REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

BY CHARLES HAMLIN,

REPORTER OF DECISIONS.

MAINE REPORTS,

VOLUME LXXXI.

PORTLAND, ME.:
LORING, SHORT & HARMON.
1889.

WILLIAM M. MARKS, PRINTER, PORTLAND.

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. CHARLES E. LITTLEFIELD.

FROM JANUARY, 1889.

TABLE OF CASES REPORTED.

TABLE OF CASES

CITED BY THE COURT.

CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

CHARLES A. AREY *vs.* SAMUEL P. HALL, and others.

Hancock. Opinion December 8, 1888.

Shipping. Agency. Promissory Note. Money had and received. Action by Assignee. R. S., Chap. 82, *Sec.* 130.

A ship's husband may contract bills against the vessel, but cannot, by virtue of his office, borrow money on the credit of the owners, to pay them.

It is a general rule, applicable to the facts here reported, that a person who receives the benefit of the money or property of another, is not liable to the owner therefor, in the absence of contract between the parties, if there be any ground upon which the money or property, or its benefit, may be rightfully retained by him without accounting to the owner.

A ship's husband, himself an owner, borrowed money of another owner, with which to pay bills on the vessel, without authority of the owners, undertaking to give a note therefor as their agent. *Held*, that the owners are not liable for the money, in an action in the name of the lender, or in the name of any person to whom the claim has been assigned by the lender.

The doctrine of the case of *Otis* v. *Inhabitants of Stockton*, 76 Maine, 506, as qualifying the rule stated in previous cases, is re-affirmed.

ON REPORT. This was an action of assumpsit against all the

owners of the schooner, J. G. Stover. The plaintiff claims as assignee of Amos S. Arey, a part owner, who loaned money to S. P. Hall, a part owner and agent of the vessel, and took Hall's note, signed by him as agent for schooner and owners. The writ contained two counts upon the promissory note. There was also a count for money lent, money expended, and money had and received. The first count upon the note is as follows: "In a plea of the case, for that the said defendants, at said Bucksport, to wit, at said Ellsworth, on the 28th day of May, A. D. 1885, by their promissory note of that date, by them subscribed, promised one Amos S. Arey, to pay him the sum of $700 on demand, with interest; and the said Amos S. Arey, thereafterwards, to wit, on the 14th day of September, A. D. 1887, by an instrument in writing under his hand, assigned, transferred and set over said promissory note, and all claim thereunder to the said plaintiff; which said written assignment is filed with this writ in court; by reason and in consideration whereof, the said defendants became liable, and promised, etc."

Plea, the general issue with a brief statement that "said promissory note declared on in the plaintiff's writ, was the note of S. P. Hall, and not the note of these defendants."

Wiswell, King and Peters, for plaintiff.

No express authority to Hall to borrow the money being proved, the authorized payment by him of these lawful debts against the owners, creates or constitutes the cause of action. *Billings* v. *Monmouth*, 72 Maine, 174; *Bank* v. *Stockton*, Ibid, 525. In *Lincoln* v. *Stockton*, 75 Maine, 141, the principle is again reaffirmed and again it is emphasized, that it is the extinguishment of legal claims against the town which is the very basis of the claim.

We are entitled to recover so much of the $700 as was actually used in the extinguishment of these claims.

Hall, being ship's husband, was authorized to make the payments. Abbott on Shipping, page 107. Parsons' Maritime Law; *McCready* v. *Thorn*, 51 N. Y. 454.

Hall could recover if he had advanced the money himself.

Rennell v. *Kimball*, 5 Allen, 356, 367. Defendants have ratified the payments by retaining the benefit thereof. *Kenan* v. *Holloway*, 16 Ala. 53.

A part owner who furnishes necessary repairs for a vessel in a foreign port, or who pays for such repairs, can recover from the other owners their proportion of such disbursements. *Benson* v. *Thompson*, 27 Maine, 470; *Hardy* v. *Sproule*, 31 Maine, 71.

No need of going into equity. Case does not involve any question of profit or losses, earnings or expenses, or settlement of ship's accounts.

Assignee may maintain the action in his own name. R. S., c. 82, § 130.

Charles P. Stetson, *O. F. Fellows* with him, for defendants.

PETERS, C. J. The claim here in suit is for money had and received by the defendants of a person who sues in the name of an assignee. It will be convenient to speak of such person as the plaintiff.

He and the numerous defendants were, in 1885, owners, as tenants in common, of a schooner which hailed from Bucksport, where the owners resided. One of the owners, S. P. Hall, was ship's husband. In May of that year the vessel went ashore on Nantucket, and bills were incurred for her preservation and repair. Hall, then in good financial credit, without the knowledge or authority of his associates, procured from the plaintiff, at the plaintiff's suggestion, $700.00 with which to pay the bills on the vessel, giving his own note therefor, reading as follows:

"BUCKSPORT May 28, 1885.

$700. Borrowed and received of A. S. Arey seven hundred dollars to pay bills on the schooner J. G. Stover, it being for wreckers and repairs bills, payable on demand and interest.

S. P. HALL,

Agent for schooner J. G. Stover and owners."

Hall placed the money in bank to his private credit with one or two hundred dollars of other money, and paid the bills by drawing checks on the bank account for their respective amounts. He did not at the time place the borrowed funds to the credit of

the owners, nor render it to them in any account until after his insolvency and failure occurred two years afterwards. Hall owed the owners $300.00 for the vessel's earnings when he borrowed of plaintiff, and $1300.00 when he failed, exclusive of the borrowed money. The plaintiff made no demand for his money, not needing it for his own use, until this suit was instituted.

The plaintiff endeavors (in the name of the assignee) to maintain the action by proving that the money he loaned to Hall was actually expended to pay the bills against the vessel.

It is not pretended that Hall was authorized to borrow the money on the personal credit of the owners. Clearly, he was not. If he could borrow money for one purpose, he might use it for another purpose, and therefore the law does not invest a ship's husband with such authority. Of course, he might be expressly authorized by the owners to borrow. He may contract bills against the vessel, though he may not borrow money on the vessel's account to pay them. 3 Kent Com. 187. Story Agen. (9th ed.) § 35, and note. 1 Bell. Com. (5th ed.) 504.

The plaintiff, however, contends that he is entitled to recover upon another ground, which is that the owners have enjoyed the benefit of the money in the payment of their debts, and cannot retain that benefit without rendering to the plaintiff compensation therefor. It is contended that the defendants, by refusing restitution, have ratified the act of their agent. It is not difficult to see that such a sweeping proposition would almost entirely subvert the principles of agency before mentioned. It makes the principal liable in all cases for unauthorized borrowings by his agent, provided the agent expends the money in the management of the principal's business, regardless of the existence of any equities or necessities which should exonerate the principal from making restitution.

It is well settled, as a general rule, that a person who has received the benefit of the money or property of another, is not liable to such person therefor, in the absence of contract between the parties, if there be any ground upon which the money, or property or its benefit, may be rightfully retained by its possessor without accounting to the owner. Ratification of another's act does

not result in such case. It is the wrongful keeping of another's property, which creates liability to him.

There are several reasons why this rule is applicable to the facts of the present case.

In the first place, it is at least doubtful if, in a legal sense, it was plaintiff's money that went to the benefit of the defendants. It was legally loaned to Hall. Hall was and still is liable on the note. As one of the owners he surely does not wrongfully retain the money. He merely neglects to pay his note. There is a difference between money, which has no ear mark, and other property. *Dwinel* v. *Sawyer*, 53 Maine, 24. *Thatcher* v. *Pray*, 113 Mass. 291.

It was held, in *White* v. *Sanders*, 32 Maine, 188, that, if one wrongfully sell the plaintiff's goods, the receipt of money from him by the plaintiff on account of the goods, would not be a ratification of the sale, provided the plaintiff would have a right, without ratifying the sale, to keep the money. *Hastings* v. *Bangor House Proprietors*, 18 Maine, 436, is a marked illustration of the same principle.

One reason why the defendants are not wrongfully withholding the borrowed money, is that they are unable to restore it. It has gone into the vessel without the defendants knowing they were receiving the plaintiff's money. It was held in *Davis* v. *School District*, 24 Maine, 349, that a school district cannot be considered as promising to pay for unauthorized repairs on their school-house, by using it afterwards. They could restore what they had received only by an abandonment of their property, and that they were not obliged to do. *School District* v. *Ætna Ins. Co.*, 62 Maine, 330.

Further, the defendants' condition has become changed, without notice of the plaintiff's claim. Instead of being indebted to the ship's husband, he has become a debtor to them in a larger sum than the plaintiff's claim, and is insolvent. The plaintiff has slept on his claim. *Bryant* v. *Moore*, 26 Maine, 84.

The town cases, relied on by the plaintiff, properly understood, are not inconsistent with these views, and do not support the plaintiff's contention. In the first of them the doctrine was

rather too broadly stated, 72 Maine, 522, and in *Lincoln* v. *Stockton*, 75 Maine, 141, some qualification of the doctrine of previous cases was intended; and in *Otis* v. *Stockton*, 76 Maine, 506, the doctrine is enunciated more satisfactorily.

Another difficulty which is in the way of a recovery in this action, is that no action at law for contributions for advances by one owner can be maintained against the other owners jointly. A joint remedy must be in equity. And the assignee can have no greater right in this respect than the assignor. An owner cannot enlarge his claim against co-owners by selling it.

Plaintiff nonsuit.

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

ALLEN MERRILL, in equity, *vs.* JOSEPH A. JOSE and wife.

Penobscot. Opinion December 8, 1888.

Equity. Married Woman. R. S., Chap. 61, *Sec.* 1; *Chap.* 76, *Sec.* 32.

The interest which a wife has in a written contract for the conveyance of land to her by a third person, the payments therefor having been made by her husband out of his own money or means, may be taken in an equitable process against husband and wife, to be appropriated by a creditor on a debt of the husband occurring before the existence of the contract to convey.

BILL IN EQUITY. Heard on demurrer to bill.

The case is stated in the opinion.

Crosby and Crosby, for defendants.

Bill cannot be sustained at common law.

The statute, on which the bill is founded, has no reference to an interest by bond.

Case presents no special claim in equity. The husband is alleged to have paid the first two notes. If so, his wife owes him

$200; he can be compelled to assign this indebtedness on a poor debtor's disclosure.

Blake v. *Blake*, 64 Maine, 177; *Gray* v. *Chase*, 57 Maine, 558; R. S., c. 61, § 1.

Shepherd should be made a party to the bill. *Chase* v. *Hathaway*, 14 Mass. 222.

V. A. Sprague, for plaintiff.

Shepherd not a necessary party. R. S., c. 81, §§ 56, 60. *Ib.* c. 76, §§ 32, 51.

The interest under a contract or bond for the purchase of real estate, is attachable. Counsel also cited *Blake* v. *Blake*, 64 Maine, 182, and *Bell* v. *Packard*, 69 Maine, 105. The allegations in the bill sufficient. *Hamlen* v. *McGillicuddy*, 62 Maine, 268. Having a legal remedy, may resort to equity. *Ibid.*

PETERS, C. J. In *Sampson* v. *Alexander*, 66 Maine, 182, it was held that real estate purchased by the wife, so far as paid for by the husband's money or means, is, in equity, liable to be taken to pay her husband's debts contracted prior to her obtaining title to such real estate; and in that case a bill in equity was sustained against the husband and wife to reach the husband's interest.

The statute on which the decree in that case was founded, is not confined to realty, but applies to personal property as well. R. S., c. 61, § 1, provides that when payment has been made, for "property" conveyed to her, from the property of her husband, it may be taken as the property of her husband to pay his debts contracted before such purchase.

We cannot see why this statutory provision does not furnish a remedy in the present case. The bill alleges that the complainant is a judgment creditor of the husband; that after the judgment was obtained the husband contracted for the purchase of a parcel of land of Abner Shepherd, to be conveyed for the consideration of three hundred dollars payable on time; that the bond or written agreement was taken from the seller by the husband in the wife's name for his benefit; that the husband has already actually paid two thirds of the purchase money out of his own

property or means; that an execution has been issued on the judgment and *nulla bona* returned thereon; and he therefore prays that the right to a conveyance, nominally and apparently the wife's, but really the husband's, may be in some proper manner taken and appropriated to the debt due him from the husband.

The right which the wife has in her name is an equitable real estate, or an equitable interest in real estate, which, if in the husband's name, could be attached and levied on by the complainant for his debt. R. S., c. 76, § 32. Not being in the husband's name, the ordinary legal proceeding would not apply, and resort must be had to a remedy in equity. The husband cannot, under the shelter of his wife's name, conceal from his creditors the attachable interest in a right to title in land any more effectually than he could the title itself. Either is attachable property, and property within the meaning of the statute, before quoted, which regulates the property rights of husband and wife.

The bill is not very artistically or completely drawn, but the arguments have made an issue only on the general legal merits of the proceeding, no minor questions being presented. We think the defendants should have the right of further answer.

Demurrer overruled.

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

INHABITANTS OF MONSON *vs.* JOHN C. TRIPP and others.

Piscataquis. Opinion December 8, 1888.

Note. Deed. Consideration.

A note is not without consideration because given by a grantee for a quit-claim deed of land of which the grantor had no title whatever, no misrepresentation having been made or deceit practiced; though equity might extend relief in an extreme case of the kind on the ground of mistake.

A note given to a town for a deed in its name, executed by its treasurer without any previous authority or subsequent ratification by vote of the town, is without consideration and between the parties void.

The makers are not estopped to set up such a defense in an action by the town on the note, by the fact that they in turn conveyed the same land, receiving something therefor, to still other parties.

ON REPORT.

ASSUMPSIT on the defendants' promissory note given to the town for a quitclaim deed of a lot of land, executed by the town treasurer, but without authority. It was admitted that the town had no title to the land, and defendants never had possession.

J. F. Sprague, for plaintiffs.

Defendants knew there was no authority for the conveyance. Chapin, town officer and clerk had notice of want of authority. *Johnson* v. *Williams*, Kan. Sup. Ct., Albany Law Journal, vol. 36, page 238. Taking quitclaim only, the defendants were put upon inquiry.

"The buyer of land is at his peril to see to the title." *Pasley* v. *Freeman*, 3 T. R., 56. Same doctrine laid down in *Hammatt* v. *Emerson*, 27 Maine, 308; *Wyman* v. *Heald*, 17 Maine, 329; *Coburn* v. *Haley*, 57 Maine, 346.

Defendants having sold and conveyed the land estopped from setting up illegality of town's deed, or denying validity of sale. *Reed* v. *Crapo*, 127 Mass. 405.

Henry Hudson, for defendants.

It is the established law of this state that a total failure of title is a valid defense to this note, it not being in the hands of innocent holders. *Jenness* v. *Parker*, 24 Maine, 296; *Wentworth* v. *Goodwin*, 21 Maine, 154; *Gates* v. *Winslow*, 1 Mass. 63; *Fowler* v. *Shearer*, 7 Mass. 21; *Howard* v. *Witham*, 2 Maine, 390; *Hodgdon* v. *Golder*, 75 Maine, 295.

Nothing passed by the deed. *Merrill* v. *Burbank*, 23 Maine, 538.

There is no rule of law that the officers of a town must be acquainted with the contents of all its records. *Lancey* v. *Bryant*, 30 Maine, 467.

PETERS, C. J. The defendants are sued upon a note given by

them to the town of Monson for a quitclaim deed of a tract of land to which the town claimed title under a tax deed. The title of the town was utterly worthless, and admitted to be so. The proceedings were void by which it was undertaken to create the tax title. It was wild land, and neither the town nor its grantees ever had any possession of it or derived any rents or profits from it. It is also admitted that the deed to the defendants was made by a town treasurer without any vote of the town authorizing a conveyance, and that the town has never by any vote ratified the treasurer's act.

It is contended that the note is without consideration and not recoverable, for two reasons. First: Because the deed failed to convey any title whatever. We do not concur in this view. It is against our own decisions. Had the deed been authorized by the town, the town selling such title as it had or might have, without any misrepresentation or deceit on its part, the contract would have been a legal one. *Emerson* v. *County of Washington*, 9 Maine, 88. *Soper* v. *Stevens*, 14 Maine, 133. *Butman* v. *Hussey*, 30 Maine, 263. Equity will sometimes relieve parties in such transactions, on the ground of mistake, if the mistake be of a character grave enough to justify its interposition.

Secondly: The defendants claim that the note is without consideration and void because the treasurer possessed no authority to convey the property for the town. On this point the defense can be sustained. An unauthorized deed is not a deed. If a treasurer can, of his own volition, convey away the doubtful titles of his town, he may convey all its titles and property in the same way. He is not invested with any such privilege, and his act in this instance was unquestionably void.

The plaintiffs contend that the defendants are estopped to set up this point of defense, because of their after conveyances of some portions of the same land to other persons, the defendants obtaining about twenty-five dollars in all from such persons. That was a matter between the defendants and third persons in no way affecting the town, and the fairness of their after dealings, and the question whether those dealings resulted in losses or profits, we cannot take into consideration. Nor does the

bringing of a suit on the note by some town officer without any vote or instruction from the town, establish any liability upon the defendants. *Bliss* v. *Clark*, 16 Gray, 60.

Judgment for defendants.

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

BEYMER BAUMAN LEAD CO. *vs.* JAMES H. HAYNES and others.

Penobscot. Opinion December 8, 1888.

Contract. "Protect and Guarantee."

An agreement by a manufacturer and seller of white lead "to protect and guarantee" a customer on lead, means that the manufacturer will supply the article to his customer as low as the most favorable market price at the time of delivery. Sales or offers exceptionally low for special reasons, not representing fair market price, would not govern.

ON REPORT. After the evidence was out the action was withdrawn from the jury and reported to the law court. The full court were to render such decision as the legal rights of the parties require, from the admissible evidence, being invested with jury powers, &c.

The case appears in the opinion.

Lewis Barker, T. W. Vose and L. A. Barker, for defendants.

The defendants claim that the plaintiffs agreed, by the telegram and letter in reply, to furnish them what white lead they might order for the season's trade, for 5½ cents per lb., less 2½ per cent. in 60 days; and for less, if the defendants could buy of responsible parties for less. Defendants thereby agreed to take the season's lead of them.

Plaintiffs' interpretation of "protection and guaranty"—meaning that in no case shall the purchaser pay more than the price fixed upon—is little more than a play upon the words, since

every other corroder might sell for less, and defendants being bound to take the season's lead of the plaintiffs, must pay their price.

The defendants, wholly on account of plaintiffs' failure to fill their orders, paid out for lead in the market, and freight, $60.43 more than the contract price with plaintiffs,' and hence is a legitimate charge in offset to plaintiffs' bill.

Upon the question of usage, counsel cited *Jones* v. *Hoey*, 128 Mass. 585.

Charles H. Bartlett, for plaintiffs.

The first contract was that the plaintiffs should sell the defendants lead at the lowest price *their own* lead reached, up to the time when their agent should arrive.

If the defendants, as they claim, were to have the benefit of the protection and guaranty for the whole season, what was the need of having the plaintiff's agent call on them? Suppose the agent had come, would the defendants been bound to buy lead of him or his concern?

They made no objections to the price and terms specified in the different invoices, on all of which it plainly appears that the 2½ per cent. cash discount was at the end of *fifteen days*.

It was not the event of the agent's coming which was the important thing, it was time which was thereby fixed. The defendants lost nothing by failure of the agent to come. The plaintiffs immediately corresponded with them in regard to the sale of the lead, and the defendants made no objection that the agent did not come. The prices charged are the lowest in the market for the season. All the witnesses testify that the sixty days refers to the time when the bill must be paid, and the discount is connected with the fifteen days.

The other lead was not sent because the defendants furnished no specifications for more than 9,500 pounds, and because they did not pay the first invoice when due, and were already claiming damages for delay.

PETERS, C. J. There are differences between the parties as to the construction of certain correspondence between them con-

cerning the sale and delivery of amounts of white lead, and a resort was had to the testimony of experts in the trade to ascertain the meaning of certain short expressions and abbreviations in the correspondence which would not explain themselves.

The defendants expecting the arrival of the plaintiffs' agent, with whom they were to make more definite terms, telegraphed the plaintiffs in these words, "Will you protect and guarantee us on lead until your agent gets here? we are offered inducements." The answer was "yes."

The plaintiffs contend that this meant that, until other arrangement should be personally made by the agent, the lead forwarded should be priced as cheaply as the same article was sold by them to any one else, while the defendants' construction is that the price should be as low as any other party would have sold the same thing to them. We are satisfied that the meaning of the expression was that the plaintiffs would sell as low as the most favorable market price at the time. Other sales or offers which were exceptionally low for special reasons, not representing or reflecting fair market price, would not govern. Offers have not the force of sales. We are further satisfied that plaintiffs' prices were not an overcharge, but fair and reasonably low.

There is a difference as to how long the contract before named would continue in case the agent did not arrive according to the anticipation of the parties. He failed to go to Bangor where the defendants resided. We see no materiality in this minor issue, discussed on briefs of counsel, inasmuch as the parties, in the absence of the agent, settled the terms of the contract by letters between themselves.

But the meaning of this, lastly made contract, is in contention. The defendants contend that the bargain was for lead "5½, less 2½, 60 days," or, in other words, that the lead was to be 5½ cents per pound, with 2½ per cent. discount on the price if paid in 60 days, with interest after that time; while the plaintiffs more correctly contend, we think, from the testimony of the business experts, that the contract was 5½ cents per pound, with 2½ per cent. discount if paid in fifteen days, otherwise in 60 days without discount.

In our opinion, after careful scrutiny of the rather uncertain and indefinite evidence, on the question of damages, the defendants had some cause of complaint for tardy deliveries that caused them some additional expense in the business, which, as nearly as the same can be estimated or computed, should reduce plaintiffs' claim from $65 to $30. Judgment for that amount to be entered for plaintiffs.

Judgment for plaintiffs.

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

SUSAN DANBY *vs.* SAMUEL E. DAWES.

Hancock. Opinion December 8, 1888.

Probate. Petition. Jurisdiction. Amendment.

A petition asking that administration be granted on the estate of a person deceased, in which it is alleged that such person died intestate, possessed of goods to be administered, implies goods of the amount to authorize administration.

The judge of probate would not in fact have jurisdiction unless it turns out that the intestate died possessed of personal property of the value of at least twenty dollars, or that he owed debts of that amount and had real estate of that value.

And it would be better practice to so aver in the petition for administration.

The petition in this case, or in any such case, may be amended by permission of the judge of probate. That court may allow amendments.

ON EXCEPTIONS.

This was an appeal from the probate court appointing an administrator on the estate of Joseph Dawes, deceased. The appellant alleges, among other reasons for the appeal, that sufficient facts were not alleged in the petition for appointment, and that sufficient facts did not exist to authorize the granting of administration.

The presiding justice, in this court, found that sufficient facts

did exist, and ruled that administration could lawfully be granted in the present proceeding, and passed a decree affirming the appointment of an administrator by the probate court.

Appellant excepted to this ruling and decree.

Hale and Hamlin, for appellant.

The petition should allege sufficient facts to show the matter clearly within the jurisdiction of the court. This petition does not allege either that "the deceased left personal estate to the amount of at least twenty dollars, or owed debts to that amount and left real estate of that value."

The record of the probate court must show jurisdiction. *Overseers of Fairfield* v. *Gullifer*, 49 Maine, 360; *Gross* v. *Howard*, 52 Maine, 197.

The allegations in a petition are not presumed to be true, if not objected to, but their truth must be made to appear. Waterman's Probate Practice, p. 3; cases *supra; Moore, Admr.* v. *Philbrick*, 32 Maine, 102; *Bean, Admr.* v. *Bumpus*, 22 Maine, 549; *Record, Adm'r.* v. *Howard, Admr.*, 58 Maine, 225.

Wiswell, King and Peters, for appellee.

The finding of the appellate court upon the question of fact presented by the appeal is conclusive. *Crocker* v. *Crocker*, 43 Maine, 562. That issue, then, is not before this court. Upon the question of jurisdiction, counsel cited *Veazie Bank* v. *Young*, 53 Maine, 555; *Wiggin, Admr.* v. *Swett*, 6 Met. 197; *Deering* v. *Adams*, 34 Maine, 44; *Gilman* v. *Gilman*, 53 Maine, 188; *Boynton* v. *Dyer*, 18 Pick. 1.

PETERS, C. J. A petition was filed in the probate court, asking the appointment of an administrator on the estate of Joseph Dawes, alleging that he "died intestate, possessed of goods remaining to be administered, leaving no widow." The question presented by the exceptions is whether, under such a petition, an administration can be legally granted. The appellant contends that the petition on its face fails to show that the judge had jurisdiction, because it does not aver either that the intestate died possessed of personal property of the value of at least twenty

dollars, or that he owed debts of that amount and left real estate of that value. The statutes require that such a condition of the estate shall exist in order to authorize administration. R. S., c. 63, § 6, and c. 64, § 1.

The appellee contends that the petition implies that sufficient facts exist to warrant administration, that "property to be administered" means an amount exceeding twenty dollars, and that the statutes are satisfied by the proof to be furnished rather than by the allegations made.

While we would not discourage formal and orderly proceedings in the probate court, we think that the technical strictness of allegation which the appellant invokes is not indispensable, and that his exceptions must be overruled. That court is not one of general or common law jurisdiction, and formal pleadings are unknown in its proceedure. Its practitioners are largely persons who do their own business before the court, or unprofessional persons whom their neighbors have employed to act for them.

The appellant correctly contends that the records of the probate court must show that it had jurisdiction in the cases in which it acts. Still it does not necessarily follow that the petition shall aver everything which may be proved to authorize jurisdiction. We think the form of petition in this case is one which has been principally used in probate court practice in this state for many years, and still the form of allegation which the argument of the appellant prescribes as the correct one would no doubt be better pleading.

Why does not the record in this case indicate jurisdiction? The presiding judge found as a basis for his ruling all facts necessary to confer jurisdiction, namely, that the intestate died leaving real estate to the value of at least twenty dollars, and owing debts of that amount. These findings will be as much a part of the record as the petition will be. The same findings should and it is to be presumed, will appear in the record of the court below. By R. S., c. 64, § 1, no administration is to be granted, "unless it appears to the judge" that the requisite amount of estate was left by the deceased. The fact must be found by the judge whether alleged or not.

The probate judge had ample authority at any time, and will continue to have until the proceedings are closed, to allow the petitioner to amend his petition. In *Edds & wife*, appellants, 137 Mass. 346, where a petition for the adoption of a child was objected to as insufficient because not containing all the allegations to make out a case, the court said, "We do not think that the technical rules of pleading should be stringently applied in a case of this kind. It is more important that the petition should contain facts * * * which would give information to those interested than that it should be formally correct as a pleading. If practically insufficient the probate court can order an amendment."

The cases cited by the appellant do not bear out the technical proposition advocated by him. In *Gross* v. *Howard*, 52 Maine, 192, the petition did not aver sufficient facts to give jurisdiction over the subject-matter involved in the petition, and the decree found no facts other than those averred, and still the court discussed and considered facts extraneous of both the petition and decree in arriving at their conclusion. In *Fairfield* v. *Gullifer*, 49 Maine, 360, a demurrer was filed in the appellate court to a petition for guardianship, and the petitioner saw fit to join the demurrer, instead of asking for an amendment, as a direct mode of ascertaining whether the facts alleged were sufficient; he undoubtedly having no other facts to stand upon.

Exceptions overruled.

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

STATE *vs.* GEORGE W. HALL.

Sagadahoc. Opinion December 9, 1888.

Warrant. Return. Intoxicating Liquors.

Where an officer is commanded by a warrant to seize liquors described therein, and he says in his return on the warrant: "By virtue of this warrant I have seized liquors," describing them in the same way as described in the warrant, the return will be good.

The return implies that the liquors ordered to be seized and the liquors seized are the same.

ON EXCEPTIONS, to the ruling of the court in overruling defendant's motion in arrest of judgment.

The principal ground of the motion, relied on by the defendant was that, "the return of the officer on the warrant, wherein the defendant was arrested, does not show that the liquors seized by virtue of the said warrant were the same liquors alleged in the complaint to have been found and taken and kept by the complainant, nor does any part or the whole of the record."

W. Gilbert, for the defendant.

The return on the warrant is not sufficient to put the defendant on trial.

The return is silent as to the liquors, alleged in the complaint, to have been previously found.

There is nothing in the return which discloses any identity of the liquors seized, with those alleged to have been previously found in the possession of the defendant.

This identity must appear in order to give the magistrate jurisdiction of such a complaint.

If the return in connection with the complaint, does not disclose alleged facts to make a case of guilt against the person accused, then the case stands upon the same ground as any other case, where the charge is defective. There being nothing to rest a judgment upon, judgment must be arrested.

No material fact can be presumed. The facts above referred

to are material. Therefore, they must be specified in the return, thus being equivalent to an averment in a complaint, and proved.

F. J. Buker, county attorney for the state.

PETERS, C. J. The point taken, by a motion in arrest, against the validity of the officer's return on the warrant in this case, is, that the return does not with sufficient certainty indicate that the liquors declared against in the complaint and warrant, are the same liquors which were seized. The officer commences the return by saying: "By virtue of the within warrant I have seized the following described liquors," then describing them particularly. It is contended that, while the two descriptions of liquors, that in the warrant and that in the return, may appear alike, the officer does not say in the return that they are the same.

But the officer does say that the liquors were seized by virtue of his warrant and that is equivalent to saying they are the same; for, otherwise, the seizure would have been made in defiance of his warrant rather than in pursuance of it. The return clearly imports, if it does not expressly declare, identity. The mandate is obeyed. The decisions uphold such a return as a substantial and sufficient compliance with the duty commanded.

The authority for such form of return dates back as far as the year book 1 Hen. VI, 6, where upon a *scire facias* the return was, "*scire feci* A. B.," without adding the words "within named;" but because it was said, "by virtue of this precept as directed," the return was adjudged good. See *Wilson* v. *Lane*, 2 Salk. 589, where this case is quoted and approved. The precise question that arises in the case before us was elaborately argued and fully considered in *Stone* v. *Dana*, 5 Met. 98, 107, and just such a return was sustained in that case. Other Massachusetts cases are pertinent to the question. *Com.* v. *Intoxicating Liquors*, 4 Allen, at p. 600. *Same* v. *Same*, 6 Allen, 600.

Exceptions overruled.

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

ROBERT M. FIELD *vs.* EDWIN B. CAPPERS.

Kennebec. Opinion December 9, 1888.

Pleading. Puis Darrein Continuance. Repleader.

A plea of release *puis darrein continuance* is defective which alleges no place where the release was made, nor states the day of the last continuance, nor that there had been any continuance, nor any thing of that effect.

When such a plea is adjudged bad on demurrer, the court may allow a repleader on terms.

ON EXCEPTIONS, to the ruling of the superior court, Kennebec county, in sustaining plaintiff's demurrer to a plea of release *puis darrein continuance* filed in that court by the defendant.

The defendant's plea is as follows:

And now comes the defendant in the above entitled action at this first term of entry of said action in said court, and for plea says, that the said plaintiff ought not further to have or maintain his aforesaid action against him, because he says that after the 14th day of our said court, that is to say, after September 21st, 1887, to wit, on the 27th day of September, 1887, the said Edwin B. Cappers, said defendant, then and there paid the said plaintiff Robert Fields, the sum of ten dollars in full settlement, cancellation and discharge of all damages and costs of said suit; and then and there took a receipt-release therefor,—of September 27, 1887, date; said receipt being signed and given by said plaintiff, and here in court to be produced; for the valuable consideration to him paid as aforesaid, did as aforesaid, release and discharge said suit and satisfy all damages and costs named in said writ and caused by said action and all interest therein of every name and nature; and this the defendant is ready to verify.

Wherefore he prays judgment if the plaintiff ought further to have and maintain his aforesaid action against him.

E. W. Whitehouse, for defendant.

The action being an appeal case was in order for trial in the superior court, at the same term it was entered. It was so held

upon the docket. There was no intervening term, or general or special continuance of the action. It simply stood in its order upon the docket for trial. It was the proper plea. It sets forth clearly the meaning and intent of the defendant. The plaintiff is given notice of the nature of the defense. It states the amount to wit, ten dollars, and the purposes for which the money was paid, by whom and to whom paid. It states the place where and time when paid, to wit, in the County of Kennebec, and on September 27, 1887. There having been no continuance of the action in the court, to which this appeal was taken, there is no propriety in alleging, in the plea "since the last continuance."

The demurrer should be special, and not general. *Mahan* v. *Sutherland*, 73 Maine, 158.

The court may allow defendant to plead anew. *Moulton* v. *Augusta*, 75 Maine, 551.

F. E. Southard, for plaintiff.

PETERS, C. J. This action of assumpsit on an account annexed comes from a municipal court to the Kennebec superior court, by appeal. In the appellate court the defendant pleaded, *puis darrein continuance*, a release since the general issue was pleaded in the court below, the plaintiff demurring to such plea.

Great certainty is required in pleas of this description, in both substance and form. It is easy to draft a correct plea of the kind, inasmuch as recourse to the forms which have been universally approved for a century will furnish safe guidance.

The plea here is defective, in that no place is alleged where the release was made or delivered; time and place should be alleged. *Cummings* v. *Smith*, 50 Maine, 568.

It is defective, in that it does not state the day of the last continuance, or that there ever was a continuance. Such a statement in some form is indispensable, under our system composed of common law forms, whilst it may not be so in some courts which are constantly open, and do not adjourn from term to term. So held in *City of Augusta* v. *Moulton*, 75 Maine, 551.

The plea is otherwise uncertain, involved and confused, and vitally defective.

While the demurrer must be adjudged good, and the plea bad, it would be in the furtherance of justice to accord to the defendant the right of repleader on payment of costs accruing since the plea was filed. On failure to do which, judgment in the action to go against the defendant. This concession to the defendant is allowable in the discretion of the court. It was so held in the case last cited.

Demurrer sustained. Plea bad.
Repleader allowed upon terms.

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

JAMES WRIGHT *vs.* EDWIN F. FAIRBROTHER.

Somerset. Opinion December 9, 1888.

Evidence. Burden of Proof. Gift of claim not within R. S., Chap. 122, *Sec.* 12.

A plaintiff, to sustain an action for his professional services expended in carrying on a lawsuit instituted in the defendant's name as plaintiff, has on himself the burden to prove, directly or circumstantially, that the services were rendered by him at the defendant's request, and he is not relieved of that burden by the fact that the defendant undertakes, in the course of the trial, to show that the action really belonged to the plaintiff, who prosecuted it on his own account.

There is no legal impropriety in one person giving to another an account against a third person, which is in dispute and not likely to be enforced except by litigation.

ON EXCEPTIONS, and motion to set aside the verdict and for a new trial, by plaintiff.

The case is stated in the opinion.

James Wright, for plaintiff.

Walton and Walton, for defendant.

PETERS, C. J. The plaintiff sues the defendant for professional services rendered in prosecuting another suit in defendant's name

as plaintiff. To make out a case, he must show that the professional work was done, and that he was employed by the defendant to do it. It is not enough merely to prove that the work was performed, because it may have been without authority, or may have been upon the employment of some person other than the defendant. The defense was that the plaintiff carried on the suit for his own benefit, on a demand which the defendant gave him, the proceeding having been in defendant's name.

It was not denied that the services were performed by the plaintiff, but whether for himself or for the defendant was the question. To show that they were performed for the defendant, it was proved, and also admitted as well, that the defendant was present at the trial and was a witness. Proving that much, the plaintiff asked a ruling that the burden of proof changed, and was cast upon the defendant to show that the services were not rendered on his account; that is what the request amounted to.

The judge refused, and correctly so, to rule according to this proposition. The point may have had some importance, because each party was his own witness,—man against man. We do not see that the main burden resting on the plaintiff was changed.

In the beginning, and none the less at the end, it was incumbent on the plaintiff to prove that the defendant was bound to pay for the services. The defendant did not confess a *prima facie* liability by the defense which he set up, but he undertook to weaken the plaintiff's case by his testimony. There being evidence on both sides, it became a question whether plaintiff had on his side the preponderance of evidence.

The plaintiff had, in support of the burden that lay upon him, the benefit of all the inference that arises from the circumstance of the defendant's attendance at the trial, and that may have been proof enough of his contention unless the defendant explained it away. The jury might have regarded it as conclusive. But the court could not as a legal proposition instruct the jury that they must regard the evidence as conclusive unless explained by the defendant.

The burden or weight of evidence might change, but not the technical burden of proof. It would be incumbent on the defend-

ant, as a matter of course, to prove any facts he relied on in defense, before such facts should be taken into consideration, but he was not necessarily shut out from a defense if he failed to do so. And so the judge, though he said the general burden of proof was on the plaintiff, remarked that "if the matter set up in defense was proved, it constituted a valid defense." Certainly, the defendant could not be called upon to disprove what the plaintiff must first prove. The distinction between burden of proof and burden of evidence, in a case like the present, is rather a fine one, and perhaps not very practical, but we think the judge was not in error in the ruling.

The position that the defense is an illegal one is not sound. Any man can give away anything, an account as well as anything else.

We do not feel that we should disturb the verdict on any of the grounds stated in the motion. The trial was a sharp conflict between the parties as witnesses. One side or the other failed to correctly remember or appreciate the arrangement that existed between them. We cannot certainly say that the jury erred.

Motions and exceptions overruled.

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

FLORENCE E. THOMSON *vs.* SEBASTICOOK AND MOOSEHEAD R. R. CO.

Somerset. Opinion December 10, 1888.

Railroad. Land Damage. Evidence.

It is not a ground of exception that admissible testimony was excluded at one stage of a trial, if the witness from whom the testimony was to be elicited, at another stage of the trial afterwards testifies fully in relation to the matter inquired about.

On the trial of a complaint against a railroad corporation for damages caused to complainant's land, by the location of a railroad over it, it is correct to instruct the jury to take into consideration, in order to ascertain the value

of the land at the time of taking, any permanent injury occasioned by the rightful location of another railroad previously laid across the same land. Any permanent and rightful obstructions on the land might impair its value, while any wrongful or temporary occupation might not.

ON EXCEPTIONS.

An appeal from the award of the county commissioners of Somerset county for damages sustained by the complainant in the taking her land by the defendant for their railroad. At the trial, in this court, the complainant claimed that her land so taken, was valuable for house lots. The defendant replied that the land was unfit for house lots, by reason of the water standing thereon during a portion of the year. The complainant offered to prove that the standing water was caused by obstructions in a drain passing under defendant's railroad, and by the location of another railroad.

The court ruled that the complainant could not be allowed to show a permanent obstruction to the flow of the water there. Subsequently, during the trial, evidence explanatory of this was admitted without objection.

The court, in its charge upon this branch of the case, instructed the jury, in substance, as follows, * * * "It is said that the land itself is not wet or flowed naturally to any considerable depth, but what flowing is caused there, or mainly caused, is by virtue of some obstructions which were put in in past time. All permanent obstructions I excluded for this simple reason: If this railroad was bound to pay for this land as good land, when it was made bad, unvaluable for the parties, by some other person, for instance the Maine Central Railroad not putting their culvert right, then they could get pay for their land twice, because they would have a perfect remedy against the person who made the obstruction, and if they could have another remedy it would give them double pay. But whether their remedy is good or not, this corporation is not bound directly or indirectly to pay for any wrong done by any other person, or any other corporation; but what would be a mere temporary obstruction, carried there accidentally or otherwise, would be proper to prove to a jury as to the real nature of the land, &c. * * *" Verdict for the com-

plainant who excepted to the exclusion of evidence and the instructions to the jury. Verdict was for $532.45.

Brown and Johnson, *S. S. Hackett* with them, for complainant.

The rule of damages is "just compensation." Constitution of Maine, Art. 1, § 21; R. S., c. 51, § 19. Damages too small.

That water is sometimes on the land does not affect its natural condition, or value. Obstructions easily removed and at slight expense.

Complainant should have been allowed to show how the wet condition of land was caused, and how it could be obviated; its susceptibility to use for any lawful purpose, and possibility of changing its present condition for the better. *Drury* v. *R. R. Co.*, 127 Mass. 571; *Meacham* v. *R. R. Co.*, 4 Cush. 291; *Dwight* v. *Co. Com.*, 11 Cush. 201.

J. O. Bradbury, *Merrill and Coffin* with him, for defendant.

PETERS, C. J. If the rulings and instructions are correctly interpreted by the plaintiff's counsel, they were wrong. The question of the case is not very clearly presented. But with the burden on the plaintiff to show that he has been aggrieved we are inclined to believe that his position is not sustained. The matters in controversy were more fully explained by the judge in the reported charge than the exceptions present to us.

An issue of fact in the case was, whether the land taken by the defendant road was naturally wet land or not, the evidence showing that water stood upon it for quite a period during the year. The defendants contended that the wet condition of the land was its natural condition, or that, what would be of the same effect, as between the parties to this litigation, was caused by certain legitimate obstructions, of a permanent character, put on the plaintiff's land by another railroad, the Maine Central Railroad, which prevent the free flowing of the surface water from her land. To counteract this position, the plaintiff contended that the obstruction to a free passage of the water from her land was caused not by the Maine Central Railroad bed, but by a person filling up a brook with rocks, while clearing a parcel of

land, at a point below that railroad, so that the brook would at times flow the water back through a culvert under the railroad upon her land.

An objection was made to the evidence showing this contention, and the objection was sustained. It should not have been. The rocks in the brook were not a permanent obstruction, and the owner above could have gone below and rightfully removed them from this natural water-passage, in order to prevent the incubus of water upon her land. But this error in the ruling was afterwards obviated by the witness going on at a later point in his examination and explaining the matter fully without encountering objection.

The judge in his charge properly made a distinction between permanent and temporary obstructions, taking the position, substantially, that any permanent injury to the land caused by the rightful use of it by the Maine Central road, should be considered as an impairment of its value, which would lessen the damages otherwise to be paid by the defendants. Some of the confusion in the case was evidently owing to the counsel for the defendant objecting to the admission of evidence touching permanent obstructions, when he would have much better allowed its introduction as the very argument that the value of the land taken must thereby be less.

Though it may be doubtful whether the jury fully understood the points at issue between counsel in the case, there is a failure to show that the presiding judge committed any error, or that the exceptions should be sustained.

Exceptions overruled.

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

THOMAS CROSWELL, and another *vs.* ISAAC D. LABREE.

Franklin. Opinion December 10, 1888.

Promissory Note. Alteration. Evidence. Burden of Proof.

The unauthorized alteration of a note payable "to order" by inserting after those words "or bearer," will not vitiate the note if done without any fraudulent or improper intent; but the burden of proof will rest on the holder to show that the act was done innocently.

Such an alteration is material, in that it changes the contract as an instrument of evidence, and enlarges the negotiable character of the note.

ON EXCEPTIONS.

This was an action on a promissory note, of which the following is a copy:

"$85.00. MONSON, Aug. 8th, 1883.

One year after date I promise to pay to the order of J. G. Timberlake or bearer Eighty-five $\frac{}{100}$ dollars at my house with interest, value received. I. D. LABREE."

The note was written by filling out a printed blank. The defense was that the words "or bearer" had been written in after the note had been completed, signed and delivered by the maker, and without his knowledge or consent. The presiding justice instructed the jury, that, "to constitute a defense by this alleged alteration, you must be satisfied that the words 'or bearer' were written in by some person after the note was made and delivered, for a fraudulent purpose, with an improper motive, for the purpose of changing the character of the contract and changing the obligation of the maker; because if the words were written in by mistake, without the improper motive, without the fraudulent intent, they may be disregarded, and they would not affect the contract at all."

The justice further instructed the jury that the burden of proof was upon the defendant to satisfy them that the note was improperly changed.

There was a verdict for the plaintiff, and the defendant excepted.

E. O. Greenleaf, for defendant.

It is not necessary to show fraud, if it was a material alteration. Interlining the words "or bearer" materially changes the manner of its negotiability. Daniel, Neg. Insts., 3d ed., Vol. 2, § 1395.

The agent here might have considered it harmless to add the words "or bearer," and negotiate the note with the plaintiffs instead of turning it over to Timberlake, the payee. It might possibly deprive the defendant of an offset otherwise available. It imparts a different negotiability and is a material alteration.

Among the list of alterations that have been held material, is this one claimed by the defendant in this case, i. e. inserting the words "or bearer."

Am. Decisions, Vol. 10, page 271, and the cases there cited.

Joseph C. Holman, for plaintiffs.

In connection with the whole charge, which is a part of these exceptions, there is no error in the law as given by the presiding justice.

Whether there was a material alteration in the note, and whether it was fraudulent or not, was a question of fact for the jury. *Bank* v. *Harriman*, 68 Maine, 522, and the cases there cited.

PETERS, C. J. The note in controversy contains the promise of the defendant to pay, "to the order of" J. G. Timberlake "or bearer," a sum of money, and was indorsed by the payee to the plaintiff. The defense at the trial was an alleged unauthorized alteration of the note by inserting in it the words "or bearer."

The judge at the trial ruled that, if the alteration, though unauthorized, was made innocently, without any fraudulent or improper motive, it would not avoid the note. That was correct and is well borne out by the principle established in *Milbery* v. *Storer*, 75 Maine, 69.

The further instruction was given that the burden of proof was on the defendant (the maker) to satisfy the jury that the note was improperly altered. We are of opinion that this instruction was not correct. The act of alteration was apparently fraudulent. A wrongful act naturally indicates a wrongful intent, and re-

quires explanation to excuse it. The holder of a note must show that an alteration proved or admitted was made innocently. Otherwise it would follow that, in the case of the most glaring forgeries by alteration of negotiable paper, the party sought to be charged thereon must explain the motive of the forger. In the case cited it is declared that alteration is *prima facie* evidence of fraudulent intent, but that it may be rebutted and disproved.

The alteration in the present instance was a material one. It undertook to foist a contract on the maker not made by him. It changed the obligation as an instrument of evidence. *Chadwick* v. *Eastman*, 53 Maine, 12; *Hewins* v. *Cargill*, 67 Maine, 554. It was held in *Dodge* v. *Haskell*, 69 Maine, 429, that the burden is on the plaintiff to explain any apparent material alteration of a note, so far as it does not sufficiently explain itself to the minds of a jury.

Exceptions sustained.

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

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NICHOLAS O'BRIEN *vs.* EDWARD C. LUQUES.

York. Opinion December 10, 1888.

Contract. Margins. Executed gambling contracts.

A person who puts up money with a broker for the purpose of gambling in margins on grain, cannot recover the money back because the broker represented he was dealing through a particular commission house in Chicago, when he was not, the broker having made regular settlements with the plaintiff according to the ups and downs of the market.

ON REPORT. The Law Court were to render such judgment as the law and the evidence warrant upon the testimony which was reported in full.

The case which discloses purchases and sales of grain upon margins, is stated in the opinion.

Benjamin F. Hamilton and Geo. F. Haley, for plaintiff.

The defendant being plaintiff's agent could not delegate his authority. *Stoughton* v. *Baker*, 4 Mass. 521.

The trust was exclusively personal. *Appleton Bank* v. *McGilvray*, 4 Gray, 518; *Brewster* v. *Hobart*, 15 Pick. 302; *Emerson* v. *Providence Hat Manuf'g Co.*, 12 Mass. 237; Story's Agency, § 13.

The same principle applies to brokers. *Lyon* v. *Jerome*, 26 Wend. 485; *Warner* v. *Martin*, 11 How. 209; Story's Agency, §§ 13, 29, 109.

It is proved that the contracts were to be made with Pitcher & Co. He did not invest the money according to our instructions which he was bound by law to follow. Story's Agency, § 192; *Greenleaf* v. *Moody*, 13 Allen, 363; *Coker* v. *Ropes*, 125 Mass. 577; *Whitney* v. *Merchants Union Express Co.*, 104 Mass. 152; *Sawyer* v. *Mayhew*, 51 Maine, 398; *Day* v. *Holmes*, 103 Mass. 306.

The defendant admits the money was paid him to buy grain of other parties for the plaintiff, and admits he bought on his own account, in his own name. The broker cannot disregard his instructions and speculate on the transactions for his own benefit. *Day* v. *Holmes*, *supra*; *Pickering* v. *Demeritt*, 100 Mass. 416; *Irwin* v. *Williar*, 110 U. S. Sup. Court, 499.

A broker is always bound to buy and sell in the name of his principals. Story's Agency, §§ 9, 34, 210, 211. He cannot buy or sell with himself as the other principal. Cannot act as agent and principal at the same time. It would be a constructive fraud on account of his fiduciary relation. Cook on the Law of Stock and Stockholders, § 450.

The money remained in his hands as a naked deposit, the same as in the hands of a stakeholder, to the plaintiff's use, when the defendant neglected to invest it in plaintiff's name, or with Pitcher & Co. *Sampson* v. *Shaw*, 101 Mass. 145; *Ball* v. *Gilbert*, 12 Met. 397; *McKee* v. *Manice*, 11 Cush. 357. It was an executory contract revocable at the plaintiff's option. *White* v. *Franklin Bank*, 22 Pick. 181. For further illustrations of recovery under illegal contracts, counsel cited *Mount* v. *Waite*, 7 Johns.

435; *Vischer* v. *Yates*, 11 Johns. 23. It was not a wagering contract. *Rumsey* v. *Berry*, 65 Maine, 570; *Frost* v. *Clarkson*, 7 Cowen, 24; *Irwin* v. *Williar*, *supra*; *Clark* v. *Foos*, 7 Bissell Reports, 540.

R. P. Tapley, *S. W. Luques* with him, for defendant.

The case shows clearly from the testimony of both parties that the transaction was a wager. All wagers in this state are unlawful. *McDonough* v. *Webster*, 68 Maine, 530; so recognized and stated in *Rumsey* v. *Berry*, 65 Maine, 570. See also *Irwin* v. *Williar*, 110 U. S. Sup. Court, 499. In a work on contracts for future delivery and commercial wagers, published by T. Henry Dewey of the New York Bar, the test is stated in this way: "Where the parties to a contract in the form of sale agree expressly or by implication at the time it is made, that contract is not to be enforced, that no delivery is to be made, but the contract is to be settled by the payment of the difference between the contract price and the market price at a given time in the future, such a transaction is a wager. The form of the sale is a mere cover, the real intention being to bet upon the market at some future time, the sum wagered being the difference between the two prices as that may subsequently appear:"—citing (page 28) some 60 American and English cases.

In the case at bar no controversy arises in matter of fact upon this point. The plaintiff says, "no wheat or corn was to be delivered to me; it was to be on a margin; a margin sale of differences only." The defendant says, "in these transactions between me and O'Brien there was not to be any actual delivery of grain. It was to be settled on differences."

In *Franklin County* v. *Lewiston Savings Bank*, 68 Maine, 47, Walton, J., says, "it is well settled that if it be a part of the agreement that the money shall be used for an illegal purpose, or anything is done by the lender in furtherance of such a use of the money a recovery therefor cannot be had."

The relation of principal and agent does not exist in the case between the plaintiff and defendant.

The whole purpose of the assumed agency here, was to do an

illegal act, for all wagering in this state is illegal; not simply void, but illegal. *Lewis* v. *Littlefield*, 15 Maine, 233.

PETERS, C. J. There is no ground upon which this action should be sustained. The plaintiff acquired a taste for gambling in margins on grain. He dealt with the defendant as a broker. It is immaterial whether the defendant did or not represent that the purchases were to be made of the firm of Pitcher & Co., of Chicago, although the purchases were in fact not so made. There was no intention to make actual purchases of any one. The plaintiff, a saloon-keeper in Biddeford, had no idea that he was to own $16,000 worth of wheat in Chicago. The defendant in this illegal enterprise did the business in the manner customary in such transactions. He made himself responsible to the plaintiff, and operated through another broker who in turn became responsible to him. The money staked on the margins was lost, and the plaintiff was settled with fairly, as far as appears, according to the ups and downs of the market, and according to the contracts made by him.

Having, after the lapse of several years, repented of his losses, he seeks to recover his money of the broker who received the money from him and paid it over to another. The burden of the plaintiff's lament is that the money was not paid to Pitcher & Co., and that the margins were not purchased of or through them. What difference could it make to him whether purchased of one person or another, when the result would be the same? The whole transaction was an executed gambling affair, over which the law is not disposed to make fine distinctions for the plaintiff's protection, or for the encouragement of others who may be tempted into similar speculations.

Judgment for defendant.

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

LEWIS PIERCE, admr. in equity, *vs.* CATHARINE A. STIDWORTHY, and others.

Cumberland. Opinion December 10, 1888.

Equity. Supplementary Bill. Wills. Legacies. Bonds.

Where a life-legatee is entrusted by a testator with an unqualified discretion in the use and disposal of the principal of the legacy for support during life, it is the rule in this state to allow the legatee to have full possession and control of the property.

At a former hearing, for a reason peculiar to the present case, and as an exception to the rule, a bond was required. It appearing that a bond cannot be furnished without imposing oppressive burdens on the beneficiary, the order to do so is annulled.*

ON REPORT.

Bill in Equity in the nature of a supplementary bill or petition, heard on bill, answers, and depositions of defendants. The defendant sought to be relieved from giving bond, required in the original decree, for reasons given, and on the facts stated in the opinion.

Lewis Pierce, pro se.

Woodman and Thompson, for residuary legatee.

In consequence of her inability to give the required bond, the administrator has been unable to divest himself of the custody of the fund, and to file his final accounts, and so to be relieved from his trust; he therefore brings this bill praying the further instructions of this court in the premises, in order that some means may be devised for relieving him from his trust.

There would seem to be but two ways in which this can be accomplished.

First. The court may relieve Mrs. Stidworthy from the necessity of giving any bond.

Second. The court may appoint a trustee to hold the fund and to make disbursements therefrom, in accordance with the terms of the will.

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*See *Pierce* v. *Stidworthy*, 79 Maine, 234.

The ordinary rule is that a tenant for life of personal property is entitled to its custody. *Sampson* v. *Randall*, 72 Maine, 109; *Johnson* v. *Goss*, 128 Mass. 433, 435; *Starr* v. *McEwan*, 69 Maine, 334; *Warren* v. *Webb*, 68 Maine, 133, 137; *McCarty* v. *Cosgrove*, 101 Mass. 124.

And, in the absence of any suggestion of waste, the life tenant is entitled to the custody and management of such property without giving any security therefor, the argument being that the testator might have required such security to be given had he seen fit, and that, in the absence of such requirement by the testator it will be assumed that it was his desire and intention that no security should be required. *Johnson* v. *Goss*, *supra*; *Homer* v. *Shelton*, 2 Met. 194; *Taggard* v. *Piper*, 118 Mass. 315; *Fiske* v. *Cobb*, 6 Gray, 144.

In the case at bar there is no suggestion of danger of waste either in the answer or in the testimony of respondents Elizabeth S. Smith or Sarah S. Smith. No question is raised but that the life tenant, Mrs. Stidworthy, is both honest and capable.

The reasoning of the cases above cited applies with double force to the case at bar, since, under the residuary clause of this will Mrs. Stidworthy is not a mere life tenant of this property, but is also entitled to use, if needed, the principal sum for her maintenance and support. The interest of the other respondents in the fund as remaindermen is not an interest in the entire fund, but in so much of it only as shall be left unapplied and unconsumed at the death of Mrs. Stidworthy.

Should the court incline toward the adoption of the second alternative, the appointment of a trustee, it will be difficult, if not impossible, to preserve to Mrs. Stidworthy her full rights under the will, which provides that she shall have the "right to apply to her use, if needed, any part of the principal of the personal property, *making her the sole judge of the need of so doing.*"

An instruction to the trustee to make payments from the principal to Mrs. Stidworthy, whenever she should require them, would give her the full benefit of the provision; anything short of such an instruction must, necessarily, substitute the judgment of another as to her needs, instead of her own judgment, and so

would deprive her of a part of her rights under the will. But such an instruction as that first suggested, would render the appointment of a trustee substantially nugatory, and it would be difficult, if not impossible, to find any suitable person to serve as such a trustee, giving bond for the custody of the fund, if, under the terms of the trust imposed upon him, he had no real control of the fund as against the beneficiary.

If it be argued that Mrs. Stidworthy's lack of independent means and her inability to give bond constitute an argument against her being given the custody of this fund, we reply that it rather constitutes an argument why she should be allowed to have it.

It was because of her dependent condition that her husband made this provision. He well knew that all he had to leave her was inadequate to her comfortable maintenance, and he fully intended that she should have the full benefit of what he did leave, and it would be strange indeed to turn her poverty and her necessities into an argument against her, to point out that she has lived upon a mere pittance for the last twelve years, and has necessarily run in debt, as a reason why she should be deprived of any advantage, great or small, which her husband's will has given to her.

Nathan and Henry B. Cleaves, for respondents, Elizabeth S. and Sarah S. Smith.

This court has jurisdiction as a court of equity "to determine the construction of wills, and whether an executor, not expressly appointed a trustee, becomes such from the provisions of a will; and in cases of doubt the mode of executing a trust, and the expediency of making changes and investments of property held in trust."

The question relating to the construction of the will of John Stidworthy, has once been before the supreme court, and it has once been determined to whom the fund in question belongs under the terms of the will. This court has no jurisdiction over this bill of complaint. It is not a question as to the interpretation of the terms of the will, for that question has once already been passed upon by the court. There is no doubt here as to

"the mode of executing a trust," because no trust is annexed to his office as administrator. He is an administrator, and his duties are to be determined as an administrator. He holds the funds as an administrator and the question as to their distribution is for the determination of the probate court, under the interpretation already given to the will of John Stidworthy. All legal questions relating to that matter can come here on appeal. This court does not have original jurisdiction except in cases where provision is specially made. "The supreme judicial court is the supreme court of probate and has appellate jurisdiction in all matters determinable by the several judges of probate; and any person aggrieved by any order, sentence, decree or denial * * * may appeal therefrom to the supreme court to be held within the county."

No one questions the jurisdiction of this court to determine the construction of wills, or even bills in equity brought for instructions in regard to the execution of trusts, but it will not attempt to exercise jurisdiction when the administrator does not hold funds under a special trust.

The complainant prays "for further instructions with reference to the final disposition to be made of the funds of said estate now remaining in his hands in view of the inability of said Catherine A. Stidworthy to give said bond." There is no conflict as to whom this fund is to be paid. The court has determined that question. The case does not show any settlement of the accounts of complainant or that there is any conflict as to the distribution of the fund, or that the probate court has ever been called upon by the complainant to pass a decree or to exercise the jurisdiction conferred upon it by the statutes of the state relating to the closing up of the affairs of this estate.

Why should this court, at the suggestion of the complainant that the legatee is unable to comply with the reasonable decree of the court, come here and ask for further instructions as to the method in which he shall distribute this fund when the probate court has full jurisdiction on the subject, and has the decree of the supreme court of probate before it.

The complainant further asks for the "general instructions of

the court as to the terms and conditions upon which he may make payments out of said fund to said Catherine A. Stidworthy so long as said fund remains in his hands, and particularly prays for instructions as to whether or not he shall pay to the said Catherine A. Stidworthy said sum of three hundred and thirty-two dollars and two cents as decreed by said probate court."

This is a question that is entirely within the jurisdiction of the probate court in the first instance. This court can only exercise a revising power over the action of the probate court; it cannot take original jurisdiction, but it must come here by appeal. In this manner the administrator can protect himself. *White, Judge,* v. *Weatherbee,* 126 Mass. 450; *Muldoon* v. *Muldoon,* 133 Mass. 111; *Dodge* v. *Morse,* 129 Mass. 423.

Our statute secures to the parties the right in all cases of doubt—to have the opinion of the court as to the legal effect of a will—*Baldwin* v. *Beal,* 59 Maine, 481. The rights of the parties have once been adjudicated.

We submit that the statute does not authorize the administrator, upon his own volition, to proceed by bill of complaint in this court, to ask for a reversal or modification of a former decree of the court, determining the conditions upon which a legatee under the will shall receive the funds from the hands of the administrator. The court recognized the rights of the children of John Stidworthy in this fund and by the decree have cast proper safeguards about it. It is true that under the will Mrs. Stidworthy is made the sole judge of the necessity of applying any portion of the principal to her needs, yet to guard against the abuse of this trust or any arbitrary exercise of this power, the provision that she should give the bond required by the court was wise. There is no occasion for its modification and it is foreign to the duties of the administrator to seek in this proceeding a reversal of the decree of the court after the former hearing. Even if it is a fact that she is unable to give the bond required, it gives unmistakable evidence that the decree of the court was correct, and that the fund should not pass into her hands without this wise condition.

PETERS, C. J. John Stidworthy made his wife residuary legatee under his will, in these words:

"All the residue of my estate, real, personal and mixed of which I shall die possessed, or which I may be entitled to at my decease, I give, devise, and bequeath to my faithful wife Catherine A. Stidworthy for the term of her life, with the right and power to use and dispose of the income, rents, profits and interest of the same, and with the further right to apply to her use, if needed, any part of the principal of the personal property, making her the sole judge of the need of so doing; and after her death I give and devise the same, or what shall then be left unapplied and unconsumed to my children to be divided equally between them, the children of any deceased child to take the share of their parent; if all my children and grandchildren should die in the lifetime of my said wife, then I will that the property shall go and belong to her absolutely to dispose of at her pleasure, and if she does not dispose of it by gift or otherwise in her lifetime to descend to her lawful heirs."

This language expresses the strongest confidence in the competency and integrity of the wife; too strong to be disregarded without great cause. It has been the rule, subject to exception in particular cases, to allow a life legatee who is intrusted with such unlimited discretion, to have the possession and control of the property. In a very similar case to this, *Copeland* v. *Barron*, 72 Maine, 206, and that case follows other cases to the same effect, we have fully stated the rule and the reasons for it.

When the present parties were in court before, (79 Maine, 234), from the fact that the funds in question could not have been known to the testator, as he died before the claim for them was presented before the court of Alabama Commissioners, it was deemed a peculiar case, and a bond was required of the residuary legatee, upon the supposition that she would be able to furnish one.

On the evidence submitted in support of this petition, it is evident that she cannot furnish the bond, and we think, on reconsideration of the matter in the new light afforded us, she should be discharged from the obligation to do so. It is not strange that she cannot, when we consider that sureties on a bond would have to undertake a very uncertain and indefinable liability, namely, what would be a fair discretionary use of the interest and princi-

pal of the property. If she commit waste of the property, and that would be a difficult thing to determine where the will entrusts her with such enlarged discretion, an application can be made to the court to provide a remedy.

The original decree may be amended by directing the administrator to pay over to her any balance remaining in his hands, after paying, and charging the estate therefor, the actual court disbursements on each side, on this petition, including printer's bill, and a sum to be stated as counsel fees, to the widow, and a like sum to the heirs.

Amended decree accordingly.

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

WILLIAM B. RICE *vs.* ALEXANDER BROWN.

Hancock. Opinion December 10, 1888.

Jurisdiction. Non-Resident. Abatement. Lease. Waiver. Evidence.

Any non-resident of the state may maintain an action against any other non-resident in any county in which the defendant is personally served with process.

An instrument in the form of a lease, does not have the effect of merely a contract for a lease, because the lessee who resides at a distance from the leased premises, refuses to accept possession when he comes to see the premises.

There is a sufficient mutuality of contract and of consideration to constitute a binding lease, when one party signs with a seal, and the other without, no objection having been made thereto when the leases passed.

The lessee having refused to accept possession of the leased premises, wrote the lessor among other things, thus:—"I have concluded not to accept the cottage under any circumstances whatever, nor will I acknowledge any liability in the matter." To which the lessor replied:—"I have your note of to-day. I consider you have done me a gross wrong, by violating your written pledge given me six weeks ago, on a frivolous pretext. The satisfaction I have is that our acquaintance begins and ends the same day, and that we can never by any possibility have such disagreeable tenants as you are."

Held, That the reply did not of itself amount to a waiver of lessee's obligation, and whether, in connection with extraneous facts, it should have such a construction or not, was a question for the jury.

ON EXCEPTIONS AND MOTION of the defendant to set aside the verdict, and for a new trial.

This was an action of covenant broken. The defendant seasonably filed a plea of abatement to the jurisdiction of the court, alleging that neither he nor the plaintiff were inhabitants, or citizens of the state, and that no goods, effects, or credits of his, the defendant, were found or attached upon the writ in the action. To this plea the plaintiff demurred. The presiding justice adjudged the plea bad, and sustained the demurrer. To this the defendant excepted.

The defendant requested the following instructions to the jury:—If from the evidence the jury find that the cottage was not completed and furnished on April 26, the date of the lease, and possession was never entered into by the defendant, or the cottage occupied by him, then the lease would be void as conveying something not in existence:—That the two letters (between plaintiff's agent and the defendant, embodied in the opinion) amounted to a waiver of the lease. The presiding justice declined to give the requested instructions, and the defendant excepted.

There was a verdict for the plaintiff.

W. P. Foster, for defendant.

Defendant's plea in abatement was good. The action should have been abated. The plaintiff, by his demurrer, admits the facts in defendant's plea. Neither plaintiff nor defendant, then, were either inhabitants or residents of the state, and no goods, effects or credits of the defendant were attached upon the writ. What is left upon which to found jurisdiction? The court is created by statute, and its jurisdiction is defined and limited by the legislature.

"Personal and transitory actions, * * * shall be brought * * * * * when no plaintiff lives in the state, in the county where any defendant lives; and when not so brought, they shall on motion or inspection by the court, be abated, and the defendant allowed double costs." R. S., c. 81, § 9.

Our courts were not established for the adjudication of questions of contract between foreigners.

Says Shaw, C. J., in *Putnam* v. *Dike*, 13 Gray, 535: "If indeed the defendant had never been an inhabitant of this state, and there was no effectual attachment of the defendant's property in this suit, and the defendant had appeared specially, and pleaded in abatement to the jurisdiction of the court, we do not perceive why it would not have been a good defense to this suit." This view is sustained by *King* v. *Jeffrey*, 77 Maine, 106; and *Sanborn* v. *Stickney*, 69 Maine, 343.

The two letters constituted, in law, a mutual waiver or recession of the contract declared upon, and the court should have so ruled.

The construction and effect of written instruments is for the court and not for the jury. The letters were written by the parties to the contract to each other, with regard to the subject matter of the contract. No facts were in dispute. The letter of Brown to Rice is a plain unequivocal notice on his part that he will not accept the cottage nor acknowledge any liability under the contract. All that was now needed was that Rice should assent to the proposed rescinding and the contract would be, in law, ended. The plaintiff's answer, written the same day, "Our acquaintance begins and ends the same day. I have the satisfaction of knowing that I can never by any possibility have such disagreeable tenants as you are," constitutes a sufficient and perfect acceptance of the defendant's proposed rescinding. Henceforth the contract was at an end by mutual agreement. As a simple meeting of minds was only required to make the agreement, a simple meeting of minds had ended it. The defendant, upon receipt of plaintiff's letter, leased another cottage and occupied it during the entire season. The key of the Rice cottage was never tendered him, nor was he notified in any way that the plaintiff still considered him his tenant. The cottage, "Saltair," remained in the possession and occupancy of the plaintiff as before. The letters are as high authority as the lease; a seal upon the lease was not required.

What other construction can reasonably be put upon the letter of the plaintiff than that of an acceptance of the proposed surrender? A party to a writing is presumed to have intended that it should have its ordinary and received signification. If it is

doubtful, it must be construed most strongly against him who has used the doubtful language, and in favor of him who may have been misled thereby. "The language used by one party to a contract is to receive such a construction as he, at the time, supposed the other party would give to it, or such a construction as the other party was fairly justified in giving to it." 11 Vermont, 490. And the understanding of the parties to a writing and their action upon it at the time is to be considered in interpreting it. And in that connection, the evidence of the acts of the parties at the time should have been considered, not by the jury, but by the court in determining what effect the letters had. The evidence of what was written, done and said upon the point of waiver is undisputed. The facts are unquestioned. Rice said to the defendant, "he did not propose to go to law about the matter in any event," "he refused to recognize me when we met on the street, and in every respect treated me as an entire stranger." 1 Greenl. §§ 277, 278 and notes; *Clark* v. *Lillie*, 39 Vt. 405. No question of fact as to what was done or said or written with regard to waiver or mutual rescission was in dispute. It was merely a question of interpretation, of the meaning and effect of a written instrument, and was for the court. *Holbrook* v. *Burt*, 22 Pick. 546, 555; *Drew* v. *Towle*, 30 N. H. 531; *McGee* v. *Northumberland*, 5 Watts, 33; *Nash* v. *Drisco*, 51 Maine, 417; 1 Greenl. § 49, note a. See *Dula* v. *Cowles*, 75 American Decisions, 463, where it is held that what acts amount to an abandonment of a contract are matters of law and should be decided by the court, not by the jury.

In *Hanham* v. *Sherman*, 114 Mass. 19, the sole question was whether there had been an accepted surrender of a lease, and the jury were told that any acts which would be equivalent to an agreement on the part of a tenant to abandon, and on the part of the landlord to resume possession would amount to a surrender by operation of law. In that case the dispute was as to the facts, as to what had taken place. In the present case there was no dispute as to facts, so far as waiver was concerned. The question was as to the effect of a writing. Of course much less would be required to show a surrender and acceptance of a term that had

never been entered upon than where possession had been taken. In the case under consideration, Mr. Brown had never occupied the premises.

The contract was not a lease, but an agreement for a lease. The subject of the contract was a furnished house, and the building, "Saltair," was not a house (not completed) nor furnished at the time the contract was signed. That which was the subject of the contract was to be afterwards created and not being in existence could not be leased. *Jackson* v. *Delacroix*, 2 Wend. 433. If it be said that it operated as a lease of the land or lot, then we say it was void in that respect from uncertainty. Plaintiff and defendant by their acts agreed in regarding the lease as executory.

The verdict should be set aside because the plaintiff has declared upon a sealed instrument executed on the plaintiff's part by an agent, but he has nowhere shown authority of equal dignity authorizing the agent to execute said contract. The instrument therefore lacked the element of mutuality and was not binding upon the defendant. *Snell* v. *Mitchell*, 65 Maine, 48; *Rogers* v. *Saunders*, 16 Maine, 92.

Deasy and Higgins, for plaintiff.

On the question arising upon the plea in abatement the counsel cited: *Peabody* v. *Hamilton*, 106 Mass. 217, 220; 20 Johns. (N. Y.) 208; *Lee* v. *Boston*, 2 Gray, 484, 490; *Cesna* v. *Myers*, Report of Committee on Elections, 42d Cong. U. S., McCrary on Elections, 2d ed., Appendix; Story's Conflict of Laws, §§ 543, 544; *Barrill* v. *Benjamin*, 15 Mass. 354; *Roberts* v. *Knights*, 7 Allen, 449; *Tweed* v. *Libbey*, 37 Maine, 49, 51.

It is expressly held in *Peabody* v. *Hamilton* and *Barrill* v. *Benjamin*, *supra*, that a non-resident has the same rights to sue in the courts of Massachusetts as a citizen of that state.

On the question of waiver, they contended that, the letters were properly submitted to the jury. There were circumstances surrounding and conversations between the parties, concerning the subject matter. It was proper that the jury should have the evidence of these circumstances and conversations, and the letters placed before them, together with such instructions as the court thought proper, under the circumstances, to give. When the

meaning of a contract depends upon facts *aliunde*, in connection with the written language, the question of construction is one of fact for the jury. *Springfield Bank* v. *Dana*, 79 N. Y. 108; *Solomon Etting* v. *Bank of United States*, 11 Wheat. 59; *School Dist.* v. *Lynch*, 33 Conn. 330; *Symmes* v. *Brown*, 13 Ind. 318; *Bedward* v. *Bonville*, 57 Wis. 270; *Taylor* v. *McNutt*, 58 Tex. 71; *Harper* v. *Kean*, 11 Serg. & R. 280; *Watson* v. *Blaine*, 12 Ib. 131; *Savage Manuf'g Co.* v. *Armstrong*, 17 Maine, 34; *Morrell* v. *Frith*, 3 Mee & W. 402, 404; *Donahue* v. *Fire Ins. Co.*, 56 Vt. 374.

On the lease, it was argued that if there are words of a present demise, without anything to indicate that the parties contemplate a further assurance, it is to be considered a lease, citing Taylor's Land. & Tenant, 7th ed. § 41; *Poole* v. *Bently*, 12 East. 168.

The seal imports a consideration, and there is abundant testimony of an actual consideration. The question of mutuality cannot arise in a court of law.

PETERS, C. J. The court had jurisdiction of the cause. Any non-resident of the state may sue any other non-resident in any county where the defendant is personally served with process. *Alley* v. *Caspari*, 80 Maine, 234, and cases there cited.

The instrument is clearly a lease,—not merely an agreement for a lease. The parties evidently intended it as such, and there is no evidence to prevent it having that effect. The premises were in existence when the papers were made, and were fully completed when the defendant visited them to take possession. *Sweetser* v. *McKenney*, 65 Maine, 225.

The defendant contends that, if it were a lease, he was not bound thereby, (never having actually occupied the leased premises) because there was not a mutuality of contract, the defendant sealing his contract, and it not appearing that the agent who sealed the instrument for the plaintiff had any authority under seal to do so. This point does not appear in the exceptions, nor is there any indication in the report that it was taken during the trial. But the point avails nothing, if we consider it. The

defendant sealed the contract, and the plaintiff, whether he sealed the contract or not, signed it, and each side became bound thereby. It is the same as if the contract had been in two instruments, one containing covenants or promises under seal, and the other containing promises unsealed, each being a sufficient consideration for the other. Each would be valid.

The greater contest at the trial was whether the plaintiff had waived a performance by the defendant or not. The defendant examined the leased premises, and, on account of some dissatisfaction concerning them, refused to enter into occupation. After some interviews between the parties, during which some unpleasant feeling was engendered, the defendant wrote the plaintiff this letter: "Having waited a reasonable time for you to make up your mind, I have now decided not to submit the questions between us to arbitration; and have also decided not to accept the cottage under any circumstances whatever, nor will I acknowledge any liability in the matter." On the same day the plaintiff wrote in reply: "I have your note of to-day. I consider that you have done me a gross wrong, by violating your written pledge, given me six weeks ago, on a frivolous pretext. The satisfaction I have is that our acquaintance begins and ends on the same day, and that we can never by any possibility have such disagreeable tenants as you are."

It was contended at the trial that the two communications constituted an abandonment by one and an acceptance of the abandonment by the other; in other words a waiver of the contract of lease. The judge did not interpret the papers, but left the meaning of them, in connection with other facts, to be ascertained by the jury. Although it is a question of some doubt, a close question, we think on the whole, it would be holding too rigidly against the plaintiff to determine that he waived a performance of the contract, by his letter of reply. The letter rather expresses disappointment, in a sarcastic way, and rebukes the defendant for his conduct. The plaintiff was justified in using the expression that their acquaintance was closed, without waiving any right, because the defendant had peremptorily refused to occupy the cottage, and the plaintiff might afterwards very

well understand that the defendant was not occupying it, not because released from the lease, but because he had expressly avowed before the plaintiff's letter was written that he never would occupy it. Had the plaintiff's letter been written before the defendant wrote his, and the same statement in substance been made in it, the argument for the defendant's interpretation would be stronger. Evidently, the defendant failed to accept the premises, not on account of waiver, but because he had committed himself to a refusal to do so before any waiver could have taken place.

The letters not being conclusive in themselves on the question, they were properly dealt with as belonging to a series of facts to be submitted to the jury. It was the judge's duty to instruct the jury what meaning the papers were susceptible of, if any meaning could be sufficiently comprehended from them, and the jury were to decide on all the evidence whether such or what meaning attached. The effect to be given to written when combined with oral evidence, and the general rules governing the mixed evidence, is fully explained in *State* v. *Patterson*, 68 Maine, 473. The case does not show that the proper rule in this respect was not observed.

No other points have been argued by the counsel for the defendant, although some other minor questions were reserved. The verdict was not an erroneous one on the evidence.

Motion and exceptions overruled.

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

IRONA A. KALER *vs.* GEORGE W. TUFTS.

Lincoln. Opinion December 10, 1888.

Bastardy. Pleading. Place. Time.

It is a sufficient description of place, in a declaration in a bastardy complaint, to allege that the child was begotten "at the shop of M. M. Richards & Co. in Waldoboro in the county of Lincoln."

It is not on a demurrer, a substantial discrepancy in the pleadings in a bastardy complaint, to allege in the preliminary examination that the child was begotten "on or about the 20th of July, 1886," and aver in the declaration that it was begotten "between the first and twentieth days of July, 1886."

ON EXCEPTIONS, by respondent to overruling his demurrer, which is as follows:

And the respondent comes and defends, &c., and says that the complainant ought not to have and maintain her said cause, because he says that the facts alleged in her said accusation and declaration and in the record of the proceedings thereon are not sufficient in law for her to have and maintain the same: And he further says that the complainant ought not to have and maintain her said accusation and declaration because he says the specification of the time and circumstances are in law insufficient in this, that the same are vague and general and do not inform the respondent of the circumstances thereof.

And the respondent further says that the complainant ought not to have and maintain her accusation and declaration, because there is a discrepancy between the time of the alleged begetting of said child as stated in the accusation and in the declaration.

Wherefore he prays judgment of said accusation, record and declaration, and for his costs.

The complainant joined the demurrer. The case is stated in the opinion.

H. Bliss, Jr., *T. P. Pierce* with him, for respondent.

The designation of the place, in the accusation and declaration, is too insufficient to require the respondent to plead to the merits of the action. The language employed is as general and indefinite as it is possible to make any description of place, while the statute rule, which is the only rule, requires time and place to be described, "when and where the child was begotten as correctly as can be" and "with as much precision as the case admits." R. S., c. 97, §§ 1, 5. The statute is imperative and strict. "At" may mean *inside* or *outside* the shop, somewhere near it. Webster says of this word: "It is less definite than in, or on; at the house may be in the house or near the house." Worcester gives "at" as a synonym of "near," "present," "in." It cannot be reasonably

claimed that this word has acquired a commonly accepted meaning, to the effect that it now is understood as meaning either inside, or outside the building, as here used.

A demurrer is the proper process to reach and defeat this defect. *Foster* v. *Beaty*, 1 Maine, 304.

Robinson and Rowell, for complainant.

The complaint and declaration set forth all the particulars of time and place, required by the statute. *Beals* v. *Furbish*, 39 Maine, 469; *Holbrook* v. *Knight*, 67 Maine, 244; *Woodward* v. *Shaw*, 18 Maine, 304.

All that the statute requires, is that the time and place, when and where the child was begotten, shall be taken "as correctly as they can be described." R. S., c. 97, § 1.

The same certainty, as in criminal cases, is not required. The gist of the matter is whether the child of which the complainant has been delivered, was begotten by the respondent, and not on what particular day, nor in what particular place. *Beals* v. *Furbish*, *supra*.

PETERS, C. J. This is a bastardy case, in which the respondent demurs to the declaration, and undertakes to show objections to it, which we think are without any legal force.

The declaration avers that the child was begotten by the respondent "at the shop of M. M. Richards & Co.," in Waldoboro in the county of Lincoln. It is contended that the word "at" is of equivocal meaning, and may imply either that the act was done in the shop, or outside of it. We think in this connection the word expresses the idea that the act was done inside the shop; and such would be, when descriptive of place, its common signification. It is frequently used in the statutes with that meaning, as in the following instances: Aldermen of cities shall be present "at some convenient place" to revise the list of voters. A notice to a juryman to serve in court, may be left "at his usual place of abode." A summons to a defendant may be left "at his dwelling house" or place of last and usual abode. Deponents are to be summoned to attend "at a designated time and place," to give depositions and adverse parties are to be notified to be

present "at such times and places." The point is virtually decided in favor of the complainant in the case of *Holbrook* v. *Knight*, 67 Maine, 244.

Another objection is that, whilst in her accusation on the preliminary examination she alleges that the act of seduction was accomplished upon her "on or about the 20th of July, 1886," she avers in the declaration that it was "between the first and twentieth day of July, 1886." We do not regard that as any substantial discrepancy or conflict in the pleadings.

Demurrer overruled.

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

SAMUEL BUNKER *vs.* JOSEPH W. GORDON, and another.

Somerset. Opinion December 10, 1888.

Levy. Mortgage. Notice to Attorney. Notice to Principal.

The plaintiff and defendants claim the demanded premises under the same person, Warren Hardy, the plaintiff by levies against him, and the defendants by a mortgage from him. The levies were made after, but recorded before, the mortgage was. The plaintiff had actual notice of the mortgage before he attached, through information to his attorney, communicated by Hardy in his disclosure as a poor debtor in the presence of the attorney.

Held, That the burden is on the plaintiff to show that his proceedings should not be affected by such notice, if any reason why they should not exist.

The attorney testifies that he told the plaintiff that Hardy had sworn that such a mortgage rested on the premises, and that he (witness) had examined the records and found no mortgage, and that he did not believe there was any, and he thinks that he made inquiry of the mortgagee, and that he told the plaintiff so, and that he could not find there was any, and concluded there was none.

Held, that, on this evidence the effect of the notice is not explained away. The evidence is too indefinite and uncertain for that purpose.

ON REPORT. This was an action of trespass q. c., for cutting grass on land which the plaintiff claimed to own. The defendants pleaded the general issue. After the evidence was closed, the

case was, by agreement, reported to the law court to render such judgment, upon the admissible testimony, as the law requires.

The main issue between the parties was that of title to the land, and turned upon the question whether or not the plaintiff had notice of a prior unrecorded mortgage, upon the reported testimony, which is stated in the opinion.

S. S. Brown, *J. J. Parlin* with him, for plaintiff.

The levies being prior to the record of the mortgage, under which the defendants claim prior title, give the plaintiff a good title, unless plaintiff had "actual notice" of the existence of this earlier mortgage title.

No special reason is suggested why the plaintiff's attorney, Mr. Walton who made the writ, should remember a mortgage which he made eight years before. Ordinarily, all a lawyer knows about the premises on which he draws a deed, is the boundaries described in some deed placed in his hands. Having heard Hardy disclose that there was such a mortgage, he consulted the records and found no such mortgage recorded. He interviewed the supposed mortgagee. He found no proof of its existence. He informed the plaintiff he could find no claim of the kind on the land, the extent of his investigations, and that he had made up his mind there was none. This would seem to cover the whole ground of the plaintiff's duty as laid down by this court in *Knapp* v. *Bailey*, 79 Maine, 195.

The knowledge of Jones, unless communicated to the plaintiff, would not interfere with the title which he acquired through the Jones levy. *Trull* v. *Bigelow*, 16 Mass. 405; *Coffin* v. *Ray*, 1 Met. 212.

It was held in *Stanley* v. *Perley*, 5 Maine, 369, that the uncommunicated knowledge of the officer, would not be notice to the plaintiff.

This knowledge, on the part of an agent, must be active in the mind of the agent at the time of the performance of the act to be affected. *Fairfield Savings Bank* v. *Chase*, 72 Maine, 226, 228; *Jones* v. *McNarrin*, 68 Maine, 334, 337; *Lawrence* v. *Tucker*, 7 Maine, 195; *Farnsworth* v. *Childs*, 4 Mass. 636.

A. H. Ware, *Merrill and Coffin* with him, for defendants.

Bunker, his attorney, the officer, and his grantors having notice of the existence of the mortgage, nothing passed or was acquired by the levies, and subsequent conveyances to the plaintiff, unless perhaps some right in the equity of redemption from the mortgage.

The attorney drew the mortgage deed, witnessed it, and took the acknowledgment. He heard, as plaintiff's attorney, Warren Hardy disclose its existence only a few days before the attachments. Notice to Walton was notice to Bunker. Hardy was arrested for the purpose of ascertaining by a disclosure whether this mortgage which the attorney knew he himself had drawn, and which had not been recorded, still existed and was unpaid. What further inquiries did the attorney make, and of whom did he make them? He does not say. If the record showed no incumbrance, and the attorney did not think there was any mortgage, why did he not at once cause the execution to be extended on the premises?

Charles L. Jones had notice of the mortgage. He was counsel for Hardy at his disclosure, a short time only, before he made an attachment himself. Moulton, the officer testifies "he thinks Mr. Jones made the remark that he (Jones) supposed there was a mortgage there."

William H. Stevens, guardian of Alice A. Jones, and who acquitted her interest in the Jones levy to the plaintiff, was present, as a magistrate, at Hardy's disclosure.

The levying creditors never took actual possession of the premises, though sixteen years have since elapsed. They were aware of the infirmity of their title.

The Jones levy was set off to him at the price of $70.23. This, with interest, amounts to $132.47 when it was conveyed for $20 to the plaintiff by Stevens as guardian,—hardly enough to pay expense of the levy after deducting the expenses, in the probate court, attending the sale.

On the question of notice, counsel cited: *Smith* v. *Ayer*, 101 U. S. Sup. Ct., 320; *Astor* v. *Wells*, 4 Wheat. 466; *May* v. *Le Claire*, 11 Wall. 217; *The Distilled Spirits*, Ib. 356; *Tucker* v. *Tilton*, 55 N. H. 223; and cases cited in *Knapp* v. *Bailey*, 79 Maine, 195.

PETERS, C. J. The plaintiff claims title to certain land under two levies thereon against Warren Hardy, one made by himself on a portion of the land, and the other made on another portion by Charles L. Jones, who conveyed his levy to the plaintiff. The two levies give an apparent title in the land to the plaintiff.

The defendants are claimants of the land under an assignment of a mortgage, given by Warren Hardy to Daniel S. Gordon, their ancestor, on the same property. The attachments and levies were made after the mortgage was, but were recorded first. If not disturbed by other facts, the plaintiff's title would be the best.

But the defendants contend that the plaintiff, when the attachments and levies were made, had actual notice of the existence of the mortgage, and that that fact deprives the plaintiff of his apparent priority of title.

The mortgage was made in September 1864, but was not recorded until January 1880. The attachments, on which the levies are founded, were made in January 1872, and the levies were completed and recorded the same year.

In December 1871, a short time prior to the attachments, Warren Hardy made a disclosure on an execution, which grew out of another transaction of the parties, in favor of the present plaintiff, in which he disclosed the existence of the unrecorded mortgage and the notes secured thereby. At that examination, Mr. Jones attended as counsel for Hardy, and S. J. Walton appeared as the attorney for the plaintiff. This disclosure gave to Jones personally, and to the plaintiff through his attorney, actual notice of the notes and mortgage.

The defendants, under these facts, appearing to have the better title, the result finally depends on whether that notice continued good, or whether it was counteracted and avoided by an investigation, immediately pursued by the plaintiff's attorney, which reasonably led him to believe that there was no such mortgage. And this, in turn, depends upon the testimony of Mr. Walton, called as a witness by the defendants. He testifies that he drafted and witnessed the execution of the mortgage, but had wholly forgotten the fact. He further testified: "He (Hardy) stated that there was a mortgage to Daniel S. Gordon resting

upon the premises. * * * It was when he was disclosing under one of the executions in favor of Mr. Bunker. * * * He said there was a mortgage, that covered that land, existing, running to Daniel S. Gordon. * * * I told him (Bunker) my opinion in regard to it. I told him that Mr. Hardy stated in his disclosure that there was a mortgage on these premises, but that I had examined, or caused to be examined, I don't remember the language now, the records, and I could find no mortgage on record, and I had made inquiries. I have the impression that I told him I had inquired of Daniel S. Gordon, and I could not find out that there was any mortgage, and I didn't think there was any. These were the communications I made to Mr. Bunker. I do not remember how long it was after that before I made the writ. * * * *Q.* You talked with Gordon? *A.* I think I did. *Q.* And you came to the conclusion that there was no mortgage and so informed Mr. Bunker? *A.* That is my recollection. I informed him what Mr. Hardy said and what I had done. I made a levy on the same land embraced in the mortgage," meaning in his own name on his own debt. The questions and answers were on cross examination. The evidence is plenary from other witnesses that the existence of the mortgage was disclosed by Hardy on his poor debtor examination.

Although the case may be rather near the line, we are induced by the evidence to believe that the plaintiff had actual notice of the mortgage when his attachment was made. That Jones had such notice when he attached on his demand, cannot be questioned. We do not see that the notice has been explained away. Mr. Walton's personal as well as professional interest led him, perhaps, too easily to think no mortgage existed. His investigation, from anything exhibited to us, did not warrant the conclusion. The burden is on the plaintiff to explain why he is not to be affected by the notice he received.

Mr. Walton "thinks" he talked with Gordon, the mortgagee. He does not seem to be positive that he did. He has "the impression" that he so told the plaintiff. He is not only doubtful about that, but he nowhere says that Gordon admitted or intimated that he had not a mortgage. No reply from Gordon is related.

Inquiry, pointed inquiry, should have been made of him, such as would have elicited the truth about it. Nor is it pretended that Gordon refused to make answer to any inquiries. The notice of the mortgage came in an official way in a sworn statement, and should not have been lightly regarded. It is hardly to be supposed that Hardy swore falsely, or that Gordon would have denied a transaction in his own favor, the honesty of which is not now questioned, or that Walton would have forgotten that Gordon repudiated the mortgage transaction had he done so. Walton may have believed there was not a mortgage, or a valid mortgage, but that would appear to have been his inference or supposition not founded on proof. As touching the propositions of law, on the facts that we have reviewed, the following cases have a close application. *Jones* v. *McNarrin*, 68 Maine, 334, 337; *Fairfield Savings Bank* v. *Chase*, 72 Maine, 226; *Knapp* v. *Bailey*, 79 Maine, 195.

Plaintiff nonsuit.

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

PEOPLES' SAVINGS BANK *vs.* STETSON L. HILL.

Androscoggin. Opinion December 10, 1888.

Mortgage. Assignment. Covenant. Damages.

The defendant holding a mortgage on real estate to secure the mortgagor's note to him, and foreclosure of the same having nearly expired, the mortgagor arranged with the plaintiff bank to furnish him money on a new mortgage to pay the defendant with. It was suggested by an attorney of the bank, as defendant was about to receive the money, that instead of making a new mortgage, the mortgagor give a note to the bank for the money and the defendant assign his mortgage to the bank, for them to hold as collateral security for the new note, which was done, thoughtlessly on the part of the defendant. In the assignment was inserted a clause by which the defendant covenanted that there was no incumbrance on his mortgage and that he had a right to sell and convey. It seems that some years previous to the assignment the defendant had released a portion of the mortgaged premises to the mortgagor, a transaction not remembered when the

assignment was made. At the date of the assignment September, 1882, the property remaining held under the mortgage was worth several hundred dollars more than the money advanced by the bank, but when the bank sold the property, after foreclosure by them, in June, 1887, it was worth as many hundred dollars less, and several hundred dollars are now due the bank on the note.

Held, on these facts, that the covenant was broken the instant it was made, that the bank stood evicted of the released portions of the mortgaged premises as soon as the assignment was delivered, and that in this action, commenced in 1887, by the bank on the covenant, no more than nominal damages are recoverable.

REPORT, on facts agreed.

This was an action of covenant broken. August 29, 1878, one William F. Hilton mortgaged land in Lewiston and Greene to the defendant. April 7, 1879, the defendant released the parcel in Greene to Hilton, by a quitclaim deed, which was that day duly recorded. September 6, 1881, the defendant entered the premises in Lewiston, for the purpose of foreclosure. On September 5, 1882, the defendant transferred the note without recourse to the plaintiff bank, and assigned the mortgage to it. In the assignment, he covenanted with the bank that "the within mortgage is free of all incumbrance" and that he had "good right and lawful authority to dispose of the same in manner aforesaid."

The officers of the bank then believed that said mortgage security embraced all the land described in the mortgage, and made the loan with this belief to Hilton, who had arranged for the money previously, with the bank, to take up the mortgage, giving the bank his own note, but without defendant's knowledge.

If the action was not maintainable, or if maintainable for only nominal damages, the court were to render such judgment as the law and the facts require; otherwise to stand for assessment of damages.

Savage and Oaks, for plaintiff.

Hill knew at the time he assigned the mortgage and made the assignment that the bank was relying upon the mortgage and his covenant as security for Hilton's note. Although the release from Hill to Hilton of the land in Greene was on record, the bank did not know it, and believed when they took the mortgage that they were taking security on all the land described in it.

The plaintiff is not chargeable with constructive notice of the release of the land in Greene. It was held in *Suydam* v. *Jones*, 10 Wend. 180, that where land was conveyed subject to mortgage with covenants, that an agreement that the covenant should not extend to the mortgage was inadmissible in an action on the covenants by the assignee of the covenantee; and that constructive notice of the existence of incumbrance, derived from the registry of the mortgage, does not affect the assignee's right to recover.

If the bank had knowledge of defendant's want of title, still if he chose to covenant with the bank, for the sake of getting his money due on the mortgage, that knowledge would be no defense to this action.

Parol evidence that plaintiff had knowledge of the lack of title is inadmissible. *Townsend* v. *Weld*, 8 Mass. 147; *Harlow* v. *Thomas*, 15 Pick. 66; *Estabrook* v. *Smith*, 6 Gray, 572.

This case does not seem to come within the analogy of any line of cases held by the courts to entitle plaintiffs to nominal damages only, for breach of covenants. This is not a contract to sell land or to sell a mortgage; but it is the sale itself. It is not executory; it is executed. So that the line of cases which hold that where the vendor in executory contracts, acting in good faith, declines or refuses to complete his contract is not liable, is not applicable to this case. In fact, that rule is not the law in Maine, nor has it been adopted by the supreme court of the U. S.

The basis of the rule laid down seems to be that of compensation. Just what particular rule is applicable to this case it is not necessary now to discuss. The only question involved is whether the plaintiff shall be entitled to any substantial damages. Why should it not be? It is true that at the time the bank received the security, that portion of it which was in Lewiston was worth $4,000, while the loan amounted to only $3,449.47. But it is well known that the trustees of banks in the exercise of good judgment, protecting the interest of depositors, require and ought to require a security of considerably greater value than the loan. We think that the ordinary rule in savings banks in this state is to loan not exceeding sixty per cent. of the value of real estate

secured. If this be a fair rule, it will be seen that the security afforded by the mortgage if it had all belonged to the defendant at the time would have been none too great.

Mr. Hill having covenanted with the bank that he owned the entire property described in the mortgage, they were under no obligations to him either to hold or to dispose of any part of the property any sooner than their convenience required. They did hold it until 1887. They then learned for the first time that the defendant had no title to the Greene property. This was after they had entered upon the land for the purpose of foreclosure. In the mean time the Lewiston property had become diminished in value, so that it was sold for $3,400, which is agreed to have been a fair price for the same at the time of sale. But at that time the amount due the bank was over $4,000. There is no allegation, no pretence that the bank have acted otherwise than in good faith. Had they known that the defendant's covenant was not true, undoubtedly they would not have held the security in Lewiston until it diminished to so low a value as $3,400. They have lost $600, because they were relying upon the defendant's covenant that he was giving them a good mortgage title to the land in Greene.

That being the case they have suffered damage, more than nominal damage; and we see no reason why the actual damage should not be ascertained and awarded to the plaintiff.

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

The question whether the defendant has made himself responsible under his covenants, is to be determined by the construction of the covenant. The court will require clear evidence that such was the intention of the parties. The transaction was of no advantage to the defendant, who was simply receiving his money on a mortgage perfectly secured, almost foreclosed, and executing the assignment "solely at the request of" the attorney of the bank "made without previous arrangement, or any negotiations with the bank officers" and at the same time indorsed the note "without recourse."

Covenants are to be considered according to their spirit and

intent. *Quackenboss* v. *Lansing*, 6 Johns. 49; *Ludlow* v. *McCrea*, 1 Wend. 228.

In construing a covenant, "the whole covenant, with its context, is to be taken into consideration; and that is to be considered the covenant, which, from such consideration, appears to have been the true intent and meaning of the parties." *Marvin* v. *Stone*, 2 Cow. 781.

"The inquiry always is, what was the intention of the parties." *Bull* v. *Follett*, 5 Cow. 170.

So in this state, the court has adopted "the more sensible rule of construction, which is in all cases to effect the intention of the parties if practicable, when no principle of law is thereby violated." *Pike* v. *Munroe*, 36 Maine, 315; *Bates* v. *Foster*, 59 Maine, 160.

It is also well settled, that the covenants in a deed are qualified and limited by the grant, and cannot enlarge it. *Coe* v. *Persons Unknown*, 43 Maine, 432.

So, where A conveyed by deed, all his right, title and interest in and to certain real estate described by metes and bounds, courses and distances, with the usual covenants of seizin and warranty, it was held, that the covenants were limited to the estate and interest of A in the granted premises, and were not general covenants, extending to the whole parcel described in the deed. *Sweet* v. *Brown*, 12 Met. 175; *Allen* v. *Holton*, 20 Pick. 458.

So, in the defendant's deed of warranty immediately succeeding a description of the premises by metes and bounds, was the clause, "and meaning hereby to convey to the said" grantee "the same premises and title as conveyed to me by Daniel Witham, and no more;" and the title conveyed to the defendant was an equity of redemption; held, that the defendant's deed conveyed an equity of redemption only. *Bates* v. *Foster*, 59 Maine, 157.

In *Allen* v. *Holton*, 20 Pick. *supra*, on p. 464, it is said, "We think the intention as to the extent of the grant in the present case is sufficiently plain. The grantor conveys his own title only, and all the subsequent covenants have reference to the grant, and are qualified and limited by it. That this was the intention

of the parties cannot, we think, be reasonably doubted, and the words of the covenants are to be so construed as to effectuate that intention."

So if the grantor conveys only his right, title and interest in the premises, he is not liable upon his covenants of warranty, against persons claiming title under him, though he had previously conveyed the land to another. *Ballard* v. *Child*, 46 Maine, 152.

Applying these principles to this case, the decision must turn upon the construction of the words "within mortgage and note secured hereby" as used in the deed of assignment. The parties could have intended by those words nothing more than the security then existing. The mortgage at that date was the conditional conveyance of the Lewiston land only, and the note was secured by that land, and not by the Greene land.

It is inconceivable that the defendant should have had any other intention, when he had himself released the Greene land; had he or the attorney of the bank intended to include the Greene land in the operation of the covenant, it would have been stated that the mortgage was in full force on the within described premises and in no part released or discharged; such a covenant, or one similar, would bear the construction claimed by the plaintiff.

But the bank cannot now be permitted to say that it relied on all the parcels of land, when the record showed, and had showed for almost three years and a half, that the Greene land had been released. That would recognize a too palpable neglect of duty on the part of the bank officers.

The construction which we contend for is the same placed by the court in Mass. upon a deed of assignment in which the court, said, "We are all of the opinion that the intention of both parties to the assignment, as manifested by the terms in which it is expressed, was to convey the tenant's mortgage title only." *Merritt* v. *Harris*, 102 Mass. 327.

And the defendant's mortgage title, in the case at bar, attached to the Lewiston land only, at the date of the assignment, and it was to that alone that the covenants applied.

If this is the true construction, there has been no breach of the covenants and judgment must be rendered for the defendant.

Assuming the plaintiff's position to be correct, he can recover only nominal damages.

The case shows that May 1, 1886, the bank by its attorney took possession of all the premises described in the mortgage deed; and for anything that appears, the bank is still in possession of the Greene land. It has not been evicted, nor has it surrendered its possession; there has been no disturbance of its possession; no person has asserted a paramount title, nor has the bank paid anything to remove the incumbrance.

Under such circumstances only nominal damages can be recovered for a breach of the covenant against incumbrances. *Copeland* v. *Copeland*, 30 Maine, 446; *Stowell* v. *Bennett*, 34 Maine, 422; *Reed* v. *Pierce*, 36 Maine, 455.

Further, as the plaintiff had notice from the record that the Greene land had been released, and was at least put on inquiry as to that fact by the certificate of foreclosure indorsed on the back of the mortgage, the result arrived at in *Leland* v. *Stone*, 10 Mass. 459, cited with approval in *Ballard* v. *Child*, *supra*, would be proper.

But for the reasons given above, and adopted in the Maine case last cited, the plaintiff must fail to recover even nominal damages.

PETERS, C. J. The facts in this case are such as would rarely happen. It appears, that the defendant held a mortgage of several parcels of land given by William F. Hilton to secure his note to the defendant, and that, a foreclosure of the mortgage being about to become absolute, Hilton arranged with the plaintiffs to furnish money with which to pay the mortgage and save a forfeiture; that the defendant was notified by Hilton to meet him at the office of the attorney for the plaintiffs to receive the money due on the mortgage; that after getting there the arrangement was suggested by the attorney, which was conformed to, that Hilton should give his own note to the plaintiffs for the money advanced to him by them, and that the defendant should assign the mortgage to them, which they would hold as collateral security for their note against Hilton; that in the assignment,

drawn by the attorney, which was not at all for the convenience or benefit of the defendant, who was entitled to receive the amount due on the mortgage for a naked discharge of it, was inserted a clause as follows: "and I hereby covenant with said Peoples' Savings Bank that the within mortgage is free from all incumbrances, and that I have good right and lawful authority to dispose of the same in manner aforesaid;" that several years prior to that time the defendant had released to Hilton some minor portions of the mortgaged property by deed duly recorded, but that the fact was not known by the bank and was not remembered at the time of the assignment by the other parties; that the bank (the plaintiffs) finally foreclosed the mortgage, making the remaining property covered by it absolutely their own, in June 1887; that they then sold the foreclosed property for $3400.00, admitted to be its fair value at that time, although worth at the date of the assignment, September 5, 1882, the sum of $4000.00, which was about five hundred and fifty dollars more than the sum then advanced; and that the sum at the date of the writ due the bank on the mortgage was $4013.28.

On these facts the plaintiffs claim to recover about six hundred dollars as actual damages upon the defendant's covenants in the assignment, while the defendant contends that, if any damages are recoverable, they cannot be more than nominal.

That the defendant was accidentally caught in an assignment which he did not suppose he was making, there can be no doubt. And the attorney who advised or dictated the transaction had not himself any idea that he was imposing a form of transfer which would be injurious to the defendant. It is well nigh a case where equity would interpose relief for the defendant, and the law should construe the facts in his behalf as generously as its principles can reasonably allow.

The incumbrance which the defendant covenanted against was an absolute disposal of a portion of the mortgaged property. The grantee of it was then in full and exclusive possession. It was not an incumbrance that could be paid off, or that was redeemable. The plaintiffs stood evicted the moment the assignment was delivered to them. The covenant was broken the

instant it was made. This is clear from the authorities. *Curtis* v. *Deering*, 12 Maine, 499; *Smith* v. *Strong*, 14 Pick. 128. A suit could then have been instituted for the damages. The mortgaged property then greatly exceeded in value the sum due on the mortgage. At the same time other property of the principal debtor was open to attachment by the bank.

The defendant received no actual consideration for binding himself to covenants. In fact, he received nothing from the bank. He received the money from Hilton. The bank loaned it to Hilton. The mortgage was taken as collateral security, not for the defendant's but for Hilton's debt. Had the defendant made a sale of his mortgage outright to the bank, a more rigid rule might prevail against him. But the bank did not take it as an absolute purchase either from the defendant or Hilton. They in form took it from the defendant, but in reality from Hilton through the defendant.

In the anomalous circumstances of the case, we think the plaintiffs must be satisfied with nominal damages.

Defendant defaulted for one dollar.

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

MAINE BENEFIT ASSOCIATION, in equity *vs.* GEORGE W. PARKS.

Androscoggin. Opinion December 10, 1888.

Equity. Parties. Life Insurance. Application. False Statement. Cancellation. Verdict.

A bill in equity commenced in the life-time of a husband and his wife, to annul an insurance policy issued on her life for his benefit, may, after her death during the pendency of the proceeding, be prosecuted to final decree against the husband alone, as he is, besides the complainants, the only person interested.

A policy, issued upon statements of the insured in an application for a life insurance that the applicant had good health and usually had good health, whether the statements be regarded as warranties or representations, may be cancelled and declared void by a court of equity, upon proof that such statements were in fact untrue.

The health of the body required to make the policy attach, does not mean perfect and absolute health. That seldom exists. It is that which would ordinarily and reasonably be regarded as good health. There is obviously a close distinction, though recognizable, between incipient disease, or disease in its first stages, a condition which complainants contend existed, and merely a bodily condition which is susceptible to the contraction of disease which defendant contends existed. A weak person may be well and a strong person sick. As it is difficult to determine the question by any definite general rule it becomes usually a question for the jury to determine on the facts peculiar to the case. When the questions propounded by the company in the examination of the applicant have been answered in absolute good faith and there are no reasonable grounds to suspect fraud, the questions and answers should be construed liberally in favor of the insured.

If the jury, to whom the facts are submitted in the case tried on the equity side of the court, render a clearly erroneous and unjust verdict, the court may not only set the verdict aside, but may in its discretion pronounce final judgment in the case adversely to the verdict.

ON REPORT, on bill in equity to annul a policy of life insurance issued April 30, 1887, upon the life of Alice J. Parks whose beneficiary was the defendant, and to whom it was made payable. She died July 21, 1887. Issues of fact were framed by the court and tried to a jury, who rendered a verdict for the defendant.

The issues of fact were, first, was Alice J. Parks on April 30, 1887, of good health; second, had she usually been of good health prior to that date. Answer, yes.

After the verdict the plaintiff filed a motion to set the verdict aside, and that the bill be sustained notwithstanding the verdict.

George C. and Charles E. Wing, for complainant.

Bills of this nature are frequently maintained in our courts. There are no serious questions of law in issue between the parties.

The bill may be sustained, notwithstanding the death of Mrs. Parks, against her husband, the beneficiary, her estate having no interest in the contract.

The court may decree whatever they think justice and equity require, regardless of the verdict—for a verdict of a jury upon an issue framed in equity is only advisory and not binding upon the conscience of the court.

Plaintiffs seek to annul the contract, because certain material facts, stated in the application, peculiarly within the applicant's

knowledge, were untrue; that no contract would have been made, if the true facts had been stated, and the true state of her health had been represented at the time.

These statements were warranties in law, but if regarded as representations only, they cannot avail the defendant. They were untrue, and she knew them to be untrue when she made them.

From the nature of her disease, she must have known of its existence; she was treated as late as April 13, for the cough inherited from her first illness, and she told her attending physician, in May, that she had never got over her cough or night-sweats. He then found her in an advanced stage of consumption, and thinks she had been suffering from it, six or eight weeks. He notified the company at once of this fact. Immediate investigation was made, and an offer to rescind the contract was declined. We were hardly able, with utmost diligence, to get the bill served on Mrs. Parks before her death.

D. J. McGillicuddy, for defendant.

The ordinary rule, as to setting aside the verdict, must prevail in this case. The verdict must be clearly and manifestly against the weight of evidence. "The court will not interfere unless it seems certain that injustice has been done by reason of some bias on the part of the jury, or a total misapprehension of the case upon which they have found. Where the evidence is conflicting upon points vital to the result, the conclusion of the jury will not be reversed, unless the preponderance against the verdict, is such as to amount to a moral certainty, that the jury erred." *Enfield* v. *Buswell*, 62 Maine, 128.

If Mrs. Parks, at the time of her application and insurance, was affected with incipient pulmonary consumption, which we deny, and she did not know it, and her answers were given honestly and in good faith and "to the best of her knowledge and belief," then the defendant is entitled to recover. *Clapp* v. *Mass. Benefit Association*, 146 Mass. 519.

PETERS, C. J. The complainants, by this bill, seek to have cancelled a life insurance policy, issued by them to Alice J. Parks

for the benefit of her husband. It is claimed that the policy was wrongfully obtained, or improvidently issued. She has died since this proceeding was instituted. The policy being for the benefit of the husband, the bill may be continued against him as her survivor.

The ground upon which the bill seeks a cancellation of the policy is, that she falsely stated in her application that she was at that date in good health, and that she had usually had good health. She declares at the close of her application, which is made a part of the policy, that she warrants all her statements in general and particular to be true to her best knowledge and belief, and that any untrue or fraudulent statement or concealment of facts by her shall forfeit and cancel all rights to any benefit under the policy.

The questions of fact, whether she had good health when insured, and whether she usually had good health, were submitted to a jury which found in her favor. The motion is, by the complainants, not only to set the verdict aside, but that the court, notwithstanding the verdict, shall declare the policy to be void. The judge has reported the evidence, on this motion, to the full court for its decision of the questions presented.

Possibly a question exists as to whether her answers in the application are warranties or representations, and nice distinctions may be found in the decided cases between the two kinds of contract. But that is immaterial here, as in either case the policy should be declared void, if the statements were untrue. It matters not, whether they were warranted to be true, or merely represented to be true, if in fact untrue. *Campbell* v. *Life Ins. Co.*, 98 Mass. 381. 2 Pars. Cont. cited *post.*, and cases.

The insured was about twenty-four years old, had three children, one about six months old, when her application was made. She was confined by the birth of her infant in November, 1887, and was sick of typhoid fever in January, 1888, from which she got up sometime in March afterwards. Her application is dated March 1, 1888, she was examined by the medical agent of the company on April 18th, and her application was approved by the company on April 22nd. On May 12, 1888, her physician was

called, who found her weak, with a cough, and sick with consumption, from which disease she died on the 21st of July afterwards.

The complainants contend that she was sick of incipient consumption as early as when her application was tendered to the company, and that she never really recovered from the effects of the fever with which she was afflicted at the beginning of the year. These positions are denied by the other side.

The usual question arises as to what is good health, and, as we find no statement of the law on the question more satisfactory than that of Professor Parsons, summarized from the authorities, we quote from it as expressive of our views on the subject: "The health of the body required to make the policy attach, does not mean perfect and absolute health; for it may be supposed that this is seldom to be found among men. 'We are all born,' said Lord Mansfield, 'with the seeds of mortality in us.' Nor can there be any other definition or rule as to this requirement of good health, than that it should mean that which would ordinarily and reasonably be regarded as good health. Nor should we be helped by saying that this good health must exclude all disorders, or infirmities, which might possibly shorten life; for, as has been well said in an instructive English case, that may be said of every disorder or infirmity. But it must obviously be very difficult to determine questions like these by any general rule. And it is the usual practice of courts to leave these questions to the jury. * * * Courts and juries usually, and we think properly, construe these questions and answers quite liberally in favor of the answerer, and quite strictly against the insurers, unless there be a reasonable suspicion of fraud. The good faith of the answers should be perfect. The presence of it goes very far to protect a policy, while a want of it would be an element of great power in the defense." 2 Pars. Cont. (6th ed.) 465.

There is obviously a close line between incipient disease, disease in its first stages, and merely a bodily condition which is susceptible to the contraction of disease. A weak person may be well, and a strong person sick. And, of course, a person may have a disease upon him without knowing it. The complainants

contend that, whether the insured knew or appreciated the fact or not, there was an unbroken connection between the fever and the consumption, one running into the other, the effect of which caused death, and that it was impossible that she was in good health when insured. We are so strongly impressed, that the jury have committed error in their findings, we think the verdict should be set aside, and the case decided without committing it to a jury again. It would, to our minds, be flagrant injustice to other policy holders, on the facts presented, and evidently no other material facts are attainable, to allow this policy to stand. *Larrabee* v. *Grant*, 70 Maine, 79. We think the bill should be sustained without costs, the policy annulled, and all premiums received be returned.

Decree accordingly.

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

STATE *vs.* MAINE CENTRAL RAILROAD COMPANY.

Franklin. Opinion December 10, 1888.

Railroads. Loss of Life. Negligence. Evidence.

A passenger on a railroad excursion train, which was running rapidly in a dark night on a road of frequent and sharp curves, having been last noticed alive whilst he was passing through a car in which there were vacant seats, about mid-way of the train, saying or doing nothing to indicate where on the train he was going or the purpose of going, was found dead the next morning, lying on the track between the rails, his body being in a mutilated condition, at or near the place of a sharp curve in the road. There was at the time a saloon-car hitched to the rear of the train, not annexed for the use of passengers, but presumably to be transported to a station on the road. The passenger cars were connected closely with one another by the Miller platform, but the saloon-car was attached to the train in such a manner as to leave an open space between it and the preceding car eighteen inches wide. The allegation is that the passenger while exercising due care on his part fell through this open space between cars, and was thereby killed by the negligence of the defendants. *Held:* That the facts stated do not prove that the passenger, while exercising due care, was killed in the manner alleged.

It is some evidence of negligence on the part of a passenger that he undertakes to pass through a train of cars while the train is moving rapidly in the night time, unless it may be reasonably inferred that he has some excuse for so doing more than mere restlessness or curiosity.

ON REPORT.

Indictment against defendant corporation for causing the death of one Lawrence J. Garcelon August 20, 1886. The defendant pleaded not guilty.

After the evidence for the state was out, and the state rested, the court ordered a nonsuit, upon motion of defendants' counsel, with the stipulation that if the law court were of the opinion that the evidence was sufficient to warrant a verdict for the state, the case should be sent back for trial.

F. E. Timberlake, county attorney, for the state, *E. O. Greenleaf*, with him.

The court erred in directing a nonsuit; there were questions of fact for the jury.

We are aware that, though the rule be a hard one, the burden of proof is upon the prosecution to free itself from contributory negligence, as well as to prove the negligence of the defendant; yet when a material fact is not proved by direct testimony, but is left to be inferred from the facts directly sworn to, the inference need not be a necessary one. *Commonwealth* v. *Doherty*, 137 Mass. 245.

In this case now before the court, it is shown that the deceased was last seen two or three cars from the rear going toward the rear of the train, just as other passengers, whom all would agree were prudent, are wont to do. The condition of the cars was shown, the distance between the platforms, the odd condition of the rear car, the long shackling and distance from other car, darkness upon the platforms, want of proper guards, and want of brakeman or other employes of the company,—these all were facts proven by which the jury might properly infer due care on the part of the deceased.

It has been well said that the best evidence of due care in case of instant death is lost.

The burden of proof may be aided and sustained by the pre-

sumption that arises upon the facts. *Stevens* v. *E. & N. A. Railway*, 66 Maine, 74.

The presiding justice here attempted to weigh the evidence and say that the government had not proved the fact that the defendant was negligent in placing this old car in the manner shown upon their train, and that the deceased was in the exercise of due care or common prudence, or even such a state of facts as the jury might legitimately draw such inference.

A fact proved by a legitimate inference is proved no less than when it is directly sworn to. *Doyle* v. *B. & A. R. R. Co.*, 145 Mass. 386, and cases there cited.

While due care must be shown by the plaintiff, it is not necessary that any positive act of care shall be proved. It may be inferred from mere absence of fault, when sufficient circumstances are shown to fairly exclude the idea of negligence on his part. *Maguire* v. *Fitchburg R. R. Co.*, 146 Mass. 379.

The presiding justice in the case last cited attempted to settle the whole case by directing a verdict for the defendant, but the full court say the question as to whether the deceased was in the exercise of due care should have been submitted to the jury.

Inferences are for the jury. *Cook* v. *Brown*, 39 Maine, 443.

One of the elements of this case is negligence, and cannot be considered a pure question of law and be taken from the jury, but is a mixed question of law and fact, and must be submitted to the jury. *Foot* v. *Wiswall*, 14 Johns. 304.

Presumptions from evidence of the existence of particular facts, are mixed questions of law and fact, and the jury are judges of fact. *Bank of U. S.* v. *Corcoran*, 2 Pet. 121.

The court in *Lesan* v. *M. C. R. R. Co.*, 77 Maine, 85, caution moderation in taking such cases from the jury, even though all the evidence comes from the plaintiff's side, and say the case should go to the jury.

Again, in *Shannon* v. *Boston & Albany R. R. Co.*, 78 Maine, 52, the court, in the able opinion of his Honor, Peters, C. J., say the usual practice is to submit the case to the jury.

What we claim in this case is that there are facts sufficiently proven to satisfy the jury, directly or indirectly, that there was

no want of due care on the part of the injured party, and if there was any want it did not in any way contribute to the injury, and that this question should have been left to the jury under proper instructions from the presiding justice.

The injured party may not perhaps be strictly in the exercise of due care, but did that want of care contribute to the injury? Moreover, though the deceased may have been guilty of contributory negligence (the contrary of which we claim this evidence shows), yet if the defendant could in the result, by the exercise of ordinary care, have avoided the mischief, it will not excuse the defendant. *Richmond & Danville R. R. Co.* v. *Anderson*, 31 Am. Rep. 750. (31 Gratt. 812.) Under this we claim the defendant, by properly guarded and properly lighted car and platforms, might have avoided this injury.

The surrounding circumstances, and the whole conduct of the deceased in reference thereto, afford ground for a variety of inferences as to make the verdict of the jury the only proper means to determine the essential fact. *Mayo* v. *B. & M. R. R.*, 104 Mass. 137.

The statute was designed in part to impose a punishment for the carelessness of the defendant, and the Mass. court say under a similar statute, that want of due care on the part of the passenger killed, is not a defense to such indictment. *Commonwealth* v. *Boston & Lowell R. R. Cor.*, 134 Mass. 211, and cases there cited.

That may differ somewhat from this case, but in *Same* v. *Same*, 126 Mass. 61, the court say the burden is upon the commonwealth to show that the persons killed were in the exercise of due care and diligence, but this burden is sustained by proving facts and circumstances, from which it may be fairly inferred.

The functions of the court and jury are distinct, and issues of fact must be submitted to the determination of the jury.

R. S., c. 82, § 40, provides that the presiding justice may in some cases set aside the verdict, but if the justice has the power and duty of directing a verdict according as the evidence in his opinion demands, it is difficult to understand when an occasion could arise for the exercise of the power conferred upon him by this statute.

The statute is wholly unnecessary.

While the authorities differ somewhat as to the amount of proof in cases of this kind, they all agree upon the manner in which it may be shown, viz.: that the jury is the proper tribunal to adjudicate upon the facts and the inferences drawn therefrom.

Frye, Cotton and White, for defendants.

It is difficult to imagine upon what grounds the state seeks to maintain this indictment.

To maintain it, they must show:

First, an accident, resulting in instant death.

Second, negligence on the part of the defendant corporation.

Third, due care on the part of the deceased at the time of the accident.

At best they have only shown an accident. There is no evidence showing that death was instantaneous. Upon this point the case of *Corcoran* v. *Boston & Albany R. Co.*, 133 Mass. 507, is important, for there as here the question was whether death was instantaneous.

In that case the burden of proof was on the plaintiff to show that the death was not instantaneous, and the court directed a nonsuit.

Here the burden of proof is upon the plaintiff, to show that death was instantaneous. *State* v. *Grand Trunk Railway*, 61 Maine, 114.

This important question is left to conjecture, with the argument drawn from the nature of the injuries as described by the doctor entirely in favor of the theory that death was not instantaneous.

No negligence on the part of the defendants is shown. The defendant's cars were properly lighted, properly constructed, and properly officered. But they say there was a saloon car attached to the rear car, that the platform of the saloon was some inches lower than the platform of the car to which it was attached, and that there was a space of about a foot and a half between the two platforms, and then they assume that the deceased attempted to pass from one to the other, and fell through between the cars and was killed.

It was not negligence to attach this saloon to the rear of the train. There is no evidence that the saloon was any different in the construction of its platform from ordinary saloon cars of this kind, nor was there any invitation to, nor any necessity shown for, passengers to go to this car.

And second, if he did make the attempt, then he was not in the exercise of due care himself.

When a railroad passenger goes from one car to another of a rapidly moving train merely for his own convenience, he takes upon himself the risk of all accidents not arising from any negligence of the company. *Stewart* v. *Boston & Prov. R. R. Co.*, 146 Mass. 605.

It is well settled that a party cannot recover for injuries caused by negligence, if he himself failed to exercise proper care, and his own negligence contributed to the result. It is also well settled that the plaintiff must show affirmatively that he was in the exercise of due care upon his part. *Hickey* v. *Boston & Lowell R. R.*, 14 Allen, 429, 431; *State* v. *Maine Central R. R.*, 76 Maine, 357, 364.

If the injury happen while the party is occupying a place provided for the accommodation of passengers, nothing further is ordinarily necessary to show due care. But when the plaintiff's own evidence shows that he had left the place assigned for passengers and was occupying an exposed position, he must necessarily fail, unless he can also make it appear, upon some ground of necessity or propriety, that his being in that position was consistent with the exercise of proper caution and care on his part. *Hickey* v. *B. & L. R. R.*, *supra.*

Was there any necessity or propriety shown for this young man leaving his seat in the car, where he would have rode in safety to his home, and going in the darkness of the night and when the train was running at a rapid rate between stations, to this saloon? After all, it is entirely a matter of conjecture whether he went there at all, but even if he did, every man of common sense in these days knows that the platform of a swiftly moving train is a dangerous place, even in the day time, and much more so in the night, when nothing can be seen. And we do not see that it

makes any difference whether he knew the special danger of crossing this platform or not, for if he knew it and voluntarily made the attempt to get across, then he assumed all the risks incident to the attempt, and if he did not know it, he was guilty of the grossest negligence in attempting to pass over there. It must not be forgotten that his home was Farmington, and presumably he was familiar with the stations on this road, and if he desired to go to this saloon for any purpose, he must have known that by waiting a very few minutes he would have reached the North Jay station, where he could have crossed in perfect safety.

See also: *Gavett* v. *M. & L. R. R.*, 16 Gray, pp. 501, 505, 506, 507; *Todd* v. *Old Colony R. R. Co.*, 3 Allen, 18; *Penn. R. R. Co.* v. *Langdon*, 37 Am. Rep., 651. (92 Penn. St. 21.)

PETERS, C. J. The defendants are indicted for causing the death of Lawrence J. Garcelon by their negligence. The alleged negligence is that a saloon car was attached to a train of passenger cars in such a manner that a space was left between the saloon car and the car in front of it, through which the deceased fell. He was a passenger on an excursion train returning from Old Orchard to Farmington, and was last seen, at the station of Livermore Falls, by another passenger who says he saw him at that station getting on the train just as it was put in motion. Other passengers saw him before reaching Livermore Falls, passing through a car in the direction of the rear of the train, about midway of the train. Nothing more was seen or heard of him until his dead body was discovered on the track by section men on the next morning. There was nothing said or done by him indicating any purpose of going to the rear of the train. There was no necessity for his going there. There were vacant seats in the passenger cars. The night was dark, and the train was moving rapidly between stations. His body was found about four miles from Livermore Falls station and on the homeward side of still another station which had been touched by the train, on the track about midway between the rails, at a point in the road where there is quite a sharp curve, lying on his back, with his legs drawn

up and his left arm crushed above the elbow joint. There was no fracture of the skull, but there was a scalp wound on the back of his head, and there were bruises on his left side, and his clothing was badly torn.

The plaintiff contends that it is inferentially and circumstantially proved that the death was caused by the deceased falling between the saloon and a passenger car, the space between the two being by the estimation of witnesses about one foot and a half wide. The grounds upon which the inference is to be based, are that he could not have fallen between any of the passenger cars because they were closely connected by the Miller patent platforms, and because his body would not have been found on the track if he had been thrown sideways of any of the platforms between passenger cars. And it is contended that this position is strengthened by the circumstance that the deceased was thrown from the train at or near a curve in the road, where the motion of the cars would combine with the Miller platforms in preventing the body from falling upon the track, if the fall had been between passenger cars.

Whilst there may be some plausibility in these suggestions, they seem to us to fall short of establishing the alleged negligence, and that the death was caused thereby. It cannot be considered more than conjecture that the death was caused in the manner alleged. There are many ways in which the accident might be produced without any blame on the part of the defendants. He may not have been instantly killed, and in an insensible condition may have got himself upon the track after the injury, or may have been carried there by his clothing being caught by some part of the car or its running gear, and whether the motion of the train would carry him off the track or upon it would somewhat depend upon the resistance he may have at the moment exerted against falling, and the manner of such resistance, and other explanations or suppositions about the matter might be possible.

Moreover, no one knows, nor is there a thing to indicate, what care he was exercising, or what he was doing or attempting to do, at the time of the accident. There were persons in the saloon car, and they saw or heard nothing which led them to suppose

there had been this catastrophe. As before intimated, there seems to have been no occasion for his going to the saloon car. That car was evidently not intended for the use of passengers on that day, and was hitched to the train at Leeds Junction, to be transported to the upper end of the railroad route.

Further, we think it some evidence of carelessness on the part of the deceased, that he was rambling through the cars on such an occasion, in a dark night when the train was running swiftly, on a road having frequent and sharp curves, unless there be some excuse or justification for it more than mere restlessness or curiosity. Persons traveling on railroads should know something about cars and trains and their movements, and of the impropriety of exposing themselves unnecessarily to danger. It has been frequently held that it is improper for a passenger to loiter on the platform of a moving car, and passing from car to car is just as hazardous.

There is no need of our noticing the point, whether it was improper to transport the saloon car in that way on that night, or not. That question we pass as immaterial to the result.

Nonsuit confirmed.

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

INTERNATIONAL EXPRESS CO., in equity, *vs.* GRAND TRUNK RAILWAY OF CANADA.

Cumberland. Opinion December 13, 1888.

Railroads. Express Companies. Equal facilities. R. S., c. 51, § 134.

There is a marked distinction, recognized by the statutes and judicial decisions, between the general business of express companies and that of railroad companies.

Foreign express companies are entitled equally with domestic express companies, to the facilities of transportation over our railroads, by virtue of the statute which extends equal protection "to all persons engaged in the business" within the state.

Where a defense is set up, to a bill in equity which seeks to require a railroad corporation to transport over its road the freight of an express company, that the railroad is itself doing all express business over its road, the burden is on the railroad corporation to show that it is actually engaged in doing such business to the exclusion of all other persons and corporations alike.

N. E. Express Co. v. *Maine C. R. R. Co.*, 57 Maine, 188, affirmed.

ON REPORT. Bill in equity by the International Express Co., which sought to require the defendant corporation to transport over its road the complainants' freight. The bill was filed May 25, 1885, and an interlocutory injunction granted, to continue during the pendency of the suit, a sum being agreed upon by the parties, for the service rendered. Answer and replication were duly filed. The case came before the court for a final decree upon bill, answer and proof.

The findings on issues of fact appear in the opinion.

S. C. Strout, H. W. Gage and F. S. Strout, for complainant.

Upon the questions of law, counsel cited: *N. E. Express Co.* v. *M. C. R. R. Co.*, 57 Maine, 188; *McDuffee* v. *Railroad*, 52 N. H. 430; *Munn* v. *Illinois*, 4 Otto, 113, 126; *Olcott* v. *Supervisors*, 16 Wall. 678, 696; *Com.* v. *Railroad*, 63 Maine, 269; Woods' Railway Laws, vol. 1, pp. 563, 565, 587; *Bennett* v. *Dutton*, 10 N. H. 486; Redfield on Railways, 2d ed., p. *242; Redfield on Carriers, § 65; *Sanford* v. *Ry. Co.*, 24 Pa. St., 378; *Dinsmore* v. *Louisville, &c., R. Co.*, 2 Fed. Rep. 465; *Texas Express Co.* v. *Texas & Pacific R. Co.*, 6 Fed. Rep., 427; *Wells* v. *Oregon Ry.*, 16 A. & E. R. Cases, 87; *Express Cases*, 117 U. S. Sup. Ct., 1, 20; *Express Cos.* v. *Railroads*, 10 Fed. Rep. 210; *Southern Express Co.* v. *L. & N. R. Co.*, 4 Fed. Rep. 482; *Memphis R. R.* v. *Tennessee*, 9 Tenn. 118; (13 A. & E. R. Cases, 423.) *Coe* v. *L. & N. R. Co.*, 3 Fed. Rep. 775, 781.

Sargent v. *B. & L. R.*, 115 Mass. 416, 423, cited by defendant has no application to the law and facts of the case at bar. In that case the plaintiff had formerly carried on business upon defendants' railroad, receiving certain accommodations which defendant took away from him. He demanded "to be allowed to continue * * * as formerly." The court say: "The gravamen of his complaint, then, is not that the defendants have refused to give him

equal terms, facilities and accommodations with other persons and companies, but simply that they have refused to give him such facilities as he requires, for his special business as a carrier, over their roads." "His claim must stand upon the right to demand such facilities independently of any enjoyment of like facilities by others." "As an absolute right this cannot be maintained."

A. A. Strout, for defendant.

The intention of § 134, c. 51, R. S. is to prevent discrimination on the part of railroads in favor of one express company and against another engaged in express business in this state, in all cases where the railroad furnishes accommodations to common carriers other than itself.

Counsel cited *Express Cases* and *Sargent* v. *B. & L. R.*, *supra.*

PETERS, C. J. This bill was brought to require the defendants to transport over the railroads controlled and operated by them, between the points of Portland and Lewiston, the freight business of the plaintiffs, upon equal terms and conditions with those granted other express companies. The statute requires that railroads shall extend equal facilities and accommodations to all persons or companies. R. S., c. 51, § 134. The court has acted upon this statute, sustaining the right which the plaintiffs contend for. *N. E. Express Co.* v. *Maine Central R. R. Co.*, 57 Maine, 188. The same doctrine is strongly defended in *McDuffee* v. *Railroad*, 52 N. H. 430; and in many cases.

Difficult questions might arise in some instances as to what should be considered strictly express business. But no question of the kind occurs here, because the defendants maintain the right to refuse taking any and all express business, excepting as it shall be controlled and managed by themselves. There can be no doubt, however, that there is a marked line between the general business of express companies and that of railroad companies. The express company is a wheel within a wheel, doing a business of details, much of the responsibility of which consists in work both preliminary and subsequent to the railroad transportation. It is well known that where railroad companies have undertaken to assume exclusively to themselves that class of business over

their roads, they have managed it under an administration independent of their general affairs. We indulge in these observations, which will have an application upon a question of fact in the case that will presently appear.

It is objected by the defendants that the plaintiffs are a foreign and not a domestic corporation. That fact does not disentitle them to maintain this complaint. The statute protects "all persons engaged" in the business within the state. We permit the commercial world to do business within our borders.

The defendants set up in defense of their right to ignore the claims of the complainants, that they had taken the express business, on their route within the points named, exclusively into their own hands, and that they are under no obligation to extend privileges or accommodations to express companies who are competitors of themselves, and that the statute provision was to protect express companies as between themselves, and not as between them and railroad companies.

In this alleged defense, are two questions. First, whether the allegation of fact is sustained. Secondly, what result will follow if the facts are proved. Both questions have been argued by the counsel for the parties.

The second question we do not propose on this occasion to consider, as we are satisfied that the facts alleged by the defendants, are not proved. The burden of excuse or explanation is on them. They must show why it is that the complainants' demands are not complied with.

Their evidence on this point fails. It breathes the spirit of evasion and pretext. It may be formally and superficially true, but is really untrue. The outside gauze does not cover the inside meaning. It is not pretended that the defendants were doing any express business on their own account when they first refused to carry the express freight of the complainants. The answer was that it would be inconvenient to them to accommodate two express companies. The Merchants Express Company was then doing its business over their road. But by the increasing importunity of the complainants for an equal recognition with the other express company, the defendants were led to resort to the excuse

that they would take the business into their own hands, and they asserted that, as a temporary arrangement until they could equip themselves for the work, they had employed the Merchants Express Company to do the business for them.

It seems on its face a singular mode of business, to claim to do an express business themselves, and hire an express company to do it for them. Such real or pretended arrangements would easily avoid the law which was designed to prevent unequal privileges and accommodations. The evidence discloses that the idea was more in intention than in fact. One of the managers of the railroad company states that on April 30, 1885, the company had assumed the business. On May 11, 1885, its counsel wrote the complainants that the company would do so. The pretension is that there was a contract in writing that the Merchants Express Company were to act as their agents during their (railroad company's) pleasure, which, of course might not continue longer than the complainants' importunity lasted.

The affidavit of Haines of the Merchants Express Company seems to consist mostly of an argument against the injustice of another company competing for the business with them, when there was not business enough even for one company, and he asserts that a temporary contract had been made by which they were to act as agents of the railroad company. But no contract is produced in evidence, and all its terms are not stated. Its production might disclose whether the Express Company were or not to take all the earnings for doing all the work, and whether it be a real or merely a nominal and deceptive bargain.

The rebutting affidavits go to show that no perceptible change has been effected; that all the routine business appears to be the same now as ever before; that the Merchants Express Company retains its offices, its signs, its books, its mode of receiving and delivering goods, and giving receipts therefor; and that the Canadian Express Company also runs over nearly all of the same route.

The complaint in this case was heard in May 1885, and it would not be denied by the defendants that no change has been discernible from that time till the present, a lapse of nearly four years.

The injunction should be made perpetual to this extent: that it shall stand unless, upon a motion to dissolve, it appear, that a new state of facts exists which would make it reasonable to qualify or dissolve the same. The complainants are entitled to costs.

Decree accordingly.

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

HARRISON HAYFORD *vs.* JOHN D. RUST.

Waldo. Opinion December 17, 1888.

Attachment. Deed. Notice. R. S., c. 76, §§ 16, 17, 30, 36.

A creditor who attaches real estate after another creditor has attached it, but sells the same on execution before the first attaching creditor sells it, each creditor being the purchaser in the sale on his own execution against the same debtor, will have the priority of title, as between the two creditors, if the first attaching creditor fail to record his deed for more than three months after his sale is made.

ON REPORT. Writ of entry to recover possession of certain premises in Belfast. Plea, general issue. It was admitted that both parties claim under the same grantor.

The court were to determine the rights of the parties from the legally competent and admissible testimony. The facts appear in the opinion.

W. H. Fogler, for demandant.

The attachment, seizure and sale gave the demandant title to the premises. The title continues in him unless it has become lost by the failure to record the deed within three months from the day of sale.

Tenant claims under a deed to him dated prior to demandant's deed; he is not, therefore, a subsequent purchaser. At the time of his purchase he had notice of the attachment in the suit upon which the premises were subsequently purchased. The failure to

record the demandant's deed within three months from the day of sale is settled against the tenant. *Caldwell* v. *Blake*, 69 Maine, 458; *Owen* v. *Neveau*, 128 Mass. 427; *Houghton* v. *Bartholomew*, 10 Met. 138; *Pease* v. *Bancroft*, 5 Ib. 90.

This case is distinguishable from *McGregor* v. *Brown*, 5 Pick. 170; see *Houghton* v. *Bartholomew*, *supra.*

J. Williamson, for defendant.

Demandant failed to acquire any title to the premises by reason of omitting to record the officer's deed within three months after the sale to him. The seasonable record of the deed is indispensable. The record in the registry of deeds is not sufficient notice of a prior lien so as to cure any defects which may exist in attempting to enforce the lien.

The same principle as to notice of a deed does not apply in the case of a prior attachment. *McGregor* v. *Brown*, 5 Pick. 170.

In *Houghton* v. *Bartholomew*, cited by demandant, the court proceeded on the ground that the creditor in the second execution, had actual knowledge of the prior levy, &c. The statutes of Massachusetts then required not only a copy of the attachment to be filed, but also a copy of the writ. Mass. Stat. 1839, 89. Such record or filing is not therefore to be regarded as equivalent to actual knowledge or notice, necessary to defeat the defendant's title in the case at bar.

PETERS, C. J. The demandant and defendant claim under different attachments and sales of the same parcel of land, once the property of Axel Hayford. The attachment under which the demandant claims to hold the land, was made first, but the deed from the officer to him, as purchaser under a sale in pursuance of the attachment, was not recorded until some time after the expiration of three months from the sale, whilst the defendant's title was acquired under an attachment dated after the other, the sale under it was made, and the proceedings completed, before judgment was obtained in the first action. Therefore, when the defendant's title was obtained, the demandant's right consisted of a pending attachment only. The deed to demandant not having been seasonably recorded, the title which he obtained was

only good against the debtor, and attaching creditors and purchasers having actual notice of the sale to him.

The land was sold in each instance in the manner that equities of redemption are sold, instead of being levied on by appraisement, it being allowable to do so, by recent legislation. R. S., c. 76, § 30. By section 36 of same chapter, it is provided that the officer's deed to the purchaser in such case, "being recorded in the registry of deeds where the land lies, within three months after the sale, conveys to him all the title of the debtor in the premises." The sections of same chapter relating to recording levies on land, read somewhat differently, but are no doubt of the same effect. It is provided that the officer shall, within three months after completing the levy, cause the execution and his return thereon to be recorded in the registry of deeds where the land lies. "When not so recorded the levy is void against a person who has purchased for a valuable consideration, or has attached or taken on execution the same premises without actual notice thereof. If the levy is recorded after the three months, it will be valid against a conveyance, attachment, or levy made after such record." R. S., c. 76, §§ 16, 17.

Did the defendant's grantor in the present case, or did the defendant himself, have such notice as would bar the defendant from possessing a priority of title? It is not pretended that the defendant saw or knew of anything beyond what the registry of deeds disclosed to him when he purchased of the second attaching creditor, and all that the latter saw or could see when the premises were sold to him on his execution, was the attachment in the first action then pending in court.

It is contended by the demandant that, when the sale was made under the second attachment, the pendency of the first attachment was notice, a continuing, floating or prospective notice, to the purchaser under that sale, of all the proceedings which afterwards took place in pursuance of the first attachment; and that it was immaterial whether his own deed was seasonably recorded or not. The proposition is specious, but strikes against the statutes above quoted. The pendency of the attachment might be constructive, but not actual, notice of all subsequent steps to

be regularly taken, and of nothing more. A prior levy has the effect of an intervening levy.

Suppose that still another creditor had seized the premises on execution, without any actual notice of any other proceedings, after the expiration of three months from the sale to demandant, but before demandant's deed was recorded. Would not such supposed creditor's claim on the premises have priority over the demandant's claim? If not so, the statute requiring the registry of an officer's deed, is utterly useless. He has neither actual nor constructive notice. The statute clearly prescribes the right. But this third party could not possibly have a priority of title over the second attaching creditor who has sold the premises on execution before he did. A levy, without previous attachment, made in 1887, cannot supersede a levy made in 1886, the proceedings having been regular in each case. If we are correct in this assumption, and the demandant should be also correct in the position which he must establish in order to prevail in this action, we should have most contradictory results. The supposed creditor would have a better title than the demandant, the demandant a better title than the defendant, and still the defendant would have a better title than the supposed creditor. This demandant would be enabled to recover the premises from the defendant, and the third creditor could recover them from the demandant, and then this defendant could recover them back again from him.

We think the conclusion is inevitable that the sale made by the second creditor, and it matters not whether in pursuance of a previous attachment or not, stands good until it has been defeated by proceedings afterwards duly had and duly recorded by the first creditor. The moment he committed an error in those proceedings, his attachment was lost. His loss became the defendant's gain. The point is supported by authority. The same state of facts as here, existed in the case of *McGregor* v. *Brown*, 5 Pick. 170, and the decision there is unfavorable to the demandant in the present case. It is there said, "It does not appear that the intervening creditors knew that the plaintiff would recover a judgment and would levy on the land; and, besides, all creditors who are in pursuit of satisfaction of their debts by

means of attachment, are considered as running a race and each is entitled to take advantage of defects in the proceedings of the others." The same thing has been virtually decided in our own state, in *Pope* v. *Cutler*, 22 Maine, 105. The case of *Houghton* v. *Bartholomew*, 10 Met. 138, relied on by demandant, is based on facts somewhat different from those of the present case.

Judgment for defendant.

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

HENRY MCGILVERY *vs.* HENRY S. STAPLES, and others.

Kennebec. Opinion December 22, 1888.

Justice of the Peace. "Disinterested." Poor Debtor. R. S., c. 113, § 28.

A justice of the peace and quorum who has heard one disclosure of a poor debtor arrested upon execution, and formed an opinion upon the evidence there presented, is not thereby disqualified to hear and determine a second disclosure by the debtor upon the same execution.

A mere intellectual, moral, or sympathetic interest in a matter or a party, is not such a legal interest as disqualifies an officer, required to be "disinterested."

ON REPORT. The full court were to render such judgment as the law and facts required.

The opinion states the case and material facts.

Beane and Beane, for the plaintiff, cited: R. S., c. 113, §§ 30, 42, 28; R. S., c. 1, rule 22; R. S., c. 107, § 2; *Call* v. *Pike*, 66 Maine, 350; *Hardy* v. *Sprowle*, 32 Maine, 310; *Norridgewock* v. *Sawtelle*, 72 Maine, 484; R. S., c. 113, § 28; R. S., c. 104, § 37; *Walker* v. *Greene*, 3 Maine, 215; R. S., c. 82, § 80; *Asbury Ins. Co.* v. *Warren*, 66 Maine, 523, 533; *Studley* v. *Hall*, 22 Maine, 200; *Hussey* v. *Allen*, 59 Maine, 269; *Bradbury* v. *Conly*, 62 Maine, 223; Acts of 1887, c. 137, § 26; R. S., c. 113, §§ 30, 46.

Spaulding v. *Record*, 65 Maine, 220; *Poor* v. *Knight*, 66 Maine,

482; *Hackett* v. *Lane*, 61 Maine, 31; *Knight* v. *Norton*, 15 Maine, 339; *Williams* v. *Burrill*, 23 Maine, 144; *Blake* v. *Brackett*, 47 Maine, 28; *Williams* v. *Turner*, 19 Maine, 454; R. S., c. 113, § 40; *Perry* v. *Plunkett*, 74 Maine, 328, 330; *Colton* v. *Stanwood*, 68 Maine, 482; *Bradley* v. *Pinkham*, 63 Maine, 164; *Hackett* v. *Lane*, *supra*, 36.

J. Williamson, for defendants.

The only question presented is whether a justice of the peace, by officiating in the disclosure of a poor debtor, loses his attribute of being disinterested, so that his action in a second disclosure of the same party, where the examination and testimony to some extent differ from the first, is illegal and void.

Upon the assumption by the counsel for the plaintiff that the two disclosures were identical, I submit that as the magistrate acted in a judicial capacity, he is presumed to have been unprejudiced and indifferent, "for the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea." 3 Black. Com. 361.

In New York, it was held proper for a judge of the court of appeals to take part in determining causes brought up from a subordinate court of which he was a member, and in the decision of which in the court below he took part. *Pierce* v. *Delameter*, 1 Comst. 17. So in error to a circuit court from the supreme court, the justice of the supreme court, who tried the cause below, is not disqualified from sitting in the hearing of the cause in error. *Peck* v. *Freeholders of Essex*, 1 Spenc. 457; *Turnbull* v. *O'Hara*, 4 Yeates, 446; *Young* v. *Adams*, 6 Mass. 182; *Northampton* v. *Smith*, 11 Met. 390, 395; *Smith* v. *Bradstreet*, 16 Pick. 264; *Hawes* v. *Humphrey*, 9 Pick. 350, 357.

A justice of the peace is not legally disqualified to take jurisdiction of and try a case for the reason that he has previously as one of a board of arbitrators between the same parties, and in reference to the subject matter of the suit, upon a hearing of such matter as such arbitrator, formed an opinion, and expressed it to his associate arbitrator.

Batchelder v. *Nourse*, 35 Vt. 642; *Fuller* v. *Davis*, 73 Maine,

556; *Lovering* v. *Lamson*, 50 Maine, 334; Coke Lit. 3, 251 (228); *Argent* v. *Darrell*, Salk. 648; *Rex* v. *Bell*, Strange, 995; *McDonald* v. *Beall*, 55 Georg., 288; *Commonwealth* v. *Hill*, 4 Allen, 591; *Charlton Plow Co.* v. *Deusch*, 16 Neb. 384.

EMERY, J. The material facts are these: A debtor, who had been arrested on execution, and had given the usual "six months bond," essayed to disclose, and take the poor debtors' oath in fulfillment of his bond. The justice selected by him favored administering the oath, but the other justice objected, and the third justice called in sustained the objection. The debtor then again cited the creditor to attend a new disclosure, and selected the same justice, who in the former hearing had favored administering the oath. The creditor objected and protested against this justice acting a second time in the same matter, but without avail, and this time the oath was administered. The creditor then brought this suit upon the bond, claiming it has not been fulfilled by a disclosure before two disinterested justices. The only question is, was the justice chosen by the debtor at the second disclosure disinterested.

The justice was admittedly qualified to hear and determine the first application. He was then a "disinterested justice of the peace and quorum for the county." R. S., c. 113, § 28. The creditor, however, insists that the justice, having heard and adjudicated upon the first application, is no longer "disinterested" in the matter of the debtor's applications for a discharge from this arrest. No other objection is made to his disinterestedness, or qualifications.

The justice was of course disinterested unless he had an interest in the question,—not an intellectual, moral or sympathetic interest, but a legal, positive interest, either by way of relationship to some of the parties, or by way of some accruing pecuniary gain or loss from the result. The justice clearly had no such legal interest at the time of the second hearing, and hence was disinterested.

It does not follow that the justice, by reason of the prior hearing, could not, or did not adjudicate honestly and impartially at

the second hearing. If, however, he carried into the second hearing, a pride of opinion formed at the first hearing, that would affect only his mental and not his legal qualifications. This court cannot entertain challenges against the members of any inferior courts, who are legally qualified and appointed. *Lovering* v. *Lamson*, 50 Maine, 334; *Fuller* v. *Davis*, 73 Maine, 556.

Judgment for defendants.

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

MELISSA A. ANDREWS *vs.* MELZER T. DYER, and another.

Knox. Opinion December 22, 1888.

Deed. Parties. Identity. Parol Evidence.

While parol evidence is not admissible to vary the terms or meaning of a written instrument, such evidence is necessarily admissible to identify the persons and things named in such writing.

Who is meant and referred to, by the name as grantee in a deed of conveyance, is a question of identification rather than of terms, and often can only be determined by parol evidence, where the name written as grantee is not identical with that of the person to whom the deed was delivered.

In this case the evidence shows clearly, that *Melissa A. Andrews*, the demandant, to whom the deed was delivered, was the person meant and referred to by the name *Mercy A. Andrews*, in the deed.*

ON REPORT. Real action to recover certain land on Big Green Island. The court were to render such judgment as the law and facts require.

The findings of fact by the court appear in the opinion.

C. E. Littlefield, for demandant.

To the question of law counsel, in addition to the authorities in his former argument cited: *Gillespie* v. *Rogers*, 146 Mass. 610.

T. P. Pierce, for defendants.

The counsel relied upon the authorities cited by him in his for-

*Andrews v. Dyer, 78 Maine, 427.

mer argument, and contended that the question here is not one of identity. It is not proposed to show that Melissa A. Andrews was ever known as Mercy A. Andrews, and she cannot be identified as the grantee named in the deed.

There is no such latent ambiguity in the deed as to require the admission of parol evidence by way of explanation.

The plaintiff has no rights under the deed, until she changes it in some way; until she shows that the instrument is not what it purports to be; she claims there is a mistake to be corrected, and she seeks to correct it by parol evidence,—to change the deed.

This suit is not brought to correct a mistake. It is a real action—an action at law—and must stand upon the deed presented, or fail because the deed is insufficient to show title in demandant.

The declarations of the grantor are not admissible to show who in fact was intended.

Demandant's remedy, if there was an honest mistake in the deed, is in equity. R. S., c. 77, § 6. *Adams* v. *Stevens*, 49 Maine, 362.

The grantee named in the deed is not *in esse*. Such deeds are a nullity.

EMERY, J. On report. The following are found by the court to be the facts:—

In 1875 James Andrews, intending to convey certain land to his wife, Melissa A. Andrews, went with her to a lawyer's office, and in her presence instructed the lawyer to make a deed to her of the land. The lawyer, misunderstanding the christian name of the wife, wrote the name "Mercy A. Andrews," as the grantee in the deed. Mr. Andrews executed the deed before the lawyer, and delivered it to his wife Melissa, as her deed of the land. She had the deed duly recorded. The husband afterward leased the land to the tenants. The wife, Melissa, now brings this real action, and offers as evidence of her title, the above named deed, and parol evidence of the above facts to show that she is in fact the grantee. It does not appear that there was at the time any person by the name of Mercy A. Andrews.

The only question of law is, whether Melissa, the demandant,

must go to the equity side of the court for a correction of the mistake in the name, or whether she can establish her title under the deed as it is, by showing that she is the person to whom it was delivered, and for whom it was intended.

It is of course common learning, that parol evidence should not be received to contradict or vary the terms of a written instrument. It is equally well settled however, that parol evidence must often be received to identify the persons or things named in a writing. We think the question here is one of identification, and not one of meaning or terms.

The demandant, Melissa, produces the deed. If the name stated in the deed as the name of the grantee were identical with her name, that alone would be sufficient identification and coupled with her possession of the deed would be *prima facie* evidence of delivery to her as grantee. *Andrews* v. *Dyer*, 78 Maine, 427. But the name not appearing to be the same, further identification and further evidence of delivery to the party is required. That evidence she has presented.

She does not offer to prove that she is the person intended to be the grantee in a deed made out and delivered to another person by mistake. She offers to show, rather, that the name written in her own deed delivered to her, was intended for a noting or description of herself as grantee, that she is the person referred to by the name, Mercy A. Andrews. Such evidence is clearly admissible, and makes out her title. *Jackson* v. *Stanley*, 10 John. 133; *Hall* v. *Leonard*, 1 Pick. 27, 30; *Scanlan* v. *Wright*, 13 Pick. 523; *Jacobs* v. *Benson*, 39 Maine, 132.

In the cases *Crawford* v. *Spencer*, 8 Cush. 418, and *Whitmore* v. *Learned*, 70 Maine, 276, 283, relied upon by the defendants, the deed was made out, and delivered to one party. It was held that parol evidence could not be received to show that this was a mistake and that the grantor intended another party as grantee. The distinction is apparent. It is true there are some decisions apparently adverse to our views above expressed, but the weight of authority will be found to favor them.

Judgment for demandant.

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

STATE *vs.* OWEN J. RYAN.

STATE *vs.* EDWARD CARR.

Cumberland. Opinion December 28, 1888.

Intoxicating Liquors. Indictment. Nuisance. Knowledge.

An indictment for keeping and maintaining a common nuisance under R. S., c. 17, §§ 1 and 2, need not allege that the respondent knew the place he so kept was a common nuisance.

ON EXCEPTIONS, to the ruling of the superior court, Cumberland county. Indictments for keeping liquor nuisances. The respondents filed special demurrers, alleging, among other causes, that they did not allege the places were used by them, for the unlawful purpose named, or that they were so used with their knowledge and consent. Upon joinder in the demurrers by the state, they were overruled by the court and respondents excepted.

Frank and Larrabee, for respondents.

We are aware that indictments in the form of this have been held sufficient, but this precise point here raised was not in issue.

Each act charged to have been committed was an act *malum prohibitum* not *malum in se*. Each act charged to have been committed is also an act of such a character as may be done privately and without exciting public attention. The respondent is not charged with doing any one of these acts or with permitting any one of them to be done, or with knowledge that any one of them was done. He is charged simply with keeping a place. It is no offense to keep a place. He is not charged with keeping it for any unlawful purpose. But he simply kept a place. This place it is alleged, was used for certain unlawful purposes, not by him, or with his knowledge, consent or permission. We submit it sets forth no criminal intent or knowledge on his part. All that the indictment charges may be proved and yet the respondent be entirely free of blame or responsibility.

A person may keep a grocery store or even a dwelling house.

His servants may slyly sell intoxicating liquors there. It would be true that he kept the store or the dwelling and it would also be true that it was used for the illegal sale of intoxicating liquors but would it be claimed that a crime had been committed by the keeper?

Could the parsonage be indicted as a common nuisance and the parson himself imprisoned because, forsooth, he kept the parsonage and some of the servants or inmates unlawfully sold or dispensed liquor there, he having no knowledge of such unlawful practices? And yet, if it is necessary to prove only what is alleged in this indictment, a person may be held as criminal who does only what is lawful and commendable.

We submit that, while as a general rule it is necessary to charge an offense only in the language of the statute, which creates and defines it, when a statute prescribes that certain acts make a place a criminal place, which but for those acts would not be criminal, and then prescribes a penalty for keeping such place, which but for those acts it would be lawful to keep, in order to charge such keeper with crime, knowledge of such unlawful acts should be alleged and proved against him.

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

EMERY, J. These were indictments for keeping and maintaining common nuisances, under §§ 1 and 2, of c. 17, R. S. The respondents object that the indictments do not allege, that they knew the places they kept and maintained were common nuisances.

The statute does not forbid any person keeping or maintaining a tenement or place. The first section states what acts or conditions make a tenement or place a common nuisance. The second section forbids any person keeping or maintaining a common nuisance. These indictments sufficiently state the acts and conditions which made the places in question a common nuisance. They then allege that these respondents kept and maintained these nuisances—that is, that they did, or caused, or permitted the acts and conditions which made their tenements or places common nuisances. The allegation is not that the respondents owned or

occupied the tenements, but that they kept and maintained them as common nuisances.

They knew the law and what acts would make them guilty of keeping or maintaining common nuisances. These acts are in these indictments fully and directly charged against them. If the evidence should show that they did the acts charged, they could not avoid conviction by saying they did not know they were doing wrong, or were ignorant that the tenements they kept and maintained under such circumstances were common nuisances. The statute does not require the state to allege or prove knowledge of the law, knowledge on the part of the respondents, nor their knowledge that the acts and conditions charged, made their tenements common nuisances. Their knowledge of these matters is presumed. The state would not need to prove their knowledge of the unlawfulness of their conduct, and hence the indictment need not allege it.

Exceptions overruled.

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

LYDIA CHAPMAN, and another *vs.* MARGARET R. CHICK.

Waldo. Opinion December 26, 1888.

Will. Conditional Devise. Election. Estoppel. "Rest and Residue."

A testator, having made pecuniary bequests to his immediate heirs and some others, gave to his wife certain personal property and $2,500.00 outright, and the use and occupation of his homestead during her lifetime or widowhood, and provided that she could take the $2,500.00 out of any of his property, real or personal, at the appraisal, at her election. He declares that his bequests are made on the basis of an estate of $4,750.00, and that certain of them, including that to his wife, shall be increased correspondingly with the total net estate which on final settlement may prove to have been left by him. The whole estate, which much exceeded the sum named, was distributed by the executor, the widow taking all the real estate, at the appraisal, towards her share, and retaining possession, for a long lifetime afterwards, of all the same, excepting the homestead which she conveyed away by her deed of warranty.

The heirs received their increased legacies according to the will, there being no residuary clause. *Held*, on these and other less important facts, that the title to the real estate vested in the widow.

Real estate passes under a clause in a will, giving and devising all the rest and residue of the testator's property and estate of every description, and wherever situate, after the payment of all debts and certain legacies named, unless such construction be prevented by the other parts of the will.

ON REPORT, upon agreed statement.

Writ of entry to recover two undivided third parts of the Atwood block in Winterport.

It was admitted that Nathaniel Atwood died in December, 1858, seized of the demanded premises, and that the plaintiffs and defendant are his legal heirs, entitled equally to his undevised real estate, if any.

Defendant claims under the will of Lydia Atwood, widow of Nathaniel, also under his will.

It was also admitted that the widow conveyed away by warranty deed, September 15, 1859, the homestead named in the will of her husband, and continued in the possession and control of the demanded premises, from his death until her decease in 1882, exercising all the rights of ownership.

The material portions of the two wills, which came under construction by the court, appear in the opinion.

Rice and Hall, for demandants.

1. Nathaniel Atwood's will gives no authority to the executor to convert real estate into personalty, nor to convey it, and, unless conveyed by the will itself, which defendant does not contend, no title can pass but the real estate descended to the heirs, as the demandants claim.

2. As the defendant says: there is no provision that either of the persons named in the will, except the wife Lydia Atwood, in any event should have any portion of, or interest in, the real estate; in other words, except for the life interest in the homestead and the option the widow had to select portions of the real estate as part of her $2500, (which she exercised by her deed in respect to the portion which she chose) the real estate was undevised, as the demandants claim, and two thirds descend to them

and has never been taken from them by any process known to the law.

3. No executor has a right to distribute real estate, unless by authority conferred by the will, or by authority of the court;—in either case, only by deed. No such authority exists, or is claimed in this case, and no deed from him as executor, or otherwise, to the defendant, of the demanded premises can be produced. No title has passed to her, therefore, except to the one third to which she is entitled as heir, as the demandants are to the remaining two thirds of the undevised real estate. The title to real estate of no person, least of all of a minor, can be affected by any so-called distribution or settlement of accounts of personalty by an executor.

4. The acts of ownership exercised by Mrs. Atwood and admitted in the agreed statement, were such acts as she was authorized by the will to exercise, everything being left to her care and control during her life. But the exercise of her option to take real estate as part of her legacy or bequest as her own, was used but once; by her sale of the homestead. No act of ownership inconsistent with this has been admitted.

Counsel for defendant says, "having elected to receive their shares of real estate in the form of legacies, they are estopped from claiming a share in the real estate itself."

When did they so elect? Never.

What evidence is there of such election? None.

The administrator in the settlement of his account shows a payment to Mrs. Clark, one of the demandants, of a certain sum of money. She was entitled to a sum of money from the personal estate under the will more or less, according to the amount of personal property left by the testator; she made no election and her claim to her share of the real estate cannot be defeated by any illegal act of the administrator. The other demandant, Mrs. Chapman, appears to have been a minor. Her guardian or trustee, who was one of three named in the will to act for minors, was paid a certain sum by the administrator, as appears by the account of the administrator. There is no other evidence of any payment to Mrs. Chapman, or in her behalf. As Rich was but

one of three trustees who were to receive her legacy, and could not act alone, the burden is upon the defendant to show that Mrs. Chapman has received her share of the demanded premises. Certainly the evidence produced does not show it. There is, in fact, no evidence presented by the defendant upon that vital point in the case.

It is respectfully submitted that her title to the demanded premises cannot be defeated by this payment to Rich.

Counsel further argued that the demanded premises did not pass to the defendant, as the residuary legatee, under the will of Lydia Atwood.

No mention whatever is made in her will of any real estate. There is not a word in the will by which it can be inferred that Lydia Atwood claimed to own a particle of real estate when she made this will—but the careful exclusion of any mention of real estate furnishes a strong presumption at least, that the testatrix did not claim to own any—or, at least, did not intend to devise any. If she did in fact own any real estate, the terms of the residuary clause are too vague to carry real estate to the disinherison of the heirs who are the demandants and the defendant in equal shares. Heirs are not to be disinherited by conjecture.

Counsel cited: 3 Jarm. Wills, 5th Am. Ed. p. 428, note and cases there cited. *Bullard* v. *Goffe*, 20 Pick. 252; *Howard* v. *Am. Peace Society*, 49 Maine, 288; *Baillis* v. *Gale*, 2 Vesey, sen., 51; *Davis* v. *Gardiner*, 2 P. Wms. 187, cited in Jar. Wills, (edition *supra*) p. 423; *Trimwell* v. *Perkins*, 2 Atk. 102; *Doe* v. *Rout*, 7 Taunt. 79; *Wright* v. *Hicks*, 12 Georg. 155; *Boisseau* v. *Aldridges*, 5 Leigh. 222; *Blackman* v. *Gordon*, 2 Rich. Eq., (So. Car.) 43; *Fisk* v. *Cushman*, 6 Cush. 20.

W. H. Fogler, for defendant.

1. Counsel contended that the demanded premises passed to defendant under the will of her mother who acquired title by the will of her husband, and cited: 2 Redf. Wills, 3d ed., p. 126, § 21; Ib. p. 308, § 1; Ib. p. 311, § 2; *Bullard* v. *Goffe*, 20 Pick. 252, 256; *Dewey* v. *Morgan*, 18 Pick. 295.

2. This brings us to an examination of the will of Nathaniel Atwood,—under whom the demandants claim to hold as heirs.

It is contended in behalf of the defendant,

First: The demandants can not hold as heirs of Nathaniel Atwood because he left no undivided estate, real or personal, his will providing for a disposition of all his estate;

Second: The demandants have no title as devisees under said will, because they are named as legatees of the testator, each entitled to her legacy in money, and the will contains no words indicating any intention of the testator to give them any interest in his real estate;

Third: The demandants, as legatees, under said will, have received their full share of all the estate, real and personal, of which said Atwood was seized or possessed at the time of his decease; they are estopped from claiming a share in the real estate itself;

Fourth: The demanded real estate, by the terms of said will, passed to the testator's widow, Lydia Atwood, and from her, by will to the defendant.

Counsel cited: 2 Williams, Exec., (6th Am. Ed.) 1455; 2 Redf. Wills, p. 116, § 5; Schoul. Wills, §§ 490, 561; *Wilbar* v. *Smith*, 5 Allen, 194; R. S., c. 74, § 2; *Duke of Devonshire* v. *Lord George Cavendish*, cited and quoted in *Griffith* v. *Harrison*, 4 T. R. 737, 743.

If, however, the court shall be of opinion that if by any informality or omission the legal title failed to vest in Lydia Atwood, the fact that she actually took the demanded premises as a part of her share in her husband's estate would clothe her with an equitable title; and the demandants, if they have any legal title, hold such legal title in trust for the defendant, the devisee of Mrs. Atwood.

Being in such case mere passive trustees, they cannot maintain a writ of entry against the defendant.

Sawyer v. *Skowhegan*, 57 Maine, 500; *Craig* v. *Franklin Co.*, 58 Maine, 479.

PETERS, C. J. The demandants and defendant are heirs at law of Nathaniel Atwood, deceased, and entitled to any undevised real estate left by him, the demandants to two-thirds and

the defendant to one-third thereof. The question is whether any undevised real estate was left by Nathaniel Atwood. He died in 1858, leaving a will, in which, after some minor bequests to distant relatives, he gives his wife Lydia certain personal property and twenty-five hundred dollars outright, and the use and occupation of the homestead for her life time or during widowhood. He provides that the twenty-five hundred dollars may be taken by the widow from any of his estate real or personal at the appraisal thereof, at her election.

He then gives, among bequests to others $500.00 to a daughter, one of the demandants, and $250.00 to a granddaughter, the other demandant, and declares that all his bequests are based upon the assumption that his net estate will amount to the sum of $4,750.00. He further declares that, if his estate should turn out to be more than that amount, certain of the bequests, including those to the widow and the persons who are the parties to the present action, shall be increased (relatively with each other) proportionally with the total estate left by him.

The estate much exceeded the sum named, there being real estate of the appraised value of $3,335.00 and personal estate appraised at the value of $11,197.99, total values being $14,532.99. So that the widow's portion became enlarged to $8,036.73, and the portions of the demandants were increased from the sums of $500.00 and $250.00 to the sums of $1,600.00 and $800.00, upon the basis that all the estate was converted into or settled as personal property. Each demandant, and all other legatees except the widow, received in money the portions they were thus entitled to. The widow received possession of the balance of the property, consisting of the real estate, $3,335.00 in value, about $5,700.00 in money or its equivalent. The accounts show a small discrepancy, probably from not noticing a pew, used in common by the heirs, in the calculations.

The demandants now occupy a position of hostility against this construction and settlement of the will, contending that no real estate was devised, or intended to be, beyond the use and occupation of the homestead, and that the bequests were a charge on the personal property only. They admit, however, that the

timony is not the fact of his subsequent statement, hence his testimony and statement cannot be considered as conflicting.

Thus, (in a case on all fours with this) in an action for an injury caused by an alleged defective way, a witness for the town testified that, at the time and place of the accident, the lady who was driving, in response to the witness's question, said she did not know how it happened unless the horse was frightened or she pulled the wrong rein,—the court held that testimony, offered by the plaintiff that the witness himself later on the same day being asked how the accident happened, answered—the horse shied,—was not admissible for the purpose of contradicting his testimony as it had no such tendency. Ames, J., after remarking that the witness had testified as to the explanation that the woman had given to him at the time, and that by his statement subsequently made out of court he did not undertake to give the woman's account, but his own version or theory of the accident, added: "In his testimony on the stand, he gave her explanation of the accident and nothing more; and the supposed conflicting statement has no reference whatever to his conversation with her. For that reason there is no real discrepancy and the evidence given on behalf of the plaintiff contradicts nothing and was therefore inadmissible." *Priest* v. *Groton*, 103 Mass. 530, 542. See also *Emmons* v. *Westfield Bank*, 97 Mass. 230, 244.

It cannot be said that this error was immaterial and had no improper influence on the jury. Unless contradictory, Hicks's statements to Merrow were clearly inadmissible, for they were the declarations of a person still living, in relation to the boundary of land which he never owned or had any interest in. *Morrill* v. *Titcomb*, 8 Allen, 100, and cases, *supra*. Furthermore, Hicks's statement to Merrow that the hemlock tree was on the line, was to the ordinary mind strong testimony in favor of the plaintiff, because it was the opinion of one whose father had formerly owned the premises and with which he himself had been long acquainted. And the jury could hardly be expected to understand that his statement was not to be considered as evidence, that the hemlock was in fact on the line, but simply and solely as evidence tending to contradict his testimony and thereby

render it unworthy of belief. Moreover, with their inexperience the jury quite likely might be influenced by the consideration that if Hicks's testimony and statement were conflicting, the latter might contain the truth and they would find their verdict accordingly. We think therefore this exception must be sustained. And as this gives a new trial we need not pass upon the other exceptions, further than to remark that, it is not prudent for a plaintiff to endanger his verdict by urging doubtful evidence.

Exceptions sustained.

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

BENSON M. DIXON *vs.* FRANK FRIDETTE.

Androscoggin. Opinion December 27, 1888.

Verdict. Practice. Lien. Implied Promise.

The plaintiff and his witnesses testified that the defendant agreed to cut all the wood on a certain lot, at a fixed rate per cord payable when all was cut and surveyed. The defendant and his choppers cut a portion of the wood, when the choppers sued the defendant for their wages and attached and sold the wood to secure their lien; the plaintiff paid the judgments and sued the defendant on an implied agreement to save him harmless from all liens. The defendant and his witnesses testified that he was to cut only such part of the wood as he chose and it was to be surveyed and paid for every two weeks. *Held*, that it was erroneous for the presiding justice to order a verdict for the plaintiff.

ON EXCEPTIONS. This was an action of assumpsit to recover money paid on lien judgments rendered in favor of laborers, against defendant and plaintiff's wood, and on which judgments the wood had been taken and sold. Plea, general issue.

After the evidence was closed, the case was submitted to the jury, on the charge of the presiding judge. The jury were unable to agree, and before separating the judge directed them to return a verdict for the plaintiff. To these instructions the defendant excepted.

G. C. and C. E. Wing, for defendant.

The case does not come within the rule laid down in *Heath* v. *Jaquith*, 68 Maine, 433. The evidence of the parties was conflicting. The jury should have been allowed to determine upon the evidence what the contract was. There was evidence that the plaintiff broke the contract. He was to survey and pay every two weeks for what wood was cut. If the plaintiff broke the contract he cannot maintain his action. How could he repudiate his agreement and hold defendant on an implied promise to hold him harmless from all liens thereon? Defendant had a right to stop cutting when plaintiff refused to pay, and could have maintained *quantum meruit* for the work actually done. *Mullaly* v. *Austin*, 97 Mass. 30.

Savage and Oakes, for plaintiff.

The circumstances in the case before the court are exactly similar, as to the action of the presiding justice, to those in *Heath* v. *Jaquith*, 68 Maine, 433, which is conclusive as to the power of the justice to order a verdict.

The only practical question arising then, is whether the evidence disclosed at the trial disclosed a legal defence.

Was it in the nature of a set-off? No brief statement was filed as the statute requires, and the case discloses no demand against the plaintiff sufficiently definite to be set off, if this line were open to the defense.

Is it in the nature of a recoupment? The law in regard to recoupment cannot apply here.

"To make it available it must appear that there is some stipulation in the contract sued which the plaintiff has violated. A defense by way of recoupment denies the plaintiff's cause of action to so large an amount as the plaintiff alleges he is entitled to. This can only be when the liability of both parties arises out of the same transaction, or from mutual and dependent agreements." *Winthrop Bank* v. *Jackson*, 67 Maine, 570; Waterman on Recoupment, §§ 465, 466; *Harrington* v. *Stratton*, 22 Pick. 510.

Here the cause of action is on an implied contract, the terms of which are fixed by law, and not by "mutual agreements."

This is the situation:—The defendant owed men for services in chopping wood, he neglected to pay, allowed himself to be sued, and the property of the plaintiff to be taken by process of law, to pay his, the defendant's debt.

We apprehend that the simple and only contract arising thereupon is that the defendant shall pay the plaintiff the sum he has had to pay out. It cannot matter, in this case, that some previous contract between the plaintiff and defendant had been broken by the plaintiff. That might be available to the defendant in a separate action, if he can make out his case, but surely not to cut down the verdict in this case.

If not a set-off or recoupment, does the defendant's case, giving the whole evidence its utmost weight on his side, show a legal excuse for the defendant which can free him from obligation on this promise implied by law?

We believe the mere statement of the question gives a sufficient answer.

Could the neglect of this plaintiff to fulfill his contract with the defendant, excuse the defendant from his contract with men he employed? And yet we cannot see but this must be assumed in order to make out this position for the defense.

VIRGIN, J. The plaintiff testified that the defendant took a job of him to cut all the wood on a certain lot, for eighty cents a cord, payable in "one lump" or round sum when all cut and surveyed by a sworn surveyor.

This special contract the plaintiff makes the foundation of an alleged implied promise, on the part of the defendant, to hold the plaintiff harmless from all lien claims or judgments on the wood for cutting it; and he brings this action, based upon that implied promise, to recover of the defendant the amount of six lien judgments in favor of the defendant's choppers and against the defendant and the wood chopped by them, which judgments the plaintiff paid, and thereupon contends that he paid them for the use of the defendant.

If the plaintiff's statement of the terms of the contract is correct and the defendant has performed a part of it only, and has

refused, without legal excuse and against the plaintiff's consent, to perform the rest of it, he could recover nothing either in general or special assumpsit. *Hulle* v. *Heightman*, 2 East, 145; *Dermot* v. *Jones*, 2 Wall. 1; *Faxon* v. *Mansfield*, 2 Mass. 147; *Rice* v. *Dwight Manf. Co.*, 2 Cush. 80, 87; *Otis* v. *Ford*, 54 Maine, 104; *Lakeman* v. *Pollard*, 43 Maine, 463. If he could not sue then of course he could not put any lien upon the wood.

The defendant, however, strikes at the very foundation of the plaintiff's action by testifying that the terms of the special contract were not, so far as the quantity of wood to be cut and the time of payment therefor are concerned, such as stated by the plaintiff; but, on the contrary, that he was not obliged to cut all the wood on the lot, but only so much thereof as he might choose; and that he was to receive eighty cents a cord for whatever he should in fact cut, and the survey and payment were to keep pace with the cutting *toties quoties* every two weeks.

If the defendant's version of the special contract as to the times of survey and payment, is correct, and the plaintiff absolutely refused to perform his part of it in this respect, thereupon the defendant would have the legal right to elect to rescind it and sue on a *quantum meruit* for the wood cut under it, prior to the rescision. *Withers* v. *Reynolds*, 2 B. & Ad. 882; *Planche* v. *Colburn*, 8 Bingham, 14; *Pritchett* v. *Badger*, 1 C. B. (N. S.) 296; *Dwinel* v. *Howard*, 30 Maine, 258; *Wright* v. *Haskell*, 45 Maine, 489.

In *Withers* v. *Reynolds*, *supra*, the defendant agreed to deliver to the plaintiff three loads of straw a fortnight during a specified time, at thirty-three shillings a load on delivery. After the receipt of several loads the plaintiff refused to pay on delivery, contending that he was to pay when all was delivered. On the defendant's refusing to deliver any more, the plaintiff sued him for breach of the contract, and Lord Tenterden, C. J., and his associates sustained a nonsuit, on the ground that the defendant was entitled to his pay on the delivery of each load, and that the plaintiff's absolute refusal gave the defendant the right to rescind. Patterson, J., remarked that if the plaintiff "had merely failed to pay for any particular load, that of itself might not have been an

excuse for delivering no more, but the plaintiff refused to pay for the loads as delivered." That case was cited in *Franklin* v. *Miller*, 4 A. & E. 599, and in pronouncing his opinion, Coleridge, J., said: "In *Withers* v. *Reynolds*, each load of straw was to be paid for on delivery. When the plaintiff said that he would not pay for the loads on delivery, that was a total failure, and the defendant was no longer bound to deliver. In such a case it may be taken that the party refusing has abandoned the contract."

Assuming that the law would raise an implied promise on the part of the defendant to hold the plaintiff harmless from all liens on the wood, provided the plaintiff's understanding of the special contract is right, such a promise could not be implied unless the plaintiff fulfilled on his part by paying as he agreed. Otherwise the defendant might lose all remedy for his earnings. And if he refused absolutely to pay bi-weekly, if such were the contract, he would thereby put it in the power of the defendant to rescind the special contract; and when rescinded, the parties would be in the same condition as if no such contract had been made; whereupon all the choppers might secure their wages on the wood.

Furthermore, the defendant and his witnesses to the contract, judging from their names and the language of their testimony, are Frenchmen. And the minds of the parties, on account of the defendant's imperfect knowledge of the English language, may not have met on the terms of the contract. If their testimony is true, they could not have understood the contract alike. If that should prove to be the fact, then there was no such contract ever entered into, and hence no implied promise on which to ground the plaintiff's action.

Under either aspect of the case, therefore, our opinion is, it should have been submitted to a jury to settle the facts; and the order directing a verdict for the plaintiff was erroneous.

Exceptions sustained.

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

widow might have taken her $2,500.00 in real estate, but contend that she never elected to do so.

We think that the will, evidently written by an unskillful hand, and without doubt by the testator, was intended to make a disposition of all the testator's property, real as well as personal. The tests of intention all, or nearly all, point unmistakably that way. There is no residuary clause to catch up anything not otherwise disposed of, and still the mind of the testator was evidently bent upon a purpose of making full and final dispositions. In fact it would not be a misnomer to call the provision increasing certain legacies according to the amount of the estate, a residuary clause. It operates as such. The $2,500.00 could be taken from the "estate real or personal," to go "to her and her heirs forever." He provides for a contingency that his previous advancements to a child might exceed the proportion coming to it "on the final settlement of my (his) estate." The legacies were to increase correspondingly "with my (his) estate." He names men to appraise his "property and estate." He enjoins upon his heirs to see that his estate is amicably settled "according to the provisions of this will." He expresses the hope that his heirs, to all of whom he made bequests, and to some of them he had made advancements, would not be ungrateful, but would be satisfied with his testamentary doings.

It is evident enough that he had in mind no definite distinction between real and personal estate. Nor did his executor have, who rendered his accounts as if there were no distinction, acting on the idea and meaning of the testator.

We have said that the demandants contend that the widow made no election to accept real estate in satisfaction of her portion. We think she did. She went into possession of all the realty and kept possession, at an earlier date by herself, and later by her guardian, until her death in 1882. She enjoyed the rents and profits and paid the taxes and repairs for over a quarter of a century, without opposition or adverse claim from any one. In 1859, she conveyed away a part of the real estate, the homestead, as if her own, by a warranty deed. If she did not accept the real estate in satisfaction of her portion, she never received her

portion. No sale of the land was made either by heirs or executor. The title to the land came to her by the will.

The general rule as stated by Mr. Bigelow on the point of election, in his last work on estoppel, p. 566, is applicable, and is as follows: "In regard to the question what constitutes an election, it is held in general that one who takes possession of property under a will and holds and manages it for a long time, and especially if he sell the whole or part of it, will be considered as making a binding election to accept that property under the terms of the will." Another principle stated by the same author, at p. 562, hits at the position upon which the demandants now place their claim. He says, "The most familiar example of this kind of estoppel is found in the case of wills. It is an old rule of equity that one who has taken a beneficial interest under a will, is thereby held to have confirmed and ratified every other part of the will, and he will not be permitted to set up any right or claim of his own, however legal and well founded it may otherwise have been, which would defeat or in any way prevent the full operation of the will." If the real estate was not devised by the will, the demandants have received more than the testator intended they should. We feel strongly the belief that the real estate was conditionally devised, and that the acts of the widow turned it into an absolute and completed devise. It is argued, on the demandants' side, that a circumstance indicating no intention to devise realty, is found in the clause of the will giving use and occupation of the homestead for life or widowhood, and allowing the widow to prevent any division of the property while she lived. That does not militate against the views we have expressed. It is rather in aid of them. If the widow should not elect to do so, then the other provisions would prevail.

The demandants next take the position that, if disentitled under their father to claim two thirds of the estate demanded, they are still entitled to the same as heirs of their mother, under the claim set up by them that their mother's will, under which the defendant claims the land as a devisee, does not devise any real estate. The mother, Lydia Atwood, after some small bequests, makes in her will this final provision: "I give and devise to my

daughter Margaret R. Chick (this defendant), all the rest and residue of my property and estate of every description and wherever situate, after the payment of my debts and the foregoing legacies, to have and to hold the same to her and her heirs forever." This is comprehensive and clear. There can be no doubt the intention was to include all real as well as personal property. Effective expressions are employed. She gives and "devises"—"all the rest and residue"—of her property and "estate"—of "every description"—"wherever situate"—to hold to her "and her heirs" forever.

There being nothing in other portions of the will expressing or implying anything to the contrary, she must have intended, by a general description, to cover all the property she had in the world after satisfying previous bequests. The word estate may include real as well as personal. The same may be said of the word property. In ancient cases either of the words was supposed to be used in a restricted sense. But in modern construction the popular signification is allowed to prevail. Whether the words are used in the wide or narrow sense, must depend on other words associated with them and the general context of the will. The word possessions is allowed the same scope of meaning. Schoul. Wills, § 510, and cases. *Blaisdell* v. *Hight*, 69 Maine, 306, and cases. In *Smyth* v. *Smyth*, 8 Chan. Div. 561, it was held that a freehold estate passed by force of the words, "all the rest and residue." Many kindred cases are there cited and commented upon.

Demandants nonsuit.

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

BENJAMIN M. ROYAL *vs.* CYRUS CHANDLER.

Androscoggin. Opinion December 24, 1888.

Real Action. Evidence. Non-rebutting Testimony.

In the trial of a writ of entry involving the dividing line between adjoining lands, a witness in behalf of the defendant having testified that the witness's father, the plaintiff's predecessor in title, pointed out to the witness a certain line (claimed by the defendant) as the true line; *Held*, that evidence was inadmissible in the plaintiff's behalf, for the purpose of contradicting the witness that he subsequently pointed out another line (claimed by plaintiff) to be the true one, as it did not tend to contradict the witness's testimony.

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94 38

ON EXCEPTIONS. Writ of entry to determine the location of the dividing line between the parties. The verdict was for plaintiff. The defendant excepted to testimony offered by plaintiff in rebuttal, and admitted as tending to contradict and impeach a witness of the defendant.

The grounds of the exception appear in the opinion of the court. There were other exceptions upon which the court commented.

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

The testimony of plaintiff's witness, Merrow, relating to the declarations of Hicks, defendant's witness, for the purpose of supporting the line claimed by plaintiff, was in no particular contradictory. The ruling admitted declarations of one in possession of land, not the disputed premises, in favor of his own title, which are always inadmissible. *Morrill* v. *Titcomb*, 8 Allen, 100; *Osgood* v. *Coates*, 1 Allen, 77; *Blake* v. *Everett*, 1 Allen, 248; *Bartlett* v. *Emerson*, 7 Gray, 174, 176.

The point to be proved by our witness, Hicks, was the admissions of his father and Lane, made while in a condition the same as if parties to the present suit; they were of the same quality as if spoken by the plaintiff himself. These could not be controlled or contradicted by the statements of the witness, subsequently made to third parties, not referring to his father and Lane. In

the objected testimony he did not refer to his father's and Lane's admission of the Chandler line, but gave his own claim as to where the line of his land was, in his own favor. It has no tendency to disprove his testimony as to what his father and Lane said and did against their interest. It shows that his claim as to the boundary was very different from theirs. *Collins* v. *Stephenson*, 8 Gray, 438; *B. & W. R. R.* v. *Dana*, 1 Gray, 83, 90, 104; *Priest* v. *Groton*, 103 Mass. 530.

R. Dresser, for plaintiff, argued orally.

VIRGIN, J. Writ of entry to determine the dividing line between these parties' adjoining parcels of land which are parts of lot one in Auburn, the plaintiff's being in the west half and the defendant's in the east half of the lot.

In 1822, one Little, owning the entire lot, conveyed the east half to a certain grantee who subsequently sold off fifteen acres from the north side of the east half, and still later (in 1864) conveyed the remaining thirty-five acres to the defendant.

In 1860, the title of the west half of the lot passed from Little by several mesne conveyances to Winslow Hicks and R. C. Lane.

In 1870, the Tobie road was laid out lengthwise of the lot, entering its west line about forty-five rods north of its southwest corner, thence running diagonally to its southeast corner,—leaving, a triangular piece of land between the road and the south side of the lot.

In 1871, Hicks and Lane, then owning all of the west half, conveyed to the plaintiff so much of it as lay south of the road, bounding it on the east by the defendant's land, thus making the plaintiff's east line identical with the defendant's west line south of the road, which line is the one in controversy.

At the trial, Samuel Hicks, (son of the former proprietor, Winslow Hicks) called by the defendant, testified in substance that in 1860, while his father and Lane owned all of the west half, he (witness) cut wood on the west half north of the road for his father and Lane, by whose direction he stopped cutting at certain birch trees, which they then pointed out as the line and is now claimed as the line by the defendant. These acts and declar-

ations of Hicks senior and Lane were competent testimony on the well settled exception to the general rule excluding hearsay,— that the declarations of an owner of land, since deceased, made on the land concerning its limits while pointing out the bounds which defined the whole or a portion of it, are admissible. *Daggett* v. *Shaw*, 5 Met. 223, 228; *Ware* v. *Brookhouse*, 7 Gray, 454; *Bartlett* v. *Emerson*, 7 Gray, 174; *Flagg* v. *Mason*, 8 Gray, 556; *Long* v. *Colton*, 116 Mass. 414.

In rebuttal, the plaintiff called one Merrow, who, against the seasonable objection of the defendant, was allowed to testify in substance that, in 1880, when Winslow Hicks and Lane conveyed to one Foster and the witness's wife the remaining part of the west half north of the road, he (witness) had a conversation with Samuel Hicks, then heir and administrator of the estate of his father, concerning the defendant's west line; that Hicks subsequently showed to the witness a hemlock tree at the south line of lot one, it being on the line claimed by the plaintiff and east of the birch line claimed by the defendant. This testimony was admitted for the specific purpose of contradicting Samuel Hicks's testimony above mentioned.

It is common legal knowledge that if a witness testify to the existence of a fact material to the issue, the opposite party may show that the witness has, out of court, made a contradictory statement as to that fact, with a view to affect his credit. But to render the impeaching statement admissible, it must be a contradictory opposite of the witness's testimony in court; for if the two are reconcilable, one cannot be received to contradict the other, Whart. Ev. § 558. The fact testified to by Samuel Hicks consisted of a declaration uttered by his father and Lane that the line was at the birches designated; while the statement which Hicks made to Merrow out of court in 1880 was, not that his father and Lane made no such or any different declaration, but simply stated where he himself, twenty years after their declarations were made, judged the line to be. His testimony in court related to assertions made by former owners showing where they considered their line to be; his statement out of court simply referred to his own views long afterward. The fact in his tes-

WILLIAM WEEKS *vs.* ABIAL TRASK.

Lincoln. Opinion December 27, 1888.

Award. Assumpsit. Trespass. "Abide and Perform."

Entering upon the disputed land and erecting thereon a fence several rods from the line between the parties, adjoining lands designated by arbitrators to whom the finding and fixing the true line was submitted, do not constitute a breach of the agreement "to abide by and perform the award."

ON EXCEPTIONS, by defendant to overruling his demurrer to plaintiff's declaration.

This was an action of assumpsit, in which the plaintiff declared on an agreement entered into by him and the defendant, to refer their differences as to the true boundary line between adjoining lands and mutual claims of trespass thereon, to certain arbitrators. After setting out the agreement, and the making and publishing of the award, the declaration alleges "said defendant then and there neglected and refused to abide by and perform said determinations and awards of said referees, and still neglects and refuses" * * * "whereby said defendant has become liable to pay to said plaintiff the sum of $300 as liquidated damages. * * *"

The plaintiff set out, among others, the following breaches of the award:

1. That heretofore, to wit, on the eighth day of September, A. D. 1883, and after the said award was made to the parties thereto agreeably to the terms of the submission, and notice thereof had been duly given to and received by them, the said defendant without the consent and against the will of the plaintiff entered upon the land of the plaintiff easterly of and bordering upon the division line between the plaintiff's land and the defendant's land as established by said award, and about four rods easterly of said division line, and then and there upon the plaintiff's said land built a fence about one hundred and thirty rods long, and the defendant then and there claimed that the land upon which said fence was so built was his own land, in violation

and disregard of the award aforesaid, by which award said land upon which said fence was so built was determined and decided to be the land of said plaintiff; and in violation and disregard of the division line between the lands of the plaintiff and the defendant as determined and established by said award.

2. That the defendant heretofore, to wit, on the 8th day of September, A. D. 1883, ignored and disregarded the division line determined and established by said award as aforesaid, by then and there crossing easterly over and across said line and claiming that the division line was to the eastward of the line established by said award, in violation of said award.

To the declaration the defendant filed a special demurrer, assigning, among others, the following causes:

1st. That in and by said declaration the said Abial Trask is not charged with doing any act which by the alleged agreement and awards set forth, in said declaration, he was restrained or prohibited from doing, nor with neglecting or refusing to do any act which he was by said alleged agreement or awards required to do.

2d. That it appears by said declaration that if the said William Weeks has any cause of action against the said Abial Trask, as therein alleged, the same is by an action of trespass or writ of entry, and not in assumpsit.

3d. That the alleged agreement set forth in said declaration is unconscionable, without consideration, and void.

5th. (In substance) that the controversy related to the title and possession of real estate not described or located in the agreement or awards.

6th. (In substance) that the boundary line was not so defined and described as to be capable of location upon the face of the earth, and was not designated by any permanent, definite and ascertainable monuments or objects.

8th. That the said alleged agreement and award as sought by the said declaration to be applied to the alleged causes of action therein set forth, is against public policy, in restraint of the legal and constitutional rights of the parties, and in derogation of the authority and jurisdiction of the courts.

The demurrer having been joined, was overruled by the court.

G. B. Sawyer, for defendant.

The demurrer though special in form, is in legal intendment and effect general, going to the substance—"the very right of the matter." If unnecessary, plaintiff cannot complain. Stephen's Plead., 3d Am. ed., 158, 159.

1. The award merely determines where, upon the face of the earth, the pre-existing boundaries are. Morse Arb. and Award, 513 *et seq.*, and cases cited. It can have no more effect than a deed. *Goodridge* v. *Dustin*, 5 Met. 363. The parties are then left to their ordinary legal remedies. *Jackson* v. *Gager*, 5 Cowen, 383; *Sellick* v. *Addams*, 15 Johns. 197. It only determines a matter fact. There is nothing in it which either party is to "abide by and perform" as regards establishing the line.

Plaintiff's first specification sets out only a simple act of trespass for which he has ample remedy by the ordinary processes of law. The second specification may result in a technical trespass and so *damnum absque injuria;* if actual trespass, it was actionable as such. The going across the line may have been with plaintiff's consent. It is not alleged to have been wrongful or injurious. The "claim" set up by defendant, is either harmless criticism by plaintiff or slander of title. Bouv. Law Dic. "Slander of title."

Plaintiff nowhere alleges a failure to do any act required by the award. It operates only in respect to the matters submitted. "Courts will always seek to uphold a submission * * * according to the obvious intent of the parties." Morse Arb. 47; Ib. 59. *Gordon* v. *Tucker*, 6 Maine, 247. The obligation to "abide by and perform" can only be construed as intended by the parties to apply to those parts of the award as to which performance was possible. This was a common law submission. The bond can give the award no greater force than if the submission had been by rule of court.

2. The reference was not intended to provide by "liquidated damages" in their agreement, for future trespasses. Submissions cover only, generally speaking, matters in dispute, doubt, or controversy between the parties at the date of their execution. *Thrasher* v. *Haynes*, 2 N. H. 429; parties must have power over the subject matter. *Bean* v. *Farnham*, 6 Pick. 269.

Did the referees in this case intend to make an award which should supersede the ordinary common law remedies in trespass and ejectment? If so, to how much of the land of either party should this novel remedy apply? Was it to be concurrent with the ordinary remedies, or cumulative, or exclusive? If concurrent, was it to give the injured party his election, so that for a trespass of slight importance he might claim the "three hundred dollars as liquidated damages," but for one of great magnitude he might resort to an action of trespass? If cumulative, was it intended that he might twice recover damages for the same act? If exclusive, was it intended that for any trespass, however small or great or long continued, the injured party should recover three hundred dollars, and no more or no less? In either of these aspects the stipulation, under the construction contended for by the plaintiff in this case, would be unconscionable and contrary to the spirit and policy of the law.

Counsel further argued that the award is void. It does not appear either by the submission or award how much or what width of land was in dispute, or whether the submission extended to the locus of the alleged trespass. If the submission extended to a width of four rods from the line found by the referees, it may have extended to forty or a hundred, and be set up as the pretext for a recovery for any act of trespass by either party, on any land of the other, if in the town of Jefferson, (the only description given in the submission), however remote from the disputed line.

Neither the submission or award show whether the land at a distance of four rods from the referees' line, on either side, or if on either side, which side, was a subject of controversy. We are justified, therefore, in holding that the award was void, for uncertainty,—resulting from the uncertainty of the submission. *Woodward* v. *Atwater*, 3 Clarke, (Iowa) 61, cited in *Morse Arb.* 62.

If an award is clearly void, on its face, for uncertainty, the defendant in a suit upon it may demur. *Morse Arb.* 434.

H. Ingalls, *W. H. Hilton* with him, for plaintiff.

The award is sufficiently definite. The location is given in the submission. The line established by the referees was a straight line extending from one monument to another, and, as appears

in the award, was the line in dispute. It is competent to show what line is referred to. *Parkman* v. *McQuaid*, 54 Wis. 473.

Submission not against public policy. *Tyler* v. *Dyer*, 13 Maine, 41, 49; *Cushing* v. *Babcock*, 38 Maine, 452, 455.

On the question of damages counsel cited: *Gammon* v. *Howe*, 14 Maine, 250, 253. $300 is a liquidated sum. *Dwinel* v. *Brown*, 54 Maine, 468.

VIRGIN, J. Assumpsit to recover $300 as liquidated damages for the alleged breach of a written agreement "to abide by and perform an award" by which the arbitrators found and established the division line between the adjoining tracts of lands of the parties.

It is well settled that a published award, made under a written submission giving authority "to find and establish the boundary line between the adjoining lands of different proprietors, is conclusive on the parties, and they are estopped thereby to dispute it when thus established." *Tyler* v. *Dyer*, 13 Maine, 41; *Sweeny* v. *Miller*, 34 Maine, 388; *Buck* v. *Spofford*, 35 Maine, 526; *Goodridge* v. *Dustin*, 5 Met. 363; *Thayer* v. *Bacon*, 3 Allen, 163; *Searle* v. *Abbe*, 13 Gray, 409; *Shaw* v. *Hatch*, 6 N. H. 162; *Russell* v. *Allard*, 18 N. H. 222; *Orr* v. *Hadley*, 36 N. H. 575; *Marshall* v. *Reed*, 48 N. H. 36.

Moreover, a controversy as to the location of the division line between adjoining lands necessarily involves the title of the strip of land lying between the two lines claimed by the respective parties. And though the award does not attempt in terms to transfer from one party to the other the intervening strip, nevertheless, without making any new line, it does "find and establish" —that is, ascertain and confirm what was before doubtful—the pre-existing line, on the respective sides of which the parties had held the title ever since they became the proprietors of the adjoining lots. *Searle* v. *Abbe*, *supra*.

Furthermore, the particular locality of the line upon the face of the earth having been thus ascertained and fixed, *transit in rem arbitratam*. *Duren* v. *Getchell*, 55 Maine, 241, 249. Thenceforth, relying upon the finality of that line through the estoppel of the parties to deny it and its necessary consequences, a writ of entry might be maintained by either party against the other who should

disseize the demandant of his land bordering on it (*Goodridge* v. *Dustin*, *supra*); or trespass would lie against whichever of the parties committed acts of trespass on the other side of the line. *Sellick* v. *Adams*, *supra*; *Shaw* v. *Hatch*, *supra*.

Assuming then, that the declaration sufficiently alleges that the defendant's acts complained of were committed upon the land the title to which was in controversy, until the award virtually determined it to be in the plaintiff, the demurrer directly presents the question,—whether the defendant's going upon the land after the publication of the award, and then and there, in disregard of the award, erecting the fence and claiming the land as his own, constitute a breach of his stipulation in the submission "to abide by and perform the award," for which assumpsit will lie; or whether the plaintiff must resort to his action of tort for remedy.

This precise question has been decided in New Hampshire, where it was held, that entering upon the disputed land, removing the stone monuments erected by the arbitrators to designate the division line found and established by their award, and denying that to be the true line, did not constitute a breach of the arbitration bond conditioned "to abide by and perform the award." Richardson, C. J., said, the words "abide by" did not mean to acquiesce in; but simply to await the award without revoking the submission, adding "the award is conclusive between the parties and the defendant may be liable in trespass for what he has done." *Shaw* v. *Hatch*, *supra*. A like view was adopted in *Marshall* v. *Reed*, *supra*.

Doubtless a revocation of the authority of the arbitrators before the award is made is a breach of such a stipulation. *King* v. *Joseph*, 5 Taunt. 452; *Brown* v. *Leavitt*, 26 Maine, 251. So is putting it beyond the power of the arbitrators to make an award, —as the marriage of the female party. *Charnley* v. *Winstanly*, 5 East, 266. Or, preventing one of the arbitrators from taking part in an award as to costs which were a part of subject referred. *Quimby* v. *Melvin*, 35 N. H. 198. So is refusing to pay money in accordance with the award. *Thompson* v. *Mitchell*, 35 Maine, 281; *Plummer* v. *Morrill*, 48 Maine, 184. Also refusing to do any act other than the payment of money, required by the award, such as

transferring a piece of a vessel; and when the submission is not under seal, assumpsit will lie. *Gerry* v. *Eppes*, 62 Maine, 49, 51, 52.

To "abide the order of the court" in a bastardy proceeding, said Shaw, C. J., means "to perform," "to execute," "to conform to." *Hodge* v. *Hodgdon*, 8 Cush. 294, 297.

A docket entry under an action at law "to abide the decision" in a certain equity suit, has been held to mean, not that the action at law should be dependent on the final determination of the suit in equity, but that so much of the issue as was common to both should be decided in the former the same as in the latter. *Hodges* v. *Pingree*, 108 Mass. 585.

The debtor's stipulation in his bail bond "to abide, do and perform" the judgment "means," said Peters, J., "to submit to, to stand to or to abide. The words are an useless iteration, employed to add force and expression to the idea conveyed by the words to abide." *Hewins* v. *Currier*, 62 Maine, 236, 239.

While these illustrations show that these words take some shade of meaning from the subject matter, with which they are connected, our opinion is that, in cases of this sort they mean in substance that the parties will not in anywise revoke or prevent the making and publication of the award; that when made and published it shall be final; and that they will perform any act required by the award, which is within the scope of the authority conferred on the arbitrators by the submission.

The award in this case having been made in pursuance of the submission, leaving nothing to be done by either party, the submission and the award, like a deed of partition, have performed their office. And whatever controversy the parties may have subsequently had in relation to the premises, the ordinary remedies at law afford to each ample redress.

Exceptions sustained.

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

AMOS PHILLIPS *vs.* GEORGE M. VOSE and logs.

Franklin. Opinion December 27, 1888.

Lien on logs. Assignment. R. S., c. 91, § 38. *Arrival at destination.*

When poplar and birch logs are, under one contract, cut and hauled from the same land and delivered at the same mill in separate piles, all in the same season, an action to enforce a laborer's lien thereon is seasonably commenced within sixty days after all the poplar and birch logs are thus delivered.

A merchant, to whom the laborer has sold his lien claim, for goods furnished him, may maintain an action in the name of the laborer to enforce a lien on the logs.

Murphy v. *Adams*, 70 Maine, 113, affirmed.

ON REPORT. The court were to render such decision as the law and facts require, on the pleadings and evidence.

The action was upon account annexed for the plaintiff's personal services, in cutting and hauling poplar logs and birch lumber during the winter of 1886–7, and claiming a lien thereon. The last delivery of the logs and lumber was alleged to have been made at the place of manufacture February 24, 1887. Plea, general issue, with brief statement of special matter of defense by the log owners that the lumber was not seasonably attached to enforce the lien, and that the lien had been extinguished by a sale thereof prior to the commencement of the suit. The date of the sheriff's attachment was April 23, 1887.

P. A. Sawyer, *J. C. Holman* with him, for plaintiff.

The idea that the sixty days commence to run from the time each load or parcel of lumber arrives at the place of manufacture cannot apply in any case.

A true construction of the statute does not require the laborer to discriminate between different loads or small parcels of the same lumber when all hauled during one winter's operation. When the contract of hauling is at an end the sixty days commence to run. *Sheridan* v. *Ireland*, 66 Maine, 65.

The lumber is that contemplated by the lien statute applying

to "logs and lumber." It was cut, not for wood, but lumber to be manufactured by aid of machinery into various articles or forms of merchandise.

The attachment was properly made, *Parker* v. *Williams*, 77 Maine, 418. Equities are with plaintiff. Claimants have received the benefit of his labor and have paid no one for it. Any amount they pay to discharge liens may be offset or recouped in the claim of principal defendant on his contract. The suggestion that the plaintiff sold his claim at a discount is not sustained by the evidence and is nothing to the case if it was a fact. The sale does not affect the matter, there being no written assignment.

P. H. Stubbs and W. Fred P. Fogg, for claimants.

No lien exists at common law. *Oakes* v. *Moore*, 24 Maine, 214. Being in derogation of the common law the statute should be construed strictly. Dane's Abridg. c. 44. The statute was not intended to cover two kinds of logs and lumber, hauled at different times, manufactured for different purposes, separate and distinct as to character, purpose and value, all the way from the stump to the saw, as the plaintiff knew. *Sheridan* v. *Ireland*, premises a different state of facts. In that case it was impracticable to distinguish the different kinds of logs at the place of destination. Here it is the reverse. The logs and lumber were kept separate, and could be readily distinguished at all times. Plaintiff knew that the birch arrived long prior to the poplar. The lien on the birch was therefore lost by not being effectuated within the sixty days. *Union Slate Co.* v. *Tilton*, 73 Maine, 207. The laborer is presumed to exercise ordinary care and prudence in the management of his affairs, and to be capable of determining when the occasion has arrived for an appeal to the remedy which the law affords him. He neglected to effectuate his lien, as to the first deposit, until the day following the last day which the statute allowed him.

Plaintiff admits he sold his claim, for goods, a month or six weeks before the suit. His lien claim was thereby extinguished. *Pearsons* v. *Tincker*, 36 Maine, 384; *Ames* v. *Palmer*, 42 Maine, 197. The lien given by statute is an inchoate personal right. *Colley* v. *Doughty*, 62 Maine, 501; *Ruggles* v. *Walker*, 34 Vt. 468;

Hollingsworth v. *Dow*, 19 Pick. 228. It is a personal right and cannot be transferred to another. *Daubigny* v. *Duval*, 5 T. R. 604, 606; *Holley* v. *Huggeford*, 8 Pick. 73; *Jacobs* v. *Knapp*, 50 N. H. 71; Story's Con. 219. In the absence of any statutory provision, the assignment of a demand for which the assignor may have by law a specific lien, destroys the right of lien. *Tewksbury* v. *Bronson*, 48 Wis. 581; *Rollins* v. *Cross*, 45 N. Y. 766; *Sweet* v. *Lyon*, 1 East, 4.

The lien claim did not pass by the contract of sale, if by such contract it could be passed. *Urquehart* v. *McIver*, 4 Johns. 102; *Caldwell* v. *Lawrence*, 10 Wis. 332; *McCombe* v. *Davies*, 7 East, 5; *Fox* v. *McGregor*, 11 Barb. 41; *Hunt* v. *Haskell*, 24 Maine, 339.

The nature of the term lien precludes the idea that a person can have a lien without having a debt or claim to be secured by it. The lien and debt were inseparable while both existed, and when plaintiff transferred the debt fully and unconditionally, he had no remaining interest in it, and the lien ceased to exist.

There is no equitable reason why the principle adopted in nearly every other state and this state, with the exception of *Murphy* v. *Adams*, 71 Maine, 113, should be reversed in this case.

VIRGIN, J. On report. Assumpsit for personal labor and to enforce a lien therefor upon certain lumber on which the labor was expended.

Rowe Bros. (two of the claimants) contracted with one Vose to cut, haul and deliver at their mill, during the season of 1886–7, poplar and birch timber on the land of Adelbert Meade. When hauled, the birch and poplar were piled separately in the mill-yard. The hauling of the birch was completed on Feb. 11, and the poplar on Feb. 24, 1887. The plaintiff was one of the laborers on the lumber in the woods.

1. The claimants object to any judgment for a lien upon the birch, because the attachment, made on April 23, was not within "sixty days after it arrived at its place of destination for manufacture"; and for a like reason to a judgment on so much of the poplar as arrived prior to Feb. 22.

The timber came off from the same land, all cut, hauled and delivered the same season by the same contractor, at the same

price, at the same mill as a whole and not as separate lots or parcels. We do not think this remedial statute should be so construed as to compel a laborer to divide his action for wages and make two attachments, which necessity might arise when different kinds of timber are cut and all of one kind arrives, sixty days before the other, at the place of manufacture. On the contrary we think *Sheridan* v. *Ireland*, 66 Maine, 65, is decisive of the objection.

2. The objection that the sale of the laborer's claim to a merchant for goods discharged the lien, is not sound. It was settled eight years ago by this court that one who has purchased the claim of a laborer in the cutting and hauling of logs may maintain an action thereon in the name of such laborer to enforce the laborer's lien on the logs. *Murphy* v. *Adams*, 71 Maine, 113.

These being the only objections made to the action, there must be judgment for the plaintiff for the amount of his bill and interest from date of the writ against the personal defendant George M. Vose and against the poplar and birch lumber and logs attached.

Judgment for plaintiff.

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

THOMAS GILPATRICK, and others, in equity *vs.* DANIEL GLIDDEN, admr. and others.

Kennebec. Opinion December 27, 1888.

Equity. Will. Trustee in invitum. Trust ex maleficio. R. S., c. 73, § 11. "Equally between Heirs." R. S., c. 75, § 1.

Where a husband's intention of devising his property to his own heirs was changed and it was devised to his wife by will absolute in form, upon her assurances that she would only use it during her life and devise the remainder to his heirs, on a bill in equity by the husband's heirs; *Held*, that the wife took the property charged with a trust.

IN EQUITY. On appeal by defendants from a decree in favor of complainants after hearing on bill, answer and proof.

This was a bill in equity in which the complainants, heirs of Orrin Gilpatrick, of Somerville, sought to recover from the defendants, administrator and heirs of Sarah Gilpatrick, wife of said Orrin, certain portions of his estate which it was charged said Sarah had received, upon a parol trust for them, under the will of her husband; and in violation of her trust agreement had failed in her life time, to convey to them by deed, will or otherwise.

The principal averments in the bill are as follows:

1. That your complainants are the sole heirs at law of one Orrin Gilpatrick, late of Somerville, in the county of Lincoln; that said Orrin was in his life time possessed of certain real estate, to wit: A homestead and farm situated in said Somerville, of the value of five thousand three hundred dollars, ($5,300), and of certain personal property of the value of five thousand three hundred dollars ($5,300), and all of the value of ten thousand six hundred ($10,600), and on the first day of February, 1875, died testate; that said Orrin on the twenty-eighth day of January, 1875, executed and published his last will and testament, here in court to be produced, the first clause of which reads as follows: "I bequeath to my wife, Sarah Gilpatrick, my homestead and all the real estate I now own, and all my personal property;" that said will was duly probated in the county of Lincoln, on the sixth day of April, 1875, and one Benjamin L. Tibbetts, appointed executor thereof; that said Sarah Gilpatrick died on the third day of August, 1883, intestate, leaving real estate to the value of sixteen hundred dollars ($1,600), and personal property of the value of fourteen thousand eight hundred and twenty-one dollars and twenty-six cents, ($14,821.26), and all of the value of sixteen thousand four hundred and twenty-one dollars and twenty-six cents, ($16,421.26), and that her sole heirs are Frank H. Plummer, Belle A. Dexter, Henry E. Plummer and Warren Plummer, four of the respondents herein named; that Daniel Glidden, another respondent herein named was duly appointed as administrator of her estate on the twenty-second day of October, 1883, and qualified as such, and Peter Dunton is the duly appointed and qualified guardian of said Frank H. Plummer.

2. And your complainants further aver that immediately prior to the making of his said will, and to the conveyance hereinafter referred to, said Orrin expressed to said Sarah Gilpatrick, his desire and intention to so dispose of all his property, both real and personal, that she might have the use and control of the same during her life; but that at her decease all that remained should absolutely and in fee simple pass to his legal heirs, your complainants, and not to her heirs. That said Sarah acquiesced in and agreed to said disposition, that there was then and ever after during his life, a perfect understanding and agreement between them that his intentions in this respect should be carried out, and said Sarah then and there promised the said Orrin that, if in his life time he would convey a certain part of said property to her, without an express limitation of the estate to the period of her life, and devise the rest of said property to her also without such express limitation, she would use the same during her life only, and hold the remainder thereof in trust for your orators in fee simple, and that at her death the whole then remaining of the property thus devised from the said Orrin, should pass and be transferred absolutely to the heirs of the said Orrin, your complainants, and not to her heirs, and that she would make in her life time all provisions necessary to that end.

That solely in consequence of said agreement on the part of said Sarah, and in full reliance thereon, the said Orrin was induced to and did then and there convey to said Sarah personal property of the value of five thousand dollars ($5,000), and was induced to and did on the twenty-eighth of January, 1875, make a devise of all the residue of his property, real and personal, of the value of fifty-six hundred ($5,600), to said Sarah, in terms absolute and unqualified, as hereinbefore set forth.

And your complainants further aver that by virtue of said conveyance, the said Sarah received the value of five thousand dollars ($5,000) in personal property from the said Orrin in his life time, and under said absolute devise, she received from his estate personal property of the value of three hundred dollars ($300), and his homestead farm in said Somerville, from the sale of which in 1876, she realized the sum of five thousand three hundred dollars

($5,300), making in all the sum of ten thousand six hundred dollars ($10,600).

That said Sarah had the absolute management and control and use of said property so conveyed and devised during her life time, and that at her death there remained in her hands of the estate of said Orrin Gilpatrick, said ten thousand six hundred dollars ($10,600), received by the said Sarah under the agreement above recited, and the same is included in the property of said Sarah's estate aforesaid; but in direct violation of the agreement aforesaid, and in utter disregard thereof, and in fraud of the estate of said Orrin, and of your complainants as sole heirs thereof, said Sarah made no conveyance of said property by deed, will, or otherwise to your complainants, and made no disposition of the same in order that it might pass to them at her decease, but died without leaving any will or any disposition thereof whatever, and thereby in fraud of your complainants, and against their rights, attempted to pass the same at her decease to her own heirs, the said Henry E. Plummer and Warren Plummer, respondents herein named; and said Henry E. and Warren Plummer, as heirs aforesaid and said Glidden as administrator aforesaid, now hold the same subject to the condition and promise aforesaid in trust for the complainants.

That your complainants on the eighth day of November, 1883, duly demanded in writing of said Glidden as administrator, the payment of said sum so held in trust and have made the same demand upon said respondent heirs, but all said respondents have ever refused to recognize said trust or the rights of your complainants in said property, and claim to hold the same in their own right, in fraud of your complainants, and against their equitable right.

The defendants filed a general answer denying the allegations of the bill, and made special answer as follows:

Said defendants further answering, say that the supposed expression of a desire and intention by said Orrin Gilpatrick to so dispose of all his property that the said Sarah might have the use and control of the same during her life, but that at her decease all that remained should absolutely and in fee simple

pass to his legal heirs, to which it is alleged in the plaintiff's bill the said Sarah acquiesced, if expressed at all, was not in writing, nor was there any declaration in writing signed by the said Orrin or the said Sarah relating to the same; that the said several supposed agreements, promises, understandings and undertakings in complainants' bill, as respectively alleged, were not any or either of them in writing, nor is there nor ever was there any memorandum or note thereof in writing signed by said Sarah Gilpatrick or any other person by her thereunto lawfully authorized; that the said supposed trusts alleged in complainant's bill were not created or declared in writing signed by the said Orrin or the said Sarah, or either of them or their attorneys.

The decree was for complainants, and defendants appealed under R. S., c. 77, § 20.

The facts as found by the court appear in the opinion.

Baker, Baker and Cornish, for complainants, argued several propositions of fact, and among them, the following:

1. That Orrin Gilpatrick intended that this property should go to the Gilpatrick heirs as distinguished from his wife's heirs.

2. The ultimate restoration of the property to the Gilpatrick heirs was made an indispensable condition to his willing the property to his wife absolutely, and that he persistently refused to make this absolute will until and unless an unqualified promise was first made by her, that in the end what she had left of it, should go to his heirs.

3. That after having long deliberated, she did finally before the will was made, solemnly promise her husband that if he would make the will absolute in terms, and in her favor, she would carry out all the conditions named, and that she did this in order to obtain for herself the advantage of the use and control of all of Orrin's property while she lived.

4. That all the other agreements, i. e. for the monument, the graveyard, the $500 legacy, and the Glidden reconveyance were admittedly not only made, but actually carried out by his wife precisely as agreed, and in defiance of the apparent and absolute terms of the will.

These admitted facts show conclusively, that this apparent will was not his real will but only a nominal one; that the real disposition of his property was to be different from what the will provided; that we must look outside the will itself to discover and carry out the testator's real testamentary purpose; that a solemn agreement by which she should bind herself faithfully to execute his real will was insisted on by him before he would put the property into her hands by a will in form absolute; that his wife understood fully this condition, held it long under consideration, and finally, solemnly agreed to it in order to prevent him from willing the property wholly away from her, &c., that she having admittedly agreed to all the minor conditions which were repugnant to his nominal will but indispensable to his real will, *a fortiori* would he insist on her agreeing to the most vital condition of all namely, that the property which had come down through three generations of Gilpatricks, should in the end be turned over to the Gilpatrick heirs and none other.

Still further, about the time she was executing the other conditions she called in Dr. Tibbetts and had him write and witness her sign what she called a "certification" certifying in terms, that when she was done with this property it was to go equally to his heirs.

It is for the court to construe the terms used by the parties, that Orrin's property at Sarah's death should "go to the Gilpatrick heirs." Whether *per stirpes*, or *per capita*, is for the court to say.

Counsel also argued that this was a trust having its origin in fraud, forced upon the conscience of the party by operation of law. 2 Story Eq. § 1195. To prove the fraud it needs only be shown, 1st, the real purpose of the testator; 2d, the communication of that purpose to the disponee; 3d, the assent and agreement of the disponee, either by language or silence, to faithfully carry out that purpose, notwithstanding the terms of the will; 4th, action, or refraining from action on the part of the testator in consequence of such promise, and on the trust induced by it.

Counsel cited the following cases:

Drakeford v. *Wilks*, 3 Atkyns, 539; *Reech* v. *Kennegal*, 1 Ves.

senior, 123; *Barrows* v. *Greenough*, 3 Vesey, 153; *Russel* v. *Jackson*, 10 Hare, 204, 211; *Wallgrave* v. *Tebbs*, 2 Kay and Johnson, 313; *Jones* v. *Badley*, L. R. 3 Chan. Appeals, 362; *Springett* v. *Jennings*, L. R. 10 Eq. 488, 495; *Tee* v. *Ferriss*, 2 Kay and Johnson, 357; *Podmore* v. *Gunning*, 5 Simons, 485; 7 Ib. 644; *McCormick* v. *Grogan*, L. R. 4, H. L., 82; *Norris* v. *Frazer*, L. R. 15 Eq. 318; 331; *Rowbotham* v. *Dunnett*, 8 Chan. Div. 430; *Boyes* v. *Carritt*, 26 Ib. 531; *Strickland* v. *Aldridge*, 9 Vesey, 516; *Owing's Case*, 1 Bland's Chan. 370; *Gaither* v. *Gaither*, 3 Md. Chan. 160; *Hoge* v. *Hoge*, 1 Watts, 163; *Church* v. *Ruland*, 64 Penn. St. R. 422; *Dowd* v. *Tucker*, 41 Conn. 197; *Barrell* v. *Hanrick*, 42 Ala. 60, 73; *Williams* v. *Vreeland*, 32 N. J. Eq. 734; *Glass* v. *Hulbert*, 102 Mass. 24, 39; *O'Hara* v. *Dudley*, 95 N. Y. 403; Browne Stat. Frauds, 103, § 95; *Towles* v. *Burton*, Richardson's Eq. Cases, 146, So. Car. (24 Am. Dec. 414); *Thynn* v. *Thynn*, 1 Vern. 295.

Spear and Clason, *Loring Farr* with them, for defendants.

Plaintiffs admit a will, absolute in form, and seek to engraft a trust upon it, by parol testimony. They fail by their testimony to make out a case. The burden is on them to make out their case, by the most explicit testimony, as such evidence is not regarded with favor, and the court will not act upon it, if it be not strong and irrefragable, or if it be contradicted by other witnesses. Perry's Trusts, 3d ed., Vol. 1, § 147.

Lantry v. *Lantry*, 51 Ills. 458, 466, (2 Am. Rep. 314.)

They must also show the party against whom the parol trust is established has prevented the grantor by fraudulent promises, from adopting some other mode of accomplishing his purpose, and induced him to place it in the power of such person to convert the property to his own use.

Lantry v. *Lantry*, *supra.*

Sebra C. Kennedy's testimony shows simply an understanding, a biased opinion and not an agreement. Mrs. Kennedy speaking of the alleged agreement says she did not hear Sarah Gilpatrick make any answer,—nothing definite at the time. Doctor Tibbetts does not testify to any agreement; says he did not hear any. The certificate which he made twelve years ago for her to sign, and quotes verbatim, shows no such agreement as alleged by

plaintiffs. It reads "I, &c., do hereby certify that it is my wish that the property that was left me by Orrin Gilpatrick my husband should be equally divided between his heirs at my decease." She treats the property as her own, she "certifies" that it is her own and not her husband's wish that the property left, not to Orrin Gilpatrick's heirs, or the Turner heirs, but to herself shall be divided, &c. The conversations which this witness relates, show no agreement for the property to go, as "he wanted it;"—indicate no contract, unless the court supplies a deficiency in the testimony. Because one party wants a thing done is it evidence that the other party has agreed to do it? Is it evidence of inducement or fraud? They were not assertions of facts, but made merely "to bring somebody out."

The mistake of the witness about the date of the bill of sale is important in proving his total forgetfulness, or wilful perversion of facts. This kind of testimony is not sufficient basis for engrafting a trust upon a will. It is unsatisfactory testimony. *Snelling* v. *Utterback*, 1 Bibb. (Ky.) 609; *Kimball* v. *Morton*, 1 Halstead Ch. (N. J.) 26; *Hoge* v. *Hoge*, 1 Watts, 163.

Plaintiffs' case is deficient because, 1st, this species of evidence is regarded with disfavor; 2d, no witness pretends to have heard any agreement between the parties; 3d, no witness ever heard the husband state, in detail, what arrangements he and his wife had made, except Zubra Gilpatrick; 4th, no witness has attempted to show that he was in any way diverted from making his will just as he desired, by anything said or done by his wife; 5th, no testimony to any assent, on the wife's part, to carry out any wish or agreement.

Zubra Gilpatrick's testimony is in opposition to the agreement set up by plaintiffs' bill. Thomas Gilpatrick was to "have the homestead and carry it on as he liked." This disposes of about one-half of the property and hence cannot be the trust set up;—by that the whole was to go to the heirs. Notice the language: "he would like to have Thomas have the farm, &c."

No arrangement had been made with Thomas but he would like to have him come if he desired to. It is more probable he would leave the remainder to the widow of his only son, to whom he

said "yes, you are to have the remainder" than to the Turner heirs. If the court are to draw an inference from the indefinite and uncertain testimony would it not be that she was to have all the personal property?

No trust can be charged upon real estate by parol. R. S., c. 73, § 11.

Glass v. *Hulbert*, 102 Mass. 24; *Flint* v. *Sheldon*, 13 Mass. 443, 448.

The real question in this case is whether a will executed, with all the formalities of law, explicit and clear in its terms, shall stand as the expression of the last will of the testator, as to the disposition of his property, or whether, when he can no longer speak, it shall be subject to attack and overthrow by misunderstanding, perjury and fraud. Otherwise, the familiar principle that the testator's intention is to be gathered from the whole instrument, it will be necessary for him to exclude in writing from his will, every intention which might be proved, outside the will itself, by parol testimony, in order to avoid some kind of a trust which perjury and fraud may conjure up.

Mr. Farr, in behalf of the respondents argued that evidence of intentions, expressed so long a time before making his will, is inadmissible. *Gerry* v. *Stimson*, 60 Maine, 186, 188.

The intentions testified to, are not those alleged in the bill. They are not intentions expressed to the wife by the husband, or by those to whom he expressed them. Proof of the allegations in the first charge of plaintiffs' bill not proved,—much less "with proof of the strongest character." Whart. Ev. § 1037. Best's Ev. Intr. § 24.

The evidence to maintain the allegations, in the second charge, arises only from loose, and unreliable testimony. Evidence of an understanding is not proof of a promise. It must be clear, strong, unequivocal, unmistakable. 2 Pom. Eq. § 1040; 2 Devlin's Deeds, § 1185.

All the things which the husband wanted the wife to do, she did except one, and that she attempted to do. But that one thing she was not expected to do alone. There was another whose acts and conduct were to correspond to her reasonable expectations.

Thomas Gilpatrick was to have the home place on condition of taking care of things, and living there with her, and making her home comfortable. For this reason it was not put in the will. He failed to perform the condition. This agreement and understanding which the widow attempted to carry out is inconsistent with that alleged in the bill.

There is no evidence what remainder,—whether of his own property or his wife's—the testator meant.

If his final intentions were put into his will, that ends this case depending on an alleged contract, *de hors* the will. There is no evidence that the husband, just prior to making his will, intended to devise his property to his heirs to the exclusion of his wife. If he made no will, one half of his personal estate would have gone to his wife by law. The other half has been expended as he directed. What she would have received, without or in spite of a will, or what was transferred prior to the will, does not enter into the supposed understanding, and cannot be used as the foundation of an equity suit.

The only ground upon which the trust set up can be rested, is actual intentional fraud. 1 Pom. Eq. § 1054. The mere breach of promise to convey is not enough; there must be some actual fraud in procuring a deed or devise to one's self. 1 Perry's Trusts, § 181.

The trust alleged in the bill is not a trust arising or resulting from implication of law under the statutes. Pom. Eq. *supra*, §§ 1030, 1031; Perry's Trusts, § 124; *Lantry* v. *Lantry*, 51 Ills. 458.

The court will not abrogate an explicit and time honored statute. R. S., c. 73, § 11; *Olliffe* v. *Wells*, 130 Mass. 221; *Moore* v. *Stinson*, 144 Mass. 594; *Farnham* v. *Clements*, 51 Maine, 426; *Gerry* v. *Stimson*, 60 Maine, 186, 188; *Stevens* v. *Stevens*, 70 Maine, 92; *McLellan* v. *McLellan*, 65 Maine, 500; *Norris* v. *Laberee*, 58 Maine, 260; *Baker* v. *Vining*, 30 Maine, 121, 126; *Philbrook* v. *Delano*, 29 Maine, 410.

As to the law: Most of the English cases are against the Mortmain Act, or relate to personal property.

In *Barrow* v. *Greenough*, there was a writing. The decision reads, "I am very happy that I have under the defendant's hand

writing the particulars of the conversation, so that there can be no doubt about it, for this evidence shows how dangerous it is to determine on parol evidence only. If it rested on that alone the testator's intentions could not have been effectual; * * * if it had not been for this written paper, I should have hesitated very much about admitting evidence against a written will."

Under the Mortmain Act in England, and a similar statute in New York, where parties attempt to establish trusts against the law, courts admit evidence to defeat the attempt. In this case the parties are alleged to have established a trust, and the court is asked to admit parol evidence to render it valid in spite of the law.

Our statutes concerning trusts have not been construed to allow a trust to be established on a parol promise, at least in America, with perhaps one exception. *Flint* v. *Sheldon*, 13 Mass. 443, 448; and *Goodwin* v. *Hubbard*, 15 Mass. 210, are against it. *Olliffe* v. *Wells*, *supra*, and the cases there cited in tone are against it. Connecticut and Ohio have no such statute. When *Hoge* v. *Hoge*, 1 Watts, 163, was decided, Pennsylvania had no statute of frauds, nor statute concerning trusts. *Brooks* v. *Chappell*, 34 Wis. 405, relates to legacies, and did not affect title to lands. In *Barrell* v. *Hanrick*, 42 Ala. 60, the court find as an inference that the devisee suggested and advised the devise. *Pembroke* v. *Allenstown*, 21 N. H. 107; *Graves* v. *Graves*, 29 Ind. 142; *Farrington* v. *Barr*, 36 Ib. 86; *Moore* v. *Moore*, 38 Ind. 387, are against establishing such a trust against the statute.

Parol evidence is admissible to establish a fact from which the law will raise or imply a trust, but it cannot be received to prove any declaration of a trust, or any agreement of the parties for a trust, without violating the statute.

There should be no dispute as to the evidence of the facts which the the court will find. That should be such, that different courts equally honorable could not come to different conclusions. Not a preponderance of evidence; but evidence clear, certain, explicit, undisputed. Otherwise, it would not be merely a curtailing of the statute, but ignoring the policy and purpose for which the statute was passed.

VIRGIN, J. The plaintiffs are the nephews and niece and next of kin of the late Orrin Gilpatrick and the defendants are the administrator and next of kin of the widow of Orrin, neither of whom left any children.

The plaintiffs seek to establish their title to the proceeds of certain real and personal estate, on the ground that Orrin, having expressed to his wife his intention of leaving all his property to his heirs (plaintiffs) was induced by her to sell and will it to her in form absolute, in sole consequence of his reliance upon her assurance that she would use it during her natural life only and seasonably transfer the remainder to his own heirs; that she did not fulfil her agreement, but died intestate, whereupon the property descended to her heirs instead of his; and that by reason of the premises it became vested in her in trust,—to enforce which trust is the object of this bill.

The presiding justice, who saw and heard all of the witnesses testify, found the facts in favor of the plaintiffs, which finding we should be slow to reverse unless clearly satisfied that it was erroneous. *Young* v. *Witham*, 75 Maine, 536. But after a very careful examination of the stenographer's report of the direct and uncontradicted testimony of the Gilpatricks' life-long, trusted friend and his wife and daughter in whose family Mrs. G. lived during four years of her widowhood; of their family physician of many years, their business adviser, scrivener and executor of Mr. G.'s will and the writer at her dictation of what Mrs. G. called a "certification;" of the neighbor who purchased the hay during the last ten years of Mr. G.'s life and of her thereafter,—all disinterested witnesses,—whose testimony of Mr. G.'s frequent expressions to his wife, for months before his decease, of his desire and intention that his property should go to his own heirs; of her final agreement to transfer the remainder thereof "after she was done with it," provided he would give it to her absolutely; of her frequent and freely expressed admissions of such agreement and of her own construction of it as evidenced by her own acts in executing all the stipulations thereof except the final transfer of the remainder of the property to his heirs and putting even that in writing signed by her; and of the peculiar instructions of Mr. G.

as to the phraseology of the will,—not to use the word "give,"—we are fully satisfied that the justice's finding of facts was correct; and that the following, among other facts are clearly established:

That Orrin Gilpatrick died in February, 1875, possessed of a farm which came down to him from his paternal grandfather and of other property all of the value of more than $9000, and which he desired to go to his heirs; that his widow died in 1883 leaving property which she had owned in her own right, consisting chiefly of money invested in town securities, amounting to some $5000; that they left no children, but a widow of a deceased son; that they always kept their individual property separate; that for several months before his decease, they had frequently discussed the mode of the disposition of his property, and, as she had so much in her own right, he frequently expressed to her his intention of giving his to his own heirs; that, a short time before his death, she finally induced him to give some of the personal property and will the remainder of his estate to her in form absolute upon her assurance that she would only use it, if necessary, during her natural life, pay their daughter-in-law $500, reconvey certain real estate, the legal title of which he held, to one Glidden, erect a monument in, and keep in repair their private cemetery, and finally, seasonably transfer all that remained to his heirs; that if she had not given her husband such assurance and if he had not confidently relied upon her performance of it, he would not have executed the will nor given her the personal property; that she promptly performed all of the terms of her agreement except the final transfer of the remainder which she purposely omitted to do, although she had expended but a comparatively small portion of the property during her life.

Nor do we entertain any doubt of the soundness of the law on which the decree appealed from was based, viz: a constructive trust impressed upon the property and the donee and devisee converted into a trustee *in invitum*, although not so denominated in the paper title, and although the statute expressly provides: "There can be no trust concerning lands * * unless created or declared by some writing signed by the party or his attorney." R. S., c. 73, § 11.

Fraud is infinite in its varieties and forms; and while, as Lord Hardwicke said, "the court very wisely hath never laid down any general rule beyond which it would not go lest other means of avoiding the equity of the court should be found out," (*Lawler* v. *Hooper*, 3 Atk. 278), still rules have been established governing certain classes of cases involving the element of fraud,—such as that the fraudulent suppression of a cause of action or of a will is a good answer to the statute of limitations, *Deake Appellant*, 80 Maine, 50, that married women and infants shall not take advantage of rules made for their protection to perpetrate fraud, Perry Tr. § 170; and that the statute of frauds shall not be allowed to bar a decree for the specific performance of an oral agreement for the sale and conveyance of land when there has been such a part performance by the party seeking as equity recognizes. *Pulsifer* v. *Waterman*, 73 Maine, 233; *Woodbury* v. *Gardner*, 77 Maine, 68. And while the precise question involved in the case at bar has never before arisen in this state, the cases last cited are analogous thereto in principle; and the universally recognized ground on which the decisions rest is,—that to permit the statute of frauds to be used as a bar to the compulsory performance of such an agreement thus partly performed, would practically authorize a statute, enacted for the purpose of preventing a fraud, to become the veriest instrument for perpetrating or protecting a fraud.

So for like reason, when one obtains the legal title to real or personal estate, either by will or otherwise, under circumstances which render it unconscientious for him to retain it for his own benefit while in fact another is entitled to it, or to some interest in it, equity secures to the latter his right, not by disregarding the former's legal title but by imposing on him the duty of holding and using his title for the real beneficiary.

Applying the principle to the facts in this case: Mr. G. was persuaded by his wife to change his intention of leaving his property to his own heirs and to give it to her by reason of her express promise to give the remainder to his heirs, which she omitted to do. His will was regularly probated and the legal title passed thereby to her. His heirs claim that remainder because her conduct operated as a fraud upon her husband as well

as upon them, and that by reason thereof she held the property impressed with a trust and she made a trustee. Equity does not interfere with the will. That remains unchallenged. Nor does it assume to set aside the statute of frauds which the defendants invoke. But on account of her conduct in procuring the legal title to herself, equity does declare that she cannot conscientiously hold it or its proceeds for her own exclusive benefit, and imposes on her conscience the obligation to hold all she did not use during her life for the benefit of her husband's heirs (plaintiffs) as the equitable owners thereof, and the additional obligation of perfecting their ownership by will or otherwise. But as she has deceased, equity can reach the personal or the proceeds of both real and personal in the hands of her personal representatives and any of the real estate in the hands of any subsequent holder who is not a *bona fide* purchaser thereof without notice holding it relieved of the trust. Pom. Eq. §§ 431, 1053.

We do not mean, however, that it is essential to the upholding of such a trust that a devisee should have been an active agent in procuring the devise to be made in his favor, for the great current of English authority during the last two centuries as well as that of this country, holds that, if either before or after the making of the will, the testator makes known to the devisee his desire that the property shall be disposed of in a certain legal manner other than that mentioned in the will, and that he relies upon the devisee to carry it into effect; and the latter by any words or acts calculated to, and which he knows do in fact cause the testator to believe that the devisee fully assents thereto and in consequence thereof the devise is made, but after the decease of the testator the devisee refuses to perform his agreement,—equity will decree a trust and convert the devisee into a trustee, whether, when he gave his assent, he intended a fraud or not,—the final refusal having the effect of consummating the fraud.

As this is the first case of this kind that has ever arisen in this state and we have the English and American cases before us, we mention some of them.

Thus as early as 1678, where a father, being about to change his will lest there might not be assets enough besides the lands

settled on his son to pay certain legacies to his daughter, was assured by the son that he would pay them in case of deficiency of assets if the will were not changed,—the son was held to his promise—the chancellor remarking that it was the constant practice of the court to make such decrees on such promises. *Chamberlaine* v. *Chamberlaine*, 2 Freem. 34; 2 Ab. Eq. Cas. 43.

So in 1684, where her son promised the executrix that if she would obtain a new will naming him as executor he would hold it in trust for her—which she did—the lord-keeper decreed the trust notwithstanding the statute of frauds. *Thynn* v. *Thynn*, 1 Vern. 296.

So in 1689, where a copy-holder, intending to leave the greater part of his estate to his godson, was persuaded by his wife, on her promise to carry out his intentions, to give the whole to her, the court, notwithstanding the statute, enforced the trust. *Devenish* v. *Baines*, Ch. Prec. 3.

In *Oldham* v. *Litchfield*, 2 Vern. 506, 2 Ab. Eq. Cas. 44 (1705), lands were charged with an annuity, on proof that the testator was prevented from changing them in his will by a promise of payment by the devisee.

Again in 1747, a testatrix having given a bond for £360 to the plaintiff, afterwards by a new will gave it to another on the latter's promise to give it, at her own decease, to the plaintiff, and the performance of the promise was decreed against her representatives, against the interposition of the statute of frauds, Lord Ch. Hardwicke, said: "I know of no case where the court has not decreed it, whether such an undertaking was before the will or after. * * This is not setting up anything in opposition to the will, but taking care that what has been undertaken shall have its effect. A will being ambulatory, if the testatrix has a conversation with a legatee who promises that in consideration of the testator's disposition in her favor she will do an act in favor of a third person, the testatrix lets the will stand, it is very proper the person who undertook to do the act should perform; because I must take it if she had not so promised, the testator would have altered the will." *Drakeford* v. *Wilks*, 3 Atk. 539.

The next year, a residuary legatee, who satisfied the testator

that he need not change his will in order to give a nephew £100 for he himself would pay it,—was held trustee, and a trust imposed on the residue of the assets. Lord Ch. Hardwicke, said: "The court will not suffer the statute to protect fraud so as that any one should run away with a benefit not intended. * * There is a breach of promise, but attended also with fraud upon the testator as well as the plaintiff, by representing as if there was no occasion to alter the will." *Reech* v. *Kennegal*, 1 Ves. 123; S. C. Amb. 67; 1 Wils. 227.

So in 1796, instead of changing his will with the avowed intention of increasing the annuity to his wife, the testator told his residuary legatee he would "leave it to his generosity to pay it as he promised,"—and a trust was imposed on the residue of the assets. The master of the rolls said: "The word 'generosity' cannot be construed to take away the effect of a solemn desire of the testator coupled with the promise of the defendant. The defendant had no intention of fraud at that time, for he desired the testator to make a new will. Leaving it to his 'generosity' is leaving it to his honor and conscience. * * The question is, whether by reposing that trust in the defendant, the testator was not prevented from making a new will. The defendant ought to have told him that, if he did not make a new will, he would not do it. Instead of that he promised to do it, upon which the testator refused to make a new will." *Barrows* v. *Greenough*, 3 Ves. 152.

In 1804, Lord Eldon said: "If a father devises to his youngest son who promises that if the estate is devised to him, he will pay £10,000 to the eldest son, this court would compel the former to discover whether that passed by parol; and if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of £10,000." *Strickland* v. *Aldridge*, 9 Ves. 516.

And the like result is brought about by the silent assent of the devisee to a like proposal of the testator. *Byrn* v. *Godfrey*, 4 Ves. 6, 10; *Paine* v. *Hall*, 18 Ves. 475.

In 1836, natural children of the testator alleged in substance in their bill that the testator's wife promised, in consideration of his giving to her the whole estate, to leave it to them at her decease, upon the faith of which he did it. Shadwell, V. C., said:

"My opinion is that if it were perfectly clear that the state of circumstances took place which the plaintiffs allege, they would be entitled to the relief they ask." *Podmore* v. *Gunning*, 7 Sim. 644, 654.

In 1852, a residuary estate was devised with an oral intimation by the testator to the devisee that he had confidence that he would carry out the testator's intentions which devisee well knew and assented to,—and the devisee was held a trustee. Lord Justice Turner, V. C., in discussing the question of the devisee's undertaking, said: "The true test of the answer to this question is this,—would the testator have left the property to the defendant if he had stated, in answer to that question, that he would not carry out the disposition which the testator intended to effect through the medium of the trust. No one can doubt that if the defendant had stated that he would not carry out such intentions, the disposition in his favor would not have been found in the will." *Russell* v. *Jackson*, 10 Hare, 204, 211.

In the often cited case of *Wallgrave* v. *Tebbs*, 2 K. & J. 321, the joint devisees of real estate denied that they ever knew anything of the testator's intentions till after his decease, but an unsigned letter written by him expressed his confidence in their application of the devised property in accordance with his desires,—Wood, V. C., (then Lord Hatherly) upheld the trust, saying: "Where a person knowing that a testator in making a disposition in his favor, intends it to be applied for purposes other than his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him on the faith of that promise or undertaking, it is in effect a case of trust; and in such case, the court will not allow the devisee to set up the statute of frauds, or, rather the statute of wills, by which the statute of frauds is now in this respect superseded; and for this reason,—the devisee, by his conduct, has induced the testator to leave him the property, and, as Lord J. Turner says in *Russell* v. *Jackson*, *supra*, no one can doubt that if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favor would not have been found in the will. But in this, the court does not

violate the spirit of the statute; but for the same end, namely, the prevention of fraud, it ingrafts the trust on the devise, in order to prevent a party from applying property to a purpose foreign to that for which he undertook to hold it."

In 1867, in *Jones* v. *Badley*, L. R. 3 Eq. 635, 652, Lord Romilly, M. R., quoted the foregoing extract entire and declared the law to be therein very "accurately and very comprehensively stated." On the appeal in 1868, Lord Cairns quoted the same extract and pronounced it "the clear and felicitous exposition of the law." *Jones* v. *Badley*, 3 Ch. Ap. 362.

And in 1878, in *Rowbotham* v. *Dunnett*, L. R. 8 Ch. Div. 430, 436, Malins, V. C., made the same quotation and pronounced the law "correctly laid down," but dismissed the bill for want of proof.

In 1869, in *McCormick* v. *Grogan*, L. R. 4 H. L. 82, where under the peculiar circumstances of the case no trust was decreed, some of the language of Lord Westbury in the fore part of his opinion, where he says the court "must see that personal fraud, a *malus animus* is proved, &c., has sometimes been urged by defendants as requiring more than the authorities already cited; but when it is considered in connection with the facts before him and with his own illustrations in the same opinion, that erroneous view vanishes. After discussing the *rationale* of the principle of dealing with the statute of frauds and of wills, he said: "If an individual on his death-bed, or at any other time, is persuaded by his heir-at-law or his next of kin, to abstain from making a will; or if the same individual having made a will, communicates the disposition to the person on the face of the will benefited by that disposition, but at the same time says to him that he has a purpose to answer which he has not expressed in the will, but which he depends on the disponee to carry into effect, and the disponee assents to it, either expressly, or by any mode of action which the disponee knows must give to the testator the impression and belief that he fully assents to the request; then undoubtedly, the heir-at-law in the one case, and the disponee in the other, will be converted into trustees, simply on the principle that an individual shall not be benefited by his own personal fraud."

Such, in 1873, was the view of Sir James Bacon, V. C., in *Norris* v. *Frazer*, L. R. 15 Eq. 318, 330, where a husband and wife were devisees of the bulk of the property of a testator who expressed a desire that an annuity of £300 should be provided for a third person which the wife testified she promised and the husband assented to. The vice chancellor said: "Mr. Swanston has read particularly from Lord Westbury's judgment in *McCormick* v. *Grogan*, the condition as to what the court has to see proved before it admits any such claim, and he says it must be proved that there was direct personal fraud. * * If the statement made by Mrs. Frazer (one of the devisees) be true, then a more direct, a more distinct personal fraud could not be committed than for Mrs. F. to refuse to perform that promise which she made to the testator on his death-bed."

To the same general purport are *Riordan* v. *Barron*, 10 Ir. Eq. Rep. 645, and *Fleetwood's Case*, 15 Ch. Div. 594, 606 (decided in 1880). In the latter case, Hall, V. C., after reviewing numerous cases, said: "The testator, at least when his purpose is communicated to, and accepted by the proposed legatee, makes the disposition to him on the faith of his carrying out his promise, and it would be a fraud in him to refuse to perform that promise."

Once more in the English courts in 1884, in *Boye's Case*, 26 Ch. Div. 531, 535, in speaking of this class of cases, Kay, J., said: "In these cases the court has compelled discovery and performance of the promise, treating it as a trust binding on the conscience of the donee, on the ground that otherwise a fraud would be committed, because it is presumed that if it had not been for such promise the testator would not have made or would have revoked the gift," citing cases *supra*.

This general doctrine, so long and so thoroughly established in England, has been adopted in several of the states and fully recognized in others.

Thus in 1803, a father was induced to make no will and let his Maryland property descend to his eldest son on the latter's promise to convey the same to his younger brother provided, as was expected, he himself succeeded to certain property in Scotland, which he did subsequently inherit,—and the court enforced the promise. *Browne* v. *Browne*, 1 Harr. & J. (Md.) 430.

In *Owing's Case*, 1 Bland's Ch. 370 (17 Am. Dec. 311, 317, 338) after stating the English doctrine of enforcing oral promises of devisees, Bland, Ch., said: If in such cases the person beneficially interested "could not have the promise enforced, his loss would be irretrievable. He making the promise would be suffered to frustrate the intention of the deceased, to practice a fraud with perfect impunity; and the statute of frauds, if allowed to apply, would be made to operate for the protection, instead of the prevention of fraud."

In Pennsylvania in 1832, the testator's brother was made his residuary devisee on his promise to apply the property for the benefit of the testator's illegitimate son, and a trust was decreed. Gibson, C. J., said: "Equity turns the fraudulent procurer of the legal title into a trustee to get at him. * * A mere refusal to perform the trust is, undoubtedly not enough, * * It seems to be requisite that there should appear to have been an agency, active or passive in procuring the devise," and, after citing several of the English cases, said: "If the testator was induced by the promise of his brother, much more if by his suggestion, to believe that a devise to him was the most prudent plan of securing the estate to his illegitimate son, it can not be said that a breach of confidence thus reposed in him, was intended to be protected by this statute." *Hoge* v. *Hoge*, 1 Watts, (Pa.) 163, 215, 216. To the same purport are *Jones* v. *McKee*, 3 Pa. St. 496, S. C. 6 Pa. St. 425, and *Church* v. *Ruland*, 64 Pa. St. 432; Schultz's Ap. 80 Pa. St. 396.

The English rules have also been adopted and enforced or fully recognized in the following cases: *Williams* v. *Fitch*, 18 N. Y. 546, *O'Hara* v. *Dudley*, 95 N. Y. 403, a full discussion of the whole subject. *Dowd* v. *Tucker*, 41 Conn. 197; *Williams* v. *Vreeland*, 32 N. J. Eq. 734; *Glass* v. *Hulbert*, 102 Mass. 24, 39, 40; *Campbell* v. *Brown*, 129 Mass. 23, 26; *Olliffe* v. *Wells*, 130 Mass. 221, 224.

The plaintiffs are the nephews and niece of Orrin Gilpatrick's children of his two deceased sisters, Thomas Gilpatrick being the only child of one of the sisters and the other plaintiffs, children of the other. If the property should go to them according to the

law of descent, Thomas would be entitled to one-half "by right of representation" and the other half to the other plaintiffs equally. R. S., c. 75, § 1. Mr. G. invariably spoke of its going to his heirs generally. Mrs. G.'s certificate expressed her desire that "it should be equally divided between his heirs,"—which having been written soon after her husband's decease, may be considered as probably expressing the real understanding between her and her husband. Such a division would also seem equitable.

We are of opinion, therefore, that the bill be sustained, and that the plaintiffs have judgment against the goods and estate of Sarah Gilpatrick in the hands of the administrator on her estate for the sum of $9508.06, less the sums paid to Zubra Gilpatrick, the amount paid for erecting the monument and caring for the cemetery and the commissions paid to the executor,—which amount, if not agreed upon by the parties, to be ascertained by a master.

Decree accordingly.

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

HENRY G. BROWN, administrator, *vs.* LEWIS H. REED.

Oxford. Opinion January 3, 1889.

Objection to juror. Waiver. Party. "Before trial." New trial. Notice. Defective declaration. R. S., c. 82, § 88.

The statute, R. S., c. 82, § 88, declares that if a party knows any objection to a juror in season to propose it before trial, and omits to do so, he shall not afterwards make it, unless by leave of court for special reasons. Here a party includes the attorney of a party, and the words "before trial" mean before verdict rendered.

The burden is on a party, who complains of the disqualifying relationship, of a juror to the adverse party, to show that neither he, nor any one of the attorneys engaged for him in the trial, knew the fact before the verdict was rendered.

A party or his attorney will be considered as knowing the fact who has information, from trustworthy sources, of the probable existence of the fact, and neglects to make inquiry to ascertain whether the information be well founded or not.

A new trial, will not be granted, on motion because of a grossly defective declaration, when no demurrer was filed, and no objection made at the trial to the reception of the evidence or to the charge of the judge touching the same, and the defects are such as may be cured by amendment.

ON MOTION. This was an action of trover brought by the plaintiff, as administrator of David F. Brown, of Mexico, to recover the value of personal property, rights and credits, of plaintiff's intestate which it was alleged had been converted by the defendant.

The case was tried at the October term, A. D. 1887, and the jury returned a general verdict for plaintiff for the sum of twenty-three hundred and thirty dollars with special findings against the defendant, as follows:

"Special finding.—Did David F. Brown, on May 28th, 1880, when he executed the written transfer of his personal property, understand that he was thereby transferring the title of the property to the defendant and the consideration to be received by himself? Answer, No.

Was the contract made by the undue influence of the defendant? Answer, Yes."

Besides the general motion by defendant to set aside the verdict as against law and evidence, there was a specification in the general motion of a special ground of vacating the verdict because of the relationship of the foreman of the jury to the plaintiff.

J. P. Swasey, for the plaintiff.

From the testimony it appears, and without doubt is true, that the foreman was related to the plaintiff within the limitation under rule XXII, R. S., c. 1; but "the right so far as it relates to jurors may be lost by neglect and omission of the parties." *Tilton* v. *Kimball*, 52 Maine, 500; R. S., c. 62, § 88.

Before a party can claim a new trial for the cause he alleged, it must affirmatively appear that he and his counsel were ignorant of their existence at or before the trial. *State* v. *Bowden*, 71 Maine, 89.

The courts have repeatedly held that a party knowing a ground of exception who does not seasonably take it, must be deemed to have waived it. *Orrok* v. *Ins. Co.*, 21 Pick. 277; *Inhab. of Adams*,

Petitioners, &c., 10 Pick. 373; *Kent* v. *City of Charlestown*, 2 Gray, 281; *Davis* v. *Allen*, 11 Pick. 466; *Boston* v. *Baldwin*, 139 Mass. 315; *Rowe* v. *Canney*, 139 Mass. 41; *Duckworth* v. *Diggles*, 139 Mass. 51.

In *Tilton* v. *Kimball*, *supra*, this court, adopting the language of Shaw, C. J., say that "a party litigant, knowing of matter of personal exception to a juror, lies by, taking his chance for a favorable verdict. If, when the verdict is against him, he could go back and take the exception, it would work great injustice. By consenting to go on, with a knowledge of the exception, he consents to abide the result, whether favorable or unfavorable." *Ryan* v. *Riverside, and Oswego Mills*, 15 R. I. 436; *Tilton* v. *Beecher*, 59 N. Y. 184; *Harrington* v. *Tuttle*, 64 Maine, 474; *Haley* v. *Hobson*, 68 Maine, 167; *Chase* v. *Kenniston*, 76 Maine, 212; *Breed* v. *Breed*, 110 Mass. 535.

In cases of tort, the court will not set aside a verdict on the ground of excessive damages, unless from their magnitude, compared with the circumstances of the case, it be manifest that the jury acted intemperately, or were influenced by passion, partiality, prejudice or corruption. *Thompson* v. *Mussey*, 3 Maine, 305; *Williams* v. *Gilman*, 3 Maine, 276; *Jacobs* v. *Bangor*, 16 Maine, 187; *Gilbert* v. *Woodbury*, 22 Maine, 246; *Smith* v. *Brunswick*, 80 Maine, 189.

When the bill of particulars and verdict exceed the sum claimed in the declaration the excess may be remitted. *Butler* v. *Millett*, 47 Maine, 492.

S. C. Strout, *D. R. Hastings* with him, for the defendant.

This case comes before the court upon a motion for new trial, on two grounds:

1st. That the foreman of the jury was related to the plaintiff and his intestate within the 6th degree.

2d. That the verdict is against law and evidence.

Such relationship is an absolute disqualification of the juror. *Lane* v. *Goodwin*, 47 Maine, 594.

While the objection will be regarded as waived, if the fact is seasonably known to the party or his counsel, and no action is

taken by him, R. S., c. 82, § 88, there is nothing in this case upon which to found such a waiver.

R. S., c. 1, § 22, requires a waiver of relationship to be "by the written consent of the parties." This provision is modified as to jurors by R. S., c. 82, § 88, but that provision is, "if a party knows any objection to a juror in season to propose it before trial, and omits so to do," it is waived.

The rumor that came to defendant's counsel was not before the trial, but after the case was concluded and testimony closed, with nothing but arguments and charge to follow. This case is not within the terms of R. S., c. 28, § 88, which is itself an exception from the general provision requiring the consent to be in writing to obviate the objection. Counsel further cited: *Salters* v. *Everett*, 20 Wend. 267, 273; *Keeley* v. *Shed*, 10 Met. 317; *Pierce* v. *Benjamin*, 14 Pick. 356; *Wheelock* v. *Wheelock*, 5 Mass. 104; *Caldwell* v. *Eastman*, 5 Mass. 399; *Prescott* v. *Wright*, 6 Mass. 20; R. S., c. 82, § 62; *Hoey* v. *Candage*, 61 Maine, 262; *Lovett* v. *Pike*, 41 Maine, 340; 1 Chit. Pl. 161; Steph. Pl. 136.

PETERS, C. J. We are not satisfied that the motion to set aside the verdict because the foreman of the jury was related to one of the parties, should prevail. And we feel no reluctance in coming to such a conclusion as we are convinced that the relationship did not affect the verdict in the least degree; the juror not even knowing that any relationship existed.

The defendant had notice of the relationship within a reasonable meaning of the statute which declares that, if a party knows any objection to a juror in season to propose it before trial, and omits to do so, he shall not afterwards make it, unless by leave of court for special reasons. R. S., c. 82, § 88. A party includes the attorney of the party, and "before trial" must mean, in a matter of this kind, before the termination of the trial. The party cannot keep quiet and speculate upon the chances of a verdict in his favor. He should, at the first opportunity after the discovery is made, make an open disclosure of the fact for the benefit of all concerned. *Tilton* v. *Kimball*, 52 Maine, 500; *State* v. *Bowden*, 71 Maine, 89.

The burden is on the party complaining of the relationship, after verdict, to show that neither he, nor either of his attorneys, knew of the disqualifying relationship in season to communicate it in the proper quarter before the verdict had been rendered; and actual notice would amount to knowledge and in such a case is its equivalent.

One of the defendant's attorneys gives an account of an interview he had with the defendant's principal witness, a cousin of the defendant, on the morning before the arguments were made, as follows:

"I had no sort of knowledge of any relationship and never had heard it intimated that there was any relationship between the foreman of the jury and either of the parties during the progress of the trial up to Friday morning. The case was closed and all the evidence submitted to the jury Thursday night; up to that time I had never heard the least rumor and never thought of the thing of there being any relationship existing between any member of the jury and either party."

"Friday morning, I can't tell exactly what time, it seems to me pretty near breakfast time, at any rate it was a little before the court opened for the arguments, William W. Bolster came into my room and said to me, 'When I woke up this morning I began to think about the Reed case, and it occurred to me that if the foreman of the jury is Mell Kimball, and the son of Peter Kimball, I think there must be some relationship between him and the plaintiff.' Said I, 'Do you know it?' 'No, I don't.' 'Do you know how it comes?' Said he, 'No; it occurred to me that there might be some relationship.' Said I, 'Can't you find out sure?' Says he, 'No, I can't till I go home.' Says I, 'When are you going home?' He said, I think, 'The first train; ten o'clock train.' I asked him to immediately find out and telegraph, and he said he would. I put so little confidence in what he said—."

On cross-examination, defendant's attorney further said:

"I made no efforts because I didn't put any sort of confidence in what Mr. Bolster told me and I didn't know whom to go to for information, but I did send Mr. Bolster home and told him to telegraph me.

I asked him what he knew about it; said I, 'How did it come?' and he said if in any way, it comes through Kimball's mother, who was a Wheeler; but he didn't know whether there was any or not, really; he thought there was."

We think there was reasonable notice, in fact and effect a notice, which should have been at once disclosed to the other side. The source from which it emanated and the earnestness with which it was communicated, gave it character and importance. We have lately considered the subject of actual notice very fully, in the case of *Knapp* v. *Bailey*, 79 Maine, 195, and the discussion in that case equally applies to the facts in this. In that case the general proposition was agreed to that "if a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoid inquiry, he is chargeable with the notice of the facts which by ordinary diligence he would have ascertained." Upon that rule we think the present motion, as far as this point is concerned, fails.

It is objected against the verdict that it exceeds the sum declared for in the writ. That is undoubtedly so, if a recovery by the plaintiff is to be limited to such items as are with strict technicality declared for. But such construction will exclude the allowance of items which, though not accurately declared for, were presented in evidence and considered by the jury without any objection, as far as the writ and declaration are concerned, on the part of the defendant. He neither demurred to the writ, nor objected to the evidence in support of any of the items, nor excepted to any rulings in regard to them. On motion after verdict this objection comes too late.

The plaintiff declares in trover for chattels and choses in action alleged to be of the value of $5000.00, a sum much exceeding the amount of the verdict, and refers to a schedule annexed to the writ, in which articles are enumerated which aggregate $1416.83 in value, and then an item is added, with no value carried out, "And all other notes, &c." The jury must have allowed a considerable sum for the conversion of notes which were in no other manner declared for. The declaration is irregular enough to have provoked objection before or at the trial, but none was urged.

Had there been objection, the plaintiff could have moved for an amendment, to be granted either with or without terms.

Nor on the question of insanity or undue influence, after careful examination of the evidence, are we satisfied that the verdict should be overruled.

The defendant contends that the damages are excessive in any view. On this branch of the case the evidence is somewhat doubtful and not easily understood. Mortgages are spoken of, the amounts of which do not appear in the report of the case. The burden is upon the defendant to show that the jury erred. He fails to do so.

Motions and exceptions overruled.

DANFORTH, VIRGIN, EMERY AND HASKELL, JJ., concurred.

COBBOSSEE NATIONAL BANK *vs.* ABRAHAM RICH.

Kennebec. Opinion January 1, 1889.

Insolvent Law. Composition. Discharge. Fraud. Irregularities. Amendment. Constitution. R. S., c. 70, §§ 5, 48, 49, 62.

The fraud which, by virtue of R. S., c. 70, § 62, will render void the discharge granted to an insolvent in composition proceedings is wilful fraud or falsehood. Mere mistakes or defects in the proceedings, which are not fraudulent do not have such an effect.

A discharge granted in any class of insolvency proceedings will be valid if the judge has jurisdiction in the matter in which he acts; mere irregularities in the proceedings will not make his action void.

The difference between void proceedings and merely irregular proceedings is the difference between a wrongful act and a rightful act imperfectly or defectively done. The one is a wrongful act and the other a wrongful way of doing an act. In doubtful cases courts incline to treat defects as irregularities rather than as nullities.

The provision contained in R. S., c. 70, § 49, which declares that the certificate granted to an insolvent debtor shall be conclusive evidence in his favor of the fact and regularity of his discharge, applies to a debtor discharged in composition proceedings. And §§ 47 and 48 of same chapter also apply to this kind of a discharge.

Where the debtor's oath to the truth of his list of assets and of creditors was administered by the judge whilst holding the list in his hands, the omission to annex the certificate of oath to the list was at most an irregularity merely,

and does not render the debtor's discharge void. The defect may be cured by allowing the annexation to be made as an amendment. It is not a legal objection to a debtor's discharge that the schedule of assets lodged with the messenger was adopted as a schedule for use in the composition proceedings; though to furnish new and separate schedules would be a more commendable practice.

A debtor's discharge in insolvency cannot be invalidated by proof that creditors holding the requisite amount of claims did not assent to the composition under which the discharge was obtained, the record showing that the agreement presented to the judge was on its face sufficient and the judge having adjudged it to be so. The judge decides whether the apparent correctness of the papers is real or not. Apparent correctness of the record confers jurisdiction on the judge to act, and jurisdiction once attaching continues till the proceedure ends.

A discharge in the form that is granted in the ordinary insolvency proceedings is a good discharge in composition proceedings. It contains more than it needs to.

The statute allowing a discharge to a debtor in composition proceedings is not unconstitutional.

ON REPORT, from the superior court for Kennebec county. The court were to draw such inferences as a jury might from the legally admissible testimony, and render such judgment as the law and evidence require.

This was an action of assumpsit upon defendant's promissory notes due to plaintiff bank.

The defendant pleaded the general issue, and, as special matter of defense, his discharge in insolvency granted by the insolvent court, for Kennebec county, under composition proceedings, according to chapter 70, of R. S., upon his petition filed in said court August 17, 1886. The plaintiff joined in the general issue and filed a replication, to the special matter of defense, alleging among other things that the discharge was not valid because the agreement produced by the defendant, at the second meeting was signed by less than a majority in number of his creditors holding less than three-fourths of all his indebtedness; that no schedule of defendant's assets was signed and annexed to his affidavit; that certain material statements in his affidavit were false to the knowledge of the defendant debtor making the same: (1) that the defendant, on several specified days and within four months of the commencement of the insolvency proceedings, made certain payments of money to a creditor for the

purpose of preferring him; (2) that no schedule of the assets and liabilities of said defendant, by him signed, was annexed to his affidavit; that the amount of certain claims contained in defendant's schedule was false to his knowledge.

The defendant filed a rejoinder tendering an issue to the country which was joined.

H. M. Heath, for plaintiffs.

The only method of testing the validity of a composition discharge is by an action at law, as if no discharge had been granted. *Ex parte* Haines, 76 Maine, 394.

The judge has no authority to issue a discharge under composition proceedings unless the schedules, affidavit and composition agreement are first filed strictly as required by R. S., c. 70, § 62.

Besides fraud, the defects in the record are fatal. Such defects are open to us in this action. Pleading the discharge opens the entire record. A certificate issued under § 62, is not made by the statute conclusive of its regularity, &c., as one issued under § 49; otherwise, recitals in any discharge are only *prima facie* evidence of jurisdictional facts. *Stanton* v. *Ellis*, 12 N. Y. 575; affirmed in *Hale* v. *Sweet*, 40 Ib. 97, (1, Hand); and *Morrow* v. *Freeman*, 61 Ib. 515; *Kelman* v. *Sheen*, 11 Allen, 566; *Cox* v. *Austin*, 11 Cush. 32.

The insolvent court is one of special and limited jurisdiction; its records must show jurisdiction or the proceedings will be void. *Fairfield* v. *Gullifer*, 49 Maine, 360; *Moore* v. *Philbrick*, 32 Ib. 102; *Record* v. *Howard*, 58 Ib. 225.

A decree without jurisdiction may be avoided in collateral proceedings. Jurisdiction depended on the presence of schedule of assets and liabilities. *Baker* v. *Sydee*, 7 Taunton, 179; *Ex parte* Sidey, 24 L. T. N. S. 401, C. J. B. (cited in Jacob's Fisher's Digest 7,392); *Breedlove* v. *Nicolet*, 7 Pet. 413.

Counsel argued that the discharge pleaded is null and void, upon the following grounds: 1st, no list of assets and schedule of liabilities was annexed to the affidavit filed in the composition proceedings; 2d, no list of assets of any kind was filed in the composition proceedings; 3rd, no list of assets or schedule of liabilities signed by the debtor and sworn to by him before the judge

or register was filed in the insolvency case at any time; 4th, no schedule of liabilities was filed in the composition proceedings; 5th, it does not appear in the case, as required by the statute, that the creditors' composition agreement was signed by the requisite number and value; 6th, certain material statements in the composition affidavit and the paper purporting to be a schedule of unsecured claims were false to the knowledge of the debtor; 7th, sections 62 and 63, c. 70, R. S., are unconstitutional and void; 8th, the discharge is not that authorized by § 62; and void for want of jurisdiction, because too general in its terms, and in excess of the powers of the judge.

Counsel also argued that § 62 is unconstitutional because there is no right of trial by jury secured. It is a practical denial of a remedy by due course of law, and a denial of justice. It is an anomaly among the insolvency statutes. It places the power of discharging debtors in the hands of creditors absolutely without the supervisory action of the court. The discharge is in effect, the act of three-fourths of the creditors, and not the act of the court. It contains no provision for notice to creditors that composition papers are to be filed.

By the debtor's admissions his estate should have paid at least fifteen per cent. Under a law giving the court supervisory power over the proceedings, no composition of less than fourteen per cent. could be legally approved. Creditors have thus lost their claims by no decree of court, but by a vote of three-fourths of their co-creditors. *Risser* v. *Hoyt*, 53 Mich. 185.

Upon the questions of law counsel cited: *In re Haskell*, 11 Nat. Bank. Reg. 164; *In re Morris*, Ib. 443; *In re Whipple*. Ib. 524; *In re Reiman*, 11 Ib., 12 Blatchf. 562; (S. C. 11 Nat. Bank. Reg. 21); *In re Lisburger*, 2 Fed. Rep. 158; *Risser* v. *Hoyt*, *supra*; *Wright* v. *Huntress*, 75 Maine, 303; *Williams* v. *Coggeshall*, 8 Cush. 377; *In re Goodfellow*, 1 Lowell Decisions, 510; *In re Penn*, 4 Benedict, 99; (S. C. 3 Bank. Reg. 582); *In re Alphonse Bechet*, 12 Nat. Bank. Reg. 201; *In re Tooker*, 14 Ib. 35.

B. B. Clay, for defendant.

Cited *Thaxter* v. *Johnson*, 79 Maine, 348.

This action, under § 62 of chap. 70 is an additional and

cumulative remedy. It does not take away the right of creditors to contest the discharge under § 49. The plaintiff is confined in this action to the two grounds mentioned in § 62.

Plaintiff must prove: 1st, that some creditor's signature has been obtained by fraud; or 2d, that some material statement in defendant's affidavit, or schedule is false. His replication does not specify any facts under the first head; he must therefore rely on the second.

No technical errors or defects in the proceedings can avail in absence of fraud. *Young* v. *Ridenbaugh*, 11 Nat. Bank. Reg. 563; *In re Roberts*, 71 Maine, 390.

Having taken part in the proceedings and accepted the composition money, plaintiff is estopped. *In re Harmon*, 17 Nat. Bank. Reg. 440; *Kolman* v. *Wright*, 6 Cal. 230; *Williams* v. *Coggeshall*, 11 Cushing, 442; *Loud* v. *Pierce*, 25 Maine, 233; *Beebe* v. *Pyle*, 18 Nat. Bank. Reg. 162; (Abb. N. C. 412,) *Kempton* v. *Saunders*, 130 Mass. 236, 238; *Home Nat. Bank* v. *Carpenter*, 129 Mass. 1; *Farwell* v. *Raddin*, Ib. 7; *Denny* v. *Merrifield*, 128 Ib. 228.

The discharge cannot be impeached in a collateral action, on the ground that it was obtained by fraud. *Smith* v. *Ramsey*, 15 Nat. Bank. Reg. 447, or that the defendant had fraudulently concealed and withheld from his schedule of assets certain property, *Stevens* v. *Brown*, 11 Ib. 508.

A composition is a substitute for the ordinary proceedings and discharge. *In re Bechet*, 12 Nat. Bank. Reg. 201; *In re Knight*, W. N. 479.

The composition clause in the bankrupt law of 1867 has been repeatedly held to be constitutional. Assignment law of Michigan not similar to the insolvent law of Maine. *Risser* v. *Hoyt*, 53 Mich. 185. The decision of the majority of creditors as to the amount of the composition is conclusive when exercised in good faith, and there is nothing to indicate fraud, accident, or mistake. *In re Weber Furniture Co.*, 13 Nat. Bank. Reg. 559.

The statute allows any composition which is satisfactory to the requisite majority of creditors and which is for the best interests of all concerned. *In re Parcell*, 18 Nat. Bank. Reg. 447; *In re Wells*, 18 Ib. 525; *Kempton* v. *Saunders*, *supra.*

The total unsecured debts amounted to $169,396.38. Creditors whose debts aggregated $138,547.22 signed the composition paper.

We believe that not more than three creditors, besides the plaintiff, would have refused to sign had they been urged, and only those representing $13,000, besides the plaintiff, failed to sign and accept the percentage.

The preference alleged is not a legal or moral fraud. The creditor did not know of the debtor's "anticipated insolvency."

Something more than the debtor's insolvency must be shown. *In re Rowell*, 21 Vt. 620; *In re Brent*, 8 Nat. Bank. Reg. 444; *In re Frantzen*, 20 Fed. Rep. 785; *Atkinson* v. *Farmers Bank*, Crabbe, 529; *Kenney* v. *Brown*, 139 Mass. 345; *King* v. *Storer*, 75 Maine, 62; *In re Haskell*, 11 Nat. Bank. Reg. 164. Judge Lowell held in this case that preferences do not invalidate a discharge under composition proceedings; affirmed in *Home Nat. Bank* v. *Carpenter*, *supra*.

The neglect to annex the schedule to the affidavit is not material. It was no fault of the defendant, and its omission can harm no creditor. It is a mere clerical act and can be performed at any time. *Marsh* v. *McKenzie*, 99 Mass. 64.

If the name and debt of a creditor was placed on the list the composition will bar the debt, although there was an error in stating the amount. *Beebe* v. *Pyle*, *supra*.

PETERS, C. J. The defendant went into voluntary insolvency, obtaining his discharge under a composition with creditors. The plaintiffs were parties to the composition, accepting the dividend on their debt. They afterwards sued for, and claim to recover, the balance of their debt, by virtue of § 62 of the insolvency statute. That section provides that a creditor may maintain such an action as the present, when the signature of any creditor to the composition has been obtained by fraud, or when the debtor has knowingly made any false statement of a material character in the affidavit or schedules required of him by such section.

The plaintiffs claim a right to sustain this action for the fraud of the defendant. It must be for such frauds as are described in the section, and can be for no other. It is not constructive fraud

that is aimed at by the section, but wilful fraud or falsehood. We cannot, in any ordinary case, encumber an opinion with an extended discussion of matters strictly of fact. It is enough on this branch of the case to announce that while there may be some inaccuracies and discrepancies in the matters presented, we do not discover fraud.

The counsel for plaintiffs next contends that there are defects in the proceedings, on which the composition was grounded, which will allow the action to be maintained under § 62. We do not concur in the proposition. The statute neither expresses nor implies such a thing. Unless the defects prove fraud, they are not noticeable under that section. It plainly declares just what will sustain an action, and mistakes and defects are not in the enumeration.

But the learned counsel, going further in the proposition, contends that, if the suit be not maintainable under § 62, it may be maintained for the reason that the defects in the proceedings are so radical as to deprive the insolvency court of jurisdiction in the case and render its action void. There is no doubt that if the court had not jurisdiction of the case, its decree would be void. If it had not jurisdiction to grant a discharge, the discharge is void. But it would be otherwise, if the defective proceedings were merely irregular. Void proceedings would destroy jurisdiction in a court of inferior powers, but merely irregular proceedings would not.

The difference is not always readily perceivable. Generally speaking, it is the difference between substance and form, between void and voidable, or between void action and imperfect action. Error or nullity goes to the foundations, and discovers that the proceedings have nothing to stand upon, while irregularity denotes that the court was acting within its jurisdiction, but failed to consummate its work in all respects according to the required forms. The one applies to matters which are contrary to law, the other to matters which are contrary to the practice authorized by the law. One relates more to the act, and the other more to the manner of it. It may be stated as a general rule, that in doubtful cases the courts incline to treat defects in legal proceedings as irregularities

rather than as nullities. Macnamara on Nullities, p 3; Wait on Fraudulent Conveyances, § 442, and cases cited.

Section 49, ch. 70, R. S., was designed to prevent the judgments of insolvency courts being subverted for any irregularity in their proceedings. It provides that the certificate given to the insolvent, "shall be conclusive evidence," in his favor, "of the fact and regularity of such discharge." The plaintiffs' counsel contends that this provision applies only to a certificate obtained in regular insolvency proceedings, and not to one under a composition. We think it applies to all certificates, and can see no reason why it should not. Protection against the mistakes of the court or its officers, is as desirable in the one case as in the other. The section has both a general and special application. Its provisions apply generally as far as appropriate and consistent with other sections. The only provision in the chapter in relation to the manner of pleading a discharge is contained in this section, and certainly that simple and useful provision applies to all cases. And so, too, other sections, relating to the effect of a discharge, have relation to discharges generally; as § 48, which provides that a discharge shall not release a partner, joint contractor, indorser or surety, and § 47, which excludes from the operations of a discharge liabilities for embezzlement or defalcations.

There is much reason for assuming that the same rule would have been implied, had it not been expressed in the insolvency statute, in relation to the inconsequence of judicial or clerical mistakes which are not vital on the question of the jurisdiction of the court. The probate court is invested with more dignity and powers than it formerly possessed. Our general statutes denominate it a court of record, and § 5 of the insolvency chapter declares that proceedings in courts of insolvency shall be deemed matters of record. As courts of record they may amend and correct their records according to the truth, as other courts may. *Marsh* v. *McKenzie*, 99 Mass. 64.

We are next to consider whether there are the alleged defects, and, if so, what consequences shall attach to them, in view of the discussion which we have already indulged in. Section 62 of chapter 70, R. S., directs that, to effect a composition the debtor is to

produce at a meeting of the creditors an affidavit signed by him, to be sworn to before the judge or register, to contain among other things this statement, "My assets and liabilities are correctly stated in the schedule hereunto annexed and signed by me." The judge is to grant a discharge of all the debts and liabilities named in the schedule annexed to said affidavit,"—and the discharge is not to be valid if any material statement contained in the affidavit or schedule is false, &c. The section has before been more fully quoted.

A schedule of assets and a list of creditors, each signed by the insolvent, were produced at a meeting of creditors, an affidavit in due form was sworn to before the judge, and a discharge was decreed to the insolvent, but from the inadvertence of either judge, register or party, the schedules and affidavit were filed away without being fastened together. The judge testifies as a witness, that the debtor swore to the schedules or lists, that he (the judge) held them at the time in his hands, calling the debtor's attention to them as the oath was administered, and that he informed the debtor's attorney at the same time that the papers should be annexed to the affidavit. The form of the affidavit calls for annexation. The recorded degree of the judge recognizes annexation. The work would have been perfectly done had the schedules and affidavit been fastened together.

It is contended that the debtor knowingly swore to a falsehood when he asserted in his affidavit that the papers were annexed. It would seem strange that he should commit such a crime, without any possible motive to do so, and stranger still that he should have been allowed to do so in the presumed presence of many creditors, when the error was avoidable by so little trouble. That point certainly fails.

The next position taken is, that the want of annexation of the papers deprived the judge of jurisdiction to adjudge the composition good, that annexing the papers was a matter conditional to his right to act, and that his decree is absolutely void. We do not concede such fatal consequences to the alleged defect. The weight of the argument against the validity of the proceeding, consists in the assumption that, for want of attachment

between the papers, no responsibility for false statement rests upon the debtor, and that no identity of oath with papers exists.

We are impressed with a different view of the transaction.

In the first place, the papers can now be affixed together by order of the court, as an amendment of its proceedings. The act should have been done at the time under the intimation of the court. The judge virtually ordered it to be done. The words of the oath, "hereunto annexed," imply that it is an act to be done at the time of the administration of the oath. The omission may fairly be considered as much a mistake of the court as of the party, if it be a mistake.

Further, there can be no object in any requirement to annex the papers, except to establish what papers were sworn to. The statute does not declare expressly that the papers shall be annexed. It is not named as a condition upon which a discharge is grantable. Is not the identity sufficient to deprive the defendant of a defense in the present action, should it appear that there was a wilful and false statement in either of the schedules? The papers are on file together, presumably with filings noted thereon, are evidenced by descriptive headings and by the signature of the debtor, and are proved by the testimony of the judge to be the identical papers sworn to before him. In the late U. S. bankruptcy act, only filing, not annexing, was required.

It may, we think, well be considered, in view of the facts disclosed, that there was an annexing of the schedules to the affidavit. The word is not necessarily to be confined to a narrow and strict sense. Things may be annexed without remaining in actual contact with each other. In *Savage* v. *Birckhead*, 20 Pick. 167, it was held that a deposition, taken under a commission, but not annexed to it or to the interrogatories, was sufficiently connected by the envelope and official seal, and as much so as if attached by a ribbon. "In either case," says the court, "there may be fraud or mistake, but in the absence of any suggestion of it, the objection cannot prevail." A similar question arose in the case of *Shaw* v. *McGregory*, 105 Mass. 96, 100, when a deponent swore to the genuineness of some hotel registers. The books and the deposition were together inclosed and sealed up, and directed to the clerk of

the court, and the contents were taken by him from the inclosure, and kept by him until used in evidence. The court decided that they were properly admitted in evidence, remarking, "If not the best, it was one mode of annexation, within the meaning of the statute which requires the magistrate's certificate to be annexed to the deposition, and is not open to objection when the facts show that the security aimed at has been practically attained."

In *Smith* v. *Engel*, decided by the supreme court of Iowa, reported in 14 Nat. Bank. Reg. 481, which was an action to recover a debt that was covered by a composition resolution, the objection was made that the bankrupts and certain of their creditors signed a separate paper, not attached to the resolution itself, as was required. The objection was disposed of in these words: "The objection is purely technical. Clearly the spirit of the provision is complied with when the bankrupt and a requisite number of creditors sign a paper agreeing to the terms of the composition. The signing of this paper, instead of the resolution, is at most a mere irregularity, and does not affect the jurisdiction of the court."

It is objected, that the schedule of assets, which was returned to the messenger, was amended by leave of court, and used as a schedule in the composition proceeding, instead of the debtor furnishing a new schedule. We see no objection to it. It was as correct as a new one or a copy would be. Such a practice has been held to be permissible. *In re Haskell*, 11 Nat. Bank. Reg. 164; *Home Nat. Bank* v. *Carpenter*, 129 Mass. 1, 5.

It is contended in behalf of the plaintiffs, that the creditors' agreement, when the claims are properly sifted and corrected, will turn out in reality not to contain the signatures of a majority in number of the creditors holding three-fourths of all the indebtedness, and that therefore the agreement did not confer jurisdiction on the court, and that jurisdiction is not acquired by the court deciding wrongfully that it has jurisdiction. And on this point, as well as on other points discussed, much reliance seems to be placed on the case of *Stanton* v. *Ellis*, 12 N. Y. 575. There appears to us to be a clear distinction between that case and this. In that case the list presented to a magistrate, under the then two-thirds act in that state, did not show on its face that

two-thirds in amount of the indebtedness was represented by the signers, because the amount due one creditor was carried out blank, and the true amount might make it more or less than enough to establish jurisdiction in the magistrate. He was authorized to act only on a list showing two-thirds or more of the petitioner's indebtedness. The court say that, if the blank space had been filled with some sum, even though not correctly stated, so as apparently to give jurisdiction, the objection would have been obviated, and the magistrate could then have gone on and ascertained the truth or falsity of the representation, and adjudged the proceeding accordingly.

In the case before us the lists show completeness and correctness on their face, and therefore confer jurisdiction. Jurisdiction having attached, it continues through all the steps of the procedure. There is no authority but in the insolvent court to adjudge the questions incident to the investigation. It is the court that is to "be satisfied that such agreement is signed by such proportion of the creditors," and that certain other things have been properly done. The judge decides whether the apparent correctness is a real correctness or not, or, in other words, whether the allegations are proved. The composition takes effect, not from the mere contract of the parties, but from the judgment and decree of the court. *Mudge* v. *Wilmot*, 124 Mass. 493.

Objection is made to the terms of the certificate of discharge, that it contains too much. It is sufficient for this case that it contains enough.

The question of the constitutionality of the composition clause is elaborately discussed by plaintiffs' counsel. With due respect for the argument, we think it too late in the day to expect the argument to prevail. There is too much authority against it.

It is said that it is unjust that compositions can be carried by majorities who are the insolvent's relatives and family friends. The remedy for that must be with the legislature. The best of laws do not always operate equitably.

Judgment for the defendant.

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

ZEPHIRIN BLOUIN, and another, executor in equity, *vs.* ANGIE HORTENSE PHANEUF, and another.

Androscoggin. Opinion January 5, 1889.

Will. Life Insurance. Bequest. Annuity. Trust. Residuary clause. R. S., c. 75, § 10.

Whether a testator can by will dispose of money accruing from an insurance on his life and made payable to his legal representatives, the estate being solvent, *quere.*

The intention to thus dispose of it cannot be inferred from general provisions in his will the fulfillment of which might require the use of such money.

A bequest to the testator's wife of the sum of $50 per month for the support and maintenance of herself and daughter, to be paid monthly from the income of his estate, and on the marriage of the daughter her support to cease, creates a trust in the widow, one-half of the annuity to be applied for her own support, and the other for the support of the daughter during the life of the widow.

Also held, that the widow and daughter hold equal shares as tenants in common, and in case the widow waives her provision under the will her half will fall into the residuary fund and the daughter's continue.

ON REPORT. Bill in equity to obtain the construction of the will of Magloire Phaneuf, late of Lewiston, deceased, and came before the court for hearing on bill, answers and proof.

The questions presented for decision relate to the proper disposition of money derived from life insurance, and a bequest to the widow for her support and that of her daughter, the former having waived the provisions of the will in her favor.

G. C. and C. E. Wing, for complainants.

Counsel argued that the insurance money passed by the will. The size of the bequests proves such was the testator's intention and belief; his estate would not justify such large bequest unless it would be included.

Fifty dollars per month given to the wife from the income could not be produced without the insurance money, and would have to be taken from property conveyed in trust, under the next item of the will.

The widow having waived the provisions of the will this legacy to her goes into the general trust fund; what is said in item 4 as to the maintenance of the daughter is simply the testator's request for the legacy to be used for that purpose.

We submit that the case of *Loring* v. *Loring*, 100 Mass. 340, while similar to this, lacks some of the essential features, and that the case of *Rich* v. *Rogers*, 80 Mass. 174, where the opinion is drawn by the same judge, is nearer the case at bar.

We therefore, cite the latter case and the cases mentioned in the opinion in support of this position, and also Jar. Wills, 5th Am. Ed., vol. 1, pp. 701–702.

The legacy is to the widow with the testator's motive pointed out. *Hathaway* v. *Sherman*, 61 Maine, 466, was a case where the estate was insolvent.

Counsel also cited: *Biddles* v. *Biddles*, 16 Sim. 1, and *Byne* v. *Blackburn*, 26 Beav. 41.

Frye, Cotton and White, for respondents.

The first question is whether the money arising from certain insurance policies upon the testator's life, is disposed of by this will.

The case of *Hathaway* v. *Sherman*, 61 Maine, 466, is decisive. We are unable to discover any grounds upon which the cases can be distinguished. The statement of facts in that case, page 468, says that the policies were "on his own life, and payable to himself or his administrator." An examination of the policies of this case will show that these policies are the same.

There is no reference to the policies or the money to be derived from them in this will. In the case above cited the court say: "The testator's intention to change the direction which the law gives to this very peculiar species of property is not to be inferred from general provisions in the will, the fulfillment of which might require the use of such money, but must be explicitly declared." And the same case also distinctly states that it will not pass by any general residuary clause.

The second question is whether a testator, leaving a widow and children, can bestow by will insurance money payable as this is, upon any other persons than such widow and children.

The case of *Hathaway* v. *Sherman* has distinctly held that "the power to dispose of such a fund by will, conferred by R. S., c. 75, § 10, is limited, in case of insolvency, to a disposition among the widow and children of the deceased," leaving unanswered the question as to whether a solvent testator might not dispose of it to others.

After a careful, but futile search for some additional authority covering this precise point we come back to the statement of Judge Barrows in the case cited, "that the object of this statute seems to have been to designate this very peculiar species of property as a disposition of his funds in advance, which any man may make so firmly that, with the exception of certain premiums paid to secure it, the whole shall go after his death, for the benefit and enjoyment of those who are in general dependent upon him for support while he lives, * * * and to give him power simply to regulate the proportions in which it should be divided among those interested, according to his view of their necessities, or their deserts."

And again in the same case, "a man who makes an investment of this sort, with these statutes before him, should understand that he makes it for the exclusive benefit of his widow or issue or some of them, if they or any of them survive him, and that in case of such survivorship, his testamentary power over it extends only to the designation of those among them who shall receive it, and the share which each or any shall respectively receive."

We do not think that the legislature ever intended to make the solvency of the testator the test of his right to dispose of this fund by will to others.

If he leaves no widow or issue he may dispose of it by will whether solvent or insolvent, the same as he can his other property, but such a testator cannot dispose of it by will if insolvent so as to prevent its being taken for the payment of his debts any more than he can his other property.

If he leaves a widow or issue, he may dispose of it by will, whether solvent or not. "Though the estate is insolvent" is the language of the present statute; "notwithstanding the insolvency of the estate" is the language of the original statute, but this right

to dispose of this fund by will is subject to the important qualification that he cannot bestow it upon any others than his widow or issue.

The language of the original statute clearly limited the right to dispose of this fund by will, "to a distribution of such sum among his widow and issue, or either of them, in any other proportion;" that is, in any proportion other than that designated by the statute, which was the same as the present, one-third to the widow, and two-thirds to the issue, etc.

The inability to change the direction of this fund does not depend upon the solvency of the testator at his decease, but upon the character of the fund itself. It is a "disposition of his funds in advance" for the benefit of certain persons, and the only disability he is under in regard to it is that he cannot take it away from them, although he may make a different apportionment of it among them.

The third question involves a construction of item 4 of the will.

This item gives to the wife by name, "for and during the term of her natural life, the sum of fifty dollars per month for the support and maintenance of herself and my daughter" to be paid monthly from the income of the estate.

The widow has waived the provisions of the will, and the question now arises as to how much of this monthly legacy the widow is entitled to receive for the support of the daughter, and how she holds the same; that is, whether as a testamentary trustee or not.

Upon this branch of the case we cite *Loring* v. *Loring*, 100 Mass. 340, in which case the language of the bequest was: "for her benefit and support, and the support of my son," and the court held that this created a trust, "the income of one-half to be applied for her own benefit and support, and the other to the support of the son."

And see Perry's Trusts, vol. 1, § 117.

VIRGIN, J. In addition to some $12,000 worth of real and personal estate exceeding the debts and charges of administration, the testator left four life policies of insurance,—one for $5,000 and three for $2,000 each, all payable to his legal representatives.

One of the questions submitted is: Whether the money derived from the policies goes under the residuary clause to the trustees, or descends under the provisions of R. S., c. 75, § 10, to the testator's widow and only daughter,—the estate being solvent.

Whether a solvent testator can bequeath insurance money to persons other than his widow and child, we have no occasion now to inquire, since we find no such well declared intention as the law requires expressed in the will before us. To be sure there are some indirect, inferential indications that the testator may have supposed that this money formed a part of the fund from which some of his bequests were to be paid; but that is not sufficient. "To dispose of money accuring from life insurance policies in a manner different from that which the law contemplates," said Barrows, J., "the testator must use language directly significant of his intention in this respect; classed by the legislature as this fund is, it is not to be appropriated to the payment of debts, or of any pecuniary legacies couched in general terms merely, even to the widows and children, unless it is expressly referred to as the fund from which such payment is to be made, and it does not pass by any residuary clause. In short, the testator's intention to change the direction which the law gives to this very peculiar species of property, is not to be inferred from general provisions in his will the fulfillment of which might require the use of such money, but must be explicitly declared." *Hathaway* v. *Sherman*, 61 Maine, 466, 476–7.

We are of opinion, therefore, that the money which accrued from the life policies goes in accordance with the provisions of R. S., c. 75, § 10,—one-third to the widow and the remainder to his daughter.

Another question calls for the construction of the fourth item of the will, the first clause of which is: "I give and bequeath to my beloved wife Angie, for and during the term of her natural life, the sum of $50 per month for the support and maintenance of herself and my daughter Beatrice, to be paid monthly from the income of my estate, and on the marriage of my said daughter her support to cease."

Did the testator intend to make this annuity an absolute gift

to his wife, merely stating the motive therefor to be the support and maintenance of herself and daughter, or did he intend to create a trust and impose an obligation on his wife to appropriate it to the purposes mentioned?

The bequest points out with reasonable certainty the property, the persons in whose behalf it is given, the object and the manner of application,—which are the elements of a trust. *Malim* v. *Keighley*, 2 Ves. Jr. 323, 529. *Warren* v. *Bates*, 98 Mass. 277; Pom. Eq. § 1009. And we think the true construction of the bequest is found in that numerous class of cases wherein property was given to a parent, or some one standing *in loco parentis*, with various expressions concerning the maintenance of the donee and children. In which cases the courts have generally held that a trust is implied from such and similar language though no express trust is thereby declared, unless other language in the will shall be such as to control it.

Thus, in Hill Tr. 65, it is said: "When a gift in a will is expressed to be at the disposal of the donee for herself and children, or towards her support and that of her family * * the terms employed have been held sufficient to fasten a trust on the conscience of the donee." To the same effect Perry Tr. § 117; Pom. Eq. § 1012.

In *Jubber* v. *Jubber*, 9 Sim. 503, the bequest was to the testator's wife for the benefit of herself and unmarried children, that they may be comfortably provided for during his wife's life; and the widow and unmarried daughters were held entitled in equal shares to the income during the widow's life. See also *Cole* v. *Littlefield*, 35 Maine, 439, 445; *Chase* v. *Chase*, 2 Allen, 101; *Loring* v. *Loring*, 100 Mass. 340, especially in point. *Bristol* v. *Austin*, 40 Conn. 438, 443; *Smith* v. *Bowen*, 35 N. Y. 83.

Not only does the language adopted, in giving the annuity and defining its object, indicate the testator's intention of his daughter being supported out of it, but that intention is made certain by the provision in the same sentence: "and on the marriage of my said daughter, her support to cease."

The clause that "the bequest to my said wife is to be in lieu of dower" does not impress us as affecting the construction of implied

trust, for the sum she would realize from the trust would be more advantageous to her than dower. Nor does the fact that two bequests to his daughter contained in the residuary clause are made expressly "subject to the bequest of $50 as hereinbefore bequeathed to my said wife" derogate from his intention as we have construed it. That only indicates the desires of a husband that his wife should be comfortably supported out of the sum given or for good cause increased; but also the anxiety of a father for the support of his young daughter; and hence he expressly subjected the bequests which she was to realize after her majority to that which he had deemed necessary during the fourteen years of her minority, unless in the meantime she should marry.

Our opinion, therefore, is that the wife and the daughter were entitled in equal shares of $25 each as tenants in common, the mother holding the same in trust. And if the widow waives her provision under the will her share would fall into the residuary fund and the daughter's share remain for her. This does not injuriously affect the daughter as she is residuary legatee.

Decree accordingly.

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

WARREN P. CHASE, admr., petitioner for leave to enter appeal from probate court *vs.* SOLOMON W. BATES.

Cumberland. Opinion January 5, 1889.

Probate Law. Appeal. Petition. Laches. R. S., c. 63, § 25.

Where a judge of probate on petition and proper notice thereon by one of the heirs, decreed a distribution of the balance belonging to the estate as shown by the administrator's final account; and eleven months thereafter, the administrator residing in the city where the probate court was holden, on a petition to the Supreme Court of probate, representing that "he had no knowledge of said petition and decree, that he was ignorant of the nature of said decree until a long period had elapsed; and for all which, inasmuch as he had no notice of the nature of the proceedings, and as justice requires a revision of said decree, he prays to be allowed to enter and prosecute an appeal therefrom"—*Held*, that the petitioner does not bring the case within the provisions of R. S., c. 63, § 25.

ON EXCEPTIONS. This was a petition by the administrator for leave to enter an appeal, under R. S., c. 63, § 25, from a decree of the probate court, for Cumberland county, ordering a distribution among the heirs of Silas Bates.

The heirs moved to dismiss the petition because of its insufficiency in law and other reasons which appear in the opinion of the court. The motion to dismiss was sustained by the court, and the petitioner excepted.

W. H. Looney, for petitioner.

The question at issue is the construction of the petition. It is based upon R. S., c. 63, § 25, viz: "If any person, from accident, mistake, defect of notice, or otherwise without fault on his part, omits to claim or prosecute his appeal as aforesaid, the supreme court, if justice requires a revision, may upon reasonable terms allow an appeal, &c." This language is broad, comprehensive and intended to prevent injustice and hardship. Petitioner should have been permitted to furnish testimony to satisfy the court that justice required a revision. Petition need not be drawn with technical accuracy. Sufficient to state substantially what is to be proved.

The court must be satisfied of two things before granting prayer of petitioner: (1) that there is no default on his part; (2) that justice requires a revision. *Capen* v. *Skinner*, 139 Mass. 190. How can the court be satisfied of these two things except by a consideration of the testimony?

In re Marston, 79 Maine, 25, the petitioners were given what we contend for,—a hearing. Counsel also cited: *McAllister* v. *Kuhn*, 96 U. S. Sup. Ct. 87; *R. R. Co.* v. *Hurst*, 93 Ib. 71; *U. S.* v. *Gooding*, 12 Wheat. 460; *Hale* v. *Hale*, 1 Gray, 518; *Kent* v. *Dunham*, 14 Ib. 279; *Robinson* v. *Durfee*, 7 Allen, 242; *Wright* v. *Wright*, 13 Ib. 207; *Coffin* v. *Abbott*, 7 Mass. 252; *Brewer* v. *Holmes*, 1 Met. 288; *Hutchinson* v. *Gurley*, 8 Allen, 23; *Gooding* v. *Baker*, 60 Maine, 52; *Haskell* v. *Hazard*, 33 Maine, 585.

Richard Webb, for the heirs.

Petitioner gives no reason for so long delay; his non-action

must be charged to gross laches and culpable negligence. *In re Marston*, 79 Maine, 25.

Authority to entertain the appeal is wholly statutory, and petitioner must bring himself clearly within its provisions. The first cause set forth in the petition is not a statutory reason for allowing entry of an appeal; the second alleges only ignorance of law. No allegation of time properly pleaded in alleging the two causes.

Petition should set forth what injustice, if any, has been done him by the decree. No allegation or recital is made, in support of which testimony might be offered, showing that the decree is not right and just. Stephen's Plead. p. 388.

VIRGIN, J. The petitioner is administrator on the estate of Silas Bates. On April 5, 1887, on the petition of one of the heirs and previous public notice thereon, the judge of probate decreed a distribution among the heirs of the assets then remaining in the hands of this petitioner as administrator.

On March 22, 1888,—a year less fourteen days after the decree —this petition was drawn, alleging that the petitioner "had no knowledge of the petition and decree and that he was ignorant of the nature of said decree until a long period had elapsed, so that he was unable to claim an appeal within twenty days after its date,—for all which as he had no notice of the nature of the proceedings, and as justice requires a revision" he prays for leave to enter and appeal.

The petitioner does not bring his case within the statute reasons. He does not state that the causes assigned were "without fault on his part" as the statute requires, but the allegations show that they were his fault.

The petitioner resides in Portland where the probate court holds its sessions and its records are kept to which he had recourse at all times, and the estate was one of which he was administrator; and still he alleges he had no knowledge of the proceedings and was ignorant of their nature. In the language of the court in *Sykes* v. *Meacham*, 103 Mass. 285, 286, "the facts can hardly be said to present anything more than a case of mere neglect and

inattention. He failed to make an effective inquiry and in that way remained in ignorance of a fact which was perfectly well known and which there was no attempt to conceal. * * The only mistake is the failure to know a fact about which he made no inquiry."

Neither does the petitioner show any diligence after the fact became known, nor reason for his laches. It does not intimate wherein justice requires a revision. While great technical accuracy is not required in such cases, enough should be alleged to warrant the court in compelling the respondents to be at the expense of a hearing and to give them some notice of what they are to meet. *In re Marston*, 79 Maine, 25.

Exceptions overruled.

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

MELVIN S. HOLWAY, in equity, *vs.* NATHANIEL GILMAN.

Kennebec. Opinion January 8, 1889.

Equity. Specific Performance. Mortgage. Assignment pro tanto.

Where the holder of a chattel mortgage sold one of the mortgage notes to a third person, the complainant, who was under no obligation to pay it, and at the same time agreed to assign the mortgage *pro tanto*, but refused to execute an assignment, having obtained the money on the note, and converted the chattels to his own use; it appearing that there was sufficient property to pay all the notes, *Held*, that the complainant acquired an equitable interest in the mortgage, and that the mortgagee, upon bill in equity, was liable for the note thus paid by the complainant.

ON REPORT. This was a bill in equity to enforce specific performance of a contract to partially assign a chattel mortgage. After the evidence was closed, the case was reported for the decision of this court.

In his bill the plaintiff alleges that one Kincaid mortgaged his stock of goods to the defendant September 9, 1886, to secure the payment of his three promissory notes, given to the defendant,

that day,—the first for $100, due in two months, the second for $200, due in four months, and the third for $200, due in six months. When the first note became due, Kincaid was unable to pay it; on or about December 1, 1886, the plaintiff contracted through his attorney, one Lancaster, to pay the face value of the note to the defendant, and for a reasonable time not to foreclose the mortgage, to the prejudice of his interest in the property, upon the promise of the defendant to deliver the overdue note to the plaintiff, and to assign to him the mortgage to a sufficient extent to protect the plaintiff from loss upon the note.

The facts appear in the opinion. The property embraced in the mortgage was sold by the defendant after the filing of the bill.

M. S. Holway, *L. Farr* with him, for plaintiff.

The evidence introduced by the plaintiff proves the authority of Lancaster to make the contract, as alleged in the bill. By defendant's own theory and admissions, if Lancaster had no authority, then the plaintiff paid his money under a mistake of the terms of the contract and of which the defendant was informed, and an offer was made to restore things in *statu quo*. Such being the case the defendant cannot, in morals or law, hold it as his own. Kent's Com., vol. 2, 491; Benj. Sales, 50; Wait's Actions and Defences, vol. 4, 495. He is estopped to deny Lancaster's authority as his agent having decided to hold the proceeds of the contract; it was a ratification. Pars. Con., vol. 1, p. 49; Addison on Con., vol. 1, § 60; Usher on Sales, § 73; Wait's Actions and Defences, vol. 1, 233; *Mundorf* v. *Wickershorn*, 63 Penn. 87; *Despatch Line of Packets* v. *Manufacturing Co.*, 12 N. H. 205; 37 Am. Decisions, 203; *Medomak Bank* v. *Curtis*, 24 Maine, 36; *Bryant* v. *Moore*, 26 Ib. 84. The sale of the property by the mortgagee before foreclosure was a conversion as to the mortgagor and the plaintiff an equitable owner.

The defendant should therefore be held to answer in damages. Pom. Eq., § 1410, and cases there cited.

Brown and Johnson, for defendant, besides a general answer, filed an answer by way of demurrer and argued that the bill was

defective because, 1st, no definite time is alleged when the mortgage and notes spoken of in the bill were given; 2d, the bill does not allege that the note which the plaintiff claims to have, was one of the notes secured by the mortgage; 3d, he does not allege any time or place where or when the pretended agreement, on which he bases his action, was made. Stephen's Plead. 292; 1 Chitty's Plead. 257; *Gilmore* v. *Mathews*, 67 Maine, 517; *Platt* v. *Jones*, 59 Ib. 232.

The plaintiff has failed to prove his right to an assignment by virtue of a contract. He cannot be considered an equitable assignee of the mortgage. A stranger who pays off a mortgage, in whole or in part, as a voluntary act to which he is not forced to protect his own rights cannot be subrogated to the rights of the principal or assignor. Pom. Eq., vol. 3, § 1212, *et seq;* Herman's Mort. 424; *Moody* v. *Moody*, 68 Maine, 155.

EMERY, J. This equity cause was reported to the law court for determination. We think the evidence shows the material facts to be according to the following narrative: One Kincaid, on September 9, 1886, mortgaged his stock of merchandise, to respondent Gilman, to secure three notes of $100, $200 and $200, maturing in two, four, and six months respectively. When the first note matured, the respondent Gilman, arranged with the complainant Holway through a third person, for Holway to take the first note, and have the mortgage assigned *pro tanto*. In pursuance of this arrangement, Holway paid Gilman the amount of the first note, which was delivered to Holway, but Gilman delayed, and finally refused to execute a written assignment of the mortgage. Holway was under no obligation to pay Kincaid's notes.

When the second note matured, Gilman took possession of all the mortgaged goods under his mortgage, claiming absolute ownership in them. He kept possession of them for some three months until after this suit was threatened against him, and then sold the goods at auction, At the time Gilman took possession, the goods were worth more than the whole mortgage debt, though a less sum was bid at the auction sale.

Upon the foregoing facts, there can be no doubt that Holway the complainant is entitled to relief against Gilman, the respond-

ent. Holway acquired an equitable interest in the mortgaged goods to the extent of his investment in the mortgage debt. He was entitled to share *pro rata* in the security. *Moore* v. *Ware*, 38 Maine, 496; Jones' Chattel Mort. 504.

Gilman took possession of the goods for himself however, ignoring, and refusing to account for the complainant's equitable interest. At that time, the goods were of sufficient value to pay the entire debt. Gilman appropriated the whole of them to his own use. He should be made to pay the complainant the value of his interest, which was the amount of the first note. Such, is the relief to which the complainant is entitled, and which the court in equity can grant.

Decree to be made, that complainant recover against the respondent $100 *and interest from September* 9, 1886, *and costs, and have execution therefor.*

Decree accordingly.

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

JULIETTE BUNKER *vs.* INHABITANTS OF GOULDSBORO.

Hancock. Opinión January 8, 1889.

Defective Highway. Notice. Surveyor. Holding over. Appointment. R. S., c. 3, §§ 12, 14. Due care. Evidence. Instructions.

In an action against a town to recover damages by reason of a defective highway, upon the issue of the plaintiff's due care, evidence that another person thought that under the same circumstances he would have avoided the accident, is immaterial.

Where a town omits to choose highway surveyors at its annual March meeting and fails to appoint its municipal officers to be such surveyors, those then in office hold over until the first day of May following under the provisions of R. S., c. 3, § 14.

An appointment of highway surveyors, by municipal officers, cannot take effect until the first day of May following the annual meeting, and such appointee cannot legally act or bind the town by notice of a defect in the highway, before that time.

A requested instruction to the jury, although embodying an undisputed principle of law was correctly refused, where the court, in its charge, had clearly and intelligibly given them the rule by which they ought to be governed. A judge is not bound to restate or elaborate a principle or rule once correctly stated.

The court will so decide when it appears that a requested instruction could not aid the jury in determining the issue, or when in effect, it asks for a nonsuit.

ON MOTION AND EXCEPTIONS.

This was an action to recover damages for personal injuries to the plaintiff by reason of a defect in a highway in the town of Gouldsboro, on the first day of June, 1886. The verdict was for plaintiff.

During the trial, one Whitaker, a witness for the plaintiff, was asked this question on cross-examination: "Taking the circumstances as they were, I ask you if you had been driving the horse if you think the accident would have happened?" The question was excluded by the court.

It appeared from the town records of Gouldsboro, put in by the plaintiff, that Samuel G. Wood living near the scene of the accident was elected and sworn as road surveyor at the annual town meeting in March, 1885. It also appeared from the records aforesaid that at the annual meeting in March, 1886, no road surveyors were chosen by the town and that the selectmen were instructed to appoint road surveyors. The presiding justice ruled that Samuel G. Wood held over as road surveyor until midnight of April 30th, 1886, and that actual notice to him at least twenty-four hours before that time was sufficient statute notice.

The defendant having proved the execution and delivery in April, 1886, to F. G. Tracy of a written appointment as commissioner of highways, for the purpose of showing that he was surveyor of the locality including the place of accident, offered the appointment, in evidence, but it was excluded by the court.

The court was requested by defendant's counsel to give the jury the following instructions:

1. Such a state of repair in a road as would free a town from exposure to indictment and conviction, would protect them also

against a claim of damages for an injury sustained by an individual while travelling on the same.

2. The evidence in the case to prove the twenty-four hours actual notice of the defect to a town officer (as required) is insufficient to prove such notice.

3. The town cannot be liable unless the object of fright presents an appearance that would be likely to frighten ordinary horses, nor unless the appearance of the object is such that it should reasonably be expected by the town that it naturally might have that effect, nor unless the horse was at least an ordinary kind, gentle and safe animal, and well broken for travelling upon our public roads.

Hale and Hamlin, Deasy and Higgins with them, for defendants.

Whitaker, on cross-examination should have been required to testify fully to any facts tending to show whether or not the plaintiff was in the exercise of due care. How others would have acted under the same circumstances shows what an ordinarily prudent person would do. The question was proper to test the judgment of a hostile witness.

Wood's term of office expired at the March meeting, 1886. R. S., c. 3, § 12, provides that "annual town meetings shall be held in March and the voters shall then choose by a major vote a clerk * * * and other usual town officers, &c." This statute fixes the duration of an office from one annual meeting to the next.

It is not intended that surveyors shall hold over. This appears from the fact that the legislature has made special provision in the case of officers in cities and private corporations, and none for such town officers. *Beck* v. *Hanscom*, 29 N. H. 213; *Tuley* v. *State*, 1 Ind. 500. When appointed under § 14 their term begins the first day of May and ends on the last day of the following April. Section 14 has no application to officers elected at the annual meeting. In terms it relates only to surveyors appointed. Dill. Mun. Corp. §§ 217 to 221.

It was pertinent to show that Tracy was appointed and acted as surveyor *de facto* in April during the time plaintiff claims Wood was surveyor and had notice of the defect. His oath, and record of same, with appointment are directory only. *Stebbins* v.

Merritt, 10 Cush. 31, 32; *Bank of U. S.* v. *Dandridge*, 12 Wheat. 64, 87, 88. Notice of defect to Wood was not sufficient; he was not acting as surveyor, when another had been appointed and was surveyor *de facto*. The jury must have found notice to Wood during the period Tracy acted.

The first requested instruction should have been given. It is exactly that given in *Merrill* v. *Hampden*, 26 Maine, 234; *Davis* v. *Bangor*, 42 Maine, 522, 529; *Howard* v. *Bridgewater*, 16 Pick. 189. The third is the exact law as given in *Card* v. *Ellsworth*, 65 Maine, 547; *Nichols* v. *Athens*, 66 Maine, 402. The testimony together with the allegation in the declaration that the horse "became frightened" at the defect render the requested instruction applicable.

The plaintiff must prove positively the twenty-four hours' notice required by statute. This she has not done. *Smyth* v. *Bangor*, 72 Maine, 249.

Wiswell and King, for plaintiff.

Counsel cited *Branch* v. *Libbey*, 78 Maine, 321, to the ruling excluding the question to Whitaker on his cross-examination.

R. S., c. 3, § 14, does not apply to surveyors appointed only, but fixes generally the term of office of all highway surveyors. The statute does not say that the term of office of surveyors thus appointed shall commence, etc., but it provides a way in which they may be appointed, and fixes the term of office of such officers however appointed.

Independently of any statute provision, unless the term of office is expressly limited, town officers chosen annually hold over until their successors are chosen and qualified. Dill. Mun. Corp. §§ 219, 220. *Overseers, &c.* v. *Sears*, 22 Pick. 122; *McCall* v. *Byram Mfg. Co.*, 6 Conn. 428; *Cordill* v. *Frizzell*, 1 Nev. 130; *People* v. *Fairbury*, 51 Ills. 149; *Cong. Soc.* v. *Sperry*, 10 Conn. 200; *State* v. *Fagan*, 42 Ib. 32; *Stewart* v. *State*, 4 Ind. 396.

Such is the law in the case of business corporations. *Meadow Dam Co.* v. *Gray*, 30 Maine, 547.

Boone's Law Corp. § 136, and cases cited.

The ruling may be sustained on either of two grounds: first, the office of highway surveyor, however appointed, commences on

the first day of May and ends upon the last day of the following April; second, a surveyor elected, his office terminating at the next annual meeting, holds over until the term of his successor commences.

Tracy's appointment as surveyor April 19, 1886, was inadmissible, because immaterial, and because the appointment and oath were, by statute, required to be recorded, thereby making the record the best evidence. *Moor* v. *Newfield*, 4 Greenl. 44; *City of Lowell* v. *Wheelock*, 11 Cush. 391; *Harris* v. *Whitcomb*, 4 Gray, 433; *Morrison* v. *Lawrence*, 98 Mass. 219.

The judge having given to the jury, in his charge, the law upon the question of defect fully and correctly, the exception to the first requested instruction, should not be sustained even if the requested instruction was correct. *Roberts* v. *Plaisted*, 63 Maine, 335; *Hovey* v. *Hobson*, 55 Ib. 256.

Upon the second requested instruction counsel cited *Boody* v. *Goddard*, 57 Maine, 602.

Upon the third requested instruction counsel argued that the first part was not applicable to the facts of this case; and the second part had been fully and correctly given and as favorably as the defendants were entitled. They cannot object now that the evidence did not correspond with the allegation, because that objection should have been taken when the evidence was offered, so that an amendment to the declaration might have been made, if necessary.

EMERY, J. This was a statute action to recover for personal injuries, alleged to have been caused by a defect in one of the defendant town's roads. The alleged defect was a hole or depression in the edge of the travelled part of the road. The accident occurred June 1, 1886. The plaintiff claimed that the hole existed, and was known to one Samuel G. Wood, at least twenty-four hours before May 1, 1886. The plaintiff also claimed that Wood was a surveyor of highways during April and to May 1, 1886, and in lawful charge of the district including the hole. No other town officer was shown to have had twenty-four hours actual notice of the hole, and if Wood was not a legal highway surveyor as above stated, the plaintiff concedes she has not proved notice,

and cannot recover. As to the effect of the hole, the plaintiff's evidence tended to show, that as she was turning a little to the right to pass a team, her horse came to the hole, and sheered in to the left, to avoid stepping into it, and thus brought her wagon in collision with the other team, throwing her out into the road. It did not appear that the horse was frightened by the appearance of the hole.

The verdict of the jury was for the plaintiff, and the case is now before the law court on a motion and various exceptions by the defendants. We will first consider the exceptions—

1. After Whitaker, a witness called by the plaintiff, had testified about the location, size and shape of the hole, the defendants asked him in cross-examination this question: "Taking the circumstances as they were, I ask you, if you had been driving the horse, if you think the accident would have happened?" The question was excluded.

It was said by this court in *Branch* v. *Libbey*, 78 Maine, 321, that, in these actions, evidence is not admissible to prove that a person, other than a party to the action, has either passed safely over the alleged defect, or has received an injury from it. If it be immaterial whether another person, in fact, met with an accident at the place, it must be immaterial whether another person thinks he would have met with one, even under the same circumstances. The exclusion of Whitaker's opinion as to what might have happened to him, did not exclude any fact material to the defense.

2. A material question of law at the trial, was whether Samuel G. Wood was a surveyor of highways in the defendant town as late as April 30th, 1886. He had been elected, and had qualified as a surveyor of highways, at the annual town meeting in March, 1885, the year previous. His district included the place of the accident. At the next annual town meeting in March, 1886, the town did not choose any highway surveyors, nor did they appoint the selectmen such surveyors, but voted "that the selectmen be authorized to appoint one or more highway surveyors."

No surveyors having been chosen or appointed by the town for the municipal year 1886–7, the only mode of obtaining such sur-

veyors was for the municipal officers to appoint them under R. S., c. 3, § 14, which provides that where towns at their annual meetings do not choose surveyors of highways nor appoint the municipal officers such surveyors, "the said municipal officers shall appoint surveyors of highways, whose term of office shall commence on the first day of May, and end on the last day of the following April." No appointment in this case could have been made to take effect earlier than May first, hence from the March town meeting in 1886, to May first following, there were no highway surveyors in Gouldsboro, unless those of 1885–6, including Wood, held over during that time, to May first. If they did not so hold over, then the roads in Gouldsboro, were without authoritative supervision or care during the month of April at least, in which month in this state, roads are most liable to sudden injuries, and dangerous defects.

The language of the statutes may show an intention to precisely fix and limit the tenure of a municipal officer, so that on a fixed day, his authority will cease, even if an entire vacancy and absence of authority be the result. Unless such an intention appears, however, the better opinion is, that the officer should continue to exercise his functions until another person is qualified to assume them. As the natural law is said to abhor a vacuum in physics, the municipal law may be said to dislike a vacancy in authority. Dillon on Mun. Corp. § 220. *Bath* v. *Reed*, 78 Maine, 276, 280.

While the statute directs that the "other usual town officers" (in which class surveyors of highways are included), shall be chosen at the annual town meeting in March, it does not say that the term of office shall be one year from that meeting, nor one year from date of election, or appointment. On the other hand it provides that in case the town does not appoint highway surveyors the selectmen may, and that the term of the appointees shall not commence till May first following. In fixing May first for the beginning of the term, the legislature must have intended that the old officers should continue in authority until then. The judge, in accordance with these views, ruled upon the evidence that Wood continued in his office of surveyor of highways until May 1, 1886. The ruling was correct.

3. Wood testified that he did not assume to act as highway surveyor after the annual meeting of March, 1886. The defendants claimed that one Tracy was appointed highway surveyor for that district by the municipal officers, April 19th, and that under that appointment he acted as surveyor from and after April 19th. They offered in evidence, in support of this claim, the original letter of appointment, dated April 19, 1886. It was excluded by the judge as immaterial in this case.

The claim, if fully established, could not avail anything for the defendants. No matter when he was appointed, Tracy could not be the legal surveyor till May first. A notice to the legal surveyor would bind the town, no matter who acted as surveyor. It was entirely immaterial in this case who was surveyor after May first, as the plaintiff conceded that if this defect did not exist, or was not known to the legal surveyor at least twenty-four hours before May first, she could not recover.

4. The judge in the charge correctly stated the principles determining whether the road was safe and convenient, or defective and out of repair. The defendants upon this issue, asked for the following further instructions: "Such a state of repair in a road as would free a town from exposure to indictment and conviction, would protect them also against a claim for damages for an injury sustained by an individual while traveling on the same." The language of the request perhaps states an undeniable proposition, but it could not have aided the jury in determining the question before them. It shed no light upon the issue, and the defendant's case was not darkened by withholding it.

5. The defendants requested a ruling that the evidence did not prove twenty-four hours' actual notice of the defect, to Wood as claimed by plaintiff. This was in effect, asking for a nonsuit. The refusal of such a request is never exceptionable. The remedy is by a motion for a new trial.

6. The judge instructed the jury, that the plaintiff must convince them that her horse was ordinarily kind, safe, and broken to travel, and, at the request of the defendants, gave this further instruction. "If at the time of the accident, the hole was of such a character as to be safe for a horse to travel over, or

carriage wheels to pass over in traveling, without any danger, the fact that the horse was frightened at its appearance, would not render the defendants liable for any injury occurring on that ground." The defendants then requested the following further instruction: "The town cannot be liable unless the object of fright presents an appearance that would be likely to frighten ordinary horses, nor unless the appearance of the object is such that it should reasonably be expected by the town, that it naturally might have that effect, nor unless the horse was at least an ordinarily kind, gentle and safe animal, and well broken for traveling on our public roads."

The pith of this request was sufficiently stated in the instructions given. A judge is not bound to restate or elaborate a principle or rule once correctly stated. Elaboration and illustration are discretionary.

The Motion: We have considered and discussed the evidence and the instructions, to ascertain whether the verdict should be set aside as against the evidence. The judge strongly stated the propositions to be established by the plaintiff, and we find some evidence in support of each. Although we might differ from the jury on some of the issues, the evidence does not produce a conviction that the jury were unquestionably wrong. The defendant's main contention was that the evidence did not prove twenty-four hours' actual notice of the defect, to Wood prior to May first.

Two witnesses testified that the hole was visible on the edge of the travelled part of the road, from the middle to the last of April. It appeared that Wood during that time, and up to May first passed over the road, by and near the hole, several times daily. He had been, and was highway surveyor, in charge of that district. There is some presumption that he was on the lookout for defects. He himself said that he probably saw the hole as soon as it appeared, while he denies that it appeared before May first. This evidence might induce a belief that Wood knew of the hole, twenty-four hours before May first.

Motions and exceptions overruled.

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

WARREN W. BLODGETT, and another *vs.* THOMAS H. DOW, admr.

Kennebec. Opinion January 9, 1889.

Judgment. Former suit. Bar. Estoppel. Evidence.

The plaintiffs previously commenced an action against the defendant's intestate, on the note sued in this case and three other notes, declaring specially on each note. The action was duly entered and referred to referees, by the usual rule of court, who heard the parties and made a general award in favor of the plaintiffs; which was returned to court, accepted and judgment entered thereon. That judgment is set up in bar of this action. *Held*, it is not competent for the plaintiffs to prove by parol, that the referees did not consider the note in suit in making their award, and that the former judgment is a bar to the maintenance of this action.

ON REPORT, from the superior court for Kennebec county. The law court, were to render such decision as the law and admissible testimony require.

This was an action against the administrator of the estate of William Rollins, deceased, under the provisions of R. S., c. 66, §§ 13 and 14, on an appeal, by the plaintiffs, from the report of commissioners on said estate represented insolvent.

The claim, which was not allowed, was a promissory note of the intestate, described in the opinion of the court. The defendant pleaded the general issue and a brief statement by way of further defense, "that the note declared on, in said action, has been fully adjudicated upon by a court of competent jurisdiction, and judgment rendered thereon, which judgment defendant pleads in bar of this action;" and this was the question presented for decision.

The other facts are stated in the opinion.

Clay and Clay, for plaintiffs.

To sustain his plea defendant places in evidence a writ *Warren W. Blodgett et al* v. *Wm. Rollins*, dated Feb. 24, 1880, by which it appears that this identical note was sued in the lifetime of said Wm. Rollins, together with three other notes, given and held by the same parties. Said writ having four separate counts, this

note being declared on, is the first. That action was referred by rule of court to referees, by whom an award was rendered in favor of the plaintiffs for the sum of $212, and costs, on Nov. 17, 1880.

Judgment was rendered on the award and it is still in force.

1st. It appears that the record of this last suit shows, this note never went before the referees and was not passed upon by them, for the amount of the award and judgment is exactly the aggregate of the last three notes declared on with interest, nothing being allowed for this note, and no mention being made of it. Furthermore, the last three notes are annexed to the original writ and was evidently the one on which judgment was given, while this note went back into the hands of the plaintiffs.

2. If the record does not clearly show what was presented to the referees for their consideration, then the testimony of Henry Farrington and H. S. Webster shows what was said and done at the hearing before the referees, and what was presented to them and decided by them. These gentlemen acted as opposing counsel at the trial before the referees.

Is their testimony admissible to show what was done and what was decided by the referees?

On this point we quote from Judge Rice's opinion given in *Cunningham* v. *Foster*, 49 Maine, 68, page 70. He says: "It is a well settled rule of law, that if a verdict, award or judgment of a court of competent jurisdiction, has apparently but not necessarily, covered the very ground on which a second action is brought, though this would be, perhaps, *prima facie* evidence that the matter had passed *in rem judicatam*, yet it may still be averred, and proved by parol testimony, that the cause of the second action was not in issue, and the point to be established by it was not in fact decided in the former case."

The sole question for the court, then, is whether on the evidence presented and the facts stated this award and judgment is a bar to this action.

To the effect that it is not a bar we quote the following authorities:

Greenl. Ev. §§ 528, 529, 530, 532; Whart. Ev., vol. 2, §§ 758,

781, 785 and notes, 788; *Webster* v. *Lee*, 5 Mass. 334; *Lander* v. *Arno*, 65 Maine, 26; *Howard* v. *Kimball*, Id. 308, 330; *Lord* v. *Chadbourne*, 42 Id. 429, 443; *Sturtevant* v. *Randall*, 53 Id. 149, 153; *Walker* v. *Chase*, 53 Id. 258, 260; *Cunningham* v. *Foster*, 49 Id. 68; *Baker* v. *Stinchfield*, 57 Id. 363; *Foye* v. *Patch*, 132 Mass. 105; *Hood* v. *Hood*, 110 Id. 463; *Eastman* v. *Symonds*, 108 Id. 567; *Burlen* v. *Shannon*, 99 Id. 200, 202; *Eastman* v. *Cooper*, 15 Pick. 276, 286; *Dutton* v. *Woodman*, 9 Cush. 255, 261.

Spear and Clason, for defendant.

Judgment of referees is equally valid as when founded upon a verdict. *Pease* v. *Whitten*, 31 Maine, 117. The record is, therefore, conclusive of everything contained in the action referred. As proof of this, assume that this thousand dollar note had been placed in evidence, considered by the referees, and found by them to be paid, or given without consideration. Their award would be as it now is.

Admission of parol testimony to show that the note was not concluded by the award, and judgment thereon, would have the effect to impeach the record in part. A judgment cannot be impeached, directly, indirectly or collaterally. While it remains unreversed it is conclusive. *Pease* v. *Whitten*, *supra*; *Footman* v. *Stetson*, 32 Maine, 17; *Woodman* v. *Smith*, 37 Id. 21; *Smith* v. *Abbott*, 40 Id. 442; Whart. Ev., vol. 2, §§ 759, 763; Field's Lawyer's Briefs, vol. 3, 213, § 221; Wait's Actions and Defences, vol. 6, 776; *Standish* v. *Parker*, 2 Pick. 20; *Pinney* v. *Barnes*, 17 Conn. 420.

Additional facts which should be of record cannot be added by parol. *Wilcox* v. *Emerson*, 10 R. I. 270; *Wells* v. *Stevens*, 2 Gray, 115; *Kendall* v. *Powers*, 4 Met. 553. Cannot vary record by parol. *Kendall* v. *Powers*, *supra*. An omission cannot be added to record by parol. *Teftz* v. *Pitts*, 74 Pa. St. 349.

The principle to be deduced from these cases, is this: Does the record of itself, by inspection, cover this note? If it does, it follows, that the admission of parol testimony to show it does not, must enlarge, diminish or vary the record.

Judgment is conclusive upon all matters in issue, by which is meant, that matter upon which the plaintiff proceeds by his

action, and which the defendant controverts by his pleadings. Freeman Judg., p. 222, § 257; *King* v. *Chase*, 15 N. H. 9, 14; Whart. Ev., vol. 2, § 759. The judgment was on the merits. Freem. Judg., p. 226, § 260.

The adjudication of the referees upon the note is not known. They were not called to testify. A second action, cannot be maintained upon evidence once offered and rejected in the trial for a like action, between the same parties. *Smith* v. *Whiting*, 11 Mass. 445.

The award should be co-extensive with the submission. *Bhear* v. *Harradine*, 7 Exch. 269. The submission was the action, not a part of it, and the award should cover the action, as an entirety, as it purports on its face.

In *Cunningham* v. *Foster*, cited by plaintiffs, the item claimed, in the second suit, was not in issue in the first suit. The plaintiff denied that it was sued at all. It is not claimed that the action upon which he proceeded, in the first suit, did by inspection of the record embrace the item in the second suit.

It is at this point, where the record shows, by inspection, whether or not the item, in the second suit, was in issue in the first, that the line, for the admission or rejection of parol testimony, should be drawn.

LIBBEY, J. The plaintiffs seek to recover in this action on a promissory note given by William Rollins, the defendant's intestate, to one Ellen P. Blodgett, or order, dated June 19, 1876, for $1000, payable in three years with interest, and by said Blodgett duly indorsed.

The note was seasonably presented to the commissioners in said Rollins estate, disallowed by them, and appeal taken by the plaintiffs.

No question is made as to the rights of the plaintiffs to recover, if the right of action is not barred by the judgment relied on in defense.

February 24, 1880, the plaintiffs commenced an action against said Rollins, then living, in the superior court for Kennebec county, declaring in their writ on four promissory notes, in four counts, the first declared on being the note in suit. The

action was entered at the April term of said court, when the general issue was pleaded by the defendant. At the September term of the court the action was referred, by rule of court, to referees, who heard the parties and made a general award in favor of the plaintiffs, which was returned to the court at the December term, 1880, accepted, and a general judgment entered thereon.

The plaintiffs claim that the note in suit was not passed upon by the referees; and therefore that the judgment is no bar; and the contention between the parties is, whether it is competent for the plaintiffs to prove by parol that the note was not in fact, passed upon by the referees, and formed no part of the sum awarded.

We think it is not competent to explain the judgment as proposed.

When it appears by the pleadings, that the subject matter in controversy was directly and necessarily in issue in the action, a general judgment, either on a general verdict of the jury or a general award of referees, while it stands unreversed, is a bar to another action for the same cause. The parties are estopped by it. But when the pleadings are such that the subject is not directly in issue, but may or may not be put in issue in the action, and the judgment does not disclose whether, in fact it was or not, the fact may be proved by parol; and this we understand is the distinction. *Cunningham* v. *Foster*, 49 Maine, 68; *Walker* v. *Chase*, 53 Maine, 258; *Cromwell* v. *County of Sac*, 94 U. S. 351; *Campbell* v. *Rankin*, 99 U. S. 261.

Here, in the action of the plaintiffs v. Rollins, the note in suit was specially described in the first count in the writ, and went to the referees for adjudication. There is nothing in the record showing it was withdrawn. The judgment on the general award estops the plaintiffs and cannot be explained by parol. If, at the hearing, the plaintiffs for any reason, were not prepared to litigate the note, they should have seen to it, that it appeared by the judgment, that it was withdrawn.

Judgment for the defendant.

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

SARAH JOHNSON, petitioner for review of action, ALFRED F. JOHNSON, admr. *vs.* CHARLES S. JOHNSON.

Kennebec. Opinion January 10, 1889.

Review. Party in interest. Residuary legatee. R. S., c. 89, § 1, par. 3.

A residuary legatee of a solvent testator is not such a party in interest in an action brought, by the executor, as to entitle him to petition for a review of the action under R. S., c. 89, § 1, par. 3.

REPORT on facts agreed. The case was to stand for further hearing, if on the evidence the court should hold the petitioner was such a party in interest, as is entitled to maintain the petition; otherwise the petition was to be dismissed.

Beane and Beane, for petitioner.

The real estate and the larger part of the personal property went to the petitioner as residuary legatee, under the will of her husband.

Practically, she is in the position of a party, whose rights and property have been passed upon and determined in court, without any hearing in fact, and without notice or opportunity to be heard.

The title to the real estate vested in her at the testator's death. *Wright* v. *Williamson*, 67 Maine, 524; *Kimball* v. *Sumner*, 62 Id. 305; *Heald* v. *Heald*, 5 Id. 387.

The administrator held the personal property in trust for her, and the right of property was in her. Its disposition pecuniarily affected her alone. She was the only party interested. The administrator was only a representative party. Her rights and property were affected and determined by the judgment sought to be reviewed, and not his. Redf. Wills, 3d ed. 130, 131; *Dalton* v. *Dalton*, 51 Maine, 170; *Shirley* v. *Healds*, 34 N. H. 407; *Lawrence* v. *Wright*, 23 Pick. 128; *Wiggin* v. *Swett*, 6 Met. 197; *Fuller* v. *Storer*, 111 Mass. 281.

It is not necessary, that her ownership or interest be absolute and exclusive, to be entitled to this remedial relief. *Nowell* v. *Sanborn*, 44 Maine, 80.

The objections in *Elwell* v. *Sylvester*, 27 Maine, 536, do not apply here. The court there say, "the writ of review must be sued out by a party to the former suit, or by one representing the interest of a party." Nor does *Taylor* v. *Sewall*, 69 Maine, 148, apply to the case at bar. There, the petitioner was not a party to the judgment, nor did he represent any interest of such party.

The language of the statute is general. A party in interest is any party having a pecuniary interest, and comes within its provisions. *Douglass* v. *Gardiner*, 63 Maine, 462.

Granting reviews is within the discretionary power of the court. *Sherman* v. *Ward*, 73 Maine, 29; *Berry* v. *Titus*, 76 Ib. 285.

Counsel also cited *Gooding* v. *Baker*, 60 Maine, 52.

H. Hudson, for defendant.

To the rights and powers of executors and administrators, counsel cited: Schoul. Exc. and Admr., §§ 269, 276, 277, 288; *McLean* v. *Weeks*, 63 Maine, 418; *Lawrence* v. *Wright*, 23 Pick. 129; *Dalton* v. *Dalton*, 51 Maine, 172; *Hutchins* v. *State Bank*, 12 Met. 425; *Carter* v. *Bank*, 71 Maine, 450; *Carlisle* v. *Burley*, 3 Id. 250; *Bird* v. *Keller*, 77 Id. 270, 275; *Chase* v. *Bradley*, 51 Id. 538; *Lee* v. *Chase*, 58 Id. 435; *Snow* v. *Snow*, 49 Id. 165; *Pulsifer* v. *Waterman*, 73 Id. 233; *Reed* v. *Reed*, 75 Id. 264; *Frost* v. *Libby*, 79 Id. 60.

The statute (R. S., c. 89, § 1, par. 3) invoked by petitioner reads: "on petition of a party in interest, who was not a party to the record." This means the same as the original enactment in 1859, c. 94, § 3. The petitioner therefore cannot prevail because she did not prosecute the action here sought to be reviewed.

EMERY, J. The original action, of which a review is here sought, was brought by an administrator *cum testamento annexo*, against an alleged debtor to the estate. The petitioner is the residuary legatee under the will. The estate is sufficient to pay all debts and legacies, and leave a balance for the residuary legatee. The original action not having resulted so favorably for the estate, as the residuary legatee thinks it should, and, being directly interested in the result, she now petitions for leave to review the action. She bases her petition on the third paragraph of § 1, c. 89, R. S., and claims that upon the foregoing facts, she is "a party in interest, who was not a party to the record."

There is no doubt, she is directly interested in the suit, but it does not follow that she is "a party in interest," in the legal sense of that phrase. There are many familiar cases where "the party to the record," has no interest in the suit—is a mere nominal party, and some other person is the real party—the party in interest. An action by an assignee of a claim in the name of the assignor, is a familiar instance. He, who owns the claim, either by a legal or equitable title, is the party in interest to an action upon the claim, and, as such, must answer over to the nominal party, for any damages or costs occasioned him thereby. So, in actions against a sheriff for the default of a deputy, the deputy is a party in interest, as he must answer over to the sheriff.

A residuary legatee has, as such, no title legal, or equitable, to any particular, specific item of the assets of the estate, nor is he, as such, personally liable over for any damages or costs incurred by the executor. Until distribution, except as to specific legacies, the title to all the assets, including choses in action, is in the executor. He alone can maintain actions at law for the recovery of assets. It is true, he is a representative party, but he is none the less the real party, the party in interest. The claim is his. The action is his. He controls it. Except so far as he is controlled by statute, he can dismiss the action and release the claim. *Chase* v. *Bradley*, 26 Maine, 531; *Dalton* v. *Dalton*, 51 Maine, 171; *Carter* v. *Bank*, 71 Maine, 448; *Frost* v. *Libby*, 79 Maine, 56.

If the action, in this case, were to be reviewed, the administrator *cum testamento annexo*, would be still the real party. The court would recognize him as such, and (assuming his good faith) would recognize his right to prosecute, or dismiss the action, at his discretion, he being accountable over to the petitioner in the probate court for the proper exercise of that discretion. It is evident, therefore, that not every one interested in an action, or affected by its result, can be admitted to review it. Only a party to an action should have leave to bring an action of review. He may be a party by record, or a party in interest, but he should be a party, having the care or responsibility of the action. This petitioner, though interested, is clearly not a party in interest, such as the statute contemplates.

Petition dismissed.

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

BETSEY F. GATCHELL, and ALLEN GATCHELL, *vs.* EMMA J. MORSE.

Cumberland. Opinion January 12, 1889.

Mortgage. Possession. Evidence. Bond for support.

Where an obligor gives a bond to the obligee to support him in the obligor's house, not naming what house or where situated, and secures the performance of the bond by a mortgage in the usual form upon the obligor's homestead, there is not a legal implication that the mortgagor shall retain possession of the mortgaged premises; nor is it admissible to show that there was a contemporaneous, verbal understanding, that the support should be received in the house on the mortgaged premises.

ON REPORT. This was a real action, upon a mortgage given to plaintiffs, to secure a bond for the maintenance of Allen Gatchell. The defendant claimed that there had been no breach of the condition of the bond or mortgage, and offered oral evidence to prove that by the phrase "house of the said Emma J. and Mathias M. Morse" was meant and intended the house, on the place, mentioned in the mortgage. The object of this evidence was to negative the implication, that the plaintiffs were entitled to the possession of the mortgaged premises, before the condition of the mortgage deed had been broken.

The presiding justice was of the opinion that such evidence was inadmissible, and that the plaintiffs were entitled to the possession of the mortgaged premises, whether the condition of the mortgage had or had not been broken.

By agreement of the parties the case was reported to the law court. If the opinion of the presiding justice was correct, the plaintiffs were to have judgment; otherwise the action was to stand for trial.

T. M. Giveen, for plaintiffs.

A mortgagee, as well before as after condition broken, may have judgment for possession at common law, when he does not refer to or declare on his mortgage, and when the object of the suit is not foreclosure. *Green* v. *Kemp*, 13 Mass. 515; *Partridge* v. *Gordon*,

15 Mass. 486; *Rackleff* v. *Norton*, 19 Maine, 274; *Howard* v. *Houghton*, 64 Maine, 445; *Greenlaw* v. *Greenlaw*, 13 Maine, 182, 186; *Mason* v. *Mason*, 67 Maine, 546; *Allen* v. *Parker*, 27 Maine, 531.

G. D. Parks, for defendant.

Where the bond is conditioned for the support and maintenance of the mortgagee, on the premises described in the mortgage, the mortgagee must show breach of condition before he is entitled to possession. *Lamb* v. *Foss*, 21 Maine, 240; *Allen* v. *Parker*, 27 Maine, 531; *Brown* v. *Leech*, 35 Maine, 39; *Mason* v. *Mason*, 67 Maine, 546.

The bond provides that Emma J. and Mathias M. Morse shall support and maintain, "the said Allen Gatchell in the house of the said Emma J. and Mathias M. Morse." The place is defined. The location and designation of the premises, may be shown by parol. 1 Greenl. Ev. § 287.

If the evidence should show that the house was not located on the mortgaged premises, the plaintiffs would be entitled to judgment; otherwise, they must show breach. There is enough in the bond and mortgage to show an implied agreement. *Clay* v. *Wren*, 34 Maine, 187; *Norton* v. *Webb*, 35 Maine, 218.

PETERS, C. J. Emma J. Morse and Mathias M. Morse gave a bond obligating themselves to maintain Allen Gatchell, one of the demandants during his lifetime, "in the house of Emma J. and Mathias M. Morse," and secured their bond by a mortgage in usual form on the demanded premises.

Nothing in the bond or mortgage implies that the mortgagors are to retain possession, in order to support the mortgagees on the premises. *Mason* v. *Mason*, 67 Maine, 546. The defendant (one only of the obligors appears to be sued) offered oral evidence to prove that, by the phrase "house of Emma J., &c." is meant a house on the place mortgaged. The evidence was rightly rejected. Even if the parties supposed that such would be the effect of the bond and mortgage, it would not be the legal interpretation. No one would be bound by such supposition. The mortgagors are not bound to remain on the premises. They might be there to-day, and elsewhere to-morrow. The mortgagees are to be a part of the

household wherever that may reasonably be. If that was moved they would be.

Judgment for demandants.

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

AMY V. SHAW, appellant from decree of judge of probate, appointing an administratoi of estate of William Shaw.

LLEWELLYN POWERS, appellant from same.

LLOYD B. CLARK, appellant from same.

Penobscot. Opinion January 14, 1889.

Probate. Jurisdiction. Appeal. Adjudication. Deceased Partner. Assignment. R. S., c. 63, §§ 6, 7, 29; c. 64, § 1; c. 65, § 13; c. 69, § 1; c. 71, § 23.

Where the jurisdiction of the probate court, to issue letters of administration, is drawn in question, and it appears that the property interests of the appellants are directly affected by the decree of that court, they have the right of appeal.

Though it might not be proper to affirm or reverse a decree of the probate court, void upon its face, yet where its jurisdiction in granting administration depends upon the question, whether the deceased left a certain amount of assets, the court must examine the fact, as proved, before it can decide the question of jurisdiction. This question can not be raised except by appeal; nor would a denial of jurisdiction in the probate court be a *felo de se.*

The appointment of an administrator, who never qualified, nor entered upon his duties, is not a conclusive adjudication of the question of the jurisdiction of the probate court to grant administration, upon a subsequent petition,—it appearing that the issue is not the residence of the intestate, but the location and the amount of property. This was changeable, and the court might then have had jurisdiction, and not now.

Where the right to grant administration, upon the estate of a deceased member of a partnership, depends on the question whether there was as alleged, and at the time alleged, in the county, the required amount of property which could be legally used as assets of the deceased,—it appearing that all the personal property belonged to the firm, and with its real estate was insufficient to pay the debts of the firm; *Held,* that the intestate had no such interest, in the personal property, which could be administered upon as his estate; *Also, held,* that although there was sufficient real estate in the county, the record title of which was in the name of the deceased, but

all paid for by partnership funds, and purchased for partnership purposes it was, therefore, held in trust for the firm and could not be used for the payment of private debts. It was subject to the jurisdiction of a court of equity, rather than a court of probate.

The same result follows, from an agreement in the articles of copartnership requiring all real estate, so held by any member of the firm, should be held in trust for the firm.

R S., c. 64, § 1, gives the probate court no authority to appoint an administrator for a partnership, or for a deceased partner, that he may act for the partnership. It prohibits the granting of an administration upon the individual estate of the partner, in all cases, unless the deceased left the prescribed amount of property.

An administrator appointed upon the estate of a deceased partner, of a foreign partnership, under R. S., c. 69, § 1, cannot take possession of the assets of the partnership until its dissolution.

An agreement in articles of copartnership for its continuance, after the decease of one or more of its members, is valid; and, by virtue of it, the partnership may continue until it expires by limitation, or dissolution by insolvency.

A foreign partnership, having such an agreement in its articles of copartnership, doing business in this state, where it owned real and personal property, continued business after the death of one of the partners, and made an assignment for the benefit of its creditors of all its property, situate here and elsewhere. *Held*, that the same act which dissolved the partnership, disposed of its property, by virtue of the assignment, and rendered the appointment of an administrator of the estate of the deceased partner unnecessary; and took from the probate court its jurisdiction to appoint one, if it otherwise had any.

Whether, under these facts, the rights of resident creditors to attach were affected, the court deem it unnecessary, in this case, to determine.

ON REPORT. The law court were to pass such decree, upon the legally admissible evidence, 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 required.

This was an appeal from a decree of the probate court, for Penobscot county, appointing an administrator upon the estate of William Shaw, deceased, on the petition of Sprague Adams and others, claiming to be creditors of said Shaw, filed in that court October 25, 1887.

Appellant Clark, filed the following reasons of appeal:

1. Because the deceased William Shaw aforesaid, was at the time of his death and long before a citizen of Massachusetts, where he died, and your appellant being a resident of that state was

there duly appointed administrator of his estate, which trust he still holds, and if any property exists in Maine belonging to his estate its administration should properly be committed to this appellant or to one ancillary to that, as otherwise great confusion and injury may ensue to the prejudice of the estate and general settlement of the whole.

2. Because the said probate court had no jurisdiction to appoint an administrator as prayed for, there being no property to administer nor any debts to be paid by any administrator appointed under, and in accordance with the prayer of said petitioners.

3. Because said deceased had not at the time of his death any personal estate, of the value of twenty dollars, within said county or state of Maine to be administered upon, nor has any property since his death existed in this state belonging to his estate.

4. Because at the time of his death said deceased did not owe debts to the amount of twenty dollars to said petitioners, or any of them, nor to any or all others, as contemplated by law, to authorize such administration, nor did he leave any real estate of that value in the state.

5. Because at the time of his death any and all interest in any estate, standing in his name, was no part his to be separately administered upon, but was wholly the property of the firm of F. Shaw & Brothers, and subject to the disposal and control of the surviving members thereof, by virtue of a trust created by said deceased, during his lifetime; that in pursuance of said trust all the property thus nominally in the name of said deceased was, by said survivors, subsequently conveyed and disposed of to F. A. Wyman, and the same became afterwards wholly the property of Charles W. Clement, trustee, to whom conveyance was made, including all right, legal and equitable, in all estate of every kind in which said deceased had any interest of any kind, and that long since said conveyances were by due process confirmed by the supreme judicial court in equity and adjudged legal and binding; and by special decree of said court all such nominal or other apparent interest of said deceased was, by special master, conveyed to said Clement, leaving nothing to be administered upon.

6. Because in reliance upon the conveyances and decrees

aforesaid your appellant has since made large purchases of property formerly belonging to said firm, and included within the premises conveyed as aforesaid to said Wyman, and afterwards to said Clement, the value and amount payable therefor exceeding fifty thousand dollars, the largest portion of which has been paid and notes for the balance given, all which property is sought by petitioners as included within the estate to be administered upon, whereby if administration be granted said title may be unfavorably affected, if not totally destroyed.

The appellants Amy V. Shaw, widow, and Llewellyn Powers, claiming to be aggrieved, filed reasons of appeal as follows:

First. Because said Sprague Adams and James Adams, copartners under the name of S. & J. Adams, and Edwin Belden, the petitioners in said probate court, for the appointment of an administrator as aforesaid, were not, nor were either of them, creditors of said William Shaw at the time of his decease.

Second. Because said Belden, in April, 1884, proved his claims, the same stated in his petition in said probate court for the appointment of administrator as aforesaid, in the supreme judicial court of Massachusetts, in the proceedings in a cause therein, to wit: the Globe Bank of Boston v. Ferdinand A. Wyman, trustee and assignee under the assignments for the benefit of creditors of F. Shaw & Brothers, of Boston, and by reason of said proof of claims and his acts, is barred from asking or petitioning for administration of the estate of William Shaw in said county of Penobscot.

Third. Because said William Shaw, at the time of his death, was not a resident of said county of Penobscot, but was then a resident and citizen of the state of Massachusetts; because he left no estate to be administered in said county of Penobscot, and no estate of said William Shaw was afterwards found in said county.

Fourth. Because the said probate court had no jurisdiction to appoint an administrator, as prayed for in said petition of said S. & J. Adams and Belden, there being no property to be administered, nor any debts to be paid by any administrator appointed under said petition.

The view taken by the court of the third and fourth reasons renders the first and second reasons immaterial.

The facts which came under consideration by the court and appear in the reported testimony are as follows:

William Shaw died August 31, 1882, being then a resident of Boston, and a partner of the firm of F. Shaw & Bros., whose domicile was Boston, comprised of Fayette Shaw, of Newtonville, Mass.; Brackley Shaw, of Montreal, Canada; and William Shaw, of Boston; that he left no private or individual personal property in Penobscot county, and no real estate there except such as was paid for with partnership funds, held for partnership purposes, and stood upon the partnership books as partnership property.

The partnership articles provided, that the partners should be equal owners in common of all the estate then standing, or which should be hereafter put, during the continuance of the partnership, in the names of the firm, or of all or any of the partners, bought or acquired for partnership purposes and standing upon the books as partnership property; that profits and losses should be shared equally, and upon a settlement of the partnership estate the whole property be treated as if it were personal property.

"In the event of the death of one or more of the parties, no objection being made in writing by the legal representatives of the deceased partner," the survivors were to be "allowed the term of five years, in, or within which, to continue and close the business of this copartnership." The personal representatives of a deceased partner during this time were to be allowed free access to the books, accounts, etc., and during this five years or any part thereof, "at the option of the survivors or survivor, the whole interest of such deceased partner or partners, or such part of his or their interest as to the survivors or survivor may from time to time seem best, shall remain in the business and subject to all the risks thereof," etc.

Walter D. Shaw, and Ferdinand A. Wyman were appointed and qualified as administrators of the estate of William Shaw, in Suffolk county, Mass., Sept. 11, 1882, and have acted as such. Wyman testifies that he, as administrator, made search for nearly a year to find property of William Shaw with which to pay debts,

and could find nothing save the equity to a house in Boston, and that all the property in Penobscot county belonged to F. Shaw & Bros., and that these lands were all of them included by the committee of creditors, appointed at the time of the failure, in their schedule of the property of F. Shaw & Bros., annexed to their report. The administrators of William Shaw, after careful deliberation, determined not to terminate the partnership articles, and the surviving partners exercised their right to retain all the property in the firm. The property accordingly all remained in the firm, and the business was carried on under the partnership articles after the death of William Shaw, until the firm failed and made an assignment to Ferdinand A. Wyman for the benefit of its creditors, July 28, 1883. The assignment was a general assignment for all the creditors and contained no preferences. The great mass of the creditors accepted the assignment, far more in amount than sufficient to absorb the entire assets, and the legal representatives of William Shaw assented to it. The voluntary assignee, Wyman, took possession of all the property, including the real estate standing in William Shaw's name, he being then also personal representative of William Shaw.

A suit in equity was thereafter brought by the Globe National Bank of Boston in the supreme judicial court of Suffolk county, Massachusetts, in behalf of all the creditors, against the surviving partners and their assignee, to determine who were the proper parties to share in the assigned fund, and to secure a proper distribution thereof. Notices were given to all the creditors of these proceedings, and opportunity given them, if they should desire, to oppose the granting of the prayers of the bill. During the progress of that suit, a composition was effected by the debtors in the court of insolvency, for Middlesex county, Mass., with the great mass of their creditors. By decree of the supreme judicial court, Wyman the voluntary assignee, was authorized to sell the balance of the property (excepting cash and bonds) for eight hundred thousand dollars, and to pay over the money to the court of insolvency, to be used for the purposes of the composition. In accordance with that decree he sold the property to Charles W. Clement, giving him a deed of the property which includes these

lands. The said Clement purchased the property for certain parties, who advanced the money to carry out the composition, taking as security a declaration of trust from him upon all this property. Thereafter, Clement brought a bill in equity in the supreme judicial court for Penobscot county, against the widow and heirs of William Shaw, to obtain the legal title to these lands. By decree, in that suit, it was ordered that this real estate should be conveyed to said Clement, and a deed thereof was accordingly given him by a special master duly appointed therefor.

Several parcels of this land have since been sold by claimant to appellants Llewellyn Powers, and Lloyd B. Clark. It is also admitted that said Walter D. Shaw, and Ferdinand A. Wyman resigned as administrators in Massachusetts, Nov. 26, 1883, and Lloyd B. Clark, of Springfield, Mass., was appointed in their stead.

C. P. Stetson, S. Hoar, G. W. Morse and W. Webster, for appellants, Shaw and Powers.

A. W. Paine, for appellant, Clark.

The entire issues involved may be summed up as follows: Partnership real estate of a foreign firm, situated in Maine, and held in trust by a deceased non-resident partner, the firm itself having been continued in existence after his death, by virtue of a stipulation in the articles, does not constitute assets for an administration of such deceased partner, the same having been fully administered by the firm under voluntary assignment and decree of a court of equity.

Petitioners having proved their claims, and received dividends are estopped from prosecuting this petition. *Chaffee* v. *Bank*, 71 Maine, 514, 526, 527, 528; *Bodley* v. *Goodrich*, 7 How. 276; *Adlum* v. *Yard*, 1 Rawle, 163; *Rapalee* v. *Stewart*, 27 N. Y. 310.

Appellants are parties "aggrieved," and have right to appeal. *Bancroft* v. *Andrews*, 6 Cush. 493, 496; *Thompson* v. *White*, 45 Maine, 445; *Lunt* v. *Adams*, 39 Id. 392, 395; *Paine* v. *Goodwin*, 56 Ib. 411, 413; *Bates* v. *Sargent*, 51 Id. 423, 425; *Smith* v. *Bradstreet*, 16 Pick. 264, 265; *Bryant* v. *Allen*, 6 N. H.; *Bush* v. *Clark*, 127 Mass. 111; *Stebbins* v. *Lathrop*, 4 Pick. 33, 41; *Mowry*

v. *Robinson*, 12 R. I. 152; *Smith* v. *Sherman*, 4 Cush. 408, 411; *Wiggin* v. *Swett*, 6 Met. 194, 197.

The probate court had no jurisdiction, because there was no estate to be administered. The court must be satisfied that there are assets, or it cannot appoint an administrator. *Fairfield* v. *Gullifer*, 49 Maine, 360; *Fowle* v. *Coe*, 63 Id. 245, 248, 249; R. S., c. 63, § 6, c. 64, § 1; *Bowdoin* v. *Holland*, 10 Cush. 17, 19; *Pinney* v. *McGregory*, 102 Mass. 189; *Crosby* v. *Leavitt*, 4 Allen, 410; *Emery* v. *Hildreth*, 2 Gray, 228; *Bean* v. *Bumpus*, 22 Maine, 549; *Gross* v. *Howard*, 52 Id. 192.

Trust property is not "estate to be administered." *Thompson* v. *White*, *supra*; *Trecothick* v. *Austin*, 4 Mason, 16, 29; *United States* v. *Cutts*, 1 Sumn. 133; *Johnson* v. *Ames*, 11 Pick. 173; *Thompson* v. *Thompson*, 5 Bradford (N. Y. Surrogate); *Camp* v. *Fraser*, 4 Demarest, 212, (N. Y. Surrogate); *Crosby* v. *Leavitt*, 4 Allen, 410.

Partnership property is trust property. 1 Wash. Real Est. 574; *Crooker* v. *Crooker*, 46 Maine, 250; *Buffum* v. *Buffum*, 49 Id. 108; *Burnside* v. *Merrick*, 4 Met. 537; *Dyer* v. *Clark*, 5 Met. 562; *Smith* v. *Jackson*, 2 Edw. Ch. 28; *Shanks* v. *Klein*, 104 U. S. Sup. Ct. 18; *Wilcox* v. *Wilcox*, 13 Allen, 252.

Cook v. *Lewis*, and *Putman* v. *Parker*, relied on by appellees, are cases of partnerships without stipulations for continuance, and necessarily dissolved on the death of the partner.

Partnership creditors have no lien on partnership effects, until acquired by legal process. 3 Pars. Con. § 282, 7th ed. 298, note 1. *Emerson* v. *Senter*, 118 U. S. Sup. Ct. 3; *Huiskamp* v. *Moline Wagon Co.*, 121 Id. 310, 323.

The provision in the partnership articles preserved the partnership from dissolution at the death of William Shaw. *Burwell* v. *Mandeville*, 2 How. 560; *Smith* v. *Ayer*, 101 U. S. Sup. Ct. 320; *Jones* v. *Walker*, 103 Id. 444; *Tillotson* v. *Tillotson*, 34 Conn. 335, (by provisions in will); *Phillips* v. *Blatchford*, 137 Mass. 510; *Stanwood* v. *Owens*, 14 Gray, 195; *Blodgett* v. *American Bank*, 49 Conn. 9 (by partnership articles); 2 Bouv. Inst. § 1499; 2 Lindley on Part. § 1044; 3 Kent's Com. 25 note c.; Collyer on Part. §§ 16, 167; *Crawshay* v. *Collins*, 15 Ves. 218, 228; *Scholefield* v. *Eichelberger*, 7 Pet. 586, 594.

R. S., c. 69 not intended to dissolve either domestic or foreign partnerships; it simply provides a way of administration after dissolution. *Nave* v. *Sturges*, 5 Mo. App. 557; *Edwards* v. *Thomas*, 2 Id. 282, 285; S. C. 66 Mo. 468; *Farmers and Traders' Sav. Ins.* v. *Garesche*, 12 Mo. App. 584; *Exchange Bank* v. *Tracy*, 77 Mo. 594, 599; c. 1, Act 3, R. S. of Mo.

Statute does not apply to foreign partnerships. *Chaffee* v. *Bank*, 71 Maine, 514, 524, 528 (foreign voluntary assignment); *Matherson* v. *Wilkinson*, 79 Maine, 159 (foreign contract); *Baldwin* v. *Hale*, 1 Wall. 223; *Bancher* v. *Fisk*, 33 Maine, 316; *Felch* v. *Bugbee*, 48 Id. 9; *Palmer* v. *Goodwin*, 32 Id. 535; *Hills* v. *Carlton*, 74 Id. 156, (insolvent laws).

That these lands are not "estate to be administered" is *res adjudicata* by the decree in *Clement* v. *Amy V. Shaw*. This decree was a judicial finding that they were trust property, rightfully administered by the survivors under the partnership articles, and by which an individual administrator is barred, he having no interest. *Manly* v. *Kidd*, 33 Miss. 148; *Hardway* v. *Drummond*, 27 Ga. 223. A sale by him, under license, would be void. *Dyer* v. *Clark*, and *Smith* v. *Jackson*, *supra*.

Creditors bound by decree in Globe National Bank v. Wyman, and Clement v. Shaw. *Stevenson* v. *Austin*, 3 Met. 474; *Smith* v. *Williams*, 116 Mass. 510; *Hall* v. *Williams*, 1 Fairf. 278; *Sweet* v. *Brackley*, 53 Maine, 346; *Granger* v. *Clark*, 22 Id. 128; 1 Daniel Ch. Pr., 5 Am. Ed. *281, 283, 285; Story Eq. Pl. §§ 173, 180; *May* v. *Mercer Co.*, 30 Fed. Rep. 246; *Cannon* v. *Seveno*, 78 Maine, 307; *Treat* v. *Treat*, 80 Id. 156.

The personal representatives of deceased partner may settle the partnership affairs with the survivors. Pars. on Part. § 511; Story on Part. § 347, note 1; *Sage* v. *Woodin*, 66 N. Y. 578.

The appointment of Walter D. Shaw, administrator, without the notice required by statute, is not conclusive upon the question of assets. *Gross* v. *Howard*, 52 Maine, 192; *Brigham* v. *Fayerweather*, 140 Mass. 411. Is not binding on the surviving partners, or their assignee. *Moore* v. *Philbrick*, 32 Maine, 102, 103; *Jenks* v. *Howland*, 3 Gray, 536. No evidence of title, not having qualified. *Phillips* v. *Smoot*, 1 Mackey (D. C.) 478. Not appointed

until he gives bond. *O'Neal* v. *Tisdale*, 12 Tex. 40; *Feltz* v. *Clark*, 4 Humph. (Tenn.) 79. Failing to qualify is *prima facie* evidence of refusal. *Uldrick* v. *Simpson*, 1 S. C. 283; and cannot appeal from a decree appointing some one else. *Howard* v. *Morrill*, 42 Ga. 397.

As it is agreed, in the report in this case, that William Shaw, at the time of his death, was not a resident of the State of Maine, the issue here is, whether there are, at the present time, assets of William Shaw's estate to be administered within the county of Penobscot. This cannot be held to be *res adjudicata* under the decree appointing Walter D. Shaw,—because the existence of assets in the county of Penobscot in 1887 could not have been an issue in a judicial proceeding in 1882. There may have been assets in Penobscot county in 1882, and none in 1887. But, furthermore, the existence of assets of William Shaw's estate within the county of Penobscot, in 1882, was not a fact necessary to the validity of the decree appointing Walter D. Shaw. The court, in that case, may have found, notwithstanding the agreement of the parties in this case, that William Shaw, at the time of his death, was a resident of Penobscot county, and left assets amounting to twenty dollars somewhere, not in the county. Such a finding would have been sufficient for the validity of that decree. (R S., c. 63, § 6, and c. 64, § 1). The agreement of the parties here cannot affect the issues or findings of the court in that suit. It does not appear by the decree appointing Walter D. Shaw on which of these grounds the court assumed jurisdiction. The decree then, did not necessarily involve the finding of assets in the county of Penobscot in 1882, or at any period of time.

To be a bar to future proceedings, it must appear that the former judgment necessarily involved the determination of the same fact, to prove or disprove which it is pleaded or introduced in evidence. It is not enough that the question was one of the issues in the former suit. It must also appear to have been precisely determined. *Foster* v. *Busteed*, 100 Mass. 409, 411; *Burlen* v. *Shannon*, 99 Mass. 200; *Lea* v. *Lea*, 99 Mass. 493; *Littlefield* v. *Huntress*, 106 Mass. 121; *Stapleton* v. *Dee*, 132 Mass. 279; *Hill* v.

Morse, 61 Maine, 541, in which Peters, J., approves doctrine of *Burlen* v. *Shannon*; *Tracy* v. *Merrill*, 103 Mass. 280.

The administration sought for is ancillary, and must inure for equal benefit of all creditors. *Dawes* v. *Head*, 3 Pick. 128, 141, 142.

There would be a singular difference in the two administrations of the partnership property in this case, viz: The surviving partners would administer all the property, outside of Maine, as of July 28, 1883, the day of the dissolution of the firm, for the benefit of all the firm creditors, both those prior and those subsequent to the death of William Shaw. The probate court in Maine, however, would ignore entirely all debts contracted since his death, and pay only *pro rata* dividends based upon the entire property to creditors who were such at the death of William Shaw; but what they would do with the balance it is impossible to tell. It could not be remitted to the individual administrator, in Boston, for he has nothing to do with the administration of partnership estate. It could not be remitted to the surviving partners, for then it would be distributed partly amongst subsequent creditors.

Voluntary assignments for benefit of creditors, if accepted by sufficient creditors to absorb the assets, and not tainted with fraud, are valid against non-assenting creditors, and can only be avoided by an assignee in insolvency. *Bank* v. *Eagle Sugar Refinery*, 109 Mass. 38; *May* v. *Wannemacher*, 111 Ib. 202; *Train* v. *Kendall*, 137 Id. 366; *Hapgood* v. *Means*, 19 Pick. 105; *Boese* v. *King*, 108 U. S. Sup. Ct. 379; *Mayer* v. *Hellman*, 91 Ib. 496; *Reed* v. *McIntyre*, 98 Id. 507; *Livermore* v. *Jenckes*, 21 How. 126; *Brashear* v. *West*, 7 Pet. 608; *Atherton* v. *Ives*, 20 Fed. Rep. 894; *Ingraham* v. *Wheeler*, 6 Conn. 277; *Frazier* v. *Fredericks*, 4 Zab. (34 N. J. Law) 163, 166; *Speed* v. *May*, 17 Pa. St. 91; *Chaffee* v. *Bank*, 71 Maine, 514; *Ockerman* v. *Cross*, 54 N. Y. 29.

Surviving partners may, by an assignment in all respects equitable and just, assign the firm property for the equal benefit of all the creditors. *Hoyt* v. *Sprague*, 103 U. S. Sup. Ct. 613; *White* v. *Union Ins. Co.*, 1 Nott & McCord, 556; *Galt* v. *Gallaud*, 7 Leigh, 594; *Loeschick* v. *Hatfield*, 5 Robt. 26; *Loeschick* v. *Addison*, 4 Abb. Pr., new series, 210, affirmed 51 N. Y. 960; *Wilson* v. *McConnell*, 9 Rich. Eq. 520.

This right rests upon principles laid down in *Dwinel* v. *Stone*, 30 Maine, 384, 386; *Knowlton* v. *Reed*, 38 Id. 246; and *French* v. *Lovejoy*, 12 N. H. 458, 461.

E. Walker, *Barker*, *Vose and Barker*, with him, for appellees.

In probate proceedings, the appointment of an administrator, by a judge of probate, is conclusive unless appealed from. *Clark* v. *Pishon*, 31 Maine, 506.

Jurisdiction was assumed in the appointment of Walter D. Shaw, and not appealed from, though he failed to qualify by giving the required bond. The question of jurisdiction, therefore, is not open in the probate court, though it might be called in question collaterally in a court of common law.

None of the appellants except Clark have the right of appeal, because the decree does not, *ipso facto*, operate directly or necessarily upon their property or their rights, and therefore their appeals should be dismissed without considering the reasons therefor by this court sitting as the supreme court of probate. *Smith* v. *Sherman*, 4 Cush. 408; *Veazie Bank* v. *Young*, 53 Maine, 555; *Deering* v. *Adams*, 34 Maine, 41; *Smith* v. *Bradstreet*, 16 Pick. 264; *Wiggin* v. *Swett*, 6 Met. 194; *Bryant* v. *Allen*, 6 N. H. 116; *Lewis* v. *Bolitho*, 6 Gray, 137; *Ayer* v. *Breed*, 110 Mass. 548; *Swan* v. *Picquet*, 3 Pick. 443; *Downing* v. *Porter*, 9 Mass. 386.

The appellants are limited to their reasons of appeal, and no other question is open to them except what is stated in their reasons; all other things are presumed to be correct; so that we have no occasion to consider any question not stated in the reasons. *Gilman* v. *Gilman*, 53 Maine, 184, 188; *Boynton* v. *Dyer*, 18 Pick. 1, 4.

And a party must be interested in probate proceedings, and not adverse to them, to have the right of appeal; if his interests are such as to be determinable only by a court of common law, or are adverse to the estate and to the rights of the creditors of the estate, he has no right of appeal as he is not aggrieved. *Lewis* v. *Bolitho*, *supra*.

Clark has the right of appeal only in his representative capacity as administrator of the estate of William Shaw, as his reasons given in his individual capacity stand upon the same ground as

those of the other appellants. Therefore, to show that he is aggrieved, he must show that the decree necessarily and directly operates injuriously upon the estate of the deceased, and upon the rights of the creditors of the estate which he represents. This he has not shown and is not aggrieved. *Smith* v. *Sherman*, *supra*; *Lewis* v. *Bolitho*, *supra*.

If the reasons of appeal were all true to the letter, it would follow that no one of the appellants is aggrieved, as if there is no property to be administered, the appointment of an administrator could affect the rights of no one; it is only where there is property to administer, that any one can be aggrieved. Therefore, their appeals should be dismissed without regard to their reasons.

The whole partnership property is subject to administration. The title and interest of a deceased partner in partnership property, is such estate as is required by law to be inventoried and administered upon. And William Shaw had a large interest in such property in Maine. R. S., c. 69, §§ 1 and 2; *Bass* v. *Emery*, 74 Maine, 338; *Hill* v. *Treat*, 67 Maine, 501; *Cook* v. *Lewis*, 36 Maine, 340.

There must first be an administrator upon the estate of the deceased, before there can be one on the partnership assets, as he has the first duty to perform in relation to the partnership property. R. S., c. 69, § 1.

The judge of probate has jurisdiction if a non-resident deceased leaves personal estate in Maine of twenty dollars in value, or real estate to that value, and owes debts to that amount, and any portion of such estate is in his county, however small. R. S., c. 63, §§ 6 and 7; c. 64, § 1.

And the judge first taking jurisdiction, holds it over the property in all the counties throughout. R. S., c. 63, § 7.

There is no survivorship in partnership matters, and the share of the deceased partner, both at law and in equity, descends to his heirs and legal representatives, subject to a trust for the payment of partnership debts. *Crooker* v. *Crooker*, 46 Maine, 250, and cases there cited. The estate of the deceased in land was that of a tenant in common with the survivors. R. S., c. 73, § 7.

Each partner, while living, holds his share of the title to the

partnership property, as tenant in common, subject to a trust in favor of partnership creditors; and he cannot dispose of it so as to defeat that trust, without committing a fraud, or being made accountable therefor. And upon the death of a partner his share of the real estate descends to his heirs, subject to the same trust. *Crooker* v. *Crooker*, *supra*, and cases there cited. *Burnside* v. *Merrick*, 4 Met. 537, 541. And the trust cannot be defeated by any post-mortem conveyance. R. S., c. 71, § 23.

And a partner cannot authorize any other person to convey, after his death, the property which he holds subject to such trust, so as to defeat such trust, (which he could not do while living, without committing a fraud). Therefore, any supposed authority for that purpose in the articles of copartnership, is void.

The provisions in the articles of copartnership, and the assignment to Wyman, as against the rights of creditors in this state, are void by the positive laws of our state, when brought in conflict with them. *DeSobry* v. *DeLaistre*, 3 Am. Dec. 535; *Smith* v. *Smith*, 3 Am. Dec. 410; *Soul* v. *His creditors*, 16 Am. Dec. 212; *Marsh* v. *Putman*, 3 Gray, 551, 567; *Fox* v. *Adams*, 5 Greenl. 245; *Felch* v. *Bugbee*, 48 Maine, 9.

The conveyances to Wyman and to Clement show, upon their face, that those conveyances were made in fraud of the creditors, and the record thereof is notice to all who should purchase the property of them.

The courts in Mass. could confer no authority upon Wyman, in relation to property in Maine. They could only act *in personam*, and require him to do what he might do voluntarily without the order of such courts. *Fowle* v. *Coe*, 63 Maine, 245; *Lovejoy* v. *Albee*, 33 Maine, 414.

The decree of the supreme court of Maine, and conveyance by a special master in pursuance thereof, only conveyed to Clement the right, title and interest, of the widow and heirs of William Shaw to real estate, which right, title and interest in them, is subject to the trust under which William Shaw held it in favor of creditors, and Clement holds it subject to the same trust, as also his grantees with the record notice.

And a conveyance of the right, title and interest of the heirs,

only carries their interest in the surplus, after the debts are paid. *Burnside* v. *Merrick*, *supra.*

All the real estate of which William Shaw held the title at his decease, situate in Maine, is subject to be inventoried and administered upon; as Clement had acquired only the rights and title of the heirs, and has only the same rights in proceedings in probate courts. R. S., c. 63, § 29, c. 65, § 13, and c. 71, § 23.

The real estate purchased with partnership funds of which William Shaw held the legal title, was held by him in trust to pay partnership debts, and could have been sold by him in his lifetime for that purpose, he applying the proceeds to the payment of such debts, which would have discharged the land of the trust. It follows that his administrator under a license from court could do the same thing. But only a partnership administrator could reach the title of the survivors for that purpose; and unless the record title showed that it was purchased with partnership funds for partnership purposes, he might have to resort to a bill in equity to do it. *Burnside* v. *Merrick*, *supra; Buffum* v. *Buffum*, 49 Maine, 108, and cases there cited.

It is necessary for the administrator to sell only so much of the property as is needed to pay the few outstanding debts against the firm, leaving the balance in the hands of Clement, as he has acquired the title of the survivors and heirs of William Shaw, which title is subject to those debts, and that much the creditors are entitled to have out of the property by the laws of our State, in spite of the articles of copartnership, and all the conveyances that have been made. And it is for that purpose that these proceedings are prosecuted.

The articles of copartnership, and the assignment to Wyman by the survivors, so far as they are in conflict with the positive provisions of our statutes, and the rights of creditors who are citizens of Maine are void—the *lex loci rei sitæ* must control, and our own citizens should be protected thereby whatever may be the law in other States. *Fletcher* v. *Sanders*, 32 Am. Rep. 96.

R. S., c. 71, § 23, provides that lands of which deceased died seized, etc., are liable to sale for payment of debts under any license granted under this chapter, and any deed executed and

recorded in due form of law for adequate consideration, in pursuance of such license, is effectual to pass to the purchaser all the estate, right, title and interest in the granted premises which the deceased, &c., might convey by a like deed, if living and not incapacitated; which creates a statute lien upon the real estate of a deceased person for payment of his debts, paramount to any claim made upon it or conveyance by any person after his death.

There is also a lien at common law. *Burnside* v. *Merrick*, *supra*, 543.

The contract of copartnership and the assignment to Wyman are in direct conflict with R. S., c. 69, and c. 71, § 23, and are void, and all attempted conveyances made in pursuance of such contract and assignment, and authority claimed under them, are void as to property in Maine.

Our citizens as creditors have a lien at common law and a special lien by R. S., c. 71, § 23, upon the real estate of the deceased for payment of their debts which cannot be defeated by any post-mortem conveyance.

DANFORTH, J. These three cases are appeals, by as many different persons, from the same decree of the probate court for the county of Penobscot appointing Elliot Walker administrator on the estate of William Shaw.

The petition alleges that Shaw was a citizen of Massachusetts; that he died "August 31, 1882 intestate, seized and possessed of personal estate in said county, exceeding twenty dollars in value, which ought to be administered according to law; that said deceased died leaving real estate in said county of more than twenty dollars in value, and owing debts to more than the amount of twenty dollars, which are still unpaid."

Among the reasons of appeal there is one in each case, and the principal one, which directly denies the allegations in the petition so far as they relate to property, and thus is raised a distinct issue upon that point.

There are, however, some preliminary questions raised to be first disposed of.

It is claimed that the appellants are not, in a legal sense, so aggrieved as to entitle them to a hearing. To give them this

right it is claimed that the decree must directly and unfavorably affect their rights of property, or interests; that the court of probate is not, but a common law court is, the proper tribunal to settle titles to real estate, and numerous cases are cited to sustain this view. No doubt, this as a general statement of the law is correct and the cases cited are sound law, under the facts upon which they rest. But they do not apply here. In this case, the real estate relied upon as authority for granting the petition is claimed, not by an independent or adverse title, but by a title traced directly to the intestate, and acquired through his representatives, by what they claim to be a legal and valid process. If it should prove so there will be no ground for granting the petition. The title to this real estate is therefore in issue and the court must pass upon it in order to settle the question in issue. A very considerable portion of the argument for the petitioners, is to show that this property is now in a condition to be administered upon as the property of the deceased. If the decree stands it will be an authority for the administrator to administer the property in question so far as it may be necessary. Whatever rights the appellants might have in a court of law, the decree, if it has no other effect than to send the parties to expensive litigation, will be sufficiently direct in its effect upon the title to authorize these appeals. *Allen* v. *Smith*, 80 Maine, 486; *Bancroft* v. *Andrews*, 6 Cush. 493, 496; *Paine* v. *Goodwin*, 56 Maine, 413; *Bates* v. *Sargent*, 51 Maine, 425; R. S., c. 63, § 29.

The case shows that Clark is administrator at the intestate's last place of residence. As such, his right of appeal is beyond question. *Wiggins* v. *Swett*, 6 Met. 197; *Smith* v. *Sherman*, 4 Cush. 411. The widow, having an interest in the estate, would have the same right of appeal as the administrator.

Another question, raised in this connection, is that the reasons of appeal alleging a want of jurisdiction in the probate court, are *felo de se* and the appeal should be dismissed without further consideration. This would clearly be the result if the want of jurisdiction appeared upon the record. *White* v. *Riggs*, 27 Maine, 114; *Osgood* v. *Thurston*, 23 Pick. 110. Possibly, the same result might follow if an absolute want of jurisdiction should

appear on investigation. It is quite evident that there would be no propriety in this court's affirming or reversing a void decree. Still the effect would be the same as a reversal. If the appeal is dismissed, for want of jurisdiction, it must in effect be a declaration of the nullity of the decree, and would leave no basis for any authority in the administrator appointed. But the cases cited do not apply to this case. In *Bank* v. *Young*, 53 Maine, 555, there are some remarks tending to show that the principle might be applicable in a case like this. But they are dicta only and the dismissal of the appeal rests upon a different ground. In cases like this, jurisdiction of the subject matter is given by the statute. Whether an administrator shall be appointed, is determinable by the court and the result depends upon the facts as they shall be found. Moreover, the statute makes such finding conclusive and forbids any inquiry into the question of jurisdiction, "except in cases of fraud, so far as it depends * * * upon the locality, or amount of property, * * in any proceeding whatever, except on *appeal* from the probate court in the original case, or when the want of jurisdiction appears on the same record." This seems tantamount to a direct grant of the right of appeal. R. S., c. 63, § 7.

Another preliminary objection is that the appointment of Walter D. Shaw was an adjudication of the question now at issue and conclusive upon all parties. The case shows that he was appointed upon his own petition in December 1882. That appointment was upon the condition of his giving a bond which he never gave. He never entered, or attempted to enter upon the duties of his office. He therefore in effect declined to accept the office, and the appointment was the same as if it had never been made. If he had qualified, the decree would have been conclusive as to his authority in all proceedings in which he was a party but no further. He is not now a party. At the time of his appointment, these appellants were not, nor were they in a condition, to be parties. Hence, though the decree might have become conclusive as to the title to the office, it would not have been conclusive as against these parties as to the existence of assets even at that time. *Brigham* v. *Fayerweather*, 140 Mass. 411.

Besides, the residence of the deceased is not in issue here, but the location of his property. There may have been assets at one time and not at another. If he had left assets at his decease and all had been removed, or legally disposed of, before the date of this petition, it would furnish no reason for the appointment of an administrator at this time. Another pertinent suggestion is, that we find in the decree no allegation of any assets, or of the truth of any allegations in the petition, nor does the petition show any real estate, the existence of which seems to be the question at issue here.

This brings us to the main question in issue in this case.

The petition alleges in substance that William Shaw, a resident of Massachusetts, died August 31, 1882 seized and possessed of personal and real estate of the requisite value which ought to be administered upon, and asks that Elliot Walker be appointed "administrator of said estate." One of the reasons of appeal is, in effect, that he left no such property.

The authority of the probate court to grant administration is found in R. S., c. 63, § 6, and includes "the estates of all deceased persons, who at the time of their death, were inhabitants or residents of his county, or who, not being residents of the state, died leaving estate to be administered in his county, or whose estate is afterwards found therein." The limit of this authority is found in R. S., c. 64, § 1. "No administration shall be granted on the estate of any intestate deceased person, unless it appears to the judge that he left personal estate to the value of at least twenty dollars, or owed debts to that amount, and left real estate of that value."

Hence, in order to grant the prayer of this petition it must affirmatively appear to the court, that at the date of the petition personal property of the deceased was found in the county of Penobscot, of the value of twenty dollars, or that he owed twenty dollars, and left in that county real estate to that amount; and that his interest in it was such, that it was liable to be administered upon as his. In other words that the property both real and personal must be assets of the deceased, liable for his individual debts, or to be distributed among his widow and heirs,—for

an administrator as such, can do nothing else. If the deceased held the property in trust, it might indeed go to his representatives, not to be administered upon, but to be disposed of under the trust. In one case, the court of probate would have jurisdiction, in the other a court of equity. *Trecothick* v. *Austin*, 4 Mason, 16.

All the material facts in this case are unquestioned. It appears that the deceased with his two brothers, neither of whom were residents of this state, had entered into a copartnership for the purpose of doing an extensive business in this, as well as in several other states and Canada. The firm had occasion for a large amount of personal and real estate, were the owners of both kinds of property and a considerable portion of each was in the county of Penobscot at the death of the deceased partner. There is no proof that the deceased had any personal property other than that which belonged to the partnership. As that has been disposed of before this petition was filed, and as the result has shown was insufficient to pay the partnership debts, the deceased had no such interest in that as could be considered as bearing upon the question presented by this petition. Even if the property could now be found, in the county and identified, he had no such interest in it as would authorize an administrator to administer upon it, as his individual estate, it being insufficient to pay the company debts.

The real estate is somewhat differently situated. The record title, to some or all of that, stands in the name of the deceased. But the facts show that it was bought with partnership funds for the company, and to be used for company purposes. By well settled law it must be considered, that, though the deceased held the legal title he held it in trust, not for the creditors alone, or specially, but for the firm. *Crooker* v. *Crooker*, 46 Maine, 250; *Buffum* v. *Buffum*, 49 Maine, 108. This trust is also distinctly declared in the articles of copartnership. It also appears that all this real, as well as the personal estate, is insufficient to pay the partnership debts, and except this partnership property the deceased had no other, real or personal, at the time of his death, in the county of Penobscot and none has been found since. He

clearly then had none which could, or can be administered upon as his private or individual assets, none which an administrator could legally appropriate to the payment of his private debts, or distribute to his heirs. This would seem to be decisive of this case.

But while it is conceded that an administrator must first be appointed for the deceased member of the firm, it is claimed here that it should be done, because there are partnership assets to be administered upon. But assuming it to be true that there are partnership assets, the result claimed by no means follows. The fact of partnership assets is no legal reason for appointing an administrator. On the other hand, the express terms of the statute from which the probate court gets all its authority, excludes it. The appointing power is the same whether the deceased was a member of a firm or otherwise. The administrator is not appointed for, or with reference to any firm, and if the duty of settling the partnership affairs devolves upon him it is only as an incident of his office, and after the surviving partner has refused to give the required bond. The only power the court has to appoint rests upon proof of individual assets.

The fact that the deceased held the legal title incumbered, as it is, with a trust which swallows up the whole, affords no proof of assets, for after the trust is satisfied there is nothing left for the individual. The trust must be disposed of in another way as held in *Crosby* v. *Leavitt*, 4 Allen, 410. The title would go to the legal representatives, incumbered with the trust, and not as assets to be administered upon. This, if not self evident is abundantly sustained by the authorities cited in the argument.

But further, even were it competent for the court to consider any evidence of partnership assets, as bearing upon the question at issue here, there is not only a failure to show any such assets now existing, but from the case it does appear affirmatively that whatever the firm had, at the death of William, have been long since disposed of and that before the date of this petition.

In the articles of copartnership, it was agreed, that in case of the death of one or more of the members of the firm, "the survivors or survivor shall be allowed the term of five years, in, or within

which, to continue and close the business of this copartnership." This agreement gave the survivors the same power to continue and manage the business of the firm, as when all were living, including the property interest which the deceased member had in it, and making that property liable to debts subsequently contracted, as well as those then existing. *Burwell* v. *Mandeville*, 2 How. 573, 576; and the numerous cases cited in the argument. That such is the well settled general rule of law cannot now be doubted.

But it is claimed that, in this state, such an agreement is void because it conflicts with the express provisions of the statute, c. 69, R. S., and with the rights of creditors. But this contract was made by parties, not residents of this state, and therefore not amenable to its statute laws. The contract was therefore binding upon the parties and, as such, would be enforced in this state unless contrary to its laws, or public policy. *Felch* v. *Bugbee*, 48 Maine, 9. It contravenes no public policy nor any statute of the state. It takes away none of the rights of creditors; was not intended, nor did it have the effect to hinder, or delay them, in the slightest degree. The statute gives them no special lien upon the property until one was created by legal process, and it was open to attachment after the agreement went into effect as well as before. R. S., c. 71, § 23, makes certain lands of the deceased liable to be sold for the payment of debts, and doubtless the proper and perhaps the only way for the creditor to avail himself of this provision is through an administration and under a license. But the enumeration of the different description of lands liable, omits such as may be holden in trust and the inference from this is, that they were intended to be excluded.

The only ground of conflict with chapter 69 must be found in § 1 if anywhere, which provides that the administrator of a deceased member of a firm "shall include in the inventory the property of the partnership," and in a certain event administer it. But this offers no legal proof that an administrator is needed for the deceased partner and furnishes no reason why one should be appointed. But if that provision has any reference to a foreign firm, it must have a reasonable construction. It contemplates a

dissolution. If there is no such administrator it clearly cannot be enforced. It is quite as evident that if there is no dissolution, it cannot be enforced. The use of the words administrator with the act of administration in the probate court, indicates that there must first be a dissolution, a closing up, a cessation of business. The law did not and could not intend to interfere with a living partnership and stop its business. As said by Story, J., in *Burwell* v. *Mandeville*, *supra*, p. 576. "By the general rule of law, every partnership is dissolved by the death of one of the partners. It is true, that it is competent for the partners to provide by agreement for the continuance of the partnership after such death; but then it takes place by virtue of such agreement only, as the act of the parties, and not by mere operation of law." So here, without the agreement, the partnership would have followed the general rule of law and the dissolution would have taken place at the death of the member. But under the agreement, the firm is continued, by the act of the parties and the operation of the statute is postponed, at least until a dissolution does take place. This can be no violation of the statute, for in addition to the reasons already given, it may be suggested that no time is fixed in the statute when the administrator shall take possession and the inference is, if necessary at all, it should be after a dissolution of the firm.

In this case, such a possession is not necessary, nor can it legally be taken, for by the very act of dissolution all the partnership property was disposed of and the creditors provided for so far as it was possible to do so. The assignment was necessarily a dissolution of the firm. By that assignment, the creditors whether they had a lien or not, took all the property there was. They could have had no more under an administration. The creditors therefore have no reason to complain. It is a general assignment, making no preference as to creditors. It conflicts with no statute or policy of the state. The former assignment law of this state has been repealed. *Smith* v. *Sullivan*, 71 Maine, 150. And it cannot conflict with the insolvent law because it places no obstacle in the way of enforcing that. If the parties were within the jurisdiction of this state, the insolvent law could be

invoked the same after as before the assignment. The only real objection to it seems to be in effect, that it gives no priority to the creditors of this state. But why should it? None of the statutes referred to, gives such a preference, not even that under which an administration is claimed. The insolvent law, if that could have and had been invoked, would not have allowed it. During the continuance of the partnership, the firm could have sold any portion of their property, for the payment of debts either in or out of the state. If they could have sold in parts for that purpose they could sell it as a whole for the same purpose. *Train* v. *Kendall*, 137 Mass. 366; *Boise* v. *King*, 108 U. S. Sup. Ct. 379, and numerous cases cited by counsel. Upon the propriety of giving a preference, to creditors within the state, to a priority of payment from the state property, we refer to the remarks of Parker, C. J., in *Davis, Judge* v. *Head*, 3 Pick. 128, beginning on page 143. These remarks, though not necessary to the decision in that case, are entitled to great consideration and certainly to no less, under the circumstances, developed in the case at bar.

That this assignment was valid in Massachusetts appears from the case of the *Globe Bank* v. *Wyman & als.* the records of which are made a part of this case. It has been confirmed by the decree in *Clement* v. *Shaw & als.* heard in Penobscot county, under which all the partnership real estate in this state has been disposed of in conformity with the rights of all parties. Whether it will defeat the attachments of resident creditors we do not now deem it necessary to decide.

Decree of probate court reversed.

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

HASKELL, J., having been of counsel did not sit.

FRANKLIN M. DREW, admr. *vs.* MARY HAGERTY, and trustee.

Androscoggin. Opinion January 18, 1889.

Gift. Delivery. Donatio causâ mortis and inter vivos. Imperfect gift. Bank deposit. Presumption.

The gift of a savings bank book, *causâ mortis*, to be valid, must be accompanied by an actual delivery from the donor to the donee, or to some one for the donee; the delivery must be made for the express purpose of consummating the gift; and a previous and continuous possession by the donee, is not sufficient.

A delivery, in such case, becomes necessary to distinguish it from a legacy, since without delivery, an oral disposition of property, in contemplation of death, can be sustained only as a nuncupative will.

Delivery, followed by possession, is an essential part of a gift.

A gift, *inter vivos*, to be effectual, must be immediate and absolute, accompanied by actual delivery. Words alone will not constitute delivery. There must be some act or something done. With the words there must be some accompanying act, some handing over, some unequivocal thing done and performed, indicating a change of title in the property.

A verbal agreement between husband and wife, that moneys deposited in savings banks, in their joint names, and belonging to them jointly, shall become at the death of either wholly the property of the other, is not an executed contract, and does not convey the property.

Where money is deposited in a savings bank, in the name of a husband, payable also to the wife, the presumption of law would be, nothing else appearing, that the husband was the depositor, because the account is directly in his name, although the money is payable to her.

ON EXCEPTIONS AND MOTION of the defendant to set aside the verdict, and for a new trial.

The action was for money had and received by the defendant by her collection of the amounts due on three savings bank books after her husband's death. The plaintiff sues as administrator on the estate of Daniel Hagerty, the defendant's husband. Verdict was for plaintiff for $2,420.68.

It appeared that said Hagerty, who died January 14, 1884, deposited in 1879 moneys in three savings banks and which at the time of his death amounted to about $3,000. One of the deposit books bore the indorsement, "payable also to Mary Hagerty," another was in the names of "Daniel and Mary

Hagerty," and the third was issued to "Daniel or Mary Hagerty" and bore the indorsement "pay either in any event."

On January 21, 1884, the defendant withdrew the sum due on the first book amounting to $1,186.80 and surrendered the bank book, and on the 24th day of the same month caused the sums due on the other books amounting to $1,196.39 and $595.51 respectively to be transferred to herself and son, by whom the money was subsequently withdrawn and the bank books surrendered.

At the trial, the defendant relied upon three defenses: First, that a portion of the funds deposited was hers, because they constituted the savings of both her husband and herself; second, that subsequent to the deposit, an agreement was made between her husband and herself, that whichever one lived the longest should have the money; third, that the money was given to her by her husband on the day of his death. These several claims were consolidated, so that they were presented in the following form: that when she and her husband began their married life, they agreed to save their earnings; that they did this; that the money represented their joint savings; and that the gift claimed, on the day of her husband's death, was the final consummation of a course of action tending to show an intention to give.

The defendant not being satisfied with the instructions of the court upon these classes of gifts, the second and third *supra*, excepted thereto, and to its instructions, in the matter of delivery.

On this branch of the case the presiding justice instructed the jury as follows:

"Suppose, for the sake of the argument, that Daniel deposited the money, deposited it because it was his, and that it was his when he deposited it, and that these savings bank books were his at some time. Then the question arises, did he divest himself of that ownership? Did he effectually give these books to the defendant, his wife, in any way? She claims, as a part of this case, that he did, either in one of two ways or in both of those ways: First, that he gave her the books while he was well; secondly, that he gave the books to her on his death bed, while he was sick and in peril of death.

Now it becomes necessary to explain to you how such a thing as that may be, and then it is for you to say whether it is, or not, or was. The first of these gifts, giving a thing by one person in good health to another person in good health, is called a gift *inter vivos*, or gift between living persons. The second is called a gift *causâ mortis*, a gift in prospect of death. An essential difference is this: one is an absolute gift, an absolutely executed gift; the other is a conditionally executed gift, conditional upon the death of the giver. That is, the law describes a gift thus because a party is dying, or in prospect of dying and does die afterwards of that sickness. It is a perfect gift in every respect except that it goes for nothing if the party gets well; it is conditional in that respect. A gift among the living, so called, goes into immediate and absolute effect. That is the difference. In either case the subject of the gift must be certain, definite. In either case, also, there must be a delivery. Without a delivery, into actual possession of the person to whom given, title does not pass. Delivery is essential. Without actual possession the title does not pass to the donee. A mere intention to give, a naked promise to give, a talk about giving, without some act to pass the property, is not a gift. There rests a chance all the time, you see, of repentance, *locus penitentiae*, that lasts as long as the gift is imperfect or incomplete. The delivery must be actual, it must be as complete as the nature of the property is susceptible of. Of course savings bank books are susceptible of manual delivery. I may pass them from my hands to yours, Mr. Foreman. The gift might be of ponderous articles of personal property that could not be delivered in that way. They must be actually delivered in a manner as far as the property is susceptible of it. Delivery may be made by an agent. If I want to give a thing to you I may direct my agent to hand it to you; but the donee cannot be my agent to perfect the delivery; if I give to you, you cannot be my agent to give it from me and to take it for yourself.

Mere words are not enough to constitute delivery; there must be some act, or something done; there must be words and accompanying act, some handing over, some unequivocal thing done and performed. These are general rules.

Now to come a little nearer to the matter in hand, if I have not already hit it. A savings bank book may be delivered by passing it over, by handing it to the donee, accompanied by words expressing gift. The words and the act must in effect accompany each other, nearly enough, at any rate, to be one transaction. If the property given be at the time already in the possession of the donee, the donor's saying to the donee, 'you may have it,' or 'you may keep it; it shall be yours,' does not pass the property, in the case of a gift *causâ mortis;* there is nothing done as a part of the transaction. That matter would consist of words only. In that case there may be intention, but the intention is not carried into effect; the gift is not consummated by any actual or effectual delivery, not, in such case by any delivery. That would be the rule, as I say, in the case of a gift in apprehension of death. The rule would not, under some circumstances be quite so stringent in the case of a gift *inter vivos*, that is, a gift where the parties are well, as to delivery, and you will see the reason of the distinction as I will endeavor to explain to you. In case of a gift *inter vivos*, where the parties are well, where the property is passed into the possession of the donee before the gift and has been held by him in a manner indicating a change of title in the property, and a recognition of the donee's title by the donor, proof of actual manual tradition, that is, a passing over of the property by the one to the other, by the hands of one to the hands of the other, at the time of the making of the gift, may be dispensed with. Now a case in this state where that was settled was just this: A man had the notes of another in his possession. That other person was in the habit of paying small sums of interest often on the notes. That person got possession of the notes, the notes were already in his hands by the consent of the owner of them, and the owner says, 'I give you these notes, you may keep them, you need not pay me, consider them yours.' Now, you see, there was no passing over, at the time of the talk, of the notes. But the court said there was conduct of the parties that might be considered equivalent to it. What was it? That the one ceased paying these small sums of interest and that the other ceased asking for them. And it being satisfactorily shown that

the donee had the notes in his own hands and possession, and satisfactorily shown that the donor said he might keep them, and the donor never asking for them again, there was a change of conduct between the parties in relation to them, and the court said that might be equal to a delivery or passing over. For instance, Mr. Foreman, I have a book here. I lend it to you during this term. The book is mine. It is in your hands. When I come to leave town you bring the book to me. 'I say Mr. Foreman, I will give you that book, you may keep it, I have read it enough, you seem to be interested in it, you may have it. Now I do not pass that book over to you because it is already in your hands. And if I go home and never pay any attention to the book, time elapses and I do not ask you for it, and you go on and use it exactly as if it was yours and as if you had purchased it somewhere, the law says that may be equivalent to passing it over; that is, there is no necessity of your delivering me the book just for the sake of my handing it back to you again.

That applies to a gift between living persons who are well. There is the possession; there are the words; there is the conduct. That does not apply to a gift on the day that a person is going to die or a gift during the last sickness of a person. Why? Because there is no opportunity for that person who is dying and who does die of that sickness, by any conduct of his to extend and recognize; there is no chance for conduct to be seen to operate. Possibly, in a very extreme case it might exist where there was time enough, but it would be rare, if ever that it could have an application. These are the essential requirements of a gift where a person gives a thing, that is, not a sale, no consideration paid, but a gift. Delivery, you see, is a very essential part of it.

Now the law is even more particular about the evidence of delivery, when a gift is claimed between a wife and husband, or between members of a family, where there is an opportunity sometimes to create evidence falsely, or the appearance of evidence."

Upon that branch of the defense, in which the defendant contended that the moneys deposited consisted of the several earnings

of both Daniel and Mary, and that the money belonged to them jointly and was deposited by them jointly, and the defendant relied on a verbal agreement which, it was contended, was disclosed by the evidence, between Mary and Daniel that whichever of them survived, the other should be the owner of all the money —of all the books,—the presiding justice ruled to the contrary, and on this subject instructed the jury as follows:

"I deem it my duty to allude to a phrase that was testified to. This is the phrase that I allude to, the talk that, 'the survivor should own all.' The so-called agreement, as testified to, between Daniel and his wife, that whichever outlived the other should own the whole of the savings bank books, would not convey those books. It would not be an executed agreement from the very nature of things; it would be something to be done, not something now done; something to take place in the future; not that you shall now have these books, but if you should survive me you shall have them. It requires something more than that. That would be in the nature of a testamentary contract or document, more like making a will. Had it been in writing; had the parties committed such an agreement as that to writing, properly drawn, they might have bound themselves. But the mere fact (if that is what she meant by this testimony) that I own a piece of a thing and you own a piece of a thing, and we agree that if you live the longest you shall have it all, and if I live the longest I shall have it all, does not now convey the property; it neither divests you of yours, nor me of mine. It cannot have that legal effect.

This evidence, however, introduced by the defendant, may have a bearing in combination with other evidence. It shows a disposition, it shows a state of mind. If you are satisfied that in addition to that, at some time, something more was done, while they were well or while the death-bed scene was before them, that they then consummated it, why that is another thing. You would perhaps more readily believe that there had been an actual delivery later if this was talked or agreed to earlier. The question for you is, does all the evidence, taken together, prove to you that the dying man Hagerty, or the living and well man Hagerty,

divested himself absolutely of that property, so that from that moment it was no longer his, so that he had no longer any more right to control it than you would have or I would have? That is what the defense claims, and that is what the plaintiff's side repudiates and disbelieves, or claims to; and it is for you to say. Was there, on the rules given and on the evidence, a gift of this property or any part of this property, an absolute gift, executed gift, by Daniel to his wife? If not, that theory of the defense is swept out to sea, gone from the case; and if you are satisfied it was, that would give her the books. If Daniel gave her the books, you are to give her the books. Or if he gave either book or an undivided half of a book absolutely, an executed gift, you would do the same. And if he did not, you will not." And the defendant excepted to these instructions.

Questions arose between the parties as to the burden of proof, and the presumption of ownership which would arise from the books alone, and from the books accompanied and explained by other evidence. The counsel for the defendant contended that the burden of proof was on the plaintiff, and that the presumption from the books was that the defendant was a joint owner of the funds with her husband. The court on this matter instructed the jury as follows:

"Each side relies upon the books, and these books vary considerably. Here is one. As it was originally (before altered to show that the money had been drawn out and put back, or the equivalent to that) it reads 'The Maine Savings Bank Book, Daniel Hagerty or Mary Hagerty. Pay either in any event.' And the book of the Portland Savings Bank 'in account with Daniel and Mary Hagerty.' That is an account with Daniel and Mary, and if nothing else appeared, if there wasn't a scintilla of evidence except that entry in the book, I think the legal presumption would be that it belonged to them jointly, equally. And I think that in the case of the one entered to 'Daniel Hagerty or Mary Hagerty' there would be some slight presumption, perhaps that Daniel was the depositor. And then the People's Savings Bank 'In account with Daniel Hagerty. Payable also to Mary Hagerty.' The presumption of law would be, nothing else

appearing, clearly, that Daniel was the depositor, because the account is directly in his name, although payable to her. The books made up, in this form of entry, the plaintiff contends aids his theory, and the defendant contends that it aids her theory, that she was the owner with Daniel and that Daniel was not alone the owner, as to two of the books, and more especially as to one of them. But the books may be controlled, (what appears on the books,) by other evidence, and circumstances and facts. * * *

The defense contends that she was half owner, or some proportional owner. Now here is a difficulty in my mind; how can we ascertain the proportion, if it were so, in the indefiniteness of the testimony which has been submitted? If I have money in my hand and you own a part of it and you cannot tell what part you own, how are you going to get it, if you are not able to tell me or some tribunal between you and me, as to what is yours? Now, if Daniel was the actual depositor, if he carried the money to the bank, that act, standing alone, would make him the *prima facie* owner. And if some of her funds were commingled with his and she cannot say how much, she cannot identify them, she cannot follow them in form or amount at all, she would have to fail from having no means of identity of her funds, she cannot identify the proportion. But if you are satisfied he deposited the funds, that she was the actual owner of a portion of those funds, which were taken there to be deposited as hers, just as much as his were being deposited as his, and she did not lend him the money, but it was banked, put into the bank, as her property, should you conclude that half was hers, there is an identity, half would be hers now, and the money being all in her hands, they could not recover but the other half; or if you should be satisfied that a proportion, any proportion, one-third or one-fourth. If the evidence reasonably satisfies you from what has been submitted before you here, if you are able to say in the first place that she is the owner, in this view of the case, of a part of the funds, and you can safely say what part, or you are satisfied what part, why she would have a right to retain that in her own hands, because it would be her own property. If half was hers the plaintiff could not recover but

Daniel's half. If one fourth was hers he could not recover but the three quarters, or if a fifth or a sixth,—in that proportion.

To these instructions upon the burden of proof and presumptions connected with it, the defendant excepted.

Frank L. Noble, for defendant.

No instrument of title, creating joint ownership in the deposits, necessary. Schoul. Pers. Prop., vol. 2, § 156. Defendant did not, under the common law, lose her rights by commingling her earnings with her husband's. *Blake* v. *Blake*, 64 Maine, 177; *Allen* v. *Lord*, 39 N. H. 196; 1 Chitty's Con. (11th Am. Ed.) pp. 256 257 and note.

Burden of proof is on the plaintiff. The intermixture of the moneys, being by agreement, the parties have an equal interest as tenants in common. Kent's Com. (12th ed.) vol. 2, 365; *Bryant* v. *Ware*, 30 Maine, 295. All the moneys in the Portland banks belonged to the intestate, or each owned one half part; otherwise the verdict is insensible. The same presumption as to ownership applies to both of these books. There was an executed contract of gift, *causâ mortis*, from Daniel Hagerty to the defendant. The books were in her possession six years before his death, having been delivered into her hands, by her husband after they returned from Portland. There may be a valid trust against legal representatives although the donor received the income during his life, and the donee knew nothing of the deposit. *Martin* v. *Funk*, 75 N. Y. 134. Here, after the dividends were entered, the books were returned to defendant and no moneys were withdrawn. Delivery of the books sufficient without a written transfer or assignment. *Pierce* v. *Bank*, 129 Mass. 432; *Hill* v. *Stevenson*, 63 Maine, 364; *Barker* v. *Frye*, 75 Id. 29, 33.

There being a clear intent to give, the books being in defendant's hands, the gift was executed and perfected. There was no need of the defendant's taking the books out of her trunk and place them in her husband's hands that he might give them back again to her. He recognized the fact that they were in her hands where he had already placed them. There is no difference, so far as delivery is concerned, in the two classes of gifts. *Stephenson* v. *King*, 50 Am. Rep. 172; Schoul. Pers. Prop., 2d ed., vol. 2, p. 170,

171; *Basket* v. *Hassell*, 107 U. S. Sup. Ct. 602, 611; *Stevens* v. *Stevens*, 2 (Hun.) N. Y. 470; *Wing* v. *Merchant*, 57 Maine, 383.

Newell and Judkins, for plaintiff.

Counsel argued that when the money was deposited, the defendant gave it to her husband and did not think him to be her debtor, and did not expect repayment. If so, and they were intermingled with his, and she cannot now identify her part, she cannot hold any of them. *Baker* v. *Vining*, 30 Maine, 121. She recognized his ownership, and did not set up a claim of ownership until her examination in the probate court.

Her testimony that he gave the books into her custody and saying whichever one lived the longest should have the money did not constitute a gift. It would be an attempt to make such a disposition of property as can be made by will only.

Her testimony does not prove a gift *causâ mortis*. It is improbable and contradictory. Had such a gift been made, she would have told her grandson, his guardian and the administrator instead of denying it. She was silent for four years when it was right and natural to speak of it.

Counsel cited: (gifts *causâ mortis*) *Ward* v. *Turner*, 2 Ves. sen. 431; *Tate* v. *Hilbert*, 2 Ves. jr. 111; *Borneman* v. *Sidlinger*, 15 Maine, 429; *Parish* v. *Stone*, 14 Pick. 198; *Raymond* v. *Sellick*, 10 Conn. 480; (delivery) *Drury* v. *Smith*, 1 P. Wms. 404; *Wells* v. *Tucker*, 3 Binn. 366; *Contant* v. *Schuyler*, 1 Paige, 316; *Borneman* v. *Sidlinger*, *supra*; (parting with dominion) *Hawkins* v. *Blewitt*, 2 Esp. 663; *Bunn* v. *Markham*, 7 Taunt. 224; *Reddel* v. *Dobree*, 10 Simons, 244; *Dole* v. *Lincoln*, 31 Maine, 422, approved in *Barker* v. *Frye*, 75 Id. 33; *Northrop* v. *Hale*, 73 Id. 66, 69; *Hill* v. *Stevenson*, 63 Id. 367; *Carlton* v. *Lovejoy*, 54 Id. 445, 447; *Dresser* v. *Dresser*, 46 Id. 48, 67; (actual delivery) *Cutting* v. *Gilman*, 41 N. H. 147; *Marston* v. *Marston*, 1 Foster, 491; cited with approval in *Carlton* v. *Lovejoy*, *supra*. "The donor must not only part with the possession but the dominion of the property" per WALTON, J., in *Hatch* v. *Atkinson*, 56 Maine, 324, 330. Here, the chest was in the closet, in the bed room of the intestate, and the books were not delivered at the time of the alleged gift. As between husband and wife, her possession of his property is pre-

sumed to be his possession. Either may be the agent of the other. "A possession which is as consistent with agency as gift must indicate agency instead of gift," per PETERS, C. J., in *Lane* v. *Lane*, 76 Maine, 521, 525. Delivery at the time, essential. Not possession by donee but delivery by donor that is material. Previous possession by donee is insufficient. *Parcher* v. *Saco &c. Bank*, 78 Maine, 470; *Cutting* v. *Gilman*, *supra*, and cases cited. Actual delivery at the time, the universal rule. Wing v. Merchant and Barker v. Frye are cases of gifts *inter vivos*.

Gifts *inter vivos* (parting with dominion) *Robinson* v. *Ring*, 72 Maine, 140, 144; (intent carried into effect) *Taylor* v. *Fire Department*, 1 Edw. Ch. 294; must be an actual, present, irrevocable transfer and acceptance, not to take effect in future; otherwise only a promise, and *nudum pactum*. *Taylor* v. *Henry*, 48 Md. 550, cited with approval in *Northrop* v. *Hale*, *supra*; *Dole* v. *Lincoln*, *supra*.

Intestate had control of the funds, and could have withdrawn the money, hence no gift or trust. *Northrop* v. *Hale*, *supra*; *Urann* v. *Coates*, 109 Mass. 581, 584; Perry's Trusts, 103 and cases cited; *Nutt* v. *Morse*, 142 Mass. 1, 3; *Sherman* v. *Bank*, 138 Id. 581, 582; *Pope* v. *Bank*, 56 Vt. 284. Instructions as to ownership, favorable to defendant. Defendant claiming gift of entire fund, estopped to deny husband's ownership of whole fund. *Dickschied* v. *Exchange Bank*, 28 W. Va. 341.

Burden of proof on donee. Wait's Actions, &c., vol. 3, 509 and cases cited. Voluntarily intermingling property with another's, prevents recovery without proof to distinguish. *Smith* v. *Dillingham*, 30 Maine, 370, 383; *Lupton* v. *White*, 15 Ves. 432; *Martin* v. *Mason*, 78 Maine, 452, 457; *Baker* v. *Vining*, *supra*. Presiding justice instructed the jury correctly as to presumptive ownership. Greenl. Ev., vol. 1, § 34; *Vining* v. *Baker*, 53 Maine, 544; *Magee* v. *Scott*, 9 Cush. 148, 150, and cases cited.

The deposit, of itself, gives no right to claimant. It is a matter wholly between the depositor and the bank. *Sherman* v. *Bank*, 138 Mass. 581, 583. The depositor, as against the bank, can only be estopped after he has legally divested himself of the fund

and its control. No inference can be drawn, from the form of the deposit, to thus divest himself. S. C.

A deposit, by a husband, in a savings bank, of a sum of money upon the account of both himself and wife, is not evidence of a gift to the wife, he retaining the power to draw the money at will, and in fact drawing the interest upon it on several occasions. *Schick* v. *Grote*, Cent. Rep. 1887, vol. 5, p. 826, (N. J.)

WALTON, J. The most important question is whether the gift of a savings-bank book, from husband to wife, *causâ mortis*, is valid without delivery, provided the book is at the time of the alleged gift already in the possession of the wife. The action was tried before the Chief Justice, and he ruled that to constitute a valid gift, *causâ mortis*, there must be a delivery; that if the property "be at the time already in the possession of the donee, the donor's saying to the donee, 'you may have it,' or 'you may keep it—it shall be yours,' does not pass the property in the case of a gift *causâ mortis*."

We think this ruling was correct. If the act of delivery was for no other purpose than to invest the donee with possession, no reason is perceived why it might not be dispensed with, when the donee already had possession. But such is not its only purpose. It is essential in order to distinguish a gift, *causâ mortis*, from a legacy. Without an act of delivery, an oral disposition of property, in contemplation of death, could be sustained only as a nuncupative will; and in the manner and with the limitations provided for such wills. Delivery is also important as evidence of deliberation and intention. It is a test of sincerity and distinguishes idle talk from serious purposes. And it makes fraud and perjury more difficult. Mere words are easily misrepresented. Even the change of an emphasis may make them convey a meaning different from what the speaker intended. Not so of an act of delivery. Like the delivery of a turf, or the delivery of a twig, in the ancient mode of conveying estates, or the delivery of a kernel of corn, or the payment of one cent of the purchase money, to make valid a contract for the sale of a cargo of grain, an act of delivery accomplishes that which words alone can not accom-

plish. Gifts, *causâ mortis*, ought not to be encouraged. They are often sustained by fraud and perjury. It was an attempt to sustain such a gift by fraud and perjury that led to the enactment of the statute for the prevention of fraud and perjury. See *Matthews* v. *Warner*, 4 Vesey, Jr., 187, 196, note; *Leathers* v. *Greenacre*, 53 Maine, 561, 569. As said in *Hatch* v. *Atkinson*, 56 Maine, 326, it is far better that occasionally a gift of this kind should fail than that the rules of law be so relaxed as to encourage fraud and perjury.

We are aware that some text writers have assumed that when the property is already in the possession of the donee, a delivery is not necessary. But the cases cited in support of the doctrine nearly all relate to gifts, *inter vivos*, and not to gifts *causâ mortis*. A gift, *inter vivos*, may be sustained without a distinct act of delivery at the time of the gift, if the property is then in the possession of the donee, and the gift is supported by long acquiescence of the donor, or other entirely satisfactory evidence. This court so held in *Wing* v. *Merchant*, 57 Maine, 383, and the jury were so instructed in this case, and the defendant had the benefit of the instruction. But the question we are now considering is not whether a gift, *inter vivos*, can be sustained without a distinct act of delivery, but whether such a relaxation of the law can be allowed in the case of a gift *causâ mortis*. We think not. Reason and the weight of authority are opposed to such a relaxation. *Hatch* v. *Atkinson*, 56 Maine, 324, 327; *Lane* v. *Lane*, 76 Maine, 521; *Parcher* v. *Savings Inst.*, 78 Maine, 470; *Dunbar* v. *Dunbar*, 80 Maine, 152; *Miller* v. *Jeffries*, 4 Gratt. 472; *French* v. *Raymond*, 39 Vt. 623; *Cutting* v. *Gilman*, 41 N. H. 147; *Delmotte* v. *Taylor*, 1 Red. (N. Y.) 417; *Egerton* v. *Egerton*, 17 N. J. Eq. 419; *Kenney* v. *Pub. Adm.*, 2 Bradf. (N. Y.) 319; 2 Kent's Com. (10th ed.) 602, and note; *Dickeschied* v. *Exchange Bank*, 28 W. Va. 340; *Walsh's Appeal*, (Pa.) 1 L. R. A. 535, and note.

It is the opinion of the court that the gift of a savings-bank book, *causâ mortis*, to be valid, must be accompanied by an actual delivery of the book from the donor to the donee, or to some one for the donee; and that the delivery must be made for the express purpose of consummating the gift; and that a previous and con-

tinuing possession by the donee is not sufficient; and that in this, and in all particulars, the rulings in the court below were correct; and that no cause exists for granting a new trial.

Motion and exceptions overruled.

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

ALMON L. DAY *vs.* DWELLING-HOUSE INSURANCE CO.

Lincoln. Opinion January 18, 1889.

Insurance. Void Condition. Evidence. Proof of Loss. Agent. Attorney. Waiver. R. S., c. 49, §§ 21, 90.

The insurance laws of this state render null and void a condition in a fire insurance policy that no act of any agent of the company, other than its president or secretary, shall be construed or held to be a waiver of a full and strict compliance with all the provisions of the policy.

A letter written by any agent of the company is admissible in evidence to explain or excuse delay in furnishing proofs of loss. Provisions in R. S., c. 49, §§ 21, 90, should not be limited in their application to the agents through whom insurance is effected, or to those whose names are borne upon policies; they were intended to apply to all the agents of insurance companies; to those appointed to investigate the circumstances attending fires and to adjust losses as well as to those through whom the insurance is effected.

ON MOTION AND EXCEPTIONS, by defendant.

This was an action on policy of fire insurance. Verdict for plaintiff for $999.87. The plaintiff contended, among other things, that his delay to make proof of his loss had been waived by the defendant, and offered in evidence a letter dated January 26, 1887, purporting to have been written by one D. C. Robinson to one S. W. Jackson, attorney for plaintiff. Said Robinson appeared as attorney of record of defendant at October term 1887 of said court. The letter was admitted by the presiding justice, against defendant's objection. In this connection, the presiding justice instructed the jury, among other things, as follows:

"I say then further, if that letter was written by Mr. Robinson for and in behalf of the company, and was by authority of the

company, because what I am speaking of now must come from the company itself, and if from the other testimony, you are satisfied that there were negotiations going on between these parties from the time, or very near the time, within thirty days of the time of the loss, continued up to that time, that would be a waiver of notice entirely.

Then the question is, whether you are satisfied from the evidence in the case, that the company were by themselves or through their authorized agents making an investigation into this matter in consequence of the first notice of the loss and acting upon that notice, making no objection to the plaintiff on account of the absence of the other notice or on account of any defects which might exist in it." * * *.

"The courts have decided in all these cases, that both plaintiff and defendant, both the assured and the insurer shall act in good faith, and although this notice is required to be given without any asking or demand on the part of the defendant company, it has been held to be a want of good faith in them while going on in negotiation and investigation of matters in order to ascertain their rights, to object that the notice has not been fully complied with, without informing the plaintiff of such defects or want of notice.

This case must turn under this instruction, so far as this want of notice is concerned, not upon the delay, because I tell you that is too long, but upon the question whether the company themselves have taken such a course, as would amount to a waiver, as I have endeavored to explain it to you."

The defendant requested the presiding justice to instruct the jury that the provision in the policy, that no waiver should be made, except in writing, signed by the president or secretary, was operative and binding upon the parties,—which requested instruction was refused. The provision in the policy, referred to, reads as follows:

"No act or omission of the company or any act of its officers or agents shall be deemed construed or held to be a waiver of a full and strict compliance with the foregoing provisions of the terms and conditions of this policy, nor an extension of time to the

assured for compliance, except it be a waiver or extension in express terms and in writing, signed by the president or secretary of the company."

L. M. Staples, for the plaintiff cited: R. S., c. 49, § 21; *Kingsley* v. *N. E. Mut. Fire Ins. Co.*, 8 Cush. 393, 399, 402.

W. H. Hilton, for the defendant.

By R. S., c. 49, § 21, all provisions contained in any policy of insurance, in conflict with any of the provisions thereof are null and void, and all contracts of insurance made, renewed or extended in this state, or on property within the state are subjected to the provisions thereof.

It would seem a just and legal inference that all provisions contained in a policy of insurance not in conflict with the statute are valid, and binding upon the parties to the contract. *Emery* v. *Piscataqua F. & M. Ins. Co.*, 52 Maine, 322, 326.

In *Campbell* v. *Monmouth Mut. Fire Ins. Co.*, 59 Maine, 430, 434, and in *Dolbier* v. *Agricultural Ins. Co.*, 67 Maine, 180, 184, where the question of notice is discussed, the court declares that the plaintiff must show either such notice, as has been stipulated in the contract of insurance, or such notice as the statute prescribes.

Presumably, the same rule would apply to the proof of loss or the waiver of such proof.

The policy of insurance in this case contains this provision: "No act or omission of the company or any of its officers or agents shall be deemed, construed or held to be a waiver of a full and strict compliance with the foregoing provisions of the terms and conditions of this policy, nor an extension of time to the assured for compliance, except it be a waiver or extension in express terms and in writing signed by the president or secretary of the company."

By R. S., c. 49, § 19, "the agent whose name is borne on the policy is its (the company's) agent in all matters of insurance, &c."

The only conflict between this provision of the policy and the provisions of the statute is, that by the statute, the agent whose name is borne on the policy may waive notice or proof, notwithstanding the terms of the contract.

A waiver to be operative must take place before the expiration of the time for supplying the proof, either under the policy within thirty days or under the statute within a reasonable time. 2 Wood on Fire Insurance, 971; *Smith* v. *State Ins. Co.*, (Iowa) 21 N. W. R., 145; *Beatty* v. *Lycoming Ins. Co.*, 66 Penn. St. 9.

When no attempt has been made to comply with the conditions of the policy or the requirements of the statute in furnishing proof of loss, the failure of the company to object, there being nothing to which it can object, or its silence under the circumstances, cannot be regarded as a waiver. *Connell* v. *Milwaukee Ins. Co.*, 18 Wis. 387; *Franklin Ins. Co.* v. *Chicago Ice Co.*, 36 Md. 102.

Ladd, the insurance company's agent testifies, that he prepared the application at Day's request; he was for the time, acting for Day, and the company is not thereby bound by the statements of value. *Mutual Fire Ins. Co.* v. *Deale*, 18 Md. 26, 29, (79 Am. Dec. 673,) 2 Wood on Fire Insurance, § 412.

WALTON, J. This is an action on a fire insurance policy. A trial has been had and a verdict returned for the plaintiff. The case is before the law court on motion and exceptions by the defendant. We think the motion and exceptions must be overruled.

1. The evidence of fraud, or of a fraudulent burning of the buildings insured, is very weak,—too weak to predicate a verdict upon.

2. The insurance company excepts to the admission in evidence of a letter from an agent of the company to the plaintiff's attorney. It appears that the fire occurred Oct. 6, 1886; that notice of the fire was given to the defendant's agent the next day; but that what is commonly called the proof of loss was not furnished till the next April. The defendant's attorney insisted at the trial that this was not in season; and to excuse the delay, and show that it was at the request of the defendant's agent, the letter in question was offered and admitted. It is claimed that the letter was inadmissible because, by the terms of the policy, it is declared that no act of any agent of the company, other than its secretary or president, shall be construed or held to be a waiver

of a full and strict compliance with all the provisions of the policy. The policy does contain such a provision. But we have no hesitation in declaring the provision illegal and void. Previous to the enactment of our present insurance law, policies had become so loaded down with provisos, limitations and conditions, that in many cases they secured to the insured nothing better than an unsuccessful lawsuit in addition to the loss of his property. And one of the purposes of our present statute was to put an end to this evil. The statute declares that the agents of all insurance companies, foreign or domestic, shall be regarded as in the place of the company, *in all respects*, regarding any insurance effected by them; and that all provisions contained in any policy in conflict with any of the provisions of said chapter shall be null and void. R. S., c. 49, §§ 21 and 90. We think these provisions should not be limited in their application to the agents through whom insurance is effected, or to those whose names are borne upon policies. We think they were intended to apply to all the agents of insurance companies; to agents appointed to investigate the circumstances attending fires and to adjust losses as well as to those through whom the insurance is effected. The letter admitted as evidence was written by an agent of the defendant company. It contained these words: "Make no move in the Day case until I see you." We think such a letter is admissible in evidence to explain or excuse delay. And we think that the instructions of the presiding judge to the jury as to the weight and the effect to be given to such a letter, in connection with early commenced and continued negotiations between the parties for a settlement of the plaintiff's claim, were correct and proper. We fail to discover any valid ground for granting a new trial.

Motion and exceptions overruled.

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

F. E. TIMBERLAKE *vs.* ELI CROSBY.

Franklin. Opinion January 18, 1889.

Attorney. Compensation. Negligence.

Where an attorney makes twenty writs when only one is necessary, he cannot recover for the writs, nor for term fees in the suits, thus unnecessarily commenced.

ON MOTION, by defendant to set aside the verdict. The facts appear in the opinion.

J. C. Holman, *P. A. Sawyer*, with him, for plaintiff.

W. Fred P. Fogg, for defendant.

WALTON, J. The plaintiff has obtained a verdict of $107.50, for a balance which he claims is due him for professional services and disbursements. We are forced to the conclusion that this verdict is clearly wrong and must be set aside. Lawyers, like other professional men, are required to possess and exercise a reasonable amount of knowledge and skill. And when a lawyer is employed to assist in the collection of a debt, and, through ignorance of a plain and well settled rule of law, he makes twenty writs when only one is necessary, he can not recover for the writs nor for term fees in the suits thus unnecessarily commenced. To hold otherwise would place ignorance at a premium and knowledge at a discount.

It appears that the plaintiff was employed to make one trustee writ against nineteen joint debtors, and that he made it and delivered it to the creditor, and that the latter caused it to be served on the nineteen defendants and on the Franklin & Megantic railroad company as their trustee; and that several days afterward, without instructions from his client and without seeing him, the plaintiff made nineteen more writs and had them served,—that is, he sued each one of the nineteen joint debtors in a separate action. His excuse for so doing, is that he was not certain that he "could hold their several accounts against the railroad on their joint liability."

This excuse is not satisfactory. It is a familiar rule of law that in a suit against joint debtors the property of each may be attached. And it was decided in *Smith* v. *Cahoon*, 37 Maine, 281, that "in a suit against joint debtors, a person holding goods, effects, or credits, of *either* of them may be held as trustee." The marginal note of this decision, which we have quoted, is copied into the Maine Digest under the title of "*trustee process*," and the subtitle of "*when the trustee will be charged.*" The decision is also cited on the margin of the revised statutes opposite the chapter relating to "trustee process," under the title of "*when charged.*" And it seems to us that by a search of ten or fifteen minutes, the plaintiff could have found this decision, and thus removed his uncertainty; and that to remain ignorant, with the means of information so readily accessible, must be regarded as culpable negligence. *Caverly* v. *McOwen*, 123 Mass. 574; *Wilson* v. *Russ*, 20 Maine, 421; 2 Sh. and Red. on Negligence, (4th ed.) §§ 558–9. 2 Greenl. Ev. § 144.

No reason is perceived, and none is suggested why the suit first commenced did not accomplish every purpose desired. We think it did. And we think that the nineteen suits subsequently commenced, and in which the plaintiff has charged his client for writs and term fees $190.00, were not only useless, but worse than useless, for they absorbed over $130.00 of the funds from which the creditor hoped to collect his debt, in the trustee's fees alone. And the plaintiff has charged in his account annexed to the writ, $34.10 for the officer's fees for serving these writs, and he admits that he paid the officer only $10.00, and that the officer accepted that sum in full for his services. A deduction of $24.10 must therefore be made from this item. And we think $190.00 should be deducted from the charges for writs and term fees. These two sums being deducted, the balance of the plaintiff's account, as charged by him, will be only $63.75; and, as he has already been paid $75.00, we think that nothing more can justly be recovered of the defendant.

Motion sustained.

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

STATE *vs.* ELIJAH W. LOCKLIN, and another.

Franklin. Opinion January 18, 1889.

Indictment. Conspiracy. Motion for new trial. Practice. R. S., c. 126, § 17.

An indictment under R. S., c. 126, § 17, which charges the defendant did conspire "with intent falsely, fraudulently and maliciously" to cause A to be prosecuted for an attempt to murder and kill "of which crime the said A was innocent" is sufficient without averring that the defendant knew, or had reasonable cause for believing, that said A was innocent.

A motion to set aside a verdict, as against law and evidence cannot, be determined by the law court. Such a question, in a criminal cause, must be determined in the court below.

ON EXCEPTIONS AND MOTION. Indictment for conspiracy. The exceptions were for overruling a motion in arrest of judgment. The defendant moved, after verdict, that judgment be arrested, because the indictment was insufficient in law, and did not show that the defendant knew or had reasonable cause for believing that J. Wesley Dunham was innocent of the crime of attempting to administer poison.

The indictment was as follows:

"The jurors for the said state, upon their oath present, that Abner Searles and Elijah W. Locklin both of Rangely in said county of Franklin, at Rangeley in said county of Franklin, on the fourteenth day of August, in the year of our Lord one thousand eight hundred and eighty-seven, did unlawfully conspire, confederate and agree together with intent falsely, fraudulently and maliciously to accuse one J. Wesley Dunham, that he the said J. Wesley Dunham then and there attempted to kill and murder the said Elijah W. Locklin by then and there attempting to administer a deadly poison to the said Elijah W. Locklin, with intent then and there falsely, fraudulently and maliciously to cause the said J. Wesley Dunham to be prosecuted for attempt to murder and kill, of which crime the said J. Wesley Dunham was then and there innocent, 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 oath aforesaid, do further

present, that Abner Searles and Elijah W. Locklin both of Rangely, in said county of Franklin, at said Rangely on the fourteenth day of August in the year before written did unlawfully and maliciously conspire, combine, confederate and agree together falsely to charge and accuse one J. Wesley Dunham that he the said J. Wesley Dunham did maliciously and feloniously incite, move, procure, aid, counsel, hire and command the said Abner Searles to attempt to kill and murder the said Elijah W. Locklin, by depositing in the food of him the said Elijah W. Locklin, for said Locklin to eat, a certain deadly poison, to wit: one ounce of Paris green with intent then and there falsely, fraudulently and maliciously to cause the said J. Wesley Dunham to be prosecuted for said crime, of which crime the said J. Wesley Dunham was then and there innocent, 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 oath aforesaid, do further present, that Abner Searles and Elijah W. Locklin, both of Rangely in the county of Franklin, at Rangely in the county of Franklin, on the fourteenth day of August, in the year of our Lord one thousand eight hundred and eighty-seven, did unlawfully and maliciously conspire, combine, confederate and agree together falsely to charge and accuse one J. Wesley Dunham with having feloniously and of his malice aforethought attempted to kill and murder the said Elijah W. Locklin with intent then and there falsely, fraudulently and maliciously to cause the said J. Wesley Dunham to be prosecuted for the offense aforesaid, of which crime the said J. Wesley Dunham was then and there innocent.

And the jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful and malicious combination and conspiracy the said Elijah W. Locklin did afterwards, to wit: on the twenty-second day of August in the year aforesaid, accuse the said J. Wesley Dunham of the crime aforesaid, by procuring and causing complaint to be made before a trial justice in and for said county upon which complaint made then and there by said Locklin, warrant was issued and the said J. Wesley Dunham was arrested on said warrant, as then and there issued and taken before said justice to answer to said complaint.

And the jurors do further present, that at a hearing on said complaint issued and procured as aforesaid, held on the twenty-third day of said August, and in further pursuance of said unlawful and malicious combination and conspiracy said Abner Searles and Elijah W. Locklin did state and testify under oath that said Dunham did commit the crime as aforesaid, against the peace of the state and contrary to the form of the statute in such case made and provided."

The defendant (Locklin) also moved to set the verdict aside, because there was no evidence in the case to support the verdict and because the verdict was against law and evidence, and manifestly against the weight of evidence.

H. L. Whitcomb, *P. A. Sawyer*, with him, for defendant.

No crime is fully set out in the indictment. All the allegations, if true, would not constitute a crime. There is no allegation that the respondents knew Dunham was innocent, or that they did not have reasonable or probable cause to believe him guilty. They cannot be convicted if they believed, or had probable cause to believe Dunham, was guilty.

"The indictment must contain enough to show that the oath was one which the law authorized or required" (that crime has been committed) "or it will be defective, and clearly insufficient, even after verdict; for the verdict will affirm no more than is stated in the indictment." Per WALTON, J., in *State* v. *Mace*, 76 Maine, 64, 66.

Damages, for malicious prosecution cannot be recovered without alleging and proving want of probable cause. *Severance* v. *Judkins*, 73 Maine, 376, 378. If there was probable cause an allegation of malice amounts to nothing. *Preston* v. *Cooper*, 1 Dill. 589, cited in Add. Torts, 863. There must be both malice and want of probable cause. Add. Torts, 852, note 2; Cooley's Torts, 184; *Dennehey* v. *Woodsum*, 100 Mass. 195; *Good* v. *French*, 115 Id. 201.

Probable cause, not inferrible even from express malice. *Bond* v. *Chapin*, 8 Met. 31, 33; *Parker* v. *Farley*, 10 Cush. 279, 281; *Besson* v. *Southard*, 10 N. Y. Ct. Appeals, 236; *Heyne* v. *Blair*, 62 Id. 19; *Thaule* v. *Krekeler*, 81 Id. 428.

If it is so essential to the maintenance of a civil action, to allege and prove affirmatively the want of reasonable cause, *a fortiori*, it should be alleged in criminal pleading. The omission of any fact or circumstance necessary to constitute the offense will be fatal. Whart. Am. Crim. Law, § 1059, quoted with approval by DANFORTH, J., in *State* v. *Verrill*, 54 Maine, 408, 412.

The indictment in order to charge a felony should allege that defendants feloniously conspired, &c. *Com.* v. *Kingsbury*, 5 Mass. 106. The conspiracy, not alleged to be felonious, was merged in the consummation of the end in view; and the remedy should be by indictment or civil action for a groundless and malicious prosecution, without probable cause. *People* v. *Mather*, 4 Wend. 229; *State* v. *Murphy*, 6 Ala. 765; *Com.* v. *Kingsbury*, *supra*.

The indictment in *Elkin* v. *People*, cited for the state, contains the allegation we contend is necessary to constitute the offense here sought to be charged, viz: that the defendants conspired to accuse and prosecute an innocent man for larceny, "well knowing that said crime had not been committed by him."

F. E. Timberlake, county attorney, for the state cited:

State v. *Bartlett*, 30 Maine, 132; *Commonwealth* v. *Tibbetts*, 2 Mass. 536; *Commonwealth* v. *O'Brien*, 12 Cush. 84; *Commonwealth* v. *Smith*, 103 Mass. 444; *Commonwealth* v. *Nichols*, 134 Mass. 531; *R.* v. *Spragg*, 2 Burr. 993; *R.* v. *Kennersley*, 1 Str. 193; *R.* v. *Best*, 1 Salkeld, 174; *Johnson* v. *State*, 2 Dutcher (N. J.), 313; 2 Wharton Crim. Law, § 2330; 2 Bishop on Crim. Procedure, § 240 and 41; 1 Wharton's Precedents of Ind. and Pleas., p. 26; Bishop's Directions and Forms, § 300 and note; 2 Wharton's Precedents of Ind. and Pleas., form 660; *Commonwealth* v. *Andrews*, 132 Mass. 263; *Elkin* v. *People*, 28 N. Y. 177; *State* v. *Hadley*, 54 N. H. 224; R. S., c. 126, § 17.

The indictment follows the statute and is sufficient, and would be sufficient under the common law.

There is no necessity of alleging want of probable cause; the crime itself includes or implies that, and when we declare that the conspiracy was to falsely charge or accuse another of crime, we have alleged that the respondents made a charge or accusation,

or rather that they combined together and agreed to make such charge or accusation, when there was no foundation or cause for it in their own minds, or any where else, and so could be no probable cause or want of knowledge.

The offense here charged is the combining or agreeing together to falsely accuse another of a crime. It is not a proceeding to punish for the overt act but the conspiracy *i. e.*, "the combination of two or more persons to accomplish some unlawful act; or some lawful act in an unlawful manner" and the crime is committed though there be no overt act. The indictment on those points, on which it has been assailed, follows all forms given in the different works on criminal law and the cases cited above as well as many others and has been repeatedly used and judgments had under it for the past two hundred years. All allege in substance, that the conspirators agreed together with intent falsely, fraudulently and maliciously to accuse, &c., and do not add "knowing him to be innocent" or "without probable cause." It might as well be urged, that it is necessary to allege that a person "knowingly did burn and consume," "knowingly did make an assault," or "knowingly did kill and murder."

The crime is the falsely charging. The cases cited go so far as to say it is not necessary even to allege that, the person they accuse, is innocent.

If the word "feloniously" has been improperly omitted in the indictment (which we deny) we fail to see how such omission could prejudice this defendant and would therefore be no reason for arresting judgment. R. S., c. 131, § 12.

That there has been no merger of this conspiracy is sufficiently shown by the authorities cited above. If the conspirators carry out or attempt to carry out the object of the conspiracy that fact may (or may not) be and usually is alleged in aggravation of the offense and given in evidence to prove the conspiracy. If there has been a merger in some higher crime,—what is it and how is it shown by the indictment? Two counts do not allege overt acts and certainly there can be no merger there.

WALTON, J. The defendant and one Searles are indicted for conspiring "with intent falsely, fraudulently, and maliciously," to

cause one J. Wesley Dunham to be prosecuted for the crime of attempting to murder the defendant by poison; and a verdict of guilty having been found against the defendant, he moves that judgment may be arrested, because, as he contends, the indictment is insufficient in not averring that he knew, or had reasonable cause for believing, that the said Dunham was innocent. We have examined the indictment with care, and we think it contains an averment of every fact necessary to constitute the offense of criminal conspiracy. It follows closely and accurately the words of the statute on which it is founded. R. S., c. 126, § 17. The statute makes it criminal for two or more persons to conspire, "with intent falsely, fraudulently, and maliciously," to cause another person to be prosecuted for an offense of which he is innocent. The indictment avers that the defendant and Searles did conspire, "with intent falsely, fraudulently, and maliciously," to cause Dunham to be prosecuted for an attempt to murder and kill, "of which crime the said Dunham was innocent." Here we have an averment of the *act* of conspiring, and an averment of the co-existing *intent* which made the act criminal. The charge is not merely of an intent to accuse and prosecute, but of an intent to *falsely* accuse and prosecute. The former intent may be innocent, but the latter is always criminal. The indictment not only charges an act of conspiracy, but it also charges a co-existing intent which characterizes and makes the act criminal. In this particular it follows the very words of the statute; and we think nothing more can be required.

The motion to have the verdict set aside as against evidence is not properly before us. Such a motion can be heard only in the court below.

Exceptions overruled, and the motion dismissed.

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

A. R. MILLETT, appellant, *vs.* COUNTY COMMISSIONERS OF FRANKLIN COUNTY.

Franklin. Opinion January 18, 1889.

Ways. Committee. Appeal. Terminus. R. S, c. 18, §§ 48, 49.

The provisions of R. S., c. 18, §§ 48 and 49, giving the right of appeal to a committee to revise the doings of county commissioners, in locating and discontinuing highways, are mandatory. As the law requires the committee to make their report, at the next or second term of the court, after their appointment, the committee may proceed to view the route and give the parties a hearing, notwithstanding exceptions touching questions of law raised in the case, are pending in the law court.

It is not a valid objection to the location of a highway, by the county commissioners, that the way begins in a field at the end of a town way.*

ON EXCEPTIONS.

The inhabitants of Chesterville, (appellees) excepted to the rulings of the court, in accepting the report of the committee, appointed to hear the appeal from the county commissioners upon their decision to discontinue the way. The principal question related to the legal authority of the committee to act on the appeal from the discontinuance of the way, as adjudicated by the commissioners, during the pendency, in the law court, of the former case. *Millett* v. *Co. Com.*, 80 Maine, 427.

The facts are fully stated in the opinion.

Geo. Walker, *E. O. Greenleaf*, *Beane and Beane*, for appellants.

The location and maintenance of highways are authorized and regulated by statute. The court has no statute authority to entertain objections or allow exceptions to the rulings on these proceedings.

On the return of the committee's report the court may entertain a motion; dismiss the whole proceedings, on the grounds that they are void for want of jurisdiction in the court; and to the ruling of the court; on that question, exceptions would lie. This

* *Millett* v. *Co. Com.*, 80 Maine, 427.

would be matter, *dehors*, the record. But for all matters of irregularity, within the record, relief must be sought through a petition of *certiorari*, to bring the whole record before the court, for inspection and adjudication.

The court cannot inquire or adjudicate, in this form of objection, the question of the legality of the location. That inquiry can be had only by *certiorari*. *Goodwin* v. *Co. Com.*, 60 Maine, 328.

J. C. Holman, *A. F. Belcher*, with him, for Chesterville.

The proceedings were irregular. After a case is marked law, it shall be continued until settled by the law court. R. S., c. 77, § 42. The commission was issued, notice given, hearing had, and report accepted, against our objections, while the case was pending in this court, as a law court. After judgment has been rendered in the superior court, and exceptions allowed, though not entered in this court, the superior court cannot enter final judgment. *Gassett* v. *Cottle*, 10 Gray, 375. The law court, and a term held by a single justice, are two distinct tribunals. *Averill* v. *Rooney*, 59 Maine, 580. A trustee has no right to disclose further while his exceptions to the ruling of the court charging him, are pending. *Am. S. Machine Co.* v. *Burgess*, 75 Id. 52.

There was no legal location of the way. The commissioners' return shows that it commenced in a field where there was no road or where there was an attempted location of a town way, but not accepted. The commissioners have no jurisdiction to lay out, within a town, an isolated way having no connection with other county roads at either terminus. *King* v. *Lewiston*, 70 Maine, 406, 408.

This petition was, virtually, respecting a way in two or more counties; and should have been a joint petition. R. S., c. 18, § 12.

All objections open to petition for *certiorari* may be taken on this appeal. *Goodwin* v. *Co. Com.*, 60 Maine, 328.

The record shows the commissioners had no jurisdiction; their doings may be impeached collaterally. *Small* v. *Pennell*, 31 Maine, 267; *Scarborough* v. *Co. Com.*, 41 Id. 604; *State* v. *Oxford*, 65 Id. 210.

WALTON, J. It appears that the county commissioners of Franklin county located a highway and gave the towns through which it passed three years within which to open and build it; that within the three years the commissioners were asked to discontinue the way, and they decided to do so; that, on appeal, this court decided that it was competent for the commissioners to discontinue the way notwithstanding the three years had not expired. *Millett* v. *Co. Com.*, 80 Maine, 427.

It now appears that the committee appointed to revise the doings of the commissioners has made a report in favor of the way—that is, that the judgment of the commissioners discontinuing the way be reversed,—and it is objected that this report ought not to be accepted because the hearing before the committee was had while the case was pending in the law court. We do not think this objection can be sustained. The statute giving the right of appeal, in such cases, is mandatory that the committee to revise the doings of the county commissioners shall be appointed at the first term after the appeal is taken, and that the committee shall view the route, hear the parties, and make their report at the next or second term of the court after their appointment. Delay to await the decision of the law court was therefore legally impossible. It may be, that the haste required by the statute will occasionally subject the parties to a useless hearing before the committee. Such will always be the case when the law court decides against the legality of the proceedings. But this inconvenience may not be so great as the inconvenience of the delay that would otherwise be occasioned by exceptions (too often frivolous) if no hearing could be had pending the exceptions. It is true, generally, that proceedings in the court below must be suspended pending proceedings in the law court. But such is not always the case. Exceptions to rulings on dilatory pleas do not have that effect. And we think that highway appeal cases must be regarded as exceptions to the general rule, as otherwise a compliance can not be had with the statute authorizing such appeals. (R. S., c. 18, §§ 48–9). And besides, the objection in this case was not seasonably taken. The parties appeared before the committee and had a full hearing. The report of the com-

mittee so states. And, so far as appears, no objection to the hearing was then made. It was only after the report of the committee had been returned to court, and it was seen to be adverse, that this objection was interposed. It was then too late. *Raymond* v. *Co. Com.*, 63 Maine, 110.

Another objection to the acceptance of the report is, that the location of the way was originally illegal. It is said that the way begins in a field at the end of a town way which extends into another county; that the way desired was virtually a way extending into two counties, and that the commissioners of the two counties should have acted together in locating it. We do not think this is a valid objection. County commissioners are authorized to locate highways, within their several counties, and we do not think that the mere fact that one end of a way thus located begins at the end of a town way, extending into another county, is a valid objection to the location. We can perceive no reason for such an objection, and none is suggested, and no authority is cited in support of it. We do not think it can be sustained.

We think the ruling of the court below, that the report of the appeal committee be accepted was correct, and that the entry must be—

Exceptions overruled.

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

RUTH J. HOOPER, admx. *vs.* THE BOSTON & MAINE RAILROAD.

York. Opinion January 18, 1889.

Railroads. Crossings. Gates. Negligence. Stat. 1885, *c.* 377.

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.

When railroads elect to erect gates they must be tended, or they become false signals and lead travelers into the danger against which they are intended to guard them.

A collision at a railroad crossing is *prima facie* evidence of negligence on the part of the traveler; but such inference may be repelled. An open gate which invites passing, and an obstructed view, may be sufficient to bring the question of negligence within the province of the jury to decide, and prevent a nonsuit, or setting aside a verdict, if the jury find in favor of the traveler.

Where the verdict of a jury established the fact that the deceased, at the time of the accident, was deceived and misled, by the negligence of a railroad company in leaving their gates open, at a time when they should have been closed, the court refused to set the verdict aside.*

ON MOTION, by defendants to set aside the verdict as against law and evidence.

Action on the case to recover damages for injuries received by Daniel O. S. Hooper, plaintiff's intestate, through the negligence of the defendants in the running their train.

The facts alleged in the plaintiff's declaration and disclosed by the testimony in the case are as follows:

On the 26th day of November, 1886, the Boston & Maine Railroad was in possession of and operating a line of railroad known as the Boston & Maine Railroad, Western Division, moving cars and locomotives thereon by steam, its track being laid through a compact part of the city of Biddeford, crossing a public highway there known as Main street, at grade with said street.

At the Main street crossing, the defendant corporation had for several years, maintained a gate consisting of several arms, and by their employes were accustomed to lower the same across the street, upon each side of the crossing, upon the approach of trains along its line, and thereby warned and prevented travelers from attempting to cross its track when trains were approaching the crossing, and thereby the public and plaintiff's intestate were accustomed to receive notice from the defendant, that the passage could not be made, and that a train was approaching; and when the gates were raised up, they were notified that no trains were approaching, and that the passage across the track could be safely made.

Hooper lived about two and one-half miles from the post office in Biddeford, and at the time of his decease was forty-six years of

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*See *State* v. *Boston & Maine Railroad*, 80 Maine, 440.

age, was in good health and a man of excellent habits and of standing in the community where he dwelt. He was accustomed to go from his home to the city several times a week in the daytime, passing back and forth over the crossing mentioned, and presumably knew the uses, purposes and methods of operating the gate at the crossing.

There was also another line of railroad track, operated by the Boston & Maine Railroad, known as the Eastern Division, which crossed Main street about one thousand feet northerly from the crossing first mentioned.

At a distance of twenty-four hundred and forty-five feet westerly from the first crossing mentioned, the tracks of the Western and Eastern Divisions aforesaid are only about three hundred feet apart, and a few hundred feet further west the lines were only a few feet apart. At the point where these two roads diverged and where the locomotives whistled, both roads run through deep cuts.

On the night of the twenty-sixth of November, 1886, shortly after ten o'clock P. M., Hooper, in company with two of his neighbors, Benjamin and Burnie, was travelling along Main street on his way home from the city.

They were riding in an ordinary express wagon, drawn by a slow jogging horse, Hooper in the middle holding the reins, Benjamin on the left side and Burnie on the right. From the last of June, 1886, to the twenty-fourth of October, previous to the night last mentioned, the night Pullman train ran on the Eastern Division and was then changed to the Western Division, and passed this crossing about 10.15 P. M.

When Hooper, and his companions, were within about three hundred and forty feet of the crossing, they heard the whistle of a locomotive, and Hooper remarked that he could not tell on what road it was. That point, on Main street, was at a considerable elevation above the lines of both roads, and the lay of the land and the contiguity of buildings was such, it was claimed, as to conceal from view any trains moving on the tracks; and the echoes necessarily would affect one's judgment, in determining from the sound, on what road or from what direction the train was approaching.

As they descended the hill toward the crossing, they did not increase the speed of from three to four miles an hour at which they were driving, nor did they see any locomotive approaching, nor could they have seen any as they passed along, unless the train had been so near to the crossing, that it would have passed the crossing when they were at least one hundred and fifty feet away.

As they neared the crossing, a view up the track was completely shut off by a dwelling-house until they were within fifteen feet of the track. The arms of the gates were raised up and no gate man or flag man was in attendance, and nothing to give notice of any danger at this crossing, such as was usually given, and which Hooper and his companions were accustomed to see.

From the time the whistle was heard, when Hooper made his remark "that he did not know which division of the road it was on" no conversation took place as they rode slowly down the hill, but the three men were apparently expecting the train on the Eastern Division.

The only survivor of the three testifies that he was watching the gates and that they were not moved; that as they passed the building near the track, he saw the locomotive and said to Hooper "stop and back;" and he endeavored to do so, but they were too near, and the train struck the horse's head throwing Benjamin down the line some forty feet killing him instantly; Hooper was thrown against a gate post and was injured so much that he died in about half an hour; his horse was killed, the shafts of the wagon were broken, and Burnie thrown over back of the seat.

This train was running twenty to twenty-five miles an hour, and no one of the witnesses heard any bell ringing, and no evidence was offered by the defendant as to the rate of speed or the ringing of the bell, or the place where the whistle was sounded.

The jury returned a verdict for the plaintiff.

G. C. Yeaton, *B. F. Chadbourne*, with him, for defendants.

Plaintiff's intestate was owner and driver, in sole control of the carriage; he knew the uncertainty of attempting to cross. These facts distinguish this case from *State* v. *B. & M. R. R.*,

80 Maine, 430. Driver's relation to defendants different from that of passenger. *Dyer* v. *Erie R. R. Co.*, 71 N. Y. 228.

Intestate did not use all his available faculties. No pretense of inability both to look and listen, or that the exercise of these faculties would not have disclosed the coming train. No claim of any attempt whatever to use either.

The gates had been in use by day only. Burnie's irresponsive remark interjected that he was looking for the gates to close, is inconsistent with what he said to Hooper,—relating solely to the whistle. The jury thus transfer, without and against evidence, what Burnie was thinking of, to Hooper, and thus discover an excuse for his abandonment of all attempt to use ordinary faculties under critical circumstances. Neither had seen the gates lowered at night.

The question is not whether defendants were or not negligent, in not operating its gates by night; not whether erect gates, with an attendant, would authorize a conclusive presumption of safety in one attempting to cross; not how far unattended, erect gates, by day or night, would authorize any presumption;—but this, whether, at night, unattended, erect gates would authorize one with good ears and eyes, and a partially open view, who had seasonably heard the warning whistle of an approaching train, to attempt to cross the railroad, without first attempting to look and listen, when and where by so doing he could have seen and heard, and a verdict declaring him in the exercise of ordinary care, be sustained.

But this verdict says, "No, it is not necessary that the traveler use all his faculties when approaching a railroad crossing, at grade, with the highway he is traversing; he may use a part of them, or only a part of some of them, and, if defendants are at all in contributory fault, may recover of it." This is the doctrine of comparative negligence.

Argument, and authorities cited, by counsel, upon other points will be found in 80 Maine, at pp. 434–440. Counsel also cited *Cin. Ind. St. Louis & Chi. Ry. Co.* v. *Long*, 112 Ind. 166, 175, 176.

W. F. Lunt, *F. M. Higgins*, with him, for plaintiff.

The only ground in support of the motion, is contributory neg-

ligence on the part of Hooper, that he did not look and listen, &c. Looking for the train was useless, until within fifteen feet of it. The open gates led the party to believe the train was on the other road. The jury found the plaintiff did look and listen. The open gates induced the belief that he could safely continue on without interruption. *State* v. *B. & M. R. R.*, 80 Maine, 430, 444; 2 Woods Ry. Law, pp. 1316, 1319, 1328. A traveler may assume that the company will comply with the law. *Kennayde* v. *Pac. R. R. Co.*, 45 Mo. 255.

Flag man and false signals: *Sweeny* v. *Old Colony R. R.*, 10 Allen, 368, 377; *Newson* v. *N. Y. C. R. R. Co.*, 29 N. Y. 383; *Spencer* v. *Ill. Cen. R. R. Co.*, 29 Iowa, 55; *Webb* v. *P. & K. R. R.*, 57 Maine, 117, 135, 136; 2 Woods Ry. Law, p. 1314.

Hooper had the right to assume the whistle would sound at least one hundred rods from crossing, speed of train reduced to six miles per hour, and bell rung for eighty-five rods before reaching crossing.

Negligence cannot be conclusively inferred by the court, where different inferences may be fairly drawn, or upon which fair-minded men may reasonably arrive at different conclusions. *Brown* v. *R. R. Co.*, 58 Maine, 384; *Leson* v. *R. R. Co.*, 77 Id. 85, 91; *Shannon* v. *R. R. Co.*, 78 Id. 52, 60; *Snow* v. *R. R. Co.*, 8 Allen, 441; *Treat* v. *R. R. Co.*, 131 Mass. 371; *Peverly* v. *Boston*, 136 Id. 366; *Lawless* v. *R. R. Co.*, 136 Id. 1; *R. R. Co.* v. *Stout*, 17 Wall. 657, 663, 664.

Question of care: *State* v. *B. & M. R. R.*, *supra*; *Chaffey* v. *B. & L. R. R.*, 104 Mass. 108, 115; *Greany* v. *Long Island R. R.*, 101 N. Y. 419; *Sonier* v. *B. & L. R. R.*, 141 Mass. 10, 13; *Kelley* v. *St. Paul &c. R. R.*, 29 Minn. 1.

Gates: *Wanless* v. *N. Ea. Ry. Co.*, L. R. 6 Q. B. 481; *Stapley* v. *London &c. Ry. Co.*, L. R. 1 Ex. 21; *Kessinger* v. *N. Y. & H. R. R.*, 56 N. Y. 538, 543; and cases cited by court in *State* v. *B. & M. R. R.*, *supra*, at p. 444.

WALTON, J. This is an action to recover damages for injuries received by the plaintiff's husband at one of the railroad crossings in the city of Biddeford; and for which the plaintiff has obtained a verdict for $4650. The negligence of the defendant company

is not controverted. It is conceded that at the time of the accident it was running one of its night trains at a rate of speed more than four times that allowed by law, unless it closed its gates or kept a flagman at the crossing; and it did neither. The only question is whether the evidence submitted to the jury was sufficient to justify them in finding that the plaintiff's husband at the time of receiving the injuries was in the exercise of ordinary care. We think it was. We think the evidence was sufficient to justify the jury in finding that at the time of the accident the deceased was deceived and misled by the negligence of the railroad company in leaving their gates open at a time when they should have been closed.

The facts, briefly stated, are these: The plaintiff's husband and two other men were riding together in a wagon. It was about ten o'clock in the evening of Nov. 26, 1886. As they approached the railroad crossing they heard the sound of a locomotive whistle. Their view was obstructed and they could not see the approaching train. And at that point the tracks of the Boston & Maine & Eastern Railroads run quite near together. This left them in doubt as to which road the train was on. And in this state of uncertainty, they approached the crossing,—slowly and silently, and probably both looking and listening,—and finding the gates open, which they had been accustomed to see closed when a train was about to pass, they became satisfied that the train was on the other road, or so far away as not to be a source of danger, and they attempted to cross, when the night Pullman train rushed down upon them, and one of the men was instantly killed, another hurt, and the plaintiff's husband so injured that he died in half an hour.

The open gates were the direct and efficient cause of this accident. It was not the failure of the deceased to look and listen. We have no doubt that he and his companions did both look and listen; for they heard the whistle and they saw the open gates. We are satisfied that they did not see the approaching train, and for the reason that their view was so obstructed that they could not see it. If the gates had been seasonably closed, as they should have been, this accident would not—it could not—have happened.

The rate of speed at which the train was moving, made it the duty of the railroad company to close their gates or have a flagman at the crossing. The law forbids the running of trains across a highway, near the compact part of a town, at a rate of speed greater than six miles an hour, unless gates or flagmen are maintained. Act, 1885, c. 377. This train was running at the rate of twenty-five miles an hour. The gates had been used during the day, and until a train which was due at a little before eight o'clock in the evening, had passed. The gate tender then went home leaving the gates open. In his absence this night train passed. He returned at a little past ten o'clock, and found the team smashed, the horse and one man dead, another man hurt, and the plaintiff's husband dying,—the result of negligence in omitting to perform a plain statutory duty.

The statute cited does not compel railroads to erect gates at their crossings. They can reduce the speed of their trains to six miles an hour, and then neither flagmen nor gates will be necessary. But when they run their trains as this train was run, the law requires them to maintain gates or keep flagmen at the crossings. And when they elect to erect gates, clearly the gates must be tended, or they become false signals and lead the traveler into the very danger against which they were intended to guard him. Open gates invite passing. Closed gates forbid passing. And by these signals thousands of travelers are governed every day. And as gatemen usually perform their duties with fidelity—as much so as conductors, or engineers, or switchmen—we think it would be a wrong to them as well as to travelers to hold that every one who trusts them is guilty of a want of ordinary care. It would not be true. Ordinarily, the great mass of the community do trust them. And so far as we can discover, it has never been held by any court that to trust them is a want of ordinary care. The contrary has been held in many cases. A collision at a railroad crossing is *prima facie* evidence of negligence on the part of the traveler. But the inference of negligence may be repelled. And we think that an open gate and an obstructed view may be sufficient for this purpose. Certainly, they are sufficient to bring the question within the province of the jury to

decide, and prevent a nonsuit, or the setting aside of the verdict, if the jury find in favor of the traveler. But as this precise question has already been considered by the court, in an action relating to this same accident; and the circumstances attending it, and the authorities bearing upon the questions of law involved in it, very carefully and fully examined in an opinion by the Chief Justice, we shall not pursue our inquiries further. It is sufficient to say, in conclusion, that we are not satisfied that the verdict is wrong,—certainly not so clearly wrong as to require us to set it aside and grant a new trial, See opinion of the court, above referred to, in *State* v. *Boston & Maine Railroad*, 80 Maine, 440, (6 N. E. R. 777).

Motion overruled.

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

GALEN C. MOSES, admr. in equity, *vs.* ROBERT WALLACE ALLEN, and others.

Sagadahoc. Opinion January 21, 1889.

Will. Descent. R. S., c. 74. § 10.

The lineal descendants, of a relative of the testator having a bequest in the will, are entitled to the legacy given to their ancestor, by virtue of R. S., c. 74, § 10, though the original legatee was dead at the date of the will. *Held*, accordingly, that the surviving children of deceased nephews and nieces, who died prior to the death of the testator, take the respective shares of their deceased parents.

IN EQUITY. Bill in equity, brought by the administrator, with the will annexed, of David Crooker, late of Bath, deceased, to obtain the construction of the will, by the court, upon the question as to who were entitled, as lawful claimants, to share in the estate, under the residuary clause of the will.

The case was submitted, by agreement, upon the facts stated in the bill. The facts are stated in the opinion.

C. W. Larrabee, for plaintiff.

R. P. Tapley, for lineal descendants of deceased nephews and nieces.

R. S., c. 74, § 10, provides that, "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 if he had survived." R. S., c. 73, § 7, provides that, "devises of land to two or more persons create estates in common unless otherwise expressed, and that estates vested in survivors upon the principle of joint tenancy, shall be so held."

The parties taking under this clause of the will, took several interests, and the rules of survivorship do not apply. *Whiting* v. *Cook*, 8 Allen, 63; *Emerson* v. *Cutler*, 14 Pick. 108. There is no expression creating a joint tenancy in the real estate. Same rule applies to the personal property, under R. S., c. 74, § 10. *Nutter* v. *Vickery*, 64 Maine, 490.

The nomination of devisees and legatees, by kinship, is as effectual, as by name. Statute has changed the common law, by which the legacy, to those who decease before the testator, would lapse.

No distinction is made in the devise. "Give unto my nephews and nieces." The testator speaks of them as a class; turns the residue into that class of kinship, excluding none and including all. They lived at a distance, he could not name them individually, nor did he know whether they were living or not. The absence of words of limitation, such as now living, &c., is important, where the testator nominates by a general description of kinship. Had a limitation been designed he would have imposed it. To impose such limitation would thrust upon the testator an intention never contemplated. Each family was as near to him by kinship as any other. There is no inference of law, or in the will, that he intended to withhold his bounty from children, of those who might not then be living. *Nutter* v. *Vickery*, is directly in point here, whether we suppose testator did or did not know any of her nephews and nieces were dead. These terms "nephews and nieces" identify the object of his bounty, and as said by BARROWS, J., in *Nutter* v. *Vickery*, the statute has regard to those

for whose relief it was interposed, rather than to the manner the failure would cause at common law. *Paine* v. *Prentiss*, 5 Met. 399.

The absence of any provision, in the will, for children of a deceased nephew or niece, shows he did not know of such decease, or regarded his bequest as reaching them under the law. He has named a class, a whole class, to take individually; he did not design a part of that class only, to take under this clause.

Where the will uses terms of identification, of the object of the testator's bounty, it does not speak as of the time of his death. Any other intention, than, that all the persons who ever constituted that class, of nephews and nieces, shall have a portion, to prevail, must find some warrant in the will; or as expressed in the statute of Mass. (from which ours is taken) "unless a different disposition thereof shall be made or acquired by the will," or as our statute of 1821 has it, the lineal descendants take, "any law, usage or custom to the contrary notwithstanding."

The gift must stand, as expressed in the will, and no evidence is admissible to show an intention other than that derivable from the will.

Costs: Respondents are numerous; if one or more respond and present the case successfully, all the others derive a benefit from it. The investigation relates to the distribution of the fund, and it is for the benefit of all that the opinion of the court is sought. The respondents have no right to cast upon the court the labor of the investigation, and if counsel investigate and appear, *bona fide*, they should be paid from the fund.

WALTON, J. This is a bill in equity to obtain the construction of a will. The will contains this clause:—"Sixth. All the rest and residue of my estate, real, personal, and mixed, I give, devise and bequeath unto my nephews and nieces in equal portions." The question is whether the surviving children of deceased nephews and nieces, who died prior to the death of the testator, take the respective shares of their deceased parents. We think they do. It was decided in *Nutter* v. *Vickery*, 64 Maine, 490, that upon reason, principle and authority, the lineal descendants of a relative of the testator having a bequest in the will, are

entitled to the legacy given to their ancestor, though the original legatee was dead at the date of the will; that such may fairly be presumed to have been the intention of the testator; and that our statute, which has been in force for nearly a century, was intended to secure this result. R. S., c. 74, § 10. The only difference between that case and this is that, in that case the relatives were referred to by name, while in this they are described by their relationship to the testator. We think this can make no difference in the application of the rule.

Decree accordingly with costs (including reasonable counsel fees) to all parties, to be paid out of the estate.

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

STATE *vs.* PETER O'DONNELL.

Cumberland. Opinion January 22, 1889.

Indictment. Time. Continuando. Impossible date.

An indictment must allege a particular day on which the offense was committed, even if it be set out with a *continuando*.

Where an indictment, found on the first Tuesday of May, 1888, was rendered defective by charging the offense to have been committed, with a *continuando*, on a date practically impossible (May 15, 1807) the entering a *nol pros* to acts prior to May 15, 1887, will not cure the defect.

ON EXCEPTIONS, to the rulings of the superior court, Cumberland county, in overruling defendant's demurrer, to the indictment. The case is stated in the opinion.

W. H. Looney, *C. W. Goddard*, with him, for defendant.

Counsel cited: *Commonwealth* v. *Griffin*, 3 Cush. 523; *Id.* v. *McLoon*, 5 Gray, 91; *Id.* v. *Hutton*, 5 Id. 89; *Id.* v. *Briggs*, 11 Met. 573; *Id.* v. *Wood*, 4 Gray, 11; *Id.* v. *Langley*, 14 Id. 21; *Id.* v *Adams*, 1 Id. 481, 483; *Wells* v. *Commonwealth*, 12 Id. 326;

Whart. Crim. Pl. and Pr., §§ 125, 134; *Serpentine* v. *State*, 1 How. (Miss R.) 260.

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

This is an indictment for a liquor nuisance found at the May term of the superior court for said county. By clerical error the allegation of time covered by said offense was made to read "on the fifteenth day of May in the year of our Lord one thousand eight hundred and seven, and on divers other days," etc., when it should have read, on the fifteenth day of May, A. D. 1887.

The case went to the jury and the testimony was limited to the period of time from the fifteenth day of May, 1887, to the time of the finding of said indictment, a *nol pros* having been entered, before the case went to trial, as to all time prior to the fifteenth day of May, A. D. 1887.

At the request of the defendant, the case was withdrawn from the jury after the government testimony had been put in and the court allowed him to file a demurrer. The defect in the indictment is not fatal, and the following cases go directly to the point in question: *State* v. *Hobbs*, 39 Maine, 212; *The People* v. *Stanwood*, 9 Cow. 655; *State* v. *Cofren*, 48 Maine, 364; *State* v. *Pillsbury*, 27 Maine, 449.

VIRGIN, J. An indictment must allege a particular day on which the offense was committed, even if it be set out with a *continuando*. *Wells* v. *Commonwealth*, 12 Gray, 326; *Shorey* v. *Chandler*, 80 Maine, 409; *State* v. *Small*, 80 Maine, 452.

The indictment in hand fixes the day at a date thirteen years before Maine became a sovereign state and more than forty years before the enactment of the statute which created the offense charged,—and is practically an impossible date and hence no date.

Moreover, the *nol pros*, struck out the allegation of any date, except those days named in the *continuando*, which leaves the indictment fatally defective on demurrer as was decided in the cases above cited.

Exceptions sustained.

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

JACOB H. STINCHFIELD *vs.* JOSEPH B. TWADDLE.

Franklin. Opinion January 22, 1889.

Pleading. Declaration. Schedule. Practice.

A declaration in trover, to recover the value of numerous articles, contained all the essential allegations of that form of action, excepting a description of the property, and referred to "the goods and chattels, in the schedule hereunto annexed, and of the value therein mentioned;" *Held*, that the declaration, by long usage, was sufficient.

ON EXCEPTIONS, by defendant, to the ruling of the court in overruling his demurrer to plaintiff's declaration.

This was an action of trover, and defendant demurred to the declaration because the articles, with their value, were not set out in the body of the declaration,—but were described in a schedule annexed to the writ.

H. L. Whitcomb, for defendant.

Practice of annexing a schedule to the declaration was condemned by Parsons, C. J., who also said that, "the schedule annexed to a declaration, is no part of the declaration, &c." *Kinder* v. *Shaw*, 2 Mass. 398 (note in margin). Parker, C. J., in *Rider* v. *Robbins*, 13 Mass. 284, repeats the proposition that, "a schedule annexed to a writ in replevin or trover, is held to make no part of the declaration." These authorities have never been questioned.

Chitty's Plead., vol. 2, Title, Trover; Puterbaugh's Pl. and Pr., 3d ed. 507, 508, citing 8 Moore, 379. In recording judgments, schedules become no part of the record, and a record on such a declaration as this can be no protection to the parties.

There are no adjudicated cases sustaining such a declaration.

Stubbs and Fogg, for plaintiff.

Counsel cited precedents from Oliver's Precedents by Parsons, Sewall and Adams, pp. 611, 612, 613, 614, 616. *Neal* v. *Hanson*, 60 Maine, 84.

VIRGIN, J. Trover to recover the value of numerous articles of various kinds of household furniture, agricultural implements, robes, harnesses, etc.

The declaration contains all of the essential allegations in trover excepting a description of the property. Instead of any description whatever of that, other than is expressed in the words "divers goods and chattels," the declaration refers to "the goods and chattels in the schedule hereunto annexed and of the value therein mentioned." The schedule annexed contains a detailed statement, of the various kinds of chattels, with the number and value of each article.

The defendant challenges this mode of pleading.

A very general description of the property in actions of trover is sufficient, though it is otherwise in replevin. *Taylor* v. *Wells*, 2 Saund. 74 and notes, *Colebrook* v. *Merrill*, 46 N. H. 160. But descriptions as indefinite as "divers goods and chattels" are clearly insufficient on which to found a judgment.

Learned judges have declared, that in trover, a schedule annexed to the writ, is no part of the declaration. Note to *Kinder* v. *Shaw*, 2 Mass. 398. That incidental remark of Judge Parker was approved in *Rider* v. *Robbins*, 13 Mass. 285. A like view was formerly taken of an "account annexed," in assumpsit. "By ancient usage," said PETERS, C. J., "this form of declaring has been sanctioned in this and other states. * * The account annexed to the writ is allowed to supply the want of proper allegations in the body of the declaration." *Cape Elizabeth* v. *Lombard*, 70 Maine, 399.

On recurring to "Oliver's Precedents"—the only book of the kind used in this state since the separation—numerous forms in trover like that adopted by the plaintiff are found drawn by early eminent pleaders in Massachusetts. Such was the form used in New Hampshire, though it was considered "somewhat untechnical to do it." Woodbury, J., in *Hilton* v. *Burley*, 2 N. H. 193, 195. And the court in that state refused to sustain the objection after verdict. *Edgerly* v. *Emerson*, 23 N. H. 572.

While in this state the practice has generally if not universally followed "Oliver's Precedents" whenever the property involved

comprised numerous articles,—and the question has never before been raised, we think as the defendant cannot be injured by the omission from the body of the declaration what is so fully set out in the schedule annexed, that the "untechnicality" must yield to long usage, and especially as the demurrer was filed at the return term and the defendant can plead to the merits if he desire.

Exceptions overruled.

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

GEORGE A. EMERY, appellant from decree of judge of probate, Cumberland county, disallowing the will of Esther Hunt, formerly Esther Doughty, deceased.

Cumberland. Opinion January 22, 1889.

Will. Feme sole. Revocation by marriage.

The will of a *feme sole* is not revoked by her marriage. The rule of the common law, to the contrary, is not now in force, in this state.

FACTS AGREED. The case was submitted to the full court, upon a statement of the facts, to determine the law as to the effect of the marriage of the testatrix, Esther Hunt, formerly Esther Doughty, upon the validity of her will executed before marriage.

It appeared, that the testatrix was a widow at the time she executed the will; that she subsequently married, but no children were born of the subsequent marriage; that her second husband deceased before the death of the testatrix; and that at the time of the decease of the testatrix, when said will would take effect, if ever, she was single and unmarried. Will dated Nov. 16, 1878. The probate court decreed that said instrument be not approved and allowed as the last will and testament of said deceased.

Frank and Larrabee, for appellant.

In the Massachusetts cases, *Swan* v. *Hammond*, 138 Mass. 45;

Blodgett v. *Moore*, 141 Id. 75; and *Nutt* v. *Norton*, 142 Id. 242; where the court have decided, not without hesitation, that the marriage of a woman, but not of a man, revokes a will previously made, the husband survived and his rights were affected.

Counsel cited: *Hoitt* v. *Hoitt*, 63 N. H. 475; *Morton* v. *Onion*, 45 Vt. 145; *In re Tuller*, 79 Ill. 79 (22 Am. Rep. 164); *Noyes* v. *Southworth*, 55 Mich. 173 (54 Am. Rep. 359); *Webb* v. *Jones*, 36 N. J. Eq. 163; *In re Ward*, (Wis.) 35 N. W. Rep. 731; *Fellows* v. *Allen*, 60 N. H. 439; *In re Polly Carey*, 49 Vt. 145.

H. R. Virgin, for contestant.

The will of a *feme sole* is revoked by subsequent marriage. Common law since 1589. *Forse & Hembling's case*, 4 Co. Rep. 60, 61, b.; *Hodsden* v. *Lloyd*, 2 Bro. Ch. 534; *Doe, dem. Hodsden* v. *Staple*, 2 T. R. 684; *Long* v. *Aldred*, 3 Addams, 48; 2 Jar. Wills, 129; 1 Red. Wills, 21, 22, 23; 4 Kent. Com. 527, 598; Toller's Exrs. 19; *Shaw* v. *Hammond*, 138 Mass. 45, 46.

Rule promulgated in twenty states, by statute, and prevailed in England until statute of 7 Will. IV., and I Vict., c. 26, § 18.

Maine statutes, in effect, are identical with those of Mass. They can not be changed by construction. *Currier* v. *Phillips*, 12 Pick. 226; *Swan* v. *Hammond*, *supra*, and re-affirmed in *Nutt* v. *Norton*, 142 Mass. 242, and cases there cited.

Incorporating the clause, relative to implied revocations into R. S., c. 74, § 3 is an express enactment of this common law rule. It is for the court to declare what the law is, not to repeal or annul it. The language of a statute is not to be enlarged or limited by construction. *Currier* v. *Phillips*, *supra*.

WALTON, J. The question is whether the common-law rule that, the will of a *feme sole* is revoked by her marriage, is now in force in this state. We think it is not. The rule was an outgrowth of the doctrine that the marriage of a *feme sole* destroyed her testamentary capacity. After her marriage she could neither make nor revoke a will. A will already made, if allowed to remain valid, would make a permanent disposition of her property. This would be contrary to the very essence and nature of a will. It would cease to be ambulatory. It was therefore resolved that

the marriage of a *feme sole* should, by operation of law, revoke all existing testamentary dispositions of her property. But, in this state, the marriage of a *feme sole* does not now destroy her testamentary capacity. In this particular the common law is not now in force. It has been abrogated by the legislature. A married woman can now make, or alter, or revoke a will, as fully and as freely as if she were not married. Why, then, should her marriage revoke a pre-existing will? We think it should not. *Cessante ratione legis, cessat ipsa lex.* Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself. In England it is now enacted that the marriage of either a man or a woman shall revoke a pre-existing will, unless it is executed under a power of appointment. In New York they have a statute which declares in express terms that the marriage of a woman shall revoke a pre-existing will. In Massachusetts they have a statute which, as construed by the court, has the same effect. Similar statutes exist in several other states. Where such statutes exist, the question we are now considering cannot arise. In other states, where the testamentary laws and the rights and powers of married women are similar to those now existing in this state, it has been held that the marriage of a *feme sole* will not revoke a pre-existing will. It is said in a New Hampshire case that when the incapacity of a married woman to make a will is removed, no reason remains why her will, made before her marriage, should be thereby revoked. *Morey* v. *Sohier*, 63 N. H. 507, (2 N. E. Rep. 274.) And see *Fellows* v. *Allen*, 60 N. H. 439; *Webb* v. *Jones*, 36 N. J. Eq. 163. *Ward's Estate*, (Wis.) 35 N. W. R. 731. *Carey's Estate*, 49 Vt. 236. Our statutes recognize the fact that a will may be revoked by operation of law from a change in the condition or circumstances of the maker (R. S., c. 74, § 3), but they are silent as to what the changes or circumstances are, which shall have that effect. If the marriage of a *feme sole* now, as formerly, destroyed her testamentary capacity, the change in her condition and circumstances would now, as then, also destroy the validity of an existing will. But such is not now the effect of a marriage. In this state, a *feme covert* can make or revoke a will as freely as a *feme sole*;

and the reason no longer exists for holding that the will of a *feme sole* will be revoked by her marriage. It will not be. The decree of the probate court holding the contrary was erroneous, and must be reversed.

Decree reversed.

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

GEORGE N. SEVERANCE, in equity, *vs.* ORLANDO ASH.

Penobscot. Opinion January 25, 1889.

Equity. Cancellation. Fraud. Burden of proof.

Where the plaintiff prays to have a deed cancelled, by reason of fraudulent misrepresentations, it is incumbent on him to prove that he was induced, by such misrepresentations, to execute the deed.

ON REPORT. Bill in equity for the cancellation of a deed, heard on bill, answer and proof. The facts are sufficiently stated in the opinion.

C. A. Bailey, for plaintiff.

Plaintiff was interested in the land. The mortgage, previously given by him, had not been foreclosed. Jones Mort., § 1152, mortgagee had not entered and held possession. Wild lands not capable of adverse possession. *Chandler* v. *Wilson*, 77 Maine, 76; *Hudson* v. *Coe*, 79 Maine, 83. Constructive possession not recognized. *Chase* v. *Marston*, 66 Maine, 271. To work the effect of a disseizin adverse possession is the same in equity, as in law. *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 189; *Wyncoop* v. *Demarest*, 3 Johns. Ch. 129; *Gordon* v. *Hobart*, 2 Sum. 401; *Moore* v. *Cable*, 1 Johns. Ch. 386; 4 Kent. Com. 188; *Ayers* v. *Waite*, 10 Cush. 72; Jones Mort., c. 24; *Chapin* v. *Wright*, 41 N. J. Eq. 438 note; Ang. Lim., c. 34.

Deed under which defendant and his ancestor have held was not recorded until about fifteen years before the release, in question here, was obtained. Plaintiff's rights not affected, while deed

was unrecorded. *Estes* v. *Cook*, 22 Pick. 295; *Kellogg* v. *Loomis*, 16 Gray, 48, 49; *Putman* v. *Fisher*, 38 Maine, 324.

Under a bill for relief, on the ground of fraud, court may relieve on the ground of mistake. *Reed* v. *Cramer*, 1 Green (N. J. Eq.) 277; *Berryman* v. *Graham*, 6 C. E. Green, 370; *Skillman* v. *Teeple*, Saxton (N. J. Eq.) 232; *Pooler* v. *Ray*, 1 P. Wms. 355; *Bingham* v. *Bingham*, 1 Ves. sen. 126: And allowing the mistake to be that of plaintiff alone. *Spring* v. *Hight*, 22 Maine, 408, 413; *McCarthy* v. *DeCaix*, 2 Russ. & M. 614; *Bingham* v. *Bingham*, *supra*; *Grover* v. *Perkins*, 6 Sim. 576; *Cann* v. *Cann*, 1 P. Wms. 7, 27; *Naylor* v. *Winch*, 1 Sim. & Stu. 555; *Stanley* v. *Robinson*, 1 Russ. & M. 527.

Relief granted whether mistake is one of fact or law. *Cooper* v. *Phibbs*, L. R. 2, H. L. 149; *Beauchcamp* v. *Winn*, L. R. 6, H. L. 223, 234; *Jordan* v. *Stevens*, 51 Maine, 78; Story Eq. Jur., § 120, *et seq.*

Not precluded by having consulted counsel. *Taylor* v. *Ober*, 3 Price, 300; *Murray* v. *Palmer*, 2 Sch. & Lef. 486. Actual fraud: Misrepresentation and concealment of value and quantity by defendant, ignorance of title, value, quantity and location by plaintiff. *Tyler* v. *Black*, 13 How. (U. S.) 230; *Turner* v. *Harvey*, 1 Jac. 169. Parties: *St. Johnsbury* v. *Bagley*, 48 Vt. 75; *Dunlap* v. *Stetson*, 4 Mason, 349.

Wilson and Woodard, for defendant.

The misrepresentation or concealment must be of something material, constituting an inducement or motive in giving the deed; about what plaintiff rightfully placed trust and confidence in defendant; and damage suffered. 1 Story Eq. Jur., §§ 190–203, inclusive, *Page* v. *Bent*, 2 Met. 371, 374; *Matthews* v. *Bliss*, 27 Pick. 48, 52, 53; *Stover* v. *Pool*, 67 Maine, 217.

Statements that right to redeem had become barred, matters of opinion, and not relied on. *Grant* v. *Grant*, 56 Maine, 573. Plaintiff's right was barred by lapse of time. *Phillips* v. *Sinclair*, 20 Maine, 269; *Blethen* v. *Dwinel*, 35 Id. 556, 561; *Hurd* v. *Colman*, 42 Id. 182, 190; *Roberts* v. *Littlefield*, 48 Id. 61, 62, 63; *Chick* v. *Rollins*, 44 Id. 104, 116.

Possession by intruder different than under color of title.

Jackson v. *Porter*, Paine, Rep. 457; Ang. Lim., § 400; *Proprietors* v. *Laboree*, 2 Maine, 275, 285, 286 and cases cited on p. 287. Character of possession: *Ewing* v. *Burnett*, 11 Pet. 41, 52, 53; *Clarke* v. *Potter*, 32 Ohio, 49, 64; *Fletcher* v. *Fuller*, 120 U. S. 534. Relation of parties did not justify reliance on statements of value,—were matters of opinion, (*Bishop* v. *Small*, 63 Maine, 12, 13, 14) and not relied on. Not bound to disclose sales previously made to other parties. *Matthews* v. *Bliss*, *supra*.

Plaintiff's laches: *Peabody* v. *Flint*, 6 Allen, 52, 57; *Bank* v. *R. R.*, 125 Mass. 490, 495; *Rogers* v. *Saunders*, 16 Maine, 92; *Sullivan* v. *P. & K. R. R.*, 94 U. S. 806, 811, 812; *Brown* v. *County of Buena Vista*, 95 U. S. 157, 160, 161; (subsequent increase in value of land) *B. & M. R. R.* v. *Bartlett*, 10 Gray, 384; *Holt* v. *Rogers*, 8 Pet. 420, 434.

LIBBEY, J. In his bill the plaintiff states his case in substance, as follows: On the 8th of January, 1855, he and one Goodwin purchased of Randall S. Clark a large tract of wild and uncultivated forest land on the island of Mount Desert, Hancock county, containing about three thousand acres; and on the same day and as a part of the same transaction he and said Goodwin mortgaged the same premises to Andrew H. Hall, to secure their notes for $2500, part of the consideration for the land; that they operated on the land till sometime in 1857, when, the notes having matured, legal proceedings were commenced against them, and, being unable to pay, they were compelled to leave the premises; that soon after said Goodwin died, and he, the plaintiff sought employment in another state, and never afterwards returned to the vicinity of said land; that the legal proceedings were suffered to go by default; that he supposed said proceedings were for the purpose of foreclosing the mortgage, and that it was thereby fully foreclosed. That on the 20th of February, 1884, the defendant came to his house, in Orrington, with his attorney, and represented to him that he was the owner in fee of a lot of land in Mount Desert, which was a part of the tract bought of Clark; that his claim of title was under the mortgage to Hall; that their deed from Clark, as the record stood, was a cloud upon his title, preventing him from showing a clear record title to the land, and

desired the plaintiff to give him a deed of release, that the record might show that he had no claim; that both the respondent and his attorney assured him he would part with nothing of any value to him; that if there had been no formal foreclosure, the lapse of time, or even the accumulation of the mortgage debt would be insuperable obstacles to redemption from the mortgage. That the respondent further represented to him that land of which he desired a release, was of little value; that it was unfavorably situated, difficult of access, mostly a barren mountain slope, and its only value was in about thirty acres of young growth; that he knew nothing of the value of the land except from his limited operations from 1855 to 1857; that it was worth but a few cents an acre when he left it, and believing in the defendant's representations, and that they were made for an honest purpose, for the nominal consideration of one dollar he executed a quitclaim deed of the premises as requested, dated February 21, 1884.

That he afterwards learned the mortgage had not been foreclosed, but that the mortgage debt had been paid by property taken in the action on the notes and timber and wood taken from the land by the mortgagee; and that the representations of the defendant were false and made to defraud him; and he prays that the court may decree the deed from him to defendant cancelled and void.

All the material allegations of representations of fact stated in the bill are denied, upon oath by the defendant, and he claims that the mortgage was foreclosed by more than twenty years' possession of those claiming under the mortgage prior to the execution of the deed by the plaintiff.

To entitle him to the relief prayed for, it is incumbent on the plaintiff to prove that he was induced to execute the deed by some fraudulent representation of fact, or facts alleged in the bill.

We think the evidence on which the plaintiff relies, entirely fails to prove his case. He is a witness, and states his case more strongly than any other of his witnesses. It is only necessary to give his own statement of the case to show that he has no equity, and is not entitled to relief.

After stating that the defendant, with his attorney, called at

his house in Orrington and introduced himself, he proceeds as follows: "He said he had some business with me about that Mount Desert land; he said he had bought some of it, or that his father had, I do not recollect which; anyhow he came there as the owner of it, and wanted a release from me. I says, I do not own any land down to Mount Desert, I have no claim to any land down there. He said he had a little wood lot, and there was a cloud on his title, and by getting my name to a deed, it would make his better; it would be considerable advantage to him to have me give him an acquittal. I says I cannot, I am not going to acquit anything I do not own. One of the gentlemen says, they cannot hurt you for giving a quitclaim of anybody's farm. I says I do not want to give any quitclaim, and especially without seeing some one that knows about the business, my attorney. He pressed the matter hard and I concluded to come up here to Bangor with him. He remarked if I would go to Bucksport he would supply me with two attorneys. I did not want to go to Bucksport, so they brought me up here the next morning. They stayed at my house all night."

"Q. Was there any proposition to pay you anything for a release? A. No sir; I did not ask anything because I did not own anything. Before I promised to come up with him, he made the remark, if you do not give me a deed I will make it cost you something. I was fearful of those notes, they were all strangers to me. I had a home there and I was afraid they would sweep me out; I wanted to get rid of it as easy as I could. I came to Mr. Davis' office; he got it out of them that we had the right of redemption in the property. Mr. Deasy and Mr. Ash were both present with me in Mr. Davis' office. What I wanted to see Mr. Davis for was to confirm their statement that they could not hurt me for signing a quitclaim deed; I wanted to know whether there would be anything back of this coming up by and by."

"Q. Had you agreed to sign this before coming up here if you could do it without any trouble? A. Yes, I was willing to accommodate the gentlemen if I could do them any good."

Cross-examination. "Q. You were not very much interested in the land, did not care much about it at that time? A. I

should not suppose anybody that did not think they owned it, would be. Q. You did not care much what the value was? A. I do not see as I should care anything about the value if I did not own it. Q. You did not pay any great attention to what they said about the conditon of the land or its value? A. I did not really take any stock in it. Q. Did you care anything about it? A. I do not see why I should, if I did not have anything to do with it, did not own it. I came up here the next day with them, and went to Mr. Davis' office; Mr. Davis made the deed, I executed and acknowledged it. They went back with me to get my wife's signature to it; she signed it."

Here is no proof of inducement to execute the deed by fraudulent representations of facts. He abandoned the land to the mortgagee twenty-seven years before, and supposed the mortgage had been foreclosed, and waited till the notes had become barred by limitation. He was informed at Davis' office that he had the legal right to redeem, but all he wanted to know, was, if he confirmed the title which he had supposed the mortgagee had acquired, by a quitclaim deed, whether it would make him liable for the notes so that his home might be swept from him. His consultation with his attorney assured him on this point, and this was the only inducement he desired.

As we are forced to the foregoing conclusion on the merits of the case, we do not deem it necessary to decide the other points discussed by counsel, of non-joinder of plaintiffs and defendants, and whether the Hall mortgage had been foreclosed by twenty years adverse possession of the mortgagee and his grantees.

Prayer of the bill denied.

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

BRADSTREET FULLER *vs.* LUCINDA B. EASTMAN, and another.

Kennebec. Opinion February 5, 1889.

Judgment. Estoppel. Judgment on mortgage.

Where in a writ of entry, to foreclose a mortgage, conditional judgment has been rendered, and the amount due thereon has been determined by the court, the defendant is estopped from afterwards setting up any defense, in a suit on the note, secured by such mortgage.

The conditional judgment fixes the amount of the indebtedness secured by the mortgage, and is conclusive as to such amount.

ON EXCEPTIONS, to the superior court for Kennebec county. The plaintiff excepted to the *pro forma* rulings of the presiding justice, of that court, in admitting evidence to show certain payments had been made, upon a promissory note, there in suit; and the amount which was due thereon plaintiff claimed had become *res adjudicata*, under the facts which are stated in the opinion.

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Webb and Webb, for plaintiff.

Judgment as an estoppel: Freem. Jud., §§ 247, 249; *Aurora City* v. *West*, 7 Wall. 82.

Requisite of judgment estoppels: Freem. Jud., § 252; *Aspden* v. *Nixon*, 4 How. (U. S.) 467, 497.

Identity of subject matter: Freem. Jud., § 253; *Walker* v. *Chase*, 53 Maine, 258; *Spencer* v. *Dearth*, 43 Vt. 98; *Betts* v. *Starr*, 5 Conn. 550; *Doty* v. *Brown*, 4 N. Y. 71; *Perkins* v. *Perkins*, 16 Mich. 162. Identity of form of action: *Eastman* v. *Cooper*, 15 Pick. 276, 285; Freem. Jud., § 255. Identity of Issues: Freem. Jud., § 256; *Edwards* v. *Stewart*, 15 Barb. 67; *Gates* v. *Preston*, 41 N. Y. 113; *Bellinger* v. *Craigue*, 31 Barb. 534; *Atkinson* v. *White*, 60 Maine, 396; *Rogers* v. *Libbey*, 35 Id. 200; *Hobbs* v. *Parker*, 31 Id. 143; *Holmes* v. *French*, 70 Maine, 341.

Merits: Freem. Jud., § 260; *Hughes* v. *U. S.*, 4 Wall. 232; *Love* v. *Truman*, 10 Ohio, 45; *Brackett* v. *Hoitt*, 20 N. H. 257; *Wilbur* v. *Gilmore*, 21 Pick. 250; *Keene* v. *Clark*, 5 Rob. (N. Y.) 38.

Heath and Tuell, for defendants, submitted without argument.

FOSTER, J. Assumpsit on a promissory note secured by a mortgage of real estate in Waldo county. The pleadings are general issue, and plea in bar.

On the same day that this suit was instituted in the superior court for the county of Kennebec, the plaintiff brought a writ of entry in the county of Waldo for the purpose of foreclosing the mortgage. At the return term of court in that county, October 1887, the defendants appeared by counsel, and on the eighth day of the term the action was defaulted by agreement and judgment as of mortgage entered for the plaintiff. The court, in the presence of counsel for plaintiff and defendants, adjudged the amount due upon the mortgage in accordance with §§ 8 and 9 of c. 90, R. S., and a writ of possession was issued at the expiration of two months after judgment. Subsequently, at the December term of the superior court in Kennebec county, in this action upon the note, the defendants became defaulted, and at the hearing in damages before the court offered to show that certain payments had been made upon the note long prior to the date of the judgment in the other suit. The plaintiff seasonably objected to the admission of this evidence on the ground that the defendants were concluded, by the adjudication of the amount due and payable on the mortgage, in the suit in Waldo county. The court overruled the objection, admitted the evidence, and thereupon exceptions were taken.

Was this evidence admissible? We think it was not, and that the exceptions must be sustained.

When an action is brought for the purpose of foreclosing a mortgage, the statute contemplates that there shall be two separate and distinct judgments,—the one based upon the title put in issue by the pleadings, and the other as to the amount due upon the mortgage. *Ladd* v. *Putnam*, 79 Maine, 568, 570. The latter follows the conditional judgment upon which the court determines; and adjudges the amount due upon the mortgage. The conditional judgment fixes the amount of the indebtedness secured by the mortgage, and is conclusive as to such amount. *Merriam* v. *Merriam*, 6 Cush. 91, 93; *Burke* v. *Miller*, 4 Gray, 114, 115; *Sparhawk* v. *Wills*, 5 Gray, 423, 427, 428; *Minot* v. *Sawyer*, 8

Allen, 78, 80; *Stevens* v. *Miner*, 5 Gray, 429, note; *Freison* v. *Bates College*, 128 Mass. 466; *Divoll* v. *Atwood*, 41 N. H. 449.

It is now the settled law that in such action the same defenses may be made, except the statute of limitations, which might be made in an action upon the note secured by the mortgage. *Ladd* v. *Putnam*, *supra*; *Vinton* v. *King*, 4 Allen, 562; *Davis* v. *Bean*, 114 Mass. 361. "It opens up any proper matter of defense to the validity of the note in whole or in part." *Minot* v. *Sawyer*, *supra*.

The judgment in the former suit was one required by the statute. It was between the same parties as in the suit now before us, and upon the same subject matter. The court could not adjudge the amount due upon the mortgage without determining the amount due upon the note secured by it. That note is the identical note in this suit. The evidence related to payments made long prior to the date of that judgment.

It is a principle of law too familiar to require any citation of authorities in support of it, that when a matter in controversy has once been inquired into and settled by a court of competent jurisdiction, it can not be again drawn in question in another suit between the same parties. *Homer* v. *Fish*, 1 Pick. 435, 439. Nor will it avail the defendants that the facts now offered in evidence did not in fact come in question. If allowed it would render the rule nugatory, as said by Parker, C. J., in the case last cited, and where it was held that it was sufficient that the action was of a nature to admit of such a defense, and that the party in the new suit might have availed himself of it. *Greene* v. *Greene*, 2 Gray, 361, 365; *Sparhawk* v. *Wills*, *supra*.

In *Bigelow* v. *Winsor*, 1 Gray, 299, 301, the doctrine is thus stated: "Whether it be a court of law or equity, of admiralty or of probate, if in the matter in controversy between the parties, with the same object in view, that of remedy between them, the court had jurisdiction to decide, it is a legal adjudication binding on these parties." In addition to the foregoing authorities the following will be found to sustain the same doctrine. *Walker* v. *Chase*, 53 Maine, 258, 260; *Lander* v. *Arno*, 65 Maine, 26, 29; *do.* *Howard* v. *Kimball*, 308, 330; *Burlen* v. *Shannon*, 99 Mass. 200, 202, 203.

In the case last cited, it was held, that a judgment is conclusive by way of estoppel as to all such facts as are necessarily involved in it, and without the existence, proof or admission of which such judgment could not have been rendered; that the estoppel is not confined to the judgment merely, but that it "extends to all facts involved in it as necessary steps or the groundwork upon which it must have been founded." The very recent case of *Blodgett* v. *Dow*, *ante*, 197, is to the same effect.

The record in this case pertaining to the conditional judgment covers all facts necessary in determining the amount due at the date of that judgment.

But viewing this question in the light of the authorities we find that the court, in several cases, has held that where in a writ of entry to foreclose a mortgage, conditional judgment has been rendered, and the amount due thereon has been determined by the court, the defendant is estopped from afterwards setting up any defense, in a suit on the note, secured by such mortgage. This was directly decided in the case of *Burke* v. *Miller*, 4 Gray, 114, 116.

In that case the court held, that the same question was involved and must have been determined in the former suit. Defense was attempted in a suit upon the note, and the court say: "Upon examination of the conditional judgment which was rendered in the former suit, it appears that the court did then determine that the amount of the note declared on, in the present action, was due to the plaintiff. The real question of indebtedness, therefore, which is now in issue between the parties, was not only involved in the former suit, but was in fact made the subject of an actual adjudication."

The same is also true in the case of *Sparhawk* v. *Wills*, 5 Gray, *supra*; *Divoll* v. *Atwood*, 41 N. H. 449; *Betts* v. *Starr*, 5 Conn. 550; *Holmes* v. *French*, 70 Maine, 341, 344.

In the case of *Minot* v. *Sawyer*, 8 Allen, 78, which was a writ of entry to foreclose a mortgage, the court affirm the doctrine, and say: "As already remarked, this judgment is conclusive as to the amount legally due on the note. The defendant is compelled to raise the question of usurious interest in this suit, or be estopped from claiming the deduction hereafter."

Nor is it essential that the estoppel or bar should exist before the commencement of the suit. *Morgan* v. *Barker*, 26 Vt. 602.

The entry must therefore be,

Exceptions sustained.

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

ANDREW PRESSEY *vs.* GEORGE L. SNOW.

SAME *vs.* LUCY A. SNOW.

Knox. Opinion February 5, 1889.

Writ. Indorser. R. S., c. 81, § 6.

All writs of summons and attachment are original writs within the meaning of R. S., c. 81, § 6, and such as are required to be indorsed, before entry in court, by some sufficient inhabitant of the state, where the plaintiff is not an inhabitant thereof.

The want of such indorser, being a defect apparent upon inspection of the writ itself, may be taken advantage of by motion, and no plea in abatement is required.

The court has no discretionary power to permit an indorsement of such writ after entry in court.

ON EXCEPTIONS. From the bill of exceptions, it appears that the actions were begun by writs of attachment, and that the plaintiff was not an inhabitant of the state. On the second day of the term, the defendant filed a plea in abatement, and a motion to dismiss the actions for want of an indorser. Plaintiff's counsel, during motion hour, on the same day, moved for leave to furnish an indorser. The plaintiff contended: First, that by the statutes no indorser was required; second, it was within the discretionary power of the court to permit the writs to be indorsed. The court overruled these points, sustained the defendant's motion, and the plaintiff excepted.

A. P. Gould, for plaintiff.

Offer to furnish indorser was contemporaneous with the entry of the actions,—when the docket of new entries was brought into

court on the second day of the term. The statute is remedial and should be liberally construed. *Clark* v. *Paine*, 11 Pick. 66, 68; 1 Black. Com. 88, note. Directory: *McVickar* v. *Ludlow*, 2 Ham. 246; *Cox* v. *Hunt*, 1 Blackford, 146; *How* v. *Becktle*, Id. 213; *White* v. *Stafford*, 1 Breese, 28; *Smith* v. *Lockwood*, 34 Wis. 72. Allowed in *Farnum* v. *Bell*, 3 N. H. 72; *Whitsett* v. *Blumenthall*, 63 Mo. 479. Ruling subject to exception. *Clapp* v. *Balch*, 3 Maine, 216, 219 at foot.

Time not of the essence of statute; security, the essential thing. Cooley's Const. Lim., 5th ed., pp. 92, 93 [*78] and cases cited in note 1, p. 93. Statute intended to promote justice, not to defeat it. *Winslow* v. *Kimball*, 25 Maine, 493, 495; 1 Kent's Com., 11th ed., 506, [*465]. *State* v. *Smith*, 67 Maine, 328.

Statute does not require indorsement. Writs of attachment not embraced. Not "original writ."

Symonds and Libby, *Robinson and Rowell*, with them, for defendants.

Writs were original, and plaintiff not being an inhabitant of this state, should have been indorsed. R. S., c. 81, § 6. Original writs under English law [Black. Com., vol. 3, 273; Abbott's Law Dict.] dissimilar to ours. *Clark* v. *Paine*, 11 Pick. 66, 67.

Original writs, by statutes: R. S., c. 81, § 2; Id. (1840) c. 114, §§ 21, 22, 23; Laws, 1821, c. 59, § 8, and c. 63, § 1.

Decisions: *Hall* v. *Jones*, 9 Pick. 446; *Bailey* v. *Smith*, 3 Fairfield, 196; *Crossen* v. *Dryer*, 17 Mass. 222; *York & Cumb. R. R.* v. *Myers*, 18 How. (U. S.) 246, where Campbell, J., speaks of the writ as an original writ. *Whitcher* v. *Josslyn*, 6 Allen, 350; *Robbins* v. *Hill*, 12 Pick. 569; *Harmon* v. *Watson*, 8 Greenl. 286; *Gould* v. *Barnard*, 3 Mass. 199, 201, where Parsons, C. J., says: "A writ of replevin is, without question, an original writ. It must, therefore, be indorsed." Statute identical with Laws, 1821, c. 59, § 8, and Mass. statute, 1784, c. 28; but writs of error and *scire facias* held not original writs. *Grosvenor* v. *Danforth*, 16 Mass. 73; *Dearborn* v. *Dearborn*, 15 Id. 318, and same in N. H. *Tracy* v. *Perry*, 5 N. H. 173.

Plaintiff's construction would require indorsements only of

exceptional writs, and require none for main body of writs originating actions under our statutes.

Court had no discretion to permit indorsing, after entry. *Clapp* v. *Balch*, 3 Greenl. 216, 217; *Archer* v. *Noble*, Id. 418, 419; *Gould* v. *Barnard*, and *Robbins* v. *Hill*, *supra*; *Hayward* v. *Main*, 18 Pick. 226; Howes' Prac. 107; Spaulding's Prac. 79; *Pettengill* v. *McGregor*, 12 N. H. 190. Court bound by statute. "Whether we can discern the reason of a legislative act or not, we are still bound by it," per Sedgwick, J., in *Gould* v. *Barnard*, *supra*.

FOSTER, J. These actions were brought by writs of summons and attachment. The plaintiff was a citizen of New York. Neither of the writs were indorsed before entry by any sufficient inhabitant of this state. Upon the second day, of the return term, the defendant in each case, filed a plea in abatement and motion to dismiss for want of said indorser. Thereafter, during motion hour of that day plaintiff's counsel moved for leave to furnish an indorser and to have each of the writs indorsed, contending *first*,—That by the statute no indorser was required; and *second*,—That it was within the power of the court at that time to permit an indorser to be furnished, and to have the writs then indorsed. The court overruled the first point, and further ruled, as matter of law, that it had no power to permit the plaintiff to procure an indorsement of the writs at that time, and sustained the defend ant's motion.

We have no doubt of the correctness of this ruling, and therefore the exceptions cannot be sustained.

1. Section 6, c. 81, R. S., provides that "every writ original, of *scire facias*, of error, of *audita querela*, petition for writ of *certiorari*, for review, or for partition, and bill in equity, shall, before entry in court, be indorsed by some sufficient inhabitant of the state, when the plaintiff or petitioner is not an inhabitant thereof."

The term "original writ" as used in English practice was one of technical meaning. According to Blackstone, it was a mandatory letter from the king, sealed with his great seal, directed to the sheriff of the county wherein the injury was committed, to be by him returned into the court of common pleas, and was

the foundation of the jurisdiction of the court, being the king's warrant for the judges to proceed in the determination of the cause. But, in our practice, modified as it is to conform to our own institutions, there is no such thing as the technical "original writ" known to the English practice. In this state, not only the jurisdiction of the court, but the forms of writs and the manner of commencement of actions, are provided by general statutory provisions, and when we have ascertained the meaning and construction thereof, we are to be governed by them rather than by any technical meaning derived from English practice.

As early as 1784 the Massachusetts statute, c. 28, provided that "all original writs issuing out of the supreme judicial court or court of common pleas shall, before they are served, be indorsed," etc. The meaning of the term "original writ" as contained in this statute was raised in *Clark* v. *Paine*, 11 Pick. 67, and the court say: "According to the English books of practice it would not be considered as an original writ; but this designation has in England a technical meaning which it would not be safe to adopt in giving a construction to our statute."

Section 2, c. 81, R. S., provides that "all civil actions, except *scire facias* and other special writs, shall be commenced by original writs; which, in the supreme judicial court, may be issued by the clerk in term time or vacation, and framed to attach the goods and estate of the defendant, and for want thereof to take the body, or as an original summons, with or without an order to attach goods and estate." These provisions are substantially the same as embraced in the earlier statutes of 1821, c. 59, § 8; c. 63, § 1; and R. S., 1840, §§ 21, 22, 23, of c. 114.

An examination of these statutes leaves no room for doubt as to the intention of the legislature, and that writs of summons and attachment, like the ones before us, are original writs and embraced within the meaning of the expression "every writ original" as used in § 6, c. 81, R. S., and such as are required to be indorsed before entry in court by some sufficient inhabitant of the state when the plaintiff is not an inhabitant thereof.

That such have been regarded as original writs by the courts of this state and Massachusetts, may be inferred from the

following cases: *Bailey* v. *Smith*, 12 Maine, 196, 197; *Hall* v. *Jones*, 9 Pick. 446; *Crossen* v. *Dryer*, 17 Mass. 222; *Whitcher* v. *Josslyn*, 6 Allen, 350.

Scire facias and other special writs enumerated in § 6 are additional to the original provisions requiring original writs to be indorsed, and are not qualifications or limitations thereof, as contended by the counsel for the plaintiff. *Tracy* v. *Perry*, 5 N. H. 172.

2. These writs being such as the law required to be indorsed before entry, the want of an indorser was seasonably taken advantage of, by plea in abatement and motion to dismiss.

The defect being one apparent from an inspection of the writ itself, advantage may properly be taken by motion, and no plea in abatement is required. *Clapp* v. *Balch*, 3 Maine, 216; *Scruton* v. *Deming*, 36 N. H. 433; *Seaver* v. *Allen*, 48 N. H. 473.

Nor had the court any power, in face of the imperative provisions of the statute, to permit the writs to be indorsed at that time. It was not a case where the discretion of the court could properly be exercised. This principle was settled in *Haywood* v. *Main*, 18 Pick. 226, where a petition for a new trial was filed and the respondent moved to dismiss the petition because the petitioner resided in the state of New York, and because the petition was not indorsed before entry as required by statute. The motion was sustained by the presiding Justice and the petitioner thereupon excepted, and also moved for leave to furnish an indorser, which motion was overruled. Shaw, C. J., in delivering the opinion of the court said: "The provisions of R. S., c. 90, § 10, authorizing the court in all cases to require an indorser does not apply, because in case of a petition from out of the state, the statute is imperative. The court are all of the opinion that the order to dismiss the petition for want of an indorsement was right and must be affirmed."

In New Hampshire, under a statute like that formerly existing in this state and Massachusetts, requiring all original writs to be indorsed, before service, when the plaintiff was not an inhabitant of the state, the same conclusion was reached, in the case of *Pettengill* v. *McGregor*, 12 N. H. 190, which substantially overrules

the earlier decision of *Farnum* v. *Bell*, 3 N. H. 72, cited in argument by plaintiff's counsel. In that case the court hold that when a writ is not properly indorsed before service, the court has no authority to permit the same to be subsequently indorsed, without the assent of the defendant. "We are not aware," the court say, "that the practice has gone to the extent, and it is not believed that the court possesses the power, where the writ is not indorsed at the time of its service, to permit the plaintiff to cause the writ to be indorsed at any subsequent period, without the assent of the defendant. The plaintiff in such action is not properly in court at all. The indorsement of the writ is as much a prerequisite to the right to call upon the defendant to answer to the action, as is the proper service and notice of the pendency of the action. The writ is not in fact properly in court, in contemplation of law. There is good reason why the indorsement should be made, and that it should be done before the defendant is compelled to answer to the merits of the action. The time of the indorsement is material. It is made so by the statute." This decision is affirmed in *Brackett* v. *Bartlett*, 19 N. H. 130. See also Howe's Practice, 107; Spaulding's Practice, 79.

Exceptions overruled.

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

WILLIAM H. MARTIN *vs.* CITY OF PORTLAND.

Cumberland. Opinion February 5, 1889.

Tax. Broker. Shop. Store. R. S., c. 6, § 14, par. 1.

The plaintiff, an inhabitant of another town April 1, 1885, was taxed for personal property by the defendant town, where he was a cotton broker, engaged in buying and selling cotton. He occupied a desk, and desk room there which he rented. He kept his account books and papers in the desk; received and answered his correspondence there; received samples of cotton, but made no sales there; kept no goods there other than the samples sent him by mail, which he never exhibited there for sale. He made his sales

by taking his samples and exhibiting them to the purchasers at their places of business outside of the defendant town. A part of the payments was made by notes through the mail to his place of business, and a part was made at the places of sale. He had a large quantity of cotton stored in three warehouses in the defendant town, paying storage thereon, from which houses cotton was shipped after sale; but he had no direction or control over the warehouses. He was not an agent for any one in making the sales.

Held, upon these facts, that the plaintiff did not occupy a store or shop within the meaning of R. S., c. 6, § 14, par. 1, and was therefore not liable to the tax.

AGREED STATEMENT. Assumpsit to recover taxes assessed upon the plaintiff, by the city of Portland, for the municipal year 1885, and paid under protest. The facts appear in the opinion. The court were to render judgment in accordance with the legal rights of the parties.

S. C. Strout, H. W. Gage and F. S. Strout, for plaintiff.

Plaintiff taxed as non-resident, burden of proof is on defendant to show case falls within clause 1, § 14, c. 6, R. S.

Kind and nature of property taxed, not stated in the lists. Non-residents not required to furnish lists. If not stated, plaintiff may be compelled to pay taxes twice, on same property, in different towns, in violation of Art. 9, § 8, Const. Taxes shall be apportioned and assessed equally. *Brewer Brick Co.* v. *Brewer*, 62 Maine, 62, 73. List and valuation indispensable. *Thurston* v. *Little*, 3 Mass. 429, 433; *Lorrey* v. *Millbury*, 21 Pick. 64, 67.

Tax "as agent" invalid. No authority under statute for it. Assessments legal only by statute. *Fairfield* v. *Woodman*, 76 Maine, 551; *Hooper* v. *Emery*, 14 Id. 375. Must comply with statute. *Haynes* v. *Fuller*, 40 Maine, 162; *Savage* v. *Holyoke*, 59 Id. 345, 346. Personal property to be taxed to owner. Taxed to plaintiff as agent, assumes he is not owner. If legally assessed, plaintiff may, here, be compelled to pay tax on another's property.

Plaintiff did not occupy a store or shop. Occupation, is the essential thing. *Ellsworth* v. *Brown*, 53 Maine, 519, 522. Warehouses, not "stores, shops, etc." *Hittinger* v. *Westford*, 135 Mass. 259; *Desmond* v. *Machiasport*, 48 Maine, 478, 480; *Lee* v. *Templeton*, 6 Gray, 579, 584, (wharfage); *Campbell* v. *Machias*, 33 Maine, 419; *Stockwell* v. *Brewer*, 59 Maine, 286, 289. Not taxable in

Portland because "stored" there. *Loud* v. *Charlestown*, 103 Mass. 278; *Huckins* v. *Boston*, 4 Cush. 543; *Charlestown* v. *Com.*, 109 Mass. 272.

Only remedy, by suit. *Preston* v. *Boston*, 12 Pick. 7. Assumpsit proper form of action. *Briggs* v. *Lewiston*, 29 Maine, 472.

Symonds and Libby, for defendants.

Question of sufficiency of assessment not open to plaintiff. List and valuation not required, where persons fail to bring in to assessors their lists. *Noyes* v. *Hale*, 137 Mass. 266.

There was actual occupation of an office, personally, and of storehouses through agents within the true definition of the statute words "store or shop." Contrary construction would defeat the object of the statue. Cases cited by plaintiff are different, in the facts, from case at bar. Plaintiff's only place of business, in Portland, where all his goods are on deposit. Traffic in Portland, not merely incidental to manufacturing. He was a Portland merchant living out of town, having his stock in trade, business, and place of business in town. *Hittinger* v. *Boston*, 139 Mass. 17; *Boston Loan Co.* v. *Boston*, 137 Id. 332.

Plaintiff in reply. *Noyes* v. *Hale*, *supra*, applies only to residents.

LIBBEY, J. This case comes up on an agreed statement of facts, and the deposition of the plaintiff is made a part of the statement. All the material facts stated in the deposition must, therefore, be taken as true.

In 1885, the plaintiff was an inhabitant of Cape Elizabeth, and for that year the city of Portland assessed two taxes against him: one against him as individual of $105, on "personal property, valued at $5,000;" the other against him as agent of $210 on "personal property, valued at $10,000." Warrants were duly issued against the plaintiff for each tax, and delivered to the constable of Portland for service, who on the fifth day of Nov. 1885, arrested the plaintiff, and to relieve himself from arrest he paid the taxes and costs. The sums paid for the taxes were paid into the city treasury.

This action is brought to recover back the sums paid, on the ground that the plaintiff was not legally taxable in Portland.

By R. S., c. 6, § 13, the plaintiff was taxable for all his personal property, in Cape Elizabeth, unless within one of the exceptions named in § 14. To sustain the tax in Portland it must appear that he was within one of the exceptions. The defendant claims that he was taxable under the first paragraph of § 14, which reads as follows, "all personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, shall be taxed in the town where so employed on the first day of April; *provided*, that the owner, his servant, sub-contractor or agent, so employing it, occupies any store, shop, mill, wharf, landing place or ship-yard therein for the purpose of such employment;" on the ground that on the first day of April he occupied a store, or shop in Portland.

The material facts upon the question in contention are as follows: The plaintiff was a cotton broker, engaged in buying and selling cotton, and occupied a desk and desk room in No. 28, Exchange street, Portland, which he rented of one Allen. The room in which he had the desk was occupied for insurance offices. He kept his account books and papers in the desk; received and answered his correspondence there; received samples of cotton there; but he made no sale there, kept no goods there other than the samples sent him by mail, which he never exhibited there for sale. He made his sales by taking his samples and exhibiting them to the purchasers at their places of business outside of Portland. A part of the payments was made by notes through the mail to his place of business, and a part was made at the places of sale. He had a large quantity of cotton stored in three warehouses in Portland, paying storage thereon, from which houses cotton was frequently shipped after sale; but he had no direction or control over the warehouses. He was not agent for any one in making sales during that year.

We think upon these facts it cannot be held that the plaintiff occupied a store, or shop in Portland. The words "store" and "shop" must be construed according to the common meaning of the language. The appropriate meaning of "store" as used in our

statute, given by Webster is, "any place where goods are sold either by wholesale or retail." "Shop" as used in the statute can have no broader meaning. This is the meaning given to these words by the court in Massachusetts, in a statute similar to ours. *Huckins* v. *Boston*, 4 Cush. 543; *Hittinger* v. *Westford*, 135 Mass. 258.

Here, the plaintiff had merely a desk privilege, in a room, mostly occupied by others, as insurance offices. He kept no goods or merchandise which he sold, or exhibited for sale there. The case of *Huckins* v. *Boston*, *supra*, appears to cover this. The facts, in that case were quite as strong against the plaintiff as in this case, but the court say: "It is manifest from the statement of facts, in this case, that the plaintiff did not hire any store, shop, or wharf in the city of Boston. He had a privilege in a counting-room only for the transaction of his business; what goods he had in Boston, were in stores or shops, or on wharves hired or occupied by others and not by himself. But it does not appear that the plaintiff himself hired or occupied any store, shop or wharf in the city of Boston, and of course, therefore, was not liable to taxation there."

The plaintiff did not occupy the warehouses within the meaning of the statute. They were occupied by the owners who stored in them the plaintiff's cotton, as bailees. *Desmond* v. *Machiasport*, 48 Maine, 480.

It is not sufficient that the plaintiff carried on business in the city of Portland. It must be shown that he occupied one of the places named in the statute in which he employed his personal property in trade.

As this conclusion disposes of both taxes, it is unnecessary to discuss the question, whether he was legally taxed "as agent."

Judgment for plaintiff.

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

HUGH MONAGHAN *vs.* ISAAC P. LONGFELLOW.

Washington. Opinion February 9, 1889.

Chattel Mortgage. Record. Notice. R. S., c. 91, § 2. Town clerk.

A chattel mortgage is to be considered as recorded, when received by the town clerk for record, even though the mortgage be not actually spread on the record book, and the time of reception is not noted on the record book, *provided*, the mortgage remains on file.

The town clerk is liable to any person injured by his delay in recording.

ON EXCEPTIONS. Replevin of a buggy wagon. The material question was whether the mortgage under which plaintiff claimed was duly recorded. The presiding justice ruled that the recording was not sufficient, and the plaintiff excepted.

The facts are stated in the opinion.

J. F. Lynch, for plaintiff.

Mortgage shall be considered as recorded when received. R. S., c. 91, § 2.

After delivery and entry, the effect is the same as if actually spread upon the record. The purpose of the law is to give notice to all persons interested, and applies when the mortgage is left with the clerk until recorded. *Jones* v. *Parker*, 73 Maine, 248, 251.

Notice: *Denny* v. *Lincoln*, 13 Met. 200. Certificate of town clerk, not impeachable. *Ames* v. *Phelps*, 18 Pick. 314.

C. B. Donworth, for defendant.

The instrument properly known as a Holmes' note, which is relied on by plaintiff as the basis of his title is a statute mortgage. R. S., c. 111, § 5; c. 91, § 7; *Shaw* v. *Wilshire*, 65 Maine, 485; and was not recorded at time of defendant's attachment of the buggy as the property of John W. Elsmore. It is both admitted and proved that the name of John W. Elsmore as promisor was not affixed to the record until after the attachment; the record therefore lacked the essential element of a note, i. e., the signature, hence the note was not recorded.

But if there was a constructive record of the note, the case does not show that it was in the proper place. The instrument should have been recorded in the city, town or plantation in which Elsmore resided. R. S., c. 91, § 1. And this means where he resided at the time of making the contract. *Bither* v. *Buswell*, 51 Maine, 601. No evidence was introduced touching Elsmore's place of residence at that time. No legal inference of residence in Wesley in the year 1886 can be drawn from proof of residence there in the year 1887.

Defendant did not have actual notice of the incumbrance before attachment. To amount to actual knowledge the notice must be "full, clear and explicit," and should impart "the same information as would be given by an inspection of the instrument." *Denny* v. *Lincoln*, 13 Met. 200.

But if defendant had actual notice, such notice does not make the incumbrance valid as against him. The language and intent of the statute is plain, and it provides that an agreement made part of a note such as is here relied on shall not be valid against third parties "unless it is recorded like mortgages of personal property." R. S., c. 111, § 5. *Rich* v. *Roberts*, 48 Maine, 548; *Sheldon* v. *Connor*, 48 Maine, 584; *Travis* v. *Bishop*, 13 Met. 304; *Bingham* v. *Jordan*, 1 Allen, 373; *Shaw* v. *Wilshire*, *supra*.

EMERY, J. The plaintiff had a mortgage bill of sale, in the form of a "Holmes' note," of the wagon he replevied from the defendant. The defendant, an officer, represents an attaching creditor of the mortgagor. The plaintiff passed his mortgage to the proper town clerk for record under R. S., c. 91, § 2. The town clerk noted on the mortgage the following: "Entered Nov. 8, 1886. Recorded in Book 2, p. 181." He began a record at that time but did not complete it, as he omitted the name of the mortgagor. He did not note in the record book, the date of his receiving the mortgage. The mortgage itself with the above indorsement, remained with the town clerk at the place where he kept his official records and files. In this condition of things, the defendant March 16, 1887, attached the wagon as the property of the mortgagor, the mortgage still remaining with the town clerk as above stated.

The question is, whether the mortgage "shall be considered as recorded" prior to the date of the attachment; whether the omission of the town clerk to note in the record book the time when the mortgage was received prevents the mortgage being "considered as recorded when received?"

It is purely a question of statute construction, since the efficacy of the record depends solely upon statute; but the statute being one regulating a business transaction, is to be read in the light of common business practice.

The first statute upon the subject, (1839, c. 390, R. S., 1841, c. 125, § 30,) provided that the clerk should note in the record book and on the mortgage, "the time when the same was received, and it shall be considered as recorded when left as aforesaid with the clerk." In *Handley* v. *Howe*, 22 Maine, 560, the court was divided upon the question. A majority held that the mortgage could not be considered as recorded until the clerk had noted the time of reception in the record book, as well as upon the mortgage. Much stress however was laid upon the words "left as aforesaid" in that statute. The mortgage was not to be "considered as recorded when left * * * with the clerk," but "when left as aforesaid with the clerk." This language was thought to postpone the protection of a mortgage, by record, till after the entry in the record book.

At the next revision of the statutes, after this decision, the language of this section was materially changed. The words "as aforesaid" which seemed to the court so important in that case were omitted, and it was then, as now, expressly and unqualifiedly declared, that the mortgage should "be considered as recorded when received." R. S., 1857, c. 91, § 2. The case of *Handley* v. *Howe* therefore should not conclude the construction of the present statute.

In a later case *Jones* v. *Parker*, 73 Maine, 248, it was recognized, that the noting of the time in the record book, cannot well be made until the mortgage is in fact recorded. The court, on page 250, said, "the entry of the time received, in the book where it is recorded, is required by law, but need not, perhaps cannot, be made until actually recorded," and again on page 251, the court

said, "The statute evidently contemplates that the record will not at once follow the delivery, else there would be no occasion for the provision, 'it shall be considered as recorded when received.'" The town clerk had noted the time of reception on the mortgage, and also on an index book or "entry book," but had not recorded the mortgage, nor made any note of its reception on the record book. Before the attachment, the mortgagee withdrew the mortgage from the clerk's office. The court held that the noting in the index or entry book was not the noting in the record book, which the statute required, but intimated that if the mortgage itself had remained in the clerk's office, the mortgagee would have been protected against the attachment. The decision against the mortgagee was expressly put on the ground that he had withdrawn his mortgage, before record and before attachment.

We think the opinion in the case cited suggests the right construction of the statute. It is evident, that mortgages cannot always, or often, be recorded as soon as received by the clerk, and that, if the mortgagee cannot be protected until actual record is made, he must often suffer loss, without fault of his. The statute therefore, declares that the mortgage "shall be considered as recorded when received." It is essential to save disputes, that the time of such reception should be fixed, and officially noted; hence the statute requires the clerk to note the time, on the mortgage, and also in the record book. These statute provisions enable the inquirer to always ascertain the time when the mortgage was received, and when it should be considered as recorded. If the mortgage be actually recorded, the inquirer finds the time of reception noted in the record. If the mortgage is not in fact recorded, but is on file, he finds the time noted on the mortgage itself. There is need of noting on the mortgage, at once when received, but there is no need of noting the time in the record, until the record is actually made. If there be no actual record, the inquirer looks to the files of mortgages, and there finds all he requires to know. If there be an actual record, that alone should show everything needful, as was said in the case last cited. A noting of the time of reception, in the index, or entry book, may be a convenience, but it is superfluous. The statute

seems to contemplate a noting of the time, in the record, and as a part of the record, and hence not to be done until the record is actually made. In the meantime, the mortgage itself, with the noting upon it, by remaining on the files, serves as a record.

Comparison of statutes often throws light upon the legislative intent. A difference of language in statutes upon kindred subjects indicates a different intent, as similar language indicates a similar intent. In R. S., c. 7, § 15, it is enacted that, "the register of deeds shall, at the time of receiving any deed or instrument for record, minute thereon the day and time of day when it was received and filed," and that "every such paper shall be considered as recorded at the time when such minute is made." This language expressly fixes the time of the making the minute, not the time when received, as the beginning of the protective power of the record. The language of the statute under consideration is noticeably different. Here, it is stated with equal positiveness that the paper "shall be considered as recorded when received."

Again, R. S., c. 81, § 26, providing for the preservation of attachments of personal property, by filing copies thereof, in the town clerk's office, enacts that the, "clerk shall receive the copy, — noting thereon the time,—enter it in a suitable book," etc. It does not state like c. 7, § 15, that the effect of filing shall date from the time of the noting, or entering by the clerk, and we accordingly held in *Lewiston Steam Mill Co.* v. *Foss*, *post*, that the time of the filing by the officer was the criterion of priority.

In the case at bar, the attaching creditor finding no record on the record book, (for in this case the attempted record was null) should have remembered that mortgages are not recorded until after they are received, and that some time may elapse between their reception and actual record, and that they yet are to be "considered as recorded when received." An inspection of the files of mortgages would have shown him this mortgage received for record, and the time of its reception duly noted upon it. He cannot insist that the time shall be noted upon the record, before a valid record is made.

The language of the note upon the mortgage is "entered" instead of "received," but there can be no doubt that an inquirer

would understand from the whole noting, that the mortgage was received for record on the day named, and that the town clerk intended thereby to state the day of reception. We cannot expect precision of language from clerks of small towns.

The question is mooted as to how long a clerk may delay actual record, and still the mortgage be considered as recorded while on file. It is not necessary to solve that question here. Undoubtedly, the clerk is responsible to any party injured by his unreasonable delay.

We have discussed this question at some length, because of the opinion in *Handley* v. *Howe*, *supra*, upon which the defendant relied. We think that opinion should not conclude us in construing the present statute. Our conclusion is, that the mortgage in this case, must "be considered as recorded when received," to wit, Nov. 8, 1886, and that, having remained on file, it prevails against the attachment. The ruling to the contrary was erroneous.

Exceptions sustained.

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

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

Waldo. Opinion February 9, 1889.

Injunction Bond. Damages. Counsel Fees.

Where there was a hearing in equity for an injunction, and the bill, on its merits, was dismissed, an action may be sustained on the bond given to procure the preliminary injunction, without a formal decree being signed and filed.

Counsel fees are not recoverable in an action on an injunction bond, unless they were necessarily incurred in some successful effort to dissolve the preliminary injunction.

ON REPORT. Action on a bond, given by defendants, to procure an injunction in equity, the injunction having been denied

after a general hearing on the bill. After this suit was begun, all other damages, except counsel fees, were adjusted, and the case was reported to the law court for the determination of two questions: First, whether the action was maintainable; and, second, if so, whether counsel fees were recoverable as part of the damages.

J. Williamson, for plaintiffs.

Court authorized to proceed on liberal grounds. Costs allowed: *Swett* v. *Patrick*, 12 Maine, 9, (eviction); *Jennings* v. *Norton*, 35 Id. 309; *Lindsey* v. *Parker*, 142 Mass. 582, (indemnity bonds); *Whipple* v. *Cumb. Mfg. Co.*, 2 Story, 661, (flowage case); Injunction suits: High on Injunctions, § 973; *Edwards* v. *Bodine*, 1 Bart. 227; Sedg. Dam. 488, note; *Andrews* v. *Glenville Woollen Co.*, 50 N. Y. Ct. App. 282; *Solomon* v. *Chesley*, 59 N. H. 24; *Brown* v. *Jones*, 5 Nev. 374; *The Derry Bank* v. *Heath*, 45 N. H. 524. Injunctions were, in these cases, merely incidental, ancillary, auxiliary to the main object. Here, prayer was for injunction only; efforts of counsel were directed towards a dissolution and against continuation in a perpetual form. Bill and injunction, one and inseparable. Bill being dismissed, injunction falls with it without special order. *Willis* v. *Yates*, 1 Coop. Sel. Cas. 498.

Fees paid by plaintiffs are immediate and direct elements of damage. Contra: *Oelrichs* v. *Spain*, 15 Wall. 211, is not cited by High.

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

No final decree filed and entered, in equity suit, this action cannot be maintained. R. S., c. 77, §§ 20, 23, 26, 32, 37; Rules 49 and 50 for practice in chancery.

Counsel fees not part of damages. *Oelrichs* v. *Spain*, 15 Wall. 211; *Oliphant* v. *Mansfield*, 36 Ark. 191. Fees limited to services in obtaining dissolution of injunction. High on Injunctions, §§ 964, 973 and 974; *Newton* v. *Russell*, 87 N. Y. 527; *Randall* v. *Carpenter*, 88 Id. 293; *Bustamenta* v. *Stewart*, 55 Cal. 115; *Porter* v. *Hopkins*, 63 Id. 53; *Langworthy* v. *McKelvey*, 25 Iowa, 48. In N. H. cases, terms of the bonds are broad enough to include fees.

EMERY, J. The now defendant, Haskell, brought a bill in

equity against the now plaintiffs, the Thurstons, praying to have them permanently enjoined from using certain waters. Pending this bill, the complainant therein procured a preliminary injunction of like nature, upon filing a bond to the then respondents as provided in R. S., c. 77, § 32. The condition in the bond was expressed to be, that the complainant should pay all damages and costs caused by such preliminary injunction. The then respondents made no effort to procure a dissolution of the preliminary injunction, but contested the equity suit generally. The equity suit was reported to the law court which sent down a rescript denying the injunction, and dismissing the bill with costs. No formal decree was signed and filed at the *nisi prius* term, but the rescript was filed, and the entry made on the docket as ordered by the law court, and execution was issued to the then respondents for their costs.

The then respondents now bring this action on the bond given for the preliminary injunction, and the action is reported to the law court for the determination of two questions:

1. The now defendants claim that this action is prematurely brought, and allege, as a reason, that the equity suit is not yet ended, no final decree having yet been made by a single justice at *nisi prius*.

We do not think such a decree is necessary to end an equity suit under such circumstances. The judgment of the law court in this case, was not an affirmation of any rights, or duties, to be declared and enforced by an executive decree. It was a simple negation of the complainant's claim. It stopped the suit; dismissed, ended it. The entry on the docket was a decree to be formulated by the clerk in the extended record. It sufficiently effectuated the order of dismissal.

2. The plaintiffs claim that among "the damages and costs caused" by the preliminary injunction, are the fees, he was obliged to pay counsel in defense of the equity suit.

Non constat that the preliminary injunction caused this expenditure. The plaintiffs, (then respondents) would have resisted the prayer for a permanent injunction, if no preliminary injunction had been obtained. With or without a preliminary injunc-

tion, there would have been the same defense,—the same pleadings,—the same evidence,—the same arguments,—the same judgment and consequently the same counsel fees. The expenditure was caused by the *suit*, and not by the preliminary injunction. It must, therefore, be excluded in assessing the damages, in this action upon the bond for the preliminary injunction, which bond was only to pay such damages and costs, as were caused by the preliminary injunction. *Oelrichs* v. *Spain*, 15 Wall. 211; *Newton* v. *Russell*, 87 N. Y. 527.

The plaintiff's counsel cites some decisions to the contrary, but we think our conclusion is supported by the better reason and authority.

The report states that all other damages have been adjusted, since the action was begun. Hence no damages can be recovered, and, as the action was maintainable, the defendants cannot recover costs. By the terms of the report, we can determine what end to make of the action, and we think that end should be an entry of "neither party."

Neither party.

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

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81 306
94 164

SARAH C. PRESTON, in equity, *vs.* ABBIE E. C. WRIGHT.

Waldo. Opinion February 18, 1889.

Equity. Taxes. Tenants in common. Lien. Reimbursement.

Where taxes were assessed, in one sum, upon property belonging to tenants in common, and they are paid by one of the owners in order to prevent a forfeiture of his interest, equity will not thereby establish a lien for reimbursement, upon the share of the other co-tenant.

ON REPORT. Bill in equity, heard on bill and demurrer. The facts are stated in opinion.

J. Williamson, for plaintiff.

Plaintiff cannot recover by an action at law. Payment of taxes inured to benefit of all the owners.

An owner, who pays the amount required to redeem his own share and the share of a co-tenant, cannot be entitled to recover of that co-tenant the amount equitably chargeable to his share without other proof, for he may not have paid by his consent or at his request. Such co-tenant may have concluded that the land was not of such value, that it would be beneficial to him to have it redeemed. He could not be compelled to redeem, but might, if he pleased, abandon his title to the purchaser and refuse to pay to him or to any other person the amount, which would be required to redeem it. If one, who may be obliged to redeem the share of a co-tenant to relieve his own share from incumbrance, could have no right to retain the share of such co-tenant as security and to obtain a reimbursement of the amount equitably chargeable to it, he might utterly fail to obtain compensation; and yet his co-tenant without making any payment might be entitled to the full possession and benefit of his share of the land, discharged from the incumbrance.

The law cannot be justly chargeable with such results, as produced by conformity to its provisions. The principle is well established and is of frequent application in the redemption of mortgages, that one having a legal interest in an estate under incumbrance, may redeem the whole estate when necessary, to enable him to redeem his own share or to relieve his own title from incumbrance, even against the pleasure of a co-tenant or other owner, and may be regarded as the assignee of the incumbrance upon the other shares or interests, and may retain possession of them to secure a reimbursement of the amount equitably chargeable to them. *Watkins* v. *Eaton*, 30 Maine, 529; citing *Gibson* v. *Crehore*, 5 Pick. 146; *Jenness* v. *Robinson*, 10 N. H. 215; *Wilkins* v. *French*, 20 Maine, 111.

Where the whole estate is subject to, and benefited by the discharge of an incumbrance not created by either party at interest, equity will apportion it ratably between the different parties. *Plympton* v. *Boston Dispensary*, 106 Mass. 544.

In this case, the tenant for life was held to pay the remainder man his proportion of a sewer assessment.

"The rule is perfectly well settled," remarks chief justice

Bigelow, "that a party may by express agreement create a charge or claim in the nature of a lien on real as well as personal estate of which he is the owner or possessor, and that equity will establish and enforce such claim. * * * It is obvious that the law gives no remedy by which such a lien can be established, and the trust thereby created be declared and enforced. Equity furnishes the only means by which the property on which the charge is fastened can be reached and applied to the stipulated purpose." *Pinch* v. *Anthony*, 8 Allen, 536.

W. H. Fogler, for defendants, submitted without argument.

DANFORTH, J. This is a bill in equity, to which a demurrer has been filed.

It appears that the plaintiff and defendants are tenants in common of a certain lot of land in Northport, upon which the town had from year to year assessed taxes; that the plaintiff has for several years paid the whole of the taxes assessed thereon, the last of which was that assessed for the year 1886, and that these payments were made for the purpose of saving her interest from forfeiture. It does not appear that any steps were taken by the authorities at any time to secure a forfeiture, except once in 1886 the lands were advertised for sale for the tax of 1884, assessed before the plaintiff had acquired a title.

The bill now asks, "that a charge or claim in the nature of a lien upon the interests of said defendants in said premises, for their proportion of said sums, may be established and enforced, and that in default of the payment of such proportion, with costs and expenses, said interest may be sold in the same manner as real estate is sold on execution, and with the same right, of redemption, and the money arising therefrom be in the same manner applied to her reimbursement."

There are many cases where a person pays the whole amount of an incumbrance upon real estate under a legal liability jointly with others to do so, or where he is compelled to pay for others in order to save his own share from forfeiture, he may be entitled to an assignment of that incumbrance from the owner that he may hold and enforce it against the land for his reimbursement.

No case has been cited, nor are we aware of any which goes any farther. In all these cases it is an assignment or what is treated as such of an actual existing incumbrance, in which the assignee succeeds to all the rights of the assignor and none other.

Undoubtedly, a tax duly assessed under a statute giving a lien, is an incumbrance upon the land. But it is a limited or an inchoate one. It gives no title to or interest in the land until it has been sold in the way provided by statute. In this case the lien has been discharged by the payment of the tax as well as by the lapse of time. So that if the town ever had any right to assign, which may well be doubted, it has none now. Hence, the plaintiff in paying the tax, relieved the land of no incumbrance which could by any possibility enable or assist her in getting possession of the land, or holding it as security.

The case of *Watkins* v. *Eaton*, 30 Maine, 529, was indeed a tax case. But there the lien had been perfected by a legal sale, by the proper authorities and one of the tenants in common while the right of redemption existed redeemed the whole, as the only way he could save a forfeiture of his own interest. At the same time he took from the purchaser a conveyance which was in effect an assignment of his interest, and the court held that such an interest was virtually a mortgage under which he was entitled to enter and hold until redeemed, and if not redeemed, at the expiration of the right, the title would become absolute. This would seem to be a proper, plain, and simple method of proceeding, and one in conformity with well settled principles of law.

But the plaintiff, apparently aware that she may not succeed under a right of subrogation, put the prayer of her bill in broader language and such as may, perhaps should be, understood as asking the court to establish for her a new lien, or a charge in the nature of a lien and enforce it by a sale as land is sold upon an execution. But surely after the lien under the statute is lost, it cannot be restored so as to be made available consistently with the statute.

Nor are we aware of any principles of law or equity upon which a new one can be established. It would seem to be equally a nullification of the statute. It is conceded that there is no personal liability for the money sought to be recovered. Then

why should this particular piece of property of the defendants more than any other be liable? Not because of any lien upon it, for if there ever was one, it no longer exists. Not because the money was expended for its benefit, because even that is problematical. It was optional with the town, to try the experiment of selling the land for taxes or try some other method of collecting them, and what is, perhaps, of more consequence, if the land were to be sold for taxes or the money which paid them, the defendants had the right to a statute sale, and within the time allowed by the statute.

The law or the parties may impose a trust or lien upon real and personal property and a court of equity will enforce it; but it must be a very extraordinary case where the court will impose either.

This does not seem to be a proper case for the intervention of equity; for, though in the absence of correct information as to the ownership of the land it may have been competent for the assessors to have taxed it *in solido*, no reason is perceived why the plaintiff may not, by making the list for the guidance of the assessors required by R. S., c. 6, § 93, have her interest taxed separately.

Demurrer sustained.

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

HENRY KINGSBURY, in equity, *vs.* CHARLES P. MATTOCKS, assignee in bankruptcy.

Cumberland. Opinion February 18, 1889.

Alabama Claims. War Premiums. Assignee in Bankruptcy. Act of Congress, March 2, 1867; *June* 5, 1882.

In April 1863, the plaintiff paid war premiums on certain vessels insured against capture or destruction by confederate cruisers. In May 1868, he was adjudicated a bankrupt, under the act of Congress of March 2, 1867, and the defendant was appointed his assignee. Under the act of Congress of June 5, 1882, by which the court of commissioners of Alabama Claims was

re-established, he made application to that court for reimbursement for the premiums so paid. Subsequently, by reason of a rule of that court, the defendant became a party to that proceeding, prosecuted it to final judgment and received the proceeds thereof. The only question presented is, whether the defendant holds that sum in trust for the plaintiff, or for his creditors in bankruptcy.

Held, that creditors can hold only such property, &c., as passed by the assignment. At its date, this claim was not in existence, either as property, or the representative of property, the same as were claims for property destroyed. It never became such until the act of June 5, 1882, and therefore did not pass by the assignment to the assignee.

ON REPORT. Bill in equity, heard on bill, answer and agreed statement.

This was a bill in equity brought by Henry Kingsbury, against his assignee in bankruptcy, to determine the question whether the money collected from the Alabama court by the assignee, upon a judgment therein obtained for war premiums, paid by the plaintiff, belonged to him or his creditors.

The material facts are stated in the opinion.

Clarence Hale, for plaintiff.

Adjudication of Alabama court not conclusive between parties. It leaves the rights of claimants to their own courts.

Money did not pass to the assignee. *Heard* v. *Sturgis*, 146 Mass. 545; *Brooks* v. *Ahrens*, 68 Md. 212; *Tafts* v. *Marsily*, 47 Hun. 175; U. S. Rev. Stat., § 5046.

Payment of war premiums created no right against the U. S. Reimbursement to parties, an act of generosity and bounty by the government. Claims which have passed to assignees were for property, cases of spoliation and unjust capture. *Comegys* v. *Vasse*, 1 Pet. 193; *Pierce* v. *Stidworthy*, 79 Maine, 234; *Leonard* v. *Nye*, 125 Mass. 455; *Grant* v. *Bodwell*, 78 Maine, 460; *Williamson* v. *Colcord*, 1 Hask. 621. Recovery of judgment for war premiums proof that there was no injury to property.

Claims for war risk insurance excluded by Geneva Arbitrators. Protocols 5, 6 and 7; Messages and Documents, State Department, part 2, vol. 4, 1872–3, pp. 19 to 22. After paying first class claims, Congress did not intend by the act June 5, 1882, distributing the remaining $9,500,000 to discharge a debt of the

government. It was the application of a surplus, to a praiseworthy object, a meritorious action rewarded. *Emerson's Heirs* v. *Hall*, 13 Pet. 221. If regarded as a claim, Congress would have considered how far shippers had reckoned war premiums in the increased price of their goods.

As claims against private persons, they would impose no legal obligation,—being voluntary payments for another's benefit, &c. *Warren* v. *Whitney*, 24 Maine, 561; *Dodge* v. *Adams*, 19 Pick. 429; *Hackett* v. *Bradley*, 7 Conn. 57. But war premiums were paid not for another's but the party's own benefit. That war premium men asked for a gratuity, raised no assignable claim. Shep. Touch. 322, 328; 4 Kent Com. 206. They had nothing but an unassignable hope of future generosity. *Burnand* v. *Rodocanachi*, 7 App. Cas. 333, 336. Test of assignability is the nature of the claim, not the fact that such a claim was made. *Emerson* v. *Hall*, *supra*; *Erwin* v. *United States*, 97 U. S. 392.

No claim passed to assignee, the payment under the act of 1882 being merely an act of generosity of the government. Assignees succeed to bankrupts' rights as of date of bankruptcy. Executors represent the person of their testator, hence decisions of the court relating to claims growing out of capture in respect to estates of deceased persons, do not apply to estates in bankruptcy.

Equity proper remedy. R. S., c. 77, § 6, par. 4 and 7; *Tappan* v. *Deblois*, 45 Maine, 122; *McLarren* v. *Brewer*, 51 Id. 402; (defendant a trustee), Story Eq. Jur., vol. 2, p. 434; *Platt* v. *Bright*, 9 N. J. 148.

C. P. Mattocks, for defendant.

The money, received by the defendant, being in the nature of, and not distinguishable in principle from "indemnity for an unjust capture," passed to the defendant, as a part of said bankrupt estate. *Comegys* v. *Vasse*, 1 Pet. 193.

Assignment is sufficient in form, although a different form of assignment for such claims may have been provided by law. *Leonard* v. *Nye*, 125 Mass. 455.

The decision of a court which makes a distinction between, or divides into classes, claims provable under the Acts of Congress of June 23, 1874, and June 5, 1882, is supererogative of the work

already done by Congress, which, in the Acts referred to, places all such claims upon exactly the same basis, as being for injuries actually received, incurred by the same cause, and based upon a certain fixed value lost by the claimant, either by the destruction of property, or the enforced payment of money. The amount of such loss, in either case, to be proven in the same manner, and any concession made by the arbitrators, to prevent delay in the arbitration, in no way controls the scope of the acts of Congress making the distribution. Opinion by French, J., Ct. Com'rs Alabama Claims. Dissenting opinion, Field, J., in which Allen, J., concurs, in *Heard* v. *Sturgis*, cited by plaintiff.

This court has already decided that claims provable under the act of June 5, 1882,—which is the act under which the sum in controversy was received,—pass by the residuary clause in a will. *Grant* v. *Bodwell*, 78 Maine, 460; *Pierce* v. *Stidworthy*, 79 Maine, 234.

And if such claims pass by will, they are clearly distinguishable from the claim considered in *Emerson's Heirs* v. *Hall*, 13 Pet. 409, in which the sum in controversy was a mere gift or donation, and pass to the assignee in bankruptcy. *Leonard* v. *Nye*, 125 Mass. 455.

Since the decision in *Comegys* v. *Vasse*, 1 Pet. 193, in 1828, it has been the settled law of the land, and so held in the state and federal courts, that sums received by treaty or arbitrament with foreign nations for unjust seizure of, or injuries to the property of our own citizens, as under the treaty with Spain of February 22, 1819, or that with Great Britain, concluded May 8, 1871, are of the estate of the beneficiaries even before any method of proof has been established; that such sums are in no way gifts or donations, and pass to executors, administrators or assignees in bankruptcy. In the rare cases in which the attempt has been made to change this uniform current of decisions, and to characterize a part of such awards as gifts, and another part as a part of the estate of the claimants;—such attempt has always involved the necessity of trenching upon ground already fully covered by the several acts of Congress named making such distributions, and the reasoning made necessary by such attempt, tested by

itself, leads to no safe tangible ground, but becomes so dissipated as followed out, that the old maxim, *de minimis non curat lex*, well applies.

The complainant can have the decree he asks, only by making a distinction between money paid by the treasury for property destroyed and money paid in refunding insurance premiums enhanced by war risks;—a distinction, it is submitted that was never contemplated by Congress, which is nowhere even suggested in the body of any act of Congress; and a distinction unwarranted by natural justice. Much was due to American merchants who kept the flag of our merchant marine afloat in troublous times of the war, and it was but natural justice that they should be in some way relieved from the burdens imposed upon them; but it would be difficult to see why money paid for the hull or rigging of a ship destroyed, is more sacred in its character, although lost to the owner, than money paid for enhanced war premiums and equally as hopelessly lost.

DANFORTH, J. In April 1863, the plaintiff paid the sum of $1,233.12 as war premiums on certain vessels insured against capture or destruction by confederate cruisers. In May 1868, he was adjudicated a bankrupt and the defendant was appointed his assignee. Under the act of Congress of June 5, 1882, by which the Court of Commissioners of Alabama Claims was re-established, he made application to that court for a reimbursement of the premiums so paid. Subsequently by reason of a rule adopted by the court the defendant as assignee came in, prosecuted the claim to judgment and on September 15, 1886, received thereon the sum of $662.84.

The only question involved is, whether the defendant holds that sum in trust for the plaintiff, or as assignee for the creditors in bankruptcy. The fact that it was recovered in his name as assignee can have no effect upon the decision, for, that was the result of adjudication by the commissioners beyond their jurisdiction and therefore not conclusive.

It must now be considered as well settled, that claims allowed by that court under the act of June 23, 1874 or June 5, 1882 and

in accordance therewith, for the capture or destruction of property by the confederate cruisers, are such property as would and did pass by an assignment in bankruptcy bearing date after the capture or destruction, and before the allowance, or more accurately stating it, the claim itself passed by the assignment and the amount allowed referred back to the loss, took the place of the property so lost and goes where that would have gone. *Comegys* v. *Vasse*, 1 Peters, 193; *Leonard* v. *Nye*, 125 Mass. 455; *Grant* v. *Bodwell*, 78 Maine, 460; *Pierce* v. *Stidworthy*, 79 Maine, 234. In these cases the principles involved and cases decided are so exhaustively discussed as to leave nothing to be added. In *Comegys* v. *Vasse*, which is the leading case in this country, Mr. Justice Story states the ground of assignability thus, "vested rights *ad rem and in re*, possibilities coupled with an interest, and claims growing out of, and adhering to property, may pass by assignment."

This description, presumably, was not intended to include all classes of property assignable, but it clearly goes to the utmost limit of that represented by such claims as are the subject matter of the cases cited. It may, therefore, be safe to assume, that unless the claim under consideration comes within the above description it was not assignable, and the case at bar would be clearly distinguishable from those relied upon in defense.

The origin of the claim shows its nature. It comes from a simple contract between the plaintiff and his insurers. He paid them his money and as a full consideration, received their contract of indemnity in case of a loss. There were no expectations for the future, no foundation for any hope to get his money back, unless there was a loss. It was only a loss, to or under which, he could have any claim, or which could give rise to any "possibilities coupled with an interest;" it was only a destruction, or capture of the property insured, by the confederate cruisers, which could give rise to any claims "growing out of, and adhering to property." Here was no loss, or destruction, or capture of the property. Hence the whole thing began and ended with the contract. There was, indeed, an increase in the premium paid consequent upon the fact that cruisers were afloat, but so far as

appears the vessels were not rendered less valuable permanently, or their voyages less profitable by that increase.

Besides, if this claim was in any sense a debt, so as to be assignable, as such, there must necessarily be a debtor. Here there is, or was at the time of the bankruptcy, none. There is no pretense that there was any claim upon the United States government, and it is conceded, that in whatever it did in behalf of the claimants, was in pursuance of its duty as agent for, or protector of, its subjects. As such, it presented this claim for allowance to the government of Great Britain. Upon objection being made, it was decided that by the international law that government was not liable and the claim was withdrawn. This decision, if not conclusive was satisfactory to the contracting parties, and clearly in accordance with the law applicable.

Thus, we are brought to the conclusion that at the time of the plaintiff's bankruptcy, this claim was not assignable, was not in fact an existing right to any description of property, and therefore did not pass under the assignment to the defendant as assignee.

But it is claimed, that by the subsequent proceedings in regard to the claim it is made assignable, and that these proceedings should relate back to the beginning and thus carry the claim to the assignee.

It may be true, that the claim is now assignable. But on what principles of law or equity the result contended for should follow is certainly not apparent. The assignment covers only property existing at its date. The creditors are entitled to so much and to no more. In all the cases relied upon, the corner stone upon which the decision rests, is that at the time of the assignment the claim was assignable property and as such passed by the assignment. If this claim is now assignable it is by virtue of the act of Congress of June, 1882. There was nothing growing out of the original payment of the insurance money, any more than in the payment of money for any other purchase, to which the creditors were entitled. If they get this claim, they get something to which they were not and are not at all entitled.

It is evident, from the act referred to and the circumstances

under which it was passed, that Congress did not so intend. It is significant that the act does not, as in the prior one, give the amount awarded to assigns; but this may not be conclusive.

The board of arbitration allowed no amount whatever, for claims of this class, but a sum in gross for damages caused by the capture or destruction of property. The sum allowed was accepted in full for such losses. It then became the duty of the government to provide for such losses. This it did, and the balance left belonged to it as much as any money in its treasury. With this money it saw fit to pay in part, or all, as the amount might be found sufficient, of the sums paid for enhanced premiums. The act of 1882 was passed for this purpose. It was not founded upon any legal or equitable right or claim, nor was it an acknowledgment of such, but was purely and simply a voluntary act, not only as a government not suable, but such would have been its effect as between individuals. *Emerson's Heirs* v. *Hall*, 13 Peters, 409. But whether that statute confers a gratuity, or is the creation of a debt, the result is equally fatal to the defense in this case.

The only conflicting decision to which our attention has been directed is that of the commissioners, which rests very largely upon the decisions relied upon in the defense of this case. As we have seen, those cases differ materially and are not authority upon any question involved in this. On the other hand the conclusion here reached, is sustained by *Brooks* v. *Ahrens*, 68 Md. 212; *Taft* v. *Marsily*, 47 Hun. 175, and *Heard* v. *Sturgis*, 146 Mass. 545, in which, especially the last, will be found a very exhaustive discussion of the principles involved on both sides.

Bill sustained.

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

CATHARINE M. SAWYER *vs.* JOHN MCGILLICUDDY.

Androscoggin. Opinion February 18, 1889.

Landlord and tenant. Common stairway. Care and maintenance.

The defendant was the owner of a building, on the second floor of which were several tenements, all of which, were leased to different tenants. There was one stairway for the accommodation of all, and used in common by the several tenants. The plaintiff was one of the tenants, and while in the proper use of the stairway was injured by a defect in the landing.

Held, that it was incumbent upon the defendant, as owner and landlord, in the absence of an express agreement to the contrary, to suitably care for and maintain for the tenants, the stairway, at his own expense.

ON EXCEPTIONS. This was an action for negligence to maintain in good repair a stairway, connected with certain rooms, which the defendant rented to the plaintiff in his building. The ingress to the rooms was by a stairway running through the building. The same stairs were erected and designed for all the rooms in the building, some of which were leased by the plaintiff, others to other tenants. On the point of defendant's liability to maintain the stairway and landing, the presiding justice gave the following ruling:

"The parties in this litigation are landlord and tenant. The plaintiff is a tenant of the defendant,—her landlord; and she alleges negligence in his maintaining a passage-way or stairway, annexed to her rooms, which were her tenements. In the first place, what are the legal relations of the parties? The landlord who lets a tenement, as a rule, does not imply a covenant that the premises are in repair,—that they are fit for occupation. He sells the use of the premises for the time being; he ceases for the time being to be the owner of the premises, and the tenant becomes the owner, has the possession and control. A landlord is never obliged to repair the leased premises unless he has expressly agreed to do so,—unless as part of the letting, there is an agreement that he will do so.

Some authorities (that is, the courts in some states) make an exception to this rule in the case of a passage-way common to

different apartments, let to different persons by the same landlord; but even that exception is strongly combatted by some courts.

I think the tendency of decision in this state is favorable to the view taken by the plaintiff; and while it is the exception to the rule, at any rate, I so rule for the purposes of this case. I give to you this rule to govern this case; namely,—if the defendant let rooms to plaintiff in his building, having, at the same time, other rooms let to other persons, or to any other person, and there was in the building or outside of it, annexed to it, a stairway designed for and being common to all the rented rooms or apartments,—in such case there is an implied covenant, between the landlord and tenant, that he will suitably care for and maintain the passage-way or stairway for the tenants, unless there be an express agreement that he is not to maintain the stairway, at his own expense."

Plaintiff was injured by the falling of a part of the landing at the foot of the stairway.

Verdict for the plaintiff.

To the instruction (founded on the facts stated by the judge) touching a tenant's liability to maintain and keep the stairway in repair, the defendant excepted.

D. J. McGillicuddy, *G. E. McCann*, with him, for defendant.

There was no agreement to repair.

Landlord not obliged to repair, in absence of express agreement. *Libbey* v. *Tolford*, 48 Maine, 316. Plaintiff's claim of an exception to the general rule, in the case of common stairway and landings, cannot prevail; defendant occupied no part of the building. Cases cited: *Woods* v. *Cotton Co.*, 134 Mass. 357; *Bowe* v. *Hunking*, 135 Id. 380; *Humphrey* v. *Wait*, 22 U. C. C. P. 580; *Purcell* v. *English*, 86 Ind. 34, and cases there cited. *Cole* v. *McKay*, S. C. 29, N. W. Rep. 279. Defendant did not occupy the passage-way "in common with the other tenants" as in *Looney* v. *McLean*, 129 Mass. 33. Same difference in *Toole* v. *Becket*, 67 Maine, 544.

F. L. Noble, for plaintiff, cited: *Larue* v. *Hotel Co.*, 116 Mass. 67; *Looney* v. *McLean*, 129 Id. 33; *Lowell* v. *Spaulding*, 4 Cush.

277; *Woods* v. *Cotton Co.*, 134 Mass. 361; *Kirby* v. *Boylston Market Asso.*, 14 Gray, 249; *Readman* v. *Conway*, 126 Mass. 374; *Toole* v. *Becket*, 67 Maine, 544; *Priest* v. *Nichols*, 116 Mass. 401; *Campbell* v. *Sugar Co.*, 62 Maine, 552; *Norcross* v. *Thoms*, 51 Id. 503; *McCarty* v. *Savings Bank*, 74 Id. 315, 321.

DANFORTH, J. The ruling complained of in this case raises but a single question, namely, the liability of the defendant, upon the facts stated in the exceptions, "to suitably care for and maintain the passage-way or stairway for the tenants, unless there be an express agreement that he is not to maintain the stairway, at his own expense." By the ruling, this liability is imposed upon the defendant by virtue of an implied covenant. It is to be noticed that the plaintiff's right to recover is not made to rest upon this proposition alone. This is only one of the elements of her case, among many others, upon which we must assume that correct instructions were given.

It appears that the defendant was the owner of the building including the stairway in question; that in the upper part of the building there were several different tenements leased to as many different tenants of whom the plaintiff was one; and that the stairway was built for the accommodation of the different tenants and used by them in common as a passage-way to their several rooms; and as conceded in the defendant's argument the plaintiff received the injury which is the subject of this suit "by falling through the landing at the foot of the stairway."

In such cases the rights and liabilities of the parties are the result of a contract between them. In the absence of an express contract, the law will imply such as shall be deemed reasonable, under all the circumstances. In this case there was an express contract as to the tenancy, but that left the obligation to repair, to such, as might be implied by law. In the first instance, the burden of repairs reasonably necessary for the protection of all persons rightfully upon the premises, is upon the owner; and if he would be relieved, the burden is upon him to show that the obligation has been transferred to another.

In the ordinary case of landlord and tenant that transfer is made. The lease is an instrument of conveyance. The lessee

takes the possession of the property and has the full control of it. The landlord has no right of entry even, except so far as it may have been reserved. The tenant for the time being is in the place of the owner, taking the property as he finds it. These circumstances are so connected with the repairs, that the law deems it reasonable and proper that, in this respect as well as in others, the tenant should take the place of the owner and authorizes the inference that such was the intention of the parties, in the absence of controlling facts. This would also be true of all appurtenances connected with, or ways to, the premises when such appurtenances and ways were included in the lease, with the same right of possession in the tenant as in the premises. This rule is now beyond controversy.

But when the reason ceases, the law ceases. Though the relation of landlord and tenant exists between these parties as to the tenement occupied by the plaintiff, it does not as to the stairway in question. Over that she has only a right of way in common with others; no right of exclusive, or any possession, except as she is passing over it; no right of entry even for any other purpose. Hence in these circumstances we find no evidence to sustain an implied covenant on the part of the plaintiff to make the repairs, or that the obligation to do so had been transferred from the defendant, who still retained possession and control of the stairway. If this inference could be drawn against the plaintiff, it could be with equal propriety against each of the other tenants, and each would have a claim against the others severally for neglect. The obligation could not be upon all jointly for their titles were several.

It is suggested that the defendant is not an occupant of any part of the building. This may be true. But it is not necessary that a person should be actually in, or upon, the premises in order to have the possession and control of them. The defendant was the owner of the stairway, as well as the other parts of the building, and though built for the accommodation of the tenements above and in that sense an appurtenant to, though not a part of them, it was as easily divisible from them as they from each other. By his leases he made such a division and, in effect, retained the

control of the stairway, with a right to enter at any and all times to himself. He could have retained no greater right, if he had retained one of the tenements for his own occupation, leasing the others as now.

But, while these facts not only fail to furnish any sufficient foundation for an implied covenant on the part of the plaintiff to make the necessary repairs upon the stairway, they are abundantly sufficient to sustain such a covenant on the part of the defendant. He was the owner of the tenements, and kept them for the purpose of profit. But to insure that, there must be some means of access to them. He preferred to make one passage-way for all, rather than one for each. This was an invitation, an inducement for all who needed such accommodation, to come and pass over this passage-way. It was a way provided for them to pass over precisely as a man provides a way for his customers to get to his place of business, and the same implied covenant to keep in safe and convenient repair must exist as much in one case as in the other.

But it is said, that when a person has a right of way over the premises of another the presumption is, that he is bound to repair at his own expense. This may be true, when the way is held under a license, to be used by the licensee, for his own benefit exclusively. But such a way and one provided, as this was, as an inducement to obtain tenants for the tenements, or customers to the business of the person providing it, are two very different things. This distinction is clearly illustrated in *Campbell* v. *Portland Sugar Co.*, 62 Maine, 552, 561. See also *Stratton* v. *Staples*, 59 Maine, 94.

Thus it is evident that the ruling in question rests upon sound principle.

We are of the opinion that, though there may be some conflict in the decisions real or apparent, the preponderance of authority will bring us to the same result. In Massachusetts, the question seems to have been clearly settled in accordance with the ruling. The same principle runs through all the cases,—that the obligation to repair, in the absence of any express agreement, depends upon the right of possession,—and that an appurtenant attached to and

made for the accommodation of several different tenements, leased to different tenants, remains in the possession of the lessor, though the use of it goes to the lessees.

Milford v. *Holbrook*, 9 Allen, 17, was the case of an awning made for and attached to a block containing three shops leased to different tenants. It was held, that though all had the use of the awning, yet the possession remained in the landlord, and he was held liable for any defects in it.

Elliot v. *Pray*, 10 Allen, 378, is in point, showing that under similar circumstances the landlord and not the tenant is bound to keep the passage-way in repair.

In *Shipley* v. *Fifty Associates*, 101 Mass. 251, the whole building was leased to different persons in tenements, under leases requiring the tenants to make repairs, and yet it was held that the possession of the roof, however necessary to all, was not conveyed to any one of the tenants, nor to all jointly, and was therefore left in the owners, who were liable for new repairs.

Readman v. *Conway*, 126 Mass. 374, in principle is not distinguishable from the one at bar. Three tenements, with a platform in front for the benefit of all, were leased to different persons. In the opinion it is said: "If the lease to each tenant was of the shop occupied by him, and the landlords had constructed the platform for the common use and benefit of all the shops and the public, there would be no presumption in the absence of any agreement to that effect, that the tenants were to keep the platform in repair. Neither tenant acquired any exclusive right to use or control the part in front of his shop, and there is no such leasing of the platform as would exonerate the landlord from responsibility for defects in it."

Looney v. *McLean*, 129 Mass. 33, is in every respect like the one under consideration and sustains the ruling.

In this state the same question does not appear to have arisen, but the cases tend the same way. *Campbell* v. *Portland Sugar Co.*, *supra*; *Toole* v. *Becket*, 67 Maine, 544, and cases cited.

In *Bold* v. *O'Brien*, 12 Daly (N. Y.) 160, it is held that a tenant of a part of a building is not bound to make general repairs. If the landlord fails to make them and the building falls he is liable to the tenant.

In *Donohue* v. *Kendall*, 50 N. Y. Sup. Ct. 386, it is held that the owner of a tenement house owes to his tenants of apartments therein, and to strangers rightfully on the premises, the duty of keeping the stairways and hallways in repair.

So far as our attention has been called to other cases in defense, or any we have been able to find, we do not think them sufficient to overcome the authority of those above cited, and others similar. Some of them rest upon temporary obstructions or as in *Purcell* v. *English*, 86 Ind. 34, and *Woods* v. *Cotton Co.*, 134 Mass. 357, where the obstructions were accumulations of ice and snow. We see no reason to complain of these and such like decisions. They are not founded upon a defect, in the thing itself, and so are not in conflict with our decision in the case at bar. Nor do we intend to decide, that the landlord is liable for any fault of the tenant; nor is it a necessary inference that he would be holden for a defect in the construction of the stairway, or existing before the lease. It might be, that in the case of a tenant, in the absence of hidden defects, he would be bound by the condition of the stairway, the time of the lease, and bound to keep it clear from the accumulation of temporary obstructions arising from use or from natural causes, as ice and snow, leaving the landlord liable for repairs made necessary by the ordinary use or decay. These several questions do not arise in this case and we give no opinion upon them. An examination of the cases upon this subject will show, we think, that much of the apparent conflict in them, arises from the fact that different questions are involved.

Exceptions overruled.

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

ABIEL TRASK *vs.* WILLIAM WEEKS, AND STINSON WEEKS.

Lincoln. Opinion February 18, 1889.

Limitations. Statute. Waiver. New Promise.

The defendant being indebted in 1868 to plaintiff in account, which was barred by the statute, gave the plaintiff the following writing: "Whereas A. (the plaintiff) has unsettled accounts against B. and myself which it is not convenient to settle at this time, now I hereby agree to waive any and all objections to said accounts, which might be brought against them, on account of the statute of limitations, and hereby renew the promise to pay whatever balance shall be against us."

In an action on the account commenced in 1888, *Held*, not to be an independent covenant not to plead the statute in the future. To do so, would require a division of the contract, and if so construed, would be void for want of consideration, as the account was barred at its date. It was a new promise under the statute, having a sufficient consideration;—but is itself barred by the statute.

ON REPORT. The action, which was assumpsit, on account annexed, was to stand for trial, if in the opinion of the law court it could be maintained.

C. E. Littlefield, for plaintiff.

Agreement contains two elements; a waiver of the statute of limitations, and a new promise. Defendant perpetually estopped from setting up the statute. The agreement is a perpetual bar to its operation. *Warren* v. *Walker*, 23 Maine, 458, and cases there cited, approved in *Hodgdon* v. *Chase*, 29 Maine, 47, 50. Agreement not to plead the statute, held to operate as an estoppel. *Utica Ins. Co.* v. *Bloodgood*, 4 Wend. 652; *Lowry* v. *Dubois*, 2 Bailey (S. C.), 425; *Lindsay* v. *Jameson*, 4 McCord (S. C.), 93; *Glenn* v. *McCullough*, Harp. (S. C.) 484; *Stearns* v. *Stearns*, 32 Vt. 678; *Noyes* v. *Hall*, 28 Vt. 645; *Burton* v. *Stevens*, 24 Vt. 131, 132.

W. H. Hilton, for defendants.

Action cannot be maintained against William Weeks. R. S., c. 81, § 97. *True* v. *Andrews*, 35 Maine, 183.

Contract was essentially conditional. Plaintiff having never

presented or settled any, cannot maintain this action. *Lunt* v. *Stevens*, 24 Maine, 534. The new promise must identify the debt with certainty. *Landis* v. *Roth*, 109 Pa. St. 621; *Buckingham* v. *Smith*, 23 Conn. 453; *Clarke* v. *Dutcher*, 9 Cow. 674; *Gray* v. *Garcelon*, 17 Maine, 145; *Bell* v. *Morrison*, 1 Pet. 351. The agreement itself is barred. *Noyes* v. *Hall*, 28 Vt. 645. Agreement not to sue, different from agreement to waive statute. Agreement not to sue is a discharge, and ends the matter. Agreement to waive statute barred in six years. Agreement is a new promise. There should be a count upon it. *Howe* v. *Saunders*, 38 Maine, 350, 352.

Littlefield, in reply, cited: *Dinsmore* v. *Dinsmore*, 21 Maine, 433, 437; *Shipley* v. *Shilling*, 66 Md. 558; *Hunter* v. *Kittredge*, 41 Vt. 359; *Jordan* v. *Jordan*, 85 Tenn. 561.

DANFORTH, J. It is conceded that this action cannot be maintained against the defendant, William Weeks. The result as to the other defendant must depend upon the construction of the following written contract, viz:

"Whereas Abiel Trask of Jefferson has unsettled accounts against William Weeks and myself which it is not convenient to settle at this time, now I hereby agree to waive any and all objection to said accounts, which might be brought against them on account of the statute of limitations, and hereby renew the promise to pay whatever balance shall be against us." This contract was dated March 20, 1868, signed by the defendant Stinson Weeks and presumably delivered to the plaintiff at its date; and now after the lapse of twenty years this action is brought upon an account which is assumed to be that referred to in the agreement. To this action the defendant proposes to plead the statute of limitations. Is it competent for him to do so?

The plaintiff answers this question in the negative, claiming that the contract is equivalent to a covenant not to set up the statute in the future as a defense to the debt and is therefore technically an estoppel, or operates as an estoppel to avoid circuity of action, and relies upon *Warren* v. *Walker*, 23 Maine, 453.

It is clear that the contract cannot operate as an estoppel, for having been entered into after the statute limitation had taken

effect, there is no evidence in the case that the plaintiff, in consequence of it, has been induced to change his position, so as to lose any legal rights by delay or otherwise.

There appear also insurmountable obstacles to its operation as a covenant. To give it this, or any effect, it must necessarily have a sufficient consideration to support it. Such a contract, as seen in *Warren* v. *Walker*, is entirely independent of that mentioned in the statute as an acknowledgment of or a new promise to pay the debt, and must therefore have an independent consideration. In *Warren* v. *Walker*, this was evidently considered an indispensable requisite and much stress was laid upon the fact that a sufficient consideration there appeared.

In this case, though there appears abundant consideration for the contract construed as a new promise, none appears for such as the plaintiff claims it to be. As such it is immaterial that there is a subsisting debt, for while the debt is the subject matter of the contract, its state or condition is not changed, its obligation has neither increased or diminished. Its value might be greater in consequence of a valid contract of that kind, but a benefit to the plaintiff is no reason for an increased obligation to the defendant, and the statute limitation having already applied, the delay takes no legal right from the plaintiff. True, as a supplementary report, there is in the case an agreement from the plaintiff to the defendant which we may assume is a part of the same transaction, but it is not of the same tenor as the defendant's. It promises nothing. It simply agrees to waive the statute and "allow whatever may be found justly due them on settlement." This can only be construed to allow the amount on the plaintiff's account, and as the defendant had already provided for this by his promise to pay the balance only, the agreement could be of no value to him, or injury to the plaintiff. It can, therefore, hardly be considered a valid consideration for the defendant's contract as claimed by the plaintiff.

The proper construction of the agreement shows clearly that it is not in effect what the plaintiff claims, but that it was intended rather as the new promise, contemplated by the statute, to take the account out of its provisions, than an independent covenant not to set it up in defense. The plaintiff contends that it is both;

that it contains two elements; a waiver of the statute, and a new promise to pay the balance due. There may be two elements, but they constitute one contract only. They are so combined that they cannot be separated and must be construed as one whole. It is not to be expected even if it were possible, that the parties would thus put in one, two contracts so entirely different in their nature and effect, when either would have answered the purpose in view. That the parties at the time the contract was made, had in view the then condition of the account is evident from its terms. It refers in the preamble to the inconvenience of a settlement "at this time," agrees to waive, not the statute, "but all objections which" not may, but "might be brought against them on account of the statute" and then evidently to accomplish this purpose, adds, "and hereby renew the promise to pay whatever balance shall be against us" thus making the last clause a qualification of what went before. The waiving and the promise, must stand or fall together; the former being in force only as long as the latter, and hence the contract as a whole subject to the statute of limitations.

Thus it is seen that this case differs materially from that of *Warren* v. *Walker*, *supra*, in which the contract contained, as shown in the opinion, nothing which could be construed into a promise, but was a simple waiver of the statute founded upon a sufficient consideration.

In *Hodgdon* v. *Chase*, 29 Maine, 47, a much more restricted agreement and one more nearly like that in *Warren* v. *Walker* if not of the same effect, was treated as intended for an acknowledgment and new promise. Otherwise, it could not have been rejected for not being in writing; for, no statute requires a contract not to set up the statute in defense simply, to be in writing.

In *Kellogg* v. *Dickinson*, 147 Mass. 432, (reported in 7 N. E. R. 5) in which the contract differed from that in the case at bar only in the fact that the promise was renewed by a payment, it was held that the contract was not a covenant not to plead the statute in the future. That case is in point.

Plaintiff nonsuit.

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

SUSAN H. MCPHERSON, in equity, *vs.* JARVIS HAYWARD, and another.

Aroostook. Opinion February 19, 1889.

Equitable mortgage. Foreclosure. Redemption. Laches. Parties.

Where one has a contract for a conveyance of land to him, and procures another to complete the payments for him, and such other person does so, and takes the deed in his own name for his advances, the transaction constitutes a mortgage between the parties.

The relation of mortgagor and mortgagee, once established, continues until the mortgage is redeemed or discharged, or the right of redemption is legally barred.

The right to redeem may be barred by the exclusive and adverse possession of the land by the mortgagee for twenty years;—but such possession must be unequivocally adverse to the mortgagor, or those claiming under him.

Where the mortgagee's possession was under an arrangement with the mortgagor, for him to hold possession of the property, and manage it until he should satisfy his claim from the proceeds, such possession is not adverse until the mortgagee's claim is satisfied, or he asserts an absolute title in himself, and gives distinct notice of it to the mortgagor.

The question of laches does not arise under a bill to redeem a mortgage. The duration of the mortgagor's right to redeem is clearly defined by law, and cannot be abridged or enlarged by the court.

One part owner, of an equity of redemption, can maintain a bill to redeem, by joining the other part owners as defendants.

ON REPORT. Bill in equity, to redeem a mortgage, heard on bill and supplemental bill, answers, and proofs.

The bill, as originally framed, was to redeem a statute mortgage of certain lands in Aroostook county, given by Nathaniel Blake to G. K. Jewett, August 31, 1861. After an answer to this bill was filed, it was discovered that the title of the mortgagor, Blake, was by a conditional deed of the land from the state, which, it was alleged, became forfeited for non-payment; and a second answer was filed denying there was any right of redemption, it being claimed that the title to the land had vested in G. K. and E. D. Jewett October 18, 1862 under a release to them by the state.

It became a material question, as fully appears in the opinion, whether or not, the plaintiff was entitled to redeem the property,

upon the ground that the transactions between Blake and Jewetts, under whom the plaintiff and defendants claim, constituted an equitable mortgage.

Powers and Powers, *L. C. Stearns*, with them, for plaintiff.

Land agent's deed to Blake vested in him an estate upon condition subsequent. *Underhill* v. *Saratoga R. R.*, 20 Barb. 455; *Hayden* v. *Stoughton*, 5 Pick. 528; *Stone* v. *Ellis*, 9 Cush. 95; *Spofford* v. *True*, 33 Maine, 283; *Bangor* v. *Warren*, 34 Id. 324; Resolve of 1859 was a ratification of the deed, and changed the condition, if precedent, into one subsequent. It confirmed the original grant. *Thompson* v. *Bright*, 1 Cush. 420. Estate has not been revested in the state;—there was no re-entry. 1 Prest. Est. 48; Co. Lit. 214; *Willard* v. *Henry*, 2 N. H. 120; *King's Chapel* v. *Pelham*, 9 Mass. 501; *Tallman* v. *Snow*, 35 Maine, 342; *Hooper* v. *Cummings*, 45 Id. 359; *Webster* v. *Cooper*, 14 How. 488, 501. No inquest of office, as required by R. S., c. 93, recognizing the common law rule to same effect. *Wilbur* v. *Tobey*, 16 Pick. 177; *Thompson* v. *Bright*, *supra*. That statute applies only to conditions subsequent. Resolve of 1859 cannot obviate the necessity of entry or inquest; cannot defeat grantee's seizin and reseize the state. Acting retrospectively, it cannot effect Blake's rights under the deed. *Coffin* v. *Rich*, 45 Maine, 507; *Read* v. *Frankfort Bank*, 23 Id. 318; *Lewis* v. *Webb*, 3 Greenl. 326. They were beyond legislative control. *Stearns* v. *Godfrey*, 16 Maine, 158.

State could not convey without entry, possession recovered, or office found. *Thompson* v. *Bright*, *supra*.

Deed to Jewetts conveyed no title from state under the resolve if condition is precedent. Land agent could convey only the interest forfeited to a "part owner." G. K. Jewett had only the right to make payment to the state for Blake, and under the security of the Blake mortgage. He cannot deny his mortgagor's title. The release from the state goes to strengthen mortgagor's title. 2 Wash. Real Prop. 159; *Farmer's Bank* v. *Brownson*, 14 Mich. 369. Mortgagee became trustee of mortgagor. 2 Wash. Real Prop. 116. G. K. Jewett trustee of E. D. Jewett & Co. who rendered accounts in respect of the land from 1861, to 1875.

Mortgage of 1861, secures the whole debt. Its redemption destroys the basis of any other title resting on the release as an assignment of the mortgage.

Defendant stands in no better position than original mortgagee. Any assignment, by the release, would be discharged by operation of law. *Hatch* v. *Palmer*, 58 Maine, 271; *McCabe* v. *Swap*, 14 Allen, 188; *Carlton* v. *Jackson*, 121 Mass. 592. Equity will assume that the charge of the state is extinguished. *Forbes* v. *Moffatt*, 18 Ves. 385; *James* v. *Morey*, 6 Johns. Ch. 417. Jewett & Co. charged Blake in account with $1090.04, the consideration paid for deed from state, and made no claim otherwise than as mortgagees. Estopped from setting up any other title than mortgagees. *Hatch* v. *Kimball*, *supra*. That was the only title that passed to defendant Hayward. *Dugan* v. *Nichols*, 125 Mass. 43; *Green* v. *Holmes*, Id. 46, note; *Goss* v. *Coffin*, 66 Maine, 432; *Coe* v. *Persons Unknown*, 43 Id. 432; *Walker* v. *Lincoln*, 45 Id. 67. Assignee in bankruptcy conveyed only the right, title and interest of the bankrupts. Smith's L. C., vol. 2, 627. Defendant, Hayward, knew the arrangements between Blake and Jewett & Co. Equity to redeem not barred. White & Tudor's L. C. in Eq., vol. 2, part 2, p. 1984. Defendant estopped to deny right to redeem, by his answer. Smith's L. C., vol. 2, 627, 671; *Huntington* v. *Am. Bank*, 6 Pick. 340.

A. W. Paine, *Madigan and Madigan*, with him, for defendant, Hayward.

No title vested in Blake by deed from the state. *Stratton* v. *Cole*, 78 Maine, 553. Defendant does not hold premises in trust. Nature and grounds of trust, must be stated in bill. *Rowell* v. *Freese*, 23 Maine, 182. Trust based on Blake's ownership not well founded in fact. No fraud is charged, hence plaintiff must prove a use of Blake's money, or agreement to make a purchase for him. Jewetts paid with their own money. No trust: *Nortil* v. *Schead*, 29 N. J. Ch., 458; Hill's Trusts, *94, *96, *97, note; Perry's Trusts, § 133; *Pinnock* v. *Clough*, 16 Vt. 507; *Philbrook* v. *Delano*, 29 Maine, 410, 413, and cases cited; *Kelly* v. *Jenness*, 50 Id. 455; *Kendall* v. *Mann*, 11 Allen, 15; *Davis* v. *Wetherbee*,

Id. 19; *Conner* v. *Lewis*, 16 Maine, 268, 274; *Bottsford* v. *Burr*, 2 Johns. Ch. 405; *Steere* v. *Steere*, 5 Id. 1.

Contract to purchase must be in writing. *Walker* v. *Hill*, 21 N. J. Eq. 191, 202; *Wakeman* v. *Dodd*, 27 Id. 564; *Duffy* v. *Masterson*, 44 N. Y. 557; *Baker* v. *Vining*, 30 Maine, 121, 127.

Hayward, innocent purchaser for value. He had the right to rely on the record. Burden on plaintiff to prove notice, &c., of trust. Notice: Perry's Trusts, § 231, *et seq.* *Frost* v. *Belmont*, 6 Allen, 152, 162; *Duffy* v. *Masterson*, *supra.*

Blake's rights lost by laches. Hill's Trustees, *95; Robert's Fraud, 99; *Smith* v. *Clay*, 3 Bro. C. C. 639; *Wagner* v. *Baird*, 7 How. 234; *Michoud* v. *Girod*, 4 How. 503, 561; *Gould* v. *Gould*, 3 Story, 516; *Hendrickson* v. *Hendrickson*, 42 N. J. Eq. 657; *Bowman* v. *Wathen*, 1 How. 189; *Brinkerhoff* v. *Brinkerhoff*, 23 N. J. Eq. 477; *Merritt* v. *Brown*, 21 Id. 401; *Farnam* v. *Brooks*, 9 Pick. 212; *Plymouth* v. *Russell Mills*, 7 Allen, 438, 445; *Kline* v. *Vogel*, 90 Mo. 239; *Laughlin* v. *Mitchell*, 121 U. S. 411, 420, 421; *McGiveney* v. *McGiveney*, 142 Mass. 156; *Briggs* v. *Hodgdon*, 78 Maine, 514; *Fox* v. *Mackreth*, 1 L. C. in Eq. *92 and notes. Perry's Trusts, § 239, *et seq.*

Equity of redemption barred. Cases last cited, and *Slicer* v. *Bank*, 16 How. 571; *Fay* v. *Valentine*, 12 Pick. 40, 45; *Platt* v. *Squire*, 12 Met. 494; *Ayers* v. *Waite*, 10 Cush. 72, 75; *Chapman* v. *Pingree*, 67 Maine, 198; *Southard* v. *Sutton*, 68 Id. 575, 578.

Plaintiff's co-tenant should have been joined as party plaintiff. Story's Eq. Pl., §§ 182, 287, 201; 1 Daniel Ch. 260; *Stone* v. *Locke*, 46 Maine, 445, 449; *Beals* v. *Cobb*, 51 Id. 348; *Chamberlain* v. *Lancey*, 60 Id. 230; *Southard* v. *Sutton*, 68 Id. 575.

EMERY, J. The material facts found by the court are these:

Nathaniel Blake, January 4, 1853, bargained with the state land agent for the purchase of a large tract of state land, and for the purchase money gave three notes of that date for $1,186.57 each, and maturing in one, two and three years respectively. He at the same time, received from the land agent the usual deed, to himself and heirs and assigns, conditioned that it should be void, if the said notes were not paid at their maturity. Blake himself paid the first note, and also part of the second note.

Part of the purchase money remained unpaid, when the legislature by resolve approved March 11, 1859 declared that one-third of the sum then due should be paid by Sept. 1, 1860, one-third by Sept. 1, 1861, and the last third by Sept. 1, 1862, or the land should be held forfeited to the state. Blake then arranged with E. D. Jewett & Co., to pay the balance due on his notes and take security therefor upon the land. At the request of the Jewetts, Blake on Sept. 10th, 1861, executed and delivered to them a mortgage deed of the land to secure them for the payments they had made, and for the additional payments they should thereafter make on his land notes. This deed was recorded Sept. 17, 1861. The Jewetts completed the payments for the land under this arrangement, and then took a deed of the land from the state to themselves dated Oct. 18, 1862. This deed was taken solely as security for their payments made on Blake's account for the same land. The Jewetts under the same arrangement assumed the care of the land, and kept a regular account with it, charging what they had paid and interest, &c., and crediting proceeds, &c. The land was designated upon their books as the "Blake purchase." They made statements of this account to Blake yearly for several years,—till 1874 at least. The understanding was that the Jewetts were to re-imburse themselves out of the land for all expenditures and services in that behalf, and then convey the land to Blake.

In 1875, the Jewetts went into bankruptcy, and their title to this land, with other lands, passed to their assignee under the usual court deed March 14, 1876. The assignee transferred this title, with other lands to the respondent Hayward, April 23, 1879. Hayward knew of the mortgage deed and of the arrangement between Blake and the Jewetts, about this land.

Blake stated verbally in 1879, or 1880, that he saw little chance of being able to redeem the land from the Jewetts, and had given up the hope of redeeming. He declined however to execute a quitclaim deed when asked to do so by the Jewetts. It does not appear to the court, that he made the statement in answer to any inquiry from a would be purchaser, or that the land was purchased from the assignee on the strength of Blake's statement.

Blake died in 1880. Sarah H. McPherson, the complainant, now owns 35–36ths of such interest in this land as he left, and one Harriet Carr owns the other 36th. Mrs. McPherson filed this bill February, 1886, against Hayward, making Mrs. Carr a co-respondent. The bill prays for an account, and for a decree of redemption and conveyance of the land. The usual account had been demanded and refused.

The question of law is mainly, whether or not the papers and transactions above recited constituted a mortgage of the land from Blake to the Jewetts. If so, the rights of the parties would be those of mortgagor and mortgagee, and hence easily determined, by familiar rules.

If at the time of his arrangement with the Jewetts and his deed to them, Blake had the legal title to the land, the transaction clearly constituted a mortgage, through which the Jewetts acquired only a mortgagee's interest, leaving in Blake the full interest of a mortgagor. We do not think, though, that a legal title in Blake was essential to a mortgage relation between him and the Jewetts. Blake under his contract with the state, evidenced by the notes and the deed, undoubtedly acquired at least an equitable interest or estate in the land itself. In equity he would be regarded as the real owner, and the state as simply reserving a lien for the purchase money. He had a good title against all the world except the state. *Stratton* v. *Cole*, 78 Maine, 553. This interest of Blake, was clearly subject to sale, or assignment, and also subject to sale or assignment for security or in mortgage. *Jones on Mort.* 136. Blake could mortgage as well as sell his interest.

If the Jewetts acquired the fee directly from Blake, they were of course simply mortgagees, and could make their title absolute only in the way provided by law. They however acquired the beneficial ownership from Blake, and the legal ownership from the state. They acquired both solely for security for their advances to Blake for the purchase of the land. They received both titles not in trust, but as security for what Blake owed them. They were creditors, not trustees. Such a transaction constitutes a mortgage, however indirectly or circuitous the transfer, and

whatever the form of the instruments. The criterion always is,—whether the transaction was intended to simply secure one party for claims against the other. The most formal absolute deed of unconditional warranty, will not create a different relation, if the deed was clearly given for security only. *Reed* v. *Reed*, 75 Maine, 264.

If Blake had received the money into his own hands from the Jewetts,—had himself then paid it to the state,—had received from the state a conveyance of the fee to himself,—and had then conveyed it by absolute deed to the Jewetts as security for their loan to him, the transaction unquestionably would have created the mortgage relation between the parties. If instead of two deeds, as above supposed (first from the state to him, and, second, from him to the Jewetts,) Blake on paying the money had procured the state deed to be made direct to the Jewetts, for the same purpose of security, the mortgage relation would not have been changed. If instead of receiving and paying the money in person he arranged for the Jewetts to pay it directly to the state for him, and they took the state deed as security for their advances, it is difficult to see how that economy of method and detail would change the relations between them.

Where one has a contract for a conveyance of land to him, and procures another to complete the payments for him, and such other person does so, and takes the deed in his own name as security for his advances, the transaction constitutes a mortgage of the land between the parties. *Stoddard* v. *Whiting*, 46 N. Y. 627; *Carr* v. *Carr*, 52 N. Y. 251; *Honsor* v. *Lamont*, 55 Pa. St. 311; *Smith* v. *Cremer*, 71 Ill. 185.

We think the facts found in this case, establish the relation of mortgagor and mortgagee between Blake and the Jewetts as to this land.

This relation, once established, continues until the mortgage is redeemed and discharged, or the right of redemption is legally barred. No other subsequent change in the circumstances or conditions will change it. "Once a mortgage always a mortgage." *Reed* v. *Reed*, 75 Maine, 264. The death of Blake passed his right of redemption to his heirs. The bankruptcy of the Jewetts

transferred their right of security to their assignee, and on to the respondent Hayward. The relation between the complainant representing the heirs, and this respondent Hayward is still the mortgage relation, unless there has been a redemption, or the right to redeem has been foreclosed.

There has been no redemption, and the right of redemption, admittedly, has not been barred by any statute process of foreclosure. The only other mode of effectually barring that right, is for the mortgagee to take and keep possession of the land for twenty years, to the exclusion of the mortgagor, and in denial of his right. The possession of the mortgagee must be unequivocally adverse to the mortgagor, or to those claiming under him. *Jones on Mort.* 1144. Waiving the question whether the mortgagees' possession in this case was sufficient in other respects to raise a bar, it clearly was not antagonistic to the mortgagor until 1874, when they ceased rendering to him statements of the accounts of the land. Up to that time the mortgagor's rights in the land were recognized. The mortgagees' possession was under an arrangement with the mortgagor, for them to hold possession of the property and manage it until they should satisfy their claims from the proceeds. Such a possession does not become adverse until the mortgagees' claim is satisfied, or he asserts an absolute title in himself and gives distinct notice of it to the mortgagor. *Jones on Mort.* 1152; *Quint* v. *Little*, 4 Maine, 495.

The adverse possession in this case did not begin till 1874, if so early, and the right to redeem would not be barred till 1894.

No question of laches arises under a bill to redeem a mortgage. The duration of the mortgagor's right to redeem is clearly defined by law, and one the court cannot abridge, or enlarge by a single day. The right continues indefinitely, until barred by some process of foreclosure, or by twenty years' adverse possession of the land by the mortgagee.

It is immaterial whether or not the assignee in bankruptcy had notice of Blake's interest. The assignee was not a purchaser for value, nor an attaching creditor. He acquired no beneficial interest in the land, but simply succeeded to the Jewetts' title, by operation of law. He acquired no new right against Blake. Hay-

ward obtained no protection through the assignee's want of notice, and he himself had notice.

The non-joinder of Mrs. Carr as complainant is no objection to the maintenance of the bill. Mrs. McPherson, the sole complainant, must, of course, pay the whole amount due, in order to obtain a conveyance, a release, for the mortgagee is entitled to payment in full. Mrs. Carr is made a respondent. If she moves for a decree fixing the amount she should contribute and for a conveyance of her share to her by the complainant after redemption, that motion can be considered. As it is, the complainant is entitled to a decree. *Jones on Mort.* 1063.

The decree should be that the bill be sustained as against Hayward,—that he be ordered to render an account as mortgagee in possession,—that the cause be sent to a master to determine the amount due to Hayward. Further decrees can be made on the coming in of the master's report.

Bill sustained.

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

FRANCES E. ANDREWS, in equity, *vs.* CHARLES A. ANDREWS.

Cumberland. Opinion February 25, 1889.

Deed. Reformation. Mutual mistake.

To warrant the reformation of the description of land in a deed, the plaintiff must satisfy the court beyond reasonable controversy that the mistake was mutual.

Where the plaintiff's homestead farm was the subject matter of negotiations between the parties, neither of whom knew its actual external limits, and the deed subsequently made, through ignorance and misapprehension, included other small parcels of adjoining land, which many years before, one of the plaintiff's early predecessors in title had sold and conveyed, *Held*, that the mistake was one of fact; and it being mutual the deed should be reformed.

ON REPORT. Bill in equity, heard on bill, answer and proofs. The bill was brought to reform a deed of real estate, given by

the plaintiff to the defendant, October 14, 1884; the plaintiff claiming that a certain quarry, and three small lots of land were included in the description in the deed under a mutual mistake, and that they should have been excepted therefrom. The facts are fully stated in the opinion.

Frank and Larrabee, for plaintiff.

Equity will relieve as between the parties in case of admitted mutual mistake in deeds. Will reform the deed on parol evidence, though defendant denies the alleged mistake, if the court is fully satisfied on the evidence that there was a mistake. Story Eq. § 140 and note on p. 154; Id. § 156; *Stines* v. *Hayes*, 36 N. J. Eq. 369; *Lass* v. *Obry*, 22 Id. 55; *Gillespie* v. *Moon*, 2 Johns. Ch. 585, and note (Lawyer's Co-op. Ed.).

C. A. Strout, H. W. Gage, and C. A. Strout, for defendant.

Counsel cited: Story's Eq., vol. 1, § 156, 157. Mistake must be made out by clearest evidence, according to understanding of both parties. *Andrews* v. *Ins. Co.*, 3 Mason, 10; *Farley* v. *Bryant*, 32 Maine, 483.

Evidence: (strongest possible) Pom. Eq., vol. 2, § 859; (irrefragable) *Tucker* v. *Madden*, 44 Maine, 215; (beyond reasonable doubt) *Stockbridge Co.* v. *Hudson Co.*, 102 Mass. 49; S. C. 107 Id. 317; *Ins. Co.* v. *Davis*, 131 Id. 316. Nothing certain but the written deed where testimony is conflicting and contradictory. *Sawyer* v. *Hersey*, 3 Allen, 333. Intention of both parties must be misrepresented by mistake in the written contract. Mistake of one side not sufficient, unless other side agreed to it in same way. *Lyman* v. *Ins. Co.*, 17 Johns. 373. Mistake one side ground for recession, but not for alteration. *Young* v. *McGowan*, 62 Maine, 61. No fraud charged.

VIRGIN, J. The plaintiff seeks to reform her warranty deed to the defendant, upon the ground that its metes and bounds include not only her homestead farm which alone she sold and intended to convey, but also, by reason of a misapprehension of its true boundaries, three other small adjoining parcels of land together with a granite ledge, all of which prior to 1867 were a part of the original farm but were severally sold and conveyed

to various grantees by the original owner,—one of the plaintiff's early predecessors in title.

The office of a description of the land in a deed of conveyance is to furnish and perpetuate the means of identifying the premises conveyed. And if the language is precisely what the parties intended it to be when they adopted it, nevertheless, if back of that they through ignorance or misapprehension mistakenly believed that it correctly delineated the actual boundaries of the premises intended to be conveyed, the mistake is one of fact and not of law. *Burr* v. *Hutchinson*, 61 Maine, 514; *Bush* v. *Hicks*, 60 N. Y. 298; *Baker* v. *Pyeatt*, 6 W. R. 283.

To sustain her bill under the equity head of mistake, with no allegation of fraudulent or other inequitable conduct on the part of the defendant, the plaintiff must prove that the deed not only misdescribes the real estate which she sold and intended to convey, but also that which the defendant understood he purchased,—that the mistake was mutual. *Butman* v. *Hussey*, 30 Maine, 263; *Burr* v. *Hutchinson*, *supra; National Trad. Bank* v. *Ocean Ins. Co.*, 62 Maine, 519. In other words, that when the deed was executed, both parties understood it to convey the identical land which the bill alleges it ought and would have conveyed, had not the alleged mistake occurred; and that the reformation, in some at least of the particulars alleged, is necessary in order that the deed may correctly speak the actual intention of both parties and thereby perfect and perpetuate their real agreement which the deed in its present form fails to express. *Lumbert* v. *Hill*, 41 Maine, 475; *Adams* v. *Stevens*, 49 Maine, 362; *Young* v. *McGowan*, 62 Maine, 56; *Andrews* v. *Essex Ins. Co.*, 3 Mason, 373; *Kilmer* v. *Smith*, 77 N. Y. 226, 232; *German & Am. Ins. Co.* v. *Davis*, 131 Mass. 317. For if the plaintiff only was mistaken, a reformation obviating her mistake would only result in the inequitable consequence of shifting from the plaintiff to the defendant the burden of abiding by a contract which he never made. Hence if the parties differently understood the original agreement as to the identity of the premises, the relief would take on the form of cancellation rather than reformation. *Young* v. *McGowan*, 62 Maine, 56, 61.

1. As to the reformation sought in relation to the granite:

Miltimore Watts owned the farm from 1846 to 1880, when he conveyed it to the plaintiff's former husband by a deed which by metes and bounds included not only the farm as it then existed, but also the three small adjoining parcels of land and the granite ledge of thirty to forty acres before mentioned, all of which parcels and ledge he had in 1852, 1853 and 1867 conveyed to various grantees. The plaintiff being ignorant of the true bounds of the farm and knowing that her husband had sold off none of it, until the day before his decease in May, 1882, when he conveyed it to her, fully believed that the Watts deed to her husband correctly described the farm as it then existed. Her husband's deed to her afforded no information as to its limits, the description therein being simply, "my (his) homestead farm on which I now reside and formerly known as the Miltimore Watts farm." She confidently relied upon the supposed accuracy of the deed of Watts (her cousin) and beyond all doubt executed her deed to the defendant under this mistaken belief. It would be absurd to suppose that she knowingly undertook to warrant and defend the title to various parcels of land of which she had no title, especially as she took back a mortgage of the same premises to secure two-thirds of the entire purchase money, some of which, was not payable till seven years thereafter. And if we felt equally certain that this mistake as to the granite was mutual we should not hesitate to sustain the bill in respect of that at least.

Was the mistake mutual? In 1867, Watts by his unconditional warranty deed, conveyed to one Goss "all the granite" in some forty acres of the farm, "excepting and reserving so much thereof as may be necessary for the cellar and underpinning of a new barn and shed,"—with the right at all times to enter and remove it and a right of way therefrom through the pasture to the highway. Goss worked the ledge for a few years, when the granite proving too soft for other use than that of walls, he suspended all further operations thereon some ten or twelve years ago.

In relation to the granite, the plaintiff testified that she knew she did not own it, and that during their negotiations, she so informed the defendant, in which she was fully corroborated by

her present husband,—brother of the defendant. Clark, one of the defendant's witnesses, testified on cross-examination, that he informed the defendant of Goss' title in the granite. While admitting this information from Clark, the defendant and his wife testified that on mentioning Goss' title to the plaintiff she replied that Goss once owned it, but by reason of his neglecting to pick and pile the loose stone resulting from working the ledge, he had forfeited his right to the ledge and that she had a perfect right to sell it and had been so advised by her attorney. These statements she and her husband unqualifiedly denied, declaring that they never heard of any "forfeiture" until 1888, and gave a very different explanation of what was said about picking and piling the stone. Watts' deed was unconditional and no attorney ever advised her of any forfeiture. Moreover, Goss himself testified, that when he demanded of her pay for the granite which she appropriated for her new barn, she did not claim exemption by reason of any supposed forfeiture but under the exception or reservation expressed in Watts' deed to Goss.

Nevertheless, in corroboration of the testimony of the defendant and his wife, his other brother, sister and nephew testify that the plaintiff subsequently and frequently made like declarations relating to the forfeiture, and her right to sell the granite. Therefore, although the preponderance of this conflicting testimony might, in our view, be in favor of the plaintiff, still that is not sufficient; for to warrant the reformation of so solemn an instrument as a deed, the fact of mutual mistake must be "fully proved" or "established beyond fair and reasonable controversy." *Fessenden* v. *Ockington*, 74 Maine, 123. So far as the granite is concerned therefore, the plaintiff has not sustained the burden of proving that it was included in the deed by mutual mistake; and hence no reformation in respect of that can be decreed.

2. As to the small parcels of land formerly belonging to the farm but which Watts in 1882–3 sold and conveyed to Marston, Rice and Plummer respectively:

The evidence satisfies us beyond all cavil that the plaintiff's homestead farm, which she and her husband had successively owned and occupied, was the sole subject of the parties' negoti-

ations, without any regard to its specific boundaries. She made no attempt personally to point them out, for she did not know them. While they had talked about the granite and its title, nothing was said or known by either of them about these parcels which had been sold more than thirty years to adjoining owners. It is morally certain, that neither of them had any knowledge whatever of the external limits of the farm, about which they were negotiating. The defendant, to be sure, with one Atwood who resided in the neighborhood, started with the Watts deed to look over the farm, when the rain prevented their proceeding further than the ledge. And the defendant testifies that he, subsequently, with the same deed in hand perambulated the lines and found certain monuments which he described. But he is evidently mistaken about the monuments, for the evidence is overwhelming that those monuments were all erected long after the execution of the deed to him. Moreover he is also mistaken as to his perambulation of the lines; for the Watts deed furnished no evidence by which a stranger could locate the land described in it. It contains twelve or more different general courses, no one of which is specified, otherwise than as "thence northerly," or "easterly," etc.; and the length of none of the lines is given. The terminus of each line after leaving the respective points of departure, is defined as "to the land owned," or "formerly owned by" some person named, or "to the side line of" some lot named, etc. Atwood, Marston, Plummer and others testified that it is impossible to trace the lines thus generally defined in the Watts deed without a knowledge of the bounds of the adjoining lands and lots mentioned. Even the surveyor, who made the plan, could not trace the lines with that deed alone. Besides, the defendant himself, long after he took possession under his deed, built or repaired the fence between the farm and the Plummer parcel without suspicion that his deed in terms included that parcel. And Marston was cutting the wood on his and Rice's parcel year after year without any suggestion of trespass from the defendant.

Finally, we have no doubt that if the deed be reformed as to these three small parcels, the defendant will then have all the land, save the granite, which he supposed he was buying, and we by no

means feel sure about the granite. He believed he made a good trade, without any knowledge of its external boundaries, and repeatedly declared he could sell for $500 more than he gave. The buildings were good, some of them new on which he obtained an insurance for $2500, or $20 more than he gave for the whole farm and the twenty tons of hay then in the barn.

Our conclusion, therefore, is that the defendant be perpetually enjoined from prosecuting his action at law on the plaintiff's covenants in her deed to the defendant, so far as the three parcels of land sold by Watts to Marston, Rice & Plummer are alone concerned; and that the defendant, on demand, execute a deed of release to Marston of the Marston & Rice parcels and a deed of release of the Plummer parcel to Plummer, both of which deeds shall be prepared by the plaintiff and recorded in Cumberland registry of deeds at her own expense. And that the mortgage of defendant to the plaintiff be reformed by the plaintiff's releasing the same parcel to the defendant.

Decree accordingly.

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

HENRY A. HURD, admr. *vs.* INHABITANTS OF ST. ALBANS.

Somerset. Opinion February 25, 1889.

Towns. Hiring money. Ratification.

No suit can be maintained against a town to recover money loaned to its officers, unless the plaintiff proves that they had authority to hire the money, or that the hiring has been ratified by the town, or that the money has been applied to the legitimate uses of the town, and such application ratified by the town.

The payment of a town debt, with money hired without authority, will not be sufficient to charge the town, unless the town has ratified the payment.

ON REPORT. The law court were to render its decision upon so much of the evidence as was legally admissible.

The action was assumpsit, brought to recover the amount due

upon two town orders dated March 22, and April 5, 1882; one being given for the renewal of a former order, and the other for money hired to pay town debts. The writ contained two special counts, one upon each of the orders, and the common money counts joined.

J. O. Bradbury, for plaintiff.

Counsel contended that the money was loaned to the town under its vote in 1875, "to instruct the selectmen to hire money when needed, necessary for building a barn and replacing tools destroyed;" and the loan had been ratified by payment of interest. Plaintiff should not suffer by failure to produce the records, by which the application of money could be proved. Facts are different from *Otis* v. *Stockton* and *Bank* v. *South Hadley*.

Merrill and Coffin, for defendants.

To recover upon the special counts, plaintiff must show the orders were given pursuant to vote of the town to hire money. Town officers must have express permission to issue town notes. "This," says VIRGIN, J., "is too well settled to require the citation of authorities." *Parsons* v. *Monmouth*, 70 Maine, 262, 263; *Bessey* v. *Unity*, 65 Id. 342; *Bank* v. *Stockton*, 72 Id. 522; *Rich* v. *Errol*, 51 N. H. 350; *Nashville* v. *Ray*, 19 Wall. 468. Not only show a vote, but must bring claim strictly within its terms. *Warren* v. *Durham*, 61 Maine, 19; *Marsh* v. *Fulton Co.*, 10 Wall. 684.

Plaintiff's name not in the account of money borrowed under vote of 1875.

Under the general count, plaintiff has not proved the money into town treasury; its application to payment of town debts; or ratification, of the action of its selectmen, by the town. *Otis* v. *Stockton*, 76 Maine, 506; *Brown* v. *Winterport*, 79 Id. 305.

Printed town reports not accepted by the town, no acknowledgment or ratification. *Dickinson* v. *Conway*, 12 Allen, 487, 491. Counsel also cited: *Dedham Inst.* v. *Slack*, 6 Cush. 409; *Benoit* v. *Conway*, 10 Allen, 528; *Bank* v. *Lowell*, 109 Mass. 214.

WALTON, J. This is a suit to recover money supposed to have

been loaned to the town of St. Albans. It appears that one J. M. Skinner, who, for many years, acted as chairman of the board of selectmen of the town, hired the money, pretending that it was needed to pay town debts, and that he has absconded, leaving orders outstanding against the town to the amount of about $17,000, although his last report to the town showed an indebtedness of only $3,500; and the defendants claim to believe that Skinner embezzled this money, together with other large sums; and it is upon this ground that they resist the payment of it.

It is now settled law in this state that no suit can be maintained against a town to recover money loaned to its officers, unless the plaintiff proves that the officers had authority to hire the money, or that the hiring has been ratified by the town, or that the money has been applied to the legitimate uses of the town and such application ratified by the town. Even the payment of a town debt with money hired without authority will not be sufficient to charge the town, unless the town has ratified the payment. *Lincoln* v. *Stockton*, 75 Maine, 141; *Otis* v. *Stockton*, 76 Maine, 506; *Brown* v. *Winterport*, 79 Maine, 563.

A careful examination of the evidence in this case fails to satisfy us that the selectmen had authority to hire the money sued for, or to give the orders declared on, or that the money, or any portion of it, has been applied to the legitimate uses of the town, or to the payment of any town debt, or that the town has ever ratified the action of its officers in any of these particulars. It is therefore clear that the action is not maintainable.

Judgment for defendants.

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

STATE, by complaint, *vs.* JAMES KELLEHER, applt.

Cumberland. Opinion February 25, 1889.

Intoxicating liquors. Dwelling-house. Stable. Appurtenant.

One charged with the illegal keeping of intoxicating liquors in a dwelling-house and its appurtenances, cannot be rightfully convicted upon proof that he kept liquors in a stable not used in connection with the dwelling-house, the stable being used exclusively by the defendant, and the dwelling-house exclusively by another person.

A stable, to be appurtenant to a dwelling-house, must be used with it, so that the two buildings will constitute but one tenement or messuage.

ON EXCEPTIONS. This was a search and seizure process, begun in the municipal court of Portland, and tried, on appeal, to a jury in the superior court. The jury found the defendant guilty, and he excepted to the rulings and refusals of the presiding justice to instruct the jury.

From the evidence it appeared that the dwelling-house, described in the warrant, was occupied by one Quinn, but no liquors were found there; and the stable, in which liquors were found, was occupied by the defendant. The warrant, which was issued against both persons, directed a search to be made "in the dwelling-house and its appurtenances." The defendant contended, among other things, that the stable occupied by him was not appurtenant to the dwelling-house, and requested the following instructions:

"Unless it has been proved, in this case that the defendant occupied the dwelling-house described in the complaint June 16, A. D. 1887, or about that time, the jury must return a verdict of not guilty. Also, the stable was not appurtenant to the Quinn house and was not used in connection with it."

The presiding justice declined to give these instructions. The view of the court, upon this branch of the case, renders a report of the other exceptions by defendant, unnecessary.

D. A. Meaher, for defendant.

Complaint authorized search of Kelleher's dwelling-house only.

McGlinchy v. *Barrows*, 41 Maine, 74. The testimony of the officers shows that Quinn did not have the use or control of the stable; hence case not like *State* v. *Burke*, 66 Maine, 127, where a woodshed was held to be part of the dwelling-house. Stable not appurtenant to the dwelling-house; it stood twenty-five feet away; Quinn had nothing to do with it.

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

First requested instruction could not be given, as desired, since if Kelleher occupied an appurtenance of the dwelling-house, and carried on illegal traffic therein, though not in the house proper, he was liable under the complaint.

The other requested instruction is a question of fact for the jury to decide. *State* v. *Burke*, 66 Maine, 127; *State* v. *Wood*, 68 Id. 409; *State* v. *Bartlett*, 47 Id. 395; *Elliot* v. *Grant*, 59 Id. 418; *Ripley* v. *Hebron*, 60 Id. 379.

WALTON, J. The defendant is charged with the illegal keeping of intoxicating liquors in a dwelling-house and its appurtenances. No liquors were found in the dwelling-house described. The liquors seized were found in a stable. And the question is whether, upon the proof, the stable can be regarded as one of the appurtenances of the dwelling-house. We think not. A stable is not necessarily one of the appurtenances of a dwelling-house. To become such, it must be used in connection with the dwelling-house. The house and the stable must be used together as one tenement or messuage. *Jones* v. *Fletcher*, 41 Maine, 254; *State* v. *Burke*, 66 Maine, 127. In this case, the stable was not so used. The stable was used exclusively by the defendant, and the house exclusively by one Mrs. Quinn. So far as their use was concerned, they were separate and distinct tenements. Such is the uncontradicted testimony of the government witnesses. It is clear that, upon such proof, the stable can not be regarded as an appurtenance of the dwelling-house.

And this was a material variance. For in this class of cases, the offense is local in its character, and the place where it is alleged that the liquors were kept must be proved as alleged. *State* v. *Roach*, 74 Maine, 562. We think the requested

instruction, that the stable was not appurtenant to the Quinn house, should have been given.

Exceptions sustained.

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

ELIZA EDNA OVERLOCK *vs.* MELVIN R. HALL.

Waldo. Opinion February 25, 1889.

Bastardy. Child as evidence. Burden of proof. Notice to produce. Practice.

Where the adverse party or his counsel has a letter with him in court, he may be called on to produce it, without previous notice, and in the event of his refusing, the opposite party may give secondary evidence.

In a bastardy suit, the burden of proof to establish the paternity of the child, is on the complainant.

In such a suit, the child cannot be exhibited to the jury, as evidence, that the defendant is its father.

ON EXCEPTIONS.

This was a complaint in bastardy. The verdict was for the defendant.

From the bill of exceptions it appeared, that the presiding justice allowed the defendant, against the objection of the plaintiff, to give the contents of a certain letter, by secondary evidence, when no notice had been given before the trial began, to produce the same. It appeared that the letter in question was in court, in the hands of the plaintiff's counsel, and while the trial was in progress defendant's counsel gave notice to produce the same. The letter not being produced, the defendant was allowed to prove its contents by copy.

The plaintiff offered to show the bastard child to the jury, in evidence, and the presiding justice refused to have the child so shown for that purpose. The child was a little more than six months old at date of trial.

The presiding justice instructed the jury as follows, * * * * "The burden of proof is on the complainant. She must

cause you to believe that with some strength of belief, and if upon the whole, you find that to be true, that he did beget that child, you are bound to say so. If you do not believe it, you are bound to say that. If you do not know what to do, if your minds are an entire blank, if the complainant by her evidence, has failed to cause you to believe that, then you are to say he is not guilty."

To the admission of the secondary evidence, against objection, the refusal to allow the said bastard child to be shown to the jury, in evidence, and these instructions to the jury the plaintiff excepted.

T. P. Pierce, *H. Bliss, Jr.*, with him, for complainant.

Admission of secondary evidence: Court rule, 27; *Emerson* v. *Fisk*, 6 Maine, 200. Wharton is in conflict with rule 27.

Exhibiting child in evidence: *Finnegan* v. *Dugan*, 14 Allen, 197; *Gilmanton* v. *Ham*, 38 N. H. 108. It was more than six months old.

L. M. Staples, for respondent.

Admission of secondary evidence: Notice given in season; evidence was by exact copy of letter.

Burden of proof: *Richardson* v. *Burleigh*, 3 Allen, 479; *Young* v. *Makepeace*, 103 Mass. 50.

Child in evidence: *Eddy* v. *Gray*, 4 Allen, 346; *Kenniston* v. *Rowe*, 16 Maine, 38. Infant was before the jury with its mother and putative father. Its physiognomy did not aid the jury. Evidence too uncertain, cannot be tested by reliable means. Parents and grandparents of both parties equally admissible *ad infinitum*. *Clark* v. *Bradstreet*, 80 Maine, 454.

WALTON, J. The exceptions state that the presiding judge, against the objection of the plaintiff, allowed the defendant to prove the contents of a letter by secondary evidence, when no notice had been given, before the trial began, to produce the letter. But the exceptions also state that the letter in question was in court, and in the hands of the plaintiff's counsel, and that while the trial was in progress, the defendant's counsel gave him notice to produce it, and that the letter not being produced, the

defendant was then allowed to prove its contents by secondary evidence.

We think the ruling was correct. We understand it to be now settled law, both in England and in this country, that notice before the trial begins is not necessary when the writing is in court, and in the hands of the adverse party, or his counsel. The old authorities seem to doubt the propriety of such a relaxation of the rule. But Mr. Stephen, in his Digest of the Law of Evidence (Art. 68) says that such is now the settled law in England. And the plaintiff's counsel admits that the law is so laid down by Mr. Wharton in his work on evidence. And we quote the following statement of the law from Fisher's English Digest:

"The principle on which notice to produce a document is required by law, is merely to give a sufficient opportunity to the opposite party to have the document in court to produce if he likes, and so secure the best evidence of its contents, and if he does not, to enable his adversary to give secondary evidence. Therefore, where a party to a suit, or his attorney, has a document with him in court, he may be called on to produce it without previous notice, and in the event of his refusing, the opposite party may give secondary evidence." *Dwyer* v. *Collins*, 7 Exch. 639. And we find a similar statement of the law in the American Digest, citing *Anon*; Anth. (N. Y.) 199; *Brown* v. *Isbell*, 11 Ala. 1009; *Dana* v. *Boyd*, 2 J. J. Marsh, (Ky.) 587.

Our rule of court (Rule 27) establishes no new principle. It merely affirms a well settled rule of the common law. So held in *State* v. *Mayberry*, 48 Maine, 218. And it must be accepted and enforced with such limitations and exceptions as experience has shown to be reasonable and proper. Mr. Stephen, in his admirable condensation of the law of evidence (Article 68) states these exceptions as follows:—

Notice is not required in order to render secondary evidence admissible:—

1. When the document to be proved is itself a notice.

2. When the action is founded on the assumption that the document is in the possession or power of the adverse party and requires its production.

3. When it appears or is proved that the adverse party has obtained possession of the original from a person subpœnaed to produce it.

4. When the adverse party or his agent has the original in court.

The ruling that in a bastardy suit, the burden of proof is on the complainant, and the refusal to allow the child (then a little more than six months old) to be exhibited to the jury as evidence, were undoubtedly correct, and in accordance with the decisions of this court. *Knowles* v. *Scribner*, 57 Maine, 495; *Clark* v. *Bradstreet*, 80 Maine, 454.

Exceptions overruled.

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

LEVI E. JUDKINS *vs.* SAMUEL WOODMAN.

Somerset. Opinion February 26, 1889.

Mortgage. Fuel. Right to remove. Evidence.

If the mortgagor of a farm, while remaining in possession, cuts no more than a reasonable quantity of wood for his own use as fuel, he may on leaving the farm remove the wood for use elsewhere.

A schedule of articles claimed by a mortgagee, and prepared by him, on which the wood does not appear, may be used by the mortgagor as evidence in a suit between him and the mortgagee, touching the title of the wood.

ON EXCEPTIONS. Trover to recover for eighteen cords of wood cut by plaintiff under the following circumstances: The plaintiff mortgaged the farm on which the wood was cut, March 10, 1886. There was no stipulation in the mortgage that the mortgagor might remain in possession, until condition broken. The wood was cut in the winter of 1886–7. Part of the wood was left in the woods, when defendant took possession of the farm, in the spring of 1887, and was in the form of cord wood.

The plaintiff claimed the wood was cut by him in the course of good husbandry, and for his use the coming year, and that it

belonged to him; and that he had a right to remove it from the farm after the defendant had taken possession.

The defendant claimed, that he had a right to take it, because it belonged to him under the mortgage.

In August 1887, the plaintiff demanded the wood of the defendant, always claiming to have owned it.

The presiding justice, among other things, instructed the jury as follows,—to which defendant excepted:

"The mortgagor was permitted to remain there and carry on that farm, and in permitting him to remain there and carry on the farm, he would have the right to carry it on prudently and properly; and whatever he did there, that is, whatever increase he got from the land, as soon as it was severed became a chattel and belonged to him and he had a right to it. But along, another winter, he having remained there during that summer, during the year before not having had any notice to quit so far as the case shows, not being notified by the mortgagee that he should enter and take possession of the premises, he conceived it proper that he should cut up his wood for the next year, presuming to remain there, I suppose. Some of it he carried to the house, and some of it remained in the woods cut. Now if he lawfully severed that wood from the freehold it became his property, and he would have a right to it and a right to remove it. If on the other hand he unlawfully severed it, he would have no right to it. If before he had cut the wood the mortgagee had entered and forbid his cutting it, and had remained in possession, and he had then cut it, he would then have been a trespasser; he would have had no right to cut it. If, on the other hand, the mortgagee allowed him to remain there; if you find that the mortgagee consented to his cutting it, then it would be his property.

Now as to the consenting to the cutting. That may be either express or implied. That is,—a license. Did the defendant give the plaintiff a license to cut that wood? That license may be either express or implied. It would be express where he told him that he might go and do it. It might be implied where the relations of the parties, under all the circumstances of the case, would warrant him in doing it in honesty and in good faith.

Now he had been a tenant without objection during the season previous, and had carried on the farm for aught that appears here in a prudent and husbandlike way, committing no waste or strip nor doing anything wrong. It came winter time, and the plaintiff says, anticipating the next season, and desiring to get out his wood for the next season's use, expecting to remain on the farm and not wishing to burn green wood, was justified in going into the woods and cutting the wood to supply his fires for the year, and that as the defendant did not object, the jury have a right to imply a license to do so from the relations of the parties. On the other hand, the defendant says, that he had no legal right to do it in any event; that he had no right to strike an ax into a tree. Upon this I instruct you, that he did have a right to cut that wood, provided under all the circumstances of the case, between these two parties and the relations which they bore to each other, and the conduct which the defendant had suffered the plaintiff to perform, you find he was acting prudently, reasonably and properly in providing his next year's store of wood, and so going and cutting it. If you find that as a good husbandman, properly managing the farm under all the circumstances of the case, he cut this wood without objection on the part of the mortgagee, then you are authorized to imply a license for the plaintiff to so cut, and if he had once cut, under an implied license from the defendant then his cutting would not be unlawful, and if it was not unlawful, when it was done, the wood belonged to him and he had a right to it, and if the defendant ever afterwards took it and refused to deliver it to the plaintiff on demand, then the plaintiff may sue and recover the value of it."

For the purpose of showing, at the time defendant took possession of the farm, that he did not claim the wood, the plaintiff offered in evidence, a copy of a bill of sale of personal property from plaintiff to defendant, but in which the wood in question did not appear. In regard to the bill of sale, the plaintiff, subject to defendant's objections, testified that he had a conversation with the defendant in regard to the property he had on the premises;— that in response to a request for a copy of what he had a claim

on—the bill of sale—he furnished the plaintiff with said copy, offered in evidence.

The presiding justice, upon this branch of the case, instructed the jury as follows,—to which defendant excepted:

"When the plaintiff was about to move away, the defendant came to him and gave him this paper, which he says was a schedule of what he claimed was there that belonged to him, the defendant.

The plaintiff says that indicates that defendant did not claim this wood, because the wood is not mentioned in it; but the defendant says that it has nothing to do with the case; that it is only a bill of sale, and does not apply to this mortgage at all.

If you should find that the parties understood, at the time it was delivered, that this constituted all the property the defendant claimed there, of every description, it is evidence bearing upon the license of the defendant to the plaintiff to cut the wood.

If, on the other hand, you find the parties understood it to refer to nothing but the property, included in the bill of sale, then it would have nothing to do with the case, and you must disregard it."

The verdict was for plaintiff, and defendant excepted.

Merrill and Coffin, for defendant.

Effect of the mortgage upon the title to the wood. Fee of realty, in mortgagee, and possession by mortgagor not adverse. *Stowell* v. *Pike*, 2 Maine, 389; *Blaney* v. *Bearce*, Id. 132; *Smith* v. *Goodwin*, Id. 175; *Noyes* v. *Sturdivant*, 18 Id. 104; *Allen* v. *Bicknell*, 36 Id. 436; *Wilson* v. *R. R.*, 67 Id. 361. Wood part of realty. Cannot diminish security. *Union Bank* v. *Emerson*, 15 Mass. 159; *Page* v. *Robinson*, 10 Cush. 99; *Woodruff* v. *Halsey*, 8 Pick. 333; *Gooding* v. *Shea*, 103 Mass. 360; *Byrom* v. *Chapin*, 113 Id. 311. Until debt is paid, no title vests in mortgagor. *Butler* v. *Page*, 7 Met. 42. He is but a tenant at sufferance; no license inferred; wood not an annual crop, and not an estover for removal or sale. *Keech* v. *Hall*, 1 Smith's L. C. 888, note 5; Taylor's L. & T. § 351, 352; *Smith* v. *Jewett*, 40 N. H. 532; *Gardiner* v. *Derring*, 1 Paige, 573; *Sarles* v. *Sarles*, 3 Sandf. Ch. 601; Wash. Real Prop. 116; *Cook* v. *Cook*, 11 Gray, 123; *Phillips* v. *Allen*, 7 Allen, 117; *Elliot* v. *Smith*, 2 N. H. 430; *Fuller* v.

Wason, 7 Id. 341; *Miles* v. *Miles*, 32 Id. 164; *Johnson* v. *Johnson*, 18 N. H. 594; *Bussey* v. *Page*, 14 Maine, 216; *Livingston* v. *Reynolds*, 2 Hill, 157; *White* v. *Cutler*, 17 Pick. 252; *Padelford* v. *Padelford*, 7 Pick. 152.

Bill of sale admitted in evidence, was irrelevant.

Walton and Walton, for plaintiff.

No question as to amount or value of wood can arise, there being no motion for new trial.

Mortgagor, in possession, not liable to account for rents and profits. *Long* v. *Wade*, 70 Maine, 358. Has same rights as if he had not mortgaged, except cannot impair estate or security. *Fernald* v. *Linscott*, 6 Maine, 234, 238; *Wilder* v. *Houghton*, 1 Pick. 87, 89; *Hewes* v. *Bickford*, 49 Maine, 71. Assent of mortgagee presumed. *Smith* v. *Moore*, 11 N. H. 55; *Page* v. *Robinson*, 10 Cush. 103. Well-known usages, not to be overlooked. *Hapgood* v. *Blood*, 11 Gray, 403, cited with approval in *Vehue* v. *Mosher*, 76 Maine, 470.

Jury question. *Searle* v. *Sawyer*, 127 Mass. 491. Wood when severed, became mortgagor's, same as the hay in *Hewes* v. *Bickford*, *supra*, no real injury being done the premises.

No distinction, which requires the wood to be consumed on premises, when hay and crops can be removed. Right to cut and remove to market, sustained in *Searle* v. *Sawyer*, *supra*.

Plaintiff's rights not affected by his giving up possession. *Wright* v. *Lake*, 30 Vt. 206; Jones Mort., vol. 1, § 694.

WALTON, J. The question is whether, if the mortgagor of a farm, while remaining in possession, cuts a reasonable quantity of wood for his own use as fuel, he can, on leaving the farm, remove the wood for use elsewhere. His right to cut the wood is not denied. His right to remove it for use elsewhere is denied. Assuming that the wood was lawfully cut, being reasonable in amount, and in cutting it that no rule of good husbandry was violated, we think that upon leaving the farm the mortgagor would have a right to take the wood with him. When severed from the soil, if rightfully and lawfully severed, the wood would become a mere chattel, and would no more belong to the mortgagee than

hay or grain or fruit harvested from the farm. This rule does not apply to wood or timber unlawfully cut; it applies only to wood lawfully cut for fuel for family use. Such in effect was the ruling of the judge who tried the case, and we think the ruling was correct.

Objection was made to the admission in evidence of a paper said to be a schedule of articles claimed by the mortgagees, and on which the wood in question does not appear. It was objected to on the ground of irrelevancy. We think it was admissible. It was prepared by the defendant, and was admissible upon the same ground that any declaration of a party, written or oral, is admissible. Its probative force, if any, was for the jury.

Exceptions overruled.

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

SAMUEL HUNT *vs.* SILAS L. ADAMS.

Cumberland. March 6, 1889.

Minor. Sabbath. Cancelling contract.

The plaintiff's minor son was at work for the defendant, under a contract for a specified time. The defendant persisted in requiring the son to work, on the Sabbath, in violation of law, and notwithstanding the father's protest.

In a suit to recover for the son's services, *Held*, that under these circumstances, as the son was not of age to act for himself, it was not only the right, but the duty of the father, to take his son away.

ON EXCEPTIONS, by defendant to the superior court, for Cumberland county.

The facts are stated in the opinion.

Frank and Larrabee, for defendant.

Counsel cited: *Miller* v. *Goddard*, 34 Maine, 102; *Myers* v. *Meinrath*, 101 Mass. 366, 377; *Robeson* v. *French*, 12 Met. 24, 25; *Towle* v. *Larrabee*, 26 Maine, 464, 469; *Plaisted* v. *Palmer*, 63

Id. 576. Pars. Con., vol. 2, note on p. 761; *Watts* v. *Van Ness*, 1 Hill, 76; *Smith* v. *Wilcox*, 19 Barb. 581.

W. H. Vinton, for plaintiff.

DANFORTH, J. This is an action to recover pay for the services of the plaintiff's minor son. The defense is a breach of the contract in leaving the defendant before the expiration of the time agreed upon.

The action is in the name of the father and no objection is made on that ground to his maintaining it. We must assume, therefore, that he made the contract. There was as alleged a breach of it, and the excuse given is that the son was required to do work on the Sabbath in violation of law. Was this sufficient to justify the breach? Had the contract been for the father's own labor the argument for the defendant would have been entitled to much consideration. He could act for himself and either have submitted to the wrong or have refused to violate the law and wait for the defendant to discharge him. But the son was a minor and presumed by the law to be lacking in the discretion necessary to govern and control his own conduct. It was his father's duty to look after his welfare and especially to care for his morals, and to see that he was not only, not compelled to become a violator of the law, but that he should not be induced willingly to do so. We are, therefore, led to the conclusion that after the defendant had once committed the wrong, and notwithstanding the objection of the father made known to him, persisted in that wrong, still requiring the obligations of the law and the sanctities of the Sabbath to be disregarded, it was not only the right, but the duty of the father to cancel his contract, and take his son from such influences and out of such custody; and the fact, if it be a fact that the son was willing to perform the illegal labor, as required, made this duty on the part of the father still more imperative.

Exceptions overruled.

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

WILLIAM G. ALDEN, in equity, *vs.* SAMUEL D. CARLETON, and others.

Knox. Opinion March 6, 1889.

Mill dam. Tenants in common. Repairs. Equity. R. S., c. 57.

The parties were owners, as tenants in common, of a reservoir dam upon which the plaintiff made repairs and sought by bill in equity to recover of the defendants their share of the expenses. The mills below were not owned in common.

Held, that if the dam were part and parcel of the mill below, so as to come within the mill act, the law provides an ample remedy.

Held, also, that the remedy in equity, is only when subsequent to the repairs, the defendant has by some voluntary act appropriated or adopted them, and derived some benefit from them.

ON REPORT. This was a bill in equity, in which the plaintiff
81 358 | 94 164 | sought to recover of the other co-owners of a reservoir mill dam, their respective shares for repairs and improvements.

The facts are sufficiently stated in the opinion.

J. H. Montgomery, for plaintiff.

In *Webb* v. *Laird*, 59 Vt. 108, where one co-owner repaired a mill dam the court say: "Each having an interest in the water power, and the right to maintain it if the other abandons it, it follows that they have a mutual interest in, and are under a mutual duty to maintain it, so long as each continues to exercise his right to it. While enjoying this mutual interest under the mutual duty, equity will compel each to contribute towards its maintenance according to his relative right and interest." Story's Eq. § 1237; Wash. Real Prop., vol. 1, p. 665; *Coffin* v. *Heath*, 6 Met. 76, 80. Dam necessary for all the mill owners. Notification to Alden, ten years before this work was done. If Adams was not agent, plaintiff was led into mistaken belief, on which he worked for mutual benefit of all the owners, and equity will aid him. Story's Eq., § 77. Answer of defendants to the Fernald bill in equity, competent evidence. *Brown* v. *Jewett*, 120 Mass. 217.

W. H. Fogler, for defendants.

Defendants are tenants in common, but not co-partners, in dam.

Jordan v. *Soule*, 79 Maine, 590, 592. Plaintiff should have proceeded in manner provided by R. S., c. 57. Statute remedy exclusive, in absence of contract. *Buck* v. *Spofford*, 31 Maine, 34; *Carver* v. *Miller*, 4 Mass. 559, 561, 562.

Notice, request and refusal are not sufficient. *Carver* v. *Miller*, *supra*. Plaintiff has proved no contract. Express promise of Adams, if any, does not bind his co-tenants. *Lane* v. *Tyler*, 49 Maine, 252.

Having a legal remedy cannot maintain action in equity. *Bird* v. *Hall*, 73 Maine, 73; *Dennison Co.* v. *Robinson Co.*, 74 Id. 116; *Gamage* v. *Harris*, 79 Id. 531; *Davis* v. *Weymouth*, 80 Id. 307. This defense available, after hearing on answer. *Dennison Co.* v. *Robinson Co.*, *supra*; Story's Eq., § 447.

DANFORTH, J. The parties in this case are the owners, as tenants in common, of a reservoir dam at the outlet of Megunticook lake, built and maintained for the purpose of storing water to be used by the mills on the stream below, when needed. But while they are tenants in common of the dam, they do not use the water in common. The plaintiff owns and operates one mill, while the answering defendants as tenants in common with Joseph Norwood, are the owners and operators of another and a different mill, on a different privilege farther up the stream.

At different times, the plaintiff made repairs and improvements upon and in connection with the dam and seeks in this process to recover of the defendants their contributory share of the expenses. One defense is that the plaintiff's remedy is at law.

That the plaintiff now has no remedy at law, is certain. That he might have had one for the repairs, may be equally certain. But he has lost it by the omission of the necessary preliminary proceedings.

If this dam was a part of the several mills on the stream, the plaintiff upon the refusal of the defendants to join in making the necessary repairs, under the provisions of the old common law of England, could have resorted to the writ of *de reparatione facienda*. 4 Kent Com. 370; 2 Story Eq. Jur., § 1235. This writ, however, has not been received with much favor in this country and very early in Massachusetts it was superseded by the passage of the mill

act. This act with slight change has remained in force in Massachusetts and this state to the present time. R. S., c. 57. This act affords a remedy in such cases and the only remedy, unless the repairs are made under a special contract, the terms of which, the act, by its provisions, does not interfere with R. S., c. 57, § 3; *Carver* v. *Miller*, 4 Mass. 559; *Buck* v. *Spofford*, 31 Maine, 34; *Converse* v. *Ferre*, 11 Mass. 325.

If there is an existing obligation to make repairs, then whether the dam comes within the mill act or otherwise, an action will lie in favor of the repairing owner, but only when a previous request to the co-tenant has been made, to join in the repairs and a refusal by him. *Doane* v. *Badger*, 12 Mass. 65; Washburn R. P. 571, (3d ed.) 4 Kent. Com. 371, (12th ed.) The preliminaries required in either case not having been complied with, the plaintiff has no remedy at law unless by virtue of a contract. If there were one it cannot aid in this process, but would destroy it. It is sufficient now that none has been alleged and none proved.

It is thus evident, that the plaintiff has, so far as now appears, lost his remedy by law through his own negligence in not complying with its provisions. Can he support his bill in equity?

It may be said, that having thus lost his legal remedy, if the plaintiff made the repairs without a contract he did so at his peril and is now without any remedy. This is true so far as the legal foundation is concerned. The mere fact that he made the repairs upon the common property is not sufficient foundation for his claim in equity; nor can it be sustained by a relation between the parties previously existing, or on any obligation previously resting upon the defendants. It must be sustained, if at all, by something more than these, something done by the defendants subsequent to the repairs.

In Story's Eq. Jur., § 1236, the author says: "But the doctrine of contribution in equity is larger than it is in law; and in many cases, repairs and improvements will be held to be, not merely a personal charge, but a lien on the estate itself." But this is not for the purpose of saving a man from the consequences of his own negligence nor of charging the other party in opposition to the law. As Judge Story says in the next section, it is "where the

party making the repairs and improvements has acted in good faith and innocently, and there has been a substantial benefit conferred upon the owner, so that, *ex aequo et bono*, he ought to pay for such benefit." Broom in his Maxims, page 706, states the same principle thus: "He who derives the advantage ought to sustain the burden." There are various other ways in which the principle has been stated, but all to the effect, that the party to be charged without any previous contract or obligation to pay, has put himself voluntarily in a condition, by adopting or appropriating the repairs, to receive, and has received a substantial benefit from them. In *Webb* v. *Laird*, 59 Vt. 108, these principles were fully discussed, and the defendant held, because he had appropriated the repairs and received a benefit from them. The same principles, applied to the facts in this case, lead to an opposite conclusion.

It is true, the bill alleges and the fair inference is, that the dam was built for the mills below and that they or some of them received a benefit from it. But there is no allegation, and the proof does not warrant the inference, that the defendants desired the improvements made in 1886, and this must include the repairs of that year, (as both the bill and proof show that they were made necessary by the improvements,) or that their mill needed them, or that they have received any benefit from them. On the other hand the proof shows, that the defendants did not want the improvements, have never adopted them, or voluntarily received any benefit from them, but have used their mill as before, and that previous notice in writing was given the plaintiff warning him against making them. Nor can we deem it, in entire accordance with good faith, to make the repairs in disregard of the preliminary requirements of the statute, as the facts now appear.

Judgment for the defendants, who have answered, with costs.

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

CLARENCE E. HALL *vs.* DAVIS TILLSON.

Knox. Opinion March 6, 1889.

Wharf owner. Rights and duties. Obstructions. Use by public. Care.

While the owner of a public wharf is required to keep it safe for those having business there, his liabilities are not the same as in the case of highways.

Highways are used for the purpose of travel only, and must be kept free from obstructions, as well as safe in other respects, and are definitely located. A public wharf is used for landing and taking away freight, as well as for travel; the way cannot be definitely located, but the whole wharf must be kept safe, subject to such obstructions, as are caused by the proper deposit of freight. The wharf, therefore, must be used for both purposes, with due regard to the requirements of each.

The plaintiff's horse and carriage were injured, when being driven upon the defendant's wharf, by running upon a pile of gravel there deposited as freight, in a proper place, and as near the edge of the wharf as it could be done with safety. There was an abundance of room between the gravel pile, and the sidewalk opposite for teams to pass with safety and convenience. There was no complaint of any defect, except such as might arise from the supposed obstruction, caused by the gravel. *Held*, that the gravel was rightfully there. *Held, also*, that the prevailing darkness, though not sufficient evidence of carelessness on the part of the plaintiff's bailee in going there, did impose upon him additional care, in making the passage.

ON REPORT. After the evidence was out, the parties agreed that judgment was to be rendered in favor of the plaintiff, if in the opinion of the law court, the evidence was sufficient to justify a verdict for plaintiff, and the court were to assess the damages; otherwise, judgment was to be rendered for the defendant.

The facts appear in the opinion.

J. E. Hanly, for plaintiff.

Counsel cited: *Tobin* v. *R. R.*, 59 Maine, 183, 188, and cases there cited; *Campbell* v. *Sugar Co.*, 62 Id. 552; *Low* v. *R. R.*, 72 Id. 313, 321; *Stratton* v. *Staples*, 59 Id. 94; *Carleton* v. *Franconia &c. Co.*, 99 Mass. 216; *Wendall* v. *Baxter*, 12 Gray, 494; *Beck* v. *Carter*, 68 N. Y. 283; *Graves* v. *Thomas*, 95 Ind. 361; *Campbell* v. *Boyd*, 88 N. C. 129; *Nave* v. *Flack*, 90 Ind. 205; *Knight* v. *R. R.*, 56 Maine, 234, 241; *Flagg* v. *Hudson*, (55 Am.

Rep.) 142 Mass. 280; *Crogan* v. *Schiele*, 53 Conn. 186; *Norwich* v. *Breed*, 30 Conn. 535, 547; *Barber* v. *Abendroth*, 102 N. Y. 406; *Albert* v. *State*, 66 Md. 159; *Branch* v. *Libbey*, 78 Maine, 321.

C. E. Littlefield, for defendant.

Plaintiff guilty of contributory negligence. Defendant not in fault. There was a passage-way, twenty-two to twenty-five feet wide, and wharf rightfully used for landing, storing, &c., of merchandise. Defendant not bound to light his wharf. *Sparhawk* v. *Salem*, 1 Allen, 30, 32; *Macomber* v. *Taunton*, 100 Mass. 255, 257; *Lyon* v. *Cambridge*, 136 Id. 420; *Flagg* v. *Hudson*, 142 Id. 280, 286. It does not appear that plaintiff was invited there by defendant or his lessees, impliedly or otherwise. *Severy* v. *Nickerson*, 120 Mass. 306; *Stratton* v. *Staples*, 59 Maine, 94, 96; S. P. 62 Id. 561; *Larmore* v. *Crown Point Co.*, 101 N. Y. 394; *Matthews* v. *Bonsee*, Atlantic Rep., vol. 16, No. 4, 195, (Sup. Ct. N. J.).

DANFORTH, J. On the evening of October 25, 1886, the plaintiff's horse, carriage and harness were injured upon the defendant's wharf. The horse was driven by the plaintiff's bailee, who in passing down the wharf to the boat landing at the end, run upon a pile of gravel, by means of which the carriage was upset and the horse thrown down. The claim is that the gravel was an obstruction and, therefore, a defect in the way provided for passengers to the boat, for which the defendant is liable.

It is not contended that the driver, with the team, was not rightfully on the wharf on his way to the boat. It follows, that the defendant was bound to exercise reasonable care, in providing and keeping in repair a suitable way for the driver and his team. What is suitable, is reasonably safe; but in other respects it must depend upon its location and the purposes for which it is used. *Campbell* v. *Portland Sugar Co.*, 62 Maine, 552.

A highway used only for travel is definitely located, and within its limits must be made and kept safe, not only from all structural defects, but from all obstructions which might render it unsafe for travelers; and yet there are incidents of travel which sometimes render temporary obstructions necessary and which a

traveler must avoid at his peril; such as a team unloading at a shop door, or a horse and carriage temporarily left in the way while the owner is detained otherwheres. *Matthews* v. *Kelsey*, 58 Maine, 56.

Upon a wharf where the only or principal business is landing and taking away freight and passengers, from the nature of the case, the way for teams which must be used, cannot be definitely located. The teams must go where the freight and passengers are and, consequently, the travel must be substantially over the whole wharf, and therefore the whole must be kept free from structural defects and unnecessary obstructions, so that it may be safe for the teams. The freight, without which there would be no use for teams, must be landed on and taken from the wharf, and this of itself is an obstruction and would often compel teams to travel in different ways. The wharf being for the use of both teams and freight, each must be used with a reasonable regard to the safety and convenience of the other.

In this case the only defect complained of is the pile of gravel. That was landed as freight, in the proper place for freight, and as near the side of the wharf as was safe. If it had not been there, a carriage might have gone over the ground with no other danger, perhaps, than that of falling into the dock. But there was no necessity for it. There was more than room enough between that and the sidewalk on the other side, for all the teams required at the boat, a safer road, than could have been had where the gravel was deposited, and a way in which teams usually, if not always, traveled on their way to the boat. There is really no more propriety in saying, this pile of gravel was within the limits of the way, than any other freight, for, the way covers the wharf when not thus obstructed.

Complaint is made of the darkness and that no light was placed there. It may sometimes be necessary to place a light, as a warning, against an unusual danger arising from a defect, or when, for any reason, the way is perilous in a peculiar manner. But here there was no defect, but a straight and level path,—no more need, or duty to place a light there than in a common highway.

But the darkness did impose a duty upon the driver. Though

it was not sufficient to prove negligence in going there, it was sufficient, to impose additional care, especially in view of the fact that the alleged obstruction was properly there, and within the driver's knowledge, might have been expected there.

It is certainly difficult to understand how, under all the circumstances, the accident could have happened without a want of care on the part of the driver. But when we consider the suddenness of the upset, the force with which and the distance the parties riding were thrown, as well as the extent of the injury to the horse and carriage, and this from coming in contact with a gravel bank, two feet high, we are forced to the conclusion that, under the circumstances, there was more speed than reasonable care would authorize.

Judgment for defendant.

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

NATHANIEL B. MANSFIELD, in equity, *vs.* GARDINER SHERMAN.

Hancock. Opinion March 6, 1889.

Equity. Specific performance. Mistake.

A bill in equity for a decree for specific performance of a contract, for the sale of real estate, is addressed to the sound discretion of the court.

Where a vendor of real estate made a material mistake, as to the extent and boundaries of one of the lots bargained, the vendee cannot, upon being apprised of the vendor's mistake, insist upon specific performance. 81 365 a94 376 f94 379

Equity will not assist one party to gain an advantage from the mistake of another party, but will leave him to his remedies at law.

ON REPORT. Bill in equity, for specific performance, heard on bill, answer and proofs.

The facts appear in the opinion.

Wiswell, King and Peters, for plaintiff.

Contract by correspondence, completed. *Bird* v. *Munroe*, 66 Maine, 337, 345, 346; *Alger* v. *Scoville*, 1 Gray, 391; *Allen* v. *Bennet*, 3 Taunt. 169; 1 Benj. Sales, § 220, and notes. Imma-

terial, that letters were addressed to broker, instead of plaintiff. *Bird* v. *Munroe*, *supra*, and cases cited; 1, Benj. Sales, pp. 245, 246, and note; Brown St. Frauds, § 346; *Townsend* v. *Hargraves*, 118 Mass. 325. Verbal acceptance of Wood, and his parol agency, sufficient. *Doty* v. *Wilder*, 15 Ill. 407; (60 Am. Dec. 576.) *Johnson* v. *Dodge*, 17 Ill. 433; *McConnell* v. *Brillhart*, Id. 354 (Am. Dec. 661); 1 Benj. Sales, p. 252, (note 36 by Corbin). Parol acceptance of written proposal, sufficient to bind signer. 1 Benj. Sales, § 254, and note. *Williams* v. *Robinson*, 73 Maine, 186; *Bird* v. *Munroe*, *supra*, 346. Wood's letter was an acceptance, as soon as mailed. 1 Benj. Sales, p. 64, § 44, and notes. Acceptance unconditional. "As he said one-half cash, would like to have you make it so if you can," was the expression of a hope, or wish, and did not vary terms of contract. *Phillips* v. *Moor*, 71 Maine, 78, 79; 1 Benj. Sales, p. 55, and note.

No mutual mistake. If one of quantity, on part of defendant, will not prevent specific performance. *Davis* v. *Parker*, 14 Allen, 94.

Deasy and Higgins, for defendant.

Before trade was consummated, defendant discovered mistake, and notified plaintiff. No contract made enforceable in equity, and no sufficient memorandum. Defendant intended to sell one building lot, and lot 12, on plan includes two. Mistake on one side, though not sufficient to reform may be for rescinding, or refusing specific performance. *Young* v. *McGown*, 62 Maine, 56, 61; *Fahlberg* v. *Cosine*, (5 N. E. Rep. 23); *Lawrence* v. *Staigg*, 8 R. I. 256; S. C. 10 Id. 581; *Harris* v. *Pepperell*, L. R. 5 Eq. 1; *Garrad* v. *Frankel*, 30 Beav. 445; *Wright* v. *Goff*, 22 Id. 207; *Spurr* v. *Benedict*, 99 Mass. 463, 465; *Kyle* v. *Kavanagh*, 103 Mass. 356, 359. Where there is mistake as to what was sold, equity will not interfere in favor of either party. 1 Sugden's Vendors, 7th Am. Ed. 279. Mistake may be proved in defense, but not to reform. Sugden's Vendors, 8th Am. Ed. 160, and cases cited.

Court may refuse to reform or rescind, leaving parties to their legal remedies. *Osgood* v. *Franklin*, 2 Johns. Ch. 23; *Mortlock* v. *Buller*, 10 Ves. 292; *Mason* v. *Armitage*, 13 Id. 25; *Hepburn*

v. *Dunlop*, 10 Wheat. 179, 198. Contract not enforceable, in cases of doubt. *Clowes* v. *Higginson*, 1 Ves. & B. 524, 533. No laches: *Cook* v. *Clayworth*, 18 Ves. 12; *Ball* v. *Storie*, 1 Sim. & Stu. 210; *Malins* v. *Freeman*, 2 Ke. 25; *Coles* v. *Bowne*, 10 Paige Ch. 527; Pom. Sp. Per. § 252.

Brokers exceeded their authority, hence no enforceable contract. *Loudon Soc.* v. *Bank*, 36 Pa. St. 498; *Carmichael* v. *Buch*, 10 Rich. (So. Car.) 332; *Persley* v. *Morrison*, 7 Ind. 356; *Rossiter* v. *Rossiter*, 8 Wend. 494; *Reese* v. *Medlock*, 27 Tex. 120; *Craighead* v. *Peterson*, 72 N. Y. 279; *Martin* v. *Farnsworth*, 59 Id. 555.

Dealer must inquire, where principal has not held his agent out as having general authority. *Reitz* v. *Martin*, 12 Ind. 308. No mutually enforceable contract. *Snell* v. *Mitchell*, 65 Maine, 48; *Moore* v. *Fitz Randolph*, 6 Leigh, 175; Pom. Eq. § 1405, and cases cited; Adams Eq. §§ 77, 82; *Butman* v. *Porter*, 100 Mass. 337; *Sullings* v. *Sullings*, 9 Allen, 234.

Verbal promise to buy not such a valuable consideration as required in equity. Bispham Eq. 372; Pom. Eq. 1293; Adams Eq. 77; *Stone* v. *Hackett*, 12 Gray, 227; *Wason* v. *Colburn*, 99 Mass. 342.

Letters previous to May 6, may identify the property, but not admissible to prove contract, because defendant revoked broker's authority and withdrew his lots from market. His letter of May 25, not a ratification of previous contract, but authority to make a new and different contract.

EMERY, J. This is a bill in equity, in which the court is asked to decree the specific performance of a contract for the conveyance of two lots of land, as marked upon a plan.

Such an application is addressed to the sound discretion of the court. Not every party, who would be entitled as of right to damages for the breach of a contract, is entitled to a decree for its specific performance. Before granting such a decree, the court should be satisfied not only of the existence of a valid contract, free from fraud, and enforceable in law, but also of its fairness and its harmony with equity and good conscience. However strong, clear and emphatic the language of the contract, however plain the right at law, if a specific performance would, for any

reason, cause a result, harsh, inequitable or contrary to good conscience, the court should refuse such a decree and leave the parties to their remedies at law. In an equity proceeding, the complainant must do equity and can obtain only equity. *Mortlock* v. *Buller*, 10 Ves. 305; *Willard* v. *Taylor*, 8 Wall. 557; *Snell* v. *Mitchell*, 65 Maine, 48.

In this case the answer sets up the defense among others, that the respondent made his offer to sell the land, and named the price under a material mistake, as to the extent and boundaries of one of the lots,—that he did not understand that the lots included a certain valuable building site, which he never intended to sell at such a price—that by reason of such mistake, he named an inadequate price for the lot and that for the complainant to seek to compel him to convey at that price is inequitable, and is taking an unfair advantage of his mistake.

The facts material to this issue seem to be these: Mr. Sherman, the respondent, living in New York, owned a tract of land in Bar Harbor, which he had caused to be laid out into avenues and building lots, and a plan to be made by a landscape engineer. There were twelve lots, marked on the plan by numbers.

In March 1887, Mr. Mansfield, the complainant, saw these lots, and inquired of a firm of real estate brokers at Bar Harbor about lot No. 7, a small lot, at the extreme southern end of the tract. The brokers wrote to Mr. Sherman in New York, about this inquiry, and suggested that he authorize them to sell the lots. After some correspondence, Mr. Sherman sent from New York, the plan, and a list of prices for the lots, and instructions about selling, the conditions, &c. The scale of prices on this list ranged all the way from $1500 for lot 7, to $10,000 for lot 10. The price of lot No. 12, was marked $2,500,—the lowest but two on the list. Lot No. 1, was reserved and the aggregate price of the eleven lots was $44,000. Mr. Mansfield, after learning the prices and examining the lots, not only said he would take lot No. 7, but said he would take lot No. 12, nearly at the other extremity of the tract, at the price named. Mr. Sherman, on being written to, sent to the brokers May 25, an offer to sell both the lots at the price of $4,000. He subsequently came to Bar Harbor early

in June, (the 3d or 4th,) and went upon the land with the plan, and immediately afterward informed the brokers that he had made a great mistake as to lot No. 12—that he found it contained a valuable building site, which he supposed was not included, and which he had not intended to bargain at such a price,—and that therefore he could not convey it.

The testimony of all the witnesses, as to the relative value of the lots, is to the effect, that lot 12, was one of the most valuable lots in the tract, if, indeed, it was not the most valuable. The real estate agents (called by the complainant) so testified, and also that its value was nearly double that of lot No. 11, marked at $6,000. This evidence was not contradicted, and shows that from some cause, Mr. Sherman named a very inadequate price for lot 12, in comparison with the other lots. If this was owing to an error in judgment, or a mistaken opinion about the relative values, perhaps the court should not consider it. Mr. Sherman, however, testifies that it was owing to a mistake in material matters of fact; and not to a mistake in judgment. He says there are two building sites within the territory of what is now lot 12, and that he directed the engineer to make two lots of what was lot 12, so as to include in lot 12, as left, only the more northern and cheaper building site, and exclude the southern and more valuable site,—that he supposed that his directions were followed, and that he made the offer to sell lot 12, for $2,500, under the belief that it did not include the more valuable of the two sites. The engineer corroborates Mr. Sherman. He testifies that he was directed to make such division, but afterward thought it best not to do so, and so put both sites in one lot. It does not appear, that Mr. Sherman was ever informed of this departure from his instructions.

It is urged that this story of Mr. Sherman's is not natural, and that he should have seen from the plan itself, when sent him by the engineer, that lot 12, included more than one site, or at least, that it had not been divided. Mr. Sherman may have been careless in the matter, and perhaps he should have seen the departure from his instructions, but we can understand how, under the circumstances, he might overlook it and retain the belief that his instructions had been followed. The story explains an evident

disparity in price. It is uncontradicted, and it seems to us probable, that Mr. Sherman did make the offer under a mistake of fact, as he states.

It should be remembered here, that Mr. Mansfield, at first, only inquired about lot No. 7,—the smallest lot, and situated at the extreme southern end of the tract. It was not till after he saw the list of prices, that he desired to include in his purchase lot 12, near the extreme northern end of the tract. The two lots are far apart, and have no possible connection with each other. It seems probable that Mr. Mansfield saw the disproportion of price as to lot 12, and for that reason endeavored to secure it.

Would it be equitable, and in accord with good conscience to compel a conveyance under such circumstances? Do equity and good conscience require that Mr. Mansfield should gain and Mr. Sherman lose by this mistake? The equitable principle involved can perhaps be more vividly illustrated by stating a case similar in kind, but stronger in degree. Suppose Mr. Sherman had built a costly residence on lot 12, and yet, living in New York, he in some way had the impression, that the structures were on lot 11, and that lot 12, was an unimproved lot, and under such actual impression had bargained lot 12, at a correspondingly low price to one who knew that the buildings were on lot 12. Would it be fair, or honorable in the vendee, after being apprised of the vendor's mistake, to insist on a conveyance at such an inadequate price? Would not such a vendee justly be thought a hard, rigorous man, and the rule of law that sustained him, justly be thought a harsh, inequitable rule?

Mr. Sherman living at a distance, remembering the particular building site, which he thought so valuable, had somehow acquired the erroneous impression, that it was not included in lot No. 12. It was a mistake of fact, and about an important and controlling fact. Mr. Mansfield must have been aware from the evident disparity that there was very likely some mistake about it.

Of course, if there was a valid contract, Mr. Sherman should answer in damages for all the loss his mistake and refusal to convey have occasioned Mr. Mansfield. The court when appealed to in an action at law, can only consider whether there was a

valid contract and a breach. The mere mistake of one party however great, will not excuse him from making full compensation. When however application is made to the court, not to determine and enforce legal rights, but "to do equity" between the parties, the court will be careful to do only equity, and will not aid one party to take advantage of the mistake of the other party. We think in this case, we should decline to decree a specific performance, and should leave the parties to their rights and remedies at law. It does not appear, that pecuniary damages for the breach, would not fully compensate Mr. Mansfield for all losses he has sustained in the matter.

A few cases will illustrate the principle, that a mistake of one party will justify a court of equity in refusing to decree a specific performance against him. In *Leslie* v. *Tompson*, 9 Hare, 268, an estate was put up for sale in several lots. The vendor made a mistake in computing the amount of land in four of the lots. These four lots were sold to one purchaser, and after the sale, were found to contain more land than was stated at the sale. It was held that the vendor was entitled to increased compensation, although them is takewas his. In *Alvanley* v. *Kinnaird*, 2 Macn. & G. 1, land was sold under an order of court, with this description, "The manor of *Bredbury cum Goite*, with the court baron to the same belonging, and all and every the rights, royalties, liberties, privileges and advantages." The purchaser bought in good faith under this description. The vendors however did not intend to include the mines and minerals under any lands within the manor, and it was their mistake, that the exception was not expressed in the order of sale. Cottenham, Ld. Ch., said, that in such a case specific performance would not be enforced against the vendors. In *Malins* v. *Freeman*, 2 Keen, 25, the respondent bought at an auction sale, "Lot No. 3," under the mistaken impression that it was the "Davies Lot." The mistake was wholly his, as the auctioneer distinctly and correctly described "Lot No. 3." The court declined to decree a specific performance against the purchaser, and left the parties to their remedies at law. In *Webster* v. *Cecil*, 30 Beav. 62, the respondent owning several parcels of land, had made a memorandum of the price of each,

which footed up £2100. After some negotiations with the complainant about a sale, he wrote to him offering the whole estate for £1100. The complainant in writing formerly accepted the offer. The respondent immediately afterward discovered his error, and at once notified the complainant, who was innocent of any mistake. Sir John Romilly, M. R., said the court would not decree a specific performance, and compel a person to convey his property for much less than its real value, and for £1000 less than he intended. In *Baxendale* v. *Seale*, 19 Beav. 601, the land bargained was described to be "the manor of Stoke Fleming, * * * * embracing nearly the whole parish of Stoke Fleming," with certain immaterial exceptions. The vendor supposed that the manor did not include any lands beyond the parish, but after the sale, it was found that the manor did include lands outside the parish. The purchaser, innocent of any mistake, insisted on specific performance but the M. R., Sir John Romilly, refused to decree it. In *Buckhalter* v. *Jones*, 32 Kansas 5, Buckhalter wrote to Jones, offering him $2000, for a parcel of land. Jones wrote in reply, "we will accept your offer." It appeared that, although the offer was in fact, only $2000, yet Jones somehow understood it to be $2100, and he refused to convey for less. The court declared the contract to be binding at law, but on account of the mistake, refused a decree for specific performance, and left the parties to their remedies at law.

In this case, were it clear, that there is a contract binding at law, we should think it equitable for the respondent to pay the costs of this proceeding, which would then be defeated by his own mistake; but as there is some doubt about the validity of the alleged contract, we think it more equitable to leave each party to bear his own costs.

Bill dismissed.

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

RANDALL B. CLARK *vs.* DWELLING-HOUSE INSURANCE CO.

Washington. Opinion March 12, 1889.

Insurance. Insurable interest. Husband and wife. R. S., c. 49, § 20, c. 61, §§ 1 and 2.

By the laws of this state, a husband has no insurable interest in the wife's property, conveyed to her by him.

Where a husband took out a policy of fire insurance, upon his wife's property, payable in case of loss to himself, *Held*, that he has no valid claim to reimbursement because he can suffer no pecuniary loss, by the destruction of the property.

Public policy forbids wagering on the property of others, in which the party has no interest.

ON REPORT. Action of assumpsit, upon a policy of fire insurance. The case was submitted, after the evidence was taken out, to the full court for decision upon the legally admissible evidence. The court were to determine the law and the facts, and render judgment. The opinion states the case.

E. B. Harvey, for plaintiff.

Plaintiff was owner, and had an insurable interest. Deed to wife, intended as testamentary provision for wife, was not delivered. She had no knowledge of it. *McGraw* v. *McGraw*, 79 Maine, 257, 259; *Maynard* v. *Maynard*, 10 Mass. 456; *Stoney* v. *Winterhalter*, (Pa. St.) 11 Atlantic Rep. 611. It was an ineffectual attempt to convey, and not an alienation.

Plaintiff's mistake was one of law. Defect of legal knowledge does not work an estoppel to bar rights acquired by mistake, without fraud or deception. *Gwynn* v. *Gwynn*, (So. Car.) 4 S. E. Rep. 229. Deed to wife and collection by her of other policies, *res inter alios*. Rights to be determined according to actual state of title. *Bryan* v. *Traders Ins. Co.*, 145 Mass. 389; *Bank* v. *So. Cong. Soc.*, 127 Id. 516; *Lindley* v. *Ins. Co.*, 65 Maine, 368.

Husband's possibility of dower, an insurable interest, sufficient to support policy.

Time for proof of loss not fixed by statute, or policy. Such

defects waived, no call being made for corrections, &c. *Walker* v. *Ins. Co.*, 56 Maine, 371; *Bailey* v. *Ins. Co.*, Id. 474; *Bartlett* v. *Ins. Co.*, 46 Id. 500. Statute provisions may be waived as well as those in policy. *Fox* v. *Ins. Co.*, 53 Maine, 107, 109; *Lewis* v. *Ins. Co.*, 52 Id. 492; *Caston* v. *Ins. Co.*, 54 Id. 170.

D. C. Robinson, defendant.

Any recovery based on plaintiff's possible interest by way of survivorship, limited to its value. Burden on him to show what that is. Wood's Mayne Dam. §§ 437, 507; Bailey's Onus Prob. p. 129.

Deed to wife: Property, since, treated as hers. Issued two other policies to her while he was insurance agent. Under this policy, makes a proof of loss and swears she is owner. *McGraw* v. *McGraw*, held no title passed; not to be an advancement to wife, but to defraud state of penalties. Delivery of deed proved by subsequent conduct. *Gould* v. *Day*, 94 U. S. 405.

Proof of loss, not according to R. S., c. 49, § 21. His interest not stated; not sworn to before disinterested magistrate; and not furnished within reasonable time.

Onus with assured to show, if preliminary proofs of loss are required, substantial and timely compliance, or waiver by insurer. Bailey's Onus Prob. p. 131; Wood's F. Ins. § 422, *et seq;* Abb. Tr. Ev. 489; 2 Phillip's Ins., c. 22; *Edgerly* v. *Ins. Co.*, 43 Iowa, 587; *Blossom* v. *Ins. Co.*, 64 N. Y. 162; *Ins. Co.* v. *Kranick*, 36 Mich. 289; *Home Ins. Co.* v. *Duke*, 43 Ind. 418; *Oceana Co.* v. *Francis*, 2 Wend. 64; *Birmingham* v. *Ins. Co.*, 67 Barb. 595.

EMERY, J. This is an action at law, on a written policy of insurance dated Nov. 14, 1883, in which the defendant company, in consideration of the premium paid, promised to insure the plaintiff against loss or damage by fire or lightning on his house and ell, which were afterwards burned within the time of the policy. To recover in this action, the plaintiff must prove that at the time of the insurance, and at the time of the fire, he had an insurable interest in the buildings. The contract of fire or marine insurance is one of indemnity only. If the holder of such an insurance policy suffers no pecuniary loss by the destruction

of the property, he has no valid claim to pecuniary reimbursement. Public policy forbids any wagering on the property of others in which the party has no interest. Davis, J., in *Insurance Co.* v. *Chase*, 5 Wall. 509, 512; *Folsom* v. *Insurance Co.*, 38 Maine, 414; *Sawyer* v. *Mayhew*, 51 Maine, 398. This requirement of the law of insurance, has not been lessened by any statute. R. S., ch. 49, § 20.

To show his interest in the property, the plaintiff produced a deed of conveyance to himself from the former owners. The defendant then put in evidence an office copy of a deed of conveyance of the same property, from the plaintiff to Mary J. Clark his wife, dated April 16, 1874, and duly executed and recorded. The plaintiff contends that this deed was never intended to be delivered, and so testified. The defendant adduced evidence tending to show a delivery. The question is one of fact.

At the time of the deed to his wife, the plaintiff made on his own deed this memorandum: "This property was conveyed by deed to M. J. Clark, wife of the said Randall J. Clark, April 16, 1874." He procured the building, to be twice insured in his wife's name. He intended to have this policy written in her name. After the fire, he advised her to make on the two proofs of loss, on her policies, affidavits before him as magistrate, that she alone owned the buildings and that no one else had any interest in them. In making the proof of loss on this policy, the plaintiff himself deliberately made oath that the property belonged to Mary J. Clark, and that no other person had any interest therein. These acts done by the plaintiff, before any litigation arose, are directly opposed to his present claim that he never intended to convey the property to his wife. They outweigh his testimony given after the suit was begun, and to meet a troublesome defense set up. He does not offer the testimony of his wife, nor account for its absence. We find that at the time of the insurance and at the time of the fire, the property belonged to the wife, under her deed.

The next question is one of law. Has a husband, under the laws of this state, an insurable interest in property which he has conveyed in fee simple to his wife, as late as the year 1874?

Our statutes seem to have removed the last vestige of the common law marital rights of a husband in the real estate of his wife, however she may have acquired it. His only rights now in real estate he conveys to his wife, are a naked veto of a conveyance by her in fee, and a possibility of taking by descent from her, at her decease, depending on his survivorship, and her solvency. Her creditors have more right than he in such estate. She may manage the property without the joinder or assent of her husband. R. S., ch. 61, § 1. She may make him her agent, or not, as she chooses. Id. § 2. The law gives the wife the entire control over such property in every respect (except the power of conveyance in fee) and even, if it be a homestead, he can occupy it only by her consent. It is subject to be taken by her creditors. *Virgie* v. *Stetson*, 77 Maine, 520. A married woman is not limited in the management of her property however obtained. She may control its income. She may lease it without her husband's assent, and her lessee may expel him from the possession. *Perkins* v. *Morse*, 78 Maine, 17. During her lifetime he has no interest, not even a right of occupancy. If he survives her, and her estate is solvent, he acquires by these events a new interest and by way of descent only. R. S., ch. 103, § 14.

He would be no more affected by the burning of her house, than he would by the burning of any house which he was merely occupying rent free, or which he might possibly inherit. It has never been held, as far as we know, that a son has an insurable interest in the property of his father, which he had only a chance of inheriting. Nor has it been held, to our knowledge, that a mere occupier, without any estate, or claim of right has an insurable interest. The burning of this house undoubtedly subjects the plaintiff to inconvenience, and perhaps to the expense of providing another home. So would he, had he been living rent free and at sufferance in the house of his father, or brother, or son, in which he had no estate. While he may be affectionately concerned about his wife's property, we do not see that he has any pecuniary interest in it, legal, equitable, or even ponderable, or which the courts can measure, or which he can insure under our law.

We have examined the judicial decisions in other states, holding that a husband has an insurable interest in his wife's property, and we think it will be found in all of them that the husband had by the law some fixed cognizable estate, or interest, in his wife's property, which the wife could not divest. A loss of the property by fire was, in such case, a direct pecuniary loss to the husband.

The possible estate the husband may acquire by descent after the death of his wife, if he survives her, and she be solvent, has no existence before her death. Before her death he has no estate, but only a chance of acquiring one. The wife's right of dower exists in her husband's lifetime, though it is then inchoate; but we know of no case where a wife has attempted to insure such a right.

The evidence in this case suggests the theory that the intention was to insure the wife's interest, and that the insurance agent, by mistake, wrote the policy in the name of the husband. It is urged that the company have received the premium, and should not profit by their agent's blunder. If it be true that by reason of mistake, the policy does not truly express the real contract, and the wife was the person intended, she may perhaps by proper proceedings in equity, have the policy reformed and enforced according to the true intent of the parties, and the equities of the case. In bringing this action at law on the policy as it reads, the plaintiff under the rules of law assumed the burden of showing an insurable interest in himself, which he has not done.

Plaintiff nonsuit.

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

JOSEPH POMROY *vs.* JEFFERSON CATES, appellant.

Somerset. Opinion March 15, 1889.

Costs. Practice. Prevailing party. Appeal.

When a party wrongfully enters upon the docket of this court what purports to be an action appealed from a lower court, and the adverse party appears

and moves its dismissal, because no appeal had been duly taken, and the motion is sustained and the action dismissed, *Held*, that the party on whose motion the dismissal was obtained, is a "prevailing party," and entitled to costs.

ON EXCEPTIONS. At the *nisi prius*, term of this court, held in March 1888, at Skowhegan, Somerset county, Pomroy found the above entitled action on the docket, and filed a motion "that said action be dismissed, because, he says that the said Joseph Pomroy never had any judgment of any court against the said Jefferson Cates, to be appealed from; that there has been no such appeal taken; and that there has been no suit, between said parties, or appealed from. Wherefore, the said Joseph Pomroy prays that said supposed action be dismissed, and for his costs."

The court sustained the motion to dismiss, but refused costs, and Pomroy excepted.

J. Wright, for plaintiff.

Prevailing party recovers costs in all actions, unless otherwise specially provided. R. S., c. 82, § 117. Costs allowed: *Whitney* v. *Brown*, 30 Maine, 557, (after mis-entry); *Reynolds* v. *Plummer*, 19 Id. 22, (action brought in wrong county); *Turner* v. *Putnam*, 31 Id. 557, (irregularly brought up); *Call* v. *Mitchell*, 39 Id. 465, (nullity, for want of jurisdiction); *Brown* v. *Allen*, 54 Id. 436, (dismissed for illegal recognizance); *Ellis* v. *Whittier*, 37 Id. 548, (by statute in force at time of judgment); *Fuller* v. *Miller*, 58 Id. 40, (discontinuance); *Estes* v. *White*, 61 Id. 22, (prevailing party); *Bennett* v. *Green*, 46 Id. 499, (dismissed for want of recognizance); *Hunter* v. *Cole*, 49 Id. 556, (want of copies from appellate court); *Cary* v. *Daniels*, 5 Met. 236; *Turner* v. *Blodgett*, Id. 240; *Jordan* v. *Dennis*, 7 Id. 590; *Hunt* v. *Hanover*, 8 Id. 343, (no jurisdiction); *Fuller* v. *Whipple*, 15 Maine, 53, (judgment reversed, pending suit thereon); *Foster* v. *Buffum*, 20 Id. 124, (costs to indorser, maker having paid, *pendente lite*); *Cole* v. *Sprowl*, 38 Id. 190; *Moore* v. *Lyman*, 13 Gray, 394, (appeal); *State* v. *Harlow*, 26 Id. 75, (state on *scire facias*.)

Walton and Walton, for defendant.

This not an action. Names inadvertently placed on docket.

Nothing here, but motion to dismiss, and that is of a supposed action. Plaintiff not entitled to costs, on his own motion. No papers in case except the motion. On what can costs be taxed? Plaintiff cannot be harmed by this entry. No judgment, against him, can be entered up. *Steward* v. *Walker*, 58 Maine, 299.

WALTON, J. When a party wrongfully enters upon the docket of this court what purports to be an action appealed from a lower court, and the adverse party appears and moves its dismissal, assigning as a reason for its dismissal that no appeal had been duly taken, and the motion is sustained and the action dismissed, we think the party making the motion, and obtaining the dismissal, must be regarded as a "prevailing party," and entitled to costs. *Bennett* v. *Green*, 46 Maine, 499; *Moore* v. *Lyman*, 13 Gray, 394; *Wentworth* v. *Wyman*, 80 Maine, 463, and cases cited.

In this case, the defendant, as appellant, caused what purported to be an action between himself and the plaintiff to be entered upon the clerk's docket of this court, and the exceptions state that the plaintiff appeared by his attorney, and on the second day of the term filed a motion that said action be dismissed and for his costs, assigning among other reasons for the dismissal, that there had been no appeal duly taken; and that thereupon the court allowed the motion to dismiss, but denied costs.

The only ground on which the recovery of costs is resisted, is the fact that the plaintiff in his motion to dismiss has not only asserted that no appeal was duly taken, but has also asserted that there was no suit between the parties to be tried or appealed from; and, accepting this statement as true, the defendant insists that the statute gives costs only in an "action;" and that, if it be true, as the plaintiff asserts, that there was no action between the parties, then no costs can be recovered. The fallacy of this argument consists in not distinguishing between the pendency of an action in the court below, and the pendency of an action in this court. It may be true, that there was no action between these parties in the court below, but the record makes it certain that there was an action between the parties in this court, and that a motion was made to dismiss it, because it was wrongfully here, and that it was dismissed. If there was no such action in the

court below, then the error of the defendant in entering the action here, is all the more apparent.

If a person finds an action upon the docket of this court, in which he is named as a party, and he files a motion to have it dismissed, he tenders an issue. If the motion is resisted by the adverse party, then the issue is joined. If the court hears the parties, then there is a trial. If the motion is sustained, and the action dismissed, then there is a judgment, and a final judgment, in the case. Such a proceeding constitutes an action from its commencement to its termination, whether there is any other foundation for the proceeding than the facts stated or not. In the language of the dictionaries, it is the formal demand of a right, made and insisted upon in a court of justice, and prosecuted to final judgment. And we can not doubt that in such a proceeding the prevailing party is entitled to his costs.

Exceptions sustained.

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

ALONZO E. FULLER *vs.* JESSE E. MOWER.

Somerset. Announced May 31, 1888.

Opinion filed March 15, 1889.

Town officer. Personal liability. Invalid town order. Negligence. Warranty.

The defendant, one of the board of selectmen, signed and delivered to the chairman, a town order in blank, to be used for a legitimate purpose. The chairman issued it to the plaintiff, who loaned and advanced to him the money thereon, relying upon his sole assurance, that the town was in need of the money to pay town debts, and that the board was authorized by the town to hire the money. The defendant was wholly ignorant of such disposition of the town order, and the false representations made by the chairman.

In an action of the case, the plaintiff charged the defendant with having falsely and fraudulently represented to him, that he and the chairman had authority to hire money in behalf of the town, and to execute valid orders therefor, when in truth and in fact they had no such authority.

Held, that the action could not be sustained.

ON EXCEPTIONS AND REPORT.

This was an action of false warranty against the defendant, as one of the selectmen signing a town order, on the ground that he thereby falsely assumed to be the duly authorized agent, of the town of St. Albans, for the purpose of hiring money to pay town debts, for the year 1881, when in fact he had no such authority.

The declaration is as follows: "For that on the 21st day of November, 1881, the defendant together with one J. M. Skinner and A. J. Bonney, all of said St. Albans, were the duly elected, and qualified, and acting, selectmen of said town of St. Albans for the municipal year, beginning March 7, 1881, and were known to the plaintiff as such; and that on said 21st day of November 1881, at said St. Albans said defendant falsely and fraudulently represented to said plaintiff that he and said Skinner, in their capacity as selectmen of said town, and as constituting a majority of said selectmen, had power and authority to hire money in behalf of said town, and to sign, execute and deliver on behalf of said town valid orders therefor on the treasurer of said town, and that they were the agents of said town for these several purposes; and the plaintiff avers, that in consequence of the said defendant's several false and fraudulent representations aforesaid and in full reliance thereon and believing the same to be true, he was then and there induced to and did loan to said defendant, the sum of three hundred dollars in money, and was induced to and did take therefor a certain pretended town order signed by said defendant and by said Skinner, as selectmen aforesaid, in the words and figures following:

$300. ST. ALBANS, Nov. 21st, 1881.

To N. H. Vining, town treasurer or his successor:—Pay to A. E. Fuller or bearer, three hundred dollars and interest annually at 5 per cent. it being for money hired to pay town debts for the year 1881.

No. 119.

J. M. SKINNER, } *Selectmen*
J. C. MOWER, } *of St. Albans.*

And the plaintiff avers, that said defendant did thereby undertake and warrant to him that said order was valid and binding

on said town; whereas in truth and in fact neither said defendant nor said Skinner had any power or authority to hire money, in behalf of said town, for any purpose or to execute or deliver any valid order therefor, either on said town or on its treasurer, and said order was not valid or binding on said town; and by reason wholly of the false warranty of said defendant and of the several false and fraudulent representations as aforesaid, the plaintiff has lost said sum of three hundred dollars, with interest thereon from said 21st day of November, 1881, and spent time and labor and has been put to great expense personally, and in the employment of counsel in attempting without success to enforce said order against said town."

To this declaration, the defendant filed a demurrer, which after joinder was overruled by the court, and the defendant excepted.

Before trial, plaintiff offered the following amendment to his declaration, and to which defendant objected as a new and different cause of action, and not allowable in the then state of pleading. Amended declaration, same as before, (inserting the words "undertook and warranted" after represented in the eighth line, inserting the words "had been duly authorized by said town" in place of the allegation, had power and authority to hire money in behalf of said town,) alleges, after the line 15, as before, "and by means of the said defendant's false and fraudulent representations and warranty aforesaid, and by means of a certain pretended town order signed by said defendant, and by said Skinner, as selectmen aforesaid, in the words and figures following: (town order as before)

And by means also of the false warranty, contained in said order, that the same was valid and binding on said town, said plaintiff was then and there induced to and did loan and advance to said defendant, and to said Skinner, for said town, the sum of three hundred dollars in money. Whereas, in truth and in fact, neither said defendant, nor said Skinner, had any power or authority to hire money in behalf of said town, for any purpose, or to execute or deliver any valid order therefor, either on said town or on its treasurer, and said order was not valid or binding on said town: and by reason wholly of the false warranty of said

defendant, and of the several false and fraudulent representations as aforesaid, the plaintiff has lost said sum of three hundred dollars, with interest thereon, from said 21st day of November, 1881, and spent time and labor, and has been put to great expense, personally, and in the employment of counsel in attempting, without success, to enforce said order against said town."

After the testimony was out, the case was reported to the law court to draw such inferences as a jury might, from the legally admissible evidence, and allow the amendment to the declaration, if allowable.

The facts are stated in the opinion.

Baker, Baker and Cornish, J. O. Bradbury, with them, for plaintiff.

If a person, acting as agent, represents that he is authorized to do a certain act in behalf of his principal, when in fact he has not such authority, he is liable either in tort or contract, as for a false warranty to any person who has suffered loss on the strength of such false warranty. 1 Chitty Con. 313, (11th Am. Ed.); *Thomson* v. *Davenport*, 2 Smith, L. C., 367, 368; *Collen* v. *Wright*, 8 E. & B. 648; *Lewis* v. *Nicholson*, 18 Q. B. 503, 510; *Jefts* v. *York*, 10 Cush. 392, 395; *Noyes* v. *Loring*, 55 Maine, 408; *Teal* v. *Otis*, 66 Id. 329; *Cherry* v. *Bank*, L. R., 3 P. C., 24; *Richardson* v. *Williamson*, L. R., 6 Q. B. 278; *Beattie* v. *Lord Ebery*, 7 L. R., Ch. Ap. 777; *Randell* v. *Trimen*, 18 C. B. 786; *Hughes* v. *Graeme*, 33 L. J., Q. B., 335; *Bartlett* v. *Tucker*, 104 Mass. 336, 340; *Royce* v. *Allen*, 28 Vt. 234; *Baltzen* v. *Nicolay*, 53 N. Y. 467, 469; *Dung* v. *Parker*, 52 Id. 494; *White* v. *Madison*, 26 Id. 117; 1 Chit. Pl. 41, note S; Story's Agency, § 264; Thompson's Liability Officers, &c., pp. 1, 80, and notes.

Plaintiff's case: Defendant, as selectman, represented and warranted by signing and giving town order for hired money, that he had received authority from the town to hire this money, when in fact he had no such authority, and plaintiff having advanced his money in good faith on the strength of this false warranty, the defendant is liable.

No particular words necessary, to constitute such representation or warranty. Naked assumption of authority, a warranty that

the authority exists. Order bears upon its face express representation that it is "for money hired to pay town debts for the year 1881."

Defendant, as selectman, had no authority to hire money, on behalf of the town, without express authority by vote of the town. *Otis* v. *Stockton*, 76 Maine, 506 and cases cited.

Where one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud. Campbell's Sale of Goods and Com. Agency, p. 35, and cases there cited. Principle extended to cases of mere negligence or misplaced confidence. Id. p. 35. Rule as applied to blanks in an instrument: (negotiable paper) *Bank* v. *Neal*, 22 How. 96, 107; *Davidson* v. *Lanier*, 4 Wall. 447, 457; *Angle* v. *Ins. Co.*, 92 U. S. 330; 1 Daniel Nego. Inst., § 836; *Abbott* v. *Rose*, 62 Maine, 194, 202; (stock certificate, non-negotiable) *Sewall* v. *Water Power Co.*, 4 Allen, 277, 279, 282; (Sealed instruments) *So. Berwick* v. *Huntress*, 53 Maine, 89; *Drury* v. *Foster*, 2 Wall. 24. Defendant made Skinner his appointed agent, by intrusting him with order in blank. He was culpably negligent, and plaintiff innocent of wrong. Defendant not equally innocent.

Where the action is contract on implied warranty of authority, no fraud need be proved. Neither *scienter*, nor *mala fides* are material. *Collen* v. *Wright*, and cases, *supra; Trowbridge* v. *Scudder*, 11 Cush. 83, 87; 2 Chitty Pl. 262, 16th Am. Ed.

If action be in tort, it is in the nature of a false warranty, and governed by its own peculiar rules. *May* v. *Tel. Co.*, 112 Mass. 90, 94.

Misrepresentation, was one of fact, and not of law. *Beattie* v. *Lord Ebery*, *supra.* Non-existence of necessary vote of town, not known to plaintiff. *Richardson* v. *Williamson*, *supra.* Parties do not stand equal in duty and means of knowledge therein. Bigelow's Torts, pp. 19, 20. Plaintiff may rest upon defendant's representation, and forbear personal examination. *Weare* v. *Gove*, 44 N. H. 196; Story's Agency, § 264; *May* v. *Tel. Co.*, *supra;* Kerr's Fraud and Mistake, pp. 78, 80; *Chapham* v. *Shillito*, 7 Beav. 149; Benj. Sales, § 429, note c. 2d Am. Ed. and exhaustive dis-

cussion in 2 Pom. Eq., §§ 887, 891, and notes § 895, *et seq;* Thomp. Neg. p. 1175. Same as to matter of record. *David* v *Park*, 103 Mass. 501; *Ward* v. *Wiman*, 17 Wend. 193; *Brown* v. *Castles*, 11 Cush. 348, 350; *Atwood* v. *Chapman*, 68 Maine, 38; Pom. Eq., § 810, and note p. 275.

Defendant liable although a public agent. *Noyes* v. *Loring; Weare* v. *Gove*, *supra.*

D. D. Stewart, for defendant.

Alleged fraudulent representations, were matter of opinion,—matter of law, about which plaintiff knew as much as defendant did, or could. *Holbrook* v. *Connor*, 60 Maine, 578, 580, 581, 584, 585; *Bishop* v. *Small*, 63 Id. 12; *Norton* v. *Marden*, 15 Id. 44, 45.

Selectmen, as such, having no power to hire money upon town's credit, even to pay a town debt, plaintiff, if he had made reasonable inquiry would have ascertained whether the order was given for a matter for which the credit of the town could properly be pledged by the selectmen. *Rich* v. *Errol*, 51 N. H. 359; *Lincoln* v. *Stockton*, 75 Maine, 141, 145; *Ladd* v. *Franklin*, 37 Conn. 53; *Hartford* v. *Bank*, 49 Id. 539; S. P. *Otis* v. *Stockton*, 76 Maine, 506, and cases cited. One who contracts with a municipal corporation, or its officers, is bound at his own peril to know the limits of municipal power, and officers' authority. *Farnsworth* v. *Pawtucket*, 13 R. I. 82; *Sanford* v. *McArthur*, 18 B. Mon. 421; S. P. *Parsons* v. *Monmouth*, 70 Maine, 264; *Owings* v. *Hall*, 9 Pet. 608, 628, 629; *White* v. *Langdon*, 30 Vt. 599; *Goodrich* v. *Tracy*, 43 Id. 314. This doctrine, especially reasonable and pertinent, when a party deals with selectmen and is resident of the town. *Ladd* v. *Franklin*, *Farnsworth* v. *Pawtucket*, *supra*, *Austin* v. *Coggeshall*, 12 R. I. 329, 332; *Bank* v. *Winchester*, 8 Allen, 120, 121. Plaintiff bound to examine town records. Cases in Conn., N. H., R. I. & Ky. *supra; Parlin* v. *Small*, 68 Maine, 289, 291. No deceit, fraud, or warranty, where subject matter is equally open to the knowledge, or inspection of each party. *Poland* v. *Brownell*, 131 Mass. 138, 142; *Leavitt* v. *Fletcher*, 60 N. H. 182, 183.

When a party dealing with an agent has same means of

knowledge that the agent has, as to extent of his authority, agent not personally liable. *Paddock* v. *Kittredge*, 31 Vt. 378, 384; *Snow* v. *Hix*, 54 Id. 478; *Smout* v. *Ilbery*, 10 Mees. & Wels. 1; *Jones* v. *Downman*, 4 A. & E. (N. S.) 235 to 239; S. C. 45 Eng. Com. Law, R. 234; *Jefts* v. *York*, 10 Cush. 395, 396; Story's Agency, § 265, and note. Declaration alleges a loan to defendant. This would be a fraud upon the town, to which plaintiff was a party. No allegation that defendant knew his representations were false. *Carter* v. *Peak*, 138 Mass. 439; *Randell* v. *Trimen*, 18 C. B. 786; *Tryon* v. *Whitmarsh*, 1 Met. 1; 2 Chitty's Pl. 691, 692, 693, 694.

Amended count alleges the loan was "for the town," introduces a new cause of action, and intended to relieve plaintiff from his attempted fraud upon the town, in taking a town order from a selectman in payment of his private debt. Plaintiff guilty of negligence. Counsel also cited: *Webster* v. *Larned*, 6 Met. 522; *Middlebury* v. *Rood*, 7 Vt. 125.

Plaintiff, in reply.

Defendant responsible for representations made over his signature the same as for direct oral assertions. Cases cited, on this point, by defendant, relate to actions against corporation itself, or plaintiff had actual knowledge of falsity of representation and warranty. In *Sanford* v. *McArthur*, defendant's name was not on the unauthorized notes.

Principle of liability not confined to private agents alone. *Noyes* v. *Loring*, and *Weare* v. *Gove*, *supra*, cases of public officers.

Defendant can not set up defense of being a public officer. He ceased to act as such, by exceeding his authority, and went out of his way to do a private wrong.

Viewed in the light of the decided cases, it was a personal contract, from which he is not relieved by being also a public officer.

WALTON, J. The material facts in this case are few. The plaintiff asked one J. M. Skinner, then chairman of the board of selectmen of the town of St. Albans, if the town was in need of money, and whether the selectmen were authorized to hire money in behalf of the town; and, having received affirmative answers,

he let Skinner have $300 and took a town order for it. What Skinner did with the money does not appear. He has absconded, and it may be that he embezzled it; but of this there is no proof. The order was signed by Skinner, and purports to have been signed by the defendant, who was also a member of the board of selectmen. But this use of the defendant's name was not authorized. The defendant had signed four or five blank orders to be used in the renewal of some orders then outstanding against the town, and Skinner, without the knowledge or consent of the defendant, used one of these blanks on which to write the plaintiff's order. The defendant testifies that he never authorized or ratified this use of his name, and had no knowledge of the transaction till this action was commenced against him.

The action is in form an action on the case for deceit. The plaintiff charges the defendant with having falsely and fraudulently represented to him that he and Skinner had authority to hire money in behalf of the town, and to execute valid orders therefor, when in truth and in fact they had no such authority.

Can the action be sustained? We think not. We have examined the authorities with care, and given to the question much thought, and we can find no satisfactory ground on which a decision in favor of the plaintiff can rest. We assume that Skinner practiced a fraud upon the plaintiff, but we can find no rule of law which, upon the facts established by the evidence, will make the defendant responsible for that fraud. The defendant made no false representations to the plaintiff. He had no knowledge of the transaction, or any connection with it whatever, except that he had signed a blank order for another and a different purpose, and Skinner, without his knowledge or consent, used the blank on which to write the plaintiff's order.

The argument is pressed upon us that Skinner ought to be regarded as the defendant's agent; but we can find no rational ground for so regarding him. Selectmen are not the agents of each other. Between them the relation of principal and agent does not and can not exist. Their authority is not transferable. An attempt to transfer it would be null and void. One selectman can not possibly exercise the authority of another. The law does not allow it. And the plaintiff is chargeable with notice of this fact;

and he can not be allowed to say that in making his contract with Skinner, he supposed Skinner was acting as the agent of either of the other members of the board. He could, if he chose, rely upon Skinner's word that another member of the board had sanctioned the contract; but for the truth of such a representation he would have no right to rely upon any one except Skinner. And, evidently, the plaintiff's loss is the result of his reliance upon Skinner. If he had made his contract with a majority of the board, as the law requires all such contracts to be made, and had delivered his money into the custody of a majority of the board, there is no reason to suppose that he would have lost it. Or, if he had consulted a majority of the board, undoubtedly he would have been informed of the want of authority in the selectmen to hire money for the town, and thus avoided his loss. But he seems to have had full confidence in Skinner. He consulted him alone, he made his contract with him alone, he delivered his money to him alone, and if he loses it, we think he must look to Skinner alone for his indemnity.

It is urged that the defendant was careless in signing a blank order and leaving it with Skinner. Perhaps he was. It can now be seen that it was dangerous to do so. But the defendant was not more careless in trusting Skinner with a blank order than the plaintiff was in trusting him with money when no other member of the board was present to witness or sanction the transaction. And in this particular they are in *pari delicto*. And if it be true, as counsel urge, that Skinner's fraud would not have been possible but for the defendant's negligence, it is equally true that the fraud would not have been possible but for the plaintiff's negligence. Both trusted him and both were deceived by him. But negligence alone, if proved, will not support the action. The gist of the action is the alleged fraud and deceit, and, unless these are proved, the action is not maintained. *Tryon* v. *Whitmarsh*, 1 Met. 1; *Kingsbury* v. *Taylor*, 29 Maine, 508. And very clearly the allegations of fraud and deceit on the part of the defendant are not proved.

Judgment for defendant.

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

STATE *vs.* JOEL DUNLAP.

Franklin. Announced January 7, 1889.

Opinion. March 19, 1889.

Indictment. Cider. "Beverage or tippling purposes." R. S., c. 27.

An indictment for the sale of cider sets out no offense under R. S., c. 27 without an averment that the cider was sold as "a beverage or for tippling purposes."

ON EXCEPTIONS. Indictment for single sale of cider, in quantity less than five gallons, August 1, 1886. After a verdict of guilty, the defendant moved an arrest of judgment because 1st, no crime is charged in the indictment; 2d, everything charged in the indictment may be true, and still the defendant may be innocent; 3d, the indictment gives the defendant no notice of what he had to meet on the trial. The presiding justice overruled the motion, *pro forma*, and the defendant excepted.

There were other exceptions by the defendant, but they became immaterial, in the view taken by the court of the motion.

H. L. Whitcomb, for defendant.

Sale of cider, in the abstract, no offense. *State* v. *McNamara*, 69 Maine, 133. Indictment demurrable. *State* v. *Keen*, 34 Maine, 500; *State* v. *Gurney*, 37 Id. 149; *State* v. *Godfrey*, 24 Id. 232; *State* v. *Bennett*, 79 Id. 55.

Cider being excepted from the general provisions of the statute, the state must charge and prove it was sold as a "beverage or for tippling purposes." *Rex* v. *Liverpool*, 3 East, 36; *State* v. *Northfield*, 13 Vt. 565; Starkie's Crim. Pl., 2d ed. 190; 1 Bishop Crim. Proc., §§ 513, 637; *State* v. *O'Donnell*, 10 R. I. 472; *Com.* v. *Maxwell*, 2 Pick. 139; *Com.* v. *Thurlow*, 24 Pick. 374; *Com.* v. *Odlin*, 23 Pick. 275; Bishop Stat. Crimes, § 1034, b, note; *Dawson* v. *People*, 25 N. Y. Ct. App. 399, (11 Smith) *Vanderwood* v. *State*, 50 Ind. 36; *Dowdell* v. *State*, 58 Ind.

F. E. Timberlake, county attorney, for the state.

This is an indictment under § 34, c. 27 of the R. S. prior to the amendment of 1887.

The indictment declared the article sold to be "intoxicating liquor," and the evidence must have sustained the allegation, as the verdict of the jury was "guilty."

The description—"to wit, a quantity less than five gallons of cider"—might be rejected and the indictment would then be sufficient. *Com.* v. *Conant*, 6 Gray, 482; *Com.* v. *Timothy*, 8 Gray, 480; *Com.* v. *Anthes*, 12 Gray, 29; *Com.* v. *Dean*, 14 Gray, 99;

An indictment as common seller or for nuisance would be sustained by proof of sales of cider unlawfully. *State* v. *Roach*, 75 Maine, 123; *State* v. *Starr*, 67 Maine, 242;

Whether it is intoxicating liquor is a question of fact for the jury. *Com.* v. *Blos*, 116 Mass. 56.

All matters of defense not a part of the description of the offense need not be set out in indictment. 1 Bishop on Crim. Proc. § 638. *Com.* v. *Edwards*, 12 Cush. 187.

A *prima facie* case is stated and it is for the party for whom matter of excuse is furnished by the statute to bring it forward in his defense. *State* v. *Gurney*, 37 Maine, 149.

An exception or proviso which is not in the enacting clause, whether in the same section with it or not, need not be negatived. 1 Bishop Crim. Proc. § 639, and cases there cited. *Guptill* v. *Richardson*, 62 Maine, 257, 263; *State* v. *Boyington*, 56 Maine, 512; *Com.* v. *Fitchburg R. R.*, 10 Allen, 189; *Com.* v. *Hart*, 11 Cush. 130, 136.

A negative averment need not follow the words of the statute. A negative in general terms will suffice. 1 Bishop Crim. Proc. § 641, and cases there cited. *State* v. *Keen*, 34 Maine, 500, 505.

"Without any lawful authority, etc.," sufficiently negatives all modes of selling warranted by law. *Com.* v. *Conant*, *supra*; *Com.* v. *Davis*, 121 Mass. 352; *Com.* v. *Clark*, 14 Gray, 367, 374.

HASKELL, J. The indictment charges the sale of "a quantity less than five gallons of cider" on the first day of August 1886, without stating that it was sold "to be used as a beverage or for tippling purposes." The omission is fatal to the indictment; for

all that the indictment charges may be true, and the defendant have violated no law.

The indictment is found under c. 27 of R. S.; and that chapter permits the sale of unadulterated cider, not sold "to be used as a beverage or for tippling purposes." These uses to be made of the article must exist, in order that the statute may apply to the sale of cider at all. The sale must be tainted and coupled with the particular use or purpose to come within the statute. *State* v. *McNamara*, 69 Maine, 133; *State* v. *Roach*, 75 Maine, 123.

This case does not come within the rule that an exception or proviso not in the enacting clause of a statute need not be negatived; for this statute, by its express language, does not apply to the subject at all, unless certain conditions exist. These conditions are not exceptions withdrawn from the scope of the statute, but are made the subject matter upon which the statute may act. Unless they exist, the statute is inoperative; and unless they be averred, no violation of the statute is shown.

Exceptions sustained.

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

STATE *vs.* BENJAMIN DODGE.

Lincoln. Opinion March 19, 1889.

Indictment. Time. Negative averment.

An act, prohibited by statute on certain particular days only, must be charged in an indictment as having been committed on one of those particular days, else no offense is set out.

ON EXCEPTIONS, to overruling a motion in arrest of judgment, after verdict, upon the following indictment:

"The jurors for said state, upon their oath present, that Benjamin Dodge of Newcastle, in said county of Lincoln, at Newcastle in said county of Lincoln, on the first day of June, in the year of our Lord one thousand eight hundred and eighty-six, and

on divers other days and times between said first day of June, A. D. 1886, and the fifteenth day of July, A. D. 1886, did keep and maintain for the purpose of taking alewives and other fish, a certain fish-weir in the waters of the Damariscotta river, in said county of Lincoln, at Dodge's Point, so-called, in said Newcastle, and not within the part of said waters exempt from provisions relating to migratory fishes and the supervision of fish-ways by the commissioners, by § 31 of c. 40 of the R. S., of the year A. D. 1883, of the state of Maine; and the said Benjamin Dodge was bound and required by law to take out and carry on shore the netting or other material which while fishing closes that part of said weir where the fish are usually taken, and let the same there remain during the weekly close time, as prescribed and required by § 43 of c. 40 of said R. S., being the time between sunrise on Saturday morning of the twelfth day of June A. D. 1886, and sunrise on the following Monday morning of the fourteenth day of June, A. D. 1886, but the said Benjamin Dodge did not take out and carry on shore the netting or other material which while fishing, closes the part of said weir where the fish are usually taken, and let the same there remain during said close time, as required by statute, being the time between sunrise of Saturday morning of the twelfth day of June, A. D. 1886, and sunrise of the following Monday morning of the fourteenth day of June, A. D. 1886 but did then and there during said close time keep the part of said weir, where the fish are usually taken, as aforesaid, closed, against the peace," &c.

The motion in arrest of judgment was in substance; that said indictment does not allege that the respondent kept or maintained a weir in or during any time which was close time; but only that on the first day of June 1886, and on divers other days and times between said first day of June 1886, and the fifteenth day of July 1886, the respondent did keep and maintain such weir. That said first day of June 1886, was not close time, and that there were divers other days and times between said first day of June 1886, and the fifteenth of July 1886, which were not close time.

G. B. Sawyer, for defendant.

The indictment follows a form which would be applicable to a continuous close time between the dates named. It should have averred, either, that on the first day of June and during all the time between that day and the fifteenth day of July, the respondent "did keep and maintain," &c., or discarding the *continuando* altogether, averred the keeping and maintaining on the precise days to which the proof was applicable. Where the criminality of an act depends solely on the time of its commission, the time is a material averment, not only as to the act itself, but also as to every essential element to its commission,—and should be alleged with certainty.

We are aware that keeping and maintaining a weir is not in itself the substantive offense which the statute contemplates; but it is an essential element, without the existence of which, at the very time of the offense, the offense can not be committed.

Suppose that on Tuesday, the first day of June, the respondent had, in Damariscotta river, such a weir as the indictment describes, and that he kept and maintained it till Friday, the fourth day of June, when he wholly and finally removed it. The allegation of "keeping and maintaining," as in the indictment, would be strictly true, and yet no offense would have been committed. The subsequent allegation, that "the said B. D. did not take out and carry on shore the netting," &c., "and let the same there remain" during a specified close time would also be true, as it would of every other person in the community. But without the "essential fact," properly alleged, that on the particular days named the respondent had, or "kept and maintained," such weir, it fails to sufficiently allege any violation of the law. *State* v. *And. R. R. Co.*, 76 Maine, 411; *Barter* v. *Martin*, 5 Maine, 76; *State* v. *Lashus*, 79 Maine, 541.

The intervening allegation, that the said B. D. "was bound and required by law to take out and carry on shore the netting," &c., during a specified time, merely attempts to state a conclusion of law; and would be unobjectionable, by way of inducement, if based on a sufficient allegation that on the days named he had such a weir. Without that it falls to the ground.

The concluding averment in the indictment,—"but did then and there during said close time, keep the part of said weir, where the fish are usually taken, as aforesaid, closed," is subject to the same objections above stated; and, besides that, it does not sufficiently allege any offense known to the law.

O. D. Castner, county attorney, for the state.

Allegation of Time:

An indictment must show a time certain when the offense was committed, and the time may be laid with a *continuando;* and the "divers other days" must be alleged with legal exactness. "Such exactness is obtained by alleging that the offense was committed on a day certain and on divers other days between two days certain." *Wells* v. *Com.*, 12 Gray, 327. Evidently such allegation, when made with the above degree of exactness, may include any and all days within the time named. Having made an allegation which would admit proof of maintaining a weir on any day within the two days named, the indictment goes on to describe the offense, and designates the close time particularly when the same was committed.

Mode of charging the offense:

It is established by a list of authorities too numerous to cite, that it is not necessary to describe a statutory offense in the exact words of the statute, but that the indictment is sufficient if the offense be substantially set forth, though not in the words of the statute. See Abbott's U. S. Dig. Title "Indictment" III, 2, No. 206 and authorities there cited. An indictment thus framed "fully, plainly, formally and substantially" describes the offense. *Com.* v. *Fogerty*, 8 Gray, 490–1. There is no variance, in the given indictment, because the offense is charged in the exact words of the statute; there is no material omission, because the portions of statute not included relate to other violations not intended to be charged.

Exceptions and Provisos:

It is a well established rule of pleading that it is not necessary to negative a proviso found in a different clause or statute from that containing the prohibition. The case in 78 Maine, (p. 392), does not abrogate that general rule. The ground of that decision

was that the complaint did not even make out a *prima facie* case. The criminality of the act charged depending on the locality, there did not necessarily appear any offense committed, admitting all the allegations. But the distinction is very clear between the principles which govern that case and the general rule that a proviso or exception need not be negatived, which, instead of entering into the essence of the offense, furnishes a justification or excuse for committing it. Exceptions and provisos of the latter class merely furnish grounds of defense. And therefore the exceptions and provisos in question, being of the latter class, need not be negatived. See *Com.* v. *Jennings*, 121 Mass. 49; 29 Iowa, 551 (Abbott N. S.) II, "Indictment" No. 25.

The above rule is not only well established, but is one on which the pleader greatly relies in drafting indictments, to avoid unnecessary prolixity and cumbersome forms of expression.

HASKELL, J. "Neither a complaint nor an indictment for a criminal offense is sufficient in law, unless it states the day, as well as the month and year on which the supposed offense was committed." *State* v. *Beaton*, 79 Maine, 314.

An act, prohibited by statute on certain particular days only, must be charged as having been committed on one of those particular days; for the time laid is a material element in the offense, and, unless laid on a day within the statute, no offense would be charged. In the case at bar, both time and place are material elements to constitute the statute offense. *State* v. *Turnbull*, 78 Maine, 392.

The statute prohibits the maintaining of closed weirs in certain inland waters on Saturdays and Sundays between April 1st and July 15th. R. S., c. 40, § 43. The indictment charges the maintaining of the weir on June 1st, Tuesday, not close time, and on divers other days and times between that day and July 15th. All this may have been lawfully done. Saturday and Sunday are not pointed out as among the "divers other days and times." The defendants are presumed to have regarded law, not to have violated it.

True, the indictment avers that during Saturday and Sunday, June 12 and 13, the defendants were bound to carry and keep on

shore the netting which closes that part of the weir where fish are usually taken, and that they did not do it. But if they did not maintain the weir on those days they had no need to do it. It is said that the last clause in the indictment sufficiently charges the offense. But the trouble with that clause is, that it assumes, what is no where alleged, that the defendants during some Saturday or Sunday maintained the weir.

It is best for the proper administration of justice, that reasonable exactness and precision of statement be required from those officers of the law, selected on account of their professional skill in this behalf.

Exceptions sustained.

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

CHARLES SHAW *vs.* ROBERT W. GILMORE.

Penobscot. Opinion March 19, 1889.

Replevin. Mortgage of crops. When void.

At common law, the grant of crops of hay to be grown for an indefinite period of time in the future, upon the land of the assignor, and of which he retains possession, is inoperative and conveys no title to the same as against a *bona fide* purchaser of a year's crop, after the same has been harvested.

ON REPORT. This was an action of replevin. Writ dated November 2, 1881. Plea, general issue and brief statement, that at the date of the writ and the service thereof the title to the property, and the right of possession was not in the plaintiff, but in him the defendant, and in Gilman, Cheney & Co. who furnished him the money to pay for the same.

The plaintiff, to support his title to the property claimed, being forty tons of hay, introduced a mortgage of real estate, from which the hay was cut, given by one Sanford Stevens to plaintiff, dated April 14, 1877, and recorded April 20, 1877, and one of the $1,000 notes secured thereby; also a chattel mortgage, which appears in

the opinion, dated April 19, 1877, and recorded in the town clerk's office, of Dexter, the same day.

The defendant introduced evidence, bearing upon the question of said Stevens' residence, at the date of the chattel mortgage, and which defendant alleged was in Bangor, while the plaintiff offered testimony to show it was in Dexter.

Counsel argued this question of residence, and the proper place for recording the chattel mortgage, in their briefs at length. A report of the arguments upon this point, becomes unnecessary, by reason of the construction put upon the chattel mortgage, by the court.

The full court were to render such decision as the rights of the parties required, upon the legally admissible evidence.

Crosby and Crosby, for plaintiff.

That the hay was not in potential existence, at the date of the chattel mortgage, plaintiff answers, that Shaw's deed of the farm to Stevens, the mortgage of the same back to Shaw by Stevens and the latter's chattel mortgage of the hay to Shaw, were all simultaneous.

Defendant had full knowledge of the chattel mortgage. He had lived in Dexter for ten years or more, said he knew all about it, and he had solicited advice of attorneys who informed him that it amounted to nothing. *Sheldon* v. *Connor*, 48 Maine, 584, was decided by a divided court. It can not be said that the law upon this point can be considered settled in defendant's favor.

T. H. B. Pierce, for defendant.

Chattel mortgage invalid, because it does not describe definitely the farm that is to produce the mortgaged hay; it does not say when bought, nor where situated. Plaintiff can not recover because the twenty-five tons reserved are included in the replevied hay. Mortgage contains a power of sale which would protect a purchaser from Stevens. It was given before Stevens had any title to the farm if it means this farm from which the hay was cut. The deed of farm and mortgage back, not delivered until the next day, at least, after the mortgage of hay was recorded. Nothing conveyed by the chattel mortgage given before delivery of the

other deeds. *Head* v. *Goodwin*, 37 Maine, 187; *Pratt* v. *Chase*, 40 Id. 269; *Morrill* v. *Noyes*, 56 Id. 469; *Farrar* v. *Smith*, 64 Id. 77.

It can not affect third parties whose rights have intervened. *Allen* v. *Goodnow*, 71 Maine, 420; *Griffith* v. *Douglass*, 73 Id. 535.

HASKELL, J. The plaintiff claims title to certain hay, cut upon a farm in 1881, by virtue of an equitable mortgage, dated April 19, 1877, of the following tenor:

"For a valuable consideration, to me paid by Charles Shaw of Dexter, I hereby sell to him all the hay that is to be cut on the farm I have bought of him, and I agree to harvest and safely store the said hay in the barn on the said farm, and keep the same without expense to said Shaw, and deliver the same to him on demand. Twenty-five tons of the said hay is to be reserved from this sale for my own use. It is hereby agreed as a condition in this trade that we are to dispose of the said hay from year to year, to the best advantage, and apply the proceeds to the payment of the notes that yearly become due on the payment of said farm. The crops of 1877 is to be applied in payment of the note that becomes due April 14th, 1878, and the crops of 1878 in payment of the note that becomes due in 1879, and so on from year to year. It is further agreed that I am to keep an amount of insurance on the said hay that will amount to four hundred dollars."

This is an action at law, and must be decided upon legal and not equitable principles. It is a maxim of the common law, that a man can not grant that which he hath not; but it is well settled, that he may assign that of which he is "potentially, but not actually possessed. He may make a valid sale of the wine that a vineyard is expected to produce, or of the grain a field may grow in a given time." The sale however can only operate upon a specific thing, as the grass of a particular field during a specified time that the grantor owned the right to cut and gather it in. *Emerson* v. *E. & N. A. Railway Co.*, 67 Maine, 387; *Farrar* v. *Smith*, 64 Maine, 74. Even in equity, an assignment of wages to be earned in the future, but not under an existing employment, must specify the time during which such wages are to be earned, and the employment from which they are expected to arise; and the assignment must neither contravene public policy, nor be

inequitable. *Edwards* v. *Peterson*, 80 Maine, 367; *Lehigh Val. R. Co.* v. *Woodring*, (Pa.) 9 Atl. Rep. 58.

In the present case, the grant purports to be of the yearly crop of hay for an indefinite period of time. The controversy is over the fifth crop, sold by the assignor, who was in possession of the same, to a *bona fide* purchaser. Under the rules of the common law, the conveyance must be held inoperative as to the hay in dispute and, therefore, the plaintiff's title to the same fails.

Judgment for defendant and for return.

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

WILLIAM H. TITCOMB *vs.* JOHN MCALLISTER.

Knox. Opinion March 19, 1889.

Surety. Contribution. Payment. Presumption rebutted. Application of indemnity.

The presumption that the taking of a note for a pre-existing debt is a payment of the debt, is rebutted by the fact that the creditor held security, which he did not relinquish, upon the taking of the note.

A co-surety upon a note, who takes security from the promisor to indemnify himself against his suretyship, and also for an accommodation indorsement of a previous note for the same maker, is not bound to share his security with his co-surety, so long as it is insufficient to indemnify him for the first indorsement.

Such co-surety should apply his security to his indemnity as of the date when the same has been reduced by him to cash.

Where the plaintiff thus held security which was insufficient to indemnify him against his prior indorsement, *it was held*, that he might recover of the defendant, as his co-surety, one half of the amount which he had paid on their joint suretyship with interest.*

ON REPORT. The law court were to render such judgment as the law and facts required. The action was assumpsit to recover of the defendant the sum paid out by the plaintiff upon a note,

**Titcomb* v. *McAllister*, 77 Maine, 353.

upon which they both were accommodation indorsers. The note was for $1600, payable to Alfred Sleeper, signed by Williams & Dean, but not indorsed by the payee. The defendant was the first, and plaintiff the second indorser. Plaintiff paid October 24, 1879, $1,800.81 to discharge the judgment recovered by Sleeper against the parties on the note.

C. E. Littlefield, for plaintiff.

Plaintiff and defendant not co-sureties.

From the order of their names on the back of the note, legal presumption is that the parties assumed the conditional liability of successive indorsers. *Coolidge* v. *Wiggin*, 62 Maine, 568; *McDonald* v. *Magruder*, 3 Pet. 470, approved in *Phillips* v. *Preston*, 5 How. 288; *McCarty* v. *Roots*, 21 How. 432; and *Coolidge* v. *Wiggin*, *supra*.

Plaintiff not estopped by allegations of a co-suretyship in his equity suit. They were allegations only of legal inferences, and not of fact. That record is not in this suit, and not admissible. Whart. Ev., § 1119. Understanding of parties after their responsibilities become fixed by law can not determine their legal rights. They may view the law differently. No evidence of any agreement or understanding at time of indorsement. Question of co-suretyship in equity suit not in issue there.

Plaintiff's right to be reimbursed, from mortgaged property, for insurance, taxes and money expended to preserve the property: Jones Mort., §§ 1126, 1135, 1137; *Ruby* v. *Religious Soc.* 15 Maine, 306; *Starrett* v. *Barber*, 20 Id. 457; *Sparhawk* v. *Wills*, 5 Gray, 423; *Woodward* v. *Phillips*, 14 Id. 132.

Interest on disbursements from time of payment: *French* v. *French*, 126 Mass. 360.

Plaintiff, then being defendant's creditor, defendant must first pay the secured debts, if he desires to receive the benefit of the security. Story Prom. Notes, § 281; Daniel Neg. Inst., vol. 2, p. 324; 1 Story Eq. Jur., § 499; *Richardson* v. *Bank*, 3 Met. 536, 541; *Bank* v. *Wood*, 71 N. Y. 412.

If parties are co-sureties, same rule applies and first note must be paid, before applying balance of proceeds to second note. Parties sharing in security must all be liable for same debt, and

for which it was given. Defendant not liable on first note. Order of appropriation: *Wilcox* v. *Bank*, 7 Allen, 270; *Farebrother* v. *Wodehouse*, 23 Barb. 18; *Brown* v. *Ray*, 18 N. H. 104; *McCune* v. *Belt*, 45 Mo. 124.

J. E. Hanly, for defendant.

Parties were joint promisors, and sureties, and not indorsers. *Woodman* v. *Boothby*, 66 Maine, 389, and cases cited.

Titcomb v. *McAllister*, 77 Maine, 353, decides these parties are co-sureties. Plaintiff must account with defendant for his security. *Scribner* v. *Adams*, 73 Maine, 541, and cases there cited. Action for contribution founded on purely equitable principles. *Mason* v. *Lord*, 20 Pick. 447. Co-sureties entitled to share equally in indemnity received by either, directly or indirectly. *Schaeffer* v. *Clendenin*, 100 Pa. St. 565. Bound to exercise good faith to each other. L. C. Eq., vol. 1, p. 162. Security taken for benefit of all, equity will treat surety as trustee for all. L. C. Eq., *supra*, and cases cited.

Grounds of accountability; also neglect, and misconduct: L. C. Eq., vol. 1, p. 163, and cases cited; Rand. Com. Paper, vol. 2, p. 425; *Bank* v. *Henniger*, 105 Pa. St. 496; Am. L. C., vol. 2, p. 355; *Chilton* v. *Chapman*, 13 Mo. 470; *Tutor* v. *Pierce*, 11 B. Mon. 399; Fells Law Guar. & Surety, p. 299; *Torrance* v. *Cook*, 63 Ga. 598; *Rollins* v. *Taber*, 25 Maine, 144.

Merits: Plaintiff has converted security to his own use, thereby releasing defendant as co-surety. First note was paid June 1877. New note taken, with no agreement by which presumption of payment was done away.

HASKELL, J. The plaintiff, being accommodation indorser upon a demand note for $1000, became co-surety with the defendant upon another demand note, of the same promisors, for $1600; and, to secure himself on both notes, the plaintiff took from the makers of them a mortgage of one-sixteenth of the barkentine Addie E. Sleeper, conditioned to re-transfer the security upon payment of both notes. *Titcomb* v. *McAllister*, 77 Maine, 353.

It is claimed that a renewal of the first note since the mortgage

was given operated as payment, and relieved the security from any lien on account of it.

By the renewal, the plaintiff's liability was not changed. He continued holden for the same debt after the renewal, as before; and needed the security as much then, as when he obtained it. The giving of a promissory note for an existing debt is, *prima facie*, payment of it; but the presumption is rebutted, when the creditor holds security; as the mere taking of a debtor's note shows the want of sufficient motive, by the creditor, to forego his security. He cannot be presumed to have intended action, so prejudicial to his interest. *Bunker* v. *Barron*, 79 Maine, 62.

It is next contended that the security should be applied to both notes *pro rata;* and certain admissions of the plaintiff are relied upon to work out that result.

The mortgage recites: "I have this day received a bill of sale &c., as collateral security for the payment of said two notes." The admissions amount to no more than that the plaintiff believed the security sufficient to save him harmless from both notes. He took the security primarily for his own benefit. The defendant has no right to it by contract; but only such equity as works equality among those of equal merit. This is not wholly the case of a surety who, gaining security for the debt, is held in equity to share it with his co-sureties, by applying it to the debt as far as it will go. It is the case of one attempting to indemnify himself from liability incurred for another's accommodation; and it would be inequitable and unjust to strip the plaintiff of his security for signing the first note, and compel him to share it with the defendant, as if a co-surety upon both notes.

By the payment of both notes, the plaintiff became the creditor of the makers of them, and of the defendant, for his moiety of the last one. The plaintiff then held his debtor's property to secure several debts, upon one of which the defendant was liable as surety. Can a surety compel the creditor to apply security, taken from the debtor to secure several debts, to that debt upon which the surety is liable, in preference to the other debts, or to apply it *pro rata* upon all of them? In *Wilcox* v. *Fairhaven Bank*, 7 Allen, 270, the court held that he could not. The doctrines

there laid down are decisive of this point in the case at bar. The plaintiff may first apply his security to the first note.

The plaintiff had received the income of the security for several years prior to June 20,1885, when it was wholly converted into cash, by the payment of insurance for a total loss. Then the security changed its character, and became cash in the hands of the plaintiff, for which he is held to account. The net amount received by the plaintiff including interest to June 30, 1885 was $778.53. The amount that he paid upon the first note with interest to that date was $1264.33, a sum larger than that received from the security, so that nothing remained to be applied to the last note, and the defendant is liable to pay one-half of it.

It is contended that the plaintiff so dealt with his security as to have become guilty of its conversion, and then liable for its value; but the evidence does not warrant a conclusion of that sort. No bad faith appears on his part; nor is he shown to have conducted unlawfully in regard to it. The defendant did not offer to redeem the security from the plaintiff and has no reason to complain of his management in the premises.

The plaintiff paid, Oct. 24, 1879, $1800.80 upon the note, whereon the defendant was his co-surety.

Judgment for plaintiff for $900.40 *with interest from October* 24, 1879.

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

ELIZA C. GORE *vs.* FRANK CURTIS.

Androscoggin. Opinion March 19, 1889.

Trespass. Evidence. Reputation. Specific acts.

In trespass for assault upon and for soliciting the plaintiff, a married woman, to commit adultery with the defendant, specific acts of unchastity by her with other men prior to the alleged assault can not be shown in defense.

ON EXCEPTIONS. This was an action for indecent assault and battery upon the plaintiff, a married woman.

The defendant offered testimony to prove specific acts of unchastity on the part of the plaintiff with other men than the defendant prior to the alleged assault. The presiding justice ruled that such evidence was inadmissible, but allowed the defendant to submit evidence of the plaintiff's general reputation for chastity. To this ruling the defendant excepted.

Verdict for plaintiff for $112.00.

Savage and Oaks, for defendant.

Counsel contended the defendant should have been permitted to show plaintiff's actual character, first, as bearing upon the question of damages, and second, as bearing upon the force which is alleged by the declaration to have been used.

Rule sought to be declared applies peculiarly to assaults of this character; and courts have recognized the force of its reason. 1 Whart. Ev., § 51; Abbott's Trial Ev., pp. 651, 682; Waterman Tresp., § 271; *People* v. *Abbott*, 19 Wend. 192.

The objection of raising collateral issues, by admitting specific acts, may be answered by the fact that plaintiff, if innocent, can disprove the few instances which could be adduced in testimony more readily by her own evidence than by rebutting her general reputation for unchastity, and on which question she can not testify.

Counsel also cited: *Treat* v. *Browning*, 4 Day, 408; *State* v. *Johnson*, 28 Vt. 512; *State* v. *Reed*, 39 Id. 417; *Watry* v. *Ferber*, 18 Wis. 500 (S. C. Am. Dec. 789); citing *People* v. *Benson*, 6 Cal. 221; 2 Greenl. Ev., § 556; *State* v. *Murray*, 63 N. C. 31.

G. C. and C. E. Wing, for plaintiff.

Counsel cited: *Peterson* v. *Morgan*, 116 Mass. 350, 352; *Com.* v. *Kendall*, 113 Mass. 210; Greenl. Ev., vol. 1, § 55, and cases cited; Abbott's Trial Ev. 672, 674; Phillips Ev., vol. 1, p. 176, 2d ed., Id. vol. 2, 339 note.

HASKELL, J. In trespass for assault upon and for soliciting the plaintiff, a married woman, to commit adultery with the defendant, can he be permitted to show specific acts of unchastity by her with other men prior to the alleged assault, in mitigation of damages, and to rebut the probability of alleged force?

At the trial the court excluded the evidence, and the learned counsel for the defendant in the opening paragraph of their brief say: "We are aware that the ruling was in accordance with the law of half a century ago." The court is not aware of any change in the law since that time. No statute intervenes; nor is the reason for the rule less cogent now than it always has been; whereby the rule is obsolescent, even.

Evidence tending to show the plaintiff's general reputation for unchastity was admitted. Persons seeking damages in actions of this sort must be prepared to defend their general character; but are not required to come ready to explain the various specific questionable acts of their lives, and to rebut false accusations, of which they can have no premonition. It would be a hard rule that would compel a plaintiff to defend every act of his life, as the price of justice.

Exceptions overruled.

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

STATE OF MAINE, by *scire facias*, vs. ABNER GILMORE, and others.

Waldo. Opinion March 19, 1889.

Scire facias. Recognizance. Description of offense. Effect of default.

A recognizance taken by a magistrate in a criminal case must show at what court the conusor is required to appear, and that an offense was committed within the jurisdiction of the magistrate.

The record of default entered in the proper court upon such recognizance is conclusive of the fact and sufficient to maintain *scire facias* upon the same.

ON EXCEPTIONS.

This is an action of *scire facias* on a recognizance given in the police court of the city of Belfast, on a complaint charging said Abner Gilmore with keeping and maintaining a common nuisance. Plea, the general issue.

The case was referred to the presiding justice with the right to except.

The state introduced in evidence the complaint and warrant, record of examination in the police court, recognizance, indictment found against said Gilmore at the October term, 1887, of this court, and the docket entries in the matter of said indictment no record of said case having been extended. No evidence was introduced by the defense.

The defendants contended that the state could not recover:

Because the complaint before the police court was not sufficient to hold said Gilmore to bail.

Because neither said complaint nor the recognizance sufficiently described the offense of keeping and maintaining a common nuisance.

Because the indictment charged a different offense from that charged in said complaint, and described in the recognizance.

Because the time, in which the offense was alleged to have been committed, is stated in the indictment differently from that charged in the complaint and in the recognizance.

Because the indictment is not sufficient in law.

The presiding justice gave judgment for the state, and the defendants excepted.

The portions of the complaint and recognizance to which defendants excepted, are as follows: "that said Abner Gilmore on the first day of August, A. D. 1887, and on divers other days and times, between that day and the day of making of said complaint, at Belfast aforesaid, in the county of Waldo aforesaid, did keep and maintain a place of resort where intoxicating liquors were and are kept and sold and given away and drank, and dispensed in divers manners not provided for by law, to the great and common nuisance of all good citizens of the state of Maine, and contrary to the statute, in such case made and provided."

The recognizance was returnable to the October term, 1887, of this court, Waldo county. On the 13th day of the term, both principal and sureties were defaulted.

At the same term of the court the following indictment was returned by the grand jury:—

"The jurors for said state upon their oaths present that Abner G. Gilmore of Belfast, in said county, at Belfast in said county of Waldo, on the first day of July, in the year of our Lord one thousand eight hundred and eighty-seven, and on divers other days and times between said first day of January aforesaid, and the day of the finding of this indictment, without any lawful authority, license or permission, did knowingly and wilfully keep and maintain a common nuisance, to wit: A certain room in a building called the Angier House on the westerly side High street in said Belfast, then and there by him, the said Abner G. Gilmore, used for the illegal sale and illegal keeping for sale of intoxicating liquors, to the great damage and common nuisance of all citizens of said state and contrary to the form of the statute in such case made and provided."

W. H. Fogler, *J. S. Harriman*, with him, for defendants.

The indictment offered in evidence by the state is against Abner G. Gilmore, and not the defendant. It also charges that the nuisance was kept, &c., on the first day of July, A. D. 1887, and on divers other days and times between said first day of January aforesaid, and the day of finding of this indictment.

No sufficient description of offense, in complaint, or recognizance. *State* v. *Lane*, 33 Maine, 536.

The alleged nuisance is described as a "place of resort." There is no description or designation of the alleged nuisance or of the place where it is alleged to exist.

"Locality is an essential element of the offense denominated a common nuisance. There can be no such nuisance without a designation of the place where it is alleged to exist." *State* v. *Lashus*, 67 Maine, 564.

The omission to describe the alleged nuisance is not cured by R. S., ch. 133, § 25; for that statute provides that it must appear "from the description of the offense charged that the magistrate was authorized to require and take" the recognizance.

As neither the complaint nor the recognizance contain a sufficient description of any offense cognizable by the magistrate, the recognizance is void for want of jurisdiction. *State* v. *Lane*, 33 Maine, 538; *State* v. *Hartwell*, 35 Maine, 129.

Section 1, c. 17, R. S., declares, first: "All places used * * * * for the illegal sale or keeping of intoxicating liquors, &c.;" secondly: "All places of resort where intoxicating liquors are kept, &c.," to be common nuisances.

The two offenses are distinct, requiring distinct allegations descriptive of the offense.

Proof of facts which constitute one of the offenses will not warrant a conviction of the other offense. *State* v. *Dodge*, 78 Maine, 439.

The complaint upon which this recognizance was taken, as appears by the complaint and as recited in the indictment, charged that Abner Gilmore "did keep and maintain a place of resort," &c. The condition of the recognizance is that said Gilmore appear and "answer to said accusation"—the accusation of keeping and maintaining "a place of resort." No breach of that condition is shown.

The indictment put in evidence charges that "Abner G. Gilmore did keep and maintain a certain room (described) used for the illegal sale and illegal keeping for sale of intoxicating liquors."

Under this indictment, as shown by the docket entries, Abner Gilmore and the other two defendants were called and defaulted, and for such default the state claims to maintain an action upon the recognizance.

Action not maintainable, because the indictment charges a different offense from that charged in the complaint and recited in the recognizance; and because the respondent charged in the complaint is Abner Gilmore, and the person charged in the indictment is Abner G. Gilmore. There is no proof that the person charged in the complaint is the same charged in the indictment.

The indictment is bad. Every material fact which serves to constitute the offense charged should be alleged and set forth in the indictment with precision and certainty as to time. *State* v. *Thurstin*, 35 Maine, 205.

The words in the indictment "and on divers other days and times between said first day of January aforesaid and the day of the finding of this indictment" cannot be treated as surplusage, because reference is afterwards made to time and place by the words "then and there."

"When two distinct times and places have been mentioned in, and at which, the substantive offense has been committed, and reference is afterwards made to time and place by the words "then and there," the allegation will be deemed defective, as it will be uncertain to which time and place "then and there" refer. *State* v. *Jackson*, 39 Maine, 296; *State* v. *Hurley*, 71 Maine, 355; *State* v. *Day*, 74 Maine, 220; *State* v. *Buck*, 78 Maine, 193.

The condition being to appear and answer to an accusation recited in the recognizance, the principal conusor is not bound to appear and answer to any other accusation; *a fortiori*, he is not bound to answer to an indictment which contains no accusation against him. Certainly he is not bound to answer to an indictment against another person.

R. F. Dunton, county attorney, for state.

The complaint sufficiently describes the offense of keeping and maintaining a common nuisance, and the recognizance follows the language of the complaint. R. S., c. 17, § 1. *State* v. *Lang*, 63 Maine, 215.

It is not necessary in a recognizance to state an offense with all the precision required in an indictment. All that the statute requires is, that it can be sufficiently understood from the tenor of the recognizance, at what court the party was to appear, and from the description of the offense charged, that the magistrate was authorized to require and take the same. R. S., c. 133, § 25; *State* v. *Hatch*, 59 Maine, 410; *State* v. *Howley*, 73 Maine, 552.

It is not necessary to describe the place, in a complaint for liquor nuisance. *State* v. *Lang*, 63 Maine, 215.

The offense charged in the indictment is the same as that charged in the complaint and described in the recognizance. Each describes a nuisance under the same section of the statutes. While the language differs, the substance is the same. Evidence which would sustain the indictment, would also sustain the complaint, and a conviction upon the indictment would be a bar to an indictment describing the offense in the language of the complaint. *State* v. *Lang*, 63 Maine, 215.

In *Commonwealth* v. *Slocum*, 14 Gray, 395, respondent recognized on a complaint for being a common seller of intoxicating

liquors, and the court held that his failure to appear and answer to an indictment found against him for the same offense, was a breach of the conditions of the recognizance, although the indictment charged the commission of the offense during a longer period of time, and also contained counts for unlawful single sales of intoxicating liquor.

The error as to time, in charging a continuation of the nuisance, in the indictment, is immaterial and may be rejected as surplusage. *State* v. *Noble*, 15 Maine, 476; *State* v. *Mayberry*, 48 Maine, 218; *State* v. *Madison*, 63 Maine, 546.

It is not necessary to allege or prove that the respondent was indicted. The default was a breach of the recognizance, and fixed the liability of the bail. It is presumed to have been rightfully entered, and, while it stands, full effect is to be given to it in all matters dependent upon it. *State* v. *Cobb*, 71 Maine, 198; *Commonwealth* v. *Dowdican's Bail*, 115 Mass. 133.

No question is raised as to the identity of respondent in the complaint and indictment. In fact, the exceptions admit the identity.

HASKELL, J. *Scire facias* upon a recognizance taken before the judge of the police court for the city of Belfast.

I. It is contended that the complaint upon which the recognizance was taken is insufficient, and that the latter does not sufficiently describe an offense and is therefore void.

To the recognizance "we must look," and beyond that "we can not go for a description of the offense." *State* v. *Lane*, 33 Maine, 536. But R. S., c. 133, § 25, declares that no recognizance in a criminal case shall be invalid for any defect in form, if it can be sufficiently understood from its tenor at what court the party was to appear "and, from the description of the offense charged, that the magistrate was authorized to require and take the same." "All this statute requires is, that it should appear from the description of the offense, that the court taking the recognizance had jurisdiction. It does not require technical precision in the description." *State* v. *Howley*, 73 Maine, 552, 555.

The description of the offense given in the recognizance in

suit is in the exact language of § 1 of c. 17, of R. S., that declares certain places of resort to be common nuisances; and charges that the principal conusor, "on, &c., at Belfast, &c., did keep and maintain" the same. This description clearly enough shows an offense, committed within the jurisdiction of the magistrate, to authorize him to examine into the same and take bail.

II. It is contended that no indictment was found for the same offense described in the recognizance, and, therefore, no judgment upon the same could be rendered in favor of the state.

The case shows that the recognizance in suit was returned to the proper court, at a term thereof when and where the principal conusor had engaged to appear, and that he did not so appear but made default, and that his default, and the default of his sureties to then and there have him present, as they had engaged to do, were entered of record.

By the default, the penalty named in the recognizance became forfeited, and ripe for suit in the state's behalf. "'The record of the default is conclusive evidence of the fact, and, of course, not subject to be impeached, controverted or affected by extrinsic evidence.' *Commonwealth* v. *Slocum*, 14 Gray, 397; *Commonwealth* v. *Bail of Gordon*, 15 Pick., 193." *State* v. *Cobb*, 71 Maine, 207.

Exceptions overruled.

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

HENRY P. DORMAN, and others, petitioners for *certiorari*, *vs.* CITY COUNCIL OF LEWISTON.

Androscoggin. Opinion March 19, 1889.

Way. Laying out. Lewiston city council. Committee. Notice. Adjudication. "Public convenience and necessity."

The city council of Lewiston, under the city charter, is authorized, in the first instance, to refer a petition for the location of a new street, in the usual course, to a committee of its own body, to view the premises, hear the parties interested, and determine and report what it deems expedient action in the premises, for final consideration by the city council.

Notice to all parties interested to appear before such committee, is notice to appear and be heard, before the city council.

The notice required by law for the laying out of town ways, is the notice required by the charter of Lewiston for the laying out of new streets.

The words "street or public highway," in the charter of the city of Lewiston, are synonymous, and mean public ways or streets.

An order of the city council accepting the report of such committee, and establishing a new street according to the report, makes the adjudication of the committee the adjudication of the council.

An adjudication that "public convenience and necessities of the city" require the laying out of a new street, although neither in the exact phrase of the statute nor of the city ordinance, is the equivalent of both. It means that the public convenience and necessity of the citizens require the way, and is sufficient.

ON REPORT. The law court were to render such judgment as the law and facts required, upon so much of the facts agreed, and testimony as is admissible, material and relevant.

This was a petition for a writ of *certiorari*, to which the Union Water Power Company became a party petitioner, praying that the proceedings of the respondent tribunal in laying out Mill street, in Lewiston, may be certified to this court and quashed. The case came before this court upon report of the petition, answer, admissions, and certain evidence bearing upon special points.

The petitioners alleged several errors of the respondents, in their proceedings, in the taking and laying out the street. At the hearing, on the petition, they were reduced to three in number. First, it was claimed, that the action of the street committee in laying out the proposed way was illegal, for the reason that such power is intrusted by the charter of Lewiston to the city council, and that the city council could not, and did not attempt to delegate that power to the committee; second, if the committee had authority to lay out the way, they proceeded without giving legal notice, and without making the adjudication as to its necessity required by the ordinances of the city; and, third, if the order passed by the city council, accepting the committee's report, should be construed as a laying out, that action was illegal, because it was taken without giving notice of hearing, or any hearing to parties interested, and without any adjudication as to the necessity for the way, as required by law.

It appeared from the testimony and admissions of the parties, that in 1855 the *locus in quo*, together with a large strip of land of which the locus was a part, belonged to the Lewiston Water Power Company. That company caused this land to be plotted, and a plan of the same to be recorded in the registry of deeds of Androscoggin county. Among the streets delineated on this plan was "Mill Street" so-called, of the width of sixty-seven feet, and extending from Lincoln Mills, north of Main street, in a southerly direction, substantially parallel with the river. It thus crosses three streets, namely, Main, Chestnut and Cedar,—the two latter at right angles. That portion, some 600 feet in length of "Mill street" which was laid out, lies between Chestnut and Cedar streets. On it, plotted to be sixty-seven feet wide, the Maine Central Railroad occupies twenty-seven feet as a right of way nearly its entire length. Subsequent to this plotting and recording the plan, the Lewiston Water Power Company, and its successors in title sold and conveyed to several parties, lots on "Mill Street" and described the lots in the conveyances, as bounded on it. These conveyances were prior to those to the petitioner, Dorman, who purchased March 24, 1880, all the right, title and interest of the Franklin Water Power Company, successors in title to the Lewiston Water Power Company, to a strip three hundred feet in length extending northerly from Cedar street, and forty feet wide, or what was left of "Mill Street" between Main and Chestnut streets, after the railroad location was taken. As to this strip, there were no covenants in the deed.

The records of the city council did not show what notice of the hearing before the committee on highways, etc., had been given. Neither the original notice, nor a copy of it was preserved. This became, therefore, an issue of fact in the case. The city clerk, who prepared the notice at the request of the committee, testified to its contents; and it was admitted that the two places where it was posted were in the vicinity of the proposed way. It was also admitted that no notice of hearing was given, or hearing had on the original petition, before the city council.

N. and J. A. Morrill, for petitioners, Dorman & Co.

Committee had no jurisdiction to lay out proposed street.

Exclusive power is in city council. Its duty is judicial. *Lyon* v. *Hamor*, 73 Maine, 56; *Brimmer* v. *Boston*, 102 Mass. 19, 22; *State* v. *Delesdernier*, 11 Maine, 473. Lewiston city charter different from those of Portland and Bangor, where committees have power under charter or ordinance. *Jones* v. *Portland*, 57 Maine, 42, 45; *Preble* v. *Portland*, 45 Id. 241, 245; *Cassidy* v. *Bangor*, 61 Id. 434, 437. Power cannot be delegated unless expressly sanctioned by legislature. 1 Dill. Mun. Corp., 3d ed., § 96, p. 123, and note there cited.

No attempt was made, to confer upon committee duty, to lay out street. Committee proceeded regardless of city ordinance. Petition referred to committee without any instructions. Ordinance does not authorize committee to lay out street; provides only for preliminary examination, and assessment of damages. Notice, there provided, can only relate to hearing on damages. *Cassidy* v. *Bangor*, *supra*. Final decision, after notice and hearing, is with city council; that body must adjudicate upon the convenience and necessity of the proposed way. *Cassidy* v. *Bangor*, *supra*, R. S., c. 18, § 4.

Acceptance of committee's report does not adopt it. Ordinance requires both acceptance and adoption. *Dudley* v. *Weston*, 1 Met. 477; *Collins* v. *Dorchester*, 6 Cush. 396.

Due and legal notice not given by committee. Notice should have been that relating to public highways, and not to town ways. *Blackstone* v. *Worcester*, 108 Mass. 68.

No notice of hearing was given, or hearing had on original petition, before city council. Assuming committee did give notice, not sufficient, because that notice only applies to damages, and they had no authority to lay out. City council must pass upon question of necessity and convenience after hearing before them. *Ruggles* v. *Collier*, 43 Mo. 359 (affirmed on re-hearing) p. 375, approving *Thompson* v. *Schermerhorn*, 6 N. Y. 92; *East St. Louis* v. *Wehrung*, 50 Ill. 28; *St. Louis* v. *Clemens*, 52 Mo. 133; time to be fixed by council, and not by committee. *State* v. *Jersey City*, 1 Dutch. 309; *State* v. *Patterson*, 34 N. J. L. 163. Can not delegate power to committee. *Whyte* v. *Mayor*, 2 Swan (Tenn.) 364; *Smith* v. *Morse*, 2 Cal. 524; *Oakland* v. *Carpentier*, 13 Cal. 540; *Brooklyn* v. *Breslin*, 57 N. Y. 591.

Discretionary power of court in *certiorari: Spofford* v. *R. R.*, 66 Maine, 26, 48; in cases of wrong and injury, *Levant* v. *Co. Com.*, 67 Id. 429, 433; *Fairfield* v. *Co. Com.*, 66 Id. 385; *Bangor* v. *Co. Com.*, 30 Id. 270; want of notice, *Ware* v. *Co. Com.*, 38 Id. 492. See also *Parsonsfield* v. *Lord*, 23 Id. 511; *Windham, Petrs.*, 32 Id. 452; *Cornville* v. *Co. Com.*, 33 Id. 237. *Certiorari* proper remedy. *Baldwin* v. *Bangor*, 36 Maine, 518; *Gay* v. *Bradstreet*, 49 Id. 580; *Lee* v. *Drainage Comrs.* (Ill.) 14 West. Rep. 398.

Consent or acquiescence of petitioners, present with committee, gave them no jurisdiction to proceed beyond their authority.

Dedication to uses of land for street: Owners, if not entitled to damages, are to have notice of proceedings. *Howard* v. *Hutchinson*, 10 Maine, 335; *Warren* v. *Blake*, 54 Id. 276, 281. May use land for temporary purpose. *Bartlett* v. *Bangor*, 67 Maine, 460, 466.

Committee did not adjudge proposed way of common convenience and public necessity, as required by ordinances; nor did city council, as required by law. The report of committee that "common convenience and necessities of the city" required the location, does not meet either the requirements of the statutes or ordinances. Testimony not admissible to supply this defect.

There being no appeal from city council, strict observance of the law should be required. *Biddeford* v. *Co. Com.*, 78 Maine, 105.

Newell and Judkins, for respondents.

Notice of hearing sufficient. These petitioners appeared and made no objections.

Counsel argued that the evidence sustains the following facts and conclusions: that the description of the way contained in the notice, posted prior to the hearing was clear, definite, and unambiguous; that Mr. Straw, agent of the Union Water Power Company was present at the hearing, as the agent of the company, and in the discharge of his duty as agent, participating in the hearing and neither making objections to sufficiency of petition, the jurisdiction of the committee, nor sufficiency of the notice;

that public convenience and necessity require the location and construction of the proposed street.

Law: City council subject to such rules and regulations as govern municipal officers in locating town ways, and not those of county commissioners in laying out county ways. Town ways, and not county ways, are to be laid out by the city council. Description of way, by reference to plan, proper and legal. *Stone* v. *Cambridge*, 6 Cush. 270; Petition sufficient to give city council full jurisdiction. *Hayford* v. *Co. Com.*, 78 Maine, 153, 156; *Orland* v. *Co. Com.*, 76 Id. 462; *Raymond* v. *Co. Com.*, 63 Id. 112; *Acton* v. *Co. Com.*, 77 Id. 128.

Exclusive authority to lay out new streets, may be legally and constitutionally given to a city council. Committee, under proper ordinance, represent the city council and may give notices to appear. "Rules and restrictions" to be observed are those relating to town ways. Acceptance of committee's report, by city council, sufficient compliance with statute. Notice to appear before committee sufficient; notice and hearing before city council not necessary. *Preble* v. *Portland*, 45 Maine, 241; *Biddeford* v. *Co. Com.*, 78 Id. 106; *Cassidy* v. *Bangor*, 61 Id. 434.

No adjudication of "common convenience and necessity" required. *Limerick, Petrs.*, 18 Maine, 183; *Hebron* v. *Co. Com.*, 63 Id. 314. Ordinance makes "common convenience and necessity" a test. Committee reported "public convenience and the necessities of the city," &c. No difference in these terms. *Cushing* v. *Gay*, 23 Maine, 9, 16.

Dedication: *Bartlett* v. *Bangor*, 67 Maine, 460; *Stetson* v. *Bangor*, 73 Id. 357; *Godfrey* v. *Alton*, 52 Am. Dec. 476; *Guthrie* v. *New Haven*, 31 Conn. 321; *Hobbs* v. *Lowell*, 19 Pick. 405, 408; *Cincinnati* v. *White*, 6 Pet. 431, 437, and cases cited in 1 Dill. Mun. Corp. § 632 in note. *Cole* v. *Sprowl*, 35 Maine, 161; *Southerland* v. *Jackson*, 32 Id. 80. Dillon Mun. Corp. § 642; *State* v. *Bradbury*, 40 Maine, 154; *State* v. *Bunker*, 59 Id. 366; *Mayberry* v. *Standish*, 56 Id. 342. Way legally established, through vote of city council, by acceptance of its dedication by owner of the land. *Com.* v. *Fisk*, 8 Met. 238, 243. Vote of city council was an acceptance. *Todd* v. *Rome*, 2 Maine, 55; *Hopkins*

v. *Crombie*, 4 N. H. 520; *State* v. *Atherton*, 16 N. H. 203; *Noyes* v. *Ward*, 19 Conn. 250; *Browne* v. *Bowdoinham*, 71 Maine, 144, 149.

Petitioners, not injured by the laying out, not entitled to writ of *certiorari*. *Bath Bridge, &c.* v. *Magoun*, 8 Maine, 292; *Harkness* v. *Co. Com.*, 26 Maine, 353. Not entitled to even nominal damages. Per WALTON, J., in *Bartlett* v. *Bangor*, *supra*.

Certiorari: *Levant* v. *Co. Com.*, 67 Maine, 429, 433; *Porter* v. *Rochester*, 21 Barb. 656; *People* v. *Mayor*, 2 Hill. 10; *Rand* v. *Tobie*, 32 Maine, 450; *West Bath* v. *Co. Com.*, 36 Id. 74; *Furbush* v. *Cunningham*, 56 Id. 184; *Bethel* v. *Co. Com.*, 60 Id. 535, 539; *Detroit* v. *Co. Com.*, 35 Id. 373, 379; *Smith* v. *Co. Com.*, 42 Id. 395, 402; *McPheters* v. *Morrill*, 66 Id. 123, 126; *Vassalborough, Petrs.*, 19 Id. 338, 343; *Winslow* v. *Co. Com.*, 37 Id. 561, 563; *Noyes* v. *Springfield*, 116 Mass. 87, 88; *Pickford* v. *Mayor*, 98 Mass. 491, 496; *Chase* v. *Rutland*, 47 Vt. 393; *Londonderry* v. *Peru*, 45 Vt. 424, 429.

HASKELL, J. The petitioners ask for a writ of *certiorari*, to the end that the record of the city council of Lewiston, touching the laying out of Mill street in that city, may be quashed.

Upon notice, the city solicitor of Lewiston appeared and answered the petition by showing a certified copy of the record, and averring various facts supposed sufficient to influence the discretion of the court as to awarding the writ. None of these facts show how the record can be truthfully amended and made more perfect than it now is, save as to the notice, given by the committee, of the time and place of hearing; so that, with this exception, and possibly one other as to the petitioners' waiver of objection to authority of the committee, the case may be considered as though the writ had issued, and the record had been certified to the court for its inspection.

The record shows a sufficient petition for the location of the proposed street, and that the same was received by the city council and referred, in the usual course, to its committee on highways, for its action thereon.

I. It is contended that such reference was an unauthorized

delegation of authority, and, therefore, gave the committee no power to act in the premises.

By § 7 of the city charter, the city council is given "exclusive power and authority to lay out any new street or public way," in the manner provided by the law of the state for the laying out of "public highways."

By § 1, of c. 24, of the revised ordinances, the city council is authorized to refer any written application for the laying out of any street, highway, or private way, to the committee on highways; and the committee is required, after giving legal notice, to proceed and examine the premises, and, if in its judgment common convenience and public necessity require the laying out of the same, to estimate the damages sustained thereby, and report its doings in writing to the city council, as soon as may be; and the ordinance further provides that, after such report shall have been accepted and adopted by an order of the city council, such street, highway, or private way shall become established and known as a public street, highway or private way.

The city council, composed of two branches, can hardly be expected to give its attention as a body, in the first instance, to all the details incident to the various questions arising at a hearing involving the expediency of locating a new street, and of indemnifying those whose lands may be taken or damaged thereby. Undoubtedly, as the cases cited at the bar clearly show, it can not delegate its authority to a committee, to finally and irrevocably act in its place and stead. That is not the purpose and effect of the ordinance; but such purpose and effect merely are, in the first instance, to refer the matter to a committee to hear all parties interested, and determine what seems expedient action in the premises, and report the same to the city council, where the matter can then the more intelligently be considered and finally adjudged.

The city charter of Portland confers upon its city council exclusive authority to lay out, widen or otherwise alter, or discontinue the streets or public ways in the city, without petition therefor; but, unlike the charter of Lewiston, requires this to be done by a committee of the city council, after giving a specified notice of

the time and place of its proceedings; and requires an acceptance of the committee's report by the city council, before it shall become operative.

In *Preble* v. *Portland*, 45 Maine, 241, the expediency of widening Temple street, having been referred to a committee, upon the coming in of its report, the city council amended it, and ordered "that said committee be authorized and directed to alter said street" accordingly. The committee, having given the required notice of its proceedings, and heard the parties, proceeded to widen the street as directed, and made return to the city council, where the same was accepted.

In that case, it was objected that no notice of the widening of Temple street had been given by the city council as required by law. But the court said: "Neither the city council nor the committee had altered Temple street previous to the order to the latter" directing the alteration; "and, before any proceedings took place under the order, all parties had been legally notified of the time and place where they could be heard before the committee. The notice to appear before the committee is to be regarded as notice to be heard before the city council, to whom every thing material may be expected to be reported. *Harlow* v. *Pike*, 3 Greenl. 438."

The above language of the court applies with force to the case at bar; for, although the charter in that case provided for a hearing before a committee, just as the ordinance does in this case, yet, the court considered that the committee stood in the place of the city council for the purposes of hearing the parties, and of reporting the existing facts and necessities of the case to it, where final action must determine the validity and effect of the committee's doings; and that its notice served the purpose of a notice for a hearing before the city council. The cases are not exactly alike; but the doctrine of the court in the Portland case, when carefully considered, is very nearly decisive of the case at bar. The Portland charter compels procedure through the aid of a committee. The Lewiston city council determined, by ordinance, to adopt that method of procedure. The method in one case is compulsory; in the other case voluntary; but it is equally feasible and convenient in both.

The charter of Bangor, upon this subject, is like the charter of Lewiston; but, an ordinance of the Bangor city council provides for committing the matter to the board of street engineers instead of a committee of the council; and requires the engineers to report their doings for revision by, and subject to the determination of the city council.

In *Cassidy* v. *Bangor*, 61 Maine, 434, a petition to widen a street was referred to the board of engineers; and they, having given seven days' notice of the time and place of hearing, and having heard the parties, proceeded to widen the street and made report to the city council that was duly accepted.

It was objected there, as here, that the proceedings were void, because the council acted through, and by the aid of a subordinate body; and because of insufficient notice. But the court held the commitment to the engineers under the ordinance valid, and the notice sufficient, although the notice for estimate of damages was insufficient, under the requirements of a subsequent statute.

The cases of *Preble* v. *Portland* and *Cassidy* v. *Bangor* settle the contention of the petitioners adversely to them, and must govern the present case.

II. It is contended that the notice given by the committee of the time and place of hearing was insufficient, inasmuch as it was the notice provided by statute as a pre-requisite to the laying out of town ways, instead of highways.

The city charter requires the proceedings of laying out streets to conform to the laws relating to laying out "public highways." So does the charter of Bangor; and the court held in *Cassidy* v. *Bangor*, *supra*, the seven days' notice, applicable to town ways, sufficient. This view seems most natural and reasonable. The charter speaks of laying out "any new street or public way," neither of which would become a "highway," within the statute meaning of that word. They would become public ways or streets within the city, and under its exclusive control, the same as town ways are under the exclusive control of any town. The words "street or public highway," in the charter of Lewiston, are synonymous, and mean public ways or streets, and nothing else. The notice given by the committee must be held sufficient.

III. It is contended that the city council did not determine and adjudge that common convenience and necessity required the laying out of the way.

This contention is not sustained by the facts. The report of the committee expressly states the fact, and upon the coming in of the report, the city council ordered that the street, "as laid out and reported by the committee as aforesaid, be and is hereby accepted, allowed and established as a street or public way for the use of the city of Lewiston." This order adopts the findings of the report, and makes the adjudication of the committee the adjudication of the council.

But it is said that the adjudication is neither, that "common convenience and necessity" require the location, a pre-requisite named in the statute, nor that "common convenience and public necessity" require it, the pre-requisite called for by the ordinance, but is, that "public convenience and necessities of the city" require it.

The adjudication is neither in the exact phrase of the statute, nor of the ordinance; but it is the equivalent of both. It means, the public convenience and necessities of the citizens require the way; and it is hard to see why public convenience is not common to all.

Petition denied with costs.

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

LUCY A. COMERY *vs.* ALBERT E. HOWARD, and another.

Lincoln. Opinion March 23, 1889.

Contract. Recision. Action. Submission and Award. Evidence.

The plaintiff having conveyed her homestead, and personal property on the same, to the defendants, in consideration of receiving support from them, retained possession of the property under the contract. In an action to recover its value from the defendants, it appearing that the contract had not been rescinded, *Held*, that the action could not be maintained.

In order to effectuate a rescision of their contract, by mutual agreement, and enable the plaintiff to obtain a reconveyance of her property, the parties entered into a submission of all demands under which the referee made an award of the amount due the defendants, *Held*, that to entitle the plaintiff to a reconveyance, or upon a refusal and neglect to reconvey, to recover the value of the property, she must pay or tender to the defendants, the amount thus awarded; that her remedy, after the award was made, was under the award.

Held, also, that it was not competent for the plaintiff to prove by parol, in this case, that the value of the farm was not passed upon or considered by the referee.

On exceptions.

Assumpsit to recover the value of a certain farm and personal property.

The plaintiff put in evidence her deed to the defendants covering the property sued for. The deed is dated May 27, 1882.

For the purposes of the hearing, it was admitted that the property mentioned in said deed, and which embraces household furniture and other chattels, was not paid for at the time of the conveyance, except so far as advances had been made, prior to that time.

The defendants put in evidence a submission entered into between the plaintiff and the defendants, bearing date October 15, 1887, and the award thereon, sufficiently described in the opinion of the court, and contended that said submission and award were a bar to this suit.

The plaintiff offered to show by the testimony of the referee, that in the hearing before him, no testimony was introduced, in any way, relating to the payment of the consideration of said conveyance to the defendants, and that this question was not adjudicated, nor passed upon by him, except as appears in the award.

The plaintiff further offered testimony, tending to prove that a portion of the personal property sued for, had been taken and retained by the defendants, which was not mentioned in said award, and was not adjudicated upon by said referee.

The presiding justice, thereupon, ruled that said submission and award were a bar to the action; that oral testimony was not admissible to show whether the payment of the consideration for

said conveyance was passed upon by said referee, or had ever been made; and that this suit could not be maintained.

Robinson and Rowell, for plaintiff.

Plaintiff entitled to recover, unless barred by the submission and award.

May show that she has not received the consideration in her deed to defendants. *Bassett* v. *Bassett*, 55 Maine, 127; *Jellison* v. *Jordan*, 68 Id. 373; *Long* v. *Woodman*, 65 Id. 56; *Barter* v. *Greenleaf*, Id. 405; *Goodspeed* v. *Fuller*, 46 Id. 141, 148. All matters embraced in the submission, not covered by the award; no final disposition of them. *Colcord* v. *Fletcher*, 50 Maine, 398. Award not a bar to claims not considered or decided by referee. *Mt. Desert* v. *Tremont*, 75 Maine, 252, and cases there cited, *Littlefield* v. *Smith*, 74 Id. 387; *Hammond* v. *Deehan*, 78 Id. 399; *Boston Water Co.* v. *Gray*, 6 Met. 131; *Bean* v. *Farnam*, 6 Pick. 269, 274.

Evidence admissible to show consideration of deed not submitted to referee; not passed on. *Wyman* v. *Hammond*, 55 Maine, 534; *Buck* v. *Spofford*, 35 Id. 526; *Galvin* v. *Thompson*, 13 Id. 367; *Hale* v. *Huse*, 10 Gray, 99; *Edwards* v. *Stevens*, 1 Allen, 315; Abbott's Trial Ev., p. 468, and cases cited.

Burden of proof upon defendants, to show that the personal property had been paid for. This property taken by defendants; not mentioned in award; not adjudicated upon by referee.

A. P. Gould, for defendants.

It is obvious that the subject matter of controversy was the property conveyed by the deed, to which the submission refers, and this embraces the personal as well as the real.

Whatever the character of the defendants' title, under the deed taken alone, might have been, upon the execution of the submission, it became an equitable one. The two papers are to be construed together; and although, as the agreement to reconvey was not given at the same time as the deed, the obvious intent of the submission was to ascertain what was equitably due to the defendants, under their equitable title. Whereupon, this is the view which the referee took of the case, and upon performance

of his award, the plaintiff is entitled to a reconveyance. Such being the purpose of the submission, the gist of the controversy was, taking all their transactions into view, what sum of money was due to the defendants to entitle plaintiff to redeem.

Counsel cited: Morse Arb. p. 348, and cases in note, *Dolbier* v. *Wing*, 3 Maine, 421; *Gray* v. *Gwennap*, 1 Barn. & Ald. 106; 1 Whart. Ev. §§ 788, 789.

LIBBEY, J. This is assumpsit to recover the value of a farm, farming tools and household goods, alleged to have been conveyed by the plaintiff to the defendants May 27, 1882. Prior to that date, the defendants had rendered to the plaintiff certain services and furnished her with some supplies, when an arrangement was made between them, by which the defendants were to continue to aid the plaintiff by furnishing her with means of support, during her life; and in consideration of their agreement, she executed to them the deed of the date aforesaid, conveying the farm and personal property in controversy, with the following reservation; "reserving the above described premises as a home for myself, and the net income during my natural life."

The plaintiff continued to live in the house on the farm, and retained possession of the personal property for which she now claims to recover, receiving means of support from the defendants in performance of their agreement to October 15, 1887, when some difficulties having arisen between them, they appear to have determined to rescind the contract which they had made, and for the purpose of determining all matters between them, they entered into a written submission, by which they submitted to a referee in the terms following. After reciting the deed aforesaid, they say, "A controversy having arisen as to the rights of the respective parties in said estate, we hereby agree to submit all matters in dispute, both before the date of said deed and thereafterwards, to the time of hearing this case, to Henry Ingalls, Esq. of Wiscasset in said county of Lincoln, whose determination shall be final and binding between the parties and their legal representatives."

"And, it is hereby mutually understood and agreed, that all

claims joint and several against the said Lucy A. Comery in favor of the said Albert E. and Charles H. Howard, and all claims between the parties shall be adjudicated upon by said Ingalls. And the said Albert E. and Charles H. Howard do hereby agree that upon the payment to them by the said Comery, her legal representatives or assigns, within sixty days of the time of making the award by the said referee, and notice of the same to said parties, of such sum as the referee may find due to them, from the said Comery, they will make and execute and deliver to the said Comery, her legal representatives or assigns a good and sufficient deed of said real estate."

The referee duly heard the parties on the 9th of December 1887, when each of the parties presented to him all claims which they had against each other, to enable him to determine how much was justly and equitably due from the plaintiff to the defendants, for what they had furnished her more than they had received from the property; and he awarded that there was due from her to them as of that date, $486.90. He annexed to his report a schedule of all the items presented to him by the parties and considered by him, which shows that the defendants had received in money and in various articles from the property $310.48, which was deducted from the sum allowed the defendants. And he also annexed to his report a special report, stating particularly what matters he considered and what determinations he made of such matters.

In his special report, he says, "I decide as a matter of law that the deed of the defendant (plaintiff) to the plaintiff's (defendants) of May 27, 1882 is not a mortgage but a deed with a reservation to become effectual and absolute at the decease of the defendant," (plaintiff). Then follows a particular statement of his determination of their several claims in regard to personal property.

The defendants claimed that the award was conclusive against the plaintiff's right to recover in this action. The plaintiff offered to prove as matter of fact, that no claim was presented to the referee by the plaintiff for the value of the farm or the personal property, nor considered by him at the time of the hearing. This evidence was excluded, and the court held that the award was a conclusive defense to the action. We think this ruling correct.

Under the contract between the parties of May 27, 1882, while the plaintiff remained in possession of the property conveyed, she could maintain no action against the defendants for the value of the farm or of the personal property. Under the award of the referee, which was within his powers, the title had not passed to the defendants absolutely, but was to be effectual only on the death of the plaintiff. To give her a right of action to recover for either, it was necessary that that contract be rescinded. It appears by the submission and the award, that the parties undertook to rescind it in October 1887. And for the purpose of effectuating that intention, the submission was made by which the referee was to determine how much was justly and equitably due from one party to the other, growing out of the partial execution of their contract of May 1882; and to perfect and effectuate fully the rescision, the defendants agreed to reconvey to the plaintiff on the payment of such sum as the referee might find due them. The award of the referee fixed that sum. To entitle the plaintiff to a reconveyance, or upon a refusal and neglect to reconvey, to recover the value of the property, it is incumbent on her to pay or tender to the defendants the amount awarded. Her remedy after the award was made was under the award. As we have said, she could not recover before the rescision. After the rescision, she could only recover under the terms and stipulations by which the rescision was to be effectual.

It is claimed by the plaintiff, that where under a submission, all matters in controversy between the parties are submitted to a referee, and an award is made by the referee, and afterwards a claim arises between the parties and comes in litigation, and the submission is invoked as a defense, it is competent for the plaintiff to prove by parol that the claim in contention was not in fact presented to the referee or considered by him. This proposition is supported by many authorities; but we think it does not aid the plaintiff in this case. By the terms of the submission, and the findings of the referee, it appears that it was not in the contemplation of the parties that a claim should be presented for the value of the property embraced in the deed of May 27, 1882; for by the agreement of submission that property was to be recon-

veyed, by the defendants to the plaintiff so far as they had any title under that deed, on the payment by the plaintiff of the sum awarded. Of course, under such a submission, the referee could not charge the defendants with the value of that property, and then make an award by which they were to reconvey it to the plaintiff, as stipulated in the submission. We can see no ground in the case as submitted, upon which the plaintiff can maintain this action.

Exceptions overruled.

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

IDA GRAY *vs.* JAMES H. DOUGLASS.

Waldo. March 25, 1889.

Poor debtor. Citation. Seal. Notice. Justice. Selection. Surety. Recitals in discharge.

A justice of the peace, who is a surety on an execution bond of a poor debtor, has the power to issue a citation to the creditor for the debtor's disclosure.

When it appears, by the record of two justices of the peace and quorum, that the creditor unreasonably neglected to select a justice, at the time appointed for the disclosure, a good ground is shown for the selection of a justice for him, by the officer.

When the justices, who are duly selected, certify in their record that the debtor "has caused the aforesaid creditor to be notified according to law," it is conclusive upon the creditor, and the sufficiency of the citation; and he cannot show that it was not sealed.

When it appears, by the bond and citation, that the judgment was rendered at the January term of the supreme judicial court, it is not a misrecital in the discharge, to describe it as rendered on the 23d of January,—both being correct.

ON REPORT. Action on a poor debtor's bond. Defense, performance of the conditions of the bond. In support of this defense, defendant introduced in evidence the disclosure of the principal in the bond, and the certificate of the magistrates, discharging the debtor. It was admitted that the citation to the creditor was not under seal; and that the magistrate who issued the

citation, was one of the sureties in the bond. This magistrate, however, did not sit in the disclosure.

The law court were to render judgment according to the legal rights of the parties.

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

Debtor must follow statute implicitly, in all its requirements. *Hackett* v. *Lane*, 61 Maine, 31. Citation is the foundation of the jurisdiction of the justices. *Poor* v. *Knight*, 66 Maine, 482. No presumption in favor of their jurisdiction. *Lane* v. *Crosby*, 42 Maine, 327; *Waterville Iron, &c. Co.* v. *Goodwin*, 43 Id. 431. Judgments, rendered by courts not having jurisdiction, void. *Lovejoy* v. *Albee*, 33 Maine, 414.

Record does not show that the justices examined the citation and return; they did not certify that they were correct; therefore *Lewis* v. *Brewer*, is not in point.

By the stipulation in the report, everything in the case open to the court to adjudicate upon. *Pike* v. *Herriman*, 39 Maine, 52.

Citation not being under seal, the justices not having certified that they examined it and found it correct, they had no jurisdiction. Judgment, in their certificate of discharge, void. Cases, *supra.*

Variance between recital of judgment in bond and in discharge, material and fatal. *Poor* v. *Knight*, *supra.*

When creditor fails to appear and select a justice under R. S., c. 113, § 42, the court can not organize until after the expiration of the hour. *Foss* v. *Edwards*, 47 Maine, 145, 149. Record must show how long the creditor neglected to appoint a justice. No presumption arises that the justice for creditor was not appointed within the hour; hence court had no jurisdiction to administer the oath, or grant the discharge.

One of the sureties in the bond issued the citation. He was pecuniarily interested in the result of the principal's disclosure, and disqualified from hearing the disclosure. *Winsor* v. *Clark*, 36 Maine, 110. Surety ought not to be allowed to issue a citation any more than the debtor himself. Comments by court in *Lovering* v. *Lamson*, 50 Maine, 334.

G. W. Heselton, for defendants.

Plaintiff should have called the attention of the justices, at the disclosure-hearing, to any defects in the citation; and having failed to do so she is bound by the record of the justices. This is in accord with the repeated decisions of our court, especially in the question of the want of a seal, settled in *Lewis* v. *Brewer*, 51 Maine, 108, and sustained by subsequent decisions, viz.: *Emery* v. *Brann*, 67 Maine, 39; *Cannon* v. *Seveno*, 78 Maine, 307.

The fact that the citation was issued by a justice who was one of the sureties does not invalidate it. Section 26, c. 113, R. S., simply says that application may be made "to a justice of the peace." It does not require, as in the matter of the hearing of the disclosure that the justice shall be disinterested, because in the former case the justice is merely performing the ministerial act of signing the citation; in the latter, the judicial act of listening to testimony and deciding issues, is required.

Moreover, the justice to whom the debtor makes this application, without regard to interest in the case, is obliged under this section of the statutes to issue the citation,—showing clearly that the legislature intended only that the citation should be made by a justice of the peace.

In *Cummings* v. *York*, 54 Maine, 386, 388, the extent of a justice's duties in issuing a citation is clearly set forth.

In this matter, as in the omission of the seal, "the adjudication of the justices upon the sufficiency of the notice to the creditor is conclusive as between the parties, if the justices have jurisdiction." *Agry* v. *Betts*, 12 Maine, 415, 417; *Pike* v. *Herriman*, 39 Id. 52; *Waterhouse* v. *Cousins*, 40 Id. 333.

LIBBEY, J. This is an action on a poor debtor's six months bond, and the defense is, that the debtor performed one of the conditions of the bond by duly citing the creditor to attend his disclosure before two justices of the peace and of the quorum, and that at the time and place appointed, he appeared before two justices of the peace and of the quorum, made a full disclosure, was permitted to take the oath prescribed in the statute and was duly discharged by said justices.

Three objections are made by the plaintiff to the debtor's dis-

charge. First. It is claimed that the citation is invalid. It was issued by a justice of the peace who was one of the sureties on the debtor's bond. And the plaintiff contends that he was so interested in the subject matter that he had no power to issue the citation.

R. S., c. 113, § 26, does not require that a justice of the peace who issues a citation to the creditor shall be disinterested. He performs no judicial duties, but acts ministerially. In *Patterson* v. *Eames*, 54 Maine, 203, the court held that a deputy sheriff who was a surety on the debtor's bond, had the power to select a justice of the peace and quorum for the creditor on his neglect or refusal to select, to hear the debtor's disclosure. There is stronger reason, why an officer thus interested, should be held to be incompetent to select a justice to act in the disclosure, than exists in the case of a justice of the peace, who issues the citation. We think this objection is untenable.

Again, it is claimed that the citation was not sealed as the statute requires. The record of the justices recites, that the creditor unreasonably neglected to select a justice at the time appointed for the disclosure. This is *prima facie* sufficient to give an officer power to appoint. The justices having been duly selected had jurisdiction, and their adjudication that the debtor "has caused the aforesaid creditor to be notified according to law" is conclusive as to the sufficiency of the citation. *Lewis* v. *Brewer*, 51 Maine, 108. It is not competent for the plaintiff to show now that the citation was not under seal.

Then, it is claimed that the discharge misrecites the judgment on which the debtor was arrested. The execution and bond describe it as rendered at the January term 1886, of the supreme judicial court in Waldo county; and in the citation it is described as rendered on the 23d of January 1886. There is no inconsistency in the dates. One is the term of the court at which the judgment was rendered. The other is the particular day of the term on which it was rendered. Both are correct.

Judgment for the defendants.

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

LEMUEL COUNCE, in equity *vs.* JOHN R. STUDLEY.

Knox. Opinion April 8, 1889.

Equity. Specific performance. Submission. Partition incomplete. Barn part of realty.

On a bill in equity, for specific performance of a submission to referees, where it appeared, that each party was required to execute and deliver to the other a good and sufficient deed to make effectual a partition of certain land and a barn; and the plaintiff executed and tendered to the defendant a deed of the land, but not of that portion of the barn assigned and set off to him by the referees, *Held*, that the defendant could not be compelled to execute his part of the agreement.

At the hearing, in the court below, the plaintiff presented a paper, signed by him, not being a deed, affirming the doings of the referees. *Held*, to be an irregular proceeding.

IN EQUITY. On appeal by defendant from a decree in favor of the complainant after hearing on bill, answer and proof.

This was a bill in equity to compel specific performance of an award of referees, who made division of certain real estate between the parties, under an agreement to refer the matter of division to them.

The premises belonging to the parties, in common and undivided, consisted of a certain lot of land, and also a barn thereon. The plaintiff claimed nine-tenths of the land, and denied the defendant's title to one-tenth of the barn. The submission contained the following clause :—

"And we do hereby further agree that forthwith, on the receipt by us of the report of said referees, we will severally make, execute and deliver each to the other, a good and sufficient deed of release and quitclaim, making valid and effectual the partition of said land and barn as made by the said referees, or a majority of them."

The referees, after setting off and assigning to each of the parties to have and to hold in severalty the land, also set off and assigned to the defendant a portion of the barn "for the use and benefit of said Studley so long as said barn may last" * * *

"and the remainder of said barn, we assign and set off to said Counce, to his sole use so long as said barn lasts, with right of ingress and egress."

Deeds were drawn by the referees necessary to enable the parties to carry out the terms of the agreement; but they contained no division of the barn, and which by the evidence, it was claimed did not stand upon the property divided, but upon land owned by the plaintiff in severalty. The defendant claimed that plaintiff's deed to him was not good and sufficient, because plaintiff's wife had not joined in releasing her dower therein; and because it did not make a valid and effectual partition of the barn.

The plaintiff presented to the court, at the hearing, a paper prepared and executed by him, after the time in which the award was to be published, intended for the signatures of both parties, and not signed by the defendant, confirming and adopting the report of the referees in the division of the use of the barn. The plaintiff claimed that it was presented, in pursuance of his offer of performance, set out in his bill.

C. E. Littlefield, for defendant.

Plaintiff having failed to execute the agreement on his part is not entitled to compel performance by defendant. He who asks for specific execution of his contract, must show performance on his own part, or that he has offered to perform. *Rogers* v. *Saunders*, 16 Maine, 92; *Hull* v. *Noble*, 40 Id. 459; *Boone* v. *Missouri Iron Co.*, 17 How. 341; *Love* v. *Sortwell*, 124 Mass. 446; Story Eq. Jur. §§ 750, 771, 776.

Referees held defendant was entitled to a part of the barn, and described it in their report.

Plaintiff's deed not sufficient. Does not release dower, and does not convey the part of the barn set out to defendant by referees. No offer in plaintiff's bill to make such deed.

Barn is part of the realty. Deed of a barn, house, dwelling-house, mill, etc., held to convey real estate. These words alone sufficient to convey the soil on which the barn, house, dwelling-house, or mill stood. Wash. Real Prop., vol. 3, pp. 387, 388, 389; *Woodman* v. *Smith*, 53 Maine, 79.

Being part of the realty, defendant's rights in the barn not affected by its being set off to him, so long as it may last, or that it is on land, held in severalty, by plaintiff.

Plaintiff has not made, nor tendered, and does not offer to make any deed of defendant's part of the barn; but the defendant, according to the decree must make a deed of plaintiff's part of this barn to him. For this reason alone the appeal should be sustained.

A. P. Gould, for plaintiff.

Plaintiff's wife has no right of dower, in that portion of the common estate set off to defendant. *Mosher* v. *Mosher*, 32 Maine, 412.

Barn was personal property; defendant had no interest in the land on which it stands. No deed, or other instrument of conveyance was necessary to completely vest the title in defendant of that part of the barn set off to him. Referees' written award sufficient evidence of title.

Conveyance of the barn as personal property, unnecessary, was drawn, and not executed because defendant was not there to join plaintiff in it. Plaintiff, having offered in his bill to execute all necessary conveyances, signed the paper before the hearing.

WALTON, J. This is a bill in equity to obtain the specific performance of an agreement. The defendant insists that the bill ought not to be sustained, because the plaintiff himself is in fault in not performing his part of the agreement; that, by the terms of the agreement, each party was required to execute and deliver to the other a good and sufficient deed to make effectual the partition of certain land and a barn; and that while it is true that the plaintiff executed and tendered to him a deed of the land, he never executed, and never offered to execute, or deliver to him a deed of that portion of the barn which was set off to him. To this the plaintiff says that the barn was personal property; that the defendant had no interest in the land on which it stood; and that no deed or other instrument of conveyance was necessary to vest the title in the defendant. To this the defendant replies that he does not

admit that he has no interest in the land; that, by the terms of the agreement which the plaintiff asks to have enforced, he (the defendant) is entitled to a deed of that portion of the barn which was set off to him by the referees; and that, if it be true, as the plaintiff claims, that the barn is on land wholly owned by him, that that fact alone proves the necessity of the defendant's having such a deed as the agreement calls for.

We are forced to the conclusion that the defendant is right. The agreement which the plaintiff claims to have enforced certainly entitles the defendant to such a deed as he claims. And, as the plaintiff did not execute, and did not offer to execute, such a deed, within the time limited in the agreement, nor, so far as appears, at any time since, but insists that such a deed is unnecessary, we think he is in no condition to insist that the defendant shall be compelled to execute his part of the agreement.

The case shows that at the hearing in the court below, the plaintiff signed a paper, not a deed, affirming the doings of the referees, and presented it to the court. This was an irregular proceeding, and can have no influence in the decision of the cause.

The decree in the court below was in favor of the plaintiff. We think the decree is clearly wrong, and that it must be reversed.

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Decree in the court below reversed.
Bill dismissed with costs.

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

ABIGAIL L. SANFORD *vs.* STEPHEN L. LANCASTER, executor.

Kennebec. Opinion April 8, 1889.

Limitations. Trustee. Agent.

It is the settled law, in this state, that whenever money is payable immediately, or on demand, or when requested, or when called for, the statute of limitations commences to run immediately, whether any demand of payment is made or not.

An action at law, is not maintainable between a trustee and *cestui que trust,* in matters arising out of the trust. The remedy is in equity.

An agent invested his principal's money in a loan, secured by an absolute title of real estate to himself, with the knowledge and consent of the principal. The debt not having been paid, the principal is entitled to have the property, and all evidences of the debt transferred to him.

ON REPORT, from the superior court, for Kennebec county. The law court were empowered to draw such inferences, from the legally admissible testimony, as a jury might and render such judgment thereon, as the law and evidence required.

This was an action of assumpsit. There were two counts in the declaration. The first count was upon a promissory note of Sewall Lancaster, defendant's testator, for four hundred dollars dated September 22, 1875, and payable to the plaintiff on demand with interest. The note, upon which defendant's liability was admitted, bore indorsements of interest paid to September 22, 1884.

The second count was for seven hundred dollars, money had and received, by the said Sewall Lancaster to the use of the plaintiff. Under this count the plaintiff offered in evidence, two instruments in writing, signed by said Lancaster, of the following tenor, to wit:

"Received of Abigail L. Sanford, three hundred and seventy-five dollars for investment, for which she is to have eight per cent. interest per annum, from this date—October 14, 1870, and which I am to pay.

{ 2 cent U. S. Rev. stamp. } S. LANCASTER."

"Feb'y 25, 1878.

The above is secured by real estate conveyed to me, and which I hold in trust for Mrs. A. L. Sanford.

S. LANCASTER."

"June 6, 1871. Received of Mrs. Abigail L. Sanford, two hundred dollars, for investment with interest from this date.

S. LANCASTER."

"The above was loaned to Walter Matthews, the loan secured by real estate conveyed to me.

S. LANCASTER."

Plea, general issue, with brief statement that the alleged cause

of action in the second count, had not accrued within six years next before the bringing of the suit.

The testimony disclosed the transaction between the parties, to be of the following character:

The plaintiff, Mrs. Sanford, loaned $375.00, October 14, 1870, to one Walter Matthews, now deceased, and the loan was secured by real estate conveyed to Sewall Lancaster, in trust for her. June 6, 1871, she loaned the same party $200.00 secured in the same way. In 1875, the buildings on one of the lots conveyed to Lancaster, in trust, was destroyed by fire. The insurance money, $500.00, was collected by him, September 20, 1875, and on September 22, 1875 he paid the plaintiff $400, the net proceeds of it, which was indorsed on his receipt for $375.00 dated October 14, 1870. On the same day, September 22, 1875, the plaintiff loaned this $400.00 to said Lancaster, taking his note therefor,—being the note declared on, in this case.

October 14, 1872, Lancaster paid the plaintiff $50.00 which was indorsed upon his second receipt for $200.00; but besides the interest on his note, made her no other payments.

March 19, 1884, there was an interview between the parties. The plaintiff produced the note and it appears to have been written near the bottom of a sheet of paper, and there were figures of computations on the same sheet, above the note. The final figures are $480.81 and against them, a memorandum "will be due Oct. 14, 1884." Said Lancaster died March 3, 1885.

The plaintiff contended that the figures, thus placed above the note were put there by Lancaster, March 19, 1884, to show how much he owed her, besides the note; and that they are a sufficient acknowledgment and promise in writing to take the case out of the statute, and to make him personally liable therefor.

The defense contended that they were made September 22, 1875, to show plaintiff how much was then due her on the Matthews' investment after deducting the $400 insurance money loaned to Lancaster; and that the last computations were made March 19, 1884, for the same purpose, and when the last payment of interest, including six months advance, was made.

S. and L. Titcomb, for plaintiff.

The note described in the first count of the plaintiff's writ, admitted to be due by the defendant, becomes material only as to the indorsements and figures thereon proved to be in the handwriting of the testator, as evidence of the indebtedness upon the papers under the second count.

The receipt for $375.00 for investment of October 14th, 1870, containing an express agreement for the payment thereof, with interest from that date, by the defendant's testator, cannot be construed as a promise to pay at its date, but the right of action would commence upon demand, and not before,—and the evidence clearly shows that no legal demand was made until March 19th, 1884; and the action is not, therefore, barred by the statute of limitations.

The receipt of June 6th, 1871, for $200.00 is also of the same nature. The evidence in writing and figures proved to have been made by the testator, relates to the whole amount of his indebtedness when so made in 1884, of between eight hundred and nine hundred dollars at that time; and the statute of limitations would not commence running prior to that date. *Thomas* v. *Waterman*, 7 Met. 227, 229; *Reynolds* v. *Sumner*, 3 Ill. 663; 12 West. Rep. 827.

Where defendant invests funds of another in his own name, the statute of limitations does not apply. *Trustees* v. *Harrodsburg &c. District* (Ky.), 7 S. W. Rep. 212; *Thomas* v. *Merry*, (Ind.), 15 N. E. Rep. 244; *Horne* v. *Ingraham*, (Ill.), 14 West. Rep. 567.

The defendant claims that, if the two receipts are personal obligations of Sewall Lancaster, deceased, they are barred by the statute of limitations; and if they disclose a trust, the remedy is in equity and not at law. We answer, that, assuming the general rule to be, that a *cestui que trust* can not sue his trustee at law, it is well settled, that if a trustee admits a balance in his hands, due from him to the *cestui que trust*, he may be sued at law on such admission. 1 Chitty's Pleading, (16 Ed.) 40; *Roper* v. *Holland*, 3 A. & E. 99; S. C. 1 Har. & Woll. 167; 4 Nev. & Man. 668.

R. W. Black, for defendant.

Counsel argued that if the two receipts were personal obliga-

tions, they are barred; and if they disclose a trust, plaintiff's remedy is in equity for specific performance.

Trust not terminated by demand; no demand for money made. Plaintiff only asked if it was not about time she had a deed of the Matthews' property, and Lancaster replied he didn't know but it was.

Not a case of diversion of funds, or failure to invest. Matthews' estate, only, liable for the money. Investments made with knowledge and consent of plaintiff.

The words "and which I am to pay" in the receipt relate to the payment of interest and not the principal. Lancaster was to have the care of the property, collect the interest and pay it to plaintiff; but not become personally liable before it was collected.

WALTON, J. We do not think the claim to recover the money received by Mr. Lancaster in 1870 and 1871, can be sustained. It was received "for investment." His receipts so state. And we doubt if he or the plaintiff ever understood that he was to be personally liable for its payment, except as it should be collected from the one to whom it was loaned. But if it was received under such circumstances as to make him personally liable for it, very clearly the claim is barred by the statute of limitations. Nothing was paid on it for nearly ten years before Mr. Lancaster's death, and there is no new promise such as will take it out of the operation of the statute. The law is well settled in this state, whatever the rule may be in other states, that whenever money is payable immediately, or on demand, or when requested, or when called for, the statute of limitations commences to run immediately, whether any demand of payment is made or not. Of course, the statute will not commence to run till a right of action accrues; but in such cases a right of action accrues immediately. *Young* v. *Weston*, 39 Maine, 492; *Ware* v. *Hewey*, 57 Maine, 391.

It is urged that this was a trust, and that the statute of limitations does not run against trusts. This is a suicidal argument so far as this suit is concerned; for the doctrine invoked applies only to suits in equity, and to such trusts as are cognizable in equity alone. If the true relation existing between the plaintiff

and Mr. Lancaster was that of trustee and *cestui que trust* (and we incline to think it was), and the trust was of such a character that the statute of limitations would not run against it (and on this point our minds incline to the affirmative), then her remedy is exclusively in equity, and, so far as this claim is concerned, her action at law is not maintainable.

It is plain that Mr. Lancaster received the plaintiff's money for investment; that he loaned it to Walter Matthews; and, as security, took an absolute title of real estate to himself; he acknowledged in writing that he held the real estate in trust for the plaintiff; she seems to have had full knowledge of this arrangement, to have acquiesced in it, and to have been satisfied with it. Mr. Lancaster now being dead, and the debt not being paid, we can perceive no reason why in equity and good conscience she is not entitled to have the real estate, and all other evidences of the debt, transferred to her. If this is done by the heirs or devisees of Mr. Lancaster voluntarily, there will be no occasion for further litigation; if not, then the plaintiff's remedy is in equity. We are clear that, so far as this claim is concerned, an action at law can not be maintained.

The first count, in the plaintiff's writ is on a note of hand. On this count she is entitled to judgment for $400, and interest from Sept. 22, 1884. This is conceded by the defendant.

Judgment for plaintiff.

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

WILLIAM H. OWEN *vs.* NATHAN F. ROBERTS.

Penobscot. Opinion April 15, 1889.

Insolvent law. Foreign creditor. Dissolution of attachment.

By the provisions of § 33, c. 70, R. S., an assignment of the debtor's property relates back and dissolves all attachments on *mesne* process, made within four months of the commencement of insolvency proceedings.

No exception is made in favor of foreign creditors.

The purpose and object of the insolvent law is the marshalling of the debtor's property to secure an equal distribution among his creditors.

A foreign creditor seeking his remedy within this jurisdiction upon a contract entered into while the insolvent law is in force, can not successfully invoke the protection of that provision in the state and federal constitution which prohibits a state from passing any law impairing the obligation of contracts.

The remedy existing when and where the contract is made and to be performed is all that can be accorded.

In reference to contracts made before the enactment of the insolvent law, a different rule would apply, and the party might properly claim protection of a vested right under the general law of attachment in existence when the debt was contracted.

REPORT, on facts agreed.

The plaintiff is, and ever has been, a resident of the city, county and state of New York. The defendant is a resident of Dexter in the county of Penobscot, and a deputy sheriff in and for said county of Penobscot.

October 1, 1885, one William J. Haseltine, from his birth a resident of said Dexter, was indebted to the plaintiff for certain goods before that time purchased by him, of the plaintiff, through his travelling salesman, at said Dexter. On that day, the plaintiff brought his action in this court, returnable to the January term, 1886, to recover for the said indebtedness; and on the same day delivered the said writ to the defendant Roberts for service, who attached certain goods, wares and merchandise of the said Haseltine and made due return on the said writ, and kept the said goods in his possession by virtue of his said attachment. The action was duly entered at the January term of this court for 1886 and continued from term to term until the October term of said year, when judgment was rendered against the said Haseltine; but an entry at the same term, was made upon the court docket, that execution should not run against the body of said Haseltine. November 15, 1886, execution was duly issued thereon against the said Haseltine in common form, with the usual clause for arrest and imprisonment stricken out.

Within thirty days after the rendition of said judgment, a demand was seasonably and legally made by a proper officer holding said execution, on the said Roberts for the said goods, wares and merchandise for the purpose of satisfying said execu-

tion, which the said Roberts failed to deliver, and the said officer made due return thereof on the said execution.

It was further agreed, that on January 22, 1886, within four months after the attachment of the goods, by the defendant as deputy sheriff, the said Haseltine was adjudged an insolvent debtor on his own petition in the insolvent court for Penobscot county, and that on the 11th day of February following, an assignee of his estate was appointed, who April 30, 1886, made demand on the said Roberts for the said goods held by him by virtue of the said attachment. Said Roberts, after notice to the attorneys of the said Owen, but without their consent, delivered said goods to said assignee, who also gave notice to the said attorneys of said Owen that he held said goods in his possession.

On the third day of June following, the said assignee petitioned the insolvent court for leave to sell said goods under § 36, c. 70, R. S., and after due notice to the attorneys of the said Owen the judge of the said court after a hearing, at which there was no appearance on the part of the said Owen, either by himself or his attorneys, ordered the said assignee to sell the said goods. The assignee afterwards sold the same at public auction of which the plaintiff's attorneys had notice.

The original debt was contracted by the said Haseltine since the enactment of the insolvent laws of Maine.

The insolvency of the said Haseltine was duly suggested at the January term, 1886. October 7, 1886, the said Haseltine was duly granted his discharge in insolvency by the insolvent court of Penobscot county, which said discharge was presented in this court at the October term, 1886, a formal pleading of the same being waived, and thereafterwards at said term, plaintiff's said judgment was rendered and execution issued thereon, as before stated.

It was agreed that all the proceedings on the part of the plaintiff are in due form of law; the defendant contending that the requirements of §§ 36 and * 37 of c. 70, R. S., ought to have been complied with by the plaintiff, but have not.

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*R. S., c. 70, § 37, provides that "the claimant of property sold under section thirty-six shall bring his suit against the assignee, to be served on him within sixty days after the judge orders such sale, to recover compensation for the value thereof, or be precluded thereafter from maintaining any action at law or in equity for its recovery."

It was agreed that all the proceedings in insolvency are in due form of law.

This action was brought January 27, 1888.

Crosby and Crosby, for plaintiff.

Insolvent laws of Maine have no application to citizens of another state. *Hills* v. *Carlton*, 74 Maine, 156; *Felch* v. *Bugbee*, 48 Id. 9, 14.

If an attachment, made by a creditor of another state is dissolved, he has no protection; no recognition of his constitutional rights. Section 17 of the law forbidding payment of debts to foreign creditor, impairs the obligation of contracts. Under § 33 how can assignee recover preferences from foreign creditor entitled to his whole pay? Provisions of §§ 44, 46, 47 and 49 regulating a discharge of provable debts can have no application to foreign creditors who do not come in and prove their debts. *Merrill* v. *McLaughlin*, 75 Maine, 64, 68. Legislature, in changing the remedy can not deprive a party of all remedy; must leave him a substantial remedy. Cooley Con. Lim., pp. 289, 290, 352, note; *State* v. *Bank*, 1 S. C. (N. S.) 63.

Proceedings under § 36 relate only to questions between domestic creditors and the assignee. Assignee can not compel foreign creditor to submit his case to the insolvent court of this state. Notice, under this section, should have been given to the sheriff, Roberts, holding the goods, and not Owen who had no right of possession and could not maintain an action for their possession or conversion.

Section 37 provides that the claimant shall bring his suit against the assignee within sixty days after the judge has ordered the sale. The order of sale was July 7, more than sixty days before plaintiff got judgment. It would be absurd to bring suit against the assignee, when his only claim was by virtue of an attachment, thus situated, and which might never come to judgment.

The only provision which, in terms, applies to foreign creditors is c. 319, acts of 1885, exempting debtors from liability to arrest, on account of debts due out of the state. Its specific application to this case, expressed in well defined terms, strengthens the

argument, that all the other provisions have no such application. "*Expressio unius est exclusio alterius.*"

M. Sprague, for defendant.

The purpose of the statute as defined in *Wright* v. *Huntress*, 77 Maine, 180, would be defeated if the position of the plaintiff is sustained. A foreign creditor coming into the courts of this state to enforce his claims, is bound by the remedies there afforded. He is bound by our statute of limitations and exemptions. His right of attachment is subject to be defeated by insolvency. *Grant* v. *Lyman*, 4 Met. 470, 475.

The remedy by imprisonment, is subject to be defeated in same manner, if the claim is provable in insolvency. Ch. 319, Acts of 1885. Plaintiff admits the constitutionality of the law and power of legislature to thus change the remedy, by taking his execution against the goods attached and not against the body of the debtor. Validity of the contract not thereby affected. *Sturges* v. *Crowninshield*, 4 Wheat. 122.

As to the effect of dissolving attachments, after the insolvent law went into operation, on contracts entered into before its passage, counsel cited, *Bigelow* v. *Pritchard*, 21 Pick, 169, 175. In case at bar, statute had been in operation several years, before the attachment was made.

Foreign creditor suffers no hardship by the dissolution of his attachment. He may come into the insolvent court and share equally with other creditors. The result is an equal distribution of the assets.

Plaintiff had no special property in the goods by virtue of the attachment. The property was in the custody of the law; by insolvency of the debtor it remained in the custody of the law; only the right to its possession was changed to the assignee, who could maintain actions for its possession, &c. *Jewett* v. *Preston*, 27 Maine, 400.

Attachment being dissolved, defendant's obligations to plaintiff ceased. *Sprague* v. *Wheatland*, 3 Met. 416.

Defendant not liable, even for nominal damages. *Grant* v. *Lyman*, 4 Met. 470. Plaintiff's rights lost by failure to comply with §§ 36 and 37, c. 70, R. S.

FOSTER, J. Tort against the defendant as deputy sheriff for failing to keep property attached on a writ in favor of the plaintiff, a resident of New York.

The question is whether or not that attachment was dissolved, and the defendant thereby released from his legal obligation to safely keep the attached property, by the insolvent proceedings of the plaintiff's debtor commenced within four months of the date of the attachment.

Had the plaintiff been a resident of this state there is no doubt but that his attachment would have been dissolved by the insolvency proceedings.

Does the fact that the plaintiff was and still is a resident of another state continue the force of the attachment against the assignment in insolvency?

We think it does not.

By the express provision of § 33, c. 70, R. S., such assignment relates back, and dissolves all attachments made within four months of the commencement of insolvency proceedings.

No exception is made in favor of attachments of foreign creditors. Nor is there any reason, either upon principle or authority, why there should be any such exception. The purpose and object of the insolvent law is the marshalling of the debtor's property to secure an equal distribution among his creditors. For this very purpose all attachments are dissolved and all lien claims are broken up, unless made and existing at least four months prior to insolvency proceedings.

But it is contended that this provision ought not to extend to and bind this plaintiff, because he is a citizen of another state, and he invokes that provision of the federal and state constitutions which prohibits the state from passing any law impairing the obligation of contracts.

The answer to that proposition is, that it has no application to the case under consideration.

While the obligation of contract, wherever it exists, is always to be protected and sheltered by the broad canopy of the constitution, yet that which is purely a matter of process or remedy is to be governed and regulated by the laws of the place where the

remedy is sought. Nor will the inhibition of the constitution be held to apply where there is a change in the form of the remedy merely, or a modification of it, provided no substantial right secured by the contract is thereby impaired. No more can properly be demanded, even by the most liberal construction of constitutional rights bearing upon the obligation of contract, than the remedy existing when and where the contract is made and to be performed. If greater protection is claimed, it certainly can not be by virtue of any obligation of contract. If such protection is to be found it must exist on account of the insolvent law which was in existence at the time the plaintiff's debt was contracted, and its relation to the parties to that contract.

It is unquestionably true that state insolvent laws have no extra-territorial force, and can affect only such contracts as are made between citizens of the state in which the law exists. Nor can the legislature of a state, by an insolvent law, suspend or bar the right of action on a contract, or discharge a debt, made between one of its citizens and a citizen of another state. "A certificate of discharge will not bar an action brought by a citizen of another state, on a contract made with him." *Cook* v. *Moffat*, 5 How. 295. The authorities are in harmony in support of this doctrine. *Felch* v. *Bugbee*, 48 Maine, 9; *Hills* v. *Carleton*, 74 Maine, 159; *Baldwin* v. *Hale*, 1 Wall. 223; *Guernsey* v. *Wood*, 130 Mass. 503.

But while it is true that the state insolvent law has no control over the debt or contract made with citizens of another state, where they are not parties to proceedings under such law, yet it by no means follows that the law has no control over the property of the insolvent. *South Boston Iron Co.* v. *Boston Locomotive Works*, 51 Maine, 590; *Grant* v. *Lyman*, 4 Met. 475; *Frost* v. *Ilsley*, 54 Maine, 351.

Whether there might not have been a vested right in the plaintiff under the general law of attachment, had his debt been contracted prior to the enactment of the insolvent law, is a question not now before us. The plaintiff's debt, in the case under consideration, was contracted with the insolvent law in existence at the time. Although a citizen of another state, the law was before his eyes when the debt was made and when the remedy for its

satisfaction was invoked. He came into this state, sought the *lex fori*, and attached the property of his debtor. He must be satisfied with the remedy he finds here,—such remedy as the citizens of this state are obliged to submit to. Neither the comity between states, nor the obligation of contract, can be invoked in this case to the prejudice of our own citizens. *Fox* v. *Adams*, 5 Maine, 245; *Chaffee* v. *Bank*, 71 Maine, 524; *South Boston Ins. Co.* v. *Boston Locomotive Works*, 51 Maine, 590, 591.

The question here is not whether the certificate of discharge under the insolvent law would be a bar to the plaintiff's action, or whether such proceeding is incompetent to discharge a debt due a citizen of another state. The plaintiff's debt was not discharged, nor his action barred, on account of the insolvency proceedings. He recovered judgment against his debtor. But the attachment was dissolved by force of the statute operative upon all who saw fit to contract subsequent to its enactment. The plaintiff has no just ground of complaint because he is placed on the same plane with the citizens of our own state, and in the remedy which he has sought he has justice done him if allowed to enjoy equal privileges with them.

The decision in *Grant* v. *Lyman*, 4 Met. 470, 475, is decisive upon the question involved in the case before us.

"As the attachment was dissolved by operation of law, the officer's liability to the creditor, at whose suit the attachment was made, is at an end." *Mitchell* v. *Gooch*, 60 Maine, 110, 113; *Sprague* v. *Wheatland*, 3 Met. 416; *Grant* v. *Lyman*, *supra*.

Judgment for defendant.

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

JOSEPH WILLIAMSON, assignee, *vs.* A. B. NEALEY.

Waldo. Opinion April 15, 1889.

Insolvent law. Assignee's title,—nature of. Mortgage of after-acquired property.

In a suit in trover for the value of property brought by an assignee in insolvency, the plaintiff's rights are only those of the insolvent himself.

His rights are only those which the insolvent himself had and could assert at the time of his insolvency, except in case of fraud.

As between the parties, a mortgage upon goods which authorizes the mortgagor to sell them, and with the proceeds of such sale to purchase other goods to take their place, may be upheld as to such after acquired property.

REPORT, on facts agreed.

The facts are stated in the opinion.

J. Williamson, for plaintiff.

It is a principle well established by the decisions of this court, that as between the parties, a mortgage upon goods which authorizes the mortgagor to sell them, and with the proceeds of sale to purchase other goods to take their place, may be upheld as to after-acquired property.

That the assignee in insolvency of such a mortgagor is a party will hardly be claimed, for it is only "they who make any deed, and they to whom it is made, that are called parties to the deed." Jacobs' Law Dictionary: Parties.

By R. S., c. 70, § 33, an assignment in insolvency "vests the title to all the property and estate of the debtor," not expressly exempt by law, in the assignee. The latter does not merely succeed to the rights of the debtor, but he succeeds also to the rights of the creditors. He takes the property as a grantee or vendee for a sufficient consideration; as an attaching creditor. The statute is full of authority to him to sue for and recover property, rights and credits, where the debtor could not have sustained an action, and to set aside as void, transactions by which the debtor would be bound. *Sawyer* v. *Hoag*, 17 Wall. 610, 620.

The case finds that the status of the defendant remained unchanged, from the date of the mortgage in 1878, to the appoint-

ment of the assignee in 1886. During that period, it is a reasonable presumption that the original and substituted property was the constant subject of barter, sale and exchange, but the defendant caused no new record to be made of the mortgage; took no delivery of any property which he claimed by virtue of it; assumed no possession, and did no new act whatever. Without some intervening act or conveyance, to give life and vigor to the first transaction, the mortgage could vest no further interest in him. *Griffith* v. *Douglass*, 73 Maine, 532; *Jones* v. *Richardson*, 10 Met. 481, 492; *Moody* v. *Wright*, 13 Met. 17; *Wright* v. *Tetlow*, 99 Mass. 397.

The case is governed by the principles laid down in *Chase* v. *Denny*, 130 Mass. 566, which distinctly affirms the rule adopted in the last three cases above cited.

Frye, Cotton and White, for defendant.

By the terms of the mortgage, Hodgdon, the mortgagor had authority to barter, sell and exchange the mortgaged property in the usual course of trade and with the proceeds to purchase other property of like kind, which he stipulated should be equally subject to the lien of the mortgage.

No question of fraud is raised or intimated, and the case finds that the property conveyed by the mortgage was sold by the mortgagor, and with the proceeds of such sale he purchased other property,—which is the property in controversy.

Every question raised here is covered by the decisions of this court in *Allen* v. *Goodnow*, 71 Maine, 420, and *Abbot* v. *Goodwin*, 20 Maine, 408.

FOSTER, J. Trover for the value of certain personal property, the title to which is claimed by both parties. The plaintiff claims it as assignee in insolvency of Abner Hodgdon who, in 1878, conveyed in mortgage "all the goods, wares, merchandise * * and stock in trade" then in his store to secure payment of an indebtedness of $400. The mortgage contained the following clause: "It is agreed that the said Hodgdon may barter, sell and exchange the above described property in the usual course of trade, and with the proceeds of such barter, sale and exchange,

purchase other property of like kind, which shall be equally subject to the lien of this mortgage; and it is also specially agreed and understood that any and all property added to said stock in any way, shall also be equally subject to the lien of this mortgage."

At the date of the mortgagor's petition in insolvency, all the property conveyed by the mortgage had been sold by him in the usual course of trade, and with the proceeds of such sale he had purchased and then had in his possession other property of like kind of the value of one hundred dollars.

The defendant duly became the owner of the mortgage by assignment long before the mortgagor's petition in insolvency, although his foreclosure of the same has been perfected since that time.

The defendant's rights are therefore precisely those of the original mortgagee.

The rights of the plaintiff are only those of the insolvent himself. He stands in the place of the debtor, and takes only the property and interest which he had, subject to all valid claims existing in reference to such property. His rights are only those which the insolvent himself had and could assert at the time of his insolvency, except in case of fraud, and no fraud is alleged in this case. *Herrick* v. *Marshall*, 66 Maine, 435; *Hutchinson* v. *Murchie*, 74 Maine, 187, 189.

This controversy, in reference to title, may then be considered as if it were between the original parties to the mortgage.

It is a principle established by the decisions of this court, that as between the parties, a mortgage upon goods which authorizes the mortgagor to sell them, and with the proceeds of such sale to purchase other goods to take their place, may be upheld as to such after-acquired property. *Allen* v. *Goodnow*, 71 Maine, 424; *Deering* v. *Cobb*, 74 Maine, 332, 334.

In the case of *Allen* v. *Goodnow*, *supra*, LIBBEY, J., in delivering the opinion of the court says: "We know no principle of law which prevents the parties from making such a contract; and if honestly executed by the mortgagors by using the proceeds of sales in purchasing other goods which were put into the store to

take the place of those sold, the title to such goods is in the mortgagors, precisely the same as if they had made the sales and purchases themselves by the consent of the mortgagors."

The question before us, it must be noticed, is not one between the mortgagee and a subsequent purchaser for value, or an attaching creditor, but, as we have stated, between the original parties to the mortgage, and must be determined by the stipulations contained in the mortgage. These stipulations render the case unlike that of *Griffith* v. *Douglass*, 73 Maine, 532, in which there was no power of sale with the duty to invest the proceeds for the benefit of the mortgagee, and which was a mortgage of the furniture "now owned or to be owned" by the mortgagor, without reference to such renewals as should be procured by any reinvestment of proceeds arising from sales of the original stock. That case, and that of *Jones* v. *Richardson*, 10 Met. 481, cited by the plaintiff, arose between the mortgagee and third persons claiming as attaching creditors of the mortgagor, and consequently have no application to the facts in this case.

Upon the facts presented for consideration in the case now before us, the entry must be

Judgment for defendant.

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

MARY F. PHINNEY, in equity, *vs.* SARAH E. PHINNEY, and another.

Penobscot. Opinion April 15, 1889.

Equity. Contract. Constitution. Obligation. Impairment. Stat. 1887, *c.* 129.

The obligation of contracts, which is protected from impairment by the state and federal constitutions, does not arise wholly from the acts and stipulations of the parties, independent of existing law.

This obligation has vitality and subsists outside the stipulations expressed by parties in their contracts.

The laws which exist, at the time and place of making the contract, enter into and form a part of it, as if they were expressly referred to or incorporated into it.

While a state may, to a certain extent and within proper bounds, regulate the remedy, yet if by subsequent enactment it so changes the nature and extent of existing remedies as materially to impair the rights and interests of a party in a contract, this is as much a violation of the compact as if it absolutely destroyed his rights and interests.

The constitutional prohibition secures from attack not merely the contract itself, but all the essential incidents which render it valuable and enable its owner to enforce it.

Chapter 129 of the public laws of 1887 held to be unconstitutional, so far as it applies to mortgages in existence, prior to its enactment.

ON REPORT. Bill in equity, heard on bill, demurrer and joinder.

This was a bill in equity by a creditor, who sought to realize a judgment out of the debtor's equity of redemption in a mortgage, given to secure the performance of a collateral agreement or undertaking, other than the payment of money.

The bill is founded on the provisions of c. 129 of the acts of 1887. The material portions of the act are stated in the opinion.

The essential parts of the bill are as follows:

Mary F. Phinney, of Augusta, in the county of Kennebec, and state of Maine, complains against Sarah E. Phinney and Nancy Parsons, both of Plymouth, in the county of Penobscot, and state of Maine, and says, that said Sarah E. Phinney is debtor to your complainant in and by virtue of a judgment, rendered November 25th, A. D. 1885, by the consideration of our justices of the supreme judicial court holden at Bangor within and for the said county of Penobscot on the first Tuesday of October, A. D. 1885, for the sum of three hundred and seventy-seven and 4-100 dollars, damages and twenty-four and 73-100 dollars, costs of suit, recovered by your complainant against said Sarah E. Phinney, which judgment is still unreversed, not annulled and in no part satisfied, and your complainant says that said Sarah E. Phinney is at the date hereof, debtor to her in the amount of said judgment for said damages and costs of suit with legal interest thereon, from the said date of said rendition of judgment.

That said Nancy Parsons and one Sally Parsons, by their deed of quitclaim dated August 5th, A. D. 1875, recorded in Penobscot registry of deeds, vol. 455, p. 352, conveyed to said Sarah E.

Phinney all their right, title and interest in and to the following real estate situate in said Plymouth: (description of premises.)

That said Sarah E. Phinney by her deed of mortgage, dated August 5, A. D. 1875, recorded in Penobscot registry of deeds, vol. 458, p. 289, mortgaged said real estate, (description of premises) to said Nancy and Sally Parsons to secure the performance of the agreement of said Sarah E. Phinney to maintain the said Sally and Nancy during their lives, and the survivor during her life, in a comfortable manner according to their station in life, both in sickness and in health, and shall pay their funeral charges, the same being a collateral agreement or undertaking other than the payment of money.

That said Sally Parsons is dead, and said Nancy Parsons, as the survivor of said mortgagees has commenced proceedings to foreclose said mortgage for alleged breach of the conditions thereof, by a notice of foreclosure, signed by said Nancy Parsons, bearing date July 28, A. D. 1884, published in the Bangor Weekly Commercial, a public newspaper printed in Bangor, Penobscot county, Maine, vol. 44, Nos. 32, 33 and 34, dated Aug. 8, 15 and 22, 1884, and recorded in Penobscot registry of deeds, September 16, A. D. 1884, in Book H, p. 265.

That the time of redemption of said mortgage has not expired.

That your complainant has the claim aforesaid, the judgment hereinbefore described, against the said Sarah E. Phinney, said mortgagor.

That your complainant, by and upon a certain writ, dated July 18, A. D. 1887, returnable to the supreme judicial court next to be holden at said Bangor within and for said county of Penobscot, on the first Tuesday of October, A. D. 1887, wherein said Sarah E. Phinney was summoned to answer unto your complainant in a plea of debt setting forth in the declaration therein the above described judgment, did attach said mortgagor's interest in said estate on said claim, to the amount of eight hundred dollars, July 18, A. D. 1887, and did on said July 18th, cause said attachment to be duly recorded in the registry of deeds for said county of Penobscot.

That Nancy Parsons is the owner of such mortgage and resides at Plymouth in said county of Penobscot.

That the aforesaid mortgaged property is situated in said Plymouth in said county of Penobscot.

That said agreement has to be performed in the said county of Penobscot.

Your complainant prays as follows:

1. That said court may examine into the facts and ascertain whether there has been any breach of the conditions of said mortgage, and if such is found to be the fact to assess the damages arising therefrom, and to make such orders and decrees in the premises as will secure the rights of said mortgagee, so far as the same can be reasonably accomplished and enable your complainant, by fulfilling such requirements as the court may impose, to hold said property, or such right or interest as may remain therein by virtue of such attachment, for the satisfaction of her claim.

2. That said mortgagee may be decreed to have possession of such property for such time as the court deems just and equitable.

3. That pending these proceedings the right of redemption shall not expire by any attempted foreclosure of such mortgage.

4. That for the purposes aforesaid, all necessary or proper accounts may be taken, inquiries made and decision given.

5. That the complainant may have such further or other relief as the nature of the case may require.

6. That said respondents may upon oath make full, true and perfect answer to all and singular the matters hereinbefore stated, as fully and particularly as if the same were hereinafter repeated and they were distinctly interrogated in relation thereto.

And may it please the court to grant to your complainant a writ of subpœna directed to Sarah E. Phinney of Plymouth, county of Penobscot and state of Maine, and to Nancy Parsons of said Plymouth, in the form provided by law and the rules of this court.

Dated this 20th day of July, A. D. 1887.

MARY F. PHINNEY.

H. M. HEATH,
Complainant's Solicitor.

The bill, duly sworn to, was filed July 30, 1887.

Defendants filed a demurrer as follows:

The demurrer of Nancy Parsons and Sarah E. Phinney, who say, the plaintiff is not entitled to the relief prayed for:

Because, she has, as is shown by her bill, a plain and adequate remedy at law.

Because, the plaintiff shows by her said bill, that she recovered judgment against the defendant, Sarah E. Phinney, on the first Tuesday of October, A. D. 1885, and does not show, nor allege that she sued out execution on said judgment, nor that she has attempted in any manner to enforce said judgment against the goods and estate of said Sarah, nor that said Sarah has not sufficient goods and estate to satisfy said judgment, that may be reached by ordinary process of law, without recourse to the intervention of this court sitting in equity.

Because, the plaintiff does not show in her said bill that she has exhausted her remedies at law.

Because, the plaintiff has not by her said bill shown such a case as entitles her to any such relief as is thereby prayed, or any other relief whatsoever against these defendants.

Wherefore, these defendants demand the judgment of this honorable court, whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their reasonable costs.

NANCY PARSONS,
SARAH E. PHINNEY.

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94 422

H. M. Heath, for plaintiff.

Statute in question, applies clearly to mortgages in force at date of its becoming a law.

The process is in the nature of a bill in equity to redeem brought by attaching creditor.

It leaves the contract between the mortgagor and mortgagee untouched, and only affects the remedy.

Legislature has power to alter remedy, if contract is unimpaired. *Oriental Bank* v. *Freeze*, 18 Maine, 109.

Until judgment in some action, the mortgagee has no vested right in any particular remedy or method of foreclosure. *Bangor* v. *Goding*, 35 Maine, 73.

Right to foreclose is statutory. What is given by statute may be changed by statute. *Bank* v. *Freeze*, *supra.*

If mortgagee has any cause of complaint, it is because during

pendency of this bill in equity the time of redemption is indirectly extended.

Courts of equity have always possessed power to extend time of redemption. *Bank* v. *Eldredge*, 28 Conn. 566. (73 Am. Dec. 688). *Jones* v. *Crittenden*, 1 Car. Law Rep. 385. (6 Am. Dec. 536).

The books abound in instances where this power has been sustained, in cases of claims existing at passage of statutes. (Statute enlarging time to bring actions of ejectment against adverse holders). *Billings* v. *Hall*, 7 Cal. 1; *Cox* v. *Berry*, 13 Geo. 306; (Statute extending time to bring actions upon sealed instruments). *Dyer* v. *Gill*, 32 Ark. 410; (Statute relative to actions to foreclose mechanic's liens). *Edwards* v. *McCaddon*, 20 Iowa, 520; (Statute providing for limitation of actions to enforce judgments, although there was no limitation when the judgment was rendered). *People* v. *Circuit Judge*, 37 Mich. 287. (Statute extending time of redemption from tax sales). *Dikeman* v. *Dikeman*, 11 Paige, 484. (Statute granting chancery powers to relieve against forfeitures and penalties already incurred). *Potter* v. *Sturdivant*, 4 Maine, 154. (Statute repealed, without saving clause, law giving lien. Held to apply to an action pending to enforce lien although attachment had been made). *Bangor* v. *Goding*, 35 Maine, 73. (Statute changing requirements to constitute liens, applied to pending action). *Frost* v. *Ilsley*, 54 Maine, 351.

As to the essential principles involved, *Berry* v. *Clary*, 77 Maine, 482, would seem to be decisive of case at bar.

The contract between the mortgagor and mortgagee is undisturbed and unimpaired. The mortgagee can take and hold possession of the premises, enjoy the rents and profits, bring her action at law for damages for breach of the contract for support, prosecute the various methods of foreclosure, and in fact enjoy all her legal and equitable rights and remedies, the only effect of the bill in equity being that we instead of the mortgagor shall be allowed to redeem, and that until decree the equity of redemption shall not be allowed to expire.

Sections 60, 61 of c. 82, R. S., are analogous provisions where mortgages secure money.

This court could have exercised the powers of the statute under its broad chancery powers.

The bill is drawn under the statute and contains all the elements of the statute. The remedy being statutory, nothing more is required than the statutory averments.

As to the causes of demurrer :

To entitle the plaintiff to relief under the statute in question, it is not necessary to aver or show that we have no adequate remedy at law. The remedy given is concurrent.

The second cause is irrelevant. Under the statute it is not necessary to show or allege that we sued out execution on said judgment. The remedy is given to any person having a claim against the mortgagor; a judgment is a claim. It is equally immaterial that the plaintiff has not attempted in any manner to enforce said judgment against the goods and estate of said Sarah; the statute requires no such step. For the same reason, it is equally immaterial that the plaintiff does not allege that said Sarah has not sufficient goods and estate to satisfy said judgment, that may be reached by ordinary process of law, without recourse to the intervention of this court sitting in equity. In the absence of the statute such objections would have great weight.

The third cause is immaterial, because the remedy given by the statute is concurrent and additional to the remedies at law.

The fourth is of no weight, if the statute applies to claims and mortgages in force at the time the statute in question went into effect.

The general statute excepting pending actions does not apply. Our claim was a judgment debt, when the act became a law. Counsel also cited the following cases, in support of the principle that a general statute, permitting defendants in actions to foreclose mortgages to have six months to file answers, and requiring six months' notice, before sale on decree, was held valid even as to pending actions, although under former practice defendant had but twenty days. *Von Baumbach* v. *Bade*, 9 Wis. 559. (76 Am. Dec. 283). *Holloway* v. *Sherman*, 12 Iowa, 282. (79 Am. Dec. 537).

S. S. Hackett, for defendants.

The question is whether the statute applies to this mortgage dated August 5, 1875, the act being approved March 16, 1887. In *Bryant* v. *Merrill*, 55 Maine, 515, DICKERSON, J., says, "A retroactive effect will not be given to a statute, unless it clearly shows that such was the intention of the legislature." *Hastings* v. *Lane*, 15 Maine, 134; *Given* v. *Marr*, 27 Id. 212; *Ellis* v. *Smith*, 38 Id. 114; *Curtis* v. *Hobart*, 41 Id. 230; *Rogers* v. *Greenbush*, 58 Id. 395; *Whitman* v. *Hapgood*, 10 Mass. 438; *Bank* v. *Copeland*, 7 Allen, 139. In *Whitman* v. *Hapgood*, *supra*, Jackson, J., says that retrospective effect is not to be given to a statute "especially if it tends to produce inconvenience or injustice." This statute tends to that effect. By the law, in force when this mortgage was given, it became foreclosed in three years, after breach, etc. This statute provides that any person, having a claim against the mortgagor, may intervene without performing, or offering to perform, and indefinitely postpone the foreclosure. The equity suit must await the determination of the creditor's suit at law against the mortgagor, whether it takes one year or ten. In ten days after the bill was filed, and twenty-seven days before defendants could appear to answer, this mortgagee would have had an indefeasible title.

It was formerly doubted whether these mortgages were subject to redemption. But this court held in *Bryant* v. *Erskine*, 55 Maine, 153, and *Fales* v. *Hemmenway*, 64 Id. 373, that they were. In the former case, it was held, that the services to be performed were personal, and could not be assigned to a stranger; and a demurrer to the bill was sustained, because it did not allege that the transfer was made with the consent of the mortgagee. Hence, when this mortgage was made, a creditor could acquire no interest in the premises, even by a levy; and the statute changes the contract to the prejudice of the mortgagee, by permitting new parties to come in without his consent.

Statute, unconstitutional, if retroactive.

Plaintiff must, first, exhaust legal remedies. There must be a levy, a return of *nulla bona*. *Webster* v. *Clark*, 25 Maine, 313; *Baxter* v. *Moses*, 77 Id. 465.

But the chief objection is, that statute allows the creditor, to come in and make a new contract,—to come in where the parties had contracted—for the law is part of the contract. *Walker* v. *Whitehead*, 16 Wall. 314; *Memphis* v. *United States*, 97 U. S. 293.

Case not like *Berry* v. *Keller*, 77 Maine, 270, and *K. & P. R. R. Co.* v. *P. & K. R. R. Co.*, 59 Id. 9. In the latter, KENT, J., says that the decision rests upon the vital fact that our statutes had provided no method of foreclosure; and he supposed the legislature can not, constitutionally shorten the time of foreclosure.

Where the statute is direct and governs the case the equity court is bound by it. *Kemp* v. *Pryor*, 7 Ves. 249; *Bronson* v. *Kinzie*, 1 How. 311.

If there has not been a breach of the mortgage, then there is no provision in the act, that the court shall make any decree. There are no sufficient allegations in the bill to authorize a decree, outside the statute. *Webster* v. *Clark*, and *Baxter* v. *Moses*, *supra.*

FOSTER, J. The object of this bill is to enable an attaching creditor of the mortgagor, pending proceedings for foreclosure, to step in, postpone the time for the expiration of the right of redemption, and enable him to fulfill the requirements devolving on the mortgagee, agreeably to c. 129, Laws of 1887.

This statute provides that in all cases where a debtor has mortgaged real estate to secure the performance of a collateral agreement other than the payment of money, and proceedings have been commenced to foreclose the mortgage and the time of redemption has not expired, a creditor of the mortgagor having attached the mortgagor's interest may file a bill in equity, and the court is thereupon authorized to ascertain whether there has been a breach of the conditions of the mortgage; and if such is found to be the fact, to pass any order or decree, and thereby enable the creditor, by fulfilling such requirements as the court may impose, to hold the property or such right as may be acquired by virtue of such attachment, for the satisfaction of his claim. And it is therein provided that "pending such proceedings, the

right of redemption shall not expire by any attempted foreclosure of such mortgage."

The mortgage in question was given long prior to this enactment, and was to secure performance of an agreement of the mortgagor to maintain the mortgagees, and the survivor of them, during their natural lives in a comfortable manner according to their station in life, and at their decease to pay their funeral charges.

Proceedings for the foreclosure of this mortgage had been commenced, and the time for redemption had nearly expired when this bill was brought.

The defense interposed by demurrer and pressed upon our consideration, is, that the statute, if retrospective and therefore operative upon this mortgage, is unconstitutional and consequently void so far as this mortgage is in question; that it is in contravention of that provision of the Constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts.

That it was intended to act retrospectively and apply to mortgages existing at the date of its enactment, as well as to such as should thereafter be made, there can be no question.

The contract under consideration falls within the provisions of this act, and the question to be determined is whether the statute in respect to this contract is valid, or whether the legislature in enacting it transcended its power.

The Constitution of the United States (Art. 1, § 10) declares that no state shall pass any law which "impairs the obligation of contracts." If the act in question, so far as it relates to contracts existing at the date of its passage, is within the inhibition of the Constitution it is, to that extent, inoperative and void. It is insisted that this mortgage, having been given long prior to the act, must be governed by the law then existing both as to its redemption and foreclosure, and that the law in relation to it then in force became a part and parcel of the contract, and so annexed to it that any extension of the time of foreclosure or redemption would impair the obligation guaranteed by the constitution.

It is now well settled that contracts do not derive their obligation solely from the acts and stipulations of the parties independent of existing law. This obligation has vitality and subsists outside of the stipulations expressed by parties in their contracts. And, in accordance with this principle, the highest courts in this country have in very many cases laid down the doctrine, that the laws which subsist at the time and place of the making of the contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms, embracing not only those laws which affect its validity, construction and discharge, but also those in relation to its enforcement. *Von Hoffman* v. *City of Quincy*, 4 Wall. 550. "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence." *Edwards* v. *Kearzey*, 96 U. S. 600.

At the time when this contract was made, the statute law of the state provided specific modes by which the mortgagee of real estate might foreclose his mortgage, after breach of the condition on the part of the mortgagor, and it specifically defined the time in which the mortgagor might redeem the estate after commencement of proceedings under the statute to foreclose the equity. That time, where no express agreement for a shorter period had been inserted in the contract, was a fixed and definite term of three years. At the expiration of that term, if there had been no redemption, the estate would vest in the mortgagee and he would thereby become invested with an indefeasible title. The rights of the mortgagor and mortgagee were well and clearly defined, and existed by positive law. There was no indefinite equity of redemption, created by courts of equity and enforceable in those courts, as in many of the states, (*Kennebec & Portland R. R. Co.* v. *Portland & Kennebec R. R. Co.*, 59 Maine, 25, 30) but the right of equity and the right of foreclosure were creatures of the statute. The rights of the mortgagee were no less valuable to him than were those of the mortgagor. If existing and secured to him, from the nature of the contract and the laws in force at the time of its execution, those rights were as inviolable as were those of the mortgagor.

Does the legislative act, upon which this bill is founded, so affect the rights of the mortgagee that the obligation of his contract is impaired, and thus entitle him to protection at the hands of the court?

While it is not intended to disturb the proper application of the principle, that a state to a certain extent and within proper bounds may regulate the remedy, yet if by subsequent enactment it so changes the nature and extent of existing remedies as materially to impair the rights and interests of a party in a contract, this is as much a violation of the compact as if it absolutely destroyed his rights and interests. The constitutional prohibition secures from attack not merely the contract itself, but all the essential incidents which render it valuable and enable its owner to enforce it.

Thus it was said in the case of the *Planter's Bank* v. *Sharp*, 6 How. 301: "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation,—dispensing with any part of its force." The doctrine is also there asserted that if, in professing to alter the remedy only, the rights of a contract itself are changed or impaired it comes within the spirit of the constitutional prohibition, and when the remedy is entirely taken away, or clogged "by condition of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired." "And the test, as before suggested," remark the court, "is not the extent of the violation of the contract, but the fact that in truth its obligation is lessened, in however small a particular, and not merely altering or regulating the remedy alone."

In *Louisiana* v. *New Orleans*, 102 U. S. 206, Mr. Justice Fields in the course of the opinion says: "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of those means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." See also *Green* v. *Biddle*, 8 Wheat. 84.

The result arrived at in all the decisions, bearing upon this question, seems to be that the legislature may alter or vary existing remedies, provided that in so doing, their nature and extent is not so changed as materially to impair the rights and interests of parties to existing contracts.

This rule, while somewhat vague and unsatisfactory, is the most certain general one of which the nature of the subject admits. The difficulty arises in its application to particular cases, and distinguishing between what are legitimate changes of remedy and those which impair the obligation of contract. Every case must be determined, in a great degree, by its own circumstances.

In a leading case upon this point in the United States court, *Bronson* v. *Kinzie*, 1 How. 311, the distinction between legislation affecting the remedy only, and that which transcends the constitutional limit, is carefully given. In that case, as in this, the legislation pertained to the extension of time for the redemption of mortgages. A mortgage was executed in Illinois containing a power of sale under a decree of foreclosure. Subsequently, an act of the legislature was passed giving the mortgagor twelve months, and any judgment creditor of the mortgagor fifteen months, within which to redeem the mortgaged property from a judicial sale; and prohibiting its sale for less than two-thirds of its appraised value. The court held the act void as applied to mortgages executed prior to its passage. It was contended in argument in support of the act, as in the case now before us, that it affected only the remedy of the mortgagee, and did not impair the contract. But the court replied that there was no substantial difference between a retrospective law declaring a particular contract to be abrogated and void, and one which took away all remedy to enforce it, or encumbered the remedy with conditions that rendered it useless or impracticable to pursue it. The language of Chief Justice Taney, who delivered the opinion of the court, in reference to that statute has an appropriate bearing upon the case before us, and therefore we can not forbear quoting it: "This brings us to examine the statutes of Illinois which have given rise to this controversy. As concerns the law of February 19, 1841, it appears to the court not to act merely on

the remedy, but directly upon the contract itself, and to engraft upon it new conditions injurious and unjust to the mortgagee. It declares that, although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable interest in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged, as to deprive the mortgagee of the benefit of his security, by rendering the property unsaleable for anything like its value. The law gives to the mortgagor, and to the judgment creditor, an equitable estate in the premises which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the constitution."

This decision has since been repeatedly affirmed.

The case of *McCracken* v. *Hayward*, 2 How. 611, arose the following year under the same statute law of Illinois, and the same question was involved as in *Bronson* v. *Kinzie*, *supra*, except that it arose upon the sale of real estate upon execution. The court arrived at the same conclusion as in the former case.

The same is true in the case of *Gantley's Lessee* v. *Ewing*, 3 How. 716, which arose under a similar statute in Indiana, and the court there held that the legislature could not, by such a law, impair or defeat the obligation under the disguise of regulating the remedy.

The question was again before the court in *Howard* v. *Bugbee*, 24 How. 461, upon a statute of Alabama allowing a judgment creditor of a mortgagor to redeem the land within two years after a sale under a decree of foreclosure of the mortgage, and the

decision of the court, in accordance with the foregoing principles of the cases cited, was, that the statute was unconstitutional as impairing the obligation of the contract of mortgages, as to all such mortgages as were in existence when the statute was enacted.

In various forms and numerous cases the principle has come before the courts, but the doctrine established by the decisions, to which we have referred, has been firmly adhered to by the supreme court of the United States, and the courts of last resort in most of the states. Additional authorities might be cited indicating the judicial sentiment and opinion upon this question. *Malony* v. *Fortune*, 14 Iowa, 417, and *Cargill* v. *Power*, 1 Mich. 369, where an extension of time for the redemption of a pre-existing mortgage was held unconstitutional; *Blair* v. *Williams*, 4 Litt. (Ky.) 34, a law extending the time of a replevin bond beyond that in existence when the contract was made, held unconstitutional; *Gunn* v. *Barry*, 15 Wall. 610, and *Edwards* v. *Kearzey*, 96 U. S. 595, where it was so held in relation to statutes exempting from sale on execution any substantial part of the debtor's property not so exempt at the time the debt was contracted; *Brine* v. *Ins. Co.*, 96 U. S. 627, 637, laws in existence in regard to real estate, when a contract is made in relation thereto, including the contract of mortgage, enter into and become a part of such contract. See also *Ex parte Christy*, 3 How. 328; *Clark* v. *Reyburn*, 8 Wall. 322; *Walker* v. *Whitehead*, 16 Wall. 317, 318; *Kring* v. *Missouri*, 107 U. S. 233; *Memphis* v. *United States*, 97 U. S. 293; *Seibert* v. *Lewis*, 122 U. S. 284, 294; *Butz* v. *City of Muscatine*, 8 Wall. 575; *Mobile* v. *Watson*, 116 U. S. 305; *Curran* v. *State of Arkansas*, 15 How. 319.

In the case last cited, it was said by the court that "it by no means follows, because a law affects only the remedy, that it does not impair the obligation of the contract. The obligation of a contract, in the sense in which those words are used in the constitution, is that duty of performing it, which is recognized and enforced by the laws. And if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of contract no longer remains the same."

It is however argued in support of the statute before us, that it violates no constitutional provision, and several decisions are cited in support of the plaintiff's position.

The principal one is that of *Von Baumbach* v. *Bade*, 9 Wis. 559, where the court held that a general statute permitting defendants in actions to foreclose mortgages to have six months to file answers, and requiring six months' notice before sale on decree, was valid even as to pending actions, although under former practice the defendant had but twenty days. The court, notwithstanding, admitted the correctness of the doctrine laid down by the supreme court in *Bronson* v. *Kinzie*, *McCracken* v. *Hayward*, and *Curran* v. *State of Arkansas*, but said that the case did not come within either of those decisions; that the remedy of the mortgagee, as it previously existed was in all its parts substantially continued, and that no new conditions were ingrafted upon it. "A complete and substantial remedy was left them," remark the court in conclusion, "according to the course of justice, as it was administered before its passage, the only difference being that it was less expeditious, but not so much so as materially to affect or diminish their rights."

Hollway v. *Sherman*, 12 Iowa, 282, is also cited. This was a case where the statute, regulating the foreclosure of mortgages by proceedings in equity, gave the defendant nine months additional in which to file an answer. The court admitted that it was unable to fix with precision the dividing line between acts strictly remedial, and those impairing the obligation of contracts, and held the law valid inasmuch as it "simply gave to the defendant an enlarged time for answering, leaving the remedy of the plaintiff in all other respects just as it existed under the previous law."

Nor does the case of *Bridgeport Savings Bank* v. *Eldridge*, 28 Conn. 556, to which our attention has also been called, militate against the doctrine enunciated in the decisions of the United States supreme court before cited. It was a case where a second mortgagee had acquired by foreclosure the right of redemption after the time allowed to redeem had expired under a decree of foreclosure; it was simply a question whether sufficient ground

was shown for opening a decree of the court of equity, and whether a court of equity possesses the power of reopening a decree of foreclosure and extending the time of redemption. The court there say,—that this power is inherent in the court that made the decree, is too well settled to need citation of authorities.

It will be noticed that in these decisions the foreclosure was under proceedings in equity where the court of chancery was authorized to decree foreclosure,—a proceeding which has never existed in this state. *K. & P. R. R. Co.* v. *P. & K. R. R. Co.*, 59 Maine, 31. As we have remarked, foreclosure in one of the modes provided by law is fixed by positive statute enactments, and does not depend upon any decree of the chancellor. It is not subject to that decree of flexibility, both as to time and process, which exists in those jurisdictions where foreclosure proceedings are relegated to courts of equity. The remedies there are more elastic than under a system where the time of redemption is known and understood to be for a fixed and definite term. So long as we maintain that the remedy, furnished by the laws at the time the contract is entered into, constitutes a part of the obligation (*Walker* v. *Whitehead*, 16 Wall. 314) so long must we see that it is not materially impaired by any disguise of remedial legislation. The doctrine of remedy must not affect the doctrine of rights. The latter is superior to the former, and guaranteed not only by the federal but every state constitution.

While we admit the difficulty, in some cases, of determining whether the change in the remedy has thus materially impaired the rights and interest of the creditor, we do not think any such difficulty exists in this case. The act in question abrogates a right which the defendant had as mortgagee, at the time the mortgage was given, of a fixed and definite period for the foreclosure of the mortgagor's equity. By this act, that which was before certain is rendered uncertain. It expressly provides that pending proceedings between the mortgagor and any of his creditors who may have a claim against him, and who may see fit to enforce it by attachment and subsequent bill in equity, the right of redemption shall not expire by any attempted foreclosure

of such mortgage. Litigation upon such a claim may be protracted for months or even years. If the claim is a valid one, then an equitable interest is conferred upon one, other than the mortgagor, with rights against the mortgagee of paying such damages as a court of equity may assess, and fulfilling requirements which, as in this case, by the terms of the mortgage contract devolved upon the mortgagor to fulfill personally. *Bryant* v. *Erskine*, 55 Maine, 156; *Eastman* v. *Batchelder*, 36 N. H. 141, 149; *Clinton* v. *Fly*, 10 Maine, 296. The right of redemption and the time for foreclosure may thus be so prolonged as materially to diminish the security of the mortgagee, notwithstanding he may be allowed possession of the premises. The rights conferred upon the judgment creditor are directly in conflict with the rights of the mortgagee acquired when the mortgage was made.

"If such rights may be added to the original contract by subsequent legislation," said the court in *Bronson* v. *Kinzie*, *supra*, "it would be difficult to say at what point they must stop."

The conclusion to which we have arrived in reference to this statute, as applied to pre-existing contracts, renders any further consideration of the case unnecessary.

Demurrer sustained.

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

LYMAN M. COUSENS, and another, *vs.* GEORGE E. LOVEJOY, and the ROYAL INSURANCE COMPANY, of Liverpool, England, trustee.

Washington. Opinion April 15, 1889.

Trustee Process. Foreign Corporations. Non-resident Debtor. Jurisdiction. R. S., c. 86, § 8.

This court has jurisdiction over the property of a non-resident defendant, in the possession of his trustee transacting business in this state, through duly authorized agents, notwithstanding such trustee is a foreign corporation.

Lovejoy v. *Albee*, 33 Maine, 414; *Columbus Ins. Co.* v. *Eaton*, 35 Maine, 391; and *Smith* v. *Eaton*, 36 Maine, 298, distinguished.

A state may permit foreign corporations to transact business within its limits upon such terms and conditions as it may prescribe, not inconsistent with the constitution and laws of the United States.

In exercising this privilege, granted by the state, they subject themselves to the provisions of existing law.

The court may have jurisdiction over the property of a non-resident defendant, though not over his person.

Such jurisdiction will be sustained if goods, effects or credits of a defendant, though a non-resident, are found within the state, and being found are attached.

Attachment, to give jurisdiction, may be made upon trustee process, as well as in other cases where his property is attached.

ON EXCEPTIONS, by plaintiffs to the *pro forma* ruling of the presiding justice, discharging the trustee who made a disclosure, and upon which arose the question of jurisdiction of the court over the property of the defendant, no service having been made upon him.

Besides the facts stated in the opinion, it appeared that on September 13, 1867, the insurance company by its agents, Downes and Curran, at Calais, Maine, issued a policy of fire insurance to the principal defendant, for $1000, upon his stock of goods situate at Milltown, New Brunswick. About December 23, 1887 the goods were damaged by fire to an amount exceeding the sum insured by the policy. The defendant, Lovejoy, at Calais, presented his proof of loss to said agents, which was forwarded to the general agents for New England, at Boston, who on January 11, 1888 sent to said Downes and Curran, as agents of said company, a check for the amount of the policy, payable to the order of said Lovejoy. This check was in the hands of the agents of the insurance company, at the time of the service upon them of the writ. It also appeared that, at the time of the service of the writ upon the insurance company, there was a sum of money belonging to it, in their agents' hands, at Calais, admitted to be not less than one thousand dollars,—its annual receipts being about $60,000 which were paid over to the Boston agency at the end of each month.

Edgar Whidden, for plaintiffs.

State may impose such conditions as it chooses upon foreign corporations, seeking the privilege of doing business within its

limits. *R. R. Co.* v. *Koontz*, 104 U. S. 643, and cases there cited. *Hobbs* v. *Ins. Co.*, 56 Maine, 417, 421.

Foreign corporations subject to trustee process, same as domestic corporations. R. S., c. 86, § 8. Mass. statute, under which *Danforth* v. *Penny*, 3 Met. 564, and other early cases were decided, different from ours.

Lovejoy v. *Albee*, 33 Maine, 414, and *Smith* v. *Eaton*, 36 Id. 298, should have no effect on this case. They apply to persons, and not corporations. The act of the agent of a person is constructively that of his principal, that of the corporation's agent is the act of the corporation itself. *Pettengill* v. *R. R. Co.*, 51 Maine, 370, 373.

Upon principles of estoppel, foreign corporation precluded from denying jurisdiction of court. *Merch. Man. Co.* v. *R. R. Co.*, 13 Fed. Rep. 358, and cases cited. This corporation became a resident for all purposes of suit, and liable as garnishee of its non-resident creditors. *Roche* v. *Ins. Co.*, 2 Brad. 360; *Libbey* v. *Hodgdon*, 9 N. H. 394. Service on agent sufficient. *Hobbs* v. *Ins. Co.*, *supra.*

Check in favor of defendant not delivered; indebtedness of company to him still exists.

Contract made in this state; *lex loci contractus* prevails.

Whatever constitutes a good defense, by the law of the place where the contract is made, or is to be performed, is equally good in every other place where the question may be litigated. 2 Kent. Com. 459; Story Conflict Laws, § 331; *Walker* v. *Whitehead*, 16 Wall. 314.

Judgment against trustee operates as a discharge from the demand of the principal defendant. R. S., c. 86, § 76.

Harvey and Gardner, for trustee.

The form of indebtedness was negotiable paper, and is excepted from trustee process. R. S., c. 86, § 55, clause 1.

Court has not jurisdiction of the debt under the facts, that it can transfer it from principal defendant to the plaintiffs, in these proceedings.

Statutes do not affect the status of debts of foreign corporations,

due parties out of the state, so as to make them attachable here. *Tingley* v. *Bateman*, 10 Mass. 343.

As to the practical difficulties of enforcing judgments, if the debtor was a resident, see *Eddy* v. *O'Hara*, 132 Mass. 56; *Kidder* v. *Packard*, 13 Mass. 80.

The principal defendant and trustee are both foreign parties. No service has been effected on defendant. Case precisely within the principle of *Lovejoy* v. *Albee*, 33 Maine, 414, and *Smith* v. *Eaton*, 36 Id. 298. "No judgment can be rendered against one as trustee, at common law, or under statutes, if neither he nor the principal defendant resides within the jurisdiction, and if no tangible property of the defendant has been found and attached here." Per SHEPLEY, C. J.

The debt due between these parties, out of the United States, is beyond the reach of the legislature and the court. The courts of their domicile, by no stretch of courtesy, could be expected to recognize a judgment, rendered against their citizens, by a court that never had their persons or property within its jurisdiction. Judgments of sister states, under constitutional provisions, are different. *Parker* v. *Danforth*, 15 Pick. 302.

Not a question of jurisdiction over insurance company and its property, but over property of a citizen of New Brunswick, in a debt due from a London insurance company. Trustee process fails to bring, under the jurisdictional power of the court, the intangible right of action of a foreign resident, against foreign trustee.

This proceeding is purely *in rem*, there being no personal service on defendant; the attachment or arrest of the debt, due from one non-resident to another, in legal contemplation, does not bring it within the state, and so subject to attachment. *Tingley* v. *Bateman*, *supra*.

Counsel also cited: *Gold* v. *R. R. Co.*, 1 Gray, 424; *Mahoney* v. *R. R. Co.*, 21 Fed. Rep. 817; *R. R. Co.* v. *Bunker*, 32 Id. 849; *Ray* v. *Underwood*, 3 Pick. 302; *Hart* v. *Anthony*, 15 Pick. 445; *Danforth* v. *Penny*, 3 Met. 564; *Nye* v. *Liscombe*, 21 Pick. 263.

Plaintiffs in reply.

Legislature intended to make foreign corporations liable to

trustee process, same as are domestic corporations. Statute is clear and explicit; is to receive such construction as intended by the legislature, and according to its plain import. *Winslow* v. *Kimball*, 25 Maine, 493; *Ingalls* v. *Cole*, 47 Id. 530.

Statute is constitutional. (Art. 4, Part 3, § 1, Const. of Maine.) Whether it is reasonable, and for the benefit of the people, is for the legislature alone to determine. *Moor* v. *Veazie*, 32 Maine, 343.

FOSTER, J. The plaintiffs, residing in Maine, have brought this suit against the defendant, a resident of the province of New Brunswick, and summoned the Royal Insurance Company, a foreign corporation, as trustee. This corporation was organized under the laws of England and has its head office at Liverpool. Its managers for New England are Scull & Bradley of Boston, and its agents duly appointed for this state are Downes & Curran of Calais, at which place it does a fire insurance business under a license from the insurance commissioner of Maine.

This trustee, through its agents in this state upon whom service of the writ was made, has disclosed an indebtedness of $1000, due from it to the principal defendant which was in the hands and possession of these agents, at the time of the service of the writ upon them.

No service has yet been made upon the principal defendant.

The question presented is in relation to the jurisdiction of this court, over the property of the defendant in the possession of the trustee, through its duly authorized agents transacting business in this state.

It is insisted in defense, that inasmuch as the principal defendant is not a resident of this state, and the corporation summoned as trustee is a foreign corporation, this court has no jurisdiction of the parties or the subject matter of the suit.

In support of this proposition reliance is placed upon the decisions of our court in *Lovejoy* v. *Albee*, 33 Maine, 414; *Columbus Ins. Co.* v. *Eaton*, 35 Maine, 391; and *Smith* v. *Eaton*, 36Maine, 298, the doctrine of which is, that no judgment can be rendered against one as trustee if neither he nor the principal defendant resides within the jurisdiction, and if no tangible property of the

defendant be found here. Also the earlier decisions in Massachusetts, *Tingley* v. *Bateman*, 10 Mass. 343; *Ray* v. *Underwood*, 3 Pick. 302; *Hart* v. *Anthony*, 15 Pick. 445, and *Nye* v. *Liscombe*, 21 Pick. 263, which hold that service of trustee process upon a non-resident party does not subject such party to the jurisdiction of the court, for the purpose of charging the property or funds in his hands.

The principle upon which these decisions are based is, that the presence of the alleged trustee within the jurisdiction was only temporary, and, as stated by the court in the early case of *Tingley* v. *Bateman*, *supra*, the property of the defendant possessed by the trustee is, "to be considered for this purpose as local, and remaining at the residence of the debtor or person intrusted for the principal; and his rights, in this respect, are not to be considered as following the debtor to any place where he may be transiently found, to be there taken at the will of a third person, within a jurisdiction where neither the original creditor nor debtor resides."

It will be noticed that in the decisions to which we have referred from our own court, it was not the fact alone that both principal defendant and trustee were non-residents, which deprived the court of jurisdiction, but that fact taken in connection with the very important element that no property of the defendant was "found within the state and attached in some form." *Lovejoy* v. *Albee*, 33 Maine, 414, 418.

For many years, both in this state and in Massachusetts, corporations were not subject to trustee process. And after the statute, authorizing corporations to be summoned as trustees, the same principle was held to apply to foreign corporations as to individual non-residents, and consequently in *Danforth* v. *Penny*, 3 Met. 564; *Gold* v. *Housatonic Railroad*, 1 Gray, 424, and *Larkin* v. *Wilson*, 106 Mass. 120, the court held that a foreign corporation having no goods, effects or credits within the state was not liable to be summoned as a trustee, though some of its officers resided within the state and its books and records were kept there. The object of the statute, in both states, seems to have been to place corporations upon the same footing in relation to

trustee process as individuals. As said by Shaw, C. J., in *Gold* v. *Housatonic Railroad*, *supra*: "The statute in question was only an extension of an existing system. It was intended, we think, to put corporations on the same ground as individuals. And it is well settled that an individual, an inhabitant of another state, is not chargeable by the trustee process, although found in this commonwealth, and here served with process."

It was in this condition of the law that the foregoing decisions were rendered.

Since then, however, the statute not only in Massachusetts (1870, c. 194) but in this state has been materially changed, so that while heretofore only domestic corporations were liable to trustee process, the same as individuals resident in the state, now by Pub. Laws of 1877, c. 153,—R. S., c. 86, § 8,—"All domestic corporations, and all foreign or alien companies or corporations established by the laws of any other state or country, and having a place of business, or doing business within this state, may be summoned as trustees," etc.

A state may permit foreign corporations to transact business within its limits upon such terms and conditions as it may prescribe, not inconsistent with the constitution and laws of the United States; and in exercising this privilege granted by the state they subject themselves to the provisions of existing law.

So far as appertains to the present case the Royal Insurance Company was "doing business within this state;" and in the exercise of this privilege it has subjected itself to the provision of this statute, and is liable to be summoned as trustee. As laid down by the court in *Attorney Gen.* v. *Bay State Mining Co.*, 99 Mass. 148, 153: "A corporation which seeks, by its agents, to establish a domicil of business in a state other than that of its creation, must take that domicil as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there."

The exemption from trustee process on account of non-residence is not to be pushed beyond the reason of the rule, which rests upon the idea that the property or debt sought to be reached is without the jurisdiction of the court, and for that reason incapable

of being subjected to its process. It was upon this doctrine that the decisions in *Lovejoy* v. *Albee, supra; Columbus Ins. Co.* v. *Eaton, supra;* and *Smith* v. *Eaton, supra*, were founded. The alleged trustees were non-resident individuals temporarily within the jurisdiction. The trustee was sought to be held under that provision of the statute which provides that, "A person summoned as trustee may be adjudged trustee by the court, although he was not then, and never had been an inhabitant of the state." R. S., c. 86, § 13.

It was that provision upon which the decision of the court was based; and it was there held that the purpose of that provision "appears to have been to provide a remedy in a case, where a person at no time a resident within the state was indebted to, or had property belonging to a person *resident or found within the state.*" The court, therefore, obtained, "no jurisdiction to render a judgment against the principal defendant by his being a citizen or resident, or found within this state, or by his having any property found within it."

The statute under consideration is that in reference to foreign corporations having a place of business, or doing business within this state, in which it is expressly provided that in such case they may be summoned as trustees. In the present case the trustee is a foreign corporation having a place of business and transacting business within this state, and possessing property here belonging to the principal defendant.

Herein the decisions to which we have referred differ from the case at bar.

The property of the defendant in the possession of the trustee is within our jurisdiction. Our laws recognize its attachment in the hands of the trustee. We have jurisdiction over the property of the defendant, though not over his person. It is in the nature of a proceeding *in rem.* The jurisdiction of this court is to be sustained if goods, estate, effects or credits of a defendant, though a non-resident, are found within the state, and being found are attached. Property of the defendant and its attachment are prerequisites to jurisdiction where the defendant is a non-resident. Where there is no attachment, no valid judgment can be rendered. *Cassity* v. *Cota*, 54 Maine, 380; *Bruce* v. *Cloutman*, 45 N. H. 37.

In this form of process the statute in reference to trustee process, c. 86, § 2, authorizes "an attachment of goods and estate of the principal defendant in his own hands, and in the hands of the trustees," and by § 4, "service on the trustee binds all goods, effects or credits of the principal defendant * * * as when attached by ordinary process."

Under a statute like ours, the court in New Hampshire has held that an action may be commenced against a non-resident defendant by the attachment of his property in the hands of his trustee; and that it is an attachment of the principal debtor's property, so far as to bring the case within the provisions of the statute, which provides for proceedings against non-resident defendants when their property has been attached in the state. *King* v. *Holmes*, 27 N. H. 266; *Young* v. *Ross*, 31 N. H. 201, 205; *Bufford* v. *Sides*, 42 N. H. 495, 505.

Our own statute, c. 86, § 7, provides that, "when the principal is out of the state, at the time of the service, and has no agent therein, notice shall be given as provided in § 21, of c. 81; or proceedings may be had as provided in § 3, of c. 82, unless in the meantime he comes into the state before the sitting of the court," etc.

If there was any question as to whether this statute applies to cases where the principal defendant is a non-resident, as in the case now under consideration, it will be found that this court has so construed it in the case of *Lovejoy* v. *Albee*, *supra*. This section of the statute, observes the court, has, "reference to cases, in which a defendant having a residence within the state, is absent from it at the time of service without having a last and usual place of abode or an agent within the state; and also to cases, in which a suit has been commenced against a person not resident or found within the state, whose property has been found within the state *and attached in some form*."

That such is the proper construction of the statute, and that suit may be commenced against a non-resident defendant by trustee process, as well as in other cases where his property is attached is implied by the early decisions in Massachusetts, and by more recent ones in this state. *Gardner* v. *Barker*, 12 Mass. 36; *Jacobs* v. *Mellen*, 14 Mass. 132; *Cassity* v. *Cota*, 54 Maine, 380.

In the former of these cases, and also in *Cassity* v. *Cota*, it was held, that if upon the disclosure of the trustee, where the principal defendant was a non-resident and had not been notified, it should appear that there was no property in his hands belonging to the principal, the suit would be dismissed,—which was in effect saying, that had there been property, it would have been a good commencement of the action, and the court would have had jurisdiction over it.

As we have before remarked, the property of the defendant has been found within the state; it has been attached in the hands of the trustee,—an attachment not only authorized by statute, but an attachment "in some form" sufficient to give jurisdiction over it, as remarked by the court in *Lovejoy* v. *Albee*, *supra*. "Upon this principle, then," as was said by the court in *Young* v. *Ross*, *supra*, "that where an attachment is made, the court obtains jurisdiction and service may afterwards be completed and judgment obtained, it would seem that the trustee in this case must be held. The property was attached in his hands, while in his possession, in this state. If he had not had the property with him, but had left it at his residence in Maine, it could not be said that it was attached here; but having it with him, we see no reason why it might not be attached in this way, as well as if it had been visible personal property of the defendant, and taken by the officer."

Since the amendment of the statute in Massachusetts, authorizing foreign corporations to be summoned as trustees, the court in that state has had occasion to review the earlier decisions in reference to non-resident trustees, and in the course of the opinion the court says: "If a corporation may be sued in a state where it has a usual place of business, or where it has property subject to attachment, there is no reason why it may not be summoned as trustee; and if such trustee is charged, we must presume that the judgment will protect it in other states as well as in Massachusetts, if it should hereafter be sued by the creditor for whom it is summoned as trustee," and the authorities are there cited in support of that doctrine. *National Bank of Commerce* v. *Huntington*, 129 Mass. 444, 450.

The ruling of the court at *nisi prius* that the trustee is not chargeable, was only *pro forma*, and we think the entry should be

Exceptions sustained. Trustee charged for $1000, *the amount disclosed.*

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

AUGUSTUS W. CLARK, and another, appellants *vs.* MAINE SHORE LINE RAILROAD COMPANY.

Hancock. Opinion April 15, 1889.

Appeal. Land damages. Railroad. R. S., c. 51, §§ 22, 23.

Where the language of a statute is clear and plain, the court has no authority, in consideration of the consequences resulting from it, to give it a construction different from its natural and obvious meaning.

R. S., c. 51, § 23 provides that an appeal from the assessment of damages by county commissioners where land has been taken for railroads, must be "to the next term of the supreme judicial court to be held in the county where the land is situated, more than thirty days from the day when the report of the commissioners is made," etc.

Held, that such appeal was not seasonably taken, although it was taken at the next term of court after service upon the appellants, of the notice issued by the clerk of the commissioners, as provided in § 22.

ON EXCEPTIONS, by appellants, upon facts agreed.

Said railroad company, July 7th, A. D. 1886, filed and entered in the county commissioners' court of Hancock county, at the July term thereof, their petition for assessment of damages in the premises. Proper proceedings were had before said commissioners, the appellants being present, and said commissioners, on the 27th day of January, A. D. 1887, at their regular January term, 1887, made their report of their estimate of damages received by said appellants. And it was admitted that the record shows said report as recorded on that date.

The notice to appellants provided by statute, stating said award, was not served on either of said appellants, until January 9th, A. D. 1888. At the April term A. D. 1888, of this court, in

Hancock county, the appellants filed their complaint of appeal, duly served, being aggrieved by the award of said commissioners. The respondents thereupon duly filed their motion to dismiss, which was sustained by the court.

Plaintiffs offered to show that the record of said award was not extended on the records as it purports, on the 27th of January, A. D. 1887, but not until subsequent to the October term of the supreme judicial court, Hancock county, A. D. 1887, and prior to January 9th, A. D. 1888. This is to be considered by the court, if admissible in evidence; otherwise not.

The question was whether, on the whole, the appeal was seasonably taken.

G. P. Dutton, for plaintiffs.

The appeal was seasonably taken. The statute, as it now stands, without reference to older statutes, must be construed to mean that appeals are to be taken to the first term of the supreme judicial court, after notice to the parties provided in § 22, and not before. Statutes are to be construed according to the intention of the makers, although such construction may seem contrary to the ordinary meaning of the letter of the statute. *Staniels* v. *Raymond*, 4 Cush. 314, 316; and cases there cited; *Hughes* v. *Farrar*, 45 Maine, 72; *Winslow* v. *Kimball*, 25 Id. 493.

Notice required by § 22 is mandatory. Commissioners' report not complete until communicated to parties; nor until return of officer, showing notice to parties, has been made into their court. *Veazie* v. *China*, 50 Maine, 518; *Low* v. *Dunham*, 61 Id. 566. Otherwise, no effect is given this section, and what meaning is there in § 23 which limits time of appeal to thirty days prior to a term of court, when only fourteen days' notice is required between party and party?

Effect is to be given to all parts of a statute; reasonable interpretation to obscure parts; intention so construed as not to curtail existing rights. *Wales* v. *Stetson*, 2 Mass. 143, 146; *Staniels* v. *Raymond*, *supra*; *Cleaveland* v. *Norton*, 6 Cush. 380, 384; *Pearce* v. *Atwood*, 13 Mass. 324, 343.

But it often happens, as in the present case, that the meaning of an obscure statute is made plain by previous legislation on the

subject. "And the true intent and construction of statutes which have been revised and condensed may often be best ascertained by an examination of the original enactment." BARROWS, J., in *French* v. *Co. Com.*, 64 Maine, 583, 585. In the law of 1871 (R. S., 1871, c. 51, § 8) either party dissatisfied with the damages estimated by the commissioners had the same right to apply for an increase or decrease of damage as in case of highways. In said § 8th the provision for notice by the clerk to the parties at issue, is the same as in the present statutes. Section 8 of the statute of 1871 then provides that when no petition for increase or decrease is filed within thirty days after service of notice, the proceedings are closed. In the laws of 1873, c. 95, the procedure for increase of damage is changed from application to the commissioners to appeal by petition to the supreme court direct. In said c. 95, which has been incorporated into the statutes as they now stand, there is no repealing clause.

It is plain that the only object of the legislature in the passage of c. 95, 1873, was to render the process of the final settlement of railroad damage less cumbersome by one step, viz: by appeal direct to the supreme court and jury trial rather than back again to the county commissioners who should choose a jury, who should report to the supreme court, and that this was their sole and only object.

It is plain that the legislature did not intend to keep parties at issue, dancing attendance upon the county commissioners, by taking away the benefit of the notice and substituting a pitfall in its place. And it is plain in accordance with all the well known rules for the interpretation of statutes, that in regard to the question of notice, the statutes of 1871 in terms is to control; and that the right of appeal exists to parties at issue before the county commissioners, until after they have been duly notified, according to the statute.

Hale and Hamlin, for defendants.

There is nothing ambiguous or uncertain, in the language of the statute, when the appeal is to be made. It prescribes the next term of the supreme judicial court, etc., held, etc., after the day

when the report of the commissioners is made. Appellants were, admittedly, present.

Rule of construction of statute: *Coffin* v. *Rich*, 45 Maine, 507; *Currier* v. *Phillips*, 12 Pick. 226. Change in the statute, regulating the appeal, was intended by the legislature, in order that adjudication of damage, in court of last resort, might be had as nearly as possible to the time of taking. Clerk required to make notice at time of the report. No fault of appellees if not done until afterwards.

Statute, as to notice, either a direction or a mandate. If directory only, right of appeal is lost. A mere direction or instruction of no obligatory force, involving no invalidating consequence (Maxw. Stat. 330) can not be construed as an integral part of a statute. If mandatory, then right of appeal gone.

FOSTER, J. This is an appeal from assessment of damages by the county commissioners for land taken for the location of the road of the Maine Shore Line Railroad Company.

The only question is whether the appeal was seasonably taken in accordance with R. S., c. 51, § 23.

July 7, 1886, the defendant corporation petitioned the county commissioners to assess damages for taking the appellants' land. After due proceedings had, their report was made and recorded on the 27th day of January, 1887, being their regular January session, of their estimate of damages received by the appellants.

The notice to these appellants provided by § 22, stating the amount of damages awarded, was not served on either of the appellants until January 9, 1888.

At the April term of this court, 1888, being the next term after the service of notice upon them, the appellants filed this appeal. Thereupon the respondents filed a motion to dismiss the appeal on the ground that it was not seasonably taken, which was sustained by the court.

It is admitted by the learned counsel for the appellants that if a literal and technical interpretation is to be given to the statute, then the appeal was not seasonably taken, for by the language of § 23 the appeal must be, "to the next term of the supreme judicial

court to be held in the county where the land is situated, more than thirty days from the day when the report of the commissioners is made," etc.

It is true that the appeal was taken at the next term of this court after service upon the appellants of the notice issued by the clerk of the commissioners as provided in § 22. By that section, the "commissioners shall make a report of their general estimate of damages, stating therein specifically, the rights and obligations of each party, at a regular session, and cause it to be recorded; their clerk shall then make out a notice to each person, stating the amount of damages awarded to him, which shall be served by an officer on those resident in the state," etc.

On the part of the appellants it is maintained that this language is not directory merely, but mandatory, and that in the construction of § 23 it is necessary to enlarge the time in which an appeal may be taken so as to give an appellant the next term of court after service of notice, instead of the next term after "the report of the commissioners is made," in which to enter an appeal.

But we are not inclined to construe the statute contrary to its plain and manifest intent. The provision relating to appeals in cases of this kind was enacted in 1873, c. 95, authorizing such appeals to be made directly to the supreme judicial court instead of remitting the parties to their remedy "as in case of highways." This statute was incorporated into the R. S., c. 51, § 23. This court in *Knight* v. *Aroostook Railroad*, 67 Maine, 291, 292, in an opinion by DANFORTH, J., held that, "the proceedings under the latter statute are entirely different in all respects from those under the former, and are complete in themselves, covering the whole subject matter." This is true. The only provision to be found relating to appeals is contained in this latter statute. Its language is plain and unambiguous. The time when the appeal is to be made, if at all, is at "the next term of the supreme judicial court to be held in the county where the land is situated, more than thirty days from the day when the report of the commissioners is made," etc.

If the language of a statute be clear and plain, courts have no authority, in consideration of the consequences resulting from it,

to give it a construction different from its natural and obvious meaning. *Coffin* v. *Rich*, 45 Maine, 507.

Whether the clerk was remiss in his duty in not having notice served upon the appellants, for nearly a year after the report of the commissioners had been made and recorded, is not a question for our determination in this case.

Formerly, by R. S., 1871, c. 51, § 8, proceedings were not closed till thirty days after service of notice of the amount of damages awarded to a party, and no petition could be entertained for an increase of damages filed after the proceedings were closed. But by the enactment of the statute of 1873, c. 95, the former statute was so far changed, in relation to proceedings for an increase of damages, that we must look to the latter statute as being the most recent expression of the legislative will, and the one that, "must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law." *Commonwealth* v. *Kelliher*, 12 Allen, 480.

The proposition of introducing evidence to contradict the record of the commissioners, and to show that the record of the award was not extended at the time it purports, is not insisted on. The records must be held to be correct as they stand,—if not they must first be corrected under proper proceedings, instead of being attacked collaterally.

Exceptions overruled.

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

EMERY, J., did not sit.

EMMA L. MITCHELL *vs.* INHABITANTS OF ALBION.

Penobscot. Opinion April 15, 1889.

Promissory note. Town order. Payment. Exceptions. Practice.

A promissory note, or order, payable to a particular person, which has been paid by one whose duty it was to make payment, is no longer a valid contract.

In such case it has lost its vitality, and can not again become a valid security.

ON MOTION AND EXCEPTIONS.

This was an action of assumpsit to recover the amount of a town order for $56.00, dated February 18, 1881, payable to Mary Etta Bradstreet, or bearer; it being for teaching school in District No. 10, in the town of Albion, and indorsed, "April 19, 1881. James Whittaker, Treasurer, Albion."

The writ contained the common money counts, and two special counts upon the order.

Defense, general issue and brief statement that the order, which was signed by only two of three selectmen of the town, was not legally executed by the proper officers of the town; that no consideration was ever received by the town from the plaintiff or her assignors, on account of the order; that it had been materially altered since it was issued to the payee; and that the order, in its original form, was once paid by the treasurer of the town, and subsequently put in circulation by fraud or mistake, and without consideration to defendants.

The plaintiff introduced evidence showing the origin of the order, and its purchase by her, for value, from a subsequent holder who obtained it of one Webb who appears to have had it of the town treasurer several weeks after its acceptance; also the records of the town, and town reports for the several years from 1881 to 1885, by which it would appear, as she contended, that the treasurer had never turned it in to the town in the settlement of his account, and that it had remained as an outstanding town debt.

The defense called Edwin York, who testified "I was school agent for District No. 10, in Albion, for a part of the year 1881. Mary Etta Bradstreet taught school in that district. At the close of the school, I obtained an order for her pay; I obtained the order from Amasa H. Hammond (order produced),—that is the order. Mr. Littlefield was not there when I took the order; his name was not there when I took it. Subsequently I paid Miss Bradstreet and took the order. Mr. Littlefield did not sign the order while I had it. I did not keep it over three weeks. I took it to Mr. Whittaker, our town treasurer, and he paid the money on it; and the subsequent history of it I don't know anything about. I knew it was inquired for considerably throughout the

town. They inquired of me about it; but I knew nothing about it, after I let Mr. Whittaker have it."

The presiding justice then stated that if the plaintiff could not disprove this testimony, a verdict for the defendants would be directed, and the plaintiff allowed exceptions.

The plaintiff offered to show that the order was paid out again, or that the money obtained for the order issued by the treasurer, was to pay the selectmen the year before, on account of their salaries. The case was submitted to the jury upon the following charge:—

"The plaintiff sues to recover $56.00 from the town of Albion, and to prove her suit has read in evidence a town order, No. 104, payable to Mary Etta Bradstreet, or bearer.

It is agreed by the parties that Mr. Edwin York was the school agent for the district where the payee taught school; that he paid Mary Etta Bradstreet, and received from the chairman of the selectmen this order, which thereafterwards, within a period of a few weeks, he presented to Mr. Whittaker, the town treasurer, for payment; and thereupon the town treasurer paid the order. Now the plaintiff offers to prove, that after Mr. Whittaker paid the order, he negotiated it in payment of services of the selectmen for the year before; and I instruct you that, that would be no answer to the defense set up by the town; and even if these facts should be proved, they would not avail the plaintiff, and she could not recover on the order."

The verdict was for the defendants, and the plaintiff excepted to the ruling and charge.

Besides the general motion to set aside the verdict, as against law and evidence, the plaintiff also filed a motion for leave to amend her writ, by adding a new count on account annexed; and for leave to file an assignment from Hammond and Littlefield of the claim due to them from defendants, for their services as selectmen for the year 1880–81, which bills or claims were paid, in part, (as alleged in the motion) by the money paid for the order, in suit.

H. L. Mitchell, for plaintiff.

Plaintiff should have been allowed to show that the town treas-

urer, having no town's money on hand, cashed the order with his own funds; and afterwards procured money on the order for the town with which to pay salaries of selectmen. The order made out a *prima facie* case, and its impeachment should come from the defense. Dillon Mun. Corp. § 502, (old 410); *Treat* v. *Orono*, 26 Maine, 217; *Emery* v. *Mariaville*, 56 Id. 315.

Jury should have passed on the testimony, offered by plaintiff, without the presiding justice expressing his opinion as to what the verdict should be. R. S., c. 82, § 83. The presiding justice erred in his charge when he said "it is agreed by the parties, etc." York's testimony, if true, does not show that the order was paid by the town's money, or that the treasurer so intended. His name upon the order shows he did not so intend; town could not claim it had been paid until it had been allowed in settlement of his account. Whittaker had none of town's money then; had the right to cash it with his own money, hold it as his own, or pass it to another for value. It would remain a valid order against the town, until charged in the treasurer's account and allowed him, on settlement. *Willey* v. *Greenfield*, 30 Maine, 452.

It is not a town payment, until two things concur, actual payment, and credit to treasurer therefor,—especially so, where there is no particular pile of money that constitutes the treasury. Payment thus made, is an individual matter, requiring a crediting to make it a town transaction. No evidence that Whittaker obtained credit for it prior to time plaintiff became owner.

Whittaker's indorsement an official act; guaranty that the order was regular and valid promise of town to pay when in funds.

Rights of treasurer in unpaid vouchers: *Canal Bank* v. *Supervisors, etc.*, 5 Denio, 525.

The ruling of the presiding justice prevented the plaintiff from showing a state of facts, by which defendants were estopped from denying their liability, and bringing her case within the principle of *Lincoln* v. *Stockton*, 75 Maine, 141, 146, and cases there cited.

Plaintiff, as assignee of the order, can maintain her action under the money counts. R. S., c. 82, § 130; *Wood* v. *Decoster*, 66 Maine, 542; *Ware* v. *R. R. Co.*, 69 Id. 97. Courts of law will

protect equitable interests of assignees. *Pollard* v. *Ins. Co.*, 42 Maine, 221, 225; *Bank* v. *McLoon*, 73 Id. 498.

Order was accepted the day before Hammond & Littlefield were paid. See their receipt dated April 20, 1881. Plaintiff can recover the money, received by town on the order to pay these parties, under the count for money had and received. *Bank* v. *Stockton*, 72 Maine, 522, and cases there cited.

Barker, Vose and Barker, for defendants.

Plaintiff, having admitted through her counsel, that she was unable to disprove or controvert the payment of the order, a verdict for defendants was rightfully ordered.

After its payment, order ceased to be negotiable. *Ballard* v. *Greenbush*, 24 Maine, 336; *Pray* v. *Maine*, 7 Cush. 253; *Chapman* v. *Collins*, 12 Cush. 163.

Plaintiff's request to be allowed to show that the money, paid on the order by previous holder, from whom it came to her through several parties, was paid to Whittaker,—the treasurer—and by him used to pay a town debt,—thus laying the foundation for recovery under money counts—was rightfully refused. The treasurer could not bind the town in any such way. *Bank* v. *South Hadley*, 128 Mass. 503; *Otis* v. *Stockton*, 76 Maine, 506.

Plaintiff's money not used to pay a town debt. She bought of her brother who had it of another party; and no attempt was made to trace it back to Whittaker. No one but the original party, who paid it, can maintain an action for money had and received. Non-negotiable claims must be assigned in writing.

FOSTER, J. The plaintiff seeks to recover of the defendants upon a town order which she claims came into her hands in the due course of business. It was drawn by the municipal officers upon the town treasurer in payment for services rendered by the payee in teaching school.

The defense, as shown by the evidence which is reported and made a part of the case, is that the payee of the order passed it to the district agent receiving the money upon it from him, and that he within a few weeks presented it to the town treasurer for payment who thereupon paid the order.

The plaintiff then offered to prove that after the treasurer paid the order he negotiated it in payment of services of the selectmen for the previous year; the court instructed the jury that if these facts should be proved the plaintiff could not recover; and directed a verdict for the defendants.

The evidence has been reported in order that we may understand its bearing upon the pertinency and propriety of the instructions given. These instructions present no valid ground for exceptions.

It is a principle well established that a promissory note, or order, made payable to a particular person, which has been paid by one whose duty it was to make payment, with no right to repayment from another party, is no longer a valid contract. In such case it has lost its vitality and can not again become a valid security. *Ballard* v. *Greenbush*, 24 Maine, 336; *Mead* v. *Small*, 2 Maine, 207; *Bryant* v. *Ritterbush*, 2 N. H. 212; *Davis* v. *Stevens*, 10 N. H. 188; *Hopkins* v. *Farwell*, 32 N. H. 425; *Pray* v. *Maine*, 7 Cush. 253.

The only questions open for consideration in this court are those presented by the bill of exceptions, (*Withee* v. *Brooks*, 65 Maine, 14) and that relates entirely to the instructions given by the court to the jury. The presiding justice stated the issue between the parties to the jury, and the facts offered to be proved. If there was error in such statement, he should have been informed before the jury retired, in order that he might correct any misstatement,—otherwise it will be taken to be correct in matters of fact. Moreover, upon a most careful examination of the evidence we are satisfied of the correctness of the statement of what was offered to be proved. Upon this the instructions of the court were correct, and it was therefore within the province of the presiding justice to direct a verdict for the defendants. It is a rule long settled that where a party, having the burden of proof upon an issue which is necessary to the maintenance of an action, or to the defense of a *prima facie* case, introduces no evidence which if true, allowing it all its probative force, will authorize the jury to find in his favor, the judge may direct a verdict against him. *Heath* v. *Jaquith*, 68 Maine, 433, 436, and cases there cited.

The evidence offered to be proved would not have supported a verdict for the plaintiff had it been introduced.

Motion and exceptions overruled.

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

URSULA S. GILMAN *vs.* DWELLING-HOUSE INSURANCE CO.

Waldo. Opinion April 23, 1889.

Insurance. Insurable Interest. Equitable ownership. Description. Increase of risk. R. S., c. 49, § 20.

An equitable title or interest is sufficient to give validity to the contract of insurance.

An equitable interest, held under an executory contract for conveyance, is a valid subject of insurance.

Where the assured though in possession, had only a contract for a purchase of the property, subject to a condition which had not been complied with, but of which the vendor had taken no advantage at the time of effecting the insurance, or at the time of the loss, *Held*, that this was sufficient to constitute an "insurable interest" in the assured.

Where there is an "insurable interest," in the absence of any specific inquiry by the insurer, or express stipulation in the policy, no particular description of the nature of the insurable interest is necessary.

ON REPORT.

Assumpsit on a policy of fire insurance. The law court were to determine all questions of law and fact, and render judgment accordingly. Plea, general issue, and brief statement as follows: 1. That the plaintiff at the time the policy of insurance declared on was issued, and at the time the buildings insured were destroyed by fire, was not the owner of said buildings and had not an insurable interest therein. 2. That the statement of title to said buildings at the time of procuring said policy of insurance was erroneous, and that the difference between the property, as described and as it really existed, materially increased the risk. 3. That the plaintiff, at the time of procuring said insurance, did not disclose to the defendant corporation the true state of the title to said buildings.

The insured premises were a house, ell, barn, household furniture, and some hay in the barn. The facts relating to the plaintiff's ownership of the buildings, found by the court to be an equitable title, are stated in the opinion.

The ownership is thus stated in the proof of loss. "The property belonged to me, and no other person or party had any interest therein except as follows: I am indebted to the heirs of Caroline W. Abbott, who have a conveyance to said Caroline W. Abbott of the farm, on which said house, ell and barn stood, to secure the payment of said indebtedness."

G. E. Johnson, for plaintiff.

Mrs. Abbott held the premises only as security. *Ricker* v. *Moore*, 77 Maine, 292.

Plaintiff as equitable owner had an insurable interest. Wood Fire Ins. § 265. Persons may have an insurable interest in property without any title to the same. Wood Fire Ins. §§ 279, 281; *Ins. Co.* v. *Barracliff*, 16 Vroom, 543, (46 Am. Rep. 792) and cases cited.

Plaintiff has suffered loss. Value of farm diminished, by destruction of buildings, to extent of their value, while her liability to pay remains the same as before the fire.

Counsel also cited: *Ins. Co.* v. *Dunham*, 10 Cen. Rep., p. 575 (Pa.); *Elliot* v. *Ins. Co.*, Id. p. 581; *Ins. Co.* v. *Lawrence*, 2 Pet. 25, (cases of equitable title); Wood Fire Ins. §§ 266, 270, 272, 275; *Reed* v. *Ins. Co.*, 74 Maine, 537; *R. R. Co.* v. *Ins. Co.*, 98 Mass. 420, 423; *Williams* v. *Ins. Co.*, 107 Id. 377; *Redfield* v. *Ins. Co.*, 56 N. Y. 354.

Case does not show erroneous statement of title. If false, should have been proved. Agents of company to whom statements were made live at place of trial and were not called. Court will not presume false statements without evidence, but the contrary, and that insurers made all necessary inquiries in regard to title and received proper and truthful answers. *Jones Manf'g Co.* v. *Ins. Co.*, 8 Cush. 82; Wood Fire Ins. § 238; R. S., c. 49, § 20. Question of forfeiture of title not open to defendants.

W. H. Fogler, for defendants.

Plaintiff not owner of the buildings. Only proof is the agree-

ment, not under seal, or conditions not performed. No evidence of waiver by Mrs. Abbott or her representatives.

She did not have an insurable interest. An insurable interest is *sui generis*, and peculiar in its texture and operation. *Hancock* v. *Ins. Co.*, 3 Sum. 132. It must be one, vested or contingent, present or prospective, which can be ascertained and identified, and enforceable at law or in equity (1 Wood Fire Ins. § 283, p. 652); that the peril may have a direct effect upon, instead of a remote, circuitous, consequential effect, (1 Phil. Ins. § 175); which would be recognized by a court of law or equity (per Miller, J.,) in *Warren* v. *Ins. Co.*, 31 Iowa, 464; a right in the thing insured. *Cumb. Bone Co.* v. *Ins. Co.*, 64 Maine, 466, 471.

There had been a breach of condition in the agreement to convey, at date of policy and the loss. Plaintiff was only occupant by owner's permission; tenant at sufferance. She had no legal or equitable rights under her broken contract,—hence no insurable interest. 1 Phil. Ins. §§ 180, 183; *Brown* v. *Williams*, 28 Maine, 252; *Sawyer* v. *Mayhew*, 51 Id. 398; *Ins. Co.* v. *Lawrence*, 2 Pet. 25; *Birmingham* v. *Ins. Co.*, 42 Barb. 457.

In the agreement Mrs. Abbott reserved the insurable interest to herself by stipulating that the plaintiff should keep the buildings "insured during said term in the sum of $500, in the name of, or payable to me, the said Caroline W. Abbott." If Mrs. Abbott retained an insurable interest to the amount of $500, the plaintiff could not have such an interest to the same extent.

Insurable interest in buildings can not exceed the extent of her actual cash interest, $275.03. 1 Wood Fire Ins. § 275. Notes not taken as payment of the property, as it was not to pass until payment. See cases of similar character: 1 Phil. Ins. §§ 289, 292, 309; 1 Wood Fire Ins. §§ 295, 305, 313, (mortgagee, creditor, factor or consignee).

Policy void for misrepresentation of title. She received and retained policy obtained through her agent, thereby ratifying his acts, which insured the property as hers. She reiterates this in her proof of loss. Matters of title material. *Abbott* v. *Ins. Co.*, 30 Maine, 414, 418; *Ins. Co.* v. *Lawrence*, 2 Pet. 25, 49. Facts relating to property and title, unusual or extraordinary, should be disclosed. 1 Wood Fire Ins. § 176.

Policy provides "that upon the alienation of any estate hereby insured, this policy thereupon shall be void." If void by subsequent alienation, much more would it be void where the title was in a party other than the assured, of which fact the insurer had no notice.

The failure to disclose the true title to the buildings, even though without fraud, was material and increased the risk. The fact that the plaintiff could acquire a title only by payment of $700,—a sum equal to the whole amount of insurance effected, was material in determining the interest which the assured might have in guarding the premises against fire. Whether it is for the pecuniary interest of the assured, that the property should be preserved or be destroyed, must always be a material element in a contract of insurance. *Richardson* v. *Ins. Co.*, 46 Maine, 394; *Gould* v. *Ins. Co.*, 47 Maine, 403; *Day* v. *Ins. Co.*, 51 Maine, 91; *Davenport* v. *Ins. Co.*, 6 Cush. 340; *Marshall* v. *Ins. Co.*, 7 Foster, 157.

If the policy is void as to the buildings it is void *in toto*, as the contract is an entirety. 1 Wood Fire Ins. § 165; *Lovejoy* v. *Ins. Co.*, 45 Maine, 472; *Barnes* v. *Ins. Co.*, 51 Maine, 110; *Brown* v. *Ins. Co.*, 11 Cush. 280; *Friesmuth* v. *Ins. Co.*, 10 Cush. 587; *Ins. Co.* v. *Resh*, 44 Mich. 55, cited and quoted in 1 Wood Fire Ins. § 165.

FOSTER, J. The parties to this policy of insurance have, by the terms of their contract, avoided some of the questions arising in other cases. Oftentimes the numerous conditions annexed to the contract, upon the breach of any one of which the parties agreeing that the policy shall be void, have given rise to embarrassments and discussions in different courts, and led, in some instances, to an apparent conflict of opinion if not of decision.

The present case is free from all embarrassments arising out of any conditions ingrafted upon the policy, and but two questions are presented for our consideration: *First*, had the plaintiff an insurable interest in the property destroyed? *Second*, was that interest sufficiently described?

I. That the plaintiff had not the legal title to the premises or buildings destroyed, is conceded.

She held an agreement in writing from the one having the legal title, and upon the performance of certain conditions to be by her performed, as therein specified, the title was to be conveyed to her. The party executing this agreement had agreed to convey by quitclaim deed, on or before six years from its date, the premises in question, provided the plaintiff first pay the sum of seven hundred and twenty dollars and three cents in certain specified amounts, and at certain specified times agreeably to seven promissory notes.

At the time this contract of insurance was entered into, all the notes had matured, the last one being nearly a year overdue. Two of the notes had been paid, and the other five, with interest thereon from Feb. 25, 1879, remained unpaid, except $55, paid Jan. 30, 1884, being the last payment upon the notes, and more than three years prior to the loss by fire.

Notwithstanding the whole amount unpaid upon the remaining notes was overdue, at the time the contract of insurance was effected, the vendor had taken no steps in relation to the contract or the premises mentioned; nor had any action been taken looking towards the enforcement of the payment of the notes.

The contract was therefore executory and still subsisting between the parties to it.

If it were necessary, in order for the plaintiff to recover, that she should prove the existence of a legal title to the premises, her case would present a different question from that now under consideration. The law does not require this. An equitable title or interest in the plaintiff is all that is necessary to give validity to the contract of insurance. *Strong* v. *Manufacturers Ins. Co.*, 10 Pick. 40, 43.

An equitable interest held under an executory contract is a valid subject of insurance. *Columbian Insurance Co.* v. *Lawrence*, 2 Peters, 25; *Cumberland Bone Co.* v. *Andes Ins. Co.*, 64 Maine, 466, 470; *Imperial Ins. Co.* v. *Dunham*, 12 Atlantic Rep. (Pa.) 668.

In *Ricker* v. *Moore*, 77 Maine, 292, numerous authorities are there cited sustaining the doctrine laid down in that case, that where one executes and delivers to another an agreement to convey

land to him for a fixed price payable at a certain time, he thereby transmits an equitable estate; and the equitable vendor thereupon becomes the trustee of the estate for the equitable vendee, retaining the legal title as security for the purchase money. Professor Pomeroy in his work on equity, § 368, says that the vendee under an executory contract at once becomes the equitable owner of the land, and the vendor equitable owner of the purchase money, upon the execution and delivery of the contract, even before any portion of the price is paid. It is true, he says, that the vendee's equitable estate is incumbered or charged with a lien as security for the unpaid price, and he may by the enforcement of this lien upon his final default in making payment, lose his whole estate in the same manner as a mortgagor may lose his interest.

So in *Siter's Appeal*, 26 Pa. St. 180, the court say: "It does not seem to be necessary to produce this effect that any part of the purchase money should be paid; it results from the contract. When a part of the purchase money is paid, the interest of the purchaser in the land is not circumscribed by the extent of the money paid, but embraces the entire value of the land over and above the purchase money due. He is treated as the owner of the whole estate, incumbered only by the purchase money. If the land increases in value it is his gain; if it decreases, if improvements are destroyed, by fire or otherwise, it is his loss."

And in *Reed* v. *Lukens*, 44 Pa. St. 200, the doctrine there stated is to the same effect,—that after a contract for the sale of real estate, the purchaser is the equitable owner thereof, and being responsible for the purchase money is liable to the whole loss that may befall it, including the loss of the buildings by fire.

The leading case upon this point in this country is *Columbian Ins. Co.* v. *Lawrence*, 2 Peters, 25. The assured in that case, though in possession, had only a contract for a purchase of the property, subject to a condition which had not been complied with, but of which the vendor had taken no advantage at the time of effecting the insurance, or at the time of the loss. Chief Justice Marshall, delivering the opinion of the court, says: "That an equitable interest may be insured is admitted. We can perceive no reason which excludes an interest held under an executory

contract. While it subsists, the person claiming under it has undoubtedly a substantial interest in the property. If it be destroyed, the loss in contemplation of law is his. If the purchase money be paid, it is his in fact. If he owes the purchase money, the property is its equivalent, and is still valuable to him. The embarrassment of his affairs may be such that his debts may absorb all his property; but this circumstance has never been considered as proving a want of interest in it. The destruction of the property is a real loss to the person in possession, who claims title under an existing contract, and the contingency that his title may be defeated by subsequent events does not prevent this loss." This is the well settled principle prevailing generally in this country. *McGivney* v. *Phœnix Ins. Co.*, 1 Wend. 86; *Ætna Fire Ins. Co.*, v. *Tyler*, 16 Wend. 385, 396; *Birmingham* v. *Empire Ins. Co.*, 42 Barb. 457; *Cumberland Bone Co.* v. *Andes Ins. Co.*, *supra; Insurance Co.* v. *Chase*, 5 Wall. 509, 513; *Goodall* v. *N. E. Fire Ins. Co.*, 25 N. H. 186.

It may be stated as a general proposition, sustained by all the authorities, that whenever a person will suffer a loss by a destruction of the property, he has an insurable interest therein.

In this case the plaintiff's notes given as the consideration of the purchase were still held by the equitable vendor. The plaintiff remains liable upon them, and the vendor may yet see fit to enforce their payment. Their payment is not conditioned on some prior act of the vendor. The plaintiff's promise to pay is absolute. On the other hand, the vendor's promise to convey is conditional. It is at the election of the vendor to say whether the agreement to convey may be enforced by exacting payment of the notes, although overdue, or whether it may be considered at an end,—as in *Manning* v. *Brown*, 10 Maine, 49, 51; *Little* v. *Thurston*, 58 Maine, 86, 88, and the cases there cited; *Ockington* v. *Law*, 66 Maine, 551.

Being in possession under a subsisting contract, with the liability to pay the notes, at the time not only when the insurance was effected but also at the time of the loss, we have no doubt the plaintiff had such an interest as was insurable, and as was said in *Columbian Ins. Co.* v. *Lawrence*, *supra*, "the contingency

that" her "title may be defeated by subsequent events does not prevent this loss."

II. We are also of the opinion that the interest of the assured was sufficiently described in the policy.

Insurance for a specific sum was placed "on her one and one-half story frame dwelling house and ell occupied by the assured as a private dwelling" * * * * and another sum "on frame barn adjoining."

There is no evidence showing any inquiry, either verbal or in writing, by the defendant, and no provision or condition in the policy calling for a statement of the nature of the plaintiff's interest. Having an insurable interest, it is well settled by numerous authorities that in the absence of any specific inquiry by the insurers, or express stipulation in the policy, no particular description of the nature of the insurable interest is necessary. *Williams* v. *Roger Williams Ins. Co.*, 107 Mass. 379; *Fowle* v. *Springfield Ins. Co.*, 122 Mass. 191, 194; *King* v. *State Ins. Co.*, 7 Cush. 1, 7; *Strong* v. *Manf. Ins. Co.*, 10 Pick. 40; *Washington Mills Manf. Co.* v. *Weymouth Ins. Co.*, 135 Mass. 503, 505; *Springfield Ins. Co.* v. *Brown*, 43 N. Y. 396; *Buck* v. *Phœnix Ins. Co.*, 76 Maine, 586, 588; *Walsh* v. *Phila. Fire Association*, 127 Mass. 383, 385; *Tyler* v. *Ætna Ins. Co.*, 12 Wend. 507.

In the case of *Fowle* v. *Springfield Ins. Co.*, *supra*, the court held that "the words 'his' or 'their,' used in a policy, as descriptive of the property of the assured, do not render the policy void, if the insured has an insurable interest, although the interest may be a qualified or defeasible, or even an equitable interest;" and the authorities are there cited supporting this doctrine. And if the authorities are examined, it will be found, that this is true notwithstanding the policy provides in express terms that the interest of the assured in the property to be insured shall be truly stated in the policy, and if not, the policy to be void. *Fowle* v. *Springfield Ins. Co.*, *supra*; *Williams* v. *Roger Williams Ins. Co.*, *supra*.

The defendants issued their policy without any specific inquiries of the plaintiff in reference to her interest in or title to the property. The policy contained no provision requiring the interest of the assured, if other than the entire, unconditional or legal

ownership, to be so expressed; no requirement that the interest of the assured should be particularly or accurately described either in the policy or proofs of loss. No misrepresentation or concealment is proved. Moreover, the statute provides that erroneous descriptions or statements of value or title by the insured, do not prevent a recovery upon the policy unless the difference, between the property as described and as it really existed, contributed to the loss or materially increased the risk. R. S., c. 49, § 20. No evidence is introduced showing the statements,—or if made that they contributed to the loss or materially increased the risk. It is not a question of law, but one of fact to be proved, even where there is evidence of misrepresentation. *Sweat* v. *Piscataquis Mutual Ins. Co.*, 79 Maine, 109, 110; *Bellaty* v. *Thomaston M. F. Ins. Co.*, 61 Maine, 414.

Upon the facts in the case, the plaintiff is entitled to recover the whole amount of damage to the property, not exceeding the sum insured. *Strong* v. *Manf. Ins. Co.*, 10 Pick. 40, 44; *Buck* v. *Phœnix Ins. Co.*, 76 Maine, 586, 589.

No contention is raised as to her recovery for the personal property of which she held title, in case she is entitled to recover upon the other property. Although the hay was insured for $100, the evidence shows a loss of only $50 thereon.

Judgment for the plaintiff for $635, *with interest from the date of the writ, Nov.* 5, 1887.

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

LEWIS F. STRATTON, and others *vs.* MICAJAH CURRIER, and others.

Penobscot. Opinion May 6, 1889.

Waters. Mill-owners. Mill-dams. Log-sluice. Reservoir-dams. Storage-water.

A mill-owner who constructs and maintains a dam on his own land, on a stream floatable for running logs, to raise a sufficient head of water to operate his mill, with a sufficient sluice-way to conveniently pass over it all logs which the stream will float in its natural condition cannot, afterwards, be required to enlarge the capacity of the sluice, by a log owner above his dam, who, under a charter from the legislature, constructs dams to store and hold the water of the stream for use when needed, and removes natural obstructions in it, and thereby increases its capacity for floating logs to such an extent that the sluice is insufficient.

Pearson v. *Rolfe*, 76 Maine, 380, and *Foster* v. *Searsport Spool & Block Co.*, 79 Maine, 508, affirmed.

ON EXCEPTIONS, by plaintiffs.

This was an action on the case for obstructing the Piscataquis river, in 1884, at Abbot.

The plaintiffs and others obtained a charter from the state, in 1883, under which they had constructed two reservoir-dams and otherwise improved the river above Abbot. In the spring of 1884, the plaintiffs, making use of the water thus stored up by these reservoir-dams, drove their logs, the drive being four million feet, down the river through a sluice in the defendants' dam, at Abbot, but, as they say, were put to unreasonable expense, because the sluice was not a reasonable and proper one.

The principal question, at issue in the trial of the case, was whether the sluice was a reasonable one, for the driving through of the plaintiffs' logs.

Plea, general issue, and brief statement alleging, in substance, that the dam was a lawful and proper structure erected and maintained, for upwards of twenty years, for the purpose of running the mills connected with it in manufacturing lumber; and that there was a sufficient sluice-way in the dam so that the

plaintiffs could drive their logs with reasonable convenience and facility.

The defendants further claimed the rights of mill-owners on said dam for the purpose of manufacturing lumber; and that they took no more water, nor in a different manner than was necessary or lawful, as such mill-owners; also the right to erect and maintain and use the dam by possession and ownership of the land and privilege.

The defendants also contended that any detention or injury which arose in the driving the logs was caused by the plaintiffs' own act or neglect; but in this branch of the case, there were no exceptions to the rulings or instructions of the court.

After the evidence was closed, the jury viewed the premises, and rendered a verdict for the defendants.

The plaintiffs excepted to the following portions of the charge to the jury by the presiding justice:

"Rivers are public highways, and if they be navigable rivers,—that is, within the ebb and flow of the tide,—then the riparian owner owns only to low water mark, and if the holding is upon a bay or place where the tide ebbs more than one hundred rods, then to low water mark not exceeding one hundred rods. But that is not the law in regard to streams non-navigable. There the riparian owner owns to the thread of the stream; and if he owns upon both sides he owns the land under the stream, he owns the rocks in the bed of the stream; he owns every thing that is attached to the realty; and no man can remove a rock from a floatable stream except by permission of the riparian owner, or by permission from public grant, by reason of original authority, and then upon provision being made for any damages or compensation awarded to the riparian owner for the taking of his property.

The following portions of the charge in brackets were not excepted to. (So that, as in the present case, a floatable river like the Piscataquis, which is admitted by the defendants in this case to be a floatable stream in its natural state, the riparian owners are possessed of the bed of the stream. They own the soil under it and the rocks in it, and they have a right to build mills upon it and to extend their dams across it. On the other hand, the pub-

lic has a right to navigate it, to float lumber to market. The one has the right to use the water for propelling machinery; the other, the right to the use of the water in bearing and floating the products of the forest to market. The rights, you see, are common rights, rights which each party is vested with; and where those rights conflict, then certain reasonable rules of law obtain which determine the prior or superior right.

Now the mill-owner across a floatable stream like the Piscataquis, when he attempts to put his mill and dam across the stream, cannot abridge, unreasonably, the public right of navigating it with lumber, but he may impede the navigation of the stream if he does not do it unreasonably; and whether or not his dam and the provisions he has made for the passage of lumber that floats down the stream, is or is not a nuisance to the public, depends upon whether he has provided a reasonable chance for the passage; or, in a case like the present, whether he has provided a reasonable log-sluice,—a sluice that is convenient and one which facilitates the running of the logs.) And in determining whether the mill-owner has provided a reasonable opportunity for the operator to float his logs by, is a question of fact,—a question for the jury to decide; and in determining that, they are to take into consideration, only, the stream in its natural state. If the stream be a rocky, hard stream to drive, suitable only for driving small or short lumber, and the mill-owner impedes the stream by placing a dam across it, he is bound, only, to provide a passage to float lumber in its natural state without the aid of any artificial device. And whether the defendant in this case has provided a reasonable and proper sluice for floating logs through, depends upon whether or not he has done so while the stream remained in its natural condition; because, otherwise, if the riparian owners above should clear a channel and by legislative authority or otherwise, should store water and make the stream navigable, if you please, for a craft that could be floated over dams, he might be required to furnish locks to get them up and down, and that the law does not require him to do; it only requires him to give a reasonable chance for the passage of lumber that may be floated upon the stream in its natural state. Has the defendant in this

case so done? If in the spring of 1884, he had in his dam at Abbot, a reasonable sluice for the passage of logs or lumber, taking into consideration the stream in its natural state and its capabilities in its natural state without the aid of artificial device, without the aid of volumes of water to be stored up and to be used at the pleasure of the owner of it, that was all the law required him to do. * * *

If they had to have that sluice-way capable of aiding and accommodating the floating of lumber beyond what the stream would naturally float and drive, they must obtain authority from the public and give compensation for any improvement made; or they must buy it if they use it as their own property. * * *

Taking into consideration the situation of the mill, the location, and all the surrounding circumstances; taking into consideration the burden of the mill-owner and taking into consideration the necessities of the log driver, did the defendants furnish a reasonably convenient and suitable passage for logs on that river in its natural state, at a drivable pitch? If they did that, then they were bound to do no more and they are not liable in this case. * * *

If the plaintiffs stored that water in the reservoir above, they owned it, and they had a right to let it down that stream and to run their logs with it, and to acquire the facilities of the mill-owners, that is, a sluice such as they would be required to furnish for the running of the river in its natural state, in a drivable pitch."

At the request of the plaintiffs, the presiding justice also gave the jury the further instruction, "that if the plaintiffs' logs could have been driven, with the river in its natural state at any season of the year, they were entitled to have a reasonable passage, when by reason of the water stored, they could float their logs to the defendants' dam."

D. F. Davis and C. A. Bailey, for plaintiffs.

Under the ruling of the court, the mill-owner is not obliged to enlarge or improve his sluice, so as to accommodate the capacity of the stream in its improved condition, but is held only to main-

tain a reasonable sluice, taking into consideration the capacity of the stream in its natural state at the dam, at a drivable pitch.

This presents the question, if the log or land owner, above a mill-dam, improves and enlarges the capacity of the stream for driving logs, whether the mill-owner is obliged to enlarge and improve his log-sluice so as to accommodate said logs.

Plaintiffs do not claim the water raised by defendants, as in *Pearson* v. *Rolfe*, 76 Maine, 380, relied on by defendants, but they claim that defendants should furnish a suitable sluice, through which they may run their own logs, by means of water raised by their own dams.

Doctrine of *Pearson* v. *Rolfe*, does not apply. The river at Abbot dam was naturally floatable when plaintiffs' logs were driven over it. Plaintiffs did not claim exclusive use of the water at that time; only claimed a reasonable sluice, large enough and so constructed that they might drive their logs with the water, which they had stored themselves.

The gist of that decision is, that Pearson had the right to run his mill with the water raised by his mill-dam, while here plaintiffs claim the right to use water stored by themselves.

If the doctrine of the charge is to stand, it must have a marked effect upon the lumber industry of the state. New methods of improving water courses, render streams capable of floating large quantities of logs, which in their natural state can float but few logs. Lumber will be driven from extreme head waters. Railroads being pushed through the interior of the state, mills will spring up on all large water courses.

Reservoir-dams, etc., will increase the driving season of small floatable streams for weeks and even months. Having thus improved the navigation of the stream and increased its capacity twenty-fold, what is the land and log owner to do with his two million feet of logs, in place of the former one hundred thousand, when he finds the dam below insufficient, yet, according to the charge, all that the law requires?

The more reasonable rule is for the mill-owner to maintain his sluice capable of accommodating all logs, no matter how much the stream is improved. The burden on the mill-owner is trifling,

while the damage he may cause the log owner may be immense. Besides, the improvements made by the log owner will be beneficial to the mill-owner.

What rule is to be applied to the mill-owner who erects a mill on a stream after the log owner has doubled its capacity for floating logs above its natural condition? The rule laid down, in the charge, will produce uncertainty.

Counsel also cited *Treat* v. *Lord*, 42 Maine, 552, 554, 556.

A. G. Lebroke and W. E. Parsons, for defendants.

The plaintiffs were driving logs by the use, in part, of water stored in reservoir-dams, at Shirley Bog and Bald Mountain Stream, many miles above Abbot. The dams were built under a charter enacted in 1883, more than forty years after defendants' rights to their mill and privilege had been established.

The corporation has right to take tolls. The changes or improvements made by it, were not at defendants' mill and sluice, but many miles above Abbot. Without the use of the surplus water from the reservoir-dams, the logs could not have been floated over the rough bed of the stream above defendants' mills, or reached Abbot, at the time in question. River at Abbot, at time in question, not navigable or floatable; and use of water at such time and place belongs exclusively to riparian proprietors. *Pearson* v. *Rolfe*, 76 Maine, 380, 384. Rights and liabilities of parties are to be based, not upon an artificial condition, but the natural state of the stream. *Pearson* v. *Rolfe*, *supra*, *Foster* v. *Searsport Spool & Block Co.*, 79 Maine, 508. This view sustained by the authorities; and is the only sound, practical and constitutional rule which can be adopted. No legislative act can load defendants with burdens twice as onerous, as before its passage, without just compensation under the constitution.

There would be no certain rule, which mill-owners could adopt and feel secure, if they were compelled to be governed by the fitful and spasmodic acts of others making improvements and changes in the bed of streams, and sending forth vast volumes of water artificially stored, and increasing indefinitely logs hurled upon and piled up at a single point, in a single day.

If riparian proprietors or owners of mills and dams should be held to be bound by the wanton, or capricious, or uncertain acts of owners or managers of dams and reservoirs, over which such riparian proprietors or mill-owners had no control, and of which the mill-owner might not have knowledge or notice, such structure for raising water, being perhaps far remote in the inaccessible wilderness, the rule would be as uncertain as the movements of the *ignis fatuus;* and might be as destructive to the mill-owner as the visit of a cyclone, if he were to be held responsible for all consequences. With these vast reservoirs, plaintiffs could by the raising of a gate produce a freshet; and by closing it could produce a drouth at pleasure.

The charge is sustained by *Pearson* v. *Rolfe*, *supra;* Cooley's Torts, p. 583; *Lancey* v. *Clifford*, 54 Maine, 487; *Dwinel* v. *Veazie*, 50 Id. 479; Gould, Waters § 110, and all the authorities.

If the river was not navigable or floatable, at the time and place in its natural state, defendants not bound to make it so; yet plaintiffs have sued defendants because they say they were hindered in getting their logs over defendants' works, when they were obliged to use stored water to drive their logs down to defendants' mill. No action would lie under all these circumstances.

LIBBEY, J. In 1884, the defendants were the owners of a mill, and dam across the Piscataquis river, to raise and hold a sufficient head of water to operate their mill, on their own land at Abbot. They claim that they had owned and possessed their mill and dam, in the same condition that they were then in, for more than twenty years. The Piscataquis river at that point was not navigable as a tidal river, but was floatable for the running of logs at certain seasons of the year. The defendants claim that when their dam was constructed it was provided with a sluice proper and sufficient for passing all logs that the river in its natural state, and as it then was and had been down to 1884, could float. They say that prior to that time, by reason of the natural character of the river above their dam, the water fell so rapidly in the running season that comparatively but a small quantity of logs could be floated to and over their dam.

The plaintiffs do not seem to have controverted these facts, but claimed and introduced evidence to prove, that in 1883, they obtained a charter from the state to build reservoir-dams and otherwise improve the river above that place, and that under that charter they had constructed two reservoir-dams and otherwise improved the condition of the river for floating logs above Abbot.

That in the spring of 1884, they had in the river above Abbot four millions of logs which they drove down the river that season; and that to enable them to drive that quantity they had their reservoir dams full of water, which they used for that purpose. They claimed that the sluice at the defendants' dam was not of sufficient capacity to enable them to run that large quantity of logs over the dam without unreasonable and unnecessary delay; and that for that reason the dam was a nuisance to them and caused them great damage.

The great question in contention between the parties was, whether the defendants were obliged to maintain a sluice over their dam reasonable and proper for the use of the plaintiffs for floating the large quantity of logs which they were able to float, by the water which they had stored up by their reservoir-dams, and which they would not have been able to float by the natural and usual condition of the river before their dams were constructed; or whether they complied with the duty imposed upon them by maintaining a sluice reasonable and proper for passing all the logs, which could be run in the river above their mill, by the natural condition of the water.

Upon this point, the court charged the jury in substance, that the defendants had a right to construct and maintain their dam upon their own land for the purpose of raising a sufficient head of water to operate their mill. That the stream being of sufficient capacity to float lumber, the public had a right to its use for that purpose; the plaintiffs had a right to its use for that purpose; and that in constructing and maintaining their dam, the defendants were bound to provide reasonable and proper means for floating over their dam the lumber which the stream was capable of floating, in its natural condition. That they were not bound to provide in 1884, for the plaintiffs a sluice of additional capacity

to enable them to run the large quantity of logs, which they were able to float that year, by the use of the large quantity of water which under their charter, by artificial means, they had held back and stored for that purpose.

After the judge had given the jury his instructions upon this point, at the request of the counsel for the plaintiffs he gave them the further instruction: "That if the plaintiffs' logs could have been driven with the river, in its natural state at any season of the year, they were entitled to a reasonable passage when by reason of the water stored they could float their logs to the defendants' dam."

We think the instructions correct. It is not necessary to determine what the duties of the defendants would have been if the capacity of the river for floating logs had been increased by removing artificial obstructions, such as fallen trees, accumulations of logs, roots and brush in the river which impaired its capacity for floating lumber; for no such question appears to have been involved or raised at the trial.

The plaintiffs' contention is, that if the defendants' dam, as it was constructed and has been maintained prior to 1884, furnished reasonable and proper facilities for the exercise of the public right of floating lumber in the natural condition of the river, the action of the plaintiffs under their charter of increasing the capacity of the river by removing natural obstructions and by artificial means had correspondingly increased the duties of the defendants; so that, if prior to 1884, the dam was not a nuisance, and the defendants could not have been made responsible, the plaintiffs, by their own artificial devices, converted it into a nuisance to the public right and changed the liability of the defendants. We think this proposition is unsound.

The plaintiffs, by their charter, could not require the defendants to do anything in removing natural obstructions in the bed of the river. They could not enter upon the defendants' land to remove any obstructions to the damage of the defendants without rendering just compensation, if their charter in the exercise of the right of eminent domain by the state had conferred upon them the right to do so. If they could not take the defendants'

property for the purpose of accomplishing their objects, under their charter without just compensation, how can they by their acts under their charter increase the obligations of the defendants, and require them to construct a larger sluice at an expense of one hundred dollars or two hundred dollars, and thus substantially take their property without compensation?

The relative rights of mill-owners and of log owners, on floatable streams in this state, have recently been so fully discussed and determined by this court in *Pearson* v. *Rolfe*, 76 Maine, 380, and in *Foster* v. *Searsport Spool & Block Co.*, 79 Maine, 508, that we deem it unnecessary to enter upon a more extended discussion of the law in this case. We think the instructions of the court are in entire accord with the law as determined in those cases.

Exceptions overruled.

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

STATE *vs.* EROLD E. HOSMER.

Knox. Opinion May 17, 1889.

Indictment. Insurance. Agent without license. Pleadings. R. S., c. 49, § 73, Stat. 1887, c. 109.

An indictment founded on R. S., c. 49, § 73, as amended by act of 1887, c. 109, relating to soliciting insurance without a license, which does not allege that the defendant solicited applications as agent of the insurance company, named, nor allege the name of any person of whom an application was solicited, will be adjudged bad on demurrer.

ON EXCEPTIONS, by defendant, to overruling a demurrer to an indictment for unlawfully soliciting insurance risks.

The indictment, containing two counts, was as follows:—

First count. At the supreme judicial court, begun and holden at Rockland, within and for the county of Knox, on the second Tuesday of March in the year of our Lord one thousand eight hundred and eighty-eight.

The jurors for said state upon their oath present, that Erold E. Hosmer of Camden, in said county, at Camden in said county of Knox, on the thirtieth day of December, in the year of our Lord one thousand eight hundred and eighty-seven, did solicit applications for insurance to a certain insurance company, called the Manufacturers' Accident Indemnity Company of the United States, without having first received license therefor as provided by law, against the peace of said state and contrary to the form of the statute in such case made and provided.

Second count. And the jurors aforesaid, upon their oaths aforesaid further present that said Erold E. Hosmer, at said Camden, on the thirtieth day of December, in the year of our Lord one thousand eight hundred and eighty-seven, did fraudulently assume to be an agent of a certain insurance company called the Manufacturers' Accident Indemnity Company of the United States, and thus procured risks and received money for premiums, against the peace of said state, and contrary to the form of the statute in such case made and provided.

J. H. Montgomery, for defendant.

The first count, charging defendant, "did solicit applications of insurance, etc," not sufficient. Statute does not intend forbidding friends or creditors urging their friends or debtors from insuring their lives or property.

It is not sufficient to charge an offense in the words of the statute. *Com.* v. *Bartlett*, 108 Mass. 302; *Com.* v. *Bean*, 11 Cush. 414; *Com.* v. *Wolcott*, 10 Cush. 61, 63; *Com.* v. *Bean*, 14 Gray, 52. Statute must mean soliciting as agent of some insurance company; and indictment must so charge. *State* v. *Higgins*, 53 Vt. 191; *State* v. *Jones*, 33 Vt. 443; *State* v. *Cook*, 38 Vt. 437; *State* v. *Daley*, 41 Vt. 564; *State* v. *Miller*, 60 Vt. 90; *U. S.* v. *Cruikshank*, 92 U. S. 542; *U. S.* v. *Simmons*, 96 U. S. 360.

Description of means used should have been stated in the indictment. *State* v. *Roberts*, 34 Maine, 320.

Second count open to same objection. Neither count charges that any person was defrauded. It does not appear to whom he assumed to be an agent, or solicited risks and money for premiums. No person is named. The state must know and should have

named the person in the indictment. *State* v. *Lashus*, 79 Maine, 541.

All the material facts should be alleged (*State* v. *Philbrick*, 31 Maine, 401); the acts done in assuming to act as agent; kind of agent and such as contemplated by the law; that there was such a company; the persons to whom the assumptions were made; that they were insurance risks, and money received for insurance premiums.

Each act being subject to fine and punishment, the number of risks solicited and procured should be alleged, if not stated in separate indictment. *Com.* v. *Hall*, 15 Mass. 240.

J. H. H. Hewett, county attorney for the state.

LIBBEY, J. This indictment is based upon § 73, of c. 49, of the R. S., as amended by act of 1887, c. 109. It provides that "no person shall act as an agent of an insurance company until there has been filed with the commissioner a duplicate power of attorney from the company or its authorized agent, empowering him to act, or a certificate from the company setting forth that such person has been duly appointed and authorized as an agent thereof. Upon filing such power or certificate, the commissioner shall issue a license to him, if the company is a domestic company, or has received a license to do an insurance business in this state. * * * And if any person solicits, receives, or forwards any risk or application for insurance to any company, without first receiving such license, or fraudulently assumes to be an agent, and thus procures risks and receives money for premiums, he shall be punished" as provided therein.

The first count in the indictment charges that the defendant, "at Camden, in said county of Knox, on the thirtieth day of December, in the year of our Lord one thousand eight hundred and eighty-seven, did solicit applications for insurance to a certain insurance company called the Manufacturers' Accident Indemnity Company, of the United States, without having first received license therefor as provided by law."

It is claimed in behalf of the state that this count is in the language of the statute and sufficiently charges the offense. But

the charge in an indictment in the language of a statute creating the offense, is not necessarily sufficient. *State* v. *Lashus*, 79 Maine, 541. In that case the court say: "The law affords to the respondent in a criminal prosecution such a reasonably particular statement of all the essential elements, which constitute the intended offense, as shall apprise him of the criminal act charged; and to the end, also, that if he again be prosecuted for the same offense he may plead the former conviction, or acquittal in bar."

The offense created by the statute consists in acting as an agent for any insurance company in soliciting, receiving or forwarding any risk, or application for insurance, to the company without a license therefor. Under the terms of the statute, one can be licensed only to act as agent for some particular insurance company, after furnishing the required evidence of his appointment as such agent. The offense consists in acting as such agent without first complying with the statute and receiving a license to act as such agent. In this count, there is no allegation that the defendant in soliciting the applications for insurance, as set forth, acted or claimed to act as agent for the insurance company named.

Section 74, of c. 49, provides, that "any person may be licensed by the commissioner as a broker to negotiate contracts of insurance, and to effect insurance for others than himself for a compensation, and by virtue of such license he may place risks or effect insurance with any company of this state, or with the agents of any foreign company who have been licensed to do business in this state." For aught that appears in the indictment, the defendant may have been a licensed insurance broker under the provisions of this statute, or the president or secretary of the company, having as such, full authority to solicit risks for the insurance company named. Hence the necessity that the indictment should allege the capacity in which the defendant acted or assumed to act.

Again, to render the charge of the offense reasonably specific, the indictment should allege the name of the person from whom the risk was solicited, so that the defendant may know the act charged against him, that he may be able to prepare his defense. There is no such allegation in this count.

The second count charges that the defendant "did fraudulently assume to be an agent of a certain insurance company called the Manufacturers' Accident Indemnity Company of the United States, and thus procured risks and received money for premiums." In this count there is no allegation of the person or persons from whom the risks were procured and the money received. Nor is there any allegation that the risks were procured and the money received for insurance in any particular company. For the reasons stated, we think both counts in the indictment bad.

Exceptions sustained.

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

STATE *vs.* EROLD E. HOSMER.

Knox. Opinion May 17, 1889.

Indictment. Insurance. Agent without license. Pleadings. R. S., c. 49, § 73, Stat. 1887, c. 109.

Where an indictment charged the defendant with soliciting from a person an application for insurance to a certain insurance company, called the Manufacturers' Accident Indemnity Company, without first having received a license therefor, but did not allege that the defendant acted or claimed to act as the agent of the company; upon demurrer, *Held*, bad.

See previous case, *ante*, p. 506.

ON EXCEPTIONS, by defendant, to overruling a demurrer to an indictment for unlawfully soliciting insurance risks.

The material portions of the indictment are sufficiently stated in the opinion.

J. H. Montgomery, for defendant.

The indictment does not state the means employed; nor that a risk was procured; nor money received for a premium.

The statute provides, "if any person solicits, receives or forwards any risk or application for insurance to any company, without first receiving such license, or fraudulently assumes to be an agent, and thus procures risks and receives money for premiums * * *." Defendant must have, by soliciting, procured a risk and received money for a premium of said Gould, which the indictment does not allege. The crime consists as much in procuring the risk, and receiving money for premium, as in soliciting. If he only solicited, there is no crime.

J. H. H. Hewett, county attorney for the state.

LIBBEY, J. This indictment is under the same statute recited in the preceding case, *State* v. *Hosmer*, and charges that the defendant "did solicit from one Willis P. Gould an application for insurance to a certain insurance company called the Manufacturers' Accident Indemnity Company of the United States, without first having received a license therefor as provided by law."

For some of the reasons stated in the case referred to, we think this charge insufficient. It is not charged that the defendant acted or claimed to act as the agent of the insurance company named. He is liable, under the statute, only when he acts or assumes to act, as the agent of the company for which he solicits the application for insurance, without a license as such agent. He may legally have solicited the application as a licensed insurance broker, or as president or secretary of the company, and still all of the averments in this indictment would be true.

Exceptions sustained.

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

BENJAMIN YOUNG *vs.* CHARLES W. CLEMENT.

Washington. Opinion May 17, 1889.

Trespass. Deed. Forfeiture. Covenant.

In 1870, the plaintiff sold and conveyed by deed to his grantee the exclusive right to improve the navigation of a stream of water, flowing through a timber township belonging to him, with the right to use, improve and repair the same. The deed contained an exclusive grant of the hemlock trees and bark on a large tract of land in the township, adjacent to the above waters, not to exceed a certain amount to be cut each year, and for a stipulated price payable on the first day of July of the year after the bark was peeled. The habendum was to the grantee, heirs and assigns forever, subject to all the conditions and stipulations therein contained. The grantee covenanted to cut and pay for the logs and bark as stipulated; but there was no condition in the deed that the rights in the stream and locks and canals, which the grantee might erect under the grant, should be forfeited on his failure to pay for the bark and logs as stipulated; nor that on failure to pay as stipulated the title to the logs and bark cut should be forfeited to the grantor. The grantee entered under the deed, improved the stream, constructed canals and locks, and cut the hemlock and peeled the bark, paying for the same as stipulated until July 1, 1883, when he became insolvent, and failed to pay the sum then due. The stream, canals and locks thus constructed were used for transporting bark and general merchandize in boats and scows to that time. In July 1886, the grantee conveyed to the defendant all his interest in the premises, including bark peeled prior to 1883, then on the plaintiff's land.

After this conveyance, the plaintiff gave his grantee and the defendant written notice of his claim of forfeiture of all rights under the deed by reason of the failure to comply with its condition; and forbade their entering upon the premises. He also fastened the gates of the locks. Afterwards, the defendant for the purpose of removing the bark then on the lands, entered upon the premises, removing the fastenings of the gates, and with his boats and scows, transported the bark over said stream, doing no unnecessary damage.

Held, that for the acts last named, an action of trespass did not lie.

Held, also, that the defendant owned the bark cut prior to 1883, and had a right to use the stream and the improvements upon it for the transportation of the bark.

Held, also, that the defendant under his deed succeeded to the rights of his grantor, and that the plaintiff had no right to close the navigation of the stream against him.

ON EXCEPTIONS, by plaintiff, to the rulings of the justice of the Calais municipal court.

This was an action of trespass, *q. c.* in which the plaintiff claimed that by a written agreement dated July 6, 1870, sealed, acknowledged and recorded, between him and F. Shaw & Bros. the latter were given the right to enter upon the land described in the writ for the purpose of cutting and peeling bark, and also to build and use on said township a canal for transporting bark, etc.; that said Shaw & Bros. forfeited their rights under the agreement, by not paying for the bark as therein agreed, and that they had not paid but became insolvent. In May 1886, the plaintiff gave written notice to said Shaw & Bros. and to the defendant, Clement, of the termination of the agreement. In July 1886, the defendant by his servants and agents broke open the lock which the plaintiff had put on the canal gate, and used the canal for transporting the bark, although forbidden by the plaintiff.

It was agreed that the men who passed through the canal were the servants of the defendant and that he was responsible for their acts; also that F. Shaw & Bros. being insolvent conveyed in July 1886, by trust deed all their property in this state to defendant Charles W. Clement, trustee, to secure a debt for money borrowed; and that he held all the title the Shaws could convey in the property in dispute.

The defendant contended that the agreement, the material portions of which appear in the opinion of the court, was an absolute conveyance forever of the canal rights named in it. The court below so ruled, and the plaintiff excepted.

G. A. Curran, for plaintiff.

The agreement itself makes no distinction between the right of entry for canal purposes and that for peeling bark.

The two permits follow each other and are connected by the word "also". The consideration for both permits is the same and the habendum applies alike to both, being inserted at the end of the permit to peel bark. If the permit to enter for canal purposes is a perpetual grant, regardless of the agreements and stipulations as to payment, so must be the permit to peel bark.

The plaintiff contends that the entire agreement is nothing more than a mutual contract under seal and that it should be

construed as a whole; and not as a deed of canal rights and a contract as to the other rights.

The consideration for all the grants made by plaintiff was only one, and that was payment of prices named at times stated in the agreement.

If defendant's contention is well founded, then the Shaws on the day the indenture was signed became absolute owners of the right to build and maintain a canal on plaintiff's land, and had they failed at that time, this valuable right would go to their assignee while the plaintiff would receive nothing. Such a construction of the agreement is not justified by the instrument nor by any rules indicating the intention of the parties thereto.

The consideration for the right to build and use the canal, as well as for the other rights granted, was "the agreements and stipulations herein contained," and even the habendum is "subject to all the conditions and stipulations herein contained."

E. B. Harvey, for defendant.

Defendant might well have demurred to this declaration. It alleges facts that prove conclusively that Sisledobsis stream is a public navigable stream. If it were otherwise, the acts complained of could not have been committed; and there is no evidence to show that the plaintiff has any right to close it with gates and locks to prevent its use for navigation.

Defendant as well as his assignors, and the public had the right to navigate it and for that purpose to go on the banks when necessary. This right attaches to all streams that are navigable for any useful purpose. *Brown* v. *Chadbourne*, 31 Maine, 9, and cases cited.

When water runs in a sufficient quantity for navigation, for any useful purpose, the public right attaches. *Com.* v. *Charlestown*, 1 Pick. 179, 185; *Com.* v. *Chapin*, 5 Pick. 199.

Defendant had the right by the grant to Shaw & Brothers to use the Sisledobsis stream and the locks built by them on it. There were three separate grants in the agreement.

First, of the right to improve and clean the bed and banks of the stream, and build dams and locks on it and straighten the course of it so as to make it navigable for boats, steamers and

scows of any size deemed by them advisable and the right to use and improve, keep up and repair, to the Shaws, their heirs, executors and assigns, with only one qualification, namely, not to injure the mill privilege on the stream, or hinder or prevent the use of it for milling purposes. This is not a condition but a restriction upon the use. *Ayling* v. *Kramer*, 133 Mass. 12; *Episcopal City Mission* v. *Appleton*, 117 Mass. 326; *Skinner* v. *Shepard*, 130 Mass. 180. The violation of this restriction would not forfeit the estate granted, the easement in the stream and its banks. But whatever was done, within the terms of the restriction, would be in excess of the grant and might be restrained by injunction or would be good ground of suit for damages. *Bagnall* v. *Davies*, 140 Mass. 76; *Crane* v. *Hyde Park*, 135 Mass. 147; *Hadley* v. *Hadley Mf'g Co.*, 4 Gray, 140.

There is not in the whole instrument a condition. It would be absurd to say that the covenant to peel and pay for bark was a condition. It was a covenant, and was the consideration for the license to peel bark and remove it and for nothing else. The failure to peel and pay for bark was not a breach of condition. It was not a failure of consideration; and if the right to peel and take bark was forfeited, it was because the permission to peel and promise to pay were concurrent, and on that ground alone; not as a breach of a condition.

The undertaking to peel and pay for certain quantities of bark was, in no sense, the consideration for the grant of the use of the stream, or the improvements made upon it.

The consideration for the right to make the excavations and erections that have been made by defendant and his assignors, the Shaws, and the right to use them, was their undertaking to make and maintain them and thereby to improve the stream, all which has been executed by making the improvements. The failure of consideration for the bark permit in no way affects this transaction of improving and navigating the stream. The grants are separate and distinct and on separate and distinct considerations; and the failure of a consideration of a grant of land (and equally of an easement in land) will not alone defeat the estate granted, especially of an executed grant. See *Laberee* v. *Carleton*, 53 Maine, 211.

The law does not favor forfeiture, and will construe a clause as a covenant and not a condition, if susceptible of such construction to save a forfeiture. *Woodruff* v. *Woodruff*, Atl. Rep., (N. J.,) vol. 16, No. 1, p. 4, and cases cited, Oct. 1888.

The Shaws were granted the right to make improvements to facilitate the navigation of this stream by building on it dams and locks. Under that grant, whatever erections they made were their property as if they had under a license built a house or a mill upon plaintiff's land; and the locks remain their property, and never became the property of plaintiff.

LIBBEY, J. By the deed of the 6th of July 1870, Benjamin Young, the plaintiff, granted to Fayette Shaw, William Shaw and Brackley Shaw, co-partners in the name of F. Shaw & Bros., certain rights in his timber township, in the following language:

"Said Benjamin Young in consideration of the agreements and stipulations hereinafter written, does hereby give, grant, bargain, sell and convey and confirm unto the said F. Shaw & Bros., party of the second part, the exclusive right to enter upon and improve and clear the bed and banks of the stream called the Sisledobsis Stream, flowing from Sisledobsis Lake into Pocumpus Lake through my lands, lying in township No. 5, in the county of Washington, and to build dams and locks upon said stream, and straighten the course thereof, so as to make said stream navigable for boats, steam-boats and scows of any size deemed advisable by said F. Shaw & Bros., and for this purpose to remove any earth, rocks or other material, and dig and excavate in and upon the bed and banks of said stream and the ground adjacent thereto, and to make canals through the same, if necessary for the purposes aforesaid. And all the said improvements, locks, canals, erections or excavations to use and improve, keep up and repair, with the right and privilege for the purposes aforesaid, to pass and repass over and upon my lands there situated whenever necessary thereto. The said Shaw & Bros., not however by any of said improvements or operations, or the use thereof, to hinder or prevent the use of the mill privilege at the outlet of Sisledobsis Lake, nor to injure the same for milling purposes."

This is followed by a grant to the Shaws of the exclusive right

to cut down and peel hemlock and take away the bark upon the plaintiff's timber lot on both sides of Sisledobsis Lake, to be cut and piled at such times and in such quantities as said Young might elect, he giving reasonable notice before the beginning of the season for peeling bark in each year; not however to exceed one million feet of logs, board measure, in any one year, the Shaws paying for said bark at the rate of fifty cents for every thousand feet of the saw logs from which the bark should be peeled. "To have and to hold all and singular the premises aforesaid to the said Fayette, William and Brackley, their heirs and assigns forever, subject to all the conditions and stipulations, herein contained."

Then follows another grant by the plaintiff to the Shaws, for the consideration aforesaid, the right to cut and haul from said lands hemlock logs, timber and bark not exceeding one million feet of saw logs in any one year, for the term of ten years at the rate of $2.00 per thousand feet for the saw logs, including the bark therefrom. And the Shaws on their part covenant to cut and peel the quantity of logs required by said agreement and to pay for the same at the rate stipulated, on the first day of July of the year after the same was peeled.

Under this deed, the Shaws entered upon the plaintiff's land, improved said stream, constructed canals and locks between said lakes, and cut from time to time the hemlock on the plaintiff's land and peeled the bark, paying for the same according to the stipulations in their contract, until July 1, 1883, when they became insolvent and failed to pay the sum then due. They had used said stream and the canals and locks they constructed for transporting their bark and general merchandize in their boats and scows to that time. In July 1886, the Shaws conveyed all their right, title and interest, in said premises including bark peeled prior to 1883, then on the plaintiff's land, to Charles W. Clement, trustee, to secure a debt for money borrowed. And it was agreed that he holds all the title that the Shaws could convey in the property in dispute.

After the conveyance to the defendant Clement in 1886, the plaintiff gave to the Shaws and to Clement notice in writing that

he claimed a forfeiture of all the rights granted to the Shaws by said deed, for failure on their part to comply with the conditions thereof, and forbade their entering upon said lands or stream or using the canal and locks; and he fastened the gates of the locks. Afterwards the defendant, for the purpose of removing the bark that had been peeled and was then upon the lands, entered upon the premises, removing the fastenings, which the plaintiff had put upon the gates, and with his boats and scows, transported his bark over said lakes and stream, doing no unnecessary damage. And for those acts the plaintiff brought this action of trespass. The court below ruled that it could not be maintained. We think the ruling was correct.

There is no condition in the deed that the rights in the stream and the locks and canals, which the Shaws might erect under the grant, should be forfeited on failure to pay for the bark or logs as stipulated, nor that on failure to pay as stipulated, the title to the logs and bark cut should be forfeited to the plaintiff. True, there was a covenant on the part of the Shaws to cut and pay for the logs and bark as stipulated. But there is no stipulation that a failure to keep that covenant should forfeit their rights to their erections upon the stream and the use of them for navigation.

We think it unquestionable that in 1886, when they conveyed to the defendant, they owned the bark which they had cut prior to 1883, and had a right to use the stream and their erections upon it for the purpose of transporting the same to their tannery, or to a market; and that by the conveyance to the defendant he succeeded to their rights, and that the plaintiff had no right to close the navigation of the stream against him. In doing what he did, the defendant was not a trespasser.

Exceptions overruled.

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

SAMUEL BUNKER *vs.* FIFIELD IRELAND.

Somerset. Opinion May 18, 1889.

Promissory note. Guaranty. Limitations.

The following agreement: "April 18, 1877, for a valuable consideration to me paid by S. Bunker and for value received I promise to pay S. Bunker the within note, it being goods furnished my family.

Witness, J. P. Spooner.

FIFIELD IRELAND."

written on the back of a promissory note of the following tenor:

"$105. December 26, 1874.

After date I promise to pay to the order of S. Bunker one hundred and five dollars and interest in ten equal monthly payments from date, value received.

ARDELL M. IRELAND."

is not a promissory note, signed in the presence of an attesting witness,— but a guaranty; and an action upon it as barred in six years.

ON EXCEPTIONS.

Assumpsit on the writing signed by the defendant set out in the head note. Plea, general issue, with brief statement that plaintiff's action accrued more than six years prior to the commencement of the action.

The only evidence of consideration for the signing by defendant of the instrument declared upon, dated April 18, 1877, was the testimony of plaintiff that he agreed not to enforce payment of the note, signed by Ardell M. Ireland, for the present but for no definite time, in consideration that defendant would sign the instrument declared upon.

The instruction of the court to the jury, upon the question whether the statute of limitations was a bar to the action, was as follows:—

"There are several defenses mentioned here set up, and the first is the statute of limitations. That, under the evidence, which has been given here, is a question of law entirely. If the note stood alone it would be outlawed. If the writing on the back is a promissory note, that being witnessed, it is not outlawed; if not, it would be outlawed, if not a promissory note.

But that depends upon the construction given to the writing. It is therefore a question of law, and, for the purpose of enabling you to settle the facts in the case, that are involved here, I rule, for the purpose of this trial, that it is so far a promissory note that the witness takes it out of the statute of limitations."

There was a verdict for the plaintiff; and the defendant excepted to the ruling of the presiding justice.

Walton and Walton, *A. H. Ware*, with them, for defendant.

The instrument declared upon is not a promissory note, but a guaranty, and barred by the statute although witnessed. R. S., c. 81, § 86; *Young* v. *Weston*, 39 Maine, 492; De Coylar, Guar. & Suretyship, p. 40; Edwards' Bills & Notes, 2d ed., p. 215; *Colburn* v. *Averill*, 30 Maine, 310, 318; 2 Parsons' Notes & Bills, 2d ed., pp. 118, 124; *Bray* v. *Marsh*, 75 Maine, 452; *Hunt* v. *Adams*, 5 Mass. 358; *Moies* v. *Bird*, 11 Mass. 436, 439; *Mecorney* v. *Stanley*, 8 Cush. 85; *Howe* v. *Taggart*, 133 Mass. 284; *Crocker* v. *Gilbert*, 9 Cush. 131; *Dennett* v. *Goodwin*, 32 Maine, 44.

It is not a promissory note, because it is necessary to refer to another contract to ascertain the amount due. It is not payable in money, absolutely, without contingency, either as to amount, event, fund, or person. *Bunker* v. *Athearn*, 35 Maine, 364, 367; Story, Prom. Notes, § 22.

It was necessary to prove consideration of defendant's contract, but not of a promissory note. *Stone* v. *White*, 8 Gray, 589. His liability was contingent. *Chapman* v. *Wright*, 79 Maine, 595.

J. J. Parlin, for plaintiff.

The only question raised by the exceptions is whether the paper declared on is "so far a promissory note that the witness takes it out of the statute of limitations." No particular form of words necessary to constitute a promissory note if they import an absolute agreement to pay a certain sum of money. Edwards' Bills & Notes, 2d ed., pp. 118, 207. Here are all the elements of a promissory note. *Ins. Co.* v. *Whitney*, 1 Met. 21, 23; *Grinnell* v. *Baxter*, 17 Pick. 386; *Josselyn* v. *Ames*, 3 Mass. 274; *White* v. *Howland*, 9 Mass. 314, 316; *Ketchel* v. *Burns*, 24 Wend. 456; *Allen* v. *Rightmere*, 20 Johns. 365.

Action is not barred. *Warren Academy* v. *Starrett*, 15 Maine, 443; *Marsh* v. *Hayford*, 80 Maine, 97.

LIBBEY, J. This is assumpsit on an instrument of the following tenor:

April 18, 1877.

For a valuable consideration to me paid by S. Bunker and for value received I promise to pay S. Bunker the within note, it being for goods furnished my family.

His
FIFIELD X IRELAND.
Mark.

Witness, J. P. Spooner.

This instrument is written on the back of the following promissory note.

$105. December 26, 1874.

After date I promise to pay to the order of S. Bunker one hundred and five dollars and interest in ten equal monthly payments from date; value received.

ARDELL M. IRELAND.

The defendant relies on the statute of limitations, and the only question in contention is, whether the instrument declared on is a promissory note, signed in the presence of an attesting witness, or a guaranty,—a collateral undertaking to pay the debt of another.

We think it cannot be held to be a promissory note but must be held to be a guaranty. It is agreed, that the only consideration for it, was temporary forbearance on the part of the plaintiff to enforce payment of the note on which it is written. It goes with that note and has no validity independent of it. It is a "promise to pay S. Bunker, (the payee) the within note." If the note had ceased to have legal validity by payment or any other means, it would be a good defense to the defendant. If Ardell M. Ireland had paid the note after the defendant's promise was written upon it, it would be a good defense to the defendant. *Comm. Ins. Co.* v. *Whitney*, 1 Met. 21.

It is an agreement to pay the debt of another and must be in writing and for a good consideration, to be binding. *Comm. Ins. Co.* v. *Whitney*, *supra*, is relied on by the plaintiff as decisive of

this case. But in that case, the defendant, by his promise in the presence of an attesting witness, admitted the validity of his own promissory note, and agreed to pay it on demand. The promise was an original one, and not a guaranty. The maker of a note can not be a guarantor of it. But that case is in conflict with *Young* v. *Weston*, 39 Maine, 492, decided fifteen years later by our own court; and if we were required to follow either we should follow our own decision. But the facts of this case do not bring it within the authority of either of those cases. In both, the new agreement was by the promisors of the notes. The contract declared on here comes within the definition of guaranty. 1 Bouv. Law Dict. 570, "Guaranty." *Oxford Bank* v. *Haynes*, 8 Pick. 423; *True* v. *Harding*, 12 Maine, 193.

Exceptions sustained.

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

GEORGE W. BROWN, appellant, *vs.* DANIEL W. FESSENDEN, executor.

Cumberland. Opinion May 20, 1889.

Executor. Rents and Profits. Probate. Account.

Rents and profits of real estate of a deceased insolvent debtor go to the devisee or heir and not to the executor.

Where an executor did not become chargeable, as executor, for rents of real estate taken by him for the devisee, he was not required to account therefor in the settlement of his account with the probate court.

ON REPORT, upon agreed statement.

This was an appeal from the probate court, for Cumberland county, upon the settlement of the appellee's account as executor of the will of Daniel Brown, late of Portland, deceased. By his will the testator, after the payment of certain legacies, devised and bequeathed to the appellee, said Fessenden, all his estate, in trust, for the benefit of his son, the appellant, until he should arrive at the age of thirty years, at which time the trust would

terminate, and the property vest in the appellant. Fessenden did not file any bond as testamentary trustee, nor did he qualify as such. While he was executor he collected certain of the rents and income of the real estate and paid part of it to the appellee, who claimed, upon the settlement of the executor's account, that the rents and income should be accounted for by the appellee as executor. A written motion to this effect was denied by the probate judge who decreed, as matter of law, that he was not required as executor to do so. An appeal was taken from this ruling and decree.

No action of the probate court was ever taken in regard to said trustee, nor any bond as such trustee required. He regarded himself, in collecting the rents, as trustee and not as executor. The estate being insolvent was disposed of under a license from the probate court and the proceeds of the sale were required for the payment of the testator's debts.

The question presented for decision was whether the appellee should be held to account, as executor, for the balance of rent and income which he collected and had not paid over to the appellant.

Frank and Larrabee, for appellant.

Executor's bond should be holden for the rents collected and not paid to the heir. R. S., c. 64, § 57. "If any part of the real estate is used or occupied by the executor or administrator, he shall account for the income thereof to the devisee or heirs in the manner ordered by the judge," etc. R. S., of Mass., c. 144, § 5. *Brooks* v. *Johnson*, 125 Mass. 310; and cases cited. Not relieved as executor until he qualifies as trustee. R. S., c. 68, § 1; *Groton* v. *Ruggles*, 17 Maine, 137; *Deering* v. *Adams*, 37 Id. 275; *Daggett* v. *White*, 128 Mass. 398; *Choate* v. *Arrington*, 116 Id. 552; *White* v. *Ditson*, 140 Id. 351; *Riggs* v. *Baptist Church*, 3 N. E. R. 831; *Prior* v. *Talbot*, 10 Cush. 1.

S. C. Strout, *H. W. Gage*, *and C. A. Strout*, for appellee.

Executor had no right to take possession of the land and collect rents until it became necessary to sell the real estate for the payment of debts. *Stearns* v. *Stearns*, 1 Pick. 158; *Drinkwater* v.

Drinkwater, 4 Mass. 358; *Palmer* v. *Palmer*, 13 Gray, 328; *Stinson* v. *Stinson*, 38 Maine, 594; *Fuller* v. *Young*, 10 Id. 371.

Rents and profits of real estate belong to the heirs, or devisees, after the death of the deceased testator until a sale by the executor or administrator to pay debts. This applies even when the estate is insolvent. *Kimball* v. *Sumner*, 62 Maine, 307; *Fuller* v. *Young*, *supra*, 387; *Stinson* v. *Stinson*, *supra*; *Mills* v. *Merryman*, 49 Maine, 66; *Gibson* v. *Farley*, 16 Mass. 287. Fessenden could not collect the rents as executor; he did not take them as testamentary trustee, not having qualified as such.

Nothing appears to warrant a supposition that any arrangement existed, which would bar the plaintiff of the usual remedy at law. *Palmer* v. *Palmer*, *supra*; *Almy* v. *Crapo*, 100 Mass. 218.

The facts warrant the conclusion that Fessenden acted as the agent of the heir, and is personally responsible, but not as executor.

In *Brooks* v. *Johnson*, 125 Mass. 310, the heirs gave the executor no authority to collect rents. In *Choate* v. *Arrington*, 116 Mass. 552, the executor charged himself in his first account with the income collected, which was assented to by the parties interested and it was allowed by the court. He continued the collections until the trustees were ready to assume charge of the trust estate. The only point decided in *Daggett* v. *White*, 128 Mass. 398, was whether the probate court could appoint another person as trustee where an executor delayed too long to qualify as trustee.

In *Briggs* v. *Baptist Church*, 3 N. E. R. 831, testator directed the executor to take possession, as executor, and rent the real estate. The executor was therefore bound to account for the rents and income received therefrom.

HASKELL, J. It is the settled law of this state that rents and profits of the real estate of a deceased insolvent debtor, until it shall be sold for the payment of debts, belong to the devisee or heir at law, and not to the executor or administrator. *Kimball* v. *Sumner*, 62 Maine, 305.

When an executor or administrator takes rents of real estate, by agreement with the devisee or heir, as assets, to save the real estate from sale, or for the advantage of all persons interested,

then it is proper enough to include the same in the probate account; but by operation of law, independent of any agreement of the parties, such rents do not belong to the executor or administrator, and are not assets that he is required to administer or account for within the condition of his bond. If a will should give such rents to an executor to be administered by him, or should make them assets to be administered upon, the case would be different.

In the case at bar, the testator devised his real estate to his executor by name, in trust for the benefit of a son until he should arrive at the age of thirty years. This is clearly a testamentary trust, and the income of the real estate did not become assets to be administered by the executor. True, the trustee, now dead, did not qualify as trustee by giving the bond required by statute, but, so acting, received certain rents and profits of the real estate, and paid a portion of the same to his *cestui* in accordance with the terms of the trust as defined in the will.

In what capacity the supposed trustee took and received the rents and profits in question it is not now necessary to decide, as it is clear that they did not come to his control as executor by operation of law, nor by force of any agreement of the parties in interest.

Decree of the judge of probate affirmed with costs.

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

ROSCOE F. CROSS and others, in equity, *vs.* ALPHEUS S. BEAN, and RUFUS G. A. FREEMAN.

Oxford. Opinion May 20, 1889.

Equity. Deed. Reformation. Mutual mistake. Bona fide purchaser.

Equity will reform written instruments so that they shall conform to the precise intent of the parties to them, when a mutual mistake is shown by proofs that are full, clear and decisive, free from doubt and uncertainty, and such as to entirely satisfy the conscience of the court.

In such cases, courts of equity will interfere only as between the original parties, or those claiming under them in privity, including purchasers from them, with notice of the facts.

Where, in a bill to reform a deed, there was no allegation that a subsequent purchaser had notice, the plaintiff was allowed to amend his bill.

ON REPORT. Bill in equity, heard on bill, answers and proof.

The bill was brought to reform a deed of land described as lot No. 6, in range 5, so as to read lot No. 5, in range 6, such being alleged to be the original intent and oral agreement of the parties; but by mutual mistake, the former lot instead of the latter was inserted in the deed. The deed is dated February 20, 1873; and the purchasers, who have had the use and occupation of lot No. 5, and which they allege they supposed was the lot covered by their deed, did not discover the error until thirteen years later and after it had been purchased of the same owner, by the defendant Bean.

The following is a summary of the bill. Defendant, Freeman, under whom the parties claim, was the owner of lands in Fryeburg Academy Grant, Oxford county, embracing lot No. 6, range 5, and lots No. 4, and 5, range 6, according to a plan of the township. Prior to February 20, 1873, negotiations were carried on by the plaintiff Cross, and Charles Gerrish, deceased, with Freeman for the purchase of lot No. 5, through his agent, one John P. Lowell, of Bethel, who represented him in the management and sale of said lands. Lowell showed Cross and Gerrish the lot, and pointed out the lines of it to them. After agreeing upon the terms of the sale and purchase, Freeman, who lived at a distance and was informed by letter from his agent, made and executed a deed to Cross and Gerrish, February 20, 1873, supposed by them and the agent to convey lot No. 5. But it so happened by accident and mistake, and without design on the part of any one, that Freeman conveyed to Cross and Gerrish, lot No. 6, range 5, in said grant, instead of lot No. 5, range 6.

October 2, 1886, plaintiffs sold defendant Bean all the birch timber on said lot No. 5; and he being desirous of obtaining more birch timber bargained with Freeman through his agent, son of the former agent, deceased, for lot No. 4, range 6, in said grant; and on November 6, 1886, Freeman made and executed, as

directed by his agent, but by mistake and without design, a deed to Bean, which according to its legal effect conveyed lot No. 5, range 6, and which is the same lot occupied and claimed by the plaintiffs. Soon after Bean received his deed he discovered the mistake, and denied the plaintiffs' ownership in lot No. 5, range 6; and refused to pay for the birch timber on it which he had bought of them. They further allege that said Bean bargained for lot No. 4, instead of lot No. 5, paying therefor twenty-five dollars; and that the fair value of lot No. 5, deeded to him by mistake is $500, and lot No. 6, range 5, is of no real value; and that they had no knowledge of the lotting of the grant, and always supposed their deed described the lot bargained and paid for until the mistake was discovered by said Bean. They have offered to reimburse Bean for all he had paid out on account of said conveyance; and have asked him to release to them lot No. 5, range 6, which he refused to do; and allege their willingness to release lot No. 6, range 5, to Freeman, etc.

They further allege that after Bean discovered these mistakes he procured December 4, 1886, a deed to himself of lot No. 4, range 6. The prayer of the bill asks that the deed from Freeman to Cross and Gerrish may be reformed so that it shall describe the lot bargained and paid for, viz., lot No. 5, range 6, in said grant, and that the deed of said Freeman to said Bean purporting to convey the last named lot may be cancelled and annulled, or that said Bean be ordered and required to release to plaintiffs said lot; and that such relief be granted as will not prejudice the plaintiffs in recovering from said Bean the amount agreed to be paid by him for said birch.

There is no allegation in the bill charging Bean with notice of the first deed and the error in it. The deed does not appear to have been recorded.

A. E. Herrick, for plaintiffs.

Courts of equity frequently grant relief in similar cases. *Burr* v. *Hutchinson*, 61 Maine, 514, and cases cited; *Bush* v. *Hicks*, 60 N. Y. 298; *Peterson* v. *Grover*, 20 Maine, 363; 2 Pom. Equity, § 981.

R. A. Frye, for defendant, Bean.

Counsel cited: *Young* v. *McGown*, 62 Maine, 56; *Smith* v. *Greeley*, 14 N. H. 378; *Gillespie* v. *Moon*, 2 Johns. Ch. 585, 597; *Getman* v. *Beardsley*, Id. 274; *Lyman* v. *Ins. Co.*, Id. 630; Waterman, Con., §§ 361 to 368; *Fehlberg* v. *Cosine*, 5 N. E. R. 763; (R. I.). *Farley* v. *Bryant*, 32 Maine, 474; 1 Greenl. Ev. §§ 63, 120; *Pike* v. *Crehore*, 40 Maine, 503; *Dow* v. *Sawyer*, 29 Id. 117; Heard, Eq. Pl., 34; Best Ev., § 285; *Ins. Co.* v. *Gurnee*, 1 Paige, Ch. 278; *Whitman* v. *Weston*, 30 Maine, 285; *Foster* v. *Kingsley*, 67 Id. 152.

A. W. Paine, for defendant, Freeman.

Freeman not proper party to the bill. He is a mere witness. Daniel, Ch. 5, Am. Ed. *256 and note; 295, c. 5, § 4; *281, 283, 285, 296; Story, Eq. Pl., §§ 78, 173 to 180, 231; *Pratt* v. *B. & A. R. R.*, 126 Mass. 443, and cases cited; *Palmer* v. *Stevens*, 100 Mass. 461, 465, 467; *Moor* v. *Veazie*, 32 Maine, 343; *Buffington* v. *Harvey*, 95 U. S. 99; *Duncan* v. *Luntley*, 48 Eng. Ch. 30; *Montague* v. *Lobdell*, 11 Cush. 111; *Canedy* v. *Marcy*, 13 Gray, 373; *Laughton* v. *Harden*, 68 Maine, 208, and cases cited; *Williams* v. *Smith*, 49 Id. 564; *Williams* v. *Russell*, 19 Pick. 162; *Burlingame* v. *Hobbs*, 12 Gray, 367; *Woodbury* v. *Gardner*, 77 Maine, 68, 75.

Fraud not being charged, bill cannot be sustained, unless grantee besides payment has been in possession and made valuable improvements which can not be removed. *Glass* v. *Hulbert*, 102 Mass. 24; *Ahrend* v. *Odiorne*, 118 Mass. 261, 268; *Burns* v. *Daggett*, 141 Id. 368, 373, and cases cited; *Woodbury* v. *Gardner*, *supra*, 32, 37; *Douglass* v. *Snow*, 77 Maine, 91, 92.

Bean being the only party who can correct the mistake can not be decreed to convey unless he bought with fraudulent intent to cheat. If he bought, after information that plaintiffs claimed the lot, that does not create a trust such as to expose him to a decree. *Pratt* v. *Taunton Copper Co.*, 123 Mass. 110; *Bank* v. *Field*, 126 Id. 345; *Pratt* v. *B. & A. R. R.*, *supra*; *Brown* v. *Kendall*, 6 Cush. 292; *Lyons* v. *Child*, 61 N. H. 72, 74; *Brown* v. *Collins*, 53 Id. 442.

The thirteen years delay and acquiescence by plaintiffs was such

laches as to justify Freeman in selling the lot to another as he did, innocently, and without knowledge of the mistake. *Stockbridge Co.* v. *Hudson Co.*, 102 Mass. 45, 48; *Plymouth* v. *Russell Mills*, 7 Allen, 438, 444, and cases cited; *Farnam* v. *Brooks*, 9 Pick. 212, 242 to 248; *Peabody* v. *Flint*, 6 Allen, 52, 57; *Royal Bank* v. *R. R.*, 125 Mass. 490, 494, 495; *Wagner* v. *Baird*, 7 How. 234; *Holdane* v. *Trustees, &c.*, 21 N. Y. Ch. 477; *Veazie* v. *Williams*, 8 How. 134; *Mactier* v. *Osborn*, 146 Mass. 399, 402; *Hancock* v. *Carlton*, 6 Gray, 39, 59.

Plaintiffs in reply.

Freeman properly joined as party defendant. *Richards* v. *Pierce*, 52 Maine, 563; *Whittemore* v. *Cowell*, 7 Allen, 448; *Davis* v. *Rogers*, 33 Maine, 224, 225; *Pierce* v. *Faunce*, 47 Id. 413; *Laughton* v. *Harden*, 68 Id. 209; *Farley* v. *Bryant*, 32 Id. 488.

Statute of frauds not a bar. *Peterson* v. *Grover*, 20 Maine, 364; *Scofield* v. *Stoddard*, 58 Vt. 290; *Lawrence* v. *Chase*, 54 Maine, 196, 201; *Bird* v. *Munroe*, 66 Id. 337, 346; *Farwell* v. *Tillson*, 76 Id. 227, 236, 237; *Montgomery* v. *Edwards*, 46 Vt. 151. Contrary doctrine to *Glass* v. *Hulbert*, is held in nearly all other states. *Hitchins* v. *Pettingill*, 58 N. H. 386; 2 Pom. Eq. §§ 865, 867 notes and cases cited.

Open possession sufficient. Pom. Eq. § 1409. Bean not a *bona fide* purchaser. *Farley* v. *Bryant*, *supra*; *Boggs* v. *Anderson*, 50 Maine, 161; 2 Pom. Eq. §§ 614 (n. 2,) 762.

Plaintiffs not guilty of laches. *Tash* v. *Adams*, 9 Johns. 467; *Merriam* v. *R. R.*, 117 Mass. 241; 2 Pom. Eq. § 965; *Farley* v. *Bryant*, *supra*.

HASKELL, J. Equity will reform a written instrument so that it shall conform to the precise intent of the parties to it, when a mutual mistake is shown by proofs that are full, clear and decisive, free from doubt and uncertainty, and such as to entirely satisfy the conscience of the court. *Fessenden* v. *Ockington*, 74 Maine, 123.

A mutual mistake between Freeman and Cross and Gerrish, the parties to the deed sought to be reformed, is sufficiently shown

to authorize the court to reform that deed, had the rights of another not intervened; but, the bill charges that Freeman, since the delivery of that deed, conveyed the premises intended to have been conveyed by it to Bean, and that the latter deed was not intended by the parties to convey such premises, but another lot of land; and by reason of a mutual mistake between the parties to this deed, its reform is also sought in order to authorize the reform of the first named deed from Freeman to Cross and Gerrish.

Inasmuch as the parties have agreed that the answer of Freeman shall be considered as though it had been called for in the bill to be under oath, it becomes evidence as to the matters in it responsive to the charges in the bill, and must be overcome by evidence.

Bean, in his answer, emphatically denies the charges in the bill that his deed from Freeman was mutually intended to convey a lot of land different from that described in it; and the proof fails to clearly and decisively sustain the charges of the bill in this particular. Whether he had knowledge of the deed from Freeman to Cross and Gerrish and of the error in it before he obtained his own deed, it is unnecessary to now decide, as no allegation of that sort is contained in the bill.

If Cross and Gerrish desire to amend their bill, by charging Bean with such knowledge of their deed and of its erroneous description of the premises, named in it, as will destroy the deed to Bean as a *bona fide* purchaser, they should be allowed to so do within thirty days after decree; otherwise the bill must be dismissed with costs.

Decree accordingly.

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

STEPHEN D. MILLETT in equity, *vs.* FRANK E. BLAKE, and DAVID M. WILLEY.

Piscataquis. Opinion May 23, 1889.

Name. Idem sonans. Sheriff's sale. Notice to debtor. Bill to redeem. Tender. Parties. R. S., c. 76, § 42.

The surname of Eliza A. Kealiher, in judicial proceedings in civil actions against her, and in proceedings for sale of her land, was spelled in the following different ways: *Kealiher, Keoliher, Kelliher, Kellier, Keolhier, Kelhier. Held,* that the names are *idem sonans*, and sufficiently identify her.

When, in a sale of a debtor's land on execution by an officer, the debtor resides out of the county where the land lies, and his residence is stated in the proceedings, a return by the officer that he "forwarded to the judgment debtor in this execution a like notice, by mail, postage paid," is a sufficient compliance with the requirements of the statute.

Under R. S., c. 76, § 42, a return by an officer on an execution that he took and sold "all the right, title and interest which" the debtor has, is sufficient to pass all the title of the debtor to the lands described.

No tender to an assignee of a mortgage, or demand on him for an account of the amount due on the mortgage, is necessary by a plaintiff claiming the right of redemption under an attachment of the equity, when such assignee had no interest in the mortgage, at the time of the attachment.

Such assignee is, however, a proper party to a bill brought by the owner of the equity, seeking to redeem the mortgage, where he contests the validity of the owner's title to the equity.

ON REPORT.

This was a bill dated December 26, 1883, to redeem a parcel of land from a mortgage, held by the defendant Blake, under an assignment from one Smith, holder of the original mortgage, dated April 16, 1880. The usual statute demand for an account was made on Blake, December 10, 1883; and no account was given. Plaintiff had no actual knowledge of the mortgage given by Blake to the defendant Willey, and Willey was not made a party to the bill until after the mortgage to him had been disclosed in Blake's answer. No demand was made on Willey for an account.

The case was reported by the presiding justice to the law court, by the agreement of the parties.

Henry Hudson, for plaintiff.

To the question of identity, counsel cited: Whart. Ev. §§ 701, 1273; *Goodell* v. *Hibbard*, 32 Mich. 48; *Tibbetts* v. *Kiah*, 2 N. H. 557; *Colburn* v. *Bancroft*, 23 Pick. 57, 58; *Com.* v. *Mehan*, 11 Gray, 321, 322; *Com.* v. *Gill*, 14 Gray, 400; Arch. Crim. Pl. (10th Ed.) p. 101; *Rex* v. *Foster*, Russ. & Ry. 412; *Com.* v. *Donovan*, 13 Allen, 571, 572; *Com.* v. *Jennings*, 121 Mass. 47. The names are different in *Shaw* v. *O'Brien*, 69 Maine, 501, and *Dutton* v. *Simmons*, 65 Maine, 583. The original certificate, produced for inspection, is competent evidence to show the date of the attachment was March 24, 1881. The officer may be permitted to amend his certificate. *Knight* v. *Taylor*, 67 Maine, 594; *Peaks* v. *Gifford*, 78 Maine, 362, 364.

Proper notice was given the judgment debtor. The officer adopts the exact language of statutes. *Townsend* v. *Meader*, 58 Maine, 288.

To the objection that the officer sold the debtor's right, title and interest and not the land, counsel cited: *Woodward* v. *Sartwell*, 129 Mass. 210.

Bill may be maintained, Blake not having rendered any account. R. S., c. 90, § 14; *Jones* v. *Bowler*, 74 Maine, 310, 314.

Demand on Blake sufficient. *Mitchell* v. *Burnham*, 44 Maine, 286. Should the court hold otherwise, by reason of the assignment of the mortgage to Willey, then the foreclosure by Smith is void, and plaintiff may be let in to redeem.

J. B. Peaks, *C. A. Everett*, with him, for defendants.

Attachment not valid because the officer's certificate of the attachment gives the name of defendant under which plaintiff claims as Kellier instead of Kealiher. It is a misnomer. *Shaw* v. *O'Brien*, 69 Maine, 501. Statute requires the officer to state in his certificate the date of the writ (which was March 24, 1881) and he returned it as being March 29, 1881. Officer's testimony that he intended to make it March 24, is not admissible. He is now plaintiff. *Pierce* v. *Strickland*, 26 Maine, 277, 289. Register's certified copy should control. R. S., c. 81, § 59; *Benjamin* v. *Spear*, 13 Maine, 187. Officer should have sold the equity of redemption, or the land, and not the debtor's right, title and

interest. We do not know by the return where the officer sent the notice to the debtor.

Bill should be dismissed as to Willey with costs because no notice was given him to account.

Blake could not discharge the mortgage after the assignment, and Willey having no notice to account, the bill should be dismissed as to both.

LIBBEY, J. This is a bill in equity to redeem a lot of land situated in Orneville, Piscataquis county, from a mortgage given by Eliza A. Kealiher to Joseph L. Smith, dated April 16, 1880, recorded April 17, 1880, and assigned by said Smith to the defendant, Blake, April 15, 1881, and recorded on the 18th of the same month.

The complainant claims the equity of redemption by virtue of an attachment on a writ in favor of *George W. Canney* v. *Eliza A. Kealiher*, on the 24th day of March 1881; judgment duly entered in that action; execution issued thereon; sale of the land by an officer on the execution to said Canney and deed from Canney to him dated November 12, 1883, recorded on the next day.

The defendants claim the land by conveyance from said Eliza A. Kealiher. They raise four objections to the validity of the plaintiff's title.

First. The want of identity as to mortgagor and the defendant in said attachment, judgment and sale. The name of the mortgagor in the mortgage is Eliza A. Kealiher of Lagrange. In the action, attachment and subsequent proceedings the name appears spelled as follows: in the writ, Eliza A. Keoliher of Lagrange; in the return of attachment, Eliza A. Kelliher; in the officer's certificate to the registry of deeds, Eliza A. Kellier; in the execution, Eliza A. Keolhier of Lagrange; in the return upon execution, Eliza A. Kelhier; in the sheriff's deed Eliza A. Keolhier of Lagrange. The land described in the officer's return of sale and in his deed to Canney is the same as that described in the mortgage.

Notwithstanding this difference in the spelling of the name in the proceedings relied upon, we think the sound in pronunciation

substantially the same. The residence of the party described when given is the same. The subject matter in which the name is used throughout is the same. It is worthy of remark, that while the name of the mortgagor, in the mortgage is Kealiher, that the defendant Blake in his notice of foreclosure of that mortgage, spells it Kelliher, one of the modes of spelling which he objects to in the proceedings relied upon by the plaintiff. We think the proceedings relied upon sufficiently establish the identity of the mortgagor throughout. *Tibbetts* v. *Kiah*, 2 N. H. 557; *Colburn* v. *Bancroft*, 23 Pick. 58; *Comm.* v. *Mehan*, 11 Gray, 322; *Comm.* v. *Gill*, 14 Gray, 400; *Comm.* v. *Jennings*, 121 Mass. 47.

Second. It is claimed that the date of the attachment was misstated in the officer's certificate to the registry of deeds. It is claimed by the defendants that the date of the attachment as stated in the certificate is March 29 instead of March 24. The date of the certificate returned to the registry is March 24, 1881. The original certificate returned to the registry is exhibited to the court for inspection. Although the second figure in the date of the attachment is somewhat obscure, still taken in connection with the date of the certificate itself, we read the date as March 24, and not 29.

Third. It is claimed that the sale by the officer is invalid for want of proper notice. That the proper notice, as appears by the officer's return, was posted in the town where the land was located and in two adjoining towns and published in a newspaper as required by law, is not questioned. After stating the posting of the notices in the towns, the officer in his return says, "and having forwarded to the judgment debtor in this execution a like notice by mail, postage paid, she not being a resident of Piscataquis county," more than thirty days before the sale. It is objected that this is not a sufficient return of notice to the debtor, because it does not appear directly, to what place or post office, the notice was sent. When the debtor's land is taken on execution and transferred to the creditor by levy, or sold at auction, the general rule is that the officer's return shall state in substance that every act was done, required by statute to constitute a valid levy or sale.

It is not necessary, however, that the officer should state in his return in direct terms the performance of such acts. No particular phraseology is required. It is sufficient if it appears by the language used, or can be reasonably and fairly inferred from it that the act was done. As in *Sturtevant* v. *Sweetser*, 12 Maine, 520, where the officer in his return of a levy, stated that the debtor refused to appoint an appraiser and he appointed one for him, the court held that that was a sufficient statement by the officer that reasonable notice was given to the debtor for that purpose. And in *Bugnon* v. *Howes*, 13 Maine, 154, where the officer in his return of a levy, stated that the debtor neglected to appoint an appraiser and he appointed one for him, it was held a sufficient statement by the officer of notice to the debtor; because if notice had not been given, a return of the officer that the debtor refused to appoint or neglected to appoint, would be false.

In the case at bar, the debtor resided in Lagrange, was so described in the execution, and in all the proceedings. The officer states that he forwarded the notice "to the judgment debtor in this execution" by mail, postage paid, she not being a resident of his county. When the debtor is not a resident of the county where the land lies, the statute provides that the notice may be given by the officer to him, by mail, postage paid. The question here is, whether it may be fairly inferred from the language used, that the notice was given the debtor by mail directed to her at her residence, as stated in the execution. Something may be inferred as to the correctness of the action of a public officer when the law requires him to do a certain act. *Snow* v. *Weeks*, 75 Maine, 105. We think it may be fairly inferred from the officer's statement, that the notice was directed to the debtor at her residence, as stated in the execution. If not, it can not be true that he forwarded it to the judgment debtor in the execution through the mail. If not directed to her at her residence, but directed elsewhere, it was not forwarded to her through the mail; and the officer would be liable for a false return.

Fourth. It is claimed that the sale of the land or of the equity of redemption is invalid, because the officer returns only that he ook and sold "all the right, title and interest, which said Eliza

A. Kelhier had on the twenty-fourth day of March, A. D. 1881, in and to," the land described.

The defendants' contention is, that such a return of a seizure and sale is unauthorized by law, that the officer should say that he seized and sold the land. By R. S., c. 76, § 42, "real estate attachable, may be taken on execution and sold, as rights of redeeming real estate mortgaged are taken on execution and sold." * * * * "Such seizure and sale pass to the purchaser, all the right, title and interest that the execution debtor has in such real estate at the time of such seizure, or had at the time of the attachment thereof on the original writ, subject to the debtor's right of redemption."

Prior to the enactment of this statute, the right to redeem the debtor's lands under mortgage could be acquired by the creditor by levy of his execution upon the lands as provided in said chapter, or by seizure and sale of the equity of redemption. If by levy, the amount due upon the mortgage would be deducted from the appraised value of the land taken. So that by either mode, the creditor took the right to redeem only. Under § 42, the right of the creditor was enlarged so that he might sell a debtor's lands instead of making the levy, and in that way take all of the right, title and interest that he has in the lands, of any nature.

It is the settled law of this state, that an attachment of all the right, title and interest which the debtor has in lands, is a good attachment of the land itself. And the question presented here is whether under this enlarged remedy of the creditor, a seizure and sale of all the debtor's right, title and interest as rights of redeeming real estate mortgaged are taken on execution and sold, will pass to the creditor the debtor's right of redemption where the land is mortgaged. We think it will. We can see no good reason, and no sufficient reason has been pointed out by counsel, why the statute should not be so construed. We think such a seizure and sale will pass to the creditor all the debtor's right, title and interest in the land, whether it be a fee or a less estate.

The same question came before the court in Mass. in *Woodward* v. *Sartwell*, 129 Mass. 210, under the statute of that state of 1874,

c. 188, which in terms is substantially if not precisely like § 42 of our statute, and was elaborately considered by that court. And the court held that the seizure and sale of all the right, title and interest of the debtor by the officer upon execution, passed to the creditor the title to the land, as against a prior unrecorded deed of the debtor. The reasons for that construction are fully stated in the opinion by Judge Endicott in that case; and we adopt them here without restating them.

But the defendants say, assuming the plaintiff's title to the equity to be valid, this bill cannot be maintained, because it does not allege a tender of the amount due on the mortgage to Willey or a demand on him for an account and a refusal or neglect to render one.

We think the answer to this position is, that by the case as reported, it does not appear that Willey had any interest in the mortgage from Kealiher to Smith, which the plaintiff seeks to redeem. The attachment under which the plaintiff holds was made March 24, 1881. Kealiher at that time held the equity of redemption. She conveyed to Blake April 14, 1881, and Blake mortgaged to Willey on the same day. Smith assigned the Kealiher mortgage to Blake April 15, 1881, so that it appears that when Blake made his mortgage to Willey, he had no interest in the Smith mortgage. It follows therefore, that Willey has no right to the money due on that mortgage. He is a proper party in this process, because he claims under Blake and contests the validity of the plaintiff's title.

The result is, that the plaintiff has a right to redeem the Smith mortgage. The amount due may be assessed at *nisi prius*, or a master in chancery may be appointed.

Bill sustained.
Costs for plaintiff.

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

STEPHEN H. WEEKS, in the name of and by authority of the Attorney General, petitioner for mandamus, *vs.* ORAMANDAL SMITH, Secretary of State, and CHARLES W. TILDEN, Secretary of the Senate.

Kennebec. Opinion May 31, 1889.

Mandamus. Judicial inquiry into passage of laws. Records. Evidence. "Medical Registration Act" of 1887, *not a law.*

Mandamus to redress a public grievance must be moved for and prosecuted by the attorney for the state in the state's behalf.

Whether an act of the legislature be constitutionally passed is a judicial question, to be decided by the bench from an understanding of public matters, regardless of plea or proof.

The secretary of state is a constitutional officer, and is required to "carefully keep and preserve the records of all the official acts and proceedings of the Governor and Council, Senate and House of Representatives;" and such records are to be kept in his office.

The records of the proceedings of the legislature in the secretary's office, fair upon their faces, showing no infirmity that would invalidate the record if not explained, are conclusive evidence of what they purport to be, and can not be overturned by parol evidence.

The "Medical Registration Act" of 1887, is shown by the record in the secretary's office to have been vetoed by the governor and refused a passage over the same;—and the record is conclusive.

ON REPORT, AND EXCEPTIONS.

Petition for mandamus, in the name of and by authority of the attorney general, to compel the secretary of state to restore a public law to its place in his office, among the public laws of the state.

It appears by the records of the secretary of state's office that the legislature of 1887, passed what is known as the "Medical Registration Act," and sent the same to the governor for his approval, who within the time fixed by the constitution returned the bill without his approval, to the senate, where it originated, with a veto message stating his objections, as required by the constitution; and that the bill was there refused a passage over the governor's veto.

The petition was filed in Kennebec county, June 25, 1888, by

the relator in behalf of the Maine Medical Association, of which he is the president. The hearing took place before the chief justice July 11, 1888.

The respondents appeared by the attorney general and resisted the petition.

The material facts appear in the testimony of the governor's private secretary, called by the relator, the governor being dead. He testified, in substance: that on the morning of the 17th of March, the last day of the session, this bill with others was upon the governor's table, in the executive chamber, awaiting executive approval. The governor proceeded to consider and approve them, but directed his secretary to lay this one aside for the present. The governor had been previously furnished with a copy of the bill, and had read it and considered of it. He saw various persons and conferred with them concerning it, during the forenoon. About one o'clock he took the bill from its jacket, or envelope, signed it and handed it to his secretary who replaced it in its jacket, and laid it upon the governor's table. Immediately, the governor, without remark or direction to his secretary, left the executive chamber, and went to his home, in Hallowell, about two miles distant, for dinner. After his departure, his secretary took the bill to the office of the secretary of state, and left it with a clerk who entered it upon a list of acts approved, kept in a book for convenience, and to aid in the dispatch of business and not by requirement of law. The private secretary of the governor was accustomed to take bills from the executive chamber after being approved by the governor and without special orders to do so, either carry them to the office of the secretary of state, or deliver them to the messenger of the governor and council, to be taken there.

The private secretary further testified, in substance: that in about one hour and a half, after the governor left the executive chamber for dinner, he returned and immediately called for the "Registration Act," and upon being informed by his secretary that it had been carried to the office of the secretary of state, he directed his private secretary to "go down and get it,"—which he did. Thereupon the governor erased his name from the bill, by

drawing his pen through his signature, and returned the bill without executive approval, together with his objections, to the senate.

The following is a summary of the exceptions filed by the relator.

The relator claimed upon the evidence that the bill in question was, after full consideration, approved by the governor on the seventeenth day of March, 1887, in the forenoon, and was by him left in the possession of his private secretary, to be delivered to the secretary of state and deposited in his office among the public laws of the state; and that the governor some hours after, upon his return from dinner to his office in the state house, had changed his mind in regard to the approval of the bill and thereupon had determined to recall the act from the office of the secretary of state.

The relator further claimed upon the evidence that the governor, having on his return from dinner recalled the bill from its place of deposit in the secretary of state's office, was hesitating for several hours as to what action to take upon the bill, and did not determine to return the same, with the alleged veto message to the senate, until about eight o'clock in the same evening.

The relator at the hearing offered to introduce evidence of declarations of the governor, made during the time, from the return of the governor from dinner on March seventeenth, to the sending to the senate of the veto message, in the evening of that day, to the effect that, before going to dinner on March seventeenth, he had finally decided to approve the bill and had affixed his signature of approval thereto and sent it down to the secretary of state's office, and that it was then too late to do anything further about it; that remarking the strong vote, about three to one, by which it had passed, he had decided to approve the bill and leave the responsibility of the law, if it worked badly, upon the legislature; that later, and during the evening of the same day, the governor repeated the declarations to the same effect; that he had signed the bill and sent it down, but added that his impression during the afternoon had been that it was too late for him to do anything further about it, but that he had since been informed that he had a right to withdraw his approval, if he desired. The

relator also offered evidence of declarations of the governor to the same effect made at a later period; all of which evidence was excluded by the chief justice.

The case was reported upon the petition and evidence by consent of the parties, to the full court, to be heard at Portland at the July term of the law court. The full court were to decide the questions, and to determine whether the petition should be granted or not.

The "Medical Registration Act" has not hitherto been published, nor obeyed, as a public law of the state.

C. W. Goddard, and Symonds and Libby, for relator.

Mandamus is the appropriate remedy, apparently the only adequate one. R. S., c. 77, § 5; c. 102, §§ 16, 19; *Baker* v. *Johnson*, 41 Maine, 15; *Williams* v. *Co. Com.*, 35 Id. 345; *Smyth* v. *Titcomb*, 31 Id. 272; *Harriman* v. *Co. Com.*, 53 Id. 83; *Andrews* v. *King*, 77 Id. 224; High, Ex. Rem. §§ 63, 65, 80.

The question whether a statute exists and is valid and in force or not, is a purely judicial question, a question for the court. *Gardner* v. *The Collector*, 6 Wall. 499; *Town of S. Ottawa* v. *Perkins*, 4 Otto, 286; *Post* v. *Supervisors*, 15 Otto, 667; *Legg* v. *Mayor*, 16 Am. Law Reg., N. S. 25; Albany Law Jour., June 9, 1888, citing *Sherman* v. *Story*, 30 Cal. 253, S. C. 89 Am. Dec. 93; *Bank* v. *Ottawa*, 105 U. S. 667; *People* v. *Com. of Highways*, 54 N. Y. 276; *People* v. *Allen*, 42 N. Y. 381; *People* v. *Petrea*, 92 N. Y. 138; *Berry* v. *R. R.*, 41 Md. 446; *Opinion of the Justices*, 35 N. H. 580; *The Soldiers' Voting Bill*, 45 N. H. 607; *Opinion of the Justices*, 52 N. H. 622.

The statute under consideration is the law of the state. *People* v. *Hatch*, 19 Ill. 283; Cool. Con. Lim. (5th Ed.) *186; *People* v. *Devlin*, 33 N. Y. 283; *Tarlton* v. *Peggs*, 18 Ind. 26; *Jones* v. *Hutchinson*, 43 Ala. 721; *Harpending* v. *Haight*, 39 Cal. 189; *Marbury* v. *Madison*, 1 Cranch, 137; *Fowler* v. *Pierce*, 2 Cal. 165; *Prince's case*, 8 Coke, 28; *Bolander* v. *Stevens*, 23 Wend. 103; *People* v. *Purdy*, 4 Hill, 394; *Opinions of the Justices*, 70 Maine, 560, *et seq*; *People* v. *Mahaney*, 13 Mich. 492; *Evans* v. *Brown*, 30 Ind. 514; *R. R.* v. *Governor*, 20 Mo. 353; *State* v. *Whisner*, 35 Kans. 272; *Wolfe* v. *McCaull*, 76 Va. 876.

Exceptions: The governor's action in the forenoon was final. The bill thereby became a law, and his declarations in the afternoon could not be a part of the *res gestae* and were properly excluded. If otherwise, they must be regarded as parts of the *res gestae*, and in that case, are admissible.

Orville D. Baker, attorney general, for respondents.

There is no controversy but what it has been recognized and understood, that the bill was finally refused a passage over the veto, and never did become a law; all the people and state officials have governed themselves accordingly, ever since 1887.

Case differs from those cited by the relator, where the courts have gone underneath the apparent record to inspect and see whether the constitutional requirement was lacking, which had been supposed to exist.

The question is whether it is the duty of the court to breathe life into a rejected bill, where every step necessary for its rejection, as prescribed by the constitution and statute has been carried out, and received the solemn sanction, both of the executive and legislative branches of the government. The judicial branch is asked to set aside the deliberate and approved judgment of the two co-ordinate branches, after nearly two years have elapsed from the time when these events occurred, which, if ever, would make it law. The court has no power to act in this matter where every constitutional step has been taken to complete the rejection of the law; or to inquire into the evidence sought to be brought forward. No case cited justifies the exercise of such power.

The private memorandum book kept by the clerk in the secretary of state's office for his own convenience is not a public record. If admitted in evidence, the question would then arise whether the governor had a right to reconsider his own action, and erase his own signature on the bill, which he had signed, the erasure being made within the constitutional five days, which he has, to consider his action. The sole technical question would be then, whether by virtue of some assumed or grown up practice in the office among the clerks, that power, vested in him under the constitution, had been taken away from him, without his concurring mind, so far as the measure is concerned. The purpose

of this constitutional provision is to insure that nothing shall be done without serious and sufficient reflection; that no final action shall be taken until the executive has the opportunity to carefully consider,—and reconsider his act. The position contended for by the relator strips him of that power; ours permits its exercise. The usual routine of office, adopted by subordinates, can not strip him of this power, or the power to sign bills only upon his matured approval. It attaches to each bill, and can not be abridged by the superserviceable act of any subordinate in his office.

"The right to reconsider: *People* v. *Hatch*, 19 Ills. 283. The right to retract approval: *State* v. *Whisner*, 35 Kans. 272. The bill after being signed was not voluntarily placed by the governor in the custody of some independent department. *State* v. *Whisner*, *supra*. He gave no direction to have it taken any where out of his own custody when, after signing it, he went immediately to dinner. Any action the court can take in the present stage of the case would be nugatory and impossible. The act requires the appointment of a board of commissioners before May 1, 1887; certificates of registration must have been granted before January 1, 1888, with fines and imprisonment for neglect to register. Who shall command the governor to appoint the board of commissioners, upon whose appointment every provision of the bill is conditional? The writ prayed for would put upon the statute book a law impossible to execute; and a law made impossible by the laches of the petitioners.

J. W. Symonds, in reply.

This is an appeal to the discretion of the court. Not its will but its judicial discretion.

We contend that if the governor did not intend to deposit the bill in the secretary's office, still it became a law. Public policy requires that the outward act, the signing the bill, etc., must determine the fact of approval. There are no circumstances in this case to take it out of the operation of the general rule. The fact of deposit should control in all ordinary cases. The record shows that the governor, when he left his office at noon March 17, intended that law to go into the office of the secretary of state, and that he subsequently changed his mind. The routine of his

office is just as much an act of the executive, as any special act or any special word in any particular case.

The public act we wish restored is this enrolled act, and not the blotter.

There is no instance where the court will not receive secondary evidence when the public record, proved to have existed, has been proved to have been destroyed. We produce the original act itself. No lapse of time, nor neglect can deprive the people from ascertaining in a proper cause, evidence and proceedings, from its highest tribunal whether a public statute exists or not. It was impossible for us to obtain a decision of the court prior to the date when, under the act, the commissioners were to be appointed.

The record does not show that the senate knew the facts in regard to the deposit of the law with the secretary of state, when it acted upon the veto message.

HASKELL, J. The writ of mandamus is authorized by R. S., c. 77, § 5; but, as that statute does not provide in what behalf the remedy may be had, the rules of the common law apply.

A private person may move for the writ, in proper cases, when his personal rights have been invaded beyond those rights that he enjoys as a part of the public and that are common to every one; but, when the common right is invaded, it is a public grievance, and the remedy must be asked in behalf of the public, and by the proper officer, who is required by law to prosecute in the state's behalf.

If then, the right be a public right only, the attorney for the state must move for the writ; and this he must do in the state's behalf, in good faith, asking for no more than he believes the public weal to demand. *Sanger* v. *County Commissioners*, 25 Maine, 291.

This application is signed by Stephen H. Weeks, who informs in the name of and by authority of the attorney general. That officer, however, appears and resists the application. It seems as if this resistance must work a discontinuance of the relator's petition and end the case.

But, waiving any irregularity in the proceeding, the court considers it best to decide the only remaining question in the case,

viz.: Whether "an act to regulate the practice of medicine," supposed to have been enacted in 1887, is a statute of the state.

This is a judicial question, and has been so regarded from the time of horn-books. Saunders said at the bar more than three centuries ago in the time of Edward VI, (1553):

"And as to the statute, you judges have a private knowledge and a judicial knowledge; and of your private knowledge you cannot judge, but may use your discretion. * * * For the judges ought to take notice of statutes which appear to them judicially, although they are not pleaded." And it was so held in the common bench, *Partridge* v. *Strange*, Plow. 83. See also the case of *The Prince*, 8 Coke, 28. (3 Jac. 1606.)

A judicial knowledge does not result from plea and proof; but comes from an understanding of public laws and records, of the methods of the executive and legislature, from a knowledge of history and of historical facts, and of matters of public notoriety and interest; and commands inquiry from the widest field of general information.

In the *Duke of Norfolk's case*, 1 Dyer, 93, (1 Queen Mary, 1553), it being much debated among the judges, whether royal assent had been given to an act of parliament through letters patent, bearing the sign-manual of Hen. VIII, for want of the genuine signature of the king, inasmuch, first, as it was written beneath the tests of the patent, whereas he was used to put it above the head; and second, because the writing was so perfect that it could not have been written by a man so ill and near his death as the king was, for he died the same night; the clerk of parliament brought the original record of the act before the judges for their inspection of it.

In *King* v. *Arundel*, Hob. 108, (14 Jac. 1617), the validity of a private act of parliament being called in question before the Lord Chancellor and Coke and Hobart, chief justices, they, each *more suo*, proceeded to inform themselves of it by consulting the original roll and the journals of parliament.

In *Rex* v. *Jeffries*, 1 Strange, 446, (7 Geo. 1721.) The original parliament roll was referred to, to correct an error in printed statutes.

So, in *Rex* v. *Robotham*, 3 Burr. 1472, (4 Geo. III, 1764), the original act of parliament was examined and Lord Mansfield, and his associates declared its true construction, notwithstanding a manifest error in it.

The result of all the authorities upon this question is well stated by Mr. Justice Miller, of the supreme court, in *Gardner* v. *The Collector*, 6 Wall. 505. He says, p. 511:

"We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, the judges, who are called upon to decide it, have a right to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." *Post* v. *Supervisors*, 105 U. S. 667. *State* v. *Wagner*, 61 Maine, 178.

Although the question to be here decided is a judicial question, the legislature not having enacted any rule touching the effect to be given to those considerations from which a conclusion must be reached, the rules of the common law must control so far as they can be of any aid.

The first and best evidence of a statute is the enrolled act, accomplished by the deposit of the original act, when approved by the governor, in the office of the secretary of state, who, by the Constitution, Art. V, § 4, is required to "carefully keep and preserve the records of all the official acts and proceedings of the governor and council, senate and house of representatives;" and, by R. S., c. 1, § 4, is required to give written notice to the senate and house of the approval of all public acts by the governor; and, by R. S., c. 2, § 44, is to cause to be printed all public laws passed at each session of the legislature within thirty days after the close thereof.

The deposit of a statute in the secretary's office is equivalent to the English custom of enrollment; and the original act thereby becomes the record; precisely as a private act of the English parliament has been held to be the record of parliament without enrollment; for it is not customary to enroll private acts, but only to deposit them with the clerk of parliament.

The houses of parliament were not required by law to keep journals; and these, therefore, have been held not to be records, but remembrances only, that expired when parliament dissolved. But our constitution, like the constitution of the United States and of most or all of the sister states, requires both branches of the legislature to keep journals of their proceedings, thereby making them public records to be looked to, when nó higher or better source remains from which to establish the validity of a statute.

But when the original act, duly certified by the presiding officer of each house to have been properly passed, and approved by the governor, showing upon its face no irregularities or violation of constitutional methods, is found deposited in the secretary's office, it is the highest evidence of the legislative will, and must be considered as absolute verity, and cannot be impeached by any irregularity touching its passage shown by the journal of either house.

Legislative journals are made amid the confusion of a dispatch of business, and are therefore much more likely to contain errors than the certificates of the presiding officers are to be untrue. Moreover, public policy requires that the enrolled statutes of our state, fair upon their faces, should not be put in question, after the public have given faith to their validity. No man should be required to hunt through the journals of a legislature to determine whether a statute, properly certified by the speaker of the house and president of the senate and approved by the governor, is a statute or not.

The enrolled act, if a public law, and the original, if a private act, have always been held in England to be records of the highest order, and, if they carry no "death wounds" in themselves, to be absolute verity and of themselves conclusive.

In *King* v. *Arundel*, Hob. 108, the validity of an act of parliament came in question because of a suggestion that, although the act made no mention of a proviso, yet the indorsement upon it made in the lower house indicated its passage in that house with a proviso, and that it had not received the assent of both houses without the proviso.

The act, being a private act, as customary, had been properly

filed with the clerk of parliament and by him labelled and sealed, but not enrolled as public acts are, and thereby became the original record.

The lord chancellor and chief justices sought information from the original act and the journals of parliament and said:—

"Now journals are no records, but remembrances for forms of proceedings to the record; they are not of necessity, neither have they always been. They are like the dockets of pronotaries, or the particular to the king's patent. Co. Lib. 2, 34, b. and 16 Eliz. 331, of the particular. The last intended parliament, 10 Jac., if you be judged by the journal, it was a large and well occupied parliament, yet, because no act passed nor record is of it, it was resolved by all the judges to be no parliament.

"The journal is of good use for the observation of the generality and materialty of proceedings and deliberations as to the three readings of any bill, the intercourses between the two houses and the like; but, when the act is passed, the journal is expired. And in this journal there appears but one reading of the bill in the upper house when it passed, which is unlikely. But if the record of the act itself carry its death wound in itself, then it is true that the parchment, no nor the great seal, either to the original act, or to the exemplification of it, will not serve as in the 4 H. VII, 18, when the act was by the king with the assent of the lords (omitting the commons,) and was judged therefore void. And he that observes the case of 33 H. VI, 17, which was the only case relied upon by defendant's counsel, shall find it so; and upon this rule the doubt to be conceived, *scil.*, upon the parliament roll itself, not upon the journal."

The two leading cases in this country that hold to this doctrine are *Pangborn* v. *Young*, 32 N. J. L. 29, and *Sherman* v. *Story*, 30 Cal. 253. The New Jersey case so carefully considers the question and reviews the authorities that its conclusion is irresistible, that, under a constitution like our own, an enrolled statute can not be set aside by resort to journals of the legislature or other parol evidence. The court says:—

"The court can not try issues of fact; nor, with any propriety, could the existence of statutes be made dependent upon such

investigations. With regard to matters of fact, no judicial unity of opinion could be expected, and the consequence would necessarily be, that the conclusion of different courts, as to the legal existence of laws, from the same proofs, would be often variant, and the same tribunal, which to-day declared a statute void, might to-morrow be compelled, under the effect of additional evidence, to pronounce in its favor. The notion that the courts could listen upon this subject to parol proof is totally inadmissible, and it therefore unavoidably results, that if the journal is to be taken into consideration at all, its effect is uncontrollable; neither its frauds can be exposed, nor its errors corrected." * * * *

"The prerogatives, to make, to execute, and to expound the laws must reside somewhere. Depositaries of those great national trusts must be found, though it is certain that such depositaries may betray the confidence thus reposed in them. In the frame of our state government, the recipients and organs of this threefold power are the legislature, the executive and judiciary, and they are co-ordinate—in all things equal and independent; each, within its sphere, is the trusted agent of the public. With what propriety, then, is it claimed that the judicial branch can erect itself into the custodian of the good faith of the legislative department? It is to be borne in mind that the point now touched does not relate to the capacity to pronounce a law, which is admitted to have been enacted, void by reason of its unconstitutionality. That is clearly a function of judicature. But the proposition is, whether, when the legislature has certified to a mere matter of fact relating to its own conduct and within its own cognizance, the courts of the state are at liberty to inquire into or dispute the veracity of that certificate? I can discover nothing in the provisions of the constitution, or in the general principles of government, which will justify the assumption of such superior authority. In my opinion, the power to certify to the public laws itself has enacted is one of the trusts of the constitution to the legislature of the state."

The California court says:—

"Better, far better that a provision should occasionally find its way into the statute through mistake, or even fraud, than

that every act, state and national, should at any and all times be liable to be put in issue and impeached by the journals, loose papers of the legislature and parol evidence. Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable."

The court of Ohio in *State* v. *Smith*, 44 O. 349, says:—

"Public policy requires that the authority of laws should rest upon public memorials of the most permanent character. They should be public, because all are required to conform to them; they should be permanent, that rights acquired to-day upon the faith of what has been declared to be law shall not be destroyed to-morrow, or at some remote period of time by facts resting only in the memory of individuals."

In contrast with these sound doctrines, compare the mischiefs flowing from the series of decisions of the Illinois supreme court, holding a printed statute of the state, that had been solemnly certified and signed by the presiding officer of each house and approved by the governor, and filed and published as law, to be void, because the legislative journals did not show all constitutional requirements to have been had in its passage, and consequently, that municipal bonds, issued in conformity with the published statute, were void in the hands of innocent holders, who thereby suffered irreparable loss in trusting to a published statute of the state.

Moreover, the supreme court of the United States was compelled to sustain these decisions because they treated entirely of state questions of which the decision of the state court was conclusive. *Post* v. *Supervisors*, 105 U. S. 667, and cases there cited.

In the case at bar, the act in question is found in the secretary's office, the archive of the state. Upon it is indorsed the certificate of the presiding officer of each house of the legislature, under date of March 17, showing that the bill having had three several readings in the house and two several readings in the senate passed that day to be enacted. Upon it is also indorsed a certificate of the secretary of the senate of the same date. "Returned to the senate by the governor. Signature refused. Failed of a passage over his veto."

This act with the indorsements upon it is a record of the highest order, and, under the doctrines above declared, is absolutely conclusive, unless upon its face it bears its own "death wound."

An inspection of the act discovers above the certificate of the secretary of the senate and under the certificates of the presiding officers of both houses the words, "Approved, March 16, 1887," and the signature of the governor with a heavy line in ink drawn through the March 16 and the name of the governor.

This supposed infirmity may explain itself, for the date of the supposed approval appears to have been the day before the bill passed either house of the legislature to be enacted, as if the bill by mischance had been prematurely sent to and by mistake signed by the governor, who, upon discovering the error, corrected the same by making the erasure and returning the bill to the legislature to be put upon its final passage.

But however this may be, accompanying the original act is found the veto message of the governor, under date of March 17, that had been returned with the act to the senate, with his objections as required by the constitution. This is also a record of high order, and most completely cures the supposed irregularity shown upon the face of the act, and is conclusive evidence that the same was returned to the senate without executive approval. No act of the legislature can become a statute when the governor withholds his approval and seasonably returns the same to the proper house with his objections. This act was returned to the proper branch of the legislature on the same day of its passage by the governor with his veto. That was a deliberate act, solemnly done, by the chief executive of our state, and has passed into a record so complete and conclusive, that no evidence of a lower grade can be permitted to overthrow it. He alone was trusted by our people to wield the veto power; and his own solemn declaration of the exercise of that power, within constitutional limits, is as conclusive upon the judiciary, a co-ordinate branch of the government, as the certificates of the presiding officers of the senate and house are conclusive of the passage of an act therein.

The signature of the governor to an act of the legislature is conclusive evidence of executive approval against every one but

himself. He alone should be permitted to dispute it, and only then, while he holds control of the act, and before he shall have deposited the same in the archives of the state; for then it becomes operative, as expressing the legislative will in the form of a statute. *People* vs. *Hatch*, 19 Ill. 283. It has then passed under the control of a constitutional officer whose duty is to "carefully keep and preserve" it. He is neither required to enroll it, by copying it upon a book of records, nor to enter its receipt upon a special book kept in his office for that purpose; and whatever books of that sort he does keep for his own convenience and to aid in the proper dispatch of business are simple remembrances, of no more probative force than other parol evidences of equal credit.

The relator seeks to overturn the solemn record that stands against him, by the testimony of the governor's private secretary and other witnesses, (the governor being dead,) whose evidence is supposed to show that the governor approved the act by signing it and leaving it upon his table in the executive chamber to be taken to the secretary's office, in the usual course of business, where it was taken during the governor's absence at dinner, but who, upon his return, immediately called for the act, and on the same day returned it to the senate with his veto.

Had the act been deliberately deposited in the secretary's office by the governor, it is not to be presumed that the secretary of state would have surrendered it and allowed it to have been taken from his custody. On the other hand, if by mistake it was left in his office without authority from the governor, it could hardly be considered as the deposit of a document in his custody, and therefore did not become the record of a statute that if lost or destroyed could be declared by the court from its judicial knowledge as an existing law, under the doctrine of the case of *The Prince*, 8 Coke, 28. There it is said: "For God defend, if the record of such acts shall be lost, or burnt by fire or other means, that the same shall be to the general prejudice of the commonwealth; but although it be lost or burnt, the judges, by printing or by the record in which it is pleaded, or by other means, may inform themselves of it."

The act in question has been neither lost nor destroyed, but is

now a solemn record in the secretary's office showing that it never became a statute; and the parol testimony relied upon to establish a lost or destroyed record is incompetent, inasmuch as in seeking to set up a lost record it flatly contradicts an existing one.

The cases relied upon by the relator do not controvert our view of the law, but rather confirm it.

The first case cited upon this point shows that the governor had signed an act of the legislature and deliberately deposited it in the state archives as an approved act, and thereafterwards, without withdrawing the act from the custody of the secretary of state, sent a veto message to the legislature stating that he had approved the act, but objecting to some of its provisions. Of course, the veto came too late. The record was conclusive. *State* v. *Whisner*, 35 Kan. 271.

The second case cited shows that the legislature had passed an act and sent it to the governor for his approval, but, before he acted, recalled it by a joint resolution, and he thereupon returned it without approval or disapproval; and the court held that it became a law without executive approval. All these facts appeared by the records of the legislature. *Wolfe* v. *McCaull*, 76 Va. 876.

The third case cited shows that the president had approved an act of congress, that took effect upon its passage, without affixing the year; and the supreme court declared the date of its passage. The original record was imperfect, and the judges sought information from the journals of congress, the records of the department of state, and the message of the president to congress stating the date of his approval of the act. All the best evidence in existence, used to supplement an imperfect record, not to contradict and destroy one. *Gardner* v. *The Collector*, 6 Wall, 499.

And so it is with all the other cases cited by the relator, except the Illinois bond cases before referred to, and a series of decisions in New York relating to what is known as "two thirds bills," where the court allowed the journals of the legislature to overcome the certificates of the presiding officers of the two houses, as showing that these bills, appropriating money for local or private purposes, did not pass each house by a two-thirds vote as required

by the constitution. But in these cases, so far as the reports of them show, the certificates did not state the passage of the bills by a two-thirds vote, but only that they passed, &c., so that these cases may not be regarded as authorities against the doctrine here laid down. *People* v. *Allen*, 42 N. Y. 378. *People* v. *The Commissioners*, 54 N. Y. 276. *People* v. *Petrea*, 92 N. Y. 128.

The opinion of the justices in New Hampshire touching the bank cashiers' act seems to hold to the same doctrine of the Illinois bond cases; but it is to be remembered that the opinion was given without the aid of arguments at the bar, and, therefore, is of less weight than a decision considered in the light of solemn argument. 35 N. H. 579.

Writ denied.

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

DEBORAH P. GRAY, and others, appellants from decree of judge of probate, *vs.* MARY BELL GARDNER, appellee.

Penobscot. Opinion June 27, 1888.

Probate. Appeal. Adoption. R. S., c. 67.

A person, without issue, having adopted a child under the provisions of R. S., c. 67, died within twenty days after the decree of adoption had been made in the probate court. The next of kin, being the mother, brothers and sisters, duly entered an appeal from the decree of adoption. *Held*, that the appellants had no right of appeal, as heirs; for as such they had no vested rights in the estate of their ancestor while living, which she might not deprive them of at her will, either by the legal adoption of an heir, or by any of the various methods known to the law.

They could not appeal after her death; for if deprived of their inheritance, it is by an act of the ancestor, competent for her to perform, and they must abide by it.

Nor could they appeal as representatives of their ancestor. As heirs they are acting, and must act, if at all, for themselves, and for their own interests. As administrators, they would be equally powerless, for the adoption is the result of a completed act of the intestate.

This was a suit arising out of the settlement of the estate of

Augusta P. Norton, deceased, intestate, involving the question of inheritance. The appellants, are the natural or blood heirs of the deceased, her mother, brothers, and sisters, she having died without issue. The appellee is a young child, less than five years old, who is claimed to be heir of the deceased by adoption, she having no claim by kinship.

The question presented for decision, was whether or not the appellee became by adoption the legal inheritor of the estate of the deceased, which in turn depended upon the validity of the adoption.

The case came up from the probate court by appeal and arose as follows:

At the July term of the probate court in 1887, for Penobscot county, Augusta V. Norton, a widow and without issue, applied for leave to adopt the appellee. No notice of the petition was given, and the case was continued to the next term, holden August 31, when the petition was granted. The child had a father living, also, a guardian appointed by the probate court in Barnstable county, Mass., where she was born. This guardian consented to the adoption, and without this, no other notice or consent was given. On the 8th day of September, following the adoption, Mrs. Norton died, and, within the time allowed by law, the appellants filed their appeal from the decree of adoption.

The appellants relied mainly on the two following grounds of appeal:

1. That the judge of said probate court had no authority under the law to make said decree, for the reason that said child was under fourteen years of age, and there was no consent of its living parent to such adoption, neither was there any consent given by any legal guardian of said child having jurisdiction in this state, neither was there any consent by any next of kin in this state, nor by any person appointed by the judge of probate to act in the proceedings as the next friend of said child.

2. That Thacher T. Hallett, who represents himself as being the guardian of said child and gave his consent to the adoption of the same, as appears by said petition, was not the legal guardian of said child in this state, and had no authority to act for said

child in said court, or in any matters pending in this state touching said child.

The appellee, by her guardian, *ad litem*, moved to dismiss the appeal for the following reasons:

1. Said appellants do not show, by their reasons of appeal and preamble thereto, that on the last Tuesday of August, 1887, they had any such interest in the subject matter of said original petition of said Augusta V. Norton and the decree of the said probate court thereon, nor that they have since acquired any such interest in the same, as entitled them to make or now maintain said appeal.

2. That said Augusta V. Norton, in person presented said petition to the judge of probate, and then and there, clearly and definitely stated to the judge thereof, that her object and desire in asking for such adoption, among other things, was to make said minor her legal heir, never having had any children herself.

3. That said Augusta V. Norton, in all she did in the premises, was not ignorant of all and singular the legal effect of her acts and of said decree.

At the trial, in this court upon the appeal, the presiding justice was of the opinion that the reasons for appeal do not show any right of appeal, and are insufficient in law; he therefore sustained the motion to dismiss the appeal; but refused to affirm the decree below, and the appellant excepted.

The appellee also excepted to the ruling refusing to affirm the decree below.

A. W. Paine, for appellants.

The decree of adoption was illegal for want of notice to the father, and consent on the part of the child by guardian or *prochein ami*.

The decree of adoption was vacated by this appeal, and can not have effect until affirmed. There can be no affirmation because the adopted mother is dead.

Sewall v. *Roberts*, 115 Mass. 262, 275; *Edds and wife*, appellants, 137 Id. 346; *Humphrey and wife*, appellants, Id. 84; *Woodworth* v. *Spring*, 4 Allen, 321, 324, and cases cited. *Tarbox* v. *Fisher*, 50 Maine, 236; *Paine* v. *Cowdin*, 17 Pick. 142; *Adams* v. *Adams*,

10 Met. 170; *Gilman* v. *Gilman*, 53 Maine, 184, 186; *Boynton* v. *Dyer*, 18 Pick. 1; *Arnold* v. *Sabin*, 4 Cush. 46.

Appellants are interested persons, and have the right of appeal. An heir apparent or presumptive is such a person as is legally aggrieved within the meaning of the statute. *Lunt* v. *Aubens*, 39 Maine, 392, 395; *Deering* v. *Adams*, 34 Maine, 41; *Paine* v. *Goodwin*, 56 Id. 411; *Veazie Bank* v. *Young*, 53 Id. 555, 560; *Boynton* v. *Dyer*, 18 Pick. 1; *Farrar* v. *Parker*, 3 Allen, 556; *Smith* v. *Bradstreet*, 16 Pick. 264; *Smith* v. *Sherman*, 4 Cush. 408, 409; *Curtis* v. *Bailey*, 1 Pick. 198; *Lewis* v. *Bolitho*, 6 Gray, 137; *Bancroft* v. *Andrews*, 6 Cush. 493; *Lawless* v. *Reagan*, 128 Mass. 592.

Cases co-extensive with danger of being injured by the decree. *Wiggin* v. *Swett*, 6 Met. 194, 197; *Bryant* v. *Allen*, 6 N. H. 116; *Mather* v. *Bennett*, 21 N. H. 188; *Pierce* v. *Gould*, 143 Mass. 234, and cases cited; *Lee*, appellant, 18 Pick. 285; *Smith* v. *Haynes*, 111 Mass. 346; *Saunders* v. *Dennison*, 20 Conn. 526.

Lewis Barker, *T. W. Vose*, *and L. A. Barker*, for appellee.

The minor was under fourteen years of age; one parent dead, the other had abandoned it. R. S., c. 67, § 33. "If there are no such parents, or if the parents have abandoned the child and ceased to provide for its support, consent may be given by the legal guardian." If there was need of a guardian *ad litem* to validate the adoption, it was only an irregularity, which a stranger cannot avoid to the injury of the child. *Sewall* v. *Roberts*, 115 Mass. 262, 275.

DANFORTH, J. In July 1887, Augusta V. Norton petitioned the probate court for leave to adopt a child under the provisions of the R. S., c. 67. The prayer of her petition was granted and a decree to that effect entered of record on the last Tuesday of August of the same year. The petitioner died on the subsequent 8th day of September and on the next day, the parties now before the court, representing themselves as the mother, brothers and sisters of the deceased petitioner, entered an appeal with their reasons therefor. At the hearing at *nisi prius* the presiding justice dismissed the appeal on the ground, "that the reasons for

appeal do not show any right of appeal and are insufficient in law." To this ruling exceptions were allowed. This presents the simple question whether, in a case like this the heirs of the petitioner, presumptive or actual, have a right of appeal.

The statute provides that "any petitioner, or any such child, by his next friend, may appeal from such decree, to the supreme court of probate * * as in other cases." R. S., c. 67, § 36. Here is a precise designation of the parties allowed the right of appeal. Neither of these parties saw fit to appeal at the time the decree was passed. At that time, the petitioner living, it is clear the heirs presumptive had no right of appeal. They were not the petitioners nor could they in any legal sense be the representatives of the petitioner. The adoption of the child would impose no duties or obligations upon them. Nor had they any vested rights as heirs which the adoption would interfere with, nothing in this respect, the prospect of which, it was not entirely competent for the petitioner to deprive them, either by the adoption of an heir or in the various other methods known to the law. Nor are their rights increased by her death. If they are deprived of their inheritance, it is by an act of the ancestor legal and competent for her to perform, and by which they must abide.

It is equally clear that they cannot appeal as representatives of the petitioner. Not as heirs, for as such they are acting and must act if at all, in their own behalf and for their own interests. Not as administrators, if such they were, for the decree is the result of a completed act of the intestate.

The exceptions of the appellee are not urged. They must also be overruled. The appeal being dismissed as a nullity, the court has no jurisdiction of the case and can neither affirm or reverse the decree of the court below.

Both exceptions overruled.
Appeal dismissed.

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

MICHAEL GRACE *vs.* JUDAH D. TEAGUE.

Aroostook. Opinion June 27, 1888.

Officer. Title in issue. Officer de facto. Damages.

When an officer sets up his title to an office in justification of his official act, for which the action is brought, he must prove his legal title to the office. It is not sufficient that he shows he was an officer *de facto*.

ON EXCEPTIONS AND MOTION.

This was an action of trespass, for assault and battery, tried on agreed statement of facts, by the presiding justice of the superior court, Aroostook county, with the right to except.

The defendant, after his commission as trial justice had expired, but not aware of this fact, issued a warrant upon a proper complaint, against the plaintiff who was arrested thereon and brought before the defendant for trial. Plaintiff was found guilty and required to pay a fine and costs.

The parties agreed that if the defendant was liable in this action, it being conceded he acted in good faith, the damages, not to exceed $36.00 might be assessed by the court. The presiding justice gave judgment for the plaintiff, and assessed the damages at $36.00. The defendant excepted and moved for a new trial because the damages were excessive, contending, as appears in the motion, that they should be nominal only.

No briefs of counsel were received by the reporter.

King and King, for defendant.

P. C. Keegan, for plaintiff.

LIBBEY, J. The law is well settled, that, when an officer sets up his title to an office in defence of an action against him for his acts, he puts in issue his title to the office, and to justify must show that he has the legal title. It is not sufficient for him to show that he is exercising the duties of the office as an officer *de facto*. The ruling of the court below on this point is correct. *Pooler* v. *Reed*, 73 Maine, 129; *Andrews* v. *Portland*, 79 Maine, 488, and cases there cited.

It was agreed by the parties that the damages should not exceed the sum awarded. They are not excessive.

Exceptions and motion overruled.

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

JEROME F. MANNING, appellant, *vs.* AUGUSTA M. DEVEREUX.

Waldo. Opinion February 19, 1889.

Probate. Appeal. Exceptions. Proof of death.

Upon an appeal from the probate court to the supreme court of probate, no issue of fact having been framed to be submitted to the jury, at the trial of the appeal, it is the duty of the presiding justice to determine all issues of fact; and to his determination of such issues, exceptions do not lie.

The burden of proof is on the appellant to sustain the allegations of his petition. It appearing to the court that the facts were otherwise, his exceptions to such findings were properly overruled.

ON EXCEPTIONS.

Appeal from a decree of the judge of probate, Waldo county, refusing to vacate a decree granting administration on the estate of one Albert Devereux.

The appellant, claiming to be a creditor of said Devereux, for reasons of his appeal alleged that the appellee was appointed administratrix upon her petition representing that said Albert Devereux died between October 4, 1884, and January 30, 1885; that the only grounds for such allegation were that he went to sea on said 4th day of October, 1884, and had not been heard from between those dates; that said decree granting administration was prematurely made; the mere absence of said Devereux, on a voyage at sea for a period of six months and ten days, being insufficient to raise a presumption of his death.

The case was tried, on the appeal, by the supreme court of probate, Waldo county, at the October term 1887. The appellee testified that said Devereux, her husband, sailed from Port Spain, Trinidad, October 4, 1884, on board the bark Cinderilla, heavily

loaded with molasses, bound for Philadelphia. There was a hurricane October 6, and since then no tidings had been received from the vessel, or any one connected with it. Twenty-five days are considered a fair passage for the voyage.

The presiding justice ordered the decree of the probate court affirmed, and appellant's petition dismissed. The appellant excepted to the order and ruling of the court.

J. Williamson, for appellant.

Administration granted, without other evidence of death than was presumed by mere absence at sea six months and ten days, may be revoked upon suggestion of one having no interest in the matter; by a stranger; by an *amicus curiæ*.

Obtained by fraud, and misrepresentation, voidable by the court granting it, and may be repealed. Toller, Exors. 121, 122.

Administration *quia improvide*, repealed but granted to same person. Com. Dig. (B. 8.) The ordinary may revoke or set aside administration granted to next of kin, if they come too hastily to take out administration, within the fourteen days. 3 Bac. Ab. 50.

King's court will issue prohibition, upon information of either plaintiff, defendant, or a mere stranger if the ecclesiastical court should hold plea of matters not belonging to its jurisdiction. 5 Bac. Ab. C. 650. Appellant, interested and "person aggrieved." *Smith* v. *Bradstreet*, 16 Pick. 254; *Boynton* v. *Dyer*, 18 Pick. 1; *Smith* v. *Sherman*, 4 Cush. 409; *Stebbins* v. *Palmer*, 1 Pick. 98; *Lewis* v. *Bolitho*, 6 Gray, 137; *Veazie Bank* v. *Young*, 53 Maine, 555; *White* v. *Riggs*, 27 Id. 114; *Deering* v. *Adams*, 34 Id. 41; *Sturtevant* v. *Tallman*, 27 Id. 78.

Burden of proof upon appellee to prove death of her husband at any time less than seven years after October 4, 1884. 1 Taylor Ev. § 157; *Davie* v. *Briggs*, 97 U. S. 628; *McCartee* v. *Camel*, 1 Barb. Ch. 455; *Smith* v. *Knowlton*, 11 N. H. 191; *Newman* v. *Jenkins*, 10 Pick. 515; *White* v. *Mann*, 26 Maine, 361.

Thompson and Dunton, for appellee.

Decree, not having been appealed from, conclusive. *Clark* v. *Pishon*, 31 Maine, 503.

Facts show Albert Devereux was dead on the 8th day of April, 1885. *Johnson* v. *Merithew*, 80 Maine, 111.

LIBBEY, J. Augusta M. Devereux was appointed administratrix on the estate of Albert Devereux, deceased, by the probate court in Waldo county, the second Tuesday of April, 1885. At the June term of said court, 1887, the appellant, claiming to be a creditor of said Albert Devereux, filed his petition praying that said decree appointing the administratrix, be annulled, on the ground that at the time of said decree Albert Devereux was not dead. On a hearing of the parties the judge of probate denied the prayer of the petition, and the petitioner took an appeal to the supreme court of probate. On the trial of the appeal, in that court, no issue of fact was framed to be submitted to a jury. It was the duty of the presiding justice to determine all issues of fact; and to his determination of such issues exceptions do not lie. For that reason the exceptions should be overruled.

But assuming that the whole case is properly before this court, we can see no error. The petition raised two issues of fact. 1. Whether the petitioner was a creditor of Albert Devereux. 2. Whether said Devereux was dead when the decree granting administration on his estate was passed by the probate court. We think the evidence was not only sufficient to authorize the finding of both issues against the appellant, but to require it.

Exceptions overruled.

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

MOSES M. RICHARDS *vs.* LILLIE P. PAGE.

Lincoln. Announced May 31, 1888. Opinion August 7, 1888.

Jury. Verdict. New trial. Practice.

The court at *nisi prius* has power to direct the discharge of a jury when satisfied that they can not agree.

When the court so direct and in accordance with such direction, the jury separate, they no longer have charge of the case and have no power over it.

After separating, the jury have no more power to assemble and further consider a case, than if it had never been committed to them.

ON MOTION AND EXCEPTIONS.

EXCEPTIONS. The jury, failing to agree, were discharged by the officer in charge, without a verdict at midnight, under orders of the presiding judge.

The next morning before the sitting of the court, the jury, of their own motion re-assembled and agreed upon a verdict against the plaintiff, and came into court and rendered the same as the verdict of the jury, which verdict was received and affirmed in the usual manner, without any knowledge or suspicion on the part of the justice presiding, that the verdict had not been agreed upon before the jury had separated. Upon discovery of the facts, relating to the time of making said verdict, the plaintiff made his motion that the verdict be set aside and for a new trial; and upon proof of the foregoing facts, claimed that the said verdict be set aside by the presiding justice, who, being of opinion that the motion must go to the law court, on report of evidence given in proof of the facts declined to grant the motion.

To this ruling the plaintiff excepted.

The plaintiff also filed the following motion duly sworn to for a new trial, which came up to the full court with his exceptions.

MOTION. And now after verdict rendered against him in the cause aforesaid, comes the plaintiff and prays the said verdict may be set aside and a new trial granted because he says, he has discovered, that since the said verdict was rendered, the same was not made and agreed to by the jury, before they were dis-

charged of the case, but on the contrary, was made and agreed to after the said jury had been discharged of the case and had separated, and without authority of law, re-assembled and entered into further deliberations; and he expects to prove the aforesaid facts by the testimony of Morrill Glidden and William H. Levensaler.

Gilbert and Castner, for the plaintiff.

Cited: R. S., c. 82, § 40; *Com.* v. *Townsend*, 5 Allen, 216; *Weston* v. *Gilmore*, 63 Maine, 493.

Peregrine White and T. P. Pierce, for the defendant.

From the nature of the exception it is evident that the motion in this action, was addressed to the presiding judge. The exception raises only a single question,—did the judge err in the disposition he made of that motion.

This motion was addressed to the presiding judge, and, as the plaintiff refused to bring it here on report, his determination of it must be accepted as final; *Averill* v. *Rooney*, 59 Maine, 580; affirmed in *Burr* v. *B. & B. R. R.*, 64 Maine, 130; *Milo* v. *Gardiner*, 41 Maine, 549; *Gifford* v. *Clark*, 70 Maine, 94; *Trafton* v. *Pitts*, 73 Maine, 408. Motions were filed to set aside the verdicts for alleged irregularities of the jury, and they were all sent direct to the full court.

Rule 17, decisive of the question.

Separation did not vitiate the verdict; 1, Gra. and Wat. N. T. 80, 92, and cases there cited; *Com.* v. *Sholes*, 13 Allen, 55.

In *Clough* v. *Clough*, 6 Foster, (N. H.,) 33, jury were called upon after separation to explain the verdict and permitted to do so without objection; a motion to set verdict aside was overruled and the court in the opinion said,—"that although the inquiry was made after the jury had separated, but, as we presume, in the presence of the parties, no objection was taken on that account."

The evidence does not show that any of the jury communicated with anybody, or was guilty of any misconduct or impropriety whatever, save alone the mere act of separation. *Gifford* v. *Clark*, *supra*.

The verdict a just one, and the defendant should not be sub-

jected to the expense of a new trial, on a mere technical objection. 1, Gra. and Wat. N. T. 301, 310, and cases there cited.

LIBBEY, J. This case was committed to the jury in the afternoon, and at the time of adjournment they had not agreed. The officer in charge of the jury was directed by the court, that, if they had not agreed at twelve o'clock in the night to let them separate. At that hour the foreman informed the officer in response to an inquiry by him, that the jury had not, and could not agree. Thereupon the officer opened the door and told them to separate, and they did so. The next morning the jury assembled in their room and agreed upon a verdict for the defendant, reported it in court and it was affirmed. The facts about the disagreement and discharge of the jury were not known to the court or the plaintiff's counsel till after the verdict was received and affirmed. When the facts became known to the plaintiff's counsel a motion was made addressed to the presiding justice to set the verdict aside, but the justice, being of opinion that the motion was one on which he had no power to act, so ruled, and exception was taken. A new motion was then filed addressed to this court, and upon that motion the case is considered.

The court at *nisi prius*, had the power to be exercised in its discretion, to direct the discharge of the jury when satisfied that they could not agree. That power was properly exercised in this case; and when the jury separated by order of the court they no longer had charge of the case, and had no power over it. The jury had no more power to assemble in their room and further consider the case, than if it had never been committed to them. The case is unlike those cited by the counsel for the defendant, where there was irregular and unauthorized misconduct on the part of the jury, which was, in no way injurious to the losing party; but one where the jury no longer had power to act. *Commonwealth* v. *Townsend*, 5 Allen, 216; *Weston* v. *Gilmore*, 63 Maine, 493.

Exceptions overruled.
Motion sustained.
Verdict set aside.

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

BIDDEFORD SAVINGS BANK *vs.* DWELLING-HOUSE INSURANCE COMPANY.

York. Opinion June 1, 1889.

Insurance. Insurable Interest. Ownership. Notice. Proof of Loss. Waiver.

At the time of issuing a policy of fire-insurance the plaintiff bank held a mortgage upon the insured premises, and the policy contained a clause by which the policy was made payable in case of loss to the bank "as its interest may be." *Held*, that this was not an assignment of the policy but, in effect, an accepted order on the defendant to pay that amount to the plaintiff, in case of loss.

The mortgagor subsequently conveyed the property, and assigned the policy to another who in turn transferred the property, with the policy by the consent of the defendant to the plaintiff, receiving back an agreement, not under seal, for a re-conveyance on certain conditions. A loss under the policy afterwards happened. *Held*, that the plaintiff under the last conveyance held the legal title,—the mortgage being discharged or merged—and was the owner of the policy issued upon the property insured, and entitled to enforce its payment.

The proof of loss was made and notice given, not by the bank but an intermediate party, having an equitable interest under plaintiff's last grantor. It appearing that all the material facts were known to the defendant company, which made no objection to the sufficiency of the proof, its form, or the source whence it came, but was received by the company and a satisfactory conclusion reached, through its adjuster, as to the actual damage, and no suggestion is now made that it was not correct, or that the company has suffered from any deficiency in the proof, *Held*, that all objections to the notice and proof must be considered as waived.

REPORT, on facts agreed, a summary of which is as follows:— October 30, 1882, W. F. Wildes conveyed in mortgage, a lot of land and the buildings thereon, situate in Biddeford, upon which buildings the policy in suit was issued, to E. Stone to secure $225, and June 1, 1883, quit-claimed them to Louisa M. Dearborn, to whom the defendant, through its agents Smith and Tibbetts, issued its policy for $1250, September 19, 1883, containing the following clause "payable in case of loss to Biddeford Savings Bank as its interest may be." Stone, September 9, 1883, assigned his mortgage to the Biddeford Savings Bank, the plaintiff; and said Dearborn, November 11, 1884, reconveyed the premises by

quit-claim to said Wildes assigning at the same time her policy with the consent of the insurance company's agents. On this day Dearborn conveyed the premises by warranty deed to the bank, which at the same time gave him a written agreement, not under seal, to reconvey said premises to him on payment of his indebtedness to it. August 18, 1886 said Wildes executed and delivered a quit-claim deed of the premises to his wife, Ruth B. Wildes, after which the policy was assigned with the consent of the company's agents to the bank,—the agents having knowledge of the deed to the bank. The property insured was destroyed by fire August 4, 1887, and notice thereof was immediately received by the defendant.

A proof of loss made by Ruth B. Wildes was furnished the defendant August 9, 1887 to which no objection, as to matter of form and substance, was made. This is the only proof of loss furnished; and defendant has not requested additional proofs. The adjuster of the company found the loss or damage to the property to be $1125.00. After the lapse of sixty days from the time when the proofs of loss were furnished, a demand was made on the defendant for payment of the loss, which was refused.

The amount due to the plaintiff on its mortgage, at the time of the loss was $338.41, and the defendant at the May term 1888, filed an offer to be defaulted for that sum and interest from the date of loss and costs of suit.

The case was submitted to the law court to determine the legal rights of the parties upon the agreed statement, and enter proper judgment thereon.

R. P. Tapley, *E. Stone* with him, for plaintiff.

Plaintiff entitled to recover for whole loss, being liable over, to party legally entitled to enforce the agreement for a reconveyance, for any balance in its hands. The policy provides, "that upon the alienation of any estate hereby insured * * * the purchaser having this policy legally transferred to him may upon application have this policy revived with the consent of the company expressed in writing; and by such revival the company and purchaser shall be entitled to all the rights to which the original parties respectively were entitled before such alienation."

Ruth B. Wildes had an interest in the insurance money through the quit-claim from her husband, describing her title in proof of loss by reciting the several transfers, and claiming ownership subject to mortgagee's interest. Proofs in this and other respects ample and full. *Bartlett* v. *Ins. Co.*, 46 Maine, 500; *Lewis* v. *Ins. Co.*, 52 Id. 492; *Walker* v. *Ins. Co.*, 56 Id. 371; *Patterson* v. *Ins. Co.*, 64 Id. 500. Notice required by the policy, or statute, sufficient. *Campbell* v. *Ins. Co.*, 59 Maine, 430; *Fox* v. *Ins. Co.*, 53 Id. 107; *Caston* v. *Ins. Co.*, 54 Id. 170; *Dolbier* v. *Ins. Co.*, 67 Id. 180.

All acts shown to have been done by defendant's agents, bind the defendant company. R. S., c. 49, §§ 19, 90; *Farrow* v. *Cochrane*, 72 Maine, 309, 310; *Emery* v. *Ins. Co.*, 52 Id. 322, 324. Action may be maintained by assignee of policy. R. S., c. 49, § 51.

Equitable right of Wildes or his wife does not prevent a recovery of full amount; it is not an alienation or an incumbrance. *Newhall* v. *Ins. Co.*, 52 Maine, 180; *Grant* v. *Ins. Co.*, 75 Id. 196, 204.

W. F. Lunt, *I. W. Dyer*, with him, for defendants.

The bank could insure only its interest, the mortgage debt, and this sum defendants offered to pay. *Carpenter* v. *Ins. Co.*, 16 Pet. 495; Wood, Fire Ins. §§ 257, 297. Can recover only the amount of its interest as mortgagee. No notice or proof of loss being received from the bank, the only party insured, there were no defects to object to, or which might be considered as waived. The "insured" was the bank and not Wildes or his wife. If the bank was "owner" it should give the notice; if Mrs. Wildes, then she should have a policy in her name.

Plaintiff, in reply.

Plaintiff claims not only under the terms of the policy, but by the assignment, which carries with it all the rights of the original parties.

Wildes' deed to his wife operated as an assignment to her of his interest in the agreement of the bank to convey. She was a "person sustaining loss" and competent to give notice and make

proof of loss, which, under this policy, may be made by any reasonable and satisfactory evidence,—the testimony of eye-witnesses being sufficient.

We do not admit there was no notice from any person "suffering loss," but suppose it were so, defendant is as competent to waive all notice, as well as defective notice.

DANFORTH, J. This is an action upon a policy of insurance. It is presented upon an agreed statement of facts from which it appears that the policy in question was issued, to Louisa M. Dearborn September 19, 1883, containing a provision by which it was payable to the plaintiff "in case of loss as its interests may be." At that time the assured was mortgagor of the premises insured and the plaintiff mortgagee.

On November 11, 1884, the assured conveyed her interest in the premises insured and with the consent of the defendant company assigned the policy to William F. Wildes, and on the same day he, in consideration of two hundred dollars, conveyed, by warranty deed, the premises to the plaintiff, who gave back a written agreement not under seal, for a reconveyance, which is made a part of the case.

On May 6, 1887, Wildes with the written consent of the company assigned the policy to the plaintiff, though previous to this he had released his interest in the premises to his wife Ruth B. Wildes.

The defendant raises a preliminary objection to its liability for want of notice and proof of the loss, which happened August 4, 1887.

It may be conceded that in the absence of due notice and proof of loss by the assured or by some one acting for and in its behalf and by its authority, no duty or liability would rest upon the defendant. But this requirement is for the sole benefit of the insurer; and it is now well settled that whether imposed by contract or statute, it may be waived in part or in whole by the company for whose benefit it is imposed. In this case, the agreed statement finds that notice was received by the defendant immediately after the loss, and that in a few days afterward proof of the damages was furnished by Ruth B. Wildes. No objection to

this is now made except that it is not shown to have been under the authority of the plaintiff. No objection whatever was made at the time, but the company acted upon it, made an investigation and came to a conclusion as to the amount of damages satisfactory to it then, and as we must conclude satisfactory now, as no suggestion is made that the conclusion is not correct, or that the company have suffered, or are likely to suffer, from any defect of proof or notice. Hence there seems to have been a very clear waiver of any want or deficiency of notice or proof of loss.

The only remaining question is as to the amount the plaintiff is entitled to recover. While it claims the whole damage covered by the policy, as found by the defendant's agent or adjuster, in behalf of the defense, it is contended that the amount should be limited to the sum actually due the plaintiff as mortgagee. This would clearly have been in accordance with the legal construction of the contract, as the facts were when the policy was issued. At that time the plaintiff had only the title of a mortgagee, and had no insurance even upon that interest. The provision for it in the policy, was not an assignment of the policy in its favor, but simply an order on the company to pay that amount in case of a loss. "The insurance was upon the property of the mortgagor as the general owner and not upon the interest of the plaintiff as mortgagee." *Brunswick Sav. Inst.* v. *Commercial Ins. Co.*, 68 Maine, 313; *Carpenter* v. *Washington Ins. Co.*, 16 Peters, 500; *Gillett* v. *Liverpool & L. & G. Ins. Co.*, 28 *American L. Regr*, (2d Series) 216 and note; *Fogg* v. *Middlesex M. I. Ins.*, 10 Cush. 337, 346.

But when Wildes conveyed to the plaintiff there was an entire change in the title to the premises. Whatever may have been the effect of the instrument given back, the original mortgage ceased to exist, the mortgagor parted with his title which became from that time vested in the plaintiff. The contract to reconvey may have created an equitable mortgage and may have been an insurable interest, but it in no way affected the legal title, nor was it insured by the policy. Nor did the conveyance to the wife affect the policy, for the grantor's interest in that had all gone by the prior conveyance. In this condition of the title the policy

was duly assigned to the plaintiff with the consent of the defendant. This policy was an insurance upon the property itself issued to a person having the legal title. The assent of the company to the assignment, was a renewal of the original contract to the assignee with all its force, effect and liabilities, as well as its conditions and limitations. In the language of the opinion in *Grant* v. *Ins. Co.*, 75 Maine, 196, 203, it is "a new contract with the assignee of the policy on the basis of the old one."

Thus the plaintiff presents itself as having the legal title to the property and the owner of the policy by which that property is insured, duly issued to itself.

The contract for a reconveyance though creating an equitable mortgage is no objection to a recovery; it is not even an incumbrance. *Grant* v. *Ins. Co.*, *supra*; *Newhall* v. *Union M. F. Ins. Co.*, 52 Maine, 180.

Nor will this result be inequitable. By the contract which the plaintiff gave for a reconveyance, if the property is redeemed, the expense of insurance is one of the items to be paid; if not redeemed it is still the duty of the plaintiff to dispose of the property and after deducting the amount due including the expense of insurance, account to the equitable mortgagor for the balance. So that the defendant simply performs its contract for which it has received the consideration provided, and the proceeds are divided in accordance with the principles of equity. R. S., c. 49, § 51; *Stinchfield* v. *Milliken*, 71 Maine, 567, 572.

Judgment for the plaintiff for $1125, *the amount of loss as found by defendant's adjuster, with interest from October* 8, 1887.

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

WILLIAM GUTHRIE, by his next friend, *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion June 5, 1889.

Railroad. Negligence. Brakeman. Broken cars. Evidence. Burden of proof.

Upon the issue of defendant's negligence, where the testimony tends to show that the injury complained of resulted from a defect in a car, which the defendant was bound to keep in repair so that it should be reasonably safe, and under such circumstances as would imply some fault on the part of the defendant; and the jury, unless the circumstances are explained by the defendant, would be authorized to find for the plaintiff, *Held*, that the case should be submitted to the jury.

ON REPORT. The parties agreed that if the action can be maintained upon the plaintiff's testimony, it should come back for trial.

Action by a brakeman, for personal injuries received at the railroad station, in Bangor, while shackling a broken box car unfit for use and dangerous to handle, on which the draw bar had been torn away and the bumpers smashed and broken.

The declaration is as follows:—

First count, charging negligence by reason of broken car.

For that the defendant corporation on the twenty-second day of February, A. D. 1887, was possessed of a certain railroad extending through Bangor aforesaid, and was then in the full occupation of said railroad, thereon running and using locomotive engines and cars, and had the control, management and direction of said railroad, and the engines and cars on the same; and the plaintiff, the said William Guthrie, was, at said Bangor, on the day and year last aforesaid, in the employ of, and at work for the defendant corporation, as brakeman, by reason whereof, it became and was his duty to help attend to the brakes upon the cars and trains of cars of the defendant corporation upon which he was, and to assist in shackling and unshackling cars, making up trains, setting out cars from trains, and in helping said cars and trains of cars out of the yard and depot of the defendant corporation, at said Bangor. And it was the duty of the defend-

ant corporation, to have and keep the engines and cars, so by it used and drawn upon said railroad, in good and sufficient condition and repair, so that its brakemen and other servants could, in setting out cars, making up, managing and moving trains of cars upon said railroad, with proper care and prudence, perform their duties in, upon and about said engines and cars, and about said railroad with safety. Yet the defendant corporation, not regarding their said duty, on the day and year last aforesaid, at said Bangor, carelessly and negligently suffered and allowed a certain freight car, so as aforesaid by it used, to be and remain broken and out of repair, unfit for use, and dangerous to handle, the end thereof smashed in, and draw-bar torn away, the bumpers upon one end smashed and broken; all of which was known to the defendant but unknown to the plaintiff, by reason of which neglect of duty by the defendant corporation, and broken condition of said car, the plaintiff, while in the performance of his duty, as such brakeman, for said corporation, in attempting to shackle another and a moving car to said broken car, at said Bangor, on the twenty-second day of February, A. D. 1887, and while in the exercise of due care and caution, was caught by and between said broken car and said other car to which he was attempting to shackle it, and thereby plaintiff's body was jammed, crushed, broken, bruised and wounded, the bones of his right shoulder broken and displaced, his shoulder and right arm wounded and disabled, and permanently injured, and his left foot jammed and toes crushed, so that his great toe had to be and was amputated, his head was wounded, and mind and power of speech injured, and he thereby became and was sick, sore and disordered, and has so continued for a long space of time, to wit: from thence, hitherto, and still so continues, during all which time the plaintiff thereby has suffered great pain of body and mind, and has been wholly prevented from doing any labor or business whatever.

Second count, for not having made and promulgated to employes suitable rules for the care and transportation of such rolling stock as may become defective.

Also, for that the said Maine Central Railroad Company, a body corporate, before and on the twenty-second day of February, in

the year of our Lord one thousand eight hundred and eighty-seven, was, and ever since has been possessed of a certain railroad, extending from Portland, in Cumberland county, state aforesaid, to and through Bangor, aforesaid, in said county of Penobscot, to Vanceboro, and was before, and on said twenty-second day of February, aforesaid, and has been ever since, in the full occupation of said railroad, thereon running and using locomotive engines and cars, for the transportation of passengers, freight and for other purposes, and having the control, management and direction of said railroad, and the engines and cars on the same. And the plaintiff, the said William Guthrie, was before, and on said twenty-second day of February, in the year last aforesaid, in the employ of said railroad company, and on the day and year last aforesaid, at Bangor, at work in such employ for said company as brakeman, by reason of which employment and work as brakeman, it then became, and was his duty to help attend to the brakes upon the cars and trains of cars of the defendant corporation, upon which he was, and to assist in shackling and unshackling cars, making up trains, setting out cars from trains, and in helping said cars and trains out of the yard and depot of defendant corporation at said Bangor. And it was the duty of the defendant corporation to have and keep its engines and cars so by it used and drawn upon said railroad in good condition and repair; and to make, have, and make known to its engineers, conductors, and its other servants and employes, and to enforce proper rules and regulations for the making up, running, management and control of its trains, the repair, and transfer, and conveyance for repair, and handling of its broken engines and cars, and for notifying and warning its employes of danger to them, and to protect them as far as practicable, against accident and injury to them in its service, so that said servants and employes could, with proper prudence and care, perform their duties in, upon and about said engines and cars and about said railroad with reasonable safety. Yet the defendant corporation, not regarding its said duty in the premises, had not before, nor did it on the day and year last aforesaid, have or make known to its engineers, conductors, or its other employes,

proper rules and regulations, or any rules and regulations at all, for the repair of its broken cars, their handling, transfer and conveyance for repair or otherwise, or for notifying or warning its brakemen or other employes, that a car was broken, unfit for use, or dangerous to handle. And the defendant corporation, on the day and year last aforesaid, at said Bangor, made up a train of cars on the said railroad, and by, through, and because of its said neglect of duty, carelessly and negligently attached to the end thereof, a broken car, unfit for use and dangerous to handle, without warning or notice to its brakemen or others, of its broken or dangerous condition; by reason of which neglect of duty by the defendant corporation, and broken and dangerous condition of said car, the plaintiff, while in performance of his duty as such brakeman for said corporation, in attempting to shackle another and a moving car, to said broken car, at said Bangor, on the twenty-second day of February, A. D. 1887, and while in the exercise of due care and caution, was caught by, and between said broken car and said other car to which he was attempting to shackle it, and thereby plaintiff's body was jammed, crushed, broken, bruised and wounded, and the bones of his right shoulder broken and displaced, his shoulder and right arm wounded and permanently injured, and his left foot jammed and toes crushed so that his great toe had to be and was amputated, his head was wounded and mind and power of speech injured, and he thereby became and was sick, sore and disordered, and has so continued for a long space of time, to wit: from thence hitherto, and still so continues during all which time the plaintiff thereby has suffered great pain of body and mind, and has been wholly prevented from doing any labor or business whatever.

Besides the facts stated in the opinion of the court, it was admitted that there was no placard placed on the broken car.

Jasper Hutchings, *P. H. Gillin*, with him, for plaintiff.

Counsel cited: *Herdinger* v. *Hine*, 18 N. Y. W. Dig. 404, S. C. 31 Hun. 316; *Weber* v. *R. R.*, 58 N. Y. 451; *Gottlieb* v. *R. R.*, 29 Hun. 637, 639; *Ellis* v. *R. R.*, 95 N. Y. 546, 552; *Kain* v. *Smith*, 89 N. Y. 375; *Durkin* v. *Sharp*, 88 N. Y. 225; *Stevens* v. *R. R.*, 66 Maine, 74; *Penn. Co.* v. *Roy*, 102 U. S. 451; *Pant-*

zar v. *Tillie Foster, &c. Co.*, 99 N. Y. 372; *Schwander* v. *Birge*, 33 Hun. 189; *Clark* v. *Holmes*, 7 Hurl. & N. 937; *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572; *Russell* v. *R. R.*, 32 Minn. 234; *R. R. Co.* v. *Jones*, 95 U. S. 441; *Mowrey* v. *R. R.*, 66 Barb. 46; *Williams* v. *Syracuse Iron Works*, 31 Hun. 392; *Campbell* v. *Syracuse*, 20 N. Y. W. Dig. 449; S. C. 34 Hun. 626; Shear. & Red. Neg., p. 15, § 13, p. 17, and cases cited, p. 16, § 13[a]; *Bridges* v. *R. R.*, L. R., 6 Q. B., 377; *Scott* v. *London Docks*, 3 Hurl. & C. 596; *Clare* v. *Nat. City Bank*, 1 Sweeney, 539; Pierce, Railroads, 379; R. S., c. 51, § 62; *Snow* v. *R. R.*, 8 Allen, 441; *Atkins* v. *Merrick Thread Co.*, 142 Mass. 431; *Everson* v. *Rollins*, 6 Cent. Rep. 745; *Maguire* v. *R. R.*, 146 Mass. 379; *Shanny* v. *Androscoggin Mills*, 66 Maine, 420; *Abel* v. *Del. & Hud. Canal Co.*, 5 Cen. Rep., 615 (N. Y.) Dec. 7, 1886, S. C., 103 N. Y. 581; *Sheehan* v. *R. R.*, 91 N. Y., 332, 339; Kirkman's Ry. Service, 253, 258; Road Master's Assist. 187, 237, 242.

F. A. Wilson and C. F. Woodard, for defendants.

Action must be founded upon the charge of negligence on the part of the defendant corporation, and not on the part of its employes who were co-servants with the plaintiff, and for whose negligence the company can not be held responsible to him.

This is a distinction to be carefully observed in this case, for if the facts show negligence on the part of anybody except the plaintiff himself, we submit it must be upon the part of the fellow servants of the plaintiff and not of the defendant corporation itself or of anybody standing in its place.

The other men employed on the train on which plaintiff was, the servants who placed the broken car where it was, and whoever should have marked or placarded it, if any mark or placard should have been placed upon it, were all fellow servants of the plaintiff. *Doughty* v. *Pen. Log Driving Co.*, 76 Maine, 143; *Cassidy* v. *R. R.*, 76 Maine, 488; Pierce on Railroads, 361–6; *Holden* v. *R. R. Co.*, 129 Mass. 268; *Mackin* v. *R. R.*, 135 Mass. 201.

The fact that the plaintiff is a minor makes no difference in the application of the rule that the defendant is not liable to him for any negligence on the part of his fellow servants. *King* v.

R. R., 9 Cush. 112; *DeGraff* v. *R. R.*, 76 N. Y. 125, 132; Pierce, Railroads, p. 360 and cases cited; *Williams* v. *Churchill*, 137 Mass. 243, 244. By the express provisions of rule 160 contained in time-table, put into the case by plaintiff, "the regular compensation of employes covers all risk or liability to accidents."

Defective and broken car: It does not appear that it belonged to defendant, how long it had been defective, that it was not injured immediately before the accident without time to remove or placard it, or defendant notified of the defect. No presumption that it belonged to defendant. Freight cars of other companies daily hauled over the road. Judicial notice may be taken how railroads are managed in their daily practical operating. *Slater* v. *Jewett*, 85 N. Y. 61, 68. Defendant bound to receive and draw others' cars. *Mackin* v. *R. R.*, 135 Mass. 201, 206. No presumption of negligence on part of defendant, from the fact alone, of the accident, or plaintiff being injured while in employ of defendant. *Wormell* v. *R. R.*, 79 Maine, 397, 403; *Nason* v. *West*, 78 Id. 253, 257. Case unlike *Stevens* v. *R. R.*, 66 Maine, 74. Facts do not raise presumption of negligence on part of defendant. Patterson, Ry. Accident Law, 438, *et seq.* *Nason* v. *West*, *supra*. Defendant bound to its employe to use only ordinary care. *Wormell* v. *R. R.*, *supra*. Burden of proof not shifted to defendant. Rorer, Railroads, 1200, and cases cited. Plaintiff must prove that defendants' negligence caused the injury by evidence having legal weight and upon which a verdict would be allowed to stand. *Nason* v. *West*, *supra*. Defendants' duty to plaintiff, as employe, is to use ordinary care in providing and maintaining machinery and cars, so that the servant, in the exercise of due care may perform his duty without exposure to dangers outside the obvious scope of his employment. *Wormell* v. *R. R.*, *supra*; *Holden* v. *R. R.*, 129 Mass. 268, 277; Pierce, Railroads, 370, 373.

Plaintiff must prove, first, a defective car, second, negligence in failing to exercise ordinary care and diligence to ascertain the defect, and remedy it. *DeGraff* v. *R. R.*, 76 N. Y. 125, 128.

Rules for care and transportation of broken rolling stock:

Company not required to make such rules, it being impractic-

able. *Besel* v. *R. R.*, 70 N. Y. 171, 174, 175; *Yeaton* v. *R. R.*, 135 Mass. 418, 420. Their only purpose is to give employe knowledge of defects. Master not bound to give notice of patent defects. Pierce, Railroads, 379. Servant assumes all ordinary risks. Wood, Master and Servant, pp. 680, 681, 682; *Woodley* v. *R. R.*, 21 Moak. Eng. R. 519, note. Must inform himself. Beach, Contrib. Neg. § 138. He needs no printed placard to announce a precipice when he stands before it. *R. R.* v. *Smithson*, 45 Mich. 412. But rules, if made, would not have prevented this accident. Plaintiff says he did not see the car, or know whether any car was there or not;—hence he could not have seen any placard, flag, etc.

It must be shown that negligence was the cause of the accident. *State* v. *R. R.*, 76 Maine 357, 366.

Plaintiff guilty of contributory negligence. Pierce, Railroads, 377.

DANFORTH, J. The plaintiff seeks to recover damages for an injury, suffered by him while he was in the employment of the defendant as a servant, and in the execution of his duties as such. The case is reported upon the plaintiff's testimony alone with the proviso that if the action is maintainable it is to stand for trial; otherwise to be nonsuit.

It appears that a freight train stood upon the track of the defendants' railroad, at the station in Bangor, ready to be started for Waterville. To this train was attached a freight car from the rear end of which the bumpers and draw-bar had been broken. Such was the grade out of the station toward Waterville, that it was necessary to render some extra assistance to start this train upon its way. In order to do this another train, consisting of an engine and about eight cars, upon which the plaintiff was a brakeman, was backed toward the Waterville train with a view of coupling to it and pushing it over the grade. On approaching the Waterville, the conductor of the assisting train ordered the plaintiff who was on the top and about midway of it to "run ahead and make the hitch." The plaintiff started in obedience to the order, but before its execution was accomplished the accident happened and he became unconscious. As there is no

witness who saw him at the time, we have no direct testimony as to the manner in which the injury occurred.

These facts present the first question raised in this case. That is, whether the proof is sufficient to authorize the jury to come to the conclusion that the injury was caused in whole or in part by the defective car. If not so caused there is no ground disclosed upon which the action can be maintained against the company. If it was so caused, as it is the duty of the company to provide suitable cars and exercise due care in keeping them in repair, the action can be sustained if made out in other respects. The same result would follow if such was the effective, proximate cause even though the negligence of a fellow servant might have contributed to the accident. It is true the company in this case would not be responsible for the negligence of a fellow servant; neither would the plaintiff. Nor can a party be relieved from the consequences of his own want of care by the intervention of the wrong of a third party when that wrong was contributory only. *Cayzer* v. *Taylor*, 10 Gray, 274; *Elmer* v. *Locke*, 135 Mass. 575.

Could then, the jury have, fairly, come to the conclusion that the defective car was the efficient cause of the injury? The plaintiff testifies that when the order was given "I started to run across the cars to make the hitch." Subsequently he says, "I started to make the hitch." Between these statements, there is some testimony indicating some things he had done toward making the coupling, or which may be understood as stating the manner of doing it. There is also testimony of the surgeons showing the nature of the injuries and by inference how they must have been caused. The plaintiff's counsel seems to understand and assume that the plaintiff had made some progress in the execution of the order at least so far as to have begun to descend the ladder necessary to reach the place of coupling, and thus being between the defective car and the one to be attached, was there caught and injured. The defendant views it differently. Hearing the testimony would probably give a better understanding of it than a report. Taking all the testimony together with the fact which should not be overlooked, that the case discloses nothing to show

that the accident could have happened in any other way, we think it should be submitted to the jury.

The second question raised is whether the plaintiff is shown to have been in the exercise of due care at the time of the accident. The degree of care required is not in dispute, nor is it denied that it is a question for the jury. But it is denied that the plaintiff has affirmatively discharged the burden resting upon him of showing that he was not guilty of negligence which contributed to the accident. This at best is a negative kind of proof. It is not necessary, nor is it ordinarily expected, that any positive act of care shall be proved. If there is any fault that is usually susceptible of proof. But the absence of fault, with evidence of circumstances which naturally exclude it, is sufficient. *Maguire* v. *Fitchburg R. Co.*, 146 Mass. 379.

It would seem to be a fair inference from the testimony that the plaintiff, though some years under his majority, had sufficient intelligence and experience to enable him to understand and appreciate the dangers attendant upon the service to be performed. He well knew the necessity of the draw-bar and bumpers and could not fail to know the result likely to follow an attempt to shackle the cars in their absence. If the plaintiff was upon the ground facing the defective car, he could not fail to see the defect and the danger resulting from it. But the case shows affirmatively that he was on the top of the car and so far as appears properly so. To perform his duty he must descend, and the only way provided, was a ladder at the end of the car and so near to it that he could go down only by facing the car upon which he was, and, of course, with his back to the defective car. True, in work which is at best dangerous, vigilance is an element of the care required in the servant. But it is that degree of vigilance which is consistent with a prompt and efficient discharge of his duty and not that which follows, when such a duty is to be performed, from a delay sufficient to allow a careful examination and search for defects, which it is the duty of the master to guard against.

In this case the plaintiff was in the performance of a duty, performing it so far as appears in the ordinary way, and if at the time of the accident, the jury find as we have seen the evidence

tends to show, that he was descending the ladder or had just reached the ground, we think in the absence of other testimony the jury would be authorized to find due care on the part of the plaintiff.

The third question raised, and which is most discussed at the bar, relates to the sufficiency of the proof to sustain the charge of negligence against the defendant company. That the burden of proof to sustain this charge is upon the plaintiff is not denied. This burden does not change in any stage of the case. This can only be done, by admitting a previous fact, or series of facts sufficient to maintain or defeat an action and setting up another fact or series of facts, not in rebuttal of the first but to avoid their effect. There may be a *prima facie* case made by the testimony, the effect of which may be modified or destroyed by rebutting testimony. In such case, the issue is to be decided by the preponderance of testimony, the burden remaining where it first rested. In *Stevens* v. *E. & N. A. Ry.*, 66 Maine, 74, it was decided that the burden of proof was upon the plaintiff to show negligence on the part of the defendant company; but it was further held that the plaintiff made out a *prima facie* case by showing simply that the cars run off the track by which the injury was caused. This was upon the ground that in running railroads the simple fact that the cars run off is presumptive evidence that there is something wrong in the track or in the management of the train, and as in that case the plaintiff was a passenger, for whose safety the company was responsible, and for the care of its employes, as well as for the good condition of its track, the evidence shows a presumptive wrong on the part of the company, which it was bound to explain if it were susceptible of explanation. This principle seems to be in accordance with sound law as settled by the authorities. It is made more evident by the fact that the road is in the possession, and its running in the control of, the company, and hence the explanation, if any, must be in its control also. This too is perfectly consistent with the principle enunciated in *Nason* v. *West*, 78 Maine, 256, that the mere fact of an accident raises no presumption of wrong on the part of the defendant. This is true in the case referred to and may be true

in very many cases. The accident, in order to raise that presumption, must be one which, from its nature, or from such attending circumstances, would not be expected unless by an omission wrongful on the part of the defendant, and perhaps when the explanation is in the control of the defendant.

The case at bar is in favor of an employe. But there appears no reason why the same principle should not be applied, so far as it is applicable. Assuming, as we must in this stage of the case, that the injury was caused by the defective car, its defect is undeniable; it was in or attached to a train of similar cars, with nothing so far as the case discloses to show that it in any way differed from the others or was there for a different purpose; but the indications were that it was to be used as any other car, and from its position it became necessary to use it in the way by which the accident was caused. Of the condition of the car the plaintiff had no knowledge; there was nothing to put him upon his guard. As employe he had no control over the car, no responsibility for its being there, or for its being out of repair. Nor did his fellow servants; for any employe whose duty it was to attend to repairs, was not a fellow servant for whose neglect the plaintiff would have no remedy. On the other hand it is a plain duty of the company to provide suitable cars for its employes, use due diligence in keeping them in repair and in providing all reasonable means to protect its servants from increased danger from want of repairs. The case then reveals clear *prima facie* evidence of an omission of duty on the part of the company. If there is any explanation it is within the power of the company to give it.

It is contended that the plaintiff on the authority of *Nason* v. *West*, *supra*, should be held to prove that the company had notice of the defect in the car. But *Nason* v. *West*, in that respect is not applicable. In that case the accident occurred by the falling in of an oven. But it did not appear that it was for any defect for which the defendant was responsible, or which imputed in any degree any fault in him, but the opposite.

This principle of law is by no means a new one, nor is it alone applicable to railway companies. In all cases where a wrong, a

fault, or an omission of a duty even, is proved, from which damages result, the wrong, fault, or omission, implies a neglect, in the absence of other evidence, which requires explanation, from the apparently guilty party.

Action to stand for trial.

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

CLARENCE E. MCINTIRE, in equity, *vs.* RUEL ROBINSON and others.

Knox. Opinion June 5, 1889.

Insolvency. Irregular dismissal. Void record. Notice to creditors. R. S., c. 70, § 13.

Where a decree, dismissing proceedings in insolvency was granted upon motion of a creditor, which did not state any reason as the ground of the dismissal; upon a bill in equity by the debtor under R. S., c. 70, § 13, to have the decree revised and his case restored, *Held*, that the dismissal was irregular, no cause having been assigned. The decree is in the nature of a judgment, and the particular facts necessary to sustain it will not be presumed. If such facts do not appear in the jurisdiction exercised by courts of record, dependent upon special statutes, the judgment will be treated as void.

A dismissal of a petition in insolvency, after an adjudication and the issuing of a warrant, should take place only with the consent of creditors and after proper notice to all parties interested.

ON REPORT.

Bill in equity certified to the full court for decision, in vacation, under R. S., c. 70, § 13, by the presiding justice, upon the request of the parties.

The bill alleged, in substance, that the plaintiff filed his petition in insolvency, in the insolvent court for Knox county, March 14, 1888, and that a warrant was issued thereon March 20, returnable April 17, 1888. The messenger gave the public notice required by law. He returned the warrant at the time fixed for the first meeting and reported that he had not notified the creditors by mail, as no schedule of the creditors had been fur-

nished him by the debtor, he being temporarily out of the state. His attorney was unable to find the schedule, which the debtor left with him, in season for due service upon creditors by mail.

The case was continued to May 15, and on motion of the plaintiff's counsel a new warrant was issued returnable at that time. The new warrant was properly served and returned by the messenger May 15. When the first warrant was returned April 17, the defendant, Witherspoon, one of the creditors, appeared by his attorney and moved that the petition of the debtor and all proceedings thereon be dismissed. A hearing on the motion was assigned to take place on the same day to which the new warrant was returnable. A hearing was had on the last named day upon this motion, and thereupon the judge ordered and decreed that the plaintiff's petition be dismissed; which order and decree was erroneous in law, because said judge had no power to dismiss said petition for any of the aforesaid causes, which were all the causes shown therefor; and because said judge should have proceeded under said new warrant, all persons interested having had due and proper notice, of the return day thereof and of the proceedings thereon; and if the proceedings, subsequent to the filing of said petition, had been irregular said judge should have retained said petition, and new proceedings should have been had thereon, according to the course of law, in insolvency proceedings.

A general demurrer, after hearing, having been overruled, the defendants filed an answer to the bill. It admits the formal proceedings set out in the bill, and denies that the debtor was, at the time of the filing of the petition, within the jurisdiction of the court of insolvency. They say that the messenger made no return on the first warrant, but reported to the court that he was unable to find the insolvent, or get any schedule of creditors from him, or any list of assets, or to find out by his solicitor, or any other person, his whereabouts or when he would return; that his solicitor then and there being present, did not know where he was, or when he would return; that said insolvent was out of the state at the time; that because he could not be found and by reason of the other facts, defendant, Witherspoon, moved to dis-

miss the petition. They also say, that when the second warrant was returned, the insolvent had not then returned to the state, was not present at said court, nor could it be then definitely ascertained where he was, or when he would return. Said Witherspoon was the only creditor at said court, and he was there simply to be heard on his motion; that he had proven no claim against his estate; and that said petition was dismissed and all proceedings under it, for want of suitable prosecution thereof, and for divers other good and sufficient reasons.

The answer concludes:—that if the plaintiff has sustained any damage, by reason of the dismissal of the said petition, it is simply in the delay for which he has a complete, adequate and exclusive remedy at law. The defendants further claimed to have the same benefits under their answer, as if they had demurred to the bill.

The judge presiding in the court of insolvency when the first warrant was issued, and his successor in office, were made parties to the bill.

The case was submitted on bill, answer and proofs. The proof introduced by the plaintiff consists of the records of the court of insolvency, his own testimony and that of his solicitor, a report of which becomes unnecessary, by reason of the view of the case taken, in the opinion of the full court.

C. E. Littlefield, for plaintiff.

Legal question here presented, same as raised by demurrer to bill, and settled in plaintiff's favor, no exceptions having been taken to the ruling. That ruling conclusive. *Treat* v. *Treat*, 80 Maine, 156, 161. Plaintiff has been deprived of his legal rights. The decree of the judge on the petition under R. S., c. 70, § 15, shows that the "facts therein stated" have "been satisfactorily made to appear." Under § 16, the judge was bound to issue his warrant. There was no subsequent failure, or absence of jurisdictional facts. Having jurisdiction of the debtor, and his estate he had no right to dismiss the case. No statute authority to do it. Rights of insolvent, once in court, not dependent on the caprice of the judge, who should see that statute provisions are executed,—the debtor, "prosecuting" or not, the proceedings.

If proceedings do not become effective by reason of defective

service, etc., court has power to make effective by new service, or issue a new warrant. Filing the petition and issuing warrant divested debtor of his estate. *Judd* v. *Ives*, 4 Met. 401, 408; *Perry* v. *Manf. Co.*, 10 Law Rep. 264. No failure of the officer or neglect can revest it in him. Otherwise the debtor may pass his estate into the custody of the court, and withdraw it at his pleasure. Every court may correct its own proceedings, and cause them to be "had with due regularity." *In re* Hall, 2 B. R., 192. May order a second adjournment to perfect notice, *In re Devlein*, 1 B. R. 38, or issue a new warrant, *In re Schapeler*, 3 B. R. 170.

Debtor was deprived, by the dismissal, of his after-acquired property *quoad* his creditors who are affected by the insolvency proceedings.

Montgomery and Montgomery, for defendants.

Plaintiff no where claims that he is any way injured by the dismissal of his petition. The facts show no injury to him or any creditor. His absence, uncertainty of his return, lack of schedules and list of assets, no claims proved, and general uncertainty caused the court to dismiss the petition. Where is the damage to the plaintiff? No accumulation of new property appears. He could file a new petition on his return.

Supervisory powers over insolvent court to be exercised with great caution; not in cases of laches, but only where the party is aggrieved and has pursued his case diligently. *Lancaster* v. *Choate*, 5 Allen, 530, 538; *Bird* v. *Cleveland*, 78 Maine, 528.

It is not sufficient for overruling the decree of dismissal that this court might have decided differently, or that the judge of the insolvent court assigns no strictly legal reasons for his action. *Twitchell* v. *Blaney*, 75 Maine, 581, 582. Plaintiff was not a resident of the state. *Parsons* v. *Bangor*, 61 Maine, 459.

PETERS, C. J. A debtor, adjudged an insolvent upon his own petition, under R. S., c. 70, §§ 15 and 16, failed or neglected to furnish the messenger, with a list of assets and schedule of his creditors, in season to give them notice of the first meeting. He went out of the state, for temporary purposes, about the time he

filed his petition, and left the list and schedule with his attorney, or a friend, to be delivered to the messenger when called for. His attorney, who could not find them at the time, on the return day of the warrant, having discovered the missing papers, moved for a new warrant, which was duly issued and served.

When the first warrant was returned, one of his creditors filed a motion to dismiss the proceedings; but no reason was stated in the motion as the grounds for dismissal. The court ordered a hearing on the motion, to take place upon the return day of the second warrant. When the messenger returned the second warrant, no further proceedings took place under it, but the court proceeded to hear the motion to dismiss; and it was granted.

The debtor now seeks by his bill, under § 13, to have these proceedings, ending in a dismissal, revised and his case restored.

We think the court below erred in dismissing the case. No reasons, in the motion to dismiss, were assigned, from which it appears upon what grounds the action of the court was predicated. The facts upon which the court must have passed are not proved. We are, therefore, unable to determine whether the dismissal was ordered under a mistake of the law, or a mistaken exercise of discretionary authority. Without deciding what power resides in a court of insolvency, in the absence of any statute provision, to dismiss a petition because of laches of the petitioner, we think the case as presented on the bill, shows a dismissal without a cause being assigned.

Doubtless, at the hearing upon the motion, reasons were orally given, which were sufficient to induce the court to make the decree here complained of; but the defendants have failed to show what those reasons were. The decree of dismissal is in the nature of a judgment. The particular state of facts necessary to sustain it will not be presumed. If such facts do not appear in the jurisdiction exercised by courts of record, dependent upon special statutes, the judgment will be treated as void. Freem. Judgments, § 123.

It has been held that a voluntary bankrupt cannot withdraw his petition at his own pleasure, but must show good reason for doing so. The creditors have an interest in the proceedings from

the moment that the petition is filed. Under our statute, the filing of the petition divests the debtor of his estate. We fail to find any case where, after adjudication, a petition has been dismissed without the concurrence and consent of all creditors. Upon reason and authority the same principle should apply to the creditor who moves for the dismissal of a petition. As all the creditors are interested in the case, their rights should be protected. The dismissal of a petition in insolvency, after an adjudication and the issuing of a warrant, should take place only after proper notice and opportunity for hearing of all parties interested. Such we understand is the well settled practice.

For these reasons, we think the decree complained of can not be sustained and should be reversed.

The defendants urge the fact that the plaintiff does not claim or prove he was injured by the dismissal of his petition. We are not convinced that this is the correct view of the law. The debtor and his creditors were improperly deprived, by the decree, of their legal rights under the statute, and it is not, therefore, necessary to consider how they may have been otherwise affected.

We do not deem it necessary to determine the effect which the issuing of a second warrant had upon the motion to dismiss. It is evident that both could not be granted, at the same time, and remain in full force and effect.

As the bill concerns two of the defendants, in their official capacity, no costs should be taxed against them. Costs are allowed against the other defendant.

Bill sustained.

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

JOHN CASSIDY *vs.* JAMES J. HOLBROOK.

Penobscot. Opinion June 5, 1889.

Plea in abatement. Practice. Replevin.

A plea in abatement, to a replevin writ brought in a wrong county, is bad, if the plea concludes with a prayer "of judg— of said writ." The abbreviated expression "judg—" will not be accepted for the word judgment.

Where matter, which is pleadable in abatement, appears on the face of the writ, the practice requires that a prayer for judgment shall be inserted in both the beginning and conclusion of the plea. Dilatory pleas are allowed, because sometimes promotive of justice; they are strictly construed, because often preventive of justice.

Where a replevin writ is brought in a right court, but in a wrong county, and the defendant undertakes to avail himself of the objection by pleading it in abatement, and his plea fails, on demurrer thereto, for want of proper form, he will not be permitted to have the benefit of the objection upon subsequent motion, or under any subsequent pleadings, although the objection might have been a defense under the general issue, as well as in abatement.

ON EXCEPTIONS.

This was an action of replevin for property exceeding twenty dollars in value, alleged in the writ, to have been detained by the defendant at Milo, Piscataquis county. The writ was made returnable and entered in this court, in Penobscot county.

The defendant appeared and seasonably filed the following plea in abatement:—

And now, on the first day of the term, the said defendant comes and defends, &c., when &c., and prays judgment of the writ in the above entitled action, because he says that the value of the goods to be replevied, and in said writ described, exceeded twenty dollars at the time of the issuance of said writ, and that at the time of the purchase and service of said writ, and long before, said goods were in the lawful possession of, and were lawfully detained by said defendant, at said Milo, in the county of Piscataquis, as by the allegations of said writ will appear to the court: wherefore the said plaintiff, if he had any good cause of action against the said defendant, ought to have commenced the same

in accordance with the statute in such cases made and provided, that is to say, in the supreme judicial court, in the county of Piscataquis aforesaid, and not in said court, in the county of Penobscot; and this he is ready to verify.

Wherefore he prays judg— of said writ, that it may be quashed, and for a writ of restitution for the return of said goods, and for his proper damages and legal costs in the premises.

JAMES J. HOLBROOK.

The plaintiff, to this plea, filed a general demurrer, in which the defendant joined. The presiding justice adjudged the plea bad, and sustained the demurrer; and the defendant excepted to the ruling, etc.

Peregrine White, for defendant.

The court can have no jurisdiction of this case upon plaintiff's own showing; and can render no judgment upon the record. Such judgment would be a nullity; and no protection to the plaintiff. Action should have been brought in the county where the goods are detained. R. S., c. 96, § 9.

The want of jurisdiction being apparent upon the record, there is no need of a motion, or plea in abatement. The court was bound to abate the writ *ex proprio motu*. Defendant's appearance and plea could not give the court jurisdiction. When a substantial defect in the writ appears on the record the court ought, *ex officio*, to abate it. *Hart* v. *Fitzgerald*, 2 Mass. 509; *Tingley* v. *Bateman*, 10 Id. 343; *Osgood* v. *Thurston*, 23 Pick. 110, 111; *Haskell* v. *Woolwich*, 58 Maine, 535. The court will dismiss an action at any stage of it, whether moved by a party or not, when it is discovered that they have no jurisdiction. *Chittenden* v. *Hurlbut*, 1 D. Chip. 384; *Glidden* v. *Elkins*, 2 Tyl. 218; *Southwick* v. *Merrill*, 3 Vt. 320; *Stoughton* v. *Mott*, 13 Id. 175; *Shepherd* v. *Beede*, 24 Id. 40; *Thayer* v. *Montgomery*, 26 Id. 491.

The judgment will be no protection to the officer. *Driscoll* v. *Place*, 44 Vt. 252.

The word judgment used in the commencement of the plea is indicated as the word intended to be used in the concluding prayer, by the presence of the first half of the word at the end of the line, together with a hyphen to show that it was intended to

be completed at the beginning of the line below, that is to say, the word judgment.

C. P. Stetson, *P. H. Gillin*, with him for plaintiff.

Pleas in abatement must be certain to every intent. *Bank* v. *Mosher*, 79 Maine, 242, 245.

Plea should conclude with praying judgment of the writ. *Hazzard* v. *Haskell*, 27 Maine, 549. Plea contains no such prayer,—judg is not judgment. This not a prayer for judgment. Judg is an abbreviation for judges. See Webster's Academic Dictionary.

PETERS, C. J. Dilatory pleas are allowed because sometimes useful, and promotive of justice. But, for the reason that they are often resorted to for inequitable purposes, the law does not favor them. Therefore, they are to be very strictly construed. And the rule of strictness is general, applying to all cases. The rule really imposes no hardship. An attorney may preserve all his client's most technical rights by attention to the customary and well known forms and precedents.

In the case at bar, property, which was detained in Piscataquis county, was wrongfully replevied on process returnable in Penobscot county. For this error the defendant undertook to plead in abatement of the writ. At the close of his plea he prays "judg— of said writ." This abbreviated expression "judg—" can not be accepted for the word "judgment." It may stand for other words as well as for that. He therefore fails in his plea to pray judgment of the writ, the plea being for that cause fatally defective on demurrer. The plaintiff demurred to the plea. The defendant's error cures the plaintiff's.

Mr. Chitty in his work on pleadings cites a case where the benefit of a plea in abatement was lost by using the phrase "judgment if," instead of "judgment of." It was held in *Hazzard* v. *Haskell*, 27 Maine, 549, that praying in a plea of abatement that the writ may be quashed without a prayer for judgment of the writ, is bad on general demurrer. This will be found to be the doctrine of all the authorities controlled by the common law. It does not mend the matter that the defendant prays judgment of the writ in the commencement of the plea.

It is indispensable that the prayer be inserted in the conclusion of the plea. The rule is that where matter which appears on the face of the writ is pleaded in abatement the plea must both begin and conclude with praying judgment of the writ; and that all pleas shall so conclude. Mr. Chitty declares the rule to be positive and without exceptions. See cases in Chitty's Pleadings (16th Am. Ed.) *477 and subsequent pages. The rule is well stated and explained in cases in New Hampshire. *Pike* v. *Bagley*, 4 N. H. 76; *Baker* v. *Brown*, 18 N. H. 551.

The defendant, however, contends that, if defeated in his plea in abatement, the point is open to him on motion to abate, which may be made now, or at any time, as the want of jurisdiction is apparent on the face of the writ. Replevin being, in a strict sense, a local action, though there is not much reason for so classifying it, the defendant may have had the privilege of making his objection to the jurisdiction by pleading in abatement, or by demurrer, or by proof under the general issue. *Blake* v. *Freeman*, 13 Maine, 130; *Haskell* v. *Woolwich*, 58 Maine, 535. He elected to plead in abatement as a mode of defense affording him some supposed advantage. Having been once heard he cannot be heard again on the question. He made the challenge at the outset, and was worsted on his selected ground; and further opportunity is foreclosed against him. A defendant can never plead a fact twice in abatement, without leave of court for special reason, and there is as much ground of objection to pleading the same fact first in abatement and then in bar, if it be legitimately pleadable either way. The result will not be inequitable, for, as said by this court in an early case, "there is not readily discernible a reason for putting the action of replevin upon any different ground than that of all other personal actions for trespass for taking goods." *Pease* v. *Simpson*, 12 Maine, 261. The present action is pending in the right court, though in a wrong county. *Otis* v. *Ellis*, 78 Maine, 75. There is no incongruity that prevents even the trial of a real action in a county where the land does not lie. *Osgood* v. *Lynn*, 130 Mass. 335.

Plea bad. Defendant to answer over.

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

THE LEWISTON STEAM MILL COMPANY *vs.* RODNEY F. FOSS.

Androscoggin. Opinion June 5, 1889.

Attachment. Return. Town Clerk. R. S., c. 81, § 26.

An attachment of personal property, which by reason of its bulk or other special cause, can not be immediately removed, may be preserved, by the attaching officer filing a return of the attachment in the town clerk's office, as provided by R. S., c. 81, § 26.

The validity of the attachment depends on the doings of the attaching officer. It will not be invalidated by the mistake of a town clerk in recording it.

REPORT, on facts agreed.

Action on the case to recover damages of the defendant, city clerk of Auburn, alleged to have been sustained by the plaintiffs, through defendant's mistake and negligence in recording an attachment.

The writ is dated Sept. 6th, 1887:—Ad damnum, one hundred and fifty dollars:—plea, the general issue, which was joined.

The writ has two counts, one for the loss of a lien attachment, and one for loss of an ordinary attachment of the property in question; both however intended to cover the same claim.

The facts are as follows:

February 17, 1887, Jonas W. Strout and Frank H. Fellows, copartners as Strout & Fellows, were indebted to the plaintiff in the sum of $74.79 for materials furnished the said Strout & Fellows, within ninety days next preceding said date, used in the erection of a certain wooden building, described fully in the plaintiffs' writ.

On said date, the plaintiff commenced suit against said Strout & Fellows, duly claiming a lien, and commanding the officer to attach, &c., to enforce the same.

The writ in said suit was duly delivered to the sheriff for service, and pursuant to the command in said writ said officer attached said building, as the property of the debtors, and it being of such bulk that it could not easily be removed, filed in the office of the city clerk of the city of Auburn, where said building was

located, an attested copy of so much of his return as is required by the statute in such cases.

On the back of said document appears the following:

"Androscoggin, ss,—Registry of deeds,—Received, Feb. 18, A. D. 1887, at 10 h, 50 m, A. M.

RODNEY F. FOSS, *City Clerk.*

The foregoing return of the officer was placed on file by said clerk in his office, and remains on file in the office of the city clerk of Auburn.

On the city records, in the book of attachments, the following entries were made by said defendant:—

Defendants—Fred H. Fellows of the firm of Strout & Fellows.

Plaintiffs—Lewiston Steam Mill Company.

Date of Writ—Feb. 17, 1887.

Court Returnable—L. M. C.

Officer, Hillman Smith.

Description of the property—One story wooden building situated in Auburn on Oaks road leading to Danville Junction.

Date of Attachment—1887, Feb. 17, 4 h, P. M.

Amount—$100.

Date of entry—1887, Feb. 18, 10 h, 50 m, A. M.

City Clerk, R. F. Foss.

No.—46.

February 19, 1887, Strout & Fellows mortgaged said building to one N. M. Neal, which mortgage was duly recorded in the city clerk's office, in Auburn, for a sum exceeding the value of said building, but other personal property was included in said mortgage, which with said building, exceeded in value the amount of said mortgage.

The suit of the Lewiston Steam Mill Company proceeded to judgment against the said Strout & Fellows, and execution issued thereon, against the defendants and said building, on the sixth day of May, 1887, for the sum of $75.77, debt or damage, and $8.49, costs of suit.

Said execution was seasonably placed in the officer's hands, who sold the property to the plaintiffs, for one dollar, May 31, 1887, after giving public notice of the sale, by posting notices of the sale

in Auburn; but did not post any notices in Lewiston, where the sale took place.

Afterwards the mortgagee, having tendered the plaintiffs one dollar to redeem their claim, received a bill of sale from them of their interest in said building.

There was no other property of the defendants which could be attached to satisfy said execution, and the same was duly returned into court, satisfied only in the sum of one dollar, as aforesaid.

Since the time of said sale and subsequent to the time of bringing this suit, the said Fellows went into insolvency, and the plaintiff's are entitled to receive a dividend on their claim against said insolvent estate, amounting to $14.88, as of Sept. 15, 1887; which is all they have received on said claim.

Upon such of the foregoing facts as, would be admissible or are relevant and material, the law court were to render such judgment as the law and facts require.

Savage and Oakes, for plaintiffs.

The law required the defendant to receive a copy of the officer's return, noting thereon the time, enter it in a suitable book, and keep it on file for inspection of those interested therein. R. S., c. 81, § 26.

The law provides for the clerk's fee.

The clerk negligently failed to do his duty. The only rational interpretation of the law would seem to be that the return was to be recorded as any other instrument.

This is evident from the closing sentence of the section above cited, which in providing for cases in an unincorporated place says, "such copy shall be filed and recorded in the office of the clerk of the oldest adjoining town in the county."

But, granting that the defendant would have been justified if he had merely filled out the blanks in his book with correct abstracts, instead of the full record, yet, by what seems to be extreme negligence, he did not even do this. The officer's return gave the names of the defendants correctly,—"Jonas W. Strout and Frank H. Fellows, late copartners as Strout & Fellows"—

The city clerk, got it, "Fred H. Fellows, of the firm of Strout & Fellows."

If the alteration of the middle letter of a name, in a certificate of attachment, is sufficient to make it of no effect, (*Dutton* v. *Simmons*, 65 Maine, 583) what must be the effect of the entire change of the first name, as in this case?

There is nothing in the record to show to what court the action was returnable. "L. M. C.," which was all our clerk found time to write, might, indeed, mean Lewiston Municipal Court, or it might mean almost anything else.

But it certainly could give no information, to any one possibly desiring to contest the attachment, at which term of the court it would be necessary for him to appear.

If the record is to be of any value, at all, it must be sufficiently accurate to furnish constructive notice of all necessary facts connected with the return, so that a reasonable person, on inspection of it would be aware that the property of Frank H. Fellows and Jonas W. Strout was attached.

The negligence of the recording officer in making an incorrect entry upon his books invalidates the attachment, as against subsequent incumbrances.

It has recently been decided in this state that a mortgage for two thousand dollars, recorded as two hundred dollars, "was not proof of the record of the two thousand dollar mortgage." *Hill* v. *McNichol*, 76 Maine, 314. See also cases there cited.

The strongest cases we find on the defendant's side of the question, are those arising under a statute which provides that the instrument is to take effect from the time it is filed. Jones on Mortgages makes this distinction. He lays down the general proposition that "if the record of a mortgage be defective for any cause, it does not amount to constructive notice, * * * * * the obligation of giving notice rests upon the party holding the title." Jones, Mort., § 550.

But he qualifies this by adding, "where the law makes the record complete as constructive notice from the time of delivery of the mortgage to the recording officer to be recorded, it follows that any error in transcribing the deed, as for instance, * * * in the sum secured by it, does not prejudice the mortgage." Id. § 552.

Our statute contains the provision referred to above, namely, "A deed or instrument" is to be minuted "with the time when it was received and filed, and shall be considered as recorded at the time when such minute is made." R. S., c. 7, § 15.

In regard to the effect of such a provision, it seems apparent that there is a conflict between the law as laid down by Mr. Jones, and that enunciated in *Hill* v. *McNichol*, cited above.

The different states of the Union are hopelessly divided on the whole question. The cases are collected in 91 Am. Dec. 109, note.

To the cases cited against our position may be added that of *Sykes* v. *Keating*, 118 Mass. 517; but it may be remarked that this case was decided with two of the judges absent, and that no authorities are given for the position taken.

We think that with regard to a deed or mortgage, the position of the court in Maine is decisively taken in *Hill* v. *McNichol*.

The further question arises, whether an attachment as in this case stands on any different basis.

Why should it? On general principles is there any good reason for applying one rule of law to an incumbrance in the shape of a conveyance, and another to one in the shape of an attachment? It would seem to introduce unnecessary confusion into our practice.

Why should a party who finds a mortgage recorded for the sum of two hundred dollars, upon a piece of property which he thinks of buying, be entitled to rely upon the record as stating the whole incumbrance, but if he finds an attachment for two hundred dollars, be obliged to hunt up and examine all the proceedings, before he has a right to conclude that it should not read two thousand dollars, instead? Or, to put it differently,—if he should look through the records for an incumbrance upon the title of John Jones or Frank H. Fellows, but should only find incumbrance upon the property of William Jones or Fred H. Fellows, he might rely upon the record as he found it. Is the court then to say that if he looks for an attachment against John Jones or Frank H. Fellows, and only finds one against Fred H. Fellows, he must hunt further? or in other words, for it would practically amount

to the same thing, he must, at his peril, in every case, find the original papers placed in the hands of the recording officer.

So much for the reason of the matter. It would seem that unless the legislature had made it necessary for the courts to do so, they would hesitate long before saying that the record was to be relied on in the one case, and something else, entirely indefinite, in the other.

We believe however, that as our statute reads, the reason is stronger for holding that such an attachment, as the one in question, must stand or fall by the record, than in the case of a mortgage.

As we have suggested, our statute provides that mortgages, &c. shall take effect from the time they are filed for record. So in the case of attachment of real estate, R. S., c. 81, § 59.

If the principle to which we have referred, as laid down by Jones, and sustained by the decisions in a number of the states, that there is a distinction when the law provides, that an instrument shall take effect from the time of filing, is to apply at all in Maine, it must apply, under the sections above cited, to the case of a mortgage or real estate attachment. But the contrary doctrine has been clearly established in *Hill* v. *McNichol.*

Nothing is said in c. 81, § 26, about the relation of the attachment to the time of filing. There is the simple substitution of constructive for actual possession, and we submit that the constructive possession must be shown by the entries of the clerk, sufficiently so that a purchaser may be informed by the appearance of the record how the property is held,—and that he may rightfully depend on the record as he finds it to inform him of his title.

N. & J. A. Morrill, for defendant.

Assuming the inaccuracies on the part of the clerk to be so material, that a subsequent purchaser would have no notice of the attachment from the clerk's entry, still the attachment itself was not thereby rendered inoperative. The entry by the clerk is no part of the attachment; it is simply an index and the attachment is effectual without it.

The provision of § 26, relating to the city clerk is a subsequent

matter. He shall "receive the copy, noting thereon the time, enter it in a suitable book, and keep it on file for the inspection of those interested therein." The only parties having any interest in the entry to be made by the city clerk are those who, as subsequent purchasers or otherwise, may have occasion to look for attachments; and as to them, it is simply an index; if it is sufficiently full, so that such parties can refer to the files, they have no cause for complaint.

In this case, if there was any failure of duty by the clerk, which it is not necessary to discuss, it was to N. M. Neal, the mortgagee, and not the plaintiff. *Darling* v. *Dodge*, 36 Maine, 370; *Sykes* v. *Keating*, 118 Mass. 517; *Schell* v. *Stein*, 76 Pa. St. 398, S. C. 18 Am. Rep. 416; *Bishop* v. *Schneider*, 46 Mo. 472, S. C. 2 Am. Rep. 533; *Chatham* v. *Bradford*, 50 Ga. 327, S. C. Am. Rep. 692.

In all the three cases last cited it was held that the index was no part of the record of the deed; so here, the entry by the clerk is no part of the attachment; that was valid and effectual when the officer seasonably filed his copy in the clerk's office, especially if the copy, as here, remained on file.

But the case shows that the plaintiffs' own action caused the damage of which it complains.

It appears that the Neal mortgage of February 19, 1887 was given after the attachment, and that the mortgage covered not alone the building which the plaintiff attached, but also other personal property "which with said building exceeded in value the amount of the mortgage."

The officer's return on the execution shows that he sold "said building" on May 31, 1887, for one dollar to plaintiff, who afterwards accepted from the mortgagee the sum of one dollar in discharge of its claim on said building.

It thus clearly appears that when they made the seizure on execution, plaintiffs' attorneys did not consider the attachment lost, for they thereby endeavored to "enforce the plaintiffs' lien claim;" the mortgagee did not so consider, for he tendered the price for which the building was sold "to redeem plaintiffs' claim on said building," and the plaintiff received the money "in dis-

charge of the same," and executed a bill of sale to said mortgagee. The idea had not then come to them that the attachment was worthless; they paid their own price for the building and received their money,—the amount which they had fixed as the value of the building, and its true value for anything that appears in the case.

That they did not see fit to bid more was their own misfortune; that no other person bid higher may possibly be explained by the fact that the officer instead of posting the notices of sale and of adjournment "in the town or place of sale" as required by R. S., c. 84, § 4, posted them in Auburn, the sale being in Lewiston.

The fact is, this claim that the attachment was lost through the negligence of the clerk is an after-thought, and utterly inconsistent with the plaintiffs' course in the matter. The loss occurred in not bidding the building in for a larger sum, if it was worth more; if not, they suffered no loss, for they received the full value of their attachment.

It is impossible to state what the fact is as to the claim of loss, for the value of the building does not appear in the case, except as it is to be inferred from the price for which it was sold by the officer.

For this reason, if for no other, it seems to us impossible to render a judgment for the plaintiff, there being no evidence that a dollar was lost.

WALTON, J. The question is whether the mistake of a town clerk in recording an attachment will invalidate it. We think it will not. The validity of the attachment does not depend upon the doings of the clerk, but upon the doings of the officer. If the officer has in all particulars performed his duty, nothing which the town clerk can do or omit to do will invalidate the attachment. This will be made plain by a reference to the statute. The statute declares that:—

"When any personal property is attached, which by reason of its bulk or other special cause can not be immediately removed, the officer may, within five days thereafter, file in the office of the clerk of the town, in which the attachment is made, an attested

copy of so much of his return on the writ, as relates to the attachment, with the value of the defendant's property which he is thereby commanded to attach, the names of the parties, the date of the writ, and the court to which it is returnable; and such attachment is as effectual and valid, as if the property had remained in his possession and custody." R. S., c. 81, § 26.

Here the statute comes to a full stop. And it will be noticed that the validity of the attachment is made to depend upon the doings of the officer, and not upon anything to be done by the clerk. If the officer has made an attachment, and made a proper return of it to the clerk's office, the express words of the statute are that the attachment shall be "as effectual and valid as if the property had remained in his possession and custody."

Then follows another and an independent provision, and one which originally formed a separate section of the statute, directing the clerk to "receive the copy, noting thereon the time, enter it in a suitable book, and keep it on file for the inspection of those interested therein." But there is nothing in the words of the statute, or its history, or in reason, why the attachment, which has been perfected by the officer, should be dissolved or invalidated by an imperfect performance of duty by the clerk. We think such will not be the result. We do not doubt the liability of the clerk to any one who may have been injured by his negligence. But the facts reported fail to show any injury to the plaintiff.

Judgment for defendant.

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

APPENDIX.

The Act of the Legislature of Maine, approved March 13, 1889, being c. 308, Public Laws of 1889, held to be constitutional.

AUGUSTA, MAINE, March 30, 1889.

To the Honorable Justices, of the Supreme Judicial Court :—

Under, and by virtue of, the authority conferred upon the Governor, by the Constitution of Maine, Art. VI, § 3, and being advised, and believing, that the questions of law are important, and that it is upon a solemn occasion, I, Edwin C. Burleigh, the Governor, respectfully submit the following statement of facts, and question, and ask the opinion of the Justices of the Supreme Judicial Court thereon.

STATEMENT.

$1,748,000.00 of the bonded indebtedness of the State of Maine, issued by virtue of a resolve, approved March 19th, 1864, (Resolves 1864, c. 318) mature on the 1st day of June, A. D. 1889.

$2,187,400.00 of the bonded indebtedness of the State of Maine, issued by virtue of an act of the legislature, approved March 7th, A. D. 1868, (P. L. 1868, c. 225,) as amended by act approved March 3rd, A. D. 1869, (P. L. A. D. 1869, c. 40) mature on the 1st day of October, A. D. 1889.

In addition to this bonded indebtedness there is other outstanding bonded indebtedness of the State of Maine, amounting to $82.000.00.

The legislature of 1889, enacted an act, entitled "An Act to Provide for the Refunding of the Public Debt, and to repeal an

act entitled, 'an Act to Provide for the Refunding of the Public Debt,' approved February 26th, A. D. 1889," approved March 13th, 1889, (P. L. 1889, c. 308,) a copy of which is herewith submitted.

QUESTION.

Is this act, (P. L. 1889, c. 308,) constitutional, and would bonds issued by virtue of its provisions, be valid?

Very respectfully,

EDWIN C. BURLEIGH,
Governor.

AUGUSTA, MAINE, April 1st, 1889.

Honorable Edwin C. Burleigh, Governor.

Sir:—Your communication, of date March 30, 1889, asking the opinion of the Justices of the Supreme Judicial Court, whether, in their opinion, upon the statement in your communication the Act of the Legislature of Maine, approved March 13th, A. D. 1889, being c. 308, of the public laws of 1889, is constitutional, and whether bonds issued under that act would be valid, was duly received and has been fully considered.

In answer to your inquiry we respectfully reply, that it is the opinion of all the justices that the act referred to is constitutional, and that bonds issued in pursuance of such act would be valid.

Article IX, § 14 of the constitution, declares that the legislature shall not create any debt exceeding a limited amount named, "except to suppress insurrection, repel invasion, or for purposes of war." The issue of these bonds which, by the Act of 1889, is to be dated as of June 1st, 1889, will vastly exceed the constitutional limit, should it be regarded as a new debt. In our opinion, it can not, in a constitutional sense, be so regarded.

It will rather be the old in a new form. The issue of bonds soon to mature, was originally provided "for purposes of war," and represents a war debt of the state. But the bonds to be issued will just as much represent the war debt as do the bonds

to be retired. It will be, as the act denominates it, a renewal and extension of the bonded indebtedness of the state.

A new credit of borrowing is substituted for the old, upon favorable terms to the state.

If the new bonds be exchanged for the old, bond for bond, it would literally be a renewal and extension of the debt, and if the new bonds are sold to obtain means with which to liquidate the old, it will in all essential respects amount to the same thing. The same result will be reached as far as the state is concerned. The old bonds were evidence of the war debt. The new bonds will become such evidence by substitution. The holders of the old bonds would in equity, be considered as receiving payment of their debt from the purchasers of the new bonds, when the money received from the new is applied to take up the old bonds, and the act provides that the receipts of sale shall be so applied, and the judicial remedy may be had, if need be, to prevent misapplication. Whether the debt of the state be represented by the one set of bonds, or the other, it is one and the same debt, as far as the constitutional provision affects the question.

The new issue postpones payment of the debt, but does not extinguish it. Final payment must come, as the act intends, from gradual taxation of the people and property of the state.

The issue of bonds to bear date of October 1st, 1889, is to be appropriated for the payment or renewal of another indebtedness of the state, which was originally authorized by § 15, of Art. IX, of the constitution. That section authorized the state to issue bonds payable within twenty-one years, with six per cent interest, the bonds or their proceeds to be devoted towards the re-imbursement of the towns and cities of the state for the expenditure of moneys for the purposes of war during the Rebellion.

Now that these bonds are nearly due, we can perceive no constitutional, or other objection, to a renewal or payment of them by new issues. The constitutional clause provided that the original issue should be, at six per cent, on no longer time than twenty-one years. But it does not in terms, or by implication, limit the means by which the indebtedness should be finally paid.

No sinking fund is required, nor mode of taxation prescribed, by the constitutional clause, to insure an extinguishment of the debt before or at the end of the twenty-one years. The debt is a valid constitutional obligation of the state, and the legislature is not prevented from resorting to any practical method for keeping the credit of the state unsullied. It follows that the legislature has the power to prescribe such means for the payment or renewal of this branch of the state indebtedness, as it deems proper, without infringing upon other constitutional provisions.

JOHN A. PETERS,
CHAS. W. WALTON,
CHARLES DANFORTH,
WM. WIRT VIRGIN,
ARTEMAS LIBBEY,
LUCILIUS A. EMERY,
ENOCH FOSTER,
THOS. H. HASKELL.

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BURDEN OF PROOF.

1. A plaintiff, to sustain an action for his professional services expended in carrying on a lawsuit instituted in the defendant's name as plaintiff, has on himself the burden to prove, directly or circumstantially, that the services were rendered by him at the defendant's request, and he is not relieved of that burden by the fact that the defendant undertakes, in the course of the trial, to show that the action really belonged to the plaintiff, who prosecuted it on his own account. *Wright* v. *Fairbrother*, 38.
2. The unauthorized alteration of a note payable "to order" by inserting after those words "or bearer," will not vitiate the note if done without any fraudulent or improper intent; but the burden of proof will rest on the holder to show that the act was done innocently. *Croswell* v. *Labree*, 44.
3. Where the plaintiff prays to have a deed cancelled, by reason of fraudulent misrepresentations, it is incumbent on him to prove that he was induced, by such misrepresentations, to execute the deed. *Severance* v. *Ash*, 278.
4. In a bastardy suit, the burden of proof to establish the paternity of the child, is on the complainant. *Overlock* v. *Hall*, 348.

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1. *Cassidy* v. *Bangor*, 61 Maine, 434, affirmed. *Dorman* v. *Lewiston*, 420.
2. *Columb. Ins. Co.* v. *Eaton*, 35 Maine, 391, distinguished. *Cousens* v. *Lovejoy*, 471.
3. *Foster* v. *Searsport &c. Co.* 79 Maine, 508, affirmed. *Stratton* v. *Currier*, 497.
4. *Handley* v. *Howe*, 22 Maine, 560, distinguished. *Monaghan* v. *Longfellow*, 300.
5. *Hatch* v. *Atkinson*, 56 Maine, 326, affirmed. *Drew* v. *Hagerty*, 243.

CARE.

The plaintiff's horse and carriage were injured, when being driven upon the defendant's wharf, by running upon a pile of gravel there deposited as freight, in a proper place, and as near the edge of the wharf as it could be done with safety. There was an abundance of room between the gravel pile, and the sidewalk opposite for teams to pass with safety and convenience. There was no complaint of any defect, except such as might arise from the supposed obstruction, caused by the gravel. *Held*, that the gravel was rightfully there. *Held*, *also*, that the prevailing darkness, though not sufficient evidence of carelessness on the part of the plaintiff's bailee in going there, did impose upon him additional care, in making the passage. *Hall* v. *Tillson*, 362.

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CORRUPT AGREEMENT.

There is no legal impropriety in one person giving to another an account against a third person, which is in dispute and not likely to be enforced except by litigation. *Wright* v. *Fairbrother*, 38.

COSTS.

When a party wrongfully enters upon the docket of this court what purports to be an action appealed from a lower court, and the adverse party appears and moves its dismissal, because no appeal had been duly taken, and the motion is sustained and the action dismissed, *Held*, that the party on whose motion the dismissal was obtained, is a "prevailing party," and entitled to costs. *Pomroy* v. *Cates*, 377.

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1. The defendant holding a mortgage on real estate to secure the mortgagor's note to him, and foreclosure of the same having nearly expired, the mort-

DISTRIBUTION.

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EQUITY.

1. The interest which a wife has in a written contract for the conveyance of land to her by a third person, the payments therefor having been made by her husband out of his own money or means, may be taken in an equitable process against husband and wife, to be appropriated by a creditor on a debt of the husband occurring before the existence of the contract to convey. *Merrill* v. *Jose*, 22.

2. A bill in equity commenced in the life-time of a husband and his wife, to annul an insurance policy issued on her life for his benefit, may, after her death during the pendency of the proceeding, be prosecuted to final decree against the husband alone, as he is, besides the complainants, the only person interested. *Maine Benefit Asso.* v. *Parks*, 79.

3. If the jury, to whom the facts are submitted in the case tried on the equity side of the court, render a clearly erroneous and unjust verdict, the court may not only set the verdict aside, but may in its discretion pronounce final judgment in the case adversely to the verdict. *Ib.*

4. Where a defense is set up, to a bill in equity which seeks to require a railroad corporation to transport over its road the freight of an express company, that the railroad is itself doing all express business over its road, the burden is on the railroad corporation to show that it is actually engaged in doing such business to the exclusion of all other persons and corporations alike. *Int. Express Co.* v. *Grand Trunk Ry.*, 92.

5. Where a husband's intention of devising his property to his own heirs was changed and it was devised to his wife by will absolute in form, upon her assurances that she would only use it during her life and devise the remainder to his heirs, on a bill in equity by the husband's heirs; *Held*, that the wife took the property charged with a trust. *Gilpatrick* v. *Glidden*, 137.

6. Where the holder of a chattel mortgage sold one of the mortgage notes to a third person, the complainant, who was under no obligation to pay it, and at the same time agreed to assign the mortgage *pro tanto*, but refused to execute an assignment, having obtained the money on the note, and converted the chattels to his own use; it appearing that there was sufficient property to pay all the notes, *Held*, that the complainant acquired an equitable interest in the mortgage, and that the mortgagee, upon bill in equity, was liable for the note thus paid by the complainant.
Holway v. *Gilman*, 185.

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GIFT.

1. The gift of a savings bank book, *causâ mortis*, to be valid, must be accompanied by an actual delivery from the donor to the donee, or to some one for the donee; the delivery must be made for the express purpose of consummating the gift; and a previous and continuous possession by the donee, is not sufficient. *Drew* v. *Hagerty*, 231.
2. A delivery, in such case, becomes necessary to distinguish it from a legacy, since without delivery, an oral disposition of property, in contemplation of death, can be sustained only as a nuncupative will. *Ib.*
3. Delivery, followed by possession, is an essential part of a gift. *Ib.*
4. A gift, *inter vivos*, to be effectual, must be immediate and absolute, accompanied by actual delivery. Words alone will not constitute delivery. There must be some act or something done. With the words there must be some accompanying act, some handing over, some unequivocal thing done and performed, indicating a change of title in the property. *Ib.*
5. A verbal agreement between husband and wife, that moneys deposited in savings banks, in their joint names, and belonging to them jointly, shall become at the death of either wholly the property of the other, is not an executed contract, and does not convey the property. *Ib.*
6. Where money is deposited in a savings bank, in the name of a husband, payable also to the wife, the presumption of law would be, nothing else appearing, that the husband was the depositor, because the account is directly in his name, although the money is payable to her. *Ib.*

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HUSBAND AND WIFE.

1. A verbal agreement between husband and wife, that moneys deposited in savings banks in their joint names, and belonging to them jointly, shall become at the death of either wholly the property of the other, is not an executed contract, and does not convey the property.
Drew v. *Hagerty*, 231.
2. Where money is deposited in a savings bank, in the name of the husband, payable also to the wife, the presumption of law would be, nothing else appearing, that the husband was the depositor, because the account is directly in his name, although the money is payable to her. *Ib.*
3. By the laws of this state, a husband has no insurable interest in the wife's property, conveyed to her by him. *Clark* v. *Dwelling House Ins. Co.*, 373.
4. Where a husband took out a policy of fire insurance, upon his wife's property payable in case of loss to himself, *Held*, that he has no valid claim to reimbursement because he can suffer no pecuniary loss, by the destruction of the property. *Ib.*

IDEM SONANS.

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INDICTMENT.

1. An indictment for keeping and maintaining a common nuisance under R. S., c. 17, §§ 1 and 2, need not allege that the respondent knew the place he so kept was a common nuisance. *State* v. *Carr*, 107.
State v. *Ryan*, 107.
2. An indictment under R. S., c. 126, § 17, which charges the defendant did conspire "with intent falsely, fraudulently and maliciously" to cause A to be prosecuted for an attempt to murder and kill "of which crime the said A was innocent" is sufficient without averring that the defendant knew, or had reasonable cause for believing, that said A was innocent.
State v. *Locklin*, 251.

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See INDICTMENT, 7.

INSURANCE, (FIRE.)

INSURANCE, (LIFE.)

INTOXICATING LIQUORS.

JUDGMENTS.

JURISDICTION.

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JURY.

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LANDLORD AND TENANT.

The defendant was the owner of a building, on the second floor of which were several tenements, all of which, were leased to different tenants. There was one stairway for the accommodation of all, and used in common by the several tenants. The plaintiff was one of the tenants, and while in the proper use of the stairway was injured by a defect in the landing.

Held, that it was incumbent upon the defendant, as owner and landlord, in the absence of an express agreement to the contrary, to suitably care for and maintain for the tenants, a stairway, at his own expense.

Sawyer v. *McGillicuddy*, 318.

LACHES.

See PROBATE, 5. MORTGAGE, (Real,) 9.

LEASE.

1. An instrument in the form of a lease, does not have the effect of merely a contract for a lease, because the lessee who resides at a distance from the leased premises, refuses to accept possession when he comes to see the premises. *Rice* v. *Brown*, 56.

2. There is a sufficient mutuality of contract and of consideration to constitute a binding lease, when one party signs with a seal, and the other without, no objection having been made thereto when the leases passed. *Ib.*

3. The lessee having refused to accept possession of the leased premises, wrote the lessor among other things, thus:—"I have concluded not to accept the cottage under any circumstances whatever, nor will I acknowledge any liability in the matter." To which the lessor replied:—"I have your note of to-day. I consider you have done me a gross wrong, by violating your written pledge given me six weeks ago, on a frivolous pretext. The satisfaction I have is that our acquaintance begins and ends the same day, and that we can never by any possibility have such disagreeable tenants as you are."

Held, That the reply did not of itself amount to a waiver of lessee's obligation, and whether, in connection with extraneous facts, it should have such a construction or not, was a question for the jury. *Ib.*

LEVY.

See TITLE, 1, 2.

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See MORTGAGE, (Real,) 11. INDICTMENT, 7, 8.

LEWISTON CITY COUNCIL.

See WAY, 6.

LIEN.

1. When poplar and birch logs are, under one contract, cut and hauled from the same land and delivered at the same mill in separate piles, all in the same season, an action to enforce a laborer's lien thereon is seasonably commenced within sixty days after all the poplar and birch logs are thus delivered. *Phillips* v. *Vose*, 134.

2. A merchant, to whom the laborer has sold his lien claim, for goods furnished him, may maintain an action in the name of the laborer to enforce a lien on the logs. *Ib.*

3. Where taxes were assessed, in one sum, upon property belonging to tenants in common, and they are paid by one of the owners in order to prevent a forfeiture of his interest, equity will not thereby establish a lien for reimbursement, upon the share of the other co-tenant.

Preston v. *Wright*, 306.

See CONTRACTS, 4.

LIFE-LEGATEE.

See WILLS, 1, 2, 8.

LIMITATIONS.

1. The defendant being indebted in 1868 to plaintiff in account, which was barred by the statute, gave the plaintiff the following writing: Whereas A. (the plaintiff) has unsettled accounts against B. and myself which it is not convenient to settle at this time, now I hereby agree to waive any and all objections to said accounts, which might be brought against them, on account of the statute of limitations, and hereby renew the promise to pay whatever balance shall be against us.

In an action on the account commenced in 1888, *Held*, not to be an independent covenant not to plead the statute in the future. To do so, would require a division of the contract and if so construed, would be void for want of consideration, as the account was barred at its date. It was a new promise under the statute, having a sufficient consideration;—but is itself barred by the statute. *Trask* v. *Weeks*, 325.

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MORTGAGE, (CHATTEL,).

1. Where the holder of a chattel mortgage sold one of the mortgage notes to a third person, the complainant, who was under no obligation to pay it, and at the same time agreed to assign the mortgage *pro tanto*, but refused to execute an assignment, having obtained the money on the note, and converted the chattels to his own use; it appearing that there was sufficient property to pay all the notes, *Held*, that the complainant acquired an equitable interest in the mortgage, and that the mortgagee, upon bill in equity, was liable for the note thus paid by the complainant.
Holway v. *Gilman*, 185.

2. A chattel mortgage is to be considered as recorded, when received by the town clerk for record, even though the mortgage be not actually spread on the record book, and the time of reception is not noted on the record book, *provided*, the mortgage remains on file. *Monaghan* v. *Longfellow*, 298.

3. At common law, the grant of crops of hay to be grown for an indefinite period of time in the future, upon the land of the assignor, and of which he retains possession, is inoperative and conveys no title to the same as against a *bona fide* purchaser of a year's crop, after the same has been harvested.
Shaw v. *Gilmore*, 396.

4. As between the parties, a mortgage upon goods which authorizes the mortgagor to sell them, and with the proceeds of such sale to purchase other goods to take their place, may be upheld as to such after acquired property.
Williamson v. *Nealey*, 447.

MORTGAGE, (REAL,).

1. The defendant holding a mortgage on real estate to secure the mortgagor's note to him, and foreclosure of the same having nearly expired, the mortgagor arranged with the plaintiff bank to furnish him money on a new mortgage to pay the defendant with. It was suggested by an attorney of the bank, as defendant was about to receive the money, that instead of making a new mortgage, the mortgagor give a note to the bank for the money and the defendant assign his mortgage to the bank, for them to hold as collateral security for the new note, which was done, thoughtlessly on the part of the defendant. In the assignment was inserted a clause by which the defendant covenanted that there was no incumbrance on his mortgage and that he had a right to sell and convey. It seems that some years pre-

MUTUAL MISTAKE.

NAME.

NEGLIGENCE.

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OFFICER.

When an officer sets up his title to an office in justification of his official act, for which the action is brought, he must prove his legal title to the office. It is not sufficient that he shows he was an officer *de facto*.

Grace v. *Teague*, 559.

OPINION OF THE JUSTICES.

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PARTITION.

PAYMENT.

PLEADINGS.

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SHIPPING.

1. A ship's husband may contract bills against the vessel, but cannot, by virtue of his office, borrow money on the credit of the owners to pay them.
Arey v. *Hall*, 17.

2. A ship's husband, himself an owner, borrowed money of another owner, with which to pay bills on the vessel, without authority of the owners, undertaking to give a note therefor as their agent. *Held*, that the owners are not liable for the money, in an action in the name of the lender, or in the name of any person to whom the claim has been assigned by the lender.
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SPECIFIC PERFORMANCE.

See EQUITY, 16, 17, 18, 19.

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PUBLIC STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

SUNDAY LAW.

See CONTRACTS, 6.

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See AWARD.

SURETY.

1. A co-surety upon a note, who takes security from the promisor to indemnify himself against his suretyship, and also for an accommodation indorsement of a previous note for the same maker, is not bound to share his security with his co-surety, so long as it is insufficient to indemnify him for the first indorsement. *Titcomb* v. *McAllister*, 399.

2. Such co-surety should apply his security to his indemnity as of the date when the same has been reduced by him to cash. *Ib.*

3. Where the plaintiff thus held security which was insufficient to indemnify him against his prior indorsement, *it was held*, that he might recover of the defendant, as his co-surety, one half of the amount which he had paid on their joint suretyship with interest. *Ib.*

See POOR DEBTOR, 2.

TAX.

1. The plaintiff, an inhabitant of another town April 1, 1885, was taxed for personal property by the defendant town, where he was a cotton broker, engaged in buying and selling cotton. He occupied a desk, and desk room there which he rented. He kept his account books and papers in the desk; received and answered his correspondence there; received samples of cotton, but made no sales there; kept no goods there other than the samples sent him by mail, which he never exhibited there for sale. He made his sales by taking his samples and exhibiting them to the purchasers at their places of business outside of the defendant town. A part of the payments was made by notes through the mail to his place of business, and a part was made at the places of sale. He had a large quantity of cotton stored in three warehouses in the defendant town, paying storage thereon, from which houses cotton was shipped after sale; but he had no direction or control over the warehouses. He was not an agent for any one in making the sales. *Held*, upon these facts, that the plaintiff did not occupy a store or shop within the meaning of R. S., c. 6, § 14, par. 1, and was therefore not liable to the tax. *Martin* v. *Portland*, 293.

2. Where taxes were assessed, in one sum, upon property belonging to tenants in common, and they are paid by one of the owners in order to prevent a

TENANTS IN COMMON.

See TAX, 2.

TENDER.

See MORTGAGE, (Real,) 13.

TIME.

See INDICTMENT, 3, 4, 6.

TITLE.

1. The plaintiff and defendants claim the demanded premises under the same person, Warren Hardy, the plaintiff by levies against him, and the defendants by a mortgage from him. The levies were made after, but recorded before, the mortgage was. The plaintiff had actual notice of the mortgage before he attached, through information to his attorney, communicated by Hardy in his disclosure as a poor debtor in the presence of the attorney.

Held, That the burden is on the plaintiff to show that his proceedings should not be affected by such notice, if any reason why they should not exist.
Bunker v. *Gordon*, 66.

2. The attorney testifies that he told the plaintiff that Hardy had sworn that such a mortgage rested on the premises, and that he (witness) had examined the records and found no mortgage, and that he did not believe there was any, and he thinks that he made inquiry of the mortgagee, and that he told the plaintiff so, and that he could not find there was any, and concluded there was none.

Held, that, on this evidence the effect of the notice is not explained away. The evidence is too indefinite and uncertain for that purpose. *Ib.*

3. A creditor who attaches real estate after another creditor has attached it, but sells the same on execution before the first attaching creditor sells it, each creditor being the purchaser in the sale on his own execution against the same debtor, will have the priority of title, as between the two creditors, if the first attaching creditor fail to record his deed for more than three months after his sale is made. *Hayford* v. *Rust*, 97.

4. Under R. S., c. 76, § 42, a return by an officer on an execution that he took and sold "all the right, title and interest which" the debtor has, is sufficient to pass all the title of the debtor to the lands described.
Millett v. *Blake*, 531.

TOWN OFFICER.

The defendant, one of the board of selectmen, signed and delivered to the chairman, a town order in blank, to be used for a legitimate purpose. The chairman issued it to the plaintiff, who loaned and advanced to him the money thereon, relying upon his sole assurance, that the town was in need of the money to pay town debts, and that the board was authorized by the town to hire the money. The defendant was wholly ignorant of such disposition of the town order, and the false representations made by the chairman. In an action of the case, the plaintiff charged the defendant with having falsely and fraudulently represented to him, that he and the chairman had authority to hire money in behalf of the town, and to execute valid orders therefor, when in truth and in fact they had no such authority.
Held, that the action could not be sustained. *Fuller* v. *Mower*, 380.

See TOWNS, 1, 2.

TOWN ORDER.

See ACTION, 3. PROMISSORY NOTE, 8.

TOWNS.

1. Where a town omits to choose highway surveyors at its annual March meeting and fails to appoint its municipal officers to be such surveyors, those then in office hold over until the first day of May following under the provisions of R. S., c. 3, § 14. *Bunker* v. *Gouldsboro*, 188.

2. An appointment of highway surveyors, by municipal officers, cannot take effect until the first day of May following the annual meeting, and such appointee cannot legally act or bind the town by notice of a defect in the highway, before that time. *Ib.*

3. No suit can be maintained against a town to recover money loaned to its officers, unless the plaintiff proves that they had authority to hire the money, or that the hiring has been ratified by the town, or that the money has been applied to the legitimate uses of the town, and such application ratified by the town. *Hurd* v. *St. Albans*, 343.

4. The payment of a town debt, with money hired without authority, will not be sufficient to charge the town, unless the town has ratified the payment. *Ib.*

See WAY, 1.

TOWN CLERK.

See ATTACHMENT, 3. MORTGAGE, (Chattel,) 2.

TRESPASS.

See DEED, 10, 11, 12. OFFICER.

TRIAL JUSTICE.

See OFFICER.

TROVER.

See PRACTICE, (Law,) 11. INSOLVENT LAW, 14.

TRUSTS.

See ACTION, 7. AGENCY, 2. BANKRUPTCY.

TRUSTEE PROCESS.

WAY.

WHARF OWNER.

WILLS.

11. The will of a *feme sole* is not revoked by her marriage. The rule of the common law, to the contrary, is not now in force, in this state.
Emery, appellant, In re Esther Hunt, 275.

WORDS AND PHRASES.

WOOD.

See MORTGAGE, (Real,) 11.

WRIT.

1. All writs of summons and attachment are original writs within the meaning of R. S., c. 81, § 6, and such as are required to be indorsed, before entry in court, by some sufficient inhabitant of the state, where the plaintiff is not an inhabitant thereof. *Pressey* v. *Snow*, 288.

2. The want of such indorser, being a defect apparent upon inspection of the writ itself, may be taken advantage of by motion, and no plea in abatement is required. *Ib.*

3. The court has no discretionary power to permit an indorsement of such writ after entry in court. *Ib.*

See MANDAMUS, 1. REPLEVIN.