REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By JOSEPH WHITMAN SPAULDING,

REPORTER OF DECISIONS.

MAINE REPORTS,

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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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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

NATHAN F. BACKUS, appellant, *vs.* OREN B. CHENEY and others.

SARAH E. STANLEY, appellant, *vs.* Same.

Franklin. Opinion February 1, 1888. Announced August 2, 1887.

Will. Probate appeal. Change of venue. Practice. R. S., c. 63, § 28.

In a probate appeal, "if . . . any question of facts occurs proper for a trial by jury, an issue may be formed (framed) for that purpose under the direction of the court and so tried." R. S., c. 63, § 28.

When such issue has been framed the court has power to order a change of venue for a trial of the same.

If the issue is decisive of the case the whole case is transferred, and the decision is certified directly to the probate court. Otherwise where other proceedings must be had in the appellate court after the decision of the issue framed for the jury.

When questions of law arise in the trial before the jury, they should be entered and heard in the district in which the trial was had.

ON exceptions.

An appeal from the decision of the judge of probate for Franklin county, approving and allowing of the will of Sarah S. Belcher, late of Farmington, deceased.

The proponents of the will filed the following motion and the exceptions were to the ruling of the court, as a matter of law, that there was no authority in the court to grant the motion.

(Motion.)

"And now on the first day of said term come the president and trustees of Bates college, a corporation legally existing under the laws of the state of Maine, and interested as the residuary legatee and devisee, under the said will of Sarah S. Belcher, and Oren B. Cheney, executor named in said will, and respectfully move the court, in case the court should determine to submit to the jury issues of fact arising therein, to order the transfer of the above entitled civil action and appeal relating to the probate of the said will of said Sarah S. Belcher, and the codicil thereto and to the appointment of the executor therein named to be the executor of said last will and testament, now pending in said court, to the docket of said court in some other county, as the court shall determine, in said state, other than said county of Franklin, for trial, and respectfully show the following causes for the granting of said motion:

"That by the provisions of said will the title to a large amount of real and personal estate, exceeding fifty thousand dollars in value, and heretofore subject to assessment for purposes of taxation in said Farmington, passes to the said president and trustees of Bates college, and thereby becomes devoted perpetually to the education of youth, and exempt, under the laws of the state, from all taxation whatever, either for state, county or municipal purposes; leaving all public charges in said town and county, if said will should be allowed, to be assessed upon the other property therein, and thereby giving the inhabitants of said town of Farmington and of said county of Franklin a direct pecuniary interest adverse to the probate of said will.

"That by the publication of certain newspaper articles in said county commenting upon the effect of the will in the respect above mentioned, by current reports and by frequent and general conversation throughout the county, the fact of such exemption of property from taxation under the terms of said will has become generally known, and a prejudice against the will as injurious to the interests of Farmington and of the county itself, prevails generally throughout the county of Franklin.

"That many of the heirs-at-law of the said Sarah S. Belcher

who resist the probate of the will, nephews and nieces of the said testatrix, are residents of the town of Farmington and its vicinity, and have numerous and extensive family connections throughout the county; and there exists generally in Farmington and in the other towns of the county a very strong and bitter local prejudice against the will and against its being allowed as the last will and testament of said Sarah S. Belcher, with an almost universal disposition and desire to defeat it if possible.

"That this prejudice and feeling against the will, and interest and desire to defeat it, arising from its provisions and from its effect to transfer the title to a large estate from heirs resident in Franklin county to Bates college, and to exempt it from local taxation, and from other causes which will be more fully stated in evidence, are so general throughout the county and so intense that your petitioners are advised by their counsel, and respectfully inform the court of their own conviction and belief that it is impossible for them to have a fair trial upon the merits of the case before the jury at a term of said court holden in said Franklin county.

"The President and Trustees of Bates college, and Oren B. Cheney, executor named in said will. By S. Clifford Belcher and Joseph W. Symonds, their attorneys."

S. C. Strout, *H. L. Whitcomb*, *Holman and Belcher*, for appellants.

In both appeals there are questions of fact to be tried by a jury. At common law as adopted and applied in New England, no court had power to change the venue in any action. *Lincoln* v. *Prince*, 2 Mass. 544; *Hawkes* v. *Kennebeck*, 7 Mass. 461.

No such power exists in Massachusetts at the present time, there being no statute to authorize it. The power never existed in Maine until 1872, when it was conferred by chapter 45, laws of 1872, now incorporated in Revised Statutes, c. 82, § 14. We are not aware that in Massachusetts, nor in Maine prior to 1872, the administration of justice in either state has been delayed, perverted, or in any way thwarted by the absence of such power, and as the power exists only by virtue of the statute, it can only

be exercised, and ought only to be exercised, in cases expressly provided for, and as provided in the statute. *Powers* v. *Mitchell*, 75 Maine, 369.

Such statute being in derogation of the common law must be construed strictly. *Dwelly* v. *Dwelly*, 46 Maine, 377.

If the Supreme Court of Probate and the Supreme Judicial Court can be considered as one and the same then the power to transfer these appeals does not exist. The words of the statute are "any civil action or criminal case;" this is not a criminal case, nor is it a civil action. *Scire facias* is not a civil action. 104 Mass. 375. *Habeas corpus* is not a civil action. 41 Ind. 92. Submission to arbitration is not. 1 Allen, 212. Mandamus is not. 6 Binn. 5.

The statute words are "civil action and criminal case." The term civil action is undoubtedly used in the legal and accepted sense; if not so intended, both civil and criminal proceedings would have been classed under one term, as civil and criminal cases or causes; on the contrary, the term civil action, which has a well known legal meaning, is used, and the term case as applied to criminal is larger and may perhaps include all proceedings of a criminal nature. Civil action is defined in Rapalje's law dictionary as "an action instituted to enforce a private or civil right, or to redress a private wrong, as distinguished from proceedings to punish infringements of public rights and crimes, which are called criminal actions or prosecutions, the latter being the better word." Probate of a will has none of these elements. It is more nearly a proceeding *in rem* to determine the status of the deceased and the validity of the will. Civil actions are divided into three classes: "First, real actions." (This is not a real action.) "Second, personal actions, such as concern contracts, sealed or unsealed, and offences or trespasses. Third, mixed actions, which lie as well for the recovery of the thing as for damages, for the wrong sustained as ejectment." Wharton's Law Dictionary, Title Actions.

"Civil actions are divided into real, personal and mixed. Personal actions are *ex contractu*, or *detinue*, or *ex delicto*." Bacon's Abridgment, Title Actions, A. 47.

None of these old and well settled definitions of the term civil action can apply to or include a statute appeal of the kind here in issue. When the legislature uses a phrase having a well known and definite meaning in the law, it is presumed to be used in such sense. 4 Pick. 411; 7 Mass. 523; 27 Maine, 16; 24 Pick. 296; 1 Pick. 261; 66 Maine, 161.

The phrase, "civil action," is within this rule. By the Constitution, article first, section 20, in all civil suits the party shall have a right to a trial by jury. Suit and action are synonymous. 38 Vermont, 171.

Therefore, if this was a civil action or suit, the right to such a trial by jury must exist, but neither party can claim a trial by jury in a probate appeal as a matter of right. *Bradstreet* v. *Bradstreet*, 64 Maine, 209.

Symonds and Libby, and *S. Clifford Belcher*, for appellees, cited: R. S., c. 82, § 14; Tidd, Pr. 544, 548, 549; *Poole* v. *Bennet*, 2 Str. 874; *Mylock* v. *Saladine*, 3 Burr. 1564; *Rex* v. *Amery*, 1 T. R. 363; *Rex* v. *Harris*, 3 Burr. 1330; *Holmes* v. *Wainwright*, 3 East, 330; Compare *Gerard* v. *De Robeck*, 1 H. Bl. 280; *Howarth* v. *Willett*, 2 Str. 1180; *Foster* v. *Taylor*, 1 T. R. 781; *Watkins* v. *Towers*, 2 T. R. 275; *Cailland* v. *Champion*, 7 T. R. 205; *Mostyn* v. *Fabrigas*, Cowp. 177; *Petyt* v. *Berkely*, *Id.* 510; *Watt* v. *Daniel*, 3 Bos. & P. 425; *Rowley* v. *Allen*, Willes, 318; Esp. N. P. 211, 516, 517; Jacob, Law Dict. *Venue*; 3 Bl. Com, *383, § 4.

General law powers of a court are exercised without the aid of a statute. *Cochecho R. Co.* v. *Farrington*, 26 N. H. 428; *Hilliard* v. *Beattie*, 58 N. H. 112; *Putnam* v. *Bond*, 102 Mass. 371; *Osgood* v. *Lynn*, 130 Mass. 335; *Lincoln* v. *Prince*, 2 Mass. 546, 547; *Cleveland* v. *Welsh*, 4 Mass. 592; *Hawkes* v. *Kennebeck Co.* 7 Mass. 463; *Carvill* v. *Carvill*, 73 Maine, 139.

For meaning of "cause" and "action" see, *Bridgton* v. *Bennett*, 23 Maine, 425; Abb. L. Dict. Action; *Valentine* v. *Boston*, 20 Pick. 203; *Ex parte County Commissioners*, 30 Maine, 221; *Webster* v. *Co. Com.* 63 Maine, 29; *Belfast* v.

Fogler, 71 Maine, 403; *Stiles' Appeal*, 41 Conn. 329; *Taylor* v. *Gardiner*, 11 R. I. 182.

HASKELL, J. This is a probate appeal wherein the validity of a will is denied because of the incompetency of the testator, and because the same was procured by undue influence.

The appellees moved a change of venue because of local prejudice so great as to prevent a fair and impartial trial of the issues involved before a jury of the vicinity.

The presiding justice ruled as matter of law that the court had no power to grant the motion, to which ruling the appellees have exception.

R. S., c. 63, § 23, makes the Supreme Judicial Court the Supreme Court of Probate; and section 28 provides that the Supreme Court of Probate "may reverse or affirm, in whole or in part, the sentence or act" of the probate court "appealed from, pass such decree thereon as the judge of probate ought to have passed, remit the case to the probate court for further proceedings, or take any order therein that law and justice require; and if upon the hearing any question of fact occurs proper for a trial by jury, an issue may be formed (framed) for that purpose under the direction of the court, and so tried."

Questions of sanity and of undue influence arising upon the probate of wills are usually submitted to a jury for determination. This practice has been so common and uniform as to become almost a law of the court.

When such issues are framed for a jury trial, "all incidents of such trial follow." *Carvill* v. *Carvill*, 73 Maine, 136. The cause then assumes the character of an action at law. The procedure is according to the course of the common law, and is governed by legal rules throughout.

R. S., c. 82, § 14, provides that any judge of the Supreme Judicial Court, while holding a *nisi prius* term, on motion of either party shall, for cause shown, order the transfer of any civil action or criminal case pending in said court to the docket thereof in any other county for trial."

No good reason is shown why a probate appeal, when it has

assumed the character of, and is to be conducted as an action at law, should not be subject to the provisions of the above statute.

If the issue framed for the jury is substantially decisive of the whole case, and no ulterior proceedings are to be had before the court requiring further investigation or consideration, the whole cause should be transferred to the other county, and the decree from the court there sitting should be certified directly to the probate court from whence the appeal came.

If, however, the court is of opinion that further proceedings before the court will be necessary after the issues framed for the jury shall have been decided, it may certify to another county such issues only for trial; and upon their determination the result should be certified back to the court from whence they came for its further consideration.

When a jury trial is had in another county from that where the cause was originally pending, questions of law arising upon the trial should go to the law court in the district where the trial was had and there be settled; and the mandate of the law court should be sent to the clerk of the court from whence the exceptions came to be obeyed as its tenor may direct.

Exceptions sustained.

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

STILLMAN ILSLEY and others *vs.* LEONARD ILSLEY and another.

Cumberland. Opinion August 14, 1888. Announced March 23, 1887.

Will. Trust. Trustee.

The will bequeathed five-sevenths of the residue of the testator's estate, to the plaintiffs in trust, thereby creating five distinct trusts of one-seventh each for the benefit of the respective *cestuis que trust* named, and authorized each trustee to use for the support of the respective beneficiaries such part of his or her share of the principal funds, as he in his good judgment may deem necessary. In a subsequent paragraph, the will provided that none of the funds shall be paid to any one of the beneficiaries "so long as their health and strength continue, and they are able to do anything (or something) for

themselves for their support, to be held till any one of them becomes sick and totally unable to support themselves. The fund to be a reserve fund in case (any one) of sickness, . . what I mean by sickness is to take the cases of my brother (named) and sister-in-law (named) all of which proved incurable or total." *Held*, that these latter clauses are to be deemed merely advisory, and to be followed by the trustees as nearly as they in their good judgment may deem necessary.

On report.

Bill in equity by the trustees under the will of Joseph Ilsley to obtain a construction of the will.

Heard upon bill and answers and a copy of the will which is sufficiently stated in the opinion.

Lewis Pierce, for plaintiffs.

John A. Waterman, for respondents.

"A clearly expressed intention in one portion of the will, is not to yield to a doubtful construction in any other portion of the instrument."

"The plain and unambiguous words must prevail." Red. on Wills, Vol. 1, pp. 430, (12) 433, (2) and 434 (4).

"When the intention is obscured by conflicting expressions, it is to be sought rather in a rational and consistent, than an irrational and inconsistent purpose." Jarman's XIII Rule.

Virgin, J. In the first sentence of this holographic will the testator expresses himself as "being desirous to make a suitable provision for (his) my brothers, nephews and nieces." After making a few specific bequests to various persons, he then bequeathed five-sevenths of the "residue of his estate" to certain trustees named, one-seventh "for the benefit" during life of two surviving brothers, and one-seventh "for the equal benefit" during life of the respective nephews and nieces of each of three deceased brothers—thus creating five separate and distinct trusts.

After designating the fund which the respective *cestuis que trust* are to have the benefit of, the testator then declared his general intent as to the mode of dispensing the funds among them in the following clear and unambiguous language: "Each of said trustees is hereby authorized to use for the support of

either of the persons for whom he is trustee, such part of his or her fractional share of the principal funds (as) in his good judgment (he) may deem necessary." And to show his entire confidence in the "integrity and faithfulness" of the trustees, he also appointed them executors of his will and "directed that no bond shall be required of them as executor or trustees."

Each and all of the provisions of the will harmoniously concur in showing the manifest purpose and general intent of the testator in dispensing the five-sevenths of the residue of his estate among his beneficiaries to be as above indicated—leaving it at the discretion and in the good judgment of the trustees—except one paragraph which occurs later in the will. That contains expressions which not only render obscure the general import of the will, but which are repugnant to it. For instance, the provisions that none of the funds shall be paid to any of the beneficiaries "so long as their health and strength continue and they are able to do anything (or something) for themselves, for their support—to be held till any one of them becomes sick and totally unable to support themselves." "The fund to be a reserve fund in case (any one) of sickness." . . And "what I mean by sickness is to take the cases of (his) my brothers named and his sisters-in-law named," all of which proved incurable or total.

The literal force and effect of these expressions would utterly defeat the obvious intention and primary purposes of the testator which the earlier language of the will legitimately imported. These expressions are repugnant to all that goes before. It is absurd to suppose that the testator really intended that no part of the trust funds should be used for the benefit of those for whom he was "desirous to make a suitable provision" to keep them from the poor house, or for their relief in case of sickness, until the trustees knew that the objects of his bounty had become "incurable" and were beyond relief. Such a construction of the whole will would be unreasonable and inconsistent with its manifest intention.

We think these latter clauses at most should be deemed merely advisory in character, to be followed by the trustees as

nearly as their "good judgment," in which the testator so implicitly relied, "may deem proper."

Decree accordingly.

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

VIRAM B. PAUL *vs.* JESSE H. FRYE and another.

Waldo. Decided December 22, 1887.

Equity practice. Report of master.

The report of a master has substantially the weight of a verdict, and his conclusions are not to be set aside or modified without clear proof of error. The decision of a single justice upon matters of fact in an equity hearing will not be reversed unless it clearly appears that the decision is erroneous.

ON appeal by the plaintiff.

80 26
94 318

The opinion states the point.

Joseph Williamson, for plaintiff.

The report of a master is not conclusive, although every reasonable presumption is to be made in its favor; and if the evidence clearly shows that he is mistaken in his conclusions, the court will set them aside on exceptions. *Drew* v. *Beard*, 107 Mass. 64.

William H. Fogler, for defendants.

PER CURIAM. This is an equity appeal. The bill is to enforce specific performance of an agreement to convey lands. The question was as to the amount the complainant was to pay for such conveyance. The case was referred to a master, who heard the parties and their witnesses, and examined their papers, and made his report, stating the amount he found due; he also reported the evidence taken before him. The complainant objected to the master's findings, and was heard thereon by the presiding justice, who reviewed the reported evidence and found the master's findings to be correct, and decreed accordingly.

The complainant thereupon appealed. Questions of fact only are presented by the appeal.

While the master's report upon questions of fact is not conclusive, yet it has substantially the weight of a verdict of a jury; and his conclusions are not to be set aside or modified without clear proof of error on his part. *Dean* v. *Emerson*, 102 Mass. 480; *Trow* v. *Berry*, 113 Mass. 146; *Richards* v. *Todd*, 127 Mass. 172; *Cary* v. *Herrin*, 62 Maine, 16.

Again, we have before held that the decision of a single justice upon matters of fact in an equity hearing should not be reversed unless it clearly appears that such decision is erroneous. *Young* v. *Witham*, 75 Maine, 536.

The appellant must show the decree appealed from to be clearly wrong, otherwise it will be affirmed.

Applying these rules, we cannot say that the finding of the master and that of the single justice are clearly wrong. The evidence was conflicting, but some of it fully sustains the findings.

Decree affirmed.

JOSEPH MAYBERRY *vs.* JAMES C. MEAD.

Cumberland. Decided January 3, 1888.

Pew-owners' corporation. Meeting-houses. R. S., c. 12, § § 31, 32. Assessment of pews.

A corporation of the pew-owners, by a majority vote, may control the meeting-house, make repairs thereon, etc., at a meeting of the corporation duly called therefor. It cannot be done at a meeting called by a justice of the peace, on application to him therefor, for the purpose of organizing the corporation.

Proceedings which were held to be for the organization of pew-owners.

It must appear that a majority of the members voted to repair, raise the money, and assess the pews, in order to make a valid assessment.

An assessment is void where the assessors added an overlay to the sum raised, and assessed it upon the pews.

ON report.

This was an action for the recovery of pew No. 16 in the Congregational meeting-house in North Bridgton. It was admitted that the title to the pew was conveyed by deed in

1875. But the defendant claimed title under a deed from the treasurer of a corporation of the pew-owners, given in 1884. This deed was sufficient in form, and, it was admitted, conveyed a good title if the following proceedings were valid:

(Records.)

"To Edward Kimball, Esq., one of the Justices of the Peace in and for the county of Cumberland and state of Maine.

"The undersigned proprietors and pew-owners in the house known as the Congregational meeting-house in North Bridgton village, in said county, hereby make application to you to issue your warrant to one of them to notify the proprietors and pew-owners of said house to meet in said house on Saturday, the 6th day of October, A. D. 1883, at two o'clock P. M., to act on the following articles, viz.:

"1. To choose a moderator to govern said meeting.

"2. To choose a clerk.

"3. To see if said proprietors and pew-owners will incorporate themselves into a legal body.

"4. To determine the mode of calling future meetings.

"5. To determine whether they will repair said house.

"6. To determine in what manner money shall be raised for repairs.

"7. To choose treasurer, appraisers, assessors, and any other officers, committees, or agents, as they may think proper for executing such purposes as they may direct.

"8. To transact any other business that may legally come before them.

"Dated this fifth day of September, A. D. 1883.

Luke Brown,
G. E. Chadbourne,
Asa Gould."

(L. S.) "State of Maine, Cumberland, ss.

"To Luke Brown, Esq., of Bridgton: In compliance with the foregoing application to me directed you are hereby required to notify and warn the pew-owners therein named to meet and assemble at the time and place, and for the purposes specified in

said application, by posting an attested copy of the same on the principal outer door of said meeting-house, and one at the North Bridgton post office, also to be printed in the Bridgton News at least twenty-one days before the time of said meeting.

"Given under my hand and seal this tenth day of September, A. D. 1883.

Edward Kimball, Justice of the Peace."

(Warrant duly served and returned.)

"North Bridgton, Oct. 6, 1883.

"Met in accordance with the foregoing request and warrant, at the time and place and for the purpose therein named, and called to order by Mr. Brown, to whom said warrant was directed.

"Chose by ballot, Jacob Hazen, Moderator.

" " Geo. E. Chadbourne, Clerk,

who was sworn to the faithful and impartial discharge of the duties incumbent to that office by the moderator. A majority in interest of the owners being present, voted, on motion of the clerk, that we now declare this a body corporate, and that a committee of three be appointed by the chair to draft a code of by-laws for the use and the government of said corporation. G. E. Chadbourne, Luke Brown and C. H. Gould were appointed the committee.

"Voted, on motion of A. A. Libby, that the report presented by the committee be accepted.

"Voted, on motion of Mr. Gould, that each item of said report be voted on for adoption, amendment, or rejection; and the following preamble and code was unanimously adopted:

"This association now being a body corporate in accordance with chapter 12 of the Statutes of the State of Maine, the same to be known for all legal transactions as the Pew-owners and Proprietors of North Bridgton Meeting-house, the same to be governed by the following by-laws: . . . .

"Chose by ballot, C. H. Gould, Treasurer. } Sworn by
" " Austin B. Friswold, Collector. } Moderator.

"Chose by ballot, Jacob Hazen, Luke Brown and G. E. Chadbourne, Assessors. Mr. Hazen was sworn by Edward

Kimball, justice of the peace; Brown and Chadbourne by the moderator. . . . .

"Voted, that the meeting-house be reshingled and the plastering be repainted in distemper.

"Voted, on motion of Mr. Brown, that said repairs be done by assessment on the pews.

"Voted, on motion of the clerk, that the procuring of materials and putting on be left with the executive committee, with power.

"Voted, that whenever we do adjourn, it shall be to meet at this place one week from to-day, at two o'clock P. M., to hear the report of committee, etc.

"Adjourned.

"A true record. Attest: Geo. E. Chadbourne, Clerk.

"North Bridgton, Maine, Oct. 13, 1883.

"Met according to adjournment.

"Report of the executive committee on the purchase of shingles, etc., made verbally and accepted.

"Voted, to raise one hundred and fifty dollars for the purpose of shingling the roof and repairs on plastering.

"Voted, that when we adjourn, it shall be at this place two weeks from to-day, at three o'clock P. M.

"Adjourned.

"A true record. Attest: Geo. E. Chadbourne, Clerk.

"Tax of one hundred and fifty dollars, with overlay of five dollars and forty cents, assessed on the pews of the meeting-house at North Bridgton, Oct. 20, 1883, committed to collector for collection Oct. 20, A. D. 1883.

Caleb A. Chaplin, for plaintiff.

A. H. Walker, for the defendant.

PER CURIAM. We think the defendant fails to show title to the pew in suit, for the following reasons:

I. The proceedings put in evidence by the defendant, and relied on by him, must be treated as an organization of the pew-

owners of the meeting-house, as a corporation under R. S., 1871, c. 12, § § 31, 32.

II. By section 33 of same chapter, such corporation, by a majority vote of its members, may control the meeting-house, etc. It must be done at a meeting of the corporation duly called therefor. It cannot be done at a meeting called by the justice of the peace, on an application to him therefor, for the purpose of organizing the corporation. The meeting so called is not a meeting of the corporation, but one called before there was a corporation.

III. It does not appear by the record that a majority of the members of the corporation were present or voted to repair, raise the money, or assess it on the pews.

IV. The assessors had no authority to add to the sum raised an overlay at their pleasure, and assess it on the pews. We find no statute authority for it, and in the absence of such authority they had power to assess the sum raised only. In adding the overlay they exceeded their power, and for this reason the assessment was void.

Judgment for the plaintiff.

EBEN A. HOLMES *vs.* LEVI K. CORTHELL.

Washington. Opinion January 4, 1888.

Way. Pleading. Nuisance. Trespass.

A declaration for obstructing a public way containing the essential averments is sufficient, either in a plea of trespass or trespass on the case.

One who suffers special damages from a public nuisance may recover the same from the person creating the nuisance; and from the person maintaining it after request to abate it.

When the declaration in such a case fails to show that the plaintiff has suffered any special damage for which the defendant is responsible it will be adjudged bad on demurrer.

John H. French, for plaintiff.

"Any person injured in his comfort, property, or the enjoyment of his estate, by a common and public, or 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.

In *Ashby* v. *White*, Lord Raymond, 938, Lord HOLT says, "If men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense." The case of *Brown* v. *Watson* explains the law fully. 47 Maine, 161.

The court says, "Those who have no occasion of business or pleasure to pass over a road so obstructed, and who have not attempted it, cannot maintain an action for the obstruction thereof."

In the same case the learned judge, in his opinion, quotes the decision *Greasly* v. *Codling*, 2 Bing. 263, that a person being obstructed on his journey and obliged to proceed by a more circuitous route, might recover for the loss of time and inconvenience against the individual by whom the obstructions were erected. The case of *Norcross* v. *Thoms*, 51 Maine, 503, gives a construction to § 12, c. 17, of the Revised Statutes, even beyond what we claim on this point.

The case of *Wesson* v. *Washburn Iron Co.* 13 Allen, 95, though referring to a private nuisance, seems to indicate that the same principle may apply to a public one.

Harvey and Gardner, for the defendant, cited: *Blood* v. *Nashua & Lowell R. R. Corp.* 2 Gray, 140; *Willard* v. *Cambridge*, 3 Allen, 574; *Quincy Canal* v. *Newcomb*, 7 Met. 276; *Brainard* v. *Conn. Riv. R. R.* 7 Cush. 511; *Brightman* v. *Fairhaven*, 7 Gray, 271; *Harvard College* v. *Stearns*, 15 Gray, 1; *Hartshorn* v. *South Reading*, 3 Allen, 504; *Stetson* v. *Faxon*, 19 Pick. 147; *Smith* v. *Boston*, 7 Cush. 254; *Wesson* v. *Washburn Iron Co.* 13 Allen, 95; *Franklin Wharf Co.* v. *Portland*, 67 Maine, 59; *Brayton* v. *Fall River*, 113 Mass. 218; *Norcross* v. *Thoms*, 51 Maine, 503; *Cole* v. *Sprowl*, 35 Maine, 161.

HASKELL, J. Trespass for obstructing a public way by building a stone wall across it, whereby the plaintiff claims to have suffered special damage.

The distinction between trespass and trespass on the case is abolished by R. S., c. 82, § 15. "A declaration in either form is good." *Hathorn* v. *Eaton*, 70 Maine, 219.

It is settled in this state that one who suffers special injury, no matter how inconsiderable, from a common nuisance, may recover damages in an action at law from the person creating it; R. S., c. 17, § 12; *Brown* v. *Watson*, 47 Maine, 161; *Dudley* v. *Kennedy*, 63 Maine, 465; and from the person maintaining it after request to abate it. *Pillsbury* v. *Moore*, 44 Maine, 154.

Three demurrers to the declaration have been filed, and two amendments of it have been allowed. To the sustaining of the last demurrer to the declaration as finally amended, the plaintiff has exception.

The declaration avers the existence of a public way and the obstruction of it by the defendant in erecting a stone wall across it, whereby on a given day and on divers other days and times, etc., the plaintiff, in attempting to travel upon such way, was "hindered, obstructed and prevented from passing" along it, and "incurred great danger and suffered great pain and inconvenience in attempting to climb and pass over said wall," and thereby was injured in his comfort, property, and the enjoyment of his estate.

The plaintiff avers that he was "hindered," etc., from passing along the way; be it so; no averment shows any specific damage from this hindrance; it does not appear that upon any special occasion he was thereby compelled to make a longer detour to reach a particular place where he had need to go, nor that he lost any time or was put to any expense thereby.

He may have incurred danger and suffered pain in trying to climb the wall, both of which may have resulted from his own careless or rash conduct, for which the defendant is not responsible.

The plaintiff avers that certain of the work people in his sardine factory "were hindered and prevented from going to and attending to their work, whereby he lost and was deprived of their services." Suppose this to be true, where is the injury to

the plaintiff? He does not aver the loss of their service to be at his cost, nor that their services, if rendered, would have been of any value to him. Upon this score the plaintiff does not appear to have suffered any damage.

Exceptions overruled.

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

CATHERINE D. FITCH

vs.

LEWISTON STEAM MILL COMPANY and others.

Androscoggin. Opinion January 9, 1888.

Deed. Acknowledgment. Corporation. Agent.

As between the parties a deed is valid though not acknowledged.

A mortgage deed was executed purporting to be in behalf of the corporation by its treasurer duly authorized. The certificate of acknowledgment stated that the treasurer personally appeared and acknowledged the instrument to be "his free act and deed." *Held*, That the deed, in every other respect complete and formal, was not vitiated by this informality in the certificate of acknowledgment.

At common law corporations have the power to sell and convey their property as they think proper.

This power to sell and convey their property and to borrow money, and make contracts, implies the power to mortgage their property, real and personal, to secure the payment of their debts.

This right may be limited by statute, or by the acts under which they are organized.

In matters where the acts of the agent of a corporation in the transfer of personal property require no formal instrument under seal, it is not necessary that the authority should be given by formal vote.

Such authority may be inferred from the conduct of its officers, or from their knowledge and neglect to make objections, as in the case of individuals.

An agent of a corporation may be appointed without the use of a seal, whatever may be the purpose of the agency.

ON report.

An action on a mortgage by the executrix of the will of Jonas Fitch.

The point is stated in the opinion.

Charles P. Mattocks and D. J. McGillicuddy, for plaintiff.

Savage and Oakes, for defendants.

Primarily the power to mortgage real estate of a corporation resides in the corporation alone. Jones on Mortgages, § 127.

We think that the statement in the text of Jones on Mortgages, p. 99, that "the directors of a corporation, in the absence of any restriction by charter or by-law, may, in behalf of the corporation, mortgage its property to any debts they are authorized to incur, without express authority," is supported by the decisions cited. But the power to sell real estate does not confer the power to mortgage. "The power should expressly declare the intention that the agent should have the authority to mortgage the property." Jones on Mortgages, § 129, and cases cited.

The law is well stated in a recent Massachusetts case, *Murray* v. *Lumber Co.* 3 New England Reporter, 420. "It is the well settled rule that a ratification by a principal of the unauthorized acts of an agent, in order to be effectual, must be made with a knowledge on the part of the principal, of all the material facts, and the burden is upon the party who relies upon a ratification to prove that the principal having such knowledge, acquiesced in and adopted the acts of the agent. It is not enough for him to show that the principal might have known the facts by the use of diligence." See also *Combs* v. *Scott*, 12 Allen, 493.

One of the directors, without any vote or action, either of the board of directors or of the corporation, mortgages in the name of the corporation, to another director, Fitch, the entire mill property and machinery, "the property which was used in carrying on our business," to secure a pre-existing debt, and thereby gain a preference over the other creditors of the corporation, and Fitch's estate is now in court seeking to maintain this security by suit not only against the corporation, but against Savage and Packard, to whom the property was subsequently conveyed in trust for the benefit of creditors.

The bare statement of the facts is itself an argument. Morawetz, § § 516, 517, 518, and the numerous cased cited

thereunder; 97 U. S. Rep. 13; 4 Howard, 552; 2 Black. 715; Angell and Ames, § 312.

FOSTER, J. The only question to be determined is whether the plaintiff is entitled to prevail in this action, which is a writ of entry upon a mortgage alleged to have been given to Jonas Fitch, plaintiff's testatrix, by the defendant corporation.

Two objections are interposed. *First*, that the mortgage is defective in form. *Second*, that it was given without the authority of the corporation.

1. The defect relied upon relates wholly to the acknowledgment of the instrument. The mortgage itself is free from any objection in form. It purports to be executed as the deed of the corporation by its treasurer duly authorized. It names the corporation as the party making it. Upon its face it is the contract of the defendant corporation. But it is contended by the counsel for the defence, that the acknowledgment is not for or in behalf of the corporation, but is the acknowledgment of the treasurer in his individual capacity. By the certificate of the magistrate, it appears that "James Wood, Treasurer," personally appeared "and acknowledged the above instrument to be his free act and deed."

It needs no discussion to show that the mortgage, in every other respect complete and formal, is not vitiated by this informality in the certificate of acknowledgment. As between the parties, a deed is valid though not acknowledged. It will pass the title to the estate in such case, as against the grantor and his heirs. *Lawry* v. *Williams*, 13 Maine, 281; *Buck* v. *Babcock*, 36 Maine, 493; *Poor* v. *Larrabee*, 58 Maine, 559.

Such an acknowledgment as this, however, has been sustained by other courts. Thus in *Tenney* v. *Lumber Co.* 43 N. H. 343, the same objection was raised as in the present case, and the court there held that the acknowledgment was sufficient, and that "this objection has no reasonable foundation."

2. That it was given without authority of the corporation.

The equities in this case are by no means in favor of the defendant corporation. The mortgage was executed in behalf of

the corporation by one who was and for a long time had been its treasurer and general business manager. The money obtained upon this mortgage, $13,551.76, was received and retained by the corporation. It is in evidence that the treasurer and general manager of this concern had been in the habit of deeding and conveying land with the corporation's name, for corporation purposes, and for the corporation's benefit, and that this was one of those transactions. It appears also that at the time of this conveyance the treasurer exhibited a vote of the corporation to Fitch, the mortgagee, and informed him that he had authority, by virtue of such vote, passed at the organization of the company, to execute this mortgage as security for the money obtained from him. That vote is as follows: "Voted, that the treasurer be hereby authorized and empowered to make, sell, execute and deliver, in the name of the company, any and all conveyances of land by deed or bond or otherwise, and all the papers of the company not otherwise provided for in the by-laws."

The corporation has retained the money thus obtained, paying interest thereon to the mortgagee from year to year with checks drawn by the treasurer of the corporation upon its funds.

There is no good reason why this mortgage should not be upheld, if it can be done consistently with the rules of law.

Let us pass then, for a moment, to the consideration of these rules, so far as may be proper in their application to this case.

It is a well settled principle applicable to corporations that they have the power to sell their property, real and personal, and to mortgage it for the security of their debts. This is incident to the power of acquiring and holding it. *Pierce* v. *Emery*, 32 N. H. 503; Jones on Mort. § 124; Angell and Ames, Corp. § 107; *Richards* v. *Railroad*, 44 N. H. 135. This is a right existing by common law, but of course may be limited by statute, or by the acts under which they are organized. No charter or by-law has been introduced limiting the general power of this corporation.

This power, unlike that applicable to natural persons, is in general executed only through some agent of the corporation,

and whose authority is derived in some manner therefrom,—or, if not authorized, whose acts may be subsequently ratified by the corporation.

And in matters where the acts of the agent of a corporation in the transfer of personal property require no formal instrument under seal, as in the sale or mortgage of personal property, it is not necessary that the authority should be given by a formal vote. In this state, as well as many others, it is held that the same presumptions are applicable to corporations, as to individuals; and that a deed, vote, or by-law, is not necessary to establish a contract, promise, or agency. *Maine Stage Co.* v. *Longley*, 14 Maine, 449; *Trundy* v. *Farrar*, 32 Maine, 228. "Authority in the agent of a corporation may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals." *Sherman* v. *Fitch*, 98 Mass. 64; *Badger* v. *Bank of Cumberland*, 26 Maine, 428, 435; *Goodwin* v. *The Union Screw Co.* 34 N. H. 378; Story, Agency, § 52.

It is a general rule of law applicable to natural persons that whenever the act of agency is required to be done in the name of the principal under seal, the authority to do the act must be conferred by an instrument under seal.

Such was formerly the doctrine in regard to the authority of agents of corporations. But in modern times this ancient rule has been wholly discarded, in this country, and it is now well settled that an agent of a corporation may be appointed—certainly by vote—without the use of a seal, whatever may be the purpose of the agency. *Bank of Columbia* v. *Patterson*, 7 Cranch, 299; *Fleckner* v. *The Bank of the United States*, 8 Wheat. 338; *Despatch Line Co.* v. *Bellamy M'f'g Co.* 12 N. H. 231; Angell and Ames Corp. § § 282, 283.

The contention, therefore, that the mortgage in question was given without authority, comes with ill grace from the defendants, and under the circumstances must be deemed untenable.

Here was the express authority of the corporation created and existing by vote duly recorded, authorizing and empowering its treasurer to make, sell, execute and deliver, in the name of the

corporation, any and all conveyances of land by deed, bond, or otherwise. This authority was broad enough to embrace the transaction in relation to this mortgage. The treasurer, not only in this case, but on other occasions, had acted in like manner, relying on the authority conferred by this vote. The party who advanced the money and received the mortgage was led to believe that the treasurer was acting under that authority. This is not denied.

Consequently, after enjoying the benefit of the loan, and acquiescing in the transaction for more than eight years, it does not lie in the mouth of the defendant corporation to say that the mortgage is inoperative and void. *Aurora Society* v. *Paddock*, 80 Ill. 263.

Judgment for plaintiff.

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

SAMUEL HUBBARD

vs.

THE GREAT FALLS MANUFACTURING COMPANY.

York. Opinion January 9, 1888.

Mill-dam. Flowage. Practice. Arbitration.

In proceedings upon complaint for flowage, the statute contemplates that when the right to flow is controverted, such fact must be established or admitted before the appointment of commissioners.

It is not within the power, nor is it any part of the duty of commissioners to determine that question.

When a submission is made by private parties to a given number of persons, without any express authority given or to be inferred from the manner or circumstances of the submission, that a smaller number may decide, an award or decision will be void unless made by all.

A different rule prevails when authority is conferred upon several persons in matters of public concern.

ON exceptions.

Complaint for flowage. The questions presented by the exceptions are stated in the opinion.

James A. Edgerly and Harry V. Moore, for complainant, cited: R. S., c. 92, § 9; *Vandusen* v. *Comstock*, 3 Mass. 185; *Bryant* v. *Glidden*, 36 Maine, 36; *Lincoln* v. *Whittenton Mills*, 12 Met. 34; Morse, Arb. & Award, 162; *Furbish* v. *Ponsardin*, 66 Maine, 430; *Cutler* v. *Grover*, 15 Maine, 159; *Walker* v. *Sanborn*, 8 Maine, 288.

R. P. Tapley, for the respondent.

The office of the commissioners is to ascertain and report the damages sustained by the complainant, by reason of acts done by the respondent. And we may here say, this court has determined that simply flowing a man's land may not in all instances produce injury to him. That actual injury must be shown. *Bryant* v. *Glidden*, 39 Maine, 462.

To obtain a right of flowage by long use, actual injury and damages must be shown, is well settled. Say the court, in *Knowlton* v. *Homer*, 30 Maine, 555, "it is one of the plainest principles of law and of common sense, that when a party has voluntarily surrendered a right which he could have asserted, he should not avail himself of it to the prejudice of his adversary." Most certainly he should not, when he has voluntarily for good consideration surrendered such rights.

It will not, we apprehend, be contended that commissioners appointed as these were cannot act by majority. It is only by giving them some other character that unanimity can be required. In the above cited case it is said, "an agreement to submit a controversy to arbitration must have effect according to the intention of the parties exhibited in the submission, like any other contracts." "That if they intend that a concurrence in opinion of all the referees is not necessary to constitute a binding award, and that intention is apparent upon the submission, the decision of a majority is valid. This intention may be expressed in direct terms, but if it is not so expressed, but is clearly inferable from the whole instrument, it is equally obligatory." Page 553. So we say here it is clearly inferable that the parties

understood the decision was to be made as in ordinary cases of such commissioners. Everything indicates it.

FOSTER, J. This was a complaint for flowage. At the first term after notice the respondents appeared and without any pleadings being filed or other action had, the court, by consent and agreement of parties, appointed three commissioners, as provided by R. S., c. 92, § 9.

When their report was returned to court the respondents moved its acceptance, and the complainant claimed a trial by jury. Thereupon the case was continued to the next term, when the justice presiding declined to accept the report and rejected the same, to which the respondents excepted.

The exceptions cannot be sustained.

It must be conceded that inasmuch as this is a statutory proceeding it must be strictly pursued, and can be sustained only in accordance with the statutory provisions relating to such proceedings.

The statute unquestionably contemplates that when the right to flow is controverted, such fact must be established or admitted before the appointment of commissioners. It is no part of their duty, nor is it within their power, to determine that question. Not having pleaded to the complaint before the appointment of commissioners, and not having shown "any legal objection to proceeding," the effect was practically the same as if a default had been entered; and all matters that should have been determined by the proper tribunal before such appointment were shut out. *Axtell* v. *Coombs*, 4 Maine, 324–5; *Vandusen* v. *Comstock*, 3 Mass. 187; *Bryant* v. *Glidden*, 36 Maine, 42.

It only remained for the commissioners to proceed in accordance with the authority with which they were invested under the statute and their warrant issued from the court. By that they were directed and empowered to go upon the premises and make a true and faithful appraisment under oath of the yearly damages, if any, done to the complainant by the flowing of his lands described in the complaint, and determine how far the

same may be necessary, and ascertain and make report what portion of the year the complainant's lands ought not to be flowed.

Instead of this, however, at the hearing before the commissioners the parties entered into a written agreement to open the whole question of damages without regard to the statute of limitations of three years, and that the defendants might show what right they had to modify the same, and to assess damages in a lump sum.

The commissioners proceeded and heard the cause under this agreement.

The parties, by this agreement in writing, constituted the commissioners a tribunal to try matters entirely outside of the authority conferred upon them by their appointment or by statute. Not only the agreement, but also the report, signed by two of their number, shows that the right to flow was a question submitted to their consideration, and which they undertook to determine.

They were not the proper tribunal to decide that question. In undertaking to act in accordance with the agreement of parties, they failed to act in accordance with the provisions of the statute by which their powers and duties are clearly defined. Such proceedings were, therefore, irregular.

Nor could an acceptance of their report properly be claimed as an award upon a submission at common law. If it could be deemed such, then this court has nothing to do with it. And moreover a further objection would lie, and that is, that of the three arbitrators, selected by the parties, two only have concurred in the award.

For it is a well settled principle that where a submission is made by private parties to a given number of persons, without any express authority given or to be inferred from the manner or circumstances of the submission, that a smaller number may decide, an award or decision will be void unless made by all, though a different rule prevails where authority is conferred to several persons in matters of public concern. *Towne* v. *Jaquith*, 6 Mass. 46; *Green* v. *Miller*, 6 Johns. 39; *Ex parte Rogers*,

7 Cowen, 530; *Eames* v. *Eames*, 41 N. H. 181; *Patterson* v. *Leavitt*, 4 Conn. 50; *Anderson* v. *Farnham*, 34 Maine, 161.

The result is that the entry must be,

Exceptions overruled.

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

LUCIUS PACKARD and others

vs.

COUNTY COMMISSIONERS OF ANDROSCOGGIN COUNTY.

Androscoggin. Opinion January 9, 1888.

Way, petition for. Practice.

Reasonable certainty and a substantial compliance with the statute is what is required in proceedings for the laying out of highways.

Technical exactness and precision is not required.

It is not a valid objection to the proceedings that the petition describes alternative places either for the location of the way or its *termini*.

ON exceptions.

This was an appeal from the decision of the county commissioners in adjudging that common convenience and necessity did not require the laying out of a new way in Auburn on the petition of A. M. Fogg and one hundred and thirteen others.

A committee was appointed on the appeal and by order of the court the city of Auburn was served with a notice of the time and place of hearing by the committee. The committee reported in favor of the way, reversing in whole the doings of the commissioners. The exceptions were by the city of Auburn to the ruling of the presiding justice, in overruling objections to the acceptance of the report, as stated in the opinion.

Savage and Oakes, for appellants, cited: *Sumner* v. *Co. Com.* 37 Maine, 112; *Wayne* v. *Co. Com.* 37 Maine, 560; *Hayford* v. *Co. Com.* 78 Maine, 155; *Pembroke* v. *Co. Com.* 12 Cush. 351.

George C. Wing, city solicitor, for the city of Auburn.

The city of Auburn, which resists the location of the proposed way, and which has appeared by counsel in all the proceedings, contends that the court of county commissioners has not jurisdiction, and relies upon the authority of William B. Hayford and others, against the county commissioners of Aroostook county. 78 Maine, 153. It is not deemed necessary here to restate the reasons given by the court for its opinion in that case.

We submit that the facts and circumstances in that case and in the case at bar are as near alike as cases are ever found, and that the reasons given in the opinion referred to, as well as the opinions cited in that opinion, apply with the same force to the case here. The city of Auburn further cites 37 Maine, 112; 37 Maine, 558; 49 Maine, 146; 12 Cushing, 351; 2 Metcalf, 185.

Certainly the vagueness of the petition is inexcusable, and the proceedings should not be upheld. They respectfully ask that the exceptions may be sustained for the reasons above given.

FOSTER, J. An appeal was taken from the decision of the county commissioners of Androscoggin county, a committee appointed, and upon the coming in of their report objections were seasonably filed against its acceptance. The presiding justice overruled the objections, ordered the acceptance of the report, and that the judgment be certified to the county commissioners.

The case comes before this court on exceptions.

The only question involved is in regard to the description of the way named in the petition to the county commissioners. The claim set up in defence is, that the petition upon which the proceedings were had is uncertain and indefinite, and does not describe a way as required by R. S., c. 18, § 1.

This contention relates to no other part of the petition than the description of the southern terminus of the way, which is designated, in the language of the petition, at "some point to be determined by your honors, on some one of the ways or roads near 'Perryville' or 'Fossville,' so called, in Auburn, by which the travel may reach the county buildings aforesaid."

While the petition cannot be recommended as a model, and

evidently was not drawn by a professional hand, yet we think that the objections to it cannot be sustained.

From the statement of facts in the bill of exceptions it appears that "Perryville" and "Fossville" are local names applied to certain of the more thickly inhabited portions of the city of Auburn, and within the limits of these places are five or six streets leading in the direction of the county buildings. These places are separated only by a small ravine or valley. The streets are but a short distance apart, any one of which can be entered by the proposed road, and by any one of which "the travel may reach the county buildings" directly.

The statute prescribes what is necessary to confer jurisdiction upon the county commissioners. Among other things, not material in the decision of this case, it requires a "petition describing a way." The statute, however, does not designate what description of the proposed way is to be set out in the petition; but undoubtedly it should be such as to describe the way with reasonable definiteness. "Hence it has been the practice in such cases to state at least the *termini* of the proposed way with reasonable and approximate definiteness." *Hayford* v. *Co. Comm'rs*, 78 Maine, 156.

Reasonable certainty, as well as a substantial compliance with the statute, is what is required in proceedings of this character; but technical exactness and precision cannot be expected and has never been required. *Windham* v. *Co. Comm'rs*, 26 Maine, 406; *Raymond* v. *Co. Comm'rs*, 63 Maine, 112–15; *Hayford* v. *Co. Comm'rs*, 78 Maine, 156. And though in laying out the way the commissioners are not required to follow minutely the line indicated in the petition, a substantial compliance therewith being all that is demanded, (*Wayne* v. *Co. Comm'rs*, 37 Maine, 558) yet in regard to the *termini* of the way thus laid out, they must necessarily be more precise and designate them exactly by monuments. *Cushing* v. *Gay*, 23 Maine, 12.

Nor does it furnish any valid objection to the proceedings that the petition describes alternative places for the location. *Sumner* v. *Co. Comm'rs*, 37 Maine, 112; *Raymond* v. *Co. Comm'rs*, 63 Maine, 112.

In this last case the petition described alternative places for the proposed way, with different *termini* for each, described with what may be regarded as reasonable and approximate definiteness, though not with that technical precision and exactness which might be requisite in conveyancing, or in laying out the way by the commissioners. Nor have the courts in the decided cases demanded such technical accuracy.

The same may be said of the petition in *Sumner* v. *Co. Comm'rs*, *supra*, except that there the petition set out alternative places for the commencement of the proposed route. The same objection was raised in that case as in this, but the court sustained the proceedings. "It does not appear in this case," says SHEPLEY, C. J., "that the description was so defective that a person would find it difficult to determine what was designed to be accomplished."

In the case now before us the southern terminus of the proposed way was to be in *one* of the roads near "Perryville" or "Fossville," by which the travel may reach the county buildings.

This was but an alternative designation of the place where the proposed route was to terminate, leaving it in the discretion of the commissioners to say into which one of the roads near these places the way was to enter. The general terminus was the city of Auburn, as an examination of the petition shows, and within which were the particular localities of "Perryville" and "Fossville," lying side by side of each other.

If there had been but two roads—one near "Perryville" and the other near "Fossville"—would not the petition be considered as describing reasonably and approximately the alternative places of ending? As much so, certainly, as in other cases, (*Windham* v. *Co. Comm'rs*, 26 Maine, 406; *Wayne* v. *Co. Comm'rs*, 37 Maine, 559; *Raymond* v. *Co. Comm'rs*, 63 Maine, 113) where the court has sustained proceedings of this nature. And in the recent case of *Hayford* v. *Co. Comm'rs*, *supra*, where the proceedings were not upheld on account of the vagueness and indefiniteness of the description, the court say, "We do not mean to be understood as holding that the petition for every short piece of new road must necessarily contain a statement of its termini,

in totidem verbis, for they may be so otherwise described by their connections with the roads already made, that they cannot fail to be understood by interested persons owning land and residing along their routes."

The description was there held to be too vague and indefinite to answer the requirement of the statute, for "no one could tell within ten miles the place where 'the most direct and feasible route to Fort Kent' would terminate, nor how long the route would be."

This case is manifestly unlike that, or the case of *Pembroke* v. *Co. Comm'rs*, 12 Cush. 351, where the terminus might be at any place within a distance of four miles.

Exceptions overruled.

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

WILLIAM LEADER *vs.* FRANK O'LOUGHLIN and others.

Androscoggin. Opinion January 9, 1888.

Will. Residuary legatee.

The last will of the testatrix contained the following clause: "I have but one son, John Russell, and I do not know whether he is alive or not, I have not heard from him for a long time, I give and bequeath and devise unto him the amount of money that stands in his name in the Bath Savings Institution at Bath, Maine." After making other bequests, and naming her brother as residuary legatee, the testatrix further says: "If I take the money that stands in the name of my son, John Russell, from the Bath Savings Institution and deposit it in the bank in my name, it is my will and desire that the amount, which is about six or seven hundred dollars, I can not remember the exact amount, shall be given my son, John Russell, if he should return at any time within ten years of my death, and it is my will that that amount shall be kept at interest for my said son, John Russell, that he may have it for his own forever, if he returns or is found anywhere alive within ten years after my decease." The money was kept at interest by the executor during the ten years. The son never returned, nor was he ever heard from. *Held:* That the money and accumulated interest belonged to the residuary legatee.

ON report.

The case is stated in the opinion.

D. J. Callahan, for the plaintiff.

Frye, Cotton and White, for the defendants.

FOSTER, J. The complainant, administrator *de bonis non* of the estate of Mary Russell, late of Lewiston, who died in October, 1873, brings this bill to obtain a proper construction of her will.

The only doubt arises in relation to the items wherein her only child is mentioned.

The first item is as follows: "I have but one son, John Russell, and I do not know whether he is alive or not. I have not heard from him for a long time. I give and bequeath and devise unto him the amount of money that stands in his name in the Bath Savings Institution at Bath, Maine."

Then follow other bequests to relatives, with a general residuary clause in which all the rest, residue and remainder of her property is bequeathed and devised to her brother, Frank O'Loughlin.

Item seven reads thus: "If I take the money that stands in the name of my son, John Russell, from the Bath Savings Institution and then deposit it in the bank in my name, it is my will and desire that that amount, which is about six or seven hundred dollars, I cannot remember the exact amount, shall be given my son, John Russell, if he should return at any time within ten years of my death, and it is my will that that amount shall be kept at interest for my said son, John Russell, that he may have it for his own forever if he returns or is found anywhere alive within ten years after my decease."

This son entered the army at the commencement of the war and nothing has ever been heard from him directly or indirectly since the spring of 1865, although every effort has been made, both before and since the death of the testatrix, to ascertain whether he is living or dead. Considering the length of time, the fact that he was a dutiful son and in the habit of frequent correspondence, and the efforts which have been put forth for many years to find him, there is no room at the present time to

question his death, even if there was at the time of making the will. It may well be presumed.

What the intention of the testatrix was must be sought from an examination of the foregoing items when taken and examined in connection with each other. That intention seems to have been to give the money named to her son if living. She was uncertain whether he was living or not, as her language clearly indicates. Moreover she had not seen him, she says, for a long time.

The last item, wherein the son is mentioned, while indicating a hope, still bears upon it the expression of uncertainty as to whether her son may be living, and appears to be in the nature of a conditional limitation of the first item, and provides that if she takes the money named from the Savings Institution and redeposits it in her own name, then it is her will that it should go to the son if he should return or be found alive at any time within ten years after her death. She also directs that it may be left at interest for him if he can be found anywhere alive within that time.

She withdrew the money from the Savings Institution and deposited it in a bank in her own name. If the son was dead at the time the will was made, the unqualified bequest under the first item, if considered alone, was inoperative, and the money would become a part of the residuum. If considered in connection with the other item, the money having been drawn and deposited by her, and the administrator having held the amount for the ten years named, upon interest, and nothing ever having been heard of the son, his death may properly be presumed. This money, with the accumulated interest, would become a part of the residuary estate, and should go to the residuary legatee, Frank O'Loughlin.

The costs of this suit should be borne by the estate.

Bill sustained. Costs of complainant to be paid out of the estate. Decree in accordance with this opinion.

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

CHARLES S. DEAKE, appellant from decree of Judge of Probate.

Cumberland. Opinion January 17, 1888.

Will, fraudulent concealment of; probate of. Statute of limitations. R. S., c. 64, § 1. Stat. 1887, c. 108.

A pending case is not affected by statute, 1887, c. 108, which provides that where an original will is produced for probate, the time during which it has been lost, suppressed, concealed or carried out of the state, shall not be taken as part of the limitation provided in R. S., c. 64, § 1.

When a will has been fraudulently concealed by any person interested in its non-production, the statute bar of twenty years provided in R. S., c. 64, § 1, does not begin to run until the will is discovered.

ON report.

The case is stated in the opinion.

Nathan and Henry B. Cleaves, for appellant.

No attestation clause to a will is required by law. 1 Jarman, Wills, (5 Am. ed.) 218; *Fry's Will*, 2 R. I. 88; *Osborn* v. *Cook*, 11 Cush. 532; *Ela* v. *Edwards*, 16 Gray, 91; *Eliot* v. *Eliot*, 10 Allen, 357; *Moore* v. *Griswold*, 5 N. Y. Surrogate Rep. 388; *Roberts* v. *Phillips*, El. & Bl. 450.

Statute of limitation affects remedy only. *Bulger* v. *Roche*, 11 Pick. 38; *Lincoln* v. *Battelle*, 6 Wend. 485.

Remedy may be changed by legislature so as to affect pending cases. *Thayer* v. *Seavey*, 11 Maine, 284; *Oriental Bank* v. *Freese*, 18 Maine, 109; *Read* v. *Frankfort Bank*, 23 Maine, 318; *Sampson* v. *Sampson*, 63 Maine, 329; *Wright* v. *Oakley*, 5 Met. 410; *Dean* v. *Dean*, 2 Mass. 150; *Springfield* v. *Hampden Coms.* 6 Pick. 501; Sedgwick, Stat. & Cons. Law, 412; *Sampeyreac* v. *U. S.* 7 Pet. 222; *Foster* v. *Essex Bank*, 16 Mass. 273.

Will fraudulently concealed. Redf. Wills, Part 2, p. 9; R. S., c. 81, § 96; 1 Jarman, Wills, 53; *Shumway* v. *Holbrook*, 1 Pick. 117; *Lyman* v. *Gedney*, 55 Am. R. 871; R. S., c. 1, § 5, does not apply. *Webster* v. *Co. Com.* 64 Maine, 434; *Belfast* v. *Fogler*, 71 Maine, 404.

Mattocks, Coombs and Neal, for Warren Hayford and al., named as executors of will, and for John F. Colby, special administrator of the estate of George Deake.

Stat. 1887, c. 108, cannot affect the case at bar. It is a settled rule in construing statutes that they are to be considered as prospective only, unless the intention of the legislature to give them a retrospective operation is clearly expressed, or it is a necessary construction. *Hastings* v. *Lane and al.* 15 Maine, 134; *Rogers* v. *Inhabitants of Greenbush*, 58 Maine, 395; *Given* v. *Marr*, 27 Maine, 212.

"A retrospective operation should never be given, when not required by express command or necessary implication." *Murray* v. *Gibson*, 15 Howard, 421; *Harvey* v. *Tyler*, 2 Wallace, 329; *Chew Heong* v. *United States*, 112 U. S. 536.

"We never hold an act to be retrospective unless it is plain that no other construction can be fairly given." *Rogers* v. *Greenbush*, 58 Maine, 397.

In analogous cases it has been held that similar statutes did not apply to cases where, as in the case at bar, the proceedings were barred by the statute of limitations that was in force before the amendment went into operation. So held in case of an amendment that the time of residence of a defendant out of the state should not constitute a part of the time limited for commencement of action. *Wright* v. *Oakley and al.* 5 Met. 400.

Also by statute giving a remedy by bill in equity in certain cases to those holding claims against estates of deceased persons not prosecuted within the time limited therefor. *Garfield* v. *Bemis*, 2 Allen, 445.

Also as to a statute extending the time for filing a petition; it was held that such a statute would not revive a right of action by petition for land damages, barred by the statutes of limitations in force when the amendment was adopted. *Kinsman* v. *Cambridge*, 121 Mass. 558.

This original will is not proved to have been lost, destroyed, suppressed, or carried out of the state, so that it could not be obtained after reasonable diligence.

1. It was not lost, but was in the possession of George Deake

when found by Mrs. Brown, one of the appellants in this case, and has been in the possession of the latter since.

2. It was not destroyed, but is in existence to-day.

3. No evidence shows that it was ever suppressed, so that it could not be obtained by reasonable diligence.

Mrs. Brown found it in the house of George Deake in 1873; no attempt had been made at concealment; it could have been found at any time, by reasonable diligence. It was actually in the possession of Mrs. Brown after 1873, and the twenty years' limitation did not expire until August, 1874; her own want of diligence in presenting the will, defeats the application of Ch. 108 of the Public Laws of 1887, which is not intended to give relief against want of diligence of a petitioner in such cases.

Any alleged proof of a suppression of this will is inferential merely and attacks the good fame of both Charles Deake, the father, and George Deake, the uncle, of these petitioners. It is a far more probable and honorable inference that the will was revoked by the alleged testator. The conduct of both Charles and George Deake was inconsistent with improper motives. The property remains to-day as it was at the demise of Benjamin Deake.

VIRGIN, J. This is an appeal from a decree of the judge of probate disallowing the proposed will of Benjamin Deake, late of Cape Elizabeth, deceased.

The report discloses the following, among other facts:

The testator resided for many years in this county and died here August 7, 1854, leaving real estate in Boston, real and personal estate in this county, and two sons, George and Charles Deake, his only heirs at law.

On November 21, 1854, no will having been produced or suggested, Charles Deake was appointed administrator on his father's estate.

Several years prior to 1873, Charles resided with his brother, George, in Boston, and died there in December of that year, leaving one son (appellant) and two daughters, his only heirs at law.

George Deake died in Boston in 1885, leaving a widow, but no children.

Some months after Charles's decease in December, 1873, his daughter, (Mrs. Brown) then about twenty years of age, while looking over some old letters and other papers at her uncle George's, took among others what now purports to be a holographic will of her grandfather, (Benjamin Deake) the purport of which she did not then know, having incidentally taken it with the others out of mere curiosity, as specimens of his handwriting and signature; tied them together and carried them to New York, where she then resided, and never saw them afterward until found there by her brother, (appellant) who, after the decease of his uncle George in 1885, having learned then for the first time, in an interview with the latter's widow, that the will was made, and having thereupon sought for it in vain among his uncle George's papers, finally found it in the bundle of papers in New York, where Mrs. Brown unwittingly left it.

The will is quite lengthy, untechnically drawn, and phonetical in its orthography; but the intention of the testator is not left in doubt.

The only attestation clause preceding the signatures of the witnesses, is simply the word "witness." But as the statute (R. S., c. 74, § 1) simply requires a will to be "subscribed in his (testator's) presence by three credible attesting witnesses," no *testimonium* clause is necessary. 1 Redf. Wills, 231, and cases in note. The statute does not require the testator to sign in the presence of the witnesses, but does require them to subscribe in his presence, in order that he may identify the instrument which they subscribe as his will. *Dewey* v. *Dewey*, 1 Met. 349; 2 Greenl. Ev. § 678. They need not subscribe at the same time or in the presence of each other. *Ib.* They need not see him sign, his acknowledgment of his signature to each separately by word or act, accompanied with a request for them to attest as witnesses, is clearly sufficient. *Stonehouse* v. *Evelyn*, 3 P. Wms. 254; *Hogan* v. *Grosvenor*, 10 Met. 56; *White* v. *Trs. Brit. Museum*, 6 Bing. 310. They need not know that the instrument subscribed by them is a will; for the fact that it is in

his own handwriting is sufficient evidence that the testator knew its contents and intended it to be his will. *Osborn* v. *Cook*, 11 Cush. 532; *Ela* v. *Edwards*, 16 Gray, 91, and cases there cited. Moreover, when, as in this case, all the witnesses are dead, it is well settled that proof of the genuineness of the signatures of the testator and of the witnesses, is *prima facie* proof that all the requisites of the statute have been complied with, especially when, as in the case in hand, the witnesses were men of character, and friends and neighbors of the testator. *Hand* v. *James*, 2 Com. 531; *Crost* v. *Pawlet*, 2 Stra. 1109; *Nickerson* v. *Buck*, 12 Cush. 332; *Ela* v. *Edwards*, *supra*. The will is proved to be in the handwriting of the testator, the signatures of the testator and of the respective witnesses are amply established as genuine; and in the absence of any suggestion to the contrary, we consider the due execution of the will established.

The principal objection interposed to the probate of the will, proposed for the first time in November, 1885, thirty-one years after the decease of the testator, is based on R. S., c. 64, § 1, which, so far as applicable to this will, provides: "After twenty years from the death of any person, no probate of his will shall be originally granted." This bar is sought to be avoided under an exception thereto found in St. 1887, c. 108, which provides: "When an original last will is produced for probate, the time during which it has been lost, suppressed, concealed or carried out of the state, shall not be taken as part of the limitation provided in the first section." We are of opinion, however, that the provisions of that new statute cannot affect this case.

This report was made up at the April term, 1886, of the supreme court of probate, was entered at the succeeding July law term, when it was set down to be argued by both parties within ninety days; but the arguments were not filed until June, 1887. In the meantime the new statute was enacted and did not take effect until April 16, 1887, nearly one year after the case was set down for argument. So that the twenty years' bar had expired thirteen years before the new statute became effective.

Now passing by the question whether the legislature had authority to revive the right of probating a will after it had become

fully barred by the express provisions of the statute, (*Atkinson* v. *Dunlap*, 50 Maine, 111, Wood Lim. 32) we are of opinion that a fair construction of the new statute will not allow it to affect this case. For it is one of the settled rules of the interpretation of statutes, (though like all others subject to exceptions) that they shall always have a prospective operation unless the intention of the legislature is clearly expressed or clearly to be implied from their provisions, that they shall apply to past transactions. *Bryant* v. *Merrill*, 55 Maine, 515. We may well adopt the language of KENT, J., who, in speaking for the court in relation to another statute passed during the pendency of an action, said: "There is no language in the new statute which indicates any intention of the legislature to make it retrospective, or to interfere with actions pending. We never hold an act to be retrospective unless it is plain that no other construction can fairly be given." *Rogers* v. *Greenbush*, 58 Maine, 397; see also *Garfield* v. *Bemis*, 2 Allen, 445; *Kinsman* v. *Cambridge*, 121 Mass. 558; *Harvey* v. *Tyler*, 2 Wall, 329; 1 Kent's Com. * 455; *Dash* v. *Van Kleeck*, 7 Johns. 477; Smith's Cons. & St. L. § 172.

But it does not necessarily follow, that because more than twenty years have elapsed since the death of the testator, his will may not now be admitted to probate. For fraudulent concealment of a cause of action has long been considered a good replication to a statute bar, in actions at law as well as in suits in equity, (2 Sto. Eq. § 1521; *Sherwood* v. *Sutton*, 5 Mason, 143, 145, and cases; Wood Lim. § 275; Ang. Lim. ch. 18, § 4, *et seq.*) though judges have not always agreed respecting the grounds for the rule.

This question became *res judicata* in this state long before the separation. *First Mass. Turnp. Corp.* v. *Field*, 3 Mass. 201. The defendant in that case contracted to construct a turnpike for the plaintiff; did some of the work deceitfully, covered it with earth, but represented it completed and received his pay therefor. The defect having been discovered after six years, it was held, in an action for damages for the defective work, that the statute of limitations did not bar the action. PARSONS, C. J., said:

"If the knowledge of the defective work was fraudulently concealed from the plaintiff by the defendant, we should violate a sound rule of law if we permitted the defendant to avail himself of his own fraud."

This principle has been followed, approved and recognized in numerous cases, among which are: *Homer* v. *Fish*, 1 Pick. 435; *Welles* v. *Fish*, 3 Pick. 74; *Bishop* v. *Little*, 3 Maine, 406; *Cole* v. *McGlathry*, 9 Maine, 131; *Farnam* v. *Brooks*, 9 Pick. 212, 244; *Nudd* v. *Hamblin*, 8 Allen, 130; *Atlantic Bank* v. *Harris*, 118 Mass. 147, 153; *Carr* v. *Hilton*, 1 Curt. 230, 237–8; *Bailey* v. *Glover*, 21 Wall. 342, 348.

After the decision in *Turnpike* v. *Field*, *sup.* the legislature of Massachusetts enacted a statute of the same purport, which, in 1841, was followed by the legislature in this state, making it applicable only to the specific actions therein enumerated. R. S., 1841, c. 146; R. S., c. 81, § 96. This statute is merely declaratory of the common law, so far as it goes, and finds many illustrations in the cases cited on the margin of the section in the revision.

But to bring a case within the rule, actual fraud and concealment must be shown, (*Cole* v. *McGlathry*, 9 Maine, 131; *Nudd* v. *Hamblin*, *supra*) unless the fraud itself was *per se* concealment. *Gerry* v. *Dunham*, 57 Maine, 334. And if the plaintiff had ample means, in the exercise of ordinary diligence, to detect the fraud, he is chargeable with knowledge of it. *McKown* v. *Whitmore*, 31 Maine, 448; *Rouse* v. *Southard*, 39 Maine, 404; *Farnam* v. *Brooks*, 9 Pick. 212; *Wells* v. *Child*, 12 Allen, 333, 335, or, in the language of Mr. Justice MILLER, "when the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or effort on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey* v. *Glover*, 21 Wall. 348, and cases. Which proposition was reaffirmed in *Traer* v. *Clews*, 115 U. S. 537–8.

This being the rule governing matters in law and in equity, we

perceive no reason why it should not, but many reasons why it should also apply to wills fraudulently concealed.

Whether the facts in the present report are sufficient to bring the case within the rule, we need not now inquire; for this question was not raised in the probate court or made a reason for the appeal, and hence the appellees have had neither occasion nor opportunity to meet it. But the facts apparent on the face of the report, such as the finding of the will among the papers of persons interested in its non production; their duty under penalty of imprisonment to deliver it to the propate court (R. S., 1857, c. 63, § 1); its non delivery and the consequent deprivation of the appellant's property rights, especially when connected with the fact that the real property in Portland at least still remains in the family, as it did at the decease of the testator, all compel in us the belief that "law and justice require" us, under the authority conferred by R. S., c. 63, § 28, to remand the case to the probate court for the trial of the question whether or not the will in question was fraudulently concealed, where the parties can both be fully heard on such evidence as they may adduce.

If that question is determined in behalf of the appellant, the rights of all parties may be protected thereafter. 2 Redf. Wills, 8, and note; *Rebhan* v. *Mueller*, 114 Ill. 343; S. C. 55 Am. R. 869.

Case remanded to probate court for the purpose mentioned above, and for further proceedings.

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

STATE OF MAINE *vs.* INTOXICATING LIQUORS, C. H. GUPPY, claimant.

Cumberland. Opinion January 20, 1888.

Trial by jury. Constitutional law. Construction of statutes. Stat. 1887, c. 140. Intoxicating liquor. Motion for new trials in criminal cases in superior courts. Practice.

The right of a trial by jury is guaranteed by the constitution, and it is not within the province of the legislature to enact a law which will destroy or materially impair that right.

If a statute is susceptible of two interpretations, one of which will render it unconstitutional, the other should be adopted.

Stat. 1887, c. 140, declaring that the payment of a special tax as a retail liquor dealer shall be held to be *prima facie* evidence that the person paying such tax is a common seller of intoxicating liquor, only means that such evidence is competent and sufficient to justify a jury in finding such person guilty if they are satisfied beyond a reasonable doubt of his guilt.

Motions for new trials in criminal cases tried in either of the superior courts, are to be heard and finally determined by the justices thereof.

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

An appeal from the municipal court of Portland on a libel of forty-one gallons of brandy seized by Charles W. Stevens, a police officer, in a freight car at the depot of the Boston and Maine Railroad Company in Portland, and claimed by C. H. Guppy, a druggist and apothecary.

The presiding justice, in his charge to the jury, gave, amongst other things, the following instruction and rulings, viz.:

1st. "It is in evidence that this claimant, at the time this liquor was seized or prior thereto, paid a special tax to the United States, which authorized or permitted him to conduct the business of a retail liquor seller. The statute says that fact is *prima facie* evidence that the person so paying the tax is a common seller of intoxicating liquors."

2d. "As I have said, testimony has been offered tending to show that Guppy, at the time the liquor was seized, had paid such a tax, and I instruct you as a matter of law that if such was the fact, then at this time he was a common seller of intoxicating liquors."

3d. "The claimant says that he paid the special tax to the United States because he deemed it to be his duty, he being a druggist."

4th. "It is true that a druggist has a right to have in his possession intoxicating liquors intended to be mixed with other ingredients, the compound itself not to be intoxicating."

5th. "If you find that Mr. Guppy bought it simply to compound with other ingredients in his business as a druggist, the mixture itself not being intoxicating, then you should find for the claimant."

To these instructions exceptions were alleged.

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

This court has not jurisdiction of a motion for a new trial in criminal cases, on the ground that the verdict is against evidence. All questions as to the sufficiency of evidence must be addressed to and decided by the justice of the superior court. *State* v. *Hill*, 48 Maine, 241; *State* v. *Smith*, 54 Maine, 33; *State* v. *Intoxicating Liquors*, 63 Maine, 121.

The claimant says in the first assignment that the verdict is against law. But he sets out no specific error of law or instruction under this assignment. The only questions of law regularly before the court are those taken out by way of exception. *Brunswick* v. *McKean*, 4 Maine, 508.

The refusal of the court to grant the motion for order of restoration is not a subject of exception, being a discretionary act of the court. *State* v. *Smith*, *supra*; *Boody* v. *Goddard*, 57 Maine, 602; *French* v. *Stanley*, 21 Maine, 512; *Stephenson* v. *Insurance Co.* 54 Maine, 55; *Leighton* v. *Manson*, 14 Maine, 208; *Bragdon* v. *Ins. Co.* 42 Maine, 259.

The question for the jury to determine in this case was whether the liquor was intended for unlawful sale in this state. It is proper on this issue to show all the circumstances attending the business of the claimant. *State* v. *Plunkett*, 64 Maine, 535; *Commonwealth* v. *Dearborn*, 109 Mass. 368; Bishop on Statutory Crimes, § 1058, and cases cited; Public Laws of Maine, 1887, c. 40, § 8; *State* v. *McGlynn*, 34 N. H. 422; *Commonwealth* v. *Timothy*, 8 Gray, 480.

But to be available upon exceptions, an objection to testimony must be specific. *Harriman* v. *Sanger*, 67 Maine, 442; *Baker* v. *Cooper*, 57 Maine, 388; *Bonney* v. *Morrill*, 57 Maine, 368; *Staples* v. *Wellington*, 58 Maine, 453; *Oxnard* v. *Swanton*, 39 Maine, 125.

To authorize the court to sustain exceptions it must affirmatively appear that the party excepting was aggrieved by the ruling to which exceptions are taken. *Soule* v. *Winslow*, 66 Maine, 447; *State* v. *Pike*, 65 Maine, 111.

But the intention of the court was not called to the error at the time, hence his exception cannot now be sustained as he thereby waived his right of exceptions. *Stephenson* v. *Thayer*, 63 Maine, 143; *Harvey* v. *Dodge*, 73 Maine, 316.

"The term 'intoxicating liquor' denotes any liquor which by reason of its containing alcohol, whether only created by fermentation or afterwards extracted by distilling and then mixed with other ingredients, or left pure, is, in such quantities as may be practically drank, capable of producing intoxication." Bishop on Statutory Crimes, § 1007; *Commonwealth* v. *Blos*, 116 Mass. 56; *Commonwealth* v. *Peckham*, 2 Gray, 514; *Commonwealth* v. *Pease*, 110 Mass. 412.

The statute establishing a rule of *prima facie* evidence is constitutional. *Com.* v. *Williams*, 6 Gray, 1; *Com.* v. *Wallace*, 7 Gray, 222; *Com.* v. *Rowe*, 14 Gray, 47.

D. A. Meaher, for defendant.

Jury were influenced by improper motives. *Williams* v. *Buker*, 49 Maine, 427; *Hovey* v. *Chase*, 52 Maine, 304; *Folsom* v. *Skofield*, 53 Maine, 171; *Fessenden* v. *Sager*, 53 Maine, 531; *Bangor* v. *Brunswick*, 27 Maine, 351; *Edwards* v. *Currier*, 43 Maine, 474. Statutes impairing vested rights unconstitutional. *Coffin* v. *Rich*, 45 Maine, 507; *Kennebec Purchase* v. *Laboree*, 2 Maine, 275; *Oriental Bank* v. *Freese*, 18 Maine, 110; *Atkinson* v. *Dunlap*, 50 Maine, 111.

WALTON, J. One of the provisions of the act of 1887, chapter 140, (amendatory of the liquor law) declares that payment of the United States special tax as a liquor seller, shall be held to be *prima facie* evidence that the one paying the tax is a common seller of intoxicating liquors. What is the meaning of this provision? Does it impose upon the court the duty of instructing the jury, as matter of law, that proof of such payment will make it their duty to find the defendant guilty, whether they believe him to be so or not? It is a sufficient answer to say that a jury cannot be so instructed in any criminal case. The right of trial by jury is guaranteed by the Constitution, and it is not within the province of the legislature to enact a law which will destroy

or materially impair the right. The very essence of "trial by jury" is the right of each juror to weigh the evidence for himself, and in the exercise of his own reasoning faculties, determine whether or not the facts involved in the issue are proved. And if this right is taken from the juror—if he is not allowed to weigh the evidence for himself—is not allowed to use his own reasoning faculties, but, on the contrary, is obliged to accept the evidence at the weight which others have affixed to it, and to return and affirm a verdict which he does not believe to be true, or of the truth of which he has reasonable doubts—then, very clearly, the substance, the very essence of "trial by jury" will be taken away, and its form only will remain. And if the enactment under consideration must be construed as having this effect, then, very clearly, it is unconstitutional and void.

But we do not think it is necessary so to construe it. We have many similar statutes, in some of which the words used are "*prima facie* evidence," and in others the words are "*presumptive* evidence." We cannot doubt that these phrases are intended to convey the same idea. Thus, the possession of a dead bird at certain seasons of the year, and the possession of a mutilated, uncooked lobster, are declared to be *prima facie* evidence that the former was unlawfully killed, and that the latter was less than ten and a half inches long when taken; while the possession of a salmon less than nine inches in length, or of a trout less than five inches in length, is declared to be *presumptive* evidence that they were unlawfully taken. Similar provisions exist with respect to the possession of the carcasses of moose and deer at those seasons of the year when it is unlawful to hunt or kill them.

Can it be doubted that these provisions all mean the same thing? We think not. And we are not aware that either of them has ever been construed as making it obligatory upon the jury to find a defendant guilty, whether they believe him to be so or not. They mean that such evidence is competent and sufficient to justify a jury in finding a defendant guilty, provided it does, in fact, satisfy them of his guilt beyond a reasonable doubt, and not otherwise. It would not be just to the members of the legislature to suppose that, by any of these enactments, they intended to

make it obligatory upon the jury to find a defendant guilty, whether they believe him to be so or not. It is a well settled rule of construction that, if a statute is susceptible of two interpretations, and one of the interpretations will render the statute unconstitutional and the other will not, the latter should be adopted. If it be thought that these statutes, and especially the one now under consideration, if construed as above indicated, add nothing to the weight of such evidence, it will be well to remember that declaratory statutes are not uncommon, and that they are not always useless. They often serve to remove doubts and to give certainty and stability to a rule of law, which it did not before possess; and that, in these particulars, the act under consideration may be regarded as a wise and useful enactment.

The ruling of the justice of the superior court not being in harmony with this interpretation of the statute, the exceptions must be sustained and a new trial granted. But the motion is not properly before us. Motions for new trials in criminal cases, tried in either of the superior courts, are to be heard and finally determined by the justices thereof. R. S., c. 77, § 82. And, although this is a proceeding against the liquor only, still it must be regarded as a criminal case. *State* v. *Robinson*, 49 Maine, 285.

Exceptions sustained and a new trial granted.

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

JOSEPH C. NUGENT

vs.

THE BOSTON, CONCORD AND MONTREAL RAILROAD.

Cumberland. Opinion January 25, 1888.

Railroads. Negligence. Contributory negligence. Leased railroad. Evidence.

In the trial of an action on the case against a railroad corporation for a personal injury resulting from the alleged defective construction of the defendant's station-house, the question of contributory negligence, though depending upon undisputed facts, is properly submitted to the jury, when intelligent, fair-minded persons may reasonably arrive at different conclusions thereon.

A railroad corporation, over a section of whose track another company, by virtue of a contract, runs its trains, is liable in tort to the latter's brakeman, who, while in the due performance of his duty on his employer's train, receives a personal injury solely by reason of the negligent construction of the former's station-house.

When a railroad corporation leases its road and appurtenances by virtue of a legislative enactment containing no provision whatever exempting it from liability, the lessor is liable to one lawfully there, for a personal injury which resulted solely from the original defective construction of its station-house, though the lessee had long been in full possession and control under the lease, and had covenanted therein to maintain, preserve and keep the station-houses in as good order and repair as the same were in at the date of the lease.

In an action by a brakeman for an injury received while ascending the side ladder on a box car, which resulted from the proximity of the station-awning to the car, testimony that no other awning on the road was like this one is admissible.

In such an action the admission of testimony by an experienced brakeman on the same train that the ladders were so variously constructed that the undivided attention of a person ascending them was required, affords no ground of exception to the defendant.

On exceptions and motion to set aside the verdict.

An action by a brakeman on the Portland and Ogdensburg Railroad, for personal injuries received by reason of the negligent construction of the awning at the station of the defendant company at Bethlehem Junction, New Hampshire.

The material facts are stated in the opinion.

The following is the testimony referred to at the close of the opinion:

Eugene H. Sawyer, conductor of the train on which the plaintiff was employed as rear brakeman at the time of the accident, was called by the plaintiff, and, among other things, testified that he had had daily experience in going up ladders on moving cars for the last four years. He was then asked the following questions, which were seasonably objected to by defendant's counsel, but were admitted by the court.

"Q. Whether or not it requires the undivided attention of a man going up and down a ladder on a moving car in that way?

"A. I should say it did; it does mine.

"Q. Why?

"A. Because the ladders on the cars are not all alike. They

differ in a good many ways; the difference that bothers us most is the handle on the top of the car; sometimes it will be a rod of iron a foot and a half long to get hold of; then it will be just a small handle, just enough to get your hand hold of."

Wilbur F. Lunt and Joseph W. Spaulding, for the plaintiff.

A railroad company is liable for damage caused by the negligent construction of its station. *Heaven* v. *Pender*, 11 Q. B. Div. 503; *Railroad Co.* v. *Stout*, 17 Wallace, 661; *Tobin* v. *Railroad Co.* 59 Maine, 183; *Wendell* v. *Baxter*, 12 Gray, 494; *Toledo W. W. Ry. Co.* v. *Grash*, 67 Ill. 262; *St. L. Q. M. & S. Ry* v. *Fairbairn*, 4 S. W. Rep. 80; 2 Wood Ry. 1339; *Godley* v. *Haggerty*, 20 Penn. St. 387; *Phil. & Read. Rail. Co.* v. *Derby*, 14 How. (U. S.) 468; *Sawyer* v. *Rutland Railroad*, 27 Vt. 370; 2 Wood Ry. 1389, and other cases there cited; *Bennett* v. *L. & N. Ry. Co.* 102 U. S. 580; *Davis* v. *Cent. Cong. Society*, 129 Mass. 367; *Nickerson* v. *Tirrell*, 127 Mass. 236; *Carleton* v. *Franconia Iron Co.* 99 Mass. 216; *Tobin* v. *P. S. & P. R. Co.* 59 Maine, 188; *Larmore* v. *Crown Point Iron Co.* 2 Central Reporter, 409; *Snow* v. *H. Railroad*, 8 Allen, 441; *C. Railroad* v. *Armstrong*, 49 Penna. St. 186; 52 *Id.* 282; *Graham* v. *Northeastern Railroad Co.* 18 C. B. (N. S.) 229: Shear. & Red. on Neg. 101; Patterson Ry. Accident Law, 222, and cases there cited; *Yeomans* v. *Nav. Co.* 44 Cal. 71; Dicey on Parties, 19; *Marshall* v. *York R. Co.* 11 C. B. 655; *Martin* v. *G. I. P. R. Co.* L. R. 3 Exch. 9; Wharton on Negligence, § 439; *Graham* v. *N. E. Ry.* 18 C. B.; N. S. 114 E. C. L.; *Norris* v. *Androscoggin Railroad*, 39 Maine, 276; *Whitney* v. *A. & St. L. Railroad Co.* 44 Maine, 367; *Gardner* v. *L. C. & D. Ry.* 2 L. R. Ch. 201; *W. A. & G. Railroad* v. *Brown*, 17 Wallace, 445; *Y. & M. L. Railroad* v. *Winans*, 17 Howard, 30; *Beman* v. *Rufford*, 1 Sim. N. S. 550; *Winch* v. *B. L. & C. J. Ry.* 5 DeG. & S. 562; 16 Jur. 1035; *G. N. Ry.* v. *E. C. Ry.* 9 Hare, 306; *Black* v. *D. & R. Canal Co.* 22 N. J. Eq. 130; *M. R. R.* v. *B. & C. Railroad*, 115 Mass. 347; *Thomas* v. *W. J. Ry.* 101 U. S. 71; *Keep* v. *Indianapolis & St. Louis Railroad*, 10 Fed. Rep. 454; 3 McCrary, U. S. C.

C. 302. Liability of landlord generally for dangerous condition or unsafe structure. *King* v. *Pedly*, 1; Adolphus and Ellis, 822; *Roswell* v. *Prior*, 12 Md. 635; *King* v. *Moore*, 3 B. & Ad. 184; *Cheetham* v. *Hampson*, 4 Term Reports, 318; *Plumer* v. *Harper*, 3 New Hampshire, 88; *Woodman* v. *Tufts*, 9 *Id.* 88, 91; *Beswick* v. *Cunden*, Croke's Elizabeth, 402; *Waggoner* v. *Jermaine*, 3 Denio, 306; *Fish* v. *Dodge*, 4 Denio, 311; *House* v. *Metcalf*, 27 Conn. 631; Wood on Nuisances, § 837, and note 2, cases there cited; § 827, *Id.*; Sherman & Red. Negligence, § 56, and cases cited; *Mahoney* v. *A. & St. L. Railroad*, 63 Maine, 68; *I. C. Railroad* v. *Barron*, 5 Wall. 90; *McElroy* v. *N. Railroad*, 4 Cush. 400; *Y. & M. L. Railroad* v. *Winans*, 17 How. 30; *St. Louis, &c. Railroad Co.* v. *Curl*, 28 Kan. 622; 11 Am. & Eng. R. R. Cas. 458; *Cook* v. *Milwaukee, &c. Railroad Co.* 36 Wis. 45; *Fontaine* v. *So. Pac. R. Co.* 1 Am. & Eng. Cas. 159 (54 Cal. 645); *Ill. Cent. Railroad Co.* v. *Kanoyse*, 39 Ill. 227; *Tol. &c. Railroad Co.* v. *Rumbold*, 40 Ill. 143; *Freeman* v. *Minn. &c. Railroad Co.* 7 Am. & Eng. Railroad Cases, 410 (Minn.); *Wasmer* v. *D. L. & W. R. Co.* 1 Am. & Eng. Railroad Cases, 122 (80 N. Y. 212).

The New Hampshire case of *Murch* v. *Concord Railroad*, 9 Foster, 124, is criticised in 2 Wood Ry. Law, 1339, and is in conflict with many well considered cases. See *Snow* v. *Housatonic Railroad Co.* 8 Allen, 441; *Sawyer* v. *Rutland Railroad Co.* 27 Vt. 370; *Nelson* v. *Vermont, &c. Railroad Co.* 26 Vt. 717; *Graham* v. *N. E. R. Co.* 18 C. B. (N. S.) 229; *Low* v. *Grand Trunk R. Co.* 72 Maine, 313; *Tobin* v. *P. S. & P. R. Co.* 59 Maine, 183; *Wendall* v. *Baxter*, 12 Gray, 494; *Collett* v. *London, &c. Ry.* 16 Ad. & El. (N. S.) 984; Shearman & Redf. Negligence, 101; *Balsley* v. *St. L. A. & T. H. R. Co.* 119 Ill. 68 (25 Am. & Eng. Railroad Cases, 497); S. C. 6 Western Reporter, 469; *Singleton* v. *Southwestern R. Co.* 70 Ga. 464 (48 Am. R. 574); see valuable note in 25 Am. & Eng. Railroad Cases, pp. 501–2.

Negligence and due care. *Chicago, &c. R. Co.* v. *Swett*, 45

Ill. 197; *Ill. Cent. R. Co.* v. *Welch*, 52 Ill. 183 (4 Am. R. 593); *Chicago, &c. R. Co.* v. *Russell*, 91 Ill. 298 (S. C. 33 Am. R. 54); *Hough* v. *Railway Co.* 100 U. S. 213; 3 Wood Ry. 1482; *Baltimore, O. & C. R. Co.* v. *Rowan*, 1 Western Rep. 914; *Chicago & A. R. Co.* v. *Johnson*, 2 Western Rep. 388; 3 Wood Ry. 1480 and *seq.*; *Kearns* v. *Chicago, Milwaukee & St. Paul Railroad Co.* 22 Am. & Eng. Railroad Cases, 287 (Iowa); *Gould* v. *Chicago, Burlington & Quincy Railroad Co.* 22 Am. & Eng. R. Cases, 289; *Houston & Texas Rail. Co.* v. *Hampton*, 22 Am. & Eng. Railroad Cases, 291 (Texas); *Clark* v. *Richmond & D. Railroad Co.* 18 Am. & Eng. Railroad Cases, 78; *Riley* v. *Conn. Riv. Railroad*, 135 Mass. 292; *Wabash Ry. Co.* v. *Elliott*, 98 Ill. 481 (4 Am. & Eng. Railroad Cases, 651); *Pittsburg, &c. Railroad* v. *Sentmeyer*, 92 Penn. 276 (5 Am. & Eng. Railroad Cases, 508); *Lawless* v. *Conn. Riv. Railroad Co.* 136 Mass. 1; *Jeffrey* v. *K. & Des Moines Railroad Co.* 5 Am. & Eng. Railroad Cases, 577; *Herbert* v. *Northern Pacific R. Co.* 8 Am. & Eng. 85; *Tissue* v. *B. & O. Railroad*, (Penn.) 6 Eastern Reporter, 853; *Baltimore, &c. Railroad* v. *Rowan*, 1 Western Reporter, 914; *Houston, &c. R. Co.* v. *Cram*, 49 Texas, 341; *Chicago, &c. Railroad Co.* v. *Swett*, 45 Ill. 197; *Illinois Cent. Railroad Co.* v. *Welch*, 52 Ill. 183; *Chicago, &c. Railroad Co.* v. *Russell*, 91 Ill. 293; *Hough* v. *Railroad Co.* 100 U. S. 213 (XXV. Law ed. 612); *Indiana Car Co.* v. *Parker*, 100 Ind. 181; Beach on Contributory Negligence, § 134.

No one of the objections to the admission of testimony was specific, no ground of objection was stated when the testimony was offered. *State* v. *Bowe*, 61 Maine, 171; *Harriman* v. *Sanger*, 67 Maine, 442; *Baker* v. *Cooper*, 57 Maine, 388; *Bonney* v. *Morrill*, 57 Maine, 368; *Staples* v. *Wellington*, 58 Maine, 453; *Glidden* v. *Dunlap*, 28 Maine, 379; *Emery* v. *Vinall*, 26 Maine, 295; *Lee* v. *Oppenheimer*, 34 Maine, 181; *White* v. *Chadbourne*, 41 Maine, 149; *Doane* v. *Baker*, 6 Allen, 260; *Peebles* v. *B. & Albany R.* 112 Mass. 498; *Spinney* v. *Bowman*, 4 N. Eng. Rep. 699; *State* v. *Bennett*, 75 Maine, 590; *Bean* v. *Dolliff*, 67 Maine, 228; *Soule* v. *Winslow*, 66 Maine, 447.

People might disagree as to whether the awning was a nuisance, therefore it was for the jury to say. *Shannon* v. *B. & Albany Railroad*, 78 Maine, 52; *Lesan* v. *M. C. Railroad Co.* 77 Maine, 91; *Ry. Co.* v. *Stout*, 17 Wall. 657.

A. A. Strout, for defendant.

People who have been employed upon railroads for a length of time adequate to give them necessary experience are bound to take notice and to have knowledge of structures which are placed in proximity to the trains upon which they are employed. It is as much negligence for them not to observe and take notice of these structures and to acquire a knowledge sufficient to enable them to exercise a proper judgment, as it is not to think of them when they are employed in a dangerous occupation in connection with them. Nor have the courts been silent in relation to this principle.

Without wearying the court by quotation in this brief, I will cite, in relation to this matter of due care, the following: Wood's Railway Law, Vol. 2, pp. 1098 and 1253 to 1262, and cases there cited; *Chase* v. *Maine Central Railroad*, 78 Maine, 346; *State* v. *Same*, 77 Maine, 538; *Taylor* v. *Curew Manufacturing Co.* 143 Mass. 470; *Lovejoy* v. *Boston & Lowell Railroad*, 125 Mass. 79; *Thayer* v. *St. L. A. & T. H. Railroad*, 22 Ind. 26; *Perigo* v. *C. R. & P. Railroad Co.* 52 Iowa, 276.

In *Gibson* v. *Erie Railway Co.* 63 New York, 449, the party injured was caught by projecting roof of depot and killed whilst climbing up over the side of the car. In granting a new trial the court says: "Here the structure was permanent in its character, and the risk resulting from its location was apparent to the ordinary laborer as to the skilled mechanic or expert; they were visible to all, and could be as well appreciated by the deceased, who had for many years resided at the place of the injury, as by the officers and agents of the company." The case was also remanded because of contributory negligence. *Toomey* v. *London, &c. Railroad*, 3 C. B. 149; *Atchison, Topeka & Santa Fe Railroad* v. *Retford*, 18 Kansas, 245; Pear's Railroad Law, 379, and cases there cited.

It would be observed in this case that there was no contract between the plaintiff and the defendant corporation. Whatever contract or license to use the road of the defendant corporation there was, was with the Portland and Ogdensburg Railroad Company. This contract had existed for a long period prior to the accident, and had passed into the hands of a separate corporation. The plaintiff, accepting employment upon the Portland and Ogdensburg Railroad, and knowing that it runs over the track of another railroad, accepted the condition of such track, and any structures adjacent thereto, and consented to use them at his own risk and peril. It is not necessary to cite cases to this court to show that where the facts are uncontradicted the issue becomes a question of law and not of fact. *Grows* v. *Maine Central Railroad*, 67 Maine, 100; *Burns* v. *Boston & Lowell Railroad*, 101 Mass. 50.

The books are full of cases where a non-suit has been ordered because of the negligence of the plaintiff, where such negligence is shown with less certainty than in the present case. Of course the jury would find in a case against a railroad that the plaintiff was in the exercise of due care, no matter what the facts were, especially where the plaintiff lost an arm, and thereby appealed to the reasonable sympathies which every man entertains where there is misfortune and suffering.

In the case of *Murch* v. *The Concord Railroad Corporation*, 29 New Hampshire, 9, the court held that a railroad company, by giving permission to another railroad to use a part of their track, did not appoint themselves to make their track safe, nor to put it in repair, nor to make any change in its existing state; such company, by contracting to let to another company the use of their track, was under no duty to a passenger of the other railroad. The claim of such passenger injured is on the company with whom he contracts.

The court is especially referred to the language of Judge BELL, found on pages 33 and 34, in which he says, that "Permission could not, of course, extend further in the case of such passenger than in the case of the railroad itself,—a permission to use the railroad as it is." The court is also referred to the case of

Baylor v. *D. L. & W. Railroad*, 40 N. J. L. 23; *Baltimore & Ohio Railroad* v. *Stricker*, 51 Md. 47; *Owen* v. *N. Y. C. Railroad*, 1 Lansing R. 108; *Devitt* v. *Pacific Railroad*, 50 Mo. 302; *Stettler* v. *C. & N. W. Railroad*, 46 Wisconsin, 497; *Same* v. *Same*, 49 Wisconsin, 609; Wood's Railway Law, Vol. 2, § 325, page 1333 *et seq.* and cases there cited.

No law is better settled than that the defendant would not be liable for the neglect of the employees of the Portland and Ogdensburg Railroad, and I cite, *Clarke* v. *C. B. & Q. Railroad*, 96 Ill. 43.

VIRGIN, J. By a contract of March 1, 1884, the Portland & Ogdensburg Railroad Company, for certain valuable considerations therein expressed, was permitted, among other things, to run all of its through freight trains, for one year at least, over that portion of the defendant's tracks between certain named stations, between which was the Bethlehem station, the defendant "assuming all liability and risk of accident arising from defect of road bed or track or default of its employees or servants."

On June 19, 1884, while the permit was in full force, the Boston and Lowell Railroad Company leased for ninety-nine years the defendant's railroad, stations, etc., agreeing to save harmless the defendant "against all claims for injuries to persons during the term, from any and all causes whatever."

The plaintiff was rear brakeman on a Portland and Ogdensburg special freight train bound west. While he, in pursuance of a signal for setting brakes, was rapidly ascending the iron ladder on the side of a box car to perform his duty of setting the brake thereon, the train being in motion, his head came in contact with the end of the depot awning, of same height as the car and eighteen inches therefrom, and he was thereby knocked off between the cars, and before he could extricate himself, his right arm was so crushed by the wheels of the saloon car that amputation became necessary.

The jury, after a charge to which, so far as the general merits of the case is concerned, no exception is alleged, returned a verdict for the plaintiff for three thousand one hundred dollars.

Under the instructions, the jury must have found that the awning was negligently constructed on account of its proximity to the passing car; (2) that the injury was caused solely thereby; and (3) that the plaintiff was in the exercise of ordinary care at the time of the injury.

1. It is contended that the plaintiff was guilty of contributory negligence; and that as the facts in relation thereto were undisputed, the question was one of law and should, therefore, have been decided by the presiding justice, which he declined to do, but submitted it to the jury. While there are numerous cases wherein questions of the negligence of both parties in actions of this nature have been decided by the court on undisputed facts, still the negligence of neither party can be conclusively established by a state of facts from which different inferences may be fairly drawn, or upon which fair minded men may reasonably arrive at different conclusions. *Brown* v. *European & N. A. Railroad Co.* 58 Maine, 384; *Leasan* v. *Maine Central Railroad Co.* 77 Maine, 85, 91; *Shannon* v. *Boston & Albany Railroad Co.* 78 Maine, 52, 60; *Snow* v. *Housatonic Railroad Co.* 8 Allen, 441; *Treat* v. *Boston & L. Railroad Co.* 131 Mass. 371; *Peverly* v. *Boston*, 136 Mass. 366; *Lawless* v. *Conn. Riv. Railroad Co.* 136 Mass. 1; *Railroad Co.* v. *Stout*, 17 Wall. 657, 663–4.

As a practical illustration of this proposition: The conductor of a freight train had resided at the place of accident for twenty years, and as conductor and brakeman passed the station once or twice daily for seven years. Just as his train started up, he caught hold of the side ladder of a passing car, and, without any call of duty there, as he climbed toward the top, was struck and killed by the roof of the depot which projected over, and within thirty-four inches of the car; and the court was divided on the questions of negligence involved. *Gibson* v. *Erie Railway Co.* 63 N. Y. 449. So in another case, where a brakeman (the plaintiff), who had pulled out the pin and disconnected a portion of the train from the engine, was walking beside the train, and on signal for brakes, ran up the side ladder of a car and was struck, knocked off and lost his arm, by the awning which pro-

jected within eighteen inches of the car; the court held the plaintiff not guilty of contributory negligence, but set aside the verdict of ten thousand dollars as excessive. The court remarked, "it would be preposterous in us to say, or to ask a jury to say, that a brakeman engaging in the service of the company must be held to know whether or not there may be one among the station-houses whose roof or awning so projects over the line of the road, that a brakeman on a freight train, in the performance of his duties, would be liable to be swept from the train by collision with it." *Ill. Cent. Railroad Co.* v. *Welch*, 52 Ill. 183.

We are of opinion that the presiding justice very properly submitted to the jury the question of the defendant's negligence and also that of the plaintiff's exercise of ordinary care.

Moreover, a careful examination of all the testimony bearing upon these questions, aided by the exhaustive argument of counsel, has failed to satisfy us that we ought to interpose and set the verdict aside. And without taking space to state our reasons at length, we remark: The train never stopped at this station, except when obstructed by another, and occasionally down by the tank for water. His attention was never particularly called to the nearness of the awning, as he had no occasion to notice it in passing. When the accident happened, the plaintiff was engaged in the prompt performance of a call to active duty. The exigency caused by the repeated starting and stopping of the mixed train required his speedy ascent to the top of the car by means of the ladder. Before he reached it, his car being in motion, arrived at the awning. Due care on the part of the defendant required space enough between the car and the awning for reasonable action of body, arms and legs of the brakeman, whose duty required him to ascend the ladder there. It was deficient in this respect, and the plaintiff, with his attention properly fixed on his duty, was struck. It is no answer, that the train, though on a down grade of thirty feet to the mile, might be handled by the engine when working steam. The plaintiff's duty was not to rely on the possibility of the engine holding the train, but to perform the duty signaled by the conductor standing on the engine; and he lost his right arm in

the prompt attempt to perform it, in consequence of the defendant's faulty awning. The acts of the plaintiff "cannot be judged of by the rule applicable to persons engaged in no special or particular duty." The plaintiff's previous knowledge of the awning must, on account of his few opportunities for gaining it, have been comparatively slight, and was "by no means decisive. The service then and there to be performed was of a character to require his exclusive attention to be fixed upon it, and that he should act with rapidity and promptness; and it could hardly be expected that he should always bear in mind the existence of the defect, even if he knew it, or be prepared at all times to avoid it." *Snow* v. *Housatonic Railroad Co.* 8 Allen, 441, 450.

But while this rule may not be seriously questioned as between a railroad company and its own employees, the defendant challenges its application as between it and the plaintiff. This presents the question, whether a railroad company, over a section of whose track another company, by virtue of a contract, runs its trains, is liable in tort to the latter's brakeman, who, without the fault of himself or of his co-employees, receives a personal injury while in the performance of his duty on his employer's train, solely by reason of the negligent construction of the former's depot. We are of opinion that it is.

In such a case the only materiality which attaches to the contract between the companies, is to make certain that the plaintiff was lawfully, and not a trespasser on the defendant's road. And although the defendant, in its contract with the P. and O. company, in express terms "assumed all liability and risk of accident arising from defect of road bed, track, or default of its employees," nothing was thereby added to the defendant's legal obligation and duty; these terms did not express all which the law required of railroad companies as to the reasonable safety of its station-houses. *Tobin* v. *Portl. S. & P. Railroad Co.* 59 Maine, 183. It is common learning that as a compensation for the grant of its corporate franchise intended in large measure to be exercised for the public good, the common law imposed upon the defendant a duty to the public independent of contract and coextensive with its lawful use, to keep its road and its appurte-

nances in a reasonably safe and proper condition. *Thomas* v. *Railroad,* 101 U. S. 71, 83; *Bean* v. *At. & St. L. Railroad Co.* 63 Maine, 293, 295. If the cause of action were a breach of the contract, the plaintiff could not maintain an action thereon for want of privity. But this is an action *ex delicto*, for an injury caused by a neglect of a duty created by law. Broom's Com. (4th ed.) 675-6, and cases. And for the neglect of such a duty privity is not essential to the maintenance of an action of tort therefor. *Campbell* v. *Portl. Sug. Co.* 62 Maine, 552, 564; Broom's Com. 673 *et seq.*

This principle is variously illustrated by the numerous cases cited in Broom's Com. 655–670. Thus a railroad company is liable for the loss of a passenger's luggage whose fare was paid by another, not on account of breach of contract, but of legal duty: *Marshall* v. *York N. & B. Railroad Co.* 11 C. B. (73 E. C. L.) 655.

So where the defendant sold naphtha to one known to him as a retailer of fluids, to be burned in lamps for illuminating purposes, and the retailer sold a pint thereof to the plaintiff to be used in a lamp and it exploded, the defendant was held liable, "not upon any supposed privity between the parties, but upon a violation of duty in the defendant, resulting in an injury to the plaintiff." *Wellington* v. *Downer Ker. Oil Co.* 104 Mass. 64, 67.

So where a chemist compounded a hair wash and knowingly sold it to a husband for the use of his wife, who was injured by its use, the wife sustained an action of tort for the injury, on the ground of the defendant's breach of duty. *George* v. *Skinnington*, (L. R.) 5 Exch. 1.

In like manner, "where a stage proprietor," said PARKE, B., "who may have contracted with the master to carry his servant, is guilty of neglect and the servant sustains personal damage, he is liable to the latter; for it is a misfeasance toward him, if, after taking him as a passenger, the proprietor or his servant drives without care, as it is a misfeasance towards every one travelling on the road. So if a mason contracts to erect a bridge or other work over a public road, which he constructs not according to the contract, and the defects are a nuisance, a

third person, who sustains an injury by reason of its defective construction, may recover damages from the contractor, who will not be allowed to protect himself from liability by showing an absence of privity between himself and the injured person, or by showing that he is responsible to another for breach of the contract." *Longmeid* v. *Holliday*, 6 Eng. L. & Eq. 563.

So, where a station being in the joint occupation of the defendant and another railway, the plaintiff's decedent, a blacksmith in the service of the other railway, while engaged in repairing one of its wagons on a siding at the station, was killed by the negligent shunting of the defendant's train on that siding —a motion to set aside a verdict for the plaintiff was overruled. *Vose* v. *L. & Y. Railway*, 2 H. & N. 728.

And it seems that an apothecary who administers improper medicine to his patient, or if a surgeon unskilfully treat him to his injury, is liable to the patient, even when a father or friend of the patient was the contractor. *Pippin* v. *Sheppard*, 11 Price, 40; *Gladwell* v. *Steggall*, 5 Bing. (N. C.) 733, (E. C. L.) 292; *Thomas* v. *Winchester*, 2 Seld. 397.

The principle is sustained in the well considered case of *Sawyer* v. *Rutland & B. Railroad Co.* 27 Vt. 370, which was re-examined and reaffirmed by the same learned court in *Merrill* v. *Cent. Vt. Railroad Co.* 54 Vt. 200; also in *Smith* v. *New York & H. Railroad Co.* 19 N. Y. 127; *Snow* v. *Housatonic Railroad Co.* 8 Allen, 441; Pierce, Railroads, 274; Patter. Ry. Ac. § 228; 2 Wood, Railway L. 1338–9, and notes.

We are aware that this view is not in accordance with *Murch* v. *Concord Railroad Co.* 29 N. H. 35, and *Pierce* v. *Concord Railroad Co.* 51 N. H. 593, which cases were cited by a divided court in this state on another point; (*Mahoney* v. *At. & St. L. Railroad Co.* 63 Maine, 72;) but notwithstanding our high opinion of the learned court which pronounced those opinions, we think the views herein declared are more satisfactory.

Our opinion, therefore, is that the plaintiff had the lawful right, as brakeman on the train of the P. & O., to pass and repass by the Bethlehem station-house of the defendant which, therefore, owed a duty to him to construct and maintain its station-house

there in such a reasonably safe manner that its awning would not injure him while in the performance of his duty with due care; and that a negligent breach of that duty by the defendant, having resulted in a personal injury to the plaintiff without fault on his part, he is entitled to maintain this action therefor, unless the leasing and consequent full possession of the defendant's road by the B. and L. constitutes a defence.

It is declared to be the settled law of this country that one railroad corporation cannot, without statutory authority, divest itself of, or relieve itself from, any duty or liability imposed by its charter or the general laws of the state, by leasing its road and appurtenances to another. *York & M. L. Railroad Co.* v. *Winans*, 17 How. 30; *Thomas* v. *Railroad Co.* 101 U. S. 71, 83.

Assuming the lease of the defendant road, station-houses, etc., to the B. and L. to have been duly authorized by the respective legislatures of the states which granted their charters, and that the lessee had, months before the plaintiff's injury, received under the lease full possession, management and control, was the defendant thereby relieved from liability to this plaintiff for his injury?

This court has held that an authorized lease of a railroad does not relieve the lessor from the liability under the general statute, for an injury caused to property along its line by fire communicated by a locomotive of the lessee. *Pratt* v. *At. & St. L. Railroad Co.* 42 Maine, 579; *Stearns* v. *Same*, 46 Maine, 95. In Massachusetts, both lessor and lessee are held liable for the injury under a like statute. *Ingersoll* v. *Stockbridge & P. Railroad Co.* 8 Allen, 438; *Davis* v. *Prov. & Wor. Railroad Co.* 121 Mass. 134.

Courts of the highest respectability have held, in well considered opinions, that the duly authorized leasing of one railroad to another does not absolve the lessor from liability to a passenger for injury caused by the negligent acts of the lessee's employees, unless the statute authorizing the lease contains an express exemption to the lessor; that "grants to corporations, whether of powers or exemptions, are to be strictly construed, and their obligations are to be strictly performed, whether they may be

due to the state or to individuals." *Singleton* v. *Southwestern Railroad*, 70 Ga. 464 (48 Am. R. 574); *Nelson* v. *Vermont & Can. Railroad Co.* 26 Vt. 717; 1 Redf. Railways, 590.

This view is adopted and sustained in an opinion reviewing the cases and authorities, by the court in Illinois. The court, in its opinion, does not rest its decision "upon the narrow ground alone of the lessee being in the exercise of a franchise which belonged to the lessor, and in so doing is to be held as the servant of the lessor corporation; but in consideration of the grant of its charter, the corporation undertakes the performance of duties and obligations toward the public; and there is a matter of public policy concerned that it should not be relieved from the performance of its obligations without the consent of the legislature," adding, "there is no express exemption in the statute which authorized the lease." *Balsley* v. *St. Louis A. T. H. Railroad Co.* 6 West. Rep. 469; see also Pierce, Am. Ry. L. 244.

In this state, where the defendant had leased its road under the authority of a statute which expressly provided that "nothing contained therein . . shall exonerate the lessor from any duties or liabilities imposed upon it by the charter or by the general laws of the state," a divided court held that the lessee, and not the lessor, was liable to a passenger injured by an assault and wrongful expulsion from its train by one of the lessee's servants. *Mahoney* v. *At. & St. L. Railroad Co.* 63 Maine, 68. This case, however, does not meet the facts in the case at bar; for there the injury complained of resulted solely in the wrongful acts of the servant of the lessee, who had sole control of the trains, and not, as here, from the wrong of the lessor in the negligent original construction of its depot.

And herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its

road, station-houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility. *St. Louis W. & W. Railway Co.* v. *Carl*, 28 Kan. 622 (11 Eng. & Am. R. Cas. 458).

The covenant in the lease to "save the lessor harmless," etc., is predicated of an implication of a primary liability on the part of the lessor. It is an obligation which in nowise affects the plaintiff, or the defendant's liability to him, but is simply a contract for reimbursement for such damages as may in anywise be recovered against it by the plaintiff and other lawful claimants, whose injury results from its breach of duty owed them.

We are also of opinion that the defendant is liable, under the rule which governs the responsibility of a lessor of demised premises, for their condition. For it is settled law, that when the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable, whether in or out of possession, for the injuries which result from their state of insecurity, to persons lawfully upon them; for by the letting for profit, he authorizes a continuance of the condition they were in when he let them, and is therefore guilty of a nonfeasance. Among the numerous cases supporting this general view are: *Rosewell* v. *Prior*, 2 Salk. 459 (S. C. more fully reported, 12 Mod. 635, 639), where the defendant erected a house, thereby obstructing the plaintiff's ancient lights, and demised it to another; and the court held the "action well brought . . for before his assignment over, he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting over." See also *Rex* v. *Pedly*, 1 Ad. & E. 822; *Staple* v. *Spring*, 10 Mass. 72; *Fish* v. *Dodge*, 4 Denio, 311; *House* v. *Metcalf*, 27 Conn. 631; *Todd* v. *Flight*, 9 C. B. (N. S.) 377. In the last case EARLE, C. J., after reviewing *Rex* v. *Pedly*, and *Rosewell* v. *Prior*, said: "These cases are authorities for saying that, if the wrong causing the damage arises from the nonfeasance or the misfeasance of the lessor, the party suffering damage from the wrong may sue him. And we are of opinion that the principle so contended for

on behalf of the plaintiff is the law, and that it reconciles the cases." Also, *Nelson* v. *Liverpool Brewery Co.* (L. R.) 2 C. P. 311; *Awing* v. *Jones*, 9 Md. 108; *Gandy* v. *Jubber*, 5 B. & S. 76; S. C. on error, 5 B. & S. 486; see opinion S. C. 9 B. & S. 15; *Stratton* v. *Staples*, 59 Maine, 94. This principle is recognized in *Campbell* v. *Portland S. Co.* 62 Maine, 552, and in *McCarthy* v. *York Co. Sav. Bank*, 74 Maine, 315, 325; *Burbank* v. *Bethel S. M. Co.* 75 Maine, 373, 383; *Allen* v. *Smith*, 76 Maine, 335, 341.

See also, *Godley* v. *Haggarty*, 20 Pa. 387, affirmed in *Carson* v. *Godley*, 26 Pa. 111, where buildings were let to the government as bonded ware houses, and being defectively built and of insufficient strength, they fell by reason of storage of heavy merchandise.

So, in Maryland, in *Albert* v. *State*, 6 Cent. Rep. 447, the court of appeals approved the instruction: "If the jury found that the defendant was the owner of the wharf and rented it to the tenant, and that at the time of the renting the wharf was unsafe and the defendant knew, or by the exercise of reasonable diligence could have known of its unsafe condition, and the accident happened in consequence of such condition, then the plaintiff was entitled to recover."

So in *Swords* v. *Edgar*, 59 N. Y. 28, the court, after an elaborate review of the cases, held that the lessors of a pier, in the possession of their lessee from whom they received rent for it, were liable for an injury received by a longshoreman engaged in discharging a cargo thereon, the cause of the injury being a dangerous defect which existed at the time of the demise.

In a very recent case in Rhode Island, of like facts, the court held both lessor and lessee jointly liable. *Joyce* v. *Martin*, 4 N. Eng. Rep. 796; see also the recent case in New Jersey, of *Rankin* v. *Ingwerson*, 8 Cent. Rep. 371; also a Massachusetts case, *Dalay* v. *Savage*, 4 N. Eng. Rep. 863.

We are aware that there are a few cases which hold that, even if premises are dangerous when demised, the lessor is not liable to one injured thereby, if the tenant in the lease covenanted to keep them in repair. *Pretty* v. *Bickmore*, (L. R.) 8 C. P.

401. And the same principle was subsequently affirmed in a case of very similar facts. *Gwinnell* v. *Eamer*, (L. R.) 10 C. P. 658; see also *Leonard* v. *Storer*, 115 Mass. 86, where the lessee covenanted to "make all needful and proper repairs, both internal and external." The language of the court when taken in connection with the facts is explainable in consonance with the early English cases before cited. See also the *dictum* in the recent case in Massachusetts, already cited, of *Dalay* v. *Savage*.

But this principle has been ably reviewed in the strong opinion of FOLGER, J., in *Swords* v. *Edgar*, *supra*. This opinion declines to accept the doctrine of the above cases for the reason that they "ignored the rule announced in *Rosewell* v. *Prior*, (*supra*) and followed and established in many cases." FOLGER, J., speaking for the whole court upon this question, said: "The person injuriously affected by the ruinous state of the premises demised, has no right nor privity in the covenant. He is not given thereby a right of action against the lessee greater nor more sure than he had before. He has the right, without the covenant. The covenant is a means by which the lessor may reimburse himself for any damages in which he is cast by reason of his liability. But it is an act and obligation between himself and another, which does not remove nor suspend that liability. It is not so, that a person on whom there rests a duty to others, may, by an agreement between himself and a third person, relieve himself from the fulfillment of his duty. Surely an ineffectual attempt to fulfill would not; as if in this case, insufficient repair of the pier had been made by a builder who had contracted with the lessor to do all that was needful to make the pier secure for all comers. A covenant taken from a lessor to keep in order and repair, is no more effectual than a contract with a builder to the same end. Both may afford an indemnity to the lessor, but neither can shield him from responsibility." The New Jersey case of *Rankin* v. *Ingwerson*, *supra*, sustains the same view. And we adopt the doctrine of the case from which we have so largely quoted as sound on legal principles and public policy.

And even if a lessee's covenant would, when broad enough in its terms, operate a relief of the lessor's liability, the covenant

here would not affect the case in hand, for it is restricted and limited to "maintaining, preserving and keeping the station-houses in as good order and repair as the same now are, so that there shall be no depreciation in the general condition thereof, at any time during the term."

The testimony as to the proximity of the awnings at the other stations had a legitimate bearing on the question of the exercise of care on the part of the plaintiff; and the defendant pursued the same line of inquiry not only on cross examination, but in the direct examination of its own witnesses, Stowell and Winters. We think also that Sawyer's testimony was legitimate.

Motion and exceptions overruled.

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

STATE OF MAINE *vs.* HENRY F. CONWELL.

Cumberland. Opinion January 27, 1888.

Indictment. Intoxicating liquors. Prior conviction.

A prior conviction is not well laid at a term of court which ended before the certificate of decision was received from the law court in the cause.

ON report from superior court.

Search and seizure complaint under the liquor law.

The facts are sufficiently stated in the opinion.

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

Revised Statutes, c. 27, § 27 abrogates the common law technicalities of pleading in a great measure, and provides that, in such cases as this among others, "it is not requisite to set forth particularly the record of a former conviction, but it is sufficient to allege briefly, that such person has been convicted of a violation of any particular provision or as a common seller, as the case may be."

For the construction see *State* v. *Wentworth*, 65 Maine, 247; *State* v. *Gorham*, 65 Maine, 273; *Dolan* v. *Hurley*, 69 Maine, 576.

If all that portion of this allegation, to wit: "at a term .... on the tenth day of August, A. D. 1887," be rejected as surplusage, there will be left an allegation of a prior conviction, in all respects identical in force, and answering in every condition of the Statute provision, with those set out in *State* v. *Wentworth*, *supra*, in *State* v. *Gorham*, *supra*, and in *Dolan* v. *Hurley*, *supra*.

That this portion of the said allegation may be so rejected as surplusage, see Vol. 1, Bish. Crim. Proc. §§ 229, 230, which says, "whatever is immaterial to the indictment, is surplusage, which may be wholly disregarded or rejected." Also see *State* v. *Noble*, 15 Maine, 476; *State* v. *Staples*, 45 Maine, 320; *State* v. *Jackson*, 39 Maine, 296.

A conviction is had on a criminal case when the jury finds the defendant guilty, or the defendant confesses or pleads guilty. Blackstone, Vol. IV, § 362.

"Where the time when a fact happened is immaterial, and it might have happened at another day, then, if alleged under a scilicet, it is absolutely nugatory and therefore not traversable; and if it be repugnant to the premises, it will vitiate, but the scilicet itself will be rejected as superfluous and void." Vol. I, Bishop's Crim. Proc. § 257; Gould on Pl. c. 3, § 40.

Dennis A. Meaher, for the defendant, cited: *People* v. *Jackson*, 3 Denio, 101; *Crickton* v. *People*, 6 Parker, C. R. 363; *Mallett* v. *Stevenson*, 26 Conn. 428; Wharton's Cr. Ev. (9 ed.) 14, 15.

HASKELL, J. The May term of the superior court adjourned *sine die* June 1, 1885. The former conviction is laid at that term "to wit on the tenth day of August, A. D. 1885," when a certificate of decision was received by the clerk from the law court.

The May term had ended before the cause had been decided in the law court. The defendant's recognizance taken when his cause was marked "law" required his attendance "from term to term until and including the term of said court, next after the

certificate of decision shall be recived" from the law court. R. S., c. 134, § 26. Until that term, his attendance was not required and no judgment could be rendered against him.

Judgment for the State, but not for prior conviction.

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

CHARLES R. MILLIKEN and others *vs.* KATE H. DOCKRAY.

Cumberland. Opinion January 27, 1888.

Equity practice.

A defence that may be interposed in an action at law cannot be invoked as a cause for relief in equity.

ON appeal by the defendant.

The opinion states the case.

William L. Putnam, for plaintiffs.

We do not deem it necessary to discuss the facts, as we think this is clearly one of the class of cases in which the court will not set aside the findings of the court below, on matters of fact.

"It is not enough for the appellant merely to raise a doubt on conflicting testimony that the judgment of the court below may possibly be erroneous; the judgment of the court below is assumed to be correct till the contrary is made to appear. It is not sufficient to produce a record from which it does not appear whether it is right or wrong." *The Potomac*, 2 Black. pp. 581 and 584.

Neither the facts alleged nor the facts found show an estoppel which would operate in a suit for dower. It does not appear that the complainants were unaware of the condition of the title; but the presumption is, that they acted under a mistake of law, or took it as granted that Mrs. Dockray would not attempt so inequitable a thing as to disturb a title which they had taken for mutual benefit. We think, therefore, the only remedy was in equity.

It does not appear that the complainants were guilty of laches; and we do not understand that a claim of this sort is set up. The record shows that the complainants set up a defence to the action for dower and relied on that, and brought this bill promptly after the law in that case was determined against them. On the other hand, the record shows that Mrs. Dockray acquiesced in the rights of the complainants as now claimed, from some time in January, A. D. 1878, to October, A. D. 1883, when she brought her action of dower.

The equitable principle which underlies this decree, and is stated in the findings of the court below, is so familiar that we do not deem it necessary to trouble the court with any discussion of it. There are several other grounds on which the complainants think the bill might have been maintained; although they are satisfied that the court at *nisi prius* placed the decision on the equity which is the simplest and clearest.

Under the doctrine of election, respondent, having elected to claim dower, becomes in equity trustee of the residue of the personal property, to protect the owners of the fee who hold under warranty deeds from her husband, the testator. This is a well settled principle of equity law. Story's Equity Jurisprudence, § 1083; *Firth* v. *Denny*, 2 Allen, p. 468. The principle is also fully explained in Pomeroy's Equity, § § 516, 517, 467 and 468.

In section 512 the principle by which the widow is admitted to her dower in the event of unexpected insolvency, is explained as a concomitant of the doctrine of election.

Harvey D. Hadlock, for the defendant, cited: *Vattier* v. *Hinde*, 7 Pet. 252; *Crockett* v. *Lee*, 7 Wheat. 522; *Boone* v. *Chiles*, 10 Pet. 177; *Dockray* v. *Milliken*, 76 Maine, 517; *Hughes* v. *Blake*, 6 Wheat. 453; *Carpenter* v. *Prov. Wash. Ins. Co.* 4 How. 185; *Walton* v. *Hobbs*, 2 Atk. 19; *Arnot* v. *Briscoe*, 1 Ves. 97; *Cooke* v. *Clayworth*, 18 Ves. 12; *Flagg* v. *Mann*, 2 Sum. 489; *Langdon* v. *Goddard*, 2 Story, 267; *Hough* v. *Richardson*, 3 Story, 659; *Highbie* v. *Hopkins*, 1 Wash. 230; *Smith* v. *Shane*, 1 McLean, 22; *Plate* v. *Vattier*, 1 McLean,

163; *Tobey* v. *Leonard*, 2 Cliff. 40; *Parker* v. *Phetteplace*, 2 Cliff. 70; Bacon's Abr. Title "Executors and Administrators;" *Packman's Case*, 6 Coke, 293; *U. S.* v. *Walker*, 109 U. S. 265; *Beall* v. *New Mexico*, 16 Wall. 535; *Coleman* v. *Murdo*, 5 Randolph, 51; *Bank of Penn.* v. *Haldeman*, 1 Penn. & Walls, 161; *Potts* v. *Smith*, 3 Rawle, 361; *Bell* v. *Spright*, 11 Humph. 451; *Swink* v. *Snodgrass*, 17 Ala. 653; *Slaughter* v. *Fronan*, 5 Mor. 19; *Gamble* v. *Hamilton*, 7 Mo. 469; *Nason* v. *Allen*, 5 Maine, 479; *Gooch* v. *Atkins*, 14 Mass. 378; *Maxon* v. *Gray*, 1 N. E. Rep. 27 (R. I.); Story, Eq. Jur. § § 635, 690, 694; High, Injunctions, § 30; *Batchelder* v. *Bean*, 76 Maine, 375; 42 Conn. 276; 53 N. Y. 351; 76 Pa. St. 354; 23 N. J. Eq. 171; 4 Kent's Com. 305; *Steere* v. *Steere*, 5 Johns. Ch. 1; *McClellan* v. *McClellan*, 65 Maine, 500; *Walker* v. *Locke*, 5 Cush. 90.

Haskell, J. Bill in equity to restrain the enforcement of a judgment at law awarding the respondent dower in real estate of which one of the orators is seized. 76 Maine, 517.

If the cause assigned for the relief prayed could have been interposed in defence of the action at law, the orators can have no relief in equity. *Batchelder* v. *Bean*, 76 Maine, 370.

The findings of the court below show that the title was acquired by Milliken for the benefit of himself and the other orators at the request of the respondent and for her benefit; and the court held that her conduct acted upon by Milliken created an equitable estoppel, on account of which the orators are entitled to relief.

Equitable estoppels are favored and may be interposed in an action at law. *Stanwood* v. *McLellan*, 48 Maine, 275; *Piper* v. *Gilmore*, 49 Maine, 149; *Wood* v. *Pennell*, 51 Maine, 52; *Caswell* v. *Fuller*, 77 Maine, 105; *Fountain* v. *Whelpley*, 77 Maine, 132; *Briggs* v. *Hodgdon*, 78 Maine, 514; *Davis* v. *Callahan*, 78 Maine, 313; *McClure* v. *Livermore*, 78 Maine, 390.

The grounds for relief in this case either were or might have been interposed to defeat the respondent's action of dower, and cannot be again invoked for relief in equity.

In this particular the court below erred in granting the relief prayed, and the decree must be reversed.

Decree below reversed. Bill dismissed without costs.

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

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

Cumberland. January 27, 1888.

Lobsters. Constitutional law. Stat. 1885, c. 275 and c. 258. Magistrate.

The act of 1885, c. 275, prohibits the destruction of lobsters within this state, even though taken or caught more than a marine league from the shore.

That act is not unconstitutional by reason of the penalties imposed by it.

The act of 1885, c. 258, is not unconstitutional by reason of the enlarged jurisdiction given to magistrates under it.

A magistrate is not disqualified by reason of interest in cases where a part of the penalty goes to the municipality in which he is a resident and tax-payer.

ON exceptions from the superior court.

The case is stated in the opinion.

George M. Seiders, county attorney, for the state, cited: *Whitehead* v. *Smithers*, 2 C. P. Div. 553; *State* v. *Randolph*, 3 Cent. L. J. 187; *Phelps* v. *Racey*, 60 N. Y. 10; *Wagner* v. *People*, 97 Ill. 320; *Com.* v. *Hall*, 128 Mass. 410; *State* v. *Beal*, 75 Maine, 289; *Lord* v. *Chadbourne*, 42 Maine, 442; *Black* v. *McGilvery*, 38 Maine, 288.

C. W. Goddard, for defendant.

It is not in the power of the state to prohibit the taking of short lobsters outside the limits of Maine, and the state nowhere undertakes to do it. Neither does the law undertake to forbid the bringing into Maine of lobsters lawfully taken outside of the state. When, therefore, it is declared in § 3 of c. 275 of 1885, that "it is unlawful to fish for, catch, buy, sell, expose for sale or possess short lobsters" during a certain period, the statute must, of course, intend, and will be construed as intending, like all other penal statutes, "within the limits of the state."

In *State* v. *Beal*, 75 Maine, 291, Mr. Justice SYMONDS says: "But we think that if fish were caught at this pond during the period which was the close time for other waters of the state, and still were caught in a manner which was lawful at that place under the special act, taking them home to dispose of them in any legal way, would not be an act forbidden by section sixteen. The taking, the possession, the purpose, would all be lawful; the act of carrying, if in common phrase, or in a legal sense, it could properly be described as a transportation from place to place, would manifestly be wanting in that element of illegality against which it is clear, when all the provisions of the act are examined together, the penalties of that action were directed."

In *Allen* v. *Young*, 76 Maine, 80, Mr. Justice WALTON, in delivering the opinion of the court, cites the case of *State* v. *Beal* with approval, and proceeds to say, "The question is whether, if deer are killed during the time when it is lawful to do so, it is a crime to carry or transport the hides or carcasses from place to place in this state during the time when it is unlawful to kill them. We think it is not. True, the transportation at such a time seems to be within the letter of the law; but we think such could not have been the intention of the legislature. We can see no possible motive for making such transportation a crime. . . . *Com.* v. *Hall*, 128 Mass. 410. . . . . Frequently has it been said that a thing within the intention is as much within the statute as if it were within the letter, and a thing within the letter is not within the statute if contrary to the intention of it. *Holmes* v. *Paris*, 75 Maine, 559."

"All penalties and punishments shall be proportioned to the offence"—"excessive fines" shall not "be imposed." Const. Art. 1, § 9. Unless these constitutional safeguards are to be deemed simply directory to the legislature, and beyond the power of the court to enforce, it would seem difficult to defend so severe a law as the present, which imposes a forfeiture of this magnitude for such an offence. The sweeping act, 1885, c. 258, has indefinitely extended the original jurisdiction of municipal and police judges and trial justices in one class of criminal prosecutions. I am aware that provision is made for appeal under certain

qualifications and restrictions, but such appellant must recognize in a reasonable sum, with sufficient sureties, to appear and prosecute his appeal; which sum is usually double the amount of the fine appealed from; in the present case it would be two hundred and forty-four dollars, and in the case referred to, two thousand seven hundred and thirty-six dollars.

Is such a contrivance as the law of 1885, c. 258, a fair compliance with the constitutional requirement of Art. 1, § 6? "In all criminal prosecutions, the accused shall have a right to have a speedy, public and impartial trial, by a jury of the vicinity." "He shall not be deprived of his life, property or privileges, but by judgment of his peers, or by the law of the land." Is the case at bar one of "such cases of offences as are usually cognizable by a justice of the peace?" (Art. 1, § 7.)

HASKELL, J. Complaint for possessing certain lobsters in violation of the act of 1885, c. 275, § 3. The complaint is not made a part of the case, and, as no objection to it is pressed by the learned counsel for the defendant in his brief, the court may well assume that it is sufficient both in form and substance.

I. The court was requested to instruct the jury that, if the lobsters possessed by the defendant were taken more than a marine league from the shores of Maine, he would not be guilty.

The request was properly denied. The statute prohibits the destruction of certain lobsters. *State* v. *Bennett*, 79 Maine, 55. It is immaterial where the lobsters were taken if the defendant possessed them within the jurisdiction of the court for the purpose of not liberating them alive, or for destroying them.

The cases cited by defendant are authorities against him. In *State* v. *Beal*, 75 Maine, 289, the indictment was for having trout, not alive, in possession during close time, with intent to sell the same in violation of the statute. Although the trout may have been lawfully taken from waters exempt from the operation of the statute, it was held that the possession of such trout with intent to sell them was illegal. And the court says: "The taking, the possession, the purpose, would all be lawful; the act of carrying, if in common phrase or in a legal sense it could

be properly described as a transportation from place to place, would manifestly be wanting in that element of illegality, against which, it is clear, when all the provisions of the act are examined together, the penalties of that section were directed."

So in *Allen* v. *Young*, 76 Maine, 80, it was held that transportation of deer in violation of the letter of the statute killed before close time was not illegal, inasmuch as the court says:

"We fail to see any motive for making the mere transportation of the hide or carcass of a deer from one place to another a crime when the deer has been lawfully killed, and is lawfully in the possession of the one who transports it. . .

"It has been repeatedly asserted in both ancient and modern times that judges may in some cases decide upon a statute even in direct contravention of its terms; that they may depart from the letter in order to reach the spirit and intent of the act. *Holmes* v. *Paris*, 75 Maine, 559."

The intent of the act in question is to protect lobsters and prevent their unreasonable destruction. The act charged is the very thing that the purpose of the act seeks to prevent.

II. The constitutionality of the act of 1885, c. 275, § 3, under which this prosecution is brought, is denied because penalties are imposed not proportioned to the offence.

The object and purpose of the act is to prevent the destruction of lobsters to such a degree as materially to diminish the supply and to preserve a necessary and valuable source of food. The penalty imposed is one dollar for each lobster unlawfully destroyed. Certainly that penalty is neither excessive nor severe.

That the unlawful destruction of many lobsters has created penalties aggregating a large sum signifies no more than a purpose to violate the statute regardless of the penalties affixed. It rather shows that the present forfeitures are insufficient to work obedience to the statute than that they are too severe. It can hardly be said that penalties which fail to prevent a violation of law by wholesale are disproportionate to the act prohibited. What good can come of a statute with penalties so mild as to allow its violation without loss to the offender? The purpose of a penal statute is to prevent conduct in violation of its terms;

and the argument that from a repeated violation of its provisions the penalties aggregate large sums rather shows the insufficiency of the penalty imposed than the reverse. The penalties imposed for a violation of the statute in question cannot be said to be excessive or disproportionate to the offence created by it.

III. It is contended that the act of 1885, c. 258, giving magistrates jurisdiction of various offences under the fish and game laws is in violation of the constitution as infringing the right of trial by jury.

Article 1, section 6, of the constitution secures a "speedy, public and impartial trial . . by a jury of the vicinity;" and section 7 provides, "no person shall be held to answer for a capital or infamous crime, unless on presentment or indictment of a grand jury, except in cases of impeachment or in such cases of offences as are usually cognizable by a justice of the peace, or in cases arising in the army and navy or in the militia when in actual service in time of war or public danger."

The statutes accord a trial by jury on appeal to the proper court from the decisions or judgments of all magistrates rendered in a case under the act in question. No more bail would be required of the accused on his appeal from a decision of the magistrate against him than would be if the magistrate could only hold him to bail for appearance before the appellate court. Moreover, in the former case he would be accorded the benefit of reasonable doubt, while in the latter he must be held for probable cause. This act is rather a benefit to the accused than a burden or disadvantage to him. He must be confronted with the witnesses against him, and discharged if a reasonable doubt of his guilt be not removed.

The offences of which the act gives magistrates jurisdiction are neither capital nor infamous crimes, and need not be considered by a grand jury. Prosecutions may as well be instituted before magistrates as by indictment, and the former method cannot be considered in violation of any provision of the constitution.

IV. The objection that the magistrate before whom the case at bar was originally heard was then a resident and tax payer in

the municipality to which a moiety of the penalty accrues has been already considered and decided by this court. *State* v. *Severance*, 2 N. Eng. R. 425; *State* v. *Intoxicating Liquors*, 54 Maine, 564; *Fletcher* v. *Somerset R. R. Co.* 74 Maine, 434.

V. No exceptions to the charge were pressed at the argument other than the questions already considered.

Exceptions overruled.

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

ROBERT TILLSON, appellant,

vs.

WILLIAM H. SMALL, administrator.

Androscoggin. Opinion January 27, 1888.

Probate law. Appeal. Husband and wife.

A husband may appeal from the decree of distribution upon his wife's estate. But, where he has assigned his share to the administrator for certain uses, the decree of the probate court, allowing the administrator's account, which accounted for the husband's share in the manner directed in his assignment, will be sustained.

The decree of distribution must be among all those entitled by law to share in the estate, though some of the shares have been assigned.

Appeal from decree of the judge of probate.

The point is stated in the opinion.

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

Frye, Cotton and White, for the defendant.

HASKELL, J. Probate appeal by the husband of his deceased wife to the allowance of her administrator's final account.

It is objected that the appellant is not entitled by law to take the appeal, because he had released to the administrator in trust for the heirs at law all his interest in the estate.

"Any person aggrieved by any order, sentence, decree, or

denial" of judges of probate, "except the appointment of a special administrator, may appeal," etc. R. S., c. 63, § 23.

By statute the appellant takes a distributive share in his wife's estate, and should he be unlawfully deprived thereof by a decree of the judge of probate, he certainly would be aggrieved.

In the case at bar the judge of probate decreed the allowance of the appellee's final account disposing of all the personal estate without according to the appellant his distributive share therein; and whether such decree was lawful cannot be ascertained by the appellate court unless this appeal could be taken. A decree of distribution must be among all entitled by law to a share in the estate to be divided, even though some shares may have been assigned; but payment to the assignee might be required as a compliance with the decree. *Knowlton* v. *Johnson*, 46 Maine, 489; *Grant* v. *Bodwell*, 78 Maine, 460.

The appellant executed a release under seal of his interest in the estate. He did it voluntarily. No fraud is shown. He had ample opportunity to read and know the contents of it, and must be presumed to have availed himself of the privilege.

Having released to the administrator in trust for others his distributive share, he shows no reason to revise the decree allowing the account, showing a disposal of his share according to his release.

Decree of judge of probate affirmed with costs. Case remanded.

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

STATE OF MAINE *vs.* INTOXICATING LIQUORS.

York. Opinion January 27, 1888.

Intoxicating liquors. Search and seizure. Libels. Practice.

Libels against liquors seized on search warrants are separate proceedings from the search and seizure process.

Such libels must be filed with the magistrate before whom the search warrant upon which the liquors were seized is returnable. It need not have been

returned. Such warrant, when issued by a trial justice, must be made returnable before any trial justice in the county.

Where the libel avers the search and seizure warrant to have been issued by the magistrate with whom the libel was filed, it is sufficient.

On exceptions.

The exceptions were to the ruling of the court in overruling a demurrer to the libel.

(Libel.)

"State of Maine. York, ss. To Addison E. Haley, Esq., one of the trial justices, within and for the county of York: The libel of William E. Towne shows that he has, by virtue of a warrant, duly issued by Addison E. Haley, Esq., a trial justice in and for said county, seized certain intoxicating liquors and the vessels in which the same were contained, described as follows: about thirty-six gallons of whiskey in a cask, said cask being painted as a kerosene oil barrel, because the same were kept and deposited in the freight house of the Boston & Maine Railroad on the southerly side of the track of said railroad, in Kennebunk village, in Kennebunk, in the county of York, and were intended for sale within this state in violation of law. Wherefore he prays for a decree of forfeiture of said liquors and vessels, according to the provision of law in such case made and provided.

"Dated at Kennebunk, in said county, the twenty-seventh day of April, in the year of our Lord one thousand eight hundred and eighty-five.

"William E. Towne, Deputy Sheriff."

H. H. Burbank, *county attorney*, for the state.

This libel answers the requirements of § 41 of c. 27 of the Revised Statutes. The description of the liquors seized, the place of their seizure, and the purpose of their deposit, &c., if alleged with "reasonable certainty," is sufficient. *State* v. *Bartlett*, 47 Maine, 401.

R. P. Tapley, for the defendant.

While this proceeding is initiated by a single process, at the

return of that process "the proceedings are divided and constitute thenceforth two distinct cases." *State* v. *Miller*, 48 Maine, 581.

In *State* v. *Learned*, 47 Maine, 432, KENT, J., in delivering the opinion of the court says, "we do not doubt the power and right of the legislature to prescribe, change or modify the forms of process and proceedings in civil actions and to determine what shall be deemed a sufficient allegation in form or substance to bring the merits of the case before the court. But in criminal prosecutions, the exercise of this right is limited and controlled by the paramount law in the constitution."

In *State* v. *Robinson*, 49 Maine, 286, it was determined that the process was a criminal one and its elements and paternity are fully considered.

HASKELL, J. Libels under R. S., c. 27, § 41, of liquors and vessels seized on search warrants under section 40, although resulting from search and seizure process are separate and distinct proceedings to determine whether the liquors are forfeit as intended for unlawful sale in this state.

The statute requires public notice to be given of the time and place, when and where any person claiming the liquors may appear and show cause why the same should not be decreed forfeit.

A claim on oath may be made for the liquors, and the magistrate upon such evidence as may be presented is required to determine the truth of the respective allegations in the libel and claim, and make such order thereon as law and justice may require.

The proceedings upon the libel and claim are of a criminal nature, and the rules applicable to criminal cases apply. *State* v. *Robinson*, 49 Maine, 285. *State* v. *Guppy*, 80 Maine, 57.

No rule of criminal pleading is better established than that proceedings before magistrates, being courts of limited jurisdiction, must show upon their face that the magistrate has jurisdiction of the cause.

R. S., c. 27 § 41 provides, "when liquors and vessels are seized as provided in the preceding section, the officer who

made such seizure shall immediately file with the magistrate before whom such warrant is returnable a libel," etc. It need not have been returned.

Section 63, prescribes the form of such libel, which has been followed in this case; but the claimant demurs to the libel because it does not show the magistrate with whom the libel was filed was the magistrate before whom the search and seizure process upon which the liquors in question were seized was returnable. The libel avers that the liquors, etc., were seized upon a warrant issued by the magistrate with whom the libel was filed. R. S., c. 132, § 7, provides "warrants issued by trial justices shall be made returnable before any justice in the county; and a justice for issuing one not so returnable shall be imprisoned for six months, and pay the costs of prosecution."

R. S., c. 27, § 63, provides the form for warrants in cases of seizure, and that form commands the officer to bring the defendant "before me the subscriber or some other trial justice within and for said county," so that although section 40, might seem to require such warrant to be returnable before the magistrate who issued it only, such is not its real meaning taken in connection with the other statutes above cited.

All warrants are required to be "made returnable before any justice in the county." The libel in question avers the search and seizure warrant to have been issued by the magistrate with whom the libel was filed. The law required it to be returnable before himself as well as all other trial justices in the county, so that the averment as to who issued the warrant is equivalent to an averment that it was returnable before himself, and shows a case within the jurisdiction of the magistrate.

The proceedings on the original search and seizure process need not be more fully recited than the statute form for a libel in such cases requires. No statute or common law rule requires that they should be. The libel in this case conforms to the statute requirements and is sufficient.

Exceptions overruled.

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

E. STANLEY HART *vs.* FIDELIA C. MCLELLAN.

Androscoggin. Opinion January 27, 1888.

Promissory notes. Protest, notice of. Indorser.

The holder of an indorsed note made no inquiries for the address of the indorser until after it was protested, and then inquired of an employee at the office of the firm from whom he received it, and sent the notice of protest to the address thus ascertained, which proved to be an incorrect address. *Held* that there was not reasonable diligence used to ascertain the correct address.

ON report.

Assumpsit by an indorsee against the indorser of a promissory note dated at Cincinnati, October 1, 1884, for $1000, payable to the order of the defendant in two years with interest. This note was actually indorsed by the defendant at Newport, Kentucky, in March, 1885, for the accommodation of the maker, and subsequently came into the possession of Hubbard Brothers of Philadelphia, for whom the plaintiff discounted it at the request and upon the written guaranty of Mr. A. H. Hubbard of that firm.

When the note became due the address of the defendant was at Lewiston, Maine.

The note was protested and notices of protest were sent to the plaintiff October 6, 1886, when he was at his house, sick. He directed his book-keeper to inquire of Hubbard Bros. for the address of the defendant. The book-keeper made the inquiry of an employee at the office of Hubbard Bros. and was informed that the address was Auburn, Maine, where the notice was sent and subsequently returned uncalled for according to the special request on the envelope.

The notice was finally received by the defendant at Farmington, Maine, October 22, 1886, by mail from the plaintiff's attorney in this case.

J. W. Mitchell, for the plaintiff.

As to the question of due diligence I would call the attention of the Court to the rule as laid down in *Saco National Bank* v. *Sanborn*, 63 Maine, 340; and see also 16 Maine, 249; 17 Maine, 360; 4 Howard, 336; 9 Howard, 552.

N. and J. A. Morrill, for the defendant, cited: *Hill* v. *Varrell*, 3 Maine, 233; *Peirce* v. *Pendar*, 5 Met. 353; *Hodges* v. *Galt*, 8 Pick. 251; Abbott's Tr. Ev. § 87, citing *Bank* v. *DeGoot*, 7 Hun. 213; *Phipps* v. *Chase*, 6 Met. 491; *Spencer* v. *Bank of Salina*, 3 Hill, 520; *Porter* v. *Judson*, 1 Gray, 175; *Granite Bank* v. *Ayers*, 16 Pick. 392; *Wheeler* v. *Field*, 6 Met. 290; *Lowery* v. *Scott*, 24 Wend. 51; *Bank* v. *Corcoran*, 2 Pet. 121; (7 L. ed. 368,) 1 Pars. Cont. 278; *Stewart* v. *Eden*, 2 Cai. 121, and note in Lawyers' ed. bk. 2, p. 351; *Utica Bank* v. *De Mott*, 13 Johns. 432; *Bartlett* v. *Robinson*, 39 N. Y. 187; *Ticonic National Bank* v. *Bagley*, 68 Maine, 249; *Harrison* v. *Ruscoe*, 15 Mees. & W. 231; 3 Kent's Com. (8 ed.) 142, note *a*, citing *Fitler* v. *Morris*, 6 Whart. 406; 2 Dan. Neg. Inst. §§ 1045, 988, 989; *Turner* v. *Leech*, 4 B. and Ald. 451; *Roscow* v. *Hardy*, 12 East, 434; 2 Camp. 458; noted 1 Jacob Fisher's Dig. 1273; *Chapman* v. *Keane*, 3 Ad. and E. 193; *Lysaght* v. *Bryant*, 9 Man. G. and S. 46; *Page* v. *Gilbert*, 60 Maine, 487.

HASKELL, J. Assumpsit against the indorser of a negotiable promissory note payable at a place certain.

A careful consideration of the evidence fails to show legal notice to the defendant of the dishonor of the note.

The notice seasonably mailed was not addressed to a post-office in the city of defendant's residence, nor, as the authorities cited by defendant's counsel clearly show, was reasonable diligence used to ascertain the defendant's proper address.

Judgment for defendant.

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

PEMBROKE S. MARSH *vs.* OTIS HAYFORD.

Franklin. Opinion January 27, 1888.

Promissory notes. Action for money paid.

The owner of a promissory note, payable to the order of another and not indorsed by him, cannot maintain an action at law upon the same against the maker in his own name. If such owner of the note sell and deliver the same, and guarantee the payment of it, without the request, assent or knowledge of the maker, and be compelled to pay his guaranty, he cannot maintain an action for money paid to the maker's use against him.

ON exceptions.

The opinion states the case.

E. R. Luce, for plaintiff.

That a note payable to order may be transferred for a valuable consideration, before indorsement, is well settled. 15 Maine, 399.

The principle that one cannot voluntarily pay the debt of another and make him his debtor does not apply. The guarantor in this case should be considered in the sense of a surety. The principles discussed in 59 Maine, 308, will apply.

While we could not maintain an action on the note, it having been barred while in the hands of the court, he can recover for money paid, the cause of action having accrued at the time the money was paid. 59 Maine, 308.

John P. Swasey, for the defendant, cited: *Bray* v. *Marsh*, 75 Maine, 452; *Springer* v. *Hutchinson*, 19 Maine, 359; *Irish* v. *Cutter*, 31 Maine, 536.

HASKELL, J. Assumpsit for money paid by the plaintiff at the defendant's request, and for money had and received by the defendant to the plaintiff's use. Plea, the general issue and the statute of limitations.

The plaintiff, being the owner of the defendant's promissory

note payable to the order of another and not indorsed by him, sold and delivered the note to one Bray, and guaranteed the payment of it without the request, assent or knowledge of the defendant, and was compelled to pay, by judgment at law upon his contract of guaranty, the amount of the note after the same was barred by the statute of limitations, but within six years of the date of his writ. See *Bray* v. *Marsh*, 75 Maine, 452.

An action at law upon the note could only be maintained in the name of the payee or his personal representative. *Brown* v. *Nourse*, 55 Maine, 230. So that the plaintiff cannot recover upon the note, even though his action upon it be not barred by the statute of limitations.

The plaintiff's sale and guaranty of the note was a separate and independent contract of his own. *Seavey* v. *Coffin*, 64 Maine, 224. It could not affect the defendant who was neither party nor privy to it.

The defendant's liability upon the note was barred six years after the same fell due. The plaintiff might have seasonably paid his guaranty and have caused a suit to be brought upon the note before it became barred by the statute. This he did not do, and from his want of vigilance he must suffer.

This is not the case of a surety whose liability was incurred for the defendant's benefit and at his request, nor of an indorser who was authorized to incur liability for the maker by the terms of the note. *Woodward* v. *Ware*, 37 Maine, 563; *Godfrey* v. *Rice*, 59 Maine, 308. It is an independent collateral contract apart from the note, and has no more relation to it than it would have had if the same had not been negotiated, and should not charge the defendant with a liability that he did not authorize the plaintiff to assume in his behalf.

One can charge another only for money paid to the latter's use at his request, express or implied; and a request is implied when the payment is compelled by the violation of some promise or duty of the latter to the former. *Davis* v. *Smith*, 79 Maine, 351. The plaintiff was not compelled to pay this note; he was compelled to pay his voluntary promise to pay it, given without request or authority from the defendant.

If this plaintiff can recover, any man who may guarantee or insure the payment of a stranger's debt may enlarge the statute bar from six to twelve years without the latter's consent, and in violation of the terms of his contract. No case has been cited to authorize such doctrine.

Exceptions sustained.

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

MAINE BENEFIT ASSOCIATION *vs.* GEORGE HAMILTON and another.

Androscoggin. Opinion January 27, 1888.

Exceptions. Practice.

The exceptions to an interlocutory decree should not be brought to the law court until the final decree has been entered, except in such cases as will not admit of that delay.

When exceptions are prematurely brought to the law court, they will be dismissed from the law docket.

ON exceptions.

The point is stated in the opinion.

George C. Wing, *A. R. Savage* and *Seth M. Carter*, for plaintiff.

Crosby and Crosby, for defendants.

HASKELL, J. Bill in equity by a benefit corporation to compel the surrender of one of its certificates of membership because obtained by fraud.

The respondents plead "*nul tiel* corporation," and file answers in support of the same. The cause was set down for hearing as to the sufficiency of the respondents' pleas at rules, and the sitting justice decreed that the same must be overruled, "costs reserved for final determination of the bill."

To this ruling the respondents were allowed exceptions for the consideration of which the case is sent up.

The decree entered below was interlocutory only and did not finally dispose of the cause, but left it for further hearing upon

answer and proof if the parties saw fit to further litigate the same.

By R. S., c. 77, § 22, appeals from any interlocutory decree are allowed within the time fixed for appeals from final decrees; but the statute says, "Such appeal shall not suspend any proceeding under such decree or order, or in the cause, and shall not be taken to the law court until after final decree." The docket entries show that an appeal was taken from the decree passed in this cause.

Section 25 allows exceptions to be taken to rulings in matters of law during the progress of the cause within the time allowed for appeal, and says, "In all other respects such exceptions shall be taken, entered in the law court and there heard and decided like appeals. . . . The allowance and hearing of exceptions shall not suspend the other proceeding in the cause."

The rule laid down in *Stevens* v. *Shaw*, 77 Maine, 566, is, that it is irregular to hear exceptions in an equity cause before final hearing, and that such hearing should not be allowed unless the question does not admit of delay until then.

In this cause, the respondents can as well present their exceptions at the final hearing, when their appeal taken to the decree already passed must be heard, as before. The question raised is in the nature of abatement to an action at law, which, if decided at *nisi prius* adversely to the defendant, is never considered by the law court before the trial is had. R. S., c. 77, § 52. Moreover, upon the merits, the question now raised may become immaterial.

Exceptions dismissed from the law docket.

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

MARY L. NICKERSON *vs.* RUFUS L. NICKERSON and trustee.

Waldo. Opinion January 28, 1888.

Fire insurance. Proof of loss. Waiver. Mortgage. Law and fact.

An insurance company can neither be subjected to a suit upon a policy of insurance by the assured, nor to trustee process, in favor of the mortgagee or other creditor, until the preliminary proofs of loss, as required by statute, have been furnished or waived.

After the notice provided by the statute has been given by a mortgagee of real estate to an insurance company having issued a policy of insurance upon the same, he becomes the equitable owner of the policy and his mortgage, and, inasmuch as preliminary proofs are required to fix the liability of the insurance company, and he must commence his action within sixty days after the loss, he may furnish the requisite proofs of loss in his own name if the assured neglects or refuses to furnish them, in order that he may avail himself of his rights under the policy, and he may avail himself of any waiver of such proofs by the insurance company.

Such waiver is a question of fact for the jury, whenever it is to be inferred from the evidence adduced or is to be established from the weight of evidence.

On exceptions and motion. The case is stated in the opinion.

W. P. Thompson and R. F. Dunton, for the plaintiff, cited: *Martin* v. *Ins. Co.* 20 Pick. 389; *Fox* v. *Harding*, 7 Cush. 516; R. S., c. 49, §52; *Butterworth* v. *Western Assurance Co.* 132 Mass. 492; *Bartlett* v. *Union Ins. Co.* 46 Maine, 500; *Lewis* v. *Monmouth Ins. Co.* 52 Maine, 492; *Works* v. *Farmers Ins. Co.* 57 Maine, 282; *Couch* v. *Rochester Ins. Co.* 25 Hun. N. Y. 469; *Carson* v. *Jersey City Ins. Co.* 43 N. J. 300; *Franklin Fire Ins. Co.* v. *Chicago Ice Co.* 36 Md. 102; *Rokes* v. *Amazon Ins. Co.* 51 Md. 512; *Patterson* v. *Triumph Ins. Co.* 64 Md. 500; *Bailey* v. *Hope Ins. Co.* 56 Md. 474; *Savings Bank* v. *Com. Union Assurance Co.* 142 Mass. 142; *White* v. *Jordan*, 27 Maine, 370; *Googins* v. *Gilmore*, 47 Maine, 9; *Williams* v. *Baker*, 49 Maine, 427.

Daniel C. Robinson, for trustee.

It was plaintiff's duty as mortgagee to see that the insured took the proper preliminary steps for the recovery of the insurance, or in case of his neglect so to do, to take such steps herself. Wood on Fire Insurance, § 438; *Graham* v. *Phœnix Ins. Co.* 77 N. Y. 171.

The company admitted that they "had knowledge of the fire in some way on the day after it occurred." But this did not obviate the necessity of such notice. Wood on Fire Insurance, § 439; *Woodfin* v. *Ashville Ins. Co.* 9 Jones, (N. C.) 558; *Edward* v. *Lycoming Ins. Co.* 75 Penn. St. 378.

The company had had information that this fire was caused by

the act of the insured, and Richardson went there as he testified, for the purpose of investigating that matter, and according to his testimony, that was the burden of the whole interview. And such a visit as he made could not affect the duty of the plaintiff to make proper proof of loss. *Underwood* v. *Farmer's Ins. Co.* 57 N. Y. 500; *Edwards* v. *Baltimore Ins. Co.* 3 Gill. (Md.) 176; *Blossom* v. *Lycoming Ins. Co.* 64 N. Y. 162.

In *Boyle* v. *North Carolina Ins. Co.* 7th Jones, N. C. 373, the evidence of a waiver of proof of loss was much stronger than in the case at bar. An agent of the defendant was present at the fire, and fifteen days afterward a travelling agent of the company (such as Mr. Richardson in this case) saw the plaintiff about the loss and said; "The matter will be all right with the company." Held no evidence of waiver. A waiver "is an intentional relinquishment of a known right," and in order to find a waiver on the part of the company by Richardson's act, (supposing him to have authority to waive, which we deny) we must find that he intended to waive the furnishing the proofs and that his acts and words were to that end. We submit that it would be the height of unreason to deduce this from the evidence. Richardson was talking with the old man and woman, not as the assured, but simply as people who lived on the premises, and were conversant with the circumstances of the fire, and there is no evidence to go to the jury of the requisite intention which is a *sine qua non*. *Donahue* v. *Windsor County Ins. Co.* 56 Vt. 374; *Home Ins. Co.* v. *Valt. W. H. Co.* 16 Am. Law. Reg. 162; *Interprise Ins. Co.* v. *Pariso*, 35 Ohio. St. 35; *Findeison & ux.* v. *Metropole Ins. Co.* 57 Vt. 520.

See a thorough discussion of the principle of waiver of proof of loss by company's agent in the recent case of *Bowlin* v. *Heckla Fire Ins. Co.* (Minn.) reported in Insurance Law Journal for April, 1887.

It is good law that a representation upon applying for insurance, that the property has no mortgage upon it, is a material one. *Richardson* v. *Maine Ins. Co.* 46 Maine, 394; *Gould* v. *York Ins. Co.* 47 Maine, 403.

Whether or not the omission to disclose the mortgage was

intentional or not does not matter. *Dennison* v. *Thomaston Ins. Co.* 20 Maine, 125; *Gould* v. *York Ins. Co. ante.*

HASKELL, J. Trustee process, under R. S., c. 49, § 53, by a mortgagee of real estate to enforce a lien upon a policy of insurance against fire procured by the mortgagor, brought within sixty days after the loss.

The insurance company disclosed a burning of the property insured, and that the policy was void by reason of a false representation of title by the assured in that he concealed a mortgage thereon to the plaintiff conditioned to secure the support of herself and husband during their natural lives, and that no proof of loss had been furnished, and that the property was feloniously fired by the assured whereby all claim under the policy became barred.

The plaintiff answered the disclosure by averring that, if false representations of title were made, the risk was not increased by reason of the mortgage concealed, and that formal proof of loss had been waived, and that the property was not fired by the assured.

These issues of fact were submitted to a jury that found in substance, by direction of the court, that no sufficient proof of loss had been furnished or waived, and, upon the evidence, that the risk by reason of the mortgage concealed was not increased, and that the fire was not the fraudulent act of the assured.

The principal defendant neither appears to have answered to the suit nor to have testified at the trial.

To the ruling of the court directing the jury to find that sufficient proofs of loss had neither been furnished nor waived the plaintiff has exception.

This ruling is expressly based upon the statement, that evidence was adduced tending to prove that "one Richardson," a duly authorized agent of said company and sent by said company, went to Knox and held an interview with the plaintiff and her husband; that said agent was informed by said plaintiff and her husband, about the fire, the property burned and the value thereof; that said Richardson wrote what they said to him in a

book and stated to them that "that was all that was required."

R. S., c. 49, § 21, declares the assured, within a reasonable time after notice to the company of the loss, shall furnish it with "as particular account of the loss and damage as the nature of the case will admit, stating therein his interest in the property, what other insurance if any exists thereon, in what manner the building insured was occupied at the time of the fire and by whom and when and how the fire occurred so far as he knows or believes, to be sworn to before some disinterested magistrate, who shall certify that he has examined the circumstances attending the loss, and has reason to and does believe such statement to be true; the assured shall, if requested, . . . submit to an examination under oath in the place of his residence; no other preliminary proof of any kind shall be required before commencing an action against the company. . . . All contracts of insurance made, renewed or extended, or on property within the state, are subject to the provisions hereof."

It is not pretended that the preliminary proofs of loss prescribed by the statute had been furnished, but it is contended they were waived.

R. S., c. 49, § 52, give a mortgagee of real estate a lien upon the policy insuring the mortgaged property after notice to the company of his mortgage and the amount due thereon.

Section 53 gives such mortgagee a right to collect his mortgage debt by trustee process against the assured and the insurance company as trustee, commenced within sixty days after the loss.

R. S., c. 86, § 55, provide that, "no person shall be adjudged trustee . . . by reason of money or other thing due from him to the principal defendant, unless, at the time of the service of the writ upon him, it is due absolutely and not upon any contingency."

The insurance company can neither be subjected to a suit upon the policy by the assured, nor to trustee process, either in favor of a mortgagee or other creditor, until the preliminary proofs of loss required by statute have been furnished or waived.

The court says in *Davis* v. *Davis*, 49 Maine, 282: "The

liability of the insurer does not become absolute unless the preliminary proof as required in the conditions of the policy is obtained. If no proof is furnished the liability does not attach. . . . The contingency is not of proving a case, but of ever having one to prove, of there ever being a time when the insured would have a right of action."

Sec. 21, of c. 49 of R. S., was enacted in 1861, and took effect in May before the loss under the policy in *Davis* v. *Davis*, in November; and that case was decided without reference to the statute, no doubt, because that policy was in force prior to its passage; but that decision applies equally well to conditions engrafted upon a policy by statute and conditions contained in it.

After the notice provided by statute has been given by a mortgagee of real estate, he becomes the equitable owner of the policy *qua* his mortgage; and, inasmuch as preliminary proofs are required to fix the liability of the insurance company, and he must commence his action within sixty days after the loss, unless he may furnish the requisite proofs of loss in his own name, if the assured neglects or refuses to furnish them, his lien upon the policy might become worthless. The legislature could never have intended that result, and an illogical and unreasonable construction of statute law could only produce it.

If the mortgagee may furnish the preliminary proofs of loss in his own behalf, it follows that he may avail himself of any waiver of the same by the insurance company; and it is settled law that an insurance company may waive the furnishing of preliminary proofs altogether, or objection to irregular or defective ones. *Carson* v. *Jersey City Ins. Co.* 43 N. J. 300; *Martin* v. *Fishing Ins. Co.* 20 Pick. 389; *Bartlett* v. *Union M. F. Ins. Co.* 46 Maine, 500; *Bailey* v. *Hope Ins. Co.* 56 Maine, 474; *Works* v. *Farmers' M. F. Ins. Co.* 57 Maine, 281; *Patterson* v. *Triumph Ins. Co.* 64 Maine, 500.

Waiver may be a question of fact for the jury. It is always so whenever it is to be inferred from evidence adduced, or is to be established from the weight of evidence. In the case at bar an express waiver is asserted. "The true inquiry is, what was said or written, and whether what was said indicated the alleged

intention." *West* v. *Platt*, 127 Mass. 372; and this must be for the jury. *Savage M'f'g Co.* v. *Armstrong*, 17 Maine, 34.

The authorized agent of the company, after the fire and after notice from the plaintiff that she as mortgagee claimed a lien upon the policy under the statute, went to the plaintiff and her husband and took in writing their account of the fire and of the property burned and of the value of it, and stated to them, "that was all that was required."

Taking into consideration the parties and the nature of the interview and the statement made by the company's agent, might not the plaintiff have understood that she was relieved from any further account of her loss? may not the statement of the agent, fairly considered, convey the meaning that he had gained all the information he desired, and that it was satisfactory to him, and that nothing further would be required as a pre-requisite to the payment of the loss? If regular proofs had been required by the agent, would he not have said so? If he did not mean to deceive the parties, ought he not to have said so? He did say, after writing their statements, "that was all that was required." Can it be said that a jury would not be warranted in taking him at his word, and that if they did, the verdict could not stand?

The agent of the company apparently had full authority in the premises, and his acts bind the company, even though he exceeded his powers. *Packard* v. *Dorchester M. F. Ins. Co.* 77 Maine, 144.

The trustee moves for a new trial because the findings of the jury, that the risk was not increased by reason of the mortgage and that the assured did not fire the buildings, are not supported by the evidence.

The assured appears to have been repeatedly charged with setting the fire and never to have positively denied it. He surrendered his policy after the fire and requested an assurance that he should not be prosecuted for the felony. He has not made any claim under the policy and did not testify at the trial. The circumstances attending the fire and his presence and conduct are suspicious.

Both issues submitted to the jury are so intimately connected

that the consideration of one necessarily bears upon the other and cannot well be separated from it. The motive causing the felonious burning, if any there was, arose from his agreement to support the mortgagee and her husband, secured by the mortgage. Had there been no mortgage, he might have had no inducement to fire the buildings.

After a careful consideration of the evidence, the court is of opinion that the findings of the jury are not supported by the evidence.

Exceptions sustained. Motion sustained. New trial granted.

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

SPENCER W. MATHEWS, assignee, *vs.* ASA F. RIGGS.

Waldo. Opinion January 28, 1888.

Insolvent law. Preference.

When a creditor receives a payment from his debtor, and the transaction is of such a nature as to give him a reasonable cause to believe that the debtor was insolvent, it will be regarded as a preference in fraud of the insolvent act.

If the payment is received through an agent of the creditor, and the agent had knowledge of the insolvency of the debtor, that is effectual to charge the creditor with knowledge.

ON report.

The opinion states the case.

W. P. Thompson and R. F. Dunton, for the plaintiff, cited: R. S., c. 70, § 52; Bump, Bank'y, 832, 836; *Otis* v. *Hadley*, 112 Mass. 105; *Meserve* v. *Weld*, 75 Maine, 483; *Tuttle* v. *Truax*, 1 N. B. R. 601; *Re Palmer*, 3 N. B. R. 283; *Re Meyer*, 2 N. B. R. 422; *Re Coleman*, 2 N. B. R. 563; *North* v. *House*, 6 N. B. R. 365; *Scammon* v. *Cole*, 5 N. B. R. 257; *Collins* v. *Bell*, 3 N. B. R. 587; *Heywood* v. *Reed*, 4 Gray, 574; *Beals* v. *Clark*, 13 Gray, 18; *Forbes* v. *Howe*, 102 Mass. 427; *Toof* v. *Martin*, 13 Wall. 40 (20 L. ed. 481); *Warren*

v. *Delaware L. & W. R. Co.* 7 N. B. R. 451; *Merrill* v. *McLaughlin*, 75 Maine, 64; *Wilson* v. *Stoddard*, 4 N. B. R. 254; *Re Kingsbury*, 3 N. B. R. 318; *Ungewitter* v. *Von Sachs*, 3 N. B. R. 723; *Graham* v. *Stark*, 3 N. B. R. 357; *Vogle* v. *Latrobe*, 4 N. B. R. 439; *Markson* v. *Hobson*, 2 Dill. 327; *Mayer* v. *Hermann*, 10 Blatchf. 256; *Oxford Iron Co.* v. *Slafter*, 13 Blatchf. 455.

William H. Fogler, for defendant.

In order to recover the plaintiff must prove four things: First. That at the time of the transfer of the stock to the defendant, Mrs. Morrison was insolvent or in contemplation of insolvency. Second. That the transfer in question was made with a view to give a preference to the defendant over other creditors. Third. That at the time of said transfer the defendant had reasonable cause to believe that Mrs. Morrison was insolvent or in contemplation of insolvency. Fourth. That the defendant also had reasonable cause to believe that such conveyance was made in fraud of the laws relating to insolvency. R. S., c. 70, § 52; *Merrill* v. *McLaughlin*, 75 Maine, 64; *Forbes* v. *Howe*, 102 Mass. 427; *Abbott* v. *Shepard*, 142 Mass. 17; *Toof* v. *Martin*, 13 Wall. 40.

The insolvent act does not define what shall constitute "insolvency." The term is used in its restricted sense to express the inability of a party to pay his debts as they become due, only in case of merchants or traders. As to all other persons it is used in its general signification, to denote the insufficiency of the entire property and assets of an individual to pay his debts. See *Toof* v. *Martin*, 13 Wall. 40, in which this distinction in the use of the term is recognized and adopted.

In order that the transaction be declared void it must appear that the defendant had "reasonable cause to believe" that Mrs. Morrison was "insolvent or in contemplation of insolvency," and that the transfer was "made in fraud of the laws relating to insolvency." R. S., c. 70, § 52.

In reference to the meaning of the phrase "having reasonable ground to believe such a person insolvent," it is not enough that a creditor has some cause to suspect the insolvency of the debtor,

but he must have such a knowledge of facts as to induce a reasonable belief of his insolvency. *King* v. *Storer*, 75 Maine, 62; *Grant* v. *National Bank*, 97 U. S. 80; *Priest* v. *Barbour*, 103 *Id.* 293; *Everett* v. *Stowell*, 14 Allen, 32; *Purinton* v. *Chamberlain*, 131 Mass. 589; *Abbott* v. *Shepard*, 142 Mass. 17; *Coburn* v. *Proctor*, 15 Gray, 38.

HASKELL, J. Case by the assignee of an insolvent debtor to recover from the defendant the value of eighty shares in a corporation received by him from the insolvent debtor within four months of insolvency proceedings as a fraudulent preference under the insolvent law.

No questions are raised as to the form or sufficiency of the declaration, but the cause is submitted upon the merits.

On March 6, 1886, prior to insolvency proceedings begun May 27, 1886, the debtor, being hopelessly insolvent and not able to meet her maturing demands in the ordinary course of business, *Clay* v. *Towle*, 78 Maine, 86, assigned to the defendant eighty shares of Coliseum stock of the par value of twenty-five dollars each and of the actual value of fifty or sixty cents on the dollar, amounting to some one thousand or one thousand two hundred dollars, in exchange for her son's notes, amounting to one thousand nine hundred and twenty-eight dollars, and not due for a year to come, upon which she was an indorser.

This transaction was not in the usual and ordinary course of business, and was therefore *prima facie* fraudulent, R. S., c. 70, § 52, and must be so considered unless the contrary appears. *Scammon* v. *Cole*, 1 Hask. 214; affirmed in 3 Cliff. 472.

On the same day, the debtor conveyed other parcels of her property in a manner indicating no desire to distribute the same equally among all her creditors, and there can be no doubt but that she intended a preference to the defendant. *Merrill* v. *McLaughlin*, 75 Maine, 64.

The defendant denies that he knew of the debtor's insolvent condition; but the transaction was of such character as to at least give him reasonable cause to believe her insolvent, and that is all that the statute requires. *Merrill* v. *McLaughlin*, *supra*. He

admits that he applied to the insolvent's son to negotiate the transaction for him. He says, "Mr. Morrison acted for me at my request. He was acting for me in negotiating for the exchange of the notes for the stock." Mr. Morrison testifies, "I knew my mother's financial condition in the winter and spring of 1886."

The defendant sought the exchange of his notes for stock in value scarcely exceeding one-half the face of the notes, when the notes had run only half their time and would not fall due for a year to come. He employed an agent to accomplish the exchange who knew of the debtor's insolvency and no doubt conferred with his principal about the advisability of the exchange.

Moreover, the knowledge of the debtor's financial condition by Morrison, the defendant's agent, is just as effectual to charge the defendant with such knowledge as though he actually possessed it. *Re Edward Meyer*, 2 B. R. 422; *Vogle* v. *Lathrop*, 4 B. R. 439; *North* v. *House*, 6 B. R. 365; *Markson* v. *Hobson*, 2 Dillon, 327; *Meyer* v. *Hermann*, 10 Blatch. 256.

"The general rule that a principal is bound by the knowledge of his agent is based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject matter of negotiation, and the presumption that he will perform that duty." *The Distilled Spirits*, 11 Wall. 367.

"The general doctrine that the knowledge of an agent is the knowledge of the principal cannot be doubted." *Hoover* v. *Wise*, 1 Otto, 310; *Bank* v. *Davis*, 2 Hill, 451; *Ingalls* v. *Morgan*, 10 N. Y. 178; *Fulton Bank* v. *N. Y. & S. C. Co.* 4 Paige, 127.

The court is constrained to hold that the defendant had reasonable cause to believe that his debtor was insolvent and that he received the property sued for in fraud of the insolvent law.

Defendant defaulted for one thousand dollars and interest from March 6, 1886.

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

EMILY W. JOHNSON and another *vs.* MARY H. MERITHEW.

Waldo. Opinion January 28, 1888.

Witness. Death, presumption of. Survivorship where several lives are lost in the same disaster.

When a plaintiff in a real action is not a party as "heir of a deceased party," but claims title in his own right, he is a competent witness.

A person is presumed to be dead, who is not heard from, by those who would naturally hear from him, for the space of seven years, if his absence was for temporary purposes.

There is no presumption that death occurred at any particular time during that period. But death within a particular time may be inferred from the circumstances.

In this case a vessel sailed from Troon, Scotland, heavily laden with coal, for Havana, and was never heard from. *Held*, these facts authorized an inference that the vessel was lost with all on board within six months after leaving Troon.

Where several lives are lost in the same disaster there is no presumption of survivorship by reason of age or sex.

Survivorship in such a case must be proved by the party asserting it.

ON report.

The case is stated in the opinion.

W. P. Thompson and R. F. Dunton, for the plaintiffs:

The grantor must have mental capacity to understand the business in order to make a valid conveyance. *Hovey* v. *Hobson*, 55 Maine, 279; *Darby* v. *Hayford*, 56 Maine, 246; *Hovey* v. *Chase*, 52 Maine, 304; *St. George* v. *Biddeford*, 76 Maine, 593; Best. Ev. § 405; *Patterson* v. *Snell*, 67 Maine, 559.

Presumption of death. *White* v. *Mann*, 26 Maine, 361; *Loring* v. *Steineman*, 1 Met. 204; *Stinchfield* v. *Emerson*, 52 Maine, 465; *Stevens* v. *McNamara*, 36 Maine, 176; *Wentworth* v. *Wentworth*, 71 Maine, 72; *Newman* v. *Jenkins*, 10 Pick. 515; 1 Taylor, Ev. § 157; *Davie* v. *Briggs*, 97 *U. S.* 628 (24 L. ed. 1086); *McCartee* v. *Camel*, 1 Barb. Ch. 455; *Smith* v. *Knowlton*, 11 N. H. 191; *White* v. *Mann*, 26 Maine, 361; *Jeffers* v. *Radcliff*, 10 N. H. 242; *Tisdale* v. *Com. Mutual Life Ins.*

Co. 26 Iowa, 70; S. C. 28 Iowa, 12; *Moons* v. *DeBernales*, 1 Russ. 301; *Thompson* v. *Donaldson*, 3 Esp. 63; *Brigham* v. *Fayerweather*, 140 Mass. 415.

No presumption of survivorship. *Newell* v. *Nichols*, 12 Hun. 604; *Stinde* v. *Goodrich*, 3 Redf. 87; *Russell* v. *Hallett*, 23 Kan. 276; Best. Ev. § 410; 1 Greenl. Ev. § § 29, 30.

Wm. H. Fogler, for defendant.

Seven years having elapsed, the presumption is that Capt. Nickerson is dead. 1 Greenl. Ev. § 41; 4 Starkie, Ev. 458; *White* v. *Mann*, 26 Maine, 361. The date of his death is to be determined by the court from all the circumstances of the case. *White* v. *Mann*, *supra*; *Smith* v. *Knowlton*, 11 N. H. 191; *King* v. *Paddock*, 18 Johns. 141; *Gerry* v. *Post*, 13 Howard, Pr. 118; *Watson* v. *King*, 1 Starkie, 121 (2 Eng. Com. L. R. 322); 1 Greenl. Ev. § 41; *Newman* v. *Jenkins*, 10 Pick. 515.

By the Roman Law, and by the French Code, there were certain presumptions, as to the question of survivorship, based upon age, sex, &c. See 1 Greenl. Ev. § 29. I think it is the settled doctrine that no such presumptions obtain in this country. *Smith* v. *Croom*, 7 Fla. 61; Greenl. Ev. § 30; *Coye* v. *Leach*, 8 Met. 371; *Moehring* v. *Mitchell*, 1 Barb. Ch. 264, (affirmed 3 Denio 610). The law presumes every person to be of sound mind. Swinburne on Wills, 45, part 2, § 3, cl. 4; 1 Redfield on Wills, 16; *Wait* v. *Maxwell*, 5 Pick. 217; *Howe* v. *Howe*, 99 Mass. 88. Absolute soundness of mind is not necessary to enable a person to make a valid contract or conveyance. 7 Wait's Actions and Defences, 155; *Hovey* v. *Hobson*, 55 Maine, 256; *Farnam* v. *Brooks*, 9 Pick. 212; *Dennett* v. *Dennett*, 44 N. H. 531.

The testimony of the demandants, Mrs. Heath and Mrs. Johnson, is incompetent and inadmissible. R. S., c. 82, § 98; *Higgins* v. *Butler*, 78 Maine, 520. They are demandants as heirs of their mother. The mother, if alive, would be the party and not they. "The statutory inhibition applies only in cases where the heir is made a party because he is an heir, and where the ancestor would have been a party were he alive." *Wentworth* v. *Wentworth*, 71 Maine, 75.

The deed of an insane person not under guardianship is not void but voidable, and may be confirmed by him if afterwards sane, or by his heirs. *Hovey* v. *Hobson*, 53 Maine, 453; *Allis* v. *Billings*, 6 Met. 415; *Wait* v. *Maxwell*, 5 Pick. 217; *Arnold* v. *Richmond Iron Works*, 1 Gray, 434; 2 Kent's Com. 236; *Robinson* v. *Weeks*, 56 Maine, 102; *Emmons* v. *Murray*, 16 N. H. 385; 1 Washb. Real Prop. 306, and cases cited in note 3.

HASKELL, J. Writ of entry. Plea *nul disseizin*. Both parties claim title under Margaret P. Nickerson. The tenant claims that Margaret conveyed the premises to her son, Aaron W. Nickerson, in 1875, but demandants say that such deed is void for fraud and inoperative for want of her capacity to make the grant and for want of delivery.

Upon this issue the tenant objects to the competency of Mrs. Heath, one of the demandants, because she claims to have inherited a share of the property as heir to her mother, Margaret P. Nickerson.

This objection is not well taken, for Mrs. Heath demands in her own right that which she inherited from her mother, and is not made a party as "heir of a deceased party," R. S., c. 82 § 98; *Higgins* v. *Butler*, 78 Maine, 520.

It appears that in January, 1875, while on a visit to her daughter, Mrs. Heath, in Boston, Mrs. Margaret P. Nickerson was stricken with paralysis or some kindred malady that prostrated her bodily and confused and unsettled her mind; that in the following March, being somewhat restored, she was taken to her home in Belfast where she and her husband resided with their son, Aaron W. Nickerson, until her death in the following October; that, ever after her illness in January, she at times could not recognize her children and friends, and persisted in calling one of her daughters, Aaron.

An office copy of the deed of the demanded premises from Margaret P. to her son Aaron W. dated and recorded April 15, 1875, is set up as evidence of a conveyance of the property to

him. The original is not produced, nor is any reason given for withholding it; nor is the subscribing witness who took the acknowledgment of the deed as a magistrate called to testify.

A mortgage of the same property is also in evidence, dated the same day, and recorded December 21, 1875, after the death of Margaret P. in the preceding October, from Aaron W. to her husband, Aaron, conditioned to secure the payment of twelve hundred dollars in instalments, the last falling due in four years, and a discharge of the same is shown by the record August 26, 1876, but no other evidence is adduced upon that subject.

From a careful consideration of all the evidence, without reviewing it in detail, the court is of opinion that the supposed deed from Margaret P. Nickerson to her son Aaron W. did not operate as a conveyance of the property to him. It has become a recognized rule in this court that, in actions at law, when the parties submit questions of fact to the determination of the law court, they must be content with a decision of them without a review of the testimony in the opinion and reasons stated in detail.

Margaret P. Nickerson died in October, 1875, seized of the demanded premises, leaving three children, the demandants and Aaron W., to whom the same descended in undivided shares of one-third each, so that the demandants became seized of two undivided thirds thereof.

The other one-third descended to Aaron W., who accompanied by his wife and three children, all under ten years of age, sailed February 3, 1880, from Troon, Scotland, in command of a vessel loaded with coal for Havana, none of whom have since been heard from.

His father, Aaron ,died September 6, 1886, having quit-claimed all his interest in the demanded premises to the tenant, September 11, 1880; so that if Aaron W. died before that date leaving no children surviving him, his one-third share in the same descended to his father, and passed under the latter's deed to the tenant; but if Aaron W. survived that date, then nothing passed by the father's quit-claim deed to the tenant; *Pike* v. *Galvin*, 29 Maine, 183; *Crocker* v. *Pierce*, 31 Maine, 177; *Coe*

v. *Persons unknown*, 43 Maine, 432; *Walker* v. *Lincoln*, 45 Maine, 67; *Harriman* v. *Gray*, 49 Maine, 537; *Read* v. *Fogg*, 60 Maine, 479; *Powers* v. *Patten*, 71 Maine, 583; and the demandants inherited from him two-thirds of his one-third in the demanded premises, making their interest in the same eight-ninths in all.

A person who leaves his home for temporary purposes, and is not heard from for the space of seven years by those who would naturally have heard from him is presumed to be dead. *Wentworth* v. *Wentworth*, 71 Maine, 72; *Stevens* v. *McNamara*, 36 Maine, 176; *Loring* v. *Steineman*, 1 Met. 204; but the death of such person at any particular time during that period is never presumed, but must be proved. *Newman* v. *Jenkins*, 10 Pick. 515.

Death may be proved by showing facts from which a reasonable inference would lead to that conclusion, as by proving that a person sailed in a particular vessel for a particular voyage and that neither vessel nor any person on board had been heard of for a length of time sufficient for information to be received from that part of the globe where the vessel might be driven or the persons on board of her might be carried. *White* v. *Mann*, 26 Maine, 361.

If death may be inferred from facts shown, it logically follows that the time of the death may be fixed with more or less certainty in the same manner. *Watson* v. *King*, 1 Starkie, 121.

In the case at bar, the vessel commanded by Aaron W. Nickerson, heavily laden with coal, sailed from Troon, in the south of Scotland, for Havana, a voyage usually accomplished in from twenty-five to forty days, in the track of many sailing vessels and steamers plying between the north of Europe and America.

In case of shipwreck, it is improbable if not impossible that the Benj. Haseltine, if driven ashore, should not have been reported in the United States within six months of her loss. If any on board of her had been rescued by passing vessels, they would have, within that time, sent the intelligence of shipwreck to the home port of the vessel. The circumstances surrounding the

vessel and the voyage that she entered upon may well authorize the inference of her loss with all on board within the six months following the date of her departure from Scotland, and a jury would be authorized to find the death of her master and his family prior to September 11, 1880.

The weight of authority, at the present day, seems to have established the doctrine that where several lives are lost in the same disaster, there is no presumption from age or sex that either survived the other; nor is it presumed that all died at the same moment; but the fact of survivorship, like every other fact, must be proved by the party asserting it. *Underwood* v. *Wing*, 4 DeG. M. & G. 633, affirmed on appeal in *Wing* v. *Angrave*, 8 H. L. Cas. 183; *Newell* v. *Nichols*, 75 N. Y. 78; *Coye* v. *Leach*, 8 Met. 371; S. C. 41 Am. Dec. 518, and note of cases, 522.

In the absence of evidence from which the contrary may be inferred, all may be considered to have perished at the same moment; not because that fact is presumed, but because from failure to prove the contrary by those asserting it, property rights must necessarily be settled on that theory.

In the case at bar, the father was a man forty years of age and his minor children under ten. The last known of either was upon their sailing from Scotland. No evidence whatever gives any light upon the particular perils they encountered at death. The children are not proved to have survived their father, and therefore he died without issue, and his one-third of the demanded premises descended to his father, Aaron, prior to the date of the latter's quit-claim to the tenant, and passed to her under it.

By R. S., c. 104 § 10, it is provided that "the demandant may recover a specific part or undivided portion of the premises to which he proves title although less than he demanded."

Judgment for the demandants for an undivided two-thirds of the premises demanded.

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

STATE OF MAINE *vs.* HENRY WYMAN.

Waldo. January 28, 1888.

Indictment. Former conviction. Intoxicating liquor.

Where the indictment for a single sale of intoxicating liquors alleges that the defendant at a certain term of the court was convicted "of selling a quantity of intoxicating liquors," it is a sufficient averment of former conviction.

ON exceptions.

The exceptions were to the ruling of the court that the indictment sufficiently charged a former conviction.

The following were the averments of the bill.

"The jurors for said state upon their oaths present that Henry Wyman of Belfast in the county of Waldo, on the sixth day of October, in the year of our Lord one thousand eight hundred and eighty-six, at Belfast aforesaid without any lawful authority, license, or permission, did, then and there, sell a quantity of intoxicating liquors, to wit: one pint of intoxicating liquors to one Wilder S. Grant against the peace of the state and contrary to the form of the statute in such case made and provided."

"And the jurors aforesaid upon their oaths aforesaid do further present that the said Henry Wyman was duly convicted by the Supreme Judicial Court, at a term thereof holden at Belfast, within and for the county of Waldo, on the first Tuesday of January, A. D. 1886, of selling a quantity of intoxicating liquors."

Robert F. Dunton, county attorney, for the state cited: R. S., c. 27, § § 57, 63; *State* v. *Robinson*, 39 Maine, 150; *State* v. *Wentworth*, 65 Maine, 247; *State* v. *Gorham*, 65 Maine, 270; *State* v. *Dolan*, 69 Maine, 573.

Wm. H. Fogler, for respondent.

The respondent is indicted for a sale of intoxicating liquor in violation of § 34 of c. 27 of the Revised Statutes, as amended

by § 2 of c. 366, Public Laws of 1885. Section 57 of said chapter provides that "it is not requisite to set forth particularly the record of a former conviction but is sufficient to allege briefly, that such person has been convicted of a violation of any particular provision, or as a common seller, as the case may be." This indictment does not allege that the respondent had been convicted of "a violation of any particular provision." The allegation of a former conviction should show either by express words or by reference to the statute that the former conviction was for the exact offence charged in this indictment. See form in case of common seller, c. 27, § 63, R. S.

In *State* v. *Wentworth*, 65 Maine, 234; and in *State* v. *Gorham*, *Id.* 270, in which the court say, technicality is not required in charging a former conviction, the indictment named the statute under which the former conviction was had.

HASKELL, J. The indictment charges a single sale of intoxicating liquor in apt terms, *contra formam statuti*, and further avers that at a particular term of court the defendant was convicted "of selling a quantity of intoxicating liquor."

R. S., c. 27, § 33, prohibits the sale of intoxicating liquor. Section 34 as amended by § 2, act of 1885, c. 366, provides that whoever "sells any intoxicating liquor in violation of this chapter forfeits," &c., "and on every subsequent conviction shall be punished by" fine and imprisonment.

The indictment charges a prior conviction of the same unlawful act charged in it; and is sufficient under R. S., c. 27, § 57. A record of conviction no more specific than this indictment was held sufficient in *State* v. *Lashus*, 79 Maine, 504.

Exceptions overruled.

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

ISAAC JACKSON *vs.* WILLIAM P. CASTLE.

Waldo. Opinion January 28, 1888.

Nuisance. Pleadings.

To enable one to recover the damages sustained by his horse taking fright at persons sliding in the street with boisterous conduct, he must allege the facts constituting a nuisance and show that it was the proximate cause of the damage.

Declaration given which was held insufficient.

ON report.

This case was reported to the law court upon a copy of the writ, with the agreement that if the action could be sustained upon the allegations contained in the declaration the case should stand for trial, otherwise a nonsuit should be entered.

(Declaration.)

"In a plea of the case, for that the plaintiff, to wit: On the fifteenth day of December, A. D. 1884, at said Belfast, while in the exercise of his vocation, was then and there lawfully in and upon a certain public way in said city called Miller street, with his two horses and sled, and that the said defendant and others, to the number of seven or more, were then and there sliding and coasting, with two or more sleds connected together, upon and down the sidewalk on said street, contrary to law, and then and there, within the limits of said street, made a loud noise by outcries and hallooing, contrary to law, and that by reason of said sliding and loud noise, the horses of him, the said plaintiff, became frightened and ran furiously down said street and struck against a tree with such force that his sled and harnesses were broken, and one of said horses so much injured as to render him worthless, and that it was necessary to kill him, to the damage of said plaintiff, as he saith, the sum of three hundred dollars."

Joseph Williamson, for the plaintiff.

The public have a right to require that whoever uses the limits

of the highway for any purpose, should make such reasonable use of it as not unnecessarily to place objects there to frighten horses. *Winship* v. *Enfield*, 42 N. H. 211.

There can be no question that an individual who does anything likely to frighten the horse of a traveller, is liable in damages for the injuries caused thereby. Shearman and Redf. on Neg. § 388.

So, one who carelessly fired a gun, by which the plaintiff's horse, standing on the opposite side of the road, became frightened and ran away, was held responsible. *Cole* v. *Fisher*, 11 Mass. 137.

The act of exploding fire crackers in a public street, even on the fourth of July, is wrongful, and if any injury results therefrom, the injured party has a remedy against the wrong doer. *Conklin* v. *Thompson*, 29 Barb. 218.

Upon the same principle, the use of a highway for playing ball has been adjudged as foreign to its appropriate purpose, and a passer who was struck by the ball recovered damages. *Vosburgh* v. *Moak*, 1 Cush. 453.

Although modern decisions have extended the legitimate uses of streets beyond any purpose contemplated in the days of Blackstone, by determining as in *Purple* v. *Greenfield*, 138 Mass. 1, that it cannot be laid down "as an universal proposition that any and every use of any kind of velocipede upon the sidewalk is unlawful," or as in *Taylor* v. *Goodwin*, Q. B. Div. 1879 (Am. Law Rev. 13, 770) that a bicycle is a carriage, and thereby placed upon an equal with vehicles drawn by horses, they have not yet gone to the extreme point that sliding down the sidewalk of a city street is a legitimate mode of passage. "Streets are not proper places for the recreation of sliding down hill," is the language of this court in *McCarthy* v. *Portland*, 67 Maine, 168; and in *Ray* v. *Manchester*, 46 N. H. 60, which was an action against the city to recover for injuries occasioned by boys sliding for sport in the street, the opinion adverts to "the fact that this sliding was a public nuisance." A similar Massachusetts case, *Shepherd* v. *Chelsea*, 4 Allen, 113, refers to sliding as "an unlawful or careless act." Although "sliding

down on the way to business or school," might, under circumstances, be a rightful use of the sidewalk, the allegation that the defendant was acting "contrary to the law," destroys any such presumption in his favor. If the outcries and hallooing contributed to the result charged, they were equally illegal with the sliding. A right of way cannot be thus abused. It has been held a trespass for one to stand upon a street and insult another by words. *Adams* v. *Rivers*, 11 Barb. 390.

A statute which does not give the action, but is only in affirmance of the common law, need not be recited. Bac. Ab. Pleas. &c. B. 5, 3.

"But a private act of parliament, or any other private record, may be brought before the jury and given in evidence if it relates to the issues in question, though it be not pleaded; for the jury are to find the truth of the fact in question, according to the evidence brought before them." Esp. N. P. 733 (citing Hobart's Reports, 272, and Croke, *in tem.* James, 112).

If the act prohibited by statute is an offence or ground of action at common law, the indictment or action may be in the common law form, and the statute need not be noticed, even though it prescribe a form of prosecution or of action. The statute remedy is merely cumulative. *Andrew* v. *H. De Lewkner*, Yelv. 116, note (1).

In an action by a town to recover the price of a right of fishing, sold by them under an authority derived from a statute, it is not necessary to set forth in the declaration their authority to make the sale. *Taunton* v. *Caswell*, 4 Pick. 275.

Private statutes may be proved, though not set out in pleading, where it is necessary to state them as part of the cause of action. *Atlantic Ins. Co.* v. *Sanders*, 36 N. H. 252.

Even in an action on the case upon a statute, brought by a party aggrieved, to recover damages merely, it is not necessary to allege in the declaration that the injurious act or neglect of the defendant was *contra formam statuti*. *Reed* v. *Northfield*, 13 Pick. 94.

William H. Fogler, for defendant, cited: 1 Wait's Actions

and Defences, 146; *Graves* v. *Shattuck*, 35 N. H. 257; *Com.* v. *Byrnes*, 126 Mass. 248; *State* v. *Connelly*, 63 Maine, 212; *Murphy* v. *Deane*, 101 Mass. 455; *Dickey* v. *Maine Tel. Co.* 43 Maine, 492; 1 Chitty, Pl. 214; *Nichols* v. *Athens*, 66 Maine, 402; *Blodgett* v. *Boston*, 8 Allen, 237; *Tighe* v. *Lowell*, 119 Mass. 472.

HASKELL, J. Does the plaintiff's declaration set out a cause of action? It charges in substance that the plaintiff, being lawfully in a public street with his two horse team, suffered special damage in the loss of a horse by reason of both horses taking fright at the defendant's sliding in the same street with others engaged in boisterous outcries incident to their sport.

Sliding in a street accompanied with boisterous conduct is not necessarily unlawful. Nor is it necessarily a public nuisance. The averment that defendant's acts were "contrary to law" does not help the plaintiff's case. It is merely a conclusion that he draws from the facts stated. If the facts do not warrant it, the court cannot adopt it.

Sliding in a street, accompanied with boisterous conduct calculated to frighten horses lawfully travelling therein, may be a public nuisance; but there is no such averment in the declaration. Sliding may be prohibited in streets by a city ordinance, and a violation of the same would be evidence tending to show negligence. If the plaintiff would recover, he must show negligent or unlawful conduct to be the proximate cause of his injury.

Plaintiff nonsuit.

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

CITY OF AUGUSTA *vs.* INHABITANTS OF MERCER.

Kennebec. Opinion January 28, 1888.

Stat. 1875, c. 21. R. S., c. 24, § 8. Stat. 1885, c. 269. Paupers. Soldiers.

Under the act of 1875, chap. 21, supplies furnished to relieve the distress of a soldier, to operate as pauper supplies and prevent his gaining a new pauper settlement, must have been furnished to relieve distress not occasioned "in consequence of an injury sustained in the service."

The act of 1875 partially, and the act of 1885 completely, save the exception contained in it, removed pauper disabilities from soldiers whose distress calls for relief under the pauper laws of the state. Under either act, supplies furnished to relieve a soldier from distress may be recovered of the town charged with his legal settlement.

On exceptions and motion to set aside the verdict, by the defendants, from the superior court.

The opinion states the case.

A. M. Goddard, city solicitor, for the plaintiff, cited: *Sebec* v. *Dover*, 71 Maine, 573; Stat. 1885, c. 265; Stat. 1887, c. 9, & c. 146; R. S., c. 24, § 3; *Etna* v. *Brewer*, 78 Maine, 377.

Merrill and Coffin, for defendants.

By R. S., c. 24, § 10, it is provided that towns shall relieve persons having a settlement therein when, on account of poverty, they need relief. By § 35 of the same chapter overseers shall relieve destitute persons found in their towns, and having no settlement therein, and may recover for supplies so furnished of the town liable.

Section 8, c. 24, provides that no soldier who served by enlistment in the army or navy of the United States, in the war of eighteen hundred and sixty-one, and in consequence of injury sustained in said service, has or may become dependent upon any town, shall be considered a pauper, or be subject to disfranchisement for that cause.

All existing statute provisions upon a particular topic are to be examined together to ascertain the meaning of each, and a meaning which is incompatible with any plain provision must be rejected. *Merrill* v. *Crossman*, 68 Maine, 414.

When we examine into the history of § 1, c. 144, of the R. S., we find it to be in keeping with the promises made by the State when the Governor called for ten thousand men in 1861. P. L., 1861, c. 63, amended by 1862, c. 128 and from year to year up to 1865.

Haskell, J. Assumpsit to recover pauper supplies furnished in 1885 and 1886 to an honorably discharged soldier of the United States in the war of the rebellion.

It is admitted that the soldier had a legal settlement in defendant town prior to June 5, 1877, and that since that date he has resided in plaintiff city; so that unless he received supplies as a pauper from the plaintiff city during his residence there, so as to interrupt any five consecutive years of it, he has gained a legal settlement there, and the plaintiff cannot recover.

The act of 1875, c. 21 provides: "No soldier who has served by enlistment in the army or navy of the United States in the war of 1861, and in consequence of injury sustained in the service may become dependent upon any city or town in this state, shall be considered a pauper or subject to disfranchisement for that cause."

In order that supplies furnished to relieve the distress of the soldier may, under this act, operate as pauper supplies to prevent his gaining a new pauper settlement, they must have been furnished to relieve distress that was not occasioned "in consequence of an injury sustained in the service." *Glenburn* v. *Naples*, 69 Maine, 68.

The evidence authorized the jury to find that supplies furnished by the plaintiff city in May and June, 1880, were not to relieve distress "in consequence of an injury sustained in the service," and therefore operated to interrupt any five consecutive years' residence of the soldier in plaintiff city prior to the supplies sued for, furnished in March and April, 1885. The burden to show the contrary was upon the defendant town. *Etna* v. *Brewer*, 78 Maine, 377.

The disability resulting from the soldier's army service was piles. The sickness causing the distress necessary to be relieved was occasioned by sudden cold resulting in a lung fever. The latter sickness is not proved to have resulted from or to have been caused by the former physical trouble. No connection can be shown between the two, but from the most intangible, indefinite and unsatisfactory reasons.

The act of 1875 was re-enacted in the revision of 1883, c. 24, § 8, and that was amended by act of 1885, c. 269, omitting the provision, "in case of injury sustained in the service," thereby removing pauper disabilities from all honorably discharged

soldiers of the United States in the war of the rebellion receiving pauper supplies, and adding the provision, "but the time during which said soldier is so dependent shall not be included in the period of residence necessary to change his settlement."

The act of 1875 partially, and the act of 1885 completely, save the exception contained in it, removed pauper disabilities from soldiers whose distress calls for relief under the pauper laws of the state. Under either act, supplies furnished to relieve a soldier from distress may be recovered of the town charged with his legal settlement. *Sebec* v. *Dover*, 71 Maine, 573.

The charge of the presiding justice is in accord with this opinion, and the evidence fully sustains the verdict.

Motion and exceptions overruled.

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

LIBBEY, J., did not sit.

EDWIN R. HAYNES *vs.* HENRY THOMPSON and trustees.

Piscataquis. Opinion January 28, 1888.

Assignment of wages. Trustee process.

Wages to be earned under an existing contract may be assigned at law.

The claimant of funds in the hands of trustees must show the true state of affairs between himself and the defendant.

Wages not exceeding twenty dollars earned within one month prior to each service on the trustee are not attachable.

ON report.

The opinion states the case.

Frank A. Hart, for plaintiff, cited: *Toothaker* v. *Allen*, 41 Maine, 324; *Lamb* v. *Franklin M'f'g Co.* 18 Maine, 187; *Page* v. *Smith*, 25 Maine, 256; 1 Greenl. Ev. § 87; *Thornton* v. *Moody*, 11 Maine, 253; *McLellan* v. *Cumberland Bank*, 24 Maine, 566; *Palmer* v. *Fogg*, 35 Maine, 368; *Wilson* v. *Hanson*, 12 Maine, 58; *Bell* v. *Woodman*, 60 Maine, 465; *Sylvester* v. *Staples*, 44 Maine, 496; *Farley* v. *Bryant*, 32 Maine, 474; *Littlefield* v. *Littlefield*, 28 Maine, 180; *Chadwick*

v. *Perkins*, 3 Maine, 399; *Osgood* v. *Davis*, 18 Maine, 146; *Hancock* v. *Fairfield*, 30 Maine, 299; *Thompson* v. *Reed*, 77 Maine, 425; *Farnsworth* v. *Jackson*, 32 Maine, 419; *Emerson* v. *E. & N. A. R. Co.* 67 Maine, 387; *Pullen* v. *Hutchinson*, 25 Maine, 249; *Robinson* v. *Stuart*, 68 Maine, 61; *Prentiss* v. *Russ*, 16 Maine, 30; *Ripley* v. *Severance*, 6 Pick. 474; *Giddings* v. *Coleman*, 12 N. H. 153; Cooley, Torts, 473, 474; Drake, Attachment, § § 523, 601; 1 Schoul. Pers. Prop. § § 80, 81; 1 Pars. Cont. 466; 2 Pars. Cont. § 13.

J. F. Sprague, for claimant.

The question as to whether future earnings can be assigned has been settled in the affirmative. *Hartley* v. *Tapley*, 2 Gray, 565; *Emery* v. *Lawrence*, 8 Cush. 151; *Lannan* v. *Smith*, 7 Gray, 150; *St. John* v. *Charles*, 105 Mass. 262.

The validity of such assignments is also settled in *Darling* v. *Andrews*, 9 Allen, 108; *Boylen* v. *Leonard*, 2 Allen, 409.

The assignment of an unliquidated balance is good. *Crocker* v. *Whitney*, 10 Mass. 316; *Mulhall* v. *Quinn*, 1 Gray, 107; *Herbert* v. *Bronson*, 125 Mass. 475, and other Massachusetts cases.

If the consideration is a good one and without fraud, the claimant is entitled to the funds. *Lannan* v. *Smith*, 7 Gray, 153.

Maine decisions upon the foregoing points are among others, 4 Maine, 428; *Farnsworth* v. *Jackson*, 32 Maine, 420; *Littlefield* v. *Smith*, 17 Maine, 327.

In *Holmes* v. *Porter*, 39 Maine, 158, the court say: "In actions against several partners on a contract the proof of the partnership usually consists in evidence that they have acted as partners in the particular business. Less evidence is usually sufficient in this case than is requisite when partners sue as plaintiffs, for they are not cognizant of all the means by which the fact is capable of being proved."

In determining whether the trustee shall be discharged his answer must be taken to be true as to all matters of fact. *Chase* v. *Bradley*, 17 Maine, 89; *Lamb* v. *Franklin M'f'g Co.* 18 Maine, 187; *Stedman* v. *Vickery*, 42 Maine, 132.

HASKELL, J. Trustee process. The alleged trustees disclose an assignment to the claimant by the defendant of all of his wages due May 29th, 1885, the date of the assignment, and to become due within the year following under a contract between the defendant and the alleged trustees that the former should continue in their service so long as mutually agreed.

The case stipulates that all "facts appearing in the disclosure" are to be taken as true, and that the disclosure, the allegations of the claimant and the assignment attached, are all made a part of the case. No other evidence is adduced, and it is agreed that upon so much of the evidence as is legally admissible judgment shall be rendered.

The disclosure states that, at the date of the first service on the trustees, July 11, 1885, there was due the defendant fifty-two dollars and twenty-seven cents, and that, at the date of the second service, one month later, there was due the defendant thirty-six dollars and thirty-one cents more, in all eighty-eight dollars and fifty-eight cents; that whenever a monthly payment became due to the defendant, the claimant had collected it.

The consideration recited in the assignment, a writing not under seal, is, "for a valuable consideration."

The assignment of wages due and to become due was of the fruits of an existing employment, to cease at the pleasure of either party; but, so long as it should continue, the defendant would receive his wages, and from it, he might receive future benefit.

"A defeasible or voidable contract in force is a good ground upon which an interest may be raised, until defeated." *Brackett* v. *Blake*, 7 Met. 335. This contract raised an interest which might be assigned at law. *Weed* v. *Jewett*, 2 Met. 608; *Emery* v. *Lawrence*, 8 Cush. 151; *Mulhall* v. *Quinn*, 1 Gray, 105; *Hartley* v. *Tapley*, 2 Gray, 565; *Farnsworth* v. *Jackson*, 32 Maine, 419; *Emerson* v. *E. & N. A. Railway Co.* 67 Maine, 387; *Wade* v. *Bessey*, 76 Maine, 413.

By agreement of the parties, a copy of the assignment is to be used. Under that stipulation, the one before the court is sufficient.

The assignment is of wages due from the Oakland Slate

Company, a copartnership composed of the individuals named as trustees, and was seasonably recorded as required by statute; it is sufficient for that purpose, and if there be any fault, it is in the plaintiff's not having specifically attached a copartnership debt.

Ordinarily, the burden rests upon trustees to clear themselves from being charged. *Barker* v. *Osborne*, 71 Maine, 69; *Toothaker* v. *Allen*, 41 Maine, 324. So, when they disclose a sum due the defendant and an assignment of the same, unless the assignee is summoned or voluntarily appears and claims the fund, they must be charged. R. S., c. 86, § 32. But when the assignee does appear and claims the fund, the burden rests upon him to establish his claim. *Thompson* v. *Reed*, 77 Maine, 425.

In the case at bar the only evidence presented is the trustee's disclosure, the facts stated in which are agreed to be true and of course taken to prove those inferences naturally to be inferred from them, the assignment, and the claimant's statement of claim, which is only competent as admissions against himself.

The statement of claim does not pretend that the assignment was given as security for an existing indebtedness, but asserts a purchase of defendant's wages due and to be due for one year, for the sum of one hundred and one dollars and eighteen cents.

No evidence whatever in the case tends even to substantiate the truth of such claim. Had the claimant asked security for the balance of the amount stated to have been paid after deducting the amounts already received from the trustees at monthly payments, the case would have been different.

As stated in *Thompson* v. *Reed*, "a just regard for the rights of creditors requires trustees to make full, true and explicit answers to all questions propounded to them touching their indebtedness to the principal defendant in the suit, and the same rule applies to assignees who claim the funds sought to be held by the attachment."

The claimant should have more explicitly shown the true state of affairs between himself and the defendant, and not have left his claim unsupported by even his own testimony.

As between the plaintiff and claimant, equitable considerations must prevail so far as the nature of the process will admit. The claim is an equitable interference to defeat the plaintiff's claim to the fund in the hands of the trustees. *Exchange Bank* v. *McLoon*, 73 Maine, 498; *White* v. *Kilgore*, 78 Maine, 323.

The trustee cannot be charged for the sum exempted for personal labor by R. S., c. 86, § 55, viz., twenty dollars earned within one month prior to each service on the trustee, and the same, in all forty dollars, must be deducted from the amounts due at each service of the trustee process. *Collins* v. *Chase*, 71 Maine, 434.

Trustee charged for forty-eight dollars and fifty-eight cents, from which he may retain his costs. Claim disallowed. Plaintiff to recover costs of claimant.

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

BENJAMIN F. HASKELL *vs.* MARY THURSTON and another.

Waldo. Opinion January 28, 1888.

Injunction. Law and equity.

When an apprehended injury is reparable by an ordinary action at law an injunction will not be granted.

Facts stated upon which an injunction was denied.

ON report.

Bill to restrain the defendants from using more than their portion of the water from a reservoir dam in which the plaintiff was interested.

The facts are fully stated in the opinion.

W. P. Thompson and R. F. Dunton, for plaintiff.

So far as the rights of these parties to the use of the water are concerned, the case of *Jordan* v. *Mayo*, 41 Maine, 552, is conclusive.

The grant by the owner of the whole stream of water sufficient for a given purpose, precludes the grantor and his assigns from diminishing or defeating in any way what he has thus conveyed. *Id.*

In *Covel* v. *Hart*, 56 Maine, 518, the owner of land on both banks of a stream, together with the water power created by a dam across it, having a tannery on one side and a saw mill on the other, conveyed the tannery, together with the land connected with it, and also, "a right to draw water from the saw mill flume sufficient to carry on the business of tanning in said yard." *Held*, That, by the terms of the deed, the grantee acquired an absolute and prior right to the use of the quantity of water named.

"Where the rights and relations of different parties to the use of water are clearly fixed by contract, an injunction may be obtained to restrain any act of either party in violation of the contract, without considering the question of the probable damage or benefit resulting to the plaintiff from the change." Wait's Actions and Defences, Vol. 3, p. 714; *Adams* v. *Barney*, 25 Vt. 225; *Corning* v. *Troy Iron and Nail Factory*, 40 N. Y. 191; *Dickenson* v. *Canal Co.* 19 Eng. Law & Eq. 287.

The mere existence of a legal remedy will not bear equitable jurisdiction where the remedy in equity is more adequate, comprehensive and effectual. Gould on Waters, § 511; *Bemis* v. *Upham*, 13 Pick. 169; *Boston Water Co.* v. *Boston & Worc. R. R. Co.* 16 Pick. 512.

In *Gardner* v. *Newburgh*, 2 Johns. Ch. 161, Chancellor KENT says: "It is a clear principle in law, that the owner of land is entitled to the use of a stream of water which has been accustomed from time immemorial, to flow through it, and the law gives him ample remedy for the violation of this right."

In *Senaca Woolen Mills* v. *Tillman*, 2 Barb. Ch. 8, the court say, "The objection of the defendant, that the complainants are not stated to be in the enjoyment of the right claimed, and that such right has not been established in a suit at law is not well taken."

The fact that the complainant has not established his right at law is no ground for demurrer to the bill. *Lockwood Company* v. *Lawrence*, 77 Maine, 312.

Where parties have regulated their rights in water by a contract, and its meaning is clear, or has been adjudicated, equity will restrain the parties from any breach of it, although the acts proposed would not apparently be injurious to the plaintiffs. Gould on Waters, § 538.

In *Bardwell* v. *Ames*, 22 Pick. 333, the court say: "The complainants set forth, that they are mill owners; that as annexed to their mills they have certain definite rights and privileges in the flow of the water in certain quantities, to and from their respective mills, and that the defendants have certain definite rights in the same stream; and that the defendants have disturbed them in the enjoyment of their rights, both in diverting the water and in unlawfully flooding their mills with an excess of water beyond their rights. The case thus stated is, in legal contemplation, a nuisance, and thus it is brought within the branch of the statute, which gives this court jurisdiction in equity in all cases of nuisance."

Joseph Williamson, for the defendants, cited: High, Inj. § § 517, 556, 558; *Porter* v. *Witham*, 17 Maine, 292; *Jordan* v. *Woodward*, 38 Maine, 423; Gould, Waters, § 506; *Vanwinkle* v. *Curtis*, 3 N. J. Eq. 422; *Denison P. M'f'g. Co.* v. *Robinson M'f'g. Co.* 74 Maine, 116; *Lancey* v. *Clifford*, 54 Maine, 490; *Phillips* v. *Sherman*, 64 Maine, 174.

EMERY, J. The evidence seems to establish the following facts. There was a lawful dam across a non-navigable river. From this cross-dam, a wing dam extended down the stream to conduct the water to the mills; on this wing dam was a cider mill, and below the cider mill, but on the same wing dam was a woolen mill. One Newell formerly owned both dams and both mills. In 1878 he conveyed the lower mill, the woolen mill, to the complainant. The bounds named in the deed did not include any part of the cross-dam, but the deed contained this

language: "And the said Newell hereby conveys an equal privilege in the water power and dams, to the said Haskell, provided the said Haskell shall pay one-half of the repairs made and to be made on said dam and flumes and one-half of the purchase contemplated for the upper dam, so called. It is also hereby agreed that in case of drouth said Haskell is to have the first right to use the water to the amount of two hundred and twenty-five inches."

The "upper dam" alluded to was a reservoir dam, some distance above the main cross-dam, and does not appear to have belonged to Newell.

In 1884 Newell conveyed to the respondents the rest of the property, "excepting so much of said estate as was sold to B. F. Haskell, (complainant) January 5th, 1878, and all rights and privileges conveyed to said Haskell at that time."

There was a drouth in the summer and early fall of 1884, but beyond some disputatious talk, there was no conflict in the use of the water until October 11th; on that day the respondents purchased one-fourth interest in the upper or reservoir dam from one Shuman, taking a bond for a deed (and afterwards, October 21, taking a deed). The respondents upon making this purchase, claimed a right to use one-fourth of the water, without reference to the complainant's claim to a prior exclusive use of two hundred and twenty-five inches. The respondents then began to use the water for fifteen minutes during each hour, although less than two hundred and twenty-five inches was flowing. October 19th the complainant began these proceedings in equity to restrain the respondents from using even one-fourth of the water under such circumstances.

There is some diversity of opinion among different courts as to when a court of equity should interfere by injunction in matters of this kind, but this court has always been conservative in this respect. It has considered the remedy by injunction, an extraordinary remedy, and only to be used when it is evident that the ordinary remedy at law will not afford adequate relief. It has required the plaintiff to show plainly that his right is clear, and that the anticipated injury is irreparable, — that is, not

reparable by recovery of damages in an action at law, whether from need of numerous or successive suits, or from insolvency of the defendant, or from derangement of business, or from some other cause.

In this case, the question of right is over the respondents' claim to one-fourth of the water under their purchase from Shuman. The respondents do not seem to make any other claim. If this question should be determined against them in an action at law, we have no reason to doubt they would acquiesce, and would refrain from making such use of the water against the complainant. We cannot apprehend a multiplicity of actions.

The operation of the complainant's mill is likely to be hindered only during seasons of drouth, and then only for one-fourth of the time. He has failed to convince us that his business would be seriously deranged. We do not see why he may not readily maintain an action at law and recover full compensation, if he is in the right.

There is no suggestion of any inability of the respondents to pay damages recovered.

The situation and circumstances are widely different from those in *Lockwood Mills* v. *Lawrence*, 77 Maine, 297, relied upon by complainant. They are more nearly like those in the following Maine cases, in which the injunction was denied. *Porter* v. *Witham*, 17 Maine, 292; *Jordan* v. *Woodward*, 38 Maine, 423; *Varney* v. *Pope*, 60 Maine, 192; *Denison Mf'g Co.* v. *Robinson Co.* 74 Maine, 116; *Westbrook M'f'g Co.* v. *Warren*, 77 Maine, 437. We think this case is within the principle of those cases.

Injunction denied. Bill dismissed with costs and without prejudice.

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

ORRIN MCFADDEN and others *vs.* TOWN OF DRESDEN.

Lincoln. Opinion February 1, 1888.

Injunction. Towns.

An injunction will not be granted to restrain a town from dividing money in its treasury, when there is no proof of an intention on the part of the town, or its officers, to thus divide, at the time of the commencement of the suit.

ON appeal from a decree of a single justice.

Bill in equity under the provisions of R. S., c. 77, § 6, cl. 9, to restrain the town from dividing the Lithgow money under the following proceedings of the town at a meeting legally called and held June 5, 1886.

(Warrant.)

"Art. 2. To see if the town will vote to divide the proceeds of the real and personal estate which is now or may hereafter be received under the provisions of the will of the late L. W. Lithgow, deceased, among the inhabitants of the town according to families."

(Votes.)

"Voted, Divide Lithgow money, Yes, 139; No, 112.

"Voted, That the town treasurer be authorized to ask the Supreme Court whether the vote to divide the Lithgow bequest among the inhabitants of the town of Dresden can be legally carried into effect, with such other questions as may enable him to pay out the money safely, and that he be authorized to employ counsel for that purpose."

The bill was dated October 20, 1886.

Other material facts stated in the opinion.

Geo. B. Sawyer, for complainants.

Bill in equity, under the provisions of the 9th specification of § 6, c. 77, R. S., which gives the court equity jurisdiction in cases "when counties, cities, towns, school districts, villages or other corporations, for a purpose not authorized by law, vote to

pledge their credit, or to raise money by taxation, or to exempt property therefrom, or to pay money from their treasury, or if any of their officers or agents attempt to pay out such money for such purposes."

The other provisions of the statute are disjunctive from this. *Johnson* v. *Thorndike*, 56 Maine, 32. The origin of the fund to which the bill relates is fully stated in the report of the case of *Luques* v. *Dresden*, 77 Maine, 186. The acquisition of money by a town, is not to be deprecated, except where it involves burdensome taxation. All the mischief which the statutes guard against lies in the expenditure. *Hooper* v. *Emery*, 14 Maine, 375.

The present officers are not named or known as respondents. The bill seeks to enjoin not only them but their successors. They may change their views and intentions. The majority may elect officers favorable to the views of the majority, "and the new officers might be qualified and carry the illegal doings of the corporation into effect before service of a new injunction could be made." *Clark* v. *Wardwell*, 55 Maine, 61; *Johnson* v. *Thorndike*, 56 Maine, 32.

Even a different disposition of the fund by a subsequent vote of the town (if such vote shall be passed,) so long as the vote of which we complain stands unrescinded, would leave the town liable to the payment and distribution of other money instead of this, under the authority of that vote, or at least to be made defendant in a petition for mandamus to compel it. *Davis* v. *Bath*, 17 Maine, 141.

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

WALTON, J. We think the plaintiffs' bill must be dismissed for want of sufficient proof to sustain it. It is undoubtedly true, as the plaintiffs' counsel contends, that a town can not lawfully divide its money among its inhabitants. But the defendants deny the existence of an intention to do so. They say that, on the contrary, the officers and agents of the town had been advised by legal counsel, and were satisfied, long before the commencement of this suit, that it would be illegal to do so. The votes of the town indicate a willingness, and, perhaps, an

intention, to divide the "Lithgow money," provided they could do so lawfully. But there is no proof that the town, or any of its officers or agents, intended such a division at the time of the commencement of this suit. The Court is, therefore, of opinion that there is no call for the injunction prayed for, and that the same ought not to be granted.

Decree below (dismissing the bill) affirmed, without costs.

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

JOHN DOYLE, appellant,

vs.

MAINE SHORE LINE RAILROAD COMPANY.

Hancock. Opinion February 1, 1888.

New trial.

It is not within the province of the court to say that the jury acted corruptly or perversely, or erroneously, in relying upon the uncontradicted testimony of respectable men, experienced in the matter about which they were testifying.

ON motion of the defendant to set aside the verdict and for new trial.

John B. Redman, for the plaintiff.

Hale and Hamlin, for defendant.

The verdict in this case was absurd and outrageous. The jury were misled, prejudiced and improperly influenced by testimony. Otherwise they could not have found such a verdict. *Newton* v. *Newbegin*, 43 Maine, 293; *Kimball* v. *Bath*, 38 Maine, 219: *Cyr* v. *Dufour*, 62 Maine, 20; *Thompson* v. *Mussey*, 3 Maine, 305; *Williams* v. *Gilman*, 3 Maine, 276; *Jacobs* v. *Bangor*, 16 Maine, 187; *Gilbert* v. *Woodbury*, 22 Maine, 246; *Butler* v. *Bangor*, 67 Maine, 385; *Hobbs* v. *E. R. R. Co.* 66 Maine, 572; *Gleason* v. *Bremen*, 50 Maine, 222; *Jewell* v. *Gage*, 42 Maine, 247.

WALTON, J. Proceedings to ascertain the damage done to the plaintiff's land by the location of the defendants' railroad across it. The jury assessed the damage at one thousand two hundred and eighty-seven dollars and twenty-eight cents. The defendants claim that this amount is excessive, and move to have the verdict set aside and a new trial granted. We do not think the motion can be sustained. The evidence is uncontradicted, and, if believed, justifies the verdict. The witnesses were unimpeached, and they appear to have been respectable and experienced men. One of them had been for several years an assessor of Ellsworth, and was at the time of testifying its treasurer. We do not think it is within the province of the court to say that the jury acted corruptly, or perversely or erroneously, in relying upon the uncontradicted testimony of such witnesses.

Motion overruled.

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

JESSE M. LIBBY *vs.* ELLEN P. MAYBERRY.

Androscoggin. Opinion February 1, 1888.

Executors and administrators. Evidence. Tax deed. Tax. Description.

No license is required from the judge of probate to enable an executor to assign a mortgage upon real estate held by the testator at the time of his decease.

Recitals in a tax deed are not evidence of the truth of the facts stated.

"Twelve acres pasture lot" is not a sufficient description for the purposes of taxation, nor to support a tax title.

ON exceptions by the defendant.

Trespass, *quare clausum fregit.*

Both parties claimed title to the *locus*: the plaintiff through a mortgage assigned to him by an executor, the defendant through a tax deed. Other material facts stated in the opinion.

Savage and Oakes, for the plaintiff.

David Dunn, for the defendant.

WALTON, J. The ruling of the presiding justice (by whom the action was tried without a jury) that no license from the judge of probate is necessary to enable an executor to assign a mortgage of real estate, held by the testator at the time of his decease, was correct. Such mortgages, and the debts thereby secured, are personal assets in the hands of executors and administrators, and may be sold or otherwise disposed of by them, at any time before a foreclosure is completed, the same as personal property pledged to the testator. So declared by statute, R. S., c. 90, § 12. And a sale or assignment of such mortgages by an executor or administrator is valid without a license from the judge of probate. *Crooker* v. *Jewell*, 31 Maine, 313.

The ruling that the tax deed through which the defendant claimed title was insufficient to convey a title, was correct. The recitals in a tax deed are not evidence of the truth of the facts stated. *Phillips* v. *Sherman*, 61 Maine, 548. And, if they were, the recitals in the deed referred to, fall very far short of showing that the tax was legally assessed, or that the land was legally sold for the non-payment of it. It does not appear that the land was described with such fullness and accuracy as the law requires. "Twelve acres pasture lot," is the only description given of it, except that it is in the town of Poland. In what part of the town, or how bounded, is not stated. Nor is the number or range of the lot stated. Such a description is clearly insufficient. Nor does it appear that the sale was within two years from the date of the collector's warrant. R. S., 1871, c. 6, § 173; R. S., 1883, c. 6, § 200. The recitals in the deed are in other particulars defective; but, as already stated, the recitals, if complete, would not be evidence of the truth of the facts, stated, and it is unnecessary to examine them further.

Exceptions overruled. Judgment affirmed.

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

CHARLES H. HOLMAN *vs.* WILLIAM O. HOLMAN and another.

Knox. Opinion February 1, 1888.

Probate practice. Appointment of guardian for non compos.

When an application is made for the appointment of a guardian for a person, on the ground that he is insane, and by debauchery is wasting his estate and exposing himself to want and the town to expense, he should have notice of the inquisition by the selectmen. The want of such notice is a valid objection to further proceedings in the probate court.

ON exceptions by the defendants.

An appeal by plaintiff from the decision of the judge of probate, refusing to grant his motion to dismiss the petition of William O. Holman and David M. Holman, that the plaintiff be placed under guardianship. The facts are stated in the opinion.

A. P. Gould, for the plaintiff, cited: *Penobscot R. R. Co.* v. *Weeks*, 52 Maine, 456; R. S., c. 67, § 6; *Chase* v. *Hathaway*, 14 Mass. 222; *Hathaway* v. *Clark*, 5 Pick. 490; *Wait* v. *Maxwell*, 5 Pick. 217; *Allis* v. *Morton*, 4 Gray, 63; *Conkey* v. *Kingman*, 24 Pick. 115; *Hovey* v. *Harmon*, 49 Maine, 260; *H.* v. *S.* 4 N. H. 60; *Kimball* v. *Fisk*, 39 N. H. 110.

C. E. Littlefield, for the defendants.

We say it was too late to raise the question of informality in the preliminary proceedings, at the second term of the probate court. In *Otis* v. *Ellis*, 78 Maine, 75, the question involved here was raised. It was in a trial justice's court, and the question was, whether pleas and motions in abatement should be made at the first term, and before a general continuance, or at any time to suit the convenience of the party. In determining the point the court used the following language. "Pleas and motions in abatement, should be filed before a general imparlance," which is nothing else than a continuance of the cause till a further day.

Our court well said, in *State* v. *Brown*, 75 Maine, 457: "Exceptions should not be sent to the law court until the case is fully disposed of in the trial court." The appellant claims that

he can appeal from any order, or decree of the probate judge. R. S., c. 63, § 23; and that after his appeal is claimed and the bond and reasons therefor filed, "all further proceedings cease" until the appeal is determined. R. S., c. 63, § 27.

As Judge BARROWS, said in *Cameron* v. *Tyler*, 71 Maine, 28, they are asking the court to "pass upon questions which may never be even in his own estimation of any importance to him."

The case of *Abbott* v. *Knowlton*, 31 Maine, 77, is a good illustration of the principle involved. *Witherel* v. *Randall*, 30 Maine, 168, is a very strong case in point. *Daggett* v. *Chase*, 29 Maine 356, is also in point, and perhaps contains as full a discussion of the principle upon which the case turns, as any of the authorities. The ruling of the judge of probate court was right, and if the exceptions were properly here, they should be overruled. Section 6, under which the proceedings were had, reads as follows: "In all other cases, the judge shall issue his warrant to the municipal officers of the town where such person resides, requiring them to make inquisition into the allegations made in the application; and they shall, upon such evidence as they are able to obtain, decide whether such allegations are true; and, as soon as may be, report the result to the judge; and if, on said report, after personal notice to the other party and a hearing thereon, he adjudges that such person is insane, a spendthrift, or incapable as aforesaid he shall appoint a guardian."

This precise question does not appear to have been before our court, and we have no authority in point. We think that the authorities relied upon by the appellant, are not sufficient to authorize such a conclusion.

We will briefly examine the cases in their order. The defect at bar, let it be borne in mind, was a want of notice by the selectmen of the inquisition. They rely upon *Chase* v. *Hathaway*, 14 Mass. 222. In that case the reasons of appeal stated that no notice of the inquisition, and what is more to the point, no notice of the hearing before the probate court was given. The case of *Hathaway* v. *Clark*, 5 Pick. 490; also relied upon cites the case above commented upon, and does not go beyond it.

They also rely upon *Wait* v. *Maxwell*, 5 Pick. 217. In that case the opinion begins with these remarks, "The decree of the court of probate, granting letters of guardianship, is void, because it does not appear that any notice was given to the subject of it before the inquisition taken; nor is there any judgment or decree ascertaining that she was *non-compos*." In *Conkey* v. *Kingman*, 24 Pick. 115, the court said, p. 119, "It further appears, that no notice was given to the plaintiff of the inquisition of the selectmen or of the proceedings before the judge of probate, and that there was no adjudication that she was *non-compos* or that a guardian be appointed." *Allis* v. *Morton, et al.* 4 Gray, 63, is also relied upon. That is a case where the guardian was appointed without any notice to the ward, and the question of whether or not notice of the inquisition was necessary, was not raised in the case.

The present statute of Massachusetts, R. S., Mass. c. 139, § 7, provides for the appointment of a guardian for the insane, without the intervention of an inquisition. Section 8, provides the same proceeding in the case of excessive drinking, etc., etc. This statute was passed upon by the court in *Brigham* v. *Boston & Albany R. R. Co.* 102 Mass. 14, without any suggestion that they deemed this proceeding an improper one. The case of *McCurry* v. *Hooper*, 46 Am. Dec. 280, relied upon by the appellant at the probate court, relies for authority upon the Mass. cases cited. *Kimball* v. *Fisk*, 39 N. H. 117, was also relied upon. In that case it appears that the statute required a notice to be given before the decree was made.

The only case that I find in our state where this statute was before the court, is *Hovey* v. *Harmon*, 49 Maine, 269. The statute under which the question arose in that case, was c. 51, § 49, of the statutes of 1821.

WALTON, J. It is the opinion of the court that the defendant should have had notice of the inquisition by the selectmen. It is true that there is no express statute provision requiring such notice. But it is a well settled rule of the common law that when an adjudication is to be made which will seriously affect

the rights of a person, he should be notified and have an opportunity to be heard. Necessity creates some exceptions to the rule. But no such necessity exists in the class of cases of which we are now speaking. The allegations against the defendant were that, he was of unsound mind; that by debauchery he had become incapable of managing his affairs, and was so wasting his estate as to expose himself to want and the town to expense. Surely, charges like these are too serious, and an adjudication upon them too important, not to entitle the person charged to a hearing. It is said that a hearing may be had in the probate court after the inquisition by the selectmen is made and returned. True. But such an adjudication by the selectmen is no trifling matter. It is the foundation of all subsequent proceedings, and may seriously affect a man's reputation and standing in the community. And we believe an appeal to any one's sense of justice and fairness will compel him to admit that a person thus charged ought to have an opportunity to be heard before such an adjudication is made, even by the selectmen of a town.

We do not find any decision in this state or Massachusetts which holds directly and positively that such a notice is necessary; because, in all the cases in which the question is discussed, there happened to be other grounds on which the decisions might rest. But it seems to have been the opinion of the courts that such a notice ought to be given. *Chase* v. *Hathaway*, 14 Mass. 222; *Hathaway* v. *Clark*, 5 Pick. 490.

In this state, in *Peacock* v. *Peacock*, 61 Maine, 211, it was held that, although a guardian for a child two years old, whose father was dead, might be appointed without notice, still no decree could be made depriving the mother of its care and custody without notice to her, although there was no express statute requiring such notice. The decision rests on the dictates of natural justice and the rules of the common law.

We think the want of notice to the defendant of the inquisition by the selectmen was a valid objection to proceeding further in the probate court; that the objection was seasonably taken, and

the appeal not premature. The court so ruled at *nisi prius*. The ruling was correct.

Exceptions overruled. Decree below affirmed.

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

GEORGE W. WALKER *vs.* JOHN F. SIMPSON.

Kennebec. Opinion January 30, 1888.

Referee. Award. Evidence. Dividing line. Trespass.

Where a referee does not decide the question submitted to him, and his report shows that he did not intend to, it will not be conclusive on the parties.

Where a dividing line has been agreed upon and recognized, and occupied to by the parties in interest for twenty years, it is conclusive; and it would not be waived by a subsequent reference and void award.

ON report.

Trespass, *quare clausum fregit.*

The question at issue was the location of the dividing line between the lands of the parties. The jury rendered a general verdict for the defendant, and a special verdict fixing the dividing line. The case was then reported to the law court with the agreement, that, if the award of the referees, which was put into the case and is referred to in the opinion, was conclusive against the defendant, judgment should be entered for the plaintiff for five dollars damages; otherwise, judgment on the verdicts, unless the law court should consider the instructions to the jury were erroneous and prejudicial to the plaintiff. In such case the court was to render such judgment as the whole case required.

E. F. Webb and Appleton Webb, for plaintiff.

The arbitrators do not make new boundaries, nor change old ones; they merely determine where upon the face of the earth the pre-existing boundaries are. Morse on Arb. 515.

Determining lines does not affect the freehold. *Rogers* v. *Kenwrick*, Quincy, 63, 64; *Searle* v. *Abbe*, 13 Gray, 412; *Clark* v. *Burt*, 4 Cush. 396.

An award does not transfer title, but a party to it is estopped

by his own agreement to dispute the title. *Shelton* v. *Alcox*, 11 Conn. 240; *Cox* v. *Jagger*, 2 Cow. 638.

The submission is a mere matter of fact to ascertain where the lines would run on actual survey. *Terry* v. *Chandler*, 16 N. Y. 356.

The award is not offered as evidence of title, but of location of boundary. The line can even be established by parol. The agreement passes no interest in lands, it merely defines the extent. *Gray* v. *Berry*, 9 N. H. 447.

An award on a parol submission as to the boundaries or location under a deed is binding in an action of ejectment. *Jackson* v. *Gager*, 5 Cow. 383.

"An agreement of the parties, verbal or written, though not effective as a conveyance, is evidence of the true location of lines or monuments. And there seems to be no good reason why a fact which parties can lawfully agree upon for themselves, may not, by their consent, be determined for them by arbitrators, with the same effect as if they had agreed to it without such assistance. When the award is made the agreement is executed and becomes operative." HOAR, J., in *Byam* v. *Robbins*, 6 Allen, 66.

"In the absence of evidence to the contrary, the law presumes that the parties intended to make the decision final and conclusive. This presumption is especially important in its application to an award of arbitrators acting under a submission *in pais*, because the court cannot provide for the correction of errors made by arbitrators, as it can in respect to the awards of referees appointed by rule of court." CHAPMAN, J., in *Mickles* v. *Thayer et al.* 14 Allen, 119.

If the award follows the submission it is conclusive. *Byam* v. *Robbins*, 6 Allen, 66.

A rule of construction should not be sought for, which will nullify the submission and award and the intention of the parties, unless for fraud or misconduct; on the contrary, a rule should be adopted to sustain the intention of the parties; every reasonable intendment is to be made to uphold an award. *Ott* v. *Schroeppel*, 5 N. Y. 482.

No technical expressions are necessary, or introductory recitals. Russell on Arb. 244, 245.

Where the parties have expressly, or by reasonable implication, submitted the question of law as well as the question of fact arising out of the matter in controversy, the decision of the referees on both subjects is final. Morse on Arb. 302.

Chief Justice SHAW, in *Boston Water Company* v. *Gray*, 6 Met. 131, on page 167, said, where the arbitrator was not a professional man, that the submission to arbitration embraced the power to decide questions of law, unless the presumption was rebutted by some exception or limitation in the submission. Submissions and awards are to be expounded according to the intent of the parties. *Gordon* v. *Tucker*, 6 Maine, 247.

All presumptions of law are to be taken favorably for the support of the award, and the burden of proof is upon the party who would impeach it to show the grounds of such impeachment. *Bigelow* v. *Newell*, 10 Pick. 348; *Deane* v. *Coffin*, 17 Maine, 52.

In the examination of witnesses and the investigation of matters in dispute, and especially in the character of the evidence received, arbitrators have, at common law, a wider latitude than courts in the trial of issues of a similar kind. Cald. on Arb. 52; Morse on Arb. 131; *Fuller* v. *Wheelock*, 10 Pick. 135; *Tobey* v. *County of Bristol*, 3 Story, U. S. 800; *Hooper* v. *Taylor*, 39 Maine, 224.

The award must contain that actual decision of the arbitrators which is the result of their consideration of the various matters discussed before them. *Patterson* v. *Bayard*, 7 Ired. Eq. 255; *Blossom* v. *Van Amringe*, 63 N. C. 65; *Lamphire* v. *Cowan*, 39 Vt. 420; Morse on Arb. 266.

An award need not recite the various facts necessary to give it validity. Morse on Arb. 276.

An erroneous or false recital made by the arbitrator, if it be merely concerning his authority, appears to be an immaterial matter. It does not enlarge his authority, nor does it invalidate his award. *Id.* 277.

Where an award settles the boundary of land, it is sufficient

to enable the party to whom the land has been awarded to bring an action of ejectment, and is a justification in an action of trespass brought by the other party. *Sellick* v. *Addams*, 15 Johns. 197.

It is competent evidence and judgment may be based upon it. *Cushing* v. *Babcock*, 38 Maine, 452.

A decision of controverted questions made deliberately by judges constituted by the voluntary choice of the parties, is always to be regarded with respect and will be supported so far as it can be done conveniently with the established rules of law. *Bigelow et al.* v. *Newell*, 10 Pick. 354.

Courts have now departed from the ancient strictness "which was a reflection on the administration of justice." For the benefit of society, critical niceties are discouraged. Morse on Arb. 437.

Strict compliance with the stipulations in the submission may be waived by the parties, by their subsequent conduct. *Sellick* v. *Addams*, 15 Johns. 197; *Perkins* v. *Wing*, 10 Johns. 143.

The formality of the revocation must follow and conform to the formality of the submission. Thus, if the submission be under seal, so also must be the revocation; if the submission be in writing, the revocation must be written; but if the submission be only verbal, then the revocation may be verbal also. If this rule be not complied with, a revocation which is insufficient under it will be of no effect. Morse on Arb. 232; *Howard* v. *Cooper*, 1 Hill, 44; *Brown* v. *Leavitt*, 26 Maine, 251; *Sutton* v. *Tyrrell*, 10 Vt. 91.

"When an award is made, the agreement is executed, and becomes operative." HOAR, J., in *Byam* v. *Robbins*, 6 Allen, 66.

When it is made and published, the parties cannot change it. An award when duly made and signed, and its contents made known to the parties, fixes their rights and cannot rightfully be altered, recalled, or withheld by the referees. *Thompson* v. *Mitchell*, 35 Maine, 281.

The publishment is satisfied by the award having been made and notice having been given to the parties. *Knowlton* v. *Homer*, 30 Maine, 556. Or when executed in duplicate and

delivered to the parties. *Plummer* v. *Morrill*, 48 Maine, 184.

Parties who have submitted a dispute to arbitration *in pais*, and have accepted the award, will not be permitted to open the matter again. Bigelow on Estoppel, 515; *Males* v. *Lowenstein*, 10 Ohio, 512; *Reynolds* v. *Roebuck*, 37 Ala. 408; *Burrows* v. *Guthrie*, 61 Ill. 70.

If Hayden, in 1840, established a line and afterwards the parties disagreed and entered into a new reference that of itself revoked and waived the Hayden line, and the last award, if valid, would supersede all preceding ones. *Wyman* v. *Hammond*, 55 Maine, 534.

Baker, *Baker and Cornish*, for the defendant, cited: Morse, Arb. 131, and cases cited, 213; *Sawyer* v. *Freeman*, 35 Maine, 543; *Boynton* v. *Frye*, 33 Maine, 217; *Littlefield* v. *Smith*, 74 Maine, 387; *Wyman* v. *Hammond*, 55 Maine, 534; *Butler* v. *Mayor*, 7 Hill, 329; *Cook* v. *Jaques*, 15 Gray, 59; *Richards* v. *Todd*, 127 Mass. 167; *Rollins* v. *Townsend*, 118 Mass. 224; *Gaylord* v. *Norton*, 130 Mass. 74; *Sperry* v. *Ricker*, 4 Allen, 17; *Whitten* v. *Hanson*, 35 Maine, 435; *Brown* v. *Gay*, 3 Maine, 126; *Mosher* v. *Berry*, 30 Maine, 83; *Lincoln* v. *Edgecomb*, 28 Maine, 275.

DANFORTH, J. The first question presented in this case is whether "the award of Garland and Clifford, referees, under the submission and evidence, is conclusive against the defendant." The only objection made to it is that the referees exceeded the authority given them in the submission, and it is claimed that this appears not only upon the face of the papers, but also by the testimony bearing upon that point.

The agreement of submission provides that the parties, "in order to have the line established between the land of said Simpson and said Paul, refer the running of said line between them to David Garland and John B. Clifford, according to the deeds and facts which shall be presented to them for their consideration." Here was the only guide for the referees in the performance of their duty, and it would seem so plain as to admit of no doubt. The direction was to "run" a line already described upon the

face of the earth. The deeds made but one line between the parties, and that is fully described in that under which the plaintiff holds; the defendant's deed limits him only by that line. That was the line to be run. There was no occasion for running any other, there was no dispute except as to the location of that line upon the face of the earth. Hence the language of the submission was appropriate and direct, to "run" the line according to the deed and facts presented. The line described in the deed is to be ascertained, aided by whatever facts which may be shown as shall throw light upon that location, shall enable the referees to ascertain the precise line submitted that they may "run" it.

Such being the submission, it was the duty of the referees to make a report of their doings in such language as to show the parties that the precise matter submitted had been considered and decided by them. Their duty to the parties required this; the rights of the parties demanded it. In *Wyman* v. *Hammond*, 55 Maine, 534, it was held that, "to be conclusive upon the parties to it, an award must contain in express terms, a clear and distinct determination of the exact point submitted." This case is corroborated by that of *Lisbon* v. *Bowdoin*, 53 Maine, 324. In the opinion the following remarks are so appropriate to the case at bar that we quote: "It is equally clear that commissioners, appointed by the court, cannot alter or depart from the boundaries established by the legislature. Their duty is to determine, in case of dispute, where and how the line in question is to be run and established on the face of the earth. Their determination may be erroneous, but it is binding on the parties, if they keep themselves within the power given, and if their report shows that they simply undertook to ascertain and determine where the line given by the legislature was in fact. But this should appear by their report, at least nothing should there appear which leaves in doubt, whether the line established by them is the old line or a new and arbitrary one."

The report in the case at bar is subject to the same objection as those in the two cases cited. After the introduction, coming to the matter decided, the referees say, "We, . . on the

12th day of May, 1868, did run the following described line as the dividing line between the land of said Simpson and Paul, and *do hereby establish the same* as the dividing line between the lots of the parties." Then follows a description of the line. It is true that from this statement we cannot say that the line submitted was not the line run by the referees; but it is equally true that we cannot say that it was. All reference to the restriction in the submission is omitted in the award. Here is certainly sufficient "to leave a doubt, whether the line established is the old one or a new one," enough to enable us to say with the change of a word or two in the language of KENT, J., in *Lisbon* v. *Bowdoin*, "This report does not follow the language of the submission, and under it, we cannot be certain that it is not an entirely new line." Thus the case seems to be entirely within the two cases cited and which seem to be well settled in principle.

But it is said that referees are presumed to do their duty and follow the submission until the contrary is shown, and authorities to that effect are cited: *Sperry* v. *Ricker*, 4 Allen, 19; *Gaylord* v. *Norton*, 130 Mass. 74, and cases cited. These citations fully sustain the proposition stated and enunciate sound law; but they are not inconsistent with the doctrine of *Wyman* v. *Hammond*, and *Lisbon* v. *Bowdoin*. In all of them the award in terms follows the submission and leaves no doubt that the referees intended to decide the precise question submitted. But the objection was that some item included in the submission had not been considered, or in some cases an item not included in the submission had been considered. This, of course, could only appear by proof, and would not be presumed without proof.

But in this case we are not confined to the papers alone, for, by the report, we are to examine the testimony as well; not, however, to ascertain whether the line was run correctly by the referees, for if they followed the submission, however erroneous it might be, it would be conclusive upon the parties, no suggestion of corruption having been made. But the only question now involved is whether the referees did intend to run the line according to the deeds, as submitted. Upon this point it is brief and fully confirms the conclusion to which we have come from an

examination of the papers. All we need refer to is the answer of one of the referees to a question put to him when they were running the line. He says, "There is a surplus here and we are dividing it up." It necessarily follows that if they were running a line so as to divide a surplus they were not running the "line according to the deeds." No line described in a deed can give a part of a surplus. It may be that one or both parties may be entitled to a surplus and that title might enure by virtue of a deed. But all that would not change any line described in the deed; that would remain the same.

It is, however, claimed that referees are the final arbiters and the conclusive judges of the law and fact. Therefore, in this case they must construe the deed and decide finally whether there was a surplus and what portion of it would belong to each party. This as a general proposition is true, limited only by the restriction in the submission. But as to matters not submitted it cannot be true. It is sometimes true, as in some of the cases cited, that a provision relating to the method of reaching a conclusion upon a matter submitted, as that a "regard should be had to the law," or the matter submitted "to be decided upon legal principles," will be construed as directory, and still leave the judgment of the referees conclusive as to the law. But a construction of the submission by the referees which would enable them to include matters for their consideration not included in its terms, is never admissible. That must be construed as other contracts, and when those interested do not agree, as a last resort by the court. In this case undoubtedly the referees had authority to construe the deeds so far as the description of the line was involved. But the surplus was entirely another matter. That was not submitted. If the parties did not choose to include it, it was certainly competent for them to omit it as they did; and why should they include it? If the line in the deed could be found, as they then supposed, there was no surplus to divide. The east line of the plaintiff was the west line of the defendant, and while the one would hold up to that line, the other would also.

Hence, both upon the face of the papers and by the evidence, the award of the referees was not binding upon the defendant.

Under this conclusion the report provides that there shall be "judgment upon the verdicts, unless the court shall be of opinion that the law given to the jury in the charge is erroneous, to the prejudice of the plaintiff."

No exceptions have been filed and but two alleged errors have been pointed out, one of fact and one of law.

The first, that of fact, does not come within the terms of the report, and besides the justice's attention should have been called to it at the time. But it is claimed that it not only prejudiced the jury against the plaintiff, but "entirely changed the rule of law as to the division of the surplus." It is not, however, admitted to have been an error. There may have been testimony tending to show where the north-west corner of check lot No. 1 was, but we do not find that any witness at the trial stated where it was upon the face of the earth. The fact that the judge called the attention of the jury to it and qualified it as he did with the words, "so far as I remember," would tend to impress upon their minds its importance, and if such testimony existed they would certainly recall it. Besides, the rule of law given the jury by which they were to be governed in dividing the surplus, was correct and given in such terms as would require the jury to weigh any and all testimony bearing upon that point.

Nor does the alleged error in law exist. It is too well settled to admit of question that a line agreed upon by the parties in interest and occupied up to for more than twenty years, becomes conclusive, nor would it be waived by a subsequent reference resulting in a void award.

These conclusions under the provisions of the report preclude all consideration of the propriety of the verdicts, which has been quite fully discussed.

Judgment on the verdict.

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

SAMUEL DUNBAR, administrator, *vs.* BENNETT DUNBAR.

Hancock. Opinion January 31, 1888.

Evidence. Disclosure in probate court. Gift causa mortis. R. S., c. 64, § 67.

A disclosure before the judge of probate, under R. S., c. 64, § 67, is admissible in evidence against the party who made it, in an action by the administrator to recover the property disclosed.

A few days before her death a mother gave her son her pocket-book containing some money and told him where he could find more money, which she wanted him to use for her last sickness and funeral expenses, and the balance should be his. He left the money where it was until after his mother's death, then it was delivered to him. *Held*, not a gift *causa mortis*.

ON report.

Assumpsit for money had and received.

Wiswell and King, for the plaintiff, cited: *Hendrickson* v. *People*, 61 Am. Dec. 721; *O'Dee* v. *McCrate*, 7 Maine, 471; *Hatch* v. *Atkinson*, 56 Maine, 327; *Dole* v. *Lincoln*, 31 Maine, 422; *Robinson* v. *Ring*, 72 Maine, 141; *Northrop* v. *Hale*, 73 Maine, 66.

George P. Dutton, for defendant.

This power of the judge of probate is clearly an extension of his jurisdiction and gives no remedy, simply furnishing a discovery, something by means of which the plaintiff can procure evidence and not evidence itself. 4 Mass. 318; 7 Maine, 470; 7 Pick. 14.

The balance was a valid gift. The essentials of a valid gift are intention, delivery and acceptance. In this case there was the consideration of love and affection which was a good consideration, but no consideration was necessary. 9 Met. 339.

George M. Warren, also for defendant.

DANFORTH, J. The defendant was summoned before the judge of probate for the county of Hancock, on complaint of the plaintiff as administrator, to disclose any property in his possession belonging to the estate represented by the plaintiff, under the provisions of R. S., c. 64, § 67. The statement then

made is now offered as evidence in support of this action, which is a suit upon an implied contract to recover the money so disclosed. It is objected to, as inadmissible for such purpose.

The sole object of the statute is, to obtain facts, known only to the party summoned, to lay the foundation for ulterior proceedings. If the person summoned is an executor or administrator, and reveals property belonging to the estate, without further evidence, he would be ordered by the probate court, to add to his inventory and account for the property so disclosed. *Bourne* v. *Stevenson*, 58 Maine, 499; *Hill* v. *Stevenson*, 63 *Id.* 365. If any other person is cited, the jurisdiction of the probate court ceases with the disclosure and the statement is similar to an answer to a bill of discovery and the facts obtained may be used as evidence when applicable, in any process proper to obtain the end sought. *O'Dee* v. *McCrate*, 7 Maine, 267. Were the disclosure incompetent evidence, in most cases it could be of no possible use. As in the case at bar the facts wanted and thus obtained, are within the knowledge of no one except the party against whom they are to be used, and can be proved only by the statement; nor does the statement furnish any means of proving them otherwise. From the necessity of the case the defendant's disclosure must be admissible and no doubt such was the intention of the statute. In this conclusion, however, no criminal process is included.

Whether the defendant's testimony upon the stand as a witness is admissible, or otherwise, we have no occasion to enquire. He was called in his own behalf, therefore he cannot object; and the other party has no occasion to.

Can the action be maintained upon the defendant's own statements? He admits that he has, or had, in his possession two sums of money which belonged to the plaintiff's intestate, in her lifetime. He now claims it as a gift, *causa mortis*. The burden of proof is therefore upon him to show such a gift.

The defendant's statement as to the sum of one hundred dollars is that, "A few days before my mother's death she sent for me to come there and arrange for her burial. She said she had some money she wanted me to use for her last sickness and

funeral expenses, and the rest was mine." Here was a sufficient recognition of the near approach of death, and possibly of an intended gift coupled with a trust as in *Curtis* v. *Savings Bank*, 77 Maine, 151. But the gift could not be a completed one, until there was a sufficient delivery to and retention by the donee, of the property in question. Upon this point the defendant says, "I received it at the time from my mother; she passed me the pocket-book, and told me of some other money, and where I could find it. A few days after, my brother and sister came to me and gave me the same pocket-book which I had accidentally left when my mother gave it to me." On cross examination it appears that, "When mother gave it to me I simply left it right where she gave it to me," and that he received it again after her death. Whatever might have been the delivery, it is certain that the money was not retained by the alleged donee, in his possession until the death of the donor. In *Hatch* v. *Atkinson*, 56 Maine, 324, it is held that "the donee must take and retain possession until the donor's death. On page 327, in the opinion, WALTON, J., says, "It not only requires the delivery to be actual and complete, such as deprives the donor of all further control and dominion, but it requires the donee to take and retain possession till the donor's death. Although the delivery may have been at one time complete, yet this will not be sufficient, unless the possession be constantly maintained by the donee. If the donor again has possession, the gift becomes nugatory. And public policy requires these rules to be enforced with great stringency, otherwise the wholesome safeguards of our testamentary laws become useless."

We are not unmindful of the fact that the defendant says that he left the pocket-book accidentally, but he also says he left it just where his mother gave it to him. It is also a somewhat significant fact that although there, as he says from one to three times a day, he does not call for it, but waits for it to be brought to him after the intestate's death. This does not seem to have been from forgetfulness, as he did obtain the other money in question left there for a time, but taken before the donor's death. Taking these circumstances into consideration in connection with

the fact that the money was not to be used until after the donor's death, and that nothing was said about a delivery or a retention when the pocket-book was passed, the conclusion is not an unnatural one that the passing of the pocket-book was for some purpose other then a delivery, perhaps that the amount might be ascertained, and that both parties understood that it was to remain in the custody of the intestate, as it evidently did. But in any view the evidence of a delivery falls very far short of that "clear and unmistakable proof," which is required in cases of this kind.

The testimony as to the seventy-nine dollars found in the tea pot, utterly fails as satisfactory proof of either an intended gift, or delivery. The statement does not authorize the conclusion that it was included in the money which the intestate desired the defendant to use the necessary amount of, and retain the balance. It is left then to the simple statement that she informed him where the money could be found; but for what purpose does not appear. He there found the money but did not take it then, afterwards he did. This taking appears to have been done not in the intestate's presence, but whether by her direction, or even with her knowledge or consent does not appear.

It appears that the defendant has paid certain bills for the benefit of the estate as directed by the intestate, for which he produces vouchers, amounting to fifty dollars; for these he should have credit; another of twelve dollars without a voucher, but, of its payment no question seems to be made. This therefore may properly be allowed. The sum of these taken from the one hundred and seventy-nine dollars for which the defendant is chargeable, leaves the amount of one hundred and seventeen dollars now due; to this must be added interest from the date of the writ.

Judgment for the plaintiff for $117, and interest from date of writ.

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

WEBSTER TREAT, administrator

vs.

FRANKLIN TREAT and another.

Waldo. Opinion February 1, 1888.

Probate practice. Executor and administrator.

An administrator is bound by a decree of the Supreme Court of probate directing him to enter in his account of administration the proceeds of real estate sold by him for the heirs.

ON report.

An appeal from the decree of the probate court in the matter of the settlement of the account of the appellant, as administrator of the estate of Robert Treat, deceased.

The opinion states the facts.

A. W. Paine, for appellant.

No inventory was ever filed, the omission to do so being according to the wish of the parties concerned. This, however, affords no objection as has been directly decided by the court. *Pettingill* v. *Pettingill*, 60 Maine, 411; *Nelson* v. *Jaques*, 1 Glf. 139, and no objection is made on that account.

Is the claim barred by statute of limitations? This is readily answered and conclusively so by the fact that there is no statute limiting claims of an administrator against the estate, nor *vice versa*. The statute limiting suits in probate matters is confined to suits brought by creditors against the administrator. *Bancroft* v. *Andrews*, 6 Cush. 493; *Johnson* v. *Ames*, 11 Pick. 180. It was early settled by our court that probate accounts were not subject to the statute of limitations. *Heald* v. *Heald*, 5 Glf. 387, in which the court distinctly hold that the statute is confined to civil actions and does not apply to proceedings in probate.

The same principle was again affirmed afterwards in *Nowell* v. *Bragdon*, 14 Maine, 320. See also the case of *Richmond Admr.* 2 Pick. 567. The case of *Potter* v. *Titcomb*, 7 Glf. 303,

confirms the same principle and the reasons given fully apply to the position taken by me, that as the administrator is the party on both sides no presumption of payment can be made and hence no bar. In *Greene* v. *Dyer*, 32 Maine, 460, the same doctrine is again affirmed. The recent case of *Smith* v. *Wells*, 134 Mass. 11, is one where nine years delay had occurred, but in spite of the statute of limitations the court enforced the claim. The statute not applicable to such cases.

All mistakes and errors in former accounts should be rectified and settled. This mode of settlement is not only equitable but legal; our courts have so decided. In the case of *Stearns* v. *Stearns*, 1 Pick. 157, the court corrected a similar error even after the account had been fully passed upon and allowed and recorded. And how to correct such an error the court teaches in another case. *Stevens* v. *Gaylord*, 11 Mass. 269, in which the court substantially settle the doctrine that if one comes into possession of money as administrator, and has a debt against his estate, he can offset the one against the other. 1 Salk. 306, in which Lord HOLT says, if the administrator, having no assets, pays a debt of his intestate, to the amount of what he himself owed, this would be a release. In *Hatch* v. *Greene*, 12 Mass. 195, a mistake was made in the account settled and being afterward detected was corrected even to the prejudice of an assignee who had bought the fund in reliance upon the probate. There the error was corrected by an offset which an equitable principle suggested. That is like our case precisely. In *Ipswich Co.* v. *Story*, 5 Met. 313, the principle is settled that where the administrator is debtor to the estate his debt is regarded as paid and he in funds to that extent, as he cannot sue himself and when the same hand is to pay and receive money, that which the law requires to be done shall be deemed to be done. 1 B. and P. 630; 9 B. and C. 130.

These cases would seem to point to the same conclusion as already arrived at, viz: that when the administrator here had a demand against the estate for the three thousand two hundred dollars, and became possessed of the collection of the three thousand nine hundred and thirty-eight dollars and six cents, the

law applied the one to the satisfaction of the other *pro tanto*, leaving only the balance whichever way it might be for future consideration. When he got funds he should pay and stop interest. *Forward* v. *Forward*, 6 Allen, 494.

Is an administrator chargeable in the settlement of his administration account in probate with money received by him, while acting as agent of all the heirs, for the conveyance of real estate executed by the heirs to respective purchasers?

That an administrator has no control or power over real estate by virtue of his office as such, no right to sell or otherwise dispose of or interfere with it, except when wanted to pay debts and then only under license of court specially obtained, is a principle which is too well recognized to need any citation of authority. The statute regulating the settlement of estates is demonstrative of this principle of law and the multitude of authorities are unanimous to the same point. Beginning with *Nelson* v. *Jaques*, 1 Glf. 142, and cases cited in same, our reports are full of it. The able and exhaustive discussion of this whole matter makes the subject all so plain in *Kimball* v. *Sumner*, 62 Maine, 310, that it would seem nothing additional need be said and none can make the subject more plain.

The fact that an administrator cannot be licensed, even for the sale of real estate without giving a new bond, is a complete refutation of the idea that he can get the money and make his administration liable for the sales of real estate under his bond as administrator, even by consent of the heirs or by their agreement. *Robinson* v. *Millard*, 133 Mass. 236.

The heirs or appellees think they find support for their position in the decree which the court filed in the case and which is made a part of it. The passage referred to is as follows, viz: "The court below to enquire and determine what sums have been received from the real estate by said accountant as agent of the heirs and to allow any such not already properly accounted for."

Though this language might be construed to support the heirs' position, yet taking everything into consideration, the meaning is very clearly that he is to allow "what was received from the real estate," not for real estate—that is, he is to allow the rents

which have been derived from the real estate by him as agent under an agreement to account for them as administrator as before explained. The court in drawing the decree, had evidently in mind the principles which had been so elaborately and correctly worked out in *Kimball* v. *Sumner*, 62 Maine, 310, already cited. With that interpretation the law and justice of the case are both satisfied, while with the interpretation placed upon it by the apellee, both are outraged. In such case we except to the correctness of the decree, and ask to be heard upon the question, a right which the court will readily grant us.

W. P. Whitehouse, with whom was *W. H. Fogler*, for the defendants, cited: *Fay* v. *Taylor*, 2 Gray, 154; *Stearns* v. *Stearns*, 1 Pick. 159; *Kimball* v. *Sumner*, 62 Maine, 309; *Littlefield* v. *Eaton*, 74 Maine, 522; 125 Mass. 307; Schoul. Ex'rs, 539; *Stiver* v. *Stiver*, 8 Ohio, 221; 2 Wms. Ex'rs, 817; *Com.* v. *Stub*, 11 Pa. 150 (51 Am. Dec. 519); *Pettingill* v. *Pettingill*, 60 Maine, 411; *Storer* v. *Storer*, 9 Mass. 37; *Preble* v. *Preble*, 73 Maine, 362; *Wadleigh* v. *Jordan*, 74 Maine, 483; *Payne* v. *Pusey*, 8 Bush, 564; Wood, Lim. Act. 389; *Lancey* v. *White*, 68 Maine, 28; 24 N. H. 400; *Nowell* v. *Bragdon*, 14 Maine, 324; *Ricard* v. *Williams*, 7 Wheat. 116 (5 L. ed. 412); *Gross* v. *Howard*, 52 Maine, 192.

EMERY, J. Robert Treat, of Frankfort, died intestate and solvent, in 1859 leaving a widow and several children. His oldest son, Webster Treat, the appellant, was appointed administrator December, 1859. He filed no inventory, and by arrangement with the widow and heirs, he was to make a division of the personal estate in specie, as soon as practicable (there being few if any debts), and was to receive one thousand dollars per year as compensation therefor. Such a division was made in December, 1860, though the formal quittances were not executed till February 14, 1861.

The widow's dower was in the meantime set out to her, the reversion remaining undivided. From time to time, Webster Treat sold parcels of the dower estate, including the reversion,

as agent for the widow and heirs, they all signing the deeds. He received the proceeds of these sales.

After the issue of the letters of administration, the authority of the probate court was not invoked in the matter of this estate till July, 1881, when Webster Treat filed an administration account. This account was allowed in the absence of contest at the July term, 1882, a large balance appearing to be due to the administrator. In May, 1884, some of the heirs, the widow having died, petitioned the probate court to open the account for corrections and new settlement. The probate court denying the petition, an appeal was taken to the Supreme Court of probate. At the April term, 1886, in Waldo county, the Supreme Court, upon this appeal, decreed—that the account should be opened; that the administrator should be charged with a certain additional stated sum and interest; and that he should also be charged with the proceeds of the real estate sold by him for the heirs as above described, so far as he had not already accounted for them.

At the August term, 1886, of the probate court after this decree, the administrator filed a new and additional account, and thereupon the probate court passed upon the whole account. Four matters only seemed to have been seriously questioned.

1. The administrator charged for compensation as per arrangement up to time of division and settlement in February, 1861, alleging that he omitted to deduct it at the time, and had never received it. The probate court disallowed this charge.

2. The administrator charged one thousand dollars for services since the division. The probate court disallowed this charge, and allowed instead a commission of five per cent on sums received.

3. The administrator claimed as a creditor of the estate, three thousand two hundred dollars, and interest for an error in computation in the accounts between him and the intestate in the lifetime of the latter in March, 1854. The probate court disallowed this item.

4. The court charged the administrator with the proceeds of the sales of four parcels of real estate out of the lands set out as

dower. The controversy here was whether Webster had properly accounted for the proceeds. He claimed that he credited them all to the widow, by the direction of the heirs. They claimed, however, that he was to pay the income only to the widow during her life, and was to pay the principal to the heirs after her death.

Webster appealed from the decree of the probate court, settling the account as above, and the whole case and evidence has been reported to the law court. Though numerous reasons of appeal were stated, the affirmance or reversal of the decree depends upon the determination of the four matters above stated.

It is evident that the questions presented are almost entirely of fact. Mooted questions of law would be immaterial, if not presented by the facts finally found. The case was argued orally and the justices before separating, considered the evidence and the arguments carefully, and were unaminous in their conclusions upon all the questions. The case was held however for a re-examination of the testimony and the briefs, which re-examination has been made and has not changed our conclusions.

Upon our finding of the facts, the only question of law raised that calls for notice, is whether an administrator can be charged in his administration account for the proceeds of real estate sold by him as agent for the heirs. But even this question is immaterial in this case. The Supreme Court of probate, upon proper proceedings in the matter of this very account, had already decreed,—that this administrator should so account in his administration account. He took no appeal, nor exceptions, and made no effort to procure a reversal or modification of the decree. That decree still stands and controls this case. The probate court properly followed it. Whether the sureties upon the administrators bond are bound by such a decree is a question to be raised by them.

It only remains to announce our conclusions upon the facts, which we state briefly, without giving our analysis of the evidence, which is seldom if ever advisable.

1. We think the administrator has received his agreed compensation for services up to February 14, 1861.

2. We find nothing in the case entitling him to more than the commission of five per cent after February, 1861.

3. We think the error in computation in the accounts between Webster, (the administrator) and Robert Treat (the intestate) in March, 1854, was undoubtedly adjusted.

4. We think the appellant had no authority from all the heirs to credit to the widow the principal of the proceeds of the real estate sold, and hence that such a credit to the widow did not discharge him, in this account.

It follows that the decree of the probate court must be affirmed.

It is suggested that one or more of the heirs have already received part or all of his share of such proceeds of real estate. If so, of course, such heir must credit the administrator with such sum and interest, in the distribution of the estate. It is also suggested that one or more of the heirs did direct the appellant to pay or credit to the widow the principal of the said proceeds, even if all did not. If so, such crediting in pursuance of his instructions may bind such heir, as a payment made to his order, and be reckoned with the interest as a payment to him, in the distribution. These are matters between the administrator and the individual heirs or distributees, not between him and the estate, and hence are not properly cognizable by us in this proceeding.

Decree affirmed with costs. Case remitted to probate court.

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

ALICE BROWN *vs.* WILLARD W. TUTTLE.

Androscoggin. Opinion February 6, 1888.

Husband and wife. Persons living as such without marriage.

A man and woman mutually agreed to live together as husband and wife without being married. They lived together in that unlawful relation for about thirteen years, when the man married another woman. The woman

then brought suit for services rendered in keeping house in that relation, and for money which was delivered to the defendant to be used towards paying their family expenses to enable them to continue to live together as they had agreed to do. No express promise was made by the defendant to pay the plaintiff for her services or to repay the money. The plaintiff did not expect pay. *Held*, Upon these facts the law will not imply a promise.

On report.

The opinion states the case.

W. W. Bolster, for plaintiff.

"If one accepts or knowingly avails himself of the benefit of services done for him without his authority or request, he is held to pay a reasonable compensation therefor." *Abbott* v. *Hermon*, 7 Maine, 118, 121.

It is claimed that the evidence is sufficient in this case to prove a previous request, either express or implied. 2 Green. on Ev. § 108; *True* v. *McGilvery*, 43 Maine, 485.

There must be a communion of profit to constitute a partnership, as between the parties. The communion of profit and loss is the true test of partnership. *Banchor* v. *Cilley*, 38 Maine, 553; *Knowlton* v. *Reed*, *Id.* 250.

"Every partnership is founded in a community of interest, but every community of interest does not constitute a partnership." Story on Part. § 3.

2 Chitty on Contracts, 11th Amer. ed. p. 973, says, "Where the consideration is tainted by no illegality and some of the promises only are illegal, the illegality of these does not communicate itself to, or taint the others, except when owing to some peculiarity in the contract, its parts are inseparable." Also see same Vol. p. 1001; Bishop on Contracts, § 471.

A promise of marriage is a consideration of the highest order, that is to say, a valuable consideration. 2 Blackstone, Com. * 297 and * 444.

A woman can maintain an action for breach of promise of marriage even when guilty of fornification induced thereby. Cooley on Torts, 510; see also *Carleton* v. *Woods*, 28 N. H. 290; *Robinson* v. *Green*, 3 Met. 159; 2 Chitty on Cont. 11th Amer. ed. 973, 1001; 1 Addison on Cont. p. 422, § § 285, 289, 299.

Frank L. Noble, for defendant, cited: 1 Chitty, Contr. 11 Am. Ed. 89; *Concord* v. *Rumney*, 45 N. H. 428; *Withee* v. *Brooks*, 65 Maine, 18; *White* v. *Franklin Bank*, 22 Pick. 186; 2 Chitty, Contr. 11 Am. ed. 472; *White* v. *Buss*, 3 Cush. 449.

LIBBEY, J. This action is brought to recover for the plaintiff's labor for the defendant, and money loaned to him at various times between the first of January, 1871, and May, 1884. The case comes here on the testimony of the plaintiff alone, from which it appears that in January, 1871, she and the defendant, by mutual agreement, commenced living together as husband and wife, without being lawfully married, and continued to live in that relation till May, 1884, when the defendant left her and married another woman. During all the time they lived together they held themselves out to their relatives, friends and the public, as husband and wife. As the fruit of their unlawful union, they had a son born to them in the early part of 1872. All the services rendered by the plaintiff were rendered in keeping house as the defendant's wife, and not as his servant. Nothing was said about pay. No pay was expected by the plaintiff. She says, "we agreed to keep house as man and wife;" "as man and wife that were lawfully married." They both labored, and their earnings were used to pay their family expenses. She says, "The money that I turned in was used to pay bills. The money that he earned was turned in; when I wanted a dollar I had it. He always had the money. If I wanted it I always asked him for it."

Question. "You did not consider this money loaned?"

Answer. "No, sir; it was turned in just as if I had been his wife."

Question. "At that time, did you have any expectation of receiving any money?"

Answer. "Nothing only this way: I expected to spend my days with him, no other way."

The only contention is whether upon these facts the law will imply a promise to pay for the labor performed by the plaintiff,

or for the money she earned and delivered to the defendant for the purposes stated by her.

The parties were living together in violation of the principles of morality and chastity as well as of the positive law of the state; a relation to which the court can lend no sanction. The services rendered, as well as the money furnished, were in furtherance, and for the continuation of that unlawful relation. The law will imply no promise to pay for either. If there had been an express promise for such a purpose, the court would not enforce it. *White* v. *Buss*, 3 Cush. 448; *Gilmore* v. *Woodcock*, 69 Maine, 118.

But the evidence repels any idea of a promise, either express or implied.

Plaintiff nonsuit.

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

BLACKSTONE NATIONAL BANK *vs.* RICHMOND J. LANE, trustee.

Cumberland. Opinion February 1, 1888.

Parties. Declaration. Promissory note. Demand. Money count. Venue. New trial.

An action is against a defendant in his individual capacity, notwithstanding it describes him as a trustee for another and is upon a note signed by the defendant, "trustee of the estate," etc.

It is not a variance, in an action on a promissory note, that the declaration does not mention a memorandum on the note, stating that it was held as collateral security.

Where the declaration contains a money count, in such an action, it is not necessary to aver a demand at the place where the note was payable. It is sufficient if there is proof that such a demand was in fact made.

Venues are not required in transitory actions.

A new trial will not be granted because of the admission of irrelevant and immaterial testimony, when it was harmless.

ON exceptions.

Assumpsit on a promissory note against the defendant as "trustee of the estate of George E. Davis of Boston." The

questions raised by the exceptions and the material facts are stated in the opinion.

Symonds and Libby, for plaintiff.

Venues are of no use. *Briggs* v. *Nantucket Bank*, 5 Mass. 95.

A promissory note sustains a money count. *Wild* v. *Fisher*, 4 Pick. 421; *State Bank* v. *Hurd*, 12 Mass. 171; *Eagle Bank* v. *Smith*, 5 Conn. 74; *Smith* v. *Smith*, 2 Johns. 239; *Young* v. *Adams*, 6 Mass. 189; *Carver* v. *Hayes*, 47 Maine, 258; *Atkins* v. *Brown*, 59 Maine, 90; *Felton* v. *Dickinson*, 10 Mass. 289.

The court must presume that the law of the place of contract (here Massachusetts) is the same as in this state, when not proved otherwise. *McKenzie* v. *Wardwell*, 61 Maine, 139; *Legg* v. *Legg*, 8 Mass. 100; Story, Confl. L. § 637; *Palfrey* v. *Portland S. & P. R. Co.* 4 Allen, 56; *Chase* v. *Alliance Ins. Co.* 9 Allen, 311; *Carpenter* v. *Grand Trunk Ry. Co.* 72 Maine, 388; *Murphy* v. *Collins*, 121 Mass. 6; *Stevenson* v. *Payne*, 109 Mass. 378; *Throop* v. *Hatch*, 3 Abb. Pr. 27; *Wright* v. *Delafield*, 23 Barb. 498.

As to averment and proof of demand, see *Rowe* v. *Young*, 2 Brod. & B. 165; *Wallace* v. *McConnell*, 13 Pet. 136; *Ruggles* v. *Patten*, 8 Mass. 482; *Carley* v. *Vance*, 17 Mass. 389; *Payson* v. *Whitcomb*, 15 Pick. 216; *Carter* v. *Smith*, 9 Cush. 322; *Bond* v. *Storrs*, 13 Conn. 416; *Bacon* v. *Dyer*, 12 Maine, 23; *Remick* v. *O'Kyle*, 12 Maine, 340; *McKenney* v. *Whipple*, 21 Maine, 98; *Gammon* v. *Everett*, 25 Maine, 66; *Tebbetts* v. *Pickering*, 5 Cush. 85.

Woodman and Thompson, for the defendant.

The venue in the first count of the declaration is "at Boston, in the state of Massachusetts."

"A venue should be laid to every material traversable fact." Saunders' Pleading, p. 413; Gould's Pleading, Ch. III, § 102.

The usefulness of the averment of a proper venue, even in transitory actions, has been maintained by this court. *Bean* v. *Ayers*, 67 Maine, 486.

Its necessity has been asserted by the Supreme Court of

Massachusetts. "We therefore hold a declaration without a venue, or with a wrong one, as bad in form when specially demurred to." *Briggs* v. *Nantucket Bank*, 5 Mass. 96.

In Revised Statutes, c. 32, § 10, it is provided that "in an action upon a promissory note payable at a place certain, either on demand, or on demand at or after a time specified therein, the plaintiff shall not recover unless he proves a demand made at the place of payment, prior to the commencement of the suit." The statute is plain, absolute and unqualified. The note in suit is one which falls within its terms, and its description, as set forth in the first count of the declaration, is such as to show this fact. On this point it was ingeniously contended for the plaintiff at the argument at *nisi prius* that at common law in this state, prior to this statute, no demand was necessary upon a note of this kind (*Stowe* v. *Colburn*, 30 Maine, 34), and that, in the absence of evidence as to the law of Massachusetts in regard to demand, the court will presume that it is the same as our common law, and not the same as our statute law, citing *Carpenter* v. *Grand Trunk R'y Co.* 72 Maine, 291, which was a case arising under the Act of 1871, Ch. 223.

"As to the law regulating remedies, it is clearly settled, and upon most satisfactory grounds, that every case must be governed by the law of the place where the remedy is sought. What species of process a creditor may have by arrest of the person, attachment or sequestration of real or personal property, the time, place and manner in which, and the tribunal before whom suit may be brought, are all regulated by the *lex fori*." *May* v. *Breed*, 7 Cush. 34.

It may be contended that, granting that this note was one which was binding upon the trust estate, it was not an obligation upon which an action at law could be maintained, but that the plaintiff's remedy against the trust property could only be enforced in equity, and that it will not be assumed that the plaintiff has endeavored to sue a person who is not suable at law, and that, therefore, all words referring to his trusteeship will be rejected as *descriptio personæ* and surplusage, but to the effect that a trustee may be sued at law where the demand is a

liquidated one which does not require a general accounting by the trustee of the affairs of the trust. See *Johnson* v. *Johnson*, 120 Mass. 465; *Rogers* v. *Daniell*, 8 Allen, 343; *McLaughlin* v. *Swann*, 18 Howard, 217; *Crooker* v. *Rogers*, 58 Maine, 339.

The first note is objectionable in that it varies from the note declared upon. The declaration sets forth a simple, absolute, promissory note, while the note produced has expressed upon its face that it is "collateral security for any paper now held or which may hereafter be held by said bank, signed by R. J. Lane and Pratt," a materially different contract from that declared upon, inasmuch as the contract set forth in the note is a conditional or contingent one. *Whitaker* v. *Smith*, 4 Pick. 83; *Tebbetts* v. *Pickering*, 5 Cush. 85.

WALTON, J. Action upon a promissory note, tried by the justice of the superior court without a jury, and brought into the law court on exceptions by the defendant. We fail to find any valid reason why the plaintiff is not entitled to judgment, as ordered by the justice of the superior court.

1. The objection that the defendant is sued in two capacities, and that there is, therefore, a misjoinder of counts, is not well founded. He is described in the note and in the writ as trustee of the estate of George E. Davis; but this is only *descriptio personæ*. The note is binding upon the defendant in his private and individual capacity, and we think the action is against him in that capacity and no other.

2. The alleged variance between the declaration and the note offered in evidence is not well founded. There is a memorandum inserted in the note that it is to be held by the bank as collateral security for other notes, and this memorandum is not mentioned in the declaration, but we do not think this constitutes a variance.

3. The want of an averment in the declaration that payment of the note was demanded at the Blackstone bank, where it was made payable, is no objection to a recovery. A recovery under the money count can be had without such an averment, upon proof that such a demand was in fact made; and we think the evidence that such a demand was made was amply sufficient to

justify the justice of the superior court in so finding; and he has so found. Whether such a demand was necessary, it is not necessary to determine.

4. Nor is the want of a venue in the first count in the writ any objection to a recovery. The plaintiff could recover if that count was struck out of the writ. Besides, a venue in a transitory action is entirely useless. Venues in transitory actions were long ago abolished in England, and were declared unnecessay in Massachusetts more than half a century ago (24 Pick. 398, rule 45); and we think they should be allowed to become obsolete in this state. Of course these remarks are not applicable to local actions. In local actions, a proper venue is still necessary.

5. It seems to be true, as the defendant contends, that some irrelevant and immaterial evidence was admitted into the case; but this evidence was entirely harmless, and furnishes no ground for a new trial. In fact, we find no valid ground for a new trial.

Exceptions overruled.

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

ISAAC H. LANCY and others *vs.* AARON H. RANDLETT and wife.

Somerset. Opinion February 9, 1888.

Equity. Practice. Lost deed. Amendment.

Courts of equity take jurisdiction for discovery and relief in proper cases, touching lost written instruments.

Equity withholds relief in cases where the party asking it deliberately makes the mischief from which he suffers.

If the loss of a deed be accidental, and without the fault of the grantee, thereby subjecting his title to hazard and peril for which the law gives him no adequate relief, equity will afford that relief most suited to the necessities of the case.

A bill in equity may be maintained for discovery, where the same is necessary to enable the party to obtain that relief which he cannot have without it.

A court of equity, having obtained jurisdiction of a cause for the purpose of discovery, if relief is also asked, has authority to award the same, even though the discovery shows the proper relief to be an award of damages that might be assessed in an action at law.

A bill in equity for discovery and relief, in a cause purely legal, upon the

ground of discovery, must aver that the facts sought to be discovered are material to the cause of action, and that the party has no means of proving them in a court of law, and that the discovery of them by the defendant is indespensible as proof, and a want of such averment is fatal on demurrer.

When the discovery sought, be in aid of averments that show the cause to be one of equitable jurisdiction, the averments necessary for discovery are not essential, and a demurrer will not be sustained for the want of them, but discovery must follow as a matter of course.

A bill is insufficient for the want of equity, when it fails to show the circumstances of the loss of the missing deed, or at least that the loss was occasioned without the plaintiff's fault.

That may be remedied by amendment upon such terms as the court deems proper.

On exceptions to the ruling of the court sustaining a demurrer to the bill.

Bill in equity to remove a cloud from the title to certain land in Palmyra.

The points are stated in the opinion.

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

Before the statutes making parties witnesses, discovery was the only means of ascertaining the fact, and equity uniformly compelled the discovery. *Whitfield* v. *Fausset*, 1 Ves. 392; Story's Eq. Jurisprudence, § § 83, 84; *Campell* v. *Sheldon*, 13 Pick. 19. This jurisdiction for discovery, originally existing in equity, is not displaced because now courts of law may reach a similar result. *Campbell* v. *Sheldon*, 13 Pick. 19; *East India Co.* v. *Boddam*, 9 Ves. Jur. 465; *Bromley* v. *Holland*, 7 Ves. Jr. 19; *Kemp* v. *Pryor*, 7 Ves. Jr. 249; *Toulmin* v. *Price*, 5 Ves. Jr. 235; Story's Eq. § § 83, 84; *Clapp* v. *Shephard*, 23 Pick. 228; *White* v. *Milday*, 2 Edw. Ch. 486; *King* v. *Baldwin*, 17 Johns, 384; *Varet* v. *New York Ins. Co.* 7 Paige, Ch. 560; *Sailley* v. *Elmore*, 2 Paige, Ch. 497.

Where the bill is sustained for discovery, the court will grant relief, although the same relief might be had in a court of law, to prevent multiplicity. Story's Equity Jurisprudence, § § 690, 1483, 1484, 71, 254, and note. Fonblanque's Eq. B. 6, c. 3, § 1, note. *Campbell* v. *Sheldon*, 13 Pick. 19. In *Russell* v. *Clark*, 7 Cranch, 69, the court says: "That if certain facts, essential to the merits of a claim purely legal, be exclusively within the knowl-

edge of the party against whom the claim is asserted, he may be required in a court of chancery to disclose these facts; and the court being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy." This was said by the Supreme Court of the United States, which by statute has jurisdiction in equity only where there is not a plain, adequate and complete remedy at law. A less jurisdiction than is possessed by this court. The affidavit of loss required by the English practice, is here supplied by the oath to the whole bill; but it is unnecessary in a case like this. 13 Pick. 19.

When a deed of land has been destroyed or is concealed by defendants, a party may come into equity, and the court will make a decree that plaintiffs hold and enjoy the land until defendants produce the deed or admits its destruction. "So if a deed concerning land is lost, and the party in possession prays discovery, and to be established in his possession under it, equity will relieve, for no remedy in such a case lies at law." Story's Equity, § 84. In *Dalton* v. *Coatsworth*, 1 P. Will. 733, the court decreed a conveyance as "the most effectual and reasonable decree."

While it is generally true that a discovery cannot be had except in aid of a suit at law, unless the bill makes a case for equitable relief, (*Coombs* v. *Warren*, 17 Maine, 404,) in the case at bar, the bill makes a case for removal of a cloud on title, and for quieting and perpetuating the enjoyment and possession, which afford ample ground for equitable relief. A cloud upon title is where the title is regular and valid on its face, but in fact invalid from facts to be proved by evidence. *Briggs* v. *Johnson*, 71 Maine, 235; *Chapman* v. *Brewer*, 114 U. S. 171; *Clouston* v. *Shearer*, 99 Mass. 209; *Russell* v. *Deshon*, 124 Mass. 342.

The jurisdiction in equity to remove such a cloud is nearly as old as equity process. If we attempt to sell the land the defect in record title would defeat the sale.

We cannot avail ourselves of R. S., c. 73, § 25, because we cannot produce a copy of the deed; nothing less than that will suffice under this statute. The remedy by c. 146, laws of 1883, by summoning defendant to bring suit, might suffice as to

defendant Randlett, though not so ample a remedy as equity can afford, but could not be used or applied to Mrs. Randlett, to affect her dower. She can bring no suit while her husband is alive.

"Where an instrument on which a title is founded is lost or fraudulently suppressed or withheld from the party claiming under it, a court of equity will interfere to supply the defect occasioned by the accident or suppression, and will give the same remedy which a court of common law would have given if the instrument had been forthcoming. In all such cases, therefore, a demurrer because the subject matter of the suit is within the jurisdiction of a court of law, will not hold." Daniel's Chancery, 552; 1 Story's Equity, § § 81, 184; *Bromley* v. *Holland*, 7 Vessey, Jur. 3 and note.

This court has full equity power in case of fraud or accident, and to compel discovery in such cases even if there may be a remedy at law. R. S., c. 77, § 6, IV, VIII. In this class of cases this court has jurisdiction in equity concurrent with courts of law. This court has so held as to VI of the same section. *Nash* v. *Simpson*, 78 Maine, 142. The limitation of power where there is a clear and adequate remedy at law, contained in XI, does not apply to the jurisdiction previously granted. This case is one of accident; 13 Pick. 19; and it may be of fraud, if it turns out, as we suspect, that Randlett has possession of the deed, obtained surreptitiously.

The prayer of the bill is for a new deed, not to convey title, but to furnish evidence of the title complainants now have. No harm can come to defendant by giving such deed. Rights of third persons are not involved. The apparent title is in Randlett, the actual title in complainants. We ask to have the apparent made consistent with the actual title that thus the cloud may be cleared, and we may obtain what we have a right to the full beneficial interest, available for all purposes. This would afford us a full and complete remedy, which we submit cannot be obtained at law as fully and completely, and certainly not as cheaply.

In *Dalston* v. *Coalsworth*, 1 P. Williams, 732, where a will

had been destroyed, the devisee brought a bill against the heir, and the decree was for the heir to convey. In *Lawrence* v. *Lawrence*, 42 N. H. 109, where a mortgage upon land to secure personal support had been accidentally lost, the court decreed the execution of a new mortgage. But, if any doubt exists as to this, the case made by the bill entitles the complainants to a decree establishing their title and perpetuating the possession and enjoyment in them under the prayer for other relief. *Sullivan* v. *Finnegan*, 101 Mass. 447; Story's Equity Pleadings, § 40; *Hinchley* v. *Greany*, 118 Mass. 595. Nothing in *Robinson* v. *Robinson*, 73 Maine, 170, is opposed to the argument here.

D. D. Stewart, for defendant, cited: *Stearns* v. *Page*, 7 How. 829, 830; *Carr* v. *Hilton*, 1 Curtis C. C. R. 390; *Stevens and al.* v. *Moore*, 73 Maine, 559; *Smith* v. *Greeley*, 14 N. H. 378; *Craig* v. *Kittredge*, 23 N. H. 236; *Hilton* v. *Lothrop*, 46 Maine, 297; *Rogers* v. *Durant*, 106 U. S. 645; Rev. Stat. 1871, c. 73, § 25; *Robinson* v. *Robinson*, 73 Maine, 176; 1 Stor. Eq. Jur. § 105; 1 Daniell's Ch. Pl. and Pr. 377; 1 Stor. Eq. Jur. § 78; 1 Stor. Eq. Jur. § 105, 146; 2 Pom. Eq. Jur. § 823, "Accident." *Id.* § 824, note 1; *Penny* v. *Martin*, 4 Johns. Ch. 569; *Marine Ins. Co.* v. *Hodgson*, 7 Cranch, 332; *Rogers* v. *Durant*, 106 U. S. 645; *Bank* v. *Haskins*, 101 Mass. 374; *Warren* v. *Baker*, 43 Maine, 573; *Young* v. *McGown*, 62 Maine, 61; *Cobb* v. *Dyer*, 69 Maine, 497; *Woodman* v. *Freeman*, 25 Maine, 532; *Walmsley* v. *Child*, 1 Ves. Sr. 341; *Whitfield* v. *Fausset*, 1 Ves. Sr. 392; *Dalton* v. *Coatsworth*, 1 P. Will. 731; *Dormer* v. *Fortescue*, 3 Atk. 132; S. C. 2 Atk. 282.

I find no suggestion in Adam's Equity or in Spencer's Eq. Jur. that courts of equity in England have any jurisdiction over deeds lost by the party holding them, without the fault or agency of the defendant, and I find no precedent for such a bill in Hughes' Eq. Draftsman, or in any English or American book of precendents in equity, within my reach; and I have Smith's Maddocks, Blakes and Hoffmans, Daniell's Chancery Pr., Whitworth's Eq. Prec. Curtis' Eq. Prec. Willis' Eq. Pl. & Pr. and Story's Pl. I have been unable to find a reported case in New England,

unless *Lawrence* v. *Lawrence*, 42 N. H. 109, is to be so regarded. In this state the precise question here raised was decided adversely to the plaintiff by this court in *Robinson* v. *Robinson*, 73 Maine, 170. From the time of Blackstone to the present day, the remedy at law, as Judge Blackstone says, has been full and ample. 3 Blackstone's Com. 431; R. S., c. 1883, c. 107 § § 22, 23; R. S., c. 104 § 47, c. 73, § 25; *Pratt* v. *Pond*, 5 Allen, 59; *Metcalf* v. *Cady*, 8 Allen, 589; *Boardman* v. *Jackson*, 119 Mass. 161, 163; *Bassett* v. *Brown*, 100 Mass. 356.

There being no statute provision in Massachusetts like section 6, of c. 104, of our Revised Statutes, but the common law being unchanged in that state, a party in possession cannot bring a writ of entry. *Clouston* v. *Shearer*, 99 Mass. 212; *Hill* v. *Andrews*, 12 Cush. 185; *Dewey* v. *Bulkley*, 1 Gray, 417. The complainants have therefore a plain and adequate remedy at law. *Lewis* v. *Cocks*, 23 Wall. 466.

"The statute giving to the court full equity jurisdiction," said CHAPMAN, J., in delivering the opinion of the Supreme Court of Massachusetts in *Pratt* v. *Pond*, 5 Allen, 59, "expressly limits it to cases where the parties have not a plain, adequate and complete remedy at law. And the remedy at law must refer to remedies at law as they exist under our statutes, and according to our course of practice." *Suter* v. *Matthews*, 115 Mass. 255; *Pratt* v. *Pond*, 5 Allen, 59; *Jones* v. *Newhall*, 115 Mass. 251. So with the statute of Maine, conferring jurisdiction on this court. Stat. 1874 c. 175; R. S., 1883, c. 77, § 6, art. II.

Our statute provisions, therefore, afford ample and specific remedy to the complainants, and this bill cannot be maintained. *Stare decisis* may well be applied. *Robinson* v. *Robinson*, 73 Maine, 176; *Fletcher* v. *Harmon*, 3 New Eng. Rep. 245.

HASKELL, J. The orators ask to be confirmed in their title to land clouded by the loss of their title deed prior to its record.

The respondents demur upon three grounds.

I. For the want of jurisdiction in equity over the subject matter of the bill.

II. For the want of equity shown on the face of the bill.

III. Because of a plain and adequate remedy at law.

Equity jurisdiction for discovery and relief in proper cases touching lost written instruments is as old as equity itself. Sto. Eq. Jur. § § 79, 84; *Whitfield* v. *Fausset*, 1 Ves. 392; *Blight's Heirs* v. *Banks*, 6 T. B. Monroe, 192; Pom. Eq. Jur. § 1376, note 3; *Campbell* v. *Sheldon*, 13 Pick. 8.

The bill avers more than a dozen years' undisturbed possession under the lost deed, and that the grantor has repeatedly refused to execute a new deed in its stead, and puts searching interrogatories for answer upon oath concerning the execution and delivery and loss of the missing deed; but it does not aver that the loss was not without even the culpable negligence of the orators themselves; nor does it suggest that the respondents were in any way responsible or chargeable for its loss or destruction.

Equity withholds relief in causes when the party asking it deliberately makes the mischief from which he suffers.

If the loss of a deed be accidental and without the fault of the grantee, thereby subjecting his title to hazard and peril, from which the law gives him no adequate relief, equity will afford that relief most suited to the necessities of the case. *Hord* v. *Baugh*, 7 Humph. 576; *Dalston* v. *Coalsworth*, 1 P. Wms. 731, 733.

If the bill be for discovery, containing the averments essential to a bill of that sort, and the discovery is had showing facts that warrant relief in equity or at law, the court having obtained jurisdiction of the cause may award such relief as proper for courts of equity to grant, if relief as well as discovery be prayed for in the bill. Stor. Eq. Jur. § § 71, 72; *Russell* v. *Clarke's Ex'rs*, 7 Cranch, 69. If the discovery shows the proper relief to be an award of damages that ought to be ascertained by a jury, an issue can be framed and tried in the same suit without sending the parties to an action at law. R. S., c. 77 § 30.

But to obtain jurisdiction for relief in equity, over a cause purely legal, upon the ground of discovery, the bill must aver that the facts sought to be discovered are material to the cause of action, and that the orator has no means of proving them in a court of law, and that the discovery of them by respondent is indispensible as proof. Pom. Eq. Jur. § 229; Stor. Eq. Jur. § 74, and cases cited; and the want of such averment is fatal

on demurrer to the bill when jurisdiction is sought in equity for discovery and relief solely upon the ground of discovery. So, if by plea in such case these facts be traversed, it would seem that the issue must be decided in favor of the truth of the bill, before discovery could be decreed.

If the discovery, as in most cases, be in aid of the averments of the bill that show the cause to be one of equitable jurisdiction, then the averments of necessity for discovery are not essential, and a demurrer cannot be sustained for the want of them, but discovery must follow as a matter of course.

The orators' bill is insufficient for the want of equity, inasmuch as it fails to show the circumstances of the loss of the missing deed, or at least that the loss was occasioned without the orators' fault. For aught that appears in the bill, the orators may have designedly destroyed the missing deed for some fraudulent purpose. For this reason, the demurrer is well taken and the exceptions must be overruled. *Hoddy* v. *Hoard*, 12 Ind. 474. Nor can the bill be maintained for discovery and relief upon the ground of discovery alone, for the necessary averments in such bill are wanting; but, if the orators can truthfully amend their bill so as to come within the reasoning of this opinion, they should be allowed to do so upon such terms as the court below shall consider just.

If the deed has been lost without fault for which the orators are in equity chargeable, it would seem that they have no plain and adequate remedy at law. It is true that, although the deed has not been recorded, its contents may be proved by parol in an action at law; *Moses* v. *Morse*, 74 Maine, 472; but the cloud is upon the record title, and the remedies pointed out by the learned counsellor for respondents fail to heal the apparent defect of title shown by the registry of deeds. That cloud can only be removed by an appropriate decree in a court of equity.

Exceptions overruled.

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

EDMUND F. WEBB *vs.* FRAZIER GILMAN.

Kennebec. Opinion February 11, 1888.

Assault. Trespass. Exemplary damages. Evidence.

In an action for a wanton, brutal and malicious assault, with a deadly weapon accompanied with threats to take the plaintiff's life, and without any provocation, exemplary damages may be allowed.

In such an action, a verdict of five thousand dollars is not excessive.

Evidence of the pecuniary ability of the defendant in such an action is admissible.

Malice is a pre-requisite in exemplary damages and may be a factor in actual damages.

Instructions stated in which the court perceived no error.

ON exceptions and motion to set aside the verdict as excessive and as being against law and evidence.

The opinion states the case.

At the trial the presiding judge, among other things, instructed the jury as follows:

"And in estimating them, it is proper that the jury should take into consideration always, all that is developed in the case, everything that there is by way of aggravation which induced the defendant to commit the assault, or what there is that tends to show malice on his part, as aggravating his assault upon the plaintiff. These are all matters which you should consider in estimating the actual damages."

The presiding judge further instructed the jury as follows:

"Then, gentlemen, there is another element in a case like this that is proper for the consideration of a jury, and that is what is termed exemplary damages, damages by way of example, damages by way of punishment of a defendant who wilfully, wantonly or maliciously commits a wrong upon another. And this element has no regard to the actual damages which the plaintiff may have suffered. It is entirely independent of it. It is one which the jury is not required as a matter of law to give damages for, but

it is one that the jury may give damages for. In proper cases, where, from the evidence, the jury is satisfied that the assault was malicious, wilful or grossly wanton, then it is a proper case for exemplary damages, which shall teach the defendant not to repeat the offence, damages which shall say to all citizens, you must obey the law and not commit a like offence. This is an element which especially addresses itself to your discretion."

The presiding judge further instructed the jury as follows, among other things:

"The plaintiff claims that the interview was a pleasant one. Mr. North tells you that he heard nothing to the contrary. The defendant tells you it was, with the exception, that Webb told him that if he would not agree to sell upon terms that would be acceptible to the corporation, then they would condemn his land, that is as he understood it. He tells you that the process under the laws would go on, for the purpose of taking and paying for the land."

"He went to the village of Eden, he called to his aid a Mr. Rice and they rode from the village of Eden, about two miles, more or less, to the point where he intercepted the plaintiff and the sheriff in their travel. For what purpose did he call to his aid Mr. Rice, commanding him to get a whip and go with him? Was it his purpose, then, merely to go and intercept the sheriff and the plaintiff in traveling across a lot of his land in a trail? Why, you remember I put the question to him, if the sheriff was driving, directing the team, if he had objection to their traveling across his land, why he did not address the objection to the sheriff, and his answer, as I understood it and remember, was, in substance, that that would be a thing unknown there, to intercept a traveler merely because he was traveling in a trail across a lot of land. Did he go there for that purpose?"

The presiding judge further instructed the jury as follows:

"Did he go armed? For what purpose? You must judge of it. What were his motives, what were the desires of his heart? Why, he tells you here upon the stand, that if the plaintiff had taken one of the pistols and got out of the carriage at any distance, thirty paces or any distance from him, he would have

shot him there, with murder in his heart, ready to commit it if he could have the opportunity which he desired, and he told you in substance, that if it was what they call a fair fight, he should not apprehend much danger of punishment in that territory."

The presiding judge further instructed the jury as follows:

"But it is claimed by his counsel that damages of this character should not be allowed to the plaintiff because he was guilty of great rashness and folly in going to see the defendant at all, that actual malice had existed between the parties for years, and that the plaintiff was guilty of such indiscretion, such rashness in going to the defendant to try and make a contract with him in regard to his land, and if not to have the proper process served, that if he was beaten, if he was assaulted by the defendant, he ought not to have anything by way of exemplary damages. Well, gentlemen, I have known many cases of this character, where a defence was made to a claim for exemplary damages on the ground that the parties were friendly before the affray, and that the affray was merely the result of sudden provocation, which excited to great anger, sufficient to overthrow the reason for the moment, and that is an answer properly addressed to a jury in a case of this kind; but I think I have never heard before a claim of a defence to this class of damages based upon the ground of actual malice existing, on the part of the defendant for years, culminating in a trespass, in an assault."

To the foregoing instructions, and especially the instruction that the jury were authorized to find and allow exemplary damages in this case, the defendant alleged exceptions.

Appleton Webb, (*Baker and Cornish* with him) for the plaintiff.

Rules of court are as binding as a statute. *Maberry* v. *Morse*, 43 Maine, 176; *Thompson* v. *Hatch*, 3 Pick. 516; *Tripp* v. *Brownell*, 2 Gray, 402; *Witzler* v. *Collins*, 70 Maine, 290.

Evidence of defendant's rank and of the amount of his property is admissible. 2 Greenl. Ev. § 269; *Bennett* v. *Hyde*, 6 Conn. 27; *Goddard* v. *Grand Trunk Ry. Co.* 57 Maine, 202; *Pendleton* v. *Davis*, 1 Jones, L. (N. C.) 98; *Humphries* v. *Parker*, 52 Maine, 502; *McNamara* v. *King*, 7 Ill. 432;

Hosley v. *Brooks*, 20 Ill. 115; *Karney* v. *Paisley*, 13 Iowa, 89; *Bell* v. *Morrison*, 27 Miss. 68; *Shute* v. *Barrett*, 7 Pick. 82; *Adcock* v. *Marsh*, 8 Ired. L. 360; *Tillotson* v. *Cheetham*, 3 Johns. 56; *Huckle* v. *Money*, 2 Wils. 206; *Johnson* v. *Smith*, 64 Maine, 553; 1 Suth. Dam. 745; *Jones* v. *Jones*, 71 Ill. 562; *McCarthy* v. *Niskern*, 22 Minn. 90; *Winn* v. *Peckham*, 42 Wis. 493; *Birchard* v. *Booth*, 4 Wis. 67; *Barnes* v. *Martin*, 15 Wis. 24; *Whitefield* v. *Westbrook*, 40 Miss. 311.

Plaintiff may recover for mental anxiety, wounded sensibility, etc., and exemplary damages. 43 Maine, 163; *Pike* v. *Dilling*, 48 Maine, 539; *Fry* v. *Bennett*, 4 Duer. 258; *Taylor* v. *Church*, 8 N. Y. 460; *Day* v. *Woodworth*, 13 How. 371; *Taylor* v. *Grand Trunk R. Co.* 48 N. H. 304; S. C. 2 Am. R. 240; *Hoadley* v. *Watson*, 45 Vt. 289; *Bixby* v. *Dunlap*, 56 N. H. 456 (22 Am. R. 484); *Phila. W. & B. R. Co.* v. *Larkin*, 47 Md. 155 (28 Am. R. 445); *Borland* v. *Barrett*, 44 Am. R. 155; *Dibble* v. *Morris*, 26 Conn. 426; *Merrills* v. *Tariff M'f'g Co.* 10 Conn. 387; *Stowe* v. *Heywood*, 7 Allen, 123; *Smith* v. *Holcomb*, 99 Mass. 554; *Hawes* v. *Knowles*, 114 Mass. 519.

The charge required of the presiding justice is not to be tested and its correctness determined by disconnected and isolated remarks. It must be erroneous and injurious to affect the verdict. R. S., c. 82, § 83; *State* v. *Benner*, 64 Maine, 267; *Perkins* v. *Oxford*, 66 Maine, 545; *Grows* v. *Maine Cen. R. Co.* 69 Maine, 412; *McLellan* v. *Wheeler*, 70 Maine, 285; *State* v. *Benner*, 64 Maine, 291; *State* v. *Smith*, 65 Maine, 269; *Burt* v. *Merchants' Ins. Co.* 115 Mass. 16; *Magniac* v. *Thompson*, 7 Pet. 348; *Jackman* v. *Bowker*, 4 Met. 236; *Nason* v. *U. S.* 1 Gall. 53; *Eddy* v. *Gray*, 4 Allen, 435; *People* v. *Doyall*, 48 Cal. 85; *Melledge* v. *Boston Iron Co.* 5 Cush. 180; *Dole* v. *Thurlow*, 12 Met. 157; *Dodge* v. *Emerson*, 131 Mass. 469; *Noyes* v. *Shepherd*, 30 Maine, 173; *Howard* v. *Miner*, 20 Maine, 325; *Johnson* v. *Blackman*, 11 Conn. 342; *Branch* v. *Doane*, 17 Conn. 402; *Woodman* v. *Chesley*, 39 Maine, 45; *Copeland* v. *Wadleigh*, 7 Maine, 141; *Springer* v. *Bowdoinham*, 7 Maine, 442; *Pike* v. *Warren*, 15 Maine,

390; *Hathaway* v. *Crosby*, 17 Maine, 448; *Osgood* v. *Lansil*, 33 Maine, 360; *French* v. *Stanley*, 21 Maine, 512.

L. D. Carver, for defendant.

It is a well known rule of law governing in actions of this kind, in those states where exemplary damages are allowed, that, where the jury find the defendant was actuated by malice in committing the wrong, they may in their discretion, give such damages therefor, but are not required to do so, as a matter of law. *Johnson* v. *Smith*, 64 Maine, 553; *Goddard* v. *Grand Trunk R. R. Co.* 57 Maine, 202; *Pike* v. *Dilling*, 48 Maine, 539; Mayne, Dam. § 791; 2 Sedg. Dam. 332, and notes.

The question of malice is for the jury; and the question, whether exemplary damages are given therefor or not, is also for the jury. *Graham* v. *Pacific R. R. Co.* 66 Mo. 536; 54 Ga. 224.

And it is error to instruct the jury to give exemplary damages. *Jerome* v. *Smith*, 48 Vt. 230, 403; 33 Ill. 473; 40 Miss. 374; Field, Dam. § 76.

The same rule prevails in reference to matters in aggravation of actual damages, in those states where exemplary damages are not allowed; but all damages are awarded as a compensation to plaintiff. *Worster* v. *Canal Bridge*, 16 Pick. 541; *Bixby* v. *Dunlap*, 56 N. H. 456; *Hawes* v. *Knowles*, 114 Mass. 518; 49 Am. Rep. 366; 7 Col. 541.

Plaintiff is not entitled to exemplary damages, or damages from circumstances in aggravation of actual damages, as a matter of legal right. *Boardman* v. *Goldsmith*, 48 Vt. 403; *Snow* v. *Carpenter*, 49 Vt. 426; *Hopkins* v. *A. & St. L. R. R. Co.* 36 N. H. 9.

It is an equally well known rule in cases of tort, that if the unlawfulness of the act is admitted by defendant, or proved by testimony of witnesses, the jury are required, as a matter of law, to award the plaintiff actual damages, regardless of the intention of the defendant in committing the act. *Prentiss* v. *Shaw*, 56 Maine, 427.

Actual damages must be allowed where wrong intention is wanting; even infants and *non compotes* are liable for actual

damages. 3 Barb. (N. Y.) 647; *Morse* v. *Crawford*, 17 Vt. 499; *Bullock* v. *Babcock*, 3 Wend. 391; 26 Barb. 172; 29 Barb. 218; Shear. & Red. on Negl. § 557.

Mr. Mayne declares that malice may be shown. Mayne, Dam. § 25.

In *Childs* v. *Drake*, 2 Met. (Ky.) 146, the court says, "every recovery for a personal injury, with or without vindictive damages, operates in some degree as a punishment, but it is a punishment which results from the redress of a private wrong. The damages are allowed as a compensation for the loss sustained, but the jury are permitted to give exemplary damages on account of the nature of the injury.

Mr. Sedgwick lays down the broad proposition, that wherever the elements of fraud, malice, gross negligence or oppression mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts an entirely different rule. It permits vindictive or exemplary damages. 1 Sedg. on Dam. p. 39.

The term exemplary damages seems to have heretofore been used to designate, in general, those damages only which are incapable of any fixed rules, and lie in the discretion of the jury, such as damages for mental anguish, or personal indignity, disgrace, etc., and these so far only as the sufferer is himself affected. *Austin* v. *Wilson*, 4 Cush. 273.

In *Churchill* v. *Watson*, 5 Day, R. 144, SMITH, Judge, says, "In actions founded in a tort, the first object of a jury is to remunerate a plaintiff for all the real visible damage he has sustained; in addition to the actual damage sustained by plaintiff the jury are at liberty to give a further sum, called exemplary damages. 3 Day, R. 447.

The tort is aggravated by the evil motive; and on this rests the rule of exemplary damages. 2 Add. on Torts, and notes, 253.

In *Prentiss* v. *Shaw*, 56 Maine, 427, Judge KENT, in speaking of exemplary damages, says, "These, as our law now stands, are made up of injuries partly private and partly public in their nature. They evidently and necessarily require a consideration of all the facts in any way clearly and fairly connected

with the trespass, and bearing upon the motives, provocation and conduct of the parties in the controversy."

If weight of authority and decisions are of any avail, this court will find it difficult to sustain the ruling of the presiding judge on this point. *Fay* v. *Parker*, 53 N. H. 342.

The court in Indiana, discussing the two theories, compensatory and actual and exemplary damages, say, "It matters little to the offender under what form he pays damages, if he pays but once." 56 Ind. 284; 34 Am. Rep. 34; 63 Ind. 193; 49 Am. Rep. 366.

Mr. Sedgwick, in his work on damages, concludes that the difference between himself and his critics, who hold to the theory that all damages are compensatory, is, after all, little more than a verbal one.

That the elements to be considered in assessing exemplary damages are not the same as those considered in estimating actual damages, but are additional to and other than the elements going to make up the latter kind of damages, the following cases will show: *Prentiss* v. *Shaw*, 56 Maine, 427; 53 N. H. 342; 27 Am. Dec. 684; 17 Fed. Rep. 912; *Murphy* v. *Hobbs*, 49 Am. Rep. 366; Field, Dam. 26–73; *Hoadley* v. *Watson*, 48 Vt. 289; 3 Wis. 424; *Dibble* v. *Morris*, 26 Conn. 416; *Bixby* v. *Dunlap*, 56 N. H. 456; *Howes* v. *Knowles*, 114 Mass. 518; *Schindel* v. *Schindel*, 12 Md. 108; *Childs* v. *Drake*, 2 Met. (Ky.) 146; *Kimball* v. *Holmes*, 60 N. H. 163; *Cook* v. *Ellis*, 6 Hill, (N. Y.) 466, and cases heretofore cited.

It is maintained that the jury in such cases should not only be allowed to assess such damages as directly result from the wrong, including losses more or less remote from the injurious cause, for which a pecuniary estimate can be made, but in addition thereto, in aggravated cases, such further damages in their discretion as will furnish an example and punish the wrong doer; that many elements, considered proper under the other theory, in estimating damages, such as suffering to the mind, the insult, the indignity and sense of wrong, arising from the nature of the wrong, and the malice of the defendant, are not really capable of any definite proof, or any certain pecuniary estimate; that for many wrongs

there would be no punishment or compensation except such as is imposed by the jury in exemplary damages; and that, practically, the same result is attained by either method. Field on Dam. § 26; 2 Greenl. Ev. § 266; Sedg. Dam. 3d ed. appendix and notes.

The presiding justice told the jury that exemplary damages had no regard to the actual damages which the plaintiff may have suffered. This was clearly erroneous. It is conceded by all courts and law givers, in commenting upon the law of damages in torts, that all damages, actual, compensatory and exemplary, operate alike as a punishment to the defendant. *Cook* v. *Ellis*, 6 Hill, (N. Y.) 466; *Childs* v. *Drake*, 2 Met. (Ky.) 146; *Bixby* v. *Dunlap*, 56 N. H. 456; *Goddard* v. *G. T. R. R. Co.* 57 Maine, 202.

In striking contrast to the instructions in the case at bar upon this point, are the instructions of the justice at *nisi prius* in the case *Goddard* v. *Grand Trunk Ry. Co.* 57 Maine, 202.

In fixing the amount of exemplary damages, it is often given as a rule, that the jury must have regard to the extent of the wantonness or malice evinced by the defendant. Mayne on Damages, § 50, and note; *Boardman* v. *Goldsmith*, 48 Vt. 403; 2 Met. (Ky.) 146; Sed. Dam. 330, and notes.

Damages are sometimes called vindictive, exemplary or punitive, but these terms do not imply that the award of such damages is intended by law as a punishment for violation of criminal law. Such damages are not a sum awarded in addition to actual damages, and separate from it; but are the whole damages estimated by the more liberal rules which prevail in the case of a malicious wrong. Being intended for a compensation for a wrong, and not as a punishment for the violation of the criminal law, such damages are not open to the objection that they expose the defendant to a double punishment. 53 N. H. 342; 2 Cal. 54; *Cole* v. *Tucker*, 6 Texas, 266; *Etchberry* v. *Levielle*, 2 Hilt. (N. Y.) 45; Mayne, Dam. § 48; 41 Ill. 62; 48 Ill. 261.

The very term, exemplary damages, is destroyed and rendered meaningless by the elimination and exclusion therefrom of every

idea of damages and compensation for something to the plaintiff. The blending of the interests of the individual and of the public, spoken of by Mr. Sedgwick, is entirely wanting in such instructions. That some damages to the plaintiff or compensation therefor are necessary to the successful support of this branch of the case, the following cases show: 21 Howard, 202, "Reparation to plaintiff and act as an adequate punishment to defendant." 45 Vt. 289, "Given in enhancement of ordinary damages." 26 Conn. 416; 114 Mass. 518; 7 Allen, 118; 56 N. H. 456; *Prentiss* v. *Shaw*, 56 Maine, 427; 1 Otto, 489; 1 Sedg. Dam. 7th ed. p. 217, note "a;" Field, Dam. § 25, 26, 78 and note; 27 Am. Dec. 685, notes; 56 Ind. 284; 17 Fed. Rep. 912; 21 Iowa, 379; 12 Md. 108; 10 Law Rep. 56; 1 Sedg. Dam. 58, 53; 48 Maine, 543.

Sedgwick declares the difference between the two theories but little more than a difference of terms used: "Every recovery, with or without vindictive damages, operates as a punishment, but it is a punishment that results from a redress of a private wrong. It is the increase of damages resulting from the nature of the offence and intention of the defendant that is denominated punitive damages." *Childs* v. *Drake*, 2 Met. (Ky.) 146.

Smart money is incidentally compensatory, and at the same time serves as a punishment. *Cook* v. *Ellis*, 6 Hill, (N. Y.) 466. In *Childs* v. *Drake*, 2 Met. (Ky.) 146, the court says, "Vindictive damages operate, it is true, by way of punishment, but they are allowed as compensatory, for the private injury complained of in the action."

The arguments against punitive damages proceed upon the erroneous assumption that such damages are inflicted by way of criminal punishment, and are not given by way of compensation for the injury complained of. They operate as a punishment, but are allowed by way of remuneration for the wrong suffered. They are proportioned to the aggravating circumstances and the reckless character of the act. 56 N. H. 456; 27 Am. Dec. 684 and notes; 50 Am. Dec. 400 and notes; 6 Hill, 466.

Punishment of defendant in a criminal action for same offence cannot be shown in mitigation of exemplary damages, because

plaintiff's wrongs and compensation therefor are involved in and make up an undivided portion of such damages. *Childs* v. *Drake*, 2 Met. (Ky.) 146.

In some jurisdictions, exemplary damages, as commonly understood even, are not allowed when the same wrong is punishable criminally. *Austin* v. *Wilson*, 4 Cush. 273; *Humphries* v. *Johnson*, 20 Ind. 190; *Murphy* v. *Hobbs*, 7 Col. 541; 49 Am. Rep. 366; 2 Greenl. Ev. 235; 3 Parson's Contracts, 171; 1 Sutherland, Dam. 716; Field, Dam. 64.

In other jurisdictions, criminal punishment may be shown in mitigation of them. 23 Pa. St. 424; 7 Jones, (N. C.) 64; Phelps, (N. C.) 342.

The only case similar to this, or where a similar rule for exemplary damages was given, has already been referred to. *Fay* v. *Parker*, 53 N. H. 342, where exceptions were sustained against the rule given at *nisi prius*.

Smith v. *Bagwell*, 19 Fla. 117 (45 Am. Rep. 12) is a case where this question of double punishment was raised and the constitutional question discussed at great length, and many of the cases examined with great care.

In *Henrickson* v. *Kingsbury*, 21 Iowa, 380, the court say they are called punitive damages by way of distinction from pecuniary damages.

In *Boetcher* v. *Staples*, 27 Minn. 308, 38 Am. Rep. 295, the court say, "They are intended in some measure as a punishment upon the defendant."

In *Cole* v. *Tucker*, 6 Texas, 266, the court say, Compensatory damages are given when the injury is not tainted with fraud, malice, etc.; but when these elements intervene, another ingredient is added to ordinary constituents, viz: The sense of wrong and insult.

In *Borland* v. *Barrett*, 76 Va. 128, 44 Am. Rep. 152, the court say, Such damages, although sometimes denominated vindictive, are in their nature compensatory as much as those given for bodily pain, loss of time and expense incurred.

In the following cases, where exemplary damages were allowed and sustained against the constitutional objection, it will be found

that they invariably had some element of compensation to the plaintiff to sustain them, and distinguish them from a penalty. *Wilson* v. *Middleton*, 2 Cal. 54; *Voltz* v. *Blackmar*, 64 N. Y. 440; *Kiff* v. *Yowmans*, 20 Hun. 123; *Millard* v. *Brown*, 35 N. Y. 297; *Cook* v. *Ellis*, 6 Hill, 466; *Brown* v. *Swineford*, 44 Wis. 282; 28 Am. Rep. 582; *Corwan* v. *Watson*, 18 Mo. 71; *Hoadley* v. *Watson*, 45 Vt. 289; 12 Am. Rep. 197; *Smith* v. *Holcomb*, 99 Mass. 552; *Bixby* v. *Dunlap*, 56 N. H. 456; 22 Am. Rep. 475; *Day* v. *Woodworth*, 13 How. 363.

In *Prentiss* v. *Shaw*, 56 Maine, 427, J. KENT says, The damages, as our law now stands, are made up of injuries partly private and partly public.

In *Pike* v. *Dilling*, 48 Maine, 539, the citations there given and the language of the court, clearly indicate that compensation for some injury to plaintiff was regarded as involved and inherent in the award of exemplary damages.

In *Goddard* v. *Grand Trunk Ry. Co.* 57 Maine, 202, the presiding justice instructed the jury to consider all the elements of damages, in estimating actual damages given in this case except the malice of defendant.

S. S. Brown, also for defendant, in an able argument, contended that the motion to set aside the verdict should be sustained.

HASKELL, J. Trespass *vi et armis*, tried upon the plea of not guilty, on motion for a new trial because the verdict is against law and evidence and the weight of evidence, and because the damages assessed at five thousand dollars, are excessive, and on exceptions.

I. The evidence discloses a most wanton, brutal and malicious assault upon the plaintiff by the defendant with deadly weapons, accompanied with threats to take the plaintiff's life, and without any provocation whatever.

To hold that the verdict is against law and evidence would be absurd; and to say that it is excessive would be invading the province of the jury, no member of which is shown to have been actuated by any improper motive. It is a case where exemplary or punitive damages are clearly warranted by the evidence, and

the court cannot say the jury has awarded a sum larger than is reasonable and proper, and necessary to have that salutary effect intended by the law in such cases. *Goddard* v. *The Grand Trunk Railway Co.* 57 Maine, 202.

II. It is settled in this state, that evidence of the actual pecuniary ability of the defendant may be shown to bear upon the amount of damages, necessary in such cases to work obedience to the law and a warning to others not to commit a like offense. The evidence, therefore, admitted tending to show the number of the defendant's herd of horses and cattle was competent for that purpose. *Johnson* v. *Smith*, 64 Maine, 553.

III. The court instructed the jury that evidence, tending to show malice by the defendant as aggravating his assault upon the plaintiff, might be considered in assessing the actual damages sustained, even though exemplary or punitive damages should be added thereto.

Exemplary or punitive damages cannot be demanded as a matter of right; actual damages may be; and whatever elements make the measure for the latter cannot be withheld or excluded therefrom because the former may or may not be awarded. Malice is a pre-requisite to the former, and may be a factor in the latter. The plaintiff had a right to demand and recover his actual damages; and if the assault was premeditated and malicious, can it be said to have worked no greater injury than if it had been provoked or resulted from mistake? If one assaults another, mistaking him for an enemy who had wronged him, would the injury be as great, and the suffering as keen and intense, and continue so long after the mistake became known, as where the insult and injury must forever remain burning like a red hot cinder in the eye?

The actual injury to one's person may be the same, whether inflicted by design or accident; but the body of a man is of little moment, compared with the life that temporarily abides in it. Mental suffering may not result from bodily harm alone, but most keenly may flow from those causes tending to degrade and humiliate the spirit and self respect of a man. *James* v. *Campbell*,

5 C. & P. 362; *Meagher* v. *Driscoll*, 99 Mass. 281; *Hawes* v. *Knowles*, 114 Mass. 519.

IV. It is settled law in this state, that exemplary damages may be allowed, in cases like the one at bar, in addition to the actual damages sustained. *Pike* v. *Dilling*, 48 Maine, 539; *Goddard* v. *Grand Trunk Railway Co.* 57 Maine, 202; *Johnson* v. *Smith*, 64 Maine, 553.

V. The presiding justice properly reviewed the evidence, and submitted to the jury, in a pointed and appropriate manner, the various issues upon which it was their duty to pass, and the court perceives no error, either of manner or substance, in those portions of the charge excepted to.

Motion and exceptions overruled.

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

RUFUS SMITH *vs.* INHABITANTS of BRUNSWICK.

Cumberland. Opinion February 20, 1888.

New trial. Estoppel. Prior judgment. Former action.

In an action of case, to recover damages for an alleged injury to the plaintiff's premises, by reason of the wrongful acts of the defendants in constructing a ditch by which, for a period of six years prior to the commencement of the suit, large quantities of water were conducted across the defendants' land and discharged upon and against the premises of the plaintiff, thereby causing his land to be undermined, excavated, and otherwise damaged; *Held*, that a new trial will not be granted, upon a motion to set aside the verdict where the evidence is conflicting, and the case has been left to the determination of the jury under a clear and impartial charge.

Nor does the fact that a verdict has been rendered in favor of the defendants in a former action between the same parties, brought more than six years before the commencement of this suit, necessarily constitute a bar to the present action.

It is not enough, by way of estoppel, to show that the matter in controversy may have been determined in a former litigation between the same parties. It must, in order to constitute a bar, be made to appear affirmatively by legal evidence that it was in fact determined.

ON motion of the defendants to set aside the verdict and for new trial.

The opinion states the case.

John J. Perry and Dennis A. Meaher, for the plaintiff.

When a verdict may be set aside. *Elliott* v. *Grant*, 59 Maine, 418; *Hunter* v. *Heath*, 67 Maine, 507; *Staples* v. *Wellington*, 58, Maine, 453; *Enfield* v. *Buswell*, 62 Maine, 128; *Glidden* v. *Dunlap*, 28 Maine, 379; *Handly* v. *Call*, 30 Maine, 9; *Franklin Bank* v. *Pratt*, 31 Maine, 501; *West Gardiner* v. *Farmingdale*, 36 Maine, 252; *Weld* v. *Chadbourne*, 37 Maine, 221; *Coombs* v. *Topsham*, 38 Maine, 204; *Bryant* v. *Glidden*, 39 Maine, 458; *Hunnewell* v. *Hobart*, 40 Maine, 28; *Sawyer* v. *Nichols*, 40 Maine, 212; *Milo* v. *Gardiner*, 41 Maine, 549; *Hill* v. *Nash*, 41 Maine, 585; *Beal* v. *Cunningham*, 42 Maine, 362; *Googins* v. *Gilmore*, 47 Maine, 9; *Williams* v. *Baker*, 49 Maine, 427; *Peabody* v. *Hewett*, 52 Maine, 33; *Farnum* v. *Virgin*, 52 Maine, 576; *Gleason* v. *Bremen*, 50 Maine, 222; *Drown* v. *Smith*, 52 Maine, 141; *Stone* v. *Augusta*, 46 Maine, 127; *Readfield* v. *Shaver*, 50 Maine, 36; *Darby* v. *Hayford*, 56 Maine, 246; *Bishop* v. *Williamson*, 8 Maine, 162.

As to flowage of surface water. *Bangor* v. *Lansil*, 51 Maine, 521; *Gannon* v. *Hargadon*, 10 Allen, 106; *Flagg* v. *Worcester*, 13 Gray, 601; *Chase* v. *Silverstone*, 62 Maine, 175; *Dickinson* v. *Worcester*, 7 Allen, 22; Angell, Watercourse, 6th. ed. 136, 138; *White* v. *Chapin*, 12 Allen, 516; *Miller* v. *Laubach*, 47 Pa. 154; *Tillotson* v. *Smith*, 32 N. H. 90; *Butler* v. *Peck*, 16 Ohio St. 334.

Weston Thompson, for defendants.

When the railroad was built (about 1846), the embankment and the weight of it prevented the further escape of water from the place by percolation, so that it began to accumulate on the town farm of the defendants and on adjacent lands. See *Greeley* v. *Maine Central*, 53 Maine, 200.

Now the question whether the town is liable for a washout at that place, caused by that ditch, has been once tried, and settled by the judgment rendered in the first case. The town is not bound to try that question over again with Smith as often as he can find means to sue. The judgment settles the question of liability on the conceded facts. It is a bar to this action, unless the plaintiff shows that since the former action was begun, the

town has done something to make the flow of water there wrongful. It was not necessary to plead the judgment in bar. 53 Maine, 149, 258; 49 Maine, 68; 1 Greenl. Ev. 531.

A watercourse, which may not be lawfully obstructed or diverted is not made by human agency, but is a natural stream, having defined banks and bed through which water usually, though perhaps not constantly flows. Angell on Watercourses, 4 to 4 *d*.

The doctrine of *Greeley* v. *Maine Central*, before cited, that no action lies for turning mere surface water upon land of another, is as well settled and as certain as anything in the law. The same rule applies to swamp water and spring water as to surface water. Angell on Watercourses, 108 *a* to 109; *Morrison* v. *Bucksport, R. R. Co.* 67 Maine, 353; *Stanchfield* v. *Newton*, 142 Mass. 110; *Swett* v. *Cutts*, 50 N. H. 439; S. C. 9 Am. Rep. 276; *Hoyt* v. *City of Hudson*, 27 Wis. 656; S. C. 9 Am. Rep. 473; *Chase* v. *Silverstone*, 62 Maine, 175; *Chesley* v. *King*, 74 Maine, 164; *Dickinson* v. *Worcester*, 7 Allen, 19; *Gannon* v. *Hargadon*, 10 Allen, 106; *Franklin* v. *Fisk*, 13 Allen, 211; *Turner* v. *Dartmouth*, 13 Allen, 291; 100 Mass. 181; 120 Mass. 99; *Rawstron* v. *Taylor*, 11 Exch. 369; *Greatrex* v. *Hayward*, 8 *Id.* 291; *Wood* v. *Wand*, 3 *Id.* 748; *Broadbent* v. *Ramsbottom*, 11 *Id.* 602; *Chatfield* v. *Wilson*, 28 Vt. 49; *Buffum* v. *Harris*, 5 R. I. 243; *Bethall* v. *Seifert*, 77 Ind. 302; *Cairo R. R. Co.* v. *Howey*, *Id.* 364; *Barkley* v. *Wilcox*, 86 N. Y. 140; *Smith* v. *Thackerah*, L. R. 1 C. P. 564; *Popplewell* v. *Hodkinson*, L. R. 4 Exch. 248; *Humphries* v. *Brogden*, 12 Q. B. 739; *Wilson* v. *Wadell*, 2 App. Cas. 95; *Elliott* v. *Northeastern Ry. Co.* 10 H. L. Cas. 333; *Partridge* v. *Scott*, 3 Mees. & W. 220; *Goodale* v. *Tuttle*, 29 N. Y. 459; *New Albany &c. R. R. Co.* v. *Peterson*, 14 Ind. 112; S. C. 77 Am. Dec. 60; *Brown et. al.* v. *Illius*, 71 Am. Dec. 49; *Haldeman* v. *Bruckhart*, 84 *Id.* 511; *Bowlsby* v. *Speer*, 86 *Id.* 216; 87 Am. Dec. 627, note; *Delhi* v. *Youmans*, 6 Am. Rep. 100; *Roath* v. *Driscoll*, 52 Am. Dec. 352; *Waffle* v. *N. Y. Central*, 13 Am. Rep. 467; *Hougan* v. *Milwaukee*, &c., 14 *Id.* 502; *Bangor* v. *Lansil*, 51 Maine, 521; *Luther* v. *Winnisi-*

ment Co. 9 Cush. 171; *Parks* v. *Newburyport*, 10 Gray, 28; *Flagg* v. *Worcester*, 13 Gray, 601; *Murphy* v. *Kelley*, 68 Maine, 521; *Greenleaf* v. *Francis*, 18 Pick. 117; *Curtis* v. *Eastern R. R. Co.* 14 Allen, 55; *Ashley* v. *Wolcott et als.* 11 Cush. 195;

FOSTER, J. The defendants' motion to set aside the verdict in this case must be overruled. The evidence, when carefully examined, will be found to furnish a sufficient basis upon which the jury might found a verdict for the plaintiff.

The action is case to recover damages for an alleged injury to the plaintiff's premises by reason of the wrongful acts of the defendants in constructing a ditch by which for a period of six years prior to the commencement of this suit, large quantities of water were conducted across the defendants' land and discharged upon and against the premises of the plaintiff, thereby causing his land to be undermined, excavated and otherwise damaged.

The evidence introduced on the part of the plaintiff, if it is to be believed, is sufficient to authorize the jury in returning a verdict in his favor. In some respects the evidence is conflicting. It does not so preponderate in favor of the defendants, however, as to warrant this court in setting the verdict aside. It is a rule that a new trial will not be granted when the evidence is conflicting and the case has been left to the determination of the jury under a clear and impartial charge. *Hunter* v. *Heath*, 67 Maine, 507. In this case the charge of the presiding justice seems to have been satisfactory to both parties. No exceptions were taken.

Where the evidence is conflicting upon points vital to the result, a verdict will not be reversed unless the preponderance against it is such as to amount to a moral certainty that the jury erred. *Enfield* v. *Buswell*, 62 Maine, 128.

Nor does the fact that a verdict has been rendered in favor of the defendants in a former action between the same parties, necessarily constitute a bar to this suit. The former verdict may have been rendered upon facts which, had they been proved in this suit, might have caused the jury to render a verdict against

the plaintiff. The cause of action in the present suit, as disclosed by the evidence, is not the same as in the former. The jury must have so found under the charge of the presiding judge. The damages here claimed are for injuries happening to the plaintiff's premises since the commencement of the other suit. In the former suit the plaintiff may have failed to show that he had suffered any damage by reason of the alleged wrongful acts of the defendants. The record introduced does not show upon what grounds the defendants prevailed. Six years intervened between the two suits. The evidence in this suit, though more or less conflicting, shows that the plaintiff's property has been damaged within the six years next preceding the commencement of this action. It is not sufficient by way of estoppel to show that the matter in controversy may have been determined in a former litigation between the same parties. It must, in order to constitute a bar, be made to appear affirmitively by legal evidence that it was in fact determined. *Young* v. *Pritchard*, 75 Maine, 518; *Hill* v. *Morse*, 61 Maine, 543.

The causes of action disclosed in the two suits, as they appear not only from the evidence, but from an examination of the declaration in each suit, are not the same. Whether the defendants prevailed in the former suit on the ground that the plaintiff had failed to show that he had sustained damage, or on the ground that the defendants were not guilty of any wrongful act in relation to the construction or use of the ditch, does not appear. The judgment in that suit is therefore no bar to this action. *Arnold* v. *Arnold*, 17 Pick. 8; *McDowell* v. *Langdon*, 3 Gray, 513; *Hill* v. *Morse*, *supra*.

The damages do not appear to be excessive. There was evidence which might warrant the jury in awarding the amount named. A period of six years was embraced in these damages. During all that time the plaintiff claims that his land was injured to a greater or less extent.

Motion overruled.

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

STATE OF MAINE *vs.* STILLMAN G. THOMPSON.

York. Opinion February 20, 1888.

Evidence. Handwriting. Standard of comparison. Practice.

In this state, when the genuineness of handwriting is in question, it may be proved by comparison with other handwriting of the party sought to be charged, admitted or proved to be genuine.

Such writing is admissible in evidence, whether relative to the issue or not, as a standard, for the purpose of comparison with the handwriting in controversy, to determine whether the latter is or is not genuine.

Before such writing can be admitted and used as a standard of comparison, it must be proved or admitted to be the genuine handwriting of the party sought to be charged.

The question of its admissibility as a standard, is to be determined by the judge presiding at the trial.

So far as his decision is of a question of fact, it is final, if there is any proper evidence to support it.

Exceptions to its admission will not be sustained, unless it clearly appears that there was some erroneous application of the principles of law to the facts, or that the evidence was admitted without proper proof of the qualifications requisite for its competency.

Such standard may be compared by experts in the presence of the jury, and they may express an opinion as to the fact, whether the controverted writing is genuine, or not, founded upon such comparison.

ON exceptions.

The case and material facts are stated in the opinion.

H. H. Burbank, county attorney, for the state, cited: R. S., c. 77, § 51; *Burr* v. *Bucksport & B. R. Co.* 64 Maine, 131; *Dunn* v. *Kelley*, 69 Maine, 147; *Jackson* v. *Jones*, 38 Maine, 187; *Jones* v. *Roberts*, 65 Maine, 276; *Fayette* v. *Chesterville*, 77 Maine, 28; *Nunes* v. *Perry*, 113 Mass. 276; *Com.* v. *Coe*, 115 Mass. 504; *Walker* v. *Curtis*, 116 Mass. 98; *Com.* v. *Sturtivant*, 117 Mass. 137; *Blair* v. *Pelham*, 118 Mass. 421; *Costello* v. *Crowell*, 133 Mass. 352; *Same* v. *Same*, 139 Mass. 590; *Copeland* v. *Wadleigh*, 7 Maine, 141; *Pike* v. *Warren*, 15 Maine, 390; *Osgood* v. *Lansil*, 33 Maine, 360; *Woodman* v. *Chesley*, 39 Maine, 45; *Com.* v. *Hayes*, 138 Mass. 185; *Hammond's Case*, 2 Maine, 33; *Page* v. *Homans*, 14 Maine,

478; *Hopkins* v. *Megquire*, 35 Maine, 78; *Woodman* v. *Dana*, 52 Maine, 11; Maine Constitution, Art. 1, § 4; R. S., c. 129, § 5.

Hamilton and Haley, for defendant.

We understand that the wise provision of the English Common Law which has been adopted by a majority of the states in the Union, refusing to allow papers to be submitted to the jury to be used as a standard to judge of the writing which is material to the issue, has been relaxed in Maine, Massachusetts and Connecticut, but we contend that the rule has not been relaxed as far as contended for in this case. The rule, as it is settled in Massachusetts and Maine, is as laid down by Greenleaf on Ev. Vol. 1, § 581.

In *Richardson* v. *Newcomb*, 21 Pick. 315, the court says that if the paper is proved to be the handwriting of the respondent it was competent evidence. And the great case of *Commonwealth* v. *Eastman et als.* the rule is laid down thus: "Nothing but original signatures can be used as a standard of comparison by which to prove other signatures to be genuine." 1 Cush. 189.

The same doctrine is recognized in *Moody* v. *Rowell*, 17 Pick. 490, where upon the question as found by the court, "whether it was competent in order to prove that a handwriting is genuine or fabricated and forged, to give in evidence another signature of the same person to a paper, and otherwise competent evidence in the cause, to enable the court and jury, by an examination and comparison of the genuine specimen with the controverted one, to form an opinion whether the latter be genuine or not." The court said, "We consider the question entirely settled in this commonwealth." *Homer* v. *Wallis*, 11 Mass. 309.

In *Hammond's Case*, 2 Greenl. 33, the court recognized the rule as adopted in Massachusetts, where it was said, "A witness may testify that the signature in question is in the handwriting of the person attempted to be charged, from his acquaintance with such person's hand."

The doctrine of Hammond's case is recognized in *Page* v. *Homans*, 14 Maine, 478, and in *Sweetser* v. *Lowell*, 33 Maine, 446, where it is said, "where handwriting is subject of contro-

versy in judicial proceedings, witnesses who by study, occupation and habit, have been skillful in making and distinguishing the characteristics of handwriting, are allowed to compare that in question with other writings, which are admitted or fully proved to have come from the party, and to give opinions formed upon such comparison." Citing the Hammond case and *Richardson* v. *Newcomb*, 21 Pick. 315.

But in my researches I have not been able to find any authority which allows the rule to be so perverted as to allow experts in a judicial proceeding to compare the disputed writings with other disputed writings and give an opinion based upon such comparison, as was done in this case. In *Woodman* v. *Dana*, 52 Maine, 9, *Sweetser* v. *Lowell* was reaffirmed, the court saying, "Specimens of handwriting not otherwise pertinent to the issue, but admitted or proved to be genuine, may be introduced before the court and jury, as a standard for examination and comparison."

As said by Greenleaf in the quotation from his work, "only papers conceded to be genuine are admissible as standards." In *Rickardson* v. *Newcomb*, 21 Pick. 315, "nor can a paper proposed to be used as a standard be proved to be the original and genuine signatures merely by the opinion of a witness that it is so, such opinion being derived solely from his general knowledge of the handwriting of the person whose signature it purports to be."

In *Homer* v. *Wallis*, 11 Mass. 309, "the genuineness of the standard offered for comparison, the proof must be direct to the fact of its having been written by the party, by one who see him write it." In *Sweetser* v. *Lowell*, 33 Maine, 446, says, "The standard must be fully proved or admitted." *Woodman* v. *Dana*, 52 Maine, 9, says, "Specimen of writings admitted or fully proved may be used as a standard."

FOSTER, J. The defendant was tried upon an indictment for libel. In the trial of the case the government offered certain writings as being in the handwriting of the defendant, for the purpose of being used as a standard of comparison. Two witnesses, claiming to have seen the defendant write, and to be

acquainted with his handwriting, were introduced and testified that the writings thus offered were in the handwriting of the defendant. Thereupon the court admitted them for the purpose for which they were offered, against the defendant's objection. Afterwards, during the trial, expert testimony was introduced by the government and these writings were used by them as a standard of comparison, to which the defendant also objected. To the ruling and decision of the court admitting the writings as a standard of comparison, and their use by experts, the defendant excepted. It is in relation to the correctness of those rulings only that any question is raised by the bill of exceptions.

The principles governing this case seem to be pretty thoroughly settled by the decisions of the court in this and other states.

The question came before the court in Massachusetts, in *Commonwealth* v. *Coe*, 115 Mass. 504, where it was held that before a writing can be used as a standard of comparison of handwriting, it must be proved that the specimen offered as a standard is the genuine handwriting of the party sought to be charged, and that the question of its admissibility as a standard is to be determined by the judge presiding at the trial, and so far as his decision is of a question of fact merely, it is final, if there is any proper evidence to support it; and that exceptions to its admission as a standard will not be sustained unless it clearly appears that there was some erroneous application of the principles of law to the facts of the case, or that the evidence was admitted without proper proof of the qualifications requisite for its competency.

The same question has very recently been before the court in Vermont in the case of *Rowell* v. *Fuller's Estate*, 59 Vt. 688, (5 N. E. Rep. 217) where the court, reviewing the decisions there, says that the question has not before been authoritatively decided in that state, and lays down this rule: That when a writing is disputed and another is offered in proof as a standard, the court should first find as a fact that the latter is genuine, and then submit it to the jury in comparison with that in controversy.

The doctrine as enunciated in *Commonwealth* v. *Coe*, *supra*, which is the same as that so recently settled in Vermont, has since been reaffirmed in *Costello* v. *Crowell*, 133 Mass. 352, and again in *Costello* v. *Crowell*, 139 Mass. 590.

The rule in England is now the same as in Massachusetts and Vermont. For centuries, however, it was otherwise, and the English courts denied the admissibility of such testimony altogether, until 1854, when parliament, by 17 and 18 Victoria, c. 125, passed what is known as "The Common Law Procedure Act," which provides that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." Under this rule, when any writing is proved to be genuine to the satisfaction of the presiding judge, it shall be admitted as a standard of comparison. By the English rule under this statute the jury need not consider or inquire into the genuineness of the writing introduced for the purpose of comparison, as the statute obviates the necessity of any such inquiry and makes the finding of the judge conclusive on that point.

In the light of the authorities, and the decisions in those jurisdictions where the same rule prevails as in this state in relation to proof of handwriting by comparison, we believe the rule adopted by them, upon the question by whom the genuineness of the standard is to be determined, to be the more correct and satisfactory one.

Notwithstanding that, however, there are courts of high standing, and for whose decisions we have great respect, which have adopted a different rule, and which hold that the jury should ultimately pass upon the question. Such is the rule in New Hampshire, where, as it is well understood, the doctrine of proof of handwriting by comparison has always clung more tenaciously to the conservative English common law rule, than ever appeared satisfactory to the courts of Maine, Massachusetts, Connecticut, Vermont and some of the other states.

In *State* v. *Hastings*, 53 N. H. 461, SARGENT, C. J., speaking of the introduction of evidence to prove the genuineness of the handwriting offered as a standard, says: "It is to be received, and then the jury are to be instructed that they are first to find, upon all the evidence bearing upon that point, the fact whether the writing introduced for the purpose of comparison, or sought to be used for that purpose, is genuine. If they find it is not so, then they are to lay this writing and all the evidence based upon it entirely out of the case; but if they find it genuine, they are to receive the writing and all the evidence founded upon it, and may then institute comparisons themselves between the paper thus used and the one in dispute, and settle the final and main question whether the signature in dispute is or is not genuine."

In *Costello* v. *Crowell*, 139 Mass. 590, it was said that unless the decision of the judge in admitting the specimens as standards is founded upon error of law, or upon evidence which is, as matter of law, insufficient to justify the finding, the full court will not revise it upon exceptions. The same principle is laid down in *Nunes* v. *Perry*, 113 Mass. 276, and cases there cited.

In the case before us the testimony in proof of the genuineness of the standard, came from witnesses who, if they are to be entitled to credit, were qualified to testify in relation to the genuineness of the defendant's handwriting. It was in accordance with the well settled doctrine of this state as laid down in *Woodman* v. *Dana*, 52 Maine, 13, where the court in an exhaustive and carefully considered opinion by RICE, J., reviewed the authorities, and stated as a principle well established that the handwriting of a person may be proved by any person who has acquired a knowledge of it, as by having seen him write, from having carried on a correspondence with him, or, as was decided in *Hammond's Case*, 2 Maine, 32, from an acquaintance gained from having seen handwriting acknowledged or proved to be his. *Page* v. *Homans*, 14 Maine, 481; 1 Greenl. Ev. § 577; Wharton on Ev. § § 707, 709.

The New Hampshire court, in the case to which we have referred, speaking of what proof is necessary in establishing the genuineness of the standard, say that any competent evidence

tending to prove that the paper offered as a standard of comparison is genuine, is to be received, whether the evidence be in the nature of an admission, or the opinion of a witness who knows his handwriting, or of any other kind whatever.

And in Vermont, in the case of *Rowell* v. *Fuller's Estate*, already cited, it was insisted in argument that the evidence was legally insufficient to warrant the court in admitting the standard in evidence as genuine; but the court say, that while great care should be taken that the standard of comparison should be genuine, yet any evidence pertinent to the issue is admissible.

In the case under consideration there was the testimony of two witnesses who stated their knowledge of the handwriting of the specimens offered, and that the handwriting was that of the defendant. It was upon this evidence that the court admitted the same as a standard of comparison, and for no other purpose as stated by the court, and as the exceptions themselves show. The decision of the judge presiding was based upon certain elements of fact, as to whether the specimens of writing were sufficiently proved to have been written by the defendant to allow them to be introduced and submitted to the jury as a standard. That fact he determined by admitting them in evidence and allowing them to be submitted to the jury for that purpose after the testimony of the witnesses for the government as to their genuineness. His decision must be final and conclusive, "unless it is made clearly to appear that it was based upon some erroneous view of legal principles, or that the ruling was not justified by the state of the evidence as presented to the judge at the time." *Nunes* v. *Perry*, 113 Mass. 276; *Jones* v. *Roberts*, 65 Maine, 276; *Commonwealth* v. *Coe*, 115 Mass. 505.

The same principle applies as in determining whether or not a witness introduced as an expert is competent by his study, business, or other qualification to testify. This is a preliminary question for the court. An element of fact is involved to be decided by the court upon which the capacity to testify depends. Upon that question the decision of the judge, like all decisions of a similar character, is and must be, for obvious reasons, final and conclusive, unless upon a report of all the evidence bearing

upon the question it is shown to be without foundation, or is based upon some erroneous application of legal principles. *Commonwealth* v. *Sturtivant*, 117 Mass. 137; *Fayette* v. *Chesterville*, 77 Maine, 33. The judge presiding is to hear and consider this preliminary evidence and to decide whether it is credible or not, and his decision as to its credibility, like that of a jury upon questions of that kind, is conclusive. *Foster* v. *Mackay*, 7 Met. 538.

The evidence upon which the decision of the court was based in admitting the several writings for the purpose offered is before us, and form a part of this bill of exceptions. This evidence, as in all cases where the discretion and judgment of the court is brought into requisition, involves so much of the element of fact that great consideration must necessarily be given to the decision of the presiding judge. We do not feel authorized from an examination of it to say that he was not warranted in admitting the writings offered, and for the purpose claimed; nor do we feel that there was any such error in the decision to which he arrived in admitting them as to call for any revision by this court upon exceptions. *Commonwealth* v. *Morrell*, 99 Mass. 542; *O'Connor* v. *Hallinan*, 103 Mass. 549; *Clapp* v. *Balch*, 3 Maine, 219.

Notwithstanding the common law rule in England and in several of the states does not allow the proof of handwriting by comparison of hands as liberally as in Maine, Massachusetts and Connecticut, (*Moore* v. *United States*, 91 U. S. 273) yet it has always been the practice in these states to introduce other writings, admitted or proved to be genuine, whether relative to the issue or not, for the purpose of comparison of the handwriting. The object is to enable the court and jury, by an examination and comparison of the standard with the writing in controversy, to determine whether the latter is or is not genuine. *Hammond's Case*, 2 Maine, 35; *Chandler* v. *LeBaron*, 45 Maine, 536; *Woodman* v. *Dana*, 52 Maine, 13; *Homer* v. *Wallis*, 11 Mass. 309; *Moody* v. *Rowell*, 17 Pick. 490; *Richardson* v. *Newcomb*, 21 Pick. 315; *Lyon* v. *Lyman*, 9 Conn. 55.

"For this purpose," observes the court in *Woodman* v. *Dana*,

supra, "the specimens of handwriting, not otherwise pertinent to the issue, but admitted or proved to be genuine, may be introduced before the court and jury, as a standard for comparison by which to test the genuineness of the writing in controversy, and for this purpose such standard specimens may be compared by *experts* in the presence of the jury, and such experts are permitted to express an opinion as to the fact whether the controverted paper be genuine or not, founded upon such comparison."

The exceptions present no objections in relation to the use of the writings admitted by the court as standards, by experts, which are not fully authorized by the foregoing decision of our own court and the authorities generally. Wharton on Ev. § 719, and cases cited.

No exceptions were taken to the charge of the presiding judge, and as the only questions open for consideration before this court are those presented in the bill of exceptions, (*Withee* v. *Brooks*, 65 Maine, 14) it becomes unnecessary to enter upon the consideration of the other questions urged by the learned counsel for the defendant.

Exceptions overruled.

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

ROBERT J. GRANT *vs.* SIMON N. FROST.

Washington. Opinion February 21, 1888.

Evidence. Bill of sale. Mortgage. Bill of parcels.

In an action at law, parol evidence is inadmissible to prove that a formal bill of sale, which is absolute in its terms, was not intended to be absolute, but was given as a pledge or mortgage.

But this rule has no application where the instrument consists of a mere bill of parcels, not used or designed to embody and set out the terms and conditions of a contract of sale.

A bill of parcels is in the nature of a receipt, and, as between the parties to it, is always open to parol evidence to show the real terms upon which the agreement of sale was made.

ON exceptions and motion.

The case and material facts are stated in the opinion.

A. McNichol, for the plaintiff, cited: *Hazard* v. *Loring*, 10 Cush. 267; *Shaw* v. *Wilshire*, 65 Maine, 485.

E. E. Livermore, for defendant.

The courts of this state have uniformly held, in actions at law, parol testimony is not admissible to vary the terms of a written document, or to show that a bill of sale, absolute in its terms, was intended as security for a loan of money; and the latest decisions of the supreme court of Massachusetts are to the same effect. *Osgood* v. *Davis*, 18 Maine, 146; *Shaw* v. *Shaw*, 50 Maine, 94; *Hancock* v. *Fairfield*, 30 Maine, 299; *Bryant* v. *Crosby*, 36 Maine, 563; *Stevens* v. *Haskell*, 70 Maine, 202; *Reed* v. *Reed*, 71 Maine, 156; *Pennock* v. *McCromick*, 120 Mass. 275; *Philbrook* v. *Eaton*, 134 Mass. 398.

No delivery of personal property named in a formal bill of sale is necessary to pass the title, as between the original parties. And this rule of law is well settled by the courts. *Richardson* v. *Kimball*, 28 Maine, 463; *Philbrook* v. *Eaton*, 134 Mass. 398; *Phillips* v. *Moor*, 71 Maine, 78.

The question, whether the bill of sale was a pledge, or equitable mortgage, belongs to the equitable jurisdiction to determine; it cannot be determined by law. *Jewett* v. *Mitchell* 72 Maine, 28; See also *Bailey* v. *Knapp*, 4 New England Reporter, 280.

FOSTER, J. This was an action on the case for negligence in the management and care of the plaintiff's horse while in the defendant's pasture.

The defendant introduced in evidence the following writing:

"$300. April 16, 1884. Eastport, Maine.

I have this day sold to S. N. Frost, my red mare lately owned by J. Rogers, of Pembroke, together with top buggy, and pung, harness, robes and blanket and halter, for the sum of three hundred dollars. $300.

Payment received, Robert J. Grant."

Thereupon the plaintiff, against the objection of the defendant, offered oral testimony to prove that the foregoing instrument was

not intended as an absolute sale, but as a mortgage to secure the payment of a debt which the plaintiff owed the defendant, and that the debt had been mostly paid.

To the admission of this evidence the defendant excepted, and this is the only question raised by the bill of exceptions. The action is between the original parties to the instrument, and no question arises as to the rights of third parties, creditors, or *bona fide* purchasers.

The contention of the defendant is that this was a bill of sale, absolute upon its face, and that parol evidence is not admissible in an action at law to contradict, vary, or explain the contents of a written instrument.

The rule relied on by the defendant is well established, that in an action at law parol evidence is inadmissible to prove that a sale in writing, which is absolute in its terms, was not intended to be absolute but was given as a pledge or mortgage. This doctrine is sustained by numerous authorities, among which may be cited: *Bryant* v. *Crosby*, 36 Maine, 563; *Harper* v. *Ross*, 10 Allen, 332; *Newton* v. *Fay*, *Id.* 507; *Pennock* v. *McCormick*, 120 Mass. 277; *Philbrook* v. *Eaton*, 134 Mass. 400.

In such case the written contract must govern. It speaks for itself. The parties having reduced their contract to writing, their rights must be governed by and depend upon its terms as therein expressed, irrespective of any parol evidence of what was intended, or what took place previous to or at the time of the making of the contract.

But while it is the well settled general rule that parol evidence is inadmissible to contradict, vary or explain the terms of a written instrument, it has no application when the instrument consists of a mere bill of parcels, not used or designed to embody and set out the terms and conditions of a contract of sale. Such a bill of parcels is an informal document, intended only to specify the price, the articles, the names of the buyer and seller, and a receipt of payment. It is in the nature of a receipt, and, as between the parties to it, is always open to parol evidence—an exception to the general rule—to show the real terms upon which the agreement of sale was made. *Hazard* v. *Loring*, 10

Cush. 268; *Caswell* v. *Keith*, 12 Gray, 351; *Shaw* v. *Wilshire*, 65 Maine, 485; *Fletcher* v. *Willard*, 14 Pick. 466; *Atwater* v. *Clancy*, 107 Mass. 375: *Harris* v. *Johnston*, 3 Cranch, 311; *Wallace* v. *Rogers*, 2 N. H. 506; *Hersom* v. *Henderson*, 21 N. H. 224; Jones on Chat. Mort. § 21.

The defendant falls into an error when he assumes that the instrument in question is a formal bill of sale, and therefore not subject to parol evidence even between the parties to it. It is not a formal bill of sale whatever designation the parties may see fit to give it. It is in law but a mere bill of parcels, like those in *Hazard* v. *Loring*, 10 Cush. 267; *Stacy* v. *Kemp*, 97 Mass. 167-8; *Atwater* v. *Clancy*, 107 Mass. 375; *Fletcher* v. *Willard*, 14 Pick. 466; *Hilbrith* v. *O'Brien*, 10 Allen 104; *Shaw* v. *Wilshire*, 65 Maine, 492; where the court has directly passed upon the question, and held that such instruments were not contracts within the rule excluding parol evidence, but that they were only bills of parcels, and, as such, open to explanation by parol evidence of their object and purpose.

In the case at bar parol evidence was offered by the plaintiff, after the introduction of the instrument by the defendant, to prove the real terms upon which the agreement of sale was made. Upon well settled principles the evidence was competent and proper as between the parties. The exceptions therefore must be overruled.

A careful examination of the evidence satisfies us that the motion to set aside the verdict cannot be sustained. The evidence, to be sure, is somewhat conflicting, as it is in most cases of this kind; but we do not feel warranted in saying that the jury were influenced in their decision by any such improper bias or prejudice as would justify this court in setting aside their verdict.

Exceptions and motion overruled.

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

FRED KING *vs.* STEPHEN HAYES.

Androscoggin. Opinion February 23, 1888.

Constitutional law. Cruelty to animals. R. S., c. 124, § 42.

So much of R. S., c. 124, § 42, as authorizes an officer or agent of a society for the prevention of cruelty to animals, to condemn, conclusively fix the value of, and kill a horse, without notice to the owner, that he might be heard, is in violation of the constitution.

ON exceptions.

The opinion states the case.

The exceptions were to the ruling of the court that the defendant, being an agent of a society for the prevention of cruelty to animals, was justified by R. S., c. 124, § 42, in killing the plaintiff's horse.

Savage and Oakes, for the plaintiff, cited: Constitution of Maine, Art. 1, § 6; *Eames* v. *Savage*, 77 Maine, 212; *Dunn* v. *Burleigh*, 62 Maine, 24; *Saco* v. *Wentworth*, 37 Maine, 165; 1 Kent. Com. 13; *Allen* v. *Jay*, 60 Maine, 138; *State* v. *Doherty*, 60 Maine, 504; Story, Com. on Const. 661; *Portland* v. *Bangor*, 65 Maine, 120; 79 Am. Dec. 529; 24 Am. Dec. 538, n; 48 Am. Dec. 272; 47 Am. Dec. 440; 83 Am. Dec. 729, 731.

Frye, Cotton and White, for the defendant, submitted without argument.

PER CURIAM. This is an action of trespass for killing the plaintiff's horse.

The defendant justified as an agent of the society for the prevention of cruelty to animals, he first having strictly followed the provisions of R. S., c. 124, § 42.

The appraisers adjudged the horse to be of no value, and so testified before the jury in this action; but the jury fixed the value at thirty dollars.

We are of opinion that so much of the provisions of R. S., c. 124, § 42, as allowed the defendant to condemn, conclusively fix

the value of and destroy the plaintiff's horse, without any notice actual or constructive to the owner in order that he might be heard, is in violation of the fundamental law, which prohibits any person of being deprived of his property without due process of law. *Dunn* v. *Burleigh*, 62 Maine, 24.

Such have been the adjudications even in regard to the destruction of intoxicating liquors intended for unlawful sale, *Fuller* v. *McGirr*, 1 Gray, 1; *Lincoln* v. *Smith*, 27 Vt. 355. Our own statute contains provisions for notice before destruction of such liquors, R. S., c. 27 § 41. Same has been held in relation to gambling implements. *Lowry* v. *Rainwater*, 70 Mo. 152; S. C. 35 Am. Rep. 420. See cases in note 48, Am. Dec. 272, *et seq.*

Exceptions sustained.

TAMLIN ELWELL *vs.* CORNELIUS SULLIVAN.

Washington. Opinion February 25, 1888.

Practice. Expression of opinion by the court.

Remarks of the presiding justice when made to counsel in relation to the manner of conducting a cause then on trial, are not to be regarded as the expression of an opinion upon "issues of fact" within the prohibition of R. S., c. 82, § 83.

When counsel regard a remark of the presiding justice as such an expression of opinion he should call the attention of the court to the fact at the time.

ON exceptions by the defendant.

The point is stated in the opinion.

George Walker, for the plaintiff.

Harvey and Gardner and *A. McNichol*, for the defendant.

The remark of the presiding justice that the testimony of the defendant "does not contradict Mr. Walker at all," was an expression of opinion upon the evidence, in the presence and hearing of the jury. It was none the less an expression of opinion because made to counsel. It was an incident of the trial and calculated to influence the jury quite as much as if addressed to them in the charge, and it is not to be assumed that they were not influenced by it.

Though men are met who boast that they are so independent as to pay no regard to the arguments of counsel, and sometimes they are equally regardless of the court, yet the fact is that men are rare who are not influenced by the opinion of others, whenever and wherever they have the responsibility of deciding any question of importance addressed to them.

There can scarcely be any more effective way of influencing the jury by the presiding justice than by remarks interposed during the presentation of the evidence which indicate a leaning or opinion to the one side or the other.

FOSTER, J. There is but one ground of complaint in the bill of exceptions which is presented for our consideration. That relates to a remark of the presiding justice made to counsel during the progress of the trial.

Counsel had stated to the court, after inquiry as to the purpose of certain testimony, that he proposed to contradict the statements of the witness, Walker, who had testified upon the other side. Thereupon the testimony was admitted. After the answer of the witness had been given, the court remarked to the counsel of whom the inquiry had been made: "That does not contradict Mr. Walker at all."

No exception was taken, nor was any objection to the remark made known to the presiding justice, until after the jury had returned their verdict.

It is now claimed that the remark thus made was in violation of R. S., c. 82, § 83, and that a new trial should be granted for that reason.

We do not think the statute prohibition should be applied in this case. The court has duties, as well as counsel, in the trial of causes. And it is not every remark of the presiding justice, especially when made to counsel in relation to the manner of conducting a cause, that is to be regarded as the expression of an opinion upon "issues of fact." If counsel thought the remark was in contravention of the statute, and he was desirous of preserving his rights by exceptions, it was his duty to call the attention of the court to the fact at the time, instead of lying by

in silence and taking the chance of a verdict in his favor, and complaining afterward.

It has long been settled that if the presiding judge in his charge inadvertently assumes as uncontroverted any matter of fact in evidence upon which either party desires to raise an issue to the jury, or if through inadvertence he misstates any material fact, it is the duty of counsel to call the attention of the judge to the error at the time in order that the mistake may be rectified before the case is submitted to the jury. When this is not done it is regarded as a waiver of exceptions on such matters. *Harvey* v. *Dodge*, 73 Maine, 318; *Murchie* v. *Gates*, 78 Maine, 306.

The analogy is strong between these principles and the case at bar. The duty of counsel is no more imperative in one instance than in the other.

If the excepting party in this case could properly be said to have had any just cause of complaint, we have no doubt he waived the same by neglecting to make his objections known to the court at the time. *State* v. *Bowe*, 61 Maine, 175; *McLellan* v. *Wheeler*, 70 Maine, 287; *State* v. *Benner*, 64 Maine, 267; *State* v. *Wilkinson*, 76 Maine, 323.

Exceptions overruled.

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

ELIZABETH HILL *vs.* ARCHIBALD MCNICHOL, Administrator.

Washington. Opinion February 27, 1888.

Deed. Delivery. Instructions. Damages.

Where a deed, made by A to B is found in B's possession long after its date, the controversy being whether the deed was delivered to B, or was surreptitiously obtained by B without delivery, it was not error for the judge to instruct the jury, that an intention that there shall be a delivery must exist in the minds of both parties, to be evidenced by words or act, or by words and act combined. Nor was it error in such case to instruct that it is not evidence that a deed has been delivered because containing the words, "signed, sealed and delivered," nor because it has been recorded in the public registry.

Nor was it error for the judge to remark to the jury that there was not a scintilla of evidence (meaning actual evidence), that the grantee had the deed before the first time found in her possession, the fact bearing out the statement, the statement being accompanied with the explanation that having the deed at any time in her possession the presumption would be that it was delivered to her at its date.

Nor was it error, upon the question of delivery for the judge to say to the jury that "it is a general rule of law, that where a person sees another conveying property which belongs to himself instead of to the person conveying, and makes no dissent when he should dissent, he is estopped from making a claim;" referring to her act of signing away her dower in her husband's deed of the same property which the disputed deed had apparrently conveyed to her.

Where, in such case, the judge peremptorily instructs the jury to return a verdict for a certain sum named, provided they find a delivery of the deed, and they return a verdict for the defendant, thereby finding no delivery and consequently no damages, instructions which effect only the amount of damages become immaterial.

On exceptions, and motion to set aside the verdict.

Assumpsit for money had and received against the administrator of the insolvent estate of Monroe Hill, brought under the statute, upon appeal from the allowance of the claim by the commissioners of insolvency.

The material facts are stated in the opinion.

S. C. Strout, for the plaintiff.

The courts uniformly regard this evidence of possession of the deed, with the presumption which it raises of a proper delivery, as *prima facie* sufficient, until overcome by counter proof. *Butrick* v. *Tilton*, 141 Mass. 95; *Patterson* v. *Snell*, 67 Maine, 561; *Sweetser* v. *Lowell*, 33 Maine, 447; *Webster* v. *Calden*, 55 Maine, 171; *Blethen* v. *Dwinel*, 34 Maine, 135.

When there is no evidence in the case, as here, of the fact assumed in the instruction, it is misleading, prejudicial, and ought not to be given. *Pierce* v. *Whitney*, 22 Maine, 113; *Stephenson* v. *Thayer*, 63 Maine, 147.

There is not in the case a particle of evidence that the deed was delivered upon any condition, trust or understanding of any kind. The deed was absolute upon its face, for a valuable consideration expressed in it. This suit is against the estate of Monroe Hill, the grantor in the deed. It would be inadmissible

for him to prove that the deed was without consideration, and his representatives have no higher privilege; they do not stand in the place of creditors. *Hammond* v. *Woodman*, 41 Maine, 207; *Allison* v. *Kurtz*, 2 Watts, 185; *Wait* v. *Franklin*, 1 Binn. 502; Shep. Touch. 222.

So it is not admissible for the grantor to prove by parol that an absolute deed was in fact subject to a condition, or was delivered as a trust, or that any trust was reserved therein, or in any way to lessen the effect of his deed. This would be contradicting his deed. *Warren* v. *Miller*, 38 Maine, 108; *Jordan* v. *Otis*, 38 Maine, 429; *Brown* v. *Thurston*, 56 Maine, 127; *Osgood* v. *Davis*, 18 Maine, 146; *Bennock* v. *Whipple*, 12 Maine, 346.

If that deed was delivered to her, it was not competent, as we have shown, for Monroe Hill, or his estate, to contradict that deed, or import into it any trusts, conditions or limitations, by parol evidence. *Brown* v. *Thurston*, 56 Maine, 127, and other cases cited.

The court instructed the jury, "A deed may be delivered, although complete and in absolute form, as a trust, or it may be delivered as absolutely to convey title, and as a trust as far as rents and profits are concerned. A man deeds his house to his wife, nothing said about it; there may be an understanding in the minds of the parties that the title is placed there for safety, but the husband goes on and occupies it; the wife is holding it in trust for him." A different doctrine is held in 70 Maine, 92.

No trust in law can be created, unless in writing, except such as arise by implication of law. R. S., c. 73, § 11.

Constructive trusts arise from fraud, as where property has been obtained by fraudulent representation, the property in the hands of the holder is charged with a constructive trust in favor of the defrauded grantor. Perry on Trusts, § 168.

No facts in this case have any tendency to show a trust of either of above classes.

A resulting trust may arise, first, where the purchaser of an estate pays the purchase money and takes the title in the name of a third person; or, second, where a person standing in a

fiduciary relation uses fiduciary funds to purchase property, and takes the title in his own name; or, third, where an estate is conveyed upon trusts which fail; or, fourth, where the legal title to property is conveyed and there is no reason to infer that it was the intention to convey the beneficial interest; or, fifth, where voluntary conveyances are made, or conveyances without consideration. Perry on Trusts, § 125.

The first three instances of resulting trust, above stated, manifestly do not apply here. As to the fourth, where legal title is conveyed, but there is no reason to infer the beneficial interest was intended to be conveyed. We have here a deed expressed to be for a valuable consideration; nothing in the deed suggests a doubt that the beneficial interest was intended to be conveyed. "The trust must result, if at all, at the instant the deed is taken, and the legal title vests in the grantee. No oral agreements, and no payments before or after the title is taken, will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction itself." Perry on Trusts, § § 133, 134–151.

There is no evidence that Abner Hill paid the consideration in the deed, Monroe Hill to plaintiff. Nothing of the kind is claimed or attempted to be proved. Hence there is no basis for a suggestion that the land was charged with a resulting trust in his (Abner's) favor. Even if such payment had been made by Abner, the deed being to his wife, for whom he was bound to provide, it would be presumed and treated as a gift, and the beneficial title would pass and no trust result. Perry on Trusts, § § 143, 144, and cases cited.

It is inadmissible for Monroe Hill, or his representative, to allege a resulting trust to himself, against the expressed terms of his absolute, unlimited warranty deed. *Gerry* v. *Stimson*, 60 Maine, 188; *Hale* v. *Jewell*, 7 Maine, 435; Perry on Trusts, § 162; *Ellis* v. *Higgins*, 32 Maine, 34; *Rogers* v. *McPheters*, 40 Maine, 114.

As to voluntary conveyances, the resulting trust to the grantor is confined to common law conveyances, such as feoffments, grants, fines, etc., which operated without consideration. But

this rule does not apply to modern conveyances by deed of bargain and sale, when a consideration is conclusively presumed, and parol evidence cannot be received to show no consideration in an issue between the parties to the deed, or their privies. Perry on Trusts, § 162; *Philbrook* v. *Delano*, 29 Maine, 410; *Randall* v. *Phillips*, 3 Mason, 288.

Besides, voluntary conveyances to a wife or child, were never within the rule, that a trust resulted to the grantor. It is not perceived why a voluntary grant from a son to his mother should not be governed by the same rule. *Stevens* v. *Stevens*, 70 Maine, 92; Perry on Trusts, § 164.

In the portions of this charge excepted to, the judge, after enumerating various circumstances as tending to show non delivery of deed to plaintiff, and among other things the deed from Abner Hill to Horatio Hill and als., August 23, 1871, in which Mrs. Hill joined in release of dower, and which purported to convey the Tomah lands conveyed to Mrs. Hill by Monroe Hill in 1862, with a large number of other tracts of lands, instructed the jury that "it is a general rule of law that when a person sees another conveying property which belongs to himself instead of to the person conveying, and makes no dissent when he should dissent, he is estopped from making a claim." This instruction was erroneous as applied to this case. It is defective as a legal proposition, because it omits the following elements necessary to raise an estoppel:

1st. It must appear that the party standing by knew the state of his own title, and that the property being conveyed by another was his property. Herman on Estoppel, § § 414, 415.

2nd. It must appear that the purchaser was ignorant of the true state of the title, and could not have ascertained it by consulting the public records. Herman on Estoppel, § § 413, 415, 422, 425; *Wood* v. *Griffin*, 46 N. H. 230; *Matthews* v. *Light*, 32 Maine, 308; *Parker* v. *Barker*, 2 Met. 431.

3rd. It must appear that the purchaser, without fault on his part, was deceived by the silence or acts of the true owner, and that his conduct was influenced by it. Herman on Estoppel, § § 32[2], 411, 412, 425; *Morton* v. *Hodgdon*, 32 Maine, 127.

4th. An estoppel can only be applied against the owner in favor of the grantee and those claiming under him. It cannot be set up by other parties. Herman on Estoppel, § § 323, 324, 328, 423.

It was also defective in leaving the jury to determine when the owner should dissent, without giving them a rule by which to determine it.

The court instructed the jury: "If Monroe Hill was not the principal, but made these cuttings for his father, then the defendant is not liable; because, if he acted as an agent in the woods, the property came down in the name of Abner Hill, and as a part of the property of the concern and business of Abner Hill." To this instruction plaintiff objects, that if Mrs. Hill owned the land, and the cuttings were made by Monroe, or by his command, as the evidence shows, such cutting was unauthorized and a trespass, and it is no defence to Monroe, in a suit for the value of the cuttings, to say he acted as agent and some one else received the proceeds. He would be equally liable with his principal. *Bacheler* v. *Pinkham*, 68 Maine, 255; *Cram* v. *Thissell*, 35 Maine, 88.

In this case, any claim against Monroe Hill, whether in tort or contract, may be recovered.

C. B. Rounds and G. M. Hanson also, for plaintiff.

Baker, Baker and Cornish, (*E. B. Harvey*, *L. G. Downes* and *George A. Curran* with them) for the defendant, cited: *Brown* v. *Brown*, 66 Maine, 316; *McGraw* v. *McGraw*, 79 Maine, 257; *Stephenson* v. *Thayer*, 63 Maine, 147; *Bradstreet* v. *Bradstreet*, 64 Maine, 204; *Harvey* v. *Dodge*, 73 Maine, 316; *Goodspeed* v. *Fuller*, 46 Maine, 148; *Harmon* v. *Harmon*, 61 Maine, 224; *Rerick* v. *Kern*, 2 Am. Lead. Cas. 549; S. C. 16 Am. Dec. 501, note; *Kent* v. *Kent*, 18 Pick. 571; *Driscoll* v. *Marshall*, 15 Gray, 62; *Hazelton* v. *Putnam*, 3 Chandler, 117, notes; 54 Am. Dec. 166–7, and cases; *Wynn* v. *Garland*, 19 Ark. 23 (68 Am. Dec. 196); *Lakin* v. *Ames*, 10 Cush. 198; *Merrick* v. *Plumley*, 99 Mass. 566; *Putney* v. *Day*, 6 N. H. 470; *Raritan Water Co.* v. *Veghte*, 21 N. J. Eq. 475

(2 Am. Lead. Cas. 565); *Ricker* v. *Kelly*, 10 Am. Dec. 43, notes; *Drake* v. *Wells*, 11 Allen, 142; *Hill* v. *Cutting*, 107 Mass. 596; *Wynn* v. *Garland*, 68 Am. Dec. 196.

PETERS, C. J. The primary question of this case is, whether a deed, under which the plaintiff claims important interests, was ever delivered to her. The evidence on the point is scarcely at all contradictory, and strongly supports the verdict of the jury against delivery. A brief statement of the facts, excluding voluminous details which relate only to the question of damages, will render an elucidation of the case easy.

The central historical figure seen in the facts is Abner Hill, who, for more than a half century, resided either in this state or New Brunswick, engaged in the lumbering business on the St. Croix river. His several sons, as they grew up, participated in his business in different relations, without any change of ownership, apparent or proved, and without any contracts for compensation for their services. They continued on after becoming of age in the same manner as while under age. Any son wanting money for his use received it, while all were economical.

Monroe Hill, another important figure in the scenes, was the oldest son, evidently the ablest in business respects, who naturally succeeded to the more difficult tasks of the business, the father and all the sons co-operating. All were employed. Mills, stores and houses were owned by Abner Hill, who had undoubted commercial credit for many years. Monroe, being unmarried, lived at his father's home until he died in October, 1867. The only departure from these relations up to the death of Monroe that can be discovered in the books and papers and other evidence in the case, is that Monroe purchased and owned some real estate in his own name. There is a possibility that he became a partner with his father in some way, but the evidence is extremely meagre which has any tendency to show it.

In 1861, for some cause not disclosed in this case, possibly having connection with the then threatened civil war, in this country, they doing business on the Province side of the river, Abner conveyed to Monroe his interest in a block of valuable stores in Calais, the deed being at once recorded. On June 16,

1862, he conveyed to him certain valuable wild land, and this deed was immediately recorded. It turns up, after Monroe's death, that, on the same day, June 16, 1862, Monroe made a warrantee deed, purporting full consideration, of both the Calais stores and the wild land, to his mother, Elizabeth Hill, the plaintiff, which deed was never seen or heard of, by any person who testified, until within a few days after Monroe died, when it was taken from a drawer in a bureau at the Hill house by the mother, and hurriedly sent by a special messenger to Machias to be recorded. There is every reason to believe that this act of the wife was intended to be kept secret, and that it was not known to the husband up to the time of his death in 1872.

It is by virtue of this deed that the plaintiff's claims are now made. From 1861 until 1872, all the property included in this conveyance remained in Abner Hill's possession and under his management, by himself or through his sons, precisely as if never by him or his son conveyed. His wife had no money to pay for it, and evidently paid nothing for it. It was never in the lifetime of her husband taxed to her, nor insured in her name, nor did she before his death collect any rents or stumpages, or attempt or claim to, nor were any collected on her account or in her name. In no way did she assert, by any word or act disclosed in the case, any claim under the deed of 1862 while either the son or husband was alive. That she had intelligence enough to do so is displayed by many things done by her concerning the property afterwards. In 1866, Monroe sought a partition of the stores between himself and other owners, as if his property. In 1870, her husband deeded to her some of the store property, referring to the partition made. And, as if she had not deeds enough, in 1871 he deeds to his son, George A. Hill, the same property, and on the same day George conveys the same to his mother, making allusion to the same partition, such acts being utterly inconsistent with the idea of her receiving a valid conveyance in 1862. Among other participations in conveyances, she accepts a lease of an interest in the store property, which was already hers if the deed of 1862 was valid.

Then comes a most significant piece of evidence which is fairly

a rebuke to her present claims. In 1871, the father retiring from active business, with his aid and by the use of his property, the living sons undertook to carry on business under the name of Hill Brothers. To furnish them a capital, and to enable them to retrieve some business disasters, Abner Hill made a mortgage with other property, of this same wild land, which was already his wife's by the pretended deed of 1862, and she joins in the conveyance to release her dower therein, the conveyances of 1862 being unsuspected by the grantees in the mortgage. As required by the law of the Province of New Brunswick, where the land is situated, she was examined before a magistrate apart from her husband, as to the free exercise of her own will in affixing her signature, and she refused, after full explanation from the draughtsman, to execute the mortgage until after she had taken the papers home to personally examine and consider them. Though an admissible witness to all facts occurring after the death of Monroe, had she dared the ordeal of cross examination, and thus having an opportunity to explain her acts and omissions, since October 8, 1867, which make so strongly against her present claims, she did not see fit to testify. Even the original deed of 1862 to her was not found, and a copy was used at the trial.

Obtaining a large property through uncontested conveyances from her husband and son, and remaining in undisturbed possession of the same ever after her husband's death in 1872, she allowed Monroe's estate to remain unmolested until 1880, when she procured a friendly administration upon it in the name of her counsel. Being the only creditor, and procuring a representation of insolvency, she asks that the estate be sold to satisfy her demands against it, and sues to recover the following claims: For an amount due under the covenants of warranty in the deed by Monroe to her in 1862, the incumbrance being a mortgage placed upon the property by some owner prior to Monroe, about two thousand dollars; for services taking care of Monroe in his last sickness, about eight hundred dollars; for rents collected, between 1862 and 1867, from the Calais stores, about three thousand dollars; for stumpages taken from the wild land, in

same time, about five thousand dollars. She claims interest on these sums for twenty years or more.

The property at which her claims are aimed is real estate which her husband and sons, after Monroe's death, sold and conveyed as the heirs of Monroe, receiving full payment therefor, and the real defendants, admitted to the defense of the suit, are the parties who innocently purchased such real estate and fully paid for it.

The case was nonsuited, so far as the bill for nursing was concerned, and although an exception was taken to that ruling, the exception is not pressed.

The defenses set up against the claims for rents and stumpages were, that the deed of 1862, under which the claims are asserted, was never delivered to the plaintiff, or not delivered before the rents and stumpages were taken, or that the rents and stumpages were not taken by Monroe Hill, but by Abner Hill, or on Abner's account and accounted for to him. It was further contended that, if the deed had been delivered in Monroe's lifetime, it was as a cover against creditors, and in secret trust for Abner Hill's benefit, and that she allowed him to possess and use the property precisely as if it were his own, without liability to her for such use or for any products or proceeds thereof, and that she cannot now recover for such rents and profits as were actually taken and enjoyed under such unretracted or uncancelled permission and understanding.

The charge of the judge has been ploughed over thoroughly, almost paragraph by paragraph, for the discovery of objections, and seems to be complained of by the plaintiff, as argumentative and too impressive in behalf of the defendant, and as here and there expressive of the opinion of the judge upon questions which are of fact and not of law. The complaints are not well founded.

It would be useless to accompany counsel through so much of his able argument on these points as relates to the rents and stumpages, because those matters appertain only to the amount of damages recoverable, and those questions were never reached by the jury, the finding being that the facts would not justify a

verdict for any damages for the plaintiff. On the claim for damages for covenant broken, the ruling was distinct and positive that there must be a verdict for the plaintiff for two hundred and five dollars, if the deed of 1862 to the plaintiff was ever delivered. If the deed was never delivered the plaintiff made no pretension of recovery, except for the nursing bill, which is now as good as out of the case, but the defendant contended that none of the claims outside of the covenants could be recovered even if there had been a delivery. The jury were required to make several findings as to the different classes of claims, the judge using the following language: "The two hundred and five dollars can be recovered under the covenants, if the plaintiff has satisfied you that the deed of Monroe was ever authoritatively delivered to her. If that deed was delivered to her so as to pass the property to her, so as to make the title hers, (here referring to an earlier instruction to be noticed hereinafter) then the covenants must be made good. If the deed was never delivered to her, never at any time delivered with the assent of Monroe Hill, the grantor, then she cannot recover at all under this branch of the case. So, to review a little, and in an inverse order, this sum of two hundred and five dollars is recoverable if that deed was delivered, and if not, not." The jury, in allowing no damages, and rendering a verdict on all the questions for the defendant, determined that the deed of 1862, under which plaintiff's claims are founded, was never a valid, operative deed, was never delivered. That question was the fulcrum on which the plaintiff's case turned.

The sign of a careful trial, covering a period of nearly two weeks, is seen in the fact that in the reception of a voluminous amount of testimony, but a single instance is found of an exception to evidence, and that upon an issue removed from the case by the verdict, which was the admission of a question on cross-examination to counteract a contrary statement of the same witness on the direct examination.

We think the learned counsel, in his criticisms upon the instructions on the point of delivery, overlooks or fails to appreciate the case as presented by the law and the facts. He claims that the facts were misstated on which the law depends. An

examination of the charge at its close shows that while a colloquy was held by the court with counsel, to correct misunderstandings and omissions, no suggestion was made that any rules of law were insufficiently expressed, or any facts misstated. That any such complaint, now for the first time made, falls far short of justification, a closer examination of the case will show.

"A great question," says the judge, "is whether there was a delivery of the deed. No particular form of proceeding is required to effect a delivery. It may be by acts merely, or, under circumstances, by words merely, or by both combined; usually, it is by both combined; but in all cases an intention that it shall be a delivery must exist in the minds of both parties." It would be impossible to state the general rule more exactly. Certainly, a grantor need not deliver his deed until he has a mind to, nor can it be forced upon the person named as grantee therein without his consent to receive it.

The charge further declared: "It is no evidence that a deed has been delivered because containing the words, signed, sealed and delivered; that is a preparation for delivery, because the words must be written before the deed can be delivered. Nor is it any evidence in this case that the deed was delivered, because it has been recorded; that is not the least legal evidence of delivery." This is correctly stated, and such a statement is reasonably demanded, when a judge deems it proper to counteract an undue influence that arguments of counsel may create in placing great stress upon such matters. Here it was peculiarly fitting, as the facts show. The illustrations which follow the statement of these rules, were not based upon the facts of the case, nor intended to be, but were descriptions laid before the minds of the jury to help them grapple the force of the principle to be by them applied, to enable them to appreciate the difference between mere possession of a thing and having a rightful delivery of it. And this painstaking by the judge was apropos to the facts of the case and in no respect at all overreaching. The battle of the case was fought over the question of intention. There was no question of the existence of the deed, and no doubt that the plaintiff, after Monroe's death, got it from a bureau and

had it recorded. The greater question was whether it had been properly taken or not. The court would have been remiss of duty to have passed silently by the defendant's propositions of law or of fact on this question.

The counsel for the plaintiff thinks there is no evidence in the case upon which a proposition could be submitted to the jury, allowing them to find a delivery at any time later than the date of the deed, failing to notice that such a submission was in fact favorable, in view of the verdict rendered, to the plaintiff, inasmuch as the jury were thereby permitted to find a later if not an earlier delivery, allowing to her two chances upon which to recover instead of one. It was much easier to believe that a delivery was made in 1867 than in 1862, considering the events happening between those dates, but the jury were incredulous of any delivery at any time.

Perhaps the objection most strongly urged, is to a remark of the judge in the charge that "there is not a scintilla of evidence that she ever had the deed in her possession before October, 1867," and this objection is founded in misapprehension. No witness ever saw the deed until after Monroe Hill died in October, 1867. From a bureau drawer in Abner Hill's house, where there is reason to believe, from the evidence, that both Abner and Monroe kept papers and transacted some business, the evidence being silent as to whether Mrs. Hill had any papers or did any business there or not, the deed was taken by Mrs. Hill, as before said, within a few days after Monroe's death, in the presence of a son, who immediately and secretly hurried with it to the registry at Machias. There is no evidence in the case of any previous possession, more than a presumption arising from her possession at that time, and of that presumption the language of the charge gave her the very fullest benefit. The counsel says, the undisputed fact that the deed was taken from the drawer by Mrs. Hill was evidence of some weight that it had been there before. But much more importance and force was ascribed to that fact than even counsel is here claiming. Said the judge, "She relies upon her possession of the deed in October, 1867, and its record; that fact makes out a *prima facie* case. Having

the deed in 1867, nothing else appearing, it raises a presumption that she had it at its date. The remark objected to as a misstatement of fact is itself followed by the explanatory and qualifying remark, "but that is the date, and the presumption of law that attaches to it and arises from it." In fact the whole of plaintiff's case was that naked and uncorroborated presumption, as far as evidence of title was concerned. The distinction was correctly drawn between actual and presumptive evidence, and no complaint of it was thought of at the time.

Another phrase in the charge is objected to, which is this: "It is a general rule of law that when a person sees another conveying property which belongs to himself instead of to the person conveying, and makes no dissent *when he should dissent*, he is estopped from making a claim." This is argued to be an incorrect principle of estoppel, insufficiently elaborated and applied. The answer is that it was not given as any rule to be applied to these facts, nor was it pretended that any estoppel would apply here. It was correct as a general remark, explaining itself in its connection, embodied in a statement of what circumstances counsel for the defendant relied on as indicating an admission that the deed of 1862 had never been delivered by Monroe Hill to plaintiff; among those acts being her signing off her dower in the deed of her husband when she was the owner herself under the deed of 1862, if that deed was ever delivered. No principle of estoppel was claimed, and all the demands presented in this suit occurred before the transaction spoken of took place. Her conduct in this matter was submitted to the jury only on the question of delivery, there being no other question in the case besides that of the damages. And on that issue the judge, among other things in connection with the remarks complained of, said, "this testimony, of course, the weight of it is for you to say, is of a character which the law regards important, if she knew and understood the matter. If she knew that that deed was conveying the Tomah property when the Tomah property was included in the deed to her, and therefore that her husband could not own it, if she understood that, the law regards her act as a very important act and

important testimony, and so, much must depend on the question whether she understood what she was doing, knew what she was about."

Exceptions and motion overruled.

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

JAMES B. DASCOMB and others

vs.

ERASTUS W. MARSTON and others.

Somerset. Opinion March 2, 1888.

Equity practice. Will. Legacy. Income.

When a cause is set down to be heard on bill and answer the plaintiff waives his replication and the answer must be taken as true.

The legacy of a specified sum "the income only to be expended annually," by the legatee, is an absolute legacy.

A testator bequeathed two hundred thousand dollars to the American Baptist Home Mission Society; "one-half of which is to be applied in aid of freedmen's schools (other than the Wayland Seminary)," and he also bequeathed fifty thousand dollars to the Wayland Seminary of Washington. *Held*, that the whole legacy consisting of $250,000 should be paid to the mission society, it appearing that the Wayland Seminary is a school established and maintained by said mission society.

A legacy to certain trustees, "to be appropriated at their discretion in founding a free public library," in a town named, is valid.

A bequest to a town for the worthy and unfortunate poor, one-half of the income of the same to be expended by a woman's aid society formed for that purpose," is valid, whether such a society exists or not.

ON report.

Bill in equity by the executors of the will of Abner Coburn to obtain a construction of the following clauses in the will and codicil.

(Will.)

"Third. I give and bequeath to the Maine State College of Agriculture and Mechanic Arts, one hundred thousand dollars, the same to be funded, and the income only to be expended annually.

"Fourth. I give and bequeath to Colby University, two hundred and fifty thousand dollars, one hundred and seventy-five

thousand dollars of which to be funded, and the income only to be expended annually.

"Fifth. I give and bequeath to the American Baptist Home Mission Society, two hundred thousand dollars, one-half of which to be applied in aid of Freedmen's schools (other than the Wayland Seminary).

"Sixth. I give and bequeath to the Wayland Seminary at Washington City, in memory of my deceased sister, Fidelia C. Brooks, late missionary to Africa, and Mary A. Howe, late teacher in the Seminary, fifty thousand dollars.

"Fourteenth. I give and bequeath to the trustees of Bloomfield Academy, to be appropriated at their discretion in founding a free public library in the town of Skowhegan, thirty thousand dollars. . . .

"Fifteenth. I give and bequeath to the town of Skowhegan, for the worthy and unfortunate poor, and to save them from pauperism, to be funded, and one-half of the income of the same to be expended by a Woman's Aid Society, formed for that purpose, twenty thousand dollars."

(Codicil.)

"First. Whereas by my said will I did give and bequeath to Colby University the sum of two hundred and fifty thousand dollars, now I do hereby revoke the said legacy, and do give and bequeath to the said Colby University the sum of two hundred thousand dollars, one hundred and fifty thousand dollars of which to be funded, and the income only to be expended annually.

"Second. And whereas by my said will I did give and bequeath to the Maine Insane Hospital the sum of one hundred thousand dollars, now I do hereby revoke said legacy and do give and bequeath to the said Insane Hospital the sum of fifty thousand dollars, the income only to be expended annually."

Edmund F. Webb and *Appleton Webb*, for the executors.

Extrinsic evidence admissible to aid in construing devises. *Howard* v. *Am. Peace Soc.* 49 Maine, 288; *Standen* v. *Standen*, 2 Ves. Jr. 589; *Selwood* v. *Mildmay*, 3 Ves. Jr. 306.

Real and personal property may be disposed of by will. R. S., c. 74; *Deering* v. *Adams*, 37 Maine, 269.

Intent of testator controls. *Cotton* v. *Smithwick*, 66 Maine, 367; *Simpson* v. *Welcome*, 72 Maine, 499; *Tappan* v. *Deblois*, 45 Maine, 122; *Du Bois* v. *Ray*, 35 N. Y. 162; Charitable Will; Statutes of Elizabeth: Story, Eq. Jur. §§ 1137–1140; *Preachers' Aid Soc.* v. *Rich*, 45 Maine, 553; *McGill* v. *Brown*, Brightly, 346; *Greene* v. *Dennis*, 6 Conn. 293; *Am. Bib. Soc.* v. *Wetmore*, 17 Conn. 182; *Bartlet* v. *King*, 12 Mass. 537; *Old South Soc.* v. *Crocker*, 119 Mass. 1; 1 Jarman, Wills, §§ 386, 390, p. 382; *Perin* v. *Cary*, 24 How. 494; *McCartee* v. *Orphan Asylum Soc.* 9 Cow. 484; *Bartlett* v. *Nye*, 4 Met. 378; *Phila. Bap. Ass.* v. *Hart*, 4 Wheat. 1; *Inglis* v. *Sailors' Snug Harbor*, 3 Pet. 99; Boyle, Char. 51; *Jackson* v. *Phillips*, 14 Allen, 556; Shelf. Mortm. 59; *Morice* v. *Bishop of Durham*, 9 Ves. Jr. 399; *Coxe* v. *Basset*, 3 Ves. Jr. 155; *Att'y Gen.* v. *Bowyer*, 3 Ves. Jr. 714; *Moggridge* v. *Thackwell*, 7 Vesey, Junior, 36; 2 Kent's Commentaries, 287; *Girard Will Case*, 2 Howard, 127; *Power* v. *Cassidy*, 16 Hun. 296; 79 New York, 603; *Jones* v *Williams*, 1 Amb. 651; 2 Perry, Trusts, § 687; 2 Pomeroy, Equity Jurisprudence, §§ 1018–1024; *State* v. *Gerard*, 2 Ired. Eq. 210; *Going* v. *Emery*, 16 Pick. 119; *Att'y Gen.* v. *Aspinwall*, 2 Mylne & C. 618; *White* v. *White*, 7 Ves. Jr. 423.

Charitable bequests held valid. *Whicker* v. *Hume*, 14 Beav. 509; *Att'y Gen.* v. *Clarke*, 1 Amb. 422; *Waller* v. *Childs*, 2 Amb. 662; *Re Schouler*, 134 Mass. 426; *Saltonstall* v. *Sanders*, 11 Allen, 446; *Power* v. *Cassidy*, 16 Hun. 297; *Fairbanks* v. *Lamson*, 99 Mass. 533; *Swasey* v. *Am. Bib. Soc.* 57 Maine, 525; *Piper* v. *Moulton*, 72 Maine, 155; *Clement* v. *Hyde*, 50 Vermont, 716; S. C., 28 Am. Rep. 522; *Quinn* v. *Shields*, 62 Iowa 149 (49 Am. R. 141); *Sowers* v. *Cyrenius*, 39 Ohio St. 29 (48 Am. R. 419); *Magee* v. *O'Neill*, 19 S. C. 170 (45 Am. R. 765); *Am. Tract Soc.* v. *Atwater*, 30 Ohio St. 77 (27 Am. R. 422); *Drew* v. *Wakefield*, 54 Maine, 291; *Baker* v. *Sutton*, 1 Keen, 226; *Johnson* v. *Swan*, 3 Madd.

457; *Everett* v. *Carr*, 59 Maine, 325; *Bartlet* v. *King*, 12 Mass. 537; *Att'y Gen.* v. *Soule*, 28 Mich. 153; *Carne* v. *Long*, 2 DeG. F. & J. 75; *Craig* v. *Secrist*, 54 Ind. 419; *Burrill* v. *Boardman*, 43 N. Y. 254 (3 Am. R. 694); *Stewart* v. *Stewart*, 31 N. J. Eq. 398 (1 Am. R. 168); *Mason* v. *Robinson*, 2 Sim. & Stu. 295; *Christ's College Case*, 1 W. Bl. 90; *First Univer. Soc.* v. *Fitch*, 8 Gray, 421; *Ould* v. *Washington Hospl.* 95 U. S. 303; *McDonogh* v. *Murdoch*, 15 How. 367; *Shotwell* v. *Mott*, 2 Sandf. Ch. 51; *Sewell* v. *Crewe-Read*, L. R. 3 Eq. 60; *Booth* v. *Carter*, L. R. 3 Eq. 757; *Cresswell* v. *Cresswell*, L. R. 6 Eq. 69; *Re Watmough*, L. R. 8 Eq. 272; *Sinnett* v. *Herbert*, L. R. 12 Eq. 201.

No objection that a school exists for a restricted class. *Meeting Street Soc.* v. *Hail*, 8 R. I. 234; *Second Cong. Soc.* v. *Waring*, 24 Pick. 304; *King* v. *Parker*, 9 Cush. 71; *Carter* v. *Balfour*, 19 Ala. 814.

The law of perpetuity. *Merritt* v. *Bucknam*, 77 Maine, 253; *Slade* v. *Patten*, 68 Maine, 380; 1 Perry, Trusts, 381; 1 Jarman, Wills, 504; *White* v. *Fisk*, 22 Conn. 31; *State* v. *Griffith*, 2 Del. Ch. 392; *Dexter* v. *Gardner*, 7 Allen, 243; *Williams* v. *Williams*, 8 N. Y. 525; *Levy* v. *Levy*, 33 N. Y. 97; *Odell* v. *Odell*, 10 Allen, 6; Tudor, Char. T. 298; *Jones* v. *Habersham*, 107 U. S. 174; *Suter* v. *Hilliard*, 132 Mass. 412; *Adye* v. *Smith*, 44 Conn. 60; *DeCamp* v. *Dobbins*, 29 N. J. Eq. 36; *Shotwell* v. *Mott*, 2 Sandf. Ch. 51; 2 Perry, Tr. 736; *McDonogh* v. *Murdoch*, 15 How. 367; *Potter* v. *Thornton*, 7 R. I. 252; 2 Pom. Eq. Jur. § 1018.

The words "to be funded and the income only to be expended," do not limit the bequests. 1 Bour. L. Dict. 551; 1 McCullough, Com. Dict. 689; *Stephens* v. *Milnor*, 24 N. J. Eq. 358; *Wetmore* v. *Parker*, 52 N. Y. 450; *Auburn Theolog. Sem.* v. *Kellogg*, 16 N. Y. 89; *Levy* v. *Levy*, 33 N. Y. 116; *Bascom* v. *Albertson*, 34 N. Y. 584; *Rainey* v. *Laing*, 58 Barb. 453; 2 Redf. Wills, * 851; *Att'y Gen.* v. *Greenhill*, 9 Jur. (N. S.) * 1307; 1 Jarm. Wills, * 251, 257–261; Lewis, Tr. * 534; *Harrison* v. *Harrison*, 36 N. Y. 543; *Patterson* v. *Ellis*, 11 Wend. 259; *Norris* v. *Beyea*, 15 Barb. 425.

William T. Haines, for Maine State College of Agriculture and Mechanical Arts.

Percival Bonney, for Colby University and American Baptist Home Mission Society, cited: 2 Perry, Tr. § 737; *Stone* v. *North*, 41 Maine, 265; *Sampson* v. *Randall*, 72 Maine, 112; *Washburn* v. *Sewall*, 9 Met. 282; *Bangor* v. *Rising Virtue Lodge*, 73 Maine, 428; *Sanderson* v. *White*, 18 Pick. 328; *Hadley* v. *Hopkins Academy*, 14 Pick. 241, besides many other authorities above mentioned, cited by other counsel.

Baker, Baker and Cornish, for Maine Insane Hospital, cited many of the authorities above mentioned, given by other counsel, and also the following: 1 Perry, Tr. § § 114, 119; *Turner* v. *Hallowell Sav. Inst.* 76 Maine, 527; *Deering* v. *Tucker*, 55 Maine, 284; Co. Litt. a; Jarm. Wills, (5 Am. ed.) 694; *Stokes* v. *Cheek*, 28 Beav. 620; *Lassence* v. *Tierney*, 1 Macn. & G. 551; *Gompertz* v. *Gompertz*, 2 Phill. 107; *Kellett* v. *Kellett*, L. R. 3 H. L. 160; 3 Pom. Eq. § 1132, note 2; *Craft* v. *Snook*, 13 N. J. Eq. 121 (78 Am. Dec. 94); *Gulick* v. *Gulick*, 27 N. J. Eq. 500; *Huston* v. *Read*, 32 N. J. Eq. 596; *Silknitter's App.* 45 Pa. 365 (84 Am. Dec. 494); *Elton* v. *Shephard*, 1 Bro. Ch. 532; *Philipps* v. *Chamberlaine*, 4 Ves. Jr. 51; *Page* v. *Leapingwell*, 18 Ves. 463; *Stretch* v. *Watkins*, 1 Madd. 253; *Clough* v. *Wynne*, 2 Madd. 188; *Adamson* v. *Armitage*, 19 Ves. Jr. 416; *University of London* v. *Yarrow*, 1 DeG. & J. 72; *Gooch* v *Association*, 109 Mass. 558; *Att'y Gen.* v. *Kell*, 2 Beav. 575; *Am. Asylum* v. *Phœnix Bank*, 4 Conn. 172 (10 Am. Dec. 112); *Croume* v. *Louisville Orphan Asylum*, 3 Bush. 371; *Att'y Gen.* v. *Moore*, 3 C. E. Green, 256; *Philadelphia* v. *Elliot*, 3 Rawle, 170; S. C. 6 N. E. Rep. 840; *Storrs' Ag. School* v. *Whitney*, 8 Atl. Rep. 141; *In re Succession of Vance*, 2 Southern Rep. 54; *Erskine* v. *Whitehead*, 84 Ind. 357.

Walton and Walton, for the trustees of Bloomfield Academy and for the town of Skowhegan, in two able briefs, cited many of the authorities above given by other counsel.

D. D. Stewart, for Erastus W. Marston *et als.*, heirs and residuary legatees.

In construing the provisions of a will, the court will consider all the provisions and phrases relating to the particular bequest, and give them, as a whole, such construction as the testator evidently intended. If two clauses are repugnant, the last must stand because every part of a will is revocable. *Cotton* v. *Smithwick*, 66 Maine, 367; 1 Spence's Eq. Juris. 536; 1 Saunders, Uses and Trusts, 236 (note). "But," adds Mr. Spence, "an attempt should first be made to reconcile the clauses if possibly it can be affected."

The intention of the testator is evident. He intended to give to these donees, the yearly interest, or income of these sums of money, and prohibited them from ever having the principal, or ever having any power to alienate it. That the bequest amounts to a gift of the annual interest, and nothing more, is settled by the decision of the Supreme court of Massachusetts. *Saunderson* v. *Stearns*, *Exr.* 6 Mass. 37.

Undoubtedly, if the yearly interest had been limited to a life or lives in being, as in the case cited, with twenty-one years added, such a limitation would have been valid, and the executors would have stood charged with the trust. But the fund being tied up from alienation indefinitely, and the payment of the annual income not being limited to a life or lives in being and twenty-one years after, the vice of perpetuity attaches to these legacies and they are void. *Thellusson* v. *Woodford*, 4 Ves. 227; *Duke of Norfolk* v. *Howard*, 1 Vern. 164; *Beekman* v. *Bonsor*, 23 N. Y. 315; *Rose Will Case*, 4 Abbott's N. Y. Court of Appeals, 108; *Cadell* v. *Palmer*, 10 Bing. 140; *Thorndike* v. *Loring*, 15 Gray, 391; *Hall* v. *Hall*, 123 Mass. 120; Gray on Perpetuities, c. 10, 250 to 256; 1 Perry on Trusts, § 379; *Yates* v. *Yates*, 9 Barb. 325; *King* v. *Rundle*, 15 Barb. 144; *Wilson* v. *Lynt*, 30 Barb. 124; *Owens* v. *Missionary Soc.* 14 N. Y. 380; *Bascom* v. *Albertson*, 34 N. Y. 584; *Piper* v. *Moulton*, 72 Maine, 155; *Rex* v. *Lord Dangannon*, 1 Dr. & Warren, 245.

The case of *Tucker* v. *Seamen's Aid Soc.* 7 Met. 188, appears to be decisive against this attempt of the Amer.

Baptist Home Missionary Society to gobble up a legacy to the "Wayland Seminary."

In the absence of all proof can this court hold this to be a charitable bequest, a public charity? Can they further hold that "Freedmen's schools" are definite *cestui que trust*, sufficiently definite to be the subject of a judicial decree? All trusts should be so explicitly declared and defined that the court can, if called upon, enjoin the performance, or the non-performance, of any act necessary to the fulfillment of the trust.

"The trusts must be so certain in their objects, and in the persons to be benefited, that they can be enforced by a judicial sentence." *Williams* v. *Williams*, 4 Selden, 526; *Owens* v. *Missionary Soc.* 14 N. Y. 380; *Beekman* v. *Bonsor*, 23 N. Y. 299; *Phelps* v. *Pond*, 23 N. Y. 69; *Downing* v. *Marshall*, 23 N. Y. 382; *Phillips* v. *Aldridge*, 4 D. & E. *264; *Morice* v. *Bishop of Dunham*, 9 Ves. 398; *James* v. *Allen*, 3 Meriv. 17; *Vesey* v. *Jameson*, 1 Sim. & Stu. 69; 1 Jarman on Wills, 316; *Goddard* v. *Pomeroy*, 36 Barb. 546; *Nichols* v. *Allen*, 130 Mass. 211.

It is admitted that the "Wayland Seminary" is an unincorporated association, out of the state, and in no state, but the persons composing it are supposed to reside in the District of Columbia. The following authorities hold such a bequest void: *Baptist Ass'n* v. *Hart's Exrs.* 4 Wheat. 1; *Bascom* v. *Albertson*, 34 N. Y. 584; *Tucker* v. *Seaman's Aid Soc.* 7 Met. 188.

"The rule is," said Mr. Justice MORTON, in delivering the opinion of the court in a late case, "that executory limitations are void unless they take effect *ex necessitate*, and in all possible contingencies, within the period of a life or lives in being at the death of the testator and twenty-one years after." *Hall* v. *Hall*, 123 Mass. 124; *Rose Will Case*, 4 Abb. N. Y. App. 108; *Fosdick* v. *Fosdick*, 6 Allen, 41; *Brattle Sq. Chur.* v. *Grant*, 3 Gray, 155.

The authorities already cited show that legacies rendered invalid by suspending the power of alienation beyond a life or lives in being and twenty-one years, and such as are void for remoteness, go to the testator's legal heirs, as property unde-

vised. *Rose Will Case*, 4 Abb. Ct. of App. 108, and others cited.

HASKELL, J. The executors of the will of Abner Coburn, *quod vide*, 79 Maine, 25, ask a construction of that will. Most of the respondents have answered, and a general replication has been filed.

The bill does not call for answers on oath, and after replication they are not evidence of the facts stated in them. *Clay* v. *Towle*, 78 Maine, 86. After answer filed in an equity cause, the orator may elect to set the cause for hearing upon bill and answer, or traverse the truth of the answer by replication, thereby raising an issue of fact to be settled by evidence. If the cause be set for hearing upon bill and answer, the facts stated in the answer are to be taken as true, because the orator elects to so treat them; precisely as a plaintiff in an action at law, by demurrer to a defendant's plea, admits all the facts stated in it that are well pleaded.

In the cause before the court, the orators filed a replication to the respondents' answers, and thereafterwards moved to set the cause for hearing upon bill and answer only, and the motion was granted.

By filing the motion, the orators must be held to have waived their replication; otherwise the respondents can neither have the benefit of their answers as true, nor a chance to prove them true, and would be deprived of their defense. On motion, a replication may be withdrawn and the cause set for hearing upon bill and answer. *Rogers* v. *Goore*, 17 Ves. 130; *Brown* v. *Ricketts*, 2 Johns. ch. 425. So for questioning the sufficiency of a plea. *Greene* v. *Harris*, 9 R. I. 401.

I. The three several legacies of $50,000 to the Maine Insane Hospital, "the income only to be expended annually;" of $100,000 to the Maine State College of Agriculture and Mechanic Arts, "the same to be funded and the income only to be expended annually;" of $200,000 to Colby University, "$150,000 of which to be funded and the income only to be expended annually," are of like legal import and may, therefore, be considered together.

These donations are absolute, to enable each donee to compass certain specific objects within the scope and purpose of its charter, and incident to the beneficent design of its foundation. No other intent can be gathered from the will, and the intent of the testator therein expressed must govern. *Turner* v. *Hallowell Savings Institution*, 76 Maine, 526.

But if these legacies are treated as gifts of perpetual income, the result must be the same. A gift of the perpetual income of either real or personal estate is a gift of the property. That has always been the doctrine of this court. *Andrews* v. *Boyd*, 5 Maine, 199; *Butterfield* v. *Haskins*, 33 Maine, 392; *Earl* v. *Rowe*, 35 Maine, 414; *Stone* v. *North*, 41 Maine, 265; *Sampson* v. *Randall*, 72 Maine, 109.

Payment of these legacies to the donees will relieve the executors from further liability in the premises.

II. Two hundred thousand dollars is bequeathed to the American Baptist Home Mission Society, ("one-half of which to be applied in aid of Freedmen's schools other than the Wayland Seminary,") and $50,000 to the Wayland Seminary at Washington, D. C.

The case shows that the Mission Society is a New York corporation, chartered for "promotion of the preaching of the gospel in North America," with authority "to establish and maintain schools in connection with its missionary work among the colored population of the United States, now generally known as freedmen, . . . and for that purpose to take and hold necessary real estate, and receive, accumulate, and hold in trust endowment funds for the support of such schools;" that the society has established and is maintaining fourteen "freedmen's schools," one in each of thirteen formerly slaveholding states, and one, Wayland Seminary, in the District of Columbia.

The clear intention of the testator was that $150,000 of this donation should be applied to the support of these and such other schools of the same class as the society may establish or see fit to patronize; but that $50,000 of the same, and no more, should be applied to Wayland Seminary, one of these "freedmen's schools."

The mission society, therefore, takes the whole $250,000, but $150,000 it takes in trust for the support or aid of "freedmen's schools," according to the tenor of the legacy. To this society the whole legacy should be paid.

The society is authorized by its charter to take and hold the legacy, and its purpose is so manifestly charitable and meritorious that further consideration of it is unnecessary. *Everett* v. *Carr*, 59 Maine, 325; *Simpson* v. *Welcome*, 72 Maine, 496; *Tappan* v. *Deblois*, 45 Maine, 122; *Drew* v. *Wakefield*, 54 Maine, 291.

III. Thirty thousand dollars is bequeathed "to the trustees of Bloomfield Academy, to be appropriated at their discretion in founding a free public library in the town of Skowhegan."

This legacy is certain and specific and for a charitable purpose, and should be paid to the donees according to its tenor. The authorities already cited establish its validity.

IV. Twenty thousand dollars is bequeathed "to the town of Skowhegan for the worthy and unfortunate poor, and to save them from pauperism, to be funded, and one-half of the income of the same to be expended by a Woman's Aid Society formed for that purpose."

A trust is created for the worthy and unfortunate poor. Clearly a charity. The direction that one-half the income shall be expended by a "Woman's Aid Society formed for that purpose" does not invalidate the legacy. Whether such society exists or shall be hereafter formed makes no difference. The beneficiaries are named. "For ye have the poor always with you."

A gift to a corporation not *in esse* for a charity is valid; *Swasey* v. *American Bible Society*, 57 Maine, 523; *a fortiori* when the income only is to be expended under the direction of a society formed for that purpose.

The questions put by the heirs at law in their answer, and not already considered, have not been argued by their learned counsellor, and may therefore be considered as waived. *State* v. *Craig*, 80 Maine, 85.

Bill sustained. Decree below according to this opinion.

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

In the case of CHARLES MERRYFIELD, appellant.

Knox. Opinion March 6, 1888.

Insolvent law. Trader. R. S., c. 70, § 46.

An insolvent debtor, who, for several years prior to his petition in insolvency, was engaged in purchasing small parcels of timber lands and timber growth, about three hundred acres in all, cutting and removing timber therefrom, manufacturing the same at his mill into staves and heading, constructing the manufactured materials into barrels at his shops, and transporting these products, with his teams, to market, for sale, the business involving the employment of from six to eleven men and a capital of eighteen hundred dollars, was held to be a trader within the meaning of the insolvent law.

ON appeal by an insolvent debtor from a decree of the court of insolvency, refusing a discharge, on the ground that the insolvent was a trader and kept no cash book, or other proper books of account.

The facts are stated in the opinion.

True P. Pierce, for defendant.

Was Merryfield a trader within the meaning of ch. 70, § 46, of R. S.?

In *Sylvester* v. *Edgecomb*, 76 Maine, 499, the court examine the question at issue, and therein they say, "A trader is one who sells goods substantially in the same form in which they are bought."

J. E. Hanley, for the creditors, cited: *Groves* v. *Kilgore*, 72 Maine, 489; *In re Garrison*, 7 N. B. R. 287; S. C. 5 Ben. 430; Bump. Bankruptcy, (9th ed.) 712.

PETERS, C. J. The question to be determined is, whether an insolvent debtor should or not be regarded as a trader, who, for several years prior to the date of his petition, was engaged in purchasing small parcels of timber land and growth upon land, about three hundred acres in all, cutting and removing timber therefrom, manufacturing the same, at his mill, into staves and heading, constructing the manufactured materials into casks and barrels at his shops, and transporting these products, with his

teams, to market for sale, the business involving the employment of from six to eleven men besides himself, comprising lumbermen, millmen, coopers and teamsters, and his indebtedness of all kinds being not far from the sum of one thousand eight hundred dollars. He also occasionally sawed at his mill small amounts of lumber for others.

It is clearly enough seen that he was a trader; that he should have kept books showing the application and use of the money which he became indebted for in his business, and that, failing to do so, without any excuse, he is not entitled to a discharge.

His counsel contends, on the authority of the case of *Sylvester* v. *Edgecomb*, 76 Maine, 499, that a trader is one who sells goods in substantially the form that they are bought. But the same case also further declares that one engaged in the manufacture and sale of lumber may be a trader. In the case now before us, it appears that the insolvent was systematically engaged in a variety of business, which must have required the use of considerable capital or credit. He was constantly employed in manufacturing and selling his own and buying other goods.

Decree below affirmed.

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

FREDERICK J. ALLEY *vs.* MAX CASPARI.

Hancock. Opinion March 7, 1888.

Courts. Jurisdiction. Non-residents. Practice.

If a defendant, whose residence is out of the state, be served with process while temporarily present within the state, such process will confer complete jurisdiction over his person in our courts. His bodily presence is equivalent to residence for such purposes.

The municipal court of the city of Ellsworth has the same jurisdiction in an action against a non-resident of the state who is temporarily abiding within Hancock county, if personal service be obtained, that it would have were such person a resident within the county.

ON exceptions.

Appeal from the municipal court of Ellsworth.

The point is stated in the opinion.

W. P. Foster, for the plaintiff, cited: R. S., c. 113, § 2; 68 Maine, 47; 39 Maine, 476; 63 Maine, 384.

Deasy and Higgins, for defendant.

The Ellsworth municipal court has not jurisdiction by the act of 1869 because the addamnum is over twenty dollars. Special Acts of 1869, c. 29, § 12.

Nor by the act of 1876 because the sole defendant was not a resident of the county. Special Acts of 1876, c. 298, § 2.

Municipal, and in fact all inferior courts, are of limited jurisdiction and are strictly confined to the powers and cases delegated to them by the acts by which they are created, and nothing is inferred in their favor. Their jurisdiction must be affirmatively shown. *Frees* v. *Ford*, 6 N. Y. 176; *Case* v. *Woolley*, 32 Am. Dec. 54; *Bloom* v. *Burdick*, 37 Am. Dec. 299; *Lowry* v. *Erwin*, 39 Am. Dec. 556.

"Commorant" negatives the idea of legal residence meaning a mere temporary place of abode. Raphalje and Lawrence's Law Dictionary; *Ames* v. *Winsor*, 19 Pick. 247.

The court in this case had neither jurisdiction over the person or subject matter, and both facts appear of record and are not *dehors* the record, hence the writ should abate *ex officio*. *Osgood* v. *Thurston*, 23 Pick. 110; *Guild* v. *Richardson*, 6 Pick. 364.

The writ in this action was not legally served upon the defendant in this action. The Revised Statutes of Maine, c. 113, § 2, provides that the oath shall be certified on the "process." In this case it was written upon a piece of paper and attached to the process by one end, which is not a compliance with the statute, hence should have been dismissed on defendant's motion or should abate *ex officio*. *Hall* v. *Staples*, 74 Maine, 178; *Guild* v. *Richardson*, 6 Pick. 364.

The defendant's plea in abatement is sufficient in law. Stephen on Pleading, p. 46; Chitty on Pl. Vol. 1, p. 497.

It is not necessary in this case that the defendant should give the plaintiff a better writ as this rule only applies in cases where misnomer is pleaded for the defect relied upon depends upon some fact within the peculiar knowledge of the defendant. *Guild* v. *Richardson*, 6 Pick. 364.

The rule of pleading that all affirmative pleadings which do not conclude to the contrary must conclude with a verification, applies only where new matter is pleaded. In this plea no new matter is pleaded. *Hooper* v. *Jellison*, 22 Pick. 250.

In other cases it is a mere matter of convenience and not necessary. Stephen on Pleading, last of rule 6, p. 436.

The defendant's prayer of judgment at the close of this plea is sufficient. Chitty on Pl. Vol. 1, p. 477.

The sixth rule of the Supreme Judicial Court requiring pleas in abatement to be verified by affidavit does not apply to actions begun in municipal courts.

PETERS, C. J. In a writ, returnable to the municipal court of the city of Ellsworth, a tribunal having jurisdiction in actions where not exceeding one hundred dollars of debt or damage is demanded, and the person sued is a resident of Hancock county, the defendant is described as commorant of Eden, within that county, and was arrested on the writ as he was about to remove his residence out of the state. He disputes the jurisdiction of the municipal court upon the plea that, when arrested, he was not a resident of any place in Hancock county, but had his residence in Boston in the commonwealth of Massachusetts.

We think he was a resident in Eden, in the meaning of the act creating the municipal court, while personally present there, and having at the time no permanent home or residence elsewhere in this state. Such residence as he had, all that he had, in Maine, was in Eden. His bodily presence there was, for jurisdictional purposes, equivalent to residence. His permanent domicil may have been in Massachusetts, but his domicil for the time being, his transitory domicil, was in Maine, and he was a commorant of any place where found. If it were not so, then none of our courts have jurisdiction of defendants who are non residents of the state, but are personally present within its borders, for the statutes do not provide for such cases, if the defendant's theory be correct.

Story, in his Conflict of Laws, § 581, founds this jurisdiction of courts on the axiom laid down by Huberns, that all persons

who are found in the limits of a government, whether the residence be permanent or temporary, are to be deemed subjects thereof. Wharton takes the same view of the law, citing English and American cases in its support. Whar. Con. Laws, § 742. Our own reported cases have not embraced the question, but our practice has always been in accordance with the rule stated. In Massachusetts, there are several interesting and instructive cases on the subject. *Barrell* v. *Benjamin*, 15 Mass. 354; *Roberts* v. *Knights*, 7 Allen, 449; *Peabody* v. *Hamilton*, 106 Mass. 217. These cases cover the ground fully. In one of them the question arose in the police court of Boston, a court of limited jurisdiction. And in the case last cited, the court decided that a personal action of a transitory nature might be maintained against a citizen of another state, even if the plaintiff be an alien, if the defendant be personally served with process, either by summons or arrest, although the process be served on board of a foreign vessel arriving from a foreign port, and before the vessel was moored at the wharf. The defendant in that instance was described as of New York, and commorant of Boston.

The true interpretation of the principle is, that when an alien or non resident is personally present in any place in the state, however temporarily or transiently in such place, whether abiding, visiting, or traveling at the time, a process duly served upon him will confer complete jurisdiction over his person in our courts. *Exceptions overruled.*

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

WILLIAM H. FOGLER *vs.* ANDREW E. CLARK and another.

Waldo. Opinion March 7, 1888.

Insolvent law. Estoppel.

A creditor, whose debt accrued before the passage of the insolvency law, having proved his claim in the insolvency proceedings of his debtor and received dividends thereon, is estopped from setting up that the law is unconstitutional as to his claim. His participation in the procedure precludes his recovering the balance of his claim.

ON report.

Assumpsit against the defendants as late co-partners under the firm name of Clark and Fernald, upon a promissory note for one hundred and forty-three dollars, dated February 17, 1876, and payable on demand.

The liability of Fernald was admitted. The other defendant, Clark, relied upon a discharge in insolvency, granted February 24, 1880. The payee of the note proved it in insolvency and received dividends from the insolvent estate as follows: May 29, 1880, twenty-four dollars and ninety-four cents; August 11, 1881, eleven dollars and eighty-seven cents. Subsequently, he indorsed the note over to the plaintiff.

William H. Fogler, for plaintiff.

The insolvent law under which the discharge was granted was enacted February 21, 1878. This court has decided that that law, so far as it provided for a discharge of a debtor's liabilities existing before the law was passed, is unconstitutional and void. *Schwartz* v. *Drinkwater*, 70 Maine, 409; *Ross* v. *Tozier*, 78 Maine, 312.

Such is the settled law in this country. *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Farm. & Mech. Bank* v. *Smith*, 6 *Id.* 131; *Ogden* v. *Saunders*, 12 *Id.* 213; *Roosevelt* v. *Cebra*, 17 Johns. 108; *Matter of Wendell*, 19 Johns. 153; *Wyman* v. *Mitchell*, 1 Cow. 319; *Smith* v. *Mead*, 3 Conn. 253.

The cases of *Kimberly* v. *Ely*, *Ely* v. *Ely*, and *Allen* v. *Ely*, 6 Pick. 440, are in all respects similar to that at bar, except that in one of these cases the creditor in that case not only proved his claim and received a dividend, but was one of the insolvent debtor's assignees. It was there held that the discharge was no bar to the action.

In *Smith* v. *Mead*, 3 Conn. 253, the court in Connecticut decided that a state insolvent law could not affect pre-existing debts.

In *Hammett* v. *Anderson*, 3 Conn. 304, the question arose whether the discharge obtained on the joint petition of the plaintiffs (prior creditors), the defendants (the insolvent debtors) and others, was a bar to the plaintiff's claim. The court held that it was not a bar. See also *Boardman* v. *De Forest*, 5 Conn. 1.

Cases like *Gilman* v. *Lockwood*, 4 Wall. 409, *Clay* v. *Smith*, 3 Pet. 411, *Journeay* v. *Gardner*, 11 Cush. 355, in which it is held that a discharge in insolvency by a state court is a bar to the recovery of a debt due to a citizen of another state who voluntarily becomes a party to the insolvent proceedings, are not analogous.

Mr. Justice CLIFFORD, in *Baldwin* v. *Hale*, 1 Wall. 234, states the case as follows (p. 243): "Insolvent systems of every kind partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to be heard, and in order that they may enjoy that right, they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and opportunity to make his defence. . . . Insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extra territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceedings, has no jurisdiction in the case. Legal notice cannot be given, and, consequently, there can be no obligation to appear, and of course there can be no legal default."

In *Hawley* v. *Hunt*, 27 Iowa, 303 (1 Am. Rep. 273), DILLON, C. J., in an opinion in which the question is exhaustively discussed and numerous cases are cited, follows the reason of *Baldwin* v. *Hale*.

It is similar law that a party may voluntarily appear in a judicial proceeding and give jurisdiction over his person by consent. Such waiver may be express, or it may be implied from his acts, by taking subsequent steps in the action without objection to the previous irregular and void proceedings. 1 Wait's Actions and Defences, 50.

When, therefore, a creditor of another state comes in and becomes a party to insolvent proceedings, he submits himself to the jurisdiction. But a creditor holding a debt contracted prior to the passage of the law, stands in entirely a different position. The statute, so far as it undertakes to impair the obligation of his contract, is utterly void by reason of its unconstitutionality.

Joseph Williamson, for the defendant, Clark, cited: *Fisher* v. *Currier*, 7 Met. 424; *Chapman* v. *Forsyth*, 2 How. 202; *Morse* v. *Lowell*, 7 Met. 152; *Bigelow* v. *Pritchard*, 21 Pick. 169; *Clay* v. *Smith*, 3 Pet. 411; *Journeay* v. *Gardner*, 11 Cush. 355; *Bucklin* v. *Bucklin*, 97 Mass. 256; *Baldwin* v. *Hale*, 1 Wall. 223; *Baldwin* v. *Newbury Bank*, 1 Wall. 234; *Gilman* v. *Lockwood*, 4 Wall. 409; *Kelley* v. *Drury*, 9 Allen, 27; *Marsh* v. *Putnam*, 3 Gray, 551; *Guernsey* v. *Wood*, 130 Mass. 503; *Hills* v. *Carlton*, 74 Maine, 156; 2 Kent, Com. (9th ed.) 503.

PETERS, C. J. The plaintiff, a creditor whose debt accrued against the defendant before the passage of the insolvent law, having proved his debt against the defendant's estate in insolvency and received dividends thereon, seeks to recover the balance of his debt, on the ground that the law is, as to his claim, unconstitutional, the question being whether he is or not estopped by these facts from asserting such unconstitutionality.

The plaintiff relies upon two early Massachusetts cases to support his proposition, *Kimberly* v. *Ely*, 6 Pick. 440; *Agnew* v. *Platt*, 15 Pick. 417. These cases were prior to the case of *Clay* v. *Smith*, 3 Pet. 411, the authoritative decision on the question, and have been since overruled by the Massachusetts court. *Morse* v. *City of Lowell*, 7 Met. 152; *Bucklin* v. *Bucklin*, 97 Mass. 256, and cases there cited. The United States Supreme Court has adhered to its first opinion. *Chapman* v. *Forsyth*, 2 How. 202; *Baldwin* v. *Hale*, 1 Wall. 223; *Gilman* v. *Lockwood*, 4 Wall. 234. Kent and Story and other writers state it as an unquestioned rule that a creditor may waive his privileged claim by being a party to the insolvency proceeding. It would, surely, detract greatly from the beneficent operation of the insolvency laws, if home creditors are to be inhibited from collecting, and foreign or non resident creditors are allowed to collect, their debts against an insolvency estate, while both classes of the creditors of such estate are admitted to a common management and control of its affairs.

The plaintiff, however, insists that a difference exists between

a case, like his, where the creditor is a party to a procedure which is void because unconstitutional, and a case where the claim is merely privileged because of a fiduciary character, or where the operation of the law is not wide enough to include a non resident creditor. The position contended for is, that an unconstitutional law cannot be made constitutional by admissions; that it cannot be waived.

We do not fully concede these propositions. Of course, a void enactment does not become valid because a party admits it to be valid. But a party may, in many cases, be prevented by his acts from setting up the defense of unconstitutionality. He cannot, as the illustration goes, avail himself of the insolvency law, both as a shield and a sword. Seeking the enjoyment of its advantages, he takes its disadvantages as well. Proclaiming its validity, he cannot at the same time deny its validity.

It should be remarked at this place that the insolvency law is not unconstitutional. It would, however, be an unconstitutional act to apply its operation to the extent of discharging the plaintiff's claim, were he not a party to the procedure. But it would be just as unconstitutional to enforce the provisions of the act against non assenting creditors who reside out of the state. In either case it would impair the contract. The distinction insisted upon by the plaintiff does not appear to have received favor and scarcely recognition in the authorities on the subject.

The law which was so severely denounced as unconstitutional in the case of *Kimberly* v. *Ely*, *supra*, was an insolvent law of the state of New York, and was as valid in its general application as any state insolvent law. The case of *Van Hook* v. *Whitlock*, 7 Paige, 373, was where the claim in litigation accrued before the law was passed, and the court there says, "They (creditors) have deprived themselves of the right to object to the constitutionality of the assignment." The same case was, for the same reason, affirmed in 26 Wend. 43, where it was said that the effect of becoming a party to the procedure is as great at all events as an agreement would be in a private assignment or

composition. It was there further remarked that the obligation of the debtor ceases not from the unconstitutional law, but from the voluntary consent and agreement of the creditors. In *Lee* v. *Tillotson*, 24 Wend. 337, it was held that a party having waived a constitutional provision cannot subsequently ask for its protection. "A contrary argument," says COWEN, J., "would deprive a criminal of the power to plead guilty, on the ground that the constitution has secured him a trial by jury." In *Daniels* v. *Tearney*, 102 U. S. 426, the court says, "It is well settled as a general proposition, subject to exceptions, that when a party has availed himself for his benefit of an unconstitutional law, he cannot in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense." The case at bar is stronger than that. It is a case of judicial estoppel, or an estoppel by judicial proceedings. Mr. Cooley, after enumerating the classes of cases where, for different causes, the insolvent law is not allowed to apply, says: "If, however, the creditor, in any of these cases makes himself a party to proceedings under the insolvent law, he will be bound thereby like any other party to judicial proceedings, and is not to be heard afterwards to object that his debt was protected by the constitution from the reach of the law." Cool. Con. Lim. (5th ed.) 358; Whar. Conf. Laws, § 528.

It strikes us that the only hardship which the plaintiff can complain of is that the legislature did not, in its thoughtfulness, include a claim like his in that clause which allows certain privileged creditors to prove their claims, the dividend received to be only a payment on the debt, and not a discharge of the debtor therefrom. R. S., ch. 70, § 47.

Plaintiff nonsuit.

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

EMMA J. AMES *vs.* DELBERT STORER.

Penobscot. Opinion March 7, 1888.

Partial payment after discharge in insolvency. R. S., c. 111, § 1, p. VI.

The voluntary partial payment of a judgment, after the same has become barred by the debtor's discharge in insolvency, does not revive and make valid the balance of such judgment.

ON report.

The action was debt on a judgment, and the defense was a discharge in insolvency.

To avoid the discharge, the plaintiff relied on a partial payment of the judgment, after the discharge, and an oral promise, at the time of such partial payment, to pay the balance of the judgment.

Ira W. Davis, for the plaintiff, submitted without argument.

H. P. Haynes, for the defendant, cited: R. S., c. 111, § 1; 3 Maine, 415; 4 Maine, 9, 263; 53 Maine, 24; 66 Maine, 343; 73 Maine, 195.

PETERS, C. J. These facts present the question, whether the voluntary partial payment of a judgment, after the judgment has become barred by the debtor's discharge in insolvency, has the effect to revive the balance of the judgment so that the debtor is bound by it anew.

The statute (R. S., c. 111, § 1, p. 6,) forbids that any new promise shall have such an effect, unless it be in writing, and signed by the party to be charged thereby. Certainly, the payment of a part of a debt is not a written promise to pay the balance. It might be regarded as some evidence of a promise to pay the debt, but the element of certainty, as required to be shown by written evidence, is utterly wanting.

Plaintiff nonsuit.

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

JOHN O. YOUNG *vs.* TRAVELERS INSURANCE COMPANY.

Penobscot. Opinion March 8, 1888.

Accident Insurance. Disability. Proof of loss.

A policy of insurance against accidents provided that "if the insured shall sustain bodily injuries, . . . which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured," certain indemnity should be paid him. *Held*, that to entitle the insured to recover that indemnity he was not required to prove that his injury disabled him to such an extent, that he had no physical ability to do anything in the prosecution of his business, but that it was sufficient, if he satisfied the jury, that his injury was of such a character and to such an extent that he was not able to do all the substantial acts necessary to be done in the prosecution of his business.

When an agent of an insurance company, upon receiving notice of a claim for indemnity, undertakes to make out the proof of loss and therein misstates the date of the accident, the company cannot take advantage of that misstatement, if the proof is signed by the insured without any improper motive and by the advice of the agent.

The court in such a case may properly refuse to give a requested instruction that the plaintiff has never furnished the defendant a claim for indemnity, such as is contemplated by the policy.

ON exceptions, and on motion to set aside the verdict, by the defendant.

The opinion states the case.

Charles P. Stetson, for the plaintiff, cited: May, Insurance, § § 172, 174, 175, 522, 143, 468, 465; *Turley* v. *No. Am. F. Ins. Co.* 25 Wend. 374; *No. Am. Accident Ins. Co.* v. *Crandal*, 120 U. S. 527; *Sawyer* v. *U. S. Casualty Co.* 8 Law Reg. N. S. 233; *Hooper* v. *Accidental Death Ins. Co.* 5 Hurlst & N. 546; *Lyon* v. *Railway Passenger Ass. Co.* 46 Iowa, 633; *Union Mut. L. Ins. Co.* v. *Wilkinson*, 13 Wall. 222; *Lewis* v. *Monmouth Mut. F. Ins. Co.* 52 Maine, 493; *Malleable Iron Works* v. *Phœnix Ins. Co.* 25 Conn. 465.

F. H. Appleton and H. R. Chaplin, for defendant.

Coincident with "total loss of time;" and in conjunction therewith must also exist "total disability;" a disability, "which shall, independently of all other causes but the accident itself, immediately and wholly disable and prevent the insured from the prosecution of any and every kind of business pertaining to the occupation under which he is insured." The language of the contract, into which the defendant company and the plaintiff entered, and under which he claims, if it means anything, means total disability, or as Judge GRAY terms it in *Accidental Ins. Co.* v. *Crandal*, 120 U. S. 527, "a complete disability to do business."

We are sustained by the decision of the Supreme Court of Iowa, in *Lyon* v. *The Railway Passenger Ass. Co.* 46 Iowa, 631. The only case in the country, where this feature of an accident policy has been judicially construed.

In *Ryan* v. *World Life Ins. Co.* 41 Conn. 173, a case involving the identical question under consideration, the courts say, "The aid of the assured either as an accomplice or as an instrument, was essential. If he was an instrument, he was so because of his negligence, and that is equally a bar to his right to recover. He says he signed the proof without reading it or knowing its contents. That of itself is inexcusable negligence. The application contained his agreements and representations in an important contract. When he signed it he was bound to know what he signed. The law requires that the insured shall not only in good faith answer all the interrogatories correctly, but shall use reasonable diligence to see that the answers are correctly written.

The case of *Hooper* v. *The Accidental Death Ins. Co.* 5 H. & N. 545, cited by plaintiff, does not militate against our views. Indeed the dicta of WILDE B. and POLLOCK C. B., while they emphasize the difference in the language of that policy and ours, go far also to sustain our interpretation of the contract.

The case of *Sawyer* v. *U. S. Casualty Co.* cited by plaintiff is not in point. There the policy provided "If the insured shall sustain any personal injury which absolutely and wholly disable him from the prosecution of his usual employment."

LIBBEY, J. The plaintiff seeks to recover on an accident insurance policy issued to him by the defendant corporation. The main questions involved are: 1. Whether the plaintiff by the accident to him was wholly disabled and prevented from the prosecution of any and every kind of business pertaining to the occupation under which he was insured.

2. Whether he gave the notice and furnished the proof required by the policy to give him a right of action.

The language of the policy upon which the first question arises is as follows: If the insured, "at any time within the continuance of this policy, shall have sustained bodily injuries, affected through external, violent, and accidental means, within the intent and meaning of this contract and the conditions hereunto annexed and such injuries alone shall have occasioned death within ninety days from the happening thereof; or, if the insured shall sustain bodily injuries, by means as aforesaid, which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured, then, on satisfactory proof of such injuries, he shall be indemnified against loss of time thereby, in a sum not exceeding twenty-five dollars per week, for such period of continuous total disability as shall immediately follow the accident and injuries as aforesaid not exceeding, however, twenty-six consecutive weeks from the time of the happening of such accident."

The occupation under which the plaintiff was insured was that of a billiard saloon keeper. The contention between the parties is, whether to maintain his action it is incumbent upon the plaintiff to prove that the injuries he sustained by the accident wholly disabled him from the doing of any and every kind of act necessary to be done in the prosecution of his business, or it is sufficient if he proves that the injury received from the accident wholly disabled him from the doing of all substantial and material acts necessary to be done in the prosecution of his business. The plaintiff admitted that he could do some acts necessary to be done in the business of billiard saloon keeper but claimed and introduced evidence tending to prove that he was wholly disabled

from doing many of the material acts necessary to be done in in that business.

Upon this point the presiding justice instructed the jury as follows: "Now the reasonable construction which must be put upon the language here used is, that it must have meant that if the plaintiff was so disabled as to be incapable of doing any and every kind of business pertaining to his occupation as a billiard saloon keeper, then he would be wholly disabled from the prosecution of every kind of business pertaining to such occupation and entitled to the stipulated compensation. Otherwise, if he was not so disabled he would not be entitled; and therefore, gentlemen, I instruct you as matter of law that the meaning of the language here used is, not that he must be so disabled as to prevent him from doing anything whatsoever pertaining to his occupation, or any part of his business pertaining to his occupation as billiard saloon keeper; but that he must be so disabled as to prevent him from doing any and every kind of business pertaining to his occupation. There may be a difference between being able to perform any part of his business and any and every kind of business pertaining to his occupation."

We think that there is no error in this instruction. A contract of insurance is to receive a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt it is to be liberally construed in favor of the insured that in all proper cases he may receive the indemnity contracted for. At the same time legal effect should be given to all the language used, for the purpose of guarding the company against fraud and imposture. The object to be accomplished by this contract was, indemnity to the plaintiff for loss of time from being wholly disabled from prosecuting his business by an injury received as specified in the policy. He was not able to prosecute his business unless he was able to do all the substantial acts necessary to be done in its prosecution. If the prosecution of the business required him to do several acts and perform several kinds of labor, and he was able to do and perform one only, he was as

effectually disabled from performing his business as if he could do nothing required to be done, and while remaining in that condition he would suffer loss of time in the business of his occupation.

Suppose a barber, who can use his razor and shears in his right hand only, but can use his left to wipe his customer's face, comb and dress his hair and receive pay and make change, by an accident is wholly deprived of the use of his right hand so that he can neither shave his customer nor cut his hair; can it be said that he is not wholly disabled from the prosecution of his business as a barber? An accident policy which would not afford indemnity in such a case would be a delusion and a snare. This construction is sustained by May on Insurance, § 522; *Hooper* v. *Accidental Death Ins. Co.* 5 H. & N. 545. Affirmed in Exch. Ch. 6 H. & N. 839.

We think the presiding justice might have gone farther in the construction of this clause of the policy, and instructed the jury that to entitle the plaintiff to recover, he was not required to prove that his injury disabled him to such an extent that he had no physical ability to do what was necessary to be done in the prosecution of his business, but that it was sufficient if he satisfied them that his injury was of such a character and to such an extent that common care and prudence required him to desist from his labors and rest so long as it was reasonably necessary to effectuate a speedy cure — so that a competent and skillful physician called to treat him would direct him so to do. It is the duty of the insured towards the insurer to use all due care and pursue the proper course to effect a cure so that the loss of time for which he is to receive indemnity may be no greater than is reasonably necessary.

Upon the second question the policy provides that, "In the event of any accidental injury for which claim may be made under this policy, immediate notice shall be given in writing, addressed to the secretary of this company, at Hartford, Connecticut, stating the full name, occupation and address of the insured with full particulars of the accident and injury;" and

that proof of total disability shall be furnished to the company within seven months of the happening of such accident.

The accident to the plaintiff occurred on the 2nd day of May, 1885. The plaintiff's application for his insurance was taken by one, Parks, and the policy procured and delivered by him, and the plaintiff claimed that he was acting as the agent of the defendants at Bangor, where the plaintiff lived and was in fact their agent from that time till after his injury. Immediately after the accident the plaintiff claimed that he gave Parks verbal notice of the accident and injury which he had received and that Parks undertook to make out the necessary notice and proof required by the policy and did make such notice and proof which were duly executed by him but from some cause it did not reach the company, that Parks so informed him afterwards and undertook to make and did make new notice and proof of disability which were executed by the plaintiff and duly forwarded to the company. In the second notice, as the plaintiff claims, the date of the accident was stated to be the 25th of June, 1885, instead of the 2nd of May, 1885, by advice of Parks, Parks stating to him the reason therefor. It is not claimed that either the plaintiff or Parks had any improper motive in misstating the date of the accident. It is claimed by the defendant that the notice so given was insufficient under the policy and gives to the plaintiff no right of action. Its introduction in evidence was objected to and exception taken to its admission. The plaintiff claims that the notice was good on two grounds. First, that it was made out by Parks, the defendant's agent or by his direction, and if it is defective by misstatement of the date of the accident the defendant cannot take advantage of it. Second, that a misstatement of the date of the accident with no improper motive does not render the notice insufficient.

We see no error in the admission of the notice and proof of disability in evidence. If it can be sustained only on the ground that it was made out by Parks, it was incumbent upon the plaintiff to prove Park's agency. It is well settled that, if Parks was the agent of the company and the notice and proofs were

made by him or under his direction with no fault on the part of the plaintiff, the company can not take advantage of the error in date. *Insurance Co.* v. *Wilkinson*, 13 Wall. 222; *Insurance Co.* v. *Mahone*, 21 Wall. 152; *Miller* v. *Phœnix M. L. Ins. Co.* N. Y. Court of Appeals, not yet reported, Cen. Rep. Vol. X, 38, and cases there cited.

But upon the question of agency defendant requested the court, to instruct the jury, "that the burden of proof was upon the plaintiff to show that W. S. Parks was the agent of the Traveller's Insurance Company, and authorized to bind company in the alleged transaction between himself and the plaintiff relating to this policy and the claim of indemnity thereunder."

This request was not given in its precise terms. But the court gave to the jury full, clear and accurate instructions upon this branch of the case. Where the court gives to the jury full and accurate instructions upon any point involved in a case, it is sufficient and it is not required to repeat the instruction in the precise language of the request.

But we do not think the date of the accident so material that an honest misstatement of it in the notice is fatal. The policy does not in terms require a statement of the date. It is not of the essence of the contract. A misstatement of it in the declaration in the plaintiff's writ, would not prevent him from proving the true date. The defendant was in no way misled or prejudiced by it. May on Insurance, § 465; *Tripp* v. *Lyman*, 37 Maine, 250.

The request that the court instruct the jury, "That the plaintiff has never furnished to the defendant company a claim for indemnity such as is contemplated by the policy," was properly refused for the reasons above stated.

Exceptions and motion overruled.

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

JOSEPH MCGLINCHEY and others, by next friend,

vs.

FIDELITY AND CASUALTY COMPANY.

Washington. Opinion March 8, 1888.

Accident insurance. Death from fright.

Whilst a person, who was insured under an accident policy, was driving upon a public street, his horse became frightened at an unsightly object on the street and ran away, without upsetting the carriage or coming in contact with anything before he was brought under control by the driver. But such person was, apparently, greatly endangered at the time, and suffered so severely, either from fright produced thereby, or from some strain caused by his physical exertion in restraining the horse, that he died within about an hour afterwards. *Held*: That the death may be considered as having ensued from bodily injuries effected through external, violent and accidenta means.

The clause in the policy which provides that the insurance shall not extend to any bodily injury of which there shall be no external and visible signs upon the body of the insured, does not apply to fatal injuries, but only to those not resulting in death.

ON report.

The opinion states the case and material facts.

A. McNichol, for the plaintiffs, submitted without argument.

N. and H. B. Cleaves and E. B. Harvey, for defendant.

We cannot better state the law of this case than by quoting the language of United States Circuit Court Judge CLARK, of New Hampshire, in his charge to the jury in the case of *Ephraim Whitehouse* v. *Travellers' Ins. Co.* Insurance Law Journal, Vol. 7, p. 23, which is as follows: "Now, in order to enable the plaintiff to recover under this policy, gentlemen, it is incumbent on the plaintiff to prove to you that this injury or accident was the cause of death, and the sole cause. It is also incumbent on him to prove that the injury or accident left some external, visible mark of its happening, of injury to the person, and if he fails to prove either of these points, he must fail in his case."

The preliminary proofs are not evidence to the jury of a loss, and if necessary to lay them before the jury it must be with caution against considering them as evidence of the fact or extent of the loss. *Citizens' Fire Ins. Co.* v. *Doll*, 35 Md. 89. Preliminary proof is not evidence to the jury of the facts therein; it is only evidence of compliance with the terms of the policy. *Southern Ins. Co.* v. *Lewis*, 42 Ga. 587.

The affidavits and accounts of loss constituting the preliminary proofs are evidence that the plaintiff has complied with the requirements of the policy in this respect, and are not evidence in his favor, beyond the account of loss. *Newark* v. *London and Liverpool Fire Ins. Co.* 30 Mo. 160.

Proofs of loss are evidence only of compliance with conditions of the policy. 10 Insurance Law Journal, 657; *Williams* v. *Hartford Ins. Co.* 54 Cal. 442.

PETERS, C. J. The plaintiffs, who are minor children, sue for one thousand dollars, an amount insured in an accident policy on the life of their father by the defendant company. The circumstances of the father's death were these: On a morning, while a resident of Calais, he was driving in a covered carriage, containing himself and his two small boys, on the principal public way in St. Stephen, N. B., when his horse, frightened at a load of hides passing on the same way, suddenly sprang into a run, first jumping to the side of the way and nearly colliding with other teams, and ran a considerable distance before he was brought under control. The result was that there was no collision, nor was the carriage upset or any one thrown therefrom. Immediately afterwards the insured experienced great sickness and pain, and, going directly to his house, died in about an hour from the moment of the accident. He was in good health on that morning, before the accident, and there is no suggestion that he was not a person of generally sound and strong constitution. His business was that of a commercial traveller. The case is reported for our determination upon the law and facts.

We think, on these facts, that the common judgment of men

would instinctively declare, irrespective of the refinements which are often indulged in over primary and secondary causes, that here was a plain accident causing death, and that the company should pay the sum promised in the policy. In any reasonable view that can be taken of the series of happenings, our minds go to the same conclusion. We believe that the common sense view is also the legal view.

The company insures against death by accident. And as, in some cases, it is difficult to determine whether the death is caused by disease or by accident, in order to prevent fraud or mistake, the company provides its own tests by which the fact shall be ascertained. The leading provision of the policy is that those interested in the insurance, in order to establish the liability of the company, shall prove that death was caused "by bodily injuries effected through external, violent and accidental means," within the meaning of the contract. The company having chosen its definition of liability, and having the opportunity of annexing conditions which, usually, are not closely observed by persons accepting insurances, the meaning of the terms employed need not be enlarged or restricted for the benefit of the company, but should be liberally interpreted in favor of the insured.

Was the death in this instance caused by bodily injuries effected through external, violent and accidental means? Certainly there was an accident. The definition of accident, generally assented to, is an event happening without any human agency, or if happening through human agency, an event which, under the circumstances, is unusual and not expected to the person to whom it happens. This definition exactly fits the facts here. Argument cannot be necessary to satisfy any one that the injury happened by violent means. A well man suddenly meets a perilous emergency which taxes all his physical and mental strength, and his death is caused thereby in an hour.

The greater question is whether the death was caused by external means. We have no doubt it was. And really all the questions of the case may be resolved into the single inquiry as to what was the real cause producing death. And here a question of fact must to some extent be determined. The testimony is

meager. Possibly the counsel for the plaintiffs relies on the preliminary proofs of loss as evidence in chief, which are fuller than the general testimony, but that is not allowable. Leaving the proofs of loss to serve only the proper purpose for which they could be introduced, all the evidence we have, more than the facts already stated, is that the insured became deathly sick, and after death a discoloration appeared on the surface of the body in the region of the heart. There is no pretence that the body bore any marks of contact with anything inflicting injury, or that it came in contact with any physical object during the time of the accident. Our belief is, on the facts legitimately before us, that death was produced by a ruptured blood vessel about the heart, and that such rupture was caused by the extraordinary physical and mental exertion which the deceased put forth to save his children and himself from injury. The physical strain and mental shock was more than he could bear. In this calculation of the facts, we come easily to the conclusion that, as between these parties, physical and external causes effected the death. The misconduct of the horse, and inseparably connected therewith the conduct of the man on the occasion, in his effort to avoid the threatened catastrophe, brought death.

The defendants, however, do not agree to this version of the facts. They contend that death was produced purely by fright, and not by the aid of any physical means whatever, and that the means through which death was produced must be considered as internal only. But if it is to be admitted that death was caused through fright, even then we are just as strongly convinced that it was also caused by external means. Whether one thing or another shall be considered the proximate cause, depends upon the relation of the parties to the suit with each other, as well as upon other circumstances. If the death be laid to fright, it must be because fright produced bodily injury, and the means which produced fright were external.

It is impossible to impute the death to fright without an explanation of the circumstances or situation which produced the fright. Suppose any person inquires of another what caused the death of a friend, and the answer be that he died from fright.

Would the question be more than half answered? Would not the inquirer immediately and instinctively ask the cause of the fright? In most conditions, and in almost every sense, fear is an effect of something merely. There must be some active cause behind it.

In the present case it was no more than an agency through which the accident acted. It was a dependent and not independent factor in the series of operating forces. It was no more the real cause of the death than a hammer in the hands of a workman, who strikes a blow with it, is the cause of such blow. The efficient, true cause, dominating all other causes in the combination, was the misbehavior of the running horse. Subsequent occurrences were merely the instrumentalities through which the real cause spent its force. The act of the horse was the beginning, death was the end.

The authorities are helpful to this view, though perhaps not exactly apropos or decisive. A person pushed into a river may be able to swim, and, if in full possession of his faculties, to save himself; but, if in the confusion and terror of the moment, he loses his self command and is drowned, the person thrusting him in the water is liable for the consequences. Whar. Neg. § 94. A man with an axe chased a boy, who, in his fright, ran into a store against a barrel of wine, breaking the barrel. The man was held responsible for the loss of the wine. *Vandenburgh* v. *Truax*, 4 Denio, 467. A person is liable *civiliter* for brandishing a gun for the purpose of scaring another. *Beach* v. *Hancock*, 27 N. H. 223. And is liable *criminaliter* for the same thing. *Com.* v. *White*, 110 Mass. 407. Where, by a defendant's negligence, his horse ran into another's sleigh and frightened his horses, causing them to run into the plaintiff's sleigh, it was held that the defendant was liable. *McDonald* v. *Snelling*, 14 Allen, 290. A woman fearing she would be run over by an express wagon carelessly driven, jumped against the wall of a building and injured her face. The act of the express company, by its agent, it was held, caused the injury. *Coulter* v. *American Express Co.* 56 N. Y. 585; see *Page* v. *Bucksport*, 64 Maine, 51, and cases there cited. It will be observed that

in these cases, and there are many others that fall within the same classification, the results are predicated upon the idea that where an accident arises from the fright of a person, the injury flowing from it is imputable to causes producing the fright.

Then there are cases more directly touching the question as to whether the injuries in the case at bar were produced by external means or not. It has been held that an insane man who takes his own life dies from an injury produced by external, accidental and violent means. *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527. Same result follows when death ensues from accidental drowning. *Trew* v. *Assurance Co.* 6 H. & N. 845; *Winspear* v. *Accident Ins. Co.* 6 Q. B. Div. 42. Accidentally inhaling coal gas, causing death, entitles a recovery upon a policy like the present. *Paul* v. *Travellers' Ins. Co.* 45 Hun. 318. A death from blood poisoning, produced by virus communicated to the hand by a fly, comes within the terms of such a policy. *Bacon* v. *U. S. Mut. Accident Ass'n*, 44 Hun. 599. The latter case has been criticised upon the point whether the means in that instance were violent or not. In *Insurance Co.* v. *Burroughs*, 69 Penn. St. 43, the court says, "if the injury be accidental and the result is death, what matters it whether the injury is caused by a blow from a pitchfork or from a strain in handling it." In these cases it was held that the true cause of the death came from the outside, were external means. Upon principle, we think the same decision must be reached here.

Another point of defense is taken. By a subsidiary, conditional clause in the policy it is provided that the insurance "does not extend to any *bodily injury* of which there shall be no external and visible sign upon the body of the insured." This does not apply to fatal injuries, but only to those not resulting in death. It would be utterly unjust if this condition applied in cases of death. It would preclude recovery in all instances where death occurs by drowning, freezing, poisoning, suffocation, concussion, means of death leaving no outward mark, and also where the insured has been killed and his body is missing. The context shows that the clause is only applicable to injuries not

resulting in death. The policy declares that the insurance shall not extend to *bodily injuries* unless the external sign of injury is visible, "nor to *any death* caused" in certain ways named. There are reasons for the condition applying to a surviving claimant. He has unusual chance for feigning an internal injury, if disposed to defraud the insurers. But no such protection is required where the accident causes death. The dead body is external and visible sign enough that an injury was received. *Mallory* v. *Travellers' Ins. Co.* 47 N. Y. 52; *Paul* v. *Travellers' Ins. Co.* 45 Hun. 318.

Defendants defaulted.

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

NATHANIEL C. WYMAN

vs.

EUGENE W. WHITEHOUSE, administrator.

Kennebec. Opinion March 8, 1888.

Husband and wife. Promissory notes. Married women.

A promissory note, given by a wife to her husband in the year 1853, is void. It cannot be collected against her estate after her death.

The act of the parties authorizing a person to witness the note, in the year 1868, does not give it validity, there being no new contract or new consideration for a contract.

ON report.

S. S. Brown and L. D. Carver, for plaintiff.

In view of the fact that it is conclusively proven by the evidence, that all the use which the intestate ever had of his wife's estate was in common with her, there can arise no implied promise on his part to repay anything which he may have enjoyed in common with his wife. He is presumed to be acting for her. *Norton* v. *Craig*, 68 Maine, 275.

Money had and received, the only proper form of action to bring in this case. *Merrill* v. *Crossman*, 68 Maine, 413; R. S., c. 66, § 14.

A writ against one personally may be amended by leave of court so as to charge him in his capacity as administrator. *Lester* v. *Lester*, 8 Gray, 437; *Metcalf* v. *Yeaton*, 51 Maine, 198; *Babcock* v. *Fowles*, 32 Maine, 592; *Phillips* v. *Bridge*, 11 Mass. 242; *Tenney* v. *Prince*, 4 Pick. 385.

A negotiable promissory note in the hand of a *bona fide* holder indorsed before dishonor is not subject of set-off. *Trafford* v. *Hall*, 7 R. I. 104; 44 Maine, 271; 48 Maine, 163; 35 Maine, 324; 16 Maine, 177; 20 Maine, 175; 17 Maine, 267.

Indorsement presumed to have been made at date or delivery of note to payee; *Parker* v. *Tuttle*, 41 Maine, 349; *Hersey* v. *Elliot*, 67 Maine, 526; 63 Maine, 405. Presumed to have been endorsed before maturity. Party denying this must prove it; nor without proof that it was endorsed when it was overdue can he avail himself of the equities of defence. 2 Parsons' Notes & Bills, 9, cases there cited.

Where husband and wife live upon her farm and he carries it on for the common support, his possession is her possession. He is her agent in all acts in reference to her property. *Norton* v. *Craig*, 68 Maine, 275. Counsel will not be allowed to argue to the court in Banc against anything admitted as a fact in making up the report at *nisi prius*. *Alden* v. *Goddard*, 73 Maine, 345.

The instrument offered in evidence by the plaintiff to support his claim to recover in this action, is a valid and negotiable promissory note. The time of its payment is therein made certain. 1 Parsons' Notes & Bills, p. 39, 40. The promise to pay and the amount to be paid are absolute and without contingency. 1 Parsons' Notes & Bills, p. 42. Benjamin Chalmer's Digest, 12; and not from a limited fund but from her entire estate. In form and substance it has all the requisites of a negotiable promissory note. The memorandum thereto attached does not vary its terms or affect its form or character. Benjamin Chalmer's Digest, 14, and illustrations, *Treat* v. *Cooper*, 22 Maine, 203; 64 Md. 120; 39 Wise, 138.

It is a well known rule of law governing such cases, that a promissory note is to be regarded as made, when delivered; although it may have been written and signed by the maker long

before that time. The reason of the rule being that the maker has it in his power at any time before delivery, to destroy the writing or at the last moment to refuse to deliver it to the payee therein named. Contract is inchoate and revocable until delivery. Benjamin Chalmer's Digest, 58; *Burson* v. *Huntington*, 21 Mich. 415; *The First National Bank* v. *Strong*, 72 Ill. 559; 118 Mass. 537; 1 Parsons' Notes & Bills, 48.

The note is dated February 23, 1853, and in the absence of all other testimony in the premises, the presumption would arise that its date truly sets forth the time when in fact it was made and delivered to the payee. 26 Maine, 295; 7 Gray, 543; 57 Md. 54.

It is entirely competent however to show by extrinsic evidence that the note was in fact made and delivered at some other time than that indicated by its date. Benjamin Chalmer's Digest, 23; 32 Maine, 524; 13 East, 517; 71 N. Y. 435; 72 Ill. 21; 1 Parsons' Notes & Bills, 41; 17 Ala. 45; 24 Miss. 424. But not to invalidate the title of a *bona fide* holder for value. 58 Georgia, 94; *Huston* v. *Young*, 33 Maine, 85.

A note may be antedated or postdated without affecting its validity or negotiability. Benjamin Chalmer's Digest, 23; 4 Camp. 97; 9 Exch. 684; 2 L. R. Ex. D. 265; 14 Hun. (N. Y.) 155. In case *Nathaniel Bryant, Admr.* v. *Warren Merrill*, 55 Maine, 515, the court did not rule directly upon the point in question, but did rule that the law was not retrospective in its effect and did not apply to promissory notes made by a married woman before the enactment of the law in question.

In case *Allen Mayo et al.* v. *Henry P. Hutchinson et al.*, 57 Maine, 546, Chief Justice APPLETON, says, referring to the laws above mentioned: "The wisdom or expediency of this act is a matter solely for the legislature. Its language is most general and there can be no reasonable doubt of its meaning. A contract of suretyship is a lawful contract and for a lawful purpose; it is valid and binding on a married woman."

In the case of *Blake* v. *Blake*, 64 Maine, 177, the court, referring to this law says: "The wife can contract for any lawful purpose. No limitation is imposed upon her general right to

contract, save that the purpose be lawful. No restrictions are intimated as to the person or persons with whom the contract for lawful purposes may be made. The contract to improve her real estate, to pay taxes and to remove incumbrances upon it, are all for a lawful purpose.

The result is, that having the general and unrestricted power of making any and all contracts in relation to her estate with whomsoever she may choose, she may contract with her husband equally as with any one else. 24 Conn. 500.

It was a contract for the benefit of her separate estate, made to obtain money to remove incumbrances and liens therefrom, and to save it from forfeiture and a forced sale to her loss. In 1853, the wife could hold real and personal property, and had full power to contract for the sale, lease, purchase and preservation and protection of the same. Public Laws, 1852, c. 227, § 1; *Duren* v. *Getchell*, 55 Maine, 241; 3 Allen, 545; *Batchelder* v. *Sargent*, 7 Am. Law Register, 253. A note for the purchase of stock to put on her farm. 30 Maine, 244; 47 Maine, 330.

Under the common law, even a married woman could bind her separate estate, but, in order to create a charge thereon, the intention so to do must be declared in the contract itself, or the consideration must be obtained for the direct benefit of the estate itself. 1 Parsons' Notes & Bills, 78; 22 N. Y. 450; 21 Barb. 286; 17 Vesey, 365; 27 Miss. 347; 2 Kent. 155; 2 Parsons' Contracts, 413.

In the case at bar, both these conditions are fulfilled. In the note itself, Lucy Wyman contracts that it shall be due at her decease, and be payable out of her estate; and by her written statement attached thereto, she acknowledges the receipt of the consideration and the expenditure of the same for the direct benefit of her separate estate. True, the wife could not at common law render herself personally liable on a promissory note or contract, and Mrs. Wyman, in her note complied with this rule. It was not payable until after her death, and then out of her estate. The contract in all points conformed to the strict rules of the

common law; 18 N. Y. 265; 21 Barb. 286; 1 Parsons' Contracts, 368; 10 Ala. 616; 7 Paige, 112; 2 Greene, (Iowa) 435.

As she was invested with the control of her own property, with power to enforce and protect her rights thereto, and to manage the same in 1853, it follows that she had the power at that time to make any contract necessary to its management or for its protection and preservation, and that she would be bound by such contracts. 55 Maine, 241; 47 Maine, 330.

Interest, when expressed in a note, runs from its date. Benjamin Chalmer's Digest, 19; 67 Ill. 238; 8 Cal. 145; 5 Black. 22; 2 Parsons' Notes & Bills, 392. And this too, even if there be other terms implied which may well raise a doubt; 15 Mass. 177; 11 Ind. 392; 1 Iowa, 204. Note payable at death of maker with annual interest. See *Washband* v. *Washband*, 24 Conn. 500.

E. W. Whitehouse, defendant *pro se*, cited: *Bryant* v. *Merrill*, 55 Maine, 515; *Ingham* v. *White*, 4 Allen, 412; *Chapman* v. *Kellogg*, 102 Mass. 246; *Bassett* v. *Bassett*, 112 Mass. 99; *Lord* v. *Parker*, 3 Allen, 127; *Dodge* v. *Adams*, 19 Pick. 429; 1 Add. Cont. 16; *Dearborn* v. *Bowman*, 3 Met. 155; *Loomis* v. *Newhall*, 15 Pick. 159; *Angel* v. *McLellan*, 16 Mass. 28; *Allen* v. *Merwin*, 121 Mass. 378; *Strong* v. *Williams*, 12 Mass. 391; 2 Redf. Wills. 185, 187.

Loring Farr, for the defendant, cited: Chitty Pl. (16th Am. ed.) *59 *ad fin*; 2 Chitty Pl. 124, note *o*; Oliver, Prec. 182; *Baker* v. *Fuller*, 69 Maine, 152; *Baker* v. *Moor*, 63 Maine, 443; Heard, Civ. Prec. 172, note 2; Rapalje, & L. L. Dict.; 60 Maine, 29; Add. Cont. § § 3, 5; 1 Pars. Cont. 421; 17 Ind. 396; 19 Ind. 212; *Allen* v. *Hooper*, 50 Maine, 371; *Bryant* v. *Merrill*, 55 Maine, 515; 1 Daniel, Neg. Inst. 156; Byles, Bills, *327; 50 Maine, 371; 34 Maine, 566; 141 Mass. 283 (2 New Eng. Rep. 232).

PETERS, C. J. The plaintiff, as indorsee, sues the estate of Lucy Wyman, deceased, to recover the following note: "Vassalboro, February 24, 1853. For value received, I promise

to pay Edward G. Wyman, or order, six hundred dollars with interest annually, payable at my death out of my estate. (Signed) Lucy Wyman." This is a copy of the note as originally given. The note at some time was indorsed to the plaintiff. The original parties to the note, both now deceased, were at its date, husband and wife. On the same paper on which the note was written, the following was also written and signed by the wife. "The above note is given in consideration of six hundred dollars, paid by my husband to my brother John, and sister Betsey, August, 1852, as their full share out of my father's estate."

At common law, and that governs this contract, the note was void. At its date, the statutory changes, affecting the business rights of married women, had not reached that grade of development which would allow the wife to execute commercial paper to any person. *Howe* v. *Wildes*, 34 Maine, 566. Several other cases in this state are to the same effect. Since the date of the note, the barriers which prevented her contracting with persons other than her husband have been removed. And it has been held, that, by the implication of later statutes, husband and wife may even contract with each other, though a remedy for the enforcement of contracts strictly between themselves is not available while the marital relation exists. The remedy may come into life by the death of one of the parties or after their divorce. *Webster* v. *Webster*, 58 Maine, 139; *Blake* v. *Blake*, 64 Maine, 177.

These statutory provisions, and their implications, can have no retrospective application, and do not give any validity to a contract which was in its beginning void. *Bryant* v. *Merrill*, 55 Maine, 515. It is readily perceivable that many important contracts would have been subverted, and vested rights impaired, had the construction of the law been otherwise.

In 1868, a transaction took place between Lucy Wyman and her husband, which the plaintiff relies upon as rendering the note valid. They procured a person to sign his name to the two papers, note and memorandum, as a witness. The plaintiff goes so far as to contend that the note was really made at that time and dated back to 1853. It is enough to say, in answer to this

suggestion, that the evidence touching the note, both internal and external disproves it.

The more important inquiry is whether that act of the parties ratified and confirmed the note at that time, giving it validity. We are of opinion that it did not, even if the parties supposed it would have such effect. There was not any new consideration. A void promise continues void. A promise to keep a void promise adds no element of strength. It is a "mere dalliance to excuse the breach of promise." It is written in water.

If the note were merely a voidable contract, having any shade of force, it would be different. But here, by all authority, the contract was and is void, with no spark of vitality in it by which it can be enkindled into life. The parties in 1868, could have made a contract with each other, but there is no evidence that they did so, or that they wanted or undertook to do so. "A contract is void when it is without any legal effect; voidable, when it has some effect; but is liable to be made void by one of the parties or a third person." Bishop, Cont. § 611.

This result need not be regretted for any supposed injustice or inequity. The case shows that the husband must have expected to obtain his annual interest out of the use of her farm, the only property of any consequence she had. That he got his interest as they went along, and greatly more than that is evident. He stripped the place of its valuable wood and timber, sold off the personal property, and reduced the fields to poverty by a systematic and long continued practice of selling the hay taken therefrom. There may be no legal claim upon him or his estate in these matters, but they are evidence that he really suffered but little if any real loss on her account. *In re Blandin*, 1 Low. Dec. 543, 545. And more than all else, while there may not be strict legal proof of the fact, there is great reason to suppose that the wife believed that she was discharging all obligations to her husband by the legacy of six hundred dollars, the same amount for which her note was given, which she provided for him in her will. *Judgment for defendant.*

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

A. C. TIBBETTS and others, appellants,

vs.

MARK TRAFTON and another.

Aroostook. Opinion March 8, 1888.

Insolvent law. Practice.

A creditor's claim against his debtor in insolvency, after it has been duly proved, cannot be disallowed except upon a petition in writing, sworn to by the party objecting to the claim. The statute requires that the objections shall be in writing, and the rule of the insolvent courts requires a verification upon oath.

The insolvent courts had the power to establish the rule, which is neither unreasonable nor unconstitutional.

A creditor's claim is proved when it has been presented in due form after being verified in the manner required by law. No hearing is necessary. The creditor's oath is *prima facie* proof of his claim.

ON exceptions.

The point is stated in the opinion.

King and King, for appellants.

The judge of probate overruled the objection and allowed the claim to stand proved, on the ground that the objecting creditors had not complied with rule ten of the insolvency court.

Section 25 of c. 70, Revised Statutes, referring to proof of claims, says, "Any. . . . person interested, may at any time before final dividend, file objections in writing to the allowance of such claim, and thereupon the judge may upon such notice as he directs, order a hearing upon the same."

George Donworth, for the defendants, cited: R. S., c. 70, § § 12, 25; *Cushing* v. *Field*, 9 Met. 180; *Ex parte Morgan*, 78 Maine, 36; *Palmer* v. *Dayton*, 4 Cush. 270; *Eddy's Case*, 6 Cush. 28.

PETERS, C. J. A creditor, proving his own claim against an estate in insolvency, disputes the claim of another creditor of the estate, and files a written motion to have the latter claim

disallowed. The case came up by appeal from the insolvency court, and reaches this court on exceptions to an order dismissing the appeal for want of jurisdiction.

Section 25, c. 70, R. S., provides in what manner any creditor may contest any other creditor's claim. It sets forth, among other things, that the assignee, or any other person interested, may at any time before final dividend, file objections in writing thereto, and then certain proceedings are to be had thereon. The rules adopted by the insolvency court impose certain formalities not required by the statute. Rule ten provides that no claim, once regularly proved, shall be expunged or reconsidered, except upon the formal petition of some person interested, verified by oath. The rule requires an oath, while the statute does not.

A claim is proved when in due form it has been presented, after being verified in the manner required by law. The word proved, does not, in this connection, imply that there has been any hearing upon the claim. The creditor's oath is *prima facie* proof of his claim. He need not follow it to court, but may transmit it there in such way as he sees fit. After presentation, the claim can never be disturbed or disputed except in the manner before explained. The judge may, no doubt, reject the claim, that is, refuse to accept and file it, if upon inspection it appears to be informal, and perhaps also if the proofs upon their face indicate that the claim is illegal. But if this be done, inasmuch as it would be an unusual thing and not to be anticipated, the creditor should have seasonable notice of such action, in order to protect his claim against the objection, if he can do so. The judge may also, by special provision, postpone, until after an assignee is chosen, the proof of any particular creditor, whose claim may seem doubtful or suspicious to him. In other words, he may refuse to allow any particular claimant to participate in the organization. Subject to these qualifications, a claim regularly made out and verified, and transmitted to the court, should be regarded as proved and allowed, unless challenged in the formal manner required by section 25 and rule 10.

In bankruptcy, says Mr. Robeson, in his book on the subject,

proof denotes not only the operation of proving the existence of a debt, but also the declaration, affidavit, etc., by which debts are actually proved; and hence, "to prove against the estate," means to bring forward a claim in that way. Expunging and reducing proof is to reject the claim retrospectively as it had been made, or reducing the amount on which dividend may be made, as if originally made for the smaller sum.

In the case at bar the judge of insolvency refused to entertain the petition of the contestant, because it was not verified by oath, and for other informality. To avoid this result, the contestant contends that rule ten does not bind him, because it is variant from the statute. We do not concede as much, but, on the other hand, consider the statute, as supplemented by the rule, to be a wise provision. In these estates, creditors are usually numerous, many of them residing at various distances from the court, and many of their claims are small. After their claims have been regularly filed, they should be allowed to repose on the certainty of their allowance, unless the opposition to any claim is inaugurated by formal, written objections under oath. There should at least be oath against oath. Such precaution is necessary to prevent frivolous and malicious objections.

It is a great concession for the statute to allow to creditors the right of appeal in such cases. Few insolvent laws are so liberal as our own in this respect. *Freeland* v. *Bank*, 16 Gray, 137. In most, if not all, the systems in other states, the appeal is allowed against a claim, only to the assignee, the administrative head of the estate. Under our law, any creditor may maintain an appeal on every other creditor's claim. Stringent rules of procedure are required to prevent an abuse of the right.

Exceptions overruled.

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

FREDERICK C. ROBINSON *vs.* JAMES S. WILLIAMS and others.

Aroostook. Opinion March 8, 1888.

Bond. Poor debtor. Return of execution.

An omission by the officer to return into the clerk's office, during the lifetime of the precept, an execution upon which a poor debtor's bond was taken by such officer, constitutes no defense to an action on the bond.

ON exceptions.

Debt on a poor debtor's bond. The question raised by the exceptions is stated in the opinion.

Powers and Powers, for the plaintiff, cited: *Bean* v. *Parker*, 17 Mass. 591; *Fales* v. *Goodhue*, 25 Maine, 423.

Hersey and Shaw, for defendants.

"It is incumbent upon those who would avail themselves of a statute remedy to make it appear that the requirements of the statute have been strictly observed in all essential particulars." 76 Maine, 265.

Section 39 of c. 113, R. S., provides that the bond taken shall be returned with the execution to the court from which the execution issued. When shall this bond be returned? Certainly within the lifetime of the execution, which is three months from the date thereof; this was not done, but wholly neglected. The creditor can receive the bond from the court by filing a copy, and not without. R. S., c. 113, § 39.

The bond or copy thereof should remain on the files of the court from the time it is returned (within the lifetime of the execution) until the six months have expired, so the debtor can have an opportunity to meet the conditions of his bond, viz.:

1. If he wishes to cite the creditor, and take the oath prescribed in section 30, c. 113, R. S., he must describe in his citation the execution and the bond, and must give the creditor fifteen days notice, which he cannot do unless he can see the bond and execution, and if they are not returned to court until the

last day of the six months he cannot meet this condition of his bond.

2. If he wishes to pay the debt, interest, costs, and fees arising in said execution, he cannot do so and make a legal tender to save this condition of his bond if said bond is not returned to court until the last day of its life.

3. If he wishes to deliver himself into the custody of the keeper of the jail to which he is liable to be committed under said execution he cannot do so, and the jailor would not be obliged to receive him unless he deliver to the keeper of the jail at the same time a copy of the bond or of the execution and return thereon. 71 Maine, 405.

This last condition could not have been performed unless said bond and execution had been returned to court, and the debtor is not obliged to wait until the last day for said bond and execution to be returned so he could procure copies. If the bond can be returned on the last day of the six months it can be returned on the last moment of that day and thus defeat the purpose of the statute. 76 Maine, 262.

PETERS, C. J. The defendants, principal and sureties, set up in defense of an action against them on a poor debtor's bond, that the bond and execution on which the bond was taken were not returned into the clerk's office until on the last day before the bond expired. They contend that an omission to make the return within the lifetime of the execution released the bond.

We are not satisfied that the statute affecting the question, requires such a rigid construction. It is a general rule that an officer shall return an execution within the three months. But the rule has exceptions. If he collects an execution and pays the money to the plaintiff or his attorney, his liability ceases. It is quite a common practice to deliver the execution to the debtor in such cases, although the safest and best place for it, for all concerned, is in the clerk's files. 1 Bachus, Sheriff, 258; Tidd's Prac. 928; *Runlett* v. *Bell*, 5 N. H. p. 438, and cases there cited.

There are frequent instances where it is not possible to return the execution within three months. If the service is made at

the last moment of the time, it cannot be. Still, it has never been seriously doubted that an officer has all of the three months within which to commence a service, completing his work after the three months have expired. *Shindler* v. *Blunt*, 1 Sand. 683. Says PARSONS, C. J., in *Prescott* v. *Wright*, 6 Mass. 20, "If an officer has begun to execute the execution at any time before it is returnable, he may complete the service after it is returnable, and retain the execution to indorse the service thereon, the whole of which shall have relation to the time when it commenced." By R. S., ch. 76, § 5, it is provided that, in levying an execution upon land, the proceedings may be valid, although a part of them be made after the return day of the execution. Still, a literal compliance with the words of the execution would not permit such latitude.

In *Prescott* v. *Pettee*, 3 Pick. 331, PARKER, C. J., remarked that it was difficult to arrive at the meaning of the legislature in regard to the return of an execution into the clerk's office. He thought the requirement was "for some purpose merely directory." It was held in that case, that, although an execution levied on land must be returned into the clerk's office, in order to complete the title of the creditor, still, it would be sufficient, if returned at any time after the return day, but before it is offered in evidence. The same rule was applied in this state in *Emerson* v. *Towle*, 5 Greenl. 197; see, on same point, cases cited in *True* v. *Emery*, 67 Maine, p. 35.

At common law, a return of final process was not a regular duty of an officer. It was necessary to serve a rule upon him to make the return, if any person desired it done. *Richardson* v. *Trundle*, 8 C. B. (N. S.) 474; Bachus, Sheriff, § 262; Tidd's Prac. 928. In Dane's Abridgment, Vol. 3, ch. 75, article 12, the earlier American cases on the subject are collected and their application explained. The duty of returning an execution is now generally regulated by statute. In Murfree on Sheriffs, § 855, a late work, it is said, commenting upon the statutes of different states relating to the matter, that "the purpose designed to be accomplished by the return of process placed in the hands of the sheriff, is that by it he may show what he has done in the

matter, and what he has omitted to do, and why." "And it may be further stated," says the author, "that the statutory provisions which require sheriffs and constables to return writs of execution, and provide special remedies for defaults in doing so, are designed for the benefit of the plaintiffs in such executions, and are not available for defendants aggrieved by any omission."

It would seem to be deducible, from these considerations, that the defense attempted to be maintained by the defendants in the case in hand, cannot prevail. Their injury is imaginary, not real, nor legal.

Exceptions overruled.

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

HANFORD B. FIELD *vs.* BENJAMIN F. GELLERSON.

Aroostook. Opinion March 8, 1888.

Promissory note. Holmes note. Conditional sales. Record. Exceptions. Practice.

An agreement that personal property bargained and delivered to another, for which several notes in the aggregate amounting to more than thirty dollars are given, shall remain the property of the payee until the notes are paid, is not valid, except as between the original parties, unless the agreement be made and signed as part of the notes, and recorded as a mortgage of personal property; although each note may be less than thirty dollars.

If a judge, at a trial term, sees fit, for his own convenience, to delay his approval of a bill of exceptions, in order to have time to test their correctness, and the exceptions, as finally allowed, are regular in form, the law court cannot, upon suggestion of counsel, reject the exceptions.

ON exceptions from the superior court.

Trespass for the value of a wagon which plaintiff received of the defendant in an exchange, and which the defendant afterwards took and carried away, alleging that the wagon plaintiff let him have in the exchange was not the property of the plaintiff.

The point is stated in the opinion.

King and King, for the plaintiff, cited: *Coolidge* v. *Brigham*, 42 Mass. 548; 2 Addison, Contracts, § § 640, 645; 1 Greenl. Ev. (7th ed.) § 558.

George Donworth, for the defendant.

By virtue of the rules established under the act of the legislature, certain rights have vested in this defendant and certain obligations have been imposed on this plaintiff, as much as by any other law that regulates practice in court, and if these exceptions are not here in accordance with the law of the land, they must not be considered. *Phillips* v. *Soule*, 6 Allen, 150; *Carleton* v. *Lewis*, 67 Maine, 76.

We fail to see how this case differs from *Fish* v. *Baker*, 74 Maine, 108; in this case at bar, "no delay, for filing exceptions, was asked for or given" beyond the first Tuesday of June. Yet as the report shows the exceptions were not filed until June 20th, though they purport, in their opening, to have been filed on the 5th day of the term. The judge's certificate is conclusive as to the time of filing. *Whitcomb* v. *Williams*, 4 Pick. 228. In *Doherty* v. *Lincoln*, 114 Mass. 362, the court says, "The provisions of these statutes requiring the exceptions to be filed, &c., within the time prescribed are intended for the benefit of the adverse party, and he is entitled to insist upon due proof of a strict compliance with them, unless he has done something to waive it."

See also *Commonwealth* v. *Greenlaw*, 119 Mass. 208, in which it was held that the judge had no authority to allow the exceptions after the expiration of the time limited by law without the consent of the adverse party.

In *Nye* v. *Old Colony R. R. Co.* 124 Mass. 241, it was held that an oral agreement of counsel to extend the time was of no avail, and under our rules it would seem to be so in this state, but in the case at bar there is no agreement whatever. The consent of the adverse party is a necessary condition to the allowance of exceptions after the time required by law. *Walker* v. *Moors*, 122 Mass. 501.

Here the presiding justice was satisfied that due diligence had been employed to obtain the notes. In Greenl. on Ev. Vol. 1, § 82, it is stated that, "This rule does not demand the greatest amount of evidence which can possibly be given of any fact, but its design is to prevent the introduction of any which, from the

nature of the case, supposes that better evidence is in the possession of the party." And *Id.* 84, "until it is shown that the production of the primary evidence is out of the party's power no other proof of the fact is generally admitted." Greenl. on Ev. Vol. 1, § 558, and notes declare the law to be as given by the presiding justice.

The case of *VanDeusen* v. *Frink*, 15 Pick. 449, is directly in point and there the ruling was that secondary evidence was not admissible, unless it could be shown that the original papers were lost, or were not within the power of the party or witness.

In a mortgage there is an immediate transfer of title; in a conditional sale (as in the case of these notes) there is no transfer until the condition is performed by the bargainee. Jones on Chat. Mortgs. § 11; *Roger's Locomotive Works* v. *Lewis*, 4 Dill. (U. S.) 158. And since it is clear to any lawyer that "The three conditional notes," &c., did not constitute a mortgage, shall a new trial be necessitated because the judge failed to erroneously instruct the jury?

The two twenty-five dollar notes and the agreement therein contained were valid against the whole world without being recorded. Previous to statute 1870, c. 143, no such note was required to be recorded. *Rawson* v. *Tuel*, 47 Maine, 506. A parellel question arose in *Perkins* v. *Morse*, 78 Maine, 17, where the court say, "If the statute needs amendment, the legislature can amend it. We construe it as it stands."

It is the duty therefore of the courts to permit rescission whenever it can be done with justice to the other party and such is the tendency of modern decisions. In Vermont the courts have gone much farther than this court would consider the law to allow. *Downer* v. *Smith*, 32 Vermont, 1; *Hoadley* v. *House*, *Id.* 179.

PETERS, C. J. There is a point of considerable practical importance in these exceptions. A party took, for an article of personal property, three Holmes notes, one for twenty-five dollars, and each of the others exceeds thirty dollars in amount, the notes containing the contract, and, as allowed by R. S., c. 91, § 7, also

a stipulation that no right of redemption shall exist after a breach by non payment. The notes are not recorded, although the statute, R. S., c. 111, § 5, requires such notes to be recorded in order to be effectual against attachers and after-purchasers, "if the agreement is made in a note for more than thirty dollars." It is pretended that third parties can not be interested in the transaction for the reason that one note is under thirty dollars, and the forfeiture is claimed only on that note. Our opinion is that the notes should have been recorded, to be effectual against other parties.

In strict literalness, the case falls within the statute. If the agreement is "made in a note for more than thirty dollars," it must be recorded. This agreement is made in two notes each of which exceeds that sum, although made also in a note for less than that amount. Much more strongly is this construction required by the sensible meaning and manifest purposes of the statute. The conditional agreement should be recorded for the public benefit, whenever it is made to secure a note of more than thirty dollars, or notes which taken together exceed that amount. The phrase, "in a note for more than thirty dollars," means where it secures, in that way, an indebtedness upwards of such sum. Under a different construction the statute becomes nugatory. It could always be avoided by persons who should see fit to divide ever so large an indebtedness into notes of less than thirty dollars each. For an erroneous ruling on this point a new trial must be had.

It may be well to add, for the bearing of the suggestion at another trial, that the admission of oral proof of notes without producing the originals, or without sufficient foundation laid for their loss, and the admission of an account book kept by the vendor to prove the terms of a sale of personal property, were clearly erroneous rulings.

The defendant's counsel denies that the exceptions presented were seasonably filed. They are certified as regularly taken and allowed, and that presents them properly to us. If a judge, at a trial term, sees fit for his own convenience, to delay his

approval of a bill of exceptions, in order to have more favorable opportunity to test their correctness, and the exceptions as finally allowed are regular in form, we cannot, upon the suggestion of counsel dissatisfied with the action of the judge, reject the exceptions. *Exceptions sustained.*

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

GEORGE BLISS *vs.* GEORGE WINSLOW.

Lincoln. Opinion March 10, 1888.

Inspector of customs. Shipping. Trespass. U. S. R. S., § 2638.

An inspector of the public customs, who purchased a vessel in spite of the laws of the United States which provide that such an officer shall not own any vessel or interest therein, under a penalty of five hundred dollars, may recover the value of such vessel in an action of trespass against a sheriff, who attaches the same as the property of the person selling her to the United States official. His possession of the property is a good title as against the attaching officer.

ON exceptions.

Trespass for conversion of an alleged pleasure yacht called "Eunie" by the defendant, on June 16, 1886, who, on that day, as a deputy sheriff, attached the yacht as the property of one James Donnell, on a writ in favor of one Lester F. Cudworth, executor, and subsequently, on November 30, 1886, sold the same on execution issued on a judgment in that suit of *Cudworth* v. *Donnell*. The plaintiff claimed to have purchased the yacht of Donnell, September 22, 1884, though Donnell retained the possession of it until the attachment. It was admitted that at the time of the alleged purchase of the yacht by the plaintiff, he was employed under the authority of the United States in the collection of duties on imports or tonnage, and that his tenure of office terminated on January 31, 1887.

The exceptions were to the refusal of the presiding justice to rule that the sale from Donnell to Bliss was void.

H. Bliss, Jr., for the plaintiff, cited: U. S. R. S., § § 4131, 4214, 4170, 4312; Decisions, Secretary of the Treasury, 1877,

No. 3282; 1883, Nos. 5545, 5550; *Veazie* v. *Somerby*, 5 Allen, 285.

William H. Hilton, for defendant.

The Revised Statutes of the United States, title 34, c. 2, § 2638, provide that "no person employed under the authority of the United States in the collection of duties on imports or tonnage, shall own either in whole or in part any vessel . . . under a penalty of five hundred dollars."

Title 1, c. 1, § 3, defines the word vessel as including "every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water."

Title 48, ch. 2, § 4214, clearly recognizes pleasure yachts as being capable of being used as a means of transportation on water.

It is a well recognized rule of law that every contract made for or about a matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty, because a penalty implies a prohibition. *Harding* v. *Hajar*, 60 Maine, 340, and cases there cited.

The law never lends its aid to carry such contracts into effect. 2 Greenl. Ev. (12th ed.) § 111.

PETERS, C. J. This case falls outside of the class of cases in which a redress for injuries upon personal property is denied by the law upon considerations of public policy. It may be near the line of such cases.

The plaintiff, at a time when he was an inspector of the public customs, became the owner, by purchase, of a boat, notwithstanding the law, R. S. U. S., § 2638, provides that no person in that branch of the public employment shall "own any vessel or interest therein," under a penalty of five hundred dollars. The plaintiff supposed that his boat or yacht did not come within the prohibition of the law. But we are inclined to think it did, and we will take it for granted that it was so.

We do not conceive it to be an answer to an action for the conversion of the boat, that the trespasser was, at the time of

the conversion, an officer, attaching the property for a creditor of the seller, upon the claim and theory that no property passed by the sale. The seller's property was not diminished by the sale. He received a full consideration, merely exchanging property for property. No fraud upon creditors was accomplished or intended.

The statute itself is unlike any other prohibitory legislation, being bare of any executory or explanatory provision. Suppose an owner of vessels becomes a public officer while he is such owner, what becomes of the property owned by him? Can it be regarded as lost or abandoned, to be appropriated by any finder? Suppose the boat had been purchased to be at once broken up for its old wood and iron, or to be immediately converted into some form of property other than a boat, and such intention had been executed. Would the purchase have been in such case unlawful?

But these queries, although perhaps helpful indirectly, are rather at a distance from the point on which we place the decision of the case. There is considerable difference of judicial opinion on questions affected by the doctrine of public policy, and the present occasion does not require a discovery or discussion of the true rules to be generally applied to them. Suffice it to say that we think the present case may be saved to the plaintiff by force of the decision in *Hamilton* v. *Goding*, 55 Maine, 419, where it was held that an owner of intoxicating liquors, although such liquors were intended for sale by him in violation of law, may maintain trespass for their unauthorized conversion by a sheriff, who is at the time acting under color of office in service of civil process.

Upon principle that case and this are alike. There, as it is here, the officer attached the goods as the property of the seller. There the possession of the articles held for illegal purposes was enough to found the plaintiff's action upon. It did not lie in the officer's mouth to allege that the possession was for unlawful purposes. We think the same rule applies here. The plaintiff's possession was his title, in a conflict with the officer who represented neither possession nor any right to possession. *Adams*

v. *McGlinchy*, 66 Maine, 474; see *National Bank* v. *Matthews*, 98 U. S. 621.

Exceptions overruled.

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

ISRAEL R. BRAY *vs.* N. F. CLAPP and others.

Somerset. Opinion March 10, 1888.

Deed. Joinder of husband in wife's deed.

It is a sufficient joinder of a husband in his wife's deed, of her property derived from him, for him to express his assent thereto, under his own hand and seal, in her conveyance, without his being a formal party to the deed.

ON exceptions.

Writ of entry. The opinion states the question presented by the exceptions, and the material facts.

A. H. Ware, for the plaintiff, cited: *Webb* v. *Hall*, 35 Maine 338; *Strickland* v. *Bartlett*, 51 Maine, 356; *Child* v. *Sampson*, 117 Mass. 63; *Knight* v. *Thayer*, 125 Mass. 25; *White* v. *Graves*, 107 Mass. 328; *Hills* v. *Bearse*, 9 Allen, 403; *Chapman* v. *Miller*, 128 Mass. 269; *Cormerais* v. *Wesselhoeft*, 114 Mass. 552; *Cairncross* v. *Lorimer*, 3 Macq. H. L. Cas. 829, S. C. 7 Jur. N. S. 149; *Cornish* v. *Abbington*, 4 Hurlst. & N. 549; S. C. 28 L. J. Exch. D. 262; *Chapman* v. *Pingree*, 67 Maine, 202; *Wood* v. *Pennell*, 51 Maine, 52; 1 Greenl. Ev. § 275; *Kimball* v. *Bradford*, 9 Gray, 243; 1 Greenl. Ev. § 281; *Paine* v. *McIntier*, 1 Mass. 69; 10 Mass. 461; *Townsend* v. *Weld*, 8 Mass. 146; *McLellan* v. *Cumberland Bank*, 24 Maine, 566; *Palmer* v. *Fogg*, 35 Maine, 368; *Wilson* v. *Hanson*, 12 Maine, 58; *Bell* v. *Woodman*, 60 Maine, 465; *Sylvester* v. *Staples*, 44 Maine, 496; *Farley* v. *Bryant*, 32 Maine, 474; *Littlefield* v. *Littlefield*, 28 Maine, 180; *Chadwick* v. *Perkins*, 3 Maine, 399; *Osgood* v. *Davis*, 18 Maine, 146; *Hancock* v. *Fairfield*, 30 Maine, 299; *Jordan* v. *Otis*, 38 Maine, 429; *Rogers* v. *McPheters*, 40 Maine, 114; *Emery* v. *Webster*, 42 Maine, 204; *Kimball* v. *Morrill*, 4 Maine, 368; *Child* v. *Wells*, 13 Pick. 121; *Strout* v. *Harper*, 72 Maine, 273; *Ellis*

v. *Higgins*, 32 Maine, 34; *Whitney* v. *Lowell*, 33 Maine, 318; *Bryant* v. *Crosby*, 36 Maine, 562; *Warren* v. *Miller*, 38 Maine, 108; *Reed* v. *Reed*, 71 Maine, 159; *Gray* v. *Hutchins*, 36 Maine, 142; *Harlow* v. *Thomas*, 15 Pick. 66; *Madden* v. *Tucker*, 46 Maine, 367; *Locke* v. *Whiting*, 10 Pick. 279; *Lincoln* v. *Avery*, 10 Maine, 418; *Crawford* v. *Spencer*, 8 Cush. 418; *Cushing* v. *Ayer*, 25 Maine, 383; *Tilton* v. *Hunter*, 24 Maine, 29; *Peck* v. *Conway*, 119 Mass. 546.

Walton and Walton, for Emeline Houghton, defendant.

By R. S., c. 61, § 1, if his deed to his wife had been an unrestricted one, she could not have conveyed it, except by his joining in the deed. *Call* v. *Perkins*, 65 Maine, 444.

It was not therefore a conveyance by Emeline and Jonah Houghton, both joining in the deed, as the statute required. *Bruce* v. *Wood*, 1 Met. 542; *Greenough* v. *Turner*, 11 Gray, 332; *Wales* v. *Coffin*, 13 Allen, 213. Approved in *Pierce* v. *Chace*, 108 Mass. 258.

Clapp took no title by the conveyance of Emeline Houghton to him and on the day he gave the mortgage to the plaintiff he had no legal interest whatever in the premises. *Beale* v. *Knowles*, 45 Maine, 479.

Is any estoppel created? Is this defendant, Emeline Houghton, in any way estopped by her conveyance to Clapp and consent to his subsequent conveyance? We see no reason why she should be. *Lowell* v. *Daniels*, 2 Gray, 161; *Townsley* v. *Chapin*, 12 Allen, 476; *Bruce* v. *Wood*, 1 Met. 542; *Wales* v. *Coffin*, 13 Allen, 213; *Pierce* v. *Chace*, 108 Mass. 254; *Shillock* v. *Gilbert*, 23 Minn. 387.

There being no deception, no concealment, no fraud, there can be no estoppel. *Shillock* v. *Gilbert*, *supra*; Washburn on real property, 3rd edition, Vol. 3, pp. 74 and 80.

"The deed must contain apt words of grant or release . . . and the court could not inquire into her intention in joining in the deed . . . if that intention was not manifested by the deed itself." *Greenough* v. *Turner*, 11 Gray, 334, before cited. See also *Paul* v. *Moody*, 7 Maine, 455; *Peabody* v. *Hewett*, 52 Maine, 33; *Whitaker* v. *Miller*, 83 Ill. 381;

Hummelmon v. *Mounts*, 87 Ind. 178; *Adams* v. *Medsker*, 25 West Va. 127.

PETERS, C. J. It is conceded that the plaintiff is entitled to recover upon the case submitted, if it be a sufficient joinder of a husband in his wife's deed, of her property derived from him, for him to express his assent, under his own hand and seal, without being in any other manner a formal party thereto.

The statute, R. S., c. 61, § 1, provides that "real estate directly or indirectly conveyed to a wife by her husband, or paid for by him, or given or devised to her by his relatives, cannot be conveyed by her without the joinder of her husband." We have heretofore given what we regard as convincing reasons why this statute should be liberally construed for the sake of upholding honest conveyances. *Perkins* v. *Morse*, 78 Maine, 17.

In the case now before us, the deed is in ordinary form, as a conveyance by the wife, the name of the husband appearing only in the final clause, in the words that follow: "In witness whereof, I, the said Emeline Houghton, and Jonah Houghton, in token of his assent to this conveyance upon the terms of, and subject to, the limitations aforesaid, of the aforesaid premises, have hereunto set our hands and seals this 4th day of November, A. D. 1880." Each of them signed and sealed the instrument.

In order to ascertain whether this expression of assent by the husband is a joinder in the wife's deed, within the meaning of the statute requiring a joinder, it is necessary to appreciate the purpose of the requirement and see what is to be accomplished by it. The design of the law, no doubt, was that a married woman shall not improvidently deed away property given her by her husband or his friends, or shall not without some right of hindrance in the husband, convey real estate which she, presumably, in some way or to some extent, holds for their common use and benefit.

Is not the object completely attained by requiring merely his written assent in her deed? Is she not thus effectually prevented from making any valid conveyance by merely her own unaided

act? The statute exacts the "joinder of her husband," not as a grantor, because he has nothing to grant, but as an assenter merely, for he has only the power to withhold or give his assent. He joins in the deed, not to convey or assist in conveying anything, but to assent that she may convey her own title. The only possible right which he has in her lands, is that of dissenting from her conveyance, and that he waives by assenting to it. The word joinder implies that the assent is to be expressed in writing in her deed. What possible public policy can the statute subserve, by requiring the husband, in his wife's deed when it is one of warranty, to commit himself to a warranty of property which he does not own, and for a transfer of which he receives no part of the consideration? by requiring the idle assertion that he is seized of the premises, when he is not? or in requiring the other untruthful statements which his covenants would contain? In some of the states the statutory provision is that her deed must be made with "his assent," or "written assent." No more than written assent was really intended by our own statute, the difference in phraseology being but accidental and not essential.

An appeal to the common law rules does not weaken the argument, because they are inapplicable. The reason why a husband, under the common law sway, joined in the wife's deed, was that they were both seized of her real estate, he of a freehold and she of a fee therein. They were regarded in the old law as one person, the legal existence of the wife being consolidated into that of the husband. They were therefore required, in matters affecting her, to join in pleading and in conveyances. Those rules, under our statutory system, are obsolete.

The authorities, differ somewhat on this question of joinder. We think the best reasoned judicial expressions on the subject, are in accord with the views accepted by us. A clear and very satisfactory decision on the point, where the discussion is full, is in *Woodard* v. *Seaver*, 38 N. H. 29. In that case the court says that the deed there in question would be wholly void without the joinder of the husband, and it was held that his written assent in the deed, was a joinder. *Evans* v. *Summerlin*, 19

Florida, 858, is a pointed case favoring the same view of the question. *Exceptions overruled.*

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

MARY E. HODGES and another

vs.

AMBROSE F. HEAL and another.

Waldo. Opinion March 10, 1888.

Deed. Consideration. Evidence. Trespass.

It is admissible for a grantee in a deed of an undivided half of a parcel of land, to show by oral evidence that it was agreed between him and the grantor at the delivery of the deed, that the sum paid as a consideration for the conveyance, should also be in full satisfaction of trespasses previously committed by him upon the land.

Any one of several owners in common of land may collect or release a claim for damages arising out of trespasses upon the common property.

ON exceptions.

Trespass for breaking and entering plaintiffs' close and cutting and hauling therefrom two hundred cords of wood. The questions raised by the exceptions are stated in the opinion.

W. P. Thompson and R. F. Dunton, for plaintiffs.

The paper given by the defendants contains the only arrangement or understanding entered into between the parties. Its meaning is to be ascertained from its terms. It is upon its face intelligible, unambiguous, reasonable and complete. *Sylvester* v. *Staples*, 44 Maine, 496; *Wilson* v. *Hanson*, 12 Maine, 58; *Farley* v. *Bryant*, 32 Maine, 474; *Hilton* v. *Homans*, 23 Maine, 136.

Whatever may have been the previous conversations or understandings of the parties, if they finally proceeded to put their agreement deliberately and fairly into writing, that is conclusive not only upon them, but also, there being no fraud, upon third persons. *McLellan* v. *Cumberland Bank*, 24 Maine, 566; *Palmer* v. *Fogg*, 35 Maine, 368; *Wilson* v. *Hanson*, 12 Maine, 58; *Bell* v. *Woodman*, 60 Maine, 465.

Testimony is not admissible tending to change, alter, or vary a written contract, signed by the plaintiff and produced by the defendant, though it be not the foundation of the action. *Boody* v. *Goddard*, 57 Maine, 602; *Sawyer* v. *Hammatt*, 12 Maine, 391.

The written contract between these parties is in the form of a receipt only so far as acknowledging the amount paid to the defendants and so far as it is evidence of a contract between the parties it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence. Greenl. on Ev. Vol. 1, § 305; *Stackpole* v. *Arnold*, 11 Mass. 27; *Tucker* v. *Maxwell*, *Id.* 143; *Johnson* v. *Johnson*, *Id.* 359; *Wilkinson* v. *Scott*, 17 Mass. 257; *Brooks* v. *White*, 2 Met. 283; *Barrett* v. *Rogers*, 7 Mass. 297.

At common law in an action for trespass on land owned by several, all the co-tenants must be named in the writ. Waterman's Trespass, Vol. II, § 941; *Rice* v. *Hollenbeck*, 19 Barb. 664; *May* v. *Slade*, 24 Texas, 205.

This rule has been changed by § 18, c. 95, R. S. of Maine, in which it is provided that, "All or any of the tenants in common, co-partners or joint tenants of land may join or sever in personal actions for injuries done thereto."

"The court shall enter judgment for the whole amount of the injury proved, but shall award execution only for the proportion thereof sustained by the plaintiffs." R. S., c. 95, § 19.

The interests of the plaintiffs are not joint, for by the statute each can recover only for his proportion of the damages sustained, and a settlement by George W. Heal with the defendants would not affect Mrs. Hodges' right to recover. *Wilson* v. *Gamble*, 9 N. H. 74; *Hobbs* v. *Hatch*, 48 Maine, 55; *Longfellow* v. *Quimby*, 29 Maine, 196; Waterman's Trespass, Vol. 2, § 492.

It will be seen that in the case at bar judgment should have been awarded for the full amount of damage proved, when Mary E. Hodges could have obtained execution, by which to enforce her judgment, only for her proportion of the damages proved. If George W. Heal had already been paid he could not

obtain execution. In any event the plaintiffs had a right to amend by striking out the name of George W. Heal. R. S., c. 82, § 11; *Stinson* v. *Fernald*, 77 Maine, 576.

William H. Fogler, for the defendants, cited: *Bradstreet* v. *Rich*, 72 Maine, 237: *Willis* v. *Hulbert*, 117 Mass. 151; 1 Greenl. Ev. § 285; *Tyler* v. *Carlton*, 7 Maine, 177; *Nickerson* v. *Saunders*, 36 Maine, 413; *Brown* v. *Lunt*, 37 Maine, 434; *Dearborn* v. *Morse*, 59 Maine, 210; *Egan* v. *Bowker*, 5 Allen, 451; *Fairfield* v. *Oldtown*, 73 Maine, 575.

PETERS, C. J. The case, unencumbered by immaterial statement, comes to this: The defendants, having committed a trespass upon the woodland of the plaintiffs, tenants in common, purchased the interest of one of the plaintiffs in the land, giving, according to a receipt, three hundred and seventy-five dollars therefor. Now, are the defendants permitted to show that the consideration of the receipt, the three hundred and seventy-five dollars, not only paid for the interest in the land, but by contemporaneous verbal agreement also settled the trespass previously committed by the defendants upon the land.

The question touches very closely the principle which prohibits the reception of oral evidence to change the effect of a written contract. Still, we think the evidence offered was admissible on the theory, advanced in the case of *Farrar* v. *Smith*, 64 Maine, 74, that it affects merely the amount of consideration paid, and not the substance of the contract. It allows evidence to show that the real consideration paid for the land was less than stated, and that the whole sum was really paid for the land and something besides. In the case cited the consideration in the deed was paid for the farm and something in addition not named in the deed. A consideration may be proved to be either more or less than the sum stated in a deed or other written contract. The principal contract is not varied, but is made to be the groundwork or consideration of another contract. It is not unlike the case of a lumberman buying land, inclusive of the timber already cut down upon it by him, or of a tenant buying a house in which he lives, inclusive of rent for past occupation,

the deed in either case not mentioning that the consideration was paid for anything but the land. In such cases, it only affects the amount of the consideration, to be permitted to prove by oral evidence that the indebtedness for stumpage or occupation was also settled in the principal transaction.

The plaintiffs contend that, being tenants in common, the interest of the two in the lumber cut by the trespass, could not be settled or released by one. That is incorrect. Either could collect or release the claim. Though their estates are several, the damages are one, so to speak, are common to both estates and belong to them jointly. *Bradley* v. *Boynton*, 22 Maine, 287; *Kimball* v. *Sumner*, 62 Maine, 305, 310.

Exceptions overruled.

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

JOHN APPLETON and others *vs.* COUNTY COMMISSIONERS.

Piscataquis. Opinion March 13, 1888.

Way. Appeal. Assessment. Practice. R. S., c. 6, § 78; c. 18, § § 41, 44.

By R. S., c. 18, § § 41, 44, an appeal may be taken, by any person interested, from the decision of county commissioners in laying out a highway through unincorporated townships, the appeal to be taken on any day before, and to be entered in, the term of the Supreme Judicial Court first to be holden after such decision is made.

By R. S., c. 6 § 78, the assessment of benefits is to be made at the first regular session of the commissioners after they have laid out the road. But where an appeal has been taken from their action in laying out the road, such assessment cannot be regularly made before their first regular session after such appeal has been finally disposed of in the court above.

If the benefits are assessed at the first regular session of the commissioners after their action in laying out the way, and, as it may happen, an appeal be still later but seasonably taken to their decision in laying out the way, the result will be that the assessments have been prematurely made, and are nugatory. In due time they may be made anew.

ON exceptions.

Appeal from the decision of the county commissioners in locating a way and the assessment upon the lands over which it was located.

At the February term, 1887, of the Supreme Judicial Court the appellants filed a motion for a hearing at that "term of court on said case and to determine what part of said assessment shall be paid by the owners of the tracts or townships over which said road was located, and what part, if any, by the county of Piscataquis, in accordance with provisions of R. S., c. 6, § 78." The court denied the motion and the exceptions were to that ruling.

Wilson and Woodard, for the appellants.

Our opinion is that the presiding justice was right in denying the motion, and that the exceptions should be overruled.

But if overruled it must be on the ground that the parties will hereafter have the right to be heard on said assessments, and the same revised by a single judge under section 78, c. 6, R. S., should such a hearing be necessary and the evidence show such revision to be right and just. In that way the rights of appellants will be preserved.

W. E. Parsons, county attorney, *and A. G. Lebroke and J. F. Sprague*, for appellees, cited: *Winslow* v. *Co. Com.* 31 Maine, 444; *Atkins* v. *Wyman*, 45 Maine, 399; *Tarbox* v. *Fisher*, 50 Maine, 236; *Paine* v. *Cowdin*, 17 Pick. 142; *Ewer* v. *Beard*, 3 Pick. 64; *Com.* v. *Harvey*, 111 Mass. 421; *Com.* v. *Fredericks*, 119 Mass. 199; *Smith* v. *Cumberland Co.* 42 Maine, 395; *Hodgdon* v. *Aroostook Co.* 72 Maine, 246.

PETERS, C. J. By section 41, ch. 18, R. S., county commissioners may lay out a highway through unincorporated townships. By section 44 of same chapter an appeal from the decision of the commissioners is allowed to any person interested. No time is stated within which the appeal must be taken. But as the appeal is to be entered in the Supreme Judicial court at the term thereof first held after the decision of the commissioners' court, the implication is that it may be notified to the clerk of their court on any day before the first day of the term of court to which the appeal is taken.

The next step is to assess the benefits on the lands over which the road passes. By § 78, c. 6, R. S., this shall be done at the

first regular session of the commissioners' court after the road has been laid out. And from their adjudications on this question an appeal may be taken by any person aggrieved thereby, to be entered at the first term of the appellate court holden after the assessments are made.

It is obvious enough that, as it happens in this case, if the statutes are literally obeyed, the two appeals might come to the upper court at the same time. The processes provided are not particular enough to prevent such a result.

We think in such case the assessments prove to be prematurely made. They are to be made after the road has been laid out. But the road cannot be considered as laid out, when an appeal has been taken, until final action on the question by the appellate court. The ordinary formalities may have been taken by the commissioners for the purpose of laying out the road, but, by force of an appeal, their work is, for a time at least, deprived of its intended effect. If the court above confirms their proceedings, then the road becomes legally established. Then, and not until then, is the road laid out.

And here arises a question. What shall the duty of commissioners be in the matter of assessing benefits, when it happens that the term of their court comes round at which the assessments should be made, if there is to be no appeal, and the time allowable for an appeal has not expired. If the term of their own court goes by, and no appeal is afterwards taken, the assessments made afterwards, will be too late, while if made at such term, and an appeal is taken, they will be too early. We think they may perform this work at their first term after their action in laying out the road, and if no appeal afterwards appears, the assessments then made will be valid and regular. But if an appeal be taken to the laying out of the road after the assessments have been made, and within the time allowed for an appeal, then such assessments become nugatory and of no avail whatever. In such case, however, the commissioners will have the benefit of the examinations previously made, and of the consideration bestowed upon the questions involved, when they make the assessments again.

It may be well to observe that section 47, which is included in that portion of c. 18, R. S., which is applicable to ways in places not incorporated, does not belong in such division. It relates to appeals from assessments of damages, and not to appeals from the assessment of benefits. *Boston & Maine R. R. Co.* v. *County Commissioners*, 78 Maine, 169.

The exceptions must be overruled. The appeal on the question of assessments was ineffective, the assessments having been prematurely made.

Exceptions overruled.

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

STATE OF MAINE *vs.* ALVAH H. TOWLE.

Penobscot. Opinion March 13, 1888.

Contracts in restraint of marriage, void. Marriage. Insurance.

A written agreement between an association and its members, which provides that, if a member pays an initiation fee, and certain annual dues for nine years and until he is married, and also an assessment on the marriage of any associate, and promises on pain of forfeiture of all rights under the contract that he will not get married for two years, the company will pay one thousand dollars to his wife, the amount to be collected by an assessment upon the associates, if not already in the treasury, is not a contract of insurance, but a contract in restraint of marriage, unlawful and void.

The insurance commissioner has no jurisdiction in such business.

ON report.

The opinion states the case and material facts.

F. H. Appleton and Hugh R. Chaplin, for plaintiff.

In *White* v. *The Equitable Nuptial Benefit Union*, 7 Ala. 251, S. C. 52 Am. Rep. 325, the court declare that such a contract, with the condition that the party is not to get married in three months is a contract in restraint of marriage and illegal and void. In *Chalfant* v. *Payton*, 96 Ind. 202, S. C. 46 Am. Rep. 586, a certificate of membership issued by such company was held to be contrary to public policy, and illegal, the contract being to pay a sum of money on condition that the member did not marry in two years. See also *Hartley* v. *Rice*, 10 East. 22.

Insurance (comprehending all kinds) may be defined to be where one person called the insured member, &c., pays a small sum of money called the premium, assessment, fee, &c., to another person or body corporate called the insurer, in consideration of said insurer incurring the risk of paying a larger sum upon a given contingency. See *Paterson* v. *Powell*, 9 Bing. 320. 4 Geo. 3, c. 48, enacts, "that no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any other person or persons, or on any event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policies shall be made, shall have no interest, or by way of gaming or wagering."

The first case decided under the statute was *Roebuck et al.* v. *Hammerton*, Cowper, 737. See *Good* v. *Elliot*, 3 T. R. 693.

It may be contended that the scheme here involved does not fall within the common and accepted definition of insurance, for instance, that given by Judge MAY, as follows: "Insurance is a contract, whereby one, for a consideration, undertakes to compensate another, if he shall suffer loss." Again Judge MAY says, section 2, "Wherever danger is apprehended or protection required, it (insurance) holds out its fostering hand and promises indemnity."

M. Laughlin, for the defendant, cited: 6 Gray, 396; *Godsalh* v. *Bolders*, 2 Smith Lead. Cas. *292; May, Insurance, 1; Bouvier's L. Dict. *Insurance*: Rapalje & L. Dict. *Insurance*; 105 Mass. 160.

PETERS, C. J. The state sues to recover a penalty of the defendant for acting as a soliciting agent for the Single Men's Endowment Association, a company having its home in the state of Minnesota, and doing business in this state without a license from the insurance commissioner. The question is whether or not this association is an insurance company, under the provisions of the R. S., c. 49 § 73.

The contract between the company and its patrons declares the duties which must be assumed by the single man who becomes privileged to an endowment in the association. He pays ten

dollars as an initiation fee; two dollars as annual dues each year for nine years, and as much longer as he remains single; one dollar and a quarter on the marriage of any associate; and he promises on the pain of forfeiture of all rights accruing to him, that he will not himself marry within two years from the date of his admission to the association. For the performance by him of these undertakings, the company promises to pay to his wife, if married to him after the expiration of the two years, the sum of as many dollars as there are associates in the order, not exceeding one thousand dollars, provided that there be that amount of money in the treasury at the time, or it can be collected by an assessment upon the associates. No word is spoken of insurance. That it is a wagering or gambling contract, and void upon grounds of public policy, because in restraint of marriage, there is no room for doubt. The same or a similar contract has been held to be void in *White* v. *Equitable Nuptial Benefit Union*, 7 Ala. 251; and in *Chalfant* v. *Payton*, 96 Ind. 202.

The counsel for both parties agree that the contract, for one reason or another, is illegal, but the counsel for the state contends that, whether the contract be legal or illegal, it is a contract of insurance, and that, as such, it falls under the supervision of the commissioner.

It is not to be conceded, we think, that this contract, in the sense of any modern use of the term, is an insurance policy. No loss or casualty or peril is named for which any indemnity is promised. It is more of a betting contract on a future event. It is true that there was formerly a class of betting contracts styled insurances, and that a narrow line once existed between gambling and betting contracts and those then denominated contracts of insurance. And the case of *Patterson* v. *Powell*, 9 Bing. 320, relied on by the state, shows how far a court was induced to go to determine that a contract, similar in principle to the present, was an insurance policy, in order to declare it void. The statute, 4 Geo. 3, c. 48, rendered certain speculative insurance contracts void, and, strange to say, allowed all

contracts founded on mere bettings and gamblings to be valid. At this day, the contract in that case, with all its imitations of the thing, would hardly receive the appellation of an insurance policy.

It does not seem probable that the legislature intended to commit to the care of the commissioner the business of illegal or illegitmate insurance companies. It would be tolerating instead of condemning them. He has the power to issue and suspend licenses. But there must be cause for either act. R. S., c. 49, § § 73, 75. His business is to deal with such companies as can, when licensed, issue legal policies. His act cannot confer legality upon companies doing illegal business. The state seeks to recover a penalty of fifty dollars, because the defendant acted without an official license, while the policy, if to be called such, issued by him, would be unlawful and void, whether he was acting with or without a license. It would be inconsistent to collect a penalty of an agent for not doing business under a void license. *Plaintiff nonsuit.*

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

SARAH N. KENISTON and others *vs.* JOSHUA R. ADAMS.

Franklin. Opinion March 13, 1888.

Will. Probate. Practice. Husband and wife. Legatee dying before testator. Lapsed legacy. R. S., c. 74, § 10. "Heirs and assigns forever."

Every instrument purporting to be the last will and testament of any person, should be filed in the probate court in due time after the testator's decease. It is a punishable offense to withhold the instrument from the possession of the court.

Any person who believes himself interested in its provisions, and is not a mere intruder, if the executor declines to move in the matter, may ask that the instrument be probated.

A devise by a wife to her husband, between whom there is no relationship outside of that which arises from their marriage, lapses by his death during her lifetime. He is not a relative of his wife within the meaning of the statutory provision, R. S., c. 74, § 10, which prevents a devise from lapsing when made to a relative who at his death, in the testator's lifetime, leaves lineal descendants.

A legacy to a person named, "and so to his heirs and assigns forever,"

lapses if the legatee dies in the lifetime of the testator. The added phrase contains words of limitation only, and are descriptive of an absolute property or fee in the legatee.

It creates no remainder in his heirs, nor does it substitute them as takers in his place if he dies while the testator is alive.

ON report.

Appeal by the plaintiffs from the decree of the judge of probate. The facts were agreed and are sufficiently stated in the opinion.

Joseph C. Holman, for the appellants.

Joshua Adams died December, 1881. His wife, the testatrix, Mary Jane Adams, died October, 1885. He was not any relative to his wife only by marriage, and consequently the legacy to him lapsed when he died. Revised Statutes, chapter 74, § 10; 49 Maine, 159. The question is fully discussed on page 163 of 49 Maine Report, and cases there cited by the court as to when a legacy lapses. 64 Maine, 468; Maine Probate Practice, p. 114; Jarman on Wills, under word "lapse," and definition of word "lapsed" in Webster's Unabridged Dictionary.

Joshua Adams was not a relative of his wife, for a husband and wife are not relatives; 101 Mass. 36, and cases there cited, within the meaning of a similar statute. The husband is not the "heir or next of kin" of the wife, etc. 51 American Reports, p. 516; from 106 Penn. St. 176.

The only party who asks or desires to have this will or instrument probated, is one Joshua R. Adams, a son of Joshua Adams named in the will by a former marriage. This Joshua R. Adams is a mere "interloper" in this case. The proponent of a will should be a person who has some interest, or color of interest at least, in the estate in some way. 56 Maine, 413; 53 Maine, 555, Maine, Probate Practice, p. 9.

It is not the intention of our statute that a probate court shall arbitrarily set up a will on its own motion in opposition to everybody interested in the estate. Possibly a probate judge could have done so once. Since 1885, no will can be probated without some notice. The probate court is a creature of statute. They do not have the authority under the statute that the

authorities cited in 4 Pick. 41, may indicate. *Marston et als. Petitioners*, 79 Maine, 25, and cases there cited. That opinion in connection with the statutes fully sustains this position, also 56 Maine, above cited as to point requiring party to be interested. 3 Pick. 443, party appealed from decision of court on appeal, was dismissed because appellant was not interested. 1 Pick. p. 78, court says: "Generally administration should not be granted except on the application of some one entitled to administer, or who is interested in the estate to be administered upon. The question then is whether the respondent is interested, or has any claim upon the estate of the deceased;" also 9 Mass. 385; 2 Mass. 139; 16 Pick. p. 264, bears on the case, and shows that party interested must have some interest in the proceedings, etc.

The appellants, being all the parties having any legal interest in this estate as they understand the law, respectfully ask the court that the instrument purporting to be the last will and testament of Mary Jane Adams, may be set aside and disallowed, and the estate settled as an intestate estate, and they being all the parties interested in the estate, think they have the right to have the estate settled as they see fit.

E. R. Luce, for the appellee, Joshua R. Adams, cited: R. S., c. 64, § 3; 4 Pick. 42; R. S., c. 74, § 10; 2 Bouv. L. Dict. 668; 30 Maine, 137; *Nutter* v. *Vickery*, 64 Maine, 498; 41 Maine, 495; 33 Maine, 464; 3 Wash. Real Prop. (4th ed.) 535.

PETERS, C. J. An instrument left by a person at his death, as his last will and testament, should be filed in the probate office without fail. The person in whose custody it is, may be more interested to suppress than to publish its contents. To prevent fraud or wrong, all wills should be open to a proper public inspection. Such is the implication of the statutory provisions for punishing the unwarrantable suppression or destruction of wills. The authorities all declare that this first step is of transcendent importance. The will, having been presented, may or may not be probated. There has been some discussion, in the cases, as

to the extent of the discretionary powers of the probate judge in this matter. The true rule to be extracted from the cases is, that any person who believes himself interested in its provisions, and is not a mere intruder, if the executor declines to move in the matter, may ask that the instrument be probated. And much liberality must be extended to the petitioner by the judge, in the consideration of preliminary questions, because it cannot always be foretold who may be interested, or, what the interpretation of the will may be. Schoul. Executors, § 65; Bac. Abr. Executors; Bou. Law Dic. same title; *Stebbins* v. *Lathrop*, 4 Pick. 33.

It will readily be seen from the gravity of the questions presented, that we could very properly refuse to proceed in the present case further than to overrule the appeal and remit the proceedings to the court below for its action. But as all the questions, which are ever likely to arise in the settlement of the estate, have been fully argued, we think it expedient for the interests of all concerned, to consider and decide the same now, and make an end of the litigation.

All persons who can possibly be interested in a construction of the will are represented before us, and the agreed statement shows that the testatrix, whose will is dated in 1867, died in 1885, leaving no father or mother, nor husband or children, but leaving brothers and sisters as her only heirs. In her will is this clause. "To my husband, Joshua Adams, I give the residue of my property, both real and personal, and so to his heirs and assigns forever." The facts further show that the husband died in 1881, leaving children by a former marriage (the proponent, Joshua R. Adams being one of them,) and that no relationship existed between the husband and wife outside of their marriage. No creditors are interested. The heirs of the testatrix are desirous of a settlement among themselves, all of them being *sui juris*, to save the time and expense of a settlement in the probate court.

The proponent claims, for himself and his father's other children, an interest in the estate of the testatrix, upon two grounds.

In the first place, he contends that the bequest to his father did not lapse by his father's death before that of the testatrix, but that it was saved by force of section 10, c. 74 of the revised statutes, which reads as follows: "When a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative had he survived." This presents the question whether, in a testamentary sense, a husband is a relative of his wife. Most, if not all, the authorities there are on the question, declare that he is not. Our opinion coincides in that result.

A relative can only be one whose descendants would also be relatives. If the husband was a relative, then his son, the proponent, was. We think the statute intended to provide for a relationship by blood. If otherwise, it would have a very wide and somewhat indefinite application. We do not see good reason for the construction contended for. The result of its application in the present case would be to give the wife's property to her husband's relatives in exclusion of her own. There may be good reason why a wife would provide in her will for her husband, but generally not much reason for a more extended provision towards his side of the family. If the family situation be such as to require the protection of stepsons, special bequests would most always be made for the purpose.

It has long been settled that, in the construction of wills, the word "relation," or "relatives," includes those who are entitled as next of kin under the statute of distribution. Bou. Law Dic. 15th ed. Relations; and cases there cited. "A gift to one's relations does not, *prima facie*, refer to husband, wife, or marriage connections, but to those only of one's blood." Schoul. Wills, § 537; and cases. A grandson's widow is not entitled under a devise to grand children, nor does a gift to children extend to children by affinity. 2 Jarm. 5th ed. *121, *151, and Bigelow's notes. Those rules may be varied by the context of a will showing different intention. It was once held in this state that a husband could be regarded as an heir of his wife, but that doctrine was overruled in *Lord* v. *Bourne*, 63 Maine, 368. The

precise point of the present case has been settled adversely to the petitioner, in *Esty* v. *Clark*, 101 Mass. 36. Other cases help the argument directly or indirectly. *Kimball* v. *Story*, 108 Mass. 382; *Drew* v. *Wakefield*, 54 Maine, 291; *Cleaves* v. *Cleaves*, 39 Wis. 96; *Wells* v. *Wells*, L. R. 18 Eq. 504.

Upon another ground, it is claimed by Joshua Adams' children that they are interested in the will. The point is made that the words in the bequest, "and *so to* his heirs and assigns forever," are not descriptive of a fee to the husband, but of a life-estate to him, and a remainder to his heirs. We have no idea that any such thing was intended. If it had been, the provision would have been much more significantly stated. It is too slight a ground to hang such consequences upon. It can be regarded as nothing more than a redundant expression. Numerous phrases may be found differing from the common form, but expressing the same thing, and descriptive of a fee, such as, "A, his heirs," "A and heirs," "to A forever," to "A and his assigns forever," "to A and his house," "to A and his family," and the like. Schoul. Wills. § 549, and cases.

It has been held by a considerable amount of authority that a devise to one "or" his heirs might be regarded as good to the heirs if the primary legatee dies in the lifetime of the testator. In such case the heirs take by substitution. Although a very refined interpretation, it has been resorted to in instances where justice can be best administered only by its application. 1 Jar. Wills. *339; note. *Hand* v. *Marcy*, 28 N. J. Eq. 59; *Brokaw* v. *Hudson's Executors*, 27 N. J. Eq. 135. And see cases cited in *Kimball* v. *Story*, 108 Mass. 382. Some courts, however, think this interpretation rests upon too feeble a foundation to allow the heirs of the testator to be disinherited. *Sloan* v. *Hause*, 2 Rawle, 28. But courts have in some instances gone so for as to bring under the same rule devises running to a person named "and" his heirs, by making the word "and" read as if it were the word "or." But this has never been done unless the other provisions in the will require such a construction, and we can find no case where it has been permitted, if the devise runs to assigns as well as to heirs.

Such a construction of the present devise is inadmissible for

two reasons. First, there are no words in the will favorable to it. Secondly, the language here is to assigns as well as to heirs, and the power of assigning implies an absolute title. 1 Jarman, Wills, Big. ed., *517, and cases in note. Even where the gift is to specified persons, "or their heirs or assigns," it is clear that the words are words of limitation only. No cases are found which maintain a different doctrine. *Re Walton's estate*, 8 D. M. & G. 173; *Re Hopkins' Trust*, 2 H. & M. 411; *Dawes' Trusts*, 4 Ch. Div. 210.

The case of *Hawn* v. *Banks*, 4 Edw. Ch. 664, illustrates several points already spoken of. The words there are "and to her heirs." It was held that a devise standing on those words alone would lapse, and it was further declared that the other parts of the will clearly required the word "and" to read as "or." Really, when we consider that the purpose of introducing the words "his heirs and assigns" into deeds and wills, was to prevent the operation of the principle of primogenitureship, the words of the present devise are quite as apt for the purpose as any words would be. The idea is that the devisee may convey the property to assigns, and in failure of conveyance his heirs are to take. The words, "and so to his heirs and assigns," clearly declare that the devisee may alienate the estate or allow it to descend, and as he holds it so may his assigns or successors hold it.

Counsel for the heirs of the devisee intimates that the property devised came originally from the devisee. If the wife held his property in her name in trust for him, the remedy would be in equity to require the heirs of his wife to surrender the property to those who equitably own it.

As between the parties to the present litigation, we think the best disposition of the case, will be to allow the will to remain probated, but to omit the appointment of an administrator, unless some one of the heirs calls for such, thus allowing the heirs to settle the estate among themselves, without the aid of the court, and to allow no costs to either party.

Decree accordingly.

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

EMELINE WHITTEMORE *vs.* CHARLES B. RUSSELL and others.

Franklin. Opinion March 14, 1888.

Will. Evidence. Child omitted. Life-estate. Security given by life-tenant.

Evidence *aliunde* the will is admissible to show that an omission of provision for some of his children in a father's will, was intentional; and evidence of his declarations is admissible upon the question.

A will contained this clause: "I give to my wife the use of the remainder of my property both real and personal during her natural life-time, and after her decease it is to be equally divided between my children; the real estate may be sold if thought advisable." *Held:* that the wife takes a life-interest in the realty, and that she may personally possess and control the same.

Held further: That the phrase, that the real estate may be sold if deemed advisable, is ineffective, inasmuch as no one is directed or empowered to convey the title; that the wife can sell her life-interest, and the heirs can sell their remainder.

A gift for life of perishable articles, the use of which consists in their consumption, amounts, *ex necessitate*, to an absolute gift of the property; but if the gift be of articles which may depreciate but not necessarily wear out, by using, a full title is not given, though usually the life-legatee will be entitled to the possesion of such articles without giving security for their preservation.

Where the use of money is given for life, without discretion given to consume any portion of the principal, the gift is of the interest only, and usually security must be given against loss, or a trustee be appointed of whom a bond will be required.

The general rules on the subject may be varied by a court of equity, as circumstances shall reasonably require.

ON report.

Bill in equity by the widow of John Whittemore late of Temple, deceased, against the administrators, with the will annexed, and the heirs at law, to obtain a construction of the will.

J. C. Holman, for plaintiff.

By virtue of the authority laid down in the 6th Metc. 400, it is not necessary that it should appear by the will itself that an omission, (we claim there is no omission in this case however) was intentional, but it may be shown by parol evidence.

I would cite further the 123 Mass. 8; also cite the decision in

106 Mass. 320, as to the intention of testator to name all his children, and as competent to show that testator had declared he had prior thereto made provision for them, &c., 4 Allen, 512.

The decisions in 68 Maine, 100, also 68 Maine, 133, and the cases there cited show Mrs. Whittemore is clearly entitled to all the personal property, and can sell, deed and give a good conveyance of the real estate. The 69 Maine, 334, settles one branch of this case perfectly, and the 75 Maine, 196, settles the second branch of the case.

S. Clifford Belcher, for defendants.

The case of *Starr* v. *McEwan*, 69 Maine, 334, bears a resemblance to this case. In that case the testator does not as in this case, give the "use" of certain property to his widow, but gives the "property itself" "to her use during her natural life" with remainder over, &c. I am not clear that there is any real difference of meaning in these different phraseologies. If not, then the case cited may be a precedent to be followed in this case. If so, then the opinion of the court as expressed in the last paragraph at the foot of page 335, may be adopted as the opinion in this case.

In doubtful cases arguments drawn from inconvenience are of great weight. Co. Litt. 97, 152, *Ib.* It seems to me that this is a case where the doctrine of the maxim of *argumentum ab inconvenienti* may properly be invoked.

PETERS, C. J. In this amicable proceeding to obtain a judicial construction of the will of John Whittemore, the first question encountered is one of fact, which is whether those of the testator's children who do not receive anything under the will were intentionally omitted or not. The depositions in the case establish beyond doubt that the omission was intentional, and founded on good reasons.

The question of law which attaches to this branch of the case is, whether such intention may be shown by evidence *aliunde* the will, in connection with the internal evidence exhibited by the will itself. We cannot doubt that parol or oral evidence is admissible for such purpose. The evidence does not contradict the will in

any way, but on the contrary confirms it. It relates to a point to be established under the statutes and not under the will. The section of the statute referred to, R. S., c. 74, § 9, declares that the will shall not be affected by the omission, if intentional, or if not occasioned by mistake, or if the omitted child had received a due proportion of the estate during the life of the testator. Surely, those matters are in most cases provable only by oral evidence. The authorities generally favor this exposition of the law, and it has been always practiced upon in this state, as far as we know, as an unquestioned principle. 1 Red. Wills, 298; Schoul. Wills, § 21; *Wilson* v. *Fosket*, 6 Metc. 400. The testator gave his reasons to his family for his intended action in that respect. Of course, if oral evidence be admissible, his own declarations may be proved. *Converse* v. *Wales*, 4 Allen, 512.

Differences exist among the parties as to the legal effect of the principal provision in the will, which is this: "I give to my wife the use of the remainder of my property both real and personal, during her natural lifetime, and after her decease it is to be equally divided between my children; the real estate may be sold if thought advisable."

It is clear that the wife takes only a life-interest in the realty, for it is expressly so provided, with a gift over. Words would fail of all sensible meaning to determine otherwise. *Stuart* v. *Walker*, 72 Maine, 145, and cases there cited: *Copeland* v. *Barron*, *Id.* 206; the will in *Warren* v. *Webb*, 68 Maine, 133, a case relied on by the counsel for the widow in the present case, differs from this will, and that case stands well on the verge of the law in testamentary construction.

The meaning of the clause providing that "the real estate may be sold, if deemed advisable," is invoked by the bill. Probably the testator failed fully to express his idea. The words must be taken as they are. The land can be sold only by the persons to whom it belongs. No power of sale is conferred by the testator on the executor or any trustee. *Si voluit non dicit.* The life estate may be possessed and controlled by the wife, or she can sell it. It is her absolute property. And the reversion may be sold by the heirs. Or all interested parties can join in selling

the property, dividing the proceeds of sale according to their interests therein.

A gift of the use of personal property for a lifetime, with a gift over, as it is here, is to be regarded according to the nature of the property, and other circumstances. If of perishable articles, the use of which consists in their consumption, it amounts from necessity to an absolute gift of the property. If of articles which may depreciate by using, but which will not necessarily be consumed or worn out in that way, a full title thereto is not given; but the life-legatee, under ordinary circumstances and risks, is allowed to retain possession of the articles, without giving security for their preservation. Circumstances may, however, alter the case as to such property. Where the use of money is given, the gift is of the interest only, and as such property may be easily lost or wasted, the general rule is that the legatee must give some reasonable security to safely preserve the funds for the remainder-man, or the money may go into the hands of a trustee, of whom a bond would be required. And all these general rules are allowed to bend to the force of circumstances, and may vary, or be dispensed with even, according to amounts, situations, wants, and such probabilities and possibilities as a court of equity may deem proper to consider in deciding the question. See 1 Jar. Wills, (5th ed.) *879, and Bigelow's notes; and *Field* v. *Hitchcock*, 17 Pick. 182.

The counsel for the widow relies upon the case of *Starr* v. *McEwan*, 69 Maine, 334, in which the order was that the executor should pass personal property to the widow, the court remarking that its possession would be a matter between her and the remainder-man. That was all very true in that case, where the property was evidently small in value and was not money. Here the parties are all leaning upon the court for its advice, and the estate, outside of the realty, is money, amounting to eight hundred dollars. We think in this case the widow should give a bond, or a trustee should be appointed.

Or, what would possibly be a better disposition of so small a fund, the parties being all *sui juris*, they may, if they can agree, divide the funds, according to their respective interests therein.

But this, and other incidental matters may be best arranged by a single judge, after hearing the parties.

Decree accordingly.

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

JOSEPH E. MOORE *vs.* GEORGIA S. ALDEN and others.

Knox. Opinion March 14, 1888.

Will. Legacy. Dower. Preference. Counsel fees. Costs.

It is a well settled rule of law, that, where a testamentary gift is made by husband to wife in satisfaction of her waiver of dower in his estate, she having at his decease a dowable interest therein, the gift has a preference over all unpreferred legacies, unless a contrary intention may be clearly gathered from all the terms of the will.

The rule holds good although the gift, being an annuity for life, is made payable out of the income of the testator's estate, unless it also appears that the testator intended that the gift should be strictly limited to such income for its payment.

An intention that it is not to be so limited in the present case, is disclosed in the following facts: The testator was childless; the wife was much beloved by him; he regarded the provisions in her behalf as necessary for her needs; believed his estate would be sufficient to pay the several gifts to his wife, and also those to others, including relatives and strangers; makes the payment of his wife's annuity a prior claim to all other bequests, payable out of the earnings of all his individual and partnership properties; but his valuation of his estate turns out to have been greatly overestimated, the income falling far short of the burden imposed upon it.

Allowances, for obvious reasons to be of moderate amount, may be granted out of an estate for the expense of professional services and disbursements, in ascertaining the construction of a will, unless the facts disclose a frivolous and unnecessary case.

ON report. Bill in equity by the trustee under the will of Horatio E. Alden, late of Camden, against the widow, heirs and legatees, to obtain a construction of the will.

(Will.)

"I, Horatio E. Alden, of Camden, in the county of Knox, and State of Maine, being of sound and disposing mind and memory, do make, publish and declare this my last will and testament, hereby revoking any other or others by me heretofore made.

"First. I order and direct my executors to pay all my funeral charges and expenses of suitable gravestones, as soon as may be

after my decease, and my other individual debts as soon as property can be sold to advantage.

"Second. I give, devise and bequeath to my beloved wife, Georgia S. Alden, her heirs and assigns, all the land, orange groves and other property which I have in the State of Florida, with all the buildings, appurtenances and improvements on the same; also all the household furniture of every kind and description in my house on Elm street, in Camden village, known as the 'Estabrook house;' also all my wearing apparel and jewelry; also my horses, carriages, harnesses, saddles, and other trappings, etc., belonging with the same; also the sum of one thousand dollars to be paid to her from sales of my individual property outside of the firm property of H. E. & W. G. Alden, and I also give and grant to my said wife during her life the annuity and sum yearly of one thousand dollars to be paid from the earnings of my individual and partnership property; which devise, bequests and annuity are intended to be in lieu of all allowance, dower and distributive share of my estate.

"Third. I hereby order and direct and provide that the business of the 'Camden Anchor Works' shall be carried on after my decease by my estate and my brother William G. Alden, or his estate in case of his decease, for the period of five years, and for as much longer as my executors and my brother, William G. or his representatives, shall deem for the interest of all concerned, hereby authorizing the use of the firm name of H. E. & W. G. Alden, after my decease, in any and all business transactions necessary to carrying on said business.

"Fourth. I give and grant to my sister, Salina Andrews, the annuity and sum yearly of three hundred dollars, to continue during the life of my said wife should my said sister so long continue to live, to be paid to her, my said sister, from any of the net earnings and income of my individual and partnership property remaining after paying the annuity provided for my said wife.

"Fifth. I give and grant to my cousin Feroline Bachelder, the annuity and sum yearly of two hundred dollars, to continue during the life of my said wife, should my said cousin so long

continue to live, to be paid to her, my said cousin, from any of the net earnings and income of my individual and partnership property remaining after paying the annuity provided for my said wife and after paying the annuity provided for my said sister.

"Sixth. I give and bequeath to the town of Camden in the county of Knox, and State of Maine, the sum of two thousand dollars, to be paid to said town at the decease of my said wife, to hold the same upon the uses and trusts following: Namely, that the said town will expend the interest of one-fourth of said sum in keeping in good order the Alden cemetery lot, monument, fence, stones, etc., in 'Mountain Street Cemetery;' and the interest of one-fourth of said sum in setting out and taking care of shade trees for improving and adorning 'Mountain Street Cemetery' near Mt. Battie, in said Camden; and the interest of one-fourth of said sum in providing annually turkeys for Christmas dinners for such poor families in Camden as may be deemed by the selectmen most deserving, and the interest of the remaining one-fourth of said sum of two thousand dollars in making additions to the library of the 'Ladies' Library Association' in Camden village, of such new books as the committee of said association may select.

"Seventh. Should a child or children be born to me of my said wife before or after my decease, I give, devise and bequeath to it or to them all the rest and residue of my real and personal estate.

"Eighth. In case I leave no child or children and none are born to me of my said wife after my decease, I give and bequeath to my sister, Salina Andrews, her heirs and assigns, from any property remaining at my said wife's decease not otherwise disposed of in this will, the sum of two thousand dollars, and all the rest and residue of my real and personal estate, remaining at the decease of my said wife after carrying out all the previous provisions made in this will, I give, devise and bequeath in equal shares, as follows: One-ninth to my mother Polly G. Alden, her heirs and assigns; one-ninth to my brother B. H. B. Alden, his heirs and assigns; one-ninth to my brother William G. Alden, his heirs and assigns; one-ninth to my

brother Henry L. Alden, his heirs and assigns; one-ninth to my sister Salina Andrews, her heirs and assigns; one-ninth to my sister Sarah B. Adams, her heirs and assigns; one-ninth to the children of my late brother John M. Alden, should any of them survive my said wife; one-ninth to the children of my late brother Cyrus G. Alden, should any of them survive my said wife; and one-ninth to my cousin Feroline Bachelder, should she survive my said wife; but should all the children of said John M., or all the children of said Cyrus G., or should said Feroline Bachelder die before the decease of my said wife, then their share or shares shall be equally divided among such of my said brothers and sisters as shall survive my said wife.

"Ninth. I hereby appoint Henry L. Alden and Thaddeus R. Simonton, of said Camden, executors of this my last will and testament.

"In testimony whereof, I have hereunto set my hand and seal this thirty-first day of July, in the year of our Lord one thousand eight hundred and seventy-seven."

Duly executed, probated and allowed.

Joseph E. Moore, plaintiff, *pro se.*

A. P. Gould, for Georgia S. Alden, widow.

T. R. Simonton, for the other defendants.

PETERS, C. J. Horatio E. Alden, whose will is presented to be construed by the court, after directing that certain necessary bills be paid, and giving his wife certain property outright, also gives to her an annuity of one thousand dollars for her life time, the annuity to be paid from the earnings of his individual and partnership properties; and he declares that these gifts to his wife are to be in lieu of all allowances, dower, and distributive share to which she might be entitled out of his estate.

He then grants other annuities, their payment made subject to a prior payment of his wife's annuity, and makes sundry bequests to take effect on the death of his wife. It appears, that he died seized of dowable real estate; that no child was left by him; that the widow is now thirty-nine years old; and that the

entire estate reduced to money, now in the hands of the trustee, the administration accounts having been finally settled, amounts to $11,707.61.

It is evident enough, that the annuity to the widow, to say nothing of the other annuities, cannot be obtained from the income and earnings of the estate. And the question of the case is, whether she is entitled to receive the amount each year, although it will be necessary to entrench upon the *corpus* of the estate to supply the deficiency. She correctly claims that the full annuity should be paid to her, as long as the estate lasts, upon the rule, which appears to be well established in the law, that, where a testamentary gift is made by husband to wife, in satisfaction of her waiver of dower in his estate, the gift has a preference over all other unpreferred legacies, and for the reason that the estate receives a valuable consideration for such gift. The principle is based upon the idea of contract between husband and wife. He dictates the terms and she accepts them. The estate gets her right of dower, and she receives the gift in the will in lieu of dower.

This is an old doctrine originating with Lord COWPER, in *Burridge* v. *Brady*, 1 P. Wms. 127, adopted by Lord HARDWICKE, in *Blower* v. *Morret*, 2 Ves. Sr. 422, which has so extensively prevailed as never to have been dissented from, that we discover, either in the English or American cases. Its application was resisted by counsel in an early case (*Davenhill* v. *Fletcher*, Ambler, 244), where the gift to the wife greatly exceeded in amount the value of the dower, the argument being placed on the great inadequacy of consideration, but the point was overruled, the answer to it being that the testator is the only and best judge of the price at which he is desirous to become the purchaser of the wife's right. Rop. Leg. *432. The rule does not, however, apply, if the wife has no right of dower. Her right must be subsisting at the death of the testator. Otherwise, she is not a purchaser. In such case she pays no consideration. Same citation.

And the general rule does not prevail, if the will clearly disclose that the testator intended that the gift to his wife should not have a preference over other bequests. The burden will be on the executor to show from the terms of the will that a preference is forbidden. The presumption favors the widow's claim. The intention of the testator, as found in the will, is a part of the contract made with the widow, and if she accepts the provisions of the will, she does so voluntarily, and abides the consequences.

The internal evidence of the will, in the present instance, does not repel but favors the widow's contention. It discloses that the testator, having no child, had great affection for his wife, providing in different ways in his bequests for her protection. The evidence is conclusive that he believed his estate would easily bear all the burdens placed by him upon it. He must have assumed that the annuity to his wife would be needed by her, to sustain the equipments of house-keeping given her, including the support of horses and carriages provided for her use. He makes the payment of his wife's annuity a prior claim to all other bequests. The very relation of husband and wife creates a strong presumption in her behalf, when we consider that, after the bounties to her are paid, distant relatives if not strangers are provided for. We think that the will, as a whole, though not by express terms, by implication indicates preference in the devises and bequests to the wife, and struggles to utter it.

There is a clause in the will, which if standing alone, might seem to look in a contrary direction, and that is the declaration of the testator that the annuity is to be paid from the earnings of his individual and partnership property. We think the idea of the testator in this clause, was that he was enlarging rather than limiting the funds out of which the annuity might be paid. He devotes for the purpose the earnings of all his properties. He expresses no limitation or condition. The gift is unconditional and absolute, although, as is often the case, he overestimates the sources of supply which were to assure its payment. The sources indicated turning out to be insufficient, others must be taken to supply the deficiency. It is a demonstrative legacy, not lost

because of the non-existence of the property specially pointed out as a means of satisfying it. A case very like this, strongly sustains this conclusion. *Smith* v. *Fellows*, 131 Mass. 20. The following additional references may be profitably consulted upon the general questions of the case. *Heath* v. *Dendy*, 1 Russ. 543; *Wells* v. *Borwick*, L. R. 17 Ch. Div. 798; *Potter* v. *Brown*, 11 R. I. 232; *McLean* v. *Robertson*, 126 Mass. 537; Pom. Eq. Jur. § 1142, note and cases; Schoul. Ex. & Adms. § 490, and cases in note.

Parties to the bill ask for allowances for the expense of professional services and disbursements. Such expenses may be thrown upon the estate, unless the petitioner discloses a frivolous or unnecessary case. *Howland* v. *Green*, 108 Mass. 283; *Straw* v. *Societies*, 67 Maine, 493. But such charges should usually be moderate, for several reasons. Because there should not be strong temptation to multiply applications to the court for the exposition of wills; because representatives of estates have not the same stimulus for their protection as living owners have; and because, as a rule, such cases involve a peculiar kind of litigation which casts less responsibility than usual upon counsel, and more upon the court.

The amount of expenses to be allowed in this case, to be settled by the judge who passes upon the form of a decree.

Bill sustained.

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

CHARLES G. DAVIS *vs.* JAMES WEYMOUTH.

Penobscot. Opinion March 15, 1888.

Law and equity. Obstructions in a way. Nuisance. R. S., c. 17, § § 5, 12, 13.

A bill in equity does not lie to obtain the removal of fences, buildings, or other unlawful obstructions, from a public way, or a private way. The statutes of the state provide a full and complete remedy for such a wrong, by an action at law.

ON report.

Bill in equity alleging, among other things, that the defendant obstructed, blocked up and fenced in a large portion of Fourth street in Oldtown, and praying that the defendant may be restrained from so doing. The case was reported to law court on the bill, demurrer and joinder.

Davis and Bailey, for plaintiff.

The bill sets out a case where one owning a tract of land lays out a street through the same and sells lots bounded and abutting thereon. Neither the grantor nor any one holding under him has a right to obstruct such a way or deprive the grantee of such abutting lot of the free and unobstructed use of the entire way. *Bartlett* v. *Bangor*, 67 Maine, 460; *Fox* v. *Union Sugar Refinery*, 109 Mass. 292; *Tobey* v. *Taunton*, 119 Mass. 404.

The complainant and defendant are each in occupation of one such lot, lots derived from a common grantor, bounded and abutted by him upon a common way which he had previously laid out. Their lots abut upon said way, on opposite sides of it, directly over against each other; each therefore has an easement in the entire width and length of this way resulting from the purchase, as part of the consideration. *Providence Steam Engine Co.* v. *Prov. & Stoningham Steamship Co.* 12 R. I. 348.

In *Gorton* v. *Tiffany*, 14 R. I. 95, where a strip of land was subject to an easement or servitude before the public acquired rights therein, such easement or servitude was held not to have been extinguished because the public had also acquired rights in the same. And besides where the obstruction of a public way causes special or peculiar damage to an individual he has a right to a personal action on account of the same. *Stetson* v. *Faxon*, 19 Pick. 147; *Brown* v. *Watson*, 47 Maine, 161.

In this case such a right results to complainant from the fact that he is an abutting owner. An abutter has a special interest in the highway different from the general public and can maintain an action for an obstruction thereof. *Corning* v. *Lowerre*, 6 Johns. Ch. 439; *Brakker* v. *Minn. R. R. Co.* 29 Minn. 41; *Railroad* v. *Ruch*, 101 Ill. 157; *Casey* v. *Brooks*, 1 Hill, 365; *Mulhau* v. *Sharp*, 27 N. Y. 611; *Davis* v. *Mayor*, 14 N. Y.

506; *Bechtell* v. *Carslake*, 3 Stockton, 500; *Lahr* v. *Met. Elevated R. R. Co.* (N. Y.) 9 Eastern Rep. 583.

If it was a threatened invasion of the plaintiff's rights, there can be no doubt that an application for an injunction would be proper. High on Injunc. (2 ed.) § 768; Story's Eq. Jur. § 927; *Trustees* v. *Cowen*, 4 Paige, 510.

In a very recent case in Connecticut, *Wheeler* v. *Bedford*, 8 East. Reporter, 508, a suit in equity, where plaintiffs and defendant were adjoining owners of land and dwelling houses fronting on a town common, and defendant undertook to enclose a large part of the common for his own use. A demurrer was interposed on the ground that it was a matter for the public to attend to under the statute, and the court say: "The defendant's main defence against this proceeding is based upon the claim that plaintiffs have adequate remedy at law, arising from the fact that ample provision for the removal of nuisances and encroachments from highways by the public authorities is made in the statutes of the state and the plaintiff can have redress by application to these authorities. But suppose the authorities are unwilling to proceed. They are not bound to redress plaintiff's private grievance. Adequate remedy at law means a remedy vested in the complainant to which he may at all times resort at his own option fully and freely, without let or hindrance."

In *Cadigan* v. *Brown*, 120 Mass. 494, the court say, in a case similar to the one at bar: "The injury to the plaintiffs is permanent and continuous and a judgment for damages would not furnish them adequate relief." See also *Lockwood Co.* v. *Lawrence*, 77 Maine, 312.

In *Creely* v. *Bay State Brick Co.* 103 Mass. 516, which was a suit in equity on account of the erection of a nuisance on plaintiff's land the court say, "It is true that the act of the defendant was a trespass, and would have furnished sufficient ground for an action at law, but it was also an appropriation of plaintiff's land of a continuous and permanent nature, as to which the plaintiff had a right to resort to the prevention as well as remedial power of the court, and to seek for a decree directing the removal of the structure or requiring its discontinuance."

See also upon this point, *Spencer* v. *Burmingham R'y*, 8 Sim. 193; *Gorton* v. *Tiffany*, 14 R. I. 95; *Hartshorn* v. *Reading*, 3 Allen, 502; *Nash* v. *Insurance*, 127 Mass. 91; *Tucker* v. *Howard*, 122 Mass. 529; *Ewell* v. *Greenwood*, 26 Iowa, 377; *Wilson* v. *Saxon*, 27 Iowa, 15; *Hingham* v. *Harvey*, 33 Iowa, 204; *Wilder* v. *DeCore*, 26 Minn. 10; *Engine Co.* v. *Steamship Co.* 12 R. I. 348; *Webber* v. *Gage*, 39 N. H. 187; *Schault* v. *Blaul*, (Md.) 9 East. Rep. 452.

Charles P. Stetson, for the defendant.

WALTON, J. The plaintiff has mistaken his remedy A bill in equity does not lie to obtain the removal of fences, buildings, or other unlawful obstructions, from a public way or a private way. The statutes of the state provide a full and complete remedy for such a wrong by an action at law. Such obstructions are a nuisance (R. S., c. 17, § 5), and any person injured thereby, in his comfort, property, or the enjoyment of his estate, may not only maintain an action against the offender to recover his damages, but he may, in the same action, obtain a warrant for the abatement or removal of the nuisance, unless the defendant will undertake and enter into a recognizance with surety, to abate or remove it himself. And pending the action, the plaintiff may, in proper cases, obtain from the court an injunction to stay or prevent the nuisance. R. S., c. 17, § 12, *et seq.* The remedy thus provided by an action at law is plain, adequate and complete, and there is no occasion for a resort to a bill in equity. *Varney* v. *Pope*, 60 Maine, 192.

Demurrer sustained. Bill dismissed with costs.

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

OTIS MARTIN *vs.* JOSEPH S. TUTTLE.

Piscataquis. Opinion March 15, 1888.

New trial. Promissory note.

The weight to be given to the testimony of interested witnesses who testify in the presence of the jury, is peculiarly within the province of the jury.

ON motion to set aside the verdict and for new trial.

Assumpsit on the promissory note of the defendant for one hundred and fifty dollars dated Guilford, May 2, 1883, payable six months after date to Weed Sewing Machine Company, or bearer.

The point is stated in the opinion.

Henry Hudson, for plaintiff.

Merrill and Coffin, for defendant.

The plaintiff in interest in the case had notice of the change when he took the note. He relies upon the note as it is, with notice of its suspicious character. It had been changed from a note payable to the order of the Weed Sewing Machine Company, to one payable to bearer. This was a material alteration, or change. *Morehead* v. *Parkersburgh Bank*, 13 Am. Rep. 637.

A note when altered in a material part, without the knowledge or consent of the maker, is void. *Holmes* v. *Trumper*, 22 Mich. 427; *Waterman* v. *Vose et als.* 43 Maine, 512; Best on Ev. § 229; Bigelow on Bills and Notes, pp. 573, *et seq.*

The rights and interests of the parties to the instrument have been changed by the alteration, and the note is made void by reason of the alteration. 1 Chitty on Cont. 784.

The burden of proof is on the plaintiff to establish the genuiness of the note declared upon. "If on production of the instrument it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance. Every alteration on the face of a written instrument detracts from its credit, and renders it suspicious, and this suspicion the party claiming under it is held bound to remove." 1 Greenl. on Ev. § 564; 1 Best on Ev. § 229; Addison on Cont. § 1281; *Wilde* v. *Armsby*, 6 Cush. 318; *Delano* v. *Bartlett*, 6 Cush. 366.

And as to the point that burden of proof is upon the plaintiff. See *Simpson* v. *Davis*, 119 Mass. 271; *Delano* v. *Bartlett*, 6 Cush. 364; *Morris* v. *Bowman*, 12 Gray, 467; *Powers* v. *Russell*, 13 Pick. 69.

WALTON, J. The note on which this action is brought was written on a printed blank containing the words "to the order of."

If a note is written on such a blank, and it is intended to make it payable to the bearer, of course, the printed words, "to the order of," must be erased, and the words, "or bearer," be written in.

Such an alteration appears to have been made on the note in suit. The alteration is perfectly obvious, heavy lines being drawn through the printed words, "to the order of," and the words, "or bearer," being written in with a pen; and the only question is, when was this alteration made?

The defendant testifies that the alteration had not been made when he signed the note, and the holder testifies that it had been made when he received it. The question was submitted to the jury, and they returned a verdict for the plaintiff. The defendant claims that the verdict is against the weight of evidence; and, on that ground, asks to have it set aside and a new trial granted.

Certainly, the verdict is against the weight of the defendant's testimony; but how much weight that testimony was entitled to was a question for the jury. From the time of giving the note to the time of trial nearly four years had elapsed; and it does not appear that during that time the defendant had seen the note or had his attention called to its form. And its form, whether payable to bearer or order, when given, must have been a matter of little importance to him, and not very likely to make a deep impression upon his memory. And he does not testify in direct terms that the alteration was not made with his consent. And the defendant was a deeply interested witness. In view of these facts, it was a question peculiarly within the province of the jury to determine how much weight his testimony was entitled to. They were face to face with the witness, and could judge of the degree of credit to which he was entitled better than we can. We are by no means satisfied that the verdict is wrong. Clearly, it is not a verdict which the court would be justified in setting aside.

Motion overruled.

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

WILLIAM D. BLETHEN *vs.* EBEN MURCH.

Piscataquis. Opinion March 15, 1888.

Statute of limitations. Partnership. Promissory note.

A payment made by a partner from his individnal funds, on a firm debt, will not stop the running of the statute of limitations in favor of his co-partners.

ON report.

Assumpsit on the following note:

"$100. Dover, March 31st, 1875.

"On demand after date we promise to pay to the order of W. D. Blethen one hundred dollars at —— with nine per cent int. Value received. March and Storer."

On the back were the following:

"One year's interest paid."

"Rec'd fifty-five dollars on the within note Jan. 18, 1881."

"Rec'd thirty dollars on the within note Feb. 15, 1881."

The writ is dated August 13th, 1886.

Other facts stated in the opinion.

J. B. Peaks, for plaintiff.

The simple question is, do the partial payments by one partner take the case out of the operation of the statute of limitations? This calls for a construction of sections 97 and 100 of c. 81, R. S. Before the Revised Statutes of 1840, c. 146, § § 19, 23 and 24, a partial payment of a promissory note, made by any one of the joint promisors, would take the note out of the statute of limitations. *Lincoln Academy* v. *Newhall & als.* 38 Maine, 179.

The first case I find reported, calling for a construction of the statute of 1840, c. 146, is *Wellman* v. *Southard*, 30 Maine, 425. It makes no difference whose money Storer made the payments with, so long as he did not disclose the fact to Blethen. *Holmes* v. *Durell*, 51 Maine, 201.

The defendant would have been liable upon a new note given by Storer to Blethen in the name of the firm, in renewal of the

balance due on the old note. Whatever his liability might be upon a new note, the law is too well settled to admit of a doubt of his liability in the case at bar upon the facts agreed. *Sage* v. *Ensign*, 2 Allen, 245; *Faulkner* v. *Bailey*, 123 Mass. 589.

Morrill Sprague, for the defendant, cited: *Shoemaker* v. *Benedict*, 11 N. Y. 176; *Walters* v. *Kraft*, 23 S. C. 578 (55 Am. R. 44); *Mix* v. *Shattuck*, 50 Vt. 421 (28 Am. R. 511); *Parker* v. *Butterworth*, 46 N. J. L. 244 (50 Am. R. 407); *Miller* v. *Miller*, 19 Alb. L. J. 462; *Willoughby* v. *Irish*, 55 Am. R. 52, in note; *Winchell* v. *Hicks*, 18 N. Y. 558; *Kallenbach* v. *Dickinson*, 100 Ill. 427 (39 Am. R. 47); *Myatts* v. *Bell*, 41 Ala. 222; *Bush* v. *Stowell*, 71 Pa. 208 (10 Am. R. 694); *Odell* v. *Dana*, 33 Maine, 185; *Livermore* v. *Phillips*, 35 Maine, 184; *Hapgood* v. *Watson*, 65 Maine, 510; *Bell* v. *Morrison*, 1 Pet. 351; *Dickerson* v. *Turner*, 12 Ind. 233; *Merritt* v. *Day*, 38 N. J. L. 32 (20 Am. R. 362); *Elkinton* v. *Booth*, 143 Mass. 479; Story, Part. § 324 *et seq.*; Parsons' Part. *189, note *o*; *Beitz* v. *Fuller*, 10 Am. Dec. 697; *National Bank* v. *Norton*, 1 Hill, 572; *Tate* v. *Clements*, 16 Fla. 339 (26 Am. R. 709); *True* v. *Andrews*, 35 Maine, 183.

WALTON, J. It is settled law in this state (settled by statute) that a payment made by one joint contractor does not stop the running of the statute of limitations in favor of another. R. S., c. 81, § 100.

And this provision applies to partners. A payment by one partner will not affect his co-partners. *True* v. *Andrews*, 35 Maine, 183.

It is claimed that if the payment is made before the partnership is dissolved, or before the creditor has notice of its dissolution, it will take the debt out of the operation of the statute with respect to all the members of the firm. We think not. The statute contains no such exception, and no such distinction was made in the case just cited. It was there held to have been the intention of the legislature to deprive one joint contractor of the power to revive the contract against another by any acknowledgment, promise, or payment whatever, so as

to deprive him of the benefit of the statute. A payment made before dissolution from partnership funds, might, perhaps, be regarded as a payment by all the partners, and thus affect them all. But if the payment is in fact made by one of the partners only, and this fact is made to appear, it is immaterial whether it is made before or after dissolution; it will in neither case affect any one but him who makes it. And the dissolution itself being an immaterial fact, of course notice of it to the creditor is immaterial.

Such being the law, it is clear that this action cannot be sustained. The note in suit was payable on demand. From the date of the note to the date of the writ was over eleven years. No payments have been made by the defendant. His former partner, after a dissolution of the firm, in pursuance of an agreement to pay all the partnership debts, and from his own funds, paid one year's interest and all of the principal but fifteen dollars. He is now dead, and the action is against the survivor. But the latter has done nothing to stop the running of the statute of limitations in his favor, and very clearly the action is not maintainable.

Judgment for defendant.

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

LIBBEY, J., did not sit.

HARRISON HAYFORD *vs.* INHABITANTS OF BELFAST.

Waldo. Opinion March 15, 1888.

Paupers. Support in Insane Hospital.

A person who contracts with a city for the support of its paupers for a specified sum, is not liable for money paid by the city in support of persons in the Insane Hospital, in the absence of evidence that such persons are paupers whose settlement is in such city.

ON report.

Assumpsit, on account annexed, to recover $645.14, the same being the balance due from the city to the plaintiff, as he claimed, under two contracts for supporting and maintaining the paupers of

the city for three years, ending May 10, 1884, and for the year ending May 10, 1885.

The facts are sufficiently stated in the opinion.

Wm. H. Fogler, for the plaintiff, cited: R. S., c. 143, § § 13, 14, 21; *Naples* v. *Raymond*, 72 Maine, 213; *Eastport* v. *Machias*, 35 Maine, 402; *Jay* v. *Carthage*, 48 Maine, 353; *Pittsfield* v. *Detroit*, 53 Maine, 442; *Jay* v. *Carthage*, 53 Maine, 128; *Glenburn* v. *Naples*, 69 Maine, 68; *Corinna* v. *Exeter*, 13 Maine, 321; *Veazie* v. *Chester*, 53 Maine, 29; *Oakham* v. *Sutton*, 13 Met. 197.

Joseph Williamson, for defendants.

It is a primary and fundamental rule concerning contracts, that their construction must be according to the intention of the parties, and so paramount is this rule, that to such intention, even technical rules must give way. Hare on Contracts, 594.

A contract is to be construed in the light of surrounding circumstances, and in view of the subject matter of the agreement, the acts of the parties, and their relation to each other. *Farnsworth* v. *Boardman*, 131 Mass, 115.

If it is assented that the second clause of section 3, of the contract is repugnant to the construction claimed, then effect must be given to that part which is calculated to carry into effect the real intention; and that part which would defeat it must be rejected. Chitty on Contract, 90.

Should the plaintiff contend that the contract is ambiguous, the answer is that where a document admits of more than one construction, but where parties have long acted on the footing of a given practical construction, the court, in the absence of better evidence, will accept that construction as correct. *Forbes* v. *Watt*, 2 Eng. R. (Moak) 512; *Philadelphia et als. R. R.* v. *Trimble*, 10 Wall. 367.

The principles which govern in cases of this nature, as reduced to rules by Sergeant Williams, in note to *Pordage* v. *Cole*, 1 Saund. 319, with some modifications, are still recognized as correct. In that case, the entire consideration for lands was to be paid by a fixed day which might precede the service. It

was held that the covenant to convey was an independent one, and that an action for the money would lie before any conveyance of the land took place. Lord HOLT, further said: "What is the reason that mutual promises shall bar an action without performance? . . . If it appear by the agreement that the plain intent of either party was to have the thing to be done to him performed, before his doing what he undertakes of his side, it must be averred." *McMillan* v. *Vanderlip*, 12 Johns. 165.

"After all," remarks JARVIS, C. J., "the rule in *Pordage* v. *Cole*, only proposes to give the result of the intention of the parties, and where on the whole it is apparent that that which is to be done first is not to depend on the performance of the thing done afterwards, the parties are relying on their remedy and not on the performance or the condition, but when you plainly see that it is their intention to rely upon the condition, and not on their remedy, the performance of the thing is a condition precedent." *Roberts* v. *Brett*, 18 C. B. 561.

When the inquiry is in relation to their dependence or independence, this is to be collected from the evident sense and meaning of the parties; and however they may be transferred in the instrument, their precedency must depend on the order of time in which the intent of the transaction requires their performance. Hare on Cont. 594.

The question whether covenants are dependent or independent depends upon the intention of the parties, and the nature of the acts to be performed. *Howland* v. *Leach*, 11 Pick. 151; *Knight* v. *Worsted Co.* 2 Cush. 271.

The nature of the transaction and the order of time in which they are to be performed, are to be considered in determining what conditions are dependent and what are independent. *Hopkins* v. *Young*, 11 Mass. 302.

Suppose the plaintiff had allowed another town to obtain judgment against the defendants, for supplies furnished a pauper during the time covered by the contract which judgment the defendants have been obliged to satisfy, would it be contended for a moment that the amount should not be deducted from the next quarterly payment? Is not the present case parallel? Has

not the equitable rule laid down in *Hyde* v. *Booraem*, 16 Pet. 169, been fully regarded by the defendants, as follows: "If one party has performed in part, he may require the other to pay to the extent of the benefit received deducting damages suffered from the failure to perform fully.

Where the plaintiff for the consideration hereinafter mentioned, covenanted to deliver defendant deed of land on May 1, 1806, and defendant to pay one thousand dollars on that day and a further sum four years after, it was held that the covenants were dependent, and that the plaintiff must deliver his deed before an action would lie for the thousand dollars. *Green* v. *Reynolds*, 2 John. 207. To the same effect are, *Jones* v. *Gardner*, 10 John. 266; *Cunningham* v. *Morrell*, *Id.* 203; *Porter* v. *Rose*, 12 John. 209; *Gazley* v. *Price*, 16 John. 267.

The principle of all the cases on this head seems to be that where the plaintiff is to do an act to entitle himself to the action, he must either show the act done, or if it is not done, at least that he has performed everything that it was in his power to do. *Peeters* v. *Opie*, 2 Saund. 350, n. (3).

Where a day is appointed for the payment of money, &c. and the day is to happen after the thing which is the consideration to be performed, no action for the money can be sustained without averring performance. *Grant* v. *Johnson*, 5 N. Y. 247, Ct. App.

At the first glance, some of the facts appear similar to those in *Allard* v. *Belfast*, 40 Maine, 369, where upon the rule in *Pordage* v. *Cole*, *ubi supra*, the mutual stipulations in the contract were held independent. But it will be noticed that there was no provision in that contract, as in that in the case at bar, making the quarterly payments depend upon performance on the part of the plaintiff.

WALTON, J. The plaintiff contracted with the city of Belfast, to support its paupers three years for nine thousands dollars. Of this sum he has received only $8,362.63. And this action is to recover the balance. His right to recover depends upon whether, by the terms of his contract, he was liable for the support of Lewis R. Dodge, George A. Sleeper and Edward H. Hilton, in the Insane Hospital.

To make the plaintiff liable for their support, we think it should be made to appear that these persons were paupers, and that they were legally committed to the Insane Hospital as paupers. Fairly interpreted, we think the plaintiff's contract makes him liable for the support of paupers only. The vote of the city council was to authorize the mayor to contract with the plaintiff for the support of the city paupers only, and it is difficult to believe that he or the plaintiff had in view any other class of persons.

This brings us to the question, whether the three persons named were paupers, and whether they were legally committed to the Hospital as such. A careful examination of the evidence fails to satisfy us of either of these facts. The evidence fails to show when, or by what authority, or under what circumstances, the persons named were sent to the Hospital, or that they were ever adjudged to be paupers.

Under these circumstances, we think the city was not justified in withholding from the plaintiff any portion of his compensation.

Judgment for plaintiff for $637.37, and interest from the date of his writ.

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

MARY KATE GILKEY *vs.* ALBERT W. PAINE and others.

Penobscot. Opinion March 15, 1888.

Corporation. Dividend. Income. Life-tenant. Remainder-man.

One who is entitled to the "net annual income" of corporation-stock can rightfully claim all dividends and bonuses distributed among the stockholders which are derived from and represent the surplus earnings of the corporation; but cannot rightfully claim to hold any portion of the capital stock of the corporation which has been purchased by the corporation on credit, and distributed among its stockholders, although such stock, when distributed, is charged to the profit and loss account of the corporation.

ON report.

Bill in equity by the *cestui que trust* against her trustees, praying that the court would require the defendants to transfer to her five

shares of the stock of the Boston & Albany Railroad Company. The facts are sufficiently stated in the opinion.

Barker, Vose and Barker, for plaintiff.

This question of extraordinary dividends as between the life-tenant and remainder-man has been considerably discussed by the courts, both in this country and England, and different rules prevail in different localities. In the decisions in our own state the court has been governed generally by the intention of the directors making the dividend when that could be ascertained, and where a stock dividend has been made, intended as such, has given it to capital, but where a dividend of profits, or cash was intended, the court has guarded the right of the party entitled to income without being governed exclusively by the form in which such dividend was declared.

In *Richardson* v. *Richardson*, 75 Maine, 570, the court says, "The decided preponderance of authority probably concedes the point that dividends of stock go to the capital, under all ordinary circumstances. But we are well convinced that the general rule, deducible from the latest and wisest decisions, declares all money dividends to be profits and income belonging to the tenant for life, including not only the usual annual dividends, but all extra dividends or bonuses payable in cash from the earnings of the company."

The early English rule relating to these matters was that extra dividends, or additions to the usual annual dividend whether paid in cash or capital stock, went to the corpus of the trust. *Brander* v. *Brander*, 4 Ves. 801; *Paris* v. *Paris*, 10 Ves. 184; *Witts* v. *Steere*, 13 Ves. 363.

But this rule was abandoned as unjust, and it is now uniformly held that cash dividends, extra dividends or bonuses declared from the earnings of corporations are income and go to the *cestui que trust*. *Price* v. *Anderson*, 15 Sim. 473; *Bates* v. *McKinley*, 31 Beav. 280; *Johnson* v. *Johnson*, 15 Jur. 714; *Wright* v. *Tucket*, 1 Johns. & Hem. 266.

One of the early and much discussed cases in this country is that of *Earp's Appeal*, 28 Penn. St. 368, wherein the court

divided the dividend in the proportion in which it had been earned relative to the testator's death, that prior to his death going to the remainder-man, that subsequent to the life-tenant.

For futher discussion of above case, see *Wiltbank's Appeal*, 3 Am. Rep. 585. This division of dividends has however been substantially abandoned by the courts of this country, and the Pennsylvania Court itself, in the case of *Moss' Appeal*, 24 Am. R. 164, lays down this rule: "As a general rule nothing earned by a corporation can be regarded as profits, until it shall be declared to be so by the corporation itself, acting by its board of managers. The fact that a dollar has been earned gives no stock-holder the right to claim it until the corporation decides to distribute it as profit."

Again in the same case, "But where a corporation, having actually made profits, proceeds to distribute such profits amongst the stock-holders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity, which disregards form and grasps the substance, would award the thing distributed, whether stock or moneys, to whomsoever was entitled to the profits."

This rule has been adopted in the following cases: *Clarkson* v. *Clarkson*, 18 Barb. 646; *Simpson* v. *Moore*, 30 Barb. 638; *Vinton's Appeal*, 44 Am. Rep. 116; See *Petition of Brown*, 51 Am. Rep. 398.

The earlier Massachusetts cases recognized the intention of the corporations in making the dividend, and decreed accordingly. 10 Gray, 402; 9 Pick. 446; 6 Allen, 174.

In a long and exhaustive discussion of the rule in *Minot's Case*, *Minot* v. *Paine*, to be found in the Albany Law Journal, Vol. 33, No. 6. 106, a learned writer, among other thing says, "That the rule in *Minot's Case* is law in Massachusetts, has been repeatedly affirmed. The later cases add however, by way of explanation, that in deciding whether the distribution is a stock or cash dividend, the actual and substantial character of the transaction must be considered, and not its nominal character merely." See *Gifford* v. *Thompson*, 115 Mass. 478.

Among a series of articles recently appearing in the Albany Law Journal, written by Guy C. H. Corliss, a learned writer, upon the subject of "Life-tenant and remainder-man," is one in Vol. 33, No. 22, p. 424, in which he discusses the law applicable to stock dividends at great length, and after reviewing all the leading cases both in this country and England, he very tersely, and, as we think, very appropriately condenses the law upon this subject into the four following rules.

"1. If the dividend is made up of profits, the dividend goes to the life-tenant irrespective of the form in which it is declared."

"2. The life-tenant is entitled to all dividends whether in cash or in stock declared during the existence of his interest, whether they consist of profits which have accrued subsequently to the vesting of the life-estate, or in part of the earnings of the corporation which had accumulated at the time of the devolution upon the life-tenant of his interest in the property."

"3. That in so far as any dividends consist of money derived from an increase in the value of the corporate property, or is derived from any other source than the net earnings of the company, the life-tenant can claim no interest therein."

"4. That not only is it beyond the power of the corporation to bind the life-tenant by dividing net earnings in the form of capital stock, but the life-tenant can always show the true nature and source of the dividend, in spite of any act or declaration to the contrary; and that on the other hand, the remainder-man may prove that a dividend, which apparently belongs to the life-tenant, is the property of the remainder-man."

The only case which seems to be exactly parallel to the one before us is that of *Leland* v. *Hayden*, 102 Mass. 542. In that case the Old Colony Railroad Company, made an extra dividend of forty per cent, twenty of which was made in its own original stock which had been purchased by it and was then in its treasury, like this case, representing its surplus earnings; and in drawing the opinion of the court, the same justice who drew the opinion in *Minot* v. *Paine*, says: "The purchased shares represented cash invested so as to turn an income. If the directors had sold them and divided the avails, there could have

been no doubt that it was a cash dividend." See *Commonwealth* v. *B. & A. R. R.* 142 Mass. 146.

A. W. Paine, for the defendants, cited *Minot* v. *Paine*, 99 Mass. 101; *Daland* v. *Williams*, 101 Mass. 571; *Leland* v. *Hayden*, 102 Mass. 542; *Rand* v. *Hubbell*, 115 Mass. 474; *Gifford* v. *Thompson*, 115 Mass. 478; *Heard* v. *Eldridge*, 109 Mass. 258; *Atkins* v. *Albree*, 12 Allen, 359; *Westcott* v. *Nickerson*, 120 Mass. 410; *Hemenway* v. *Hemenway*, 134 Mass. 446; *Mudge* v. *Parker*, 139 Mass. 153; *Shaw* v. *Cordis*, 143 Mass. 443; *Com.* v. *Boston & A. R. R. Co.* 142 Mass. 146; *Goodwin* v. *Hardy*, 57 Maine, 143; *Richardson* v. *Richardson*, 75 Maine, 570.

WALTON, J. On the 18th day of April, 1880, Sylvanus Rich, of Bangor, died, leaving a will, giving to trustees fifty shares of the capital stock of the Boston and Albany Railroad Company, to be held by them for the benefit of the plaintiff (Mary Kate Gilkey, of Bangor), during her natural life, she to have "*the net annual income thereof*" as fast as it should accrue and be received by the trustees.

At the time of the death of Mr. Rich, twenty-four thousand one hundred and fifteen shares of the capital stock of the railroad company were owned by the Commonwealth of Massachusetts. But in 1882, the railroad company purchased these shares of the Commonwealth, giving in exchange the company's bonds, payable in twenty years, with interest at the rate of five per cent per annum.

Having thus become the owner of these shares, the company voted to distribute, and did distribute, seventeen thousand five hundred and eighty-eight of them among its private stockholders, the distribution being at the rate of one share for each ten shares held by the stockholders. Of these shares, the trustees under the will of Mr. Rich, received five. They then held, in all, fifty-five shares. And they have paid to the plaintiff, not only the income on the original fifty shares, but also the income on the additional five shares. But this does not satisfy

her. She claims that she is not only entitled to the income on these five shares but to the shares themselves.

We do not think this claim can be sustained. These shares are no portion of the "net annual income," to which the plaintiff became entitled under the will. They are now, as they always have been, a portion of the original capital stock of the company. They are not newly created shares. And they do not represent income. They were not created to represent income; nor were they purchased with income. They were not transferred to the stockholders as a substitute for any of the regular annual dividends of the company. These annual dividends have been paid since, as before, the distribution of these shares; and, so far as appears, they have been for the same amount. And the plaintiff has received, not only her regular dividends on the original fifty shares held by Mr. Rich at the time of his death, but she has also received the dividends on the five shares received by the trustees since his death. And there is no reason to doubt that she will continue to receive them in the future. We think she can rightfully claim no more.

If these shares had been purchased with the accumulated earnings of the road; earnings which, but for such purchase, would, or might have been distributed to the stock-holders as dividends, a very different case would be presented. Possibly, they might then be regarded as representing income, and be treated as income. *Leland* v. *Hayden*, 102 Mass. 542.

But these shares were not so purchased. They were purchased with the bonds of the company,—interest-bearing bonds,—thereby creating a debt of nearly four millions of dollars. The exact amount is three million eight hundred and fifty-eight thousand dollars. The tendency of such a debt is to reduce the amount of the dividends and impair the market value of the stock. The plaintiff may need the dividends on the additional five shares to keep her income up to what it was before this interest-bearing debt was contracted. And we think it is right that she should have them. And if she needs the dividends to keep her income up, it is equally certain that the owner of the stock will need the five additional shares to keep up the aggregate value of his

interest in the stock. For if the dividends are diminished, the market value of the stock is sure to follow.

It seems to us, therefore, that the equitable and proper division of these five shares between the owner of the life-interest in the original stock and the owner of the remainder, is to give the former the dividends and the latter the stock. If the income of the road is sufficient to pay the interest on this newly contracted debt, and keep up the amount of its former dividends, then both parties will be benefited. Her income will be increased, and so will be the aggregate value of his stock. And then the division seems to us to be equitable and just.

Authorities bearing upon the questions involved in this class of cases are cited in *Richardson* v. *Richardson*, 75 Maine, 570, and by counsel in their arguments in this case, and need not be repeated here. There is also a very able and learned review of the cases, both English and American, in the American Law Review for 1885, (Vol. 19, p. 737). And the correction of a supposed error with respect to one of the English cases, in 20 American Law Review, 746. But we can find no case presenting precisely the same question as the one which is presented in this case. The rule generally adhered to in England, is to treat all regular dividends as income, and all irregular dividends and bonuses as capital. A rule supposed to have been established in *Minot* v. *Paine*, 99 Mass. 101, and known as the Massachusetts rule, is that, stock dividends are to be regarded as principal, and cash dividends as income. But this has proved to be a very elastic rule in the state of its origin; for in *Leland* v. *Hayden*, 102 Mass. 542, while professing to adhere to it, the court did in fact treat a cash dividend as capital, and a stock dividend as income. The effort in this country has been generally, to maintain the integrity of the capital, and to give all surplus earnings, in whatever form distributed, to the life-tenant.

And, perhaps, no better rule than this can be adopted. It is the one to which we have endeavored to adhere in this case.

Bill dismissed.

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

WILLIAM G. HESELTON *vs.* JOHN HARMON.

Somerset. Opinion March 15, 1888.

Way. Dedication. Trespass.

If one sells a parcel of real estate, bounding it on a strip of land owned by the grantor and reserved for a street, such a reservation operates as a dedication of the land so reserved to the purposes of a street; and neither the grantor, nor any one holding a title derived from him, can afterward maintain an action of trespass against the grantee, or any one holding under him, for entering upon the land so reserved and preparing it for use as a street.

ON report.

Trespass *quare clausum fregit* for entering upon a strip of land, thirty-two feet wide, claimed by the plaintiff, and making it into a road or street.

The point is stated in the opinion.

Merrill and Coffin, for plaintiff.

"In construing a deed the intention of the parties, if ascertainable, should in all cases govern." *Abbott* v. *Abbott*, 53 Maine, 360.

Parol evidence of the intention of the parties is not admissible. *Sturdivant* v. *Hull*, 59 Maine, 174.

"Bounded on the east by a line parallel with and thirty-two feet west of the west line of the Mayo lot," excludes from the grant anything in the territory east of that line. The words "to," "from" and "by," are terms of exclusion, unless by necessary implication they are manifestly used in a different sense. *Bradley* v. *Rice et als.* 13 Maine, 198.

A reservation is a clause in a deed where the feoffer doth reserve to himself some new thing out of that which he granted before, something not in esse. Shepherd's Touchstone, p. 80; *Adams* v. *Morse*, 51 Maine, 498.

Nor can it be an exception, for that must be a part of the thing granted, that would otherwise pass with the deed. *Brown* v. *Allen*, 43 Maine, 599.

Easements are divided into affirmative or those where the

servient estate must permit something to be done thereon, as to pass over it, or to discharge water upon it, or the like; and negative, where the owner of the servient estate is prohibited from doing something otherwise lawful on his estate, because it will affect the dominant estate, as interrupting the light and air from the latter by building upon the former. 2 Wash. Real Prop. 377.

Where there is no ambiguity in a deed, the grant cannot be restricted or enlarged by parol evidence. Neither can the intention of the parties be proved by parol; that is to be gathered from the deed itself. *Jordan* v. *Otis*, 38 Maine, 430; *Rogers* v. *McPheters*, 40 Maine, 115; *Emery* v. *Webster*, 42 Maine, 204; *Kimball* v. *Morrill*, 4 Maine, 368.

Facts and circumstances existing at the time of the grant may become important, and may be proved by parol, but agreements and intentions of the parties cannot. *Comstock* v. *Van Deusen*, 5 Pick. 165.

A grant of land as abutting in the rear upon certain street, which was merely laid down upon a map as such, but not actually opened, the land being accessible by a street in front, is not an implied grant of way in the supposed street in the rear, nor is it an implied covenant to open the street in the rear. *Mercer Street*, 4 Cowen, 542.

In *Clapp et al.* v. *McNeil*, 4 Mass. 589, PARSONS, C. J., says, "Among the bounds of the land sold, there are these words: 'Then turning and running southerly by land of said McNeil seventy feet to a thirty feet street, then turning and running westerly by said thirty feet street fifty feet.' By these words the grantee cannot even claim a right of way in that street."

The reason is plain. By the words of the grant he was excluded from any right in the street. See also *Southerland* v. *Jackson*, 30 Maine, 462; *Palmer* v. *Dougherty*, 33 Maine, 502; *Hunt* v. *Rich*, 38 Maine, 199; *State* v. *Clements*, 32 Maine, 279.

D. D. Stewart, for the defendant, cited: *Kent* v. *Waite*, 10 Pick. 138; *Brown* v. *Thissell*, 6 Cush. 257; *Barnes* v. *Lloyd*, 112 Mass. 224; *Parker* v. *Smith*, 17 Mass. 413;

Van O'Linda v. *Lothrop*, 21 Pick. 292; *Atkins* v. *Boardman*, 2 Met. 464; *Mendell* v. *Delano*, 7 Met. 179; *Tufts* v. *Charlestown*, 2 Gray, 272; *Pratt* v. *Sanger*, 4 Gray, 84; *Stearns* v. *Mullen*, 4 Gray, 155; *Thomas* v. *Poole*, 7 Gray, 83; *Tuttle* v. *Walker*, 46 Maine, 280; *Fox* v. *Union Sugar Refinery*, 109 Mass. 295; *Tobey* v. *Taunton*, 119 Mass. 404; Washburn, Easements, 6, 7, 196; *Appleton* v. *Fullerton*, 1 Gray, 193; *Atkins* v. *Boardman*, 2 Met. 467; *Adams* v. *Emerson*, 6 Pick. 58; *Stetson* v. *Dow*, 16 Gray, 372.

WALTON, J. This is an action to recover damages for an alleged breach of the plaintiff's close. The defendant justifies under a right of way. We think his justification is complete. The land in question is a strip thirty-two feet wide, and was reserved by the owners for a street. It is so expressed in a deed from them to the defendant's grantor. The land conveyed by the deed is described as bounded on the east by a strip of land thirty-two feet wide, "*reserved for a street, and no other purpose.*"

After such a clear and emphatic dedication of the land to the purposes of a street, and a sale of land bounded upon it as a street, it was not within the power of the owners, nor of any one holding a title derived from them, to defeat the right of the grantee or the right of one holding under him, to use the land as a street. A street is, *ex vi termini*, a public thoroughfare, and may be used as such. Bou. Law Dict. (15th ed.) Street.

The effect of such a dedication has been so fully considered, and the authorities so fully cited, in a recent decision by this court, that further consideration of the question at this time is deemed unnecessay. We refer to *Bartlett* v. *Bangor*, 67 Maine, 460.

Mr. Dillon's statement of the law is as follows: "While a mere survey of land, by the owner, into lots, defining streets, etc., will not, without a sale, amount to a dedication, yet a sale of lots with reference to such plat, *or describing lots as bounded by streets*, will amount to an immediate and irrevocable dedication of the latter, binding upon both vendor and vendee." 2 Dill.

Municipal Corporations, § 503; and see *Stetson* v. *Dow*, 16 Gray, 372.

Judgment for defendant.

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

CHARLES L. HOLT *vs.* ROSCOE LIBBY and trustees.

Cumberland. Opinion March 16, 1888.

Executor. Legacy. Trustee process. "Specific." R. S., c. 65, § 31.

The rule of law that an executor may retain a legacy in whole or partial satisfaction of a debt due to the estate from the legatee, does not apply to a debt which has become barred by the statute of limitations, unless the will affirmatively shows that the testator intended that such an offset should be made.

A creditor, who upon trustee process attaches a legacy due to his debtor, has the same right which the debtor would have, to interpose the statute of limitations, as a defense against a debt claimed by the executor against the legatee in satisfaction of the legacy.

The word "specific" as used in R. S., c. 65, § 31, is not to be taken in a technically testamentary sense, but means definite, special or particular in a general sense.

Any legatee of a residuary or specific legacy may recover the same in a suit at law.

ON exceptions from the superior court.

Trustee process. The trustees disclosed that they were the executors of the last will of Edward Libby, who died September 11, 1886; that the principal defendant had a legacy under the will of two hundred dollars, and was indebted to the estate for a promissory note dated October 21, 1876, for one hundred and thirty dollars, payable on demand with interest. It was agreed that the note became barred by the statute of limitations, October 21, 1882. The exceptions were to the ruling of the court discharging the trustees.

Frank W. Robinson, for the plaintiff, cited: R. S., c. 86, § § 36, 64, 66; c. 82, § § 55–68; *Cummings* v. *Garvin*, 65 Maine, 301; *Wadleigh* v. *Jordan*, 74 Maine, 485; 1 Pom. Eq. Jur. § 541; *Allen* v. *Edwards*, 136 Mass. 138; *Nickerson* v. *Chase*, 122 Mass. 296; *Blackler* v. *Boott*, 114 Mass. 24; *Call*

v. *Chapman*, 25 Maine, 128; *Robinson* v. *Safford*, 57 Maine, 163; *Reed* v. *Marshall*, 90 Pa. 345; *Prescott* v. *Morse*, 62 Maine, 447; *Smith* v. *Lambert*, 30 Maine, 137; *Farwell* v. *Jacobs*, 4 Mass. 634; *Smith* v. *Ellis*, 29 Maine, 426; *Whitney* v. *Munroe*, 19 Maine, 44; Ang. Lim. (6th ed.) § 285; *Lord* v. *Morris*, 18 Cal. 482; *Sawyer* v. *Sawyer*, 74 Maine, 580; *Oates* v. *Lilly*, 84 N. C. 643; McConnell, Trustee Process, § 3; *Strong* v. *Smith*, 1 Met. 476; *Wheeler* v. *Bowen*, 20 Pick. 563; *McBride* v. *Protection Ins. Co.* 22 Conn. 248; *Pettingill* v. *Androscoggin R. Co.* 51 Maine, 371; *Ricker* v. *Moore*, 77 Maine, 295; 2 Story Eq. Jur. (12th ed.) § 1047; 1 Pom. Eq. Jur. § 137, p. 121, note 3; *National Exchange Bank* v. *McLoon*, 73 Maine, 504; *Pollard* v. *Somerset Mut. F. Ins. Co.* 42 Maine, 221; *Peterson* v. *Chemical Bank*, 32 N. Y. 21.

W. R. Anthoine, for trustees.

Where a creditor bequeaths a legacy to his debtor and does not mention the debt, and after his death the securities or notes are found uncancelled among his effects, such legacy is not necessarily or even *prima facie* a release or extinguishment of the debt. *Wilmot* v. *Woodhouse*, 4 Bro. C. C. 226; *Brokaw* v. *Hudson*, 27 N. J. Eq. 135.

It seems to be a well settled principle that an executor may retain a legacy in payment of a debt *pro tanto*, although all right of action on the debt is barred by the statute of limitations. *Coates* v. *Coates*, 33 Beav. 249; *Rose* v. *Gould*, 15 Beav. 189; Schouler on Exrs. and Admrs. 470; Wigram on Wills, 367; Williams on Exrs. 1304; Roper on Legacies, 1064, 1065, 1070; 2 Redfield, Wills, 189.

Section 63, c. 82, R. S., does not apply to this case. "It was manifestly the intention of the legislature to limit the operation of the statute to the demands between the parties themselves, during the lifetime of both, and that no change should be affected by the death of either in this respect, excepting by the substitution of the executor or administrator for the deceased." *Adams* v. *Ware*, 33 Maine, 228.

Had the principal defendant brought action against these

executors to recover his legacy, he could not have successfully pleaded the statute of limitations against his note. *Courtney* v. *Williams*, 3 Hare, 589; *Coates* v. *Coates*, 33 Beav. 249; *Rose* v. *Gould*, 15 Beav. 189.

It is a fundamental principle of trustee process, that the plaintiff can acquire no greater rights against the trustee than the principal defendant himself possesses. *Wilcox* v. *Mills*, 4 Mass. 218; *Sanford* v. *Bliss*, 12 Pick. 116; R. S., Maine, c. 86, § 42.

PETERS, C. J. It is a general rule, in the settlement of legacies by an executor, that he may retain the legacy, the whole or a sufficient portion, in satisfaction of the legatee's debt to the estate, if the testator does not indicate, either in the terms of the bequest or in other parts of the will, that it shall be otherwise. This is the rule both in law and equity.

The English practice goes further, and allows the rule to prevail, on the idea of lien, as to debts which have become barred by the statute of limitations. The leading case maintaining the English rule seems to be *Courtney* v. *Williams*, 3 Hare, 539. Subsequent English cases follow in the same line. *Rose* v. *Scales*, 15 Beav. 189; *Coates* v. *Coates*, 33 Beav. 249; 1 Redf. Wills, 489, and cases cited in note. One or two of the American state courts may have practiced on the English rule.

But a legacy was recoverable in England, in the day of the authorities cited, only in chancery. The same rule of equitable set-off prevails in that country not only as to legacies, but also as to the share of one entitled as next of kin in the estate of an intestate. *In re Cordwell's Estate*, L. R. 20 Eq. 644. The reason assigned in the latter case for the rule is, that "until the debtor discharges his duty to the estate by paying the debt he owes to it, he can have no right or title of it under the statute."

This doctrine cannot be applicable in this state, and in most of the states, where a legacy is made by statute, if not by ancient practice, a legal claim. With us it is a distinct and independent legal claim. The estate is just as much of a debtor to the indebted legatee as the legatee is to the estate. Each has a legal

right and remedy. And a statute-barred debt is no more recoverable by an estate than by any other creditor. To our minds, this is the better doctrine. Observation leads us to believe that a testator is more likely to intend to remit than to collect such debts, when nothing is declared of them by him in his will, especially debts against his children and relatives. In many instances such claims are covered by the dust of time and forgotten, though found by executors after the death of the testators. In many other instances the advances are intended as benefactions and gifts, conditioned upon some unforeseen circumstance arising to make it expedient to regard them as debts. The question under discussion has been in Maine already practically, and in Massachusetts expressly and fully, decided in accordance with these views. *Wadleigh* v. *Jordan*, 74 Maine, 483; *Allen* v. *Edwards*, 136 Mass. 138.

The other question of the case is, whether a plaintiff, who attaches a legacy by the trustee process, is permitted to set up the limitation bar to an offset claimed by an executor against the debtor-legatee. We think it is both logical and reasonable that the creditor should have the same right to the thing attached and all its incidents that the debtor has. If his attachment becomes perfected, the debtor's right becomes his right, and he should have the power to save and protect it as if his own. The law can make an assignment of the legacy as effectually as the legatee himself can. Otherwise, we should in the present case have, as has been suggested, the curious result of an attaching creditor failing to collect a legacy which his debtor can collect. It would allow an assignor to enjoy the benefit of a claim the title to which had legally passed to an assignee. The principle involved in this point has been virtually settled in favor of the plaintiff by the case of *Sawyer* v. *Sawyer*, 74 Maine, 580, and the very satisfactory reasoning in that case is as pertinent to the facts in this case as to the facts there.

By R. S., ch. 65, § 31, any legatee of a residuary or specific legacy under a will may recover the same in a suit at law. The word specific is not here used in a strictly technical testamentary sense, but means definite, particular, or special. Any legacy

may be recovered by legal remedy, unless from exceptional reasons, equity should be resorted to.

Exceptions sustained.

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

ELIAS M. STILLWELL *vs.* JOHN B. FOSTER.

Penobscot. Opinion March 31, 1888.

Easement. Way of necessity. Adverse user.

An owner of a building containing two stores, with partition wall between them, and with stairs on one side leading to second floor and a door through the partition wall on second floor at the head of the stairs, sold the store which had no stairs, and in the conveyance made the centre line of the partition wall the dividing line. *Held* that the conveyance did not carry with it a right of way of necessity over the flight of stairs.

There can be no title from adverse user when the tenant's occupation had been interrupted within twenty years.

ON report.

An action on the case for interruption of an easement or right of way over a stairway in the defendant's store, by blocking up a doorway at the head of the stairs with bricks and mortar, thereby preventing access by said stairs to a front room on the second floor of the plaintiff's store adjoining.

Other facts stated in the opinion.

Barker, Vose and Barker, for plaintiff.

Plaintiff's first claim is that the stairway, or rather the right to use it, was impliedly granted by Harlow, who owned both estates, when he deeded this with no other way of approaching it or of making use of it from the street, except over this stairway and continued to allow such use after his conveyance during his entire ownership, and that such right has come down to him through the various conveyances as one of the appurtenances of said estate, and he bases his claim upon the well known maxim, "*Cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit.*" Broom's Legal Maxims, *463.

And again *465, it is laid down "that when anything is granted, all the means to attain it, and all the fruits and effects of it, are

granted also, and shall pass inclusive, together with the thing by the grant of the thing itself, without the words *cum certinentiis*, or any such like words."

Lord MANSFIELD, 3 Taunton, 24, says: "That is a necessary way without which the most convenient and reasonable mode of enjoying the premises could not be had."

That is perhaps a little broad, and the rule adopted in Massachusetts may be better. "A way of necessity must be one of more than mere convenience, for if the owner of the land can use another way, he cannot claim a right by implication, to pass over the land of another to reach his own, but it would be enough if it would require an unreasonable amount of labor and expense to render the possible way convenient, that is, labor and expense which would be excessive and disproportionate to the value of the land to be accommodated." *Pettingill* v. *Porter*, 8 Allen, 1.

Washburne on Real Estate, Vol. 2, p. 288, 3rd Ed. § 16, lays down the following rule: "It is stated as a general position that if there be a severance of a heritage into two or more parts, in respect to which there had been continuous and apparent easements used by the owner, such an easement would pass by implication with the dominant estate, although technically it could not have been enjoyed as an easement by the owner of the entire estate." See also *Kieffer* v. *Imhoff*, 26 Penn. St. 438.

So where the owner of a mill, the raceway from which was an artificial trench running along the bank of a natural stream, sold the mill and the land on which it stood, by metes and bounds not including the land through which said raceway had been excavated, it was held, that the right to make use of this passed, by implication, by the deed of the land on which the mill was standing. *New Ipswich Factory* v. *Batchelder*, 3 N. H. 190.

The only limitation perhaps, which should be added, in order to apply this doctrine, is that what is claimed as an easement must be reasonably necessary to the enjoyment of that, to which it is sought to make it appendant. Washb. on Real Estate, Vol. 2, p. 291.

Where the owner of two tenements sells one of them, or the

owner of an entire estate sells a portion, the purchaser takes the tenement or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains. *Lampman* v. *Milks*, 21 N. Y. 505; *Dunklee* v. *Wilton R. R. Co.* 4 Foster, N. H. 489; *Seymour* v. *Lewis*, 13 N. J. 439.

The case of *Morrison* v. *King*, 62 Ill. 30, discusses and affirms 3 N. H. 190, before cited, and is the strongest case in favor of the plaintiff, we have been able to find.

If conveniences provided for the portion conveyed by the common owner were continuous and apparent, and necessary to the reasonable enjoyment of it, in cases where a portion is set out as dower, they will be presumed to have been taken into consideration by the commissioners and regarded as a charge upon the other portion, in favor of that allotted, and as passing with the estate by operation of law. 15 Ill. 581; 2 Beasely, 439; 1 Sumner, 492; 4 Duer, 53; 6 Duer, 17; 5 Duer, 533; 5 Harris & J. 82; 12 Gratt. 322; 5 Mason, 195; 18 N. Y. 48; 21 N. Y. 505; 8 Penn. 383; 47 Penn. St. 239; 48 Penn. St. 978; 5 Sarg. & Rawle, 107; 1 Coms. 104; 40 Eng. L. & Eq. 413; Coke, Litt. 121 b.

As settling the question, that rights like the one claimed by this plaintiff pass as an incident to the land, see Kent's Com. Vol. 3, p. 419, also Vol. 4, p. 467, and cases therein cited.

Upon conveyance of part of an entire estate, or of one of two adjacent tenements, all apparent and continuous privileges or *quasi* easements over the remaining lands of the grantor, annexed to the part granted during the unity of ownership of the beneficial and comfortable enjoyment thereof, and in actual use by the grantor, or with his consent, at the time of the grant will pass by implication, even without the word appurtenances in the conveyance. *Elliott* v. *Rhett*, 57 American Dec. 750, and particularly the discussion in note, p. 751 to 768. *Seymour* v. *Lewis*, 78 Am. Dec. 120, and note *Henry* v. *Koch*, 44 Am. Rep. 484.

This right to the use of that stairway was both apparent and continuous, it was in full use at the time of the conveyance by

Harlow to Wheelwright, had been so built by Harlow, to accommodate both stores and was the only means of ingress and egress to the upper part of either. It has so continued and in fact no other way can be built without an entire change in the construction of the plaintiff's store involving great expense and injury to the value of his property. This is the exact condition of things recognized by the court in upholding implied grants of this nature. See 7 Smith, N. Y. Court of Appeals, 505, and cases cited therein; see also 3 Mason, 272.

In this state the courts have in this class of cases, put considerable stress upon the point that the way must be one of, not absolute, but of very great necessity; still they have recognized the fact that a party may acquire such an easement. *Blake* v. *Ham*, 50 Maine, 311.

It will be argued on the strength of the language used in *Warren* v. *Blake*, 54 Maine, 276, that a party may make a deed which will cut off an easement and that if he has done so in clear and explicit language there is no remedy. We grant this but we say that mere silence in a deed, where such an easement was apparent at the time of the conveyance is not sufficient.

The court however, same case p. 288, adopt the rule of *Carbrey* v. *Willis*, 7 Allen, 364, and hold that in order to pass by implication the easement must be one of strict necessity, and say that a way when it is strictly a way of necessity falls under the rule.

Again the court of this state, *Dolliff* v. *B. & M. R. R.* 68 Maine, 176, say that it must be shown to be of clear necessity in order to overcome the presumption which obtains by reason of the silence in the deed.

It has been the intention of our court, as expressed in each of these cases, to follow the rule in Massachusetts, which as we understand it is, whether or not the party claiming the easement can do without it by constructing something to take the place of it at a reasonable expense? If so then, the deed being silent, he cannot claim the easement, but if not and the easement claimed is necessary and beneficial to his use of the property, the easement passes, and this is based upon the doctrine that a man

shall not derogate from his grant. *Johnson* v. *Jordan*, 2 Met. 234; *Leonard* v. *Leonard*, 2 Allen, 543; *Nichols* v. *Luce*, 24 Pick. 103; *Lawton* v. *Rivers*, 13 Am. Dec. 746; *Thayer* v. *Paine*, 2 Cush. 327; *Brigham* v. *Smith*, 4 Gray, 297; *Oliver* v. *Dickinson*, 100 Mass. 114; *Pingree* v. *McDuffie*, 56 N. H. 306. And as applying specially to a passage way, 30 Iowa, 386.

It is the duty of the grantor in selling to carefully reserve any rights he may wish to enjoy in the property conveyed while the grantee has the right to suppose that he is receiving whatever is necessary to the proper enjoyment of the property purchased. One of the best discussions of these two positions will be found in the case of *Mitchell* v. *Seipel*, 53 Md. 251, where these two rules are adopted.

To give a user effect, it must be continuous and uninterrupted, in the land of another, by the acquiescence of the owner, for a period of at least twenty years, under an adverse claim of right, while all persons concerned in the estate in or out of which it is derived, are free from disability to resist it, and are seized of the same in fee and in possession during the requisite period. Where all these circumstances concur, it raises a *prima facie* evidence of a right to such easement acquired by a grant which is now lost. Washb. on Real Estate, Vol. 2, p. 296, § 20, 3rd ed. It has been settled that this right can be claimed by a grantee back through his subsequent grantors. *Hill* v. *Lord*, 48 Maine, 83.

Where two adjacent owners built a party wall between their estates, resting it upon an arch, one leg stood upon the land of one owner, and the other upon that of the other, and the arch-way was used by them as a common passage way, it was held to be such an adverse user by each of the other's land as to give him a prescriptive right to have the wall thus supported. *Dowling* v. *Hennings*, 20 Md. 984.

An uninterrupted enjoyment of a way across another's land for twenty years unexplained, is presumed to be under a claim, an assertion of a right adverse to the owner, not only giving title

by prescription but raising a presumption of a grant. *Miller* v. *Garlock*, 8 Barb. 153.

Twenty years occupation alone is sufficient to ground a presumption that the occupation began in virtue of some contract between the parties, but is to be applied only to cases where the legal qualities of such a right are proved to exist. One is, that the occupation must be uninterrupted by the owner of the land; another is that the occupation must be really adverse, and not by any permission, license or indulgence of the owner. *Sargent* v. *Ballard*, 9 Pick. 251. See also *Haynes* v. *Boardman*, 119 Mass. 414; *Hill* v. *Crosby*, 2 Pick. 466; *Melvin* v. *Props. of Locks & Canals on Merrimack River*, 5 Met. 15; *Melvin* v. *Whiting*, 13 Pick. 184; *Kent* v. *Waite*, 10 Pick. 138; *Leonard* v. *Leonard*, 7 Allen, 277; *Rung* v. *Shoneberger*, 26 Am. Dec. 100.

Presumptions of this kind are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the course of ordinary affairs, occur, unless there was a transmutation of title to, or admission of an existing title in the party in possession. *Tinkham* v. *Arnold*, 3 Maine, 120; *Dority* v. *Dunning*, 78 Maine, 381; *Littlefield* v. *Maxwell*, 31 Maine, 134; *Jewett* v. *Hussey*, 70 Maine, 433; *Blake* v. *Everett*, 1 Allen, 248.

The case of *Barnes & al* v. *Haynes*, is somewhat like the case before us. In that case there was a passage way between two buildings which had been used by the owner of each for more than twenty years, and in an action by one against the other for obstructing the same, the court say, "When such actual uninterrupted use of a way, as of right, is shown to have existed a sufficient length of time to create the presumption of a grant, if the other party relies on the fact that these acts, all or some of them, are permissive, it is incumbent on such party, by sufficient proof to rebut such presumption of a non-appearing grant, otherwise, the presumption stands as sufficient proof, and establishes the right." *Barnes* v. *Haynes*, 13 Gray, 188;

Stearns v. *Janes*, 12 Allen, 582; *Parks* v. *Bishop*, 120 Mass. 340.

A very thorough and exhaustive discussion of the questions involved in this case, both as to implied grant and adverse possession, as we believe, sustaining the plaintiff's claim in this case, will be found in the following New Jersey cases, viz: *Brakely* v. *Sharp*, 9 N. J. E. Rep. 9: *Same* v. *Same*, 10 N. J. Eq. 206; *Seymour* v. *Lewis*, 13 *Id.* 439; *Fetters* v. *Humphreys*, 18 *Id.* 260; *Denton* v. *Leddell*, 23 *Id.* 64; *DeLuze* v. *Bradbury*, 25 *Id.* 70; *Chew* v. *Cook*, 39 *Id.* 396.

Charles H. Bartlett, also for plaintiff.

The intent of the parties is gathered not alone from the written words in a deed but the surrounding circumstances also; and the state of the property conveyed, at the time of the conveyance, must be considered. *United States* v. *Appleton*, 1 Sumner, 492; *Dunklee* v. *The Wilton R. R.* 4 Foster, 489.

When anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also. Shepard's Touchstone, *89. The general rule is, that when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use. 3 Kent's Com. (12th ed.) *421.

Premises pass to the grantee as they are at the time of the grant. *U. S.* v. *Appleton*, and *Dunklee* v. *The Wilton R. R. supra*; *Clark* v. *Gaffeney*, 116 Ill. 362 (3 Weston Rep. 577); *Pyer* v. *Carter*, 1 H. & N. 916; *Kent* v. *Waite*, 10 Pick. 138; *Cihak* v. *Kleker*, 117 Ill. (5 Western Rep. 490); *Watts* v. *Kelson*, L. R. 6 Ch. 174; *Parish* v. *Caspare*, 7 Western Rep. 369 (Ind.).

The conveyance to Wheelwright, passed to him as being a way in use at the time, apparent and continuous, and reasonably necessary to the enjoyment of the Stillwell store, and the front room or office therein, and became annexed thereto, and passed, through the *mesne* conveyances, to the plaintiff, although not mentioned in any part of the deeds. *Morrison* v. *King*, 62 Ill. 30; *Ins. Co.* v. *Patterson*, 1 Western Rep. 124; Bou. Law Dict. Title Easement; Washb. Easement, (4th ed.) 103, 697;

Pettingill v. *Porter*, 8 Allen, 1; *Thayer* v. *Payne*, 2 Cush. 327; MORTON, J., in *Bass* v. *Edwards*, 126 Mass. 445; FIELD, J., in *Schmidt* v. *Quinn*, 136 Mass. 575; MILLER, J., in *Mitchel* v. *Seipel*, 53 Md. 251; and this reasonable necessity is the principle on which the following cases were decided. *Johnson* v. *Jordan*, 2 Met. 234; *Carbrey* v. *Willis*, 7 Allen, 364; *Randall* v. *McLaughlin*, 10 Allen, 366.

A right of way may be appurtenant. *Kent* v. *Waite*, *U. S.* v. *Appleton*, *supra*; *Underwood* v. *Carney*, 1 Cush. 285. A ditch made to carry off surface water has been held to be an apparent and continuous easement. *Roberts* v. *Roberts*, 7 Lansing, (N. Y.) 55, and so is an alleyway which has been laid out. *McCarty* v. *Kitchenman*, 47 Pa. St. 239.

The easement having become annexed to the Stillwell store and to the office therein by the conveyance to Wheelwright and his subsequent use, would pass to every grantee without mention even though not necessary to the use and enjoyment. *Dority* v. *Dunning*, 78 Maine, 381.

The ground of reasonable necessity would seem to have been the principle in the following cases. With the grant of a boom, the right to fasten it passed. *Hoskins* v. *Brawn*, 76 Maine, 68. With the grant of a dam, the right of flowage. *Baker* v. *Bessey*, 73 Maine, 472, and the grant of a building, the right of support. *Richards* v. *Rose*, 24 Eng. Law & Eq. Rep. 406.

The following cases will be cited, by the counsel for the defendant, to show that the law in this state, is, that, only those easements pass which are strictly necessary. *Warren* v. *Blake*, 54 Maine, 276; *Dolliff* v. *Boston & Maine R. R. Co.* 68 Maine, 173; and *Steveus* v. *Orr*, 69 Maine, 323.

In Washb. Easement, (4th ed.) p. 109, it is said, "It may perhaps still be considered unsettled in Massachusetts, whether the proper instruction to the jury should be, that the easement must be strictly necessary or reasonably necessary to the enjoyment of the estate granted," and on page 73, that "the chancellor, in giving his opinion in the case of *Suffield* v. *Brown*, seems to have gone out of his record to attack and endeavor to overrule this case of *Pyer* v. *Carter*." And substantially the

same thing is stated in *Watts* v. *Kelson*, L. R. 6 Ch. Ap. 166; *Suffield* v. *Brown*, 4 D. J. & S. 185, was a case in which the plaintiff claimed the right by reservation, to have the bow-sprits of vessels lying at his wharf, extend over the adjoining premises formerly owned by him.

The possession of the tenants was that of the landlord and may be reckoned as part of the time necessary to gain a right by adverse enjoyment. Bou. Law Dict. Title Possession. Washb. Easement, (4th ed.) 186; *Bellis* v. *Bellis*, 122 Mass. 414; *Goodwin* v. *Sawyer*, 33 Maine, 541. Possession by a landlord and his tenants has been held to be sufficient in New York. *Doolitle* v. *Tice*, 41 Barb. 181. The possession of these several landlords could be tacked, so as to form a continuous adverse possession. *Leonard* v. *Leonard*, 7 Allen, 277; *Sawyer* v. *Kendall*, 10 Cush. 241.

Actual occupancy is not necessary to constitute adverse possession. *Cooper* v. *Morris*, 6 Cent. Rep. 314; *Foulke* v. *Bond*, 12 Vroom, 527; *Hovey* v. *Furman*, 1 Pa. St. 295. The fact that the Foster store may have been occupied by tenants does not make any difference. *Reimar* v. *Stuber*, 20 Pa. St. 458. It will not be contended that there was any concealment about the use of these stairs.

A use of an easement which was as notorious and well known as this, is presumed to have been known to the landlord of the Foster store, even if it were rented to tenants. Washb. Easements, (4th ed.) 180; *Close* v. *Samm*, 27 Ia. 503; *Davies* v. *Stephens*, 7 C. & P. 570. In *Blanchard* v. *Moulton*, 63 Maine, 434, it was stated by APPLETON, C. J., on p. 436, that "adverse user is nothing more than such use of the property, as the owner himself would exercise."

Where one uses premises whenever he sees fit without asking leave and without objection, it is an adverse user. *Garrett* v. *Jackson*, 20 Pa. St. 335; S. C. Lead Smith's Cas. (6th Am. ed.) 643; Washb. Easem. (4th ed.) 157.

Any occupation of land of another, under a claim of ownership, is adverse. *Jewett* v. *Hussey*, 70 Maine, 433. The use of an easement for twenty years under a claim of right is presumed to

be adverse. Washb. Easem. (4th ed.) 90; *Hazard* v. *Robinson*, 3 Mason, 272, and if sufficient even though there is no adverse possession. *Chew* v. *Cook*, 39 N. J. Eq. 396. The possession was sufficiently continuous.

In *Hill* v. *Crosby*, 2 Pick. 466, the keeping of a bridge in repair by the plaintiff's father and himself for more than twenty years, and passing over the river in boats when the bridge was down, was held to be sufficiently continuous.

"Rights of way and some other easements are not continuously exercised; but the right is acquired by an uninterrupted use of the right at all times at the pleasure or convenience of the party claiming the right." BELL, C. J., in *Winnipiseogee Lake Co.* v. *Young*, 40 N. H. 420.

In *Clancey* v. *Houdlette*, 39 Maine, 451, flats which were covered at every tide were held to be of such a character that rights in them could be gained by adverse possession.

In *Dana* v. *Valentine*, 5 Met. 8, it was held that user of buildings for an offensive trade for more than twenty years, except for about two years when they were not so used, was sufficiently continuous.

In *Bodfish* v. *Bodfish*, 105 Mass. 317, it was held in regard to a right of way, that acts of user of such a char acter and at such intervals as afforded a sufficient indication to the plaintiffs that the right of way was claimed against him.

The fact that the stairs were used by others than the tenants in the Stillwell store does not affect the case. *Kent* v. *Waite*, 10 Pick. 138. Adjoining owners using for more than twenty years a passage way lying on each side of the division line between their properties, have a right by prescription, to pass over each other's part. *Barnes* v. *Haynes*, 13 Gray, 188; *Nicholes* v. *Wentworth* (1 Cent. Rep. 737), 100 N. Y. 455. And owners of a party wall have a right of prescription, in the same manner, to the use of the wall. *Webster* v. *Stevens*, 5 Duer, 553; *Eno* v. *Del Necchio*, 6 Duer, 17.

A witness testifying as to the use of a way, may be asked if the user was under claim of right. *Turner* v. *Baldwin*, 44 Conn. 123.

Wilson and Woodard, for the defendant.

DANFORTH, J. The plaintiff and defendant are the owners in severalty of two adjoining stores, divided by a partition wall and fronting upon a street in the city of Bangor. In the defendant's store and next to the partition wall is a stairway with an entrance from the street leading to the second story. At the head of this stairway turning to the right is a door in the partition wall opening into the second story of the plaintiff's building. The tenants of the plaintiff having occasion to go to the second story, have been accustomed to use this stairway and door, having no such means of access upon their own premises. On the 28th of June, 1884, the defendant closed up this door in the partition wall, thus preventing all access that way for the plaintiff's tenants. It is for this act that the plaintiff claims damage, claiming that he has a right of way for his tenants over the stairs.

These stores were originally built by Nathaniel Harlow, in 1847, with the stairs, wall and door, as they were before the defendant closed the door, and were so used until that time.

In February, 1860, Mr. Harlow sold the store, now owned by the plaintiff, to J. S. Wheelwright, and in the deed the premises were described by metes and bounds, making the center of the wall the dividing line. The plaintiff now has this title. The defendant has title to the remaining premises.

The plaintiff claims title to a right of way over the stairs by virtue of an implied grant under the deed, Harlow to Wheelwright. He cannot claim it as a way of strict necessity, for his building fronts upon the highway, and he can make a stairway upon his own premises; but rather as a way of convenience; having been so built in the beginning and so occupied both before and after the conveyance to Wheelwright, it is claimed that it has become appurtenant to and so far a part of the premises, as to pass by the deed, if not by express grant at least by implication. But there is no obscurity in the language of the deed, no question as to the precise premises covered by it. The stairs are not conveyed even if considered a part of the premises, and the only question is whether, under the facts, a right of way over the stairs is conveyed by implication.

In this state, the rule is now so well established, that the test to be applied in such cases is, whether the way is one of strict necessity, that it is too late to change it. Nor do we think it desirable, for it seems to be founded not only upon a preponderance of authority but upon sound principle. It has the recommendation of simplicity and certainty, is easily applied, and works no injustice; for, the purchaser knows, or should know, what he is buying before his deed is accepted. In *Warren* v. *Blake*, 54 Maine, 276, this precise question was exhaustively examined and the rule adopted. In *Dolliff* v. *Boston & Maine*, 68 Maine, 173; and in *Stevens* v. *Orr*, 69 Maine, 323, the question was raised and the rule affirmed.

To guard against misapprehension, it may be well to state that in the learned and exhaustive argument for the plaintiff, many cases are cited in which the conveyance was of lots upon a plan showing the way contended for, or where in the description the lot was bounded upon a way located upon the grantor's own land and it was held that the grant carried the way. These cases rest upon the principle that by a reference to the plan that becomes a part of the description and carries the right of way by an express grant, or as when bounded upon a way upon the grantor's land, it is such a representation of the existence of a way material to the value of the land, as to estop the the grantor from denying its truth. *Bartlett* v. *Bangor*, 67 Maine, 460; *Fox* v. *Sugar Refinery*, 109 Mass. 292. These cases undoubtedly enunciate good law, but are easily distinguishable from the present. Another class of cases cited, is where the premises are conveyed by some distinguishing name, without any description by metes and bounds; then, all parts, or appurtenances, properly included in the descriptive name, will pass. These cases are readily distinguishable from the one at bar.

Another ground upon which the plaintiff claims to sustain his title is that of adverse user. It is true as the case shows, that this way has been used for more than twenty years in connexion with the plaintiff's premises, mostly, or all of the time by tenants. But it is equally true that in 1865, and for a few subsequent years, while Mr. Harlow and his successor retained

the ownership of the defendant's store, there was a tenant in there under Harlow and his successor, who occupied the premises on both sides. If therefore the occupation of the tenant was that of the landlord, here was an interruption of any adverse use, and since that there has not been sufficient time to gain a right by prescription. If the use of the tenant was not that of the landlord, then there is no pretence of title by adverse user.

The result is, both grounds upon which the plaintiff bases his title fail.

Plaintiff nonsuit.

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

GUILFORD D. STRATTON and another

vs.

EDGAR BAILEY and wife.

Penobscot. Opinion March 31, 1888.

Husband and wife. Collecting a debt of husband from real estate standing in wife's name. Equity.

The burden is upon the creditor to show, that the labor and means of the debtor contributed towards the payment of real estate, the title to which stands in the name of the debtor's wife, in an equitable proceeding to collect the debt from such real estate.

It is not sufficient to show personal labor of the husband of too little value for the law to take cognizance of.

Nor that it was paid for in part by money received by the wife from boarders, it appearing that she paid so much of the bills for provisions as were consumed by the boarders.

Nor that the labor of the wife's father, at a time when he was boarding with the husband, contributed, as a donation to his daughter, the wife.

ON report.

Bill in equity. Heard on bill, answer and proofs.

The opinion states the case.

Wilson and Woodard, for the plaintiffs.

The question at issue is mainly of fact, and the burden of

establishing it is upon the plaintiffs. *Call* v. *Perkins*, 65 Maine, 446.

The fact is established from the testimony of the defendants themselves, that the husband must have paid a part at least of the cost of building the house. The lot was purchased in 1881. All the money the wife then had was seventy-five dollars. The lot cost one hundred dollars and the house fully six hundred dollars, and all this has been paid in full, from her savings, she says. That would require savings since 1881 greatly out of proportion to what she was able to accumulate prior to 1881.

The negotiations for purchasing the lot and building of the house were made by the husband, and he paid the builders what money they received.

They made a mortgage and the husband signed the mortgage with his wife. If he had not paid any part of the cost of the property, directly or indirectly, he had no reason to join in the conveyance; and the fact that he did so was an admission on the part of both, that he had contributed towards the property.

The wife testifies that at one time she had eleven boarders. The profits from that business, under the circumstances, were the property of the husband. *Sampson* v. *Alexander*, 66 Maine, 182.

The labor of the husband on the house created an interest in him, and still more so did the labor of the wife's father who boarded with them the greater part of the time from 1881 to 1885. She said her father during that time did the most of the carpenter work. This he did without any other compensation than his board. That was the way he paid for his board. This board was furnished by the husband. This was a contribution greater in amount than the plaintiffs' debt against the husband.

Barker, Vose and Barker, for the defendants.

DANFORTH, J. The complainants having obtained a judgment against the respondent, Edgar Bailey, seek, in this process, to have it satisfied from the land described in the bill on the ground that it was in part at least paid for by his means. The respondent, Helen A., who is the wife of Edgar, claims the title. The other

respondent has now no interest in the result, he having taken his title as security for a debt which has since been paid.

The only question involved is whether the consideration, or any portion of it, was paid from the means of the husband, and upon this question the burden of proof is upon the complainants.

The testimony introduced to sustain this burden fails to make out a case. There are some facts proved, such as the husband's personal agency in the negotiation for the purchase, in the payment of money in several instances, as well as in signing papers given as security, which in themselves may have some tendency to sustain the case. But considered in the light of other circumstances proved, they are equally consistent with the theory of the defendants as with that of the plaintiffs. Notwithstanding these personal agencies of the husband, the wife is treated as the principal and the debtor in all these transactions by the parties interested. Whatever lack of means for payment there may have been on the part of the wife, judging from the evidence, we can but infer that there was a still greater lack on the part of the husband.

But the husband and wife have both testified and there is no suggestion from this, or any other source, that any third person has made any payment for the premises, but it affirmatively appears that all the payments were made by the one or the other, and by a decided preponderance that the means used for that purpose were obtained through the energy, labor and economy of the wife, with a portion claimed as a gift to her. The only question about which there can be any difficulty, is to whom did this labor and this alleged gift belong? The testimony upon this point comes largely from the husband and wife and develops three points, upon which the complainants rely for an answer in their favor.

1. The personal labor of the husband upon the underpinning and in lathing. So far as appears, no account of this was kept; from the testimony as it now stands, no value can be affixed to it and there is no reason to suppose that a further hearing would furnish any aid in this respect. On the other hand the proper inference from the testimony is that it was but a mere trifle

casually rendered and too small for the law to take cognizance of. As the burden of proof is upon the plaintiffs to show some appreciable value, as to this item they must fail.

2. The labor of the wife's father upon the house. This appears to have been of considerable amount, but the testimony clearly shows that it was not furnished by the husband, but was voluntarily rendered as a gift to the wife. True the father paid nothing for his board, and that may have been furnished by the husband. But providing the board is not a provision of the labor. It is indeed claimed that the labor was performed in consideration of the board, and to one somewhat complicated question in cross-examination, the wife gives an answer which will bear this construction. But taking the testimony upon this point as a whole and the only inference which can be fairly drawn from it, is that the labor was performed for the wife as a gift to her without any regard to the board. Whether that was furnished with or without expectation of pay is immaterial.

3. It appears that some portion of the money paid for the purchase of this property, came from keeping some boarders at one or more times. It appears from the testimony that these boarders were kept upon the premises now in question, that they were engaged by the wife upon her own responsibility, independent of her husband, kept as a business of her own, without any direction, aid or assistance from him, and to a great extent during his absence from home, the wife testifying that although the husband paid some grocery bills, perhaps enough for the family, yet when the boarders were there she "did her trading with Mr. Libbey and my boarders paid me enough to pay for their living." This as a matter of business, was outside of family duties, the income of which would belong to the wife, as much as that from a millinery or grocery store. *Colby* v. *Lamson*, 39 Maine, 119; *Oxnard* v. *Swanton*, *Id.* 125.

By R. S., c. 61, § 3, a married woman "may receive the wages of her personal labor, not performed for her own family, . . . and hold them in her own right against her husband or any other person." So far as labor was performed for these

boarders, it was not performed for her own family, even though it might be said to have been done in the family, any more than sewing or washing taken in for outsiders. Thus this case is broadly and easily distinguishable from that of *Sampson* v. *Alexander*, 66 Maine, 182, relied upon by the plaintiffs, where all that was done by the wife, was done not only in the family, but for the family; not only jointly with, but for the husband, under his direction, as his agent, the two working together as husband and wife.

Bill dismissed with costs.

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

STATE OF MAINE *vs.* GEORGE TOWLE and another.

Kennebec. Opinion April 2, 1888.

Fishing. Great Pond. R. S., c. 40, § 70.

Revised Statutes, c. 40, § 70, prohibiting the use of a net other than a dip net, when fishing in fresh water, is applicable to Great Pond in Kennebec county.

ON exceptions from the superior court.

The opinion states the case.

L. T. Carlton, county attorney, for the state.

H. M. Heath, for defendants.

The point in issue is whether R. S., c. 40, § 70, or c. 65 of the Public Laws of 1859, is the law prohibiting the taking of fish in Great Pond in Kennebec by use of nets other than a dip net. Chapter 65, Public Laws of 1859, reads as follows: "Whoever sets any net . . . in Snow, Great, Long, McGrath, North, East, or Richardson Ponds . . . for the purpose of taking, destroying or obstructing the free passage of fish therein, shall forfeit two dollars.

Chapter 65, 1859, has remained unrepealed. See Repealing Act, R. S., c. 1871, p. 935. In enumerating acts of 1859, repealed, c. 65 is excepted. See note, R. S., 1871, p. 375, at

end of c. 40, stating that c. 65, 1859, being of local interest only, is not incorporated in chapter, but still in force; see also R. S., 1883, p. 384, containing same note at the end of c. 40, to the effect that c. 65, 1859, is still in force; see also Repealing Act, 1883, p. 996, subheading "1859."

We contend that R. S., c. 40, does not apply to any pond or lake.

WALTON, J. The defendants have been tried and found guilty of the offense of using a net other than a dip net for the capture of fresh water fish in Great pond, in the county of Kennebec. This offense is described in R. S., c. 40, § 70.

The exceptions state that the defendants seasonably filed a motion in arrest of judgment, upon the ground that the acts alleged in the indictment constituted no offense under the section above mentioned; that the law governing such acts upon Great pond is the act of 1859, c. 65.

It is not clear how such an objection can be taken in arrest of judgment; but as the justice of the superior court instructed the jury that the R. S., c. 45, § 70, was applicable to Great pond, and as the question will become an important one when judgment upon the defendants is passed, the penalties under the two statutes being different, we have examined the question, and we have no doubt the ruling was correct.

In 1869, our fishery laws underwent a very thorough revision. The revising act (Act 1869, c. 70) consisted of thirty-four sections, and, with a few exceptions therein mentioned, was made applicable to all the fresh waters of the state above the flow of the tide. The very first section of the act so declares. And, as none of the exemptions apply to Great pond, of course it was included within the operation of the act. Section 20 of that act is identical with section 70, c. 40, of the present Revised Statutes. It was first copied into the revision of 1871, and from there into the present revision without the change of a single word. We have no doubt it is the law of the land to-day, and has been ever since its enactment in 1869, and that it is applicable to Great pond, in the county of Kennebec, as well as to all

the other fresh waters of the state not expressly exempted from its operation. Great pond is not exempted.

Exceptions overruled.

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

WILLIAM K. STEVENS *vs.* ISAAC H. PARSONS.

Cumberland. Opinion April 5, 1888.

Promissory note. Joint promisor.

A note was made payable to the order of the maker and endorsed by him on the back to the order of the plaintiff, and the defendant also signed the endorsement, before the delivery to the plaintiff. *Held*, that the defendant is an original promisor.

ON report from the superior court.

Frank W. Robinson, for the plaintiff, cited: *Sweet* v. *McAllister*, 4 Allen, 353; *Lord* v. *Moody*, 41 Maine, 127; Stephen, Pl. (Tyler's ed.) 341; *Smalley* v. *Wight*, 44 Maine, 446; *Little* v. *Rogers*, 1 Met. 108; *Flight* v. *MacLean*, 16 Mees. & W. 51; *Wood* v. *Mytton*, 10 Q. B. 805; *Masters* v. *Baretto*, 8 C. B. 433; *Brown* v. *De Winton*, 6 C. B. 336; *Gay* v. *Lander*, 6 C. B. 336; *Hooper* v. *Williams*, 2 Exch. 13; *Absolon* v. *Marks*, 11 Q. B. N. S. 19; 2 Chitty, Pl. (16th Am. ed.) 221, note *f*; Daniels, Neg. Inst. § 130, note 4; 1 Parsons, N. & B. 17 *et seq.*; Byles, Bills, (ed. 1856, Sharswood's notes) 65; *Scull* v. *Edwards*, 13 Ark. 24; *Colburn* v. *Averill*, 30 Maine, 310; *Irish* v. *Cutter*, 31 Maine, 536; *Adams* v. *Hardy*, 32 Maine, 339; *Malbon* v. *Southard*, 36 Maine, 147; *Leonard* v. *Wildes*, 36 Maine, 265; *Lowell* v. *Gage*, 38 Maine, 35; *Childs* v. *Wyman*, 44 Maine, 433; *Brett* v. *Marston*, 45 Maine, 401; *Woodman* v. *Boothby*, 66 Maine, 389; *Sturtevant* v. *Randall*, 53 Maine, 155; *Carver* v. *Hayes*, 47 Maine, 257; *Coolidge* v. *Wiggin*, 62 Maine, 570.

L. M. Webb, for defendant.

The plaintiff claims to hold the defendant, as joint and several

promisor, under numerous decisions of the court in this state, that "when one not the payee writes his name in blank upon the back of a promissory note at its inception, he will be liable as a joint promisor." See *Colburn* v. *Averill*, 30 Maine, 310, and cases cited in plaintiff's brief.

But it is expressly decided that if affixed after indorsement by payee the party will be treated as a subsequent indorser. *Colburn* v. *Averill*, 30 Maine, 310.

It has been expressly decided that one who puts his name before delivery on the back of a promissory note payable to the maker or order, and indorsed by the maker is an indorser and not a joint maker. *Bigelow* v. *Colton*, 13 Gray, 309.

To same effect is *Clapp et al.* v. *Rice et al.* 13 Gray, 403; *Dubois* v. *Mason*, 127 Mass. 37.

Defendant claims that the cases cited above from the Massachusetts reports are not distinguishable from this case and are decisive of it, viz.: *Bigelow* v. *Colton*, 13 Gray, 309; *Clapp et al.* v. *Rice et al.* 13 Gray, 403; *Dubois* v. *Mason*, 127 Mass. 37; Parsons on Notes and Bills, Vol. 2, p. 122.

"The only reason for which a transferee can in ordinary cases desire that the indorsement should be in full, is to guard against loss by accident or theft." Parsons on Notes and Bills, Vol. 2, p. 20.

LIBBEY, J. The only question in this case is whether the defendant is an original promisor or an endorser of the note declared on. The note upon its face and back is as follows:

"Portland, Aug. 1, 1879.

Twelve months after date I promise to pay to the order of myself two hundred dollars, at my office, Portland, Maine, with interest, value received."

Signed, "C. A. Parsons."

On the back, "Pay to the order of W. K. Stevens."

Signed, "C. A. Parsons."

" "I. H. Parsons."

In addition to what appears on the note the parties agree, "that the above endorsements are in the same order, form and

condition, in all respects, in which they were made at the inception of the note, and that said note was delivered to the plaintiff at or about the day of its date for a good and sufficient consideration."

A promissory note made payable to the order of the maker has no payee and is not a valid contract till endorsed by the maker and negotiated to some one as payee. *Smalley* v. *Wight*, 44 Maine, 442; *Little* v. *Rogers*, 1 Met. 108.

The endorsement may be in blank or special to some one named. If in blank it becomes a note payable to bearer. If special, the one named becomes the payee. In the first case it passes to the taker by delivery, or by the endorsement of the bearer; in the second case it can be transferred only by the endorsement of the payee named. *Little* v. *Rogers*, 1 Met. 108; *Masters* v. *Barretto*, 8 C. B. 433; *Brown* v. *De Winton*, 6 C. B. 336; *Gay* v. *Lander*, 6 C. B. 336; *Hooper* v. *Williams*, 2 Ex. 13; *Absalon* v. *Marks*, 11 Q. B. 19.

The same person cannot be payor and payee of a promissory note, nor can he be maker and endorser in legal sense of the word. By his formal endorsement the maker merely designates the payee. It is the equivalent of filling up a blank left for the purpose in the face of the note.

The nature of the obligation which one whose name is on the note assumes to the taker of it, must be determined by the note itself as it was when negotiated. *Bigelow* v. *Colton*, 13 Gray, 309; *Clapp* v. *Rice*, 13 Gray, 403; *Dubois* v. *Mason*, 127 Mass. 37.

It is the well settled law of this state that one not appearing to be a party to a note, as payee or endorsee, who puts his name on the back of it in blank at its inception and before negotiated, is a joint and several promisor. But if the note is payable to bearer, a different rule prevails. In such case one who puts his name on the back of the note must be held to be the bearer and endorser. This is the legal construction of the contract, and it cannot be varied by parol. *Bigelow* v. *Colton*, *Clapp* v. *Rice*, and *Dubois* v. *Mason*, *supra*.

Applying these rules of law to the case at bar, it appears that the defendant, when he put his name upon the back of the note, was neither payee nor endorsee. The endorsement of the maker designated the plaintiff as payee. By an inspection of the note when he took it, the plaintiff must have understood that the defendant was a co-promisor, as that was his relation to the note by the law of this state.

In support of his contention the defendant relies on *Bigelow* v. *Colton*, *Clapp* v. *Rice*, and *Dubois* v. *Mason*, *supra*, and claims that by the authority of those cases he is endorser only. But in all those cases the endorsement by the maker was in blank, making the notes payable to bearer, and they hold merely that the defendant whose name appeared on the back of the note under that of the maker when the note was taken by the plaintiff, must be held to be the bearer, and consequently an endorser. They are not authorities against the plaintiff's contention.

We think it clear that by the law of this state the defendant is an original promisor, and is properly declared against as such.

Judgment for plaintiff.

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

LUCY A. CORSON *pro ami vs.* ELLSWORTH DUNLAP and others.

Somerset. Opinion May 31, 1888.

Bastardy process. Final judgment. Bond. Surrender of principal.

On a complaint under the bastardy statute, the adjudication and order of the presiding justice, that the defendant is adjudged the father of the child, and that he stand charged with its maintenance with the assistance of the mother, constitute the "final judgment;" the time of the announcement and entry thereof in court, is the date of the judgment; and no surrender of the defendant on any day thereafter in court will discharge the sureties on his bond.

ON report.

Debt on a bond given in a bastardy process.

Walton and Walton, for the plaintiff, cited: *Taylor* v. *Hughes*, 3 Maine, 433; *Corson* v. *Tuttle*, 19 Maine, 409; *Doyen*

v. *Leavitt*, 76 Maine, 247; *Hodge* v. *Hodgdon*, 8 Cush. 294; *Towns* v. *Hale*, 2 Gray, 199; *Young* v. *Makepeace*, 103 Mass. 50.

Merrill and Coffin, for defendants.

By the rules of court, No. XXXIII, it is provided: "That the clerk shall make a memorandum on his docket of the day on which any judgment is awarded; and if no special award of judgment is made, it shall be entered as of the last day of the term."

By R. S., c. 82, § 138, it is provided that execution may issue on a judgment of the Supreme Judicial Court after twenty-four hours from its rendition, and the XXXIII rule of court provides that, unless there is a special award of judgment, it shall date as of the last day of the term.

If no special award of judgment has been made upon motion during the term, then upon the last day of the term judgment is rendered for the prevailing party, as of that day, in all cases that have in any way been formally determined. Spaulding's Practice, pp. 217 and 218; *Chase* v. *Gilman*, 15 Maine, 64; *Herring et als.* v. *Polley*, 8 Mass. 113.

Attachments upon real estate or personal property continue for thirty days after final judgment in the original suit, and no longer. R. S., c. 81, § 67.

Sureties on bail bonds in civil actions may, at any time before final judgment in the original suit, bring the principal into court where the action is pending, and deliver him into the custody thereof, and be thereby discharged. R. S., c. 85, § 7.

If they do not surrender the principal, the bail shall satisfy the judgment, with interest thereon from the time it was rendered. R. S., c. 85, § 8.

And when the principal avoids, the original creditor may bring his action against the bail, to be sued out within one year from the rendition of judgment against the principal. R. S., c. 85, § 9.

A review may be granted in civil actions when judgment has been rendered in any judicial tribunal, if petition therefor is

presented within three years after the rendition of judgment. R. S., c. 89, § 1.

The indorser of a writ is liable, in an action on the case brought within one year after the original judgment, in the court in which it was rendered. R. S., c. 81, § 7.

No *scire facias* shall be served on bail, unless within one year after judgment was rendered against the principal. R. S., c. 81, § 85.

The phrases, "After final judgment in the original suit" (c. 81, § 67); "before final judgment in the original suit" (c. 85, § 7); "from the time when judgment was rendered" (c. 85, § 8); "from the rendition of judgment" (c. 85, § 9); "after the rendition of judgment" (c. 89, § 1); "after judgment" (c. 89, § 1, Art. VII); "to the time of final judgment" (c. 89, § 5); "after the original judgment" (c. 81, § 7), all mean the same thing and must be construed to refer to one and the same time. Must not the same construction be given to the statute upon which the question now before the court arises, as to the statutes above referred to?

When anything is limited by statute to be done within a certain time "after judgment," or "after the rendition of judgment," or "before final judgment in the original suit," or "before original judgment," the statute must be construed as having a particular reference to the general intendment of law and practice of courts as to the date of the judgment, and the time of limitation must be reckoned from the last day of the term, unless a special judgment has been entered upon the record, as of a day certain, and the record must govern. *Davis* v. *Blunt*, 6 Mass. 487.

The plaintiff relies upon *Taylor and ux.* v. *Hughes et al.* 3 Greenl. 433; *Corson* v. *Tuttle*, 19 Maine, 409, and *Doyen* v. *Leavitt*, 76 Maine, 247.

Upon examining the statutes of 1821, c. 72, § 1, under which *Taylor* v. *Hughes* was decided, we find that there was then no provision whereby the sureties could surrender their principal and be discharged. At that time the condition of the bond could only be saved by complying with the order of court. Now, on the contrary, by R. S., c. 97, § 4, by a surrender of their

principal before final judgment, the sureties may be released. The case of *Corson* v. *Tuttle*, above referred to, is decided upon the ground that there had been no surrender of the principal before final judgment, that there had been no attempt on the part of the sureties to release themselves by a surrender.

The case of *Doyen* v. *Leavitt*, 76 Maine, 247, certainly seems to be fully in accord with the above positions. In the course of the opinion the learned justice says: "The final judgment was rendered on the last day of the term. Even if its details were not finally settled in writing until afterwards, the judgment must date of that last term day. It could not date of any later day. The principal in that bond had not been surrendered in court prior to that last day. He was not present in court at the time of passing the order, nor at any time during its session on the last day."

VIRGIN, J. At the March term, 1886, on trial on the complaint against the respondent, he was found guilty. Thereupon he carried the case to the law court on a motion to set aside the verdict. The motion having been overruled, the presiding judge, on the third day of the succeeding September term, made the adjudication and passed the order contemplated in R. S., c. 97, § 7.

On the sixteenth day of the term, before the final adjournment thereof, the sureties on the bond in suit surrendered their principal in open court, and now contend that the surrender was "before final judgment" and that they were thereby discharged under the provisions of R. S., c. 97, § 4. But we do not so understand the law. On the contrary, the adjudication and order of the presiding justice above mentioned constituted the final judgment, and the time of its announcement in court and its entry upon the docket, was the date thereof. The respective rights and duties of the parties were then fully declared. Nothing was left unconsidered or undetermined. No further order or adjudication was needed. The final judgment in such case is *sui generis*, differing somewhat from the ordinary form of judgment in civil cases, and is analogous to decrees for

alimony in libels for divorce, or like decrees in equity suits. *Young* v. *Makepeace*, 103 Mass. 50. Moreover, such a judgment has always been deemed the final judgment. *Taylor* v. *Hughes*, 3 Maine, 433; *Corson* v. *Tuttle*, 19 Maine, 409; *Doyen* v. *Leavitt*, 76 Maine, 247; *Hodge* v. *Hodgdon*, 8 Cush. 294; *Towns* v. *Hale*, 2 Gray, 199; *Young* v. *Makepeace*, *supra*.

Not having surrendered their principal "before final judgment" so that he could be committed for not "abiding the order of the court," the condition of their bond became broken, and the sureties must perform the covenant which they entered into. Cases *supra*.

Judgment for penal sum of bond. Execution to issue for such damages as accrued under the order of court.

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

CORA E. BRETT *vs.* EDGAR C. MURPHY and others.

Cumberland. Opinion June 1, 1888.

Bastardy process. Practice. R. S., c. 97, § 7. Judgment. Bond. Damages. Insolvency of principal.

In a bastardy proceeding, the judgment or order of filiation under R. S., c. 97, § 7, is the final judgment.

Unless the sureties on the bond surrender the principal in court before such judgment of filiation is entered, they are not discharged by the surrender.

The judgment for plaintiff in a suit upon the bond, under the bastardy act, should be for the penal sum. The bond may be chancered, however, by the court; and execution should issue only for the damages, which are to be assessed once for all, and they will not be reduced by the insolvency of the principal.

ON exceptions from superior court.

The opinion states the case.

George D. Parks, for the plaintiff, cited: *Doyen* v. *Leavitt*, 76 Maine, 247; *Herring* v. *Polley*, 8 Mass. 113; *Chase* v. *Gilman*, 15 Maine, 64; *Eldridge* v. *Preble*, 34 Maine, 148.

Weston Thompson, for defendants.

The record shows that a verdict of guilty was returned in the bastardy suit on the ninth day of the term; and proceeds to show what was further done on the same day, in the following words:

"And now, after verdict of guilty, the said respondent, Edgar C. Murphy, is adjudged to be the father of the complainant's child and stands charged with its maintenance with the assistance of the mother, and it is ordered that the respondent pay to the complainant the sum of one hundred and twenty-five dollars, and the further sum of two dollars per week for the maintenance of the child, till further order of court, and give a bond to the complainant in the sum of one thousand dollars with sufficient surety, approved by the court, to perform said order. Also give a bond to the town of Brunswick, in the sum of one thousand dollars, with sufficient sureties approved by the court, for the maintenance of the child, and be committed until he gives said bonds. The latter bond to be deposited with the clerk of court for the use of said town. Thereupon respondent was surrendered in court by his sureties. Committed. Warrant of commitment issued February 15, A. D. 1884."

The court knows that the ninth day of that February term was the fifteenth day of that month. (1 Greenl. Ev. § 5.)

Plaintiff claims that it was "final judgment," within the meaning of R. S. c. 97, § 4, and defendants claim that it was what it assumes to be — an "order," showing what final judgment should be, when rendered.

We do not understand that the judgment and order for judgment are the same. *Whitwell* v. *Hoover et al.* 3 Mich. 84, (59 Am. Dec. 220); *Hickey* v. *Kinsdale*, 8 Mich. 267.

The judge who made this order is one of the last to whom unfairness should be imputed. (10 Gray, 375).

The right to file motion and exceptions is a legal right, and a *nisi prius* judge has no power to force a judgment to deprive a suitor of that right, or to oust this court of its statutory jurisdiction of motions for new trial and exceptions. A direction of the court which contains no date, will not have a date assigned to it by construction which would make it illegal or unjust, when

another construction is available. *Crooker* v. *Buck*, 41 Maine, 355; R. S., c. 77, §§ 42, 51, 75, 78; 43 Maine, 176; 70 Maine, 290; 10 Gray, 375. Rules XX and XXI of superior court, Cumberland county. A judgment dates of the last day of the term, when it does not otherwise appear. 8 Mass. 113; 15 Maine, 64.

We shall claim if the exceptions are not sustained, to show in reduction of damages, that Edgar C. Murphy has had no property from the date of Miss Brett's complaint to the day of making up of damages. The right of sureties to relieve themselves by surrendering their principal before final judgment, is a condition in the bond; and on performance of it, the bond is void. This plaintiff is as well off to-day as she would have been if that condition had been performed, before verdict. She lost nothing by its omission. It is as much a condition of the bond, as if it was set out at length in the document, instead of being made part of it by law. The law of a place where a contract is made, forms part of it. 53 Maine, 471; 19 Ill. 107; 1 Otto, 406; *Pritchard* v. *Norton*, 16 Otto, 124.

There are two classes of bonds; those which by their terms are to become void on performance of duty, and those which are "for the performance of covenants or agreements." On bonds of the latter class, the damages are ascertained by the jury, by virtue of R. S., c. 82, § 32; and on bonds of the other sort they are ascertained by the court in the exercise of its equity jurisdiction. *Machiasport* v. *Small et als.* 77 Maine, 109; *Philbrook* v. *Burgess*, 52 Maine, 271; *Hathaway* v. *Crosby*, 17 Maine, 448; *Jordan* v. *Lovejoy*, 20 Pick. 86.

When a poor debtor's bond is not comformable to the statute, the section last cited does not apply. Then the case follows under the same rule of procedure which is applicable here. Then it is open to the defendants to show that the debtor had no estate, so that his failure to go into imprisonment was of no damage to the plaintiff. He might have gone into jail and exonerated his sureties, but his failure to do so cost the plaintiff nothing. The only difference between that case and this, is that the condition for imprisonment is set out in terms in the debtor's bond and is

made part of the bond before the court by law. The condition is in substance the same, but is expressed on different pieces of paper; in one case on the leaf of the statute book, and in the other in the document signed. The meaning, the legal requirement and the equitable result are the same in both cases. Equity does not favor a forfeiture and will not make a distinction between pieces of paper for the sake of giving effect to one. Nothing requires such distinction. *Ware* v. *Jackson*, 24 Maine, 166; *Howard* v. *Brown*, 21 Maine, 385; *Hathaway* v. *Crosby*, 17 Maine, 448; *Hill* v. *Knowlton*, 19 Maine, 449; *Call* v. *Foster*, 49 Maine, 452.

EMERY, J. This was an action of debt upon a bond given in bastardy proceedings under section 3, c. 97, R. S. The main question was whether the sureties had become discharged from the bond by a seasonable surrender of the principal in courts as provided in section 4.

In the original bastardy proceedings, the respondent had been found guilty by the jury. It does not appear that any motion or exceptions were interposed, or suggested, or that any delay was asked. The court, presumably without objection, on the same day made the adjudication and order contemplated in section 7.

This was the final judgment in that suit. *Corson* v. *Dunlap*, 80 Maine, 354. The case does not show that the principal was surrendered in court before that judgment was pronounced. He was surrendered on the same day, but presumably after the adjudication and order. This was too late. The sureties in such a bond, have a statute privilege of avoiding their bond by a surrender before judgment. To obtain this exemption, they must show affirmatively, a full compliance with the statute. They are not authorized to delay action until they learn what the judgment is, and then elect whether to satisfy it or surrender their principal. The statute says, they must elect before judgment. If they wait till judgment is pronounced, they must see that it is satisfied, such being the obligation they voluntarily entered into. See cases cited in *Corson* v. *Dunlap*, *supra*.

The order of judgment for the penalty of the bond was correct.

As the defendants however may wish to have the bond chancered, this may be done by the court rendering the judgment. This bond is not for the performance of any covenant, or agreement, and hence is not affected by sections 20, and 32, c. 82, R. S. It is a bond of defeasance. There is no covenant or agreement outside of, or apart from the bond itself. In such case, the breach is once for all, and the damages are sustained once for all. There having been a breach, all the damages, past, present and future are now due, and should be assessed at one time. *Philbrook* v. *Burgess*, 52 Maine, 271.

Evidence of the insolvency of the respondent cannot reduce these damages. The sureties covenanted under seal and for valid consideration, that the respondent in that suit should abide the order of court. He has not done so. The covenant of the sureties was not conditioned upon the respondent's ability, but was absolute, unless they should relieve themselves by a surrender of the respondent before final judgment, which they have not done. *Taylor* v. *Hughes*, 3 Maine, 433; *Corson* v. *Tuttle*, 19 Maine, 409; *Doyen* v. *Leavitt*, 76 Maine, 247.

Exceptions overruled. Execution to stay till next term of superior court, to enable defendants to have damages assessed.

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

INHABITANTS OF NORRIDGEWOCK

vs.

EDWARD C. HALE and others.

Somerset. Opinion June 2, 1888.

Towns. Collectors of taxes. Town treasurer.

When the same person is town collector and town treasurer, and, as treasurer pays to the state treasurer the school fund and school tax, charges the same as paid by him as collector, and it is allowed to him in his settlement of his collections, the town cannot hold his sureties on his collector's bond therefor.

The office of town treasurer is an annual office; and the sureties on his official bond are not held for any of his misappropriations of the town's money made after his official year has expired and before his successor had been qualified, notwithstanding the bond stipulated that he should "well and truly perform his trust as treasurer during the time for which he was chosen and until another should be chosen in his stead."

On report.

The case is stated in the opinion.

S. S. Brown, for plaintiffs.

The evidence in the case clearly and fully shows that there is now due the town from Edward C. Hale, and his sureties on his collector's bond, the sum $2632.48, in his capacity as collector for 1877. The town has been compelled to pay the state and county tax for him and he must be held for that. *Richmond* v. *Toothaker*, 69 Maine, 451.

The fact that the treasurer's book has been looked over by the town auditor and pronounced correct can have no weight. Even the selectmen would have no authority to discharge a collector from a legal liability gratuitously, even if they intended to do so, without a vote of the town. *Farmington* v. *Stanley*, 60 Maine, 475. In the case of *Wellington* v. *Lawrence*, 73 Maine, 125, the court held that the town treasurer had no authority to use the town funds in his hands as treasurer to pay state and county tax.

D. D. Stewart, for the defendants, cited: *Trescott* v. *Moan*, 50 Maine, 352; *Machiasport* v. *Small*, 77 Maine, 110; *Richmond* v. *Toothaker*, 69 Maine, 457; *Wellington* v. *Lawrence*, 73 Maine, 125; *Treat* v. *Orono*, 26 Maine, 217; *Arlington* v. *Merricke*, 2 Saun. 403; *Wardens of St. Savoirs* v. *Bostick*, 2 New Rep. 175; *Hassell* v. *Long*, 2 Maule & S. 363; *Peppin* v. *Cooper*, 2 B. & Ald. 431; *Leadley* v. *Evans*, 2 Bing. 32 (9 E. C. L. R. 306); *Barker* v. *Parker*, 1 T. R. 295; *Liverpool Water W. Co.* v. *Atkinson*, 6 East. 508; *Boston Hat M'f'g Co.* v. *Messinger*, 2 Pick. 234; *Bigelow* v. *Bridge*, 8 Mass. 275; *Amherst Bank* v. *Root*, 2 Met. 522; *Bank* v. *Dandridge*, 12 Wheat. 69; *Com.* v. *Kane*, 108 Mass. 423; *McGahey* v. *Alston*, 2 M. & W. 211; Broom's Leg. Max.

848; Co. Litt. 6 (b) 332; *Chelmsford Co.* v. *Demarest*, 7 Gray, 1; *Hatch* v. *Attleborough*, 97 Mass. 533.

VIRGIN, J. One of these actions is on a town collector's official bond and the other on a treasurer's, both for the municipal year of 1877. As he was both collector and treasurer that year, the principal is the same in both bonds, so in fact are the sureties.

Instead of being first sent to an auditor (R. S., c. 82, § 69; *Phipsburg* v. *Dickinson*, 78 Maine, 457), the cases are reported directly to this court, a practice not to be encouraged.

The collector kept no record of his account with the town, but did keep at least a partial one as treasurer.

The report shows that the taxes were duly assessed and amounted to fourteen thousand seven hundred and forty-four dollars and eighty-nine cents, which sum included the state tax of one thousand nine hundred and thirty dollars and thirteen cents, and the county tax of seven hundred and two dollars and thirty-five cents; and lists thereof with a warrant "admitted to be in the usual form," were committed to the collector. He was therefore bound to account for the whole amount thus committed to him. *Gorham* v. *Hall*, 57 Maine, 61-2. And he did so, as appears by the statement of a settlement with the assessors on March 7, 1881. This statement shows that he was credited with the payment of both state and county taxes as evidenced by the following item therein: "By state and county tax, two thousand six hundred and thirty-two dollars and forty-eight cents," that sum being the aggregate of the two taxes named.

But the certificate from the state treasurer, "admitted by agreement instead of any formal evidence of the same facts" — shows that he did not, as collector, but did as treasurer, pay the state tax by offsetting the school fund and mill tax amounting to eight hundred seventy-two dollars and sixty-five cents, and the balance (one thousand fifty-seven dollars and forty-eight cents) in money. And the treasurer's own account with the town, wherein he charges the town: "To cash paid E. H. Banks, one thousand nine hundred and thirty dollars and thirteen cents, less school fund and mill tax, eight hundred seventy-two dollars and

sixty-five cents, one thousand fifty-seven dollars and forty-eight cents," shows the same fact — that he, as treasurer and not as collector paid the state tax.

Moreover, the treasurer's account with the town contains the following items: "September 26, 1877, to cash paid H. C. Hall, county treasurer, one hundred dollars; December 29, 1877, to cash paid H. C. Hall, county treasurer, three hundred dollars; March 12, 1878, to cash paid H. C. Hall, county treasurer, three hundred and two dollars and thirty-seven cents," these sums aggregating seven hundred and two dollars and thirty-seven cents — the amount of the county tax for 1877. Hereupon the plaintiffs contend that as the collector did not in fact pay either of these taxes, but was by mistake allowed for the payment of them in his settlement with the town on March 7, 1881, the error should be corrected and their amount charged against him in this action on his bond.

To be sure it was the duty of the collector, and not of the treasurer, to pay these taxes as directed in his warrant; and when he had paid the state tax, then and not before, the school fund and mill tax became payable to the town treasurer. But as the treasurer did pay them and misappropriated the money by loaning it to the collector for that purpose, and the collector was allowed therefor, they must be allowed as in that settlement and the treasurer look to the collector for reimbursement. *Wellington* v. *Lawrence*, 73 Maine, 125. Having therefore, accounted for all the taxes committed to him as collector, the action on the collector's bond cannot be maintained.

Treasurer's bond. As before seen, the treasurer's account with the town shows that he, as treasurer, in fact paid the county tax and the state tax with the aid of the school fund and mill tax.

Hence the plaintiffs contend that the town has allowed the payment of them twice — once to the collector and again to the same person as treasurer, and for this misappropriation of the town's money, it is claimed that the treasurer's bond is holden.

On the other hand, the defendants contend that, although the treasurer's account shows the fact of his having paid these taxes,

still that there is no evidence in the report that their payment was allowed to him as treasurer, but that the stated settlement of the treasurer with the town approved February 2, 1880, by the town auditor, contains no such items. And such is the fact, as an inspection of that settlement shows — unless the amount of these taxes is included in some of the large items, the truth of which we have no means of testing.

But assuming that the town has allowed these sums in the treasurer's account, then we do not think they can be charged against his bond as treasurer for the municipal year of 1877. The office of town treasurer is an annual office. When an office is annual in fact, the bond covers only the official acts of the year for which it was given. *Arlington* v. *Merricke*, 2 Saund. 411; *Bigelow* v. *Bridge*, 8 Mass. 275. And the fact that the bond contains the clause which in terms extends the liability "until another is chosen and sworn in his stead," does not, like a statutory clause of the same import, extend the legal liability beyond the expiration of the municipal year. *Amherst Bank* v. *Root*, 2 Met. 542; *Chelmsford* v. *Demarest*, 7 Gray, 4; *Dover* v. *Twombly*, 42 N. H. 59 and cases there cited.

Upon recurring to the report, we find that the municipal year of 1877 expired on March 11, 1878, when the annual election for the year 1878 was held. And the case shows that three hundred and two dollars and thirty-seven cents of the county tax was paid March 12, 1878, the first day of the next municipal year, and the state tax March 16, 1878, neither of which payments was within the year for which the bond in suit was given.

Judgment for the defendants in both cases.

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

LIBBEY, J., concurred in the result.

JAMES M. EDWARDS and another

vs.

CHARLES W. H. PETERSON and another.

Cumberland. Opinion June 2, 1888.

Equity. Assignment of wages.

An assignment of wages expected to be earned in the future in a specified employment, though not under an existing employment or contract, is valid in equity.

ON exceptions.

Bill in equity against defendant, Peterson, and Forest City Steamboat Company. The exceptions were to the ruling of the court sustaining a demurrer to the bill. The material facts are stated in the opinion.

George C. Hopkins (*Elliot King* with him), for the plaintiffs, cited: Story, Eq. Juris. § 1040; Pomeroy, Eq. Jur. § 1288; Benjamin on Sales, Vol. 1, pp. 98 and 100; Jones on Mortgages, § 152; *Field* v. *Mayor of N. Y.* 6 N. Y. 179; *McCaffrey* v. *Woodin*, 65 N. Y. 459 (22 Am. R. 654); *Smithurst* v. *Edmunds*, 14 N. J. Eq. 408; *Gevers* v. *Wright's Ex.* 18 N. J. Eq. 334; *Pierce* v. *Emery*, 32 N. H. 484; *Smith* v. *Atkins*, 18 Vt. 465; *Calkins* v. *Lockwood*, 17 Conn. 154; *Walker* v. *Vaughn*, 33 Conn. 577; *Fitzgerald* v. *Vestal*, 4 Sneed, 258; 65 N. C. 695; *Cotten* v. *Willoughby*, 83 N. C. 75 (35 Am. R. 565); *Fejavary* v. *Broesch*, 52 Iowa, 90 (35 Am. R. 262); *Everman* v. *Robb*, 52 Miss. 653 (24 Am. R. 687); *Apperson* v. *Moore*, 30 Ark. 56 (21 Am. R. 170); *Pennoch* v. *Coe*, 23 Howard, 117; *Butt* v. *Ellett*, 19 Wall. 544; *Mitchell* v. *Winslow*, 2 Story, 644; *Brett* v. *Carter*, 2 Lowell, 458; *Scott* v. *Springfield R. R. Co.* 6 Bissell, 534; *Dillon* v. *Barnard*, 1 Holmes, 394; *Barnard* v. *N. & W. R. R. Co.* 4 Cliff. 351, 365; *Holroyd* v. *Marshall*, 10 House of Lords cases, 191; *Hamlin* v. *Jerrard*, 72 Maine, pp. 75 and 88; *Griffith* v. *Douglass*, 73 Maine, 537; Herman on Estoppel, § 296.

W. H. Looney, for defendants.

The assignment of a mere expectation of earning money, if there be no contract on which to found the expectation, is of no effect. *Mulhall* v. *Quinn*, 1 Gray, 105; *Hartley* v. *Tapley*, 2 Gray, 565; *Twiss* v. *Cheever*, 2 Allen, 40; *Herbert* v. *Bronson*, 125 Mass. 475; *Emerson* v. *E. & N. A. Railway*, 67 Maine, 387; *Farnsworth* v. *Jackson*, 32 Maine, 419.

Where no rule of law is infringed, and the rights of third persons are not prejudiced, courts of equity will, in proper cases, give effect to mortgages of subsequently acquired property. *Beall* v. *White*, 94 U. S. 382.

Some courts of equity decide that a man cannot assign or mortgage that which does not exist. *Moody* v. *Wright*, 13 Met. 17.

"The equitable doctrine with respect to the assignment of property to be acquired in future is extended to this species of equitable transfer. The fund need not be actually in being. If it exists potentially, that is, if it will in due course of things arise from a contract or arrangement already made or entered into when the order is given, the order will operate as an equitable assignment of such fund as soon as it is acquired, and create an interest in it which a court of equity will enforce." Pomeroy's Equity Juris. Vol. III. § 1283.

The cases which have been cited to illustrate the principle contended for by the complainants do not sustain their position. The leading cases which it is claimed advocate this view are *Pennoch* v. *Coe*, 23 Howard, 117; *Hamlin* v. *Jerrard*, 72 Maine, 62; *Mitchell* v. *Winslow*, 2 Story, 630.

In *Pennoch* v. *Coe*, and *Hamlin* v. *Jerrard*, *supra*, it was decided that the after acquired rolling stock of a railroad company attaches in equity to a mortgage, if within the description, from the time it is placed there, so as to protect it against the judgment creditors of the railroad company.

In *Mitchell* v. *Winslow*, *supra*, it was held that a mortgage given to secure a note payable in four years, for all the machinery in the manufactory of the mortgagors, with all the tools and implements of every kind thereunto belonging and appertain-

ing, together with all the tools and machinery for the use of the manufactory, which they might at any time purchase for four years from the date of the mortgage, and also the stock which they might manufacture or purchase during the said four years, constituted such a lien in favor of the mortgagee to the property acquired subsequent to the time of executing the mortgage as is protected under the provision in the second section of the Bankrupt Act, and that such stipulations in a mortgage, in regard to property subsequently acquired, protect such property from other creditors of the mortgagor.

"A mortgage of a railroad and its franchises," in harmony with this principle, "operates as an equitable assignment of the rolling stock, locomotives, cars and the like, which are required or manufactured by the company after the execution of the instrument, and passes an equitable ownership in, or lien in such articles to the mortgagee. Other cases take a different view, and hold that the rolling stocks are fixtures, and become a part of the realty as soon as acquired, and that being so annexed to the soil, the legal title thereto is vested in the mortgagee, or that the lien of the mortgage extends to them." *Vide* Pomeroy's Eq. Jur. Vol. III. § 1289, and cases cited in note.

It has also been decided, in harmony with the principle with which we contend, that after acquired lands which cannot be regarded as accretions of the road itself, will not pass under a general mortgage of a railroad as a parcel thereof, also that lands subsequently acquired, and not essential to the operation of the road, do not pass by implication under such a mortgage. *Calhoun* v. *Paducah, &c. R. R. Co.* 9 Cent. L. J. 66; 8 Reporter, 395.

HASKELL, J. Bill in equity to uphold an assignment of wages expected to be earned in the future, but not under an existing employment or contract.

When the assignment was made, the assignor was in the employ of the respondent steamboat company, but was discharged

the next day. The assignment covered wages to be earned in the employ of the steamboat company between the day of its date, October 14, and April 1, following, and was recorded as required by R. S., c. 111, § 6.

Both the assignor and the steamboat company expected the former's services would be again required by the latter, and that his employment would then begin. It did begin November 1st, and continued later than April 1st. The assignor was decreed an insolvent debtor January 21st, and, on that day, the assignee demanded from the steamboat company the wages to be earned thereafter during the time covered by the assignment. The wages were earned, and amounted to more than the debt secured by the assignment. The transactions throughout were open and above board, and not tinctured with fraud.

It is settled at law in this state, that "the mere expectation of earning money cannot, in the absence of any contract on which to found such expectation, be assigned. Future wages to be earned under a present contract imparting to them a potential existence may be assigned, although the contract may be indefinite as to time and amount." *Wade* v. *Bessey*, 76 Maine, 413; *Farrar* v. *Smith*, 64 Maine, 74; *Emerson* v. *E. & N. A. Railway Co.* 67 Maine, 392. These cases were all actions at law, and, as said in the last case cited, were decided upon "legal, and not equitable rules."

"It is common learning in the law, that a man cannot grant or charge that which he hath not." *Looker* v. *Peckwell*, 9 Vroom, 253. But, as said by the Chief Justice in *Emerson* v. *The Railway Co.*, "the reason that it may be different in equity is, not that a man conveys *in presenti* what does not exist, but that which is in form a conveyance operates in equity by way of present contract merely, to take effect and attach to the things assigned as soon as they come *in esse*, to be regarded before that time as only an agreement to convey, and after that time as a conveyance."

So it was held in *Field* v. *The Mayor, etc. of New York*, 2 Seld. 179, that the assignment of a claim against the city for work to be done and materials to be furnished, not founded upon

an existing contract and having no potential existence, was valid in equity. The court says, page 187, "The better opinion, I think, now is, that courts of equity will support assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold them."

So in *Williamson* v. *Colcord*, 1 Hask. 620, it was held that the mere expectancy and possibility of indemnity for the destruction of a vessel by a rebel cruiser was subject to donation, even before the Geneva commission was agreed to by England and the United States.

An assignment of a legacy expected from a living person was held valid in equity after the legacy became payable. The court says: "Even a naked possibility or expectancy of an heir to his ancestor's estate may become the subject of a contract of sale, if made *bona fide*, for a valuable consideration, and will be enforced in equity after the death of the ancestor." *Bacon* v. *Bonham*, 6 Stew. 616; S. C. 12, C. E. Gr. 209.

The true doctrine seems to be "that, to make a grant or assignment valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment. But courts of equity support assignments not only of choses in action, but of contingent interests and expectations, and also of things which have no present actual or potential existence, but rest in mere possibility only." *Smithurst* v. *Edmunds*, 1 McCart. 416; *Langton* v. *Horton*, 1 Hare, 549; *Robinson* v. *McDonnell*, 5 M. & S. 228; *Whitworth* v. *Ganyim*, 3 Hare, 416; *Apperson* v. *Moore*, 30 Ark. 56.

Nor can injustice result from this doctrine. If the *res* come to the hands of the assignor subject to liens or incumbrances, the assignee must take it subject thereto. *Williamson* v. *N. J. S. R. R. Co.* 2 Stew. 311; *Wellenk* v. *Morres Canal Co.* 3 Gr. Ch. 377; *Dunham* v. *Railway Co.* 1 Wall. 254; *Galveston R. R. Co.* v. *Cowdrey*, 11 Wall. 459; *U. S.* v. *N. O. R. R. Co.* 12 Wall. 362.

The invalidity of a grant at law of a mere expectancy imports no more than that it is ineffectual to pass the legal title. Equity construes the instrument as imposing a lien upon the *res* when produced or acquired, leaving the legal title still in the grantor, who may by some act ratify the grant, as by delivery of the property, and then the legal title is complete in the vendee. *Everman* v. *Robb*, 52 Miss. 653.

So in *Deering* v. *Cobb*, 74 Maine, 332, a mortgage of a stock of goods covering new goods purchased with the proceeds of the stock sold was held valid at law, after possession taken by the mortgagee, as against the assignee in insolvency of the mortgagor.

The rule laid down by Judge STORY in *Mitchell* v. *Winslow*, 2 Story, 630, seems to have been very generally followed by all chancery courts in this country. He says, "It seems to me a clear result of all the authorities that, whenever the parties by their contract intend to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy." This rule has been followed in *Pennoch* v. *Coe*, 23 How. 117; *Seymour* v. *C. & N. F. R. R. Co.* 25 Barb. 288; *Sellers* v. *Leister*, 48 Miss. 524; *Butt* v. *Ellett*, 19 Wall. 544; *Apperson* v. *Moore*, 30 Ark. 56; *McCaffrey* v. *Woodin*, 65 N. Y. 459; *Barnard* v. *N. & W. R. R. Co.* 4 Clif. 351; *Brett* v. *Carter*, 2 Low. 458; *Gregg* v. *Sanford*, 24 Ill. 719; S. C. 76 A. D. 719, with an elaborate note citing many authorities, p. 723; *Walker* v. *Vaughn*, 33 Conn. 577; *Wilcox* v. *Daniels*, 15 R. I. 261.

The case of *Halroyd* v. *Marshall*, 10 H. L. C. 223, seems to extend the rule stated further than Judge STORY. In that case it is said: "Whatever doubts, therefore, may have been formerly entertained upon the subject, the right of priority of an equitable mortgagee over a judgment creditor, though without notice, may now be considered to be firmly established."

Our own court has laid down the rule: "At law, property non existing but to be acquired at a future time, is not assignable. In equity it is so." *Hamlin* v. *Jerrard*, 72 Maine, 77; *Morrill* v. *Noyes*, 56 Maine, 458; *Griffith* v. *Douglass*, 73 Maine, 532.

The assignment set up in this case was given to secure the payment for groceries furnished and to be furnished to the assignor and his family. It is of wages to be earned of a certain employer within a specified time. It was seasonably recorded. No claim is made under it, until actual notice had been given to the employer. No other creditor intervenes an attachment or otherwise objects to the validity of the assignment. The controversy is practically between the immediate parties to it. It cannot be said to contravene public policy. *Smith* v. *Atkins*, 18 Vt. 461. The consideration was most meritorious, and the assignment was not given to delay creditors.

Whether such an assignment would be valid against subsequent attaching creditors, with or without notice, it is not here necessary to decide; nor is the effect of the record of such an assignment as notice to the employer or to attaching creditors considered; nor is an assignment upheld where it appears to have been given without a meritorious consideration, or to have operated to hinder or delay creditors, indicating a want of equity.

From the authorities cited the court is clearly of opinion that the assignment must be upheld, and, therefore, agreeable to the stipulation of the parties, ordered,

Exceptions sustained. Demurrer overruled. Judgment against both respondents for the sum of $54, and interest from April 1, 1886, with costs. Decree below accordingly.

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

CHARLES B. HAZELTINE and another

vs.

ABBIE F. VOSE and another.

Waldo. Opinion June 5, 1888.

Will. Legacy. "Home of Little Wanderers." "Home of Aged Women."

A testator in his will gave "to the institution for the Home of Little Wanderers, $1000," and "to the institution for the Home of Aged Women, $1000," and provided that these "bequests are to be given to said institutions of the State of Maine, if any such exist at my decease, or by the time said bequests are ready to be paid by my executors; if not, to be given to those of Massachusetts, if any such exist at my decease." *Held*, that the terms applied to the institutions were used as descriptive of the object and purpose of organization, rather than as names to identify particular institutions.

Held further that the Children's Home of Bangor takes the first legacy, and that the other legacy must be divided equally between four institutions: The Home for Aged Women of Bangor, Old Ladies' Home of Bath, Home for Aged Women of Portland, and the Old Ladies' Home of Saco and Biddeford.

ON report.

Bill in equity by the executors of the last will and testament of Paul R. Hazeltine, deceased, for a construction of the will.

Thompson and Dunton, for the executors.

Wm. H. Fogler, for the residuary legatees.

In determining this question the intent of the testator is to govern; and it is the intention expressed in the will and not otherwise. *Tucker & al. Exrs.* v. *Seamen's Aid Soc.* 7 Met. 188; *Howard* v. *American Peace Soc.* 49 Maine, 288; *Cotton* v. *Smithwick*, 66 Maine, 360.

"Conjecture is not permitted to supply what the testator has failed to indicate; for as the law has provided a definite successor in the absence of disposition, it would be unjust for this ascertained object to be superseded by the claim of any one not pointed out by the testator with equal distinctness." 1 Jar. on Wills, § 376.

Redfield states the rule to be that a legacy will be void for

uncertainty when it becomes mere guess, or conjecture, after all the aids derivable from extrinsic evidence, what the testator did mean. 2 Redfield on Wills, c. 3, § 1, cl. 50.

A devise is declared void when "after resort to oral testimony, it still remains mere matter of conjecture what was intended by the instrument." *Townsend* v. *Downer*, 23 Vt. 225.

In *Bull* v. *Bull*, 8 Conn. 47, it is laid down that a mere misdescription of the legatee does not render the legacy void, unless the ambiguity is such as to render it impossible, either from the will or otherwise, to ascertain who was intended as the object of the testator's bounty.

"It is laid down by Swinburne, that a bequest to any person by name, where there are two persons by the same name, and no means of determining which was intended, must be wholly void and we do not perceive any ground for escape from such a result." 2 Red. c. 3, § 1, cl. 4.

"If it appears by evidence dehors the will that there are two or more persons or subjects that would come within the words of the will, parol evidence may be received to show which was intended. But if the ambiguity is apparent on the face of the will, the court must give it a construction, if it can be done. If it cannot be interpreted then the devise must in general fail, and cannot be aided, by extrinsic evidence. *Pickering* v. *Pickering*, 50 N. H. 350.

In *Richardson* v. *Watson*, 4 Barn. & Adolph. 787, the testator devised "the close in the occupation of *Watson*." It was shown that there were two closes of the testator in the occupation of *Watson*. *Held*, that the devise was void for uncertainty.

In Lord CHEYNEY'S case, 5 Rep. 68, b. a father made a devise to his son John. The testator in fact had two sons living named John. The court held that one might introduce proof that the father thought the other was dead, but added "If no direct proof can be made of his intent, the devise is void for uncertainty."

"It is clear that when part of the description in the will applies to one person, and part to another, parol evidence is admissible for the purpose of showing which of the imperfectly described

individuals was meant to be the object of the gift. This proposition however, supposes that each of the respective claimants is sufficiently designated by that part of the description which applies to him, to have established a title under the will, if the competing claim of the person answering to the other part of the description were out of the way." 1 Jarman, 376.

"If a devisee be one of the sons of J. S., (he having several sons) the devise is void for uncertainty." 1 Jarman, 323.

In *Tucker & al. Exrs.* v. *Seaman's Aid Soc.* 7 Met. 188, it is stated p. 208, that when there is no person, taking name and description together, who answers to the name and description in the will, and upon proof of facts and circumstances to enable the court to infer who was intended, if the proof does not so preponderate in favor of either as to enable the court to determine who was intended, the bequest will be held void for uncertainty. Cites *Thomas* v. *Thomas*, 6 T. R. 671.

The court is to determine the intention of the testator, if it can be determined, from the will itself in connection with facts and circumstances tending to explain such intention. Neither by testimony, or by conjecture, is the court to supply or contradict, enlarge or vary, the words of a will. *Pickering* v. *Pickering*, 50 N. H. 350.

A gift by will to be certain requires a definite subject and object and cannot stand if either be wanting. Schouler on Wills, § 591.

Heirs at law are not to be disinherited by conjecture, but only by express words or necessary implication. *Howard* v. *Am. Peace Soc.* 49 Maine, 288.

"If after every endeavor, the judicial expositor finds himself unable, in regard to any material fact, to penetrate through the obscurity in which the testator has involved his intention, the failure of the intended disposition is the inevitable consequence." Schouler on Wills, § 591.

The rules and principles applicable to cases of ambiguity in the language of wills are discussed and laid down in *Miller* v. *Travers*, 8 Bing. 244; *Tucker* v. *Seaman's Aid Soc.* 7 Met.

188; *Howard* v. *American Peace Soc.* 49 Maine, 288. See also language from 4 Russ. R. and Gadb. Rep. 131.

An examination of all the cases in which the court has held legacies valid when the identity of the legatee was in question will show that in every case the court has been able, from the language of the will, and from the extrinsic circumstances to determine the intention of the testator. Such was the case in *Howard* v. *Am. Peace Soc. supra*; *Straw* v. *Societies*, 67 Maine, 493; *Bartlet et al.* v. *King, Exr.* 12 Mass. 537; *Going* v. *Emery*, 16 Pick. 107; *Winslow* v. *Cummings*, 3 Cush. 358; *Bliss* v. *Am. Bible Soc.* 2 Allen, 334; *Hornbeck, Exr.* v. *Am. Bible Soc.* 2 Sand. 145.

It may be claimed that because the court is unable to determine what institution was intended by the testator, the one thousand dollars should be divided among all the claimants, or among all the Homes for Aged Women in this state.

Redfield suggests such a mode of escape in case of a bequest to a person by name, and there are two or more persons of the same name, and no means of determining which was intended; but adds "But no such rule is yet established." 2 Redfield, c. 3, § 1, cl. 4.

Schouler on Wills, § 593, says, "It is said that where there are two charities bearing the same name, and it cannot be ascertained which of them is intended, the legacy will be divided between them; a doubtful example, for in so extreme a case, and supposing extrinsic proof left one's intention balanced, the analogy ought to hold good in the case of individuals."

But the court is to determine and carry out the intention of the testator. It cannot enlarge or vary the terms of the bequest.

The courts have held that it was their duty to carry out the clearly expressed wishes of the testator, in which the legacy is given to a general class of persons or associations, when no trustee has been named by the testator. Of this class is *First Universalist Soc.* v. *Fitch & Al. Admrs.* 8 Gray, 421.

Geo. E. Johnson, for Baldwin Place Home for Little Wanderers.

This claimant is a charitable institution, and that this is a charitable bequest there can be no question. Schouler on the Law of Executors, section 464 and cases cited, and note to section 465.

In *Preachers' Aid Society* v. *Rich*, 45 Maine, 559, it is said, "The court will take care if possible, in cases of charitable gifts, to give them effect."

See *Hinckley* v. *Thatcher*, 138 Mass. 477. In this case the court held that extrinsic evidence of the facts known to the testator at the time he executed the will; the names by which the missionary societies were called by him, and his interest in any particular society, was admissible to identify the society intended. To the same effect is *Nason* v. *First Bangor Christian Church*, 66 Maine, 100. In this case the court, on page 105, say, "It is familiar doctrine that in the construction of will the court will place themselves, as far as practicable, in the positition of the testator, and give effect to his leading purpose and intention as indicated by the words of the will construed with reference to all attending circumstances." See also *Howard Exr.* v. *Am. Peace Soc.* 49 Maine, 288.

A. W. Paine, for the Home for Aged Women of Bangor, and Children's Home of Bangor, cited: *Nason* v. *Bangor Christian Church*, 66 Maine, 105; *Hawley* v. *Northampton*, 8 Mass. 3; *Straw* v. *East Maine Conference*, 67 Maine, 493; *Howard* v. *Am. Peace Societg*, 49 Maine, 288; *Sohier* v. *St. Paul's Church*, 12 Met. 250; *Tucker* v. *Seamen's Aid Society*, 7 Met. 188; *Minot* v. *Boston Indigent Boys' Asylum*, 7 Met. 416; *Winslow* v. *Cummings*, 3 Cush. 358; *Sutton Parish* v. *Cole*, 3 Pick. 232; *Saltonstall* v. *Sanders*, 11 Allen, 446; *Jackson* v. *Phillips*, 14 Allen, 539; *Fellows* v. *Miner*, 119 Mass. 541; *Odell* v. *Odell*, 10 Allen, 1; *Old South Soc.* v. *Crocker*, 119 Mass. 1; *Massachusetts Soc.* v. *Boston*, 142 Mass. 24; *Kent* v. *Dunham*, 142 Mass. 216; *Phila. Bap. Asso.* v. *Hart*, 4 Wheat. 1; *Inglis* v. *Sailor's Snug Harbor*, 3 Pet. 99; *Vidal* v. *Girard*, 2 How. 127; *McDonogh* v. *Murdoch*, 15 How. 367; *Perin* v. *Cary*, 24 How. 465; *Loring* v. *Marsh*, 6 Wall. 337;

Russell v. *Allen*, 107 U. S. 163; *Jones* v. *Habersham*, 107 U. S. 174; *Ould* v. *Washington Hospital*, 95 U. S. 303; *North Adams Universalist Society* v. *Fitch*, 8 Gray, 421.

Joseph Williamson, for the Home for Aged Women of Portland, cited: *Preachers' Aid Soc.* v. *Rich*, 45 Maine, 552; *Re Kilvert's Trusts*, L. R. 7 Ch. App. 170; *Re Alchin's Trusts*, L. R. 14 Eq. Cas. 230.

R. P. Tapley, for Old Ladies' Home of Saco and Biddeford, cited: *Doe* v. *Perratt*, 6 Man. & G. 359; *Den* v. *McMurtrie*, 15 N. J. L. 276; *Greenland Cong. Soc.* v. *Hatch*, 48 N. H. 393; 2 Redf. Wills. c. 3, cl. 48, 50; c. 1, § 2, cl. 2; *Swasey* v. *Am. Bible Soc.* 57 Maine, 523; 1 Perry, Trusts, § 66; *Straw* v. *East Maine Conference*, 67 Maine, 493.

C. W. Larrabee, for Old Ladies Home of Bath.

DANFORTH, J. The complainants ask for an interpretation of a part of the fifth item of their testator's will, which reads as follows, viz: "I give and bequeath, at my wife's decease, out of my estate left her by me during her life, to the institution for the Home of Little Wanderers, one thousand dollars, ($1000); and to the institution for the Home of Aged Women, one thousand dollars, ($1000); each of said bequests to be safely and permanently invested and held in trust by each of said institutions, the income only of which to be used annually, for the benefit of the occupants of said institutions forever. These . . . bequests are to be given to said institutions of the State of Maine, if any such exist at the time of my decease, or by the time said bequests are ready to be paid by my executors; if not, to be given to those of Massachusetts, if any such exists at my decease."

In this provision we find a specific sum of money bequeathed for the benefit of two classes of people—little wanderers, or indigent children, and aged women in need of assistance. This is made clear from the language used. The terms applied to the institutions are evidently used as descriptive of the object and purpose of their organization rather than as names to identify

the particular institution which is to take. While, it is from extrinsic testimony in the case rendered quite certain that when the testator made his will he had in his mind "The Baldwin Place Home for Little Wanderers," yet it is equally certain that he so had it as an illustration of the character of the institution he wished to aid rather than the particular one to be aided; for, a part of the very clause in question provides that in the uncertain future when the legacy is to be paid, if "any such" shall exist in Maine, that shall have the preference. So with regard to the other legacy; the fact that at the execution of the will, many institutions for the aid of aged women were in existence and that the testator by the terms used referred to one, leads to a very satisfactory conclusion that he had knowledge of the existence of one or more, as well as of the class of persons to be aided by them. There can then, be no doubt as to the class of persons to be aided, the *cestui que trust* in each case of the testator's bounty, and that the gift is a charitable one. The will must therefore be sustained, and if the testator has not provided for an execution of the trust the court will. *Howard* v. *Peace Society*, 49 Maine, 288; *Preachers' Aid Society* v. *Rich*, 45 Maine, 552; *Straw* v. *Societies*, 67 Maine, 494; *Nason* v. *First Church*, 66 Maine, 100.

Has the testator provided trustees for the management of his bounty? From the considerations already suggested, the answer must be in the affirmative. For the legacy in aid of Little Wanderers, there are two applicants, one in Massachusetts and one in Maine. If the name alone were to govern it is, under the circumstances, near enough to the true name to give it to "The Baldwin Place Home for Little Wanderers," but by the express terms of the will if there is "any such" institution in Maine, "when the bequests are ready to be paid" that is to have the preference. Using as we must the name only as descriptive of the character of the institution intended by the testator as the recipient of the legacy, we find from the constitution and by-laws of the Bangor Children's Home, which are in the case, that, that is "such" an institution as the testator contemplated, that its object and purpose is the same as that of the Baldwin Place

Home. The legacy for homeless and indigent children must therefore be paid to that institution.

In regard to the other legacy it is evident that the testator had in his mind no particular institution, though he used the definite article and the singular number, "The institution." It was plainly in his mind that some then in existence might not be when the legacy was to be paid, or that others might be organized. He described the organization he wished to aid, the object to which he desired his money to be devoted, and left it to be settled, when the time of payment came, to what institutions it should be paid. For this legacy there are four applicants, all from Maine, and all from their organization having the same object and purpose in view, all answering the description in the will. They are all therefore "*such*" institutions as the testator contemplated. We see nothing inconsistent with the testator's expressed intention, in dividing this legacy among the four. On the other hand the words used in the will "if there are *any such*" in Maine, would seem to authorize it. Another consideration tends the same way. These organizations are all local in their operation. In the bequest there is no limit arising from the residence of the beneficiaries. It would therefore seem to be more in accordance with the testator's intention to make the division.

The result is that one of the legacies is to be paid to "The Bangor Home for Children," the other to be equally divided between the four applicants therefor.

Decree accordingly.

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

HENRY J. FOWLER and another

vs.

WESTERN UNION TELEGRAPH COMPANY.

Cumberland. Opinion June 6, 1888.

Telegraphs. Void contracts. Non-delivery of message without fault of company. Burden of proof.

A stipulation or regulation of a telegraph company that it will receive

messages to be sent without repetition during the night for delivery not earlier than the morning of the next ensuing business day, at reduced rates, on condition "that the sender will agree that he will not claim damages for errors or delays, or for non-delivery of such messages, happening from any cause, beyond a sum equal to ten times the amount paid for transmission," although assented to by the sender, is unreasonable and void as against public policy.

Although telegraph companies are engaged in what may be appropriately termed a public employment, they are not common carriers in the strict sense of the term.

In the absence of any contract or regulation modifying their liability they do not insure absolutely the safe and accurate transmission of messages as against all contingencies.

The degree of care which they are bound to use is ordinary care, and that is to be measured with reference to the kind of business in which they are engaged.

They are bound to have suitable instruments and competent servants, and to see that the service is rendered with that degree of care and skill which the particular nature of the undertaking requires.

But this duty does not impose a liability upon them for want of skill or knowledge not reasonably attainable in the art, nor for errors or imperfections which arise from causes not within their control, or which are not capable of being successfully guarded against.

In an action against a telegraph company to recover damages for not delivering a message, the plaintiff makes out a *prima facie* case when he shows that the message which the company undertook to send was not delivered, and that damage has resulted.

The burden is then upon the company to show that the failure to deliver was caused by some agency for which it is not liable.

On report from superior court.

An action for damages for non-delivery of a night message. The facts are stated in the opinion.

Woodman and Thompson, for plaintiffs.

The first defence set up by the brief statement raises the old question of the power of a telegraph company to limit its liability by a printed contract contained in its printed blank which this court has long since considered and decided in the well known cases of *True* v. *The International Tel. Co.* 60 Maine, 9, and *Bartlett* v. *Western Union Tel. Co.* 62 Maine, 209.

The rule as laid down in the leading case of *Hadley* v. *Baxendale* and followed in this state (*Miller* v. *Mariners' Church*, 7 Gr. 51) is that, "In general the delinquent party is

holden to make good the loss occasioned by his delinquency, but his liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. Remote or speculative damages, although susceptible of proof and deducible from the non-performance, are not allowed." This rule does not require that the parties should actually at the time of making the contract, have stopped to consider what the damages would be which would be likely to result from a breach, for in the language of EARL, C. J., in *Leonard* v. *N. Y. Tel. Co.* 41 N. Y. 544, "They very rarely contemplate any damage that would flow from any breach, and very frequently have not sufficient information to know what such damages would be." See, too, *W. U. Tel. Co.* v. *Bertram*, 12 Reporter, 798.

The profit that he would have received from the slaughter and sale of the car load of hogs (75 to 85 head), amounting to four dollars a head, as to this item of loss, that the plaintiff is entitled to recover, having specifically alleged it in his declaration, see *White* v. *Moseley*, 8 Pick. 356; *Hinckley* v. *Beckwith*, 13 Wis. 31; *Fletcher* v. *Tayleur*, 17 C. B. 21.

Baker, Baker and Cornish, for defendant.

Telegraph companies are not common carriers. *Breese* v. *U. S. Tel. Co.* 45 Barb. 274, affirmed in 48 N. Y. 132; *Ellis* v. *Am. Tel. Co.* 13 Allen, 226; *Redpath* v. *Wes. Un. Tel. Co.* 112 Mass. 71; *Grinnell* v. *Same*, 113 Mass. 299; *Birney* v. *Tel. Co.* 18 Md. 341; *Tyler* v. *Same*, 60 Ill. 421; *Tel. Co.* v. *Carew*, 15 Mich. 525; *Same* v. *Neill*, 57 Tex. 583; S. C. 44 Am. Rep. 589; *Same* v. *Blanchard*, 68 Ga. 209 (45 Am. R. 480); *Pinckney* v. *Tel. Co.* 19 S. C. 71; *MacAndrew* v. *Same*, 17 C. B. 3; *Bartlett* v. *Wes. Un. Tel. Co.* 62 Maine, 209.

They are only liable for want of due and ordinary care. *Leonard* v. *N. Y. &c. Tel. Co.* 41 N. Y. 571; *Ellis* v. *Am. Un. Tel. Co.* 13 Allen, 226; *Baldwin* v. *Tel. Co.* 45 N. Y. 74 (6 Am. R. 165); *Sweetland* v. *Tel. Co.* 27 Iowa, 433 (1 Am. R. 285); *Wes. Un. Tel. Co.* v. *Neill*, 57 Tex. 283 (44 Am. R. 589); *Tel. Co.* v. *Griswold*, 37 Ohio St. 301; *Breese*

v. *Tel. Co.* 48 N. Y. 132; *Tel. Co.* v. *Hobson*, 15 Gratt. 122; *Birney* v. *Tel. Co.* 18 Md. 341; *Tel. Co.* v. *Carew*, 15 Mich. 525; *Becker* v. *Tel. Co.* 11 Neb. 87 (38 Am. R. 356); *Tel. Co.* v. *Fontaine*, 58 Ga. 433; 2 Thompson, Neg. 836; *Graham* v. *Tel. Co.* 1 Col. 230; *White* v. *Same*, 14 Fed. Rep. 717; *Tel. Co.* v. *Dryburg*, 35 Pa. St. 298; *Bowen* v. *Tel. Co.* 1 Am. L. Reg. 685; *Stevenson* v. *Same*, 16 Up. Can. Q. B. 530; *De Rutte* v. *Same*, 1 Daly, 547; *Bartlett* v. *Wes. Un. Tel. Co. supra.*

Measure of damages. *Priestly* v. *R. R. Co.* 26 Ill. 205; *R. R. Co.* v. *Hale*, 83 Ill. 360; Gray, Com. by Tel. § 89; *Mackey* v. *Wes. Un. Tel. Co.* 16 Nev. 222; *Behm* v. *Same*, 8 Biss. 131; *Hadley* v. *Baxendale*, 9 Exch. 341; *Griffin* v. *Colver*, 16 N. Y. 490; *Squire* v. *Wes. Un. Tel. Co.* 98 Mass. 232; *Tel. Co.* v. *Graham*, 1 Col. 230 (9 Am. R. 136, note); *Lane* v. *Tel. Co.* 7 Up. Can. C. P. 23; *Hubbard* v. *Same*, 33 Wis. 558 (14 Am. R. 775); *True* v. *International Tel. Co.* 60 Maine, 9; *Cutting* v. *G. T. Ry. Co.* 13 Allen, 381; *Harvey* v. *C. & P. R. R. Co.* 124 Mass. 421; *Weston* v. *G. T. Ry. Co.* 54 Maine, 376; *Lord* v. *Midland Ry. Co.* L. R. 2 C. P. 339; *Horne* v. *Same*, L. R. 8 C. P. 131; *Gee* v. *Yorkshire Ry.* 6 H. & N. 211; *Borries* v. *Hutchinson*, 18 C. B. N. S. 445; *Wilson* v. *Newport Dock Co.* L. R. 1 Ex. 177; *B. C. S. Co.* v. *Nettleship*, L. R. 3 C. P. 499; *Cory* v. *Thames Co.* L. R. 3 Q. B. 181; *Cooper* v. *Young*, 22 Ga. 269; *Waite* v. *Gilbert*, 10 Cush. 177; *Ingledew* v. *Northern R. R.* 7 Gray, 91; *Woodger* v. *G. W. Ry. Co.* L. R. 2 C. P. 318.

FOSTER, J. This case comes up on report. It appears that on the evening of August 20, 1883, the plaintiffs, whose business is that of pork packing, delivered to the defendants' agent, at Portland, for transmission and delivery, the following night message:

"Portland, Aug. 20, 1883.

To H. F. Googins, Union Stock Yards, Ill.

Ship one car hogs to-morrow.

Thompson, Fowler & Co."

The message never having been delivered by the defendants, this action is brought to recover damages alleged to have been sustained in consequence.

In defence of the action the defendant introduced evidence and established the following facts:

At the Union Stock Yards, which are about six miles from Chicago, the defendant company had only a day office, open from half past six in the morning till ten o'clock in the evening. Night messages directed to the Stock Yards, received at the Chicago office during the night, were necessarily kept in that office until after the opening of the office at the Stock Yards on the following morning. This despatch was received at the Chicago office during the night of August 20–1, and the copy was hung upon what was called the Stock Yards' hook in the operating room, awaiting the opening of the office at that place on the morning of the 21st. About thirty minutes past six that morning, and immediately prior to the opening of the Stock Yards' office, a fire suddenly broke out in the operating room of the Chicago office, and spread with such rapidity that nothing could be saved from the room, and this copy, together with everything in the room, was destroyed.

The fire was first discovered in this room upon the back of the "switch board," where it is covered with numerous wires necessarily running very close to each other, and was caused by the crossing of several wires charged with large batteries. This crossing resulted from atmospheric conditions, the moisture accumulating on the back of the switch board forming a partial connection between the wires and acting as a partial conductor, thereby causing the electric current to leave its proper course with the result as above stated.

That such accidents are exceedingly rare is not disputed, and that there are no improvements known to the art or anywhere in use by which the possibility of such an occurrence can be prevented.

In consequence of this fire it became impossible for the defendant to deliver the plaintiffs' message.

This message delivered to the company was written upon a night message blank, and, after stipulating that the company would receive messages to be sent without repetition during the night, for delivery not earlier than the morning of the next ensuing business day, at reduced rates, there followed this condition: "that the sender will agree that he will not claim damages for errors or delays, or for non delivery of such messages, happening from any cause, beyond a sum equal to ten times the amount paid for transmission," etc.

Above the written message were these words: "Send the following night message, subject to the above conditions, which are hereby agreed to."

No evidence was offered at the trial or question raised in reference to the stipulations and condition, further than what appears upon the message blank signed at the bottom of the message. Nor is any question raised by counsel in argument before this court in relation to the validity of such a condition as is found attached to this stipulation or agreement. By its very terms, if held valid, this condition would relieve the company from all liability whatsoever for errors, delays or omissions "happening from any cause." It would protect them from all liability happening as the result of their own negligence. Whatever force or effect other courts may give to such conditions, whether as a regulation of the company or as a contract between the parties, it is now too well settled by this court to admit of question or contradiction, that they are unreasonable and void. *Bartlett* v. *W. U. Tel. Co.* 62 Maine, 209; *True* v. *The International Tel. Co.* 60 Maine, 9; *Ayer* v. *W. U. Tel. Co.* 79 Maine, 493. As in the case of common carriers, they cannot contract with their employers for exemption from liability for the consequences of their own negligence. Whether such conditions are reasonable or unreasonable must be determined with reference to public policy, rather than private contract. *Express Company* v. *Caldwell*, 21 Wall. 270.

The defence, however, is based entirely upon other grounds. No conditions contained in the stipulation are relied upon as a defence in this action. But it is claimed that under the facts in

the case, concerning which there is no controversy, the defendant company cannot be deemed guilty of any negligence, and therefore cannot be held to respond in damages. To ascertain the duties and liabilities of the defendant company we must look to the nature of the employment, and, except so far as it has limited its ordinary obligations by any special stipulation which may be held to be reasonable, be governed by the general and well established principles of law pertaining to such employment.

It is now perfectly well settled by the great weight of judicial authority, that although telegraph companies are engaged in what may appropriately be termed a public employment, and are therefore bound to transmit, for all persons, messages presented to them for that purpose, they are not common carriers in the strict sense of the term. To be sure, they are engaged in a business almost, if not quite, as important to the public as that of carriers. But while the analogy between the common carrier of goods and the common carrier of messages is very strong, nevertheless their responsibility differs in a manner corresponding to the difference in the nature of the services they perform. The common carrier of goods, in the absence of any special contract or regulation limiting its general liability, becomes an insurer of property entrusted to it for carriage. Whereas, in the absence of any contract or regulation modifying the liability of telegraph companies, they do not insure absolutely the safe and accurate transmission of messages as against all contingencies, but they are bound to transmit them with care and diligence adequate to the business which they undertake, and for any failure in such care and diligence they become responsible. This appears to be the doctrine now settled by the courts, and is founded upon reason. The following decisions in this country are authority, and may properly be cited in this connection. *Bartlett* v. *W. U. Tel. Co.* 62 Maine, 220–1; *Ayer* v. *Same*, 79 Maine, 493; *Ellis* v. *Am. Tel. Co.* 13 Allen, 232, which holds them to the use of due and reasonable care, and liable for the consequences of their negligence in the conduct of their business to those sustaining loss or damage thereby. *Breese* v. *U. S. Tel. Co.* 48 N. Y. 141; *Leonard* v.

N. Y. Albany, &c. Tel. Co. 41 N. Y. 571; *Baldwin* v. *U. S. Tel. Co.* 45 N. Y. 751; *Birney* v. *N. Y. & Wash. Tel. Co.* 1 Daly, 547; *N. Y. & Wash. Tel. Co.* v. *Dryburg*, 35 Pa. St. 298; *Graham* v. *W. U. Tel. Co.* 1 Colo. 230; *Sweetland* v. *Ill. &c. Tel. Co.* 27 Iowa, 433; *W. U. Tel. Co.* v. *Carew*, 15 Mich. 525; *W. U. Tel. Co.* v. *Neill*, 57 Texas, 283; *Wash. & N. O. Tel. Co.* v. *Hobson*, 15 Gratt. 122; *Pinckney* v. *Tel. Co.* 19 S. C. 71; *Smithson* v. *U. S. Tel. Co.* 29 Md. 167; *Little Rock, &c. Tel. Co.* 41 Ark.

A more stringent rule, however, was at first suggested in two early cases. The earliest one in which the question of the liability of telegraph companies arose was that of *MacAndrew* v. *Electric Tel. Co.* 17 C. B. (84 E. C. L. 3), decided in England in 1855. This case by implication only can be said to be authority for holding them to the liability of insurers. It was soon followed in this country by the case of *Parks* v. *Alta California Tel. Co.* 13 Cal. 422, decided in 1859, the only case to be found in which telegraph companies have been expressly held to be common carriers and subject to the same severe rule of responsibility. With this exception, all the American courts which have expressed any decided opinion upon this question have concurred in the doctrine above stated.

The degree of care which these companies are bound to use is to be measured with reference to the kind of business in which they are engaged. As compared with many other kinds of business the care required of them might be called "great care." While meaning really the same, it is variously stated by different courts in the decisions to which we have referred,—"due and reasonable care," "ordinary care and vigilance," "reasonable and proper care," "reasonable degree of care and diligence," "care and diligence adequate to the business which they undertake," "with skill, with care, and with attention," "a high degree of responsibility." These are but the varied forms of expressing the requirement of what is known in law as ordinary care, as applied to an employment of this nature, an employment which is not that of an ordinary bailee. The public, as a general rule, have no choice in the selection of the company. They have

none in the selection of its servants or agents. They have no control over the agencies or instrumentalities used in conducting the business of the company. The public must take the agencies which the companies furnish, and they have no supervision over its management or methods of performing the service which it holds itself out as willing and ready to perform. And while we do not hold that these companies are common carriers and subject to the same severe rule of responsibility, we think that those who engage in the business of thus serving the public by transmitting messages, should be held to a high degree of diligence, skill, and care, and should be responsible for any negligence or unfaithfulness in the performance of their duties.

A telegraph company which holds itself out to the public as ready to transmit all messages delivered to it, is bound to have suitable instruments and competent servants, and to see that the service is rendered with that degree of care and skill which the peculiar nature of the undertaking requires. We do not understand, however, that this duty would impose a liability upon the company for want of skill or knowledge not reasonably attainable in the art, nor for errors or imperfections which arise from causes not within its control, or which are not capable of being guarded against. *White* v. *W. U. Tel. Co.* 14 Fed. Rep. 710; *Sweetland* v. *Ill. & Miss. Tel. Co.* 27 Iowa, 433; *Leonard* v. *N. Y. &c. Tel. Co.* 41 N. Y. 572; *Ellis* v. *American Tel. Co.* 13 Allen, 233; *Bartlett* v. *W. U. Tel. Co.* 62 Maine, 221.

We think our own court has expressed the doctrine we are discussing in language so fitting that we may be justified in making the following extended quotation from the case last cited:

"To require a degree of care and skill commensurate with the importance of the trust reposed, is in accordance with the principles of law applicable to all undertakings of whatever kind, whether professional, mechanical, or that of the common laborer. There is no reason why the business of sending messages by telegraph should be made an exception to the general rule. This requires skill as well as care. If the work is difficult, greater skill is required. It is often necessary to entrust to this mode of communication matters of great moment, and therefore the

law requires great care. It is necessary to use instruments of a somewhat delicate nature, and accurate adjustment, and therefore they must be so made as to be reasonably sufficient for the purpose. The company holding itself out to the public as ready and willing to transmit messages by this means, pledges to that public the use of instruments proper for the purpose, and that degree of skill and care adequate to accomplish the object proposed. In case of failure in any of these respects the company would undoubtedly be liable for the damage resulting. This would not impose any liability for want of skill or knowledge not reasonably attainable in the present state of the art, nor for errors resulting from the peculiar and unknown condition of the atmosphere, or any agency from whatever source, which the degree of skill and care spoken of, is insufficient to guard against or avoid."

Taking the facts as proved in the case now under consideration, and applying the principles of law to them, are the plaintiffs entitled to recover?

They make out a *prima facie* case when they show that the message which the company undertook to send was not delivered and that damage has resulted. It is not necessary that they show affirmatively that the failure to deliver happened through any omission of duty by the company or its officers, or from some defect in the instrumentalities employed by the company. The failure to deliver being shown, the legal presumption is that it was caused by some one or the other of these causes, or of all combined. It then becomes incumbent on the defendant, if it would relieve itself from the consequences of such presumption, to overcome that presumption by showing that in the attempted transmission and delivery of the message, it exercised all proper care and diligence commensurate with the undertaking, and that the failure is not attributable to any fault or negligence on its part. or that of any of its employees. *Bartlett* v. *W. U. Tel. Co.* 62 Maine, 221; *Baldwin* v. *U. S. Tel. Co.* 45 N. Y. 744; *W. U. Tel. Co.* v. *Graham*, 1 Col. 230; Shear. & Red. on Neg. § 559; *W. U. Tel. Co.* v. *Wenger*, 55 Pa. St. 262.

The case last named was where a message, sent by the plaintiff's line to New York, was transmitted only to Philadelphia, and no reason was assigned for the failure to transmit the message to its destination. The court say: "No such reason as the law would recognize, and indeed no reason at all, was given for the failure to transmit the message to its destination. Thus was presented a clear case of gross negligence against the company, in performing its undertaking, and a consequent liability to the plaintiff for such damage as he had sustained in consequence thereof."

The case at bar is unlike that. While it is true that the message in this case was not transmitted to its destination, the defendant here has assumed the burden of proof, after the *prima facie* case of the plaintiffs, and by evidence which is uncontradicted has shown that the failure was caused by agencies over which it had no control, and for which it was not responsible. The despatch when received at the Chicago office during the night, was taken from the wire, and the relay copy was hung upon the Stock Yards' hook to be forwarded the following morning when the office at that place should open. This is all that could be done that night. By the terms of the company's stipulation or regulation to which the plaintiffs, by their signature thereto, either assented, or by which they must be held to be estopped, (*Breese* v. *U. S. Tel. Co.* 48 N. Y. 141–2; *Grinnell* v. *W. U. Tel. Co.* 113 Mass. 307) aside from the void condition of which we have spoken, the message was not to be delivered earlier than the morning of the next ensuing business day. An earlier transmission in this case was impossible. Immediately prior to the time for forwarding the message over the line communicating with the Stock Yards, a fire suddenly broke out in the operating room, and before anything could be rescued, the whole room was enveloped in flames and this message destroyed.

The origin of the fire, as we have stated and as the evidence shows, was due to atmospheric conditions and influences over which the defendant company had no control. There were no improvements known or anywhere in use which could guard against the possibility of such an occurrence. If the company

ought to have foreseen that such an accident might happen, or if such an occurrence could reasonably have been anticipated, and it could have been guarded against, then the omission to provide against it might be held to be actionable negligence. But the facts as they appear in the case rebut any negligence on this ground. That it was likely to occur was only a possibility. The fire does not appear to have originated through any fault or negligence of the company or its employees, or through any imperfection in the chemicals, metals, machinery or implements used by it, which, by any skill or knowledge reasonably attainable in the present state of telegraphy, could be guarded against.

The facts proved bring the case within the decisions to which we have referred in another part of this opinion, and upon those facts and the law it is the opinion of the court that the plaintiffs cannot prevail.

Judgment for defendant.

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

FRED A. H. PILLSBURY *vs.* EPHRAIM C. SWEET and another.

Penobscot. Opinion June 9, 1888.

Practice. Requested instructions. Expression of opinion. R. S., c. 82, § 83.

A requested instruction, which has no basis in the testimony in the case, should not be given.

To refuse to give such an instrution is not expressing "an opinion upon issues of fact arising in the case," contrary to the provisions of R. S., c. 82, § 83.

ON exceptions.

An action for damages sustained by plaintiff by reason of an injury to his mare while in the keeping of the defendants.

At the trial the defendants asked the court to instruct the jury as follows: "If the sorrel horse, Jim, was an ordinary safe horse, and, while properly hitched and standing in his stall, kicked the plaintiff's mare, the defendants' duty as bailees for hire would not make them liable."

This request was refused, the presiding justice remarking, "I do not regard this request as being in accordance with the evidence. It is upon a state of facts which the evidence does not warrant."

Barker, Vose and Barker, for the plaintiff, cited: *Copeland* v. *Copeland*, 28 Maine, 525; *Penobscot R. Co.* v. *White*, 41 Maine, 512; *Lord* v. *Kennebunkport*, 61 Maine, 463; *Waite* v. *Vose*, 62 Maine, 184; *Powers* v. *Mitchell*, 77 Maine, 361; *Roberts* v. *Plaisted*, 63 Maine, 335; *State* v. *Pike*, 65 Maine, 115; *Soule* v. *Winslow*, 66 Maine, 447; *Stearns* v. *Janes*, 12 Allen, 582; *Com.* v. *Tarr*, 4 Allen, 315; *Com.* v. *McCann*, 97 Mass. 580; *Coker* v. *Ropes*, 125 Mass. 577; *Northcoate* v. *Bachelder*, 111 Mass. 322; *Stone* v. *Sanborn*, 104 Mass. 319; *Saloman* v. *Hathaway*, 126 Mass. 482; *Pratt* v. *Amherst*, 140 Mass. 167; *Wilson* v. *Lawrence*, 139 Mass. 318; *Whitehead & A. M. Co.* v. *Ryder*, 139 Mass. 366; *Carter* v. *Goff*, 141 Mass. 123; *State* v. *Smith*, 65 Maine, 269; *State* v. *McDonald*, 65 Maine, 465; *Grows* v. *Maine Cen. R. Co.* 67 Maine, 100; *McLellan* v. *Wheeler*, 70 Maine, 286.

Bertram L. Smith, for defendants.

The defendants claim that the judge in refusing the requested instruction expressed an opinion upon issues of fact arising in the case in violation of the R. S., c. 82, § 83.

It will be observed that in plaintiff's brief he cites no decisions whatever, decided subsequent to the statute invoked by us. Neither do the decisions since help his case. The decision since (70 Maine, 286, and 73 Maine, 316) construing the statute are based upon the fact that the facts in the cases were not in issue and were uncontroverted.

DANFORTH, J. The requested instruction was properly refused for want of merit. The issue involved the degree of care exercised by the defendants in keeping the plaintiff's mare. No matter therefore how good the care exercised in keeping their own horse, alleged to have done the injury; if that injury was caused by the defendants' negligence in regard to the mare, they would not be relieved from liability. The request asks this relief

simply upon the ground that defendants' horse "was an ordinary safe and gentle horse, and properly hitched and standing in his stall," when the injury was done. This is evidently insufficient. It may have been that the stall was not a proper one; it may have been negligent to have put the horse into such a stall by the side of the mare, or the mare may have been improperly hitched.

Besides it does not appear in the exceptions that the judge had not fairly and clearly given all the law applicable to the case. In such a case it is no part of the duty of the court, but in many cases would be very objectionable to give the same law in answer to a request, in which is embodied hypothetical facts, grouped together in such a manner as to give them undue prominence and weight with the jury and tending to draw their attention from other facts equally important.

But it is claimed that the judge expressed an opinion in refusing the request. What that opinion was is not stated and no where appears in the exceptions. What he did say in substance and effect, was that there was no evidence in the case which would justify such an instruction. This if true would justify the refusal of the request even if in the abstract it should be sound law. R. S., ch. 82, § 83, requires that "the presiding justice shall rule and charge the jury . . . upon all matters of law arising in the case, but shall not, during the trial including the charge, express an opinion upon issues of fact arising in the case." It does not require that he shall instruct the jury upon questions of law not arising in the case especially when based upon hypothetical facts founded upon testimony not in the case. This latter course, as already seen, is nearly as objectionable as the omission of some portions of the law that is involved. It tends to confuse the minds of the jury and does injustice to the opposing party as it almost necessarily leads the jury to the conclusion that there is testimony in the case from which they may infer the existence of the facts assumed. To give an opinion upon the force and effect of testimony which is in the case, is one thing, and to state that there is none tending, or sufficient to prove a given fact, is another and a very different

thing. The former is prohibited by the statute, the latter is not, and by necessary inference at least it still remains the duty of the court on all occasions requiring it, to refuse all requests not shown to have a basis in the testimony. In this case no such foundation appears.

The request was therefore properly refused not only for its want of merit, but also for its want of testimony as a basis.

Exceptions overruled.

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

CHESTER G. ROBINSON, appellant, *vs.* SAMUEL CHASE.

Cumberland. Opinion June 12, 1888.

Insolvent law. Discharge. Practice. Waiver.

When, on the return day of the petition of an insolvent debtor for a discharge, a creditor appears to object and files a motion for an extension of time for filing his objections, the court of insolvency has power to grant the motion and fix a future day for filing the objections.

The debtor waives his right to object to the extension if he does not make his objection known until after taking his chances at the trial of the issues raised by the creditor's objections to the discharge.

ON exceptions.

An appeal from a final decree of a court of insolvency denying the appellant a discharge. The point is stated in the opinion.

Frank and Larrabee, for the debtor.

Enoch Knight, for the creditor.

LIBBEY, J. We feel clear that the court of insolvency on the return day of a notice on the debtor's petition for a discharge had the power to enlarge the time in which creditors might file their objections, to the debtor's right to a discharge. We think it a power inherent in the court having full jurisdiction over the subject matter. But if the debtor had a legal right to object thereto, by making no objection to the extension and appearing at the time fixed for a hearing after the objections were filed and going to trial before the court upon the issues raised by the

objections, he waived any right which he had to object to the extension. He could not elect to go on without objection and take his chance in the trial of the issues raised, and if the decree should be against him then for the first time in the appellate court claim that the decree should be set aside because the creditors were improperly in court.

Exceptions overruled.

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

RUSSELL S. BRADBURY

vs.

FIRE INSURANCE ASSOCIATION OF ENGLAND.

SAME *vs.* NORWICH UNION FIRE INSURANCE SOCIETY.

SAME *vs.* WESTERN ASSURANCE COMPANY.

SAME *vs.* WESTCHESTER FIRE INSURANCE COMPANY.

SAME *vs.* NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

Androscoggin. Opinion June 12, 1888.

Fire insurance. "Contained therein."

A fire policy on plaintiff's "frame stable building, occupied by assured as a hack, livery and boarding stable," specifically described; and "on his carriages, sleighs, hacks, horses, harnesses, blankets, robes and whips, contained therein," does not cover damage by fire to the plaintiff's hack, while in a repair shop one-eighth of a mile away, on another street, in the city, without the knowledge or consent of the insurer, for the temporary purpose of being repaired.

ON report.

The opinion states the cases and essential facts.

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

It would be expected that a man having a hack would use it for funerals, weddings, going to places of entertainment generally, hotels, and, if necessary, to repair shops for temporary repairs, and that such a use would not be inconsistent with the contract of insurance. In support of this position we cite, *Lyons* v.

Providence and Washington Insurance Co. 13 R. I. 347; S. C. 43 Am. Rep. 32; also *Holbrook* v. *St. Paul Fire and Marine Ins. Co.* 25 Minn. 229. The court in this case says: "Contracts of insurance are presumed, unless the language forbids it, to be made with reference to the character of the property insured during the owner's use of it in the ordinary way, and for the purposes for which such property is ordinarily held and used," etc., etc.

Again, *The London and Lancaster Fire Ins. Co.* v. *Graves*, Kentucky Court of Appeals, Feb. 21st, 1883. Two buggies were insured against fire and described as contained in a frame building, occupied as a livery stable. These were destroyed by fire while temporarily removed from the building for repairs, and it was held that the insurers were liable. *McClure* v. *Girard Ins. Co.* 43 Iowa, 349; *Everett* v. *Continental Ins. Co.* 21 Minn. 76; *Longueville* v. *Western Insurance Co.* 51 Iowa, 553. "Briefly stated, the rule seems to be that the temporary removal of property (whether occasional or habitual) in pursuance of a use which is the certain and necessary consequence arising from the character of the property, without any change in the ordinary place of keeping, will be no defence to an action on the policy."

The reasoning of Lord MANSFIELD, allowed in the case of the marine insurance, applies exactly to this question. *Pelly* v. *Governor & Co. and Royal Exchange Assurance*, 1 Burr. 341; *Holbrook* v. *St. Paul Fire and Marine Insurance Co.* 25 Minn. 229.

Nathan and Henry B. Cleaves, for the defendant in each case, cited: Wood, Insurance, 110; Blodgett, Fire Insurance, 22; *Wall* v. *East River Mut. Ins. Co.* 7 N. Y. 370; *Annapolis R. R. Co.* v. *Baltimore Ins. Co.* 32 Md. 37 (5 Bennett, F. I. Cas. 258); *Maryland Fire Ins. Co.* v. *Gusdorf*, 43 Md. 506 (5 Ins. L. J. 384); *Lycoming Co.* v. *Updegoff*, 40 Pa. St. 311 (4 Bennett, F. I. C. 565); *Prov. & Wor. R. R. Co.* v. *Yonkers Fire Ins. Co.* 10 R. I. 74; *Lewis* v. *Springfield Ins. Co.* 10 Gray, 159; *Fair* v. *Manhattan Ins. Co.* 112 Mass. 320; *Eddy Street Foundry Co.* v. *Hampden S. & M. F. Ins. Co.*

1 Cliff. 306; *Williamsbury City F. Ins. Co.* v. *Cary*, 83 Ills. 453 (6 Ins. L. J. 493); *Leibenstein* v. *Etna Ins. Co.* 45 Ills. 313; *Wood* v. *Hartford Fire Ins. Co.* 13 Conn. 544; *Alexander* v. *Germania Ins. Co.* 66 N. Y. 464.

LIBBEY, J. These actions are on fire policies, and being substantially alike were tried together and come to this court in one report. The first four policies insure a certain sum on the plaintiff's "frame stable building, occupied by assured as a hack, livery and boarding stable, situated on the north side of Court street, Auburn, Maine," and "five hundred dollars on his carriages, sleighs, hacks, hearses, harnesses, blankets, robes and whips contained therein." The fifth does not insure the building, but insures fifteen hundred dollars on the same kinds of personal property "stored in the private frame stable occupied by assured and situated near east side of Main street, Auburn, Maine."

The loss claimed by the plaintiff is for damage by fire to a hack not in his stable named in the policies at the time of the damage, but in a repair shop of one Litchfield, on another street about one-eighth of a mile distant, where it had been removed the day before the fire without the knowledge or consent of the defendant, and it is admitted that the board rate for insurance on Litchfield's repair shop and contents was one per cent more than on the plaintiff's stable on Court street.

The damage to the hack by fire while at Litchfield's shop is admitted, and no question is made as to the sufficiency of the notices. The only contention between the parties is, whether the insurance attached to and followed the plaintiff's carriages, hacks, etc., when removed from his stable to another place for repairs or some other temporary purpose, or was limited to such carriages only as were at or in the stable named at time of loss or damage.

Upon this question there appears some conflict among the authorities. The general rule stated by text writers and held by the general current of decided cases is, that place where the personal property insured is kept is of the essence of the contract, as by that the character of the risk is largely determined,

and the property is covered by the policy only while in the place described. Wood on Ins. p. 110; Blodgett on Fire Ins. p. 22; *Eddy Street Iron Foundry* v. *The Hampden S. & M. F. Ins. Co.* 1 Cliff. 300; *Annapolis & Eldridge R. R. Co.* v. *Baltimore Ins. Co.* 43 Md. 506; *Fitchburg R. R. Co.* v. *Charleston M. F. Ins. o.* 7 Gray, 64.

The following cases are cited as establishing an exception to the general rule and as sustaining the plaintiff's contention. *Everett* v. *Continental Ins. Co.* 21 Minn. 76; *Holbrook* v. *St. Paul F. & M. Ins. Co.* 25 Minn. 229; *McClure* v. *Girard Ins. Co.* 43 Iowa, 349; *Longueville* v. *Western Ins. Co.* 51 Iowa, 553; *Lyons* v. *Providence Washington Ins. Co.* 13 R. I. 347.

We think a careful examination of all these cases will show that the chattels insured are so described in the policy that they can be identified without reference to the building or place where they were kept, and the courts held that the words "contained in" a certain building, or kept in a certain building or place, was a part only of the description of the chattel, and if from its nature, character or ordinary use, the parties must have understood that it was to be out of the building or place a part of the time in ordinary use, the policy should be held to cover it while so out. This is going to the verge in construing the language used by the parties in a contract, when, ordinarily, it does not bear such meaning. But this case does not appear to us to be within the authority of those cases.

The policies in suit do not insure a particular carriage or hack by any description by which it can be identified without reference to the stable. They do not insure all the plaintiff's carriages, hacks, etc., used in his livery business, contained in the stable described. It cannot be held that they cover only such carriages, hacks, etc., as were contained in the building named at the date of the policies. From the nature of the plaintiff's business, it must have been in the contemplation of the parties that the chattels named might be changed from time to time during the year, some sold, some worn out, some destroyed by accident, and others put in to take their places. The policies are similar

to an insurance of a shop keeper on his stock of goods in his shop, or of a railroad company on its rolling stock on its road, constantly changing. In such case the property insured can be ascertained only from the place of business named. *Lyons* v. *Providence Washington Ins. Co.* 13 R. I. 347; *Eddy Street Iron Foundry* v. *Hampden S. & M. F. Ins. Co.* 1 Cliff. 300; *Ring* v. *Phœnix Assurance Co.* Mass. N. E. R. V. 5, No. 14, p. 387. The policies insure such of the plaintiff's carriages, hacks, etc., as are contained in his stable at the time of loss. We can see no other way of identifying the property covered by the policies. It cannot be that the policies should be so construed that they will cover a hack once put into the stable and then taken out, wherever it may be. The language of the contract is not apt to embrace such a risk. The risk might thus be increased two fold or three fold, and still if the contract must be construed as covering it, it is not a forfeiture of the policy for an increase of the risk. It is simply the risk contemplated by the parties. *Fitchburg R. R. Co.* v. *Charleston M. F. Ins. Co.* 7 Gray, p. 66.

The view we take of the first four policies makes it unnecessary to consider whether the terms of the fifth policy should receive a construction more strongly against the plaintiff. They are certainly no more favorable to him.

The actions are not sustained.

Judgment for the defendants in each action.

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

ROCKLAND, MT. DESERT AND SULLIVAN STEAMBOAT COMPANY

vs.

ARTHUR SEWALL, administrator.

Knox. Opinion June 12, 1888.

Corporation. Stock subscription. Waiver.

An agreement signed by several to form a corporation under the general statute, fixing the capital stock at forty thousand dollars, by which each

agrees to contribute towards the capital the sum set against his name, is not an agreement to take and pay for a certain number of shares of the capital stock when the corporation is formed, and no action can be maintained upon it by the corporation, unless the whole amount of the capital is subscribed and taken, or there is a waiver of such subscription by the subscriber.

On report.

Assumpsit to recover the par value of ten shares of capital stock which the plaintiff alleges the defendant's intestate agreed to take and pay for, by signing an agreement to form a corporation with a capital stock of forty thousand dollars and to take and pay for ten shares of the same.

The point is stated in the opinion.

A. P. Gould, for the plaintiff.

This case is not dissimilar from the case of *R. R. Co.* v. *Kinsman*, 77 Maine, 370.

For authority in that case reference is made to *Kennebec & P. R. R. Co.* v. *Jarvis*, 34 Maine, 360.

The decision in the latter case is quoted and its reason expressly sanctioned in *R. R. Co.* v. *Buck*, 65 Maine, 536.

In *R. R. Co.* v. *Veazie*, 39 Maine, 571, the charter provided the minimum number of shares, and that number was not subscribed.

The authorities cited by the court in the former opinion are in conflict with the equitable and sensible decision of our own court. The attention of the Massachusetts court seems not to have been drawn to the distinction made by our court.

If there had been no organization of a corporation there could be no question but that Mr. Sewall would have been responsible to contribute to his associates the sum of one thousand dollars towards the construction of the steamer. This liability became, by force of the organization into a corporation, a debt due to that body, upon the principle settled in many cases where the subscription was before the charter was obtained. *K. & P. R. R. Co.* v. *Palmer*, 34 Maine, 366; *Penobscot R. R. Co.* v. *Dummer*, 40 Maine, 172; *Thompson* v. *Page*, 1 Met. 565.

Sewall was a member of the corporation and became such by signing the preliminary articles of agreement, and as such was affected by all its corporate doings. The record of its doings is the most proper evidence of the proceedings of the corporation. *Penobscot & K. R. R. Co.* v *Dunn*, 39 Maine, 587; *R. R. Co.* v. *Dummer*, 40 Maine, 172.

C. W. Larrabee, for defendant, cited this case: 78 Maine, 167; 1 Chitty's Pl. (12 Am. ed.) 320; *Cabot &c. Bridge* v. *Chapin*, 6 Cush. 53; Wood's Field, Corporations, § 78; *K. & P. R. R. Co.* v. *Waters*, 34 Maine, 369.

LIBBEY, J. This action has already been before this court when it was held that upon the evidence as then reported, it was not maintainable, 78 Maine, 167. The case was then carefully and fully considered, and unless as now reported there is some element in it not then before the court which should change the result, we must affirm that decision. Upon a careful examination of the report the only new evidence that we discover is that tending to show that Edward Sewall, the defendant's intestate, was present when some negotiations were had by a committee of the associates, prior to the organization of the corporation, with one Fessenden for the construction of a steamboat for the use of the corporation when formed, and although not a member of the committee, at some stage in the negotiations participated in the general conversation in regard to the contract; but the contract was not made until sometime afterwards, and it does not appear whether he advised the making of the contract or opposed it. If he advised it we do not see how it can affect his liability in this case. This action is not upon that contract seeking to charge him as one of the contracting parties, nor is it in behalf of the other associates for a contribution by him towards the payment for the boat. But it is upon the contract signed by him for what he agreed to contribute towards the capital stock of the plaintiff corporation when organized. And the question here is whether he is legally liable to the plaintiff on that contract. That question was determined by this court by its former decision. But we are urged by the learned counsel for the plaintiff

to reconsider the case and to reverse that decision. It is claimed by him, that Mr. Sewall's contract was to take and pay for ten shares of the capital stock of the corporation when organized unconditionally and without regard to any assessments, and that the case comes directly within the authorities in this state cited by him in which the defendant has been held liable on such a contract. We think the error is in treating Mr. Sewall's contract as an unconditional one to take and pay for ten shares of the stock whether the capital was all subscribed or not. The agreement signed by him was one signed by the several associates agreeing to form a corporation for the purpose therein specified, and fixing the capital stock at forty thousand dollars, divided into shares of one hundred dollars each. And the parties agreed to contribute toward the capital of the company thus fixed the sum of money that they might severally place against their names. Sewall signed, placing against his name ten shares. This was equivalent to an agreement by him to contribute a thousand dollars towards the capital of the corporation fixed at forty thousand dollars. We think fairly construed that his liability was to depend upon the capital stock being all subscribed for and taken, that he was to contribute one-fortieth of the capital. Clearly it cannot be held that his undertaking was to become a stockholder in a corporation having for its object the purchase and running of a steamboat as specified in the agreement with only five thousand dollars of its capital subscribed for, so that he would bear one-fifth of the liability; and this we understand to be the ground upon which it was before decided.

There is nothing in the evidence reported which can be held to prove that Mr. Sewall ever modified the contract declared upon by, in any way, waiving his right to have all the capital taken. We think the case is clearly within the doctrine of *Eaton* v. *The Pacific Bank*, 144 Mass. 260.

Judgment for the defendant.

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

REBECCA J. ROGERS, appellant, *vs.* JAMES E. MARSTON.

Cumberland. Opinion June 12, 1888.

Probate practice. Heir. Executor and administrator.

The next of kin and heir at law of a testator has sufficient legal interest in the estate to authorize him to petition the probate court that the executor be required to render his final account.

ON report of facts agreed.

Appeal from the decree of the judge of probate.

The facts are stated in the opinion.

John A. Waterman and C. W. Goddard, for the appellant, cited: *Davis* v. *S. D. No. 2, in Bradford*, 24 Maine, 351; *Estes* v. *S. D.* 19, *in Bethel and Milton*, 33 Maine, 171; *Whittier* v. *Sanborn, and al.* 38 Maine, 34; *Jordan* v. *S. D. No. 3, in Lisbon and Webster*, 38 Maine, 169; *Norton* v. *Soule*, 75 Maine, 386; *S. D. No. 3, in Sanford* v. *Brooks*, 23 Maine, 543; R. S., c. 11, § § 40, 48; R. S., c. 3, § 51; *Bugbee and wife* v. *Sargent and al.* and cases there cited, 23 Maine, 271; R. S., c. 75, § § 1, 7; *Walker* v. *Bradbury*, 15 Maine, 207, 210, 216; *Potter, Judge*, v. *Cummings*, 18 Maine, 55; R. S., c. 64, § 9, p. 3; § § 55, 56; *Veazie Bank* v. *Young*, 53 Maine, 560; also *Farrar* v. *Parker*, 3 Allen, 556; *Smith* v. *Sherman*, 4 Cush. 408; *Boynton* v. *Dyer*, 18 Pick. 1; *Smith* v. *Bradstreet*, 16. Pick. 264; *Lawless* v. *Reagan*, 128 Mass. 592, and *Pierce, Exr.* v. *Gould*, a Massachusetts case decided in Essex county in January, 1887.

W. F. Lunt, for the defendant.

"School districts, whether a part of one or more towns, which have exercised the privileges of a district for one year, are presumed to be legally organized; and all districts legally organized are corporations with power to hold and apply real and personal estate for the support of schools therein, and to sue and be sued." Section 40, ch. 11, R. S. The power to sue

and be sued gives to a corporation the right to settle or compromise claims.

When a city has a judgment from which an appeal is about to be taken, the council may, if done in good faith, cancel the judgment on the payment of costs, and such an agreement, when executed, is binding upon the corporation. *Petersburg* v. *Mappin*, 14 Ill. 193; *Supervisors* v. *Bowen*, 4 Lansing, 24; 1 Dillon on M. Corp. § 398.

The duties by law imposed upon a school district as a corporation are of a public character, and all its powers are directed to the education of persons residing therein.

The purposes for which such a corporation exists are of a charitable nature, and almost all gifts for educational purposes are held to be charitable. 2 Perry on Trusts, § 700; *Jackson* v. *Phillips*, 14 Allen, 552; *Swasey* v. *Amer. Bible So.* 57 Maine, 527; *Tainter* v. *Clark*, 5 Allen, 66. If the school district is a mere trustee, it is not within its power to annul the trust. It may refuse to perform the duties of the trust, but it cannot affect the action of the will.

If the district is a trustee, (the children of the district being the *cestui que trust*,) and has abused its trust, an heir at law of the testator is not specially injured.

"If the trustee of a charity abuse the trust, misapply the charity fund or commit a breach of the trust, the property does not revert to the heir or legal representative of the donor, unless there is an express condition of the gift, that it shall revert to the donor or his heirs, in case the trust is abused." *Brown* v. *Meeting St. Baptist Soc.* 9 R. I. 177.

The rights of the beneficiary do not depend upon the trustee's acceptance. 2 Pom. Eq. 1007.

"Heirs and personal representatives of a donor have no beneficial interest reverting or accruing to themselves from the breach or non execution of a trust for a charitable use. *Sanderson* v. *White*, 18 Pick. 328; *Dublin's Case*, 38 N. H. 459; *Chapin* v. *School Dist.* 35 N. H. 445; *Hadley* v. *Hopkins*, 14 Pick. 241. And numerous cases cited in note 1, to section 744, 2 Perry on Trusts.

LIBBEY, J. The matters in contention between the parties in this case arise in the settlement of the estate of Crispus Graves, who died testate in 1879. His will was probated and the respondent was duly appointed and qualified as executor in April of that year. By his will the testator first provided that his brother, Ebenezer C. Graves, have his maintenance out of his estate during his life. The second clause in the will is as follows: "After the decease of said Ebenezer I give, devise, and bequeath to school district numbered five, in the town of Falmouth, all the residue of my estate, both real and personal, wherever the same may be found, for the purpose of educating the children of said district." Ebenezer died September, 1884. On the third Tuesday of February, 1885, the respondent settled, in probate court, his first account as executor, by which there appeared in his hands a balance of five thousand four hundred five dollars and thirty-three cents.

The petitioner is of next of kin, and one of the heirs at law of said Crispus Graves, and in April, 1886, she petitioned the probate court that said executor be required to settle his final amount of his administration of said estate. In June, 1886, the respondent appeared and filed his answer to the petition, claiming that the petitioner had not by law nor by the provisions of the will, any interest in the estate.

In support of his answer, the respondent relies on a release from said district, dated April 10, 1885, executed by one Wilder, agent, duly authorized therefor by vote of the district, by which the district, "in consideration of the sum of four hundred dollars, ($400) the receipt of which is hereby acknowledged, do hereby release, compromise, settle and discharge its claim against James C. Marston, executor of the last will and testament of Crispus Graves, late of Deering, deceased, for all sums of money *due it or claimed by it* under said will, as shown by said Marston's account."

By this it appears that the school district, for four hundred dollars released all claim it had as residuary legatee, and it would seem that the respondent, in his said capacity, still holds in his

hands, belonging to said estate, five thousand fifty dollars and thirty-three cents.

After hearing the parties, the judge of probate adjudged "that the petitioner, though one of the heirs at law and next of kin of said deceased, is not by law, nor the provisions of the will of the deceased, interested in said estate or the subject," and decreed that the petition be dismissed.

We think this decree erroneous. The question is raised and discussed by counsel whether a school district can take by devise. property to be held in trust for the education of its children. The question is not free from doubt; much may be said on both sides, but the school district and all the heirs at law, interested in the question, have not been notified and are not before the court, and, as the decision of the question is not necessary, in our opinion, to the result of the case before us, we do not decide it.

If a school district can take by devise, money to be held and used for the education of its children, it can only be by direct vote of the district in legal meeting, accepting it. If taken and held for such a trust, the court has jurisdiction to enforce the execution of the trust, and if the fund should be lost by embezzlement, misappropriation, or negligence, a decree might be rendered therefor against all the inhabitants of the district, so that the matter might interest many who would receive no direct benefit. The case does not show any such acceptance. The vote to discharge any claim it might have before acceptance, for a small percentage cannot be held to be an acceptance of the devise by the district.

Then if the school district took by the devise, and released, five thousand dollars of it in the hands of the executor, it presents a proper question for the decision of the court whether he does not hold it, in his capacity, for the benefit of the heirs of his testator.

But the first step in the litigation is the settlement by the executor of his final account. Until that is done it cannot be assumed that there will be anything in his hands for distribution. When that is done, if there is anything remaining in his hands,

the questions to which we have alluded, can properly be raised by a petition for a decree of distribution, or by bill in equity, when all the parties interested will be summoned in and have a right to be heard. We only decide now, that an heir at law has a right to petition the probate court that the executor be required to settle his final account.

Decree of probate court reversed. Respondent required to settle his final account as prayed for. Case remanded to probate court for further proceedings.

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

H. A. DOW *vs.* JOHN D. MARCH.

Cumberland. Opinion June 12, 1888.

Practice. Want of service. No judgment.

It is correct to refuse to allow judgment, when from an inspection of the officer's return it appears that the service, by summons, was only thirteen days before the court.

ON exceptions from superior court.

The opinion states the point.

E. King and George C. Hopkins, for plaintiff.

We think the ruling of the judge that the defendant did not waive the defect in the service by making no appearance, was erroneous.

The waiver consists in the neglect by the defendant to do that without which the objection becomes of no avail, that is to plead in abatement, or make the motion, within the time limited in the rules. *Bray* v. *Libby*, 71 Maine, 281; *Richardson* v. *Rich*, 66 Maine, 252; *Snell* v. *Snell*, 40 Maine, 307.

PETERS, C. J. The question is whether a judge can refuse to allow judgment to go in an action in which, on inspection of the officer's return on the writ, it appears that service, by summons, was made only thirteen days before the return day of

the writ, the defendant failing to appear in the action. The refusal of the judge was correct. The law requires the service to be made fourteen days before the return term. Anything less than that is not a legal service, in other words, is not a service. And a defendant may rely in such case on a want of notice as an excuse for his non appearance in the action. He may expect that an improper judgment will not be accorded against him. If a thirteen days' service will do, then one day's notice would do just as well.

The cases are entirely different from this, in which it has been held, as in *Snell* v. *Snell*, 40 Maine, 307, that an appearance, though special, cures a defective service, unless seasonable plea or motion be made after appearance to take advantage of the defect. A defendant in such case waives an insufficient service, if he appears to object to it, but fails to make his objection as required by the rules of court, and his appearance stands for all purposes. The presumption is that he assents to the service, and appears generally, having taken no steps to indicate to the contrary.

Exceptions overruled.

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

MARY M. SHOREY *vs.* JOHN D. CHANDLER.

Kennebec. Opinion June 18, 1888.

Pleadings. Allegation of time. Amendments. Practice.

When the allegation of time, is stated in a declaration, as "on divers days and times between" two given dates, the writ will be adjudged bad on general demurrer.

An amendment to a declaration cannot be allowed, except upon payment of costs, when exceptions have been taken to the overruling of a general demurrer, until the exceptions have been passed upon by the law court.

ON exceptions from the superior court. The exceptions were to the ruling of the court in overruling a general demurrer to the declaration.

The point is stated in the opinion.

Edmund F. Webb and Appleton Webb, for plaintiff.

This action is based upon section forty-nine of chapter twenty-seven of the Revised Statutes as follows:

"Every wife, child, parent, guardian, husband or other person, who is injured in person, property, means of support or otherwise, by any intoxicated person, or by reason of the intoxication of any person, has a right of action in his own name against any one, who by selling or giving any intoxicating liquors, or otherwise, has caused or contributed to the intoxication of such person, and in such action the plaintiff may recover both actual and exemplary damages."

The demurrer being general, we are unable to anticipate what position or points the defendants may raise. We suggest, however, that under a general demurrer he cannot attack the first count in the writ, because it is defective in form. We refer to *Mahan* v. *Sutherland et als.* 73 Maine, 158. In that case, the demurrer was special and related to the form of the writ. APPLETON, C. J., says on p. 161: "A special demurrer as to formal defects not specially assigned, is to be regarded as a general demurrer." And cites *Tucker* v. *Randall*, 2 Mass. 283.

In *Bryant* v. *Tidgewell et als.* 133 Mass. 86, the declaration alleged that on divers days and times between the dates specified, the defendant sold intoxicating liquors to the plaintiff's husband . . . The court held, that it was open to the plaintiff to prove sales of intoxicating liquors which produced intoxication in her husband, on several occasions between the dates stated in the writ.

Upon the question of amendments counsel cited: R. S., c. 82, § § 23, 10, 13; *McGee et al.* v. *McCann*, 69 Maine, 79; *Gilmore* v. *Mathews*, 67 Maine, 517; *Chase* v. *Kenniston*, 76 Maine, 209; *Heath* v. *Whidden*, 24 Maine, 383; *Wilson* v. *Widenham*, 51 Maine, 566; *Haley* v. *Hobson*, 68 Maine, 167; *Simpson* v. *Norton*, 45 Maine, 281; *Page* v. *Danforth*, 53 Maine, 174; *Solon* v. *Perry*, 54 Maine, 493; *Bean* v. *Ayers*, 67 Maine, 482; *Hayford* v. *Everett*, 68 Maine, 505; *Wyman* v. *Dorr*, 3 Maine, 183; *Clapp* v. *Balch*, *Id.* 216; *Foster* v. *Haines*, 13 Maine, 307; *Newall* v. *Hussey*, 18 Maine, 249;

Carter v. *Thompson*, 15 Maine, 464; *Bragg* v. *Greenleaf*, 14 Maine, 395; *Mathews* v. *Bowman*, 25 Maine, 157; *Kendall* v. *White*, 13 Maine, 245; *Barker* v. *Norton*, 17 Maine, 416; *McLellan* v. *Crofton*, 6 Maine, 307; *Merrill* v. *Curtis*, 57 Maine, 152; *McVicker* v. *Beedy*, 31 Maine, 313; *Pullen* v. *Hutchinson*, 25 Maine, 249; *Swanton* v. *Crooker*, 52 Maine, 415; *Lord* v. *Pierce*, 33 Maine, 350; *Towle* v. *Blake*, 38 Maine, 528; *Monroe* v. *Thomas*, 61 Maine, 581; *Goodwin* v. *Clark*, 65 Maine, 280; *Boyd* v. *Eaton*, 44 Maine, 51.

The demurrers do not relate to any matter of substance, but merely to the form, and this would not be available to the defendant, even upon special demurrer.

We refer the court to the recent case of *Place* v. *Brann*, 77 Maine, 342. And that exceptions do not lie to the exercise of the judicial discretion we refer the court to *Bolster* v. *China*, 67 Maine, 551; *Cameron* v. *Tyler*, 71 Maine, 27; *Solon* v. *Perry*, 54 Maine, 493.

We think the form of declaration stated in the first count is fully sustained in *Gilmore* v. *Mathews*, 67 Maine, 517; and in *Bryant* v. *Tidgewell*, 133 Mass. 86.

S. S. Brown, for the defendant, cited: Stephen's Pl. 292; 1 Chitty Pl. 257; *State* v. *Baker*, 34 Maine, 52; *Platt* v. *Jones*, 59 Maine, 232; *Denison* v. *Richardson*, 14 East. 291; *Gilmore* v. *Mathews*, 67 Maine, 520; *Cheetham* v. *Tillotson*, 5 Johnson, 430; *Peake* v. *Oldham*, Cowper Rep. 275; *Benson* v. *Swift*, 2 Mass. 50; *Kingsley* v. *Bill*, 9 Mass. 197; *Bishop* v. *Williamson*, 2 Fairfield, 495; R. S., c. 82, § 30.

PETERS, C. J. In this state the general rules of pleading are simple and certain, and should be adhered to. The law should be observed because it is the law. The toleration of constant departures from the rules soon casts them into confusion and disrepute.

No rule has been better established in this state than that requiring in declarations that the time of every traversable fact shall be named. The pleader must name some certain day, whether correctly named or not. The rule imposes no burden

or risk. It is easier to obey than it is to disobey it. Declarations omitting this certainty of allegations have been repeatedly held in this state to be bad on demurrer, the last reported case, in which previous cases are cited, being *Cole* v. *Babcock*, 78 Maine, 41. The plaintiff suggests that a special demurrer is required to point out the defect. We think a general demurrer is sufficient. The demurrer was general in the case cited, and also in most the cases there cited.

In the case at bar the declaration asserts that the defendant "did, on divers days and times between January 1, 1886, and the date of the writ," sell liquors to the plaintiff's husband, from which certain effects ensued. Now, it is clear that stating certain acts as done between two points of time many days apart, does not state any particular day on which they were done. Such a statement is no more certain than it would be to allege an act as occurring "on or about" a certain day named, or "near" such time; and such allegations have been held to be insufficient. Here is a *continuando* with nothing for it to attach to, with no day to begin with or to continue from. The acts complained of may have occurred months after January 1, 1886, the writ bearing date in May of that year. We find no fault with the allegation that the acts were done *diversis diebus et vicibus*. That mode of describing them is indispensable where the selling consists of continuous acts. It would be very difficult for a plaintiff to ascertain the details of an habitual offending so as to allege them in any other way. But the pleader should have alleged some certain day and in addition thereto the divers days and times.

It is just as necessary to allege a day certain where a *continuando* accompanies it as where it does not. Says METCALF, J., in *Wells* v. *Commonwealth*, 12 Gray, 326: "Every indictment must precisely show a certain day and year when the alleged offense was committed. And where the alleged offense may have continuance, the time may be laid with a *continuando*; that is, it may be alleged to have been on a single day certain and also on divers other days." The same rule is common to criminal and civil proceedings. In giving an account of the

origin of the rather free mode of allegation by the use of the *continuando*, JACKSON, J., in the case of *Pierce* v. *Pickens*, 16 Mass. 472, gives very satisfactory reasons to show that exactness of day is required to be stated in such pleading. See, also, *Folger* v. *Fields*, 12 Cush. 93. The plaintiff is not aided out of the difficulty by the case of *Bryant* v. *Tidgewell*, 133 Mass. 86, relied on by him. In that case the declaration, of doubtful validity in several respects, was not objected to, and under the Massachusetts practice act, as we understand it, a declaration is not required to allege any precise day when such an act, as was in that case involved, was done. *Knapp* v. *Slocomb*, 9 Gray, 73.

The verdict being general on all the counts, and the last two differing in essential respects from the first, the error in the first count carries a taint into the verdict which requires it to be set aside. We do not examine the questions raised on demurrer to the counts added by way of amendment, inasmuch as the court below may, on proper terms, allow such a reconstruction of the first count as will be sufficient for all purposes. Besides, a trial judge has no authority to allow an amendment to a declaration, after it has been demurred to, the demurrer overruled and exceptions taken to the ruling, before the questions raised on demurrer have been decided by the full court, unless upon payment of costs.

Exceptions sustained.

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

STATE OF MAINE *vs.* JAMES E. CADY and another.

Cumberland. Opinion June 19, 1888.

Challenges. Exceptions. Practice. Argument of counsel.

In the trial of criminal causes, other than those that were lately capital, where there are several defendants, they are jointly, and not severally, entitled to the peremptory challenges allowed by statute. The challenges are allowed to them as a party and not as persons.

Exceptions do not lie to the exclusion from the panel of a juror whom one defendant objects to and another defendant desires to retain.

A judge may in his discretion put a legal juror off the panel, but cannot put an illegal juror on.

Argument of counsel stated which was held unobjectionable.

On exceptions from superior court.

Indictment for keeping and maintaining a liquor nuisance.

The point is stated in the opinion. At the trial, the county attorney in his argument to the jury said: "The testimony shows that not only these defendants but other parties have been connected with these shops and it is well known also that when the officers enter these rooms to make a seizure, to make a search, these parties at once, if they are able to do so, mingle with the crowd in the room and exercise no authority at the time the officers are there."

To this statement of the county attorney, there being no evidence of such a fact offered in the case, the defendants' counsel then and there excepted.

George M. Seiders, county attorney, for the state, cited: *State* v. *Soper*, 16 Maine, 293; *U. S.* v. *Marchant*, 12 Wheat. 480; R. S., c. 82, § 74; *State* v. *Lang*, 63 Maine, 215; *Com* v. *Gallagher*, 1 Allen, 592; *State Hynes*, 66 Maine, 114; Bish. Stat. Crimes, § 1048.

W. F. Lunt, for defendant.

R. S., ch. 82, § 74, provides as follows:

"Before proceeding to the trial of any civil or criminal case, other than capital, the clerk may, under direction of court, at the request of either party place the names of all jurors legally summoned and in attendance, and not engaged in the trial of any other cause, separately upon tickets in a box, and the names shall be drawn from the box by the clerk, after having been thoroughly mixed, one at a time, for the purpose of constituting a jury; and each party may peremptorily challenge two jurors; but in such case all peremptory or other challenges and objections to a juror drawn, if then known, shall be made and determined, and the juror sworn or set aside, before another name is drawn, and so on until the panel is completed. A new jury shall be thus drawn, and so on until the panel is completed."

"The object (of this statute) plainly is to give a party to

such suit, so pending, a right to have a jury of twelve, selected by lot from at least two full panels, or from all the jurors in attendance not otherwise engaged." *Davis* v. *B. & P. R. R. Co.* 60 Maine, 305.

"The word party is unquestionably a technical word, and has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, whether at law or in equity; the party plaintiff or defendant, whether composed of one or more individuals. *Merchants Bank* v. *Cook*, 4 Pick. 411; 11 Allen, 568. Only two challenges allowed; 15 Ind. 274.

By statute in New Hampshire it was provided that "either party in all civil causes, and the respondent in all criminal causes not capital, shall, in addition to challenges for cause, have two peremptory challenges."

Construing these provisions, PERLEY, C. J., said, "It is the respondent, and not a respondent, nor every respondent, nor every person, as in capital causes, that has the right. Looking to the language of the statute, it evidently does not contemplate several rights of challenge belonging to different persons on the same side of the cause; the statute as in civil actions, appears to recognize but one collective party respondent." *State* v. *Reed*, 47 N. H. 466.

Our statute recognizes the distinction, because in section 12, ch. 134, in capital cases, the right of challenge is distinctly given to a person rather than a party.

In *Com.* v. *Drew*, 4 Mass. 391, two defendants were separately tried because they did not agree in their challenges.

The constitution guarantees to the parties of a cause the right of a trial by a jury duly constituted. *Rolfe* v. *Rumford*, 66 Maine, 565.

"If counsel make material statements outside of the evidence which are likely to do the accused injury, it should be deemed an abuse of discretion and a cause for reversal." 14 C. L. J. 408.

Counsel must confine themselves to the facts brought out in the evidence. *Dickerson* v. *Burke*, 25 Ga. 225; *Cook* v. *Ritter*, 4 E. D. Smith, 253; *Reed* v. *State*, 2 Ind. 438.

It is improper for counsel to state and assume as a fact anything

that has not been proved or put in evidence. *Bill* v. *People*, 14 Ill. 432; *Wightman* v. *Providence*, 1 Cliff, 524; *Rolfe* v. *Rumford*, 66 Maine, 564.

PETERS, C. J. Two respondents were arraigned together under a joint liquor indictment, having the same counsel to answer for them. The judge allowed each respondent two peremptory challenges in empanneling the jury, and when one respondent in person challenged a juror, the other disputed the challenge, claiming that he had a right to have the challenged juror on the panel. One respondent accepted and the other rejected the juror.

The judge accorded to them two challenges each, while they were entitled to two jointly, and no more. In capital cases each prisoner, under a joint trial, is entitled to his personal challenges. The statute in that case prescribes that "each person" shall be so entitled. In all other criminal cases it is "the party" that is entitled to the two challenges. If they do not agree upon the persons to be objected to, they lose their challenges. The presumption is, where respondents in criminal cases, not lately capital, consent to be tried together, or where the judge in his discretion orders a joint trial, that their interests are alike, and differences between them are uncalled for. By R. S., c. 134, § 20; it is provided that issues in fact in criminal cases not capital, shall be tried by a jury drawn and returned in the same manner, and challenges shall be allowed, as in civil cases. By R. S., ch. 82, § 74, it is provided that in civil cases, and criminal cases, not capital, "each party" is entitled to two peremptory challenges when a jury is empanneled by lot. Party does not mean person. Allowing challenges without cause is a merely statute right, not to be extended by construction. Where defendants are numerous, if each had personal challenges, it would require the presence of an impracticable number of jurors. This question is settled by several authorities. *State* v. *Reed*, 47 N. H. 466; *Stone* v. *Segur*, 11 Allen, 568; *State* v. *Sutton*, 10 R. I. 159. These cases show that several respondents are but one party, and are entitled to no more challenges than one

defendant. But if, in his discretion, the judge extended a greater privilege than the statute concedes, neither respondent is in a position to complain of it. We have held in *Snow* v. *Weeks*, 75 Maine, 105, that to a ruling of a judge, in excusing or rejecting a juryman, exceptions will not lie. It is there said: "He may put off a juror when there is no real and substantial cause for it. That cannot legally injure an objecting party as long as an unexceptionable jury is finally obtained. He may put a legal juror off. He cannot allow an illegal juror to go on." This question was exhaustively and learnedly examined in a case of piracy, *United States* v. *Marchant*, 12 Wheat. 480, in which Judge STORY maintains the same doctrine, and he there says: "The right of peremptory challenge is not of itself a right to select but a right to reject jurors." He further remarks that the right "enables the prisoner to say who shall not try him, but not to say who shall be the particular persons who shall try him."

The objection to the county attorney's remarks is without force. He was expressing his judgment upon the testimony and giving illustrations of it in an unobjectionable manner. He was not relating outside facts. The other objections have no weight.

Exceptions overruled.

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

LOREN P. JUDKINS *vs.* MAINE CENTRAL RAILROAD COMPANY.

Kennebec. Opinion June 18, 1888.

Railroads. Brakemen. Defective cars. Negligence. Contributory negligence

It is not necessarily negligence on the part of a railroad company, as between the company and a brakeman on duty in its yard, that a freight car is found in use on its road in such a damaged and crippled condition, that it exposes the employee to more than the common risk and danger which is incurred in handling ordinary cars. It is unavoidable that damaged cars must at times and places be handled by railroad employees.

A proper management of a railroad may require that reasonable rules and regulations be adopted and published, in order that employees may be apprised of any unusual danger which they may be subjected to in handling damaged cars.

If there be danger in handling a crippled car, which an experienced brakeman can appreciate for himself, the defective condition of the car being known to him, and he voluntarily assumes the risk of managing it in a manner which exposes him to unusual danger, when the emergencies are not so extreme as to require the service of him, he cannot recover of the company, if injured while so engaged.

A yard brakeman cannot recover against a railroad company for an injury received in falling from a flat freight car, loaded with coal, while attempting to stop the car from running down a side-track, and possibly off at the end of it, by jumping upon the brake-beam in the front of and under the car, and pressing it down with his feet, holding himself to the car with one hand and pulling up the brake-chain with the other, the excuse for his act being that the brake-staff was so bent that it could not be effectively used in the ordinary manner; there being no rule of the company nor any order from any officer requiring such an undertaking by him.

On motion by the defendant to set aside the verdict, which was for plaintiff in the sum of $2733.33. From superior court.

The opinion states the case.

H. M. Heath, for plaintiff.

As to the requested instruction that car inspectors and brakemen are fellow servants. The rule given follows *Shanny* v. *Androscoggin Mills*, 66 Maine, 426.

In the following cases it has been held that car inspectors and brakemen are not fellow servants. *Macy* v. *St. Paul & Dakota Ry. Co.* (Minn.) 28 N. W. Rep. 249; *Miss. Pac. Ry. Co.* v. *Dwyer*, (Kansas) 12 Pac. Rep. 352; *Busby* v. *N. Y. L. E. & West. R. Co.* 37 Hun. 104; *Fay* v. *Minn. & St. Louis Ry. Co.* 30 Minn. 231; *Texas Pac. Ry. Co.* v. *McAlee*, 61 Tex. 695; *King* v. *Ohio R. Co.* 14 Fed. Rep. 277; *Houston & Tex. Cent. Ry. Co.* v. *Marcelles*, 59 Tex. 334; *Condon* v. *Miss. Pac. Ry. Co.* 78 Mo. 567; *Brann* v. *Chicago R. I. & P. Railroad Co.* 53 Iowa, 595; S. C. 36 Am. Rep. 243; *Tierney* v. *Minn. St. L. Railroad Co.* 33 Minn. 301; S. C. 53 Am. Rep. 35.

The principle involved is decided and fully supported by the following cases: *Northern Pac. Railroad Co.* v. *Herbert*, 116 U. S. 646; *Hough* v. *Ry. Co.* 100 U. S. 214; *Ford* v. *Railroad Co.* 110 Mass. 240; *Mulvey* v. *R. I. Locomotive Works*, 14 R. I. 204; *Flike* v. *B. & A. Railroad Co.* 53 N. Y. 549.

Mackin v. *Boston & Albany Railroad*, 135 Mass. 203, is not an authority against this position.

Exceptions do not lie to a refusal to give instructions upon facts not proved in the case as existing. *Soule* v. *Winslow*, 66 Maine, 447.

That the request may be sound as an abstract question of law is immaterial if there are no facts from which to infer the hypothesis of the requested instructions. *Roberts* v. *Plaisted*, 63 Maine, 335; *Pen. Railroad Co.* v. *White*, 41 Maine, 512; *Lord* v. *Kennebunkport*, 61 Maine, 462.

Under the request, no matter how flagrantly defective a foreign car might be, no liability could rest upon the defendant company. The request goes even farther than *Mackin* v. *B. & A. Railroad Co.* 135 Mass. 201, and holds that as to foreign cars the defendant company does not owe its employees the duty even of inspection; the element of inspection is omitted from the request. The condition of the cars is the sole element. This portion of the request was clearly incorrect. Not being correct in its entirety, it was properly refused. *G. T. Ry. Co.* v. *Latham*, 63 Maine, 177.

Instructions bottom of page 9. The instructions follow *Shanny* v. *Androscoggin Mills*, almost verbatim. It should be noticed that the obligation to keep in repair is stated on page 94, and no exceptions taken to the rule as there given. To sustain this exception the court must overrule *Shanny* v. *Androscoggin Mills*.

If this testimony was misstated, defendant's counsel should have called the attention of the court to it at the time. *Bradstreet* v. *Rich*, 74 Maine, 303.

Lesan v. *Maine Central Railroad*, 77 Maine, 85, is but familiar law as applicable to this case.

Mackin v. *B. & A. Railroad*, 135 Mass. 203, does not support defendant's claim.

The next case cited by defendant's counsel, *Fitzpatrick* v. *Miami Railroad Co.* is the same in legal effect. *Nashville Railroad Co.* v. *Foster* (Tennessee); *Smith* v. *Railroad Co.*

(Mich.) and *Railroad Co.* v. *Bragonier* (Illinois), tend to support defendant's claim.

Cassidy v. *M. C. Railroad Co.* 76 Maine, 488, is not in point. It holds that the master is not responsible for an injury caused by the negligence of a fellow servant.

Chicago B. & Q. v. *Warner* (Ill.), cited by counsel, is not applicable. The doctrine there stated is that before coupling a car it is the duty of the employee to examine the coupling before using it. To the same effect is *Davis* v. *Detroit & M. R. Co.* (Mich.); *Hathaway* v. *Mich. Cent. Railroad Co.*; *Mich. Cent. Railroad Co.* v. *Coleman.*

This doctrine is controverted in *King* v. *Ohio Railroad Co.* 14 Fed. Rep. 277 (GRESHAM, J.).

King v. *Boston & W. Railroad*, 9 Cush. 112; *Holden* v. *Fitchburg Railroad Co.* 129 Mass. 277, do not in the slightest degree support the claim made that in a case like the one at bar the obligation of the defendants to the plaintiff is satisfied by the employment of suitable persons to inspect and examine the sufficiency of the car and brake and its condition of repair.

Horton v. *Ipswich*, 12 Cush. 488, is not pertinent because it contains no element of obedience to duty, as in the case at bar.

Equally inapplicable is Deering on Neg. 212.

Hickey v. *Boston & L. Co.* 14 Allen, 432, was a case where a passenger took a position unnecessarily and suffered injury. This, too, lacks the element of performance of duty. It is not an authority for the case at bar. *Shannon* v. *Boston & A. Railroad Co.* 78 Maine, 53, is equally remote.

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

Inspector of cars and a brakeman employed on them are fellow servants. *Mackin* v. *Boston & A. R. Co.* 135 Mass. 201; *Little Miami R. Co.* v. *Fitzpatrick*, 17 Am. & Eng. R. Cas. 578; *Smith* v. *Flint & P. M. R. Co.* 46 Mich. 258 (41 Am. R. 161); *Chicago & A. R. Co.* v. *Bragonier*, 11 Ill. App. 516; Deering, Neg. 205; *Cassidy* v. *Me. Cen. R. Co.* 76 Maine, 488; *Blake* v. *Me. Cen. R. Co.* 70 Maine, 60.

Contributory Negligence. *Chicago B. & Q. R. Co.* v.

Warner, 108 Ill. 538 (18 Am. & Eng. R. Cas. 101); *Davis* v. *Detroit & M. R. Co.* 20 Mich. 105 (4 Am. R. 364); *Hathaway* v. *Michigan C. R. Co.* 47 Am. R. 573; *Michigan C. R. Co.* v. *Coleman*, 28 Mich. 448.

Railroad companies are not responsible for defects in cars caused by ordinary wear and tear. *Chicago B. & Q. R. Co.* v. *Avery*, 109 Ill. 314 (17 Am. & Eng. R. Cas. 649); 3 Wood, R. R. § 373, note; 2 Thomp. Neg. 971, 933; *King* v. *Boston & W. R. Co.* 9 Cush. 112; *Sammon* v. *N. Y. & H. Railroad Co.* 62 N. Y. 251; *Holden* v. *Fitchburg R. Co.* 129 Mass. 277; *Buzzell* v. *Laconia M'f'g Co.* 48 Maine, 113.

Negligence. Deering, Neg. 198, 201, 212; *Smoot* v. *Mobile & M. R. Co.* 67 Ala. 13; *Cagney* v. *Hannibal & St. J. R. Co.* 69 Mo. 416; *Smith* v. *St. Louis K. C. & N. R. Co.* 69 Mo. 32; *Noyes* v. *Shepherd*, 30 Maine, 173; 2 Thompson, Negligence, 1015, 1010, 1011; *Reed* v. *Northfield*, 13 Pick. 94; *Whittaker* v. *West Boylston*, 97 Mass. 273; *Frost* v. *Waltham*, 12 Allen, 85; *Horton* v. *Ipswich*, 12 Cush. 488; *Hickey* v. *Boston & L. R. Co.* 14 Allen, 432.

Voluntary exposure by plaintiff. *Shannon* v. *Boston & A. R. Co.* 78 Maine, 53; *South Covington & C. R. Co.* v. *Ware*, 27 Am. & Eng. R. Cas. 206; *Merrill* v. *North Yarmouth*, 78 Maine, 200.

PETERS, C. J. The plaintiff sues to recover damages for a personal injury which he alleges was caused by the defendants' negligence. The following facts, after verdict for the plaintiff, may be considered as established: On the evening of November 3, 1885, a freight train ran into the station at Waterville, containing a flat or platform car belonging to a foreign company, (Boston and Maine) loaded with coal which it had received at Gardiner to transport to Skowhegan. The next morning the flat car, with a box car attached to it, was left standing on a side track at the station. The plaintiff, who was an intelligent and experienced hand in the business of braking and switching cars in the Waterville yard, undertook with another brakeman, in pursuing their regular work, to disconnect the box car from the

flat car, and to run it upon another track. The associate stood at the front of the box car, ready to shackle it to the engine, while the plaintiff was at the other end of the same car in order to unshackle it from the flat car, and to give to the other persons engaged in the job the customary signals. The work having been accomplished, the plaintiff started for the engine and box car as they were moving off, and, while in the act of climbing upon the box car in motion, noticed that the flat car had begun to move slowly down the siding in the opposite direction, from the effect of too strong a movement of the engine when backing down to make the disconnection. He alighted upon the platform and proceeded at once to the flat car, getting upon it at the rear, as it was moving, and passing to the front, found that his efforts to stop the car by means of the brake to be unavailing, for the reason that the brake-staff or handle was so bent that it could not be used. He then got down upon the track in front of the car, moving towards him, and grasped a hold upon the front board of the bin which held the coal, the board being near the front of the car, planting his feet upon the brake-beam under the car, endeavoring with his other hand to seize the brake-chain connecting with the beam, and thus by pulling with his hand and pressing with his feet, to work the brake sufficiently to stop the car. While attempting this operation his foot slipped and was run over by the car and badly injured. Other evidence will be stated in connection with the points to be examined.

The plaintiff's contention that it was improper or imprudent to use such a pattern of brake on cars as the augur handle brake, as it is called, has no support to stand upon. The evidence conclusively shows that the objection is not tenable.

The plaintiff contends that it was negligence for the company to allow a car in such disabled condition to be in use on its road, and, in support of the position invokes the principle that the employer is under responsibility to the employee to furnish properly constructed tracks and rolling stock and keep the same in repair. The defendants rely upon the other principle that servants take the risk of the negligent acts of fellow servants in the same employment, and contend that they employed suitable

persons as inspectors, whose duties required them to decide whether cars are fit to be run on the road or not, and that brakemen and inspectors are such fellow servants, and that no further responsibility than that, as far as brakemen's rights are concerned in a matter of this kind, rests upon the proprietors of the road.

We do not think it to be at all necessary to declare which should be the governing principle as applicable to this case. The rights of the parties depend upon other and less general rules. If we assume for the sake of progress in the examination of the case, that the car inspectors, who passed the car as one that could properly be run, were not fellow servants with the brakemen in the yard, we do not even then see that the defendants were responsible for plaintiff's injury.

In the first place, we cannot perceive that it was an act of negligence on the part of any one that the car happened to be situated, in the condition it was in, on a side track at Waterville, taking into consideration any acts of service which the yard brakeman would be likely to be called upon to perform in connection with it. It appears that it is not essential that flat cars should have brakes upon them for any purposes excepting when they are being managed singly. The movements of a freight train are governed by the brakes on the box cars, and on the saloon car at the end of the train. Flat cars are not in all instances provided with brakes. When loaded with lumber and some other kinds of merchandise, it frequently happens, and necessarily so, that the brakes on such cars cannot be advantageously used or used at all. They are often covered up by the load. And it is a very common thing that brake staffs are bent or broken, and become temporarily useless by the cars battering against one another. There were received in the usual course of business, in the Waterville yard, at the time of and long before this accident, a hundred or more box and platform cars daily, of all kinds and patterns, domestic and foreign, loaded and light, and in all conditions of repair. It was a common thing to find that the braking apparatus on a car had become broken or bent and deficient for use.

No one was directed to move the car in question from its

position on the side track. When the time should come for making up a train, it might be connected by moving other cars to it instead of moving it to them. It was inherently safe enough to keep on its intended journey with a completed train. It became necessary to detach another car from it. Who could anticipate a probability that in uncoupling the car attached to it any one might be injured? It was practically like a perfectly constructed car without a brake attached.

But suppose the car were to be moved from its position. It must be either to continue on to its destination, or be moved to some suitable place for removing the coal from it, or sent directly into the repair shop. Who is to assist in moving or managing it, if it cannot remain where it is? Is it negligence in the company to ask the assistance of their brakemen in changing its position? The very employment of the plaintiff consisted partly in such services. He says his business was in performing "odds and ends" of work about cars. It happens that the defendants have repair shops at Waterville, but maintain them at only one or two other places on the road. There are many places where cars are shifted and transferred before a car which had become disabled on the road would ordinarily get into a station where repairs could be made upon it. They cannot be left at the wayside.

To meet the necessities of all such cases, a reasonable management of the road may require that certain rules and regulations be adopted and observed in order to apprise employees of deficiencies in the running gear of cars, whereby they might be warned from exposing themselves to unusual danger. Here no notice was posted on the car. But was any notice required? Did any injury occur to plaintiff for want of notice? He was not injured by using or attempting to use a deficient brake. He knew that the brake would not work.

Any servant may be reasonably subjected to the risks which properly belong to the employment he is in. One of these risks which the plaintiff assumed, was in handling, under reasonable conditions, crippled freight cars. Under this rule, it was held in *Belair* v. *Chicago, &c. Ry. Co.* 43 Iowa, 662, that where it

was the duty of a brakeman to take damaged cars to the shops to be repaired, and he was injured while coupling such cars, he could not recover of the company on the ground of negligence in using damaged cars. The same rule applies as to injuries from overhanging bridges of which the brakeman has been warned or notified, or which he should notice for himself. In such cases the servant waives the danger or defect. Even where a master fails in his duty in respect to inspecting and repairing the machinery or appliances to be used by the employee, and the servant voluntarily assumes the risks of the consequences of the master's negligence, with knowledge or competent means of knowledge of the danger, he cannot recover damages of the master. Thomps. Neg. § 973, and cases. Here the plaintiff was acting with his eyes wide open to the perils of his undertaking. The danger was seen and the risk voluntarily assumed. The act was not required of him by any rule or request of the company.

The learned counsel for the plaintiff hopes to avoid the conclusion which this course of reasoning leads to, by the plea that the plaintiff was justified in the act attempted by him, as necessarily done in consequence of the prior acts of negligence on the part of the company. We think this position to be unsupported by the evidence. It was not cause and effect. The witnesses, though the admission comes with different force from different persons, unanimously agree that the plaintiff's mode of attempting to stop the car was extremely dangerous. An examination of the car, or of any such car, should satisfy any one that the act was hazardous, if not foolhardy in the extreme. No rule of a company, which required such a service of an employee, would be tolerated for a moment. Perhaps, in one sense, it cannot be charged against the plaintiff that he was negligent, for he voluntarily and intentionally incurred and braved the danger, on no one's responsibility but his own.

He had before needlessly done the same thing, and others had. That is no excuse. He knew better. He had been warned against it. There is a good deal of reason to induce the belief that he was acting on this occasion merely for his own convenience,

and that he could have used the brake, but the jury found the fact differently, by which finding the parties may reasonably be bound.

But the consequences, says his counsel, which would have ensued had not the car been stopped, were of such a magnitude as to require that his act should be regarded as having the assent of his principal; that the emergency conferred an implied agency on the employee to do what he did to save the company's property. It does not seem so to us. No life was in danger, no great injury to property would have ensued, and no collision was threatened from the running car. He could have used a trig of some kind. He says that it was not allowed. Others say that it was allowable to do so, even as a general practice. Certainly, in any such emergency or dilemma as this occasion was, it would be allowable. The fact that the car stopped almost at the moment it struck upon the plaintiff's foot, is evidence indicating that it had not attained much speed, and that it could have been easily checked by most anything placed in the way of it. If left alone, it might or might not have gone off at the end of the siding. The plaintiff had known of cars going off in such way without causing very material loss or damage. We do not see that any emergency existed, either apparent or real, which justified the plaintiff in thus exposing himself. He had no right to do so at the risk of the company.

The plaintiff says the company would have complained of him for allowing the car to run off the track. But the fear on his part evidently was that the company would find fault because he allowed the car to get away from him at the moment when the uncoupling was made. With an impression on him of his inattention to duty at that moment, he was evidently stimulated to great risk and exertion to prevent any injurious consequences from his remissness in that act.

We are satisfied, upon all the evidence, if not upon that of the plaintiff alone, that the verdict ought not to stand.

New trial granted.

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

A. R. MILLETT, appellant,

vs.

COUNTY COMMISSIONERS OF FRANKLIN COUNTY.

Franklin. Opinion June 23, 1888.

Way. Practice.

When, on appeal, the judgment of county commissioners, locating a highway has been affirmed and the proceedings duly closed and recorded, the commissioners may, within the three years allowed for making and opening the way, entertain a petition praying for its discontinuance.

ON exceptions.

The opinion states the case.

George Walker, for appellants.

The only way to defeat a location during the pendency of proceedings and before it is opened for the public travel, is by motion in the appellate court, or by *certiorari*, the remedies given by statute. All the parties to the proceeding are bound by the judgment of the appellate court.

A change in membership of the court of county commissioners released the court from no obligations, nor gave it any new powers under the statute. The court continues the same though its members may change in whole or in part between 1882 and 1886. The order of the appellate court is to the court or board of county commissioners and not to its members, and the inferior court must obey or be in contempt. The court speaks through its record, either to obey or disobey. We cite in support of the foregoing: *Irving* v. *Co. Commissioners Sagadahoc Co.* 59 Maine, 515; *Harriman* v. *Co. Com.* 53 Maine, 83; *White* v. *Co. Com.* 70 Maine, 328; *Smith* v. *Co. Com.* 42 Maine, 401.

Joseph C. Holman, for the appellee, cited: 2 Met. 559; R. S., c. 18, § § 7, 10, 36.

VIRGIN, J. The county commissioners, on due proceedings had, seasonably placed on file for inspection, at their December

term, 1882, their return of the location of the highway prayed for, therein allowing three years for making and opening the way.

The two towns, in which the way was located, seasonably appealed. The report of the committee duly accepted and judgment thereon entered, affirmed in whole the judgment of the commissioners, and the judgment of the appellate court was duly certified to the commissioners, at whose December term, 1883, the proceedings were duly closed and recorded.

In June, 1886, before the expiration of the three years allowed for making and opening the way, the same towns filed a petition in the court of county commissioners praying for a discontinuance of the way theretofore located. At the time and place of hearing, the original petitioners for the way appeared and filed objections to any action of the commissioners in the premises. The objections were overruled and the commissioners made their return discontinuing the way. Thereupon the original petitioners appealed, entered their appeal and filed a motion to dismiss the petition for discontinuance on the ground of want of jurisdiction of the commissioners. The presiding justice overruled the motion and the original petitioners (appellants) alleged exceptions.

The question, therefore, is: When, on appeal, the judgment of county commissioners locating a highway has been affirmed in whole and the proceedings duly closed and recorded, can the commissioners, within the three years allowed for making and opening the way, entertain a petition praying for a discontinuance of the same way?

We are of opinion that they can. If, on appeal, the judgment of the commissioners had been reversed, "no petition praying, substantially, for the same thing, could be entertained by them for two years thereafter." R. S., c. 18, § 50. That limitation does not apply when the judgment, as here, was affirmed; and even if it did, more than two years had elapsed before the filing of the petition for discontinuance.

When the proceedings on the original petition for location were closed, the located way became an established fact. *Hallock* v. *Franklin*, 2 Met. 559. And in the absence of any

statutory limitation relating thereto, we perceive no legal objection to the commissioners entertaining a petition for the discontinuance of a legally located highway, at any time after the location has become an established fact. "The subsequent discontinuance of the highway, whether very soon after it has been established by the adjudication, or after a long lapse of time, is a new, substantive, distinct, official act. It does not rescind nor annul the former proceeding, but it assumes its continued existence as the basis of the discontinuance." SHAW, C. J., in *Hallock* v. *Franklin*, *supra*. The idea of the discontinuance of a highway after location and before opening is recognized also in *Westbrook* v. *North*, 2 Maine, 179. Moreover, many various changes of circumstances suggest themselves which would warrant a discontinuance without waiting for the needless expenditure of building the new way.

The appellants invoke the peremptory language of R. S., c. 18, § 50; "In all cases the commissioners shall carry into full effect the judgment of the appellate court in the same manner as if made by themselves." The particular force of this provision is not so significant when, as in the case in hand, the judgment of the commissioners and that of the appellate court are the same, as when the former is reversed, in whole or in part, by the latter. But when the judgment of the appellate court was received by the commissioners, spread upon their record and the judgment made up accordingly and recorded, they had then "carried it into full effect in the same manner as if made by themselves."

But it is suggested that it was their duty to see to it that the towns liable therefor opened and made passable the located way within the time allowed to them, three years. But the power to cause the way to be opened is not a part, or a continuation of their duty to locate, and which their board can exercise *suo motu*. Such action can be set in motion only by a distinct process, "on a petition of those interested," and "on a notice to the town," which has neglected its duty in the premises. R. S., c. 18, § 37. *Woodman* v. *Somerset Co.* 25 Maine, 300.

If it be said that under such an administration of the law, a highway can never be made in a town which was opposed to it,

if its inhabitants can connive with the commissioners to locate in the first instance and then discontinue before the time for opening expires. One answer is, the right of appeal will correct such errors. Another is, the office of county commissioner is a public trust and the presumption is the incumbents will honestly perform their duty. And still another is the legislature may limit the time within which a located way may be discontinued.

Exceptions overruled.

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

STATE OF MAINE *vs* BOSTON AND MAINE RAILROAD COMPANY.

York. Opinion June 19, 1888.

Railroads. Crossings. Negligence. Contributory negligence.

The rule which requires that a traveler on the highway shall look and listen before he attempts to drive across a railroad track, also as imperatively requires that, if a coming train is heard by him, and there be doubt whether the train is upon such track or some other, he shall stop at a safe distance from the crossing until all doubt is solved as to its location, unless deceived by surrounding circumstances, and without his fault.

The deceased in this case, with two associates, was riding in a wagon towards a railroad crossing, at about ten o'clock in the evening of a starlight night, one of the associates owning and driving the team, and carrying the other two gratuitously as a neighborly kindness, when a locomotive whistle was heard by them. They expressed doubt among themselves whether the train was on the road they were to cross, or on another road farther away running in the same direction, and continued driving on slowly, intent upon the noise of the train. They could not see the train on account of buildings and bushes between them and it. The bell was not heard by them. As they approached nearer, they saw the gates at the crossing wide open and no person in attendance upon them, although they had been accustomed to seeing the gates in operation and a flagman there. For several years the practice of the road had been to keep a flagman in attendance at the crossing, but, unknown to these persons he usually left the place at about seven in the evening for the night. The train was the night Pullman from Boston going east, which for most of the time for many years had not run upon this road, but had run upon the other road of the same company before spoken of. The train was running through a compact portion of the city of Biddeford at an unlawful rate of speed for such a place, and at the rate of twenty-five miles an hour, or more, when the collision occurred and the person for whose death this suit

is brought was instantly killed. It is stipulated by the parties that the plaintiff shall recover if these facts would in any event authorize a jury to find a verdict in favor of the plaintiff.

Held: That a verdict for the plaintiff might be upheld.

The defendants cannot escape liability, upon the ground that no statute required them to maintain gates at the crossing. The voluntary establishment of gates is evidence of their necessity and, being advertised to travellers, it is evidence of negligence if they are not properly attended and maintained.

Less responsibility may have rested on the two persons who were passengers than on the driver who owned and drove the team. The doctrine of the English case of *Thorogood* v. *Bryan*, which imputes to a passenger the negligence of a driver over whom the passenger exercises no influence or control, as far as it has obtained a footing in this State, is overruled.

On report.

An indictment under the statute for the alleged negligent killing of William R. Benjamin, of Biddeford, in a collision at the Main street crossing in Biddeford, in the evening of November 26, 1886.

The facts are stated in the opinion.

H. H. Burbank, county attorney, for the state.

No bell was rung as required by Revised Statutes, c. 51, § 33.

This was negligence *per se*. *Webb* v. *P. & K. Railroad*, 57 Maine, 134; *Whitney* v. *M. C. Railroad*, 69 Maine, 210; *Plummer* v. *E. Railroad*, 73 Maine, 593; *Commonwealth* v. *B. & W. Railroad*, 101 Mass. 202; *Sonier* v. *B. & A. Railroad*, 141 Mass. 10; *Renwick* v. *N. Y. C. Railroad*, 36 N. Y. 132; *Smedis* v. *B. & R. B. Railroad*, 88 N. Y. 13; *G. & C. U. Railroad* v. *Loomis*, 13 Ill. 548; *St. L. J. & C. Railroad* v. *Terhune*, 50 Ill. 151; *P. P. & J. Railroad* v. *Siltman*, 88 Ill. 579, or 21 Am. & Eng. Ry. Rep. 532; *Ernst* v. *Hud. Riv. Railroad*, 32 Barb. 159.

No flagman or gate was maintained at this crossing, as required by Revised Statutes, c. 51, § 75, as amended by c. 377 of the Public Laws of 1885.

This was negligence *per se*. (See cases above cited.) *Shaw* v. *B. & W. Railroad*, 8 Gray, 59; *Norton* v. *E. Railroad Co.* 113 Mass. 366; *Prescott* v. *Same*, *Id.* 370; *Pollock* v. *Same*, 124 Mass. 158; *Eaton* v. *Fitchburg Railroad*, 129 Mass. 364; *Commonwealth* v. *B. & M. Railroad*, 133 Mass. 384; *Tyler*

v. *N. Y. & N. E. Railroad*, 137 Mass. 243; *Lesan* v. *M. C. Railroad*, 77 Maine, 89; *State* v. *Same*, *Id.* 545; *Kissenger* v. *N. Y. & H. Railroad*, 56 N. Y. 539; *Dolan* v. *Del. & Hud. Railroad*, 71 N. Y. 285; *Kan. Pac. Railroad* v. *Richardson*, 6 Am. & Eng. R. R. Cas. 96; *Welsch* v. *H. & St. Jo. Railroad*, *Id.* 455; *Same* v. *Same*, *Id.* 78; *Kinney* v. *Crocker*, 18 Wis. 82; *Butler* v. *M. & St. P. Railroad*, 28 Wis. 487; Patterson's "Railway Accident Law," p. 163.

The negligence of the corporation caused the death of Benjamin. *R. R. I. & St. L. Railroad* v. *Lewis*, 58 Ill. 49; *Dimick* v. *C. and N. W. Railroad*, 80 Ill, 341; *Trow* v. *Vt. Cen. Railroad*, 24 Vt. 495; Shear. & Red. on Neg. § 33.

These travelers were "in the exercise of due care and diligence." *Fletcher* v. *B. and M. Railroad*, 1 Allen, 15; *Cunningham* v. *Hall*, 4 Allen, 276; *Gaynor* v. *O. C. and N. Railroad*, 100 Mass. 212; *Eagan* v. *Fitchburg Railroad*, 101 Mass. 317; *Chaffee* v. *B. & L. Railroad*, 104 Mass. 115; *Williams* v. *Grealy*, 112 Mass. 81; *Treat* v. *B. & L. Railroad*, 131 Mass. 372; *Tyler* v. *N. Y. & N. E. Railroad*, 137 Mass. 241.

And our court has recognized the force of these cases; *Whitney* v. *M. C. Railroad*, 69 Maine, 211; *O'Brien* v. *McGlinchy*, 68 Maine, 556; *Shannon* v. *B. & A. Railroad*, 78 Maine, 59; *Beers* v. *Hous. Railroad*, 19 Conn. 566; *Ernst* v. *Hud. Riv. Railroad*, 35 N. Y. 26; *Schum* v. *P. Railroad*, 107 Penn. 8; *Brown* v. *H. and St. Jo. Railroad*, 50 Mo. 467.

Traveler may have reason and excuse for not using the care and diligence which he otherwise and naturally would; and thus the presumption of contributory negligence may be repelled. *Linfield* v. *O. C. Railroad*, 10 Cush. 562; *Sweeny* v. *Same*, 10 Allen, 377; *Wheelock* v. *B. and A. Railroad*, 105 Mass. 207; *Tyler* v. *N. Y. and N. E. Railroad*, 137 Mass. 242; *Low* v. *G. T. Railroad*, 72 Maine, 321; *Plummer* v. *E. Railroad*, 73 Maine, 592; *State* v. *M. C. Railroad*, 76 Maine, 365; *Same* v. *Same*, 77 Maine, 543; *Ernst* v. *Hud. Riv. Railroad*, 35 N. Y. 25; *Penn. Railroad* v. *Ogier*, 35 Penn. 60; *Spencer* v. *Ill. Cen. Railroad*, 29 Iowa, 55; *Butler* v. *M. and St. P. Railroad*, 28 Wis. 501; *Ernst* v. *Hud. Riv.*

Railroad, 32 Barb. 159; *Funston* v. *Ch. etc. Railroad*, (Iowa.) 14 Am. & Eng. R. R. Cases, 640.

The negligence of the railroad corporation may thus excuse the traveler. *Norton* v. *E. Railroad*, 113 Mass. 369; *Prescott* v. *Same*, *Id.* 371; *Pollock* v. *Same*, 124 Mass. 158; *Brooks* v. *B. and M. Railroad*, 135 Mass. 21; *Copley* v. *N. H. and N. Co.* 136 Mass. 9; *Sonier* v. *B. and A. Railroad*, 141 Mass. 10; *McKimble* v. *B. and M. Railroad*, *Id.* 470; *Plummer* v. *E. Railroad*, *supra*; *Lesan* v. *M. C. Railroad*, 77 Maine, 87; *Mackay* v. *N. Y. C. Railroad*, 35 N. Y. 75; *Richardson* v. *Same*, 45 N. Y. 849; *Glushing* v. *Sharp*, 96 N. Y. 676; *P. C. and St. L. Railroad* v. *Gundt*, 78 Ind. 373, or 3 Am. & Eng. R. R. Cases, 502; *Penn. Railroad* v. *Ogier*, 35 Penn. 60; Shear. & Red. on Neg. § 30; Patterson's "Railway Accident Law," 173.

Traveler has a right to assume and rely upon the discharge of duty on the part of the corporation and its servants, cases already cited, *supra*. *Ernst* v. *Hud. Riv. Railroad*, 35 N. Y. 25; *Same* v. *Same*, 39 N. Y. 61, 68; *Roberts* v. *C. and N. W. Railroad*, 35 Wis. 679; *Phil. and Tr. Railroad* v. *Hagan*, 47 Penn. 244; *Gray* v. *Scott*, 66 Penn. 345; Shear. & Red. on Neg. § 31; Beach on Contrib. Neg. § 64.

The gates being open, and the customary warnings not given, is equivalent to an assurance of safety. *Ernst* v. *Hud. Riv. Railroad*, 35 N. Y. 25; *Same* v. *Same*, 39 N. Y. 61, 68; *Glushing* v. *Sharp*, 96 N. Y. 676, or 19 Am. & Eng. R. R. cases, 372; *Phil. and Read Railroad* v. *Killips*, 88 Penn. 405; Patterson's "Railway Accident Law," 170.

Whether or not Benjamin was "in the exercise of due care and diligence," is not a matter of law, but wholly for the jury. *Warren* v. *Fitch. Railroad*, 8 Allen, 231; *Gaynor* v. *O. C. and N. Ry. Co.* 100 Mass. 212; *Chaffee* v. *B. and L. Railroad*, 104 Mass. 115; *Wheelock* v. *B. and A. Railroad*, 105 Mass. 206; *Williams* v. *Grealy*, 112 Mass. 81; *Norton* v. *E. Railroad*, 113 Mass. 369; *French* v. *T. B. Railroad*, 116 Mass. 540; *Craig* v. *N. Y. N. H. and H. Railroad*, 118 Mass.

437; *Treat* v. *B. and L. Railroad*, 131 Mass. 372; *Brooks* v. *B. and M. Railroad*, 135 Mass. 21; *Ropley* v. *N. H. and N. Co.* 136 Mass. 9; *McDonough* v. *M. Railroad*, 137 Mass. 212; *Tyler* v. *N. Y. and N. E. Railroad*, *Ibid.* 241; *Learoyd* v. *Godfrey*, 138 Mass. 324 *Lyman* v. *Hampshire*, 140 Mass. 311; *Sonier* v. *B. & A. Railroad*, 141 Mass. 10; *McKimble* v. *B. & M. Railroad*, *Id.* 470; *Webb* v. *P. & K. Railroad*, 57 Maine, 133; *O'Brien* v. *McGlinchy*, 68 Maine, 555; *Plummer* v. *E. Railroad*, 73 Maine, 592; *Lesan* v. *M. C. Railroad*, 77 Maine, 90; *Shannon* v. *B. & A. Railroad*, 78 Maine, 60; *Ernst* v. *H. R. Railroad*, 35 N. Y. 25; *Dolan* v. *Del. & Hud. Railroad*, 71 N. Y. 285; *Smedis* v. *B. & R. B. R. R.* 88 N. Y. 13; *Glushiny* v. *Sharp*, 96 N. Y. 676; *Butler* v. *M. & St. P. Railroad*, 28 Wis. 487; *Roberts* v. *Rh. & N. W. Railroad*, 35 Wis. 680; *Eilert* v. *G. B. & M. Railroad*, 48 Wis. 606; *Lehigh Val. Railroad* v. *Hall*, 61 Penn. 361; *Cleveland* v. *P. Railroad*, 66 Penn. 399; *Penn. Railroad* v. *Ackerman*, 74 Penn. 265; *Same* v. *Weber*, 76 Penn. 157; *Weiss* v. *P. Railroad*, 79 Penn. 387; *Same* v. *Same*, 87 Penn. 447; *Phil. & Read. Railroad* v. *Killips*, 88 Penn. 405; *Schum* v. *P. Railroad*, 107 Penn. 8; *Artz* v. *C. R. I. & P. Railroad*, 34 Iowa, 153; *Meyers* v. *Same*, 59 Mo. 223; *Trow* v. *Vt. Cen. Railroad*, 24 Vt. 495; *Ernst* v. *Hud. Riv. Railroad*, 32 Barb. 159; *Kan. Pac. Railroad* v. *Richardson*, 6 Am. & Eng. Ry. & Cases, 96; Shear. & Red. on Neg. § 43; Thompson on Neg. Vol. 1, p. 429; Hill on Torts, Vol. 2, p. 490; Beach on Contrib. Neg. § 65; Patterson's "Railway Accident Law," p. 168, 170.

George C. Yeaton and B. F. Chadbourne, for the defendant.

This process, in form an indictment, in substance a civil suit for the benefit of the widow and children of William R. Benjamin, killed by a train on defendant's railroad, at a grade crossing in Biddeford, November 26, 1886, is governed by the rules of law applicable to civil proceedings. *State* v. *Grand Trunk R'y.* 58 Maine, 176-182; *State* v. *M. Cent. Railroad* 76 Maine, 357-364.

Whenever the evidence leaves the case such that a verdict against the defendant would be set aside, it is not merely the right, but the duty, of the court to order a non-suit, or direct a verdict for defendant. *Heath* v. *Jaquith*, 68 Maine, 433; *Merrill* v. *North Yarmouth*, 78 Maine, 200; *Warren* v. *Fitchburg Railroad Co.* 8 Allen, 227; *Butterfield* v. *Western Railroad Corp.* 10 Allen, 532; *Chaffee* v. *Boston and Lowell Railroad*, 104 Mass. 108; *Barstow* v. *Old Colony Railroad*, 143 Mass. 535; *Railroad* v. *Houston*, 95 U. S. 697; *Schofield* v. *Chic. Mil. and St. Paul Railroad, Co.* 114 U. S. 615; Patterson's R. R. Accident Law, 173; cases cited in note 4, 175.

The foundation of this process is solely statutory. R. S., c. 51, § 68, provides for its maintenance, where deceased was "in the exercise of due care and diligence," and the injuries caused by the negligence of defendant corporation or its employees. It is clear that before any question can be raised concerning defendant's negligence, plaintiffs must establish the fact that deceased was then "in the exercise of due care and diligence." But, in order to secure respectable uniformity of results, it has been found necessary for courts to formulate certain rules, and in some cases, at least, to define what constitutes "due care and diligence." Perhaps in all the wide range of cases where human conduct falls under judicial examination, no class can be found in which, with less judicial dissent, any specific rule has been so widely and uniformly expressed, as the one which requires one knowingly approaching a railroad crossing at grade, while traveling on the highway, to look and listen, if he has opportunity, before attempting to pass over; and that any omission so to do, is a failure to exercise "due care." Citations here are superfluous; still, the following recent cases illustrate the steady and uniform application of this rule in widely separated jurisdictions. *Railroad* v. *Miller*, 25 Mich. 290; *Haas.* v. *Gr. Rap. and Ind. Railroad, Co.* 47 Mich. 401; *Eilert* v. *Green Bay and Minn. Railroad Co. Id.* 606; *Union Pac. Railroad Co.* v. *Adams*, 33 Kan. 427; *Garland* v. *Chic. N. W. Railroad Co.* 8 Brad. (Ill.) 571; *Wabash, St. L. & Pac. R'y.* v. *Neikirk*, 15 Brad. (Ill.) 172; *Chic. N. West. Railroad Co.*

v. *Gertsen*, *Id.* 614. (In this case where the court below charged that it was the duty of travellers to "look or listen," the case was sent back because the charge should have been that it was his duty to "look and listen;" and this in a state where the doctrine of "comparative negligence" has been promulgated.) Similarly in this state the subject has been thoroughly examined, and the same settled rules affirmed. *Grows* v. *M. C. R. R.* 67 Maine, 100; *State* v. *M. C. R. R.* 76 Maine, 357; *Lesan* v. *M. C R. R.* 77 Maine, 85; *State* v. *M. C. R. R. Id.* 538; *Chase* v. *M. C. Railroad*, 78 Maine, 346.

In many cases it has been held that "no omission of duty" on the part of the corporation, or its employees, relieved the traveller from his duty to look and listen. Among the later, are, in addition to some of those hereinbefore cited: *McGrath* v. *N. Y. Cent. and H. R. Railraod Co.* v. 59 N. Y. 469; *Culhane* v. *N. Y. Cent. and H. R. Railroad Co.* 60 N. Y. 134; *Dolan* v. *Del. and Hud. Canal Co.* 71 N. Y. 285; *Tolman Adm.* v. *Syr. and Bing. and N. Y. Railroad*, 98 N. Y. 198; *Thompson* v. *N. Y. Cent. and H. R. Railroad Co.* 33 Hun. 16; *Hixon* v. *St. L. Han. and Keok. Railroad Co.* 88 Mo. 335; *Drain* v. *St. L. Iron M. and Southern Railroad Co. App.* 10 Mo. App. 531; *Tol. Wab. and West R'y. Co.* v. *Schuckman Adm.* 50 Ind. 42; *Pitts. Cin. and St. L. R'y. Co.* v. *Gundt* 78 Indiana, 373; *Penn. Railroad Company* v. *Righter*, 42 N. J. L. 186; *Berry* v. *Penn. Railroad Co.* (New Jersey, May, 1886,) 26 Am. & Eng. R. R. cases, 396; see also cases cited in last paragraph of note, p. 181, to *Phil. and Read. Railroad Co.* v. *Boyer*, (Penn. Jan. 1881,) 2 Am. & Eng. R. R. cases, *Id.* pp. 226 *et seq.* in notes "no man has a right to depend entirely upon the care and prudence of others;" 19 Am. & Eng. R. R. cases, note a. p. 260, last paragraph; Beach on Contr. Neg. 64; Deering on Neg. Tit. R. R. § 244; Patterson's R. R. Accident. Law, 167, 168, last paragraph of 169; *Lehigh Val. Railroad Co.* v. *Brandtmaier*, (Penn. April 14, 1886,) 18 weekly notes of cases in Penn. 474; 2 Lacey's Dig. R. R. Law Tit. Injuries to persons on the track, 149, 151; and 1 Thomp.

Neg. p. 426, cited with approval by this court in *Lesan* v. *M. R. R. supra.*

The following pertinent language was employed by the court in *Wilds* v. *Hud. Riv. Railroad Co.* 24 N. Y. 430, 440, after alluding to the oft repeated declarations of the "alarming power of a locomotive and the appalling danger of running one anywhere but in a wilderness:" "All this is very true; but there are two sides to these facts. If a locomotive be eminently dangerous, everybody knows it to be so. And it is as dangerous to run against, or under it, as to have it run over you. A railroad crossing is known to be a dangerous place, and the man who, knowing it to be a railroad crossing, approaches it, is careless unless he approaches it as if it were dangerous. To him the danger is vastly greater than it is to the locomotive; he may lose his life. And if the company be bound to use very great care not to endanger him, why is not he bound to use equally great care not to be endangered? His care should be as much graduated by the danger as the company's. When everyone who knows that the railroad is there is bound to know, and to remember, that a train may be approaching, not to take the very simple precaution of looking and listening to find out whether one is coming, cannot but be want of care. To be sure the statute requires a railroad company to give specified warnings; but it neither takes away a man's senses, nor excuses him from using them (18 N. Y. 425, 426). The danger may be there. The precaution is simple. To stop, to pause, is certainly safe. His time to do so is before he puts himself in 'the very road of casualty.' And if he fails to do so, it is of no consequence, in the eye of the law, whether he merely misjudges, or is obstinately reckless. His act is not careful, and he is to abide the consequences, not the company under or into whose train he saw fit to run, whether he did so in inexcusable ignorance or in the belief that he could run the gauntlet unharmed." Similarly said DEVENS, J., in *Hinckley* v. *Cape Cod Railroad Co.* 120 Mass. 257, 262, "While one may, in the exercise of reasonable care, rely to a certain extent upon the performance of his duty by the other, no negligence of such other can be so dominant as to

relieve him from his own obligation, and if a performance of such obligation might have prevented the injury, this failure so to perform must be considered as contributing thereto."

All these cases, in their reasoning completely cover, and many of them present, actual instances of absent flagmen and open gates. However, there are several English, and two or three American cases, sometimes inaccurately cited as giving countenance to the claim that an open gate is equivalent to an invitation to pass over without other precautions. Perhaps the leading English cases on this subject are: *Stapley and another, Executors*, v. *London Brighton and South Coast Ry. Co.* L. R. 1 Exch. 21; and *Lunt* v. *London and No. West. Ry. Co.* 1 Law. Rep. Q. B. Cas. 277. That these cases are not authority for so broad a position here, is apparent from the peculiar provisions of the English act of Parliament on which they rest. Railway Clauses Consol. Act of 1845, § 47 (8 and 9 Vict. c. 20), expressly requires every railway company to erect gates at all crossings on a level, and constantly to keep "proper persons to open and shut such gates; and such gates shall be kept constantly closed across such road on both sides of the railway except during the time when cattle, carts or carriages passing along the same shall have to cross such railway," from which it is clear (1) that the duty to maintain the attendance of a flagman is universal, and (2) that closed across the highway is the normal condition of the gates, their open condition exceptional—exactly opposite to the custom in this country. Furthermore, in *Lunt* v. *Ry. Co.* the traveler not only saw the employee open the gate, but was instructed by the same employee to "come on."

Somewhat similar to the English statute are the provisions of statutes in New York, as to crossings in some of the larger towns and cities; hence, in *Glushing* v. *Sharp*, 96 N. Y. 676, when a gateman was seen to be in attendance and to raise the gates, this was held to entitle the plaintiff to go to the jury.

In *Phil. & Reading Railroad Co.* v. *Killips*, 88 Penn. St. 405, when a gateman left at 7 P. M., and a little past 7 P. M., a traveler who attempted to cross without looking where he might have seen, although "he did look" at certain other points, was

also permitted to go to the jury by a divided court. But *Phil. & Reading Railroad Co.* v. *Boyer*, 97 Penn. St. 91, holds that if the traveler had information from another source, it is "no matter what the flagman did or did not do."

In *Lake Shore and M. S. Railroad* v. *Sunderland*, 2 Brad. (Ill.) 307, it is pointed out that the only case which seems to afford plaintiffs here any sort of judicial support, the case of *St. L. Van. and Terre H. Railroad Co.* v. *Drum*, 78 Ill. 197, rests upon the doctrine of "comparative negligence."

The following among the most recently reported cases, in some of which the plaintiff was permitted to go to the jury, and in some of which he was not, are all in harmony with the contention of defendant here: *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery*, 3 L. R. App. Case, 1155; *Wakelin, App'l't*, v. *London and South Western Railroad Co.* 12 L. R. App. Case (House of Lords, March 1, 1887), part 1, p. 41; *Roades* v. *Chic. and Grand Trunk Ry.* 58 Mich. 263; *Greany* v. *Long Island Railroad Co. App'l't*, 101 N. Y. 419; *Burns* v. *North Chic. Rolling Mill Co.* 65 Wis. 312; *Central Trust Co.* v. *Wab. and St. Louis and Pac. Ry. Co.* (Circ. Ct. E. D. Mo. Mich. 24, 1886), 27 Fed. Rep. 159.

The statement in Whittaker's Smith on Neg. 401, as to the traveler being "misled" by open gates, is carefully qualified by "possibly, if there were a statutory duty on the railway," and supported by citation, in notes, of the English cases we have examined.

Obviously, it is needless to consider the doctrine governing the rights of persons confused or misled by express directions or conduct of authorized agents of the corporation, acting within the scope of their several duties, as exemplified in the case of passengers in *Warren* v. *Fitchburg Railroad Co.* 8 Allen, 227; and in the case of travelers not passengers, in *Sweeny* v. *O. C. and Newport Railroad Co.* 10 Allen, 368; or those of a traveler who is not aware that he is approaching a railroad crossing, as in *Elkins* v. *Boston & Albany Railroad*, 115 Mass. 190.

Should it be claimed that deceased and his companions were mistaken in their judgment that the train was on the other road

(as certain evidence plaintiff offered would seem to indicate as possible), two replies are clear: (1) In fact, it does not appear that this was their judgment,—one said he "couldn't tell which road it was on;" the other said he "could not tell,"—but rather that their minds were not at rest on the subject. (2) In law, had such been their judgment, it was erroneous, and an erroneous judgment, when correct conclusions might easily have been verified, will not avail to give the traveler who is not in the exercise of "due care and diligence" the rights of one who is. *Harris* v. *Ill. Cent. Railroad Co.* 41 Iowa, 227; *Benton* v. *Central Railroad of Iowa*, 42 Iowa, 192; *Schæfert* v. *Chic. M. and S. P. Railroad Co.* 62 Iowa, 624; *Prul.* v. *S. L. K. C. and N. Ry.* 73 Mo. 168; Patterson, Railroad Ac. Law, 162.

PETERS, C. J. After the plaintiff's evidence was out in this case, it was agreed by the parties that, if such evidence be, in the opinion of the full court, sufficient to authorize a jury, *in any event*, to find for the plaintiff, a judgment may be entered against the defendants for the sum of five thousand dollars.

Allowing to the plaintiff, under this stipulation, the benefit of the most favorable view which the evidence is legally susceptible of, it may be considered that the following facts are proved: The deceased, William B. Benjamin, for whose death the action is instituted in the name of the state, and two other men, of the names of Burnie and Hooper, the latter owning and driving the team, were sitting in an open, one-seated wagon, and approaching at a moderate gait, or "very slowly," a level crossing of defendants' railroad over the highway in Biddeford. It was at about ten o'clock on a starlight night in November, 1886. The railroad and town road intersect at about a right angle. The three were persons of middle age, with physical faculties unimpaired, sober and intelligent, and were returning home from a lodge meeting of some kind over a road familiar to all of them. When within about three hundred and fifty feet of the crossing a locomotive whistle was heard, but no bell was heard by them at any time. The bell was heard by others at the moment when the locomotive was passing the crossing, the train at the time running at a rate

of not less than twenty-five miles an hour through a compact portion of the city of Biddeford. When the whistle was heard, Burnie called Hooper's attention to it, and Hooper said he did not know which road it was on, meaning whether on the Boston and Maine or Eastern railroad. Burnie replied that he could not tell from the sound which road it was on. The deceased said nothing, and nothing more was said by either of them. The team moved on without stopping, and almost immediately it reached the Boston and Maine track, when a collision took place between locomotive and team by which two of the three men were almost instantly killed. The way on which the parties were traveling was slightly descending towards the crossing, and a view of the coming train was mostly obstructed from the travelers by houses and other structures, and the plans and photographs show that there may have been no opportunity for the travelers to see the train, situated as they were while in motion.

The defendants contend that the travelers did not look and listen after their interchange of words about the direction of the sound from the whistle. We think a jury would be justified in the belief that they did. On this point the survivor was not very explicit in his testimony, but he was not asked about it, nor was he at all exhaustively examined. The men did not in fact see the locomotive until they were within an estimated distance of fifteen feet from the track, the train being about one hundred feet away, and a collision may not then have been avoidable. At the place where the whistle was sounded the two railroads were within three hundred feet of touching together, then diverging until at the crossing they were about one thousand feet apart, the Eastern being the farthest away.

It is reasonable to believe that the three men, as they approached the crossing, saw that the gates there were open and unattended by any person, and that there was no signal of any kind indicating that a train was expected. A red light was burning, the usual switch signal, which was not any warning to those using the common roads. The gates were of the double-arm pattern, operating on pivots on each side of the highway,

when open the arms standing erect, and these had been in use at this crossing for about three years. An employee was in daily attendance upon them from seven o'clock A. M. until about fifteen minutes after seven P. M. when he usually locked the gates and left them for the night doing so on the night of the catastrophe. The train which struck the wagon, was the regular night Pullman train running from Boston to Bangor, on the Boston and Maine road. This train has run most of the time for many years over the Eastern railroad, but had been running over the Boston and Maine road for about a month before the accident, and had also run on the same road for a period of eight months during the year before the accident. The two roads were managed by the same company. The survivor, and the same thing may be fairly assumed of his associates, had seen that gates were in operation at the crossing, but had never noticed that they were not at all times used when trains were passing. They supposed that they were so used. The flagman in the railroad employment testified that, when for any reason the gates were out of order, he used a green lantern by night and a yellow flag by day whenever a train passed.

It is not denied that the defendants were themselves guilty of negligence. They were running their train at a rate of speed upwards of four times the rate allowed by law. Chapter 377, of the acts of 1885, prohibits a train running across a highway near the compact part of a town at a speed greater than six miles an hour, unless the parties operating the railroad maintain a flagman or a gate at the crossing. Had not the defendants been remiss in the discharge of this statutory duty, it is reasonable to conclude that the accident would not have happened.

Nor would the accident have occurred, the defendants contend, if the deceased had not also been guilty of negligence. Great stress is placed by the defendants' counsel upon the position taken for his clients that the three men did not look and listen for the location of the train, or, if they did, that they paid no heed to the signals which their ears revealed to them. It certainly cannot be denied that it was an egregious blunder for

the team to continue moving on so near to the crossing, while the occupants could not tell from which railroad, the sound of the whistle proceeded, unless other facts furnish an excuse for not stopping. The team should have halted. The very doubt felt by the men was notice enough of danger, unless they were, without their own fault, deceived by the surrounding circumstances.

The plaintiff's counsel insists that such excuse exists. It is contended on that side of the case that, taking into consideration that the train was not seen, though the deceased and his associates must have been intent upon their situation, as evidenced by their sudden silence as they were advancing on their way after their interchange of views on the subject, and considering also the fact that they had much reason to suppose that the Pullman train belonged upon the most distant road, the sight of the uplifted arms of the gates was evidence enough to dissolve all doubt in the minds of those men, and to induce them to believe that they could safely continue on without interruption. The plaintiff's counsel contends that such was the judgment of three men, who for intelligence and experience would average well with men generally.

The counsel for the defendants contends that the standing arms, indicating open gates, should not be regarded as any signal, or a sufficient signal, of safety, at any crossing where the law does not require gates to be maintained. At this place the gates were erected by the voluntary act of the company. But is it not a fair construction of the statute to say that it does require gates to be maintained, or a flagman to be present, at all grade crossings, as to trains moving more rapidly at such places than six miles an hour? And while a neglect of the company to perform its duties does not excuse the traveler in a neglect of the duties and degree of care which the law imposes on him, still, in making his calculation for crossing a railroad track safely, he is often justified in placing some reliance on a supposition that the company will perform the obligation resting on it, where there is no indication that it will do the contrary. If the gates were open and the crossing unattended by a flagman,

then these persons had a right to accept the fact as some evidence that the train would not attempt to pass the crossing at a faster speed than six miles an hour. Of course full reliance cannot always be placed on an expectation that a railroad company will perform its duties, when there is any temptation to neglect them, because experience teaches us that it would not be practicable to do so. But such an expectation has some weight in the calculation of chances, greater or less according to the circumstances. But what essential difference can it make in the relation of the parties whether the statute requires a flagman at any point or whether absolute necessity requires one; whether the legislature declares the necessity, or the company by its act confesses the necessity?

The defendants, by their counsel, contend that the English and New York authorities, cited by plaintiff, are based upon a statutory requirement that gates shall be maintained. That is not entirely correct. In a leading case, *Stapley* v. *London, &c. Ry. Co.* L. R. 1 Ex. 21, it was said that while there was no law requiring gates as to foot passengers, still the decision was that the footman in that case was fairly invited by the open gates seen by him to attempt a passage across the tracks. Nor do we find that the New York cases place the responsibilities of railroads wholly on what the statute law requires of them as to guards at crossings. It is said in *Kissenger* v. *N. Y. & Harlem* R. R. *Co.* 56 N. Y. 538, "though it is not negligence for a railroad company to omit to keep a flagman, still, if one is employed at a particular crossing, his neglect to perform the usual and ordinary functions of the place may be sufficient to charge the company." See *Glushing* v. *Sharp*, 96 N. Y. 676. If the presence of a flagman and closed gates indicate a passing train, certainly the absence of the flagman and open gates must be evidence that a train is not presently due or expected. The annexed authorities touch nearly to the point involved in the facts here presented. *Wheelock* v. *B. & Alb.* R. R. *Co.* 105 Mass. 203; *Tyler* v. *N. Y. & N. E.* R. R. *Co.* 137 Mass. 238; *Sonier* v. *B. & Alb. R. R. Co.* 141 Mass. 10; Whar. Neg. § § 385, 386, and cases. *Pierce, Railroads*, 203, and cases.

The plaintiff's case is fortified by another consideration. He neither drove, nor, as far as appears, had any control of the team on which he was riding. It is reasonable to suppose that the owner carried him either for hire or gratuitously as a neighborly kindness. His position was not of the same degree of responsibility to the railroad as was that of the driver. He was a comparatively passive party. Not that he had no duty to perform. He could have asked the driver to stop the team, or he could have left it. But it would be natural, even though his fears were excited, that he should defer to some extent to the experience and discretion of the driver, who was in the control of his own team, and before he had time to assert his own judgment against the driver's, or perhaps fully appreciate the situation, the inevitable event was upon him. We think this fact has considerable force in the combination of circumstances which weigh against the charge of contributory negligence.

And we may consider this point in the argument in behalf of the plaintiff, unless we adhere to the doctrine of imputable negligence, which has been considerably practiced on in the courts, first promulgated in the case of *Thorogood* v. *Bryan*, 8 C. B. 115, a doctrine which ascribes to a passenger the contributory negligence of a driver over whom he has no control.

This doctrine was never adopted in Scotland, nor by the English admiralty court, and was never at rest but has been constantly doubted and criticised in other English courts, until, in 1887, it was overruled by the court of appeal, without a dissenting vote on the question, in the exhaustively considered case of *The Bernina* L. R. 12 Pro. Div. 58. The action in that case, though originating in the admiralty, was brought under Lord CAMPBELL'S act, and was governed in all respects by common law rules, and the full court of England unhesitatingly swept away the old rule, saying that it was a fictitious extension of the principle of agency unwarranted upon any rule or theory of law. It is remarked in that case that the preponderance of judicial and professional opinion in England is against the doctrine, and that the weight of judicial opinion in America, is also against it. The same decision has been made in the Supreme

Court of the United States in *Little* v. *Hackett*, 116 U. S. 366, where it is said that the doctrine of *Thorogood* v. *Bryan*, rests upon indefensible foundation. It is there declared that the identification of the passenger with the negligent driver, without his co-operation or encouragement, is a gratuitous assumption. The same view of the question is entertained by text-writers generally, especially in last editions of their works. The older doctrine is rapidly fading out.

A distinction has sometimes been attempted to be made between riding in a public or riding in a private carriage, but that idea has not prevailed to any considerable extent. The cases discuss, as an English court puts it, the broad question as to what is the law applicable to a transaction in which one has been injured and in the course of the transaction there have been negligent acts or omissions by more than one party. In quite a number of the cases the facts were precisely as they are here, and the distinction is not heeded. A few cases like or nearly like the present case are the following: *Robinson* v. *N. Y. Cen.* R. R. 66 N. Y. 11; *Masterson* v. *N. Y. Cen.* R. R. 84 N. Y. 247; *Cuddy* v. *Horn*, 46 Mich. 596; *Transfer Co.* v. *Kelly*, 36 Ohio St. 86; *Bennett* v. *N. J. &c. Co.* 36 N. J. L. 325; *N. Y. &c.* R. R. *Co.* v. *Steinbrenner*, 47 N. J. L. 161; *Wabash, &c.* R. *Co.* v. *Schacklett*, 105 Ill. 564. See *Borough of Carlisle* v. *Brisband*, 113 Penn. St. 544; S. C. 57 Amer. R. 483, and cases in note.

We are not committed to the doctrine of *Thorogood* v. *Bryan*, in this state to an extent preventing its repudiation. In *Dickey* v. *Telegraph Co.* 43 Maine, 492, the rule was acted on without any expression of dissent by counsel.

The doctrine of imputable negligence as applicable to the relation of parent and minor child, which presents another and a somewhat different question, has been favorably alluded to in this state, but in cases where it did not affect the result reached on other grounds. *Brown* v. *E. & N. A. Ry. Co.* 58 Maine, 384; *Leslie* v. *Lewiston*, 62 Maine, 468.

A class of cases against towns for injuries caused by defective

highways, being statutory actions, stand upon a ground of their own, unaffected by the rule under discussion.

On the terms of the submission of this case to the court by the parties, we think judgment must be entered for the plaintiff for the sum agreed upon as damages.

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

LYDIA B. ATWOOD and another *vs.* MICHAEL C. O'BRIEN.

Penobscot. Opinion June 20, 1888.

Deed. Boundary. Way.

When the premises conveyed by a deed are described as bounded upon one side by the continuation of a side line of a street, that does not constitute a dedication of the land for a street up to and past the premises conveyed, though the continuation of the street was contemplated.

If the grantor by a second deed convey to the same grantee the fee to the center line of the contemplated street, the acceptance of that deed would constitute a waiver of all rights, if the grantee had any, beyond the center line of the contemplated street, until it was actually established as a street.

ON report of facts agreed.

The opinion states the case and material facts.

Charles H. Bartlett, for plaintiff, cited: Wash. Ease. (4 ed.) 211, 269; *Bartlett* v. *Bangor*, 67 Maine, 460; *Holdane* v. *Cold Spring*, 21 N. Y. 474; Bigelow, Estoppel, (4 ed.) 616, 350, 445; *Low* v. *Tibbetts*, 72 Maine, 92; *Holmes* v. *Turner's Falls L. Co.* 142 Mass. 590 (3 New Eng. Rep. 177); *Parker* v. *Smith*, 17 Mass. 411; *Bullard* v. *Dyson*, 1 Taunt. 279; *Harding* v. *Wilson*, 2 B. & C. 96; *Salisbury* v. *Andrews*, 19 Pick. 250; *Walker* v. *Worcester*, 6 Gray, 548; *Plymouth* v. *Wareham*, 126 Mass. 475; *Crowell* v. *Beverly*, 134 Mass. 98; *Nobleboro* v. *Clark*, 68 Maine, 87; *Howe* v. *Alger*, 4 Allen, 206; *Wood* v. *Pennell*, 51 Maine, 52.

P. H. Gillin, for defendant.

We claim by the well settled law in this state and Massachusetts, a right of way in and over the "*locus in quo.*" 109

Mass. 292; 32 Maine, 80; 10 Pick. 138; 17 Mass. 413; 20 Wend. 149; 3 Kent, 433; 18 Maine, 76; 67 Maine, 460.

By a well settled principle of the law as laid down, 8 Met. 266; 11 Pick. 213; 10 Maine, 335, the plaintiffs are estopped from denying our right of way over the "*locus in quo*," viz.: When a deed refers to a plan, if the description is partly given differing from the plan, this will vary the plan accordingly.

The general and well established rule of law in this and other states, according to the opinion of the court in *White's Bank of Buffalo* v. *Nichols*, 64 N. Y. 65, is "that where the owner of land in a city lays out a street through it, and sells lots on each side of the street, the public have an easement of way, or right of passage, although it may not become a public highway in the ordinary sense of that term until the dedication is accepted and the street adopted by the corporation, and the grantees of the lots are entitled as purchasers to have the interval or space of ground left open forever as a street."

The subsequent act of the plaintiffs' deeding to Kelley to the centre of Rowe street, while it gave him what he did not before possess, a fee to part of the street, 33 Maine, 502, could not have any bearing in taking from the public and the purchasers along said street the right of way therein. Again, in the same case, 64 N. Y. 65, the learned court says, "while a mere survey of land by the owners into lots defining streets, squares, etc., will not without a sale amount to a dedication, yet a sale of lots with reference to such plat, or describing lots as bounded by streets, will amount to an immediate and irrevocable dedication of the latter, binding upon both vendor and vendee."

It is almost the universal rule from the earliest origin of conveying the fee to land by written instrument, that the terms of such written covenant shall be strictly construed against the grantor, and when there is neither mistake or fraud on the part of the grantee, oral evidence is not admissible to controvert or disprove his (the grantor's) solemn act. The grant of a principal thing carries with it all that is necessary for the beneficial enjoyment of the grant which the grantor can convey. 41 Maine, 177. If the plaintiffs did not mean to give their grantees at the

auction sale the free use of Rowe street as marked upon the auction plan, it was an easy matter to so mention in their deed to Kelley. 67 Maine, 460. Wash. Easements and Servitudes; Sec. ed. pp. 225, 226 and 227; 21 Pick. 292; 4 Gray, 537; 17 Mass. 413; 4 Allen, 206; 22 N. Y. 217; 24 Barb. 44; 6 Wheat. 307; 6 Gray, 548.

DANFORTH, J. An action of trespass upon land, which is before the court upon facts agreed. It is admitted that the fee is in the plaintiffs. The defendant admits the alleged acts of trespass, and justifies under a claim of a right of way. The validity of this claim is the only question involved. Its foundation is found in a deed of September 18, 1884, from these plaintiffs to Andrew Kelley, Jr., the defendant's grantor, by which land south of that in question is conveyed. The description in this deed is, so far as material, as follows, viz.: "Beginning at a point on the northwesterly side line of First street . . . being on the division line between lot No. 11 and land of Barker and Davis, according to Bradley's plan of the Davenport lands extended March 24, 1851, thence northwesterly on said division line and the continuation thereof two hundred and forty feet to a stone on the continuation of the southeasterly side line of Second street, thence northeasterly on said continuation of said line one hundred and sixteen feet to a point on the continuation of the southwesterly side line of 'Rowe street' so called, thence southeasterly on said continuation line two hundred and forty feet to a point on the northwesterly side line of First street, thence southwesterly on said side line . . to the place of beginning." It is claimed that there is a grant of a right of way over what is called "Rowe street," or that the plaintiffs are estopped to deny the defendant such a right by virtue of this deed. It is undoubtedly well settled that a conveyance of a lot of land by reference to a plan upon which streets are laid down in connection with the lot conveyed, or when the land is bounded by a street, such a grant, or estoppel, will ordinarily follow.

But this conveyance lacks several of the elements necessary to bring it within that rule. The description is by fixed and definite metes and bounds, and not by a reference to any plan. The only plan referred to is that of Bradley's, and that only to fix the starting point. Upon that plan there is no location, no indication whatever of any such street or way, as is here claimed. The land is not bounded upon the street claimed. The northerly line which is alleged to be such a boundary, begins and runs upon the "continuation" of the southwesterly side line of "Rowe street," showing, as do the facts, that though Rowe street might be in existence at some other point, yet it did not at any place come in contact with, or adjoin this land. All these facts were patent and as well known, or should have been, to the grantee as to the grantors. The lot was bounded at each end by a located and traveled way. How then can it be said that here was a grant of a way when there was none in existence, no occasion for any, or an estoppel from asserting a truth equally well known to both parties and clearly recognized by the deed? Much more would the deed, with its definite description, come within the principle settled in *Warren* v. *Blake*, 54 Maine, 276, and exclude the way, even if there had been one.

But it is said that a continuation of "Rowe street" across the land in question was contemplated when the deed was given, and it is claimed that this intention was a sufficient dedication of it to enable the grantee to hold a right of way over it. In *Bartlett* v. *Bangor*, 67 Maine, 460, it was held that the location *of streets upon a plan and selling the lots* by reference to the plan, would constitute such a dedication of the way as could not be revoked by the owner. But our attention has not been called to any case, nor are we aware of any, where the mere recognition of a contemplated street as such would have that effect, especially where there was no location upon any plan. But however that might be under other circumstances, in this case it can have no such effect.

It appears from the facts in this case that "Rowe street" had been opened and traveled from Main street in the direction of this land in question, but stopping some little distance before

reaching First street, which is the easterly boundary of the land conveyed to Kelley. If continued in a straight line of the same width across First street to Second street, its southwesterly side line would be the northerly line of the lot sold Kelley, as described in the deed. In 1878, Mr. Wilson acting for the proprietors, proposed to the city of Bangor that if it would extend Rowe street, well "graded and gravelled," across this land, the city might have all the gravel contained on said street and two years to remove it. This proposition was accepted by Bangor, as appears by its records, and the gravel taken. This was the contemplated street. It was not dedicated to the public nor represented as such by any plan, or otherwise. The plan, made a part of the advertisement of the auction sale, showed it as a "proposed street," and the advertisement described the lot as lying on the "southerly side of the proposed extension of the so called Rowe street."

These facts were all open and the grantee was put on his guard by the terms of his deed, as well as in other ways. The plaintiffs had fully performed their part of the contract. It only remained for the city to perform its part. The contemplation, the contingency, was with it, and the fact that the street is not there, is not the fault of the plaintiffs, but is the fault of the city. When Kelley bought, if he relied at all upon having the street, he must have relied upon the city and not upon the plaintiffs.

But the case does not stop here. By the subsequent conduct of the parties, it is made clear that no claim was made by Kelley upon the plaintiffs, or if so, he released them from it. In June, 1885, the city having refused to make the street, paid for the gravel it had taken. In the following December, another contract was made between the plaintiffs and Kelley, by virtue of which another deed was given in which a nominal consideration is expressed. In this deed the plaintiffs release to Kelley all their interest in "the southerly half of the so called 'Rowe street' lying between the First and Second streets in Bangor, which adjoins land of said grantee." Then follow these words: "This deed is given for the purpose of settling beyond any doubt that the northerly line of said grantors' land, between said streets,

lies in the center of the so called Rowe street, and that said Kelley is the owner of the southerly half of said Rowe street, subject to whatever easement or right of way may be over the same." This deed having been accepted by Kelley, he is bound by its terms, and in it he acknowledges the title of the grantors to the northern half, the very land in question, without any reservation whatever, and for the expressed purpose of removing any doubts as to that title.

At the date of the first deed both parties had reason to expect and undoubtedly did expect that Bangor would extend and make fit for use "Rowe street." The deed was given and received with that impression, the grantee taking his chances. The expectation failed, the chance for a public street had gone, and the grantee's title extended only to the southerly line of the expected street. While fifty feet was perhaps none too wide for a public street, half that would be amply sufficient for all private purposes. Hence to quiet all claims, to remove all doubts, the latter deed was made, giving the grantee the control of the half adjoining him with the right of way over that, and the control of the other half without any right of way over that, to the grantors. Whatever may have been the effect of the former deed, the last one we think settled the whole matter, and if any right of way remained it was a private one, and over what became Kelley's own land. Of this construction certainly Kelley has no reason to complain, and the defendant can have no more rights than his grantor. As agreed, the entry must be,

Defendant defaulted. Damages one dollar.

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

STATE OF MAINE *vs.* A. J. SMALL.

Knox. Opinion June 23, 1888.

Intoxicating liquor. Pleading. Evidence.

When the offence of a common seller is set out with a *continuando*, time is material and the evidence must be confined to acts which happened within the days alleged.

ON exceptions.

Indictment charging the respondent with being a common seller of intoxicating liquor between the 1st day of June, A. D. 1887, and the date of the indictment.

At the trial the presiding justice allowed evidence to be introduced by the government tending to show that the defendant was a common seller before the first day of June, 1887, and instructed the jury that the time mentioned in the indictment was not material. To this ruling and instructions the defendant alleged exceptions.

J. H. H. Hewett, county attorney, for the state.

Robinson and Rowell, for the defendant.

VIRGIN, J. In setting out, in an indictment, an offence which consists of a single act, though an allegation of the time of its commission is necessary, still the evidence of such act is not confined to the time alleged, but may be of acts which took place at any time before the finding of the indictment and within the period allowed by the statute of limitations. Bac. Ab. Indict. G. 4; *Com.* v. *Traverse*, 11 Allen, 260.

When the offence consists of a series of acts, a day certain must be alleged, and the time is material, and no evidence of the commission of the acts on any other day is admissible. *Com.* v. *Elwell*, 1 Gray, 462; *Com.* v. *Gardner*, 7 Gray, 494; *Com.* v. *Sullivan*, 5 Allen, 513. Such offences are frequently and properly set out with a *continuando*; and when so set out, time is material, and evidence is confined to acts which happened within the days alleged. *State* v. *Cofren*, 48 Maine, 364-366; *Com.* v. *Briggs*, 11 Met. 573; *Com.* v. *Chisholm*, 103 Mass. 213; *Com.* v. *Dunster*, 145 Mass. 101; *Com.* v. *Purdy*, 5 N. E. Rep. 710. And an indictment containing such allegations may be supported by proof of the commission of the offence during any part of the period named. *Com.* v. *Wood*, 4 Gray, 11; *Com.* v. *Connors*, 116 Mass. 35.

Exceptions sustained.

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

CARRIE E. CLARK *vs.* BYRON B. BRADSTREET.

Kennebec. Opinion July 2, 1888.

Bastardy process. Infant as evidence.

In bastardy proceedings, an infant six weeks old was introduced in evidence, and viewed by the jury to enable them to judge, from a comparison of its appearance, complexion and features with those of the defendant, whether any inference could be legitimately drawn therefrom as to its paternity. This was held to be error.

Such evidence is too vague, uncertain and fanciful, and if allowed would establish an unwise, dangerous and uncertain rule of evidence.

ON exceptions from superior court.

The case and material point are stated in the opinion.

J. H. Potter, for plaintiff.

It is a well known physiological fact that peculiarities of form and feature and personal traits are often transmitted from parent to child, and although taken by itself, proof of such resemblance might be insufficient to establish its paternity, but it is clearly a circumstance to be considered in connection with the other facts. *Finnegan* v. *Dugan*, 14 Allen, 197; *Gilmanton* v. *Ham*, 38 N. H. 108; *State* v. *Woodruff*, 67 N. C. 89; Wharton on Ev. Vol. 1, 347; *Warleck* v. *White*, 76 N. C. 175; *State* v. *Smith*, 54 Iowa, 104; *State* v. *Britt*, 78 N. C. 439.

In *State* v. *Woodruff*, 67 N. C. 89, where the child was exhibited to the jury and comments made by the attorney for the complainant, the court said, "It has been the universal practice in this state for more than forty years, and is founded in common sense and sound reason."

In an action for crim. con. the child claimed to be the offspring of the defendant was exhibited to the jury. And in this case the court instructed the jury as follows: "If you believe that the child of plaintiff's wife shown to you during the trial resembles the defendant, and experience teaches you that there is anything reliable in this appearance that would be safe for you to found an opinion on, you may consider it in corroboration of her evidence." This instruction the appellate court

sustained. *Stumm* v. *Hummell*, 39 Iowa, 478; *State* v. *Bowles*, 7 Jones, N. C. 579.

In a proceeding in bastardy, the exhibition to the jury of the child and the pointing out by the counsel for the state of certain points of resemblance between such child and the defendant was held to be proper. *State* v. *Smith*, 54 Iowa, 104.

Professor Greenleaf, in his work on Evidence, Vol. 2, in a note on page 142, refers to *State* v. *Bowles*, above cited, and seemingly approves the decision therein.

Wharton, in his work on Evidence, approves the practice, Vol. 1, p. 347, and cites authorities in support thereof.

The two leading cases opposed to our position are *State* v. *Danforth*, 48 Iowa, 331, and *State* v. *Risk*, 19 Ind. 152.

There are many cases reported where it is held that testimony of witnesses to prove the likeness between the defendant and the child is inadmissible, as in the following: *Keniston* v. *Rowe*, 16 Maine, 38; *U. S.* v. *Collins*, Cranch, Rep. Vol. 1, 592; *Eddy* v. *Gray*, 4 Allen, 435. But these cases are foreign to the issue.

H. M. Heath, for the defendant, cited: *Keniston* v. *Rowe*, 16 Maine, 38; *Hanawalt* v. *State*, 64 Wis. 84; S. C. 54 Am. R. 588; *State* v. *Danforth*, 48 Iowa, 43; 30 Am. R. 387; *Risk* v. *State*, 19 Ind. 152; *Reitz* v. *State*, 33 Ind. 187; *People* v. *Carney*, 29 Hun. (N. Y.) 47; *Petrie* v. *Howe*, 4 Thomp. & Cook, (N. Y. Supreme Ct.) 85; *Robnett* v. *People*, 16 Ill. App. 299; *U. S.* v. *Collins*, 1 Cranch. C. C. 592; *Jones* v. *Jones*, 45 Md. 144; 1 Beck, Med. Jur. 615; Wills, Circ. Ev. (5 Am. ed.) 118, *94, 117; *Gilmanton* v. *Ham*, 38 N. H. 108; *State* v. *Bowles*, 7 Jones, (Law N. C.) 579; *State* v. *Britt*, 78 N. C. 439; *Warleck* v. *White*, 76 N. C. 175; *State* v. *Woodruff*, 67 N. C. 89; *Hutchinson* v. *State*, (Neb.) 27 N. W. Rep. 113; *State* v. *Smith*, 54 Iowa, 104; S. C. 37 Am. R. 192; *Paulk* v. *State*, 52 Ala. 427; *Eddy* v. *Gray*, 4 Allen, 436; *Finnegan* v. *Dugan*, 14 Allen, 197; *Young* v. *Makepeace*, 103 Mass. 50.

FOSTER, J. This was a bastardy process in which a verdict was rendered for the complainant.

At the trial the child, then but six weeks old, was offered, admitted in evidence, and exhibited to the jury by the complainant against the defendant's objection, and exceptions were taken.

Notwithstanding the paternity of the child was sought to be established and the putative father was defendant in the suit, we think the exceptions must be sustained.

The only object for which it is claimed that the child was introduced in evidence and viewed by the jury, was to enable them to judge from a comparison of its appearance, complexion and features with those of the defendant, whether any inference could legitimately be drawn therefrom as to its paternity.

In a case like this, where the child was a mere infant, such evidence is too vague, uncertain and fanciful, and if allowed would establish not only an unwise, but dangerous and uncertain rule of evidence.

While it may be a well known physiological fact that peculiarities of form, feature and personal traits are oftentimes transmitted from parent to child, yet it is equally true as a matter of common knowledge that during the first few weeks, or even months, of a child's existence, it has that peculiar immaturity of features which characterize it as an infant, and that it changes often and very much in looks and appearance during that period. Resemblance can then be readily imagined. This is oftentimes the case. Frequently such resemblances are purely notional or imaginary. What may be considered a resemblance by one may not be perceived by another having equal knowledge of the parties between whom the resemblance is supposed to exist. If there should be a likeness of features there might be a difference in the color of the hair or eyes. As was said by the court in *People* v. *Carney*, 29 Hun. (N. Y.) 47, "common observation reminds us that in families of children different colors of hair and eyes are common, and that it would be dangerous doctrine to permit a child's paternity to be questioned or proved by the comparison of the color of its hair or eyes with that of the alleged parent." Mr. Justice HEATH, in the case of *Day* v. *Day*, at the Huntington assizes in 1797, upon the trial of ejectment where

the question was one of *partus suppositio*, admitted that resemblance is frequently exceedingly fanciful, and therefore cautioned the jury in reference to such evidence. And in a trial in bastardy proceedings the mere fact that a resemblance is claimed would be too likely to lead captive the imagination of the jury, and they would fancy they could see points of resemblance between the child and the putative father.

As in the case at bar, where the infant was but a few weeks old, such evidence, if allowed in determining the paternity of the child, would be exceedingly fanciful, visionary and dangerous.

The testimony of witnesses, where they have no special skill or knowledge in such matters, has never been admitted in this state or Massachusetts to prove a resemblance in the features between the child and the alleged father. *Keniston* v. *Rowe*, 16 Maine, 38; *Eddy* v. *Gray*, 4 Allen, 438. Nor points of dissimilarity, not implying a difference of race. *Young* v. *Makepeace*, 103 Mass. 54.

We are aware that in New Hampshire, Massachusetts and North Carolina, and perhaps some of the other states, on an issue of bastardy, the courts have allowed the jury to judge of likeness by inspection. *Gilmanton* v. *Ham*, 38 N. H. 108; *Finnegan* v. *Dugan*, 14 Allen, 197; *State* v. *Arnold*, 13 Ired. (N. C.) 184; *State* v. *Woodruff*, 67 N. C. 89. And in deciding with regard to the color of the child, whether of negro blood or not, it has been held proper to exhibit it to the jury. *Warlick* v. *White*, 76 N. C. 175; *Garvin* v. *State*, 52 Miss. 207. No one will doubt the propriety or reason upon which these decisions are based when the question is one of race or color, for it is well understood that there are marked distinctions, physical and external, between the different races of mankind, which may enable men of ordinary intelligence and observation to judge whether they are of one race or another.

In *State* v. *Smith*, 54 Iowa, 104, the child was two years and one month old; and the court there held that a child of proper age might be exhibited to the jury, and that it was not error to exhibit a child of that age, with instructions to the jury to disregard the evidence unless they could see the resemblance claimed.

In the decisions from New Hampshire and Massachusetts nothing appears to show the age of the child of which the court speak. Our attention has been called to no other decisions in New England, nor have we been able to find any, where this question has come before the courts. But from a careful examination of the cases in those states where the question has arisen, we are satisfied that the weight of authority is against the admission in evidence of a mere infant, where race or color is not involved.

Thus in *Hanawalt* v. *State*, 64 Wis. 84 (54 Am. Rep. 588), a child less than one year old was exhibited to the jury for their inspection. This was held error, and the court say: "When applied to the immature child, its worthlessness as evidence to establish the fact of parentage is greatly enhanced and is of too vague, uncertain and fanciful a nature to be submitted to the consideration of a jury."

In *State* v. *Danforth*, 48 Iowa, 331, where the child was but three months old, the court say that the resemblance of infants to the father is too uncertain and indistinct to be allowed as evidence, and that it would be an unwise and dangerous rule to permit the admission of a child of that age.

In *Risk* v. *State*, 19 Ind. 152, the court doubted the right to introduce an infant in evidence, saying that it had seen no authority on the point, that it would be an uncertain rule, and would involve the necessity of giving the alleged father in evidence. The same question was before that court in *Reitz* v. *State*, 33 Ind. 187, where the child was held up before the jury for inspection, but the court decided it was improper, and told the jury to disregard it. See also *People* v. *Carney*, 29 Hun. (N. Y.) 47.

Exceptions sustained.

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

SAMUEL HADLEY and another *vs.* LEWIS A. HADLEY.

Hancock. Opinion July 25, 1888.

New trial. Real action. Mortgage. Judgment.

Where the only verdict in a real action is that the plaintiff is entitled to "Mortgage judgment" it will be set aside.

No judgment can be reudered on such a verdict.

If either party wishes a conditional judgment he must move for it. That is not a matter for the jury.

ON motion to set aside a special verdict.

The opinion states the case.

Wiswell and King, for the plaintiffs.

Deasy and Higgins, for the defendant.

WALTON, J. This action is before the law court on a motion submitted by the plaintiffs. The action is a writ of entry in common form. The motion states that the plaintiffs claimed title under a mortgage from the defendant, which the plaintiffs claimed had been foreclosed by publication, and that the equity of redemption had expired prior to the date of the writ, and that the issue of fact for the jury was whether there had been a breach of the condition of the mortgage before the commencement of the foreclosure, and that the jury returned a general verdict for the plaintiffs, and also found a special verdict of "mortgage judgment," and that before the special verdict was affirmed, the jury were asked by the presiding judge whether or not they found a breach of the condition of the mortgage before the commencement of the foreclosure, to which inquiry the jury replied "that they found no breach of the condition of said mortgage," and the plaintiffs move that the special verdict of "mortgage judgment," be set aside, as against law and evidence.

In two particulars, the record does not sustain the motion. The record does not show a general verdict for the plaintiffs. Nor does it show that the jury were inquired of with respect to a breach of the condition of the mortgage, or that they gave any

such answer in relation thereto, as is stated in the motion. Omitting the caption, the verdict certified by the clerk is as follows:

What judgment are the plaintiffs entitled to? Is it for a mortgage judgment, or a judgment for absolute title? "Mortgage judgment." D. H. EPPES, Foreman 1st Jury.

And the clerk certifies that "this is the only verdict in the case."

It is plain that upon such a verdict no judgment can be rendered. It neither affirms nor disaffirms the right of the plaintiffs to the possession of the demanded premises. If we turn to the evidence it is plain that the question actually tried was whether or not there had been a breach of the condition of the mortgage, and especially whether there had been such a breach before the attempted foreclosure. But this was an immaterial issue; for, unfortunately for the defendant, the form of the mortgage was such that the plaintiffs were entitled to the possession of the mortgaged premises whether there had been any breach of the condition or not. The issue, therefore, was an immaterial one. It did not determine the question on which the right to maintain the action depended.

The right of a mortgagee, or of any one claiming under him, to recover possession of the mortgaged premises, even before a breach of the condition of the mortgage, when there is no agreement to the contrary, is affirmed by the Revised Statutes, c. 90, § 2. No agreement to the contrary being shown in this case, the plaintiffs' right to maintain their action for possession cannot be defeated by showing that no breach of the mortgage had taken place when the action was commenced. The fact itself is therefore irrelevant, and the issue immaterial. No use can be made of the fact, whether found for the plaintiffs or the defendant.

And the right of a mortgagee, or of any one claiming under him, to bring his action for possession of the mortgaged premises without naming the mortgage in his writ, is affirmed by the Revised Statutes, c. 90, § 8. And if either party wishes for a conditional judgment, he must move for it. But the motion

must be addressed to and heard by the court. It is not a matter for the jury, § 9.

Such being the law, we think the verdict in this case must be set aside. It is irregular in form, and irrelevant in matter, and no use can be made of it in determining what the judgment in the case shall be; and to sustain it, would establish a bad precedent.

Motion sustained. Verdict set aside, and a new trial granted.

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

CHARLES S. DAVIS *vs.* PAUL WALTON and another.

Washington. Opinion July 25, 1888.

Equity. Fraudulent conveyance. Creditor's bill.

A judgment creditor whose execution has been returned satisfied by seizure and sale of real estate alleged to belong to the debtor, he being the purchaser at the sheriff's sale, cannot maintain a bill in equity, as a creditor, against the debtor and another who is alleged to hold the title to the real estate by a deed which is fraudulent as to creditors.

In such cases his remedy, if any, must be as a purchaser and not as a creditor.

Appeal from the decree of a single justice.

Bill in equity. The bill alleges that the plaintiff is the creditor of Paul Walton, and that the other defendant holds the title to the real estate of Paul Walton by, or through a conveyance which is fraudulent and void as to creditors, and prays that Paul Walton be required to pay him the amount of his debt, or the other defendant be required to give him a good and sufficient deed of the real estate. The other material facts are stated in the opinion.

A. McNichol and B. Rogers, for the plaintiff.

"A bill which charges that the judgment debtor, one of the defendants, had fraudulently and without a valuable consideration transferred his property to the other under an agreed purpose between them to defraud the plaintiff, is not demurrable." *Hartshorn* v. *Eames*, 31 Maine, 93.

"By the levy of an execution on the land of a judgment debtor

and delivery of seizen to the creditor, the possession of the tenant even if adverse to the creditor thereby becomes interrupted." *Clark* v. *Pratt*, 55 Maine, 546.

"Before a court in equity will interfere to afford relief, as by declaring a conveyance void, for fraud, plaintiff must show that he has an interest in the estate conveyed by levy or otherwise, or in other subject matter to which the bill relates." *Dana* v. *Haskell*, 41 Maine, 25.

"To give jurisdiction in case of a bill in equity seeking relief against a debtor who had fraudulently conveyed his property it must appear that the creditor has levied upon it or attempted to do so, or that the officer has returned his execution unsatisfied, showing that he had exhausted his remedy at law." *Webster* v. *Clark*, 25 Maine, 313; *Same* v. *Withey*, 25 Maine, 326; *Skeele* v. *Stanwood*, 33 Maine, 307; *Caswell* v. *Caswell*, 28 Maine, 232.

"After a creditor in such case has exhausted all legal remedies, a court of equity will aid him in perfecting his title to the estate and prevent his being injured by an outstanding fraudulent title. *Dockray* v. *Mason*, 48 Maine, 178; *Corey* v. *Green*, 51 Maine, 114.

In *Gardiner Bank* v. *Wheaton*, 8 Greenl. 373, in such case a bill in equity in favor of judgment creditors, without any levy, was finally sustained. If, in any such case, a levy should be made by a creditor, he might, perhaps, acquire a lien to the specific property, which would take priority of another creditor making no levy, or be good against a subsequent purchaser. *Corey* v. *Greene*, 51 Maine, 117.

In *Dockray* v. *Mason*, cited above, the legal title was never in the debtor.

"When a creditor seeks by bill in equity to obtain payment of his debt from certain real estate paid for by the debtor but conveyed to his wife, a levy is unnecessary if the debtor never had any title to the land." *De Brisay* v. *Hogan*, 53 Maine, 554.

E. E. Livermore, for defendants, cited: *Woodman* v. *Freeman*, 25 Maine, 531; *Webster* v. *Clark*, 25 Maine, 313; *Webster* v. *Withey*, 25 Maine, 326; *Corey* v. *Greene*, 51 Maine, 114; *Griffin* v. *Nitcher*, 57 Maine, 270; *Howe* v. *Whitney*,

66 Maine, 17; *Baxter* v. *Moses*, 77 Maine, 465; Bump, Fraudulent Conveyance, 514.

WALTON, J. We think the dismissal of the plaintiff's bill was right. He claims relief as a creditor. The proof is that at the time of filing his bill he had ceased to be a creditor. His debt had become merged in a judgment, and an execution which had been issued upon the judgment had been satisfied in full by a sale of the debtor's interest in real estate. The plaintiff was the purchaser, and if the debtor's interest was not as great or as valuable as the plaintiff supposed, his remedy, if any, must be as a purchaser and not as a creditor. He has ceased to be a creditor. Such was the opinion of the justice by whom the case was heard at *nisi prius*; and upon this ground he dismissed the bill with costs. We think the dismissal was right.

Decree dismissing the bill with costs affirmed.

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

MARCUS WENTWORTH *vs.* LUTHER E. WYMAN.

Waldo. Opinion July 25, 1888.

Costs. Want of jurisdiction. Trial justice.

One who is sued before a trial justice after his commission has expired, and who, on that account, is denied a trial, denied his costs and denied an appeal, can maintain an action to recover his costs.

ON exceptions.

The opinion states the point and material facts.

J. H. Montgomery, for the plaintiff, cited: Cooley, Torts, 468; *Call* v. *Mitchell*, 39 Maine, 465; *Shaw* v. *Reed*, 16 Mass. 450; Addison, Torts, 810; *Bond* v. *Chapin*, 8 Met. 31. *Kerr* v. *Mount*, 28 N. Y. 659.

George E. Johnson, for the defendant.

If a party to a suit has any knowledge or suspicion that the court before whom said suit is to be tried, is not qualified to try and determine the same, and proceeds to trial without raising the question, he thereby waives the question, and cannot afterwards

take advantage of it, at least he waived his right to recover any damages sustained by him in that suit. *Hussey* v. *Allen*, 59 Maine, 269; *Knowlton* v. *Homer*, 30 Maine, 552.

In *Veazie* v. *Bangor*, 53 Maine, 50, this court held that, "if there be any legal objection to the court, it should be seasonably made, and proceeding to trial without objection, if known, is a waiver of it."

See *Brown* v. *Lunt*, 37 Maine, 423, in which objection was taken to the execution of a deed by one of the defendants, that the certificate of acknowledgment was not made by a person authorized to make it. It appeared in evidence that the certificate of acknowledgment was made by a person whose commission as justice of the peace had previously expired. On page 432 the court say, after citing numerous authorities: "The case shows, that neither the magistrate, nor the parties to the deed knew, nor the public, by fair presumption, knew or supposed, that his commission had expired. He had been duly accredited by the government, and was assuming to act in his official capacity, as of right, and with at least a colorable right. . . . . He must be regarded, therefore, as a justice of the peace, *de facto*, when he took and certified the acknowledgment of the deed to Mrs. Lunt." And the court held the acknowledgment to be valid.

In *White* v. *Dingley*, 4 Mass. 433, the court held that, "no action, by the common law, lies for damages sustained by suing a civil action, when the plaintiff fails; unless it be alleged and shown to be malicious and without probable cause."

WALTON, J. The question is whether one, who is sued before a trial justice after his commission has expired, and who, on that account, is denied a trial, denied his costs, and denied an appeal, can maintain an action to recover his costs.

We think he can. It is now well settled, although formerly held otherwise, that when an action fails for want of jurisdiction, the defendant is entitled to costs; and, if he cannot recover them otherwise, he can maintain an action for them. The rule, as stated in *Elder* v. *Dwight Man. Co.* 4 Gray, 201, is that, where a writ is served, returned, and entered by the plaintiff, and the

suit fails for want of jurisdiction in the justice to try it, the defendant is entitled to costs; that the defendant has a right to appear and save his rights, and guard against even an erroneous judgment, and may rightfully be regarded as the prevailing party. And in *Call* v. *Mitchell*, 39 Maine, 465, it was held that, although a magistrate has no jurisdiction, and a judgment by him would be a nullity, still, the defendant is entitled to costs. And in *Mann* v. *Holbrook*, 20 Vt. 523, where the plaintiff sued out a writ returnable before a magistrate, and the defendant appeared, but no trial was had, because the magistrate was absent, the plaintiff having neglected to notify him of the pendency of the action, it was held that the defendant could maintain an action to recover his costs. And in *Shaw* v. *Reed*, 16 Mass. 450, although it was held that an action of trespass for false imprisonment would not lie in such a case for the arrest of the defendant on the writ, it was also held that he would have a remedy by an action on the case, if the absence of the justice arose from the plaintiff's negligence.

These authorities establish the principle that, in a proper case, an action may be maintained to recover costs. And we think this is such a case. The plaintiff was summoned to appear before a trial justice to answer in a civil suit. He did appear with his witnesses and his counsel. He was then denied a trial, denied his costs, and denied an appeal, because the defendant had carelessly brought his action before a justice whose commission had expired. The injury to the plaintiff was the same as if the justice had been absent. To him it could make no difference whether he lost his trial on account of the absence of the man or the absence of his authority. In either case, the injury to him would be the same. And for such an injury we think he could as clearly maintain an action in the one case as the other. And there is no hardship in making the wrong doer responsible in the one case any more than in the other. He not only selects the time and place of trial, but he also selects the magistrate; and it is as clearly his duty to select a magistrate

who is competent to try the action, as it is to notify the magistrate of the time and place appointed for the trial. For a neglect to perform his duty in the latter particular, it has already been decided that an action may be maintained against him. And for a neglect to perform his duty in the former particular, we think he is equally liable.

Exceptions sustained, nonsuit taken off and a new trial granted.

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

MILO M. DANFORTH *vs.* DANIEL ROBINSON and trustee.

Somerset. Opinion July 27, 1888.

Insolvent law. Discharge. Promissory note. Surety.

The discharge in insolvency of one surety on a promissory note given before the insolvent act took effect, is no bar to an action on a judgment for contribution, recovered by a co-surety after the insolvent act took effect and before the insolvent's petition and discharge.

ON exceptions.

The opinion states the case and material facts.

J. J. Parlin, for plaintiff, cited: *Chaffee* v. *Jones*, 19 Pick. 264; *Bachelder* v. *Fiske*, 17 Mass. 464; *Howe* v. *Ward*, 4 Greenl. 200; *Wood* v. *Leland*, 1 Met. 387; 22 Pick. 505; *Tupper* v. *Hussey*, 1 Dane's Ab. 197; *Johnson* v. *Johnson*, 11 Mass. 359; *Warner* v. *Morrison*, 3 Allen, 566; *Norton* v. *Coombs*, 3 Denio, 130; Fells, Guaranty and Suretyship, (3 ed.) 288; *Schwartz* v. *Drinkwater*, 70 Maine, 409; *Palmer* v. *Hixon*, 74 Maine, 448; *Sturges* v. *Crowinshield*, 4 Wheat. 122; *Farmers' Bank* v. *Smith*, 6 Wheat. 131; *Ogden* v. *Saunders*, 12 Wheat. 213; *Ross* v. *Tozier*, 78 Maine, 312; *Wilson* v. *Bunker*, 78 Maine, 313.

Walton and Walton, for defendant.

Plaintiff's counsel says the action is not barred by discharge in insolvency, for it arose by virtue of a contract existing at the

time of the passage of that law and upon which that act can have no effect, citing, *Ross* v. *Tozier*, 78 Maine, 312; *Wilson* v. *Bunker*, 78 Maine, 313.

In 1878, plaintiff had no cause of action against the defendant and *non constat* that he ever would have. *Woodard* v. *Herbert*, 24 Maine, 358; *Fernald* v. *Johnson*, 71 Maine, 437; *White* v. *Blake*, 79 Maine, 114; *Jemison* v. *Blowers*, 5 Barb. 686; *French* v. *Morse*, 2 Gray, 111; *Loring* v. *Kendall*, 1 Gray, 305.

In actions for contribution, the debt of the defendant having been paid by one also liable to pay it, a consent to such payment is presumed from the very condition of things, and defendant is not permitted, when called upon to pay his proportional part, to claim that the plaintiff co-surety who has paid the whole, who has raised the common burden, is as a stranger to him and has paid his debt without his knowledge or consent. The foundation for this is laid "in the clearest principles of natural justice," but it does not grow out of any contract entered into at the time of the signing of the note; it does not, therefore, stand upon a notion of mutual contract, express or implied, between the sureties, to indemnify each other in proportion (as has sometimes been argued); but it arises from principles of equity, independent of contract. Story's Eq. Jur. Vol. 1, § 493.

Such are the authorities, *Deering* v. *Winchelsea*, 2 B. & P. 270; *Campbell* v. *Mesier*, 4 Johns. C. R. 334; *Norton* v. *Coons*, 3 Denio, 130; De Colyer on Guaranties (Morgan, Notes), 339 to 347; *Mathews* v. *Aiken*, 1 Comst. 595; *Wells* v. *Miller*, 66 N. Y. 255; *Tyne* v. *DeJarmette*, 26 Ala. 280; *Craig* v. *Aukeny*, 4 Gill. (Md.) 225; *Harris* v. *Ferguson*, 2 Bailey, (S. C.) 397; *Gould* v. *Fuller*, 18 Maine, 367; *Powers* v. *Nash*, 37 Maine, 325; *Fletcher* v. *Grover*, 11 N. H. 368; 1 Pomeroy, Eq. Jur. 405; same, Vol. 3, 468, § 1418, note; Addison on Contracts, Vol. 3, § 1139 (Morgan's ed.).

It is true that there have been loose dicta which would seem to indicate a claim of contract made at the time of signing, although not expressly so stating, as in *Johnson* v. *Johnson*, 11 Mass. 359, and *Bachelder* v. *Fiske*, 17 Mass. 463, where the

court, not having occasion to discuss or decide whether contribution was claimed upon the ground of a contract made at the time of the signing of the note or upon promise implied at the time of the payment of the money, only determined that, after payment, a promise to contribute was implied. But in *Mason* v. *Lord*, 20 Pick. 449, C. J. SHAW correctly stated the rule as follows: "The action of assumpsit for contribution is founded purely upon equitable principles. It proceeds upon the broad ground that where two or more are subject to a loss or burden common to all, and one bears the whole or disproportionate part, it lays an equitable claim for contribution, from those who are thereby relieved." And in *Warner* v. *Morrison*, 3 Allen, 566, in an opinion by BIGELOW, C. J., the rule is again correctly stated.

In *Liddell* v. *Wisewell*, a Vermont case recently decided, the opinion being filed April 5, 1887, the court say, "The implied obligation of the defendant to bear his proportionate share of the common burden resting on all the co-sureties is not regarded as arising from contract, but from an equitable duty which the sureties are supposed to be cognizant of and assent to at the time they enter into the contract of suretyship."

This opinion also adopts the language of SHAW, C. J., in the case of *Mason* v. *Lord*, 20 Pick. 447.

VIRGIN, J. These parties were co-sureties on a promissory note given in September, 1875. In 1879, the plaintiff paid the note to the holder, and in March, 1885, recovered judgment against the defendant for contribution. Subsequently, the defendant duly obtained his discharge in insolvency from all his debts, etc., which existed in May, 1885.

The insolvent law went into full effect on September 1, 1878, when the federal bankrupt law was repealed.

The present action is debt on the judgment of March, 1885, to which the defendant has pleaded his discharge in bar.

The principal question is: Whether one surety on a note, given before the insolvent law went into effect, who paid it and recovered judgment for contribution against his co-surety after

the insolvent law took effect, can maintain an action on the judgment *non obstante* the judgment debtor's discharge.

It seems to be settled law that as between co-sureties, the right of action for contribution in behalf of one of them who has paid the whole debt for which they were liable, arises when he pays and not before. And then, and not before, can he prove his claim for contribution against the estate of his insolvent co-surety. *Dole* v. *Warren*, 32 Maine, 94. But while the right of action did not arise until he paid, it does not necessarily follow that the original liability, which then had ripened into a right of action, had not existed before.

It is contended that, as the defendant's discharge, by force of the statute, "released him from all debts, claims, liabilities and demands which were, or might have been proved against his estate in insolvency," and which existed in May, 1885 (R. S., c. 70, § 49); and as the plaintiff not only paid the whole note, but also recovered judgment against the defendant for his contributory share, prior to May, 1885, the plaintiff's claim became an existing one which "might have been proved against the estate in insolvency" of the defendant, and hence was one of the claims covered by the discharge. But this language of the statute must not be taken literally, for thus construed it would include claims and debts which ante-dated the insolvent law and thus render that provision unconstitutional as impairing "the obligation of contracts" (U. S. Const. Art. 1, § 10; Me. Const. Art. 1, § 11; *Palmer* v. *Hixon*, 74 Maine, 447, 449) as well as debts owed by citizens of this state to those of another state, regardless of date. *Hills* v. *Carlton*, 74 Maine, 156. Hence the "debts, claims, liabilities and demands," from which the defendant was released by his discharge, must be limited to such as originated after the law, by its terms, took effect, together with such as were between citizens of this state, unless the creditors or claimants in such excepted cases elected to prove their claims. *Fogler* v. *Clark*, 80 Maine, 237; *Palmer* v. *Hixon*, *supra*; *Hills* v. *Carlton*, *supra*.

Did the liability of the defendant originate prior to the insolvent

law? We think this question has been decided in the affirmative in this state and it is, therefore, *res judicata*.

The note which these parties signed as sureties was given three years before the insolvent law was enacted, and hence the law could not have formed a part of the note "as the measure of the obligation to perform it" (*McCracken* v. *Hayward*, 2 How. 612), or of the right of contribution between the co-sureties, provided that right was founded on an implied contract or promise raised by the law from the mutual relation of the parties at the time, and in consequence of, their execution of the note, unless it became merged in the judgment of March, 1885.

This court, at an early day, decided that "at the time of executing an instrument by several persons as sureties, each one impliedly promises all the others that he will faithfully perform his part of the contract and pay his proportion of the loss arising from the total or partial insolvency of the principal. . . Such a promise resembles that by which a man binds himself to pay a certain sum of money at a future day." And following out this principle, the court held that the relation of debtor and creditor among the sureties on a bond, so as to entitle one of them to impeach a voluntary conveyance made by another, commences at the time of executing the bond and not at the time when he actually pays more than his proportion of the debt. *Howe* v. *Ward*, 4 Maine, 196. And the language above quoted was reiterated in *Thompson* v. *Thompson*, 19 Maine, 244. The same was adhered to in *Thacher* v. *Jones*, 31 Maine, 528, 532, where it was held that an indorser of a note was a creditor of the maker. So in *Pulsifer* v. *Waterman*, 73 Maine, 233, 238; *Howe* v. *Ward*, *supra*, was reaffirmed, holding that the relation of debtor and creditor existed between a first and second indorser of a promissory note when it was executed by them.

So in Massachusetts, assumpsit for contribution was sustained by a surety, who paid after the decease of his co-surety, against the latter's executors upon the implied promise of the testator. *Bachelder* v. *Fiske*, 17 Mass. 463. In a later case the heirs of a deceased surety were held to contribute to a co-surety who

paid after the decease of the defendants' intestate. In speaking for the whole court, SHAW, C. J., said: "The right of action grows out of the original implied agreement arising out of their being co-sureties, that if one shall be compelled to pay the whole or a disproportionate part of the debt, for which both thus collaterally and provisionally stipulated to be liable, the other will pay such a sum as will make the common burden equal." *Wood* v. *Leland*, 1 Met. 387, 389. The same eminent jurist had used similar language, *Chaffee* v. *Jones*, 19 Pick. 260, 264.

The defendant cites several authorities which hold that the liability to contribution arises from the equitable principle that "equality is equity," and not from contract. Doubtless the ancient common law knew nothing of equalizing the burdens of sureties. "Its conception and origin," like numberless other modern rules of law, "are wholly due to the creative functions of the chancellor." Thus BIGELOW, C. J., said: "The right of contribution does not arise out of any contract or agreement between co-sureties to indemnify each other, but on the principle of equity which courts of law will enforce, that where two persons are subject to a common burden, it shall be borne equally between them. In such cases, the law raises an implied promise from the mutual relation of the parties. . . It is sufficient that they were under obligation to pay the same debt as sureties for a third person." *Warner* v. *Morrison*, 3 Allen, 566. And similar hints have been dropped in *Powers* v. *Nash*, 37 Maine, 322, 326.

From whatever source the right of contribution springs, the original contract is the bed rock on which the whole superstructure rests and to which reference must be made for a starting point and for fixing the apportionment. A proper regard for the principle of *stare decisis* compels us to adhere to the decisions of our own court.

The liability of the defendant then originating in an implied contract of an earlier date than that of the insolvent law, could not be affected by that law unless the claim was proved or was merged in the judgment of March, 1885. There is no suggestion that it was proved, and *Ross* v. *Tozier*, 78 Maine, 312, and

Wilson v. *Bunker*, 78 Maine, 313, decide that it was not merged. Moreover, the constitutional prohibition against laws impairing the obligation of contracts applies to implied contracts as well as to express contracts. *Fisk* v. *Jefferson Police Jury*, 116 U. S. S. C. 131.

Exceptions sustained.

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

HANNAH SAVAGE by CHARLES B. SAVAGE, devisee,

vs.

MARY DELIA SAVAGE.

Sagadahoc. Opinion July 30, 1888.

Deed. Married woman. Husband and wife. R. S., 1871, c. 61, § 1. Practice. Duress.

By R. S., 1871, c. 61, § 1, a married woman had the power to convey her land directly to her husband.

The court is not obliged to give a requested instruction when there is no evidence in the case to base it upon.

The jury were instructed that in order to constitute a deed from a wife to her husband void by reason of duress, it must appear that she was under so great a fear of bodily harm, or personal distress as to compel her to do that which she would not do voluntarily. *Held*, sufficiently favorable to the party setting up the duress.

When a deed is attacked on the ground of mental incapacity of the grantor at the time of its execution, evidence of the conduct, declarations and mode of living of the grantor, both before and after the execution of the deed, is admissible. But such evidence is not admissible to show duress.

ON exceptions.

Writ of entry to recover certain parcels of land in Woolwich, Maine.

The defendant offered in evidence a deed of the demanded premises, from Hannah Savage to David Savage, her husband, dated January 24, 1880, to the admission of which deed the plaintiff objected upon the ground that it was the deed of a married woman to her husband, and, for that reason, invalid.

This objection was overruled, and the deed was read in evidence, and the plaintiff had exceptions.

The plaintiff offered to prove the declarations of Hannah Savage, made a short time prior to the execution of her deed to David Savage, to the effect that David was so seriously urging her to give him a deed of the premises, by violent solicitations and threats, and so frequently, that her life was made miserable, and that she feared she would be obliged to give it up. The plaintiff, Charles B. Savage, offered to testify to the declarations of Hannah made within a few weeks, or, at most, within a few months prior to the date of her deed to David, that David was demanding of her a deed of the premises, and worrying her so violently and threatening her so frequently, to cause her to give him a deed, that her life was in torment, and she feared she would be obliged to yield to his demand, to save herself from such torment; all of which testimony the presiding justice excluded, and the plaintiff had exceptions.

Hannah Brookings was called by the plaintiff and was allowed to testify to the fact that Hannah Savage, while she was so in possession of the demanded premises, claimed title thereto, but the court excluded the declaration of Hannah concerning the particulars of her title and the conveyance of land to David, to which exclusion the plaintiff had exception.

The plaintiff contended that the deed from Hannah to David was obtained by extortion by David, and under compulsion, and duress of circumstances created by him while she was sick, and, in consequence, of feeble mind. There was evidence tending to prove this position. The justice presiding *inter alia* instructed the jury:

1. "That if the deed from Hannah to David was voluntarily given by Hannah and obtained by the husband in good faith, the same was effectual to pass the title, notwithstanding it was the deed of a married woman to her husband."

2. "Now, this deed cannot be avoided unless at the time when it was given there was such unlawful conduct on the part of David that it would not have been the free and voluntary act of the wife when she did it. It appears that Hannah afterwards

made her will. That will has been allowed. That is evidence of sanity. But the learned counsel says she was sick. He says that David threatened that if she did not give him the deed he would not pay the taxes. Well, gentlemen, that threat, by itself, would not avoid the deed, because she had her choice. But the learned counsel says she was sick, and feeble, and that by continual teasing, and by continual threats, and by over persuasion she was induced to give this deed, by duress of circumstances, by which I understand him to mean such a condition of things as takes away from the grantor her free volition, and compels her from circumstances to do the act demanded by the grantee.

"Well, now, gentlemen, you may take into consideration all that has been proved to have been said. You may take into consideration the condition of health of Hannah, and I do not know that it has been contended that she was incompetent, because it is claimed that she was competent to make a will afterwards, five years afterwards. It seems her strength held out so that she was able to make a will. But at this time it is claimed that she was sick and weak, and that by reason of these continued threats, and continual pressure the continual teasing on the part of the husband, she was induced to give this deed.

"Now, gentlemen, take all the facts which have been proved in this case and determine whether or not Hannah, at the time she gave that deed, did it voluntarily as the magistrate has certified upon the back of it that she did. In other words, was it her free act and deed, or was it an act that was extorted from her by deceit, fraud, extortion and compulsion, so that she felt that she was compelled to do it for her own personal safety. If these circumstances, all together, taking her condition, so overcame her that she was compelled to do it for the safety of her own existence, then, gentlemen,I instruct you that the deed was avoided. But if, on the other hand, there were only continual inducements, requests, threats if you please, and finally, to avoid (rid) herself of these, she concluded on the whole that she would do it, and she did voluntarily give this deed, then, gentlemen, it is a valid deed, and she can never afterwards

dispute it from that cause. Take the evidence bearing upon this and determine, under the rules I have given you, whether it was a valid conveyance or not. If you find it was a valid conveyance, your verdict must be for this defendant. If you find it was an invalid conveyance, your verdict must be for this plaintiff."

3. After the jury had retired, they sent a written note to the court, and thereupon they were allowed to come into court, and the following proceedings were had and rulings and instructions given by the presiding justice, to which the plaintiff had exceptions:

"The Court. The jury wish to know: If the deed was obtained from Hannah Savage by David Savage on the ground that she thought if she did not deed it to him she would lose her support, is it duress?"

"Not necessarily. The force of the pressure must have been so great that for fear of some serious distress, or bodily harm, she was overcome, so that the deed was not her free act.

"Mr. Gilbert. May it please your Honor, I would like to understand if the court means to limit it to the fear of bodily harm?

"The Court. No; bodily harm, personal stress, or distress. The mere threat that if one person does not do something she will lose property by it, or rights by it, is not duress. It must be that force, it must be that stress or conduct which compels them to do that which they would not do voluntarily.

"Mr. Gilbert. I ask the court to instruct the jury that if she was made to believe he would withdraw his support from her, or no longer do the duties of husband, and she was overcome in that way, that would avoid the deed.

"The Court. The instruction I must refuse, and give you an exception."

The plaintiff contested the validity of the two deeds of David to the defendant, dated September 1, 1885, and as bearing on their validity, put into the case evidence of the conduct, declarations and the mode of living of said David both before and after his execution of said deeds, tending to prove his mental incapacity to execute the same, and that they were obtained by fraud and imposition practiced upon him.

The defendant called one Pancoast as a witness who was allowed, against the plaintiff's objection, to testify, substantially, that in the spring of 1885, David Savage told him that he had formerly sent money to the plaintiff to buy some land in Cambridge, Mass. and that he thought the title had been taken to himself, but he had then found that the deed was to himself and the plaintiff jointly, and that he thought it was a rascally piece of business. The evidence was admitted upon the same ground that the evidence had been as tending to show the mental capacity of David, and to the admission of which the plaintiff had exception.

Washington Gilbert, for plaintiff.

The partial enfranchisement of the wife carries her as far as the statute goes and severs the dual person where the legislature so orders and not otherwise, and no further. And in all matters where legislation has not severed the common law bond of legal identity the doctrine stated still prevails, as found in 1 Bl. Com. Bk. I, p. 442.

"The husband and wife being one person in law, the former cannot after marriage, by any conveyance at common law, give any estate to the wife." Co. Litt. 112, a. 187 b.

"Nor the wife to the husband." Co. Litt. 187, b. as cited in note Bl. Com. p. 442.

"So that the very being and existence of the woman is suspended during the coverture or entirely emerged or incorporate in that of the husband." Bl. Com. Bk. 2, p. 433.

The statute in question is in derogation of common law, and must therefore, by acknowledged rule, be construed strictly. This doctrine has twice been applied by this court to the interpretation of statutes relating to the same subject. *Allen* v. v. *Hooper*, 50 Maine, 371; *Osgood* v. *Breed*, 12 Mass. 525; *Wilbur* v. *Crane*, 13 Pick. 290; *Dwelly* v. *Dwelly*, 46 Maine, 377.

The court construed strictly in *Osgood* v. *Breed*, and did not by extension allow it to destroy any of the incidents of marriage, but held husband and wife to their common law oneness with the consequent disability of the wife to convey.

Under the statute in vogue in the case of *Allen* v. *Hooper*, the married woman might convey as "if unmarried." On this clause the decision turns. Without this clause that decision would not have been made. But that clause had been abrogated before this deed was made, and it is submitted that the assumption that that case determines the law and puts the question beyond argument is simply gratutitous. R. S., 1871, c. 61, § 1.

Plaintiff commends to consideration a *dictum* of Mr. Justice VIRGIN, in *Webster* v. *Co. Com.* 63 Maine, 30.

"This," says the learned judge, "may prove somewhat of a hardship upon them; but the responsibility is not upon us; and neither can we aid in making shipwreck of the law because of the hardship."

Good law. How much less then in a case where the party invoking legislative action from the court has no merit in her cause.

C. W. Larrabee, for defendant, cited: *Chaplin* v. *Barker*, 53 Maine, 275; Bracton, Lib. 2, c. 15; *Adams* v. *Palmer*, 51 Maine, 486; *Allen* v. *Hooper*, 50 Maine, 371; *Hovey* v. *Hobson*, 55 Maine, 270; 2 Best, Ev. 900, note 1, (Morgan's Ed.) *Payne* v. *Craft*, 7 Watts & S. (Pa.) 562; *Sasser* v. *Herring*, 3 Dev. (N. C.) Eq. 340; *Pierce* v. *Faunce*, 37 Maine, 68; *Bartlet* v. *Delprat*, 4 Mass. 701; *Clarke* v. *Waite*, 12 Mass. 438; *Sullivan* v. *Lowder*, 11 Maine, 428; *Crane* v. *Marshall*, 16 Maine, 29; *Alden* v. *Gilmore*, 13 Maine, 178; *West Cambridge* v. *Lexington*, 2 Pick. 536; 1 Greenl. Ev. § 110; 1 Starkie, Ev. § 26; *Brewer* v. *East Machias*, 27 Maine, 494; *Fuller* v. *Ruby*, 10 Gray, 285; *Webster* v. *Calden*, 55 Maine, 170; *Oxnard* v. *Swanton*, 39 Maine, 128; 2 Green. Ev. § 301; Chitty, Contracts (5 Am. ed.) 207; *Bryant* v. *Couillard*, 52 Maine, 520; *Dunn* v. *Moody*, 41 Maine, 239; *Hovey* v. *Chase*, 52 Maine, 318; *Pope* v. *Machias Water Power Co.* 52 Maine, 535; *Gorden* v. *Wilkins*, 20 Maine, 134; R. S., c. 82, § 85; *Dyer* v. *Greene*, 23 Maine, 464; *Warner* v. *Arctic Ice Co.* 74 Maine, 475.

LIBBEY, J. Both parties claim the land in controversy under Hannah Savage, who, it is admitted, was the owner January 24,

1880. The plaintiff claims as devisee under the will of said Hannah, who died December 9, 1886. No question is raised as to the validity of the will; and if she held the title at her death the plaintiff must prevail.

The defendant claims that said Hannah conveyed her title to David Savage, her husband, January 24, 1880, and that he conveyed to her, September 1, 1885.

The plaintiff contests the validity of the deed from Hannah Savage to David Savage on two grounds. 1. That when said deed was executed a married woman had no power to convey her lands to her husband. 2. That the deed was obtained by duress.

1. Prior to the act of 1847, c. 27, husband and wife could not contract with each other, because at common law from their legal union they were regarded as one person so far as their power to contract with each other was involved; but by that act the husband was clothed with power to convey his real, or personal estate directly to his wife. *Johnson* v. *Stillings*, 35 Maine, 427.

By the act of 1852, c. 227, the wife was empowered to convey her real, or personal estate directly to her husband; not in direct terms, but as a result of the power given her to convey her estate "as if she were unmarried." *Allen* v. *Hooper*, 50 Maine, 371.

If the legal meaning of the act of 1852, has not been changed by the legislature since its passage, *Allen* v. *Hooper*, is conclusive as to the power of Hannah Savage to convey directly to her husband.

In the revision of 1857, c. 61, § 1, the words used in the act of 1852, giving a married woman the power to convey or devise her real, or personal estate "as if she were unmarried," were changed to "as if sole." This did not change the meaning at all. By act of 1861, c. 46, R. S., of 1857, c. 61, § 1, was amended by striking out the words "as if sole, and," so that it read as follows: "Section 1. A married woman of any age, may own in her own right, real and personal estate acquired by descent, gift, or purchase; and may manage, sell, convey, and devise the same by will, without the joinder or assent of her husband."

It is claimed by the learned counsel for the defendant that this change in the terms of the statute was intended by the legislature to restore the unity, or *oneness* of husband and wife, so that the wife could no longer convey her lands directly to her husband. If so it would seem to restore their common law relation so that the husband could not convey to the wife; but there is no change in the terms of the statute construed by the court as giving that power in *Johnson* v. *Stillings*, *supra*, and the statute still recognizes the authority of the husband to convey directly to the wife, and, in such case declares she shall not convey "without the joinder of her husband in such conveyance."

It is not necessary to determine the intention of the legislature in the amendment of 1861; but it may be found in the act of 1857, c. 8, which provides that, "when a husband waives a provision made for him in the will of his deceased wife, her estate being solvent, and in all cases where she dies intestate and solvent, he shall be entitled to an allowance from her personal estate, and a distributive share in the residue thereof, in the same manner as a widow is in the estate of her husband; and if she leaves issue he shall have the use of one-third; if no issue, of one-half of her real estate, for his life, to be recovered and assigned in the manner and with the rights of dower." It may have been supposed that this act was inconsistent with R. S., of 1857, c. 61, § 1, giving the wife power to devise her lands "*as if sole*" and the amendment of 1861, striking out the words above quoted, was made to bring the two statutes into harmony. No other intention is perceived.

By the revision of 1871, which was in force when the deed in contention was made, no change was made in these statutes in respect to the question involved here, and we have no doubt Hannah Savage had legal power to convey her lands directly to her husband, when she executed the deed to him.

2. The law given to the jury by the presiding judge on the question of duress was sufficiently favorable to the plaintiff. The attention of court has not been called by the learned counsel to any authority which holds it more favorable for him.

If the requested instruction presented sound law in the abstract,

the case does not show that there was any evidence proving, or tending to prove the facts upon which it was based, and the judge, for that reason, might well refuse it. He had already fully instructed the jury upon the law of the case. We can see no error in the exclusion, or admission of the evidence excepted to.

The motion is not relied on, no report of the evidence having been furnished.

Exception and motion overruled.

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

JOSIAH G. LAMBERT *vs.* ROBERT P. CLEWLEY.

Waldo. Opinion August 3, 1888.

Promissory note. Consideration. Indorser.

A mere forbearance to sue one of the makers of a promissory note is not a sufficient consideration to charge one as indorser, by signing his name upon the back after delivery, even though the forbearance was produced by the signing.

The plaintiff in an action against the indorser of a promissory note testified that the consideration of the indorsement was "that I would not sue. . . He said if I would not enter my suit, or make any trouble about it, he would see the note was paid . . . When Mr. Clewley indorsed the note it was the understanding that I was not to trouble Mr. Cousins. I was not to commence a suit." The court instructed the jury that "the evidence failed to show, and would not authorise them in finding a valid consideration. . . . so as to make it obligatory upon the defendant to pay the note." *Held*, no error.

ON exceptions and motion.

Assumpsit on a promissory note which was given by the indorser of a prior note, and that indorsement was the only consideration of the note in this case.

The point and material facts are stated in the opinion.

W. T. C. Runnells, for plaintiff.

The blank indorsement by defendant, of the note signed by William Clewley and J. F. Cousens, is only *prima facie* evidence of the contract implied by law; and, in suit between the

immediate parties, it would be competent to prove by parol evidence, the agreement which was in fact made at the time of the indorsement. *Smith* v. *Morrill*, 54 Maine, 48.

The evidence shows that defendant indorsed that note subsequent to its date, and without a prior indorsement by the payee. The law regards him a guarantor. *Colburn* v. *Averill*, 30 Maine, 310.

If the consideration for defendant's putting his name on the back of the old note and guaranteeing its payment to plaintiff was that plaintiff should forbear suit against Cousens and should not collect of him, that in law would constitute a good consideration. *King* v. *Upton*, 4 Maine, 387; *Russell* v. *Babcock*, 14 Maine, 138; Kent's Com. Vol. 2, p. 631.

If plaintiff's legal claim against defendant had been merely a colorable claim conflicting with that of defendant, its surrender to defendant and the settlement of the dispute between the parties without suit, would have constituted a sufficient consideration for the note in suit. Chitty on Contracts, p. 45.

Defendant testified that the indorsed note came into his possession as administrator. The surrender of that note to the administrator of the estate of the deceased maker of it, whether that note was at the time capable or incapable of being enforced at law, is sufficient to constitute a consideration for a new note from the administrator, and he would be personally holden thereon, although, when the new note is given by him, his final account has been allowed and no assets have since come into his hands. *Brown* v. *Eaton*, 127 Mass. R. 174.

Joseph Williamson, for the defendant, cited: *Manter* v. *Churchill*, 127 Mass. 31; *Perley* v. *Perley*, 144 Mass. 104; *McCorney* v. *Stanley*, 8 Cush. 85; *Smith* v. *Taylor*, 39 Maine, 242.

DANFORTH, J. The case shows that defendant put his name in blank upon the back of a note after it had been signed and delivered by the makers to the plaintiff as payee, as a completed contract. In this state of facts the burden of proof is upon the plaintiff to show some consideration to make valid any contract

arising therefrom. The presiding justice instructed the jury that "the evidence failed to show, and would not authorize them in finding, a valid consideration, . . so as to make it obligatory upon the defendant to pay the note." The only consideration claimed was a forbearance on the part of the plaintiff to sue one of the makers. But a mere forbearance is not sufficient, even though produced by such signing. There must be a distinct and valid contract binding upon the plaintiff not to sue. *Manter* v. *Churchill*, 127 Mass. 31.

The defendant testifies positively that there was no such agreement. The plaintiff testifies that the consideration of the indorsement was "that I would not sue." "He said if I would not enter my suit, or make any trouble about it, he would see the note was paid," and again, "When Mr. Clewley indorsed the note, it was the *understanding* that I was not to trouble Mr. Cousens. I was not to commence a suit."

Remembering that a chain has only the strength of its weakest link, it would seem that these different statements were equally consistent with a mere forbearance, as with an agreement not to sue, and if we also consider that these statements come from a party who must have known the facts, the conclusion is inevitable that the jury would not have been justified in finding a valid consideration for the indorsement. There is an entire want of testimony as to time, and hence nothing to show that there was a single hour when the plaintiff might not have commenced an action without a violation of any legal obligation he was under to the defendant.

The instruction that if the note in suit was given solely as a renewal of the supposed obligation it would fall under the same principle, was a necessary sequence.

The instructions given under the state of facts arising in connection with the surrender of the old note, are unexceptionable. If there were any omission, advantage could be taken of it only by the proper requests for further instructions.

Exceptions overruled. Judgment on the verdict.

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

IDA E. STETSON *vs.* GEORGE F. STETSON.

Androscoggin. Opinion August 3, 1888.

Exceptions. Divorce. Custody of minor children.

Exceptions do not lie to the decree of the presiding justice in relation to the care and custody of a minor child of divorced parents.

R. S., c. 60, §17, give the court complete authority over such a child, to be exercised in to the discretion of the presiding justice according to the best interests of the child.

The care and custody of such a child may be given to a parent who resides without the State.

ON exceptions.

Petition for the custody of Arthur B. Stetson, a minor child of the petitioner and respondent.

In 1883 a divorce was granted the respondent against the petitioner, and the custody of the minor child was then given to the father.

The petitioner resides in Boston, Massachusetts.

Upon this petition the court ordered: "Former decree to be altered and amended so that the mother shall take and retain general custody of the minor child until further order of court, the father to see the child on reasonable opportunities, and to take him, if the father desires, into his possession for two weeks each summer, during a vacation in his school."

To this order respondent alleged exceptions.

N. and J. A. Morrill, and *George C. Wing*, for the plaintiff, cited: R. S., c. 60, § 17; *Harvey* v. *Lane*, 66 Maine, 538; *In re McDowle*, 8 Johns. 328; *In re Waldron*, 13 Johns. 418; *In re Wollstonecraft*, 4 Johns. Ch. 80; Note Book, 1 N. Y. Ch. Rep. (Law ed.) 770; *Mercein* v. *People*, 25 Wend. 65; *U. S.* v. *Green*, 3 Mason, 482; *State* v. *Smith*, 6 Greenl. 462; *Barber* v. *Barber*, 21 How. 582; *Cheever* v. *Wilson*, 9 Wall. 108; *In re Welch*, 74 N. Y. 299.

Frye, Cotton and White, for defendant.

The petitioner's right to a change of custody of the child is

based on § 17, c. 60, of the Revised Statutes, which is as follows: "The court making a decree of nullity, or divorce, may also decree concerning the care, custody, and support of the minor children of the parties, and with which parent any of them shall live; alter its decree from time to time as circumstances require; and in execution of the powers given it by this chapter, may employ any compulsory process which it deems proper, by execution, attachment or other effectual form."

We maintain the following legal proposition: "When the aid of the court is once invoked to provide for the guardianship of infants, in case of separation of the parents, such infants become the wards of the court, and it cannot permit them to be removed beyond its jurisdiction."

It will not answer the law of the statute to say that *habeas corpus* or some other process may be resorted to for the enforcement of a right which a parent acquires under the court's decree. It may be that another court may aid in carrying out such decree; but that fact does not sanction the violation of the implied prohibition of the statute. Even if such an order is a "judicial proceeding" within the meaning of Art. 4, § 1, of the Constitution of the United States," which the decisions of this court render doubtful (see *Hardin and ux* v. *Alden*, 9 Maine, 140), it affords no answer to our position. For in that event the action of the tribunals of another state would not be the direct compulsory process provided in this statute. This precise question under like circumstances arose and was determined in the case of *Main* v. *Main*, Vol. 11, p. 43, Ill. Rep.

On page 51 of the case, the judge rendering the opinion of the Supreme Court, says: "It is apparent from the record that there is some intention on the part of the mother, if allowed to retain the custody of the child, to remove her beyond the limits of the state. This cannot be tolerated and must be guarded against."

DANFORTH, J. The authority of the court granting a divorce, over the children, is found in R. S., c. 60, § 17, and is as follows, viz.: "The court making a decree of nullity, or of divorce, may also decree concerning the care, custody, and support of the

minor children of the parties, and with which parent any of them shall live, and alter the decree from time to time as circumstances require." We find no qualification or restraint of the power given except such as may be imposed by the sound discretion of the justice presiding. That the result of the decree may cause the removal of the child beyond the limits of the state, is not of itself an objection. This may be the effect in any case. Though the parent receiving the custody may at the time be a resident within the state, there is no authority, except in cases of crime, to prevent an immediate removal from the state. The order even in this case is not that the child shall be removed, though probably such may be the effect of it.

But even though it may be so, the child is not removed from the jurisdiction of the court. That has already attached. The decree is a conditional one, subject to modification and change. The mother takes the child subject to that condition. On any proper process for a change she is bound, wherever she may be, to take notice, and though she may not personally be within the jurisdiction of the court, the subject matter is, so that the judgment of the court will be valid and binding upon her, and by the provisions of the constitution of the United States may be enforced against her, though in another state.

In such a case as this the great governing principle for the guidance of the court is the good of the child. It may often be for the best interests of the child that it should be removed from the state for the purposes of education, business, or support. If there is any occasion for imposing restraint in this, it is competent for the justice presiding to impose it. The authority given by the statue is to be exercised with such discretion as may be required under the circumstances of each case, and when exercised, exceptions do not lie to the manner of its exercise.

Exceptions overruled.

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

JOSHUA B. ALLEN *vs.* JOEL E. SMITH, administrator.

Knox. Opinion August 3, 1888.

Executor and administrator. Sale of real estate. Appeal.

When a license has been granted to an administrator to sell lands conveyed by the deceased in his lifetime, for the payment of debts, on the ground that such land had been fraudulently conveyed, the party holding such conveyance has the right of appeal.

ON exceptions.

Petition for leave to enter and prosecute an appeal from the decree of the judge of probate, granting a license to the administrator on the estate of William Beckett, 2nd, to sell lands for the payment of the debts of the estate, which the deceased in his lifetime conveyed to the petitioner. The presiding justice ruled, as a matter of law, that the petitioner had no appeal. The exceptions were to this ruling.

C. E. Littlefield, for the petitioner, cited: R. S., c. 63, § § 23, 25; c. 71, § 1; *Smith* v. *Dutton*, 16 Maine, 308; *Bates* v. *Sargent*, 51 Maine, 425; *Deering* v. *Adams*, 34 Maine, 44; *Smith* v. *Bradstreet*, 16 Pick. 264; *Veazie Bank* v. *Young*, 53 Maine, 560; *Wiggin* v. *Swett*, 6 Met. 197; *Paine* v. *Goodwin*, 56 Maine, 413; Schouler's Ex. and Admr. § 151; *Briggs* v. *Johnson*, 71 Maine, 237; *Gerry* v. *Stimson*, 60 Maine, 190.

A. P. Gould, for respondent.

By R. S., c. 71, § 19, it is provided that all licenses to sell real estate shall be for the period of one year only. The provision of the statute is that "if justice requires a revision" of a probate decree, the court may in the exercise of its discretion, grant the right to enter an appeal. R. S., c. 63, § 25.

The voluntary conveyance of Beckett to petitioner was void as to prior creditors, and by his deed he took, at most, only whatever should be left of the real estate conveyed to him after the payment of all debts; and his interest is not unlike that of a residuary legatee who has no right of appeal from a decree

allowing the executor's account, however injurious to his ultimate interests that decree may be. *Downing* v. *Porter*, 9 Mass. 386.

"A party aggrieved is one whose pecuniary interest is directly affected by the decree; one whose right of property may be established or divested by the decree." *Wiggin* v. *Swett*, 6 Met. 194, per SHAW, C. J. 197.

These decisions are recited approvingly in *Veazie Bank* v. *Young*, 53 Maine, 554, 560, where the court say, "It is not a mere remote and contingent interest, or a wish dictated by whim or policy, without any pecuniary interest to be directly affected by the decree, that will suffice."

In *Snow* v. *Picquet*, 3 Pick. 443, it was held that a debtor of an estate had no such interest in it as authorized him to oppose the appointment of an administrator. See also *Deering* v. *Adams*, 34 Maine, 41.

DANFORTH, J. By R. S., c. 71, § 23, "lands of which the deceased died seized, . . . and all that he had fraudulently conveyed, . . are liable to sale for the payment of debts, under any license granted under this chapter." In this case the intestate, ten days before his death, conveyed to the petitioner certain lands under such circumstances that it is conceded that the conveyance is fraudulent as against prior creditors. The administrator has asked and obtained a license to sell these same lands for the payment of debts. The petitioner, for reasons stated, having failed to enter his appeal in season, asks for leave to do so now, and the only question presented at this time is whether he has such an interest as will allow him to appeal from the decree of the judge of probate.

Any person who has such an interest in the subject matter that he may be and is aggrieved by any decision of the judge of probate, with some exceptions not material here, may appeal therefrom. This petitioner is the absolute owner of the land, which in this case is the matter acted upon and directly affected, subject only to the contingency that it may be wanted for the payment of prior debts. The sale, if carried into effect, would divest him of that land. He has, therefore, the same interest

that an heir or devisee would have in cases where the deceased died seized. The same right and interest to be heard as to the prior debts, as to the propriety or necessity of the sale, and to give bonds for the payment of the debts if he deemed it expedient to do so, as the heir would have. He must therefore be deemed to have sufficient interest to authorize him to enter an appeal, but whether he shall have leave to do so must be decided upon a hearing at *nisi prius*.

Exceptions sustained.

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

STATE OF MAINE *vs.* SIMEON G. DAVIS.

Kennebec. Opinion August 3, 1888.

Indictment. Nuisance. Stationary engine. R. S., c. 17, § § 17, 18.

An indictment for erecting and using a stationary steam engine without license must allege the use of the engine without license at a specified time and place.

ON exceptions from the superior court.

The exceptions were to the ruling of the court in overruling a demurrer to the following indictment.

"State of Maine. Kennebec, ss. At the superior court, begun and holden at Augusta, within and for the county of Kennebec, on the first Tuesday of September, in the year of our Lord one thousand eight hundred and eighty-seven.

"The jurors for said state, upon their oath present, that Simeon G. Davis, of Winthrop, in said county of Kennebec, on the first day of January, in the year of our Lord one thousand eight hundred and eighty-seven, at Winthrop, in said county of Kennebec, did, without having been granted license therefor by the municipal officers of the said town of Winthrop, designating the place where the buildings therefor should be erected, the materials and mode of construction, the size of the boiler and furnace, and such provision as to height of chimneys or flues, and protection against fire and explosion as they the said municipal officers of said town of Winthrop then and there judged proper for

the safety of the neighborhood, where said stationary steam engine was erected, erect a stationary steam engine; and so the jurors aforesaid upon their oath aforesaid, do say and present, that the said Simeon G. Davis did then and erect a common nuisance.

"And the jurors aforesaid upon their oath aforesaid, do further say and present, that said Simeon G. Davis, at Winthrop aforesaid, in the county of Kennebec aforesaid, on the first day of January, in the year of our Lord one thousand eight hundred and eighty-seven, without having been granted license therefor from the municipal officers of the said town of Winthrop, designating the place where the buildings therefor should be erected, the materials and mode of construction, the size of the boiler and furnace, and such provisions as to height of chimneys or flues, and protection against fire and explosion as they, the said municipal officers of said town of Winthrop, judged proper for the safety of the neighborhood, erect a stationary steam engine; and so the jurors aforesaid upon their oath aforesaid, do say and present that the said Simeon G. Davis, at said Winthrop, in said county of Kennebec, on the said day of January in the year of our Lord one thousand eight hundred and eighty-seven, did cause a common nuisance.

"And the jurors aforesaid, upon their oath aforesaid, do further say and present, that the said Simeon G. Davis, on the said first day of January, in the year of our Lord one thousand eight hundred and eighty-seven, and from that day until the day of the finding of this indictment, at Winthrop aforesaid, in the county of Kennebec, aforesaid, a stationary steam engine before that time unlawfully erected in said town of Winthrop, by the said Simeon G. Davis, without any license to him the said Simeon G. Davis, granted by the municipal officers of the said town of Winthrop, in said county, designating the place where the buildings therefor should be erected, the materials and mode of construction, the size of the boiler and furnace, and such provisions as to height of chimneys or flues, and protection against fire and explosion as they, the said municipal officers of said town of Winthrop, judged proper for the safety of the neighborhood, unlawfully did use. And so the jurors aforesaid

upon their oath aforesaid, do say and present, that the said Simeon G. Davis on the said first day of January, in the year of our Lord one thousand eight hundred and eighty-seven, and thence continually until the day of the finding of this indictment unlawfully did continue a common nuisance.

"Against the peace of the state and contrary to the form of the statute in such case made and provided.

"L. T. Carleton, County Attorney. A true bill, D. N. Gower, Foreman."

L. T. Carleton, county attorney, for the state.

J. H. Potter, for the defendant, cited: *Preston* v. *Drew*, 33 Maine, 558; *Brightman* v. *Bristol*, 65 Maine, 426; *State* v. *Philbrick*, 31 Maine, 403; *Com.* v. *Moore*, 11 Cush. 600; *Com.* v. *Bartley*, 138 Mass. 181; *Com.* v. *Maxwell*, 2 Pick. 139; *Com.* v. *Newburyport Bridge*, 9 Pick. 142; *Com.* v. *Shaw*, 7 Met. 52; *Com.* v. *Intox. Liq.* 138 Mass. 506; *Turns* v. *Com.* 6 Met. 224; *Com.* v. *Arnold*, 4 Pick. 251; *State* v. *Thurston*, 35 Maine, 205; *State* v. *Hanson*, 39 Maine, 337; *State* v. *Baker*, 50 Maine, 45; *Com.* v. *Adams*, 1 Gray, 481.

DANFORTH, J. This is a demurrer to an indictment for maintaining a common nuisance under R. S., c. 17, § § 17 and 19.

Section seventeen provides that, "No stationary steam engine shall be erected in a town, until the municipal officers have granted license therefor," under certain restrictions therein named.

Section nineteen provides that, "Any such engine erected without a license shall be deemed a common nuisance without other proof than its use."

Thus it will be seen that the erection of an engine without the prescribed license, though prohibited, is not legally a nuisance, but the use of such an one is. It would therefore seem to be immaterial whether the person using, is the same as the person erecting, or otherwise. But the use and the want of a license must concur. Both facts are material and traversable. Hence both must be alleged and as of a certain specified time and place.

In the first and second counts in the indictment the erection of the engine without a license, with the specified time and place, is alleged: but there is no allegation of use.

In the third count the two facts are alleged, but the specific time applies to the use only. The allegation of the want of a license is, simply, that it was "before that time," thus leaving it entirely uncertain whether that want had not been supplied, as it might have been, before the use of the engine.

As the two facts, the use and want of license, must exist at the same point of time, to make the engine a common nuisance every allegation in the indictment may be proved as laid, and yet the respondent guilty of no crime.

Exceptions sustained. Demurrer sustained.
Indictment bad.

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

EDWARD N. MERRILL and another *vs.* PHILENA WYMAN.

Somerset. Opinion August 3, 1888.

Trover. Fixtures. Machinery. Mortgage.

A grantor conveyed a mill privilege by metes and bounds and in the same deed, by a distinct clause, he also conveyed "the machinery and its appurtenances of the grist mill, . . . with the right to use said machinery in said mill for two years from this date free from rent." This mill was not within the metes and bounds of the privilege conveyed. As a part of the same transaction the grantee gave a mortgage back to secure the payment of the purchase money. *Held* that this transaction made the machinery personal property, whatever it may have been before.

ON report, upon the following agreement:

"Case reported to the law court, upon so much of the testimony as either party desires to have reported, for determination of the question of title. If the court find the title to the elevator belt to be in the plaintiffs, judgment to be rendered upon the verdict; if the title be found otherwise the verdict to be set aside and judgment entered for defendant."

The opinion states the material facts.

Merrill and Coffin, for the plaintiffs, cited: *Hunt* v. *Bay*

State Iron Co. 97 Mass. 279; *Pierce* v. *Emery*, 32 N. H. 484; *Haven* v. *Emery*, 33 N. H. 66; *Fifield* v. *Maine Central R. R. Co.* 62 Maine, 77; *Crippen* v. *Morrison*, 13 Mich. 35; *Sowden* v. *Craig*, 26 Iowa, 156; *Russell* v. *Richards*, 10 Maine, 429; *Hilborne* v. *Brown*, 12 Maine, 162; *Dame* v. *Dame*, 38 N. H. 429; *Bank of Lansingburgh* v. *Crary*, 1 Barb. 547; *Warren* v. *Leland*, 2 Barb. 613; *Kingsley* v. *Holbrook*, 45 N. H. 313; 1 Wash. R. P. 9, 14-20; Ewell, Fixtures, 270; Field's Lawyer's Briefs, 294; *Smith* v. *Bryan*, 5 Md. 141 (59 Am. Dec. 104); Taylor's Landlord & Ten. 426, 427; 2 Kent. Com. 243-4; *Davis* v. *Buffum*, 51 Maine, 160; *Coombs* v. *Jordan*, 2 Bl. & Ch. (Md.) 284 (22 Am. Dec. 236); *Elwes* v. *Maw*, 3 East. 38; *Van Ness* v. *Pacard*, 2 Pet. 137; *Whiting* v. *Braston*, 4 Pick. 310; *Harkness* v. *Sears*, 26 Ala. 493 (62 Am. Dec. 742); *Finney* v. *Watkins*, 13 Mo. 291; *Ombony* v. *Jones*, 19 N. Y. 234; *Kelsey* v. *Durkee*, 33 Barb. 410; *Holmes* v. *Tremper*, 20 Johns. 29; *Teaff* v. *Hewitt*, 1 Ohio St. 511 (59 Am. Dec. 634); *Guthrie* v. *Jones*, 108 Mass. 191; *Moore* v. *Wood*, 12 Abb. 393; *Holbrook* v. *Chamberlain*, 116 Mass. 155.

Walton and Walton, for defendant.

The question first presented is whether or not the instrument is a mortgage of personal property.

"Whether it is or not depends on the intention of the parties to be collected from the whole instrument." *Bacon* v. *Bowdoin*, 22 Pick. 405.

"To determine this it is proper to look at the entire contents of the instrument. Taking the entire instrument it will be seen that in form and substance it is a mortgage of real estate, that it is a grant to the grantee and his heirs and that it contains covenants not personal only, but covenants which run with the land, with the usual *habendum* in conveyances of real estate. So far, therefore, as the form is concerned, it is a deed of real estate." *Allen* v. *Woodard*, 125 Mass. 400.

The mortgage from Draper to Wyman, beyond any question, was to include the property conveyed by Wyman to Draper. Webster's Dictionary, "Premises;" Rapalje's Law Dict. Vol. 2,

"Premises." *Berry* v. *Billings*, 44 Maine, 416; *Swanton* v. *Crooker*, 49 Maine, 459.

Here there was a present interest granted in the property, before its severence, and with it the right to have it remain as situated for two years free of rent with the right to draw water from the pond to run said machinery during said two years.

It was therefore a conveyance of real estate, of an interest in land and water. *Bacon* v *Bowdoin*, 22 Pick. 401; *Allen* v. *Woodard* 125 Mass. 400; *Lamson* v. *Patch*, 5 Allen, 586; *White* v. *Foster*, 102 Mass. 375; *Hagar* v. *Brainerd*, 44 Vt. 294.

This belting was purchased by the mortgagor Draper, after he had given the mortgage and was by him cut and fitted to the machinery mortgaged. Being so cut and made and thus peculiarly fitted for use upon this machinery and thereto applied and this machinery as we have seen being mortgaged real estate, the belting was therefore, annexed to the mortgaged property as a fixture. *Farrar* v. *Stackpole*, 6 Maine, 154; *Trull* v. *Fuller*, 28 Maine, 545; *Parsons* v. *Copeland*, 38 Maine, 537.

While Draper occupied the land and the mill for two years by virtue of the conveyance of Wyman to him he did not occupy as tenant; he paid no rent and his occupation was by virtue of an interest in the real estate which he had received by conveyance and any addition or improvement made by him to his machinery came under the rule of mortgagors affixing fixtures to their own property mortgaged as security and thus evidently intended to be permanent. *King* v. *Johnson*, 7 Gray, 239; *Butler* v. *Page*, 7 Met. 40.

"If a lessee mortgages his leasehold estate, the same rules in relation to fixtures upon the estate apply as between him and his mortgagee that would apply if he owned the estate in fee." Jones on Mortgages, Vol. 1, § 439, citing, *Ex parte Bently*, 2 M. D. & De. G. 591; *Ex parte Wilson*, 4 Dea. & Chit. 143; S. C. 2 Mont. & Ayr. 61; *Shuart* v. *Taylor*, 7 How. (N. Y.) Pr. 251; *Ladley* v. *Creighton*, 70 Penn. 490.

Being so annexed by the mortgagor it was as fully covered by the mortgage as though a part of the mortgaged property at the

time the mortgage was written. *Corliss* v. *McLagin*, 29 Maine, 115; *Parsons* v. *Copeland*, 38 Maine, 537; *Winslow* v. *Ins. Co.* 4 Met. 306; *Clary* v. *Owen*, 15 Gray, 522; *Lynde* v. *Rowe*, 12 Allen, 100; *Paper Co.* v. *Servine*, 130 Mass. 511; Jones on Mortgages. Vol. 1, § 444; *Ottawa Mill* v. *Hawley*, 44 Iowa, 57; *Hart* v. *Sheldon*, 34 Hun. (N. Y.) 38; *Bank* v. *Kercherol*, 65 Mo. 682; *Green* v. *Phillips*, 26 Gratt. (Va.) 752; *Wood* v. *Whelen*, 93 Ill. 153; *Foundry Works* v. *Gallentine*, 99 Ind. 525; *Bowen* v. *Wood*, 35 Ind. 268.

In *McConnell* v. *Blood*, 123 Mass. 49, the court say, "Whatever is placed in a building by the mortgagor to carry out the obvious purpose for which it was erected, or to permanently increase its value for occupation, becomes part of the realty, though not so fastened that it cannot be removed without serious injury either to itself or to the buildings.

Now in the case at bar could this belting purchased as a strip of one hundred and twelve feet with the cups already attached and cut into three belts and fitted to the machinery (already mortgaged) be considered as furniture or anything else than a permanent addition to this machinery? Most certainly not. See also *Bank* v. *Exeter Works*, 127 Mass. 542; *Lapham* v. *Norton*, 71 Maine, 83; *Wight* v. *Gray*, 73 Maine, 297.

In *Burnside* v. *Twitchell*, 43 N. H. 390, the court say that leather belting purchased by a mortgagor after the giving of the mortgage and applied and used by him in a mill erected upon the mortgaged property after the mortgage was given where the mill is so constructed that it can only be operated by such belts connecting the several parts of the machinery with the motive power, will be held by the mortgagee.

These belts replaced at least one belt removed. This makes a stronger case for the defendant. *Bowen* v. *Wood*, 35 Ind. 268 and other cases before cited.

DANFORTH, J. This is an action of trover in which the only question involved is the title to the elevator belting sued for. The plaintiffs claim it as personal property under a chattel mortgage from Jerome B. Draper duly recorded October 13, 1885. The

defendant claims title as administratrix under a real estate mortgage from the same Jerome B. Draper to Thomas J. Wyman, her intestate, dated November 19, 1883, which was duly recorded as a deed of real estate, but not as a mortgage of personal property. It therefore becomes a material question whether this belting was real estate or personal property. Upon this question we have but little pertinent testimony in the report of the case, except such as may be derived from the acts of the parties; but that must be decisive if from them we can ascertain their intention upon this question.

It seems that by deed of warranty dated November 19, 1883, the defendant's intestate conveyed to Draper, the plaintiffs' grantor, an unoccupied mill privilege described by metes and bounds. In the same deed in a distinct clause, he conveyed "the machinery and its appurtenances, of the grist mill, . . . with the rights to use said machinery in said mill for two years from this date free from rent." This mill was not within the "metes and bounds" named in the deed, nor was it, except the two years use, conveyed by any description. At that time there was an elevator belt in the mill used in connection with the machinery, but whether as appurtenant to, or an independent part of it, does not appear; and perhaps it is immaterial for in either case it would pass by the deed. Subsequent to the deed this belting was removed, though left in the mill, and that in question, of greater value put in. On the same day and as a part of the same transaction the mortgage under which the defendant claims was given to secure the purchase money.

From this transaction we have no doubt the parties intended to, and did make this machinery and its appurtenances, personal property, whatever it might have been before. It was not, as in *Allen* v. *Woodard*, 125 Mass. 400, included in the description as a part of the real estate. On the other hand it was described in a separate clause and the building in which it was situated and of which it must have been a fixture, if of any, was not sold, but referred to as descriptive, or an identification, of the machinery, thus making a complete separation between that and the building. The sale and transfer of the machinery was immediate

and complete. True, the use of the mill was transferred, but it was only the use for a limited time, and that rather as a lease of the building in which to operate the machinery for the purpose of profit; and not as in *White* v. *Foster*, 102 Mass. 375, as necessary to keep it in existence. The machinery was not, as growing trees, an inherent part of the land, or even of the building, though it might have been fixture, and thus a part of the real estate. But as such fixture it is easily distinguishable from the building, and separated from it by a description, as the building may be from the land and thus rendered personal property as is often done. It is therefore immaterial whether the mortgage under which the defendant claims, covered this belting, as it was not recorded as a chattel mortgage and it is conceded that the plaintiffs had no knowledge of its existence.

In accordance with the provision in the report the entry must be.

Judgment on the verdict.

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

BILLINGS, TAYLOR AND COMPANY *vs.* HARRISON B. MASON.

Hancock. Opinion August 3, 1888.

Contract. Sales. Agency. Traveling salesman.

When a merchant makes a contract for the purchase of goods of an agent who agrees to receive other merchandise of a specified amount and price in part payment, and the goods purchased are shipped to the merchant by the principal, the agreement of the agent in regard to the method of payment is binding upon the principal though it was unauthorized by him.

ON exceptions.

The plaintiff is a corporation located in New York.

The case and material facts are stated in the opinion.

Wiswell, King and Peters, for plaintiff.

The case of *Trainer* v. *Morison*, 78 Maine, 160, decides that an agent who has authority to contract for the sale of chattels has authority to collect pay for them (at the time, or as a part of the same transaction) in the absence of any prohibition known

to the purchaser. But we do not understand that that case denies the well established rule that agents who are merely employed to sell, and who are not entrusted with the custody of the goods, have no implied authority to receive payment. In fact, Judge HASKELL, in the opinion in *Trainer* v. *Morison*, *supra*, says, "A traveling agent, who assumes only to solicit orders for goods to be sold at the option of his principal, may well be held unauthorized to make collections." See Benjamin on Sales, § 1095, and cases cited.

An agent who has authority to receive payment has power to receive it in money only. See Story on Agency, § 98, where the rule is laid down in this language: "So an agent authorized to receive payment has not an unlimited authority to receive it in any mode which he may choose; but he is ordinarily deemed intrusted with the power to receive it in money only." And see the English cases there cited. In Benjamin on Sales, § 1099, the principle is thus stated: "Payment to an agent must be in money." And further, that a broker or agent employed to sell, has *prima facie* no authority to receive payment otherwise than in money, according to the usual course of business, has been well established." And see notes in fourth Am. Ed. to above section.

Independently of any reasoning upon the subject, the very question in dispute has long been settled. In Story on Agency, § 78, it is said, "An authority to an agent to sell goods does not authorize him to exchange them in barter, or to pledge them; for there is no usage or trade to that extent." And the English case of *Guerreiro* v. *Peile*, 3 Barnewall and Alderson, 616, is cited in support of the doctrine. In the comparatively recent case of *Clough* v. *Whitcomb*, 105 Mass. 482, almost the exact question, if there can be any question, as to a principle so long and clearly settled, is decided. It is there said, "A commission, allowed to one who solicits orders upon sales effected through such orders, does not constitute him or prove him to be an agent with authority to make absolute contracts of sale; much less to

receive payments, and make agreements to receive payments, in other goods by way of barter."

Hale and Hamlin, for the defendant, cited: *Butler* v. *Maples*, 9 Wall. 766; *Trainer* v. *Morison*, 78 Maine, 163; *Methuen Co.* v. *Hayes*, 33 Maine, 169.

DANFORTH, J. In this action no material facts are in dispute. The court allowing certain alleged payments directed a verdict for the balance, to which order the plaintiff excepts on the ground that no part of such payment should be allowed.

The action is assumpsit upon an account annexed. The defendant admits that he received from the plaintiff the goods charged and makes no question as to the prices. This makes a *prima facie* case against him, and though technically it does not change the burden of proof it devolves upon him, if he would avoid this responsibility, to give some reason why. The explanation offered by the defendant is that, though he received the goods from the plaintiff, he received them by virtue of an express agreement with an agent or traveling salesman of the plaintiff, one element of which was that certain goods, of a like kind which the defendant then had should be taken in payment. This agreement with the agent is not questioned, but the answer to it is twofold; first, that the agent had no authority to make such a contract, and secondly, that the contract under which the action is sought to be maintained was made directly with the plaintiff, though in some degree through the instrumentality of the agent.

Assuming under the first, that the agent had no authority to make the contract he did, and the evidence is quite conclusive upon that point, still it does not change the conceded fact, that he not only assumed the authority to do so, but did actually make such a contract. Waiving for the moment the second point raised, this was the only contract having the assent of the defendant, the contract under which he acted and by virtue of which he obtained the goods. It is quite clear that the plaintiff cannot hold him upon a contract he did not make, or repudiate the contract in part and hold the remainder valid. *Brigham* v.

Palmer, 3 Allen, 450–452. Nor can he be holden upon an implied contract, for that is excluded by the express.

The second point relied upon by the plaintiff must fall with the first. True, the order for the goods was sent to the principal, presumably by the agent, with the consent of the defendant. But as to the nature of the order received there is a singular absence of testimony, though we have the evidence of the plaintiff's business manager. Whether it was accompanied with a statement of the contract does not appear. It is certain the agent had no authority to send any other, and by no other would the defendant be bound. He had a right to suppose that the plaintiff's own agent would send the order correctly and that when he received the goods, they were sent according to the contract. If such were the case, the contract of the agent would be affirmed by the principal, in sending the goods. If such were not the case the defendant would certainly be no more bound than the plaintiff, who first gave credit to the agent. This case differs materially from that of *Clough* v. *Whitcomb*, 105 Mass. 482, in which an order in writing signed by the defendant was sent to the plaintiff; nor is it like that of *Finch* v. *Mansfield*, 97 Mass. 89, in which the agent did nothing more than solicit an order and forward it as received for the action of his principal. But in the principle involved this case is like that of *Wilson* v. *Stratton*, 47 Maine, 120, in which the agent assumed to make the contract of sale with some conditions and it was held that the contract was not completed till the conditions were complied with.

It is not, however, now a question as to the validity of the contract made, but what was that to which the defendant assented. He can be held to that and to no other. In any view we can take of the case there seems to be no doubt as to the terms of the agreement to which his assent was given. If that was a valid contract the ruling was clearly correct. If it was not, the ruling was more favorable to the plaintiff than it was entitled to in this form of action. In either case the exceptions must be overruled.

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

MARY A. ULMER and others *vs.* JAMES R. FARNSWORTH.

Knox. Opinion August 3, 1888.

Assumpsit. Contract. Quarry. Custom.

Compensation for pumping water from a quarry, which run into it from an adjoining quarry where it accumulated, can not be recovered in an action of assumpsit against the owner of the other quarry, when there is no evidence of a promise to pay for such service.

Custom, to have the force of law, must, among other things, be universal and its origin so far back that the memory of man runneth not to the contrary.

ON report.

The opinion states the case and material facts.

O. G. Hall, for plaintiffs.

There was, we submit, enough evidence of the custom. The presiding judge in fact said it was not necessary to further multiply the witnesses. No certain number of witnesses is necessary to prove a custom. *Adams* v. *Pittsburgh Ins. Co.* 40 Am. Rep. 662.

The custom was general, as clearly proven. Defendant is presumed to have had notice of it, and knowledge of its existence. *Stevens* v. *Reeves*, 9 Pick. 197.

It was so uniform and had been so long continued that the defendant's knowledge is to be inferred. *Winslow et al.* v. *Dillaway*, 4 Met. 223.

When one stands by in silence and sees valuable services rendered for his benefit, such silence, accompanied with knowledge on his part that the party rendering the service expects payment therefor, may fairly be treated as evidence of an acceptance of the service, and as showing an agreement to pay for such services. *Day* v. *Caton*, 119 Mass. 515.

The maxim *Qui tacet consentire videtur*, applies when the party is fairly called upon to deny or admit his liability, and silence has often been interpreted as admission of liability, when one is fairly called upon to speak in the face of such facts. *Id.* 516; *Connor* v. *Hackley*, 2 Met. 613; *Preston* v. *Am. Linen Co.* 119 Mass. 400.

Robinson and Rowell, for the defendants, cited: *Gannon* v. *Hargadon*, 10 Allen, 106; *Sowers* v. *Lowe*, 9 Atl. Rep. 44; *Peck* v. *Herrington*, 109 Ill. 611; *Anderson* v. *Henderson*, 16 Nor. East. Rep. 232; Wash. Ease. & Serv. 353; *Bangor* v. *Lansil*, 51 Maine, 521; *Greeley* v. *M. C. R. R. Co.* 53 Maine, 200; *Chase* v. *Silverstone*, 62 Maine, 175; *Parker* v. *B. & M. R. R. Co.* 3 Cush. 107; Gould, Waters, § 294; 2 Addison, Torts, § 1049; Shear. & Red. Neg. § 511; *Luther* v. *Winnimissett Co.* 9 Cush. 171; *Flagg* v. *Worcester*, 13 Gray, 601; *Dickinson* v. *Worcester*, 7 Allen, 19; *Parks* v. *Newburyport*, 10 Gray, 28; *Leach* v. *Perkins*, 17 Maine, 462; *Latimer* v. *Alexander*, 14 Ga. 259; *Randall* v. *Smith*, 63 Maine, 105; *Homer* v. *Dorr*, 10 Mass. 26; *Strong* v. *Bliss*, 6 Met. 393; *Home* v. *Mut. Ins. Co.* 1 Sandf. (N. Y.) 137; *Higgins* v. *Moore*, 34 N. Y. 417; *Marshall* v. *Perry*, 67 Maine, 78; *Sipperly* v. *Stewart*, 50 Barb. 62; *Minn. R. R.* v. *Morgan*, 52 Barb. 217; *Boardman* v. *Gaillard*, 60 N. Y. 614.

DANFORTH, J. The plaintiffs are the owners of a lime quarry in which they have a pump used for the purpose of draining their quarry from such water as may accumulate therein, whether coming from sources within its own limits or outside. The defendant owns another quarry adjacent to, but not adjoining the plaintiffs', there being one quarry between them. It is alleged that water accumulates in the defendant's quarry, and running through the one intervening, comes upon that of the plaintiffs and is pumped up by them. It is to recover compensation for this service that this action is brought, the plaintiffs alleging that the defendant receives benefit from it, as it prevents the injurious accumulation of water in his own quarry.

The action is assumpsit and must therefore be maintained, if at all, upon proof of a promise, express or implied. The case shows no sufficient proof of an express promise.

Nor will the facts proved, independent of the alleged custom or usage relied upon by the plaintiffs, raise an implied promise. The pump by which the service was performed was situated in the plaintiffs' quarry, put there primarily for the purpose of

draining their own premises. The running of the water from the defendant's quarry to the plaintiffs', was the result of the plaintiffs' own act in digging theirs deeper than the other. The benefit accruing to the defendant, if any, was merely incidental, with no legal right to interfere with the operation of the pump, and hence under no obligation to give notice of a denial of liability. These circumstances could not raise an implied promise on the part of the defendant, certainly not if he was guilty of no wrong in permitting the water to run as it did, and if he was guilty the remedy would be in another form of action. And when we add to this the unqualified and uncontradicted denial of the defendant that any contract was made, we must come to the conclusion that the testimony not only fails to sustain a promise, but that in fact none, either express or implied, ever existed.

But the plaintiffs rely upon an alleged custom or usage in that neighborhood by which under like circumstances the parties receiving this incidental benefit, have recognized a liability to pay a certain specified sum, one cent for each cask of lime burned from the rock taken out of the quarry thus drained. It is claimed that this usage of itself raises an implied promise on the part of the defendant.

It requires the citation of no authorities to show that to give a custom the force of law, among other things, it must be universal and its origin in point of time so far back "that the memory of man runneth not to the contrary." This custom is at best but a local one and is confined to "a particular business or employment," and so recent in its origin that its beginning is within the memory of some of the witnesses. But as a local and limited usage the evidence fails to show its uniformity or certainty. On the other hand, it appears that the price paid was not the same in all cases, and in many instances both the price paid and the liability was the result of a contract. Nor does it clearly appear that this was not true in all cases; while in the constantly varying circumstances attending each case, the application must be difficult and uncertain.

But assuming the evidence to be plenary and to establish all

that is claimed for it, still, as a local and limited usage, and it can be no other, while it may be received to modify a contract, to explain the intention of the parties to it in case of an ambiguity, or the meaning of certain words used, or control to some extent the modes of dealing between parties in like business, as well as the manner of performing their contracts, many illustrations of which may be found in the usages of banks and merchants, but "it cannot be received to establish a liability, or to prove the origin of the relation by which the parties became responsible to each other." Such a usage may have an application to a contract previously existing, but cannot of itself create one. Nor can it be received to change an express contract, or in violation of an established principle of law. *Leach* v. *Perkins*, 17 Maine, 462; *Randall* v. *Smith*, 63 *id.* 105; *Bodfish* v. *Fox*, 23 *id.* 90; *Adams* v. *Morse*, 51 *id.* 497; *Dickinson* v. *Gay*, 7 Allen, 29; *Waters* v. *Lilley*, 4 Pick. 145. If this alleged usage is allowed to prevail in this case, it imposes a contract liability upon this defendant in direct opposition to the established principle of law requiring assent to a binding contract. This action must therefore fail whatever remedy may be open to the plaintiffs in a process of a different form.

Judgment for defendant.

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

NEWELL A. TRAFTON and others *vs.* LIVING L. HILL.

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Cumberland. Opinion August 7, 1888.

Insolvent law. Statute of limitation. Stat. 1887, c. 118.

Prior to act of 1887, c. 118, when the period of limitation had commenced to run on a claim provable in insolvency, the subsequent insolvency of the defendant under R. S., c. 70, did not interrupt the running of the limitation, and the right of action on such claim was barred by the general limitation of six years.

When an action is submitted to the court on an agreed statement of facts the court cannot infer a fact not agreed upon by the parties.

ON report on facts agreed.

This was an action of assumpsit upon five several notes and one check given by the defendant to the plaintiffs, at the several

dates thereof, for the several amounts stated in said notes and check.

The notes were all dated at Saco, in the county of York, payable at the York National Bank in said Saco, and the dates, times and amounts are as follows:

Date.	Time, after date.	Amount.
October 14, 1879,	60 days,	$344.00
November 11, 1879,	30 days,	319.00
November 17, 1879,	30 days,	150.00
November 25, 1879,	30 days,	250.00
December 10, 1879,	30 days,	295.00

The check was on the same bank, and dated December 10, 1879, for the sum of $135.00.

All the notes and the check were duly presented for payment, and protested for non-payment. No part of the same has been paid.

Other material facts stated in the opinion.

Holmes and Payson, for the plaintiffs.

If it should be thought that the examinations furnish no criterion by which to judge of reasonable diligence, certainly the day of the second meeting does, which in this case was January 5, 1881. The second meeting is appointed by the assignee with the approval of the judge. The debtor has nothing to do with it. Though the law says it should be within three months from the issuing of the warrant, this is often delayed beyond that time, especially if adjudication is delayed, and it is merely directory. If held after the three months it does not vitiate the proceedings. *Kimball* v. *Loring*, 11 Law Rep. 34; cited Hamlin's Insolv. Law, 51. He cannot get his discharge until he has taken the final oath. That must be taken at the second meeting. R. S., c. 70, § 43; Bump. on Bankruptcy (10th ed.), p. 270.

It has been said that the insolvent should file his petition at any time after the time designated, and the final settlement of the estate, which of course cannot be made until the second meeting. *In re Brightman*, 5 N. B. R. 213; *In re Ingersoll*, No. 520, Maine, Dist. Ct.; cited Hamlin's Insolv. Law, 52.

When proceedings do bar the commencement or maintenance of suits, they stop the running of the statute, during the time when the action is so prevented. *Collester* v. *Hailey*, 6 Gray, 517; *Stoddard* v. *Doane*, 7 Gray, 387; *Richardson* v. *Thomas*, 13 Gray, 381.

So it was held that a suit might be commenced against an adjudged bankrupt, though it could not be prosecuted to final judgment pending proceedings under the language of U. S. Rev. Stat. § 5106. But direct and positive authority for this view of the case is plentiful. *Doe* v. *Erwin*, 15 Rep. 305; 134 Mass. 90.

"As a general rule when a temporary incapacity to sue grows out of some particular provision of a statute, the time during which such temporary disability continues should be excluded from the computations." This is exactly our case. Angell on Lim. § 63.

"The law imposes the limitation, other law imposes the disability. It is nothing therefore but a necessary legal logic that one period shall be taken from another." *Semmes* v. *Hartford Ins. Co.* 13 Wall, 158-160.

"Statutes of Limitation, in fixing a period within which rights of action must be asserted, proceed upon the principle that the courts of the country where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor.

"The principle of public law which closes the courts of a country to a public enemy during war, renders compliance by him with such a statute impossible." *Brown* v. *Hiatts*, 15 Wall. 177–184.

It is therefore plain that there may be other things than statute provisions that will prevent the statute of limitations from running. This has been recognized by Massachusetts decisions. *First Mass. Turnpike* v. *Field*, 3 Mass. 201; *Homer* v. *Fish*, 1 Pick. 435; *Welles* v. *Fish*, 3 *Id.* 74, and cases in note, and by the U. S. Circuit Court in Maine; *Carr* v. *Hilton*, 1 Curtis, 230–238, in New Hampshire; *Sherwood* v. *Sutton*, 5 Mason, 143, and in Massachusetts; *Trecothick* v. *Austin*, 4 Mason, 16–27.

In another case precisely like this, and where the same defence was made, the court held that no suit could be brought while proceedings in bankruptcy were going on and the statute did not run during that time. *Greenwald* v. *Appell*, 17 Fed. Rep. 140.

The analogous cases of suits by or against assignees where concealment or want of discovery, prevents the two years from running, illustrate the doctrine we contend for. *Bailey* v. *Glover*, 21 Wall. 342; *Traer* v. *Clews*, 115 U. S. 528; *Upton* v. *McLaughlin*, 105, U. S. 640–643; *Gifford* v. *Hlms*, 98 U. S. 248; *Duff* v. *Nat. Bank of Wellsville*, 13 Fed. Rep. 65; *Bartles* v. *Gibson*, 17 *Id.* 293–299; *West Port. Homestead Assn.* v. *Lownsdale*, *Id.* 205–207.

Bailey v. *Glover*, seems to have been the leading case on this particular point and "unless subsequently overruled by this court is conclusive of the point under discussion. It never has been overruled. It has often been cited by this court, but has never been doubted or qualified." *Rosenthal* v. *Walker*, 111 U. S. 185–191.

So the suspension of the power to sue by the late civil war, is not treated as a part of the time limited, though not so provided by statute. *Hanger* v. *Abbott*, 6 Wall. 532; and this principle applies to an appeal, *The Protector*, 9 Wall. 687; *U. S* v. *Wiley*, 11 *Id.* 508.

So in Rhode Island where a suit was brought against a bankrupt the court say:

"The plaintiff contends that the time during which he was by law prohibited from suing his claim is not to be reckoned into the period fixed by the statute of limitations. We think he is right. The rule to be deduced from the cases ancient and modern is that a disability happening by an 'invincible necessity,' constitutes an exception from the statute of limitations, and is to be taken to have the same effect as those disabilities which are expressly excepted from the statute," and then goes on to say that a creditor, after his debt is proved in bankruptcy, may commence and prosecute a suit to any point short of final judgment. It clearly appears that the court considered a prohibition of the

commencement of a suit an "invincible necessity." *Hill* v. *Phillips*, 27 A. L. J. 518; S. C. 14 Rhode Island, 93.

It is true that since the commencement of this suit the legislature has seen fit to enact the main proposition of law upon which we depend. Laws of 1887, c. 118.

But this can only be construed to mean that the legislature has determined that the law ought to be as we claim it.

"Instances are not wanting in which the legislature designing to make the law more explicit, have enacted statutes which are found to be only declaratory of the law as it previously existed." *Wood* v. *Decoster*, 66 Maine, 542–544; Dwarris on Statute, pp. 55, 56–58.

Augustus F. Moulton, for the defendant, cited: *Little* v. *Blunt*, 9 Pick. 490; *Presbrey* v. *Williams*, 15 Mass. 193; *Pickard* v. *Valentine*, 13 Maine, 412; Byles, Bills, *331, *333, *336; 2 Greenl. Ev. §§ 435, 439; Angel, Lim. §§ 194, 196; *Phillips* v. *Sinclair*, 20 Maine, 269; *Mercer* v. *Selden*, 1 Howard, 52; *Eager* v. *Com.* 4 Mass. 188; 2 Chitty, Contracts, 1226; R. S., c. 1, § 5; *Prentice* v. *Dehon* 10 Allen, 355; *Schwartz* v. *Drinkwater*, 70 Maine, 409; *Barker* v. *Haskell*, 9 Cush. 218; *Palmer* v. *Merrill*, 57 Maine, 26; *Collester* v. *Hailey*, 6 Gray, 517; *Stoddard* v. *Doane*, 7 Gray, 387; *Roscoe* v. *Hale*, 7 Gray, 274; *Richardson* v. *Thomas*, 13 Gray, 381.

LIBBEY, J On the second day of April, 1880, the defendant was duly declared an insolvent debtor, and his estate was settled in insolvency; but no dividend was made, and no discharge granted to him.

All the notes and the check in suit had been overdue nearly three months at the date of the defendant's insolvency, and the period of limitation had commenced to run. By the facts agreed it appears that the plaintiffs proved the claims in suit in insolvency, but it does not appear when they were proved. The action was commenced May 12, 1886. The defendant relies on the statute of limitation, and the only question is whether the action is barred. We think it is.

Nearly six years and four months had elapsed between the maturity of the last note and the commencement of the action; but it is claimed by the plaintiffs, that there must be deducted from that period a reasonable time for the defendant, in the exercise of due diligence, to procure a decree of the court of insolvency on the question of his right to a discharge; and that would reduce the time to less than six years.

The statute relied on by the plaintiffs to support their contention is as follows: "No creditor shall commence or maintain any suit against the insolvent debtor upon a claim or demand which he has proved against such debtor in insolvency until after a discharge has been refused such debtor; *provided*, that such debtor proceeds with reasonable diligence to obtain such discharge," R. S., c. 70, § 51. Prior to the act of 1887, c. 118, there was no statute which, in terms, suspended the running of the limitation by reason of insolvency.

It is a general rule that, when the statute of limitation has commenced to run no subsequent disability will interrupt it, unless within some exception created by the statute. *Eager & ux.* v. *Comm.* 4 Mass. 182; *Mercer's Lesser* v. *Selden*, 1 How. 37; 2 Green. on Ev. § 439.

It may well be doubted if, in an action at law, the court has the power to suspend the running of the limitation, after it has commenced, on account of a disability not within an exception named in the statute. *Eager & ux.* v. *Comm.* and *Mercer's Lesser* v. *Selden*, *supra*; *Phillips* v. *Sinclair*, 20 Maine, 269; *Baker* v. *Bean*, 74 Maine, 17; *Rowell* v. *Patterson*, 76 Maine, 196. But we do not deem it necessary to so decide in this case. If it has such power it must be for some disability created by law which interrupts and suspends the right of the plaintiff to commence his action. *Swan* v. *Littlefield*, 6 Cush. 417; *Collester* v. *Hailey*, 6 Gray, 517; *Stoddard* v. *Doane*, 7 Gray, 387; *Richardson* v. *Thomas*, 13 Gray, 381.

No such disability is created by the statute. The creditor is disabled from commencing or maintaining an action "upon a claim or demand which *he has proved* against such debtor in insolvency." He is not required to prove his claim. If he does

not he may commence or maintain his action subject to the power of the court, in its discretion, to continue it pending proceedings in insolvency. *Schwartz* v. *Drinkwater*, 70 Maine, 409. He has a right to prove it, and if in exercising that right he deprives himself of his other right to commence an action against his debtor, it is the result of his own act. A contract made before the insolven cy statute was enacted is not subject to its provisions. Still if a creditor, holding such a contract, proves it against his debtor in insolvency and takes a dividend, he subjects his contract to all the provisions of the act. *Fogler* v. *Clark*, 80 Maine, 237. The same principle applies to the point under consideration.

But the case is here on an agreement of facts by the parties. This court cannot assume nor infer a fact not agreed upon by the parties. By the facts agreed, it does not appear when the plaintiffs proved their claims. Under the statute they had a right to prove them any time before final dividend. No dividend was made. They may not have proved them till long after the lapse of a reasonable time in which the debtor should have proceeded to obtain his discharge, so that there may not have been any time when the plaintiffs could not have commenced their action.

Judgment for defendant.

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

JOHN MEAD GOULD, executor, *vs.* ELIZA WAIT GRAVES.

Cumberland. Opinion August 7, 1888.

Executor and administrator. Trust. Tax. R. S., c. 6, § 14, cl. VI.

An executor, holding bonds in trust to pay the interest to a resident of this state, can not withhold out of the interest a sum sufficient to pay the taxes on the bonds.

By R. S., c 6, §14 cl. VI, the taxes upon such bonds are to be assessed directly to the person who receives the interest, or, if the beneficiary is a married woman, to her husband.

ON report.

Bill in equity by the executor of the last will of Charlotte Ilsley Harward to obtain a construction of the sixth clause of the will.

The point upon which the case turned is stated in the opinion.

Thomas L. Talbot, for plaintiff.

When a fund is left in trust, the income or interest of which is paid over, necessary expenses of the trust, such as taxes, may be first deducted and the net income paid the beneficiary. *Arnold* v. *Mower*, 49 Maine, 561; *Clark* v. *Foster*, 8 Met. 568. Revised Statutes, c. 6, § 14, cl. VI, imposes the burden of taxes in this case on the *cestui que trust* and not on the estate.

John J. Perry, for defendant, cited: *Fisk* v. *Keene*, 35 Maine, 349; *Doane* v. *Hadlock*, 42 Maine, 72; *Williams* v. *Bradley*, 3 Allen, 270; *Barrett* v. *Marsh*, 126 Mass. 213; *Deering* v. *Adams*, 37 Maine, 264; *Shaw* v. *Hussey*, 41 Maine, 495; *Osgood* v. *Lovering*, 33 Maine, 464; *Clark* v. *Foster*, 8 Met. 568; *Arnold* v. *Mower*, 49 Maine, 561; *Merrill* v. *Bickford*, 65 Maine, 118; *Merritt* v. *Bucknam*, 78 Maine, 501; *Orr* v. *Moses*, 52 Maine, 287; *Nutter* v. *Vickery*, 64 Maine, 490; *Brown* v. *Kelsey*, 2 Cush. 243; *Warren* v. *Gregg*, 116 Mass. 304.

WALTON, J. The plaintiff, as executor, is possesed of certain bonds, the interest on which is payable to the defendant during her life. The bonds themselves, at her decease, are given to other parties. The question is whether the plaintiff has a right to withhold from the defendant enough of the interest to pay the taxes on the bonds. Clearly not. The bonds are not taxable to him. The defendant is a resident of Portland in this state. The bill so states. If she is a married woman (and we understand she is, although the case does not distinctly show such to be the fact), the bonds are taxable to her husband. If she is not a married woman, then they are taxable to her. In neither case are they taxable to the plaintiff. R. S., c. 6, § 14, cl. VI. The clause cited declares that "personal property held in trust by an executor, administrator, or trustee, the income of which is to be paid to a married woman, or other person, shall be

assessed to the husband of such married woman, or to such other person, in the place of which he is an inhabitant," if such husband or other person is an inhabitant of the state; and it is only when the beneficiary, or her husband, if she has one, resides out of the state that such property can be taxed to an executor, administrator, or trustee. The tax laws of this state expressly so declare.

The statute referred to does not apply to real estate,—it applies only to personal estate. And it does not apply to personal estate when held for the ordinary purposes of administration —it applies only to personal property held in trust and the income of which is payable to another person. But when personal property is so held, it applies to executors and administrators as well as to trustees. The statute expressly so declares.

Such being the law, it is not important to inquire what the intentions of the testatrix were with respect to the taxation of these bonds. The law must govern, not her supposed or real intentions, if she had any. The will is silent upon the subject, and probably she had no intentions one way or the other. But if she had, and it were possible to ascertain what they in fact were, still, it is the law and not her intentions that must govern. We therefore decline to make the inquiry. Clearly, the bonds are not legally taxable to the plaintiff, and he has no right to withhold from the defendant any portion of the interest with which to pay the taxes. Whether he can be allowed to charge the taxes already paid by him to the estate, and thus make them a burden upon the residuary legacies, is a question which he must settle with the judge of probate.

Bill dismissed with costs.

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

GEORGE M. WARREN *vs.* JOHN E. KELLEY.

Hancock. Opinion August 9, 1888.

Shipping. Lien. Admiralty jurisdiction. Constitutional law. R. S., c. 91, § 8. Trespass. Officer. Attachment. Damages.

For repairs upon a foreign vessel, that is, a vessel out of the state or country where owned, the general maritime law gives the party furnishing the same lien upon the vessel for his security, and he may maintain a suit in admiralty to enforce his right.

In such case, if the party seeks to enforce his lien, his remedy belongs exclusively in the district courts of the United States.

Where a party furnishes materials or repairs upon a vessel in her home port, no lien therefore is implied or exists by the general maritime law as accepted and received in this country.

So long as Congress does not interpose by general law to regulate the subject, the state, although it cannot create a lien and attach it to a service or contract not maritime in its nature, and thereby extends the jurisdiction of the United States Courts, may extend a lien based upon a maritime service or contract to parties furnishing repairs or necessaries to a vessel in her home port.

But in such case the state cannot confer jurisdiction upon its own courts so as to enable them to proceed *in rem* for the enforcement of liens thus created by statute; for, by the later rules and decisions of the Supreme Court of the United States, jurisdiction for the enforcement of such liens, by process *in rem*, belongs exclusively to the district courts of the United States.

That portion of sec. 8, c. 91, R. S., which provides that "whoever furnishes labor or materials for a vessel after it is launched, or for its repair, has a lien on it therefor to be enforced by attachment within four days after the work is completed," so far as it authorizes proceedings *in rem* in the courts of this state for the enforcement of lien for labor, materials or repairs upon a domestic vessel, or foreign sea-going vessel, is in contravention of the Constitution and the Laws of the United States.

Where the tribunal from which the process issues has jurisdiction, and the process is apparently regular, the officer executing it may safely follow and obey it, and justify his acts under it.

But where the law is unconstitutional it confers no jurisdiction; the process is not merely voidable but absolutely void, and the proceedings of an officer under it cannot be justified.

In an action of trespass, where the plantiff is general owner of the property or has only a special ownership and is answerable over to others, the true rule of damages is the value of the property at the time of conversion with interest thereon to the time of verdict

The rule in relation to mitigation of damages stated.

ON exceptions and motion to set aside the verdict.

The opinion states the case.

A. P. Wiswell, for the plaintiff.

The action can be maintained by this plaintiff. 1 Chitty, Pl. 189; *Lunt* v. *Brown*, 13 Maine, 236; *Freeman* v. *Rankins*, 21 Maine, 446; *Staples* v. *Smith*, 48 Maine, 470; *Parsons* v. *Dickinson*, 11 Pick. 352; *Ayer* v. *Bartlett*, 9 Pick. 156; Abbott, Shipping, 2; 3 Kent, Com. 130; U. S. R. S., § 4192; *Perkins* v. *Emerson*, 59 Maine, 319; *White's Bank* v. *Smith*, 7 Wall. 646. Measure of damages. See: *Carpenter* v. *Dresser*, 72 Maine, 377

So much of R. S., c. 91, § 8, as authorized the court to enforce a lien for repairs upon an enrolled vessel by proceedings *in rem* is unconstitutional. *Hayford* v. *Cunningham*, 72 Maine, 128; U. S. Const. Art. 3, § § 1, 2; *Martin* v. *Hunter*, 1 Wheat. 334; *The Moses Taylor*, 4 Wall. 411; *The Hine* v. *Trevor*, 4 Wall. 555; *Ferry Co.* v. *Beers*, 20 How. 399; *The General Smith*, 4 Wheat. 438; *The Lottawanna*, 20 Wall. 219; 21 Wall. 559; 5 Am. Law Review, 603; *The Red Wing*, 14 Fed. Pep. 604; *The Howard*, 29 Fed. Rep. 604; *Stuart* v. *Potomac Ferry Co.* 5 Hughs C. C. Rep. 372; *The Alanson Sumner* 28 Fed. Rep. 670; *U. S.* v. *B. & H. Co. Ferry Co.* 21 Fed. Rep. 331.

Where the process is void for want of jurisdiction over the subject matter or person, the officer is liable in trespass, who executes it. *Savacool* v. *Boughton*, 5 Wend. 170; 21 Am. Dec. 181; *Dynes* v. *Hoover*, 20 How. 65; *Clark* v. *May*, 2 Gray, 410; *Thurston* v. *Adams*, 41 Maine, 419; *Elsemore* v. *Longfellow*, 76 Maine, 128; *Poindexter* v. *Greenhow*, 114 U. S. 269; *Fisher* v. *McGirr*, 1 Gray, 45; 3 McLean, 107; *Camp* v. *Mosely*, 2 Fla. 171; *Campbell* v. *Sherman*, 35 Wis. 103; 1 Chitty Pl. 535; *Washburn* v. *Mosely*, 22 Maine, 160; *Moore* v. *Knowles*, 65 Maine, 493; *Hollingsworth* v. *Dow*, 19 Pick. 228; *Globe Works* v. *Wright*, 106 Mass. 207.

William L. Putman and Joseph M. Trott, for the defendant.

The principal question which seems to have been raised at *nisi prius*, is a branch of the discussion which appeared in *Hayford* v. *Cunninghan*, 72 Maine, p. 134.

There is no stability in the decisions of the Supreme Court of the United States, nor indeed any decision nor anything except mere *dicta* of conflicting and varying character; and therefore nothing to justify this court in withdrawing its protection from its officers, who in good faith have been obeying the express orders of this court in enforcing literally its precepts, following the forms which have been in use, with changes in detail, since A. D. 1834, which were first questioned in *Hayford* v. *Cunningham*, *ante*, in A. D. 1881, and were not even then authoritatively determined against.

Even as late as *Homer* v. *The Lady of the Ocean*, 70 Maine, p. 350, decided November 12, A. D. 1879, although the lien was refused, no question was made on this score.

It cannot be questioned, that, if the state court should undertake to enforce by an admiralty proceeding an admiralty lien, the action of the state court would be reversed by the Supreme Court of the United States on writ of error.

This was so expressly decided in *The Hine* v. *Trevor* 4 Wallace, p. 556, *The Moses Taylor*, 4 Wallace, p. 411 and *The Belfast*, 7 Wallace, p. 624; and we are quite confident that anything which goes beyond these decisions, are mere *dicta*, which can be met to a certain extent by other *dicta*.

For example. The case of the *The Lottawanna*, 21 Wallace, p. 558, which is the case ordinarily relied on as laying down the rule, that state courts have no jurisdiction to enforce a lien which has no existence except under a state statute, came up from the admiralty court; and the real pith of the decision was, that the admiralty court could not enforce the lien, because the conditions attached to the lien by the state law had not been complied with.

Judge BRADLEY, who delivered the opinion of the court, on p. 580 said: "The state could not confer jurisdiction upon the state courts to enable them to proceed *in rem* for the enforcement of liens created by state laws."

We wish to preserve as we go along the following from the dissenting opinion of Judge CLIFFORD, on p. 602: "State lien laws are too complicated and pregnant with too many conditions and special regulations in their machinery, to be administered in

a court of admiralty, even if it be competent for this court to provide for the exercise of such a jurisdiction by a district court sitting as a court of admiralty."

In the case of *The Edith*, which is referred to in 72 Maine, as it appears in Blatchford's reports, but was finally disposed of in 94 U. S. p. 518, in A. D. 1876, the Supreme Court reiterated the pith of the decision in the case of *The Lottawanna*, by holding, that a creditor claiming the benefit of the provisions of the statute of New York, purporting to give a lien for materials furnished for repairing a vessel at a home port, must take it subject to all the conditions which the statute imposed.

In *Edwards* v. *Elliott*, 21 Wallace, p. 532, it was held, that there was no admiralty lien arising on a contract for building a ship; and the proceeding in the state court for enforcing that lien was sustained.

We have been unable to find any decision of the Supreme Court of the United States, any such weight of authority among the judges of the Supreme Court as indicated even by *dicta*, which overcomes the expression of Judge CLIFFORD, already cited, that "state lien laws are too complicated and pregnant with too many conditions and special regulations in their machinery to be administrated in a court of admiralty."

Johnson v. *The Chicago Elevator Co.* 119 U. S. 388, decided in December A. D. 1886, would seem to sustain our view of the effect of the previous decisions; because the court there said p. 397, that the "cases in which the state statutes have been held void by this court to the extent in which they authorized suits *in rem* against vessels because they gave to the state courts admiralty jurisdiction, were only causes where the causes of action were cognizable in the admiralty. Necessarily no other cases could be embraced."

This harmonizes with the expression contained on p. 133, of *Hayford* v. *Cunningham*, namely: that "the tendency of judicial opinion seems to be, that the jurisdiction of the state court shall terminate where the National jurisdiction begins; that there shall not be concurrent jurisdiction in any question of admiralty to be settled by process and proceedings *in rem*."

We do not mean, of course, to include or exclude that narrow class of cases, where a proceeding *in rem* against a vessel might possibly be regarded as a regulation of commerce, nor another class of cases like that of *Ex parte Pennsylvania*, 109 U. S. p. 174, where it is held that a claim which is a maritime claim, is none the less such because the amount due is determined by a state statute.

Johnson v. *The Chicago Elevator Co.* before referred to would seem to be clearly one of these cases, except for the fact, that there the attachment was made of "all the right, title and interest" of the owner in and to the tug.

With that exception the proceedings were in all respects substantially like those under our statute; but on p. 400, the court expressly laid aside the question generally discussed, saying: "Whether proceedings under the Illinois statute different from those had in this case, may not be obnoxious to some of the objections raised, is a question which must be left to be determined when it properly arises."

Page 398, the court discussed *Leon* v. *Galceran*, 11 Wallace, p. 185, and said it was very much like the case then before the court, and p. 399 it explained and apparently approved the case. And this must be regarded as the latest authoritative expression of the Supreme Court on the precise question which our statute raises.

Our Revised Statutes, chapter 91, section 8 in the very breath in which it gives the lien, adds "to be enforced by attachment within four days after the work is completed."

We do not say that the Supreme Court might not hold that a lien given as our statute gives this lien, could be enforced by the admiralty court. We merely say, it is not yet so decided, that there is great force in the observation of Judge CLIFFORD, and that in the absence of authoritative decision of the Supreme Court of the United States, and in view of its shifting positions on this and connected questions, our court should adhere to what has been for fifty years the statute law of the state.

Our position is not contravened by the admitted principles of admiralty law, that a lien for the repair of a vessel is a maritime

contract on which an action *in personam* would lie in admiralty, whether there is a lien or not, and that, if a pure lien, not hampered by statute restrictions and limitations, is attached by the local law, it at once adheres to the maritime contract and can be enforced by the admiralty court, as was held to be the law in the *Gen. Smith*, 4 Wheaton, p. 438, in *Peyroux* v. *Howard*, 7 Peters, p. 324, and in the *Steamer St. Lawrence*, 1 Black, p. 529.

We admit this principle, notwithstanding its apparent denial by Judge NELSON, delivering the opinion of the court in *Maguire* v. *Card*, 21 Howard, p. 248, is another illustration of the instability of the Supreme Court on these questions.

But in *The St. Lawrence*, p. 530, the court said: "There could be no embarrassing difficulties in using the ordinary process *in rem* of the civil law, if the state law gave the lien in general terms without specific conditions or limitations inconsistent with the rules and principles which govern implied maritime liens."

The state lien which came under discussion in the case of *The St. Lawrence*, *ante*, is found in the Revised Statutes of New York, published by Banks and Bros. 7th Edition, Vol. 3, p. 2404. The first section gives absolutely a lien on the vessel; all provisions as to its continuance and method of the enforcement being in subsequent sections of the statute. In this respect the New York statute differs widely from our own, the language of which gives, "a lien to be enforced by attachment within four days after the work is completed," and proceeds immediately in the next section to prescribe the form of attachment.

Moreover the New York statute, like the California, Iowa and Alabama statutes which we have already considered in the cases of *The Moses Taylor*, *ante*, *The Hine* v. *Trevor*, *ante*, and *The Belfast*, *ante*, and like the Virginia statute on which the case of *The Steamers Raleigh*, *Canknon Astoria*, 2 Hughes, p. 44, rested, gave a direct proceeding against the vessel, taking no cognizance of the owner or debtor; and in this respect it was unlike ours.

The language of the court in *The Harrisburg*, 119 U. S. p. 199, while the case itself is not much in point, illustrates the

propositions made by Judge CLIFFORD, Judge TANEY, and in the case of *The Edith*, *ante*. We quote from p. 214 where the court said: "The liability and the remedy are created by the same statute, and the limitations of the remedy are therefore to be treated as limitations of the right."

In the Maine statute the liability and the remedy are created, not only by the same statute, but in the same breath.

Some expressions in *Ex parte Royall*, 117 U. S. p. 248, will be found on proper examination, not to be so extreme as they appear at first reading.

The court said: "If the local statute under which *Royall* was indicted, be repugnant to the constitution, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity, as was stated in *Ex parte Siebold*, 100 U. S. p. 376. An unconstitutional law is void and is as no law, and an offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." And similar phraseology is quoted from *Ex parte Yarborough*, 110 U. S. pp. 651 and 654.

Now while these expressions are extreme, an examination of the context shows, that there was no intention of giving such language the effect which is claimed by the plaintiff in this case.

Ex parte Parks, 93 U. S. p. 18, where the Supreme Court of the United states refused on *habeas corpus* to investigate the proceedings of the District Court, on the claim that the matter for which the party was indicted in the latter court was not a crime against the laws of the United States, illustrates our next point; and we will close this proposition by calling attention to the fact, that in every case in this state in which it was suggested that the process of the court might not protect the officer, the language was limited to inferior courts. See *Waterville* v. *Barton*, 64 Maine, p. 326; *Thurston* v. *Adams*, 41 Maine, p. 422, and all other cases of a similar character.

Among all the cases which this long controversy has given rise to, no case can be found where, for want of jurisdiction of the state court to proceed *in rem* against a vessel, an action has been maintained against an officer serving the process of the

state court, either in the state or United States court; although it probably will be found, and is not at all inconsistent with our position, that a proceeding *in rem* from a state court, even though it went to judgment and the vessel was sold, would not bind the title of the vessel as against persons who did not appear in the suit. To this extent the proceedings of the state court would probably be void; and in this respect the analogy would be perfect to a judgment rendered *in personam* by the state court against a non-resident on whom service had not been made. Such judgment would be void; yet the officer would not be liable for serving an execution in due form issued from the clerk's office of the Supreme Judicial Court for enforcing such ineffectual judgment.

When the new rule was adopted in A. D. 1872, the effect was, not to render our statute unconstitutional, and that is in no sense the proper word to apply; it only crowded out its operation to a certain extent.

The effect was precisely the same as the effect of the insolvency law in this state, as explained *In re Damon*, 70 Maine, p. 153.

The same rule was held and elaborated by the Supreme Court of Massachusetts in *Lothrop* v. *The Highland Foundry Co.* 128 Mass. p. 120.

The analogy between these insolvency statutes and the state statute about proceedings against vessels being complete, the Supreme Court of Massachusetts in *Day* v. *Bardwell*, 97 Mass. p. 246, did not hesitate to pass on the question of the jurisdiction of the courts of Massachusetts under the insolvent law, between March 2, A. D. 1867, and June 1, A. D. 1867, although it involved the further question, whether the passage of the bankrupt law on the second of March superseded the insolvency statute in Massachusetts; precisely as this court, on the return of the original process served by the sheriff, might have proceeded to determine a like question though pointing in a somewhat different direction.

We have many inland vessels propelled by steam and others propelled by sail; the United States refused to take jurisdiction for

inspection of the former, and we have an express statute directing such inspecting by state officers.

Even if the statute had been in a certain degree unconstitutional, or if it assumed express jurisdiction over all vessels maritime and others, yet there would be no principle to prevent a severance, or to prevent our court from taking jurisdiction over the class of inland vessels of which we have just spoken. This was done in *Edwards* v. *Elliot*, 21 Wall. p. 532, where the statute is stated on p. 533, to embrace "building and repairing;" yet the Supreme Court of the United States sustained state jurisdiction of a lien accruing from building.

An analogy is found in *Schwartz* v. *Drinkwater*, 70 Maine, p. 409.

An illustration is found in *Packet Co.* v. *Keokuk*, 95 U. S. p. 80. This is the more striking, because the language of the ordinance in that case was so broad, that it was in part unconstitutional on its face.

The ordinance laid in form a tonnage tax; and as was explained in *Baldwin* v. *Franks*, 120 U. S. p. 688, it was so broad, that it "included a part of the shore declared to be a wharf, which was in its natural condition unimproved."

Another analagous case, *State* v. *Gurney*, 37 Maine, p. 149.

The court closed the opinion on p. 156 as follows: "An indictment in the state court regards only the law of the state against which the offence is committed. The statutes or law of the state which create the offence and impose the penalty, are alone to be regarded in framing the indictment. It would be a novel doctrine, to require that a defence arising from treaties with or under the statutes of another government, be negatived in an indictment for an offence against the laws of this state."

This case was reaffirmed in *State* v. *Robinson*, 39 Maine, p. 153.

On the whole, here is a process, regular in form, issuing from the highest court of the state, relating generally to a matter as to some particulars of which the court certainly had final and exclusive jurisdiction. The case seems to be entirely within the principles of *Ex parte Parks*, 93 U. S. p. 18, already referred to.

We are unable to see anything in the case distinguishing it from the familiar principles laid down in the familiar case of *Gurney* v. *Tufts*, 37 Maine, p. 134, *Waterville* v. *Barton*, 64 Maine, p. 326; and *Elsemore* v. *Longfellow*, 76 Maine, p. 130; in the latter of which the court, speaking of the process even of inferior tribunals, said that the officer is protected, unless the process is void and unless he can see from the face of the process itself, that it is void.

The fundamental principles of law applicable to the regularity of judicial proceedings, will not permit an officer to determine a question of this kind, either from his own knowledge or from any other proofs whatsoever. This was expressly determined in *Watson* v. *Watson*, 9 Connecticut, p. 140, an action against a sheriff for replevying property, which was not by law repleviable.

"It is incomprehensible," said Lord KENYON, in *Belk* v. *Broadbent and ux.* 3 Term, Rep. 183, 185, "to say, that a person shall be considered a trespasser who acts under the process of the court."

The officer is entitled to set up everything in defence or in mitigation of damages which McDougall could do, if defendant in the case. *Townsend* v. *Newell*, 14 Pick. pp. 332 and 336.

Without reciting the circumstances, it is plain that the vessel was put into McDougall's possession, and that he had a common law lien for his expenditures on her. Maclachlan on Shipping (2nd. Ed.), p. 7.

The sheriff testifies, that he merely stepped aboard the vessel and posted his notice, and clearly he did not interrupt McDougall's possession. This was substantially the course taken in *Palmer* v. *Tucker*, 45 Maine, p. 316; where it was held, that a common law lien on a lot of logs was preserved under somewhat similiar circumstances.

According to *Titcomb* v. *McAllister*, 77 Maine, p. 353, at the time the vessel was attached, Warren was simply a mortgagee. Inasmuch as he could be "indemnified by a sum of money less than the full value of the vessel per the verdict," and inasmuch as what he may recover in excess of the sixteen hundred dollars, he must pay over to McDougall, the law will not permit

the recovery of money simply for the purpose of paying it back. *Chamberlin* v. *Shaw*, 18 Pick. 283.

FOSTER, J. Labor and materials were furnished for repairing the schooner *Corporal Trim*. Payment for the same was refused, and proceedings *in rem* were instituted to enforce a lien provided by statute against the vessel for which such labor and materials had been furnished. Process for the enforcement of the lien was placed in the hands of the defendant as sheriff of the county of Lincoln, and the vessel was seized and attached by him.

This suit is trespass against the officer by the mortgagee of said vessel. A verdict of $2,443.73 has been rendered against the defendant, and the case comes before this court on exceptions and motion.

The question presented for consideration on the exceptions involves the constitutionality of a portion of section 8, c. 91, R. S., and other provisions pertaining to that portion, which in terms provide for the enforcement of liens for *repairs* upon vessels. That portion of section 8 is as follows: . . . "and whoever furnishes labor or materials for a vessel after it is launched, or for its repair, has a lien on it therefor, to be enforced by attachment within four days after the work is completed," . . . In addition thereto subsequent sections provide for enforcing this as well as other liens named in the eighth section, specifying the form of the process *in rem* against the vessel itself substantially as in admiralty proceedings, with a separate judgment and execution against the vessel for the amount of the lien claim found to be due, and process for the sale of the vessel for the satisfaction of such lien.

It is admitted that the vessel was owned within the state, and that the materials and repairs were furnished at her home port, a port within the state where the vessel was owned. It is therefore a case of a domestic and not a foreign vessel; of a domestic vessel with materials and repairs furnished in a home port.

The contention of the plaintiff is, that the contract and service for the materials and repairs were of a maritime nature, and, with reference to the enforcement of any lien therefor by

proceedings *in rem*, cognizable exclusively in the admiralty courts of the United States. And it is claimed that the statute authorizing the enforcement of such lien in the courts of this state, by proceedings of this kind, for repairs upon vessels, is unconstitutional, and therefore affords no protection to the officer acting under such process.

The question is squarely before us upon the case as it is presented, and must be directly met, notwithstanding that portion of the statute in reference to repairs upon vessels, and to the furnishing of labor or materials for the same after they are launched, has been repealed since this controversy arose.

The constitution of the United States (Art. III., § 2) ordains that "the judicial power shall extend . . to all cases of admiralty and maritime jurisdiction." And according to the highest judicial authority by which the terms of the constitution are construed, it was long ago settled that while congress can neither enlarge nor diminish this grant to the federal judiciary, it may designate the courts which shall exercise this jurisdiction. When this is done, no state law can enlarge or diminish the jurisdiction allotted to such courts.

In the proper exercise of this power by congress the Judiciary Act of 1789 was enacted constituting the district courts of the United States, by the ninth section of which it is provided that said courts "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it." It would seem unquestionable, therefore, that the jurisdiction of the district courts of the United States extends over all admiralty and maritime causes exclusively, with the exception of such concurrent remedy as was given by the common law.

"Admiralty and maritime jurisdiction," according to the generally accepted and received use of the terms, extends to all things done upon and relating to the sea, to transactions relating to commerce and navigation, to damages and injuries upon the sea, and all maritime contracts, torts and injuries. *De Lovio* v. *Boit*, 2 Gallison, 468. But as applied in this country, with

its immense lakes and numerous navigable rivers, the doctrine in modern times has extended it "wherever ships float and navigation successfully aids commerce, whether internal or external." *The Hine* v. *Trevor*, 4 Wall. 563; *The Eagle*, 8 Wall. 15.

Before proceeding further it may be proper to notice the difference in reference to liens upon domestic and foreign vessels. For repairs upon a foreign vessel, that is, a vessel out of the state or country where owned, the general maritime law gives the party furnishing the same a lien upon the vessel for his security, and he may maintain a suit in admiralty to enforce his right. In such case if the party sees fit to enforce his lien, his remedy belongs exclusively in the courts of the United States. But where a party furnishes materials or repairs upon a vessel in her home port, no lien therefor is implied by the maritime law as accepted and received in this country. The presumption in such case is that credit is given to the owners and not to the vessel. The reason for the existence of the lien in one case and not in the other, as declared by the courts, is based upon the principles of the maritime law, and not upon the fact that one is a contract maritime in its nature, and the other not, for it is conceded by all the authorities that supplies, materials and repairs furnished to a vessel in her home port is a maritime contract. *Peyroux* v. *Howard* (*The Planter*), 7 Pet. 341; *The St. Lawrence*, 1 Black. 522; *The Lottawanna*, 20 Wall. 219; *The Lottawanna*, 21 Wall. 580; Abbott on Shipping, 143, 148.

But while by the general maritime law no lien exists in favor of parties furnishing repairs or necessaries to a vessel in her home port, it has been the admitted and recognized doctrine of our jurisprudence ever since the decision in *The General Smith*, 4 Wheat. 443, in 1819, that so long as congress does not interpose by general law to regulate the subject, the state, although it cannot create a lien and attach it to a service or contract not maritime in its nature and thereby extend the jurisdiction of the United States courts, (*Peyroux* v. *Howard*, (*The Planter*), *supra*; *Forsyth* v. *Phœbus*, (*The Orleans*) 11 Pet. 175, 184; *Roach* v. *Chapman* (*The Capitol*), 22 How. 129, 132; *The*

Belfast, 7 Wall. 644) may extend a lien based upon a maritime service or contract to parties thus furnishing such repairs or necessaries to such vessel. *The Belfast*, *supra*; *The Lottawanna*, 21 Wall. 580; *Edwards* v. *Elliott*, 21 Wall. 557.

As to the methods of enforcing such liens, whether in the state or United States courts concurrently, or in the one to the exclusion of the other, notwithstanding the provisions of the Constitution and of the Judiciary Act of 1789, are questions which have frequently been before the Supreme Court of the United States, and given rise to decisions which are not easy of reconciliation. While a careful examination of the decisions is proper to a correct understanding of this question, it is unnecessary to particularly trace them in this connection. In such examination, however, it becomes necessary to bear in mind that the want of a uniform system of admiralty administration in cases where local law or state statutes gave a lien upon the property where none existed by the general maritime law, led to the adoption of what is known as Rule XII in admiralty, in 1844, and the amendments thereto in 1859 and 1872.

For many years after the adoption of the Constitution, jurisdiction was concurrently exercised by the state and United States courts in reference to proceedings *in rem* for the enforcement of liens created by the statutes of the different states. The federal courts entertained jurisdiction and enforced liens which were not maritime or based upon maritime service or contract. Liens created by statute and applied to the construction and building of new vessels, which are land and not sea contracts, were enforced by the admiralty or district courts of the United States, as well as liens for materials or repairs upon them after they were built. But in *The People's Ferry Co.* v. *Beers*, 20 How. 393, in 1857, the court laid down the doctrine that a contract for the construction of a vessel is not maritime because it is neither made nor performed on the water, and that no maritime lien is created or exists by the performance of such a contract, and refused to recognize jurisdiction in the district courts in the enforcement of statutory liens attached to contracts for the original construction of vessels. *Roach* v. *Chapman*

(*The Capitol*), 22 How. 132; *Edwards* v. *Elliott*, 21 Wall. 532.

The decision in *Peyroux* v. *Howard* (*The Planter*), 7 Pet. 324, rendered in 1833, has been considered as establishing the principle that if a state statute gives a lien in its nature maritime, that is, founded upon a maritime contract, and the subject matter is within admiralty jurisdiction, the lien may be enforced by a suit *in rem* in the admiralty courts.

No principle of admiralty appeared to be better established in the United States than that which we have just stated—that where a local law attaches a maritime lien to a maritime service within admiralty jurisdiction, a suit to enforce such lien lies in the federal courts in admiralty, and that a lien for materials or repairs on a vessel engaged in maritime commerce, a sea-going vessel, is a maritime lien, and within admiralty jurisdiction. This doctrine was generally understood in the district courts, and was affirmed in *The General Smith*, 4 Wheat. 438, in 1819; *Peyroux* v. *Howard* (*The Planter*), 7 Pet. 324, in 1833; *Forsyth* v. *Phœbus* (*The Orleans*), 11 Pet. 175, in 1837.

It was after these decisions that Rule XII in admiralty was adopted, not as establishing the law, but assuming it to be settled, *first*, that there was no lien for materials or repairs on a domestic vessel unless by force of local or statute law; and, *second*, that if there was such a lien by local or statute law, it was enforcible in the admiralty courts of the United States. *The St. Lawrence*, 1 Black. 529.

This rule was changed in 1858 to take effect May 1, 1859, and by the change thus made process *in rem* was denied unless the lien was given by the maritime law. *Maguire* v. *Card* (*The Goliah*), 21 How. 248; *The St. Lawrence*, *supra*.

This change in the rule, while attempting to avoid the embarrassment arising in the federal courts from the varying and conflicting state laws, and the conflict of rights arising under them, (*The St. Lawrence*, *supra*) proved unsatisfactory, and after "diverse experiences and many agitations of the subject," the Supreme Court adopted a policy in accordance with the earlier decisions of that tribunal, and in 1872 the following rule was established: "In all suits by material men for supplies or

repairs, or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner *in personam*." As was said by PETERS, C. J., in *Hayford* v. *Cunningham*, 72 Maine, 133, "the doors of the district courts, which had been since 1859 shut against suits like those now before us, were opened to them again. Since this date the opinion and feeling among the judges of the federal courts seem to be that their jurisdiction must be exclusive."

But in determining to what extent the legislature may go in creating or extending liens in matters of this kind, it is now too well settled to admit of doubt that the legislature of a state cannot grant admiralty jurisdiction to its own courts in matters within the jurisdiction of the district courts. The highest judicial tribunal in the land, in a line of decisions by which this court must be governed, has most emphatically asserted the doctrine and established the principle that the jurisdiction for the enforcement of a maritime lien, is, under the Constitution and the Judiciary Act of 1789, exclusively in the courts of the United States, and cannot be exercised by state courts, although conferred on them by statute.

The question was not directly decided until 1866, in the case of *The Moses Taylor*, 4 Wall. 411. The statutes of California had established a system of liens upon vessels, foreign and domestic alike, and authorized the courts of the state to enforce them by proceedings *in rem*. The liens created and the proceedings authorized had the character and incidents of admiralty liens and proceedings. The steamer *Moses Taylor* was seized and libelled in the state court of California by a proceeding *in rem* to enforce a lien for the breach of a contract to transport a passenger from Panama to San Francisco. The state court sustained jurisdiction, and the case was taken to the Supreme Court of the United States. The question was directly whether a state court can entertain an admiralty suit *in rem* to enforce an admiralty lien. The court was unanimous in holding that such jurisdiction was exclusively vested in the district courts of the United States, and that the provision in the Constitution by which the judicial power of the United States "shall extend

. . to all cases of admiralty and maritime jurisdiction," had, of itself, the effect to take such jurisdiction from the courts of the states. And it was further held that whether that was so or not, the Constitution at least authorized congress to vest the admiralty jurisdiction in federal courts exclusively of the state courts, and that congress had done this by the Judiciary Act of 1789, which provides that "the district courts shall have, exclusively of the courts of the several states, cognizance . . and shall also have exclusive original cognizance of all civil causes of admiralty and marine jurisdiction."

It was contended in argument, however, that a concurrent jurisdiction in the state courts was reserved for proceedings of this nature by the last clause of the Judiciary Act, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." But the court held that this does not save a proceeding *in rem* as used in the admiralty courts, and that such a proceeding is not a remedy afforded by the common law.

At the same term of the court came the decision in *The Hine* v. *Trevor*, 4 Wall. 555. The statutes of Iowa, like those of California, provided for its courts remedies and processes for enforcing liens on vessels, and under them proceedings had been had against the Hine for a collision on the Mississippi river. The state court sustained jurisdiction, and the case was taken to the Supreme Court of the United States. Following the decision in *The Moses Taylor* the court held exclusive jurisdiction in the district courts of the United States. "It is a little singular," say the court, "that, at this term of the court, we should for the first time have the question of the right of the state courts to exercise this jurisdiction, raised by two suits of error to state courts, remote from each other." The claim was also set up in that case that the proceedings authorized by the statutes of Iowa came within that clause of the Judiciary Act which saved to suitors the right of a common law remedy. But the court say that "the remedy pursued in the Iowa courts, in the case before us, is in no sense a common law remedy. It is a remedy

partaking of all the essential features of an admiralty proceeding *in rem*."

In 1868, the same question arose in a case of contract in *The Belfast*, 7 Wall. 624, and received the same decision. The state court in Alabama had entertained proceedings to enforce a lien for breach of contract of affreightment, the statutes of that state having authorized the proceedings. Mr. Justice CLIFFORD, giving the opinion of the court, places the case on the authority of *The Moses Taylor* and *The Hine* v. *Trevor*, and says the difference between contract and tort is immaterial, on the point of the exclusiveness of the jurisdiction of the federal courts. If the contract is maritime, and the lien attached to it is a maritime lien, not enforcible by common law remedies, the jurisdiction of the district courts is exclusive of that of any other court, whether state or national.

Very many state courts, as well as district courts, have passed upon the question either directly or indirectly, and all seem to incline in one direction.

This is now the settled policy of the Supreme Court as foreshadowed if not directly asserted, in all its recent decisions where the question is raised. As late as 1874, in the case of *The Lottawanna*, 21 Wall. 580, the doctrine of exclusive jurisdiction in the district courts was affirmed in the most emphatic terms. The court say, "It seems to be settled in our jurisprudence that so long as congress does not interpose to regulate the subject, the rights of material men furnishing necessaries to a vessel in her home port may be regulated in each state by state legislation. State laws, it is true, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts so as to enable them to proceed *in rem* for the enforcement of liens created by such state laws, for it is exclusively conferred upon the district courts of the United States. They can only authorize the enforcement thereof by common law remedies, or such remedies as are equivalent

thereto. But the district courts of the United States having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by the state laws."

A lien on a sea-going vessel for repairs made upon her is a recognized admiralty lien. It is nothing else. But it is not known to or enforcible by courts of common law. This lien when applied to a domestic vessel has not changed its nature. All the change there is, is this: It is extended to a class of persons not entitled to claim its benefits under the general maritime law. And such lien may lawfully be granted by the laws of a state in favor of material men for furnishing repairs or materials to a domestic vessel, to be enforced by proceedings *in rem* in the district courts of the United States, but not in the courts of the state. *The Lottawanna*, 21 Wall. 559. The authorities which have been cited are sufficient to show the judicial sentiment upon this question. It has been followed and acted upon in several recent cases in the district courts. *The Red Wing*, 14 Fed. Rep. 869, decided in 1882; *The Howard*, 29 Fed. Rep. 604, decided in 1887; *The Alanson Sumner*, 28 Fed. Rep. 670; *U. S.* v. *B. & H. County Ferry Co.* 21 Fed. Rep. 331.

Nor do the authorities deny that such liens may be enforced by common law remedies or such as are equivalent thereto, in the state courts. "But it is not a remedy in the common law courts which is saved, but a common law remedy; not such as a legislature may confer upon a common law court, but such as the common law itself (in 1789) was competent to give." *Hayford* v. *Cunningham*, 72 Maine, 133. "It could not have been the intention of congress by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by state statutes, for this would have enabled the states to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases." *The Hine* v. *Trevor*, 4 Wall. 571.

The proceedings in the case under consideration, as in *Hayford* v. *Cunningham*, *supra*, were not a common law remedy, nor such as the common law was competent to give. The suit was

against the vessel itself and not against the interest of the owner in it. The characteristic feature of the proceeding is that the vessel proceeded against is itself seized and impleaded as the defendant, which is substantially the proceeding in a court of admiralty in proceedings *in rem*. At common law, proceedings are against persons, and if property is seized or taken it is taken as the property of the person proceeded against, and the purchaser at the sheriff's sale gets only such title or interest as the defendant had. The process is against another as owner of the property, "and not against the property as an offending thing, as in the case where the libel is *in rem* in the admiralty court to enforce a maritime lien in the property." *Leon* v. *Galceran*, 11 Wall. 189; *Johnson* v. *Chicago Elevator Co.* 119 U. S. 397.

The statute, therefore, so far as it authorized proceedings *in rem* in the courts of this state for the enforcement of a lien for labor, materials, or repairs upon a domestic or foreign sea-going vessel, must be held to be in contravention of the constitution and laws of the United States.

The result is that the process under which this defendant attempts to justify was not such as would protect him in seizing the vessel. Sufficient appeared upon its face to show that it was not from a court of competent jurisdiction in reference to the subject matter. The process disclosed upon its face that it was to enforce a lien claim by proceedings *in rem* for repairs upon the vessel against which the charges were made as the specifications annexed to and forming a part of the proceedings plainly show. The process was not only irregular, but absolutely void. Such was the decision in *Campbell* v. *Sherman*, 35 Wis. 103, where it was held that a process *in rem* to enforce a maritime lien issuing from a state court will not protect the officer executing it inasmuch as the state courts have no jurisdiction in such cases. This principle is recognized in *Fisher* v. *McGirr*, 1 Gray, 45, where it is expressly held that if the court has no jurisdiction over the subject matter, the process, though apparently regular, is not merely voidable, but wholly void, and the officer taking property under it has no authority, and is therefore liable to an action of trespass. See also *Cassier* v.

Fales, 139 Mass. 462; *Elsemore* v. *Longfellow*, 76 Maine, 130–1. And moreover it is settled that where the law under which the officer acts is "unconstitutional it is void; though having the form, it has not the force of law; the provisions, professing to confer jurisdiction, give no jurisdiction; and the proceedings even of subordinate officers under it cannot be justified." *Warren* v. *Mayor and Aldermen of Charlestown*, 2 Gray, 97; *Norton* v. *Shelby County*, 118 U. S. 442; *Virginia Coupon Cases*, 114 U. S. 271.

The case shows that the plaintiff in this action, at the time when the seizure was made, and at the commencement of this suit, held a mortgage upon the vessel with the right of immediate possession in himself, the time having elapsed in which such right belonged to the mortgagor by the terms of the mortgage. He can therefore maintain this action. *Welch* v. *Whittemore*, 25 Maine, 86; *Holmes* v. *Sprowl*, 31 Maine, 76; *Barrows* v. *Turner*, 50 Maine, 128; *Staples* v. *Smith*, 48 Maine, 470; *Codman* v. *Freeman*, 3 Cush. 306.

The only remaining question is one of damages. And upon this the instructions given to the jury were undoubtedly correct. We have examined this question with considerable care, and are unable to arrive at any other conclusion than that the value of the vessel at the time of the conversion, with interest thereon to the time of verdict, is the true rule of damages in this case. Such is the general and well settled rule in actions of this nature. This rule applies where the plaintiff is general owner, or is answerable over to others.

But where the defendant, although a wrong doer, has a lien on the property, such amount as may be due on the lien is allowed to be deducted from the value, to avoid circuity of action, in mitigation of damages. *Chamberlin* v. *Shaw*, 18 Pick. 283.

Or, he may show in mitigation that the goods did not belong to the plaintiff and that they have gone to the use or benefit of the owner. *Squire* v. *Hollenbeck* 9 Pick. 552. But in such case it is essential to show that the property has actually gone to the use of the real owner, for although there may be a mere outstanding title in a third person, that would furnish no ground for reduction

of damages to one who has wrongfully taken the property or converted it to his own use. *Case* v. *Babbitt*, 16 Gray, 280; *Lyle* v. *Barker*, 5 Bim. (Pa.) 457; *White* v. *Webb*, 15 Conn. 302; *Cressey* v. *Parks*, 76 Maine, 534; *Pierce* v. *Benjamin*, 14 Pick. 356; *Perry* v. *Chandler*, 2 Cush. 242; *Carpenter* v. *Dresser*, 72 Maine, 380. Or, in reduction, it may be shown that the defendant is entitled to the property after the plaintiff's mortgage has been satisfied. *Spoor* v. *Holland*, 8 Wend. 445; *Ullman* v. *Barnard*, 7 Gray, 558.

But where the plaintiff is responsible over by operation of law or otherwise to a third person; or if for any cause the defendant is not entitled to the balance of the value; then the rule is, that the value of the property should be assessed to the plaintiff. *Chamberlain* v. *Shaw*, 18 Pick. 284; *Green* v. *Farmer*, 4 Burrows, 2214. Or, if the wrong doer is a third person and not the general owner. *White* v. *Allen*, 133 Mass. 424.

In the case of *Ullman* v. *Barnard*, *supra*, the court say: "The measure of damages is the value of the flour, with interest from the time of its conversion. The right of property and possession were both in the plaintiff; and although he had only a special property in the flour, as security for the amount of the drafts, he is entitled to recover its full value. He is answerable over to the general owner." In this case the actual possession was not in the plaintiff, but he had the right of possession.

The case of *Codman* v. *Freeman*, 3 Cush. 314, is very analogous to the question before us. The action was trespass by the mortgagees against an officer for attaching and selling certain personal property. Insolvency proceedings were instituted against the party owing the property and thereby the attachments were dissolved, and the court say that the attaching creditors no longer had any lien by their attachment or other interest in the goods, and that the interest of the officer created by the attachment was divested, and he and the creditors were then strangers. SHAW, C. J., by whom the opinion of the court was delivered, says: "By force of the mortgage, the plaintiffs became owners of the property, as against the mortgagor, with the right of present possession, by a defeasible title, indeed, still by a

title which made them owners until defeated. The sheriff takes them under claim of a right to attach them in behalf of creditors; but that attachment is dissolved, and then the plaintiffs have the same right against the officer, as they would against any other stranger; and, upon recovering damages, they are entitled to the full value." See also *Pomeroy* v. *Smith*, 17 Pick. 86; *Barrows* v. *Turner*, 50 Maine, 129–30; *Carpenter* v. *Dresser*, 72 Maine, 379.

In this case the seizure was without right. The officer was a wrong doer, and upon no principle of law can he claim any mitigation or reduction of damages from the real value of the vessel. The defendant stands in no position to show that he is entitled to the balance of the value, if any, above the plaintiff's mortgage. His position is that of a stranger and wrong doer, and by the well settled principles of law is responsible to this plaintiff for the value of the property.

But notwithstanding the plaintiff is entitled to recover upon the law as appears to have been correctly given, yet we have no doubt from the evidence that a wrong has been done the defendant in the amount of the verdict. The case shows that the mortgagor has surrendered all his interest in the vessel to the plaintiff with no consideration other than that of the original mortgage. Whatever the law may be as applied to other cases, the court in this case will not sustain a verdict for an amount larger than the mortgagee's interest in the vessel, and not even to that extent if the amount is greater than a fair value of the vessel. The schooner was twenty-five years old. Some of the witnesses place its value as low as one thousand dollars. Others place a higher estimate upon it. While the plaintiff may be entitled to a fair compensation, certainly there is nothing in the case by which he should be entitled to any fancy value of the property. The equities of the case are most decidedly against it. The jury must have been influenced by bias or prejudice in returning the amount of their verdict.

The motion for a new trial must be sustained, unless the plaintiff will remit from the amount of the verdict all above one thousand seven hundred dollars. If he shall remit all above that sum, and have such entry made upon the docket

where the action is pending within thirty days from the time notice of decision in this case is received by the clerk, then the motion for a new trial is to be overruled, otherwise to be sustained and a new trial granted.

Exceptions overruled. Judgment accordingly.

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

RUTH WINCHESTER *vs.* HIRAM M. EVERETT.

Oxford. Opinion October 12, 1888.

Married woman. Arrest. False imprisonment. Trespass.

A judgment creditor is not liable in trespass for refusing, on notice that his judgment debtor is a married woman, to release her from arrest already made by an officer on an execution regularly issued on a judgment recovered against her as a single woman before a court having complete jurisdiction.

ON exceptions.

An action of trespass for an alleged unlawful arrest and in detention of the plaintiff, on an execution issued on a judgment recovered before the municipal court of Norway, in favor of this defendant and against this plaintiff.

The point raised by the exceptions is stated in the opinion.

James S. Wright, for plaintiff.

The action is not against the officer making the arrest, or one aiding the officer, but is against the principal who caused the arrest to be made. The plaintiff in this action was not liable to arrest in the former action, being then and there a married woman, and the law prohibited her arrest. R. S., c. 61, § § 4 and 5.

The execution was irregularly obtained in the form it was, in that it ran against her body, contrary to law.

"Where an arrest is made upon legal process, regular upon its face, and therefore sufficient to justify an officer, but which has been fraudulently or irregularly obtained and issued, the party who procures it, and directs it or causes it to be served, is not justified by it. He is bound to see to it, before he sets the law in motion, that the process he obtains is regular and valid; and if it is not, he is

liable in an action of tort in the nature of trespass." *Cassier* v. *Fales*, 139 Mass. 462; *Emery* v. *Hapgood*, 7 Gray, 55; *Cody* v. *Adams*, 7 Gray, 59.

If the defendant was not liable for the arrest in the first instance, there can be no doubt but that he became liable when he had knowledge of the privilege; and for her subsequent detention. See Hilliard on Torts, Vol. 1, Ch. 6, p. 231.

In the case of *Curry* v. *Pringle*, 11 Johns. 444, New York reports, the action for false imprisonment was sustained against the party at whose instance the arrest was made, by one who was privileged, as being a man with a family. See also *Gold* v. *Bissell*, 1 Wend. 210; Blake's Case, 106 Mass. 504.

In *Hubbard* v. *Sanborn*, 2 N. H. 468, RICHARDSON, C. J., in his opinion, gives as a reason why the plaintiff in the action where the arrest was made would not be liable, "because the arrest may be without his knowledge."

The question of marriage was settled by the jury; and submitting to the process of disclosure to procure her release was not a waiver of any rights to redress. See 129 Mass. p. 40.

F. O. Purington, and Savage and Oakes, for defendant, cited: *Cassier* v. *Fales*, 139 Mass. 462; *Belk* v. *Broadbent*, 3 T. R. 183; *Marks* v. *Townsend*, 97 N. Y. 590; *McGuinty* v. *Herrick*, 5 Wend. 240; *Scott* v. *Shepherd*, 1 Smith Lead. Cas. 764; 1 Hilliard, Torts. p. 198, § § 3, 12, 13; *Blanchard* v. *Goss*, 2 N. H. 491; *Kimball* v. *Molony*, 3 N. H. 378; *Williams* v. *Smith*, 14 C. B. 596; Waite's, Actions and Defences, "False Imprisonment." *Deyo* v. *Van Valkenburgh*, 5 Hill. 242; 5 Vt. 588.

VIRGIN, J. This bill of exceptions presents the question: Whether a judgment creditor is liable in trespass for refusing, on notice that his debtor is a married woman, to release her from arrest already made by an officer on an execution regularly issued on a judgment recovered against her as a single woman before a court having complete jurisdiction.

When the judgment was recovered, execution issued and the arrest made, the statute provided that "no person shall be

arrested on an execution issued on a judgment founded on a contract, when the debt is less than ten dollars," (R. S., c. 113, § 19) and "in all other cases, except where express provision is by law made to the contrary, an execution shall run against the body of the judgment debtor, and he may be imprisoned thereon." R. S., c. 113, § 20. To this general provision an "express provision is by law made to the contrary" by R. S., c. 61, § § 4 and 5, which provide in substance that, a married woman may make contracts for any lawful purpose, prosecute suits at law or in equity, and her property may be attached and taken on execution, but "she cannot be arrested on writ or execution." Yet as the judgment was founded on a lawful contract and the debt was not less than ten dollars, her arrest would have been strictly in accordance with the foregoing statutory provisions, provided she had been in fact a "single woman" as she was described in the original writ, judgment and execution.

Does it necessarily follow that her arrest can be the foundation of an action for false imprisonment because she was in fact a married woman when arrested and the statute absolutely exempted her from arrest? Had she been described as a married woman in the execution it might have been void on its face and her arrest unauthorized the same as if the debt were less than that which authorizes the execution to run against the body. *Green* v. *Morse*, 5 Maine, 292; *Smith* v. *Cattel*, 2 Wils. 376. *Brooks* v. *Hodgkinson*, 4 Hurl. & N. 712; which is not this case.

For the execution on which she was arrested described her as a "single woman;" personal service of the writ was made on her and she appeared by counsel; and without making any suggestion that she was in fact other than as described in the writ, she suffered the action, after several continuances, to go to judgment on default, and only suggested her coverture after she was arrested and taken to the place where the jail was situated.

The execution being "fair on its face," and having been issued by a tribunal having complete jurisdiction of the subject of the suit and of the parties, the officer was protected in following its mandate; for when armed with such a process, the justification

of the officer is essential to the securing of a due, prompt and energetic execution of the law's behests. *Cameron* v. *Lightfoot*, 2. W. Black. 1190; *Nichols* v. *Thomas*, 4 Mass. 232; *State* v. *McNally*, 34 Maine, 210; *Gray* v. *Kimball*, 42 Maine, 299; *Savacool* v. *Boughton*, 5 Wend. 170; *Erskine* v. *Hohnbach*, 14 Wall. 613.

At an early day the English courts and more recently many of the courts in the United States have had before them numerous cases of false imprisonment against the respective parties who caused the arrests, in which three distinct principles have been enunciated:

1. A writ on execution void for want of jurisdiction or otherwise can be no justification to a party thereto for any action under it. As where the debtor was arrested on a writ or execution wherein the debt was less than that authorizing an arrest. *Green* v. *Morse*, *supra*; *Smith* v. *Cattel*, *supra*. Or where an administratrix was arrested on an execution without suggestion of *devastavit*. *Barker* v. *Braham*, 3 Wils. 368. Or where a term intervened between the teste and the return of a writ on which the defendant was arrested. *Parsons* v. *Loyd*, 3 Wils. 341. So in case of arrest on execution issued after the judgment was paid. *Bates* v. *Pilling*, 6 B. & C. 38; or discharged under the insolvency statute. *Deyo* v. *Van Valkenburgh*, 5 Hill. (N. Y.) 242, although in the latter case, it seems, the officer would not be liable even if the defendant showed his discharge before the arrest. *Willmarth* v. *Burt*, 7 Met. 257.

2. Where a process is not void, but only voidable for some irregularity in issuing it, the party is justified for acts done in accordance with it, provided it is never actually superseded; but when it is set aside for the irregularity, the party at whose instance it was issued becomes a trespasser for acts done under it while in force as if no process had ever issued. Thus in trespass for false imprisonment of a certified bankrupt, BULLER, J., said: "The original plaintiff would not be liable to an action of trespass till the writ is superseded, for till then it is a justification; after a supersedeas trespass will lie against the party, but still not against the sheriff. I take this to have been settled over

and over again." *Tarlton* v. *Fisher*, 2 Doug. 671, 677; *Prentice* v. *Harrison*, 4 A. & E. (N. S.) 850. So where an execution is issued against an absent defendant without filing bond pursuant to statute, it is good till superseded. *Gard. Manf. Co.* v. *Heald*, 5 Maine, 381. So where the debtor was arrested on an execution issued more than a year after the date of the judgment, without a *sci. fa.* to revive it. *Codrington* v. *Lloyd*, 8 A. & E. 449; *Blanchenay* v. *Burt*, 4 A. & E. (N. S.) 707; *Kerr* v. *Mount*, 28 N. Y. 659 and cases there cited.

3. When the process is neither irregular nor void, but is simply erroneous, then the party is forever protected for whatever he had done under it before it is reversed. This rule has been said to be founded in public policy, that parties may be induced freely to resort to the courts for the enforcement of their rights and the remedy of their grievances without the risk of undue punishment for their own ignorance of the law or for the errors of courts. *Marks* v. *Townsend*, 97 N. Y. 590, 595. "It is incomprehensible," said Lord KENYON, in *Belk* v. *Broadbent*, 3 T. R. 185, "to say that a person shall be considered a trespasser who acts under a process of court." "There is a great difference," remarked Lord Chief Justice DEGREY, "between erroneous process and irregular (that is to say void) process. The first stands valid and good until it be reversed, the latter is an absolute nullity from the beginning. The party may justify under the first until it be reversed, but he cannot under the latter, because it was his own fault that it was irregular and void at first." *Parsons* v. *Loyd*, 3 Wils. 341, 345.

So in *Philips* v. *Biron*, it was said that a plaintiff is not justified by a judgment (process?) set aside for irregularity as he is where reversed on error, "for in case of error it is no fault of the party, but of the court, and therefore binds till reversed." 1 Stra. 509. So, where a process of attachment sued out by a party is afterwards set aside on appeal for error, the party is not liable for trespass under it; but when set aside for irregularity or bad faith in obtaining it may be. *Williams* v. *Smith*, 14 C. B. N. S. (108 E. C. L.) 594. WILLIAMS, J., said: "The master of the Rolls came to the conclusion that the facts warranted the

attachment. That opinion was pronounced by the Lord Justices upon appeal to be erroneous. That brings the case within that class of cases where it has been held that the party causing process to be issued is not responsible for anything that is done under it when the process is afterward set aside, not for irregularity, but for error." WILLS, J., said: "It by no means follows, that because a writ of attachment is set aside, an action for false imprisonment lies against those who procured it to be issued. If that were so, this absurd consequence would follow, that every person concerned in enforcing the execution of a judgment would be held responsible for its correctness. When an execution is set aside on the ground of an erroneous judgment, the plaintiff or his attorney is no more liable to an action than the sheriff who executes the process is. In order to entitle the party against whom process issues to maintain an action for any intermediate acts done under it, he must show that it has been set aside by reason of some misconduct or at least some irregularity on the part of the person who sued it out."

So where a plaintiff, notwithstanding an insolvent discharge exempting the defendant from execution, obtained a general judgment and procured an execution on which the defendant was arrested, the judgment was held to be simply erroneous and protected the plaintiff from an action for false imprisonment. *Brown* v. *Crowl*, 5 Wend. 298. See also *Day* v. *Bach*, 87 N. Y. 56; *Marks* v. *Townsend*, *supra*, and the cases therein cited for illustrations of this rule.

Upon recurring to the process in the case at bar as already seen, the court had full jurisdiction of the subject of the suit as well as of the parties; that none of the regular judicial methods or rules of practice were omitted from the suing out of the writ to and including the service of the execution; but all was regular and in strict conformance with the law and facts presented in the case. "The plaintiff's exemption from imprisonment," said MORTON, C. J., in *Cassier* v. *Fales*, 139 Mass. 461, 462, "under the writ arises not from any irregularity or illegality in the writ, but from his personal privilege of infancy." The judgment and execution in this case at most were simply erroneous

so far as they authorizied her arrest, and all by reason of her omission to suggest her coverture when she had ample opportunity to do so. And so long as that judgment remains unreversed any act done under it and in accordance with the execution duly issued on it is protected whether done by the officer or the party. And the fact that this defendant was notified of the coverture was immaterial, for it could not then affect the validity of the judgment. The case of *Cassier* v. *Fales*, *supra*, we consider to be decisive of this on the ground that the violation of a personal privilege is no ground for an action for false imprisonment. *Deyo* v. *Van Valkenburg*, *supra*; *Smith* v. *Jones*, 76 Maine, 138.

We may add that the King's Bench declined to discharge a married woman from arrest on execution where, as in this case, being sued as a *feme sole*, she suffered judgment to go by default and was subsequently arrested on the execution. On application for her discharge, Lord Chief Justice TENTERDEN, said: "She must be left to her writ of error." *Moses* v. *Richardson*, 8 B. & C. 421. This case was followed by *Pool* v. *Canning*, L. R. 2, P. C. 241, where a married woman, being sued as a *feme sole*, pleaded coverture, but failing to sustain the plea by evidence, the verdict was against her. WILLIS, J., said: "There is no authority for extending the power of discharge to the case of one sued as a *feme sole* suffering judgment on default, or to a case of a married woman who pleaded her coverture and allowed the verdict to go against her on trial of that issue."

Moreover this court refused on a writ of error to reverse a judgment rendered on default against a husband and wife, there being nothing in the original writ to indicate the existence of such relation, the court held that she was sued as a *feme sole*; and having neglected a fair opportunity to plead her coverture and make her defence, she cannot maintain a writ of error to reverse the judgment. *Weston* v. *Palmer*, 51 Maine, 73.

Exceptions sustained.

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

WILLIAM OLIVER *vs.* SYLVESTER BROWN and another.

Lincoln. Opinion October 12, 1888.

Trespass. Law and fact. Practice.

In an action of trespass for removing boards from a barn, it is error to instruct the jury to return a verdict for the defendants, on the ground that the defendants were the servants of the real owner of the barn, when the plaintiff claims to be the owner and there is evidence tending to show, that the barn set across the dividing line, on the plaintiff's land.

ON exceptions.

The opinion states the case.

William H. Hilton, for the plaintiff, cited: *Hunnewell* v. *Hobart*, 42 Maine, 565; *Bradley* v. *Davis*, 14 Maine, 44; *Norton* v. *Craig*, 68 Maine, 277.

W. Gilbert and O. D. Castner, for the defendants.

VIRGIN, J. Trespass for stripping boards from a certain barn to which the plaintiff claims title. Plea, general issue, with a brief statement that the barn is the property of one Mary A. Demuth, as whose servants the defendants acted in the premises. The defendants admitted they took off the boards.

The case comes up on exceptions to the order of the presiding justice, who directed a verdict for the defendants.

The reported evidence shows, that by the partition of the Philip Demuth homestead in October, 1859, the barn in controversy, though situated (as claimed by the plaintiff) on that portion of the homestead set out to Daniel and William Demuth, was set out to Sarah "with the right of removing the same with care." She never removed it, but in December, 1859, she quitclaimed all her right, title and interest in her father's farm described by metes and bounds, "with the buildings thereon," to Charles, which conveyance must have included the barn wherever situated upon the farm.

In 1873, Charles conveyed his interest in the entire farm to Daniel and William, which also must have included the barn; and if that were personal property before, its sale to the owner

of the soil on which it had always stood, rendered it a part of the realty from which it had never been severed. *Curtis* v. *Riddle*, 7 Allen, 185.

Six years later (in 1879) Daniel and William quitclaimed back to Charles all of the farm which lay north of the parcel on which (as the plaintiff claims) the barn has always stood; and if the plaintiff's claims as to its location is correct, then the barn was not included in this conveyance, but remained the property of Daniel and William, to whom Charles conveyed it in 1873.

Subsequently (in 1885) Daniel, by his deed of warranty, conveyed by metes and bounds one and one-half acres of land on which (as the plaintiff claims) the barn has always stood, to the plaintiff, Daniel having, as he testified, previously obtained William's interest in that parcel.

The north line of the one and one-half acre parcel is claimed by the plaintiff to be a continuation of the line of three stone posts which marked the south line of the strip of land set out to Sarah by the partition. If that is the true line, it should be straight, as the line designated by the report of the commissioners consists of one course, "north 85° 45′ west." That line extended would leave the barn a few feet south of it and upon the one and one-half acre parcel conveyed by Daniel to the plaintiff in 1885. The testimony of the plaintiff as well as that of Governor Marble is positive that the western post was moved southerly in the early summer of 1887, and that the three no longer, as prior to the time named, stand in a straight line. Following the crooked line as now indicated by the posts and it would strike the north-east corner of the barn and thence pass diagonally through it as it does not sit parallel with the line.

If the stone posts when straight mark the true line, then the mortgage to Kennedy under which Mary A. Demuth claims becomes immaterial, inasmuch as it would not include the barn.

The presiding justice took this question of boundary from the jury, which we think was erroneous.

Exceptions sustained.

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

THE ROCKLAND WATER COMPANY, in equity,

vs.

THE CAMDEN AND ROCKLAND WATER COMPANY.

Knox. Opinion November 3, 1888.

Charters. Corporations. Vested rights. Water companies. Waters. Spec. stat. 1850, c. 381; 1861, c. 79.

Acts of incorporation, granted upon a valuable consideration, partake of the nature of contracts within the meaning of that clause of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts.

When rights have become vested under them, the authority of the Legislature to disturb those rights is at an end; nor can any subsequent act control or destroy them, unless such power is reserved in the act of incorporation, or in some general law in operation at the time the act was passed.

There may be such legislative action as to injuriously affect the interests of those with whom such contract exists, and yet impair no obligation of contract.

When a state by act of incorporation confers no exclusive privileges to one company it impairs no contract by incorporating a second one with powers and privileges which necessarily produce injurious effects and consequences to the first.

By the provisions of c. 381, Special Laws of 1850, certain individuals therein named, with their associates and successors were constituted a corporation by the name of the Rockland Water Company "for the purpose of conveying to the village of Rockland, a supply of pure water for domestic purposes, including a sufficient quantity for the extinguishment of fires, and the supply of shipping in the harbor of Rockland." The third section of said act reads thus: "Said corporation is hereby authorized for the purposes aforesaid, to take, hold and convey to, into and through the said village of Rockland, the water of Tolman's Pond, so called, situate in Rockland, and Camden, by pipes sunk below the bottom of its outlet, and may also take and hold by purchase or otherwise, any land or real estate necessary for laying and maintaining aqueducts for conducting and discharging, disposing of, and distributing water, and for forming reservoirs. But nothing in this act shall be taken or construed to prevent the owners of mills, or of mill privileges on the stream flowing through the outlet of said pond, from using the water thereof in the same manner that they now do or have heretofore done; but said mill owners shall not nor shall any other person or persons, be permitted, either by cutting below the pipes of said corporation, or in any other way to withdraw the water or obstruct the water-works of said corporation." By a subsequent act of the Legislature (c. 79 Spec. Laws of 1861) amendatory

of the plaintiffs' charter, this company was authorized "to take, hold and convey" in the manner provided in the original act, "as well the water of Oyster River Pond in Camden, as of Tolman's Pond, into and through the city of Rockland and town of Thomaston, and also from the city of Rockland into the towns of Camden and South Thomaston not exceeding one mile from the boundary line of said Rockland; and the corporation shall have the same rights, powers and privileges and be subject to the liabilities, limitations and conditions and be answerable to parties injured thereby in the same manner in respect to taking and conveying the said water, as are provided for in said act, in respect to taking and appropriating the water of Tolman's Pond." This act further authorized the corporation "to take, use and appropriate water from both or either of said ponds for supplying the people of said city and towns with pure water, and for all necessary and useful purposes subject to the liabilities provided for by said act."

Held, That there was no exclusive right conferred by either of said acts; and that inasmuch as the corporation had never taken or appropriated the water or any portion thereof, from Oyster River Pond nor shown any necessity for so doing, the water in Tolman's Pond being sufficient for the purposes designated in the charter, the Legislature transcended no constitutional rights in granting a charter to a rival company with powers and privileges similar to those first granted, and authorizing the use therefor of the water in Oyster River Pond.

On report.

Bill in equity, heard on bill, answer and proof.

The opinion states the case.

A. P. Gould, for the plaintiff.

The act of 1861 was a competent mode of making a legislative grant, expressly sanctioned by the Supreme Court of the United States in the Binghamton Bridge case, 3 Wall. 51.

The rules of construction applicable to grants or franchises, and public property to corporations upon which some duty to the public is imposed, and therefore their objects are beneficent to the public, are more liberal than in grants of franchises for private purposes merely; monopolies and legalized nuisances, such as the grant to the Fertilizing Company discussed in 97 U. S. 659.

Grants for the purpose of creating a benefit to the public, such as the supply of water to a given community, are of mutual benefit to the grantor and grantees, and should, therefore, be

construed substantially as private. *State* v. *Noyes*, 47 Maine, 189; *Boulton* v. *Bull*, 2 H. Blk. 463–500.

The charter is not to be construed by the rules laid down for the construction of royal grants. As was said by Chief Justice PARSONS, "In England prerogative is the cause of one against the whole. Here it is the cause of all against one. In the first case, the feeling and vices, as well as the virtues, are enlisted against it; in the last, in favor of it. And, therefore, here it is of importance that the judicial courts should take care that the claim of prerogative should be more carefully watched." 1 Mass. 356.

A distinction is recognized by the courts, both in this country and England, between the construction of a crown grant and a legislative grant. Judge STORY, in the Charles River Bridge case, 11 Pet. 598.

It was competent for the legislature to make an exclusive grant to plaintiff of the water of Oyster River Pond for the purposes mentioned in the grant. *Piscataqua Bridge* v. *N. H. Bridge*, 7 N. H. 35, 63, and numerous authorities there cited; *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 496; Cooley's Con. Lim. pp. *281, *284.

That the express language of section 3 is sufficient to create an exclusive privilege, is supported by many decisions of the highest authority. That the grant need not be in express terms exclusive, but that the intention of the legislature may be gathered from its whole scope, and from the nature and object of the grant, see the opinion of STORY, J., in *Charles River Bridge* v. *Warren Bridge*, beginning on page 588, and especially from pages 555 to 559, and the authorities cited by Justice MCLEAN.

For language which was considered sufficient to create an exclusive right, see *Bridge Proprietors* v. *Hoboken Co.* 1 Wall. 116.

In *Binghamton Bridge*, 3 Wall. 51, the court hold that "a clause in a statute, 'that it shall not be lawful for any person or persons to erect a bridge within a distance of two miles,' means,

not only that no person or association of persons shall erect such a bridge without legislative authority, but that the legislature itself will not make it lawful for any person or association of persons to do so by giving them authority."

In *State* v. *Noyes*, 47 Maine, 189, the court hold that a charter containing a limitation of legislative power no more specific than the plaintiff's respecting the grant of water, was a binding contract on the part of the state, which is to be construed "upon the same principles which are applied to contracts between private individuals." This doctrine has been solemnly announced in this state, in *Moor* v. *Veazie*, 32 Maine, 343, and in Massachusetts in 2 Gray, 1; (*Boston & Lowell R. R.* v. *Salem & Lowell Co. et als.*) *Piscataqua Bridge Co.* v. *N. H. Bridge Co.* 7 N. H. 35, is an illustrative and very pertinent case.

Judge COOLEY says, a grant by the legislature of a state can no more be disregarded than a grant by an individual. "A contract executed, as well as one which is executory, is binding on the parties. A grant in its own nature amounts to the extinguishment of the right of the grantors, and implies a contract not to reassert that right," and this doctrine applies to states as well as to individuals. Cooley's Con. Lim. *274, *275; see *238.

"If a privilege granted by the state is of such a character that it cannot be enjoyed by several parties at the same time, the state cannot impair its original grant by subsequently conferring similar privileges upon other parties." Morawetz, Corp. § 432; *Chesapeake & Ohio Canal Co.* v. *Baltimore & Ohio R. R.* 4 Gill. and John. 1, and *New Haven* v. *New Haven Water Co.* 44 Conn. 106.

In *West River Bridge Co.* v. *Dix*, 6 How. (U. S.) on page 537, the court say, "the franchise, no more than a grant of land, can be annulled by the state. These muniments of right are protected alike, subject to be taken for public uses."

"A grant of new franchises to a corporation, is clearly a waiver which will debar the state from proceeding against the company on account of any prior forfeiture. . . . An act showing an intention on the part of the state, that the corporation shall

continue its existence, will be considered an absolute waiver of any existing right to enforce a forfeiture of the company's franchises." Mor. Corp. § 555, last clause and authorities cited in note (2).

R. S., c. 46, § 23, provides that "acts of incorporation may be amended, altered, or repealed by the legislature, unless they contain an express limitation." If that provision can have any reference to such a case as ours, we have the "express limitation" of the power of the legislature to grant the water to others. A repeal or modification is in the nature of a decree of forfeiture, and, in accordance with a cardinal principle in our law, there must be notice and a hearing. *Coleman* v. *Andrews*, 48 Maine, 562, 564.

And the notice must contain a specific statement of the proposition to repeal, alter, or amend. The power of repeal or modification is not unlimited. *Commonwealth* v. *Essex Co.* 13 Gray, 239, 253.

Our right to the water in Oyster River Pond has become vested by the acceptance of the grant, and the expenditures based upon the faith of it. Cooley, Con. Lim. * 238.

In *Holyoke Co.* v. *Lyman*, 15 Wall. 500, on page 519, in discussing the power of the legislature under the reserved right to repeal, alter or amend a charter or act of incorporation, the court say: "Vested rights, it is conceded, cannot be destroyed or impaired under such a reserved power."

It may be conceded, as was intimated by SHAW, C. J., in *Lumbard* v. *Stearns*, 4 Cush. 60, 62, that the legislature, under the reserved right to amend, would have the right to inquire whether we have been guilty of a breach of public duty. We admit that we are bound to use due diligence in giving to the people a supply of water; and failing in this, that the legislature might direct how it should be done, but we deny the power to take our property from us in the mode attempted. See Morawetz, Corp. § 498.

If the whole of a franchise should become necessary for the public use, I am not prepared to say that the right of eminent domain in an extreme case, would not extend to, and authorize

the legislature to take it on payment of a full equivalent." *Boston Water Power Co.* v. *Boston & Worcester R. R. Co.* 23 Pick. 360, 393; Cooley's Con. Lim. (5th ed.) *562, *563.

"The settled and fundamental doctrine is, that government has no right to take private property for public purposes without giving a just compensation, and it seems to be necessarily implied that the indemnity should, in cases which will admit of it, be previously and equitably ascertained and be ready for reception concurrently in point of time with the actual exercise of the right of eminent domain." Kent's Com. (7th ed.) *339, note c; *Cushman* v. *Smith*, 34 Maine, 247.

The defendant by this answer is precluded from asserting that our rights are to be taken by authority of the legislature, in the exercise of the power of eminent domain. And in no event could such a claim be asserted, until our property had been taken by the defendant by a written act of seizure duly notified to the plaintiff, specifically describing the water, rights, franchise and property of every kind which it takes or proposes to take. *Hamor* v. *Bar Harbor Water Co.* 78 Maine, 127.

The constitutional power of the legislature to grant to us the exclusive right to withdraw the water from Oyster River Pond "to supply aqueducts," for the purposes defined in our grants, is expressly declared by our court in *Moor* v. *Veazie*, 32 Maine, 343, 359; see also Morawetz, Corp. § 431; *Boston & Lowell R. R. Co.* v. *Salem & Lowell R. R. Co.* 2 Gray, 1, 32–34; *Fletcher* v. *Peck*, 6 Cranch, 135.

Grants by the legislature of franchises, rights, privileges and property, to a corporation, become vested upon their due acceptance by the corporation. They then become like accepted grants between private persons. Morawetz, § § 14, 15, 16, and authorities cited.

Even if the legislature should repeal our charter and its amendment, i. e., both the act of 1850 and the act of 1861, the property which had vested in the corporation would not thus be taken from it, but would vest in the shareholders. R. S., c. 46, § 54.

Even under the reserved right to alter, amend or repeal the

charter, the grantees of exclusive rights from the state cannot be divested of those rights by alteration or repeal. It can be done only by the exercise of the right of eminent domain. Morawetz, § 428, and authorities in note 2; *Parker* v. *Metropolitan R. R. Co.* 109 Mass. 506; *Roxbury* v. *Boston & Prov. R. R. Co.* 6 Cush. 424; *Commonwealth* v. *Essex Co.* 13 Gray, 239; *Fitchburg R. R. Co.* v. *Grand Junction R. R. Co.* 4 Allen, 198; *Commonwealth* v. *Eastern R. R. Co.* 103 Mass. 254; *Commissioners of Inland Fisheries* v. *Holyoke Water Power Co.* 104 Mass. 446; *Greenwood* v. *Freight Co.* 105 U. S. 13.

Under the power reserved by a general statute of Connecticut, the court held, "that when the legislature had reserved a general power of altering, amending or repealing a charter, it might impose any additional condition or burden, connected with the grant, which it might deem necessary for the welfare of the public, and which it might originally and with justice have imposed." *English* v. *N. H. & No. Hampton Co.* 32 Conn. 240.

Judge STORY, in *Wilkinson* v. *Leland*, 2 Peters, 627, 657, said, "That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people." *Terrett* v. *Taylor*, 9 Cranch, 43.

What would be a violation of § 11 of Article 1 of the Constitution of Maine, or par. 1, § 10, Article I, of the Constitution of the United States, prohibiting the passage of any law impairing the obligation of contracts, if such an act is not? *Langdon* v. *City of New York*, 93 N. Y. 129, is a very important and elaborately reasoned case, bearing in many respects upon the case at bar; see also 3 Kent's Com. 458, 459 (Title Franchises).

There are several water and gas company cases directly in point, and of the highest authority, in plaintiff's favor. *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674; *New Orleans Gas Co.* v. *Louisiana Light Co.* 115 U. S. 650.

The principles upon which the decision in the last cited case is made, are elaborately discussed by Mr. Justice HARLAN, and we refer to that opinion in detail and the authorities cited by him. We call especial attention to his citation and affirmation of the cases, *Bridge Proprietors* v. *Hoboken Co.* and *The Binghamton Bridge.* He distinguishes clearly between that class of cases and the case of *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659. He also says that the case of *Stone* v. *Mississippi*, 101 U. S. 814, was decided upon the same principles. See also *Louisville Gas Co.* v. *Citizens' Gas Co.* 115 U. S. 683; *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U. S. 64; *Commonwealth* v. *Penn. Canal Co.* 66 Pa. St. 41.

If plaintiff has not adopted such means as are best adapted to furnishing a supply of water to the city, or has in any way misused its franchise, it would be competent for the legislature to make any reasonable amendment regulating the use of the franchise, which would not defeat or essentially impair the object of the grant. This seems to be the established construction and application of the reserved power to amend, alter or repeal, as appears in the case cited from 109 Mass. 506, *Parker* v. *Metropolitan R. R. Co.* and in the cases cited by the court in that opinion, p. 508.

This is also the utmost extent of legislative power under the Massachusetts reservation, which is suggested by Chief Justice SHAW in *Lumbard* v. *Stearns*, 4 Cush. 60; and by MERRICK, J., in *Fitchburg R. R. Co.* v. *Grand Junction R. R. Co.* 4 Allen, 198, 205.

Judge COOLEY says, "Whether a corporation has been guilty of abuse of authority under its charter, so as to justly subject it to forfeiture, is a judicial question which cannot be decided by the legislature." Cooley's Con. Lim. (*106) and notes 1 and 3. In note 3 he cites approvingly *Irvine's Appeal*, 16 Penn. St. 256, 268; see *Greenough* v. *Greenough*, in 11 Penn. St. 489.

In *Commonwealth* v. *Proprietors New Bedford Bridge*, 2 Gray, 339, the defendants' charter authorized them to build and maintain a bridge over tide waters, with a draw of suitable width for the accommodation of the public, but not to be less than thirty feet, with which defendant complied. The legislature in 1851, passed an act requiring the draw to be not less than sixty feet. An attempt was made to sustain the validity of the act of 1851 by contending that the legislature, by necessary implication, had the right of regulating the construction of the draw. But the court say, "This is founded on an entire misapprehension of the relations of the parties, as created by the act of incorporation. They are but parties to a contract."

In *Briggs* v. *Cape Cod Canal Co.* 137 Mass. 71, it is held that: "Whether a corporation has complied with the condition of its grant, is a question of fact to be judicially ascertained."

In *Boston Glass Co.* v. *Langdon*, 24 Pick. 49, 52, the court say: "Although a corporation may forfeit its charter by abuse or misuse of its powers and franchises, yet this can only take effect upon a judgment of a competent tribunal."

In *Towar* v. *Hale*, 47 Barb. 361, it was held that "a cause of forfeiture cannot be enforced against a corporation collaterally or incidentally. The corporation must have an opportunity to answer."

In *Davis* v. *Gray*, 16 Wall. 203, the court held that the grant of a charter to a railroad by the state, together with certain public lands which were to become the property of the corporation upon the condition precedent that fifty miles of the road should be built within a certain time.

Our right to the water, acquired as it was by grant, would not be forfeited or lost by non-user for any length of time. It is like the grant of any property, and could be lost only by an adverse use, or possession by some other party for more than twenty years. Mere non-user for twenty years of an easement created by deed is not sufficient proof of abandonment, and the right is not thus lost. 3 Kent's Com. (12th ed.) 449, note 1; *Owen* v. *Field*, 102 Mass. 90; *Bannon* v. *Angier*, 2 Allen,

128; *Arnold* v. *Stevens*, 24 Pick. 106; Washburn's Easements, § 551.

"A right acquired by use, may be lost by non-user. . . . This rule is not applicable to rights, or incorporeal hereditaments, secured by a deed of conveyance." *Farrar* v. *Cooper*, 34 Maine, 394.

Washburn says, "Where an easement has been created by express grant, no length of non-user will operate as an abandonment, where there has been no hostile or adverse acts done by the owner of the servient estate during that time, extinguishing such right and creating an adverse prescription." 2 Washburn's Real Prop. (* 83).

In *Jewett* v. *Jewett*, 16 Barb. 150, this doctrine was applied in the case of a water course; and in *Arnold* v. *Stevens*, 24 Pick. 106, to a case where a right to dig ore in a mine was held not to be lost by forty years' non-user.

It is said that non-user may be a cause of forfeiture of a franchise; but this applies to a franchise of incorporation, as in the case cited in 2 Greenleaf's Cruise, p. 64.

The plaintiff's remedy is in equity. No remedy at law would be adequate. High on Injunctions, § § 570, 571, 395, 573, 575.

This case is very similar to those cited by us from the 1st and 3rd of Wall. *Bridge Proprietors* v. *Hoboken Co.* 1 Wall. 116, and *Binghamton Bridge*, 3 Wall. 51, where equity was not questioned as the proper remedy. *Piscataqua Bridge Co.* v. *N. H. Bridge Co.* is a similar case where equity is held to be the proper remedy.

In *Higgins* v. *Flemington Water Co.* 36 N. J. Eq. 338, it was held that "a water company will be enjoined from wrongfully diverting the water of a stream to the injury of a mill, although the injury is not irreparable."

In *Wilson* v. *City of Mineral Point*, 39 Wis. 160, it was held that "where an injury is of such a nature that it cannot be adequately compensated in damages, or cannot be measured by any certain pecuniary standard, it is irreparable, and will be restrained by injunction."

"An injunction will be granted to protect and secure a party

claiming a franchise under a statute, who is in the possession and enjoyment of such franchise." *Charles River Bridge* v. *Warren Bridge*, 6 Pick. 405; *Boston Water Power Co.* v. *B. & W. R. R. Co.* 16 Pick. 525.

"Where the injury is irreparable, not susceptible of being adequately compensated by damages, or such as, from its continuance a permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented, as where loss of health, loss of trade or business, . . . or permanent ruin to property may or will ensue from the wrongful acts, in every such case a court of equity will interfere by injunction." *Webber* v. *Gage*, 39 N. H. 182, 186, and cases cited; see *Boston Water Co.* v. *Boston & W. R. R. Co.* 16 Pick. 512, 525, 526, and authorities cited; *Central Bridge Co.* v. *Lowell*, 4 Gray, 474, 480.

The legislature could not authorize water that had been granted to plaintiffs, or in which plaintiffs had been granted a perpetual privilege, whether exclusive or not, to be taken by the defendants for a private purpose such as the running of their machinery or leasing it as a power. Constitution. Bill of Rights, § 21; Opinion of Court, 58 Maine, 593, *et seq.*; *Allen* v. *Jay*, 60 Maine, 124; *Brewer Brick Co.* v. *Brewer*, 62 Maine, 62, 71; Cooley's Const. Lim. p. 527, note, and cases cited.

The first franchise may be taken in certain cases, by the right of eminent domain, by paying or providing adequate compensation. We have already cited in the general discussion some authorities on this point. We refer especially to the statement of the law on this subject by Morawetz, that, "if a privilege granted by the state is of such a character that it cannot be enjoyed by several parties at the same time, the state cannot impair its original grant by subsequently conferring similar privileges on other parties." § 432. No more precise statement of the proposition is found. An attempt to confer the same privileges upon other parties is condemned by Chief Justice Shaw, in this terse language: "Such a measure would be substantially in fact, under whatever color or pretence, taking

the franchise from one company, and giving it to another, in derogation of the first grant, not warranted by the right of eminent domain, and incompatible with the nature of legislative power." 23 Pick. 393; *Central Bridge Co.* v. *Lowell*, 4 Gray, 474.

In *Lake Shore, &c. R. R.* v. *Chicago, &c. R. R.* 97 Ill. 506, it is held that "The courts will not interfere by injunction to restrain a railroad corporation from condemning a right of way across the tracks of another corporation. There is no want of constitutional power in the legislature to provide for such condemnation; the public use contemplated is not the same use, and, although applied to public uses, the property so taken is, nevertheless, private property, and so within the power of eminent domain, and the courts of law afford an ample forum for the adjustment of compensation."

Nathan and Henry B. Cleaves and *Charles E. Littlefield*, for the defendant, cited: Every grant of sovereign power is construed in favor of government, in case of doubt. *Commissioners on Inland Fisheries* v. *Holyoke Water Power Co.* 104 Mass. 450; *Newton* v. *Commissioners*, 10 Otto, 548; *Bradley* v. *S. C. Phos. Co.* 1 Hughes, 72; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; 6 Cush. 383; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 666; *Christ Church* v. *Philadelphia*, 24 How. 301; *Union Bridge Co.* v. *Spaulding*, E. Reporter, Vol. 1, 344.

Exclusive right to water in Oyster River Pond was not given to the plaintiff corporation; if it was, it has been forfeited. *Ætna Mills* v. *Waltham*, 126 Mass. 422; *The Railroad Commissioners, Petitioners*, v. *The Portland and Oxford Central R. Co.* 63 Maine, 269; *Bailey* v. *Woburn*, 126 Mass. 420; *Fort Plain Bridge Co.* v. *Smith*, 30 N. Y. 62; Am. Corp. Cases, Vol. 3, p. 1; *Platt et al.* v. *Covington and Cincinnati Bridge Co.* Am. Corp. Cases, Vol. 4, p. 401; *Oswego Falls Bridge Co.* v. *Fish et als.* 1 Barb. Ch. R. 547; *Mohawk Bridge Co.* v. *Railroad Co.* 6 Paige, Ch. Rep. 554; *Turnpike Co.* v. *State*, 3 Wall. 210; *Re Twenty-Second Street*, 102 Pa. St. 108; *Leich Water Company's Appeal*, 102 Pa. St. 515; *The Bing-*

hamton Bridge, 3 Wall. 51; *Farrill* v. *Woodard*, 12 Wis. 458; *Kent* v. *Cartersville Bridge Co.* 11 Leigh, (Va.) 539; High on Injunc. § § 573, 574; *Mayer* v. *Spring Garden*, Penn. St. 348.

Courts have intervened only when exclusive rights have been expressly given. *Piscataqua Bridge* v. *New Hampshire Bridge*, 7 N. H. 35; *West River Bridge Co.* v. *Dix et als.* 6 How. 537; 2 Gray, 1; *Com.* v. *Essex Co.* 13 Gray, 239; *Langdon* v. *Mayor of City of New York*, 93 N. Y. 129; *New Orleans Gas Light Co.* v. *Louisiana Light and Heat Producing and M'f'g Co.* 115 U. S. 650; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674; *Louisville Gas Co.* v. *Citizens' Gas Light Co.* 115 U. S. 683; *Rice* v. *Railroad Co.* 1 Black. 380; Sedg. Stat. and Const. Law, 369; *Lees* v. *Canal Co.* 11 Cart. 652; *New Jersey et als.* v. *Wright*, Supreme Court Reporter, Vol. 6, No. 22, 907.

The state is not required to institute proceedings for a forfeiture. *U. S.* v. *Grundy*, 3 Cranch, 337; *Com. et al. Att'y Gen'l* v. *Lykens Water Co.* At. Rep. Vol. 2, No. 2, 63; *Hooker* v. *Utica Turnpike Co.* 12 Wend. 371; 13 Am. Rep. 181; Mills on Eminent Domain, § § 38–57; Morawetz on Corps. § 428; 102 Penn. St. Rep. 123.

Special charters since 1831 Stat. c. 503, subject to amendment. *State* v. *M. C. R. R. Co.* 66 Maine, 488; *Miller* v. *State*, 15 Wall. 478, 499; *Bangor Railroad Co.* v. *Smith*, 47 Maine, 44; *Roxbury* v. *B. & P. R. Corp.* 6 Cush. 424; *Holyoke Co.* v. *Lyman*, 15 Wall. 500; *West Wisconsin R.* v. *Sup. of Trempaleau Co.* 35 Wis. 257; *Lothrop et al.* v. *Steadman et al.* Am. Law. Reg. Vol. 15. p. 346; *Brown* v. *Lowell*, 8 Met. 174; *Pratt* v. *St. Lawrence R. R. Co.* 42 Maine, 587; Field on Corp. § 51; Sedg. on Stat. Law, p. 124; Dwarris on Statutes, 155; *McCrea* v. *Port Royal Railroad Co.* S. C. 381; *Chapman* v. *Curran*, 31 Wis. 209; *Union Branch Railroad* v. *East Branch Ga. Railroad Co.* 14 Ga. 327; *Met. Railroad Co.* v. *Highland Ry.* 118 Mass. 293; *Com.* v. *Essex Company*, 13 Gray, 247; *Greenwood* v. *Freight Co.* 105 U. S. 22; *East Alabama Railway Co.* v. *Doe*, 114 U. S. 340.

Property including franchises of corporations may be taken for public uses by the power of eminent domain. *West River Bridge Co.* v. *Dix*, 6 How. 507; *Central Bridge Corp.* v. *Lowell*, 4 Gray, 474; *Boston Water Power Co.* v. *B. & W. Railroad Corp.* 23 Pick. 360; *Richmond, &c. Railroad Co.* v. *Louisiana Railroad Co.* 13 How. 71; *Enfield Toll Bridge Co.* v. *H. & N. H. Railroad* Do. 44 Am. Dec. 556; *Head* v. *Amoskeag M'f'g Co.* 113 U. S. 9; *B. & R. Mill Corp.* v. *Newman*, 12 Pick. 477; *Hazan* v. *Essex Co.* 12 Cush. 477; *Talbot* v. *Hudson*, 16 Gray, 423; *Riche* v. *Bar Habor Water Co.* 75 Maine, 95; *Todd* v. *Austin*, 34 Conn. 78; Mills on Eminent Domain, § 23; Gould on Waters, § 244; *Haskell* v. *New Bedford*, 108 Mass. 214; High on Injunc. § § 636, 637, 1274.

The defendant's charter, authorizing the use of street to lay its piping, is lawful. Dillon's Mun. Corps. § 683; *Quincy* v. *Jones*, 76 Ill. 231, 244; *Spring* v. *Russell et als.* 7 Maine, 273; 82 N. Y. 202.

A portion of a charter, which is unconstitutional, may be discarded. Cooley on Const. Lim. 178; *Gorden* v. *Cornes et al.* 47 N. Y. 617; *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Allen* v. *Louisiana*, 103 U. S. 80; *Fisher* v. *McGirr et al.* 1 Gray, 1; *People* v. *Bull*, 46 N. Y. 61; *Warren et al.* v. *Mayor of Charlestown*, 2 Gray, 98; *Com.* v. *Clapp*, 5 Gray, 100; *Com.* v. *Hitchings*, 5 Gray, 485; *Packard* v. *Lewiston*, 55 Maine, 458; *Schwartz* v. *Drinkwater*, 70 Maine, 409; *State* v. *Wheeler*, 25 Conn. 299.

Interests in water as well as land may be taken by the right of eminent domain. *Hamor* v. *Bar Harbor W. Co.* 78 Maine, 127; *Eastern Railroad Co.* v. *B. & M. Railroad*, 111 Mass. 131; *Com.* v. *Essex Co.* 13 Gray, 239; *Hingham & Quincy Bridge Co.* v. *County of Norfolk*, 6 Allen, 353; *Haverhill Bridge* v. *County Commissioners*, 103 Mass. 120; *N. Y. H. & N. R. Co.* v. *B. H. & E. R. Co.* 36 Conn. 196; *W. R. Turnpike Co.* v. *V. C. Railroad Co.* 21 Vt. 590; *People* v. *Smith*, 21 N. Y. 595–598; Mills on Eminent Domain, § 18; *Burden* v. *Stein*, 27 Ala. 104; *Kane* v. *Baltimore*, 15 Md. 240; *Ætna Mills Co.* v. *Brookline*, 127 Mass. 69; *Emporia*

v. *Soden*, 37 Am. Rep. 265; *Cushman* v. *Smith*, 34 Maine, 247; *Bigelow* v. *Union Freight Railroad*, 137 Mass. 480; *Mason* v. *Kennebec & P. Railroad*, 31 Maine, 216; High on Injunc. § 589; *Chenango Bridge Co.* v. *Paige et al.* 83 N. Y. 187; *Farrell* v. *Woodard*, 12 Wis. 458.

FOSTER, J. The Rockland Water Company claims that it has the exclusive right of supplying the city of Rockland and portions of adjoining towns with the water of Tolman's Pond and Oyster River Pond for domestic purposes, the extinguishment of fires, and the supply of shipping in Rockland harbor. By bill in equity the plaintiffs ask that the defendant corporation may be perpetually enjoined from withdrawing the water or any portion thereof from Oyster River Pond, and from conveying the same to the city of Rockland or towns adjoining for domestic purposes, the extinguishment of fires, supplying shipping, and the use of manufactories, notwithstanding such right has been granted by the legislature of this state.

Both plaintiff and defendant corporation derive their franchises and authority from the state acting in its sovereign capacity. Only such portions of their charters as are necessary to be considered in the determination of this case will be referred to.

By the provisions of c. 381, special laws of 1850, certain individuals therein named, with their associates and successors, were constituted a corporation by the name of the Rockland Water Company, "for the purpose of conveying to the village of Rockland, a supply of pure water for domestic purposes, including a sufficient quantity for the extinguishment of fires, and the supply of shipping in the harbor of Rockland."

The third section of said act reads thus: "Said corporation is hereby authorized for the purposes aforesaid, to take, hold and convey to, into and through the said village of Rockland, the water of Tolman's Pond, so called, situated in Rockland and Camden, by pipes sunk below the bottom of its outlet; and may also take and hold by purchase or otherwise, any land or real estate necessary for laying and maintaining aqueducts for

conducting and discharging, disposing of, and distributing water, and for forming reservoirs. But nothing in this act shall be taken or construed to prevent the owners of mills, or of mill privileges on the stream flowing through the outlet of said pond, from using the water thereof in the same manner that they now do or have heretofore done; but said mill owners shall not nor shall any other person or persons, be permitted, either by cutting below the pipes of said corporation, or in any other way to withdraw the water or obstruct the water works of said corporation."

There are other provisions authorizing the construction of an aqueduct from Tolman's Pond through the city of Rockland, and for securing and maintaining reservoirs, and distributing water by means of pipes throughout the city; for regulating its use and establishing rents; for the payment of damages accruing to mill privileges and mill owners on the stream flowing through the outlet of the pond, and for the taking of land or excavating through the same for the purpose of laying down pipes.

Under the authority thus granted this corporation constructed works and introduced water into the city.

By a subsequent act of the legislature, (c. 79, Special Laws of 1861,) amendatory of the plaintiffs' charter, this company was authorized "to take, hold and convey," in the manner provided in the original act, "as well the water of Oyster River Pond in Camden, as of Tolman's Pond, into and through the city of Rockland and town of Thomaston, and also from the city of Rockland into the towns of Camden and South Thomaston, not exceeding one mile from the boundary line of said Rockland; and the corporation shall have the same rights, powers and privileges and be subject to the liabilties, limitations and conditions and be answerable to parties injured thereby in the same manner in respect to taking and conveying the said water, as are provided for in said act, in respect to taking and appropriating the water of Tolman's Pond."

The second section of this act is in these words: "The said corporation is hereby empowered to take, use and appropriate water from both or either of said ponds, for supplying the

people of said city and towns with pure water and for all necessary and useful purposes subject to the liabilities provided for by said act."

In 1885, the legislature granted an act of incorporation to the defendant company by the name of the Camden and Rockland Water Company, "for the purpose of conveying to and supplying the towns of Camden, Thomaston, South Thomaston and the city of Rockland with pure water for domestic and municipal purposes, the extinguishment of fires, supplying of shipping and the use of manufactories."

By the provisions of this act the defendants are authorized, for the purposes aforesaid, "to take, detain and use the water of Oyster River Pond and all streams tributary thereto in the town of Camden," etc. Authority is also given for erecting and maintaining dams and reservoirs, laying down and maintaining pipes and aqueducts necessary for accumulating, conducting, discharging, distributing and disposing of water and forming proper reservoirs, for taking and holding by purchase or otherwise lands or real estate necessary therefor, and for the payment of damages for property taken.

Prior to the filing of the plaintiffs' bill, the defendants had purchased iron pipe, castings and materials necessary for the construction of their works, and had entered upon the construction of the same. They had also entered into a written contract with the city of Rockland for the term of ten years, to supply the city with pure water for domestic and municipal purposes and the extinguishment of fires. The defendants have since completed their works and extended them into the towns of Camden and Thomaston, and are supplying the citizens of Rockland, Rockport, West Camden and Camden village with pure water.

The plaintiff corporation has never used or undertaken to use or appropriate the water of Oyster River Pond, and the case shows that the supply in Tolman's Pond is sufficient for all its purposes.

The question which is presented to the court, under the claim set up by the plaintiffs, involves the validity of the charter of

the defendant corporation — whether the act of incorporation authorizing the defendants to use the water of Oyster River Pond for the purposes named is valid, or void as impairing the obligation of contract between the state and the plaintiff corporation.

This act authorizing the defendants to supply the citizens of Rockland with pure water appertains to purposes of public utility. It emanates from the legislative power of the state, and must be held to have the force of law, unless in passing it the legislature exceeded its powers, or it is found to be in violation of some provision of the constitution of the state or United States.

The contention in behalf of the plaintiffs is, that the acts of 1850 and 1861, together with what was done in pursuance of the same, constituted an executed contract which is binding on the state, and that the subsequent grant from the legislature of the defendants' franchise, rights and privileges, impairs the obligation of that contract, and brings the case within the contract clause of the constitution of the United States, (Art. 1, § 10,) and of this state. (Art. 1, § 11.)

Unquestionably the state in the exercise of her sovereignty may contract like an individual and be bound accordingly. The cases are numerous in support of this principle. For more than seventy years it has been settled in this country that acts of incorporation, when granted upon a valuable consideration, partake of the nature of contracts within the meaning of that clause of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts. *The Binghamton Bridge*, 3 Wall. 73; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 527; *State* v. *M. C. R. R. Co.* 66 Maine, 494; *Wilmington Railroad* v. *Reid*, 13 Wall. 266; *Stone* v. *Mississippi*, 101 U. S. 816; *State* v. *Noyes*, 47 Maine, 205. This principle was settled many years ago in *Dartmouth College* v. *Woodward*, 4 Wheat. 518. And when rights have become vested under them, the authority of the legislature to disturb those rights is at an end; nor can any subsequent act control or destroy them, unless such power is reserved in the act of incorporation, or, what is equivalent, in

some general law in operation at the time the act was passed. *Holyoke Company* v. *Lyman*, 15 Wall. 511; *Tomlinson* v. *Jessup*, *Id.* 457.

The question, therefore, to be determined in cases of this kind, where legislative interference is claimed, is whether such interference does in fact impair the obligation of the contract. For there may be legislation such as to injuriously affect the interests of those with whom such contract exists, and yet impair no obligation of contract. Thus it has been held that where a state by act of incorporation confers no exclusive privileges to one company, it impairs no contract by incorporating a second one with powers and privileges which necessarily produce injurious effects and consequences to the first. *Turnpike Company* v. *State of Maryland*, 3 Wall. 210. The misfortunes which follow in such cases, as the court aptly remarks in that case, "may excite our sympathies, but are not the subject of legal redress."

Such was the doctrine laid down in *Charles River Bridge* v. *Warren Bridge*, *supra*; and which from that day to this has been sustained by the courts of last resort in this country. *Union Bridge Co.* v. *Spaulding* 63 N. H. 298; *Tuckahoe Canal Co.* v. *Tuckahoe R. R. Co.* 11 Leigh (Va.), 42. The recent cases of *Lehigh Water Co's. Appeal*, 102 Penn. St. 515, 528, and *Lehigh Water Co.* v. *Easton*, 121 U. S. 391, are directly in point.

In considering the question whether the legislature has transcended its powers by the act of incorporatian of the defendant company, with the rights and privileges therein contained, it becomes necessary to construe the legislative acts under which the plaintiffs assert their claim of exclusive right. For, notwithstanding the plaintiffs' act of incorporation became a contract between the state, acting in its sovereign capacity, and the corporation, founded upon mutual considerations, yet, if no exclusive right was conferred by legislative grant, such as the plaintiffs claim, then the act of the legislature incorporating the defendant company is valid, because no obligation of contract is thereby impaired. *Bridge Proprietors* v. *Hoboken Co.* 1

Wall. 145; *Lehigh Water Co.* v. *Easton*, 121 U. S. 391. Nor will equity interfere by injunction to restrain the operations of persons claiming the right to exercise a similar franchise under legislative authority. High on Injunc. § 902.

What construction, then, is to be given to the plaintiffs' charter? Does it in terms or by necessary implication confer those exclusive rights asserted by the plaintiffs? While it is the accepted doctrine that all grants are to be construed according to the intention of the parties, yet there are certain general rules of construction by the light of which such contracts are to be examined. These rules are well settled by numerous authorities. One is, that in all grants by the government to individuals or corporations, of rights, privileges and franchises, the words are to be taken most strongly against the grantee, contrary to the rule applicable to a grant from one individual to another. Another rule is, that one who claims a franchise or exclusive right or privilege in derogation of the common rights of the public, must prove his title thereto by a grant clearly and definitely expressed, and cannot enlarge it by equivocal or doubtful provisions, or probable inferences. "Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare." *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 666. "Repeated decisions of this court," remarks Mr. Justice CLIFFORD in *Holyoke* v. *Lyman*, 15 Wall. 512, "have established the rule, that whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation and in favor of the public, and that nothing passes but what is granted in clear and explicit terms. Whatever is not unequivocally granted in such acts is taken to have been withheld, as all acts of incorporation and acts extending the privileges of corporate bodies are to be taken most strongly against the corporations." *Rice* v. *Railroad Co.* 1 Black. 380; *Newton* v. *Commissioners*, 100 U. S. 561; *Charles River Bridge* v.

Warren Bridge, *supra*; *Commissioners*, &c. v. *Holyoke Water Power Co.* 104 Mass. 449; *Attorney General* v. *Jamaica Pond Aqueduct Co.* 133 Mass. 365.

Applying the foregoing rules to the charter of the plaintiff corporation, and the amendatory act of 1861, the result is adverse to the plaintiffs' claim. No language expressly conferring any exclusive right is to be found in either act. The word exclusive no where appears. Neither do any words synonymous therewith. Nor is there in either of the acts anything in terms prohibiting the legislature from chartering a rival corporation. If the plaintiffs have an exclusive right to the water in either of those ponds, or if the legislature is prohibited from granting a charter to a rival corporation with similar rights, it must result from inference or implication. This corporation was created for a definite and specific purpose — for conveying to the city of Rockland a supply of pure water. That supply was for purposes expressly limited. The language of the charter is plain and clear upon that point. It was to be "a supply of pure water for domestic purposes, extinguishment of fires, and the supply of shipping in the harbor of Rockland." The water which, by the terms of the charter, the company was authorized to take and use was for certain specific and defined purposes, and beyond that the plaintiffs were not authorized to go. By that charter they had no right to take or use the water for the purpose of propelling machinery. The right which they acquired from the state was a franchise right to so much water as was necessary for the "purposes aforesaid." When those purposes were fulfilled or satisfied, this company could not lawfully hold the whole pond and thus eliminate the express provision of the legislature limiting their rights. This franchise right was not an exclusive right — a right by title or property right to the entire body of water of Tolman's Pond,— but only to so much thereof as was required for those purposes specified in the charter. Any other construction would render nugatory the limitation by which the company was prohibited from using the water for the purpose of propelling machinery.

Among numerous authorities which might be cited sustaining these views, the case of *Bailey* v. *Woburn*, 126 Mass. 420, furnishes an illustration. There the town of Woburn by special act of the legislature was authorized "to take, hold and convey to, into and through said town the waters of Horn Pond, so called; in Woburn, or the waters of any other pond in Woburn," for the purpose of supplying its inhabitants with pure water. In that case as in the one before us an exclusive right to all the water in the pond was claimed, but the court held otherwise, saying: "But this construction is not correct. The town can take only so much water as is required for the purposes named in the act."

But in support of their claim of exclusive right to the water of Tolman's Pond, the plaintiffs rely upon the language of the last clause of section three which is in these words: "But nothing in this act shall be taken to prevent the owners of mills, or of mill privileges on the stream flowing through the outlet of said pond, from using the water thereof in the same manner that they now do or have heretofore done; but said mill owners shall not, nor shall any other person or persons, be permitted, either by cutting below the pipes of said corporation or in any other way to withdraw the water or to obstruct the water works of said corporation "

Conceding to the plaintiffs the most favorable construction which this language warrants, yet we are inclined to the opinion that no such exclusive rights are reserved to the plaintiffs as contended for. This clause in the section referred to has particular reference to the rights and duties of the owners of mills and mill privileges upon the stream flowing through the outlet of the pond. The language employed shows that it was the purpose of the legislature to protect this company against the acts of the mill owners upon the stream. This clause in the section has reference to a particular class of individuals. It defines their rights, permitting them to use the water naturally flowing through the outlet of the pond, but declares that they shall not, either by cutting below the pipes of the corporation or in any other way withdraw the water or obstruct the water works of

said corporation. In order therefore to effectually guard the corporation against any person representing such mill owners, whether servants or employes, not only the mill owners but all persons are prohibited from doing it by cutting below the pipes or in any other manner. The language of the prohibition in its broadest and most general sense, if standing alone, would have a very different signification from that in the connection in which it is found. In this connection it, in terms, includes "any other person or persons," prohibiting them "either by cutting below the pipes of said corporation, or in any other way, to withdraw the water or to obstruct the water works of said corporation." But these general words, in the connection in which they are used, undoubtedly refer to the particular class or subject matter in question, rather than indicate an intention of depriving the legislature of the right to grant the use of this water, not required for the purposes named, if public necessity should require it. The maxim, *noscitur a sociis*, may well be applied here. It is frequently applied in the construction of statutes, the meaning of words, and consequently the intention of the legislature, being ascertained by reference to the context. In accordance with this principle it is laid down in the text books and decisions that "language, however general in its form, when used in connection with a particular subject matter, will be presumed to be used in subordination to that matter." Story's Agency, § § 21, 62. *Emerson* v. *E. & N. A. Railway*, 67 Maine, 393; *Marston, Petitioner*, 79 Maine, 36; Broom's Legal Maxims, 523*. In *Regina* v. *Cheworth*, 4 Best & Smith, 932, (116 E. C. L. 930,) speaking of this principle COCKBURN, C. J., says: "Then there is a general expression 'other person whatsoever;' but, according to a well established rule in the construction of statutes, general terms following particular ones, apply only to such persons or things as are *ejusdem generis* with those comprehended in the language of the legislature." So in *Allen's Appeal*, 32 P. F. Smith, (Pa.) 302, the words of an act giving a preference for wages to persons employed "in any works, mines, manufactory or other business," &c. were construed to apply only to any other business *ejusdem generis*.

By the amendatory act of 1861, the plaintiff corporation was authorized to take, hold and convey, "in the manner provided for" in the original charter, "as well the water of Oyster River Pond in Camden as of said Tolman's Pond," and was to have the same rights, powers and privileges, and be subject to the same liabilities, limitations and conditions, and be answerable to parties injured thereby in the same manner in respect to taking and conveying the said waters, as are provided for in said act, in respect to taking and appropriating the water of Tolman's Pond." Authority is also granted "to take, use and appropriate water from both or either of said ponds, for supplying the people of said city and towns with pure water," etc.

Inasmuch as the controversy between the parties is in reference to the defendants' use of the water in Oyster River Pond, the language of this act is important in determining the intent of the legislature, and ascertaining the plaintiffs' rights therein.

The plaintiffs' claim of exclusive right to this water is based upon what they assert to be their rights by legislative grant in Tolman's Pond, for by the act of 1861, they are authorized to take, hold and convey the water of Oyster River Pond only "in the manner" and "with the same rights, powers and privileges" as are provided in the original act with reference to the water of Tolman's Pond.

If the plaintiffs' position is correct, that an exclusive right to the water of Oyster River Pond is granted by the provisions of the act of 1861, then all the water of this pond became theirs by force of the act itself, excluding necessarily the idea of any future "taking and appropriating" by them. But the legislature in explicit terms refers to the plaintiffs as "taking and appropriating"— "to take, use and appropriate water from"— language entirely repugnant to and inconsistent with the idea that the title to all this water was vested in them and required no act on their part to reduce it to possession. Webster defines pond as "a confined, or stagnant, body of fresh water." It is the body of water which composes a pond. The legislature has authorized the plaintiffs "to take, use and appropriate water *from*" Oyster River Pond, for the purposes designated,— language

implying separation, as well as future action on the part of the plaintiffs, rather than immediate title to the whole *corpus*. It cannot, therefore, by any fair construction be said that the legislature intended to grant to the plaintiffs the absolute title to, or property in, the water of this pond with no further act to be done by them. Such intention must be clearly expressed or necessarily implied to have that effect, and not be left to be discovered by astute construction and lame inferences. Had it been the intention of the legislature to grant exclusive privileges, it could have been easily done in clear and definite language instead of being left to be inferred. On the other hand the language of the act clearly negatives any such intention. It was a franchise right only which was granted by the state, and which authorized this corporation "to take, use and appropriate" so much of the water from this pond as might be required for the particular purposes named in the act. *Bailey* v. *Woburn*, *supra*. In so much only as was thus required, taken and appropriated would the plaintiffs have a vested right.

There was no surrender on the part of the state of the right to grant other franchises of a similar character, if the interests or necessities of the public required it; and hence there was no impairing of the obligation of any contract with these plaintiffs in granting to this defendant corporation the franchise rights which they possess.

It will be observed that the authorities to which our attention has been called, where the court has interfered to protect grants or franchises, the language of the acts has provided in explicit terms that the grant was exclusive. They are not analogous to the case at bar. They are *Piscataqua Bridge* v. *N. H. Bridge*, 7 N. H. 35; *West River Bridge Co.* v. *Dix*, 6 How. 530; *Boston and Lowell Railroad* v. *Salem and Lowell Railroad*, 2 Gray, 1; *The Bridge Proprietors* v. *The Hoboken Co.* 1 Wall. 116; *The Binghamton Bridge*, 3 Wall. 53, 73; *New Orleans Gas Co.* v. *Louisiana Light Co.* 115 U. S. 650; *New Orleans Water Works Co.* v. *Rivers*, *do.* 674; *Louisville Gas Co.* v. *Citizens' Gas Co. do.* 683, 687; *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U. S. 64. None of

these cases militate against the doctrine expressed in this opinion.

The facts before us show that at no time since the organization of the plaintiff corporation has there been a scarcity of water in Tolman's Pond, or any necessity of connecting the two by aqueduct or otherwise to increase the supply in that pond. On the contrary it appears that there has been, during all these years, an average depth of about six feet of water above the plaintiffs' outlet pipe. This pond has an area of three hundred and thirty acres, with a yielding capacity of four and a half million gallons in every twenty-four hours. Large quantities have continually run to waste from the outlet of the pond, and the evidence is conclusive that there has always been much more water than has been required for the purposes of the plaintiffs' grant.

Oyster River Pond lies three miles distant from the other, and has an area of one hundred and five acres, with a daily yielding capacity of one million gallons.

More than twenty-five years have elapsed since the privileges, conferred by legislative enactment, were given to the plaintiffs, and yet no necessity has been shown, or attempt been made by them, to take or use the water of Oyster River Pond. Nor do the facts show that the defendants, in the exercise of their franchise rights, are using any water necessary for the plaintiffs' works. They claim no rights to the water of Tolman's Pond. That is left to the entire use of the plaintiffs for the purposes set forth in their charter.

The plaintiffs' charter was granted after the enactment of the general statute of 1831, c. 503, (R. S. c. 46, § 23,) reserving to the legislature the power to amend, alter or repeal at pleasure all acts of incorporation afterwards passed, as if they contained express provision to that effect, unless there should have been inserted therein an express limitation to the contrary. But we do not, in the view we have taken of the case, consider it necessary to decide how far the rights of either party might be affected by this statute. It is not necessary in the determination of this case upon the facts presented.

There are no grounds upon which the plaintiffs are entitled to the relief which they claim.

Bill dismissed with costs for defendants.

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

STEPHEN P. LANE, in equity, *vs.* MARY F. S. LANE and others.

York. Opinion November 19, 1888.

Trust. Husband and wife. Equity.

A grantor conveyed real estate to a person who immediately conveyed the same to the first grantor's wife. It was one transaction, and no consideration passed from either grantee. Several years afterwards the wife wrote her husband substantially this: "The land I intend to take care of myself. I told you at first you could have it back, but I changed my mind, and shall sign no more deeds."

Held: That these words, as between husband and wife, do not furnish sufficient evidence of an express trust.

Held, further, that a trust is not implied by the transaction; because no consideration was paid by the husband for a conveyance to his wife; and, further, because, if there had been such consideration, the presumption would be, that the husband intended the conveyances as a gift to his wife; and the evidence does not overcome this presumption.

A complainant cannot recover money by a bill in equity, which he failed to recover in an action at law, where the law, as well as equity has jurisdiction of the claim.

Where a wife, during the marital relation, purchases railroad stocks in her own name, with her husband's money, acting as his agent, he may, after they have been divorced from each other, recover the stocks, or their value, from her by equitable remedy.

ON report.

Bill in equity.

The opinion sufficiently states the facts.

Edward P. Payson and Wm. M. Payson, and C. W. Goddard, for the plaintiff, contended that the case showed:

1st. An express trust created by parol and proved by "some writing." "Some writing" means any writing however informal from which the existence of the trust in the estate and the terms of it can be sufficiently understood, whether it was intended by the signer as such or not." *McClellan* v. *McClellan*, 65 Maine,

500; Pomeroy on Equity, § 1006–1007, and notes. It may be a subsequent writing. *Ibidem.*

Trust may be incidentally recognized or admitted in a letter. *Kingsbury* v. *Burnside*, 58 Ill. 310, in which the whole subject is very thoroughly considered. And see *Johnson* v. *Ronalds*, *Adm.* 4 Munf. 77; 57 N. H. 43.

2nd. A resulting trust. The law is established, that when the legal title is taken in the name of one person and the consideration is furnished by another, a trust results in favor of the latter. That the trust arises by operation of law and may be proved by parol evidence.

Defendant received the real estate by deed from M. D. L. Lane, the consideration of which was the conveyance of the same premises to M. D. L. Lane by plaintiff with a request accordingly. How a consideration is paid whether in money or bond, or any other thing of value, matters not. "It is sufficient that it (payment) was made in such manner as to induce him (the third party) to convey." *Dwinel* v. *Veazie*, 36 Maine, 512. Professional services are sufficient. 4 Nev. 280.

The presumption of advancement arising from the fact that the grantee was the wife of the party paying the consideration may always be, and has been here rebutted. The technical rule of law that a grantor shall not dispute his own deed is irrelevant.

Later decisions allow him to contradict the acknowledgment of consideration for all purposes except to raise a resulting trust. *Goodspeed* v. *Fuller*, 46 Maine, 141. An absolute deed may even be shown to be a mortgage. *Reed* v. *Reed*, 75 Maine, 264.

The court has said however, that any kind of consideration is sufficient. *Dwinel* v. *Veazie*, *supra.*

In 114 Mass. *Gould* v. *Lynde*, the point here presented was not raised, the court did not consider it all. In New York in a late case decided in 1882, upon facts very similar to this case, though not so strong the court found a trust and granted relief. *Bitter* v. *Jones*, 28 Hun. 492.

3rd. A constructive trust. Whenever a trustee or person clothed with a fiduciary character takes advantage of the relationship and thereby acquires the title or use of the trust

property, then a constructive trust is imposed upon the property. 2 Pomery Eq. § 1052; *Foote* v. *Foote*, 58 Barb. 258.

This principle is applied to all abuses of confidence whereby the one in whom the confidence is imposed, obtains an undue advantage. *Ibidem.*

If one party makes use of some confidential relation to obtain the legal title upon more advantageous terms than he could otherwise have done, equity will convert such party into a trustee. Perry on Trusts, § 166.

Whenever two persons stand in such relation that while it continues confidence is necessarily reposed by one, and the confidence is abused to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not be impeached if no such confidential relationship had existed. *Tate* v. *Williamson*, *L. R.* 2 Ch. Ap. 61.

The court will not permit the grantee to retain the beneficial interest if there was *mala fides* on his part. Lewin on Trusts, 145, 180 and cases cited.

A conveyance to wife of the grantor on the understanding that she would hold for him and convey to anyone he should desire, or to him, raises a trust. *Bartlett* v. *Bartlett*, 15 Neb. 594.

Fraud vitiates all deeds. *Boegle* v. *Dents*, 55 Pa. 369, and see 6 Watts & S. (Pa.) 97; *Manning* v. *Hayden*, 5 Sawyer Cir. Ct. 360; *Harden* v. *Darwin*, 66 Ala. 55; *Willard* v. *Willard*, 56 Pa. 119.

Constructive trusts arise by operation of law and are not within Statute of Frauds. 2 Pom. Eq. 1008.

Parol evidence is admissible to show intent of parties to a deed and prove a constructive trust. *Hosford* v. *Merwin*, 5 Barb. 51. The fraud need not exist at the time of original conveyance. It may arise subsequently, whenever the trustee wrongfully refuses to perform the trust. In *Barrell* v. *Hanrick*, 42 Ala. 60, the court say "that in avoidance of a fraud parol evidence may be engrafted on an instrument that purports to be absolute on its face," notwithstanding the Statute of Frauds "for although

there is no fraud in the execution in the deed if it be afterward converted to a fraudulent purpose or one wholly different from the one intended by both parties at the time of its execution, equity ought to interpose." Where a person has parted with a valuable property upon the faith of a verbal contract, equity will not allow the other party to retain the property so obtained to consummate the fraud. The Statute of Frauds does not apply. *Traphagen* v. *Burt*, 67 N. Y. 35.

Parol agreement to reconvey on demand was admitted by defendant. Original conveyance was by deed reciting consideration paid but none was paid in fact. Held Statute of Frauds did not apply, and relief was granted. *Haigh* v. *Keye*, 41 L. J. Ch. 567.

Conveyance was upon parol agreement that defendant should reconvey if plaintiff was not convicted of bigamy. Defendant denied agreement and set up Statute of Frauds. Held Statute did not apply and relief was granted. 35 Beav. 208.

In these cases the fraud arose after the conveyance, the subsequent refusal to keep a prior parol agreement. See also *Rudkin* v. *Dohman*, 35 L. T. (N. S.) 791; *Booth* v. *Turle*, 1 Rep. 16 Eq. 182.

The testimony in the case at bar shows beyond question that defendant obtained the legal title to this property only by being the wife of the plaintiff. When therefore, she terminated that relationship without his consent, by reason of which only she obtained the property, she also terminated the trust that depended upon such relationship. A trust ceases with the purpose for which it was created. *Bellinger* v. *Shafer*, 2 Sand. Ch. 293.

The law is well settled that if a woman (or a man) being possessed of real or personal estate, and being about to marry makes a conveyance of such estate without the knowledge or consent of the other party to the marriage contract, before marriage, it is such a fraud upon his marital rights as equity will relieve against. *Leach* v. *Duval*, 8 Bush. (Ky.) 201; *Logan* v. *Simmins*, 3 Tred. (N. C.) 487; *Tucker* v. *Andrews*, 13 Maine, 124; *King* v. *Cotton*, 2 P. Will. 357, 674.

Is it any less a fraud upon his marital rights first to obtain his property as his wife on the understanding that the relationship will continue and then desert him and still retain the property?

The evidence also shows an absolute promise on her part to reconvey the premises, and so much confidential relationship coupled with a promise to reconvey. *Wood* v. *Rabe*, 96 N. Y. 414. A constructive trust is raised whenever the conveyance was obtained under a promise to convey to a designated person or to reconvey to the grantor. 2 Pom. Eq. and cases *supra*.

In *Stone* v. *Wood*, 85 Ill. 603, a wife received a deed from her husband under a promise to sell, pay his debts and return him the surplus. Instead she used it for her own private debts. The court granted relief; saying the husband would be estopped if he had intended vesting the title in her to hold as her sole and separate property, but he never intended such result and that when either party becomes untrue to his or her marital duties and by fraud obtains an unjust advantage over the other, equity will as readily afford relief as between other persons.

And finally without further specific authority than is found in a reasonable application of equitable principles to the marriage relationship, this court might well hold that the free right of contract and conveyance between husband and wife, coupled with a facility of divorce, such as existed under the civil law, require a proportional exercise of these principles, lest equity become incompetent to keep pace with society, and fail to adjust itself to new phases of "fraud, accident and mistake."

Wilbur F. Lunt, for the defendant, cited: *Smith* v. *M'Iver*, 9 Wheat. 532; *Hendrickson* v. *Hinkley*, 5 McLean, 211; *Cowan* v. *Wheeler*, 25 Maine, 273; *Alsny* v. *Daniels*, 4 Atl. Rep. 755; *Kurtz* v. *Carr*, (Ind.) 5 N. East. Rep. 692; *Radford* v. *Folsom*, 3 Fed. Rep. 199; *Bachelder* v. *Bean*, 76 Maine, 375; *Brooks* v. *O'hara*, 8 Fed. Rep. 529; Rev. Stats. c. § 11; *Edgerly* v. *Edgerly*, 112 Mass. 175; *Comerais* v. *Wesselhoeft*, 114 Mass. 550; *Titcomb* v. *Morrill*, 10 Allen, 15; *Gould* v. *Lynde*, 114 Mass. 366; *Dickenson* v. *Davis*, 43 N. H. 647; 2 Pom. Eq. § 1041; *Osborn* v. *Osborn*, 29 N. J. Eq.

385; 1 Howard, 189, 168; 8 Howard, 210; See also 2 Abbott's No. 1 Digest, 391; *Jouzan* v. *Toulmin*, 9 Ala. 662; *Pickering* v. *Pickering*, 38 N. H. 400; *Stevens* v. *Stevens*, 70 Maine, 92; 1 Perry on Trusts, 191–192; *Chesterfield* v. *Jansen*, 2 Ves. 155; *Gale* v. *Gale*, 19 Barb, 251; 1 Fonbl. Eq. B. L. C. 2, § 3, note R; *Blodgett* v. *Hildreth*, 103 Mass. 484; *Roddy* v. *Roddy*, 3 Neb. 96; *Barkley* v. *Lane*, 6 Buch. Ky. 587; Vol. 7 North East. Rep. 95; *Ahrend* v. *Odiorne*, 118 Mass. 261; *Tatge* v. *Tatge*, 25 N. W. Rep. 596; *Randall's Adm.* v. *Randall*, 9 Wis. 379; *Lickman* v. *Harding*, 65 Ill. 505; *Fitzgerald* v. *Fitzgerald*, 100 Ill. 386; *St. Patricks Catholic Church* v. *Dalet et al.* 4 North East. Rep. 241; *Falsken* v. *Harhendorf*, 7 N. W. Rep. 749; *Allen* v. *Withrow*, 3 U. S. Ct. Rep. 524; *Laughlin* v. *Mitchell*, 14 Fed. Rep. 382; *Merivitz* v. *Floring*, 2 North East. Rep. 529; *Ingham* v. *Burnell*, 2 Pac. Rep. 804; *Shafter* v. *Huntington*, 19 N. W. Rep. 11; *Bumpus* v. *Bumpus*, 19 N. W. Rep. 29.

PETERS, C. J. The complainant was married to the principal defendant in 1841, they living together until 1870, and after that time separately until 1874, when she obtained a divorce. The complainant first knew of the divorce in 1880. In 1868, he conveyed to her, by means of a deed from himself to a brother who conveyed immediately to her, certain valuable real estate in Saco. She also got into her possession some thousands of dollars of his money, which came from his earnings and from debts due to him.

In 1882, he commenced against her an action of money had and received, to recover his money in her hands, including rents collected by her from the real estate. A referee, who heard the case, hesitating about what rules of law should govern their claims on each other, the case came to this court for instructions, as appears in *Lane* v. *Lane*, 76 Maine, 521. It was held, in that case, that the rents were not recoverable in an action of law, and that the value of specific articles of personal property of his, withheld by her from him, could not be recovered in that

form of action, but that his money in her hands could be; and that the same rules would govern which applied ordinarily to the relation of principal and agent, so far as related to his property remaining in her possession at the date of the divorce.

This bill was afterwards brought to obtain a reconveyance of the real estate, and personal property in her hands, and to recover the money. She died after the case was submitted to the court, and before a decision was rendered. By a subsequent agreement, made a part of the case, between the complainant and the administrator of the wife as well as with all her heirs, and the legatees and devisees in a will left by her, which is of doubtful validity, all these persons, none other being possibly interested, have come into court as parties, and submit the case anew on the evidence previously prepared, and the matters stated in their stipulation, and the complainant and all parties defendant ask that all questions may be finally settled, without any bill of revivor or of supplement or any additional pleadings. It is therefore desirable that all differences be thus judicially adjusted.

It is contended that the real estate was held by the wife on an express trust for the husband. We do not think an express trust is proved. There must be written evidence of it. The writing relied on is a letter which she wrote him in answer to communications from him. She says, in letter dated July 25, 1873, "Stephen: The deeds received. I shall sign the Virginia property for the reason you gave. The Saco property I intend to take care of myself, unless John wants it enough to pay me ten thousand dollars for it, cash down. I told you at first you could have it back, but, after learning what I did three years ago, I changed my mind, and now shall sign no more deeds, and do not wish to be troubled in this way again. If I am, I shall place myself in a position where I cannot be, and have my support. M. F. S. Lane."

The words of this letter might, perhaps, be regarded as a sufficient declaration of a trust, had the parties stood in the attitude of strangers to each other; combined with the fact that no pecuniary consideration was paid for the property by the

grantee. We think otherwise of it, as a communication to a husband from his wife. There may be no good reason why a stranger should hold as his own the real estate of another without paying a consideration for it, while there may be good reason why a wife should receive a title to her husband's property without any valuable consideration being paid therefor. A man is likely to give real estate to his wife or children, and not to strangers. There are strong moral and family considerations for the one act, and ordinarily no motive for the other. As between the husband and wife, the letter should not be construed as containing an admission that the property was his and not her own. They were not carrying on business transactions with each other. The letter expresses no obligation. Its tone is the reverse of it. It states no time when or terms under which she had said he might have the lands back. It gave no information of the circumstances which led him to convey to her. It was not at all inconsistent with her right to hold the property, as a gift to herself, that she had said at some time that he could have the property back. She was declaring what she would accord to him as a favor, not as a right. We do not understand that she meant, by using the expression "at first," that she made any promise at the time when the conveyance was made to her. That is not pretended. The fair inference would be that she had so said, at some date after the deed passed and prior to the date of writing the letter.

There are even less grounds for saying that an implied trust, as to the real estate, has been established by the evidence. The complainant, on this point, relies on the equitable principle that, in ordinary cases, where land is conveyed to one person and another pays the consideration, a resulting trust will be presumed in favor of the one paying the consideration. We think that principle is not applicable to the present facts. This was not a transaction of that kind. Here no consideration was paid to the person who conveyed to the wife. The transaction was in effect the same as if the deed had been made directly from husband to wife. The papers in the case disclose that the complainant conveyed to his brother by deed dated August 18, 1868, and the brother conveyed to complainant's wife by deed dated

August 19, 1868, but both deeds were acknowledged on August 19th, and were recorded at the same instant in the registry, on December 28, 1868. No money or other valuable consideration passed. The complainant was not a purchaser, nor his brother a seller. It was the husband's conveyance through the brother.

But the rule, invoked in behalf of complainant, does not apply for another reason. The presumption applies only when the transaction is between strangers, where there is neither legal nor moral obligation for the purchaser to pay the consideration for another. The rule is reversed in its application between husband and wife, and also between father and child. As between such parties, the presumption is, that the payment, by husband or father, for property conveyed to wife or child, is an advancement or gift. A man is not permitted to bestow property in this way to-day, and take it back to-morrow. If he makes his wife the owner, ordinarily he must abide by her ownership. This doctrine is declared in positive terms, and fortified by many authorities, by the author, in 2 Pom. Eq. Jur. § 1039 and notes. It is a doctrine too generally admitted to require argument in support of it.

No doubt, an implied trust may arise from a transaction where the consideration is paid by the husband, while the property is conveyed to the wife. But proof will be required to overcome the presumption the other way. The burden will be on the husband to prove such circumstances as will warrant such a result. *Stevens* v. *Stevens*, 70 Maine, 92. As bearing on the reason why the wife should or should not retain the property, the parties have testified very divergently. It is oath against oath. Better that some of the testimony should not be brought into the light. In any view, however, no stain can be cast upon the wife. Without going into details, our opinion is that the evidence, on collateral considerations, leaves the case as it finds the case, and that neither side makes any change in the effect which attaches to the ordinary presumptions. The case is much like that of *Edgerly* v. *Edgerly*, 112 Mass. 175, where the court said: "The only reasonable inference from all the facts proved is, that while the husband did not intend to make a gift of the property to his

wife which would deprive him of all benefit thereof, he did intend that the use of the estate, and the application of the income . . . should rest in her discretion." So here, the wife was in any view no more than a discretionary trustee, with the legal right to do with the property as she pleased, only that, under our statutes, she could not convey it in his lifetime without his joinder in her conveyance.

The complainant claims to recover money in the wife's hands at the date of her divorce. He cannot. That claim was foreclosed against him by a judgment against him in the action at law. He has been heard and had his day on that question. The law as well as equity had jurisdiction over that claim. *Bachelder* v. *Bean*, 76 Maine, 375.

This brings us to consider another claim presented by the complainant, wherein, on the evidence we arrive at the conclusion that he is justly entitled to recover. There can be no doubt, from the testimony outside that of the parties, as well as from their statements, that he passively allowed her to collect the bulk of his earnings, while he was a clerk and accountant, for many years; that she received a considerable sum of money due to him in notes; that in this way principally she received many thousand dollars in all; that the understanding between them was that any surplus, left unexpended for family support, should be invested in bonds or stocks for him as his property; that, with his general but not circumstantial knowledge, she made and changed such investments from time to time; and that some years before divorce, in this way she purchased with her husband's money, as his agent, twenty-eight shares of preferred stock in the Northern Pacific Railroad Company, and took the certificate of shares in her own name. The certificate stood in her name till her death in 1886. In her testimony, she very unwillingly confessed the transaction, and, as it was, the amount of the stock was not discovered until disclosed, after her death, by her will, a copy of which, by stipulation of parties, is made a part of the case. The complainant, searching in the dark for his properties in her hands, prays that his monies may be restored to him, or property, "if the money has been invested or changed in form."

The title to this stock has never before been claimed or contested, and we think the complainant is entitled to it, or its value.

We are not reluctant to reach this conclusion. There will be justice as well as equity in it. She died childless. Her estate goes from him and his heirs to strangers. She dispenses it in her will largely to her own brothers and sisters, who are, from aught that appears, able to provide for themselves. The complainant is old, and possessed apparently of but an insignificant estate. She lived upon means which came through him, having no other, until her death, leaving behind an estate probably not less than seven or eight thousand dollars. Once it was all his.

There is doubt if the divorce was a valid one. Neither side cares to question its validity, as it would be a two-edged sword in either's hands. We need not ourselves examine for defects, as it would work no practical difference in the end, if the divorce be void, only that such a discovery might necessitate new or supplemental proceedings. The controversies would be essentially, if not exactly, the same.

We think costs better not be allowed. And as it might complicate some of her bequests, which her heirs are desirous of making effectual, whether valid or not, it may be expedient, instead of requiring the administrator to transfer the shares specifically to the complainant, to assess against her estate the present proximate value of the shares in money. Their value may be estimated to be sixteen hundred dollars.

Decree accordingly.

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

JOHN F. CHADBOURNE, appellant, *vs.* DANIEL W. HARDING.

Somerset. Opinion November 19, 1888.

Insolvent law. Preferences. Partnership.

When two debtors are in insolvency as a firm and also individually, and one has assets exceeding his own private indebtedness, a firm creditor is interested in the private estate of the solvent partner, and may contest the allowance of claims against such estate, presented by other creditors.

The exchanging a note against an insolvent firm for the note of the individual members of the firm, within four months of the commencement of insolvency proceedings by the debtors, the result of which would give the creditor a larger dividend on his debt than he would otherwise obtain, operates as a preference, and the substituted note cannot be legally allowed against the estates of the debtors.

On exceptions from the ruling of the presiding justice on appeal from insolvency court.

Proof of debt by Daniel W. Harding, against the individual estate of Josiah Holbrook, who was a member of the firm of J. & C. D. Holbrook composed of himself and his son Cyrus D. Holbrook, against whom insolvency proceedings were instituted November 2, 1886.

The appellant John F. Chadbourne, was a firm creditor, and appealed from the allowance by the court of insolvency of the claim of Harding against the individual estate of Josiah Holbrook.

It was objected that Chadbourne, being only a firm creditor, had no right of appeal under the statute, from a claim allowed against the individual estate of one co-partner in the firm. This objection the court considered not well taken, inasmuch as the individual assets of Josiah Holbrook were shown to be more than sufficient to pay the individual creditors in full, and therefore overruled the same.

It appeared that on August 7, 1886, Harding received a promissory note for four hundred and eighty-two dollars and ninety-two cents, of that date, payable to his own order, on demand with interest, signed by C. D. Holbrook and Josiah Holbrook, which he claimed was given in renewal of a note dated in 1882 or 1883, and signed by the same parties for the sum of about four hundred dollars.

The appellant insisted that this note, within four months of the Holbrooks' insolvent proceedings, and in fraud of the insolvent law, was given in renewal of two notes: one, for one hundred dollars, signed by C. D. Holbrook and the other for three hundred dollars signed by the firm of J. & C. D. Holbrook, given for that sum loaned the firm.

The presiding justice ruled that the giving of these notes was a preference to which ruling the defendant excepted.

Merrill and Coffin, for plaintiff.

Walton and Walton, for defendant, claimed: 1st. That this was not a preference made void by the insolvent law. 2nd. That a firm creditor should not be heard objecting to a claim against an individual estate. 3rd. That proof was properly made against the individual estate of Josiah Holbrook.

Section 29 of c. 70, R. S., must be construed in connection with § § 33, 46 and 52 of the same chapter and is of no wider scope and extent than they. "All these provisions relate to the same subject matter, the property, and all three aim to protect property of insolvents from fraudulent disposals." Bump. on Bankruptcy, (9th, ed.) pp. 837, 795, 636-7, 397.

In a careful examination of authorities we find no transaction pronounced invalid except where there was either a *nudum pactum* contract or the obtaining of property of the debtors and in a direct manner.

We submit that a preference must have to do directly with property and in a direct manner and that a giving of credit which may change the legal mode of proof in insolvency, is not embraced in the prohibition of the insolvent act.

Appellant, being a creditor of the firm, has no right of appeal from the decision of the judge of the court of insolvency. *George* v. *Grant*, 28 Hun. (N. Y.) 169; *Ex parte Whiting*, 14 Nat'l Ban. Reg. 307.

We contend that the insolvent law makes void, not a transaction which ultimately works out a preference, but the giving of a present preference by the turning out, the transfer, or conveyance, or the giving of security, upon property.

There being full consideration for Josiah Holbrook's signing his name to the note offered for proof, the old notes not being paid by any money or property of the firm or either of its members, and no provision of the insolvent law making it invalid, especially upon the objection of firm creditors proof was rightly made against the individual estate of Josiah Hoolbrook. It was improperly expunged and the exceptions should be sustained.

PETERS, C. J. It appears, as found by the judge at *nisi prius*, that two debtors are in insolvency as partners and also individually; that the partnership assets are small, but that the private assets of one of the partners are enough to pay all his own liabilities and leave a surplus to be applied on the liabilities of the firm; that a creditor of the solvent partner denies that his own claim can be contested by another creditor whose claim is against the partnership estate only; and whether the one creditor is or not entitled to resist the other creditor's alleged claim is one of the questions presented.

We have no doubt that the contesting creditor has such right. Although a direct creditor of the firm only, he has an interest in having all the estates comprehended in the insolvency proceeding turn out as large as possible. The more the individual assets may be, the larger the dividend to be received on his debt. His pecuniary interest in the solvent individual estate may be even more in amount than that of some of the creditors whose claims are against the debtors personally.

It also appears, as further found by the judge, that the note, which is the subject of controversy in this case, was given, within four months of the institution of the insolvency proceedings, by the two insolvents personally in exchange for two other notes, on one of which only the partnership was holden, and on the other only the partner who individually has no assets whatever; and that the exchange of notes was made for the fraudulent purpose of giving to the claimant a better standing when his debt should be proved in the insolvency proceedings. It is plain to be seen that upon the proof of the old notes the creditor could receive but a small dividend, while upon proof of the substituted note he would receive his claim in full. The judge ruled, on this finding of fact, that the transaction amounted to a preference, such as is inhibited by the statute, and rejected the claim wholly. The ruling was right.

The excepting party contends that merely making a written promise is not the transfer of any property, that it does not convey the thing promised, and that the statutory provisions touching preferences refer to the conveyance or transference of

some material or tangible thing. If this should be the correct view of the law, it would be easy to practice a class of frauds upon insolvent estates, with no power in the court of insolvency to prevent them. If the note were allowed, its collection would be a transfer of the very thing promised.

It is true that the statutory provision does not hit such a case in very express terms, and for the reason that the contrivance resorted to by these parties is so uncommon and novel as not to have been foreseen by the framers of the statutes. But we think that the transaction is comprehended by the spirit and purpose of the law, and practically enough within its literal provisions. Section 29, c. 70, R. S., in general terms prohibits preferences, and other sections of the insolvency chapter are declaratory of the same idea. By section 33, money may be recovered back, mortgages annulled, and attachments dissolved, under certain conditions which are prescribed to prevent preferences, and it would be a strange result if money fraudulently or improperly paid and received in contemplation of bankruptcy, may be recovered back, and still a note fraudulently given by the insolvent for the payment of money be legally enforced.

The common definition of preference, as found in law dictionaries, is, the paying or securing to one or more of his creditors, by an insolvent debtor, the whole or a part of their claims, to the exclusion of the rest. A note is property. The note in question was given in payment of or as security for other notes, and represents a lien on the insolvents' estates which did not exist before. It undertakes to secure the creditor as he was not secured before. Allowing an attorney of an attaching creditor to take judgment which would give that claim a privilege over claims not in judgment, is giving a preference. *Eastman* v. *Eveleth*, 4 Met. 137. If paying money would be wrongful, certainly the giving a promise to pay the money would not be right, and a note given for such purpose, would be void as against creditors. If the money paid can be recovered back for the benefit of the estate, a note given for the money cannot be

collected against the estate. If the ruling does not cancel a fraudulent transfer, it prevents one.

Counsel complains that by the ruling his client loses his original notes. It was not so ruled. It was ruled that he could not prove and collect the new note. The other question does not arise in this controversy.

Exceptions overruled.

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

IDA M. RICHARDSON, in equity,

vs.

SARAH R. RICHARDSON and others.

Hancock. Opinion November 19, 1888.

Devise. Power of disposal by life-tenant. Estate tail. Construction of will in equity.

A testator, after some minor bequests, gave the general residue of his estate to his wife, "to her use and behoof and dispose of for her maintenance during her natural life." *Held:* That her power of disposal permitted her, acting in good faith, to sell and convey an entire homestead, the bulk of the property devised to her, for the consideration of a life-support secured to her by the grantee in the deed.

In extreme cases a court of equity may interfere to prevent a wanton or reckless execution of the discretionary power of sale entrusted to a life-tenant by a testator.

The testator further devised any remainder of his estate, left at his wife's decease, to two persons named by him, to go to the survivor of them, if the other died without children, and, if both died without children, to go to the testator's grandchildren then living. *Held:* That this is a devise of an estate tail by implication, to the two persons first named, and that they may, by our statutes, convey the title to the property by deed in fee simple.

The court has jurisdiction to determine these results, in a bill in equity, all living grandchildren, and all others interested appearing as parties to the proceeding.

ON report.

Bill in equity, brought to determine the construction of a will. The opinion states the material facts.

Wiswell, King and Peters, for complainant, cited: On the jurisdiction of the court, Story's Eq. Pl. § § 77, 96; *Wood* v.

Dummer, 3 Mason, 317; *Crease* v. *Babcock*, 10 Met. 525, 531; Daniel's Ch. Pr. & Pl. p. 191; *Robinson* v. *Smith*, 3 Paige, 222; Story, Eq. Pl. § § 94, 78, 99, 105, 207, B; *Harvey* v. *Harvey*, 4 Beav. 215; Story, § § 120, 116.

On the construction of the will, *Baldwin* v. *Bean*, 59 Maine, 481; *Ramsdell* v. *Ramsdell*, 21 Maine, 288; *Shaw* v. *Hussey*, 41 Maine, 495; *Hall* v. *Preble*, 68 Maine, 100; *Nash* v. *Simpson*, 78 Maine, 142; *Parker* v. *Parker*, 5 Met. 134; *Allen* v. *Trustees*, 102 Mass. 262.

Hale and Hamlin, for respondents, Ida M. Richardson and Sarah R. Richardson, cited: *Stuart* v. *Walker*, 72 Maine, 145; *Hall* v. *Preble*, 68 Maine, 100; *Shaw* v. *Hussey*, 41 Maine, 495, and cases there cited; *Nightingale* v. *Burrell*, 15 Pick. 104; *Parker* v. *Parker*, 5 Met. 134, 139; *Allen* v. *Trustees*, 102 Mass. 262.

Deasy and Higgins, for respondents, Sarah R. Richardson and James E. Hamor, cited: *Nash* v. *Simpson*, 78 Maine, 149; *Stuart* v. *Walker*, 72 Maine, 146; *Dodge* v. *Moore*, 100 Massachusetts, 336; *Ayer* v. *Ayer*, 128 Massachusetts, 575; *Gorham* v. *Billinys*, 77 Maine, 386; *Whitcomb* v. *Taylor*, 122 Massachusetts, 248; *Downing* v. *Johnson*, 5 Coldwell, (Tenn.) 229; *Hoyt* v. *Jaques*, 129 Mass. 286; *Paine* v. *Barnes*, 100 Mass. 470; *Willey* v. *Haley*, 60 Maine, 176; *Fisk* v. *Keene*, 35 Maine, 349; *Roach* v. *Martin*, 27 Am. Dec. 746; *Arnold* v. *Brown*, 7 R. I. 196; *Allen* v. *Trustees*, 102 Mass. 265; *Parker* v. *Parker*, 5 Met. 134; *Wheatland* v. *Dodge*, 10 Met. 502; *Hayward* v. *Howe*, 12 Gray, 49; *Hall* v. *Priest*, 6 Gray, 18; *Weld* v. *Williams*, 13 Met. 486; *Hulburt* v. *Emerson*, 16 Mass. 241; *Nightingale* v. *Burrell*, 15 Pick. 104; *Parkman* v. *Boardman*, 1 Sumner, 359; *Bacon* v. *Crosby*, 4 DeG. & S. 261; Jarmon on Wills, 3–195; Washburn on R. P. 1; *Brightman* v. *Brightman*, 100 Mass. 238; *Richardson* v. *Noyes*, 2 Mass. 56; R. S., ch. 73, § 4.

George P. Dutton, for certain respondents, (grandchildren of testator) contended that it was evidently not the intent of the testator to establish an estate tail. *Richardson* v. *Noyes*, 2 Mass. 56; 15 Pick. 112.

As to the deed of Bethiah Richardson, conveyances made in accordance with powers, to be exercised in accordance alone, with the judgment and discretion of the life-tenant, are not to be questioned. 68 Maine, 133.

But it is also well settled that a devise like this in the will, creates a life-estate in Bethiah Richardson, with power of disposal over the remainder only when the exigencies of her support required mere disposal; and even in this case, it is incumbent on those claiming under her to show that the exigency had arisen which justified the sale, and that the conveyance was no more than reasonably adequate for the contingency. 72 Maine, 145; 68 Maine, 134.

It was the intention of the testator that the estate should go to remainder men impaired only so much as was necessary for maintenance of life-tenant. Bethiah Richardson had only a life-estate and her grantee can have no more. The burden is on grantee to show that the conveyance was justified. The deed of Bethiah confesses on its face to much more than this and is void. 68 Maine, 137; 28 Maine, 22–25; 18 Mass. 325; 34 Mass. 339.

As to the contingent interest of the grandchildren, and the nature of the conveyance to Sarah and Ida. A devise of land conveys all the estate of the testator therein, unless it appears by his will that he intended a lesser estate.

When an estate is devised in fee with a devise over, upon the happening of a certain event, the first devisee may take an estate in fee simple and conditional, and the devise over may take effect as an executory devise or he may take an estate-tail and the devise over may take effect as a remainder. Which of these results is produced, depends upon the language used. 35 Maine, 355.

Where a contingency is limited to depend on an estate of freehold is capable of supporting a remainder, it shall never be construed as an executory devise. And a devise over after an estate in fee cannot take effect as an executory devise unless the event, upon which it is to rest, must necessarily happen within a life or lives in being and twenty-one years, &c. *Duke of Norfolk's Case.*

If the clause "dying without children" referred to an indefinite failure of issue the fee simple of the first devisees would be reduced to a fee-tail and the devise over could not take effect as an executory devise, because it would be too remote, and also because it could take effect as a remainder. 5 Mass. 503.

But such is not the established construction of these words. Dying without children means children living at the death of the first devisees. I have already commented on the intent of the testator as to these children. Jarman on Wills, page 223, note, says, "In no case in which an estate in fee has been limited by the first words, has that estate been reduced to an estate-tail, in order to construe the words of the gift over as a remainder. It is begging the question to say that the gift over is a remainder. It is necessary first to make out that the gift in fee is cut down to an estate-tail."

In *Morgan* v. *Morgan*, 5 Day, 517, the words used were "dying without children" held to be children living at the death of the first testator.

In 3 Halst. 29, the words "if any of the children die without issue alive such shall go to the survivors," were held to be good as an executory devise. See also 23 Wend. 513, and 12 Wheat. 153.

In *Anderson* v. *Jackson*, 16 Johnson, 382, a leading case in New York, it was held that words "if either should die without lawful issue his share shall go to survivors," constituted an executory devise; because that was no estate-tail created by these words, but the true construction was a failure of issue living at death of first taker. See also this case commented on in 5 Denio, 664.

In the 2nd Mass. p. 55, the doctrine contended for is upheld, and the respondents represented in this argument stand exactly as "survivors" stand in that case, and the discussions of the questions at bar in 5 Mass. p. 503, is equally in point in considering the case at bar here.

Sarah R. Richardson and Ida M. Ash, the first devisees, took as tenants in common estates in fee simple determinable upon the death of either without children, with cross limitations to the

survivor, and upon the death of both without children remainder to grandchildren by way of executory devise.

PETERS, C. J. The questions presented for decision call for a construction of these clauses in Amos Richardson's will:

"Third. I give and bequeath to my beloved wife, Bethiah Richardson, all the rest, residue and remainder of my property, both personal and real, of what kind and nature soever I may die possessed of to her use and behoof and dispose of for her maintenance during her natural life.

"Fourth. I also devise that whatever property of my estate which may remain at the decease of my wife Bethiah, may be divided equally between my daughter, Sarah R. Richardson, and my granddaughter, Ida M. Ash, provided that, if either of the above named persons shall die without children, then this legacy shall go to the other, and if both die childless then the same shall be distributed equally among my grandchildren then living."

The will is dated in December, 1876. The testator died in January, 1877. Bethiah, his wife, died in June, 1888. She, in 1884, conveyed by absolute deed the homestead left by the testator, his principal property, to Sarah R. Richardson, another devisee in the will, for the consideration of a life support to be furnished her by the grantee. A bond was given by the grantee for the deed. The deed contains a condition that, if the grantee die before the grantor the conveyance shall become thereby void.

The first question is, whether the transaction of deed and bond, the grantee surviving the grantor, was valid or void. If the parties acted in good faith, and such must be the presumption, as nothing on the face of the transaction indicates the contrary, we think it must be pronounced to be valid.

A power to thus convey the property was conferred on the wife by the will. The mode and manner of disposing of the property are not dictated to her. The purpose for which it may be done is indicated. She could dispose of a portion or all. Nothing restricts her as to the quantum of interest to be disposed of. The testator does not provide a remainder, but only disposes of one should it exist. In one sense the widow literally followed

the mandate of the will. She did "dispose the estate for her maintenance during her life." Her judgment governs, even though she exercises poor judgment. All rests in her own discretion.

Counsel for some of the remainder-men raises objections to such an execution of the trust. But the objections apply more against such a kind of trust, than against this mode of its execution. They were objections for the testator to have considered. He did consider, presumably, the same objections and in his own mind overruled them. He requires no bond. He creates no trustee. He places all confidence in her, having all opportunity to judge of her capacities, both mental and moral.

It is said, she should and could sell only as her wants from time to time required. That might be the judgment of some persons, but it was not her judgment, and her judgment governs. But does it follow that her judgment was not prudently exercised? She knew her situation better than we know it. It might be that she could not effect a sale in any other way. Small and poor farms will not usually sell in parcels or nibbles. She carefully provides for herself, if she should survive the grantee. But it is contended that if she could sell the property as a whole, the consideration to be received should be absolute and not contingent or conditional. We think that argument makes rather against the expediency of the transaction than its legality. The value of the land has increased since the conveyance. It might perchance have decreased. It is not alleged that it was not a fair contract between parties, but it has not resulted favorably for those interested in a remainder after her death.

It is said a fraud might easily be committed upon the remainder-man in such a transaction. The question of law is whether it was *per se* fraudulent. If the transaction were a fraudulent one in fact, both parties participating in the fraud, it could undoubtedly be avoided by other parties interested. The court could have been called upon to enjoin the conveyance or declare it void.

It is further said in opposition to the scheme which the widow

adopted, that she might be too simple-minded to be allowed to participate in so complicated and important a transaction, and that the husband could not possibly have anticipated such an unusual execution of the trust. The answer to that suggestion must be that in any extreme case the court would interfere to prevent injustice, if applied to. The power lies in the court, to be exercised in extreme cases, to take the execution of a discretionary trust from a life-tenant, and commit it to another, if the circumstances justify judicial interference. As to what might be an emergency demanding such action by the court, will be found to have been fully stated by us, in the case of *Copeland* v. *Barron*, 72 Maine, 206, 211.

It is also intimated in the argument of counsel that to defend any sale by a life-tenant, who has a power of disposal like this, it must appear that there was an emergency requiring a sale. That is impossible. If such were the rule, no man would buy at a fair price the whole or any part of the property. It would so cripple the practical use of the power to sell, as to make it in very many cases worthless to its possessor. There is no doubt that, in small estates, devises of remainders like the present are scarcely ever beneficial to anybody, and testators ought to appreciate that fact when they make them. All the risks are avoidable by placing the trust in responsible and disinterested hands. Pertinent illustrations of the views expressed by us, on the main point presented, will be found in the following cases, in addition to the case cited: *Shaw* v. *Hussey*, 41 Maine, 495; *Warren* v. *Webb*, 68 Maine, 133; *Starr* v. *McEwan*, 69 Maine, 334.

Then we come to another question, though we infer there cannot be much, if any, property that it can apply to, provided we have correctly decided the point already disposed of. The question is whether the devise under examination creates, in Sarah R. Richardson and Ida M. Ash, an estate for life or a fee simple determinable, or an estate tail; provided a remainder exists for this part of the will to operate upon. We think an estate tail was legally constructed.

An application of plain rules to plain facts ought to produce

satisfactory results in the construction of wills. The intricacy on the subject has largely grown up from the distaste which the people and courts have for certain classes of devises. Judge CURTIS, in *Abbott* v. *The Essex Company*, 2 Curtis, (C. C.) 126, says: "I think it may be said with truth, that the American courts, while they have recognized the rule (relating to the creation of estates tail), have shown a strong disposition to lay hold on pretty slight expressions in the will to defeat its operation; a tendency which has been effectually sanctioned not only in several states in this country, but in England, by legislation which abolishes the rule altogether." Now, that our statute has ameliorated the effect of the rule, by allowing any person seized of land in tail to convey it in fee simple, there need not be much difficulty in the way of bestowing upon such devises a fair and consistent construction. R. S., c. 73, § 4.

Had the devise in this case stopped with the provision made in behalf of Sarah and Ida, without a devise over to the grandchildren, it might not have been an estate tail. There are strong authorities to that effect, two of which will clearly illustrate the argument on that side of the question. *Abbott* v. *The Essex Company*, before cited; S. C. 18 How. 202; *Richardson* v. *Noyes*, 2 Mass. 56. There seems to be some chafing between the latter case and some other subsequent cases in Massachusetts.

But that construction does not hold good when the latter part of the devise in the present case is taken into consideration. The whole devise makes the legal meaning too clear to admit of misapprehension. Within the Massachusetts rule, it creates an estate tail. In *Allen* v. *Trustees of Ashley School Fund*, 102 Mass. 262, it is said, "It is well settled in this Commonwealth, that, after a devise of real estate in fee, a devise over in case the first devisee shall die 'without leaving issue,' or, 'without leaving heirs of the body,' looks to an indefinite failure of issue, and therefore cannot take effect as an executory devise, but the first devise in fee is cut down by the subsequent devise to an estate tail, and the subsequent devisee takes an estate in remainder. The same rule of construction applies, when the first devise is to two persons, and the devise over, in case of the death of

either, leaving no issue, is not to the survivor, but to a stranger." In the case at bar the principle of entail is even more significantly manifested. There is a devise to two persons, and a devise over to the survivor of them, and still another devise over to other persons.

This devise comes easily within the definition of an estate tail, however differently the rule be stated in the authorities, and comes clearly within the statement of the law in *Fisk* v. *Keene*, 35 Maine, 349. The two cases are essentially alike. The definition of an estate tail created in definite and express words, is given in accurate terms by Professor Washburn, who says: "Estates tail are estates of inheritance, which, instead of descending to heirs generally, go to the heirs of the donee's body, which means his lawful issue, his children, and through them to his grandchildren in a direct line, so long as his posterity endures in a regular order and course of descent, and, upon the extinction of such issue, the estate determines." Then he describes an estate tail created by implication or construction, which is a case where a testator's meaning is not declared in express terms, but is fairly and clearly enough to be inferred from what he does say. His words imply as much as if more directly stated. He says: "An instance of an estate tail by construction, where there is no direct limitation to the heirs of the donee's body, would be an estate to A, with a proviso that if he shall die without heirs of his body, the estate shall revert to the donor or go over to one in remainder." 1 Wash. Real Prop. 5th ed. *72, *73.

The present is an implied or constructive estate tail, which is much more common than those otherwise created. It is implied that the testator designed to send the estate down to the children of Sarah and Ida, because he gives it over to others only for the reason that Sarah and Ida have no children at their decease to take the estate. He seeks to give first to the devisees and then to their children, and reserves a remainder for third parties only on the contingency that there be no children through whom the entailment can descend. The case of *Hall* v. *Priest*, 6 Gray,

18, is pertinent to this discussion, and see also, *Willey* v. *Haley*, 60 Maine, 176. It may not be amiss to say that the cases speak of devises to persons "and their heirs," and then over. Under our statutes a devise to a person, means to such person "and his heirs." R. S., c. 74, § 16.

There can be no doubt that we have jurisdiction to determine these questions. All persons in the world who can by possibility be interested are parties to the proceeding. The statute benignantly accords to the court jurisdiction to determine the construction of wills, and, in cases of doubt, the mode of executing a trust. R. S., c. 77, § 6. Being a privileged suit, the ear of the court should be open to it, to relieve parties from tedious and expensive family litigations. Especially fitting is it that we should entertain the present application, as it comes before us immediately after the decease of the widow; and the executors, and the heirs near and remote are anxious to know the condition of the estate, and who must be the recipients of its bounties.

Bill sustained. Decree according to the opinion.

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

IN RE WILLIAM W. BUTTERFIELD.

Franklin. Opinion November 18, 1888.

Insolvent law. Discharge. Appeal. Practice.

A creditor who desires to oppose an insolvent's petition for discharge, must appear for that purpose on the day assigned by the judge for a hearing thereon. His appearance to oppose a discharge, is not implied from his presence on such occasion for other purposes.

A creditor is not entitled to appeal from a decree discharging an insolvent debtor, unless at a proper time before such decree he has filed objections against a discharge.

ON exceptions.

Appeal of James O. White, a creditor who had proved his debt against the insolvent estate, from a decree of the judge of the court of insolvency dismissing the written objections of the

creditor to the discharge of the insolvent, on the ground that they were not seasonably filed, and to the decree granting the discharge.

King and King, for the appellant.

The examination of the debtor being in progress on August 3, so that the creditors could not then know what objections could properly be made, an adjournment of all proceedings, as well under the order to show cause as under the petition for discharge was proper, and the rights of the creditors were the same on the adjourned as on the return day. (1 Bankruptcy Register, 323.) In fact the adjournment of the petition and the notice to show cause, was on account of the appearance of the creditor to oppose a discharge, and the commencement of the examination of the debtor.

Had the debtor on the return day claimed a discharge, or any other action under the petition, the creditor would have been reminded and filed his objections, or obtained such decree of the judge as would have protected his rights, and the inadvertent failure would not have occurred.

The order of court giving notice of hearing upon the objections, was equivalent to an order of the court allowing the objections to be filed *nunc pro tunc*, which the court had a right to allow in case of failure through inadvertency. (2 Bankruptcy Register, 328.) The court could in its discretion allow a creditor to enter his appearance and file his objections, although the time for entering an appearance had passed. (14 Bankruptcy Register, 385.) The insolvency court erred in the opinion that the statute was imperative and that he could not regard the equities of the case. (2 Bankruptcy Register, 552.) The "examination" of the debtor, a part of the record, disclosing that the debtor was not entitled to a discharge, it was the duty of the court, had no objections been filed, to refuse the discharge.

By section 46 of c. 70, R. S., it is prescribed that a discharge shall not be granted under certain circumstances. This imperative statute contemplates a careful scrutiny by the court of everything that may appear upon the face of the proceedings, objections or no objections.

It does not contemplate reading by the court between the lines nor as *addenda*, the proviso that "if objections shall have been filed on the return day of the petition for discharge."

The insolvency statute is like the former U. S. bankruptcy statutes but in that section corresponding to our 46th section, gambling is an additional bar to a discharge, and in the *Williamson case*, 3 Bankruptcy Register, 286, the court said, "The bankrupt applied to be finally discharged, no objections being interposed by creditors. This court upon inspecting the record of the bankrupt's examination by the assignee, discovered that since the passage of the act the bankrupt had lost a large sum of money at gambling. The discharge was refused, the court holding that it was its duty to examine the record before granting a discharge, and if it appeared that the bankrupt was not entitled thereto, to refuse it, although creditors interpose no objections."

In several cases the U. S. court in considering the question of the necessity of filing written objections make exceptions as to those grounds appearing upon the face of the proceedings. (*Seabury case*, 10 Bankruptcy Register, middle 92–93 page, last clause and first paragraph of 96 page. *Schuyler*, 2 Bankruptcy Register, 549.)

Under our statute the creditors having placed on file the examination of the debtor and other witnesses, disclosing that the debtor was not entitled to his discharge, they might well rely upon the court without filing objections, might urge the records as a ground for refusing the discharge; and if the insolvency court disregard the records, on the ground that no objections are on file, and grant a discharge, appeal will lie.

Joseph C. Holman, for the insolvent debtor, cited: *Dow, App't*, v. *Young*, 4 New Eng. Rep. 503; R. S., c. 70, § § 30, 44; 8 Gray, 316; Spaulding's Practice, 29, 30; Hamlin, Insol. 21; Bump. Bank, 386.

PETERS, C. J. It was decided in *Dow* v. *Young*, 4 N. E. Rep. 503, that if a creditor does not appear at the time appointed by the judge of insolvency for a hearing on the question of the debtor's

discharge, he has not, as a rule, any right to appear for such purpose afterwards; the opportunity for objecting to a discharge will be lost. He must appear as an objecting creditor. The insolvent law is strict with debtor and creditor alike, and allows no laxity or negligence. It requires expeditious, business-like proceedings.

Having made the appearance as an objecting creditor, the judge may grant him indulgence if he pleases. It is held in *Robinson* v. *Chase*, 80 Maine, 395, that the judge may extend the time for filing objections to a discharge.

The return day which was appointed for a hearing on the debtor's petition, was August 3, 1887. On July 6, 1887, the objecting creditor made a written motion for an examination of the debtor and two others, and this was also assigned for a hearing on August 3, 1887. When the return day came, the creditor appeared, and attended to the examinations on that and subsequent days, but the record does not show that he put in any appearance to file objections to the debtor's discharge. He now contends that such must have been the implication from what he did; that his action indicated such an intention. We think his conduct indicated an intention to appear, but the block in the way is that he did not in fact appear for that purpose. He postponed his appearance on the petition for discharge to a later time. Intention to do is not doing.

There is no doubt that the judge would have a right to amend the record if there had been oral proceedings which should have gone upon record, but that idea is negatived by the judge refusing a right of appeal. It does not necessarily follow that the creditor even intended to appear against the debtor's discharge. He may have pursued the examinations for the purpose of rendering assistance to the judge, without assuming personal responsibility,—or for some ulterior purpose.

The creditor further contends that he may appeal from a decree of discharge, whether he files objections or not. That position is a misinterpretation of the statute which requires a creditor to file a specification of his objections. He is in that way to aid the judge in the discovery of reasons which may exist against

granting a discharge. If he fail to disclose his grounds of opposition at the right time before the decree, he can find no fault that he cannot be allowed to appeal afterwards. The judge should be informed and assisted by the creditor before the decree is made. The presumption is, that, if a creditor cannot before the decree, and at the time appointed for such purpose, show good cause why a discharge should be denied, he cannot afterwards. If this were not the rule, then any creditor could enter an appeal whether there be any real grounds for an appeal or not. Such a practice would lead to looseness and irresponsibility in the procedure not comporting with a due and orderly administration of the law.

Denying the creditor this privilege which he claims, does not prevent a refusal of discharge by the judge, nor prevent the creditor from rendering to the judge assistance in his investigations, if, in his discretion the judge sees fit to accept the same. But whatever his decree may be, no creditor, who has not observed the preliminaries required by the statute, can appeal therefrom. *Exceptions overruled.*

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

JAMES W. PENDLETON *vs.* INHABITANTS OF NORTHPORT.

Waldo. Opinion November 30, 1888.

Ways. Defect. Notice.

Notice to the town officers that a culvert was not of sufficient size to readily vent the water seeking its way through it, in time of a freshet, is not notice of a defect in the way produced by an overflow of the water at such time.

ON report.

This was a special action of the case under R. S., c. 18, § 80, to recover the value of a horse alleged to have died from the effects of injuries received on the twenty-ninth day of April, 1888, by reason of a defect in a way in the defendant town.

The facts are sufficiently stated in the opinion.

J. H. Montgomery, for the plaintiff, cited: *Smyth* v. *Bangor*, 72 Maine, 249; N. E. R. Vol. 1, page 118, R. I.; *Hinckley* v.

Somerset, N. E. R. Vol. 5, page 377; *Monies* v. *Lynn*, 119 Mass. 273–5; *Brooks* v. *Somerville*, 106 Mass. 271; *Holmes* v. *Paris*, 75 Maine, 559.

W. P. Thompson and R. F. Dunton, for the defendants, cited: R. S., c. 18, § 80; *Spaulding* v. *Winslow*, 74 Maine, 564; *Church* v. *Cherryfield*, 33 Maine, 460; *Merrill* v. *Hampden*, 26 Maine, 234; *Moore* v. *Abbot*, 32 Maine, 46; *Farrar* v. *Greene*, 32 Maine, 574; *Smyth* v. *Bangor*, 72 Maine, 252; *Ryerson* v. *Abington*, 102 Mass. 526; *Parkhill* v. *Brighton*, 61 Iowa, 103; *County Com.* v. *Burgess*, 61 Md. 29; *Indianapolis* v. *Cook*, 99 Ind. 10; *Pittsburgh R. R. Co.* v. *Taylor*, 104 Pa. 306.

PETERS, C. J. The plaintiff's horse was injured while his owner was attempting to drive along a highway in the defendant town, at a place where a covered culvert had become broken and out of repair from an overflowing caused by unusually heavy rains. It was established at the trial that the culvert, in its original construction, was not of sufficient size to readily vent, at all times, the amount of water seeking its way through it, thereby causing an occasional overflowing of the road. The town, through its officers, did not have actual notice of the defective condition of the road twenty-four hours before the accident happened, and in fact the defect had not then existed that length of time. The town, however, knew of the narrowness of the culvert, and that it was inadequate to carry off the current of water to which it was occasionally subjected.

The plaintiff contends that knowledge on the part of the town of the original construction of the culvert, and of its susceptibilities and tendencies for getting injured and out of repair in case of a heavy rain-fall, was actual notice of the defect produced by such causes, and that the undersized culvert was the proximate and responsible cause of the accident.

We do not believe that the law imposes on towns such an enlarged liability as that construction would require of them. It would be frittering away the very reasonable requirement that, to establish liability, there must be actual notice of the actual

defect. Notice of the cause of the defect, or of some conditions which in some contingency might cause or create a defect, is not enough. The case of *Smyth* v. *Bangor*, 72 Maine, 249, is emphatical on this point, where it is said, "The notice must be of the defect itself, of the identical defect which caused the injury. Notice of another defect, or of the existence of a cause likely to produce the defect, is not sufficient." Other cases are to the same effect. *Bragg* v. *Bangor*, 51 Maine, 532; *Ryerson* v. *Abington*, 102 Mass. 526. There is every reason for adherence to this rule. Towns have suffered many harsh and inequitable verdicts in road cases under the old rules on the subject of notice. The present statute was intended to work a reform in that respect. In the case before us, the defect was the broken and not the unbroken culvert, the culvert as it was after and not before the deluge of rain. And of that the town had not the statutory notice.

Judgment for defendants.

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

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2. "Twelve acres pasture lot" is not a sufficient description for the purposes of taxation, nor to support a tax title. *Ib.*
3. An executor, holding bonds in trust to pay the interest to a resident of this state, cannot withhold out of the interest a sum sufficient to pay the taxes on the bonds. *Gould* v. *Graves*, 509.
4. By R. S., c. 6, § 14 cl. VI, the taxes upon such bonds are to be assessed directly to the person who receives the interest, or, if the beneficiary is a married woman, to her husband. *Ib.*

TELEGRAPH.

1. A stipulation or regulation of a telegraph company that it will receive messages to be sent without repetition during the night for delivery not earlier than the morning of the next ensuing business day, at reduced rates, on condition "that the sender will agree that he will not claim damages for errors or delays, or for non-delivery of such messages, happening from any cause, beyond a sum equal to ten times the amount paid for transmission," although assented to by the sender, is unreasonable and void as against public policy. *Fowler* v. *Western Union Telegraph Co.* 381.

WITNESS.

WORDS.

The following errors have been noticed in Volume 79:

The word "pumps" in the fourth line of the head note on page 140, should read "fires."

The word "Clark" in the twelfth line of page 423, should read "Cook."