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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CITED BY THE COURT.

CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

STATE OF MAINE *vs.* GEORGE THRASHER.

Franklin. January 29, 1887.

Practice. Game Law. Deer. Stat. 1885, c. 258. Evidence.

Whether or not a penalty for killing a deer out of season is barred by the statute of limitations cannot be raised on a motion in arrest of judgment.

The penalty for killing a deer out of season may be recovered on a complaint.

The complaint for killing a deer out of season need not allege to whom the penalty is to go.

Answers in a deposition which tend to show a voluntary payment by the deponent whose guide killed a deer out of season, are not admissible in the trial of a complaint against the guide.

ON exceptions.

Complaint for killing a deer out of season. The exceptions were to the ruling of the court in overruling defendant's motion in arrest of judgment; also in excluding as evidence the following portion of the deposition of George M. Harmon, taken in behalf of the defendant:

"At this time the steamer was just starting from the landing at the outlet of the lake, upon her trip to Rangeley. I hailed the steamer, and gave to the captain of the boat, Capt. Frank C. Hewey, forty dollars, at the same time requesting him to

hand the money to George D. Huntoon, whom I had known as fish and game warden during the previous three years, and to say to Mr. Huntoon that it was to pay the fine for killing a deer in Rangeley Lake. I also requested Hewey to say to Huntoon that I did not kill the deer, but that Thrasher did it; but as Thrasher had no money with which to pay the fine, I would pay it for him.

"In the afternoon of the same day Mr. Huntoon called at Lake Point cottage to see me, and I fully explained to him the circumstances under which the deer was killed, and said to him that I was ready to do whatever might be necessary to satisfy the law.

"Mr. Huntoon said it would be necessary for him to go to Phillips and have some papers made out, in order to have the settlement legal.

"I replied, all right, my baggage wagon is going out this afternoon, and if you would like to go out on it instead of using your own team, you can do so. Mr. Huntoon availed himself of my offer, at the same time suggesting to me that as I had paid for the deer I might like to take it home. I replied I should like to take it very much, and if there is no objection, I will do so. Mr. Huntoon and myself went down the lake to Esty's, that afternoon, together. The carcass of the deer being boxed, went with us on the steamer. Mr. Huntoon helped load and unload it, and rode on my baggage wagon with it from Esty's (or Greenvale), to Phillips.

"The next morning, Monday, the 16th of June, Mr. Huntoon called at my hotel at an early hour, and said it was necessary I should go before Judge Butterfield and plead to the complaint. I went to Judge Butterfield with Mr. Huntoon and the judge said to me: You are accused of killing a deer out of season. I replied, I did not kill the deer, but am settling for my guide; but if necessary, I plead guilty.

"Interrogatory 4. State whether or not you ever paid Fish and Game Warden Huntoon any money, for and in behalf of George Thrasher, the respondent in this action. If so, for what purpose, and how much?

"Answer. I paid Fish and Game Warden Huntoon through Frank C. Hewett, forty dollars in behalf of George Thrasher, the respondent in this action, for killing a deer in Rangeley Lake, on Sunday, June 15, 1884."

Joseph C. Holman, county attorney, for the State, cited: 39 Maine, 212; 39 Maine, 353; Wharton, Crim. Ev. § 105; *State* v. *Hobbs*, 39 Maine, 216; R. S. c. 131, § 14; *U. S.* v. *Cook*, 17 Wall. 168 (L.Co-op. ed. Book 21, p. 538); Whart. Crim. Pl. & Pr. § 318.

F. E. Timberlake, for defendant.

The respondent was entitled to the benefit of the deposition of George M. Harmon.

Because it tends to prove the recovery of one fine by and in behalf of the State for the offence alleged to have been committted.

See *Rex* v. *Clarke* (Cowp. 610) where it was decided that when an offence created, or made penal by statute, is in its nature single, one single penalty only can be recovered though several join in committing it.

Also *Rex* v. *Bleasdale*, 4 Term, Rep. 809, and the case put by Lord Mansfield under the statute for the preservation of game.

Sec. 4, chap. 70 of the Statutes of Mass. 1797, provided a penalty for catching alewives, etc., at certain seasons. See cases under that statute. *Boutelle* v. *Nourse*, 4 Mass. 431; *Burnham* v. *Webster*, 5 Mass. 266.

Because it proves the voluntary payment of one fine to the complainant, at that time supposed to be a fish and game warden, by the respondent for this same offence which would estop this complainant (who must be a party in interest by being entitled to one-half the amount recovered) from commencing any further action, although another might do so. *Raynham* v. *Rounseville*, 9 Pick. 44; *Wheeler* v. *Goulding*, 13 Gray, 542.

The complaint should allege to whom the fine or penalty is to be paid. *Allen* v. *Young*, 76 Maine, 82; *Com.* v. *Messenger*,

4 Mass. 466; *State* v. *Grand Trunk R. R. Co.* 60 Maine, 145; *State* v. *Johnson*, 65 Maine, 362.

In *State* v. *Smith*, 64 Maine, 423, one-half of the fine went to the county, in any event, and in *State* v. *Willis*, 78 Maine, 70, one-half went to the town where the offence was committed.

This action is barred by the Statute of Limitation. R. S., c. 81, § 94.

The complaint alleges an act committed more than one year prior to the commencement of these proceedings, and the evidence was confined to the same date. *Cum. & Oxford Canal Cor.* v. *Hitchings*, 57 Maine, 146; *Cum. & Oxford Canal Cor.* v. *Hitchings*, 59 Maine, 209; *Beals* v. *Thurlow*, 63 Maine, 9; *State* v. *Hobbs*, 39 Maine, 212.

Sec. 1, chap. 133, Revised Statutes, makes a clear distinction between complaint and information:

"The time within which all actions and suits for a penalty or forfeiture on any penal statute may be commenced, is limited to one year. The prosecution by indictment, suit, or information, to two years." *State* v. *Gray*, 39 Maine, 353; *Com.* v. *Howes*, 15 Pick. 231.

VIRGIN, J. The respondent contends that the prosecution against him is barred by the statute of limitations. But the law does not allow that question to be raised under a motion in arrest of judgment. A limitation bar is a matter of defence and should be pleaded or given in evidence by the accused, and then it is traversable. *U. S.* v. *Cook*, 17 Wall. 168, 181.

The complaint need not allege to whom the penalty is to go. Its appropriation is a matter in which the defendant has no concern. His responsibility in relation to the penalty ceases with his payment of it to the clerk of the court which tried him. *State* v. *Smith*, 64 Maine, 425; *State* v. *Willis*, 78 Maine, 70.

Those parts of the deposition excluded by the presiding justice were inadmissible. They were not legitimate evidence to show the deponent's conviction of killing the same deer; a certified copy of the record is the proper evidence of that; but they merely show that he had voluntarily paid $40 to a certain person

for having killed it. A proper administration of the law recognizes no such condonations.

The prosecution by complaint is authorized by St. 1885, c. 258.

Exceptions overruled.

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

MAURICE BONDUR and others,

vs.

HENRY LE BOURNE and 149 cords of Lumber.

ANSEL STEVENS, claimant.

York. Opinion January 29, 1887.

Practice. Amendment. Lien. Wood pulp. R. S., c. 91, § 38.

An amendment of the declaration of a writ may be allowed at the discretion of the court even after default.

One who cuts and piles poplar wood to be manufactured into pulp has a lien on the wood for his pay under the provisions of R. S., c. 91, § 38, although he cuts by the cord.

ON exceptions.

The case is stated in the opinion. The presiding justice ruled that the plaintiffs had a lien.

Hamilton and Haley, for the plaintiffs, cited: *Hayford* v. *Everett*, 68 Maine, 505; *Colton* v. *King*, 2 Allen 317; *Sands* v. *Sands*, 74 Maine, 239; R. S., c. 91, § 38.

R. P. Tapley, for the claimant.

The first point to be noticed is that the amendment is made long after default. The defendant is not in court. The plaintiff had taken his default without amendment.

There was, at the time this action was commenced, no lien on wood for cutting into cord wood. The first act giving such lien was c. 280, Laws of 1885.

It is claimed this material is lumber, and a lien exists or is created thereon by sec. 38, c. 91, R. S. That section provides "that whoever labors at cutting, hauling, rafting or driving logs or lumber has a lien thereon for his personal services." It does not embrace peeling or piling of logs or lumber, both of which acts are done on logs and lumber.

The contract was entire. It is not susceptible of division. The three acts enter into it and it cannot be sub-divided. It is for all, the $1.25 was to be paid; not for a part. If cutting is a lien claim, peeling and piling is not. No statute provides for a lien on lumber for peeling and piling.

Manufacture of the log into lumber makes it the lumber of commercial use. After it leaves the log for lumber use it is denominated lumber; the log has disappeared and the lumber appeared. Hence as has been held in *Sands* v. *Sands*, 74 Maine, 240, cedar shingles if cut four feet in length and hauled to the mill, is embraced in c. 91, sec. 38.

VIRGIN, J. Assumpsit for cutting, peeling and piling 149¾ cords of poplar lumber for pulp. The defendant was defaulted. The claimant came in to defend against an alleged lien. The presiding justice, after the default of the defendant, allowed an amendment by striking out the word "peeling," and the claimant alleged exceptions.

We think the ruling was within the discretion of the judge. *Hayford* v. *Everett*, 68 Maine 505; *Colton* v. *King*, 2 Allen, 317.

We are of opinion also that his ruling was correct in relation to the lien. *Sands* v. *Sands*, 74 Maine, 239.

To be sure, the contract was specific in terms to prevent any misunderstanding, and included "peeling and piling," as well as "cutting," which term alone is mentioned in R. S., c. 91, § 38, as being the foundation of a lien. But it was poplar, cut into logs of four feet in length, for the particular purpose of being manufactured into pulp. Moreover, the evidence is that it must be "peeled" before it can be thus manufactured, not as in the cases of hemlock because the bark is of any value, but in

order to fit it for manufacture, and which is as essential as cutting, and, as one of the witnesses testifies, "peeling is an incident and necessary to it as pulp lumber."

Of course, it must be "piled" by the chopper, who cuts it by the cord, in order that his surveyor might ascertain the quantity and thereby furnish him the means of knowing how much he was entitled to under the contract which was to be $1.25 per cord.

Exceptions overruled.

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

EDSON L. OAK *vs.* WILLIAM H. DUSTIN.

Penobscot. Opinion January 31, 1887.

Duress. Principal and surety. Arrest on mesne process.

Though duress be practiced on the principal it cannot be invoked as a defense by the surety on whom no restraint is imposed.

Whether the certificate of the oath of a creditor given in the report of this case, was sufficient to authorize arrest is not decided.

ON report.

Scire facias against bail.

The following is a copy of the certificate of the oath referred to in the last clause of the opinion.

"State of Maine. Penobscot, ss. May 5th, 1882. Then personally appeared S. P. Crosby, attorney to the within named creditor, and made oath that he has reason to believe and does believe that the within named debtor is about to depart and reside beyond the limits of the State, and take with him property or means of his own exceeding the amount required for his immediate support, and that the demand sued for, or the principal part thereof, amounting to at least ten dollars, is due to the within named creditor. Josiah Crosby, justice of the peace."

Crosby and Crosby, for plaintiff, cited, upon the question of the sufficiency of the certificate of oath: *Roop* v. *Johnson*, 23

Maine, 335; *Prentiss* v. *Kelley*, 41 Maine, 436; *Knowlton* v. *Plantation No. 4*, 14 Maine, 20; *Penobscot Boom Corp.* v. *Lamson*, 16 Maine, 224; *Marston* v. *Savage*, 38 Maine 128; *Adams* v. *Macfarlane*, 65 Maine, 143.

Bail can not deny liability of principal: *Stever* v. *Sornberger*, 24 Wend. 274; *Hall* v. *Young*, 3 Pick. 80; *Springfield Card M'f'g Co.* v. *West*, 1 Cush, 388; 1 Chit. Pl. 486, 512-13; 2 Chit. Pl. 311; *Com.* v. *Brickett*, 8 Pick. 140.

Thomas H. B. Pierce, for defendant.

The certificate of the oath must show every statute requirement complied with. *Proctor* v. *Lothrop*, 68 Maine, 256.

The certificate in this case does not meet the statute requirements. R. S., 1871, c. 113, § 2.

Caswell v. *Fuller*, 77 Maine, 105, virtually sustains my position. It proceeds upon the ground that the creditor is liable to the debtor for causing his arrest by an oath in any material respects untrue.

WALTON, J. This is an action of *scire facias* on a bail bond. The defense is duress. Not duress of the surety, against whom the action is brought, but duress of the principal in the bond, who is not sued. It is claimed that he was unlawfully arrested on a writ, the oath, as the defendant contends, not being sufficiently formal to justify his arrest. The defense can not prevail. The person on whom the duress was practiced is the only one who can take advantage of it as a ground of defense. It can not be set up by a stranger, nor by a surety, on whom no restraint was imposed. *Springfield Card Man. Co.* v. *West*, 1 Cush. 388; *Robinson* v. *Gould*, 11 Cush. 55.

In the case last cited it is said that this distinction rests on sound principle; that he only should be allowed to avoid his contract upon whom the unlawful restraint or fear has operated; that the contract of a surety, if his own free act, and executed without coercion or illegal menace, should be held binding; that the duress of his principal can not affect his free agency, or in any way control his action; that it may excite his feelings,

awaken his generosity, and induce him to act from motives of charity and benevolence towards his neighbor; but that these can furnish no valid ground of defense against his contract, which he has entered into freely and without coercion.

The defense of duress not being open to the defendant, it is not important to inquire whether his principal was or was not unlawfully arrested. But it may not be improper to add that the authorities cited by the plaintiff's counsel seem to sustain the form of the oath and the legality of the arrest; and, if so, then there was no duress of any one. But upon this point we express no opinion.

Judgment for plaintiff for $101.86, with interest from date of the writ.

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

ALONZO C. MARSTON and another, petitioners for leave to enter appeal from decree of JUDGE OF PROBATE OF SOMERSET COUNTY, admitting to probate the will of ABNER COBURN.

Somerset. Opinion February 2, 1887.

Judge of Probate. Jurisdiction. Relationship. R. S., c. 63, § 25. Practice. Witnesses to will. Taxpayer a witness, when legacy to town.

Under the statutes of this State, the authority of a judge of probate to take the probate of a will is not affected by the fact that his aunt by marriage is a legatee.

The provision of R. S., c. 63, § 25 is remedial in its character, but its remedy is not to be granted for the mere asking.

To entitle a collateral heir to the remedy provided in R. S., c. 63, § 25, it must appear that the petitioner made reasonable endeavors to seasonably claim an appeal and exercised reasonable diligence in prosecuting his petition; and even then his petition will not be sustained unless justice requires a revision of the decree of the judge of probate admitting the will to probate, especially when it appears that the real object sought is to try and compel a compromise.

Under the statutes of this State, the fact that a will contains a legacy or devise to a town in trust does not render a tax-paying inhabitant thereof an incompetent witness to the will.

The fact that a will gives a legacy to an incorporated Hall association "in part to secure a liberal policy in respect to the use of the hall for objects of public interest," does not render a stockholder of the association an incompetent witness to the will.

On exceptions.

The opinion states the case and material facts.

D. D. Stewart, for petitioners.

The will must be attested by three "credible witnesses not beneficially interested under said will." R. S., 1871, c. 74, § 1.

Who are "credible" witnesses? Those "competent" by the rules of the common law. Interested witnesses are, by that law, incompetent. The statute expressly leaves the law regulating the execution of wills to be governed by the provisions of the common law. R. S., 1871, c. 82, § 84; *Sparhawk* v. *Sparhawk*, 10 Allen, 156; *Hawes* v. *Humphrey*, 9 Pick. 350; R. S., 1841, c. 115, § 75; R. S., 1857, c. 82, § 80; *Haven* v. *Hilliard*, 23 Pick. 10; *Warren* v. *Baxter*, 48 Maine, 193; *Smalley* v. *Smalley*, 70 Maine, 548.

The witnesses, who were citizens of Skowhegan, were directly benefited by the provisions of the will, and incompetent under both provisions of the statute. They were not "credible" witnesses within the meaning of the statute; and they were "beneficially interested under the will;" and therefore directly interested to support it. 3 Dane's Abr. 415; *Com.* v. *Ryan*, 5 Mass. 91; *Com.* v. *Worcester*, 3 Pick. 471; *Com.* v. *McLane*, 4 Gray, 427; *Clark* v. *Lamb*, 2 Allen, 396; *Hush* v. *Sherman*, 2 Allen, 597; *State* v. *Walpole*, 15 N. H. 27; *Gifford* v. *White*, 10 Cush. 494; *Northampton* v. *Smith*, 11 Met. 390; *Bacon Applt.* 7 Gray, 391; *Lufkin* v. *Haskell*, 3 Pick. 359; *Odiorne* v. *Wade*, 8 Pick. 517; *Pet. of Nashua*, 12 N. H. 429; *Sanborn* v. *Fellows*, 22 N. H. 473; *King* v. *Prosser*, 4 T. R. *17.

Every tax payer in Skowhegan is beneficially interested under this will. *Hawley* v. *Baldwin*, 19 Conn. 589; *Pierce* v. *Butler*, 16 Vermont, 104; *King* v. *Inhab. of Killerby*, 10 East, 292; *King* v. *Inhab. of Kirdford*, 2 East, 559.

In *Starr* v. *Starr*, 2 Root (Conn.) 306, it was held that the

inhabitants of a town or city to which a permanent fund for the benefit of its poor and needy citizens is given by a will, are not competent witnesses to such will. The fund tends to reduce their taxes.

"A witness beneficially interested under a will, is one gaining by or under its provisions." APPLETON, C. J., in *Smalley* v. *Smalley*, 70 Maine, 549. Nothing in *Piper* v. *Moulton*, 72 Maine, 155, contra. Mere dicta, not authority.

According to all the authorities a stockholder in a private corporation is not competent at common law as a witness to a will giving a legacy to such corporation. *Eustis* v. *Parker*, 1 N. H. 274; *Moses* v. *Julian*, 45 N. H. 55; *Watson* v. *Lisbon Bridge*, 14 Maine, 201; 1 Greenl. Ev. § 333, and authorities already cited.

The judge of probate had no jurisdiction to admit the will to probate. A legacy of $5000 was given to Mrs. Eleanor L. Turner, his aunt by marriage. The statutes forbid his acting as judge of probate in such case. R. S., 1883, c. 1, § 6. art. 22; R. S., 1883, c. 63, § 8.

In admitting a will to probate he acts judicially. He must hear evidence, and determine and decide whether the testator was of sound mind, and testamentary capacity. To allow him to decide such a question where his own aunt was a legatee of $5000 under the provisions of the will, would be simply a farce. Suppose the will was procured by her undue influence and that was the issue? Could he decide it? Her own nephew? Her title to it depends upon his decision. He takes it by his judicial determination and decision from the testator's heirs and gives it to his aunt. The law is open to no such reproach. *Conant* v. *Norris*, 58 Maine, 453; *McKeen* v. *Gammon*, 33 Maine, 187; *Call* v. *Pike*, 66 Maine, 350; *Lyon* v. *Hamor*, 73 Maine, 56; *Russell* v. *Belcher*, 76 Maine, 503; *Gay* v. *Minot*, 3 Cush. 352; *Sanborn* v. *Fellows*, 22 N. H. 473, 490; *Moses* v. *Julian*, 45 N. H. 56; *Northampton* v. *Smith*, 11 Met. 390.

All acts of the judge of probate who has no jurisdiction are absolutely void. *Holyoke* v. *Haskins*, 5 Pick. 20; S. C. 9 Pick. 259; *Gay* v. *Minot*, 3 Cush. 352; *Bedell* v. *Bailey*, 58

N. H. 62; *Sigourney* v. *Sibley*, 21 Pick. 101; *Moses* v. *Julian*, 45 N. H. 56; *Record* v. *Howard*, 58 Maine, 225; *Jochumsen* v. *Bank*, 3 Allen, 87; *Stearns* v. *Wright*, 51 N. H. 600.

All objections to his jurisdiction, except that growing out of the residence of the deceased which has been changed by statute, are open. *Record* v. *Howard*, 58 Maine, 225; *McFeely* v. *Scott*, 128 Mass. 17; *Jochumsen* v. *Bank*, 3 Allen, 87.

Administration granted by a judge of probate on an estate over which he has no jurisdiction is void, although no exception or appeal was taken. *Sigourney* v. *Sibley*, 21 Pick. 101; *Peters* v. *Peters*, 8 Cush. 543.

And although the whole proceedings are void, and may be treated as a nullity, still the better and equally proper remedy is by appeal, and the effect of the appeal will be to vacate the prior decrees and proceedings not appealed from. *Sturges* v. *Peck*, 12 Conn. 141. *English* v. *Smith*, 13 Conn. 223. It was the duty of the probate court itself to treat its own acts as void. *Sturges* v. *Peck*, 12 Conn. 141; *English* v. *Smith*, 13 Conn. 225.

If the judge of probate is a creditor of an estate, he has no jurisdiction at common law, and none by statute, if his debt exceeds $100.00. R. S., 1883, c. 63, § 8; *Cottle, Applt.* 5 Pick. 483; *Coffin* v. *Cottle*, 9 Pick. 287.

If he is a debtor to the estate, he has no jurisdiction, and his appointment of an executor under a will is utterly void; and no consent, ratification or waiver, or confirmation on the part of those interested in the estate, can make such appointment valid. Opinion of court by SHAW, C. J. in *Gay* v. *Minot*, 3 Cush. 352; *Sigourney* v. *Sibley*, 21 Pick. 106.

If he is "otherwise interested," as by relationship within the prohibited degrees to any legatee in the will, upon the validity of which he must necessarily pass, as between the heirs and legatees, he has no jurisdiction, and his acts are void. The will has never been legally admitted by probate, and all the subsequent proceedings are void. R. S., 1883, c. 1, § 6, cl. xxii; authorities and statutes before cited, R. S., 1883, c. 63, § 8; *Holyoke* v. *Haskins*, 5 Pick. 20; *Gay* v. *Minot*, 3 Cush. 354.

In the present case the judge of probate being disqualified to act judicially as between the heirs of Gov. Coburn and his own aunt, should have declined to admit the will to probate and the executors should have appealed. No legal objection to the probate of the will in the appellate court upon the ground of relationship would then have existed. *Patten* v. *Tallman*, 27 Maine, 28; *Moses* v. *Julian*, 45 N. H. 52.

If this course could not have been legally adopted, then the executors should have presented the will for probate in an adjoining county. R. S., c. 63, § 8; *Sigourney* v. *Sibley*, 21 Pick. 106, and note on p. 108.

If the judge of probate had been a citizen of Showhegan, to which the large legacies in items 15 and 16 of the will were given, he would have been disqualified to admit the will to probate. *Northampron* v. *Smith*, 11 Met. 390; *Bacon, Applt.* 7 Gray, 392.

Same rule disqualifies a witness to the will. In *Stile's Appeal from Probate*, 41 Conn. 330, the court say: "Courts of probate are tribunals of limited jurisdiction and powers. Their authority is strictly statutory, and the mode by which all issues involving the validity of their decrees are to be heard and determined, is provided by the legislature. These courts have existed as a material part of our judicial system from a period anterior to the earliest reports of adjudged cases in this State, and a large part of the most important litigation in our higher courts originate with them."

Proof of their acts and doings is to be derived from their records. And while they are courts of records, they are still courts of limited jurisdiction. *Donovun's Appeal from Probate*, 41 Conn. 551; *Brown* v. *Estate of Sumner*, 31 Vermont, 673. "Courts of probate shall be deemed for all purposes a court of record," is the provision of the statute of New Hampshire. R. S., N. H. c. 152, § 19. Yet they are courts of but limited jurisdiction. *Tebbetts* v. *Tilton*, 24 N. H. 120; *Morgan* v. *Dodge*, 44 N. H. 257; *Wood* v. *Stone*, 39 N. H. 572.

"It is an inferior tribunal, and if it proceeds in a manner not authorized by law, the proceeding is void." *Smith* v. *Rice*, 11 Mass. 507; *Peters* v. *Peters*, 8 Cush. 543.

In delivering the opinion of this court in *Fowle* v. *Coe*, 63 Maine, 248, Mr. Justice VIRGIN said: "Although courts of probate are declared by R. S., c. 63, § 1 to be 'courts of record' having an official seal and 'power to issue any process necessary for the discharge of their official duties,' still their proceedings are not according to the course of common law, but they are creatures of the statute, having a special and limited jurisdiction only."

Whenever a review would be granted in a suit at common law or a default taken off, leave to enter an appeal from the probate court has been uniformly granted. It has never been considered necessary or usual to inquire into the merits further than to see that the party has fair ground for legal controversy. *Parker's Appeal*, 15 N. H. 24; *Wilcomb's Petition*, 26 N. H. 370; *Mathews' Pet*, 35 N. H. 289; *Moulton's Pet.* 50 N. H. 537; *Woodworth* v. *Wilson*, 50 N. H. 220; *Grout* v. *Cole*, 57 N. H. 547; *Wadleigh* v. *Eaton*, 59 N. H. 574; *Brewer* v. *Holmes*, 1 Met. 288; *Cross* v. *Cross*, 7 Met. 211; *Hutchinson* v. *Gurley*, 8 Allen, 23; *Wright* v. *Wright*, 13 Allen, 207; *Keene* v. *White*, 136 Mass. 23; *Boston* v. *Robbins*, 116 Mass. 314.

Mr. Bispham, in his principles of equity, says: "A mistake exists when a person under some erroneous conviction of law or fact, does, or omits to do, some act which but for the erroneous conviction he would not have done or omitted to do. It may arise either from unconsciousness, ignorance, forgetfulness, imposition or misplaced confidence." Bispham's Eq. § 185. See also Story's Eq. Juris. 121, § 110.

That exceptions lie as matter of right to all rulings admitting or rejecting evidence will probably not be denied. It is perfectly well settled. *James* v. *Townsend*, 104 Mass. 367-8; *Boston* v. *Robbins*, 116 Mass. 313.

And it seems to be equally well settled that where this court has all the evidence before it that the judge had below, and can see plainly that he erred in his conclusions, made a mistake of some sort, and reached a result, from some mistake or misapprehension, or for any other reason decided the case wrongly, it is within the power of the court and becomes their duty, to revise

and correct the result below. *McKenney* v. *Alvord*, 73 Maine, 224; *Jackson* v. *Gould*, 72 Maine, 335; *Fayette* v. *Chesterville*, 77 Maine, 33; *Fessenden*, *Applt.* 77 Maine, 98; *Boston* v. *Robbins*, 116 Mass. 314. Late case in this State, 4 Eastern Rep. 939.

In *Piper* v. *Moulton*, 72 Maine, 155, the legacy was not for the support of such schools, as the town in its corporate capacity was obliged to support and maintain, but for a special school enacted by the will, and which imposed upon the town the burden of erecting a building for it. Of course the town took no corporate beneficial interest under it, and the inhabitants had none. Exactly like *Loring* v *Park*, 7 Gray, 42.

Nettleton v. *Nettleton*, 17 Conn. 543, cited by the other side, turned upon the peculiar statute provisions of Conn. at that time. See contra, *Stoddard* v. *Moulthrop*, 9 Conn. 503; *English* v. *Smith*, 13 Conn. 227; *Hawley* v. *Baldwin*, 19 Conn. 589; *Stiles' Appeal*, 41 Conn. 329.

Whether the petitioners had or had not an intention to appeal is of no consequence. *Canfield* v. *Wooster*, 26 Conn. 388.

On an appeal by an heir, held that the fact that all the other heirs assented, was immaterial. *Watrous* v. *Chalker*, 7 Conn. 226.

Edmund F. Webb and *Appleton Webb* (with whom was *Wm. L. Putnam*) for the executors.

Justice and equity do not require that the petition be granted, it will therefore not be granted. *Ahearn* v. *Mann*, 1 East, Rep. 551; *Waltham Bank* v. *Wright*, 8 Allen, 122; *Jenny* v. *Wilcox*, 9 Allen, 246; *Richards* v. *Child*, 98 Mass. 285; *Sykes* v. *Meacham*, 103 Mass. 286; Pomeroy Eq. Jur. § 1364, note 1, § 836; *Brown* v. *Buena Vista*, 95 U. S. 159; *Wells* v. *Child*, 12 Allen, 334; Story Eq. Jur. § 887; *Marine Ins. Co.* v. *Hodgson*, 7 Cranch, 201; *Truly* v. *Wanzer*, 5 Howard, 141; *Bradley* v. *Richardson*, 2 Blatchf. 347; *Nason* v. *Smalley*, 8 Vt. 118; *Creath's Admr.* 5 Howard, 204; *Jones* v. *Eaton*, 51 Maine, 387; *Brooks* v. *B. & M. L. R. R.* 72 Maine, 365; *Todd* v. *Chipman*, 62 Maine, 189.

The petitioner is estopped from contesting the will: *Holt* v. *Rice*, 54 N. H. 398 (20 Am. Rep. 138); *Watson* v. *Watson*, 128 Mass. 152; *Caulfield* v. *Sullivan*, 85 N. Y. 153.

Witnesses to the will were competent. Laws 1821, c. 38, § 2; R. S., 1840, c. 92, § 52; R. S., 1857, c. 74, § 1; Stat. 1859, c. 120; R. S., 1871, c. 74, § 1; *Jones* v. *Larrabee*, 47 Maine, 476; *Smalley* v. *Smalley*, 70 Maine, 548; *Warren* v. *Baxter*, 48 Maine, 195; *Patten* v. *Tallman*, 27 Maine, 28; *Fletcher* v. *S. R. R. Co.* 74 Maine, 436; *Hawes* v. *Humphrey*, 9 Pick. 350; *Loring* v. *Park*, 7 Gray, 42; Greenl. Ev. §§ 409, 331; *Northampton* v. *Smith*, 11 Met. 390; *Hinson* v. *Kersey*, 4 Burns' Ec. Law, 88; *Jones* v. *Habersham*, 63 Geo. 146; *Smith* v. *Belknap*, 1 John. 487; *Bloodgood* v. *Jamaica*, 12 John. 285; *Piper* v. *Moulton*, 72 Maine, 155; *Eustis* v. *Parker*, 1 N. H. 273; *State* v. *Stuart*, 23 Maine, 111; *State* v. *Woodward*, 34 Maine, 249; *Fletcher* v. *R. R. Co.* 74 Maine 436; *King* v. *Prosser*, 4 T. R. *20; *King* v. *Kirdford*, 2 East, 560; *Nash* v. *Reed*, 46 Maine, 168; *Jones* v. *Tebbetts*, 57 Maine, 572; *Patterson* v. *Eames*, 54 Maine, 203; *State* v. *Intox. Liquors*, 54 Maine, 564; *Nason* v. *Thatcher*, 7 Mass. 398.

The bequest to the Hall association was a charity. The following cases bear on the question: *Saltonstall* v. *Sanders*, 11 Allen, 455; *Everett* v. *Carr*, 59 Maine, 333; *Olliffe* v. *Wells*, 130 Mass. 221; *Ayde* v. *Smith*, 44 Conn. 60; *Veazey* v. *Jameson*, 1 Simons & Stewart, 69; *Ellis* v. *Selby*, 1 Mylne & Craig, 286; *Williams* v. *Kershaw*, 5 Clark & Fin. 111; *James* v. *Allen*, 3 Merrivale, 15; *Prichard* v. *Thompson*, 95 N. Y. 76; *Power* v. *Cassidy*, 79 N. Y. 602; *Grimes* v. *Harmon*, 35 Ind. 198 (9 Am. Rep. 690); *Clement* v. *Hyde*, 50 Vt. 716 (28 Am. Rep. 522); *Simpson* v. *Welcome*, 72 Maine, 496; *Dole* v. *Lincoln*, 31 Maine, 422.

Stockholders in the Hall association competent as witnesses to the will: *Windham* v. *Chetwynd*, 1 Burrows, 414; Jarman, Wills, 71; *Hatfield* v. *Thorp*, 5 B. and Ald. 589; 3 Jarman, Wills (Randolph & Talcott's ed.) 777-8; *Sullivan* v. *Sullivan*, 106 Mass. 474; *Regina* v. *Arnand*, 9 Ad. and El. 806; *Van Allen* v. *Assessors*, 3 Wall. 584; *Hagar* v. *Bank*, 63 Maine,

512; Morawetz' Corp. § 351; Wood's Field's Corp. § 92; *Rand* v. *Hubbell*, 115 Mass. 474; *Gifford* v. *Thompson*, 115 Mass. 478; *Minot* v. *Pain*, 99 Mass. 106; *Foote, Applt.* 22 Pick. 304; *In re Dodge & Stephenson Manuf. Co.* 77 N. Y. 101.

Judge of probate had jurisdiction: *Russell* v. *Belcher*, 76 Maine, 501; *Winchester* v. *Hinsdale*, 12 Conn. 93; 5 Black. Com. 361; *Hall* v. *Thayer*, 105 Mass. 219; *Aldrich, Appt.* 110 Mass. 189; *Cottle, Appt.* 5 Pick. 483; *Stearns* v. *Wright*, 51 N. H. 600; *Northampton* v. *Smith*, 11 Met. 395; *Cutts* v. *Haskins*, 9 Mass. 543; *Holyoke* v. *Haskins*, 5 Pick. 25; *Harvard College* v. *Gore*, 5 Pick. 370; *Nettleton* v. *Nettleton*, 17 Conn. 542; *Ryans*, 72 N. Y. 1; *Com.* v. *Emery*, 11 Cush. 406.

VIRGIN, J. The petitioners seek under R. S., c. 63, § 25, for leave to enter an appeal from the decree of the judge of probate for this county, whereby an instrument, purporting to be the last will of the late Abner Coburn, was admitted to probate.

The petitioners contend that the judge did not have jurisdiction of the probate of this instrument because of a legacy of $5,000 therein to Eleanor S. Turner, who is the judge's aunt by reason of her marriage, prior to the execution of the instrument, with a brother of the judge's mother; and the provision of R. S., c. 1, § 6, clause 22 is invoked to sustain the point.

We are of opinion that that provision, first enacted in the revision of 1841 for another and entirely different purpose, to wit: fixing the extreme limit of the disqualification by relationship of those to whom it was intended to apply; can have no possible application to judges of probate; for they were never required by statute to be disinterested by relationship in the estates of deceased persons. On the contrary, whatever may have been the rule at common law, the legislature of this state, when probate courts were first established here, perceiving the great difficulties and confusion which would otherwise necessarily attend the probating of wills and granting administration on the

estates of citizens deceased within the several counties, took in hand the whole subject matter of probate courts, their jurisdiction and the jurisdiction of the judges, and enacted a full, complete and independent code intended to reach every case that could arise; and subsequently made such alterations and additions as experience suggested, to meet new or omitted cases. Hence this court has repeatedly said: "Courts of probate are creatures of the statute, having a special and limited jurisdiction only. *Fairfield* v. *Gullifer*, 49 Maine, 360. We must look to the statute for the jurisdiction of such courts in a given case." *Fowle* v. *Coe*, 63 Maine, 248. And now we may add, what we had no occasion to decide then, to wit: to ascertain whether the judge of probate for a given county has jurisdiction for taking the probate of the will of a deceased inhabitant or resident thereof, we must look to the provisions of R. S., c. 63, which contain all of the present law on the subject. And this view is made morally certain by an examination of the legislation on this subject.

Probate courts were first established by statute in 1784. Mass. St. 1784, c. 46. *Wales* v. *Willard*, 2 Mass. 124. The subject was more thoroughly examined by the general court in 1817 and resulted in an act of forty-five sections. Section one established a probate court in each county and provided for the appointment of "some able and learned person as judge therein for taking the probate of wills and granting administration on the estates of persons deceased, being inhabitants of, or residents in, the same county, at the time of their decease." St. 1817, c. 190, § 1. Section 5 provided: "Whenever any judge of probate shall be interested in the estate of any person deceased within the county of such judge, "the estate shall be settled in another county." And the Supreme court decided that when the judge of probate for the county where a person deceased had jurisdiction of his estate, the acts of any other judge of probate on such estate are void. *Cutts* v. *Huskins*, 9 Mass. 544; *Holyoke* v. *Huskins*, 5 Pick. 25.

In 1821, in establishing and defining the jurisdiction of probate courts and of the judges thereof in this state, the legislature

passed an act comprising seventy-five sections, adopting literally most of the provisions of the Mass. St. 1817, c. 190, and including the subject of guardians. But instead of re-enacting a transcript of § 5 of St. 1817, with its simple general provision ("whenever any judge of probate shall be interested in the estate of any person deceased within the county of such judge," the estate be settled in another county;) our legislature defined specifically the disqualifying interest to be that of an "heir, legatee, creditor or debtor, or within the degree of kindred which by the laws of the State, he might by any possibility be heir in the estate of any person deceased within the county of such judge." St. 1821, c. 51, § 2. And this comprehensive and clearly defined interest constitued the only exception which precluded or excused a judge of probate from taking the probate of the will of any deceased inhabitant of his county.

To exclude all cavil, the legislature at its next session amended the St. of 1821 by an act of a single section expressed in the positive, unqualified, peremptory language following: "The estates of all persons deceased shall be settled in the probate court of the county where the deceased was last an inhabitant, unless the interest of the judge of probate in such estates, as heir, legatee, creditor or debtor, shall exceed the sum of $100, any law to the contrary notwithstanding." St. 1822, c. 198. The object of this statute would seem to be both declaratory and amendatory: to construe the previous statute as to the general jurisdiction and to fix the minimum limit of personal pecuniary interest which should disqualify a judge of probate. And these provisions of the Stats. 1821 and 1822 remained unchanged and were in substance put in two sections by the revision commissioners and re-enacted in R. S., 1841, c. 105, § § 3 and 18, the latter containing the provisions as to the disqualifying interest.

In 1841, while the first revision of the statutes was being made, a statute was enacted for transferring to another county the uncompleted settlement of an estate whereof the executor, administrator or guardian had received the appointment of judge of probate, St. 1841, c. 149, § 1. This provision suggested an additional disqualifying interest not previously

covered. A few days thereafter, and to condense and make § 18 of the revision consistent, the same legislature, by the general "Act of Amendment" appended to the revision, provided: "Chapter 105, § 18 shall be amended by striking out the words 'as heir, legatee, creditor or debtor or,' and inserting instead thereof, 'either in his own right or in trust, or in any other manner, or be,' so that the section, as amended, shall be as follows: "Whenever any judge of probate shall be interested either in his own right, or in trust, or in any other manner, or be within the degree of kindred, by means of which by law he might, by any possibility, be heir to any part of the estate of any person deceased," such estate shall be settled in another county; 'provided, that the amount of the interest of such judge shall not be less than $100 in such estate.'" R. S., 1841, c. 105, § 18, as amended by "Act of Amend." of April 14, 1841, § 15.

By the foregoing amendment the substituted words: "in his own right," obviously included the direct personal interest previously described as that of "an heir, legatee, creditor or debtor," while "in trust" were evidently intended to cover any indirect, representative interest which the judge might have strictly as trustee, or as executor, administrator or guardian; and to make sure of comprising every pecuniary relation of a judge to an estate within his county, the legislature added in the same connection, *nosci a sociis*, "or in any other manner." The "kindred" clause which immediately follows and the fixed money limit of interest make certain this construction. This part of § 18, save the redundant words, has been re-enacted in the several successive revisions and appears in the plain language now found in R. S., c. 63, § 8.

Moreover, that the legislatures of 1874 and 1883 believed that the phrase, "in any other manner" had no reference to any interest by "relationship within the sixth degree" appears morally certain from the following considerations: When probate courts were established and their jurisdiction and that of the judges were defined in St. 1821, c. 51, their power to appoint guardians in their county was comprised in the same section with

that of probating wills and granting administration on estates of deceased persons, § 1; and the disqualifying interest mentioned in § 2 was alike applicable to judges whether acting in relation to estates or to guardians. But in the first revision of the statutes (1841), the provisions relating to guardians were separated from those concerning the estates of deceased persons, and put into different chapters; the latter in c. 105, and the former in c. 110. And while c. 110, § 1 conferred power on a judge of probate to appoint guardians to minors residing in his county, that chapter contained no exception by way of a disqualifying interest. Hence the legislature, in 1874, amended the unqualified language of c. 110, § 1, by adding: "But when any judge is interested either in his own right, in trust, or in any other manner, *or within the sixth degree of kindred*, such appointment shall be made in an adjoining county. St. 1874, c. 156. Both of these chapters (R. S., c. 63, § 8 and c. 67, § 1) were revised by the same learned commissioner and legislative revision committee of 1883 and literally re-enacted by the legislature of that year; and if the same construction was intended for the disqualifying interest in both sections, they would hardly be expected to express it in such widely different language.

If it be objected that the judge would not be the proper person to try the question, had such been raised, whether or not his aunt, by undue influence, procured the will to be made, the answer is we are construing the statute, and if that constitutes him the tribunal to pass upon that question, he must do so, as there would be no other (*Com.* v. *Ryan*, 2 Mass. 89, 91); and his decision, if not satisfactory, could be tested on appeal by the aggrieved party.

There being no pretension or suggestion that the "kindred" clause in c. 63, § 8, can have any possible application to this case, our conclusion is, that the judge of probate who admitted the will to probate had jurisdiction. If he had, then as before seen no other judge could have except under the conditions mentioned in c. 63, § 5; none of which existed here.

We are aware that the practice in Massachusetts and New

Hampshire, under their peculiar constitutional and statutory provisions, is different. They class probate courts with all inferior tribunals. *Hall* v. *Thayer*, 105 Mass. 219, and cases there cited. *Aldrich, Apllnt.* 110 Mass. 189; *Moses* v. *Julian*, 45 N. H. 52; *Stearns* v. *Wright*, 51 N. H. 600; *Perkins* v. *George*, 45 N. H. 453. And in the latter state, when the judge is interested otherwise than is provided by their statutes, and therefore has no jurisdiction, the practice is for him to decline to act and take the case up by appeal. *Perkins* v. *George, supra.* Such practice has never obtained in this state. *Hatch* v. *Allen*, 27 Maine, 85.

As the judge of probate had jurisdiction in this case, his decree is conclusive, in the absence of any appeal therefrom, even if the witnesses were beneficially interested. *Piper* v. *Moulton*, 72 Maine, 155, 158, and cases cited there.

But while no appeal was taken within twenty days from the date of the decree, as required by R. S., c. 63, § 23, without any discrimination in favor of non-residents, the petitioners asked the supreme court of probate sitting in the county of Somerset to allow them to enter an appeal for the reasons set out in their petition, which, if granted, would "have the same effect as if it had been seasonably done." R. S., c. 63, § 25.

To authorize the granting of their prayer, the petitioners were bound to satisfy the court that they "omitted to claim an appeal" within the twenty days next succeeding the date of the decree, "from accident, mistake, defect of notice, or otherwise without fault on their part;" and thereupon, "the supreme court, if justice requires a revision, may upon reasonable terms, allow an appeal to be entered." R. S., c. 63, § 25.

The presiding justice denied their prayer and directed their petition to be dismissed. He must, therefore, not only have determined, as we have—that the judge of probate had jurisdiction, but also, that the petitioners, at least, had failed to sustain the burden of satisfying him that "justice required a revision."

The petitioners' allegations under R. S., c. 63, § 25 are, that they had no notice or knowledge whatever of the existence of any such will, until Jan. 26, 1885, or that it had been or would

be offered for probate on Feb. 3, until Feb. 26, when the time for appeal had expired; that they should "surely and certainly have appealed within the twenty days, had they known it;" that their omission to seasonably appeal "was wholly without fault on their part;" that they were deprived of notice "by the accidents growing out of the situation and their great distance from the probate court; and that "justice requires a revision of the decree."

A careful and patient consideration of the voluminous evidence filed, has failed to satisfy us of the truth of any of these allegations which are material to the matter before us.

The petitioners are a nephew and niece of the testator resident in San Francisco, having a father in Waterville, a sister and brothers in Skowhegan, one of which brothers was the duly constituted agent of the nephew. The petitioners were in "frequent consultation," the nephew doing all the writing for both." The statute requires no personal notice, and the general notice by publication was given. The testator died January 3, 1885, of which the petitioners were apprised by telegram received January 4th. The will was read, by the executor who wrote it, to the resident heirs, and twice to the nephew's agent, in the evening after the funeral on January 7th. One of the California heirs—a brother of the petitioners—was a subscriber to the Skowhegan newspaper which contained a copy of the will in its issue of January 14th. Both of the petitioners must have known there was a will of some kind. The nephew visited his friends in Skowhegan about a year after the will was executed, where he tarried some months, and then declared to one of the executors—what was a matter of great notoriety—that "he supposed his uncle had made a will and that it was understood the property generally went out of the family;" and he substantially admitted, by declining to deny when pressed, that he read in the California daily newspapers, within a week of the testator's death, dispatches announcing that the testator had bequeathed the bulk of his property to the cause of education. Moreover, prior to February 28th, his agent wrote to him, and his co-petitioner "every few days, oftener than once a week," and

his sister in Skowhegan had "written to all about everything, twice to his (agent's) certain knowledge."

That any number of these non-produced letters miscarried, is utterly inconsistent with common experience under our efficient postal service, and with unsatisfactorily explained expressions in their letters, such as that of March 5th, where it drops out that they knew as early as February 5th, that executors had been qualified. And that several of these letters have been purposely withheld, among them that which accompanied the copy of the will, is evident from the petitioners' utterly irreconcilable testimony relating to the search for them, together with their very distinct recollection of the dates of some letters received and their obliviousness as to the dates of others and of their contents.

If they did not actually know the precise terms of the will until January 26, they must have known its substance—that they were not to share the whole property. That a large part of it was going to charitable objects had become so notorious when the nephew was in Skowhegan, a year after the will was made, as to call from him the remark already mentioned. Having as much at stake as they did, and considering the ill effect of delaying the settlement of the estate, ordinary care and diligence, which the law requires, demanded that they should be active and make use of all such reasonable means as were within their reach to obtain the information, if they had not already done it, necessary to enable them to prosecute their right of appeal. They knew in February that their present counsel was in California, and had had some communication from him, for on March 3d, "he (nephew) had been waiting a few days to see him."

But it is obvious that they had no intention of appealing at any time after January 26 and before February 23, hence their non-residence placed them in no better situation than they would have had if residents. We are not satisfied, therefore, that their omission was not without fault on their part; but, on the contrary, that gross laches and culpable negligence were the cause of their non-action.

Thus where an analogous remedial statute, (R. S., c. 77, § 19,) authorized the Supreme Court, on a bill in equity, to give a creditor judgment for his claim which he did not seasonably present to the administrator on his debtor's estate, provided, *inter alia*, the "creditor is not chargeable with culpable negligence," it was held in Massachusetts, under a like statute, that a bill alleging that the complainant resided in Montreal and did not know of the debtor's decease, or of the appointment of the administrator until the special limitation bar had intervened, could not be maintained. The court said: "The only ground on which he can rest his claim is, that he resided in the remote city of Montreal, and had not been informed of the debtor's decease. The facts can hardly be said to present anything more than a case of mere neglect and inattention. He failed to make an effective inquiry, and in that way remained in ignorance of a fact which was, of course, perfectly well known, and which there was no attempt to conceal. The formal notice required by law and directed by the probate court, was given. The only mistake is the failure to know a fact about which he made no inquiry." *Sykes* v. *Meacham*, 103 Mass. 286.

Again, the petitioners were guilty of negligence in prosecuting their petition. It is of the utmost importance that an estate of this magnitude, comprising more than one million four hundred thousand dollars of "rights and credits," should, as speedily as the law will allow, come into the possession of the rightful administrators for proper distribution. The petitioners not only had no intention of seasonably appealing, but even the nephew did not conclude to prosecute the petition until shortly before its date in September, and the niece, as late as August 24, wrote: "Lon (nephew) is very anxious I should sign all papers with him, and come in to help pay the expenses I suppose, if he fails to get a compromise." But it seems she succumbed, for on October 26, she wrote: "No wonder you were astonished to see my name, but I could not get out of it. He (nephew) annoyed me so much that I finally decided to go in with him for better or worse. If I make nothing out of it, he says he will pay all the expenses."

While the law affords to parties a year as its extreme limit of indulgence, still a reasonable construction demands diligence on their part, and does not allow them to spend the whole time, when they know all the necessary facts, in coming to a conclusion whether or not they will attempt to avail themselves of its remedial provisions.

No good reason is assigned for not having the petition drawn, obtaining an order of notice thereon in vacation, (R. S., c. 81, § 1) and entering and trying it at the March term, and thus save a year in taking it to the law court, instead of entering it on the nineteenth day of September term simply for notice, and trying it at the December term. For the clause in R. S., c. 63, § 25, providing that the "petition shall be heard at the next term after the filing thereof," is simply directory, limiting the time of delaying the hearing. But the real reasons are obvious. The niece had not then yielded to the "annoyances" of the nephew. Compromise was early the height of his expectation, and later of hers. Delay, as an obstruction to a desirable early settlement of the estate, was deemed to be the most convincing argument for a compromise. An attorney was being sought, who, in direct violation of R. S., c. 122, § 12, would enter into the scheme and trust to success for his fees. Thus as early as March 3, the nephew wrote to his agent in Skowhegan: "It would seem to me that a good lawyer would take such a case as this and stand in for a share if he won the case;" adding, "All these big cases here (California), such as Lick, compromised, and this is probably what the lawyers would do in this." And on March 5, he wrote that a lawyer, formerly from Maine, "thinks there can be no doubt but a movement in that direction would bring them to a compromise at once." So, also, on August 24, the niece wrote: "What do you think of ——'s idea of forcing a compromise?" adding what we quoted above from her same letter in regard to the nephew's desire to have her sign "all the papers and help pay the expenses, if he fails to get a compromise." And although they did not succeed in finding a lawyer "who would take such a case as this and stand in for a share if he won," their fruitless search did not finally deter them from pursuing their main purpose.

Nor do we think that "justice requires a revision." For there can be no well grounded pretension that this instrument is other than the result of the deliberate, thoroughly matured and well settled purpose of the eminent man whose signature it bears, completing the line of donations begun years before his decease, showing full conversance with the magnitude of his own and of his brother's estates, (the latter of which, under a power of attorney from its heirs, including the petitioners, he also managed during the last nine years of his life) and a full appreciation and knowledge of the condition and circumstances of his heirs. To be sure, the petitioners offered certain testimony tending to show that certain of his brothers "broke down mentally," and also his business affairs, with his manner of conducting them, so far as his books might disclose them—all as bearing upon his testamentary capacity—which the presiding justice, in the exercise of his undoubted discretionary power to direct the course of the trial before him, temporarily declined to hear, apprising their counsel at the same time that he did not rule it to be incompetent, but would postpone it until some evidence of a more direct and substantial character should be introduced. But as no such testimony was introduced and the offer was not renewed, we conclude that that issue was abandoned, especially as the trial was taking place in the town where the testator had lived so many years, and where the nephew had stopped six months in 1883 and 1884, thus having not only personal knowledge of the testator's mental condition, but ample opportunities for sounding his townsmen on the subject. Hence, if a revision is to be granted under this head, it must be based upon some provision in the will which is unjust to the petitioners. But it is our opinion that none of its provisions are unjust to them.

The claim made in their petition is that if the will is allowed to stand, it "practically and to a great extent disinherits his heirs." That is to say, her uncle gave one-half of his estate to charitable objects, in which he notoriously took a great interest during many of his latter years, and to her only her equal share of the remainder, save a few comparatively small bequests to some

intimate friends. This disposition of his estate the law fully authorized, since the whole was his own; and they being collateral, and not lineal heirs, he was under no legal obligation to support them. (R. S., c. 24, § 16.) And knowing that she would receive her equal share of all his brother's estate, of the same magnitude as his own, we fail to perceive wherein any injustice is done to her by the will. The nephew's share of the testator's residue, is bequeathed, to be sure, to him in trust for his son; but he inherits in his own right, his equal share of all of Philander's; and it is quite apparent from the testimony why the testator made this discrimination, which may in the end show wisdom rather than any want of testamentary capacity, or any injustice to the nephew and his family. Neither new trials in equity nor reviews in law, when not a matter of right, are granted, except upon the merits to prevent injustice. Pom. Eq. § 836; *Brooks* v. *B. & M. L. R. R. Co.* 72 Maine, 365; *Jones* v. *Eaton*, 51 Maine, 387, and cases there cited.

This provision of the statute (R. S., c. 63, § 25) has never before been before the law court, though like provisions have more or less frequently been construed in other jurisdictions and applied to a variety of circumstances, the courts declaring the provisions to be remedial in their character, in which view we fully concur. The language of the statute precludes the idea that leave is to be granted for the mere asking. But while it is remedial and wisely intended to practically extend the time for appealing to parties having meritorious cases, and who in good faith have shown reasonable diligence in availing themselves of the primary right of appeal as well as of the extended indulgence, still a liberal administration of it will not, through mere caprice, extend to parties an unwarranted license to negligently waste the time allotted them, either for taking an appeal or filing their petition for leave to appeal, for the purpose of delay, and thus, under a misnamed legal discretion, invite and uphold cases begun for pure compromise and speculation.

We are of opinion, therefore, that the decision of the presiding justice that the judge of probate had jurisdiction and that justice does not require a revision of his decree, was correct.

The petitioners also allege that the will was not subscribed, as required by R. S., c. 74, §1, by "three credible attesting witnesses, not beneficially interested under the will;" but that, on the contrary, they were not "credible," and were "beneficially interested under the will," inasmuch as they were tax payers in the town of Skowhegan, to which a legacy was given and a devise made, by the 15th and 16th items of the will.

"Credible witnesses, not beneficially interested under the will," are obviously intended to mean witnesses other than those described in St. 1821, c. 38, § 2, and in R. S., (1841) c. 92, § 2, as simply "credible;" for all the words of description must have some meaning. We can not impeach the intelligence of the law makers by considering the clause tautological.

It seems that the common law looked upon some persons as unworthy to obtain credit, and excluded them from being witnesses through fear that if heard, their testimony would be believed, and hence they were denominated not incredible witnesses, for that term the law applied to testimony, but incompetent witnesses — not entitled to the general character of credibility. While those who were free from infamy and certain other disqualifying taints and influences, including that of interest, the law trusted to testify, because of their general character of credibility, and called them competent. Hence "credible," as applied to witnesses, is universally considered to mean competent. But as "credible" witnesses are those free from interest, the clause "not beneficially interested under the will," was introduced for the purpose of eliminating the element of interest from the term credible, which formerly included it, and define and modify the interest which should thereafter disqualify one from subscribing a will. In other words, "credible" witnesses, as that term has hitherto been understood, were no longer essential; but witnesses who are competent in every respect other than that of interest, and so far as their interest should thereafter render them incompetent, it must not only be a "beneficial interest," but such as would be directly derived from or "under the will." Otherwise the utmost care and vigilance on the part of a testator, in selecting witnesses to his will, would fail, and his

will, since the omission of certain provisions of the statutes soon to be mentioned, would be void, instead of saving the will at the expense of some provision in favor of the witness.

We think this view is fully warranted by a review of the statutes of wills, as follows: The first statute (St. 1821, c. 38) contained certain provisions, borrowed from the English statutes, making void any beneficial legacy, devise or interest given or made to a subscribing witness, thereby rendering him a competent witness and saving the remaining provisions of the will; and his competency was also restored by his receiving, releasing or refusing to accept, before testifying, any such interest given him by the will, § § 8, 9 and 10. These provisions, in substance, were re-enacted in R. S., (1841) c. 92.

In 1856, the legislature made a total revolution in the common law governing the competency of witnesses so far as their personal interest was concerned, neither excusing nor excluding them by reason of interest as party or otherwise, with certain exceptions immaterial to our present inquiry, but provided that this statute should not affect the law relating to the attestation of wills, St. 1856, c. 266, § § 1 and 3. Subsequently, but during the same year, the legislature commissioned Ex-Chief Justice SHEPLEY to make a new revision of the statutes, and in his report, the provisions in St. 1821, c. 38, above mentioned, were intentionally omitted (as he said in a note to the chapter on wills) "as being superseded or inconsistent with recent enactments allowing persons interested to be witnesses," Shep. Rep. 74, note c. Whether this view was strictly correct or otherwise, those omitted provisions have never re-appeared in any subsequent revision. So that, if a subscribing witness had given him by the will such an interest as was described in those omitted sections, and the same technical construction of the attestation clause were retained as formerly, not only the provision in the will in favor of the subscribing witness, but the whole will would be absolutely and irretrievably void. Hence, instead of liberalizing and enlarging, in the line of modern legislation, the law in regard to the making of wills, the legislation narrowed and restricted it, and introduced new obstructions which might

readily escape the most prudent foresight. Perceiving this condition of things, the legislature, at its first session next after the revision of 1857 (from which those sections were first omitted) took effect, changed the attestation clause by adding, "not beneficially interested under the provisions of the will," (St. 1859, c. 120, § 1) with the evident intention of liberalizing the statute by declaring in substance that a subscribing witness is competent, whose interest a reading of the will does not show to be one which is vested by and given in the will, and not one which comes indirectly or consequentially by reason of an interest given to some person other than the witness. And this amendment, save the redundant words "the provisions of," has been re-enacted in the subsequent revisions.

A fair construction of the 15th item is that a specific sum of money is given to the town, to hold in trust, "for the worthy and unfortunate poor," resident therein; that the principal is "to be funded," and the income to be "expended," one moiety thereof by a "woman's aid society," and the other by the town. But the town is not authorized to use the latter moiety together with any sum which it may raise by taxation, as a joint fund for the support of its paupers; nor to assist such "worthy and unfortunate poor" only as have a settlement therein; but to distribute it among the residents described, regardless of any pauper settlement of the recipients. Moreover, the clause "to save them from pauperism," was not intended to mean, for the avowed purpose of preventing those who thus enjoyed his bounty from imminent legal pauperism, nor to qualify or in anywise limit or restrict the distribution to such persons as, without it, would necessarily or probably become a town charge; but it was simply intended to express, in the most general and abstract manner, the testator's belief of the good effects which might, in part, incidentally result from this considerate charitable bequest.

The devise also was for a public purpose, from which the inhabitants of the town might derive more or less benefit of a general character, but not of that direct, certain pecuniary nature which would thereby make them "beneficially interested." Such a devise cannot be reasonably expected to lessen the taxes of the inhabitants.

The land devised and the money bequeathed are to be held by the town as trustee for the respective purposes prescribed in the will. They cannot be rightfully used for any other purposes. No execution issued on a judgment against the town can be levied on the land, since the nature of its tenure is disclosed by the record, to be read of all men. But if the mode of distributing the income of the bequest should sometimes incidentally happen to keep from public expense some of its recipients and thereby indirectly affect the taxes in some slight degree, that fact would not render these witnesses incompetent. "It is clear," said WILDE, J., "that unless the witnesses are to be relieved from their taxes by this donation, they are competent. It is possible, though not probable that they may thus be relieved, but neither possibilities nor even probabilities are sufficient to disqualify a witness." *Hawes* v. *Humphrey*, 9 Pick. 350, 360. *Northampton* v. *Smith*, 11 Met. 390.

In actions where a town is not a party to the record, but is simply indirectly interested, its inhabitants were at common law in this state competent, because their interest was contingent. *State* v. *Stuart*, 23 Maine, 111, 114; *State* v. *Woodward*, 34 Maine, 293; *Fletcher* v. *Som. R. R. Co.* 74 Maine, 434.

But this question has been decided in principle in *Piper* v. *Moulton*, 72 Maine, 155, 158, and is decisive of this branch of the case. One ground on which the decision was put was that the interest of two of the witnesses, though tax-payers in the town to which a bequest was made in trust, was not "certain and direct." The opinion was drawn, after thorough argument by learned counsel against the will, by the distinguished chief justice at that time, and it received the unqualified concurrence of our late learned associate, Judge BARROWS, who for years before his twenty-one years' service on the supreme court bench, was judge of probate for Cumberland County. That opinion was announced and published nearly two years prior to the execution of this will. It was probably in the mind of Judge DASCOMB, who wrote the will, when the testator came to execute it, and it afforded them the freshest assurance of this court that the friends and neighbors who had known the testator so long

and well, whom he desired to witness his solemn act of making a testamentary disposition of his vast possessions, one-half whereof he thereby devoted to charity's sake, although they were men of substance in the town which he had constituted trustee of some of his public bounty, were not thereby rendered incompetent therefor under our statute.

Furthermore, the petitioners contend that the witness Cushing, even if not disqualified by reason of being a tax-payer in Skowhegan, was "beneficially interested under the will," because, at the time of its execution, he held two shares of stock of the trading corporation called the "Skowhegan Hall Association," to which the testator bequeathed $15,000, "in part to secure a liberal policy in respect to the use of the hall for objects of public interest."

The name of the corporation shows the object to have been to secure a public hall, and realizing that it would not at first be self-supporting the block included stores, which would command good rents. The testimony shows that the hall was always used for "public meetings, temperance meetings, agricultural meetings, lyceum lectures, concerts, graduation exercises of high school, and town meetings, for which the custom was to charge rent, except for town meetings which was free in consideration of $2,200 contributed by the town.

The obvious intention of the testator was to contribute the sum named toward making the hall free for all such "objects of public interest." The phrase "in part" could not have been intended as equivalent to "a part of." It in nowise indicated a desire or intention of devoting an undefined part of the bequest to securing a free use or "a liberal policy in respect to the use of the hall" for public objects, leaving the remainder to be appropriated for the pecuniary benefit of the stockholders. But when considered in connection with the charitable tenor of the will, together with the particular "objects of public interest" for which it had always been used, the clear meaning of the testator was, that while, from knowledge derived during his long presidential tenure, he knew the sum alone bequeathed would

not fully, but would "in part" at least bring about the desired result; and that he thereby contributed what he considered to be his share of whatever sum might be found necessary thereto.

But no part of this legacy conferred on Cushing any direct and certain interest in it. The most that can be claimed is that the legacy gave an interest to a corporation two shares of whose stock—worth $1.50 each—the witness, at the time of the execution, held but disposed of before the probate of the will.

Even if the theory of the petitioners be adopted—that a part of the legacy was to be appropriated to "securing a liberal policy in respect to the use of the hall for objects of public interest," Cushing's interest at best was contingent. The part to be thus applied not being designated in the will, the corporation might, by appropriating substantially the whole of it, deprive any stockholder of any beneficial interest whatever in it.

But we do not place the decision upon this ground, but upon the broader ground that the legislature did not intend to declare incompetent a subscribing witness to a will which contained a legacy to a corporation of whose stock the witness happened to hold one or more shares.

If a testator can give none of his estate to his town for charitable purposes, without thereby disqualifying as witnesses every one of his neighbors and townsmen who know him, and all other citizens of whatever town, county or state, who happen to own property in his town liable to taxation therein; or to a corporation, without thereby rendering incompetent every stockholder therein, then the practicability of legally executing a will —especially since the omission and consequent repeal of the former provisions hereinbefore mentioned—becomes a matter of chance; for it would be substantially impracticable to seasonably ascertain such disqualifying facts.

On the other hand—to repeat what we have substantially already said—we think the legislature intended, by its amendment of the attestation clause, to relieve wills from the dilemma in which the omission and consequent repeal of the early statutory provisions heretofore mentioned had placed them, and

thereby enable a testator to readily know from a perusal of the provisions of his will, whether or not he had therein given to those whom he desired to witness it, a direct and certain interest in his estate; and if their names do not appear therein as devisee, legatee or donee of some direct and certain pecuniary interest named and they are not heirs to any such devisee, legatee or donee—they shall be deemed not "beneficially interested under the will."

Exceptions overruled.

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

DANFORTH, J., did not sit.

JOSIAH C. BENNETT and another

vs.

GEORGE HOLMES and another.

Androscoggin. Opinion February 3, 1887.

Indorsement of writs. R. S., c. 81, § 6.

A writ was indorsed "No. 262. From the office of J W. Mitchell." *Held*, sufficient compliance with R. S., c. 81, § 6.

ON exceptions.

A real action. The plaintiffs were described in the writ as residents of Lynn, Massachusetts. On the first day of return term, the defendants filed a motion to abate the writ, because it was not indorsed before entry in court by a citizen of this state, as required by statute. The writ was indorsed as shown in the opinion, and the court held that was sufficient; to that ruling, the defendants alleged exceptions.

J. W. Mitchell, for the plaintiffs, cited: *Stone* v. *McLanathan*, 39 Maine, 131; *Richards* v. *McKenney*, 43 Maine, 177; *Booker* v. *Stinchfield*, 47 Maine, 340; *Sawtelle* v. *Wardwell*, 56 Maine, 146; 8 Cush. 98; 3 Pick. 442; 8 Pick. 25; 11 Pick. 66; *Wrights* v. *Coles*, 11 Met. 293.

David Dunn, for the defendants.

We cite the case *Gilmore* v. *Crosby et al.* 76 Maine, 599. That case settles this case clearly and firmly.

HASKELL, J. It is settled law in this state, that an indorsement of a writ as follows, "No. 262. From the office of J. W. Mitchell," is sufficient. *Jacobs* v. *Benson*, 39 Maine, 132; *Richards* v. *McKenney*, 43 Maine, 177; *Sawtelle* v. *Wardwell*, 56 Maine, 146. The indorsement in *Gilmore* v. *Crosby*, 76 Maine, 599, was in different form.

Exceptions overruled.

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

STATE OF MAINE *vs.* CORDIS L. LONGLEY.

Cumberland. Opinion February 3, 1887.

Search and seizure. Prior conviction. Pleadings.

An averment of prior conviction in search and seizure process, that "defendant has been before convicted . . . of unlawfully keeping and depositing in this State . . . intoxicating liquors, with intent that the same should be sold in this State in violation of law" is sufficient, when accompanied with particular averments of the time and place and court in which the conviction was had.

ON exceptions from superior court.

The exceptions were to the ruling of the court in overruling the defendant's motion in arrest of judgment.

The following were the averments of the complaint.

"Benj. F. Andrews of Portland, in said county, competent to be a witness in civil suits, on the third day of December, A. D., 1885, in behalf of said State, on oath complains that he believes that on the third day of December, in said year, at said Portland, intoxicating liquors were, and still are kept and deposited by Cordis L. Longley of Portland, in said county, in the shop and its appurtenances, situated on the westerly side of Exchange street in said Portland, and numbered eighty-eight on said street, and occupied by said Longley, said Longley not being then and

there authorized by law to sell said liquors within said State, and that said liquors then and there were, and now are intended by said Longley, for sale in the State in violation of law, against the peace of the State and contrary to the form of the statute in such case made and provided.

"And the said complainant on his oath aforesaid, further alleges and complains, that the said Cordis L. Longley has been before convicted in the municipal court for the city of Portland, to wit: on the sixth day of May, A. D. 1885, of unlawfully keeping and depositing in this State, in said county of Cumberland, intoxicating liquors, with the intent that said liquors should be sold in this State in violation of law, against the peace of the State and contrary to the form of the statute in such case made and provided. He therefore prays that due process be issued to search the premises hereinbefore mentioned, where said liquors are believed to be deposited, and if there found, that the said liquors and vessels be seized and safely kept until final action and decision be had thereon, and that said Longley be forthwith apprehended and held to answer to said complaint, and to do and receive such sentence as may be awarded against him."

George M. Seiders, county attorney, for the State, cited: R. S., c. 27, § 57; 65 Maine, 248; 39 Maine, 150; 69 Maine, 573; 64 Maine, 267; 35 Maine, 203; 67 Maine, 130, 442; 62 Maine, 135; 68 Maine, 253; 65 Maine, 111.

D. A. Meaher, for the defendant.

The allegation of a former conviction as set out in this complaint is bad, because:

1st. It does not refer to any specific provision of the statutes, as having been previously violated, and the sole information as to the nature of the former offence must therefore be gathered entirely from the allegation itself.

2nd. This allegation does not set out briefly or at length, any offence under the statutes of Maine, nor does it describe an offence under § 40, c. 27. A sufficient allegation of an intent

on the part of said defendant, to wit: that the liquors referred to were by him intended for unlawful sale, is omitted.

Such a clear averment is necessary. *State* v. *Learned*, 47 Maine, 426; *State* v. *Miller*, 48 Maine, 576.

The statute cannot override the provisions of the Constitution and make bad pleading good. *State* v. *Mace*, 76 Maine, 65; § 370, Bishop on Statutory Crime.

Whatever is indispensably necessary to be proved, must be alleged. *State* v. *Verrill*, 54 Maine, 414; *State* v. *Philbrick*, 31 Maine, 401.

The prayer for process is defective, because the liquors to be seized are not mentioned with certainty. "Said liquors," may as well refer to the liquors mentioned in the allegation of a former conviction, as to any other.

The word "said" does not incorporate a previous description, that is to say, the word "said" as used in the prayer of process, does not designate the liquors alleged to be deposited in the place alleged. *Rex* v. *Cheeve*, 4 Barn. & Cres. 902; 7 Dowling & Ryland, 461.

The place to be searched and the article to be seized should be designated, with certainty, when a search warrant is prayed for.

The designation must be special. Art. 1, § 5, Const. of Maine; § 12, c. 132, R. S.

The allegation is uncertain and the prayer defective. *Jane (a slave)* v. *State of Missouri*, 3 Missouri, 61.

HASKELL, J. No argument is offered in support of the exceptions to the charge of the presiding justice, and no error is perceived therein.

Nor is the complaint defective. The allegation of prior conviction is, that respondent has been convicted of keeping and depositing in this State intoxicating liquors with intent that the same should be there sold in violation of law.

The averment in substance is, that the respondent had the liquors, intending them for illegal sale; and this is an offense under R. S., c. 27, § 40. It differs from the cases of *State* v. *Miller*, 48 Maine, 576, and *State* v. *Learned*, 47 Maine, 426, where the allegation was that the respondent had the liquors,

intended it may be, not by him, but by some other person for unlawful sale, for which he would not be responsible.

Exceptions overruled.
Judgment for the State.

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

STATE OF MAINE *vs.* DUNCAN BENNETT.

York. Opinion February 3, 1887.

Indictment. Lobster law. Stat. 1885, c. 275, § 21.

An indictment that avers that the defendant "did have in his possession" certain lobsters, without averring that he did not liberate them alive, charges no offense, and is bad on demurrer.

ON exceptions.

Indictment under the lobster law. The exceptions were to the ruling of the court in overruling a demurrer to the indictment.

Frank M. Higgins, county attorney, for the state.

Hamilton and Haley, for the defendant, cited: *Smith* v. *Moore*, 6 Maine, 274; *Com.* v. *Maxwell*, 2 Pick. 138; *Com.* v. *Hart*, 11 Cush. 130; *State* v. *Smith*, 61 Maine, 388.

HASKELL, J. The statute 1885, c. 275, § 21, provides that "it is unlawful to . . . catch, . . . or possess," certain female and short lobsters, "and such lobsters, when caught, shall be liberated alive, . . under a penalty of one dollar for each lobster so caught . . or in possession, not so liberated."

The penalty is for not liberating alive certain lobsters caught, or in possession, or in other words for destroying them.

The indictment avers that the defendant "did have in his possession" certain female and short lobsters. All this might be true, and yet no offense be committed, because the defendant might just then have taken the lobsters from the sea mixed

promiscuously with large lobsters, having an intention of liberating alive the lobsters described in the indictment as soon as he could do so.

Exceptions sustained. Demurrer sustained. Indictment quashed.

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

FRANCIS S. FROST and others *vs.* CHARLES E. LIBBY and others.

Cumberland. Opinion February 3, 1887.

Executors and administrators. Fraudulent conveyances. Equity.

The executor or administrator of an insolvent estate is the proper person to sue for and recover property conveyed by the deceased in fraud of creditors.

It may be that one or more creditors of an insolvent estate, upon refusal of the legal representatives to sue for property conveyed by the deceased in fraud of creditors, may recover the same in their own names; but for the common benefit of all creditors of like interest with themselves; but one or more creditors cannot recover the same for their own benefit, to the exclusion of other creditors equally meritorious with themselves.

ON exceptions to the ruling of the court in sustaining a demurrer to the bill.

Bill in equity by two creditors of the insolvent estate of Lot Libby, deceased, against Wm. K. Neal, administrator on the estate, and Charles E. Libby, to whom it was alleged the deceased fraudulently conveyed in his lifetime certain real estate. The bill asked "that said deed and conveyance from said Lot Libby to him (Charles E. Libby) be decreed null and void, and that the same be given up and cancelled, and that said Charles E. Libby be ordered to account for all the income and profits of said real estate received by him, and that said real estate and the income and profits thereof be subjected and applied to the payment of the several claims of and indebtedness to your orators."

Frank and Larrabee, for plaintiffs.

Where a debtor has conveyed away real estate in fraud of his

creditors, the creditors must first obtain judgments, and levy on said real estate before they can resort to equity to set aside said conveyance. *Howe* v. *Whitney*, 66 Maine, 17; *Webster* v. *Clark*, 25 Maine, 312; *Webster* v. *Whitney*, 25 Maine, 327; *Taylor* v. *Robinson*, 7 Allen, 253.

Where a debtor has paid for real estate conveyed by third party to his wife or other third party in fraud of his creditors, the creditors must obtain judgment on their claims but need not levy on said real estate previous to bringing their bill in equity. *Corey* v. *Greene*, 51 Maine, 114; *Dockray* v. *Mason*, 48 Maine, 178.

Where personal estate has been given by debtor in fraud of creditors, the administrator of the deceased debtor may maintain assumpsit against the fraudulent donee to recover the value of same. *McLean* v. *Weeks*, 61 Maine, 280; S. C. 65 Maine, 418.

Where real estate or personal estate has been conveyed in fraud of creditors, the administrator could not maintain bill in equity against grantee or donee, unless the claims of creditors had first been reduced to judgment or proved before commissioners in insolvency. *Fletcher* v. *Holmes*, 40 Maine, 365; *Caswell* v. *Caswell*, 28 Maine, 232.

But in none of the decisions in this State has a bill in equity by an executor or administrator to set aside a fraudulent conveyance of real estate by the deceased debtor been maintained. *Caswell* v. *Caswell*, 28 Maine, 232, where bill was dismissed, being the only case presented to the court.

In *Pulsifer* v. *Waterman*, 73 Maine, 241, it was held that the provisions of c. 113, § 68, R. S., applies to fraudulent conveyances of real estate, and that a creditor of deceased debtor could recover double the amount of his claim against the fraudulent grantee, without having reduced his claim to a judgment, or proved it before commissioners.

In *Fowler* v. *Kingsley*, Penn. Reports decided, November, 1878, and reported in The Reporter, vol. 7, p. 756, the court say, "Fraud is one of the recognized subjects of equity jurisprudence. . . . As a rule, courts of equity have jurisdiction to

relieve against every species of fraud. . . It is espceially adapted to this class of cases."

See also Bump on Fraudulent Conveyances (3d ed.) p. 540; *Dunn* v. *Murt*, Dist. of Columbia, in October, 1885, case reported in 1 Central Reporter, 85; *Hagan* v. *Walker*, 14 Howard, 33.

In *Kennedy* v. *Creswell*, 11 Otto, 645-6, the court say: "The authorities are abundant and well settled that a creditor of a deceased person has a right to go into a court of equity for the discovery of assets and payment of his debts."

In book 17, p. 554 of Lawyers' Co-operative Edition of U. S. S. C. Reports, note at bottom of page the following: "Creditors of a deceased person may come into court of equity and ask to reach the property belonging to his estate for the satisfaction of their claims without having previously established the amounts of their debts by judgment at law, particularly where estate is insolvent, and debt could not be paid in ordinary course of administration," and the following authorities are cited in support of same. *Offert* v. *King*, 1 McArthur, 312; *Whitney* v. *Kimball*, 31 Ill. 336; *Steere* v. *Hoaglana*, 39 Ill. 264; *Hall* v. *Joiner*, 1, S. C. 186.

As to right of creditors to join in one bill, we cite following cases: Bump on Fraudulent Conveyances, 3d ed. 547; *Brinkerhoff* v. *Brown*, 6 Johns. Ch. 152; *Birely* v. *Staley*, 25 Am. Dec. 303; *Edmeston* v. *Lyde*, 1 Paige, 637; *Clarkson* v. *DePeyster*, 3 Paige, 320; Story on Eq. Pl. § § 286, 531-2-3-5-7; *Chapman* v. *Banker & Tradesman*, 128 Mass. 478.

As to joinder of administrator as party defendant we cite *Dunn* v. *Murt*, 1 Central Reporter, 85.

In *Hagan* v. *Walker*, 14 Howard, 29, the court say: "A court of equity has jurisdiction of a bill against the administrator of a deceased debtor and a person to whom real and personal property was conveyed by the deceased debtor for the purpose of defrauding creditors."

In *Kennedy* v. *Creswell*, 101 U. S. 641, bill by creditor against executor and devisees for discovery was sustained.

To the same point we cite case reported in 25 Am. Rep. 678 (54 Ala. 277).

That the administrator has no statute power in this State to resort to equity to reach real estate, conveyed by the deceased debtor, previous to the recent equity statutes, there can be no question; and that this power did not exist by virtue of general equity jurisdiction, although otherwise intimated in *Caswell* v. *Caswell*, we cite the following: *Peaslee* v. *Barney*, 1 D. Chipman (Vt.) case reported in 6 Am. Dec. 743; also *Martin* v. *Martin*, 1 Vt. 91.

In *Crosby* v. *DeGraffenreid*, 19 Ga. 290, the court say: "The creditors have no title to the property, but a right to subject it to the payment of their debts. The executor cannot, therefore, be trustee of this property, any more than his testator could if living. The executor cannot have more rights than the testator had. Besides, the court say, the creditors have an ample remedy, one in fact better, more direct and less expensive than to allow the executor to recover for them." See also 54 Ala. Dec. 1875, reported in 25 Am. Rep. p. 678; *Ewing* v. *Handley*, 4 Littel (Ky.) 346 (2); *Partee* v. *Matthews*, 53 Miss. 140; *Blake* v. *Blake*, 53 Miss. 182; *Loomis* v. *Tift*, 16 Barb. 545; Bump on Fraudulent Conveyances, 444-5, in 3d ed. 438 in 2d ed.

See Public Statutes of Mass. ch. 151, § 2, c. 11, and § § 3 and 4; R. S. of Maine, c. 77, § 6,—x and xi.

Section 3 in Mass. statute is embraced in last part of § 6—x of Maine stat.

We cite the following Massachusetts decisions as construing above statutes, in addition to the authorities annotated under said sections in the revision of 1882. *Bresnihan* v. *Sheehan*, 125 Mass. 11; *Barry* v. *Abbot*, 100 Mass. 396; *Tucker* v. *McDonald*, 105 Mass. 423; *Crompton* v. *Anthony*, 13 Allen, 36-7; *Welsh* v. *Welsh*, 105 Mass. 229; *Parker* v. *Flagg*, 127 Mass. 28.

That the fraudulent grantee is sufficiently protected see *Pulsifer* v. *Waterman*, 73 Maine, 241-2.

Holmes and Payson, for Charles E. Libby, and *Ardon W. Coombs*, for Wm. K. Neal, administrator, defendants, cited: *Caswell* v. *Caswell*, 28 Maine, 232; *Webster* v. *Clark*, 25

Maine, 313; *Howe* v. *Whitney*, 66 Maine, 18; *Fletcher* v. *Holmes*, 40 Maine, 364; *McLean* v. *Weeks*, 61 Maine, 280; *Parker* v. *Flagg*, 127 Mass. 28; *Hall* v. *Sands*, 52 Maine, 355; *Taylor* v. *Robinson*, 7 Allen, 253; *Legro* v. *Lord*, 10 Maine, 161; *Phoenix Ins. Co.* v. *Abbott*, 127 Mass. 558; *Donnell* v. *R. R. Co.* 73 Maine, 570; *Baxter* v. *Moses*, 77 Maine, 465; *Chapman* v. *B. & T. Pub. Co.* 128 Mass. 478; *Trow* v. *Lovett*, 122 Mass. 571; *Wilmarth* v. *Richmond*, 11 Cush. 463; *Dockray* v. *Mason*, 48 Maine, 178; *Pulsifer* v. *Waterman*, 73 Maine, 241; *Reed* v. *Reed*, 75 Maine, 268; *Baxter* v. *Moses*, 77 Maine, 465; *Hayden* v. *Whitmore*, 74 Maine, 230; *Martin* v. *Abbot*, 1 Maine, 333; Bump. Fraud. Con. 555.

HASKELL, J. The joint bill of two creditors of a deceased debtor, whose estate was represented insolvent in the probate court, against an alleged fraudulent grantee of the debtor and his administrator, to recover certain land supposed to have been voluntarily and without consideration conveyed by the debtor in his lifetime to the respondent grantee in fraud of creditors.

The executor or administrator of an insolvent estate is charged by law with the collection and distribution of all the assets of the deceased, including property conveyed by the deceased in fraud of creditors; and to accomplish this result he may have the aid both of courts of law and of equity, even where the deceased, if alive, could have no relief. The legal representative of an insolvent estate is a trustee for the various persons interested in the distribution of the estate according to their respective legal and equitable interests. *Caswell* v. *Caswell*, 28 Maine, 235; *Pulsifer* v. *Waterman*, 73 Maine, 233; *McLean* v. *Weeks*, 61 Maine, 277, 65 Maine, 411; *Reed* v. *Reed*, 75 Maine, 264.

Dicta in some of these cases indicate that the legal representative has the sole right to maintain an action or suit to recover assets for the benefit of an insolvent estate, even though he refuses to attempt their recovery; but whether upon tender of indemnity to the representative, followed by his refusal to sue

in equity to recover estate conveyed by the deceased in fraud of creditors, one or more creditors may not maintain their bill to recover the same for the benefit of all creditors entitled to share in it by making the representative a party respondent upon apt averments, thereby virtually making the suit one in his behalf, it is unnecessary to now decide, for the bill does not aver any refusal of the respondent administrator to perform his full duty in recovering the property, said in the bill to have been conveyed in fraud of creditors.

It is clear however, that the present bill cannot be maintained, if for no other reason, for want of equity, inasmuch as it seeks a preference for the orators over other creditors of like merit.

In the settlement of insolvent estates, the aim of the law is "to produce an equitable, *pro rata* distribution of all that remains of the dead man's property or effects;" and to best serve this purpose, a recovery by the legal representative, or by creditors in his behalf, of assets that ought to be distributed, is the most efficacious method, and the only one that commends itself to a court of equity. If the orators would have individual relief, let them seek it in an action at law, and not ask a court of equity to give them an inequitable preference over other creditors of of equal merit with themselves.

If the debtor were alive, the orators could not maintain this bill against the fraudulent grantee, inasmuch as they have not exhausted their remedy at law. *Howe* v. *Whitney*, 66 Maine, 17; *Buxter* v. *Moses*, 77 Maine, 465; and after he is dead, why should they have equitable relief that they could not have in his lifetime?

Nor can the bill be maintained under the act of 1876 as an equitable garnishee process, for neither the allegations in the bill nor the parties to it bear proper relations to a suit of that kind. *Donnell* v. *Railroad*, 73 Maine, 567.

Exceptions overruled. Bill dismissed with costs on the exceptions.

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

SAMUEL BUNKER *vs.* J. FRANK BARRON.

Somerset. February 3, 1887.

Deeds. Mortgages. Promissory notes. Payment. Presumption.

A deed, absolute upon its face, together with an instrument of defeasance under seal executed at the same time, as part of the same transaction, between the same parties, constitutes a mortgage.

It is a well settled rule of law in this state that a negotiable note, given for a simple contract debt, is *prima facie* to be deemed a payment or satisfaction of such debt.

This presumption relates to the intention of the parties and may be rebutted and controlled by evidence that such was not their intention.

Such presumption may be rebutted by proof of facts or circumstances under which the negotiable paper was received, showing that it was not intended to operate as payment.

As a general rule, and in the absence of any express agreement, this presumption will be overcome where it would deprive the creditor taking the note of the substantial benefit of some security, such as a mortgage, guaranty or the like.

Nothing but payment of the debt, or its release will discharge a mortgage.

ON report.

Writ of entry. The facts are stated in the opinion.

J. J. Parlin, for plaintiff.

The note of February 1, 1875, was payment of all demands Paine held against William Quint and of all other indebtedness to Paine from either of the Quints, because it is negotiable and therefore presumed to be in payment of what it was given for. 2 Parsons on Notes and Bills, 150, note a. Parsons on Contracts, 8th ed. vol. 2, p. 776. This is the law in Massachusetts, Maine and Vermont.

C. J. APPLETON says on page 165, Maine Rep. Vol. 56, "By the law of Massachusetts and of Maine, the giving a negotiable note or draft is to be deemed *prima facie* evidence of payment." In *Thacher* v. *Densmore*, 5 Mass. 299, and in *Whitcomb* v. *Williams*, 4 Pick. 228, it is held to be an absolute payment and discharge of the debt. Nothing is shown to rebut the presump-

tion of law that it, the note dated February 1, 1875, was given in payment.

The payment by Quint to Paine was by one whose duty it was to pay the Bunker note and mortgage, and the release or giving a new bond by Paine to him will be held to operate as a discharge. 100 Mass. 131. I refer to the case of *Wadsworth* v. *Williams and others*. Also *Gibson* v. *Crehore*, 3 Pick. 475, and *Brown* v. *Lapham*, 3 Cush. 552.

The deed and bonds back unquestionably constitute mortgages. None of the authorities cited by defendants have any tendency to show the contrary. The case of *Bayley* v. *Bailey*, 5 Gray, 509, decides the bond then in question to be a mortgage, and decides nothing further. *Harrison* v. *Phillips Academy*, 12 Mass. 465, contains nothing in point. In *Bodwell* v. *Webster*, 13 Pickering, 415, and especially in *Flagg* v. *Mann*, 14 Pickering, 480, there was no debt contracted by the mortgagor.

The great question in the case is whether the transaction of February 1, 1875 did not constitute a payment and discharge of the original first mortgage on the premises here in controversy. Upon this the authorities cited by the counsel for the defendants throw no new light. The case *Taft* v. *Boyd*, 13 Allen, 86, merely decides the question whether the old note was paid by the new, under the circumstances of that particular case, was a question of fact to be submitted to the jury. *Crosby* v. *Chase*, 17 Maine, 369, holds only that an apparent discharge of a mortgage will be vacated if the intended consideration fails. *Davis* v. *Maynard*, 9 Mass. 242; *Parkhurst* v. *Cummings*, 56 Maine, 155, only state the familiar rule, that the renewal of a note is not payment unless so intended. In other words, the giving of a new note, especially for the same amount, is not conclusive of payment. Nor is any such rule contended for by the plaintiff here. Our contention simply is that the giving of the new note here, under the circumstances of this particular case, is a payment. The grounds for this we have already reviewed.

D. D. Stewart and *A. H. Ware*, for the defendant, cited: *Rowell* v. *Mitchell*, 68 Maine, 25. No mortgage without a debt. Jones, Mortgages, § 269; *Flagy* v. *Mann*, 14 Pick. 480; *Bayley* v. *Bailey*, 5 Gray, 509; *Bodwell* v. *Webster*, 13 Pick. 415; *Harrison* v. *Phillips Academy*, 12 Mass. 465; *Graves* v. *Graves*, 6 Gray, 392.

Change in the form of mortgage debt will not discharge the mortgage. *Taft* v. *Boyd*, 13 Allen, 84; *Davis* v. *Maynard*, 9 Mass. 242; *Parkhurst* v. *Cummings*, 56 Maine, 155; *Crosby* v. *Chase*, 17 Maine, 369; *Pomroy* v. *Rice*, 16 Pick. 24; *Hill* v. *Beebee*, 13 N. Y. 563; Jones, Mortgages, § 927.

As to presumption of payment. *Machine Co.* v. *Brock*, 113 Mass. 194; *Gregory* v. *Thomas*, 20 Wend. 20; *Fowler* v. *Ludwig*, 34 Maine, 460; *French* v. *Price*, 24 Pick. 13; *Kidder* v. *Knox*, 48 Maine, 551; *Wilkins* v. *Reed*, 6 Maine, 220 (2 ed. note); *Butts* v. *Dean*, 2 Met. 76; *Curtis* v. *Hubbard*, 9 Met. 328; *Perrin* v. *Keene*, 19 Maine, 355; *Paine* v. *Dwinel*, 53 Maine, 52; *Page* v. *Hubbard*, Sprague, 335.

Mortgagor can not maintain writ of entry against a mortgagee in possession. *Rowell* v. *Mitchell*, 68 Maine, 21; *Rowell* v. *Jewett*, 71 Maine, 409.

Deed and defeasance, when and under what circumstances a mortgage. *Newhall* v. *Pierce*, 5 Pick. 450; *Newhall* v. *Burt*, 7 Pick. 158; *Smith* v. *Monmouth M. F. Ins. Co.* 50 Maine, 96; *Bailey* v. *Myrick*, 50 Maine, 171; *Knight* v. *Dyer*, 57 Maine, 174; R. S., c. 73, § 9.

Defence to writ of entry. *Stanley* v. *Perley*, 5 Maine, 369; *Walcot* v. *Knight*, 6 Mass. 418; *Williams Coll.* v. *Mallett*, 16 Maine, 84; *Bussey* v. *Grant*, 20 Maine, 281; *Bruce* v. *Mitchell*, 39 Maine, 390; *Derby* v. *Jones*, 27 Maine, 357; 2 Greenl. Ev. §§ 331, 556; *Chaplin* v. *Barker*, 53 Maine, 275; Jackson, Real Actions, 161.

FOSTER, J. The plaintiff claims the premises in question under a mortgage to him from William Quint, dated September 12th, 1874. While the tenant in possession does not claim to own the premises, or any part thereof, his defence is based on a

title, earlier in point of time, in William Barron, his father, whose agent or servant he is in the occupation and possession of the premises. That title originated in this way. On January 7, 1868, William and Draxcy Quint, and Mary Quint, their mother, conveyed by warranty deed to John S. Paine, who on the same day and as part of the same transaction, gave back a bond to these parties, therein agreeing to reconvey the premises, being the farm where they then lived, upon payment to him by them of the sum of three hundred dollars in annual payments of one hundred dollars each in three, four and five years from date, and also all other debts which the said Quints should thereafter contract with the said Paine. No notes accompanied these transactions. The bond was not recorded till May 26, 1876. November 7, 1874, the Quints obtained $225 more from Paine, and William and Draxcy on that day conveyed to him by warranty deed another small parcel of land adjoining the home farm. February 1, 1875, in consideration of one hundred dollars paid by Paine, Lydia, the wife of William Quint, released her right of dower in the home farm. At the same time William Quint gave Paine his note for $872.34, and Paine gave him back a bond therein agreeing to convey to him the farm and the other parcel named, upon payment by said Quint of the said note. No part of this note has ever been paid. Paine conveyed the the premises, and his title has come to William Barron, the defendant's father, under whom he is in possession.

The plaintiff claims that the deed of January 7, 1868, to Paine and the bond back to the same parties constituted a mortgage of the premises, and that the subsequent transactions of February 1, 1875, between William Quint and Paine, extinguished the mortgage, thereby letting in the plaintiff's title upon which he bases this action to recover possession of the premises.

While we are of the opinion that the deed and instrument of defeasance executed at the same time, and between the same parties, constituted a mortgage, we feel confident that the same was neither paid nor extinguished by what took place between

William Quint and Paine, February 1, 1875. At that time, to be sure, everything due was reckoned up and embraced in the note of $872.34. This included the amount specified in the first bond, the several notes which had been given from year to year as interest on that amount, the sum of about two hundred and twenty-five dollars lent the November before, together with interest on all these sums up to the time the note was given. And we may well assume that it contained all the other indebtedness from the Quints contracted between the time when the first bond was given and the time when the note was dated, inasmuch as the first bond provided for the payment of all other debts, in addition to the specific sum therein named, which the obligees should thereafter contract with the obligor,—and inasmuch also as William Quint himself states, that the note was given not only for the sum named in the first bond but for "all other indebtedness to said Paine from us." His testimony is that the note was given in payment of all matters between the Quints and said Paine. The question is whether it was such payment as amounted to an extinguishment of the mortgage. Paine is dead, and his testimony is not before us. The circumstances surrounding the transaction, taken in connection with the evidence in the case, have an important bearing upon the question, and afford sufficient light by which we are enabled, we think, to judge correctly of the intention of the parties relative to that transaction.

It is the well settled rule of law in this State, as also in Vermont and Massachusetts, that a negotiable note given for a simple contract debt is *prima facie* to be deemed a payment or satisfaction of such debt. But it is equally well settled, if not as frequent in its application, that this presumption may be rebutted and controlled by evidence that such was not the intention of the parties. *Fowler* v. *Ludwig*, 34 Maine, 460; *Dodge* v. *Emerson*, 131 Mass. 467. From these and many other cases it may be seen that the presumption relates to the intention of the parties, and that such presumption may be rebutted by proof of facts or circumstances under which the negotiable paper was received showing that it was not intended

by the parties to operate as payment. Whenever it may properly be inferred that the parties did not so intend, the court, when invested with authority so to do, will ascertain and carry out the intention of the parties.

The circumstances which might have such an effect are so numerous, even in the decided cases, that it would not be proper even if it were possible, to enumerate them in a single opinion. Of the very many that have been spoken of by the courts, we may properly refer to a few as bearing somewhat upon the questions involved in the case before us.

Thus it has been held that where a note is taken in ignorance of the facts, or under a misapprehension of the rights of the parties, as where the negotiable paper is not binding on all the parties primarily liable, the presumption that it was taken in payment is rebutted. *Paine* v. *Dwinel*, 53 Maine, 52; *Kidder* v. *Knox*, 48 Maine, 555; *Melledge* v. *Boston Iron Co.* 5 Cush. 170; *Strang* v. *Hirst*, 61 Maine, 15.

In a number of the decided cases it has been held that where the debt consists of a note secured by mortgage, the renewal of the note is not to be presumed a payment so as to discharge the mortgage—*Taft* v. *Boyd*, 13 Allen, 86—in which case it was held that there is no conclusive presumption that a note and mortgage taken for the amount found due upon a computation of the amounts of former notes secured by mortgages, as well as of mutual claims unsecured by mortgage, were accepted in payment and discharge of such former notes and mortgages.

In *Kidder* v. *Knox*, 48 Maine, 555, it was laid down as a correct principle of law that whenever it appears that the creditor had other and better security than such note for the payment of his debt, it will not be presumed that he intended to abandon such security and rely upon his note.

To the same effect may be cited the case of *Lovell* v. *Williams*, 125 Mass. 442, in which the court say that the fact that such presumption of payment would deprive the creditor taking the note of the substantial benefit of some security, such as a mortgage, guaranty, or the like, would be sufficient evidence to meet and repel the presumption. And the same principle may

be found in the following cases: *Maneely* v. *M'Gee*, 6 Mass. 143; *Cowan* v. *Wheeler*, 31 Maine, 443; *Curtis* v. *Hubbard*, 9 Met. 328; *Tucker* v. *Drake*, 11 Allen, 147; *Machine Co.* v. *Brock*, 113 Mass. 196. In the case last cited a bond with sureties was given, conditioned that the principal should pay for all purchases made by him from the obligee, and it was held that the bond remained in force, notwithstanding the obligee received the notes of the principal for purchases made by him. "Taking the notes, therefore," the court say, "did not extinguish the debt or discharge the sureties. Even if the notes were treated as payment, the sureties would be held, for they bind themselves in terms to pay all notes given to the plaintiffs by Brock and Delano for machines purchased."

Moreover, in another case, where a bond was given, conditioned to secure the balance of account, and the debtor gave his negotiable promissory note to the creditor for the amount of the debt, and received a receipt from the creditor for the balance of account, it was held that the note was not intended as payment of the debt, or a discharge of the bond. *Butts* v. *Dean*, 2 Met. 76.

"The general doctrine is, that the taking of a note is to be regarded as payment only when the security of the creditor is not thereby impaired." *Paine* v. *Dwinel*, 53 Maine, 54.

In many if not most of the cases where the presumption of payment has been held to apply, it will be found that the original claim was not secured. But the cases are numerous in which this presumption has been held to be overcome by the facts and circumstances surrounding the transaction of giving the note, and in addition to those already cited may be added the following as among the more prominent. *Varner* v. *Nobleborough*, 2 Maine, 125; *Wilkins* v. *Reed*, 6 Maine, 221; *Descadillas* v. *Harris*, 8 Maine, 304; *Mehan* v. *Thompson*, 71 Maine, 501; *Parkhurst* v. *Cummings*, 56 Maine, 159; *Perrin* v. *Keene*, 19 Maine, 358; *Atkinson* v. *Minot*, 75 Maine, 193; *Thurston* v. *Blanchard*, 22 Pick. 18; *Appleton* v. *Parker*, 15 Gray, 174; *Grimes* v. *Kimball*, 3 Allen, 520; *Holmes* v. *First Nat. Bank*,

126 Mass. 359; *Dana* v. *Binney*, 7 Vt. 493; *Seymour* v. *Darrow*, 31 Vt. 122.

The facts in this case irresistibly repel the presumption that the note was intended as payment and discharge of the security of January 7, 1868. Not one dollar was paid at the time the note was given. Nor is it pretended that a dollar has actually ever been paid upon the mortgage since its first existence to the time this suit was brought. That mortgage was a lien upon the home farm. The mortgagee, on the very day the note was given, purchased the prospective right of dower from the wife of one of the mortgagors, paying therefor one hundred dollars. For what purpose, it may well be asked, was this purchase of the prospective right of dower in the farm from the wife of William Quint, if the intention of the mortgagee was, in taking the note in question, to release and discharge his mortgage which he then held upon it? If he was a stranger to any title in the farm at the time he received the deed of the wife's dower, certainly it would amount to nothing to him, as nothing would thereby pass by such deed. *Harriman* v. *Gray*, 49 Maine, 537.

It is apparent from the transactions that the parties understood and intended, when the note was given, that the mortgagee should retain his title till the debt was paid. This is shown not only from the fact that the mortgagee at that time purchased in the dower interest, but also from the fact that in the bond given at that time the title to the farm is therein recognized as still remaining in the mortgagee. Nor could it be reasonably supposed that had not such been the understanding of the parties, the mortgagee would have been willing to release the most valuable security, and rely alone upon the individual name of William Quint and a piece of real estate which had but recently been purchased for the sum of two hundred and twenty-five dollars. This understanding and intention is also manifest from the fact that when the indebtedness of the Quints was reckoned up and the note taken and new bond given, there was no cancellation or surrender of the bond of January 7, 1868, neither was there any conveyance made or asked for in accord-

ance with the terms of that bond. *Watkins* v. *Hill*, 8 Pick. 523.

In view of these facts and circumstances together with the evidence before us, it is impossible to arrive at any other conclusion than that it was the intention of the parties by their transactions of February 1, 1875, to leave the former security unaffected, and that the note was not intended as payment of the debt due at that time. There was a change in the form of the debt, but there was no actual payment of it. That is not enough to affect the mortgage. Nothing but payment of the debt or its release will discharge a mortgage. *Crosby* v. *Chase*, 17 Maine, 369; *Parkhurst* v. *Cummings*, 56 Maine, 159; *Ladd* v. *Wiggin*, 35 N. H. 426. "The mortgage remains a lien until the debt it was given to secure is satisfied, and is not affected by a change of the note, or by giving a different instrument as evidence of the debt." Jones on Mort. § 924; *Pomroy* v. *Rice*, 16 Pick. 24.

At the time the plaintiff acquired his mortgage from William Quint, neither of the bonds which had been given by Paine had been recorded, and the apparent record title to the premises was in John S. Paine. The bonds were not placed upon record till May 26, 1876—more than a year and eight months after the plaintiff's title accrued, and then by his procurement. Moreover, as late as February 24, 1879, the plaintiff appears to have understood that Paine's mortgage was a valid, subsisting claim upon the premises, and that he held only the right of redemption under it, as appears by his statements in writing contained in the notice and demand by him on Paine's administrator for an account of the sum due on the mortgage.

Paine's interest passed and became vested in William Barron, who is in possession, as the evidence discloses, by his agent or servant—the defendant in this suit. The rights of the defendant are the same, therefore, as those of the person whom he represents by that possession. This action could not be maintained by the mortgagor against the mortgagee or his assignee in possession without showing a satisfaction of the mortgage. Neither can it be maintained by the grantee of the mortgagor.

Woods v. *Woods*, 66 Maine, 206; *Jewett* v. *Hamlin*, 68 Maine, 172; *Rowell* v. *Jewett*, 71 Maine, 409.

Judgment for the defendant.

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

D. W. PILLSBURY and others

vs.

MAYOR AND ALDERMEN OF AUGUSTA.

Kennebec. Opinion February 5, 1887.

Practice. Certiorari. Ways. Petitioners withdrawing and remonstrating. Railroads. Damages.

Certiorari will not lie to quash the proceedings of the mayor and aldermen in discontinuing a portion of a street and thereby changing the course of travel, where they have acted upon a proper petition, although some of the petitioners may have withdrawn from the petition and remonstrated against the discontinuance before final action.

The legality of the proceedings is not affected by the fact that the railroad company, across which the street lay, was authorized by the city council to erect a stone wall along the west line of its land at the end of the street with stone steps for the use and convenience of foot passengers, thereby saving the city from any burden on account of such discontinuance.

Nor because no damages were assessed, or return made that none had been sustained.

ON report.

The opinion states the case.

The following is the petition and the final action of the mayor and alderman thereon.

(Petition.)

"To the Honorable Mayor and Aldermen of the City of Augusta:

"The undersigned taxpayers and citizens of Augusta, respectfully represent that Oak street, directly west of the railroad track, is very steep and narrow, and inconvenient and dangerous for public travel by horses and vehicles, on account of the natural formation of the rock which forms the earth's surface at that point; that it is necessarily expensive, difficult and almost

impossible to have the same kept safe and convenient at all times for travelers with teams; that Dickman street, having an easy grade, unites with Oak street near that point and affords convenient and ample access by teams to and from all points on Oak street; that it would be no injury to persons or property to have said street at the point between the railroad and the east line of Dickman street closed to travel with horses and teams.

"Your petitioners also represent that the sidewalk of said street at the point aforesaid (and westerly) is of wood, uneven, rotten and dangerous to foot travelers, and of a steep grade, and ought to be entirely rebuilt of granite, and its grade made easier and the foot path wider.

"Therefore your petitioners respectfully ask that you cause the portion of Oak street which lies westerly of the railroad track and easterly of Dickman street, to be closed to travel by horses and teams, so that it will be practicable to widen and improve the sidewalk in a permanent manner, and as in duty bound will ever pray.

"E. E. Myrick, and sixteen others."

"Voted, That any matter relative to damages in case of the discontinuance of Oak street, be referred to the committee on new streets, to report at the next meeting of the board.

"Ordered, That course of public travel on Oak street for horses, teams and carriages, shall be changed at the east line of Dickman street, extended northerly to a point twelve feet south of the north line of Oak street and turned into Dickman street, and that that part of Oak street from said extended line easterly to the west rail of the railroad track, be closed to public travel for horses, teams and carriages.

"Ordered, That the Maine Central Railroad be, and hereby are, authorized to erect a stone wall from the east line of Dickman street, extending northerly to a point twelve feet south of the north line of Oak street, and to erect stone steps on said point from twelve feet south of the north line of Oak street to the north line of said street, provided they will remove the brick water tank now standing near the foot of Oak street, and keep the stone steps to the sidewalk covered with planks or boards in

the winter, so as to make it safe and convenient for foot travel.

"Said wall to be built under the direction of the street commissioner, mayor, and committee on highways."

S. and L. Titcomb, for the plaintiffs.

The order provided that the course of public travel under certain specified conditions should be changed, and that a portion of the street should be closed — as it was closed — to public travel for horses, teams and carriages. The conditional discontinuance of this portion of the street, as specified in the report of the committee and acceptance, is illegal and void. *Christ Church* v. *Woodward*, 26 Maine, 172; *State* v. *Calais*, 48 Maine, 456.

A part of the action of the Board of Aldermen being void and not authorized by or conformable to the petition, the whole must be quashed. *Dwight* v. *City of Springfield*, 4 Gray, 110; *Commonwealth* v. *West Boston Bridge*, 13 Pick. 195.

When an alteration is made in an existing highway by lawful authority, it operates *ipso facto* as a discontinuance of so much of the old way as lies between the two points where the alteration begins and ends. *Cyr* v. *Dufour*, 68 Maine, 499; *Commonwealth* v. *Cambridge*, 7 Mass. 165; *Same* v. *Inh. of Westborough*, 3 Mass. 407.

In *Commonwealth* v. *Coombs*, 2 Mass. 493, no damages were assessed, nor was there any return that none had been sustained. This objection and several others, were considered fatal. The court say, "The proceedings must necessarily be quashed, as they can not be supported against either of these exceptions."

The answer does not deny, and the record shows, that the orders of the mayor and aldermen did provide for a conditional adjustment with the Maine Central Railroad Company, which was accepted by that company, and the wall built, etc., in accordance therewith. This action was unauthorized and illegal. *Christ Church* v. *Woodward*, 26 Maine, 180.

By the report of the committee it appears that nine of the seventeen original petitioners withdrew their names from the petition before the hearing. A majority of the petitioners having

thus withdrawn, no valid action could subsequently be had thereon. This fatal defect is not cured by the allegation in the answer, that before final action was taken on the petition it included twenty-two persons, and that a majority of said signers (the twenty-two) which must have included eight only (a minority) of the original signers, and fourteen new signers, thus making a new petition, upon which no notice as required was given, and upon this new petition, upon which notice had never been given, and not upon the old petition, thus withdrawn by the action of a majority of the original signers, the final action referred to in the second specification of the answer, was taken.

No extrinsic evidence, *dehors* the record, can be introduced, and the allegations in the answer of the respondents setting forth new facts, are irregular, and can not control the record. *Charlestown* v. *Co. Com'rs of Middlesex*, 109 Mass. 270; 5 Allen, 16.

Baker, Baker and Cornish, for the defendants.

Answer conclusive as to facts. *Farmington River Co.* v. *Co. Com.* 112 Mass. 206; *Great Barrington* v. *Co. Com.* 112 Mass. 218; *Tewksbury* v. *Co. Com.* 117 Mass. 563.

A way may be discontinued in part. *Vassalboro'*, *Pet'rs*, 19 Maine, 338; *Jones* v. *Portland*, 57 Maine, 42.

Streets may be laid out at any width. *Baldwin* v. *Bangor*, 36 Maine, 518; see *Cassidy* v. *Bangor*, 61 Maine, 434.

Proceedings not affected because the railroad bore the expense. *Parks* v. *Boston*, 8 Pick. 218; *Copeland* v. *Packard*, 16 Pick. 217; *Crocket* v. *Boston*, 5 Cush. 182; *Gay* v. *Bradstreet*, 49 Maine, 580; *Coombs* v. *Co. Com.* 68 Maine, 484; see *Smith* v. *Boston*, 7 Cush. 255; *Castle* v. *Berkshire*, 11 Gray, 26; *State* v. *Brewer*, 45 Maine, 606; *Hicks* v. *Ward*, 69 Maine, 436.

Granting a writ of certiorari is a matter of discretion. *Rand* v. *Tobie*, 32 Maine, 450; *Furbush* v. *Cunningham*, 56 Maine, 184; *Jones* v. *Portland*, 57 Maine, 42; *Levant* v. *Co. Com'rs*, 67 Maine, 429; *Hayford* v. *Co. Com'rs*, 78 Maine, 153.

FOSTER, J. Petition for certiorari to quash the proceedings of the mayor and aldermen of the city of Augusta in discontinuing

a portion of Oak street, and thereby changing the course of travel through Dickman street, on account of certain alleged errors and defects in the records relating to such proceedings.

The case comes before the court upon report of the petition and answer, no evidence having been taken on either side.

Nine errors are assigned. The second is not insisted upon, and the remainder, several of which relate substantially to the same objection, may be grouped into three classes.

1. The cause first assigned is that a majority of the original petitioners for the discontinuance and change of the course of travel of the street in question, withdrew their names from the petition, and remonstrated against the same before final action taken by the municipal authorities of the city.

Assuming this to be true as claimed by these petitioners, we do not think this is error. The petitioners in the proceedings were citizens of Augusta, and the petition related to a subject matter over which the city council had jurisdiction. It is not suggested that the petition was not in due form. Its object was to call the attention of the city council to the suggested change. It gave them jurisdiction over the subject matter, and jurisdiction having attached, it was then in their province to determine what changes, if any, in accordance therewith, public convenience required. Although the petitioners might deem it for the best interests of the public that certain changes should be made, the council were not necessarily to be governed by their suggestions. While the petitioners might consider it proper that the discontinuance and change suggested by them should be made, the city council were possessed of discretionary powers, and were to be governed not particularly by the number of names upon the petition, or the statements set forth in it, but upon evidence adduced at the hearing, and whose decision was to be rendered upon what might be considered by them to be for the public good. The petition having been received, afforded the proper basis for an investigation in relation to what the public interests might seem to demand, rather than for the purpose of superseding their discretion. *Cassidy* v. *Bangor*, 61 Maine, 440. Consequently, jurisdiction having once attached, the mere question

of numbers does not become essential to the validity of the proceedings.

2. The second class of errors alleged is, that the discontinuance was conditional; that the Maine Central Railroad was authorized to erect a stone wall across a portion of the street, and that the action of the municipal authorities of the city in thus authorizing this erection, based their adjudication in reference to the discontinuance and change upon a contemplated bargain with said railroad, and not upon public convenience and necessity, thereby benefitting individuals, or a corporation, to the detriment of the public, and especially of those residing upon said street.

A copy of the records of the city council in relation to the whole proceedings, has been laid before the court in the answer of the respondents. Not having been annexed to the petition, these copies properly form a part of the respondents' answer, which, so far as it relates to the record in question, is in the nature of a return of the doings of the city council, and is conclusive of the facts set forth in such record. *Levant* v. *Co. Commissioners*, 67 Maine, 435; *Tewksbury* v. *Co. Commissioners*, 117 Mass. 564; *Fairbanks* v. *Fitchburg*, 132 Mass. 43.

From an inspection of those records, we are satisfied that the action of the city council was neither conditional, nor based upon any bargain with the railroad. We are to assume that the records speak the truth. We must take them as they appear. The petition for the proposed discontinuance and change contains no reference to any action on the part of the railroad. Upon that petition due notice was given, a hearing had, and the discontinuance was ordered and effected. The order passed by the city council appears to be in the most explicit terms — is absolute and unqualified, and based upon no condition or bargain. The recommendation of the committee of the board, it is true, states that they believe the public interests demand the alteration, as prayed for by the petitioners, provided Dickman street is improved and graded. But this was a statement in their report to the board, and was not the final action of the council in the discontinuance of the portion of the street in question. It by no means establishes

the fact that the discontinuance was conditional. In the same report, the committee before whom the hearing was had, state that the street was not used to any extent as a highway for horses, teams and carriages, on account of the great ascent which made it dangerous in its abrupt approach upon the railroad crossing, and that it could not be graded without great expense to the city, as well as injury to the property of the residents upon it. That report negatives the claim set up in relation to any bargain or offer on the part of the railroad company, and asserts in positive terms that public convenience and necessity demanded the alteration.

But the records show that at the same meeting at which final action was taken and the discontinuance was effected, another order was also passed authorizing the railroad company to erect a stone wall along the west line of the railroad, across a portion of the street, with stone steps twelve feet in width, to be covered with boards in the winter season, for the use and convenience of foot passengers. This wall was to be built under the direction of the street commissioner, mayor and committee on highways.

The effect of this order was that the railroad company, by being authorized to construct the wall, bore the expense attendant upon the discontinuance, and thereby saved the city from any burden on that account.

The legality of the proceedings were not affected by this fact. The same question came before the court in Massachusetts in the case of *Parks* v. *Boston*, 8 Pick. 218, in which the court meet the objection in these words: "If the public necessity and convenience required the alteration, it is immaterial at whose expense it was made. A donation or contribution from individuals to relieve the burden upon the city, has no tendency to prove that the enlargement of the street was not a public benefit. It is not material at whose expense such are laid out or altered." The same doctrine has been laid down in this state in the case of *Gay* v. *Bradstreet*, 49 Maine, 580, and in *Coombs* v. *Co. Commissioners*s 68 Maine, 484.

3. The last assignment of error is that no damages were assessed, nor return made that none had been sustained, although

by a vote at a meeting prior to that upon which final action was taken, all matters relating to damages were referred to a committee who were requested to report at the next meeting of the board.

It has been decided in several cases that the proceedings in relation to the discontinuance of ways are not affected on account of there being no determination in relation to damages, and nothing done upon that subject. *Howland* v. *Co. Com.* 49 Maine, 143; *Hicks* v. *Ward*, 69 Maine, 441. Nor do we think the present case is one which calls for any exception to the rule. The action of the city council appears to be based upon the ground of public convenience and necessity. In such cases, much must be left to the discretion of the tribunal whose province it is to determine those questions. Nothing appears from the records to show that they have not honestly exercised that discretion, or that there has been such informality or illegality in the proceedings as to warrant this court in granting the prayer of these petitioners. *Bethel* v. *Co. Commissioners*, 60 Maine, 539.

Writ denied with costs.

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

LIBBEY, J., did not sit.

A. JACKSON SMALL *vs.* AMOS D. ORNE and another.

Knox. Opinion February 5, 1887.

Election of constable. Casting vote by mayor. R. S., c. 3, §34. Intoxicating liquors. Search and seizure. Trespass.

Where, by the city charter, the mayor is allowed a casting vote in the city council, in accordance with R. S., c. 3, § 34, his act is sufficiently formal for that purpose if he determines and declares which of the candidates is elected, although he may not go through the formality of casting a ballot.

A warrant was issued authorizing the defendant to enter "the saloon, outbuildings, and appurtenances thereof, occupied by the" plaintiff, "and situated on the west side of Main street, also the cellar under the saloon, and rooms above, in said Rockland," and there search for intoxicating liquors. The rooms above the saloon, except one used as a restaurant,

were occupied by the plaintiff as a dwelling. The officer entered the saloon and searched for intoxicating liquors. In an action of trespass against the officer: *Held*, that the warrant authorized him to enter the saloon and there search for intoxicating liquors, and in so doing he would not be liable in trespass.

On report.

The opinion states the case.

Robinson and Rowell, for plaintiff.

"A dwelling house is the apartment, building, or cluster of buildings, in which a man, with his family, resides." Bishop on Statutory Crimes, § 278.

"If one part of a building is used for abode, it gives the character of dwelling house to every part to which there is an internal communication." *Id.* § 280.

"If there is no internal communication, the parts are to be considered as though they were distinct buildings." *Id.* § § 280, 285.

In *State* v. *Spencer*, 38 Maine, 30, the warrant, like the complaint, charges "that spirituous and intoxicating liquors are kept and deposited in a certain building, part of which is used as a store, and part for a dwelling house." The court say on page 32, "It does not appear that a shop or other place is kept for the sale of liquors in that part of the building used as a dwelling house, without which allegation in the complaint, no warrant could be issued to search the dwelling house."

See also *McGlinchy* v. *Barrows*, 41 Maine, 74, where it is held that a warrant thus defective is no justification for the officer, and also *State* v. *Staples*, 37 Maine, 228, and *State* v. *Carter*, 39 Maine, 262.

"A magistrate has no authority to issue a warrant to search a dwelling house for intoxicating liquors . . unless it shall first be shown to him by the testimony of witnesses, etc. . . Unless the warrant shows this preliminary proceeding, it is void." *State* v. *Staples*, *supra*, and *Jones* v. *Fletcher*, 41 Maine, 254.

In *State* v. *Kiely*, 116 Mass. 342, under a statute like ours, the complaint alleged that intoxicating liquors were kept "in a certain tenement on Derby Square, and numbered 6 on said

square, and the rooms over the tenement on the first floor numbered 6, on said square, the entrance to said rooms being numbered 8 on said square." The warrant followed the complaint, and directed the officer to enter and search the premises mentioned. The court held the warrant was void.

The provisions of the act of 1885, so far as they relate to the election of constables, are unconstitutional. The constitution provides that cities may vote in their wards for all officers they have been accustomed to vote for. Constitution of Maine, Art. IV., part 1, § 5. And because it is local legislation and is a change in the general laws of the state, to apply to but one locality. *State* v. *Flemming*, 66 Maine, 142.

By R. S., c. 3, § § 12 and 13, provision is made that constables must be elected by the ballots of the citizens, unless some other method is agreed upon by vote of the town.

A constable is not a mere local officer; he is a state officer, and may serve precepts any where in the county where he is elected. *Sullivan* v. *Wentworth*, 137 Mass. 233; 1 Dillon, Mun. Corp. (3d ed.) § 60 and notes, and § § 58 & 59 and notes.

The provisions of the charter as to time and mode of election must be strictly observed. 1 Dillon, Mun. Corp. § 207.

C. E. Littlefield, for defendants.

The election of the constable was legal. *Sampson* v. *Bowdoinham S. M. Corp.* 36 Maine, 78; 1 Dill. Mun. Corp. § 285; Morawetz, Corp. § 359; 1 Pick. 154; 9 Pick. 97; 12 Allen, 480.

The warrant was regular. *State* v. *Woods*, 68 Maine, 409.

FOSTER, J. This is an action for breaking and entering the plaintiff's shop. The defence is justification as constable of the city of Rockland, and by virtue of a complaint and warrant from the police court of said city.

But two questions of any importance are involved in the decision of this case: (1.) Was the defendant, Orne, a legally elected constable? (2.) If legally elected and qualified, was the warrant with which he was armed a justification for the

acts of himself and of the other defendant who was acting as his aid?

I. No discussion is necessary in establishing the fact that Orne was legally elected. The report shows that his election was at a regular and stated meeting of the city council, and that an equal number of ballots were cast for Orne and one Cook, each receiving thirteen votes. Thereupon the mayor, after ascertaining the fact that an equal number of ballots had been cast for each of the two candidates, without going through the formality of casting a ballot, determined and declared that Orne was elected.

The amended charter of the city in force at the date of this election, (Laws of 1885, c. 482, § 3) allowed the mayor a casting vote. His act was sufficiently formal to bring it within the provisions of § 34, c. 3, R. S., wherein it is provided that "in the election of any city officers by ballot in the board of aldermen, or in convention of the aldermen and common council, in which the mayor has a right to give a casting vote, if two or more candidates have each half of the ballots cast, he shall determine and declare which of them is elected."

Authority is conferred by the city charter upon the city council to elect one or more constables. The number is not limited. It rests in the discretion of the city council whether they will elect one or many constables. From their records, the order which was passed in concurrence provided for the election of five or more city constables. Twenty-six out of the twenty-eight members composing the city council were present and voted. The defendant, Orne, was legally elected, and he afterwards qualified, as appears from the report. It therefore becomes unnecessary to discuss the objections in detail relating to this particular branch of the case.

II. The warrant commanded the defendant to enter "the saloon, outbuildings, and appurtenances thereof, occupied by the" plaintiff "and situated on the west side of Main street, also the cellar under the saloon and rooms above, in said Rockland," and therein search for intoxicating liquors.

No question is made but that the designation of the place to be searched is sufficiently definite to meet the requirements of the constitution in that respect. *State* v. *Burke*, 66 Maine, 127.

All the rooms above the saloon, with the exception of one used as a restaurant, were occupied by the plaintiff and his family as the place of their residence and dwelling house. The objection raised against the warrant is, that the officer was directed to search the plaintiff's dwelling house, and that the warrant was void because it contained no allegation that the dwelling house, or some part of it, was used as an inn or shop, or for purposes of traffic, nor that the magistrate issuing the warrant was satisfied by evidence presented to him, that intoxicating liquors were kept in such house or its appurtenances, as the statute requires. R. S., c. 27, § 43.

Looking at the objections in the inverse order from that in which they are stated, it will be found upon examination that the warrant recites the fact that satisfactory evidence was presented to the magistrate that intoxicating liquors were kept in the house and its appurtenances, and that they were intended for sale in this state, in violation of law. That objection may, therefore, be considered as out of the case.

But there is a further answer interposed against the plaintiff in this action. This suit, as the declaration shows, is not for any act of the officer in entering and searching those rooms above the saloon, and which were occupied by the plaintiff as a dwelling, but for entering and searching the plaintiff's saloon. The place searched was a saloon—not a dwelling. The officer's return upon the warrant negatives the fact of searching any other part of the premises designated in the complaint and warrant, except the saloon. Nothing appears upon the face of the process to indicate to the officer that it is not regular. It issued from a court of competent jurisdiction. The officer is to be protected unless the process is void, and the want of validity can be seen upon its face. *Elsemore* v. *Longfellow*, 76 Maine, 130. Nor is there anything in the case showing that the officer was not justified in entering the plaintiff's saloon and there searching for intoxicating liquors, as commanded by that process.

According to the stipulation in the report, the entry must be,

Action to stand for trial.

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

HENRY HUDSON *vs.* EBENEZER S. COE.

Piscataquis. Opinion February 5, 1887.

Tenants in common. Assumpsit. Disseizin. R. S., c. 95, § 20.

A tenant in common, independently of R. S., c. 95, § 20, may maintain *indebitatus assumpsit* against his cotenant who has received in money more than his share of the rents and profits of the common estate.

Such action will not be defeated on account of a dispute raised by the defendant concerning the title, provided the plaintiff is owner in the estate and was not disseized at the date when the income was received in money by the defendant.

The plaintiff in such action has the right to show his title and seizin to the estate owned by him at the time when the defendant received the income.

Title by adverse possession and disseizin to large tracts of wild and uncultivated land can not be acquired by mere acts of ownership exercised over it, such as tracing and running lines, keeping off trespassers, permitting wild grass to be cut from year to year from small portions of it, and occasionally timber from other portions, paying taxes, etc.

Nor will acts which might properly be held to constitute a dissezin if done by a stranger, have such effect if done by one tenant in common as against the other cotenant.

As between tenants in common, mere possession, accompanied by no act that can amount to an ouster of the other cotenant, or give notice to him that such possession is adverse, will not be held to amount to a disseizin of such cotenant.

Before it will have that effect there must be notorious and unequivocal acts of exclusion.

ON report.

The opinion states the case and material facts.

Charles A. Bailey, for plaintiff, cited, upon the question of plaintiff's title by levy: Stat. 1821, c. 60, § 27; U. S. Process Act of May 19, 1828; *Bank* v. *Halstead*, 10 Wheat. 1; *Beers* v. *Haughton*, 9 Pet. 362; *Catherwood* v. *Gapete*, 2 Curtis, 96; *Springer* v. *Foster*, 1 Story, 602; *U. S.* v. *Knight*,

3 Sumner, 358; *Allen* v. *Portland Stage Co.* 8 Maine, 207; *French* v. *Allen*, 50 Maine, 440; *Fitch* v. *Tyler*, 34 Maine, 463; *Childs* v. *Barrows*, 9 Met. 414; *Dodge* v. *Farnsworth*, 19 Maine, 280; *Bamford* v. *Melvin*, 7 Maine, 14; *Herring* v. *Polley*, 8 Mass. 115; R. S., 1841, c. 94, § 24; *Cowan* v. *Wheeler*, 31 Maine, 439; *Wilson* v. *Gannon*, 54 Maine, 384.

Upon the question of disseizin and its effect, he cited: *Clark* v. *Pratt*, 47 Maine, 55; *Knox* v. *Jenks*, 7 Mass. 492; *Mylar* v. *Hughes*, 60 Mo. 105; Wells, Res Adjudicata, 146; *Bates* v. *Norcross*, 14 Pick. 224; *Coburn* v. *Hollis*, 3 Met. 125; *Slater* v. *Jepherson*, 6 Cush. 129; *Cook* v. *Babcock*, 11 Cush. 206; *Moore* v. *Cable*, 1 Johns. Ch. 386; *Morrison* v. *Chapin*, 97 Mass. 73; *Morris* v. *Callanan*, 105 Mass. 129; *Little* v. *Megquier*, 2 Maine, 178; *Chandler* v. *Ricker*, 49 Vt. 128; *Leach* v. *Beattie*, 33 Vt. 195; *Jackson* v. *Woodruff*, 1 Cowan, 276; *Jackson* v. *Oltz*, 8 Wend. 440; *Munro* v. *Merchant*, 28 N. Y. 9; *Thompson* v. *Burhans*, 61 N. Y. 52; S. C. 79 N. Y. 93; *Miller* v. *Long Island R. R.* 71 N. Y., 385; *Chandler* v. *Spear*, 22 Vt. 405; *Farrar* v. *Eastman*, 10 Maine, 195; *Blood* v. *Wood*, 1 Met. 528; *Cook* v. *Babcock*, 11 Cush. 206; *Parker* v. *Parker*, 1 Allen, 245; *Bates* v. *Norcross*, 14 Pick. 224; *Colburn* v. *Mason*, 25 Maine, 435; *Great Falls M'f'g Co.* v. *Worster*, 15 N. H. 458; *Roberts* v. *Morgan*, 30 Vt. 325; *Downer* v. *Smith*, 38 Vt. 464; *Williams* v. *Gray*, 3 Maine, 207; *Davis* v. *King*, 87 Pa. St. 261; *Dubois* v. *Campan*, 24 Mich. 360; *Varney* v. *Stevens*, 22 Maine, 334; 1 Wash. R. P. 687; *Burhans* v. *Van Zandt*, 3 Selden, 528.

A. W. Paine, for defendant.

The title to real estate cannot be tried in an action of assumpsit. *Codman* v. *Jenkins*, 14 Mass. 93; *Miller* v. *Miller*, 7 Pick. 136.

In *Bigelow* v. *Jones*, 10 Pick. 161, the principle was again recognized to its fullest extent.

In *Bridgham* v. *Winchester*, 6 Met. 460, the court carefully distinguish this case from that common one where the defendant

has tortiously converted the plaintiff's personal property into money and is thus liable in assumpsit upon a waiver of a tort.

In the more recent case of *Pickman* v. *Trinity Church*, 123 Mass. 1, the court recognizing the principle say, "The law is indeed well settled that such title (real estate) cannot be tried in an action for money had and received."

In our own State, the court, under the lead of our eminent chief justice of that day, began with laying down its principles in its broadest terms and too in a case where the same question was pending as here, viz: the validity of a levy as the basis of claim. Says the judge, "even admitting plaintiff's levy to be good, yet this action can not be maintained . . . but the plaintiff must seek some other remedy. *Wyman* v. *Hook*, 2 Glf. 337. In *Rogers* v. *Libbey*, 35 Maine, 200, the same principle was adopted, notwithstanding the plaintiff's title was good. If not recognized by defendant no promise is implied. *Balch* v. *Patten*, 45 Maine, 41, on p. 49 the chief justice goes the whole length of our case, being one exactly like ours in principle.

There must be an express or an implied promise. *Porter* v. *Hooper*, 2 Fair. 170. *Richardson* v. *Richardson*, 72 Maine, 409, distinctly recognizes the principle.

There is no privity of contract, such as is necessary to raise a promise, or from which the law will imply a promise. *Allen* v. *Thayer*, 17 Mass. 299; *Badger* v. *Holmes*, 6 Gray, 118.

When there is no contract express or implied, assumpsit will not lie. *Bartlett* v. *Jones*, 60 Maine, 246.

So if the tenant denied the ownership of the plaintiff, although his title was good, assumpsit is not in place. *Howe* v. *Russell*, 41 Maine, 446 and cases cited.

The occupation must be by previous agreement or consent, or by subsequent ratification. *Curtis* v. *Treat*, 21 Maine, 525, and cases cited.

Plaintiff, however, contends that by the statute of Anne the right to recover in such case has been enlarged and that under that statute, as a part of our common law, this action may be

maintained. And he relies on the case of *Richardson* v. *Richardson*, 72 Maine, 403, already cited by me.

This statute, in its effect, modifying our common law, has been considerably discussed and the cases are not altogether consistent with each other. Besides the case now cited the subject has been quite elaborately discussed in the following other cases in our State. *Gowen* v. *Shaw*, 40 Maine, 56; *Cutler* v. *Currier*, 54 Maine, 81; *Carter* v. *Bailey*, 64 Maine, 458; *Dyer* v. *Wilbur*, 48 Maine, 287; *Monroe* v. *Luke*, 1 Met. 459.

Mr. Justice VIRGIN, in *Carter* v. *Bailey*, 64 Maine, 465, uses the same language, suggesting a right of action, "after demand . . and then he will be liable to special assumpsit. R. S., c. 95, § 16."

In *Moses* v. *Ross*, 41 Maine, 362, APPLETON, J., uses the same language. "Special assumpsit" under "Statute of August 8, 1848," (original of above.)

It does not appear from the officer's return that the appraisers were sworn as the statutes provide, all that he says is that they "upon oath appraised the same," &c. Neither does he refer to any other certificate as part of his return. *Fitch* v. *Tyler*, 34 Maine, 464; *Cowls* v. *Hastings*, 9 Met. 476; *Smith* v. *Keen*, 26 Maine, 411.

In reference to all the foregoing objections the following citations are made, to the end that to make a valid levy everything must be done that the statutes requires. *Lumbert* v. *Hill*, 41 Maine, 475; *Williamson* v. *Wright*, 75 Maine, 35; *Benson* v. *Smith*, 42 Maine, 414; *Jackson* v. *Woodman*, 29 Maine, 266; *Glidden* v. *Philbrick*, 56 Maine, 222; *Munroe* v. *Reding*, 15 Maine, 153.

The elaborate discussion of this matter of interest in the following cases must satisfy every mind. *Wolcott* v. *Ely*, 2 Allen, 338; *Cowdrey* v. *Sheldon*, 122 Mass. 267; *Fuller* v. *Dame*, 18 Pick. 472.

In the American Law Register of February, 1886, p. 135, is an elaborate and labored discussion of this whole subject of interest in a case where one acting as agent procured a physician

to use his influence with a railroad company to promote the matter of damages, on the secret promise to receive a certain percentage of the result. The contract was held void.

If one records a deed of a parcel of land and enters upon any part of it and thus occupies it openly and adversely as his own, his occupation of a part is in law that of the whole. This was directly settled in *Props. &c.* v. *Laboree*, 2 Glf. 275. This case is so full and conclusive that no further citation is necessary. See *Foxcroft* v. *Barnes*, 29 Maine, 128 and cases below.

And such possession and occupancy is "sufficient if the possession of defendant shall have been as open, notorious and exclusive as is usual in the case of the ordinary management of similar estates in the possession and occupancy of those who have title thereto." This is the exact language of the eminent chief justice in the case already cited. *Props. &c.* v. *Laboree*, 2 Glf. 287.

And to effect this object it is not necessary that the deed should be one that would be a valid legal deed to pass the title even if the grantor had it. Any deed is sufficient. *Gookin* v. *Whittier*, 4 Glf. 16; 3 Glf. 316.

This result follows even though the part actually occupied he had a good title to, provided only the deed covered the disputed part. *Noyes* v. *Dyer*, 25 Maine, 468; *Trustees, &c.* v. *Fisher*, 34 Maine, 172.

Title to the whole is made good provided the lots are continuous and not detached from each other. 1 Fair. 191; *Otis* v. *Moulton*, 20 Maine, 205.

A tax deed is good to effect the above object though the proceedings have not been regular so as to pass the title. *Little* v. *Megquier*, 2 Glf. 176; *Boothby* v. *Hathaway*, 20 Maine, 251; *Johnson* v. *Boardman*, 6 Allen, 28.

If one tenant in common enter into the whole lot under a deed duly executed and recorded, even from one who has no title, it is an actual disseizin of his cotenants. Stearns on R. A. 41; 5 Glf. 204; *Higbee* v. *Rice*, 5 Mass. 352; *Rehoboth* v. *Carpenter*, 23 Pick. 137; *Prescott* v. *Nevens*, 4 Mason, 330; 5 Pet. 355; *Bellis* v. *Bellis*, 122 Mass. 414; *Thornton* v. *York Bank*, 45

Maine, 158; *Brackett* v. *Persons*, *Unk.* 53 Maine, 228 and cases cited.

They have been accustomed to run and spot the lines whenever expedient around the town, and that they have lotted the town with lots for greater convenience for operations, in the manner usual for owners to manage and occupy their own lands of a like kind, and under claim of ownership. *Jewett* v. *Hussey*, 70 Maine, 433.

In *Thompson* v. *Burhans*, 79 N. Y. 93-100, the court speak of cases where such use is made of the whole as cutting logs on the land for the use of one's mill, that then the acts do help the disseizin and so of other acts mentioned. *Jackson* v. *Oltz*, 8 Wend. 440, the fact that a part of the land was used as a wood lot, say fifty acres, that saved the whole six hundred acres in question. *Simpson* v. *Downing*, 23 Wend. 322, failed because the time was short of twenty years and is of course of no force.

Thompson v. *Burhans*, 61 N. Y. 52, was where only four hundred acres of a whole track of 6300 was thus used and this in one part of the town while the land in controversy was another lot far away. It was like the case cited by me from 77 Maine, 76 and 1 Fair. 191, where the lots were not continuous.

Monro v. *Merchant*, 28 N. Y. 9, was a case where a large tract of uncultivated land was held by disseizin, when the acts were like these in our case, where the cutting of wood and timber for the market was held sufficient.

In *Miller* v. *L. I. R. R.* 71 N. Y. 385, the question here discussed is not raised.

But in answer to all those authorities from the reports of other states, it is sufficient to say that the law of our State is different from theirs. Our own decisions are of a more positive character and in our favor.

And besides the New York cases are under a provision of a statute reading different from ours. N. Y. Code, § 83 (61 N. Y. 70).

FOSTER, J. The parties to this suit are tenants in common and undivided of township Number 2, Range 8, north of Waldo

patent in Penobscot county, containing about thirty-six square miles. The plaintiff claims to recover as owner of eleven ninety-sixths, his share of stumpage which the defendant as part owner of the township has collected and retains in his hands. The action is general *indebitatus assumpsit* for money had and received, and is brought not upon R. S., c. 95, § 20, relating to actions between tenants in common, but at common law, based upon the statute of 4 and 5 Anne, c. 16, which is declared to be a part of the common law of this State. *Richardson* v. *Richardson*, 72 Maine, 403.

1. The defendant contends that the plaintiff has no remedy at common law, and that if entitled to any, it can exist only by virtue of R. S., c. 95, § 20, after demand in a special action of assumpsit. We are not inclined to this view, and such we think is not the law.

The ancient rule of the old common law as laid down by Lord Coke (Co. Lit. 199 6,) was, that one tenant in common could not maintain an action against his cotenant for taking the whole profits of the common estate, unless he had been appointed bailiff by his cotenant. It was thus stated: "If one tenant in common maketh his companion his bailiff of his part, he shall have an action of account against him. But, although one tenant in common, without being made bailiff, take the whole profits, no action of account lies against him; for, in an action of account, he must charge him either as a guardian, bailiff, or receiver, which he cannot do, unless he constitute him his bailiff." Sole occupancy alone was not sufficient upon which to maintain an action. Each was said to occupy *per mi et per tout* and had a right to occupy the whole if the other tenant did not see fit to go in and occupy with him. Such occupancy was held to be no exclusion of the other, and no action would lie against the tenant who by such occupancy had taken the entire profits. But by statute 4 and 5 Anne, c. 16, § 27, this old doctrine of the common law of England was changed, and it was therein provided that an action of account might be maintained by one joint tenant or tenant in common against the other, charging

him as bailiff for receiving more than his joint share or proportion. But in order to maintain such action it was necessary that one tenant should show not mere occupation of the premises by another tenant in common, but an actual receipt by him of the rents and profits over and above his share thereof, and which actually belonged to his cotenant. To avoid the somewhat tedious proceedings pertaining to the old action of account an action on the case upon a promise to account was at first substituted (*Brigham* v. *Eveleth*, 9 Mass. 541); and afterwards Lord Holt, in construing the statute, came to the conclusion that whenever account could be maintained *indebitatus assumpsit* might be also; holding that the statute being a remedial one it ought to receive a liberal construction. *Jones* v. *Harraden*, 9 Mass. 540. While the right of action was founded on the statute of Anne, and not by any right under the old common law, from the liberal construction placed upon it by a long series of decisions, it became as firmly settled that the action of general *indebitatus assumpsit* for money had and received would lie, in place of the old action of account, by one tenant in common against his cotenant, as bailiff, for receiving more than his share of the rents and profits. Such was the doctrine laid down in the cases to which we have referred; and this form of action was sustained in *Miller* v. *Miller*, 7 Pick. 133, and 9 Pick. 34, to recover money due for the share of one tenant in common in the sale of trees from the common estate. It was allowed in *Monroe* v. *Luke*, 1 Met. 459, which was assumpsit by one tenant in common against his cotenant to recover his share of rents, and it was there held that where it was a claim for money actually received by the defendant, to which in some form the plaintiff has title, it could be conveniently settled in this form of action. It is said in *Fanning* v. *Chadwick*, 3 Pick. 424, that the action of account has become nearly obsolete in England, and that there seems to be no necessity for reviving it here, and that assumpsit now has all the advantages, without the disadvantages, peculiar to an action of account. In support of the same principle may be cited: *Cochran* v. *Carrington*, 25 Wend. 410; *Richardson* v. *Richardson*, 72 Maine, 403; *Gowen*

v. *Shaw*, 40 Maine, 58; *Cutler* v. *Currier*, 54 Maine, 91; *Holmes* v. *Hunt*, 122 Mass. 513; *Sargent* v. *Parsons*, 12 Mass. 152; *Dickinson* v. *Williams*, 11 Cush. 258. It is an equitable form of action to recover money which the defendant in equity and good conscience ought not to retain.

But when resorted to as the common law action—the outgrowth of the statute of Anne, and independently of R. S., c. 95, § 20—by one tenant in common against his cotenant, it is to be "restricted to cases where the money has been actually received, and the liability to account has resulted in a duty to pay money, or where the defendant holds the share as bailiff of the plaintiff, or the occupation has been by consent." *Currier Cutler*, 54 Maine, 91.

2. It is also claimed in defence that this action can not be sustained because the question of title is involved in it. But we have no doubt the action will lie notwithstanding there may be a mere dispute raised by the defendant concerning the title, provided the plaintiff is owner of the estate and was not disseized at the date when the income from the common estate was received in money by the defendant. Such is the conclusion of this court in the recent case of *Richardson* v. *Richardson*, *supra*. Were it otherwise, the plaintiff in any case seeking his common law remedy under the statute of Anne, notwithstanding his title and seizin be complete, might be subjected to the annoyance as well as expense of a nonsuit, whenever the defendant cotenant might see fit to dispute his title. We do not mean to be understood as denying the general doctrine, where it has its proper application, that the title to real estate is not to be tried in an action of assumpsit; but we are satisfied that it has no application in the present case. It must also be borne in mind that this is not an action for use and occupation of the common estate under R. S., c. 95, § 20, which is a modification of the statute of Anne, but of *indebitatus assumpsit* authorized, through a long line of decisions, by the latter statute as the common law action to recover the plaintiff's due proportion of moneys in the hands of the defendant which he has received from the common estate.

Many of the decisions to which our attention has been called and in which it is held that the title to real estate can not be tried in an action of assumpsit, are those for use and occupation depending upon contract express or implied between the parties, and which have no application to the case at bar.

There are many cases where the right to recover depends upon the title, yet they are not cases in which the title is tried, within the meaning of the rule. Neither does the rule prevent an action for money had and received in many cases which require an investigation of title, as was held in *Parkman Trinity Church*, 123 Mass. 6.

The plaintiff in this action undoubtedly has the right to show his title and seizin to the estate owned by him at the time when the defendant received the income. Upon proof of these facts he would be entitled to his remedy under the statute of Anne. "If the defendant were in possession of the estate under a denial of the plaintiff's title, it would be evidence tending to show the disseizin of the plaintiff, and if it resulted in proof of that fact—as it might well do if unexplained—then and not till then would the relative position of the parties be changed." *Richardson* v. *Richardson*, *supra*.

To make out his title, then, the plaintiff starts with the unquestioned title to five ninety-sixths of the township by deeds from the heirs of Henry Ilsley who was the owner of one-sixteenth in common and undivided in 1839; and to six ninety-sixths by levy of an execution upon a judgment recovered in the United States circuit court for the district of Maine at the October term, 1841, in favor of the Merchants' National Bank of Newburyport, against Seth Paine and John L. Meserve, and from said bank through sundry conveyances to himself by deed bearing date of July 1st, 1884.

It is in reference to the plaintiff's title under this levy that the defendant takes issue with the plaintiff, and a considerable portion of the argument of counsel has been devoted to this branch of the case. We do not deem it necessary, however, to enter upon an investigation of title under the levy, inasmuch as it is not claimed that the plaintiff obtained any title to the six

ninety-sixths therein mentioned till July 1, 1884—several months after the stumpage had been taken off and the money had been received by the defendant. If otherwise entitled to recover, the plaintiff can recover only his due proportion of such money as was received by the defendant from stumpage sold after his title accrued. *Kimball* v. *Lewiston Steam Mill Co.* 55 Maine, 499. From an examination of the deeds from the heirs of Henry Ilsley, it will be seen that the plaintiff at that time had acquired title to only four ninety-sixths of the township.

3. Admitting, however, the plaintiff's title through deeds from the heirs of Ilsley, the next ground of defence interposed to the plaintiff's action is that he and his predecessors in title have been disseized by the defendant and Samuel H. Blake—the other tenant in common—and that they have acquired by adverse possession for more than twenty years, title to the whole township, and are entitled to retain the entire stumpage.

To establish this claim of disseizin the defendant, who was the admitted owner of seven-sixteenths and his alleged joint disseizor of another seven-sixteenths—the two owning seven-eighths of the whole township—puts in a tax title acquired by themselves of the entire township, and claims under this recorded deed, as color of title, a disseizin of their cotenants.

The evidence upon which this claim of adverse possession and disseizin is based is detailed by the defendant—in substance, consisting of acts of ownership exercised over this township—such as tracing and running lines—keeping off trespassers—permitting wild grass to be cut from year to year from small portions of it, and occasionally timber from other portions—paying taxes, etc. This whole township of thirty-six square miles was principally forest and timber land—all in its natural and unimproved state. The question we are asked to consider in this case certainly presents the doctrine of disseizin somewhat diffusively applied. The cases are numerous, however, where acts even stronger than are furnished in this case are declared to be insufficient to work a disseizin even of the sole owner of unimproved lands. *Chandler* v. *Wilson*, 77 Maine, 76; *Slater* v. *Jepherson*, 6 Cush. 129; *Parker* v. *Parker*, 1 Allen, 245;

Little v. *Megquier*, 2 Maine, 178; *Thompson* v. *Burhans*, 79 N. Y. 98, 99.

But acts which would properly be held to constitute a disseizin if done by a stranger have no such effect if done by a tenant in common, as the possession of one tenant in common is that of all. The entry of one is the entry of both. Either has the right to actual possession, and such possession will be presumed to be in accordance with his title—rightful rather than wrongful —till some "notorious and unequivocal act of exclusion shall have occurred." *Colburn* v. *Mason*, 25 Maine, 434. And by all the authorities it is settled that mere possession, accompanied by no act that can amount to an ouster of the other cotenant, or give notice to him that such possession is adverse, will not be held to amount to a disseizin of such cotenant. *McClung* v. *Ross*, 5 Wheat. 124. The acts of ownership by one tenant, which if done by a stranger would operate as a disseizin of the other cotenant, must be done, as was said in *Ingalls* v. *Newhall*, 139 Mass. 273, "in the assertion of an independent title, inconsistent with that of the cotenant, and be of such character that it is, or must reasonably be held to be, known by those in derogation of whose title they are done that this is so." And it has been held that the entry of a tenant in common upon property, even if he takes the rents, cultivates the land, or cuts the wood and timber without accounting or paying for any share of it, will not ordinarily be considered as adverse to his cotenants and an ouster of them, but in support of the common title. *Thornton* v. *York Bank*, 45 Maine, 158.

This principle has been thus expressed by the Vermont court in the case of *Roberts* v. *Morgan*, 30 Vt. 325, in which the court say: "Where one joint owner is in possession of the whole, the legal presumption is that he is keeping posession, not only for himself but for his cotenant, according to their respective interests, and the other joint owners have the right to so understand until they have notice to the contrary; and the statute would only run from the time of such notice. We consider the principle substantially the same as between landlord

and tenant, as to converting a mere fiduciary possession into an adverse or hostile one."

The nature of the property in which the tenants are owners—its character, situation and extent—must be taken into consideration, moreover, in determining the question of possession and occupation, and whether it is exclusive or otherwise. And between tenants in common it is very difficult to determine by any fixed rule what may constitute disseizin. Each case must be judged by its own particular circumstances and the facts connected with it.

In this case the facts are plain, and there is but little controversy concerning them. Nor do we consider it necessary to extend this opinion by any further reference to them. Assuming them all to be true, they do not show such exclusive possession, or such notorious and unequivocal acts of exclusion as to amount to a disseizin of the plaintiff or his predecessors in title. The action therefore is maintainable.

The defendant admits that he received a certain amount of money from the sale of stumpage in the fall and winter of 1883-4. That sum was six hundred and ninety-one dollars and seventy-nine cents. At the time this stumpage was taken from the township the plaintiff had acquired title to only four ninety-sixths of it, and that is the proportion to which he is entitled of the money in the defendant's hands.

Judgment for plaintiff for twenty-eight dollars and eighty-two cents, with interest thereon from the date of the writ.

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

STATE *vs.* MARY J. FRAZIER.

Cumberland. Opinion February 10, 1887.

Intoxicating liquors. Nuisance. Owner of building, when liable. R. S., c. 17, § 4.

To constitute the offence of aiding in the maintaining of a nuisance under R. S., c. 17, § 4, it must appear that the tenement was either let for the

illegal use, or that the illegal use was permitted, that is, consented to by the defendant, either as owner of the tenement, or as a person having the control of the same.

One who has authority to let a tenement and receive the rents has control of it within the meaning of the statute.

On exceptions, from the superior court.

George M. Seiders, county attorney, for the state, cited: *State* v. *Ruby*, 68 Maine, 543; *State* v. *Burke*, 38 Maine, 574; *State* v. *Stimpson*, 45 Maine, 608; *Carlton* v. *Commonwealth*, 5 Met. 532; Whart. Cr. Law, § 414 and cases; 1 Bish. Cr. Pro. § 202 and cases; *State* v. *Lang*, 63 Maine, 215; *Eaton* v. *Telegraph Co.* 68 Maine, 63; *State* v. *Pike*, 65 Maine, 111.

Ardon W. Coombs, for defendant.

It is an offence at common law for an owner of a building to knowingly let it with intent that it should be used by the tenant as a house of ill fame. *Com.* v. *Harrington*, 3 Pick. 28.

In other respects, the statute is additional to the common law, and like all criminal statutes, must receive a liberal construction in favor of the respondent. Bishop on Stat. Crimes, § § 155 & 193; *People* v. *Kelly*, 35 Barb. 444; *Dwelley* v. *Dwelley*, 46 Maine, 377.

All right of the landlord to occupation and control of demised premises is suspended during the term, and unless he has reserved the right to enter, he would have no right to do so. Taylor's Landlord and Tenant, § § 174-78; *Walker* v. *Hutton*, 10 M. & W. (Eng.) 249; *Barker* v. *Barker*, 3 C. & P. (Eng.) 557; *Neale* v. *Wyelie*, 3 B. & C. 533; *Shaw* v. *Cunmisky*, 7 Pick. 76; *Parker* v. *Griswold*, 17 Conn. 288; 4 Am. Dec. 739; *Dixon* v. *Clow*, 24 Wend. 188; *Heermance* v. *Vernoy*, 6 Johns. 5; *Woodruff* v. *Adams*, 5 Blackf. (Ind.) 317; 35 Am. Dec. 122; *Dockham* v. *Parker*, 9 Mo. 137; *Turner* v. *McCarthy*, 4 E. D. Smith, (N. Y.) 247; *White* v. *Mealis*, 5 J. & S. (N. Y.) 72.

We take it to be well settled that a tenant — even a tenant at will — may maintain trespass *quare clausam fregit* against his landlord, for a forcible entry upon him before the tenancy is

terminated. WALTON, J., in *Marden* v. *Jordan*, 65 Maine, 10; *Brock* v. *Berry*, 31 Maine, 293; *Dickinson* v. *Goodspeed*, 8 Cush. 119; *Cunningham* v. *Horton*, 57 Maine, 420.

The landlord has a right to rent and to enter to receive or demand rent, &c., &c., but in other cases he must obtain consent of the tenant. *Proud* v. *Hollis*, 1 B. & C. 8; *Blake* v. *Jerome*, 14 Johnson, 406; *Dockham* v. *Parker*, 9 Maine, 137; *Lehman* v. *Shackleford*, 50 Ala. 337.

The landlord can not make alterations or repairs during the term without consent of the tenant, however beneficial such repairs would be to the latter. *Parker* v. *Griswold*, 17 Conn. 288; *Anonymous*, 42 Am. Dec. 739; *Brown* v. *Powell*, 25 Pa. St. 299; *Kaiser* v. *New Orleans*, 14 La. An. 178.

During the term, the tenant is invested with all the rights of an absolute owner, so far as the possession and use are concerned. *Day* v. *Swackhamer*, 2 Hill, (N. Y.) 4; *Willard* v. *Tillman*, 2 Hill, (N. Y.) 274; *Livingston* v. *Reynolds*, 2 Hill, 157; *Bradstreet* v. *Pratt*, 17 Wend. 44.

"Mere non-feasance on the part of the landlord can not involve him in the guilt of the tenant. To make him liable, he must aid, assist, or give his consent to the illegal use." *Com.* v. *Harrington*, 3 Pick. 26; *State* v. *Stafford*, 67 Maine, 126; *Jennings* v. *Com.* 17 Pick. 80; *Brockway* v. *People*, 2 Hill, 558; *People* v. *Erwin*, 4 Denio, 129; *State* v. *Abrahams*, 6 Iowa, 118. See *Trask* v. *Wheeler*, 7 Allen, 111.

See also *Healy* v. *Trant*, 15 Gray, 312; *O'Connell* v. *M'Grath*, 96 Mass. 289. "In *Healy* v. *Trant*, 15 Gray, 312, held: That illegal use by under tenant does not avoid original lease, but only the under lease."

Mere neglect of the landlord to avail himself of the privilege given by statute to eject a tenant, who uses the tenement for an illegal purpose, is not in itself sufficient to render him liable to indictment. Some evidence must be produced to show consent to such use. *State* v. *Stafford*, 67 Maine, 126; *Brockway* v. *People*, 2 Hill, 558; *People* v. *Erwin*, 4 Denio, 129. "Failure to take steps to prosecute does not make the landlord liable."

State v. *Abrahams*, 6 Iowa, 118; see *Machias Hotel Co.* v. *Fisher*, 56 Maine, 322.

The rule, as stated in the last words to the jury, dispensed with the requirement of permission which involves some act or word equivalent to consent. *State* v. *Stafford*, 67 Maine, 126.

The fact of her being landlord, receiving rent, and that she had power to expel the tenant, does not of itself make her liable.

To make her liable, it must be shown that she left it for the purpose, from which her consent would be implied, or she must afterward aid, assist, or give her consent to the illegal use. *Com.* v. *Harrington*, 3 Pick. 26; *Jennings* v. *Com.* 17 *Ib.* 80; *Brockway* v. *People*, 2 Hill, 558; *People* v. *Erwin*, 4 Denio, 129; *State* v. *Abrahams*, 6 Iowa, 118.

HASKELL, J. Indictment for aiding in the maintaining of a nuisance under R. S., c. 17, § 4, in that the respondent did permit a tenement under her control to be used as a house of ill fame, and for the illegal keeping and illegal sale of intoxicating liquors with her knowledge, permission, and consent.

To constitute an offense under the statute cited, it must appear that the tenement was either let for the illegal use, or that the illegal use was permitted.

It appeared that the respondent's tenants at will occupied the premises, and used them for the illegal purposes charged.

The respondent is not guilty of a violation of the statute, unless she permitted the use, that is, consented to it; whether she did so consent is a fact to be determined by the jury.

One, who has authority to let a tenement and receive the rents, has control of it within the meaning of the statute; and if he knowingly permits the illegal use, that is, consents to it, he becomes liable for aiding in maintaining a nuisance; but the mere fact that he so has control of the tenement, does not make him liable; he must be proved to consent to the illegal use; and if such use is known to him, and he takes no measures to prevent it, his inaction may be evidence of his consent to such use, or that he permitted it; but his permission of the use must be proved, to charge him under the statute; and these same rules

apply to the owner, and the same facts must be proved in order to charge him. *State* v. *Stafford*, 67 Maine, 126.

The charge of the presiding justice touching the control of the tenement was in accord with this opinion. He expressly told the jury that the state must prove that the respondent "knowingly permitted it to be used as a nuisance." This instruction is an accurate statement of the law, and sufficient to inform the jury that the respondent could not be held, unless they were satisfied affirmatively of her consent to the illegal use.

Separate offences of the same nature, charged in separate counts, may be included in the same indictment. *State* v. *Burke*, 38 Maine, 574; *State* v. *Ruby*, 68 Maine, 543.

Each count charges the repondent with aiding in maintaining a nuisance by permitting a tenement, controlled by her, to be used as a house of ill fame and for the illegal keeping and illegal sale of intoxicating liquors. The charge is for permitting the illegal use for two purposes, either of which is sufficient to create the offense. But one offense is charged in each count, and neither is defective. *State* v. *Lang*, 63 Maine, 215.

Exceptions overruled.

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

STATE *vs.* JAMES WELCH and DANIEL WELCH.

Cumberland. Opinion February 10, 1887.

Search and seizure. Intoxicating liquors. Affirming to complaint. R. S., c. 27, §§ 40, 57. Former conviction.

A complaint for search and seizure of intoxicating liquors under R. S., c. 27, § 40, may be made on affirmation by one who is conscientiously scrupulous of taking an oath.

The certificate of the magistrate to whom such a complaint is made, which recites the fact that the complainant made solemn affirmation to the complaint is conclusive, not only that the complainant was "conscientiously scrupulous of taking an oath," but that he formally "affirmed under the pains and penalties of perjury."

Such a complaint need not allege that the complainant has "probable cause to believe," it is enough for the complainant to allege that he does in fact believe that intoxicating liquors are thus kept.

Technical accuracy is not required in setting out a former conviction under R. S., c. 27, § 57. The allegations in this complaint are sufficient and need not allege that the judgment has not been annulled.

On exceptions from the superior court.

(Complaint.)

"State of Maine. Cumberland, ss. To the recorder (the judge being absent from the court room,) of our municipal court for the city of Portland, in the county of Cumberland.

"Ezra Hawkes of Portland, in said county, competent to be a witness in civil suits, on the twenty-fifth day of March, A. D. 1886, in behalf of said State, on solemn affirmation, complains that he believes that on the twenty-fifth day of March, in said year, at said Portland, intoxicating liquors were, and still are kept and deposited by James Welch and Daniel Welch of Portland, in said county, in the shop and its appurtenances, situated on the northerly side of Pleasant street, in said Portland, and numbered one on said street, and occupied by said James and Daniel Welch, said James and Daniel Welch not being then and there authorized by law to sell said liquors within said State, and that said liquors then and there were, and now are intended by said James and Daniel Welch for sale in the State in violation of law, against the peace of the State and contrary to the form of the statute in such case made and provided.

"And the said complainant, on his solemn affirmation aforesaid, further alleges and complains, that the said James Welch has been before convicted in the municipal court, for the city of Portland, to wit, on the fourth day of May, A. D. 1882, of unlawfully keeping and depositing in this State, in said county of Cumberland, intoxicating liquors, with the intent that said liquors should be sold in this State in violation of law, against the peace of the State and contrary to the form of the statute in such case made and provided.

"He therefore prays that due process be issued to search the premises hereinbefore mentioned, where said liquors are believed to be deposited, and if there found, that the said liquors and vessels be seized and safely kept until final action and decision be had thereon, and that said James and Daniel Welch be forthwith apprehended and held to answer to said complaint, and to

do and receive such sentence as may be awarded against them.

EZRA HAWKES.

"Cumberland, ss. On this twenty-fifth day of March aforesaid, personally appeared the said Hawkes and made solemn affirmation that the above complaint, by him signed, is true.

"Before me, EDWIN L. DYER, *Said Recorder.*"

George M. Seiders, county attorney, for the State.

W. F. Lunt, for defendant.

Unless the right to affirm to a complaint is conferred by statute, such affirmation is a nullity. At common law, the evidence for the king must in all cases be upon oath. Hawkins' Pleas of the Crown, book 2, c. 46, § 29. The affirmation of a Quaker was excluded in criminal cases, by statute. 7 & 8 Will. 3 c. 34, § 6, *vide* Burns' Justice, 254. The existence of this rule was recognized when certain privileges of affirmation were conferred by the Provincial Ordnance of December, 1758, (Ancient Charters and Laws of Massachusetts Bay,) yet by that ordnance, the right to affirm was limited, and no Quaker could sit as a juror in the trial of a criminal cause, unless he took the oath by law required.

"The word oath includes an affirmation, when affirmation is allowed." "The words 'sworn,' 'duly sworn,' or 'sworn according to law,' used in a statute, record, or certificate of administration of an oath, refer to the oath required by the Constitution, or laws in the case specified, and include every necessary subscription to such oath." R. S., c. 1, § 6. "When a person required to be sworn, is conscientiously scrupulous of taking an oath, he may affirm." R. S., c. 1, § 7. "No warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized; or without probable cause—supported by oath or affirmation." Article 1, § 5, Const. of Maine.

It is settled law, that the facts essential to the exercise of

special jurisdiction must affirmatively appear in such complaints. *Galpin* v. *Page*, 18 Wall. 371; *U. S.* v. *Stowell*, 2 Curtis, C. C. 161-2. One jurisdictional averment, required in § 40, c. 27, as to the competency of the complaint, appears.

When a right of procedure is affirmatively granted by statute in a specified manner, the right to proceed in any other way is impliedly negatived. *U. S.* v. *Moore*, 3 Cranch, 170; *Durousseau* v. *U. S.* 6 Cranch, 314. And § 11, c. 132, R. S., expressly negatives any method of procedure except as specified in § 12.

If the complainant was not a person conscientiously scrupulous of taking an oath, his complaint made on affirmation would not be lawfully verified, and the magistrate could not issue his warrant. In such a case a false affirmation, willfully and corruptly made, would not subject the complainant to a prosecution for perjury, because such affirmation is not authorized by law and no conviction could follow. *State* v. *Mace*, 76 Maine, 66.

In *State* v. *Harris*, 7 N. J. L. (2 Hals.) 361, and *State* v. *Fox*, 9 N. J. L. (2 Hals.) 244, it was held that, "Where an indictment appears to be on affirmations of some of the grand jurors, it must appear that they were legally entitled to serve on these mere affirmations, or the indictment will be fatally defective."

The word "required" in the statute does not mean voluntary action, nor a mere verbal and unauthorized request, but it does mean, compelled by legal authority. See 2 Term Report, 1, for the meaning of the word "required" in a statute.

The allegation of intent does not set out briefly or at length, any offence under the statutes of Maine, nor does it describe an offence under section 40, c. 27. A sufficient allegation of an intent on the part of said James Welch, to wit: that the liquors referred to were by him intended for unlawful sale, is omitted. Such a clear averment is necessary, *State* v. *Learned*, 47 Maine, 426; *State* v. *Miller*, 48 Maine, 576, to bring the description of an offence within the statute. Nor is there any allegation, that the conviction remains in force, or has not been vacated by appeal, &c.

The statute cannot override the provisions of the Constitution

and make bad pleading good. *State* v. *Mace*, 76 Maine, 65; § 370 Bishop on Statutory Crimes, especially as to allegation of intent. Whatever is indispensably necessary to be proved, must be alleged. *State* v. *Verrill*, 54 Maine, 414; *State* v. *Philbrick*, 31 Maine, 401.

The prayer for process is defective, because the liquors to be seized are not mentioned with certainty. "Said liquors," may as well refer to the liquors mentioned in the allegation of a former conviction, as to any other. The word "said" does not incorporate a previous description, that is to say, the word "said" as used in the prayer of process, does not designate the liquors alleged to be deposited in the shop on Pleasant street. *Rex* v. *Cheere*, 4 Barn. & Cres. 902; 7 Dowling & Ryland, 461. The place to be searched and the article to be seized should be designated with certainty when a search warrant is prayed for. The designation must be special. Art. 1, § 5, Const. of Maine; § 12, c. 132, R. S. The allegation is uncertain and the prayer defective. *Jane* (*a slave*) v. *State of Missouri*, 3 Mo. 61.

VIRGIN, J. The defendants, under their demurrer to the complaint, object that it was made on affirmation and hence is not a "sworn complaint," which § 40, c. 27, R. S., on which it is founded, designates.

The answer is: A warrant may be issued "when supported by oath or affirmation." Const. Art. 1, § 5. And inasmuch as the word "oath includes affirmation when affirmation is allowed," (R. S., c. 1, § 6, cl. xii), a "sworn complaint" includes one made on affirmation, when the complainant is allowed to affirm. In the revision of 1883, the commissioner and legislature substitute "sworn complaint" for "complaint upon oath or affirmation," in R. S., 1871, c. 27, § 35.

Moreover "he may affirm, when required to be sworn, and is conscientiously scrupulous of taking an oath." R. S., c. 1, § 7. "A person is required to be sworn" when he makes a complaint under this statue, for he cannot make it in any manner other than on oath or affirmation. It would be hypecritical to

hold that "one conscientiously scrupulous of taking an oath" could not lawfully make a complaint under this statute for the reason that it provides for a "sworn complaint."

This complaint alleges that it was made "on solemn affirmation." The certificate of the magistrate recites the same fact. And the certificate is conclusive not only that the complainant was "conscientiously scrupulous of taking an oath," but that he formally "affirmed under the pains and penalties of perjury," as is required by R. S., c. 82, § 104. *State* v. *Blake*, 79 Maine.

2. The complaint is founded on R. S., c. 27, § 40, and not on c. 132, § 11; and hence need not allege that the complainant "has probable cause to suspect and does suspect," but by following the language of the statute on which it is based it is sufficient. *State* v. *Nowlan*, 64 Maine, 531.

3. Technical accuracy is not required in setting out a former conviction under R. S., c. 27, § 57. The purpose of this provision was to obviate the merely technical objections that might otherwise be made upon common law principles to the allegations and proof of such convictions. *State* v. *Wentworth*, 65 Maine, 234; *State* v. *Hurley*, 69 Maine, 573. No practical wrong can grow out of this mode. *State* v. *Gorham*, 65 Maine, 270. If the judgment of the former conviction has been vacated in anywise, it can be shown in defence.

4. The objection that "said liquors" in the prayer for process may mean those mentioned in the allegation relating to a prior conviction is too fine to prevail.

Exceptions overruled.

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

STATE *vs.* JAMES DUNPHY, Appellant.

Cumberland. Opinion February 10, 1887.

Intoxicating liquors. Search and seizure. Seizure without a warrant. R. S., c. 27, § § 39, 40.

When an officer has, under R. S., c. 27, § 39, without a warrant, seized intoxicating liquors for the purpose of keeping them in some safe place until he can procure "such warrant," he may then proceed on complaint to obtain a

warrant under R. S., c. 27, § 40, and seize the liquors *nunc pro tunc* and make his return thereon that the liquors were seized on such warrant.

When an officer has thus taken liquors without a warrant, his complaint for a warrant may allege, that the liquors were unlawfully kept and deposited in the place when and where he found them and that they were then and there intended for sale within this State in violation of law.

On the warrant thus issued the person so keeping the liquors and intending to unlawfully sell the same, may, if it be so alleged, be arrested.

On exceptions from the superior court.

(Complaint.)

"State of Maine. Cumberland, ss. To the recorder (the judge being absent from the court room,) of our municipal court, for the city of Portland, county of Cumberland. Benjamin Gribbin of Portland, in said county, competent to be a witness in civil suits, on the first day of July, A. D. 1885, in behalf of said State, on oath complains that he believes that on the first day of July in said year, at said Portland, intoxicating liquors were kept and deposited by James Dunphy and Kate Dunphy of Portland, in said county, in a certain yard, said yard being on the easterly side of Green street, in said Portland, and is the first yard northerly from building numbered one hundred and thirty-nine and one hundred and forty-one on said street, said James and Kate Dunphy not being then and there authorized by law to sell said liquors within said State, and that said liquors then and there were intended for sale in this State by said James and Kate Dunphy in violation of law, against the peace of the State and contrary to the statute in such case made and provided.

"And the said Benjamin Gribbin, on oath, further complains that he the said Gribbin at Portland, on the first day of July, A. D. 1885, being then and there an officer, to wit, a deputy sheriff within and for said county, duly qualified and authorized by law to seize intoxicating liquors kept and deposited for unlawful sale and the vessels containing them, by virtue of a warrant therefor, issued in conformity with the provisions of law, did find upon the above described premises, one jug containing about two gallons of rum, one copper boiler containing about one half pint of rum, intoxicating liquors as aforesaid,

and vessels containing the same, then and there kept, deposited and intended for unlawful sale as aforesaid, within the State by said James and Kate Dunphy, and did then and there by virtue of this authority as a deputy sheriff as aforesaid, seize the above described intoxicating liquors and the vessels containing the same, to be kept in some safe place for a reasonable time, and hath since kept and does still keep the said liquors and vessels to procure a warrant to seize the same. . . . "

George M. Seiders, county attorney, for the State, cited: 68 Maine, 418; 63 Maine, 223.

Edward M. Rand, for defendant.

The complaint in this case, commonly known as a search and seizure process, is drawn under either § 40 or § 39, R. S., Maine, or under both.

Section 40 provides that "If any person competent . . makes sworn complaint before any judge . . that he believes that intoxicating liquors are unlawfully kept or deposited . . by any person, and that the same are intended for sale within the State in violation of law, such magistrate shall issue his warrant, directed to any officer . . commanding him to search the premises described . . and if said liquors are there found, to seize the same. . . The name of the person so keeping said liquors, . . if known, . . shall be stated in such complaint, and the officer shall be commanded by said warrant . . to arrest him . ."

"The search and seizure statutes are aimed against a present, and not the past possession of liquors. The person is liable, who at the date of the complaint, has liquors, and not the person who before that time has had them in his possession with intent to sell." *State* v. *John Howley*, *app.* 65 Maine, 100.

Section 39 provides that "Intoxicating liquors kept and deposited in the State, intended for unlawful sale . . are forfeited. . . And in all cases where an officer may seize intoxicating liquors . . upon a warrant, he may seize the same without a warrant, and keep them in some safe place for a reasonable time until he can procure such warrant."

Such warrant! What warrant? Why, a warrant to seize the liquors—that is the the only warrant authorized by this section. It gives no right to search, and no right to arrest, but merely declares a forfeiture and authorizes a seizure.

VIRGIN, J. The defendant moves to arrest a judgment against him under a search and seizure complaint, and warrant, for the alleged reason that the complaint is defective and that at most the arrest of him on the warrant was illegal. We do not think so.

Following the order adopted in R. S., c. 27, § § 30 to 37 inclusive, of first prohibiting the various modes, therein described, of selling intoxicating liquors, and then fixing the respective penalties for a violation thereof, the statute then takes up the matter of the liquors themselves. Accordingly § 38 prohibits the depositing or having them in one's possession with intent that they shall be sold in this State. Section 39 declares them and their vessels forfeited to the town where kept when seized; and authorizes an officer whenever he could seize them with a warrant, to do it without one and hold them in some safe place, "for a reasonable time, until he can procure such warrant." Experience suggested the necessity of this provision, for not infrequently liquors liable to seizure and seen by an officer who did not then have a warrant, were not readily found after a complaint and warrant had been made and obtained. Hence to meet this emergency this provision was enacted to allow an officer, as in analogous cases, by virtue of his official capacity, to act at once, by taking the liquors into his possession and keeping them until he could procure a warrant for their seizure, provided he obtained one within a "reasonable time" which, in the absence of any good reason for a longer delay, should not exceed twenty-four hours. *Weston* v. *Carr*, 71 Maine, 356.

After the officer has taken possession of the liquors and their vessels and put them in a safe place, he can do nothing more with them until he procures "such warrant" as is mentioned in the last line of this section, which is a warrant on which the

officer might search for and seize the liquors in the place where he found them.

Then § 40 points the mode of making a complaint and obtaining a warrant on which to search for and seize liquors—or in other words "such warrant." *State* v. *Grames*, 68 Maine, 418, 421. And as this is the only provision under which a warrant can be obtained to search and seize liquors in a place, he must proceed thereunder, within the time mentioned, obtain a warrant and seize the liquors thereon, the same as when having arrested a thief in the act of committing a larceny, he subsequently to securing possession of the offender obtains a warrant and arrests and holds him under that, and so returns on it.

In making a complaint for a warrant to search a place for liquors before the search is made, the allegations must be made in the present tense, to wit: that they "are unlawfully kept and and deposited" and that they "are intended for sale within the State in violation of law," the statute form using both forms "were and still are," for in such cases the provisions are "aimed against a present and not a past possession of liquors." *State* v. *Howley*, 65 Maine, 100, 102. But when an officer has taken them into his possession for safe keeping without a warrant and then proceeds, in the only mode known to the statute, to make the necessary complaint to procure a warrant, the allegations must be changed to the past tense—that they were unlawfully kept and deposited in the place when and where the officer found them when he took them and that they were then and there intended for sale within this State in violation of law; for after being taken by the officer even for safe keeping only, it could no longer be consistently alleged that they still "are kept" and "are intended for unlawful sale."

When the warrant is thus obtained with the proper allegations in the complaint, the liquors are taken thereupon and due proceedings had thereunder. Thus in the case already cited, in construing what is now § 39, PETERS, J., said: "By that provision, an officer may seize liquors without a warrant; but in such a case he must keep them until a warrant can be obtained; so that, when a warrant is procured, the officer can take the

liquors thereupon. The warrant is used *nunc pro tunc.*" *State* v. *Howley*, *supra*. The same view is recognized in *Weston* v. *Carr*, *supra*.

And when the name of the person so keeping said liquors is stated in the complaint, the officer shall be commanded by the warrant to arrest him. R. S., c. 27, § 40.

The officer's return therefore is correct, that he seized the liquors mentioned in the complaint "by virtue of the warrant." *State* v. *McCafferty*, 63 Maine, 223.

The complaint also properly sets out the essential facts of the officer's primary taking the liquors "by virtue of his authority of a duly qualified deputy sheriff," and not by virtue of a warrant and of his keeping them until on the same day he applied for a warrant.

Exceptions overruled.

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

ADRIANNA SWEAT

vs.

PISCATAQUIS MUTUAL INSURANCE COMPANY.

Piscataquis. Opinion February 12, 1887.

Fire insurance. Misrepresentation of title.

An applicant for insurance against fire stated that the property was unincumbered, when in fact, there was a mortgage on it. *Held*, that the materiality of the misrepresentation was a question for the jury.

ON exceptions.

Assumpsit upon a policy of fire insurance for four hundred and fifty dollars.

Crosby and Crosby, for plaintiff.

The instruction was correct. *Strong* v. *Manufacturers' Ins. Co.* 10 Pick. 40; see also *Thayer* v. *Providence Ins. Co.* 70 Maine, 531; *Brown* v. *E. & N. A. Ry. Co.* 58 Maine, 389.

Henry Hudson and C. A. Everett, for defendant.

Prior to Stat. 1861, c. 34, § 2, it had been repeatedly held that misrepresentation as to title was material and avoided the

policy. *Bellatty* v. *Thomaston M. F. Ins. Co.* 61 Maine, 416; *Day* v. *Charter Oak F. & M. Ins. Co.* 51 Maine, 99; *Merrill* v. *Farmers' and Mechanics' Mut. F. Ins. Co.* 48 Maine, 286; *Gould* v. *York County Mut. F. Ins. Co.* 47 Maine, 408; *Richardson* v. *Maine Ins. Co.* 46 Maine, 398.

Whether the representation is material is a question of fact for the jury. *Bellatty* v. *Thomaston M. F. Ins. Co. supra.*

The plaintiff is bound by the statements made in her application. *Barrett* v. *Union Mut. F. Ins. Co.* 7 Cush. 179; *Oakes* v. *Manufacturers' Ins. Co.* 135 Mass. 250.

WALTON, J. Whether an erroneous description or misrepresentation of title in an application for insurance is or is not material, is a question of fact for the jury and not a question of law for the court. In this case, the plaintiff, in her application for insurance, stated that the property was unincumbered, when in fact, there was a mortgage upon it. The presiding judge instructed the jury that this misrepresentation was not material. This was error. The materiality of the misrepresentation should have been submitted to the jury. R. S., c. 49, § 20; *Bellatty* v. *Ins. Co.* 61 Maine, 414.

Exceptions sustained. New trial granted.

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

SAMUEL S. DAVIS *vs.* JAMES F. MALONEY.

Penobscot. Opinion February 14, 1887.

Attachment. Officer's receipt. Seizure on execution. Trespass.

The creditor who directs an officer to take an accountable receipt for property attached, thereby elects to rely upon the receipt, rather than on any obligation of the officer to keep the property safely; and upon gaining possession of the receipt, he may assert it as an equitable assignee thereof, without demand on the attaching officer for the property.

An officer not holding the receipt can not legally demand the property attached from the receiptor, so as to subject the property to the lien imposed by the original attachment.

Trespass may be maintained against such an officer who takes such property on execution, if it is property not liable to seizure on execution.

On report.

The opinion states the case and material facts.

Jasper Hutchings, for the plaintiff, cited: *Gilmore* v. *McNeil*, 45 Maine, 599; *Hinckley* v. *Bridgham*, 46 Maine, 450; *Stanley* v. *Drinkwater*, 43 Maine, 468; *Waterhouse* v. *Bird*, 37 Maine, 326; 14 Maine, 312; *Wentworth* v. *Sawyer*, 76 Maine, 434.

H. L. Mitchell, for defendant.

At the time of the original attachment upon the writ, March 21st, 1884, the plaintiff in this suit was present, and if he claimed that any portion of the books were exempted property, then in order to have them left unattached, he was bound to set apart such portion, notify the officer in order to justify him in leaving the books so claimed as exempt. The plaintiff failed to do so and the officer was bound to attach all of the books that were confused with the whole lot of books that were attached. *Smith* v. *Chadwick*, 51 Maine, 515; *Clapp* v. *Thomas*, 5 Allen, 158; *Nash* v. *Farrington*, 4 Allen, 157.

The question presented in *Dow* v. *Cheney*, 103 Mass. 181, is very much like the question presented to this court in this case now under consideration. That is, that portion of this case that relates to the confusion of all the books.

In the opinion of the court, in *Twitchell* v. *Shaw*, 64 Mass. 46, (10 Cush.) the court say: "But the officer was not bound to investigate the genuineness or sufficiency of the receipt; he held an execution from a court of competent jurisdiction, and that was a legal justification to him for taking and selling the present plaintiff's property. No action, therefore, either of trespass or case, can be maintained against him by the present plaintiff." And cites the case, *Wilmarth* v. *Burt*, 7 Met. 257.

In delivering the opinion of the court, in *Wilton M'f'g Co.* v. *Butler*, 34 Maine, 440, Judge Tenney says: "No obligation rests upon a ministerial officer to look beyond a precept in his hands, as sufficient legal warrant to its commands, and it would

be absurd to hold him accountable for any error in the judicial proceedings of the court which awarded it."

"If the debtor, who has a larger quantity of any kind of provisions than the law exempts from attachment, sets apart no portion thereof for the use of himself and family before it is about to be attached, and makes no claim to any portion of it, when the officer is about to attach the whole, he can not maintain an action against the officer who takes the whole." *Clapp* v. *Thomas*, 87 Mass. 158; *Smith* v. *Chadwick*, 51 Maine, 515; *Copp* v. *Williams*, 135 Mass. 401, and cases cited on page 405.

Chief Justice PETERS, in the opinion of the court in the case, *Shepherd* v. *Hall*, 77 Maine, 571, says: "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." Also see case, *Hapgood* v. *Hill*, 20 Maine, 372.

I submit that the case *Gilmore* v. *McNeil*, 45 Maine, 599, is not a rule to govern this case now before the court, for in that case the officer who made the demand was the same officer who made the original attachment.

HASKELL, J. Trespass against an officer for an unlawful seizure of books on execution against the plaintiff.

A deputy sheriff, out of office when the seizure was made, had attached certain books and book cases on a writ against the plaintiff, and by direction of the creditor, had taken the plaintiff's accountable receipt therefor, with sureties approved by the creditor, and thereupon had surrendered the property attached to the plaintiff, the debtor.

The receipt stipulated that the debtor should return the property attached to the officer, or to his successor in office, or to any person authorized to receive the same on demand. By directing the officer to take the receipt, the creditor elected to rely upon it, rather than upon any obligation of the officer to keep the property safely; and upon gaining possession of it, might assert it as equitable assignee thereof, and no demand upon the attaching officer would be required. *Shepherd* v.

Hall, 77 Maine, 569. But this she did not do. The receipt was allowed to remain with the attaching officer, to whom the debtor engaged to be accountable; and the creditor, having procured a special judgment and execution against the property attached, the debtor meanwhile having been discharged as an insolvent debtor, caused another officer, not holding the receipt, to demand the property attached, that he might seize it on the execution. This officer could make no legal demand for the property, because he did not hold the receipt. *Gilmore* v. *McNeil*, 45 Maine, 599; *Hinckley* v. *Bridgham*, 46 Maine, 450. Nor did he pretend to demand the property by virtue of the receipt, but rather required the debtor to produce certain property that he was not compelled to produce, that it might be taken on the execution.

True, the debtor, supposing the officer authorized to demand the property by virtue of the receipt, produced it, and demanded his receipt, which being refused him, he forbade the officer from taking away a part of the property that he had produced, viz., the books; but the officer, in disregard of the debtor's protest, took all the property produced and sold it on the execution. By the terms of his execution, he could only take property upon which the attachment created a lien that he might perfect the same, and he could only do this by gaining possession of the property by demand upon the receipt, so that the seizure made by him on the execution was not a continuation of and perfection of any lien created by the attachment, but was an independent seizure of property that had either passed to the debtor's assignee in insolvency, or was exempt from seizure upon execution; and as the debtor had lawful possession of the property that he forbade the officer to take, whether it belonged to him, or to his assignee in insolvency, is immaterial, and he should recover the value of the same.

Defendant defaulted for $165, with interest from December 3, 1885.

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

ALBERT D. WHITE *vs.* GILMAN L. BLAKE and others.

Oxford. Opinion February 14, 1887.

Sheriff. Bond of deputy. Liability of deputy to sheriff. Bankruptcy of deputy.

Although a judgment recovered against a sheriff for the default of his deputy has been settled by the deputy, still, if the sheriff is afterwards sued on the judgment, it is the duty of the deputy to indemnify him against the expenses incurred in defending the suit, and his refusal to do so will be a breach of his official bond, for which an action will lie against him and his sureties; and the discharge of the deputy in bankruptcy will be no defense to an action for a breach of the bond which has occurred subsequent to the discharge.

ON report.

Scire facias by a sheriff.

The material facts are stated in the opinion.

George D. Bisbee and Oscar H. Hersey, for the plaintiff, cited: 74 Maine, 494; 37 Maine, 302.

R. A. Frye and A. E. Herrick, for defendants.

Mr. Blake's discharge in bankruptcy operated as a discharge of the plaintiff's claim, if any he ever had. *Grover* v. *Clinton*, 8 B. R. 312; *Manf. Co.* v. *Barnes*, 49 N. H. 312; Bump on Bankruptcy, 7 Ed. 639.

When the plaintiff, as defendant, in action *Davis* v. *White*, on the judgment sued, pleaded payment and satisfaction of said judgment by Blake, and the court so found and gave judgment for the plaintiff, then defendant, in said action, the plaintiff is estopped to deny that Blake did not pay the judgment as it was agreed between the plaintiff and Blake. *Foss* v. *Stewart*, 14 Maine, 312; Big. on Estoppel, 512.

Sureties are by rules of law regarded with favor, which has been formulated into the maxim that the liability of sureties is *strictissimi juris*.

They are bound so far only, as they distinctly, by contract, bind themselves; their liability is not to be extended by construction. Hence, when the plaintiff entered into the arrange-

ment with Blake that Blake should settle the execution, *Davis* v. *White*, then White released and waived his claim upon the sureties, because the sureties were not parties to the new contract, between Blake and White, the plaintiff. *U. S.* v. *Corwine*, 4 Myers, Fed. Dec. § § 736-7; *U. S.* v. *De Visser*, 10 Fed. Reptr. 642; *Brown* v. *Mosely*, 19 Miss. 354; *Schloss* v. *White*, 16 Cal. 65; *Andrews* v. *Marrett*, 58 Maine, 539.

The neglect of Blake to see that the satisfaction of said judgment was endorsed upon the execution, was not among the official duties which the sureties agree to indemnify the plaintiff against, to wit, the doings, wrong doings or neglect of Blake, in the execution of the office of deputy sheriff. And the plaintiff has no claim in *sci. fac.* upon Blake or his sureties, for any costs, damage or expense, arising from his defence of the action on the judgment, *Davis* v. *White*. *Kendrick* v. *Smith*, 31 Maine, 162; *Smith* v. *Berry*, 37 Maine, 303; *Junkins* v. *Lemonds*, 29 Ind. 294; *McDonald* v. *Atkins*, 13 Neb. 568; *Wilson* v. *State*, 13 Ind. 341; *U. S.* v. *Boecker*, 21 Wall. 652; *Tobey* v. *Leonard*, 13 Mass. 200.

The agreement of Blake with the plaintiff to settle the execution *Davis* v. *White*, can not be considered an official duty or act within the scope of the conditions of his official bond, for which the sureties are liable. *Governor* v. *Perrine*, 23 Ala. 808; *Dean* v. *Governor*, 13 Ala. 536; Murfree on Bonds, § 723; *Gwinn* v. *Buchanan*, 4 How. 1.

To illustrate further our position, we cite, *U. S.* v. *Adams*, L. R. Vol. 19, No. 5, p. 882.

The sureties of a sheriff are not liable upon his official bond, for a deposit of money, made in lieu of bail. *State* v. *Long*, 8 Ind. 415.

The defendants having plead performance, and no official neglect being proved by the plaintiff on whom is the burden, judgment must be for defendants. *Machiasport* v. *Small*, 77 Maine, 109.

WALTON, J. This is an action on a deputy sheriff's bond. The plaintiff (White) was formerly sheriff of Oxford county,

and one of the defendants (Blake) was his deputy. Blake attached some personal property on a writ, but neglected to keep it, and the attachment was lost. For this neglect the creditor sued the sheriff. Blake assumed the defense of the action and informed the sheriff that he had arranged with the attorney of the creditor for a settlement of the judgment. He said that the attorney had agreed to offset the judgment against an equal amount due from the attorney to him for services. But the execution was not discharged, and sixteen years afterwards the sheriff was sued on the judgment. The deputy was notified to defend the action, but declined to do so. Thereupon the sheriff undertook the defense of it, and with the aid of Blake's testimony and in view of the long delay which had been allowed to elapse without an effort to enforce the judgment, succeeded in satisfying the court that the judgment had been settled in the manner stated. The defense, therefore, was successful. But in making it, the sheriff spent considerable time and incurred considerable expense, and he claims that it was the duty of the deputy to indemnify him, and that his refusal to do so was a breach of his bond.

We think the sheriff is right. A deputy sheriff's bond is very sweeping in its terms. It secures to the sheriff a full and complete indemnity against all suits whatsoever having their origin in the defaults of his deputy. It is immaterial whether it is a first suit or a second suit, a suit founded directly on the default itself or a suit on a judgment recovered for such a default. If its origin is a default of the deputy, as deputy, the sheriff's right to indemnity is full and complete. Nor is it necessary that the suit against the sheriff should be successful. His right to indemnity does not depend upon the success of the suit. There may be numerous instances, says the court in *Smith* v. *Berry*, 37 Maine, 298, where the sheriff may be called upon in a suit for an alleged default of his deputy, and such action may fail as having no valid foundation in law or fact, and yet he may have a perfect claim upon the deputy and his sureties for his expenses in the defense of the action.

In defense of the deputy (Blake) a plea of bankruptcy is

interposed. To this it is replied that this cause of action accrued subsequent to the bankruptcy. We think the plaintiff is right on this branch of the case. His right to indemnity did not accrue till he had been sued and the suit had terminated. Till then the amount required to indemnify and save him harmless could not be known, and the deputy could not be in fault for not paying it. But when the suit against the sheriff had terminated, and the expenses incurred by him in defending it had been ascertained, and the deputy had been notified of this amount, and the required indemnity was refused by him, then, and not till then, was there a breach of his official bond, and then, and not till then, did this present cause of action accrue; and that was long after the bankruptcy of Blake, and after he had obtained his certificate of discharge; and of course his prior bankruptcy is no defense to this subsequent cause of action.

Judgment having already been entered for the penal sum named in the bond for a prior breach of its condition, nothing remains to be done in this suit but to order an execution to issue for the amount of the plaintiff's damages and costs. See *White* v. *Blake*, 74 Maine, 489.

Execution to issue in favor of the plaintiff for damages assessed at $142.38 and interest thereon from date of writ, and the costs of this suit.

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

STATE OF MAINE *vs.* DEVEREAUX N. FENLASON.

SAME *vs.* SAME.

Washington. Opinion February 17, 1887.

Indictment. Perjury. Allegation of time.

An indictment for perjury does not set forth with sufficient particularity the time when the offence was committed when the only allegation in reference to time is stated to be "heretofore, to wit: At the Supreme Judicial Court, begun and holden at Machias, within and for the county of Washington,

aforesaid, on the first Tuesday of January, in the year of our Lord one thousand eight hundred and eighty-six."

On report.

Two indictments for perjury. The defendant claimed that they were invalid and insufficient on the ground that no definite time is alleged on which the crime was committed. The presiding justice was of the opinion that there was great doubt as to the sufficiency of the indictments in that respect, and, on his suggestion, the cases were reported by him to the law court, the county attorney and defendant agreeing thereto. "If the indictments are good, the cases are to be sent back for trial; if bad, they are to be quashed and the defendant discharged."

Edward E. Livermore, county attorney, for the state.

George M. Hanson and Edgar Whidden, for the defendant, cited: Archibald, Cr. Pl. § § 37, 38 (10th ed.); Whart. Cr. Ev. § 103, a; 2 Whart. Cr. L. § 1314 (8th ed.); Whart. Cr. Pl. & Pr. § 135 (8th ed.); *State* v. *Corson*, 59 Maine, 141; R. S., c. 122, § 4; *State* v. *Hanson*, 39 Maine, 337; *State* v. *Day*, 74 Maine, 220; *State* v. *Baker*, 34 Maine, 52.

Foster, J. It is unnecessary to reiterate the well established rule in criminal pleadings which has so often been the subject of judicial decision, that the day upon which the state claims that the offence was committed should be stated in the indictment with certainty and precision. *State* v. *Day*, 74 Maine, 221.

No indictment can be sustained which fails to set forth with precision some particular day as the time when the offence charged against the accused was committed, although it is not essential that the offence charged be proved to have been committed on the day alleged, except in cases where time is material, or an essential element in the constitution of the offence. *State* v. *Hanson*, 39 Maine, 340; *State* v. *Baker*, 34 Maine, 52; *State* v. *Thurstin*, 35 Maine, 206; *Commonwealth* v. *Adams*, 1 Gray, 483; 1 Bish. Crim. Proc. § § 237, 251.

The rule should be complied with. It must not be left to inference or conjecture. A departure from the well settled

doctrine of the necessity of certainty and precision in the allegations as to time and place in criminal pleadings, would be dangerous in the extreme. However severe and unnecessarily strict these rules may sometimes appear, they have been too long established for their propriety to be questioned, or the necessity of the reason for their establishment to be stated.

While these rules are recognized by all the authorities, and are being constantly sustained by judicial decisions, the question that has most frequently arisen has been in reference to the observance of these rules, and whether certain averments have fulfilled their requirement.

In the cases now before us, the indictments contain no sufficient averment of the time when the offence of perjury is alleged to have been committed. No particular day is set forth. All that could reasonably be understood in relation to time is, that it was during the particular term of court named in the indictments. The only allegation in relation to time is that it was "heretofore, to wit: At the Supreme Judicial Court begun and holden at Machias, within and for the county of Washington aforesaid, on the first Tuesday of January, in the year of our Lord one thousand eight hundred and eighty-six, by Charles Danforth," etc. That the time referred to relates particularly to the session of the court is apparent, not only from the language used, but also from the fact that the indefinite statement of time contained first in the term "heretofore," is immediately thereafter particularized under the videlicet—"to wit: At the Supreme Judicial Court begun," etc.

In *State* v. *Hanson*, *supra*, this court held that designating the term of the court at which the offence happened was not a sufficient averment of the time required to be stated in an indictment for perjury. Such indictment could not be sustained as giving the accused sufficient notice of the "nature and cause of the accusation against him" required by the constitution.

Although the legislature has seen fit in some particulars to simplify the common law requisites in indictments for perjury, which formerly required great care and nicety of statement, and to reduce the essential averments to the smallest possible

compass consistent with constitutional requirements, yet, even according to the form prescribed by statute, the distinct allegations of time and place are among the requisites of the several particulars which go to make up the offence. R. S., c. 122, § 4; *State* v. *Corson*, 59 Maine, 141. The defendant is entitled to a more definite allegation of time than that contained in these indictments. In accordance with the terms of the report the entry must be,

Indictments quashed.

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

STATE OF MAINE *vs.* JOHN WILBUR DAY.

Washington. Opinion February 17, 1887.

Arson. Threats. Evidence. Practice. Expression of opinion by presiding justice. Juror. R. S., c. 82, § 83. R. S., c. 106, § § 2, 3.

It is not necessary that the accused should be previously shown to be connected with the crime, for which he is on trial, to render his threats in relation to the commission of such crime admissible in evidence. Such evidence is admissible at any stage of the government's case.

The statute (R. S., c. 82, § 83) forbidding the expression of an opinion by the presiding justice upon an issue of fact does not prohibit him from calling the attention of the jury to such issue, thereby enabling them to apply the rules of law to the controverted questions involved.

Facts about which there is no dispute may be stated to the jury as proved or admitted, or about which there is no contention, without any infringement of the statute prohibition.

Although by R. S., c. 106, § § 2, 3, a juryman above the age of seventy years is not obliged to sit upon a jury in the trial of a cause, still if he waives that exemption and does sit, the parties have no ground of complaint.

ON exceptions.

Indictment for arson. The opinion sufficiently states the material facts.

The following is that portion of the charge of the presiding justice referred to in the opinion; the particular portions excepted to are included in brackets and numbered to correspond with the numbers used in the opinion:

"We can not always account for a man's conduct by what we

would do ourselves. An honest man cannot comprehend any reason why any man should commit a crime. He knows that crimes are committed, because we have evidence before us constantly; our courts are full of them, so that a man may commit a very great folly. A crime is said to be more than folly. It is one of the unaccountable things that human nature will do. When a crime is committed, you are to look at the circumstances; when a statement is made, you are to look at the circumstances under which it was made. When you examine into human nature, with regard to that, you will find that the better instincts rebel against keeping a secret of that kind. They are very apt, perhaps, to resort to some confession, throwing it out without thinking of the folly there was in it; but of course so far as that is concerned, you will judge.

"[(2) There is another thing in connection with that. What are the probabilities? If he was disposed to make a revelation of that kind, if he felt like it, to whom would he be likely to make it? Would he select a stranger, some one who knew nothing about it, or had no sympathy with him, to make it to, or would he take one with whom he was associating, had been associating, who had some sympathy with him?]

" Now, there has been a good deal of evidence introduced here, upon the one side and the other, not only in regard to threats, but in regard to combinations which existed in the town of Wesley in opposition to other laws. Now, whether there is any violation of law in regard to killing deer, I do not think is of any consequence here. Whether the game wardens, there or elsewhere, did their duty or more than their duty or less than their duty, is of no consequence as bearing upon the crime itself. One crime does not justify another.

" But, if there was such a state of things existing there as it is claimed on the one side that there was and on the other side that there was not, it might have a bearing upon the probability of his making the statement. [(3) You have heard the evidence. Whether the witness was one of those associating with the persons who were opposed to the game warden, opposed to the execution of the law, as it bears upon the question of whether

the party committing a crime of this kind would be likely to make such a statement to him. If so, if you find such to be the case, there is some probability that he might have done it.] Now, you have heard the evidence, upon the one side and the other. If he did not make the statement, it should not bear against him. If he did make it, you will give it the weight to which it is entitled. You will weigh the evidence. You have seen the witnesses upon the stand."

* * * * * * *

"Now, another matter to which he has resorted is what is called an alibi in law; that means, that at the time when the crime was committed he was somewhere else. Now, if he was somewhere else, away, too far off to give any aid or assistance, so that he could not have committed it, that would be a good defense. [(4) If he was near enough to render any assistance, to give any alarm, to give protection to those who were doing it, if such were the facts, then he would be near enough to be a guilty party himself,] but if he was away from there where he could not render any assistance, then he could not have done it.

"Now, the question comes up as to the truth of the allegation, how far it is true. In the first place, you are to ascertain whether the evidence relied upon covers the ground so that he could not consistently with its truth have been present. [(5) It is true that the witnesses have testified in great detail. It must have been very carefully prepared.] They seem apparently to leave no opportunity for him to be there. As to the precise time the fire did take place, I do not know that we have any testimony. You will remember how that is for yourselves."

Edward E. Livermore, county attorney, for the state, cited: Whart. Crim. Ev. § 756 (8th ed.); *State* v. *Reed*, 62 Maine, 129; *State* v. *Benner*, 64 Maine, 267; *McLellan* v. *Wheeler*, 70 Maine, 287; *State* v. *Smith*, 65 Maine, 257; *Lord* v. *Kennebunkport*, 61 Maine, 462; *Soule* v. *Winslow*, 66 Maine, 447; *Hunter* v. *Heath*, 67 Maine, 507; *State* v. *Forshner*, 43 N. H. 89; *Fellows' case*, 5 Maine, 333; *State* v. *Quimby*, 51 Maine, 395; *State* v. *Wright*, 53 Maine, 328.

John F. Lynch, for defendant.

The law scrupulously guards the rights of the accused. The legislature in its wisdom has expressed its desire for the protection of parties in courts by prohibiting judges from expressing an opinion upon issues of fact arising in a case. R. S., c. 82, § 83.

Evidence of threats was introduced and admitted by the court against the objections of the defendants, to prove guilt. Wharton, in his work of Criminal Law, Vol. 1, p. 728, says: "Perhaps the sound view of this species of evidence is that while it ought not to be received to establish the fact of guilt, it is proper to indicate the grade of the offence."

The foreman of the jury was seventy-four years old, and absolutely disqualified to serve as a juryman. R. S., c. 106, § 2.

FOSTER, J. Several exceptions have been alleged to the rulings and instructions of the justice presiding at the trial of the respondent, who was convicted of the crime of arson.

Some of these exceptions have been waived and are not insisted upon. Of those remaining it would hardly seem necessary to speak in detail, inasmuch as they may be reduced to two classes — those relating to the introduction of evidence, and to the charge of the presiding justice.

I. The first objection that is pressed upon the attention of the court is in relation to the introduction in evidence of what has been termed the "Shacker Boys'" song. The exceptions of themselves afford the court no light as to the nature of this composition; and if we were to pass upon this objection as presented in the bill of exceptions, there would be no grounds upon which it could be sustained. However, the counsel having treated the question as though it were before us, and being furnished with a copy of the evidence objected to, upon inspection, we are satisfied there is no foundation for the objection, even when viewed in reference to its merits.

The evidence in the case, corroborated by the admission of the prisoner upon the witness stand, shows that the song was in the handwriting of the respondent, and was in part, if not

wholly, his own composition. The statements contained in it were material, taken in connection with the other evidence in the case, tending to show a combination against the game wardens, and manifesting a spirit of hostility to them. It was admissible like any statement, either oral or in writing, made by the prisoner in reference to the subject matter under investigation.

II. The next objection relates to the introduction of threats by the respondent before proof was offered to connect him with the crime.

While it is true that the commission of the offence charged must necessarily be the foundation of every criminal prosecution, yet it by no means follows that it is necessary that the accused party should be previously shown to be connected with the crime in order to render his threats in relation to the commission of such crime admissible. The order in which they are received is not material. They are admissible at any stage of the government's case. Such evidence, when connected with the subject of investigation, is admissible, because from it, in connection with other circumstances, and on proof of the *corpus delicti*, guilt may be logically inferred.

III. The third exception recites five extracts from the judge's charge, of which the respondent complains as being in contravention of c. 212, Laws of 1874 (R. S., c. 82, § 83). Of these, only the second, third and fifth, are insisted upon as containing expressions of opinion upon issues of fact arising in the case.

Upon a careful examination, we do not think that either one of them is open to the objection urged by the respondent. While the statute in question forbids the expression of an opinion by the presiding justice upon issues of fact, it has never been and never should be held to go to the extent of prohibiting the presiding judge from calling the attention of the jury to those issues, thereby enabling them intelligently to apply the rules of law to the controverted questions involved. This is certainly an important duty devolving upon the court in the proper administration of justice, and one which the legislature never intended to prohibit. The prohibition relates to the expression

of an opinion upon an issue of fact arising in the case. Facts about which there is no dispute, and concerning which there is no issue, may properly be called to the attention of the jury in the discretion of the presiding justice. They may be stated to the jury as proved or admitted, or about which there is no contention, without any infringement of the statute prohibition. Such is the decision of this court in *McLellan* v. *Wheeler*, 70 Maine, 287. In that case the court say that "inferences from such matters may be potent in disposing of the controverted questions; yet the statement by the judge of the matters proved and not controverted (or expressly admitted), is not an expression of opinion upon an issue of fact, however strong the inference therefrom may be."

Nor does it follow that there is an expression of opinion upon any issue of fact merely because the presiding justice may see fit to call the jury's attention to certain questions of fact by way of interrogatories addressed to them upon matters important for their consideration in arriving at a correct conclusion upon the main question. A statute like this, if it is to be held as not trenching upon the prerogative of the court, must be strictly construed.

Viewed in the light of these principles, the extracts from the charge of the presiding justice, upon which the respondent's exceptions are based, are not in contravention of the statute prohibition.

That the correctness of a charge is not to be determined from mere isolated statements extracted from it without reference to their connection with what precedes, as well as that which follows, is illustrated when we examine the third and fifth paragraphs. In the closing sentence of the third paragraph the presiding judge observed: "If so, if you find such to be the case, there is some probability that he might have done it." From an examination of the charge which is before us, it appears that the court was calling the attention of the jury to the question whether the respondent had made a certain statement or not, and not to the commission of the crime. The facts were left to the jury to determine, and only such inferences as might

legitimately follow, provided a certain state of facts were found by them, were stated by the court to aid the jury in coming to a conclusion whether or not such statement was made. In this there is no such indication or expression of opinion upon an issue of fact as the statute contemplates to render exceptions available.

IV. From the argument of counsel as well as from an examination of the case and the judge's charge, it appears that one of the grounds of defence relied upon at the trial was that of an *alibi*. In the course of the charge the presiding judge remarked: "It is true that the witnesses have testified in great detail. It must have been very carefully prepared." Exception is taken to this remark, also, as being the expression of an opinion upon an issue of fact, and an infringement of the statute prohibition. Were we to judge of this expression as found in the bill of exceptions, standing, as it does, isolated from everything which precedes or follows, with no explanation as to what it refers, it would be difficult to see how the respondent could be prejudiced by it. From anything appearing in the exceptions the remark may well apply to the witnesses for the defence, and in support of the truthfulness of the *alibi*. The natural import of the statement, if it is susceptible of any meaning without resort to other portions of the charge in connection with it, is in favor of the prisoner, and he could not be aggrieved thereby. If any confirmation of this fact were necessary, it will be found by an examination of the paragraph in the judge's charge, from which this isolated fragment is taken.

V. The last exception relates to the decision of the court in overruling the motion for a new trial claimed by the respondent on the ground of disqualification of one of the jurors who sat in the trial of the case.

It appeared that Rufus Fickett, the foreman of the jury, was seventy-four years of age at the time he was drawn to serve as a juror, although his age was not known to the prisoner or his counsel till after the trial.

The statutes of this state, c. 106, § 2, provide that the board of municipal officers, "at least once in every three years, shall

prepare a list of jurors, under the age of seventy years, qualified to serve as jurors." In the section following, certain persons therein designated are exempted from serving as jurors, and the statute directs that their names shall not be placed on the lists. This statute has never been construed as disqualifying, but simply as excusing the persons named. Thus constables have always in this state been exempt from serving as jurors; but in *Fellows' Case*, 5 Maine, 333, a constable was returned as juryman and the court held that he was competent, though not compellable to serve.

Statutes similar to the one in question exist in many of the states in this country as well as in England. But the general doctrine applicable to these statutes is, that they do not disqualify, but merely excuse the persons named. In accordance with this doctrine, it has been held by this court that a postmaster of the United States, though exempt, was not disqualified to serve as a juror. *State* v. *Quimby*, 51 Maine, 395. It has also been held that exemption, not being a disqualification, is a personal privilege of the person exempted, which he may waive; and if he does so, parties have no ground of complaint. *State* v. *Wright*, 53 Maine, 344; *State* v. *Forshner*, 43 N. H. 89. The language of the statute in reference to the age of jurors, above referred to, and applicable to the case before us, is hardly as strong in its disqualifying tendency as the language in section three of the same statute, to which we have also referred, where it is provided in express terms that the names of the persons therein referred to "shall not be placed on the lists." Yet the decisions to which we have referred seem to place the matter beyond question.

Exceptions overruled.

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

HASKELL, J., concurred in the result.

CHARLES D. BRYANT and others

vs.

COUNTY COMMISSIONERS OF PENOBSCOT COUNTY.

Penobscot. Opinion February 18, 1887.

Ways. Appeal from county commissioners. Committee.

A committee appointed by the Supreme Judicial Court, on appeal from the doings of the county commissioners, has only to determine and report whether common convenience and necessity require that the doings of the commissioners shall be affirmed, or reversed, in whole or in part.

Such committee is not to determine whether or not the doings of the commissioners have been legal.

A petition for a way, which names the termini and the general course of the route sufficiently plain to answer all practical purposes, is good.

If the location of a way conform substantially with the route described in the petition, though neither end reaches to the terminus fixed in the petition, it is valid.

ON exceptions to the ruling of the court in accepting the report of a majority of the committee appointed by the court on an appeal from the decision of the county commissioners, as reversing the judgment of the commissioners.

Wilson and Woodward, for the appellants.

The appeal opens to the consideration of the committee the whole question which was before the county commissioners. *Winslow* v. *Co. Com.* 31 Maine, 444.

The whole question before the county commissioners was, whether or not the way should be located, as prayed for in the petition. *Hodgdon* v. *Co. Com.* 72 Maine, 246.

The county commissioners can have jurisdiction in a particular case in which they are called upon to act, only by the existence of those preliminary facts which confer it, and, of course, the existence of those facts they must find. *Hayford* v. *Co. Com.* 78 Maine 153.

And the whole question which was before the county commissioners, being before the committee, the committee must also find the existence of these jurisdictional facts, and hence there was before the committee something more than the question of

"common convenience and necessity," and the theory upon which the exceptions are based fails. That the committee must adjudicate upon the existence of vital jurisdictional facts clearly appears from *Goodwin* v. *Co. Com.* 60 Maine, 328; *Shattuck* v. *Co. Com.* 73 Maine, 318; S. C. 76 Maine, 167; and *Acton* v. *Co. Com.* 77 Maine, 131, are all cases wherein the court have expressly held that other questions besides that of "common convenience and necessity" should be considered by such a committee.

It may be urged that the language of the court in *Irving* v. *Co. Com.* 59 Maine, 513, sustains the theory upon which these exceptions are based. That language is that "the judgment of the appellate court is that public convenience and necessity do require the road as prayed for."

Every objection that could be urged on a petition for certiorari against the proceedings resulting in the judgment of the county commissioners in making the location, may be as effectually made on this appeal. *Goodwin* v. *Co. Com.* 60 Maine, 328; *Hodgdon* v. *Co. Com.* 68 Maine, 226.

In *Cushing* v. *Gay*, 23 Maine, 9, the error complained of was "that the termini of the road as laid are not the same as designated in the petition." The answer made to it was that it was not proved that the termini were different and nothing appeared to so show, and that the court could presume their substantial identity.

In *Windham* v. *County Com.* 26 Maine, 406, a ground relied upon was, "that the way was not located according to the prayer of the petition to the county commissioners." On this point the court said: "It is not necessary that the commissioners should describe the way located in the same language used in the petition, provided there is a substantial compliance therewith. . . . . There is nothing showing that the way was not laid out as prayed for, and by the record it is to be understood that there was not a departure from the way as prayed for."

In *Orono* v. *Co. Com.* 30 Maine, 302, one of the causes of error assigned was, because it does not appear from the report

of the commissioners that the said highway was located and established as prayed for in the petition of said Jameson *et al.*, but on the contrary that it was not so located and established." As to this, the court said: "There is nothing in the record exhibiting any want of identity."

Humphreys and Appleton, for the appellees, cited: *Cyr* v. *Dufour*, 68 Maine, 492; *Moore's Appeal*, 68 Maine, 407; *Irving* v. *Co. Com.* 59 Maine, 515; *Shattuck* v. *Co. Com.* 76 Maine, 171; *Inhabs. of Brunswick*, Appellants, 37 Maine, 450.

HASKELL, J. Two of the committee join in a report, "that the judgment of the county commissioners . . in laying out said way should be wholly reversed, for the reason that in our judgment the proceedings in laying out said way, or road, are entirely illegal and void;" and the third member reported in substance that the judgment of the county commissioners should be wholly affirmed.

A majority of the committee may determine the questions submitted to them; R. S., c. 1, § 6, rule III. The majority report does determine that the judgment of the commissioners in laying out the road shall be reversed, but upon specific grounds, viz., illegal procedure. Does that reason warrant their decision, and if not, is the decision conclusive upon the court? Substantial justice requires that it should not be. Whether the proceedings of the commissioners were legal or not is a question of law for this court to decide, either upon *certiorari*, or upon acceptance of the report of the committee, regardless of their views upon the question. *Goodwin* v. *Co. Commissioners*, 60 Maine, 328.

The petition asks for a road leading from Stacyville to Medway, beginning at a point in a specified road in Stacyville, near the home of S. R. Mitchell, thence across specified townships to the east branch of the Penobscot river, thence southerly on the east side of that branch across township No. 1, Range 7, and across the corner of A, Range 7, connecting with the Medway road near the house of John A. Hathaway.

The points of beginning and ending are specific, and the general course of the route is sufficiently plain to answer all practical purposes. The petition must be sufficiently specific to give information of what is desired, and should not be too critically judged of, especially when the termini are plainly stated to be at fixed points. *Windham* v. *Co. Commissioners*, 26 Maine, 409; *Sumner* v. *Co. Commissioners*, 37 Maine, 112; *Ragmond* v. *Co. Commissioners*, 63 Maine, 112. Nor does the case of *Hayford* v. *Co. Commissioners*, 78 Maine, 153, conflict with this view. In that case, one terminus was not fixed within ten miles. The petition in this case is sufficient.

Nor is the location made by the commissioners invalid. It need only substantially conform to the route described in the petition. It appears to have been so laid; but it is said that neither end reaches the terminus fixed in the petition, but that both ends stop short of these points. That is no legal objection. It amounts to a location between the points fixed by the commissioners on the route petitioned for, and a refusal to lay out the residue. *Winslow* v. *Co. Commissioners*, 31 Maine, 444; *Harkness* v. *Co. Commissioners*, 26 Maine, 353. It does not invalidate the location, but it may be a good ground for appeal to be considered by the committee in determining whether common convenience and necessity requires a location of the road prayed for. The committee may reverse the action of the commissioners in refusing to lay out a part of the way prayed for, and affirm the residue of their judgment.

Common convenience and necessity is a fact for the committee to decide in determining whether the doings of the commissioners shall be affirmed or reversed, in whole or in part. In determining that fact, the committee must consider the location as actually made by the commissioners, and if the way located by them has not proper connections, termini, so as to make it convenient for public use, and the fault can not be corrected by the committee under the petition, that may be a good reason for reversing the location. The committee, as they find "the convenience and necessity" to be, must either affirm or reverse the doings of the commissioners, in whole or in part, and that

is their whole duty. *Brunswick* v. *Co. Commissioners*, 37 Maine, 446; *Hodgdon* v. *Co. Commissioners*, 72 Maine, 246; *Shattuck* v. *Co. Commissioners*, 76 Maine, 167.

The report of the committee can only be accepted, rejected, or recommitted for the correction of some manifest error of the committee. The majority report in this case plainly shows that the committee based their action upon their own view of the law, which was erroneous, and did not determine those questions with which the law charged them.

That the committee may determine whether common convenience and necessity required the location of the way prayed for, and as their judgment may be, report whether the judgment of the commissioners shall be affirmed or reversed, in whole or in part, the report must be recommitted. *Shattuck* v. *Co. Commissioners*, *supra*.

Exceptions sustained. Report recommitted with instructions to follow this opinion.

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

CHARLES GOODRIDGE *vs.* ROBERT M. FORSMAN and others.

Cumberland. Opinion February 23, 1887.

Contract. Interest. Timber.

The plaintiff sold to the defendants the timber on certain tracts of land, to be removed within five years from May 1, 1882, the price payable to depend upon the number of thousands of feet; on failure to cut a certain amount in the first and second years, interest to be paid on the deficiencies from May 1 following (in each year) to May 1, 1884; and all timber remaining uncut on May 1, 1884 (cut after that date) to be settled for with interest from the first of January, 1882.

Held: That allowing five years to remove the timber does not conflict with the interest obligations.

Held also: That interest upon interest, or double payment of interest, is not called for by the contract; that interest paid on the deficiencies prior to May 1, 1884, should be accounted for as prepayment of interest on cuttings after that date.

The court cannot declare such contract unconscionable, there being no

suggestion of fraud practiced upon the defendants, who are men of mature years and of business intelligence, even if an intricate and hard contract.

On report.

The case is stated in the opinion.

(Copy of contract declared on.)

"This agreement made this twenty-first day of January, A. D. eighteen hundred and eighty-two, by and between Charles Goodridge of Deering, in the State of Maine, of the first part; Robert M. Forsman of Williamsport in the State of Pennsylvania, William T. Price of Black River Falls, in the State of Wisconsin, and George F. Foster of Portland, in the State of Maine, of the second part: witnesseth — that it is mutually agreed as follows, to wit: the said party of the first part hereby agrees to sell to said parties of the second part all timber standing, lying, or growing on the following described parcels of land situated in Eau Claire county, in the State of Wisconsin, to wit: . . . for the agreed price of two dollars and twenty-five cents for each one thousand feet of merchantable pine timber on said lands that will measure twelve inches at the top, and at least twelve feet long, to be paid by said parties of the second part to said party of the first part as follows: Four thousand dollars on the execution of this agreement and the balance as hereinafter specified; said four thousand dollars is to be held by said party of the first part as security for the performance of this agreement, and on the completion of the same by the said parties of the second part, is to be allowed with interest from the second day of January, A. D. eighteen hundred and eighty-two, on the last payment to be made by them under this agreement. It being understood that all merchantable pine timber of the dimensions aforesaid, including all timber twelve inches in diameter in every tree which is large enough to make one log of the dimensions aforesaid cut on said land, shall be paid for by said parties of the second part to said party of the first part, at the rate aforesaid, interest being allowed as hereinafter specified.

"Said sale is made subject, however, to the following conditions.

and agreements, to wit: said timber shall be cut and removed from said lands by said parties of the second part within five years from the first day of May, A. D. eighteen hundred and eighty-two, and shall be cut clean from said lands as fast as the work progresses. All timber which is sound and large enough to be cut into logs twelve inches at the top and twelve feet long, including unsound logs, the sound portions of which will give the measurements aforesaid, shall be cut and accounted for to said party of the first part at the rate aforesaid. The logs as measured are to average sixteen feet in length; logs twenty-four feet long are to be measured twice, to wit, as two logs, and if longer there shall be a measurement for every twelve feet additional. All timber cut on the above lands is to be hauled by said parties of the second part to the Eau Claire River or its tributaries and to be scaled on the bank. It shall be kept separate from all other timber until it has been so scaled and the scale has been accepted by the party of the first part. All logs are to be scaled sound, and such a record of the scale shall be kept as is usual according to the standard form of scale books that are in use on the Chippewa River; such scale shall be made by some competent scaler who shall be mutually agreed upon by the parties to this contract, and shall be paid for his services by the said parties of the second part. Provided however, that if at any time either of the parties to this agreement shall be dissatisfied with the scale so made he may cause said logs or any portion thereof to be scaled by the district scaler of the district in which said timber is situated, the expense of said rescaling to be borne by the party causing the same to be made, unless the first scale is found to be incorrect, in which case the expense is to be borne by both parties jointly. All logs are to be marked by said parties of the second part in a plain and substantial manner with such a mark as shall be registered for the season, which said mark shall be recorded in the name of the party of the first part in the office of the Surveyor General of logs and lumber in the district where the timber is situated. Said parties of the second part are to cut and haul not less than three millions three hundred and thirty-three thousand feet of timber, to be

accounted for to said party of the first part, from said lands during each of the two winters of eighteen hundred and eighty-one and eighteen hundred and eighty-two, and eighteen hundred and eighty-two and eighteen hundred and eighty-three, respectively. And in case of failure to cut and haul the above amount are to allow and pay to said party of the first part interest on the amount of the deficiency in each year from the first day of May following to the first day of May A. D. eighteen hundred and eighty-four; and all timber on said lands remaining uncut after said first day of May eighteen hundred and eighty-four shall be settled for at the rate aforesaid with interest from the first day of January A. D. eighteen hundred and eighty-two. All timber cut on said lands in any year as hereinbefore provided shall be paid for on or before the first day of November following with interest from the first day of May preceding, on which day the account of the timber cut in that year shall be made and adjusted. All timber destroyed or injured by fire or wind subsequent to the date of this agreement shall be accounted for by said parties of the second part as if cut and hauled by them, it being understood that all the timber on said lands stands at the risk of the parties of the second part after the date of this agreement. It is further understood and agreed that this agreement shall not be transferred by said parties of the second part, nor shall any sale of the timber cut on said lands give to any other party the right to cut and haul the same without the written consent of the party of the first part.

"The said party of the first part is to pay all taxes on each forty acres of the foregoing lands until they shall be cleared of timber as aforesaid, after which time all taxes on the same shall be paid by said parties of the second part and the lands shall thereupon be conveyed by quit-claim deed to said parties of the second part. It is further agreed that the interest specified in this agreement shall be at the rate of six per cent. And the said parties of the second part in consideration of the premises hereby agree to purchase of said party of the first part said timber to be cut as aforesaid, and to pay said party of the first part for the same at the rate and in the manner hereinbefore

provided, and to do all other things on their part necessary to be performed in order to carry out in good faith the foregoing agreement in all its specifications and details." Duly executed.

Symonds and Libby for the plaintiff.

A. A. Strout and H. C. McCormick for defendants, Robert M. Forsman and William T. Price.

C. W. Goddard for defendant, George F. Foster.

PETERS, C. J. The plaintiff made an agreement with the defendants, which was, in effect, to sell them certain parcels of timber land in Wisconsin, the total price to depend upon the quantities of timber on the tracts; the price per thousand feet to be $2.25; the land, when stripped of timber, to be deeded to the defendants.

The defendants were by the agreement dated January 21, 1882, but consummated by delivery in May, 1882, to have five years from May 1, 1882, within which the timber should be wholly taken from the territory. The contract imposes certain obligations on the defendants, such as are expressed in the following clauses:

"The parties of the second part (defendants) shall cut and haul not less than three millions three hundred and thirty-three thousand feet of timber, to be accounted for to said party of the first part, from said lands during each of the two winters of eighteen hundred and eighty-one and eighteen hundred and eighty-two, and eighteen hundred and eighty-two and eighteen hundred and eighty-three, respectively. And in case of failure to cut and haul the above amount are to allow and pay to said party of the first part interest on the amount of the deficiency in each year from the first day of May following to the first day of May A. D. eighteen hundred and eighty-four; and all timber on said lands remaining uncut after said first day of May eighteen hundred and eighty-four shall be settled for at the rate aforesaid with interest from the first day of January A. D. eighteen hundred and eighty-two. All timber cut on said lands in any year as hereinbefore provided shall be paid for on or

before the first day of November following with interest from the first day of May preceding, on which day the account of the timber cut in that year shall be made and adjusted."

The defendants deny any liability under the clause which stipulates for interest from January 1, 1882, upon the price of the timber that might remain uncut on May 1, 1884, contending that the clause is null and void. After a careful examination and consideration of the question in all its aspects, we find ourselves unable to concur in that view. The clause is too prominent a part of the contract to be easily overlooked.

It is urged that the controverted clause is inconsistent with the dominant provision in the contract, which gives five years for the removal of the timber. We do not see that it is. The entire contract may be performed by the defendants any time within the five years, but if an early performance is accomplished, it will be much more beneficial to them. They lose very much by prolonging the period of executing their obligations. The difference in result was intended to stimulate them to act promptly. The theory of the defense would allow all the cuttings, after the first two years, to be made in the fifth year of the contract, with no interest accruing to the plaintiff before that time. It seems to have been the intention of the parties that the timber should be removed within three years at the most, or that the plaintiff should be compensated for the delay.

It is also contended that the clause under examination is inconsistent with another clause which provides for annual settlements in May, or as of May, and annual payments in November afterwards, the plaintiff to receive interest accruing between those dates. It is said that this implies a payment of interest from May 1 of each year instead of from January 1, 1882. At first look, this might seem an inconsistency, but we think the intention is discernible. For any operations after the third year, settlements are to be made on May 1, payments made on November 1, and interest to be reckoned on the sums due, from May to November, and also from January 1, 1882 to May 1, in each year. For instance, for an operation in 1885-6, a settlement on May 1, 1886, ascertains the amount due — that

amount is payable on November 1, 1886, adding interest on such amount from May 1, 1886, and also adding interest on the same amount from January 1, 1882 to May 1, 1886 — or, in other words plaintiff would be entitled, on November 1, 1886, to the sum due as principal with interest from January 1, 1882. Interest is not to be cast upon interest. If the sum due as principal on November 1, 1886, were $10,000, the sum then payable would be $10,000, plus $300 (interest from May to November) plus $2,600, (interest from January 1, 1882 to May 1, 1886) that is, $10,000, plus $2,900, (interest from January 1, 1882 to November 1, 1886) that is, $12,900.

It is also contended that the clause is irrational and illegal because it calls for a double payment of the same interest. This objection refers to a supposed requirement to pay interest on the value of certain quantities of timber not cut in 1881-2 and 1882-3, the deficiencies for those years, and to pay interest on the same quantities of timber when actually cut after May 1, 1884. That is not our view of the rights of the parties. We think that neither interest upon interest nor a payment of double interest is called for. The words of the contract are, that the timber remaining uncut after May 1, 1884, shall be settled for, " with interest from January 1, 1882." That is not a declaration that any part of such interest shall be twice paid. The plaintiff is to have interest from January 1, 1882, including and not excluding what has been paid before. He gets interest in such settlements from January 1, 1882, by having a portion at the dates of the settlements and a portion before. If the plaintiff has already received a portion of the interest, and gets the balance when a settlement ensues, he will literally have "a settlement with interest from January 1, 1882." He must credit the prepaid interest. The result will be that the plaintiff will recover no interest on cuttings after May 1, 1884, unless an excess of interest has accrued over the amount paid on the deficiencies of cuttings for the first two years.

Finally, the defendants contend that, if literally construed, the clause in question imposes unconscionable burdens upon them,

and for that reason it should be adjudged void. That it is an unusual and a severe contract there can be no doubt. There is nothing, however, informing us that the defendants did not enter into the contract freely and intelligently. If there be cause for reforming the contract for any mistake of the parties, the appeal must be in equity. We cannot but think that the agreement is in some respects not fortunately worded. Its full meaning, does not, perhaps, lie openly enough on its face. It is complicated.

But we cannot declare the contract unconscionable. To be sure, under certain conditions, it exacts the payment of an extraordinary sum of constructive interest,—or interest in the nature of penalty or damages. The defendants would have exempted themselves from this burden by clearing the land of its growth in the first three years. They did not agree to do so, but they, impliedly at least, agreed upon a greater consideration to be paid to the plaintiff should they fail to do so. It may be, for aught we know, that the price for the timber was placed at a lower rate than it otherwise would have been, on account of the stringency of the demands of the contract in the matter of time. We think none of the points tenable, which we find on the briefs of counsel, in opposition to the view of the contract which impresses us as the correct one, and we leave them without further discussion.

The figures give the following result: There were no operations on the lands during the first and second years,—but the sums of $899.90 and $449.95, making together $1,349.85, were advanced as interest on the so-called deficiencies of those years. There was a small operation in the third year, which has been settled for. During the fourth year (1884–5), the cuttings, including broken timber, were 4,030,550 feet, coming at contract price to $9,068.73. Interest on that sum from January 1, 1882, until 29 October, 1885, when a payment was made, is the sum of 2,084.29. Deducting from that amount of interest the prepaid interest, $1,349.85, leaves $734.44, which balance added to the principal, $9,068.73, makes $9,803.17. From which

deducting the payment made on October 29, 1885, of $6,784.43, leaves a balance due, on that date, of $3,018.74.

Defendants defaulted for $3,018.74, with interest thereon from October 29, 1885, to the date of judgment.

WALTON, VIRGIN, LIBBY, EMERY and HASKELL, JJ., concurred.

ROCKLAND, MT. DESERT AND SULLIVAN STEAMBOAT COMPANY

vs.

WILLIAM H. FESSENDEN.

Knox. Opinion February 24, 1887.

Contracts. Measurements at sea. "Mile."

Where a person contracts with a company for a certain consideration to build and equip for them, to ply between ports on the coast of Maine, a steamboat which shall be able to attain a speed of fifteen miles an hour, with forty pounds of steam, without forcing the pumps, and to make a trial trip "at sea" at the time of delivery, the measurement is to be in marine or sea miles, and not land or statute miles.

ON exceptions and motion to set aside the verdict.

An action for damages for failure of the defendant to perform the following contract:

"This agreement, made this thirteenth day of December, A. D. 1878, between William H. Fessenden of Portland, in the county of Cumberland and state of Maine, of the first part, and Thomas S. Lindsey and John Lovejoy of Rockland, Maine, Horace W. Jordan of Boston, in the commonwealth of Massachusetts, Henry W. Swanton and Edwin Reed of Bath, Maine, the committee appointed December 9, 1878, by the Rockland, Mt. Desert and Sullivan Steamboat Company, an organization formed by articles of agreement dated November 7, 1878, of the second part, witnesseth.

"That the party of the first part, for the consideration hereinafter mentioned, agrees to build for the party of the second part, a side wheel steamboat, with boiler and machinery, according to

the specifications submitted to him by the party of the second part, except so far as alterations therein may be agreed upon in writing, to guarantee to said boat a speed of fifteen miles per hour, with forty pounds of steam, and without forcing the fires, to procure the proper certificate from the United States Inspectors, to make a trial trip at sea and to deliver said boat to said party of the second part, on the twentieth day of May, 1879.

"And in consideration of the foregoing, the party of the second part agrees to pay all inspection and Custom House fees, to furnish the equipment required by the laws of the United States, to pay the pilot on the trial trip, and to pay the party of the first part the sum of thirty-four thousand seven hundred dollars as follows:

"The sum of four thousand dollars in one month, the sum of six thousand dollars in two months, the sum of six thousand dollars in three months, the sum of eight thousand dollars in four months, and the sum of ten thousand seven hundred dollars on the delivery of said boat as aforesaid, and the acceptance of the same by the party of the second part.

"It is understood that the party of the first part shall pay to the party of the second part the sum of fifty dollars per day for each and every day that the delivery of said boat may be delayed beyond the time herein agreed upon, unless said delay should arise from causes not within the control of said party of the first part." Duly executed.

The verdict was for the plaintiffs for eight thousand three hundred and thirty-one dollars and thirty cents.

A. P. Gould, for the plaintffs, cited: 24 Rees' Cyclopedia, "Mile"; Webster's Dict. "Mile"; Worcester's Dict. "Mile"; 11 Appleton's Cyclopedia, "Mile"; 16 Encyclopedia Brit. (Ed. 1858) Tit. "Navigation"; 14 Encyclopedia Brit. (Ed. 1858) Tit. "Log"; *People's Ferry Co.* v. *Beers*, 20 Howard, 393.

Evidence of usage was admissible. *Lethulier's case*, 2 Salk. 443; *Vallance* v. *Dewar*, 1 Camp. 503; *Robertson* v. *Jackson*, 2 C. B. 412 (52 E. C. L. 411); *Pelly* v. *Royal Exch. Ass.* 1 Burr, 341; 2 Whart. Ev. § 963; 1 Greenl. Ev. § 289; *Morse* v. *Weymouth*, 28 Vt. 824.

Nathan Webb, James D. Fessenden and Nathan and Henry B. Cleaves, for defendant.

No word is better and more distinctly defined than this word, mile. There is no ambiguity about it. It is of common and familiar use, and to the great majority of men is not known to ever be applied, even with qualifying adjectives, to the designation of but one fixed and definite measure of length or distance. *Nash* v. *Drisco*, 51 Maine, 417.

There was, therefore, no difficulty in respect to the significance of that term in this contract, requiring the aid of intrinsic evidence to interpret it. *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.*

The language of the contract being free from ambiguity, evidence of usage was not admissible to show that it meant anything different from its plain and natural import. *Ripley* v. *Crooker*, 47 Maine, 376; *Metcalf & als.* v. *Weld & als.* 14 Gray, 212.

"Where the meaning of terms is plain and unequivocal and *a fortiori*, where the law has annexed a particular meaning to the use of the term, it seems to be a universal rule that no evidence can be admitted of a custom or usage to receive such terms in a different sense." 2 Starkie's Ev. p. 455.

"So where words have a known legal meaning which belongs to them." 3 Starkie, 1038.

"But where the words have a known legal meaning, such for instance as measures of quantity fixed by statute, parol evidence that the parties intended to use them in a sense different from the legal meaning, though it were still the customary and popular sense, is not admissible." 1 Greenl. Ev. § 280; Taylor on Ev. § 1062.

"Where words have acquired a known legal meaning, it can not be shown that they were used in a different sense." *Boorman* v. *Jenkins*, 12 Wend. 574; *Att'y General* v. *Plate Glass Co.* 1 Anstruther, 39.

That the word mile has in the United States acquired a known legal meaning, is clear from the legislation of the Congress of the United States, and of the Legislature of Maine.

Revised Statutes of United States, § 74, "not exceeding ten cents a mile," etc., allowed for travel to serve precepts of either house of Congress; § 1273, "ten cents a mile, and no more, for each mile actually traveled," allowance to army officers; § 1566, "an allowance of ten cents a mile may be made to officers in the Naval service . . for traveling expenses when under orders."

There is not one kind of miles for army officers and civilians and another kind for naval officers. § 5126, "five cents a mile each way," fees of messenger in bankruptcy; § 829, marshal's fees, "ten cents a mile for himself and each prisoner," to attend court, "ten cents for going only," for serving process, "six cents per mile"; § 828, clerk's fees, travel to court, "five cents a mile for going and five cents for returning."

Revised Statutes of Maine, c. 116, § 11, travel of jurors, "six cents a mile for their travel out and home"; § 13, witnesses, "six cents per each mile's travel going and returning"; § 14, parties and attorneys, "the same (33 cents) for every ten miles' travel"; p. 815, sheriff's travel, "four cents a mile," "more than fifty miles only one cent a mile"; p. 814, appraisers of real estate, "four cents a mile," etc., etc. "Bushels, without any other explanation, means a bushel by statute measure." *Hockin* v. *Cooke*, 4 Term. Rep. 314; *Noble* v. *Durrell*, 3 Term. Rep. 271; *Master of St. Cross* v. *Lord Howard De Walden*, 6 Term. Rep. 338.

"The English statute mile was defined (incidentally it would seem) by an act passed in thirty-fifth year of the reign of Queen Elizabeth, by which persons were forbidden to build within three miles of London, and the miles were declared to be eight furlongs, of forty perches, of sixteen and one-half feet each. The statute mile is therefore 1760 yards, or 5280 feet." Brande Encyclopedia of Science and Art, Title "mile"; Statute 35 Elizabeth, c. 6; Bouvier's Law Dict. "mile"; also Jacob's Law Dict.

Revised Statutes of United States, § 3570, giving table of Equivalent Measures in Metric system; § 4233, prescribing rules to be observed by all vessels of the navy and mercantile marine of the United States for prevention of collisions at sea.

Rule two, A, requires a light to be visible, "at a distance of at least five miles." "Where a written contract is susceptible on its face of a construction that is reasonable, resort can not be had to evidence of custom or usage to explain its language." *Insurance Cos.* v. *Wright*, 1 Wall. 470; *Kemble* v. *Lull*, 3 McLean, 274; *Cross* v. *Eglin*, 2 Barn. & Adol. 106 (22 E. C. L. 36).

In *Brown* v. *Brown & al.* 8 Met. 576, SHAW, C. J., "We think the general rule of law is, that the construction of every written instrument is a matter of law, and, as a necessary consequence, that courts must in the first instance, judge of the meaning, force and effect of language." *The Reeside*, 2 Sumner, 569.

This contract for building a vessel was not a maritime contract, and the claim that its terms should receive a construction suitable to a maritime contract can not be sustained. *People's Ferry Co.* v. *Beers*, 20 Howard, 402; *Cunningham* v. *Hall*, 1 Clifford, 45; *The Coernine*, 7 Am. Law. Reg. 5; *Calkin* v. *United States*, 3 Nott. & Hunt. 297; *Young* v. *Ship Orpheus*, 2 Clifford, 35.

In *Roach & al.* v. *Chapman & al.* 22 Howard, 132, Mr. Justice GRIER, delivering the opinion of the court, says: "A contract for building a ship, or supplying engines, timber or other material for her construction, is clearly not a maritime contract."

To make evidence of custom admissible, to control the ordinary and well known sense of the terms of a contract, that usage must be so notorious that not only those engaged in the business to which the custom pertains, but also all who deal with them, must be understood and taken to have known it and had reference to it, upon contracting. *Rogers* v. *Mechanics Ins. Co.* 1 Story, 607; *Macy & al.* v. *Whaling Ins. Co.* 9 Met. 363.

PETERS, C. J. The defendant contracted in writing to build for the plaintiffs a steamboat (for the consideration of $37,000) which would attain a speed of fifteen miles per hour, with forty

pounds of steam, without forcing the fires, and to make a trial trip of the boat "at sea" at the time of delivery.

The main question of the case is whether the speed should be reckoned upon a measurement of land or of sea miles. The plaintiffs contend that miles as measured on the sea — sea miles — knots — marine or geographical miles, and the defendant contends that land miles only — were intended. A very important question is thus presented, which, after much research, we do not find, either as a question of law, or of fact founded on usage, ever before came before any court in the world. Not a direct authority has been cited on either of the remarkably able briefs of counsel, and we confidently believe not one can be found. We have ourselves suffered some unsteadiness of opinion in our attempt to solve the question; but, after long consideration, we are led to the belief that the most satisfactory end of the case will be to allow the plaintiffs' contention to prevail.

Not, however, to prevail, as the judge allowed the jury to place it, on the ground of usage, but on a construction of law. If the law will not support the plaintiffs' position — usage cannot. There can be no usage covering the point in controversy, unless it be such a one as the law recognizes as a part of itself. The law, we know, appropriates many usages and customs as a foundation for itself to stand upon. The evidence of the experts does not have any real force to overturn the legal rule, whatever it may be. Not a witness ever knew a case or a contract where any such question arose. The witnesses inform us of the nature of sea miles and of the manner of measuring them. If we adopt their meaning of the word when occurring in contracts, why should we not engraft the same meaning upon the word when it appears in legislative enactments, federal and state, concerning distances on the sea? The word must have the same meaning, in the same connection, whether spoken by a captain or pilot, or by a legislator. Its application should be universal. The explanations of the experts are interesting, however, and are helpful to the court in matters of common, every day

knowledge, such as a court may acquire for itself from reading books or making personal inquiry.

Each side is contending for a measure that is no more nor less than a mile. One contends for a mile which measures 5280 feet on the land — the other for a mile that measures 6086.7 on the sea. The land mile is more common to those whose business is upon the land — to landmen — while the sea mile is the only one recognized by those who navigate the sea — by seamen. The first named was legalized in the reign of Queen Elizabeth, known as "statute mile" — or "English mile" — or "English statute mile;" and the "log" was invented at about the same time which inaugurated the measuring of sea or marine miles, known as "English geographical miles." Each is adapted to its own sphere.

It would be impossible to measure the sea as we do the land. Charts of the ocean and other navigable waters are made on a scale of sixty geographical miles — sea miles — to a degree. Speed of vessels, whether propelled by steam or sails, is only ascertained by "log and line," each "knot" in the line representing one mile on the sea. The navigator can also ascertain distances run from day to day by taking altitudes of the sun, and finds his position on the chart by computations based on the sea mile as his measure. Different rules from those on the land — different knowledge — different laws and even different courts — control the business and controversies pertaining to the seas.

It is said that the navigator may reduce his sea mile to a land mile, and be in accord with that mile in that way. It is not often done, and cannot by ordinary men be easily done. A practice of making the reductions would impose burdens and mistakes upon business. The seamen would contend that the land mile should be extended to the length of the sea mile, to ensure uniformity. The statute mile is adopted only in England and the United States, while the marine mile is known to and acted upon by all the civilized peoples of the globe.

The contract is, to run fifteen miles per hour. Whether the boat had that speed was to be ascertained by "a trial at sea." Was it not to ascertain if she would make that distance in the

time on the sea? Was not the distance to be measured in the manner that distances are measured on the sea? Was it not sea miles that were to be run upon the sea? It seems reasonable to think so. The contract fails only in the slightest degree of so expressing it,— while the implication declares it to be so nearly as strong as words would express it. It may be, that difficulties attend this view; but will not greater difficulties attend any other view? The uncertainties of usage would only still more embarrass the solution of the contract,— it can be better interpreted by the law.

Would not the same question have arisen in the courts before had the law not been already considered to be as we declare it? We are much impressed with the fact that the words "miles" and "knots" are constantly used in marine cases as convertible and equivalent terms. There are many cases where the words are used in the same acceptation in legal opinions.

It is noticeable in admiralty cases that the word "knot" is more commonly employed to denote the rate of speed, and the word "mile" more commonly used to express distances accomplished by speed — the result of speed. As examples: One head note in an English case reads, stripping it of redundant words, thus: "A steamer, going at the rate of seven knots an hour, ran into a bark, about two hundred miles from Sandy Hook, the bark going at the rate of about a mile an hour;" and the steamer was in the wrong. Another is this: "A steamer, when off the Casketts, and ten miles therefrom, was running at a speed of eight or nine knots an hour;" an unlawful rate of speed in that case. Another sample: "Four or five knots an hour is not a moderate speed for a steamer in a thick fog, twenty-five miles east of Gothland." In these and a vast number of cases, the words miles and knots mean the same thing — mean marine miles. In many cases, the word knots is first used and then repeated as miles — the words being spoken as interchangeable expressions.

In the case of *The Queen* v. *Keyn*, the Franconia case, L. R. 2 Ex. Div. 63, in which a question of international law of extraordinary importance was discussed by many judges, a case

involving a crime committed below low water mark, but within three miles from the English shore, the phrases "three miles," "marine league," "three geographical miles" and "three sea miles," are over and over again used to express precisely the same thing. In treaties between nations more caution is observed in using exact language, and writers on international law are circumspect in that respect. The English statutes commonly use the words "marine league" to indicate the three-mile belt from shore, but not always so, as may be seen in an act of Victoria copied in the above case on page 84. The United States statutes use the words "marine league" in expressing the distance from shore in which admiralty jurisdiction shall be limited, but use the term miles in other cases. There is, or was, a statutory law of Massachusetts (*Dunham* v. *Lamphere*, 3 Gray, 268) preventing fishing within one mile of Nantucket shores. Could that be a land mile, when located on the sea? Miles on the land consist of "paces"—those on the sea must be differently measured.

It seems evident enough that the word mile means marine mile or "admiralty knot," in the business of the Navy department in this country. In the latest circular of that department, advertising for the construction of war vessels, the conditions require that the vessels "must be able to maintain a rate of speed of seventeen knots an hour *on the measured mile*." In General Order Number 314 of that department, published in 1883, the measured mile is thus specified: "For these (trials of speed) a convenient locality should be chosen, where a *nautical mile* can be laid off and marked at each end by two stakes placed in a line at right angles to it." An examination of other public papers of that department shows pretty clearly that the words, knots and miles, are there considered as the same thing.

We find cases in the common law courts where it is not unlikely that the distances on the sea spoken of, were measured as land miles or parts of land miles, instances of measurements upon or near the shore, or measurements in rods and feet, cases resting upon peculiar facts. Illustrations of these are found in the following citations: *Mahler* v. *Transportation Co.* 35 N. Y.

352, 360; *People* v. *Supervisors*, 73 N. Y. 393; *United States* v. *Jackalow*, 1 Black. 484; *Dolner* v. *Monticello*, Holmes, 7.

When we speak of measures and weights, we mean wine measure for one article and beer measure for another, and different standards of weight for different solid substances. When we speak of measuring our roads we imply the common mile, and when of tracks across the sea, we mean that standard of distance by which such tracks are not only usually but always measured. When we say a boat shall be sailed fifteen miles at sea, or on the sea, we mean that distance in sea miles. The sea mile is as important in its sphere as the land mile is in the sphere where it operates. It may be that the defendant did not understand that he was bound by sea-mile measure; but it must be pronounced by the law that he should have so understood it. There is no need of discussing the question upon the theory that the trial trip was to be on some river, inasmuch as the vessel route from Rockland to Bar Harbor is a coastwise sea passage, and the test of speed was to be exhibited on the sea.

This decides the vital point of the case. We think the minor rulings are unexceptionable. The jury evidently held the defendant to the test of marine miles. Upon that basis, we do not feel like taking upon ourselves the responsibility of declaring the verdict wrong.

It may be appropriate to add that, while the case was set down for argument in 1880, the papers reached the court in the latter part of the year 1885.

Motion and exceptions overruled.

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

JOHN A. WATERMAN, JUDGE OF PROBATE,

vs.

KATE H. DOCKRAY and others.

Cumberland. Opinion February 24, 1887.

Bond. Probate judge. Practice. Amendment.

A probate bond, which on account of some deficiency is merely a common-law bond, while destitute of power to enforce statutory penalties, and suable

only in the name of the judge to whom given, is available for the enforcement of all legal obligations assumed by the makers, in the same manner as if a statutory bond.

The writ in a suit on such bond, brought in the obligees' name, for the benefit of the estate generally, is amendable by inserting the name of a person as prosecutor; the amendment does not bring into the case either a new party or new cause of action; the obligee (judge of probate) is the party in trust for all persons interested.

On exceptions.

This was the second time this case had been before the law court. It is reported in 78 Maine, 139, where is given a copy of the original declaration. The plaintiff, after the first opinion of the court filed an amendment to the declaration and the defendant moved that the amendment be not allowed because, among other reasons, it set out new causes of action and introduced new parties. The presiding justice *pro forma* sustained the motion and refused to allow the amendment. To this ruling the plaintiff alleged exceptions.

(Amendment to declaration in writ.)

"Under the decision of the law court, and the order of the justice presiding at the January term, 1886, in said county, plaintiff files the following amendments to his writ and declaration, viz. :—

"1. Amend the writ by inserting immediately before the declaration after the words 'James R. Dockray' the following :— 'as well as by Ammi R. Mitchell, of Cleveland, in the State of Ohio, a creditor of said estate and a party interested.'

"2. Amend the declaration by inserting after the words 'here in court to be produced' the following :— 'which writing is of the tenor following :—

" 'Know all men by these presents, that we, Kate H. Dockray of Portland, executrix of James R. Dockray of said Portland and Oliver Gerrish and Charles R. Milliken, both of Portland, in the county of Cumberland, within the state of Maine, are holden and stand firmly bound and obliged unto John A. Waterman, Esquire, judge of probate of wills, and for granting administration, within the county of Cumberland,

in the sum of ten thousand dollars, to be paid unto the said judge of probate, or his successors in said office; to the true payment whereof we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally by these presents.

"'Sealed with our seals. Dated the sixteenth day of December, in the year of our Lord one thousand eight hundred and sixty-eight.

"'The condition of this obligation is such, that if the above bounden Kate H. Dockray, executrix of the last will and testament of James R. Dockray, late of Portland in said county of Cumberland, deceased—

"'First.—Shall 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 shall have come to her possession or knowledge;

"'Secondly. — Shall administer, according to law, and to the will of the testator, all his goods, chattels, rights and credits;

"'Thirdly.—Shall render, upon oath, a just and true account of her administration, within one year, and at any other times, when required by the judge of probate;

"'Fourthly.—Shall 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 her, or with her 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 upon 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 deceased, or by waste or trespass of any other kind, and also for such damages as she may recover of any heir or devisee of the estate, or other person, for the like waste or trespass, committed on any such real estate.

"'Then the above written obligation shall be void, otherwise shall remain in full force.

"'Signed, sealed and delivered in presence of Kate H. Dockray, [L. s.]
Oliver Gerrish, [L. s.]
S. C. Strout, Charles R. Milliken, [L. s.]
L. Kidder. (U. S. I. R. Stamp. Value of $1.00.)
"'Cumberland, ss. Dec. 16, A. D., 1868.

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

John A. Waterman, Judge.'"

"3. Further amend the declaration by adding thereto the following:—'And plaintiff avers that said Kate H. Dockray, executrix of the last will and testament of said James R. Dockray, at a term of the probate court for said county of Cumberland, begun and held on the first Tuesday of October, 1873, represented the estate of said James R. Dockray, insolvent, and in her said representation and petition, commissioners of insolvency were appointed thereon at the term of said court begun and held on the first Tuesday of November, 1873, and said commissioners made their final report and the same was accepted and approved at the term of said court begun and held on the first Tuesday of June, 1876, and the following claims were then and there proved and allowed according to law against said estate, viz.:

"And plaintiff further avers that at a term of said court begun and held on the third Tuesday of May, 1875, on petition of said Mitchell, creditor aforesaid, said Kate H. Dockray, executrix aforesaid, was ordered to present her account on or before the first Tuesday of the next June.

"And at a term of said court begun and held on the third Tuesday of June, 1875, said Mitchell petitioned for the removal of said executrix because she had failed to settle her account and because she had mismanaged said estate.

"And at a term of said court begun and held on the third Tuesday of July, 1875, the said John A. Waterman, then judge of probate within and for said county, removed said Kate H. Dockray, executrix aforesaid, from her said trust, and expressly authorized said Mitchell, a creditor of said estate, to bring suit in his name on said bond hereinbefore set forth.

"And thereafterwards, at the term of said court begun and held on the first Tuesday of March, 1876, said Lewis Pierce was appointed administrator *de bonis non* with the will annexed of said estate, and duly qualified as such.

"That thereafterwards, at a term of said court begun and held on the first Tuesday of May, 1876, said Kate H. Dockray, late executrix aforesaid, settled her first and final account as executrix of said estate, wherein she acknowledged herself chargeable to said estate with a balance of $7,288.96.

"That thereafterwards, on the fifth day of July, 1876, at a term of said court begun and held on the first Tuesday of July, 1876, on petition of said Pierce, administrator *de bonis non* with the will annexed as aforesaid, she was cited into court and examined in regard to the assets of said estate, and then and there demand was made upon her for the balance with which she had charged herself as aforesaid in her said account, but said Kate H. Dockray then and there refused to deliver to said Pierce, administrator *de bonis non* with the will of said James R. Dockray annexed, any books, accounts, notes, papers, money, property or assets of said estate.

"That thereafterwards said Kate H. Dockray caused to be delivered to said Pierce, certain notes belonging to said estate being part of the assets of said estate, of the value of $1,265.

"And that said Kate H. Dockray still refuses to deliver to said Pierce, administrator *de bonis non* with the will annexed as aforesaid, any other portions of the assets of said estate named in her said account and in the inventory of said estate filed by said Kate H. Dockray, when executrix as aforesaid, but retains and withholds from him the remainder thereof, of the value of $6,023.86, all which is property of said estate not administered upon by said Kate H. Dockray, as executrix aforesaid, and a part of which is household furniture and other goods and chattels of the value of $599.75, and the remainder money, as has been specifically ascertained by said inventory and her said account."

C. W. Goddard, for plaintiff.

H. D. Hadlock, for defendant.

PETERS, C. J. The bond in suit, being a common law bond, is necessarily sued in the name of the person who was judge of probate when it was given, instead of in the name of his successor, is destitute of power to enforce statutory penalties, but is available for the enforcement of all legal obligations assumed by the makers, in the same manner as if it were a statutory bond. *Cleaves* v. *Dockray*, 67 Maine, 118; Schoul, Ex. § 143, and cases.

When this case was presented to the court before (78 Maine, 139), the writ charged that the action was prosecuted in John A. Waterman's name by the administrator, *de bonis non*, of the estate of Dockray. That was held not maintainable because the administrator had no adjudged claim of his own to recover, and no authority from the judge of probate to prosecute the action in behalf of the estate generally. The court say that Ammi R. Mitchell, a creditor, might have prosecuted the action, having had leave to do so, and that the plaintiff might amend his writ and declaration on payment of costs. The costs were paid by the plaintiff, and accepted by the defendants.

How to amend? If the writ was not a valid writ, was it not to amend so as to make it valid? If the decision was that the action could only be prosecuted by the creditor, Mitchell, was it not to so amend as to make Mitchell the prosecutor? Have not the defendants voluntarily received a consideration for allowing an amendment that will give the proceeding full force and efficacy? Were the costs received to allow merely a useless amendment? In our opinion, the plaintiff is entitled to amend to any extent necessary to make his pleadings sufficient.

But it will be a change of parties and of the cause of action, is argued by the adverse party. We think not, in any substantial sense. The real parties will be the same after as before amendment; the plaintiff was and still will be John A. Waterman. In his name the judgment must be recovered for all the creditors,— and in his name alone will execution be issued. The original action was not commenced under section 10 of c. 72, R. S. No particular claim was sought to be recovered. The attempt was to sue the bond under section 16 for the estate — the benefit

of all. The essential party is John A. Waterman, the obligee in trust of all persons interested in the bond.

Nor is the cause of action changed in the least by the amendment. The cause of action is the same whether the suit be promoted by one or another person. It is essentially the same thing to the defendants, whoever the secondary parties may be. In any case, the cause of action is the bond and a forfeiture under it. When a judgment is recovered, the judge of probate assigns it to the new administrator to collect for the benefit of the estate generally. R. S., c. 72, § 18.

In the earlier practice such suits were brought by the judge of probate in his own name, upon the indemnity of some interested party to save him harmless of costs. In the present Massachusetts practice, the requirement is that the writ shall be indorsed "by the person for whose benefit or at whose request the suit is brought, or by his attorney." In *Bennett* v. *Woodman*, 116 Mass. 518, it is said: "The judge of the probate court, and not the indorser of the writ, represents the rights upon which the action is to be maintained, if at all," in an action for the general benefit of the estate. It was there held to be immaterial that the person upon whose representation the action was brought would receive no benefit from a recovery on the bond. The party permitted to commence the action is merely a promoter or prosecutor, a person who volunteers to carry on the suit, at his own risk and expense, for the common good. He is not the party—he merely supports the party. In an action under section 10, commenced without leave of court, it would be different.

It has never been decided that an amendment such as is offered here is inadmissible. In *Potter* v. *Cummings*, 18 Maine, 55, an amendment of the kind was not rejected. In *Patten* v. *Tallman*, 27 Maine, 68, it was held that "such an amendment could be allowed only on terms." In *McFadden* v. *Hewett*, 78 Maine 24, an amendment of as much substance as this was allowed. Bear in mind that our statutes now allow, on payment of costs, a change of parties, by way of amendment, by either

lessening or increasing the number of either plaintiffs or defendants.

It appears from the facts stated in the proposed amendment, that a large amount of unadministered property has remained in the principal defendant's hands for more than ten years, and that creditors have been thus far baffled, in their attempts to recover their claims, by her maladministration of the estate. The liability under her bond seems to be doubly fixed. First, by neglecting to account when required to do so,— secondly, by a failure to turn over the property to her successor when demanded of her. Escape from liability altogether, a consequence that might ensue if an amendment be not allowable, would be a stigma on the law itself, occasioned by the remissness of some of its servants or officers. That need not be.

Perhaps it would leave the writ and declaration more consistent to strike Pierce's name therefrom, although not necessary to do so, and allege that the action is prosecuted by Ammi R. Mitchell, a party interested, for the benefit of the estate, he having been expressly authorized to do so by the judge of probate.

At all events, the plaintiff should be allowed to make the amendment asked for, or any other which would not be a substantial departure from the limit indicated.

Exceptions sustained. Motion of defendant overruled. Amendment allowed.

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

JAMES P. WENTWORTH *vs.* EDWARD H. WOODSIDE.

Cumberland. Opinion February 24, 1887.

Lord's day. R. S., c. 82, § 116.

The statute which provides that no person shall defend an action on a contract upon the ground that it was made on the Lord's day, until he restores the consideration received for the contract, applies to an action in which the defendant is sued for a sum which he promised to pay as the difference of

value between horses exchanged by the parties, the defendant not restoring or offering to restore the horse obtained from the plaintiff.

On exceptions from superior court.

The opinion states the material facts.

F. V. Chase for the plaintiff, cited: *Berry* v. *Clary*, 77 Maine, 482; *State* v. *Bonney*, 34 Maine, 223.

Weston Thompson, for the defendant.

The exchange of animals was proposed, assented to and effected on the "Lord's day," in violation of Rev. Stat. c. 124, secs. 20 and 22, and because the plaintiff was a party to that violation, and does not come into court with clean hands, he cannot recover in this action. There was no legal contract on which to maintain assumpsit. The declaration is false, and the plea is true. 26 Maine, 464; 50 Maine, 83; 63 Maine, 576; 71 Maine, 238; 15 Gray, 433.

Against these reasons and authorities, the plaintiff hopes to prevail by R. S., c. 82, sec. 116, enacted in 1880.

The loss falls on that party who is unable to maintain himself in court without showing his own fault. Broom's Legal Maxims, 574 to 579.

The prohibition which this late act relaxes, is part of the iron creed of the Puritan, and as old as the laws of Athelstan, and is also founded on the secular considerations which Blackstone says the law much regards. 4 Bl. Com. 63.

If ever a statute should have a narrow construction and a restricted application, it is one which puts the law at the service of a plaintiff who claims to recover damages on the proof and strength of his own crime. The question is — what did the Legislature mean? The distinction which we make, between sale and barter, is not suggested in the language of the act, but words are not the only evidence of its intent, and are not necessarily the controlling evidence of it. Where the effect would be needless mischief, it is more reasonable and more respectful, and more in accord with public policy, to say the Legislature was unskilful in the choice of words than that it meant to make the law a thief. Such an imputation should not be put upon those

who forebore to repeal the laws against arson, robbery, larceny, embezzlement and malicious mischief. *Landers* v. *Smith*, 78 Maine, 212, (1 New England Rep. 896;) *Holmes* v. *Paris*, 75 Maine, 561; *Somerset* v. *Dighton*, 12 Mass. 384; *Gibson* v. *Jenney*, 15 Mass. 204; *Com.* v. *Loring*, 8 Pick. 370; *Com.* v. *Kimball*, 24 Pick. 370; *Brown* v. *Pendergast*, 7 Allen, 429; *Winslow* v. *Kimball*, 25 Maine, 493; *People* v. *Utica Ins. Co.* 15 Johns. 358; *Blakeney* v. *Blakeney*, 6 Porter, 109; *People* v. *Lambier*, 5 Denio, 9; *Rogers* v. *Brent*, 5 Gilman, 573.

In such cases, the tender is excused when the party to whom it was due has voluntarily parted with power to do what would be his duty if the tender were made. 2 Allen, 440; 6 Allen, 273; 112 Mass. 509; 9 Cush. 215; 17 N. H. 573; 30 B. Monroe, 517; 17 Maine, 296.

PETERS, C. J. The plaintiff and defendant exchanged horses on the Lord's day, the defendant agreeing to pay fifty dollars for the difference in value between the animals. The action is to recover the fifty dollars, the defendant not returning nor offering to return the horse which he received from the plaintiff. The action may be sustained. The statute seems to be completely applicable, which declares that "no person who receives a valuable consideration for a contract, express or implied, made on the Lord's day, shall defend any action upon such contract on the ground that it was so made, until he restores such consideration."

The whole consideration received by the defendant is still in his hands. He cannot retain it and avoid his contract. It is urged that he cannot safely make restoration — that by doing so he might lose the horse which the plaintiff received from him. But the statute is exacting — unconditional. It matters not that the defendant cannot restore, or profitably or safely restore. If he does not in fact restore he cannot defend. There may be many cases where a defendant cannot restore the consideration received. It may have passed into other hands, or gone into other form, or been consumed or lost. And cases may often arise, as in this case, where a defendant is unwilling to take the

risk to restore. But for all such cases was the statutory requirement intended. The statute is broad and remedial and should be liberally construed, to prevent fraud or injustice.

The argument of counsel would seem to imply that the law was enacted to protect a defendant. It is for the public protection, treating parties fairly, alike. It must be borne in mind, looking at the just and equitable view of the transaction, that the worst which can befall a defendant who fails to make the restoration required of him, will be to perform his contract, which though made on Sunday, is presumed to have been as carefully made as if on any other day.

Exceptions overruled.

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

MILLER MATHERSON and another *vs.* JOHN W. WILKINSON.

Cumberland. Opinion February 24, 1887.

Partnership. Assignee of partnership affairs. R. S., c. 69, §§ 1-4.

The provisions of R. S., c. 69, §§ 1-4, relating to the settlement of the estates of deceased partners, do not apply to an account sued in the name of surviving parties for the benefit of one partner to whom the account was assigned by the partnership during the lifetime of all the partners.

ON exceptions to the rulings of the judge of the superior court.

The opinion states the material facts.

David W. Snow, for the plaintiffs.

C. W. Goddard, for the defendants.

PETERS, C. J. The amended pleadings admit these facts: The two plaintiffs, non-residents of this State, surviving partners of a third person, sue the defendant, also a non-resident, on an account annexed to the writ. The suit is prosecuted for the benefit of one of the plaintiffs, who owns the claim in suit by an assignment from the partnership during the lifetime of all the partners.

It is objected, that the suit is forbidden by our statutes applicable to the settlement of partnership estates after the death of one of the partners.

It may be, as responded to this objection by the plaintiff, that such statutes do not apply to the concerns of a partnership existing and carried on out of our State. We pass that point, as not necessary to the decision of the present case.

The other point relied on by the plaintiffs in justification of the suit, we think must prevail; that is, that the action may be maintained because the account does not belong to the firm but to an assignee. There is no reason, as between a partnership and its debtors, why the partners may not assign their claim to one of themselves. It is a common thing for one partner to purchase of his associates. The partners could sell an account as well as any other assets. This account could have been sued in the name of the assignee, by observing the requirement imposed on assignees in such cases. Section 1, c. 69, R. S., makes a provision for the settlement of "the property of the partnership." This debt is not now the property of the partnership, though sued in its name. The partners do not own the claim after selling and assigning it.

The defendant objects that the writ does not disclose that the suit is for the benefit of an assignee. We think it does, but it need not. The fact was pleaded when it became necessary, and the defendant was at liberty to admit or deny it. His demurrer admits it.

Exceptions sustained.

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

JOHN L. THOMPSON *vs.* FRANK SMITH.

Lincoln. Opinion February 24, 1887.

Lobsters. R. S., c. 40, § 21. Stat. 1885, c. 258 and c. 275, § 3.

An action to recover penalties for infractions of the lobster law is not barred by previous criminal proceedings for the same offence before a magistrate, who bound the defendant over instead of trying the complaint himself, the

law giving him no jurisdiction to send the case up. The first proceedings were a nullity.

Where the writ or indictment alleges in one count the illegal possession of a definite number of lobsters, the verdict may be for any number less than the whole number alleged; and the penalties be proportionate with the finding.

The complainant was not under obligation to prove that the lobsters under nine inches long were young lobsters; the word young is used in the statute in a presumptive sense; the law assumes that those under nine inches long are young lobsters.

It is not unlawful to have in one's possession dead lobsters less than nine inches long, if the same lobsters were nine inches or more long when taken alive.

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

An action of debt to recover the penalties for having in possession six hundred and fifty-five young lobsters under nine inches long, in violation of R. S., c. 40, § 21.

The jury found four hundred and twenty lobsters unlawfully in the possession of the defendant, and rendered a verdict for four hundred and twenty dollars.

True P. Pierce, for plaintiff, cited: *Bixby* v. *Whitney*, 5 Maine, 192; *Stevens* v. *Fassett*, 27 Maine, 282; *York* v. *Goodwin*, 67 Maine, 260; 1 Bish. Crim. Law, § § 1013, 1014, 1021; *Com.* v. *Loud*, 3 Met. 328.

William H. Hilton and Joel P. Huston, for defendant.

In *Burnham* v. *Webster*, 5 Mass. 268, the court say, that where the plaintiff declared in one count for several penalties, that is, "for each and every of said offences the sum of fifteen dollars, amounting in all to sixty dollars," had the jury returned a verdict for more than one penalty, viz., fifteen dollars, it would have been irregular. Upon like principle the jury in this case, had they found young lobsters unlawfully in the defendant's possession, less than nine inches in length, should not have returned a verdict for more than one dollar.

If the magistrate erred, it is no fault of the defendant, nor should he be made to suffer for it. Even should the proceedings before the magistrate prove no bar to another criminal prosecu-

tion, it should bar this action of debt. This is a civil action and inconsistent with the criminal process instituted before the magistrate. *Canfield* v. *Mitchell*, 43 Conn. 169.

The plaintiff having elected to recover these penalties by complaint and warrant, in the name of the state, irrevocably waived the remedy by action of debt. *York* v. *Goodwin*, 67 Maine, 260; *Wise* v. *Brownstein*, 35 Hun. (N. Y.) 569.

In *Allen* v. *Young*, 76 Maine, 80, the court say: "It has been repeatedly asserted in both ancient and modern cases, that judges may in some cases, decide upon a statute in direct contravention of its terms, that they may depart from the letter in order to reach the spirit and intent of the act;" and cite with approval *Holmes* v. *Paris*, 75 Maine, 559, and cases there cited.

There is no evidence in the case that the lobsters were young. Every essential part of the description must be proved. Allegations of matter of substance must be substantially proved, but allegation of description must be literally proved. *Ackley* v. *Dennison*, 22 Maine, 168.

PETERS, C. J. This action is instituted to recover penalties incurred for infractions of the lobster law. Several questions are presented under the exceptions and motion.

A question arose, preliminarily, whether this action is barred by a previous criminal prosecution. It appears that, before this action was commenced, the defendant was arraigned, for the same offense, before a trial justice, who bound him over to a higher court, although the trial justice had plenary jurisdiction to try the complaint himself. Those proceedings were a nullity, and cannot operate to discharge this action brought for the same offense. They were an attempted, but not a real, prosecution. The defendant has not been, in the constitutional sense, twice tried for the same offense. *Coleman* v. *State*, 97 U. S. 520; *Stevens* v. *Fassett*, 27 Maine, 282. In *Com.* v. *Hamilton*, 129 Mass. 479, a magistrate made precisely the same mistake that was made here, and with the same result.

The defendant contends that it was not competent for the jury to find a verdict for a less number of lobsters than the whole

number declared for. We think a verdict may be for any number from one to the whole number in the declaration, indictment or complaint,—and that the fine is to be proportionate to the finding.

The defendant takes the position that there should be no recovery for taking a lobster under nine inches long, unless it be a "young" lobster, contending that there are old "dwarf" lobsters less than that length, which can be legally taken. We think the word "young" in the statute, is used in a presumptive or assumptive sense merely; that the legislature meant to declare that any lobster under nine inches long should be regarded as a young lobster. The inhibition is against taking any under the prescribed length.

It is contended that it was not illegal to have in one's possession a dead lobster measuring less than nine inches in length, if the same lobster was nine inches or more long when taken alive. We concur in that position. The object of the law is to prevent the taking of small lobsters out of the sea. It requires a restoration into the sea when innocently taken out. In order to carry the primary design more effectually into execution, it is declared to be an offense to have in possession any lobster under the legal length,—without indicating whether the lobster may be dead or alive. It must mean this: That it is illegal for any person to have in his possession a live lobster less than nine inches long, or a dead lobster (no matter what the length) which was less than nine inches long when alive—that is, when taken from the sea. No person can have a lobster in his possession which, when alive, was less than nine inches long. But if a person has in his possession a boiled lobster less than nine inches long, and the same lobster was nine inches long or more when alive, in such case no offense is committed by the possession.

It would be a strange result, if a person could legally take a lobster alive, and legally keep him as long as alive, and be guilty of an offense for possessing the same lobster after it is dead; if a legal catch can thus become illegal.

Evidence of the length of boiled lobsters is no doubt admissible as indicating the length of the same lobsters before they were

boiled. And the distinction above made becomes immaterial, of course, if boiling a lobster does not in any case diminish its length — does not reduce him from the legal to the illegal length.

Most of the testimony, at the trial of this cause, tended to show that there was no appreciable difference between lobsters when alive and when boiled. The jury, however, made some deduction, evidently, for a supposed difference. Some of the witnesses maintained that, instead of shrinking by boiling, the length of the lobster is increased.

Exceptions and motion overruled.

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

WAYLAND KNOWLTON

vs.

COUNTY COMMISSIONERS OF WALDO COUNTY.

Waldo. Opinion February 24, 1887.

Fees. Trial justices. R. S., c. 115, § 2. Stat. 1885, c. 345.

The fees to which trial justices are entitled by law in criminal prosecutions are provided for in § 2, c. 116, R. S.

The allowance of eighty cents for the trial of an issue applies only to civil proceedings.

ON exceptions to the ruling of the court in refusing to grant the writ of mandamus on plaintiff's petition.

The opinion states the facts.

Wayland Knowlton, for plaintiff.

Thompson and Dunton, for defendants.

FOSTER, J. The petitioner seeks for mandamus to compel the county commissioners of Waldo county to audit and allow, in three criminal bills of cost, certain items to which he claims to be entitled as the magistrate before whom the proceedings originated.

The case comes before this court upon exceptions to the decision of the presiding justice in denying the writ.

The only question involved is whether the magistrate in criminal prosecutions originating before him is entitled to eighty cents for the trial of an issue, as in civil actions, and twenty-five cents for taxation of costs.

The fees to which trial justices are entitled by law in criminal prosecutions are provided for in § 2, c. 116, R. S. Those fees to which they are entitled in civil actions and other matters other than those of a criminal nature are specified in the first part of the section named; after that there follows a statement of those fees to which they are entitled in criminal prosecutions.

The allowance of eighty cents for the trial of an issue was evidently intended by the framers of the law to apply only to civil proceedings. This is more apparent when we come to examine the earliest statute upon this subject, establishing and regulating the fees of justices and other officers, passed February 13, 1796, (2 Mass. Laws, 699,) afterwards incorporated into the statutes of 1821, c. 105, § 1, and amended in 1835, c. 178, § 7. It will be found upon examination, that in those early statutes the express authority by which magistrates were allowed for "the trial of an issue" was contained in the paragraph relating to civil causes which was in these words: "For the entry of an action, or filing a complaint in civil causes, including filing of papers, swearing of witnesses, examining, allowing, and taxing the bill of costs and entering up the judgment and recording the same, sixty-one cents. The trial of an issue, fifty cents."

Following that, were the several paragraphs substantially the same as in the present statutes.

Matters relating to criminal prosecutions were,—as they still are,— grouped together in those separate paragraphs which form a different and distinct portion of the section referred to, and where the specific items of fees in all the proceedings relating to criminal prosecutions are definitely stated.

Had it been the intention of the framers of this statute to allow, in criminal proceedings, any additional fee to what is so clearly and specifically stated, we cannot help believing that they would have so expressed it.

As it is, we have no doubt of the correctness of the decision of

the court in denying the writ under the law as it then stood.

Since the plaintiff's claim originated, R. S., c. 116, § 2, has been amended by c. 345 of the Laws of 1885, so that the allowance of eighty cents for an issue is now limited by express enactment to civil cases.

Exceptions overruled.

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

HERBERT F. SHAW *vs.* JACOB S. GRAVES AND WIFE.

Kennebec. Opinion February 24, 1887.

Contract. Support and maintenance. Physician's bill.

Where a husband and wife bound themselves by bond to other persons to furnish support to a third party, and fail to perform their duty in that respect, there is no implied authority to warrant such third party in obtaining outside assistance upon their credit and expense.

Where the wife knew a physician had been sent for to attend such party, and did not object, and the husband, on the arrival of the physician at his house, forbade him rendering any service on their account, and the physician rendered services, making his charge therefor to such third party, he cannot, after such election, recover of the husband and wife, or either of them, either the whole charge for such visit, or so much of it as accrued before the husband's repudiation of his authority to act.

ON motion to set aside the verdict from superior court

Assumpsit on an account annexed, by a physician, for professional attendance upon Mrs. Sarah J. Cofren, amounting to $10.15. The verdict of the jury was for the plaintiff for ten dollars and forty-two cents. This verdict the defendant moved to set aside as being against law and evidence.

J. H. Potter for the plaintiff, cited: *Enfield* v. *Buswell*, 62 Maine, 128; *Hunter* v. *Heath*, 67 Maine, 507; *Staples* v. *Wellington*, 58 Maine, 453.

Bean and Beane and *H. M. Heath*, for the defendants, cited: *Wyman* v. *Hook*, 2 Maine, 337; *Porter* v. *Hooper*, 11 Maine, 170; *Howe* v. *Russell*, 41 Maine, 446; *Jewett* v. *Somerset*, 1 Maine, 125; *Wyman* v. *Banton*, 66 Maine, 171; *Moody* v.

Moody, 14 Maine, 307; *Winchester* v. *Howard*, 97 Mass. 305; *Earle* v. *Coburn*, 130 Mass. 595; *Whiting* v. *Sullivan*, 7 Mass. 107; *Boston Ice Co.* v. *Potter*, 123 Mass. 28; *Hills* v. *Snell*, 104 Mass. 173; *Mass Gen'l Hospital* v. *Fairbanks*, 129 Mass. 78; *Mellen* v. *Whipple*, 1 Gray, 317; *Hennessey* v. *Deland*, 110 Mass. 145; *Dow* v. *Clark*, 7 Gray, 198.

PETERS, C. J. The merits of this very elaborate case lie within quite narrow limits.

A physician was called to visit a Mrs. Cofren who lived with the defendants. She had the bond of her sons that they would support her, and the sons had the obligation of the defendants to render the support. In rendering this support they might have to make contracts with physicians or other persons, but the person to be supported could not make contracts in their name without their consent. The plaintiff, a physician, performed medical services for Mrs. Cofren and made the charges to her therefor.

An action for those services cannot be maintained against the defendants on an implied promise. Such an implication does not arise from the situation of the parties. *Moody* v. *Moody*, 14 Maine, 307.

No express promise was made by either of the defendants (husband and wife), nor can any promise be fairly inferred from the circumstances. The most that can be pretended, to fix any liability on the wife, is, that she knew that the plaintiff had been sent for, not directly by her, but without any objection on her part. But the case shows that, when the plaintiff first came to the house, he was met by the husband, who forbade him rendering any services on their account.

The utmost claim that could have been in any view possibly recoverable, would be for so much of the first visit of the plaintiff as consisted in going to the house, before he was met by the husband in a hostile attitude, almost at the door. But this the plaintiff cannot recover, if for no other reason, because at that interview, he elected not to divide the charge, rendering the services on the credit of Mrs. Cofren, against whom he charged all subsequent visits, and against whom and whose estate he has

since endeavored, until this suit was brought for the same services, to make a collection of his bill. The verdict is unsupported by the evidence.

Motion sustained.

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

WILLIAM H. LIBBY *vs.* DANIEL C. ROBINSON.

Kennebec. Opinion February 24, 1887.

Partnership. Settlement. Money had and received. Actions. Statute of limitations.

The plaintiff, a deputy sheriff, had an account against a firm which consisted of the defendant and another. When sued, the account was barred by the act of limitations. At some date before the bar could operate against the account, the partners settled their partnership matters, and on defendant's representation to his partner that he had paid plaintiff's claim, when he had not, he was allowed the amount of it in such settlement.

Held: That the plaintiff cannot maintain an action for money had and received upon the ground that the settlement placed money in the defendant's hands for plaintiff's benefit, or that it had the legal effect to do so, or was equivalent to doing so.

ON exceptions from superior court.

The opinion states the question presented by the exceptions.

H. M. Heath, for plaintiff.

If one of the partners is constituted agent for the firm, and power is delegated to him to wind up the partnership business, such power ceases when the business of the firm is closed up. Story on Partnership, pp. 512 to 570.

After the final settlement, the partnership was absolutely concluded, except that it remained liable for the mistakes and wrongs committed by their agent in settling up the company business, and in case of such mistake or wrong, an action would lie against the agent when the agent was a partner of the firm whose business he was settling up, or against the firm at the election of the injured party. *Averill* v. *Lyman*, 18 Pick. 346.

Every person is a trustee who receives money to be paid to

another, or to be applied to a particular purpose to which he does not apply it. *Finney* v. *Cochran*, 1 Watts and Sergent, 112.

It makes no difference that the defendant received this sum of money as money already paid to plaintiff, when in fact it was not paid, or that he did not receive it as money to be paid, to plaintiff; neither was it necessary for defendant to promise the firm to pay over such money to plaintiff, the law will presume that he promised to pay over such sum of money to the party to whom it actually belongs. *Wiseman* v. *Lyman*, 7 Mass. 286; *Calais* v. *Whidden*, 64 Maine, 249; *Mason* v. *Waite*, 17 Mass. 558; 4 Wait's Actions and Defences, 469.

If then, at the commencement of this action, the defendant had in his possession money which *ex equo et bono* he ought not to have retained from the plaintiff, plaintiff is entitled to recover. This must depend upon the facts appearing in the evidence produced at the trial and referred to by the presiding justice in his decision. *Hall* v. *Marston*, 17 Mass, 574, and cases; *Williams* v. *Everrett*, 3 Price's Re. 58; 4 Wait's Actions and Defences, 469; Chitty on Contracts, 673, with note *f*; 2 Greenl. Ev. 117.

When the fact is proved that the defendant has the money of the plaintiff, if he cannot show that he has a legal and equitable ground for retaining it, the law creates the privity and the promise, although the party so holding or receiving such money has never seen or heard of the party to whom it belongs. *Mason* v. *Waite*, 17 Mass. 560; *Williams* v. *Everrett*, 3 Price's Re. 58; *Hall* v. *Marston*, 17 Mass. 574; *Lewis* v. *Sawyer*, 44 Maine, 332; *Keene* v. *Sage*, 75 Maine, 138; *Calais* v. *Whidden*, 64 Maine, 249; *Shepherd* v. *McEvers*, 8 Am. Dec. 561; *Cumberland* v. *Codrington*, 3 Johns. Ch. 261.

D. C. Robinson, for defendant, cited: Parson's Part. * 398; *Mellen* v. *Whipple*, 1 Gray, 320.

PETERS, C. J. The defendant and another, law partners, were indebted to the plaintiff, a deputy sheriff, for official services performed by him for their firm. The bill became barred by

the statute of limitations. The bar is attempted to be avoided by the plaintiff upon the following finding of facts: At some time during six years prior to the date of the writ in this case, the defendant and his partner had a settlement of their partnership accounts, when the defendant represented to his partner that he had paid the plaintiff's bill, and they made a settlement on the basis of such payment. The ruling of the judge was that that act was equivalent to placing in the defendant's hands at that time an amount of money for the plaintiff, which he can recover in this action of money had and received. We are unable to concur in the ruling. It would be pushing the principle of implied promise too far to give it such application. The cases cited fall short of supporting the conclusion contended for. They are instances where money was paid by one person to another to be paid over to a third party. In the present case there was no assertion by the defendant that he would in the future pay the plaintiff, nor was any money placed in his hands for such purpose. He did not assume a new debt — he asserted that he had paid an old one, when he had not. He merely paid less to, or received more from, his partner, by reason of the misrepresentation, and he is still liable to his partner on account of it. He cannot be liable to pay the reserved sum to his partner and to the plaintiff also. Nor would the firm be released from the plaintiff's claim, were the limitation question eliminated from the facts.

The case against the defendant cannot be stronger than it would have been had he given to his partner a bond of indemnity against the plaintiff's claim; and that would establish no new liability to the plaintiff. We think that the settlement created no new contract or privity of contract between the parties.

Exceptions sustained.

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

LIBBEY, J., did not sit.

INHABITANTS OF MONMOUTH *vs.* INHABITANTS OF LEEDS.*

Kennebec. Opinion Februrary 24, 1887.

Costs. Proceeding to establish dividing line between towns.

Costs are not allowable to either side in a statutory proceeding to discover and establish boundary lines between towns. There is no action, or litigation, and no pleadings are filed.

The court has control of such proceedings so far as to prevent a report being final, unless satisfied of its freedom from fraud, and of its legal correctness.

ON exceptions.

Plaintiffs filed a bill of costs with written motion to be allowed costs. The motion was overruled and the plaintiffs alleged exceptions.

J. H. Potter, for the plaintiffs.

Should the court hold that the proceeding is not strictly an action at law, still, in the light of several decisions in this state, we are entitled to costs up to the time when commissioners were appointed. *Moore* v. *Mann*, 29 Maine, 559; *Ham* v. *Ham*, 43 Maine, 285; *Thornton* v. *York Bank*, 45 Maine, 158.

F. M. Drew, for the defendants, cited: Spaulding's Practice, 45; *Hopkins* v. *Benson*, 21 Maine, 399; *Moore* v. *Mann*, 29 Maine, 559; *Counce* v. *Persons unknown*, 76 Maine, 548; *Stetson* v. *County Com.* 72 Maine, 17.

PETERS, C. J. Costs are claimed in a statutory proceeding in which commissioners were asked for to establish the boundary line between two towns.

We think costs are not allowable. The proceeding is not an action, nor of the nature of one. The towns do not come into court as parties to a litigation. No pleadings bring them to an issue in court. A line becomes obscured or lost, and the petition seeks its discovery.

At the same time, it may be well to say that the court has more powers of decision in such proceedings than sometimes has

* See same case reported 76 Maine, 28.

been ascribed to it. It is contended by counsel on one side that our own decisions determine that the court has no power to pass judgment on the work of the commissioners. It may be a limited authority. Still, some authority exists. It seems to have been overlooked in some of the cases that the report of the commissioners was required by the earlier statutes to be accepted by the court. The laws of 1832, ch. 560, expressly required it. The R. S. of 1841, ch. 5, § 27, required it. The R. S. of 1857, ch. 3, § 30, with no legislative change, for the sake of brevity, omits the words relating to acceptance, the revisers of the laws supposing, evidently, that the power to accept or reject would be implied. Why should it not be so? What object is there in making a return to court if the return is not to be acted upon? In *Bremen* v. *Bristol*, 66 Maine, 354, the court settled some legal questions and recommitted the case to the commissioners. We do not see why the court should not so far control the proceeding that it may, as in cases before referees, prevent a report being final until satisfied of its freedom from fraud and of its legal correctness.

No costs allowed.

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

STATE OF MAINE *vs.* JOSEPH CHANDLER and another.

Aroostook. Opinion February 26, 1887.

Scire facias. Recognizance. Non-joinder of parties. Pleadings. Demurrer. R. S., c. 133, § 20.

Scire facias upon a recognizance, taken in a criminal proceeding, is a civil action.

Scire facias against two of the three persons who jointly and severally recognized, upon such recognizance, cannot be sustained, while the third remains liable to an action thereon; and when the declaration shows that three recognized and does not allege a reason why the third was not joined, the non-joinder may be taken advantage of by demurrer.

Revised Statutes, chap. 133, § 20, does not authorize a mis-joinder or non-joinder of parties, to a recognizance, under the rules of pleading.

ON exceptions to the ruling of the court in overuling a demurrer to the declaration.

The opinion states the case.

Charles P. Allen, county attorney, and *Lewis C. Stearns*, for the state.

Should the court decide that the demurrer is properly before them, then we submit that inasmuch as it is general there are no defects in the writ and declaration which it may reach. The person and case can be rightly understood, and the process clearly falls within the rule embraced in sec. 25 of c. 133 of the R. S.

That three were bound and only two sued does not render the writ and declaration ill on general demurrer. The joinder of all is not necessary. But granting it were it is submitted that the non-joinder could only be taken advantage of by a plea in abatement. *Wilson* v. *Nevers*, 20 Pick. 20; *Tuttle* v. *Cooper*, 10 Pick. 281; *Elder* v. *Thompson*, 13 Gray, 91; *Simonds* v. *Turner*, 120, Mass. 328; *White* v. *Cushing*, 30 Maine, 267; *Reed* v. *Wilson*, 39 Maine, 585.

The rule laid down in *Harwood* v. *Roberts*, 5 Maine, 381, and in Gould's Pl. c. 5, sec. 115, that when the declaration shows more are liable than are sued, it is bad on demurrer, does not apply in this case.

Indeed it has been held by the Massachusetts court that non-joinder of defendants in certain actions of debt is not abatable. *Boutelle* v. *Nourse*, 4 Mass. 430; 5 Mass. 265.

Wilson and Lumbert and *Powers and Powers* for defendants, cited: 1 Bouvier's Dict. 356, § 12; 4 Blackstone, 465; *Harwood* v. *Roberts*, 5 Maine, 441; Gould's Pl. c. 5, § 115; 1 Chitty's Pl. (16 Am. ed.) 54 K; Spaulding's Practice, 513; *Richmond* v. *Toothaker*, 69 Maine, 455; *Rand* v. *Nutter*, 56 Maine, 341; *Tappan* v. *Bruen*, 5 Mass. 193; *Com.* v. *Downey*, 9 Mass. 520; *State* v. *Brown*, 41 Maine, 535; *Bridge* v. *Ford*, 7 Mass. 209.

FOSTER, J. The defendants as sureties, together with one Benjamin R. Condon as principal, entered into a joint and several recognizance upon an indictment found against the said Condon

as a common seller of intoxicating liquors. Default having been entered against all the parties upon the recognizance, *scire facias* is brought against these two defendants who file a general demurrer.

The only question involved is whether the proper parties are joined as defendants in this action.

It is the general rule in actions *ex contractu* that objection to the non-joinder of a defendant can be taken only by plea in abatement, thereby giving the plaintiff a better writ, by therein disclosing the names of those who ought to be joined. *Harwood* v. *Roberts*, 5 Maine, 442; *Reed* v. *Wilson*, 39 Maine, 586; *Richmond* v. *Toothaker*, 69 Maine, 455. But to this rule there is an exception, as well settled as the rule itself, — that if it appears from the face of the declaration or other pleading on the part of the plaintiff, that a person not made defendant was a joint contractor with those who are defendants in the suit, there being no averment of the death of such person, then such non-joinder is good ground for demurrer, as well as abatement. *Harwood* v. *Roberts*, *supra*; *Richmond* v. *Toothaker*, *supra*; Gould Pl. c. 5, § 115; 1 Chit. Pl. 46*; *McGregor* v. *Balch*, 17 Vt. 567.

It is likewise held to be ground for demurrer where there is a mis-joinder of defendants, in actions upon contract, where too many persons are made defendants and the objection appears upon the face of the plaintiff's pleadings. Chitty states it thus: "If *too many* persons are made defendants, and the objection appear on the pleadings, either of the defendants may demur, move in arrest of judgment, or support a writ of error; and even if the objection do not appear upon the pleadings, the plaintiff may be non-suited upon the trial, if he fail in proving a joint contract." 1 Chitty Pl. 44*; Gould Pl. c. 5, § 104. "If it appears on the pleadings, it gives rise to a demurrer; if it appears at the trial, to an adverse verdict." Dicey on Parties, 507.*

It is elementary law that where three or more parties contract jointly and severally, all are to be sued in one action, or each may be sued severally. It is improper as all the authorities hold

to join two and omit the others, for in such case they are sued neither jointly nor severally, as they promised. And in case the plaintiff does not see fit to proceed against them severally, it is the undoubted right of the defendants to have all their joint promisors or obligors joined with them in the suit. *Harwood* v. *Roberts*, *supra*; *Bangor Bank* v. *Treat*, 6 Maine, 207.

The recognizance in this case, although taken in a criminal process, and depending for its validity upon a record based upon such proceeding, is wholly collateral to the original proceeding, and in its nature a civil matter. *State* v. *Baker*, 50 Maine, 53. It is an obligation of record (*Longley* v. *Vose*, 27 Maine, 188) founded upon contract, (*State* v. *Boies*, 41 Maine, 345) and entered into by the recognizors upon certain conditions (*State* v. *Burnham*, 44 Maine, 284) upon the breach of which the recognizance became forfeited, and an absolute debt of record, in the nature of a judgment, was created, and upon which *scire facias* properly lies for the recovery of the forfeiture. *State* v. *Kinne*, 39 N. H. 135, 137; *State* v. *Harlow*, 26 Maine, 75; *Commonwealth* v. *Green*, 12 Mass. 1; *Commonwealth* v. *McNeill*, 19 Pick. 138.

But *scire facias* upon a recognizance entered into in a criminal proceeding, in no respect partakes of the original criminal proceeding out of which it originated, but is held to be a civil action, *State* v. *Harlow*, 26 Maine, 76; *State* v. *Kinne*, 41 N. H. 239; *Commonwealth* v. *McNeill*, 19 Pick. 138; *McLellan* v. *Lunt*, 14 Maine, 257; *State* v. *Baker*, 50 Maine, 53.

This action, then, must stand or fall like any other founded upon contract. It is brought against two only of the three parties who jointly and severally recognized to the state — now plaintiff in this suit. It is not brought against them in accordance with their obligation entered into by them. They are sued neither jointly nor severally. There are too many joined as defendants to correspond with their several obligation — too few to correspond with it as joint. This being so, the misjoinder in the one case, or the non-joinder in the other, as we have said, is good ground of demurrer, since the fact appears upon the face of the plaintiff's declaration that there was a joint and several

obligation entered into by three, all of whom are known as well to the plaintiff as to the defendants in this suit.

It makes no difference that one of the recognizors was the principal in the criminal process, and the other two were his sureties. The recognizance itself determines the liability of the parties, and, as appears from the record, that liability was joint and several in relation to the three parties who became bound by it. It was not a joint and several undertaking on the part of the sureties only; and the plaintiff can not, by its pleading, change their liability from that which they assumed. The case of *Commonwealth* v. *McNeill supra*, was *scire facias* upon recognizance taken in a criminal proceeding as in the case at bar, but against only one of three who had severally recognized. In that case as in this, one of the recognizors was named as principal and the other two as sureties, and all recognized in the same sum. One of the objections raised at the trial related to an alleged variance between the allegations and the proof. "On reference to the recognizance," says SHAW, C. J., "it appears that the parties were severally bound, and therefore it was a several recognizance by each; though as all were joined in one recognizance, they might have been proceeded against jointly."

No intimation is given by the court that they were liable except jointly or severally.

Attention has been called to R. S., c. 133, § 20, which provides that "when a person, under recognizance in a criminal case, fails to perform its condition, his default shall be recorded, and process shall be issued against such of the conusors as the prosecuting officer directs," etc.

Whether the "process" mentioned is such as has been commenced in this case, it is unnecessary to determine at this time, and with the facts as they exist in relation to the proceeding before us; for, even if this is such process as the statute contemplates, we can not believe it was the intention of the legislature to give the prosecuting officer authority to violate well settled rules of pleading. Full efficacy can be given to the statute without any such violation. Were it otherwise, then there might be reason in giving the statute such a construction as would

accomplish the object sought to be attained in its enactment.

Whether or not an amendment would be proper, and if so, upon what terms, is a matter to be considered by the court below.

Exceptions sustained.

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

GEORGE E. WALLACE, in equity,

vs.

ROBERT HAWES and others.

Waldo. Opinion February 28, 1887.

Will. Devise.

A woman, in the first clause of her will, devised her farm to her husband, absolutely; in the second clause, she provided a life support for him on the farm; in the next clause, she declared that another man shall receive his support out of the farm, "in accord with former agreement," when there was no such agreement; in the next, it may be conjectured she had in her mind some provision about monuments for herself and husband, but she failed to fully express it; and finally she "orders" that still another person, "if he proves faithful and remains on the farm" until the death of the before named persons, shall have the residue of her estate, and that, if he does not so behave, the same shall be divided among certain other persons. *Held:* That the wife having first given the whole estate to her husband, and using afterwards no appropriate language to cut down the estate or take it from him, he takes a fee therein subject only to her debts and last expenses.

Bill in equity by the administrator, with the will annexed of the estate of Jane H. Hawes, brought to obtain a construction of the will, which was as follows:

"I, Jane H. Hawes, of Searsmont, in the county of Waldo and state of Maine, being weak in body, but of a sound mind and memory (blessed be Almighty God for the same), do make, publish and declare this my last will and testament, in manner and form following, viz.:

"1. I give and devise to my beloved husband, Robert Hawes, the farm on which I now live, it being the same as deeded to me

by Sully B. Muzzy on February 22, 18—, and recorded at the register's office in Book No. 141, page 404, for a full description of said premises.

"2. And I further declare that the said Robert Hawes, my husband, is to have his support out of said property, being provided with clothing and food, good and sufficient as heretofore, and all nursing and medical attendance needful in sickness, so long as he may live.

"3. I also declare that Ebenezer Robbins shall have his support out of said property, in being provided with food and clothing as heretofore, so long as he may live, in accord unto former agreement.

"4. I also order that after paying all my just debts and burial expenses of Robert, my husband, and of myself, and erecting suitable white marble grave stones, to the value of about twenty-five dollars for each of us.

"5. I also order that John Frank Wood, that now lives with us, if he proves faithful and remains on the farm above described and works to carry on the same, until the death of the above named persons, the residue of my estate shall fall to him, as the legal heir. But if he, the said John, leaves and goes away from said premises to look out for himself, then this last provision is null and void, and the residue as above named, whatever it may be, shall go one-half to John E. Hart, and the other half to Ward Butler and his wife, Lucinda.

"6. And I also make choice of Nathan P. Bean of Searsmont, my sole executor, of this my last will and testament, whose duty it shall be to see that the provisions of this instrument are faithfully carried out, so far as to have a watchful care over my husband, Robert Hawes, and Ebenezer Robbins, to see that they are provided with all the above named benefits as described.

"7. In witness whereof I have hereunto set my hand this thirteenth day of August, eighteen hundred and eighty-one."

(Duly executed.)

George E. Wallace, for the plaintiff.

L. M. Staples, for the defendant, Robert Hawes.

William H. Fogler, for the defendant, John Frank Wood.

PETERS, C. J. The instrument which calls for an interpretation under this bill, is an illustration of the confusion of ideas which prevails among unskilful persons who write their own or their neighbors' wills. While the idea of this testatrix might be conjectured to be one thing, the language used so clearly and absolutely expresses a different thing, we can only follow the general rules of construction which appertain to such cases.

In the first clause of the will, she gives to her husband an absolute estate in her farm, valued at six hundred dollars, her principal or only property. By R. S., c. 74, § 16, a devise of land conveys all the estate of the devisor therein, unless it appears by the will that he intended to convey a less estate. If the other portions of the will had the effect to prevent a fee passing to the husband, he would take no estate at all, but only a life support.

In the second clause, the testatrix does not cut the fee down to a life estate or otherwise qualify it, but "declares" the husband is to have his support out of the farm as long as he lives. In the next item she also declares that another person shall receive his support out of the same farm, "in accord unto former agreement," when, as the case finds, there never was any agreement about such a matter.

In the next item, she undertook to provide for the erection of grave stones for her husband and herself, but fails to make a sensible provision.

She, then, in the next item, "orders" that still another person, "if he proves faithful and remains on the farm" until the death of the before named persons, shall have the residue of her estate, and that, if he does not so behave himself, the same shall be divided among several other persons.

The wife, having first given the whole estate to her husband, and using afterwards no appropriate language to cut it down or take it away from him, the interpretation of the will must be that he takes a fee in the farm, subject to her debts and last expenses. *Mitchell* v. *Morse*, 77 Maine, 423.

Decree accordingly.

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

ELISHA W. SHAW and others *vs.* GEORGE WATERHOUSE.

Penobscot. Opinion February 28, 1887.

Contract. Sunday law. Burden of proof.

The burden is upon the defendant to prove that a bond, on which he is sued as obligor, was delivered on Sunday, instead of on Monday, the day of its date, if he sets up the Sunday-law in defense of the action. The party affirming fraud or illegality, must prove it.

ON exceptions.

Debt on a bond.

Powers and Sanborn and *Davis and Bailey* for plaintiffs, cited: 10 Gray, 68; 10 Cush. 374; *Powers* v. *Russell*, 13 Pick. 77; *Davis* v. *Jenney*, 1 Met. 224; *Bayley* v. *Taber*, 6 Mass. 451.

F. H. Appleton and John Varney for defendant.

Upon the instruction especially excepted to, we cite as conclusive, *Small* v. *Clewley*, 62 Maine, 159; *Heinemann* v. *Heard*, 62 N. Y. 448.

Plaintiffs cite *Pullen* v. *Hutchinson*, 25 Maine, 247, and 5 Gray, 400. An examination of both cases will disclose them to be favorable to the position of the court in this case. In the first case, SHEPLEY, J., expressly says: "if the instrument be the foundation of the party's claim, or if he be privy to it, or if it purport to be executed by his adversary, there may be good reason for holding him to strict proof of its execution."

Hilton v. *Smith*, 5 Gray, 400, was not a suit between the original parties, and recognizes the distinction between it and *Burnham* v. *Allen*, 1 Gray, 496, where the contracting parties were the parties litigant.

The instruction complained of relates rather to the weight of evidence than to the burden of proof, but as a proposition of law, is clearly correct. *Small* v. *Clewley*, 62 Maine, 155; *Burnham* v. *Allen*, 1 Gray, 496.

In the 6 Mass. 452 and 25 Maine, 241, cited by the plaintiffs, there was neither a denial of the execution of the instrument declared on, nor any brief statement filed as in this case.

PETERS, C. J. The defendant is sued upon a written contract bearing date on a week-day; the defense is that it was really signed and delivered on Sunday; the ruling was that, while the plaintiff is aided by the presumption arising from the date of the paper, there being evidence on both sides of the issue, the burden of proof was upon him to show that the instrument was delivered on some lawful day for business and not on Sunday. This was not correct. The burden of proving the illegal transaction rested on the defendant.

The general rule is, that the burden of proof lies upon the party who takes an affirmative. Here the defendant affirms the illegality. It was not necessary that the plaintiff declare that the contract was not made on Sunday, or that it was not illegal. This rule affects defenses generally where fraud or illegality is set up. Where a transaction is not on its face unfair or illegal, the burden is on the party who assails its fairness or legality to substantiate his objection. Whar. Ev. § 366, and cases. *Blaisdell* v. *Cowell*, 14 Maine, 370; *Winslow* v. *Gilbreth*, 50 Maine, 90.

The usual test employed to determine on which side the burden of proof lies, meets the present case. Which party would be entitled to a verdict if no evidence be offered on either side of the issue? Here the plaintiff asserts a contract, and produces it. Nothing unlawful appears on its face. The defendant alleges that it was unlawfully made. If no proof be exhibited either way, the defense fails.

The case of *Small* v. *Clewley*, 62 Maine, 155, relied on by the defendant, does not sustain the defendant's position. It was there held that the burden of proof was on the plaintiff to show that a note sued by him was given for consideration. It was necessary for him to allege consideration. He did allege it. An independent defense was not relied on. The defendant merely denied one of the substantive averments which the plaintiffs made. It is argued, however, that when a plaintiff comes into court he necessarily affirms that he is presenting a legal contract. It may be implied that he does so. And that is the difference between this case and the case cited. Affirmations

merely implied, not expressed, do not require proof. When a note or other contract is declared upon, there may be some sort of implied or silent affirmation by the plaintiff that the instrument produced in evidence was not fraudulently obtained; or that it was not an usurious contract; or given for an illegal consideration; or that the maker was not a minor or insane; or laboring under other disqualification. Still, if any one of such defenses be alleged, it is to be proved by the defendant, and is not to be disproved by the plaintiff. In the case before us, date is not an essential matter of allegation or proof, except to correctly identify the paper declared upon.

In *Pullen* v. *Hutchinson*, 25 Maine, 249, it is said: "The party producing it (a written contract) is not required to proceed further upon a mere suggestion of a false date, where there are no indications of falsity found upon the paper, and prove that it was actually made on the day of its date." In *Bayley* v. *Taber*, 6 Mass. 451, certain notes declared upon were valid if issued before a certain date and invalid if issued after such date. They were dated before. "When," said PARSONS, C. J., "the defendants would avoid their promise by availing themselves of the statute, it is incumbent on them to prove that the notes are within the statute; and the plaintiffs are not obliged to show that the notes are without the statute." In *Nason* v. *Dinsmore*, 34 Maine, 391, where the defense was that a bond was made on the Lord's day, the court said: "The defendants allege an infirmity in the bond, which does not appear on its face, and the burden of proof is on them to show its existence."

Exceptions sustained.

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

CITY OF BATH *vs.* PARKER M. WHITMORE.

Sagadahoc. Opinion February 28, 1887.

Taxes. Suit for taxes. Assessment. Interest. R. S., c. 6, § § 100, 122, 175.

The only remedy which a person, who is a taxable inhabitant in the place where he is assessed, has for obtaining relief from an assessment for personal

property which he does not own, is by a petition to the assessors with the right of appeal from them to the county commissioners; if sued for the taxes, under R. S., c. 6, § 175, and he has obtained no abatement from assessors or commissioners, the defense is not open to him.

Where a person is sued for his taxes, he cannot defeat the suit upon the ground that the recorded list of assessments, upon which his assessment appears, is not signed by the assessors; the papers in the collector's hands are sufficient proof of the assessments.

The neglect of assessors to certify an assessment of the state tax, as required by R. S., c. 6, § 122, is merely an omission to observe a directory order which the law may overlook without injury to any one; it does not render an assessment void; it may be supplied by amendment, if necessary.

It is a general rule that an illegal provision in a warrant, separable from its other provisions, will not vitiate the instrument, unless the direction is acted upon. An unauthorized mandate in the warrant to a collector to collect interest on the assessments, not enforced or attempted to be, does not affect in other respects the validity of the warrant.

On exceptions.

The opinion states the case.

W. Gilbert and W. E. Hogan, for plaintiffs, cited: *Norridgewock* v. *Walker*, 71 Maine, 181; *Lowe* v. *Weld*, 52 Maine, 588; *Johnson* v. *Goodridge*, 15 Maine, 29; 21 Pick. 67.

C. W. Larrabee and J. W. Spaulding, for defendant.

The action is under R. S., c. 6, § 175, which in its amended form reads: "In addition to the other provisions for the collection of taxes legally assessed, the mayor and treasurer of any city, the selectmen of any town, and the assessors of any plantation to which a tax is due, may in writing direct an action of debt to be commenced in the name of such city, or of the inhabitants of such town or plantation, against the party liable." This statute was originally enacted in 1874.

It is claimed that the language "taxes legally assessed," relates only to matters of form or of record in the assessment and commitment of the taxes, and in the election and qualification of assessors, as in *Dresden* v. *Goud*, 75 Maine, 298.

It is said that the question here presented has never been considered by the court. If that is so, it is difficult to understand how the court could have made the order of "plaintiffs nonsuit" in *Bucksport* v. *Woodman*, 68 Maine, 33. That case

was under this same statute, and the tax sought to be recovered was assessed upon a judgment of the first Court of Commissioners of Alabama Claims; the defence was that such an award or judgment was not taxable, and the court sustained that defence, in that action.

In *Camden* v. *Camden Village Corporation*, 77 Maine, 538, the tax sought to be recovered was upon a building containing the lockup, offices, etc., of the village corporation. The action was under this same statute. The defence was that the property was not taxable, and the court sustained that defence in that action.

It seems to us that those two actions were decided exactly right, and in compliance with the statute under which they were brought. That the "condition precedent to the maintenance of the action, that the tax should be legally assessed," was not fulfilled if the property was not taxable. A tax can not be "legally assessed" when it is assessed upon property which is not taxable.

What was the purpose of the legislature in the act of 1874? At that time there was in vogue the following methods of collecting taxes, for convenience we cite present statutes:

1. Distrain the goods and chattels. R. S., c. 6, § 132.

2. Arrest of the tax-payer on the warrant. R. S., c. 6, § 134.

3. Sale of real estate. R. S., c. 6, § 193 *et seq.*

4. An action of debt in the name of the collector. R. S., c. 6, § 141.

In no one of these methods could the party assessed successfully defend, or interfere and stop proceedings on the ground sustained in *Bucksport* v. *Woodman*, *supra*.

"Pay your tax" the law said, as construed by the court, and if you are injured bring an action to recover it back. And it was specifically held in *Waite* v. *Princeton*, 66 Maine, 226, in an action in the name of the collector, that the remedy of the defendant in an action like the one at bar, was by application for abatement.

But there is an important difference between the statute authorizing an action in the name of the collector and the statute authorizing this action.

Prior to 1874, if a person was improperly taxed, as was this defendant by the City of Bath, he must apply to the assessors for abatement, § 95; if their decision was adverse, he must apply to the county commissioners, § 96; if their decision was adverse, he must appeal to this court, and he thus, in that round-about way, after the expense and trouble to all parties of two hearings, gets before a competent tribunal to hear and determine a question of law.

The legislature undoubtedly considered all that circumlocution unnecessary and burdensome to both parties. And they enacted this short cut to the court of last resort, that towns and cities could adopt in cases, like the present, where there was an honest difference of opinion.

In order that the taxes shall be legally assessed, the list of assessments must be signed by the assessors. *Norridgewock* v. *Walker*, 71 Maine, 181.

The warrant, in so many words, required the collector to collect interest, when no interest could be collected. *Snow* v. *Weeks*, 77 Maine, 429.

We are told that these provisions are directory only; *et ergo* of no consequence. And SHAW, C. J., in *Torrey* v. *Millbury*, 21 Pick. 67, is cited to sustain this point. We submit that the opinion of the learned jurist has been unjustly treated before now, and that the paragraph preceding the one quoted by plaintiffs' counsel contains the rule for distinguishing between conditions and directions only. "All those measures which are intended for the security of the citizen . . . are conditions precedent, and if they are not observed he is not legally taxed."

In *Thurston* v. *Little*, 3 Mass. 429, which is the first case we find, where the point was specially discussed, the court say, "the statute expressly requires assessors to make and lodge in the clerk's office, or in their own, if they have one, an invoice of valuation from which the rates of assessment shall have been made."

If the opinion of the court in *Thurston* v. *Little*, *supra*, is good law and worthy of consideration, then apply the rule given by SHAW, C. J., in *Torrey* v. *Millbury*, *supra*, and the point is settled.

Statutes are to be construed in reference to the principles of the common law. 1 Kent, 463.

PETERS, C. J. The defendant, having a taxable residence in Bath, and being assessed there for a supposed ownership in several vessels, the taxes upon which he refused to pay, is sued for the taxes by the collector, in the name of the city, by virtue of authority given in the R. S., c. 6, § 175.

The branch of defense most strongly urged against the suit is, that the defendant was only a mortgagee of the vessels and not assessable therefor. If he had not been at the time of the assessment an inhabitant of Bath, and thereby not subject to the jurisdiction of its assessors, the defense would be open to him. *Ware* v. *Percival*, 61 Maine, 391; *McCrillis* v. *Mansfield*, 64 Maine, 198. As it is, he cannot urge such defense to the suit. If vessels which he did not own were taxed to him, it was merely an over-valuation of his property, a hardship which could be avoided in only one way, and that would be by petition to the assessors for an abatement, and, if unsuccessful before them, by an appeal to the county commissioners. An over-valuation may consist in assessing to a person property which he does not own, as well as in estimating too highly that which he does own. In neither class of over-valuation is an excess of jurisdiction assumed by the assessors, and in each case the remedy can be only by appeal from the assessors to the commissioners. *Stickney* v. *Bangor*, 30 Maine, 404; *Hemingway* v. *Machias*, 33 Maine, 445; *Gilpatrick* v. *Saco*, 57 Maine, 277; *Waite* v. *Princeton*, 66 Maine, 225.

We do not mean to say that assessors have an unlimited discretion in assessing taxes. Fraudulent action on their part may be corrected in equity; and there may possibly be other remedy for fraudulent valuation. Cool. Taxation, (2d ed.) 784, 792.

In behalf of the defendant it is contended that, while a taxpayer may be shut off from all redress for overvaluation, except by petition to the assessors and appeal from them to county commissioners, in cases where the body is arrested or chattels are distrained by the collector, the rule does not prevail when a suit is instituted to collect taxes. We do not feel any force in the distinction. Public policy invokes the rule as strongly in one case as in any other. Juries are not the most competent tribunal for such questions. Assessors and commissioners have better judgments on values, more opportunity to make comparisons between properties, and act much more speedily than courts can.

Stress is placed on the language of the statute that the remedy by an action is allowed for the collection of taxes "legally assessed." But this requirement applies just as much in the remedy by arrest or by seizure as in a remedy by suit. In either case, there must be a legal assessment. The answer is, so far as the point of over-valuation affects the question, that the assessment is presumed to be legal, and that the defendant is not permitted to deny its legality, except in the way pointed out by statute for that purpose. It would seem to be unreasonable and inconsistent to allow the defendant greater opportunities to escape taxation when sued than when arrested by the collector. It has been held, in cases above cited, that an overrated taxpayer cannot pay the tax under protest and afterwards recover it of the town or its collector. The principle must be the same whether he be plaintiff or defendant in the litigation. In *Camden* v. *Village Corporation*, 77 Maine, 530, and *Bucksport* v. *Woodman*, 68 Maine, 33, cases relied on by the defendant, the point now made did not appear. Those were cases of facts agreed to by the parties for the purpose of presenting certain questions of law to the court.

It does not strike us, as contended by counsel, that there would be any dilemma in the possible chance, if this doctrine be established, that a collector might be prosecuting a suit and the defendant be, at the same time, prosecuting a petition, the one to collect, and the other to abate the same tax. It would be like any suit on a judgment, where there can be no defense

against the suit until the judgment be somehow annulled or reversed.

Other points of alleged illegality in the proceedings are relied upon by the defense, where the principle of estoppel cannot apply, and the most important one is that the recorded list of assessments is not signed by the assessors. How much force the objection would possess if it were sought to produce the forfeiture of an entire estate for the non-payment of an ordinary tax upon it, would be another question. As was said in *Cressey* v. *Parks*, 76 Maine, 534, where a marked distinction is made between collecting taxes by suit and proceedings to create a forfeiture: "To prevent forfeitures strict constructions are not unreasonable. But, where forfeitures are not involved, proceedings for the collection of taxes should be construed practically and liberally."

The papers committed to the collector are complete in themselves, and are original papers. The law requires the assessors to make a record of their assessment more for the general convenience than for the establishment of any individual right. It is for the perpetuation of proof more than all else. From these recorded proofs the assessors can furnish a new commitment to the collector, if his be lost or destroyed. § 124, c. 6, R. S. The records are useful as a test in case the collector's list need be confirmed in any way, and are necessary to make settlements by with the collector. The absence of a perfected record cannot excuse the defendant's resistance against paying his taxes which are clearly and regularly inscribed upon official papers possessed by the collector. The necessary proof, if not upon record, is in the hands of the collector. *Norridgewock* v. *Walker*, 71 Maine, 181.

The defense, however, goes to the extent of assailing the regularity of the warrant in the collector's hands, because it contains a demand to collect interest on the assessments after a prescribed date. There has been no attempt to enforce this admittedly unauthorized mandate in the warrant, and it is independent of and separable from all other parts of the instrument which contains it. Not fusing with the other requirements of

the warrant, it does not corrupt them. If it destroys the legality of the tax against the defendant, it must for the same reason destroy all the assessments on the list, and none are collectible. That cannot be.

It is a general rule that an illegal provision in a warrant, separable from its other provisions, will not vitiate the instrument, nor become material, unless the direction is acted upon. No objection can be raised thereto by the person against whom there is no attempt to enforce it. *Barnard* v. *Graves*, 13 Met. 85; *Walker* v. *Miner*, 32 Vt. 769; see, also, numerous cases cited in Cooley's Taxation, 426, in support of the principle approved by the author in his text.

Finally, it is submitted in behalf of the defense, that the case omits to show that the assessors made the certificate of the assessment of the state tax as required by R. S., c 6, § 122. This is a mere irregularity, if it be as much as that, which very little concerns the individual tax-payer, a neglect to obey for the time being a directory order of the law. This the law easily overlooks. The omission may be supplied by an amendment. The certificate may be added. Black. Tax. Tit. 397; Cool. Tax. 314, *et seq.* and cases.

Exceptions overruled.

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

BENJAMIN LINCOLN *vs.* DANIEL GALLAGHER.

Washington. Opinion February 28, 1887.

Sales. Delivery. Shipping.

An owner who, at a place distant from Portland, sells a vessel to be delivered at Portland, should deliver the vessel in some reasonable and suitable place at wharf or dock in Portland, provided such place, after notice to him, be indicated by the purchaser. But if the purchaser refuse to provide such place, a delivery may be tendered at safe and usual anchorage in the harbor.

The seller would be obliged to afford the purchaser an opportunity to examine the vessel before acceptance, but not to incur such an unusual expense to himself as would be involved in hauling the vessel into dry dock and making a delivery there.

ON exceptions.

This was an action of assumpsit for damages on a breach of contract for the purchase and sale of thirty-five sixty-fourths of the schooner Annie Gus of Dennysville, Maine.

The defence was that the schooner was not delivered by plaintiff to defendant in a reasonable time, and that the defendant had no opportunity to examine the vessel in order to see that she was in good order as stipulated in the contract.

Writ was dated March 20, 1885.

The case was tried at the January term, A. D., 1886, in and for the county of Washington, and a verdict rendered for the plaintiff.

Thomas L. Talbot, for the plaintiff cited: Benj. Sales, (2 Am. ed.) § 645; *Isherwood* v. *Whitmore*, 11 M. & W. 347.

John F. Lynch, for defendant.

The plaintiff was bound to give the defendant an opportunity to examine the vessel so that the defendant could satisfy himself whether she was in good order and condition in accordance with the terms of sale. No valid delivery could be made until such opportunity was given. See Benj. on Sales, p. 650, § 695.

There can be no acceptance and actual receipt of goods within the statute unless the vendee has had an opportunity of judging whether the goods sent corresponds with the order. *Hunt* v. *Hecht*, 8 Exch. 814.

PETERS, C. J. It was said in *Howard* v. *Miner*, 20 Maine, 330, that on a contract for the delivery of specific articles which are ponderous or cumbrous, when it is not designated in the contract, and there is nothing in the condition and situation of the parties to determine the place of delivery, it is the privilege of the creditor to name a reasonable and suitable one; that the debtor should request the creditor to select the place, and if the creditor fails to do so, the debtor may appoint the place.

In the case at bar a vessel was purchased on the eastern coast somewhere, to be delivered to the buyer in Portland. Had the defendant provided a suitable place at some dock or wharf, which could have been reached by the use of reasonable exertion, the

delivery should have been made there. The purchaser, after notice, failing to provide a place, we think the seller would be justified in tendering a delivery at safe anchorage in the harbor. He should not be required to go to special expenses to himself to obtain a place at the wharf or upon the shore.

By the bill of exceptions, examined with the judge's charge, we find that a controversy arose between the parties over the requirement of the purchaser that the seller should go to the expense himself of placing the vessel in a dry dock in order that the seller could there examine her. There was some reason to suspect that the vessel had been ashore on her voyage to Portland, and the purchaser desired an inspection to see whether she had escaped injury or not.

There can be no doubt that, in offering delivery, the seller was under obligation to afford an opportunity to the purchaser to make the examination. But any expenses to be incurred thereby, beyond what would be necessary in putting the vessel in a proper place for delivery, would fall upon the buyer and not upon him. The seller was under no obligation to incur any unusual expense. He could not be called upon to place the vessel in a dry dock. He tenders the property as sound, according to the agreement under which he acted. The buyer must accept or reject it at his risk. Benj. Sales, § 695. *Croninger* v. *Crocker*, 62 N. Y. 151.

Exceptions overruled.

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

JOHN WINSLOW JONES, Appellant,

vs.

FIRST NATIONAL BANK and others.

Cumberland. Opinion March 1, 1887.

Insolvent Law. Discharge. Fraud. R. S., c. 70, § 46.

To entitle a merchant or trader to a discharge in insolvency, he must have kept, for the period material to the inquiry, as the statute was prior to 1885, "a cash book and other proper books of account," as the statute now is,

"proper books of account." No matter what the motive may have been in not keeping them.

False swearing by the insolvent, in material matters, before the insolvent court, deprives him of a discharge; the presumption is conclusive that the intent is to defraud.

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

The opinion states the case.

Harvey D. Hadlock, for appellant.

Keeping proper books of account, within the meaning of the bankrupt law, consists in keeping and preserving an intelligent record of the merchant's or tradesman's affairs with such reasonable accuracy and care as may properly be expected from a man in that business. An accidental failure to make a proper entry will not vitiate. *Re Winsor*, 16 Bank. Reg. 152.

The requirement that the bankrupt shall keep proper books of account is satisfied if his creditors can gather from the book as kept, a correct understanding of his business and financial condition. *Re Antisdel*, 18 Bank. Reg. 289.

A business connection with a corporation, as stockholders and officers, will not constitute one a merchant or trader where such corporation is not itself in bankruptcy. *Re Stickney*, 17 Bank. Reg. 305.

The word trader should not be deemed to extend to a person whose principal and proper vocation is that of a farmer, though he has sometimes bought stock, produce, etc., to sell again. This provision being penal, should be limited to the persons clearly within its object and policy, those who are habitually in the business of buying and selling to such an extent that by usage they may be expected to keep systematic books of account. *Re Cote*, 14 Bank. Reg. 503.

Occasional buying and selling will not necessarily make one a trader under bankrupt and insolvent laws; to make one such, he must buy and sell as a business. *Groves* v. *Kilgore*, 72 Maine, 489.

A person who sells his own products is not a trader. *Sylvester* v. *Edgecomb*, 76 Maine, 500.

A bankrupt must have his discharge unless some of the

grounds of the opposition specified can be established by it. In the matter of *Clark* v. *Clark*, 2 Biss. 73.

A specification of opposition to the discharge of a bankrupt alleging that he has destroyed, mutilated and falsified his documents and papers showing his business and financial transactions, but not averring that the acts were done with intent to defraud his creditors, is defective. *Mater* v. *Marston*, 5 Ben. 313; *Re Freeman*, 4 Ben. 245.

Specifications in opposition to a discharge must be precise and definite — as precise, even, as a charge in an indictment. *Re Butterfield*, 5 Bliss. 120; 14 Bank. Reg. 147.

Discharge can be refused only on the ground specified in this section. R. S., sec. 46, c. 70.

In order to bar a discharge on the ground that the bankrupt swore falsely in the affidavit accompanying his schedule that he was indebted to a creditor named therein, or that he did not disclose to the assignee that the claim was false and fictitious, it must appear that he knew that the claim was false and fictitious. *Re Blumenthal*, 18 Bank. Reg. 555.

Symonds and Libby, for appellee.

PETERS, C. J. This case is before us on a motion to set aside the verdict of a jury upon certain issues submitted to them, which have been found adversely to the appellant, and in substance deny him a discharge in insolvency. It was brought up by appeal from the Judge of Insolvency, Cumberland county, refusing the appellant a discharge, under the provisions of the insolvent act, for the reasons set forth in the decree. The proceedings in the insolvent court were begun by creditors' petition, filed May 17, 1884.

The issues found by the jury, in this court, against the appellant, are shown in questions seven, nine and ten, as follows:—

(7.) "Did said insolvent, being a merchant and trader at said Portland, from the first day of January, A. D., 1883, to the

sixteenth day of May, A. D., 1884, fail during said period, or any part thereof, to keep a cash book or other proper books of account? Answer. Yes."

(9.) "Did said insolvent knowingly and falsely swear in his said examination, in a material matter, that he had no private business of his own from the time of the failure of said J. Winslow Jones & Co. Limited, namely, on or about the first day of January, A. D., 1882, to the time of the commencement of these proceedings, namely, on the sixteenth day of May, A. D., 1884? Answer. Yes."

(10.) "Did said insolvent falsely and knowingly swear, in a material matter in the course of said examination, that during the years 1882 and 1883, and that part of the year 1884, which was prior to the commencement of said proceedings in insolvency, he had no letter books, in which he kept letter-press copies of letters written by him, or copies of such letters? Answer. Yes."

The case is not affected by chapter 326 of the act approved March 4, 1885, amending section 46 of chapter 70 of the revised statutes, by which a merchant or trader is required to keep a cash book or other proper books of account. It is provided by the second section of the amendatory act that it shall not apply to pending proceedings.

These issues passed upon by the jury relate to the nature and extent of the insolvent's business transactions, and were material matters of investigation by his assignee and creditors, for the proper administration of his estate. The failure by a merchant or trader to keep a cash book, or other proper books of account, and false swearing, are made by the statute (§ 46 c. 70, R. S.) causes for refusing an insolvent's discharge. The right of an insolvent debtor to a discharge from his debts depends upon whether or not he "has in all things conformed to his duty under this chapter." (Chap. 70, R. S.)

We have carefully examined and considered the testimony adduced at the trial before the jury on the issues submitted to them, and are of the opinion that it is not a case where the evidence will permit of our interference.

Appellant, on his examination, and at the jury trial, testified that he had carried on no private business, and admitted that he kept no cash book,—no books whatever—and this is a sufficient ground for refusing him a discharge. Appellant's counsel claims in his argument that he was not then doing business on his own account, and therefore, not being a merchant or trader, that he is not amenable to the statute interdiction. To this it is sufficient to say that the finding is otherwise.

Nor do we think the case one of an accidental failure to make proper entries, which courts have not considered fatal to a discharge. Appellant's counsel contends that there must be a finding that the commissions and omissions, charged against the insolvent, were perpetrated by him "for the purpose of defrauding creditors," before he can be convicted of any wrong which will prevent his discharge under section forty-six of chapter seventy, revised statutes. That phrase in that section applies to matters different from these. If an insolvent swears falsely in material matters, the presumption is conclusive that the intent is to defraud. Nor does it make any difference what the motive may be in not keeping books — books must be kept — the requirement is absolute.

A failure to keep a cash book or other proper books of account at any time "since March 23, 1878," is within the statute. "Since" means any time after the passage of the act, though the neglect may not cover the whole period. *In Re Rosenfield*, 1 Bank. Reg. 575.

Motion overruled.

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

HASKELL, J., having been of counsel, did not sit.

JOHN N. KNAPP, JR., in equity, *vs.* CHARLES A. BAILEY.

Penobscot. Opinion March 1, 1887.

Equitable mortgage. Evidence. R. S., c. 73, § 12. Notice. Actual notice.

A grantee who conveys the land conveyed to him, to another, is a competent witness to testify against his own grantee that the absolute conveyance to

himself was but an equitable mortgage. He can testify where any other witness could, to impeach the title.

While the general rule is that the effect of a deed cannot be controlled by oral evidence, there is this exception, recently established, that, in equity, where the oral proof is clear and convincing, a deed absolute on its face may be construed to be a mortgage.

Section 12, ch. 73, R. S., which declares that the title of one who purchases property for a valuable consideration, cannot be defeated by a trust affecting the property, unless the purchaser has notice of the trust, while it may in peculiar instances mean constructive notice, in cases generally, including a case where the trust reduces an absolute deed to a mortgage, means actual notice.

Actual notice, as applicable to conveyances, does not necessarily mean actual knowledge; it may be express or implied; it may be proved by direct evidence, or may be implied (in that way proved) from indirect or circumstantial evidence; a person may have notice or its equivalent; may be estopped to deny notice;—in fine, the statutory actual notice is a conclusion of fact capable of being established by all grades of legitimate evidence.

The doctrine of actual notice implied by circumstances supports the rule, that, if a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids inquiry, he is chargeable with notice of the facts which, by ordinary diligence, he would have ascertained. Actual notice of facts which, to a prudent man, can only indicate notice — is proof of notice.

As to what would be a sufficiency of facts to excite inquiry, is too difficult of definition to admit of any definite rule, each case depending on its peculiar facts.

In this case the grantor, under whose deed the defendant claims, was out of possession, and never had been in possession; the defendant knew that others had controlled the property for many years; he examined the Registry, where he must have seen evidence inconsistent with the validity of his grantor's deed; he gave an insignificant price, taking a quitclaim deed; he made no inquiry of the grantor of the circumstances of his title, but on the other hand contended with him that he had no valuable title. These facts are held to amount to proof of actual notice.

Spafford v. *Weston*, 29 Maine, 140, modified.

On appeal from the judgment and decree of a single judge.

The opinion states the case.

A. W. Paine and Charles P. Stetson, for plaintiff, cited: *Ham* v. *Ham*, 14 Maine, 351; *Hains* v. *Gardner*, 10 Maine, 383; *Fox* v. *Widgery*, 4 Maine, 214; 1 Greenl. Ev. § 25; *Nourse* v. *Nourse*, 116 Mass. 101; *Weed* v. *Emerson*, 115 Mass. 554; *Sanford* v. *Sanford*, 135 Mass. 314; *Reed* v. *Reed*, 75 Maine, 265; Perry, Trusts, § 243; 4 Kent's Com. §

179; *Patten* v. *Moore*, 32 N. H. 385; *Woods* v. *Farmere*, 7 Watts, 382; *Brush* v. *Ware*, 15 Pet. 93; *Kent* v. *Plummer*, 7 Maine, 464; *Evans* v. *Chism*, 18 Maine, 220; *Daniels* v. *Davison*, 17 Ves. 433; *Hanly* v. *Sprague*, 20 Maine, 431; Hill, Trustees, §§ 510, 515, 516; Perry, Trusts, 219–223; *George* v. *Kent*, 7 Allen, 16; *Van Horne* v. *Fonda*, 5 Johns. Ch. 407.

D. F. Davis and Charles A. Bailey, for defendant.

In 1 Perry on Trusts, § 352, it is stated: "If the estate was originally conveyed to trustee for some particular purpose, as by way of security or idemnity, or to raise an annuity or portion, or for any other purpose, as soon as the purpose is accomplished, the trustees become mere dry trustees, and it is their duty to convey the estate to the beneficial owners. When, from lapse of time joined with other circumstances, there is a moral certainty that the purposes of the trust have all been accomplished, the court will act upon the certainty and presume a reconveyance, although there is no direct proof of the fact."

A conveyance may be presumed where the estate has been dealt with by the beneficial owner in a manner in which reasonable men do not deal with their estates unless they are legal as well as beneficial owners. 1 Perry on Trusts, § 354.

It is open to respondent upon this appeal to claim that upon the allegations in the bill, the plaintiff, as matter of law, is not entitled to the relief awarded, even though the objection appearing upon the face of the pleadings might have been taken by demurrer to the bill. *Smith* v. *Townsend*, 109 Mass. 500.

In *Flagg* v. *Mann*, 2 Sumner, 560–1, Judge STORY fully expresses the character and effect of a deed like this. And our own court say in *Farrar* v. *Eastman*, 10 Maine, 196, "The possession being by construction of law in the true owner, the terms of the deed, although it contains no covenants and although the consideration may have been merely nominal, were sufficient to transfer and convey the land."

"By this deed one-third of the land is conveyed absolutely, and the grantor cannot be heard to aver the contrary." *Weld* v. *Madden*, 2 Cliff. 588; *Gilmer* v. *Poindexter*, 10 Howard,

(U. S.) 267; *Van Rensselaer* v. *Kearney*, 11 Howard, 322; *McIldomey* v. *Williams*, 28 Pa. St. 492; *Wilkinson* v. *Scott*, 17 Mass. 256; see also 3 Wash. R. P. 4th Ed. 97; and in *Davenport* v. *Mason*, 15 Mass. 90, held, "Any evidence repugnant to the deed is inadmissible."

"The acts and admission of a grantor after the execution of his deed cannot be received in disparagement of the title already vested in his grantee." *Farwell* v. *Rogers*, 99 Mass. 35; *Padgett* v. *Lawrence*, 10 Paige, 170; *Jackson* v. *Gilchrist*, 15 Johns. 106.

The principle upon which testimony is admissible between the parties to the transaction to prove a conveyance absolute on its face, a mortgage, goes upon the ground that it is an element of the consideration upon which the deed is given. *Campbell* v. *Dearborn*, 109 Mass. 130, 142.

But it is at once apparent that this doctrine has no application to a case of this kind. He may convey without right, but he is estopped by his deed all the same. *Currier* v. *Earl*, 13 Maine, 224. The question here presented was raised in the case of *Taylor* v. *Luther*, 2 Sumner, 234.

In *Cole* v. *Lee*, 30 Maine, 397, the court say, "The defendant did not intend to convey a title which would be indefeasible against all, nor did he so agree; but only against claims and titles caused by him or those claiming under him."

Upon both principle and authority, he is estopped from giving evidence the very effect of which must be to make him liable on his covenants, *Williamson* v. *Williamson*, 71 Maine, 442, unless it shall be held that this trust here set up is nothing for which he is any way responsible.

It has been held in a suit in equity that "a deed absolute on its face which purports to be given for a good and valuable consideration, carries with it the presumption that the grantee holds the land conveyed, to his own use, and this presumption cannot be rebutted by parol evidence. *Philbrook* v. *Delano*, 29 Maine, 410.

"If the consideration be valuable, it need not be adequate; mere inadequacy of consideration will not defeat a purchase for

a valuable consideration without notice." 1 Perry on Trusts, § 220; *Bassett* v. *Nosworthy*, 2 Lead. Cases, Eq. 103.

The change of Stat. 1821, c. 36, § 1, by R. S. of 1841, gave rise to a series of decisions of which, perhaps, that in *Spofford* v. *Weston*, 29 Maine, 140, is as comprehensive as any, as a judicial declaration of the rights and obligations of parties under this statute as amended, and it refers to and quotes from a similar decision in Massachusetts, the case of *Pomroy* v. *Stevens*, 11 Met. 244.

It has been held in a series of decisions that the "actual notice" of the statute is actual knowledge that a deed has been executed, not merely that a sale has been made. *Lamb* v. *Pierce*, 113 Mass. 72, and cases cited.

Observe that the two sections of the old revision are condensed into one, and the words "shall be considered to be actual notice," are now made to appear as "that is to be regarded as such notice," the two expressions representing the same legislative idea, unless the purpose to change the statute is made clearly to appear. *Hughes* v. *Farrar*, 45 Maine, 72.

In *Flagg* v. *Mann*, 2 Sumner, 554, Judge STORY says, "Indeed, the American courts seem indisposed to give effect to this doctrine of constructive possession in its most limited form. Thus in *Scott* v. *Gallagher*, 14 Serg. & R. 33, the court held that a possession of a *cestui que trust* and the exercise by him of acts of ownership were not constructive notice to a purchaser of the legal title from the trustee, but there should be direct, express and positive notice of the trust. This doctrine was probably enforced by considerations growing out of our registration acts which are designed, and with great justice, to protect purchasers against latent equities."

This subject is also extensively discussed in *Harris* v. *Arnold*, 1 R. I. 139.

It is contended by respondent that there can be no possession of such land as this, that will in any case afford constructive notice. *Patten* v. *Moore*, 32 N. H. 383; *Holmes* v. *Stout*, 10 N. J. Eq. 419; *Coleman* v. *Barklew*, 3 Dutch. 357; *McMechan* v. *Griffing*, 3 Pick. 149; *Brown* v. *Volkeniny*, 64 N. Y. 82;

Pope v. *Allen*, 90 N. Y. 298; *Grimestone* v. *Carter*, 3 Paige, 425.

Possession must be open, manifest, unequivocal and apparently by virtue of an unrecorded deed to be equivalent to registry. *Atwood* v. *Bears*, 47 Mich. 72. Must be open, notorious and exclusive. *Stafford Bank* v. *Sprague*, 17 Fed. Rep. 784. Should be inconsistent with the title upon which the plaintiff relies. *Staples* v. *Fenton*, 5 Hun. 172; *Cook* v. *Travis*, 20 N. Y. 400; *Lincoln* v. *Thompson*, 75 Mo. 613; *Harris* v. *Arnold*, 1 R. I. 139; 2 Pomeroy's Eq. Jur. § 620, and note; Hilliard on Vendors, 412; *Tilton* v. *Hunter*, 24 Maine, 29; *Bates* v. *Norcross*, 14 Pick. 224; *Harris* v. *Arnold*, *supra*, 135; 2 Pomeroy's Eq. Jur. § 658.

The notice that is to break in upon the registry acts must be such as will, with the attending circumstances, affect the party with fraud. *Dey* v. *Dunham*, 2 John. Ch. 190; *Bell* v. *Twilight*, 18 N. H. 164; *Fort* v. *Burch*, 6 Barb. 78; 2 Pomeroy's Eq. Jur. § 602.

It is claimed that respondent, being tenant in common with the orator at the time of the purchase of the Chapin and Gleason one-third, is precluded from setting it up against him. But this principle is not applicable to cases like this. This rule is generally applied either where the co-tenants derive title from a common source, as in *Van Horne* v. *Fonda*, 5 John. Ch. 407, or where the incumbrance is one in which all are alike interested in its removal; as, for example, a tax title upon the entire common property. 1 Wash. R. P. (4th ed.) 687.

But persons acquiring unconnected interests in the same subject, by distinct purchases, are not bound to any greater protection of one another's interests than would be required between strangers. See note to *Keen* v. *Sandford*, 1 Lead. Cas. in Eq. 74, 75.

PETERS, C. J. This bill seeks to remove a cloud overhanging complainant's title to an undivided parcel of land—in effect, to redeem the land from an equitable mortgage, the allegation being that the debt has been paid. We can have no reasonable doubt of the facts thus far alleged.

The defendant's grantor was called as a witness by the complainant. The defendant contends that his testimony was inadmissible, and cites cases which sustain the ordinary principle, that a grantor cannot dispute with his grantee the title which he has assumed to convey. The objection goes to the testimony, and not to the witness personally. The principle of estoppel, which is invoked, is aimed not against the witness because he is a grantor, but against any oral testimony to contradict the terms of a deed. As said by Judge CURTIS, in answer to the same objection, "the facts to be proved were *dehors* the record, and one witness was as competent, in point of law (to prove them), as another." Where a grantor is allowed to prove a fact by another, he may do so by himself. *Holbrook* v. *Bank*, 2 Curtis, 246.

It is true, as a general rule, that the effect of a deed cannot be controlled by oral evidence. But among the exceptions to the rule is, that, in equity, where the proof is clear and convincing, a deed absolute on its face may be construed to be an equitable mortgage. In *Rowell* v. *Jewett*, 69 Maine, 293, this exceptional doctrine was first allowed to have operation in this state. It was fully accepted in *Stinchfield* v. *Milliken*, 71 Maine, 567, where the opinion says: "But the transaction was in equity a mortgage—an equitable mortgage. The criterion is the intention of the parties. In equity, this intention may be ascertained from all pertinent facts, either within or without the written parts of the transaction. Where the intention is clear that an absolute conveyance is taken as a security for a debt, it is in equity a mortgage. The real intention governs." In *Lewis* v. *Small*, 71 Maine, 552, the same doctrine is admitted. It has since been affirmed in other cases, receiving an able discussion in the late case of *Reed* v. *Reed*, 75 Maine, 264. The effect of many of the older cases in this state has been swept away by this new principle in our legal system, a product of the growth of the law, very greatly promoted by legislative stimulation. The present case must be governed by the equitable rule declared in the later decisions.

Another question presented by the case, is, whether the

statutory provision (R. S., c. 73, § 12) which declares that a title of a purchaser for a valuable consideration cannot be defeated by a trust, unless the purchaser had notice thereof, means actual or constructive notice. Section 8 of the same chapter requires "actual notice" of an unrecorded deed, to defeat a subsequent purchaser's title from the same grantor. The two sections were incorporated in our statutory system at the same time,—in the revision of 1841. One requires "notice," the other "actual notice."

We think the difference in phraseology may be accounted for partly on the idea that section 8 would be applicable more to law cases, and section 12 more to questions in equity. We can have no doubt that there may be cases of constructive trusts where section 12 would apply. At the same time, where the facts present questions analogous to those ordinarily arising under the other section, we think actual notice would be required; that under either section, in cases generally, actual notice, as we understand the meaning of the term, would be the rule; and that actual notice applies in the present case.

There is a conflict in the cases and among writers as to what is actual notice. Much of the difference is said to be verbal only, more apparent than real. Certain propositions, however, are quite well agreed upon by a majority of the authorities.

Notice does not mean knowledge,—actual knowledge is not required. Mr. Wade describes the modes of proving actual notice as of two kinds. One he denominates express notice, and the other implied. "*Implied*, which imputes knowledge to the party because he is shown to be conscious of having the means of knowledge, though he does not use them. In other words, where he chooses to remain voluntarily ignorant of the fact, or is grossly negligent in not following up the inquiry which the known facts suggest." Wade Not. (2d ed.) § 5. Some writers use the word implied as meaning constructive, and would regard what is here described to be implied actual notice as constructive notice merely. As applicable to actual notice, such as is required by the sections of the statute under consideration, we think the classification of the author, whom we quote, is satisfactory.

The author further explains the distinction by adding that "notice by implication differs from constructive notice, with which it is frequently confounded, and which it greatly resembles, with respect to the character of the inference upon which it rests; constructive notice being the creature of positive law, or resting upon strictly legal inference, while implied notice arises from inference of fact."

It amounts substantially to this, that actual notice may be proved by direct evidence, or it may be inferred, or implied, (that is, proved) as a fact from indirect evidence — by circumstantial evidence. A man may have notice or its legal equivalent. He may be so situated as to be estopped to deny that he had actual notice. We are speaking of the statutory notice required under the conveyances act. A higher grade of evidence may be necessary to prove actual notice appertaining to commercial paper. *Kellogg* v. *Curtis*, 69 Maine, 212.

The same facts may sometimes be such as to prove both constructive and actual notice, that is, a court might infer constructive notice and a jury infer actual notice from the facts. There may be cases where the facts show actual, when they do not warrant the inference of constructive notice; as where a deed is not regularly recorded, and not giving constructive notice, but a second purchaser sees it on the records, thereby receiving actual notice. *Hastings* v. *Cutler*, 24 N. H. 481.

Mr. Pomeroy (2 Eq. Jur. 596, note) summarizes the effect of the American cases on the point under discussion in the following words: "In a few of the states the courts have interpreted the intention of the legislature as demanding that the personal information of the unrecorded instrument should be proved by direct evidence, and as excluding all instances of actual notice established by circumstantial evidence. In most of the states, however, where this statutory clause is found, the courts have defined the 'actual notice' required by the legislature as embracing all instances of that species in contradistinction from constructive notice,—that is, all kinds of actual notice, whether proved by direct evidence or inferred as a legitimate conclusion from circumstances."

The doctrine of actual notice implied by circumstances (actual notice in the second degree) necessarily involves the rule that a purchaser before buying should clear up the doubts which apparently hang upon the title, by making due inquiry and investigation. If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids the inquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained. He has no right to shut his eyes against the light before him. He does a wrong not to heed the "signs and signals" seen by him. It may be well concluded that he is avoiding notice of that which he in reality believes or knows. Actual notice of facts which, to the mind of a prudent man, indicate notice — is proof of notice. 3 Wash. Real Prop. 3d ed. 335.

It must be admitted that our present views are not fully supported by the case of *Spofford* v. *Weston*, 29 Maine, 140, a decision made forty years ago. But the doctrine has grown liberally since that day, and the correctness of some things pronounced in that opinion is virtually denied in subsequent cases. *Porter* v. *Sevey*, 43 Maine, 519; *Hull* v. *Noble*, 40 Maine, 459; *Jones* v. *McNarrin*, 68 Maine, 334. Many cases which affirm the doctrine contended for by the complainant, as well as many opposing cases, are cited by the text writers. Wade, Notice, § § 10, 11, *et seq.* and cases in notes. 2 Pom. Eq. Jur. § 603, and notes. The decided preponderance of authority supports the position that the statutory "actual notice" is a conclusion of fact capable of being established by all grades of legitimate evidence.

As to what would be a sufficiency of facts to excite inquiry no rule can very well establish; each case depends upon its own facts. There is a great inconsistency in the cases upon this point. But we are satisfied that in the case before us, the defendant must be charged with notice that his grantor held title by what equity must declare to be an invalid deed. He saw that the grantor was out of possession. He could have easily ascertained that he never had possession He knew that others had

controlled the property in many ways for many years. He examined the registry, where he discovered the deed in question, and there must have seen evidence of other conveyances inconsistent with its full validity. He purchased the property for forty dollars, while worth, had the title been perfect, nearer one thousand dollars. He took a quitclaim deed, and it is held by some courts that such an instrument of conveyance does not make him a *bona fide* purchaser without notice. *Baker* v. *Humphrey*, 101 U. S. 494. Although in our system it is a circumstance only, bearing on the question. *Mansfield* v. *Dyer*, 131 Mass. 200. More than all else perhaps, the defendant made no inquiry of the grantor whether he had any real title or not, asking no explanations, but insisting to him that he had no valuable title. It is impossible for us to say, in the light of these impressive, illuminating proofs, that the defendant purchased without notice. He purchased on the basis of a merely nominal title.

We would not say that he did not believe he could legally purchase, encouraged as he was by the doctrine of the earlier cases, now abrogated; nor do we impute more than a want of caution and diligence. Men's interests spur their judgments to one-sided conclusions oftentimes. The great dramatist makes a character, reluctant to acknowledge the situation, say, "I cannot dare to know that which I know;" while another, more quick-sighted, because anxious to believe, exclaims, "Seems, madam! Nay, it is. I know not seems." One rejects proof on the clearest facts; the other accepts it on the slightest.

Judgment affirmed.

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

CHARLES A. BAILEY *vs.* JOHN N. KNAPP, JR.

Penobscot. Opinion March 1, 1887.

Partition. Practice. Law and equity. Deed.

A petition for partition, is a legal and not equitable proceeding, and the respondent is not entitled to plead or prove that an absolute deed, under which petitioner claims a part of his title, was given as an equitable mortgage, and that the debt secured thereby has been paid.

A conveyed to B an undivided half of a tract of land, identifying it as a half coming from certain particular conveyances, A at the time owning the other half. B cannot, by his deed, take the second half because the first half turns out to be encumbered by mortgage.

On exceptions.

Petition for partition.

In 1863, Adam Blackman, while seized of the one undivided half part of said tract under the Pinhorn mortgage, gave a quit-claim deed to George V. Blackman, mentioned in the opinion, as follows:

"One undivided half part of a certain tract of land . . . containing 1772 acres more or less, same known as the 'Eaton Tract;' intending hereby to release and convey all right and title to all that undivided half part of said premises which were conveyed in mortgage by Luke P. Rand to Amasa Stetson, by deed bearing date Aug. 8, 1857, recorded in Penobscot Registry book 280, page 160, and since assigned to said George, which I derived by deed Charles D. Gilmore Sheriff to me, dated Feb. 26, 1861, and recorded as aforesaid, book 310, page 62, and all title to said half which I have by virtue of any and all deeds for taxes, and especially by the two deeds from Edwin Eddy, one dated Jan. 18, 1861, recorded book 309, page 119, and the other dated Jan. 11, 1862; also including all other title which I have to said half part, reference to said deeds to be had."

Other material facts stated in the opinion.

Charles A. Bailey, for plaintiff.

A. W. Paine, for defendant.

Peters, C. J. This is a petition for partition, and is to be governed by legal and not equitable principles.

The respondent contested a portion of the petitioner's apparently legal title, upon the ground that one of the deeds under which he claimed his portion of the land was no more than an equitable mortgage, and that the debt had been paid. The judge correctly ruled that the attempted defense was inadmissible in this proceeding. The question whether the deed is an equitable mortgage or not belongs to the equitable jurisdiction to

determine; cannot be determined at law. *Jewett* v. *Mitchell*, 72 Maine, 28.

Adam Blackman, while owner of one half of a tract of land conveyed to his son all his right and title in the half of the land which was mortgaged by one Rand to Amasa Stetson — which was the other half. The respondent contended that by the deed the son took a moiety of the land, whether it was the Rand half or any other half; that he could take an unencumbered half. The very statement is its own refutation.

Exceptions overruled.

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

CHARLES E. WHITE, in equity,

vs.

WESTON THOMPSON, administrator.

Penobscot. Opinion March 1, 1887.

R. S., c. 87, § 19. Executors and administrators. Promissory notes.

The design of the statute (R. S., c. 87, § 19), which allows a creditor of the estate of a deceased person to maintain a bill in equity to recover his debt, was not to create the relation of creditor and debtor, where such relation does not already exist, but to assist, in certain emergencies, those who are creditors, but who failed to seasonably present or prosecute their claims without culpable negligence on their part.

A person who, in the lifetime of one deceased, indorsed his note for his accommodation, and after his death indorsed his administrator's note given in exchange for his note, and indorsed several renewals of the administrator's note, and finally paid the last note in the series himself, does not thereby become a creditor of the estate of the deceased, although the administrator's note was in each instance worded as the note of the estate and not his own note. The administrator's notes bound him personally, but would not bind the estate.

ON report.

Bill in equity, heard on bill, answer and proof.

A. N. Williams, for plaintiff.

It seems that a promise of an administrator to pay, or to become responsible for, the debt of his decedent, to render him

personally liable thereon, must not only be in writing, but must also be founded on a sufficient consideration. Schouler's Ex'r and Adm'rs, 255; Wms. Exrs. 1776; *Davis* v. *French*, 20 Maine, 21; *Walker* v. *Patterson*, 36 Maine, 273. But in this case the administrator did not undertake to become responsible individually to plaintiff for his claim for reimbursement from the estate; and if he had he would not be holden, it being a bare promise without consideration. *Ten Eyck* v. *Vanderpoel*, 8 Johns. 120; *Davis* v. *French*, *supra*. That being so, all the other notes given in renewal to the First Nat. Bank were in the same category as between plaintiff and H. P. Thompson. *Nutter* v. *Stover*, 48 Maine, 163. But assuming that there was a sufficient consideration for H. P. Thompson signing the notes in renewal and that he was holden thereon to plaintiff, that would not extinguish plaintiff's claim against the estate. Schouler's Exrs. & Admrs. 441; *Davis* v. *French*, 20 Maine, 21.

Weston Thompson, for defendant.

The plaintiff's claim for reimbursement is against the former administrator, and not against this defendant in any capacity. *Davis* v. *French*, 20 Maine, 21; *Baker* v. *Moor*, 63 Maine, 443; *McEldery* v. *McKenzie*, 2 Porter, (Ala.) 33 (27 Am. Dec. 643); *Harding* v. *Evans*, 3 Porter, 221 (29 Am. Dec. 255); *Fitzhugh* v. *Fitzhugh*, 11 Gratt. 300 (62 Am. Dec. 653); *Luscomb* v. *Ballard*, 5 Gray, 403; *Kingman* v. *Soule*, 132 Mass. 288; *Merchant's Bank* v. *Weeks*, 53 Vt. 118; *May* v. *May*, 7 Fla. 207 (68 Am. Dec. 431); *Shepherd* v. *Young*, 8 Gray, 152; *Lucht* v. *Behrens*, 28 Ohio St. 231 (22 Am. R. 378); *Sumner* v. *Williams*, 8 Mass. 199; *Farhall* v. *Farhall*, L. R. 7 Ch. 123; *Dowse* v. *Cox*, 3 Bing. 20.

PETERS, C. J. The complainant seeks to obtain, under R. S., c. 87, § 19, an allowance and payment of his claim against the estate of Charles W. Thompson, deceased.

Shortly before Thompson's death, the petitioner indorsed a note for him, upon which Thompson obtained money at a bank, Thompson, the maker, dying before the note matured. After his death, his administrator, H. W. Thompson, renewed the

note to the bank, signing it as maker in his capacity as administrator, and the petitioner renewed his indorsement, the new note being given for the old one. This note was in turn renewed once or twice in the same way, when the bank refused to continue the renewals longer. A new note was then made of the same tenor as before, upon which the money was procured elsewhere, the bank receiving payment of its note from the proceeds. This last note became due on March 7, 1884, and, the administrator failing to pay it, the complainant paid it in October afterwards. The first note in the series was made on April 5, 1880. In June, 1884, the administrator resigned, and the present administrator (*de bonis non*) was appointed in his place. In December, 1884, the estate was represented insolvent, and commissioners were appointed, before whom the complainant submitted his claim. But the claim was rejected as barred by the special limitation act of two years and six months. Not having any legal remedy, the complainant asks equity to lend its helping hand. We think equity cannot afford the necessary relief.

The design of the statute was not to create the relation of creditor and debtor where not already existing, but to assist, in certain emergencies, those who are already creditors, but who have failed to seasonably present or prosecute their claims without culpable negligence on their part.

Here the petitioner is not to be considered a creditor of the estate. He may be a creditor of its former administrator, whose note he indorsed. A note given by an administrator, although worded as the promise of the estate, binds the administrator only. The original note given by the intestate was long since paid. The note paid by the petitioner cannot be regarded other than a different and independent transaction.

What claim the former administrator may have against the estate, and whether now available or not, we cannot consider. *Kingman* v. *Soule*, 132 Mass. 285.

Bill dismissed with costs.

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

LEMUEL Q. TYLER *vs.* J. HERBERT CARLISLE.

Penobscot. Opinion March 1, 1887.

Gambling. Money loaned for.

If money is lent with an understanding and intention on the part of the lender that it is to be used for gambling purposes, and it is so used, it cannot be recovered by the lender from the borrower.

ON exceptions, which were as follows:

"This was an action of assumpsit, to recover one hundred and fifty dollars, which plaintiff claimed he loaned and delivered to the defendant in money, while defendant was engaged in a game of poker. Defendant claimed that the one hundred and fifty dollars was a poker or gambling debt, and was the amount he was indebted to the plaintiff at the end of the game. The verdict was for the defendant. The presiding judge instructed the jury as follows:

"That if the lender of money knows that the borrower wants it to gamble with, and lends it to him, with the express understanding and intention that it shall be so used, and it is so used, the debt thereby created is not recoverable. The law will not lend its aid to enforce such a contract. I do not mean to say that the mere belief on the part of the lender that the borrower intends to gamble with the money, or a knowledge, even, that he will so use it will defeat a recovery. I do not so understand the law. What I mean to say is, that if knowing of the illegal use which the borrower intends to make of it, the lender furnishes the money for the very purpose of enabling the borrower to gamble with it, and it is so used, the debt thereby created cannot be recovered.

"To which instruction the plaintiff excepts, and prays that his exceptions may be allowed."

C. E. Littlefield, for plaintiff.

R. S., sec. 10, furnishes no justification for the ruling complained of.

The necessary implication arising from this statute is that money loaned at the time and place may be recovered. The statutes are not to be extended by construction. They are to be strictly construed. *Abbott* v. *Wood*, 22 Maine, 546; *Com. & W. & N. R. R.*, 124 Mass 563; *Cleveland & al.* v *Norton*, 6 Cush. 383.

It has therefore been held that a similar statute did not affect the loan itself, but that the money might be recovered. *Peck* v. *Briggs*, 3 Denio, 107.

We say that the last clause of the instruction, or the last proposition is clearly erroneous, that it not only misled the jury but that a careful analysis demonstrates that it has no legal foundation upon which it can stand.

We think we are able to show that the origin of this language was such as does not justify its application to the case at bar, and has been carried down through the authorities by reason of an incorrect apprehension of the original precedent.

The 68 Maine case relies for authority upon *Cannan* v. *Bryce*, 3 Barn. & Ald. 179; *McKinnell* v. *Robinson*, 3 M. & W. 434 and *Tracy* v. *Talmage*, 14 N. Y. 162.

An examination of the Maine case discloses the fact that the proposition in that case was nothing but a dictum, as the court there said: "There is no claim in this case for money lent." The same is true of the 14 N. Y. case, *Cannan* v. *Bryce*, and *McKinnell* v. *Robinson*, which were there cited as authority for the language. *McKinnell* v. *Robinson* cites and expressly relies upon *Cannan* v. *Bryce*, and a statute of George 3, which goes much farther than our own case.

Now the case of *Cannan* v. *Bryce*, instead of being against the case at bar, makes a distinction that is decisive against the second proposition.

J. E. Hanley, for the defendant, cited: R. S., c. 125, §§ 2, 10; *Franklin Co.* v. *Lewiston Sav. Bank*, 68 Me. 47; *Flagg* v. *Baldwin* (38 N. J. Eq. [11 Stew.] 219); 48 Am. Rep. 308; *Whitesides* v. *Hunt*, (97 Ind. 191) 49 Am. Rep. 441; *Cunningham* v. *National Bank, Augusta*, (71 Ga. 400) 51 Am. Rep. 266.

PETERS, C. J. The plaintiff claims to recover a sum of money loaned by him while the defendant was engaged in playing at cards. The ruling, at the trial, was that, if the plaintiff let the money with an express understanding, intention and purpose that it was to be used to gamble with, and it was so used, the debt so created cannot be recovered; but otherwise, if the plaintiff had merely knowledge that the money was to be so used. Upon authority and principle the ruling was correct.

Any different doctrine would in most instances, be impracticable and unjust. It does not follow that a lender has a guilty purpose merely because he knows or believes that the borrower has. There may be a visible line between the motives of the two. If it were not so men would have great responsibilities for the motives and acts of others. A person may loan money to his friend,— to the man, and not to his purpose. He may at the same time disapprove his purpose. He may not be willing to deny his friend, however much disapproving his acts.

In order to find the lender in fault, he must himself have an intention that the money shall be illegally used. There must be a combination of intention between lender and borrower— a union of purposes. The lender must in some manner be a confederate or participator in the borrower's act, be himself implicated in it. He must loan his money for the express purpose of promoting the illegal design of the borrower; not intend merely to serve or accommodate the man. In support of this view many cases might be adduced. A few prominent ones will suffice. *Green* v. *Collins*, 3 Cliff. 494; *Gaylord* v. *Soragen*, 32 Vt. 110; *Hill* v. *Spear*, 50 N. H. 252; *Peck* v. *Briggs*, 3 Denio, 107; *McIntyre* v. *Parks*, 3 Met. 207; *Banchor* v. *Mansel*, 47 Maine, 58. (See 68 Maine, p. 47.)

Nor was the branch of the ruling wrong, that plaintiff, even though a participator, could recover his money back, if it had not been actually used for illegal purposes. In minor offences, the *locus penitentiæ* continues until the money has been actually converted to the illegal use. The law encourages a repudiation of the illegal contract, even by a guilty participator, as long as it remains an executory contract or the illegal purpose has not

been put in operation. The lender can cease his own criminal design and reclaim his money. "The reason is," says Wharton "the plaintiff's claim is not to enforce, but to repudiate, an illegal contract." Whar. Con. § 354 and cases there cited. The object of the law is to protect the public — not the parties. "It best comports with public policy, to arrest the illegal transaction before it is consummated," says the court in *Stacy* v. *Foss*, 19 Maine, 335; see *White* v. *Bank*, 22 Pick. 181.

The rule allowing a recovery back does not apply where the lender knows that some infamous crime is to be committed with the means which he furnishes. It applies only where the minor offences are involved.

Exceptions overruled.

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

JAMES W. TUFTS *vs.* ALONZO SYLVESTER.

Franklin. Opinion March 1, 1887.

Stoppage in transitu. Insolvency. Messenger.

An insolvency messenger cannot, before an assignee is appointed, prevent a seller's right of stoppage in *transitu* by accepting goods from a carrier, after the insolvent purchaser had himself refused to receive the goods in order that they might be reclaimed by the seller.

A messenger in insolvency is merely a middleman, like the carrier himself, on whom no such responsibility rests as to accept or refuse title for the estate.

ON report upon agreed statement of facts.

Trover by a seller of goods against the messenger in insolvency. The facts are stated in the opinion.

S. Clifford Belcher, for the plaintiff cited: 1 Benj. Sales, (4 Am. ed.) § § 490, 500, 501; Same. American notes by Charles L. Corbin, § § 782, 783, 784, 785, notes *w*, and *x*; *Lane* v. *Jackson*, 5 Mass. 156; *Grout* v. *Hill*, 4 Gray, 361; *Scholfield* v. *Bell*, 14 Mass. 39; *Seed* v. *Lord*, 66 Maine, 580; 29 Am. Dec. 392 note; *Harris* v. *Pratt*, 17 N. Y. 249; *Sutro* v. *Hoile*, 2 Neb. 186.

H. L. Whitcomb for defendant.

Inasmuch as the right of stoppage in *transitu* can be exercised only in case of the insolvency of the vendee, it follows that the vendee can never exercise that right; because such an act would amount to an unwarrantable preference in favor of the vendor, over the other creditors of the insolvent, who have an equal right to the goods as assets. *Neate* v. *Ball*, 2 East. 117; *Barnes* v. *Freeland*, 6 T. R. *81; *Bartram* v. *Farebrother*, 4 Bing. 579; Story on Sales, § 324.

The right of stoppage must be exercised before the rights of any third parties intervene. Story on Sales, § 324 and cases cited in note. Benj. on Sales, (Bennett's Ed.) § 500. And notice must be given to the party who actually has the goods in possession at the time. Benj. on Sales, § 1276; Story on Sales, § 325.

The purchaser having become an insolvent and the messenger being vested with all his rights, the delivery to the messenger, or into the store of Wards, put an end to the *transitus*, and determined the right of stoppage. Benj. on Sales, § 1275.

The case of *Grout* v. *Hill*, 4 Gray, 361, has no parallel to this.

But in the note *Hause* v. *Judson*, 29 Am. Dec. (377, on page 392) the reporter in speaking of *Grout* v. *Hill*, (4 Gray, 361) and other kindred cases says, "Perhaps, however, this is more properly speaking, rescission of the contract, if the vendor assents to the refusal by retaking the goods," and cites *Sturtevant* v. *Orser*, 24 N. Y. 538.

PETERS, C. J. The plaintiff sold a bill of goods to be shipped at Boston to the buyer at Farmington in this state. The buyer, becoming insolvent after the purchase, countermanded the order, but not in season to stop the goods. Before the goods came he had gone into insolvency, and a messenger had taken possession of his property. An express company, bringing the goods, tendered them to the buyer, who refused to receive them, but the messenger accepted the goods from the carrier, paying his charges thereon. After this, but before an assignee was appointed, the seller made a demand upon both the carrier and

the messenger, attempting to reclaim his goods. The question, upon these facts, is whether the goods were seasonably stopped *in transitu* to preserve the plaintiff's lien thereon. We think they were. The right of stoppage *in transitu* is favored by the law.

It is clear that the goods did not go into the buyer's possession. He refused to receive them. He had a moral and legal right to do so. Such an act is commended by jurists and judges. He in this way makes reparation to a confiding vendor. "He may refuse to take possession," says Mr. Benjamin, "and thus leave unimpaired the right of stoppage *in transitu*, unless the vendor be anticipated in getting possession by the assignees of the buyer." Benj. Sales, § 858. In *Grout* v. *Hill*, 4 Gray, 361, SHAW, C. J., says: "where a purchaser of goods on credit, finds that he shall not be able to pay for them, and gives notice thereof to the vendor, and leaves the goods in possession of any person, when they arrive, for the use of the vendor, and the vendor, on such notice, expressly or tacitly assents to it, it is a good stoppage *in transitu*, although the bankruptcy of the vendee intervene." See same case at p. 369. 1 Pars. Con. *596, and cases.

The decision of the case, then, turns upon the question whether the messenger could accept the goods and terminate the lien of the vendor. We do not find any authority for it. A bankruptcy messenger acts in a passive capacity — is intrusted with no discretionary powers — acts under mandate of court, or does certain things particularly prescribed by the law which creates the office — is mostly a keeper or defender of property, a custodian until an assignee comes — and he can neither add to or take from the bankrupt's estate. He is to take possession of the "estate" of the insolvent. These goods had not become a part of the estate. He was not at liberty to affirm or disaffirm any act of the insolvent. The law imposes on him no such responsibility. Chancellor Kent says, that the transit is not ended while the goods are in the hands of a carrier or middleman. A messenger has no greater authority, *ex officio*, than a middleman, excepting as the insolvent law expressly prescribes.

In Hilliard's Bankruptcy, p. 101, the office of a messenger is likened to that of a sheriff under a writ; he becomes merely the recipient of property. The title of the assignee, when appointed, dates back of the appointment of a messenger. Until appointment of assignee, the bankrupt himself is a proper person to tender money for the redemption of lands sold for taxes. *Hampton* v. *Rouse*, 22 Wall. 213. See *Stevens* v. *Palmer*, 12 Metc. 464. The case cited by the plaintiff, *Gates* v. *Hoile*, 2 Neb. 186, supports his contention.

Defendant defaulted.

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

WALDO G. BROWN and another *vs.* THOMAS MOORE and trustee.

Aroostook. Opinion March 3, 1887.

Superior Court, Aroostook. New trial.

The justice of the superior court for the county of Aroostook has the power to set aside the verdict, and grant a new trial, in a case tried before him, when in his opinion the case demands it.

ON exceptions from superior court.

Assumpsit on an account annexed. The verdict was for the plaintiff for the sum of one cent. The presiding justice, on motion of the plaintiff set the verdict aside and granted a new trial, and the defendant alleged exceptions on the ground that the justice was not authorized to set aside a verdict in that court.

Powers and Powers, for the plaintiff.

John P. Donworth, for the defendant.

The power to set aside verdicts does not exist unless so expressed *in totidem verbis*, for an act conferring such power is in derogation of the common law, and cannot be extended by construction so as to embrace causes not fairly within the scope of the language used. See 46 Maine, 377.

The superior court in Aroostook court was not created by force of a general law, so that sec. 40 of c. 82 of the Revised Statutes does not apply. Stat. 1885, c. 324, establishing that court does not confer the power of setting aside a verdict.

PETERS, C. J. The question is whether the judge of the superior court for Aroostook county, has the power to set aside a verdict, and grant a new trial, in a case tried before him, when in his opinion the evidence demands it. We have no doubt that he has.

The language of § 40, c. 82, R. S., is comprehensive enough to admit such construction. "Any justice . . of a superior court" may do so. The argument on the other side of the question is that it cannot be so, because the Aroostook county court was not in existence when the statute referred to was passed, and that the extent of jurisdiction granted to the local court must be found only in the act creating it. We are not strongly impressed with this argument. The statutory provision pertaining to the subject is found in a chapter of rules regulating proceedings in courts generally, most of which are as applicable to one court of record as to another. Before the last revised statutes the provision applied specifically to superior courts in Cumberland and Kennebec counties. Acts of 1881, c. 44. But the idea of the revising committee, adopted by the legislature, was that the power better be general, and apply to present or future superior courts. There is no good reason why the Aroostook court should not possess such power while other courts have it. In fact, it is a power usually belonging to courts exercising common law jurisdiction, and the new trial was in early times granted only by the trial judge or judges. It remained so until statutory provisions supervened altering the practice. The statutes rather take from than add to the powers of a single judge in this respect.

The historical aspect of the question in this state is fully stated in the case of *State* v. *Hill*, 48 Maine, 241. The origin of the practice of granting new trial is of extremely ancient date. Blackstone gives an interesting and satisfactory account of it. 3 Bl. Com. 387, 388; Bou. Law Dic. New trial.

Exceptions overruled.

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

GEORGE W. COLLINS *vs.* CALVIN BLAKE.

Aroostook. Opinion March 3, 1887.

Liens on animals. R. S., c. 91 § 41.

The statute giving a lien for feeding and sheltering animals provided that it should be enforced "as liens on goods and personal baggage by inn-holders or keepers of boarding houses." *Held*: That repealing the mode of remedy in the latter case did not repeal or change the remedy applicable to the former.*

ON report upon agreed statement of facts.

Trespass, for taking and converting to the defendant's own use three colts. The colts were taken by the defendant, then a deputy sheriff of the county of Somerset, April 21, 1883, and were sold by him by virtue of an execution issued on a decree for lien on the colts and for sale of the same, made at the Supreme Judicial Court for Somerset county, March term, 1883, on a petition for lien for keeping the colts, by Frank Lord of Ripley, in the county of Somerset, entered in said court December term, 1882. In that petition Charles F. Collins is alleged to be the owner of the animals, and in the decree and execution Charles F. Collins is stated to be the owner of the animals. The keeping of the colts by Frank Lord was by and with the consent of George W. Collins, plaintiff in the present suit. The plaintiff in this suit was the owner of the colts at the time they were taken by the defendant and sold. If this action can be maintained, judgment to be for the plaintiff and damages to be assessed by the jury, otherwise plaintiff to become nonsuit.

Wilson and Lumbert, for plaintiff.

It is well settled that an officer is protected only when he proceeds under a precept regular on its face and issued from a tribunal having jurisdiction of the subject matter. *Nowell* v. *Tripp*, 61 Maine, 430, citing 14 Wallace, 613.

* Liens on animals are now enforced in the same manner as liens on goods and choses in action. See Stat. 1887, c. 1, enacted after the opinion in this case was written. REPORTER.

See also *Elsemore* v. *Longfellow*, 76 Maine, 128; *Wilmarth* v. *Burt*, 7 Met. 259; *Clark* v. *May*, 2 Gray, 413; *Donahoe* v. *Shed*, 8 Met. 326; Hilliard on Torts, 4th ed. vol. 2, p. 126. Now in this case these two necessary facts do not exist.

The petition was dated Nov. 22, 1882, and was to enforce a lien for feeding and sheltering the colts from and including the winter season of 1880-81, to the date of the petition. The case is the same which is referred to in *Lord* v. *Collins*, 76 Maine, 443.

The Supreme Judicial Court at that time had no jurisdiction of such liens. The remedy provided for innholders and keepers of boarding houses at that time was a sale at auction under chapter 99 of the public laws of 1876.

"Liens are in derogation of the common law and the court is not authorized to extend the law beyond the objects specifically provided for or enforce a remedy by statute except in accordance with the items thereof." *Lord* v. *Collins*, 76 Maine, 444. His precept was issued by virtue of a proceeding not according to the course of the common law and although the court was one of general jurisdiction there was no presumption of jurisdiction. *Prentiss* v. *Parks*, 65 Maine, 562; *Penobscot R. R. Co* v. *Weeks*, 52 Maine, 456; *Com.* v. *Blood*, 97 Mass. 538; *Morse* v. *Presby*, 5 Foster, 302.

Everybody is bound to know the law and what is authorized. *Vinton* v. *Weaver*, 41 Maine, 430.

The execution was therefore illegal on its face and was issued by a court having no jurisdiction of the subject matter. *Fisher* v. *McGirr & als.* 1 Gray, 45; *Greene* v. *Briggs*, 1 Curtis, C. C. R. 335; *Com.* v. *Crotty*, 10 Allen, 405; *Smith* v. *Keniston*, 100 Mass. 173.

"It is well settled that a warrant issuing from a court or magistrate having no jurisdiction of the case confers no authority on the officer who executes it." *Bowker* v. *Lowell*, 49 Maine, 430, opinion of Judge GOODNOW; Hillard on Torts 4th ed. vol. 2, p. 125.

Every fact essential to the special jurisdiction must appear upon the record. 65 Maine, 562, and 52 Maine, 456.

"It is held that where the subject matter of the suit is not within the jurisdiction of a court all the proceedings are absolutely void and the officer is a trespasser." Hillard on Torts, 4th ed. vol. 2, p. 130, sec. 3.

J. O. Bradbury, for the defendant, cited: *Guptill* v. *Richardson*, 62 Maine, 237; *Gray* v. *Kimball*, 42 Maine, 307; *Horton* v. *Auchmoody*, 7 Wend, 200; *Fisher* v. *McGirr*, 1 Gray, 1; *State* v. *McNally*, 34 Maine, 210; *Gurney* v. *Tufts*, 37 Maine, 130; *Wilton Mf'g Co.* v. *Butler*, 34 Maine, 431.

PETERS, C. J. We think the *in rem* judgment which is attacked by the plaintiff in this case, was not erroneously granted. The statute gave a lien on animals for feeding and sheltering them, the lien "to be enforced in the same manner as liens on goods and personal baggage by inn-keepers or keepers of boarding houses."

That meant enforcement in the manner then existing,— not as it might be in the future by a new enactment. A reference was the readiest way to describe the process to be employed for enforcement. The repeal of the process in the one case does not repeal the process in the other, there being no words in the act of repeal including the latter. Suppose the inn-holders' lien had been wholly abrogated, would it be pretended that the lien on animals would fall with it? There is no dependency between the two classes of liens or their enforcement. The case of *Lord* v. *Collins*, 76 Maine, 443, by implication, so settles the question.

The act affecting this case was passed before the present revised statutes; which retain, on this subject, a reference to a law after it has been changed or repealed. The complication needs the notice of the legislative department, to prevent misadventure.

Plaintiff nonsuit.

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

EDWARD T. DUGAN *vs.* CHARLES E. THOMAS and another.

Piscataquis. Opinion March 3, 1887.

Exceptions. Practice. Entry for condition broken. Agreements to oust courts of jurisdiction.

An exception does not lie to a judge's saying the burden of proof was on the plaintiff, when he meant to say on the defendant, if the mistake was so obvious that no one concerned in the trial could be misled by it.

It is unimportant that a witness, called to notice a person making a re-entry upon land, did not at the time know the purpose of the act, where the person making the entry for condition broken took and kept actual possession for that purpose, ousting the defendant. The act speaks for itself.

A father is not legally bound by an agreement, in his deed to his son, that, if any controversy arise between them about the father's support provided for in the deed, it shall be settled by an arbiter mutually agreed upon; they might not be able to agree on a person for arbiter.

The right to free access to the courts a man cannot deprive himself of by his own agreement, in matters that go to the substance of the principal claim or cause of action; though he may impose conditions on himself with respect to preliminary and collateral matters which do not go to the root of the action; courts cannot be ousted of their jurisdiction by agreements between the parties.

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

Writ of entry to obtain possession of certain real estate in Medford. Plea, general issue.

The opinion states the case presented by the exceptions.

Peaks and Everett for plaintiff.

Forfeitures for condition broken are not favored by the law. 1 Washburn, Real Property, title "Estate upon condition."

Conditions subsequent, especially when relied upon to work a forfeiture, must be created by express terms or clear implication, and are construed strictly. *Merrifield* v. *Cobleigh*, 4 Cush. 178; *Bradstreet* v. *Clark*, 21 Pick. 389; *Ludlow* v. *Harlem*, *R.* 12 Barb. 440.

One of the conditions of this deed, is that there shall be no forfeiture without arbitration if either party desires it. This plaintiff did desire it.

This plaintiff had taken a conditional deed. Under it he had

supported his father and mother nine years. He had put into the conditions a stipulation that there should be no forfeiture until there had been an arbitration. He had a right to have his deed construed strictly. 4 Cush. 178, *supra*; 21 Pick. 389, *supra*.

Ephraim Flint, (*Josiah Crosby* with him) for the defendants.

The mis-statement by the presiding justice should have been called to his attention before the jury retired. *Stephenson* v. *Thayer*, 63 Maine, 143; *Gilbert* v. *Woodbury*, 22 Maine, 246; *Frankfort Bank* v. *Johnson*, 24 Maine, 500; *Dyer* v. *Greene*, 23 Maine, 464; *Loud* v. *Pierce*, 25 Maine, 233; *Eaton* v. *Tel. Co.* 68 Maine, 69; *Oxnard* v. *Swanton*, 39 Maine, 125; *Lyman* v. *Redman*, 23 Maine, 289.

The entry for condition broken in this case was sufficient. *Jenks* v. *Walton*, 64 Maine, 100; *Brickett* v. *Spofford*, 14 Gray, 519.

PETERS, C. J. This is a real action between a son and father, another defendant being coupled with the father, where the question involves the right of possessing a homestead which the father conveyed by a conditional deed to the son to secure a life support. The son claims that he has by his deed a right to the possession, and the father claims that the right which the son had has been forfeited for condition broken.

An exception is taken, that the judge said to the jury that the burden to show forfeiture was on the plaintiff (the son), when he meant to say defendant instead of plaintiff. It is too late for the plaintiff to urge an objection. He should have called for a correction at the moment or before the jury retired.

It must have been understood to be an inadvertence. The judge was describing the duties imposed on the plaintiff, and accidentally said, "The burden is upon the plaintiff (meaning defendant), to show that he has failed to do it." No one could suppose the plaintiff was required to show his own default. Besides, the judge afterwards said that the burden was on the defendant, and such must have been the drift of the whole charge.

An objection is urged upon the exceptions and motion, that a sufficient re-entry was not effected by the defendant, because a witness called to observe the act did not know the purpose of it. But his presence was not at all necessary. The plaintiff moved away from the premises, virtually abandoning them, and the defendants' agent took re-possession for condition broken. The grantor took possession of the farm and held it until his conveyance to the other defendant. The evidence upon that point is plenary.

The deed from the father to son contains a clause providing that, if a controversy arise, "the parties or either of them may submit" the matter to arbitration, the "arbiter to be mutually agreed upon." The judge instructed the jury that this would not bar the defendant from sitting up forfeiture unless the plaintiff asked for a reference and was refused. The plaintiff cannot justly complain of a ruling more favorable to himself than he was entitled to. If the defendant could not justify a re-entry until an arbiter had so awarded, he might be forever deprived of his right, because an arbiter might never be "mutually agreed upon."

Such a clause of arbitration cannot bind parties. The right of free access to courts is inalienable. Whar. Con. § 416. Parties may by agreement impose conditions precedent with respect to preliminary and collateral matters, such as do not go to the root of the action. But men cannot be compelled, even by their own agreements, to mutually agree upon arbiters whose duties would, as in this case, go to the root of the principal claim or cause of action, and oust courts of their jurisdiction. *Robinson* v. *Insurance Co.* 17 Maine, 131; *Hill* v. *More*, 40 Maine, 515; *Pearl* v. *Harris*, 121 Mass. 390.

The motion has no meritorious grounds to stand upon.

Exceptions and motion overruled.

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

SETH WEBB *vs.* JOANNA H. GROSS and another.

Hancock. Opinion March 3, 1887.

Executors and administrators. Insolvent estates. R. S., c. 66 § 21. Damages.

An action lies on an administrator's bond for failure to present an account for settlement within six months after a report is made by commissioners of insolvency.

If the defense relied upon in such an action is, that the estate was not sufficient to pay for more than the expenses of administration and claims of the privileged classes, it cannot prevail, when the case does not disclose that there would be nothing for the common creditors after converting the real estate into assets.

Unless some actual injury has been sustained only nominal damages can be recovered in such an action.

The rule that there has been no breach of an administrator's bond until he has been cited to render an account does not apply to insolvent estates.

Dickinson v. *Bean*, 11 Maine, 50, modified.

ON REPORT.

This is an action, brought by the judge of probate for Seth Webb, of debt on the bond of the administratrix upon the estate of William Whitmore. The report says that, "The inventory showed real estate appraised at $125, but no personal property. The estate was represented insolvent, and commissioners were appointed, who allowed Seth Webb's claim of $1198.96. This report was accepted at the December term, 1882. The administratrix did not settle, nor file any account within six months thereafter, nor did she obtain any order of allowance of further time from the judge. At the April term, 1885, after this suit had been entered in court, she settled an account before the judge of probate, which account shows a balance due her of $29, the assets, according to her account not being sufficient to pay the costs of the administration. Webb duly demanded of the administratrix his dividend or claim."

Hale and Hamlin for plaintiff.

Failure to render an account within six months after the commissioners' report was made, was a breach of defendant's bond. R. S., c. 66, § 21.

Judgment should be for the penalty of the bond and execution should issue for the amount of debt and costs. This was squarely decided in *Dickinson* v. *Bean*, 11 Maine, 51, and never overruled.

The decision of *Dickinson* v. *Bean* is supported by *Cony, Judge*, v. *Williams* 9 Mass. 114.

George M. Warren for defendant.

The representation of insolvency and appointment of commissioners was unnecessary as there were no assets to pay creditors of the fifth class. It was mere surplusage in the administration. The plaintiff was not injured by it and the administratrix is not liable on her bond. R. S., c. 66, § 2; 4 Mass. 625.

The whole estate consisted of real property, and that being so the administratrix was not liable for not settling or filing an account within six months from acceptance of report of commissioners. That liability pertains to personal estate only. *Butler* v. *Ricker*, 6 Maine, 268; *Eaton* v. *Brown*, 8 Maine, 22.

The administration bond does not cover real estate, and real estate is all there is in this case. Action cannot be maintained. See form of bond, Waterman's Probate Practice, p. 50.

PETERS, C. J. The principal defendant is an administratrix on an insolvent estate, which had not personal property enough to pay the expenses of administration. The inventory showed no personal assets, but returned real estate valued at $125. The inquiry is whether an action can be maintained on the bond of the administratrix for her failure to settle an account within six months after a report was made by the commissioners of insolvency.

The administratrix contends that she is protected from liability by the statute (R. S., c. 66 § 2,) which provides that, where an estate is not sufficient to pay more than the expenses of administration and claims of the privileged classes, an administrator is exonerated from making a representation of insolvency. The statute relied on is not quite applicable to the facts of the present case. It was necessary to render an account or report

of some kind, from which to ascertain whether the real estate should or not be sold for the payment of debts. The case does not disclose that there would be nothing for the common creditors after converting the real estate into assets.

The next ground taken in defense is that no action can be maintained on the bond until the administratrix had been cited by the probate court to render an account; the defendants, in support of this position, relying on R. S., c. 72, § 16, and on several reported cases among which is that of *Gilbert* v. *Duncan*, 65 Maine, 469. An examination of the cases referred to discloses that all of them involved the settlement of solvent estates, — not insolvent estates. It may not be easy to appreciate any reason for the distinction, but it was one of the rigors of the old common law, and finds a survival in § 21, c. 66, R. S., which declares that it shall be a breach of his bond for an administrator to neglect to settle his account for more than six months after the report on claims is made. The terms of the statute are absolute. *Dickinson* v. *Bean*, 11 Maine, 50.

What must the damages be? The plaintiff contends that his whole debt is recoverable, about $1200, and cites the case of *Dickinson* v. *Bean*, *ante*, in support of his contention. Such would, no doubt, be the result if the doctrine of that case held good at this late day. But that case was determined under the statute of 1821, which is worded very differently from the statute of to-day. That statute, founded on the older Massachusetts enactments, relentlessly demanded payment of a creditor's whole debt for what might be no more than a technical shortcoming of the administrator. This terrible penalty was, however, abolished by an act passed on February 26, 1833. The present statute merely prescribes the duty but affixes no penalties for a breach.

In the present instance the damages must be nominal. No one sustains any real injury. It is a technical default only. The judgment must be for the amount of the penalty of the bond; execution to issue for one dollar damages.

Defendants defaulted.

WALTON, DANFORTH, EMERY, FOSTER AND HASKELL, JJ., concurred.

FRANK LORD *vs.* CHARLES F. COLLINS.

Somerset. Opinion March 3, 1887.

Liens on animals. Proceeds of sale to enforce lien. Equity.

The complainant procuring a sale of horses under a lien upon them for their keeping, an officer paid an excess which the horses sold for, above the amount of complainant's lien-judgment, into court, as provided by statute. The complainant, having a claim for keeping the horses from the date of his petition for sale to the date of sale, seeks to recover it from the money in possession of the court. *Held:* That the process cannot be maintained.

ON exceptions to the ruling of the court in sustaining a demurrer to the following bill in equity:

"Somerset, ss.

"To the Honorable Justices of the Supreme Judicial Court:

"Frank Lord, of Ripley, in the county of Somerset, complains against Charles F. Collins, last of Ashland, in the state of Massachusetts, now of residence unknown, and says: That on the sixteenth day of October, 1880, he made a verbal contract with said Collins, then a resident of Dexter, Maine, to feed and shelter three colts, then owned by said Collins, for a certain time, at a price agreed. That after the expiration of the agreed time the animals remained in possession of said Lord, said Collins neither taking them away or paying the sums due for keeping. That on the 22d day of November, A. D. 1882, said Lord, to enforce his lien for payment for keeping against said property, filed in this court, in this county, his petition for decree for enforcement of his lien for agreed price and reasonable charges of keeping to that time, and for his reasonable charges for keeping said animals pending said process and for his costs therein, which said petition was heard at the March term, A. D. 1883, and he was adjudged a lien on said animals for the sum of one hundred and ninety-eight dollars and forty cents, for amount due for said feeding and shelter at date of his said petition, and twenty-two dollars and thirty-one cents, costs of said suit, and decree was made for the sale of said animals to satisfy said lien. Under this decree the animals were sold by the officer, and from said sale a surplus amounting to the sum of one hundred and

sixteen dollars and thirty cents was realized, over and above the amount of said lien, costs and charges of sale, and the same was paid over to the clerk of court of said county of Somerset, as prescribed by statute, and in his hands said sum still remains. That from the date of said petition of lien to the time the officer took said animals for the purposes of said sale, said Lord kept, fed and sheltered said animals, viz.: From said 22d day of November, A. D. 1882, to April 18th, 1883, at great expense, viz.:

For keeping largest colt during that time,	$35.00
" " 2 smaller colts, ($30 each)	60.00
Total,	$95.00

"That the above expenses of keeping were not allowed to him in the petition to enforce the lien, as they arose after the date of said petition and were not within the scope of the statute authorizing such liens.

"That by reason of such necessary expense in keeping said animals for said Collins pending said process, said Lord became a creditor of said Collins for that amount, and still remains a creditor therefor as no part of the same has ever been paid or tendered him by any person. That said Collins has absconded, his residence being now unknown, and he has no property that your petitioner is aware of that can be come at to be attached to satisfy his claim. That the amount of said surplus arising from sale of said property and now in the hands of the court, or its clerk, cannot be come at to be attached or taken in execution, wherefore he prays in this matter to be heard in equity and that the decree may be made in his behalf under the provision of chap. 77, section 6, article 10, of the Revised Statutes, applying the said surplus in payment of his said debt, and also allowing him his cost herein and satisfying the same from said funds, and that such further relief shall be granted him herein as under the practice in equity he shall be found entitled.

(Sworn to.) Frank Lord."

Thomas H. B. Pierce, for the plaintiff.

Our bill is brought under c. 77, § 6, cl. X, R. S. The

point urged by counsel in the court below was that the lien proceedings were illegal because the remedy had been repealed. Hence the money was not in the hands of court, but in the hands of the clerk as a private individual, and he should have been made a party; conceding in express terms, as I understood his words, that if the law or remedy was not repealed by the law of 1876, then it was lawfully in the hands of the court, and the bill was a proper remedy. I understood the reason upon which the demurrer was sustained to be that in proceedings under this statute a third person must be made a party, under the decision in *Donnell* v. *Railroad Company*, 73 Maine, 567, in order to maintain a bill;—that the clerk was not made a party, hence the bill was demurrable.

I assume, for the purpose of arguing this question, that the lien proceedings were valid — that the money claimed was legally in the hands of the court and subject to its order. It is property not exempt from attachment or seizure, but so situated in the possession of the court that it cannot be come at to be attached or seized. Defendant is out of the jurisdiction of the court, and as there is no other property, complainant can have no remedy against him personally or *in rem*, because of the situation of the thing. His sole remedy is in equity to have the fund applied to the payment of his debt. The court has it — not the clerk personally. The court cannot or need not appear before itself. It can protect its rights. It can direct the disposition of what it holds in its possession. Now to say, in a case of this kind, when there can reasonably be no third party but the court itself, which is the equitable trustee, that because the court is not made a party, the complainant is without any right to the use of the power of the court in his behalf, is, to say the least, unjust.

D. D. Stewart, for the defendant, cited: *Webster* v. *Clark*, 25 Maine, 314; *Jones* v. *Green*, 1 Wall. 330; *Webster* v. *Withey*, 25 Maine, 326; *Caswell* v. *Caswell*, 28 Maine, 232; *Lord* v. *Collins*, 76 Maine, 443.

PETERS, C. J. No view that can be taken of this case, on its merits, makes the bill maintainable.

It is professedly a bill in the nature of an equitable trustee process, brought under R. S., c. 77, § 6, Art. 10. It has been decided that, in such a proceeding, there must be some third party summoned in — an equitable trustee. If it were not for this necessity, creditors might too much embarrass debtors, before obtaining execution against them, against the policy of the law. *Donnell* v. *Railroad*, 73 Maine, 567.

In this case there is no third party,— no equitable trustee. And from the facts alleged, we do not see how there can be any.

If the clerk were made such party, evidently he could not be holden. He has been acting merely as the hand of the court, and not for himself. He should not be subjected to the risk and expense of a litigation. Nor does it follow that he would be holden even if acting in an individual capacity merely. We have judicial notice, from another case* before us, that a person other than the respondent claims to be a mortgage-owner of the animals which were sold. Even if the respondent's possession of the property might have invested him with authority to create a lien on the animals for their keeping, that lien cannot subsist upon the funds in question. *Lord* v. *Collins*, 76 Maine, 443.

It is impossible to make the court itself a party by its being an official depositary of the fund. The statute relied on as furnishing a remedy, cannot possibly accomplish such a thing— and was never intended to.

The result of the matter simply is, that the court has in its official possession an amount of money which can be surrendered only when the court is satisfied upon proper process, affecting proper parties, who the true owner may be. Upon no facts indicated in the case can this complainant obtain it. The complainant probably missed his own interests in procuring a sale of the property before its full value was absorbed by the lien; or, in selling more of it than was necessary to protect himself at the time of the sale — more in value than the amount of his lien.

Exceptions overruled.

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

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* *Collins* v. *Blake*, *ante* page 218.

CITY OF PORTLAND

vs.

UNION MUTUAL LIFE INSURANCE COMPANY.

Cumberland. Opinion March 4, 1887.

Tax. Union Mut. Life Ins. Co. R. S., c. 6, §§ 13 and 14. Stat. 1885, c. 329.

Prior to the enactment of Stat. 1885, c. 329, the Union Mutual Life Insurance Company was taxable in Portland for its national bank stocks, bonds, securities and other personal property under provisions of R. S., c, 6, § 13.

The personal property of a life insurance company, in which its annual earnings and premiums, received from policy holders, are invested, are not "personal property placed in the hands of any corporation as an accumulating fund for the future benefit of heirs or other persons," within the meaning of the seventh clause of R. S., c. 6, § 14.

ON report.

This was an action to recover a tax assessed by the city of Portland upon personal property of the defendant for each of the years 1882 and 1883 and was submitted to the law court upon an agreed statement of facts. The material facts are stated in the opinion.

Joseph W. Symonds, city solicitor, for plaintiff, cited: *Davis* v. *Macy*, 124 Mass. 195.

The class of cases to which the seventh clause R. S., c. 6, § 14, applies may be seen by examination of *Hathaway* v. *Fish*, 13 Allen, 267; *Freetown* v. *Fish*, 123 Mass. 355; *Davis* v. *Macy*, *supra*.

Bion Bradbury, also for plaintiff, cited: *Augusta Bank* v. *Augusta*, 36 Maine, 255; *Baldwin* v. *Trustees*, &c. 37 Maine, 372; Redf. Railways, c. 30, § 228, c. 5; *Otis* v. *Ware*, 8 Gray, 509; *P. S. & P. R. R. Co.* v. *Saco*, 60 Maine, 200; *Judkins* v. *Reed*, 48 Maine, 386; Hilliard, Taxation, c. 9, § 9 *et seq.*; *British* v. *Commissioners*, 31 N. Y. 32; *Salem Iron Factory* v. *Danvers*, 10 Mass. 514; *Amesbury W. & C. M'f'g Co.* v. *Amesbury*, 17 Mass. 461; *Hartford Fire Ins. Co.* v. *Hartford*, 3 Conn. 15; *Sun. Ins. Co.* v. *New York*, 4 Seld. 241; *People* v. *Board*, 16 N. Y. 424.

Drummond and Drummond, for defendant.

As matter of fact, the personal property held by corporations has been taxable by the municipalities in comparatively few cases. And yet if the construction claimed by the plaintiff's counsel in this case is correct, every one of them should be taxed. Take for example the case cited by counsel for plaintiff, *Augusta Bank* v. *Augusta*, 36 Maine, 255. The tax in question in that case was assessed under chapter 159 of the laws of 1845, and is almost exactly the same as the law was when the tax in this case was assessed.

In this case we invoke and rely upon the precise principle decided in that Augusta case. The law requires the policy-holder to be taxed for the value of his policy as in that case it required the shareholder to be taxed for the value of his share; and in neither case can the corporation be taxed.

The fact is that the law favors life insurance as it does deposits in savings banks, and even more as is seen by the provisions in relation to exempting them from attachment; and it certainly cannot be held to subject them to double taxation.

Our funds are property placed in our hands as an accumulating fund for the future benefit of widows and orphans, whose rights are sedulously protected by the law, so that neither the person placing the funds nor his creditors can divert them. The provision in the law was evidently made for this very case, as well as for savings banks. So our funds are expressly excepted from the provisions of R. S., c. 6, § 13.

LIBBEY, J. The only question in this case that need be decided is, whether the defendant corporation, a mutual life insurance company, was legally taxable for its personal property, in Portland, in 1882 and 1883. It owned stocks in national banks, in this state of an assessable value sufficient to produce the tax assessed against it and claimed in this action, besides a large amount of other personal property, in which its funds and annual earnings had been invested. It is a corporation organized under the law of this state and had its principal place of business in Portland, so that it was taxable there if legally taxable.

By R. S., c. 6, § 13, "all personal property within or without the state, except in cases enumerated in the following section, shall be assessed to the owner in the town where he is an inhabitant, on the first day of each April."

This language embraces corporations as well as persons. The defendant being the owner of the property in this state, was taxable unless within one of the exceptions in § 14, or exempt by some other provision of the statute. It is claimed and strenuously maintained by its counsel that it is within the seventh exception enumerated in § 14, which reads as follows: "Personal property placed in the hands of any corporation as an accumulating fund for the future benefit of heirs or other persons, shall be assessed to the person for whose benefit it is accumulating, if within the state, otherwise to the person so placing it, or his executors, or administrators, until a trustee is appointed to take charge of it or its income, and then to such trustee."

The deposit so placed may be of a kind of property, such as stocks, to be retured *in individuo*, with its income, or it may be money to be invested at interest and a like sum with its accumulations returned at the time stipulated. In either case the obligation is absolute. *Hathaway* v. *Fish*, 13 Allen, 267; *Davis* v. *Macy*, 124 Mass. 193.

Are the premiums paid as the consideration for the contract of life insurance, personal property placed in the hands of the insurance company as an accumulating fund for the future benefit of heirs or other persons within the meaning of this statute? We think not. The premiums are paid absolutely to the corporation as the consideration for the policy of insurance. They, with their accumulations are not to be paid to heirs or other persons at some future day; but the sum to be paid by the special contract on the happening of the death of the insured is fixed and absolute, having no regard to the amount of premiums paid or their accumulations. The insurance may become payable by the death of the insured within the first year, before a second premium becomes due, or it may not become due and payable till the premiums paid, with their accumulations are double or

triple the sum of the insurance; or it may never become payable by reason of a failure to pay the premiums, or a violation of some other condition of the contract by the insured, and if the insurance is payable in case of the death of the insured, to his legal representatives, and he dies leaving no widow or issue, the insurance is not for the "benefit of heirs or other persons," but goes into his general estate to be administered as other personal assets, R. S., c. 64, § 48, and c. 75, § 10. If anything is left after payment of debts the heirs take by descent and not by purchase as when the fund is placed in the hands of a corporation to accumulate for their future benefit. The contract of life insurance is not a deposit of the premiums to be paid to some person with their accumulations at some future time, but a special contract of hazard for the payment of a sum stipulated without regard to the amount paid in premiums before the happening of the contingency.

It is claimed that the construction which we feel compelled to give to the statute casts upon mutual life insurance companies an unjust burden. If so it is a question addressed to the legislature, and not to the court; and since this action was commenced the legislature has acted upon it by providing a new mode of taxing all life insurance companies, so the question is no longer of practical importance. Act of 1885, c. 329.

Judgment for plaintiffs.

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

LEWIS PIERCE, administrator,

vs.

CATHERINE A. STIDWORTHY and others.

Cumberland. Opinion March 4, 1887.

Wills. Legacies. Alabama claims. Bonds.

A claim for the loss of a vessel by capture by confederate cruiser, Sumpter, which was allowed and paid under the Act of Congress of June 5, 1882, to the administrator of the owner, was such a property right as passed under

the residuary clause of the will of the owner though he died in April, 1875.

A testator who died in April, 1875, provided in his will "All the residue of my estate, real, personal and mixed, of which I shall die possessed, or which I may be entitled to at my decease, I give, devise and bequeath to my faithful wife Katherine A. Stidworthy for the term of her life, with the right and power to use and dispose of the income, rents, profits and interest of the same, and with the further right to apply to her use if needed, any part of the principal of the personal property, making her sole judge of the need of so doing; and after her death I give and devise the same, or what shall then be left unapplied and unconsumed, to my children to be divided equally between them, the children of any deceased child to take the share of their parent; if all my children and grandchildren should die in the lifetime of my said wife, then I will that the property shall go and belong to her absolutely, to dispose of at her pleasure, and if she does not dispose of it by gift or otherwise in her lifetime to descend to her lawful heirs." *Held*, that a claim allowed the administrator with the will annexed, by the court of commissioners of Alabama claims, under the Act of Congress of June 5, 1882, passed by the will to the use of the widow; and that she was entitled to the custody of the fund arising therefrom upon giving bond to the judge of probate, with sureties, for the faithful management and preservation of the fund according to the terms of the will.

On report.

Bill in equity by the administrator, with the will annexed, of the estate of John Stidworthy against the widow and heirs of the testator, to obtain a construction of the will.

Lewis Pierce, pro se.

Woodman and Thompson, for the widow, cited: *Comegys* v. *Vasse*, 1 Peters, 210; *Erwin* v. *U. S.* 7 Otto, 392; *Phelps* v. *McDonald*, 9 Otto, 298; *Leonard* v. *Nye*, 125 Mass. 455; *Bacon* v. *Woodward*, 12 Gray, 376; *McCarty* v. *Cosgrove*, 101 Mass. 124; *Gifford* v. *Choate*, 100 Mass. 343; *Sampson* v. *Randall*, 72 Maine, 109.

Nathan and Henry B. Cleaves, for the heirs.

In the present case no valid claim existed against Great Britain, no claim growing out of and adhering to the property which would pass by general bequest. In speaking of the treaty with Spain the court say, in *Comegys* v. *Vasse*, 1 Peters, 212, "The object of the treaty was to invest the commissioners with full power and authority to receive, examine and decide upon the amount and validity of the asserted claims upon Spain,

for damages and injuries. Their decision within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable. The parties must abide by it as a decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review in any judicial tribunal."

The claim of John Stidworthy against Great Britain was passed upon by the tribunal of arbitration, a competent tribunal and their decision was conclusive. The case of *Randall* v. *Cochran*, 1 Ves. 98, holds, that the right of indemnity travels with the right of property and that there can be no doubt that if the party injured dies before or after a treaty is made and compensation is subsequently made, it would be assets distributable as such in the hands of his executors. The decision however is based upon an existing recognized right to compensation under the treaty. A claim demanded by our government, and as such granted, not refused as in the case of the testator.

It has been held that money paid by the United States, according to a decision of the Court of Commissioners of Alabama Claims, under the statute of June 23, 1874, to the owner of a cargo destroyed by one of the insurgent cruisers, with respect to which it was determined by the tribunal of arbitration at Geneva, constituted by the treaty of Washington of 1871, that Great Britain had failed to fulfil her duties as a neutral government, belongs to an assignee of such owner, appointed under the bankrupt act of 1867. *Leonard, Assignee*, v. *Nye*, 125 Mass. 455.

In the case last cited the court held that the bankrupt had a claim against Great Britain, through her violation of international duty, that he was justly entitled to compensation from Great Britain, though he could not obtain his rights in the ordinary course of judicial proceedings, but only by petition to the British government or through the interposition of his own government. His own government demanded compensation for his loss as a matter of right and it was awarded under the treaty by the tribunal of arbitration. The act of congress for the

adjudication and disposition of the moneys received from Great Britain, provided for their application to the payment of claims directly resulting from the damages caused by these insurgent cruisers, and the sum awarded the bankrupt by the court was upon such a claim. It was awarded by reason of his right to compensation established by the tribunal of arbitration, and it was a right capable of passing by assignment.

"The claim of the defendants was one for which compensation was justly due to them from Great Britain; was demanded by the United States from Great Britain as a matter of right; as such was awarded to be paid and was paid by Great Britain to the United States, in accordance with the provisions of the treaty between the two nations, and with the determination of the tribunal of arbitration created by that treaty; and was paid by the United States to the defendants out of the money received from Great Britain. . . . The money so demanded and received by the United States from Great Britian, and paid by the United States to the defendants, was money collected on the claim described in the agreement." *Bachman et als.* v. *Lawson et al.* 109 U. S. 659.

In the case cited, it will be observed that the claim is identified as one of the class embraced in the award. In the case at bar, no money was received from Great Britain on account of the destruction of the schooner Arcade, no compensation was due from Great Britain, no claim existed.

If it is found that the alleged claim for the loss of the schooner Arcade was of such nature and in such condition at the decease of the testator, that it would be capable of passing under the general clause contained in this will, then the intention of the testator "is to be ascertained from the terms of the will itself, elucidated it may be, by the light of the circumstances under which it was made, the state of his property, his kindred and the like." *Dunlap et als. app.* v. *Dunlap et als.* 74 Maine, 402; *Blaisdell* v. *Hight*, 69 Maine, 306.

If it is said that this supposed claim for the loss of the Arcade was constantly on his mind, the fact that no allusion is made to the claim is only additional evidence that he did not intend that

it should pass by the terms of his will. *Webster et als. executors*, v. *Mary Ann Weirs et als.* 51 Conn. 569.

LIBBEY, J. This is a bill in equity to obtain the true construction of the will of John Stidworthy, who died in April, 1875.

By the second clause in his will he gave small legacies to each of his children. The third clause is as follows: "All the residue of my estate, real, personal and mixed, of which I shall die possessed, or which I may be entitled to at my decease, I give, devise and bequeath to my faithful wife, Katharine A. Stidworthy, for the term of her life, with the right and power to dispose of the income, rents, profits and interest of the same, and with the further right to apply to her use if needed, any part of the principal of the personal property, making her sole judge of the need of so doing; and after her death I give and devise the same, or what may be left unapplied and unconsumed to my children to be divided equally between them, the children of any deceased child to take the share of their parent; if all my children and grandchildren should die in the lifetime of my said wife, then I will it shall go and belong to her absolutely, to dispose of at her pleasure, and if she does not dispose of it by gift or otherwise during her lifetime, to descend to her lawful heirs."

In 1861 Stidworthy owned one half of the schooner Arcade, which was destroyed by the confederate cruiser, Sumpter, in November of that year. Under the act of congress of June 5, 1882, the complainant, as administrator with the will annexed filed his application for the damage sustained by said Stidworthy by reason of the destruction of the schooner, before the court of commissioners of Alabama claims, re-established by said act, which awarded him, in his said capacity thereon $2,255.21, with interest, amounting in all to $3,639.54, which was paid him, September first, 1884. After settling his account in probate there remained in his hands $2,595.52. Said Stidworthy left a widow and two daughters, named in his will, who are parties to this bill.

Two questions are propounded to the court.

1. "Is the widow of John Stidworthy entitled to the use of the

above mentioned balance of money paid by the United States for the loss of his share of the schooner Arcade, or does it belong to his heirs?"

2 "If the widow is entitled to the benefit and use of said balance, is she entitled to its custody?"

By the third clause in the will of Stidworthy his intention is clearly expressed that all the residue of his estate, both real and personal of which he should die possessed, or which he might be entitled to at his decease should go to his wife "for the term of her life, with right and power to dispose of the income, rents, profits and interest of the same, and with further right to apply to her use any part of the principal of the personal property, making her the sole judge of the need of so doing." Under this clause all the residue of his property and rights, or claims to property, which he had the power to dispose of, by conveyance or assignment, passed to his widow to hold as therein specified. In support of this conclusion, authorities need not be cited as the same question has just been decided by this court in *Grant, Appl.* v. *Bodwell*, 78 Maine, 460. The case is unlike *Dunlap* v. *Dunlap*, 74 Maine, 402.

This brings us to the question whether the damage sustained by Stidworthy by the destruction of the Arcade by the Sumpter, was a right or claim to personal property before it was recognized by the United States by the act of 1882, which was the subject of assignment by him. It was a claim for damage to property by a wrong doer and partook of the nature of the thing destroyed. The claim existed in equity and justice against some one as soon as the damage was sustained. True the testator had no legal claim which he could enforce against any one, because the claim had not been recognized by the government, but admitting responsibility for it and providing for its payment did not create it. It was a property right existing before. It was not a claim created by congress, but its existence was admitted by it. It was a claim which would pass to the assignee in bankruptcy before it was recognized by congress. It has long been so settled by the Supreme Court of the United States, *Comegys* v. *Vasse*, 1 Pet. 193; *Erwin* v. *United States*, 97

U. S. 392. It is so held in Massachusetts; *Leonard* v. *Nye*, 125 Mass. 455; and so decided in this state in *Grant* v. *Bodwell*, *supra*.

The question is so thoroughly and ably discussed by Mr. Justice STORY in *Comegys* v. *Vasse*; and by GRAY, C. J., in *Leonard* v. *Nye*, that an extended discussion of it here seems unnecessary.

If the claim existed and was assignable before it was recognized and provided for by congress, it would certainly pass by devise as a claim to personal estate.

But it is claimed by the learned counsel for the heirs that sums allowed, awarded and paid, under the act of congress of June 5, 1882, were not in payment of any claims against the United States for damages done by the confederate cruisers during the war of the rebellion, but mere donations or gratuities; that the sum of $15,500,000 awarded against Great Britain by the Tribunal of Arbitration under the treaty of Washington, was awarded for damages done by the confederate cruisers Alabama, Florida and Shenandoah and their tenders, and that the tribunal determined and adjudged that Great Britain was not responsible for the damages done by the other confederate cruisers. While this is so the claims presented to the tribunal embraced the damages done by all the confederate cruisers, and the tribunal awarded the gross sum of $15,500,000 "for the satisfaction of all claims referred to the consideration of the tribunal, conformably to the provisions contained in Article VII, of the aforesaid treaty" and declared that "all the claims referred to in the treaty as submitted to the tribunal are hereby fully, perfectly, and finally settled," and the United States received that sum in full settlement and bar of all the claims submitted. The fund was then in the United States treasury, and it was exclusively within the power and discretion of congress to determine how it should be distributed. By the act of June 23, 1874, congress provided for the allowance and payment of claims for damages done by the Alabama, Florida and Shenandoah, and after all such claims were paid, it was found that a large part of said fund still remained in the treasury; and by the act of June 5, 1882, it

provided for the allowance and payment out of said fund of claims for damages done by other confederate cruisers during the late rebellion, "including vessels and cargoes attacked on the high seas," and therein prescribed the rules by which the damages done to property should be measured. This act provides for the allowance and payment of claims for damages to *property* to the persons damaged, and only to the extent of their net damages, deducting what might have been received from other sources to be proved in the manner provided therein. Is it in the nature of a donation or gratuity, to those who had no *claim?* or is it a recognition of claims for damages to property, already existing? Upon this point we deem a quotation from the opinion of Mr. Justice STORY in *Comegys* v. *Vasse*, *supra*, appropriate. In discussing the question whether the claim before it is admitted as a right to property he says: "The theory, too, that indemnification for unjust captures is to be deemed, if not a mere donation, as in the nature of a donation as contrasted with right, is not admissible." "The very ground of the treaty is, that the municipal remedy is inadequate, and that the party has a right to compensation for illegal captures, by an appeal to the justice of the government. It was never understood that the case was one to which the doctrine of donation applied. The right to compensation, in the eye of the law, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property, in a municipal court of justice." "It recognized an existing right to compensation, in the aggrieved parties, and did not, in the most remote degree, turn upon the notion of a donation or gratuity." And so in this case, the idea of a donation or gratuity is nowhere to be found in the act. The United States had the money in its treasury which it had no equitable right to retain and sought to distribute it to those justly entitled to it in payment of their claims for damages to their property.

The will giving the widow the use and income of the fund during her life, with the right to apply to her use, if needed, any part of the principal, making her the sole judge of the need

of so doing, we are of opinion that she is entitled to the possession and management of it; but as she will be charged with the trust of managing and preserving it for the heirs who are to take what may be left at her death as well as for herself, we think it but reasonable, under the peculiar circumstances of this case, that, before it is paid over to her, she be required to give a bond to the judge of probate in the sum of $5000 with sureties to be approved by him, conditioned for the faithful management and preservation of the fund according to the terms of the will.

The court answers the questions as follows:

1. The balance in the hands of the complainant as administrator passed to the widow by the third clause of the will.

2. The widow is entitled to its possession and management upon giving bond as herein required.

Bill sustained. Costs for complainant to be paid out of the estate. Decree in accordance with this opinion.

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

BIDDEFORD SAVINGS BANK *vs.* MARY E. M. MOSHER and trustee.

York. Opinion March 5, 1887.

Trustee process. Pleadings. Abatement.

A plea in abatement to a trustee writ, founded upon the fact that the alleged trustee was not a resident of the county, is bad if it does not allege the non-residence at the time of the commencement of the action.

ON EXCEPTIONS to the ruling of the court in overruling a demurrer to the following plea in abatement.

"And now the said defendant, Mary E. M. Mosher, comes and defends the wrong and injury, etc., and prays judgment of the plaintiff's writ, and that the same may be quashed, because she says that the Mutual Life Insurance Company of New York, named in said writ as trustee of the said defendant, Mary E. M. Mosher and the only trustee named in said writ, is a foreign corporation existing under the laws of the State of New York,

and at the time of the service of said writ upon Benjamin F. Chadbourne, the alleged agent, to wit, on the fifteenth day of April, 1886, at said Biddeford, had no established or usual place of business at Biddeford, within the County of York, as alleged in said writ, or at any place within said County of York; nor did it hold its last annual meeting in said County of York; nor did it usually, or ever hitherto hold any meetings in said County of York; nor was the said Benjamin F. Chadbourne at the time of the service of said writ upon him, to wit, on the fifteenth day of April, 1886, the agent of said Mutual Life Insurance Company of New York, to wit, at said Biddeford; but the said Mutual Life Insurance Company at the time of the service of said writ, to wit, on the fifteenth day of April, 1886, did have an established and usual place of business in the County of Cumberland, in said State of Maine, to wit, at Portland, in said County. William D. Little of said Portland then, and long before, and ever since, being their duly authorized agent for the transaction of their business in said County of Cumberland, and in said State of Maine, and this, she, the said Mary E. M. Mosher, is ready to verify.

"Wherefore, inasmuch as the said writ of the said plaintiff is brought in the Supreme Judicial Court for and within the County of York, in which the said supposed sole trustee has no residence, instead of being brought in the Supreme Judicial Court for and within the County of Cumberland, in which the said supposed sole trustee had an established and usual place of business, long before and at the time of the service of said writ, to wit: on the fifteenth day of April, 1886, at Portland, aforesaid, in the County of Cumberland aforesaid, the said defendant prays judgment of said writ and that the same may be quashed and for her costs. Mary E. M. Mosher,

By Hiram Knowlton, her attorney and agent."

"State of Maine, York, ss. May 18, 1886.

"Personally came Hiram Knowlton, above named, on this eighteenth day of May, A. D. 1886, and made oath that the foregoing plea is true in substance and in fact, before me,

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

R. P. Tapley, for plaintiff, cited: *Burnham* v. *Howard*, 31 Maine, 569; *Adams* v. *Hodsdon*, 33 Maine, 225; *Tweed* v. *Libbey*, 37 Maine, 49; *Getchell* v. *Boyd*, 44 Maine, 482; *Bellamy* v. *Oliver*, 65 Maine, 108; 1 Chitty's Pl. 457; *Severy* v. *Nye*, 58 Maine, 246; *Sargent* v. *Hampden*, 38 Maine, 581; R. S., c. 81, § 95.

Edwin Stone, also for plaintiff.

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

The question raised by the pleadings is the sufficiency of the plea in abatement. The Revised Statutes, chapter 86, § 5, provides that when a foreign corporation is summoned as trustee, the suit shall be brought and the writ made returnable in a county where the corporation "has an established or usual place of business, held its last annual meeting or usually holds its meetings." The Statute prescribes in what county the writ shall be returned, if returned elsewhere it is abatable. *Greenwood* v. *Fales and Tr.* 6 Greenleaf 405; *Scudder* v. *Davis, and al. and Tr.* 33 Maine, 576; *Jacobs and another* v. *Mellen and Tr.* 14 Mass. 133.

The plea is proper in form, free from duplicity, contains but one matter sufficient to answer plaintiff's writ, being to the jurisdiction, shows what court has jurisdiction and contains the proper affidavit. *Hooper, Jr.* v. *Jellison and Tr.* 22 Pick. 250; *Atwood* v. *Higgins*, 76 Maine, 423.

By demurring plaintiff admits the statement in the plea that trustee has no residence as defined in chapter 86, § 5, R. S., in York county. The plea is filed by the proper party. Any defendant may file a plea in abatement in such suits. *Scudder* v. *Davis and Tr.* 33 Maine, 576; *Mansur* v. *Coffin and Tr.* 54 Maine, 314.

HASKELL, J. The writ describes the plaintiff and defendant to be residents of York county where the writ is returnable, and the only trustee as a corporation doing business by its agents in York and Cumberland counties respectively.

The defendant seasonably interposed a plea in abatement of the writ, because the only trustee, at the time of the service of

the writ upon its alleged agent, was not a resident of the county of York, but was then a resident of the county of Cumberland.

Pleas in abatement must be certain to every intent. *Bellamy* v. *Oliver*, 65 Maine, 108; *Getchell* v. *Boyd*, 44 Maine, 482; *Tweed* v. *Libbey*, 37 Maine, 49; *Adams* v. *Hodsdon*, 33 Maine, 225; *Burnham* v. *Howard*, 31 Maine, 569.

Revised Statutes, chapter 86, section 5, provides that "if all the trustees live in the same county, the action shall be brought there. An action not so brought is abatable," *Scudder* v. *Davis*, 33 Maine, 576, even though plaintiff discontinues as to trustee upon the entry of the action in court. *Greenwood* v. *Fales*, 6 Maine, 405. "When a court once acquires jurisdiction over a cause, it cannot be devested of it by a change in residence of any of the parties." *Dorr* v. *Davis*, 76 Maine, 301.

The plea interposed does not aver that the only trustee was not a resident of York county when the action was "brought.' For all that is said in the plea, the trustee may have resided in York county when the action was brought, and removed before the writ was served; and in such case the action would not be abatable for that cause. An action is brought when the writ is sued out with an intention of service. R. S., c. 81, § 95. *Johnson* v. *Farwell*, 7 Maine, 370; *Haskell* v. *Brewer*, 11 Maine, 258. The date of a writ is presumed to be the time when the action is brought. *Johnson* v. *Smith*, 2 Burr. 950; *Bronson* v. *Earl*, 17 Johns. 65; *Johnson* v. *Farwell*, *supra*. "A writ may be considered as purchased at any moment of the day of its date which will most accord with the truth and justice of the case.' *Badger* v. *Phinney*, 15 Mass. 359; *O'Neil* v. *Bailey*, 68 Maine, 429.

Exceptions and demurrer sustained. Plea adjudged bad. Defendant to answer over.

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

VESTA I. BROMLEY and others

vs.

LORINDA GARDNER and others.

Kennebec. Opinion March 5, 1887.

Wills Devises. Life-estate. Evidence.

Prior to the Revised Statutes of 1841, a devise of land, in this state, without words of inheritance, carried only a life-estate, unless it could be collected from the whole will that a fee was intended by the testator. That rule governs all testamentary instruments made before that date.

Where, in a will ante-dating 1841, a father gave his daughter half his estate outright, consisting of real and personal property, and the other half subject to a life-estate to his wife therein, using no words of inheritance in his devises,— but limiting an estate to his wife in appropriate words — and declaring that he was disposing of his "estate"— making no general residuary clause — and in the devises to his wife and daughter using the phrase, "one-half of *all* my real and personal estate"— naming all his heirs in his will and making small gifts to them,— and where from these provisions the daughter might never take the second half of the estate unless she took a fee, because she might die before the mother,— it is manifest that the testator intended to devise to the daughter an absolute estate, less the limited estate to the mother — a full fee.

Although a devise on its face may import an absolute gift to the devisee in her own right, it is competent to show by her written admissions, that she was to take the property in trust for herself and others; but such proof could not affect the right of a third party purchasing the property without notice of any trust.

ON report.

Bill in equity by the heirs of Jacob Stevens, named in the opinion, to sustain and quiet their title to the homestead farm of the testator, in Vassalboro'. The title of the defendant, Lorinda Gardner, was by deed from the administrator on the estate of Jacob Stevens' daughter, Lucy. Other material facts stated in the opinion.

Robert B. Caverly, (*John L. Hunt* with him) for plaintiffs.

The will (as of course) is in writing by the testator, and its intent in creating the trust is confessed in a writing signed by the trustee herself, who, also, has sanctioned it by a part performance. *Barrell* v. *Joy*, 16 Mass. 221. In this the court

say: "But though the conveyance be absolute, any declaration in writing made by the grantee or assignee, at any time after the conveyance, is competent proof of the trust." Also see *Bates* v. *Hurd*, 65 Maine, 180, 181.

Again, the trust is fortified by the implications of law, which arise from the words and obvious intent of the will itself, apparent upon its face. *Baker* v. *Bridge*, 12 Pick. 31. In this case Chief Justice SHAW says: "It is not enough that the court may conjecture that the testator intended to pass a fee, and failed to do so from ignorance of the rules of law, or otherwise; but it must appear affirmatively that such was the intention from the will itself, and 'that in putting such construction upon any particular clause, it is allowable to consider any other part of the will in order to ascertain the testator's intent.'" See also *Cook* v. *Holmes*, 11 Mass. 531.

In 21 Maine, 340, TENNEY, Justice, says: "If the intent be wanting no fee passes." This was the law of Massachusetts and Maine when this will was made, on January 13, 1838. And this law is the law which, as we submit, is to settle this question of intent. There is a statute since passed (in 1841) to the reverse of the above, which provides that "a devise of land is to be construed to convey all of the estate of the devisee therein, unless it appears by the will that a less estate was intended. Revised Statutes, c. 92, § 26. But plaintiffs submit that neither this act nor the decisions under it, can in any way affect this will made in 1838. A trust being established, and a breach of it being thus fully proved and confessed, this court has the power to grant to these heirs, adequate relief — just what justice requires. 1 Story's Equity, c. 4, § 98; 2 Story's Equity, c. 18, § 781.

That this court has jurisdiction in cases of partition is, as we submit, very clear. Be this as it may, it is enough that this is a court of law as well as a court of equity. 1 Story's Equity, c. 14, § § 646–658; 59 Maine, 482.

E. W. Whitehouse, for defendant.

The law was the same before the enactment of 1840. *Butler* v. *Little*, 3 Maine, 239; *Ramsdell* v. *Ramsdell*, 21 Maine, 288;

Godfrey v. *Humphrey*, 18 Pick. 537; *Carter* v. *Homer*, 4 Mod. 89; S. C. 1 Eq. Cas. Abr. 177.

A fee passes by use of the word estate when all the estate is devised. *Baker* v. *Bridge*, 12 Pick. 31; *Murry* v. *Wyse*, Finch's Prec. Ch. 264; S. C. 2 Vernon, 564, notes; *Kellogg* v. *Blair*, 6 Met. 322; *Putnam* v. *Emerson*, 7 Met. 333; *Randall* v. *Tuchin*, 6 Taunt. 410; *Brown* v. *Wood*, 17 Mass. 73; 55 Maine, 287; 107 Mass. 590; 3 Cush. 557; 21 N. Y. 423; 5 Cowp. 221; 18 Vesey, 193; 2 Jarman, Wills, 326; 1 Jarman, Wills, 33, and note; 2 Redf. Wills, 327, 323–4; 1 Wash. R. P. 59; *White* v. *White*, 21; The Reporter, 578; Shepherds, Touch. 439, n. 1 (1803); *Fogg* v. *Clark*, 1 N. H. 163; *Leland* v. *Adams*, 9 Gray, 171; *Josselyn* v. *Hutchinson*, 21 Maine, 339; *Doe* v. *Snelling*, 5 East. 87; *Mathews* v. *Windsor*, 2 Kay & J. 406.

PETERS, C. J. Jacob Stevens, in 1838, made his will in which he gave to his wife the use of one undivided half of his estate, to be held during her widowhood. He then makes this provision: "I give, devise and bequeath unto my daughter, Lucy Stevens, one undivided half of all my estate, both real and personal, of every description, consisting of the farm on which I now live, stock, farming tools, money, debts due, etc.; and I also give to her, the said Lucy, the other half of my said real and personal estate, when my said wife ceases to be my widow."

One question of the case is, whether Lucy Stevens received a fee or only a life-estate in the real estate.

By a statute passed in 1841 (R. S., c. 92, § 20), it was provided that a devise of land shall be construed to convey all of the estate of the deviser therein, unless it appears by the will that a less estate was intended. Prior to that time the rule was the reverse. A devise of land, without words of inheritance, conveyed a life-estate only, unless from the whole will it affirmatively appeared that a fee was intended by the testator. The will, therefore, is to be construed as the law stood before the act of 1841.

We think the meaning of Jacob Stevens, as manifested from

the whole will, was to give his daughter a fee, in half the farm at his own death, and in the other half upon the death or marriage of his wife. Several features of the will, taken singly, have much force, and, taken together, are of abundant authority, to warrant such a conclusion.

The testator proposes to make a disposition of his "estate," meaning his whole estate. He fails to do so unless his daughter takes a fee. There is no general residuary clause. In many cases the word "estate" implies a fee. *McLellan* v. *Turner*, 15 Maine, 436; *Josselyn* v. *Hutchinson*, 21 Maine, 339; *Leland* v. *Adams*, 9 Gray, 171. It is a striking evidence of the intention of the testator to give a fee when in clauses two and three of his will he uses the phrase, "all of my estate, real and personal, of every description." Inasmuch as the widow takes a life-interest in half the estate, the daughter might never obtain any interest in that half, unless she took a fee. She might die while the mother remained a widow.

It appears that the testator appreciated the nature of a life-estate, as he limited an estate to his wife in appropriate terms; and he could have devised a limited estate to his daughter had he designed to do so. And he no doubt understood the nature of a residuary clause, making a particular one to the daughter, and none for the benefit of his heirs generally, although not omitting any of his heirs from some benefit under the will, naming them all. He provides for them out of the estate which he first devises to his wife and daughter, a significant fact in collecting the intention of the testator. *Butler* v. *Little*, 3 Maine, 239.

The complainant further contends that, if the devisee took a fee, she took it under an oral trust for the benefit of all the heirs, and that she has sufficiently confessed the trust by her conduct and by a writing signed by her.

If the question were between the complainants and Lucy Stevens alive, there would be much force in the complainants' position. But as between her heirs and her father's heirs it is doubtful if equity should interfere, since she has made equitable provision for the complainants by her own will. And, certainly, as between the complainants and the principal defendant, equity

cannot afford the relief asked for. She purchased the premises for a fair consideration, without notice of any trust. R. S., c. 73, § 12, protects her as an innocent purchaser. The will on its face funishes no indication of any trust. Its whole drift is the other way.

Bill dismissed.

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

MASONIC TEMPLE ASSOCIATION *vs.* ARNOLD HARRIS.

Waldo. Opinion March 7, 1887.

Waters. Streams. Drains. Prescription. Nuisance. Injunction.

The city of Belfast has, for a long period, maintained an underground or covered drain, running through an ancient brook which, in its natural state, carried a considerable volume of water through the city to the sea. For many years the drain has served to carry off waste water and foulings from the houses and stores situated in its vicinity. The complainant and respondent have adjoining premises through which the drain runs. Lately the city diverted the drain at a point just above complainant's premises, carrying it around the premises of both parties, and uniting the new link with the old drain below respondent's land. Thereupon, the respondent threatened to stop up the old drain on his own land, thereby preventing the complainant using it, alleging that its occupation is wrongful and injurious to him — the complainant denying it. And the complainant claims not only the right to have the benefit of the natural brook for its waste, but also the right to a greater enjoyment of it, acquired by the public by user.

Held, that the complainant is not answerable for any consequences of the diversion caused by the city. But their privileges may be curtailed thereby, as next stated.

Held, also, that the respondent should not have any increased burdens or inconveniences put upon his premises by the change; and that his burdens should not be augmented, to his injury, by the act of the city, or of the complainant, or of both combined. The respondent is not to be a loser, if not a gainer, thereby.

Held, further, that, if the complainant, by this rule, suffers from the act of the city in making the diversion, the city will be answerable to it for any damages sustained, unless the complainant assented to the change, and the evidence is that it did assent to it.

The right to pollute a stream to a greater extent than is permissible of common right, may be acquired by the public or by individuals by prescription.

If the complainant has a prescriptive right to maintain, or have maintained,

a close underground drain across respondent's land, it may continue using it to any extent which will not affect respondent more injuriously than as heretofore used. In such case it is not perceivable that it would make any difference whether the amount of foulings sent through the drain be more or less.

If, however, the complainant has only the prescriptive right of having a drain maintained, over respondent's land, which shall be subject to openings to be made in it for the private uses of the respondent, the complainant must be confined to a more restricted use of the drain, if a more restricted use be necessary to save any annoyance, to the respondent, more than existed before the diversion.

An abuse of a prescriptive right does not create a forfeiture of the right, to use it lawfully.

If a person feels aggrieved at the acts of another in over-using or abusing a prescriptive or natural right in a drain in which he is interested, he may sue him for damages, or procure an indictment against him, or move in equity for an injunction. But he would not be justified in entirely cutting off the drain in which the encroaching party has some right of use, and where the summary act would strike a blow at both individual and public privilege.

Such a threatened act is restrainable by injunction.

William H. Fogler and R. F. Dunton, for the plaintiff, cited: *Ashley* v. *Wolcott*, 11 Cush. 195; *Luther* v. *Winisimmet Co.* 10 Cush. 174; *Morrison* v. *R. R. Co.* 67 Maine, 356; Gould, Waters, § § 204, 210, 270; Angell, Watercourses, § § 115, 123, 200, 444; Wash. Real. Prop. 67; *Murchie* v. *Gates*, 78 Maine, 300; Bigelow, Estoppel, § § 369, 509, 512; Story, Eq. Jur. § 927; High, Injunctions, § § 545, 556.

George E. Johnson, for defendant.

When the object for which an easement is created no longer exists, the easement is at an end. Wash. on Eas. 700; 1st Add. on Torts, 160, 161.

The same rule applies in this case as to a right of way. A way by necessity is commensurate only with the existence of such necessity, so that when the necessity ceases the right of way also ceases. *Id.* 165; Angell on Watercourses, § § 165, 166 (5th ed.).

If the act which prevents the servitude be incompatible with the nature or exercise of it, and be by the party to whom the servitude is due, it is sufficient to extinguish it; and if it be extinguished for a moment it is gone forever. *Id.* § 247.

Where a right is suspended by the act of God, as by the

drying up of the spring, it will revive again if the spring chance to flow; but if it be suspended by the act of the party, as by building a house or wall, it would not be restored, even though the obstacle should be removed by a stroke from heaven. *Id.* § 248.

If the owner of an easement, by permanent erections, obstruct and render it useless, the easement is extinguished, especially in favor of a *bona fide* purchaser. 16 Wend. 531.

This watercourse was built for the purpose of carrying off the surplus water which accumulated above High street, and was so used until complainant stopped the flow of water in 1878, and connected eight water closets and several sink pipes therewith, thus increasing the burden upon the servient estate. Either of these acts of complainant would destroy its right to the use of this sewer. First, it destroyed the sewer itself; secondly, it has appropriated that part remaining for a radically different purpose from that for which it was originally designed. Wash. on Eas. 64, 175, 176, 700; 2d Wash. on Real Prop. 342 (3d ed.) In *Steere* v. *Tiffany*, 13 R. I. 568, "Where a way had been laid out for the common use of lots bounded on it, and A, the owner of one of these lots, had appropriated to his own use the part of the way opposite his lot, it was held that A had abandoned his easement and could not maintain an action against the owner of another of the lots for obstructing the way."

To authorize an injunction, there should be not only a clear and palpable violation of the plaintiff's rights, but the rights themselves should be certain, and such as are capable of being ascertained and measured. *Olmsted* v. *Loomis*, 6 Barb. 152.

Complainant had no legal right to connect its pipes with this sewer, even if it should be held that it is a public sewer. R. S., c. 16.

The sewer extending down Spring street has been substituted by the city for this old one, and that is the one which complainant should connect pipes with. *Dolliff* v. *Boston & Maine R. R.* 68 Maine, 177.

PETERS, C. J. The respondent threatened to obstruct a drain running through his land from the complainants' premises down-

ward into Belfast bay. The evidence shows that the route traveled by the drain was an ancient natural brook, in former times carrying a considerable volume of water, during the wet seasons of the year, through the city of Belfast into the sea; that for many years the city has supported an underground or covered drain in the place of the brook, extending through the brook its whole length, from an upper part of the city to the bay; and that this drain has served to carry off waste and foul materials from shops, stores and houses situated upon it. The complainants own a large block, lately erected, containing stores, offices and halls, fitted with water closets, the contributions from which, together with a large volume of water collected in cisterns for flushing purposes, are emptied into this drain.

The respondent justifies his threatened violence upon the drain, upon the ground, as he alleges, that, while the complainants' building was in process of erection, the municipal officers of the city diverted the drain at a point immediately above the building, carrying it around the land of both the complainants and the respondent, and connecting the new link with the old drain below them; the effect being to lessen the water-power of the water-course, although increasing its burdens; and in consequence thereof bringing upon the respondent's premises odors which render such altered and increased use of the drain a nuisance to him.

The complainants deny such assertions. While admitting the diversion, they disclaim all responsibility of it, and contend that, as matter of fact, more water goes into the drain, in proportion to the waste and filth passing through it, than before the diversion. They further claim that, besides a natural right of using the original watercourse, they have acquired, in common with others, an easement for a more extended enjoyment, by long continued user. Their position is that as a part of the public, they were entitled to have maintained over the respondent's land an underground, closely covered drain, from which no odors would be emitted, and no annoyance felt by the respondent, if he had not wrongfully, in an improper manner, opened the drain on his land for his own purposes. The complainants do not regard the proof as establishing much of a nuisance, if any.

The evidence of the case is not of a very definite character in all respects. It is enough for present purposes, upon which to predicate some legal propositions for the guidance of the parties, if the legal controversy be continued between them. It does not with certainty appear when and how the drain became a covered drain on respondent's premises, nor how tightly it has been heretofore maintained there and elsewhere. It does not appear that any drain has been laid out under statutory authority, though it seems that the city has for a long period exercised care over it — and perhaps built it. Evidently, the waters of the brook, for more than a half century, have only been useful for carrying off waste of various kinds.

Whether the complainants are to be affected by the act of the city in causing a diversion, and, if so, to what extent, depends on circumstances. They are not directly answerable for the act. They are not to be cut off below because cut off above. Their own hand has not done it. They have a natural right to use the original brook — the natural watercourse. No one can prevent the exercise of that right. *Ashley* v. *Ashley*, 6 Cush. 70. Nor can the complainants' easement greater than the natural right be thus taken from them; and it is evident enough that they had an easement in the brook or drain, acquired by user.

Still, it is our opinion that the respondent should not suffer any injury by the change. His burdens and inconveniences should not be increased thereby any more than the complainants' should. The complainants are entitled to use the drain in its changed condition, precisely to an extent which will not inflict more annoyance or injury upon the defendant than he was legally obliged to endure before the change. The respondent is not to be a loser — nor a gainer — by the change. The change cannot add to the burdens of easement upon his land,— nor lessen the legal burdens already resting upon it. The respondent's burdens should not be augmented, to his injury, either by the consequences of the act of the city, or of the complainants, or of the acts of the city and complainants combined.

We are using the drain to no greater an extent now, say the

complainants, than we were before,—than we ever did. The answer is, but your former use and enjoyment of the drain were only relative — dependent — conditional. It was a right to send down your share of the accustomed pollution, provided water came from above interfused with it. Suppose the city had blocked up the drain just below the respondent's land,— could the complainants be permitted to fill the watercourse with foulings from their buildings to the injury of the respondent? In principle, where is the difference whether the obstruction is made above or below, if it renders the drain a nuisance? It necessarily follows that, if the city has cut off a natural watercourse or an acquired easement from the complainants, the city would be answerable to them for any hurtful consequences, unless the change was assented to by them, and then the act as affecting them would be *damnum absque injuria*; and there is evidence in the case that they did assent to the change, and that they even induced the city to make the change.

Upon the facts presented, certain propositions are derivable, in addition to those already stated, and growing out of them, which may further explain the relative rights of the parties.

There is no doubt that the right to pollute a stream to a greater extent than is permissible of common right, may be acquired by prescription. Gould, Waters, § 345, and cases in note. We need not now define a prescriptive easement or explain how one may be acquired.

If the complainants have a prescriptive right to maintain, or to have maintained for their benefit, a close underground drain across the respondent's land, they may continue using it to any extent which will not affect the respondent more injuriously than when heretofore used as a close and covered drain. In such case, we do not perceive that it would make any difference to the respondent whether the amount of pollution passing *through* and *under* his land be more or less. We all know that in the large towns and cities drains are laid under houses, stores, and along the streets, and are unobjectionable as long as properly constructed and properly maintained. In such case, if the respondent uncovers the drain in order to locate privies upon it,

thereby creating a nuisance in the neighborhood, he must submit to the consequences of his own act. Few drains will admit such openings without the presence of nuisance. Filth may be carried into the channels provided for it in a manner more recommendable. Of course, if there be a covered drain, those who maintain it should keep it in good repair.

If, on the other hand, the complainants are not entitled to maintain a close drain over the respondent's land, but only a drain subject to openings such as the respondent made in it for private uses of his own, then the complainants would be entitled, as before described, to no use of the drain that will inflict greater annoyance or injury than was imposed on him by such prescriptive easement as existed before the diversion. Gould, Waters, § § 342, 344, 345, 346, and cases. And, in such case, it might make a difference to the respondent whether the amount of foulings contributed by the occupation of complainants' buildings be one quantity or another.

Under the evidence, this bill must be sustained, whatever the rights of the parties may be in any future litigation. In any view, the complainants had a right to use the drain for some purposes — to some extent. They have never lost or abandoned such right. Even an abuse of the right does not deprive them of it. Gould, Waters, § 348. *Locks and Canals* v. *Railroad*, 104 Mass. 8. The respondent was intent upon a total destruction of the water passage, preventing any use whatever of the drain by complainants. The result, had he been unopposed, would have been a wanton blow against both individual and public privilege. The respondent's lot, through which the drain runs, is not of much value and from its situation never can be, costing him fifty dollars to obtain title to it some years ago.

The respondent mistook his remedy. If aggrieved, he can sue the complainants for damages; or procure an indictment against them; or, the most fitting remedy, can move for an injunction in equity, a jurisdiction whose door is always open for the reception of complaints and early action on them. The respondent was bent on a swifter remedy than equity would accord, for equity, acting by injunction, withholds the blow in such case

until those interested can make preparation for both private and the public needs. *Boston Rolling Mills* v. *Cambridge*, 117 Mass. at p. 401, and citations there.

Bill sustained with costs.

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

CATHERINE MCGRAW *vs.* FRANK MCGRAW and others.

Washington. Opinion March 7, 1887.

Deeds. Delivery.

M deeded his homestead to a minor son; the son, on same day, deeded to M's wife; M recorded both deeds and kept them many years in a trunk in his bedroom, where they were when he died; no consideration was paid; M's motive was to avoid payment of fines in liquor prosecutions; the wife, a witness, says the deed is hers and was in her possession, but swears to no act or word of her husband about the deed; she first had the trunk after his death; she applied for dower out of the same land; the husband conveyed an adjoining parcel to another, bounding it upon the land, in question, as his wife's land. *Held*, between her and his (not her) children a delivery of the deed to her is not proved.

ON report.

Real action for the possession of certain premises in Eastport. The opinion states the facts.

H. M. Heath, (with him *E. E. Livermore*,) for the plaintiff.

In some respects the case is similar to *Bean* v. *Boothby*, 57 Maine, 295, one of instantaneous seizin, where Frank was the mere conduit through whom his father's title passed to the plaintiff. See p. 303 of that case, citing, *Hazleton* v. *Lesure*, 9 Allen, 24; *King* v. *Stetson*, 11 Allen, 407; *Chickering* v. *Lovejoy*, 13 Mass. 51; *Webster* v. *Campbell*, 1 Allen 313; see also, *Hubbard* v. *Cummings*, 1 Maine, 11.

That both deeds were made at the same time, and constituted throughout but one transaction is not in controversy.

In such a case no estate vests in the intermediary, and he acquires no beneficial interest, 4 Mass. 566; *Haynes* v. *Jones*, 5 Met. 292; *Hazleton* v. *Lesure*, 9 Allen, 24.

That an infant may be a trustee is well settled. Perry on Trusts, § 54, and cases. *Tucker* v. *Bean*, 65 Maine, 352; *Wakefield* v. *Marr*, 65 Maine, 341; *McClellan* v. *McClellan*, 65 Maine, 500.

In *Talbot* v. *Bowen*, 1 A. K. Marshall, (Ky.) 436; S. C. 10 Am. Dec. 747, a father by parol constituted his minor son his agent to sell a parcel of land. The son made a contract to sell, and on his refusal to perform, the court in chancery decreed specific performance, holding that an infant may be an agent, and his contracts as such, otherwise unexceptionable will bind his principal. See further, *Prouty* v. *Edwards*, 6 Iowa, 353; *Elliott* v. *Horn*, 10 Ala. 348; S. C. 44 Am. Dec. 488; citing Co. Litt. 172 a; *Zouch* v. *Parsons*, 3 Burr. 1801; *Tucker* v. *Moreland*, 10 Pet. 58; *U. S.* v. *Bainbridge*, 1 Mason, 82; *Whitney* v. *Dutch*, 14 Mass. 457; Bingham on Infancy, c. 2.

The settled rule in chancery in cases where the infant trustee also has an interest in the estate is to afford him six months after attaining majority to show cause against the decree. *Coffin* v. *Heath*, 6 Met. 76. But the final decree will be made during his minority, if he has no beneficial interest. Sec. 2, c. 19, statute 7 Anne, (given in 65 Maine, 508) expressly provides for this. Following by Lord Ch. King in *Ex parte Vernon*, 2 P. Wms. 549, and by Lord Ch. Talbot in *Goodwin* v. *Lester*, 3 P. Wms. 387. "Generally whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit at law." Co. Litt. 172 a. Embodied to some extent, in statute 7 Anne, c. 19 § §1, 2, the principal was applied in the famous of *Zouch* v. *Parsons*, 3 Burr. 1801, where an infant mortgagee, in whom the title vested, upon payment of the mortgage made a reconveyance of the land, which was sustained. This case and its principles, Justice Story upholds in *Tucker* v. *Moreland*, 10 Pet. 67, upon the ground that the infant was the trustee of the mortgagor. Ch. Kent, to same affect, in *Livingston* v. *Livingston*, 2 Johns. Ch. 541. The general principle is stated by Perry in his work on Trusts, § 54. Akin to this is same work, § 52, that an infant is capable of executing a naked power,

unaccompanied with any interest or not requiring any discretion. 4 Kent, 324.

Such trusts as in case at bar were executed by infants in the following cases, cited above: *Prouty* v. *Edwards*, 6 Iowa, 353; *Elliot* v. *Horn*, 10 Ala. 348; *Zouch* v. *Parsons*, 3 Burr. 1801.

Plaintiff introduced in evidence the deed James McGraw to Frank McGraw, duly acknowledged and properly recorded; such a deed is presumed to have been duly executed and delivered, and the adverse party must overcome such presumption with sufficient proof. *Webster* v. *Calden*, 55 Maine, 165.

The only delivery necessary would be the delivery to the *cestui que trust.* This would be true upon principle, and it was so held in *Chickering* v. *Lovejoy*, 13 Mass. 51; cited approvingly in *Bean* v. *Boothby*, 57 Maine, 295. See also, *Haynes* v. *Jones*, 5 Met. 592; *Hazleton* v. *Lesure*, 9 Allen, 24.

In *Gould* v. *Day*, 94 U. S. 405, the court say, "Subsequent conduct of the parties to the action recognizing the title as transferred is competent to show ratification of a delivery shown only by record."

In *Corley* v. *Corley*, 2 Coldw. (Tenn.) 520, held, "If the grantor of a deed of gift acknowledges the execution of a deed, and directs it to be registered, and subsequently recognizes the title of the grantee under it, that, although not a delivery, is equivalent to a delivery."

"Where a deed is first delivered to a grantee after it has been recorded by the grantor, the grantee takes the deed the same as if the delivery had been before record. *Jones* v. *Roberts*, 65 Maine, 273.

In *Kerr* v. *Birnie*, 25 Ark. 225, the court hold that if the grantor in a deed not delivered cause the same to be recorded this is a sufficient delivery to enable the grantee to hold the land as against the grantor. In *Bent* v. *Cassely*, 12 Ala. 734, a deed of land was drawn by an attorney by direction of vendor and left with the attorney for purpose of registration, the vendee not being present. Held a sufficient delivery. A much stronger case is found in *Elsbery* v. *Boykin*, 65 Ala. 336, where a mortgagor acknowledged a deed on the day of its date before the probate

judge and left it with him for registration and it was duly recorded; this was held sufficient to perfect the delivery. And in *Moore* v. *Giles*, 49 Conn. 570, the court hold that placing a deed on record with the intent that it should pass the title to the grantee constitutes a valid delivery.

The rule is stated in *Ruckman* v. *Ruckman*, 32 N. J. Eq. 259, "Where the circumstances show unmistakably that one party intended to divest himself of the title and to invest the other with it, delivery will be considered complete though the instrument still remains in the hands of the grantor.

"Delivery may be made by leaving it with the recording officer, and if once delivered, retention of the deed by the grantor does not effect the title." *Burkholder* v. *Casad*, 47 Ind. 418.

A similar case is reported in *Cecil* v. *Beaver*, 28 Iowa, 241, where a father executed a deed to his child, absolute in form and beneficial in effect, and caused it to be recorded; the court held that such an act was in law a sufficient delivery to the infant.

Defendant's position upon the joint control of the trunk is overthrown by *Le Sauliner* v. *Loew*, 53 Wis. 207.

A want of consideration as between the original parties is not admissible to defeat the deed. *Goodspeed* v. *Fuller*, 46 Maine, 141; *Bassett* v. *Bassett*, 55 Maine, 127; *Laberee* v. *Carleton*, 53 Maine, 211. Such a position would be open only to creditors, *Hatch* v. *Bates*, 54 Maine, 136.

E. B. Harvey, for the defendants, cited: *Brown* v. *Brown*, 66 Maine, 361; *Patterson* v. *Snell*, 67 Maine, 559; *Parker* v. *Hill*, 8 Met. 447; *Hawkes* v. *Pike*, 105 Mass. 560; *Maynard* v. *Maynard*, 10 Mass. 455; *Hatch* v. *Haskins*, 17 Maine, 391; *Stilwell* v. *Hubbard*, 20 Wend. 44; *Marshall* v. *Jaquith*, 134 Mass. 138; *Langdon* v. *Clouse*, Cent. L. J. January 28, 1886. 1 Perry, Trusts § 52; *Coventry* v. *Coventry*, 2 P. Wms. 229; Sugden, Powers, 213, 220.

PETERS, C. J. James McGraw, by deed dated May 15, 1876, conveyed a homestead to his minor son, who by deed dated May 19, 1876, conveyed the same to Catherine McGraw, the wife of James, and both deeds were recorded on the twenty-second day

of the same month. If the deed to the plaintiff, Catherine McGraw, was never delivered to her, she cannot recover. We think a delivery is not proved.

The further facts are these: The deeds, having been sent for record by the husband, were recorded at his expense and returned to him. He then placed them in a small hand-trunk, in his bed-room, in a file of other papers of his, where they remained till his death, when by the consent of the plaintiff they fell into the hands of the son William. No consideration was paid by the wife. The conveyance was not as an advancement or as security for any debt. The deeds were merely a form to shield the husband against the recovery of fines which were at the date of the transaction likely to be adjudged against him by the state. A very strong fact against the plaintiff is that, although a witness and an intelligent person, she does not disclose a word ever said by the husband to her about the transaction in all his lifetime. She says on cross-examination that the deed was in her possession and is hers, and that is all she says about it. What she means by possession is that she took the trunk at one time. Had there been a delivery she would be enabled to disclose more conversation and details about the deed. It also greatly makes against her, that she applied for an assignment of dower out of her husband's real estate when he left none but this.

It is contended by the plaintiff that she has her husband's confession of a delivery, by his executing another deed afterwards in which he describes land as bounded on one side by the plaintiff's real estate, meaning the property in question. That act has its force, no doubt, but we think it is explainable. She was the owner of record — the apparent owner — and the husband's purpose was to have the world believe that she was the owner. It would be natural and convenient to bound the land in this way. Frank McGraw testifies that he never delivered any deed to the plaintiff, though her title comes through him. It also appears that the plaintiff got more personal allowance upon a representation to the court of probate that she had no real estate. These facts are much stronger against her than any that make in her

behalf. The controversy is between her and her husband's heirs, who are not her children.

Judgment for defendants.

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

JOHN R. HORNE

vs.

C. P. STEVENS, AND LEWISTON STEAM MILL COMPANY, trustee.

PASCHAL M. MORGAN *vs.* SAME.

CHARLES C. GERRISH and another *vs.* SAME.

Androscoggin. Opinion March 8, 1887.

Trustee process. Assignment of part of the fund.

Equity recognizes the validity of an assignment of a part of a claim, and the assignee may avail himself of the equitable principle, in a trustee process, in which he appears as claimant of a part of the fund.

Bank v. *McLoon*, 78 Maine, 498, affirmed.

ON exceptions by Charlotte Rowell, the claimant of part of the fund in the possession of the trustee.

The presiding justice found the following facts:

Stevens, the principal defendant, had a claim against the trustee prior to September 10, 1883, of twelve hundred dollars. About that time Stevens wished to take up two notes he had negotiated to the claimant, Rowell, amounting to some over two hundred dollars, and to obtain money of her to make up the whole amount to three hundred dollars. He thereupon made the following assignment:

(Assignment.)

"Lunenburg, Sept. 10, 1883.

"For a valuable consideration I sell, assign and transfer all the account I have or hold against the Lewiston Steam Mill Company, of Lewiston, Maine, the same I bought of George M. Smith of Stark, Coos county, that is now in suit in the Coos county court, reserving the right to prosecute and carry on the said suit and to bring it to a close as quick and as cheap as possible. C. P. Stevens."

(Indorsements.)

"The transfer of C. P. Stevens. September 10, 1883. Received three hundred dollars of Charlotte Rowell.

C. P. Stevens."

No notice was given the trustee of any such assignment until after the attachment, but notice was given before the disclosure. The assignment was, in the opinion of the judge, not made for security, but was an outright sale, if anything, of three hundred dollars, out of the claim against the trustee. The judge thereupon ruled that the claimant could not hold any part of the fund against the plaintiffs.

To which ruling the claimant alleged exceptions.

R. N. Chamberlain, for plaintiff.

This court have decided that an assignment of part of an entire chose in action cannot be upheld in a court at law, against the consent of the person owing the demand assigned. *Mandeville* v. *Welch*, 5 Wheat. 277; *Tiernan* v. *Jackson*, 5 Pet. 580; *Gibson* v. *Cooke*, 20 Pick. 15; *Robbins* v. *Bacon*, 3 Maine, 346.

And that an assignment of part of an entire chose in action will be upheld in a court of equity. *Bank* v. *McLoon*, 73 Maine, 498.

In *Bartlett* v. *Pearsons*, the case finds that the debtor had notice of the assignment. The court say: "The assignment made by Lawrence to his creditor, conveyed the equitable title to the balance due from defendant to Lawrence, at the time when defendant had notice of the assignment." 29 Maine, 15. In *Hardy* v. *Colby*, the administratrix had notice of the assignment before the service of the trustee process upon her, 42 Maine, 382; also *Pollord* v. *Insurance Co.* 42 Maine, 224. In last case, defendant had notice and assented to the assignment. *Garnsey* v. *Gardner*, 49 Maine, 167, is not in point, as this was an action between assignor and assignee.

There are some cases that hold that an equitable assignment of a fund is good against the assent of the debtor, and as we read the case of *Bank* v. *McLoon*, (the case relied on by claimant's counsel) that is all the court decides. There are many cases in the different states that support our view, and we

respectfully ask the attention of the court to the following: *Conway* v. *Cutting*, 51 N. H. 407; *Garland* v. *Harrington*, 51 N. H. 409; *Farmers' Bank* v. *Drury*, 35 Vt. 469; *Peck* v. *Walton*, 25 Vt. 33; *Webster* v. *Moranville*, 30 Vt. 701; *Dale* v. *Kimpton*, 46 Vt. 76; *Holmes* v. *Clark*, *Idem.* 22; *Austin* v. *Ryan*, 51 Vt. 113; *Vanbuskirk* v. *Hartford Ins. Co.* 14 Conn. 144; see also *Hawley* v. *Bristol*, 39 Conn. 27; *Foster* v. *Mix*, 20 Conn. 400; *Peters* v. *Goodrich*, 3 Conn. 146; *Woodbridge* v. *Perkins*, 3 Day, 364; *Manwaring* v. *Griffing*, 5 Day, 561; *Judah* v. *Judd*, *Idem.* 534; *St. John* v. *Smith*, 1 Root, 157.

We think the court must have had this distinction in mind when considering the case of *Bank* v. *McLoon*, as in all the cases cited in support of the doctrine in *Bank* v. *McLoon*, both English and American, which we have had an opportunity to examine, notice of assignment was given, although the debtor in some refused to be bound by the assignment. *Brice* v. *Bannister*, 3 Q. B. Div. 569, is a case in point.

We have examined *Milliken* v. *Loring*, 37 Maine, 408, cited by claimant's counsel, and cannot see how it is authority as claimed. The court simply decide that if the trustee have notice of any claim, by third parties, it is his duty to disclose it to the court to protect himself.

Twitchell and Abbott, also for plaintiff.

W. and H. Heywood, for claimant, cited: *Bartlett* v. *Pearson*, 29 Maine, 9; *Hardy* v. *Colby*, 42 Maine, 381; *Pollard* v. *Som. Ins. Co.* 42 Maine, 221; *Garnsey* v. *Gardner*, 49 Maine, 167; *Bank* v. *McLoon*, 73 Maine, 498; *Milliken* v. *Loring*, 37 Maine, 408; *Bunker* v. *Gilmore*, 40 Maine, 88; *Larrabee* v. *Knight*, 69 Maine, 320; R. S., c. 86, § 32.

PETERS, C. J. This case is governed by the case of *Bank* v. *McLoon*, 73 Maine, 498. The judge who heard the evidence decided, as matter of fact, that the principal defendant had assigned a part of his debt against the trustee to the claimant. Precisely that fact existed in the case referred to. Notice of

the assignment was given to the trustee before his disclosure, which in our practice was seasonable.

Exceptions sustained.

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

BENJAMIN M. ROYAL *vs.* CYRUS CHANDLER.

Androscoggin. Opinion March 8, 1887.

Evidence. Declarations of grantor.

Evidence of a grantor's declaration in disparagement of his title, made while he was owner of the land granted by him, introduced by a party claiming adversely to the grantee, cannot be contradicted by evidence of such grantor's declarations made subsequently and in relation to the same title.

ON exceptions by the defendant.

The opinion states the case.

John P. Swasey and Richard Dresser, for the plaintiff.

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

PETERS, C. J. This, a real action, involves the location of the line between the plaintiff's and defendant's premises.

A person, now deceased, who was once an owner in plaintiff's land, while an owner and upon the land, made declarations respecting the line favorable to the defendant's claim. These admissions in disparagement of his own title were properly proved at the trial by the defendant. To detract from the force of this evidence, the plaintiff was allowed to prove later and contradictory statements made by the same person under other circumstances when he was not upon the land. The last declarations were not admitted as original, primary evidence, but to contradict the first declaration. What the former owner said for himself was admitted to impeach what he had previously said against himself. The last declarations were not admissible. It was not a legal contradiction. It was unsworn evidence.

The fallacy of the idea allowing the testimony to be received, consists in looking upon the former owner as a witness in the cause. The first declarations were made by him while standing

in a condition the same as if a party to the present suit. His admissions against his own title were of the same quality of evidence as if spoken by the plaintiff himself. If a man's conversation in his favor be admitted against what he has said against his interest, then he would certainly be allowed to corroberate one statement by consistent statements made at other times, and no limit could be fixed in respect to such evidence. Opening the door so widely would lead to mischievous results.

The question in the ruling does not appear to have received attention in our own state. It has been several times considered in Massachusetts, and is there in each instance disposed of unfavorably to the plaintiff here. The case of *Baxter* v. *Knowles*, 12 Allen, 114, meets the point exactly, where it is said: "The declarations of the defendant's testator, from whom he claimed title, were not made admissible in his favor by the fact that his declarations at other times were given in evidence by the plaintiff as admissions." *Pickering* v. *Reynolds*, 119, Mass. 111, is also precisely in point.

Exceptions sustained.

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

HASKELL, J., did not sit.

ALBION S. BURGESS

vs.

DENISON PAPER MANUFACTURING COMPANY.

Oxford. Opinion March 8, 1887.

Accord and satisfaction.

The defense of accord and satisfaction is not made out, by showing that the plaintiff promised to accept, for labor already performed by him, a deed of land from a third person in satisfaction of his claim, it appearing that the deed was executed but not delivered nor tendered.

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

Assumpsit for labor performed.

The verdict was for plaintiff for one hundred and six dollars and twenty-three cents.

The opinion states the point raised by the exceptions and material facts.

H. A. Randall, for the plaintiff.

John P. Swasey, for the defendant.

PETERS, C. J. The plaintiff has a claim against the defendants for labor. The defendants rely on an alleged accord and satisfaction, contending that the plaintiff agreed to take a deed from a third party in satisfaction of his claim. The defendants obtained the deed but did not deliver it, relying on the plaintiff to call for it. "The accord is the agreement for the reception of the thing in discharge of the debt; the satisfaction is the actual reception of the thing." Whar. Con. § 996; *Bragg* v. *Pierce* 53 Maine, 65. Here there was accord but not satisfaction. The deed was not received. Nothing short of an actual reception of the deed would constitute a defense.

Exceptions overruled.

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

AARON B. CHAPMAN and others

vs.

COUNTY COMMISSIONERS OF YORK COUNTY.

York. Opinion March 8, 1887.

County Commissioners. Certiorari. Ways. Practice.

One county commissioner may act with his associates in a part of the proceedings of laying out a way, and another (his successor) act afterwards in his place in completing the proceedings, where the acts of the former are separable from those of the latter.

County commissioners are a court which is not dissolved by one going out and another coming in.

In a hearing under petition for *certiorari*, the sworn answer of the commissioners, as far as containing conclusions of fact, is regarded as having the same effect as if their record were amended according to the answer.

If, however, the answer should be indefinite, or equivocal, the court may require an amended answer, or the production of an amended record.

The commissioners should file their report at the next regular session after the hearing, and may return it to any day of such session.

ON report.

Petition for certiorari to quash the proceedings of the county commissioners in laying out a highway from Limerick village to Newfield.

R. P. Tapley, for plaintiff.

The action of the new commissioner infuses into the judgment an illegal and foreign element, viz.: the judgment of a stranger; and this vitiates the whole judgment.

The introduction of this foreign element is not unlike a stranger acting with a grand jury. In such case it is held the indictment found is void although twelve and more of the persons legally qualified concurred in the finding. *Com* v. *Parker*, 2 Pick. 560 and cases cited.

The petitioners were in fact cut off from appealing at the October session, by the suspension of action and as soon as the certificate was filed the proceedings were closed; so they have been prevented from making an appeal and compelled to submit to the action and judgment of a person who did not hear them. In the case of *Inh. of Windham, Petr's.* 32 Maine, 452, SHEPLEY, C. J., persons injured have a right to the same available length of time to make their applications as if no appeal had been taken.

The case of *Levant* v. *Co. Com.* 67 Maine, 429, does not, it seems to me, hold that matters which should appear of record can be proved by evidence *aliunde*. It specifically declares that "if the original record be defective it may be amended by the tribunal in accordance with the facts at any regular session." No evidence *aliunde* is received except upon the question of discretionary action, and when necessary to show what certain rulings complained of were founded upon.

L. S. Moore, for the respondents, cited: 30 Maine, 351; 31 Maine, 578; 32 Maine, 450; 36 Maine, 74; 65 Maine, 160; *Levant* v. *Co. Com.* 67 Maine, 429.

PETERS, C. J. Can a county commissioner act with his associates in receiving a petition, ordering notice upon it, taking a view under it, adjudicating in favor of a road asked for by the petition, and his successor in the office act afterwards in his place in completing the proceedings to a finality—and the record be legal? This inquiry might perhaps be avoided in the case before us, by force of the fact that two other commissioners, a quorum of the board, concurred in the steps taken throughout, thus rendering their action valid. But as the same question may occur at most any time again, from the present election law requiring commissioners to be chosen singly in consecutive years, instead of all of them in the same year, we are disposed to put the question at rest at this opportunity. We see no irregularity in such proceedings.

The board are a court and the court is not dissolved by one commissioner going out and another coming in. It continues to be the same court though its personality be changed. One commissioner participates in the earlier questions arising in the proceedings, and helps decide them. Those questions are then disposed of. We see no need of going over that ground again, any more than in any other court where one judge at one term settles a preliminary question and another judge at another term tries the case in its subsequent stages. Of course, the first action must be in its nature, separable from the later acts.

Counsel for the petitioners contend that the record does not show specifically what part of the proceedings each commissioner participated in, and that it must appear from the record, and cannot be supplied by the answer of the respondents. His point is that the adjudication that the road is demanded by public convenience and necessity is merely a legal conclusion — not a fact — and that legal conclusions can appear only of record.

We think it to be a fact that an adjudication was made, and that what the adjudication was would be a fact. Its legal effect would be another thing.

But we also think the doctrine of the case of *Levant* v. *Commissioners*, 67 Maine, 429, does not admit of so illiberal an interpretation as counsel puts on it. On the hearing of a peti-

tion the oath of the respondents, in matters officially known to them, is as good as a record, to supply mere deficiencies. The inference is that they would amend their record, which they could do, in accordance with their sworn statement, and, as that is regarded as certain which can be made certain, the record, for the purposes of the hearing is regarded with the same effect as if it were amended accordingly. If the court should suspect evasion or prevarication, it could no doubt require further answer, or that an amended record be produced for its examination. Commissioners do not keep exact journals of all minor and preliminary proceedings, and they rely upon covering all necessary points when they file their report at length. It would not be expedient to view county commissioners' records with as much circumspection as would be rulable in criminal and even in some civil matters. The rules prescribed in *Levant* v. *Commissioners*, *supra*, have had an excellent practical influence in preventing unwise and wearisome litigations.

It is contended that the commissioners' report was not filed at the next regular term after the view was had, because dated in June and the court commenced its session in April. But the record produced declares it to have been returned at the regular April term, and the commissioners swear to the fact. Counsel for the present petitioners conceives the answer to be equivocal in that respect. He could have required a more certain answer, if needed. The objection cannot avail.

It is further objected that a report cannot be filed at so late a day of a regular term as this report was. That is a matter to be regulated by the rules of procedure of that court. It is hardly pretended that the filing must be on the first day of their meeting, and no rule of law can determine on what day it shall or shall not be done.

Nor did the commissioners make any mistake in making their report to the April term, the first regular session after the hearing. Other older statutes may have been susceptible of some uncertainty on this point; the present statute is clear.

There are no merits in the case requiring our discretionary intervention to defeat the contemplated road. The question has

run the gauntlet of the commissioners, of a committee on appeal, and of this court at *nisi prius*. All possible means of opposition have been expended to prevent the road.

Petition denied.

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

JOHN HEALD *vs.* HIRAM MOORE and others.

Somerset. Opinion March 8, 1887.

Ways. Openings. Boundaries. Fences. R. S., c. 18, § § 36, 95.

A town way, three rods wide, was enlarged, by a new county location, to a width of four rods, one-half rod having been added on each side. But the fences had remained in place on the old road for thirty-seven years after the new location before the town officers interfered with them, when they removed the plaintiff's fence, on one side of the way, from the old to the new line.

Held, that the statute provision, that a way duly laid out shall be considered as discontinued unless opened within six years from the time allowed therefor, does not literally apply; the new width is merely an incident of the old; traveling upon the old way is traveling upon the new; it accepts the added width and secures it to the public use.

Held, also, that the statutory rule, which provides that a fence, which has continued in the same place on a road for forty years, shall conclusively indicate the line of the road, does not apply, since the forty years do not begin until the last road was laid out.

ON exceptions.

Trespass against certain of the municipal officers of the town of Madison, and their employees, for removing plaintiff's fence from the limits of a way in that town.

Walton and Walton, for plaintiff.

We claim that if there be nothing done by the town for six years to indicate a purpose to take that additional rod, that it cannot be done afterwards. R. S., c. 18, § 36.

The land owner is to have damages when the land is taken and not till then. R. S., c. 18, § 7.

We ask, then, how there is any taking if the road as used is exactly as before the location, and the land owners still

occupying up to the fences which mark the bounds of the three rod road.

The real facts in this case are that the road was never legally located. That portion in Cornville was proceeded against by certiorari, that fact ascertained, and every one thereupon supposed it would not do to build the four rod highway,—to go outside of the old three rod road. *Cornville* v. *Co. Com.* 33 Maine, 237; *State* v. *Cornville*, 43 Maine, 427; *State* v. *Madison*, 59 Maine, 538; S. C., 63 Maine, 546.

So far as the opening of the four rod road is concerned, we say, in the language of TENNEY, C. J., in *State* v. *Cornville*, 43 Maine, 428, "It cannot be said, with propriety, that the road has been opened as a whole when nothing at all has been done to that portion which constitutes three-fourths of it, (in this case one-fourth) and the remainder was a road open and used before as such."

The same rule applies to land taken at the side of a road as that taken at the end of the same. There is no difference in principle. The only question is one of fact. Has the location been abandoned? The mere use of the old road, continued as before, does not, necessarily, constitute an opening — such as entering upon and taking possession of that outside the old road for the purpose of construction and use — so far as the new portion is concerned, whether that new portion lies along side or either end of the old road. *Pet. of Mt. Vernon*, 37 N. H. 515.

Such a construction should be given the statute as will protect the rights of owners of real estate, who have purchased property by the side of the highways, the bounds of which are so uncertain that they have actually bought and paid for land which is really within the limits of the highway. *Danvers* v. *Essex Co. Comrs.* 6 Pick. 20.

Merrill and Coffin, for the defendants.

Exceptions do not lie because the plaintiff was not aggrieved by the ruling complained of. *State* v. *Pike*, 65 Maine, 111; *Soule* v. *Winslow*, 66 Maine, 451; *Webber* v. *Read*, 65 Maine, 565; *Kilpatrick* v. *Hall*, 67 Maine, 543; *Boothby* v. *Woodman*, 66 Maine, 387; *Decker* v. *Somerset Ins. Co.* 66 Maine, 406.

A highway differs from a town way. *Waterford* v. *Co. Com.* 59 Maine, 453; *State* v. *Bigelow*, 34 Maine, 246; R. S., c. 18, § § 1, 14.

Trespass cannot be maintained. *Whittier* v. *McIntyre*, 59 Maine, 145; *Kimball* v. *Rockland*, 71 Maine, 140; *Perley* v. *Chandler*, 6 Mass. 454; Angell, Highways, 398; *State* v. *Kittery*, 5 Maine, 259.

C. A. Harrington, also for defendants.

PETERS, C. J. Only one question in this case needs to be discussed, the findings of the jury having disposed of all others. And that question must be determined against the plaintiff, even accepting the interpretation of the facts as claimed by him. Let it be admitted that the case finds that, in 1804, a town road was laid out, three rods wide, the centre line of which was the southerly boundary of plaintiff's land; that he built a fence on his side of the road and on his line; that there was also at the same time a fence on the other side of the road, the located road being three rods in width between fences; that the same fences have been continued on the same lines ever since they were built; that, in 1846, the county commissioners laid out the road anew over the old location, but widening it on each side a half rod, thereby making it a four rods road instead of three; and that a half rod in width of the located road on each side has been within the fences of the coterminous proprietors for thirty-seven years, the fences having existed more than forty years.

The plaintiff invokes certain statutory provisions as sustaining his claim. R. S., c. 18, § § 36, 95. One section provides that a highway which has been duly laid out shall be considered as discontinued unless actually opened within six years from the time allowed therefor. The other provides that a fence which has continued in the same place on a road for forty years, will be justified in remaining thereon,—shall indicate conclusively the true line of the road.

It would seem to be a strange result, if a forty years' continuance of a fence is to dictate the line of a road laid out less than

forty years ago. Such cannot be the policy or implication of the statute. The widened road became a new road. Plaintiff's fence did not exist on this road before 1846, because that was the beginning of this road's existence. Prior to that time the fence was upon another road,— a road of other dimensions. It is to be presumed that, when the road was widened in 1846, the plaintiff received damages for so much of his land as was taken, including compensation for the expense which a removal of his fence would impose on him. Suppose the fence had been maintained for a full forty years prior to the proceedings of 1846. Would that fact have prevented the widening? Or, suppose the forty years had expired in a week after the latter proceedings. Would the public right be lost if the fence were allowed to continue for a week? The principle would be the same whether the time be a week or many years.

But the new road or new part of it has never been opened, it is argued. The statutory requirement about opening a road, from the nature of things, would not literally apply to a case like this,— would have an application different from what it has where an entirely new road is to be constructed. There was no need of any opening more than to use the general road. There was no occasion for making the traveled path wider than it was. Using any part of the three rods was in effect using the four rods. Opening a part opened all — using a part was using all. The principal road was already opened,— the incident went with it. The public took the plaintiff's land — paid for it — and the moment the traveler passed over the usual traveled track afterwards, the new road, all of the road, became dedicated to the public use. But the fences were not removed within the six years, it is replied. The town neither builds nor maintains fences. The owner should have removed them. The officers of the town attempt to remove them to prevent a forty years' user, and are sued for it in this action. The case relied on by the plaintiff, *State* v. *Cornville*, 43 Maine, 427, does not aid his argument. In that case the addition was in length and not in width of road — was an extension of new road. The case of

Baker v. *Runnels*, 3 Fair. 235, is much more like the case at bar, and strongly opposes the plaintiff's propositions.

Exceptions overruled.

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

THE NATIONAL BANK OF DERBY LINE

vs.

FRED N. DOW and others.

Cumberland. Opinion March 8, 1887.

Promissory notes. Indorsers. Extension to maker.

The maker of an over-due note, on which the defendants are accommodation indorsers, applied to the plaintiffs for a renewal. Plaintiffs refused to renew, writing the maker January 27, 1885, that they prefer to hold the note, but would carry it thirty to sixty days, "as it is, if nothing materially transpires to change the status of the security and the names;" upon the condition that the maker remit at once interest on the note to January 15, 1885. The maker remitted three months interest at seven per cent per annum, the legal rate being six per cent, writing that he sent the interest at the rate of seven per cent, "which you ask," It was the maker's inference from previous transactions that the plaintiffs asked seven per cent interest. The plaintiffs retained the money, indorsing three months interest on the note, not naming the amount indorsed. At six per cent there was more due for interest on the note than the amount sent, and the law of Vermont, which governs the transaction, applies all excess above six per cent interest on the contract on which it is received.

Held, that the transaction was not a contract to extend the note, such as will discharge the defendants from their liability as indorsers.

ON exceptions from the superior court.

Assumpsit against Fred N. Dow, Ossian Ray and Charles E. Benton, on the following promissory note.

"$7,000. Lancaster, N. H. Oct. 12, 1883.

"One year after date I promise to pay to the order of myself seven thousand dollars, at the National Bank of Derby Line, Vt.

"Value received. $416.50

$6,583.50

Jacob Benton."

"No. 3286. Due Oct. 12-15.

(Indorsed on back.)

"Pay to the order of Charles E. Benton, Ossian Ray and Fred "N. Dow, jointly.

Jacob Benton.
Charles E. Benton.
Ossian Ray.
Fred N. Dow."

"Rec'd Sept. 30, 1884. One hundred and forty-one and 30-100 dollars by O. Ray, $141.30.

"Rec'd Jan'y 31, 1885. Int. to Jan'y 15, 1885."

Duly protested.

Ardon W. Coombs, for the plaintiff, cited: Story, Prom. Notes § 419, note 2; *Williams* v. *Smith*, 48 Maine, 138; *Berry* v. *Pullen*, 69 Maine, 103; *Mariners' Bank* v. *Abbott*, 28 Maine, 280; *Page* v. *Webster*, 15 Maine, 249; *Bank* v. *Rollins*, 13 Maine, 207; *Bank* v. *Ives*, 17 Wend. 501; *Creath's Adm'r* v. *Sims*, 5 How. 207; *Potter* v. *Green*, 6 Allen, 444; *Reynolds* v. *Ward*, 5 Wend. 501; *McLemore* v. *Powell*, 12 Wheat. 554; *Halstead* v. *Brown*, 17 Ind. 202; *Oxford Bank* v. *Lewis*, 8 Pick. 457; *Blackstone Bank* v. *Hill*, 10 Pick. 132; *Whitney* v. *So. Paris Mf'g. Co.* 39 Maine, 316; *Nightingale* v. *Meginnis*, 34 N. J. (5 Vroom,) 461; *Bank* v. *Parsons*, 138 Mass. 53; *Norris* v. *Crumney*, 2 Rand. 328; *Sohier* v. *Loring*, 6 Cush. 538; *Hutchins* v. *Nichols*, 10 Cush. 300; *Morse* v. *Huntington*, 40 Vt. 488; *Bank* v. *Goss*, 31 Vt. 315; *Dixon* v. *Dixon*, 31 Vt. 450.

Clarence Hale, for the defendant.

It cannot be that the bank intended to say, "we will extend provided the extension is illegal and inoperative and of no effect upon the parties to the note;" the bank very well knew the law; as every one is presumed to know it. It understood that such extension without the consent of the indorsers would operate as a discharge; and that if it chose to make such extension without the consent of the indorsers it took its chances of being able to recover from the indorsers. It is clear that the word "transpires" refers to some future event or fact which should effect the financial standing of those whose names were

on the note; the word "transpires" being used in its popular, although incorrect significance. The letter does not say "provided nothing in this shall be construed to affect our rights on the indorsers," but it refers to an event to "transpire." It cannot be argued that anything has actually "transpired" to affect such credit or financial standing; the bank waited the thirty days and even more than sixty days. It cannot be reasonably argued that the language of the letter reserved the rights of the bank against the indorser. The language cannot be construed into an agreement to reserve rights, such as is shown in the following cases where the court held that a discharge was not effected. *Potter* v. *Green*, 6 Allen, 442; *Hutchins* v. *Nichols*, 10 Cushing, 299; *Sohier* v. *Loring*, 6 Cushing, 537.

The law expressly declares that if any reservation of rights against the sureties is made it must be in "clear and unambiguous terms." *Boultbee* v. *Stubbs*, 18 Ves. 20; *Rees* v. *Berrington*, Leading Cas. in Eq. p. 717.

The bank should not be excused from the legal consequences of the extension they suggested and granted. When the bank officers took the responsibility of enlarging the time of payment they altered the contract; they changed the liability of the surety; and that surety has a right to say that this is not the contract into which he entered. *Greely* v. *Dow*, 2 Met. 178. Byles on Bills, 55, § § 247, 250, 253, and notes and cases cited.

The promise to extend was based upon a legal consideration. That consideration consisted in the usurious interest paid. The interest due up to Jan. 15, 1885, was about $102, and that sum is acknowledged by the indorsement of interest on the back of the note; but at least $17 more was paid. That overplus is clearly a legal consideration for the extension of time. There can be no doubt but that the actual payment of usurious interest, as in this case, constitutes a consideration. This is assumed in *Berry* v. *Pullen*, 69 Maine, 101, and shown in cases therein cited; of course an executory contract to pay such interest would not be a consideration; but in this case the interest was actually paid, but was not endorsed on the note; only the legal "interest to Jan. 15, 1885," appears on the back of the note. It is no

answer to say that the $17 may be recovered back under the laws of Vermont and that it has been tendered back in this suit.

It may be argued in behalf of the plaintiff bank that the recent case *Haydenville Bank* v. *Parson*, 138 Mass. page 53, is a case of import in their favor; and it is true that the court has gone as far in that case as it has ever gone in that direction. But it must be remembered that the usury law of Vermont is entirely different from the interest law of Massachusetts, any rate being allowed in Massachusetts if expressed in the contract, whereas in Vermont any sum over six per cent may be recovered back. The case at bar shows the payment of money not due; and such payment is clearly a benefit to the creditor and an inconvenience to the debtor; and in both respects is a good consideration for a promise. *Greely* v. *Dow*, *supra*; *Rees* v. *Berrington*, *supra*. De Golyar on Guarantees, p. 407, *et seq.*, and cases cited. Story on Prom. Notes, § § 413-421, and cases cited.

The subject of usury as a consideration for an extension of time is fully considered in *Vary* v. *Norton* by the U. S. C. C., Michigan, 6 Federal Reporter, 808; this decision fully appears in Myer's Federal Decisions, vol. 3, page 614, § 552. See also *Turrill* v. *Boynton*, 23 Vt. 142; *Burgess* v. *Dewey*, 33 Vt. 619; see also *Gardiner* v. *Gardiner*, (23 S. C.) 25 Am. L. Reg. 412.

PETERS, C. J. The defendant, an accommodation indorser of a note, contends that he is released from liability by an agreement between the maker and holder to extend the time of payment of the note without his assent.

The principle involved in such a defense, while clearly logical, is subtle and refined, so much so that persons unlearned in the law rarely suspect the legal consequences that may follow their giving time for the payment of over-due notes. It is the unseen, sunken rock on which thousands of commercial obligations have been wrecked, to the utter dismay of the losers and sometimes to their ruin. While the situation of a surety must be carefully scrutinized, so should that of a holder be, who is to lose, if he loses at all, about seven thousand dollars for unwittingly

receiving the merest pittance of consideration for extending a note.

Applying to the present case the definition of liability as declared by VIRGIN, J. in *Berry* v. *Pullen*, 69 Maine, 101, we are convinced that the facts, affected as they are by the finding of the judge, fail to prove any contract of extension which can release this indorser from liability on the note. It is in that case said: "But before a surety, whose name was deliberately and understandingly placed upon a note to give it credit, can be thus absolved from liability, the law, as well as justice and equity, requires that there shall be a valid, binding contract — one founded on a sufficient consideration, and the effect of which shall be to give further definite time to the principle, without the consent of the surety." We think this plaintiff has escaped from the risk of any such contract; the facts fall short of it.

The maker of the note in a letter dated January 24, 1885, offers to renew his then over-due paper, asking that the name of one endorser be omitted from the new note. The plaintiffs do not accept the proposition, they are unwilling to lose an indorser. They answer, on January 27, 1885, in these words: "We prefer to hold the note we now have to taking a new one, but will carry it for thirty to sixty days as it is, if nothing materially transpires to change the status of the security and the names; this, however, is only on condition that you remit immediately the interest on the note for three months, to January 15."

All the phrases of this letter are freighted with the idea that the bank was unwilling to lose an indorser from the note. It is the language of caution and self-protection. They were willing to grant indulgence, but at no risk to themselves. They prefer to "hold the note" — "as it is" — "will carry it," not change it — not for any fixed, definite time — but "for thirty to sixty days." The very indefiniteness of the indulgence shows merely promise not to press, and not a contract to be bound by.

The maker's reply indicates that he was craving indulgence merely, and not expecting to make any legal contract for delay. "I trust you will give me sixty days," he writes. But the bank

was not disposed to grant any indulgence, if thereby anything transpires to change materially the status of the security or of the names. What, from their standpoint, can this mean, unless it be that they would be bound to do nothing which would expose to risk any rights then held by them. They were in any event to retain their status both as to the security and the names. And still the defendant assumes the position, that, while the plaintiffs were repelling all idea of a contract, they were really making one. We can have no doubt that the plaintiffs intended to reserve to themselves the right to enforce the note or not at their discretion. The learned counsel for the defendant suggests that the bank and its legal advisers well understood the law of the case, and intended to obtain the consent of the indorsers. We do not believe that they intended to do any act which would require their assent. The paper may not be in all respects worded with exact verbal propriety. But as a whole we think it strongly and impressively expresses a protest against the very misinterpretation now endeavored to be put upon it;—the intention shines through it.

We do not say, of course, that there may not be some force in the ingenious argument submitted in behalf of the defendant's position. Truth mixes with error in many cases, the alliance making error only the more difficult to contend against. We do say that the plaintiffs' position is much the most satisfactory.

The plaintiffs asked for nothing as a legal consideration for an extension. Over-due interest, and not all of that, only was required. They did not write for extra interest — it was "interest" that was wanted. The contention of the defense is that interest at seven per centum per annum was intended,— while there is not evidence in the case to show any such thing. When a settlement was to be made, out of which this note grew, the president of the bank wrote that they would accept notes with interest in advance at "six per cent." At another time a bank official offered to settle this note, by new notes which they would discount at seven per cent; which would be a legal transaction. The record of the case shows no other instance when interest of any kind was mentioned by the bank.

But interest for three months at seven per cent was remitted by the maker, he supposing, no doubt, that on that account his appeal for lenity would be more likely to prevail. "Which you ask," writes the maker. The plaintiffs had asked of him "interest," and no more,— presumptively, legal and not illegal interest.

The whole amount was kept. Why should it not be? More of legal interest was then due than the amount sent. It was a *pro tanto* protection to the indorser to keep it. The bank indorsed three months interest, not naming the amount of it. But if they did not appropriate the excess over six per cent, the law of Vermont appropriated it, upon the note, at the moment it was received. It could not be retained for an illegal purpose. It was never asked for for any purpose. There is not satisfactory evidence that the bank designed to use the excess illegally, in view of the finding of the judge, upon both law and fact, in favor of the plaintiffs. The judge ruled as a matter of law that the correspondence and the conduct of the parties did not operate to discharge the defendant. His decision of fact implies that the conduct was not incompatible with such finding. The case is before us on exceptions, and not on report of evidence or an appeal from the whole record. The finding at *nisi prius* gives all favorable intendments, which the facts can allow, to the plaintiffs. If it be necessary to find as a fact that the extra was not accepted as a consideration for extending the note, the finding below makes it so. And here it may forcibly be asked how the extra interest could be regarded as the consideration for the promise of the bank, when the promise was made without such consideration — before it was received.

The question, a doubtful one, whether the payment of usury would be a valid consideration for such an agreement as the defendant depends upon, never decided either in Vermont or Maine, need not now be entertained by us.

There may be stronger ground, possibly, for contending that the time of payment was not extended to the indorsers than there is that it was not extended to the maker — and this action is against an indorser only. Some distinction of the kind might appear, upon the face of the principal letter, to some persons.

It is a well settled principle, recognized by most courts, the doctrine of reservation, that a holder may agree with the maker to extend the contract as to him, and at the same time, as a part of the same agreement, reserve the right of action against all indorsers or sureties — and in such case those parties are not absolved from liability. Such reservation might prevent much of the expected benefit of an extention to the creditor, but that would not lessen the validity of the qualification annexed to it. In Big. on Bills and Notes, 598 to 607, the leading cases on this subject are reviewed and an abundance of authorities cited. See also *Bank* v. *Parsons*, 138 Mass. 53; a case bearing upon the point arising in the case at bar.

Exceptions overruled.

WALTON, VIRGIN, LIBBEY and EMERY, JJ., concurred. HASKELL, J., concurred in the result.

HENRY F. FARNHAM *vs.* HORACE F. DAVIS and dwelling house.

Cumberland. Opinion March 10, 1887.

Liens on buildings. R. S., c. 91, § § 32, 34, 45.

To enforce a lien claim on a building there must be a suit against the party promising.

R. S., c, 91, § 45, does not dispense with the suit against the contracting party.

When a lien arising from one contract has been dissolved it cannot be revived by tacking on a new lien arising under a new contract.

ON report.

Assumpsit on account annexed brought to enforce a lien on a dwelling house and lot on Oak street at Stevens' Plains in the town of Deering.

The opinion states the facts as found by the court from the evidence and admissions.

Symonds and Libby, for the plaintiff.

This is a case of a definite lien and "for a particular work" within the decision of *Baker* v. *Fessenden*, 71 Maine, 292.

Under the act of 1879, which enlarges materially the rights of lien claimants, "judgment may be rendered against the defendant

and the property covered by the lien, or against either, for so much as is found due by virtue of the lien." The intent of the statute is clear, and should be liberally construed.

A lien judgment need not be strictly a judgment *in rem* against the whole world. It must respect prior mortgagees' rights—if such exist, as has been held by the court in *Morse* v. *Dole*, 73 Maine, 351. An action to enforce a mechanic's lien is "essentially a suit in equity," as declared by Mr. Justice FIELD in *Davis* v. *Alvord*, 94 U. S. 546, and he further says that statutes giving such liens are "to be liberally construed."

It is well known, as it is apparent upon examination, that the act of 1879, ch. 136, (R. S., ch. 91, secs. 44, 45) was passed to remedy the defects which previous decisions, especially *Byard* v. *Parker*, 65 Maine, 577, had shown to exist in the process for enforcing liens on buildings.

R. S., ch. 91, sec. 44, provides for notice to the owner, and the mode in which he may be made a party, where he is not the defendant in the action, or does not voluntarily appear. Section 45, of the same chapter, manifestly from its terms, refers to cases in which the owner is the defendant, as well as to the class of cases mentioned in the previous section.

Now, in this case, if the defendant is not holden personally for the whole debt—as we claim he should be,—we respectfully urge that we are entitled to a personal judgment against him to the extent of his personal liability, and a lien-judgment against the property, which will be valid against all his interest in the property, and against all other interest therein, which is not such as by law to take precedence over plaintiff's lien.

To give us less than this in a case where the defendant is admitted to be the owner, and where all the materials were delivered under circumstances which give the lien, seems to us to be a forced and unnecessary limitation upon the remedy which the legislature intended to give.

These views as to the nature of a lien-judgment are sustained by the large number of cases cited in the last edition (1882) of Phillips on Mechanics' Liens, in the chapters treating of the procedure and judgment in lien actions. § § 320, 395, 397, 399, 447, 449, 458.

If the court, however, still holds in face of the statute that it is not sufficient to make the "owner" a party to the suit but that a general notice must be given, then we ask that the case may be remitted to the court at *nisi prius* to give such notice, as was done in *Sheridan* v. *Ireland*, 61 Maine, 486.

Woodman and Thompson, for the defendant, cited: R. S., c. 91 § 43; *Frost* v. *Ilsley*, 54 Maine, 345; *Hayford* v. *Cunningham*, 72 Maine, 128; *Sherinan* v. *Ireland*, 66 Maine, 70; *Oliver* v. *Woodman*, 66 Maine, 59; *Ames* v. *Swett*, 33 Maine, 479.

EMERY, J. The evidence and the admissions establish the following facts: One Chase made a contract with the defendant to furnish the labor and materials in the construction of defendant's house. Chase procured of the plaintiff certain material which he put into the construction of the house under his contract. This material was sold to Chase upon his credit, but with knowledge of whose house it was intended for. It was so furnished Chase, for said construction December 16, 1884. The contract between Chase and the defendant was afterward cancelled, and subsequently in May and July, 1885, the defendant upon his own credit purchased of the plaintiff other material for the construction of the house. The plaintiff filed the proper lien claim August 6, 1885, and began this suit by attachment September 15, 1885, to recover of the defendant and to enforce a lien for all the material.

There was a sufficient tender for the second lot of material, that purchased by the defendant in person, followed by the timely payment of the money into the court, hence we have only to consider the first bill of material, that purchased by Chase, the contractor, December 16, 1884.

I. The evidence does not satisfy us, that the defendant was an original promisor for that bill. That material was not furnished upon his credit. If he did afterward promise to see it paid, it was a collateral verbal promise, not enforceable. We think the evidence does not warrant any personal judgment against the defendant.

II. Should there be a judgment against the house? To obtain such a judgment for material so furnished, the plaintiff should have filed his lien claim within thirty days after he ceased to furnish material, and have attached the house within ninety days after the last material furnished by him. R. S., c. 91, § § 32, 34. If this bill of December 16, 1884, were the only material furnished by the plaintiff for this house, then of course, his lien was lost long before he moved to enforce it. In May following however, he began again to furnish material for the house, and this time, his last furnishing was within thirty days before filing the lien-claim, and within ninety days before the attachment.

Here were two distinct periods of furnishing material. One began and ended in December. The other began in May and ended in July. They were distinct transactions, under distinct and different contracts. The first was under a contract with Chase. The last was under a contract with the defendant. Each bill was a separate cause of action, to be enforced in a separate suit against a different person. The lien for each was a separate lien to be separately enforced. Our statute so far as liens on buildings are concerned, does not provide for a process *in rem*, regardless of any personal defendant or any contract. There must be a suit against the party promising, upon which the property benefitted may be attached. The contract, whether express or implied, is the principal. The lien is the incident. The lien must be enforced along with the contract. When a lien arising from one contract has been dissolved, it cannot be restored by tacking on a new lien arising under a new contract. Philips on Mechanics' Liens, § 324 and cases cited. *Ames* v. *Swett*, 33 Maine, 479; *Frost* v. *Ilsley*, 54 Maine, 345; *Oliver* v. *Woodman*, 66 Maine, 59.

The plaintiff urges, that however it may have been under former statutes, there may now under § 45, c. 91, be a judgment against the property alone, without any against the defendant. There may be cases, where judgment should not be rendered against the defendant personally, for the reason of his discharge in insolvency or for some other reason, although his promise is established. In such case, the judgment may be against the

property alone. This statute however does not change the nature of the lien as an incident of the contract. It does not dispense with a suit against the contracting party. It does not authorize a suit directly against the owner of the property, if he was not the contracting party. If no contract express or implied is proved against the defendant the suit must fall, and the annexed lien falls with it.

Judgment for defendant.

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

ELLEN THOMPSON *vs.* HENRY THOMPSON.

Knox. Opinion March 10, 1887.

Divorce. Declarations of agent. Practice. Cross-examination. Medicine. Support. New trial.

The declarations of an agent of a husband, when persuading a wife to return, may be admissible at the hearing upon the wife's libel for divorce, upon the question of condonation, as showing the inducements held out, and the conditions upon which she returned.

Cross-examination of libellee, upon acts of cruelty not set out in the libel, is within the discretion of the presiding justice.

Medicine, when needed, is a part of a proper support, and evidence of failure to supply needed medicine is admissible under an allegation of not providing proper support.

A motion for a new trial in a divorce case, heard by a single justice, cannot be granted. The law court cannot revise the decision of the presiding justice on the facts — nor upon the law, otherwise than on exceptions.

ON exceptions and motion for new trial.

Libel for divorce. The opinion states the points and material facts.

J. E. Moore, for the plaintiff, cited: *Ford* v. *Ford*, 104 Mass. 198; *Mayhew* v. *Sullivan M. Co.* 76 Maine, 100; *Com.* v. *Bean*, 137 Mass. 570; *Oakland Ice Co.* v. *Maxcy*, 74 Maine, 294; *Tarr* v. *Smith*, 68 Maine, 97; *Harriman* v. *Sanger*, 67 Maine, 442; *Millett* v. *Marston*, 62 Maine, 477; 2 Whar. Ev. § 1173; Story, Agency, § 451; *Robbins* v. *Robbins*, 100 Mass. 150; *Gardner* v. *Gardner*, 2 Gray, 434; Abbott's Trial Ev. 747; *Fairfield* v. *Oldtown*, 73 Maine, 573; *Haskell* v.

Hervey, 74 Maine, 192; *Maglathlin* v. *Maglathlin*, 138 Mass. 299; *Sparhawk* v. *Sparhawk*, 120 Mass. 390; *Edmundson* v. *Bric*, 136 Mass. 189; Mason's Mass. Pr. 429.

C. E. Littlefield, for the defendant.

We believe that the declaration of the agent, "I know that he has illtreated you," etc., comes within the rule established by the following authorities and is clearly inadmissible: By *Hyland* v. *Sherman*, 2 E. D. Smith, (N. Y.) 234, where the court held that an agent to receive money only, has no authority to make any declaration in relation thereto which could affect his principal, and *Bynurn* v. *Southern Pump, &c. Co.* 63 Ala. 462, where the court held in an action of detinue to recover a mule, that the defendant could not introduce as evidence admissions or declarations of a party who was the plaintiff's agent merely, to demand and get the mule, in disparagement of the plaintiff's rights to the mule.

All of the evidence excepted to was prejudicial to the defendant and he is entitled to the benefit of his exceptions in their full weight, as though the case had been tried to the jury. *Slade* v. *Slade*, 58 Maine, 157.

The evidence as to a pretended refusal by Mr. Thompson to procure medicine and exercise proper care toward the libellant when she was suffering from the effect of a fall, as given by the libellant and the witness, Marshall, is inadmissible, as there was no allegation in either the libel or bill of particulars, under which such evidence could be introduced. No allegation contains any hint that the libellee would need to be prepared to meet such a charge. *Ford* v. *Ford*, 104 Mass. 198.

This court has distinctly held that when a statute has received a judicial construction of the court in the state where it was in force, and the same statute has been enacted in this state with the same provision which has been the subject of judicial discussion and decision, the legislature are understood to have adopted the construction given. *Myrick* v. *Hasey*, 27 Maine, 17; *Gregory* v. *Gregory*, 76 Maine, 535.

This is precisely in point, and we must look to the Massachusetts decisions for the construction or definition of "extreme

cruelty" and "cruel and abusive treatment." This is the rule, "a reasonable construction of the statute requires that it shall appear to be at least such cruelty as shall cause injury to life, limb or health, or create danger of such injury, or a reasonable apprehension of such danger, upon the parties continuing to live together. This is broad enough to include mere words if they create a reasonable apprehension of personal violence, or tend to wound the feelings to such a degree as to affect the health of the party or create a reasonable apprehension that it may be affected." *Bailey* v. *Bailey*, 97 Mass. 380.

DANFORTH, J. This is a libel for divorce and comes before the court upon exceptions and a motion.

1. The first exception is to the declarations of one Pinkham, claimed to be admissible as an agent of the defendant. What particular declarations were objected to does not appear from the exceptions, but the objection covers all. Therefore, by a well known rule of practice, if any of them were admissible, the exception must be overruled. We learn from the testimony reported, which is made a part of the exceptions, that the libellant had left her husband on account of alleged cruelty, the result of personal violence, and that the declarations in question were made by Pinkham to her during a negotiation between them to induce her to return to her husband. In this negotiation he assumed to act for and in behalf of the husband, and there is evidence in the case tending to prove such authority.

It further appears that an important question involved in the issue was whether the previous alleged violence had been condoned by her return. Hence the circumstances under which she returned and the inducements held out to secure that return, were material upon this question of condonation, and upon this question such declarations as were a part of the act were admissible, though not for the purpose of proving the previous acts of the defendant. The particular declaration objected to in the argument, standing by itself, was of no use whatever, and would undoubtedly have been excluded. But it was a part of a transaction which was material and could not easily be separated

from it, nor was the presiding justice asked to do so. The motion made was to strike out all the declarations.

The agency of Pinkham was both asserted and denied, and there was evidence on both sides. It was a question of fact for the court to decide, and what that decision was nowhere appears. It may, therefore, be that the decision was such that the testimony was rejected and no use made of it. So that in any event, the libellee fails to show that he was aggrieved by the doings of the presiding justice in this respect.

2. The libellee was examined on cross-examination as to certain acts of alleged cruelty, not found in the libel or bill of particulars. These acts could not be proved as an independent cause of divorce. The divorce, if granted, must be for some cause alleged in the libel. Other acts can only be considered so far as they tend to prove such as are alleged. But this comes from a cross-examination of the defendant for the purpose of showing his disposition and feeling, and thus testing his credibility as a witness. Its limits, therefore, even in matters collateral, are within the discretion of the court and not subject to exception. *Ford* v. *Ford*, 104 Mass. 138. But the evidence here objected to would be admissible as tending to prove the cruelty charged as the foundation for the divorce, even if drawn out in the direct examination. It would render such a charge more probable and gives force to such other testimony as may bear upon the cause alleged. This practice is allowable even in criminal cases. *State* v. *Plunkett*, 64 Maine, 534; *State* v. *Neagle*, 65 Maine, 468.

In this libel, there are three causes of divorce, and three only, set out, such as the law now recognizes as such, viz: Extreme cruelty, cruel and abusive treatment, and being of sufficient ability, a gross, wanton and cruel refusal to provide for the wife. Whether these causes are sufficiently set out is not a question raised by any pleadings in this case. After these allegations under another complaint, the libel sets out a series of acts which may or may not be cruel, according to the circumstances connected with them, and the bill of particulars is of a

similar character. It is not clear whether these acts were set out as distinct causes of divorce, or as the foundation for the three charges. If the latter, it would be necessary to prove a sufficient number of them, connected with such circumstances as would sustain one or more of the three charges alleged. If the former, it would certainly be very doubtful if they are sufficiently set out to authorize a decree of divorce. But in either case we cannot consider these specifications as details of the evidence to be relied upon and to which the party is to be confined in her proof. To sustain her libel, she must prove at least one of the sufficient causes of divorce therein alleged. This she may do by any competent evidence she may have.

3. The plaintiff under objection was allowed to prove a refusal on the part of the libellee, without cause, to furnish medicine when needed. The suggestions under the last head will apply to this. But in addition to that, this clearly comes within the specification both in the libel and bill of particulars. The supplying of proper and needful medicine is as much required for a proper support and comfortable home, as any other article of maintenance.

4. The plaintiff was allowed to prove the improbability that the parties would ever again live together, under objection. The exceptions do not show what this testimony was. All we can find in the report of the evidence comes from the cross-examination of the defendant, and is in substance an opinion expressed by him that it would be of little use for them to try to live together again. This, too, was a matter of cross-examination and within the discretion of the court. It may have been of some use as expressing the present state of the defendant's feeling, or it may have turned out, like the most of testimony elicited upon cross-examination, of no use whatever, or harmful to the party calling it out. It could only be used as bearing upon the past, or in some way throwing light upon testimony the witness had previously given. The casual remark made by the judge that it might influence his decision, might be true in a proper sense, as it might very properly have some influence in interpreting the other testimony. As the law allows no dis-

cretion outside of a judicial judgment in granting divorces, the court could not legally consider the evidence as bearing upon the future. There is not the slightest evidence that it did so, and we cannot infer that an error was committed. Besides, the remark was not a ruling and is not subject to exception.

There is also a motion for a new trial for various causes set out, both of fact and of law. This is somewhat of a novel proceeding in divorce, or any other cases tried by a single judge. It has usually been considered in such cases that the findings in matters of fact are conclusive, and that errors of law must be presented by exceptions. Our attention has not been called to any case in which such a motion has been entertained. In *Starbird* v. *Henderson*, 64 Maine, 570, the court refused to entertain such a motion, holding that "the evidence cannot properly be reported for the revision of the law court as to the correctness of his decision upon the facts. His adjudication upon them is final." In *Haskell* v. *Hervey*, 74 Maine, on page 195, the same doctrine is announced. In *Sparhawk* v. *Sparhawk*, 120 Mass. on page 392, GRAY, C. J., says: "But we are unwilling . . . to imply that in any case of divorce or alimony, a party has the right to have the evidence reported, or the decision of a single justice revised in matters of fact." In *Edmundson* v. *Bric*, 136 Mass. on page 191, is is said: "What was the real transaction . . . was a question of fact, to be determined by the judge, upon his view of the credibility of the witnesses, the consistency of their testimony as to the transaction with their subsequent dealings with the property, and all the evidence in the case; and we have no right to revise his finding." *Sheffield* v. *Otis*, 107 Mass. 282; *Backus* v. *Chapman*, 111 Mass. 386.

In matters of law the proper practice is to take the case up by exceptions, even though the objection is to the final ruling granting the divorce. In which case the presiding justice reports the facts as he finds them, or in some cases the testimony upon which he grounds his conclusion, and thus is distinctly presented the question whether, as a matter of law, he has committed an

error. *Robbins* v. *Robbins*, 100 Mass. 150; *Maglathlin* v. *Maglathlin*, 138 Mass. 299.

In this case we have no report of the facts found by the judge, and no report of the testimony upon which he relied; nor is there any exception to his ruling in granting the divorce, or in fixing the alimony. We have no means of ascertaining any farther than the exceptions go, whether he has made any error of law in his final adjudication. Nor can we from the report of the evidence revise his findings to ascertain whether he has made an error in fact. But from a somewhat careful examination of the testimony, applying that to the law as interpreted in *Holyoke* v. *Holyoke*, 78 Maine, 404, we perceive no error either in law or fact in his conclusions.

Exceptions and motion overruled.

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

CARRIE M. GILLEY *vs.* FRANK E. GILLEY, and Trustee.

Kennebec. Opinion March 10, 1887.

Support of children. Husband and wife. Divorce.

Irrespective of any statutory provision relating thereto, a father is bound by law to support his minor children; but it is otherwise with the mother during the life of the father.

The mother may maintain against the father an action for the necessary support of their minor children, furnished by her after a divorce *a vinculo* decreed to her for "desertion and want of support," no decree for custody or alimony having been made.

ON exceptions from superior court.

Assumpsit on account annexed. The defendant did not appear, but Charles W. Hilton, a subsequent attaching creditor, appeared by leave of court and defended.

Baker, Baker and Cornish, for the plaintiff.

A father is bound to support his infant children. 2 Ken. Com. *191; 1 Chitty, Contr. 213; 1 Parsons, Contr. 307; 2 Bish. Mar. and Div. § 528; *Stanton* v. *Wilson's Exrs.* 3 Day, 37 (3 Am. Dec. 255); *Benson* v. *Remington*, 2 Mass. 115;

Whipple v. *Dow*, 2 Mass. 419; *Nightingale* v. *Withington*, 15 Mass. 274; *Dennis* v. *Clark*, 2 Cush. 352; *Reynolds* v. *Sweetser*, 15 Gray, 78; *Brow* v. *Brightman*, 136 Mass. 187; *State* v. *Smith*, 6 Maine, 462; *Garland* v. *Dover*, 19 Maine, 441.

Divorced wife may recover for support of children when their custody is not decreed to her. *Finch* v. *Finch*, 22 Conn. 411; *Hancock* v. *Merrick*, 10 Cush. 41; *Brow* v. *Brightman*, 136 Mass. 107; *Husband* v. *Husband*, 67 Ind. 583 (33 Am. R. 107); *Burritt* v. *Burritt*, 29 Barb. 124; 2 Bish. Mar. and Div. § 557; Schoul. Dom. Rel. 322; see *Carlton* v. *Carlton*, 72 Maine, 115; *Webster* v. *Webster*, 58 Maine, 139; *Blake* v. *Blake*, 64 Maine, 177. Some courts hold the father liable for support of his minor children after their custody has been decreed to the mother. See *Holt* v. *Holt*, 42 Ark. 495; *Courtwright* v. *Courtwright*, 40 Mich. 633; *Plaster* v. *Plaster*, 47 Ill. 290.

S. and L. Titcomb, for subsequent attaching creditor.

In *Mortimore* v. *Wright*, cited in 8 Law Reporter, 222, the court say, "In point of law a father who gives no authority and enters into no contract is not liable for goods supplied to his son while under age any more than an uncle, a brother or a stranger would be."

The later view according to Tyler on Infancy, pp. 107-8-9-11 is that the liability of a father even for necessaries is a matter depending wholly upon contract.

The statutes provide a way in which a parent can be made liable and third parties by the later cases are restricted to that. Tyler on Infancy above; 60 N. H. 197; 1 Add. on Con. (Smith's ed.) 202.

"There appears to be no responsibility on the part of a father even for necessary goods supplied to his son unless there be some proof of a contract express or implied; and that there must be a prior authority or a subsequent recognition of the claim." Chitty on Con. (Perkins' ed.) 117.

To the same effect, *Raymond* v. *Loyl*, 10 Barb. R. 483.

This case contains no allegation which can bring it under R. S., c. 24, § 16, (case of paupers) and if it did by that section

the mother herself is liable. Nor can it come under R. S., c. 59, § 30, which authorizes towns only to recover.

The law raises no promise of payment where a child is supported by its mother. *Cummings* v. *Cummings*, 8 Watts, (Pa.) 366. And in *Duffey* v. *Duffey* 44 Pa. St. 399, it was held that the relationship excludes the implication of a promise, a grandparent cannot recover for the maintenance of grandchildren.

In *Pawling* v. *Willson*, 13 Johns. 192, the mother is under equal natural obligation with the father to support her children. There is no legal ground to authorize the recovery by the mother against the father for the maintenance of children, at most she could have right to sue for contribution only. Doctrine something like this in *Harris* v. *Harris*, 5 Kansas, 46. A later Conn. case, *Finch* v. *Finch*, 22 Conn. 411. The court refuse to sustain an action of book account brought by wife after divorce against the father for cost of maintaining children.

VIRGIN, J. Assumpsit by the mother against the father for their young children's necessary support furnished after a divorce *a vinculo* decreed to her for his "desertion and failure to support," he having been absent from the state several years prior to the decree and never having returned or furnished any support whatever during the time, and no decree for alimony or custody of the children having been made.

It is a matter of common knowledge that a father is entitled by law to the services and earnings of his minor children. It is equally well known that this right is founded upon the obligation which the law imposes upon him to nurture, support and educate them during infancy and early youth, and it continues until their maturity, when the law determines that they are capable of providing for themselves. *Benson* v. *Remington*, 2 Mass. 113; *Dawes* v. *Howard*, 4 Mass. 98; *Nightingale* v. *Withington*, 15 Mass. 274; *State* v. *Smith*, 6 Maine, 462, 464; *Dennis* v. *Clark*, 2 Cush. 352-3; *Reynolds* v. *Sweetser*, 15 Gray, 80; *Garland* v. *Dover*, 19 Maine, 441, *Van Valkinburgh* v. *Watson*, 13 Johns. 480; *Furman* v. *Van Sise*,

56 N. Y. 435, 439, 445, 446; 2 Kent's Com. *190 *et seq.* Schoul. Dom. Rel. 321.

In *Dennis* v. *Clark*, *supra*, the court said: "By the common law of Massachusetts, and without reference to any statute, a father if of sufficient ability is as much bound to support and provide for his infant children, in sickness and in health, as a husband is bound by the same law and by the common law of England to support and provide for his wife. And if a husband desert his wife or wrongfully expel her from his house and make no provision for her support, one who furnishes her with necessary supplies may compel the husband by an action at law to pay for such supplies. And our law is the same, we have no doubt, in the case of a father who deserts or wrongfully discards his infant children." This upon the ground of agency. *Reynolds* v. *Sweetser*, *supra*; *Hall* v. *Weir*, 1 Allen, 261; *Camerlin* v. *Palmer Co.* 10 Allen, 539. But a minor, who voluntarily abandons his father's house, without any fault of the latter, carries with him no credit on his father's account even for necessaries. *Weeks* v. *Merrow*, 40 Maine, 151; *Angel* v. *McLellan*, 16 Mass. 27. Otherwise a child impatient of parental control while in his minority, would be encouraged to resist the reasonable control of his father and afford the latter little means to secure his own legal rights beyond the exercise of physical restraint, *White* v. *Henry*, 24 Maine, 533.

Moreover in actions for seduction, whereof loss of service is the technical foundation, the loss need not be proved but will be presumed in favor of the father who has not parted with his right to reclaim his minor daughter's service, although she is temporarily employed elsewhere. *Emery* v. *Gowen*, 4 Maine, 33. "And this rule results from the legal obligation imposed upon him to provide for her support and education which gives him the right to the profits of her labor." *Blanchard* v. *Ilsley*, 120 Mass. 489; *Kennedy* v. *Shea*, 110 Mass. 147; *Emery* v. *Gowan*, *supra*; *Furman* v. *Van Sise*, 56 N. Y. 435, 444.

So also in that large class of cases wherein needed supplies, furnished by the town to minor children between whom and their father, though they lived apart, the parental and filial

relations still subsisted, are considered in law supplies indirectly furnished the father—the reason is because he was bound in law to support them. *Garland* v. *Dover*, 19 Maine, 441.

We are aware that courts of the highest respectability, especially those of New Hampshire and Vermont, hold that a parent is under no legal obligation, independent of statutory provision, to maintain his minor child, and that in the absence of any contract on the part of the father, he cannot be held except under the pauper laws of those states which are substantially like our own. *Kelley* v. *Davis*, 49 N. H. 187; *Gordon* v. *Potter*, 17 Vt. 348.

But as before seen the law was settled otherwise in this state before the separation and has been frequently recognized in both states since; and we deem it the more consistent and humane doctrine.

It is also settled that at least during the life of the father, the mother, in the absence of any statutory provision, or decree relating thereto, not being entitled to the services of their minor children, is not bound by law to support them. *Whipple* v. *Dow*, 2 Mass. 415; *Dawes* v. *Howard*, 4 Mass. 97; 2 Kent's Com. *192; *Weeks* v. *Merrow*, 40 Maine, 151; *Gray* v. *Durland*, 50 Barb. 100; *Furman* v. *Van Sise*, *supra*, both opinions. R. S., c. 59, § 24.

This leads to an inquiry into the effect of the divorce *a vinculo* alone, unaccompanied by any decree committing the custody of the children to the mother. For when such a decree is made then the father would have no right, either to take them into his custody and support them or employ any one else to do so, without the consent of the mother. *Hancock* v. *Merrick*, 10 Cush. 41; *Brow* v. *Brightman*, 136 Mass. 187; *Finch* v. *Finch*, 22 Conn. 410. Although it is held otherwise in some jurisdictions. *Holt* v. *Holt*, 42 Ark. 495, and other cases on plaintiff's brief.

But a decree of custody to the mother is predicated of its primarily belonging by right to the father, and the granting of it implies that such action on the part of the court is absolutely essential to imposing upon her the legal obligation of supporting

their minor children. So long as the father lives, the mother, in the absence of any decree of custody in her behalf, cannot of right claim, as against him, their services, provided he is a suitable person to have the care of them. He may on *hab. corp.* obtain custody as against their mother, on satisfying the court that he is a fit custodian. *Com.* v. *Briggs*, 16 Pick, 203.

It would seem to follow that the divorce alone while it dissolved the matrimonial relation between the parties thereto, did not affect in any wise the parental relation between them and their children. When the divorce was decreed in behalf of his wife the defendant thereupon ceased to be her husband, but he still remained the father of the children which had been born to him during his conjugal relation with the plaintiff, with all the father's duties and legal obligations full upon him.

The cases which hold that in case of a decree for custody, the father is not holden, impliedly hold that in the absence of any such decree, he is liable. *Brow* v. *Brightman*, *supra*.

When the bond of matrimony was dissolved, these parties became as good as strangers; and the plaintiff may then maintain an action against the defendant for any cause of action which at least subsequently accrued. *Carlton* v. *Carlton*, 72 Maine, 115; *Webster* v. *Webster*, 58 Maine, 139.

We are of opinion therefore that this action is maintainable on the implied promise of the defendant resulting from the circumstances and the law applicable thereto.

Exceptions overruled.

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

GEORGE H. BENNETT *vs.* ROXANNA BENNETT.

Oxford. Opinion March 10, 1887.

Contract.

An action cannot be maintained upon a written promise to pay a certain sum of money on demand, or guarantee the payee the use of a certain farm during the life-time of the promisor, when it appears that the payee voluntarily left the farm without cause.

ON exceptions.

Assumpsit upon the writing, (which had been duly assigned to the plaintiff,) recited in the opinion. At the trial the presiding justice directed the jury to return a verdict for the defendant. To this direction the plaintiff alleged exceptions.

S. F. Gibson, for plaintiff.

Choses in action "are such as the owner has not in possession but merely a right of action for their possession." Chitty defines choses in actions to be rights to receive or recover a debt, money or damages for breach of contract, or for a tort connected with contract but which cannot be enforced without action and therefore termed choses or things in action. Bouvier's Law Dic. under "chose." Are they assignable? see R. S., c. 82, § 130; 66 Maine, 542; 69 Maine, 99.

In order for the defendants to have the right to question the validity of the assignment or its sufficiency she should have done so by plea or brief statement. 66 Maine, 545; 54 Maine, 196.

Husbands may sue and maintain actions at law against their wives, on any contract or agreement signed by the wife given for any lawful purpose. 64 Maine, 181 and cases there cited, decisive on that point also. 57 Maine, 547; 65 Maine, 222.

R. A. Frye and A. E. Herrick, for the defendant, cited: *Dennett* v. *Goodwin*, 32 Maine, 44; *Bunker* v. *Athearn*, 35 Maine, 364; *Mathews* v. *Houghton*, 11 Maine, 377; *Allen* v. *Hooper*, 50 Maine, 371; 2 Add. Cont. 789; *Bryant* v. *Erskine*, 55 Maine, 153; Big. Estoppel, 503, 507; *Thompson* v. *Hoop*, 6 Ohio St. 480; Waterman, Con. § § 131, 73, 74; *Stevens* v. *Adams*, 45 Maine, 611; *Bethlehem* v. *Annis*, 40 N. H. 44; *Emerson* v. *Fisk*, 6 Maine, 205; *Eastman* v. *Batchelder*, 36 N. H. 141; *Clinton* v. *Fly*, 10 Maine, 292; *Heath* v. *Jaquith*, 68 Maine, 433; *Beaulieu* v. *Portland Co.* 48 Maine, 291; *White* v. *Bradley*, 66 Maine, 254.

EMERY, J. The evidence for the plaintiff makes out the following case. In June, 1880, Daniel P. Bennett conveyed his farm to the defendant, and in the following August, married her. He lived on this farm with the defendant, his wife, till March, 1884. In May, 1883, while thus living on the farm, he gave her

his bank-book, and took back from her this instrument, written by himself and signed by her at his request.

"May 11, 1883.

"On demand I promise to pay to the order of Daniel P. Bennett, eight hundred and seventy two dollars, value received, or guarantee to said Bennett, the use of the farm, my life-time— Deeded to me by said Bennett. Roxanna Bennett."

The only question of law is the construction of this instrument. There was no loan to the defendant. Daniel wanted the use of the farm. He transferred the bank-book to obtain such use. He himself framed such instrument as he desired her to execute for that purpose. He asked for no other assurance or guarantee. He accepted this. There is no suggestion that any other was contemplated. This memorandum was to be his evidence of right to the use of the farm. It is evidence of her promise to permit him to use the farm. It provides a penalty for a breach of such promise. She was to allow Daniel the use of the farm or pay him the sum named. She had the option, not he. 1 Add. on Con. 319; 2 Par. Cont. 651, 657.

Daniel could not recover the money, so long as there was no interference with his use of the farm. There is no evidence of any such interference. So far as the evidence shows, he left the farm in March, 1884, of his own accord, without cause, and he may go back when he will. He cannot by his own action fix upon her a liability to pay the penalty, the money. All the evidence fails to show any such liability. It would not sustain a verdict for plaintiff. The court properly instructed the jury to that effect. *Exceptions overruled.*

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

LUTHER HEMMENWAY *vs.* GEORGE A. LYNDE and another.

Knox. Opinion March 10, 1887.

Executors and administrators. Mortgages. R. S., c. 65, § § 32, 35.

The title to lands held by a decedent in mortgage passes to the administrator, and remains in the administrator, under R, S., c. 65, § § 32, 35, until redemption, sale or distribution among those entitled to the personal estate.

On report.

The opinion states the case and facts.

Lindley M. Staples, for the plaintiff.

The real estate of a person intestate descends, being subject to the payment of debts, in equal shares to his children, and to the lawful issue of a deceased child, by right of representation. R. S., c. 75, § 1; *Kimball* v. *Sumner*, 62 Maine, p. 305; *Heald, Administrator*, v. *Heald*, 5 Maine, 387.

Was Joseph Tolman, by virtue of the mortgage, possessed of real estate in said farm? What is real estate? R. S., c. 1, § 6, is as follows: "Land or lands, and the word real estate includes lands and all tenements and hereditaments connected therewith, and rights thereto and interest therein."

A. P. Gould, for the defendant, cited: *Smith* v. *Porter*, 35 Maine, 287; *Ramsdell* v. *Tewksbury*, 73 Maine, 197; *Vose* v. *Handy*, 2 Maine, 322; *Robbins* v. *Bacon*, 3 Maine, 346; *Crain* v. *Paine*, 4 Cush. 483; *Prout* v. *Root*, 116 Mass. 410; *Middlesex Freeholders* v. *State Bank*, 11 Stew. (N. J. Eq.) 36; *Cutler* v. *Haven*, 8 Pick. 490; 2 Hill. Mort. 222; *Hatch* v. *Bates*, 54 Maine, 136; *Carter* v. *Nat. Bank*, 71 Maine, 450; *Moore* v. *Ware*, 38 Maine, 496; *Douglass* v. *Durin*, 51 Maine, 121.

Emery, J. This is a real action. From the admissions and the admissible evidence, the following facts appear: There was a mortgage of the demanded land, conditioned for the support of the mortgagee. He began a real action for the land for a breach of the condition, pending which suit he died. His administrator, with the will annexed, prosecuted the action and recovered the usual conditional judgment in case of mortgages. He afterward received seizin and possession of the land by himself or attorney. He afterward died, and an administrator *de bonis non* was appointed. There was no foreclosure upon the judgment, and the right of redemption is not barred. The mortgage has never been redeemed, and the administrator has made no sale of the land. The estate of the mortgagee has never

been finally settled in the probate court, and there has been no decree of distribution.

The demandant has acquired the title of the mortgagor, and also has quitclaim deeds of the land, and deeds of release of the mortgage and the judgment from the heirs and residuary legatees of the mortgagee. The tenant is in possession under the administrator.

The demandant contends that the legal title was in the mortgagee, and that he had the legal estate according to the Maine doctrine of mortgages,—that consequently upon his death the legal estate and the land passed to his heirs or residuary legatees, and by their deed to the demandant, subject to the contingency of its being required for the payment of the decedent's debts, etc. The demandant contends that until the administrator shall obtain the proper special license to sell, etc., the legal estate is in him, the demandant, and he is entitled to the possession.

This contention cannot prevail against the language of our statutes, even if it otherwise could. R. S., c. 90, § 12, declares that the executor of the mortgagee shall hold the mortgaged lands as assets,—have the control of them as a personal pledge, recover seizin and possession of them for the use of such person as may be entitled to them upon the settlement of the estate. Chap. 65, § 32, declares that such lands shall be deemed personal assets so long as there remains a right of redemption,—shall be held by the executor in trust for the persons who would be entitled to the money, if redeemed; and if not redeemed, he may sell the lands as he would personal property. Section 35 declares that if not redeemed nor sold, the lands shall be distributed among those entitled to the personal estate.

It is quite apparent from these statutes that mortgaged lands do not pass upon the death of the mortgagee to his heirs. They pass to the executor as fully as personal property passes to him. He administers them as he does personal property. His deed will convey them. *Crooker* v. *Jewell*, 31 Maine, 306. The deed of the heirs will not convey them. *Douglass* v. *Durin*, 51 Maine, 121. An entry upon them by the heirs would be trespass against the executor. *Palmer* v. *Stevens*, 11 Cush. 148.

The demandant, however, further contends that the case sufficiently shows there are no valid debts against the estate, and there can be none by reason of the statute of limitations. He claims that thus the estate is practically settled, and the title to these lands has thus passed to him as the grantee of the heirs. He also claims that in this state of affairs, there being no debts, the release of the condition of the mortgage by the heirs and residuary legatees becomes effectual, as the lands must come to them.

The case of *Webber* v. *Webber*, 6 Maine, 127, which might be thought to sustain this contention of the demandant, cannot be considered as an applicable authority. The language of the statutes has been much changed since the opinion in that case, and the present statutes are much more explicit than that of 1821. We think the title to lands held by a decedent in mortgage, passes upon his death to his executor, and remains in the executor and his successors until redemption, sale, foreclosure or distribution. The heirs only acquire title by purchase or distribution. *Boylston* v. *Carver*, 4 Mass. 598; *Taft* v. *Stevens*, 3 Gray, 504; Schouler on Ex'rs, 214; *Bird* v. *Keller*, 77 Maine, 270. Not having acquired the legal estate, the demandant cannot maintain a real action. Whatever rights he has acquired from the heirs or legatees, he must enforce against the administrator *de bonis non*, in the probate court or upon his bond.

Demandant nonsuit.

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

SAMUEL F. GIBSON *vs.* ROXANNA BENNETT.

Oxford. Opinion March 10, 1887.

Marriage, a consideration for a deed. Fraud.

Marriage is a good and valuable consideration for a conveyance of land.

The grantee under such a conveyance is not affected by any fraudulent intent of the grantor, of which she was ignorant.

A levying creditor of the husband must in such case show the grantee's notice.

ON motion to set aside the verdict.

Real action to recover one hundred and fifty acres of land in Bethel. The opinion states the facts.

S. F. Gibson, for plaintiff.

A valuable consideration "is either money or something that is money's worth." 2 Washburn on Real Prop. 103 (2d ed.); also see 4 Kent's Com. 518 (8th ed.).

The date of the deed is not intended to express the hour and minute when executed, but rather the time of its delivery. 33 Maine, 67. The actual time of delivery may be proved by parol. 33 Maine, 446; 58 Maine, 543; 18 Maine, 190; 63 Maine, 245; 56 Maine, 45. What is a delivery of a deed? 30 Maine, 110; 66 Maine, 316. The record is not conclusive. 67 Maine, 559. The record cannot supersede the necessity of proof of delivery. 67 Maine, 559, *supra*. If the delivery be conditional, so as not to constitute a present obligation, it is an escrow and no title thereby passes to the grantee. 22 Maine, 569; 65 Maine, 273.

Where a deed, though containing the name of the person who paid the consideration and with whom covenants were made, did not express the name of any grantee, nothing passed by the deed. 7 Maine, 455.

The plaintiff was a prior creditor. 61 Maine, 13; 60 Maine, 208, and 524; 53 Maine, 53; 56 Maine, 158; 18 Maine, 249; 19 Maine, 358; 5 Maine, 172; 2 Maine, 121; 61 Maine, 425; 12 Maine, 418; Smith's Leading Cases, 439, &c.; 68 Maine, 232; 71 Maine, 501; 70 Maine, 56; 72 Maine, 173.

If he had other property wherewith to satisfy plaintiff's claim, he, plaintiff, had the right to elect which to take. 65 Maine, 439; 57 Maine, 558; 62 Maine, 268.

R. A. Frye and A. E. Herrick, for the defendant, cited upon the question of fraud: *Rollins* v. *Mooers*, 25 Maine, 192; *Webster* v. *Withey*, 25 Maine, 326; *Hall* v. *Sands*, 52 Maine, 355; *Stevens* v. *Robinson*, 72 Maine, 381; *Chandler* v. *Von Roeder*, 24 How. 224; *French* v. *Holmes*, 67 Maine, 189; *Randall* v. *Vroom*, 30 N. J. Eq. 353; *Brown* v. *Lunt*, 37 Maine, 435; *Jordan* v. *Dobson*, 2 Abb. U. S. 398; *Thompson*

v. *Wharton*, 7 Bush. 563; *Klein* v. *Horin*, 47 Ill. 430; *Beatty* v. *Fishel*, 100 Mass. 448; *Ewing* v. *Gray*, 12 Ind. 64; 2 Add. Contr. 768, note 1; *Downing* v. *Freeman*, 13 Maine, 90; Best, Ev. § 24.

Marriage is a good consideration. *Derry* v. *Derry*, 74 Ind. 560; *Magniac* v. *Thompson*, 7 Pet. 348; 4 Kent's Com. 463; 1 Add. Cont. 15, note 1; *Vance* v. *Vance*, 21 Maine, 376; *Stevens* v. *Moore*, 73 Maine, 564; *Anderson* v. *Green*, J. J. Marsh, 448; *Waters* v. *Howard*, 8 Gill. 222; *Whelan* v. *Whelan*, 3 Cow. 537; *Wood* v. *Jackson*, 8 Wend. 9; *Garvin* v. *Cromartie*, 11 Ind. 174; *Chichester* v. *Vass*, 1 Mumf. 98; *Rainbolt* v. *East*, 56 Ind. 538; *McCole* v. *Loehr*, 9 C. L. J. 436; *Verplank* v. *Sterry*, 12 Johns. 536; *Smith* v. *Allen*, 5 Allen, 454; *Herring* v. *Wickham*, 29 Gratt. 628; *Prewit* v. *Wilson*, 103 U. S. 22; *Kevan* v. *Crawford*, 6 Ch. D. 29.

EMERY, J. The tenant was a witness and told substantially the following story: While she was a widow, Mr. Bennett proposed marriage to her, and offered to give her in consideration for such marriage, a deed of the demanded land. After some reflection, she accepted the offer and promised marriage to Mr. Bennett, as proposed by him. Thereupon, Mr. Bennett delivered to her the deed under which she now claims. Soon afterward she married him in pursuance of the agreement and to fulfill it on her part. She was not aware that Mr. Bennett was in debt at the time of the deed, or of the marriage. She was not aware that the deed would hinder or delay any creditor of Mr. Bennett.

It is clear that upon such a state of facts, no creditor of the husband can take the land by a subsequent attachment and levy. Marriage is a valuable consideration for a deed, and if the marriage afterward take place, the deed is valid so far as consideration is concerned. Any fraud intended by the grantor upon his creditors would not avoid the deed, if the grantee was innocent. Wait on Fr. Con. 199, 212; *Verplank* v. *Sterry*, 12 Johns. 536; *Prewit* v. *Wilson*, 103 U. S. 22; *Smith* v. *Allen*, 5 Allen, 454; *Vance* v. *Vance*, 21 Maine, 370; *Wentworth* v. *Wentworth*, 69 Maine, 253.

Mrs. Bennett's story is contradicted by her husband. They had separated and there was much feeling. The truth of either story was for the jury to ascertain and declare. It has declared the wife's story to be the true one. We think we should leave the case upon the jury's finding of the truth.

Motion overruled. Judgment on the verdict.

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

GEORGE W. BROWN *vs.* INHABITANTS OF WINTERPORT.

Penobscot. Opinion March 10, 1887.

Towns. Note given by selectmen. Town meeting. Warrant.

To entitle one to recover of the town money borrowed by a majority of the selectmen without prior express authority, for which a town note was given, the plaintiff must show that the money was paid into the town treasury, or applied to the payment of legal liabilities of the town, and that the town had ratified the action of the selectmen.

An article in a warrant for a town meeting, to see if the town would vote to pay a number of town notes, specifying each note by giving name of the payee, amount and date, is sufficient.

Where all the voters and officers of a town meeting by unanimous consent, but without a vote, go out into the open air, in front of the place of meeting, where they could more conveniently vote upon a proposition, and there vote without objection on the part of any person, the action is legal.

Where a town has in town meeting by vote ratified the doings of the selectmen in borrowing money and giving a note therefor, in behalf of the town it cannot at a subsequent meeting rescind such a ratification.

ON report.

The case is stated in the opinion.

Barker, Vose and Barker, for the plaintiff, cited: 21 Howard, 42; 51 Am. Rep. 88; 78 Ill. 170; 47 Miss. 24; 51 Miss. 305; 82 Penn. 297; 59 Am. Dec. 451; *Hodge* v. *Linn*, 100 Ill.; 25 Alb. L. J. 37; *State* v. *Rogers*, 86 N. C.; 26 Alb. L. J. 336; 4 Cowen, 297; 8 Cowen, 102; 20 Wend. 14; 3 Hill, 42; 5 Denio, 409; 20 Pick. 484; 7 Pick. 18; 116 Mass. 172; 122 Mass. 270; 40 Vt. 171; 41 Vt. 28, 418; *Hunneman* v.

Grafton, 10 Met. 454; 42 Vt. 485; 44 Vt. 87; 8 Mich. 100; *Lawrence* v. *Taylor*, 5 Hill, 107; Angell and Ames, Corp. 9 (ed.) § 304; 1 Potter, Corp. 211; 1 Dill. Mun. Corp. 385.

W. H. Fogler, for defendants.

The right of towns to grant or raise money, so as to bind the property of the inhabitants, or subject their persons to arrest for non-payment, is derived solely from statute. They have no authority to grant or raise money except for the purpose provided by the statute of the State. *Bussey* v. *Gilmore*, 3 Maine, 191; *Hooper* v. *Emery*, 14 Maine, 375; Opinion of the Justices, 52 Maine, 598; *Westbrook* v. *Deering*, 63 Maine, 231; *Lincoln* v. *Stockton*, 75 Maine, 145; *Luques* v. *Dresden*, 77 Maine, 186; *Stetson* v. *Kempton*, 13 Mass. 272; *Parsons* v. *Goshen*, 11 Pick. 396; *Anthony* v. *Adams*, 1 Met. 284; *Minot* v. *West Roxbury*, 112 Mass. 1; *Van Sicklen* v. *Burlington*, 27 Vt. 70.

A vote of a town to raise or pay money for any purpose not authorized by the statute is void. As stated in *Anthony* v. *Adams*, 2 Met. *supra*, 286, "For it is now well settled that a town, in its corporate capacity, will not be bound, even by the express vote of a majority, to the performance of contracts, or other legal duties, not coming within the scope of the objects and purposes for which they are incorporated."

The warrant calling a town meeting shall specify the place at which the meeting shall be had. R. S., c. 3, § 5.

The place appointed for holding this meeting was at Union hall basement. This means within the walls of said basement. It could not meet and organize at any other place. *Chamberlain* v. *Dover*, 13 Maine, 466; *Sherwin* v. *Bugbee*, 16 Vt. 439; Dillon's Municipal Corp. 3rd ed. 267.

Even if all the voters of the town assent to and are present at a place other than that at which the meeting is called, the doings will have no validity. *Moor* v. *Newfield*, 4 Maine, 44; *Jordan* v. *School Dist.* 38 Maine, 170; *Sherwin* v. *Bugbee*, 17 Vt. 337; Dillon, § 266, 7nd. ed.

Dillon § 269, says that the majority may adjourn to another place within the corporate limits "if fairly done."

In *Chamberlain* v. *Dover*, *supra*, it is said, "We do not say that they may not have the right to adjourn to another place. But there should be limitations to the exercise of such discretion. "The law is strictly held as to the important particulars of time and place." Dillon, § 267.

That a town may, at any time before the rights of third parties have intervened, lawfully rescind previous votes is too well settled to require argument. Dillon, § 290 and notes 2 and 3; *Hunneman* v. *Grafton*, 10 Met. 456; *Withington* v. *Harvard*, 8 Cush. 68; *Getchell* v. *Wells*, 55 Maine, 433; *B. & M. L. R. R. Co.* v. *Unity*, 62 Maine, 148.

A vote by a municipal or other corporation to ratify the unauthorized acts of its officers must be as explicit and clearly expressed as would be required in a vote granting previous authority to the officers to perform such acts. *Salem Bank* v. *Gloucester Bank*, 17 Mass. 28. The cases in which a vote of a town to pay or refund money has been held not revocable, are not applicable to the case at bar. The vote in that class of cases are, like that in *Nelson* v. *Milford*, 7 Pick. 18, to indemnify officers of the town, who acting illegally but in good faith, or like that in *Hall* v. *Holden*, 116 Mass. 172, to pay money which, through the acts of its agents, has been paid wrongfully into the treasury of the town.

If the plaintiff has the right under the vote to rely upon the original transaction between Arey and Ritchie and the lender of the money, and upon the disposition of the money borrowed, the facts disclosed by the testimony are not sufficient in law to render the town liable, even if the vote of December 6, shall be regarded as a ratification of the act of the selectmen in borrowing the money. Assuming that the parties to that transaction have testified truthfully in relation thereto, it appears that the mining company through Mr. Fernald, its treasurer, loaned to Arey and Ritchie, the selectmen of the defendant town, the sum of $550, upon the supposed credit of the town, but without the authority of the town. Such loan is the basis of the plaintiff's suit.

His case comes precisely within the decisions of several recent

cases in this state, in which the law applicable to such a state of facts has been so thoroughly discussed, and so explicitly, decidedly and deliberately stated by this court as to hardly require further discussion or citation of authorities. *Parsons* v. *Monmouth*, 70 Maine, 262; *Billings* v. *Monmouth*, 72 Maine, 174; *Belfast Nat. Bank* v. *Stockton*, 72 Maine, 522; *Lincoln* v. *Stockton*, 75 Maine, 141; *Otis* v. *Stockton*, 76 Maine, 506; *Atkinson* v. *Minot*, 75 Maine, 189.

"An absolute excess of authority by the officers of the corporation, in violation of law, cannot be upheld." Dillon, § 463.

"Transactions which are absolutely illegal or *ultra vires* cannot be ratified." Green's Brice's *Ultra Vires*, 550.

"No sort of ratification can make good an act without the scope of the corporate authority." *Peterson* v. *The Mayor*, 17 N. Y. 449.

EMERY, J. This action, though in the name of nominal assignee, Brown, is in fact brought by the Mineral Hill Mining Company, to recover of the town of Winterport, money alleged to have been loaned to the town by that company. Two of the three selectmen of the town, Arey, (chairman) and Ritchie, assuming to act in behalf of the town, borrowed of the plaintiff company $550 as for the town, and gave what purported to be a town note therefor, signed by them as selectmen. This was May 31, 1881.

This transaction alone of course does not imply a promise by the town to repay the money. To imply such a promise, the plaintiff must establish by evidence two other propositions of fact. 1. That the money so obtained was either paid into the town treasury or was applied in fact to the discharge of lawful liabilities of the town to that extent. 2d. That the town ratified the action of the selectmen in so borrowing and applying the money. *Lincoln* v. *Stockton*, 75 Maine, 141; *Otis* v. *Stockton*, 76 Maine, 506.

I. Ritchie, one of said selectmen, testified that all the money thus borrowed was at once used to pay off and take up outstanding town orders, previously given for and representing legal

liabilities of the town for ordinary municipal purposes, such as schools, streets, the poor, &c. He does not now profess to remember the dates, numbers, amounts, or payees of each, or many of these orders nor for what purpose each was given. He does state quite fully as to some of them. He testifies however, that all the orders were produced at the time by Mr. Arey, the chairman, that he and Mr. Arey examined them, that he was satisfied at the time of their authenticity, and that they were regularly issued for the usual municipal purposes,— that they were recorded with dates, numbers and amounts, &c., upon the book used by the town officers to record paid town orders. The amount was $553. He says that after being thus recorded, they were cancelled on the spot by burning. The book was left with Arey, the chairman, and it is claimed it was afterward burned in the fire that consumed Arey's store.

Ritchie further testifies, that a list or memorandum of all these orders was read to the town meeting held Dec. 6 1884, a meeting called to consider the question of re-paying this money and which voted to do so. Mr. Ritchie is not contradicted, and although the evidence is not wholly satisfactory, and is not so clear and full as we could wish, we think it fairly sustains the proposition, that the money was in fact applied to the discharge of the town's legal indebtedness to that extent.

Mr. Arey was the holder of these orders, and the defendants urged, that the money could not lawfully be applied to the orders held by him, as he was, (as the defendants say) indebted to the town at the time, in a much larger sum; indebted not simply as a debtor, but as a town officer for money of the town wrongfully appropriated to his own use. Much evidence is in the case upon this question of Arey's indebtedness to the town. We do not think it matters, whether and how he was indebted. The plaintiff, in the absence of fraud, (and no fraud upon his part is suggested,) would not be affected by the state of the accounts between Arey and the town. If Arey was indebted to the town even for the money wrongfully appropriated, the town was also indebted to him. Each indebtedness was distinct, and of a different nature. Each was outstand-

ing. Neither had been applied toward liquidating the other. He was the holder of certain audited claims against the town, and the plaintiff's money extinguished them. The town thus had the benefit of the money.

II. Two of the selectmen for the year 1884, gave the plaintiff company a town order for $618.13, dated July 7, 1884, to take up the original note, that sum being the amount with interest. They afterward called a town meeting, to see if the town would vote to pay this order among others. At this meeting held Dec. 6, 1884, it was voted that the treasurer hire money to pay the various notes and orders named in the warrant, including the order to the plaintiff company. This official vote, if valid, would seem to be an effectual ratification of the act of the selectmen in borrowing the money and giving the town order.

The defendants contend that the article in the warrant was too indefinite and general to authorize such a vote. Instead of a separate article for each note or order to be submitted to the town, there was one article naming distinctly and separately all the notes and orders to be acted upon. This particular order was named in the article by date, amount and name of payee. We think the warrant gave a notice sufficiently specific.

The defendants further contend that the vote was illegal, for the reason that it was not passed within the walls of the room named in the warrant as "Union Hall basement;" but was passed just outside, in the open air, in front of the building. It seems there was by reason of the crowd, considerable difficulty in ascertaining the will of the meeting, while within the room, and calls were made from the floor that the division be had outside the building. These suggestions seem to have met with general approval and no opposition. The people at once all passed out of doors, the moderator and clerk with them. The meeting then divided, and the count was made in the open air close to the building. There was no formal adjournment from the room to the open air, but what was done, seems to have been done spontaneously and by unanimous consent. There was no abridgement of freedom of speech, or of vote. No person was misled. No person was prejudiced. The effort was to obtain greater freedom, and more certain expression of the real will of

the meeting. The act complained of now, was not complained of then. It was not the omission of any necessary step in the procedure, nor the interpolation of any illegal restrictive step, but simply the well doing outside the walls, what could not have been well done inside the walls. It is a maxim of parliamentary law that anything, as to the mode of action, may be done by unanimous consent.

It will be seen upon a careful examination of the cases cited by the defendants to this point, that they do not conflict with our reasoning. In those cases it appeared that some persons' rights were abridged, or that the meeting itself was unauthorized. The following authorities cited by the plaintiff sustain the vote *Dole* v. *Irwin*, 78 Ill. 170; *People* v. *Kniffin*, 21 How. Pr. 42.

The defendants again claim, that if we find there was a valid ratification, it was effectually rescinded by a subsequent vote at a legal meeting, Aug. 15, 1885, passed before the treasurer had obeyed the former vote. The act ratified however was the borrowing the plaintiff's money by the then selectmen. That act had been done. The vote of ratification at once applied to the act, and adopted it as the act of the town. The act was then as binding on the town, as if the vote were prior in time to the act. It was then the town's act. The town had borrowed the plaintiff's money. A ratification after the act is as potent as authority before the act. The act is equally binding upon the principal in either case, and in neither case can the principal, after the act, relieve himself by a simple declaration of his change of mind. The cases cited by the defendants do not hold to the contrary.

We think the evidence fairly establishes the propositions: that the money was borrowed for the town,— that it was used by the town in payment of proper municipal charges,— that the town has ratified the borrowing, and has ratified the giving the order declared upon. *Judgment for plaintiff for $618.13, with interest from December 9, 1884, the date of demand.*

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

EMERSON W. BRYANT *vs.* MAINE CENTRAL RAILROAD COMPANY.

Franklin. Opinion March 14, 1887.

Deed. Boundary. Record. Notice.

When one accepts a deed bounding him by another's land, the land referred to becomes a monument which will control distances, and the grantee can hold no portion of the other's land, although his deed of it is not recorded.

The plaintiff was bounded by the "east bound of the Maine Central Railroad." To give him the quantity of land described in his deed, he must overlap the railroad just half a rod. The deed to the railroad was not acknowledged, although actually recorded, and the plaintiff had no actual notice of the true location of the east side line of the railroad when he took his deed. *Held*, in an action to recover that half a rod strip from the railroad company, that judgment must be entered for the defendant.

ON report upon agreed statement.

Writ of entry to recover a strip of land half a rod in width across the Lorenzo Keyes farm in Jay, from the easterly side of the railroad.

J. C. Holman and S. C. Belcher, for the plaintiff.

This case is to be distinguished from *Bonney* v. *Morrill*, 52 Maine, 252. In that case, the grantor bounds his grantee by "land now or formerly owned by Isaac Bonney," without in any way stating or suggesting where said Bonney's boundary line was. The grantee was put on his guard, by the language used, to inquire and learn for himself where "the land now or formerly owned by Isaac Bonney" was situated. The court have good reason to say that they cannot presume the grantor intended a fraud upon his grantee.

In this case, however, the grantor expressly points out the line of the defendant's land by establishing a monument which he says is twelve feet from the easterly line of defendant's land. Plaintiff had no occasion to make further inquiries. He relied, and had a right to rely, upon the statement of his grantor, who had full knowledge of the boundaries. In *Bonney* v. *Morrill*, there was some ambiguity in the description. There were two monuments, either of which would answer the call in the deed. In this case there is no ambiguity. The plaintiff's deed embraces without question, in fact the case so finds, the land in contro-

versy. The only question is whether or not he can hold all the land described in his deed. We contend that he can.

Frye, Cotton and White, for the defendant, cited: *Bonney* v. *Morrill*, 52 Maine, 256; *White* v. *Jones*, 67 Maine, 20; *Wiswell* v. *Marston*, 54 Maine, 270; *Wellington* v. *Fuller*, 38 Maine, 63; 2 Pom. Eq. Jur. § 600.

WALTON, J. We think judgment must be rendered for the railroad company. It appears that in 1856, Lorenzo Keyes conveyed a strip of land five rods wide for a railroad. That strip of land is now held by the Maine Central Railroad. In 1879 he conveyed another parcel of land to the plaintiff, bounding him on the west by the "east bound of the Maine Central Railroad." Two stone monuments are mentioned in his deed. One of them is described as standing ten feet, and the other twelve feet, from the east bound of the railroad. And if these distances are adhered to, the plaintiff's land will overlap the land of the railroad just half a rod; for the land of the railroad is just half a rod nearer to these stone monuments than the distances named in the plaintiff's deed. And this half rod is the land in dispute. The plaintiff had no actual notice of the location of the side lines of the railroad, and he says that he supposed the east bound to be where his deed indicated. And he says that he is not chargeable with constructive notice, because the deed to the railroad, although actually recorded, was not legally recorded, it not having been acknowledged. And for these reasons, he insists that he should be allowed to hold to the full extent of the distances named in his deed. To this the defendant replies that when one accepts a deed bounding him by another's land, the land referred to becomes a monument which controls distances, and that the law will not allow him to overlap and hold any portion of the other's land, whether the latter's deed of it is or is not recorded. We think the defendant's position is correct. It is sustained by the decision in *Bonney* v. *Morrill*, 52 Maine, 256; and upon principle we think such ought to be the law.

Judgment for the defendant.

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

STATE *vs.* WILLIAM BEATON.

Lincoln. Opinion March 14, 1887.

Complaint. Pleading.

Neither a complaint nor an indictment for a criminal offense is sufficient unless it states the day, as well as the month and year, on which the offense was committed.

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

An appeal from the decision of a trial justice on a complaint and warrant for fishing for and catching lobsters in violation of law.

Roswell S. Partridge, county attorney, for the state.

Hilton and Huston, for the defendant, cited: *State* v. *Baker*, 34 Maine, 52; *Moody* v. *Hinkley*, 34 Maine, 200; *State* v. *Hanson*, 39 Maine, 337.

WALTON, J. Neither a complaint nor an indictment for a criminal offense is sufficient in law, unless it states the day, as well as the month and year, on which the supposed offense was committed. In this particular, the complaint in this case is fatally defective. It avers that "on sundry and divers days and times between the twenty-third day of September, A. D. 1885, and the thirtieth day of September, A. D. 1885," the defendant did the acts complained of. But it does not state any particular day on which any one of the acts named was committed. Such an averment of time is not sufficient. *State* v. *Baker*, 34 Maine, 52; *State* v. *Hanson*, 39 Maine, 337, and authorities there cited.

Exceptions sustained. Complaint quashed.

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

JOSEPH TITCOMB

vs.

KENNEBUNK MUTUAL FIRE INSURANCE COMPANY.

York. Opinion March 14, 1887.

Corporations. Mutual insurance companies. Assets. Dissolution.

When a corporation, which, like a mutual insurance company, has no stockholders, is dissolved, its personal property, if any, which remains after discharging all liabilities against the company, vests in the state.

ON report.

Bill in equity to dissolve the defendant corporation and obtain an order for distribution of the fund remaining on hand.

Walter L. Dane, for plaintiff.

R. P. Tapley, for the corporators.

Bourne and Son, for policy holders.

In *Carlton* v. *Southern Mut. Ins. Co.*, decided by the Supreme Court of Georgia, June 10, 1884, reported in the Reporter July 16, 1885, the court hold, "That a mutual insurance company is based on the idea that each of the assured becomes one of the assurers, and thereby becomes interested in the profits, and liable for the losses. That such an organization, without a charter, would be governed by the general law regulating partnerships, and except as governed by the charter. Equity will apply the law of partnership in respect to the interest in and division of profits."

WALTON, J. The Kennebunk Mutual Fire Insurance Company was incorporated in 1856. It has issued no policies since 1877.

In 1884, its last policy having expired, the company voted to close up its affairs and to do no more business. A decree has been obtained at *nisi prius* dissolving the corporation, from which no appeal has been taken or claimed; and the only question before the law court is to determine what shall be done with the assets of the company. Our statutes contain ample provisions for the disposition of the assets of stock companies.

R. S., c. 46, § § 25, 26, 27 and 54. But this is a mutual company and has no stockholders, and the provisions cited do not apply. According to the old settled law of the land, says Chancellor KENT, upon the civil death of a corporation, when there is no special statute to the contrary, all its real estate reverts to the grantors and their heirs, and all its personal estate vests in the people. 2 Kent, (10th ed.) 385–6. To the same effect is Angell and Ames on Cor. c. 22, § 6 (2d ed.).

But it is said that in this class of cases the corporators named in the act of incorporation should be regarded as stockholders. They are not stockholders; and to hold that they are would be a fiction, and fictions are not favored, and are never resorted to except to work out some strong and inherent equity; and there is no such equity in favor of the corporators of a mutual insurance company. They contribute nothing towards its assets, and we think it would be against public policy to allow them to have a pecuniary interest in them. Such an interest would inevitably tend to create a temptation to fix the rates of insurance higher than would be necessary to meet losses; and then, when a surplus had been thus obtained, to divide it among themselves, and thus reap a profit from a business in which they had invested no capital and had taken no risks; and this at the expense of the policy holders. We think there is a much stonger equity in favor of the former policy holders, whose money has contributed to produce the assets. But we do not think they can be regarded as stockholders after their policies have expired and their premium notes have been cancelled or given up to them. They have then received in full the benefits for which they contracted, and are no longer members of the company; and to distribute among them a small amount of assets, and to determine what each former policy holder's share ought in equity to be, would be attended with difficulties and an amount of labor which the end would not justify. When a man dies leaving no wife or kindred, his property descends to the state. And when a corporation, which, like a mutual insurance company, has no stockholders, ceases to exist, we are not prepared to say that the

rule of the common law, which gives its surplus assets to the state, is not a wise one.

But it is said that unless the corporators can be regarded as stockholders, the court has no authority to decree a dissolution of the corporation. It is a sufficient answer to this argument to say that the question of dissolution is not before the law court. The court at *nisi prius* decreed a dissolution in May, 1885. From that decree no appeal was taken or claimed. It was made at the request of the corporators; and so far as appears, no objection was made by any one. Thereupon a receiver was appointed and the case was sent to a master; and it was upon the coming in of the master's report that the question, and the only question now before the law court, was first raised. It is now too late to object to the dissolution of the corporation. The only question is what shall be done with the small amount of assets now in the possession of the receiver. They amount to only one thousand four hundred and three dollars and twenty-three cents, and a safe.

It is the opinion of the court, and it is accordingly ordered and decreed that the receiver pay the costs of this suit, including reasonable counsel fees, and that he pay the balance, if any shall remain, to the state treasurer for the use of the state.

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

CHARLES L. GORHAM *vs.* AARON B. HOLDEN.

Cumberland. Opinion March 22, 1887.

Lease of piano. Conditional sale. Waiver.

By a written agreement between G and B dated December 5, 1872, G agreed to lease to B a piano for two hundred dollars in advance, and fifty dollars thereafter quarterly, with interest at seven and three-tenths per cent; and G further agreed that when five hundred dollars had thus been paid for the use of the piano, he would give B a bill of sale of it. The agreement gave G authority to enter any dwelling of B and take and carry away the piano upon failure of any payments. The advance payment was then made and the

piano delivered. After that payments were made from time to time until October 9, 1874, when all the payments aggregated five hundred dollars. B continued in the undisturbed possession of the piano until her death in June, 1884. No claim of title nor demand for further payment was ever made upon her by G.

Held in an action of trover by G against B's executor that the pretended lease was a conditional sale, and if it was a sale upon a condition precedent, the condition had been waived in B's lifetime.

On report from superior court.

E. S. Ridlon for plaintiff.

The sum and substance of defendant's brief is based upon the assumption, that the performance of the condition of the sale was waived by the vendor. We say assumption, because there is nothing in the case upon which to base a waiver, unless indeed, it be that plaintiff's indulgence to Mrs. Barnes, permitting her to continue in possession of the piano, without having paid for it, for so long a time operates as a waiver of all his rights under the agreement. But does that alone amount to a waiver? Waiver is the intentional relinquishment of a known right. *Dey* v. *Martin*, 16 Reporter, 443; 32 Conn. 21.

Mere silent acquiescence does not amount to a waiver. *Adams* v. *One Knob Copper Co.* U. S. C. C. 12 Reporter, 166.

A party shall not be allowed to insist upon a forfeiture arising from non-performance which is the result of his own acts. *Haynes* v. *Fuller*, 40 Maine, 169.

Symonds and Libby and A. B. Holden, for the defendant, cited: *Murch* v. *Wright*, 46 Ill. 487; *Hervey* v. *R. I. Locomotive Works*, 93 U. S. 664; Benjamin, Sales, § 566; *Carleton* v. *Sumner*, 4 Pick. 516; *Upton* v. *Sturbridge Cotton Mills*, 111 Mass. 446.

Haskell, J. Trover for a piano.

The plaintiff pretended to lease to the defendant's testatrix a piano of the stated value of five hundred dollars, for the term of three months upon a cash payment of two hundred dollars, and so long thereafter as payments of fifty dollars should be made at the end of each ensuing three months, until the full sum of five hundred dollars should be paid with interest at seven and three-

tenths per cent, when the testratrix should receive a conveyance of the piano.

The testatrix, at the date of the pretended lease Dec. 15, 1872, paid two hundred dollars and received the piano. Installments were endorsed upon the pretended lease until Oct. 9, 1874, when together with the first payment they aggregated five hundred dollars. The testatrix retained the piano until her death in June, 1884, nearly ten years, without any request by the plaintiff, either for payments of interest, or for surrender of the piano. That came to the defendant as executor of the supposed vendee, and after demand for the same by the plaintiff, the defendant sold it for one hundred twenty-five dollars.

The pretended lease contains all the necessary stipulations of a conditional sale. The price and when and in what installments the same was to be paid are all stipulated, and the property sold was delivered to the vendee to become hers when she had fully paid for the same. The sale may have been upon condition precedent, but that the plaintiff could waive, if he saw fit; whether he has done so is a question of fact to be determined from the evidence in the case; *Farlow* v. *Ellis*, 15 Gray, 229; and if the condition has been waived, the title has passed to the vendee. *Seed* v. *Lord*, 66 Maine, 580; *Stone* v. *Perry*, 60 Maine, 48; *Whitney* v. *Eaton*, 15 Gray, 225.

For nearly ten years after the plaintiff had received the full price for his piano, he allowed the vendee to retain it without requesting the payment of interest, or pretending any title to it, and not until after the death of the vendee, did he make any claim to the same. Considering that indorsements were made by the parties upon the agreement between them without any mention of interest, and that the stipulated price of the piano had been fully paid for so long a period prior to the vendee's death, during which time she was allowed to retain it without any suggestion from the plaintiff that it was not hers, the conclusion is irresistible, that both parties must have understood that any condition in the agreement requiring payments to vest the title to the piano in the vendee had been waived by the plaintiff; and the court is satisfied that the waiver has been

proved, and that the title to the piano came to the defendant as executor of the vendee.

Judgment for defendant.

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

SAMUEL B. HINCKLEY *vs.* DANIEL HINCKLEY and another.

Penobscot. Opinion March 23, 1887.

Witness. R. S., c. 82, § 98. Equity. Trust. Conveyance.

The plaintiff in a suit in equity cannot be a witness where the defendants are "made parties as heirs of a deceased party."

It would be a fraud in equity to convert into an absolute sale that which was intended for a different purpose.

A son conveyed to his mother all the estate which he inherited from his father and received from her an agreement to reconvey when he paid her an indebtedness of a specified amount. She thereafter kept a strict and detailed account of the property and its income and regularly paid her son the net income. She repeatedly spoke of it in her letters to him as his property. She willed it to another to hold in trust for her son. There was no account of any indebtedness of the son to his mother and no evidence of any save the paper she gave him when she received from him the conveyance. *Held*, that the mother held the property in trust for the son and that the trust terminated at her death.

ON report.

Bill in equity.

John Varney, F. H. Appleton and Hugh R. Chaplin, for the plaintiff, cited: *Gerrish* v. *Towne*, 3 Gray, 82; *Stearns* v. *Hall*, 9 Cush. 31; *Blood* v. *Hardy*, 15 Maine, 61; *McClellan* v. *McClellan*, 65 Maine, 500; 1 Perry, Trusts, § § 86, 81, 82; Brown, Stat. of Frauds, § § 97, 111; Lewin, Trusts, 201; *Rogan* v. *Walker*, 1 Wis. 527; *Faxon* v. *Folvey*, 110 Mass. 392; *Haskell* v. *Hervey*, 74 Maine, 196; Jones, Mortgages, § 248; *Kerr* v. *Gilmore*, 6 Watts, 405; *Murphy* v. *Calley*, 1 Allen, 107; *Campbell* v. *Dearborn*, 109 Mass. 140; Jones, Mortgages, § 265; Kent's Com. *144 note d (12 ed); *Henry* v. *Davis*, 7 Johns. Ch. 40; *Stinchfield* v. *Milliken*, 71 Maine,

567; *Corvell* v. *Hall*, 22 Mich. 377; *Truck* v. *Lindsey*, 18 Iowa, 504; *Peugh* v. *Davis*, 96 U. S. 332.

Wilson and Woodard, for the defendants.

Up to the time of the production of the papers by Mr. McCrillis, defendant's counsel had regarded the transaction between the mother and son as similar to the transactions in the case *Hunnewell* v. *Lane*, 11 Met. 163, where a daughter had been persuaded by her father to place in his hands some thousands of dollars worth of property to protect it against her inability to take care of it, and upon the death of the father, and his estate being represented insolvent, a bill was brought by the daughter for a conveyance, and it was decreed.

The letters of Mrs. Hinckley to Samuel, are largely relied upon to maintain the bill. We submit that there is nothing in them inconsistent with our view of trust for the security of property for the son, and an equitable mortgage for the security of the debt due from the son to the mother.

It is not denied that in case of an instrument absolute upon its face, with no instrument of defeasance back, parol testimony might be admissible to prove, that it was really intended as security for a debt, but, when, as in the case at bar, there is an instrument of defeasance, free from any imputation of fraud, accident or mistake, unambiguous in its terms, parol evidence cannot be admitted to vary, add to or contradict the written instrument.

This doctrine is fully discussed in *Campbell* v. *Dearborn*, 109 Mass. 140. Likewise in *Elder* v. *Elder*, 10 Maine, 80, also *Glass* v. *Hulburt*, 102 Mass. 24; *Chadwick* v. *Perkins*, 3 Maine, 399.

The case *Woolen* v. *Hearn*, reported in White and Tudor's Leading Cases in Equity, vol. 2, part. 1, p. 920, lays down the doctrine, which seems to be founded on good reason that "though a defendant, resisting a specific performance, may go into parol evidence to show that by fraud the written agreement does not express the real terms, a plaintiff cannot do so, for the purpose of obtaining a specific performance with a variation."

The testimony of Samuel B. Hinckley is not admissible under the first of the statutes of this state relating to evidence in cases in which an executor or administrator is a party. R. S., c. 82, § 98, sub. § 11; *Hall* v. *Otis*, 77 Maine, 122; Dwarris on Statutes, p. 199.

The control of the question of the costs of these proceedings is wholly with the court. We cite 2 Perry on Trusts, § 892, 899, 928; 1 Perry on Trusts, § 245; *Stilson* v. *Leeman*, 75 Maine, 412.

HASKELL, J. Bill to regain an estate, partly real and partly personal, of the approximate value of $100,000, conveyed by the orator to his mother in her lifetime to be held by her, either as a personal trust for his benefit, or in equitable mortgage to secure advances made to the orator, or for his benefit, and interest upon the same.

The answer admits, that on January 8, 1868, the orator conveyed the real estate to his mother and received from her a writing, promising to reconvey the same upon payment of all sums of money then due to her from the orator within one year, and that on June 3d of the same year, he conveyed to her the personal estate, but avers, that he then received a writing from her in place of, and as a substitute for, the writing of January 8, whereby she promised to reconvey both the real and personal estate to the orator upon condition only, that he should pay her $12,817.56, with interest, one half in two months, and the other half in six months, when the writing should become void, and that the orator has not paid any part of the sum mentioned, but has forfeited all right to reclaim his estate, and that his mother in her lifetime acquired the absolute title to the same, and by a codicil to her will, that has been proved and allowed in the probate court, devised the same to the respondent, Daniel, in trust nevertheless for the orator during his life, and at his death to descend to his children if any, if not then to be divided among her heirs, and that the respondent, Daniel, at the death of the mother took the estate, and has since held the same pursuant to the trust created by the mother's will as he has a legal right to do.

It appears that the orator had been improvident, and had incurred debts, and was inclined to be wasteful of property that he had recently inherited from his father, and had expensive, if not dissolute habits, and that his mother, desirous to preserve the property for him and to prevent its waste, induced him to convey the same to her upon the terms mentioned in the writings between them; that she took possession of the property and managed and controlled it until her death, July 10, 1883, meantime paying to the orator the net income as it accrued, of which she kept a strict and detailed account; that she left no account showing the indebtedness of $12,817.56, or any writing explaining the same or its origin, or any credit or writing showing that any part of the same had been paid.

The cause comes up on report, with a stipulation that objection to the competency of witnesses, or to the admissibility of evidence, may be made at the trial.

Objection is well taken to the competency of the orator as a witness, inasmuch as the respondents are "made parties as heirs of a deceased party," and his testimony must be laid out of the case. R. S., c. 82, § 98. *Simmons* v. *Moulton*, 27 Maine, 496; *Burleigh* v. *White*, 64 Maine, 23; *Wentworth* v. *Wentworth*, 71 Maine, 72; *Higgins* v. *Butler*, 78 Maine, 520.

The respective legal rights of the mother and of the orator flow from the written instruments between them; but extraneous evidence is admissible to prove every material fact known to the parties when the writings were executed. *Conway* v. *Alexander*, 7 Cranch, 218; *Morris* v. *Nixon*, 1 How. 118; *Russell* v. *Southard*, 12 How. 139.

The deed and memorandum of June 3d, do indicate an absolute sale; but the question recurs, whether the "terms were not adopted to veil a transaction" widely differing from the appearance that it assumed? It would be fraud in equity to convert into an absolute sale that which was intended for a different purpose. *Whittick* v. *Kane*, 1 Paige, 202; *Taylor* v. *Luther*, 2 Sumner, 228; *Flagg* v. *Mann*, 2 Sumner, 486; *Jenkins* v. *Eldredge*, 3 Story, 181; *Wyman* v. *Babcock*, 2 Curtis, 386; s. c. 19 How. 289; *Campbell* v. *Dearborn*, 109 Mass. 130; and to

determine this, the court must look through the cloak that conceals the real truth, and consider from the light thrown upon the transaction by all the circumstances surrounding it what the real purpose and intent of the parties must have been. *Peugh* v. *Davis*, 96 U. S. 332.

In this case, a mother saw her son improvident, wasteful of his substance, and it may be, of dissolute habits; she knew that he had incurred debts, and was likely to incur other liabilities and indulge in expenditures that not only threatened his personal welfare, but as well the consuming of a large estate, recently inherited from his father, her husband. She first took from him a conveyance of all his real estate, and gave in return a writing that she would reconvey the same upon payment within one year of all the sums he owed her and interest. Six months later she received all his personal property, and gave in return a writing to reconvey both the real and personal estate upon payment to her within six months of nearly thirteen thousand dollars with interest. The security exceeded the supposed debt nearly or quite eight fold. She must have known that he had no means to pay so large a debt, save from the property she had received. How the debt arose, the evidence does not show. She left nothing to show it. What then can be the true interpretation of the contract between the mother and son, unless it be, that she acquired his property to preserve it, and incidentally to secure her from loss for advances made for his benefit?

The bill is framed in a double aspect; either that the mother was an equitable mortgagee, or held the estate as a trust, voluntarily created by the orator for his own benefit; and it may be of little practical consequence in which capacity she held the estate. That the transaction of June 3, might well be held to create an equitable mortgage, if the debt named in it was real, there can be little doubt; but the evidence, touching the mother's treatment of the property for the sixteen years that she held it prior to her death, and her written declarations to the orator concerning it, may as well be held to prove, that she did not claim to hold the property simply in mortgage, but rather that she held the property by what she considered "a sacred trust for her son."

An express trust concerning lands can only be created, or declared, by some writing signed by the party or his attorney. R. S., 1857; 1883, c. 73, § 11; and the writing need not be made at the time of the principal transaction; it may be made subsequently; and it is sufficient, though it be informal, if the terms of the trust can be understood from it. *McClellan* v. *McClellan*, 65 Maine, 500 and cases cited. *Faxon* v. *Folvey*, 110 Mass. 392.

So soon as the mother acquired the property, she began a detailed account of its income; and as long as she lived, caused a strict account of income and expenditure to be kept touching it, and promptly paid to the orator the net income as it accrued, without deducting a farthing in payment of any supposed debt of her own, or of interest upon it, or for her own services in the management of the property. Her letters to the orator show how tenderly her affections followed him in sickness and in health, and how solicitous she was, that the income from his property should be as large as possible. In one letter she says, "You seem to feel, and have no confidence in me, when I have written you repeatedly, that I considered your property in my hands, as sacred as my own heart's blood. I have done the very best for you that I could. I have wished many, many times, that you had never put your property into my hands, for it has caused me so much care and trouble, but it has been much better, for you have received your income regular, without any trouble or expense." . . . I shall do right by you. You say you have nothing to show in case I am taken away. You have my letters; besides, there is plenty of evidence among my papers that your property is all right." Again she writes, "You may rest assured, I shall always send you all of your interest, except enough to pay your taxes. . . . I think yours is invested as well as it can be these times." Again she writes, "Your income is a little more this year. I send you $200 this month, and shall continue to send you the same amount every month as long as your property yields it."

These letters plainly enough declare, that she held the orator's property in trust for his benefit, and her own conduct conformed

to the declarations of her pen. She writes the orator, "I shall always send you all of your interest except enough to pay your taxes." And at her death she left a will, providing that all of the orator's estate should be held in trust, the income to be paid to him during life, and the principal to be distributed among his heirs at his death.

The memoranda of January 8, and of June 3, are evidence of the relation of debtor and creditor; and that of June 3, is the only evidence in the case of the amount of the mother's supposed debt. It is not signed by the orator, nor is it made the basis of his claim by any averment in his bill. The respondents set it up in their answer as containing a condition, for the breach of which, the orator has forfeited all right to regain the property conveyed to his mother, and the orator replies that the debt named in it is wholly fictitious, and stoutly contends that the circumstances under which it was given, and the conduct of the mother for sixteen years while she held, managed and paid over to him the income of his property, without ever suggesting that it was burdened with a debt of nearly $13,000, or making any charge or entry of the same in her book of account with him, outweigh all evidence of the debt from the writing itself.

The accounts of the mother show that she has been repaid all sums that she had charged to the orator, and that at her death she held a cash balance of income from his estate of $2,242.50.

The court is constrained to believe, that the $12,817.56 mentioned in the writing of June 3d is not due from the orator, but that it is a fictitious sum written for the appearance of a debt when no debt existed. She charged the orator for payments of money made for him during the year prior to June 3, 1868, and on the 31st of July, 1868, charged him with $2,172, paid upon her note given June 2d, the day before the date of the writing of June 3d, in payment of sundry executions against him, but made no charge of the $12,817.56 mentioned in that writing. It is improbable that she could have kept so detailed and strict an account with the orator and not have charged him with all that he owed her. Moreover, if she had advanced so large a sum, is it possible that for sixteen years she would not have men-

tioned it to some of her relatives, or friends, or counsellors, or have referred to it in some of her numerous letters to the orator? On the contrary, her letters clearly show that she considered all the property that she had received from the orator as his, and so treated it as long as she lived. Her conduct and her letters repudiate any claim for the $12,817.56 now sought to be charged upon the orator's estate, and must be held to overcome the writing of June 3d in that particular.

The trust assumed by the mother was personal, and terminated with her own life. *Hunnewell* v. *Lane*, 11 Met. 163; she could not delegate it, or by devise continue it. It follows, therefore, that the respondent Daniel, the executor of the trustee, should account for the personal estate that his testatrix held belonging to the orator, and should pay over the same to him. The respondents, heirs of the testatrix, should release their interest to the orator in the real estate that he conveyed to her by deed of January 8, 1868, and neither party should recover costs. In case of disagreement about performing the final decree, either party may apply for relief by written application in this cause.

Decree accordingly.

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

WILLIAM F. ALLEN and another

vs.

MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion March 24, 1887.

Carriers. Stoppage in transitu.

A notice by the shipper to the carrier, not to deliver goods in transit, to the consignee, need not state the reason.

Upon receiving such a notice the carrier replied that the shipper would have to prove property, and thereupon the shipper forwarded his affidavit that he was the shipper and annexed to it an invoice of the goods. Before receiving the affidavit the carrier delivered the goods to the consignee. *Held*, that the carrier was liable to the shipper for the value of the goods.

ON report, upon agreed statement of facts, from the superior court.

Case for the value of four bales of woolen rags of the value of of $176.41, shipped by William F. Allen and Co. of Philadelphia, to William Beatty of Gray, Maine.

Soon after Allen and Co. parted with the goods they learned that Beatty was insolvent, and notified the station agent of defendant company who had charge of receipts and delivery of freight at Gray, Maine, to stop the transit of the goods. They gave this notice by the following telegram received at quarter past three of the afternoon of its date. "Philadelphia, March 24th, 1884. Stop and return four bales rags consigned to William Beatty, No. Gray, Maine, marked Diamond P. with B. outside. W. F. Allen & Co."

They also at the same date, March 24th, 1884, instructed the agent of the steamship company, the Winsor Line, to have the stock returned, and wrote a letter in addition to their telegram to the said station agent of the Maine Central Railroad, at Gray, Maine, of which the following is a copy:

"William F. Allen & Co., Woolen Rags, Wool and Hair, No. 132 North St., Phildelphia, March 24, 1884.

"To F't Agt. Maine Central R. R., Gray, Maine Dear sir: We telegraphed you to stop and return four bales rags consigned to William Beatty, No. Gray, Maine, marked Diamond P. with B. outside, we now write to confirm same, inclosed you will find a postal card, please make us an early reply and oblige

Yours truly, W. F. Allen & Co."

A postal card was inclosed, with their printed address upon it, for an answer. In answer to the letter and telegram, A. H. Perley, the station agent at Gray, on March 26, 1884, sent the following message upon the postal card which had been forwarded to him by plaintiffs, to wit:

"Gray, March 26, 1884. Your rags are in freight-house at Gray. Mr. Beatty claims that he can take the rags if he pays the freight. I will do as the company says. A. H. Perley."

This postal card was received by plaintiffs, as appears by the post stamp upon it, March 27th, 1884; and upon the same day plaintiffs sent another letter to Perley, as follows:

"Dear sir: Your postal at hand; we are very much obliged

to you for the information in reference to rags consigned to Beatty; we have instructed the agent of the Steamship Co. here to have the stock returned, which we trust will be successful; and if we do get them back it is all due to your kindness in notifying us. We inclose you a postal which, if not too much trouble, would like you to write and state whether the rags have been shipped back or not. Awaiting your reply, we remain,

Respectfully yours, W. F. A."

Before receiving the last letter Perley, under date of March, 27th, wrote Allen & Co. as follows:

"You will have to prove that those rags are yours before I can send them; Mr. Beatty claims them. A. H. Perley, Agent."

On March 28th, in answer to postal of Perley, of March 27th, just quoted, plaintiffs wrote to Perley as follows:

"Dear sir: Your postal at hand; we have forwarded through the Winsor Line agent our affidavit proving our claim to the goods which will probably arrive at your end of the line in due time. Our attorney advises this course, although our telegram to you would relieve you of any responsibility, but of course you are the judge of that. As soon as our affidavit arrives please return stock. Thanking you for your promptness in answering our communication, we remain, Respectfully yours,

W. F. A. & Co."

On April 1, the general freight agent at Portland received the following letter inclosing an affidavit a copy of which follows:

"Office of the Boston & Phildelphia Steamships, E. B. Sampson, Agent. 70 Long Wharf, Boston, March 31, 1884.

"Mr. W. S. Eaton, General Agent Maine Central R. R. Portland.

"Dear sir: Referring again to the four bales rags consigned to Wm. Beatty, North Gray, Maine, our agents in Philadelphia send me a copy of bill and desposition of shippers which I herewith inclose to you, they further say, 'from what we know of the firm we believe the goods belong to them (the shippers) and that their request to have them returned should be complied with unless there are some legal proceedings to prevent it.' Please advise me result. Yours truly, E. B. Sampson, Agent."

The bill and deposition are as follows:

"Philadelphia, March, 15, 1884.

"Mr. Wm. Beatty, Bought of Wm. F. Allen & Co., Wholesale Dealers of Woolen Rags, Wool and Hair, No. 132 North Front Street.

493	4 Bales Soft Woolens,			
467		1,857	9½	$176.41
456				
441	Marked Diamond P. with B. outside.			

Shipped to North Gray, Maine, via Winsor Line."

"State of Pennsylvania. County of Philadelphia, ss. Before me, the subscriber, a Notary Public, personally appeared William F. Allen, who being duly sworn according to law, doth depose and say that he is a member of the firm of Wm. F. Allen & Co. and that said firm of Wm. F. Allen & Co. shipped four bales of soft woolen rags, as is set out on the invoice hereto attached, marked A. J. R. M. N. P., to Wm. Beatty of North Gray, Maine, by the Winsor Line, via Maine Central Railroad.

William F. Allen."

"Sworn to and subscribed before me the 28th day of March, A. D. 1884. Joshua R. Morgan, Notary Public."

In afternoon of March 31, the station agent at Gray, under threat of immediate suit by Beatty, delivered the goods to him.

Clarence Hale, for the plaintiff.

The notice was sufficient. Benjamin on Sales, (4 Am. ed.) 859; *Holst* v. *Pownal*, 1 Esp. 240; *Northey* v. *Field*, 2 Esp. 613; *Litt* v. *Cowley*, 7 Taunt. 169; *Newhall* v. *Vargas*, 13 Maine, 93; *Mills* v. *Ball*, 2 Bos. & Pul. 457; *Reynolds* v. *B. & M. R. R. Co.* 43 N. H. 580; *Mottram* v. *Heyer*, 5 Den. 633; *Rucker* v. *Donovan*, 13 Kan. 251; s. c. 19 Am. Rep. 85; *Ex parte Falk*, 14 Ch. D. 446. Notice was given proper party. *Whitehead* v. *Anderson*, 9 M. & W. 518; *Litt* v. *Cowley*, *supra*. Carrier liable. 2 Kent's Com. (12 ed.) 605; Benj. Sales, § 861, and cases cited.

Drummond and Drummond, for the defendants.

In the first case of this character at law, the consignee's claim

was not allowed, but in a case in equity, the claim was allowed, "As a matter of equity based upon the equitable lien of the vendor for the price of the goods." 2 Rorer on Railways, 1335. At first the doctrine was that this claim could be exercised only where the consignee became insolvent after the purchase of the goods; but it was soon extended to cases in which he was insolvent at the time of the purchase, but the fact not known to the consignor till afterwards. 2 Rorer on Railroads, 1337, 3.

We invite examination of some text-book law, founded upon dicta of courts. It is said that the consignor, must "serve a notice upon the carrier, describing and identifying the goods, the nature of his claim, the evidence thereof and of his own identity as consignor, and notifying the carrier not to deliver the same to the consignee." 2 Rorer on R. R. 1337, 1338.

The author adds: "After the service of such notice on the carrier, he cannot deliver the goods to the consignee, without rendering himself liable to the consignor, in case it turns out that consignor is entitled to the possession of the goods and incurs a loss by reason of their being delivered to the consignee." *I bid.* 1338.

But suppose they are not delivered to the consignee, and "it turns out" that the consignor is not entitled to the possession? If so delivered, the consignor may maintain trover, to enforce his right, "if well founded." *I bid*, 1338

If not "well founded" cannot consignee maintain trover, if they are not delivered to him? The same author says further, "After notice, it becomes the duty of the carrier to hold the goods, and not deliver them to the consignee. The law will then afford the parties, consignor and consignee, or the assigns of the latter, such opportunity of asserting or enforcing their rights to the property as will effectually guard the interests of the carrier from the responsibility of delivering to either when not entitled to receive the same. We do not conceive it to be the duty of the carrier to decide between them, and actually deliver the goods to the alleged consignor, or that it is required by law, forasmuch as the carrier can seldom, if ever, know, and is not made the judge to decide, whether or not the circumstances exist which reinvest

the property in the consignor, or, indeed, whether the person claiming to be the consignor be, in fact, such or not; and especially on long lines of railways, is personal knowledge the more impracticable. After notice, he occupies the position of a stake-holder between the parties."

And again: "In short, the duty of the carrier, raised by the notice, is a negative one. It requires him to not deliver the goods to the consignee, thereby placing him in the light of a stake-holder of the property for those who may, by legal process, prove themselves entitled to it. It does not make the carrier a judge to decide who is entitled to the property, nor is he bound to take on himself the responsibility of determining that question; but it becomes his duty to hold it, and let the parties assert their rights by judicial process, as in cases of other disputes about property in the hands of a third person, and if need be the parties may be compelled, on general principles, at his application, to interplead with each other as to the ownership or right of possession."

With all deference to the learned author and the other authors whom he quotes, except the statement relating to a bill of interpleader, the whole extract is "a delusion and a snare," legally and practically. It is not law and never has been law. No decided case can be found which holds that a carrier can legally defend an action brought by a consignee for refusal to make instant delivery of goods, on the ground that he had been notified that the consignor claims to stop them *in transitu*, unless he goes further and shows the right of the consignor to stop them.

Benjamin in his work on Sales says: "The usual mode is a simple notice to the carrier, stating the vendor's claim, forbidding delivery to the vendee, or requiring that the goods shall be held subject to the vendor's orders." § 1276.

In a note he says, "If the party in possession is clearly informed that it is the intention and desire of the vendor to exercise his right of stoppage *in transitu*, the notice is sufficient." § 1267, note.

EMERY, J. The only mooted question in this case is, whether the plaintiffs effectually exercised against the carrier their clear right of stopping the goods *in transitu*.

The plaintiffs seasonably telegraphed and wrote the proper officer of the defendant company, (the carrier) to stop, and return the goods. The defendant company contend the notice was insufficient, because there was no statement of the nature or basis of the claim, to have the goods stopped. While such a statement is probably usual, it does not seem necessary in this case. The carrier is presumed to know the law, and by such a notice as was given here, is effectually apprised of a claim adverse to the consignee, as well as of a claim upon himself. In Benj. on Sales, 1276, while it is said that the usual mode is a simple notice to the carrier, stating the vendor's claim, &c., it is also stated, that, "all that is required is some act, or declaration of the vendor countermanding the delivery." BREWER, J., in *Rucker* v. *Donovan*, 13 Kan. 251, (19 Am. R. 84) said, "a notice to the carrier to stop the goods is sufficient. No particular form of notice is required." In *Cleminston* v. *G. T. Ry. Co.* 42 U. C. Q. B. 42, while it was held that the notice was faulty in not identifying the goods, it was said that a specification of the basis of the claim was not necessary.

The defendant further contends, that the plaintiffs' omission to afterward prove to the carrier their right to stop the goods, when requested by the carrier to do so, has vacated their claim, and released the carrier from liability. But the carrier is not the tribunal, to determine the rights of the consignor and consignee. Neither of these parties can be required to plead or make proof before the carrier. No man need prove his case to his adversary. It is sufficient if he prove it to the court. The carrier cannot conclusively adjudicate upon his own obligations to either party. He is in the same position as is any man, against whom conflicting claims are made. If, as is alleged here, the circumstances are such, that he cannot compel them to interplead, he must inquire for himself, and resist, or yield at his peril.

It is reasonable however, that the person assuming the right to stop goods in transit, should act in good faith toward the carrier. He should, if requested, furnish him in due time, with reasonable evidence of the validity of his claim, though it may not amount to proof. Should the consignor refuse such reasonable informa-

tion as he may possess, such refusal might be construed as a waiver of his peculiar right, and might justify the carrier after a reasonable time, in no longer detaining the goods from the consignee. But there was no such refusal here. The plaintiffs sent forward the invoice and their affidavit within a reasonable time.

The plaintiffs have now proved their right to stop the goods, and the defendant company having denied that right without good reason, must respond in damages.

Judgment for plaintiffs for $176.41, with interest from the date of the writ.

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

LUCILLIUS A. EMERY, Executor,

vs.

UNION SOCIETY OF SAVANNAH and others.

Hancock. Opinion March 30, 1887.

Wills. Devises.

When a testator devises real estate and subsequently conveys it to a person other than the devisee, the devise thereby becomes impliedly revoked.

In such case, the proceeds of the sale, in the absence of any specific provision in the will therefor, do not go to that devisee, or, next of kin, but to the residuary legatee or devisee.

ON report.

Bill in equity by the executor of the will of William F. Howland, late of Eden, Maine, to obtain a construction of the will, against the Union Society of Savannah, Ga., and Anna Marion Wirgman, John Myers Durborrow, Richard Newton Durborrow and Savannah Struthers, all of Philadelphia.

Hale and Hamlin, for the plaintiff.

Holmes and Payson, for Union Society of Savannah.

The devise was adeemed. 1 Redf. Wills, *339, *336; 1 Jarman, Wills, (5 Am. ed.) 309; 1 Williams, Executors, 241; Powell, Devises (3 Am. ed.) 376-7; 1 Toller, Executors, (3 Am. ed.) 19, 20, 22; *Carter* v. *Thomas*, 4 Maine, 341; *Hawes* v.

Humphrey, 9 Pick. 350; *Ward* v. *Ward*, 15 Pick. 511; *Wiggin* v. *Swett*, 6 Met. 194; *Webster* v. *Webster*, 105 Mass. 538; *Herrington* v. *Budd*, 5 Denio. 321; *Walton* v *Walton*, 7 Johns. Ch. 258; *Arthur* v. *Arthur*, 10 Barb. 9; *Skerrett* v. *Burd*, 1 Wharton, 246; *Brush* v. *Brush*, 11 Ohio, 287; *Bowen* v. *Johnson*, 6 Ind. 110 (61 Am. Dec. 110); *Epps* v. *Dean*, 28 Ga. 533; *Wells* v. *Wells*, 35 Miss. 638; *Tanner* v. *Van Bibber*, 2 Dur. (Ky.) 550; *Adams* v. *Winne*, 7 Paige, 97: *Philson* v. *Moore*, 23 Hun. 152; *Beck* v. *McGillis*, 9 Barb. 35; *Rose* v. *Rose*, 7 Barb. 174; *Arthur* v. *Arthur*, 10 Barb. 9; *Brown* v. *Brown*, 16 Barb. 569.

The proceeds of the sale go to the residuary fund. *Farrar* v. *Winterton*, 5 Beav. 1; *Moor* v. *Raisbeck*, 12 Sim. 123; *Ex parte Hawkins*, 13 Sim. 569; *Clingan* v. *Micheltree*, 31 Pa. St. 25; 1 Jarman, Wills, 326; *Donohoo* v. *Lea*, 1 Swan. (Tenn.) 199 (55 Am. Dec. 725); *Bosley* v. *Bosley*, 14 How. 391; *Atwood* v. *Weems*, 99 U. S. 183; *Ommany* v. *Butcher*, 1 Turn. and Russ. 260; 2 Williams, Executors, 1565; *Webster* v. *Webster*, 105 Mass. 538; *Drew* v. *Wakefield*, 54 Maine, 291; *Thayer* v. *Wellington*, 9 Allen, 283; 1 Redfield, Wills, 336; 2 Redfield, Wills, 174; *Hayden* v. *Stoughton*, 5 Pick. 537; *Adams* v. *Winne*, *supra*; *Arthur* v. *Arthur*, *supra*; *Beck* v. *McGillis*, *supra*; *Rose* v. *Rose*, *supra*; *King* v. *Strong*, 9 Paige, 94; *James* v. *James*, 4 Paige, 114; *Philson* v. *Moore*, *supra*; *Kennell* v. *Abbott*, 4 Ves. 802; *Birch* v. *Baker*, Mosely, 374; *Gale* v. *Gale*, 21 Beav. 349; *Frazier* v. *Frazier* 2 Leigh, 642; *Clark* v. *Packard*, 9 Gray, 417; *Prop'rs of Church* v. *Grant*, 3 Gray, 142. Intention of testator cannot overcome fixed rules of law. See *Bosley* v. *Bosley*, and two cases last cited above, also *Smith* v. *Bell*, 6 Pet. 68; *Ramsdell* v. *Ramsdell*, 21 Maine, 288; *Fisk* v. *Keene*, 35 Maine, 349; *Malcolm* v. *Malcolm*, 3 Cush. 472; *Warren* v. *Webb*, 68 Maine, 135; *Nash* v. *Simpson*, 78 Maine, 142; Powell, Devises, 376. Toller, Executors, 21; *Brown* v. *Brown*, *supra*; 4 Kent's, Com. *528; *Thomas* v. *Carter*, 4 Maine, 341. The laws of Maine, control, *Gilman* v. *Gilman*, 52 Maine, 165.

Symonds and Libby, for the other respondents.

As was said in *Morey* v. *Sohier*, in an opinion announced by the New Hampshire Supreme Court, in March, 1886, and cited in the Albany Law Journal for July 10th, 1886: "In this state many of the conditions upon which the doctrine of implied revocation was formerly based in England no longer exist. Under this alteration of the common law any form of words showing the intent of the testator to devise all the estate which he should own at the time of his decease, passes all his property, real and personal, whether owned at the time of making the will or acquired afterward. If a testator after executing his will makes a conveyance of lands specifically devised, and subsequently becoming re-vested with the title, is the owner of the same land at his decease, it passes by the will as if there had been no alienation."

In 1 Redfield on Wills, 338, it is said: "According to the present English statute, and those of most of the American states, it is only necessary that the will be so expressed, in order to operate upon such estate as the testator may have at his decease, and it is not material, even as to real estate, that he should be seized of the same estate at the time of executing the will, since the instrument will operate upon any estate, coming fairly within its terms, in which the testator is seized of a disposable interest at the time of his death."

Now we submit that under our present statutes and under the established rules for the construction of wills, in which the great object sought to be attained is to arrive at the intention expressed by the testator, it would not be a forced construction of this will to hold that whatever interest in real estate in Savannah, the testator had at the date of his death by virtue of the mortgage, as well as the debt which said mortgage was given to secure, passed under the devise to the nephews and nieces, for whom the trustee was directed to reserve such real estate unless a strong necessity to sell it should arise, and this construction is much more reasonable and more in accordance with the testator's intention, than one which would substantially exclude the heirs from the benefit of their inheritance, and after very trifling

bequests give the whole estate under the last clause in the will to the Union Society of Savannah. See *Dunlap* v. *Dunlap*, 74 Maine, 402.

A testator devised to his daughter H. one-third part of a certain farm, "but if my executor shall think best to sell said farm, then I give to her one-third part of the proceeds of the sale of said farm;" to his daughter S. one-third part of the same farm, "or if said farm is sold, then one-third part of the proceeds of the sale of said farm;" and after a devise to his daughter A. in the same words as to S. added, "And I hereby authorize my executor to sell and pass deeds to convey said farm in such manner as he may think best for all concerned; and divide the proceeds as above directed; but if he should think best not to sell the same then they may take the farm." After the making of his will, the testator in his lifetime sold the farm. Held, that S. was entitled to one-third of the proceeds of such sale. *Clark* v. *Packard*, 9 Gray, 417.

If it be held in this state, *Drew* v. *Wakefield*, 54 Maine, 296, that the distinction has been abolished between a lapsed devise of real estate, and a lapsed legacy of personal estate, and that both now pass by the residuary clause, the same is not true of the law of Georgia.

See 1 Jarman on Wills, p. 635, note 8, in which it is said, "In the absence of all statutory provisions the rule of the common law has been adopted in many states, that void and lapsed legacies go to the residuary legatee, but void and lapsed devises to the heir," citing *Hughes* v. *Allen*, 31 Georgia, 489; *Wird* v. *Mitchell*, 32 Georgia, 623; *Thweatt* v. *Redd*, 50 Georgia, 181.

Undoubtedly if it had been the intention of the testator for the bequest and devise to Anna Marion Wirgman *et als.* or for the bequest and devise to the Union Society, to take effect upon the death of the testator's wife at any time, the effect of her death in the lifetime of the testator would simply be to accelerate the enjoyment of such legacies and devises by removing the prior life-estate out of the way, but in each of these case we submit that the whole context and purport of the will and the conduct of

the testator, so far as it appears as a fact in the present case, tend to show that he did not intend either of these legacies or devises to take effect at all except upon the death of his widow or her re-marriage. The event of her death and of her re-marriage are referred to the same period of time, namely, that succeeding his own decease. See *Tucker* v. *Tucker*, 5 N. Y., 420; *Randfield* v. *Randfield*, 2 De Gex & J. 59.

The argument of the learned counsel for the Union Society wholly misconceives the position which we take in this case. We claim no revocation of the will. We do not deny that the will is to take effect precisely according to the intent expressed in it; nor do we claim that there is any rule of law which prevents the gift over to the Union Society from taking effect in any event in which the testator so designed. If the meaning of this will is that the gift over to the Union Society is to be effective in the event of the decease of the testator's wife in his own life, as well as in the event of her decease after his own death, we do not urge that there is any technical rule of law which prevents that result. We do not deny anything stated by the court in the case cited on the other side, *Morton* v. *Barrett*, 22 Maine, 257. The gift over to the Union Society is just as valid in the event (which happened) of the death of the wife before, as it would have been in the event of the death of the wife after, the testator's own decease, provided that is the testator's intent expressed in the will. What we do deny is, that the will so intends, and we do not see how a doubt arises upon the proposition that the testator was framing the trust in this residuary clause solely with reference to his own death during the lifetime of his wife, and provided only for that event.

It is the aim of all our highest courts — and of none is this more true than of this court — to adopt that construction which reproduces from the will the real intent which the testator himself expressed in it, and for this purpose to consider the man himself, his relations to others, the position in which he stood, the circumstances surrounding him, and to declare what such a man, so placed, meant by the language he used.

We appeal with confidence to all general rules of construction

as in our favor in this case, but general rules hold only when special facts do not control them, and we respectfully submit that the more carefully the precise language of this will is studied in the light of the situation itself and of the testator's manifest feeling and desire, the stronger the conviction becomes that the will intended what the man himself intended, and is as far from attempting the wrong which the Union Society would impute to it, as the testator would be, if he could now declare his intention to the court. Compare *Corbyn* v. *French*, 4 Vesey, 435; *Stewart* v. *Jones*, 3 De Gex & J. 532; *Tilson* v. *Jones*, 1 Russell & Mylne, 553; *Cowley* v. *Knapp*, 13 Vroom, 302-3; *Randfield* v. *Randfield*, 2 De Gex & J. 57; *Nash* v. *Simpson*, 78 Maine, 147.

VIRGIN, J. The testator, a resident in this state, executed his will February 3, 1883, died April 23, 1885, and his will was probated the succeeding June.

At the date of his will he had a wife and five nephews and nieces — children of his only sister, residents in Philadelphia. He also owned one moiety of certain real estate in Savannah, Georgia — which was all he owned there — and his nephews named, owned the other moiety.

After giving certain specific legacies to various persons, the testator bequeathed and devised to the plaintiff as his trustee, all the residue of his estate real and personal upon certain trusts, and authorized him to lease, exchange, sell and convey any or all of his estate for the purpose of executing the provisions of his will.

The trusts specified were: to hold, manage, care for and invest all the residue of his estate real and personal according to his best discretion and judgment, pay the annual income thereof to his wife so long as she shall remain his widow; should that not suffice, then the trustee should add thereto, irrespective of any other source of income possessed by her, such a sum out of the principal as would suffice — but that he should not sell the real estate in Savannah, "until a strong necessity should arise therefor," and "to divide so much of his estate, as may be remaining

upon the death or re-marriage of his wife, among his residuary legatees as provided in this will."

He then bequeathed and devised upon the death or re-marriage of his wife, unto four of his Philadelphia nephews and nieces — Anna M. Wirgman, John M. Durborrow, Richard N. Durborrow and W. F. H. Durborrow — "to hold in equal shares, all his real estate in Savannah."

He then bequeathed and devised "upon the death or re-marriage of his wife, all the residue of his estate real and personal, to the Union Society of Savannah," a society duly incorporated for charitable purposes.

After the execution of the will but before the decease of the testator, his wife died. Thereafter, on July 31, 1884, the testator sold and conveyed his real estate in Savannah, for the sum of fifteen thousand dollars — five thousand dollars cash, and two notes of five thousand dollars each payable in one and two years respectively with interest, secured by a mortgage on the premises. The notes were entrusted by the testator to the husband of one of the devisees for collection, who after the decease of the testator collected the first note and interest on both to July 31, 1885, and remitted the same to the plaintiff as executor, and the second note still remains unpaid in the custody of him to whom it was entrusted.

Not only the surviving nephews and nieces, but the Union Society claim the proceeds of the Savannah property. In their answer the former claimed them and "the interest of the testator therein, by virtue of the mortgage as belonging to them under the will." At the argument the claim is that the trust declared was based on the contingency that his wife would survive the testator, in which event the residuum was to go to the trustee; but that in the event which actually happened of his wife's death preceding his own, the will is silent and that such property remains undisposed of by the will and is to go according to the rules of inheritance under the law of the state of Georgia.

The testator's domicile having been in this state the construc-

tion of his will and its effect depend upon the law here. *Gilman* v. *Gilman*, 52 Maine, 165.

It is settled law that whether searching for the meaning of the whole, or of any particular clause of a will, the intention of the testator as collected from all of its provisions and its general scope is the criterion for its interpretation ; and when that intention is ascertained full latitude can be given to it provided it conforms to those settled rules of law which establish and secure the rights of property. *Anderson* v. *Parsons*, 4 Maine, 423, 425 ; *Morton* v. *Barrett*, 22 Maine, 257 ; 4 Kent's, Com. *535.

Doubtless the provisions of the will in controversy establishing the trust are based on the testator's expectation that his wife would survive him, and that her death and re-marriage referred to a time subsequent to his own decease. It is equally certain that when he executed his will, he intended that the four children of his only sister mentioned by name therein as devisees, should after his decease have his moiety of the Savannah real estate, or so much thereof as should not be needed for the maintenance of his widow in "that style and station to which she had been accustomed as his wife." And if the title to that property had been in the testator at his decease probably no question would have arisen in regard to the devisees' title.

But his own sale and conveyance of it after the death of his wife, when it was no longer possibly needed for her support under the will, took it away from the provisions of the will so far as it related to the trust and the devise to his nephews and nieces, and thus revoked *pro tanto* those devises. *Carter* v. *Thomas*, 4 Maine, 341 ; *Hawes* v. *Humphrey*, 9 Pick. 350, 361 ; *Webster* v. *Webster*, 105 Mass. 542. In *Brydges* v. *Duchess Chandos*, 2 Ves. p. 417, the Chancellor declared this to be a principle of the common law not to be shaken in point of authority. It is the rule laid down in all of the elementary works on Wills and Devises as well as in a multitude of judicated cases.

And the fact that the testator took back a mortgage which passed no title, but simply created a lien upon the property for security of a part of the purchase money, does not prevent the

partial revocation. *Adams* v. *Winne*, 7 Paige, 97; *Beck* v. *McGillis*. 9 Barb. 35; *McNaughton* v. *McNaughton*, 35 N. Y. 201.

"Conveying a part of the estate upon which the will would otherwise operate," said WESTON, J., "indicates a change of purpose in the testator as to that part; and suffering the will to remain uncanceled, evinces that his intention is unchanged with respect to other property bequeathed or devised therein." *Carter* v. *Thomas*, *supra*. Kent's Com. (12th ed.) *529. And implied revocation is recognized in R. S., c. 74, § 3.

The proceeds of the sale of the Savannah property cannot go under the will to the nephews and nieces as devisees, for the will contains no such provision, as did the wills in *Clark* v. *Packard*, 9 Gray, 417; *Atwood* v. *Weems*, 99 U. S. 183; *McNaughton* v. *McNaughton*, *supra*.

If after the decease of his wife the testator still intended that the real estate which he had devised to his nephews and nieces, should go to them, why did he sell and convey it to a stranger — why not convey it to them and thus execute his own will in that respect; and if he intended they should have proceeds of the sale, why did he take the cash and entrust the notes to the husband of one of them for collection instead of passing them over as their property?

If the proceeds do not go by the will to the devisees of the land to whom do they go? The nephews and nieces contend that they are not disposed of in any manner by the will, but are intestate property and hence go by descent to the next of kin; while the Union Society claims that they fall to it through the residuary clause. And this result we think is in accordance with the rules of law. Rules of law are necessarily general, and sometimes operate harshly, but still they are land-marks which must be observed.

It is not to be disputed that a general legatee as distinguished from a particular legatee is entitled to everything which "turns out not to be disposed of," 2 Wms. Ex'rs, (6Am. ed.) 1567 and notes. 2 Jar. Wills, *762; *Bosley* v. *Bosley*, 14 How. 391; *Drew* v. *Wakefield*, 54 Maine, 291; *Thayer* v. *Wellington*, 9

Allen, 283, 295. "Because the testator is supposed to take the particular legacy from the residuary legatee only for the sake of the particular legatee; so that upon the failure of the particular intent, the court gives effect to the general intent." 2 Wms. Ex'rs, 1569; 2 Jar. Wills, *762.

To be sure, the testator may by the terms of the bequest narrow the title of the residuary legatee so as to exclude lapsed legacies. *Dunlap* v. *Dunlap*, 74 Maine, 402; 2 Wms. Ex'rs, (6 Am. ed.) 1571. 2 Jar. Wills. *762; *Bullard* v. *Goffe*, 20 Pick. 252; *Tindall* v. *Tindall*, 9 C. E. Gr. 512, and cases cited. In this will, however, we find no such language as would seem to bring the residuary clause — whereby "upon the death of his wife all the residue of the testator's estate real and personal" was to go to the Union Society — within this rule.

The result is, the proceeds of the sale of the Savannah real estate falls into the general residuary clause in behalf of the Union Society.

Bill sustained. Costs of both parties to be paid by the executor, including reasonable counsel fees.

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

WILLIAM F. SEELE *vs.* INHABITANTS OF DEERING.

Cumberland. Opinion April 5, 1887.

Town. Nuisance.

A town is not liable for acts which result in creating a nuisance to the property of one of its citizens, when the acts complained of are not within the scope of its corporate powers.

ON exceptions from the superior court.

An action on the case for creating a nuisance. At the return term the defendants filed a demurrer to the declaration, which was joined. The presiding justice sustained the demurrer and adjudged the declaration bad. To this ruling the plaintiff alleged exceptions.

The opinion states the point.

John J. Perry and D. A. Meaher, for plaintiff.

A demurrer admits all such matters of fact as are sufficiently pleaded. *Lowell* v. *Morse*, 1 Met. 475; *T. & G. Railroad* v. *Newton*, 1 Gray, 544.

A general demurrer to a declaration containing several counts will be overruled if one of the counts is good. *Dole* v. *Weeks*, 4 Mass. 451; *Swett* v. *Patrick*, 11 Maine, 181; *Blanchard* v. *Hoxie*, 34 Maine, 376; *N. E. Bank* v. *Abell*, 63 Maine, 346.

"The causing or suffering any offal, filth, noisome substance to collect, or remain in any place to the prejudice of others; . . the corrupting or rendering unwholesome or impure the water of a river, stream or pond; the unlawfully diverting it from its natural course or state, to the injury or prejudice of others are nuisances." R. S., c. 17, § 5.

Any person injured in his comfort, property or the enjoyment of his estate by a common and public,—or by a private nuisance, may maintain against the offender an action on the case for his damages, unless otherwise specially provided. R. S., c. 17, § 12.

There has been a series of cases in this state in which the court has decided that cities and towns are not liable for the unlawful acts of health officers in providing for "small pox' patients, and further guarding against the spread of the disease. *Mitchell* v. *Rockland*, 52 Maine, 118; *Brown & als* v. *Vinalhaven*, 65 Maine, 402; *Lynde* v. *Rockland*, 66 Maine, 309; *Barbour* v. *Ellsworth*, 67 Maine, 294. A careful examination of these cases will show, that there was no question of law involved, applicable to the case.

This court has decided at least in one case, a town is liable for the "unauthorized" acts of its officers. *Dover* v. *Robinson & al.* 64 Maine, 183.

And where a street commissioner in removing a fence, appropriated land outside of the limits of the street, it was held that the city under whose authority and by whose direction he was acting, was liable for damages to the owner. *Woodcock* v. *Calais*, 66 Maine, 234.

And in Massachusetts, where the agent of a town in repairing a highway entered a close without the consent of the owner and

took away stone to repair a bridge, it was held that the town was liable in tort to the owner of the close. *Hawks* v. *Charlemont*, 107 Mass. 414.

These *quasi* corporations are liable for an act done by the officers having competent authority. 1st, either by express vote of the city government; or 2nd, by the nature of the duties and functions by which they are charged by their offices to act upon the general subject matter; or 3rd, if the act was done, with an honest view to obtain for the public some lawful benefit or advantage; and 4th, if their acts were ratified by the towns or cities for whom they were acting. *Thayer* v. *Boston*, 19 Pick, 511; *Dayton* v. *Pease*, 4 Ohio, 80.

An action of tort lies against a city by the owner of land, through which its agents have unlawfully made a sewer. *Hildreth* v. *Lowell*, 11 Gray, 345.

A municipal corporation which creates a private nuisance is *prima facie* liable for its continuance. *Pennoyer* v. *Saginaw*, 8 Mich. 534.

"If a city or town negligently constructs or maintains . . culverts in a highway . . across a natural watercourse so as to cause the water to flow back upon and injure the land of another it is liable to an action of tort to the same extent that any corporation or individual would be liable for doing similar acts." *Anthony* v. *Adams*, 1 Met. 284; *Lawrence* v. *Fairhaven*, 5 Gray, 110; *Perry* v. *Worcester*, 6 Gray, 544; *Parker* v. *Lowell*, 11 Gray, 353; *Wheeler* v. *Worcester*, 10 Allen, 591.

So if a city by its agents, without authority of law makes or empties a common sewer on the property of another to his injury it is liable to him in an action of tort. *Locks, &c.* v. *Lowell*, 7 Gray, 223; *Hildreth* v. *Lowell*, 11 Gray, 345; *Haskell* v. *New Bedford*, 108 Mass. 208.

For neglect in the construction or repair of any particular sewer whereby private property is injured an action may be maintained against a city or town. *Child* v. *Boston*, 4 Allen, 41; *Emery* v. *Lowell*, 104 Mass. 13; *Merrifield* v. *Worcester*, 110 Mass. 216; *Hill* v. *Boston*, 122 Mass. 344.

Taking the decisions of the courts in this and other states already cited, it settles the question of liability of the defendant town. See *Woodcock* v. *Calais*, 66 Maine 234; *Hawks* v. *Charlemont*, 107 Mass. 414; *Thayer* v. *Boston*, 19 Pick. 511; *Hildreth* v. *Lowell*, 11 Gray, 345.

Nathan and Henry B. Cleaves and *Drummond and Drummond*, for the defendants cited: *Hooper* v. *Covington*, 6 Supreme Court Reporter, 1026; *Cole* v. *Sprowl*, 35 Maine, 161; *Norcross* v. *Thoms*, 51, Maine, 504; *Brayton* v. *Fall River*, 113 Mass. 229; *Hooper* v. *Emery*, 14 Maine, 375; *Lemon* v. *Newton*, 134 Mass. 479; *Davis* v. *Bangor*, 42 Maine, 522; *Small* v. *Danville*, 51 Maine, 359; *Lynde* v. *Rockland*, 66 Maine, 309; *Cushing* v. *Bedford*, 125 Mass. 526; *Kean* v. *Stetson*, 5 Pick. 492; *Anthony* v. *Adams*, 1 Met. 284; *Walcott* v. *Swampscot*, 1 Allen, 102; *White* v. *Phillipston*, 10 Met. 110; *Woodcock* v. *Calais*, 66 Maine, 234; *Hawks Charlemont*, 107 Mass. 418; *Johnston* v. *District Columbia*, 22 Reporter, 80.

VIRGIN, J. Assuming — what the demurrer admits — the allegations in the declaration to be true, it is obvious that a most unmitigated nuisance has been created on and about the premises of the plaintiff to his great injury; and were the defendant an incorporated city, its alleged acts would constitute *prima facie* such a cause of action as might render it liable in the absence of any justification (*Cumb. & Oxf. Can. Co.* v. *Portland*, 62 Maine, 505); but we have looked in vain through both counts for any allegations which in our view render the defendant town liable for the alleged acts which have resulted so injuriously to the plaintiff's property.

The authority and liability of our *quasi* public corporations known as towns as distinguished from municipal corporations incorporated under special charters, are generally only such as are defined and prescribed by general statutory provisions. Some things they may lawfully do and others they have no authority for doing. To create a liability on the part of a town not connected with its private advantage, the act complained of

must be within the scope of its corporate powers as defined by the statute. If the particular act relied on as the cause of action be wholly outside of the general powers conferred on towns, they can in no event be liable therefor whether the performance of the act was expressly directed by a majority vote or was subsequently ratified. *Morrison* v. *Lawrence*, 98 Mass. 219.

So a town is not liable for the unauthorized and illegal acts of its officers even when acting within the scope of their duties. *Brown* v. *Vinalhaven*, 65 Maine, 402; *Small* v. *Danville*, 51 Maine, 359; but it may become so when the acts complained of were illegal but done under its direct authority previously conferred or subsequently ratified. *Woodcock* v. *Calais*, 66 Maine, 234 and cases there cited.

The difficulty with the counts is that the allegations therein do not bring the acts complained of within the scope of the corporate powers of the town, or aver that they were performed by its officers in the execution of any corporate duty imposed by law upon the town. *Anthony* v. *Adams*, 1 Met. 284. There is no intimation that the acts were done in connection with the making or repairing of any highway or town-way which the law imposed upon the town, or in relation to any drain or sewer laid out or attempted to be laid out by the town authorities under R. S., c. 16, for which it might under certain circumstances become liable. *Estes* v. *China*, 56 Maine, 407; *Franklin Wharf Co.* v. *Portland*, 67 Maine, 46; or in emptying a common sewer upon the property of the plaintiff outside of the public works, as in *Propr's L. & C.* v. *Lowell*, 7 Gray, 223. But the principal allegations are that the defendants "wrongfully opened and dug a ditch across the main road . . in Deering and into an artificial ditch in the rear of a tripe and bone boiling establishment from which a cess-pool of stagnant and filthy water was then and there collected and then and there continued said ditch across the land of Samuel Jordan two hundred feet in the direction of the plaintiff's land and out of the natural course of said water and on to the plaintiff's land and along through the same into his mill pond."

It is quite evident that a town, independent of any statutory

authority, has no corporate power to dig ditches across another's land. Such an act is *ultra vires*; and any express majority vote based on a proper article in a warrant calling a meeting of the defendants directing such acts, would create no liability on the part of the town. *Cushing* v. *Bedford*, 125 Mass. 526; *Lemon* v. *Newton*, 134 Mass. 476.

Whether or not the declaration can be amended so as to make the town liable, we cannot in the absence of a knowledge of the facts now determine.

Exceptions overruled.

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

WALTON, J., did not sit.

ALBERT H. THAXTER and others *vs.* MELVILLE JOHNSON.

Penobscot. Opinion April 14, 1887.

Insolvent law. Composition. Discharge. R. S., c. 70, § 62.

In composition proceedings under the insolvent law, a discharge granted to a debtor is not valid if any material statement contained in the affidavit or schedule of the debtor named in R. S., c. 70, § 62 is false, and known to be so to the debtor.

In such case the discharge is no bar to a recovery of any balance which a creditor may show to be due him from the debtor, in an action brought within the two years named in that section.

ON report.

Assumpsit on an account annexed.

It was agreed that there was due the plaintiffs the sum of nine hundred and eleven dollars and ninety-one cents and interest from May 22, 1884, the date of the writ, unless the claim sued upon was barred by the discharge in insolvency.

The facts affecting the discharge in insolvency are sufficiently stated in the opinion.

Wilson and Woodward, for the plaintiffs cited: R. S., c. 70 § 62; *Hopkins* v. *Ellis*, 1 Salk. 110; *Colkett* v. *Freeman*, 2 T. R. 59; Hilliard, Bankruptcy, 24; Robinson, Bankruptcy, 95; *Blodgett* v. *Hildreth*, 11 Cush. 311; *Paige* v. *Loring*, 1 Holmes, 275; *In re Goldschmidt*, 3 Bank. Reg. 164.

Barker, Vose and Barker, for defendant.

The oath required of the debtor before he can receive his discharge under composition proceedings is as follows, viz.: "I solemnly swear that I have not removed, concealed or secreted any money, paper, securities, effects or property, real or personal with intent, purpose or expectation of receiving, directly or indirectly, any benefit or advantage to myself, and that I have not changed or falsified any of my books of account, deeds or papers relating to my estate, and that I have not sold, pledged, conveyed or transferred any of my property or estate in anticipation of insolvency, or made any conveyance, mortgage, pledge, transfer or payment to any creditor or caused or procured any attachment of my property for preferring any of my creditors; and that I have not directly or indirectly, given to any creditor or other person, any compensation or promise of reward, except reasonable counsel fees for services or influence in effecting a compromise with my creditors, and that my assets and liabilities are correctly stated in the schedule hereto annexed and signed by me." R. S., c. 70, §62.

Upon taking this oath the debtor, if he produce the composition paper required by the same section, receives his discharge, but, "such discharge is not valid if the signature of any creditor has been obtained by fraud, or if any material statement contained in such affidavit or schedule is false, to the knowledge of the debtor making the same, and any creditor may within two years, sue for and recover the balance of his claim or debt against such debtor." R. S., c. 70, § 62.

We claim that the reasons which might be applicable to a discharge obtained in the regular course of insolvency, as set forth in § 46, c. 70, are not applicable to this case, as the method of proceeding to get the discharge annulled is entirely different. *Ex parte Haines*; *In re Hoyt*, 76 Maine, 394.

There was no secretion or concealment. The legal title remains in the insolvent until the assignment is made. *Hampton* v. *Rouse*, 22 Wall. 263.

The term "concealment" in the insolvent law implies something wilfully intentional. *In re Wilson*, 6 Law Rep. 272; *Dresser* v. *Brooks*, 3 Barb. 429.

FOSTER, J. It was the evident design of the insolvent law of this state that all creditors of the same class should fare alike in the distribution of the debtor's property, and that no secret arrangement should be made whereby one creditor should obtain an advantage over another.

Fraud, in its various forms and under its different guises, appears to have been carefully guarded against by express enactment. And while by § 62, relating to composition proceedings, the process is one specially provided by statute, and essentially different from ordinary proceedings, nevertheless the object of these provisions is to guard the rights of creditors in matters of composition, and to see that there is a full and fair settlement, that nobody is deceived or defrauded, and that all fare equally. The affidavit which is required of the debtor before he can receive his discharge under these proceedings, among other stringent provisions against fraudulent transactions or preferences, prohibits the making of any payment to any creditor for the purpose of preference, or the giving, directly or indirectly, to any creditor or other person any compensation or promise of reward, except reasonable counsel fees for services or influence in effecting a compromise with his creditors. For such services reasonable counsel fees alone are excepted, and payments for other services or to other persons are forbidden. The intent of the law being that the remainder of the insolvent's property shall be distributed among his creditors, and that no inducements shall be offered to some of the creditors to sign away the rights of others. Upon complying with the conditions pertaining to composition proceedings the debtor may receive his discharge, but it is expressly provided that "such discharge is not valid if the signature of any creditor has been obtained by fraud, or if any material statement contained in such affidavit or schedule is false, to the knowledge of the debtor making the same, and any creditor may within two years, sue for and recover the balance of his claim or debt against such debtor."

This suit is brought by a creditor within the two years named to recover the balance of his claim. However stringent this remedy may appear, it is one provided by the special provisions

of the insolvent law pertaining to composition proceedings, and is allowed to any creditor who deems himself defrauded, (*Ex parte Haines*, 76 Maine, 394) or who may be able to show that any material statement contained in the affidavit or schedule of the debtor is false and known by him to be so. In such case the discharge is not valid. It is no bar to a recovery of any balance which the creditor may show to be due him from the debtor.

In this case a full report of the evidence is before us. The creditors were each to receive thirty-five per cent of their demands provided for by the composition. The evidence is plenary that instead of that one creditor actually received the sum of three hundred dollars and another the promise of one hundred and eighty-three dollars, in addition to the thirty-five per cent, as a compromise settlement, and that this was known by the debtor and acquiesced in by him. Nor were these the only parties who had or were to receive sums additional to the amount named in the composition agreement, as the testimony discloses.

Here was a preference, as well as a promise of reward, prohibited by the special provisions of the law invoked in behalf of the debtor. The statement under oath of the debtor in his affidavit was that he had not directly or indirectly given to any creditor or other person any compensation or promise of reward, except reasonable counsel fees for services or influence in effecting a compromise with his creditors. This statement was material and false to the knowledge of the debtor himself.

Judgment for plaintiff for the sum of $911.91, together with interest thereon from the date of the writ.

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

LUTHER DAVIS *vs.* NANCY A. SMITH.

Somerset. Opinion April 14, 1887.

Contract. Indemnity. Judgment. Docket entries. Money paid.

Where a person, either by operation of law or by express contract, is responsible over to another against whom a judgment is rendered, and notice has

been given him of the pendency of the suit and he has had an opportunity of appearing and taking upon himself the defence of it, such judgment, if obtained without fraud or collusion, will be conclusive against him, whether he appeared or not.

The notice in such a case may be implied from his knowledge of the pendency of the action, and his participation in its defence.

Where the record of the judgment is not fully extended, the docket entries therein are the only proper evidence of the judgment.

Where there is an express contract of indemnity, not under seal, and by its terms it contains nothing more than the law would imply, it is optional with the plaintiff to declare in general *indebitatus assumpsit* for money paid or upon the special contract.

When the action for money paid will lie.

On report.

The opinion states the case.

Merrill and Coffin, for the plaintiff.

The judgment was conclusive upon the defendant. *Cooly* v. *Patterson*, 52 Maine, 472; *Dorr* v. *Davis*, 76 Maine, 301; *Chamberlain* v. *Preble*, 93 Mass. 373; *Boston* v. *Worthington*, 10 Gray, 498; *Train* v. *Gold*, 5 Pick. 380; *Littleton* v. *Richardson*, 34 N. H. 187; *Stone* v. *Hooker*, 9 Cowen, 154; *Lowell* v. *Parker*, 10 Met. 315.

The docket entries are evidence of the judgment. *Read* v. *Sutton*, 2 Cush. 123; *Leathers* v. *Cooley*, 49 Maine, 342; *Pruden* v. *Alden*, 23 Pick. 184; *Longley* v. *Vose*, 27 Maine, 179; *Central Bridge Corp.* v. *Lowell*, 15 Gray, 122; *Benedict* v. *Cutting*, 13 Met. 186; *Tillotson* v. *Warner*, 3 Gray, 577.

The notice was sufficient. *Miner* v. *Clark*, 15 Wend. 426; *Rogers* v. *Kneeland*, 13 Wend. 123; *Stone* v. *Hooker*, 9 Cowen, 154; *Hamilton* v. *Cutts*, 4 Mass. 352.

D. D. Stewart, for defendant.

In *Props. Brattle Square Church* v. *Bullard*, 2 Met. 366, the court say: "The plaintiffs are bound to prove that such a title has been established, by legal evidence. To do this, they must give in evidence the common proofs of title, or, a judgment to which the defendant was party or privy. It comes back therefore to the same question, whether this was such a judgment."

In *Hall* v. *Thayer*, 12 Met. 136, the court say: "The defendants promised and agreed to indemnify and save harmless the

said committee (the plaintiffs) in proportion to the number of shares for which they had respectively subscribed. Upon the contract no cause of action arose against the defendant, at least until an action was instituted and a judgment rendered thereon against the committee; and no substantial cause of action, that is, no right to recover the amount of such notes would exist, until those notes were actually paid."

Recovery of judgment and execution, without actual payment no breach of a contract to indemnify and save harmless. *Hussey* v. *Collins*, 30 Maine, 190; *Wicker* v. *Hoppock*, 6 Wall. 99.

The only part of that count which could possibly have any application to the case at bar is that "for money paid by the plaintiff for the use of said defendant at her request." Can such a count be maintained upon a written contract of indemnity? We submit that it cannot. No money paid by the party holding a written indemnity from a third person, can be considered as paid at the request of such third person. That is the very thing he does not want done; and the very thing he indemnifies the other for not doing. But if compelled to do it by an outstanding better title, then his indemnity comes in to protect him. The very word "indemnity" excludes *ex vi termini*, the idea of an implied promise on the part of the party indemnifying. And the party indemnifying cannot recover upon a count for money paid and rely upon an implied request, but must declare specially upon his written contract of indemnity. These questions are fully considered and so decided in *Brown* v. *Fales*, 139 Mass. 21; *Toussaint* v. *Martinnant*, 2 Term R. 101.

But for want of the proper papers and vouchers which the plaintiff in that action should have filed in court but never did, that court could not, and never did enter any judgment whatever in the suit of *John Dorr* v. *Luther Davis*, referred to in this rescript. *Rockland Water Co.* v. *Pillsbury*, 60 Maine. 425; *Leathers* v. *Cooley*, 49 Maine, 337.

"A record," said the court in *Sayles* v. *Briggs*, 4 Met. 423, "is a memorial or history of the judicial proceedings in a case commencing with the writ, or complaint, and terminating with

the judgment; and it must, therefore, be precise and clear, containing proof within itself of every important fact on which the judgment rests, and it cannot exist partly in writing and partly in parol. Its allegations and facts are not the subject of contradiction."

"The record," said SHEPLEY, C. J., in delivering the opinion of this court in *Holden* v. *Barrows*, 39 Maine, 136, "is not liable to be explained or contradicted by parol testimony, or by extraneous documents. And a copy of the record regularly authenticated, is the legal and best evidence of it." S. P. in *Central Bridge* v. *Lowell*, 15 Gray, 107.

Excluding, therefore, under the stipulations of this report all evidence offered not legally admissible, and the only proof of any alleged judgment against this plaintiff must be confined to the extended record. That not only fails to prove any judgment, but proves affirmatively that none was ever recovered. *Rockland Water Co.* v. *Pillsbury*, 60 Maine, 425, before cited; *Noyes* v. *Newmarch*, 1 Allen, 51.

There being no proof of any judgment against this plaintiff in favor of a third party having a better title than the defendant and neither allegation nor proof that such third party had in fact a better title, this action cannot be maintained under any form of declaration. *Foster* v. *Pierson*, 4 D. &. E. 617; *Hamilton* v. *Cutts*, 4 Mass. 349; *Props. of Brattle Square Church* v. *Bullard*, 2 Met. 363; *Hall* v. *Thayer*, 12 Met. 131; *Kelly* v. *Dutch Church*, 2 Hill, 105. And it deserves consideration whether the defendant does not clearly show affirmatively the better title in herself. *Somerville* v. *Hamilton*, 4 Wheat. 230; *Lathrop* v. *Grosvenor*, 10 Gray, 52.

FOSTER, J. This action, brought upon a contract of indemnity, comes to this court upon a full report of the evidence, with the stipulation that the court is authorized to draw such inferences therefrom as a jury might legally do.

It appears that the plaintiff, on January 24, 1871, gave his negotiable promissory note for two hundred and nine dollars, to Harrison Dorr, guardian of Rosetta Dorr, niece of the defend-

ant, payable on the first day of January, 1874. The defendant had obtained letters of guardianship in an adjoining county in which she resided, and with whom Rosetta was at that time living, and soon after the note became due represented to the plaintiff that she was the lawful guardian of Rosetta Dorr, and as such was legally authorized to collect said note. Whereupon the plaintiff paid the defendant the sum of two hundred and thirty-one dollars and twenty-one cents, the amount then estimated to be due upon the note. At the same time and in consideration thereof the defendant agreed in writing to fully indemnify and save the plaintiff harmless in consequence of his paying the note to her. Suit was afterwards commenced by the indorsee of the note; the case was tried and carried to the full court; finally judgment was rendered against this plaintiff for the amount of the note and interest thereon from date. *Dorr* v. *Davis*, 76 Maine, 301.

After judgement was rendered against him, this plaintiff paid the amount of it, together with costs of suit, to the plaintiff in that action, and now seeks to recover the sum thus paid, amounting to four hundred and seventy-nine dollars, from the defendant in this suit.

To entitle him to a recovery he must show that some other person has established a better title to the money upon that note than the defendant herself had, and that he has been compelled to pay it to such person. This he may do in one of two ways: (1) By ordinary proof of an outstanding better title in such third person, to which he yielded and paid; or (2), by a judgment against him by such third person, to which the defendant was party or privy, and which judgment he has been compelled to pay. *Hall* v. *Thayer*, 12 Met. 136.

The plaintiff does not base his claim upon the ordinary proof of an outstanding superior title in some third person to which he yielded and paid, but upon the recovery of a judgment against him, payment of the same, and for which the defendant was bound to indemnify and save him harmless.

The defendant was not a party to the action upon which that judgment was rendered. *Prima facie* she was not bound by

the judgment, and to make it evidence against her and in favor of himself the plaintiff must show that it was rendered against him in favor of the indorsee of the note, upon a transaction against which the defendant was bound to indemnify him. If such was the fact it would be legitimate and competent evidence; otherwise it would not. And evidence *aliunde* is admissible for such purpose. *Littleton* v. *Richardson*, 34 N. H. 189.

From an examination of the evidence it is apparent that the cause of action in the other suit was the identical note which this defendant had induced the plaintiff to pay over to her—the amount of which she acknowledges she received from the plaintiff at the time of agreeing to indemnify him in consequence of such payment. With this connecting parol evidence, together with the copy of the declaration and of the note in question, as well as with what appears from the other evidence in the case, the identity of the cause of action in that suit with the subject matter to which the indemnity relates is sufficiently established.

Was the judgment therein rendered against this plaintiff, conclusive against the defendant in this action? It was, provided she had due notice of the pendency of the action in which that judgment was rendered and had an opportunity to defend it. The rule seems to be established, that when a person is responsible over to another, either by operation of law or by express contract, and notice has been given him of the pendency of the suit, and he has been requested to take upon himself the defence of it, he is no longer regarded as a stranger to the judgment that may be recovered, because he has the right to appear and defend the action, equally as if he were a party to the record. When notice is thus given, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not. *Veazie* v. *R. R. Co.* 49 Maine, 124; *Hardy* v. *Nelson*, 27 Maine, 530; *Boston* v. *Worthington*, 10 Gray, 498; *Littleton* v *Richardson*, 34 N. H. 187.

We are of the opinion, from the evidence before us, and with the inferences legitimately to be drawn from it, that the defendant had such notice of the pendency of the suit as renders the judgment recovered therein conclusive against her. She

employed and paid the counsel who tried the case. She went in company with the plaintiff twice to Dover to have the case tried —it being continued the first time because the other side was not ready. She was present at the trial, testified in the case, and paid all the expenses of this plaintiff and his witnesses. If the evidence reported is to be taken as true, she appears to have regarded the case as her own until the decision rendered from the law court. The facts shown are sufficient to render the judgment conclusive against her, although the plaintiff had not in terms requested her to take upon herself the defence of that action. "This was not necessary," say the court in *Boston* v. *Worthington*, *supra*, "to render the judgment conclusive against them as to the facts thereby established." And this principle is established by the great weight of authority, that where one stands in the position of indemnitor to another who is liable over to a third party, his liability may be fixed and determined in the action brought against such third party, by notice of the pendency of such action and an opportunity offered him to defend it. *Aberdeen* v. *Blackmar*, 6 Hill, 324; *City of Chicago* v. *Robbins*, 2 Black, (U. S.) 423. In such case the authorities hold that notice in writing, or even express notice, is unnecessary but that notice may be implied from his knowledge of the pendency of the action, and a participation in its defence. *City of Chicago* v. *Robbins*, *supra*; *Robbins* v. *The City of Chicago*, 4 Wall. 657; *Port Jervis* v. *Bank*, 96 N. Y. 557; *Barney* v. *Dewey*, 13 Johns. 226; *Beers* v. *Pinney*, 12 Wend. 309; *Warner* v. *McGary*, 4 Vt. 508; *Boston* v. *Worthington*, *supra*; *Chamberlain* v. *Preble*, 11 Allen, 374; *Veazie* v. *R. R. Co.* 49 Maine, 119-20. "It cannot be material to the person agreeing to indemnify, that he should have a formal notice served upon him. The law requires that he should have notice before the judgment can be used against him, because he is the real party in interest. But any notice which will enable him to present any defence which he may have either in law or on fact, is all that can be useful to him, and the law requires no vain or useless ceremonies in such cases." *Holbrook* v. *Holbrook*, 15 Maine, 12. In such case the judgment binds the party whose duty it

is to indemnify, and becomes legitimate evidence in favor of the plaintiff and against the defendant. *Train* v. *Gold*, 5 Pick. 379; *Kip* v. *Brigham*, 6 Johns. 159; *Ryerson* v. *Chapman*, 66 Maine, 563.

But the defendant contends that there is no sufficient legal evidence introduced of any judgment such as the plaintiff has alleged in the several counts of his writ—that there is a fatal variance between the allegations and the proof—and consequently the plaintiff is not entitled to recover.

At the time the order for judgment was sent down from the law court an entry was made upon the docket of the county where the action was pending, for hearing in costs by the defendant. No vouchers have ever been filed by the plaintiff in that action, and no hearing had by the defendant therein in relation to costs. Consequently no extended record of the judgment has ever been made, as appears from the testimony of the clerk. True, a record was commenced, but it was never completed. That portion of the record which the clerk had commenced, a copy of which was introduced, shows affirmatively that it is incomplete, never having been made up and attested by the clerk. When the record is once made up, however, it becomes conclusive upon all parties until altered or set aside by a court of competent jurisdiction, and the statements contained in it must be regarded as importing absolute verity, and not subject to explanation or contradiction by any evidence outside of such record. But until the record is in fact fully extended, it is well settled that the docket is the record, and the entries therein are the only proper evidence of the judgment. *Willard* v. *Whitney* 49 Maine, 238; *Leathers* v. *Cooley*, *id.* 342.

The fact that there may be no fully extended record does not affect the judgment. That is the principal thing—the record is only evidence of it. Here the certified copies of the docket entries were introduced, and they show that judgment was rendered against this plaintiff for the sum of two hundred and nine dollars, with interest from January 24, 1871—the full amount of the note—"as per certificate from clerk of law court received and filed June 10, 1884." By R. S., c. 77, § 45, it

became the duty of the clerk to "enter judgment as of the preceding term," and the judgment when entered up should have been as of the February term preceding. "But for most purposes," remarks BARROWS, J., in *Huntress* v. *Hurd*, 72 Maine, 454, "the order of the law court to the clerk of the Supreme Judicial Court to enter up judgment, or directing such a disposition of all pending questions as leaves nothing to be done but to make up the judgment, must be deemed a judgment. For all purposes when it is necessary in order to sustain legal and equitable rights, the court so regards it."

Were this an action of debt brought upon the judgment itself it would necessarily be against the party defendant therein named and the plaintiff might therefore, meet with serious difficulty in the introduction of a judgment in evidence, in support of his allegations, differing so widely as to the time of its rendition from the time alleged in the first three counts of the plaintiff's writ, viz.: June 9, 1884.

But the basis of the plaintiff's claim is assumpsit and not debt —it is founded on a promise of indemnity and not on a contract of record. His claim is to recover in assumpsit for the money which he has been compelled to pay by force of that judgment. In addition to the special counts in his writ he has declared upon the general count for money paid,—and we think he is entitled to maintain this action under that count. The judgment therefore becomes admissible and competent evidence between these parties. *Hardy* v. *Nelson*, 27 Maine, 530; *Holbrook* v. *Holbrook*, 15 Maine, 11.

Nor do we think that the objection of the defendant is tenable, that there being a written contract of indemnity the plaintiff must declare specially upon such contract, and will not be allowed to introduce proof in support of his claim under the general count for money paid. The objection is one of form and does not touch the real merits of the case. Still if it rests on sound legal principles it is the duty of the court to give effect to it. It is undoubtedly the general rule of law, that where the parties have made an express contract the law will not imply one. But this rule is not inflexible, and like most general rules is subject

to exceptions. Thus it has been held that when the special contract is not under seal the plaintiff has his option, under some circumstances, either to declare on the implied promise, or to set out the special contract in his declaration. *Tousey* v. *Preston*, 1 Conn. 175. An action for money had and received will lie on a promissory note, or bill of exchange; and yet they are express contracts. *Pitkin* v. *Frink*, 8 Met. 12; *Henschel* v. *Mahler*, 3 Denio, 428.

It is also a reasonable and well recognized principle of law settled by numerous decided cases, that where there is an express contract of indemnity, and by its terms it contains nothing more than the law would imply, it is optional with the plaintiff to declare in general *indebitatus assumpsit* for money paid, or upon the special contract.

This question arose in *Gibbs* v. *Bryant*, 1 Pick. 118, where a written promise of indemnity had been given to the plaintiff by the defendant, and upon objection by the defendant that there was a special agreement which ought to have been declared on, the court say: "This objection cannot avail the defendant, because the written contract produced contained nothing more than what the law would imply. The right of action rests upon the payment of money for the use of the defendant. The law raises a promise, and the plaintiff may make use of his written contract or not, as he pleases. If there is anything in the written promise to contradict the implication of law, the defendant may show it."

Precisely the same doctrine was laid down in *Sanborn* v. *Emerson*, 12 N. H. 58, where the declaration contained a general count for money paid, laid out and expended for the use of the defendant. There the plaintiff had receipted for the property of the defendant, attached in sundry suits commenced against him, and had the actual custody of it, and at the request of the defendant the plaintiff delivered the property to him, the defendant expressly agreeing that the plaintiff should be indemnified and saved harmless on account of the obligation resting upon him in consequence of his having receipted the property attached. Judgments were afterwards recovered in the several

suits, and the plaintiff being unable to surrender the property was compelled to pay the amount of the several judgments. The court there say that the case comes "directly within the principle of the decision in *Gibbs* v. *Bryant*,—the special contract, as it appears, containing nothing more than the law would imply. On this branch of the case, then, we hold that the action is well maintained, notwithstanding the existence of the special contract of indemnity and the omission to set it out in the declaration; and the objection that the action should have been brought on the express contract, is therefore overruled." The following cases sustain the same principle. *Colburn* v. *Pomeroy*, 44 N. H. 23; *Rushworth* v. *Moore*, 36 N. H. 195; *White* v. *Leroux*, 1 M. & M. 347 (22 E. C. L. 331); *Williamson* v. *Henley*, 6 Bing. 299, (19 E. C. L. 89); *Pownal* v. *Ferrand*, 6 B. & C. 439, (13 E. C. L. 232-3); *Keyes* v. *Stone*, 5 Mass. 394.

The relation of the present parties in reference to the note upon which the indemnity was given, was such as would in law raise an implied duty or obligation of indemnity as strong as where a receiptor upon request, had delivered up property to the owner against whom suits had been commenced. The defendant in the one case had no right to the property—in the other, no right to the money or note, and the contract of indemnity in both cases contained no more than the law would imply.

The plaintiff alleges that he has paid so much money for the use of the defendant. To sustain this allegation it is necessary for him to show that the money was paid at the defendant's request, either express or implied. "The request to pay, and the payment according to it, constitute the debt, and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect where he is placed by him under a liability to pay, and does pay, makes no difference. . . . In every case, therefore, in which there has been a payment of money by the plaintiff to a third party, at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount, this form of action is maintainable."

Brittain v. *Lloyd*, 14 Mees. & Wels. 773. And the doctrine of the courts is, that when the plaintiff shows that he, either by compulsion of law, or to relieve himself from liability, has paid money which the defendant ought to have paid, this count will be sustained. 2 Gr. Ev. § 114. *Nichols* v. *Bucknam*, 117 Mass. 491. In such case, said Lord TENTERDEN, C. J.: "I am of the opinion that he is entitled to recover upon the general principle, that one man, who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter, and I think that money paid under such circumstances may be considered as money paid to the use of the person who is so bound to pay it." *Pownal* v. *Ferrand*, 6 B. & C. 439 (13 E. C. L. 231).

The only remaining question relates to the measure of damages under the particular facts and circumstances of this case. What is the defendant's liability under this branch of the case? She was notified of the pendency of the action against this plaintiff in which the title to the note in question and the validity of payment to her were put in issue. She appeared and participated in the defence, and has paid the counsel fees. It was her duty thus to appear and if possible save this plaintiff harmless on account of his paying, upon her representations, the note to her when in fact she had neither the legal title to it, nor the lawful right to the money upon it. Judgment being rendered against this plaintiff, the defendant was called upon and requested by him to settle the same, and this she refused to do. After such refusal the plaintiff was not obliged to wait until his property was seized on execution issued upon that judgment before being authorized in law to pay the same.

The amount he paid to relieve himself from the judgment against him, as appears by the evidence, was no more than the judgment rendered and costs legally taxable against him in that suit and incident to that judgment. This the plaintiff has paid in good faith. He is entitled to recover it as the measure of his damages. *Coolidge* v. *Brigham*, 5 Met. 72; *B. & A. R. R. Co.* v. *Richardson*, 135 Mass. 477; *Ryerson* v. *Chapman*,

66 Maine, 562; *Kingsbury* v. *Smith*, 13 N. H. 125; *Veazie* v. *Penob. R. R. Co.* 49 Maine, 127.

Judgment for plaintiff for $479.00 and interest thereon from the date of writ.

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

ELLEN F. BRIGGS

vs.

LEWISTON AND AUBURN HORSE RAILROAD COMPANY.

Androscoggin. Opinion April 14, 1887.

Ways. Street railroad. Change of grade. Location. Trespass.

The legislature and the city council can lawfully empower a street railroad company to locate and maintain its railroad in the streets of a city, without providing for additional compensation to the owner of the land.

If the company, acting under the authority of the city council, change the grade of the street, it commits no trespass against the land owner.

ON report.

The opinion states the case.

Savage and Oakes, for plaintiff.

Where land is bounded by a highway, the center line of the way is the boundary. 3 Wash. Real Prop. 635; *Johnson* v. *Anderson*, 18 Maine, 76; *Bangor House* v. *Brown*, 33 Maine, 309; *Id.* 502; *Warren* v. *Blake*, 54 Maine, 283; *Webber* v. *Overlock*, 66 Maine, 177; *Oxton* v. *Groves*, 68 Maine, 371; 45 Maine, 9; 59 Maine, 105; 13 N. H. 584; 45 Maine, 13; *Hunt* v. *Rich*, 38 Maine, 195.

If the plaintiff owns to the center of the highway, including the land upon which the acts of the defendant complained of were done, she can maintain trespass for the injury unless the defendant can in some way justify. Angell on Highways, § § 301 to 309; Waterman on Trespass, Vol. 2. § 392; 28 Am. Dec. 300 and notes; *Robbins* v. *Borman and al.* 1 Pick. 122; *Stackpole* v. *Healy*, 16 Mass. 33; *Hunt* v. *Rich*, 38 Maine, 195.

The only effect the grant or license from the city can have is

to protect the company from any prosecution for disturbing the public rights. 2 Dillon, 548; 25 Conn. 19; 69 Am. Dec. 662, n. 1; 67 Ill. 445; 68 N. Y. 397; *Green* v. *City of Portland*, 32 Maine, 431.

The purpose (horse railroad,) becomes one which will accommodate the public presumably, and the privilege is one which the legislature has power to grant, upon one condition, — that provision shall be made for compensation for any private property taken for such purpose. Const. of Maine, Art. 1, § 21; Cooley Const. Lim. 560; Dillon Mun. Corp. § 477; 1 Redf. on Railways, 248; 2 Kent's. Com. 248; 2 Johns. 167; 7 Am. Dec. 526; 24 Am. Dec. 550; 45 Am. Dec. 61; 61 Am. Dec. 283; 11 Pet. 658; 13 Wall. 178; 51 N. H. 521; 33 Conn. 548.

In some states, when the owner is held to part with the fee of his land, where the highway is laid out, there is no question that the legislature may authorize the use of the street for the purpose, either of a horse or steam railroad, without any provision for payment of damages. Dillon Mun. Corp. 574 and notes.

As to the rule in states where the owner does not part with the fee, we find *Williams* v. *N. Y. Central R. R. Co.* to be a leading and carefully considered case, overruling the position previously taken by the court of that state (New York). 16 N. Y. 97; 69 Am. Dec. 663 and note.

We are aware that this is opposed to the decisions in Massachusetts and some other states, but it is followed by the courts of many states, and we think the reasoning by which the result is reached is sound.

"The right of the public in a highway is an easement, and one that is vested in the whole public. Is not the right of the railroad company, if it has a right to construct its track upon the road, also an easement? This cannot be denied; nor that the latter easement is enjoyed, not by the public at large, but by a corporation."

This case arose in reference to a steam railroad, and at first an attempt was made to confine its application to these, but in *Craig* v. *Rochester, &c. R. R. Co.* 39 Barb. 494, overruling

the case *Brooklyn, &c. R. R. Co.* v. *Brooklyn City R. R. Co.* 33 Barb. 420, it was held to apply alike to horse railroads. See also 39 N. Y. 407.

"The feature which most widely distinguishes a railroad from an ordinary highway is, that the former is a strict monopoly, excluding all idea of competition." *Davis* v. *Mayor*, &c. of N. Y; 14 N. Y. 506; 33 Am. Dec. 516.

"The uses to which streets in towns and cities may legitimately be put, are greater and more numerous than with respect to ordinary roads or highways in the country." 2 Dillon Mun. Corp. § 544 and note; 1 Redf. Railways, 315 n.; 11 Barb. 414; 12 Iowa, 246.

Where the public have only an easement in a street or highway the use of the street or highway for a steam railroad is an additional burden which cannot be imposed without compensation to the proprietor for such new servitude. Dillon Mun. Corp. 557, and cases cited: Cooley Const. Limitations, 549; Redf. on Railways, § 76, p. 316; 16 N. Y. 97; 25 N. Y. 526; 14 Ohio, 523; 22 Conn. 74; 34 Conn. 579; 20 N. J. Eq. 61; 16 Wis. 640; 3 Foster, 83; 6 Foster, 266; 21 Mo. 580; 9 Ind. 433, 467; 5 Dutcher, 393; 31 Am. Dec. 313; 56 Am. Dec. 396; 136 Mass. and cases cited in the dissenting opinion of ALLEN, J.

Frank W. Dana and Willard F. Estey, for defendant.

The city had a right to authorize the company to grade the street. R. S., c. 18 § 75; City ordinances, c. 3, § 5; *Callender* v. *Marsh*, 1 Pick. 417; *Cyr* v. *Dufour*, 68 Maine, 501; *Cool* v. *Crommet*, 13 Maine, 255; *Fitz* v. *Boston*, 4 Cush. 365; Cooley's Const. Lim. 235 *et seq.* Ang. and Ames, Corp. § § 111, 239; *State* v. *Ferguson*, 33 N. H. 430; *Hovey* v. *Mayo*, 43 Maine, 335; *Green* v. *Portland*, 32 Maine, 434.

A horse railroad is not a new use of a way; Cooley's Const. Lim. 682, 687, 700; *Com.* v. *Wilkinson*, 16 Pick. 175; *Murray* v. *Co. Com.* 12 Met. 455; *Benedict* v. *Goit*, 3 Barb. 459; *Wright* v. *Carter*, 27 N. J. 76; *State* v. *Laverack*, 34 N. J. 201; *C. F. &c. Plank Road Co.* v. *Cane*, 2 Ohio (N. S.) 419; *Douglass* v. *Turnpike Co*, 22 Md. 219; Wood's Railway Law, 721, 724; *Elliott* v. *F. and W. R. R. Co.* 32 Conn. 579;

Dillon Mun. Corp. (2 ed.) § 573; *Attorney General* v. *Metropolitan R. R. Co.* 125 Mass. 515; *Citizens' Coach Co.* v. *Camden Horse R. R.* 33 N. J. Eq. 267; *Cushing* v. *Boston*, 122 Mass. 175; *Porter* v. *R. R. Co.* 33 Mo. 128; *Hobart* v. *Milwaukee City R. R. Co.* 27 Wis. 194; *Street Railway* v. *Cumminsville* 14 Ohio St. 523; *Hamilton* v. *N. Y. and Harlem R. Co.* 9 Paige, 170; *Adams* v. *Saratoga and Wash. R. R. Co.* 11 Barb. 414; *Plant* v. *Long Island R. R. Co.* 10 Barb. 26; *Chapman* v. *Albany*, &c. 10 Barb. 360.

EMERY, J. A strip of the plaintiff's land in Auburn, had been lawfully taken by public authority for a public highway, and just compensation had been made to the owner therefor. The defendant company had subsequently constructed a street railroad, (commonly called a "horse railroad") in this highway and over the strip of land, thus taken from the plaintiff's land. Early in 1885, the company lowered the grade of their rails on this strip, whereupon the plaintiff brought this action, alleging said acts of the defendant company to be a trespass on her land.

All these acts of the defendant were within the limits of the highway, and were done under express license from the city council of Auburn, and from the Legislature. They would not therefore constitute any trespass on the plaintiff's land, if such license conferred lawful authority. The plaintiff contends however, that the license invoked in this case, has no validity and confers no authority because it undertakes to make a new and different use of her land, without providing a just compensation therefor.

We do not think the construction and operation of a street railroad in a street, is a new and different use of the land from its use as a highway. The modes of using a highway strictly as a highway are almost innumerable, and they vary and widen with the progress of the community. When a highway is first established in some unfrequented locality, it may exist for a time as a rude road, with a narrow track, and only occasionally used. With the growth of population and business, and the transformation of the lonely neighborhood into a thriving, increasing city, the

highway may also go through the transformations of being turnpiked, planked, macadamized, and paved for its entire width. From bearing an occasional rude cart, it may come to sustain an endless succession of wagons, drays, coaches, omnibuses and other vehicles of travel and traffic. There is a continual march of improvement in streets and in vehicles. It cannot be that the land owner must be compensated anew, at each new improvement in street, or vehicle, or with every increase of traffic. All the land originally taken, was taken for a highway, and for all time, if needed, and the compensation was estimated on that basis. The taking and the payment were once for all. The public, at the first taking, acquired an untrammeled right of way over every part of the land taken, with full right to do all things upon the land to facilitate its use as a highway, and make it sufficient at any time for the increasing need of the public for a highway. There is in such cases no stipulation limiting the public to any particular kind of road or vehicle.

The laying down rails in the street, and the running street cars over them, for the accommodation of persons desiring to travel on the street, is only a later mode of using the land as a way, using it for the very purpose for which it was originally taken. It may be a change in the mode, but it is not a change in the use. The land is still used for a highway. The weight of authority is so manifestly in favor of this proposition, it is unnecessary to cite particular decisions.

Our attention is called to the fact that this defendant company is authorized to use steam as a motor, on this same railroad, and we are cited to decisions of courts, holding that the ordinary steam railroad companies must make additional compensation to land owners — before taking a street for their railroads. The argument is, that however it may be as to horse railroads, steam railroads must make compensation.

We do not think the motor is the criterion. It is rather the use of the street. If the railroad company exclusively occupy the land — shut off the street from it, deprive it of its character of bearing the easement of a street — use it, not for street traffic, but for what is known as railway traffic, the company may

perhaps be said to make a new and different use of the land. But we have no occasion now to express any opinion on that question. This defendant company is using the land as a street. Its railroad is a street railroad. Its cars are used by those who wish to pass from place to place on the street. A change in the motor is not a change in the use.

If public authority can lawfully authorize the construction and operation of a street railway in a public street, without providing for additional compensation to the land owner (as we think it can), it can also lawfully authorize a change of grade for that purpose, without committing a trespass upon the land owner.

The officers of municipalities, charged with the duty of making the streets safe and convenient, for the use of an increasing traffic, have large authority, and wide discretion in all matters of construction and improvement, including grades. It has been held, that the lowering the grade of a street by a person acting under municipal authority, and in good faith, without wantonness, is not a trespass against the land owner. *Hovey* v. *Mayo*, 43 Maine, 332. In this case the lowering of the grade was done under the authority of the city council, and of the commissioner of streets. There is no suggestion of want of good faith.

We think the plaintiff is confined to the remedy provided by statute, § 16 of city charter of Auburn — and § 68, of chap. 18 of R. S. These statute provisions will afford a remedy, if she be entitled to any compensation. She cannot maintain this action of trespass.

Judgment for defendant.

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

JOSEPH B. BABSON *vs.* SAMUEL W. TAINTER.

Hancock. Opinion April 14, 1887.

Deed. Waters. Flats. Island. Colonial ordinance, 1641-7.

Calls in a deed, which describe a parcel of seashore as running "to the water and thence by the water," carry the grant to low water mark.

An island consisting of about two acres of rocks and ledges, although unfit

for habitation, may be of extent and importance enough to admit a title thereto to be acquired by adverse possession.

The title to an island, situated within one hundred rods from the opposite upland, there being no channel between the island and the mainland at low water, does not extend, as between the island and the mainland, unless by special grant, to any flats circling the island, except such as lie on the seaside of the island, between the island and the receded sea.

The rule is not varied by proof that there had been, anciently, a channel, at low water, between the mainland and the island, which had become filled up by the slow processes of accretion.

On exceptions.

This was an action of trespass wherein the plaintiff claimed damages for the erection of a weir by defendant on the flats connecting defendant's island with plaintiff's land on the main. It was contended by the defendant, and there was evidence tending to show it, that at the time of the original conveyances of the main land and the island under which plaintiff and defendant now hold, from a common grantor, that there was a channel at low water next the mainland.

The presiding justice instructed the jury as follows:

1st. "That by the gradual filling up of the channel under the principle of accretion, the bar would belong to the owner of the shore of the mainland."

2d. "That the bar would belong to the mainland by accretion, and would extend as far as the bar extended if southerly of high water mark at the southerly end of the island, and within one hundred rods."

3d. "That if that bar is southerly of the island, so far as it may be material in this case, and, is within the one hundred rods adjacent to the upland, whether title to the island be acquired by deed or by possession, it would belong to the plaintiff."

To all of these instructions the defendant alleged exceptions.

Wiswell and King, for the plaintiff.

George P. Dutton and *Charles A. Spofford*, for the defendant.

Peters, C. J. The plaintiff owns a parcel of the main shore, while the defendant owns or possesses what he calls a

small island opposite the shore, within one hundred rods from the plaintiff's upland, and the mainland and island are connected at low water by flats extending from shore to shore. A dispute arises between the opposite proprietors over the ownership of the flats between their properties.

The questions presented involve the construction, as applicable to present facts, of that portion of the Massachusetts colony ordinance of 1641-7, wherein "It is declared, that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining, shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further." In the present case there is no water at low tide between the two ownerships.

The parties claim their holdings under the same grantor, who conveyed mainland to one and island to another. The plaintiff suggests that, as his deed was dated and recorded first, and bounds him "to the water" and "by the water," the island itself or some part of it, comes within his boundaries. That description no doubt carries the plaintiff's line to low water mark, and includes whatever lies above it on the shore. The words "to the water" would have the same significance to carry a boundary to low water mark that other words have been decided to have, such as "by the sea," "tide water," "salt water," "the harbor," "bay," "cove," "creek," "river," "stream," or other tantamount expression. Gould, Waters, § 195; and cases. But the plaintiff is deprived of the benefit of this principle upon this bill of exceptions, because it does not appear that the jury may not have concluded that the defendant won his title by adverse possession.

To foil the effect of this answer to his proposition, the plaintiff resorts to the position that the defendant's territory is too insignificant in size to be regarded an island, or such an island as would be subject to the principle of adverse possession. It is generally conceded that it is not everything which rises above high water mark that can be called island. There may be reefs and rocks and accumulations that are not such in any

essential sense. Thatch growths may not be. *Thornton* v. *Foss*, 26 Maine, 402. Elevations of muscle bed have been declared not to be. *King* v. *Young*, 76 Maine, 76. Sand heaps and bars may not be,—or it may be a question of fact whether they are or not, when separated from the mainland only by narrow channels or sloughs. *Railroad* v. *Schurmeier*, 7 Wall. 272; S. C. 10 Minn. 82. Here the parcel is described as containing about two acres, and, though it consists mostly of rocks and ledges, and is unfit for the habitation of man, it must be considered as having size and permanency enough to entitle it to the appellation of island—a right to which, might be obtained upon the principles of adverse possession. It must be of some importance. The colonial ordinance applies to islands. *Hill* v. *Lord*, 48 Maine, 83.

This decision of the previous questions brings up another, more essential inquiry, whether the flats between the mainland and island belong to the one or to the other or to both.

What right in flats, islands, situated within the one hundred rods from high water mark at the shore, shall have, when not regulated by the special terms of any grant, seems not to have been very much considered in the cases. The ordinance is in very general terms. The colonial government of the mother commonwealth granted the great boon to landholders without much thought or intimation about the manner of dividing the flats among its grantees. No rule can compass all cases. The Massachusetts court has adopted different rules for different classes of cases, and has frequently had occasion to remark upon the difficulty and embarrassment attending a practical application of any construction of the ordinance. *Gray* v. *Deluce*, 5 Cush. 9; *Rust* v. *Mill Corporation*, 6 Pick. 158; *Com.* v. *Alger*, 7 Cush. 53-69. In our own state a rule was agreed upon, not as dominating all cases, but as fitting the early settlers' lots which extended comparatively long distances upon the rivers or shores. But our own rule has not received much commendation from other courts. *Emerson* v. *Taylor*, 9 Maine, 42; S. C. with note, 23 Am. Dec. 531-537. *Stockham* v. *Browning*, 18 N. J. Eq. p. 396; *Treat* v. *Chipman*, 35 Maine,

34; *Call* v. *Carroll*, 40 Maine, 31. The effort of the judicial department has evidently been to give to each upland proprietor a share of flats as nearly proportionate to his length of line on the river or sea as circumstances permit, meting out as just and equitable results in all cases as possible.

Our opinion is that the flats in dispute in the present case belong wholly to the plaintiff, and that the island takes no share in them. It would seem that they must go wholly to the island or wholly to the main,—they are a continuous, unbroken embankment between the two "proprieties." If the island takes them, the mainland frontage has no flats for that extent. It is certain that the island cannot take the flats surrounding it on all sides. For, if it did, it would not only appropriate to itself, those lying between itself and the shore, (northerly of the island), but would take a great extent of flats along the shore, lying easterly and westerly of itself. In this way a diminutive island might be so situated as to absorb into its ownership an immense area of flats at the expense of the opposite uplands. It was virtually held in *Thornton* v. *Foss*, 26 Maine, 402, *supra*, that an island within the one hundred rods, owned separately from the ownership of the shore, did not include flats on its easterly and westerly sides along the shores in front of the mainland, nor flats extending northerly from itself to the mainland, but that the title extended to such flats as were on its southerly side between itself and the receded sea. Judge WILDE says, in *Rust* v. *Mill Corporation*, *supra*, "If the demandant were entitled to the flats, he could claim them only in the direction to low water mark. This is the obvious meaning of the language of the ordinance." We think such a rule would be thoroughly equitable,—to give the island no collateral flats, when that would interfere with flats of proprietors on the main,—to give to owners on the main the flats, so far as continuous and unbroken, over to the island in the direction towards the ebbing sea,—and to allow to the island all flats on its opposite side between itself and the sea. In such case the island has as much frontage of flats on its sea side as the main shore has for the same distance facing the sea. Of course, this rule would not

divest an island of property in flats entirely encircling the island, if it be wholly surrounded by water at low tide.

But the defendant relies upon another element of the case as so far qualifying the application of the principles above stated, that he, as he contends, may still be the lawful possessor of a portion of the sand bar or flats in dispute,—and this presents another important question. It seems that many years ago there was, according to some of the evidence, a channel, even at the lowest tide, between the island and the main. In such case, the island would take the flats bordering about it down to the channel. The defendant contends that, once including such flats, the island must always include them, and that the then existing line of division would not be lost by the channel gradually filling up from the process of accretion afterwards; that the natural annexation does not take away a right once obtained.

We do not concur with the defendant in this view—the doctrine of the authorities lead us to an opposite conclusion. It may seem odd that nature may, without any act of man, transfer one person's property to another. But she may do it, when her work is accomplished by movements so slowly and silently operating as not to be seen while they are going on. The true answer to this proposition of the defendant is, that an owner of flats has no fixed and absolute title thereto. It is a shifting, ambulatory, dependent, or conditional ownership. The owner of the island might own flats appended to the island until those flats became affixed to the opposite shore. The elements might operate favorably to the one proprietor or the other. They might make and keep the channel near the mainland or near the island—or might from time to time change and remove it—or might fill it up—and might open it again. But wherever natural causes place the channel they interpose a ruling boundary. If they altogether remove the channel other principles settle the boundary.

In *Dunlap* v. *Stetson*, 4 Mason, p. 366, Judge STORY says of a proprietorship of the kind: "He (owner) takes the title, subject to those common incidents which may diminish or increase the extent of his boundaries." An owner may gain or lose. The

consideration for the gain is that he might have lost—may in the future lose—by the operation of natural causes. The doctrine of accretion, as applied to extending or lessening an area of flats was recognized as early as the case of *Adams* v. *Frothingham*, 3 Mass. 353. The present case merely requires a new application of an old principle. In a New Jersey case touching a similar question (45 N. J. L. 405), it is said, "It" (a shore-ownership) "cannot be taken as an absolute, a fixed, boundary. It must be treated as relative, as having relation to the things as they are from time to time." The general question is exhaustively examined and clearly illustrated in the late case of *Mulry* v. *Norton*, 100 N. Y. 426; and that case is reproduced in 53 Am. R. 206, with an instructive note citing all the principal pertinent cases. The following are pointed authorities upon the question. *Com.* v *Roxbury*, 9 Gray, 451, and note p. 503. *In re Hull, &c.* 5 M. & W. 327; *The King* v. *Lord Yarborough*, 3 B. & C. 91; see 4 B. & C. 485; see also 25 Alb. Law Jour. 90.

The conclusion arrived at by us does not clash with the principle, well settled, that, where the right to the soil under the water belongs to a subject, he is entitled to all increments coming thereon, 2 Bl. Com. 262. This applies to growths upon and above flats. Should the bar in this case come up above high water mark, and become solid land, it would be an incident of—a part of—the island or of the main, according as it grew up from the shore to the island, or *vice versa*. If an island increase itself by accretion, the increment—the enlargement—is a part of the island. If the main increase itself, the increase is a part of the main. The flats in question are a part of neither island or main, but are between the two, incident to the main and in a sense belonging to it.

Nor does the rule which governs the present case apply to flats (circling an island), which have been reclaimed from the sea. It affects, not what may have been flats, but what are such at the time of their annexation to the main. A littoral proprietor takes flats which become by accretion attached to his shore, but he does not in the same way take upland, whether naturally or artificially created. Flats reclaimed by occupancy and filling

up partake the character of permanent property, become integral parts of the adjoining land. It is the "unimproved" and "unenclosed" flats that may be subject to transition of ownership. And the right of reclamation and of wharfage is general. One of the chief purposes of the ordinance was to confer such privileges. Every occupier of the shore was to be enabled to reach the sea at all periods of the tide. *Lockwood* v. *New York R. R. Co.* 37 Conn. 387. *Storer* v. *Freeman*, 6 Mass 435; *Com.* v. *Alger*, 7 Cush. 53; *Montgomery* v. *Reed*, 69 Maine, 510, 515. *Kean* v. *Stetson*, 5 Pick. 492, 495; Gould, Waters, § 169. Of course, wharves and storehouses and the filling of flats must be such as not to materially impair the navigable right.

The rule of the present case, evidently, would not be fitting, as between opposite owners on a cove or creek, the channel of which has become filled up, where each is as equal and dominant an owner as the other in the interjacent flats. If it does not apply, however, to the flats involved in the present dispute, the plaintiff will be to a great extent cut off from access to the sea at low water, the result being that he is a loser, instead of a gainer, by the disappearance of the channel. And he will be thus restricted, by oral proof that an ancient, uncertain and indefinite intercepting track of water once existed somewhere at low water between the main shore and the island. That cannot be. The theory or fiction of the law is that flats, brought into existence by the slow and imperceptible process of accretion, are presumed to be a natural condition always existing, or as having the same effect as if they had always so existed. It matters not, in applying the doctrine, whether the nucleus of the flats which finally extend from the upland, commences at the shore or at a distance in the sea from the shore and separable from it. *King* v. *Young*, 76 Maine, 76, *ante*.

After retaining and considering the case a long time, we are unable to satisfy ourselves with any other determination of the questions presented. *Exceptions overruled.*

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

CASCO NATIONAL BANK *vs.* FAYETTE SHAW and others.

Cumberland. Opinion April 19, 1887.

Promissory notes. Notice of protest. Indorsers, notice to, when insolvent. Mailing notice in street letter boxes. Practice.

Notice of the dishonor of a note indorsed by an insolvent firm is sufficient if addressed to the firm at its former place of business, where its affairs are being settled by a trustee to whom the firm has made an assignment for the benefit of its creditors and is received by the trustee.

Depositing such a notice, properly addressed, in a street letter box, put up by the Post Office Department is as truly mailed as if deposited in the letter box within the post office building itself.

Money received by the holder of a note, upon a contract to assign the note to the person paying such money, is not a payment on the note, which the indorser may have applied in a suit by the holder against the indorser.

When the defendant in a pending action is in insolvency, the continuance of the action until the termination of the insolvency proceedings is within the discretion of the court, and can not be claimed by the defendant as a matter of right.

ON report.

Four actions between the same parties were submitted by the report on the same facts. The first action was assumpsit on five promissory notes of ten thousand dollars each, signed by John F. Mills, and indorsed by the defendants; the second action was assumpsit on two promissory notes of forty-six hundred and thirty-nine dollars each, signed by W. E. Plummer, and indorsed by the defendants, and on three promissory notes of $4,659.78, $4,675.31 and $4,658.61, respectively, signed by Chas. W. Clement and indorsed by the defendants; the third action was assumpsit on seven promissory notes of $4,867.50, $4,754.63, $4,516.96, $3,996.59, $4,439.40, $4,713.61 and $4,916.84, respectively, signed by W. E. Plummer and indorsed by the defendants, and on three promissory notes of $4,411.21, $4,362.19, and $4,409.60, respectively, signed by John F. Mills & Co. and indorsed by the defendants; the fourth action was assumpsit on three promissory notes of $4,137.15, $4,205 and $4.115.20, respectively, signed by Charles H. Ward, and indorsed by the defendants, and on four promissory notes of $2,997.87, $4,481.96,

$4,694.83 and $5,897.43, respectively, signed by Charles W. Clement, and indorsed by the defendants, and also on two other promissory notes of $5,316.29 and $5,132.26, respectively, signed by L. J. Orcott and indorsed by the defendants.

William L. Putman, for the plaintiff, on the validity of the protest, cited: *Pattee* v. *McCrillis*, 53 Maine, 410; Mass. Stat. 1882, c. 77, §§ 8–22; Daniel, Neg. Instruments, § 1017; *Malden Bank* v. *Baldwin*, 13 Gray, 154; *Allen* v. *Avery*, 47 Maine, 287; *McGoun* v. *Walker*, 49 Maine, 419; *Bradley* v. *Davis*, 26 Maine, 51; *King* v. *Crowell*, 61 Maine, 244; *Gilbert* v. *Dennis*, 3 Met. 495; *Warren* v. *Gilman*, 17 Maine, 360; *Freeman's Bank* v. *Perkins*, 18 Maine, 292; *Flint* v. *Rogers*, 15 Maine, 67; *Lord* v. *Appleton*, 15 Maine, 270; *Lambert* v. *Chiselin*, 9 How. 552; *Saco Nat. Bank* v. *Sanborn*, 63 Maine, 340; *Grafton Bank* v. *Cox*, 13 Gray, 503; *Requa* v. *Collins*, 51 N. Y. 144; *Bank of Utica* v. *Phillips*, 3 Wend. 408; 1 Greenl. Ev. § 40; 33 Alb. L. J. 478; Abb. Trial Ev. 433, 434; *Bank* v. *DeGroot*, 7 Hun, 210; *Pearce* v. *Langfit*, 100 Penn. St. 507; *Wood* v. *Callaghan*, 28 N. W. Rep. 162; *Berridge* v. *Fitzgerald*, L. R. 4 Q. B. 639; *Eastern Bank* v. *Brown*, 356; *Harrison* v. *Bailey*, 99 Mass. 620; *Keyes* v. *Winter*, 54 Maine, 401; *Cornor* v. *Pratt*, 138 Mass. 446; Byles, Bills, (7 Am. ed.) 304; *Bank of Com.* v. *Law*, 127 Mass. 72; *Fuller* v. *Hooper*, 3 Gray, 334.

No protest was required since the notes were for the accommodation of the indorsers. Daniel, Neg. Inst. § 1086 *et seq.*; *Blenn* v. *Lyford*, 70 Maine, 149.

Continuance is a matter of discretion. R. S., c. 70, § 51; c. 82, § 54; *Schwartz* v. *Drinkwater*, 70 Maine, 409; *Barker* v. *Haskell*, 9 Cush. 222.

George W. Morse and N. and H. B. Cleaves, for defendants.

Notice mailed to the defendants at 268 Purchase Street, Boston, after they had made an assignment of all their property to F. A. Wyman, and abandoned the premises to him, was an insufficient notice to charge the defendants as indorsers of the plaintiff's notes.

Because it is held that notice to the voluntary assignee of an

indorser is insufficient to charge the indorser with liability. *House, Assignee*, v. *Vinton Co. Nat. Bank*, (Sup. Court of Ohio, January 16, 1885,) Reporter, August 26, 1885, p. 247.

It was likewise held that demand made at the maker's place of business, then occupied by his assignee, was insufficient in *Armstrong* v. *Thurston*, 11 Md. 148, and *Benedict* v. *Caffe*, 5 Duer, N. Y. Superior Court, 226.

In *Granite Bank* v. *Ayers*, 16 Pick. 392, the court nonsuited the plaintiffs, on the ground that no proper demand had been made upon the makers, and intimated that no proper notice had been given to the indorsers.

In the case of the *Bank of America* v. *The Shaws*, 142 Mass. 290, the decision in the appellate court was upon the facts as already found, and they differed materially from the facts in the case at bar.

Deposit in street letter boxes was, under the circumstances, insufficient notice to charge the defendants as indorsers. The ordinary rule is, that where personal notice is given at an indorser's place of business, it must be given in business hours, and, "if left after these hours, it will not be deemed sufficient," &c., &c. Story on Prom. Notes, § 315.

The rules in the United States Courts, to stay all suits, whether such as would be barred or not by discharge (unless in cases of inexcusable laches of the debtors), is imperative. R. S., U. S., § 5106; *In re Rosenberg*, 3 Benedict, 14; *In re Chirardelli*, 1 Sawyer, 343; *Ray* v. *Wight*, 119 Mass. 428.

At the conclusion of the bankruptcy proceedings, if the claim was secured by a prior attachment or other lien, the courts under the United States practice render, in case the debtor was discharged, only a special judgment to be satisfied out of the debtor's estate. *Doe* v. *Childress*, 21 Wall. 642; *Peck* v. *Jenness*, 7 How. 612; *Bowman* v. *Harding*, 56 Maine, 559; *Leighton* v. *Kelsey*, 57 Maine, 85; *Franklin Bank* v. *Batchelder*, 23 Maine, 60; *Kittredge* v. *Warren*, 14 N. H. 509; *Matter of Rowell*, 21 Verm. 620; *Johnson* v. *Collins*, 116 Mass. 392; *Stockwell* v. *Silloway*, 113 Mass. 382; *Davenport* v. *Tilton*, 10 Met. 320; *Bates* v. *Tappan*, 99 Mass. 376.

In the state insolvency courts of Maine, although customary to stay suits pending insolvency, the rule is not imperative, but discretionary; hence, in case of claim which would not be barred, the Supreme Court rightfully refused to stay proceedings, because no damage could ensue to any parties thereby. *Schwartz* v. *Drinkwater*, 70 Maine, 409.

In those cases, under the insolvency laws where plaintiff's claims are such as would not be barred by the debtor's discharge, it is held that his person is exempt from arrest, the court rendering a special judgment only. *Choteau* v. *Richardson*, 12 Allen, 365.

The reason why special judgments are allowed after the debtor's discharge, is thus stated by TENNEY, J., in *Franklin Bank* v. *Batchelder*, 23 Maine, 65.

If the judgment is rendered in this case pending the insolvency proceedings, it will create a new debt which will not be barred by the defendants' discharge therein. *Woodbury* v. *Perkins*, 5 Cush. 86; *Faxon* v. *Baxter*, 11 Cush. 35.

The contract by Wyman for the purchase of these notes, made without the consent of the defendants, with condition of forfeiture both of agreement and of payments, was not within the purview of his powers as general assignee.

Contracts by parties having limited powers in excess thereof are void. *Williams* v. *Evans*, L. R. 1 Q. B. 352.

In *Smead* v. *Wiggins*, 3 Ga. 94, which was a case of an agreement by plaintiff providing for payment in certain instalments, the second instalment not being made at the stipulated time, the court held the agreement forfeited (time being of the essence of the contract), but the plaintiff credited the payments upon his judgment.

WALTON, J. We think the defendants had due notice of the dishonor of the notes declared on. Notices were addressed to them at their former place of business, where their affairs were being settled up by a trustee, to whom they had made an assignment for the benefit of their creditors, and we have no doubt that the notices were received by the trustee. Notices so sent

and received are sufficient. *Bank of America* v. *Shaw*, 142 Mass. 290. Better reported in 2 New Eng. Rep. 572. In the case cited the notice was to the same firm and under substantially the same circumstances as in the cases now before us, and the notice was held good, "because it was sent to what had been the place of business of the firm, where its affairs were actually in process of settlement under the trust."

It is objected that the notices were not properly mailed, because they were dropped into a street letter box. We think this is not a valid objection. Street letter boxes are authorized by an act of Congress (R. S., U. S., § 3868), and are as completely and as exclusively under the care and control of the postoffice department as boxes provided for the reception of letters within the postoffice buildings themselves; and we think a letter deposited in a street letter box, which has been put up by the postoffice department, is as truly mailed, within the meaning of the law, as if it were deposited in a letter box within the postoffice building itself. It has been held that a delivery to a letter carrier is sufficient. *Pearce* v. *Langfit*, 101 Penn. St. 507.

Payments are claimed. Since the commencement of these actions the bank has received $44,398.17 from F. A. Wyman, which the defendants claim should be credited to them. The credit can not be allowed. The money was not delivered or received as payments on the notes in suit. It was received on a contract by which the bank agreed to assign to Wyman, the notes in suit, and the actions thereon, "with all benefit of attachments, if any, made in said suits," and this contract has been assigned by Wyman to a third party. It is clear therefore that the defendants are not entitled to the benefit of these payments. So far as appears they have neither a legal nor an equitable right to the benefit of them.

Payments to the amount of $11,720.52 have been made by C. W. Clement and C. H. Ward, on such of the notes in suit as are signed by them, which will of course be allowed, and the defendants will have the benefit of them.

The court is asked to continue these actions to await the result of insolvency proceedings which they aver are pending against them in this state. We are not satisfied that this request ought to be granted. The petitions have been pending since November, 1883, and yet no adjudication has been had upon them; and we doubt if there is any intention to prosecute them further; for the petitioning creditors appear to have been settled with and their claims assigned to the defendants' trustee, Wyman. Continuances for such a cause are discretionary with the court; they can not be claimed as a matter of right; and they will only be granted when the court is satisfied that justice will be thereby promoted. *Schwartz* v. *Drinkwater*, 70 Maine, 409. We are not satisfied that justice would be thereby promoted in these actions. The request is therefore denied.

Four actions between the same parties have been submitted to the law court upon one report of evidence; and the parties have agreed that the court shall render such judgment in each case as the legal rights of the parties may require. It is the opinion of the court that the plaintiff is entitled to judgment in each of the four actions, and such judgments will accordingly be entered.

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

HASKELL, J., did not sit, having been of counsel.

LIZZIE M. WATSON *vs.* DANIEL CRESSEY.

Cumberland. Opinion April 20, 1887.

Deed. Vested remainder. Life-estate.

A deed from a father to two sons contained the following provisions — the grantees "to come into possession of said property after the decease of me and my wife Margaret and not before; . . . this deed is to take effect and go into operation on the decease of me and my wife, and not before." *Held*, that the deed conveyed a vested remainder to the grantees, which they could convey, even before the termination of the life-estate.

ON report on agreed statement of facts.

Writ of entry by which the plaintiff demands the homestead farm of the late James McIntosh in Gorham.

George F. McQuillan, for the plaintiff.

F. M. Ray, for the defendant.

WALTON, J. The facts agreed upon and reported to the law court do not sustain the plaintiff's title. They show title in the defendant.

A grantor may lawfully convey his real estate reserving to himself, or to himself and wife, a life-estate in the premises. Such a conveyance vests an estate in remainder in the grantee immediately. His estate is not postponed till the termination of the life estate. His right of possession or enjoyment is postponed, but his estate, such as it is, vests immediately. In other words, he takes a vested remainder. Such an estate is transferable. The owner may convey or mortgage it; and he can do this before as well as after the termination of the life-estate. Of course the estate of the grantee or mortgagee will be no greater than that of the grantor or mortgagor. He will hold subject to the life-estate. But, with this limitation upon it, a vested remainder may be conveyed or mortgaged as well as any other interest in real estate.

These principles are decisive of the case now before us. James McIntosh conveyed his real estate to his two sons, Stephen and George, reserving to himself and wife a life-estate. The language of the deed is this: "Said Stephen and George to come into possession of said property after the decease of me and my wife Margaret and not before." And again: "This deed is to take effect and go into operation on the decease of me and my wife and not before. . . . My wife is to have the place while she lives after my death." The intention of the grantor was to reserve an estate for the life of himself and wife, and to convey the remainder to his two sons. Of this there can be no doubt. And the law will give effect to this intention. The demanded premises are a portion of what was conveyed to George. James McIntosh and his wife are now both dead and the life-estate ended. The demandant claims title through the heirs of James McIntosh. Her title can be maintained only upon the ground that the deed above referred to was inoperative and void; or,

in other words, that it did not convey a vested remainder to the grantees.

We think it did convey a vested remainder to the grantees. The conveyance was conditional; but the conditions were all subsequent, not precedent; they would not prevent the vesting of the estate; and it is agreed that the conditions have all been performed, and can never, therefore, devest it. The plaintiff claims through the heirs of James McIntosh, the father and grantor of George, and the defendant through the grantees of George. The defendant has the better title. *Wyman* v. *Brown*, 50 Maine, 139; *Drown* v. *Smith*, 52 Maine, 141.

Judgment for the defendant.

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

ALBERT P. GOULD *vs.* NATHANIEL M. WHITMORE, Administrator.

Knox. Opinion May 28, 1887.

Executors and administrators, actions against. Limitations of actions. Practice. Costs. R. S., c. 87, § 12.

Under R. S., c. 87, § 12, one having a claim against a deceased party may maintain an action thereon against the administrator, if commenced within two years and six months after notice of the appointment of the administrator is given, without a presentation of his claim in writing to the administrator and demand of payment within two years after such notice. But by so doing he subjects himself to the burden of having his action continued, at his cost, to the next term of court and for such further time and on such other terms as the court shall order; "and a tender of payment, or offer thereof filed in the case, during the time of such continuance shall bar the same and the defendant shall recover his costs."

When by the plaintiff's declaration some of the items in his account annexed are alleged to be for services rendered within six years of the date of the writ, the action does not appear "on the face of the papers" to be barred by the general limitation of six years.

ON exceptions.

Assumpsit against the administrator of the estate of Jason M. Carlton, deceased, on an account annexed for professional services from May, 1865, to May, 1882, amounting to $3639.

The decedent died August 1, 1882. The administrator gave notice of his appointment October 31, 1882. The writ was dated February 28, 1885. The plea was the general issue and brief statement alleging that no demand was made on the administrator before commencing the action, and setting up the statute of limitations.

A. P. Gould, for the plaintiff.

S. C. Whitmore, for the defendant.

By R. S., ch. 87, § 12, and statute 1883, ch. 243, a demand must be made on the administrator, in writing, within two years after notice of his appointment in order to bring and maintain an action within the six months next following.

In the laws of 1872, c. 85, the words, "or within the six months next following," are first found in our statutes and the purpose the legislature had in first enacting the same, is made clear. The maintenance of an action, before the law of 1883, was absolutely contingent upon demand being made within the two years. Those words cannot be construed as extending the time of making a demand, but extending the time only of bringing an action, and making the maintenance of it so brought, contingent upon a demand being made within the two years in writing.

This court so held in *Fowler* v. *True*, 76 Maine, 43.

In the law of 1883, nothing is said about a penalty if plaintiff does not prove a demand within the two years, showing that the legislature only amended the law of 1872, so far as it referred to the thirty days' notice.

Two years is the limit in other sections of the statute and reasoning from analogy, it is the limit in section 12 of c. 87, R. S. Chap. 87, § § 13, 14 & 16.

His honor, Judge WESTON, says in *Davis* v. *Smith*, 4 Greenl. 337, "When mutual promises are relied upon to repel the operation of the statute of limitation, it is upon the principle of a new promise, of which the acknowledgment of an unsettled account, implied from new items of credit within six years, is evidence."

The receipts, showing that the payments were made for spe-

cific services, are not on the general account. In *Benjamin* v. *Webster*, 65 Maine, 170, his honor, Chief Justice PETERS, says that "where an item of charge in a plaintiff's account, in cases where there are several items, and not as a payment upon the account generally, such payments would not have the effect to take the whole account out of the operation of the statute." See also *Perry* v. *Chesley*, 77 Maine, 393.

LIBBEY, J. This is an action of assumpsit to recover for professional services and disbursements according to the account annexed to the writ. Two grounds of defence were pleaded by the defendant.

First. That the action was barred by R. S., c. 87, § 12.

Second. That it was barred by the general limitation of six years; and it was claimed that these limitations were apparent upon the face of the papers; but this contention was not sustained by the justice presiding.

We think the ruling correct. By the act of 1872, chapter 85, no action could be maintained against an administrator on a claim against the estate unless such claim was first presented in writing and payment demanded at least thirty days before the action was commenced, and within two years after notice was given by him of his appointment; and the right to commence such action was limited to two years and six months from the time such notice was given.

This act was amended by act of 1883, ch. 243, incorporated into the R. S., of 1883, ch. 87, § 12. By this statute the plaintiff is not required to present his claim in writing, and demand payment at least thirty days before commencing his action and within two years after notice of his appointment is given; but if he commences his action without so presenting his claim and demanding payment, he takes upon himself the burden of having his action continued at his cost to the next term of court, and such further time and on such other terms as the court shall order; and "a tender of payment, or offer thereof filed in the

case during the time of such continuance shall bar the same, and the defendant shall recover his costs." The same limitation of the right to commence the action to two years and six months is retained. The language used is not felicitous, but its meaning is plain. The fact that the plaintiff did not present his claim in writing, and demand payment before commencing his action is no defense to its maintenance. The statute treats the commencement of the action as a presentation of the plaintiff's claim and a sufficient demand of payment, and gives the administrator sufficient time to investigate the validity of the claim, and tender or offer payment of it as a defense. Nor is it barred by not having been commenced within two years from the giving of notice.

Upon the second point it is sufficient to say that the action is not barred "on the face of the papers," as a portion of the items in the account appear to be for services performed within six years before the action was commenced.

By the agreement of the parties the case must go to the assessor agreed upon to assess the damages and he must determine upon the evidence submitted how much is due and what items in the account, if any, are barred by limitation.

Exceptions overruled.

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

BOSTON AND MAINE RAILROAD COMPANY

vs.

COUNTY COMMISSIONERS.

OLD ORCHARD BEACH RAILROAD COMPANY *vs.* Same.

York. Opinion June 2, 1887.

Constitutional law. Railroads. Crossings. R. S., c. 18, § 27. Police power. Damages.

The provisions of R. S., c. 18, § 27, requiring that the expense of building and maintaining so much of a town way or highway as is within the limits of

the railroad, where such way crosses a track at grade, shall be borne by the railroad company, are constitutional.

Those provisions are applicable to a company though its charter provides that it is not to be altered, amended or repealed, and they do not impair the obligation of any contract with such company.

The power of the legislature to impose such burdens for the general safety is fundamental. It is the police power, which must be sufficiently extensive to protect all persons and property.

Police power defined. *State* v. *Noyes*, 47 Maine, 189, considered too narrow.

In estimating the damages of a railroad company for land taken in laying out a way across its track the jury are not to take into account any damages for expenses in defending itself against claims for accidents at such a crossing.

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

These two cases were appeals to this court from awards of land damages, made by the county commissioners, to the corporations for the taking of a portion of their lands, and crossing their railroads at grade, by the location of a county way three rods in width.

Both were tried together.

Appellants asked the court to give the jury the following instructions as applicable to the claim of the Boston and Maine Railroad, viz.:

(1.) "A railroad corporation across whose road another railroad or a highway is laid out, has the like right, as all individuals or bodies corporate, owning lands or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures on the land, or changes in its surface, absolutely required by law, or in fact necessary to be made by the corporation injured in order to accommodate its own land to new condition."

(2.) "The appellant is entitled to recover damages for taking its land for the purposes of a highway, subject, however, to its use for a railroad; for the expense of erecting and maintaining signs required by law at the crossing, for making and maintaining cattle guards at the crossing if necessary, and for the expense of flooring the crossing and keeping the planks in repair."

(3.) "In as much as the charter of the Boston and Maine

railroad is not subject to legislative power to 'amend, alter or repeal' acts of incorporation since March 17, 1831, appellant is not subject to the provision of R. S., c. 18, § 27, imposing on it the duty of bearing the expense of building and maintaining so much of this way as is within its limits without being entitled to recover as land damages a sum sufficient to indemnify it for the additional expense, thus by law put upon it by the location of this way."

(4.) "While no damages for increase risk of accidents by reason of the crossing can be given, yet if the present and actual value of the entire property be diminished because of the expense reasonably to be apprehended as inevitably incidental to such accidents and claims arising therefrom, and the adjustment of, or defence against such claims, this is an element of damages which you may take into account."

The court declined to give any of the four, except as may be contained in the charge to the jury.

The points thus presented are concisely stated in the opinion.

G. C. Yeaton, for the plaintiff.

Instructions numbered (1) and (2) are quoted directly from *Massachusetts Central Railroad Company* v. *Boston, Clinton and Fitchbury Railroad Company*, 121 Mass. 124, 126; and *Old Colony and Fall River Railroad Company* v. *County of Plymouth*, 14 Gray, 155, 163, (with such verbal changes as fits the language to the cases at bar,) and we assume will be conceded sound and applicable to the cases at bar, except so far as they may be affected by so much of the provisions of R. S., c. 18, § 27, as embodies the provisions originating in c. 214 of 1874, and modified by chap. 43 of 1878, that "when such way crosses the track at grade, the expense of building and maintaining so much of such way as is within the limits of such railroad shall be borne by the railroad company whose track is so crossed."

It was claimed at *nisi prius*, and may be claimed here, that this statutory provision has received full and final construction by this court in the late case, *Portland and Rochester Railroad*

Company v. *Inhabitants of Deering*, Eastern Reporter, March 13, 1886, p. 98; 78 Maine, 61; and that the opinion in that case entirely covers the ground taken by appellants in these cases. Whatever may be conceded, so far as the appeal of the Orchard Beach Railroad Company is concerned, it is not admitted that this statute applies to the Boston and Maine Railroad.

The statute was held valid, because that corporation (the Portland and Rochester Railroad) was admitted to be within the scope of the provisions of R. S., c. 46, § 23, originating March 17, 1831, subjecting all acts of incorporation subsequent to the last mentioned date to legislative alteration and amendment, "unless they contain an express limitation," as also subsequent to the constitutional amendment above referred to.

Exactly this limitation the original charter of the Boston and Maine Railroad does contain. The act of March 30, 1836, c. 179, § 17, provides, "That an act entitled 'an act concerning corporations,' passed March seventeenth, in the year of our Lord one thousand eight hundred and thirty-one, shall not extend or apply to the company hereby incorporated." Webb's Railroad Laws of Maine, 86.

The spirit, and, in part, the scope, of the protection afforded by this exemption, as well as the entire constitutionality of this, and similar statutory provisions, this court has declared in *State* v. *Dexter and Newport Railroad Company*, 69 Maine, 44. Nor will it be claimed that this exemption was lost by the corporation, in any way, until the act of 1871, c. 630. Webb, *Id.* pp. 90, 91.

Some of the marks of distinction between an act or incorporation and a grant of additional power to an existing corporation, are pointed out in *State* v. *Maine Central Railroad*, 66 Maine, 488.

It follows, then, the act of 1871 not being an act of incorporation, but merely an additional grant to an already existing corporation, that the question is not whether this act confers the exemption from the legislative power to "amend, alter, or repeal," but whether this exemption, already one of appellant's powers or privileges, is, by the act of 1871, taken from it. It

is not a question of grant but of repeal. *Vide State of Tennessee* v. *Whitworth, Tr. etc.* 6 Sup. Ct. Rep. 649, citing a line of twelve decisions of the same court from *Philadelphia and Wilmington Railroad Company* v. *Maryland*, 10 How. 394, to *Chesapeake and Ohio Railroad Company* v. *Miller*, 114 U S. 185.

As to the difficulties of any repeal of specific legislation by general, or of special provisions by general language, *vide Webb* v. *Ridgeley*, 38 Md. 364; *Fitzgerald* v. *Champneys*, 30 L. J. Ch. 782; Wilberforce on Stats. 318, 330, 331, 334; Maxwell on Interp. of Stats. 66; Dwarris on Stats. 530, 532.

The power of the legislature to subsequently require a railroad corporation to construct any portion of a way not in existence at the date of its charter, can only be supported as an exercise of what has been termed the police power, which, being inalienable in its nature, the legislature must forever retain.

One of the plain limitations it can never transgress, is the boundary line which surrounds vested property rights. Cooley, Constitutional Limitations, p. 572; Morawetz, Private Corporations, p. 443; *Railroad* v. *Richmond*, 96 U. S. 521, 528.

Illustrations of the rightful exercise of this power, and impliedly, if not of its exact limit, certainly of a field clearly beyond this limit, *quoad* regulation of railroads at their intersection with public ways, may be found cited by Mr. Morawetz, in Private Corporations, § 443, *et seq.*, including two domestic decisions; viz.: *Norris* v. *Androscoggin Railroad*, 39 Maine, 273; *Inhabitants of Veazie* v. *Mayo*, 45 Maine, 560.

A very full discussion of the nature and limits of the police power is found in *Philadelphia, Wilmington, and Baltimore Railroad Company* v. *Bowers*, 4 Houst. 506, 537. See also *State* v. *Commissioners*, 37 N. J. L. 240. Unless the land owner is paid such sum as leaves him in as good condition as he was before the taking, no sophistry can reconcile the process with the constitutional provision protecting private property against confiscation. *Atlantic and Pacific Telegraph Company* v. *Chicago Rock Island and Pacific Railroad Company*, 6 Bissell, 158, 161; Morawetz Private Corporations, 436.

R. P. Tapley, for defendants, cited: *State* v. *Bunker*, 59

Maine, 366; *Browne* v. *Bowdoinham*, 71 Maine, 144; *Bigelow* v. *Hillman*, 37 Maine, 52; *Estes* v. *Troy*, 5 Maine, 368; *Com* v. *Coupe*, 128 Mass. 66; *Fitchburg Railroad* v. *Page*, 131 Mass. 395; *Lawrence* v. *Mt. Vernon*, 35 Maine, 100; *Sprague* v. *Waite*, 17 Pick. 309; *Hannum* v. *Belchertown*, 19 Pick. 312; *Walker* v. *Pierce*, 38 Vt. 98; *Richardson* v. *Pond*, 15 Gray. 390; *Curtis* v. *Keesler*, 14 Barb. 511; Webb's Railroad Laws, 90, 87; *Stetson* v. *Bangor*, 60 Maine, 315; S. C. 73 Maine, 357; *Memphis Railroad* v. *Comr's*, 112 U. S. 609; 10 How. 416; 13 How. 71; 1 Blackf. 360, 436; 8 How. 569; *Ohio and M. Railroad* v. *Wheeler*, 1 Blackf. 286; *Muller* v. *Dows*, 94 U. S. 444; *New Jersey* v. *Yard*, 95 U. S. 104.

EMERY, J. The county commissioners of York county laid out and established a county road, crossing at grade, the tracks of both the appellant railroad companies, and made an appraisal of the damages sustained by each company from the necessary appropriation of its land within the limits of its location. The railroad companies appealed, and the question of damages was tried before a jury in this court.

The bill of exceptions presents practically only two questions, one raised by the first three exceptions, and the other by the fourth exception. The solution of these two questions will dispose of all the exceptions.

The legislature had ordered by R. S., c. 18, § 27, that in such cases, the railroad company shall at its own expense build and maintain so much of said county road as is within the limits of the railroad. This court held in *P. & R. R. R. Co.* v. *Deering*, 78 Maine, 61; that this statute duty of the railroad company did not entitle it to any extra compensation for the taking of its land—that the expense thus put upon the railroad company was not to be considered in appraising their damages. The result in the case cited is decisive against the claim of the Orchard Beach railroad company on this point, as its charter is expressly subject to legislative control.

The Boston and Maine railroad company, however claims that its charter is not subject to "amendment, alteration or repeal,"

the state having therein stipulated against such action. We do not think it necessary to express any opinion on this claim.

The company further claims, that by reason of such stipulation in its charter, the legislature cannot lawfully require this company to bear such burdens without providing pecuniary compensation, since such requirement would impair the obligation of the contract between the state and the company contained in the charter. We do not think such a result necessarily follows from the assumed premises.

Perhaps the question of the legislative authority over this company in this particular cannot strictly arise until the company refuse to comply with the statute, but as the company intimate their wish to obey the statute, and only claim that the burden imposed by it, is an important element in the appraisal of their damages, we may properly pass upon the question in this proceeding. The question can perhaps be more directly presented, if stated in this way. Could the legislature lawfully impose this burden on this company, in the case of a pre-existing county road? Could the legislature lawfully require this company to assume the care of county roads (within its location) existing and crossing its track before the enactment of the statute? If the legislature could impose this duty as to pre-existing roads without compensation, it certainly could do so, as to future roads. There must be the same answer to either statement of the question.

In determining whether a statute is within the powers of the legislature, or whether it "amends, alters, or repeals" a charter contrary to stipulation, it is important to ascertain the intent or purpose of the statute. The purpose of this statute was evidently to promote the safety of travelers both upon the railroad and the county way. In view of the nature of the ordinary steam railroad, and the dangers necessarily attending its operation, and the onerous liability of the railroad company to its patrons and the public, it is clear that the company should have the whole control of all things necessary to be done within its location, for any purpose, whether for the benefit of the company, or that of the public. It must practically have the exclusive

possession of the land within the lines of its location. *Hayden* v. *Skillings*, 78 Maine, 413. An independent and possibly antagonistic interest or authority should not be admitted within those lines.

Still, that part of the county way within the lines of the railroad location must be kept safe and convenient for travelers upon it. It must also be so constructed and maintained as not to endanger safety in operating the railroad. The one need combines with the other. The county way is as necessary as the railroad. To ensure such construction and maintenance, to ensure such safety upon both roads at the point of intersection, to protect travelers upon both roads, to provide for the better security of persons and property, the legislature has put this whole matter of construction and maintenance of both roads within the railroad limits, upon the railroad company. The company is required to do this for its own protection and that of citizens generally.

This power of the legislature to impose uncompensated duties and even burdens, upon individuals and corporations for the general safety, is fundamental. It is the "police power." Its proper exercise is the highest duty of government. The state may in some cases forego the right to taxation, but it can never relieve itself of the duty of providing for the safety of its citizens. This duty, and consequent power, override all statute or contract exemptions. The state cannot free any person or corporation from subjection to this power. All personal as well as property rights must be held subject to the police power of the state. *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Stone* v. *Mississippi*, 101 U. S. 814; *Butchers' Union Co.* v. *Crescent City Co.* 111 U. S. 746.

This important power must be extensive enough to protect the most retiring citizen in the most obscure walks, and to control the greatest and wealthiest corporations. Its exercise must become wider, more varied and frequent, with the progress of society. "This police power of the state extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the state." *Thorpe* v.

Rutland Railroad Co. 27 Vt. 150. "It extends to the protection of the lives, health and property of the citizens and the preservation of good order and public morals." *Beer Co. case*, 97 U. S. 33. Its wide extent can be illustrated by instances of its actual exercise without direct compensation. Many of these instances are too familiar to need citations of authorities.

The sale of provisions has been regulated and abridged. The sale of intoxicating liquors has been prohibited. Licenses to manufacture liquors, have been recalled, and the manufacture prohibited, after much expenditure by the licencees. *Beer Co. case*, 97 U. S. 33. Lotteries chartered for a consideration paid, have been suppressed. *Stone's case*, 101 U. S. 814. Dealers in many articles of merchandise, are required to submit them to inspection by a public officer and pay the cost of inspection. Dealers using weights and measures must have them approved by a public officer, and pay the expense. The builder of buildings is often compelled to use more expensive material and adopt more expensive appliances, than he otherwise would. Safety for others may require it. The blameless sufferer from a contagious disease, is often compelled to leave home and friends and bear his pain in some place of quarantine. The infected places are disinfected and the infected clothing destroyed, all at the expense of the unfortunate owner. In the emergency of danger from fire, this power can tear down private buildings and otherwise destroy private property without compensation, to prevent a greater destruction from the conflagration. 2 Kent's Com. 339, notes. An instance something like the requirement of this statute, is the compelling the owners or occupants of buildings to keep the public sidewalks, in front of the building, clear from snow. Dillon on Mun. Corp. sec. 394.

When the party or property affected, though private in its character, yet has a public relation, the operation of the police power is still more extensive and frequent. The owners of theatres and halls are required to provide ample means of exit though to do so may involve expensive changes in the building. Hotel proprietors are compelled to provide fire-alarms, fire escapes, watchmen, &c. Carriers of passengers are peculiarly

subject to the exercise of this power. Steamboats must submit to inspections and pay the costs thereof. They must use such boilers and engines and carry such boats, etc., as may be prescribed. They may be required from time to time to discard old appliances and adopt and use new and more expensive appliances for safety. Railroads are constantly having imposed upon them additional duties with reference to safety of persons and property. The use of new inventions, in brakes, platforms, switches, signals, heating, lighting, etc., is often commanded, even though former expenditure is thereby made useless. "The state in the exercise of its police power may require reports, the numbering of the cars, the fixing and posting of rates, a slow rate of movement, the disuse of steam in cities, the ringing of a bell and the blowing of a whistle on approaching highways, the stationing of a flagman at a highway crossing, the lighting of the railroad in cities and villages." Pierce on Railroads, 462. Although the charter may have prescribed one kind of fence to be built by the railroad company, the legislature may afterward lawfully require another kind of fence. Pierce on Railroads, 463.

Neither is this police power confined to saving life or limb. It may protect business interests by prohibiting discriminations, by regulating tariffs, by enforcing facilities for the public. *Munn's case*, 94 U. S. 113. The interstate commerce act of congress, illustrates this proposition.

The case *State* v. *Noyes*, 47 Maine, 189, decided in 1859, is now generally considered too narrow and strict an interpretation. Broader views have prevailed since then.

From the above instances of the application of the police power, the Maine statute requiring the railroad company to care for and maintain highway crossings within its location, seems to be a moderate and ordinary exercise of a constitutional power.

Corporations derive their existence from the state and hence are subject to the state even more completely than individuals. Corporations created for public purposes and invested with large powers as railroad corporations are, can properly be required to do any reasonable thing and to assume permanently any reason-

able duty, which shall promise greater security from the dangers attendant upon the exercise of their powers. There must needs be a highway. The crossing at the railroad must be kept in repair. To permit any divided authority or responsibility as to the crossing would be dangerous. The railroad company would loudly remonstrate if the municipality were given the power to manage the crossing. The company needs the entire control for its own protection as well as that of its passengers. By operating its road it occasions the danger. It is not unreasonable that the railroad company should provide against the danger so occasioned. Such a requirement does not seem to be an "alteration, amendment or repeal" of the charter of the Boston and Maine Railroad Company. The company exercises all the powers and privileges it had before the enactment of the statute requiring this duty of maintaining crossings. The statute simply requires more care and greater security in such exercise. However the statute may affect the company or its charter, we think the company is subject to it. It follows that the principles announced in the case of the *P. & R. R. R. Co.* v. *Deering*, above cited, govern the case of the Boston and Maine Railroad Company as well as that of Orchard Beach Railroad Company.

The fourth exception is not urged; we have found no authority for the requested instruction. Such an apprehension of expense which may never be incurred, is too uncertain and indefinite to to be an element in estimating the damage to the company's property. There may be no accidents. There may be no unfounded claims made. None can be certainly anticipated. If the company cannot have compensation for increased liability to accidents, it should not have it for mere apprehension of expense in defending against groundless claims.

It will be seen that our answers to the questions raised by the exceptions, requires the exceptions to be overruled.

The motion to set aside the verdict as against evidence, has also been fully considered. It may be that the special findings particularly as to the width of the prescriptive way, are not according to the weight of the evidence on those points. However that may be, the majority of the court is of the opinion that

upon the whole evidence there is no reason to expect a larger award of damages, from another trial, and that the general verdict should stand.

Exceptions and motion overruled.

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

SYLVESTER S. WORMELL

vs.

MAINE CENTRAL RAILROAD COMPANY.

Kennebec. Opinion June 4, 1887.

Railroads. Negligence. Due care. Master and servant. New trial.

Though an employee, at the time of receiving an injury, is in the performance of duties outside of his regular employment (here, a workman in the car shops was in the yard shackling cars, by direction of the foreman,) he cannot recover from the employer the damages sustained, if a want of due care on his own part contributed to produce the injury.

The law requires the exercise of ordinary and reasonable care on the part of each — the master in providing and maintaining suitable means and instrumentalities with which to conduct the business in which the servant is engaged; and the servant in providing for his own safety from such dangers as are known to him or discoverable by the exercise of ordinary care on his own part.

The question of care is one of fact for the jury, ordinarily; but it is for the court to determine whether there is sufficient evidence of due care on the part of the plaintiff to sustain a verdict in his favor. Evidence so slight as not to have legal weight is insufficient.

Facts stated in the opinion which were held insufficient to show due care.

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

The verdict was for four thousand dollars.

The facts are fully stated in the opinion.

Walton and Walton, for plaintiff.

The evidence relating to the custom of sending men out of the shop to do work, elsewhere, was properly admitted. Woods' Railway Law, Vol. 3, page 1488; *Ohio & Mississippi Ry. Co.* v.

Collarn, 73 Ind. 261; *Pennsylvania Co.* v. *Stoelke*, 104 Ill. 201. Whether the plaintiff should have done as ordered was a question of fact for the jury, as stated in the charge. *Patterson* v. *P. & C. Ry. Co.* 76 Penn. St. 389; Woods on Master and Servant, p. 760.

There is no question that the drawbar in the case at bar was not in proper condition, because the buffer did hit the deadwood and crushed plaintiff's arm against it. The defendants are liable if this was the case, as their agent Philbrick, whose duty it was to provide and repair the machinery, could have known by reasonable diligence the fact of its improper condition. *Shanny* v. *Androscoggin Mills*, 66 Maine, 420; *Gilman* v. *Eastern R. R. Co.* 13 Allen, 433; *Ford* v. *Fitchburg R. R. Co.* 110 Mass. 240; *Holden* v. *Fitchburg, R. R. Co.* 129 Mass. 268; *Warden* v. *Old Colony R. R. Co.* 137 Mass. 204; *Gormley* v. *Vulcan Iron Works*, 61 Mo. 492; *Dowling* v. *Allen*, 74 Mo. 13; *Brobbets* v. *Chicago Ry. Co.* 38 Wis. 289; *Strahlendorf* v. *Rosenthral*, 30 Wis. 674; *Dobbin* v. *Richmond Ry. Co.* 81 N. C. 446; *Corcoran* v. *Holbrook*, 59 N. Y. 517; *Sheehan* v. *N. Y. Cent. Ry. Co.* 91 N. Y. 332; *Mitchell* v. *Robinson*, 80 Ind. 281.

While the plaintiff's attention was intent upon his right hand, with which he was guiding the shackle, is it any wonder that his left hand was not held safely, was brought forward and caught by the buffer and crushed? *Snow* v. *Housatonic R. R. Co.* 8 Allen, 441. Is he to blame that he did not know which way to face? *Hackett* v. *Middlesex Man. Co.* 101 Mass. 101; *Plummer* v. *Railroad*, 73 Maine, 591.

He was not in fault in obeying orders and relying upon Philbrick's direction. Negligence should not be attributed to him therefor. *Howard Oil Co.* v. *Farmer*, 56 Texas, 301; *Connolly* v. *Poillon*, 41 Barb. 366; *Keegan* v. *Kavanaugh*, 62 Mo. 230; *Luelka* v. *Chic. Mil. & St. P. Ry. Co.* 59 Wis. 127; Woods on Master and Servant, pp. 720 to 733, 760. Thom. on Neg. Vol. 2, p. 974, 971.

The jury were justified in finding that Mr. Wormell, was not in fault but there was negligence on the part of Philbrick in

sending plaintiff out to do the shackling without informing him of the peril to which he would thereby be exposed, irrespective of the question of the suitableness of the coupling, drawbar and buffer attachment. Whart. Neg. § § 216 to 220. *O'Connor* v. *Adams*, 120 Mass. 427; *Parkhurst* v. *Johnson*, 50 Mich. 70; *Keegan* v. *Kavanaugh*, 62 Mo. 230; *Dowling* v. *Allen*, 74 Mo. 13; *Hill* v. *Gust*, 55 Ind. 45; *Howard Oil Co.* v. *Farmer*, 56 Tex. 301; *Lalor* v. *C. B. & Q. Ry. Co.* 52 Ill. 401; Woods Ry. Law, Vol. 3, p. 1487; Woods, Master & Servant, p. 723, § 354.

It is only where the servant with full notice of the risk he assumes, chooses to enter the employment, that the master is relieved from liability. *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 572; Rorer on Railroads, Vol. 2, p. 836; Woods, Master and Servant, 17, § 353.

So far as the case considered as a whole is concerned, it was one manifestly for the jury particularly when the jury had an opportunity to examine an engine and car for themselves. *Brown* v. *Moran*, 42 Maine, 44; *Lawless* v. *Conn. River R. R. Co.* 136 Mass. 1; *Arkerson* v. *Dennison*, 117 Mass. 407; *Avilla* v. *Nash*, 117 Mass. 318; *Huddleston* v. *Lowell Machine Shop*, 106 Mass. 282; *Meesel* v. *Lynn & Boston R. R. Co.* 8 Allen, 234; *Snow* v. *Housatonic R. R. Co.* 8 Allen, 441; *Reed* v. *Deerfield*, 8 Allen, 522; *Bigelow* v. *Rutland*, 4 Cush. 247; *Plummer* v. *R. R. Co.* 73 Maine, 594; *Spofford* v. *Harlow*, 3 Allen, 176; *Quirk* v. *Holt*, 99 Mass. 164; *Gaynor* v. *Old Colony & N. Ry. Co.* 100 Mass. 208; *Shapleigh* v. *Wyman*, 134 Mass. 118; *Tyler* v. *N. Y. & N. E. Ry. Co.* 137 Mass. 238; *Johnson* v. *Bruner*, 61 Penn. St. 58; *Penn. R. R. Co.* v. *Ogier*, 35 Penn. St. 60; *Fay* v. *Minn. & St. La. Ry. Co.* 30 Minn. 231; *Sheehy* v. *Burger*, 62 N. Y. 558; *McIntire* v. *N. Y. Cen. Ry. Co.* 37 N. Y. 287; *Hawley* v. *Same*, 82 N. Y. 370; *Hanley* v. *N. Y. Cen., Ry Co.* 17 Hun, 115; *Marsh* v. *Chickering*, 25 Hun, 405; *Howard Oil Co.* v. *Farmer*, 56 Tex. 301; *Snoboda* v. *Ward*, 40 Mich. 420; *Hill* v. *Gust*, 55 Ind. 45; and the other cases before cited in this argument.

F. A Waldron, also for plaintiff.

In *Lawless* v. *Conn. River R. R. Co.* 136 Mass. 1, the court

says: "It is the duty of the defendant to furnish a locomotive engine suitable for the work which it required the plaintiff to perform with it, and to exercise ordinary care in the performance of this duty and it was responsible to the plaintiff if he was using due care for an injury resulting from its negligence or want of ordinary care in this respect." 110 Mass. 240; 129 Mass. 268; 100 U. S. 213; 139 Mass. 584.

The decided cases adopt this rule. "It is the duty of a master to notify his servant of peculiar dangers which are not known or obvious to them, but known to the defendant, its officers or agents. And the notice and instructions must be adapted to the immaturity and inexperience of the servant." 102 Mass. 572; 120 Mass. 427; 29 Conn. 548; 30 Wis. 674; 31 Ohio, 479; 37 Mich. 205; 25 Ala. 659; 21 Hun, 396; Prince on Master and Servant, 376.

If it be said that a man in the exercise of ordinary care could have avoided the danger to which he was exposed, we answer in the language of the court in *Hawks* v. *Locke*, 139 Mass. 209. "We are to regard (consider) not only that which may prove to have been necessary upon a review of the situation in cool blood but what would naturally seem so in the hurry and excitement of the moment when the parties had to act."

In *O'Conner* v. *Adams*, 120 Mass. 427, the evidence showed that defendant's agent ordered the plaintiff to work in a place of peculiar danger of which he had no knowledge or experience without informing him of the risks or instructing him how to avoid the danger. And the court held the defendant responsible for the injury sustained by the plaintiff.

In *Lalor* v. *C. B. & Q. R. R. Co.* 52 Ill. 401, a laborer employed in loading and unloading freight cars was ordered to couple cars by defendant's superintendent who knew him to be inexperienced and unacquainted with the manner of doing such work when he ordered him to do it. The laborer did not appreciate the danger to which he was exposed and the court held the defendant responsible in damages for the injury sustained.

The standard is different in each case and as the facts and circumstances are developed at the trial it cannot be determined

by the court but must be submitted to the determination of the jury. This position is supported by an unbroken line of authorities of which I will cite a few. 4 Cush. 247; 10 Allen, 159; 6 Allen, 87; 12 Allen, 58; 8 Allen, 234, 522; 32 Vt. 612; 28 Conn. 264; 101 Mass. 101; 102 Mass. 572; 11 Allen, 419; 136 Mass. 1; Eastern Rep. Vol. 4, No. 11, p. 871.

Baker, Baker and Cornish, for the defendant.

If the duty commanded is glaringly perilous then the servant who attempts is guilty of contributory negligence. *Lalor* v. *Railroad*, 52 Ill. 401 (4 Am. R. 616); *Railroad* v. *Bayfield*, 37 Mich. 205; *Railroad* v. *Adams*, 5 No. East. Rep. 600; *Jones* v. *Railroad*, 49 Mich. 573; *Smith* v. *Car Works*, 27 N. W. Rep. 662; *Railroad* v. *Fort*, 17 Wall. 553; *Miller* v. *U. P. R. R.* 12 Fed. Rep. 600; *Same* v. *Same*, 17 Fed. Rep. 67; *Thompson* v. *Railroad*, 14 Fed. Rep. 564; *Crew* v. *Railroad*, 20 Fed. Rep. 93; *English* v. *Railroad*, 24 Fed. Rep. 906.

His employer could not require it, if not within the scope of his contract. *Wallace* v. *DeYoung*, 98 Ill. 638 (38 Am. R. 109); *Cassidy* v. *Railroad*, 76 Maine, 489; *Griffiths* v. *London, &c. Dock Co.* 12 Q. B. Div. 495; S. C. 13 Q. B. Div. 259; *Nason* v. *West*, 3 Atl. Rep. 911; *Leary* v. *B. & A. R. R.* 139 Mass. 580.

Master is not bound to notify the servant of obvious danger. *Coolbroth* v. *M. C. R. R.* 77 Maine, 165; Wood, Master and Serv. § 326; *Woodley* v. *Railway Co.* 21 Moak's Eng. Rep. 519, note; *Gibson* v. *Railroad*, 46 Mo. 163; Beach, Con. Neg. § 138; *Wheeler* v. *Wason M'fg Co.* 135 Mass. 296; *Hathaway* v. *Mich. Cen. R. R.* 51 Mich. 253 (47 Am. R. 569); *Railroad* v. *Smithson*, 45 Mich. 212; *Cummings* v. *Rollins*, 61 Mo. 523.

FOSTER, J. The plaintiff was at work as a locomotive machinist in the car shops of the defendant corporation at Waterville. On the day the injury was received he was directed by the foreman of the car shops to go out with an engineer and

move an engine from the paint shop near by to the repair shop where the plaintiff worked. The engine with which the moving was to be done was then standing on the turn-table in the machine shop. In order to move the engine from the paint shop to the repair shop it became necessary first to remove certain cars which were on the track in the yard. The plaintiff went out, and while waiting for the switches to be turned, Philbrick, the master mechanic of the road, came out and asked him if he knew how to shackle the passenger car that stood upon the paint shop tracks, and the plaintiff replied that he did not know how to shackle any cars. Thereupon the master mechanic took him to the car and explained the peculiar danger that might arise from the shackling of a passenger car, no special instructions being given in relation to shackling flat cars, but told him he must not get in line of the drawbars, and finally told him that he guessed he could get along by being careful. The flat cars stood next to the engine and had to be coupled first. In attempting to couple the tender to the first flat car he made several efforts, but failed, as he claimed, because the shackles were too short. Finally, when the engine and tender backed the third time, standing as he had stood before between the tender and the flat car, with the tender on his right and the flat car on his left, while adjusting the shackle with his right hand, he allowed the wrist of his left hand to rest over the edge of the deadwood of the flat car directly over its drawbar, and directly in front of the buffer upon the tender, which is a projecting arm out of which the shackle extends, and failing to connect the shackle with the drawbar of the car, the buffer came back against and crushed his left hand, necessitating its amputation.

The plaintiff bases a recovery against the defendant corporation upon two grounds — that the implements and means furnished were not proper and suitable for the work which the plaintiff was directed to do,— and that Philbrick, representing the corporation as a vice-principal, placed him in a position of peculiar peril without notifying him of the danger.

The latter position is the one most strenuously urged and relied on by the plaintiff who recovered a verdict against the

defendant, and the case is now before this court on motion to set aside the verdict, and also on exceptions.

With the view which the court has taken of the case, it does not become necessary to determine in what capacity Philbrick was acting, whether as vice-principal or as a fellow-servant with the plaintiff, inasmuch as it is the opinion of the court that the verdict cannot be upheld upon other grounds.

The action set forth is founded upon the charge of negligence. It is the gist of the action. To entitle the plaintiff to recover, he must prove such negligence, the omission of some duty, or the commission of such negligent acts on the part of the defendant as occasioned the injury to the plaintiff.

If the injury was occasioned through his own neglect and want of ordinary care, or was the result of accident solely, the defendant being without fault, the action is not maintainable. "The negligence is the gist of the action, but the absence of negligence contributing to the injury, on the part of the plaintiff, is equally important." *Brown* v. *E. & N. A. Railway Co.* 58 Maine, 387; *Osborne* v. *Knox & Lin. Railroad*, 68 Maine, 51.

There is no presumption of negligence on the part of the defendant from the fact alone that an accident has happened, or that the plaintiff has received an injury while in the employment of the defendant. In the long line of decisions both in this country and in England from *Priestley* v. *Fowler*, 3 Mees. & Wels. 1, to the present time, it has been held that the mere fact of the relationship of master to servant, without a neglect of duty, does not impose upon the master, a guarantee of the servant's safety but that the servant of sufficient age and intelligence to understand the nature of the risks to which he is exposed, engaging for compensation in the employment of the master, takes upon himself the natural, ordinary and apparent risks and perils incident to such employment. *Coolbroth* v. *Maine Central R. R. Co.* 77 Maine, 167; *Nason* v. *West*, 78 Maine, 257.

The relationship of master and servant may and most frequently does exist by simple mutual agreement that the servant is to labor in the service of the master. In such case the

law holds that the terms of the contract are not fully expressed, and that there exists by implication reciprocal rights and obligations on the part of each which it will protect and enforce equally as if expressed by the parties. Among other things it implies that each is to exercise ordinary and reasonable care. It implies that the master is to use ordinary care in providing and maintaining suitable means and instrumentalities with which to conduct the business in which the servant is engaged, so that the servant, being himself in the exercise of due care, may be enabled to perform his duty without exposure to dangers not falling within the obvious scope of his employment. The implied duty of the master in this respect is measured by the standard of ordinary care. *Hull* v. *Hall*, 78 Maine, 117. The law holds him to no higher obligation than this.

Nor is the employer bound to furnish the safest machinery, instrumentalities or appliances with which to carry on his business, nor to provide the best methods for their operation, in order to save himself from responsibility resulting from their use. If they are of an ordinary character and such as can with reasonable care be used without danger, except such as may be reasonably incident to the business, it is all that the law requires. *Railroad Co.* v. *Sentmeyer*, 92 Penn. St. 276.

Thus it has been held that where an injury happens to a servant while using an instrument, an engine or a machine in the course of his employment, the nature of which he is as much aware as his master, and in the use of which he receives an injury, he cannot, at all events if the evidence is consistent with his own negligence in the use of it as the cause of the injury, recover against his master, there being no evidence that the injury arose through the personal negligence of the master; and that it was no evidence of such personal negligence of the master, that he had in use in his business an engine or machine less safe than some other in general use. *Dynen* v. *Leach*, 26 L. J. (N. S.) Exch. 221.

And in accordance with the same principle it was held in *Indianapolis B. & W. Railway* v. *Flanigan*, 77 Ill. 365, that a railroad company was not liable for an injury received by an

employee, while coupling cars having double buffers, simply because a higher degree of care is required in using them than in those differently constructed.

So in *Fort Wayne, &c. Railroad* v. *Gildersleeve*, 33 Mich. 133, it was decided that a railroad company which used in one of its trains an old mail car which was lower than others, was not liable to its servant, who knowingly incurred the risk, for an injury resulting from the coupling of such old car with another, though the danger was greater than with cars of equal height.

Every employer has the right to judge for himself in what manner he will carry on his business, as between himself and those whom he employs, and the servant having knowledge of the circumstances, must judge for himself whether he will enter his service, or, having entered, whether he will remain. *Hayden* v. *Smithville*, 29 Conn. 548; *Buzzell* v. *Laconia M'f'g* Co. 48 Maine, 121; *Shanny* v. *Androscoggin Mills*, 66 Maine, 427; *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 585; *Ladd* v. *New Bedford R. R. Co.* 119 Mass. 413.

Moreover, the law implies that where there are special risks in an employment of which the servant is not cognizant, or which are not patent in the work, it is the duty of the master to notify him of such risks; and on failure of such notice, if the servant, being in the exercise of due care himself, receives injury by exposure to such risks, he is entitled to recover from the master whenever the master knew or ought to have known of such risks. It is unquestionably the duty of the master to communicate a danger of which he has knowledge and the servant has not. But there are corresponding duties on the part of the servant; and it is held that the master is not liable to a servant who is capable of contracting for himself, and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom. *Lovejoy* v. *Boston & Lowell Railroad*, 125 Mass. 82; *Ladd* v. *New Bedford R. R. Co. supra*; *Priestley* v. *Fowler*, *supra*. It is his duty to use ordinary care to avoid injuries to himself. He is under as great obligation to provide for his own safety, from such dangers as are known to

him, or discoverable by the exercise of ordinary care on his part, as the master is to provide it for him. He may by the want of ordinary care so contribute to an injury sustained by himself as to destroy any right of action that might under other circumstances be available to him.

These rules are elementary and fundamental, and are everywhere recognized. They grow out of the necessities of the relation of master and servant, and are founded and sustained by public policy. Though dressed in language differing somewhat in style of expression, it will be found that the decisions generally are in accord with the principles herein expressed. One writer has thus summed up the doctrine in the following language: "As we have seen it to be the duty of the master to point out such dangers as are not patent, so it is the duty of the employee to go about his work with his eyes open. He cannot wait to be told, but must act affirmatively. He must take ordinary care to learn the dangers which are likely to beset him in the service. He must not go blindly to his work when there is danger. He must inform himself. This is the law everywhere." Beach, Contrib. Neg. § 138. *Russel* v. *Tillotson*, 140 Mass. 201.

In speaking of the respective duties and obligations between master and servant in reference to dangers which are concealed and those which are obvious, the court, in *Cummings* v. *Collins*, 61 Mo. 523, say: "The defendants are not liable for any injury resulting from causes open to the observation of the plaintiff, and which it required no special skill or training to foresee were likely to occasion him harm, although he was at the time engaged in the performance of a service which he had not contracted to render."

Upon a careful examination of the evidence in the case under consideration, we are satisfied that the verdict cannot stand. There is not sufficient evidence upon which a jury could properly found a verdict that the plaintiff himself was in the exercise of due care at the time he received his injury. This is an affirmative proposition which, in this state and many of the others, it is incumbent on the plaintiff to make out by proof before he could be entitled to recover. *Dickey* v. *Maine Telegraph Co.* 43 Maine,

492; *Lesan* v. *M. C. R. Co.* 77 Maine, 87; *State* v. *Same*, 77 Maine, 541; *Crafts* v. *Boston*, 109 Mass. 521; *Taylor* v. *Carew M'f'g Co.* 140 Mass. 151. Nor will this proposition be sustained where the evidence in reference to it is too slight to be considered and acted on by a jury. It must be evidence having some legal weight. Such is the general doctrine of the decisions. A mere *scintilla* of evidence is not sufficient. *Connor* v. *Giles*, 76 Maine, 134; *Riley* v. *Connecticut River Railroad*, 135 Mass. 292; *Corcoran* v. *Boston & Albany Railroad*, 133 Mass. 509; *Nason* v. *West*, 78 Maine, 256, and cases there cited: *Cornman* v. *Eastern Counties Railway Co.* 4 Hurl. & Nor. 784.

It is not denied, as contended for by the learned counsel for the plaintiff, that the question of due care is ordinarily one of fact for the jury. But the question oftentimes becomes one of law whether there are such facts or circumstances upon which the jury can properly base their determination in favor of such care. If not, it is within the province of the court, in the due administration of justice according to well settled legal principles, to revise their findings.

And in this case the evidence uncontradicted from the plaintiff himself as to the manner of the accident is conclusive against the verdict upon this point. Not only do the facts as detailed by him, and about which there appears to be no controversy, fail to show the exercise of due care, but rather that degree of carelessness and neglect on his part which must be held to have very largely if not wholly contributed to the injury complained of. He was a man forty-five years of age, and had been for many years familiar with engines of all constructions; had been a locomotive machinist for twelve years, repairing them constantly, and six years in the employ of the defendant corporation. For five years prior to the accident engines with buffers had been in common use upon the road, and he had worked on every pattern of engine that came into the shops where he was employed. He testifies that the engine with which he was injured came that morning from the repair shop where he was working, and that it might have been there four or five weeks, and he might have worked on it. He had received a general warning from Philbrick

to be careful, and was specially warned of the danger in reference to shackling passenger cars. It also appears from the testimony that he stood there watching the clearing of the tracks from fifteen to thirty minutes. He had full leisure to examine and inform himself of all the common dangers incident to shackling. It appears that he attempted three times to do the shackling, and the third time he received his injury. The first time he stood with the engine backing down upon his right, himself facing the engine and shackling apparatus on its rear, of which the buffer was the most prominent part. The shackle itself which he took hold of projected from the buffer, and he could not see one without seeing the other. Every thing was in plain sight. It was in broad day light. At the first attempt he failed to connect the shackle with the drawbar. Consequently the tender brought up against the deadwood of the car on his left. As the shackle did not connect, the contact between the tender and the flat car could only have been caused by the buffer striking against the deadwood of the car precisely in the spot where he afterwards placed his left hand and received his injury. He then tried a new shackle, repeating the same process. The second time the shackle failed to connect, and the engine and car came together again in precisely the same manner as at first — the buffer again striking the car at the very point where afterwards he placed his hand. After these two attempts, immediately under his eye, he tried a third shackle, and the engine a third time backed down towards him, again giving him full opportunity for observation — he facing the buffer as before and necessarily looking right into the shackling apparatus of which the buffer was a part, and this time hung his left wrist over the front edge of the center of the deadwood, directly in front of the approaching buffer, in precisely the same place where the buffer had just struck the deadwood twice before. It was, as the evidence shows, the only place upon the car where he could not have placed his hand with perfect safety. Placing it where he did the injury was inevitable. It required no special skill or training to know that such an act would necessarily result in injury. This was not an extraordinary or concealed danger which required to be specially pointed out

to a person of mature years and ordinary intelligence. He had been employed, as he himself testifies, for twelve years solely in work about and upon all manner of engines and cars including engines with buffers precisely as this one was equipped. No man needs a printed placard to announce a yawning abyss when he stands before it in broad day light. *Yeaton* v. *Boston & Lowell Railroad*, 135 Mass. 418; *Coolbroth* v. *Maine Central Railroad Co.* 77 Maine 165; *Railroad Co.* v. *Keenan*, 103 Penn. St. 124; *Osborne* v. *Knox & Lincoln Railroad*, 68 Maine, 51.

And it was held in *Wheeler* v. *Wason M'f'g Co.* 135 Mass. 298, that where the servant is as well acquainted as the master with the dangerous nature of the machinery or instrument used, or of the service in which he is engaged, he cannot recover. Beach, Cont. Neg. § 140.

Very similar were the facts in the case of *Hathaway* v. *Railroad*, 51 Mich. 253 (47 Am. Rep. 569), to these in the case before us. There, the plaintiff, an inexperienced brakeman, was called upon by the conductor in the night time to couple two cars of the Erie road which were made specially dangerous by having double deadwoods which the plaintiff had never seen before. In that case, as in the present, one of the real grounds set up by the plaintiff, was that he had not been sufficiently instructed in what was required of him by the company to enable him to discover and appreciate the danger, and that some notice thereof should have been given him by the company other than the general one which he received. The court say: "The plaintiff had the full opportunity of examining the one by which he stood some moments before the cars came together; its size, shape and the location of the drawbar were before him. He had only to look at it to be informed of any perils surrounding it. The moving car at a distance of twenty feet with its deadwood and drawbar in plain view slowly approached the one where the plaintiff was standing. It does not appear that there was any hurry about the business. How could the plaintiff have been better warned? He could see the deadwoods and drawbar thereon as well as if he had made the coupling of them a thousand

times before. He could not fail to see if he looked at all." See also *Taylor* v. *Carew M'f'g Co.* 140 Mass. 151.

If the plaintiff, as is contended, was at the time of this unfortunate occurrence, in the performance of duties outside of his regular employment, he will nevertheless be held to have assumed the risks incident to those duties. This principle is settled by numerous decisions. *Woodley* v. *Metropolitan District Railway Co.* 2 Exch. Div. 389; *Railroad* v. *Fort*, 17 Wall. 553; *Rummill* v. *Dillworth*, 111 Penn. St. 343; *Buzzell* v. *Laconia M'f'g Co.* 48 Maine, 121; *Hayden* v. *Smithville*, 29 Conn. 548; *Wright* v. *N. Y. Central Railroad* 25 N. Y. 570; *Leary* v. *Boston & Albany Railroad*, 139 Mass. 587.

In the last case cited where the question is fully discussed, the court say: "Where one has assumed an employment, if an additional or more dangerous duty is added to his original labor, he may accept or refuse it. If he has an existing contract for the original service, he may refuse the additional and more dangerous service; and, if for that reason he is discharged, he may avail himself of his remedy on his contract. If he has no such contract, and knowingly, although unwillingly, accepts the additional and more dangerous employment, he accepts its incidental risks; and, while he may require the employer to perform his duty, he cannot recover for an injury which occurs only from his own inexperience."

From the disposition of the case already made, it becomes unnecessary to consider the defendant's exceptions. The law pertaining to the case in order to cover it fully at the time of the trial was necessarily somewhat complicated; and it is very questionable whether the numerous abstract propositions appearing in the charge, and following each other in quick succession, could be readily comprehended by a jury unaccustomed to grapple with abstruse and intricate legal propositions. While the charge may have been correct in the abstract, we are of the opinion that several of the defendant's requested instructions were proper to a full understanding of the principles involved, and their application to the questions at issue, and should have been given.

As the case is disposed of however, on other grounds, nothing further need be said in relation to the exceptions.

Motion sustained. New trial granted.

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

CHARLES B. HAZELTINE and others

vs.

BELFAST and MOOSEHEAD LAKE RAILROAD COMPANY and others.

Waldo. Opinion June 6, 1887.

Railroad corporations. Dividends. Net earnings. Preferred stock, when court will order dividends upon.

Holders of preferred stock in the Belfast and Moosehead Lake Railroad Company are entitled to a dividend from net profits each year during which they are earned, but not, under the terms of their subscription, to cumulative dividends; the arrearages of one year are not payable out of the earnings of subsequent years; the inquiry is, whether earned during the particular year for which they are demanded.

While the prospective wants and liabilities of a railroad corporation may be taken into account in ascertaining whether net profits have been earned from which the corporation can afford to declare a dividend, directors are not justified in refusing to declare a dividend to preferred stockholders from earnings on hand, merely because the corporation cannot pay all of its funded mortgage indebtedness at maturity if dividends be paid; other conditions are to be considered.

The court will compel a corporation to declare and pay dividends on preferred stock, when the question becomes one more of right to be determined by the law than of discretion to be determined by the directors, and the directors refuse to perform their legal duty.

The defendant corporation owes nothing but a bonded mortgage debt of $150,000, to mature in 1890; the common stock is $380,400, and the preferred $267,700; the road cost $1,050,000; the earnings of the road have paid off an indebtedness of $251,900, which entered into its construction, the reduction commencing in 1871, and terminating in 1885, leaving in the latter year $22,412.32 cash assets on hand; the expenses of the corporation are trifling beyond the payment of $9,000 annually as interest on the bonded debt; the road is under lease until 1921, at an assured rent of $36,000 per year, the lessee running the road at its own risk and expense, and keeping it in repair and paying all taxes thereon; the corporation has the ability,

upon the strength of the lease, or on the value of the road, to renew a portion of the debt, or all of it, upon advantageous terms; and the preferred shareholders have been for many years deprived of dividends to enable the corporation to consummate the payment of its debts.

Held, under these and other less important facts, that the preferred stock is entitled to a full annual dividend from the balance of earnings remaining on hand at the expiration of the year 1885.

On report.

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

William H. Fogler, for the plaintiffs, cited: *Belfast & M. H. L. R. R. Co.* v. *Belfast*, 77 Maine, 445; Morawetz, Corp. (2 ed.) § § 440, 441, 459; Green's Brice's *Ultra Vires*, 164; *Richardson* v. *Railroad Co.* 44 Vt. 613; *Kent* v. *Quick Silver Mining Co.* 12 Hun. 53; *Barnard* v. *Railroad Co.* 7 Allen, 521; *Boardman* v. *Railroad Co.* 84 N. Y. 157; *Thompson* v. *Railroad Co.* 45 N. Y. 468; *Prouty* v. *Railroad Co.* 1 Hun, 655; *Beers* v. *Bridgeport Co.* 42 Conn. 17; *Pratt* v. *Pratt*, 33 Conn. 446; *Scott* v. *Eagle Fire. Co.* 7 Paige, 203; *Jermain* v. *Railroad Co.* 91 N. Y. 483; 1 Story, Eq. Jur. § 28; 1 Pom. Eq. Jur. § 109; *Nickals* v. *R. R. Co.* 15 Fed. Rep. 575.

Drummond and Drummond, for defendants.

The condition was that no assessment (except for preliminary survey and location) should be made, nor any work be commenced "until the full amount be secured for its completion to Newport." The design of this provision and the result expected from it are expressly stated (as if to avoid any possible question) "thereby avoiding the necessity of any mortgage or incumbrance being ever contracted by this corporation."

To prevent the violation of such a contract, a single stockholder may maintain a bill in equity against the directors, the corporation, or the other stockholders. Wood's Field on Corporations, § 361.

"The holder of a certificate does not thereby become a creditor of the corporation, and cannot maintain an action at law against the corporation for a failure to declare and pay dividends." Wood's Field on Corporations, § 107.

We admit however, a distinction between the two classes of stock as stated by the same author. *Id.* § 108.

In a recent case in the New York Court of Appeals, in which a stockholder brought a suit to compel it to declare a dividend, the corporation had thirty-six thousand dollars on hand; it owed seventy-five thousand dollars due in seventeen years; the corporation had no immediate need of the surplus on hand, or of its earnings, except to pay the current expenses, which including interest on the debt were about ten thousand dollars a year; the court say: "The property of every corporation, including all its earnings and profits, belongs, primarily, to such corporation, exclusively, and not to its stockholders, individually or collectively. They have a certain claim, it is true, but their claims are always subordinate to the claims of creditors, and the latter approach much nearer to the condition of ownership than the former. No stockholder can entitle himself to any dividend, or to any portion of the capital stock, until all debts are paid. The funds on hand, which the plaintiff asks to have divided and distributed among the stockholders, are only about half sufficient to pay the indebtedness of the defendant. It is no sort of consequence, in a legal point of view, that the debt is not yet due, and has a number of years to run before it matures. The creditors still have the better right to the funds, which the defendant holds for them in trust. The court cannot undertake to say, judicially, that the future business of the corporation will be prosperous, nor has it any right to postpone the rights and claims of creditors to future earnings and accumulations, even if it could be certain they would accrue. The board of directors, in their discretion and in view of all the facts within their knowledge, might do this, but no court, I apprehend, would ever undertake to deal in such a manner with the funds of the corporation which was indebted to an amount, at least double the fund sought to be distributed. *Karnes* v. *Rochester Railroad Co.* 4 Abb. Pr. (N. S.) 109, cited by Wood, § 93.

But it is said that the object of the directors is to help the non-preferred stockholders; to this we reply that it is their duty to promote the rights of those stockholders; but beyond that,

if the directors are performing their duty and acting within the scope of their rights, it matters not what their motive may be.

Counsel claims that this is *res adjudicata*, covered by *Belfast, &c. R. R. Co.* v. *Belfast*, 77 Maine, 445. But so far as the decision in that case goes, it sustains our position in every respect. It is the settled rule both at law and in equity that the property of the corporation is held primarily for the payment of the debts of the corporation. See Wood's Field on Corp. § 365. It is often said that dividends cannot properly be made until the debts have been paid. *Ibid* and cases cited. Our statute, chapter 46, § § 46, 47, recognizes this principle, and the payment of dividends when a debt of such magnitude is so soon to become due is in violation of its spirit, if not of its terms.

PETERS, C. J. The facts of this case and most of its questions were before the court in the case of *Belfast, &c. R. R. Co.* v. *Belfast*, 77 Maine, 445. The preferred stockholders of the company are now complainants against the company and its directors, seeking to obtain through a court of equity dividends on their stock.

On March 20, 1886, when this bill was brought, the following facts existed: The road was, and since May 10, 1871, had been leased to the Maine Central Railroad Company, the lease to run until May 10, 1921, the lessee to operate the road during the intervening period at its own risk and expense, to keep it in repair and pay all taxes thereon, and pay a rent of $36,000 per year.

The common stock amounts to $380,400, and the preferred to $267,700, all paid in, amounting at par value to $648,100. The road cost $1,050,000. The means expended for its construction, besides stock paid in, consisted of a bonded debt of $150,000, a floating debt of $150,000, and an indebtedness to the city of Belfast, the principal stockholder, of $101,900 for borrowed money. The bonded debt is secured by mortgage on the road, the principal of which will mature May 15, 1890, having existed in the same form since May 15, 1870, the interest thereon having been regularly

paid semi-annually. It is the only debt existing against the company, nor is it pretended that any other can arise against the company from this time to the end of the lease in 1921. The company's expenses are trifling, being only such as are necessary to keep up a formal corporate organization. The floating debt had been wholly extinguished, the borrowed money paid, and there were in the treasury $22,412.32 of cash assets, all from rents received under the lease, at the date of this complaint.

At that time the directors had laid aside out of money on hand $19,900 which, with future rents, might be available as a reserve fund wherewith to pay the bonded debt when it matures in 1890. But before this appropriation, which can easily be recalled, the complainants had used due diligence, in the way of demands, notices, motions and other movements, to obtain from the directors a recognition of their equitable right to a dividend.

Three questions arise on the facts. First: Are the preferred stockholders entitled to annual dividends, if earned? Second: At the date of the bill had dividends been earned? Third: Is this a case authorizing the court to require the directors to declare a dividend?

While all of these questions were hardly before the court in the former case, to be directly adjudicated, still they were necessarily involved in it, and we then considered them carefully, hoping the parties would be satisfied with the results which were foreshadowed, without proceeding with further litigation. We then indicated that we were of the opinion that the preferred stockholders would be entitled to dividends after the floating debt became paid, and, after considering the questions anew, we at this time see nothing to require us to change that opinion.

There can be no possible doubt that the obligation of the company to the privileged shares rests on by-law 18, and that the by-law establishes the terms of a contract between company and stockholders. We have already so decided.

The by-law runs thus: "Dividends on the preferred stock shall first be made semi-annually from the net earnings of the road, not exceeding six per centum per annum, after which dividend, if there shall remain a surplus, a dividend shall be made on 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 construction which we gave to this contract in the previous case, was certainly very liberal towards the holders of the common stock, and all the doubts were weighed in their behalf, in the decision that the preferred stock was non-cumulative. Had the by-law merely provided that the preferred shares should be entitled to a dividend of six per cent annually when earned, the arrearages of one year would have been payable out of the earnings of subsequent years, and there would have been no occasion for the present controversy between the two classes of stockholders. There is no question among the authorities on this point. Jones, Railway, § 620. Morawetz, Cor. 2d ed. § 458. Cook, Stock and Stockholders § 272. The latter author, in a note to § 269 of his work, published in 1887, cites *Belfast, &c. R. R Co.* v. *Belfast*, 77 Maine, 445, *supra*, as inconsistent with the general rule, but states the ground for the variance; that, inasmuch as the by-law implies that the entire net earnings of each year should be paid out in dividends, a deficiency of preferred dividend in any year, could not be made up in subsequent years.

The next question is whether the money on hand shall be regarded as net earnings out of which a preferred dividend should be paid; and the question has been discussed, secondarily, as to what extent future earnings under the lease will come under the same head. This point depends usually on several considerations—is a relative question—not always susceptible of clear demonstration—and is a matter to a considerable extent of good judgment in conducting the company's business and of good faith in upholding its contracts on the part of directors.

All the cases in which an inquiry has arisen concerning the propriety or legality of paying preferred dividends, where the contract is to pay as often as annually if there are annual earnings, concur in this, that the inquiry must be whether net profits have been earned in the particular year at the expiration of which dividends are demanded. The future wants and liabilities of

the company may, no doubt, be taken into the calculation to a certain extent, as will be more fully explained hereafter.

We think that under any of the approved definitions of net earnings, meaning such net earnings as are applicable to dividends, the complainants make out a case.

Certainly, in a literal view, there must be net earnings each year till 1890, if not up to the end of the lease. For the bills payable are $9,000 per annum, a trifle only more, and bills receivable are $36,000, leaving $27,000 balance on hand each year. The preferred dividend would be $16,062 per annum, leaving about $11,000 in the treasury annually. This balance cannot now possibly be paid on any debt of the company. It is only claimed by the respondents that in the future it may be so used.

In *Hill* v. *Supervisors*, 4 Hill, 20, it is said, "Profits generally mean the gain which comes in or is received from any business or investment where both receipts and payments are to be taken into account." The case of *Dent* v. *London Tramway Co.* L. R. 16 Ch. Div. 344, strongly resembles the present case on this point. There, as here, the preference dividends were dependent upon the profits of the particular year only. JESSEL, M. R., says, "That means this, that the preferred shareholders only take a dividend if there are profits of the year sufficient to pay their dividend. They are co-adventurers for each particular year, and can only look to the profits of that year. If they are lost for that year, they are lost forever. Profits for the year mean the surplus receipts after paying expenses and restoring the capital to the position it was in on the first day of January of that year." *Elkins* v. *Camden and Atlantic Railroad Co.* 36 N. J., Eq. decided in 1882, presents questions similar to the present, and announces the rule that the preferred stockholders' "rights are to be governed and regulated each year by the pecuniary condition of the corporation at the close of the year."

In Morawetz on Corporations, 2d ed. § 459, an approved work, the doctrine is stated: "The directors of a corporation have a discretionary power to withhold profits from the holders

of common shares in order to accumulate a surplus, etc.; but it is the duty of the directors to pay the preferred shareholders their promised or guaranteed dividends, whenever the company has acquired funds which may rightfully be used for the payment of dividends. This rule applies with peculiar strictness where the preferred shareholders are entitled to receive their dividends annually out of profits earned during the current year only, and a deficit in any year does not become payable out of subsequent profits."

But apply to the question the definition of net profits which would be regarded as the most liberal to the company, or the holders of the common stock; allow that there must be net profits such as should be applied to dividends; and that funds may be kept on hand sufficient to make reasonable provision for both the present and future necessities of the company. A very much quoted definition, as applicable to railroad corporations, is that formulated by Mr. Justice BLATCHFORD in *St. John* v. *Erie Railroad Company*, 10 Blatch. 271, "Net earnings are, properly, the gross receipts less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains, that is, out of net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders to go toward dividends which in that way are paid out of the net earnings." This definition was substantially repeated in *Warren* v. *King*, 108 U. S. 389, Mr. Justice BLATCHFORD, upon another bench, delivering the opinion, and asserting that, "while the rights of a preferred stockholder are not to be superior to the rights of creditors, they are nevertheless enforceable against the company according to the terms of the contract made by them." We refer to the views to which we committed ourselves upon this branch of the case in 77 Maine, p. 452, before cited.

It will be noticed that the definition of net profits, in the case of railroad corporations, which are generally more heavily in debt than other kinds of business corporations, calls for the payment of interest on the company debt, but not necessarily

for payment of any portion of the principal. At this point the parties come to a closer issue and really to the turning point of the controversy. And that is, whether the bonded debt of $150,000, due in 1890, must be first wholly paid before any declaration of dividends. The respondents so contend. The complainants contend that, in ascertaining net profits, a portion only of the earnings should be reserved for the payment of the debt, and that the debt, or some portion of it, when it comes due, should be extended in some form.

The authorities, on the subject of ascertaining what are the annual net profits or earnings of a railroad corporation, perhaps without exception, make a distinction between the payment of its floating debt and the payment of its permanent or bonded debt, —between ordinary and extraordinary indebtedness. It is not indispensible, however, that the company be free from the pressure of floating debt before it may lawfully pay dividends even to holders of its non preferred stock. It may, even, under some circumstances, borrow money to pay dividends. Morawetz, Cor. 2d ed. § 438, and cases.

In many cases there is difficulty in ascertaining what the actual condition of a company may be. None exists here. There could not well be an instance of less complicated affairs. The business of the company is guaranteed, its amount of income fixed, its expenses are nominal, and its freedom from all the liabilities and risks usually incident to the management of a railroad is assured, for the next thirty-three years.

In every sense this last debt of $150,000 is a permanent debt. It is a bonded, mortgage and interest-bearing debt. The lease secures it many times over. The road itself is an absolute security for it, and undeniably for much more. It is a permanent debt for another reason. It entered into the construction of the road and is represented in its permanent property. A distinction between expenses for construction and ordinary expenses is maintained in the leading cases on this subject. The argument is that capital paid in and capital borrowed unitedly produced the earnings, and that a proportionate share of the earnings should be accorded to each. 77 Maine, before cited,

p. 453. In that view the bonded debt earns but $9,000 per annum of the $36,000 earned in all.

It will be readily seen that there are special reasons for deeming the complainants' claim equitable. They have been required to remain in waiting for dividends for many years, in order that a large amount of the company's indebtedness, say $250,000, should be first paid, quite an exacting construction against them being required to produce such result. The company or its common shareholders would have suffered no injustice had the debt to the city of Belfast, been placed in a permanent funded form. Another thing, before spoken of, which favors the complainants, is, that by our former opinion their dividends were held to be non-cumulative, and if lost now are forever lost. Still another thing may be of importance enough to be taken into account, and that is that the corporation is paying six per cent interest on its bonds, and receives about one-third interest on the sums which it proposes to keep on hand.

The respondents go further than to deny that net profits have been or will be earned; they contend that they should not be divided even if they have been earned. Of course all the net earnings of an indebted company should not always be devoted to dividends. We think a company should have a right to base its calculations upon a final payment of its debts at some time. But steps in that direction are not to be untimely, or oppressive to other interests, and should be such as not to unreasonably interfere with the expectations or interests of stockholders, and such as will not prevent a reasonable performance of all other obligations which have been assumed by the company. The more practical question is, as to how far the earnings shall be reserved and how far divided. But it comes round to the primary question, which is, have net profits been earned, such as are reasonably applicable to dividends? The argument of the learned counsel for the respondents seems to proceed upon the idea that the complainants have a prior right to receive dividends only whenever they have been actually declared, but that the company has the right to refuse to declare dividends, whether they have been earned or not. Such is not

the letter or spirit of the contract entered into. The promise of the company was, that dividends semi-annually from net earnings "shall be made."

But when the present mortgage debt of $150,000 was established it was to be paid in twenty years, and shall it not be paid at the end of that time, asks counsel? It may have been supposed that twenty years would be long enough for the debt to run without a renewal. But if it was even supposed that the debt could be conveniently paid at maturity without renewal, was it not calculated by the parties that dividends would be in the meantime distributed to the preferred stockholders? The result only proves a miscalculation by the company of its ability to literally perform its obligations. Is it an excuse for not declaring dividends out of net earnings, provided there are net earnings, merely that a company cannot pay an entire bonded debt at maturity without creating a new debt or borrowing again? Is it not reasonable to require the company to keep all its obligations, when they can easily do so? If the company had no means or credit which would enable them to place a new obligation on the market there would be force in the position. But no such inability is or possibly can be pretended. Can it be said that a railroad company makes no net profits in a year in which it gains $36,000 and has only $9,000 to pay out, because it owes $150,000, payable in four years, abundantly secured upon its property, when the company has a perfect credit and abundant means to enable it to replace the old with a new loan on advantageous terms? Does a merchant who carries on business partly on borrowed capital, earn no profits in a year at the end of which, besides retaining his capital, he has received $27,000 more than all he has paid out, simply because he owes a debt for his borrowed capital which he has abundant ability to pay, but not without further borrowing? Says Morawetz, (Cor. § 439): "In ascertaining whether a company has a surplus which may be divided among the shareholders, permanent improvements made by means of borrowed money may often be valued as counterbalancing the liability of the company for the money used to construct them."

Two cases are relied on for the respondents neither of which appears to us as having any tendency to support their general position. One is *Karnes* v. *Rochester Railway Co.* 4 Abb. Pr. N. S. 107. That case shows that two sets of railroad directors were chosen, and a controversy was going on between them as to which was the legitimate board. Pending that litigation a common shareholder—there was no preferred stock—brought a bill to have all the moneyed assets of the corporation distributed among the stockholders. There were $36,000 in government bonds on hand, the debt was $70,000, due in seventeen years, the annual expenses were about $10,000, and the bill, which was demurred to, did not allege whether there was any annual balance of profits or not. The court, amongst other grounds of decision, said, that no breach of any obligation on the part of the company to the stockholders, nor any omission of duty, was alleged; that the acts of directors should not be interfered with by courts except to prevent injustice; that the corporation could make no dividends, and the directors were not a party to the bill; that there was nothing to indicate that the money on hand was not needful for the security of the creditors of the company; that it was not even alleged that the directors had refused to make a dividend, nor stated that one, in justice, ought to be made; and the bill was dismissed.

The other case is *New York, Lake Erie & Western Railroad Co.* v. *Nichals*, lately determined in the Supreme Court of the United States, reported in 15 Fed. R. 575. The case was first decided in the circuit court, 21 Blatch. 177, where it was held that the company could not, against the interests of preferred stockholders, divert a large quantity of funds from them to other uses of the company. The decree was reversed in the upper court, not for any difference between the two tribunals as to the law of the case, as stated by the judge below, but upon a difference of opinion in making an application of the law to the facts. The points of the case are correctly represented by the head-notes which are as follows: "The holder of preferred stock is not entitled absolutely to a dividend, even if there be 'net earnings' from which such dividend might be paid. The

directors may use the 'net earnings' for the improvement of the road, where such improvement is shown to be imperatively necessary to the preservation of the corporate property, and the continuance of the corporate business." The court were deeply impressed with the uncontradicted testimony of the president of the company, that "but for using the funds in question in that case, the company could not have paid its fixed charges, but would have again gone into bankruptcy, and the entire interest of the stockholders been destroyed." That is unquestionable doctrine. Preferred stockholders are not to be protected to the extent of endangering the rights of creditors, or of wrecking or crippling the enterprise of the road. Clark Stock. § 271. *Culver* v. *Reno, &c. Co.* 91 Penn. St. 367.

The condition of the railroad above alluded to, the Erie system, illustrates the fallacy of the claim that all the earnings of a railroad corporation should be withheld from stockholders until its debts are paid. That company has a capital of over seventy-seven million of common and preferred stock, and an indebtedness exceeding one hundred million of dollars, secured and unsecured. The court need not have troubled itself over the difficulties presented in that case, if it had had the courage to assume that the preferred stockholders were not entitled to dividends until the one hundred million dollars of debt were paid. There is hardly a railroad company in the world that has not a funded debt. Such a rule would work an injustice amounting to cruelty in many cases. Sec. 100, c. 42, R. S., provides that savings banks may invest their deposits in the stocks of any dividend paying railroad in New England. How would the rule contended for work with savings bank deposits invested in Maine Central Railroad stock, a company having $3,600,000 stock and $11,000,000 of indebtedness; or in the Boston and Maine, with a debt of $7,000,000; or in the Boston & Albany, with a debt of $10,000,000; or, if we look out of New England, in the Chicago, Burlington & Quincy Railroad Co., one of the most reputable companies in our country, having more than $80,000,000, of funded indebtedness? What would annuities and life estates be practically worth to the holders of

them in railroad companies, under a rule which allowed no dividends until all debts are paid. The history of railroad enterprises teaches us that the old liabilities of companies are well nigh habitually paid by the creation of new ones, the general design being to lessen the liabilities, which are represented in the construction, by gradual processes.

The last point which the case presents is whether the court can interfere in behalf of the complainants. We think it can and should. The directors refuse to perform a duty. They ignore a contract. They are chosen by the holders of the common stock, who are the majority, and are hostile to the interest of the complainants. We asserted the right of the court in the former case, and there cited authorities in support of it. Says Morawetz (Cor. § 280): "Where certain shareholders are entitled to privileges which do not belong to the other members of the company, the court will provide a remedy for an infringement of these privileges by the other shareholders of the company's agents." See Cook, before cited, § 541, and cases. Says WHEELER, J., in *Lake Erie, &c. Railroad Co.* v. *Nickals*, *supra*, "when it comes to the question of using the profits which would go to one set of stockholders for the benefit of another set, a more rigid rule should be upheld. The question becomes more one of right to be determined by the law, than one of policy to be determined by the discretion of the directors." When the resolution of directors makes an alteration in the priorities and payments provided in the memorandum of association, it is beyond their power, and may be interfered with by the court. *Ashbury* v. *Watson*, L. R. 30 Ch. Div. 376. Even an action at law was allowed on a contract to make a dividend of earnings. *Bates* v. *Railroad Co.* 49 Maine, 491.

But has the court the power, asks the learned counsel, to prevent a company paying its debt when it becomes due? Not at all. On the contrary, the court would compel the company to pay its debts to the letter. It will also exercise its power in a legitimate case to require the company to keep its other obligations, legal or equitable. While the company does not

owe a debt to the preferred shareholders, it does owe them an obligation, founded upon a contract which is as sacred as any other contract. If the company had not sufficient means or credit with which to pay its debts without applying upon them the funds in question, the funds should be so used. But no creditor makes opposition to complainants' claim, nor have they any occasion to. The creditors must be protected, and so must the different classes of stockholders, according to their respective rights. If the preferred stock is in the way of an earlier enjoyment of dividends by the holders of the common stock, than otherwise would have been, it is an impediment of the company's own creation. The contract to pay dividends on preferred stock, was upon the sole condition that net earnings are possessed by the company. New conditions cannot be imposed by the company alone. Good faith forbids it.

Finally, what shall the decree be? The complainants, admitting that the mortgage debt should be paid within some reasonable time, which must from necessity be somewhat arbitrarily fixed, and adopting the scheme suggested by the court in the former case, ask that a decree be passed allowing dividends for the present and the future for such an amount semi-annually as will not deprive the company of an opportunity of extinguishing its debt within the life of the lease, if it desires to, and of paying dividends to the preferred stockholders during the same period. That would require a calculation which a master, and not the court, should make, and we are inclined to the view that such an extensive decree may not be expedient, all things considered, at the present juncture. The future action of the company may make such a comprehensive proceeding avoidable.

The limited and more direct inquiry is whether on January 1, 1886, the company should have declared a dividend on the preferred stock, requiring therefor the payment of $16,062. We think, as between itself and that class of stockholders, it was possessed of net earnings enough, which by its agreement it had pledged for that purpose. It had $22,412.32 in its treasury; it received $18,000 in addition on May 10, 1886; it

had nothing to pay until a half year's interest, $4,500, became due on May 15, 1886.

Bill sustained with costs. Decree according to the opinion.

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

JOHN FRENCH *vs.* DAVID COWAN and others.

Androscoggin. Opinion June 9, 1887.

Lewiston city marshal. Mandamus. Practice. Special Stat. 1880, c. 293. Quo warranto.

Chapter 293 of the private and special laws of 1880, entitled "An act to promote the efficiency of the police force of the city of Lewiston," is to be regarded as amendatory of the original act of incorporation, and is to be construed in accordance with the true intent and meaning of the legislature as evidenced not only from the language of the particular act, but also from the act of incorporation which it sought to amend.

One of the objects sought to be attained by the amendment, besides a modification in the manner of appointment, was, that the terms of office of city marshal were to consist of consecutive periods of two years each, commencing with the beginning of the municipal year as provided in the city ordinances, and following each other in regular order, the one commencing when the other ends, instead of annual terms of one year each as before the passage of the act.

Mandamus is not an appropriate remedy to try the title to an office as against one actually in possession under color of law.

Where a person is in the actual possession of an office under an election or a commission, and is thus exercising its duties under color of right, the validity of his election or commission cannot, in general, be tried or tested on *mandamus* to admit another, but only by an information in the nature of *quo warranto*.

William L. Putnam and George C. Wing, for plaintiff.

We regard this case as fully covered by the opinion of the Justices in 61 Maine, 601. There is no question as to any officer of the United States holding for a term of years, whether his term commences at the expiration of a previous term, or at the death of a previous incumbent, or on his removal. In either case the successor holds for the full term named in the statute. This is the settled practice, and the law was so expressed in the case of the navy agent. Opinions Attorney General, Vol. 2, p. 333.

The relations between them are in no way in the nature of contract. Even the salary could not be recovered on that theory, and can be sued for in assumpsit only on the ground of an implied assumpsit. *Farwell* v. *Rockland*, 62 Maine, 296.

It is said in *Andrews* v. *King*, 77 Maine, 230, that the city marshal "has other than municipal duties." See *Commonwealth* v. *Swasey*, 133 Mass. 538; *Shaw* v. *Macon*, 21 Ga. 283.

In *Philadelphia* v. *Rink*, 4 Eastern Rep. 642, an action for salary brought by an officer who had been "counted out," the court said: "It is no answer to say that he did not then take the oath or give the bond." He was denied the privilege of doing either.

It is stated that mandamus will not lie except where there is a clear, legal right, and the court in *Townes* v. *Nichols*, 73 Maine, 517, has used very effective language on this point.

It was long ago determined in *Commonwealth* v. *Dennison*, 24 Howard, 66, as follows: "It is equally well settled that a mandamus in modern practice is nothing more than an action at law between the parties, and it is now regarded as a prerogative writ." This was reaffirmed in *Hartman* v. *Greenhow*, 102 U. S. 675.

We are unable to understand the full applicability and force in Maine and Massachusetts of the language so commonly used, that mandamus only lies where there is a clear, legal right, in view of the fact of the elaborate and difficult questions of law which were settled in Strong's case, 20 Pick. 484. *Putnam* v. *Langley*, 133 Mass. 204; *Williams* v. *Co. Com.* 35 Maine, 345; *Baker* v. *Johnson*, 41 Maine, 15; *Smyth* v. *Titcomb*, 31 Maine, 272, and other cases which we might cite.

Moreover, while it is doubted whether mandamus is the proper remedy for a person claiming office, who has never been in office, it is held that it is the proper remedy, under the circumstances like those at bar, in High on Extraordinary Remedies, § § 46 and 49, and Dillon on Municipal Corporations, § 847.

It seems not improper in closing to cite the following from the expressions of Lord MANSFIELD in *Rex* v. *Barker*, Burrow's Reports, p. 1267: "Mandamus," he says, "ought to be used on

all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. Within the last century it has been liberally interposed for the benefit of the subject and advancement of justice."

John B. Cotton, *William H. Newell and Wilbur H. Judkins*, city solicitor, for defendants, cited upon the first point considered in the opinion: 1 Dillon, Mun. Corp. § 87; Cooley's Con. Lim. 194; *Mason* v. *McClave*, 99 N. Y. 89; *State* v. *Pearcy*, 44 Mo. 159; *Landers* v. *Smith*, 4 East, Rep. 933 (78 Maine, 212); *Holmes* v. *Paris*, 75 Maine, 561; *Baker* v. *Kirk*, 33 Ind. 521; *Trustees* v. *Erie*, 31 Pa. St. 515; *Goodwin* v. *Thoman*, 10 Kansas, 191; *People* v. *Weller*, 11 Cal. 87; *State* v. *Mebling*, 6 Ohio St. 43; *Chalmers* v. *Cook*, 20 Ohio St. 253; 16 Fla. 842, and cases cited; 50 Maine, 607; 61 Maine, 601; *Blankley* v. *Winstanley*, 3 T. R. 28; *Rex* v. *Osborne*, 4 East, 337; *Mayor* v. *Long*, 1 Camp. 22; *Rex* v. *Bellringer*, 4 T. R. 316; *Rex* v. *Headley*, 7 B. & C. 496; 1 M. & R. 345; *Sherwin* v. *Bugbee*, 16 Vt. 439.

FOSTER, J. The controversy in this case arises in relation to the title to office of city marshal of the city of Lewiston, and a petition for mandamus is instituted against the mayor and aldermen, and Daniel Guptil, the present incumbent of said office. The petitioner claims under an appointment made by the mayor by and with the advice and consent of the aldermen, March 12, 1885. The defendant, Guptil, claims under a similar appointment made April 1, 1886. It being conceded that both appointments were made by the proper authorities, the controversy arises by reason of the contention of the petitioner that his appointment, although expressly purporting to extend only to April 1, 1886, was by operation of law for the term of two years from the date of such appointment and would not expire till March 12, 1887, and that consequently the appointment of Guptil during that time was unauthorized and void. Guptil, at the time of his appointment, took possession of the office and was recognized as the lawful city marshal, and has ever since been acting as such.

Inasmuch as the question presented, if we are to decide it upon its merits, becomes one of statutory construction, it will be necessary briefly to examine the act of incorporation of the city, as well as the subsequent enactment of 1880, entitled "An act to promote the efficiency of the police force of the city of Lewiston."

By an examination of section four of the city charter, it will be found that all subordinate officers were to be elected and appointed annually by the city council for the ensuing year, on the third Monday of March or as soon thereafter as might be convenient; that all officers should be chosen and vacancies supplied for the current year, except as therein otherwise provided; and that all the subordinate officers and agents of the city should hold their offices during the ensuing year, and till others should be elected and qualified in their stead, unless sooner removed by the city council.

Thus the tenure of office provided by this section was for the current year.

Section eighteen authorized the appointment of a city marshal by the mayor and aldermen in the manner provided in the section before named; constituted such marshal chief of police, and specified his duties.

It is also provided by said charter that the city may ordain and publish such acts, laws and regulations, not inconsistent with the constitution and laws of this state, as shall be needful to the good order of the city.

In accordance with the express authority with which the city was thus invested, certain ordinances were duly ordained and published,—the twenty-first section of which provided that all police officers should hold their office until the last day of March next succeeding their appointment.

And here it may be stated as a fact about which there is no dispute, that since the incorporation of the city it has been the custom pertaining to the administration of police for the term of office of city marshal to expire on the last day of March and to begin on the first day of April in the respective years in which terms of said office expire and begin, not only under the original

act of incorporation, but also since the special act in relation to promoting the efficiency of the police went into operation in the spring of 1880.

Inasmuch, therefore, as that act provided that the city marshal should hold his office for the term of two years, the subsequent appointments were made on April 1, 1880, 1882 and 1884. Although several appointments were made from April 1, 1884, to the time when the petitioner was appointed, none of them received the advice and consent of the aldermen till the appointment of the petitioner, March 12, 1885.

It is at this point that the present controversy arises. It is insisted by the petitioner that a city marshal duly appointed in accordance with said act to succeed one whose term has fully expired, has by the express provisions of the act a definite and individual term of office of two full years from such appointment which cannot be abridged either by the act of the mayor or of the aldermen, and whether made at the commencement of the municipal year or any time thereafter.

On the other hand, it is claimed in defence that by a proper legal interpretation of the act when read along with the act of incorporation, as necessarily it must be, the term of a city marshal appointed to succeed one whose term has expired, is to be reckoned, for the purpose of ascertaining its duration, from the first day of April next succeeding the prior term, and that the person thus appointed is entitled to hold his office only to the expiration of two years from that date, notwithstanding there may have been an interval of time of greater or less extent between the expiration of the prior term and the date of his appointment.

In arriving at a correct conclusion in determining which of the foregoing positions is correct, we must be guided by the established rules pertaining to the construction of statutes — that like a will or contract it is to be read and construed as a whole, recourse being had to all its parts rather than to any particular clause where the meaning is doubtful, or where by giving a particular clause full effect it would conflict with other clauses. And in the construction of statutes it is held to be the duty of

courts to execute all laws according to their true intent and meaning; that intent, when collected from the whole and every part of a statute, must prevail, even over the literal import of terms, and control the strict letter of the law, when the latter would lead to possible injustice and contradictions. *State* v. *Mayor of Laporte*, 28 Ind. 248; *Holmes* v. *Paris*, 75 Maine, 561, and cases there cited.

Hence, the act of 1880 is to be read and construed not as standing alone, but in the light of the instrument which it sought to amend. That instrument is the act of incorporation; and only so much thereof is altered or repealed as is inconsistent with the act in question. This act in express terms changes the manner of appointment of the city marshal, deputy marshal and policemen. Formerly the appointment was the joint act of the mayor and aldermen; by the amendment, these appointments are vested in the mayor, the confirmation in the aldermen. The tenure of certain offices is changed. The act provides that "the city marshal shall hold his office for the term of two years, and the *remainder* of the police force shall hold their office for the term of three years, providing, however, that the first year after this act shall take effect, one-third in number, as near as may be, of said police force, shall be appointed for the term of one year; one-third in number, as near as may be, shall be appointed for the term of two years, and one-third in number, as near as may be, shall be appointed for the term of three years, and there shall be appointed each year thereafter one-third in number, as near as may be, of said police force."

It is evident, when we consider the language of the amendment in connection with the act of incorporation, that one of the objects to be attained, besides a modification in the manner of appointment, was that the terms of office of city marshal were to consist of consecutive periods of two years following each other in regular order, the one commencing when the other ends, instead of annual terms of one year each as before the passage of this act.

The purport of the statute in question is to promote the efficiency of the police force of the city. That force consists of

the marshal, deputy marshal and policemen. It was also the design of the statute that the terms of the policemen should consist of periods of three years, following each other in like consecutive order as those of the city marshal. The tenure of their office was so arranged that one-third of their number, as near as may be, were to be appointed each year, thus preserving the efficiency of the force. It is admitted that the police year in practice ever since the adoption of the city charter, has begun on the first day of April, and that since the passage of this statute the office of city marshal has been filled in separate and distinct terms of two years each, these terms commencing on the same day in April as the police year. The same paragraph which designates the terms of office of the remainder of the police also specifies the tenure of office of the city marshal. That office is intimately associated with and forms a part of the police department, the marshal being chief of police and possessing all the powers and exercising all the duties appertaining to constables of towns. It partakes more of the character of a municipal office commencing at the beginning of the municipal year, than of those offices which, like judges and registers of probate and judicial officers, are entirely independent of municipal affairs. In the latter class the terms are fixed and positive to be sure, when no vacancy occurs, but in case of any vacancy the constitution provides otherwise for the commencement of such terms. The constitution in express terms provides that all *judicial* officers shall hold their respective offices for a definite term "from the time of their respective appointments." The rule applicable in such cases cannot properly be applied in the construction of a statute the provisions of which may be controlled by the true intent and meaning of the law makers, as evidenced from all its parts and the object sought to be attained. *Opinion of the Justices*, 61 Maine, 602; 50 Maine, 608; *Hale* v. *Brown*, 59 N. H. 555; *People* v. *McClave*, 99 N. Y. 89.

If we were to give any other construction to this statute in relation to the commencement and duration of the terms of office of the marshal and the policemen, the terms of service of the appointees might soon become such as to entirely destroy the

force of the provision that one-third, as near as may be, should be appointed each year. The results of any other construction may properly be anticipated, and if those results should be found to be anomalous, unjust, or even inconvenient, it is a legitimate and strong argument against such construction, and it might well be presumed that the legislature did not intend any such results. *Landers* v. *Smith*, 78 Maine, 213.

Thus the case of *State* v. *Mayor of Laporte*, 28 Ind. 248, was a proceeding to determine the right to an office. The city charter provided that only one councilman, of the two from each ward, should be elected every two years, for a term of four years. It was contended that the terms were four years whether from a general election or a special election, and that they were not necessarily distinct and consecutive with periods of two years intervening. But the court held otherwise, saying: "If the provision that 'all officers elected at any special election shall hold their offices until the next general election on the first Tuesday in May,' is held to include councilmen, it must result, that from special elections to fill vacancies occurring in that office, the two councilmen from the same ward will often be elected at the same general election, for the full term of four years, and regularly thereafter at the same date, thus defeating the object of the legislature, which was to avoid an entire change in the representation of any ward at any regular election."

In the case before us, the statute, it is true, does not designate any definite point of time from which the terms of the several offices therein mentioned shall commence. Yet the evident purpose of the statute requires, for the police force at least, that a definite time be fixed from which the several terms shall begin to run, and when so fixed that the individuality of such terms be adhered to, and that, as in the case last cited, they follow each other in consecutive order. The act of incorporation expressly provides when the terms in relation to all subordinate officers shall begin. It provides that the city council shall annually, on the third Monday in March or as soon thereafter as convenient, elect and appoint for "the ensuing year." It provides that "all

officers shall be chosen and vacancies supplied, for the current year." And may not this be fairly understood as meaning the year commencing with the "third Monday in March or as soon thereafter as convenient?" Here, then, is a time designated for the commencement of the municipal year. The statute of 1880 does not, either expressly or by implication, change the commencement of that year. An ordinance, moreover, was existing at the date of the passage of the statute, providing that all police officers should hold their office until the last day of March next succeeding their appointment.

We cannot presume that the legislature intended to disturb, further than was necessary, the existing order of things, or to change the already existing provisions in regard to the beginning of the terms of service in force when this act was passed, and in no way repealed by it. Not only the ordinances ordained and published prior, as well as subsequent to this enactment, recognize the commencement of the municipal year as we have stated, and definitely fix the first day of April as such commencement. These ordinances do not appear to be inconsistent with the constitution and laws of the state, or with the charter which contains a general grant of power to pass all such by-laws as may be necessary to the well being and good order of the city. Cooley, Cons. Lim. 194; Dillon, Munic. Corp. (2d ed.) § 250.

The construction we have here given in relation to the commencement and duration of the terms of these offices, has been received and acted on by all parties interested, from the adoption of this statute to the time when this controversy arose. Such, also, appears to have been the understanding of the petitioner, as well as those who made and confirmed the appointment, as is shown not only by the records of the board of mayor and aldermen, wherein his nomination and confirmation are stated to be "for two years from April 1, 1884, to April 1, 1886," but also from the language of the petitioner in his official bond, in which he states that he "has been appointed and elected city marshal of the city of Lewiston for the term of two years, beginning on the first day of April, A. D. 1884, and ending April 1, A. D. 1886."

While such understanding or custom can have no room for operation where the language of the enactment is plain and the legislative intent is clear upon the face of it, yet it may not be without its importance in aid of a proper construction of a charter or statute if the language be uncertain or doubtful.

"In construing statutes applicable to public corporations," remarks REDFIELD, J., in *Sherwin* v. *Bugbee*, 16 Vt. 444, "courts will attach no slight weight to the uniform practice under them, if this practice has continued for a considerable period of time." It was upon this principle that the court in *State* v. *Severance*, 49 Mo. 401, held "that the cotemporaneous construction of a city ordinance adopted by all parties interested in its enforcement, although not controlling, is, in doubtful cases, entitled to great weight." *State* v. *Cook*, 20 Ohio St. 259.

In the examination of the question before us, we have looked directly to the legal merits of the case. But there is another ground which is decisive against the petitioner and brings us to the same conclusion.

The office to which the petitioner seeks to be restored is actually filled by another, claiming under a legal appointment, admitted and sworn and exercising the functions of the office under color of right. In such case, the appropriate remedy of the petitioner in the first instance, if entitled to any, is by *quo warranto*, and not by *mandamus* alone. In this case, the petitioner is virtually attempting to oust an actual incumbent, and to place himself in an office the title to which is in controversy and which cannot be tried in a proceeding of this kind. The general and well nigh universal rule is that *mandamus* is not an appropriate remedy to try the title to an office as against one actually in possession under color of law. The decided weight of authority, both in the English and American courts, is in support of this doctrine.

In Dane's Abridgement, the rule is thus stated: "But if the office be already full by the possession of an officer *de facto*, no writ will be granted to proceed to a new election, until the person in possession has been ousted on proceedings in *quo warranto*."

Judge DILLON, in his work on municipal corporations, after stating the English rule as above given, and that the same is generally recognized to be the law in this country, says: "We have before seen that it is the doctrine of the English law, quite generally adopted in this country, that where a person is in the actual possession of an office under an election or a commission, and is thus exercising its duties under color of right, that the validity of his election or commission cannot, in general, be tried or tested on a *mandamus* to admit another, but only by an information in the nature of *quo warranto*." § § 674, 678, 679, 680, 716. The same doctrine is more emphatically laid down in High on Ex. Leg. Rem. § 49, and he asserts that the rule is established by an overwhelming current of authority that *mandamus* will not lie to compel the admission of another claimant nor to determine the disputed question of title to an office, where it is already filled by an actual incumbent who is exercising the functions of the office *de facto* and under color of right. In such cases, the party complaining and desirous of an adjudication upon his alleged title and right of possession, must assert his rights by the only proper, efficacious and speedy remedy, and that is an information in the nature of a *quo warranto*.

A careful examination of the decisions both of the English and American courts will not fail to convince the most doubting mind that the general current of authority runs in the same direction, and that the exceptions to the rule are rare and not well founded. A few of the very many authorities bearing directly upon this rule are given,— enough when examined to authenticate the assertion that the rule is too well settled to be denied. *King* v. *The Mayor of Winchester*, 7 A. & E. (34 E. C. L. 81); *The Queen* v. *The Mayor of Derby*, 7 A. & E. (34 E. C. L. 135); *King* v. *The Mayor of Oxford*, 6 A. & E. 348 (33 E. C. L. 89); *Frost* v. *The Mayor of Chester*, 5 E. & B. 538, (85 E. C. L. 536), COLERIDGE, J: "A mandamus goes only on the supposition that there is no one in office, for the purpose of restoring a party to office or to cause an election to be held." *The King* v. *The Mayor of Colchester*, 2 T. R. 259; *The Queen* v. *Phippen*, 7 A. & E. 966 (34 E. C. L. 263);

People v. *New York*, 3 Johns. cases, 79; in this case the court held: "Where the office is already filled by a person who has been admitted and sworn, and is in by color of right, a mandamus is never issued to admit another person," and it is there laid down that the proper remedy, in the first instance, is by information in the nature of a *quo warranto* by which the rights of the parties may be tried. *People* v. *Stevens*, 5 Hill, (N. Y.) 629; *People* v. *Lane*, 55 N. Y. 219; *In re Gardner*, 68 N. Y. 467; *Duane* v. *McDonald*, 41 Conn. 517; *Wood* v. *Fitzgerald*, 3 Oregon, 568; *Underwood* v. *Wylie*, 5 Ark. 248; *Bonner* v. *The State*, 7 Ga. 473; *People* v. *Detroit*, 18 Mich. 338; *Brown* v. *Turner*, 70 N. C. 93; *Denver* v. *Hobart*, 10 Nev. 28; *Merideth* v. *Supervisors*, 50 Cal. 433. "Mandamus will not be issued to admit a person to an office while another is in under color of right," *State* v. *Auditor*, 36 Mo. 70; "Mandamus will not lie to turn out one officer and to admit another in his place," *People* v. *Matteson*, 17 Ill. 167; *People* v. *Head*, 25 Ill. 325; *Hill* v. *Goodwin*, 56 N. H. 456; *Exparte Harris*, (Alabama), 14 Am. Law Reg. (N. S.) 646; *McGee* v. *State*, 1 West. Reporter, 467, (Indiana); *Ellison* v. *Raleigh*, 89 N. C. 125. "By *quo warranto* the intruder is ejected. By mandamus the legal officer is put in his place," *Prince* v. *Skillin*, 71 Maine, 366.

That there have been exceptions to the rule is true. But upon what principle the exceptions have been founded, where there has been an actual incumbent, exercising the functions of the office, and being in under color of right, the decisions themselves fail to afford any satisfactory answer. In Maryland and Virginia, the courts have held that in such cases mandamus would lie. Thus in *Dew* v. *The Judges of the Sweet Springs Dist. Court*, 3 Hen. & Munf. 1, it was held that mandamus was the best remedy. So in *Harwood* v. *Marshall*, 9 Md. 83, the court of appeals of Maryland, came to the conclusion that resort to *quo warranto* as preliminary to mandamus was not necessary on the grounds of delay growing out of the use of the process, citing in support of its decision the case of *Strong. Pet.* 20 Pick. 484, a case more generally referred to as an exception to the rule than any other authority. But an examination of that case shows the fact that it

was mandamus to the board of examiners to issue a certificate of apparent election to the petitioner, although, as the court there say, he might then be obliged to resort to *quo warranto* to test the title to the office. A distinction is there made between the cases where applications had been made to be admitted to an office by proceedings on mandamus, and the case there decided, where the petitioner only sought for a *certificate* of his election, like the case of *Marbury* v. *Madison*, 1 Cranch, 168-9, and *The King* v. *The Mayor of Oxford*, 6 A. & E. 349 (33 E. C. L. 89), where it was said that the certificate was only one step towards the completion of the title. The court also in *Strong's case* admitted that the two processes might be necessary to enable the petitioner to get possession of the office,— the one to establish the legality of his election, the other to set aside that of the incumbent, and that although they were independent of each other, they might have been applied for at the same time and proceeded *pari passu*. The court *arguendo* claimed that there are authorities in support of the doctrine that mandamus is the appropriate remedy where there is an actual incumbent acting *de facto*, but the decision of the court is not based upon that ground, and is not authority to the extent claimed in *Conlin* v. *Aldrich*, 98 Mass. 558, where it is referred to. The general tenor of the decisions from Massachusetts recognize and adopt the rule rather than the exception to it. *Attorney General* v. *Simonds*, 111 Mass. 256. It is a fundamental principle that mandamus can be used only to compel the respondent to perform some duty which he owes to the petitioner, and can be maintained only on the ground that the petitioner has a present, clear, legal right to the thing claimed, and that there is a corresponding duty on the part of the respondent to render it to him. If therefore, as in the case at bar, the two persons are claiming the title to office adversely to each other, the respondent being in possession and exercising the duties pertaining to that office *de facto* under color of right, mandamus will not lie to compel the admission of the petitioner, or to determine the disputed question of title.

It is the opinion of the court upon the best reflection we have

been able to give to the questions presented in this case, that upon neither branch is the petitioner entitled to prevail.

Writ denied, with only one bill of costs for respondents.

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

HASKELL, J. I dissent from the reasoning of the opinion. The act of March 16, 1880, provides that the city marshal of Lewiston shall be appointed by the mayor, by and with the advice and consent of the aldermen, and "shall hold his office for the term of two years," and that "all acts and parts of acts inconsistent with this act are hereby repealed."

The language of this act, touching the tenure of the marshal, is substantially the same as that in the constitution, declaring the tenure of various state officers. Art. VI, Sec. 4, provides, that "all judicial officers shall hold their respective offices for the term of seven years from the time of their respective appointments." Sec. 5, "Justice of the peace and notaries public shall hold their offices during seven years, if they so long behave themselves well." Sec. 7, "Judges and Registers of Probate shall hold their offices for four years commencing on the first day of January next after their election." Sec. 8, "Judges of Police and municipal courts shall hold their offices for the term of four years."

In case of vacancy in any of these offices, it has been the custom for the new officer to hold for a full term.

This court declared, that a person, elected to the office of Register of Probate made vacant during the term, should hold for the full term of four years. Opinion of the Justices 61 Maine, 602.

The act of 1880 is "clear and unambiguous," and provides that "the marshal shall hold his office for the term of two years." No good reason exists for departing from the plain meaning of the statute, especially, when it expressly repeals all acts inconsistent with its provisions. Its title purports "to promote the efficiency of the police force," which is not likely to flow

from short terms and frequent changes. The marshal neither appoints his deputies, nor any part of the police force, and when appointed, he should hold the full term of two years.

I concur in the result, upon the ground that mandamus does not lie to eject an officer *de facto*, performing his duties under color of right.

ELLSWORTH WOOLEN MANUFACTURING COMPANY,

vs.

WILLIAM FAUNCE and others.

Hancock. Opinion June 10, 1887.

Corporations. Meetings. Quorum. Capital stock. Directors. Officers de facto.

The by-laws of the plaintiff corporation provided that "the capital stock of the company shall be $10,000, divided into 400 shares of $25 each;" and that "no business shall be transacted at any meeting of the stockholders unless a majority of the stock is represented, except to organize the meeting and adjourn to some future time."

Held, That it would take 201 shares to constitute a majority of the stock.

Held, also, That no meeting at which a less number than 201 shares were represented would be legal for the transaction of business.

A board of directors claiming an election at such meeting cannot, as against another board holding over from a previous election about which no question is raised, be regarded as officers *de facto*. That doctrine is not applicable where other individuals, as the defendants in this suit, are claiming to hold the title to the offices and the right to act in that capacity, and to have been legally elected to such office.

In what cases a court of equity, upon proper proceedings, will grant relief against the fraudulent acts of the directors of a corporation.

ON report on agreed statement.

The opinion states the case.

Wiswell and King, for plaintiff.

"Capital stock" is defined as follows in the books. Rapalje & Lawrence's Law Dict. gives it in this way: "Capital stock, The aggregate sum represented by the shares of stock in a company or corporation; the amount subscribed to the stock by the promoters and members, upon which assessments or calls may be made and dividends paid; the corporate fund as distinguished from other property of the corporation." Bouvier's Law Dict.

defines it in this way: "Capital stock, The sum divided into shares, which is raised by mutual subscription of the members of the corporation."

In Boone on the Law of Corporations it is said page 105: "In reference to a corporation the word capital for most purposes signifies the aggregate of the sums subscribed and paid in, or secured to be paid in by the shareholders." "The term stock when not employed to denote the same thing as capital has reference to the interests of the shareholders or individuals. Field on Corporations, § 123, says, in defining stock, "It is the money or capital invested in the business," &c.

The R. S., c. 48, § 17, in giving the powers of persons who associate themselves together, provides, among other things, that they may "fix the amount of the capital stock," this does not mean that they may create it but fix the amount of the limits just as was done in this case.

The power of a corporation to make by-laws is always subject to the restriction that such by-laws must be reasonable and not oppressive, vexatious or unequal. Boone on Corporations, § 58.

Under the circumstances of this case the directors are certainly officers *de facto* under the rule laid down in the books, and the rule holds good as to officers of a corporation as much as to public officers. *Hooper* v. *Goodwin*, 48 Maine, 80; Boone on Corporations, § 135 and cases cited; *Bliss* v. *Day*, 68 Maine, 201; *Simpson* v. *Garland*, 76 Maine, 203.

Wilson and Woodard, for the defendants cited: R. S., c. 46, § 6; *Dodge* v. *Woolsey*, 18 How. 331; *Hersey* v. *Veazie*, 24 Maine, 9; *Hawes* v. *Oakland*, 104 U. S. 450; *Brown* v. *Lunt*, 37 Maine, 423; *Woodside* v. *Wagg*, 71 Maine, 207.

FOSTER, J. Bill in equity for the redemption of a mortgage given by the plaintiff corporation upon its real estate to one Lewis Friend, and by him assigned to the defendants, who were at the date of the assignment, and still claim to be, a majority of the board of directors of said corporation. Fourteen days after the assignment, the defendants commenced foreclosure proceedings by publication, the mortgage containing the ordinary one

year foreclosure clause. Before the time for redemption had expired, an annual meeting of the company was held, and, as it is claimed, a new board of directors was elected. The defendants being in possession an account under the statute was demanded, which the defendants refused to render on the ground that no authority existed in the board, or either of its members, to demand an account.

Whereupon, four days before the expiration of the year for redemption, this suit was brought.

On the first day of the return term, the defendants duly filed a motion to dismiss the bill for want of authority to commence or prosecute the same. The motion being seasonably filed brings the question properly before the court. *B. O. & M. R. R. Co.* v. *Smith*, 47 Maine, 44. The president of a manufacturing corporation, as such, has no authority to commence an action in the name of the corporation. *Ashuelot M'f'g Co.* v. *Marsh*, 1 Cush. 507; *Mahone* v. *R. R. Co.* 111 Mass. 75, and cases cited.

Here are two sets of officers, each claiming to be the legal board of directors — the defendants, as the board elected at a prior annual meeting of the company and as such with authority by its by-laws to hold their office for one year or until their successors should be chosen; the other board, as that elected at the subsequent annual meeting in 1885.

The question presented for our consideration then, is whether the board of directors claiming an election at the annual meeting in 1885, and commencing this suit, was legally authorized to act so far as this proceeding is concerned.

The answer to this depends upon the validity of their election.

It is admitted that the company was legally organized, and its by-laws duly adopted. The second by-law provides that "the capital stock of the company shall be $10,000, divided into 400 shares of $25 each;" and by the thirteenth by-law, "no business shall be transacted at any meeting of the stockholders unless a a majority of the stock is represented, except to organize the meeting and adjourn to some future time."

At the organization of the company 243 out of the 400 shares of the capital stock were subscribed for, and this number has

remained substantially without change during the time involved in this case,— no more than that number ever having been subscribed for.

What should constitute a quorum for the transaction of business at their meetings, was a question which the stockholders had a right to determine, (R. S., c. 46, § 6,) and this they did by the adoption of the foregoing by-law providing that unless a majority of the stock was represented, no business should be transacted at any meeting, except to organize and adjourn to some future time.

At the annual meeting of June 8, 1885, at which it is claimed the new board was elected, 138 shares of the capital stock were represented and no more. Was there a majority of the stock represented at that meeting? If not, there could be no legal election of officers at that meeting.

We think a fair and reasonable as well as proper construction of the by-laws leaves no room for doubt as to what was intended by a "majority" of the stock. It was divided into 400 shares, and it would take 201 shares to constitute a majority of that stock. The language of the by-law is plain and susceptible of no ambiguity. If we turn from the language of the by-law to the action of the stockholders themselves who were the authors of it we shall find that such seems to have been their understanding from the time when the company was first organized, and the by-laws adopted.

The first annual meeting was held June 12, 1881, at which meeting only 133 shares were represented. And the question being raised at that time whether the meeting was one at which business could be legally transacted, the record shows that another meeting was called. At that meeting a majority of all the stock was represented, and the stockholders proceeded to the transaction of business. Moreover, in the call for that meeting, was the following: "2d. To see if the corporation will amend by-law thirteen by adding the word 'subscribed' after the word 'stock' in the second line." The records do not show that any action was taken in reference to that article in the call. The question being thus brought squarely before the stockholders at a

meeting in which a majority of the whole stock was represented, they chose to take no action upon it, and left the by-law as it was.

Furthermore, the report shows that annual meetings were regularly called each year thereafter, but at every meeting less than 201 shares of the capital stock were represented — and at every meeting until that of June 8, 1885, no business was done except to adjourn. At that meeting, however, a resolution was adopted and recorded, declaring 138 shares to be represented, and that the same constituted a legal quorum for the transaction of business.

But inasmuch as there was not, in fact, a majority of stock represented at that meeting, there could be no legal business transacted, except to organize and adjourn to some future time. Such was the language as well as the evident intent and meaning of the by-law, duly adopted for the government of the corporation. Consequently it was not in the power of a minority to do that which only a majority could legally accomplish. Hence, it cannot be held that the board which now represents this plaintiff corporation, and which claims the right to commence and prosecute this action, was legally elected.

The consequence is that the old board of directors, about whose election no question is raised, continued in office by virtue of the by-laws of the company, and were the only legal board of directors at the time this suit was commenced.

Nor do we think that the other position of the plaintiff can be sustained — that the new board of directors were officers *de facto*, if not *de jure*, and thereby authorized to commence and maintain this suit for redemption. Here were two boards of directors claiming title to the same offices. Were there no other persons claiming to hold these offices and to have been legally elected to them, then it might be that, acting under color of an election, the acts of such new board might be valid as to the public or third persons affected thereby or interested therein. But we do not understand that the principle applies in a case like the present where other individuals — the defendants themselves — are claiming to hold the offices and the right to act in that capacity, and to have been legally elected to such offices. *Charitable Association* v.

Baldwin, 1 Met. 359; *Cooper* v. *Curtis*, 30 Maine, 488; Ang. & Am. Corp. § 286; *Woodside* v. *Wagg*, 71 Maine, 210.

The case comes before this court on report. From the stipulations therein contained we are only to determine whether, from the facts as stated, the bill can be maintained. If it cannot, then it is agreed that it is to be dismissed. The plaintiff corporation, acting through a board of directors, elected not in accordance with the by-laws of the corporation, and consequently, as against the defendants, having no authority to act, seek to maintain this bill as a bill for the redemption of a mortgage held by the defendants. There is no allegation of fraud, nor is there sufficient to warrant the court in assuming that the defendants are acting in violation of their trust. The court will not assume that there was fraud when none is alleged. It does not appear that the defendants have refused or neglected to do and act for the interest of the corporation, or that they have not, in doing what they have, acted according to their best judgment for the corporation. Whenever the contrary may appear, and it can be shown that the defendants have been acting in violation of their trust, or have combined to injure the property of the corporation, or have fraudulently misappropriated the corporate property for their own benefit or for the benefit of third persons, or have obtained undue advantage, benefit, or profit for themselves by purchase, sale or other dealings with the same, then undoubtedly, upon proper proceedings, this court as a court of equity has power to grant relief, and the rights of the corporation, when violated, may be enforced by equitable remedies. Pom. Eq. § 1094. But in this suit, which is in its nature a statutory proceeding for redemption of mortgaged premises, no authority is shown whereby the plaintiff can maintain this bill.

Bill dismissed.

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

EMERY, J., did not sit.

ELLEN D. JONES *vs.* ELIJAH SMITH.

Penobscot. Opinion June 10, 1887.

Mortgages. Mortgagor and mortgagee. Trespass.

The plaintiff, as mortgagor, had yielded possession to the mortgagee, and afterwards brought a bill in equity and obtained a decree authorizing her to redeem upon the payment of the amount found to be due within three months from the date of the decree. Thereupon, as by the decree, the premises were to be surrendered, and a deed was to be executed and delivered to the plaintiff within five days from the time of such payment "conforming to this decree, and therein reciting the decree, and in proper terms discharging said mortgages, and releasing and freeing said mortgaged premises from any and all incumbrances created or made by said mortgages," etc. The money was paid within the three months named in the decree. *Held*, That defendant is not liable in trespass for acts done upon the premises, while in possession thereof, between the time of the payment of the money and the time when the deed was delivered to the plaintiff, and within the five days named in the decree in which the deed was to be executed and delivered.

Until the execution and delivery of the deed, during such time, the defendant was in the lawful possession of the premises, and trespass would not lie against him by the mortgagor.

As between mortgagor and mortgagee, the mortgage vests the legal title and seizin of the estate in the mortgagee immediately upon delivery of the mortgage.

The gist of trespass to personal property is the injury to the plaintiff's possession.

There must be either title, or possession, or the right to immediate possession, in order to entitle a plaintiff to recover in an action of trespass to persona property.

ON report of an action of trespass. The opinion states the material facts.

Jasper Hutchings, for plaintiff.

Upon the payment into court of the amount decreed to be due upon the Bowler mortgages the legal title revested at once in plaintiff. R. S., c. 90, § 31.

The statute, enacted in 1870, was intended to do away wholly with the distinction that had existed before that time, according to *Stewart* v. *Crosby*, 50 Maine, 130, decided by a divided court, between payment of a mortgage debt before and payment

after a breach of the condition of the mortgage, in its effect upon the legal title.

Says Jones on Mortgages, § 690, "the mortgagee has no right of action after payment. If the mortgagee purchase the mortgaged premises at the foreclosure sale for the full amount then due on the mortgage, he has no claim to logs previously cut upon the premises. When he has been paid his debt, his right of action is gone, although the trespass upon the property was committed before the payment."

The cases of *Davis* v. *Nash*, 32 Maine, 411, and *Seavey* v. *Preble*, 64 Maine, 121, are authorities in support of trespass *quare clausum* without actual possession by plaintiffs. Furthermore, so soon as the vegetables, apples, etc., were severed from the soil and buildings, they at once became personal property — the personal property of the plaintiff — and upon familiar principles of law she is entitled to recover for them under her counts of trespass *de bonis* without having had possession. *Freeman* v. *Rankins*, 21 Maine, 446; *Staples* v. *Smith*, 48 Maine, 470.

Between mortgagor and mortgagee and their tenants, there is no right to emblements. Wash. on Real Prop. Title Emblements. Jones on Mortgages, § § 697, 780.

Davis and Bailey, for the defendant, cited: *Chase* v. *Wingate*, 68 Maine, 204; *Stewart* v. *Crosby*, 50 Maine, 133; Jones, Mortgages, § § 697, 780; *Gilman* v. *Wills*, 66 Maine, 273; *Farrar* v. *Smith*, 64 Maine, 74; *Burges* v. *Souther*, 5 East Rep. 168.

FOSTER, J. The plaintiff was the owner of the premises in question, and mortgaged the same to Lorenzo A. Bowler. The interest of the mortgagee passed by sundry conveyances to Sandford C. Smith, son of this defendant, and under whose authority the defendant claims to have been acting.

The plaintiff had yielded possession to the mortgagee in 1881, and afterwards brought a bill in equity, (*Jones* v. *Bowler*, 74 Maine, 310) and obtained a decree authorizing her to redeem upon payment of the amount found to be due within three

months from the sixteenth day of June, 1884. Thereupon, the premises were to be surrendered, and a deed was to be executed and delivered to the plaintiff within five days from the time of such payment, "conforming to this decree, and therein reciting the decree, and in proper terms discharging said mortgages, and releasing and freeing said mortgaged premises from any and all incumbrances created or made by said mortgages," etc.

Within the three months named in the decree, viz., September 6th, the money was paid in accordance therewith; and whatever acts were done by this defendant of which the plaintiff complains, were done between that date and September 10th, the time when the plaintiff received the deed of release, mentioned in the decree, and possession of the premises.

During that time the premises remained in the possession of the assignee, or those acting under his authority.

The defendant, therefore, can be holden for no acts which, if done by the mortgagee in possession or his assignee, they would not have been legally answerable for in an action like the one before us.

There is no evidence connecting the defendant with several of the acts alleged to have been committed by him, and no further mention need be made of them. The remaining acts are such as indicate that the plaintiff is looking more to the gratification of her will than for any pecuniary gain in the prosecution of this suit, and relate to the gathering of a few beets, cabbages, tomatoes and cucumbers planted by the assignee that season — to the gathering of about a dozen bushels of apples from the orchard— and to hauling a small load of manure from the premises.

The plaintiff, by her learned counsel, admits the settled doctrine of the common law, that payment of the mortgage debt after condition broken would not divest the mortgagee of his legal title, and that the legal estate would remain in the mortgagee until it was released. (*Stewart* v. *Crosby*, 50 Maine, 130.) But she claims that since the provisions of R. S., c. 90, § 31, such payment operates as an extinguishment of the mortgage, and at once revests the legal title in the mortgagor, who may forthwith treat the mortgagee in possession, or any one

claiming under him, as wrongfully in possession and liable not only in an action of ejectment, but also in trespass.

However this may be in a case where the principle can be properly applied, it must certainly be received with some modification in the case now before us. In this case, there was a decree from a court of equity, to which the plaintiff had seen fit to resort by bill, praying for an account of the rents and profits and for redemption. By that decree, introduced in evidence, the rights of both parties in this action are, to a certain extent, to be determined. It affects parties and privies. True, by that decree, the plaintiff, upon payment of the amount due upon the mortgage debt, was to have possession of the premises. But that decree also provided that the mortgagee in possession, or the party claiming under him, was to have five days from the time of such payment, in which to execute and deliver a suitable deed conforming to that decree, therein reciting the same, and in proper terms discharging said mortgages, and releasing and freeing the mortgaged premises from any and all incumbrances created or made by them. Within the time named, the deed was executed and delivered. We cannot say that the party who was lawfully in possession of the premises had no rights there during the time specified in which a deed was to be executed. We think his possession was such as it was contemplated might lawfully continue until the delivery of the deed within the time named, otherwise we should be doing violence to the language of the decree upon which the plaintiff's rights in this action to a great extent are based. By that, the plaintiff was authorized, within such time as the court in its discretion saw fit to grant, to make tender or payment of the mortgage debt. The court, as it undoubtedly had the right to do, gave the other party a reasonable time in which to execute a release of such incumbrances as may have existed upon the property and been discharged by such payment. It would not be reasonable to suppose that one should be entitled to the whole time thus allowed by the court for the performance of that which it was

optional with her whether she would perform or not, and that the other party should have none.

When the acts complained of were done, the mortgagee had not executed the release. Possession had not been surrendered to or taken by the plaintiff. That possession, to the time the deed was executed and delivered in accordance with the decree, must be held to be a legal possession. *Taylor* v. *Townsend*, 8 Mass. 415.

The case to which we have referred was where an action of trespass was brought by the mortgagor against the assignee of the mortgagee, in possession, and the trespass complained of was the taking down and removal of a barn and shed erected by him. The plaintiff there had by a bill in equity previously obtained a decree for possession, the mortgage having been redeemed, and for a deed of release of the mortgaged premises. (*Taylor* v. *Weld*, 5 Mass. 124.) "Now in the case at bar," says PARKER, J., "Townsend was not only in possession, but was *lawfully* so, and that under the plaintiff himself until the judgment of the court against him. And when the act complained of was done, he had not been amoved, nor had he released, or otherwise surrendered his possession. It is impossible, therefore, to consider him a trespasser; and if the act done by him was wrongful, the proper remedy is by action in the nature of waste, considering him a tenant at will after the rendition of the judgment, for an injury done to the reversion."

While thus in the lawful possession, the mortgagee, or his assignee, is not liable in trespass for the occupancy of the premises. He is entitled by his possession to the rents and profits, and is accountable for them to the mortgagor if the premises are redeemed.

As between mortgagor and mortgagee, the mortgage vests the legal title and seizin of the estate in the mortgagee immediately upon the delivery of the mortgage; and the mortgagee is regarded as having all the rights of a grantee in fee, subject to defeasance. *Gilman* v. *Wills*, 66 Maine, 275.

Consequently, it has been held that an action of trespass *quare clausum* will not lie in favor of the mortgagor against the

mortgagee, or his assignee, for entering peaceably upon the mortgaged premises and digging up and carrying away and converting to his own use portions of the soil. *Furbush* v. *Goodwin*, 29 N. H. 321. Nor for removing fixtures belonging to the real estate. *Chellis* v. *Stearns*, 22 N. H. 312.

The defendant's acts upon the premises, as the evidence shows, were by authority of the son, who was the assignee of the mortgages, and who carried on the place that season. With the exception of the removal of the manure which belonged to the farm, (*Chase* v. *Wingate*, 68 Maine, 204; *Vehue* v. *Mosher*, 76 Maine, 470) the evidence is not sufficient to warrant the court in saying that anything was done by him which could be considered as an injury to the freehold.

It is plain that this action cannot be maintained upon the count in the plaintiff's writ for breaking and entering. The right of entry and possession at the time was in the son, and in law the defendant stands in his place in reference to any acts done by him.

Nor can the plaintiff prevail upon the other counts of *de bonis asportatis*. At the time of the alleged taking, the title and possession were rightfully in the defendant or those under whom he claims. There was neither title nor possession, nor the right to immediate possession, in the plaintiff. *Carlisle* v. *Weston*, 1 Met. 26; *Codman* v. *Freeman*, 3 Cush. 310; *Staples* v. *Smith*, 48 Maine, 470; *Butman* v. *Wright*, 16 N. H. 220; *Lunt* v. *Brown*, 13 Maine, 236.

"The *gist* of trespass to personal property is the injury done to the plaintiff's possession. The substance of the declaration is, that the defendant has forcibly and wrongfully injured property in the possession of the plaintiff. To maintain the action, it is absolutely essential that the plaintiff should have had, at the time of the alleged injury, either actual or constructive possession of the property injured." *Wilson* v. *Martin*, 40 N. H. 91; *Lunt* v. *Brown*, *supra*; *Muggridge* v. *Eveleth*, 9 Met. 235; *Wade* v. *Mason*, 12 Gray, 335.

And an action of trespass cannot be supported against one coming to the possession of goods lawfully, for a subsequent

unlawful conversion of them. *Bradley* v. *Davis*, 14 Maine, 44; *Butman* v. *Wright*, *supra*.

Judgment for defendant.

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

ELLEN D. JONES *vs.* ELIJAH SMITH and others.

Penobscot. Opinion June 10, 1887.

Replevin. Bond. Damages.

The failure to enter a replevin writ in court and to prosecute the same to judgment, when due service has been made upon the defendant, constitutes a breach of the replevin bond.

In a suit upon the replevin bond the defendant may show title to the property replevied, in mitigation of damages, when there has been no judgment in the replevin suit determining the title to the property.

ON report.

Debt on a replevin bond. The opinion states the material facts.

Jasper Hutchings, for the plaintiff.

The plaintiff is entitled to maintain her action and recover nominal damages at any rate. *Smith* v. *Whiting*, 97 Mass. 316; S. C. 100 Mass. 122.

The case at bar is unlike *Pettygrove* v. *Hoyt*, 11 Maine, 66.

Davis and Bailey, for defendants.

The plaintiff has sustained no damage by the non entry of the replevin writ. In fact if we are correct in our view of the case, she is the gainer thereby. We respectfully call the attention of the court to the authorities cited by the plaintiff's attorney, to the effect that plaintiff has suffered no damage and cannot maintain the action. See *Pettygrove* v. *Hoyt*, 11 Maine, 66; *Smallwood* v. *Norton*, 20 Maine, 83; also see *Gilman* v. *Wills*, 66 Maine, 273.

FOSTER, J. Debt on a replevin bond. The principal parties are the same as in the preceding action (*Jones* v. *Smith*).

The replevin suit in which the bond was given was for ten tons of hay in the barn upon the premises named in that action, a part of which was grown and cut on the premises in 1884, and for one ton of unthreshed peas also grown thereon the same season, harvested and lying in heaps in the field at the time the replevin suit was commenced.

This defendant had cut the hay and harvested the peas under an arrangement with the assignee of the mortgagee in possession, and was the undoubted owner of the property replevied. To obtain possession of the same after this plaintiff had redeemed the estate mortgaged and came into possession thereof under a decree for redemption, this defendant brought his writ of replevin, returnable at the October term of court, 1884, for Penobscot county.

The writ was duly served upon this plaintiff, as appears by the officer's return thereon; but it was never entered in court, and no judgment has been rendered in the replevin suit.

This was a breach of the bond—one of the conditions of which was, that the party should prosecute the said replevin to final judgment, and which has not been done. *Pettygrove* v. *Hoyt*, 11 Maine, 69; *Tuck* v. *Moses*, 54 Maine, 121-2; *Smith* v. *Whiting*, 97 Mass. 316, 318; *Persse* v. *Watrous*, 30 Conn. 139; *Perreau* v. *Bevan*, 5 B. & C. 284 (11 E. C. L. 237).

In *Morgan* v. *Griffith*, 7 Modern, 380, it was said by LEE, C. J., that "in all replevin bonds there are several independent conditions; one to prosecute, another to return the goods replevied, and a third to indemnify the sheriff; and a breach may be assigned upon any of these distinct parts of condition."

Dias v. *Freeman*, 5 T. R. 195, was an action upon a replevin bond, the declaration alleging that the plaintiff in replevin did not appear at the county court next after giving the bond according to the condition; and did not then and there, or in any manner, or at any place or time prosecute his suit with effect against the defendant in said suit. On special demurrer the declaration was adjudged good, and the plaintiff had judgment thereon, although it did not appear that the suit in replevin was legally determined, or what the judgment was, if any, that was

given therein, or whether there was any judgment for return or not.

This question came before the court in Connecticut in *Allen* v. *Woodford*, 36 Conn. 143, and it was there held that a breach of the bond may occur in consequence of a failure to return the writ through negligence of the officer or the plaintiff. But that the title of the plaintiff in replevin may be shown in such case in mitigation of damages in an action upon the bond.

And in *Smith* v. *Whiting*, 100 Mass. 122, the precise question was presented, and it was there held that if the plaintiff in replevin fails to prosecute the replevin to final judgment in conformity with the condition of his bond, it will constitute a breach thereof and entitle the defendant in replevin to judgment for nominal damages in an action on the bond, even if he had no title to the property replevied.

What damages is the plaintiff entitled to recover? The bond is given as an indemnity for whatever loss or damage the plaintiff may have suffered. There has been no judgment in the replevin suit determining the title to the property, and the question of property has in no way been passed upon. The question of damages, so far as it has not been settled by any judgment, is therefore open to the defendants. *Tuck* v. *Moses*, 58 Maine, 476; *Buck* v. *Collins*, 69 Maine, 448. There can be no valid objection in permitting the defendant, in a suit like the present, to show anything in mitigation of damages, where it is not inconsistent with any judgment in the replevin suit. Thus in an action upon the replevin bond it has been held competent for the defendants to show in mitigation of damages that since the taking by the replevin writ, the plaintiff's interest in whole or in part has ceased to exist, and that the actual damages sustained by the plaintiff was the simple question involved, *Tuck* v. *Moses*, 58 Maine, 462; so in an action on the bond by one of the owners of the property held in common, it has been held that his interest may be shown in mitigation of damages and as limiting the amount to be recovered, *Bartlett* v. *Kidder*, 14 Gray, 449; or, that the suit was prematurely brought, and that the action of replevin failed solely upon that account, *Davis* v.

Harding, 3 Allen, 302; or, that the goods have been delivered and accepted pending the suit, and in such case that only nominal damages could be recovered, unless perhaps the plaintiff might be entitled to interest on the value, *Conroy* v. *Flint*, 5 Cal. 327. In these cases there had been a judgment for return, and yet the court held the evidence admissible as not being inconsistent with the judgment, nor impeaching it, in reference to the right of property which had not been determined in the progress of the replevin suit. Of course if it has been so determined, it can not be opened anew in the suit on the replevin bond. This is the doctrine of all the authorities. *Tuck* v. *Moses*, *supra*; *Buck* v. *Collins*, 69 Maine, 447-8; *Clapham* v. *Crabtree*, 72 Maine, 477; *Davis* v. *Harding*, 3 Allen, 306.

Consequently in mitigation of the plaintiff's damages, it has been held that in a suit on the replevin bond the defendant may show that the plaintiff had no title to the property, on the ground that the judgment in the replevin suit was not necessarily conclusive upon that question. *Wallace* v. *Clark*, 7 Blackf. (Ind.) 298; *Allen* v. *Woodford*, 36 Conn. 143; *Smith* v. *Whiting*, 100 Mass. 122; Sedgwick on Dam. 503.* Field on Dam. § 838; *McFadden* v. *Ross*, (Ind.) 5 Western Rep. 693.

"Such is the reasonable doctrine," remarks DANFORTH J., in *Tuck* v. *Moses*, *supra*, "for it is simply a question of actual damage to the plaintiff or those he represented. It could be no damage to him to withhold that which he had no right to receive, or having received he would be under legal obligation to return."

And in *Farnham* v. *Moor*, 21 Maine, 509, in a suit on a replevin bond, "judgment is to be rendered upon default," remarks WHITMAN, C. J., "for the plaintiff, for as much as he is in equity and good conscience entitled to recover." This is the principle by which the courts have been governed in their determination of cases like the one now before us. *Miller* v. *Moses*, 56 Maine, 128, *Leonard* v. *Whitney*, 109 Mass. 265; *Claggett* v. *Richards*, 45 N. H. 364; *Witham* v. *Withim*, 57 Maine, 449, and *Clapham* v. *Crabtree*, 72 Maine, 473, are all in harmony with this equitable position of the courts which will

not be found to militate in the least against the wholesome doctrine of estoppel by judgment.

This case is before the court on report. The defendants by their pleadings, and by way of mitigation of damages, assert title to the property at the time the replevin suit was commenced to have been in Elijah Smith, the plaintiff in that suit—now one of the defendants in this. The evidence satisfies us that this is true. While it is not a complete defence to this action, the plaintiff, however, will be entitled to recover only nominal damages, as that is the extent of the damage disclosed by the evidence.

Judgment must therefore be for the plaintiff for the amount of the penalty named in the bond, (*Davis* v. *Harding*, 3 Allen, 302; *Wright* v. *Quirk*, 105 Mass. 48) but execution is to issue for only one dollar as nominal damages.

Judgment accordingly.

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

JOHN F. WOODMAN *vs.* WOODMAN C. PITMAN and others.

Penobscot. Opinion June 16, 1887.

Waters. Ice. Rights of ice cutters on tidal rivers. Travelers on the ice. Law. Legislative and judicial functions. Negligence.

Neither the right of traveling upon the ice of a river, affected by the tide, nor the right of taking ice therefrom, is an absolute property right in any person. Both are natural or common rights belonging to the people generally.

Though such rights are theoretically open to all — are for the equal enjoyment of all — those persons who first take possession of them are entitled to their enjoyment without interference from other persons; such rights are the subjects of qualified property by occupation.

Each right is relative or comparative, when conflicting with the exercise of the other right, to be itself exercised reasonably; and what would be a reasonable exercise of the one or the other, at any particular place, must depend largely upon the benefits which the people at large are to receive therefrom.

These and all other public rights, and the relation that shall subsist between them, may be regulated by the legislature as a trustee of the rights for the people.

In the absence of legislative regulation of conflicting public interests, such matters necessarily become the subjects of judicial interpretation; the scope

of the judicial, though less than the legislative, authority permitting courts to determine the manner in which such public privileges may be best enjoyed by the public, provided that any judicial regulation shall do no violence to existing legal principles.

The law is constantly subject to gradual growth and development, and when, in the ever changing conditions and relations of society, new questions arise, it has within itself elastic and creative force enough to adapt itself to such questions.

The general right of traveling on the ice in all parts of our public rivers, is not invested with the same degree of importance as that which attaches to the right of passage for vessels in navigable waters; is a less dominant right; and is the superior right or not, according to circumstances of place and situation.

The right of passage over the ice for general travel is not the paramount right at such a place as the Penobscot river at Bangor, and for some distance below, where the great body of the ice is annually taken from the river, for the purposes of trade, both domestic and foreign, constituting an enterprise of vast value to the public at large, and the traveler is there provided with a passage over roads on the banks of the river, and at ferries across the river, at the public expense; the traveler's privilege at such place being of trifling consequence, compared with other interests conflicting with it, and beset with difficulty and danger during the ice cutting season.

Those who appropriate to their use portions of a public river for ice fields, should guard their occupations, after they have been cut into, so as not to expose to danger any persons who may be likely innocently to intrude upon the fields.

Although a defendant may have been in fault in leaving an ice field unprotected against accident, a plaintiff who afterwards got injured at such place, cannot recover, if he had a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent. In a legal sense, the plaintiff's negligence is the controlling cause of the accident, and the defendant's act does not even contribute to it.

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

An action of the case for damages sustained by the loss of the plaintiff's two-horse team, while being driven by his driver across the ice field of the defendants, on the Penobscot river, near Bangor. The team was driven upon a place where the thick ice had been cut and removed by the defendants and the new ice had not attained sufficient thickness and strength to sustain such a weight.

The verdict was for the plaintiff for the sum of six hundred and twenty-one dollars.

The opinion states other facts.

Charles P. Stetson, for plaintiff.

The instructions as to right of plaintiff to travel on the ice, and the duty of the defendant in cutting ice to guard the place cut with suitable barriers to warn the traveler, were correct. *French* v. *Camp*, 18 Maine, 433; *State* v. *Wilson*, 42 Maine, 25; Angell on Watercourses, § 538.

"The rights of the riparian proprietor were not changed in the least, when the surface of the river was covered with ice, all the citizens had still a right to traverse the river in that state at pleasure." 42 Maine, 25.

Wilson and Woodard, for defendants.

PETERS, C. J. This case largely depends for its solution upon what may be the extent of the right to harvest ice from our large rivers, compared with the conflicting right of traveling upon such rivers during the winter season. This is an interesting topic of inquiry, in view of the importance which ice has lately assumed as a merchantable commodity, and is a branch upon which the law has as yet hardly passed beyond a formative period. The inexhaustible and ever-changing complications in human affairs are constantly presenting new questions and new conditions which the law must provide for as they arise; and the law has expansive and adaptive force enough to respond to the demands thus made of it; not by subverting, but by forming new combinations and making new applications out of, its already established principles,—the result produced being only "the new corn that cometh out of the old fields."

Neither of the rights which seem in conflict in the present case, that of harvesting ice and that of traveling upon the ice, is absolute in any person. No one has any absolute property in either. They are derived from a natural right which all have, to enjoy the benefit of the elements, such as air, light and water, and are common or public rights which belong to the whole community. In the Roman law they were classified as "imperfect rights." Not that all persons can or do enjoy the boon alike. Much depends upon first appropriation. One man's possession may exclude others from it. Says Blackstone (2 Com. 14):

"These things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards." They are the subjects of qualified property by occupation. 2 Kent's Com. 348.

Each right is in theory, speaking generally, relative or comparative. Each recognizes other rights that may come in its way. Each must be exercised reasonably. And what would be a reasonable exercise of the one or the other at any particular place, for, clearly, there would be a difference in the relative importance of the different rights in different localities, depends in a large degree upon the benefits which the community derive therefrom. The public wants and necessities are to be considered. The two kinds of franchise belong to the people at large, are owned in common, and the common good of all must have a decisive weight on the question of individual enjoyment.

These, and all other public rights, and the relation that shall subsist between them, when not thereby trenching upon congressional jurisdiction, may be regulated by the legislature. The legislature is the trustee of the public rights for the people. And, as such agent or trustee, the legislature of this state has gone a great way in abridging an individual enjoyment of some of the common rights and privileges possessed by society, when the legislation has presumably inured to the common good. It authorized the changing of the channel of Saco river, although the effect of the diversion was to impair the value of a good deal of private property. *Spring* v. *Russell*, 7 Maine, 273. Has allowed private interests to be subserved to the injury of other private interests, by permitting dams and mills to be erected which prevented the flow and ebb of the tide, upon the ground that the public, as a whole, were to be benefitted thereby. *Parker* v. *Cutler Milldam Co.* 20 Maine, 353. Has granted to a single individual the exclusive right of navigating Penobscot river above the tide with steamers for a period of twenty years, for the consideration of improvements to be made in the navigation of the river by the grantee. *Moor* v. *Veazie*, 31 Maine,

360; S. C. 32 Maine, 343; S. C. 14 How. 568. These are illustrations of the legislative power in such matters.

The legislature has the constitutional authority, no doubt, to provide rules regulating the possession and cultivation of the ice fields upon our navigable rivers, where the tide ebbs and flows, at all events so far as the business is carried on below low water line; and for the adjustment of conflicting interests which may affect that privilege. If it omits to do so, such matters necessarily become the subjects of judicial interpretation. While the judicial is not co-extensive with the legislative jurisdiction upon the questions, there can be no doubt that it is within the scope of judicial authority to determine the manner in which such public privileges may be best enjoyed by the public, provided that any judicial regulation which may be attempted shall do no violence to existing law.

The law is subject to slow and gradual growth. A remarkable instance of the development of the law is seen in the doctrine unanimously adopted by the courts in this country, that a river may be considered navigable, although not affected by a flow of the tides from the sea. The common law was otherwise. Lord HALE, the great publicist, knew no such doctrine. Legislation did not create it. The courts felt obliged to adopt the interpretation, as a new application of an old rule, from an irresistible public necessity. The court of no state has probably ventured so far as this court has, in maintaining that small streams have floatable properties belonging to the public use. Our climate and forests, together with the interests and wants of the community, make the doctrine here reasonable — a reasonable interpretation of the law. While in some of the states, where less necessity for the doctrine exists, it is considered by their courts to be untenable as subversive of private rights. So, in handling the somewhat novel and important questions now pending before us, we are certainly at liberty to construct out of admitted legal principles, such reasonable rules as will meet the requirements of the case.

The importance to the public, of the ice privileges within the territory before named, is incomparably greater than is that of

traveling on the ice. Winter river-roads are of much less consequence at the present day than formerly. In the earlier days, the natural ways were the only ways for travel, and upon the large ponds and lakes and upon the rivers in remote places, the same necessity may even now exist. But at Bangor, and for some distance below, the principal area of Penobscot river from which the ice cuttings have been for some years customarily taken, the public have no need of a way on the ice. The traveler receives much more than an equivalent for any deprivation of the natural passage, in the use of the roads on the banks of the river, at all times kept passable at the public expense. Roads over the ice are rarely suitable and passable — only occasionally so. The access to them from the shores is difficult if not dangerous, where the tide, as it does here, ebbs and flows. Permission must be had of the riparian proprietor to cross his land, to enable one to get to the river without being a trespasser. The inconveniences render the privilege nearly, if not quite, worthless. Nor is any considerable use of the river for such purpose proved or suggested.

On the other hand, the business of gathering ice for merchantable purposes has assumed extraordinary importance on our rivers. Large amounts of capital are invested; thousands of men and of teams are employed at a season of the year when other employment cannot be obtained by them; the outlay is mostly in bills for labor, widely circulated; a crop of immense value is annually produced from an exhaustless soil without sowing; the shipping business is materially aided by it; the wealth of the state is greatly increased by it; it is eminently a business of the people. It would seem unreasonable to embarrass such an important enterprise by according to the traveling public a paramount right of passage, when such right, even to its possessor, is scarcely good for anything.

It is an error, we think, to invest the right of passing on the ice in all places with the same degree of importance as that which attaches to the right of vessels in navigable waters. It may be an offshoot of the navigable right — something akin to it — but a right of a secondary or inferior degree. The idea of roads

over the frozen surface of rivers was never broached in the old common law — it has grown up since — and should be the superior right or not, according to circumstances. We know of only one judicial decision touching the subject, that in our own state (*French* v. *Camp*, 18 Maine, 433), and that does not contradict the views we express in this discussion. There the plaintiff's injury came from the defendant's carelessness in cutting a hole through the ice, and leaving it exposed, upon or near a place where there had been a winter road for more than twenty years. WESTON, C. J., there says: "Assuming that the defendant has as good a right to the use of the water, as the plaintiff or the public generally had to the right of passage, the use of a common privilege should be such as may be most beneficial and least injurious to all who have occasion to avail themselves of it." In the present case, it must be remembered, the defendants are not defending themselves as riparian owners, for that would justify their possession only to low water line, but as a portion of the public, partaking of a common and public right. *Brastow* v. *Rockport Ice Co.* 77 Maine, 100.

An unlawful obstruction to navigation, being a common nuisance, is remedial by indictment, or by abatement; or a court of equity may take jurisdiction upon an information filed by an attorney general. Gould, Waters, § 121. It would seem strange to see the ice harvesters accused of nuisance. But nuisance exists, in lawful business, only where actual injury is sustained. It must be some essential injury and damage. "People living in cities and large towns must submit to some annoyance, to some inconvenience, to some injury and damage; must even yield a portion of their rights to the necessities of business." Wood, Nuisance, 11. In an English case it was said: "Where great works are carried on, which are the means of developing the national wealth, persons must not stand on extreme rights, and bring actions for every petty annoyance." *St. Helen's Smelting Co.* v. *Tipping*, 11 Jur. 785, reported in 116, E. C. L. 1093. In *Rhoades* v. *Otis*, 33 Ala. 538, a much quoted case, the test of the floatability of a stream was held to be, whether fit for valuable floatage and useful to important public interests. In

Wethersfield v. *Humphrey*, 20 Conn. 217, it was held that, in order to make a stream navigable, "there must be some commerce and navigation upon it which is essentially valuable." Same decision in 22 Conn. 198. Navigators must endure inconveniences for the greater general good. *Brown* v. *Town* of Preston, 38 Conn. 219. To constitute nuisance, the obstructions must *materially* interrupt general navigation. *State* v. *Wilson*, 42 Maine, 9. In *Rowe* v. *Granite Bridge Co.* 21 Pick. 344, 347, SHAW, C. J., said; "But in order to have this character it must be navigable to some purpose useful to trade or agriculture." In *Attorney General* v. *Woods*, 108 Mass. 436, it is said that this language is applied to the capacity of the stream rather than to its uses. But the last was a case where the officers of the Commonwealth were endeavoring to prevent an act supposed to injuriously affect the harbor of Boston.

It is our opinion, that any occupation of the Penobscot river, within the limits now receiving our attention, for the purpose of a winter way would be, at this day, of such insignificant importance, so useless and valueless in comparison with other public interests, that it cannot be set up to prevent or abridge the taking of ice within those limits to any extent whatever.

We do not, however, apply the rule stated to any place where a way is commonly used across the river, connecting town or county roads, or where a ferry is established by law. R. S., c. 20 § 7.

The traveler's right, even if existing theoretically, does not, under the circumstances, assert itself. Reasonable use is practically no use. The same public possessing both rights prefer to abandon the use of the one for the much more valuable use of the other.

We are aware that the law, in facilitating the enjoyment of public rights,— and no private right is involved in this controversy,— scans closely the grounds upon which it admits the advantage of one person to be set off against the disadvantage of another. In an early English case, *Rex* v. *Russell*, 6 B. & C. 566, an extreme rule was promulgated, in later cases not fully assented to, that staiths erected in the river Tyne, should not be

regarded as a public nuisance, if the public benefit produced by them countervailed the prejudice done to individuals,—the supposed public benefit being that in consequence of the erections coals would be brought to the London market in better condition or for lesser price. In subsequent cases it has been maintained that the benefit to be derived from tolerating any impairment of the navigable convenience, must be direct, and that the staiths in the Tyne, were a remote and indirect benefit merely, and not computable as a public benefit in the sense of the term in which it should be used when considering the question of nuisance; and it has been explained that the benefit must be a public benefit to the same public; that the same public or same part of the public which suffers the inconvenience, must also receive the benefit; that it must be both beneficial and injurious to the public using the same waters.

A satisfactory explanation of the doctrine appears in a discussion by HESSEL, M. R., in *Attorney General* v. *Terry*, L. R. 9 Ch. 423, where he says; "Then it may be asked, what is a public benefit? In my view it is a benefit of a similar nature, showing that on a balance of convenience and inconvenience the public *at that place* not only lose nothing, but gain something by the erection." In that case it was decided that any benefit in the way of gaining trade, to a single individual erecting a wharf in navigable waters, was too remote to be held to be for the advantage of the public generally, when the channel intruded upon was so narrow that every foot of it was wanted for navigation. In the opinion an illustration of public benefit is given, by supposing the piers of a bridge to be placed in the middle of a navigable river, thereby "to some extent, to a more or less material extent, obstructing the navigation," but the necessity is great and the injury trifling. In that case, says the opinion, "it would be a benefit that would counterbalance the public injury."

Applying the doctrine as carefully as it is guarded in the cases most widely differing from the case of *Rex* v. *Russell*, above cited, we feel assured that our conclusions are correct in sustaining the contention of the present defendants. Here the ice-

gatherer and the traveler belong to the same public; have presumably interests alike; were using the same river — the same waters — though in different ways. The ice-takers were occupying the river under the natural right of dipping water therefrom, and it is as if thousands of men were simultaneously exercising the right together The enterprise directly fosters the interests of navigation on the river. On the other hand, as we have before said, the right of the traveler, so far as pertaining to the navigation of the river, is, under the circumstances, at most a secondary, theoretical right and of no real and essential value. Even private property may be taken for public use by affording compensation. Here, if the traveler is not allowed the use of the river, it is because more than compensation is supplied to him in other roads provided for his use.

We think the trial was conducted upon a too literal application of the principles which govern the use of navigable streams, and that the jury were thereby prejudiced against the defendants to their injury.

These views being accepted, it necessarily follows that this portion of the river should be considered as virtually closed during the winter against general traveling. The whole tract cut over must be constantly beset with danger to a traveler who does not keep up an especial acquaintance with the condition of the ice. Besides, the ice fields, after they have been staked and fenced and scraped, and in some instances connecting fields extend across the river, have so far become the property of the appropriator that an action would lie against one who disturbs his possession. *People's Ice Co.* v. *Steamer Excelsior*, 44 Mich. 229.

At the same time the appropriators should by suitable means reasonably guard their fields against exposing to danger persons who may be likely to innocently intrude upon them, if such likelihood may be seen to exist. It is not necessary, in the present case, to inquire whether the defendants sufficiently observed such caution or not, inasmuch as we are clearly of the belief that the plaintiff's servant in charge of his team, was guilty of an act of carelessness which caused the plaintiff's loss.

Even if the defendants were in fault, their delinquency would be a prior act, while the servant's was a subsequent, distinct, independent act. The defendants had no reason to suppose the servant would go in the direction he did, or be heedless in his course if he were to go there. As some judge said: "One man is not required to take another man's discretion in his keeping."

At all events, the defendants' act or omission was not negligence against the plaintiff — not an act which the plaintiff can complain of. The idea is clearly expressed in 2 Law Quar. Rev. (London) p. 507: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." In such case defendants are not even guilty of contributory negligence; that is, their negligence does not in a legal sense contribute to it or participate in it. It is merely a passive agency, or condition, or situation, through or by which the accident happened — but no part of its real and controlling cause. *O'Brien* v. *McGlinchy*, 68 Maine, 552, 557.

The servant was hardly even a traveler on the river in the ordinary sense of the term. He was himself an operative at the ice fields. He came with his team upon the ice by crossing defendants' land, striking a traveled way which led upon the ice, along the shore, up to the field of operations he was to engage in. From a freak of his own, instead of keeping the road, as properly he should, he crossed one of defendants' fields, as properly he should not, and while attempting to go across or around another field of theirs, his team broke through the ice and was lost.

The pretense is set up that the defendants had no fence as a protective barrier at the end of the field extremest from the west bank of the river, to prevent the traveler from going upon the thin ice. None was needed. The exercise of ordinary care by the servant was all that was needed. There was a large ridge of snow and ice at the easterly end of the field, several feet high, thrown up by scraping the field from west to east in preparation for ice-cutting. It seems that the ice was left uncut and solid for a space of twelve or fifteen feet in width inside of the piles

or ridge, in order to afford space wide enough for a pair of horses to travel upon while cutting out and handling the cakes of ice. It is a risky track for any horses, but what dangers there are upon the track is incidental to the business. The servant confesses that he was acquainted with the mode of the business,— that he knew that the ice had been scraped up to the ridge of snow,— knew that there might be holes and thin ice where the field had been scraped,— knew that he was going upon the scraped ice,— and still he recklessly undertook to conduct his team on the inside of the ridge, when there was an abundance of room to drive safely outside of it. By his carelessness, for which there seems to be no rational explanation, the plaintiff's property was lost.

Motion sustained.

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

HASKELL, J. I concur in the result, but I cannot agree to the reasoning of the opinion of the court for the following reasons:

The right of navigation in public waters is paramount, although they may be subjected to any other useful purpose, even though such use may temporarily impede the paramount right; but when a use blocks navigation, it must cease until the necessities of navigation be served.

A vessel may lawfully be at anchor in and completely obstruct a roadstead so long as it is not needed for passage by other vessels; but when needed, the channel must be left open. The rights of passage and of anchorage are common rights, but the former from necessity is paramount, that both rights may be reasonably enjoyed. Both may be exercised, but neither can lawfully be destroyed.

A sailing vessel in ascending a river may occupy the whole channel if necessary, and a steamer astern must so remain unless it may pass her safely; but when the former comes to anchor, the steamer has the paramount right of passage, and the channel must be left open if possible.

So a traveler upon a highway has the paramount right to pass along, and teams standing and obstructing the way must move to give reasonable chance for passage.

Frozen navigable rivers are public highways, and the traveler ordinarily has the paramount right of passage as necessarily incident to the reasonable enjoyment of his right, but it must be exercised in common with such uses as the frozen surface of the river is adapted to. One such use is the harvesting of ice, a use that may impede travel. Both are common rights, and both may be lawfully exercised; but both cannot be enjoyed at the same spot at the same time, because the one may be there destructive of the other, so that it may be reasonable for that use giving the larger public benefit to restrict other uses to a narrower compass, but it cannot lawfully monopolize the whole right to the utter destruction of all other rights.

Ice gathering has become a remunerative and useful industry, and is of great benefit to the public. The nature of the business necessarily requires that it should not be subjected to a paramount right of travel that may destroy its reasonable enjoyment. Both ice gatherers and travelers are partakers in a common right. Neither has such a paramount right as to permanently and entirely extinguish that of the other; but both may exercise their right reasonably under all the circumstances surrounding their conduct.

If the public has appropriated a particular portion of the ice of a stream or pond, and has worn a well beaten track upon the same, would it be reasonable for the ice gatherer to interrupt such use? So if the ice gatherer has appropriated and marked his ice fields, leaving the traveler room for passage, would it be reasonable for the traveler to go upon it and defile it? Both uses of the ice are lawful, but neither may wholly exclude the other. Both cannot have the possession and use of the same ice for different purposes, although both have a common right to it so long as it remains unappropriated by either. The taker of water from a stream may not interfere with the navigation of it; but the harvester of ice obstructs the public highway at that place, so the one can no more take the whole ice and destroy the public highway, than the other without legislative authority could

divert the stream and leave its bed dry and unnavigable. Courts may declare the relative rights of persons, but they cannot extinguish them.

The plaintiff's servant had no need to enter upon the defendants' ice field, and he is chargeable with notice of the dangerous character of the spot, and for his imprudence in so doing the plaintiff is not entitled to recover.

JOHN W. MITCHELL *vs.* EMERY BOARDMAN.

Waldo. Opinion June 29, 1887.

Mandamus. Judge police court. Search and seizure. Intoxicating liquors.

The court will not grant a writ of mandamus on the petition of a private citizen to compel a judge of a police court, having jurisdiction, to issue a search warrant upon the complaint of such citizen.

The court will not issue mandamus when it is too late to be an available remedy, as when the thing commanded to be done would be an idle and useless ceremony.

ON report.

The case is stated in the opinion.

R. W. Rogers, for plaintiff.

It was agreed between the parties before the drawing of the petition, that no question as to the right of a private citizen to petition in a public matter would be raised, and it is presumed that no such contention will be made. For the convenience of the court, however, in case any doubt of its authority to issue the writ prayed for, should arise in connection with that question, the following cases are cited. *Hamilton, Auditor* v. *The State*, 3 Ind. 452; *The People* v. *Collins et al.* 19 Wend. 56; *Union Pacific R. R. Co.* v. *Hall*, 91 U. S. 355, and cases cited; *Williams, Petitioner*, v. *Co. Comr's*, 35 Maine 347; *State* v. *Gorham*, 37 Maine, 461; *Dane* v. *Derby*, 54 Maine, 95, and *Walton* v. *Greenwood*, 60 Maine, 363.

"On a summary hearing on a petition for mandamus, this court will not determine the question of the constitutionality of the law, involving the rights of third persons, but will leave that

question to be settled, when properly presented by parties to an action." *Smyth* v. *Titcomb*, 31 Maine, 285.

The contention, however, that the statute is in conflict with § 5, Art. 1, of the Constitution of Maine, is without any foundation. The constitution neither delegates, nor requires the legislature to delegate to magistrates the power of passing upon the question of probable cause. It has the right to withhold that power, if it sees fit, and prescribe instead the rules and conditions upon which they shall issue their warrants. That is precisely what the legislature has done in § 40, and this court has at least twice directly and explicitly declared its action to be constitutional. *Gray* v. *Kimball*, 42 Maine, 307; *State* v. *Miller*, 48 Maine, 576.

And the law has often been indirectly sustained by the court, the last time in the recent case of *State* v. *Dunphy*, (Maine) 3 New England Rep. 827.

W. P. Thompson and R. F. Dunton, for the defendant, cited: R. S., c. 132, § § 6, 11, 12; *State* v. *Nephla*, 35 La. 365; 2 Greenl. Ev. 452; *Munns* v. *Dupont*, 3 Wash. C. C. 31; *Foshay* v. *Furguson*, 2 Denio, 617; *Ulmer* v. *Leland*, 1 Greenl. 135; *Stone* v. *Crocker*, 24 Pick. 81; *Flaherty* v. *Longley*, 62 Maine, 420; *State* v. *Miller*, 48 Maine, 580; *State* v. *Bartlett*, 47 Maine, 392; *State* v. *Wheeler*, 64 Maine, 532; *Harris* v. *Niagara Co. Sup.* 33 Hun, (N. Y.) 279; *Vanhorne's Lessee* v. *Dorrance*, 2 Dallas, 304; *Davis* v. *Co. Comr's*, 63 Maine, 398; High, Ex. Leg. Rem. §§ 42, 156; *U. S.* v. *Seaman*, 17 How. 225; *U. S.* v. *The Com.* 5 Wall. 563; *Secretary* v. *McGarrahan*, 9 Wall. 298; *Ex parte Newman*, 14 Wall, 165; *Ins. Co.* v. *Wilson*, 8 Pet. 302; *U. S.* v. *Peters*, 5 Cranch, 135; *Ex parte Bradstreet*, 7 Pet. 648; *Ex parte Many*, 14 How. 24; *Com.* v. *Whiteley*, 4 Wall. 522; *Ins. Co.* v. *Adams*, 9 Pet. 602; *Sanger* v. *Co. Comr's*, 25 Maine, 294.

DANFORTH, J. In this case the petitioner in his individual capacity applies for a writ of mandamus to compel the respondent, the judge of the police court of the city of Belfast, to issue a warrant of search and seizure upon his complaint in due form

under oath. It has for a very long time been well settled law in this state that "a private individual can apply for this remedy only in those cases, where he has some private or particular interest to be subserved, or some particular right to be pursued or protected by the aid of this process, independent of that which he holds in common with the public at large. It is for the public officers, exclusively to apply when public rights are to be subserved." *Sanger* v. *Co. Com.* 25 Maine, 291-6. No private right, distinct from that of the public, is involved here. It is the refusal of a public officer to act in a public matter; an officer of the government in a matter which relates to the enforcement of a public law, and if he has violated his duty or refuses to perform it, there is other remedy more appropriate and efficient than this. The cases cited by counsel are unlike this, and in those cited from our own state this question was not raised.

Were it otherwise, in this case no available remedy would result from granting the writ. The warrant asked for, if issued, could only be against such liquors as were in the building described at the date of the complaint. If the officer were to levy it upon any other, he would do so at his peril, and so long a time has elapsed since the complaint was made and must in cases of this kind always elapse before a judgment can be obtained, that the issuing of the warrant would be a useless act, and more especially in this case as the building described in the complaint has been destroyed by fire, a historical fact of which the court will take judicial cognizance. Under these facts the court will not grant a mandamus even if the petitioner were otherwise entitled. It would be an idle and useless ceremony. *Williams, Petr.* v. *Co. Com.* 35 Maine, 349; *Woodbury* v. *Co. Com.* 45 *id.* 304; *Dane, Pet.* v. *Derby*, 54 *id.* 102.

Writ denied.

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

INHABITANTS OF ORNEVILLE *vs.* CALEB O. PALMER.

Piscataquis. Opinion June 29, 1887.

Tax. Qualification of assessors.

A tax assessed by assessors who took the oath of office before the moderator of the town meeting at which they were elected is not valid.

A moderator is not authorized to administer oaths in such cases.

ON report.

Debt to recover a tax assessed upon the defendant in Ornville for the year 1884.

By the town clerk's record of the annual town meeting, that year, it appears that Bela L. Fowles was elected and qualified as moderator, and Bela L. Fowles, Asa Parker, 2nd, and J. S. Morgan were elected assessors and thereupon Fowles was sworn by a justice of the peace, and Parker and Morgan were sworn by the moderator. The tax sought to be recovered was assessed by that board of assessors.

George W. Howe, for plaintiff.

Where forfeitures are not involved, proceedings for the collection of taxes should be construed practically and liberally. *Cressey* v. *Parks*, 76 Maine, 534.

The oath taken by the assessors was sufficient and in conformity with the provisions of the R. S., c. 1, § 6. *Greene* v. *Lunt*, 58 Maine, 532.

C. A. Everett, for the defendant.

HASKELL, J. It is settled law in this state that assessors must qualify by taking the oath of office in the manner prescribed by statute before they can assess a legal tax. R. S., c. 3, § 24; *Dresden* v. *Goud*, 75 Maine, 298.

The statute provides that assessors may be sworn "by the town or parish clerk, or by any person authorized by law." R. S., c. 3, § 24. Two of the assessors attempted to qualify by

taking the oath of office before the moderator, who was not authorized by law to administer oaths in such cases, and therefore these assessors were not legally qualified to perform the duties of office, and could not assess a legal tax.

Plaintiff nonsuit.

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

INHABITANTS OF LIBERTY *vs.* INHABITANTS OF PALERMO.

Waldo. Opinion July 1, 1887.

Pauper. Settlement. Minor. Emancipation.

Pauper supplies furnished to a minor child will not be considered as supplies indirectly furnished the father when there is a destruction of the parental and filial relations, and the father has deliberately abandoned such child, and has taken up his residence in another town, emancipating the child from all duty to him, and renouncing all obligation to it.

Supplies furnished under such circumstances, even with the knowledge of the father, will not be considered as supplies furnished to him so as to prevent his gaining a settlement in his new place of residence.

ON report.

The opinion states the case and material facts.

W. P. Thompson and R. F. Dunton, for plaintiffs.

Emancipation is never to be presumed but must always be proved. *Lowell* v. *Newport*, 66 Maine, 78; *Oldtown* v. *Falmouth*, 40 Maine, 106.

The court in *Sanford* v. *Lebanon*, 31 Maine, 124, say, "The test to be applied is that of the preservation or destruction of the parental and filial relations."

In *Monroe* v. *Jackson*, 55 Maine, 59, the court say in speaking of a similar case: "Poverty even culminating in absolute pauperism of the parent and resulting in a binding out to service of the child by the selectmen until he is twenty-one years of age, does not affect it."

In *Clinton* v. *York*, 26 Maine, 167, the settlement of John Beal was the question, and where supplies furnished his daughter

while living apart from his family were claimed to have prevented the father from gaining a settlement, and it appeared that the daughter had lived round in a good many places since her childhood, and that her father would not have her in his house, the court held that the daughter was not thereby emancipated.

The court in *Lowell* v. *Newport*, 66 Maine, 90, in reviewing the reported cases upon the question of emancipation, say, "From these cases as well as others in harmony with them, the principle to be deduced is that emancipation such as will effect a settlement under the pauper laws, however it may be in other cases, must be an absolute and entire surrender on the part of the parent, of all right to care and custody of the child, as well as to its earnings, with a renunciation of all duties arising from such a position.

William H. Fogler, for the defendants, cited: *Lowell* v. *Newport*, 66 Maine, 90; *Green* v. *Buckfield*, 3 Maine, 136; *Hallowell* v. *Saco*, 5 Maine, 143; *Raymond* v. *Harrison*, 11 Maine, 190; *Manchester* v. *West Gardiner*, 53 Maine, 525; *Garland* v. *Dover*, 19 Maine, 441; *Sanford* v. *Lebanon*, 31 Maine, 124; *Hampden* v. *Troy*, 70 Maine, 485.

FOSTER, J. This action is brought to recover for supplies furnished Harris Bailey and family, paupers residing in the plaintiff town.

It is agreed that Bailey formerly had a settlement in the defendant town, and that before the supplies for which this action is brought had been furnished he had acquired a legal settlement in the plaintiff town by having his home therein for five successive years, unless prevented by the fact that supplies had been furnished by the defendant town to Evilla May Bailey, a minor daughter by a former wife from whom he was divorced in 1869.

It was admitted that this daughter has received pauper supplies from the defendant town every year since her birth, which was in April, 1867, to within four years last past; and the plaintiffs claim that said supplies were indirectly furnished to Harris

Bailey, and thus prevented him from gaining a settlement in the plaintiff town.

The defendants, while admitting the support to have been thus furnished to the daughter, contend that it had no effect upon the father's settlement, because as they claim, the child was during all said time totally abandoned and emancipated by the father.

This is the only controverted question in the case—the only one we need consider, and the one decisive of the rights of the parties.

The evidence satisfies us that the child was emancipated by abandonment.

At the time the child was born Bailey and his wife were living apart from each other, having separated two months before. He first saw the child when she was six weeks old, his wife carrying her to him where he was at work in an adjoining town. He then refused to take the child; utterly refused to furnish anything for her, and denied that she belonged to him. He repeatedly thereafter declared that the child was not his, and that he should not support her, or have anything to do with her. The next time he saw the child was about a year after that when she was again carried to him, and he then refused to take any notice of her, still denying her paternity, and swearing that he would never support her. With one possible exception, and about which the evidence is conflicting, the father did not again see the girl for a period of about ten years, when he happened to meet her at a neighbor's house, but did not know who she was. When informed he manifested no interest whatever in her, and according to his testimony, does not recollect that he even spoke to her. The child was then eleven years old, and his home had been in the plaintiff town for more than six years.

In 1880, the girl, then being thirteen years of age, by invitation went to his house and remained four days. From that time to the present the father has had nothing to do with her, and it does not appear that he has even seen her. While there is some evidence that at one time he bought the child two yards of print, his own testimony is, "I never helped her any that I know of;" and he does not recollect of ever furnishing the child

anything in her life except just what food she ate while she was at his house.

The father was a man of sound health, able bodied, and received good wages. Divorced from the mother of this child in 1869, when it was two years of age, he again married in 1871, and has reared and supported a family of four children, having received assistance but once, and that only to the amount of five dollars in the town of Somerville, previous to the bill for which this suit is instituted.

The separation of the child from the father was not occasioned through poverty, nor in other respects did the parental and filial relation continue, as in *Garland* v. *Dover*, 19 Maine, 446; *Clinton* v. *York*, 26 Maine, 170; *Sanford* v. *Lebanon*, 31 Maine, 124; or *Eastport* v. *Lubec*, 64 Maine 244, cited by the plaintiffs. Here, from the testimony of the father it appears that he could have supported this child if he had wanted to, but he "didn't want to."

In the cases to which we have referred it will be found that the mere fact that the child was not residing in the family of the parent was not satisfactory proof of abandonment or emancipation. And the more satisfactory criterion of whether or not there had been such abandonment or emancipation, was found to be that of "the preservation or destruction of the parental and filial relations."

It is in accordance with this principle that the decisions of our court have uniformly held, in cases where the parental and filial relation no longer continues to subsist, and the father has "deliberately abandoned his family and taken up his residence in another town, emancipating them from all duty to him, and renouncing all obligation to them, that supplies furnished, even under such circumstances as imply a knowledge of the fact upon his part, will not be considered as supplies furnished to him, so as to prevent his gaining a settlement in his new place of residence." *Eastport* v. *Lubec*, 64 Maine, 246; *Raymond* v. *Harrison*, 11 Maine, 190; *Hallowell* v. *Saco*, 5 Maine, 143; *Lowell* v. *Newport*, 66 Maine, 87.

During the entire lifetime of this child, now more than twenty

years of age, the father has bestowed upon her no parental care. Neither has he exercised or attempted to exercise over her any parental control, and has required of her no filial obedience or duty. In no sense can it be said that she has been under her father's care and protection. There was such a voluntary and absolute renunciation of all duties arising from the parental and filial relation that, according to the established tests in such cases, emancipation would inevitably result.

In *Munroe* v. *Jackson*, 55 Maine, 59, it is said by BARROWS, J. that it occurs not only by the act of God in depriving the child of his natural protector by death, but also "by the voluntary act of the parent in surrendering the rights and renouncing the duties of his position, or in some way conducting in relation thereto, in a manner which is inconsistent with any further performance of them."

And in *Lowell* v. *Newport*, 66 Maine, 90, after an examination of many decided cases wherein the question of emancipation has arisen, the court say: "Indeed, the best test which can be applied is the separation and resulting freedom from parental and filial ties and duties, which the law ordinarily bestows at the age of majority."

What more potent evidence of deliberate abandonment, of freedom from parental and filial ties, and the renunciation of all parental obligation and duty is required than appears in this case? It is sufficient, we think, to establish a defence to this suit.

Judgment for defendants.

WALTON, DANFORTH, LIBBEY, EMERY and HASKELL, JJ., concurred.

J. EDWIN EATON *vs.* HUMPHREY N. LANCASTER and another.

Waldo. Opinion July 19, 1887.

Stable-keeper. Negligence. Bailment.

The owner of a stable is liable to the owner of a horse boarding therein, for any damage occasioned to the horse through the negligence of his employees and watchmen therein, within the scope of their employment.

Whether it is negligence for the watchman in a livery and boarding stable to allow three men, known to him to be smokers and under the influence of liquor, to go into the hay loft at midnight to pass the remainder of the night, is a question of fact for the jury.

Facts stated upon which a jury would be authorized to find negligence.

On exceptions.

The opinion states the facts and case.

J. E. Hanley, for the plaintiff, cited: Shear. & Red. Negligence, § § 2, 20, 21, 59, 65, 79, 601, 594, 14; Add. Torts, § § 600, 585, 577, 592; *Little* v. *Fossett*, 34 Maine, 545; *Healey* v. *Gray*, 68 Maine, 489; *Mason* v. *Thompson*, 20 Am. Dec. 471; *Beardslee* v. *Richardson*, 25 Am. Dec. 596; *Marlatt* v. *Levee, &c. Co.* 29 Am. Dec. 468; *Hill* v. *Owen*, 35 Am. Dec. 124; *Shaw* v. *Berry*, 31 Maine, 478; *Newson* v. *Axon*, 10 Am. Dec. 685; *Noyes* v. *Shepherd*, 30 Maine, 179; *Dickerson* v. *Rogers*, 40 Am. Dec. 642; *Savage M'f'g Co.* v. *Armstrong*, 17 Maine, 34; *Foster* v. *Dixfield*, 18 Maine, 380; *Lake* v. *Milliken*, 62 Maine, 240; *Ricker* v. *Freeman*, 50 N. H: 420.

W. H. Fogler, for defendants.

The defendants were bailees for plaintiff, and as such, were bound to ordinary diligence and responsible for ordinary negligence. They were bound to take only common and reasonable care of the plaintiff's team. Story on Bailments, § 442, *et seq.*; *Healey* v. *Gray*, 68 Maine, 489; *Burnham* v. *Young*, 72 Maine, 273; *Foster* v. *Essex Bank*, 17 Mass. 501; *Maynard* v. *Buck*, 100 Mass. 47.

"Ordinary care" means such care as men of ordinary sense, prudence and capacity would take, under like circumstances, in the conduct and the management of their own affairs. *Shrewsbury* v. *Smith*, 12 Cush. 177; *Shaw* v. *B. & W. R. R.* 8 Gray, 45.

"Ordinary care" has relation to the situation of the parties and the business in which they are engaged. *Fletcher* v. *B. & M. R. R.* 1 Allen, 9; *Cunningham* v. *Hall*, 4 Allen, 268.

In the case at bar it cannot be contended that there was any want of ordinary care on the part of the defendants personally,

for neither of them did any act in connection with the plaintiff's team.

The master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders, or doing his work. Shearman & R. on Negligence, § § 62, 63; *McManus* v. *Crickett*, 1 East. 106; *Lynch* v. *Nurdin*, 1 Ad. & Ell. N. S. 29; *Wilson* v. *Peverly*, 2 N. H. 548; *Howe* v. *Newmarch*, 12 Allen, 57.

The act was not only not authorized by the defendants, nor in performing any duties in the defendants' business, but was done against the reasonable rules of the defendants, and in defiance of the protest of their authorized employee. *Johnson* v. *Barber*, (Ill.) 50 Am. Dec. 416.

"Negligence is not actionable unless it is the proximate cause of the injury complained of." Shearman & R. § 9.

"The true inquiry is whether the injury sustained was such as, according to common experience, and the usual course of events, might reasonably be anticipated." *Derry* v. *Flitner*, 118 Mass. 134.

LIBBEY, J. After the plaintiff's evidence was all out, the presiding justice ordered a nonsuit, to which the plaintiff excepted. If there was any evidence which, if believed by the jury, would authorize a verdict for the plaintiff, a nonsuit should not have been ordered. The following facts are not controverted. On the eleventh day of July, 1885, the defendants were livery stable keepers in Belfast, and on that day the plaintiff's horse and harness were delivered to them at their stable to be kept for hire for an indefinite time. In the night of that day the stable took fire from some cause, and with the plaintiff's horse and all the horses in it but one, was burned. About one o'clock in the night, three men, McCabe, Twombly and Casey, drove into the stable a team belonging to the defendants which they had been using. They were to some extent intoxicated. After the team was put up they went into the loft of the stable, which was full of dry hay, to stay during the night. About half an hour after, the stable was on fire in the loft and Twombly and Casey were burnt in it, McCabe escaping slightly burned. McCabe and Twombly

were servants of the defendants, employed in their stable during the day, but were not on duty that night, and were not doing any act for the defendants. One McIntosh was a servant of the defendants, and that night was charged with the duties of night watch and the general care of the stable. One of the regulations of the defendants for the care and management of the stable was that no one should be permitted to sleep in the loft during the night. McIntosh knew that the three men were smokers, smoking pipes, and were in the habit of carrying their pipes and matches with them.

The plaintiff claims that he made out his right to recover on two grounds: First, that the fire was set to the stable carelessly by the three intoxicated men, two of whom were then in the employ of the defendants. Second, that the three intoxicated men were permitted by McIntosh, the night watch, to go into the loft to sleep, and that that act was not the exercise of due care over the plaintiff's property, and that by reason of that careless act the stable was burned and the plaintiff's horse and harness were destroyed.

By the contract of bailment, the defendants were bound to exercise ordinary care over the plaintiff's property, that degree of care which prudent and careful men would exercise over their own property under like circumstances. They were liable for the negligence of their servants in the performance of any duty in regard to the care and custody of the plaintiff's property within the general scope of their own employment.

As to the first ground of the plaintiff's claim, we think it entirely fails, as neither of the three men were in the performance of any act for the defendants during that night, but were acting as they pleased for their own pleasure.

Upon the second ground of the plaintiff's claim there is more doubt. The plaintiff's claim is that McIntosh permitted the intoxicated men to go into the loft for the night; that this was within the scope of his general employment and in the performance of his duty as night watch; that it was a careless, negligent act on his part, for which the defendants are responsible, and

was the proximate cause of the loss of plaintiff's property. These propositions are all controverted.

The first fact embraced in this ground of claim is that McIntosh permitted the three intoxicated men to go into the loft to sleep for the night. The burden is on the plaintiff to prove it. The only direct evidence in regard to it comes from McIntosh. He says the men went up in his presence. "They came into the office where I was going up to lie down up stairs, they then stepped out of the office and went across the barn floor to go up into the loft, and did go up into the loft, a hay loft, loose hay in it; should say the loft was sixty to seventy-five feet long and perhaps thirty-five feet wide. It was full of dry hay." "Q. Did you make any objections to their going up in the loft?" "A. I did. I told them I should not go up there, says I, boys, you better go up and lie down with me, there is plenty of room up stairs." He further said he never knew them to go up there to lie down before; he knew it was against the rules.

McCabe, one of the three men who went up, was a witness, but did not testify upon this point. This was all of the evidence as to what McIntosh did to prevent their going. Might the jury infer his consent from his testimony and the surrounding circumstances? We think they might. True, he says he objected; but when he states what he said to them, it appears more like advice feebly expressed. He does not state their answer. He did not tell them they must not go, it was against the rules; nor did he interpose, nor attempt to interpose any force to stop them. They appear to have been friendly to him, two of them fellow servants, working with him by day, and it is fair to presume that they would have heeded any vigorous objections on his part; but as soon as they went into the loft, he went to his sleeping place and went to sleep. He was not a willing witness against the defendants, was still in their employ and testifying to sustain his own conduct. The jury might well infer that, if he objected at all, his objection was of the character which is equivalent to consent.

Was permitting them to go into the hay loft in their then

condition, knowing that they were smokers and carried their pipes and matches with them, to stay during the night, a want of due care? This was a question of fact for the jury, and we think that they might properly so find. It may be assumed that the defendants thought so, as, by one of their rules, they had forbidden it.

Are the defendants responsible for this negligent act of their servant, McIntosh? We think so. It was an act directly in the line of his duty as a night watch, in charge of the stable. The fact that his negligence was in violation of the defendant's orders, if it was within the general scope of his duties, does not relieve the defendants from responsibility. The case is not like *Williams* v. *Jones*, Ex. Ch. 3 H. & C. 356, 602; L. J. Ex. 297, to which our attention is called, where a carpenter was employed by A, with B's permission, to work for him in a shed belonging to B, and the carpenter set fire to the shed in lighting his pipe with a shaving. His act, though negligent, had nothing to do with his employment as A's servant, and was not within the general scope of his duties. Here, the negligent act is directly within the line and purpose of McIntosh's employment. It is more like *Whatman* v. *Pearson*, L. R. 3 C. P. 422, where a carter having an allowance of an hour's time for his dinner in his day's work, but also having orders not to leave his horse and cart or place where he was employed, happened to live hard by, and contrary to his instructions, he went home to dinner and left the horse and cart unattended at his door. The horse ran away and did damage to the plaintiff's railings, and the master was held liable.

The remaining inquiry is, was the negligence of McIntosh the proximate cause of the loss? The rule as claimed by the counsel for the defendants is, that the injury must be such as, according to common experience and the ordinary course of events, might reasonably be anticipated. Admitted; and then it is a question for the jury. We think the jury would have been authorized to so find. To what extent the men were intoxicated was a fact for the jury. If to the extent to deprive them, substantially, of the use of their mental and physical powers, and they were in the habit of smoking, carrying matches for a light, might not

what in fact occurred, have been "reasonably anticipated?" If it was negligent to let them go into the loft to stay, under the circumstances, it must have been on account of danger from fire. There appears to have been no other danger to be apprehended. The negligence involved was permitting them to go into the loft to sleep If, in their condition, they were a dangerous element there, the defendants must be held responsible for their acts. The case is the same in principle as where a railroad company, through its agents or servants, knowingly or negligently permits an intoxicated man to enter its cars among the general passengers, and from his intoxication, he commits an assault upon a peaceable passenger; in such case, the company is liable. True, the degree of care required in the two cases is different, but so far as the test of proximate cause is involved, the principle is the same.

Exceptions sustained.

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

JOHN P. SWASEY, Administrator,

vs.

HEZEKIAH AMES and another.

Oxford. Opinion August 2, 1887.

Executors and administrators. Parties as witnesses. Deceased parties.

Although one party to a suit be the representative of a deceased person, the other party may be a witness in his own behalf as to matters happening after the death of such deceased person.

ON exceptions.

Trover by the administrator of the estate of Mellen T. S. Ames for two pairs of steers and a shoat, all of the value of two hundred dollars. The writ was dated September 1, 1883. The plea was the general issue. The verdict was for one hundred and seventy-nine dollars and four cents.

At the trial the defendants' counsel called Deborah B. Ames, one of the defendants, to testify to facts happening after the death of the intestate. The court ruled that, only when the

representative party takes the stand and testifies to facts happening after the intestate's death, is the door opened to the opposite party to testify to such facts. To this ruling the defendants alleged exceptions.

John P. Swasey, for plaintiff.

George D. Bisbee, for defendants.

PETERS, C. J. The fact that one of the parties to a suit is the representative of a person deceased, does not preclude the other party from the privilege of being a witness in his own behalf respecting matters that have happened after the death of such deceased person, whether the representative party testifies or not. Formerly the rule was otherwise, the statutory provision having been amended since the decision in *Kelton* v. *Hill*, 59 Maine, 260. Laws 1873, ch. 145; R. S., ch. 82, § 98. The legislature deemed it reasonable to allow the living party to be a witness in relation to matters of which the deceased in his lifetime could have known nothing, and about which some one other than the living party may be supposed to be in a position to testify.

Exceptions sustained.

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

BENJAMIN F. ANDREWS *vs.* CITY OF PORTLAND.

Cumberland. Opinion August 2, 1887.

City marshal, Portland. Salary. Officer de facto.

The person who holds the legal title to the office of city marshal of Portland, has the legal right to the salary.

It is no defense to an action against the city to recover a salary to which the plaintiff has a legal title, to prove that the city had paid the salary to another — an officer *de facto* — the city having notice of the plaintiff's claim before payment.

In such an action by the city marshal of Portland, for his salary, the city has no legal right to have deducted a sum earned by the plaintiff from other

sources during the same time for which he is entitled to recover for his salary.

On exceptions.

The facts are stated in the opinion.

William L. Putnam and *C. W. Goddard*, for plaintiff.

Plaintiff is entitled to interest. *Swett* v. *Hooper*, 62 Maine, 54; *People* v. *New York*, 5 Cowen, 331; *Philadelphia* v. *Rink*, 4 Eastern Rep. 642.

The plaintiff is entitled to the whole salary without deduction. *U. S.* v. *Addison*, 6 Wall. 291; *Costigan* v. *Mohawk, &c. R. R. Co.* 2 Denio, 609; *Allen* v. *McKeen*, 1 Sumner, 315; *People* v. *Miller*, 24 Mich. 458; (9 Am. R. 131); Dillon, Mun. Corp. § 235; *Mayfield* v. *Moore*, 53 Ill. 428 (5 Am. R. 52); *Nichols* v. *MacLean*, 4 East. R. 294; *Saline Co.* v. *Anderson*, 20 Kansas, 298 (27 Am. R. 171); *Pettitt* v. *Rousham*, 15 La. An. 239; *Singer* v. *Crenshaw*, 10 La. An. 297; *Major Herod*, 13 Opinions Attorney General. *Frazer* v. *U. S.* 16 Court of Claims, 507; *Stuhr* v. *Curran*, 15 Vroom, 181 (43 Am. R. 353).

Officer *de facto* not entitled to salary. *Pooler* v. *Reed*, 73 Maine, 129; *State* v. *Carroll*, 38 Conn. 449; *McVeany* v. *Mayor*, 80 N. Y. 192; *Dolan* v. *Mayor*, 68 N. Y. 274; *McCue* v. *County Wapello*, 56 Iowa, 698 (41 Am. R. 134); *People* v. *Potter*, 63 Cal. 127 (15 Reporter, 646); *Philadelphia* v. *Given*, 16 Penn. St. 136; *Mathews* v. *Copiah Co.* 53 Miss. 715 (24 Am. R. 718); *Carroll* v. *Sieben Thaler*, 27 Cal. 193; *Douglass* v. *State*, 31 Ind. 429; *Memphis* v. *Woodward*, 12 Heisk. 499 (27 Am. R. 750). Counsel also cited: *Goddard* v. *G. T. Ry.* 57 Maine, 228. Opinion of Justices, 70 Maine, 596. Freeman, Judgments, § 481.

Joseph W. Symonds, city solicitor, for defendant.

In *Farwell* v. *Rockland*, 62 Maine, 296, it is held that "a public officer has no proprietary interest in his office, nor property in the future compensation attached to it." "There is no contract express or implied, between a public officer and the government whose agent he is. The latter enters into no agreement that he

shall receive any particular compensation for the time he shall hold office; nor, in the case of statutory office, that the office itself shall continue any definite period."

"A policeman of the city of Bridgeport, is an arm of the law; he holds an office as a trust from the state; he is a preserver of the public peace; he is not the hired servant of a master; no contract relation exists between him and the city by which he is bound to its service; he can lay down his trust at any time according to his pleasure without exposing himself to an action for damages for breach of contract. As a rule, so far forth as public officers are concerned those only are entitled to the salary who both obtain and exercise their offices. Payment follows the actual discharge of duty, and not the formal offer to do it, no matter how honestly or persistently made." *Farrell* v. *Bridgeport*, 45 Connecticut, 195; *Marden* v. *Portsmouth*, 59 N. H. 18.

"A was illegally removed from the office of assessor and tax collector by the board of county commissioners, who appointed B in his stead. B performed the duty, and was compensated therefor. Subsequently A was restored to office. Held, that he could not recover from the county the fees to which he would have been entitled but for his illegal suspension." *Gorham* v. *Boise Co. Com.* 1 Idaho, N. S. 655, cited in 13 U. S. Digest, N. S. 692, Par. 36, 1883.

"B and M were opposing candidates for county treasurer. M was declared elected by the county canvassers and entered upon the duties of the office. The election was contested, and B was finally declared entitled to the office by the judgment of the Supreme Court. The county auditor in settling with M allowed him the salary for the time he held the office. Held, that B could not exact salary for the time M was actually in office." *Wayne Co.* v. *Benoit*, 20 Mich. 176 (4 Am. Rep. 382).

"County commissioners paid to the county clerk *de facto*, claiming *de jure*, the salary of his office. The title to the office was then in litigation to the knowledge of the commissioners, and the clerk *de facto* was insolvent. Held, that the clerk *de jure*, whose title was affirmed, had no cause of action for such salary." *Saline Co.* v. *Anderson*, 20 Kans. 298 (27 Am. R. 171).

In *Stubenville* v. *Culp*, 38 Ohio St. 18, (43 Am. Rep. 417,) it was held that "a police officer suspended by the mayor of a city under authority of the city charter, 'for sufficient causes,' is not entitled to wages during the period of suspension although the city council afterward declared the cause of suspension insufficient." *Compare Regina* v. *Cambridge*, 12 Ad. & El. 713 & 714.

"Disbursing officers charged with the duty of paying official salaries have, in the discharge of that duty, a right to rely upon the apparent title of an officer *de facto*, and to treat him as an officer *de jure* without inquiring whether another has the better right." *Dolan* v. *Mayor*, 68 New York, 274, 278-283.

A municipal corporation, whose disbursing officer has once made payment of the compensation given by law to an office, to one actually in the office, discharging its duties, with color of title, and with his right thereto not determined against him by a competent tribunal, is protected from a second payment." *McVeany* v. *Mayor*, 80 New York, 185, 193-194.

In *Terhune* v. *Mayor*, 88 New York, 247, it appeared that "the plaintiff was appointed inspector of combustibles by the Fire Commissioners; he was removed, and S appointed in his place; but under a decision of the Supreme Court determining that his removal was unauthorized and illegal, the plaintiff was reinstated. S performed the duties and received the salary of the office from the time of his appointment. Held, that plaintiff could not maintain an action against the city to recover the salary during the time he was kept out of office."

And in this case the court, after referring to it as no longer an open question that payment to a *de facto* officer, while he is holding the office and discharging its duties, is a defence to an action brought by the *de jure* officer to recover the same salary, proceeds to say, "But the plaintiff claims that his action may be treated as one to recover of the city damages for his wrongful dismissal from office. It is a sufficient answer to this claim that the city did not dismiss him from his office. The fire commissioners were public officers and not agents of the city. The city is no more liable for their wrong in dismissing the plaintiff than

it would have been if they had committed an assault and battery upon him;" thus putting the case in this respect upon precisely the same ground taken by this court in the case of *Andrews* v. *King*, 77 Maine, 224, that the removal of the plaintiff from his office by the order of the mayor and aldermen, was a judgment of court, and in no sense the act of the city.

It may be said in argument that these cases which have been cited to the effect that disbursing officers of cities and counties may pay the *de facto* officer in possession without being subject to liability themselves, and without subjecting the municipality or the county to danger of being obliged to make double payment, proceed upon the ground that the *de jure* officer in such case has his remedy against the *de facto* officer to recover of him the salary which he has received from the disbursing officer. It is undoubtedly true that many of these cases assume, argumentatively, that such remedy against the officer *de facto* exists. Thus in *Mayfield* v. *Moore*, 53 Ill. 428, (5 Am. Rep. 52) it was held that the legal right to an office confers the right to receive and appropriate the fees and emoluments legally incident to the place. So, if a person without legal right assumes to perform the duties of an office and receives the fees and emoluments thereof, he will be liable, in an action for money had and received, to him who holds the legal title for the amount so received, deducting therefrom the reasonable expenses of earning the same, where the person receiving the fees acted under an apparent right and in good faith. The same was substantially held in *Benoit* v. *Miller*, 24 Michigan, 458 (9 Am. Rep. 131). But the opposite was held in an elaborate opinion in *Stuhr* v. *Curran*, 15 Vroom, 181, (43 Am. Rep. 353,) and the whole subject is considered in a note to this case in 43 Am. Rep. 361-365.

We do not understand that the theory, that the officer *de jure* can recover of the officer *de facto* the salary of the office during the time that he held the title but performed no service, forms any essential part of the doctrine that the municipality or the county may safely pay to the officer *de facto* in possession, without liability to make second payment. That doctrine proceeds upon entirely different grounds, namely, upon the general principles of law

applicable to officers *de facto*, that, so far as the public and third persons are concerned, their actions are valid, and they are in fact the incumbents of the office which they hold. The disbursing officers of the county or municipality are just as much under the necessity, and therefore have just as much right to treat them as incumbents of the office as the public or any other persons who have occasion to have dealings with such officers *de facto*.

LIBBEY, J. The plaintiff was duly appointed city marshal of Portland, March 31, 1883, was duly qualified April 2, 1883, and performed the duties of the office till May 1, 1884, when by proceedings had before the mayor and aldermen of said city, he was formally removed. May 14, 1884, one Decelle was appointed by the mayor, with the advice and consent of the board of aldermen, to said office, to fill the assumed vacancy. He performed the duties of the office under that appointment till March 6, 1885.

The salary of the city marshal was fixed by the city council of Portland, at $1,300 a year, payable quarterly, on the first days of January, April, July and October, and he was required to provide at his own expense a horse and carriage for his official use.

On May 6, 1884, the plaintiff protested to the board of aldermen against his removal, claimed the right and offered to continue to perform the duties of the office.

He refused to surrender the keys to the marshal's office, held himself ready to perform the duties of marshal, keeping his team therefor till he was reinstated. During the time of his suspension he earned by his personal labor $495.

May 17, 1884, the plaintiff filed his petition for a writ of *certiorari* to quash the proceedings of his removal, and on proceedings duly had thereon, this court held that the proceedings were not in conformity to law and void, and that the plaintiff was legally entitled to the office of marshal. This decision was announced May 1, 1885. *Andrews* v. *King & als.* 77 Maine, 224.

From May 14, 1884, to March 7, 1885, the salary was paid by the city to Decelle.

The question in contention in this action is, whether the

plaintiff can recover of the city his salary from May 14, 1884, to March 7, 1885, while the duties of the office were performed by Decelle, and the salary paid to him. We think he can.

The plaintiff was marshal *de jure*. His salary was fixed by law. The legal right to the office carried with it the right to the salary or emoluments of the office. The salary follows the legal title. This doctrine is so generally held by the courts, that authorities hardly need be cited. *Dolan* v. *The Mayor*, 68 N. Y. 274; *McVeany* v. *The Mayor*, 80 N. Y. 185; *Fitzsimmons* v. *Brooklyn*, 102 N. Y. 536.

A *de facto* officer has no legal right to the emoluments of the office, the duties of which he performs under color of an appointment, but without legal title. He cannot maintain an action for the salary. His action puts in issue his legal title to the office, and he cannot recover by showing merely that he was an officer *de facto*. In *Nichols* v. *McLean*, 101 N. Y. 526, the court says: "It is abundantly settled by authority, that an officer *de facto* can as a general rule assert no right of property, and that his acts are void as to himself unless he is also an officer *de jure*." In Cro. Eliz. 699, the doctrine is tersely stated as follows: "The act of an officer *de facto*, when it is for his own benefit, is void; because he shall not take advantage of his own want of title which he must be conusant of; but where it is for the benefit of strangers, or the public, who are presumed to be ignorant of such defect of title, it is good." *Pooler* v. *Reed*, 73 Maine, 129; *State* v. *Carroll*, 38 Conn, 449; *McVeany* v. *Mayor*, 80 N. Y. 192; *Dolan* v. *The Mayor*, 68 N. Y. 274; *Nichols* v. *Maclean*, 101 N. Y. 526; *McCue* v. *County of Wapello*, 56 Iowa, 698; *The People* v. *Potter*, 63 Cal. 127. Hence it was held in *Nichols* v. *Maclean*, *supra*, after a careful examination of authorities, that the *de jure* officer, who was prevented from performing the duties of the office by an illegal removal, might recover of the *de facto* officer who performed the duties under color of an appointment, the salary which he had drawn while performing them. This result can be reached only on the ground that the *de facto* officer has no right to the emoluments of the office.

But it is contended by the learned counsel for the defendant that, admitting the foregoing propositions to be well founded, still

Decelle was exercising the duties of the office in fact, under color of title upon which the defendant might well act, before his legal right was decided, and be legally protected in paying the salary to him. We think this contention, when tested by the facts of the case and well established legal principles is unsupported by logic or sound reason. The city had full notice of the plaintiff's claim as the legal officer, and that the title to the office was in litigation. It must be held that it knew that the legal title to the office would draw with it the salary. May it assume to determine the question of legal right between the parties before decided by the court, pay to the one having no legal title, and then successfully set up its action in defence of the claim of the one having the legal right? May A, who holds a fund claimed by B and by C, with full notice of the claim of each, elect to determine between them, and pay to B, who has a *prima facie* right, and set up the payment as a defence to the claim of C, who has the legal title? It is perfectly well settled that he cannot. If he elects it is at his peril. He is not required to do so. He may await an action at law and then bring both claimants into court by bill of interpleader to litigate their title; or he may bring the bill at once without waiting for the commencement of an action at law. Here the city was in no peril. It might have refused to pay to either till the title to the office was determined; or by bill of interpleader, it might have brought the parties into court to litigate their title to the salary.

It is well settled that an office which has attached to it emoluments, has a pecuniary value although primarily it is an agency for public purposes, and that the right to the emoluments follows the legal title to the office. *Nichols* v. *McLean*, *supra*; *Andrews* v. *King*, 77 Maine, 231. The officer cannot be deprived of his office without due process of law. Can it be, that, while the action of the mayor and aldermen of Portland, in the attempted removal of the plaintiff, was illegal and void as effecting his title to his office, it deprives him of his salary, all that was of pecuniary value to him? Such a contention has no support in well established legal principles. It would give the mayor, having the power of removal for cause, by the consent of the aldermen, the opportunity by unauthorized proceedings, to

deprive the legal officer of his salary, and bestow it upon a favorite.

We are aware that courts of high authority have sustained the doctrine contended for by the defendant. The doctrine of the court of appeals of New York, now seems to be that a payment of the salary by the city to the officer *de facto*, before the title to the office is determined, is a good defence to a claim by the legal officer: but that the legal officer may recover all of the salary not, in fact, paid before the right to the office is determined, although it accrued before the determination of the title. We do not find that that court has noticed the element of notice to the city by the legal officer of his claim before payment. Courts in some other states have followed the New York doctrine. Courts of high authority in several of the states have held that the officer, having a legal title to the office, may recover of the city the salary, notwithstanding it has been paid to the officer *de facto*. We have not attempted to analyze the cases and to try to reconcile them. They appear irreconcilable. Our court is uncommitted and we have come to the conclusion which seems to us best supported by reason and sound legal principles.

There is another question involved in the case, although not before us on the exceptions, arising on the special finding of the jury of the amount earned by the plaintiff by his personal labor during the time involved. It is claimed that the defendant has the right to recoup and have that amount deducted from the salary. The right of recoupment exists when the plaintiff claims damages for the breach of a contract; and then the sum to be recouped must arise out of the contract or the execution of it. The right to a salary, fixed by law, is not by contract. It is by statute, and unless there is some inhibition of the power, the tribunal establishing it, may change it at pleasure. *Farwell* v. *Rockland*, 62 Maine, 301. This precise question was settled in *Fitzsimmons* v. *Brooklyn*, 102 N. Y. 536.

The result is that the plaintiff is entitled to recover his salary as claimed, with interest from the time of demand.

Exceptions sustained.

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

FRED W. AYER *vs.* WESTERN UNION TELEGRAPH COMPANY.

Penobscot. Opinion August 24, 1887.

Telegraph companies. Negligence. Void stipulation limiting liability.

The dropping of an important word in the transmission of a message by telegraph is *prima facie* evidence of negligence on the part of the telegraph company, unless explained or accounted for.

The usual stipulation upon telegraph blanks that the company shall not be liable for the negligence of itself or any of its servants, in case of a mistake or omission in transmitting the message, unless the message is repeated at the expense of the sender, is void, being against public policy.

As between the sender and receiver of a message by telegraph, any loss occasioned by a change of the terms of the message during transmission, must fall upon the party who elected that means of communication for that message.

Such party has his remedy over against the telegraph company, in case the error resulted from its negligence.

ON report.

An action to recover damages sustained by the plaintiff by the negligence of the defendant in transmitting his telegraphic message to A. W. Von Utassy, Philadelphia.

The opinion states the facts.

Wilson and Woodard, for the plaintiff cited: *Bartlett* v. *Western Union Tel. Co.* 62 Maine, 209; *True* v. *International Tel. Co.* 60 Maine, 9; Gray, Communication by Telegraph, § 105; *May* v. *Weston Union Tel. Co.* 112 Mass. 90; *Boston and Albany R. R. Co.* v. *Richardson*, 135 Mass. 472.

Baker, Baker and Cornish, for the defendant, contended that there was no contract between the plaintiff and the person to whom the message was sent. Assuming that the telegraph company was the agent of the plaintiff, it is well settled that the principal is not responsible when the agent acts beyond the scope of his authority; it matters not whether the agency be general or special. *Rossiter* v. *Rossiter*, 8 Wend. 496; *Johnson* v. *Wingate*, 29 Maine, 404; *Hazeltine* v. *Miller*, 44 Maine, 177.

The limitation of the power of a special agent is universally

recognized. *Blaine* v. *Proudfit*, 3 Call. 207: *Munn.* v. *Com. Co.* 15 Johns. 44; *Beals* v. *Allen*, 18 Johns. 363; *Thompson* v. *Stewart*, 3 Conn. 171; *Moore* v. *Lockett*, 2 Bibb. 67; *Martin's Admr.* v. *The United States*, 2 T. B. Mon. 89; *Banorgee* v. *Hovey*, 5 Mass. 11; *Starbird* v. *Curtis*, 43 Maine, 352; *School Dist.* v. *Ætna Ins. Co.* 62 Maine, 330.

Now, if a telegraph company can be deemed the agent of the sender in any sense, its power is closely restricted, and the authority conferred upon it is extremely limited. That authority is simply to deliver a particular message in exact and unvarying terms.

Applying the principles of law to the facts of this case, it is evident that the plaintiff was not bound to deliver the laths at two dollars per thousand.

The question arose in England in 1870, in the case of *Henkel* v. *Pape*, Law Rep. 6 Ex. 7; S. C. Allen's Tel. Cases. p. 567.

The same question arose in Scotland in 1871, in *Verdin* v. *Robertson*, 10 Court of Sess. Cas. 35; S. C. Allen's Telegraph Cases, p. 697.

"If the person sought to be charged under the rule, as employer did not contract with the party committing the wrongful act for his labor or services, and is not directly liable to him for compensation for such labor or services, and has no such control over him as will enable the employer to direct the manner of performing the labor or services, he is not liable for the wrongful act of the agent or servant." *Calahan* v. *B. & M. R. R. Co.* 23 Iowa, 562, and see *McCarthy* v. *Second Parish of Portland*, 71 Maine, 318; *Mayhew* v. *Sullivan Mining Co.* 76 Maine, 100.

And the same principle flows through all the authorities: *Fletcher* v. *Braddich*, 5 Bos. & Pul. 182; *Sproul* v. *Hemmingway*, 14 Pick. 1; *Clark* v. *Vt. & Can. R. R. Co.* 28 Vt. 103; *Pawlet* v. *Rutland & Wash. R. R. Co.* 28 Vt. 297; *Eaton* v. *E. & N. A. Ry. Co.* 59 Maine, 520; Wood, Master & Serv. § § 279, 311, 314.

"Unless the relation of master and servant exists, the party contracting is not responsible for the negligent or tortious acts

of the person with whom the contract is made, especially if those acts are outside of the contract." *Eaton* v. *E & N. A. Ry. Co.* 59 Maine, 520.

The condition, printed at the top of the blank upon which the plaintiff wrote the message, limiting the liability of the defendant where the message was not repeated, was valid and binding.

In 1866 the question came before the Supreme Court of Massachusetts in the leading case of *Ellis* v. *Amer. Tel. Co.* 13 Allen, 226.

Mr. Chief Justice BIGELOW held the condition valid in a most elaborate opinion, making its reasonableness the test of its validity.

This decision has been followed in Massachusetts in *Redpath* v. *Wes. Un. Tel. Co.* 112 Mass. 71; *Grinnell* v. *Same*, 113 Mass. 299; *Clement* v. *Same*, 137 Mass. 463.

The error in the case at bar was such as would have been remedied by repetition. The counsel for the plaintiff says the defendant was bound to show this, and that there is no evidence upon the point. It is evident from the very nature of the case that such a fact cannot be proved by positive testimony. Nor is it required. It is enough if (to use the language of the court in *True* v. *International Tel. Co.* 60 Maine, at 18,) the error, causing the injury, "would have been manifestly prevented or avoided by repeating."

Without quoting further we will simply cite a few of the authorities supporting the validity of this condition as to repetition. *Camp.* v. *Wes. Un. Tel. Co.* 1 Met. (Ky.) 164; *De Rutte* v. *N. Y. Tel. Co.* 1 Daly, 547; *Breese* v. *Tel. Co.* 48 N. Y. 132; *Wes. Un. Tel. Co.* v. *Carew*, 15 Mich. 525; *Wann.* v. *Tel. Co.* 37 Mo. 432; *Passmore* v. *Tel. Co.* 78 Pa. St. 238; *Becker* v. *Tel. Co.* 11 Neb. 87; *Kinghorne* v. *Same*, 18 U. C. Rep. 60; *MacAndrew* v. *Same*, 17 C. B. 3; *Lassiter* v. *Same*, 89 N. C. 334; *Tel. Co.* v. *Neill*, 57 Tex. 283; *Womac* v. *Tel. Co.* 58 Tex. 176; *Tel. Co.* v. *Gildersleeve*, 29 Md. 232.

EMERY, J. On report. The defendant telegraph company was engaged in the business of transmitting messages by

telegraph between Bangor and Philadelphia, and other points. The plaintiff, a lumber dealer in Bangor, delivered to the defendant company in Bangor, to be transmitted to his correspondent in Philadelphia, the following message: "Will sell 800M. laths, delivered at your wharf, two ten net cash. July shipment. Answer quick." The regular tariff rate was prepaid by the plaintiff for such transmission. The message delivered by the defendant company, to the Philadelphia correspondent was as follows: "Will sell 800M laths delivered at your wharf two net cash. July shipment. Answer quick." It will be seen that the important word "ten," in the statement of price was omitted.

The Philadelphia party immediately returned by telegraph, the following answer: "Accept your telegraphic offer on laths. Cannot increase price spruce." Letters afterward passed between the parties which disclosed the error in the transmission of the plaintiff's message. About two weeks after the discovery of the error, the plaintiff shipped the laths, as per the message received by his correspondent to wit, at $2.00 per M. He testified that his correspondent insisted he was entitled to the laths at that price, and they were shipped accordingly.

The defendant telegraph company offered no evidence whatever, and did not undertake to account for, or explain the mistake in the transmission of the message. The presumption therefore is, that the mistake resulted from the fault of the telegraph company. We cannot consider the possibility that it may have resulted from causes beyond the control of the company. In the absence of evidence on that point we must assume that for such an error the company was in fault. *Bartlett* v. *Tel. Co.* 62 Maine, 221.

The fault and consequent liability of the defendant company being thus established, the only remaining question is the extent of that liability in this case. The plaintiff claims, it extends to the difference between the market price of the laths, and the price at which they were shipped. The defendant claims its liability is limited to the amount paid for the transmission of the message. It claims this limitation on two grounds.

I. The company relies upon a stipulation made by it with the plaintiff, as follows: "All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message should order it *repeated*; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message, and this company, that said company shall not be liable for mistakes or delays in the transmission, or delivery, or for non-delivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." This is the usual stipulation printed on telegraph blanks, and was known to the plaintiff, and was printed at the top of the paper upon which he wrote and signed his message. He did not ask to have the message repeated.

Is such a stipulation, in the contract of transmission, valid, as a matter of contract assented to by the parties, or is it void as against public policy? We think it is void.

Telegraph companies are *quasi* public servants. They receive from the public valuable franchises. They owe the public, care and diligence. Their business intimately concerns the public. Many and various interests are practically dependent upon it. Nearly all interests may be affected by it. Their negligence in it may often work irreparable mischief to individuals and communities. It is essential for the public good, that their duty of using care and diligence be rigidly enforced. They should no more be allowed to effectually stipulate for exemption from this duty, than should a carrier of passengers, or any other party engaged in a public business.

This rule does not make telegraph companies insurers. It does not make them answer for errors not resulting from their negligence. It only requires the performance of their plain duty. It is no hardship upon them. They engage in the business voluntarily. They have the entire control of their servants and instruments. They invite the public to entrust messages to them for transmission. They may insist on their compensation

in advance. Why then, should they refuse to perform the common duty of care and diligence? Why should they make conditions for such performance? Having taken the message and the pay, why should they not do all things (including the repeating) necessary for correct transmission? Why should they insist on special compensation for using any particular mode or instrumentality, as a guard against their own negligence? It seems clear to us, that having undertaken the business, they ought without qualification, to do it carefully, or be responsible for their want of care.

It is true there are numerous cases in other states holding otherwise, but we think the doctrine above stated, is the true one, and in harmony with the previous decisions of this court. *True* v. *Tel. Co.* 60 Maine, 1; *Bartlett* v. *Tel. Co.* 62 Maine, 221.

II. The defendant company also claims that the plaintiff was not in fact damaged to a greater extent than the price paid by him for the transmission. It contends that the plaintiff was not bound by the erroneous message delivered by the company to the Philadelphia party, and hence need not have shipped the laths at the lesser price. This raises the question, whether the message written by the sender and entrusted to the telegraph company for transmission, or the message written out and delivered by the company to the receiver at the other end of the line, as and for the message intended to be sent, is the better evidence of the rights of the receiver against the sender.

The question is important and not easy of solution. It would be hard, that the negligence of the telegraph company, or an error in transmission resulting from uncontrollable causes, should impose upon the innocent sender of a message, a liability he never authorized, nor contemplated. It would be equally hard that the innocent receiver, acting in good faith upon the message as received by him, should, through such error lose all claim upon the sender. If one, owning merchandise, write a message offering to sell at a certain price, it would seem unjust that the telegraph company could bind him to sell at a less price, by making that error in the transmission. On the other hand, the

receiver of the offer, may in good faith, upon the strength of the telegram as received by him, have sold all the merchandise to arrive, perhaps at the same rate. It would seem unjust that he should have no claim for the merchandise. If an agent receive instructions by telegraph from his principal, and in good faith act upon them as expressed in the message delivered him by the company, it would seem he ought to be held justified, though there were an error in the transmission.

It is evident that in case of an error in the transmission of a telegram, either the sender or receiver must often suffer loss. As between the two, upon whom should the loss finally fall? We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is, that, as between sender and receiver, the party, who selects the telegraph as the means of communication, shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal and the answer. The receiver has no such choice, except as to his answer. If he cannot safely act upon the message, he receives through the agency selected by the proposer, business must be seriously hampered and delayed. The use of the telegraph has become so general, and so many transactions are based on the words of the telegram received, any other rule would now be impracticable.

Of course the rule above stated, presupposes the innocence of the receiver, and that there is nothing to cause him to suspect an error. If there be anything in the message, or in the attendant circumstances, or in the prior dealings of the parties, or in anything else, indicating a probable error in the transmission, good faith on the part of the receiver, may require him to investigate before acting. Neither does the rule include forged messages, for in such case, the supposed sender did not make any use of the telegraph.

The authorities are few and somewhat conflicting, but there are several in harmony with our conclusion upon this point. In *Durkee* v. *Vt. C. R. R. Co.* 29 Vt. 137, it was held that where the sender himself elected to communicate by telegraph

the message received by the other party is the original evidence of any contract. In *Saveland* v. *Green*, 40 Wis. 431, the message received from the telegraph company was admitted as the original and best evidence of a contract, binding on the sender. In *Morgan* v. *People*, 59 Ill. 58, it was said that the telegram received was the original and it was held that the sheriff receiving such a telegram from the judgment creditor, was bound to follow it, as it read. There are dicta to the same effect, in *Wilson* v. *M. & N. Ry. Co.* 31 Minn. 481, and *Howley* v. *Whipple*, 48 N. H. 488.

Tel. Co. v. *Schotter*, 71 Ga. 760, is almost a parallel case. The sender wrote his message, "Can deliver hundred turpentine at sixty-four." As received from the telegraph company it read, "can deliver hundred turpentine at sixty," the word "four" being omitted. The receiver immediately telegraphed an acceptance. The sender shipped the turpentine, and drew for the price at sixty-four. The receiver refused to pay more than sixty. The sender accepted the sixty, and sued the telegraph company for the difference between sixty and the market. It was urged, as here, that the sender was not bound to accept the sixty as that was not his offer. The court held, however, that there was a completed contract at sixty—that the sender must fulfill it, and could recover his consequent loss of the telegraph company.

It follows, that the plaintiff in this case is entitled to recover the difference between the two dollars and the market, as to laths. The evidence shows that the difference was ten cents per M.

Judgment for plaintiff for eighty dollars with interest from the date of the writ.

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

STATE OF MAINE *vs.* REUBEN C. HALL.

Kennebec. Opinion October 27, 1887.

Intoxicating liquors. Nuisance. Indictment. Exceptions. Evidence. Records.

Where the indictment for maintaining a liquor nuisance describes the building as "a certain building occupied by the said [defendant] as a saloon, situated at the corner of depot square in said Gardiner," it is sufficient.

An order of the court committing a witness, for contempt, for refusing to answer when directed by the court, affords the defendant no ground for exception.

A copy of the record of the collector of internal revenue, sworn to in court by a competent witness, is admissible.

On the trial of an indictment for maintaining a liquor nuisance the record of a previous conviction for a like offence is admissible in evidence only when it appears that the building described in the record is the same as that described in the indictment.

ON exceptions from the superior court.

Indictment charging that the defendant "a certain building occupied by the said Reuben C. Hall, as a saloon, situated at the corner of depot square in said Gardiner, unlawfully did use for the illegal keeping and sale of intoxicating liquors."

At the trial a witness was called by the government, who testified that he was a deputy collector of internal revenue, and he refused to produce certain records, or memoranda called for. His last answer was "I think it is possible that if Mr. Hall has paid the United States tax as a retail liquor dealer his name would appear on the memorandum I keep. I refuse to produce that under instructions of my superior officer. I do not desire an opportunity to refer to my memoranda to refresh my recollection."

The witness was committed for contempt.

The defendant excepted to that order of court "that fact having occurred during trial."

Other points and material facts stated in the opinion.

L. T. Carleton, county attorney, for the state.

The indictment is sufficient. 13 Pick. 359; Chitty's Crim. Law, 294; 48 Maine, 237; 63 Maine, 552; Bish. on Crim. Law,

Vol. 1, § 810, and cases there cited. 13 Pick. 363; 3 Starkie's Evidence, 1527.

As to the admission of the "examined copy" from the internal revenue department. I cite, 65 Maine, 270; 77 Maine, 561.

H. M. Heath and G. W. Heselton, for defendant, cited: Constitution Art. 1, § 6; *Com* v. *Austin*, 97 Mass. 595; *State* v. *Plunkett*, 64 Maine, 534; *State* v. *Noble*, 15 Maine, 476.

DANFORTH, J. The motion in arrest of judgment in this case was properly overruled. The building is sufficiently described in the indictment, and whether in fact it corresponded with that description was a question for the jury.

The controversy with the collector and his deputy with the proceedings against the latter for contempt affords the respondent no ground for exception.

The copy of the collector's record having been taken and sworn to by a competent witness was admissible. *State* v. *Lynde*, 77 Maine, 561. The fact that the building is not described in the same language as in the indictment, if material, could only make it necessary to show that it was the same by other testimony. *Com* v. *Austin*, 97 Mass. 597. The certificate of the witness attached to the record was not sufficient to authorize its admission and might have been objectionable but for the oral testimony in court; with that it became immaterial.

The record of the former conviction was admissible for certain purposes. The situation of the building is more particularly described in the present indictment than in the former; but the two descriptions are not inconsistent. It was then permissible to show by other testimony that both referred to the same building.

But we think the instruction to the jury in regard to the use to be made of this evidence was erroneous. After giving the correct instruction the justice added, "and I say to you further that if you find that he (the defendant) maintained another place in the city of Gardiner, for the illegal keeping, or illegal sale of intoxicating liquors, although it was not located in this precise place, you have a right to consider that in determining with what intent he maintained the premises in the condition in

which the officer described them in this case." The jury must have understood that if they found that the building referred to in the record was not the same as that in the indictment, still they might consider the record of the former conviction as having some tendency to show the intent of the defendant in maintaining the building described in the indictment. This was evidently giving the record much too broad an application. It is very much like admitting the proof of one crime to sustain the charge of another. This would be in violation of a rule to which though there may be an apparent, there is no real exception. It is not unlike proving a defendant's bad character before he has opened the door by offering evidence to prove his good.

There was no prior conviction alleged in the indictment, so there was no occasion to offer the record to prove such an allegation. It could only be competent so far as it tended to prove any fact material to the issue in the case at bar; and for that purpose it derives no efficacy from the fact that it was the record of a conviction except it may be more reliable testimony. It is conclusive between the parties like the judgment in a civil suit, as to the facts in issue; and this is true whether the judgment is founded upon a plea of guilty, or is the result of a trial and verdict. *State* v. *Lang*, 63 Maine, 220. Hence no facts can properly be proved by such a record except such as from their relevancy to the issues involved in the case on trial, might well be proved by any other competent testimony.

The indictment in this case is for maintaining a certain building and using it for the illegal keeping and illegal sale of intoxicating liquors, whereby it became a nuisance. The facts in issue and which the defendant was called upon to answer, were the keeping and use of that particular building. It was competent for the government as tending to sustain this charge, to show a similar maintaining and illegal use of this building prior to the time alleged in the indictment. *Com.* v. *Kelley*, 116 Mass. 341; *Com.* v. *McPike*, 3 Cush. 184; *State* v. *Plunkett*, 64 Maine, 534. If the building described in the record were the same as that in issue in the case at bar, the facts then involved would under these authorities, be pertinent to the present case. But if

the building were not the same, it is evident that the facts then settled would not be competent and the record should have been so restricted in the instructions. The application and limitation of this kind of testimony is fully illustrated in *Com.* v. *Tuckerman*, 10 Gray, 197, and in a note to *The King* v. *Wylie*, 2 Heard's Crim. Cases, 32.

For this error only must the exceptions be sustained.

Exceptions sustained.

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

STATE OF MAINE *vs.* LEVI LASHUS.

Kennebec. Opinion October 27, 1887.

Intoxicating liquors. Former conviction. Record. Law and fact.

A record is admissible to show prior conviction which says, "Indictment for being a common seller of intoxicating liquors . . . being presented to a jury duly impanneled, they find a verdict of guilty," etc.

The identity of the respondent with the person named in such record is a question of fact for the jury.

ON exceptions from superior court.

Indictment as a common seller of intoxicating liquors, alleging a former conviction for same offence.

To show former conviction the following record was introduced in evidence, omitting formal parts:

"*State* v. *Levi Lashus.* Indictment for being a common seller of intoxicating liquors, found at the March term, 1871, when and where the defendant being arraigned pleads not guilty, thereupon, the issue being presented to the jury duly impanneled, they find a verdict of guilty, thence the action was continued to this term for sentence. Sentence, first day of this term. Fine, one hundred dollars and costs. Monday, August 7, 1871, committed for non-payment."

Other facts stated in the opinion.

L. T. Carleton, county attorney, for the state.

The allegation of a prior conviction was properly set out in

the indictment. R. S., c. 27, § § 63, 57, 52; 65 Maine, 234 and 270.

Docket entries may be read to a jury when a more extended record has not been made. *State* v. *Neagle*, 65 Maine, 468; *Leathers* v. *Cooley*, 49 Maine, 337; *Pierce* v. *Goodrich*, 47 Maine, 173; *Longley* v. *Vose*, 27 Maine, 179; *Read* v. *Sutton*, 2 Cush. 115; *Pruden* v. *Alden*, 23 Pick. 184.

S. S. Brown, for defendant.

In this record which was introduced into this case at bar, there is nothing but a mere unauthorized statement of the clerk, that the alleged previous conviction was for being a common seller of intoxicating liquors. We refer to the following authorities bearing upon the validity and effect of such statements by a recording officer, viz.: *McGuire* v. *Sayward*, 22 Maine, 230; *Owen* v. *Boyle*, 15 Maine, 147; *Oakes* v. *Hill*, 14 Pick. 442.

In the case of *State* v. *Hines*, 68 Maine, 202, the county attorney put in the docket entries as in this case, and also the indictment in the former case. By means of said indictment, it was made plain what the previous charge was, but nothing of the sort was done here, and hence, we say all the record introduced proves nothing. We cannot see how this court can possibly hold otherwise. We contended in our argument to the jury, and we contend now, that this record proves nothing and should have been disregarded by the jury, and that a general verdict of guilty under this indictment was unwarranted by the evidence. We cite the following strong and decisive authorities on this question: *State* v. *Wedgwood*, 8 Maine, 75; *Commonwealth* v. *Briggs*, 5 Pick. 429; also see, near close of the opinion in the case of *Commonwealth* v. *Norcross*, 9 Mass. 492, the statement of the court as to the necessity of proving the identity of the parties; also, 1 Bishop, Crim. Procedure, § 816.

DANFORTH, J. The record of the prior conviction alleged in the indictment was properly admitted. None more extended had been, or is usually, made. The addition of the indictment would have given no more information as to the nature of the

offence charged than is obtained from the record. In each, it is described in the same language, using the words of the statute, viz.: "A common seller of intoxicating liquors." The issue tried and conviction following, is so clearly set out as to leave no room for mistake.

The error is in the instruction to the jury in which they were told "that if they were satisfied beyond a reasonable doubt, from all the evidence introduced before them, that the defendant had, during any portion of the time named in the indictment, been engaged in selling intoxicating liquors as a business, they should return a verdict of guilty." Thus the jury were required to, and did render a verdict of guilty of the higher offence charged, upon testimony sufficient only to convict of the lower.

It may be true that so far as the sufficiency and legal effect of the record are involved, a question of law only is presented. But the identity of the defendant on trial, with the person named in the record, is a question of fact. The identity of name is some evidence of identity of person, more or less potent, according to the connecting circumstances, but it is not, certainly in this case, sufficiently conclusive to authorize the court to take it from the jury and treat it as a question of law.

But neither of the rulings objected to in any way affects the verdict so far as it relates to the lower offence charged. Upon that, it rests on evidence and instructions not objected to. The prosecuting officer may therefore enter a *nol. pros.* as to the allegation in the indictment of a prior conviction, and let there be judgment for the state, otherwise the exceptions must be sustained.

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

STATE OF MAINE *vs.* ALANSON M. PHILLIPS.

Hancock. Opinion November 22, 1887.

Election of assessors by board of aldermen. Quo warranto.

After an assessor has been elected by a board of aldermen, and the ballot declared and recorded the board cannot at an adjourned session, held the

next day, reconsider the election of such assessor and elect another person to that office.

On exceptions.

An information of the attorney general in the nature of *quo warranto*. The facts are sufficiently stated in the opinion.

A. P. Wiswell, for the state, upon the question considered in the opinion, cited: City charter of Ellsworth, § 4; R. S., c. 3, § § 12, 13; *Mussey* v. *White*, 3 Maine, 290; Dillon, Mun. Corp. § § 288, 254-256; *Putnam* v. *Langley*, 133 Mass. 204; *Baker* v. *Cushman*, 127 Mass. 105.

John B. Redman, for the defendant.

Libbey, J. At a meeting of the aldermen of the city of Ellsworth, held on the 15th of March, 1887, for the purpose of electing city officers, a ballot was taken for second assessor of taxes; and Albert G. Blaisdell, was declared elected and his election was entered of record. The meeting then took a recess till the next day, March 16, when, on motion therefor it was voted to reconsider the election of second assessor, and a new ballot was taken, and the respondent was declared elected. Blaisdell took the necessary oath of office on the first day of April, 1887.

On the foregoing facts the court held that Blaisdell was duly elected, and that the election of Phillips, the respondent, was void, and ordered judgment of ouster against him. To which rulings exception was taken.

We think the rulings of the court below correct. The election of assessors was required to be by ballot. While a municipal body having the power of election may set aside a ballot by which it appears that an election is made, for some irregularity or illegality before the election is declared, (*Baker* v. *Cushman*, 127 Mass. 105,) we are aware of no authority which holds that, when the election by ballot is declared and entered of record, it may be reconsidered at an adjourned meeting on a subsequent day, and a new election had. When the aldermen balloted and declared the election of Blaisdell, and it was recorded, their power over the election to that office was exhausted unless he should decline

to accept it. He did not decline to accept and the aldermen could not deprive him of the office except by removal in the manner provided by law. There being no vacancy in the office when the respondent was elected, his election was void.

Exceptions overruled. Judgment of ouster affirmed.

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

HENRY N. FOSTER and another

vs.

SEARSPORT SPOOL AND BLOCK COMPANY.

Penobscot. Opinion November 19, 1887.

Waters. Mill-owners. Mill-dams. Logs.

The owners of mill-dams on floatable streams are required to furnish reasonably convenient facilities for the passage of logs. It would not be reasonable to require them to furnish such expensive locks or sluices as would enable large and loosely constructed rafts of logs to pass without being broken up.

The owners of mill-dams are not required to provide the same facilities for the passage of logs as existed before the erection of the dam.

ON motion to set aside the verdict. There were also exceptions in the case, which were not considered, a new trial having been granted on the motion.

An action of the case for damages caused by the breaking up of rafts of logs owned by the plaintiffs while passing through the defendant's dam across Piscataquis river at Howland.

The verdict was for plaintiffs for $847.99.

John Varney and *John A. Blanchard*, for plaintiffs.

The court will not disturb the verdict of the jury in cases of conflicting testimony, unless the result is so manifestly erroneous as to make it appear that it was produced by prejudice, bias or some improper influence or by mistake of the facts or law of the case. 36 Maine, 252; 40 Maine, 28; 59 Maine, 418; 58 Maine, 454; 67 Maine, 314.

Defendant in erecting that dam was bound to give the public

as good a channel for running rafts as there had been in its natural condition. *Parks* v. *Morse*, 52 Maine, 260; *Rolfe* v. *Pearson*, 76 Maine, 383; Gould on Waters, 138, 196, 765, and cases there cited.

Wm. H. McCrillis and Charles P. Stetson, for defendant.

WALTON, J. We regard this as a very important case; for if the law is as claimed by the plaintiff, it imposes upon mill owners a duty which it will be very difficult indeed if not impossible for them to perform.

It is claimed that the owner of a mill dam upon a floatable stream is obliged to provide a sluice through which large and loosely constructed rafts of logs may be run without being broken up.

We doubt whether the construction of such a sluice is practicable. The evidence shows that when one of these rafts enters a sluice, the more rapid current of the water in the sluice draws the front logs away from the rear logs, and that when the front logs reach the less rapid current at the outlet of the sluice, their speed is suddenly checked, and the rear logs, which are then passing through the more rapid current of the sluice above, are driven against the front logs with such force that they will either go under or over them, and the raft be thus doubled up and broken to pieces. We doubt whether it is practicable to construct a sluice that will avoid these results. Unquestionably a lock may be so constructed. But how an ordinary sluice, open at both ends, can be constructed that will avoid them, we are unable to understand. The water in the sluice must inevitably flow more rapidly than the water in the pond above. And when the front end of a long raft enters this more rapid current, what can prevent its being pulled away from that portion of the raft which still remains in the more sluggish water of the pond above? And when the front end of the raft strikes the more sluggish current at the outlet of the sluice, and its speed is thereby suddenly checked, what can prevent the more rapidly moving logs behind from being driven under or over the logs in front? We fail to see. Certainly such a sluice can be constructed,

if constructed at all, only at very great expense, an expense, we believe, out of all reasonable proportion to any benefit that would be conferred upon the log driver.

It has never been decided in this state that such a responsibility rests upon the mill owner. It has been decided that he must furnish the log driver with reasonably convenient facilities for running his logs. But it has never been decided that he is obliged to furnish locks or sluices through which large and loosely constructed rafts of logs can be run without being broken up or the logs displaced. And we decline to place such an obligation upon him. We believe it would be unreasonable to do so. That to do so would place upon the mill owner a burden out of all proportion to any benefit that would be conferred upon the log driver.

The proof in this case is that for the express purpose of accommodating log drivers, the defendants had constructed in their dam a good and substantial sluice, thirty feet and four inches wide, and sixty-one feet and nine inches long, the descent in its whole length being only three feet and three inches. And it is admitted that the facilities thus provided are legally sufficient for running unrafted logs. But the plaintiff undertook to run his logs in rafts. These rafts were from twenty to twenty-two feet wide, and from one hundred to one hundred and fifteen feet long. And they were loosely constructed. Some of the logs had no fastenings, and were held in place only by the logs by which they were surrounded. The result was that in their passage the rafts were more or less broken up. The witnesses say that when the front logs entered the sluice they would be pulled away from the hind logs, and that when the front logs reached the outlet of the sluice, they would be driven to the bottom of the river, and their speed being thus suddenly checked, the hind logs would be forced on top of them; and in this way the fastenings would be loosened and the rafts more or less broken up. And it is for the delay and the cost of reconstructing the rafts that the plaintiff claims compensation from the defendants.

In support of this claim it is contended that a log driver is

entitled to the same facilities for running his logs after the erection of a dam as he had before; that if before the erection of a dam he could run rafts of logs without their being broken up, he is entitled to the same facilities after the dam is erected.

We can not sustain this proposition to its full extent. The right to erect a dam upon a non-tidal stream (and we are speaking of no others) is a clear statutory right. The legislature in creating it must have foreseen that its exercise would to some extent necessarily interfere with the use of such streams as highways. It is impossible to believe that the legislature intended that this newly created right should be burdened with the expensive if not the impossible obligation of providing for log drivers the same facilities for running their logs as they had before. If the legislature had so intended it would have said so. The statute imposes no such obligation. It is silent upon the subject. The court has by judicial construction engrafted upon the statute a condition in favor of log drivers to the extent of requiring mill owners to furnish reasonable facilities for the passage of logs; but it has never determined that it would be reasonable to require them to furnish locks or sluices through which large and loosely constructed rafts of logs may be floated without being broken up. We do not mean to say that it was not the duty of the defendants to prepare a sluice through which the plaintiffs' rafts of logs could be run. What we mean to say is that, in the opinion of the court, the sluice prepared by the defendants was all that could reasonably be required of them, and that they were not responsible for the breaking up of the rafts; and that the verdict against them, which holds otherwise, is clearly wrong.

In support of this conclusion, and for a more full discussion of the relative rights and duties of mill owners and log drivers, and the rules by which they are to be measured and adjusted, see *Pearson* v. *Rolfe*, 76 Maine, 380.

Motion sustained, verdict set aside, and a new trial granted.

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

FREDERICK G. MESSER and another

vs.

HORACE P. STORER and others.

Cumberland. Opinion November 21, 1887.

Insolvency. Composition. Examination of debtor. Equity pleadings. R. S., c. 70, § § 42, 62,

After composition papers are filed in a court of insolvency, a creditor has not a right to examine the debtor generally upon all matters relating to his insolvency under R. S., c. 70, § 42. An examination at such a time is limited to the questions, whether the agreement was signed by the requisite proportion of the creditors, and whether the debtor had secured to his creditors the percentage agreed upon.

It is not sufficient in a bill in equity to allege that the complainant "had been informed and believed" that the facts set out were true. He should allege the facts on information and belief.

Where an insolvent debtor makes false statements in his affidavit, filed in composition proceedings which are perfected, and a discharge is granted thereunder, any creditor who is aggrieved has a plain and adequate remedy at law under R. S., c. 70, § 62.

ON report. Bill in equity. Heard on bill, answer and proof.

The bill, after setting out the proceedings in the court of insolvency, sufficiently stated in the opinion, contained the following allegation:

"Tenth. That your orators are informed and believe that the affidavit filed by said insolvents applying for said composition under said proceedings for composition as provided by section 62, chapter 70, of the Revised Statutes of this state, are not true, but that they had, and ever since have concealed and secreted money, securities, effects and property, real and personal, belonging to them individually and to said firm, with intent, purpose and expectation to receive, directly and indirectly, the benefit or advantage thereof to themselves; that they have changed and falsified the books of said firm; that they had sold, pledged, conveyed and transferred property and estate belonging to them individually and to said firm, in anticipation of insolvency, and had made conveyances, mortgages, pledges and transfers and payments to sundry of their creditors, for the purpose of

preferring said creditors; that they had given to sundry of their creditors and other persons, compensation and promise or reward, besides reasonable counsel fees for services in effecting a compromise with their creditors, and that the assets and liabilities of said Storer Brothers and Co. and the individual members thereof, were not correctly stated in the schedules annexed to said affidavits and signed by them; that in said schedules large amounts of property were omitted, and the material statements contained in said affidavits and schedules were false to the knowledge of the debtors making the same; that the signatures of a large number of the creditors who signed the composition agreements therein, were obtained by fraud; that in obtaining said agreements, and in their said schedule, the said insolvents knowingly misstated and understated the value and amount of their property; but the particulars thereof are not so known to your orators that they can state them more specifically, and the examinations proposed by your orators in the proceedings in said court of insolvency were necessary for the purpose of ascertaining such particulars, and to show thereby that the discharge ought not to be granted by the court, and to show that if granted, it was not valid, and your orators have no other means than by such examinations of ascertaining the particulars aforesaid."

Holmes and Payson, for plaintiffs.

The case of *Bisbee* v. *Ham*, 47 Maine, 543, has no application to this case, where there was no voluntary agreement. This was not an accord and satisfaction entered into by the parties, like the one in that case. See *Warner* v. *Vallily*, 26 A. L. J. 254 (R. I.).

The distinction between a voluntary agreement to settle, and an attempt at compulsion, as in this case, should be carefully noted, as it is only in the former case that there is a rescinding which requires the one making a rescission to place the other *in statu quo*. This is said to be an estoppel, not an estoppel to maintain generally the prayers which are set forth in the bill, but to deny that we have ceased to be creditors. *Chafee* v. *Fourth National*

Bank, 71 Maine, 514, is relied upon, but it will be observed that the point in question there, was the title to property, and whether an assignment of certain property to an assignee would pass the title as against a creditor residing out of the state, who had received a portion of the proceeds of property conveyed by the same assignment, under an attachment made by the creditor, claiming that the assignment was void, under which a levy was about to be made. The rights of other creditors, third parties, were affected.

Equity cases are ordinarily decided by a single justice. There is one case in which they are not decided by a single justice, and that is the precise one at bar. Such cases are reported to the law court instead, for their decision of all questions. *Springer* v. *Austin*, 75 Maine, 417.

Unless this were so, the whole proceeding in making up the defense, and putting in the large amount of documentary evidence to support the several allegations of the pleadings, as well as the law itself providing for such method, would be a perfect farce. The case would go upon bill and answer with unsettled questions of fact. The respondents' answer and supplemental answer, if rightly allowed, are not evidence in the case, although sworn to, because the complainants' bill does not ask for an answer upon oath, and "in such case it has no effect as evidence, except to cast the burden of proof upon the plaintiff." R. S., c. 77, § 15; *Clay* v. *Towle*, 78 Maine, 86.

The learned counsel has cited the case of *Ex parte Morgan*, 78 Maine, 36, in support of his position that the judge of the insolvent court was justified in excluding the examination asked for. It has no application to this case; because that case was one upon appeal, as distinguished from the exercise of the supervisory powers of this court upon a bill in equity. That case decided two questions which were necessary for the purpose of disposing of the case. First, that an appeal does not lie from the allowance of a discharge of an insolvent who makes a composition settlement with his creditors. Equity proceedings were the proper remedy in such case. Second, that the refusal by the judge, of an examination, gives no cause of appeal. These

propositions of law are obviously correct, and are well established by the decision in that case. No appeal in insolvency lies in any case arising under this chapter, unless specifically provided for therein. R. S., c. 70, § 12. And no provision is made for an appeal from the ruling of the insolvent court refusing an examination.

If these complainants were satisfied that a full, frank and complete statement had been made by the respondents in the insolvency proceeding, or that no further information was necessary or important in the proceedings, they could not come with very good grace to ask for permission to examine about matters which had been fully stated, and the allegation that they were informed and believed, shows that they understood that matters had been concealed, which required further investigation, and puts them in the position of parties, who, not having the details, and therefore not able to allege the particulars which go to make up the fraud, yet have sufficient reason to believe to justify a reasonable and prudent man in prosecuting the investigation. The demurrer admits such information and belief. *Walton* v. *Westwood*, 73 Ill. 125.

The case of *Ex parte Haines*, 76 Maine, 394, has reference only to an appeal as distinguished from these proceedings, and specifically states that, "Besides the remedy by action, each creditor acting by himself, the equitable jurisdiction of the court can be invoked in proper cases, the court having, under the insolvency law, ample powers in that respect."

Insolvent and bankrupt laws proceed upon principles generally uniform, though differing in details. If a composition is subject to the rule laid down by respondents and the judge of the insolvent court, it is a startling innovation. 2 Kent's Com. 389, *et seq.*

The examination could be had only before discharge was granted, that is, during the proceedings. R. S., c. 70, § 42.

This court has full power to annul a discharge under a composition. *Twitchell* v. *Blaney*, 75 Maine, 577; *Ex parte Haines*, 76 Maine, 394–96.

William L. Putnam, for the defendants, cited: R. S., c. 82,

§ 45; *Bisbee* v. *Ham*, 47 Maine, 543; *Chafee* v. *Fourth Nat. Bank*, 71 Maine, 514; *Ex parte Morgan*, 78 Maine, 36; *Ex parte Haines*, 76 Maine, 394; 2 Benedict, 509.

LIBBEY, J. This is a bill in equity brought to set aside and annul the discharges granted to the defendants, who were insolvent debtors, as co-partners and in their individual capacity, by the court of insolvency. Two grounds are relied upon in support of the bill. First, that the court of insolvency denied the petitioners, on their application therefor, the right to examine the insolvent debtors upon all matters relating to their insolvency as provided in § 42, c. 70, R. S.

Second, that the respondents committed acts in fraud of the insolvency statute, which renders their discharges invalid.

The first ground involves the construction of the insolvency act in cases of composition. The insolvent debtors produced to a meeting of their creditors, the affidavit required by § 62, c. 70, and at the same time produced an agreement, signed by a majority in number of their creditors, each of whose debts exceeded fifty dollars, and by creditors holding three-fourths of all their indebtedness, as required by said section; and the affidavit and agreement were duly filed in the court of insolvency. The debtors had been decreed insolvent, but their estate remained in the hands of the messenger, no proceedings for the choice and appointment of an assignee having been had. After these proceedings were had, the plaintiffs in this bill, who were not parties to said agreement, claimed the right to examine the debtors generally upon all matters relating to their insolvency, under said § 42. This claim of right was denied them by the judge of the court of insolvency, but they were permitted to examine them upon all matters embraced in the issue, whether the "agreement was signed by said proportion of the creditors of the debtors, and that they had paid or secured to all the creditors whose names appeared in the schedules annexed to their affidavit, the percentage named in said composition agreement, and according to the terms thereof." The contention on the part of the plaintiffs is that the judge of the court of

insolvency, having denied them their right of general examination, had no power to proceed and discharge the debtors; and that, as they had no right of appeal from his decree, they have the right to maintain this bill and have the discharges annulled; and this raises directly, for the first time in this court, the question whether, after composition papers are filed in the court, a creditor has the right to examine the debtor generally as to his insolvency, as claimed here.

Upon a careful examination of all the provisions of chapter 70, of the Revised Statutes relating to insolvency, we are of opinion that he has not such right, and that the ruling of the judge of the court of insolvency complained of is correct. Sections 1 to 61 inclusive, of said chapter define the jurisdiction of the court of insolvency, and prescribe and regulate the proceedings in insolvency where the estate of the insolvent debtor is settled and distributed by the court of insolvency. Section 42 before referred to, gives to the creditor the right of general examination of the debtor upon all matters relating to his insolvency before a certificate of discharge shall be granted him. This relates to cases settled in insolvency. Section 62 gives to the debtors and the requisite number of creditors, after the decree of insolvency has been made, by an agreement of composition for a discharge of their debts, the right to take the case out of the general provisions for the settlement of the estate in insolvency, and when that is accomplished, the debtor is entitled to his discharge, and his estate is to be restored to him upon the payment of all expenses incurred during the proceedings. This mode of the settlement of their estate appears to be independent of the general provisions before referred to, and rests upon contract between the debtor and his creditors. Under it, when "the judge is satisfied that such agreement is signed by said proportion of the creditors of such debtor, and that he has either paid or secured to all the creditors whose names appear in the schedules annexed to his affidavit, the percentage named in such composition agreement, and according to the terms thereof, he shall give to such debtor, under his hand and the seal of the court, a full discharge of all his debts and liabilities contracted

prior to the commencement of the insolvency proceedings, and named in the schedule annexed to said affidavit." These provisions raise no issue before the judge as to the truth of the facts stated in the debtor's affidavit, but the only questions presented to the judge are whether the agreement is really executed by the requisite number of creditors and the percentage has been paid or secured as required by this section. The statute contemplates that the proceedings shall be summary and speedy so that the creditors may receive without delay, their percentage and the debtor's estate shall be restored to him that he may dispose of it as he pleases and prevent loss by waste and and deterioration. Hence no appeal from the decree of the judge is given, but in lieu thereof "a special and stringent remedy of another sort is provided. An action to recover his debt is allowed to any creditor who deems himself defrauded. This privilege is not accorded to creditors under any other provision of the insolvency law." *Ex parte Haines*, 76 Maine, 394.

If the general proceedings to be had where the estate of the debtor is settled in insolvency, should be held to be applicable to composition proceedings, the great object to be accomplished by composition would be defeated, by the protracted litigation which might follow. Then to show more clearly that it was the intention of the legislature that the general provisions of the statute before referred to should not apply to composition proceedings, the facts which, if established, will prevent the granting of a discharge to an insolvent debtor under section 46, are not the same as are required to be set forth in the affidavit in composition proceedings, which if not true will invalidate the discharge in composition.

In as much as there was no question before the judge involving acts of the debtors which would deprive them of their right to a discharge if their estate were settled in insolvency the only effect of a general, prolonged examination would have been to delay the proceedings in composition. This question was incidentally but not directly, before this court in *Ex parte Morgan*, 78 Maine, 36, where the chief justice, in the opinion of the court, says, "He," (the judge) "could see no expediency in the examination of the

debtor after the composition agreement was entered into and we see none." This though a dictum in that case, we think well supported by the law. The reasons for the rule are well stated in that opinion.

Upon the second ground upon which the plaintiffs claim to maintain their bill, we think the bill is fatally defective. It alleges merely that the plaintiffs are informed and believe the facts set out in that clause of the bill. It does not allege the facts upon information and belief. It alleges information and belief of the facts only. Such an allegation in equity is insufficient to raise the issue sought to be raised.

Again, while it alleges generally certain things in fraud of the insolvency act, it alleges no specific act or fact by which the fraud was committed. It should specify the acts, means, or omissions of the defendants by which the fraud was committed. It should, at least, be as specific as required by section 49, in an application to the court to annul a discharge granted under section 44. It seeks to excuse this defect on the ground that the plaintiffs have no specific knowledge or information. But it is not framed as a bill of discovery. It prays that the discharges may be annulled, and that the debtors be required to submit to a full examination in the court of insolvency. We have already held that the plaintiffs have no legal right to such examination.

But passing these objections, the plaintiffs have a clear, adequate and complete remedy at law under the provisions of section 62. It is, at least, doubtful if in this case they are entitled to relief in equity, if the bill contained the necessary allegations.

Bill dismissed with single costs.

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

ROSCOE PERLEY *vs.* EDWARD C. CHASE and another.

Cumberland. Opinion November 29, 1887.

Mortgage. Rights of mortgagor in possessions after foreclosure.

A mortgagor of land, who simply continues in possession after foreclosure and his right of redemption has expired, has no right to cut and sell the hay.

On exceptions from superior court.

The opinion states the case and material facts.

Frank and Larrabee, for plaintiff.

The instructions of the presiding judge as to the right of a mortgagor in possession, undisturbed, to the crops when harvested, were correct. *Vide*, *Teal* v. *Walker*, 111 U. S. 242, and cases therein cited; *Noyes* v. *Rich*, 52 Maine, 115; *Wilder* v. *Houghton*, 1 Pick. 87; *Boston Bank* v. *Reed*, 8 Pick. 459; Taylor's Landlord and Tenant, § 64; 1 Jones on Mortgages, § § 667, 670, 672; *Tucker* v. *Keeler*, 4 Vt. 161.

George M. Seiders, for defendants, cited: 2 B. & A. 604; 2 Sharswood's Bl. 149, n. 14; *Gillman* v. *Wills*, 66 Maine, 275; *Reed* v. *Elwell*, 46 Maine, 270; 1 Cruise's Digest, 263; 1 Wash. R. P. § 102, and cases cited; *Betts* v. *Lee*, 5 Johns. 348; *Silsbury* v. *McCoon*, 4 Denio, 332; *Stephenson* v. *Thayer*, 63 Maine, 143.

Virgin, J. Assumpsit for the stipulated price of a certain quantity of hay which the plaintiff sold and delivered to the defendants in the spring of 1886.

The hay was cut and harvested by the plaintiff in the haying season of 1885, on land once held by him as mortgagor, and which he continued to occupy until after the sale and delivery of the hay, although his right to redeem the premises on which it grew had been forever foreclosed in March, previous to the cutting. After the delivery to the defendants, they were forbidden by the holder of the foreclosed mortgage to pay any person other than himself, he claiming title thereto.

One of the disputed questions of fact at the trial was, whether the plaintiff, when he commenced to cut the hay, at some place other than the farm on which it grew, agreed with the holder of the mortgage to cut it for him at a stipulated price.

The judge instructed the jury, in substance, that when the mortgagee simply allows the mortgagor to continue in possession after the right of redemption has expired, then the mortgagor while thus in possession, in the absence of any agreement to the

contrary and of any taking possession by the mortgagee, has the right to gather the annual crops and dispose of them as he sees fit. . . . But if before the hay was cut, the plaintiff agreed that it should belong to the holder of the mortgage, or if he agreed to cut it for him, or if the holder of the mortgage claimed it and the plaintiff acceded to the claim and cut it in pursuance thereof, then it became the property of the holder of the mortgage.

The jury found for the plaintiff, and the defendants challenge the soundness of the ruling.

Eliminate the fact of foreclosure from the instruction, and the defendants could not be aggrieved; for the authorities generally concur in holding that, so long as the mortgagor is allowed to remain in possession without an entry by the mortgagee, although there has been a breach of the condition of the mortgage, the mortgagor is entitled to receive the rents and profits to his own use, and is not liable to account therefor to the mortgagee. *Noyes* v. *Rich*, 52 Maine, 115; *Teal* v. *Walker*, 111 U. S. 249–50.

But this proposition, unlike the instruction complained of, is predicated of a subsisting mortgage and of the consequent relation of mortgagor and mortgagee — before foreclosure. For when the foreclosure becomes perfected, the mortgage, if the premises are of sufficient value, thereby becomes paid, (*Hurd* v. *Coleman*, 42 Maine, 182; *Morse* v. *Merritt*, 110 Mass. 458) ceases to exist, and the title of the mortgagor becomes extinguished, leaving the title in the mortgagee absolute and indefeasible. "Until foreclosure, or possession taken by the mortgagee," (says Jones, Mort. § 697) "the mortgagor is entitled to emblements," implying that after the happening of either foreclosure or possession by the mortgagee, the emblements belong to the latter. 1 Washb. R. P. 120, § 21, and cases there cited.

As before seen, when the right of redemption has become "forever foreclosed," the relation formerly existing has become extinguished; and if without any agreement, express or implied, the former mortgagor continues in possession after the determination of the particular estate by which he originally gained it, he thereby brings himself within the definition of a tenant at

sufferance. 4 Kent's Com. 116; 1 Thos. Co. Litt. 650; 2 Black. Com. 150; 1 Washb. R. P. 534, § 2; *Livingston* v. *Tanner*, 12 Barb. 484. And if a tenant at sufferance, he is not entitled to emblements. *Bennett* v. *Turner*, 7 M. & W. 226; 1 Washb. R. P. 121, § 4. And if he were, emblements do not include the grass which is not an annual crop. 1 Washb. R. P. 119, § 4.

But if we take the view which is the most favorable to the plaintiff — that inasmuch as the plaintiff was allowed to continue in possession for more than one year after the foreclosure had become absolute, and to cultivate and harvest the crops for the season of 1885, and that (as suggested by PARKE, B., in *Bennett* v. *Turner*, *supra*) "slight evidence would probably satisfy a jury that a tenancy by sufferance, in which the tenant is not entitled to the fruits of his own industry, as he has no right to emblements, would not long be continued;" and that a tenancy at will might be inferred by a jury from the acts of the parties,— still, the plaintiff would not then be entitled to the hay, it being no part of the annual crops. Or, if we adopt the view of the court in *Allen* v. *Carpenter*, 15 Mich. 38, and hold that where a purchaser under a foreclosure sale suffered the mortgagor to occupy the premises without interruption for three months, and in the mean time to go on and manage the premises and plant crops, he had a right to claim them as emblements, still, he would gain no right to sell the hay off from the land.

In the absence of any express or implied agreement for holding over, the plaintiff has no reason to complain, for he pays no equivalent by way of rent. He has taken the crops which he raised and no question is raised as to them.

Exceptions sustained.

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

INHABITANTS OF WELLS *vs.* COUNTY COMMISSIONERS.

York. Opinion November 29, 1887.

Ways. County commissioners. Spec. Stat. 1885, c. 497.

County commissioners have authority to locate a highway over and upon a

previously existing town way whenever either terminus of such location connects with a highway, although the whole of such location is within the limits of one and the same town,

When objections involving matters of fact are made at *nisi prius* to the acceptance of the report of a committee of appeal on the location of a highway and are overruled, and the report accepted and exceptions are taken to the ruling, the exceptions will be overruled unless the case finds that the facts were found in favor of the excepting party by the presiding justice.

Spec. Act of 1885, c. 497, which provides that "A highway may be laid out, constructed and maintained in the manner provided in R. S., c. 18, across the tide waters of the Ogunquit river," confers jurisdiction on the county commissioners to make the location.

On exceptions.

The opinion states the case and material facts.

Nathan and Henry B. Cleaves and *George C. Yeaton*, for the appellants.

The case of *King* v. *Lewiston*, 70 Maine, 406, is the leading authority relating to the powers of the commissioners in laying out highways under the provisions of chapter eighteen. It is cited with approval in *Acton* v. *County Commissioners*, 77 Maine, 128. In the case of *King* v. *Lewiston*, the commissioners, of Androscoggin Co., laid out a county way entirely within the limits of the city of Lewiston, but leading from one county road to another, and across a third.

The court held that the commissioners possessed the authority because here the new road became a part and parcel of a system of county roads and the court remarks that "the defendants do not contend that county commissioners have jurisdiction to lay out within a town an isolated way, having no connection with other county roads at either terminus." The cases referred to in this opinion are *Smith* v. *Co. Com.* 42 Maine, 395; *Hermon* v. *Co. Com.* 39 Maine, 583.

The road referred to in the legislation of 1885 has no connection with a county road at either terminus. The legislation of 1885, was not intended to enlarge the provisions of chap. 18, of the Revised Statutes, but that chapter and the powers of the commissioners under it, were to remain the same as before. The state of facts was not the same as existed in *Harkness* v.

Co. Com. 26 Maine, 353, or in other cases cited. The difficulty arises from the language of the act; it does not in terms or by implication confer original jurisdiction on the county commissioners.

In 1846, the legislature authorized the county commissioners of Waldo county, to lay out and establish a road over Fish river in the town of Belfast. Here the authority is delegated to the county commissioners by express statute, they are the tribunal selected by the legislature to determine the question. An act was passed January 21, 1870, authorizing the county commissioners to lay out a highway across the Kennebec river, between the towns of Waterville and Winslow. The authority is direct to the commissioners; their powers are not curtailed by reference to the provisions of law applicable to the location of highways. 59 Maine, 80; 53 Maine, 473.

As said by the court in the case of *Hall, petitioner*, v. *Co. Com.* 62 Maine, 327, in discussing the location of a private way by the county commissioners from one county road to another county road in the town of Newcastle, "in this case the private way as laid out, merely connects two county roads, it is not laid across either of them but only to them, nor could it be, as one way could not be laid over another." In *West Boston Bridge Pet.* v. *Co. Com. of Middlesex*, 10 Pick. 269, it was held that a highway could not be laid along a turnpike, because the land had "already been taken and appropriated to public use."

The record shows that the county commissioners do not adjudge the way to be of common convenience and necessity, before proceeding to locate the same. The record says, "after a full hearing of all the facts, testimony and arguments by them presented and having maturely considered the same, we were of the opinion, and adjudged, and do hereby adjudge and determine that common convenience and necessity, do require, and, in pursuance of the foregoing adjudication, we, the county commissioners aforesaid, proceeded to make said location as follows:" The fact that the commissioners proceeded to make the location, was not a sufficient determination of the fact that common convenience and necessity required such location.

As said by the court in *Cushing* v. *Gray*, 23 Maine, 15, it has often been adjudged "that the want of a preliminary adjudication that the road prayed for is of common convenience and necessity, is fatal to the laying out of a way; it is always safest and advisable to follow the language of the statute in such cases."

If it is said in this case that the record does not show a want of jurisdiction, we claim that if the record neither shows a jurisdiction nor a lack of jurisdiction, it is clearly fatal. *Pownal* v. *Com.* 8 Maine, 271; *State* v. *Oxford*, 65 Maine, 210.

A way can be located across tide waters only by authority of the legislature, and our court has frequently held that this authority must be strictly pursued, that the authority must be shown by the record of the tribunal undertaking to exercise it. *Cape Elizabeth* v. *Co. Com.* 64 Maine, 456.

The committee, in their report, have undertaken to relieve the commissioners of the error into which they have fallen, and report, "we affirm the judgment of the county commissioners on the aforesaid petition, except as to so much of the location of said highway across Ogunquit river as lies below the southerly line of the town road leading from the county road, near C. H. Littlefield's store, to said river, which we reverse." "Their action was based upon their own view of the law." It was illegal. *Bryant* v. *Co. Com.* 8 Atlantic Reporter, 460 (*ante*, 129).

All objections that may be made on the petition for writ of certiorari may be taken on this appeal. *Goodwin* v. *Co. Com.* 60 Maine, 328; *Hodgdon* v. *Co. Com.* 68 Maine, 226. The record in this case shows that the county commissioners had no jurisdiction, and their doings may be impeached collaterally. *Small* v. *Pennell*, 31 Maine, 267; *Scarboro'* v. *Co. Com.* 41 Maine, 604; *State* v. *Oxford*, 65 Maine, 210.

But if this be not so, then, assuredly, whether or not the location or any part of it is "below the southerly line of the road" named in the act of 1885, being a jurisdictional fact on this appeal and the question of acceptance of the committee's report, any statement made by them,— even if it were of the solemn character of a record, which it is not yet — may be

qualified, modified, and even contradicted. Otherwise this court might find itself in the ridiculously helpless plight of being compelled to suffer three committee men to finally interpret and construe statutes for it, and even fabricate facts without redress. All the cases everywhere, we have ever found, forbid such a conclusion, and support our contention as to the entire competency of the evidence offered by appellants on this subject. *Vide passim*, Powell on App. Proc. c. IV, § § 6–11, and cases cited; Freeman on Judgments, § § 130 *et seq.*

It cannot be maintained that however illegal the attempted location may be in some parts, the other parts may be sustained, for the reasons given by SHAW, C. J., in *Commonwealth* v. *West Boston Bridge Co.* 13 Pick. 195, that the illegal points are "so independent of and disconnected with each other that a part may be questioned and leave the remainder an entire beneficial and available judgment, to the purpose for which it is intended." The case at bar rather falls within the principles announced by LIBBEY, J., in *Acton* v. *Co. Com.* 77 Maine, 128, 131, who cites the foregoing from *Com.* v. *West Boston Br. Co.* and adds, "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."

R. P. Tapley, for appellees, cited: *Waterford* v. *Co. Com.* 59 Maine, 450; *Sanger* v. *Co. Com.* 25 Maine, 291; *Heald* v. *Moore*, 4 New Eng. R. 398 (*ante*, 271); *Hall* v. *Co. Com.* 62 Maine, 325; *King* v. *Lewiston*, 70 Maine, 406; *Acton* v. *Co. Com.* 77 Maine, 128; *Bryant* v. *Co. Com.* 79 Maine, 129; Spec. Stat. 1885, c. 497; *Belfast* v. *Co. Com.* 53 Maine, 437; *Limerick, Pet'rs*, 18 Maine, 186.

VIRGIN, J. Sometime prior to 1885, a town road or way was made from the county road, near C. H. Littlefield's store, to Ogunquit river. The legislature of that year enacted a special act which provided: "A highway may be laid out, constructed and maintained in the manner provided in R. S., c. 18, across the tide waters of Ogunquit river, in the town of Wells; but not below the southerly line of the road leading from the county

road, near C. H. Littlefield's store, to said river." Spec. L. 1885, c. 497.

After this special act took effect, certain inhabitants of York and of Wells duly petitioned the county commissioners to locate a "highway" from the county road, near Littlefield's store, extending easterly to and over Ogunquit river, to highwater on the ocean beach. Accordingly, after due preliminary proceedings had, the commissioners, at their October term, 1885, reported in favor of, and located the highway as prayed for.

From this location, the inhabitants of Wells duly appealed, a committee was appointed, who, after a hearing, made their report, wherein they "affirmed the judgment of the commissioners, except so much of the location of said highway across Ogunquit river as lies below the southerly line of the town road leading from the county road, near C. H. Littlefield's store, to said river, which we reverse," specifying the portion intended to be reversed, extending from highwater mark one hundred and ninety-four feet toward the channel of the river.

To the acceptance of the committee's report, the appellants, at the September term, 1886, filed three written objections and introduced evidence which they contended supported their allegations. The presiding justice overruled the objections and ordered the report to be accepted; to which rulings the appellants alleged exceptions which are now before us for decision.

1. The first objection is, in substance, That the location affirmed by the committee covers the identical territory of the town road and does not otherwise connect with any county road. The answer is, that the commissioners had authority to locate a highway over and upon a previously existing town road, when either terminus of such location connects with a county road or highway, although the whole of such location is within the limits of one and the same town. *Harkness* v. *Co. Com.* 26 Maine, 353; *Windham* v. *Co. Com.* 26 Maine, 406, 410; *King* v. *Lewiston*, 70 Maine, 406; *Acton* v. *Co. Com.* 77 Maine, 128.

2. That a part of the highway located by the commissioners and affirmed by the committee, is below the southerly line of the town road mentioned in the special act. The answer is,

that the presiding justice did not so find the facts. The case comes up on a bill of exceptions and not on report. The report of the evidence is not legitimately before us, and we cannot revise the finding of facts at *nisi prius*.

3. That the commissioners had no original jurisdiction to locate a highway from the county road, near Littlefield's store, to Ogunquit river and across the tide waters thereof, nor do the provisions of the special act of 1885 confer such jurisdiction; and that the committee had no authority to affirm such unauthorized location. Answer: As already seen, the commissioners had authority to locate a highway to the river, inasmuch as one terminus was at a county road or other highway. Of course the commissioners could not locate across tide waters without the authority of the legislature; and this authority the special act of 1885 confers. To be sure, it does not contain the words "county commissioners," and hence does not in direct, express terms, authorize that board *eo nomine* to make the location, as the Spec. St. 1846, c. 365, authorized the "county commissioners" of Waldo county to locate a highway across Fish river, or as the Spec. St. of 1870, c. 282, authorized the "county commissioners" of Kennebec county to build a bridge across the Kennebec river. Nevertheless, the special statute of 1885 did authorize "a highway" to be located across the Ogunquit "in the manner provided by R. S., c. 18." And "highway may include a county bridge, county road or county way." R. S., c. 1, § 6, cl. VI. It never means a town way in the statute. *Cleaves* v. *Jordan*, 34 Maine, 9, 13. As it authorized a "highway" to be located, and that, too, "in the manner provided by R. S., c. 18;" and as highways can only be located by county commissioners, under R. S., c. 18 (§ 1), we perceive no difference in the authority conferred, between an act authorizing county commissioners *in totidem verbis* to locate a highway, and an act authorizing a "highway" to be located "in the manner provided in R. S., c. 18."

It is also further urged under the third objection that the commissioners did not, in their report, "judge the way to be of common convenience and necessity," as required by R. S., c. 18,

§ 4, and that the omission is fatal to their jurisdiction. Answer: If this question was raised at *nisi prius* and is open now, we are of opinion that it is not maintainable, for when properly construed, the report expressly recites that the commissioners "do hereby adjudge and determine that common convenience and necessity do require . . . said location,"—said location being the object of "require," as well as of "made."

Exceptions overruled.

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

WILLIAM W. BIRD *vs.* JOHN F. SWAIN.

Oxford. Opinion November 30, 1887.

Contract. Minor. Ratification. R. S., c. 111 § 2.

The defendant during his minority bargained and delivered a horse to the plaintiff and took a Holmes note thereon as security for the purchase money; after attaining his majority he indorsed on the note and signed the following words: "The within note being paid I hereby discharge the property thereby secured." *Held*, that the indorsement cannot be construed as a "ratification in writing" within the meaning of R. S., c. 111, § 2, of an alleged warranty of the soundness of the horse.

ON exceptions.

The opinion states the case and material facts.

S. F. Gibson, for plaintiff.

In *Boody* v. *McKenney*, 23 Maine, 525, the court tells us what is a ratification or affirmance of a contract like this one; the court say "that when he has during his infancy sold and delivered personal property. When the contract was executed by his receiving payment, it is obvious, that he can receive no benefit by acquiescence; and it alone does not confirm the contract. When the contract remains unexecuted and he holds a bill or note taken in payment for the property, if he should collect or receive the money due upon it, or any part of it, that would affirm the contract." See 8 Maine, 405;

1 Greenl. 11; 6 Greenl. 89; 34 Maine, 594; 56 Maine, 102. In 70 Maine, the court say, "without a further citation of authorities it seems to be established as a general rule that when an infant enters into a contract and after becoming of age receives the benefit from it or by virtue of it does an act which is an injury to the other party he thereby ratifies it."

The court in 56 Maine, 102, *Robinson* v. *Weeks*, say that in order for a minor to avoid his contracts that are voidable by him, he should be held to place the party, with whom he deals, substantially in *statu quo*.

Bearce and Stearns, for the defendant.

VIRGIN, J. The plaintiff counted on an alleged verbal contract whereby the defendant warranted a horse which he bargained and delivered to the plaintiff, on November 12, 1884, to be "all right and good to work."

The defendant pleaded infancy.

By agreement the action was referred by rule of court. The referees reported in substance that on the day named, the defendant being then more than twenty, but less than twenty-one years of age, bargained and delivered to the plaintiff a horse, receiving therefor a cow, a pair of steers and the plaintiff's note for sixty-five dollars on six months, in which it was stipulated that the horse should remain the defendant's property until the note was fully paid. After maturity, the note was paid to the defendant who then had attained his majority.

The referees made an alternative report that if the action is maintainable, they find a promise and assess damages at twenty-five dollars—otherwise no promise. The referees find no ratification in writing. The report of the referees was accepted and judgment ordered for the defendant, whereupon the plaintiff alleged exceptions.

We are of opinion that the exceptions must be overruled. R. S., c. 111, § 2, provides that no action shall be maintained on any contract made by a minor, unless he or some person lawfully authorized, ratified it in writing after he arrived at the age of twenty-one years, except for necessaries or real estate," &c.

No fact found by the referees brings the case within the provisions of the statute. The early authorities cited by the plaintiff declare the common law rule of ratification, and the cases were decided before the statute above mentioned was enacted in 1845. *Davis* v. *Dudley*, 70 Maine, 236, related to real estate which is an exception expressly mentioned in the statute.

Even if the indorsement on the note—"the within note being paid, I hereby discharge the property thereby secured," was signed by the defendant after he became of age, it cannot be construed as a "ratification in writing" of the alleged warranty of the horse.

Exceptions overruled.

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

HOWARD W. GAMAGE *vs.* SUSIE A. HARRIS and others.

Androscoggin. Opinion December 2, 1887.

Equity. Cloud on title.

A complainant brought a bill in equity to remove a cloud from his title to land, of which he was not in possession, alleging that the defendants held it by a levy of a fraudulent and collusive judgment. *Held*, that failing to prove the fraud he could not further maintain his bill as he had a plain and adequate remedy at law.

The rule is, that when a cause of action, cognizable at law, is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out can not be granted, the court is without jurisdiction to proceed further, and must dismiss the bill without prejudice.

ON report.

Bill in equity, heard on bill, answer and demurrer, and proof. The facts are sufficiently stated in the opinion.

Savage and Oakes, for plaintiff.

That the plaintiff has a remedy at law cannot be presumed in a case of fraud, especially when a discovery is prayed for. *Dwinal* v. *Smith*, 25 Maine, 382; *Taylor* v. *Taylor*, 74 Maine, 589.

In *Taylor* v. *Taylor*, it is pointed out that the decisions in Massachusetts, are somewhat different on account of the restrictive clause in their statute giving equity jurisdiction. But contra, the United States courts maintain the doctrine of the English courts, notwithstanding a like restrictive clause in the judiciary act.

In *Hartshorn* v. *Eames*, 31 Maine, 96, the complainant charged that he "had been defrauded by a voluntary conveyance of real and personal property from one defendant, his debtor, to the other, pending a judgment in his favor on an award." Defendants demurred, on the ground of want of equity and complete and adequate remedy at law. The court say "it would seem to be too clear at this day to need argument to show, that the demurrer is not well taken. The allegation of fraud brings the case within one of the specifications of the statute conferring equity jurisdiction upon this court."

In *Corey* v. *Greene*, 51 Maine, 114, it is written, "if the debtor at any time has had the legal title to the estate, and after the debt was contracted, conveyed it for the purpose of defrauding his creditors, such deed is void in contemplation of law, and the creditor may still levy his execution upon it, and then establish the fraud by proceedings in equity."

If the creditor makes a levy, he may then resort to equity to complete his title. *Call* v. *Perkins*, 65 Maine, 439. See also *Belcher* v. *Arnold*, 1 N. E. Rep. 15, (R. I.)

If a person, having the legal title to real estate, incur a debt, and subsequently convey his estate, in fraud of his creditor, to his wife who makes a similar conveyance thereof to her brother in trust for herself, the creditor thus defrauded may extend his execution issued upon the judgment recovered upon his debt upon the land thus fraudulently conveyed, and perfect his title by a bill in equity against the wife and her grantee. *Wyman* v. *Fox*, 59 Maine, 100.

Wyman v. *Richardson*, 62 Maine, 295, referring to *Wyman* v. *Fox*, lays down this doctrine, "a fraudulent conveyance is no transfer of the title as against creditors. The demandant by his levy acquired a legal estate. The bill in equity was for the

purpose of removing any possible cloud resting upon the title thus acquired."

In *Egery* v. *Johnson*, 70 Maine, 260, it was alleged that complainants were the creditors of one of the defendants, who then owned certain real estate, which he conveyed without adequate consideration to the other defendant, to defraud and hinder the complainants; that they recovered judgment against the grantor, and levied their execution upon the land so conveyed and complainants prayed that the defendants should release all their apparent title to the land levied upon to the complainants. The bill was sustained and decree made as prayed for.

As to making the judgment debtor a party. It was done in *Hartshorn* v. *Eames*, 31 Maine, 93; *Egery* v. *Johnson* 70 Maine, 260.

Where one claims under an officer's sale *in invitum*, though not bound to do it, he is certainly justified, in asserting his right against other persons, in making the execution debtor a party. *Richards* v. *Pierce*, 52 Maine, 562.

This case was heard on demurrer to the bill and it was held that it should not be dismissed for misjoinder of parties.

In *Laughton* v. *Harden*, 68 Maine, 208, a bill to set aside a fraudulent conveyance the court say that *Smith* v. *Orton*, 21 How. 41; *Whitmore* v. *Woodward*, 28 Maine, 392; *Dockray* v. *Mason*, 48 Maine, 178; *Richards* v. *Pierce*, 52 Maine, 560, decide that the fraudulent grantor could properly have been joined, but that it was not necessary to join him. If joined, the bill would not have been dismissed on that account.

A demurrer cannot be good as to a part which it covers and bad as to the rest; the whole must stand or fall. And if a demurrer to a part of a bill be not good as to the whole of that part, it is not good for any part of it. *Burns* v. *Hobbs*, 29 Maine, 277; *Laughton* v. *Harden*, 68 Maine, 208; 1 Daniell Ch. Pl. & Pr. 584.

The English rule that plaintiff shall only have discovery of what is necessary to his own title, and shall not pry into title of the defendant, held not applicable in this country. *Adams* v. *Porter*, 1 Cush. 170.

C. Record, (*Frye*, *Cotton and White* with him) for the defendants, cited: 1 Pom. Eq. Jur. § § 221, 222; R. S., c. 76, § 14 and c. 104, § § 1, 6; *Corey* v. *Greene*, 51 Maine, 114; *Call* v. *Perkins*, 65 Maine, 439; *Robinson* v. *Robinson*, 73 Maine, 170; *Lewis* v. *Cocks*, 23 Wall, 466; *Coombs* v. *Warren*, 17 Maine, 404; *Marston* v. *Marston*, 54 Maine, 476; *Spofford* v. *B. & B. R. R. Co.* 66 Maine, 51.

HASKELL, J. Bill to remove a cloud from the title of the orator to two several parcels of land.

The orator claims to have acquired the right to redeem both parcels from a mortgage by virtue of a sale of the equity to him on execution.

Three of the respondents, sisters, claim title to one parcel by virtue of a levy upon it on execution in their favor, and to the other parcel by virtue of a sale to them, on execution, of the right to redeem the same from mortgage; both the levy and the sale were made to perfect a lien upon the land, created by an attachment made earlier than the attachment in the orator's favor under which he claims title.

The orator, not being in possession of the land, seeks to avoid the respondents' levy for irregularity, and to avoid their purchase of the equity, because there was none, and because the sale was irregular and invalid.

Failing in these particulars, the orator seeks to have both the sale and the levy annulled, because the judgment, whereon the execution issued upon which the sale and levy were made, was fraudulent, collusive and void.

The bill invokes two specific grounds for relief: one the invalidity of certain judicial conveyances, the validity of which can as well be determined in an action at law, as in equity; the other a fraudulent and collusive proceeding at law, under which the three respondent sisters claim title.

The second cause for relief is properly within the jurisdiction of a court of equity. The orator charges that three of the respondents, daughters of the other respondent, fraudulently and collusively procured a judgment and execution against their

father, the other respondent, upon a fictitious and groundless claim, and that the title which they claim under the levy and sale on the execution, is colorable only and invalid.

The orator called for an answer to his bill upon oath, to search the conscience of each daughter, and of their father as well. They all answer fully, and no doubt satisfactorily to the orator, as he has no exception to any suggested insufficiency or evasiveness in the answers. The answers, so far as responsive, are evidence on the part of the defence, and must be taken to be true, unless overcome by evidence that outweighs them. They deny all fraud and collusion between the three respondents claiming title and their father, touching the judgment in question.

A careful consideration of the evidence fails to prove that the judgment in controversy is fraudulent, or collusive. The orator and the three female respondents had suits pending at the same time, in the same court against the same defendant, wherein the same land was attached, the attachment of the respondents having been first made, and it is improbable that the orator did not then know of the respondents' suit and attachment. If he then believed that the respondents' suit was upon a fictitious claim, or for a sum too large, he might have defended the same as a subsequent attaching creditor. R. S., 1871, c. 82, § 39; 1883, c. 82, § 46. But this he omitted to do. He might then have compelled the respondents to prove their damages and have prevented expensive litigation in a court of equity. He who asks equity must not only do equity, but come into court free from laches himself.

The three female respondents, scarcely beyond their majority, believed that they had a claim against their father for wood cut by him upon land that they had inherited from their mother, and fearing lest their father might become unable to pay them, consulted a counsellor, whom the court has no reason to distrust, and by his direction prosecuted their claim by suit and recovered judgment and execution. The testimony of their counsellor clearly proves good faith in the proceeding, and the orator has no reason to complain of the result. Had he been more diligent in collecting overdue notes, running at eight per cent interest, his attachment might have been the earlier one.

The orator, failing to prove the fraud charged in his bill, cannot farther maintain the same for a cause giving a plain and adequate remedy at law.

"The rule is, that when a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice. *Russell* v. *Clark*, 7 Cranch, 69. *Price's Patent Candle Co.* v. *Bauwens Patent Candle Co.* 4 Kay & J. 727; *Baily* v. *Taylor*, 1 Russ & M. 73; *French* v. *Howard*, 3 Bibb. (Ky.) 301; *Robinson* v. *Gilbreth*, 4 *id.* 153; *Nourse* v. *Gregory*, 3 Litt. (Ky.) 378;" *Dowell* v. *Mitchell*, 105, U. S. 430.

The orator, not being in possession of the land, cannot in equity test the validity of the levy and sale set up against him. A writ of entry will afford him a plain and adequate remedy. *Spofford* v. *B. & B. R. R. Co.* 66 Maine, 51; *Briggs* v. *Johnson*, 71 Maine, 237; *Robinson* v. *Verrill*, 73 Maine, 176; *Russell* v. *Barstow*, 144 Mass. 130.

Bill dismissed, but without prejudice as to matters not decided in this opinion. Respondents to recover one bill of costs.

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

HATTIE J. SMITH *vs.* JOSHUA B. ALLEN.

Knox. Opinion December 6, 1887.

Costs. Second action for same cause. Practice. R. S., c. 82, § 124.

Revised Statutes, c. 82, § 124, providing that, when costs have been allowed against a plaintiff on nonsuit or discontinuance and a second suit has been brought for the same cause before the payment of such costs, proceedings in such second suit shall be stayed until such payment, should be interpreted liberally in behalf of defendants,

It is enough that the plaintiff has so brought his second suit that the cause of action first relied on may be relied on again.

On exceptions.

This is a writ of entry for the recovery of certain real estate situate in Cushing, entered at the March term, 1886. The defendant at the next September term moved that the action be dismissed unless the costs be paid of another suit which he alleged to be for the same cause of action, previously brought, and entered in this court. The two writs are of identical forms except as to date and term of court.

The previous suit was a writ of entry by the same plaintiff against the same defendant to recover the same premises, entered at the March term, 1885, and continued to the December term, 1885, at which term the plaintiff became nonsuit.

At the hearing upon defendant's motion the plaintiff alleged and the defendant admitted that at the bringing of the first suit, and during its pendency, the plaintiff's sole claim to recover was by reason of the alleged insanity of defendant's alleged grantor, whose sole heir the plaintiff was. After the first suit was dismissed, and before the commencement of this action, the plaintiff became the owner of a certain mortgage given by the grantor to one Samuel B. Flint, covering the demanded premises, and brought her present suit to recover possession of the premises, and the plaintiff offered to be confined in her proof to the mortgage, and not the insanity proposition.

The presiding judge ruled that the two suits were for the same cause of action, and fixed a time when the previous costs must be paid, to all of which rulings the plaintiff duly excepted. And the costs not being paid at the time fixed by the court, the presiding judge ordered the second suit to be dismissed; to which order and ruling the plaintiff duly excepted.

A. P. Gould, for the plaintiff.

The present suit is not for the same identical cause, and R. S., c. 82, § 124, does not apply.

The form of writ in this case is not the test in determining whether the cause of action in both suits was the same. The true test is the character of the judgments sought to be recovered. This form of writ is expressly authorized by our statutes, in two

different causes of action, where the purpose of the suits, and the results sought are very different.

Revised Statutes, c. 104, § 1, provides that "any estate of freehold in fee simple, fee tail, for life, or any term of years, may be recovered by writ of entry." Section 2 provides that the demandant shall declare on his own seizin. The purpose and effect of such action is to test the plaintiff's title to the premises. He declares for an unconditional fee.

Revised Statutes, c. 90, § 8, provides that "the mortgagee, in an action for possession, may declare on his own seizin, in a writ of entry, without naming the mortgage, or assignment, and if it appears on default, demurrer, verdict, or otherwise, that the plaintiff is entitled to possession, and that the condition had been broken, when the action was commenced, the court shall award the conditional judgment." By § 9, the conditional judgment shall be, that "if the mortgagor," etc., "pays the sum that the court adjudges to be due and payable, with interest, within two months from the time of judgment . . . no writ of possession shall issue, and the mortgage shall be void."

In *Howard* v. *Kimball*, 65 Maine, 308, motion was made, as is in this case, to stay proceedings until judgment for costs in a former suit was paid. To determine whether the motion should be granted, the court make the question to depend on whether the former action would be a bar to the second, and say on page 330, "to ascertain whether a former judgment is a bar to present litigation, the true criterion is found in the answer to the question, was the same vital point put directly in issue and determined?" And on page 331 they hold that the motion was rightfully overruled, because the first suit was not identical with the second.

C. E. Littlefield, for the defendant, cited: *Warren* v. *Homested*, 32 Maine, 37; *Morse* v. *Mayberry*, 48 Maine, 162.

PETERS, C. J. The Revised Statutes, c. 82, § 124, provide that, "when costs have been allowed against a plaintiff on nonsuit or discontinuance, and a second suit has been brought for the same cause before the costs of the former suit are paid, further proceedings shall be stayed until such costs are paid." We think

this statute should be interpreted liberally in behalf of defendants. It imposes no unreasonable burden on a plaintiff, to require him to pay costs which he has put upon a defendant without cause, before he can proceed again.

The question here is, whether the defendant has been twice sued for the same cause. If we are governed by the record, he certainly has been. The declarations are precisely alike. It matters not that the plaintiff may have in the second suit more or better evidence of her claim than she had in the first, or that she could not maintain her first suit, but can maintain the second. The statutory requirement is not founded on the theory that the plaintiff has as good grounds for sustaining one suit as the other. The presumption is that she discontinues her suit for the reason that she may improve her chances of success by a later proceeding. But the defendant should not be perplexed by the plaintiff's experiments without some amends for the annoyance which is thereby inflicted on him.

The result must be the same in the present case, if we look beyond the literal record and consider the admissions and evidence accompanying the papers.

It appears that, during the pendency of the first suit, the plaintiff's sole claim to recover the land was by reason of the alleged insanity of the defendant's grantor, the plaintiff being the sole heir of such grantor, and that, since the first suit was discontinued and before the second was commenced, she purchased a mortgage subsisting on the premises, under which she now claims to recover, the mortgage being a better title than the deed under which the defendant claims. But there is no notice in the writ or declaration that the plaintiff's claim will be limited to the mortgage right, or be based upon it in any way. The plaintiff merely offers, at the hearing of defendant's motion to dismiss the second suit, that she would be "confined in her proof to the mortgage, and not the insanity proposition."

The offer came too late. The defendant should not be required to wait until a trial be had to ascertain what proof or cause of action the plaintiff will rely on. It is enough that the plaintiff has so brought her suit that the cause of action first relied on

may be relied on again,— that the declaration just as much embraces it in the second as in the first suit. The plaintiff does not necessarily abandon one ground for recovery because she has another. Her claim is for possession of the premises in dispute, and she is not precluded from relying upon any legal evidence which will show that she is entitled to possession. The statutory requirement, which we are discussing, applies, although a new and additional cause of action is embraced in the second writ. *Morse* v. *Mayberry*, 48 Maine, 161.

In the present instance, the test is to be found in the writ and declaration, and not in the evidence to be offered to sustain the action.

Exceptions overruled.

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

STATE OF MAINE *vs.* MICHAEL MALIA.

Sagadahoc. Opinion December 12, 1887.

Misnomer. Criminal pleadings. Practice.

When in a criminal prosecution the respondent pleads misnomer in abatement sufficient in form, the question of *idem sonans*, being a question of fact, must be raised by replication and not by demurrer.

ON exceptions.

At the trial the defendant first filed a plea of misnomer, alleging that his name was Michael Mallia. The exceptions were to the ruling of the court in sustaining a demurrer to that plea, but not for want of form.

Frank J. Buker, county attorney, for the state.

George E. Hughes, for the defendant, cited: *Rex* v. *Shakespeare*, 10 East, 83; Heard's, Criminal Law, 169; 11 Gray, 320.

VIRGIN, J. The county attorney filed a demurrer to the defendant's plea of misnomer. No question is raised as to the form of the plea, and we perceive no defect therein. *State* v. *Flemming*, 66 Maine, 142. The demurrer having been sustained by the judge, the defendant was found guilty on his plea of not

guilty. By going to trial, he waived no right to his exceptions on the pleading. *State* v. *Pike*, 65 Maine, 111.

In the absence of any defect in the plea of misnomer, the state could have raised either of two questions by replication: (1) That the defendant was known as well by the name in the complaint as by that in the plea (*State* v. *Corkrey*, 64 Maine, 521); or (2) That the two names were pronounced alike. The county attorney filed no replication but demurred; and now contends in substance that the two names are *idem sonans*, which is not a question of law but of fact, which the defendant has the right to submit to a jury. *Rex* v. *Shakespeare*, 10 East, 83, and cases in note *a*; *Com.* v. *Mehan*, 11 Gray, 323 and cases there cited.

The result is

Exceptions sustained. Verdict set aside.
Judgment for the defendant.

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

STATE OF MAINE *vs.* LEVI LASHUS, appellant.

Kennebec. Opinion December 12, 1887.

Intoxicating liquors. Transporting from place to place. R. S., c. 27, § 31. Pleadings.

A complaint founded on R. S., c. 27, § 31, which simply follows the language of the statute, is too vague and indefinite, and the complaint will be adjudged bad on demurrer.

ON exceptions from superior court.

The exceptions were to a *pro forma* ruling of the court, overruling a demurrer to the following complaint.

(Complaint.)

"State of Maine. Kennebec, ss. To Horace W. Stewart, Esquire, judge of our municipal court of Waterville, in the county of Kennebec. James P. Hill, of Waterville, in the county of Kennebec and State of Maine, in behalf of said state, on oath complains, that Levi Lashus of Waterville, in the county of Kennebec, on the twenty-first day of December, A. D. 1886, at said Waterville, in said county of Kennebec, did then and

there, knowlngly transport from place to place, in said state of Maine, intoxicating liquors with intent that the same shall be sold in violation of law, in said county of Kennebec, in said state of Maine, by some person to said complainant unknown, and with intent then and there to aid said person to said complainant unknown, in such sale in said county of Kennebec, in said state of Maine; against the peace of the state, and contrary to the statute in such case made and provided."

L. T. Carleton, county attorney, for the State.

I do not see how in the nature of things the allegation could be made more precise without tedious and useless prolixity as the court say. 61 Maine, 181; 78 Maine, 546 and authorities there cited; 77 Maine, 380; R. S., c. 27, § 31.

Again, it is not necessary that a complaint should be so formal and precise as is required in an indictment, as the court say in *State* v. *Corson*, 10 Maine, 473, "The same technical precision and accuracy is not required as in an indictment."

F. A. Waldron, for the defendant, cited: 11 Pick. 432; 13 Met. 368; 2 Pick. 143; 13 Pick, 363; 17 Pick. 399; 19 Pick. 307; 1 Stark. Cr. Pl. 89; 2 Hale, 169; Arch. Cr. Pl. (5 Am. ed.) 36; 1 Chit. Cr. Law, 213; 2 East, P. C. 651, 781; *Rex* v. *Walker*, 3 Camp. 264; *Rex* v. *Robinson*, Holt, N. P. 595; *Com.* v. *Blood*, 4 Gray, 31; *Com.* v. *Phillips*, 16 Pick. 211; 3 Stark, Ev. 1527; 11 Cush. 143; *Com.* v. *B. & W. R. R. Co.* 11 Cush. 512; *Com.* v. *Moore*, 11 Cush, 600; *Com.* v. *Pray*, 13 Pick. 359; *Com.* v. *Reily*, 9 Gray, 1.

VIRGIN, J. The complaint follows the language of the statutory provision (R. S., c. 27, § 31,) which creates the offence intended to be charged; but such a mode of setting out a violation of a penal or criminal statute is not necessarily sufficient. *State* v. *And. R. R. Co.* 76 Maine, 411; *Com* v. *Pray*, 13 Pick. 359. The law affords to the respondent in a criminal prosecution such a reasonably particular statement of all the essential elements which constitute the intended offence as shall apprise him of the criminal act charged; and to the end,

also, that if he again be prosecuted for the same offence he may plead the former conviction or acquittal in bar.

Recurring to the complaint we find no allegation designating from what place or to what place, "in the state of Maine," the liquors were transported. The complaint is too indefinite to afford to the defendant the requisite information, to which the law entitles him, or to identify it, in case another and subsequent prosecution for the same offence should be instituted. The case of *Com.* v. *Reily*, 9 Gray, 1, based on a similar statute, is in point, and holds, on a motion in arrest of judgment, that a complaint like the one at bar is insufficient.

Had the allegations limited the places to and from which the liquors were transported to a particular town or city, the complaint might have been sufficient. *Com.* v. *Hutchinson*, 6 Allen, 595.

Exceptions sustained. Complaint adjudged bad.

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

LOVISA H. WILLIAMS

vs.

THE CAMDEN AND ROCKLAND WATER COMPANY.

Knox. Opinion December 16, 1887.

Damages. Action. Waters.

In an action of the case for damages caused by diverting the water, by means of a dam, from its natural water-course over the plaintiff's land, the plaintiff can only recover the damages sustained prior to the date of the writ.

Such an action can not be maintained when the dam is erected under the authority of a statute which provides a remedy for one who sustains damage by reason of the dam.

ON exceptions.

J. H. Montgomery, for plaintiff.

The rule for prospective damages is laid down clearly in the case of *Canal Co.* v. *Hitchings*, 65 Maine, 142. In this case

defendants cannot be made to remove the dam at the mouth of the pond, which stops the flow of water by the brook through the plaintiff's land and causes the injury of which she complains. The right to build the dam and divert the water of the pond is granted defendant, by legislative authority, and if that authority is not exceeded, injunction will not lie. *Moen Man. Co.* v. *Worcester*, 116 Mass. 458.

In the case of *Lee* v. *Pembroke Iron Co.* 57 Maine, 481, where by authority of the Legislature, defendant corporation erected a dam across the Pennemaquan river which caused the water to flow back and injured plaintiff's mill and privilege, the court say, "It cannot be necessary to waste time or words to establish the proposition that he who assumes under color of legislative authority, to overflow an ancient mill 'takes' that mill and privilege from the owner as directly and effectually as though he entered upon the premises and demolished the buildings."

If the damages were to be assessed under the statute immediate and prospective would be the rule. *Bailey* v. *Woburn*, 126 Mass. 421.

Cogswell v. *Essex Mill Cor.* 6 Pick. 94, a case where by legislative authority a corporation was empowered to erect a mill dam across a river and no remedy was provided to compensate persons injured thereby, the court say, "What then is the remedy if any one is injured by the execution of the act of the legislature? An action at common law . . and they will have an action for the consequential injury."

In *Newhall* v. *Ireson*, 8 Cush. 599, a case similar to this, in which plaintiff only asked for nominal damages, the court say: "And although the plaintiff has sustained no present damages, because she has had no mill upon it or otherwise used it for any agriculture or manufacturing purposes, yet such diversion would prevent such beneficial use of it hereafter and thus impair the value of the estate."

And therefore a cranberry meadow although never used for that purpose yet the possible use of it for such purpose, is a proper claim, when water is diverted from it under legislative

authority. *Warren* v. *Spencer Water Co.* 143 Mass. 155; so with a water power, *Plumleigh* v. *Dawson*, 6 Ill. (1 Gilm.) 544; so with a prospective ferry landing, *Magre* v. *Little Rock, &c. R. R. Co.* 41 Ark. 202.

And the general rule is, the market value of the land appropriated, in view of all the purposes to which it is naturally adapted is the measure of damages. *Moulton* v. *Newburyport Water Co.* 137 Mass. 167; *Cobb* v. *Boston*, 112 Mass. 181; *Lawrence* v. *Boston*, 119 Mass. 126; *Drury* v. *Midland R. R. Co.* 127 Mass. 571.

C. E. Littlefield, for defendant, cited; *Cumberland and Oxford Canal Corporation* v. *Hitchings*, 65 Maine, 140; *Rockland Water Company* v. *Tillson*, 69 Maine, 268; *Cole* v. *Sprowl*, 35 Maine, 161; *Dority* v. *Dunning*, 78 Maine, 390; *Staple* v. *Spring et al.* 10 Mass. 75; *Lund* v. *New Bedford*, 121 Mass. 286; 1 Sedgwick, Damages, 195, 279, 280; 1 Sutherland, Damages, 187, 202.

LIBBEY, J. This is an action of case against the defendant for diverting the water from a natural watercourse over the plaintiff's land from April 1, 1886, to the date of writ, July 26, 1886.

The watercourse flowed from Oyster River pond, and in 1885 the defendant erected a dam at the outlet of the pond, which, when the water was low, diverted the water from the brook, which the plaintiff claims damaged her pasture and a natural mill privilege on her land.

The contention between the parties is whether the plaintiff can recover in this action prospective damages, or must be limited to damages sustained prior to the commencement of the action. The court below ruled that she could recover only what she had sustained at the date of the writ.

We think this ruling correct. The case as reported, does not show the destruction of the watercourse. The flow of the water in it was diminished only. In time of drought it is prevented by the dam from flowing at all. If the dam was unlawfully

erected, it is the duty of the defendant to remove it, or open a gate in it to give the water its natural flow over the plaintiff's land; and every day it continues the dam it is guilty of a wrong. If it removes the dam which it may at any time do, or permits the water to have its natural flow in its course, it is no longer guilty. While the dam is maintained it is a nuisance, and its continuance may be enjoined. In such case it is the settled law of this state that damages are limited to the date of the writ. *C. & O. Canal Co.* v. *Hitchings*, 65 Maine, 140; *Dority* v. *Dunning*, 78 Maine, 381.

But the plaintiff claims that the diversion of the water by the defendant is by virtue of an act of the legislature of 1885, c. 522, which gives it authority to take it for the purposes specified; and therefore the injury is permanent.

The case does not show that the erection of the dam by the defendant was under the authority of that act. If the water was taken by it in conformity with the requirements of the act, it was not unlawful—not a tort—and this action cannot be maintained. The plaintiff must pursue her remedy for damages under section four of the act, which provides that they shall be "ascertained in the same manner, and under the same conditions, restrictions and limitations as are by law prescribed in the case of damages by the laying out of highways." But the case as reported does not show that the defendant had taken the water in accordance with the provisions of the act.

By the report, if the exceptions are overruled the court is to assess the damages upon the evidence reported. We think the evidence does not show that the plaintiff sustained more than ten dollars damage prior to the date of the writ.

Exceptions overruled. Damages assessed at ten dollars.

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

PETERS, C. J., did not sit.

BENJAMIN THATCHER *vs.* GEORGE E. WEEKS and another.

Kennebec. Opinion December 17, 1887.

Officers. Prevention of crimes. Drums. Trover.

An officer who has taken a drum from a person, whom he had arrested for beating the drum in violation of a city ordinance, cannot detain it after the trial of the offender, although he had reason to believe and did believe that the offense would be again immediately committed if the drum was restored.

Trover will lie for the owner of the drum against the officer who refuses to restore it upon demand after the trial has been had.

ON exceptions from the superior court.

Trover against the mayor and city marshal (H. T. Morse) of Augusta, for the value of two drums alleged to have been converted, August 20, 1885. The writ was dated November 16, 1885. The drums were restored to the plaintiff after the commencement of the action, and the plaintiff at the trial claimed only nominal damages for the detention of the drums.

The opinion states the facts bearing upon the question raised by the exceptions.

Melvin S. Holway, for the plaintiff, cited: Bishop, Crim. Pro. § 212; *Bullock* v. *Dunlap*, 2 Ex. D. 43; 19 Eng. Rep. 363; *Ex parte Craig*, 4 Wash. C. C. 110.

A. M. Goddard, for the defendants.

"And really it is an honor, and almost a singular one, to our English laws, that they furnish a title of this sort, (Prevention of crimes) since preventive justice is, upon every principle of reason, of humanity, and of sound policy, preferable in all respects to punishing justice." 4 Wend. Bl. Com. 251.

And for a more modern and American authority, I will cite 1 Bishop on Criminal Pr. § § 183, 210, 211, extracts from which the presiding judge read as a part of his charge to the jury, and which probably constitutes the part most objectionable to the plaintiff.

I find a case exactly parallel in Vermont, in the discussion of

which the learned judges express their surprise that the plaintiff should have had the presumption to have brought such an action, the law being so clear that it had never been questioned in the history of legal proceedings. *Spalding* v. *Preston*, 21 Vt. 9.

EMERY, J. One of the defendants was the city marshal of Augusta, and had arrested the plaintiff for violation of a city ordinance in beating drums. The case does not show what the officer did with his prisoner, but we may assume that he did his duty and took him within a reasonable time before the proper court for trial; we may also assume that the court duly disposed of the charge. At the time of the arrest, the officer also took from the plaintiff the drums, and had kept them for some over three months, when the plaintiff, after demand, brought this action of trover for their value. The officer did not bring the drums before any court or magistrate, nor did he obtain any order or decree from any magistrate as to their disposition.

The officer (the defendant) claims it was no part of his duty so to do. He claims that for the purpose of preventing any further violation of the city ordinance, he could lawfully take the drums, thus being unlawfully used, and could lawfully detain them in his own possession so long as he had reason to believe and did believe that the plaintiff would immediately again use the drums in the same unlawful manner, if restored to him. The principle thus contended for by the officer, would enable him to detain the team of a person arrested for too fast driving, so long as he, the officer, believed with reason the owner would immediately repeat his offence of too fast driving if the team were restored to him.

Does the power of executive officers extend so far?

It is common learning that an officer may, without a precept, arrest any person he finds committing an offence. It is also well known that he must within a reasonable time, bring his prisoner before the proper court, or obtain a legal precept for detaining him. A failure to do so may make the officer a trespasser. R. S., c. 133, § 4. An officer making an arrest upon a criminal charge, may also take from his prisoner the

instruments of the crime and such other articles as may be of use as evidence upon the trial. These may not be confiscated or destroyed by the officer however, without some order or judgment of a court. We do not find any authority or reason for the officer rendering any judgment in the matter. He holds the property, as he does the prisoner, to await and subject to the order of the court. The officer, having taken into his possession such articles as will supply evidence, "holds them to be disposed of as the court shall direct." Bish. Cr. Pr. 211. "The taking of things from the arrested person does not change the property in them. The officer holds all such property subject to the order of court." *Ibid.* 212. Wharton, in his Crim. Pr. § 61, (8th ed.) says: "They (the articles taken from the prisoner) should be carefully preserved for the purposes of the trial, and after its close, returned to the person whose property they lawfully are."

In *Spalding* v. *Preston*, 21 Vt. 9, relied upon by the defendant, the prisoner was committed for trial, and the officer was preserving the property (counterfeit coin) to be used as evidence at the trial. The court held that the officer could lawfully retain them for that purpose. In the case before us, it is not claimed that the drums were detained for evidence. The trial was presumably long over.

There is an evident difference also, between articles which can only have an unlawful use, like counterfeit coin, and articles in themselves innocent, like drums. If an officer may indefinitely hold the former, it does not follow that he can so hold the latter. Yet in the former case, it is provided by our statute, R. S., c. 125, § 12, that all such contraband articles are to be kept "by the direction of the court or magistrate having cognizance of the case."

We think it clear that after the trial is over, the officer has no right to detain the property without some order of court. The court below sustained the defendant's contention above stated. We think this was error.

Exceptions sustained.

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

HYMEN BLUMENTHAL *vs.* MAINE CENTRAL RAILROAD COMPANY.

Kennebec. Opinion December 17, 1887.

Railroads. Baggage. Common carriers.

The plaintiff being about to take passage on one of the defendant's passenger trains, had his valise checked by the baggage master to go upon the same train as his personal baggage. The valise did not contain any personal baggage, but only merchandise for sale. *Held*, that the defendant was under no obligation to transport the valise, and was not liable for failure to transport it.

ON report from the superior court.

An action to recover the value of a valise and merchandise contained therein amounting to four hundred and eighty dollars and thirty-nine cents, which the plaintiff had checked as baggage at Bangor station of the defendant's road for Augusta.

The facts are stated in the opinion.

F. E. Southard, for plaintiff.

While there is a case which apparently holds that pack-pedlars have no rights which railroads are bound to respect, (see *Blumantle* v. *F. R. R.* 127 Mass. 322,) and while it is conceded that the checking of merchandise by a party intending thereby to defraud the carrier of the freight money, creates no liability as a common carrier for its loss, it is believed that the circumstances of this case create some liability for which the defendant is answerable, and bring it within another, and quite different principle from that governing cases of actual or legal fraud, such as is spoken of in *R. R.* v. *Carrow*, 73 Ill. 348; S. C. 24 Am. R. 248.

The learned editor of the American Decisions in a note to *Hutchings* v. *R. R. Co.* 71 Am. Dec. 161, says, "The true doctrine seems to us to be that where there is no concealment on the passenger's part and a carrier receives and treats as baggage a package which he knows to be merchandise, he should be liable in case of loss, although no extra compensation was charged for its transportation; and certainly he should be liable if he

knowingly receives merchandise and charges for and carries it as extra baggage." See *Great Northern R. R.* v. *Shepherd*, 8 Exch. 30; *Sloman* v. *R. R.* 6 Hun, 546.

The baggage master who checked the package, so far as the plaintiff was concerned, had authority to do so. *Perley* v. *R. R. Co.* 65 N. Y. 374; see also *Sloman* v. *R. R. supra*; Field on Corp. § 193.

The action of the baggage master has been ratified by the defendant. Upon the authority of the agent, the defendant has raised no question either by the pleadings or at the time of taking evidence. If it had intended to repudiate the agent's authority, it should have been done long ago, and cannot be heard to deny such authority now. The defendant's silence has ratified the agent's act. 2 Kent's Com. 616; *Kelsey* v. *Bank*, 69 Penn. St. 429; *Bank* v. *Reed*, 1 W. & S. 101; *Ward* v. *Williams*, 26 Ill. 447; S. C. 79 Am. Dec. 385 and note.

The liability of this defendant is settled by the case of *Railroad* v. *Carrow*, 73 Ill. 348; S. C. 24 Am. Rep. 248, in which it is held that although the fraudulent checking of merchandise as baggage and its loss by the carrier does not make the latter liable as a common carrier but that he is liable as a bailee without reward or as a mandatary. That the defendant owes to the plaintiff the duty of ordinary care and is responsible to him for gross negligence is, I think, hardly to be controverted. Story on Bailments, § § 182, 182 a; *Coggs* v. *Bernard*, 2 Ld. Raym. 909.

Judge Story in his work on Bailments, § 278, lays down the rule in these words. "Where a demand of the thing loaned is made, the party must return it, or give some account how it is lost. If he shows a loss, the circumstances of which do not lead to any presumption of negligence on his part, there the burden of proof might perhaps, belong to the plaintiff to establish it." See also *Logan* v. *Mathews*, 6 Burr. R. 417; *Bush* v. *Miller*, 13 Barb. 482; the case of *Beardslee* v. *Richardson*, 11 Wend. 31; S. C. 25 Am. Dec. 598, would seem to be a leading authority upon this proposition.

"All persons who stand in a fiduciary relation to others are

bound to the observance of good faith and candor. . . . . The property is in the possession and under the oversight of the bailee whilst the bailor is at a distance. Under these circumstances good faith requires that if the property is returned in a damaged condition some account should be given of the time, place and manner of the injury." *Collins* v. *Bennett*, 46 N. Y. 490. And the rule is the same where the property is not returned at all. *Boies* v. *R. R.* 37 Conn. 272. See *Camden and Amboy R. R.* v. *Baldauf*, 16 Penn. St. 67; S. C. 55 Am. Dec. 481; *Clark* v. *Spence*, 10 Watts, 335; 2 Kent's Com. 587; *Mills* v. *Gilbreth*, 47 Maine, 320; 74 Am. Dec. 487; *Schouler on Bailments*, 25, note; *Schmidt* v. *Blood*, 9 Wend. 268; S. C. 24 Am. Dec. 143, and see a very elaborate note on page 153; *Funkhouse* v. *Wagner*, 62 Ill. 59.

Baker, Baker and Cornish, for the defendant, cited: *Blumantle* v. *Fitchburg R. R.* 127 Mass. 322; *Collins* v. *B. & M. R. R.* 10 Cush. 506; *Stimson* v. *Conn. River R. R.* 98 Mass. 83; *Connolly* v. *Warren*, 106 Mass. 146; *Wilson* v. *Grand Trunk Ry.* 56 Maine, 60; *Smith* v. *R. R.* 44 N. H. 330; *Macrow* v. *Great West. Ry.* L. R. 6 Q. B. 612; *Cahill* v. *L & N. W. Ry.* 10 C. B. (N. S.) 154; *Hutchings* v. *W. & A. R. R.* 25 Ga. 61 (71 Am. Dec. 156); *Alling* v. *B. & A. R. R.* 126 Mass. 121; *Mich. Cen. R. R.* v. *Carrow*, 73 Ill. 348 (24 Am. R. 248;) *B & B. Ry.* v. *Keys*, 9 H. L. Cas. 556; *Dunlap* v. *Steamboat Co.* 98 Mass. 371; *Haines* v. *Chicago &c. . R. R.* 29 Minn. 160 (43 Am. R. 199).

EMERY, J. The plaintiff's story is substantially as follows:

Just before the morning train was leaving for Augusta, he was at the Bangor station of the Maine Central Railroad (the defendant) company, with a large valise, around which an oil cloth cover was strapped with a common shawl strap. This valise contained no personal baggage for use upon a journey, but only merchandise for sale. He purchased of the company's ticket agent, a passage ticket for Augusta, and then, having his ticket in his hand, took the valise to the baggage master, and asked him to check it for Waterville, and received from him a

check therefor. He did not inform the baggage master of the contents of the valise, but held the passage ticket so it could be seen. The baggage master made no inquiries.

The plaintiff went to Augusta, on the same morning train, giving up his passage ticket to the conductor. A few days later he presented his baggage check to the baggage master of the railroad company, at Waterville, but his valise could not be found there. He has made no inquiries at Bangor, and has made no other effort to find his valise.

He has now brought this action against the railroad company, to recover the value of the merchandise, alleging as a cause of action, its obligation to transport the merchandise safely, and its failure to do so.

The plaintiff's purchase of a passage ticket entitled him to safe transportation of himself and his personal baggage on the same train. It entitled him to nothing else. The company was then under that obligation, but under no other obligation to him. There was created no obligation to transport the plaintiff's merchandise. *Wilson* v. *Grand Trunk Railway*, 56 Maine, 60.

By going as he did with his valise to the baggage master, and asking for a baggage check for Waterville, without stating the contents of the valise, he evidently meant the baggage master to believe that he was intending to take passage on the train then about to leave, and that the valise contained only personal baggage, such as he was entitled to take with him as a passenger. The check was given him in that belief. He thus committed a fraud upon the company, to obtain free transportation of his merchandise. His fraud, however, did not impose upon the company such an obligation. The baggage master received the valise upon the implied assurance of the plaintiff, that it contained personal baggage only. If that assurance was false, and the valise contained no personal baggage, neither the baggage master, nor the company were bound to forward it, though they had received it.

The plaintiff further testified however, that other baggage masters of the same company at other stations, knew the usual contents of the valise, and he now urges that the company thus

had notice of the contents, at the time it was received by the Bangor baggage master. Notice to other baggage masters at other times, and other places, of matters existing only at those times and places, cannot affect the company at this time and place, where its only eyes, and ears in this matter, were those of its Bangor baggage master. The other baggage masters had nothing to do with the Bangor station, and were not servants of the company there.

Of course, the baggage master having received the valise could not lawfully throw it away, destroy it, or convert it, and if he or any of the company's servants has done so, the company may be liable therefor. There is no such evidence in this case however. The valise may still be at Bangor waiting for the plaintiff to remove it, or if lost, may have been lost without fault of the company. This action is for failure to transport safely, and the evidence does not show any such obligation on the company.

Judgment for defendant.

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

SILAS A. SKILLIN *vs.* COLBY MOORE and dwelling house.

Piscataquis. Opinion December 20, 1887.

Liens. Buildings. Real estate.

Where the purchaser of land takes a bond for a deed with a right to enter into possession and erect a building thereon, the building when erected becomes a part of the realty and the legal title to it is in the owner of the land.

In order to enforce a lien upon such a building, for labor or materials used in its erection, the building and lot should be attached as real estate, and a return thereof made by the officer to the registry of deeds in the county.

ON report.

Assumpsit for labor on a dwelling house under contract with defendant, Moore, for which a lien was claimed on the dwelling. William Paine, the alleged owner of the dwelling, appeared in obedience to a mandate of the court and was made a party to the action.

The opinion states the facts.

J. F. Sprague, for plaintiff.

The proper certificate of the amount due the plaintiff was filed in the clerk's office of the town of Monson. This was a sound foundation for the action. *Ricker* v. *Joy*, 72 Maine, 107.

If the town clerk did not perfect his record in accordance with the facts he had the authority to amend it at a subsequent time. *Welles* v. *Battelle*, 11 Mass. 477; *Chamberlain* v. *Dover*, 13 Maine, 466; *Prince* v. *Skillin*, 71 Maine, 361; Spaulding's Practice, 325 and cases there cited.

The officer's return is conclusive in all actions except those in which the officer is a party. *Witherell* v. *Hughes*, 45 Maine, 62; *Darling* v. *Dodge*, 36 Maine, 370; *Dutton* v. *Simmons*, 65 Maine, 586; *Bott* v. *Burnell*, 11 Mass. 165; *Campbell* v. *Webster*, 15 Gray, 28.

In various ways Paine consented to this work. This makes the lien good against him although the contract was made with Colby Moore. *Morse* v. *Dole*, 73 Maine, 353.

This case is within the rule laid down in *Rines* v. *Bachelder*, 62 Maine, 95. The court here decided that one who has bargained for a parcel of real estate and failed to pay for it, having erected buildings thereon by the consent of the owners of the realty, such buildings are his personal property.

An agreement giving a right to remove a dwelling house which is put upon the land of others may be implied upon circumstances; 14 Allen, 124.

When the owner of land has given permission to another person to erect a building upon his land to be held and enjoyed as his personal property, if given before the building is erected, such building is not a part of the realty. *Gibbs* v. *Estey*, 15 Gray, 587, and cases there cited; 4 Mass. 514; 5 Pick. 487; 8 Pick. 402; 8 Cush. 190; 1 Gray, 578; 7 Allen, 187.

The case also shows that Paine made a written contract with Moore to build this house. When he did that he thereby empowered Moore to employ the necessary workmen to execute said contract, and the labor of such workmen was performed by the consent of Paine necessarily implied from the contract under which said house was built. *Parker* v. *Bell*, 7 Gray 429;

Hilton v. *Merrill*, 106 Mass. 530; *Worthen* v. *Cleaveland*, 129 Mass. 573; *Davis* v. *Humphrey*, 112 Mass. 314.

It seems that the land was sold by each and all the parties with a superadded agreement that buildings were to be erected. To sustain the positions that such dwelling house is personal property, I cite the following cases: *First Parish in Sudbury* v. *Jones*, 8 Cush. 190; *Wells* v. *Banister*, 4 Mass. 514; *Howard* v. *Fessenden*, 14 Allen, 128; *Russell* v. *Richards*, 10 Maine, 431; S. C. 11 Maine, 374; *Jewett* v. *Patridge*, 12 Maine, 250; *Osgood* v. *Howard*, 6 Maine, 452; *Rines* v. *Bachelder*, 62 Maine, 99; *Dustin* v. *Crosby*, 75 Maine, 75; *Davis* v. *Humphrey*, 112 Mass. 313; *Dame* v. *Dame*, 38 N. H. 429.

Henry Hudson, also, for the plaintiff.

By c. 140, Public Acts, 1876, § 28, c. 91, R. S., 1871, was amended so that the laborer has a lien unless the owner gives written notice that he will not be responsible.

The law of 1883, c. 91, § § 30 to 34 inclusive, of R. S. is essentially word for word with that of 1871 with the exception of the amendment of 1876.

Bouvier says, that "consent is either express or implied. Express when it is given *viva voce* or in writing; implied when it is manifested by signs, actions, or facts, or by inaction, or silence which raise a presumption that the consent has been given."

Consent may be implied from such knowledge and acts as appear in this case. *Morse* v. *Dole*, 73 Maine, 353; *Weeks* v. *Walcott*, 15 Gray, 54; *Hilton* v. *Merrill*, 106 Mass. 530; *Davis* v. *Humphrey*, 112 Mass. 313; *Worthen* v. *Cleaveland*, 129 Mass. 573.

Ephriam Flint, *A. G. Lebroke* and *W. E. Parsons*, for William Paine, cited: R. S., c. 91, § 31; *Morse* v. *Dole*, 73 Maine, 351; *Westgate* v. *Wixon*, 128 Mass. 306; *Lapham* v. *Norton*, 71 Maine, 88; *Hemenway* v. *Cutler*, 51 Maine, 407; *Poor* v. *Oakman*, 104 Mass. 309; *Hinkley* v. *Black*, 70 Maine, 473; *Dustin* v. *Crosby*, 75 Maine, 75; 1 Wash. R. P. c. 1; *Williams* v. *Amory*, 14 Mass. 30; *Wilson* v. *Buck-*

nam, 71 Maine, 547; *Crocker* v. *Pierce*, 31 Maine, 183; *Brett* v. *Thompson*, 46 Maine, 480.

LIBBEY, J. The contention between the plaintiff and William Paine, claimant of the property, is whether the plaintiff is entitled to a judgment against the house described in his writ for the lien claimed by him.

The evidence reported fully establishes the following facts: In March, 1884, one Chapin purchased the land known as the Cushman farm, in Monson, of Lucinda Cushman, paying her a part of the price agreed upon and taking a bond for a deed on the payment of the balance at times stipulated. It was understood between the parties that Chapin might take possession of the land, and sell it in lots for the erection of dwelling-houses. Afterwards in the spring of the same year, Chapin contracted with one Penny to sell him a part of the land and give him a deed when he made payment of the price as agreed. In the same season Penny, by parol agreement, sold a part of the land which he bought of Chapin to Paine, the claimant. It was understood between all the parties that the purchaser might build on the land as if it was his own; but there was no agreement or understanding between them that the buildings should be the personal property of the builder and might be moved off by him. It was the ordinary case of contract for the purchase of land with a bond for a deed the purchaser to have the right to enter into possession at once, and erect buildings.

In such case the buildings when erected and attached to the land become a part of the realty, and the legal title to them is in the owner of the land. *Hemenway* v. *Cutler*, 51 Maine, 407; *Lapham* v. *Norton*, 71 Maine, 83.

The plaintiff worked on the house for the defendant, Moore, who built it by contract for Paine, in the fall of 1884.

December 12, 1884, Chapin paid the balance of the purchase money and took a deed from Mrs. Cushman, and December 13, 1884, Chapin conveyed to Penny, who conveyed to Paine June 17, 1885.

The house was real estate and the plaintiff so claimed it when

he filed his lien claim, January 1, 1885, in the office of the town clerk. After describing the buildings in language sufficient, if in a deed, to convey the house and land on which it stood, he says: "For which I claim a lien on said buildings and the land on which the same are situated."

If the plaintiff had a lien for his work as he claims, as against Paine, it was on the house and lot, and to preserve and enforce it, the house and lot should have been attached as real estate; but the officer did not return his attachment to the registry of deeds in the county, but returned it to the town clerk of Monson, as an attachment of personal property. For this reason the plaintiff cannot have judgment for his lien, and as this is fatal it is unnecessary to consider the other grounds of defence.

Judgment against Moore for the sum claimed. Judgment for lien on the house denied.

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

WILLIAM D. SNOW *vs.* HENRY M. FOSTER.

Somerset. Opinion December 22, 1887.

Insolvent law. Discharge. Promissory note. Payment.

An action on a promissory note, dated subsequent to the passage of the insolvent law, is barred by a discharge in insolvency, though it was given to take up another note dated prior to the enactment of that law, when there is nothing in the case to rebut the presumption that the old note was paid by the new note.

That presumption is made conclusive by endorsing the new note to a third party in whose name the action is brought.

ON report.

The opinion states the case and material facts.

Danforth and Gould, for plaintiff.

The substitution of one simple contract for another is not payment; the same debt continues in a different form. *Frink* v. *Branch*, 16 Conn. 275.

"Payment is the transfer of money from one person to another." Rapalja and Lawrence, Law Dict. Vol. 2. "Payment."

The taking of this note acted to carry forward the day of payment and ought not to deprive the holder of the note of his remedy, for if the holder's right to maintain this action was taken away by the debtor's obtaining a discharge in insolvency under an insolvent law passed after the debt was contracted, it would be contrary to the federal constitution,— it would impair the obligation of the contract. Constitution of U. S. Art. 1, § 10.

The courts of this state have already held that "the general doctrine is that the taking of a note is to be regarded as payment only when the security of the creditor is not thereby impaired." *Paine* v. *Dwinel*, 53 Maine, 54.

In *Ross* v. *Tozier*, 78 Maine, 312, it is decided that a judgment founded upon a contract existing at the time of the passage of the insolvent law is not barred by a discharge under said law.

This case seems to us to be similar and that the law in this case should be the same, for here we have a note existing in August, 1876, prior to the passage of the insolvent law; instead of its passing into a judgment and putting the defendant to needless costs and vexation, a new note is given January 18, 1880, to carry forward the time of payment of said debt. The amount for which the new note is given is arrived at by the same process as though we were ascertaining the amount for which judgment should be rendered; the one act or the other prolongs the life of the debt.

Walton and Walton, for the defendant, cited: The old note is paid. *Strang* v. *Hirst*, 61 Maine, 14; *Paine* v. *Dwinel*, 53 Maine, 52; *Thacher* v. *Dinsmore*, 5 Mass. 299; *Melledge* v. *Boston Iron Co.* 5 Cush. 169; Parsons, Notes and Bills, (2d ed.) 161, 162; *Coburn* v. *Kerswell*, 35 Maine, 126.

Note dated since the enactment of the insolvency law is barred. *Rindge* v. *Breck*, 10 Cush.43; *Wyman* v. *Fabens*, 111 Mass. 77; *Ross* v. *Tozier*, 78 Maine, 312, not in point.

DANFORTH, J. This is an action upon a negotiable promissory note payable to William B. Snow, administrator, and by him, as the case shows, indorsed and delivered to the plaintiff.

The defence is a discharge in insolvency which is admitted to

have been duly obtained. To this it is replied that the note in suit was given in renewal of a prior note bearing date before the passage of the insolvent law, and is not, therefore, affected by the discharge. The note in suit comes within the provisions of the law; the prior one does not. Which is to prevail? It is evident that if the prior note was discharged by the later, the defence is made out.

It is now too well settled in this state, that taking a negotiable note in consideration of an existing debt is a presumptive payment of that debt, to require the citation of authorities. This presumption may be rebutted; for the parties may make such a contract in regard to it as they see fit. In this case the facts agreed upon show nothing tending to rebut that presumption. There was no collateral security for the first note. That had only the personal liability of the defendant; the last note had the same. The existence of the insolvent law would not affect any security, whatever influence it might have upon the note. On the other hand, the facts tend strongly to confirm the presumption. When the new note was given the old one was delivered to the maker, which, unexplained, must be considered a cancellation of it. But farther, and if possible more conclusive than this, the payee has indorsed and delivered the last note to the plaintiff, thus treating it as a distinct and subsisting contract. The two cannot stand together as separate contracts. The parties have treated the first as discharged, and the last as the only one in force. The plaintiff certainly can have no claim for exemption from the insolvent law. He shows no connection with the prior debt. His rights began with the purchase of the note in suit, and he can only claim such rights as that gives him. His contract was made under the insolvent law and must be subject to its provisions.

Judgment for defendant.

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

SEWARD DILL *vs.* DANIEL WILBUR and trustee.

Franklin. Opinion December 22, 1887.

Trustee process. Practice. R. S., c. 86, § 30.

Where allegations under § 30, c. 86, R. S., are not filed till after the court has passed upon the disclosure, and adjudged the trustee chargeable, they are not seasonably presented.

It is then in the discretion of the court whether it will allow the entry charging the trustee to be stricken off and open up the case anew for examination and consideration.

ON exceptions.

The case and material facts are stated in the opinion.

F. E. Timberlake, for the plaintiff, cited: *Tunks* v. *Grover*, 57 Maine, 589; *Dalton* v. *Dalton*, 48 Maine, 43; *Parker* v. *Wright*, 66 Maine, 394; *Jordan* v. *Harmon*, 73 Maine, 259; *Larrabee* v. *Knight*, 69 Maine, 320; R. S., c. 86, § § 10, 11, 32.

B. Emery Pratt, for defendant.

R. S., c. 86 § 30, provides that, "The answers and statements sworn to by a trustee, shall be deemed true, in deciding how far he is chargeable, until the contrary is proved, but the plaintiff, defendant, and trustee, may allege and prove any facts material in deciding that question."

At the time *Tunks* v. *Grover*, 57 Maine, 588 was decided, defendant did not have this right but by the laws of 1862, c. 120, he acquired it.

Compare R. S., 1857, c. 86, § 29, with R. S., 1883, c. 86, § 30; the decision in the 57 Maine, already cited was under the statute of 1857, § 29.

FOSTER, J. In this case the trustee disclosed that he owed the principal defendant nineteen dollars and fifty cents for lumber purchased of him. Upon this disclosure the court adjudged the trustee chargeable for said amount.

After such adjudication the principal defendant by his attorney appeared and filed allegations, (R. S., c. 86, § 30,) therein claiming that the lumber when sold was the property of another person, and that in the sale of it to the trustee he was acting as agent of such person; that the facts alleged should be heard in connection with the disclosure of the trustee, and that the entry of such adjudication charging the trustee should be stricken from the docket.

The court refused to entertain the allegations or change the entry upon the docket.

To this refusal the defendant filed exceptions. The exceptions can not be sustained. The allegations were not filed till after the court had passed upon the disclosure and adjudged the trustee chargeable for the amount in his hands. They were made too late. The trustee had already been charged. *Larrabee* v. *Knight*, 69 Maine, 322.

It was in the discretion of the court whether it would allow the entry charging the trustee to be stricken off and open up the case anew for examination and consideration. It did not see fit so to do. Exceptions will not lie to the proper exercise of such discretion.

A party invoking the right of alleging and proving facts material in deciding how far a trustee is chargeable, aside from the answers and statements sworn to by the trustee, must move before the adjudication of the court upon the trustee's disclosure, or submit to the discretion of the court in allowing or denying a reopening of the case, if no movement is made in that direction till after such adjudication. *Vigilantibus, non dormientibus, jura subveniunt.*

Exceptions overruled.

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

HENRY A. DEXTER *vs.* CANTON TOLL-BRIDGE COMPANY.

Kennebec. Opinion December 27, 1887.

Toll-bridges. Weight of load, driver's weight included. R. S., c. 50, § 3.

The statute having prescribed the weight which may lawfully be transported across a toll-bridge, if it appears that the plaintiff's load exceeded such weight, and thereby the bridge is broken down and injuries are sustained by him, he is prohibited from recovering for such injuries.

The statute prohibition applies to "any loaded cart, wagon or other carriage, the weight whereof exceeds forty-five hundred pounds, exclusive of the *team* and *carriage*;" *Held*, the driver, though seated upon the carriage, is not a part of such team or carriage, and not being included in the statute exception, his weight must be taken into consideration in determining the weight of the load.

ON exceptions and motion to set aside the verdict.

The case and material facts are stated in the opinion.

L. T. Carleton, for plaintiff.

The verdict will not be set aside. 22 Maine, 133; 28 Maine, 477; 40 Maine, 28; 36 Maine, 252. In 43 Maine, 484, the court say without citing any authorities, "We think the jury must have misapprehended the evidence or disregarded their duty." Another case in 50 Maine, 222, for injuries on a road, $5,525.00, where no limbs were broken, was awarded, the court without citing authorities say, "We are forced to the conviction that the weight of evidence is clearly against the plaintiff, and for this cause a new trial should be granted."

Again in 62 Maine, 20, Judge WALTON in drawing the opinion said, "When a verdict is so clearly wrong as to satisfy the court that the jury must have acted corruptly or mistakenly it will be set aside. But the court will not infer corruption or mistake simply because the verdict is contrary to what the court deems a mere preponderance of evidence."

Again in 62 Maine, 93, Judge WALTON in drawing the opinion said, "A verdict which has no other support than the testimony of a deeply interested party to the suit, in opposition to the positive testimony of five intelligent unimpeached and disin-

terested witnesses must be regarded as clearly manifestly against the weight of evidence."

Again in 69 Maine, page 208, the court say it is evident the verdict is so manifestly against the weight of evidence that it ought to be set aside. See 49 Maine, 427; 47 Maine, 9; 62 Maine, 128 and 473; 59 Maine, 418; 58 Maine, 454; 36 Maine, 252; 37 Maine, 221; 40 Maine, 217; 53 Maine, 171; 42 Maine, 362; 65 Maine, 285; 69 Maine, 159. In 75 Maine, 477, the court say, "One jury might arrive at one result and another jury at another result, and yet both act honestly, the court has no right to set aside the verdict and put the parties to the trouble and expense of another trial." See further, 78 Maine, 569; 76 Maine, 282; *State* v. *Inhab. of Madison*, 59 Maine, 538.

It must be conceded that the legislature contemplated that a driver should accompany the team. The language of the statute in c. 50, § 3, "Or drives or transports over it any loaded cart, &c., the weight whereof exceeds 4,500 pounds, exclusive of the team and carriage, and thereby breaks it down," &c. And it would make no difference whether the driver was on the load, or walking on the bridge, indeed in the latter case the danger would be increased.

John P. Swasey, for the defendant, cited: R. S., c. 50, § 3; Shear. & Red. Negligence, 39, 251, 369, 418; *Orcutt* v. *Kittery Point Bridge Co.* 53 Maine, 500; *Bigelow* v. *Reed*, 51 Maine, 325; *Murphy* v. *Deane*, 101 Mass. 455; *Hinckley* v. *Cape Cod R. R.* 120 Mass. 262; *Hubbard* v. *Concord*, 35 N. H. 52; *Howe* v. *Castleton*, 25 Vt. 162; 46 N. H. 521.

FOSTER, J. The plaintiff brought suit against the defendant corporation to recover damages for injuries to his person and property sustained by reason of the breaking down of the center span of the defendant's toll bridge located across the Androscoggin river in the town of Canton.

At the time of this accident the plaintiff was driving across the bridge with a load of cord-wood, upon which he was seated, drawn by two horses. The bridge gave way, precipitating the plaintiff, together with the load and horses upon the ice below,

and inflicting severe injuries to the person and property of the plaintiff. He has brought this suit to recover the damages sustained, basing his action upon the alleged negligence of the corporation in the construction and repair of the bridge.

The case was tried in the Superior court for Kennebec county and the jury rendered a verdict for the plaintiff for $2,745.33 damages, and the defendant brings the case to this court on motion and exceptions.

1. One of the grounds of defence insisted upon at the trial, and now urged upon the attention of the court under the motion, is in reference to the weight of the load which was being transported over the bridge at the time it broke down.

By R. S., c. 50, § 3, it is provided in reference to toll bridges more than fifty feet in length from one abutment, pier or trestle part to another, that if any person, without the consent of the toll gatherer or agent of the corporation owning it, "drives or transports over it any loaded cart, wagon or other carriage, the weight whereof exceeds forty-five hundred pounds, exclusive of the team and carriage, and thereby breaks it down or injures it, neither he nor the owner of any property under his charge shall recover any damages against such corporation for his loss or injury."

The bridge in question is one to which the forgoing provisions apply, and no claim is made that any consent was asked or obtained to transport over it any load exceeding in weight that specified by statute.

It therefore became material in the trial of the case to determine whether the plaintiff, at the time the injuries were received, was violating the provisions of statute in relation to the weight of the load which was being transported across the bridge. The statute having prescribed the weight which might lawfully be transported across it, if the plaintiff's load exceeded that he is prohibited from recovering, however severe the injuries which he may have received, or however great the damages he may have sustained.

The testimony from both sides shows that the plaintiff's load was composed of poplar, hemlock, white birch, beech and white

maple. For the plaintiff it is claimed that the load contained one cord and seven-eighths, and that its weight could not have exceeded 4,380 pounds. On the other hand the defence maintains that there were more than two cords upon the sled, and that its weight greatly exceeded 4,500 pounds.

We are aware of the well established rule that it is the province of the jury to weigh conflicting testimony, and that the court will be slow in disturbing a verdict unless there is sufficient to make it appear that the verdict was the result of improper bias, or prejudice; or clearly against the weight of evidence (*Pollard* v. *Grand Trunk Railway Co.* 62 Maine, 93). Whenever it clearly appears that a verdict has thus been improperly rendered, it is the duty of the court in the furtherance of justice to set such verdict aside and grant a new trial.

It becomes unnecessary in this opinion to enter upon a detail of the evidence, or to refer particularly to the testimony of witnesses bearing upon the question of the weight of the plaintiff's load. We have given the case a thorough and careful examination, and from all the evidence upon this point, and one which appears to have been material in the decision of the case, —we are forced to the conviction that the weight of evidence so strongly preponderates against the plaintiff as to justify the the court in setting the verdict aside. For this cause the motion must be sustained.

2. The result would be the same were we to consider the case upon the exceptions alone.

The jury were instructed in effect that the weight of the driver or person in charge of the team was not to be taken into account in ascertaining the weight of the load. This we think was error, and by which the excepting party may properly claim to have been aggrieved.

In actions like this the statute prohibition applies to "any loaded cart, wagon or other carriage, the weight whereof exceeds forty-five hundred pounds, exclusive of the *team* and *carriage*."

It is an established rule in the construction and exposition of statutes that their language is to be understood in its plain,

obvious and ordinary signification, particularly if the words are of common use.

Applying this rule to the statute before us, we see no reason why we should seek to ascertain the intention of the lawgiver by going outside of the language used, or by engrafting any additional exception upon what expressly and plainly appears.

The very words of exception afford the strongest light by which we are enabled to read the legislative intent. No other words are embraced in this exception than "team and carriage." The driver or person in charge is not a part of either. Webster's Dic. Title, "Team," "Carriage." See R. S., c. 19, §§ 1 to 10 inclusive. The maxim, that the express mention of one thing implies the exclusion of another may be appropriately applied here. If it had been intended that the driver as well as the "team and carriage" was to be excluded in ascertaining the weight of the load that might lawfully be transported across such bridge, it would have been an easy matter for the legislature to have expressed such intention in language as clear as it has already done with reference to that which is excluded in express terms. Not having done so, we think we shall not be straining the construction by coming to the conclusion that it intended just what it said.

In the case of *Howe* v. *Castleton*, 25 Vt. 162, the court, from the peculiar phraseology of the statute under consideration in that case, held that the weight of the carriage, as also of the driver or person in charge of the load, should not be taken into account in ascertaining its weight. That decision was based upon a statute the phraseology of which differed essentially from the one now before us.

The entry must therefore be,

Motion and exceptions sustained.
New trial granted.

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

HARVEY LADD *vs.* JOHN PUTNAM.

Kennebec. Opinion December 24, 1887.

Mortgage, action on. Evidence. Practice. R. S., c. 90, § § 8, 9.

At the trial of an action upon a mortgage given to secure a portion of the purchase money of a farm, before the presiding justice with right of exception, the defendant offered to prove that the plaintiff in selling the farm misrepresented the boundary lines, the size, and amount of annual products of the farm, and claimed to have the damages, sustained by the false representations, allowed on the mortgage debt. The evidence was excluded. *Held*, error.

The statute (R. S., c. 90, § § 8, 9,) contemplates that in proceedings upon a writ of entry brought for the purpose of foreclosing a mortgage, there may be two separate and distinct judgments; the one based upon the title put in issue by the pleadings; the other as to the amount due. The former may be the result of a verdict; the latter the work of the court.

In such action the same defences may be made, except the statute of limitations, which might be made in an action upon the note, or other evidence of debt, secured by the mortgage. If the defence goes to the whole debt, it may be tried upon the main issue. If it is partial only, then it must necessarily be heard by the court upon the motion for conditional judgment.

ON exceptions.

The opinion states the case and material facts.

J. H. Potter, for plaintiff.

The plaintiff is entitled to judgment if there is anything due on the mortgage and unless the entire condition of the mortgage has been performed. *Mason* v. *Mason*, 67 Maine, 546.

The partial failure in the consideration of a note is no defence when the damages sought to be set off against the note are unliquidated. *Day* v. *Nix*, 9 Moore, 159; *Greenleaf* v. *Cook*, 2 Wheat, 13.

The partial failure of the title to the land is no defence to an action on the notes given for the purchase money or to an action on the mortgage given to secure the same. The defendant must resort to the covenants of warranty in his deed. *Lloyd* v. *Jewell*, 1 Greenl. 352; *Wrinkle* v. *Tyler*, 15 Martin, (La.) 111.

The defendant cannot take advantage of the alleged fraud at

this stage of the case. He should have offered to rescind within a reasonable time. *Lamerson* v. *Marvin*, 8 Barb. N. Y. 9; *McAllister* v. *Reab*, 4 Wend. 483; 8 *Id.* 109; *Curtis* v. *Hannay*, 3 Esp. R. 82; *Burton* v. *Stewart*, 3 Wend. 236.

When failure or want of consideration may be set up in bar of recovery on a sealed instrument, the purchaser of land is not allowed to allege failure in whole or in part while he is in the undisturbed possession of the land. 7 Martin, R. (La.) 223; 15 *Id.* 111; 11 *Id.* 235; 1 Bailey's S. C. Rep. 217.

L. T. Carleton, for the defendant.

FOSTER, J. Plaintiff conveyed a farm to defendant, the consideration therefor being two thousand dollars. Four hundred dollars were paid down. The defendant gave his notes for the balance, secured by mortgage upon the same premises.

This action was brought to foreclose the mortgage, and was referred to the presiding justice with the right of exception.

At the hearing the defendant offered to prove that the plaintiff when showing the defendant the premises pointed out to him as the north line, a line more than fifteen rods north of the true line, making a difference of some fifteen acres which the defendant would have got if the line had been where the plaintiff pointed it out; and that during the negotiations for the purchase the plaintiff took the defendant into his barn and showed him the hay, representing that all the hay then in the barn was cut from the premises the previous year, whereas in fact it had been accumulating there for years, and only ten or fifteen tons of the hay then in the barn were cut from the premises as represented, and that the defendant was damaged by means of these representations; and asked to be allowed to go into these matters and have the damages suffered by him allowed in reduction of whatever might be found due on the mortgage.

The court excluded the evidence offered, ordered judgment for the plaintiff, and on motion, conditional judgment as of mortgage.

From the case as presented, it may properly be inferred that the defendant did not understand or intend his defence to strike deep enough to defeat the plaintiff's action. Taking the whole

case as presented by the pleadings and the evidence offered, and viewing it in the light of the alleged fraud, and the claim of the defendant that the damages should be allowed on whatever might be found due on the mortgage, it is evident that he understood that there was something due upon the mortgage and that the plaintiff was entitled to judgment. The contract had never been rescinded; nor did the defendant claim that the land was not worth more than the sum paid down at the time of the purchase.

The evidence was not offered for the purpose of defeating the action by showing that even with the damage allowed nothing would be due under the mortgage, and was not admissible upon that branch of the case; yet in adjudging the amount due under the motion for the conditional judgment we think the evidence should have been received, and therein the court erred in excluding it.

The statute contemplates that in proceedings like this there may be two separate and distinct judgments — the one as based upon the title put in issue by the pleadings, and the other as to the amount. The former may be the result of a verdict, or, if referred to the court as in the present case, the judgment of the court in the place of the jury — the latter, under our statutes, (R. S., c. 90, § § 8, 9,) the work of the court. These provisions involve the necessity, when raised by the pleadings, of inquiring not only into the title, but also the existence and amount of the debt claimed to be due, in order to a proper entry of the conditional judgment. It may appear, that the debt has been wholly paid, and that nothing is due,— in which case no conditional judgment can be entered. Or it may appear that something is due, or that the conditions have not been fully performed, and in that case the plaintiff is entitled to judgment, and upon motion of either party, to the conditional judgment for such amount as the court may adjudge to be due. These judgments being separate and distinct, testimony may be admissible as pertinent to the one which might not be as to the other.

It may now be regarded as settled law that in an action of this kind to foreclose a mortgage the same defences may be made,

except the statute of limitations, which might be made in an action upon the note or other evidence of debt secured by the mortgage. *Vinton* v. *King*, 4 Allen, 562; *Davis* v. *Bean*, 114 Mass. 361; *Northy* v. *Northy*, 45 N. H. 141; 2 Jones on Mort. § 1296.

In *Wearse* v. *Pierce*, 24 Pick. 141, which was a writ of entry upon a mortgage, the defence set up was want of consideration for the notes secured by the mortgage, and the issue was tried by the jury and the defence prevailed. In that case the court held that inasmuch as the jury found that the notes were given without consideration there was nothing due on the mortgage upon which to found a conditional judgment, and that this amounted to a complete defence, thereby defeating the action.

In *Freeland* v. *Freeland*, 102 Mass. 475, the defence of a partial failure only was held appropriate upon a hearing on a motion for conditional judgment.

So in *Minot* v. *Sawyer*, 8 Allen, 78, it was held that an action of this kind opened any proper matter of defence in whole or in part to the validity of the note secured by the mortgage.

"We see no more reason," say the court in *Davis* v. *Bean*, "why any defence which relates to the validity of the debt, or to the consideration of the notes secured by a mortgage, should not be admitted to defeat or limit the right of the mortgagee to enforce his claim against the land of the mortgagor, as well as when he seeks to enforce it against the mortgagor personally. If the defence goes to the whole debt, it may be tried upon the main issue. If it is partial only, then it must necessarily be heard with the motion for conditional judgment."

In the case at bar the action is upon a mortgage made to secure notes given for the purchase of the very land covered by the mortgage. The sale of the land and the mortgage back were one transaction, so that if suit had been brought upon the notes, the evidence offered would have been admissible in mitigation of damages. Had action been brought by the plaintiff upon the notes instead of this suit upon the mortgage, the defendant might defend against the notes to the extent of the damages sustained by the plaintiff's fraud. *Rand* v. *Webber*, 64 Maine,

193; *Herbert* v. *Ford*, 29 Maine, 546; *Perley* v. *Balch*, 23 Pick. 283; *Dorr* v. *Fisher*, 1 Cush. 275.

It was upon this principle that in *Hammatt* v. *Emerson*, 27 Maine, 308, the court held that a partial failure of consideration for a note, given in payment for land sold, not arising out of a failure of title, but out of fraudulent representations respecting the quantity of timber trees then upon it, might be given in evidence in defence in a suit upon such note, while it remained in the hands of the seller, or of one having no superior rights.

Although the case is somewhat imperfectly made up, and does not show in express terms the amount for which the order for conditional judgment was made; yet it may fairly be understood to embrace the amount of the mortgage debt unaffected by anything offered in defence. The testimony which was offered seems to have been understood by counsel as excluded for all purposes, although admissible under the motion for conditional judgment. Lest an injustice be done to the party offering it the court are of opinion that the entry should be,

Exceptions sustained.

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

FRANCIS H. PEABODY and others *vs.* JAMES MAGUIRE and another; CHASE, LEAVITT AND COMPANY, trustees; and J. O. LAFRENIERE and DESROSIERS AND PAILLE, claimants.

Cumberland. Opinion December 27, 1887.

Trustee process. Attachment. Goods in bonded warehouse. Sales. Conditional sales. Waiver. Conflict of laws. Amendment of trustee writ. Practice.

Property in bond for storage in the United States custom house, is not subject to actual attachment by a state officer, although it is in the constructive possession and control of the consignee.

While thus situated it may be subject to trustee process.

A sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title till performance of the condition, and if the condition is not fulfilled, the vendor may repossess himself of the goods, not only as against the vendee, but also against his creditors.

So if the property is to be paid for by cash or note on delivery, the payment of the money or giving of the note is a condition precedent to the passing of the title; and until that is done, or waived, no title passes.

Where delivery and payment are to be simultaneous, and the goods are delivered with the expectation that the price is to be paid immediately, which is not done, the seller is entitled to put an end to the contract and reclaim the goods.

But although a sale is conditional, the vendor may waive the condition of the sale, and by so doing pass the title.

When the condition is shown to have been waived the sale becomes absolute, and vests the title in the purchaser.

Even in a conditional sale the mere fact of delivery, without performance by the purchaser of the conditions of sale, and without anything being said about the condition, although it may afford presumptive evidence of an absolute delivery and of a waiver of the condition, yet it may be controlled and explained, and is not necessarily an absolute delivery, or a waiver of the condition.

This is a question of fact to be ascertained from the evidence, and, like any other fact, may be proved either directly or inferentially from circumstances.

The law of the country where the contract is made, is the law for its interpretation and construction, although its performance may be demanded in a foreign jurisdiction.

Where no foreign law is proved which shows that the rights of the parties are to be affected in any manner different from the law of the country where the remedy is sought, the court will assume that their rights are to be determined in accordance with those laws existing in the country where the remedy is sought.

When a writ is sued out against one only of two members of a copartnership, and served upon the alleged trustees of said copartnership, no valid attachment is created against the partnership property in the hands of the alleged trustees.

As soon, however, as such writ is amended by leave of court, by joining the other partner as a defendant, the alleged trustees still continuing to hold the property, then all the necessary parties being before the court, and no rights of third parties having intervened, the previous attachment becomes valid as to the property in the hands and possession of the said trustees.

As against a claimant who appears and claims the property in the hands of the trustee, the plaintiff, if he prevails in holding the property, is entitled to costs from the time such claimant appears claiming the property in dispute.

On report from the superior court.

The case is stated in the opinion.

The following are the laws of Canada referred to in the opinion which were introduced as evidence in the case:

(Copies of Laws.)

[Seal.]

Article 1998 of the Civil Code of Lower Canada in force since the first of August, 1866. "The unpaid vendor of a thing has two privileged rights:

1st. A right to revendicate it.

2nd. A right of preference upon its price.

In the case of insolvent traders, these rights must be exercised within fifteen days after the sale."

It was held in the superior court at Montreal, by Justice Rainville, in the case of *Thibandeau and als.* v. *Mills and al.* on the twenty-eighth day of February, 1883, as follows:

"Considering that under the terms of Art. 1998 of the Civil Code of L. C., the vendor of a thing unpaid may exercise two privileges: 1st, that of its revendication; 2nd, that of preference on its price.

"Considering that under the terms of Art. 2000, the unpaid vendor, if he has lost his right to revendicate, or if he has sold with a term, keeps his privilege on the product of a thing against all creditors except the lessor and the bailee.

"Considering that it is proved that the goods in question at the time of their return to the vendor by the vendee, were in the same state as at the time of their delivery, separated from all the other goods of the said Chaput and Masse, entire and bound with ropes, and that there is no doubt as to their identity.

"Considering that under the terms of the Art. 1543, C. C., the vendor of a moveable property has a right to the cancelling of the sale, for default of payment of the price, so long as the thing sold remains in the hands of the buyer.

"Considering that the parties have without fraud cancelled the said agreement or sale, by mutual consent, and that the said Chaput and Masse have executed beforehand what the law would have obliged them to do, and that the plaintiffs did not suffer any prejudice from that transaction in so far as the effect of the exercise of the privilege of said Mills and Hutchinson, by one way or another, would have been the same.

"Considering that under the terms of Art. 1998, the vendor, in

cases of insolvency under an insolvent law, *faillite*, can only exercise his privileges within fifteen days after the sale; that such provision applies only to cases of insolvency under an insolvent law, *faillite*, and not in cases of insolvency under common law, *insolvabilite*, the said Chaput and Masse are not insolvent traders in so far as there is no longer a law permitting to put a person in insolvency, and that in consequence the unpaid vendor is always in time to exercise his right of preference."

Maintains the said pleas, etc., etc.

It was held by Mr. Justice Rainville, sitting in the superior court at Montreal, on September 7th, 1877, in the case of Thompson and Whitehead, insolvents, Thos. Darling, assignee, and W. Greenwood, petitioner, as follows, according to the report of the case, 9 R. L. p. 379:

"The petitioner, merchant of Leeds, England, presented a petition in order to recover possession of goods sold to the insolvents and sent by the petitioner to the buyers' agent at Liverpool and expedited by such agent to Montreal, where they were stored in the custom house; in the meantime the buyers had become insolvent.

"The assignee opposed the petition on the ground that the conveyance of the goods had ceased by their delivery to the buyers' agent at Liverpool and by their arrival at Montreal.

"Many authorities were cited on both sides, among others sec. 82 of the Insolvent Act of 1875, which enacts that: 'In the preparation of the dividend sheet, due regard shall be had of the rank and privilege of every creditor; which rank and privilege, upon whatever they may legally be founded, shall not be disturbed by the provisions of this act except in the province of Quebec, where the privilege of the unpaid vendor shall cease from the delivery of the goods sold.'

"His honor granted the petition on the principle that the delivery of goods according to Art. 1543 of the C. C. means their delivery in the store and in the hands of the insolvents, and not their deposit at the custom house, and that the vendor of moveable effects has a right to revendicate goods unpaid."

Art. 1543 is in the following terms: "In the sale of moveable

things, the right of dissolution by reason of the non-payment of the price can only be exercised while the thing sold remains in the possession of the buyer, without prejudice to the seller's right of revendication, as provided in the title of 'Privileges and Hypothecs.'"

It was held in the superior court at Montreal, *re Hawsworth* v. *Elliott*, X. L. C. Jurist, 197: "That the delivery contemplated by the 12th section of the Insolvent Act of 1864, is an actual, complete and final one, and consequently the delivery of goods to a purchaser's shipping agent in England, for transmission to purchaser in Canada, and the entering of the goods in bond here, by the purchaser's custom house broker, is not such a delivery as will defeat the vendor's remedy, under the 176th and 177th articles of the Custom of Paris."

It was held in the superior court at Montreal, *re The Bank of Toronto* v. *Hingston*, XII L. C. Jurist, 216, "That the expression 'fifteen days after the sale' in the 1998th article of the Civil Code of Lower Canada, means after the sale and delivery. The delivery of goods sold in England to a shipping agent there, employed by the vendees, who forwards them to the vendees carrying on business in Montreal, is not such a delivery as is contemplated by the 12th section of the Insolvent Act of 1864, and such goods may be legally revendicated by the unpaid vendors in the hands of the Grand Trunk Railway here, although more than fifteen days elapsed since each delivery to the shipping agent."

We, Prothonotary of the superior court of the district of Montreal, hereby certify that the preceding pages contain faithful transcript of the Civil Code in force in this province and a faithful translation of judgments and reports in the way above indicated.

[Stamp. Seal.] Geo. H. Kernick,
Deputy Proth'y Superior Court,
District of Montreal.

J. W. Spaulding and Enoch Knight, (*I. W. Dyer* with them) for plaintiffs.

Trustee process was the proper remedy since the lumber could not be come at to be attached. *Harris* v. *Dennie*, 3 Pet. 292; *Conard* v. *Pacific Ins. Co.* 6 Pet. 262.

There was a waiver of the conditions, if it was a conditional sale. Usher, Sales of Personal Property, § 204; *Carleton* v. *Sumner*, 4 Pick. 516; *Smith* v. *Dennie*, 6 Pick. 262; *Fairbank* v. *Phelps*, 22 Pick. 539; *Dresser M'f'g Co.* v. *Waterston*, 3 Met. 17; *Whitney* v. *Eaton*, 15 Gray, 227; *Farlow* v. *Ellis*, 15 Gray, 231; *Scudder* v. *Bradbury*, 106 Mass. 427; *Upton* v. *Sturbridge Mills*, 111 Mass. 446; *Goodwin* v. *Boston & L. R. R. Co.* 111 Mass. 489; *Haskins* v. *Warren*, 115 Mass. 533; *Freeman* v. *Nichols*, 116 Mass. 309; Benjamin, Sales, § § 677, note f, 566; see *Heller* v. *Elliot*, 16 Reporter, 276 (N. J.); *Chapman* v. *Lathrop*, 6 Cowan, 110 (8 N. Y. C. L. Law ed. 849, see note); *Lupin* v. *Marie*, 6 Wend. 77 (10 N. Y. C. L. Law ed. 1025); *Stone* v. *Perry*, 60 Maine, 49; *Seed* v. *Lord*, 66 Maine, 580; Benjamin, Sales, § 594; *Acker* v. *Campbell*, 23 Wend. 372 (14 N. Y. C. L. Law ed. 402).

The laws of Canada do not apply to this case. Daniel, Neg. Inst. § 866; 1 Burge, Com. 5; *Bartley* v. *Hodge*, 1 Best & Smith, 375; *Hawkins* v. *Barney*, 5 Pet. 457; Story, Con. of Laws, § § 414, 557, 558, 575, 576, 581, 571; *Bulger* v. *Roche*, 11 Pick. 36; 8 Pet. 361; *Potter* v. *Brown*, 5 East, 124; 2 Kent's Com. 461; 2 Burge, Com. 778; *Fox* v. *Adams*, 5 Maine, 245; 11 Maine, 41; 71 Maine, 514; *Boston Iron Co.* v. *Boston Loc. Works*, 51 Maine, 585; *May* v. *First Nat. Bank of Attleboro*, 7 Western Rep. 681; *Heyer* v. *Alexander*, 108 Ill. 385; *Rhawn* v. *Pearce*, 110 Ill. 350; *Hibernia Nat. Bank* v. *Lacombe*, 84 N. Y. 367; *Brown* v. *Knox*, 6 Mo. 306; *Upton* v. *Hubbard*, 28 Conn. 275; *Paine* v. *Lester*, 44 Conn. 196; *Warner* v. *Jaffray*, 96 N. Y. 248; *Kidder* v. *Tufts*, 48 N. H. 121; *Davis* v. *Pierce*, 7 Minn. 13; *McFarland* v. *Butler*, 8 Minn. 116; *Jackson* v. *Buttler*, 8 Minn. 117.

Holmes and Payson, for the claimants.

"Where payment and delivery are agreed to be simultaneous, and the payment is omitted, evaded, or refused by the purchaser on getting possession of the goods, the seller may at once reclaim them. No title passes till the terms of the sale have been complied with. Where nothing is said about payment at the time of the purchase, the law presumes that the sale is for cash, and in such case payment and delivery are concurrent acts.

"When goods are sold on time, and delivered under an agreement that they are to be paid for in a promissory note of the purchaser, such payment is a condition precedent, and the title will not pass till it is made." Usher on Sales, Secs. 202, 203; 1 Benjamin on Sales, § 334.

As early as 1808 this question came before the Massachusetts court; it was held that the title still remained in the vendors upon the simple ground that the plaintiffs had not received the security before the delivery of the goods, as appears by the ruling at *nisi prius* and the overruling of the exceptions. *Hussey* v. *Thornton*, 4 Mass. 405. In a case decided by the same court in 1827 there was a purchase of some property partly for cash and partly on credit. It was held by the court that the title never passed. *Marston* v. *Baldwin*, 17 Mass. 606.

Whenever there is any question in a conditional sale whether the vendor has made such delivery as has waived the condition, the proof is upon the party claiming the sale as against the one maintaining that any waiver existed. It is the intention of the parties which governs in such cases. *Riddle* v. *Varnum*, 20 Pick. 280.

This is to "be ascertained only from the terms of the agreement as expressed in the language and conduct of the parties and as applied to known usage and the subject matter. It must be manifested at the time the bargain is made." Of course, as was said in this case, no secret undisclosed purpose on the part of the vendor to retain the title would prevent it from passing. This is not our case. *Foster* v. *Ropes*, 111 Mass. 10, 16.

Now we understand the weight of authority to be that when a sale has been made upon any particular terms or conditions,

and the delivery made pursuant to that agreement, that is, in consequence of and by reason of it, the delivery thereby becomes conditional in like manner as the sale. *Smith* v. *Dennie*, 6 Pick. 262-266.

A distinction between a delivery which is unconditional after a conditional sale, and one where the condition still exists, is well taken. *Burbank* v. *Crooker*, 7 Gray, 158.

Sundry cases are found in the Massachusetts reports where a special agreement was proved that the property should remain the title of the vendor until paid for in cash. *Sargent* v. *Metcalf*, 5 Gray, 306; *Blanchard* v. *Child*, 7 Gray, 155.

In another case decided in 1849, a sale of teas was made, and the bill or parcels given by the seller to the buyer was, "Brown's note six months his order or four per cent off." It will be observed that this case, so far as the terms of the sale are concerned, is precisely like the case at bar. The court in that case found that the title did not pass. *Hill* v. *Freeman*, 3 Cushing, 257. See also *Coggill* v. *Hartford & New Haven R. R. Co.* 3 Gray, 545; *Deshon* v. *Bigelow*, 8 Gray, 159; *Whitney* v. *Eaton*, 15 Gray, 225; *Farlow* v. *Ellis*, 15 Gray, 229; *Hirschorn* v. *Canney*, 98 Mass. 149; *Adams* v. *O'Connor et al.* 100 Mass. 515; *Nelson* v. *Dodge*, 116 Mass. 367; *Armour* v. *Pecker*, 123 Mass. 143; *Salomon* v. *Hathaway*, 126 Mass. 482.

There is one authority in Massachusetts which seems to hold a contrary doctrine, but we do not think it is sustained either by the cases cited in support of it, or by the general course of adjudication in Massachusetts. *Freeman* v. *Nichols*, 116 Mass. 309.

The case of *Wigton* v. *Bowley*, 130 Mass. 252, is in conflict with many other cases in Massachusetts and elsewhere, because it contains the element of a draft attached to a bill of lading, upon the acceptance of which draft the bill of lading was to be delivered, and not without. See also *Blanchard* v. *Cooke*, (Mass.) 11 N. E. Rep. 83-89 (No. 1.)

In such cases it has been held over and over again that the parties holding the bill of lading and draft retain the title to the

property until the draft is either accepted or paid. *National Bank of Chicago* v. *Bayley*, 115 Mass. 228; *Newcomb* v. *Boston & Lowell R. R. Corporation*, 115 Mass. 230; *Alderman* v. *Eastern R. R. Co.* 115 Mass. 233; *Seymour* v. *Newton*, 105 Mass. 272; *Marine Bank of Chicago* v. *Wright*, 48 New York, 1; *National Bank of Green Bay* v. *Dearborn*, 115 Mass. 219; *Exchange Bank of St. Louis* v. *Rice*, 107 Mass. 37.

The authorities in Maine are not numerous, but they are to the point. *Hotchkiss* v. *Hunt*, 49 Maine, 213-219 *et seq.* (1860); *Stone* v. *Perry*, 60 Maine, 48; *Seed* v. *Lord*, 66 Maine, 580.

But it is well settled doctrine that when a contract is made, the laws of the jurisdiction within which it is made enter into it so far as they appertain thereto, and the terms of the contract are modified accordingly.

This is especially illustrated in the question as to the effect of proceedings in insolvency under a State law, and a discharge thereof. It is established beyond question that a discharge under such proceedings does not discharge any debt contracted prior to the enactment of the law which authorizes such proceedings, nor does it discharge any contract entered into between the insolvent debtor and an inhabitant of another State, provided such inhabitant does not submit himself to the jurisdiction of the insolvent court by proving his debt. It does operate upon subsequent contracts where the creditor is a resident of the state at the time, because the statute enters into and forms a part of the contract. *Hackett* v. *Potter*, 135 Mass. 349; *Shoe & Leather Bank* v. *Wood*, 142 *Id.* 563; *Marwin Safe Co* v. *Norton* (N. J.) 7 At. Rep. 417, 420, and cases cited.

So far as any laws of Canada are pertinent, they are by the terms of the report to be proved by certificates. It will be seen by article 1998 of the Civil Code of Lower Canada, which includes the residence and place of business of the claimants, the residence and place of business of the vendees, and the residence and the place of business of the agent of the vendees, that the unpaid vendor of a thing has two privileged

rights, first, the right to revendicate it, second, the right of preference upon its price.

In re Thompson and Whitehead, Insolvents, Darling, Assignee, and Greenwood, Petitioner, 9 R. L. p. 379, *Hawsworth* v. *Elliott*, X. L. C. Jurist, 197, are to the effect, that delivery to the buyer's agent does not deprive the creditor of his rights.

In *Greenwood* v. *Darling*, *supra*, the provisions of § 1543 of the Code are cited. This contains certain provisions, and carefully provides that they shall not affect the chapter containing section 1998.

The same court at Montreal, following the authorities and reciting the 1998th article in a case where the goods were sold in England and delivered to the purchaser's shipping agent there, held that such a delivery was not a delivery such as was contemplated by the statute, and that the goods might be legally revendicated by the unpaid vendor in the hands of the Grand Trunk railway in Lower Canada, although more than fifteen days had elapsed since such delivery. *Bank of Toronto* v. *Kingston*, XII. L. C. Jurist, 216.

It is clear from the authorities that rights and property in goods obtained in Canada by contracts made there and the laws existing there, including the laws and rights to *revendicate* the same, follow the property, although it has gone into another jurisdiction, so long as such rights or property have not in any way been abandoned by the *voluntary act* of the party who possessed them in the original jurisdiction.

But inasmuch as there is sometimes a little confusion arising as to whether any particular question is one of remedy or one of right and title to the property, and as we cannot understand the confidence which the plaintiffs seem to have in their case upon any other ground than that they have mistaken a title and vested right for a mere matter of remedy, we deem it proper to make some further allusion to the distinction between these two, in order to show that, in this case, rights arising under the circumstances, determining the title to the property are not affected by its having crossed the line.

The authority of the writers is generally very explicit. See Story, Conflict of Laws, § § 272, 402, 401.

Jones on Comm. and Trade Contracts, § 23; *Bulkley* v. *Honold*, 19 How. 390, 392; *Walker* v. *Whitehead*, 16 Wall. 314-317; *Scudder* v. *Union National Bank*, 91 U. S. 406; *Pritchard* v. *Norton*, 106 U. S. 124-130; *Morgan* v. *N. O. M. & T. R. R. Co.* 2 Woods, 244-254; 8 Meyer's Fed. Dec. § 1200; *Green* v. *Sarmiento*, Pet. C. Ct. 74; S. C. 1 Abb. Nat. Dig. p. 796; *R. I. Central Bank* v. *Danforth*, 14 Gray, 123; *Williams* v. *Wade*, 1 Met. 82; *Judd* v. *Porter*, 1 Maine, 337-339; *So. Boston Iron Co.* v. *B. L. Works*, 51, Maine, 585; *Lindsay* v. *Hill*, 66 Maine, 212-217; *Smith* v. *Eaton*, 36 Maine, 298-306.

On the other hand it is true that what pertains to the remedy is governed by the *lex fori*. This doctrine and the reasons for it are fully set forth in Judge STORY'S work already mentioned. Story's Conflict of Laws, § § 572, 575, 576 (note a). *Lennox* v. *Brown*, 12 C. B. 801.

There is still another reason which it seems to us is absolutely fatal to this attachment. The writ bore date on the 17th day of December, 1886. The direction of the officer was to attach the goods and estate of James Maguire, of Quebec, of the Province of Quebec, surviving partner of the firm of D. & J. Maguire, and doing business in the name of D. & J. Maguire, and while the writ was in that condition service was made upon the same day.

There is no question in this case, but that if the plaintiffs have any right to hold the goods in the hands of the alleged trustees, they must hold them as the property of the firm of D. & J. Maguire. No attachment however was ever made of the goods of D. & J. Maguire, but only of James Maguire. The addition of Charles Maguire's name cannot relate back so as to make the attachment good as against him, the amendment having been made after the entry of the writ in court. It was only the defendant, James Maguire's, property which was attached.

Now it is too well settled to need any authorities that the property of an individual in firm assets consists only of his

share of the assets remaining after the payment of all the debts of the firm, and, in this case, it appearing by the 6th allegation of the claimants that the firm was wholly insolvent, the attachment, even if not invalid by reason of all that has gone before and of what has already been urged, held nothing whatsoever in the hands of the alleged trustees. It has been often held that whether a trustee is chargeable depends upon the state of things existing at the time of service upon him. *Mace* v. *Heald*, 36 Maine, 135; *Williams* v. *And. & Ken. R. Co. Id.* 201; *Capen* v. *Duggan*, 136 Mass. 501.

Adding a new defendant, though he be another partner in the same firm, vacates an attachment of firm property. *Denny* v. *Ward*, 3 Pick. 199.

FOSTER, J. The plaintiffs bring this action of assumpsit against the defendants, lumber merchants residing at Quebec and there doing business under the firm name of D. & J. Maguire. Chase, Leavitt & Co. of Portland, are joined as trustees by reason of their having in their possession certain lumber shipped to them by the defendants.

The real contest is in reference to the title to the lumber in the possession of the trustees. The contention lies between the plaintiffs and the parties of whom the defendants purchased the lumber, who appear as claimants and assert that under the circumstances no title passed so as to prevent their claiming the lumber as their own.

These claimants at the time of the transactions out of which this suit arose were lumber merchants, residents of Canada, and carrying on business independent of each other at Louiseville on the St. Lawrence. The firm of D. & J. Maguire — the principal defendants — were also in the same business at Quebec. They had an agent, Arthur D. Ritchie, for the purchase of lumber in Canada, and Chase, Leavitt & Co. were there consignees of the lumber in Portland, who acted for said firm, received the lumber, entered it at the custom house, and gave a warehouse bond; subsequently an export bond was substituted, and the lumber shipped abroad as ordered by their consignors. Such was the general course of business.

At the time of the service of the writ in this case upon the trustees, the property in dispute, although in bond for storage, was constructively in their possession. While there could be no actual attachment of the property itself by a state officer undertaking to take the property out of the custom house, either by paying the duties or giving an export bond, (*Harris* v. *Dennie*, 3 Pet. 304; *Conrad* v. *Pacific Ins. Co.* 6 Pet. 262) and therefore could not be come at to be attached, there is no reason why it might not be subject to trustee process while thus in the constructive control and possession of the trustees. They could take it out of bond either by giving an export bond or by paying duties.

The lumber in question was purchased by the Maguires, through their agent about the first of November, 1886, at Louiseville, and was to be delivered at Doucet's Landing, a place about thirty miles from there down the St. Lawrence,—a terminus of the Grand Trunk Railway.

The contention on the part of the claimants is, that the terms of sale were cash less two and one-half per cent discount, or note on three months from date of shipment, and that the terms have never been complied with; in other words, that the sales were conditional, and the conditions never having been performed no title vested in the defendants.

The plaintiffs on the other hand controvert the position of the claimants, asserting that the sales were unconditional,—or if conditional, that there has been such a waiver of any conditions by the claimants as would render the title to the lumber complete in the defendants and therefore subject to this process.

These questions ordinarily are for the jury as questions of fact. But this case is before the court on report, and we must therefore determine them upon such evidence and by such means of judging as the parties have seen fit to furnish us, applying the law to the facts as we find them.

There is no doubt that it is a well settled rule of law in this state that a sale and delivery of goods, on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee till performance of

the condition and that in case the condition is not fulfilled, the vendor has a right to repossess himself of the goods, not only as against the vendee but also against his creditors, claiming to hold them under attachments. *Everett* v. *Hall*, 67 Maine, 498; *Brown* v. *Haynes*, 52 Maine, 580.

It is equally well settled that in the sale of personal property to be paid for by cash or by note on delivery, the payment of the money or the giving of the note is a condition precedent, and until that is done, or waived, the title does not pass from the vendor. *Seed* v. *Lord*, 66 Maine, 580; *Stone* v. *Perry*, 60 Maine, 50; *Whitney* v. *Eaton*, 15 Gray, 225.

If the delivery and payment were to be simultaneous, and the goods were delivered in the expectation that the price would be immediately paid, a refusal to make such payment would be such a failure on the part of the purchaser to perform his part of the contract as would entitle the seller to put an end to it and reclaim his goods. In such case the delivery may be regarded as conditional, and upon the purchaser's refusal to pay, the seller may at once reclaim the goods. The sale is not consummated, and the title does not vest in the purchaser.

No citation of authorities is necessary in support of the principle equally familiar and well founded that the vendor may waive the condition of the sale and by so doing pass the title, although the sale was originally a conditional one. He may waive the payment of the price, or agree to postpone it to a future day and proceed to complete the delivery. In that case it would be absolute, and the title would vest in the purchaser. A waiver is the voluntary relinquishment of some known right, benefit or advantage, and which, except for such waiver, the party otherwise would have enjoyed. And therefore in order for the title to vest in the purchaser when the sale has been conditional, it must in some way appear that the goods were put into his possession with the intention of vesting the title in him, or that there were such acts and conduct on the part of the seller, that such intention might be legitimately inferred therefrom. *Farlow* v. *Ellis*, 15 Gray, 232; *Paul* v. *Reed*, 52 N. H. 138.

Even in the case of a conditional sale of goods for cash there

are authorities which hold that a delivery apparently unrestricted is a waiver of the condition that payment is to be made before the title passes, although the seller has an undisclosed intent not to waive the condition. *Upton* v. *Sturbridge Cotton Mills*, 111 Mass. 446; *Haskins* v. *Warren*, 115 Mass. 533; *West* v. *Platt*, 127 Mass. 373.

But the doctrine which has the support of our own court upon this question, and which seems to be the correct and rational one, is, that even in a conditional sale the mere fact of delivery, without a performance by the purchaser of the terms and conditions of sale, and without anything being said about the condition, although it may afford presumptive evidence of an absolute delivery and of a waiver of the condition, yet it may be controlled and explained, and is not necessarily an absolute delivery or a waiver of the condition; but whether so or not is a question of fact to be ascertained from the testimony. *Seed* v. *Lord*, 66 Maine, 580; *Stone* v. *Perry*, 60 Maine, 51; *Farlow* v. *Ellis*, 15 Gray, 229; *Hammett* v. *Linneman*, 48 N. Y. 399; *Smith* v. *Lynes*, 5 N. Y. 43. "This doubtless would be good evidence of its waiver." *Dresser M'f'g Co.* v. *Waterston*, 3 Met. 18; *Furniss* v. *Hone*, 8 Wend. 247; *Carleton* v. *Sumner*, 4 Pick. 516; *Smith* v. *Dennie*, 6 Pick. 262.

Such waiver may be proved either directly, or inferentially from circumstances like any other fact. It may be proved "by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive." *Farlow* v. *Ellis*, *supra*.

Let us apply these rules to the present case.

The evidence of these contracts of sale comes entirely from the purchasers' agent, Ritchie. Neither claimant has testified. They were the parties with whom the contracts were made — the parties who afterwards delivered the lumber. We are therefore without the light which their testimony might possibly shed upon the facts in this case. Although, taking the testimony before us, we may be satisfied that the contracts were originally conditional,

nevertheless the evidence satisfies us of the fact that the vendors by their acts and conduct in reference to the property have waived any such conditions as may have originally attached to their contracts. This they had a right to do, and the evidence submitted fully warrants such conclusion. Nor are there any circumstances disclosed by the evidence which would modify the presumption of waiver by the unqualified and unconditional delivery which was made. There had been dealings of large amounts and of a similar character between the parties during the previous season. No custom or usage is shown that would delay for any number of days a cash payment. The lumber was sold to be delivered at Doucet's Landing. At the time of the delivery, which was some days after the trade was made, each claimant was present and knew that his lumber was being shipped out of the country on the cars for Portland, and made no objections of any kind. Neither claimant at the time and place of delivery mentioned any conditions, or asked for cash or note, nor was anything said as to the length of time the lumber should remain at the place of delivery. The delivery in each case was made directly to the purchasers' agent who made the contract of purchase. The purchasers not only at the time of making the contract but also at the time of delivery were doing a large business, and the evidence fails to show that they were known or even suspected to be in failing circumstances. Not more than three days were required from the time of the delivery for the certificate or bill of lading to be forwarded by the agent to the purchasers — the defendants — and the cash or notes to be returned. In this case the agent forwarded certificates of the amount of lumber of one of the claimants on the seventeenth of November, and of the other on the twenty-fifth or twenty-sixth, of the same month. The failure of the defendants occured on the seventh of December, and on the tenth an assignment of their property was made to trustees under the laws of the Province of Quebec. Up to that time neither of these claimants had taken any steps or made any movement in reference to the pay for their lumber. Nearly a month had elapsed between the delivery and the first intimation that the title to the lumber had

not vested in the defendants. Other purchases had been made by the defendants from one of these claimants about the fifth of December, or just prior to the failure, and consigned to the same parties,— the trustees in this suit. But that consignment was stopped in Montreal by the vendor.

With these facts before us, notwithstanding the law of the place of the contract introduced and forming a part of the report in this case, we are irresistibly drawn to the conclusion reached in the case of *Smith* v. *Dennie*, *supra*,— a case very frequently cited by the courts,— and the language of that opinion, drawn by Chief Justice PARKER, might be appropriately applied here. "We are apprehensive," he says, "that to establish the right to reclaim under such circumstances, would widen the door for fraudulent contrivances, and that afterthoughts respecting conditions will spring up to intercept attaching creditors, when the sale was really unconditional, or at least when the vendor has thought his condition of so little importance as to be willing to abandon it and trust to the credit of the purchaser."

The case last cited was where a chattel was sold upon condition that the vendee should give an indorsed note, but was delivered without any express reference to the condition, and remained in the possession of the vendee eight days when it was attached by his creditors, the vendor having made no claim during that period either for the note or the chattel, and no reason was assigned for omitting such a claim; and it was held that there was a waiver of the condition, so far as to warrant the attachment, and a verdict having been rendered to the contrary was set aside as against evidence.

But it is contended on the part of the claimants that the law of the country where the contract is made is the law of the contract, no matter where performance is demanded. And the learned counsel upon this branch of the case strenuously invokes the attention of the court to Article 1998 of the Civil Code of Lower Canada, an abstract of which with certain decisions of the court, have been introduced and form a part of the report.

By virtue of that law it is claimed that the unpaid vendor of personal property has the right, upon the insolvency of the

vendee, to revendicate or reclaim it. We do not understand, however, that this right attaches, according to any foreign law proved in this case, if the sale is made upon credit. Nor is there anything by which we are to be governed showing that the vendor may not waive his rights, to which he might otherwise be entitled, even under a conditional sale. No law or statute to the contrary being proved, we must assume that his rights in this respect would be the same as those existing by virtue of the laws of the country where the remedy is sought. *Carpenter* v. *Grand Trunk Railway Co.* 72 Maine, 390; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 129.

It is unnecessary, therefore, to protract the consideration of any foreign law or statute in reference to the rights of these parties.

But the further objection is urged by the counsel for the claimants and trustees that there was no valid attachment of the partnership property of the defendants in the hands and possession of the trustees.

The writ bears date on the seventeenth day of December, 1886. It was sued out against James Maguire alone as principal defendant, instead of being against each of the partners. The direction to the officer was to attach the goods and estate of James Maguire, of Quebec, in the Province of Quebec, surviving partner of the firm of D. & J. Maguire, and doing business under said name of D. & J. Maguire, etc., and while the writ was in that condition service was made upon the trustees. On the first day of the term of court to which the writ was returnable, leave was obtained to amend the same by adding the name of Charles Maguire, as a party defendant, thus making the defendants, James Maguire and Charles Maguire, copartners under the firm name of D. & J. Maguire.

The service upon the trustees of the writ as it was at first made in which James Maguire, but no partner of his was then a principal defendant, did not create a valid attachment of the partnership property. As soon however as the writ was amended by joining Charles Maguire as a defendant,— the trustees still continuing to hold the property, then, all the necessary parties

being before the court, no rights of third parties having intervened,— the previous attachment became valid as to the property in the hands and possession of the trustees. *Sullivan* v. *Langley*, 128 Mass. 237.

The conclusion of the court therefore is, that the title to the thirteen car loads of lumber for which the claimants contend, at the time this suit was commenced, was not in the claimants, but that it had passed to and became vested in the principal defendants, and was subject to trustee process by the plaintiffs in this suit, as also the lumber of the other nine car loads, about which no contention is raised. As against the claimants the plaintiffs are entitled to costs from such time as they appeared as claimants of the property in dispute.

From the terms of the stipulation submitting this case to the law court, it is provided that if the trustees are chargeable for any of the lumber mentioned in their disclosures, they are to be charged in accordance with the terms of a written agreement entered into between the parties, dated May 6, 1887. The agreement is not found in the report, nor is it before us. The amount, therefore, for which the trustees are to be chargeable must be determined by the court below. They are entitled to their disbursements and services as a lien upon the property in their possession, and which has been put in bond in the custom house by them. They should be entitled to retain the sum of two hundred and forty-six dollars and ninety-five cents,— the amount advanced by one of the claimants, and which they are to repay to him,— it being advanced towards the expenses upon the lumber in dispute, and which the trustees agreed should be refunded.

Judgment accordingly.

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

SAMUEL S. JORDAN and others *vs.* LEMUEL H. SOULE.

Sagadahoc. Opinion December 30, 1887.

Law and equity. Co-tenants. Partnership.

When tenants in common in land agree to put on improvements to adapt it to a business in which they engage, each agreeing to pay his proportional part

for such improvements, and appointing one of their number an agent to make the improvements, an action at law may be maintained by the one who paid for the improvements against any tenant for his proportion of the expenses of the same,

On report.

Assumpsit to recover one-fourth of the expenses of repairing and improving ice houses and appurtenances.

The facts are sufficiently stated in the opinion.

Joseph M. Trott, for plaintiffs, cited: *Fanning* v. *Chadwick*, 3 Pick. 424; *Marshall* v. *Winslow*, 11 Maine, 58; *Wright* v. *Eastman*, 44 Maine, 232; *Williams* v. *Henshaw*, 11 Pick. 84; Chitty, Contracts, 341; *Venning* v. *Leckie*, 13 East, 7; *French Styring*, 2 C. B. N. S. 354 (3 Jur. N. S. 670; 20 L. J. C. P. 181); Collyer, Partnership, (6 ed.) § § 256-258; Addison, Contracts, § 1305; 1 Parsons, Contracts, 140; Parsons, Laws of Business, 224, 225; *Holyoke* v. *Mayo*, 50 Maine, 390; *Gibson* v. *Moore*, 6 N. H. 547.

C. W. Larrabee, for defendant.

In *Holmes* v. *Higgins*, 1 Barn. & Cress. 76, Abbott, C. J., says, "Now it is perfectly clear that one partner cannot maintain an action against his co-partner for work and labor performed or money expended on account of the partnership."

When money is due from one partner to another, by simple contract on the partnership account payment except in a few special cases can only be expended in a court of equity. Collyer on Partnership, 4th Am. ed. c. 111 § 11; 1 Story Eq. Jur. § 664.

Danforth, J. The evidence in this case shows that the plaintiffs, and defendant were tenants in common of a lot of land with an ice privilege attached, purchased for the purpose of harvesting and selling ice; that for the purpose of carrying on that business it was agreed that certain repairs and improvements were to be made, each one agreeing to pay his share of the expenses, and one of the plaintiffs was appointed the agent of all to accomplish this purpose. There is also testimony tending to show that a similar agreement was made in relation to

gathering in and disposing of the ice. But in regard to this we have no occasion at this time to enquire; for the specification attached to the declaration in the writ, confines the claim sought to be recovered, "to the defendant's share of the expense of certain improvements and outlay in and upon the property and ice privilege, owned in common by said plaintiffs and defendant."

The defence is that these parties were partners in the transactions out of which this suit grew, that the action will not settle all matters between them as such, and therefore the remedy is in equity alone.

If this defence were sustained by the evidence, in the absence of an agreement to the contrary, it would prevail. But the ownership of the land is one thing, carrying on the ice business upon that land is another and may be a very different thing. There may be a partnership with all its incidents, in the latter when none exists as to the former. In this case there is not only an entire absence of all testimony tending to show that the land and privilege were partnership property, but the contrary appears. The proof is plenary that the land was purchased by the parties as individuals, each paying for his share out of his private funds. The ownership of the improvements must follow that of the land, not only from general principles, but as the result of the agreement clearly shown by the case, that each was to pay his share of the expense. By virtue of this contract the parties were jointly liable for the whole amount and as the plaintiffs have paid the whole, the defendant is liable for his share which is one-fourth. For this result the case of *Soule* v. *Frost*, 76 Maine, 119, is, in principle, an authority.

As to the damages the proof is not so satisfactory. But the preponderance of evidence shows that the bill of particulars is a reliable statement of the amount expended. A few of the items were evidently expended in the business of ice harvesting, such as the amount paid Trask for cutting and housing ice, $1,767.80, two years flowage, $32.00, swamp hay, $12.00 and saw dust, $2.50. These must be deducted from the sum total. Then as to the credits. The $150.00 and the $90.00 paid Packard, were

evidently paid by the defendant and upon this bill. These sums should therefore be deducted from his share. The fifty dollars, though paid by the defendant was for expenses upon the ice; and the remaining credits appear to have come from the proceeds of the ice. These items will therefore more properly be considered in the settlement of the ice account. Making up the claim pending in this suit, upon these principles, it leaves a balance due from the defendant of $453.14 for which the plaintiffs are entitled to judgment with interest from date of writ.

Judgment for the plaintiffs for $453.14 and interest from date of writ.

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

INHABITANTS OF CAPE ELIZABETH *vs.* ALBERT W. SKILLIN.

Cumberland. Opinion December 21, 1887.

Insolvent law. Taxes. Discharge.

A discharge in insolvency does not release the insolvent from arrearages of state, county or town taxes. Such taxes are not affected by a discharge in insolvency.

ON report on agreed statement of facts from superior court.

This was an action of debt brought under the statute for the collection of state, county and town taxes in the town of Cape Elizabeth for the year 1879. No question was raised as to the form of the action or the legality of the assessment of the tax. It was admitted that subsequent to the assessment of the tax said Skillin was, in the insolvent court for Cumberland county, duly adjudged to be an insolvent debtor on his own petition and was, before this action was brought, granted his discharge in due form. This discharge was pleaded in bar of the action and was the only defence. The tax sued on was not proved against the estate of Skillin when in insolvency and his estate paid nothing to creditors.

On the above acts it was agreed that the court might order default or nonsuit, according to the legal rights of parties.

N. and H. B. Cleaves and W. R. Anthoine, for the plaintiff, cited: *U. S.* v. *Herron*, 20 Wall. 251; *U. S.* v. *King*, Wall. C. C. 18; *People* v. *Kerkimer*, 4 Cow. 348; *People* v. *Gilbert*, 18 Johns. 227; *Anonymous*, 1 Atkyns' R. 262; *Richmond* v. *Brown*, 66 Maine, 375; *Saunders* v. *Com'rs*, 10 Gratt. 494; *Com'rs* v. *Hutchinsons*, 10 Penn. 446.

A. F. Moulton, for defendant.

The only question at issue is whether an action brought to collect a tax is barred by a discharge in insolvency.

Section 45 of the insolvent law (R. S., c. 70 § 49) provides that, "A discharge in insolvency duly granted shall . . . release the insolvent from all debts, claims, liabilities and demands which were or might have been proved against his estate in insolvency," and such discharge duly pleaded "shall bar all suits brought on any such debts, claims or liabilities as were or might have been proved as aforesaid."

Section 36 of the law (R. S., c. 70, § 40) specifically names a tax as a "claim," saying, "In making a dividend under the preceding section the following claims shall first be paid in full, in their order," . . . "All debts and taxes due to the state or to any county, city or town therein. . ."

No language can be more plain and direct than that which makes a tax a claim which is or may be proved and to which a discharge in insolvency operates as a full and complete bar.

EMERY, J. The question is, whether, in enacting the insolvency statute, and providing for the release of the honest insolvent, "from all debts, claims, liabilities and demands which were or might have been proved against his estate in insolvency," the legislature intended to release him from paying the arrearages of his just taxes for the support of the government.

We think the legislature did not so intend. It is a settled rule of statute construction, that the government is not bound by the words of a statute tending to restrain, or diminish any powers, rights or interests, unless it is named therein, as to be

also bound. It is old English law, that the crown is not bound by a restraining statute, unless specifically named.

The assessment and collection of taxes is a function of government. It is essential that each person, under its protection, should promptly pay his share of tax. That the tax is assessed and collected by town officers makes no difference. The prompt payment is a duty from the individual to the state.

The insolvency statute contains no words declaratory of an intention to restrain or diminish the right of the state, or its political sub-divisions to recover arrearages of taxes from insolvents. The inference is that the legislature did not so intend, and that the right to recover unpaid taxes is not thereby abridged. *United States* v. *Herron*, 20 Wall. 251.

Defendant defaulted.

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

ELIPHAZ B. CHAPMAN *vs.* HERMON WIGHT.

Oxford. Opinion December 24, 1887.

Promissory notes. Statute of limitations.

An instrument in writing whereby the defendant "promised, for value received, to pay" the plaintiff "four hundred thirty-four dollars and two cents, which sum is due to" another person named, upon the following condition: "If" the defendant "shall pay the said" other person named, "or cause to be paid the above sum in three years from next January, then this note is to be given up, otherwise to remain in full force," is not a promissory note; and even if signed in the presence of an attesting witness, it will be barred in six years from the time it is payable.

ON report.

The opinion states the case.

Alvah Black, for the plaintiff.

C. A. Chaplin, for the defendant.

VIRGIN, J. Assumpsit on a certain written instrument, dated April 9, 1853, and signed by the defendant in the presence of an attesting witness, wherein the signer promised to pay the

plaintiff four hundred and thirty dollars and two cents, "due to Charles Bellows." The declaration alleges this instrument to be a promissory note.

To constitute a promissory note, the instrument must necessarily be certain as to the fact of payment, and not be dependent on a contingency. For such "paper is intended, if negotiable, to circulate in business as money; and this on the ground that on a certain day it will become money." 1 Pars. Bills, 42.

No time of payment is specified in this instrument otherwise than by the following terms: "Now if Hermon Wight shall pay the said Bellows, or cause to be paid the above sum, in three years from next January, then this note is to be given up, otherwise to remain in full force." This contingency as to payment destroys the quality of the instrument as a promissory note. *Dennett* v. *Goodwin*, 32 Maine, 44; Chit. Bills, 162; *Cook* v. *Satterlee*, 6 Cow. 108; Pars. Bills, etc., *supra*.

Not being a promissory note, the fact of its having been signed in the presence of an attesting witness, does not prevent its being barred by the statute of limitations pleaded. R. S., c. 81, § 86.

Judgment for defendant.

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

APPENDIX.

At the suggestion of one held in high esteem by the profession in this state, a new feature is inaugurated in this report, which, it is thought, will be appreciated by many in the state, and perhaps also by some of those who have gone out from among us to practice or expound the law in other jurisdictions.

Without infringing upon the space which belongs to the report of decided cases, the following pages are inserted in memory of those who have passed over the river, and whose deaths have been announced and recorded with the court records in the different counties since January 1, 1880. It would have been more satisfactory to have reached back to an earlier date, but the difficulty of perfecting the list by supplying the omissions of the records of earlier years would detract greatly from its value. It is to be hoped that the omission of these later years, which are so painfully apparent, as we scan the roll, will be supplied by the members of the profession in each county before another report is issued.

The reporter is indebted to the clerks of court in the several counties named below for the list inserted.

ANDROSCOGGIN COUNTY.

*Seth May** of Auburn died on the first day of the September term, 1881, and his death was announced at that term.

Mandeville T. Ludden of Lewiston died in the vacation before the October term, 1882, and his death was announced at that term.

Liberty H. Hutchinson of Lewiston died September 8, 1882, and his death was announced at the September term, 1882.

*See 74 Maine, 601.

Henry C. Wentworth of Auburn died June 25, 1884, and his death was announced at the September term, 1884.

CUMBERLAND COUNTY.

Nathaniel S. Littlefield of Bridgton died August 15, 1882. His death was announced in court November 2, 1882.

James T. McCobb of Portland died August 21, 1882, and his death was announced in court November 2, 1882.

Horatio J. Swasey of Standish died August 27, 1882, and his death was announced in court November 2, 1882.

James D. Fessenden of Portland died November 18, 1882, and his death was announced in court February 3, 1883.

James O'Donnell of Portland died March 13, 1886, and his death was announced in court, May 21, 1886.

Benjamin Kingsbury of Portland died May 13, 1886, and his death was announced in court May 21, 1886.

Elbridge Gerry of Portland died April 10, 1886, and his death was announced in court May 21, 1886.

*William G. Barrows** of Brunswick died April 6, 1886, and his death was announced in law court July 30, 1886.

Emery S. Ridlon of Deering died April 11, 1887, and his death was announced in court May 4, 1887.

Bion Bradbury of Portland died July 1, 1887, and his death was announced in court October 22, 1887.

Daniel W. Fessenden of Portland died September 5, 1887, and his death was announced in court October 22, 1887.

KENNEBEC COUNTY.

Joseph Baker of Augusta died November 29, 1883, and his death was announced in court December 11, 1883.

Sewall Lancaster of Augusta died March 3, 1885, and his death was announced in court March 5, 1885.

KNOX COUNTY.

Edmund Wilson of Thomaston died April 25, 1886, and his death was announced in court October 9, 1886.

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*See 78 Maine, 584.

George W. French of Thomaston died at Orlando, Florida, December 8, 1887, and his death was announced in court December 14, 1887.

LINCOLN COUNTY.

E. Wilder Farley of Newcastle died April 12, 1880, and his death was announced in court, May 8, 1880.

Ezra B. French of Damariscotta died April 12, 1880, and his death was announced in court May 8, 1880.

John H. Converse of Newcastle died June 12, 1880, and his death was announced in court, November 1, 1880.

Samuel E. Smith of Wiscasset died January 21, 1881, and his death was announced in court April 30, 1881.

Benjamin F. Smith of Wiscasset died March 23, 1885, and his death was announced in court May 7, 1885.

OXFORD COUNTY.

Elbridge G. Harlow of Dixfield died October 23, 1883, and his death was announced at the March term, 1884.

SOMERSET COUNTY.

Cliophas Boyd of Harmony died January 28, 1880, and his death was announced at the September term, 1880.

Joseph Barrett of Canaan died September 19, 1880, and his death was announced at the September term, 1880.

Charles L. Jones of New Portland died November 16, 1880, and his death was announced at the December term, 1880.

James Bell of Skowhegan died December 8, 1880, and his death was announced at the December term, 1880.

Stephen Coburn of Skowhegan died July 4, 1882 and his death was announced at the September term, 1882.

Stephen D. Lindsey of Norridgewock died April 24, 1884, and his death was announced at the September term, 1884.

WALDO COUNTY.

James B. March of Belfast died April, 1880, announced in court May 6, 1880.

William G. Crosby of Belfast died March , 1881, announced at the April term, 1881.

WASHINGTON COUNTY.

Joseph Granger of Calais died July 11, 1880. His death was announced at the April term, 1881.

Frederic A. Pike of Calais died December 2, 1886. His death was announced at the April term, 1887.

YORK COUNTY.

Moses Emery of Saco died May 21, 1881. His death was announced in court February 21, 1884.

Edward Eastman of Saco died July 5, 1882, and his death was announced in court February 21, 1884.

Caleb R. Ayer of Cornish died October 5, 1883, and his death was announced in court February 21, 1884.

Hiram H. Hobbs of South Berwick died March 9, 1884, and his death was announced in court June 5, 1884.

Joseph Dane of Kennebunk died March 17, 1884, and his death was announced in court, June 5, 1884.

Caleb B. Lord of Alfred died October 15, 1885, and his death was announced in court October 6, 1886.

William J. Copeland of Berwick died August 1, 1886, and his death was announced in court October 6, 1886.

STEPHEN D. LINDSEY.*

The death of the Honorable Stephen D. Lindsey, which occurred at his home in Norridgewock, April 28th, 1884, removed one of the most useful and respected citizens of the state.

He was born in Norridgewock, March 3d, 1828. His father, Captain Melzar Lindsey, was for years a farmer and teacher in the common schools in that vicinity. He also held the various offices in the gift of his town. Mr. Lindsey received his early

* This notice of Mr. Lindsey was prepared at the request of the Reporter by C. A. Harrington of the Somerset bar.

education in the public schools of his town, and in Bloomfield Academy, now within the limits of the town of Skowhegan. Soon after leaving school he entered the office of the honorable John S. Abbott, of Norridgewock, as a law student. Mr. Abbott, at that time, stood first in rank in the Somerset bar which was composed in great part of men of ability. From Mr. Abbott, Mr. Lindsey learned as much of method as he did of the text from his books. He was admitted to practice and opened an office in Norridgewock in 1853, and resided there continuously to the time of his death. He was twice married, his first wife being a daughter of Dr. Amos Townsend of Norridgewock, his second a daughter of Asa Clarke of Norridgewock. She, with six children, survived him. Mr. Lindsey was singularly gentle and winning in manner; a fine conversationalist and fond of society, particularly that of his family and friends. Whenever released from the cares of business, he eagerly sought his home and the companionship of his books and his family. History and science were his favorites, though he was well versed in the solid literature of the day. To these studious habits is due in great part the fullness of intellectual power and the philosophical modes of thought which made him the well balanced man that he was—ever on the alert, but never under the most trying circumstances losing control of his passions.

In 1856, he was elected to the state legislature, where he served on the committee of the judiciary. He held the office of clerk of the Supreme Judicial Court of Somerset county from 1857 to 1860. Was a member of the state senate in 1868, 1869 and 1870, and its president in 1869; was a delegate to the National Republican conventions which nominated Abraham Lincoln in 1860, and General Grant in 1868; was a member of the executive council of Maine in 1874; was a member of the forty-fifth, forty-sixth and forty-seventh congresses. In all these positions one motive inspired him; to be a faithful servant was his aim. His private business, his ambition for preferment, were held subordinate to the effort to render honest, efficient service. His character as a public and private citizen was stainless.

Such a character made him a warm friend and good neighbor; his doors were always open; he was the counsellor without price to a host of acquaintances. None who knew him can ever forget the hearty frankness of his greeting or the steady and constant burning of the light of his friendship.

As a lawyer, he took high rank. Endowed with a defective physical constitution which gave way suddenly when he was but little past middle life, nature seemed to have attempted to compensate by giving him a strong mental organization. He had what may be truly called a *legal mind*. As a counsellor, he was cautious, prudent, safe. He fully canvassed his opponent's position, saw all the difficulties of his client's, and wherever it was practicable, effected a settlement without resort to expensive litigation. His well known rectitude of character greatly aided him to secure these amicable adjustments of differences.

In the trial of causes at *nisi prius* he aimed to get the pertinent facts in the case before the jury in the clearest manner possible, rejecting all extraneous matter; he occupied very little time in cross examination, but was very skilful in eliciting the facts on such examination. His quick perceptions and strong common sense leading his mind almost instantly to so group the facts in their proper relation as to decide what, according to the natural order of things, the truth must be, and he knew that no witness could long successfully falsify in the face of the inexorable law of cause and effect. Hence he quietly and courteously pursued his inquiries of such a witness, till, without argument, the truth was firmly settled in the minds of the jury. His arguments were characterized by the same brevity as were his examinations of witnesses. He seized the main points of the case, pressed them home to the jury in their logical order. His style of argument was singularly clear, simple, direct and earnest; it took possession of their minds; they understood his meaning; they had confidence that he would not knowingly misstate the law or the facts of the case; this was the secret of his great success before them.

The same brevity and conciseness marked his style in the law

court. His points were clearly made and supported by few citations, and those generally selected from the class familiar to the court. His modest nature shrank from any attempt to display a knowledge of books, and sought only to aid the court to understand his case.

Stricken suddenly in the prime of life, he has left an example which all may well emulate and few may excel.

BION BRADBURY.

Mr. Bradbury was born at Biddeford, Maine, in year 1811. He graduated at Bowdoin College in the class of 1830, was admitted to the bar in 1834, and his professional life continued for a period of fifty-three years, thirty in Washington county and twenty-three in Cumberland. He died at his home in the city of Portland on the first day of July, 1887. His death was announced at the October term, 1887, of the Supreme Judicial Court, Hon. CHARLES W. WALTON, justice presiding.

Judge WALTON responded as follows:

As a testimonial of the estimation in which Mr. Bradbury was held by the court, I will read a letter prepared for the occasion by Mr. Chief Justice PETERS. The letter is as follows:

Bangor, Oct. 21, 1887.

My Dear Judge:

As you kindly consented to read a letter from me in your remarks, upon the reception of the resolutions of the bar in honor of the memory of the late Hon. Bion Bradbury, I cheerfully improve the opportunity of sending to you this communication.

An intimate acquaintance with my friend, of over forty years' continuance, unmarred by a single unpleasant incident during all that period, but constantly brightened by cordial and agreeable relations between us, makes it a pleasure for me on this occasion, as far as my words will allow, to pay the tribute of my respect to his memory.

That our departed friend was for many years influential and eminent in the politics of the state and nation, that he occupied a very high position at the bar for the greater part of a lifetime, and that he was an honorable and upright citizen and a benefactor to society in many ways in his day and generation, no man would

be disposed to deny. His personal history in these respects I do not propose to touch upon. The duty of speaking in detail of the circumstances of his life, as well as of his talents and virtues, will, no doubt, be ably and gladly performed by the gentlemen at the bar who will have charge of the resolutions. Their willing hands will construct the wreaths and chaplets which are to be woven in honor of the memory of their departed and beloved friend; my remembrance for the occasion shall be a few simple flowers.

To the excellence of his character as a whole, as it shone through the various experiences and vicissitudes of a lifetime, I wish to bear my testimony.

Our friend was gifted by nature with a very fine intellectual endowment. His mental faculties were very happily organized and blended together, constituting a well-rounded and harmonious whole.

It would be difficult to know where anything could have been spared from any one mental feature for the benefit of any other, without an injury to the whole. His was "a square and constant mind." Among his liveliest traits were quickness and clearness of perception, though he possessed the strong powers both of acuteness and grasp. His ideas, together with his style of expressing them, were exceedingly direct, forcible, neat and clear. No mist stood between his mind and the object it had in view. His language was used to express and not to conceal thought. I doubt if a single sentence was ever written or spoken by him which did not visibly manifest the meaning it was intended to bear.

He was a man of a remarkably strong and intuitive common sense, a talent described as common, but, in its highest attainment, by no means commonly possessed. His natural traits were easily susceptible of cultivation and growth, and aided by a sedulous educational training, he easily attained, at almost a boyish age, a leading position among the lawyers and learned men of the state.

A striking trait possessed by him, entirely consistent with his character in all respects, and rendering other qualities the more conspicuous thereby, or rather, perhaps, to be considered a

medium or graft through which the natural forces afforded a more refined and mellowed fruit,—was calmness,—both a moral and an intellectual faculty; as a moral faculty, indicating candor, kindness, prudence, courtesy, confidence, courage and will, and, as an intellectual attribute, indicating self-command, self-reliance, discretion and sense, with other kindred powers. "The master spell of power is calmness," says a writer. Calmness indicates a power unseen and in reserve. The most impressive man is he who appears to be able to do or say more than he is for the moment doing or saying. It is character, which, like a picture by the hand of a master, speaks by its silence.

Emerson describes character as "a reserved force which acts directly by presence and without means." Our friend had much of that characteristic. Not, by any means, that duties were performed by him coldly and philosophically, merely. There were energies and forces in his disposition, and at his command, which aroused him to the achievement of effective and eloquent efforts when the occasion called for them.

His mental temperament was, upon the whole, however, quite of a judicial cast. He would have been a model judge. It is within my knowledge that, in 1852, when this court was reconstructed, he had a willingness, and perhaps some inclination, to go upon the bench, but finally prevented his friends from urging his nomination because his appointment would necessarily prevent the promotion of some one of the judges of the district court for the same place. Had he been then appointed, and had he continued in the place until his death, there can be no doubt that his career would have been most honorable to himself and most useful to the state.

His moral was in close accord with his intellectual nature. His personal traits partook of a combination of both. He was kindly and sympathetic; free of the disagreeable vanities possessed by too many; was more unselfish than most men; was confiding and generous, constantly performing services for friends; and was a broad-minded, liberal and tolerant man. All the small obligations even which every one owes towards others about him, were scrupulously performed. He had no taste or

desire for abusing other men for their honestly entertained views which differed from his own, either on social, moral or political questions. He loved truth and despised falsehood, no temptation having attraction enough to seduce him to commit a dishonest or dishonorable act.

What an admirable appurtenance of character his good manners were! How difficult to define good manners, though easy to be appreciated! Not the artificial polish — a mere veneering, something which needs to be covered up — but the real expression of the courtesy and kindness, the good sentiments that bubble up from the soul within — the shadows of the good qualities of the mind and heart. Says Emerson, "We sometimes meet a gentleman who is so original that if manners had not existed he would invent them." Good manners were an original gift to Bion Bradbury, rather than a fashionable discipline; an instinctive and natural grace beyond the reach of art. His personal appearance and deportment were a perpetual passport for him among all classes of people, especially pleasing to his intimates and associates and attractive to all persons. Few persons, even among the most trained and cultivated, can attain so enviable a position by means of this personal aptitude as he did.

He has closed the battle of life and gone to his final rest, an event which I think was for some time a part of his daily thought and contemplation. He reflected upon this great subject with his accustomed calmness and without fear. While not troubling himself with the fine distinctions between theological dogmas and creeds, he had a strong religious nature, and was a believer in an immortality beyond the grave. His last letter to me contains touching allusions to his declining years, sent to me while I was at Alfred, where was, for many years in his early life, his and his father's home, from which letter I quote. He says, "Well, John, we are all on the shady side of life. About some of us the shades of night are gathering, and the night will soon come. Let us thank God for the pleasures of this life and hope for a better, without the selfishness of this. I should like to take a run to Alfred to see you, and refresh myself with the delightful associations of the old place. And yet I should have

to go to the church yard to find my old companions and friends. For wise reasons, the love of life is implanted in the human breast, but there is something melancholy in the thought that you have outlived the companions of your youth. But old age is not without its compensations, and one of them to me is our long and warm friendship. As ever to the end,

BION BRADBURY."

The following words of Horace Walpole, I have no doubt, express the views of life which were felt by our departed friend: "To act with common sense, according to the moment, is the best wisdom I know; and the best philosophy, to do one's duties, take the world as it comes, submit respectfully to one's lot, bless the goodness which has given us so much happiness with it, whatever it is, and despise affectation."

His career at the bar will long remain to us as a profitable example. Every good life is a gain to the world, adding something to the common prosperity. His friends will not soon forget the fine looking person—the expressive, beaming and benevolent face, the fascinating manners, and the cordial, generous greeting of Bion Bradbury. Long shall we cherish the fragrance which lingers in the memory of his life and character.

Very sincerely yours,

JOHN A. PETERS.

Hon. Judge WALTON, Portland:

I do not know as I can add anything to what has been so well expressed by Chief Justice PETERS. I will, however, by way of emphasis, call attention for a moment to one of Mr. Bradbury's leading characteristics. I refer to his admirable deportment in court. He was always good tempered. Adverse rulings could never elicit from him a word, or a gesture, which, by implication even, could be regarded as disrespectful to the court. No provocation from adverse counsel, however great the provocation might be, would cause him to retort in words other than those of a gentleman. He was at times eloquent, but never noisy. He would press an argument with great force, but never in an angry or stormy manner. His good sense taught him that the court could never be convinced by mere noise, or influenced by

angry tones. In these particulars he has indeed left us an example worthy of imitation; and the motion to have placed upon the records of the court the resolutions which have been read, is most cheerfully granted.

MANDEVILLE T. LUDDEN.*

Hon. Mandeville Treat Ludden was born at Canton, Maine, February 17, 1830, and died at Lewiston, Maine, September 21, 1882. He completed his academical course at the Maine Wesleyan Seminary in 1852, and entered upon the study of law in the office of his uncle, Judge Timothy Ludden, and graduated at the law school of Harvard University in 1854. He was admitted to the bar in Androscoggin county and at once commenced the practice of his profession at Turner, in company with his uncle Timothy. January 1, 1856, he was married to Miss Mary E. Jewett, who survives him. In 1863 he was elected county attorney for Androscoggin county and re-elected in 1865, serving in this capacity four years. In 1867 and 1868 he was elected a state senator and was a prominent member of the judiciary committee of the legislature. He moved to Lewiston in 1869, where he continued to reside until his death. He was repeatedly chosen a member of the city government, city solicitor, and in 1881, mayor. At the commencement of 1880, Bowdoin college conferred upon him the honorary degree of Master of Arts.

Mr. Ludden was an able counsellor and a successful advocate. He entertained an exalted opinion of the science of law, and a profound admiration and respect for the great authors who have illustrated it, and the courts who have administered it. In his practice, while he was faithful to his client, he did not forget that in the temple of justice he was also a priest to guard its sacred shrine. Barring the infirmities of human nature, he faithfully kept his solemn oath when admitted to the bar, to do "no falsehood, or consent to the doing of any in Court," and to conduct himself "in the office of an attorney within the courts, according

*Prepared by Col. F. M. Drew of the Androscoggin Bar, at the request of the Reporter.

to the best of his knowledge and discretion and with all good fidelity, as well to the court as to his clients." He was a kind and generous man. However humble or poor, no one ever in vain solicited his services from want of influence or money, and no client was ever oppressed for payment of the compensation he had justly earned. His generosity, doubtless, diminished his earthly estate, but enriched his heavenly inheritance. His kindness was conspicuously manifested in his cordial treatment of the younger members of the bar. He never sought to discomfort them by the display of his superior knowledge, but rather to encourage them by courteous acts and encouraging words. He was a good citizen, and in the public positions with which his fellow-citizens frequently honored him, and in the private walks of life, which he always adorned by his many virtues, he successfully tried to do his duty. But above all these good qualities and virtues, as the heavenly is above the earthly, he was a christian man. In the very meridian of life he was overtaken by a fatal malady. He made a noble fight of resistance. While he was willing and ready to perform the labors of life, he had a high ambition to reap and enjoy its rewards. He fought his disease heroically. For the last year of his life it was plain that his presence in court and office was only the obedience of the body to his imperial will. But exhausted and worn out, at last his will could no longer command obedience, and he fell, while confident of victory.

He was buried in Riverside Cemetery, Lewiston, September 23, 1882, respected and esteemed by all who knew him.

"He was weary, worn with watching,
His life'crown of power hath pressed
Oft on temples sadly aching—
He was weary, let him rest."

JOSEPH BAKER.

Hon. Joseph Baker was born at Bloomfield (now Skowhegan), Maine, June 23, 1812, and died at his home in Augusta, Novem-

ber 29, 1883, of catarrhal pneumonia, after an illness of about one week.

Mr. Baker's ancestors were a strong and hardy race, both physically and intellectually, and Mr. Baker inherited these characteristics in a marked degree. He fitted for college partly at China Academy, but chiefly without an instructor; he entered Bowdoin College in 1832, and graduated from that institution in 1836. In his struggle for an education he was obliged to rely wholly upon himself; there was no one to render him pecuniary aid. After graduating he went to Augusta, and for two years was assistant teacher in the high school, under Professor Wm. H. Allen, afterwards President of Girard College. During this time he began the study of law; he completed his studies in the offices of Williams and McCobb, and Vose and Lancaster; he was admitted to the Kennebec bar in August, 1839. He immediately opened an office in Augusta, and in 1848, entered into partnership with Sewall Lancaster.

During these years he took an active part in politics, being himself a Whig, and in May, 1854, he became editor of the Kennebec Journal, William H. Simpson being proprietor In November, 1854, James G. Blaine purchased an interest in the paper, and it was published by Baker and Blaine from that time until January, 1855, when Mr. Baker disposed of his interest, and resumed the practice of law from which he never after turned aside. In 1872, his son, Orville D. Baker, became a partner, and the firm of Baker and Baker continued till 1882, when the firm of Baker, Baker and Cornish was formed, with Leslie C. Cornish as junior partner.

Mr. Baker was many times honored by the city in which he lived. He served frequently in both branches of the city government, was city solicitor in 1858, 1859, 1860 and 1868, and he also filled the position of superintendent of schools; he was a member of the House of Representatives in 1870 and of the Senate in 1847. In 1841 he was clerk of the commission on revision of the statutes, and he was a member of the commissions on revisions in 1857 and 1871. He discharged the duties of the various positions with marked ability and fidelity. Politics how-

ever was not his forte, nor were political honors the object of his ambition. Had he remained in that profession, the legal fraternity would have lost one of its brightest lights, but the world of letters would have welcomed him to a high rank. His profession was his pride, and to hold high rank as a member of the bar was ample honor for him, and it was an honor which he lived to enjoy, for not only did he become the leader of the bar in Kennebec county but he was often called to conduct important and difficult cases in all sections of the state. No case was ever submitted to the courts or left his hands without the fullest and most thorough preparation. His efforts were not the scintillations and flashes of genius, but the result of close observation, a retentive mind, power of application and hard work. With the exception of the single year of journalism, Mr. Baker was in the constant and active practice of the law for more than forty years, and his name appears in nearly every Maine Report since 1841.

As a lawyer he combined clear perception, sound judgment, and powerful, and at times eloquent advocacy. With a vigorous constitution he was enabled to work with astonishing application, and to his untiring industry supplemented by sound common sense, more than to his natural brilliancy, is to be attributed his great success; and these habits of industry and of close application continued to his death. As a man, Mr. Baker was upright and honest, kindly and generous; as a citizen, he was progressive and public spirited, and as a friend he was true and faithful.

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2. The plaintiff in a suit in equity cannot be a witness where the defendants are "made parties as heirs of a deceased party." *Hinckley* v. *Hinckley*, 320.

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1. It is not necessary that the accused should be previously shown to be connected with the crime, for which he is on trial, to render his threats in relation to the commission of such crime admissible in evidence. Such evidence is admissible at any stage of the government's case. *State* v. *Day*, 120.

2. Evidence of a grantor's declaration in disparagement of his title, made while he was owner of the land granted by him, introduced by a party claiming adversely to the grantee, cannot be contradicted by evidence of such grantor's declarations made subsequently and in relation to the same title. *Royal* v. *Chandler*, 265.

3. Where the record of the judgment is not fully extended, the docket entries therein are the only proper evidence of the judgment. *Davis* v. *Smith*, 352.

4. A copy of the record of the collector of internal revenue, sworn to in court by a competent witness, is admissible. *State* v. *Hall*, 501.

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Bailey v. *Knapp*, 205.

PARTNERSHIP.

1. The provisions of R. S., c. 69, §§ 1-4, relating to the settlement of the estates of deceased partners, do not apply to an account sued in the name of surviving parties for the benefit of one partner to whom the account was assigned by the partnership during the lifetime of all the partners.

Matherson v. *Wilkinson*, 159.

2. The plaintiff, a deputy sheriff, had an account against a firm which consisted of the defendant and another. When sued, the account was barred by the act of limitations. At some date before the bar could operate against the account, the partners settled their partnership matters, and on defendant's representation to his partner that he had paid plaintiff's claim, when he had not, he was allowed the amount of it in such settlement.

Held: That the plaintiff cannot maintain an action for money had and received upon the ground that the settlement placed money in the defendant's hands for plaintiff's benefit, or that it had the legal effect to do so, or was equivalent to doing so. *Libby* v. *Robinson*, 168.

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PAUPER.

1. Pauper supplies furnished to a minor child will not be considered as supplies indirectly furnished the father when there is a destruction of the parental and filial relations, and the father has deliberately abandoned such child, and has taken up his residence in another town, emancipating the child from all duty to him, and renouncing all obligation to it. *Liberty* v. *Palermo*, 473.
2. Supplies furnished under such circumstances, even with the knowledge of the father, will not be considered as supplies furnished to him so as to prevent his gaining a settlement in his new place of residence. *Ib.*

PAYMENT.

1. It is a well settled rule of law in this state that a negotiable note, given for a simple contract debt, is *prima facie* to be deemed a payment or satisfaction of such debt. *Bunker* v. *Barron*, 62.
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1. Under the statutes of this State, the authority of a judge of probate to take the probate of a will is not affected by the fact that his aunt by marriage is a legatee. *Marston et al. Pet'rs*, 25.
2. The provision of R. S., c. 63, § 25 is remedial in its character, but its remedy is not to be granted for the mere asking. *Ib.*
3. To entitle a collateral heir to the remedy provided in R. S., c. 63, § 25, it must appear that the petitioner made reasonable endeavors to seasonably claim an appeal and exercised reasonable diligence in prosecuting his petition; and even then his petition will not be sustained unless justice requires a revision of the decree of the judge of probate admitting the will to probate, especially when it appears that the real object sought is to try and compel a compromise. *Ib.*

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1. A person who, in the lifetime of one deceased, indorsed his note for his accommodation, and after his death indorsed his administrator's note given in exchange for his note, and indorsed several renewals of the administrator's note, and finally paid the last note in the series himself, does not thereby become a creditor of the estate of the deceased, although the administrator s note was in each instance worded as the note of the estate and not his own note. The administrator's notes bound him personally, but would not bind the estate. *White* v. *Thompson*, 207.
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1. Notice of the dishonor of a note indorsed by an insolvent firm is sufficient if addressed to the firm at its former place of business, where its affairs are being settled by a trustee to whom the firm has made an assignment for the benefit of its creditors and is received by the trustee.
Casco National Bank v. *Shaw*, 376.
2. Depositing such a notice, properly addressed, in a street letter box, put up by the Post Office Department is as truly mailed as if deposited in the letter box within the post office building itself. *Ib.*

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The justice of the superior court for the county of Aroostook has the power to set aside the verdict, and grant a new trial, in a case tried before him, when in his opinion the case demands it. *Brown* v. *Moore*, 216.

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1. The statute having prescribed the weight which may lawfully be transported across a toll-bridge, if it appears that the plaintiff's load exceeded such weight, and thereby the bridge is broken down and injuries are sustained by him, he is prohibited from recovering for such injuries. *Dexter* v. *Canton Toll-bridge Co.* 563.
2. The statute prohibition applies to "any loaded cart, wagon or other carriage the weight whereof exceeds forty-five hundred pounds, exclusive of the *team* and *carriage*;" *Held*, the driver, though seated upon the carriage, is not a part of such team or carriage, and not being included in the statute exception, his weight must be taken into consideration in determining the weight of the load. *Ib.*

TOWN.

1. To entitle one to recover of the town money borrowed by a majority of the selectmen without prior express authority, for which a town note was given, the plaintiff must show that the money was paid into the town treasury, or applied to the payment of legal liabilities of the town, and that the town had ratified the action of the selectmen. *Brown* v. *Winterport*, 305.
2. An article in a warrant for a town meeting, to see if the town would vote to pay a number of town notes, specifying each note by giving name of the payee, amount and date, is sufficient. *Ib.*
3. Where all the voters and officers of a town meeting by unanimous consent, but without a vote, go out into the open air, in front of the place of meeting, where they could more conveniently vote upon a proposition, and there vote without objection on the part of any person, the action is legal. *Ib.*
4. Where a town has in town meeting by vote ratified the doings of the selectmen in borrowing money and giving a note therefor, in behalf of the town it cannot at a subsequent meeting rescind such a ratification. *Ib.*
5. A town is not liable for acts which result in creating a nuisance to the property of one of its citizens, when the acts complained of are not within the scope of its corporate powers. *Seele* v. *Deering*, 343.

TRUST.

TRUSTEE.

See PROMISSORY NOTE, 3.

TRUSTEE PROCESS.

WAY.

WILL.

WITNESS.

See DEED, 1. REAL PROPERTY, 1. WILL, 2, 3.

WOOD PULP.

See LIEN, 1.

WORDS.

WRIT.

See AMENDMENT, 1. BOND, 2.