v. *Atwood*, 22 Pick. 286, "is that the description of the land should be such as to give notice to the tenant to what land the demand refers." A more stringent rule, however, has been applied with reference to the certainty of the description required in a writ of entry, dower or partition. Such description forms the basis of a formal and final judgment which is to fix or transfer the title or possession adversely. In these actions the description of the land must be so certain that seizin may be delivered by the sheriff without reference to any description outside the writ.

But in the case at bar we think the defendant, from the description given, might well understand to what land the petitioner referred. The premises are described. Not only is reference by deed and record given, but the number and range of the lots as well, together with certain fractional parts thereof. Such description may be considered sufficient for the proceedings

instituted by this petitioner. *Silloway* v. *Hale*, 8 Allen, 62.

Exceptions overruled.

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

HERBERT BLAKE *vs.* F. H. PECK and another.

Kennebec. Opinion December 12, 1885.

Justice of the peace. Poor debtor's disclosure.

A justice of the peace and quorum, commissioned to act for all the counties, is authorized to sit as a magistrate in a poor debtor's disclosure in any county in the state.

A debtor refused to disclose, upon an execution bond, before such a justice selected by the creditor, because the justice was not a resident of the county where the disclosure was to be made, and procured an officer to select another justice for the creditor. *Held*, that the sitting justices were without jurisdiction, and that the bond was forfeited for the full amount of the execution and costs upon it, although a disclosure was made before the justices in which the creditor participated.

ON EXCEPTIONS from the superior court.

An action on a poor debtor's bond. The presiding justice ruled that the evidence, (sufficiently stated in the opinion,) did not show that either of the alternative conditions of the bond had been performed, and did not constitute a defense to the action; and thereupon directed a verdict to be returned for the plaintiff, and entered judgment against all the obligors for the sum of five hundred and six dollars and forty-two cents, and a special judgment against the principal for the sum of twenty-seven dollars and seventy-six cents, according to the provisions of R. S., c. 113, § 40. To this ruling and direction the defendants alleged exception.

Potter and Lancaster, for the plaintiff, cited; *Spaulding* v. *Record*, 65 Maine, 220; *Hackett* v. *Lane*, 61 Maine, 31; *Guilford* v. *Delaney*, 57 Maine, 589; *Hall* v. *Houlton*, 37 Maine, 411; *Poor* v. *Knight*, 66 Maine, 448; *Ware* v. *Jackson*, 24 Maine, 166.

Asa Low, for the defendants, contended that R. S., c. 83, § 34, which was first enacted in 1880, giving justices of the peace

jurisdiction throughout the state, did not apply to the duties imposed by the poor debtor law, (chapter 113.) The only change in that chapter is in section 33, where the certificate of discharge now reads "in said county" instead of as formerly "in and for said county." The words "and for" being stricken out to show that the justices must be resident in the county.

Counsel further contended that the plaintiff waived all objections to the jurisdiction of the magistrates, by participating in the proceedings and examining the debtor at great length.

PETERS, C. J. This is an action on a poor debtor's bond. The disclosure was made in York county. The creditor chose W. P. Ayer, who resided in Androscoggin county, as a justice to hear the disclosure. Ayer, at the time, was commissioned as a magistrate to act within and for each county of the state. The debtor refused to disclose before Ayer, because he was not a resident of York county; and procured an officer to select the second justice. We think the debtor committed an error by which the bond became forfeited.

R. S., c. 83, § 34, is this: "Justices of the peace and of the quorum shall exercise their powers and duties, and shall be commissioned to act, within and for every county." They are to exercise their powers and duties — not a part of them — all of them — unless restricted by some other statutory provision. The counsel for the defendants finds some instances where the service to be performed may be of a local character. This is not one of them. Should we decide that the magistrate could not act, it would be difficult to know what powers can be accorded to the office. It can not be intended that the duties to be performed away from local residence are only ministerial. The statute is in its terms broader than that. Such work could, perhaps, be done away from the magistrate's home without the consent bestowed by the act referred to. *Learned* v. *Riley*, 14 Allen, 109, and cases cited. In *Young* v. *Bride*, 25 N. H. 482, an instructive case upon this question, it was held that a justice of the peace thoughout the state could hear and determine a civil action in any county in the state.

We are not at liberty to adopt the theory of the defense, that the want of jurisdiction in the magistrates was waived by the creditor's participation in the examination of the debtor. To do so, would require us to disregard quite a list of our own decisions where the point has been heretofore considered. It is said that the creditor should have protested against the proceeding. His action was a protest. His attempt to protect his interests, in case of erroneous supposition on his part that the magistrates were without jurisdiction, would not confer jurisdiction. *Barnard* v. *Bryant*, 21 Maine, 206; *Williams* v. *Burrill*, 23 Maine, 144; *Ware* v. *Jackson*, 24 Maine, 166.

It is claimed that the defendants are liable only for actual damages, though less than the debt. This point is foreclosed against them by late cases. *Hackett* v. *Lane*, 61 Maine, 31; *Poor* v. *Knight*, 66 Maine, 482.

Exceptions overruled.

WALTON, DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

W. H. RICHMOND *vs.* LORING FOSS.

Kennebec. Opinion December 12, 1885.

Sale of manufactured lumber. Shingles. Survey. R. S., c. 41, § § 15, 17, 21

A seller cannot recover the price of manufactured lumber sold and delivered without an official survey; shingles are not an exception to the rule; such sales are prohibited by statutory penalties.

ON exceptions from the superior court.

Assumpsit on an account annexed for forty-eight dollars and forty-five cents due for boards, planks, timber and shingles, sold and delivered, the quantity and price per thousand of each variety being given.

The presiding justice instructed the jury that the plaintiff might recover, though the lumber sued for was not surveyed by a sworn surveyor, there being no request on the part of the defendant that the lumber should be so surveyed.

To this instruction the defendant alleged exception, the verdict being for the plaintiff in the sum of twenty-nine dollars and eighty-six cents.

L. T. Carlton, for the plaintiff.

Potter and Lancaster, for the defendant.

PETERS, C. J. Can a seller recover the price of boards and shingles sold and delivered without a survey by some proper officer?

This point is determined against the plaintiff by the case of *Durgin* v. *Dyer*, 68 Maine, 143. After a critical examination of the statutes and the cases, we can see no other possible construction. There have been cases which have made, or attempted to make, a distinction which would save a seller from loss. *Abbott* v. *Goodwin*, 37 Maine, 203; *Rogers* v. *Humphrey*, 39 Maine, 382. These cases stood in their day on the outermost verge of the law on which they were decided. In the first one, it was held that, where there was a delivery by the seller under a contract solicited by the purchaser, there was not such an "offering for sale" as required the lumber to be surveyed. In the other, it was decided, not upon very conclusive reasoning, that a sale and delivery of a quantity of boards sufficient to make a certain number of sugar box shooks, was legal and binding, although no survey was ever made. In the case at bar, the plaintiff's counsel contends that the reported evidence, made a part of the case, shows that the plaintiff did not offer to sell, but that the defendant solicited the purchase. The distinction, based upon the statutes of to-day, can not prevail. Section 21, c. 41, R. S., provides that "no person shall deliver on sale" any boards or other lumber there mentioned, and provides severe penalties for disobedience. Can we say that a person does not deliver on sale, because the sale is preceded by a contract for the sale? Or, that there is a difference between a delivery on sale and a delivery on contract, if the price is to be measured by the thousands? There can be no doubt that lumber could be sold in bulk or lump, so much payable for the whole, and no survey be necessary. There would be no need of the statutory protection in such case. But when any lumber is sold, the price for which is to depend upon the number of thousands, which are to be ascertained by the survey or inspection of some person,

the surveyor must be an official surveyor, or the sale is void. On account of the opportunities for fraud possessed by the seller, the law refuses to trust any method but its own for the ascertainment of the quantities or qualities of lumber. Experts must be employed. Perhaps it would be expedient for the legislature to permit parties to a sale to waive an official survey. Such is not its present policy.

A more puzzling question is whether shingles may be excepted from the rule applying to other lumber. The attempt, by the revisers of the statutes, to retain the effect of statutes passed at different periods upon the same subject matter, creates obscurity, if not inconsistency, in the provisions relating to the sale of shingles. Still, we think, in the present instance, that the same rule must apply to shingles as to other lumber. The reason for the rule would seem to be as forcible in the one case as in the other. By section 17, c. 41, R. S., if shingles are offered for sale before they are surveyed and branded, "unless the parties otherwise agree," the property becomes wholly forfeited to the town. By section 21, same chapter, there is a penalty of two dollars per thousand for delivery of shingles on sale without inspection and survey, and there is no immunity from penalty because of any agreement of the parties. To give a consistency to both sections, the construction must be that, if there be an agreement, the penalty of a total forfeiture is not incurred; but the penalty of two dollars per thousand is incurred, whether there be an agreement or not. The revisers of the statutes would have done a service towards preventing misunderstanding and litigation, had they freed the total enactment, relating to this subject, of its ill constructed passages.

Exceptions sustained.

WALTON, DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

INHABITANTS OF RANGELEY *vs.* INHABITANTS OF BOWDOIN.

SAME *vs.* SAME.

Franklin. Opinion December 14, 1885.

Paupers. Settlement. R. S., c. 24, § 3.

A person having a pauper settlement in the defendant town, in 1837, removed

to, and lived more than five successive years in an unincorporated place. *Held*, that he and those who derived their settlement from him, thereby lost their settlement in Bowdoin, by virtue of the provisions of St. 1883, c. 374 (R. S., c. 24, § 3).

ON REPORT of facts agreed.

The opinion states the cases and the material facts.

P. A. Sawyer, for the plaintiffs.

Many interests are concerned in the construction which shall be placed upon the law of 1883, which is invoked as a defence to these actions. I submit that a construction which shall make it applicable only to residences in unincorporated places subsequent to the passage of the act would be more in harmony with the constitution of the state, Art. 1, § 11.

The law should not be construed as having a retroactive or retrospective effect, as such a construction would directly tend to impair the obligation of contracts, as the action for recovery of pauper supplies is founded upon the implied promise of the defendants to pay for the necessary expenditures of the plaintiffs in support of their dependents.

J. W. Spaulding and *F. J. Buker*, for the defendants, cited: R. S., c. 24, § 3, *Bridgewater* v. *Plymouth*, 97 Mass. 390; *Goshen* v. *Richmond*, 4 Allen, 460; *Monson* v. *Palmer*, 8 Allen, 556; *Lewiston* v. *N. Yarmouth*, 5 Maine, 66; *Appleton* v. *Belfast*, 67 Maine, 580.

VIRGIN, J. Actions for pauper supplies furnished to two families, viz: to Cyrus A. Campbell and family, from June to August, 1883, and to Mrs. Ellis and children, from June, 1883 to August, 1884.

First action: C. A. Campbell was the son of Joseph Campbell who derived his settlement from his father, Andrew Campbell.

Second action: Mrs. Ellis was once the wife of Joseph Campbell who having deceased she subsequently married one Ellis who having no settlement in this state she retained that of her former husband, if he had any.

Andrew Campbell had a settlement in the town of Bowdoin, in 1837, when he removed with his son Joseph — then only two years of age — to the unincorporated place of Letter C where he continued to reside more than ten years, and had never acquired any new settlement when Joseph attained his majority.

In 1883, the legislature enacted a statute, which went into effect in April of the same year, therein providing: "Whenever a person having a pauper settlement in a town, has lived or shall live, for five successive years, in any unincorporated place, he and those who derive their settlement from him lose their settlement in such town." St. 1883, c. 374, incorporated into R. S., c. 24, § 3. And applying the concrete facts to this statute, it appears that Andrew Campbell, having a pauper settlement in Bowdoin, in 1837, has since lived more than five successive years in the unincorporated place of Letter C, and he and his son Joseph, who derived his settlement from him, lost their settlement in that town. The result is, these actions can not be maintained if the statute is valid.

Of the validity of the statute there can be no doubt. The liability of towns to relieve and support paupers has none of the elements of a contract, express or implied, (*Augusta* v. *Chelsea*, 47 Maine, 367,) but rests solely in the positive and arbitrary provisions of statute, which the legislature can change as well as originally enact. *Lewiston* v. *N. Yarmouth*, 5 Maine, 66; *Appleton* v. *Belfast*, 67 Maine, 579, and cases there cited. Although the residence in the unincorporated place, which was the operating cause of losing the settlement in Bowdoin, was before the statute became operative, still the cause of action — which consisted in furnishing the supplies — arose thereafter.

Plaintiffs nonsuit in both actions.

PETERS, C. J., WALTON, LIBBEY, FOSTER and HASKELL, JJ., concurred.

SANDY RIVER RAILROAD CO. in equity, *vs.* PHILIP H. STUBBS.

Franklin. Opinion December 14, 1885.

Railroads. Lands taken for. Directors. Trusts.

A director of a railroad company, is, in equity, its trustee; and notwithstanding this fiduciary relation, his purchase of land across and upon a part of

which he anticipates the track may be located, and buildings for railroad purposes erected, can not necessarily be considered, at the option of the company, to have been made in trust for it.

Thus where the directors of the company were unable to make satisfactory terms with the owner of land for a right of way for a proposed change of the location of its track, and the defendant who was one of the directors purchased, with his own funds, without any suggestion of his associates, what was deemed much more land than was needed by the company, and immediately thereupon made a full report of his negotiations to his associates who at once repudiated the transaction as made on the defendant's individual responsibility and not in behalf of the company, which he confirmed; but subsequently the track was located and the buildings were erected across and upon a portion of the land; and committees appointed, at various times, to settle the land damages with the defendant, agreed with him upon and staked out the quantity of land needed and the compensation therefor, but failed to finally adjust the matter because the defendant would only convey the use for railroad purposes and not the fee of the land; and then, more than three and one-half years after the taking of the land, claimed for the first time to the defendant, that he held the whole land in trust for the company. In a bill praying for a conveyance of the whole land to the company on its payment of the consideration paid by the defendant with interest and expenses. *Held*, that the bill cannot be sustained.

ON APPEAL.

Bill in equity containing the following allegations:

"1st. That said company was duly organized on the eighth day of April, A. D. 1879, for the purpose of building and operating a railroad from Farmington to Phillips.

"2d. That Abner Toothaker, Nathaniel B. Beal, William F. Fuller, Philip H. Stubbs, and Stephen Morrell were duly elected directors of said company at a legal meeting of the stockholders of said company, holden at Strong, on the eighth day of April, A. D. 1879, were duly qualified, and entered upon the discharge of their duty, and continued to act in said capacity until the next annual meeting of said company, which was held at Strong, on the seventeenth day of March, A. D. 1880.

"3d. That the said directors, in the discharge of their duties, were endeavoring to settle the damages of the various owners of land over which said railroad was to be built, and to purchase land at different points on the line of said road on which to build station houses and other buildings necessary for operating said railroad.

"4th. That said directors in the discharge of their duties as aforesaid, had obtained a deed of certain land on which to build said road, from one Elias H. Porter, of Strong, and that said deed was duly delivered to said company, and that the company by virtue thereof became the owner in fee of the land described in said deed.

"5th. That subsequently to the delivery of said deed, the company desired to obtain more land of said Elias H. Porter, and other land, for the purpose of erecting a station house and other necessary buildings in Strong village.

"6th. That for the purpose of conferring with said Elias H. Porter in relation to the purchase of such other and additional land, the directors of said company, to wit: Abner Toothaker, Nathaniel B. Beal, William F. Fuller, Philip H. Stubbs, and Stephen Morrell, on the —— day of September, A. D. 1879, assembled at the office of Philip H. Stubbs, in said Strong, and there met and conferred with said Elias H. Porter, in relation to the purchase of such land as was required for the use of said company.

"7th. That while the negotiation for the purchase of such land between said directors and the said Elias H. Porter was in progress, said Philip H. Stubbs, who was then and there one of said directors, asked the said Elias H. Porter to retire for a few minutes from the conference, that he might go with him and view the land, which was only a short distance from the place in which the board of directors was assembled; that after a short time said Stubbs returned and informed his fellow directors that he had succeeded in purchasing the required land of said Elias H. Porter, and they would consequently have no further trouble in relation thereto; and the directors, relying upon this report of director Stubbs, and believing the business for which they had assembled to be fully accomplished, thereupon adjourned.

"8th. That the directors of said company, relying upon said report of said Stubbs, and believing that the required land of said Porter had been purchased by said company, by its director and agent, Philip H. Stubbs, proceeded to change the location

of their road in said Strong village, from the land on which it had previously been located, and of which they had a deed, to the land they supposed they had purchased through their director, P. H. Stubbs, and also proceeded to erect thereon a railway station, and other buildings necessary for the convenient operation of said railroad at Strong village.

"9th. That in fact said Philip H. Stubbs purchased said land for which the directors of said railroad company were negotiating, at the time he requested said Porter to withdraw from said conference, and took a deed thereof to himself, and paid to said Porter for and in consideration of the deed of said land to himself, the sum of five hundred dollars of his own money, and also surrendered to said Elias H. Porter the deed which said Porter had previously given to said Sandy River Railroad Company.

"10th. That after the location of said road had been changed from the land of which said railroad company had a deed, to the land which they supposed they had purchased of Elias H. Porter, through their director, Philip H. Stubbs, and after they had caused a railway station and other buildings necessary for the convenient operation of said railroad at Strong village, to be erected thereon, they learned that said Stubbs had had said land conveyed to himself, and not to said railroad company — or to himself for their benefit (see amendment of declaration) — as they believed and as they had been led to believe by the words and acts of said Stubbs.

"11th. That they, thereupon, requested said Stubbs to convey to said railroad company the said land, and offered and tendered to him all the money he had paid therefor, together with interest, charges, and expenses, to wit: They tendered to him on the twenty-eighth day of July, A. D. 1883, the sum of seven hundred and forty-two dollars, and demanded of him a sufficient deed of the real estate conveyed to him by Elias H. Porter, as and under the circumstances aforesaid.

"But the said Philip H. Stubbs utterly refused, and still neglects and refuses, to convey said land to said company.

"Whereupon the plaintiffs, believing that the said Stubbs has

not acted in good faith in this transaction, and that the company is entitled to the benefit of any purchase made of land of said Elias H. Porter, as above set forth, pray this honorable court to make and pass a decree, requiring the said Philip H. Stubbs to execute a good and sufficient deed of the land conveyed to him by said Elias H. Porter, as above set forth, and your orators hereby offer to pay over to said Stubbs, said sum of seven hundred and forty-two dollars, on delivery of said deed."

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

S. Clifford Belcher, for the plaintiff, cited: 3 Pom. Eq. § 1089, *et seq.*; *E. & N. A. R'y Co.* v. *Poor*, 59 Maine, 277; *Cox* v. *John*, 6 C. L. Journal, 389; 12 Am. Dec. 412; *Ryden* v. *Jones*, 1 Hawks, (N. C.) 497, (9 Am. Dec. 660); *Scribner* v. *Adams*, 73 Maine, 541; 1 Green. Cruise, 264, note; 1 Story, Eq. Jur. § 322, *et seq.*

J. P. Swasey, for the defendant.

VIRGIN, J. The complainant brings up this case by appeal from the decree of the presiding justice, who heard it on bill, answer and proof.

Its claim, briefly stated, is — that the defendant, as one of its directors and for its benefit, purchased certain land in the village of Strong, but took the conveyance to himself, that the company soon afterward located its track, erected its station house, water tank and wood-shed upon a portion of it; that the defendant holds the title to the whole land thus purchased in trust for the complainant; wherefore it prays that on payment to him of the consideration, interest and expenses, he be decreed to convey to the company.

The defendant denies that he acted as director *in hac re*, and claims that the company being unable to obtain from the owner a right of way across the land upon the terms it proposed, he thereupon, without its direction, suggestion or knowledge, purchased on his own personal responsibility, from the owner, much more land than was necessary for the company's use, to the end that it might have so much of it as was necessary for railroad

purposes, for a reasonable consideration, or for such a proportion of the whole consideration as the portion of the land needed and taken by the company should bear to the whole land.

Several of the allegations in the bill are not proved in the sense in which they are set out, and some of them — especially in paragraphs four and nine — are disproved. And without unprofitably extending this opinion by an analysis of the testimony, it is sufficient to say that the material facts, established by a fair preponderance of it, are these:

The company was organized in April, 1879. Prior to the following August it obtained by parol gift a right of way twenty feet in width — not including any land for its buildings — and located its track across land of one Porter, in the village of Strong. Some of its citizens and the two directors including the defendant, resident therein, expressed some dissatisfaction thereto, preferring a route farther east and nearer to the business center of the village. Whereupon, at the latter date mentioned, five of the seven directors together with Porter assembled at the defendant's office to consider the proposed change of location which if made would also cross the land of Porter. A majority of the directors not residing in Strong being at least indifferent to the change, strenuously contended that it ought not to be made unless Porter would give this right of way, land damages for railroad buildings being inevitable on either route. But after a whole afternoon's importunate urging he absolutely refused to accede, and the projected change was therefore substantially abandoned. Thereupon the defendant took Porter out upon the land, pointed out the probable proposed route and there made renewed but fruitless efforts to persuade him to give the right of way. Then the defendant proposed to personally purchase his entire field, which proposition Porter peremptorily declined to entertain. As the last resort, the defendant staked out some two and one-half acres of it, comprising much more land than they anticipated the company might need for all its purposes, but across which the new track might probably go; and after considerable bantering, Porter agreed to take five hundred dollars therefor, provided the defendant would erect

and maintain a fence against the remainder of the lot, and the defendant closed the trade. Whereupon they returned to the office where the defendant made a detailed report of his negotiations with Porter, adding in substance that having purchased the land, he could accommodate the company with a right of way, and with as much land as was necessary if they wished to locate there. But the directors expressly repudiated all participation in the defendant's purchase, alleging among other reasons that land there was not worth any such price and declaring that he must understand that it was his own personal trade — to which he readily and expressly assented — whereupon they separated.

A few days thereafter, the defendant paid Porter the five hundred dollars, received his deed containing the fencing clause and caused it to be recorded and subsequently built the fence. There was no other consideration for the land thus conveyed.

In September the location was changed. In November and December the station house and water-tank were erected, followed by the running of the trains and the erection of the wood-shed.

Subsequently the parties had several conferences in relation to settling the damages for the land taken for the track and buildings. Still later two committees were chosen for the same purpose. They staked out so much of the land as was deemed necessary for railroad purposes, agreed upon the price, but failed to conclude a final adjustment because the defendant declined to convey the fee instead of the use of the land so long as it should be used for railroad purposes. Thus the matter stood, until February, 1883, when the defendant, for the first time during the three and one-half years of his ownership of the land, received notice that the company claimed he held the whole land in trust simply. He had held the offices of director and clerk of the company from the time of its organization to November, 1883, attended its meetings, and never before received any intimation of such a claim.

Without questioning the rule so clearly recognized in this court (*E. & N. A. R. Co.* v. *Poor*, 59 Maine, 277), as well as

in many others, that his directorship constituted the defendant, in law, an agent, and in equity a *quasi* trustee at least, and thereby established his fiduciary character; fully appreciating the foundation of the important doctrine by which equity requires that the confidence imposed in a trustee shall not be abused for his personal interests; keeping constantly in mind the jealousy with which courts scan the dealings of a trustee with respect to matters involved in the trust; holding with other courts that the *cestui que trust's* right of avoidance does not necessarily depend upon the fraud or *bona fides* of the trustee (*Duncomb* v. *N. Y. H. & N. R. R. Co.* 84 N. Y. 199; and still we are of opinion that none of the cases or the principles announced therein invoked by the complainant, nor any of the numerous others upon the subject which we have carefully examined would warrant us in granting the prayer of the complainant.

The defendant zealously worked for the interests of his principal by seeking to change the location so as thereby to accommodate the business interests of the community in which one of its intermediate stations was to be located. This result had failed to be brought about by the other directors. As a last resort he personally purchased what was then considered two or three times more land than he deemed the needs of the road required for public use, not as a speculation from which he might derive secret profits (Thomp. Liab. Off. 360, § 8 and cases in *notis*) but to facilitate the desired object. He did not deal with the company's funds, but paid his own without any assurance or intimation that the company would ever take any of the land. He did not deal with the company's property. He did nothing which he concealed from its knowledge, but frankly and promptly disclosed the whole transaction and put his deed upon the public registry, and his acts were repudiated. He did no act in the premises in anywise inconsistent with the interests of his *cestui que trust*, nor acquired for himself any interest adverse to his company in any sense contemplated by the rules of equity governing trustees and *cestius que trustent*. *McClanahan* v. *Henderson*, 12 Am. Dec. 412; *Van Epps* v. *Van Epps*, 9 Paige, 238, 241.

There was no opportunity for a breach of trust, the defendant standing alone against the other six directors who had a full knowledge of all the facts with full control of the question of change of location. If they concluded to make the change the company could only "take and hold the land for public use," R. S., c. 51, § 14. It had no right to insist upon having the fee. If the parties could not agree upon the land damages, the statute furnished a tribunal to adjust that question. R. S., 1871, c. 51, § 6. If they could not agree as to the "necessity or extent of the land to be taken," their remedy was plain and adequate. R. S., 1871, c. 51, § 13.

But the alleged necessities for the whole land was evidently an afterthought on the part of the complainant. Its whole conduct down to February, 1883, points in that direction, the staking out of the land appropriated leaving a portion as not needed, the agreed price based upon a fair proportion of the whole consideration paid by the defendant, the three reports of outstanding liabilities for land damages including the defendant's claim, and the long — more than three and one-half years — acquiescence of the company all afford ample proof that the company then took a new departure.

Decree affirmed. Bill dismissed with costs.

PETERS, C. J., WALTON, LIBBEY, FOSTER and HASKELL, JJ., concurred.

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BILLS AND NOTES.

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BOND.

1. Where the debtor delivers himself into the custody of the keeper of the jail to which he is liable to be committed under the execution, and is received into jail by the jailer within the six months named in the bond, the penalty of the bond is saved, although he is afterwards released by the jailer. *Hussey* v. *Danforth*, 17.

2. In debt upon a collector's bond, before the defendant is put to proof of a plea of performance, the plaintiff must show, either that the collector has been clothed with legal authority to collect taxes, or that he actually did collect them. *Machiasport* v. *Small*, 109.

3. When such authority is shown, or the collector has been proved to have collected taxes, the burden under such plea rests upon the defendants to prove that the collector has performed the condition of his bond, by having faithfully performed all the duties of his office, or by having legally disposed of the taxes which he is shown to have collected. *Ib.*

4. In such action, on such issue, if the defendant fails to support the plea, the penalty of the bond is forfeit, and judgment should be entered therefor. *Ib.*

5. After judgment for the penalty of a bond of defeasance, on motion of the defendant, the penalty thereof may be chancered as the equitable rights of the parties may require, and execution should issue for the sum fixed by the court. *Ib.*

6. To reach this result the court may send the cause to an auditor to hear the parties and report the facts to the court. *Ib.*

7. When the penalty of a bond of defeasance is sued for, and breaches are not assigned in the declaration, the defendant may have oyer of the bond, and if it have a condition, the court on motion will order the plaintiff to assign the breaches upon which he relies, and the defendant may interpose his defense by way of brief statement under the general issue. *Ib.*

8. Compensation in damages for not conveying land in accordance with the obligations in a bond, is not regarded as adequate relief, and the obligee may maintain a bill for specific performance. *Hubbard* v. *Johnson*, 139.

9. The heirs of a deceased surety on a guardian's bond are not liable under R. S., c. 87, § 16, jointly with the principal on the bond. *Strickland* v. *Holmes*, 197.

10. Whether the claim against such heirs, as among themselves, is joint, *quere*. *Ib.*

11. Where a bond in the usual form was given in the sum of five hundred dollars, conditioned that the obligor should never open and keep a barber-shop within a certain town, the sum named will be regarded as a penalty and not as liquidated damages. *Burrill* v. *Daggett*, 545.

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CORPORATIONS.

1. A corporation was chartered by the legislature and authorized to make such improvement to the upper Androscoggin river, and the chain of lakes and their connecting streams as would "facilitate and render more convenient the drifting, or driving of logs, masts, spars and other timber, by removing obstructions, building dams, wing dams, gates, piers, booms and so forth;" and it was further authorized to demand and receive a specified toll upon every log that should pass its dam at the outlet of Big lake, and an additional toll for passing the dam at the outlet of Richardson lake. *Held*, That the wants, desires or demands of a particular share-holder in such company cannot abridge or modify the duties and obligations of the company to the log owners. *Lewiston Steam Mill Co.* v. *Richardson Lake Dam Co.* 337.

2. Where, in a subscription to the stock of a corporation, a subscriber promises, without any condition, to take and pay for a certain number of shares at the par value therein named, the promise is binding, even though the amount of the capital stock was not fixed and the minimum number of shares named in the charter were not subscribed for.

Skowhegan & Athens R. R. Co. v. *Kinsman*, 370.

3. A railroad corporation, at its organization, adopted a by-law, that its net earnings should be divided semi-annually amongst its stockholders, first paying upon the preferred stock an amount per annum not exceeding six per cent. and then, if a surplus, as much upon the non-preferred stock, and dividing any remaining surplus amongst all stockholders alike. After this, preferred stock was subscribed for in general terms. *Held:* That the subscribers for preferred stock took their shares upon the conditions named in the by-law as a contract between themselves and the corporation.

Belfast & Moosehead Lake R. R. Co. v. *Belfast*, 445.

4. There was a stipulation in the contract of subscription that there should be no assessment on shares until the full amount be subscribed sufficient to build the road, thereby avoiding the necessity of ever placing a mortgage upon it. But, without dissent by any party, debts were incurred and the road mortgaged, to obtain funds for its completion. *Held:* That this change in the policy of the company did not require that all such indebtedness should be paid before preferred dividends be declared. *Ib.*

5. The preferred stockholder is not a creditor; nor is a dividend guaranteed to him; he is entitled thereto by the by-law, provided there are net earnings; a deficiency of dividend for one year, for want of net earnings of that year, is not to be made up from the net earnings of another year; the by-law implies that all net earnings are to be wholly distributed each year. *Ib.*

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devised estate upon the conditions named in said devise, then such part together with the remainder of my estate, I then give, bequeath and devise one-half to the said town of Dresden, and the remaining half to the city of Augusta. *Held:*

1. That the testator intended to establish a fund of eight thousand dollars and the real estate given, the income of which was to be appropriated to the use of the cemetery named.

2. That the rejection of the real estate by the town of Dresden was a rejection of the whole devise.

3. That the condition was one which could not legally have been performed, for a town cannot, at its own expense, raise a fund even in part, the income of which is to be appropriated as a gratuity to individuals, or a private corporation.

4. The amount of this devise falls into the residuum which is to be equally divided between the city of Augusta and town of Dresden.

5. The residuary legatees take the real estate as tenants in common and the personal property in severalty. *Luques* v. *Dresden*, 186.

4. A devise was as follows: "I give and bequeath unto Hiram Coffin, his heirs, &c. the remainder of my homestead farm, . . upon conditions as follows, viz: That he pay annually the sum of fifty dollars to the M. E. church in Columbia village, for the support of preaching, or if the said Hiram choose to pay the principal of which the above sum is the interest, all at one time, or in payments within,—then my executors hereinafter named, shall give a good and sufficient deed to the said Hiram Coffin, his heirs, &c. which shall be as good and binding as if given by me, . . . But if said Hiram or his heirs fail in any way to perform the conditions above named, then I give and bequeath the farm before named to the said M. E. church. *Held:*

1. That as the contingency upon which the devise to the church was to vest, might not happen within a life in being and twenty-one years, the devise was void, as offending the rule against perpetuities.

2. That the option given the first taker to extinguish the condition and perfect his own title, did not remove the uncertainty of the time of the vesting of the devise over, and hence did not take the devise out of the rule.

3. That the first taker was not made a trustee for the second contingent devisee, but held in fee subject to the conditions.

4. That whatever rights the demandants representing the church have in equity, they have not the legal title accompanied by a present right of entry. *Merritt* v. *Bucknam*, 253.

5. The will of a testator, by apt and proper expression gave to his widow a life-estate in all the property of which he died seized. It gave her full power to consume and dispose of so much thereof as her comfort and convenience might require. *Held;*

1. The income and increase of the estate became absolutely her own, but the estate did not vest in her, beyond the uses and necessities mentioned in the will. All that remained of it at her decease, whether in the same specific form, as she received it, or in any new or changed aspect, resulting from sale, exchange or re-investment, remains a constituent part of the testator's estate and should be distributed according to his will. Those articles suita-

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