REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By CHARLES HAMLIN,

REPORTER OF DECISIONS.

MAINE REPORTS,

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JUSTICES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

HON. JOHN A. PETERS, CHIEF JUSTICE.

HON. CHARLES W. WALTON.

HON. CHARLES DANFORTH.[1]

HON. WILLIAM WIRT VIRGIN.

HON. ARTEMAS LIBBEY.

HON. LUCILIUS A. EMERY.

HON. ENOCH FOSTER.

HON. THOMAS H. HASKELL.

HON. WILLIAM PENN WHITEHOUSE.[2]

JUSTICES OF THE SUPERIOR COURTS.

HON. PERCIVAL BONNEY,	CUMBERLAND COUNTY.
HON. WM. PENN WHITEHOUSE,	KENNEBEC COUNTY.
HON. WILLIAM M. ROBINSON,	AROOSTOOK COUNTY.
HON. OLIVER G. HALL,[2]	KENNEBEC COUNTY.

ATTORNEY GENERAL,

HON. CHARLES E. LITTLEFIELD.

(1.) Deceased March 30, 1890.
(2.) Appointed April 24, 1890.
(3.) Appointed April 28, 1890.

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

OTIS W. BROOKS *vs.* CEDAR BROOK AND SWIFT CAMBRIDGE RIVER IMPROVEMENT CO.

Oxford. Opinion June 5, 1889.

Eminent domain. Public streams. Damages.

The legislature has the constitutional power to authorize the erection of dams upon non-tidal public streams to facilitate the driving of logs, without providing compensation for mere consequential injuries where no private property is appropriated.

Where such a dam, erected in accordance with legislative authority, causes an increased flow of water at times in the channel below thereby widening and deepening the channel and wearing away more or less the soil of a lower riparian owner, it is not such a taking of private property as entitles the owner to compensation. It is a case of *damnum absque injuriâ.*

REPORT, on facts agreed.

The defendant company is a duly organized corporation under its charter, and by virtue thereof, has made extensive improvements in the streams named in it, for the purpose of facilitating the driving of logs. Among other improvements, the company

built a dam across the Swift Cambridge river, at a point about four miles, as the river runs, above the plaintiff's land in Grafton. A head of about five feet of water can be obtained by the dam. The gate in the dam is about seven feet wide. Log-owners who have landed their logs on said river above the plaintiff's land, have used said dam and the other improvements of the company for driving purposes. The greatest increase in height that is usually produced in the river, where it crosses the plaintiff's land, by opening the gate, is one foot.

The action of the logs and water have tended to deepen and widen the stream by gradually wearing away the soil of the banks and bottom across the plaintiff's land.

The defendant company has allowed log-owners to use the dam and improvements, paying therefor the charter toll, but has never itself used the dam for the purpose of driving logs, and has never undertaken the driving of logs in any of the streams named in its charter.

If the defendant is liable for the wearing away of the banks as aforesaid, the damages are to be assessed by a referee agreed on; otherwise judgment to be for the defendant.

D. Hammons, for plaintiff.

When defendant accepted the charter it promised, by implication, to pay damages as provided in § 2. Defendant has collected tolls, given by the act, and has in its hands the damage done to plaintiff and others. If defendant has not itself driven the logs, it has permitted others to use its franchise, and accepted payment therefor.

The ownership of the soil washed away may be in plaintiff, but defendant has deprived him of its use and possession. Counsel cited, Const. of Maine, Art. 1, § 21.

A. E. Herrick, for defendant.

The wisdom of the act, and extent of public convenience requiring it, have been passed upon by the legislature. *Spring* v. *Russell*, 7 Maine, 273, 292. No claim is made of unauthorized or negligent acts. Company was authorized to build dams, etc. The only compensation provided is for land and materials taken.

There was no taking which deprived plaintiff of his title, or part of it, so that the entire dominion over it no longer remained with him. *Cushman* v. *Smith*, 34 Maine, 247.

Floating logs down the river was lawful without any charter; floating them by using defendant's improvements was made lawful by the charter.

A man may be injured in his property, and be without remedy. *Lawler* v. *Baring Boom Co.*, 56 Maine, 443; *Spring* v. *Russell*, 7 Id. 273; *Whittier* v. *R. R.*, 38 Id. 26; *Boothby* v. *R. R.*, 51 Id. 318.

Company did no driving of logs. It could not control the acts of those using its improvements, and not liable for anything so remote and consequential. *Sumner* v. *Richardson Lake Dam Co.*, 71 Maine, 106, 109.

EMERY, J. Facts agreed. Swift Cambridge River in Maine is a non-tidal stream, but is capable in its natural state of floating to market, logs and other products of the forest, and hence is a public highway for all the people of the state. *Brown* v. *Chadbourne*, 31 Maine, 9. The legislature authorized the defendant company, among other things, to build dams across this river for the purpose of facilitating the driving of logs, and improving the navigation. Special laws of 1877, c. 106. The defendant company in pursuance of its charter, and for the purposes named, built a dam across the river, about four miles above the plaintiff's land. There is no suggestion, in the statement of facts, that the dam is not properly constructed and not wholly within the terms of the defendant's charter.

The head of water accumulated by this dam increases the flow below the dam, when the gates are opened for the passage of logs. This increased flow facilitates the driving of the logs, which is the object of the company's charter and works. The greatest increase in the height of the river, where it passes through the plaintiff's land, caused by this increased flow, is one foot. The action of this increased flow of water, and of the logs borne along upon it, "have tended to widen and deepen the stream by gradually wearing away the soil of the banks and bottom across the plaintiff's land."

The plaintiff brings this common law action to recover damages for that injury to his land. He makes no other complaint. None of his land has been appropriated by the defendants. They have not flowed, nor occupied his land. They have not diverted any water from, or upon it. So far as appears, they have by their erections detained the water a reasonable time, and let it down in reasonable quantities, at proper seasons. This is just what is being continually done on nearly every stream in the state, and what every riparian owner submits to with little thought of claiming damages.

The plaintiff's injury, if any, does not flow from the wrongful act of any one, and hence is *damnum absque injuriâ*. To hold otherwise,—to hold that the mere tendency of an increased flow of water, at times, in its natural channel to wear away soil, is in itself a cause of action against the owners of mills and dams, would prevent all improvement of inland navigation, and would paralyze all industries dependent on water power. A law, requiring such a judgment, can never have been established by the people.

The plaintiff urges, however, that the legislature can not authorize the improvement of the navigation of the public streams of the state, without providing compensation to riparian owners for such injuries as his. It may be at once conceded fully, that the legislature can not authorize the taking any property of a riparian owner, for use in improving the navigation, without providing compensation. If riparian land is taken for storage of water, or for a receptacle for discharged waters, or for dams, locks, etc., the owner is entitled to compensation for the injury caused by such taking. This concession, however, does not include incidental injuries, where no land is appropriated, and no water is diverted.

The riparian owners on all public streams in this state, hold their riparian lands subject to the paramount right of navigation of such streams by the public. The public right of navigation existed before the private ownership of the land under or adjoining the public streams. The title to the whole, lands and rivers, was first in the Sovereign, whether King, Province or State. In

all the grants of lands from the Sovereign, there is always, at least unless otherwise expressly stipulated, a reservation of the public right to use all navigable rivers as public highways. Such a reservation naturally and properly retains with it the right for the Sovereign to make and authorize all reasonable improvements, from time to time, to facilitate the use of the river by the public, even though the land owner thereby suffers inconvenience or loss, so long as none of his property is actually appropriated by the Sovereign. This sovereign right has been continuously exercised in this state since its first settlement, and by the general, if not universal consent of all its citizens. The statutes of nearly every legislative session, contain acts authorizing the improvement of rivers as public highways, by the erection of dams, and applying to nearly all the public rivers of the state. All these acts assume the right of the state to make such improvements, without making compensation, except where private property is actually appropriated. The general statute authorizing the erection of dams for creating water power, contains no provision for compensation to riparian owners, when the stream is not diverted, nor the land overflowed. The early, long continued, and universal acquiescence in the exercise of such a right, is the strongest evidence of its existence. A judicial decision can hardly be necessary to establish it.

The courts, however, have recognized this right of the state. In *Moor* v. *Veazie*, 32 Maine, 343, 357, the court, through chief justice SHEPLEY, declared, (quoting from Hale *de jure maris*, c. 4, prop. 3) that "the common law accorded to the sovereign power the 'care, supervision and protection' of the common right of navigation in navigable rivers," and the court further used the following language: "The power which has 'the care, supervision and protection' of a common right, is bound to regulate its use in such manner, that it may be safe and convenient. The duty to make the use safe and convenient, involves the right to remove obstructions, to improve, or to render more safe and convenient the water for the purpose of navigation." In *Sumner* v. *Richardson Lake Dam Co.*, 71 Maine, 106, it did not appear that the defendants' dam in any way caused the injury complained of,

and hence the case is not directly in point. Still, the defendant company was chartered to build dams to improve the navigation of a public stream and the court plainly intimated that the charter was lawful, though it did not provide compensation for consequential injuries,—such injuries as are complained of here.

In other states, this question between the state, and the riparian owners, has been directly presented and adjudicated. In *Hollister* v. *Union Co.*, 9 Conn. 436 the defendant company was authorized by the legislature to build piers, wharves, bridges, etc., in the Connecticut river to improve its navigation. The company's works, built under its charter, deflected the current of the river against the plaintiff's land washing it gradually away. It was held that the plaintiff had no cause of action. The decision was put on the ground, that the state had the control of the river, and the right to improve its navigation, by any appropriate means and that every grantee of land on the river took, subject to that right. In *Holyoke Water Power Co.* v. *Conn. River Co.*, 20 Fed. Rep. 71 the same doctrine was upheld by the federal court in the Connecticut district. In *Henry* v. *Railroad Co.*, 30 Vt. 638, the defendant company, in pursuance of legislative authority, constructed works that turned the current of a stream, so that it washed away the plaintiff's land. It was held that the injury was consequential only, and that the plaintiff could not recover. In *Alexander* v. *Milwaukie*, 16 Wis. 264, the city, under legislative authority, made a "straight cut," across a point of land, to improve the harbor. The current flowing through this straight cut came against and wore away the plaintiff's land. *Held*, that the plaintiff had no cause of action. In *Green* v. *Swift*, 47 Cal. 536, the defendants, by legislative authority, changed the current of American river, so as to make the floods less dangerous at Sacramento. This change caused the current to wash the lands of the plaintiff. *Held*, that the defendant was protected by the legislative authority. In *Monongahela Nav. Co.* v. *Coon*, 6 Pa. St. 383, the company, under its charter, built dams and locks in the Monongahela river to improve its navigation. These works so held back the water as to retard the current in the Youghiogheny river above, to the injury of the plaintiff. *Held*,

that the state had the right to improve the navigation of its rivers, and that the plaintiff had no cause of action. The same doctrine is well expressed in a later Pennsylvania case, *McKeen* v. *Del. Canal Co.*, 49 Pa. St. 439, by Agnew J., as follows: "The injury which followed the raising of the water in the stream, to improve the navigation, was not a taking of property, but one merely consequential, which he must suffer without compensation. Every one who buys land upon a navigable stream, purchases subject to the superior right of the state, to regulate and improve the stream for the benefit of all her citizens."

It is urged, however, that the defendant's charter makes them responsible in this action, for the plaintiff's injury. By the second section of the charter, the company is authorized to take land and materials, "being accountable to the owners thereof, for all damages, if any, to be ascertained by reference, or by actions on the case." This does not include consequential injuries. The right of action here specified, is clearly confined to land and materials taken by the company. No land nor materials have been taken in this case. *Hollister* v. *Union Co.*, 9 Conn. 436, *supra*.

Judgment for the defendant.

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

LUCRETIA COOLIDGE *vs.* GILBERT ALLEN.

Franklin. Opinion June 5, 1889.

Guardian. Inquisition. Void appointment. R. S., c. 67, § 6.

When an appointment of a guardian of a person is made on the ground of insanity, but without an inquisition by the municipal officers, as required by R. S., c. 67, § 6, and notice to the person, the appointment will be void.

Although the supposed guardian must account for the whole amount received by him, from or in behalf of the supposed ward, there being no suggestion of any want of integrity or fidelity, and no objection upon the ground of illegality of the appointment to his acting as guardian, until nearly the time of this action to recover the property, it was, *Held*, that the amount

turned over to a guardian subsequently appointed, as well as that paid to the supposed ward, or for his benefit at his request, or with his consent express or implied, must be deemed accounted for, and deducted from the amount received.

REPORT, on facts agreed.

This was an action of assumpsit, commenced after due demand September 9, 1887, to recover from the defendant property which he had received of the plaintiff, whom he then claimed to be his ward. The writ contained a count upon an account annexed of $3,094.50. The defendant was appointed guardian of the plaintiff at the December term 1881, of the probate court, Franklin county, under proceedings proved to be void, in the following opinion, for want of an inquisition by the municipal officers and notice to the plaintiff. After ineffectual application to the probate court to be relieved of the guardianship, plaintiff applied to have the appointment revoked on the ground of its nullity. This petition is still pending in the probate court.

At the October term, 1887, Horace B. Prescott was appointed guardian, the validity of whose appointment does not seem to be contested. At the following December term, the defendant settled his second and final account, and turned over to said Prescott $1,734.74 being the amount then in his hands.

If the action could be maintained, the damages are to be assessed at *nisi prius;* otherwise the plaintiff to become nonsuit.

E. O. Greenleaf, for plaintiff.

Appointment of a guardian, without inquisition and notice, a nullity. *Holman* v. *Holman*, 80 Maine, 139; *Conkey* v. *Kingman*, 24 Pick. 115. No jurisdiction, statute not being complied with, appointment is void. *Griffith* v. *Frazier*, 8 Cranch, 9; *Sherman* v. *Ballou*, 8 Cowan, 305; *Devlin* v. *Com.*, 101 Pa. St. 273, S. C. 47 Am. Rep., 710.

H. L. Whitcomb, for defendant.

Judgment of probate court can not be collaterally attacked; decisions on matters within its jurisdiction are conclusive until reversed. *Roach* v. *Martin's Lessee*, 1 Harr. 548, S. C. 27 Am. Dec. 746; *Bailey* v. *Dilworth*, 10 S. & M. 404, S. C. 48 Am.

Dec. 760; *Merrill* v. *Harris*, 26 N. H. 142, S. C. 57 Am. Dec. 359, note p. 364; *Griffith* v. *Frazier*, 8 Cranch, 9, 23.

Guardian's authority can not be questioned collaterally, where his character has been recognized by probate court, for acts in due course of his guardianship. *Dancy* v. *Stricklinge*, 15 Tex. 557, S. C. 65 Am. Dec. 179, note p. 185. All reasonable presumptions indulged in favor of probate courts. *Dancy* v. *Stricklinge*, *supra*, and cases cited; *Kimball* v. *Fisk*, 39 N. H. 110, S. C. 75 Am. Dec. 213, and note. Appointment not void for erroneous proceedings, court having jurisdiction of subject matter. Cases last cited. Want of notice renders proceedings voidable, but not void. *Kimball* v. *Fisk*, *supra*; *Griffith* v. *Frazier*, *supra*.

Before action can be maintained, decree of appointment must be reversed.

DANFORTH, J. It is undoubtedly true that a judgment of the probate court upon matters within its jurisdiction is conclusive, until it is reversed. But it is equally true that jurisdiction of the subject matter only, is not sufficient. The preliminary requisites, and the course of proceedings prescribed by law, must be complied with or jurisdiction does not attach, and the judgment will be, not voidable merely, but void and may be avoided by plea and proof. This principle is so clearly stated and fully illustrated by Shaw, C. J., in *Peters* v. *Peters*, 8 Cush. 529, 543, and cases there cited, that further discussion of it is not necessary.

In cases like the one at bar, R. S., c. 67, § 6, requires, as a preliminary to the appointment of a guardian, that there shall be an inquisition by the municipal officers of the town where the person for whom a guardian is asked for, resides, "into the allegations made in the applications." Without this, and previous notice to the subject of the application, the court can not proceed, *Holman* v. *Holman*, 80 Maine, 139. No such requisition was had in this case and the necessary result is that the appointment was without authority and void.

But though the appointment was void and as such does not afford protection to the defendant, it is not without its influence. There is no suggestion of any want of integrity or fidelity on the part of the defendant. The plaintiff, so far as appears, recognized

him as guardian and made no objection to his acting as such on the ground of any illegality in his appointment, until April 16, 1887. Under these circumstances, though the defendant must account for the whole amount received by him from, or in behalf of the plaintiff, yet the amount turned over to the guardian subsequently appointed, as well as that paid to her, or for her benefit at her request, or with her consent express or implied, must be deemed accounted for, and deducted from the amount received. For the balance, if any, the plaintiff will be entitled to recover.

Damages assessed at nisi prius.

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

ALBERT LEAVITT, administrator, *vs.* JARVIS E. BAKER, and others.

Somerset. Opinion June 5, 1889.

Witness. Party. Deposition. R. S., c. 107, § 18.

Objections to the form of a question must be made and noted at the time of taking a deposition; but objections to the competency of a deponent, or objections to the competency of the questions or answers, may be made when the deposition is offered at the trial.

This is the rule of the statute; and was held to apply where the opposing party filed cross-interrogatories, but did not object to the taking the deposition.

Under such circumstances, in an action by an administrator, who did not testify, *Held*, that the deposition of a defendant to prove facts happening before the death of the intestate, was properly excluded.

ON EXCEPTIONS.

This was an action of assumpsit on a promissory note given by the defendant jointly with two other persons. The administrator did not testify. The defendant Jarvis E. Baker, husband of Eliza A. Baker, co-defendant, was defaulted the day before the trial. Mrs. Baker and her other co-defendant, Rebecca

Robbins, offered said Jarvis E. Baker's deposition, at the trial, taken while he was a party defending and before default, to prove that they were sureties on the note; and were discharged from liability on it by an agreement, to extend the time of its payment, made between the intestate and said Jarvis E. Baker. The plaintiff, at the taking the deposition, put cross-interrogatories to Baker, relating to facts occurring since the death of the intestate, but made no objections to the defendants' interrogatories or the competency of Baker as a witness.

The court excluded the deposition, and the defendants excepted to the ruling.

W. H. Baker, for defendants.

The deposition was admissible. The exceptions in § 98, of c. 82, R. S., are less restrictive than the common law. *Kelton* v. *Hill*, 59 Maine, 260. Husband may testify for his wife. R. S., c. 82, § 93.

Baker's interest having been removed by default, he was admissible as a witness, at common law. *Bradlee* v. *Neal*, 16 Pick. 501; *Chaffee* v. *Jones*, 19 Pick. 260; *Bate* v. *Russell*, 1 Moody & M. 332; *York* v. *Blott*, 5 Maule & S. 72; *Worrall* v. *Jones*, 7 Bing. 395; and although a party to the suit, *Johnson* v. *Blackman*, 11 Conn. 342; *Cowles* v. *Whitman*, 10 Conn. 121. Competent witness for his sureties as to facts, happening after note was given, his interest being equally balanced. *Freeman's Bank* v. *Rollins*, 13 Maine, 202.

Plaintiff waived his right to object to using deposition. *Ogle* v. *Paleski*, 1 Holt N. P. 485; *Lynde* v. *Taylor*, 17 Ala. 270; *Gray* v. *Brown*, 22 Id. 262; *Rogers* v. *Dibble*, 3 Paige, (N. Y.) 238; *Callaghan* v. *Rochfort*, 3 Atkyns, 643; *York Co.* v. *Central R. R.*, 3 Wall. 107; *U. S.* v. *Hair Pencils*, 1 Paine, C. C. 400; *Edmunds* v. *Griffin*, 41 N. H. 529; *Shutte* v. *Thompson*, 15 Wall. 151; 1 Stark. Ev. 92; *Kimball* v. *Cook*, 6 Ills. 423; *Winslow* v. *Newland*, 45 Id. 145; *Thoroughgood* v. *Anderson*, 5 Harr. (Del.) 199.

E. Lowe, for plaintiff.

I. Deponent was not a competent witness to prove facts happening before the death of intestate.

1. Because he was a party at the time of taking the deposition. R. S., c. 82, §§ 93, 98. *Buck* v. *Rich*, 78 Maine, 431.

2. Because he was a party to the record at the time of trial, although defaulted, and so incompetent, both under the statute and at common law. *Berry* v. *Stevens*, 71 Maine, 505; *Wing* v. *Andrews*, 59 Maine, 508; *Kennedy* v. *Niles*, 14 Maine, 57; *Gilmore* v. *Bowden*, 12 Maine, 412; *Com.* v. *Marsh*, 10 Pick. 57; *Vinal* v. *Burrill*, 18 Pick. 29; *Faunce* v. *Gray*, 21 Pick. 245; *Bull* v. *Strong*, 8 Met. 10; *Fox* v. *Whitney*, 16 Mass. 121; *Bridges* v. *Armour*, 5 How. 91; *Stein* v. *Bowman*, 13 Pet. 209; *Scott* v. *Lloyd*, 12 Pet. 145; *Supervisors* v. *Birdsall*, 4 Wend. 457; *Mills* v. *Lee*, 4 Hill, 549; *Frear* v. *Evertson*, 20 Johns. 142; *Benjamin* v. *Coventry*, 19 Wend. 353.

3. Because he was husband of one of the defendants and not a competent witness for her whether he was a party or not. *Jones* v. *Simpson*, 59 Maine, 180; *Hunter* v. *Lowell*, 64 Maine, 572; *Berry* v. *Stevens*, 69 Maine, 290; *Hubbard* v. *Johnson*, 77 Maine, 139.

The exceptions state that the deposition was offered by the two defendants to show that "they" were sureties, etc.

It was inadmissible for the purpose for which it was offered, and defendants must now be confined to the specific offer which they made at the trial. *Wheeler* v. *Rice*, 8 Cush. 208, and cases there cited.

Exceptions must show affirmatively that the ruling was erroneous. *Allen* v. *Lawrence*, 64 Maine, 175.

II. Even if the deponent was a competent witness the exceptions must be overruled because the defendants were not injured by the ruling. *State* v. *Pike*, 65 Maine, 113.

To discharge the sureties the agreement must be valid and binding on both parties, so that one can not pay or the other enforce payment for a definite and certain time. *Turner* v. *Williams*, 73 Maine, 470; *Berry* v. *Pullen*, 69 Maine, 101.

"A year or more" is indefinite and uncertain, nor is any consideration shown.

Dunn v. *Collins*, 70 Maine, 230; *Mathewson* v. *Strafford Bank*, 45 N. H. 104; Grayson's Appeal Reporter, vol. 20, p. 377, and cases cited.

III. The right of plaintiff to object to the competency of deponent and to the questions and answers at the time of trial is settled by R. S., c. 107, § 18, and the decisions of this court and Mass. *Parsons* v. *Huff*, 38 Maine, 144–5; *Lord* v. *Moore*, 37 Maine, 208; *Polleys* v. *Ocean Ins. Co.*, 14 Maine, 141; *Whitney* v. *Heywood*, 6 Cush. 82; *Talbot* v. *Clark*, 8 Pick. 51.

WALTON, J. The competency of witnesses, and the admissibility of evidence, including the manner of taking depositions, and the use that may be made of them, are governed in this state largely by legislative enactments; and in the construction of these enactments, the rules that prevail in other jurisdictions can have but little, if any, influence. We make this remark because the decisions cited by the defendants' counsel relate exclusively to the rules which prevail in other jurisdictions. If these rules are found to be different from ours, of course the latter and not the former must prevail.

The question presented in this case is whether, when a deposition is taken, an objection to the competency of the deponent, or to the competency of a question or answer, will be regarded as waived, unless made and noted at the time the deposition is taken, or whether such an objection may be made when the deposition is offered at the trial. We regard it as settled law in this state, that while all objections to the mere form of a question must be made and noted at the time the deposition is taken, objections to the competency of a deponent, or to the competency of the questions or answers, may be made when the deposition is offered at the trial. *Lord* v. *Moore*, 37 Maine, 208. *Parsons* v. *Huff*, 38 Maine, 137. R. S., c. 107, § 18.

We think the objection to the excluded deposition was seasonably made and properly sustained.

Exceptions overruled.

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

STATE OF MAINE *vs.* DANIEL O'CONNELL.

Waldo. Opinion June 7, 1889.

Intoxicating liquors. "R. L. D." U. S. special tax. Evidence. New trial.

A copy of the record of special taxes kept by the collector of internal revenue, sustained by the oath of the person making the examination and comparison, is admissible in evidence to show that the respondent had taken out a United States license as a retail liquor dealer.

The testimony of a witness as to the meaning of the letters "R. L. D." in such record, is admissible, if the witness has such special knowledge as to enable him to testify in relation to their meaning.

Where it is proved that a party has taken out such license, the jury may rightfully infer, in the absence of evidence to the contrary, that the party has paid the tax to the United States.

Where the jury are precluded, by the instructions of the presiding justice, from determining what weight should be given to evidence, a new trial was ordered.

State v. *Intoxicating Liquors*, 80 Maine, 57, affirmed.

ON EXCEPTIONS.

This was an indictment against the defendant for being a common seller of intoxicating liquors.

At the trial, the government introduced in evidence a sworn copy of the record of special taxes, paid in the office of the U. S. collector of internal revenue, for the district of Maine, upon which the name of the defendant appears, his business being designated under the initials R. L. D. at Belfast and the amount of taxes paid $16.67 on Sept. 23, 1887 and for the period ending April 30, 1888.

This copy was supported by the evidence of a witness who had compared it with the original. The defendant seasonably objected to the admission of the paper, as evidence of payment by him of the tax therein named, because it was incompetent and not sufficient for that purpose. The presiding justice admitted the paper, against such objections.

Subject to objection, the witness was allowed to testify that the letters "R. L. D." in the paper meant and stood for "retail liquor dealer," it appearing that he had always known their meaning,

and had seen the letters many times in the office of the collector of internal revenue.

To these rulings the defendant excepted.

The presiding justice instructed the jury *inter alia* as follows, viz.:

"I think, if you find that the United States government, through its officer, has issued to a man a license for a retail liquor dealer, that you may infer that that man has paid the tax, the license itself being his evidence that he has paid the tax, so that if the United States officers come down upon him, he can show his license as evidence of having paid the tax.

Our state government goes further, and says that when it appears to a jury that a man has paid that tax as a retail liquor dealer,—that that fact of payment, if he has paid it, is *prima facie* evidence that he is a liquor dealer, that he is a common seller, or that he was a common seller during the time the license ran."

The presiding justice further instructed the jury, in reference to the effect of respondent's having paid the tax to the United States, and which his counsel claimed prejudiced the respondent, and took from the jury the weight to be given to such evidence.

To said instruction the respondent by his counsel reserved exceptions before the retirement of the jury.

The jury returned a verdict of guilty.

W. H. Fogler, for defendant.

The sworn copy to be admissible should be a complete copy. *Owen* v. *Boyle*, 15 Maine, 147. It was only a memorandum without caption or conclusion. The original is not proved to have been made by any person whose duty it was to make it, or in the custody of any officer of the government. 1 Green. Ev. §§ 483, 484. Testimony to explain its meaning is inadmissible, it being a record which must speak for itself. The witness to meaning of letters "R. L. D." shows no special knowledge upon the subject.

The instruction of the presiding justice as to the effect of the copy admitted as evidence is erroneous. The effect of such testimony was for the jury. When the presiding justice said "I think * * * that you may infer that that man has paid the tax" it was at least the expression of an opinion, which was unauthorized.

The last paragraph of the instructions excepted to was in effect an instruction that, if the jury found that the respondent had paid the tax, he was guilty of the offense charged. *Prima facie* evidence of a fact, is in law sufficient to establish the fact unless rebutted. 1 Starkie on Ev. 479; *Kelly* v. *Jackson*, 6 Pet. 622; *U. S.* v. *Wiggins*, 14 Id. 334.

In a legal sense *prima facie* evidence, in the absence of controlling evidence or discrediting circumstances, becomes conclusive of the facts; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. *Kelly* v. *Jackson*, *supra.*

The instruction under discussion was therefore, in effect, that if the jury found that the respondent had performed an act, not criminal, to wit, if he had paid a tax as a retail liquor dealer, they were bound in the absence of any rebutting testimony, to find him guilty of the crime of being a common seller of intoxicating liquor during the time his license ran.

The jury was thus precluded from determining what weight should be given to the fact of the respondent's having paid the tax, and. therefore, were precluded from passing upon the question of the respondent's guilt or innocence.

The subsequent portions of the charge are not sufficient to overcome the objections urged against the instructions excepted to.

Orville D. Baker, attorney general, and *R. F. Dunton*, county attorney for state.

The copy of the record of the collector of internal revenue, sworn to by the witness, was properly admitted in evidence. *State* v. *Gorham*, 65 Maine, 270; *State* v. *Lynde*, 77 Maine, 561; *State* v. *Hall*, 79 Maine, 501.

The evidence of the witness, as to the meaning of the letters "R. L. D." in the record, was admissible. Green. Ev., vol. 1, § 280. *Com.* v. *Morgan*, 107 Mass. 199.

The record of the collector of internal revenue, showing the issuing of a license to respondent, as a retail liquor dealer, is *prima facie* evidence, not only of that fact, but of the fact that respondent paid the tax. Public officers are presumed to do their duty. The jury were authorized to infer the payment of the tax

by respondent, from the fact that the license was issued to him, and the instruction of the presiding judge upon this point is correct. *State* v. *Gorham*, 65 Maine, 270; Best Ev. § 348 and note.

By statutory provision, the payment of the United States tax as a liquor seller by respondent is made *prima facie* evidence, that he is a common seller of intoxicating liquors. Public Laws of 1887, c. 140, § 8.

FOSTER, J. The respondent was tried upon an indictment against him for being a common seller of intoxicating liquors.

1. Exceptions were taken to the admission in evidence of a copy of the record of special taxes, kept by the collector of internal revenue, showing that the respondent had taken out a United States license as a retail liquor dealer.

A witness for the government testified that he had compared the copy with the record, and that it was a true copy thereof.

Such copy, sustained by the oath of the person making the comparison, was admissible in evidence. It came in as an "examined copy." It was not introduced as an original record, or as a certified copy properly authenticated upon its face, and consequently further proof was necessary to its admissibility. *State* v. *Lynde*, 77 Maine, 562.

2. The same witness testified that the letters "R. L. D." in the record stand for "Retail Liquor Dealer."

This evidence was admissible if the witness had such special knowledge as would enable him to testify in relation to their meaning. 1 Green. Ev. § 280. *Com.* v. *Morgan*, 107 Mass. 199. He states his means of knowledge, and the question of his competency was one addressed to the court and to which exceptions do not lie.

3. Nor was there error in the instruction of the presiding justice that if the jury find that the United States had issued a license to a man for a retail liquor dealer, they might infer that he had paid the tax. The correctness of this proposition was laid down in *State* v. *Gorham*, 65 Maine, 272.

4. It is contended by the respondent that the presiding justice in effect instructed the jury that if they found the respondent had paid the tax he was guilty of the offense charged. While

such was not undoubtedly the intention of the court, as an examination of the whole charge shows, yet we think the jury may have derived an erroneous idea of the law upon this particular point from the language used. As stated to the jury, it is the opinion of the court that it was not in accordance with the decision of this court in *State* v. *Intoxicating Liquors*, 80 Maine, 57.

The evidence, from whatever source it is derived, must be such as to satisfy the jury beyond a reasonable doubt of the respondent's guilt.

Exceptions sustained.

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

JAMES H. SMITH *vs.* FRED A. BIBBER.

Cumberland. Opinion June 7, 1889.

Promissory notes. Collateral security. Consideration. Forbearance.

A promissory note indorsed and transferred by the payee before due, as collateral security for a pre-existing debt with no new consideration between the parties therefor, is subject to any defense that might be made as between the original parties.

To show a good consideration for the transfer, by forbearance by one who takes the note as collateral, it must be shown that he made a valid promise to forbear a suit on his debt against the indorser for some definite time. It is not sufficient to show that he did forbear to sue.

ON EXCEPTIONS AND MOTION.

Action of assumpsit, in which there was a trial in the superior court, Cumberland county, to recover the sum of $2,129.91 due on a note for $3,000, dated October 1, 1882, made by the defendant, and which the plaintiff claimed was delivered to him as collateral security for a note of $5,000, which Phinney & Jackson owed him,—he having forborne a suit on the last named debt in consideration of receiving the collateral security. The defendant answered that he had paid it; or that it being an accommodation note given by him to Phinney & Jackson, it had been passed over

to the plaintiff to secure a pre-existing debt due from them to the plaintiff, without any consideration passing between the parties, or forbearance by plaintiff to sue binding for any definite time; and that he had the same right to defend against the note in suit, as if it had been brought by Phinney & Jackson standing in the place of the payees.

There was a verdict for the plaintiff. The defendant excepted to the instructions of the presiding justice to the jury, as appears in the opinion of the court.

The motion for a new trial was not pressed for consideration.

Symonds and Libby, for plaintiff.

The court instructed the jury in substance that such forbearance would constitute the plaintiff a *bona fide* holder for value, and this instruction is sustained, we think, by authorities generally, except perhaps New York, including our own state.

The great preponderance of authority goes much further and holds that the taking of collateral security for a pre-existing debt, even without any existing agreement for forbearance and extension, makes one a holder for value so as to shut out existing equities. That is the view of the supreme court of the United States, of the highest courts in England, and of most of the state courts, including Massachusetts, New Hampshire, Rhode Island, Vermont, New Jersey, Maryland, Illinois, Michigan, Alabama, Texas, North Carolina, California, Louisiana, Iowa and Georgia. *Swift* v. *Tyson*, 16 Pet. 1, 28; *Alliance Bank* v. *Broom*, 2 Drew. & Sm. 289, cited by Clifford, J., in *Ry. Co.* v. *National Bank*, 102 U. S. 48; *Oates* v. *National Bank*, 100 U. S. 239, 250; *McCarty* v. *Roots*, 21 How. 432, affirming *Swift* v. *Tyson*; *Quinn* v. *Hard*, 43 Vt. 375; *Russell* v. *Splater*, 47 Id. 273; *Atkinson* v. *Brooks*, 26 Id. 569; *Fisher* v. *Fisher*, 98 Mass. 303; *Stoddard* v. *Kimball*, 6 Cush. 469; *Roberts* v. *Hall*, 37 Conn. 205; *Bank of Republic* v. *Carrington*, 5 R. I. 515; *Williams* v. *Little*, 11 N. H. 66; *Bowman* v. *Millison*, 58 Ill. 36; *Manning* v. *McClure*, 36 Id. 490; *Payne* v. *Bensley*, 8 Cal. 260; *Giovanovich* v. *Citizens Bank*, 26 La. Ann. 15; *Smith* v. *Isaacs*, 23 Id. 454; *Allaire* v. *Hartshorne*, 21 N. J. L. 665; *Armour* v. *McMichael*, 36 Id. 92; *Maitland* v. *Citizens' Bank*, 40 Md. 540; *Robinson* v. *Lair*, 31 Iowa, 9; *Bonaud* v. *Genesi*, 42

Ga. 639; Bigelow, Bills and Notes, 502, *et seq;* 1 Daniel Neg. Ins. (2d edition), c. 25, §§ 820—833. Story, Prom. Notes, §§ 186, 195, (Thorndyke's ed.) 1, Parsons, Notes and Bills, (2d ed.) 218, § 4, c. 6; Red. and Bigelow's L. C. Notes and Bills.

Bramhall v. *Beckett*, 31 Maine, 205, approved in *Nutter* v. *Stover*, 48 Maine, 163, 169, was decided in 1850, and the doctrine of that case is hardly in harmony with the commercial wants and usages of to-day. The needs of commerce and the extension of the credit and circulation of negotiable paper have led to the expansion of the early doctrine, so that, as above indicated, a great preponderance of authority is in favor of the position that the transfer of negotiable securities as collateral for a pre-existing debt constitutes a valuable consideration, so as to shut out equities between antecedent parties of which the holder has no notice.

In view of all these authorities and the importance of the principle involved, we think we should be justified, were it necessary, in asking this court to expand the principle enunciated in *Bramhall* v. *Beckett*, so as to accord with the prevailing commercial authorities of the world. But in point of fact and so far as the purposes of this case are concerned, that case standing alone would, we claim, sustain the rulings given at the trial.

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

The true test to determine whether a note is subject to an equity set up by the maker is this: Could the payee, at the time he transferred the note, have maintained suit upon it against the maker, if it had then been mature. Story, Prom. Notes, § 178.

The law in this state is well settled that the holder of negotiable paper, who takes it as collateral security for a pre-existing debt, "without parting with any rights, extending any forbearances, or giving any other consideration," cannot be regarded as the holder for a valuable consideration, and is not entitled to protection against the equities of the accommodation maker, acceptor or indorser. *Bramhall* v. *Beckett*, 31 Maine, 205, approved in *Nutter* v. *Stover*, 48 Maine, 169, and has never since been doubted in Maine.

The same doctrine is held in New York. *Bay* v. *Coddington*, 5 Johns. Ch. R. 54; *Coddington* v. *Bay*, 20 Johns. 637, never over-

ruled in that state, but repeatedly affirmed. *Stalker* v. *McDonald*, 6 Hill, 93; *Grocers' Bank* v. *Penfield*, 69 N. Y. 502, 505; *Stevens* v. *Brennan*, 79 N. Y. 254, 258.

In New Hampshire, the same doctrine is held. *Jenness* v. *Bean*, 10 N. H. 266; *Williams* v. *Little*, 11 N. H. 66; *Fletcher* v. *Chase*, 16 N. H. 38; *Rice* v. *Raitt*, 17 N. H. 116.

So held in Alabama. *Fenouille* v. *Hamilton*, 35 Ala. 319; *Connerly* v. *Ins. Co.*, 66 Ala. 432.

In Iowa. *Davis* v. *Strohne*, 17 Iowa, 421.
In Arkansas. *Bertrand* v. *Barkman*, 13 Ark. 150.
In Mississippi. *Brooks* v. *Whitson*, 7 S. & M. 513.
In N. Carolina. *Reddick* v. *Jones*, 6 Ired. 107.
In Ohio. *Roxborough* v. *Messick*, 6 Ohio St. 448.
In Pennsylvania. *Ashton's appeal*, 73 Pa. Stat. 153.
In Tennessee. *Wormley* v. *Lowry*, 1 Humph. 468.
In Virginia. *Prentice* v. *Zane*, 2 Gratt. 262.
In Wisconsin. *Bowman* v. *Van Kuren*, 29 Wis. 209.
In Kentucky. *Breckenridge* v. *Moore*, 3 B. Mon. 629.
In Minnesota. 1 Minn. 311, 312.

Mere forbearance is not sufficient consideration. To be such there must be an agreement to forbear, a binding agreement, upon which an action could be brought if violated, or which could be enforced by injunction or used in defense. *Stalker* v. *McDonald*, 6 Hill, 93, 114; 1, Pars. Con. pp. 440 to 444; 1 Addison, Con. § 14; Chitty, Con. 35, 531; *Berry* v. *Pullen*, 69 Maine, 101, 103.

LIBBEY, J. At the time the note sued on was made, it was the settled law of this state, as decided by this court, that a promissory note indorsed and transferred by the payee, before due, as collateral security for a pre-existing debt, with no new consideration between the parties therefor, was subject to any defense that might be made as between the original parties. *Bramhall* v. *Beckett*, 31 Maine, 205; *Nutter* v. *Stover*, 48 Maine, 169.

The defendant set up in defense payment of the note to the payee before it was indorsed to the plaintiff. As between the payor and payee this is a good defense. The contention between the parties at the trial was whether this defense could be set up against the plaintiff to whom the note was indorsed before due

as collateral security for a pre-existing debt, as the defendant claimed, without any new consideration.

On this point the court below instructed the jury as follows:

"Now, in order for the plaintiff to recover he must satisfy you, in the first place, that the note in suit was placed with the plaintiff to secure the whole indebtedness. Second, either that there was a valid consideration for the note, and that it was still unpaid at the time the plaintiff received the note, or that the plaintiff, when he received the note from Phinney & Jackson, extended some forbearance to them. If he has proved the first point, that the note was left to secure the whole indebtedness, and either of the latter points,—either that it was a valid note, or that he extended some forbearance to Phinney, if it was an accommodation note,—then he is entitled to recover." * * * "Now on the matter of forbearance, it is not necessary that any specific time should be agreed upon between Phinney and Smith during which Smith should forbear to sue; if he went to him and said 'unless you give me collateral security for this note I shall sue and attach your property,' and in consequence of that statement this collateral was given, and he did forbear to sue, that is a sufficient consideration for the taking of this collateral, and Smith under these circumstances, in taking the note, would be considered a *bona fide* holder for value."

Under this instruction the jury were authorized to find a valid contract on the part of Smith to forbear a suit against Phinney and Jackson, without any promise on his part to do so, but that the delay to bring an action was sufficient.

We think this was error. Without a promise to forbear, Smith deprived himself of no right or remedy, against Phinney & Jackson. To constitute a legal contract to forbear there must be a valid promise to do so, so that for some time, the holder of the debt has no right to maintain an action on it. It is not sufficient to show that he did forbear. *Mecorney* v. *Stanley*, 8 Cush. 85; *Robinson* v. *Gould*, 11 Cush. 55; *Manter* v. *Churchill*, 127 Mass. 31; *Berry* v. *Pullen*, 69 Maine, 101; *Turner* v. *Williams*, 73 Maine, 466; *Lambert* v. *Clewley*, 80 Maine, 480.

The rule which requires some new consideration to protect the

indorsee who takes the note as collateral for a pre-existing debt, against such a defense as is set up here, is admitted as the settled law of this state when the note in suit was made. *Smith* v. *Hiscock*, 14 Maine, 449; *Nutter* v. *Stover*, 48 Maine, 169. But it is claimed by the counsel for the plaintiff that it is in conflict with the rule established by the Federal courts, the court of Massachusetts and many of the other states, which is well shown by the many authorities cited in their brief; and they urge the court to overrule the cases in this state, and establish here the rule held by them which requires no new consideration, and thereby bring this state in accord, upon this question of commercial law, with what is claimed to be the rule established by the greater weight of authority. If the question was an open one here we should be inclined to adopt the federal rule as the one best sustained by principle and authority.

But it has been so long settled the other way and acted upon in this state, we do not feel that we should be justified in reversing it.

Exceptions sustained.

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

LARKIN THORNDIKE *vs.* INHABITANTS OF CAMDEN.

Knox. Opinion June 26, 1889.

Town. Taxing powers. Public officers. Illegal vote.

The plaintiff was collector of taxes in the defendant town for the year 1873, and as such collector had a proper warrant to collect a tax legally assessed against a party liable to taxation. He made no effort to collect the tax in money, but took a note of the party instead, and accounted to the town treasurer for it as money. The note was not paid, and twelve years afterward the town voted to refund to the plaintiff nearly all of the tax so assessed and paid to the town but never collected,—the same to be raised by assessment. In an action upon a vote of the town, *held*, that the town can not impose a tax for such a purpose; that the claim is that of a public officer to be compensated for a loss suffered by his neglect of a public duty; and

that it is not incident to or connected with the exercise, by the town, of its legal powers.

The tax was assessed to "D. Knowlton & Co.," by whom the note was given and who afterward became insolvent. It was claimed that there was no such person, and that the property meant to be taxed belonged to and was in the name of a corporation, "D. Knowlton Company." *Held*, that the variation was in the name of the same party, and too slight to raise a question of identity.

EXCEPTIONS, on facts agreed.

Action of assumpsit, on account annexed. The case was referred to the court, the right to except being reserved; and it ruled that the plaintiff was entitled to judgment for three hundred and twenty-seven dollars with interest from January 1, 1886. Defendants excepted to the ruling.

The agreed statement of facts is as follows:—

"This is an action for the recovery of an amount voted by the town to be paid to the plaintiff and interest on same.

It is agreed that plaintiff was collector of taxes of said town for the year 1873, and that among the various taxes entrusted to him for collection for that year was one against D. Knowlton & Co. amounting to more than three hundred dollars; that he failed to collect of them a portion of said tax, amounting to three hundred and sixteen and 6-100 dollars, except to take the note of said D. Knowlton and Co. running to himself; that said note was never paid to him, or any part thereof, owing to the insolvency of said D. Knowlton & Co.; that the plaintiff supposing said note to be collectible paid the amount of the same into the town treasurer for the said town of Camden; that he did not, as collector, attempt to enforce any portion of said tax against the real estate of said company, as the tax was assessed to D. Knowlton & Co. while the property meant to be taxed belonged to and was in the name of D. Knowlton Company, a corporation, there being no such party as D. Knowlton & Co.; that in 1885, at the annual meeting of said defendant town, on an article of the following tenor, to wit:

'Art. 31st. To see if the town will vote to refund to Larkin Thorndike so much of the tax assessed to D. Knowlton & Co. in 1873 as was paid to the town but never collected, amt. to three

hundred sixteen dollars and six cents and interest on same, also what sum of money they will vote to raise to pay the same,' it was voted as follows:

'Art. 31st. Voted that the selectmen be authorized to pay Larkin Thorndike the sum of three hundred dollars ($300), the same to be raised by assessment'; that this sum was early in the year 1885 demanded of the selectmen of said town but has never been paid to the plaintiff, nor assessed by said town. Luke Upham protested against the payment of said sum which was recorded. The taxes on the property of D. Knowlton Company, corporation, for years 1872 and 1877 were assessed in the name of D. Knowlton & Co. and paid to collector."

J. H. Montgomery, for plaintiff.

The court found for the plaintiff and assessed the damages. There were no controverted points of law upon which the court was required to rule. It was simply questions of fact. These were settled in favor of the plaintiff and are conclusive. No exceptions: *Curtis* v. *Downes*, 56 Maine, 24; *McCarthy* v. *Mansfield*, 56 Maine, 538; *Treat* v. *Gilmore*, 49 Maine, 34; *Berry* v. *Johnson*, 53 Maine, 401; *Keen* v. *Jordan*, 53 Maine, 144.

The only objection made to the maintenance of this action is the consideration for the vote of the town.

"Growing out of its authority to create debts and incur liabilities, a municipal corporation has power to settle disputed claims against it and an agreement to pay these is not void for want of consideration." Dillon Mun. Corp. § 477.

"A vote by a town is in law a promise express, and if there be a consideration it is a foundation for an action." *Nelson* v. *Milford*, 7 Pick. 18, 25.

The plaintiff in this case was collector of taxes for defendant town, having a tax for collection, the legality of the assessment of which was questionable, by not having properly designated the owner of the property taxed. The note taken by the plaintiff was not collectible for two reasons.

(1st.) The insolvency of the company.

(2d.) Because there was no such party as D. Knowlton & Co.

The collector paid the amount of the tax, thus improperly assessed, or a large portion of it into the town, without a clear and definite idea of what were his legal rights and duties. The assessment of the tax and the insolvency of the assessed, and the general complications of the affair were not apparent to the town officers or the plaintiff, at the time the money was paid in. The town saw this state of affairs and voted to relieve the plaintiff. The consideration is sufficient and binds the town. *Nelson* v. *Milford*, 7 Pick. 18, 25; *Bean* v. *Jay*, 23 Maine, 117, 121.

T. R. Simonton, *T. A. Hunt*, with him, for defendants.

Defendants had no authority to make the alleged contract, or raise money for such a purpose. Specific purposes for which they can raise money. R. S., c. 3, § 46. It was a gift to the plaintiff. The vote exceeded the rights vested in towns, to assess and collect money, and subject to injunction. *Dyar* v. *Farmington Village Corp.*, 70 Maine, 515, 522. Had the tax been assessed, any inhabitant, obliged to pay his proportional part, could have recovered it back with interest at 25 per cent. R. S., c. 6, § 142. Vote unconstitutional. Otherwise, such votes might be continued "until the whole property, held by citizens of the town, had passed into and out of the treasury, until the equalization of property had been effected." *Allen* v. *Jay*, 60 Maine, 124. The constitution gives no authority to raise money to give away. *Perkins* v. *Milford*, 59 Maine, 315, 318.

EMERY, J. This case is presented by the defendants' exceptions to the ruling of the presiding justice awarding judgment for plaintiff on an agreed statement of facts. In submitting a case upon an agreed statement, the plaintiff has the burden of stating all the facts necessary for the maintenance of his action. He must not depend on inferences. Omissions will be construed against him.

In this case, we must assume that the plaintiff was the duly elected and qualified collector of taxes in the defendant town for the year 1873;—that he had a legal and sufficient warrant to collect a tax of $316, legally assessed against a party liable to taxation in said town, and styled in the warrant, "D. Knowlton & Co.";—that he made no effort to collect said tax farther than to

illegally permit them to give their note instead of the money for their tax;—that he took the note as money, and accounted for it as money to the town treasurer;—that twelve years afterward, in 1885, the note not having been paid, the town voted under proper articles in the warrant to pay him $300 in consideration of the premises, the said sum to be raised by assessment.

Has the town the power to impose a tax for such a purpose? Clearly not, unless the plaintiff's claim is incident to, or connected with, the exercise by the town of its legal powers. A town is not a business or a charitable corporation. It is simply a political organization, created as a convenient agent for the performance of certain governmental duties and purposes. Its powers are almost entirely political, and are properly limited to its duties. It has only such control over the citizen, and his money or property, as is expressly granted to it, or is necessary to the performance of its duty to the public. Indeed, a town is only a trustee for the public. It does not own the money in its treasury, nor the municipal property generally, but only holds them in trust for the public, and subject to public control through the legislature. *Dillon Mun. Corp.* 61; *Meriwether* v. *Garrett*, 102 U. S. 472.

The narrow limit of the taxing power of a town, and of its power over money paid into its treasury from other sources than town taxes, is illustrated by many decided cases. In the absence of a special statute, a town cannot raise money for purposes of local defense against an invading enemy. *Stetson* v. *Kempton*, 13 Mass. 272. Nor to build places of amusement for its inhabitants. *Ibid.* Nor to abate taxes. *Cooley* v. *Granville*, 10 Cush. 56. Nor to celebrate an anniversary. *Tash* v. *Adams*, 10 Cush. 252. Not even "Fourth of July." *Hood* v. *Lynn*, 1 Allen, 103. Nor to provide uniforms for a local military company. *Claflin* v. *Hopkinton*, 4 Gray, 502. Nor to obtain a city or town charter. *Frost* v. *Belmont*, 6 Allen, 152. Nor to oppose division of the town. *Coolidge* v. *Brookline*, 114 Mass. 592. *Westbrook* v. *Deering*, 63 Maine, 231. Nor to pay a private fire company. *Greenough* v. *Wakefield*, 127 Mass. 275. Nor to build a court house. *Bachelder* v. *Epping*, 28 N. H. 354. Nor to build a county jail. *Drew* v. *Davis*, 10 Vt. 506. Nor to build a bridge in another

town. *Concord* v. *Boscawen*, 17 N. H. 465. Nor to aid a private cemetery association. *Luques* v. *Dresden*, 77 Maine, 186. It can not divide among its inhabitants money received from the state. *Hooper* v. *Emery*, 14 Maine, 375. Nor assess a tax to pay back money voluntarily paid into its treasury, to aid in relieving the town from military draft. *Perkins* v. *Milford*, 59 Maine, 315.

Within its sphere, a town may exercise some discretion as to what claims to pay, or to contest. In the matter of schools, roads, paupers, fire engines, town houses, &c., matters which towns are created to care for, the town may determine what claims on these accounts it will pay. The claim in suit, however, arises out of matters which are not entrusted to the control of town meetings. It concerns the collection of public taxes. The statute (R. S., c. 3, § 46) empowers a town to raise money for specified purposes, —that is, to fix and order by vote the amount to be assessed and collected for proper town charges,—but there the discretionary power of the town seems to end. The statute gives it no control over the assessment or collection of any taxes. It is true, the statute requires the town to appoint the assessors and collectors of all state, county and town taxes to be levied within its territory, but the town does this as the political agent of the state. The appointment could have been entrusted to any other agency. These officers are not corporate agents. They are public officers, owing to the public and not to the town alone, the duties imposed by statute. Only their appointment comes from the town. Their authority is from the statute, and they cannot be controlled by the town in the execution of that authority. *Desty on Taxation*, 508, 685. *State* v. *Walton*, 62 Maine, 106.

No vote of the town can relieve the assessors of any part of their statute duty; nor can such vote control their action in any detail. The town cannot by vote increase, diminish or vary the duties which the tax collector owes to the public, nor relieve him in case of his neglect, except in the very few cases where the statute so provides. There is an implication, perhaps, in R. S., c. 6, § 173, that the town may relieve a collector who has made a fruitless arrest after one year. In general, the negligent collector is dealt with, not by the town, but by other public officers clothed with authority for that purpose.

The assessors are authorized by statute in certain contingencies to take his tax warrant from him. §§ 147, 149. The state, county and town treasurers may each issue his warrant of distress against a delinquent or slothful collector. §§ 151, 152, 158. All these officers proceed, not under any vote of the town but independent of it and under statute authority. It would be their duty to act, when the occasion arises, even in spite of a vote of the town. When a tax collector has once received a legal tax warrant, he becomes chargeable with the whole amount of the tax, state, county and town. He must account in money to each treasurer for the amount ordered to be paid to him. *Fake* v. *Whipple*, 39 Barb. 339. *Gorham* v. *Hall*, 57 Maine, 58. This liability is not a private debt due to the town as a corporation which the corporation may release. It is an official liability to the public, which he can acquit himself of, only by executing his warrant. If he neglects to execute his warrant, his liability to pay to the treasurers the amounts due them, is as living and binding as if he had collected the money. His payments to the treasurers are general, on account of the whole sum ordered to be paid each, and not particular, on any individual tax. His warrant commands him to pay over a certain gross amount, not any particular taxes, to each treasurer. Any money he officially pays the treasurer, he pays on account of, and to diminish this gross sum, this liability. If he be dilatory, his own money or property can be taken on a treasurer's warrant of distress, and no vote of the town can restrain the treasurer or restore the money. If he be dilatory in collecting, and voluntarily pays his own money to the treasurer without waiting for the warrant of distress to be issued, he only does his official duty, only pays what he was bound to pay, and could be compelled to pay. If no vote of the town can restrain the treasurer from compelling payment, it would seem that no vote of the town can force him to restore what has been voluntarily paid him by the collector on account of his official liability. In neither case, does the collector acquire any right to repayment from his subsequent omission to collect of the tax payer.

Without the execution or revocation of his warrant, the tax col-

lector seems to have no claim in law, morals, or good conscience, either to be excused from failure to collect, or to receive out of the town treasury sums he has paid under his liability though in anticipation of collection. Such a claim on its face, whatever the particular facts, does not come within the purview of town meetings. If a town has no power to raise money from taxes, to restore a gift voluntarily made to the town by one of its citizens, as was held in *Perkins* v. *Milford*, 59 Maine, 315, much less has it power to raise money from taxes, to restore to a public officer money he has paid to the town treasurer under an official obligation to do so.

This claim is that of a public officer to be compensated for a loss suffered by his neglect of his public duty. We nowhere find any authority for a town to make such compensation. For a town to make such a compensation to a delinquent collector, or to otherwise relieve him, would be in effect abating the taxes he omitted to collect. A town has no power to abate a tax. *Cooley* v. *Granville*, 10 Cush. 56. The only tribunals authorized to grant abatements, are the board of assessors, and the appellate tribunal, the county commissioners. A town meeting has no authority to review, modify or reverse the judgment of the assessors as to the persons or property to be taxed. Nor has it any authority to excuse a man from paying his tax, or to refund to him a legal tax once paid. To concede that a town can directly or indirectly abate a tax by vote in town meeting, is to concede the power of a town to determine who shall pay taxes, and who shall be exempt, and the consequent power to place the public burdens wholly on such citizens, as the majority shall single out for that purpose. This court has emphatically held that a town has no such power, and that the legislature can not confer it. *Brewer Brick Co.* v. *Brewer*, 62 Maine, 62. If the town can not abate the tax it certainly can not excuse the collector from collecting it. The town can not do indirectly what it has no direct power to do.

The agreed statement of facts does not disclose any legal excuse for the collector's failure to collect the tax in question. He had no concern with the ownership of the property, nor with the propriety of the tax. It is said in the agreed statement that the

property meant to be taxed, belonged to, and was in the name of "D. Knowlton Company," a corporation, there being no such party as "D. Knowlton & Co." It is also said, however, that "D. Knowlton & Co." gave a note for the tax, and that afterward "D. Knowlton & Co." became insolvent. There must therefore have been a party called, "D. Knowlton & Co." and it was unquestionably the same party as "D. Knowlton Company." The variation was simply in the name of the same party, and too slight to raise any question of identity. The agreed statement negatives the possibility of any other party. There was nothing in the matter of name, to hinder the collector a moment. *Farnsworth Co.* v. *Rand*, 65 Maine, 19. The validity of the tax was not questioned.

We cannot see any ground upon which to sustain the vote of the town directing the assessment of a tax upon its citizens to pay this claim. The law has not made town meetings the courts of last resort in a matter so highly important to every citizen as the prompt collection of public taxes. It does not permit the bestowal of public money upon a delinquent officer, by a friendly majority in a town meeting. The limited power of towns over public money was well stated in *Westbrook* v. *Deering*, 63 Maine, 231. The tax payer is by no means at the mercy of local majorities. The law carefully guards his rights and immunities, and only permits him to be taxed for lawful public purposes. It gives the courts power to afford him ample protection against the inconsiderate unauthorized action of towns.

Exceptions sustained.

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

EBEN H. FERNALD, and others, in equity *vs.* KNOX WOOLEN COMPANY, and others.

Knox. Opinion June 26, 1889.

Equity. Injunction. Great Ponds. Outlet. Mill-owners. R. S., c. 92, § 1.

The water of great natural ponds or lakes can not be lawfully drawn down below their natural low-water line, without legislative authority; nor under the mill act, R. S., c. 92, § 1.

A bill in equity may be maintained by the owner of land, bounded on a great pond, to restrain by injunction mill-owners on the outlet, from drawing off the water in such pond, below its natural low-water mark by excavating the channel, or deepening the outlet.

ON REPORT.

Bill in equity, heard on bill, answer and proofs.

The plaintiffs allege in their bill that they are owners of several parcels of land, having a water front of nearly twelve miles, and bounded on Megunticook and Long ponds, in Camden and Lincolnville; also an island in Megunticook pond containing fifteen acres. They further allege, "that the respondents are owners and possessors of a dam at the outlet of said ponds, across Megunticook stream at a place known as Molineaux mills, and said respondents by means of said dam detain the waters of said ponds, forming a reservoir for the use of their several mills and factories in said stream; that hitherto said ponds have not been sufficient to supply said mills with a continuous flow of water during the summer and fall months; and three years ago or thereabouts, said respondents, in order to increase and continue the flow of water from said ponds by said stream to their several mills and factories, during said summer and fall months, excavated and depressed the channel at the outlet of said ponds and drew off and lowered the waters of said ponds below their natural low-water mark three feet. That during the summer and fall months last past, said respondents excavated and depressed the channel at the outlet of said ponds about four feet, additional, and threaten and intend thereby, whenever the natural flow of

the waters of said ponds will not supply their respective mills and factories on said stream, a sufficient and continuous force of water power, to draw off and use the water of said ponds below their natural low-water mark, so far as said excavations and depressions of the channel at the mouth of said ponds will permit.

And your orators say that the withdrawal of the waters of said ponds below their natural level is a great damage to their several described tracts of land. That during the summer and fall months of 1884, 1885 and 1886, the respondents drew off the waters of said ponds below their natural low-water mark by means of the aforesaid excavations and depressions of the channel at the outlet of said ponds, a depth of three feet, and the waters of said ponds around the shores of same, thereby receded, from the natural low-water mark, where, by right they should be kept, an average of more than seven rods, and your orators were obliged, and did extend their respective line fences, at great expense, that distance, and the shores or bottom of said ponds thus exposed were boggy and full of quagmires and pits and dangerous to the safety of beasts traveling over them from pastures on their lands aforesaid, in going to said ponds for water to drink, and your orators were put to great trouble and expense in watching their cattle and procuring them drink. And your orators further say their respective lands are valuable as cottage lots, and by withdrawing the waters of said ponds as aforesaid by the respondents said lands have been greatly reduced in value in this respect.

Wherefore your orators pray that the said respondents may be compelled to make satisfaction to them for all damages to their respective rights by reason of the withdrawal, as aforesaid, of the waters of said ponds below their natural low-water mark. And that they may be restrained by the injunction of this honorable court from drawing off the waters of said ponds below their natural low-water mark, and that your orators may have such further and other relief in the premises as the nature of their case shall require, etc."

The defendants in their answer admit the ownership and possession of the plaintiffs' lands, and that they themselves own and

possess the dam at the outlet of said ponds. Further answering the defendants say:—

"That they are the owners and possessors of several large mills and factories, erected upon their own land, below said dam and upon said Megunticook stream, which stream is not navigable, and is the natural outlet of said ponds, which said mills and factories they have the right to maintain and operate, and that said dam was erected, and is maintained by them on their own land upon and across said stream, to raise water for working their said mills and factories.

That they have hitherto, to wit, in December, 1877, acquired and still possess, by purchase from the complainants and from all other owners of land flowed by said dam, the right to erect and maintain said dam as it now exists and as it existed on the day of the date of said bill, and to flow all the lands of the complainants, and of other riparian owners, which are or have been since said purchase flowed by said dam; and that by virtue of their deeds of purchase from the complainants and other riparian owners, they have acquired and possess the right, as against these complainants, to draw off, divert and use the waters of said ponds below the natural low-water mark, so far as the same may be necessary for propelling and operating their said mills and factories, and the machinery therein.

That for the purpose of propelling their said mills and factories, and the machinery therein, they have hitherto, and before the date of said bill, deepened the channel of said stream upon their own land, from the outlet of said ponds, down the stream, for a distance not exceeding twenty rods, and to a depth not exceeding four and one-half feet below its natural depth; that such deepening was effected by cutting a canal in the bed of said stream and was necessary in order to supply water for propelling said mills and factories, and the machinery therein, in times of drought, when the natural flow of said stream is insufficient for said purpose.

They deny that during the summer and fall of the years 1884 and 1885, or during any portion of said time, they drew off the waters of said ponds below their natural low-water mark by means of said canal, or by any means whatever.

That in the summer of 1886, during a time of severe drought, when the natural flow of said stream was insufficient for propelling their said mills and factories, and the machinery therein, they drew off and diverted the waters of said ponds somewhat below their natural low-water mark, by means of said canal, for the purpose of propelling their said mills and factories, and the machinery therein, and that such drawing off and diversion was necessary for the operating of said mills and factories; that such drawing off and diversion of the water was not to the extent set forth in said bill, but much less, and that the complainants did not suffer the damage set forth in their said bill, or any damage or injury thereby.

That they intend to draw down and divert the waters of said ponds, by means of said canal for the purpose of propelling their said mills and factories, and the machinery therein, in times of drought when the natural flow of said stream is insufficient therefor, and at no other time and for no other purpose, and then only so far as is necessary for said purpose, and that they have the right, as against the complainants, to draw off, divert, and use said waters.

They deny that the drawing off and diverting of the waters of said ponds, at the times and in the manner, and for the purpose, and to the extent proposed, and intended by them, as set forth in the last preceding clause of this answer, will cause any damage or injury to the complainants, or either of them.

That if the complainants have sustained, or shall hereafter sustain, any damage or injury, by reason of the drawing off, and diversion of said waters, by means of said canal, for the purpose aforesaid, they have a complete, adequate and exclusive remedy at law.

And the defendants further say that the complainants have not, in and by their said bill shown such an interest in the waters of said ponds, and in the lands under said ponds, or made such a case as entitles them, in a court of equity, to any relief from or against these defendants, as to the matters contained in said bill, or any of such matters; and they insist upon this and claim to have the same benefits therefrom as if they had demurred to said bill."

J. H. Montgomery, for plaintiffs.

These ponds and the lands under them, below low-water mark, belong to the state, and are under its control. *Brastow* v. *Rockport Ice Co.*, 77 Maine, 100, 103; *Potter* v. *Howe*, 141 Mass. 357; *Atty. Genl.* v. *Jamaica Pond Aqueduct*, 133 Mass. 361, 364. Remedies by indictment and injunction: High Inj. § 1555; *Potter* v. *Howe*, *supra*. When the waters recede, plaintiffs obliged to extend their fences, which are destroyed by the returning waters. The estimated withdrawal around the shore of one party will be fifteen to twenty rods. Right to excavate into the pond and withdraw its waters is not given by the mill act, either in express terms or by implication. That act is in derogation of common right, and not to be extended by construction beyond its just and fair meaning. *Jordan* v. *Woodward*, 40 Maine, 317, 322; *Bates* v. *Weymouth Iron Co.*, 8 Cush. 548, 555. The excavations made into the pond were made on public land, the bottom of the pond belonging to the state. The language of the statute confines the powers given to streams not navigable. It does not apply to streams where the tide ebbs and flows though not navigable. *Murdock* v. *Stickney*, 8 Cush. 113.

W. H. Fogler and *C. E. Littlefield*, for defendants.

Counsel argued: that the state owns the waters of a great pond as public property, held in trust for public uses; that the owner of lands adjoining a great pond is bounded by the natural low-water mark; that such littoral owner has no special title or interest in the waters of such pond; and no greater right to the use of such water than has every other person; that the use of such waters is free to every one who can gain lawful access to them; that any person may lawfully take such waters for domestic, agricultural or manufacturing purposes; that for any excessive or unreasonable use or taking of the waters of such pond a person is amenable only to the state and not to any individual of the state.

It follows, therefore, that the mere fact that the defendants have deepened the channel at the outlet of Megunticook pond and have drawn off, or intend to draw off, the waters of the pond below the natural low-water level, does not give the plaintiffs the right to maintain their bill. They have no private, legal or equi-

table interest in the subject matter of the bill. *Barrows* v. *McDermott*, 73 Maine, 441, and cases cited by the court, p. 449; *Brastow* v. *Rockport Ice Co.*, 77 Maine, 100–104; *West Roxbury* v. *Stoddard*, 7 Allen, 158; *Fay* v. *Salem &c. Aq. Co.*, 111 Mass. 27; *Hittinger* v. *Eames*, 121 Id. 539; *Gage* v. *Steinkrauss*, 131 Id. 222; *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548.

The defendants are the riparian owners of the stream which flows from Megunticook pond. The usufruct of the water in a water-course is inherent in the ownership of the land through which the water flows. *Johnson* v. *Jordan*, 2 Met. 234, 239.

The defendants are also the owners of mills and manufactories upon the stream from its source to its mouth at the sea.

As mill-owners, they have the right, by the law of this state, to use the water for the operation of their mills, and to that end they may, by means of dams, or canals, or excavations upon their own land, detain or accelerate, increase or divert the flow of the water of the stream to any reasonable extent. They are liable to pay damages to those only whose property is flowed or otherwise injured by such acts.

This right of the mill-owner has always been regarded by the courts of vital importance to the public. In *Lancey* v. *Clifford*, 54 Maine, 487–491, it is said to be "the handmaid of civilization."

In the case at bar, upon the exercise of this right by the defendants depends the prosperity of one of the prosperous towns of the state. Whatever improvements they may have made by increasing the capacity of the stream inures to the public good, as well as to their own.

Plaintiffs complain that defendants have excavated and deepened the channel of the stream upon their own lands.

The stream is not navigable, nor even floatable. The defendants owned not only the land through which the stream runs, but the bed of the stream as well.

"It is settled in this state that he (the riparian owner) owns the bed of the river to the middle of the stream. He owns all the rocks and natural barriers in it." *Pearson* v. *Rolfe*, 76 Maine, 380, 385–6.

The act of excavating in the bed of the stream is in and of

itself lawful. Not even a proprietor upon the same stream, above or below, can maintain an action for the diversion, the raising or detention of the water by a neighbor upon the stream, which, being reasonable in mode and degree, is not the cause of actual, perceptible damage. Gould on Waters, § 214, and cases there cited. *Elliot* v. *Fitchburg R. R.*, 10 Cush. 191.

The complainants are proprietors of lands on the shore of Megunticook pond. They have no greater or other rights in the water of the pond than those of the public generally. They have no special property or rights in the water, and they can, therefore, have no action for its mere diversion.

They have no ground of action, in any form, in law or in equity against the defendants, unless the acts of the defendants complained of have caused or may cause, actual, perceptible damage to their property. *Fay* v. *Salem &c. Aq. Co.*, *supra.*

The damages complained of are: That the defendants are obliged to extend their fences further into the pond; that upon the land exposed by the withdrawal of the water are quagmires and pits dangerous to the safety of their beasts; that the value of the plaintiffs' lands for "cottage lots" is diminished. The testimony is entirely silent upon the second and third claims.

The water line of the shores of a natural pond, under ordinary conditions, fluctuates from the extreme high-water line to extreme low-water line. Between these lines permanent fences can not be maintained. This is an inconvenience attending littoral owners. In the case at bar, the plaintiffs have sold to the defendants the right to flow above high-water mark, thereby increasing the width of the land alternately covered and uncovered by water.

Whether the complainants will be obliged to maintain additional fences will depend upon the use to which their lands may be put, and the point on the shore where their fences will reach the water. In any event, the waters will be drawn off below low-water line only a small portion of exceptionally dry years.

Counsel further argued: that our statutes constituting the mill acts, apply to ponds, or great ponds; that they authorize the diversion of the water therefrom below low-water mark, as there

can be no diversion as to riparian proprietors on the pond, save by drawing it below its natural level at low-water; that this diversion may as well be within the spirit of this statute, by an excavation within, as without the outlet, of the pond, as it is the diversion, and not the precise manner of the diversion, that produces the results desired, and causes the injury, if any; that the facts in this case, therefore, bring us within the protection of these statutes, which furnish to the complainants, a plain, complete and adequate remedy at law, and this bill can not be maintained. *Goodwin* v. *Gibbs*, 70 Maine, 243; *Nelson* v. *Butterfield*, 21 Maine, 220; *Cummings* v. *Barrett*, 10 Cush. 186, 188.

Case differs materially from *Potter* v. *Howe*, 141 Mass. 357, 359, where the court say, "this case does not present any question as to the right of the public (meaning the public right to appropriate, under the mill act, by individuals,) so to use the water between its natural levels, but only the right artificially to detain it above high-water mark and to draw it away below low-water mark." It is not perceived how that case can have any force as an authority at bar, under a different statute and a state of facts.

If the mill act does not apply, they can recover full compensation in an action at law. *Blanchard* v. *Baker*, 8 Maine, 253; *Clapp* v. *Manter*, 78 Maine, 358, 361; *Elliot* v. *Fitchburg R. R.*, 10 Cush. 191, 196; *Brayton* v. *Fall River*, 113 Mass. 218; Gould on Waters, §§ 401, 424.

And past, present and prospective damages may be recovered in one suit. *Duncan* v. *Sylvester*, 24 Maine, 482, 489; Gould on Waters, § 416, and cases cited.

Having such remedy at law the plaintiffs can not maintain their action in equity. *Bird* v. *Hall*, 73 Maine, 73; *Denison Paper Mfg. Co.* v. *Robinson Mfg. Co.*, 74 Maine, 116; *Gamage* v. *Harris*, 79 Maine, 531; *Davis* v. *Weymouth*, 80 Maine, 307.

WALTON, J. This is a bill in equity the prayer of which is that the defendants may be restrained by injunction from drawing off the waters of certain ponds named in the bill below their natural low-water mark.

It appears that the plaintiffs own land bounded on the ponds

and that the defendants own mills on the outlet, and the complaint is that by excavating the channel, the defendants are able in times of drought to draw down the water in the ponds below their natural low-water line, and that this is a damage to the plaintiffs' land.

We think the injunction prayed for must be granted. We do not think the owners of mills on a stream, flowing from a great natural pond or lake, have a right to lower the outlet and draw down the water in the pond or lake below its natural low-water line.

Such a right is inconsistent with the existence of the pond as a pond. If exercised to its fullest extent it would destroy the pond. All the water might be drawn out and its bed left dry, a mere stream of running water only remaining. And if exercised, to any extent, the necessary effect must be to widen the shores and deprive the adjoining land owners of their natural water frontage; for it is the settled law of this state that lands, bounded on a great pond or lake, extend only to the natural low-water line, and that all beyond is owned by the state. And this natural water frontage may be as valuable to the land owner as the right to draw water is to the mill-owner. But whether of equal value or not, it is of equal validity in law, and entitled to equal protection.

This precise question was recently considered in Massachusetts, and the court held that the water of a great pond could not be lawfully drawn down below its natural low-water line; that such a use of the water would be unreasonable; that great ponds belong to the public; that to draw down the water below its natural level is inconsistent with the common right to the use of the pond as a pond; that for such an abstraction of the water an information or an indictment would undoubtedly lie for the public wrong; and that an adjoining land owner thereby deprived of his natural water frontage could obtain redress by injunction. *Potter* v. *Howe*, 141 Mass. 357.

As great ponds and lakes are public property, the state may undoubtedly control and regulate their use as it thinks proper. But in the absence of legislative authority, no individual or

corporation can lawfully draw down the water of a great natural pond or lake below its natural low-water line.

It is urged in defense, that our mill act secures to mill-owners the right to cut canals and divert water, and that the lowering of the outlet of a pond and the drawing down of the water may be justified under this act. We think not. The language of the statute is that a man may cut a canal on his own land, "and thereby divert from its natural channel the water of any stream," etc. R. S., c. 92, § 1. To divert is to turn aside. The mere abstraction of water can hardly be called a diversion of it. The lowering of a natural channel can hardly be called the diversion of water "from its natural channel." Nor can the water of a pond properly be called the water of a stream. The terms pond and stream do not mean the same thing. Nor is there any thing in the history of the act, or the inconvenience to be remedied, which leads us to believe that the legislature could have intended that the word stream should include a pond. We think the statute does not apply.

The evidence fails to satisfy us that at the time of the commencement of this suit the defendants had drawn down the waters of the ponds referred to in the plaintiffs' bill below their natural low-water level more than once, and then only for a short time during the dry season of 1886. The damages, therefore, can be nominal only. But as the defendants admit that they have lowered the outlet of the ponds some four feet or more, and avow their intention to draw down the water below its natural low-water line, whenever in times of drought the water is needed for their mills, we think the plaintiffs are entitled to the injunction prayed for.

Bill sustained, injunction as prayed for, with nominal damages and costs.

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

WILLIAM E. WELLINGTON, appellant, *vs.* JAMES MILLIKEN.

Penobscot. Opinion June 21, 1889.

Declaration. Pleading. Time. Waiver.

A declaration upon a written contract for the sale of goods, averring a subsequent parol agreement to change the place of delivery, without stating the day upon which the same was made, is bad on demurrer.

ON EXCEPTIONS.

Assumpsit upon account annexed for the sale and delivery of fruit trees. The action was commenced in the municipal court for the city of Bangor, where judgment was given to the defendant, upon the general issue, and the plaintiff appealed.

After the appeal was entered, the plaintiff had leave to amend his declaration, by adding two special counts.

The second count of the amended declaration is as follows:

Also, for that it was agreed by and between the plaintiff and the defendant, in writing, at said Bangor, on the 19th day of April, A. D. 1886, that the plaintiff should sell to the defendant and the defendant should buy from the plaintiff certain nursery stock, amounting to $12.30 in value, being twenty-six standard apple trees of the value of seven dollars and fifty cents, and six ornamental trees of the value of $4.80, upon the terms that the plaintiff should deliver the said stock to the defendant at Hermon, in the month of October or November, 1886, and the defendant should accept the same from the plaintiff and pay him the price thereof, to wit: $12.30 in cash on delivery; and that said stock was to be delivered by the plaintiff in good and thrifty and healthy condition, and said fruit trees were to be grafted or budded, and that said standard apple trees were not to be less than five feet in height. And the plaintiff avers, that it was mutually understood and agreed between the defendant and the plaintiff, that the plaintiff should deliver the said stock at the house of the defendant in said Bangor; and the plaintiff further avers that he delivered said stock at said house in the latter part of October, to wit: the 30th day of October, A. D.

1886, and that said stock was in good and thrifty and healthy condition and said fruit trees were grafted, and that said standard apple trees were not less than five feet in height, and all conditions were fulfilled and all things happened, and all times elapsed necessary to entitle the plaintiff to have the said stock accepted and paid for as aforesaid; yet the defendant did not accept the said stock from the plaintiff or pay him for the same, whereby the plaintiff has been deprived of the price and value thereof.

The defendant then filed a special demurrer to the two special counts, and assigned as causes therefor, (1) that there was no allegation of a consideration for the alleged verbal agreement; (2) that there was no averment of the time and place, when and where said verbal agreement was made, &c. The plaintiff joined in the demurrer, and the court having overruled it the defendant excepted.

Peregrine White, for defendant.

The new verbal contract which took the place of the old written one, was made after the execution of the latter, i. e., after it had been reduced to writing and signed by the parties; but when or where there is no averment to show.

The allegation of this new contract,—of the alteration thereby of the original written contract,—was material and traversable. It became the gist of the action. It was the subject of proof and disproof directly and indirectly. Accordingly it should have been laid in the declaration with certainty of time.

"An indispensable rule of pleading," says Mr. Justice DANFORTH, "requires that every traversable fact must be alleged as having occurred on some particular day, month and year." *Gilmore* v. *Mathews*, 67 Maine, 517, 520.

In another case, familiar to the court, Judge DANFORTH says again, "One of the fundamental rules of pleading is, that there must be certainty of time. The day, month and year when each traversable fact occurred must appear." *Platt* v. *Jones*, 59 Maine, 232, 241, citing Stephen and Chitty. This principle is as old as the science of special pleading itself, and needs the citation of no authority.

In the case last cited, the averment was, on "or about" the 16th day of February, A. D. 1869. The words, "or about," say the court, "take all the certainty from the allegation, and virtually leave the declaration without any time."

In this case, not only is no day, month, or year in particular laid, as the time when the verbal contract was made; but absolutely none whatever is averred.

On or about some particular day, month, or year, affords some clew to the time, gives some intimation of the date of the occurrence. But the averment in the declaration imparts no light as to when the alleged contract was made,—beyond the fact that it was after the execution of the written contract, the one first made. On what particular day, month or year, after that event, there is no allegation, nothing whatever to show.

C. H. Bartlett, for plaintiff.

The consideration for the verbal agreement is sufficiently stated. It is alleged that "it was mutually agreed and understood between the plaintiff and defendant." Each promise is a consideration for the other. "The consideration need not be directly averred, if necessarily implied from all the averments." PETERS, C. J., in *Bean* v. *Ayers*, 67 Maine, 482, 487.

The time and place were sufficiently stated. In both counts, the part objected to, is closely connected with the whole count, and time and place are plainly shown by the conjunction "and." 1 Chitty Pl. (16th Ed.) p. *274. It is not a good practice, to lay the venue in transitory actions. Says Mr. Justice WALTON, in *Bank* v. *Lane*, 80 Maine, 165, 169, * * * "a venue in a transitory action is entirely useless. Venues in transitory actions were long ago abolished in England, and were declared unnecessary in Massachusetts more than half a century ago (24 Pick. 398, Rule 45,) and we think they should be allowed to become obsolete in this state."

The allegations, in regard to the agreement to deliver at defendant's house, are immaterial and unnecessary, and therefore surplusage.

Parol proof of a waiver of delivery, at Hermon, would be admissible. *Adams* v. *McFarlane*, 65 Maine, 143, 152. Mere

surplusage is not a ground for demurrer. 1 Chit. Pl. *252. Gould Pl. § 170, p. 142.

HASKELL, J. The declaration avers the defendant's promise to pay for certain merchandise when delivered at a time and place named. It also avers a subsequent verbal agreement between the parties, without stating any time or place when the same was made, that the place of delivery of the merchandise should be changed, and that defendant refused to accept delivery there when tendered, and to pay for the same.

The demurrer calls for an averment of time when the supposed verbal agreement was made.

The plaintiff contends that the supposed verbal agreement amounted to no more than a waiver of the place of delivery originally agreed to, and need not be averred at all; and that the supposed defective part of the declaration may properly be rejected as surplusage.

The argument is plausible, but not sound; for the declaration admits that defendant refused to accede to a substituted place of delivery and accept the goods. He may have agreed to waive the place of delivery, but have refused to waive it. Waiver and an agreement to waive are not the same thing. The former may result from the latter, but the latter can not serve the purpose of the former, except it be executed, or a breach of it operate by estoppel to work a waiver, because of the breach.

The declaration avers an agreement to waive the place of delivery, and a refusal to keep the agreement. The only waiver in the case, that can arise, is because the defendant may have agreed to substitute a new place of delivery, and have refused to abide by his agreement, whereby he would become estopped from insisting upon the place of delivery originally named.

Whether such an agreement was made is a question of fact. It must be proved before the plaintiff can recover. It is material and traversable; and all traversable facts must be laid upon some particular day. *Platt* v. *Jones*, 59 Maine, 232; *Gilmore* v. *Mathews*, 67 Maine, 517; *Shorey* v. *Chandler*, 80 Maine, 409.

If the supposed verbal agreement were treated as surplusage,

the plaintiff would be no better off; for then his declaration would show an agreement to deliver the goods at a place certain, a prerequisite to his right of recovery, and an averment of a tendered delivery at a different place.

Exceptions sustained. Demurrer sustained.
Plaintiff may amend on statute terms.

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

STEPHEN D. GREENLEAF *vs.* INHABITANTS OF NORRIDGWOCK.

Somerset. Opinion June 21, 1889.

Towns. Highways. Action. Notice of defect. R. S., c. 18, § 60.

No action can be maintained against a town for an injury, caused by a defect in its highways, where the statute notice fails to specify "the nature and location of the defect which caused such injury." The statute provision, regulating the giving such notice, is not directory merely; it is mandatory.

ON EXCEPTIONS.

Action for damages caused by a defect in the highway, in Norridgwock, sustained August 26, 1885. On the second day of September following, the plaintiff sent to the municipal officers of the defendant town, the following written notice, which was seasonably received by them.

"STARKS, Sept. 2d, 1885.

"*Gents:*—In consequence of a defect in the highways in your town, I was hove from my carriage about one week ago, and got a severe injury, breaking one rib and injuring another, besides injuring my shoulder. I demand something in the shape of damage. I do not wish to be hard with you, and trust you will be willing to do the honest thing with me, without going into litigation. Hoping to hear from you soon, I am,

Yours truly, S. D. GREENLEAF."

The presiding justice ruled that said notice was fatally de-

fective, and for that reason ordered a nonsuit, to which the plaintiff excepted. If said notice is so defective that the action can not be maintained, the nonsuit is to stand; otherwise it is to be taken off and the action to stand for trial.

H. L. Whitcomb, *S. H. Willard*, with him, for plaintiff.

Notice sufficient, not misleading, and should be liberally construed. *Lowe* v. *Clinton*, 133 Mass. 526, 528, and cases cited; *Dalton* v. *Salem*, 136 Id. 278; *Fortin* v. *Easthampton*, 145 Mass. 196, and cases cited. Says Holmes, J., in this case, "it is hard to suppose that the statute intends to cover a misstatement of the case, which on the face of the thing, is more likely to mislead than no statement at all; and yet to allow a simple omission to remain fatal."

E. Low, for defendants.

Proper notice condition precedent. R. S., 1871, c. 18, § 65; Public Laws, 1874, c. 215; 1876, c. 97; 1877, c. 206; 1879, c. 156; R. S., 1883, c. 18, § 80; *Veazie* v. *Rockland*, 68 Maine, 511; *Low* v. *Windham*, 75 Maine, 113, and cases cited; *Chapman* v. *Nobleboro*, 76 Maine, 427, 430, 431; *Blackington* v. *Rockland*, 66 Maine, 332, 334.

Notice fails to state the location or nature of the defect. Sufficiency of notice, question of law. *Chapman* v. *Nobleboro*, *supra*; *Rogers* v. *Shirley*, 74 Maine, 144–151. Facts cannot be added to exceptions by argument. *Allen* v. *Lawrence*, 64 Maine, 175, 176. Object of the notice is that the precise place where injury was received, may be ascertained, &c. *Larkin* v. *Boston*, 128 Mass. 521, 523; *Hubbard* v. *Fayette*, 70 Maine, 121, 124. Cases in Massachusetts cited by plaintiff relate to informal notices, and not to notices omitting facts called for by the statute.

Plaintiff in reply.

Counsel argued that there is a liability at common law, on the part of defendants, co-extensive with the right of eminent domain to take private property for highways, and its duty to keep them in repair, citing: 2 Dill. Mun. Corp. § 789; *City of Buffalo* v. *Halloway*, 7 N. Y. 493, (57 Am. Dec. 550;) *Rapho*

v. *Moore*, 68 Pa. St. 404. If not in harmony with the doctrine of Maine and Massachusetts courts, plaintiff is entitled to a liberal construction of statute, in view of recent legislative restrictions of his rights. Notice is explicit as in *Lyman* v. *Hampshire*, 138 Mass. 74. Sufficient if it be of aid to the officers making the investigation; or such as naturally leads them to make the proper investigation. *Spellman* v. *Chicopee*, 131 Mass. 443.

In the case at bar, the plaintiff can show by an abundance of evidence outside of the letter sent, that the municipal officers knew all about the locality and defect immediately after the accident, that verbal notice was immediately sent to them, and I think they did investigate and caused the defect to be repaired the same day of the accident.

If plaintiff can show that, why this needless formality of reducing to writing what they already knew?

We claim that the fact of knowledge of the place of injury, &c., should have been submitted to the jury in connection with the letter.

Counsel argued further that if there is no remedy at common law, plaintiff may recover without giving the statute notice. The statute is merely directory and is not made a condition of the plaintiff's right of recovery.

There is no forfeiture of his right of action if the injured party fails to give the notice specified within fourteen days.

The statute is absolute that the injured party may recover if the town had notice of the defect, and if the plaintiff, knowing the defect to exist, had previously communicated the fact to the municipal officers; and there the conditions of the right to recover cease; and the right to recover depends upon no other condition.

The words of the statute following, are merely directory, and a non-compliance does not debar the plaintiff of his right of action. Statute should be liberally construed. *Tracy* v. *R. R. Co.*, 38 N. Y. Ct. of Appeal, 433; *Perley* v. *Jewell*, 26 Maine, 101.

WALTON, J. A statute of this state declares that no action shall be maintained against a town for an injury caused by a defect in one of its highways, unless the person injured shall within fourteen days thereafter notify the municipal officers of

the town in writing, setting forth his claim for damages, and specifying the nature of his injuries and "*the nature and location of the defect which caused such injury.*" R. S., c. 18, § 80. No such notice was given in this case. A notice was given stating that, "in consequence of a defect in the highways in the town," the plaintiff was thrown from his carriage and injured. But the notice does not specify the nature or the location of the defect. In these particulars the notice is fatally defective. The court below so ruled and ordered a nonsuit. The ruling was correct. The statute is not directory merely, it is mandatory. Such a notice as the statute mentions must not only be given, but it must be averred in the writ and proved at the trial, or the action can not be maintained. *Low* v. *Windham*, 75 Maine, 113, and cases there cited.

Exceptions overruled.

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

MICHAEL STEVENS, and another *vs.* DANIEL MAYBERRY, and ADLET MAYBERRY.

Cumberland. Opinion July 20, 1889.

Married woman. Contract. Consideration. Stat. Frauds.

In an action against husband and wife, the wife alone defending, to recover for grain furnished as feed for horses owned by the wife and used by the husband in his business, it being admitted that most of the grain was delivered on his credit, *Held*, that the action could not be maintained against the wife, on the ground that she owned the horses, and subsequently promised to pay for the grain.

Such promise, made after the debt was contracted, would not be binding, for want of consideration; and not being in writing would be invalid under the statute of frauds.

Mere ownership of the horses is not sufficient to charge her upon an implied promise.

ON REPORT, from the superior court, for Cumberland county.

This was an action of assumpsit to recover a balance of account claimed to be due for grain. The defendants are husband and wife. The husband was defaulted. The wife defended and pleaded the general issue.

The facts in issue appear in the opinion.

W. F. Lunt, for plaintiffs, cited *Verrill* v. *Parker*, 65 Maine, 578.

A. F. Moulton, for defendant, cited: R. S., c. 61, § 4; *Yates* v. *Lurvey*, 65 Maine, 221; *Rollins* v. *Crocker*, 62 Maine, 244; *Ferguson* v. *Spear*, 65 Maine, 277.

WALTON, J. Action against husband and wife. The husband has been defaulted. The wife alone defends. The suit is for grain furnished as feed for horses owned by the wife and used by the husband in his business as a truckman. It is admitted that most of the grain was delivered on the credit of the husband, and it is sought to charge the wife on the ground that she owned the horses and subsequently promised to see that the grain was paid for.

We can not regard the alleged promise as proved. One of the plaintiffs affirms it and the defendant denies it; and there is nothing in the situation of the parties or the circumstances to indicate that the one is more reliable than the other. And the mere fact that the wife owned the horses is not under the circumstances sufficient to charge her upon an implied promise. *Ferguson* v. *Spear*, 65 Maine, 277.

Besides, if the express promise could be regarded as proved, being made after the debt was contracted, it would not be binding upon the defendant for want of consideration; and not being in writing would be invalid under the statute of frauds. *Richardson* v. *Williams*, 49 Maine, 558; *Rollins* v. *Crocker*, 62 Maine, 244; *Sawyer* v. *Fernald*, 59 Maine, 500.

It is claimed that a portion of the grain, being the amount charged in the last four items on the plaintiffs' bill, amounting to $13.10, was delivered originally on the wife's credit. Here again we have an issue, but no such preponderance of evidence as will support the affirmative. One of the plaintiffs testifies

that he said to her that if they delivered any more grain they should charge it to her, and that she answered, "all right." She denies saying so. If we could see the witnesses and hear them testify, perhaps we could determine which is the more credible. But we have no such opportunity. The case is before us on report from the superior court. And on paper the two witnesses appear to be equally intelligent and equally credible, and we can not regard the alleged agreement as proved.

The result is that in our opinion the action is not maintained against the wife, and that she is entitled to judgment in her favor.

Judgment against the husband, but not against the wife.

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

ALBERT WHITE *vs.* INHABITANTS OF VASSALBOROUGH.

Kennebec. Opinion July 19, 1889.

Ways. Defect in Highway. Notice. R. S., c. 18, § 80.

A notice under R. S., c. 18, § 80, setting forth a claim for damages, and specifying the nature of injuries received, described the nature of the defect in the highway as "a large snow drift left in the road;" and its location, "by the house of H. F. Whitehouse." *Held,* sufficient.

ON EXCEPTIONS, by the defendants to the superior court, for Kennebec county.

This was an action on the case, for damages sustained by the plaintiff, by reason of an alleged defect in the highway in the defendant town. There was a verdict for the plaintiff.

The plaintiff offered as evidence of having complied with the provisions of R. S., c. 18, § 80, the following letter.

"Vassalboro, March, 17th, 1887.

"Sir on the night of March 15 as i was passing along the road by the house of H. F. Whitehouse there being a large snow drift left in the road upon which my horse went upsetting my load

breaking my cart & quite a large lot of my liniment & hurting me on the back shoulder & head very bad also causing my horse to run away she run ten miles to Augusta & i think she has lamed herself for life and other ways hurting herself now she is a very valuable mair i now claim damage for same i have alreddy payed out six dollars & seventy five cts if you will settle with me without further trouble i will take seventy five dollars but if not i shall claim two hundred dollars and believe i can prove a good claim at that i shall expect to here from you soon my present address will be Waterville for a few days then bangor please attend to this at once Yours Respectfully, Albert White."

The presiding justice ruled *pro forma*, that said letter was a sufficient notice to said defendant town, under the statute above referred to, and so instructed the jury.

The following agreed statement of facts was made a part of the exceptions.

"1st. That the chairman of the board of selectmen of the defendant town, received said written notice on the 17th day of March, A. D. 1887, two days after the accident; and after receiving said notice, an arrangement was made between said selectmen and said White, to meet them on the 21st of said March, at their office at East Vassalboro, with reference to a settlement of damages claimed to have been sustained by said White, by reason of said accident.

2nd. That plaintiff and Herbert F. Whitehouse, plaintiff's witness, testified that said notice was put in an envelope and given in hand to Benj. G. Hussey, one of the selectmen of defendant town, at Herbert F. Whitehouse's house in said Vassalboro.

3rd. That said Benj. G. Hussey testified that he received said notice through the mail, and sent or left it at the house of E. C. Barrows, chairman of the board of selectmen of defendant town, on said March 17th, to whom the said notice was directed.

4th. That the municipal officers of defendant town, first learned of said accident from other sources than the plaintiff, or said written notice, and acted upon the information, so first obtained, in ordering the road surveyor for the district including that part of the highway which passes the house of Herbert F.

Whitehouse, in said defendant town, to open a road through the snow drift upon which the accident happened, in front of the dwelling-house of said Herbert F. Whitehouse, in said town of Vassalboro.

5th. That on the 17th day of March aforesaid, and before receiving said written notice, said snow drift was opened; that on the 16th day of said March, verbal notice of the alleged accident was given to said Benj. G. Hussey by Charles Low, highway surveyor for said district; and that in pursuance of said verbal notice the said Benj. G. Hussey, acting for said board of selectmen, came to the residence of said Herbert F. Whitehouse, and personally examined the condition of the road at the place of the alleged accident, a few hours before the receipt of said written notice from the plaintiff."

Heath and Tuell, *E. W. Whitehouse*, with them, for defendants.

The only question before the court is the sufficiency of the above notice. Is it a compliance with the statute requiring such notice to be given? If not, defendants' exceptions must be sustained.

The notice is not put in to prove the defect, or any point in the case, except to enable the party to show what notice was given, that the court may judge whether it is a compliance with the law. *Chapman* v. *Nobleboro*, 76 Maine, 430.

The statute requiring the notice, requires that it shall be in writing and clearly defines what it shall contain. It is not to be varied by any "extrinsic facts" whatever. It is simply a question as to the meaning of the terms used and whether it is a compliance with the statute. *Chapman* v. *Nobleboro*, *supra*; *Dalton* v. *Salem*, 139 Mass. 91.

Defendants object to the sufficiency of the letter, and deny that it is a compliance with the statute, for the following reasons:

First. Because the plaintiff has made no sufficient claim for damages. The letter is only a bantering offer to settle with the defendant town for injuries alleged to have been sustained.

Second. Because there is in the letter no sufficient specification of the "nature" of plaintiff's injury.

The description of his injury or injuries is general; he says,

"hurting me on the back shoulder & head very bad," which surely cannot be called a specification of the nature of his personal injuries? His statement tells where he was hurt but is silent as to the nature of the hurt; and it is the nature of the injury that the statute requires to be specified.

Plaintiff does not claim in his letter that his horse was injured; he says, "causing my horse to run away she run ten miles to Augusta & i think she has lamed herself for life and other ways hurting herself," then he goes on to tell of the value of his "mair" and makes a claim for damages for his horse running away and for damages which he thinks he may have sustained. Plaintiff does not say that his horse is lamed; he says, "i think" she has lamed herself. He has not specified the nature of the injury done his horse; his statement is general and cannot be said to point out the "nature" of the injury, if any, to the animal.

It is not unreasonable, or more than the statute contemplates, that the party complaining should be required to give a more definite description of the injury received, than to say that he was hurt, or that his horse was lamed. We submit that construing said letter, according to the usual, plain and accepted meaning of the words used, there is no specification of the "nature" of plaintiff's injury such as the statute contemplates.

Third. Because the letter contains no specification of the "nature and location" of any defect.

The statute requires that the nature as well as the location of the defect shall be specified, and while in the great majority of cases, the nature of the defect would be sufficiently specified by naming the obstruction, as a stone, hole, or other object that might render a way unsafe and unfit for the public to use, in this case such a description would seem to be entirely insufficient.

When, as in the case at bar, the road was strewn and filled with similar defects, and that without the fault of the defendants, and beyond their power to avoid or control, it would seem only just to require a more specific description of the particular snow drift complained of. There is no specification in said letter, that distinguishes any one "large snow drift" from the many others, that at that time filled the streets and roads of defendant town.

Plaintiff does not intimate in the letter where in said road said "large snow drift" was located, or that "the road" referred to in said letter was in defendant town. He has simply located a large snow drift in a road, which extends past the house of one H. F. Whitehouse.

"The road" referred to in said letter can be located in defendant town only by inference; the letter is dated at Vassalboro; and is addressed to an inhabitant of Vassalboro. Are those facts alone sufficient to locate the road referred to in the defendant town? *Rogers* v. *Shirley*, 74 Maine, 151.

All that this letter, at most, can be construed to specify, is the road which extends past the house of H. F. Whitehouse, in which road, somewhere, a large snow drift was left. Nothing in said letter specifies the location of said "large snow drift;" it might have been located at any point in said road. The roads and highways all over our state, at the time when the plaintiff met with this accident, were more or less filled and blocked with snow; and it would seem to be absurd to hold that, on a road of indefinite length and at a time of year when all country roads were more or less filled and blocked with snow, this letter specified any particular snow drift. All snow drifts are not defects even though they may be within the limits of the way, and there is nothing in this case that would indicate that this snow drift was a defect.

The word "by" never means directly in front of or opposite of; it means near to, and we submit that the plaintiff meant as he was passing near to, or as he has expressed it "by" said house. This we claim does not specify the location of the said snow drift; for suppose the road extended north and south, then the plaintiff has described two places with equal accuracy. One near to said house in a northerly direction, the other near to the house in a southerly direction. The drift may as well be located near the said house in one direction as another. The word "near" is very indefinite; one person would call an object near when another might call it some distance away. As this letter has described with equal accuracy two or more places or localities, with nothing to indicate which was intended, on the premises at the time the notice was given, this was not a sufficient location of the defect.

Dalton v. *Salem*, 139 Mass. 91, and cases cited. And again, plaintiff was moving along, "was passing" so that it would be impossible to say at just what point the plaintiff was when the accident happened. Allowing the most favorable construction to said letter and then the word "there" can only refer to the word "by," and the most that the plaintiff could have meant was that the snow drift was located near the said house. In no case and under no possible construction can said letter be said to specify the "nature and location" of any defect. It was the intention of the plaintiff to describe the road rather than to describe any particular point or object in said road.

It is admitted that a man by the name of Herbert F. Whitehouse lived in defendant town, but there is nothing in the letter that would indicate that he was the man or person referred to. No evidence or agreement is produced to show that Whitehouse owned any house in defendant town, while the letter implies that H. F. Whitehouse owned the house that plaintiff was passing, at the time he received the injury of which he complains. Such notices should be construed strictly. *Rogers* v. *Shirley*, 74 Maine, 151; *Low* v. *Windham*, 75 Maine, 116; *Wagner* v. *Camden*, 73 Maine, 486; *Roberts* v. *Douglass*, 140 Mass. 129.

The test of the sufficiency of the notice now required, is not that it is such a notice as will lead the town to such an investigation as would result in the discovery of the defect, or its learning the facts in the case; it must be a specification of the location of the defect itself. *Rogers* v. *Shirley*, *supra*; *Larkin* v. *Boston*, 128 Mass. 523. The acts and statements of municipal officers of a town cannot be regarded as a waiver of the statute notice. *Veazie* v. *Rockland*, 68 Maine, 511. Neither can notice of the defect be proved by the admissions of the town or city officers. *Smyth* v. *Bangor*, 72 Maine, 249; *Miles* v. *Lynn*, 130 Mass. 398. The only ground, upon which the acts and statements of the municipal officers can be considered, is to show that the municipality was not misled by anything in the notice. *Fortier* v. *Easthampton*, 142 Mass. 486; *Chapman* v. *Nobleboro*, 76 Maine, 430. The cases of *Blackington* v. *Rockland*, and *Bradbury* v. *Benton* are not authorities on the sufficiency of the specification

contained in such notices at the present time. Those cases arose under the statute of 1874, c. 215, which differs from our present statute very materially. *Rogers* v. *Shirley*, *supra*.

Spear and Clason, for plaintiff.

"Notices in this class of cases are not to be very strictly construed. * * * The main object of a notice is, that the town may have an early opportunity of investigating the cause of an injury, and the condition of a person injured." *Blackington* v. *Rockland*, 66 Maine, 332.

This opinion applied to the statute of 1874, with reference to the specification of injuries required in the notice to towns. But the terms of the statute of 1874 as to injuries are identical with those required by R. S., c. 18, § 80. Therefore the same reasoning will apply to both statutes so far as the specifications of injuries is concerned, the terms being the same. R. S., c. 18, § 80, requires in addition to the specification for injuries, a specification of the location of the defect causing the injury, so that the present statute reads: "setting forth his claim for damages, and specifying the nature of his injuries and the nature and location of the defect, which caused the injury."

The language of the amendment to the statute of 1874 is "and the nature and location of the defect which caused the injury," which is used in the same connection and is almost a repetition of that used with reference to injury. Hence we claim the same liberal construction should be given to the requirement, in regard to the defect, as is given to that in regard to the injury.

The location is amply set out. First. The notice is dated, "Vassalboro, March 17th, 1887." We say it is a fair presumption of law that the place, named in the date, is the place of all transactions alluded to in the body of a written instrument, no other place being specified. Of course, a notice might be dated in one town, when the accident occurred in another; but a failure to name the town in which the accident occurred, in the body of the notice would be fatal to the plaintiff upon proof, and could do no possible harm to the defendant.

Second. The notice was directed to "E. C. Barrows, chairman of the board of selectmen of Vassalboro." Why direct the notice

to the selectmen of Vassalboro if the accident occurred in another town? Could there be the smallest doubt in the minds of the selectmen as to what town was meant?

Third. It was "by the house of H. F. Whitehouse there being a large snow drift left in the road." H. F. Whitehouse is a well known resident in Vassalboro, and it is not pretended by the defendants, that there is any other person by the same name in the town. What better designation of place can there be than the homestead of some well known citizen in town. In fact, it is the common way of directing, not only those who are acquainted, but even strangers from place to place in a town. It was "by" this house, that is "in the neighborhood of; near or next to; not far from; close to; at." Webster. "There" being a large snow drift left in the road.—Where? By the house of H. F. Whitehouse, that is, near to it. Such a designation of place is sufficient. *Chapman* v. *Nobleboro*, 76 Maine, 427.

The agreed statement of facts also shows, that the municipal officers of the defendant town were at the place of accident two days after it occurred, and ordered the surveyor to open the drift complained of. Therefore it is apparent that, however defective the notice, the selectmen themselves fully understood it and never dreamed that it was defective, until they were informed by their legal advisers.

The defendants are estopped to deny the sufficiency of the notice.

If the purpose of notice is to give the municipal officers seasonable opportunity to examine into the injury and defect, as has been repeatedly held, and if, in pursuance of a notice which they have received, have, as a matter of fact, obtained all the information the law intended they should have; have actually examined the location of the defect causing the injury and the injury caused thereby; and have acted upon this notice as a legal and valid basis of settlement of damages claimed for such injuries; met the plaintiff at their office for adjustment on this notice and made no objection whatever to its sufficiency, thereby inducing the plaintiff to believe that they regarded it as all right, when upon an intimation of defect he could have given a new notice, then we

claim the defendants should be estopped to set up a technical denial of their own acts and profit thereby, to the injury of the plaintiff. The notice required is not for, nor given to, the inhabitants of the town. It is to the municipal officers, in their official capacity, that they may have certain information upon which to act, or not, as they may see fit. It is in no way communicated to, or acted upon, by the people. Its sole purpose is to give information to the selectmen and, if they act on it as giving that information, the whole purpose of the law is accomplished; for no action can ever be taken on it beyond the selectmen. The whole power over the notice begins and ends with them. Therefore this is not one of those cases, in which the action of the selectmen cannot bind the town.

That an express requirement of the statute as to notice can be waived, is well settled in a long line of insurance cases. *Bartlett* v. *Union Ins. Co.*, 46 Maine, 500; *Lewis* v. *Monmouth Ins. Co.*, 52 Maine, 492; *Walker* v. *Metropolitan Ins. Co.*, 56 Maine, 371; *Bailey* v. *Hope Ins. Co.*, 56 Maine, 474.

HASKELL, J. The only question presented is whether the supposed notice is a compliance with R. S., c. 18, § 80, that requires any person, who sustains injury or damage by reason of a defective public way, to give notice to the proper officers, within fourteen days, "by letter or otherwise, in writing, setting forth his claim for damages, and specifying the nature of his injuries and the nature and location of the defect which caused such injury."

The supposed notice is inartificially framed, and was evidently written by an illiterate person; but, for these reasons, it should not be rejected, if it serves the purpose of conveying the information required by the statute. Its sufficiency must be determined from substance, rather than from form and elegance.

The notice was seasonably given to the proper person, setting forth a claim for damages, and specifying the nature of the injuries received. It also states the nature of the defect complained of, viz. "a large snow drift left in the road," and locates the same "by the house of H. F. Whitehouse." The notice is dated at "Vassalboro," begins "Sir," and was received by the

selectmen of that town on the day of its date, the second day after the damage was sustained.

Exceptions overruled.

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

FRANKLIN TREAT *vs.* JOHN MAXWELL.

Waldo. Opinion July 19, 1889.

Record. Judgment. Jurisdiction. Debt on judgment. Presumptions. *R. S., c.* 79, § 11.

In debt upon judgment of this court tried upon the issue of *nul tiel record*, the record must stand or fall of itself. Papers and documents filed, and not incorporated into the record, constitute no part of it.

If the record shows such judgment to have been rendered as described in the declaration, the issue is sustained by the plaintiff, and he may recover, notwithstanding the record fails to show jurisdictional facts, and is otherwise so defective as to be cause for writ of error; for this is a court of general jurisdiction according to the course of the common law, and is presumed to have had jurisdiction to award the judgment rendered by it.

Sidensparker v. *Sidensparker*, 52 Maine, 481, distinguished.

ON EXCEPTIONS.

This was an action of debt upon a judgment, recovered in this court, in Knox county. Plea, *nul tiel record.*

The plaintiff offered in evidence a duly authenticated transcript from the records of this court, for Knox county, made, as he claimed, in accordance with R. S., c. 79, § 11, and to which the defendant seasonably objected, because it was not a sufficient record of the judgment declared on. The transcript is as follows:

STATE OF MAINE.

Knox, ss.

At the supreme judicial court, begun and holden at Rockland, within and for the county of Knox, on the second Tuesday of March, being the ninth day of said month, A. D. 1875.

By the Hon. Wm. Wirt Virgin, justice of said court.

Treat vs. Maxwell & Trustee,

No. 450.

Franklin Treat, of Frankfort, in our county of Waldo, plaintiff against John Maxwell, of said Frankfort, principal defendant, and the Hurricane Granite Company, a corporation duly established by law and having an office, at Rockland, in our county of Knox, summoned as trustee of said principal defendant.

The writ in this action is dated October 29, A. D. 1874, and was served on said principal defendant and on said trustee November 17, A. D. 1874.

The action was entered at the December term, A. D. 1874.

And now at this term, it is considered by the court, that the said plaintiff recover against the said principal defendant the sum of sixty-five dollars and seventy-seven cents, debt or damage, and costs of suit, taxed at fifteen dollars and sixty cents and that execution issue therefor against the said principal defendant, his goods and estate in his own hands, and likewise against his goods, effects and credits in the hands and possession of the said trustee.

Judgment rendered March 26, A. D. 1875.

Execution issued August 18, A. D. 1875.

This record is made by special direction of the court, entered upon the docket of the March Term, A. D. 1879.

Attest, L. F. STARRETT, *Clerk of Courts.*

DOCKET ENTRIES. MARCH TERM, A. D. 1875.

Treat. 450. *Franklin Treat* v. *John Maxwell and Hurricane Granite Co., Trustee.*

Recorded. Entered by leave of court Dec. T. '74.

Vol. 9. [15.] Prin. & Tr. default.

Page 420. Judgt. for Plff. for $65.77 debt & 15.60 costs.

$81.37

Ex'on issued Aug. 18, 1875.

The presiding justice admitted the transcript against defendant's objections.

The defendant put in evidence a copy of the writ and declaration, referred to in the transcript, which showed that the action

was assumpsit upon an account annexed to the writ, and that the account was as follows:

1874.		
Oct. 16.	John Maxwell to Frank Treat,	Dr.
	To bal. due on ac.	$64.23

Upon the foregoing evidence the presiding justice gave judgment for the plaintiff, and the defendant excepted.

W. H. Fogler, for defendant.

Defendant denies that there is any record of the judgment declared on. The transcript contains no more than the statute required. The statute declares that "it is sufficient to record" the particulars therein named. "Sufficient" for what purpose? That it was not intended to be sufficient for all purposes, is evident from the fact that the statute provides that, "the court may, if special cause is shown, order a full record in any case."

The record does not disclose the nature of the action; the subject matter of the litigation; the manner of service of the writ; whether the defendant appeared; whether judgment was by default, or on verdict; whether any plea was filed; and does not disclose sufficient to establish the fact that any valid judgment was recovered.

J. Williamson, for plaintiff.

Counsel cited: R. S., c. 79, § 11; *Lewiston Steam Mill Co.* v. *Merrill*, 78 Maine, 107; *Paul* v. *Hussey*, 35 Id. 97.

HASKELL, J. The record of the judgment in suit must stand or fall of itself. Papers and documents filed in the case, but not incorporated into the record, constitute no part of it. *Valentine* v. *Norton*, 30 Maine, 200; *Lawrence* v. *Mt. Vernon*, 35 Maine, 100; Freem. Judg. § 126.

The action is debt upon a supposed judgment of this court, rendered in another county. The plea is *nul tiel record*, upon which issue is taken to the court, to decide, from inspection, whether a record of such judgment exists. "Strictly speaking," the record itself "is the best and only original evidence of the facts recited in it;" but properly authenticated copies are now

held competent evidence of such records in all cases. *Sawyer* v. *Garcelon*, 63 Maine, 26.

The transcript produced shows that the court had jurisdiction of the parties and awarded damages and costs in favor of the plaintiff. It fails to disclose the nature of the litigation, or in what plea the action was brought, or whether it was decided upon default or after issue joined. These defects might be fatal upon a writ of error, but cannot avail upon the issue here presented. The court in which the judgment was rendered has general jurisdiction according to the course of the common law, and is presumed to have had jurisdiction to award the judgment shown to have been rendered in the plaintiff's favor by its own record. It is said to be a matter of no consequence whether the jurisdiction of a domestic court of general jurisdiction appears affirmatively upon the judgment roll or not; for if it does not, it will be conclusively presumed in all cases between the parties to it so long as it remains neither annulled nor reversed. Freem. Judg. § 132. *Pratt* v. *Dow*, 56 Maine, 81; *Granger* v. *Clark*, 22 Maine, 128.

In *Penobscot R. R. Co.* v. *Weeks*, 52 Maine, 456, 458, the court says: "If, upon inspection of the record, a judgment appears to have been rendered without such notice, [service on the defendant,] it is absolutely void,—a mere nullity." That case does not appear to have been presented upon the plea of *nul tiel record*, but appears to have been reported upon the production of the original papers without any extended record; and the writ shows that no legal service had been made.

How far jurisdiction is presumed from the record of a domestic court of general jurisdiction, silent as to jurisdictional facts, in subsequent litigation between the parties to it, is not considered in *Sidensparker* v. *Sidensparker*, 52 Maine, 481.

Exceptions overruled.

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

NATHANIEL W. MORSE, executor, in equity *vs.* MARY J. MORRELL, and others.

Cumberland. Opinion July 19, 1889.

Devise. Trust. Income. Life estate. Discretion of Trustee.

A testator gave his son and daughter his dwelling-house, during their respective lives, in common and undivided, to be held under the sole control of his executor in trust, and to keep the house in good repair, pay the insurance, water rates, taxes and other necessary expenses from the income of said real estate, and from any personal property he might leave; the balance of income therefrom to be equally divided between the son and daughter. Upon the death of either, he gave to the survivor, to have and to hold for his or her life, the portion of said dwelling-house devised for life, as aforesaid, so that the survivor, after the death of the other, should take the whole of the dwelling-house for his or her life; and upon the death of the survivor, he gave the whole of the dwelling-house, in equal shares, in fee simple, as their absolute property, to his two granddaughters.

Held, that it was the intention of the testator to secure the net income of this real estate, by means of a trust, for his son and daughter, during the natural life of the survivor of them; that the real estate was devised in trust to continue during the natural life of the survivor of said children; the net income thereof to be divided equally between them so long as both live, and upon the death of one to be paid to the survivor during life.

Held, also, that the personal property, in the hands of the executor, was devised in aid of the principal trust, to be discreetly used and applied by the trustee, so that the net income from the real estate may be maintained at as high and uniform yearly sum, for payment to the *cestuis*, as possible.

Besides the real estate of the testator, appraised at $3000.00, he had a deposit of about $500.00 in the savings bank, and an assignment of the interests of two living members of a relief society. To keep such interests alive so that upon the death of the members something could be realized by the executor, in the nature of life insurance, assessments from time to time were required to be paid. *Held*, that as to the advisability of continuing such payments, the trustee should decide, having in mind all the circumstances of the case; and that his decision, made by him in good faith, is conclusive.

ON REPORT.

Bill in equity by the executor of the will of Peter W. Morrell, of Portland, for its construction by the court under the provisions of R. S., c. 77, § 6, par. 7, and for its instructions as to the

manner of administering the trust expressed therein; also a question of investment.

The property consists of a dwelling-house and lot, situated in Portland, appraised at $3,000; deposit No. 32,256 in Maine Savings Bank, $535.17; claim of the testator, as assignee of two members, still living, in the Citizens' Mutual Relief Society, of Portland, and on which the complainant has paid as assessments, since the testator's death, $208.00. The largest sum which can be realized from these two claims or relief assignments, is represented to be $1,800.

The questions presented for the decision of the court, arose from the following clause in the will:

"I give and devise my son Edwin Morrell and daughter Mary Jane Morrell, during their respective lives, my dwelling-house and land, on the corner of Congress and Hampshire streets in said Portland, to be held in common and undivided. Said property to be held under the sole control of the executor of this will, hereinafter nominated, who is to hold the premises in trust and to keep the house in good repair, pay insurance, water rates, taxes and other necessary expenses from the income of said real estate and from any personal property I may leave at my decease; and the balance of income therefrom to be equally divided with my said son and daughter; and upon the death of either of them, I give and devise to the survivor to have and to hold for his or her life, the portion of said dwelling-house devised for life, as aforesaid, to the one deceased, so that the survivor may, after the death of the other, take and hold the whole of said dwelling-house for his or her life; and upon the death of said survivor, I give and devise the whole of said dwelling-house, in equal shares, in fee simple, as their absolute property, to my two granddaughters, Alice E. Morrell and Mary F. Morrell."

The bill alleges that doubts have arisen and exist concerning the construction of the will, in the following particulars, to wit:

First. Whether the express trust as to said real estate terminates upon the death of either the said Edwin Morrell or Mary Jane Morrell, or whether such trust continues until the death of the survivor of them, the said Edwin and Mary Jane.

Second. Whether a trust is implied upon the personal estate for the benefit of the real estate or otherwise; and, if yea, to determine the extent and mode of executing such trust.

In the second particular it appeared that the testator's two children, as heirs at law, have petitioned the probate court for Cumberland county, praying for a distribution to them, as such heirs, of said specific sum of $535.17, and from the decree of the court they have taken an appeal which is pending.

The bill also alleges that the claims of the testator as assignee of the two memberships in the Citizens' Mutual Relief Society impose upon the estate the burden of paying such assessments as said society duly lays, and makes from time to time, during and on account of the memberships thus assigned; it also prayed in this matter specially that the court would determine the expediency of making a change of such investments, by selling or otherwise disposing of them, as to the court may seem wise and best.

The bill concludes as follows:

"And your orator especially avers that as to each and all the aforesaid doubts, controversy and matters this bill of complaint is by him brought as an amicable bill under the provisions of paragraph VII, § 6, c. 77, of the Revised Statutes of said state of Maine, and in behalf of your orator as well as all other parties in interest. Wherefore, your orator prays your Honors to determine the construction of said will in the particulars herein stated, also to determine the expediency of making a change in such investments by testator in said insurance claims; and that your Honors will make such other and farther orders and decrees in the premises as to equity shall pertain and to your Honors shall seem meet."

The respondents are the two children and the grandchildren named in the will of the testator.

S. C. Strout, *H. W. Gage* and *C. A. Strout*, for the granddaughters.

No special words necessary to create a trust. Courts will imply an estate in a trustee where the evident intention of the testator demands it. Perry's Trusts, (2d ed.) § 313. The trustee

Morse took an estate sufficient to effectuate the purpose of the trust and the intention of the testator. *Doe* v. *Considine*, 6 Wall. 458, 471 and citations; Perry's Trusts, (2d ed.) § 320; Jarman's Wills, 5 Am. Ed., vol. 3, p. 56, *et seq.* He therefore took an estate for the lives of testator's two children subject to vested remainder in the granddaughters. Testator intended to preserve the real estate for his granddaughters and that it should come to them in good repair, taxes paid, and covered by insurance during the lives of his children, Edwin and Mary Jane. Trust did not terminate at the death of one of the children, otherwise the survivor might impair the property by neglecting to repair, pay taxes, or failing to insure.

A trust is implied upon the personal estate. The charges for repairs, taxes, water rates and insurance are to be paid "from the income of said real estate and from any personal property I may leave at my decease; and the balance of income therefrom to be equally divided with my said son and daughter." The personal estate must be held in trust to respond at any time as the income of the real estate may be uncertain. Personal property with real estate and upon the same trusts, is held as the real estate is. R. S., c. 73, § 13. The division of the income, if any, of the personal estate with the children does not, in any way, affect the trust upon the personal property for the benefit of the real property.

J. J. Perry, for the son and daughter, cited Bouv. Law Dict., vol. 2, p. 570, "take." To hold, is to keep, to retain. While the two children were living, the executor holds the premises in trust. If either dies, then the "survivor takes and holds the whole of said building." Such is the language of the will and the testator's intention. *Orr* v. *Moses*, 52 Maine, 287. No trust is implied on the personal estate. The intention of the testator is to be gathered from what he says and facts stated in the bill. *Morton* v. *Barrett*, 22 Maine, 257; *Deering* v. *Adams*, 37 Id. 264; *Shaw* v. *Hussey*, 41 Id. 495. Testator knew there would be an income from the house over and beyond its running expenses; otherwise the testator's devise to his children was worthless and a sham. The balance of income "therefrom" has no reference to personal

property. By leaving out the clause, "and from any personal property I may leave at my decease," a clause interjected by the scrivener, not an expert, we have a perfect will.

The annual settlements of the executor show a balance of income from the real estate averaging $288.00 per annum, which negatives the idea that the personal estate should be held in trust for the benefit of the real estate. Hence the specific sum of $535.17 not being disposed of by will should be distributed to the son and daughter as heirs at law.

The court should advise the executor to turn over the relief claims to the children for a nominal sum, and let them dispose of them as they please. They are the legal heirs. No other person has any interest in them, as they are not disposed of by the will. The grandchildren are nominal parties only to the bill, and have no interest in these claims.

HASKELL, J. It was clearly the intention of the testator to secure the net income of his real estate, by means of a trust, for his own son, Edwin, and daughter, Mary Jane, during the natural life of the survivor of them.

We are of opinion, therefore, that the testator's real estate was devised in trust to continue during the natural life of the survivor of said children; the net income thereof to be divided equally between them so long as both live, and upon the death of one to be paid to the survivor during life.

It was clearly the intention of the testator, also, to increase the net income of his real estate, by directing that the small amount of personal estate that he might leave should be applied in aid of the principal trust, by paying necessary charges incident to its proper administration.

We are of opinion, therefore, that the personal property of the testator now in the hands of the executor, was devised in aid of the principal trust, to be discreetly used and applied by the trustee, so that the net income from the real estate may be maintained at as high and uniform yearly sum, for payment to the *cestuis*, as possible.

As to the advisability of continuing the payments necessary to

secure any benefit, arising from a relief society upon the death of members, to which the testator had acquired a right, the court considers that the trustee should decide, having in mind all the circumstances of the case, and that any decision made by him in good faith shall be conclusive.

The actual disbursements of this proceeding and twenty-five dollars each to the two counsel, who have submitted arguments, should be paid by the executor from the personal estate.

Decree accordingly.

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

JOSEPH B. PEAKS, in equity, *vs.* THOMAS S. DEXTER and ALBION P. MCMASTER.

Piscataquis. Opinion August 27, 1889.

Equity. Mortgage. Assignment. Discharge. Cloud on Title. Promissory Note. Co-promisors.

The plaintiff attached and sold on execution lands of his debtor, whose grantor as appeared by record in the registry of deeds had previously mortgaged, but were discharged by the assignee of the mortgage. Afterwards the assignee assigned to the defendants the mortgage which had been given by the debtor to secure a note made by him and the defendants. There was no evidence to show the debtor and the defendants bore any other relation to each other than that of co-promisors. Upon a bill in equity by the plaintiff, charging the defendants with attempting to set up their title under the assignment against him, and praying the court to decree the mortgage paid and satisfied and to enjoin the defendants against enforcing it:

Held, that the discharge by the assignee was a good discharge and satisfaction of the mortgage, as between the parties to the bill; and that it was not competent for the defendants to show that the mortgage note had been sold to them, by the assignee prior to the discharge.

Held, *also*, that in the absence of evidence showing that the mortgage note, as between the parties, was the note of the mortgagor and that it belonged to him alone to pay it, the defendants must be treated as co-promisors, and each bound to pay one-third. The defendants in their answer having admitted that their co-promisor had paid more than his part of the note,

they cannot be permitted to buy the note of the assignee, take an assignment of the mortgage and enforce it against the mortgagor, their co-promisor, or his grantee.

The plaintiff having amended his bill by alleging that he is in possession of the lands, was held entitled to a decree in his favor.

BILL IN EQUITY, reported to the full court for hearing on bill, answer, replication, documentary evidence, and the agreement of the parties to waive all technical and formal objections.

The question submitted for decision, was whether the mortgage given by Harvey Robinson to the Newport Savings Bank afterwards assigned to John C. Manson, dated March 26, 1873, and recorded in Piscataquis Registry of Deeds, vol. 63, p. 255, mentioned in the pleadings, shall be treated as a subsisting mortgage against the plaintiff notwithstanding the discharge of record by said Manson, or not. It was agreed that if the mortgage should be decided to be a subsisting valid lien, notwithstanding such discharge, the court might enter, in this suit, the same decree to that effect as if the defendants had filed a cross-bill for that purpose; otherwise decree was to be for complainant.

The facts are fully stated in the opinion.

J. B. Peaks, for plaintiff.

No mere allegation in a cross-bill that the discharge was made by accident or mistake would be admissible as a fact or statement. What was done, with the attendant circumstances legally proved, is required as a foundation for the decree of the court. The allegation that the discharge was made by mistake is not an allegation of facts or acts, but a statement of a legal opinion, anticipating the decision of the court by putting the law and not the facts before the court. The mistake must be proved beyond a reasonable doubt. *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 102 Mass. 45. Pleadings on cross-bill: *Clay* v. *Towle*, 78 Maine, 86. Plaintiff entitled to have cloud on title removed. Pom. Eq. §§ 779, 783; *Lancy* v. *Randlett*, 80 Maine, 169. Attaching creditor stands in the position of a purchaser. *Woodward* v. *Sartwell*, 129 Mass. 212, 219. *Bona fides* of plaintiff: *Atkinson* v. *Runnells*, 60 Maine, 441. Delivery of note to defendants by Manson, no trust. R. S., c. 73, § 12. Mortgage was in possession and

under control of Manson at the time when it was discharged. *Cobb* v. *Dyer*, 69 Maine, 497; *Hayden* v. *Building & Loan Association*, (N. J.) Eastern Rep. No. 7, vol. 19, p. 860, Apr. 2, 1887; Kerr's Fraud and Mistake, 312, 436; Pom. Eq. §§ 776, 871.

S. C. Strout, and Henry Hudson, J. W. Manson, with them, for defendants.

Facts stated in defendants' answer are responsive and conclusive unless overcome by evidence. As against Robinson equity would decree the mortgage to be subsisting and valid. Plaintiff stands in no better position than Robinson. Mortgage discharged by Manson, after he ceased to be the owner; by mistake; without authority or knowledge of the defendants who were equitable owners having paid the amount due on the note.

Plaintiff's attachment was of Park's interest: he occupies the same position he would under a quitclaim deed from Parks. That interest was only a right to redeem the Robinson mortgage the existence of which he knew. A levying creditor is not a purchaser for value in the sense that he can destroy equities existing against a debtor. *Wood* v. *Main*, 1 Sum. 506; *Devoe* v. *Brandt*, 53 N. Y. 462; Freem. Judgments, §§ 356, 357; Freem. Executions, §§ 335, 336. He takes the same title he would get by a conveyance from the debtor with full notice of all existing legal or equitable claims. Freem. Judgments, §§ 356, 357.

Equity will relieve defendants. *Hayden* v. *Excelsior Building Association*, (N. J.), 19 Eastern Rep. 860; *Cobb* v. *Dyer*, 69 Maine, 497; *Bruce* v. *Baring*, 12 Gray, 108; Jones Mort. § 966. Sheriff's deeds to plaintiff convey only "all the right, title and interest" and "all the right in equity" of Parks, which in fact was the right to redeem from the Robinson mortgage. Such sales admit notice of the mortgage, liens and incumbrances. *Bailey* v. *Myrick*, 50 Maine, 185; *Knapp* v. *Bailey*, 79 Maine, 195. Plaintiff estopped to claim anything under Manson's mistaken and unauthorized attempted discharge, unless he can show actual payment of mortgage debt. There were two mortgages by Robinson, and Manson discharged the wrong one by mistake.

LIBBEY, J. In his bill, the plaintiff claims to be the owner in

fee of one undivided twelfth of certain lots of land described in it and claims that the defendants are attempting to set up against his title a certain mortgage given by Harvey Robinson to the Newport Savings Bank, March 26, 1873, as assignees thereof, and asks the court to declare said mortgage paid and satisfied, and enjoin the defendants against attempting to enforce it.

In their answer, the defendants deny that the mortgage has been paid and satisfied, and claim to own it as assignees. In the report upon which the case comes up, the parties stipulate that the question they desire the court to decide is, whether the mortgage given by said Robinson to said Newport Savings Bank, as aforesaid, shall be treated as a subsisting mortgage against the plaintiff notwithstanding the discharge of record hereafter to be referred to, or not. And it is further stipulated that the court, if it shall decide that the said mortgage is a subsisting valid lien notwithstanding the discharge of record, may enter in this suit the same decree to that effect as if said defendants had filed a cross-bill for that purpose; otherwise decree to be for complainant.

So far as the title is in issue between the parties, its history is as follows: Harvey Robinson on the 26th of March, 1873, owned one-sixth undivided of the lots of land in controversy, and on that day mortgaged it to the Newport Savings Bank to secure the payment of a promissory note for two thousand dollars, payable in one year with interest at the rate of 10 % per annum until paid, signed by himself and these defendants. That mortgage was assigned by said Bank to J. C. Manson on the 27th of January, 1879. The mortgage and assignment were duly recorded.

On the 4th of October, 1881, said Manson entered upon the mortgage a discharge signed and sealed by him and duly acknowledged, reading as follows: "Having received full payment for the balance of within note, I hereby discharge the within mortgage." This discharge was duly entered of record October 10, 1881.

On the 27th of January, 1885, said Manson executed to the defendants an assignment of said mortgage which was duly entered of record, January 29, 1885. Under this last assignment,

the defendants claim to own the mortgage as against the plaintiff.

The plaintiff claims title under said Robinson through the following conveyances. By deed of warranty from said Robinson to Francis E. Parks, dated July 2, 1873, recorded August 27, 1873, of one undivided twelfth part of the lands.

On the 30th day of September, 1882, the plaintiff brought an action against said Francis E. Parks, returnable to the February term of this court for the county of Piscataquis, and on the 2nd of October, 1882, caused the lands of said Parks in said county to be duly attached thereon.

At the February term on the 7th of March, 1884, judgment was rendered in favor of the plaintiff and execution was issued on the 13th of said month. On the 27th day of March, 1884, said lands were seized on said execution by a deputy sheriff for said county, and after proceedings duly had, said lands were sold to the plaintiff by the officer on the 30th day of April, 1884.

On the 7th of November, 1881, Llewellyn Parks and others caused the lands of Francis E. Parks in the county of Piscataquis to be attached on a bill in equity pending in Somerset county, and at the March term of this court, in said county of Somerset, judgment was rendered against said Francis E. Parks in favor of Llewellyn Parks for four thousand three hundred and twenty-eight dollars and ninety-one cents. Execution was duly issued on said judgment. and within thirty days of the date of the judgment, and on the 9th of April, 1885, all the right in equity which said Francis E. Parks then had, or had on the 7th day of November, 1881, the day of the attachment, in the undivided one-twelfth of said lands was seized by a deputy sheriff of Piscataquis county on said execution, and after proceedings were duly had therefor, on the 15th day of May, 1885, said right in equity was sold by the officer to said Llewellyn Parks, and on the 23d day of November, 1886, said Llewellyn Parks by deed of quitclaim recorded November 29, 1886, conveyed all of his interest in said lands to the plaintiff.

There are other deeds put in evidence by the parties, but we think they have no direct bearing upon the question in issue.

By the foregoing statement of title, it appears that Robinson

conveyed the one-twelfth of the lands to Francis E. Parks after his mortgage to the Savings Bank by deed of warranty. It became his duty to cause the mortgage to be discharged and remove the incumbrance. And whenever the mortgage was paid or properly discharged upon the record by one having the legal authority to discharge it, Parks had an unincumbered fee. In October, 1881, Manson as assignee of the mortgage by the record, had a legal right to discharge it as to the mortgagor or one holding under him, and he was the only one having such power. His discharge entered upon the record, relieved Park's title from any incumbrance by it. The title stood in that way when the plaintiff made his attachment in October, 1882, and continued in the same condition when he purchased at the officer's sale in April, 1884. His purchase was the one-twelfth of the land owned by Parks, and not his equity or right in it. So that, testing the title by the record as it stood at that time, the plaintiff took the land unincumbered by the mortgage.

The defendants claim to set aside and have annulled the discharge of the mortgage by Manson on the ground that on or about the first day of January, 1880, they purchased the mortgage and the note secured by it, of Manson, paying him therefor the balance due on the note, and that Manson then promised to assign the mortgage to them; but for convenience, the mortgage was permitted to remain in the possession of Manson until he could conveniently make the assignment; and that they neglected to call upon him for an assignment till the 27th of January, 1885, when he made the assignment to them which has been referred to.

They claim that Manson had no power to discharge the mortgage in 1881 as to the mortgagor or any one claiming under him. We think this contention as to the plaintiff, is unsound. By permitting the mortgage to remain in the hands of Manson from 1880 until 1885, they gave to him as to third parties, so far as the record by which the title is to be tested disclosed anything, the power to discharge it. They cannot now vacate that discharge upon the grounds which they set up.

But if the discharge on the record should not be treated as fatal to the defendants, we do not see how they can prevail on the facts alleged in their answer.

By the agreement between the parties, we are to determine the case as if all the facts alleged in the answer were before us in a cross-bill, praying for a decree annulling the discharge and affirming the title of the defendants as assignees of the mortgage. By the mortgage of Robinson to the Savings Bank, it appears that the note secured by it was signed by Robinson *and the two defendants.* With no explanation of their relation to each other they must be treated as co-promisors, and each required to pay one-third. There is nothing in the allegations in the answer, or in the evidence, to explain their relation to each other. They are all competent witnesses but do not testify. The note is not produced. We cannot, therefore, hold that Robinson should pay the whole of the note. In their answer, the defendants say that said mortgage note has never been paid or satisfied by said Robinson, except in part,—$2,610.88. This is more than half of the note with the accumulated interest which it bears, and it is, and was in 1880, the duty of the defendants to pay the balance; and they cannot be permitted to buy the note of Manson, take an assignment of the mortgage and enforce it against Robinson or his grantee.

As originally drawn the plaintiff's bill contains no allegation that the possession of the premises described in it was in him. The court was of opinion that such an allegation was necessary but as no objection was raised on that point by the defendants leave was granted to the plaintiff to amend his bill in that respect. Under that permission the plaintiff has filed in the clerk's office a proper amendment so that the bill now contains a good statement of the plaintiff's case. The result is the discharge of the mortgage by Manson, found on the record, must be declared a valid discharge of it; and the subsequent assignment of it by him to the defendants is void and of no effect.

Decree accordingly, with costs for plaintiff.

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

JOHN F. SPAULDING *vs.* FREEMAN G. YEATON.

Kennebec. Opinion October 12, 1889.

Costs. Action of Debt. R S., c. 80, § 50; *c.* 82, § 120; *c.* 83, § 3.

If in a trial of an action of debt, commenced in a superior court, to recover under a penal statute not less than twenty nor more than fifty dollars forfeited to the prosecutor, the jury return a verdict for twenty dollars only, the plaintiff is entitled to quarter costs only.

ON EXCEPTIONS, by plaintiff to the ruling of the superior court for Kennebec county in the taxation of costs.

This was an action of debt to recover the penalty named in § 50, c. 80, R. S., for serving civil process without first giving bond as required therein.

By consent of parties the jury were allowed to fix the amount of the penalty.

The ad-damnum stated in the writ was one hundred dollars, and in the declaration the plaintiff claimed to recover the forfeiture in such case made and provided, but the plaintiff's counsel in his argument to the jury claimed the minimum amount of the forfeiture.

The verdict was against the defendant, and the jury fixed the penalty at twenty dollars. The day of the rendition of the verdict was February 13, 1889, and on February 17, during the term, and before judgment in said action the plaintiff filed an application to the court under § 136, c. 82, R. S., for the taxation of costs to be allowed him.

The court ruled that the plaintiff was entitled to only one-fourth of the amount of the penalty fixed by the jury, as costs.

F. E. Southard, for plaintiff.

This belongs to a class of cases where the minimum penalty only, could by any possibility, give a trial justice jurisdiction. The forfeiture, by the terms of the statute, is a variable amount. It may be twenty dollars, it may be fifty dollars, or it may be any sum between these limits. The penalty is in the nature of

a fine. Technically there are no damages. The unlawful act which this defendant was found by the jury to have committed, did no damage, strictly speaking, to any individual. The statute gives to any person the right to sue for the penalty. The action is known to the law as a "popular" action. 5 Wait's Actions and Defences, 156. The public have an interest in such cases. They have a right to have the full amount of the penalty assessed, if such a fine would be commensurate with the act complained of, and having that right, no individual, by bringing the action before a trial justice, can deprive them of it. This action is given as a matter of public policy. Shall then, an individual, by bringing the action in a court which has no power to award judgment for anything more than the minimum fine, be allowed to defeat in part the very object of the statute? And will this court say that an action of this sort, because the verdict is only twenty dollars, should have been brought before a trial justice?

By statute 18 Eliz. c. 5, § 3, no informer or plaintiff in any popular action shall compound or agree with the offender without the order or consent of the court in which the suit shall be pending. 5 Wait's Actions and Defences, 165. It is believed that this statute is a part of our law, and we submit that it contemplates that the action should be brought in a court competent to make any order respecting it, even to the imposition of the highest forfeiture given.

In these cases the prosecutor stands in the place of the state. Is there any doubt that if this prosecution had been by the state, by "suit, indictment or information" under § 94, c. 81, full costs would have followed the imposition of the minimum penalty? Take the case of the penalty for kindling fires and the spreading of the same under § 15 of c. 26,—not less than ten or more than five hundred dollars. This may be recovered by any prosecutor, half to his own use and half to the town. Will the court hold that an individual can deprive the public of the salutary influence of the imposition of a fine commensurate with an offense contemplated by this statute, by bringing an action in a court whose limited jurisdiction renders it unable to impose what might be deemed a decently adequate punishment?

I do not find any case which appears to me to be decisive of the case at bar. *Carroll* v. *Richardson*, 9 Mass. 329, is an authority for bringing an action where the penalty is from two to fifty dollars, before a justice of the peace; but the decision in that case, that the plaintiff could, by alleging his damages at twenty dollars, bring his action before a justice of the peace, went upon the ground that the whole penalty was given by the statute to the corporation suing, by name, and that they, if they saw fit, might legally demand the smallest penalty, and the court say, "Had the forfeiture been wholly to the public, or part to the plaintiff and part to the public, or to a county, town, &c., the objection" (that it should have been brought before a court competent to give judgment for the highest sum) "would have great weight." In the case at bar, the penalty was not given to the plaintiff by name. It accrued to any person who might sue. It was wholly a public matter, and should have been, as it was, brought in a court competent to render judgment for the highest amount. *Houlton* v. *Martin*, 50 Maine, 366, is no authority in this case. There the penalty was given to the town. No other corporation, no person could sue. The town was the only party competent to sue; it was not a "popular" action; the town could compromise the matter in any way they saw fit, and in that case it was very properly held that costs should be restricted. Further, the penalties in the class of cases to which *Carroll* v. *Richardson*, and *Houlton* v. *Martin*, belong, are more of the nature of damages than of fines, but in the case at bar the penalty is purely a fine and should be brought where the full amount might be awarded.

R. S., c. 82, § 120, provides that when it shall appear on rendition of judgment that the action should have been brought before a trial justice, the plaintiff recovers but one-fourth of his judgment as costs.

The judgment in this case, if it had been entered on the day the plaintiff filed his application for the taxation of costs, would have exceeded twenty dollars, and it was through no fault of the plaintiff that judgment was not entered immediately after verdict. He has interposed no motion to prevent the entering of judgment. The interest, which under § 34 of c. 82, shall be added to the

verdict makes the judgment to be entered something more than twenty dollars. In *Boothbay* v. *Wiscasset*, the plaintiff appealed from a judgment of the court of common pleas and obtained a verdict of less than one hundred dollars in the supreme judicial court. The defendant interposed a motion for a new trial and the judgment was thereby delayed until the verdict, with interest exceeded one hundred dollars, and it was held that the plaintiff was entitled to full costs. Stat. 1822, c. 193, § 4. *Boothbay* v. *Wiscasset*, 3 Maine, 354.

In *Lawrence* v. *Ford*, 44 Maine, 429, Judge MAY says, "Whether an action ought to be so brought" (that is brought originally before a justice of the peace.) "is ordinarily to be determined by the amount of the judgment," and Chief Justice WHITMAN in his opinion in *Forbes* v. *Bethel*, 28 Maine, 204, says, "It may be observed that it is not said, if the plaintiff shall recover no more than twenty dollars damages that he shall be restricted as to costs; but that, if it shall appear on the rendition of judgment, etc. This phraseology was used, doubtless, with an intention that the court should look into the case and see that the plaintiff when he commenced his action, could not have commenced it properly elsewhere than the supreme judicial court or a district court."

There is a class of cases of which *Hervey* v. *Bangs*, 53 Maine, 514, is a type, holding that the accumulation of interest on verdicts is not to affect the question of costs. But these cases really go upon the ground that the interest accumulates through the fault of the plaintiff in interposing motions for new trials or exceptions, thus himself delaying judgment until the accumulation of interest and the verdict exceeds twenty dollars.

In pursuance of these principles, the court have examined this class of cases and restricted costs because of the fault of the plaintiff in interposing delays.

We submit that no such fault can be imputed to the plaintiff in the case at bar, and that the case is one (if c. 82, § 120, applies at all) where the amount of the judgment will be allowed to draw after it full costs.

But when *Forbes* v. *Bethel* was decided the court stated that the

statute allowing interest on verdicts was discretionary and intimated that if, as in another statute, the discretion were taken away and the duty made imperative, the plaintiff who obtained a verdict of twenty dollars and delayed judgment until an accumulation of interest would make the judgment to be entered more than that sum, would be entitled to full costs. And in that case stress was laid on the fact that the plaintiff was at fault in causing delay of judgment and the court would not exercise its discretion to increase the judgment by the addition of interest, so as to give the plaintiff full costs. The law now makes the addition of interest imperative, the word "may" being left out of the revision of 1857 and the word "shall" being inserted in the last.

There is no authority in the statute for assuming that the verdict settles the costs, or that it is to be the controlling factor. On rendition of judgment the court is to examine the case, and if on the whole case it appears that it should, not might, have been brought before a trial justice, quarter costs only are to be awarded.

The legislature in fixing the penalty to be assessed in this action at from twenty to fifty dollars must have intended that actions of this sort should be brought before a superior court.

It is hardly possible to think that they intended to give one court jurisdiction to award the minimum penalty only, and another jurisdiction to award a thousand different penalties.

S. and L. Titcomb, for defendant.

Counsel cited: R. S., c. 82, § 120; *Houlton* v. *Martin*, 50 Maine, 336; *Forbes* v. *Bethel*, 28 Id. 204; *Rawson* v. *New Sharon*, 43 Id. 318; *Boston* v. *York*, 1 Id. 406; *Brewer* v. *Curtis*, 12 Id. 51; *Foster* v. *Ordway*, 26 Id. 322; *Lawrence* v. *Ford*, 44 Id. 427; *Hervey* v. *Bangs*, 53 Id. 514; *Burnham* v. *Ross*, 47 Id. 460.

Case not within the exceptions of the statute, plaintiff restricted to quarter costs. *Ladd* v. *Jacobs*, 64 Maine, 347; *Carroll* v. *Richardson*, 9 Mass. 329; *Badlam* v. *Field*, 7 Met. 271; *Blanchard* v. *Fitchburg R. R. Co.*, 8 Cush. 280.

VIRGIN, J. By serving a civil process before he had given the official bond required of him as constable, the defendant "for-

feited not less than twenty, nor more than fifty dollars to the prosecutor." R. S., c. 80, § 50.

At the trial of the plaintiff's action of debt for the recovery of the forfeiture, commenced and tried in the superior court, the plaintiff's counsel in his argument to the jury expressly claimed a verdict for only twenty dollars; and the jury concurred and returned their verdict for that sum. Four days thereafter, when the plaintiff taxed his bill of cost, the judge restricted his taxation to one quarter part of the verdict and the plaintiff alleged exception. The question therefore is: "Is the plaintiff entitled to more than quarter costs, if in the trial of his action of debt commenced in a superior court to recover under a penal statute "not less than twenty nor more than fifty dollars" forfeited to the prosecutor, the jury returns a verdict for only twenty dollars. The decision of this question depends upon a proper construction of two companion statutory provisions.

1. In actions commenced in the supreme judicial or a superior court, except those by or against towns for the support of paupers, if it appears on the rendition of judgment that the action should have been commenced before a municipal or police court or a trial justice, the plaintiff recovers for costs only one quarter part of his debt or damages." R. S., c. 82, § 120.

No provision therein contained negatives the jurisdiction of the supreme or superior court of actions commenced therein notwithstanding they properly "should have been commenced before" one of the inferior tribunals specified. On the contrary the "rendition of judgment" in such actions is permitted when the *ad damnum* is more than twenty dollars. *Cole* v. *Hayes*, 78 Maine, 539. The particular object of the provision which restricts the plaintiff's costs in certain actions to a sum equal to one quarter of his debt or damage recovered, is to discourage a plaintiff from commencing them in the higher courts when a less expensive and convenient tribunal is open to him. *Chesley* v. *Brown*, 11 Maine, 143, 149; *Burnham* v. *Ross*, 47 Maine, 460 and note by KENT, J.

The language of the original provision (Stat. 1821, c. 59, § 30) was: "If upon any action originally brought before the court of common pleas judgment shall be recovered for no more than

twenty dollars debt or damage, the plaintiff shall be entitled for his costs to no more than one quarter part," &c. Subsequently the court, by what was deemed a "fair and consistent construction" of the phrase "any action," restrained its generality so as not to include certain actions wherein title to real estate might be involved and restrict costs therein though the debt or damage recovered might be twenty dollars or less. Thereupon the legislature, to harmonize and make plain the law, changed the language of the original provision regulating costs by substituting for the unqualified phrase: "if upon any action judgment shall be recovered for no more than twenty dollars debt or damage," the general provision without specifying the exceptions: "if it appears on the rendition of judgment that the action should have been commenced before a municipal or police court or trial justice." *Hervey* v. *Bangs*, 53 Maine, 514, 516.

II. What actions should be commenced before the inferior tribunals named?

The general answer is found in the provision defining the jurisdiction of those tribunals; and that relating to trial justices is: "Every trial justice has original and exclusive jurisdiction of all civil actions (with certain exceptions not material to our present inquiry) including prosecutions for penalties in which his town is interested, when the debt or damages demanded do [does] not exceed twenty dollars." R. S., c. 83, § 3. In cases not excepted the verdict generally settles the debt or damages for which an action is instituted. If not exceeding twenty dollars, the verdict shows the cause of action was within the jurisdiction of a trial justice and "should have been commenced before him." As interest on a verdict is no part of the cause of action, but is rather in the nature of a penalty for delaying the plaintiff in reaping the fruit of the decision in his favor, it in nowise affects the question of costs even when it swells the debt or damage to an amount of judgment exceeding twenty dollars. *Hervey* v. *Bangs*, *supra*.

On recurring to R. S., c. 83, § 3, it appears that, prosecutions for penalties, even in which their towns are interested, are expressly within the jurisdiction of trial justices. And although the maximum penalty sued for is more than twenty dollars still

the sum recovered was settled by the jury and that too at the special request of the plaintiff, at a sum not exceeding twenty dollars; and we can perceive no reason why he shall be allowed to evade or avoid the plain rules of, and practice under the statute. Moreover the case is settled in principle by *Houlton* v. *Martin*, 50 Maine, 336, and cases there cited.

Exceptions overruled.

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

LINCOLN NATIONAL BANK, and others, in equity, *vs.* THE CITY OF PORTLAND and the PORTLAND & OGDENSBURG RAILWAY, and others.

Cumberland. Opinion October 12, 1889.

Railroad. New Corporation. Bond-holders. Cancelled coupons. Capital stock. Reduction of shares. Equity. Injunction. Special Laws, 1885, *c.* 507; 1872, *c.* 165.

Upon the reorganization of a railroad corporation, by its mortgage bond-holders after foreclosure, equity will restrain the issue of shares to a bond-holder to whom there has been voted more shares than he is entitled to under any legal contract between him and the mortgagor, although there was no over-issue of bonds under the mortgage.

This principle of equity applied to the following case:

The Portland and Ogdensburg Railroad Company issued its bonds to the city of Portland, dated Nov. 1, 1871, of the par value of $1,350,000, to secure the payment of city scrip of equal par value that was delivered the Railroad Company at various times in instalments of $50,000, each.

The railroad bonds were delivered to the city with all the coupons on them, except coupons amounting to $630. Coupons upon the city scrip, due before the scrip was delivered to the Railroad Company were cut off when the scrip was delivered.

The mortgage securing the railroad bonds has become foreclosed, and the city demanded from the new corporation 24,840 shares of the par value of $2,484,000. This sum is the total amount of the railroad bonds delivered the city with interest from the date of their issue.

The act of the legislature, authorizing the city loan, provided that payment of coupons upon the city scrip by the railroad company should require the city treasurer to cancel and surrender an equal amount of coupons upon the railroad bonds.

The railroad company paid coupons on the city scrip as they fell due and delivered the same to the city treasurer in the aggregate, amounting to $127,260, and, in equity, this operated as payment, cancellation and extinguishment of an equal amount of interest coupons upon the railroad bonds held by the city to secure its scrip.

The interest paid by the railroad company upon the city scrip, amounting to $127,260, and coupons amounting to $630, that had been cut from railroad bonds before they were delivered to the city—in all $127,890,—were included in the amount for which the city demanded shares in the new railroad company and in the number of shares, viz: 24,840 voted by the railroad company to the city; and therefore, the amount of stock, viz: $2,484,000, so voted the city must be reduced by $127,890, and shares representing the balance, viz: $2,356,110, only should issue.

ON REPORT.

Bill in equity for an injunction against the defendants to restrain the issue of shares in a new railroad corporation; also for a decree that certain interest coupons of the original railroad have been cancelled and surrendered; and that the city of Portland be estopped from denying that such coupons have been so cancelled and surrendered.

The legal grounds on which the plaintiffs sought relief are indicated in the following portions of their bill.

That said city claims the whole of said shares shall be issued in accordance with said vote of said directors, and has requested the issue thereof; that the same has not yet been issued, but may at any time be issued by the officers of said Portland & Ogdensburg Railway. * * *

That the issue of said stock in exchange for said interest falling due before the first day of November in the year of our Lord eighteen hundred seventy-five, would be without right and an injury to your orators, and to all other holders of said bonds and coupons, and to all other holders of shares of the capital stock of said Portland & Ogdensburg Railway except said city, and that the same ought not to be issued; and that your orators did in writing, on the eighth day of January in the year of our Lord eighteen hundred eighty-seven, notify said corporation, and the

president and treasurer thereof, and therein protest against the issue thereof, and request the rescinding of the vote of the directors aforesaid authorizing such issue, a duplicate of which said notice is hereunto attached, marked "Exhibit E," and made part hereof as though recited herein at length, but said directors have taken no action on said notice or in reference thereto; so that said vote of said directors remains unrescinded and in full force, and so that said directors have refused all relief to your orators in the premises. * * *

That the question involved in reference to the issue of said shares to said city of Portland is purely one of law, depending wholly on the effect and construction of statutes of the State of Maine and of the mortgages, contracts and other papers hereinbefore set out; and it is moreover a question of strict legal right, and therefore in no sense of that class of matters of discretion, with reference to which directors of corporations have certain margins for decision and determination, according to their best estimate of the interests of the corporation which they represent; and moreover said directors, in passing said vote on the twenty-first day of December in the year of our Lord eighteen hundred eighty-six, were guided by the wishes of said city council, communicated to them as provided in said order of said city council approved on said seventh day of December; that said city of Portland, by the vote of its city council approved the third day of January in the year of our Lord eighteen hundred eighty-seven, copy of which, being part of Exhibit C. hereto annexed, is made part hereof as though recited herein at length, reiterated a demand for said stock; that said stock may be issued before any special meeting of the stockholders or corporators of said Portland & Ogdensburg Railway can be held to act in reference thereto; that it would not avail your orators to ask the action of any meeting of said stockholders or corporators in reference to the premises, because the said city of Portland, for the reasons hereinbefore set out, could and would control the action of said stockholders, so as to give effect to the proceedings of said directors as aforesaid, and, in fact, the said city council, by virtue of said order approved on the third day of January in the year of our Lord

eighteen hundred eighty-seven, has already approved, ratified and insisted on the execution of said vote of said board of directors; so that your orators say, that they have used all efforts and exhausted all resources, which could be effectual with reference to the action of said Portland & Ogdensburg Railway or its directors in relation to the premises. * * *

That if said stock should issue in accordance with said vote of said directors, your orators and all other holders of said bonds and of the shares of the capital stock of said Portland & Ogdensburg Railway, for the reasons aforesaid, would have no adequate remedy in reference thereto, except to apply to your honors to cause the cancellation of said stock before the same might or could be disposed of by said city of Portland; that meanwhile, the issue of said stock would greatly depreciate the market value of the shares of your orators and other holders of shares in the capital stock of said Portland & Ogdensburg Railway, and prevent sales thereof at their just value; and that further your orators and other said holders of bonds and of shares, would be wholly remediless, if meanwhile said city of Portland should dispose of said shares to new and innocent holders thereof.

The case was heard on bill, pleadings and proofs. Only a portion of the arguments of counsel upon the issues of fact are given in this report.

The case is stated in the opinion.

W. L. Putnam, for plaintiffs.

To the question of jurisdiction counsel cited: Eq. Rule 94, U. S. Sup. Court; *Perdicaris* v. *The Charlestown Gas-light Co.*, Chase's Decisions, p. 435; *Gerry* v. *Stinson*, 60 Maine, 186.

The statute does not provide merely that things may, at the option of the parties interested, be done in the way pointed out by it; but it directs the nature of the contract between the parties and makes it subject as an entirety to the approval of the voters of the city. The contract is not between the city officials and the officials of the railroad company, but, with the assent of the corporation, between the legislature and the voters of the city; and even so far as concerns the voters, the legislature gave them no authority to alter any of the details to which this case

relates. Equity will not permit the city to set up these coupons as valid when the statute expressly directed its treasurer to cancel and surrender them. Story's Eq., 11th ed. § 64, g.

There is nothing in the contract of July 24, 1872, that shows the parties intended to vary from the statute. Past-due coupons were delivered to the city by mistake. City was not induced thereby to change its position, and hence no estoppel. *Starrett* v. *Rockland Co.*, 65 Maine, pp. 374, 380; *Merchants Bank* v. *State Bank*, 10 Wall. 604; *Pacific R. R. of Mo.* v. *Missouri Pacific Ry.*, 111 U. S. 505; Morawetz Priv. Corp. § 630, *et seq.*

We say, therefore, that by force of the statute of 1872, which overrides all the inadvertent and unauthorized acts and omissions of the treasurers of these two corporations, the city never had any right in any event to any overdue coupons; that by force of this statute, particularly in connection with the surrender of the coupons at the time of registration, the railroad coupons, corresponding to the amount of the city coupons paid by the railroad, are to be held to have been cancelled as provided in the closing paragraph of the fifth section of the act of 1872; and that, passing by all these, the parties, when they came to make an adjustment in the spring of 1881, went back to the principles of the act of 1872, the city at that time distinctly waiving all claim, if any it ever had, for any accrued interest in excess of interest paid by itself; and that at this time the parties, by their own voluntary act, established that the just and lawful claim of the city, both for interest and stock, is in accordance with the allegations of our bill, so that we should have the full relief asked for therein.

J. W. Symonds and C. F. Libby, for defendants.

The claim of the city is that the case stands, in all respects as to these railroad bonds, precisely the same as if the city were now in possession of the sixty coupons originally upon each one of the thirteen hundred and fifty $1000 bonds now held by the city, the coupons having been cut from them solely for the purpose of registry for greater security.

The city being the holder of $1,350,000, of the railroad mortgage bonds with sixty registered coupons upon each bond, and

the railroad company having wholly defaulted as early as March 1st, 1876, in the performance of the condition of its penal obligation which it had given to the city as aforesaid,—in February and March, 1881, proceedings were had by which the city claims that full and absolute title was given to it to all said railroad mortgage bonds, with all coupons upon them from the date of their original issue, November 1st, 1871.

There was a transfer to the city of the absolute title of all the railroad bonds, including coupons, which the city previously had held as collateral. The city was the holder of the registered coupons in law just as much as it was of the principal bonds. The intent manifest in the papers is to give the city full title to what it previously held only as collateral, and the city gave a full and, in fact, a largely excessive consideration for such transfer. Full title to the collateral security gave the city but a small percentage in value of the amount of the actual railroad debt and the city surrendered to the railroad company its penal obligation in the sum of $2,700,000, conditioned to hold the city harmless from the whole loan and from all expenditure pertaining to the same, and also gave up, as further consideration for its full title to the railroad bonds $950,000, in the stock of the railroad company.

There is nothing in conflict with the claim of the city in this respect in the fact that on April 9, 1881, after the city had acquired full title to the railroad bonds, the railroad delivered to the city the coupons which had been paid upon the municipal scrip. In any view of the matter they should have been delivered to the city, and the city treasurer was the proper depository for them. If the railroad company had ever paid its debt to the city, the amount of the coupons upon municipal scrip which it had paid would, of course, have been deducted from the amount due, but this affords no reason, why such payments should be deducted from the value of the collateral security, grossly inadequate at best to pay the railroad debt to the city.

It was discovered early in the history of these transactions that the railroad company was not going to be able to keep its obligation to the city and to hold the city harmless from the loan which it was making to the railroad, and it was precisely the thing

which the railroad ought to have done, to waive its right of cancellation or surrender of any part of the collateral security deposited with the city, when it was apparent that the railroad could not keep its principal obligation.

HASKELL, J. The Portland & Ogdensburg Railroad Company issued its mortgage bonds dated November 1, 1871, with interest coupons attached, payable semi-annually at the rate of six per cent per annum, until the bonds should fall due at the end of thirty years.

The mortgage securing these bonds became foreclosed December 15, 1885, and under chap. 507, of the private and special laws of that year, these bondholders formed themselves into a corporation under the style of "The Portland & Ogdensburg Railway," one of the defendants in this cause, and became shareholders therein according to the amounts due on the bonds held by each respectively.

The plaintiffs are holders of these bonds of the par value in the aggregate of $15,000; and the defendant city is the holder of the same of the par value of $1,350,000.

The defendant corporation, on the 21st of December, 1886, voted to issue 24,840 shares to the city of Portland, as its proper proportion of stock, computed from the aggregate of its bonds and interest thereon from the date of their issue, November 1, 1871, amounting to $2,484,000.

The plaintiffs deny that the city is entitled to so much interest upon its bonds as to give it the amount of stock voted to it by the defendant corporation, and therefore, in behalf of themselves and others of like interest, ask an injunction to restrain the threatened issue of stock to the city.

There was no over-issue of bonds under the mortgage, and, if the city be allowed the full number of shares voted to it, the plaintiffs' proportions in the mortgage debt would not be diminished beyond their respective aliquot parts thereof. Their rights flow from owning a fraction of the whole mortgage debt; and their equity to restrain the threatened issue of shares must arise, if at all, from an unlawful attempt by the defendant company to

give the city more shares than it is entitled to under any legal contract or arrangement between the city and railroad company.

It was competent for the city and old corporation to make any agreement that would give the city interest upon its collateral from the date of its issue; and the question, therefore, is whether such an agreement was made; for, if it was, then the plaintiffs have no equity that calls for relief on that score, inasmuch as no attempt is made to increase the debt beyond the amount specified in the mortgage, of which the plaintiffs are entitled to their proportionate shares only.

Had the attempt been to increase the debt beyond the limit named in the mortgage, the plaintiffs would have been threatened with diminished proportional shares in the mortgaged property, and clearly would have an equity to prevent it; but as that is not the case, their equity must arise from a violation of contract between the defendants; and unless that be shown, they cannot maintain their bill.

By c. 165, of the private and special laws of 1872, the city of Portland was authorized to issue scrip to an amount not exceeding $2,500,000, to aid in the construction of the Portland & Ogdensburg railroad, upon the security;

First, of a bond of the company "in a suitable penal sum," conditional to pay the interest and principal of the scrip as the same should fall due, and to save the city harmless on account thereof.

Second, of the mortgage bonds of the company, "issued and bearing date on the first day of November, 1871," equal to the amount of scrip issued and delivered under the act as collateral security for the penal bond.

Third, of paid up shares of the company, equal in amount to the city scrip received, from time to time, until the whole number of shares authorized by the charter of the company shall have been issued, to be held also as collateral security to the penal bond.

This act, also, provides that, "upon payment by the company of the interest which shall, from time to time, accrue upon said scrip, the city treasurer shall cancel and surrender to the company an amount of interest warrants attached to said mortgage

bonds, equal to and corresponding as nearly as may be in date, to the amount of interest so paid on said scrip," and that the shares of the company held as collateral, may be sold and transferred, with the consent of the directors of the company, whenever an exchange thereof can advantageously be made for any of the city scrip; and that the scrip so procured shall be cancelled, and that the amount thereof shall be indorsed on the respective bonds of the railroad company given on the issue and delivery of such scrip.

July 12, 1872, the bond of the company in the penal sum of $2,700,000 conditioned to save the city harmless as required by the act before referred to was delivered to the city; and upon the 24th of the same month the city, in exchange for its scrip of the par value of $50,000, received an equal amount of the mortgage bonds of the railroad company with interest coupons attached, payable semi-annually after November 1, 1871, the date of the bonds fixed by the act before named. One of these coupons upon each of the bonds received by the city upon this first exchange of bonds had been overdue since May 1, and to make the rights of the parties more clear, the city and railroad company entered into an agreement in writing on the same day that provided among other things; "said city may collect so many of the coupons of the mortgage bonds of said railroad company, overdue and as they may become due, and so much of the principal of said mortgage bonds when the principal comes due, as will indemnify the city for all existing defaults, with expenses and costs."

Under this agreement, exchanges of bonds were made, the city always taking railroad bonds with all the interest coupons upon them, with possibly a trifling exception, until the fall of 1873, when the city availed itself of a stipulation in the bonds allowing their registration, and to accomplish this, cut off all the coupons upon its railroad bonds and surrendered them in sheets of sixty coupons each to the railroad company, but retained the bonds as registered bonds.

The treasurer of the railroad company punched each coupon surrendered by the city, and did the same thing with all the coupons, as they were cut in sheets from bonds, when future exchanges

were made. He kept a book upon which all the bonds delivered to the city were entered as registered bonds, indicating the exchange of railroad bonds with all coupons on, precisely as had been done before the bonds had been converted into registered bonds.

The registration did not change or vary the rights of the parties as they existed at the time; nor does it show any intention of new or different rights for the future.

The railroad company had a right to issue bonds bearing interest from November 1, 1871, and by doing so did not invade any rights of the plaintiffs. The case indicates that both defendants understood that all the coupons, originally upon the railroad bonds, should be held by the city as collateral for its loan equally with the bonds themselves. The company pledged over $900,000 of these bonds to parties, other than the city of Portland, without regard to overdue coupons upon them. That was a custom of the company, and it strongly shows its intent concerning the city collateral.

The last exchange of bonds was in August, 1875; and the company for the last time paid interest upon the city scrip September 1, of that year. Since then the city has paid on the same $81,000 yearly.

The mortgage of November 1, 1871, secured bonds of that date amounting to $3,300,000; $800,000 of these were reserved to take up a first mortgage of that amount, but have not been issued. $1,350,000 of them were issued to the city of Portland as collateral for its loan. $108,000 were pledged as collateral for the "Dalton loan" of $51,041.88. $805,000 were pledged to various parties for loans. $213,000 were sold to contractors at par. $19,500 were sold in payment for material and equipment, and $4,500 are unissued.

All of these bonds, except the $1,350,000 delivered to the city and the $232,500 sold, were pledged to secure corporation debts amounting to less than half their face value; and the $805,000, pledged in various places, were finally taken by the pledgees or sold at prices varying from twenty to sixty cents on the dollar.

Five years after the railroad company had defaulted in the pay-

ment of interest upon the city scrip, that during that time had been paid by the city at the rate of $81,000 yearly, the company, on February 19, 1881, voted a proposition "to transfer all mortgage bonds of the Portland & Ogdensburg Railroad Company now held as collateral, upon the surrender of the stock of the company also held by the city and the discharge of the bond of the company to the city, dated July 12, 1872," and on the same day, the city council passed an order accepting the proposition, and "authorizing the mayor, city treasurer and city solicitor to carry into effect, in behalf of the city, the terms of said proposition."

The order of the city council was approved by the mayor on February 21, 1881, and on the same day the city officers, authorized to do so, reported to the city council, "that they have received from said company a transfer to the city of the absolute title of all the mortgage bonds of said Portland & Ogdensburg Railroad Company formerly held as collateral, and have surrendered the stock of said company also held as security by the city, and have discharged the bond of said company to the city, dated July 12, 1872, in accordance with said order," and on the same day this report was accepted by the city council. By this settlement between the parties, the city took the absolute title to the mortgage bonds with all the coupons on them that had ever been delivered to it, and is entitled to convert them into shares of the new company so far as they remain outstanding and unpaid.

Coupons amounting to $630, had been cut from a few of the railroad bonds before they were delivered to the city, and, therefore, never became collateral to the city scrip. This amount must be deducted from the amount of shares voted the city.

Coupons of city scrip amounting to $127,260 were paid by the railroad company as they fell due and were delivered to the city treasurer. The payment of these coupons by the railroad company operated, under the act of the legislature authorizing the loan, as payment of an equal amount of coupons upon the railroad bonds held by the city; for, by the terms of the act, the city treasurer was required to "cancel and surrender to the company interest warrants" attached to the railroad bonds, equal in amount to the interest coupons on city scrip paid by the company.

Equity holds that to have been done which ought to have been done; and, when coupons upon city scrip were paid by the company and surrendered into the city treasury, it became the duty of the city treasurer to cancel a like amount of coupons upon the railroad bonds in his custody. It was his duty to do it, and equity regards it as done.

The plaintiffs and the city are entitled to be shareholders in the new corporation in the exact proportion of their respective debts against the old railroad company; and, if either should insist upon receiving shares of stock greater in amount than its debt, the legal rights of the other would be invaded exactly so much; for the increase of one fraction correspondingly decreases the remainder of a whole.

The plaintiffs should not complain of any disposal made by the mortgagor of the bonds issued and sold to others, if there be no over-issue of bonds; but they have a right to hold their aliquot shares in the security, computed from the whole amount of bonds issued and outstanding. If none of the bonds issued had been paid, the plaintiffs could not murmur; but when part of them were paid, that liability was extinguished and the security became correspondingly increased.

Payment to the city cancelled so much of its debt; and it is impossible to revive the amount so paid by any arrangement between the city and the railroad company, its debtor, to the prejudice of the plaintiffs and of others of like merit.

Bill sustained. Shares voted to the city of Portland reduced $127,890. *Decree accordingly.*

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

DWINAL P. ALLEN *vs.* MAINE CENTRAL RAILROAD COMPANY.

Sagadahoc. Opinion October 14, 1889.

Railroad. Contributory negligence. Joint fault.

A person cannot recover for injuries, caused by the negligence of others, to which he has contributed by his own negligence.

Where negligence of both parties contributes to the injury of either, the common law gives neither party damages for his injury, arising from their joint fault.

ON MOTION, by defendants to set aside the verdict as against law and evidence, and because of excessive damages.

This was an action on the case for the loss of the plaintiff's right hand, and other injuries while driving over a crossing of the Maine Central Railroad, on Pearl street, in Bath, August 20, 1888.

The jury rendered a verdict for the plaintiff for $7,500.

Baker, Baker and Cornish, for defendant.

On the morning of the accident the plaintiff starts from a point 134 feet west of the crossing. The crossing is a dangerous one. The road to it leads down a steep hill with the crossing at the foot. All view of the track from his starting point, and clear down to a point quite near the crossing is wholly cut off and he knows it. It has no gate or flagman and he knows it. From the nature of the ground, unless the traveler is watchful, a train, especially if coming from Bath, may start out upon him at any moment from behind the bank and mangle or kill him. He starts at train time, and he knows when he starts, that at that very moment, a regular train is about due at the crossing and will come from Bath,—not towards it. The clatter of his butcher cart down the hill will inevitably deaden and perhaps drown the sound of an approaching train, while the thick canvass cover peculiar to a butcher's cart, under and inside which he sits, will additionally obscure his view, and perhaps its flapping may still further dull the sound.

All this he knows, for he has passed over this same crossing with the same cart from 175 to 350 times in the six months immediately preceding the accident; but he also knows that about 53 feet west of the crossing he can begin to get a view south of the crossing, and that, from a point some distance west of the crossing and continuously from there to the crossing itself there is an unobstructed view of the whole track for half a mile in the direction of the expected train, and that by stopping the speed and noise of his cart anywhere beyond that point, and either looking or listening he must both see and hear any train near enough to be dangerous; or that even by looking without stopping, if he were at prudent speed, he would still have ample time and space to stop his manageable horse short of the fatal rails.

In such cases and in such surroundings we say:

1st. That the plaintiff is charged as matter of law with certain fixed and sharply defined duties.

2d. That if the whole evidence shows plainly that the plaintiff neglected those duties, or omitted to perform them, then, as matter of law, he cannot recover, and no verdict in his favor can stand.

When, as here, all sight of the track and train is cut off till one gets close to the crossing, it is especially the duty of the plaintiff to listen, and listen attentively so that he may discover the train by its noise. Cut off, like a blind man, from his sense of sight, he must give peculiar heed to bring his sense of hearing into full play.

To do this he must: 1st. Be a conscious, and not a merely mechanical, listener. He must have a listening mind as well as ear.

2d. He must listen at a proper place, sufficiently unobstructed and near the crossing so that he will be sure to hear a train, if it is within limits of possible danger.

3d. When he has reached such proper place, he must give himself full physical opportunity to hear, by freeing himself from every obstacle within his own control which might prevent or deceive his hearing. If his hearing is muffled by being inside a

covered butcher's cart, he must get his head outside where he can hear. Lest all other precautions fail, and lest, with all possible care, the train should still start out upon him unexpectedly, if the approach to the crossing is down a sharp grade, making it more difficult to stop suddenly, he should approach at such a slow and cautious speed as will enable him to hear readily, and stop instantly, if a train is suddenly detected.

If the clattering of his butcher's cart with its arched skeleton frame, and its flapping canvass cover, moving down the sharp hill at a trot, which, unchecked, as it was, naturally grew faster as it neared the bottom, and which at the crossing, had become, as the Ward boy describes it "quite fast"—if all this, made his hearing of the train uncertain, or perhaps impossible, then it was his imperative duty to stop his team at suitable distance in order that he might hear.

The plaintiff was 134 feet from the crossing. He had not then got into his cart If we assume that his listening, the mounting of himself and his companion, the turning and starting of his team all occupied a minute, and that the train was moving at the average rate claimed by his own witnesses, twelve miles an hour, in that minute the train would travel over 1000 feet; and if his horse went at six miles an hour, and the train at twelve miles, the train would go 268 feet while he went 134 feet to the crossing so that at the moment of his listening the train must have been about 1300 feet or one-quarter of a mile south of the crossing, and therefore, taking the hypothenuse, more than one-quarter of a mile distant from the listener; and no man can, with decent prudence, trust such an obstructed hearing of a train so remote, when, by a moment's attention at nearer and unobstructed points, he may secure himself against any possible danger.

To sum up this point: That the plaintiff could really listen for the train all the way to the crossing and yet not hear it, is impossible, and on direct examination his counsel does not permit him to claim it.

If, listening, he heard the train, then he was criminally reckless in attempting to cross in front of it.

If, though listening, he neither stopped nor checked his speed

and thus by his own act prevented himself from hearing, this is contributory negligence as matter of law.

If, as is most probable, after listening before he mounted his cart, 134 feet from the crossing, he listened no more but dismissed the train from his thoughts, and with unheeding mind drove upon the crossing, hearing and seeing nothing till he was on the track itself, such unthinkingness and neglect would equally and as matter of law, defeat his action.

But it is the duty of the plaintiff to use his eyes as well as his ears. It is not enough to keep one sense open while he shuts the other. Intervening objects may deaden sound and so deceive the ear. Deep cuts may obscure the approach. The noise of one's own vehicle, if one refuses to still it by stopping, may drown the remote sound. Under some conditions, a single car or locomotive, even a train may steal on the traveler almost noiselessly, but the healthy eye, where a point is reached where it can sweep the track, makes its report to the brain unerringly. A man with good eyes cannot deliberately shut them and trust to his ears alone. If he does, when there is a point whence he might have seen had he looked, and seeing might have escaped, he cannot recover. If there was such a point in this case, from which the plaintiff could see the whole track, and if he knew its existence and that it was near the crossing, though he did not know or remember its precise location, it was his duty as matter of law: 1st. To watch for it. 2d. To look when he got to it, or so seasonably after that if he saw a train, he could stop in time to avert a collision. 3d. To look when he was expecting a train in the direction of the expected and not away from it. 4th. To clear his vision from any obstacle within his own control (as his own wagon cover) which might prevent his seasonable seeing. 5th. To approach the observation point at such a prudent and cautious speed that he could stop in time to avoid danger, if his eyes revealed it.

Upon this point the charge of the presiding judge is clear, emphatic and unmistakable, and the verdict is in plain disregard of the charge. Judge LIBBEY charged:

"Did he listen carefully at the point where he says he listened?

If he did and did not hear, does that satisfy you that it was not a proper point at which he could listen and in compliance with his legal duty? If he could not hear at that point, then, it was his duty to look, and look as soon as he got at a point where he could see. Did he do so? He tells you that he first looked up the track, towards Brunswick and saw nothing, and then turned and looked down and saw the train immediately upon him. And that, he tells you was when he was very near, if not upon, the railroad track, so that his team was struck by the locomotive immediately afterwards, having hardly time to think what to do between the sight of the approaching train rushing upon him and the collision.

Now, the evidence is submitted to you, showing at what point he might have seen the approaching train before he reached the railroad track. Did he look at such point? You must determine whether there is any evidence in the case that satisfies you he did do so. If he did not do so, then, under the rule of law that I have given you, and it is my duty to give you, he is not entitled to recover."

Each of these several duties is charged on the plaintiff, as matter of law, and neglect to perform any one of them, where that would have enabled him to avoid the collision, defeats his recovery as matter of law, and even after verdict. Such neglect is negligence *per se*, and not mere evidence of negligence. Such is the settled law of Maine. *Chase* v. *R. R.*, 78 Maine, 353; *Lesan* v. *R. R.*, 77 Maine, 85; Benner's case, *State* v. *R. R.*, 77 Maine, 538; Pickard's case, *State* v. *R. R.*, 76 Maine, 357. Some of the latest cases in other states which have specifically affirmed this doctrine are: Va., *R. R.* v. *Kellen's Adm'r*, 3 S. E. Rep. 703–7; *R. R.* v. *Hunter*, 33 Ind. 335; *R. R.* v. *Heileman*, 49 Pa. St. 60, quoted and approved by our court in 76 Maine, 366; *R. R.* v. *Snyder*, 24 Ohio St. 670–677; *Artz* v. *R. R.*, 34 Iowa, 153; Same case, 38 Iowa, 293; *Baxter* v. *R. R.*, 41 N. Y. 502; *Gagnon* v. *R. R.*, 100 Mass. 208.

The traveler cannot be excused from his duty by the use of one sense alone. It is his duty both to look and to listen, and, if necessary, to stop in order to do both. Where he cannot or

does not hear, he must look, whenever by looking, he could have seen the train.

Where he cannot or does not see, he must listen and stop, if necessary in order that he may hear. Mich., *Mynning* v. *R. R.*, 31 N. W. Rep. 151; N. Y., *Grippen* v. *R. R.*, 40 N. Y. 34; Iowa, *Mosler* v. *R. R.*, 34 N. W. Rep. 853; Ind., *Cones* v. *R. R.*, 16 N. E. Rep. 638; Miss., *Tucker* v. *Duncan*, 9 Fed. Rep. 867-72; Beach. Contrib. Neg. 863; N. Y., *Salter* v. *R. R.*, 75 N. Y. 273; Oregon, *Durbin* v. *Ry. Nav. Co.*, 17 Pac. Rep. 7, 8 and cases cited; Ill., *R. R.* v. *Gratzner*, 46 Ill. 74, 85; N. J., *Merkle* v. *R. R.*, 9 Atl. Rep. 680. All the Maine cases before cited speak to the same point. *C. & N. W. R. R.* v. *Gertsen*, 15 Brad. (Ill.), 614. The following late cases are specially close to the case at bar in their facts, and in all of them the court held as matter of law that the plaintiff could not recover. Iowa, *Slater* v. *R. R.*, 32 N. W. Rep. 264; Va., *R. R.* v. *Kellam's Adm'r.*, 3 S. E. Rep. 703; Ind., *Cones* v. *R. R.*, 16 N. E. Rep. 638; Mich., *Freeman* v. *R. R.*, 41 N. W. Rep. 875; *R. R.* v. *Elliott*, 28 Ohio St. 340; *R. R.* v. *Rathger*, 32 Ohio St. 66; *R. R.* v. *Beale*, 73 Pa. St. 504; *Wilds* v. *R. R.*, 29 N. Y. 315; Mich., *Kwiotowski* v. *R. R.*, 38 N. W. Rep. 463.

W. Gilbert, *W. E. Hogan*, with him, argued orally for plaintiff.

HASKELL, J. Defendants' railroad crosses Pearl street, in Bath, at the foot of a sharp pitch in that street, at the top of which, and 134 feet distant from the railroad, stands the shop of Mr. Ward.

The plaintiff's own account of the circumstances attending his injury is, in substance, that, for several months before the accident, he had been in the employ of Ward, driving a "meat team," and was familiar with the street, the railroad crossing, and the running of the railroad trains; that, on the morning of the accident, knowing that the morning train from Bath had not passed, he listened for it, did not hear it, mounted a meat wagon covered with canvass, sat at the front, inside the covering, and started for the crossing at a trot; that, as he approached the crossing, he leaned forward and looked up the track from Bath, then down

the track towards Bath, and saw the train close upon him; that when he looked towards Bath, his horse's fore feet were between the rails; that he heard the train strike, felt a jar and became unconscious.

The plaintiff listened before he started for the crossing. That was an act of care. He had a right to rely upon the train's approach at a rate of speed not exceeding that allowed by law, six miles an hour; and, if the train had been coming within that rate of speed, observing the usual signals, he may well have presumed, from not hearing it, that it was so far distant as to give him ample time to cross the track in safety; so, he appears guilty of no act of carelessness until he reached a point in the street where an approaching train might be seen, if looked for.

The evidence shows that at 25 or 30 feet distant from the crossing, the approaching train from Bath might have been seen by the plaintiff several hundred feet distant from the crossing. The plaintiff did not look in that direction until his horse's fore feet were between the rails. Was the neglect on his part to look in that direction a want of ordinary care and prudence? Is a traveler justified in driving upon a railroad crossing, in the absence of safety signals giving him the right to cross, without looking for an approaching train?

It has been many times decided in this state, that the traveler, before crossing a railroad, must both look and listen. That is the settled law of this state. *Chase* v. *Maine Central Railroad Company*, and cases cited, 78 Maine, 346.

If the crossing at which the plaintiff was injured is so constructed that an approaching train can not be seen until a traveler comes very near to the railroad track, common prudence requires him to approach at such speed that when an approaching train may be seen, he may be able to stop, and allow such train to pass.

Had the plaintiff properly slackened his pace and seasonably looked for the approaching train that injured him, he might have let it pass in safety. This he did not do; and his own negligence contributed to his injury. It is no excuse for him that the train was running at an unlawful rate of speed. Negligence of both

parties may have contributed to the disaster; but the common law, in such case, gives neither damages for his injury arising from joint fault.

The question at issue is ordinarily for a jury to decide ; but, when the facts are simple and plain, and not in dispute, and clearly show contributory negligence by a plaintiff, it becomes the duty of the court to so declare, and withhold relief. In this case, the plaintiff's own statement of his conduct shows that he has no legal right to recover damages for his injury, and the verdict must be set aside.

Motion sustained. New trial granted.

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

WILLIAM ENGEL *vs.* DEXTER S. BAILEY and JOSEPH H. PARKER, and Trustees.

JOSEPH S. WHEELWRIGHT, and others *vs.* SAME.

Piscataquis. Opinion October 25, 1889.

Insolvency. Jurisdiction. Partnership petition. R. S., c. 70, § 57.

When one of two members of a partnership, by direction of his co-partner, files in the court of insolvency a petition signed in the name of the firm, no notice on the other copartner is necessary to give jurisdiction to the court.

FACTS AGREED.

The principal defendants, copartners in business at Milo, Piscataquis county, were adjudged insolvents, upon a petition in the name of the firm, Bailey & Parker, but signed by Parker only, and filed on the 12th day of August, 1887. A warrant was issued upon said petition without notice to Bailey of the pendency of the petition. Bailey has never appeared either by himself or attorney in any of the proceedings, and has never been cited to appear. Parker has been granted his discharge. The trustees are the assignees of the estate of the insolvents; and have paid out about $800.00 priority claims but no general

dividend has been declared. It was admitted that a witness would testify, if admissible, that Bailey verbally directed Parker, his copartner, to sign the firm name to the petition in insolvency. In the first case, the plaintiffs did not appear in the insolvent court, or prove their claim; in the second case, the plaintiffs did appear and objected to Parker's discharge. The court was to enter judgment according to the rights of the parties.

C. A. Bailey, for plaintiffs.

Court of insolvency being of limited jurisdiction, not proceeding according to the course of common law, its proceedings are void, if contrary to law. *Smith* v. *Rice*, 11 Mass. 506, 513; *Peters* v. *Peters*, 8 Cush. 529, 543. Failure to give notice is not an irregularity merely; it is fundamentally fatal. The error may be taken advantage of in a collateral proceeding where it arises in courts of special and limited jurisdiction. *Peters* v. *Peters*, *supra*. This may be done, notwithstanding the supervisory jurisdiction of this court under R. S., c. 70, § 13, the proceedings being a nullity.

Consent cannot give jurisdiction. *Bearce* v. *Bowker*, 115 Mass. 129. Wheelwright not estopped by having proved his claim;—that is a nullity as well as the proceedings. Counsel also cited: *Clarke* v. *Minot*, 4 Met. 346; *Thompson* v. *Snow*, 4 Cush. 121; *Thompson* v. *Thompson*, Id. 127; *Com.* v. *Martin*, 130 Mass. 465, 467; *In re Brown's Trusts*, L. R. 5, Eq. 88; *Merriam* v. *Sewall*, 8 Gray, 316; *Segars* v. *Segars*, 76 Maine, 96.

Henry Hudson, *J. B. Peaks*, with him, for trustees.

Counsel cited: Hamlin's Insolvent Law, pp. 91 and 92; Bump's Bankruptcy, pp. 497-8; *Thompson* v. *Thompson*, 4 Cush. 127, 133; Mass. Insolvent Law 1878 and prior; *Hanson* v. *Paige*, 3 Gray, 239; *Judd* v. *Gibbs*, Id. 539; Kent's Com. 6th ed., vol. 3, p. 44, note *b*; *Hitchcock* v. *St. John*, 1 Hoffman Chan. 514; *Havens* v. *Hussey*, 5 Paige Chan. 29; *Egbert* v. *Wood*, 3 Paige Chan. 517; *Hodges* v. *Harris*, 6 Pick. 359, 361; *Pike* v. *Bacon*, 21 Maine, 280, 287; *Merrill* v. *Wilson*, 29 Maine, 58, 59; *Nutting* v. *Ashcroft*, 101 Mass. 300; *O'Neil* v. *Glover*, 5 Gray, 144, 156; *Merriam* v. *Sewall*, 8 Gray, 316, 322; *Winchester* v. *Thayer*, 129

Mass. 129, 133; *Cady* v. *Shepherd*, 11 Pick. 400; *McIntyre* v. *Park*, 11 Gray, 102, 106; *Swan* v. *Stedman*, 4 Met. 548; *Holbrook* v. *Chamberlin*, 116 Mass. 155, 161; *Fogler* v. *Clark*, 80 Maine, 237, 241; *Cobbossee Natl. Bank* v. *Rich*, 81 Maine, 164, 170; R. S., c. 70, § 13; *Farris* v. *Richardson*, 6 Allen, 118.

VIRGIN, J. The principal defendants in each of these cases were copartners doing business in the firm name of Bailey & Parker.

In August, 1887, Parker, by the direction of Bailey, filed a petition in insolvency in the court of insolvency, signed in the name of the firm. A warrant thereupon issued without any official notice on Bailey, and the persons named as trustees in this action were appointed assignees of the estate.

The assignees received several hundred dollars of assets from which they paid out about $800 on claims entitled to priority.

In Engel's case, the plaintiff did not appear or prove his claim, but after the priority claims had been paid, he sued on his claim by this trustee process and summoned the assignees as trustees who disclosed the sum of $452.27 in their hands.

In Wheelwright's case the plaintiffs did appear, filed and proved their claim and objected to Parker's discharge.

The plaintiffs, in both actions, now claim that the assignees shall be charged on the ground that, as no notice was given to Bailey prior to the issuing of the warrant, the court of insolvency had no jurisdiction, which objection is collaterally open to them in their respective actions against the firm.

The statutory provision on which the objection to the jurisdiction is based, provides: "Either partner may file his petition" containing certain specific averments, "but no warrant shall issue until such notice as the judge directs has been given to the remaining partners." R. S., c. 70, § 57.

"Notice to the remaining partners" is predicated only at the filing of the petition by a number of partners less than all; for, if all sign, notice of their own averments would be idle and senseless. *Thompson* v. *Thompson*, 4 Met. 133. The obvious purpose of the required notice is founded on the first principles of natural justice,—that persons shall not be precluded by legal proceedings

instituted against them or their property, until they shall have had an opportunity through a reasonable notice, to be heard. If some only of the partners, without the knowledge and consent of the others, should file a petition containing the essential averments of the insolvency of the firm, etc., common justice would demand that, even in the absence of any statutory requirement therefor, the other members, before the issuing of the warrant which would take their property from their possession, should receive such an official notice as would secure to them a reasonable opportunity to be heard upon the several averments.

But, we do not think it essential that every one of the partners should individually sign the petition, for one may apply in behalf of himself and the other partners named. *Thompson* v. *Thompson*, *supra*; *Hanson* v. *Paige*, 3 Gray, 239. Moreover, while from the mere partnership relation the law implies no power in one partner to assign the partnership property for the benefit of creditors (*Kirby* v. *Ingersoll*, 1 Doug. 477; *Havens* v. *Hussey*, 5 Paige, 30; *Ormsby* v. *Davis*, 5 R. I., 442) such a power may be expressly conferred by one partner upon another, or may be even inferred from the conduct of the parties. *Kirby* v. *Ingersoll*, *supra*; 3 Kent's Com., *44, cases in note *b*; 1 Lindl. Part. (Ewell's ed.) 266 and cases *in notis*. So in principle are *Pike* v. *Bacon*, 21 Maine, 287; *Cady* v. *Shepherd*, 11 Pick. 400; *Dictum*, *Merrill* v. *Wilson*, 29 Maine, 59.

In the case at bar, the application was made by one partner in the name of the firm by the express direction of the only other partner; and why should he have official notice of what he expressly directed and has never objected to?

Moreover, if notice were necessary its omission was but an irregularity at most,—a deviation from the statutory directions and did not go so deep as to reach jurisdiction. *Cobbossee Nat. Bank* v. *Rich*, 81 Maine, 164.

An additional reason why Wheelwright should not prevail is found in *Fogler* v. *Clark*, 80 Maine, 241.

Trustees discharged in each case.

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

EBEN H. GOULD *vs.* BANGOR AND PISCATAQUIS RAILROAD COMPANY.

Piscataquis. Opinion November 19, 1889.

Railroad. Lease. Fences. Injury to cattle. R. S., c. 22, § 1; c. 51, §§ 36, 37.

A railroad corporation in possession and control of a railroad belonging to another corporation, and operating it for its own benefit is bound, by R. S., c. 51, §§ 36 and 37, to keep the fence on the line of adjoining owners in good repair, although the lease under which it claims is not lawful, as between the lessor and lessee. The injured party may seek his remedy against the corporation in control without first settling the legality of a lease in which he has no interest.

Though the statute was intended to prevent the escape of cattle from the adjoining land, it neither repeals nor modifies the common law principle by which every person is bound so to use his own, or perform his obligations to others so as not unnecessarily to injure others.

The statute, though requiring a legal fence, does not authorize it to be built of such material or in such manner as to be unnecessarily dangerous to ordinarily docile animals rightfully upon the adjoining land, or through neglect permit it to become so.

ON EXCEPTIONS and MOTION, to set aside the verdict by defendants.

This was an action to recover for injuries which the plaintiff claimed his colt received October, 1887, in his pasture, by reason of want of repair of fence on the line of the railroad. It appeared that the fence was on the line of the Katahdin Iron Works Ry. and built by that company.

It also appeared, that in July, 1887, the Katahdin Iron Works Ry. leased its railroad to the defendant company, which, after that date, operated and had full control of the railroad under the lease, which was not authorized by any act of the legislature.

The defendant contended that the defendant company was not liable.

The presiding justice instructed the jury as follows:

"If you shall find for the plaintiff in other respects, then I instruct you as matter of law, that the defendant is liable, although it is not its road and it did not build the road or the fences; for

it is admitted that the defendant company is in possession and full control of the road under a lease from the Katahdin Iron Works Ry. Whether that lease between the railroad companies was or was not lawful is of no consequence in this case. It is enough that there was a lease, and that defendant company was in full possession and control of the road under that lease. The law imposed upon this company, so long as it retained possession and control and operated it, the duty and obligation of keeping in proper repair the fences which had been erected upon either side of this railroad, across the plaintiff's pasture."

There was a verdict for plaintiff and the defendants excepted to these instructions.

Charles P. Stetson, *A. M. Robinson*, with him, for defendants.

The obligation to erect and maintain fences on the line of the railroad is by statute alone. *Rust* v. *Low*, 6 Mass. 90; *Little* v. *Lathrop*, 5 Greenl. 356; *Eames* v. *S. & L. R. Co.*, 98 Mass. 560; *Railroad Co.* v. *Skinner*, 19 Penn. St. R. 298; 1 Redf. Am. Ry. Cases, p. 347; R. S., c. 51, § 36; R. S., of 1857, c. 51; original statute, 1842, c. 6.

Statutes not obligatory upon this lessee, the legislature not having authorized the lease. Statute liability is upon the corporation building the railroad; which takes the land; which must make fences before it constructs the road; whose directors are liable, during the construction; the corporation liable to be indicted and fined. Lessor held liable when out of control and possession in lessee. *Whitney* v. *At. & St. L. R. R.*, 44 Maine, 366; *Estes* v. *Lane*, 60 Id. 309.

Cases cited in text books, holding both lessor and lessees liable, depend on different statutes. Lessee in case of *Clement* v. *Canfield*, 28 Vt. 303, cited by Redfield, held liable because an "agent" within the words of the statute. The Mass. cases are those of common carriers where liability is by common law, or lease authorized by legislature.

Purpose of our statute is to afford protection to passengers and property transported, and prevent cattle escaping from adjoining land on to the track. *Wilder* v. *Me. Cent. R. R.*, 65 Maine, 332. It does not give a right of action where animals are injured in

the pasture by attempting to escape or in kicking against the fence.

Fence legal and sufficient. R. S., c. 22, § 1.

Plaintiff virtually admits the injury was caused by the colt pawing against the fence. This was in the nature of negligence of the plaintiff. Railroad should not be held liable for injuries to animals caused by kicking or pawing on fences.

Henry Hudson, for plaintiff cited:

R. S., c. 51, §§ 36, 37; Public Laws 1842, c. 9, § 6; Public Laws 1853, c. 41, § 4, and *post;* Public Laws 1857, R. S., c. 51, § 23; R. S., 1871, c. 51, § 20; *Tracy* v. *Troy & Boston Railroad Company*, 38 N. Y., 433; *Detchell* v. *Spuyten Duyvil & Port Morris R. R. Co.*, 67 N. Y. 425; Redf. Railway, 6th ed., vol. I, pp. 514, 637, and cases cited 658; *Whitney* v. *At. & St L. R. R., Co.*, 44 Maine, 362; *Estes* v. *Same*, 63 Maine, 308; *Wyman* v. *Pen. & Ken. R. R. Co.*, 46 Maine, 162; *Wilder* v. *Me. Cent. R. R. Co.*, 65 Maine, 332; *Nugent* v. *B. & C. & M. R. R. Co.*, 80 Maine, 62; *Ingersoll* v. *Stockbridge & Pittsfield R. R. Co.*, 8 Allen, 438; *Davis* v. *Prov. & Worcester R. R. Co.*, 121 Mass. 134; Broom's Commentaries, 655, and cases cited; Thompson on Negligence, 1st ed., vol. I, page 509 and cases cited; *Clement* v. *Canfield*, 28 Vt. 302; *Illinois Cent. R. R. Co.* v. *Kanouse*, 39 Ill. 272; *Woodruff* v. *Erie Railway Co.*, 93 N. Y. 609; *McCluer* v. *M. & L. R. R. Co.*, 13 Gray, 124.

DANFORTH, J. The presiding justice ruled, in substance, that the defendant is liable, if the plaintiff has made out his case in other respects, though running the road under a lease not authorized by the legislature, if it was in full possession and control under that lease.

The objection made to this ruling, is that a railroad company is not bound to build a fence upon its lines, except as provided by statute; and that the statute obligation applies only to the company owning and building the road, or its legal successor. The first part of this proposition is undoubtedly true, as stated; the latter part requires some qualification. The obligation of railroad corporations in this respect, is found in R. S., c. 51, §§

36 and 37. Section 36 provides that "legal and sufficient fences shall be made * * * before the construction of the road is commenced, and such fences shall be maintained and kept in good repair by the corporation." This does not say what corporation. It certainly does not confine the obligation to the corporation building or owning. It does require the fence to be built before the road is, and its maintenance in good repair when in operation. The reasonable construction of the statute is, that the corporation building the road must see that the fence is made, and the corporation operating it must be responsible for its repairs. The party injured is authorized to seek his remedy against the corporation in control, and is not first required to settle the legality of a lease, in which he has no interest. Were there any doubt about this construction it must be removed by the provisions of § 37, in which it appears that after notice the "corporation owning, controlling or operating, such railroad," is liable to a forfeiture for neglect to build, or repair;—thus distinctly recognizing the obligation to build or repair the fence as resting upon the corporation controlling or operating;—the notice being necessary to fix the liability for the penalty, and not as a condition precedent to the obligation to repair.

It is conceded that the obligation would have attached, if the lease had been valid. But the defendant assumed it to be valid, acted upon it as such, so far, certainly, as receiving from it all the advantages which a valid lease could give, neither the state nor the lessor interposing any objection or obstruction. It cannot set up the lease for the advantages it brings and repudiate it for the liabilities imposed. This principle was decided in *McCluer* v. *Manchester & Lawrence Railroad*, 13 Gray, 124, 129. True that case was founded upon an alleged breach of a contract. But the defense was the same as in this. In that case, the charge was a violation of an obligation imposed by a contract; in this for the neglect of one imposed by a statute, and the defense must be equally unavailable in each. Hence the exceptions must be overruled.

The case is also presented upon a motion for a new trial upon the ground that the verdict is against the law as well as the evi-

dence. As to the proper conclusions to be drawn from the evidence we apprehend there can be little if any doubt.

It is contended that as a matter of law, aside from the question raised by the exceptions, this action cannot be maintained, because, if we understand the contention aright, the injury was caused not in consequence of an escape through the fence by the injured colt, but by his coming in contact with it. If this happened through any viciousness on the part of the colt the ground would seem to be well taken. But if otherwise, if sustained, it must be upon the ground that when the corporation had built and kept up a legal and sufficient fence to prevent the escape of domestic animals ordinarily peaceful and quiet, its duty was discharged and the animals would be at the risk of the owner.

In this case, as the facts show, the colt did not escape and so far as appears the fence was sufficient to prevent the escape of any animals against which the corporation was bound to fence; and it may be conceded, that the primary and perhaps the only purpose of the statute is to prevent the escape of domestic animals, both for their own protection and that of the public.

It must, perhaps, be further conceded that a fence made of barbed wire "protected by an upper rail or board of wood," may, under the proviso attached to § 1, c. 22, R. S., be deemed a legal and sufficient fence, and when properly built and kept in repair, a full discharge of the obligation resting upon the corporation by virtue of the statute. But the statute must have a reasonable construction. It requires certain things to be done for a certain object. It neither requires nor authorizes anything beyond. The meaning of a fence is something to protect and restrain and not to destroy. To be legal it must be a compliance with the law, but not necessarily a violation of the fundamental principle that each should use his own and discharge his obligations, with a due regard to the rights of others. While the statute requires a legal and sufficient fence to be of a certain height, and, to some extent, recognizes certain materials of which it may be built, it does not specifically prescribe how the materials shall be put together. Hence it is clear that considering the object to be attained and the well established principles of law applicable,

while the fence must be so built and maintained as to be a reasonable restraint against all domestic animals of ordinary docility, it is not to be made unnecessarily dangerous to that class of animals, or permitted to become so by neglect.

That the fence now in question as originally made, was both legal and sufficient, except as to its height, is not denied and its want of the proper height does not seem to have contributed to the accident. There is some apparent conflict of testimony as to its condition, previous to and at the time of the accident, but it is susceptible of explanation consistently with the integrity of all the witnesses. A fair preponderance of the evidence leads to the conclusion that some of the posts had become decayed, by means of which the fence where the injury was done, was sloping away from the pasture; that one or more of the wires had become loosened, whereby the spaces between had become larger than they originally were, and that the colt in protecting himself, from flies or in some manner became entangled in this loose net work of barbed wires and in disengaging himself caused the injury. If the jury were of the opinion from this testimony, as they probably were, that there was undue neglect in permitting the fence to get into the condition it was, and that a man of ordinary care might well have anticipated that with one or more colts in the pasture, just such an accident would have been likely to have happened without imputing misconduct to the colt, we see no reason for disturbing the verdict.

Exceptions and motion overruled.

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

MARY TYLER *vs.* HENRY T. SALLEY.

Penobscot. Opinion November 19, 1889.

Promise to marry. Pleadings. Damages. Evidence.

In an action for breach of promise to marry, the declaration containing only the necessary averments to sustain such an action, and recovery of general damages, evidence of the plaintiff's seduction by the defendant under the alleged promise of marriage, and of her subsequent delivery of a bastard child, was held inadmissible upon the question of damages.

Such evidence might have been admissible, as tending to show the plaintiff's condition at the time of the breach of promise, under a claim for increased damages on that account; but such increased damages being consequential a special averment in the declaration for their recovery is required.

Under such a declaration, evidence as to the effect upon plaintiff's bodily health, so far as it was the result of the seduction and her pregnancy, was held to be more remote and objectionable.

ON EXCEPTIONS.

This was an action for breach of promise of marriage. The declaration alleging mutual promises, plaintiff's requests for a performance, and a breach by the defendant, concludes as follows: "by reason whereof the plaintiff has been disappointed in securing a pleasant home and the enjoyments of married life, and hath greatly suffered in her mind and affections * * *."

At the trial, the plaintiff, upon the question of damages, offered evidence of her seduction by the defendant, under the alleged promise of marriage, and of her subsequent delivery of a bastard child. The defendant seasonably objected to this evidence, upon the ground that there was no allegation in the declaration of damage from seduction, nor any allegation to which such evidence could apply. The presiding justice admitted the evidence against the defendant's objection.

The defendant's counsel then asked for a continuance, urging as a reason that he had no notice of any claim for damages for seduction, and was unprepared to meet it. It appeared to the presiding justice that the defendant and his local counsel knew for some time before the trial, that the plaintiff claimed that she

had been seduced by him, and he was the father of her child. The request for a continuance was denied.

The plaintiff, upon the question of damages, also offered evidence of the effect upon her bodily health of the breach of the defendant's promise of marriage, and of the seduction, and her pregnancy by him. To this evidence the defendant seasonably objected, upon the ground that there was no allegation in the declaration of any injury to bodily health.

The presiding justice, admitted the evidence against the defendant's objection.

Barker, Vose & Barker, and T. H. Wentworth, for defendant.

There should be a special averment of the facts sought to be proved. *Paul* v. *Frazier*, 3 Mass. 71; *Burk* v. *Shain*, 5 Am. Dec. 618; *Cates* v. *McKenney*, 17 Am. Rep. 768; *Coolidge* v. *Neat*, 129 Mass. 146; *Tobin* v. *Shaw*, 45 Maine, 331; *Stebbins* v. *Palmer*, 1 Pick. 71; *Smith* v. *Sherman*, 4 Cush. 408; 1 Chitty's Plead. 458; 2 Greenl. Ev. § 254; *Rising* v. *Granger*, 1 Mass. 47; *Cole* v. *Swanton*, 52 Am. Dec. 288; *Baldwin* v. *Weston R. R.*, 4 Gray, 333; *Laing* v. *Colder*, 49 Am. Dec. 533; *Warner* v. *Bacon*, 8 Gray, 397; *Dickinson* v. *Boyle*, 17 Pick. 78; *Prentiss* v. *Barnes*, 6 Allen, 410; *Hunter* v. *Stewart*, 47 Maine, 419; *Furlong* v. *Polleys*, 30 Id. 491; *Patten* v. *Libbey*, 32 Id. 378; *Strong* v. *Whitehead*, 12 Wend. 64; *Bedell* v. *Powell*, 13 Barb. 183.

Ira W. Davis, for plaintiff.

Counsel cited: *Sherman* v. *Rawson*, 102 Mass. 395; *Kelley* v. *Riley*, 106 Id. 339; *Baldy* v. *Stratton*, 11 Penn. Stat. 316; *Wells* v. *Padgett*, 8 Barb. 323; *Tuffs* v. *Van Kleek*, 12 Ill. 446; *Kniffen* v. *McConnell*, 30 N. Y. 285.

DANFORTH, J. This is an action for a breach of promise of marriage. The plaintiff in her declaration alleges only the facts necessary to sustain her action and claims only general damages. Upon the question of damages she "offered evidence of her seduction by the defendant, under the alleged promise of marriage, and of her subsequent delivery of a bastard child." This was objected to but admitted, and hence arises the question, whether

it was admissible without a special averment in the declaration.

The distinction between general and special damages and the necessity of a special averment to permit the recovery of special damage is now well settled.

Chitty in his work on Pleading, vol. 1, p. 411, 16th ed., says, "*General* damages are such as the law *implies* or presumes to have accrued from the wrong complained of. *Special* damages are such as *really* took place and are *not implied* by law," with some pertinent illustrations.

Sedgwick in his work on the Measure of Damages, in note on page 677, says, "All legal damages must, whether the action be in contract or in tort, *naturally* result from the act or default complained of; and although the law in certain cases permits the recovery of such damages as are physically secondary or consequential, yet they must in legal contemplation be also its proximate result. When such result is necessary, or is legally imported by the facts, the damages are general and need not be specially set forth by the pleadings; otherwise they must. In the one case, the statement of the cause of action sufficiently apprises the defendant of the extent of the claim. In the other, legal justice, in order to enable him to prepare his defense, requires the further averment of the injurious consequence."

An application of these principles to the case at bar will leave no doubt as to the result.

The law among other things in a case like this implies from a breach of the promise, shame and mortification as well as distress of mind. These naturally and necessarily follow and hence for these the plaintiff is entitled to recover under a simple statement of her cause of action. But she says this is not enough. The condition in which she was at the time and for which the defendant was responsible, tended to increase this shame and distress of mind and for this she wants increased damages. Under this statement she would be entitled to recover. This increased suffering would still be the proximate result of the wrong complained of. So held in *Sherman* v. *Rawson*, 102 Mass. 395, and *Kelley* v. *Riley*, 106 Mass. 339. But though the *proximate* result, it is not a natural or necessary one,—not one implied by the law from a

simple statement of the cause of action,—but arises from another and distinct statement of facts, which are traversable and which must be proved, and to be proved must be alleged. These are facts upon which the defendant is entitled to be heard and of which he has a right to the legal notice before he can be required to answer.

The offer of evidence to prove "the effect upon her bodily health of the breach of the defendant's promise of marriage and of the seduction and her pregnancy by him" is still more objectionable. That, as stated, would not be admissible even under a special averment. The plaintiff was in part at least responsible for the seduction and she cannot recover of her associate in the wrong, damages for it, or its consequences. *Paul* v. *Frazier*, 3 Mass. 71. So far as the loss of health is attributable to the breach of promise alone, if it can be distinguished from the other, the resulting damage must be special for the reasons referred to under the first exception.

Exceptions sustained.

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

MARIA GREGOR vs. HANNAH E. CADY.

Cumberland. Opinion November 19, 1889.

Landlord and tenant. Unsafe premises. Imperfect repairs. Injuries to tenant. New trial.

A landlord, who, at the solicitation of his tenant, gratuitously undertakes to repair the premises leased, but does it so unskilfully as to subsequently cause an injury thereby to the tenant, is liable therefor.

When a question of fact is expressly submitted to a jury on conflicting evidence, their verdict, in the absence of prejudice shown, will not be set aside, if it is founded on evidence in its support, though the preponderance is against it.

ON MOTION.

This was an action by a tenant to recover damages for

personal injuries sustained through the negligence of the landlord in making repairs to the premises.

(Declaration.)

In a plea of the case, for that the said defendant, to wit, on the first day of August, A. D. 1887, was the owner of a certain building or dwelling-house situated on the southerly corner of York and State streets, in said Portland, in which was a certain tenement consisting of four or five rooms with shed and water closet adjoining and appurtenant thereto, which said shed and water closet, and the timbers and floorings thereof were decayed, rotten and out of repair, and unsafe, unfit, and dangerous for use and occupancy. All of which the said defendant well knew.

And the said defendant well knowing the condition of said premises as aforesaid, and that the same were out of repair, unsafe, and unfit for occupancy, to wit: On the said first day of August, 1887, requested and solicited the plaintiff and her husband to hire said tenement and appurtenances thereto and offered the same for hire to them representing to them and each of them that said tenement and said shed and water closet were in good repair, and in good order and condition, suitable and safe for occupancy, and for the purposes of a tenancy for them and their family; and the plaintiff says that relying upon the false and fraudulent representations of the defendant, and being ignorant of the unsafe and dangerous condition of said premises, and believing them to be in good order and repair and condition, as represented by said defendant and safe for her own use and the use of the members of her family for the purposes of a tenancy she requested and procured her husband to hire the same, and he did hire the same at her request for the purposes of a tenancy for himself and family as aforesaid, and entered into the occupancy thereof.

Now the plaintiff in fact says, that said premises and particularly said shed and water closet, were not in good repair and condition, as represented to her by said defendant and safe for her use and the use of her family, but that the same was out of repair and the timbers and flooring of said shed and said closet were rotten, decayed, and unfit and unsafe for use and occu-

pancy, all of which said defendant well knew. That thereafterwards, to wit, on the fourteenth day of March, A. D. 1888, while the plaintiff was in the proper use and occupancy of said premises and believing the same to be in good order and condition as represented by the defendant, and using ordinary care, the timbers and flooring upon the same in said water closet being decayed and rotten, and insecurely nailed and fastened, broke and gave way, and she fell with great force and violence through the same and against and upon the door stool thereof, and was greatly hurt, strained and injured, and was confined to her bed for a long time thereafter, to wit, for the space of three months, that she suffered great pain and soreness in and through her arms, shoulders, stomach and other parts of her person; that she lost large quantities of blood; and her life for a long time was despaired of; that she never has recovered and never will recover from the effects of said fall and the injuries then received; that her physical injuries and suffering and the nervous shock then received and attending prostration have permanently undermined and destroyed her former good health. Whereof, and by means of said false and fraudulent representations, as aforesaid, said plaintiff was greatly hurt and injured. All of which is to her damage, etc.

The plea was the general issue. The case was tried before a jury in the superior court for Cumberland county.

The instructions of the presiding justice to the jury upon the legal points of the case were as follows:—

"It does not appear either from the lease or from any arrangement entered into at the time between the parties, that either party was under any obligation to make repairs on the premises. In the absence of any original stipulation in the contract, as to who shall make repairs, the law places the duty upon the tenant and not on the landlord. In other words, when the owner of the property lets it to a tenant, the tenant takes the property as it is. It is presumed that he examines the premises and in the absence of any stipulation to the contrary, the tenant takes the premises as they are and if any repairs are to be made the duty devolves upon him. As a consequence of this principle of law,

if a tenant is injured on the premises during the existence of the tenancy by their defective condition, the tenant must suffer the loss unless one of three states of facts exist. If the fact should appear that there was some trap, some weak condition of parts of the premises, known to the landlord and the existence of which was not communicated to the tenant and not known by him, then in case an accident happened from such defect the landlord would be liable on the ground that he was guilty of deceit in not communicating the existence of such hidden trap or defect to the tenant. In this case, the plaintiff claims that she was injured by the fall of the privy floor, but there is no testimony here that either she or the defendant knew of the defective condition prior to the accident. Consequently the plaintiff cannot recover on this branch of the case, because there is no testimony tending to show that Hannah or Darby Cady knew of the weak condition of the privy and failed to communicate it to the plaintiff before the injury occurred.

Another state of facts upon which the plaintiff can recover in an action like this, even though there is no stipulation as to repairs, is where there is a warranty on the part of the landlord that the premises are safe or will be safe during the tenancy. Now there is no warranty in this instrument that this tenement shall be safe for this family during the continuance of the tenancy; there is no warranty, either express or implied, that the premises shall be safe as long as the plaintiff or her husband, shall occupy them. Consequently the plaintiff cannot recover under that exception.

But the third exception under which the plaintiff can recover, even though there is no stipulation in the lease as to who shall make the repairs, is this: If the landlord's attention is called to the weak and defective condition of any part of the premises, and he assumes and pretends to make repairs, then he is held to the ordinary rule of reasonable care in making those repairs.

Now the plaintiff admits, that in the original contract of lease, there is no provision by which the landlord was to keep the premises in repair; but she claims that during the continuance of the tenancy she notified the agent of the defendant that the barn

and bridge thereto were in a defective and weak condition. She claims that in response to that demand the defendant or her agent pretended to repair the premises, but did not exercise reasonable care, and that in consequence of his failure to make the repairs which he pretended to make, she was injured. Now if such was the fact, although there is nothing in the lease providing that the landlord shall make the repairs, still, if during the continuance of the tenancy his attention was called to the defective condition of the premises, and he did assume and pretend to repair them, and notified her that they had been repaired, and relying upon his statement that the defects had been repaired she was injured, then she would be entitled to recover compensation for the injury she thereby sustained."

The verdict was for the plaintiff. The defendant moved for a new trial because the verdict was against law and evidence and because the damages were excessive.

W. H. Looney, for defendant.

If a tenant is injured by any want of repair or any defect in premises the landlord is not liable. Taylor's Landlord and Tenant, §§ 175 a, 327, 328, 382. Chitty on Contracts, pp. 466, 470, 471. *Libbey* v. *Tolford*, 48 Maine, 316; *O'Leary* v. *Delaney*, 63 Maine, 584; *Dutton* v. *Gerrish*, 9 Cush. 89; *Foster* v. *Peyser*, 9 Cush. 243; *Leavitt* v. *Fletcher*, 10 Allen, 119; *Bowe* v. *Hunking*, 135 Mass. 380; *Doupe* v. *Genin*, 45 N. Y. 119; *Jaffe* v. *Harteau*, 56 N. Y. 398, 401.

George Libby, for plaintiff.

Counsel cited: *Nugent* v. *B. C. & M. R. R.*, 80 Maine, 62; *Enfield* v. *Buswell*, 62 Id. 128; *Scott* v. *Simons*, 54 N. H. 426; *Gill* v. *Middleton*, 105 Mass. 477; *Cowen* v. *Sunderland*, 145 Id. 363.

VIRGIN, J. In August 1887, the defendant leased in writing to the plaintiff a second story tenement including a shed and privy attached to which access was had by a bridge from the kitchen. Subsequently, but prior to March 1888, the attention of the lessor was called to the rickety condition of some portion

of the premises especially the bridge; and he with a carpenter made repairs of the bridge. On March 14, 1888, while the plaintiff was in the privy, the floor gave way whereupon she in falling seized hold of the door-stool to prevent herself from going down several feet into the vault and was severely injured; for which the jury returned a verdict for $825. The defendant, without finding any fault with the amount of the verdict, seeks to have it set aside as being against law and evidence.

It is common knowledge among the members of the profession that no duty on the part of a landlord to repair leased premises arises out of the relation subsisting between him and his tenant; and in the absence of any covenant on his part in the lease that the premises are in proper repair, he is under no legal obligation to make repairs; but the tenant, on the principle of *caveat emptor*, and in the absence of any fraud on the part of the landlord, takes them in the actual condition in which he finds them for better and for worse.

Moreover, any subsequent promise by the landlord to repair is without consideration and no action of assumpsit will lie for his non-performance of such a promise. *Libbey* v. *Tolford*, 48 Maine, 316.

But while it is generally true with respect to gratuitous contracts that for non-feasance no action lies, still for misfeasance an action on the case may be maintained, inasmuch as "the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it." Smith's note in *Coggs* v. *Bernard*, Smith Lead. Cas. (6th Am. Ed.) 355. "A distinction exists between non-feasance and misfeasance,—between a total omission to do an act which one gratuitously promises to do and a culpable negligence in the execution of it. * * If a party makes a gratuitous engagement and actually enters upon the execution of the business and does it amiss through the want of due care by which damage ensues to the other party, an action will lie for this misfeasance." 2 Kent Com. 570, *Thorne* v. *Deas*, 4 Johns, 96-99; *Balfe* v. *West*, 13 C. B. 466, (76 E. C. L.) *Elsee* v. *Gatward*, 5 T. R., 143, 149, 150; *Wilson* v. *Brett*, 11 M. & W. 113, 115; 16 Am. Jur. 261, *et seq.*

This established principle is applicable to the case at bar. And although the lessor's attention, after possession taken by the lessee, was called by the latter to the rickety condition of a portion of the premises and he thereupon agreed to repair it, still he was under no legal obligation to fulfill his promise. But when upon the request of the lessee the lessor gratuitously undertook to make the repairs and negligently and unskilfully performed the work, whereby the lessee was subsequently injured, the lessor became liable by reason of his misfeasance, provided he undertook to repair the particular part of the premises to which his attention was called and where the injury occurred. *Gill* v. *Middleton*, 105 Mass. 477, which is on all fours with the case at bar.

Such was the substance of the charge of the learned judge on this point.

But the defendant contends that no complaint was made in regard to the privy and that she did not undertake to repair that, —but did repair the bridge.

The presiding judge called the attention of the jury to this question of fact and left the question to them to decide, which issue they must have found for the plaintiff. We think the evidence preponderates in behalf of the defendant; but there is evidence on which the verdict can rest.

Motion overruled.

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

THE SANDY RIVER NATIONAL BANK OF FARMINGTON *vs.* GILBERT MILLER.

Franklin. Opinion November 19, 1889.

Promissory note. Forgery. Principal and surety. Laches. Discharge.

When a note, signed by a principal and surety, is delivered up to the principal by the bank which discounted it on receipt of a new note on which the same surety's name is forged by the principal, the original thus surrendered cannot be deemed to be paid.

But when the surety is not notified of the forgery for nearly three months thereafter, and no demand on him is made for several days after that, an action against the surety on the original note will not be sustained unless it clearly appears that the unreasonable delay will not prejudice his legal interests.

ON REPORT.

This was an action of assumpsit upon a joint and several note for $1,000, dated March 24, 1888, and signed by G. W. Russell, as principal, and by the defendant and one Jacob B. Holmes, as sureties.

Besides pleading the general issue, the defendant filed a brief statement of special matter of defense:—That the note had been paid before the commencement of the action; that the plaintiffs were estopped from denying payment of the same, and defendant was relieved therefrom; and that the note was cancelled and discharged before the commencement of the action. The plaintiff filed a counter brief statement: That the note declared on has never been paid; that a forged note was presented by the principal of said note in renewal of the note in suit; and plaintiffs being deceived by the false representations of said principal and relying upon such representations and believing the signatures of such note were genuine, cancelled and delivered up the note in suit to Geo. W. Russell, the said principal, and received such note offered in renewal in lieu of the note in suit; that in fact and truth the signatures of the sureties of the note offered and accepted in renewal were not genuine, but were false, counterfeit and forged; and that the note in suit was not and has never been paid by said principal, by the sureties, or by either of them.

The following facts were agreed on the part of the plaintiffs:—

First:—That the plaintiffs have been in the habit of discounting notes for Russell upon which Miller's name appeared as surety.

Second:—That one of such notes of $1200, was discounted August 13th, 1887.

Third:—That one such note for $1200, in renewal of the preceding note, dated November 14, 1887, was discounted by plaintiffs December 13, 1887.

Fourth:—That one for $1000, was discounted by plaintiffs March 9, 1888.

Fifth:—That the note declared on in the plaintiffs' writ is for $1000, dated March 24, 1888, and was discounted by plaintiffs March 26, 1888, and that $500, was indorsed on this note at the date of discount.

Sixth:—That on July 9, 1888, said Russell presented a note to said bank for discount for $1200, dated July 9, 1888, and signed by G. W. Russell as principal, and purporting to be signed by said Gilbert Miller, the defendant, and J. B. Holmes, as sureties.

Seventh:—That plaintiffs in accordance with the request of said Russell for the note last described, gave up to him the note dated March 24, 1888, being the one described in the writ, and paid him in cash, $674.24 which, with the interest due on the note sued and the discount of the note last described, was the full face of said note, to wit: twelve hundred dollars.

Eighth:—That subsequently, to wit: November 2, 1888, the plaintiffs had reason to suspect that the signatures of the said Miller and Holmes on said last named note, to wit: the note for $1200, dated July 9, 1888, were forgeries, and on the next day, November 3, 1888, they communicated their suspicions to said Miller and said Holmes and were informed by them that they did not sign or authorize their names to be signed to said note.

Ninth:—That their signatures on said note are forgeries.

Tenth:—That the note declared on in the plaintiffs' writ has never been paid, except $500, as appears by the indorsement thereon, and that the forged note was accepted by the plaintiffs with the full belief and understanding that the signatures of Miller and Holmes thereto were genuine.

Eleventh:—That the signature of the defendant upon the note declared upon is genuine.

The following facts were agreed on the part of the defendants:

First:—It is admitted that after the plaintiffs had personal knowledge of the forged note they took an assignment of certain claims of said Russell against certain insurance companies.

Second:—It is admitted that Russell took the note declared

upon in this suit after it was delivered to him by the bank July 9, 1888, to the defendant and that the defendant erased his name from said note, as appears by said note, and that after he had erased his name to the same he returned it to Russell to be delivered to J. B. Holmes.

Third:—It is admitted that the officers of the Sandy River National Bank procured a warrant against said Russell for the forgery of the $1200 note dated July 9, 1888, on the third day of November, 1888, and that subsequently, to wit: November 24, 1888, said Russell delivered up to said bank the note declared upon in this action at the request of the bank officers.

Fourth:—It is admitted that when the note declared upon was given up to Russell on the date that the forged note was discounted for him by the bank, the bank put on the note the stamp of the bank, which signified that the note was paid.

Fifth:—It is admitted that the first notice received by Mr. Miller, the defendant, that said note was in the hands of the bank officers claiming that it was not paid was by letter from the attorney of the bank to him, dated December 7, 1888, mailed on the same date and received by Miller on December 8, 1888.

The other material facts appear in the opinion.

S. Clifford Belcher, for the plaintiffs.

A negotiable note given for a simple contract debt is *prima facie* payment of such debt. This presumption may be rebutted and controlled by evidence that such was not the intention of the parties. Thus it has been held that where a note is taken in ignorance of the facts, the presumption that it was taken in payment is rebutted. *Bunker* v. *Barron*, 79 Maine, 62 and cases cited; *Stratton* v. *McMakin*, 84 Ky. 641; S. C. 4 Am. St. Rep. 215. Money paid under a mistake of fact may be recovered back. If a valid instrument be surrendered up, and one that is forged given in place thereof, it will constitute no valid payment. 2 Daniel on Neg. Insts. [ed. 1876], § 1369. 2 Greenl. Ev. 523; *Young* v. *Adams*, 6 Mass. 182; *Markle* v. *Hatfield*, 2 Johnson 455; *Bank of United States* v. *Bank of Georgia*, 10 Wheat. 333. In this case the court approved the cases of *Young* v. *Adams* and *Markle* v. *Hatfield*, above cited. *Johnson* v. *Johnson*, 11

Mass. 359; *Ramsdell* v. *Soule*, 12 Pick. 126. In *Eagle Bank* v. *Smith*, 5 Conn. 71, the court say: "A forged note, or dishonored draft, if delivered in payment, is no satisfaction or extinguishment of an antecedent demand; and for the most just and obvious reasons. They are of no value; and not what they were, either expressly or impliedly, affirmed to be by the person delivering them as payment, or believed to be by him who accepted them as such." *Goodrich* v. *Tracy*, 43 Vt. 314; *Allen* v. *Sharpe*, 37 Ind. 67, are cases very similar to the one at bar. *Ritter* v. *Singmaster*, 73 Pa. St. 400; *Stratton* v. *McMakin*, 84 Ky. 641; *Canal Bank* v. *Bank of Albany*, 1 Hill, 287.

The demand for payment or restitution may be made within a reasonable time after the forgery is discovered, and the mere space of time is not important, unless the lapse of time is detrimental to the party of whom payment or restitution is demanded. Daniel on Neg. Insts. § 1372, and cases cited; *Boyd* v. *Mexico Southern Bank*, 67 Mo. 537.

In this case the forgery was discovered Nov. 3, 1888. Demand of payment made on defendant, Dec. 8, 1888.

The defendant was not placed in any worse condition by the delay. He gave up no security, that he already had, on account of the supposed payment.

The evidence shows that Russell was insolvent ever after the forged note was uttered; and he actually went into insolvency within less than thirty days after the discovery of the forgery.

The defendant, therefore, could not have secured himself at any time after the forged note was delivered to the plaintiffs.

H. L. Whitcomb and J. C. Holman, for defendant.

Surety was exonerated. *Baker* v. *Briggs*, 8 Pick. 122; *Guild* v. *Butler*, 127 Mass. 386; *Bank* v. *Baker*, 4 Met. 164; *Pitts* v. *Congdon*, 2 N. Y. Court of Appeals, 352.

Action cannot be maintained without restoring the $1200 note. *Perley* v. *Balch*, 23 Pick. 283; *Kent* v. *Bornstein*, 12 Allen, 342; *Estabrook* v. *Swett*, 116 Mass. 303; *Conner* v. *Henderson*, 15 Mass. 319. There should be a rescission, *in toto*. *Coolidge* v. *Brigham*, 1 Met. 547.

When one of two parties, neither of whom has acted dishon-

estly, must suffer, he shall suffer who, by his own act, has occasioned the confidence and consequent injury of the other. *Isnard* v. *Terres*, 10 La. An. 103; Bigelow, Notes and Bills, p. 547. Bank took security after knowing the forgery. Did not use diligence in finding out forgery. Have made the note their own by laches; 1 Edwards, Bills and Notes, § 276, *Levy* v. *Bank of U. S.*, 4 Dall. 234, S. C. 1 Binn. 27.

The bank knew the signature of the parties to the forged note. They had the genuine signature. They gave up the genuine note. It was cancelled by this defendant. The principal carried the genuine note,—the note in suit,—to this defendant and he erased his name from it and gave it back to him to pass to the other surety. Weeks after, it is returned to the president of the bank by the forger after the bank had sworn out and held a warrant against him, with the understanding that the bank would write the word "paid" across the face of the note; and then the bank brings this action upon the note. Principles of public policy demand that the plaintiff should not prevail.

VIRGIN, J. Assumpsit on a joint and several promissory note for $1000, dated March 24, 1888, payable to the plaintiff or order in ninety days, signed by one Russell as principal and by one Holmes and this defendant as sureties; which note the plaintiff discounted on March 26, when $500 were indorsed thereon, thus making it practically a note for $500.

Shortly after the note matured, to wit, on July 9, 1888, Russell presented to the plaintiff for discount a note of that date, for $1200, payable to the plaintiff or order in four months, signed by Russell as principal and purporting to be signed by Holmes and this defendant as sureties; whereupon the bank, at the request of Russell, with full belief that the signatures of the sureties were genuine, gave up to him the note in suit bearing thereon the bank's stamp of having been paid, and paid him in cash the balance after deducting the amount of the note in suit and the discount of that of July 9.

Thereupon, Russell took the note in suit to the defendant, who drew a line through his signature and returned it to Russell, who took it to the other surety for a like purpose.

The signatures of the sureties on the note of July 9, were forged.

If these were all the facts in the case this action might be maintained. For the general rule of law is clear and undisputed, that money paid by mistake of fact may be recovered back; and this general rule applies where a new note is given in payment of another and the former is void for any reason and especially when the signatures of the new note are forged. In such case the new note being worthless it does not operate as an extinguishment or payment of the original. *Robinson* v. *Bland*, 2 Burr. 1077; *Bell* v. *Buckley*, 11 Exch. 631; *Baxter* v. *Duren*, 29 Maine, 434, 440; *Hussey* v. *Sibley*, 66 Maine, 192; *Ritter* v. *Singmaster*, 73 Pa. St. 400. And the action may be maintained on the original. *Eagle Bank* v. *Smith*, 5 Conn. 71; *Goodrich* v. *Tracy*, 43 Vt. 314.

This general rule, however, like most others, is vexed with one or more exceptions; one of which is that, money cannot be thus recovered back where restitution cannot be made without legal prejudice to some other party affected by the mistake. *Williamson* v. *Johnson*, 3 Barn. & Cr. 428, 434; *Mer. Nat. Bank* v. *Nat. Eagle Bank*, 101 Mass. 281; *Welch* v. *Goodwin*, 123 Mass. 71; *Nat. Bank of Commerce* v. *Nat. M. B. Asso.*, 55 N. Y. 211. Or applying the rule to the case at bar: The plaintiff cannot be permitted to maintain an action on the note which was once marked paid and delivered up, if by reason of the laches of the plaintiff in the premises, the defendant has lost the opportunity of securing or indemnifying himself against his principal. *Baker* v. *Briggs*, 8 Pick. 122, 131. It is evident that mere negligence in making the mistake is not sufficient to preclude the plaintiff who made it from demanding its correction; for such negligence should not warrant the defendant in retaining the benefits of the mistake, unless his circumstances have been thereby so changed as to render it unjust and prejudicial to his legal interests. *Nat. Bank of Com.* v. *Nat. M. B. Asso.*, *supra*; *Lawrence* v. *Am. Nat. Bank*, 54 N. Y. 433.

To be sure, it was the duty of the plaintiff to exercise due diligence in discovering the forgery and notify the defendant

thereof, to the end that he might if possible save himself from the natural consequences of the mistake. The early English cases narrowed down the delay of discovery and notice to a very short space of time. But no abstract rule as to the time which, in all cases, will preserve the right of correcting the mistake,—except the one of reasonable time,—can be laid down. Each case has its own peculiar circumstances. In cases where notice to prior indorsers is involved and some others found in the books, the time may be very short. But the common sense doctrine of modern decisions seems to be that, while notice of the forgery and demand for restitution or correction should be made within a reasonable time, still the mere space of time is not necessarily an important factor, so long as it shall clearly appear that the defendant will in nowise be legally damnified by the correction of the mistake. 2 Dan. Neg. Instr. § 1372, and cases cited; *Allen* v. *Fourth Nat. Bank*, 64 N. Y. 12.

The plaintiff is a small bank in a flourishing country village. The forged note was received by it July 9. Its officers had at the same time the genuine note before them with the same names thereon. It had been in the habit for more than a year of discounting similar notes for its customer Russell, with the defendant's name thereon. When the officers first discovered the forgery does not affirmatively appear, although the case finds that they suspected it on November 2,—four months less seven days after it was received,—and had their suspicions confirmed the next day by the defendant. While, perhaps, the defendant cannot strictly speaking be considered the bank's customer, whose signature they were bound to know, still in the absence of any explanatory circumstances, it is difficult to understand how the new note could have thus passed the inspection of the officers of the bank with such facilities for detection before them, and have slumbered in its files so long and the forgery remain undiscovered for such a length of time. It seems to us unreasonable.

But conceding that delay in the abstract cannot deprive the plaintiff of recovery. We do not think it clearly appears that the correction of the mistake after such a long delay will not injure the defendant; but that on the contrary if he had been

seasonably notified of the forgery and demand made on him to pay the note, he possibly might have obtained payment or indemnity from Russell. On July 9, when the forged note was received by the bank, Russell had property in his hands valued at over $14,000. After that date he paid out $3,800. To be sure, his creditors put him into insolvency on November 27, following; but if he had known of the mistake within fifteen days after it occurred, he might have obtained indemnity from Russell which his insolvency could not have affected.

Moreover, on November 3, the bank took from Russell a mortgage of insurance policies amounting to $4,000 on which his estate realized $3,600 and on the 24th of November wrote "paid" across the face of the note and did not demand payment of the defendant until December 8.

Under these circumstances,—the negligent delay on the part of the bank and the possible injury to the legal interests of the defendant, we are of opinion that there should be

Judgment for defendant.

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

EMERY W. CUNNINGHAM *vs.* LEVI H. TREVITT.

Penobscot. Opinion November 19, 1889.

Conditional note. Sale. R. S., c. 111, § 5.

The following instrument: "Milford, April 8, 1887. Cunningham & Madden let W. Marshall have one bay horse eight years old, known as the Cunningham horse, for one hundred and fifty dollars. Fifty dollars by the 15th of April, 1887, and one hundred dollars by the first of August; that said Cunningham & Madden should hold the horse until paid for. Wm. H. Marshall," is a note with an agreement that the property bargained and delivered shall remain the property of the payee until the note is paid; and is not valid, except as between the original parties to the agreement, unless it is recorded like mortgages of personal property, as provided by R. S., c. 111, § 5.

AGREED STATEMENT.

This was an action of trover for a horse, valued at one hundred and fifty dollars, and which the plaintiff delivered to the defendant April 8, 1887, and at the same time took from him the writing which is copied in the head note. Plaintiff offered to prove by parol testimony, if admissible, that the transaction was intended as a conditional sale. On May 27, Marshall paid Cunningham seventy-five dollars;—the only payment made—and died in September following. Before his death, Marshall sold the horse. It was purchased by the defendant of another vendee, once removed, for value, without knowledge of the foregoing writing, or inquiry in relation thereto, except that before purchasing, he examined the town records where Marshall resided. The writing was not recorded. The plaintiff wrote Marshall August 14, 1887, then at Bar Harbor, asking * * * "What time will it be convenient for you to send me the rest of the money; the time is up now; it is the 14th. Write and let me know what time I can depend on it. Got the $75.00 all right. * * *" To this Marshall replied September 7th, * * * "I will send you twenty-five dollars next week. * * *"

November 22, 1887, the plaintiff demanded the horse of the defendant who then had possession of it. Before this the plaintiff had acquired the interest of Madden his co-owner.

If the action was maintainable, the court was to enter judgment according to the defendant's legal liability; otherwise a nonsuit was to be ordered.

G. T. Sewall, for plaintiff.

Sale was conditional. *Tibbetts* v. *Towle*, 12 Maine, 341. Writing is not a note, only memoranda, and need not be recorded. *Morris* v. *Lynde*, 73 Maine, 88. Damages: *Robinson* v. *Barrows*, 48 Maine, 186, 190, and cases cited. Partial payments do not diminish amount. *Brown* v. *Haynes*, 52 Id. 578, 581, 583-4, affirmed in *Everett* v. *Hall*, 67 Id. 497; *Alden* v. *Goddard*, 73 Id. 345, 351.

W. P. Foster, for defendant.

The written instrument is a note within the meaning of R. S.,

c. 111, § 5, and therefore should be recorded. *McDonald* v. *Philbrook*, 33 Maine, 366; Story on Promissory Notes, § 12; *Carver* v. *Hayes*, 47 Maine, 257; *Nichols* v. *Ruggles*, 76 Maine, 25; *Franklin* v. *March*, 6 N. H. 364; *Almy* v. *Winslow*, 126 Mass. 342; *Brummagim* v. *Tallant*, 89 Am. Dec. 61, (S. C. 29 Cal. 503); *Shaw* v. *Wilshire*, 65 Maine, 485; *Com.* v. *Wyman*, 8 Met. 247, 255. Plaintiff estopped by his letter to set up title against an innocent purchaser. *Copeland* v. *Copeland*, 28 Maine, 525; *Stevens* v. *McNamara*, 36 Id. 176; *Cummings* v. *Webster*, 43 Id. 192; *Piper* v. *Gilmore*, 49 Id. 149; *Wood* v. *Pennell*, 51 Id. 52; *Sweetser* v. *McKenney*, 65 Id. 225. Plaintiff guilty of laches. *Brown* v. *Haynes*, 52 Maine, 578; *Coggill* v. *H. & N. H. R. R. Co.*, 3 Gray, 545; *Hill* v. *Freeman*, 3 Cush. 257. Pledgee parting with possession loses his lien. *Beeman* v. *Lawton*, 37 Maine, 543; *Walker* v. *Staples*, 5 Allen, 34; *Homes* v. *Crane*, 2 Pick. 607. Plaintiff's letter a waiver of condition. *Smith* v. *Dennie*, 6 Pick. 262; *Hussey* v. *Thornton*, 4 Mass. 404.

DANFORTH, J. The result of this case depends upon the proper construction of the instrument of April 8, 1887, given by William H. Marshall to Cunningham & Madden. It was not recorded under the provisions of R. S., c. 111, § 5. If it should have been so recorded then the plaintiff, who now represents Madden as well as himself, as against the defendant who is a subsequent *bona fide* purchaser, is, by it divested of his title to the horse in question and cannot recover.

The parol testimony offered by the plaintiff to show the transaction was a conditional sale of the horse, is immaterial, for the instrument itself shows that to "let" one have a horse "for" a specified sum to be paid in specified times, can be understood only as a sale of that horse, especially when accompanied by delivery. The subsequent provision shows the condition.

The statement of facts shows that the delivery of the horse and the written instrument were at the same time and, necessarily, the one must be considered as given for the other. In this respect, this case differs materially from that of *Morris* v. *Lynde*, 73 Maine, 88, in which the delivery was made long subsequent

to that of the written instrument, which was held, not to be a note given in payment, but an order given for a future delivery of goods described and specifying the terms of payment.

The question then arises was there a note, such as is contemplated in the statute, contained in the written instrument in this case? This would seem to be settled in the affirmative in *Nichols* v. *Ruggles*, 76 Maine, 26. The promise to pay in this case is not so explicit as in that. But an express promise to pay is not necessary, even in a promissory note. Story on Promissory Notes, § 12 and cases cited. It is sufficient that a debt be created and an obligation to pay it absolutely implied. *Carver* v. *Hayes*, 47 Maine, 257. In *Almy* v. *Winslow*, 126 Mass. 343, it is said "there need not be a promise in express terms, it being sufficient if an undertaking to pay is implied in the contents of the instrument." In *Daggett* v. *Daggett*, 124 Mass., on page 150 it is said, "The test question is: are the words of the memorandum merely an acknowledgment admitting that an old debt is due, or do they import a promise to pay money to the plaintiff's intestate?"

Thus it appears that this instrument comes not only within the spirit of the statute but the letter also. It was given for a horse bargained and delivered, the price of which was definitely fixed and the times of payment specified. The terms used are not an acknowledgment of an old debt, for none existed. It was created by this transaction and its creation necessarily imports a promise to pay. The case shows that both parties so understood it.

Plaintiff nonsuit.

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

LEWIS F. STRATTON, and another, *vs.* FRANK TODD, and others.

Penobscot. Opinion November 19, 1889.

Agency. Proof. Inference from acts.

The business of selling logs, after their arrival at the market, is distinct from that of operating in the woods, or the driving of logs.

An agency for the two kinds of business is so different, that proof of an agency for the one, will have no tendency to prove its existence for the other.

To establish an agency by inference, it must be shown that the acts sought to be proved, are of the same general character and effect as those under a recognized agency.

ON MOTION.

By defendants, to set aside the verdict as against law and evidence. The action was to recover for services and expenses in driving defendants' logs, in the spring of 1887, by virtue of an alleged contract with Thomas Mason, their agent. The defendants denied the agency. They are the owners of T. 4, R. 9 on the Wassatiquoik river, and made a contract in 1884 with one Tracy by which he was to operate there, for five logging seasons, in cutting, hauling and driving logs, and delivering them at Penobscot boom to the defendants. Tracy had the sole control of the cutting, hauling and driving to the boom. The plaintiffs claimed that Mason, as defendants' agent, agreed to pay for driving some of these logs from Mattawamkeag to the Penobscot boom. Mason denied that he had so agreed.

There was a verdict for the plaintiffs.

C. P. Stetson, for defendants.

A principal is responsible, either when he has given to an agent sufficient authority, or when he justifies a party dealing with his agent in believing that he has given to the agent this authority.

A principal is responsible, only for appearance of authority which is caused by himself, and not for that appearance of conformity to authority which is caused by the agent. An agent

employed for a special purpose derives from this no general authority from his principal. *Taft* v. *Baker*, 100 Mass. 68, 74; *Gardner* v. *B. & M. R. R. Co.*, 70 Maine, 181; 1 Pars. Cont. 48, 49; *Hazeltine* v. *Miller*, 44 Maine, 177; *Temple* v. *Pomroy*, 4 Gray, 128; *Clough* v. *Whitcomb*, 105 Mass. 482.

Where the belief of the authority of an agent arises only from previous action, on his part as an agent, the persons so treating with him must, on their own responsibility, ascertain the nature and extent of his previous employment. 1 Pars. Cont. 49.

D. F. Davis and C. A. Bailey, for plaintiffs.

Plaintiffs had good reason to believe that Mason had authority to bind the Todds.

The evidence is undisputed that Mason had the entire control of all the Todd logs, after they reached Penobscot boom; that he contracted and paid for, shoring and booming them as well as for running them; that he sold and received pay from them; that he was known by everybody on the river as the Todds' agent; that he had never intimated to any body that his agency stopped at Penobscot boom; that this agency, whatever it was, extended over a period of several years; that the plaintiffs' witnesses knew nothing about any contract between the Todds and Tracy to drive the logs; that the plaintiffs themselves, as they say, knew nothing of any such contract; that in 1885 Mason made a contract with one of the plaintiffs, Burke, to drive logs similarly situated to those in controversy; that Burke did drive them, and Mason paid him; and that that transaction was after the contract between Tracy and the Todds to do the same business, (July 18, 1884); that Mason at the time he made the first contract with Burke in 1885, did not intimate to him that he must get, or had got authority from the Todds, nor did he say to him that Tracy was under contract to do the same work which he was paying him, Burke, to do.

The work done was of the greatest importance to the log owners. Tracy had all, and more than he could do on the Wassatiquoik, and East Branch, as appears by the letter from Todd to Mason. There is no evidence that Mr. Tracy paid any attention whatever to the logs that went adrift from Mattawamkeag to

Lincoln; neither is there evidence that either of the Todds did so. There was no one to do it except Mason whom everybody supposed was Todds' agent to do such work.

DANFORTH, J. In order to maintain this action the burden of proof is upon the plaintiffs to show that, in the matter in controversy, Thomas Mason was the authorized agent of the defendants, or by them held out as such.

An examination of the testimony not only fails to show this agency, but does show the contrary. Mason had an agency in regard to the logs, but it was confined to the disposal of them after they had been driven to the Penobscot boom. The claim in suit is for driving them above the boom. The duties and responsibilities of these two positions are so different that proof of an agency in one, will have no tendency to show that it exists in the other. *Hazeltine* v. *Miller*, 44 Maine, 177. Besides, the case shows that for all work to be done above the boom, Foster J. Tracy had the sole responsibility and control, by virtue of a written contract with the defendants.

Nor are the plaintiffs any more successful in relation to the other branch of their case. True, it is, that if the defendants have by their words or acts held out Mason as their general agent in respect to these logs, or in respect to this particular transaction, they might be estopped from denying such agency after the plaintiffs had in good faith acted upon such representations. But it is not pretended that the defendants have personally made any such representations. The most that is claimed is that Mason has performed certain acts, in regard to the logs, which have been recognized as valid by the defendants. "But the acts from which authority to do a specific act can be implied, must be of the same general character and effect." *Hazeltine* v. *Miller*, *supra*. It will be found on examination of the testimony that the acts relied upon to sustain this inference, with perhaps one exception, are such as pertain to the disposal of the logs after their arrival at the boom, and were within the acknowledged agency of Mason. As already seen, they were not of the same "general character and effect" as making a contract for driving

the logs above the boom. The single exception, that of the contract for driving in 1885, was founded upon a special authority obtained for that purpose and is not sufficient to prove a general, or any custom, such as is necessary to authorize the inference of general authority.

The case also fails to show any recognition of the authority to make, or the validity of the contract now set up. Assuming the contract made as alleged, though this is denied, it does not appear to have come to the knowledge of the defendants until after part or entire performance, and then was at once repudiated.

Motion sustained.

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

INHABITANTS OF TOPSHAM *vs.* JOHN F. BLONDELL.

Sagadahoc. Opinion November 19, 1889.

Taxes. Statute of limitations. Debt. Joinder of parties. Abatement. Costs. *R. S., c.* 6, §§ 141, 142, 175 ; *c.* 81, § 82, *clause* 1.

An action of debt for the recovery of taxes on poll and personal estate is within the letter and spirit of the general statute of limitations. R. S., c. 81, § 82, clause 1.

A tax assessed against the defendant "and wife," may be recovered in an action of debt against the defendant alone, if the non-joinder of the wife be not pleaded in abatement.

In an action against a tax payer the plaintiffs cannot recover costs in the absence of proof of a demand made upon the defendant before action brought.

ON REPORT.

The facts are stated in the opinion. It was admitted that the plaintiffs had not made the demand, required by the statute, before bringing the action.

Barrett Potter, for plaintiffs.

I. The assessment is valid.

Evidence was produced, and is admissible, to show intention to tax defendant by the words used. R. S., c. 6, § 142, and *Bath* v. *Reed*, 78 Maine, 276, and cases there cited, especially *Westhampton* v. *Searle*, 127 Mass. 502, 504.

As to the poll taxes, intention to tax husband rather than wife to be presumed. Respecting those taxes, at least, addition of "and wife" an error which does not invalidate assessment. Same authorities.

As to the personal property taxes, defendant was one of two intended to be taxed, and non-joinder of the other has not been pleaded in abatement. Error here, if any, probably due to defendant's failure to return a list of his taxable property. This error, also, cured by R. S., c. 6, § 142.

Defendant relies on *Trott* v. *Lowell*. If that case means more than, that assessment there considered, could not be upheld without evidence identifying defendants as parties intended to be taxed, it is overruled by later case of *Bath* v. *Reed*, above cited.

Objection to highway tax that the surveyor's list required by § 63, c. 18, R. S., could not be produced, cannot avail defendant. That tax was part of an assessment, admitted to be otherwise regular, and "is sustained by the ordinary presumption of correctness which attaches to the proceedings of officers in the performance of a public trust." *Snow* v. *Weeks*, 75 Maine, 105; *Com.* v. *Bolkom*, 3 Pick. 281.

Even if the list had not been returned, defendant would have to pay the tax. *Hayford* v. *Belfast*, 69 Maine, 63.

II. The statute of limitations not a bar.

The state is not barred by a statute of limitations, unless specially named. If this principle be admitted, its application to the collection of taxes cannot be denied. Towns and cities are the state's taxing machinery. It is in their private capacity only, if at all, that statutes of limitation run against them. *Small* v. *Danville*, 51 Maine, 359; *Cape Elizabeth* v. *Skillin*, 79 Maine, 593; *Lindsey* v. *Miller*, 6 Pet. 666; *Logan Co.* v. *Lincoln*, 81 Ill. 156; *Perry Co.* v. *Railroad*, 58 Ala. 547.

G. D. Parks, for defendant.

Assessment of tax against Blondell and wife cannot be upheld. *Trott* v. *Lowell*, 1 East. Rep. 398. Same as to deficient highway tax of 1879, no return being shown. *Patterson* v. *Creighton*, 42 Maine, 367; *Hayford* v. *Belfast*, 69 Id. 63.

Suit for all the taxes except the years 1882 and 1883, barred by R. S., c. 81, § 82, clause 1. *Nullum tempus* act applies only to the state at large.

Cinn. v. *First Presb. Church*, 8 Ohio, 298, (32 Am. Dec. 718), (1835); *Cinn.* v. *Evans*, 5 Ohio St. 595, (1855); *St. Charles County* v. *Powell*, 22 Mo. 525, (66 Am. Dec. 637); *Callaway County* v. *Nolley*, 31 Mo. 393; *Abernethy* v. *Dennis*, 49 Mo. 469; *School Directors* v. *Georges*, 50 Mo. 194; *City of Pella* v. *Scholte*, 24 Iowa 283, (1868), S. C., 95 Am. Dec. 740, and note, cases there cited; *Clements* v. *Anderson*, 46 Miss. 581: *Evans* v. *Erie County*, 66 Penn. 222; R. S., c. 6, § 101.

VIRGIN, J. Debt brought in the name of the inhabitants of the town, under the requisite written direction, to recover certain taxes alleged to have been legally assessed on the poll and personal property of the defendant, for the respective municipal years of 1877 to 1883, both inclusive, during all which time he was a resident in the town.

In addition to the general issue the defendant interposed the general statute of limitations.

Nullum tempus occurrit regi declared the common law of England. And this exception of the sovereign from the statute of limitations has been adopted in this country as applicable to the state and very generally defended upon grounds equally forcible here as in England,—that public remedies in preserving the public rights, revenues and property ought not to be lost by the laches of public officers. *United States* v. *Hoar*, 2 Mason, 312.

While there may not be any limitation bar to the collection of a tax in the old mode, we think that when the legislature, in 1874, created the additional remedy of an action of debt therefor, it thereby gave the town its choice of remedies; and if the new remedy is elected, it is accepted with all of the general rules of

pleading, practice and limitations which pertain to the action of debt. On recurring to the statute bar governing actions of debt we find it expressly includes such as are "founded on a liability not under seal." R. S., c. 81, § 82; cl. 1. That this action is within the letter of the statute cannot be questioned.

Moreover, towns in this state are generally small in territory and the inhabitants comparatively few in numbers. Their municipal officers including collectors are elected annually. Every resident's tax is spread upon the collector's lists prepared by the assessors which lists he is bound to exhibit once in two months. He is chargeable with the whole amount of the tax committed to him, (*Thorndike* v. *Camden*, *supra*, 39, 45), and he gives a bond with such sureties and in such sum as the municipal officers approve for the faithful discharge of his duties. Moreover, the annual detailed reports of the financial agents of the towns make known their indebtedness and resources. St. 1885, c. 359, § 1. We perceive therefore no reason why towns should not be held to the same degree of diligence in collecting their taxes as debts, as they are in collecting other statute liabilities owing to them. *Kennebunkport* v. *Smith*, 22 Maine, 445.

While in regard to contracts or mere private rights, towns, like private citizens may plead and have pleaded against them the statute of limitations, still, as it respects all public rights, or property held for public use upon trusts, there is some conflict of authority,—though we know of no case relating to taxes. But the overwhelming weight of authority holds that municipal corporations, even in their public character, are not so vested with the rights and privileges of sovereignty as to be within the protection of the maxim *nullum tempus*, *etc.* Wood Lim. § 53, Dill. Mun. Corp. § 529 and cases in notes, which includes *Pella* v. *Scholte*, 24 Iowa, 283, the opinion in which was drawn by Dillon, C. J. In his work on municipal corporations this opinion of the distinguished author seems to have become somewhat modified, § 533. A very exhaustive and critical review of the cases was made by the court in *Wheeling* v. *Campbell*, 12 W. Va. 36. S. C. 48 Am. Rep. 24 *et seq.*

As the writ is dated March 20, 1888, the statute bars the col-

lection in this mode of all taxes except those for the years 1882 and 1883.

The only objection interposed to the recovery of these is, that they were assessed to the defendant "and wife" instead of to the defendant alone, who alone is sued. The answer is—that while the defendant has pleaded the statute of limitation, he has omitted to plead the non-joinder of his wife who is not sued. If these taxes were assessed to him and his wife jointly, he cannot assert that they were not assessed against him. *Webber* v. *Libby*, 70 Maine, 412. And if he would invoke the limitation bar, which governs in actions of debt, he must also bring himself within the rules of pleading, which govern such actions.

Trott v. *Abner Lowell and Ada I. Lowell* (1 East. Rep. 398), was an action in the name of the collector under R. S., c. 6, § 141, to collect a tax assessed to Abner Lowell *et ux.* (and wife). The court gave judgment for the defendants upon the ground that there was no evidence in the case that Ada I. Lowell was the wife of Abner,—citing *Farnsworth* v. *Rand*, 65 Maine, 19, which decides that evidence is competent to show "whom the assessors intended to tax." The language of the late Judge BARROWS in the case cited on page 23 is applicable here, and also of PETERS, C. J., in *Cressey* v. *Parks*, 76 Maine, 532, 534; "where forfeitures are not involved, proceedings for the collection of taxes should be practically and liberally construed."

We may remark that such has been the practice ever since the legislature declared that no "error, mistake, or omission by the assessors, collector or treasurer shall render the tax void." R. S., c. 6, § 142. *Boothbay* v. *Race*, 68 Maine, 351, 357. Hence if the other taxes had not been barred, we should find no difficulty in the tax of 1880, including therein a delinquent highway tax of the year before, notwithstanding there was no evidence that the surveyor returned such highway tax as delinquent. Such omission did not render the tax void. Having paid it the defendant would have been entitled to an action "not to recover his money back,—but for his damages sustained by reason of such error on the part of the assessors, if any." R. S., c. 6, § 142; *Hayford* v. *Belfast*, 69 Maine, 63, 65.

As it is admitted, that there was no demand made upon the defendant prior to bringing of this action, the plaintiffs cannot recover costs (R. S., c. 6, § 175); but they are entitled to

Judgment for $8.45 *and interest from date of writ.*

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

STATE OF MAINE *vs.* JOHN DORR.

Waldo. Opinion November 20, 1889.

Intoxicating liquors. Indictment. Pleading. Nuisance. R. S., c. 17, §§ 1, 2.

Where an indictment, otherwise sufficient, alleges the defendant kept, maintained and used a certain building "for the illegal sale and illegal keeping for sale, of intoxicating liquors; no allegation of sale is necessary.

ON EXCEPTIONS.

The respondent filed a general demurrer to the indictment, which was joined by attorney for the state. The presiding justice overruled the demurrer and adjudged the indictment sufficient. To this ruling the respondent excepted.

The following were the averments in the bill of indictment:—

"The jurors for said state upon their oaths present that John Dorr, of Frankfort, in said county, at Frankfort in said county of Waldo, on the first day of January in the year of our Lord one thousand eight hundred and eighty-eight 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 keep and maintain a common nuisance, to wit: a certain building, in said Frankfort, then and there used during all said time by him, the said Dorr, for the illegal sale and illegal keeping for sale of intoxicating liquors, to the common nuisance of all the people, against the peace of the state and contrary to the form of the statute in such case made and provided."

Albert F. Sweetser, county attorney, for the state.

In *State* v. *Lang*, 63 Maine, 219, the indictment does allege sales generally and the court say, "No allegation of sales was required. The offense described in the nuisance statute, is not selling liquors, but the keeping and using a place for the purpose of selling. The keeping the place is the gist of the offense." Counsel also cited: *Com.* v. *Kelly*, 12 Gray, 175; *State* v. *Ruby*, 68 Maine, 543; *Com.* v. *Farrand*, 12 Gray, 176; *State* v. *Dodge*, 78 Maine, 439; *Com.* v. *Howe*, 13 Gray, 26, 30; Bish. Cr. Proc. 820; R. S., c. 17, § 1.

W. P. Thompson and R. F. Dunton, for defendant cited, R. S., c. 17, §§ 1, 2.

The indictment does not sufficiently allege that the respondent kept or maintained said building for the said illegal purpose, or that he ever sold there any intoxicating liquors; or kept there any intoxicating liquors for sale or which were intended for sale by him or any one else. Respondent is indicted under c. 152, P. L., 1873, by which it is provided that c. 17 shall apply to any place where intoxicating liquors are sold for tippling purposes;—hence the necessity of alleging a sale by respondent.

VIRGIN, J. By R. S., c. 17, § 1, "all places used * * for the illegal sale or keeping of intoxicating liquors * * are common nuisances." By § 2, "whoever keeps or maintains such nuisance shall be fined," etc.

The indictment alleges with proper time and venue that John Dorr, without any lawful authority "did keep and maintain a common nuisance, to wit: a certain building in said Frankfort then and there used during all said time by him, the said Dorr, for the illegal sale and illegal keeping for sale of intoxicating liquors to the common nuisance," etc.

We have no doubt of the sufficiency of the indictment. No allegation of sale is necessary. *State* v. *Lang*, 63 Maine, 215, 219.

Exceptions overruled.

Judgment for the State.

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

GEORGE B. FURGERSON, surviving partner, *vs.* ISAAC S. STAPLES.

Waldo. Opinion November 20, 1889.

Town order. Indorsement. Transfer. Liability when void.

The indorsement and transfer of an over-due town order, by the payee, for value, raises a contract on his part, that the order is genuine, and is the legal promise of the town that it purports to be; and the purchaser of it, after it has been adjudged void, may elect to sue such indorser upon his contract and recover the contents of the order according to its tenor, or to sue for the consideration paid, and interest upon it.

In such suit, to recover the consideration paid, the amount of the judgment should be the balance only after deducting whatever sums may have been recovered by the plaintiff from the town, whether by action in his own name, or that of the defendant for the plaintiff's use.

ON REPORT.

This was an action brought by the plaintiff, as surviving partner of the firm, Samuel Otis & Co., to recover the consideration paid, and interest thereon, by said firm to the defendant for three over-due town orders, and which were afterwards adjudged by this court to be void. *Otis* v. *Stockton*, 76 Maine, 506. The orders were indorsed by the defendant.

The writ dated November 10, 1883, contained counts for money had and received, and for interest for forbearance on money due and owing. The specification under the count for money had and received was as follows:—"the plaintiffs claim to recover of the defendant, the sum of three thousand dollars, which they paid to the defendant for three certain writings purporting to be town orders of the town of Stockton, each for the sum of one thousand dollars, dated November 17, 1877, and made payable to the defendant or his order, which said writings were not town orders of said town, and of no value."

It appeared from the plaintiff Furgerson's testimony that the defendant, in reply to his inquiry, said the orders were all right; that he had received a year's interest on them; that he would indorse them and did so, at the time of their transfer.

W. H. Fogler, for plaintiff.

In *Hussey* v. *Sibley*, 66 Maine, 192, it was decided that a town order, passed by a debtor to his creditor for the purpose of paying his debt and received for that purpose, both parties acting in good faith, will not operate as a payment if, at the time, it was utterly worthless for the reason that the drawer and acceptor had no authority to make or accept it.

The same rule obtains in case of a sale of paper which proves to be worthless by reason of want of authority on the part of the drawers and acceptors, and the seller is liable to the purchaser for the amount of the purchase money.

The contrary has been held in but two cases in this country. *Ellis* v. *Wild*, 6 Mass. 321, and *Baxter* v. *Duren*, 29 Maine, 434.

The case of *Ellis* v. *Wild* cannot now be considered as authority. In *Cabot* v. *Morton*, 4 Gray, 156, the case of *Ellis* v. *Wild* is not referred to, but, it is there held that a person who procures notes to be discounted by a bank impliedly warrants the genuineness of the signatures of the makers and the indorsers. The court say (p. 157), "It seems to fall under a general rule of law, that, in every sale of personal property, the vender impliedly warrants that the article is in fact what it is described and purports to be."

In *Merriam* v. *Wolcott*, 3 Allen, 258, the court overruled the decision in *Ellis* v. *Wild*, the court saying, "we think that the authorities which hold the seller to an implied warranty, in such case, that the note is genuine, are in conformity with the principles of sound reason and justice."

In *Hecht* v. *Batchelder*, 147 Mass. 335, the court states the law as decided in *Merriam* v. *Wolcott*, as follows: "When a man sells a note, the law implies a warranty that it is genuine, and that he has such a title as to give him the right and power to sell. This is upon the ground that the offer of the note is in itself a tacit affirmation or representation that it is genuine, etc." See also *Lobdell* v. *Baker*, 1 Met. 193.

In this state the case of *Baxter* v. *Duren* has not been overruled, neither has it been affirmed. That case has been discussed by this court in two cases, in neither of which it was necessary to decide upon the correctness of the decision.

In *Hussey* v. *Sibley*, *supra*, in commenting on the distinction, raised in *Ellis* v. *Wild* and *Baxter* v. *Duren*, between cases of payment by, and of sale of a note not genuine, after citing the authorities, the court say, "Thus from the weight of authority it would appear that the distinction noticed in *Ellis* v. *Wild* and *Baxter* v. *Duren*, is, to say the least, somewhat shadowy, and that whether the plaintiff took the order as payment or as purchaser, the defendant must be held to some responsibility as to its validity; in short, that he, as seller, warrants the order to be what it purports, a genuine order, etc."

In *Milliken* v. *Chapman*, 75 Maine, 306, the learned justice who drew the opinion corrects the statement of the counsel for the defense that the case of *Baxter* v. *Duren* had been overruled in *Hussey* v. *Sibley*, but he says, "Whether this statement of the principle would now be held to exclude a warranty of the genuineness of the signatures is not a question arising in this case. It may be that we should now say that the promise of the apparent parties, was the essence of the thing sold, and that a mutual mistake as to its existence would be a mistake as to the identity of the subject of the sale, and good ground for rescission. We have no occasion to consider that question here."

It is worthy of remark that the decision in *Baxter* v. *Duren* is not sustained by any of the authorities cited by the court in its support. The case of *Baxter* v. *Duren* stands alone in this country as authority for the principle therein laid down, and the correctness of the decision has been twice questioned by this court.

The seller of paper impliedly warrants that it is what it purports to be. *Merriam* v. *Wolcott*, 3 Allen, 258; *Cabot Bank* v. *Morton*, 4 Gray, 156; *Lobdell* v. *Baker*, 1 Met. 193; S. C., 3 Met. 469; *Herrick* v. *Whitney*, 15 John. 240; *Shaver* v. *Ehle*, 16 Id. 201; *Canal Bank* v. *Bank of Albany*, 1 Hill, 287; *Murray* v. *Judah*, 6 Cowen, 484; *Baldwin* v. *Van Deusen*, 37 N. Y. 487; *Ledwick* v. *McKim*, 53 N. Y. 307; *Terry* v. *Bissel*, 26 Conn. 23; *Thrall* v. *Newell*, 19 Vt. 202; *Aldrich* v. *Jackson*, 5 R. I. 218; *Dumont* v. *Williamson*, 18 Ohio St. 515; *Flynn* v. *Allen*, 57 Penn. St. 482; *Bell* v. *Cafferty*, 21 Ind. 411; *McKay* v. *Barber*, 37 Ga. 423; *Jones* v. *Ryde*, 5 Taunt. 488; *Gompertz* v. *Bartlett*, 24 Eng.

L. & Eq. R. 156; *Gurney* v. *Wormsly*, 4 El. & B., 138; Benjamin on Sales, §§ 607, 608; Story on Notes, §§ 118, 119, 389; Bigelow on Estoppel, 446-7; Chitty on Contracts, 471, note y.

There was not only an implied warranty, but the defendant by his indorsement of the orders expressly warranted their genuineness. Story on Notes, §§ 135, 380; *State Bank* v. *Fearing*, 16 Pick. 533; *Burrill* v. *Smith*, 7 Id. 291, 294; *Prescott Bank* v. *Caverly*, 7 Gray, 217, 220; *Canal Bank* v. *Bank of Albany*, 1 Hill, 287; Bigelow on Estoppel, p. 427, *et seq.* and cases cited.

N. H. Hubbard, for defendant.

In delivering the opinion of the courtin *Baxter* v. *Duren*, 29 Maine, 441, SHEPLEY, C. J., says, "When no debt is due or created at the time, and the paper is sold, as other goods and effects are, the purchaser cannot recover from the seller the purchase money. There is in such case no implied warranty of the genuineness of the paper. The law respecting the sale of goods is applicable. The only implied warranty is that the seller owns, or is lawfully entitled to dispose of the paper or goods."

This is claimed to be now the settled law of this state. *Baxter* v. *Duren*, has since its decision been twice called to the attention of this court in *Hussey* v. *Sibley*, 66 Maine, 192, and as late as 1883 in *Milliken* v. *Chapman*, 75 Maine, 306, and in both reaffirmed.

The expression said to have been made by defendant at the time of the sale, "that they were all right," was a mere expression of opinion, and could have had no influence in making the sale.

HASKELL, J. The defendant, upon payment of $3,000 to the municipal officers of the town of Stockton, received from them three town orders for $1000 each, dated November 17, 1877, payable to his own order, with interest annually, and already accepted by the treasurer of the town.

On the 17th of January, 1879, the defendant indorsed one year's interest upon each of the orders and indorsed and delivered the orders to the plaintiff for value, and in good faith, both parties believing them to be legal obligations of the town.

The orders have been held by this court as issued without authority from the town, and, therefore, of no binding validity upon it. The plaintiff sues in assumpsit to recover the consideration that he paid the defendant for the orders, as money had and received, and interest.

Town orders, although not commercial paper to the extent that transfer to an innocent holder shuts out equitable defenses, may be negotiable in form, and become transferable under the same rules of law that would be applicable to commercial paper. *Parsons* v. *Monmouth*, 70 Maine, 262.

The indorsement of a note is a new contract. The indorser engages that the note shall be paid according to its tenor; that is upon proper presentment, demand and notice; he engages that it is genuine and the legal obligation that it purports to be, and that he has title to it, and a right to indorse it. Sto. Pr. Notes, § 135. Dan. Neg. Ins. § 669; *Bank* v. *Fearing*, 16 Pick. 533; *Bank* v. *Caverly*, 7 Gray, 217.

All engagements of the indorser, except payment, conditioned upon demand and notice, and possibly the validity of the note when it is voidable only, are absolute warranties and not dependent upon any condition whatever. If the note transferred by indorsement be a forgery, or absolutely void for any other reason, the indorser may be sued for the original consideration paid him, or he may be held as a party without demand and notice. Dan. Neg. Ins. §§ 669, 675, 1113. Par. N. & B. 444, *Copp* v. *McDugall*, 9 Mass. 1; *Burrill* v. *Smith*, 7 Pick. 291.

The indorsement and transfer by the payee, of a dishonored promissory note, for value, must create all the engagements on the part of the indorser that an indorsement of the note before maturity would create, except as to demand and notice. To charge the indorser of a dishonored note, demand and notice are required within a reasonable time after the indorsement. The indorsement in such case is like the indorsement of the demand note of the maker of that date, or the drawing of a bill upon the maker of the note payable to the transferee. *Greely* v. *Hunt*, 21 Maine, 455; *Hunt* v. *Wadleigh*, 26 Maine, 271; *Sanborn* v. *Southard*, 25 Maine, 409; *Goodwin* v. *Davenport*, 47 Maine, 112; 2 Par. N. & B. 13.

The plaintiff has elected to sue for the consideration that he paid the defendant for the worthless orders. The plaintiff has already recovered from the town by an action for money had and received, brought in the defendant's name, the part of the money defendant loaned upon the order that went to the use of the town. This sum the plaintiff must deduct from the amount that he paid the defendant for the orders and have judgment for the balance and interest.

Defendant defaulted. Damages to be assessed at nisi prius.

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

BENJAMIN S. THURLOW, and another, *vs.* GEORGE M. WARREN, assignee.

Hancock. Opinion December 11, 1889.

Exemptions. Attachment. Partnership. Insolvency. R. S., c. 81, § 62, *cl.* 7.

A pair of working cattle, belonging to a partnership, is not exempt from attachment and seizure on execution, but pass to their assignee in insolvency.

AGREED STATEMENT.

It appeared that, at the time the plaintiffs were adjudged insolvents, they were the sole owners in their co-partnership capacity of a pair of oxen; that they were the owners of no other oxen, either as co-partners or as individuals; and that they subsequently replevied them from their assignee, the defendant, to whom the oxen had been delivered by the messenger of the court of insolvency.

It was agreed, that if judgment should be for the plaintiffs they were to recover nominal damages with full costs; and if for defendant, he was to have judgment for two hundred dollars, with interest, and full costs.

E. P. Spofford, for plaintiffs.

Statute should be liberally construed. Legislature intended to extend its protection to cases like this. Maine statute broader than that of Mass. under which *Pond* v. *Kimball* was decided. *Gilman* v. *Williams*, 7 Wis. 329. Question has not been decided in Indiana. *Goudy* v. *Werbe*, decided July, 1889. In *Stewart* v. *Brown*, 37 N. Y. 350, Judge Porter says, "If each of the plaintiffs had owned a pair of horses both teams would have been exempted. * * * It would be an obvious perversion of the statute to hold that the plaintiffs forfeited its protection by owning but a single team between them, used for the common support of both."

G. M. Warren, for defendant.

Counsel cited: *Pond* v. *Kimball*, 101 Mass. 105; *In re*, *J. S. & J. Price*, 6 N. B. R. 400; *In re*, *Handlin & Venny*, 12 Id. 49; *In re*, *Blodgett & Sanford*, 10 Id. 145; *In re*, *Tonne*, 13 Id. 170; *In re*, *Boothroyd* v. *Gibbs*, 14 Id. 223.

VIRGIN, J. Replevin of a "pair of oxen," by a partnership duly adjudged insolvent, against the assignee of the estate. The only question is: whether the oxen owned by the firm were exempt from attachment and seizure on execution.

Whether the particular business of the partnership was such as required the use of oxen does not appear. But even assuming that the "pair of oxen" replevied to have been (in the language of R. S., c. 81, § 62, cl. 7), "a pair of working cattle" actually used in and about the firm's business, we are of opinion that they were not exempt. Joint debtors are not within the letter of the statute. The language of the whole ten clauses of R. S., c. 81, § 62, specifying the property exempted is predicated upon the idea that the beneficiary is an individual. Exemption therein provided is recognized as the privilege of an individual and not of a firm or other joint association or corporation. No suggestion of partnership or other joint ownership appears in the statute. The single "debtor," "he," "himself" and "his family" are the terms adopted. The clause under which this case falls provides, "If *he* has more than one pair of working cattle, *he* may elect,"

etc., with several like uses of the singular pronoun. R. S., c. 81, § 62, cl. 7. It would seem, therefore, that the property, which can claim exemption from writ and execution, must be owned in severalty and not jointly.

The various insuperable difficulties in attempting to apply exemption to the property of a partnership are very clearly pointed out in *Pond* v. *Kimball*, 101 Mass. 105.

Moreover, although in some jurisdictions the contrary view is taken, still the great weight of deliberate and well considered cases hold that individual and not partnership property is exempt. *Pond* v. *Kimball, supra; Bonsall* v. *Cornly*, 44 Pa. St. 442; *Guptil* v. *McFee*, 9 Kans. 30; *In re*, *Handlin*, 3 Dill. C. C. Rep. 290; *Russell* v. *Lennon*, 39 Wis. 573, overruling *Gilman* v. *Williams*, 7 Wis. 336 cited by the plaintiff. Pars. Pr. Part. 314. Hence in accordance with the agreement of the parties the entry must be

Judgment for defendant for $200, *and interest from date of writ, with full costs.*

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

THOMAS E. BRASTOW, and others, *vs.* GEORGE H. M. BARRETT.

Knox. Opinion December 11, 1889.

Pleading. Abatement. Pendency of same cause.

A plea in abatement of the pendency of another action in this court, for the same cause and between the same parties, must set out or enroll the record or declaration of such action.

ON EXCEPTIONS.

The defendant excepted to the ruling of the court sustaining a demurrer to the following plea in abatement:—

Knox, ss.

SUP. JUD. COURT, MARCH TERM, A. D. 1889.

Thomas E. Brastow et als. v. *George H. M. Barrett.*

New entry. Writ dated December 6, 1888.

And the said defendant comes and defends &c., when &c., and saith that he ought not to be held to answer to the above writ and declaration of the plaintiffs against him but that the said writ ought to abate, because he says that at the time of the purchase of said writ and of the plaintiffs declaring therein, to wit: on the twenty-seventh day of November, A. D. 1888, the said plaintiffs purchased one other writ of that date returnable to the December term of said Sup. Jud. court, in and for said Knox county, and declared therein against the said defendant in a certain plea of land for the same cause of action in the writ and declaration aforesaid first mentioned, as by the files and record thereof, in this court remaining, appears.

And the said Thomas E. Brastow, Wilson A. Merriam and Edwin A. Morrill named as plaintiffs in both actions aforesaid, and the said George H. M. Barrett, named in both actions aforesaid as defendant, are the same persons and not others or divers; and the said plea of land is now pending in this court under docket No. 264 and yet remains undetermined. All of which the said defendant is ready to verify.

Wherefore, he prays judgment of the said writ, and that the same may be quashed.

J. E. Hanly, for defendant.

Plea sets out date of former writ, names of the parties, term of court to which writ is returnable, the plea, the docket number, and so much of the record cited in the plea as constitutes a sufficient setting out of the record or process.

C. E. Littlefield, for plaintiffs.

VIRGIN, J. The defendant pleads in abatement of this action the pendency in this court, in this county, of another action between the same parties for the same cause; but has not set out, or enrolled in or with his plea the record or declaration on which he relies; which omission the plaintiff contends is fatally defective to the plea.

In *Fahy* v. *Brannagan*, 56 Maine, 42, and *Turner* v. *Whitmore*, 63 Maine, 526, this court substantially adopted the old English

practice, which required such setting out or enrolling of the record or declaration, although the English courts later seem to have modified their practice by adopting the more concise form, used in this case, of referring to the files and records of the court.

We feel bound by the cases cited, although the precise question was not distinctly raised therein.

The result is the entry must be

Demurrer sustained. Plea adjudged bad.
Defendant to answer over.

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

PHINEAS B. WARNER, and others, *vs.* N. JOHNSON CUSHMAN.

Oxford. Opinion December 11, 1889.

Deed. Grant of water. Mill. Water rights. Measure of use.

Where a grantor, owning all the water power on both sides of a stream, conveyed the saw mill thereon, "with the right of use of all water not necessary in driving the wheel, or its equal, now used to carry the machinery in the shingle mill,—meaning to convey a right to all the surplus of water not required for the shingle mill or other equal machinery,"—and it appeared that, at the time of the conveyance, the shingle mill contained various other machinery beside the shingle machine; *Held*, that the parties thereby fixed the measure of the water not conveyed, and that its use was not confined to the specific purpose of driving the shingle machine.

Held, also, that the owner of the shingle mill might lawfully put into it a board saw, and use the same, provided the wheel used for propelling it consumed no more water than was previously used, even if the owner of the saw mill thereby lost all his patrons.

ON REPORT.

This was an action on the case for the diversion and appropriation of water from the plaintiffs' saw mill.

(Declaration.)

In a plea of the case; for that whereas the said plaintiffs on the twenty-eighth day of February, A. D. 1868, and ever since

that time have been and still are seized in their demesne as of fee of a saw mill and privilege and its appurtenances together with the exclusive right of water except what was needed to carry "a shingle mill, then used upon said privilege, or other equal machinery," situated on the lower dam at North Paris, and had the right of use of said water for said saw mill and the sole right and privilege of serving the inhabitants of said North Paris in sawing their lumber and for using said water for any and all purposes, subject only to the limitation aforesaid, for their own profit and income, till the plaintiffs were disturbed and hindered therein by said defendant, and they ought now to hold said mill with the privileges aforesaid freely and undisturbed. Yet the said defendant in no wise ignorant of the premises, but intending and contriving maliciously, to disturb the plaintiffs, and to deprive them of the income, profit and benefit of their said mill, with the privileges and appurtenances aforesaid, did on the first day of March, 1884, put into said shingle mill building, then standing upon said dam, a circular board saw, a planing machine, a threshing machine, and a tub-machine, and from said time has continued to operate said machinery and to draw the water of said plaintiffs and to saw and manufacture, without right or license, all kinds of lumber which of right belonged to said plaintiffs to do, and which their said mill could and otherwise would have done but for the aforesaid wrongful acts of said defendant, and by which the mill of said plaintiffs has been greatly injured; and for all that time they have been deprived of the profits and income of said mill, which they ought and otherwise would have had, and that their said mill and privilege and appurtenances have become of little or no value to said plaintiffs.

Whereby an action hath accrued to them to have and recover of said defendant, the damages occasioned as aforesaid by him, and which they say is the sum of * * *

The facts are stated in the opinion.

J. P. Swasey, *C. B. Benson*, with him, for plaintiffs.

Any change, either in the wheel or machinery, which increases the use or consumption of the water, is an infringement upon plaintiffs' rights. Defendant liable if no actual damage sus-

tained. *Butman* v. *Hussey*, 12 Maine, 407; *Munroe* v. *Stickney*, 48 Id. 462; *Hatch* v. *Dwight*, 17 Mass. 289. An infringement, which by repetition might ripen into an easement, is a sufficient cause of action. Angell, Water Courses, § 150, and cases cited. The limitation upon the water power, retained by the defendant's grantors, is fixed, by the deed, in two ways: First, by the amount of water necessary in driving the wheel then used, or its equal; second, by what water was then required for the shingle mill, or what machinery was then in the shingle mill, or "other equal machinery."

J. S. Wright, for defendant.

Upon the construction of the deed, counsel cited: *Blake* v. *Madigan*, 65 Maine, 522, 529, 530; *Davis* v. *Muncey*, 38 Id. 90, 93, 94; *Garland* v. *Hodsdon*, 46 Id. 511; *Hines* v. *Robinson*, 57 Id. 324; *Wyman* v. *Farrar*, 35 Id. 64, 71; *Ashley* v. *Pease*, 18 Pick. 268; *Tourtellot* v. *Phelps*, 4 Gray, 370.

The term "shingle mill" had reference to the whole building and machinery, and not to the shingle machine. The words "or other equal machinery" carry the right to use all water necessary to carry the mill, and the reference to the mill, indicates simply the quantity of water power to be conveyed, or rather to be retained. One building was called a saw mill, the other a shingle mill; and the last named was to have the first right to the water. Defendant is not to be confined to the running of the old fashioned shingle bolter then in use, or to the particular machinery then in the mill, but had the right to run any kind of machinery which did not consume any more water. "Other equal machinery" means the right to run a board saw or any other machinery which does not require any greater amount of water than the old wooden center-vent wheel consumed. With modern turbine improved wheels better results are accomplished, with more power and less consumption of water. Defendant had the right to an equal amount of water that the old wheel would vent; to run as much machinery as could be run by means of improved wheels which would not consume any more water.

Damages: Plaintiffs can only recover from the time they re-purchased of Ellingwood, because if there was any right of

action prior to that time it was in the mortgagor and not in plaintiffs. *Hatch* v. *Dwight*, 17 Mass. 289, 298.

If defendant has used any more water than he had the right to do, plaintiffs' mill was not affected thereby, and at the most only nominal damages can be awarded. *Munroe* v. *Gates*, 48 Maine, 463. Special damages must be alleged. *Plimpton* v. *Gardiner*, 64 Maine, 360.

The plaintiffs do not complain or allege damages for a wrongful use of water, which has deprived them of their right to the water, but for usurpation of business. Under the plaintiffs' declaration, we submit whether they can recover any damages;—those complained of not being recoverable, being too remote, contingent and indefinite to become an element of damages.

VIRGIN, J. On February 25, 1868, one Bartlett and one Chase owned and occupied the entire water privilege on the lower dam across the small stream at North Paris. On the north end of the dam was a saw mill and on the south end was a shingle mill which contained a shingle machine, bolting saw, splitting saw, planer and threshing machine with one water wheel.

On the above date Bartlett & Chase conveyed the saw mill to Warner (one of the plaintiffs) "with the right of use of all the water not necessary in driving the wheel, or its equal, now used to carry the machinery in the shingle mill,—meaning to convey a right to all the surplus of water not required for the shingle mill or other equal machinery."

By subsequent conveyances the plaintiffs obtained the title to the saw mill and its rights and privileges and the defendants the shingle mill and its rights and privileges,—the plaintiff Warner testifying that the whole plant, including the various kinds of machinery in it, was called the shingle mill.

The action is case by the owner of the saw mill, and the decision of the controversy depends upon the construction of the clause in the deed. On recurring to the unambiguous language there used, we entertain no manner of doubt that the parties did not thereby intend to restrict and confine the use of the water to the specific purposes of driving a shingle machine; but rather to fix the measure of the quantity of the water to be used by that

mill called the "shingle mill." The words, "necessary in driving the wheel, or its equal, now used to carry the machinery in the shingle mill," remove all possible doubt on this point when considered in connection with the fact that the "shingle mill" plant included various kinds of machinery in addition to that used for the manufacture of shingles. We think, therefore, that the defendants have an absolute and prior right to the use of the quantity of water necessary in driving "the wheel or its equal now [then] used to carry the machinery [then] in the shingle mill," to be used by them for any purpose to which they might deem it for their interests to appropriate it. *Wyman* v. *Farrar*, 35 Maine, 64; *Davis* v. *Muncey*, 38 Maine, 90; *Deshon* v. *Porter*, 38 Maine, 289; *Garland* v. *Hodsdon*, 46 Maine, 511, 515; *Covel* v. *Hart*, 56 Maine, 518; *Hines* v. *Robinson*, 57 Maine, 324, 333, and cases there cited. *Blake* v. *Madigan*, 65 Maine, 522, 529.

If the defendants, with their new iron wheel consumed more water than did the old five feet center-vent wooden wheel with its one hundred and seventy inches of water, to the injury of the plaintiffs, then the defendants must respond in damages.

The defendants put in an iron turbine wheel, set it two feet lower than the old one, thus obtaining two feet more head. They also substituted a new shingle machine for the old one and added a circular saw for sawing boards and a tub-machine,—all driven by the new wheel, but not all at the same time. On the issue of fact whether or not the new wheel consumes more water than the old, the testimony was somewhat conflicting; but the overwhelming weight of it was in favor of the defendants. Outside of the theoretical views of experts, absolute trial showed that the old spout drew down the water in the reservoir an half hour quicker than the new one used in driving the new wheel.

The burden of the plaintiffs' complaint is, that since the defendants added their saw for manufacturing boards, the plaintiffs have had no patronage for sawing boards, for their customers have gone to the defendant's mill. But if the defendant, as already seen, had the lawful right to add the board saw to his mill and to operate it so long as he used and consumed only his legal quantity of water, then although the plaintiffs lost

their former patronage, it is *damnum absque injuriâ*,—a loss to which all competitors in the same kind of business are subject to, but not a legal injury for which an action will lie. It is only another instance whereby the old mode of doing business has succumbed to modern improvements.

Judgment for the defendants.

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

ISAAC H. JAMES *vs.* THOMAS P. WOOD.

Franklin. Opinion December 11, 1889.

Game. Property. Possession. Illegal capture. Game Warden. Damages. R. S., c. 30, § 9.

The releasing of live game, illegally taken, does not interfere with the legal right or title of the person so holding it. Accordingly, *it was held*, that the defendant, a game warden without process from a proper court, was not liable to the plaintiff for releasing a moose from his possession, it having been captured by the plaintiff, at a time of the year, when it was unlawful to hunt and take moose.

There is no property in wild animals until they have been reduced to possession. Such possession when it does not arise from illegal capture, is a sufficient custody against all persons, except such as are clothed with lawful authority or process to take them.

The defendant, a game warden without legal process having seized a deer in the rightful possession of the plaintiff, claimed to justify his act upon the ground that the animal being in possession in close time was proof of its having been unlawfully taken and that, by virtue of his office, he was authorized to take and turn the deer loose. The defendant failed to show that it had been captured in violation of law; the plaintiff was, therefore, entitled to recover the value of the deer.

ON MOTION AND EXCEPTIONS.

This was an action of trespass, containing two counts; the first for breaking and entering the plaintiff's close on the sixth day of June, A. D. 1888, and liberating one moose and one deer; and the second for taking and carrying away, on the same day, such moose and deer.

The plea was the general issue, with a brief statement justifying the taking and liberation of such moose and deer as a game warden.

It appeared that the plaintiff had captured the moose in the forest, in March of the same year, and carried it to his home and there retained it in an inclosure prepared for the purpose. It also appeared that in the same month the plaintiff purchased from some person a deer and likewise retained him, at his home in confinement, until liberated in the following June.

The defendant contended that both animals were voluntarily turned loose by the plaintiff himself.

The presiding justice, among other appropriate instructions not excepted to, charged the jury:—

I. "The defendant says that he went up there and told them that he had come to liberate the animals and commanded them to do it. After the defendant had told the plaintiff that,—if the plaintiff himself went and turned the animals loose, it would be his own voluntary act and it would not charge the defendant with being a trespasser. If, on the other hand, the defendant commanded the animals to be brought out into the field and he himself liberated them, without the consent of the plaintiff, that would be an unlawful act and it would be a trespass. So, after all, you are to say whether or not, when the halters were taken from the animals by the defendant, it was by the plaintiff's consent and wish, or was against his consent and against his wish and was done forcibly. That is, was it done because the plaintiff saw fit to liberate them, or was it the defendant's act? If it was the defendant's act, forcibly, against the plaintiff's wish, then it was a trespass. If, on the other hand, the plaintiff consented to do it because he was commanded to do it by the defendant, then, he has no remedy against the defendant because he was not bound to do it.

So, after all, are you satisfied by a preponderance of the evidence that the defendant took from the plaintiff's possession these animals? If he did so take them, then, he is guilty under the plaintiff's writ of forcibly and unlawfully taking these two animals from the plaintiff's possession."

II. "But the defendant says that those animals were wild animals; that they were captured by the plaintiff, or that the moose was captured by the plaintiff at a time of the year when it was unlawful to hunt and take moose. He says, 'The deer being in possession in close time is proof of its having been unlawfully taken, and consequently I have a right in the state's behalf to take those animals and turn them loose myself.' He says in his plea that if he did do it, he did it by virtue of his authority as game warden. There is no property in wild animals until they have been reduced to possession. If they are unlawfully reduced to possession in violation of the statute, the man who does it is liable for the penalty. He may be fined or imprisoned, as the case may be; but, as long as he has those animals in his possession, he is entitled to retain them in his custody against every man except such as are clothed with lawful authority to take them from him. Now the defendant does not pretend that he had any precept from any court to seize, to attach, or to take the animals from the plaintiff's possession, and I instruct you, as matter of law, that he had no authority, under the evidence in this case, to go and forcibly take those animals from the plaintiff's possession. If the plaintiff be guilty of violating the game law, the courts will punish him for it. If these animals were unlawfully in his possession and subject to seizure, defendant might by process from a proper court take them, but he had no more authority to go there and take the animals from the plaintiff's possession and turn them loose than he would have, Mr. Foreman, in taking your horses and cows or sheep and doing the same thing."

The verdict was for the plaintiff for $125.00; one hundred dollars being for the moose, and twenty-five dollars being for the deer. The defendant excepted to the instructions of the court.

It seems that the bond which the plaintiff claimed to have given, noticed in the opinion, to obtain possession of the moose under the statute, was not signed by the plaintiff, and was in the form of a bond for goods released from attachment.

P. A. Sawyer, for defendant.

P. H. Stubbs, *W. Fred P. Fogg*, *J. J. Parlin*, with them for plaintiff.

The plaintiff had lawful possession of the moose and deer, not having killed or destroyed them in violation of law. R. S., c. 30, § 12.

About April 30, 1888, the moose and deer were seized by one Charles M. Hackett, a game warden, and immediately restored to plaintiff's possession upon his giving bond satisfactory to Hackett.

Whether plaintiff's possession was lawful or not, it was sufficient to enable him to maintain an action of trespass against a mere wrong-doer. *Craig* v. *Gilbreth*, 47 Maine, 416; *Brown* v. *Ware*, 25 Id. 411.

The last of May or first of June, 1888, defendant seized and liberated the moose and deer under pretense of authority as a game warden,—caused them to be led out and himself removed the halters which confined them, and turned them loose.

The defendant did not have any precept, and did not claim to have any.

It is only a precept that appears, upon its face, to have been issued by competent authority, that affords justification to the officer who executes it. *Guptill* v. *Richardson*, 62 Maine, 257.

HASKELL, J. Trespass *q. c.* and *d. b.* for entering upon the plaintiff's land and liberating a moose and deer there confined. The plaintiff had captured the moose and purchased the deer during close time. The defendant justifies as game warden.

I. The defendant cannot be considered as having seized the game under any provision of statute, inasmuch as he held no precept, either to arrest the defendant, or to seize the game; nor does he pretend that he ever had any intention of procuring one. His testimony, that he acted by the consent of the plaintiff was not believed by the jury; and as the evidence is conflicting upon that point, the court cannot say that the finding of the jury was wrong.

II. No property exists in wild animals so long as they remain in a state of nature; but, when killed or reclaimed, they become property; absolutely, when killed, and qualifiedly, when reclaimed; for, when restored to their natural, wild and ferocious

state, the dominion of man over them is at an end, and all property in them is extinguished. 7 Co. 16 Finch. 176; Kent. Com. part V, c. 35, § 2; *Blades* v. *Higgs*, 11, H. L. 621.

Since they are the subjects of property, their possession must be *prima facie* title, as with all other chattels, and sufficient to support an action concerning them against any wrong-doer. *Union Slate Co.* v. *Tilton*, 69 Maine, 244; *Adams* v. *McGlinchy*, 66 Maine, 474; *Craig* v. *Gilbreth*, 47 Maine, 416; *Brown* v. *Ware*, 25 Maine, 411; *Burke* v. *Savage*, 13 Allen, 408; *Magee* v. *Scott*, 9 Cush. 148; *Armory* v. *Delamirie*, 1 Stra. 504.

The burden is, therefore, upon the defendant to justify his act if he would defeat the action. *Hodsdon* v. *Kilgore*, 77 Maine, 155. He has not justified the taking of the deer; for the plaintiff's possession of it is sufficient evidence of title until impeached. Moreover, the evidence shows that the plaintiff purchased the deer, and fails to show that it had been captured in violation of law. He, therefore, is entitled to recover the value of the deer. The instructions of the presiding justice relating to the deer were correct; and the evidence sustains the verdict for its value.

III. One cannot justify the taking of a chattel to which he has no title by showing that the person, from whom he took it, is not the owner. *Fiske* v. *Small*, 25 Maine, 453. But, if the subject of the asportation had not become property at all, then the loss of it occasioned no damage. A poacher, who has killed game and thereby made it absolutely property, takes no title to it as against the owner of the soil whose property it would have been, had he killed it. *Blades* v. *Higgs*, *supra*.

This court has said in substance, that the law protects the title or claim of no one that arises from a violation of law. It has held that no action can be maintained upon a contract executed on Sunday; that the price of chattels sold in violation of law can not be recovered, and that no action can be maintained on a note given for goods bought to be peddled contrary to law; that no action for a tort arising from transactions done by the plaintiff in violation of the Sunday laws can be maintained. The court says: "The law distinguishes between rights acquired in conformity with and arising under its provisions, and claims originating in

their clear and palpable violation; that it will not enforce claims made in contravention of its mandates, nor protect property held against and being used for the deliberate purpose of disobeying its enactments. A different course would be suicidal. The law cannot lend its aid to the destruction of its own authority and to the disobedience of its own commands." *Lord* v. *Chadbourne*, 42 Maine, 429, 439.

Damages were claimed for preventing the plaintiffs from doing an illegal act, which, if done, would have been criminally punishable, and the court say: "It is difficult to perceive how the prevention of an offense constitutes a valid cause of action on the part of the would be-offender, who is interfered with in the commission of his intended offense. It is still more difficult to understand how any damages can have been sustained by reason of such interference." *Railroad Co.* v. *Smith*, 49 Maine, 9.

Suppose a hunter has his rifle levelled at game in close time, and some one shoves it aside so that the game is missed, shall the hunter have damages? He has only been prevented from continuing a criminal act.

Suppose lobsters illegally taken are thrown overboard alive, is he who does it a trespasser? Shall the taker of them have damages for his illegal catch? Or suppose one lands a salmon in violation of law, and a by-stander, while it is yet alive, throws it back into the water, shall the fisherman have the value of the salmon that the law forbids his having at all?

When game is killed, it absolutely becomes property, but when taken alive, only conditionally so; for, when released, property in it is gone. So long, then, as the possession of live game is illegal, qualified property in it, is illegal also; and the releasing of such game interferes with no legal right or title of the person illegally holding it captive.

The plaintiff's possession of the moose was *prima facie* title; but, when it appears that his possession was gained in violation of law, it cannot be that the same law will say that his illegal act gave him a legal title. And if he had no legal title to the moose, he has suffered no damages from its being set loose.

The plaintiff's illegal act prevented the moose from becoming

property at all. Not so with the illegal act of a thief, who may have stolen a coat, for the coat was already property, and had an owner, who alone could lawfully take it from the thief. The public, whose servant the defendant was, stands in the place of the owner of the coat; care should be taken, therefore, not to confound the doctrine of this case with the well settled rule of law, that possession of property is a good title against everybody but the true owner.

IV. R. S., c. 30, § 9, provides: "No person shall (during close time) in any manner hunt, kill or destroy any moose under * * penalty" of $100. The plaintiff followed the moose in the forest until it became snow-bound, and then, by the use of a rope, tied it to a tree, and finally bound it upon a sled, and hauled it some fifteen miles to his home, where he confined it until it was released by defendant. Without doubt this conduct resulting in capture was in violation of the statute. The plaintiff did not destroy or kill the animal, but he did hunt and thereby capture it.

The purpose and scope of the statute is to give moose absolute immunity from the vexations of men during a portion of each year, deemed, by the legislature, necessary for their preservation and protection, and to prevent their decimation and extinction. The defendant's act, therefore, was meritorious and in aid of the purpose of the statute; and while his authority gave him no especial protection, still, duty as an officer called him to interfere and prevent a continued violation of the statute.

The contention that the game had been bonded by the plaintiff is not sustained. No bond, signed and conditioned as provided by statute, was ever given. It was so irregular that it is absolutely void.

Motion and exceptions sustained, unless plaintiff remits $100.

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

MOSES S. PARKER, and others, in equity, *vs.* HIRAM TITCOMB, and others.

Franklin. Opinion December 11, 1889.

Towns. School districts. Alteration. Meeting. Warrant. Reconsideration of vote. Tax. Injunction. R. S., c. 3, § 7, c. 11, § 1. Special act, c. 377 of 1889.

A constable made return upon a warrant for a town meeting, that he had "caused" an attested copy of the warrant to be posted, etc., instead of returning that he personally did it. *Held*, that the return was sufficient.

The inhabitants of a town, "voted, by a major vote, to set off the inhabitants of school district No. 22, with their estates, and annex the same to school district No. 9, as recommended by the municipal officers and supervisor of schools." *Held*, to be a sufficient compliance with R. S., c. 11, § 1.

A town may reconsider its action at the same meeting, or at a subsequent meeting, if seasonably done, provided it does not destroy or impair intervening rights.

By R. S., c. 11, § 1, towns are forbidden to alter their school districts without the recommendation of the municipal and school officers. In the absence of such recommendation attempted action to alter, by uniting or disuniting the districts, would be *ultra vires.*

The legislature may divide towns into school districts as it pleases. Three school districts, in Farmington, had been legally annexed to a fourth by vote of the town. The town, afterwards, ineffectually voted to reconsider that vote. *Held*, that by the act of the legislature, c. 377, of 1889, the vote to reconsider had become valid.

BILL IN EQUITY, considered by the law court on stipulation of parties.

H. L. Whitcomb, for plaintiffs.

J. C. Holman, for defendants.

HASKELL, J. Bill in equity to restrain the assessment and levy of a tax upon the inhabitants of school district No. 22, to rebuild a school house, because that district had been abolished, and its territory annexed to district No. 9, by vote of the town of Farmington at a special meeting called for that purpose in April, 1888.

I. It is objected that the town meeting was not legally warned and held, inasmuch as the constable, who served the warrant, returned service "by causing to be posted up an attested copy of such warrant," etc., instead of returning that he personally did it.

The statute, R. S., c. 3, § 7, provides that town meetings shall be notified by the person to whom the warrant is directed by posting an attested copy thereof in some public and conspicuous place" etc., and that "the person who notifies the meeting shall make return on the warrant, stating the manner of notice, and the time when it was given."

Ordinarily the duties of an officer are personal, and must be personally performed by himself. The above statute requires a personal return to be made on the warrant, stating the manner of notice and the time when it was given. This duty is a personal duty, and cannot be delegated to or performed by another and, for the truthfulness of a return, so made upon the warrant, the officer or person making it is held to strict account.

In this cause, the return of the constable shows that legal notice of the special meeting had been given, and that he caused it to be so done. For the truth of his return he is responsible, and inasmuch as the statute does not make the posting of the notices a personal duty, it is sufficient, if the return of the officer shows the notices to have been seasonably and properly posted, although not by his own hand. He could not have truthfully made return that he caused the notices to be posted, unless they had been posted under his own eye. The meeting, therefore, was legally warned and held.

II. It is objected that the vote of the town is inoperative for want of certainty and of a compliance with R. S., c. 11, § 1, that provides, school districts shall not be "altered except on recommendation of the municipal officers and superintending school committee, accompanied by a statement of facts, and on conditions proper to preserve the rights and obligations of the inhabitants."

It is not contended that the recommendation of the officers and their statement of facts required by the statute were not suffi-

cient to authorize action in the premises by the town; but, it is claimed that the language of the vote is insufficient to accomplish its purpose. The language is, "Voted, by major vote, to set off the inhabitants of school district No. 22 with their estates, and annex the same to school district No. 9, as recommended by the municipal officers and supervisor of schools." The vote seems to be plain and comprehensive; and no good reason has been shown why it should not be held to have worked the purpose intended by it.

III. It is objected that the vote of the town at the April meeting consolidating school districts Nos. 8, 9, 10 and 22, was reconsidered at a subsequent meeting of the town, held for the purpose, in the following May. The vote is: "Voted, by major vote to reconsider and rescind the vote whereby they voted to annex school district No. 22, in said town, to school district No. 9, in said town." Votes of the same tenor were passed relating to the votes of the April meeting annexing districts 8 and 10 to district No. 9. The votes at that meeting, in effect, annexed school districts Nos. 8, 10 and 22, to, and consolidated them, with school district No. 9.

A town may reconsider its action at the same meeting or at a subsequent meeting if seasonably done. That is, if the action of the town hath not already accomplished its purpose. For, if the vote of a town once accomplishes its purpose, works out the intended result and hath spent its force, it cannot be reconsidered and taken back.

A town is free to act within its legal scope as it pleases. It may take action in one direction to-day, and in another to-morrow, provided it does not impair intervening rights. There is a wide difference, however, between reconsidering action that has once taken effect and worked its result, and, voting action to restore the original state of affairs by original and new proceedings.

When the April meeting adjourned, its votes consolidating three of its school districts into and as a part of district No. 9 became effective and worked their purpose. The territory of the three annexed districts became a part of the territory of the district to which they were annexed. Their organization as districts

for further school purposes were thereby abolished and extinguished. They were thereafterwards unknown as school districts in Farmington. They were as effectually abolished as though they had never been.

The statute, R. S., c. 11, § 1, forbids the alteration of districts, except upon the recommendation of municipal and school officers. Such recommendation to divide district No. 9, after its size had been increased by the annexation of three sparsely settled outlying districts, had not been given before the May town meeting attempted to dismember district No. 9, that had been enlarged, upon the express recommendation of the municipal and school officers, only the month before. If these officers should see fit to recommend the division of district No. 9, the town might legally divide it; but, without such recommendation, the town had no power to act. Attempted action would be *ultra vires*.

But it is said that an act of the legislature, c. 377, 1889, has legalized the vote of the town at its May meeting. The act is as follows: "The acts and doings of the town of Farmington in their town meeting of May 12, 1888, relating to school districts Nos. 8, 9, 10 and 22 are hereby legalized and made valid."

It is within the power of the legislature to divide towns into school districts as it pleases. Three school districts had been legally annexed to a fourth by vote of the town. The town ineffectually voted to reconsider that vote. If the act of the legislature can be considered as a division of the territory of the new district into fractions corresponding to the old districts, then the vote of reconsideration has become valid, not from any force of itself, but from a decree of the sovereign power of the State; and we think such to be the true consideration of the case. The votes of consolidation identify the limits of the old districts that became an integral part of the new. The terms of the vote of reconsideration breaks the new district into the old fractions, and the legislature made that vote valid and effective, precisely as though it had specifically provided that the new district should be divided into four parts, corresponding to the numbers and boundaries of the old districts.

The districts once abolished and re-created by the legislature

may be without legal officers or organizations, but they must reorganize as provided by statute. The tax voted by new district No. 9, and not assessed, cannot change the result.

Bill dismissed with costs.

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

JOHN S. STEVENS *vs.* ISAAC SPEAR.

Knox. Opinion December 26, 1889.

Costs. Reference. R. S., c. 82, § 120.

Where a case was referred, under rule of court, and the report awarded the plaintiff less than twenty dollars and "legal costs of court to be taxed by the court," and the defendant claimed that quarter costs only should be taxed. *Held*, by R. S., c. 82, § 120, in such cases it is provided that, "full costs may be allowed unless the report otherwise provides." In this case the report did not otherwise provide, and, therefore, the plaintiff was entitled to full costs.

ON EXCEPTIONS.

The defendant excepted to the ruling of the court at *nisi prius*, in ordering full costs to be taxed for the plaintiff.

T. P. Pierce, for defendant.

J. E. Moore, for plaintiff.

DANFORTH, J. This action was referred and the report awards to the plaintiff less than twenty dollars. The only question raised by the exceptions, is whether full or quarter costs shall be allowed.

R. S., c. 82, § 120, after establishing the general rule that in actions where a sum not exceeding twenty dollars shall be recovered, but quarter costs shall be allowed, provides that, "On reports of referees, full costs may be allowed, unless the report otherwise provides." In this case the report does not

"otherwise provide." The term "legal" does not modify or change the effect of the award in respect to costs. If left out, legal costs only,—that is, such as the statute provides,—could be taxed; with it, no less.

The cases *Thompson* v. *Thompson*, 31 Maine, 130, and *Hilton* v. *Walker*, 56 Maine, 70, relied upon in argument were decided under the provisions of § 121, which provides that cases tried before a jury, in which a set-off has been filed, and a sum not exceeding twenty dollars has been recovered, the plaintiff is entitled to full costs, if the jury certify in their verdict that the damages were reduced so low as that sum, by reason of the amount allowed in set-off." In those cases the certificate of the jury was wanting. They, therefore, fell under the general rule, by which but quarter costs were allowable. In this case, there is no provision in the report confining the plaintiff to quarter costs; it therefore falls under the provision allowing full costs.

Exceptions overruled.

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

HORACE GILPATRICK *vs.* STEPHEN L. RICKER, appellant.

York. Opinion December 27, 1889.

Tender. Profert in curiâ. Waiver. Practice.

It is settled law in this state that a tender can only be kept good by payment into court on the first day of the term.

Profert in curiâ is not a traversable part of a plea of tender.

A plaintiff may waive the payment of money into court, upon plea of tender, so long as the court does not interfere; and if the money be paid in before the plaintiff moves for relief on account of its non-payment, the irregularity is cured.

The plaintiff, after payment of the tender into court having allowed the case to proceed to trial as on a plea of *non assumpsit* to the balance of his claim, requested the court to rule that the tender had not been kept good. *Held*, that he had waived the point, and that the request came too late.

ON MOTION AND EXCEPTIONS.

This was an appeal from a trial justice's court, for York county, in which judgment was rendered for the plaintiff in an action of assumpsit on account annexed. In that court the defendant relied on a tender.

After verdict, in this court, in favor of the defendant, the plaintiff moved to set the verdict aside as against law and evidence and excepted to matters of law as appears in the opinion.

H. V. Moore and L. S. Moore, for plaintiff.

F. M. Higgins, for defendant.

HASKELL, J. The plea of tender of money without *profert in curiâ* is bad on demurrer; *Carley* v. *Vance*, 17 Mass. 389; and, without the *profert* made good by the actual payment of the money into court, is a nullity and need not be noticed or replied to by the plaintiff. *Sheridan* v. *Smith*, 2 Hill, 538. It is settled law, in this state, that a tender can only be kept good by payment of the money into court upon the first day of the term. *Pillsbury* v. *Willoughby*, 61 Maine, 274; *Reed* v. *Woodman*, 17 Maine, 43. Even after verdict for the defendant upon a plea of tender, where the money had not been paid into court, judgment was rendered for the plaintiff. *Claflin* v. *Hawes*, 8 Mass. 261.

The *profert in curiâ* is not a traversable part of the plea. It is a present averment, to be accompanied by an act of which the court takes notice as done in its presence, and shown by its own records. Failure to make the *profert* good is an irregularity, to be dealt with summarily by the court. Without the money paid in, it would be a waste of time to try the issue of tender, inasmuch as, if the tender be established by a verdict, it would be unjust to give judgment for the defendant and leave the plaintiff's admitted debt unpaid. Complete justice could only be done, in such case, by giving judgment for the plaintiff *non obstante veredicto*, as was done in *Claflin* v. *Hawes*, *supra*, and as ought to have been done before the trial.

The plaintiff, however, may waive the payment of money into court, so long as the court does not interfere to save its own time

from waste on immaterial issues. He may do this by traversing or replying to a plea of tender, where the *profert in curiâ* has not been made good; and if the money be paid in, before the plaintiff moves for relief on account of the want of it, the irregularity is cured. *Storer* v. *McGaw*, 11 Allen, 527; *Reed* v. *Woodman* is not authority against this doctrine, for there, the money was paid in on the 17th day of the term, and *non assumpsit* pleaded as to the balance of plaintiff's claim. The verdict was for the defendant, and the court reserved the question of costs arising from the supposed tender, and decided that it had not been kept good. There had been no plea of tender, and the plaintiff did nothing to waive his rights. He, therefore, his debt being paid, had judgment for his costs.

In this case, the defendant, upon the return day of the writ before a magistrate, pleaded tender before action brought, with *profert in curiâ* of one half the sum sued for; and the record shows that the money was then tendered to the plaintiff, who refused it. The money was not taken and retained by the magistrate as it should have been, but was retained by defendant's counsel. The plaintiff, without first insisting that the *profert* be made good, traversed the defendant's plea of tender and averred a greater sum due. Without issue joined or other pleadings in the case, than those mentioned, it was tried before the magistrate, who gave judgment for the plaintiff for the full amount of his claim; and the defendant appealed to the court below, where on the 15th day of the term, and before the trial, he paid his tender into court. The case was there tried without further pleading, and the jury found that the defendant did not promise, and that the tender had been legally made and kept good.

The proceedings are irregular from the beginning to the end; and more from the fault of plaintiff's counsel than from any other cause. In the first place, when the money was tendered him, he might have taken it, although intending to deny the tender. 15 Petersd. 22; 1 Bos. & Pul. 332; 6 Bacon, 465; 5 Dane, 501. When he did not take it, he should have seen that the magistrate did take it, before he replied to defendant's plea, for until the *profert in curiâ* had been made good, the plea was a nullity

and no defense to the action. He elected to traverse the plea, without first insisting upon his security, and he thereby waived the payment of the money into court until he should call for the same, which he did not do until the irregularity had been cured by its payment into court that, in the eye of the law, was payment to the plaintiff.

At the trial, plaintiff's counsel requested the court to charge the jury, in substance, that the tender had not been kept good. The request came too late; he had waived the point. He allowed the case to proceed to verdict as on a plea of *non assumpsit* to the balance of the plaintiff's claim, after the money paid into court had been deducted from it, and was cast upon the issue. He cannot now insist upon the irregularity. He took his chance to win, and lost, and must abide the result. *Strout* v. *Durham*, 23 Maine, 483.

The money paid into court belongs to the plaintiff. It is a payment upon his claim, and cannot be withdrawn by the defendant. In no event could that part of his claim so paid have been included in a judgment in his favor. *Call* v. *Lothrop*, 39 Maine, 434. The evidence shows a tender legally made, and sustains the verdict, that no more was due.

Motion and exceptions overruled.

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

CITY OF ROCKLAND *vs.* THE ROCKLAND WATER COMPANY.

Knox. Opinion December 27, 1889.

Tax. Over-valuation. Time of payment. Interest. R. S., c. 1, § 6; *c.* 6, § 6, *Par. X*, 120, 121; *R. S. of* 1871, *c.* 6, § 93; *Acts of* 1876, *c.* 92; 1880, *c.* 176.

Over-valuation cannot be set up as a defense to a suit to recover taxes.

Cities, under R. S., c. 6, §§ 120 and 121, must determine, at the time when the money is raised, and not afterwards, when their taxes shall become payable and what rate of interest thereafter shall accrue.

ON REPORT.

This was an action of debt against the defendant corporation for the collection of unpaid taxes for the municipal year 1886-7.

The list required by R. S., c. 46, § 30, to be filed by the clerk or treasurer, with the assessors on or before April 8, 1886, under oath, of all stockholders residing in Rockland, was not presented until April 14, and does not appear to have been signed or sworn to.

(Declaration.)

In a plea of debt; for that the said Rockland Water Company on the first day of April, A. D. 1886, was then located in said city of Rockland, and liable to taxation therein, and was then and there possessed of, and owner of, personal property; and then and there David H. Ingraham, Alden U. Brown and Charles L. Allen were the duly elected and legally qualified assessors of said city of Rockland; and the said assessors did duly and legally assess upon the personal property of said Rockland Water Company, as its proportion of the taxes of said city of Rockland and the due proportion of the state and county taxes alloted to said city of Rockland, for the year then current, the sum of six hundred and seventy-five dollars; and the said assessors thereafterwards, to wit, on the sixth day of August, A. D. 1886, did make a perfect list thereof under their hands, and commit the same to Andrew J. Erskine, who was then and there duly elected and legally qualified as collector of said city of Rockland, with a warrant in due form of law, of that date, under the hands of said assessors. And said city of Rockland avers that the payment of the said tax has been duly demanded of the said Rockland Water Company, by the said collector, prior to the commencement of this suit, and prior to the tenth day of October, A. D. 1886.

And said city of Rockland further avers that said tax by virtue of a vote of the city council of Rockland, passed prior thereto, became due and payable on the tenth day of October, A. D. 1886, and bore interest from and after said date at eight per cent per annum. And the said plaintiff further avers that the mayor and treasurer of said city of Rockland have ordered and directed this suit to be brought against the said defendant company.

Whereby, and by reason of the statute in such case made and provided, an action hath accrued to said city of Rockland, to have and recover of said Rockland Water Company the sum of six hundred and seventy-five dollars, with interest thereon from the date of October 10, 1886, and at the rate of percentage aforesaid.

Also, for that the said Rockland Water Company on the first day of April, A. D. 1886, was then located in said city of Rockland and liable to taxation therein, and that although the stock, or property of said company, had been divided into shares and distributed among divers stockholders, the clerk, secretary, or other officers of said company did not by the eighth day of said April return under oath to the assessors of said city of Rockland the names of such stockholders liable to taxation in said city of Rockland, the amount of stock owned by such stockholders on said first day of April, whereby and by reason of the statute in such case made and provided, such stock and personal property of said company became for the purpose of taxation the property of said company, and liable to taxation to said company; and said company was then and there possessed of, and owner, as aforesaid, of personal property, and that then and there David H. Ingraham, Alden U. Brown and Charles L. Allen were the duly elected and legally qualified assessors of said city of Rockland; and the assessors did duly and legally assess upon the personal property as aforesaid, of said Rockland Water Company, as its proportion of the taxes of said city of Rockland, and the due proportion of the state and county taxes allotted to said city of Rockland for the year then current, one other sum of six hundred and seventy-five dollars; and the said assessors thereafterwards, to wit, on the sixth day of August, A. D. 1886, did make a perfect list thereof under their hands and commit the same to Andrew J. Erskine, who was then and there duly elected and legally qualified as collector of said city of Rockland, with a warrant in due form of law, of that date, under the hands of said assessors. And said city of Rockland avers that the payment of the said tax has been duly demanded of the said Rockland Water Company, by the said collector, prior to the commencement of this suit, and prior to the tenth day of October, A. D. 1886.

And said city of Rockland further avers that said tax, by virtue of a vote of the city council of Rockland, passed prior thereto, became due and payable on the tenth day of October, A. D. 1886, and bore interest from said date at eight per cent per annum. And the said plaintiff further avers that the mayor and treasurer of said city of Rockland have ordered and directed this suit to be brought against the said defendant company.

Whereby, and by reason of the statute, in such case made and provided, an action hath accrued to said city of Rockland, to have and recover of said Rockland Water Company the sum of six hundred and seventy-five dollars, with interest thereon from the date of October 10, 1886, and at the rate of percentage aforesaid.

PLEA: General Issue.

T. P. Pierce and E. K. Gould, for plaintiff.

W. L. Putnam and J. O. Robinson, for defendant.

The tax is void because,

1st. There was embraced, in the valuation and tax, realty situated in Camden; which, both by general provisions of statute and by the express exemption relative to water companies was not assessable in Rockland, and the amount included on account of it cannot be distinguished.

2d. Likewise the real and personal estate of the corporation in Rockland was massed in one valuation and assessment beyond any possibility of severance.

3d. Therefore, because the assessors of Rockland have assumed jurisdiction to tax property which they could not lawfully tax, and because they have combined in one undistinguishable mass the two distinct subjects of taxation, namely: realty and personal property, and because also there is no method by which either the tax-payer, the city or the court can determine what is due from this corporation for the property within the jurisdiction of the assessors, or for either realty or personalty, the whole tax is necessarily void.

The aqueducts and conduits are realty; erroneously assessed as personalty.

HASKELL, J. Debt for a tax. The defendant was domiciled in plaintiff city and liable to taxation there. A tax was laid upon specific parcels of defendant's real estate valued at $1,100, which it promptly paid, and upon "aqueducts, pipes, conduits, pumps and other personal property, including money on hand or at interest," valued in gross at $30,000. To recover the tax assessed and laid upon the last item of valuation and interest thereon this suit was wrought.

I. This is not the case of a tax-payer not domiciled within the jurisdiction of the assessors who laid the tax, and not liable to be assessed for a personal tax at all, as in *Briggs* v. *Lewiston*, 29 Maine, 472; and *Hathaway* v. *Addison*, 48 Maine, 440, and *Martin* v. *Portland*, 81 Maine, 293, and *Preston* v. *Boston*, 12 Pick. 7, or, if within their jurisdiction not liable to taxation, as in *Sumner* v. *First Parish in Dorchester*, 4 Pick. 361, and *Dunnell Mfg. Co.* v. *Pawtucket*, 7 Gray, 277, and *Massachusetts Genl. Hospital* v. *Somerville*, 101 Mass. 319, or as in *Torrey* v. *Millbury*, 21 Pick. 64, where a part of the assessment was laid without authority of law and could be distinguished; but rather a case of over-valuation, as *Stickney* v. *Bangor*, 30 Maine, 404, and *Hemingway* v. *Machias*, 33 Maine, 445, and *Gilpatrick* v. *Saco*, 57 Maine, 277, and *Waite* v. *Princeton*, 66 Maine, 225, and *Bath* v. *Whitmore*, 79 Maine, 182, and *Osborn* v. *Danvers*, 6 Pick. 98, where a resident of Danvers sued to recover back a tax laid upon personal property invested in business in another state, and the court held that the action could not be maintained, because it was a case of over-valuation, and that the only remedy was under a statute similar to ours, providing a method to procure an abatement.

The law is clearly stated in *Howe* v. *Boston*, 7 Cush. pp. 273 and 275. The court says: "We consider the rule well settled in this commonwealth, that, where a party is rightfully taxed for any personal or any real estate, his remedy and his only remedy for an excess of taxation is by application for abatement. * * * But, on the other hand, if a person not legally liable to be taxed in a city or town is nevertheless assessed there, then the assessment is regarded as wholly void. * * * Personal estate

follows the domicile and is to be assessed to the owner in the place of his residence. Real estate is assessed in the town or city in which it is situated, to non-residents as well as residents. The former constitutes no lien on the property; the latter creates one on the premises assessed, for the amount assessed thereon. These differences in the mode of assessing and collecting taxes on personal and real property have caused each to be regarded, in law, as a separate and distinct class or subject of taxation in relation to which, the remedies of parties are entirely separate and distinct. But this distinction goes no farther than to allow the validity of an assessment on each class or subject of taxation to be determined by itself, irrespective of the other; * * and in order to render the whole tax invalid on either kind of property, * * it must be made to appear that the party aggrieved was not liable to assessment for any part of that class or subject of taxation, of which he complains. It follows, therefore, that a party cannot be permitted to go behind the assessment, either on personal or real estate, and look into the details and particulars of which the entire valuation is made up, and claim to recover back a portion of an entire assessment, on the ground that it included property of which he was not the owner, and for which he was not liable to assessment." *Lincoln* v. *Worcester*, 8 Cush. 55; *Bourne* v. *Boston*, 2 Gray, 494; *Salmond* v. *Hanover*, 13 Allen, 119.

How do these doctrines affect the case at bar? Clearly the intention of the assessors was to lay the tax in question upon personal property only. They had already assessed defendant's real estate separately. If the assessment were upon personal property alone, it would not be contended by defendant's counsel that the assessment would be insufficient to support the plaintiff's action. *Tobey* v. *Wareham*, 2 Allen, 594; *Noyes* v. *Hale*, 137 Mass. 266; *Bemis* v. *Caldwell*, 143 Mass. 299.

The assessment specifies, at least, some personal property liable to taxation; and was, therefore, legally laid, as a tax, upon that class of property. If the assessment was too large, for any reason, either from including property that the defendant did not own, or that was exempt from taxation, or that could not be lawfully

taxed as personal property, it is clearly a case of over-valuation, that cannot be set up in defense of this action.

What matters it, whether "aqueducts, conduits, etc.," are real estate under the doctrines of *Hall* v. *Benton*, 69 Maine, 346, and *Kittery* v. *Portsmouth Bridge Co.*, 78 Maine, 93; or whether they are exempt from taxation under R. S., c. 6, § 6, Par. X, because used by the city for the extinguishment of fires without charge? In either case, when classed with personal property subject to taxation, under a valuation *in solido*, the result must be an over-valuation,—a valuation larger than can be justly placed upon the property liable to taxation. In such case abatement proceedings alone can fairly apportion what tax shall be paid and what remitted. If the defense, in this case, should prevail, injustice would be the result; for the court cannot know what portion of the tax should be paid and what remitted.

Where forfeitures are claimed for the non-payment of taxes, the most exact compliance with the law must be observed; but when taxes are sued for and the defendant is only asked to share his just proportion of the public burdens, the most liberal construction and consideration should be given to procedure in the assessment of taxes. *Cressey* v. *Parks*, 76 Maine, 532, 534.

II. R. S., c. 6, § 120, provides: "Towns at their annual meetings may determine when the lists named in § 97 shall be committed, and when their taxes shall be payable, and that interest shall be collected thereafter." Section 121 provides: "The rate of such interest, not exceeding one per cent a month, shall be specified in the vote, and shall be added to and become a part of the taxes."

So far, the statute seems plain; but, when applied to cities under authority of R. S., c. 1, § 6, that provides, in the construction of statutes, "the word town includes cities and plantations, unless otherwise expressed or implied," the intent of the legislature is not plain, and the practical application of the statute becomes difficult. Towns may act under the statute at their annual town meetings when town officers are chosen and sufficient money is raised by vote to meet the necessary expenditures for the ensuing municipal year, and all other prudential affairs of the town are

usually considered. But cities have no annual meetings corresponding to those of towns. They have annual elections to choose the principal city officers; and these officers organize and become a council, where all levies of taxes are voted, and other city business is transacted, as it may arise during the municipal year.

R. S., of 1871, c. 6, § 93, provided: "Towns, at their annual meetings, may determine when their taxes shall be payable, and that interest shall be collected after that time." In 1876, this statute was made to include cities; chap. 92 provided: "Whenever a city or town has fixed a time within which taxes assessed therein shall be paid, such city, by its council, and such town at the meeting when money is appropriated or raised, may vote that on all taxes remaining unpaid after a certain time, interest shall be paid at a specified rate, not exceeding one per centum per month, and the interest accruing under such vote or votes shall be added to and be a part of such taxes."

In 1880, the legislature, without referring to the act of 1876, amended § 93 of R. S., of 1871, so that it should read as § 120 of R. S., now reads. The commissioner in his revision added § 121 and indicated in the marginal note that it contained the enactment of 1876. His revision went to the legislature, bearing the marginal note, and after being considered by a committee was finally enacted and the old statutes repealed. So it appears that no change in the law was intended, and, if sufficient phraseology remains in the statute, by fair construction, to give it the force intended by the legislature, it should be done.

The statute authorizes towns, at their annual meetings when the necessary levies for taxes are voted, to determine when the taxes shall become payable, and what interest shall thereafter accrue. In applying this statute to cities, the expressed limitations in it should be imposed, so far as they can be. City councils, after obtaining the estimates of the necessary expenditures for the municipal year, vote to raise the money to be assessed precisely as towns do at their annual meetings; and the same reasons apply with equal force to both, requiring them to then determine, if at all, when the taxes shall become payable, and what rate of interest thereafter shall accrue. The subject matter is

then vivid in the minds of those called to act upon it, and can never again so well receive intelligent consideration. Moreover, the tax payer then has ample notice of the time when his taxes will fall due, and he is given a fair opportunity to provide for them. It would be an unreasonable construction of the statute, that would give a city council power, at any time during the municipal year, even after the taxes have been assessed and committed for collection, to vote interest upon those that might be overdue and unpaid. That could never have been the intention of the legislature, as clearly appears from the act of 1876.

In the case at bar, the vote as to interest, touching the taxes in suit, in no respect complies with the requirements of the statute, and is therefore null.

Judgment for plaintiff for the tax only, $675.00, *with interest from date of the writ.*

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

MARIA E. SULLIVAN *vs.* MAINE CENTRAL RAILROAD COMPANY.

Kennebec. Opinion December 28, 1889.

Sunday law. Railroad. Personal injuries. Damages. R. S., c. 124, § 20.

Riding upon Sunday for exercise, and for no other purpose, is not a violation of the statute in relation to the observation of the Lord's day.

The statute was not intended as an arbitrary interference with the comfort and conduct of individuals when necessary to the promotion of health in walking or riding in the open air for exercise.

ON MOTION AND EXCEPTIONS.

This was an action to recover for personal injuries received by the plaintiff, on Sunday, August 18, 1883, when she was thrown from a wagon while crossing the defendants' track, in Burnham.

The plaintiff, a cripple, was riding with her brother along the public highway, for the benefit of the air, and when the horse

reached the railroad, which crosses the highway at Burnham station, it stepped into a hole or space between the rail and planking and was thereby thrown down, at the same time causing the occupants of the carriage also to be thrown upon the ground. The plaintiff when thus thrown from the carriage struck upon the ground in a sitting posture, and alleged that she received severe injuries from which she has endured prolonged suffering. The defendants contested the extent of these injuries. There was a verdict of $2118.18 for the plaintiff.

The defendants contended that the plaintiff, at the time of the accident, was travelling in violation of the statute relating to the observance of the Lord's day. The case was tried in the superior court, for Kennebec county, and the presiding justice, upon this point instructed the jury as follows :—

"I instruct you as matter of law in this case, that, if you find that on the day of the alleged accident this plaintiff accepted the invitation of her brother to ride in the open air, with no purpose of stopping at any place other than at her own home, after they had ridden as far as they desired, with no object of business or concerted arrangement for pleasure, and no other object than that of enjoying the open air and such gentle exercise as might be afforded by thus riding in that wagon with her brother, in view of the fact, I say, that she had been deprived of one of her legs and was unable to walk with the same comfort and facility as others, and enjoy such exercise as might be afforded by walking, she would not be travelling within the meaning of this statute and in violation of the law of the state; and would not, by that fact, be prohibited from recovering any compensation, to which she might otherwise be entitled, for any injury sustained by reason of the negligence of the defendant corporation."

To these instructions the defendants excepted.

F. A. Wilson and C. F. Woodard for defendants.

Sunday law: *Day* v. *Highland Street Ry.*, 135 Mass. 113, 114.

Motion: *Haring* v. *N. Y. & Erie R. R. Co.*, 13 Barb. 9, 15, 16; *Suydam* v. *Grand Street & Newton R. R. Co.*, 41 Barb. 375, 380; *St. Louis, Alton & Terre Haute R. R. Co.* v. *Manly*, 58 Ills.

300, 309; *Toomey* v. *London, Brighton & South Coast Ry. Co.*, 3, C. B. (N. S.) (91 E. C. L.) 146; Pierce on Railroads, p. 312.

H. M. Heath and O. A. Tuell, for plaintiff.

Case at bar is not a statutory action. It is a claim at common law. The rule in Maine that unlawful travelling on Sunday bars recovery has been enforced only in statutory actions against towns,—their duties being statutory, and liability statutory, liable only to travellers "lawfully travelling." Their duty to keep the highway "safe and convenient" is for travellers using the highway lawfully. A violator of one statute cannot invoke another statute upon which to build his action. Upon these grounds, and in cases against towns, the Mass. rule is defensible. *Johnson* v. *Irasburg*, 47 Vt. 28; S. C. 19, Am. Rep. 111.

FOSTER, J. The defendants' contention in support of the single question raised by the exceptions, is founded upon the erroneous assumption that riding upon Sunday for exercise, and for no other purpose, is a violation of the statute in relation to the observance of the Lord's day. The statute is not to be so construed. Such an interpretation would be contrary to the spirit as well as the letter of a statute which expressly excepts from its prohibition works of necessity or charity. R. S., c. 124, § 20.

And this exception may properly be said to cover everything which is morally fit and proper, under the particular circumstances of the case, to be done upon the Sabbath.

Tested by this rule, our own court in *O'Connell* v. *Lewiston*, 65 Maine, 34, and *Davidson* v. *Portland*, 69 Maine, 116, has held that walking out in the open air upon the Sabbath for exercise is not a violation of the statute.

In other jurisdictions, also, it has been held not to be unlawful to ride to a funeral, (*Horne* v. *Meakin*, 115 Mass. 326); walking to prepare medicine for a sick child (*Gorman* v. *Lowell*, 117 Mass. 65); riding to visit a sick sister, (*Cronan* v. *Boston*, 136 Mass. 384); travelling to visit a sick friend (*Doyle* v. *Lynn & Boston R. R.*, 118 Mass. 195); a servant riding to prepare needful food for her employer (*King* v. *Savage*, 121 Mass. 303); a father rid-

ing to visit his two boys (*McClary* v. *Lowell*, 44 Vt. 116); walking for exercise (*Hamilton* v. *Boston*, 14 Allen, 475); and walking partly for exercise and partly to make a social call (*Barker* v. *Worcester*, 139 Mass. 74).

The statute was never intended as an arbitrary interference with the comfort and conduct of individuals when necessary to the promotion of health in walking or riding in the open air for exercise. The prohibition is against unnecessary walking or riding. As a general rule the jury, under proper instructions from the court, must determine this question from the circumstances presented to them.

In this case we can perceive no error in the instructions, and the exceptions must be overruled.

Nor do we think the verdict should be disturbed under the motion for a new trial. A very careful examination of the evidence satisfies us that upon the questions of fact submitted to the jury no interference by this court is necessary. The plaintiff was clearly entitled to some damages. The amount awarded does not appear to be excessive.

Motion and exceptions overruled.

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

BARNABAS P. HILL *vs.* JOSEPH W. NUTTER.

York. Opinion December 28, 1889.

Note. Sale of personal property. Record. R. S., c. 111, § 5.

In an action of trover for a horse the defendant claimed title by virtue of the following instrument:—

"Newfield, August 30, 1886. I agree to let Joseph W. Nutter have two tons English hay at $14 per ton delivered, and two tons of run hay at $7 per ton delivered, and pay him $10 per month for three months to come, September, October, and November, and $5, per month until I pay him $125 and interest, for a black mare that he lets me have, and said mare is to remain said Nutter's until she is paid for. GEORGE SMITH."

Held, (1.) That the instrument should have been recorded under the provisions of R. S., c. 111, § 5. (2). That it contains a "note" given for personal property bargained and delivered, within the meaning of the statute.

See *Cunningham* v. *Trevitt*, *ante*, *p.* 145.

ON EXCEPTIONS.

This was an action of trover for a horse taken by defendant from plaintiff's possession January 12, 1887, at Kennebunk. Defendant, in support of his title, offered in evidence the instrument which appears in the head-note. This instrument was not recorded. The plaintiff seasonably objected to its admission for want of record, and that he had no knowledge of its existence. The presiding justice overruled the objection and admitted it. The verdict was for defendant; and plaintiff excepted to the ruling of the court.

Ira T. Drew, for plaintiff.

L. S. Moore, for defendant.

Counsel cited: *Morris* v. *Lynde*, 73 Maine, 88.

FOSTER, J. Trover for a horse taken by the defendant from the plaintiff's possession. The defendant in support of his title offered in evidence the instrument of August 30, 1886, given by George Smith to the defendant. It was not recorded under the provisions of R. S., c. 111, § 5. Exceptions were taken to its admission on the ground that it was not recorded, and that the plaintiff had no knowledge of its existence.

The statute provides that, "No agreement that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee until the note is paid, is valid, unless it is made and signed as a part of the note; and no such agreement, although so made and signed in a note for more than thirty dollars, is valid, except as between the original parties to said agreement, unless it is recorded like mortgages of personal property * * *."

The instrument upon its face shows that the transaction was a conditional sale of the horse upon the conditions specified. It was a sale of personal property for which a note was given, if not within the letter certainly within the spirit of the statute, and

therefore a record of the same became necessary, to enable the defendant to hold the title to the horse, except as between the original parties to the agreement. In this case the plaintiff was not a party to the agreement, and claimed to have no knowledge of its existence. The instrument, we think, contained sufficient to embrace the word "note" within the meaning of the statute. It contained all the elements of a promise to pay, in property and money, a definite sum, and at definite times. And this court has said, in *Nichols* v. *Ruggles*, 76 Maine, 25, that it may well be doubted whether the construction of the statute is to be so limited as to apply only to such promissory notes as are recognized by the commercial law, and that it is certain that when used to express a promise to pay, whether in property or money, it is equally within the mischief to be prevented.

The delivery of the horse and the written instrument, it appears, were cotemporaneous. The case of *Morris* v. *Lynde*, 73 Maine, 88, cited by the plaintiff differs essentially in this respect from the case before us. There, the delivery of the property was made a long time subsequent to that of the written instrument; and it was held not to be a note given for the price of the property, within the meaning of the statute, but an order given for its future delivery, in which the terms of payment were specified.

Exceptions sustained.

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

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

Kennebec. Opinion December 28, 1889.

Equity. Amendment. Exceptions. Final decree. Practice. R. S., c. 77, §§ 11, 20, 26.

A bill in equity "may be amended or reformed at the discretion of the court, with or without terms, at any time before final decree is entered in said cause." R. S., c. 77, § 11.

Exceptions do not lie to the exercise of this discretion.

A decree becomes final when formally drawn, adopted by the court, and placed on file as the judgment of the court.

A mere order for a decree before it is extended in due form and in apt and technical language, is not a final decree, or a complete record of the judgment of the court.

ON EXCEPTIONS.

The court having granted an amendment to the original bill (81 Maine, 158) the defendants excepted to its allowance. The grounds of the exceptions are stated in the opinion.

Baker, Baker and Cornish, for plaintiffs.

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

FOSTER, J. The case was heard in the first instance by a single justice upon the bill in its original form. A decree was rendered in favor of the plaintiffs, from which an appeal was taken by the defendants to the full court, and there the judgment of the court below was sustained, and "decree accordingly" was ordered. *Gilpatrick* v. *Glidden*, 81 Maine, 158.

Thereupon, before any final decree had been signed or ordered filed by the court, the plaintiffs by motion in writing asked leave to amend their bill and therein specifically setting forth the amendments desired.

Upon that motion notice was duly ordered, a hearing thereon had, the motion sustained and the amendments allowed. To the ruling of the justice allowing the amendments exceptions were taken.

There is no ground upon which these exceptions can be sustained.

The statute in reference to proceedings in equity specifically provides that the bill "may be amended or reformed at the discretion of the court, with or without terms, at any time before final decree is entered in said cause." R. S., c. 77, § 11.

This discretionary power vested in the court by positive and express enactment is not subject to review by this court upon exceptions. No appeal was taken. The exceptions challenge the authority and not the discretion of the court.

The only remaining question is whether there had been, at the time the amendments to the bill were allowed, any "final decree." If there had not been, the authority of the court could hardly be questioned even at that stage of the case. *Byers* v. *Franklin Coal Co.*, 106 Mass. 131.

Under the practice of the court of chancery in England and in this country wherever that practice prevails, the proceedings in a case in equity are not regarded as at an end until the final decree of the court has been signed and enrolled. It then becomes a matter of record,—can be pleaded in bar or estoppel,—execution can issue upon it and there can then be no rehearing on motion or petition, the only remedy being by a bill of review.

But in this and other states, where the English chancery practice does not prevail, the decrees of the court are not enrolled. The final decree, when formally drawn, adopted by the court and placed on file, and judgment thereon, becomes equivalent to the enrollment under the English practice.

Thus in *Thompson* v. *Goulding*, 5 Allen, 81, 84, which was a bill in equity under the Massachusetts practice, essentially the same as that of our own state, Chief Justice Bigelow said: "It may be well to add, in order to avoid misapprehension, that no decree can be said to be entered of record until it is formally drawn out and filed by the clerk. A mere order for a decree, before it is extended in due form and in apt and technical language, can not be held to be a complete record of the judgment of the court." To the same effect is the case of *Pitman* v. *Thornton*, 65 Maine, 95, 99; *Clapp* v. *Thaxter*, 7 Gray, 385.

There was no final decree in the case before us. There had been a decision in the law court, and an order for a decree. A final decree is that which fully decides and disposes of the whole cause leaving no further questions for the future consideration and judgment of the court. Here was merely an order directing that a decree be drawn in due form, and in language that would give correct expression to the judgment of the court.

By examination of the statute it will be readily seen that it is there contemplated that final decrees are to be formally drawn, signed, entered and filed. The time allowed for appeals (§ 20)

commences only after such decree is signed, entered and filed, and notice given. Moreover, the statute further expressly provides (§ 26) that every order and decree shall bear date upon the day on which it is filed and entered, and the day of such filing and entering shall be entered by the clerk upon the docket and on the decree. By our system of practice, where full power is conferred on the court to make and enter all orders and decrees at such times as the court may deem proper, it follows that such orders and decrees become operative only from the time they are thus entered of record. They then become the definite judgment of the court, forming a part of the record, and equivalent to enrolment under the English practice in chancery.

There having been no final decree at the time of the amendments allowed, the authority of the court to allow the same, either upon terms or without, in its discretion, was fully authorized by the statute.

Exceptions overruled.

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

WARREN HAMILTON *vs.* GEORGE F. MCQUILLAN and WILLIAM H. LOONEY, admrs.

Androscoggin. Opinion December 28, 1889.

Life insurance. Disposition. Legatee, action by. Legacy, when payable. Interest. Demand. R. S., c. 65, § 31; c. 74, §§ 1, 7; c. 75, § 10.

It is competent for a solvent testator having a wife but no children, to dispose by will of insurance money upon his life, coming to his estate at his decease, to a person other than his wife, where his intention so to do is clearly and definitely expressed in his will.

When such money has come into the hands of the executor, or of the administrator *de bonis non* with the will annexed, an action may be maintained by the legatee to recover the same.

Interest may also be recovered upon a pecuniary legacy from such time as, either by the will or by the rules of law, it becomes due and ought to be paid, where there are assets belonging to the estate subject to such legacies.

As a rule, a pecuniary legacy, payable generally, without designation as to time of payment, is payable at the end of one year from the death of the testator without interest: and if not then paid, it bears interest after the expiration of the year.

Nor is any demand necessary in order to entitle a legatee to interest.

AGREED STATEMENT.

This was an action of debt against the defendants as administrators *de bonis non*, with the will annexed, of Joseph V. R. Coombs, of Yarmouth, deceased, to recover a legacy under his will, it being the proceeds of a life insurance policy. It was admitted that his estate, including both real and personal property, was solvent, and that no premiums had been paid on the policy during the three years next preceding the testator's death. The defendants claimed that by R. S., c. 75, § 10, the testator could not legally give and devise his interest in life insurance policies to the plaintiff.

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

Life insurance money, belonging to the estate of the decedent, may be regarded as property of the deceased. *Hathaway* v. *Sherman*, 61 Maine, 466, 473; *Wason* v. *Colburn*, 99 Mass. 342. Plaintiff's rights not defeated by R. S., c. 75, § 10. Section 10 does not withdraw insurance money, as a distinct species of property from the operation of a solvent testator's will; it is only an exception in favor of widow and children to R. S., c. 74, § 14. Repeals by implication not favored. *Chadbourn* v. *Chadbourn*, 9 Allen, 173.

The original statute (laws of 1844, c. 114) has not been repealed and recognizes a previously existing power to dispose of such funds by will, making it clear that it was not intended to interfere with that power; and then, operating not by restriction, but by enlargement, it provides that such disposition among widow and issue, or either of them, will be carried into effect notwithstanding the insolvency of the estate; thus enlarging, not restricting, the power of the testator to withdraw in certain cases such money from liability for payment of the testator's debts.

Interest should be allowed from February 16, 1886; the money was then collected and became payable immediately; demand of payment is not necessary to entitle the legatee to interest.

G. F. McQuillan and W. H. Looney, for defendants.

Counsel cited: *Hathaway* v. *Sherman*, 61 Maine, 466; *Blouin* v. *Phaneuf*, 81 Id. 176.

It is true that in *Hathaway* v. *Sherman*, and *Blouin* v. *Phaneuf*, the court expressed no direct opinion as to whether a solvent testator could bequeath to any one other than his widow or issue, in case either survived him, the proceeds of life insurance policies, but the reasoning in *Hathaway* v. *Sherman* applies with equal force to a solvent testator.

Why should c. 75, § 10 apply to an insolvent and not to a solvent estate? What sound reason can be given for such a discrimination? Is it because in an insolvent estate the widow and issue will be deprived of all means of support and maintenance unless the proceeds of life insurance is given them? But an estate might be solvent, and yet the widow and issue would, unless property of this kind came to them, be deprived of all means of support, because there might as frequently happens, be only enough in the estate to pay the costs of administration and debts of the deceased. So that this argument has no foundation.

FOSTER, J. Action of debt for a legacy, against the defendants as administrators *de bonis non* with the will annexed. That the estate of the testator is solvent is admitted, as also the receipt of $308 by the executor from an insurance policy belonging to the estate of the testator, and a demand for payment of the same upon these defendants.

The only question for determination is whether it is competent for a solvent testator, having a wife but no children, to dispose by will of insurance money, coming to his estate at his decease, to a person other than his wife, his intention so to do being clearly and definitely expressed in the will.

This precise question has never before been presented to or decided by this court.

The only cases where any reference to this question has been raised are those of *Hathaway* v. *Sherman*, 61 Maine, 466, and *Blouin* v. *Phaneuf*, 81 Maine, 176; but in neither of which was it decided.

The former was a case where the testator died insolvent, and the court there decided that the insolvent could make no testamentary disposition of the fund accruing from an insurance policy upon his life where he left neither widow nor child, the insurance money in that event being assets for the payment of debts; and in the event of his leaving a widow and children, that it was competent for him to bequeath the insurance money among them in such proportion as he might see fit, but he could not bestow it by will upon other persons.

The latter case was where the estate of the testator was solvent, but the court found no occasion to decide this precise question, inasmuch as in that case there was no such well declared intention thus to dispose of it as the law requires,—and in both it was held that the testator's intention thus to dispose of it must be explicitly declared, and could not be inferred from general provisions in the will, the fulfilment of which might require the use of such money.

In the present case, however, no difficulty is encountered in reference to the intention of the testator as to the disposition he intended to make of the money accruing from insurance upon his life, for, after a bequest to his wife of one half his personal estate "with the exception of what may be collected from policies of life insurance," by the fifth item of his will he makes a specific bequest of the same in this language: "Fifth: I give and devise all my interest in any and all life insurance policies to Warren Hamilton, of Sabattus, in the state of Maine."

That it was the intention of the testator to change the direction which the law would otherwise give to this species of property in accordance with § 10, c. 75, R. S., there can be no doubt.

Will the law uphold such a testamentary disposition of this money thus accruing, or must the statute to which we have referred be considered as limiting the power of the testator over it on account of his leaving a widow or issue?

We have no doubt upon this question as now presented. It was competent for the testator to make such disposition of the fund as he chose inasmuch as his estate was solvent, notwithstanding he left a widow.

There is a general power given by statute to persons of sound mind, twenty-one years of age, to dispose of their real and personal estate by will, when not necessary for the payment of debts. R. S., c. 74, §§ 1, 7.

The limitation of such testamentary disposition to the widow or issue, as provided in § 10, c. 75, R. S., in respect to funds accruing from insurance on the life of the testator, applies only in cases where the estate is insolvent. When the estate is solvent, and the testator leaves a widow or issue, or both, he has the same power of disposition by will over such funds as he has over any other personal property belonging to his estate. But the intention of the testator to bequeath the same to others, including his widow or issue, must be explicitly declared by the terms of the will, otherwise it will not pass by the will, but will descend in accordance with § 10, c. 75, to which we have referred. *Blouin* v. *Phaneuf*, 81 Maine, 180.

The various provisions of statute bearing upon this question were so fully considered and discussed in the case of *Hathaway* v. *Sherman* that any further reference to them in this connection becomes unnecessary. In that case the subject for consideration related to an insolvent estate, yet anticipating that the question now before the court might sometime arise, and as foreshadowing the result, to which, in such event, the court would probably arrive, BARROWS, J., in the course of the opinion saw fit to make use of this language: "If it be held that under the general statute authorizing the disposition of property by will a solvent testator, or one whose estate would be solvent with the addition of the fund thus created, may authorize his executor to use this fund for the payment of his debts, and otherwise dispose of it in a manner different from that which the law contemplates or will allow in the case of an insolvent estate, we think, in order to effect his object, the testator must use language directly significant of his intention in this respect; that, 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 or children, unless it is expressly referred to as the fund from which payment is to be made, and

that it does not pass by any general residuary clause ; in short, that 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 fulfilment of which might require the use of such money, but must be explicitly declared."

The plaintiff, as legatee, is entitled to maintain this action against the defendants to recover the amount which is admitted to have come into their hands from the policies under the specific bequest thereof in the will of the testator. R. S., c. 65, § 31. *Smith* v. *Lambert*, 30 Maine, 137, 143 ; *Holt* v. *Libby*, 80 Maine, 329 ; *Harlow* v. *Dehon*, 111 Mass. 195, 199 ; *Allen* v. *Edwards*, 136 Mass. 138, 142.

The plaintiff is also entitled to interest upon this legacy from such time as, either by the will or by the rules of law, it became due, and ought to have been paid. No time of payment was designated by the will. The statute is silent upon the question as to when pecuniary legacies shall be paid. Inasmuch as the case as presented calls for a decision upon the matter of interest on this legacy, and as interest is to be allowed from the time it became payable, it may be stated as a general rule, subject of course to some exceptions, that pecuniary legacies are payable in one year after the death of the testator when no time of payment is specified in the will, and there are assets belonging to the estate subject to such legacies. This will be found to be settled by numerous decisions, both ancient and modern, and the rule that prevails generally. *Smith* v. *Lambert*, 30 Maine, 140 ; *Kent* v. *Dunham*, 106 Mass. 586 ; *Brooks* v. *Lynde*, 7 Allen, 64, 67 ; *Rotch* v. *Emerson*, 105 Mass. 434-5 ; *Loring* v. *Woodward*, 41 N. H. 391 ; *Rice* v. *Boston Port and Seaman's Aid Society*, 56 N. H. 191 ; *Smell* v. *Dee*, 2 Salk. 415 ; *Marsh* v. *Hague*, 1 Edw. Ch. 174 ; *Sullivan* v. *Winthrop*, 1 Sum. 1 ; *Bradner* v. *Faulkner*, 12 N. Y. 472 ; 2 Wm. Exrs. 1424* and cases there cited ; 3 Redf. on Wills, 312 ; *2 Redf. on Wills, 466* and numerous cases cited. By all the authorities it is laid down that interest is allowed as incident to the legacy after it becomes due, and not as a charge upon the executor personally on the ground of neglect or delay in its pay-

ment; nor is any demand necessary for payment in order to entitle the legatee to interest. And the general rule may thus be given,— that a pecuniary legacy, payable generally, without designation as to time of payment, is payable at the end of one year from the death of the testator without interest; and that if not then paid, it bears interest after the expiration of the year. In support of this rule the foregoing authorities may be noted, and many others referred to therein which it is unnecessary to cite.

In this case it appears that the testator died December 31, 1885. An executor was appointed and the money received by him from the insurance company within a few months after the testator's decease.

Judgment for plaintiff for $308, *and interest thereon from Dec.* 31, 1886.

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

JONATHAN A. BARTLETT, and another, appellant from decree of Judge of probate, petitioners for leave to enter their appeal.

82 210
f94 422

Oxford. Opinion December 28, 1889.

Probate. Appeal. Bond. Sureties. R. S., c. 63, § 24.

The right of appeal from the decision of the judge of probate is conditional, and such appeal can be prosecuted only upon complying with the requisites of the statute relating to such appeals.

By R. S., c. 63, § 24, "the appellant shall file in the probate office his bond to the adverse party, or to the judge of probate, for the benefit of the adverse party, for such sum and with such sureties as the judge approves.

A bond with only one surety is not such a bond as the law contemplates.

ON EXCEPTIONS.

J. P. Swasey, for appellants.

G. D. Bisbee, for adverse party.

FOSTER, J. The appellants, heirs at law of Sarah J. Walker,

deceased, asked leave to enter their appeal from the decree of the judge of probate in admitting to probate an instrument purporting to be her last will and testament.

The adverse party objected to the entry of the appeal on the ground that no sufficient bond had been filed in the probate court, and thereupon the presiding justice declined to allow the entry of the appeal.

The decision of the court was correct.

Giving the most favorable construction to the bond in question that the law will allow, there was but one surety upon it. This was an irregularity sufficient to warrant the court in declining to allow the entry of the appeal. The right of appeal is conditional. It can be presented only upon complying with the requisites of the statute relating to such appeals. Those requisites provide that "the appellant shall file in the probate office his bond to the adverse party, or to the judge of probate for the benefit of the adverse party, for such sum and with such sureties as the judge approves, etc." R. S., c. 63, § 24.

The legislature has seen fit to declare upon what conditions a party claiming an appeal shall have the right to prosecute it. It is a statute right, and the terms of the statute must be complied with before a party appealing can be held to be aggrieved at the refusal of the court to allow an appeal to be entered, where objection is made.

While it may be conceded there is a discretionary power vested in the judge of probate authorizing him to approve of the sum for which such bond may be given, and the pecuniary ability of the sureties signing it, yet he has no such discretion as would authorize him to dispense with any of the requisites to such bonds expressly provided by statute. And hence his approval of this bond could only extend to such matters as fell within his discretion. The bond which an appellant is to file as a prerequisite to his appeal is one with sureties. The statute contemplates that there should be more than one surety. It is for the benefit of the adverse party who is entitled to the protection afforded by the statute.

To be sure, there are cases where bonds have been required by

law to be executed by sureties, and the courts have held that they were valid against the principal and one surety as bonds at common law, the surety entering voluntarily into the contract in this form. But they were cases where the party for whose benefit they were given brought suit upon them, thereby ratifying instead of objecting to their informality. *Holbrook* v. *Klenert*, 113 Mass. 268; *Tuck* v. *Moses*, 54 Maine, 115, 119.

In replevin, where it is required, before serving the writ, that the officer shall take from the plaintiff, or some one in his behalf, a bond to the defendant with sufficient sureties in double the value of the goods replevied, it has been held that a bond with only one surety was fatally defective, unless the defect was waived by the defendant in not seasonably taking advantage of such irregularity. *Greely* v. *Currier*, 39 Maine, 516; *Hall* v. *Monroe*, 73 Maine, 123, 124; *Tuck* v. *Moses*, *supra*.

In the case at bar there has been no waiver, and the objection was properly and seasonably taken.

Exceptions overruled.

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

STATE OF MAINE *vs.* JOHN DORR.

Waldo. Opinion December 30, 1889.

Intoxicating liquors. Indictment. Different statutes in force. Fifth Amendment to the constitution. Repeal of existing statute. Act of 1889, *c.* 140, *constitutional.*

The fact, that the time covered by an indictment embraces a period when two different statutes were in force, is not fatal to the indictment.

No repeal of existing laws in reference to the suppression of the sale of intoxicating liquors was intended by the adoption of the Fifth Amendment to the constitution, prohibiting the manufacture, sale and keeping for sale of intoxicating liquors.

Nor is the law unconstitutional by reason of the severity of the penalty imposed by c. 140 of 1887.

ON EXCEPTIONS.

The case is stated in the opinion.

A. F. Sweetser, county attorney, for the state.

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

FOSTER, J. Indictment against the defendant, found at the January term, 1889, in which the defendant is charged with keeping a drinking house and tippling shop "on the first day of January 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," etc.

To this indictment a general demurrer was filed and joined. Thereupon judgment was rendered overruling the demurrer, to which ruling exceptions were duly taken.

Several objections are raised against the sufficiency of this indictment.

(1.) That the penalty for the offense charged was changed by Pub. Laws of 1887, c. 140, § 7, during the times covered by this indictment. (2.) That the law in relation to drinking houses and tippling shops existing at the commencement of the period covered by the charge, (Pub. Laws 1885, c. 366, § 4) was repealed by implication by the adoption of the Fifth Amendment to the Constitution of Maine. (3.) That by the amendment named suitable penalties were to be provided in such laws as the legislature should enact in reference to the suppression of the sale of intoxicating liquors, and that the penalty provided in § 7, c. 140, Pub. Laws of 1887, is not suitable or proportioned to the offense and therefore in conflict with the constitution and void.

Upon neither of the grounds set up can the defendant prevail.

I. The demurrer admits the facts duly alleged in the indictment,—that the defendant, on the first day of January, 1887, "unlawfully did keep a drinking house and tippling shop." This was contrary to the statute of 1885 which was in force for the punishment of such offenses committed prior to the more recent enactment of 1887. The fact that the time covered in the indictment embraces a period when two different statutes were in force

is not a fatal objection to the indictment. This precise question was settled in *State* v. *Pillsbury*, 47 Maine, 449, wherein the court held that "on divers other days," etc., might be rejected as surplusage, or that the attorney for the state might enter a *nol pros.* as to such offenses as were alleged to have been committed after the subsequent act took effect.

II. Nor can we agree to the proposition that by the adoption of the amendment to the constitution all statute laws in reference to the subject matter embraced in the amendment were repealed by implication. That the legislature never intended any such repeal of existing laws in reference to the suppression of the sale of intoxicating liquors, is too manifest to require discussion. The whole matter was left for legislative enactment as provided by the amendment.

III. True, the constitution, as now amended, provides that "the legislature shall enact laws with suitable penalties for the suppression of the manufacture, sale and keeping for sale of intoxicating liquors." The legislature has prescribed the penalty provided in c. 140, of the act of 1887, and this court apprehends no reason for holding the law unconstitutional by reason of the severity of such penalty. "What punishment is suited to a specified offense must, in general, be determined by the legislature, and the case must be very extraordinary in which its judgment could be brought in question." Cooley Cons. Lim. 296. The offense with which the defendant is charged in this indictment has been recognized by statute law for a long period of years as contrary to the good morals and welfare of the citizens of this state, and restrained by penalties under various statutes. The legislature has deemed it wise and seen fit to add severity to penalties previously existing in order more effectually to suppress the illegal traffic. We, therefore, perceive no reason for holding the law unconstitutional on account of the severity of the penalty imposed by the law making power. *Com.* v. *Hitchings*, 5 Gray, 482.

Exceptions overruled.

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

CARLETON MILLS COMPANY *vs.* JOSHUA E. SILVER, and another.

Piscataquis. Opinion December 30, 1889.

Deed. Water-rights. Measure of power. Limit of use.*

The plaintiffs' deed of a specific part of the premises immediately following the description of the boundaries, contained the following: "Together with the Williams dam and all the water privilege of the Carleton Mill Stream 'so called' for all the purposes of propelling a factory and its machinery and appurtenances to be built on said privilege, said factory building to be ninety-eight feet in length and forty-eight feet in width with all necessary appurtenances and machinery for working the same up to its full capacity."

Held: That this language is to be construed as a measure of the quantity of water to which the plaintiffs are entitled, and not as a limit of the use of the water to carry only such machinery as might be in the main building.

When from the terms of the grant it is doubtful whether the kind of mill or particular machinery mentioned indicates the quantity of water and measures the extent of power intended to be conveyed, or is referred to as a limit of the use to the particular kind of a mill or machinery, the former construction will be favored as more favorable to the grantee, more for the general interest of the public, and as being more probably the intention of the parties.

And if some of the machinery required in such a factory is located in an annex instead of being in the main building, and no more power is required to propel it than if it was situated in the main building, it would be within the terms of the plaintiffs' deed.

Held, also, that the following requested instruction by the defendants was rightfully denied:—"the plaintiffs' deed does not give them a preference to operate their factory more than a reasonable time; and ten hours per day of week days through the year is a reasonable time." The deed contains no such restriction.

ON EXCEPTIONS.

This was an action on the case, for diverting water from the plaintiffs. The declaration is as follows:—

"In a plea of the case, for that the plaintiffs ever since the 8th day of June, A. D. 1881, have been seized in their demesne as of fee and have been in actual possession of a large woolen mill and all the necessary machinery to run said mill to its full capacity,

*See *Warner* v. *Cushman*, *ante*, p. 168.

situate on the easterly side of Carleton stream, so called, in Sangerville village aforesaid, together with the Williams dam, being a dam across said stream at said factory, and all the water privilege of the Carleton stream aforesaid for the purpose of propelling said factory and said machinery to its full capacity, with the first right to, and control of, all the water in said Carleton stream at said dam and privilege at all times and seasons of the year for the purpose of propelling said factory and machinery to its full capacity, which said mill and machinery cannot be operated successfully unless said plaintiffs can have all said water and power to which they are entitled; and the said defendants are the owners and occupy mills situate on the westerly side of said Carleton Stream on said dam, and as such are entitled to use the water from said dam for a saw-mill when such does not interfere with or prejudice, restrict or diminish the power required by said plaintiffs to run their mill at its full capacity at all times and seasons of the year; and yet the said defendants, though well knowing the rights of said plaintiffs, have used the water from said dam to such an extent at divers times within the past ten months that said plaintiffs could only run a portion of their mill and machinery, and on the 27th day of July, and divers other days, in consequence of the wrongful use of said water by said defendants, said plaintiffs were compelled to shut down their said mill, and said mill remained shut down for the remainder of each day when shut down as aforesaid, and thereby threw out of employment forty persons employed by said plaintiffs in said mill, and to the great loss, damage and injury of said plaintiffs; and said defendants have drawn and still draw said water from said dam to such an extent that said mill cannot be operated successfully on account of the diminished power occasioned by the wrongful use of said water from said dam by said defendants.

Said plaintiffs aver that within ten months last past said defendants have each day used said water from said dam to such extent to interfere with, diminish and restrict the power necessary to run said mill and machinery to its full capacity, thereby causing the plaintiffs to run only a portion of their mill, and at times to shut it down entirely; and that said plaintiffs have requested repeat-

edly said defendants to desist from using said water as aforesaid, but they decline and refuse to do so, and are still using said water in said wrongful manner. All of which is to the damage of said plaintiffs," etc.

Plea, general issue and brief statement.

The defendants contended that the plaintiffs under their deed, described and interpreted in the opinion, had no right to put and operate the water-wheel and machinery outside of their main building in an annex, nor do the same as to the elevator in a tower adjoining the main building.

There was a verdict for the plaintiffs; and the defendants excepted to the rulings and instructions of the court, as appears in the opinion.

Crosby and Crosby, *A. G. Lebroke* with them, for defendants.

Counsel cited: *Drummond* v. *Hinkly*, 30 Maine, 433; *Barrett* v. *Parsons*, 10 Cush. 367. Plaintiffs guilty of contributory negligence in allowing penstock and flume to leak. *Kennard* v. *Burton*, 25 Maine, 39; *Perkins* v. *R. R. Co.*, 29 Id. 307, and cases cited; *Moore* v. *Abbot*, 32 Id. 46; *Bigelow* v. *Reed*, 51 Id. 325; *O'Brien* v. *McGlinchy*, 68 Id. 552. Plaintiffs entitled to preference only to a reasonable extent, i. e., ten hours per day not including Sunday. R. S., c. 82, § 43, first enacted in 1848, c. 83, § 1; R. S. of U. S. § 3738; *Bachelder* v. *Bickford*, 62 Maine, 526.

Henry Hudson, for plaintiffs.

Counsel cited: (Construction of deed.) *Deshon* v. *Porter*, 38 Maine, 289; *Sumner* v. *Williams*, 8 Mass. 162; *Covel* v. *Hart*, 56 Maine, 518; *Biglow* v. *Battle*, 15 Mass. 312; *Wakely* v. *Davidson*, 26 N. Y. 387; Gould on Waters, § 318; and cases cited under note 4; also § 320. *Pratt* v. *Lamson*, 2 Allen, 275; *Coburn* v. *Middlesex Company*, 142 Mass. 264; *Davis* v. *Muncey*, 38 Maine, 90; *Kaler* v. *Beaman*, 49 Id. 207; *Wyman* v. *Farrar*, 35 Id. 64; *Covel* v. *Hart*, 56 Id. 518; *Blake* v. *Madigan*, 65 Id. 522; *Cowell* v. *Thayer*, 5 Met. 253; *Cromwell* v. *Selden*, 3 N. Y. 253; *Olmsted* v. *Loomis*, 9 N. Y. 424. (Appurtenances.) *Salisbury* v. *Andrews*, 19 Pick. 250; *Leonard* v. *White*, 7 Mass. 8; *Maddox* v.

Goddard, 15 Maine, 218; *Cunningham* v. *Webb*, 69 Id. 92; *Baker* v. *Bessey*, 73 Id. 472; *Ammidown* v. *Ball*, 8 Allen, 293; *Parsons* v. *Johnson*, 68 N. Y. 62; Wash. on Real Prop., vol. 3, p. 394.

FOSTER, J. On June 8, 1881, Owen B. Williams was the owner of the premises, land and water privilege about which this contention has arisen, situated upon Carleton stream in the village of Sangerville. Upon that day he conveyed by metes and bounds a specific part of the premises to the plaintiffs, and in the conveyance, immediately following the description of the boundaries, is this language: "Together with the Williams dam and all the water privilege of the Carleton Mill Stream, so called, for all the purposes of propelling a factory and its machinery and appurtenances to be built on said privilege, said factory building to be ninety-eight feet in length and forty-eight feet in width, with all necessary appurtenances and machinery for working the same up to its full capacity."

Subsequently the plaintiffs built a woolen factory on the privilege conveyed by this deed, two stories high besides a basement, the main building being the same dimensions as that named in the deed. On the easterly side of the main building, but connected with it, a tower eighteen feet by twelve feet was erected, in which were the stair-ways to the main building, and an elevator operated by power from the factory wheel.

On the northerly end of the main building and connected with the same outside the ninety-eight feet in length, was erected an annex in which were placed the factory wheel, two pickers, a duster and a force pump, which were run by the factory wheel; also dye kettles, rinsing tubs, boiler to heat the factory, and chimney. The only wheel which run the factory was built under this annex.

The case shows that while the main building contained sufficient room for the wheel, pickers and duster, yet no more power was required to propel them in this annex than if located in the main building.

The points in controversy, so far as they are raised by the bill of exceptions, pertain to the legal construction of this deed, and may be determined by the answer to this single question:—

Whether the language in the deed shall be construed to measure the quantity of water to which the plaintiffs are entitled, or to limit the use of water to carry only such machinery as may be in the main building.

The plaintiffs' contention is for the former,—that the grant is of water sufficient or necessary to propel a particular factory, reference to the mill being made only to indicate and measure the quantity of power intended to be conveyed.

The defendants, upon the contrary, contend that the deed is to be so construed as to limit the power for the special purpose of propelling only such machinery as may be contained in the main building.

It is undoubtedly competent for the owner of the whole of a mill privilege to convey any part of the power he pleases and limit its use to any particular purpose which he may see fit to express in the grant and the other party is willing to accept. Where such purposes are plain from the terms of the conveyance, courts will so construe the contract as to carry into effect the expressed intention of the parties. Oftentimes, however, where such rights are derived solely from grant, particularly where they are a part only of a larger water power, it is a question of some difficulty in construing the grant to determine whether the power granted was intended to be applied to a specific use only, or whether a reference to the purposes named in the grant was made for the sole purpose of defining and measuring the quantity of power granted. If the parties from the terms of the grant have left it doubtful whether the kind of mill or particular machinery mentioned indicates the quantity of water and measures the extent of the power intended to be conveyed, or is referred to as a limit of the use to the particular kind of mill, or specified machinery, the former construction will be favored as being more favorable to the grantee, more for the general interest of the public, and as being more probably the intention of the parties. This is the general doctrine adopted by the courts and adhered to in grants of this nature whenever the description of the rights conveyed is in such terms as to leave it in doubt which of these two kinds or species of grants was intended. *Deshon* v. *Porter*,

38 Maine, 289, 293; *Pratt* v. *Lamson*, 2 Allen, 275; *Tourtellot* v. *Phelps*, 4 Gray, 370, 374; *Ashly* v. *Pease*, 18 Pick. 268, 275; *Covel* v. *Hart*, 56 Maine, 518.

In this case the court instructed the jury that the "plaintiffs' rights are not confined to such machinery alone as they might put into the main building, for the true construction of that deed does not restrict the water to such machinery as is in there, but the language of the deed is simply used to express the measure of the water to which they are entitled."

This instruction we think presented the law correctly to the jury. In construing the plaintiffs' deed from Williams the intention of the parties must first be sought from the language of the deed, taken in connection with the situation of their business, the subject matter to which it relates, and the object to be obtained. *Sumner* v. *Williams*, 8 Mass. 162; *Deshon* v. *Porter*, *supra*.

When we consider, therefore, the objects and purposes for which the power was granted, we think it clear that the language of the deed does not restrict the grantees to the use of the water for the specific purpose of propelling such machinery only as might be in the main building, but that by the terms of the deed, so far as they relate to the machinery to be used in a factory of the dimensions named, the intention was to describe the quantity of water the use of which is thereby conveyed. Hence, if some of the machinery required in a factory like this is located in an annex instead of being in the main building, and no more power is required to propel it than if it were situated in the main building, it would certainly be within the terms of the plaintiffs' deed.

The power intended to be conveyed, as expressed in the deed, is "for all the purposes of propelling a factory and its machinery and appurtenances" essential to the successful operation of a building of the size mentioned in the terms of the grant, "with all the necessary appurtenances and machinery for working the same up to its full capacity."

The annex and tower situated upon the plaintiffs' land and thus connected with the factory building proper, considering the nature of the grant and the purposes to which the power was to be applied, may properly be considered as embraced within

the terms of the deed. The case discloses the fact that there was sufficient room in the main building for such machinery as was placed within this annex. If, therefore, the plaintiffs considered it for their interest or convenience to place some portion of the machinery necessary to the operation of their factory in this separate apartment, provided no more power was required to operate it than if it had all been under the same roof, they had a right so to do. The instructions of the court to which exceptions are taken were in accordance with the views we have here expressed, and were therefore correct.

Nor were the defendants' rights affected by the refusal of the court to instruct the jury that the plaintiffs could not operate the factory more than a reasonable time, and that ten hours a day through the year is a reasonable time. The plaintiffs' rights are not thus circumscribed. It is expressly stated that the plaintiffs "have the first right to, and control of, all the water in said stream at the said dam and privilege at all times and seasons of the year for propelling their said factory and machinery for the factory building as before described." Having the right to the use of the water for the purposes of their factory at all times and seasons of the year, they had a right to run their factory as many hours a day as they considered proper. Their deed contains no limitation upon the number of hours out of the twenty-four each day in which they can run their factory. It is not for the court to restrict the time when the factory shall be operated when the parties have not seen fit to do so.

Exceptions overruled.

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

FREEMAN GOODHUE *vs.* GEORGE M. LUCE.

Aroostook. Opinion December 30, 1889.

Pleading. Abatement. Non-joinder.

A plea in abatement properly lies for non-joinder of a joint contracting party. In such plea the name of the joint contracting party must be named. It must allege that he was living, and his residence within the state at the date of the plaintiff's writ.

A plea in abatement is defective in substance which does not anticipate and exclude such supposable matter as would, if alleged on the opposite side defeat the plea. But it is only such supposable matter as can properly be alleged or set up in a replication to the plea that is to be anticipated and excluded by such plea, and not every imaginable matter.

It would be insufficient for the plaintiff in answer to a plea in abatement for non-joinder of a co-promisor to reply the fact of something which merely goes to the personal discharge of such co-promisor as death, insolvency, etc. Hence, if it could not be properly replied, it need not be anticipated and excluded in the plea.

ON EXCEPTIONS.

This was an action of assumpsit, brought in the superior court for Aroostook county, against the defendant Luce alone. The defendant seasonably filed the following plea in abatement to which the plaintiff demurred:—

And now on the second day of said term the said George M. Luce comes and defends, etc., when etc., and prays judgment of the writ and declaration aforesaid, because he says that the several supposed promises in said writ declared upon, if any such were made, were made jointly with one George F. Whitney, who is still living and residing at Presque Isle in said county, and who likewise was residing at said Presque Isle at the date of said writ, and not by the said George M. Luce alone; and this he is ready to verify; wherefore because said George F. Whitney is not named in said writ and declaration together with said George M. Luce, he the said George M. Luce prays judgment of the said writ and that the same may be quashed.

GEORGE M. LUCE,
By his attorney, GEORGE H. SMITH.

STATE OF MAINE.

Aroostook, ss.

November 7th, 1888.

Personally appeared Geo. H. Smith, attorney for the before named George M. Luce, and made oath that the foregoing plea is true in substance and in fact.

Before me, CHARLES F. WEED,
Justice of the Peace.

The presiding justice sustained the demurrer to the plea in abatement and the defendant excepted.

V. B. Wilson and A. L. Lumbert, G. H. Smith with them, for defendant.

C. P. Allen, for plaintiff.

FOSTER, J. This is an action of assumpsit, to which the defendant pleads the non-joinder of a joint contractor in abatement. To this plea the plaintiff has demurred. The court sustained the demurrer and adjudged the plea bad, to which rulings exceptions were filed. The question thus raised relates to the sufficiency of the defendant's plea.

It is elementary learning that pleas in abatement have always been regarded with disfavor, since they are dilatory in their nature and seek to defeat the particular action upon technical grounds, instead of allowing the case to proceed to a decision upon its real merits. The rule in relation to the degree of certainty required, both as to the form and substance of such pleas, requires the utmost fullness and particularity of statement, as well as the highest attainable accuracy and precision, leaving nothing to be supplied by intendment or construction, and no supposable special answer to the same unobviated. Co. Litt. 352-6. *Burgess* v. *Abbott*, 1 Hill, 477; *Furbish* v. *Robertson*, 67 Maine, 35.

Yet, while such accuracy and precision are required, the law recognizes the use of these pleas, and when possessing all the requisites which the law demands, there is no reason why they may not be properly invoked.

Judged by the most formal rules of pleading, the plea in this

case possesses every requisite essential in a plea of abatement for non-joinder of a joint contracting party. It is drawn with accuracy and skill. The pleader has followed the precedents laid down in Stephens on Pleading, 87; Story's Pl. 99; 2 Chitty Pl. 900.* This precedent has stood the test for many years in the English and American courts, and been cited with approval by the best text writers. 2 Gr. Ev. § 24, n. Nor has our attention been called to any authority in which it has been held insufficient.

Non-joinder of another joint contracting party defendant is the issue presented by this plea, and in it are found the necessary allegations. It was the duty of the defendant, by his plea, to furnish the plaintiff such information as might enable him to correct the defect in his writ. This has been done. The joint party is named. He is alleged to be living, and his residence within the state at the date of the plaintiff's writ. *Furbish* v. *Robertson*, 67 Maine, 35; *Harwood* v. *Roberts*, 5 Maine, 441, 442; *Hooper* v. *Jellison*, 22 Pick. 250. It is broader and more comprehensive than the precedents referred to, inasmuch as it alleges that not only at the date of the writ, but at the time of the plea filed, the residence of such party was within this jurisdiction, following the *dicta*, rather than the decision of the court, in *Bellamy* v. *Oliver*, 65 Maine, 108, 110; and the decision in *White* v. *Gascoyne*, 3 Exch. 35. The decision in the English exchequer court was based upon a special statute of 3 and 4 W. 4, c. 42, passed in 1833, radically changing the common law practice and requisites of pleas in abatement for non-joinder of defendants. By that statute it is provided that "no plea in abatement for the non-joinder of any person as a co-defendant, shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated, with convenient certainty, in an affidavit verifying such plea." "This statute," says Coltman, J., in *Jall* v. *Lord Carzon*, 4 M. G. & S. 249, (56 E. C. L. 253) "was designed to remedy an existing inconvenience to which the plaintiff was liable. That inconvenience was, that unless he sued all the parties to the contract, he

ran the risk of having a plea in abatement put upon the record; the effect of which might have been, as in *Havelock* v. *Geddes*, that one of the joint contractors being out of the jurisdiction of the court, the plaintiff must outlaw him before he could proceed with his action against the others."

But the precedents to which we have referred were framed with reference to the law and practice as existing prior to the English statute named, and as it exists to-day in this state, for that statute has never become a part of the common law of this state, nor has it been enacted here.

But it is claimed in support of the demurrer that all that is alleged in the plea may be true, and still the writ held good; that though the contract alleged may have been made jointly by the defendant and another, yet that joint liability may long before have ceased; that the party not joined may have been discharged in insolvency, or the promise barred by the statute of limitations, and that the plea in abatement is, therefore, defective in substance in not excluding such supposable matter, as would, if alleged on the opposite side, defeat the plea.

The answer to this proposition is found in the fact that such supposable matter, if it existed, should more properly have been averred in the plaintiff's writ by joining such parties upon the record, even if a discontinuance as to them afterwards became necessary, and that it will not be sufficient for the plaintiff to reply these facts by way of replication to the defendant's plea in abatement.

Thus it has been held that if one of two joint contractors is dead, and the survivor is sued alone, with no mention being made in the writ of the death of the other party, it will not be sufficient for the plaintiff to allege, in reply to a plea of non-joinder, the fact of his death, for this would contradict his declaration upon a separate contract by admitting it a joint one. *Bovill* v. *Wood*, 2 Maule & Selw. 25.

In all actions upon contract, the defendant has a right to require that his co-debtor should be joined with him, and the plaintiff cannot deprive him of that right, or the benefit, whatever it may be, of having his discharge from liability stated on the

record. Hence, the practice has always been, in accordance with the approved methods of pleading, to join all the contracting parties, if living; or, if dead, to make the proper averments. *Harwood* v. *Roberts*, 5 Maine, 441.

And it has been the doctrine of the English courts, as well as that of our own state, (*Bovill* v. *Wood*, *supra*; *Noke* v. *Ingraham*, 1 Wils. 89; *West* v. *Furbish*, 67 Maine, 17, 19,) that where one of the joint promisors had become bankrupt and obtained his discharge, he must necessarily be joined in the suit in the first instance, for though discharged by operation of law he is not bound to take the benefit of it, although he may, if he will, plead his certificate in discharge, and the plaintiff may then discontinue as to him, upon payment of costs, and proceed against the other.

The rule as laid down by Chitty (1 Chit. Pl. 42, a) is thus stated: "Joint contractors must all be sued, although one has become bankrupt, and obtained his certficate, for if not sued, the others may plead in abatement."

The decisions of the English courts have been that the plaintiff could discontinue as to one joint contractor and proceed against the other applied only in cases of bankruptcy, and that a replication of infancy, coverture, *ne unques executor*, and the like, of the party not sued was a good answer to a plea of non-joinder in abatement, on the ground that in such cases the plaintiff could not enter a *nolle prosequi* as to one of such joint contractors without discharging all.

But the American courts have taken a different view of the matter, holding that a discontinuance as to a party defendant, in cases where it was proper, was matter of practice resting in the discretion of the court, and, therefore, that wherever defendants sever in their pleas and one or more pleads a plea which merely goes to his personal discharge, but not denying the cause of action alleged in the writ, the plaintiff may prevail against some of the defendants, while he fails as to those who prevail, upon such special matter of defense. *Minor* v. *The Mechanics Bank*, 1 Pet. 46, 74; *Moore* v. *Knowles*, 65 Maine, 493; *West* v. *Furbish*, *supra*; *Cutts* v. *Gordon*, 13 Maine, 474, 478; *Woodward* v. *Newhall*, 1 Pick. 500; *Tuttle* v. *Cooper*, 10 Pick. 281.

Therefore, wherever the American doctrine prevails it will not be sufficient for the plaintiff, in answer to a plea in abatement for non-joinder of a co-promisor, to reply the fact of something which merely goes to the personal discharge of such co-promisor, any more than it would in the case of the death of one joint contractor, where, as we have observed, such replication or answer by the plaintiff to the defendant's plea would not be allowable. 2 Gr. Ev. § 133. *Gibbs* v. *Merrill*, 3 Taunt. 313, 314.

This supposable matter could not, therefore, be "properly alleged on the opposite side to defeat the plea." If it could not, then the plea anticipates and excludes all such matter as could properly be alleged in a replication to defeat the plea, and is sufficient.

The case is before this court simply upon exceptions to the ruling of the court below in sustaining the demurrer, and adjudging the defendant's plea bad.

Whether the furtherance of justice will require that the plaintiff, upon proper motion, shall be allowed to amend his declaration, must be determined by the court at *nisi prius*. *Maine Central Institute* v. *Haskell*, 71 Maine, 487, 491; *Plaisted* v. *Walker*, 77 Maine, 459, 462; R. S., c. 82, §§ 13, 23.

Exceptions sustained. Demurrer overruled.
Plea adjudged good. Declaration bad.

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

LUCRETIA A. MORSE, in equity, *vs.* HATTIE E. M. HAYDEN, and others.

Knox. Opinion December 31, 1889.

Will. Conditional devise. Lapsed devise. Lineal descendant. Payment of debts. Contribution. R. S., c. 78, § 10.

A devise of real estate and specific personal estate on condition that the devisee shall provide and maintain the son of the testator and devisee until

he shall attain his majority is a gift on a condition subsequent; and if the son die during the lifetime of the testator, the devisee will hold the property by an absolute title as if no condition had been attached.

Where real property is devised to the testator's two daughters and two sons to be equally divided among them and one of the sons dies in the lifetime of the testator, what was intended for him will, in the absence of any controlling provisions in the will, lapse and become intestate property.

The mother is not a "lineal descendant" of her son within the meaning of R. S., c. 78, § 10.

Where no specific provision is made for the payment of his debts by the testator, personal estate is the primary fund for their payment. If that is not sufficient, then the lapsed devise may be applied thereto. If debts still remain, then specific devises must contribute *pro rata*.

IN EQUITY.

Bill in equity by the executrix of the will of George W. Morse, of Union, deceased, to obtain the construction of the will and her duty in regard to her own share in the real and personal estate; the shares of the surviving children of the testator; and from what property the debts of the estate shall be paid. The widow did not waive the provisions of the will.

The case is stated in the opinion.

COPY OF WILL.

Know all men by these presents that I, George W. Morse of the town of Union, County of Knox, State of Maine, being of sound and disposing mind and memory, do make, ordain and publish this my last will and testament in manner and form following, viz:—

1. I direct that all the lawful debts I shall owe at the time of my decease and my funeral expenses shall be paid out of my estate by my executrix hereinafter named:

2. I give and bequeath to my beloved wife, Lucretia A. Morse, one undivided half of my homestead containing about ninety-six acres, also my pleasure carriage and best harness, together with my horse and best sleigh and best buffalo robe, also two best cows, on condition that my wife Lucretia, shall provide and maintain our son, Sydney E. Morse, until he shall attain his majority.

3. I direct my executrix to cause a granite monument, the

cost of which shall not exceed two hundred dollars to be placed on my lot in the cemetery.

4. I give and bequeath to my son Leslie M. Morse, and my daughters, Hattie E. M. Hayden of Rockland and Mary E. Potter of Central City, Colorado, and my son, Sydney E. Morse, one undivided half of the homestead, not before willed to my wife, Lucretia, also the meadow near Crawford's Pond, so called, to be equally divided between them.

5. I direct that the notes of my wife Lucretia A. Morse and my son Sydney E. Morse hold against me shall be paid out of my estate by my executrix without regard to the statute of limitation.

6. I give to my beloved wife, Lucretia A. Morse, all the remaining personal property not willed away.

7. I hereby appoint my wife, Lucretia A. Morse, executrix of this, my last will and testament, and request that she shall not be sworn.

T. R. Simonton, for plaintiff.

T. P. Pierce, for defendant.

VIRGIN, J. The construction of a will and the mode of executing the trust by the executrix are sought by these parties.

The testator, by the second item of his will gave to his wife one undivided half of his homestead of ninety-six acres together with his pleasure carriage, best harness, horse, best sleigh and buffalo robe and two best cows, "on condition that she shall provide and maintain our son Sydney E. Morse until he shall attain his majority."

1. Was the land and personal property mentioned given on a condition precedent or subsequent?

We have no doubt it was on condition subsequent. Conditions have no idiom. Whether precedent or subsequent is a question purely of intention to be gathered from the whole language adopted. Such conditions of support and maintenance in wills without any language charging the property with the performance of the conditions, or in deeds conveying farms, would seem

to be conditions subsequent because of the implication that the devisees or grantees are to have possession and control of the premises for the purpose of fulfilling the conditions. *Marwick* v. *Andrews*, 25 Maine, 525; *Thomas* v. *Record*, 47 Maine, 500; *Bryant* v. *Erskine*, 55 Maine, 153, 156. Being a condition subsequent and its performance rendered impossible by the act of God which resulted in the death of Sydney in the lifetime of the testator, the devisee holds the property by an absolute title as if no condition had been attached. *Cary* v. *Burtie*, 2 Vern. 331, 339; 4 Kent. Com. 130; *Merrill* v. *Emery*, 10 Pick. 507, 511; *Parker* v. *Parker*, 123 Mass. 584.

2. By the fourth item the other half of the homestead together with the meadow was given to the testator's two daughters and two sons, one of whom was Sydney above named, "to be equally divided between (among) them." Had all the children survived the testator they would have held severally as tenants in common. *Anderson* v. *Parsons*, 4 Maine, 486, 489. R. S., c. 73, § 7. But as Sydney died before the testator, what was intended for him would, under a general rule of the common law in the absence of any controlling language to the contrary in the will, lapse and become intestate property. *Morley* v. *Bird*, 3 Ves. 628; *Page* v. *Page*, 2 P. Wms. 489; *Snow* v. *Snow*, 49 Maine, 163; *Anderson* v. *Parsons*, *supra*. To this common law rule, the statute has created an exception which prevents the lapsing of a devise under the circumstances mentioned, when the devisee was a relative of the testator and died before him leaving lineal descendants, who take by substitution. R. S., c. 74, § 10. *Keniston* v. *Adams*, 80 Maine, 290. While the devisee in the case at bar was a relative of the testator, he did not leave "any lineal descendants,"—that is, any issue which is synonymous with "lineal descendant" (2 Wms. Exrs. 1000; 3 Pom. Eq. 1145 Notes; 2 Redf. Wills. 73) and hence would not include his mother.

3. From what part of the estate shall the debts be paid? The will makes no specific provision therefor, but simply directs "all his lawful debts and funeral expenses to be paid out of his estate by his executrix" who is his widow. How much they amount to does not appear.

As personal estate is the primary fund for the payment of the debts, real estate is only to be resorted to as an auxiliary fund. *Quimby* v. *Frost*, 61 Maine, 77, 81. Therefore, the will having made no specific provision, the personal property given to the wife in the sixth item of the will valued in the inventory at "$500 exclusive of notes and demands," is first to be appropriated. If the personal property be insufficient, then the lapsed devise,—viz: the one-eighth of the homestead devised to Sydney "may be applied in exoneration of the real estate devised." R. S., c. 74, § 13.

If debts still remain unpaid, then recourse must be had to the specific devises in items two and four, neither of which has preference over the other. For although when a widow foregoes her right of dower by omitting to seasonably waive the provisions for her in the will she thereby takes the devise in the character of a purchaser, (R. S., c. 103, § 10; *Allen* v. *Pray*, 12 Maine, 138; *Hastings* v. *Clifford*, 32 Maine, 132; *Towle* v. *Swasey*, 106 Mass. 105) and the devise to her has a preference over all general legacies, (*Moore* v. *Alden*, 80 Maine, 301) still it has none over a specific devise, (*Towle* v. *Swasey*, *supra*) and hence they are to contribute *pro rata* if at all.

Decree accordingly.

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

STEPHEN L. KINGSLEY *vs.* EVERETT E. MCFARLAND and HOSEA B. PHILLIPS.

Hancock. Opinion December 31, 1889.

Fixtures. Contract of purchase.

When one in possession of land under a contract of purchase thereof, voluntarily erects and moves buildings thereon without any agreement express or implied with the land owner that they shall remain personal property and shall not become a part of the realty; they become a part of the realty and belong to the owner of the soil.

ON REPORT.

The facts appear in the opinion.

Wiswell, King and Peters, for plaintiff.

G. P. Dutton, for defendants.

VIRGIN, J. Writ of entry to obtain possession of a certain parcel of land at Bar Harbor with the buildings thereon, comprising a two story dwelling-house and stable. The defendants do not contest the plaintiff's title and right of possession of the land, but claim that the buildings are personal property, the defendant Phillips' alleged title being under a mortgage from the other defendant.

A careful examination of the reported evidence satisfies us of the following facts: The plaintiff owning the land in question, in the early part of 1888 orally agreed to sell it for $6000 to McFarland who agreed to pay that sum therefor and to move thereon the L of a certain hotel and make it into a boarding house; and then, upon receiving a deed from the plaintiff, McFarland was to give back a mortgage to secure the payment of the whole purchase money. Under this agreement McFarland entered into possession. The L was moved on, some fifteen feet added thereto and finished off into a boarding house with a piazza extending the entire length of one side and across one end. Like most of the buildings there, this one rested on fifty cedar posts, was boarded down into the ground and connected with the sewers and water pipe. A stable was also erected standing on stone piers.

McFarland hired money of his co-defendant Phillips with which to purchase and move the L, and for security, gave him a chattel mortgage thereof dated March 8, 1888, and recorded March 10. As to the location of the L when the mortgage was given, the evidence is somewhat conflicting,—McFarland testifies that it was given "before the L was started;" Phillips, "while it was in process of moving." But the mortgage itself describes the building as then on the land in question and the disinterested witness Lord, called to the premises, on March 4, by McFarland, to estimate the cost of completing the building, testifies that on March 4 (four

days before the date of the mortgage), "the building was on the land as it is now all moved." In May, after the stable was erected, McFarland mortgaged it as a chattel to Phillips. Our conclusion is that the house was mortgaged after it was on the land.

It is undisputed that Phillips knew that the L was to be moved on to the lot when McFarland purchased it and evidently understood as did the other parties, the purpose and object of the removal.

Under these circumstances we can have no doubt that these buildings became a part of the realty and could neither be attached nor mortgaged as the personal property of McFarland against the objections of the plaintiff. For generally buildings of a permanent character are a part of the realty and belong to the owner of the land on which they stand. *Milton* v. *Colby*, 5 Met. 78, 81; *Howard* v. *Fessenden*, 12 Allen, 124, 128; *Westgate* v. *Wixon*, 128 Mass. 304, 306. They can be held by another as personal property with the right of removal only under some agreement with the owner of the land. If erected voluntarily and without any contract express or implied with the land owner that they shall not become part of the realty but shall remain personal, they became part of the realty, and belong to the owner of the soil. *Hinkley and Eg. I. Co.* v. *Black*, 70 Maine, 473, 481, and cases there cited. There is no pretense of any express agreement on the part of the plaintiff that the buildings were to remain the personal property of McFarland. He was not like a stranger, without any interest in the land, who erects buildings on the land of another with the latter's consent from which might readily be implied an understanding that they could be sold or removed by the builder. *Osgood* v. *Howard*, 6 Maine, 452; *Russell* v. *Richards*, 10 Maine, 429; *Pullen* v. *Bell*, 40 Maine, 314, as explained in *Lapham* v. *Norton*, 71 Maine, 86, 87. But on the contrary, he was in possession under an agreement to purchase having an equitable interest therein, therefore, and the plaintiff was to convey to him the land under certain conditions, and the relations of the parties were not such as that the law would imply any agreement that the buildings were to remain personal property. *Westgate* v. *Wixon*, 128 Mass. 304. Both parties evi-

dently contemplated the completion of the contract, and McFarland intended the buildings as an improvement upon the land which he expected to own, and the plaintiff, as additional security of the purchase money of the land which he expected to convey. *Lapham* v. *Norton*, 71 Maine, 83.

As Phillips made advances on the L with full knowledge of what use was to be made of it and took a mortgage after it was made a part of the realty, we think his mortgage cannot avail him. And the same principle applies to the stable.

Judgment for the plaintiff for premises described in the writ including the buildings.

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

SARAH A. CHASE *vs.* IRENE O. ALLEY and FREDERICK J. ALLEY.

Hancock. Opinion January 4, 1890.

Dower. Limitations. Jointure. Assignment. Presumption of release. Practice. Wild land. R. S., c. 61, § 6; *c.* 103, §§ 9, 10, 16; *c.* 105, § 1; *Eng. Stat.* 27, *Hen.* 8.

An action of dower is not barred by the statute of limitations until twenty years and one month after demand.

A conveyance to a married woman is not deemed a jointure, unless such intention is expressed in the deed or appears by necessary implication from its contents.

A conveyance of land to a widow, executed after the decease of her husband but in accordance with his express directions prior thereto is not to be deemed an assignment of dower against common right, in the absence of any evidence of such intention.

In an action of dower the defendant is not entitled to have the question of the presumption of a release of dower arising from the lapse of time, submitted to the jury, when the counter evidence is so overwhelming that a verdict for him would be set aside for that reason.

What constitutes wild land.

ON EXCEPTIONS.

This was an action of dower, in which the jury returned a verdict for the plaintiff.

After the testimony on both sides was closed the presiding justice, for the purpose of giving progress to the case, made a ruling that the plaintiff having made out a case was entitled to a verdict unless the defendants showed to the contrary; and that all the evidence submitted in behalf of the defense, giving it the most favorable construction it was susceptible of for the defendants, did not constitute a defense to the action. The defendants excepted to this ruling and instructions.

The case is sufficiently stated in the opinion.

Deasy and Higgins, for defendants.

Jointure: R. S., c. 103, § 9; 1 Wash. R. P. pp. 316, 317; 1 Cruise Dig. 160, 199; *Ambler* v. *Norton*, 4 Hen. and M. 23 (Va.); *Vernon's case*, 4 Co. 1; *Anon.* Owen, 33; *Villers* v. *Beamonth*, Dyer, 146, a; *Bubier* v. *Roberts*, 49 Maine, 466; 2 Scrib. Dower, p. 378, § 22; 2 Bl. Com. 138, note; 2 Eden, 60; *Walker* v. *Walker*, 1 Ves. sen. 54.

Assignment: Park Dow. 262; *Hale* v. *James*, 6 Johns. Ch. 258; *Jones* v. *Brewer*, 1 Pick. 314, 317; *Draper* v. *Baker*, 12 Cush. 288; *Pinkham* v. *Gear*, 3 N. H. 163; *French* v. *Peters*, 33 Maine, 396; *French* v. *Pratt*, 27 Id. 381; 1 Wash. R. P. p. 273, § 6; *Austin* v. *Austin*, 50 Maine, 74; *Fitzhugh* v. *Foote*, 3 Call, (Va.) 13; 2 Scrib. Dower, p. 88; *Mitchell* v. *Miller*, 6 Dana (Ky.) 79; *Johnson* v. *Neil*, 4 Ala. 166; *Robin* v. *Miller*, 3 B. Mon. 88; *Jones* v. *Powell*, 6 Johns. Ch. 194.

Limitation: *Durham* v. *Angier*, 20 Maine, 242; *Robie* v. *Flanders*, 33 N. H. 524; *Conover* v. *Wright*, 2 Halst. Ch. (N. J.) 613; *Kingsolving* v. *Pierce*, 18 B. Mon. 782; *Playsay* v. *Dozier*, 1 Can. Court, Treadw. 112; *Merrill* v. *Shattuck*, 55 Maine, 370; *Curtis* v. *Hobart*, 41 Id. 230; *Luce* v. *Stubbs*, 35 Id. 92.

Presumption of release: *Barnard* v. *Edwards*, 4 N. H. 321.

Wild land: *Johnson* v. *Perley*, 2 N. H. 56; *White* v. *Cutler*, 17 Pick. 248; *Connor* v. *Shepherd*, 15 Mass. 167.

Wiswell, King and Peters, *B. E. Tracy*, with them, for plaintiff.

VIRGIN, J. Action of dower. The demandant having proved her marriage in 1854, the seizin of her husband until 1859, his death in 1862, and the statutory demand in 1888, is entitled to a judgment for dower, unless a legal defense is shown, which the court ruled had not been, giving the evidence the most favorable interpretation in behalf of the defendants of which it was susceptible; and the soundness of that ruling is before us on exceptions.

1. Is the demandant's right of dower barred by the statute of limitations from the fact that her action was not commenced or any demand made until twenty-six years after the death of her husband? We think not.

The statutory provisions cover the whole subject of dower and the mode and manner by which a widow may be barred of her action therefor, *Littlefield* v. *Paul*, 69 Maine, 527, 534; and this statute does not include in terms any limitation of an action of dower.

Before assignment in an estate of which her husband did not die seized, a widow has no estate or interest in, or right of entry upon the land of which she is dowable; her only right rests in a right of action to recover her dower. *Johnson* v. *Shields*, 32 Maine, 424; *Bolster* v. *Cushman*, 34 Maine, 428. Nor can she commence an action therefor until after demanding her dower she has given the tenant a month's opportunity to set it out to her without an action, which he failed to improve. R. S., c. 103, § 16. Moreover, generally, the statute of limitation is not set in operation until the right of action accrues; and when a demand is a prerequisite, it begins to run from the date of demand. *Codman* v. *Rogers*, 10 Pick. 112. Applying that general rule and the statute bar would not begin until one month after demand made in June, 1888.

Again, dower has exclusive reference to real estate. *Dow* v. *Dow*, 36 Maine, 211. With certain exceptions not material to this case, no person can commence a real or mixed action for the recovery of land, or make an entry thereon, "unless, within twenty years after the right to do so first accrues; or unless within twenty years after he or those under whom he claimed, were

seized or possessed of the premises." R. S., c. 105, § 1. This provision obviously has no application to an action of dower, since as before seen, the demandant has no right to make an entry before assignment or to bring an action until the expiration of one month after demand; but it applies only to actions, entries and claims based on some previous seizin or possession from which the limitation takes date. On like statutory provisions the same views have been taken. *Barnard* v. *Edwards*, 4 N. H. 107; *Robie* v. *Flanders*, 33 N. H. 524; *Parker* v. *Obear*, 7 Met. 24.

2. Jointure. In 1859, the demandant's husband being about to fail in Boston, conveyed without consideration to his cousin—Stephen Higgins, 3d—a fifty acre lot situated at Bar Harbor, which included about one acre of improved land with a new house thereon and another acre with an old house on it. The husband soon thereafter failed in business and removed to Bar Harbor into the new house where he died in 1862. Prior to his decease, in 1861, Stephen Higgins, 3d, by direction of the husband, conveyed to the demandant a life estate in the new house and lot. Did this deed constitute a jointure? We think there is no proper evidence of it.

At law a jointure did not bar dower until it was made so by St. 27, Hen. 8, *Harvey* v. *Ashley*, 3 Atk. 612; which has been substantially incorporated into our own statute. R. S., c. 103. It may be made after marriage; and when so made, "it bars the widow's dower, unless within six months after the husband's death, she makes her election to waive such provision and files the same in writing in the probate court." R. S., c. 103, § 9. Very many cases in early times involved the construction of marriage settlements and provisions in behalf of their widows by husbands in their wills. And much conflict exists among the opinions of the various courts. All such cases as to marriage settlements are now settled by our statute, R. S., c. 61, § 6; and as to wills, c. 103, § 10 which latter provision makes it the duty of the widow to waive any specific provision for her in the will, if she would have dower, and prevents her having both, unless such intention plainly appears in the will. But no such provision is made concerning conveyances by the husband to his wife during

coverture. To constitute a jointure by deed "it must be made and expressed in the deed to be in full satisfaction of her dower," (1 Wash. R. P. 299) "or such intention must appear by necessary implication from the contents of the instrument." 1 Greenl. Cr. 225. *Bubier* v. *Roberts*, 49 Maine, 460, 466. See language of Ld. Ch. King, in *Vizard* v. *Longdale*, Kelynge Ch. Cas. 17, also in note to *Dyke* v. *Randall*, 13 Eng. L. & Eq. 408; *Lawrence* v. *Lawrence*, 2 Vern. (1st. Am. Ed.) 365, where numerous cases are collected by the American Editor.

The deed in question is in the usual form of a deed of warranty, and purports to be given in consideration of one hundred dollars paid,—though the demandant admits that she paid nothing. It contains no conditions or other terms from which can be collected any intimation or suspicion of its being given as a jointure or in lieu of dower. Nor was it delivered to her; and if her testimony is to have any weight in the absence of any contradictory evidence, she neither knew nor had any expectation whatever of receiving such a deed, though she learned the fact some time before her husband's death in 1862.

The statute imposing on her the duty of making her election is predicated upon her knowledge of a jointure being made; else of course she could not be reasonably expected to make one between such a provision and her lawful dower. To have such knowledge rest in the memory of witnesses alone would render it too uncertain for all concerned, especially when the words "as a jointure" added to the instrument would put the intention beyond cavil, and her acceptance of the deed evidenced by occupation under it or subsequent conveyance without the statutory waiver, would bind her.

There are some cases of marriage settlements and provision in wills which courts in early times have decided to be jointures because circumstances seemed to point in that direction; but we are aware of no case like the one in hand. We are of opinion, therefore, that whatever might be our suspicions collected from extraneous circumstances, this deed cannot be deemed to have been intended and accepted as a jointure, since nothing contained therein discloses any such intention. This rule cannot injure sub-

sequent purchasers of the husband's estate, for the absence of the wife's signature on the deed from her husband to his cousin as disclosed by the public registry would at once inform them of the outstanding inchoate right of dower, and the deed to herself could not lead them into error.

4. Assignment. In January, 1863, following the death of the husband in 1862, Stephen Higgins, 3d, in accordance with the instructions of the husband in his lifetime, and on request of the demandant, quit-claimed to her the fee in the new house lot of which she was already the life-tenant; and thereafter she conveyed the same to one Douglass by her deed of warranty. Was this conveyance to her of the fee an assignment of dower "against common right"? The deed itself contains no suggestion that it was so intended, nor is there any evidence that it was accepted as such. She testifies that she obtained that deed because she desired to sell the property. Douglass testifies that she spoke of it during their negotiations as the "widow's rights," which she most emphatically denies in answer to a cross-interrogatory put by the defendants. And the witness, Grace, testifies that, in 1887 while on a visit at Bar Harbor, she said—"she should not try to get anything more if the property had not come up so at Bar Harbor." But this declaration does not necessarily imply that what she had already "got" was obtained as dower. We are of opinion that this transaction cannot be deemed an assignment of dower.

5. Presumption of release. Were the defendants entitled to have submitted to the jury the question of the demandant's release of dower arising from her twenty-six years of silence? We think not. Such a course was directed in an early case in which the lapse of time, the widow's subsequent continuous absence from the state and her intervening marriage, were the same as here. *Barnard* v. *Edwards*, 4 N. H. 321. But unlike that case here is the unqualified denial by the demandant that she "ever in any way released her right of dower." And the cousin, Stephen Higgins, 3d, who was the confidential friend of the husband and held in secret trust for him the title to the whole fifty acre lot, executed both deeds to her and those of the residue of the prop-

erty, was on the stand as a witness for the defendants and never suggested that any release of dower was mentioned. He had all the opportunity of knowing the facts; and his covenant of warranty in his deed of the property in which dower is now demanded made him interested in recollecting this fact, if true. The court could not be expected to let a verdict based upon a presumption alone stand against such counter evidence.

6. Neither do we think the defendants' position in relation to wild land tenable. To be sure several witnesses speak of some portion of the four acres as wild and uncultivated land. Still an acre or more was improved land and the remainder was more or less covered with alders and was somewhat swampy, and in spots hay had been cut and grass grew. At any rate, it was suitable for pasturing, though it had not recently been used for such purpose, and the trees or bushes might be beneficial for fencing purposes and it was contiguous to the cultivated land. *Stevens* v. *Owen*, 25 Maine, 94.

As no exceptions to the exclusion of evidence were included in the bill of exceptions, we give them no consideration.

Exceptions overruled.

PETERS, C. J., WALTON, FOSTER and HASKELL, JJ., concurred. EMERY, J., did not sit.

JOHN B. HARE *vs.* STEPHEN MCINTIRE.

Knox. Opinion January 4, 1890.

Quarry. Blasting. Workmen. Fellow-servant. "All persons." R. S., c. 17, §§ 23, 24.

The remedy provided by R. S., c. 17, §§ 23 and 24 for the recovery of damages for a personal injury caused by the blasting of rocks, does not apply to workmen in a quarry.

Fellow-servants mutually owe to each other the duty of exercising ordinary care in the performance of their service, and whichever fails in that respect is liable at common law for any personal injury resulting therefrom to his fellow-servant.

ON REPORT.

This was an action to recover damages of the defendant, which the plaintiff claimed he had sustained by reason of a blast fired by the defendant in a granite quarry, of which the plaintiff gave the defendant no notice. The plaintiff was a stone cutter employed in the sheds and the defendant was a ledge man in charge of the blasting.

The case is stated in the opinion.

J. E. Moore, for plaintiff.

"Approaching" in the statute is not a word of limitation. It means to include all those not engaged in blasting. *Winslow* v. *Kimball*, 25 Maine, 493, 495. Otherwise, it would defeat the purpose of the statute originally entitled "to prevent accidents and injuries from the blasting of rocks;" and would exclude one standing still.

Flexibility of interpretation: *Holmes* v. *Paris*, 75 Maine, 559, 561; Bacon, Ab. (stat. rules of construction). Title of statute may be looked at. *Eaton* v. *Green*, 22 Pick. 526, 530, 531; *Holbrook* v. *Holbrook*, 1 Pick. 248, 250, 258.

Negligence: Shear. & Redf. Neg. § 13, a, § 54, a; *Taylor* v. *Carew Mfg. Co.*, 140 Mass. 150, 151. Defendant liable without reference to the statute. *Osborne* v. *Morgan*, 130 Mass. 102; Shear. & Redf. Neg. § 112. Plaintiff had a right to rely on supposition that defendant would do his duty, and give notice of the danger. *State* v. *B. & M. R. R. Co.*, 80 Maine, 430, 443.

C. E. Littlefield, for defendant.

Title does not constitute part of an act.

Charles River Bridge v. *Warren Bridge*, 7 Pick. 345, 455. Burden of proof upon plaintiff to establish defendant's negligence. *Beaulieu* v. *Portland Co.*, 48 Maine, 291; *Stevens* v. *E. & N. A. R. R. Co.*, 66 Id. 74. Negligence: *Parrot* v. *Wells*, 15 Wall. 537, 538; *Parker* v. *Port. Pub. Co.*, 69 Maine, 176; *Topsham* v. *Lisbon*, 65 Id. 455; Moak's Underhill on Torts, p. 271; Abbott's Trial Ev. p. 590, § 22; *Vincent* v. *Stinecour*, 29 Am. Dec. 149 and note. Servant assumes ordinary and apparent risks. *Coolbroth* v. *M. C. R. R.* 77 Maine, 167; *Buzzell* v. *Laconia Mfg. Co.* 48 Id.

121; Wood's Mar. and S., pp. 680, 698. Plaintiff must show he was in the exercise of due care; and that he did not assume the risks of the blasts, with notice, as he claims no notice was given. Thomp. Neg. pp. 1008, 1015, 1017, 1048; Wood's Mar. and S. pp. 678 (note 1), 680, 692, 693, 718, 720, 740, 748, 758; *Huddleston* v. *Lowell Machine Shop*, 106 Mass. 286; *Ince* v. *E. B. F. Co.*, Id. 152; *Ladd* v. *N. B. R. R. Co.*, 119 Id. 412; *Green* v. *Ill. Cen. R. R. Co.*, 4 Am. Rep. 192; *Gibson* v. *Erie R. R. Co.*, 20 Id. 552; *B. & O. R. R. Co.* v. *Stucker*, 34 Id. 295; *Rains* v. *St. Louis R. R. Co.*, 36 Id. 461; *Tuttle* v. *Det. G. H. & M. R. Co.*, 122 U. S. 189; *Atkins* v. *Merrick Thread Co.*, 3 N. E. Rep. 39 and note; *Gaffney* v. *N. Y. & N. E. R. R. Co.*, 4 Id. 33; *Taylor* v. *Carew Mfg. Co.*, 140 Mass. 150; *Russell* v. *Tillotson*, Id. 201; *Joyce* v. *Worcester*, Id. 245; *Hatt* v. *Nay*, 144 Id. 186; *Nason* v. *West*, 78 Maine, 257; *Judkins* v. *M. C. R. R.*, 80 Id. 417.

VIRGIN, J. An action by one workman in a granite quarry against his fellow-workman, to recover damages for a personal injury alleged to have been caused by a rock thrown from a blast discharged by the defendant. The case comes up on a report of the evidence; and if the action is maintainable it is to stand for trial for the assessment of damages.

The action is founded on R. S., c. 17, §§ 23 and 24, the material provisions of which,—including the words in brackets found in the original act of 1852, c. 257—are as follows: (23) "Persons engaged in blasting lime rock or other rocks, shall before each explosion give seasonable notice thereof, so that all persons or teams [that may be] approaching shall have [a reasonable] time to retire to a safe distance from the place of said explosion." (24) "Whoever violates the preceding section * * is liable for all damages caused by an explosion [when seasonable notice thereof was not given]; and if the persons engaged in blasting rocks are unable to pay, or after judgment and execution avoid payment by the poor debtor's oath, the owners of the quarry, in whose employment they were, are liable for the same."

Is this statutory remedy intended to apply to workmen in quarries?

A literal construction of the words, "all persons," would doubt-

less include them. Still when read in connection with the other clauses of the statute, we do not think the legislature so intended. "Persons that may be approaching" seem rather intended to apply to those only who are not engaged in and about the quarry, and who, therefore, being ignorant of their proximity to danger, are seen coming within the danger line, instead of including with them such persons also as are constantly engaged there and have personal knowledge of what is taking place there. That clause apparently limits the remedy to such outsiders as might unsuspectingly be approaching within the possible range of the blast, and the object of the "seasonable notice" to them is "so that they and their teams may have a reasonable time to retire to a safe distance."

Moreover, if the real intention of these provisions, derived from their language alone, left any doubt on this question, it is entirely removed by the further consideration that the other construction would make it in derogation of the common law; and to warrant such a result the intention should be clearly expressed. *Dwelly* v. *Dwelly*, 46 Maine, 377; *Carle* v. *Bangor & Piscataquis Canal & R. R. Co.*, 43 Maine, 269.

By the universally acknowledged rule of common law, when an employe of age and intelligence enters another's service, he is presumed to understand and therefore, as between himself and his employer and in the absence of any agreement to the contrary, to assume all the ordinary risks incident thereto, and to measurably predicate his wages upon the extent of the perils he is to encounter and assume, among which are those which he knows are more or less likely to occur through the occasional negligence of his co-employe. And as it is utterly impracticable for the employer to absolutely prevent such negligence, and the best thing he can do in that direction is to employ such prudent workmen as are least likely to act negligently, therefore, if he has used proper care in respect of their selection, the employer is not responsible to any one of them for an injury resulting from the negligence of any other. But if the statute in question is intended to include workmen in quarries, then this long established salutary rule of the common law is thereby reversed; for the

statute expressly makes the employers liable for an injury occasioned by the negligence of a fellow-servant if the one who causes it is unable to pay or avoids. If such a radical change of the law governing the duties and liabilities of employers to their employes had been in the mind of the legislature, we think the lawmakers would have clearly and directly expressed such intention; and even not limited it to workmen in quarries but extended it to other kinds of business involving more or less danger and in which large numbers of employes are engaged.

This view finds apposite illustration in a decision of this court construing a statute defining the liability of railroad companies. Chapter 81 of R. S., of 1841, after providing for the erection of sign-boards and gates and stationing agents at crossings and fixing penalties for non-compliance therewith, continued as follows: "Every railroad corporation shall be liable for all damages sustained by *any person*, in consequence of any neglect of the provisions of the foregoing section or of any other neglect of any of their agents, or by any mismanagement of their engines, in an action on the case by the person sustaining such damages." R. S., (1841) c. 81, § 21. In an action by an employe against a railroad company to recover damages for an injury caused by another employe, the court in deciding that the statute did not apply, says: "Notwithstanding the literal construction of the statute might entitle a servant to recover for injuries occasioned by the fault of a fellow-servant, still such a construction is wholly inadmissible. Statutes, unless plainly to be otherwise construed, should receive a construction not in derogation of the common law," and after expressing the opinion that the statute was not intended to change the nature of contracts between such corporations and their servants, the court continues: "If such had been the intention, we think it would have been more plainly or directly expressed. The words "*any person*" must be limited in their application to such persons as were not servants of the corporation, leaving such servants who are presumed to have arranged their compensation with their eyes open and to have assumed the relation with all its ordinary dangers and risks without any remedy against the corporation for such injuries as may

be incident to the service they have engaged to perform." *Carle* v. *Bangor & Pisc. Canal & R. R. Co.*, *supra.*

Can the action be maintained at common law?

Some of the elementary writers seem inclined to the opinion that one servant is not liable to a fellow-servant for negligence. Whart. Neg. § 245. Wood Mar. & S., § 325. To maintain his action the plaintiff must prove some contract or obligation, from which in legal contemplation, arises a duty the breach whereof is alleged against the defendant; or facts establishing such a relation between himself and the defendant that such a duty will thence result,—together with a breach thereof. Broom Com. 670.

There is no subsisting contract between fellow-servants and neither receives any compensation from the other. Neither is a party to, or has any interest or privity in the other's contract with their common master. Their separate, independent contracts with him are only material as showing that they are individually rightfully on the premises and engaged in the performance of their service there. The action cannot, therefore, be founded on any contract, but if at all on the defendant's misfeasance, which, even if it could be deemed a breach of his contract with his master, would not for that reason, exempt him from liability to others injured thereby, provided such misfeasance was a violation of a duty springing from the relation between them. And we are of opinion that where two or more persons are engaged in the same general business of a common employer, in which their mutual safety depends somewhat upon the care exercised by them respectively, each owes to the other a duty resulting from their relation of fellow-servants, to exercise such care in the prosecution of their work as men of ordinary prudence usually use in like circumstances; and he who fails in that respect is responsible for a resulting personal injury to his fellow-servant. Such a liability would necessarily have a salutary influence in inducing care on their part.

The great weight of authority lies in this direction. Thus where the plaintiff sued a railroad company to recover damages for the death of her husband—one of its employes—killed by the negligence of one of the defendants' engine drivers—Barons Pollock and Huddleston, while they exempted the company be-

cause the death was caused by a fellow-servant, said: "It is clear that an action would well lie against the driver of the engine, by whose negligent act the death was occasioned." *Swainson* v. *North E. Ry. Co.*, 3 Exch. D. 341, 343. A like *dictum* was made by Baron Alderson in *Wigget* v. *Fox*, 11 Exch. 832, 839, and by Baron Bramwell in *Degg* v. *Midland Ry. Co.*, 1 H. & N. 773, 780. And it has been directly adjudicated in *Wright* v. *Roxburgh*, 2 Ct. Sess. Cas. (3d series) 748; *Hinds* v. *Harbou*, 58 Ind. 121; *Hinds* v. *Overacher*, 66 Ind. 547; *Griffiths* v. *Wolfram*, 22 Minn. 185; and in *Osborne* v. *Morgan*, 130 Mass. 102, which last case expressly overrules *Albro* v. *Jaquith*, 4 Gray, 99. The contrary doctrine "is not only destitute of sense," says the eminent author of "Thompson on Negligence," "but it involves the monstrous conclusion that one servant owes no duty of exercising care to avoid injury to his fellow-servant." 2 Thomp. Neg. 1062. See also Add. Torts, § 245; Shearm. & Redf. Neg. § 144.

Facts. In September, 1882, the defendant, a quarry man of twelve years' experience, was engaged in opening a new place in the quarry, by blasting off the outside layer of soft stone so as to uncover those fit for use which lay beneath in sheets about two feet thick. He sunk his first hole fifteen inches deep in the front edge of the top layer and charged it with "a little more than half a pound of powder." Next north was a table rock six or seven feet high. South, southeast and southwest of this place of blasting were two tiers of long, narrow sheds extending easterly and westerly, seven or eight feet high, divided into bands, where quarried rocks were shaped and dressed. These sheds had narrow doors in each end for ingress and egress, with two sets of doors on their north and south sides, the lower ones two and one-half feet wide and so constructed as to be taken out and the upper ones three and one-half feet wide, hung at their upper edges by hinges and were opened by being swung upward.

The plaintiff was a quarryman and stone cutter. He had cut stone there in May and June, and after working July and August in the crew of one who then had charge of blasting, he returned to cutting again in September when he was engaged in the ex-

treme west end of shed No. 3, two hundred and sixty-five feet south of the place of blasting. The north side doors,—toward the blast,—were closed to keep out the north wind, while the upper south door was open and the lower one closed. When the blast exploded, a piece of rock weighing about ten pounds, came through the north wall of the shed above the closed upper door and hit the plaintiff's back while in a stooping attitude and thence out of the south open door to an iron rail where it broke.

The injury caused by this rock is the foundation of the action; and the particular complaint is that no notice was given to the plaintiff previous to the firing of the blast.

A careful examination of the mass of evidence reported satisfies us, that the general notice usually given when a small blast is to take place, was seasonably given, to wit,—a cry of "fire" three times made with short intervals of time between them, before applying the fire, and that the explosion did not take place for several minutes thereafter. It also appears that when heavy blasts,—which seldom occur,—with twenty-five to fifty pounds of powder are made, the custom is to send word to the several sheds. Frequently when light blasts are fired many workmen, on hearing the alarm go into the sheds for protection, and those already in remain, and hence has grown up a sort of a careless feeling of security on their part.

The plaintiff and some others in the same shed testify that they heard no alarm, accounted for, perhaps, by reason of the din of their hammers and the fact that the doors on the side next to the blast were closed. Still others in the same direction, and much further away distinctly heard it.

But we think the plaintiff mistook his form of remedy; and that the real fault of the defendant was not in failing to give sufficient notice, but in not sufficiently covering the blast. It is absurd to say that rocks from a blast properly covered will fly as did those which rained down upon shed 3, one of which went through its board wall. The gross carelessness of such omission appears upon its face,—*res ipsa loquitur*. But there is no such claim in the declaration and evidence thereof was therefore excluded. Neither is there any allegation in terms of negligence

on the part of the defendant or due care on the part of the plaintiff. We are of opinion, therefore, that this action is not maintainable.

Plaintiff nonsuit.

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

JAMES M. HAGAR, in equity, *vs.* PARKER M. WHITMORE, and others, and

PARKER M. WHITMORE, in equity (cross-bill), *vs.* JAMES M. HAGAR.

Sagadahoc. Opinion January 4, 1890.

Equity. Practice. Trust. Sale of securities. Accounting by trustees and compensation. R. S., c. 77, §§ 10-37.

R. S., c. 77, § 23, providing for reporting equity cases directly to the law court, without any decree by the court in the county, was intended for cases depending mainly for determination on some important or doubtful question of law, the decision of which will practically decide the case.

It is not good practice to report to the law court for original consideration, without the aid of a master's report or justice's opinion, a case in equity where it becomes necessary to sort out and decide many questions of fact, as well as some of law, and to finally adjust and compose all the disputes growing out of numerous and varied commercial and maritime transactions and in which the testimony, including a mass of correspondence, accounts and vouchers, protests, general average statements and many other documents, consists of many hundred pages.

The maxim, *probata secundum allegata,* applies in equity as well as at law. Where the evidence first discloses fresh grounds for relief, or defense, the party desiring to avail himself of them, should state them in some amendment or supplemental pleading.

An accommodation indorsement of another's note is a sufficient consideration to pay therefor, if such promise is in fact made; but the mere indorsement of a friend's note, at his request, does not raise a presumption of such a promise.

A court of equity may retain a bill against a trustee praying for an account, etc., in order to effectuate an accounting and adjustment between the parties, including matters subsequent to the filing of the bill, although the plaintiff has failed to establish the allegations in his bill.

Of the accountability of trustees and their compensation.

ON REPORT.

Bill in equity, with cross-bill, reported to the law court for hearing on bill, answers and testimony. The prayer of the bill was for an acounting by the defendants as trustees of the plaintiff;—a decree to pay over all balances;—and for damages for their alleged mismanagement of the trust property.

The case is fully stated in the opinion.

W. F. Lunt and J. W. Spaulding, for plaintiff.

Conduct and liabilities of trustees: 2 Pom. Eq. §§ 1060, 1062, note 2, 1063, 1066-1069; Perry Trusts, §§ 602, 770; 1 Flint's Lewin on Trusts, 252, 258, 422, note, 424, 435; *Oliver* v. *Court*, 8 Price, 165; *Campbell* v. *Walker*, 5 Ves. 680; *Conolly* v. *Parsons*, 3 Ves. 628, note; Sug. Vend. & Pur., 11th ed. 50; *Berger* v. *Duff*, 4 Johns. Ch. 368; *Hardwick* v. *Mynd*, 1 Anst. 109; *Ex-parte*, *Belchier*, Amb. 218; *Re*, *Speight*, 22 Ch. D. 727; *Ord* v. *Noel*, 5 Mad. 438; *Rossiter* v. *Trafalgar L. Assur. Asso.*, 27 Beav. 377; *In re*, *Chertsey Market*, 6 Price, 285.

Care and diligence required: 2 Pom. Eq. §§ 1066, 1067, 1070, 1079–1082; 1 Flint's Lewin on Trusts, 256, 293, 295, 296, 339, 435, 485; 2 Perry's Trusts, § 900; *Fox* v. *Mackreth*, 2 B. C. C. 400; *Hall* v. *Hallet*, 1 Cox, 134; *Whichcote* v. *Lawrence*, 3 Ves. 740; *Ex-parte*, *Reynolds*, 5 Ves. 707; *Randall* v. *Errington*, 10 Ves. 423; *Sinclair* v. *Jackson*, 8 Cow. 582; *Cranston* v. *Crane*, 97 Mass. 459; *Hawley* v. *James*, 5 Paige, 487; *Cocke* v. *Minor*, 25 Gratt. 246.

W. L. Putnam and C. W. Larrabee, for defendant Whitmore.

F. J. Buker and Weston Thompson, submitted brief for defendants Theobald and Libby.

EMERY, J. This is an equity cause growing out of numerous and varied commercial and maritime transactions, and in which all the testimony including a mass of correspondence, accounts, and vouchers for many years, also protests, general average statements, and other marine documents, together with numberless notes, bills, etc., has been reported to the law court in a voluminous record of over nine hundred printed pages, for original

consideration. From this heterogeneous bulk, the law court is asked, without the aid of any master's report or justice's opinion, to sort out, and decide many questions of fact, as well as some of law, and to finally adjust and compose all the disputes.

We think it would have saved the parties time and expense, had the cause been heard, in the first instance by a master or a single justice, who could have guided the hearing, asked for explanations, made suggestions, eliminated the immaterial, indicated the governing facts, and thus brought the parties to fewer and more precise issues. Amendments could then have been seasonably made to the pleadings, to embrace new claims or defenses disclosed by the evidence. We think, too, such a hearing in the first instance was required by the spirit of the statute. The Equity Procedure Act of 1881, (now R. S., c. 77, §§ 10 to 37 inclusive) intended the equity court to be held by a single justice, with power to hear and determine causes, and make final decrees, substantially as by a chancellor. An appellate court was provided for in the law court, which was authorized to entertain exceptions and appeals. The provision in § 23 for reporting an equity cause directly to the law court without any decree by the court in the county, was intended for cases depending for determination mainly on some important or doubtful question of law, the decision of which would practically decide the case.

The examination and consideration of so much testimony and so many documents have, of course, consumed much time and proportionately delayed the parties; and we regret that after so much time and labor expended, we find it impracticable, not to say impossible, to finally end the cause or to do more than to indicate the principles by which a master, or single justice is to be guided, and order the cause sent to a master, and remit the cause to the court in the county, to await the master's report. We regret the delay and expense to the parties, and wish they had not made it necessary, by their request and agreement to report the case in bulk, before anything had been determined in the county. In spite of the length of the record we shall state our conclusions with brevity. We have repeatedly declared that upon questions of fact, the law court cannot undertake to do more than state its

findings. To give reasons for findings of fact would encumber the law reports, without aiding the exposition of the law.

The case is briefly as follows:—James M. Hagar being indebted to several Bath, Augusta and Richmond banks, on some of which indebtedness Parker M. Whitmore was indorser for him, and also having had many business transactions with Whitmore, conveyed January 6, 1885, two ships, the Hagarstown and Yorktown by absolute bills of sale to said Whitmore, and Theobald and Libby, the three respondents, and took back from them a writing of the same date signed by them all. The substance of this writing was, that the said Whitmore, Theobald and Libby accepted the conveyance of the ships, to secure the payment of Hagar's indebtedness to the various banks named,—that they were not to be responsible for any debts or damages occasioned by the ships,—that Hagar was to continue to manage them, paying all bills, keeping in good repair, and keeping insured at his own expense in sums not less than $50,000;—that if Hagar should pay or otherwise secure his said debts to the banks, save Whitmore harmless as his indorser or security, pay Whitmore whatever he might owe him, all at or within eighteen months from the date of the writing, and in the meantime do all the things named in the writing for him to do, and save his said trustees harmless, they would thereupon reconvey the ships to him,—but that on Hagar's failure to do as above stated within the eighteen months, then the vendees, or trustees, were to take the property and sell the same without further notice, and from the proceeds pay the debts and liabilities named, and the surplus, if any, to Hagar.

Each of these three vendees was a director in one or more of the banks named.

Hagar did not pay the indebtedness within the eighteen months, nor perform the other conditions named in the writing; and at the end of the eighteen months, July 7, 1886, Whitmore, Theobald and Libby gave Hagar the usual statute notice for the foreclosure of mortgages of personal property, that by reason of his default they claimed a foreclosure of any right of his to manage or redeem the ships. At this time the ships were absent under masters appointed by Hagar and accounting to Hagar. The

trustees notified the masters to account and make remittances to them. About April 25, 1887, the trustees sold the Hagarstown at Shanghai, China, the ship having been much damaged by a cyclone on a voyage thither. June 27, 1887, the trustees conveyed the Yorktown back to Hagar to enable him to carry out a bargain to sell to other parties, he paying the proceeds into the banks on his indebtedness. Disputes arose between Hagar and Whitmore over these matters, culminating in this litigation.

Hagar brought his bill in equity July 25, 1887, against Whitmore, Theobald and Libby reciting the writing of January 6, 1885, and basing his claim thereon, and then alleging, *that* the respondents took possession of the ships, and received large sums of money from their earnings and sale,—*that* although he had performed all the conditions imposed upon him by the writing, the respondents would not pay him the proceeds of the ships, nor account to him as trustees, and finally; *that* they had conducted negligently and wastefully in selling the Hagarstown, in China, instead of repairing her sufficiently to return to the United States, and had thereby occasioned him heavy and unnecessary loss. These are the only allegations. The bill then prays that the respondents be required, 1st, to render a full account; 2d, to pay over all balances; 3d, to pay such damages as their mismanagement occasioned him.

The answers admit the written agreement of January 6, 1885, and admit the taking possession of the ships, but deny the other allegations in the bill. The answers of Theobald and Libby admit that the debts due the banks have been paid, and that, not counting anything due Whitmore from Hagar, there is an apparent balance due Hagar from the funds received by the trustees. Whitmore's answer alleges further, that Hagar is still indebted to him, that many accounts of the ship are still unsettled; that Hagar has prevented their settlement by requesting insurance companies not to pay insurance, by summoning Whitmore as trustee in suits against parties having bills against the ships; and by resisting the payment of taxes on the ships,—that thereby it was not possible to state the account more fully, and not safe to pay over any moneys, while taxes, claims, and debts remained

unsettled; and claims to retain large sums as compensation for the services of the trustees.

Whitmore brought a cross-bill against Hagar reciting the preceding facts and alleging that he has claims against Hagar (1) for numerous indorsements, notes, etc., (2) for personal services as treasurer of the U. S. Manufacturing Co. at Hagar's request, and (3) for personal services on a trip to New Orleans with Hagar on Hagar's business;—and further alleging that Hagar was trying to induce certain insurance companies to refuse payment to the trustees of insurance due them on the Hagarstown. The bill prays that Whitmore's said claims be ascertained, and the amount made a charge upon the money in the hands of the trustees, if any, and that Hagar be enjoined from interfering with the insurance. Hagar's answer denies all indebtedness to Whitmore, and alleges that Whitmore's financial conduct made him apprehensive that money, paid him by insurance companies, could not be recovered from him.

As to Whitmore's claims for the services alleged, we do not find from the evidence any express promise on Hagar's part to pay for them, nor that they were rendered under such circumstances as would imply a promise. Hagar and Whitmore were friends of long standing. Each indorsed notes, and signed bonds for the other for many years. Whitmore, however, did much more of this for Hagar, than did Hagar for Whitmore. Each seems to have often aided the other with advice, and indorsements and like services without thought of other compensation than gratitude and reciprocation. We do not find sufficient evidence that Whitmore asked for money compensation, or expected it, before this trouble arose. While the indorsement of the note of another may be sufficient consideration for a promise to pay therefor, if such promise is in fact made, we do not think the mere indorsement of a friend's note, at his request, raises a presumption of such a promise. Many such indorsements would not raise such a presumption especially where the favor is often reciprocated. Whitmore does not appear to have made any charge, or expected any pay in money, for the other services alleged. Hagar paid his expenses, and there was no talk at the time of any pay for services. We

do not think any of the claims for services alleged in the cross-bill are sustained.

There is no occasion shown for the injunction asked for. The courts are open to Mr. Whitmore and his co-trustees to recover the insurance money from the recalcitrant companies. We do not see how Hagar can impede such suits. We see no merit in the cross-bill and think it should be dismissed with costs.

Returning to the original bill, it is not contended that Hagar did pay his indebtedness to the banks within the time named, or that he performed generally the conditions of the agreement. It is conceded that the defendants rightfully took possession of the ships, and assumed their management. They on the other hand do not claim a forfeiture, but concede that Hagar should receive any surplus after the purposes of the trust are fully accomplished, and its affairs fully settled. It must not be forgotten, however, that the defendants were primarily trustees for the creditor banks. The conveyance of the ships was made to secure the banks. It was accepted for that purpose. The defendants owed duties to the banks as well as to Hagar. They were to care for the banks, though Hagar might suffer thereby.

It is also conceded, that after taking possession of the ships, the defendants, or at least Whitmore, did receive large sums of money from their earnings, general average accounts, insurance adjustments, and the final sale of the ships and stores, and also made large disbursements on their account, besides sums paid on Hagar's indebtedness. It also appears that the defendants or Whitmore, had not at the date of the bill fully settled the affairs of the trust and had not rendered a full account, and not paid to Hagar any balance.

The first question under the original bill would seem to be whether this delay in settling accounts, etc., was the fault of the defendants. They insist that they were pushing matters in that direction as fast as possible, and did render accounts as often and complete as practicable, and that the incompleteness and delay, if any, was owing to Hagar's interference with the insurance, &c., as alleged in the answer. We find in the case, among Hagar's exhibits, what purports to be an account of the ships and the

trust down to July 1, 1887, and which Whitmore testifies he rendered to Hagar. These accounts bring the matter down to only a little over three weeks before the suit. The Hagarstown was sold late in April. The Yorktown was reconveyed late in June. The defendants seem from the evidence to have been hindered somewhat by the obstructive conduct of Mr. Hagar as alleged. The delay in adjusting insurance and taxes seems to be on his account and at his request. We cannot say that the defendants were in fault in not having closed the trust and rendered a final account before the date of the bill July 25, 1887.

The next question under the bill is, whether the defendants were negligent and unskillful in the sale of the Hagarstown, to such a degree as to make them liable for loss. The ship having arrived at Shanghai dismasted and in a more or less dilapitated condition, from an encounter with a monsoon in the China seas, the trustees, (the defendants) sent out an agent of their own to supersede the master, and take charge of the vessel. They finally ordered her to be sold as she was, instead of attempting to repair her and bring her to the United States. The complainant does not allege fraud, but insists that the ship could have been easily repaired sufficiently to bring her home, and that to sell her in China under the circumstances, was a reckless sacrifice of his property.

Upon this point we are asked to determine, not a question of maritime law with which we might be supposed to have some acquaintance, but a question of expediency in managing a business of which we can have little or no knowledge. It is true that when a court is convinced that acts of trustees are unskillful or negligent, and occasion loss, it will relieve the *cestuis que trustent* at the expense of the trustees. The transaction here challenged, however, was upon the other side of the world in a Chinese port. The matters to be considered, in determining how to meet the emergency, were such as only persons of experience in building ships, and sailing them on for foreign voyages, could understand. No amount of mere theoretical learning would make one a safe judge of the expediency of any course. When persons, apparently of experience and practical knowledge, have

chosen a particular mode of dealing with the emergency, and the court is asked to consider such mode and award damages for the choosing it, the court may be obliged to review the transaction, but it will properly require clear and convincing evidence of its folly before so declaring.

In this case the evidence upon this question is voluminous, coming from ship masters, ship builders, ship carpenters, ship owners, seamen, etc., and affecting the model, material, and construction of the ship, the skill and experience of the defendants' agent sent to Shanghai, the experience and skill of Whitmore, the markets and customs at Shanghai, etc. The evidence is very conflicting on all these points as well as upon the general question of expediency. We have dutifully read and compared all this evidence. There is not enough in the uncontested or proven facts to make it apparent to the non-expert at this distance, that the sale at Shanghai was inexpedient. We do not think, therefore, we can safely declare that the sale of the Hagarstown was so unskillful and negligent, as to subject the trustees to damages therefor.

These findings dispose of the allegations in the bill and, perhaps, strictly of the case itself; but we may notice some other matters pressed upon us at the argument.

The complainant earnestly contends that there should be a decree against the defendants on the ground that they over insured the ships, subjecting the funds to great and needless expense for premiums; also on the ground that they did not sufficiently guard the trust estate against taxes; also on the ground that they oppressively insisted on burdensome conditions for the reconveyance of the Yorktown.

These questions were nowhere raised in any of the pleadings, and the respondents objected to much of the evidence concerning them, and insisted at the argument that they could not properly be determined in this suit. While in equity procedure all (except dilatory) pleadings are construed liberally in furtherance of the cause, yet propositions of fact, relied upon as grounds for equitable relief, must be alleged with some degree of distinctness in the bill. Claims and defenses in equity based on

facts, must be stated in bill, answer, or plea. It is not enough that they appear in the evidence, and are noticed in the argument. The maxim *probata secundum allegata* applies in equity as well as at law. If the evidence first discloses fresh grounds for relief, or defense, the party desiring to avail himself of them, should state them in some amendment or supplemental pleading, which upon proper terms he can always obtain leave to file. The decree must follow the allegations. If a party, after the evidence is taken, submits his cause upon his original allegations, he should be content with an adjudication confined to those allegations. In this cause the complainant submitted no amendments but only his original bill as first drawn. We think he cannot require us to go beyond it.

We may say, however, that we have taken the time and pains to study the evidence on these matters now suggested, and are not satisfied that, upon either ground, the defendants violated any legal or equitable rights of the plaintiff. Hagar neglected to insure the ships and thereby left the insurance to the discretion of the defendants. As we have before said, they were not merely trustees for Hagar, but primarily for his creditors. It was their duty to the creditors to keep the ships amply insured, so that making all allowances for the various deductions and expenses in marine insurance, there would be a clear surplus to pay all claims in full with interest. The evidence shows that Hagar was aware of the amount of insurance. He could have avoided the expense of it by paying his debts and retaking his property, or by selling these same ships.

In the matter of taxes, each trustee was assessed as owner of one-third of the ships, such appearing to be the title upon the record. Hagar claims that the trustees should have caused the ships to be taxed to him, as the real owner. It does not appear that the trustees were at all active in procuring the tax to be assessed against them, or that Hagar made any move toward procuring the assessment he desired. He was in possession of the ships for the taxing years 1885 and 1886, receiving their earnings, and should himself have attended to the assessment and payment of the taxes. Had he done so, had he done his duty, there

would have been no difficulty. He, however, neglected the taxes and left them to be assessed against the trustees personally. Theobald and Libby procured an abatement from the Richmond assessors. Whitmore contested the matter with the Bath authorities and was worsted. We do not see what equitable reason Hagar has to complain, when he should in equity have relieved the trustees of all this trouble by paying the taxes himself. The taxes of 1887 were scarcely due when this suit was commenced, and Hagar can adjust them himself. While he is entitled to be credited with any abatement, we think he has no ground for further equitable relief on the score of taxes. He did not do equity.

The defendants were clearly under no legal or equitable obligation to reconvey the Yorktown until all the debts, for which it was pledged, were paid in full. There is nothing inequitable, in the legal sense of the term, in trustees for creditors refusing to release any part of their security until all the secured debts are paid in full. In this case the trustees did not insist upon anything more, and, indeed, they did reconvey for less.

The plaintiff again contends in argument that the writing of January 6, 1885, does not express the real contract of the parties but was extorted from him in his extremity. He does not in his bill make any such allegation, nor pray for the cancellation or reformation of the writing. He on the contrary sets it out as the basis of his claim. It is clear he cannot be heard against it in this proceeding.

Mr. Hagar, in his testimony and in the argument, seems to make a general complaint that he has been hardly used by these defendants, especially by Whitmore; that they have unduly pushed and embarrassed him,—that they would not take such course with the property as he thought best for his interests,—that they were thinking more about making the money for the creditors than about the consequences to him. It seems that Mr. Hagar was financially embarrassed and was struggling to obtain relief. It may be that his general complaint above stated is well founded. We have no occasion to say whether it is or not, for such complaints are not cognizable by the courts until some legal or equitable

right is invaded. Rigorous creditors and struggling debtors are common spectacles. Forfeited securities are daily sold at a sacrifice by creditors, mindful only of themselves and unmindful of the debtor's loss. Summary attachments, breaking up a debtor's business and destroying his credit, are of frequent occurrence. As moralists, we may deprecate the rigor; but as jurists, we must recognize the right of the creditor to recover his own.

We might, perhaps, in strictness dismiss this bill for the reasons heretofore stated, but we think it desirable to retain the bill, as we may do, in order to effectuate an accounting and adjustment between the parties. Such accounting should be of all matters up to the date of taking the account, including items since the date of the bill. The master in taking the account and making his report, will be guided by this opinion, a copy of which should be sent to him with the order of reference. All matters determined here the master will regard as determined and not allow them to be re-opened.

The defendants claim in their answer compensation for services as trustees, in addition to their disbursements, and we may properly determine this claim here, as all the evidence is before us, and to do so will relieve the master or the justice settling the final decree, from that question. It is now the well settled American doctrine, that courts of equity may allow trustees compensation out of the estate, though none is provided for in the instrument creating the trust. In this case, from July 7, 1886, to the filing of the bill, July 27, 1887, the trustees had the care of the ships, their insurance, etc. The wreck of the Hagarstown called for extra labor, and anxiety for two or three months. There was much correspondence, telegraphing, and general managing, consuming not only time, but also nervous and mental energy. The amount involved was large, and the responsibility considerable. The work was done almost wholly by Whitmore, the other trustees being passive, but of course sharing the responsibility. We think Whitmore should be allowed $1200, and each of the other trustees $250, making a total of $1700 for compensation.

As it is impossible for the law court to determine in advance

all the questions that may arise, the matter of costs must be left till the coming in of the master's report.

Decrees to be made, sustaining original bill and sending the case to a master to state the account in accordance with this opinion and dismissing the cross-bill with costs.

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

FRANK P. CUMMINGS, and another, *vs.* JUSTIN W. EVERETT, and GERTIE M. EVERETT, his wife.

Oxford. Opinion January 20, 1890.

Married Woman. Infancy. Promissory note. Contracts. R. S., c. 61, § 4. *Act of* 1845, c. 116. *R. S.* of 1857, c. 49, § 1. *Act of* 1866, c. 52.

A married woman, under the age of twenty-one years, is not liable on her executory contracts, under R. S., c. 61, § 4.

Usually a revision of the statutes simply iterates the former declaration of legislative will.

ON EXCEPTIONS.

This was an action upon a joint note of the defendants, the only defense being interposed was that the female defendant at the time of signing the note was an infant, the wife of the other defendant, and at the time of the trial was still under the age of twenty-one years.

The presiding justice ruled that the action could be maintained against both defendants, who excepted to the ruling.

A. F. Moulton, *C. E. Holt*, with him, for plaintiffs.

First section of c. 61, R. S., begins, "A married woman of any age," etc. The following sections, referring back and making the chapter continuous, say, "she may receive," "she is liable," and "she may prosecute." The natural sequence of the section indicates that it is a "married woman of any age" of whom the

chapter treats. No contract should be held to be made in violation of the law, when by any reasonable construction, it can be made consistent with law. *Bell* v. *Packard*, 69 Maine, 105, 111.

"A married woman of any age" may own property, contract and convey, and having those rights given her by statute, the corresponding liability must go with it. The fact of her marriage should not protect her property from her creditors. Formerly she was hedged in by both minority and marriage. Now the legislature has given her more freedom than her unmarried sister, and the corresponding liability goes with the privilege, hand in hand.

The point could be made with somewhat more force if the present phraseology was the same as in c. 52 of the laws of 1866. Sec. 4, of c. 61 has, however, been almost completely remodeled since then, and has been made a constituent part of the chapter. In its present form the clause referred to has twice been re-enacted.

It would hardly be contended that the limitation of age would prevent a minor married woman from making a contract for any lawful purpose in her own name, or that she must defend it by *prochein ami*. On the contrary she may convey real or personal estate alone; and she may prosecute and defend suits at law in her own name without husband or guardian. The authority of a guardian ceases at her marriage. R. S., c. 67, § 21.

She is under no restraint in business from her husband. She acts in her own right. The court has uniformly held that having been authorized to contract she must not excuse herself from the performance. *Mayo* v. *Hutchinson*, 57 Maine, 546; *Yates* v. *Lurvey*, 65 Maine, 221.

The words "as if sole," found in R. S. of 1857, c. 61, § 1, were struck out by Act of 1861, c. 46, evidently as mere surplusage. *Savage* v. *Savage*, 80 Maine, 472, 479.

H. M. Bearce and S. S. Stearns, for defendants.

EMERY, J. This was an action upon a joint note signed by the two defendants, who were husband and wife. The wife was a minor, under the age of twenty-one years, at the time of signing

the note and at the time of the trial. She pleaded that fact in bar, which plea was overruled by the presiding justice, and she excepted.

At common law she would have been under two disabilities as to promissory notes, that of infancy and that of coverture. Both of these disabilities were in the very web and woof of the common law, but for very different reasons and purposes. The disabilities of infancy were imposed for the protection of the infant. The law wholly regarded his interests, and sought to protect him from any imprudence of his own, even at the expense of adults. An adult dealing with an infant would often be held to the contract which the infant could avoid. The disabilities of the infant were in the nature of privileges and were often so called. 1 Bl. Com. 464. The disabilities of coverture, however, were not so much imposed for the protection of the wife, as for the advantage of husband. In the feudal theory of the common law, the wife was subject to the husband. They were styled in the earlier law books, *baron* and *feme*, or lord and woman. It was accordingly held, in the old cases, that every agreement of every nature entered into by a married woman, without the express or implied consent of her husband, was absolutely void. We do not forget that Blackstone in his optimism, says that the disabilities of the wife are intended for the most part for her protection and benefit, "so great a favorite is the female sex of the law of England," but one need not read very far in the books of the common law to learn that the power and authority of the husband were of far more concern to the law, than the protection and benefit of the wife.

Modern legislation has removed many of the common law disabilities of a married woman, and made her the partner rather than the subject of her husband. In Maine, nearly the last vestige of the husband's control over his wife's business matters has been removed. The emancipation of the wife from such control has clearly been the main if not the only object of such legislation. The plaintiff, however, contends, that the statute, enlarging the powers and obligations of a married woman, have also removed the protection of her infancy against her juvenile improvidence.

We think the words of the statute should be very clear and direct, to work such a radical change in the law, and sweep away so far as married women are concerned, a common law principle, so old, so reasonable, and so universal. We think upon examination they will be found not to have that effect. In such examination we can confine our inquiry strictly to those statutes purporting to make a married woman liable on her promissory notes, as her rights or obligations in other respects are not now in question.

Although several statutes were enacted much earlier as to other powers and liabilities of a married woman, the first statute that professed or had the effect to make her liable on her promissory note, was not passed till Laws of 1866, c. 52. Before that, she was not holden on her promissory note. *Bryant* v. *Merrill*, 55 Maine, 515. The words of that statute are as follows: "The contracts of any married woman made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole." While the words "any married woman" may literally include married female minors it does not follow that they should be so construed in a statute. Statutes are enacted to amend and improve the law of the land, and should be construed with reference to the general body of the law. Comparing this statute with the law at the time of its passage, it is evident the legislature meant only to make her like an unmarried woman in respect to contracts. There is no suggestion of anything more, certainly no suggestion of removing from a female minor who should be married, the shield which had so long guarded all minors male and female, married and unmarried. If the words "any married woman" as used in this statute properly include infants, they also include lunatics and persons *non compos mentis*. It will not be contended that these latter, if married, are liable on notes signed by them in that state. Suppose a statute to be enacted, declaring that "the verbal contract of any person for the sale of land shall be valid and binding," would it not be clear that the only purpose of the statute was to repeal a clause in the Statute of Frauds? Would it be claimed that such a statute operated to make an infant liable on his

promises to convey land, while leaving him free to avoid his other promises?

The plaintiff, however, urges that the statute of 1866, was afterward incorporated into the R. S. of 1871, and again of 1883, in the chapter entitled "Rights of Married Women" in § 4, and there re-enacted in common with § 1, which contains the words, "a married woman of any age." His argument is that the whole chapter, as now revised, is to be construed as a whole; each section modifying and influencing the meaning of all the other sections; and that the words, "a married woman of any age," expressed in the first section, are to be understood in the following sections unless otherwise stated. Of course, the whole chapter should be studied; but it should be borne in mind that though technically enacted together, the different sections and clauses were first enacted independently, at different times, under different circumstances and for different purposes. In our efforts to ascertain the meaning of any section or clause, we should resort to the original statute from which it was condensed and search for the legislative intent in the words of the statute, and also in its occasion and purpose, and in the jurisprudence of the time. When a statute is incorporated in a general revision of all the statutes, and re-enacted along with the re-enactment of other statutes, its purpose and effect are not changed unless there be some compelling change in the language. Usually a revision of the statutes simply iterates the former declaration of legislative will. *Hughes* v. *Farrar*, 45 Maine, 72; *French* v. *Co. Com.*, 64 Maine, 583, 585.

Although the phraseology of the statute of 1866 has been much condensed in the revision, there has not been so much change of phraseology, as to change or extend the meaning or effect. Statutes had been passed at various times relative to a married woman's right to acquire, hold and convey property. None of them made any allusion to the minority of a married woman. Upon the consolidation of these successive statutes into § 1, of c. 49 of the R. S. of 1857, the words "any married woman" which had been the phrase in all of them, were changed for the words "a married woman of any age." We have

no occasion to imagine how the change came about. It was made only in condensing the statutes relative to the acquiring, holding, and disposing of property. There may have been an occasion and an intent to make such change of words and of legislative will. The change of will, however, should not be construed as extending further than the change in words. In construction it should be confined to the subject matter of the statute in which the change is made. In condensing the statutes relative to the executory contracts of married women, a different subject matter, no such change was made.

Moreover the whole body of previous and cotemporaneous legislation should be considered in interpreting any statute. The legislative department is supposed to have a consistent design and policy, and to intend nothing inconsistent or incongruous. After the legislature had in 1844, entered upon the work of emancipating married women from the disabilities of coverture, it in 1845, c. 116, recognized the necessity of protecting infants from improvident contracts, and affirmed and strengthened the common law rule by enacting that infants should not be bound by an affirmance of their contracts, after they became of age, unless the affirmance should be in writing. This statute has been continued through three revisions to this day side by side with the statutes relative to married women, and indicating a continued purpose to preserve the privileges of a minor.

Our conclusion is, that the legislature has not yet expressed or implied an intention that a married woman, under the age of twenty-one years, shall be held liable on her executory contracts.

Exceptions sustained.

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

FRED B. DOLLOFF *vs.* PHŒNIX INSURANCE COMPANY.

SAME *vs.* GERMAN-AMERICAN INSURANCE COMPANY.

Kennebec. Opinion January 20, 1890.

Fire Insurance. Fraud. False swearing. Forfeiture.

Where a policy of fire insurance provides that "any fraud or attempt at fraud or any false swearing on the part of the assured" shall cause a forfeiture of all claims under the policy, a wilfully false statement in the proof of loss after the fire of some pretended losses, will completely forfeit the entire policy even though the actual losses truly stated exceeded the entire amount of the policy.

ON EXCEPTIONS.

These were actions of assumpsit on two policies of fire insurance brought to recover the aggregate sum of $4,000. The plaintiff had one policy of insurance for $2,000 in each of the defendant companies, each policy covering both buildings and personal property.

Plea, general issue with a brief statement of forfeiture of the policy through fraud, attempted fraud, and false swearing by the plaintiff in his proof of loss, and examination thereunder. This defense was relied on at the trial, in the superior court for Kennebec county, especially fraud and false swearing as to the personal property set forth in the proof of loss. On this point the defendants offered evidence to prove (1) the false and fraudulent insertion of articles which the plaintiff knew were not in the house at the time of the fire; (2) false and fraudulent exaggeration of quantities of such classes of articles as were in the house; (3) false and fraudulent exaggeration of the value of the articles destroyed.

The plaintiff's proof of loss contained 564 distinct items or classes of items, and aggregating $6,800. He claimed the value of the buildings was $3,200, and that their contents,—the household goods and farming implements,—was $3,600.

Upon these issues of fraud, attempted fraud, and false swear-

ing by the plaintiff, the presiding justice instructed the jury as follows:—

1. "That if the plaintiff knowingly put a false and excessive valuation on any single article, or put such false and excessive valuation on the whole as displays a reckless and dishonest disregard of the truth in regard to the extent of the loss, such knowing over-valuation is itself fraudulent and the plaintiff cannot recover at all."

2. "That if the plaintiff falsely and knowingly inserted in his sworn schedule of loss, as burned, any single article which in fact was not in the house, or was not burned, this would constitute a fraud on the company, and the plaintiff can not recover anything on his policy."

3. "That any wilfully false or fraudulent statement in regard to the loss of its amount, would avoid the policy whether the actual loss was greater or less than the amount claimed by the insured."

4. "That if the jury find that the plaintiff knowingly claimed in his sworn proof of loss more goods than were actually destroyed by fire, that would constitute the fraud,—I should rather say constitute the attempt at fraud,—and false swearing mentioned in the contract."

5. "That it is not necessary that the fraud should be to the full extent of the proof of loss, but that if in any respect the plaintiff purposely and designedly made a false statement in regard to the proof of loss, of what his loss was, although it might have been one of small amount, it defeats the policy for the full amount, both as to personal property and the buildings."

The jury returned a verdict for the defendants, and the plaintiff excepted to these instructions.

Each policy of insurance contained the following provision:

"Any fraud or attempt at fraud, or false swearing on the part of the assured shall cause a forfeiture of all claim under this policy."

E. W. Whitehouse, for plaintiff.

By these instructions, it would be immaterial whether the personal property destroyed by fire was of the value of the amount

of the insurance or not. And, by the same ruling, it was immaterial that the buildings destroyed by fire, and insured under same policies were worth $3,127, with only an insurance of $2,100. The jury were compelled to bring in a verdict for defendants, if they found false swearing as to a single article covered by the policy although that article was worth but one cent.

The false swearing and fraud must be material to affect the policy and avoid it. *Jefferson* v. *Cotheal*, 22 Amer. Dec. p. 573; Western Marine & Fire Ins. Co., 1 La., 216. Also see note in 2 Woods on Insurance, citing *Merrow* v. *Great Republic Ins. Co.*, 35 Mo. 148. The true interpretation of the law, as to false swearing, is that it must be as to a material point. If the goods are personal property, destroyed by fire, amounting in value to more than the amount of insurance, then the false swearing and over-valuation, as to single articles or any portion thereof must be to the extent and purpose of enlargement beyond the amount of insurance thereon; otherwise, there is no materiality in the false statement or over-valuation, or including articles as being destroyed that were never there. If there is personal property enough destroyed by fire, covered by the policy to the amount of the insurance, it does not become material. The judge erred in his instructions to the jury. He should have instructed them that if they found the articles destroyed by fire were not of the value of the amount of insurance, and found that the plaintiff's proof of loss was to the effect that the goods were of larger amount than the insurance named in the policy, and then found that such proof of loss and statement was false and fraudulent and done with the intent to deceive the defendants, then the false swearing would have become material and the jury could rightly have found the verdict for the defendants, and such false swearing would then have avoided the policy.

Take it in the case at bar. The value of the buildings destroyed by fire was $3,127, the amount of insurance $2,100. The personal property destroyed was equal to and exceeded the amount of insurance thereon by some hundreds of dollars. How can a false statement affect the insurance in this case if, as of

necessity it must do, it relates to the value of an article which could not possibly have affected defendants?

Then, again, the interest of third parties, such as mortgagees are interfered with by the act of the mortgagor upon an immaterial matter. The instructions of the presiding justice should have gone to the extent that the false swearing should have been done with an intention to deceive defendants or get an advantage of them. In the case of *Merrow* v. *The Great Republic Ins. Co.*, before cited, the presiding judge refused to instruct "If the jury believe, from the evidence, that the plaintiff made the affidavit on the 10th of April, 1860 and that at the time he made it he did not know the amount of stock on the first floor and cellar, of the store therein mentioned, if at said time, plaintiff knew that he did not know the amount, then he has been guilty of false swearing, within the intent and meaning of the policy, and in that place, the plaintiff cannot recover."

Baker, Baker and Cornish, for defendants.

The exceptions involve three propositions: (1) Wilfully false statements by the insured in his proof of loss as to the amount or value of the goods burned, constitute fraud or attempt at fraud in law; (2) such fraud, or attempt at fraud, though committed with reference to the personal property alone, avoids the policy both as to buildings and personalty; (3) It avoids the policy *in toto*, whether the actual loss was greater or less than the amount claimed by the insured.

Counsel cited: May on Ins. § 479; Wood, Fire Ins. § 429; Griswold's F. Underwriters' Text Book, § 598; *Goulstone* v. *Ins. Co.*, 1 F. & F. 276; *Britton* v. *Ins. Co.*, 4 Id. 905; *Chapman* v. *Pote*, 22 L. T. N. S., 306; *Howell* v. *Ins. Co.*, 3 Ins. L. J. 656; *Leach* v. *Repub. Ins. Co.*, 58 N. H. 245; *Huckberger* v. *Ins. Co.*, 5 Biss. 106; *Sibley* v. *Ins. Co.* 9 Id. 31; *Moore* v. *Ins. Co.*, 28 Gratt., 508., S. C. 26 Am. Rep. 373-6; *Shaw* v. *Ins. Co.*, 2 Hask. 246; *Little* v. *Phœnix Ins. Co.*, 123 Mass. 380; *Cushman* v. *Ins. Co.*, 5 Allen N. B., 246; *Ins. Co.* v. *Cushman*, 2 Sup. Ct. of Can. 411; *Harris* v. *Ins. Co.*, 10 Ont. 718; *Mullen* v. *Ins. Co.*, 58 Vt. 113; *Sternfield* v. *Ins. Co.*, 50 Hun. 262; *Claflin* v. *Ins. Co.*, 110 U. S., 81; *Ins. Co.* v. *DeFord*, 38 Md. 382; *Park* v. *Ins. Co.*, 19 Up.

Can. Q. B. 110; *Sleeper* v. *Ins. Co.*, 56 N. H., 401; *Wall* v. *Ins. Co.*, 51 Maine, 32.

"With intent to defraud" need not be expressed in terms in the instructions. *Lord* v. *Goddard*, 13 How. 198; *Hammatt* v. *Emerson*, 27 Maine, 308; *Foster* v. *Charles*, 7 Bing. 105; all cited and approved in *Claflin* v. *Ins. Co.*, 110 U. S., 81.

EMERY, J. The plaintiff procured of the defendant insurance company a policy of fire insurance for $2,000 upon his home buildings and contents, each building being separately valued, and the contents also having a separate valuation. The policy of insurance contained the following stipulation: "Any fraud, or attempt at fraud, or false swearing on the part of the assured shall cause a forfeiture of all claims under this policy." The buildings and contents were consumed by fire, and the plaintiff as required by the policy and also by statute, (R. S., c. 49, § 21,) notified the company of the loss, and delivered to them a written statement on oath, purporting to be a particular account of the loss and damage. In this instrument called "proof of loss," the plaintiff, as the jury have found, knowingly and purposely made false statements on oath of some pretended losses which he did not in fact sustain.

He contended, however, that his actual losses, throwing out his pretended losses, exceeded the whole amount of the policy, and that consequently the defendant company were not and could not be harmed by his false statement of additional losses, and should pay him his actual loss.

His argument was, that these false statements of additional losses did not increase the risk or the liability of the company,—that the true statements showed a loss of over $2,000, and hence the false statements did no fraud, nor harm. The presiding justice overruled this contention, and instructed the jury to the opposite effect. The verdict being against him the plaintiff excepted, and his exceptions present substantially this question: When the actual losses, truly stated in a proof of loss, exceed the whole amount of the insurance, will a knowingly and purposely false statement on oath in the proof of loss, of other pretended losses,

destroy the plaintiff's claim for his actual losses under such a policy as this?

We cannot doubt that it will. The parties stipulated that it should. It is so provided in the contract, and it is a lawful provision. The contract of insurance is one of indemnity only. The sole lawful object of obtaining a policy of insurance is to secure simple re-imbursement for actual loss. Any purpose of making a profit on the part of the assured is unlawful and will vitiate the contract. Such being the nature of the contract, it requires good faith on the part of the assured toward the insurers. Especially is this so in the adjustment of the loss after a fire. It is impracticable for the insurers to ascertain for themselves the extent of the losses, particularly where the contents of a dwelling-house and barn are insured, as in this case. The assured, and his family or servants, are usually the only persons who can give a true account of the losses. The insurers therefore usually, as in this policy, require from the assured a detailed statement on oath of such losses, as a necessary preliminary to the payment of the indemnity. The statute also requires this (R. S., c. 49, § 21). The statute and the policy both make this statement a necessary preliminary to a right of action on the policy, and they both comtemplate of course a true statement. The demand of the statute and of the policy for such a statement is addressed to his conscience, like a bill for discovery. When, therefore, he meets this demand with knowingly false statements of losses he did not sustain, in addition to those he did sustain, he ought to lose all standing in a court of justice as to any claim under that policy.

The court will not undertake for him the offensive task of separating his true from his false assertions. Fraud in any part of his formal statement of loss, taints the whole. Thus corrupted, it should be wholly rejected, and the suitor left to repent that he destroyed his actual claim by the poison of his false claim. *Claflin* v. *Insurance Co.*, 110 U. S. 81; *Sleeper* v. *Insurance Co.*, 56 N. H. 401; *Wall* v. *Insurance Co.*, 51 Maine, 32.

We have not overlooked the case of *Shaw* v. *Insurance Co.*, 1 Fed. Rep. 761, where Judge Lowell makes the distinction con-

tended for by the plaintiff here. There the stipulation in the policy was: "All fraud or attempt at fraud *by* false swearing, &c." Here the words are, "Any fraud, or attempt at fraud, *or* false swearing, &c." It might be that there, harmful fraud should appear, while here, false swearing by itself, is made a cause for forfeiture. But it will be seen that the U. S. Supreme Court in *Claflin* v. *Insurance Co.*, *supra*, three years after Judge Lowell's opinion, considered the same question, and decided it the other way, holding that false swearing alone, without its operating as a fraud upon the company, forfeited the policy.

The plaintiff invokes § 20 of c. 49, (the Insurance Law) R. S., but that does not rescue him. It does not purport to save the assured from the consequences of his own fraud. It simply provides that immaterial and innocent misstatements shall not avoid the policy. If the statements called for in that section are material or fraudulent, they are fatal. But that section has reference only to statements made in procuring the policy of insurance. It does not apply to statements made after the loss, in the proof of loss. No allusion was made to this statute in *Wall* v. *Insurance Co.*, *supra*, but it is uncertain whether the decision was before or after the enactment of the statute. It was intimated in *Bellatty* v. *Ins. Co.*, 61 Maine, 414, sometime after the passage of the statute, that fraud in the proof of loss, if established, would bar the suit. While in *Williams* v. *Insurance Co.*, 61 Maine, 67, the jury negatived any fraud or false swearing, in the over-valuation of the goods, it was assumed that fraud or false-swearing, if established, would forfeit all claim under the policy.

It is further suggested by the plaintiff, that the buildings having been separately valued in the policy, the insurance on them is not affected by any false swearing as to the personal property. The policy of insurance, however, is an entire, single contract, to stand or fall as a whole, so far as fraud, or false swearing, is concerned. *Barnes* v. *Insurance Co.*, 51 Maine, 110.

Exceptions overruled.

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

ALONZO BROWN *vs.* INHABITANTS OF SKOWHEGAN.

Somerset. Opinion January 20, 1890.

Way. Defect. Ditch. Traveller. R. S., c. 18, § 52.

Towns are not required to render the road passable for the entire width of the whole located limits, or to provide safe and convenient access to them from the premises of adjoining proprietors.

Along the side of the travelled part of a highway and within the limits of its location was an open ditch made for drainage of the road. The plaintiff in passing from a school house to the road, in the darkness, fell into this ditch and was injured. *Held*, that he had not become a traveller upon the road and the town was not liable for the injury.

ON EXCEPTIONS.

This was an action to recover damages suffered by a defective road. The case was submitted to the court, with right of exceptions. The presiding justice ruled that the action was not maintainable, and the plaintiff excepted.

The facts are stated in the opinion.

Crosby and Crosby, for plaintiff.

The ditch, under the circumstances, was a defect. It is a question for the jury whether the obstructions are of such a nature as to affect the safety and convenience of travellers. *Bryant* v. *Biddeford*, 39 Maine, 193, in which the court say: "A width, which under some circumstances would meet all the exigencies of the public, might under a change of circumstances be entirely insufficient for that purpose." *Morse* v. *Belfast*, 77 Maine, 46; *Dickey* v. *Maine Tel. Co.*, 46 Id. 485. School house lot is not a private lot, within the principle of *Philbrick* v. *Pittston*, 63 Maine, 477. It is not reasonable that there should be only a small narrow passage way on the north end giving access to the school house. A ditch 18 inches deep, extending nearly the whole length of the lot, is not a proper path for ingress and egress for all classes of persons reasonably resorting there.

The town should be required to make the whole six rods on

the school house side smooth, have the ditch covered, and let the water run underneath.

Brown was a traveller as soon as he stepped into the limits of the highway. The case is not that of a private house, but a place of public resort.

D. D. Stewart, for defendants.

1. The plaintiff offered no record evidence of the location of the alleged road, either by the county or town authorities. A highway by user is all that he can claim, or attempt to prove. In such case, the rights of the public are limited to the user. The evidence shows that the highway described in the writ as travelled near the Haskell Corner school house, was about 15 to 18 feet wide, smooth and level within the travelled or used part, and perfectly safe for all persons travelling in it.

The alleged ditch is wholly outside of the public user, and could not therefore constitute a defect in the highway as travelled.

2. If the plaintiff had offered record evidence that the highway had been laid out three and a half or four rods wide, and that the ditch was within the limits of the three and a half or four rods, still it is familiar law that no town is obliged to keep in repair the whole width of the road as laid out, but only enough for the public travel on such road, and is not liable for defects outside of the travelled part. *Dickey* v. *Maine Telegraph Co.*, 46 Maine, 483; *Kellogg* v. *Northampton*, 4 Gray, 65, 69; *Weare* v. *Fitchburg*, 110 Mass. 337; *Howard* v. *Bridgewater*, 16 Pick. 189, 190.

In the present case the travelled part of the road is shown by the plaintiff's evidence to be 15 to 18 feet wide, and in perfect condition; and the alleged ditch, being four feet at least to the east of the travelled part of the road, could not be defect in the road. *Perkins* v. *Fayette*, 68 Maine, 152-3-4.

3. But a ditch is a necessary part of a well constructed road. "On each side of the way," said Chapman, C. J., in delivering the opinion of the court in *Macomber* v. *Taunton*, 100 Mass. 256, "there may be ditches. These are so necessary for the proper drainage of the carriage-way that they are held not to be defects,

if properly constructed, though travellers may be liable to fall into them in the dark."

There is no suggestion and no proof that the ditch was not properly constructed, in the present case; the ground of complaint here, is, that it is constructed at all. Its mere existence on the side of the road is claimed to be a defect in the road, although four feet at least from the travelled part of the road, and that travelled part of ample width and smoothness, and perfectly safe.

The plaintiff says it was in the evening and dark, and he could not see the ditch.

"Towns and cities are not required to furnish lights for the use of persons who travel in the dark." *Macomber* v. *Taunton*, 100 Mass. 257.

4. The plaintiff admits that he travelled along the road several times in the day time by this ditch, and travelled over it the same evening of the accident, and about two hours previously, in going to the school house.

Why should he not be held to have knowledge of the alleged defect,—the existence of the ditch? And so comes within the provisions of the statute. R. S., c. 18, § 80.

5. The plaintiff was not a traveller. True, he alleges in his writ that, "while plaintiff was walking along said highway "he walked into said ditch; but the evidence not only fails to sustain this allegation, but negatives it. The plaintiff himself testifies that he taught singing school in the evening in a school house, and when his school closed, a little after nine o'clock, he started to go towards the highway from the school house, and walked 55 feet on the school house lot before he came to the edge of the ditch on the east side of the road; that it being dark, he fell into the ditch in trying to get into the road, and sustained the injuries complained of,—thus negativing his allegation that "he was walking along said highway," which is the only ground upon which he could maintain any action against the town,—and showing that he was trying to get into the road, but had not succeeded.

"We have been referred to no case, "said DANFORTH, J., in delivering the opinion of the court in *Leslie* v. *Lewiston*, 62 Maine,

471, "where any person having voluntarily turned from the travelled path, or not having reached the wrought part, and suffering damages by a defect within the located limits of the road, has been allowed to recover of the town."

Same doctrine is reaffirmed by this court in *Blake* v. *Newfield*, 68 Maine, 365, 367; *Perkins* v. *Fayette*, 68 Maine, 154.

EMERY, J. The plaintiff was engaged in teaching an evening singing school in a district school house in the defendant town. The school house lot adjoined the highway for some six rods. The travelled part of this highway past the school house, was some eighteen feet wide, and free from defects. The wrought part between the ditches was twenty-seven feet wide and the evidence discloses no defect in all that width. Within the limits of the located highway, along that side of the wrought part toward the school house, was a ditch about eighteen inches deep, and extending past the school house lot. This ditch had been made and was kept open for the drainage of the wrought part of the road. Near one end of the school house lot, large rocks were in the ditch, forming a crossing which the scholars used, but the rest of the ditch was open and exposed.

One night the plaintiff returning from his work, in passing in the darkness from the school house to the street, fell into this ditch and was injured. He claims that the street was defective by reason of this open ditch, and that he is entitled to recover of the town under the statute. He contends that, whatever may be the rule as to ditches passing private buildings, all ditches passing public buildings should be covered, or so guarded, that the public passing from such buildings to the travelled part of the road, need not fall into them.

We do not find any such duty imposed upon towns by the statute, and if not imposed by statute it is not imposed at all. By the statute (R. S., c. 18, § 52,) "Highways, &c., shall be opened and kept in repair, so as to be safe and convenient for travellers. * * *" The statute, being somewhat of a penal nature, is not to be extended by construction. It has always been construed strictly. The court assumes that the legislature has expressed in terms all the duties it meant to impose. It has

been held that the town need not open and keep in repair the entire width of the way,—that it sufficiently complies with the statute, if it constructs and keeps in repair a smooth free roadway of sufficient width for teams to pass along, and by one another without obstruction,—and that it is not liable to a traveller injured by his wagon striking a rock within the limits of the highway, but outside of the part purposely fitted for travel. *Perkins* v. *Fayette*, 68 Maine, 152.

We think it would be an unwarrantable extension of the statute, to hold that towns must provide safe ingress and egress to and from the roads they make. The statute does not say they must, and we see no reason why they should. Owners or occupants of buildings and lots cannot well keep the public streets in repair, but each abutter can take care of his own approaches, and it is reasonable that he alone should be responsible for them. His right to connect his premises with the travelled part of the public road, by means of suitable roads and crossings will not be questioned, and it may reasonably be left to him to determine the location and character of such approaches, if any. It was held in *Philbrick* v. *Pittston*, 63 Maine, 477, in a well considered opinion, that a person injured by a hole in a plank—crossing over a gutter within the limits of the highway, while passing from a private way into the public way, could not recover of the town for injuries thus received. The plaintiff in that case was within the limits of the street, and was crossing the ditch on his way to the part prepared for travellers, but had not reached it. It was declared in the opinion, that it is no part of duty of towns to provide safe and convenient access to their streets from any man's house lot or garden. See also *Leslie* v. *Lewiston*, 62 Maine, 468.

We think the principle thus declared, applies as well to school house and lots. The fact that these are in the nature of public buildings and places, cannot change the principle. Those charged with the care of such buildings and places, must care for the approaches. The fact that part of such approaches are within the limits of the location of the highway, does not put their care upon the town. Those frequenting such places must use the approaches

thus provided, or make their own way. They are not upon the risk of the town, until they have reached that part of the road prepared for travellers and thus become travellers. The duty of the town is only to travellers upon its roads, not to those approaching or leaving its roads. The plaintiff must prove, as indeed he has alleged, that he was travelling upon the road. *Stinson* v. *Gardiner*, 42 Maine, 248; *McCarthy* v. *Portland*, 67 Maine, 167. As was said in *Philbrick* v. *Pittston*, *supra*. "He (at the time of the accident) had not reached that part of the street which was appropriated to public travel or prepared by the town for that purpose." Hence, he was not, when hurt, a traveller, and so cannot recover.

Exceptions overruled.
Non-suit confirmed.

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

MARTHA W. SINNETT *vs.* STEPHEN SINNETT.

Cumberland. Announced July term law court for Western District, 1889. Opinion January 20, 1890.

Limitations. Note. Partial payment. Renewal of debt.

A partial payment upon a note, after it has become barred by the statute of limitations, will renew the note and remove the bar.

ON EXCEPTIONS.

Action upon a promissory note, tried by the justice of the superior court, for Cumberland county, who signed the following bill of exceptions :—

"This was an action of assumpsit commenced Oct. 26, 1888, entered at the December term, 1888, and tried by the justice without the intervention of a jury, at the March term, 1889, subject to exceptions in matters of law. Ad damnum, $500. Plea, the general issue, with brief statement of statute of limitations and payment.

The note in suit was as follows,—

HARPSWELL, July 14, 1856.

For value received I promise to pay Martha Alexander sum of one hundred and twenty-eight dollars on demand with interest.

STEPHEN SINNETT,
MARGARET R. DURGIN.

On the 13th day of March, 1871, ten dollars were paid on the note. On the 28th day of May, 1888 the defendant paid twenty-five dollars on the note. Attempts were made at that time by the defendant to settle the balance of the note by conveyance of a certain piece of land in Harpswell, and of which a deed was at one time made, but the arrangement was never carried out.

After hearing the evidence and arguments of each party, and considering the same, I decide that said defendant did promise in manner and form as said plaintiff has declared against him, and I award damages in the sum of $345.75.

PERCIVAL BONNEY,
Justice of the Superior Court."

To the foregoing rulings in matters of law, and the ruling that either or both said payments makes the said note valid and not barred by the statute of limitations the defendant excepted.

J. J. Perry, *D. A. Meaher* with him, for plaintiff.

The declaration should count upon the new and not the old promise. *Howe* v. *Saunders*, 38 Maine, 350. First count describes a note signed by defendant alone. The note offered under this count is a joint and several note of defendant and Margaret R. Durgin. Second count describes a witnessed note signed by defendant; note not admissible on account of the variance,—not being a witnessed note. *Elwell* v. *Gillis*, 14 Maine, 72; *Gragg* v. *Frye*, 32 Id. 283. Defendant neither paid nor indorsed the ten dollar payment. R. S., c. 81, § 100. *Haven* v. *Hathaway*, 20 Maine, 345; *Clapp* v. *Ingersol*, 11 Id. 83.

If defendant can be held at all, it must be by the inference of a new promise from the payment of the $25.00 May 28, 1888. But he offered this with a certain piece of land in full payment of the note, and plaintiff accepted the proposition and after get-

ting the money refused to accept the deed. There is no new promise to pay the balance. *Bowker* v. *Harris*, 30 Vt. 424; *Slack* v. *Norwich*, 32 Id. 818; *Smith* v. *Eastman*, 3 Cush. 355; *Bell* v. *Morrison*, 1 Peters, 351.

S. C. Strout, *H. W. Gage*, *and C. A. Strout*, for plaintiff.

The note is properly declared on, being in effect a joint and several note, though in fact Margaret A. Durgin was simply a witness to the note. *Hapgood* v. *Watson*, 65 Maine, 510; *Bank of Biddeford* v. *McKenney*, 67 Id. 272, 276. The payment of the $25.00 being within six years preceding the action removes the bar of the statute of limitation. *Howe* v. *Thompson*, 11 Maine, 152; *Sibley* v. *Lumbert*, 30 Id. 253; *Evans* v. *Smith*, 34 Id. 33; *Egery* v. *Decrew*, 53 Id. 392; *Noble* v. *Edes*, 51 Id. 34.

EMERY, J. This was an action of assumpsit on an unwitnessed promissory note on demand, dated July 14, 1856. The date of the writ was October 26, 1888, more than thirty-two years after the date of note. The defendant pleaded the statute of limitations. The action was tried without the intervention of a jury, by the presiding justice, who found as a matter of fact, that the defendant paid to the plaintiff on the note twenty-five dollars May 28, 1888, nearly thirty-two years after the date of the note, and within six years before the date of the writ. The justice thereupon ruled as a matter of law, that the action was not barred, and the defendant excepted.

The defendant contends, that while a partial payment within six years from the maturity of a debt, will prevent the statute from barring a suit for the debt, such payment after six years from the maturity of the debt, and hence, after the statute has become effectual, will not remove such bar.

We see no good reason for any distinction between the effect of payments before and payments after the six years from maturity. No such distinction is made in the statute, (R. S., c. 81, § 100), and we find none made in the decided cases. The statute of limitations does not extinguish debts, nor affect them in any way, except to bar suits for them. The debt remains. The obligation to pay it, though not enforceable by action, is subsisting

and is a sufficient consideration for a new promise. A partial or full payment of it, after the statute has taken effect, is not a gratuity.

While the debtor may invoke the statute, he need not. He can recognize and re-instate the debt as a subsisting, enforceable obligation, after the statute time for its recovery has expired. If he chooses to so recognize it, and re-instate it, the length of time it has remained unpaid, will not lessen the effect of such recognition. It is common learning, that an intentional part payment of a debt is an acknowledgment of its existence and a renewal of its obligation. It cannot matter how old the debt is. The recognition, the acknowledgment, will restore the legal obligation, however late they are made. We find nothing in the statute, in the books, or in reason, which requires the recognition, the re-instatement, to be made within six years and not after. The creditor must bring his suit within the six years, but the debtor can pay or renew his obligation at any time.

The partial payment in this case was clearly a recognition of the obligation, and such a renewal of it, that it became enforceable again, and for six years longer. Wood on Limitation, § 81. The other points suggested by the defendant are disposed of by the justice's findings of facts, no exceptions having been taken to any testimony.

Exceptions overruled.

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

ROBERT MCCLAIN *vs.* DAVIS TILLSON.

Lincoln. Opinion January 27, 1890.

Fish. Bay. Entrance. "Land to land." R. S., c. 40, § 17. Act of 1885, c. 261.

Fishing for menhaden with purse or drag seines, in a bay on our coast not having an entrance over three nautical miles in width between headlands on the main, or between the mainland and an island, or between islands, is prohibited by c. 261 of the public laws of 1885, defining the width of such entrance or any part thereof to such prohibited waters, measured from "land to land."

AGREED STATEMENT.

This was an action of debt to recover the penalty for an alleged violation of the provisions of R. S., c. 40, § 17 and amendments thereof regulating the taking of migratory fish. It was admitted that on the 16th day of August, 1888, the steamer Hurricane, owned by the defendant, was engaged in fishing for menhaden with a purse seine, and that menhaden were taken, at a point northerly of Indian Island, in Muscongus Bay, Lincoln County.

The court was to render such judgement as the law and facts require.

T. P. Pierce, for plaintiff.

The entrance to Muscongus Bay, where the fish were taken, is more than three nautical miles wide if islands are not to be considered in construing the statute; otherwise, the fishing was in prohibited waters. Dropping the word "any" from the original statutes, where the clause reads "from any land to land," does not change the intent of the legislature as embodied in R. S., c. 40, § 17. The revision was intended to be more modern without essential change of legal intendment. Construction of penal statutes: *Am. Fur Co.* v. *United States*, 2 Pet. 358; *Brown* v. *Barry*, 3 Dal. 365; *Winslow* v. *Kimball*, 25 Maine, 495.

In *Myer* v. *Western Car Co.*, 102 U. S. 1, the court say: "When in construing the language of a revision of a statute there is substantial doubt as to its meaning, the original statute may be looked to." An island is land as much as a continent in the original act where the language is, small bays, etc., any entrance to the same or any part thereof from any land to land, etc. The entrance to harbors, bays, and inlets is between islands, or they form one part of the boundary to the entrance.

C. E. Littlefield, for defendant.

The three nautical miles are to be measured from shore to shore, or from one side of the entrance to the other side. Islands are not land in the sense referred to in the language used, "from land to land." The definition of the word "bay" shows that the shore is the land that bounds the entrance, or any part thereof, as islands are not mentioned as making any part of the bay.

That the word "any" is now eliminated from the statute distinctly negatives the idea that "any land," no matter how trifling, is now intended.

If "entrance," within the meaning of this statute, meant the space between the islands in the "entrance" we should have from three to six entrances to our bays, when the statute clearly contemplates but one. Islands do not make a bay, or bound it, or define it. They may well be in a bay, in its "entrance" or above the entrance; but where a statute, as does this calls for "from land to land" of the "entrance" or in shore of the entrance, the presence of one or more islands in the bay, or in the "entrance," has no tendency to locate such "land."

There can be no question that the land that defines a river, or makes it, is the shore of the mainland that bounds it. The words "from land to land" apply without any distinction to "small bays, inlets, harbors, or rivers." There is nothing in the statute to indicate, that "land" when applied to "rivers" means anything different from the same "land" when applied to "bays or inlets." On the contrary, the necessary inference is that the word "land" means the same thing in each case. Such being the case, as in the case of a "river," it undoubtedly means the shore of the mainland, it also means the shore of the mainland in case of "bays or inlets."

HASKELL, J. Debt for a penalty imposed under c. 261 of the laws of 1885, for taking menhaden with purse or drag seines in a bay, having an entrance of not more than three nautical miles in width from land to land.

The purpose of the statute is to prevent fishing, in the manner prohibited, on waters indenting our coast, where schools of fish run in and are easily surrounded and wholly taken by the use of seines, thereby unreasonably destroying both the fish and the fisheries.

The prohibition is from fishing in any bay, "where any entrance to the same, or any part thereof from land to land, is not more than three nautical miles in width." A bay may extend from headland to headland on the main; but the entrances to it may be numerous. For instance, Casco Bay is embraced by

a sinuous shore terminating at Cape Elizabeth and Small Point, headlands twenty miles distant from each other. Inside of a line between these headlands are more than three hundred islands, some large and others small. Among these islands are numerous entrances to the bay. The width of the entrance is the statute test, not the length of the front towards the ocean. The statute applies to the door of the house, not the front of it. If it were not so, a glance at the chart of our coast would show how useless the statute must be.

The defendant was seining in a land-locked part of Muscongus Bay, among the islands, well up toward its inland extremity, having passed through an entrance not over three nautical miles in width. He passed a forbidden entrance, and has violated both the spirit and letter of the statute.

Defendant defaulted. Penalty to be fixed at nisi prius.

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

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STATE OF MAINE *vs.* CHARLES L. BEAL.

Kennebec. Opinion January 27, 1890.

New trial. Appeal. R. S., c. 134, § 27.

The defendant was convicted of murder in the first degree by the superior court. He there moved for a new trial because the verdict was against law and evidence and because of newly discovered evidence. These motions were heard before the presiding justice of that court, and were overruled. From that decision of the superior court an appeal was taken to the law court under R. S., c. 134, § 27.

At the argument before this court the defendant relied on the newly discovered evidence for a new trial. It appearing to this court, that the defendant had had a fair trial, and that the testimony, taken upon the motion, in its most favorable view for the defendant tended only to discredit a single witness for the state, upon a point that may be well considered as proved by other testimony, a new trial was refused.

ON MOTION.

This was a motion for a new trial because the verdict was against law and evidence and because of newly discovered evidence. The defendant was found guilty of murder in the first degree by the superior court for Kennebec county. The presiding justice in that court after hearing, overruled the motion, and the defendant appealed to the law court.

The case is stated in the opinion.

O. G. Hall and W. C. Philbrook, for defendant.

1. James F. McManus, who testified at the trial that Beal was at his store inquiring for strychnine, has since confessed that he was mistaken as to the identity of the prisoner.

Chatfield v. *Lathrop*, 6 Pick. 417; *Hewey* v. *Nourse*, 54 Maine, 256; *Warren* v. *Hope*, 6 Maine, 479.

2. If proven that the prisoner was at the drug store, then the "low conversation" that was alluded to at the trial, but the words of which were excluded, will, when given, as we now know them, tend to reduce the degree of the crime and render the verdict different. *Anderson* v. *Titmus*, Law Times R., N. S. 711; *Vose* v. *Mayo*, 3 Cliff. 484.

C. E. Littlefield, attorney general, and *L. T. Carleton*, county attorney, for the state.

HASKELL, J. The accused was convicted of murder in the first degree, by the superior court in the county of Kennebec. He there moved for a new trial, because the verdict was against law and evidence, and because of evidence newly discovered, since the trial. These motions were heard before the presiding justice, and were overruled. From this decision of the superior court an appeal was taken to this court under § 27 of c. 134 of R. S.

At the bar, a new trial was urged solely upon the ground of evidence newly discovered. The motion was not pressed for any other cause; nor does the court, after a careful consideration of the whole evidence see any good reason why it should have been. The trial seems to have been a fair one. The charge of the justice was plain, and easy to be understood by the jury; and no exception

was taken to any part of it. The presiding justice, who saw the witnesses and heard them testify, refused to set aside the verdict, and there is no apparent reason why this court should interfere, and sustain an appeal from his decision.

At the trial, one McManus, an apothecary, testified, that the accused came into his shop and asked: "If I kept strychnine, I told him I did. He asked me if I would sell him some, and I refused. Then he asked me how much it would take,—how much of a dose it would take to kill a man. I told him about the same as epsom salts. He then came up to me and insisted on my selling it, and made some talk to that effect. One thing he said,—he either said his father or the old man had been playing tricks on the boys, and he would learn him better; and he made some talk that I did not take any particular notice of. In the meantime I had stepped into the floor by the side of my prescription desk, and he started out, and as he went through, he says, 'the old man will be surprised when he gets that dose.'"

It is admitted that upon a new trial, Warren C. Philbrook, an attorney for the accused, would testify that, after the trial, McManus called him into his shop and said: "I must have been mistaken in my testimony in the Beal case, as to its having been Charles Beal who was at my store and wanted to buy strychnine;" that Philbrook would further testify that McManus gave as a reason for his mistake, that, a day or two before, he met a man upon the street whom he took for Charles Beal, but who was not Charles Beal, and whom he recognized as the man that he mistook for Charles Beal in the shop.

McManus, upon the motion for a new trial, testified that it was Charles L. Beal with whom he had the conversation testified to by him on the trial, and that Mr. L. D. Carver was present; that he never told Philbrook that it was not Charles L. Beal.

Mr. L. D. Carver testified upon the trial, that he was in McManus' shop when Beal came in. He says: "They spoke to each other, apparently as if they were acquainted, and he asked McManus if he had any strychnine. He said he had. And he [Beal] said he wanted a bottle. McManus replied that he did not sell it except on prescription of a physician. Upon that, McManus came from behind the counter, round into the floor between

the two counters, and he [Beal] asked McManus, after he got round into the floor, how much a man could take of it. McManus seemed to treat it as a joke, and told him a man would not want to take more than he would for a dose of salts." Carver further testified that, attention having been attracted to him, a conversation continued between Beal and McManus in a low tone that he could not hear, only now and then catching a word; that he heard Beal say: " 'He is acting funny with us boys,' and then they had a whispered low-toned talk again, and finally he asked McManus again if he could not let him have it; and he said, 'No I cannot;' that Beal remarked as he went out in a laughing way: 'By G—d, the old man will be surprised when he gets a dose of that,' " and went out.

Carver testified, on the motion for a new trial, that he had no change to make in his testimony as to the identity of Beal; that after Beal went out from the shop, he had a conversation with McManus about what took place in the shop, and, in substance, that the impression left on his mind, from what he heard Beal say, and what McManus told him was, that Beal wanted strychnine to administer to his father for the purpose of making him sick.

The testimony taken upon the motion for a new trial, in the most favorable view that can be given to it, only tends to discredit a single witness for the state, upon a point that may well be considered as proved by other testimony. The material point is, did Beal call for strychnine at McManus' shop. Carver says he did, and McManus says so. Now, suppose McManus' testimony be laid out of the case, Carver's still remains, and properly may have been considered by the jury as sufficient evidence of the fact. The impression gained by Carver from what he heard and what McManus told him is immaterial and does not weaken his statement of facts, from which, together with the other evidence in the case, the jury drew a different inference of Beal's intent.

The court is of opinion, after a careful consideration of the whole case, that no just cause has been shown why the appeal should be sustained. It is ordered, therefore,

Motion overruled,
Judgment for the State.

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

WILLIAM S. HANSCOM, appellant, *vs.* JAMES E. MARSTON, executor.

Cumberland. Opinion January 28, 1890.

Executor. Account. Probate court.

An executor, in stating and settling his final account, should not charge the estate with any payments made to heirs or residuary legatees.

The probate court has no power to determine who take the residuum of an estate under a will, and no power to determine whether an alleged settlement between an executor and residuary legatee is valid.

Executors are holden to good faith and prudence, commensurate with the nature of their duties, in the control and management of funds belonging to their estates.

(See *Rogers* v. *Marston*, 80 Maine, 404.)

AGREED STATEMENT.

This was an appeal from the allowance of the defendant's account, as executor of Crispus Graves, by the probate court for Cumberland county.

Besides the facts stated in the opinion, it appeared that the executor, before the settlement of said account, had made the following exchanges, viz: —

For the $5,000 U. S. bonds, which were then worth a premium of 6 per cent, he took a note for the same amount, ($5,000,) bearing 7 per cent. interest, dated June 28, 1879.

He took, at the same time, as security from the indorser of the note, who was his counsel, a warranty deed of certain improved real estate in Portland, supposed to be worth about $14,000, dower not released, and subject to a mortgage given in 1866 to secure a $5,000 note payable in five years.

For the proceeds of the Blake note ($1,000) he subsequently took a note for the same sum, bearing interest at 7 per cent, with the understanding that the aforesaid deed was to be security therefor.

The deed he left with his counsel for record; but it was not recorded until April 3, 1882 and said property had been previously conveyed to innocent purchasers and their deeds duly recorded.

In March, 1880, Marston stated under oath, in his examination before the probate court, in the matter of Fickett's insolvency that Cram told him the deed was recorded, that he, Marston, took it and put it into the Safe Deposit Vault; that this was only a few weeks after the deed was made.

He now states that he must have been mistaken in making the foregoing statements in regard to his taking and depositing the deed.

The maker of the notes was not pecuniarily responsible, nor was the indorser, Mr. Marston's counsel; and the whole investment was lost to the estate.

The executor had no authority from the probate court to make said exchanges and investments.

No reference is made in said account to his disposal of the bonds, etc., or loss of the proceeds thereof.

He was allowed 5 per cent commissions ($600), and the balance ($5,450.33) was represented as cash, or its equivalent.

J. A. Waterman, for appellant.

School districts being only *quasi* corporations, their powers are strictly limited and defined by statute. *Jordan* v. *School District* 38 Maine, 165; *Rogers* v. *Marston*, 80 Id. 404. Special enactments have been required to enable towns to receive donations for educational purposes. R. S., c. 3, §§ 51, 53. School districts not exempt from the same conditions, in the use of the donation, as imposed on towns. First, towns must lawfully consent; Second, town must apply the fund or its income according to the testator's will; Third, if the town fails thus to apply the same, the bequest reverts to the donor or his heirs. R. S., c. 3, §§ 51, 53, 54. There must be a direct vote accepting the bequest. *Rogers* v. *Marston*, *supra*. Not only no such vote, but by a formal, deliberate vote the district has expressly relinquished its claim to it. The district has no further interest in the matter. The balance remains a part of Graves' estate to be distributed to his heirs. *Bugbee* v. *Sargent*, 23 Maine, 271. The residue of the estate was freed from the restriction of the will and became undevised estate and vested in the testator's heirs, by

the release and receipt of April 1885, and payment of $400 by Marston to the district. *Walker* v. *Bradbury*, 15 Maine, 207, 210, 216.

Executor guilty of mal-administration. Conversion of securities: R. S., c. 68, § 11; Perry's Trusts, § 466.

Executors and trustees are bound to exercise proper prudence, that prudence which careful men usually exercise in the management of their own affairs. They are liable for want of due care, and watchfulness and reasonable skill and prudence. *Cumberland County* v. *Pennell*, 69 Maine, pp. 366, 367.

If a trustee confides his duties or trust fund to a stranger, or to his attorney, he will be personally responsible.

If he employs an agent and the agent steals, or appropriates the money intrusted to him, the trustee will be responsible.

Trustees are liable if they place their papers and receipts in the hands of their solicitor so that he can receive their money and misapply it.

They must not invest upon personal or upon unauthorized security. It is not sound discretion to do so.

They must personally see to it that the security is forthcoming upon parting with the money. Allowing solicitors to receive the money upon representation that the mortgage was ready, when there was no mortgage and solicitors misapply the money, trustee held to make up the loss. Perry on Trusts, §§ 402, 441, 444, 453, 454, 463.

Although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the funds in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; yet, if that line of duty is not strictly pursued, and any part of the property be invested by such personal representative in funds, or upon securities not authorized; or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained; such personal representative will be liable to make it good; however unexpected the result, or however little likely to arise from the course adopted, and how-

ever free such conduct may have been from any improper motive. Redfield on Wills, Part II, § 75; *Clough* v. *Bond*, 3 Myl. and Cr. 490, 496 and cases there cited.

Frank and Larrabee, for appellee.

If the district had a lawful right to make the settlement with the executor, it would seem to be an end of appellant's claim.

The district was the only party entitled to the funds. Through a failure of the security which the executor took for the funds, they had been lost. The only recourse left to the district, therefore, was a suit against the executor personally or upon his bond.

They had an opportunity to get a sum in cash, without litigation.

The alternative was, therefore, before them whether they should receive this sum in settlement or should resort to legal proceedings.

If they adopted the latter course there was the uncertainty prevailing; and not only that, but the uncertainty of the executor or his sureties being able to respond to any judgment they might obtain. There, too, was the certainty of incurring no little expense which they would be obliged to pay whatever might be the result of litigation.

It was for the district to decide which was the best, most advantageous, most judicious course to adopt. They chose the former, and in accordance with their decision the settlement was consummated.

Whether under the circumstances of the case the executor would be liable to account for the funds was a fairly debatable question.

Executors are holden only to good faith and reasonable prudence in the control and management of funds belonging to their estates.

Higgins v. *Whitsey*, 20 Barb. 141; *Thompson* v. *Brown*, 4 Johns. Ch. 619; *Lansing* v. *Lansing*, 45 Barb. 182; *Denton* v. *Sanford*, 39 Hun, 141; *Brown* v. *Campbell*, Hopk. Ch. 233; *Piersay* v. *Thompson*, 1 Edw. Ch. 212; *Crabb* v. *Young*, 92 N. Y. 66; *Scheerin* v. *Public Ad.*, 2 Redf. 426; *Schultz* v. *Pulver*, 11 Wend.

361; *Ruggles* v. *Sherman*, 14 Johns. 446; *James* v. *Cowing*, 17 Hun, 267; *McCable* v. *Fowler*, 84 N. Y. p. 314; *King* v. *Talbott*, 40 N. Y. 86; *Lovell* v. *Minot*, 20 Pick. 116.

In this case funds were loaned on good security.

The advice of an attorney who was supposed to be competent and reliable, having been so adjudged by the court by his admission to practice law, was followed in making the exchanges and investments, and the deed securing the loan was entrusted to this attorney, thus rightfully believed to be reliable, for record, and he informed the executor it had been recorded.

By R. S., c. 11, § 40, school districts are declared: "Corporations with power to hold and apply real and personal estate for the support of schools therein and to sue and be sued."

Under this provision, it is entirely clear that the district might receive and apply the property bequeathed and devised to it, for the education of the children in the district. It is for this purpose that school districts exist. The district is made in no sense a trustee. It is simply the recipient of money and other property, which under its corporate powers it has a right to hold and expend.

The statute gives the district power "to sue and be sued."

A school district ought not to be obliged to fight a law suit, to the last extremity, if it seems for their interest to adjust it for a less sum than the face of their claim.

Where a city has a judgment, from which an appeal is about to be taken, the council may, if done in good faith, cancel the judgment on payment of costs, and such an agreement, when executed, is binding on the corporation.

Ford v. *Clough*, 8 Greenl. 334; *Petersburg* v. *Mappin*, 14 Ill. 193-56, S. C. Am. Dec. 501; *Supervisors* v. *Bowen*, 4 Lansing, 24; Dillon Mun. Corp., § 898 and note.

A school district may compromise its own liabilities also, as a town may, under their power to be sued. *Baileyville* v. *Lowell*, 20 Maine, 178.

The question of power being settled, the matter of judgment, wisdom or expediency is not for reconsideration by courts. *Randolph* v. *Post*, 93 U. S. 511.

EMERY, J. One Crispus Graves by will appointed Marston, the appellee, its executor, and devised all the residue of his estate, after paying debts, etc., to school district No. 5 in Falmouth "for the purpose of educating the children of said district." Graves died, and his will was duly probated, and his appointment of Marston as executor was confirmed. Among the assets of the estate, which came to the executor, were $5,000 in U. S. bonds, agreed to be worth 6 % premium; a note for $1,700 against one Blake from which $1,000 was realized; and $900 Northern Pacific R. R. bonds. What these bonds were worth, the record does not show. The U. S. bonds and the $1,000 from the Blake note were loaned by the executor to one Fickett, and his notes therefor taken with what seemed to the executor, a good indorser and good real estate security, though the latter was only a second mortgage. The maker and indorser of these notes proved insolvent, and the supposed real estate security proved to be worthless, from a failure of the title. The whole amount was lost to the estate. In making these changes of investment, the executor acted under the advice of an attorney at law of this state. In February, 1885, the executor settled in the probate court his first account, which, as settled, showed a balance due the estate of $5,450.33. No reference was made in that account to any change or loss in investments. After settling this account, and without any order of distribution, the executor, who was an inhabitant of said school district, procured a district meeting to be called, and a vote passed to accept the said notes and $400 in cash in full payment of the residuary legacy, and in full discharge of all liability of the executor to the district. Thereupon the executor paid the $400 and turned over the notes to the district agent, and took his receipt in full, according to the district vote; and supposed he had thus finally and fully administered the estate, and procured his discharge from further liability.

In June, 1886, however, an heir-at-law of Crispus Graves, the testator, petitioned the probate court to cite the executor to file and settle his final account. The executor resisted the petition upon the ground that the petitioner had no interest in the estate;

but it was finally determined in the supreme court of probate, (*Rogers* v. *Marston*, 80 Maine, 404), that the petitioner had such an interest in the estate as entitled him to require an account, and that the executor must proceed to file and settle a final account of his administration. Thereupon the executor filed an account charging himself with the balance of his first account only ($5,450.33) without premiums or interest, and crediting himself with $400 cash paid the district, and with $6,000 the par face value of the notes delivered to the district as above stated. The probate court below allowed the account as stated, showing nothing due the estate, and the heir-at-law appealed to the supreme court of probate. The facts were there agreed upon and submitted to the law court for judgment.

The executor, upon the petition of an heir interested in the estate, had been ordered to file and settle a final account with the estate, in order that the amount of the balance available for distribution might be ascertained, preparatory to proper proceedings for a distribution among those lawfully entitled. *Rogers* v. *Marston*, *supra*. The account he has filed, while nominally with the estate, is really with school district No. 5, in Falmouth, and ignores the interests of the petitioner and all other persons. It is not such an account as the court has ordered, or as the law requires.

In the probate court, the whole estate as an entity is one party to any administration proceeding, whether carried on by executor, creditor, legatee or heir. Every such proceeding is in favor of, or against the estate. Every petitioner seeks something for or from the estate. The administrator or executor, as such, settles no accounts with persons,—no accounts with individual creditors, legatees or heir, nor with either class separately, but only with the estate as an entity. Creditors and legatees of specific legacies have claims against the estate, to be paid out of the whole estate according to their legal priority, without regard to any residuum. Such claims, in the case of solvent estates, are to be paid as fast as assets are realized, (after the statute time) without waiting for full and complete administration. Payments made on these are official payments,—necessarily go into the exe-

cutor's official account with the estate,—are properly debited to the estate and credited to the administrator as fast as paid.

Heirs and residuary legatees, however, have no claim against the estate. Their time does not come till the claims have been so far paid, and the estate so far administered, that the court declares a balance to exist for distribution. They may hasten that time by following up the tardy executor with citations as in this case, but until it comes they are not entitled to any payments to themselves. If such payments to an heir, or residuary legatee, are made by the executor without an order of distribution, they are purely personal and unofficial, and have no proper place in the executor's official accounts with the estate. In the case at bar, the payment of the cash and the delivery of other assets to the school district, were personal matters between the appellee and the district, which should not have been allowed in this official account. *Paine* v. *Moffit*, 11 Pick. p. 496; *Cowdin* v. *Perry*, 11 Pick. p. 511; *Granger* v. *Bassett*, 98 Mass. 462, 469.

It should not be inferred, however, from the above suggestions, that we think the question to be one simply of practice and procedure in the probate court. Something more is involved. For the probate court to allow in a final account or upon a decree of distribution, the payment of the $400 and the delivery of the notes to the district as lawful and hence as discharging the executor, is to assume to determine judicially two things,—first, that the school district is entitled to the residuum of the estate, and, second, that the school district has effectually released the executor from any further accounting for that residuum. These are both judicial questions, and outside of the jurisdiction of probate courts.

Probate courts have no constitutional nor common law origin. They were created by statute almost solely for administrative purposes, and what little "contentious jurisdiction" they may possess is only incidental to their administrative jurisdiction. They have no administrative powers even, beyond those conferred by statute. So true is this, that in the absence of a statute authorizing it, a probate court cannot empower an administrator to sell land for payment of debts. Without the statute, he would

need resort to a court of chancery powers. The probate court has the power, upon proper proceedings, to make a decree of distribution, and, if there be no will, to determine who are the heirs and the share of each, *Loring* v. *Steineman*, 1 Met. 204 ; R. S., c. 65, § 27 ; but it has no power in this state to construe a will,—to determine its effect upon the distribution of the estate,—or to adjudicate between the heirs and the residuary legatees. Such power is given to probate courts in some states, but in our system it is reserved to the law and equity courts. Where there is a will, as in this case, the probate court may determine when the estate is fully settled, and may then order the executor to distribute the balance according to the will, so far as the will directs, otherwise according to law, but there its power ends. What the will does direct, or whether it directs at all, are questions for another tribunal. The executor like other officers, must learn the law, and unlike many other officers, he can obtain from the equity court an authoritative construction of the will, and authoritative directions how to perform the duties of his trust, so far as legacies are concerned.

In this case there is a question whether the school district can take under the will, and whether, if they can take, they have not by their action rejected the legacy. This is a question between the school district and the heirs, which can be determined only by the court of equity or law jurisdiction upon proper pleadings, notice and hearing. Not even the supreme court of probate, upon appeal, can exercise the equity powers conferred upon the supreme judicial court. It can make such decrees only as the probate court below should have made. *Grinnell* v. *Baxter*, 17 Pick. 383 ; *Lincoln* v. *Aldrich*, 141 Mass. 342. Again, assuming that the school district will be found entitled to the residue of the estate, questions will arise after the decree of distribution,—whether the district meeting was legal,—whether the vote was within the district's power,—whether the agent was authorized to discharge the district's claim,—whether he in fact received the $400, etc.,—in fine, whether the district is barred from recovering the whole in a suit at law. It is true these last questions have not yet arisen, but when they do arise, they will be questions between

the school district and the executor, to be determined like other contentious questions by a court of law, or equity. *Knowlton* v. *Johnson*, 46 Maine, 489.

The conclusion is inevitable, that the decree appealed from, assumed to adjudicate and determine matters clearly outside the jurisdiction of the probate court, and hence must be annulled. We are urged, however, to go on, and construe the will, and adjudicate between the school district and the heirs on the one hand,—and then between the school district and the executor on the other, and thus settle and compose in advance the questions likely to arise, or already mooted, and so save time and expense. It must be remembered that we are now sitting as a supreme court of probate, considering a probate proceeding; and after having determined that we have here no jurisdiction over these questions, it would be incongruous to say the least, for us to assume to determine them. We think the party desiring the determination of any of these judicial questions, should apply to the proper court with fit and appropriate process and pleadings. By such a course only, can he obtain careful consideration and authoritative judgment.

Having found that the decree below should be annulled, it remains to consider what decree should be made.

The executor contends that if he cannot be credited with the amount of the balance as turned over to the school district, he should be credited with it, as lost without his fault. He urges that he made the unfortunate investment in good faith by the advice of an attorney at law, and that the law cannot be so rigorqus as to hold him personally responsible in such case. The law, however, requires not only good faith, but prudence of the executor, and a degree of prudence commensurate with the nature of his duty. That duty is to regard the safety of the fund as paramount to any rate of income. He has no occasion to make any profit for the estate, other than that obtainable from the highest security. It is no assumption of superior financial wisdom to say that the conversion of U. S. bonds and cash into personal notes secured by a second mortgage of real estate with a faulty title, is an act far below the standard of prudence re-

quired of an executor. The entire business public would say the same.

The fact that a lawyer advised such foolish conduct, does not relieve it of its foolishness, nor save the executor from its consequences. While the advice of a lawyer may repel imputations of malice and bad faith, it can furnish no further justification. If the advice be wrong, and the client follow it, his conduct is as wrong as the advice. Lawyers are not privileged to advise foolishly, and their clients are not shielded by their foolish advice. The court will look at the act, and not at its adviser, in judging of its merit or demerit.

It is evident from these considerations that the executor can not be allowed any credits whatever, not even for commissions, as these were credited to him in full five per cent in his former account. On the other hand in addition to debits already made he must be debited with the premiums on the U. S. bonds, (agreed by the parties to be six per cent.) which he has not accounted for. He should further be debited with interest on the whole amount of the last balance and the premium, from the date of the settling his last account, to the date of his settling this his final account, for the reason that he made a wrongful use of the money, and needlessly delayed its distribution, only rendering this final account after much resistance. For the same reason we think the executor should pay the costs of this appeal.

We are asked to reopen the first account, to have the executor charged with interest before that time and to reduce the credit for commissions. That settlement of account, however, was not appealed from, and we think it best not to now disturb it.

The order of this court is, that the decree of the probate court below be reversed and annulled, and a decree be made in the supreme court of probate, in accordance with this opinion, and such decree certified to the court below.

Decree accordingly.

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

BENNETT SPRINGER *vs.* BERTHA R. HUBBARD.

Cumberland. Opinion January 29, 1890.

Requested instructions. Exceptions. Forged check. Practice.

Requested instructions should be applicable to the facts in evidence.

Exceptions will not be sustained to the refusal of the court to give requested instructions which are not applicable to the facts in evidence.

A forged check received in payment for personal property sold will not prevent the seller from recovering the consideration of the sale.

ON MOTION AND EXCEPTIONS.

This was an action of assumpsit, tried in the superior court for Cumberland county, in which the jury rendered a verdict of $1,775.22 for the plaintiff. The writ contained two counts, one on a bank check, and one on an account annexed for the consideration of the sale of plaintiff's interest in a cafè, in Boston, to the defendant. At the trial it was admitted that the check was forged and the plaintiff abandoned the count on it. The trial proceeded, on the part of the plaintiff, on the account annexed; and he contended that there being a sale completed between the parties he was entitled to recover the price agreed on. The defendant denied that a sale had been completed.

The premises occupied as a cafè were under a lease. The defendant contended that the consent of the lessor to accept the defendant as his tenant in place of the plaintiff, should have been obtained as a condition precedent before the sale to her would take effect.

She requested the following instructions:—

First. That no action can be maintained upon any contract for the sale of lands, tenements or hereditaments or of any interest in or concerning them, unless the promise, contract or agreement, on which such action is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith.

Second. If the consent of the lessor had to be obtained to accept the defendant as his tenant in place of Springer, this was a

condition precedent to be performed before the obligation commences, or the contract could be completed.

Third. If Mordaunt had completed the contract with Springer for the purchase of the cafè independent of the consent of the lessor and without first obtaining it to accept the defendant as his tenant, then the defendant is not liable for the acts of Mordaunt.

The presiding justice declined to give the instructions; and after verdict the defendant excepted. The plaintiff's evidence tended to show that the defendant together with one Mordaunt, as her agent, negotiated the sale from the plaintiff for seventeen hundred dollars. The plaintiff gave the defendant a writing, agreeing to deliver the property on payment of that sum. The defendant paid twenty-five dollars and agreed to return and pay the balance in cash or certified check. The defendant did not return but Mordaunt came with a check for $1,800 purporting to be drawn by the defendant to his order and by him indorsed, and certified by the cashier of the bank where it was payable. The plaintiff paid Mordaunt the difference between the check and the purchase price. The check was forged.

W. H. Motley and I. L. Elder, for defendant.

There was no sale. To complete a sale the minds of both parties must meet; there must be a mutual assent and it must co-exist at the same time and be unconditional. Benj. Sales, pp. 2, 53. The lessor did not consent to a transfer of the lease. The mortgagee, without whose consent they could not complete the sale, did not consent. Mordaunt was not defendant's agent; he was the broker of both parties. Defendant not responsible for Mordaunt's fraud. If a principal employs an agent to transact a particular business and if the latter commits a fraud he acts beyond the scope of his authority, and the principal is not responsible. *Udell* v. *Atherston*, 7 H. & N. 172; *Burnes* v. *Pennell*, 2 H. L. 497; *Cornfoot* v. *Fowke*, 6 M. & W. 358; *Wilson* v. *Fuller*, 3 Q. B. 68, (43 E. C. L. R. 635); *Grant* v. *Norway*, 10 C. B. 655, (2 Eng. L. & Eq. 337); *Coleman* v. *Riches*, 16 C. B. 665, (29 Eng. L. & Eq. 326); *Cargill* v. *Bower*, 10 Ch. D. 502; *Ball* v. *Sykes*, 70 Iowa, 525; *Cronin* v. *Bank*, 1 West Rep. (Ills.) 602;

Frink v. *Roe*, 70 Cal. 296; *State* v. *Fredericks*, 1 Cent. Rep. 450; *Tucker* v. *Jerris*, 75 Maine, 184; *Forsyth* v *Day*, 41 Id. 382, 395.

A lease of land and buildings is such an interest that its conveyance will bring it within the statute of frauds. R. S., c. 111; *Delano* v. *Montague*, 4 Cush. 42.

To hold the defendant there must be some memorandum signed by her. It is not claimed that she signed any writing whatever. *Patterson* v. *Cunningham*, 12 Maine, 506, 509; *Hesseltine* v. *Seavey*, 16 Id. 212, 214; *O'Leary* v. *Delaney*, 63 Id. 584; *Jellison* v. *Jordan*, 68 Id. 373; *Duffy* v. *Patten*, 74 Id. 396; *Farwell* v. *Tillson*, 76 Id. 227.

Drummond and Drummond, for plaintiff.

FOSTER, J. The only question submitted to the jury was whether there had been a completed sale of the plaintiff's half interest in a cafè and fixtures to the defendant. The plaintiff claimed that the sale was actually completed. The defendant denied it.

The plaintiff having received in payment a check that was admitted to be a forgery, brings this suit to recover the consideration of the sale,—the price of the property sold. Upon a charge that presented the issue fully and fairly and stated the law correctly in its application to that issue, the jury found for the plaintiff and returned a verdict for the amount of the consideration.

The first requested instruction could have no application in an action like this, which is for a recovery of the price, and where, to recover at all, it was necessary for the plaintiff to prove a completed sale. The instruction asked for, assumes that the action is for the breach of a contract executory in its nature. No such cause of action is set out. The requested instruction was therefore inapplicable and properly refused.

The same may be said in relation to the second and third requests.

Requested instructions should be made applicable to the facts in evidence. There was no evidence or position assumed in the case upon which the requested instructions could properly bear,

and without which an exception to the refusal of the court to give a requested instruction will not be sustained. *Brackett* v. *Brewer*, 71 Maine, 478.

The evidence fully sustains the verdict.

Motion and exceptions overruled.

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

JOSEPH W. SYMONDS, and another in equity, WALTER G. DAVIS, and others, intervening complainants,

vs.

JOHN WINSLOW JONES.

Cumberland. Opinion February 1, 1890.

Trade-mark. Labels. Transfer. Use by vendee. Equity. Injunction. New parties. Practice.

The owner of an established business, in which he uses certain peculiar labels and trade-marks, may make a valid conveyance of such labels and trade-marks, in connection with a conveyance of the plant and good-will.

If such labels and trade-marks consist largely of the name, initials of the name, or the residence of such owner, he may yet in the same manner divest himself of the right to use them, and vest the right in his vendees.

The purchasers of trade-marks and labels, however, should not use them without change if they indicate that the article to which they are applied, is made by the vendor. In such case words must be added showing that the vendor has retired, and that the goods are made by his successors.

New parties complainant may be admitted in an equity proceeding as their interests arise, if their admission does not increase the burden of the defense.

IN EQUITY.

This was an appeal from a decree of the presiding justice who heard the case, sitting in equity for Cumberland county, and who granted a decree against the defendant enjoining him from using certain labels and trade-marks, formerly employed by him in the

canning business, and which with his manufacturing establishments, good-will, etc., he had sold and conveyed. The bill praying for an injunction and account was filed July 1, 1887. After the bill was filed, Davis, Baxter and Davis, the purchasers of the labels, trade-marks and other property from the original complainants were allowed to intervene. They waived that part of the bill asking for an account.

The facts are stated in the opinion.

W. L. Putnam, for plaintiffs.

The answer is not sworn to, nor is it signed by the defendant himself. It is, therefore, a mere matter of pleading. Chancery rule 14.

The answer does not put in issue the value or validity of any of the trade-marks or the good-will. The only real issue raised by it is one of title, defendant setting up a right in himself. It is shown by the answer and proofs, that Jones in the most public manner during the three years before filing of the bill, set up a title and denied and impugned the plaintiffs' title, to the great injury of these trade-marks.

In the testimony and exhibits, the expression is not "Winslow corn" or "Winslow green corn," but "Winslow's corn" and "Winslow's green corn," indicating, by the possessive form, proprietorship, rather than quality or process.

The defendant having sold the trade-marks and labels for a valuable consideration, is estopped from questioning their validity. By setting up title, he admits their validity. No man can claim title to what does not exist; thus by claiming title he admits its existence, their validity being the very essence of their existence.

Plaintiffs should be protected in their right to the words "Globe" and "World Renowned" in the connection in which they use them. *Royal Baking Powder Co.* v. *Royal Chem. Co.*, N. Y. Superior Court, March 1873; *Same* v. *Mason*, U. S. C. C., So. District, Ills., Treat, J.; *Same* v. *Sherrill*, and *Same* v. *Jenkins*, N. Y. Sup. Court, 1880; *Same* v. *McQuade*, U. S. C. C., Northern Dist., Ills., Blodgett J.; *Same* v. *Vouwie*, U. S. C. C., Northern

Dist., Ohio, Walker, J.; *Same* v. *Davis*, U. S. C. C., Ea. Dist., Mich., Brown, J.; *McLean* v. *Fleming*, 96 U. S. pp. 245, 254.

As to defendant's claim that trade-marks, in part, indicate a process only, counsel cited: *Singer Machine Mfrs.* v. *Wilson*, 3 Appeal Cases, p. 376; *Same* v. *Larsen*, 8 Bissell, p. 151. The words, "Winslow's Green Corn," have never been permitted to go out to the world. The right to their use has been held in a single line of transmission. Its generic or public use has always been guarded against. They represent the peculiar quality, or excellence, which the owner of a trade-mark gives to his product. *Menendez* v. *Holt*, 128 U. S., 514, 520, 521.

Plaintiffs entitled to use defendant's name: *Hoxie* v. *Chaney*, 143 Mass. 592; *Kidd* v. *Johnson*, 100 U. S. 617.

Defendant cannot complain that the Winslow Packing Co. used the words, "Prepared by John Winslow Jones" because he does not set it up in his answer; they were used with his consent; he transferred the labels with those words on them; they were omitted more than two years before the bill was filed.

To the defendant's claim of forfeiture because he was not retained by the original corporation and paid as managing director, counsel argued: This was a matter of avoidance and defendant had failed to put in any evidence. Title of his vendees has been made absolute with his consent, assistance and affirmative action. No words of condition or forfeiture in the transfer of the factories, good-will and business. Inter-dependent clauses, each being executory and *pari materiâ*, not found here. The transfer was an executed and accomplished fact. There were conveyances from Jones of the good-will and trade-marks disconnected from any agreement to employ him as managing director.

Jurisdiction to restrain defendant's notices, advertisements and circulars: High on Injunc. §§ 1011, 1012, 1181; *Boston Diatite Co.* v. *Florence Co.*, 114 Mass. 69; Story's Eq. §§ 944–951, 953; *Mogford* v. *Courtenay*, 45 L. T. R., S. C. Chitty's Eq., Index, 4th Ed. Vol. 3, p. 2770; *Harper* v. *Pearson*, 3 L. T. R. (N. S.) 547; *Stevens* v. *Paine*, 18 Id. 600, S. C. Chitty's Eq. Dig., Vol. 7, "Trade;" *Massam* v. *Thorley's Cattle Food Co.*, 14 Chan. Div. 748.

Exceptions to admitting intervenors: Counsel cited, *Mason* v. *York & C. R. R. Co.*, 52 Maine, 107; *Carroll* v. *Same*, Id. and cases there cited; Story's Eq. Pl. § 343. Plaintiffs here assert only a title which is disputed and ask the prevention of future wrongs and not damages for past infringements.

B. F. Hamilton and G. F. Haley, for defendant.

The Limited Co. agreed to employ Jones at a salary of $5,000 per year, for ten years; having neglected and refused they cannot in equity compel the execution upon his part of the agreement, when they refuse to perform theirs. Real question at issue is the plaintiffs' right to the exclusive use of the Globe labels. "World Renowned" are not words capable of exclusive appropriation by any one, not being used to denote the origin, or manufacture of, but being descriptive of quality. *Amoskeag Co.* v. *Trainer*, 101 U. S. 51; *Canal Co.* v. *Clark*, 13 Wall, 311, and cases cited; *Gilman* v. *Hunnewell*, 122 Mass. 139; *Caswell* v. *Davis*, 58 N. Y. 223; *Burke* v. *Cassin*, 45 Cal. 467; *Choynski* v. *Cohen*, 39 Cal. 501; *Larabee v. Lewis*, 67 Ga. 562. "Winslow's Green Corn," was used by plaintiffs and defendant to inform the public that the corn was prepared by the Winslow process to distinguish it from the Retort process, and decided by U. S. C. C. not to be patentable (2 Hughes, 527); consequently the world had the right to use the process and so mark their goods. Plaintiffs by their own fraud and misrepresentation have deceived and misled the public, and forfeited their right to the trade-mark.

Admission of intervenors: When the trustees transferred the property discharged from the trust, the object of the bill was accomplished. Court will not determine their future rights. Purchasers of patents and trade-marks, pending suit, not protected as in other cases. *Moore* v. *Marsh*, 7 Wall. 515; *Dean* v. *Mason*, 20 How. 198; *Cross* v. *De Valle*, 1 Wall. 5. Damages would not go to intervenors. *Bardwell* v. *Ames*, 22 Pick. 333.

Trade-marks assuring the public of the origin or ownership of the article: Upton on Trade-Marks, 98; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218, and cases cited and approved; *Connell* v. *Reed*, 128 Mass. 477; *Parlett* v. *Guggenheimer*, 8 Cent. Rep.

796 (Md.); *Seigert* v. *Abbott*, 17 Id. 496; *Buckland* v. *Rice*, Id. 411; *Stachelberg* v. *Ponce*, 23 Fed. Rep. 430; *Sherwood* v. *Andrews*, 5 Am. Law Reg. (N. S.) 588.

Fraud and deception of plaintiffs, relied on by defendants, not set up in the answer in *Stachelberg* v. *Ponce*, *supra;* but the court considered it sufficient. Court utterly refuses its aid where fraud and deception are used. The inquiry is not only whether defendant, from his own showing and proof, has acted unjustly and inequitably, but also whether complainants, by their allegations and proof have shown that they are entitled to relief. *Knox* v. *Smith*, 4 How. 298.

Arthur Steuart, of the Maryland bar, for defendant.

Generic names cannot be appropriated as trade-marks. *Lea* v. *Deakin*, Price & Steuart's Am. Trade-Mark Cases, 23; *Lechlanche Battery Co.* v. *Western Electric Co.*, Id. 157, and cases cited; *Goodyear's India Rubber Glove Mfg. Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598. The words "Winslow's Green Corn," being clearly generic are public property.

A name alone is not a trade-mark when it is applied to designate, not the article of a particular maker or seller, but the kind or description of thing which is being sold. *Canal Co.* v. *Clark*, 13 Wall. 311; *Thompson* v. *Winchester*, 19 Pick. 214; *Wolff* v. *Boulard*, 18 How. Pr. 64; *Sherwood* v. *Andrews*, 5 Am. L. Reg. (N. S.) 588, 591; *Candee* v. *Deere*, 54 Ills. 439; *Singer Mfg. Co.* v. *Wilson*, L. R. 2 C. D. 484; *Cocks* v. *Chandler*, L. R. 11 Eq. 446; *Ford* v. *Foster*, L. R. 7 Chan. Ap. 611; *Burt* v. *Cassin*, 45 Cal. 467; *Burnett* v. *Phalon*, 21 How. Pr. 100; *Binninger* v. *Wattles*, 28 How. Pr. 206; *Singleton* v. *Bolton*, 3 Doug. 393; *Canham* v. *Jones*, 2 Ve. & B. 218; *Goodyear's India Rubber Glove Mfg. Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598.

Trade-marks employed upon patented articles become public property with the expiration of the patents. The court will take judicial notice that the process was patented in 1862, under the law of 1836, and hence the patents, granted for fourteen years, have expired. Patents are public records. All persons are bound to take notice of their contents. *Boyden* v. *Burke*, 14 How. 576. Expired patents: *Singer Mfg. Co.* v. *Larsen*, U. S.

C. C., N. Dist., (Ills.), P. & S. Am. Trade-Mark Cases, 13, and cases cited in the opinion.

EMERY, J. This is an equity appeal. The material facts found by the court are these:

John Winslow Jones, the respondent, for several years prior to 1880 had been carrying on extensively the business of preserving or "canning" meat, fish and vegetables at various factories in Maine, New Brunswick and Prince Edward Island, and had built up a large trade in the canned products in the United States and Canada. The particular process of canning was known as the "Winslow Process," having been originated by one Isaac Winslow. The business above stated was started by Nathan Winslow & Co., and was succeeded to by the defendant who greatly extended it. Among the labels used by him to designate the products were two in particular. One was known as the "red" label, being of a red color, and bearing the figure of an ear of corn, the words "Winslow's Green Corn," and "John Winslow Jones, Portland, Maine," and also the figure of a globe, with the words "World Renowned," and "Trade-mark" thereon. The other was known as the "yellow" label, being of a yellow color, and bearing the figure of a globe, with the letters "J. W. J.," thereon and the words, "Globe Trade-mark Brand," "Winslow's Green Corn," "World Renowned," etc. While these particular labels were used on canned corn, the figure of the globe and the various words and phrases on these labels were used on labels for other products, and on the letter-heads and circulars used in the business.

In the latter part of 1879 Jones procured the organization in England, of the "J. Winslow Jones and Company, Limited," for the purchasing, carrying on, and further extending the same business; and in pursuance of an agreement, he conveyed to the new company March 1, 1880, all his said factories, machinery and plant generally, and also, as admitted by Jones in his answer, all the labels, trade-marks and good-will of the business. Jones further admits that such conveyance included the "red" label and the "yellow" label above described.

It was stipulated in the agreement referred to, that Jones

should be employed by the Limited Company as its managing director in America for ten years at a fixed salary, and should not for the same time carry on a similar business within fifty miles of any factory of the company, nor send any similar canned goods to any part of Europe.

To secure certain debentures, the Limited Company made to trustees, Bacon and Herring, a conveyance of all the property received from Jones, including the business, good-will, labels and trade-marks. The Limited Company, subject of course to this trust deed, took possession of all the property and plant conveyed, and carried on the same business with Jones as managing director in America, until 1882,—and during that time made use of the same labels and trade-marks to designate their products. In 1882 the Limited Company becoming financially embarrassed, transferred all the property, plant and business, including labels and good-will, to Charles P. Mattocks, subject of course to the trust deed to secure debentures. It was agreed by the company, the trustees and Mattocks, that the last named should take charge of the property and carry on the business, which he did, using the same labels and trade-marks to designate the products of the factories so managed by him. This arrangement for Mattocks to take charge of the business was assented to by the debenture holders, including Jones, who was a large holder. In 1883 Mattocks leased the property, plant and good-will to the Winslow Packing Company, and gave it written licenses to use, during the lease, the labels and trade-marks, which had been used in the business. Mattocks was president and manager of this new company. The company used to some extent these "red" and "yellow" labels, among others, as they had been before used, until 1885, when they had printed across the face of the labels the words, "Winslow Packing Company, successor to."

December 8, 1886, the original trustees under the deeds to secure the debentures transferred the trust, and conveyed all the properties, including good-will and labels, etc., to J. W. Symonds and Edward Moore, the complainants, who thereafterwards held the properties, etc., under the same trust.

After the assignment of the "J. Winslow Jones Company, Lim-

ited," in 1882, Jones was no longer employed as managing director, and subsequently as early as 1884, he at various places in the United States and within the limits of the trade or custom of the former business, but not within fifty miles of any of its factories, engaged in the same kind of business. In this new business to designate his new products, he made use of some labels, similar in color and style to the old "red" and "yellow" labels of the former business. The figure of an ear of corn, the figure of a globe, the words "John Winslow Jones, Portland, Maine," "Successor to Nathan Winslow & Co.," "Winslow's Green Corn," "World Renowned," "Trade-mark," "Globe Brand," and the initials "J. W. J.," were used on these new labels. There were some minor differences between the old and new labels, but they were practically similar. Jones also used in his new business practically the same style of letter-heads that he had used in the old business and which had been used by his assignees, the Limited Company and its successors. The letter-heads had on them the words, "Winslow's World Renowned Green Corn" and the figure of a globe with the words "Trade-mark." Jones also issued circulars, claiming the right to the sole use of the globe trade-mark and the old labels, and denying any right in the assignees of the Limited Company.

This conduct of Mr. Jones, as to labels, letter-heads, etc., disturbed the trade and lessened the sale of the product of the old factories, and injured the business of those claiming under his assignees the Limited Company. Whereupon, Messrs. Symonds & Moore as trustees for the debenture holders, and joining Mattocks and the Winslow Packing Company as parties, filed this bill in equity against Jones praying for an injunction to restrain Jones from engaging in a similar business within fifty miles of any of their factories, from selling canned goods in Europe, and from using letter-heads, or labels similar to or in colorable imitation of those used by him in the old business and by him sold to the Limited Company. The bill also prayed for an account. The court held by a single justice with the equity powers of a chancellor, sustained the bill, and granted a perpetual injunction as prayed for, but made no order for accounting. The respondent

thereupon appealed to the law court sitting as an appellate equity court.

All controversies over the facts are settled by our finding of facts, as above stated, and it only remains to consider the legal and equitable principles by which, upon the facts found, the case is to be determined.

Every business man feels a natural and honorable pride in the articles produced by him, and in the business he builds up. He naturally gives some particular name to the product of his invention, of his factories, farms, mines or vineyards, to distinguish them from similar products of others; and uses peculiar labels and marks upon his products, to identify them as his own. The public come to associate these names, labels, and marks with the products of some particular origin or ownership, or of some particular factory, farm, etc. It is clear that such names, etc., thus become convenient for the consumer, and valuable to the producer, and that both the consumer and the producer should be protected against their use by other parties upon other similar products. They become valuable according to the familiarity of the public with them, and the excellence of the product designated by them. The law justly recognizes such names, labels and marks as important attributes or appurtenances of a business, and as proper to be transferred with any sale or transfer of the business and its plant.

Words, descriptive of the article, or indicative of the general locality of its production, cannot of course be appropriated by one producer to his exclusive use. Every producer of the same kind of articles can use upon his products any words descriptive of the quality of the articles, or indicative of the county or town where produced, however long time the same words may have been used by others. A man may always describe his products, and tell where they were produced. The same may be said of any color upon a label, for every label must have some color, and the number of colors is limited. Such words and marks, however, as by their own meaning, or by association in the public mind, indicate not the quality of an article, but its origin or ownership, —the person by whom, or the factory in which it was produced,—

become appropriated in their use exclusively to the originator or owner of such articles. No other person can lawfully use them to designate other similar articles of different origin or ownership. *McLean* v. *Fleming*, 96 U. S. 245; *Canal Co.* v. *Clark*, 13 Wall. 311; *Goodyear Rubber Co. Case*, 128 U. S. 598; *Manufacturing Co.* v. *Trainer*, 101 U. S. 51; *Godillot* v. *Harris*, 81 N. Y. 263.

The respondent urges that most, if not all, the words and symbols on the "red" and "yellow" labels in question are such as cannot, under the principles above stated, be exclusively appropriated by the complainants as against him. He claims that such of the words and symbols as are generic, or descriptive, or do not indicate the origin, or that the ownership is in the complainants, are free to all and that he cannot be restrained from using them. In this class he places, "World Renowned," "Trade-Mark," "Only Reliable Brand," etc. The complainants practically concede that such words could not be exclusively appropriated by one producer.

The respondent further claims that the words, "Winslow's Green Corn," do not, under the facts, indicate the origin or ownership of the products, but simply that they are prepared by a process originated by Isaac Winslow, and known to the trade as the "Winslow Process,"—that this process was never effectually patented, and was not patentable, and hence any one could use it, and could use any apt words to indicate that his product was by that process. He argues that "Winslow's Green Corn" are apt words for that purpose, and that they indicate the process only. The complainants concede that the process originated with Isaac Winslow and was never effectually patented, but they insist that the words "Winslow's Green Corn," under the facts, do in themselves and by association indicate that the articles upon which they are placed, are produced from the plant of Winslow or his successors in the business. Many authorities are cited by counsel on each side of this controversy.

The respondent further urges, that the words "John Winslow Jones" constitute his name, and that the letters "J. W. J.," are the initials of his name, and were intended to represent his name and initials; and that no one else can acquire the right to use

them or to prevent his using them. The complainants insist that the respondent should not use the words "John Winslow Jones, Portland, Maine," since he no longer carries on this business in Portland, Maine, and they do carry it on there,—that the use by the respondent of these words combined, injures their business, in that it tends to mislead the public into believing that the respondent's goods are the product of the old, well-known factories. The complainants further reply that, whatever other use the respondent may make of the letters "J. W. J.," for him to use them on the figure of a globe, has the same injurious effect.

The complainants, however, do not rest their case on the ground that they have appropriated and used these words and symbols on the "red" and "yellow" labels, and that such words and symbols are capable of exclusive appropriation. They place their case on the ground that, whatever the character of these words and symbols, they were devised and used by the respondent as the labels and trade-marks of his business, and as such were sold by him for a valuable consideration to the purchasers of his plant and business. The complainants, representing these purchasers, urge, and the facts show, that the respondent,—by selling the good-will of the business, and the labels and marks used by him to designate the products of the business,—promised, for a consideration, not to use such labels or marks for himself, and, for the same consideration, promised that the purchasers should have the exclusive use, so far as he was concerned. It is argued that whatever may be the rights of the complainants against third parties unaffected by any contract, they have acquired by valid contract from this respondent, the right to the exclusive use, as against him, of these labels and the words and symbols upon them; and that his use of them, or of any colorable imitation of them, is a violation of his contract, which an equity court can and should prevent.

What is known as the "good-will" of the business is recognized by the law as a proper subject of sale or contract, in connection with a transfer of a business plant. An established business, with plants and products well known to the trade, has a money value often far above that of its mere plant, and this is often the

controlling motive for the purchase. Labels, trade-marks, particular words and phrases devised or used to distinguish or identify the products of the plant, and associated with such products in the public mind, are in like manner usually transferred with the plant, and are regarded as valuable acquisitions for the purchasers. They are, equally with the good-will, proper subjects of such sale and contract. The name or initials of the originator or owner of the business, when used on labels and as trade-marks in the business, may thereby have a value and so may be included in a sale of the business, so far at least as to prevent the vendor afterward using them in like manner on other similar products to the detriment of his vendee.

These propositions are supported and illustrated by authorities. In *Kidd* v. *Johnson*, 100 U. S. 617, S. N. Pike adopted as a trade-mark for his whiskey the words, "S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio," enclosed in a circle. He took several partners into the business, but retained his individual ownership of the plant, and the trade-mark. The firm, Pike being a member, removed the business to New York, and Pike sold the Cincinnati plant and trade-marks to Mills, Johnson & Co., who entered upon the business with that plant, and used the same label and trade-mark before used by S. N. Pike, and the various firms with which he was associated. Pike dying, his surviving partners undertook to use the trade-mark above described. The court held that the purchasers from S. N. Pike had the exclusive right to use the trade-mark, and enjoined the defendant's use. In *Burton* v. *Stratton*, 12 Fed. Rep. 696, (U. S. D. C. E. D. Mich.) two brothers, Stratton, originated a yeast, and adopted as a trade-mark the figures of two heads (portraits of one of them with a twin brother) in an oval setting, with the words, "Twin Brothers Improved Dry Hop Yeast." The brothers, the proprietors, sold the business and the trade-mark to Burton, who carried on the same business and used the same trade-marks. Subsequently one of the Strattons began making yeast, and used the words or name, "Twin Brothers Dry Hop Yeast." The use of this trade-mark by Stratton was enjoined. Brown, Dist. J., said that the cases were numerous in which it had been held that a party may law-

fully sell not only a trade-mark indicative of origin in himself, but even the right to use his own name, in connection with a particular business. In *Pepper* v. *Labrot*, 8 Fed. Rep. 29, (U. S. C. C., Dist. of Ky.) the right to use the words "Old Oscar Pepper" was held to pass by an assignment of the plant and business, even as against Pepper himself, the former proprietor who had set up a separate establishment in another county. In *Skinner* v. *Oakes*, 10 Mo. App. 45, Oakes had originated a business of making and selling a candy called "Oakes Candy." He took a partner, Probasco, and the firm carried on the same business. He afterward sold to Probasco all his interest in the property, business and trade-marks. Probasco's title passed to Skinner. It was held that Oakes should be restrained from using the name "Oakes Candy" in a new candy business set up by him. In *Hoxie* v. *Chaney*, 143 Mass. 592, A. N. Hoxie had originated and carried on a business of making and selling soaps, and used for label and trade-mark the phrases, "A. N. Hoxie's Mineral Soap," and "A. N. Hoxie's Pumice Soap." He took Pegram into partnership, and afterward sold to him all the plant, business and good-will. Pegram then formed a partnership with Chancey. It was held that Hoxie, having sold and been paid for, the names and marks applied to the soap, could not use them in a new soap business. In *Churton* v. *Douglas*, Johns. Eng. Ch. 174, the complainant and respondent had carried on a manufacturing business under the firm name of "John Douglas & Co." Douglas sold to Churton all his interests in the plant, business and good-will, and afterward formed a new partnership with another person in the same kind of business, under the same firm name "John Douglas & Co." The new firm was restrained from using that name.

But the respondent contends that this case is not within the above principles, even if they are correctly stated. He contends that any transfer of good-will, labels, and trade-marks by him to the Limited Company, was conditional upon his being employed for ten years as managing director of that company in America; and that his discharge at the end of two years, worked a forfeiture of the right to the exclusive use of the labels and trade-marks.

No such condition of forfeiture was expressed in words in the instrument of conveyance, nor in the preliminary agreement of sale, and forfeitures are not favored in the judicial interpretation of writings. We think the agreement for hiring was an independent agreement so far as the conveyance and transfer of the property, good-will and trade-mark were concerned. As well, we think, might Jones claim a forfeiture of all the property conveyed as of this part of it. We do not think it was intended that the property, or the business or its good-will should revert to Jones, if for any reason he should be discharged from the employ of the Limited Company before the expiration of the ten years.

The respondent again contends, and stoutly, that the complainants should not have the protection of the law and of this court for these labels, for the reason that they, or the persons managing the property and the business, since he left the employ of the Limited Company, have so used the labels and marks as to mislead the public into believing that the goods were manufactured or prepared by him. The facts do show that the Limited Company, and after it, Mattocks, and the Winslow Packing Company, used the "red" or "yellow" labels more or less without change up to 1885, when the latter company printed across the face of such of these labels as it did use, the words "Winslow Packing Co., successor to." Such use of the labels, without words indicating that Jones had personally left the business, and indicating a change of ownership would evidently mislead the public as to the manufacturer of the goods, and hence should not receive protection from the court. It would wrong Jones, as well as the public. *Stachelberg* v. *Ponce*, 23 Fed. Rep. 430, S. C., 128 U. S. 686; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218. It is plain, that while thus using the labels, the parties complainant in interest, could not maintain a bill for an injunction against their use by the respondent.

The facts further show, however, that before the filing of the bill, the proprietors of the labels refrained from using them, or made such additions to those they did use, as clearly to indicate that the ownership of the business had changed, and that the

successors to Jones, instead of Jones himself, were producing the goods. At the time of filing of this bill, none of the complainants were offending in this respect, but all seem to have been dealing fairly with the public. Of course they cannot have any damages, or accounting for things done by the respondent while they were themselves offending, but if they are now themselves doing equity, they may ask the court to require the respondent to do equity also. In *Manhattan Co.* v. *Wood*, *supra*, the decision adverse to the complainant was put on the ground that the misrepresentation had been and was being continued. We find no authority deciding that a prior improper and misleading use of labels, afterward corrected and made right, should bar a bill in equity brought for the protection of the corrected label. In this case, we think the improper use was inadvertent; and now that such use has been corrected for several years, it seems to us inequitable that Jones should continue to make use of the labels and trade-marks (or colorable imitations of them) which he sold for a satisfactory consideration to the complainants' predecessors.

In coming to this conclusion upon this question, however, we bear in mind, that the improper use complained of was not by the complainant trustees, nor their predecessors in the trust, nor by the debenture holders, but by Mattocks and the Winslow Packing Co., who were practically mortgagors in possession, while the trustees and debenture holders were mortgagees out of possession. These innocent debenture holders have taken possession since the filing of this bill, as will hereafter be stated, and are now asking for protection. Perhaps, had the original complainants or those now prosecuting been guilty of the misconduct, the result might have been different. We do not say.

The respondent also raises a question of equity pleading, which we have maturely considered. Pending this suit the debenture holders have caused all the property held by the original complainants as trustees including the labels, trade-marks, etc., to be sold by the trustees to enforce the trusts and realize on the assets. At such sale duly held, Messrs. Davis, Baxter and Davis were the purchasers, and the trustees conveyed to them all the property and rights held by them under the various trust deeds. These purchasers thereupon applied to the court for leave to come in as

parties complainant, and further prosecute the suit. Leave was granted, and they were admitted as intervening complainants, to which order the respondent excepted. We do not see any objection to the admission of these new parties. Equity procedure is sufficiently elastic to admit new parties as their interests accrue. The purpose of their admission in this case is not to obtain a declaration of future rights, as argued by the respondent but to obtain a declaration of present rights, and the prevention of, future wrongs. The respondent is not prejudiced. The burden of the defense is not increased. The issues are not changed. The subject matter remains the same, and the judgment must be the same,—it being apparent that no accounting can be had in either case.

Our conclusion is, that the intervening complainants are properly made parties, and that equity requires in their behalf that the respondent should be perpetually restrained by injunction as set forth in the decree appealed from.

We think, however, it is the duty of the complainants to the respondent, as well as to the public, to refrain from using the labels in such manner and form, as might lead the public to suppose that the goods packed by them were packed by the respondent. They should strike from their letter-heads, circulars and labels any words indicating that the goods were prepared by John Winslow Jones, and, if they use his name, should add such words as clearly indicate that the goods are not prepared by him, but by them as his successors. This duty should be declared and made imperative in the decree, or in the supplemental decree, modifying the former decree. As the respondent was compelled to appeal to obtain this modification of the decree, so as to prevent the improper, misleading use of his name,—a modification we think he is entitled to,—we think he should recover the costs since the appeal, to be set off against the complainants' costs to the time of the appeal.

Decree affirmed and case remanded for additional decree in accordance with this opinion.

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

JOSIAH BRUCE *vs.* MILES SIDELINGER.

Lincoln. Opinion February 11, 1890.

Lumber. Bark. Sale. Survey. R. S., c. 41.

The statute, which requires lumber of any kind to be surveyed or measured to ascertain its quantity, does not apply to labor in any way expended on lumber, though to be paid for according to the thousands or cords of such lumber;—it applies only to sales of lumber.

ON EXCEPTIONS.

At the trial before the jury, the plaintiff was permitted to testify, against the defendant's objection, to his own measurement of the bark peeled and hauled, and his own survey of the logs hauled. The bark and logs were taken from the land of the defendant, under a written contract between the parties, by which the plaintiff in consideration of his services for cutting, peeling and hauling was to be paid at certain stated prices per cord of bark, and thousand feet of logs, respectively.

The plaintiff did not offer evidence of a measurement by a sworn surveyor.

The presiding justice instructed the jury, in substance, that the statute which provides for measuring by a sworn surveyor did not apply in the case, and that the plaintiff might prove, by any legitimate evidence satisfactory to the jury, the amount of bark and logs which he cut and hauled under the contract.

There was a verdict for the plaintiff. The defendant excepted to the admission of the evidence and the instructions to the jury.

G. B. Sawyer, for defendant.

L. M. Staples, for plaintiff.

PETERS, C. J. The plaintiff sued for his services in peeling bark, cutting logs, and hauling the bark and logs to a place of delivery. He was to be paid by the cord for peeling and hauling the bark, and by the thousands of feet for the work on the lum-

ber. He was allowed to testify to a measurement of the bark and a survey of the lumber made by himself. The defendant contends that the quantities should have been proved by a sworn surveyor, or by the certificate of a sworn surveyor. That cannot be. The statute which requires sworn officers to make surveys and measurements, distinctly and in terms relates to sales only. Work upon lumber is a very different thing from a sale of lumber. The construction which the defendant invokes would be impracticable in its operation.

Exceptions overruled.

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

JOSEPH DION, Jr., *vs.* ST. JOHN BAPTISTE SOCIETY.

York. Opinion February 11, 1890.

Lottery. Scheme, or device of chance. Church-fair. R. S., c. 128, §§ 13, 15.

The game, practiced in aid of fairs and charities of voting with tickets purchased at fixed prices for candidates, of whom one in whose name the most tickets are voted is to receive some article which the whole number of tickets pays for, is not illegal either under the statute, or at common law in this state.

ON MOTION.

The plaintiff brought this action to recover the money contributed by him and his friends at a church-fair of the defendant society, and at which he competed as a candidate for a gold watch, to be awarded to the candidate who should receive the most votes. He was the first vice-president of the society.

In February, 1888, the defendant society held a fair in Marble Hall, Biddeford. The object of the fair was to raise money to assist them in their benevolent work. One method adopted by them to make the fair a success, financially, was to purchase a gold watch. And the society selected the plaintiff, then its first vice-president, and Joseph LaChance, its second vice-president, as candidates to run for the watch. The programme was that

there should be two boxes, one marked for each candidate, and each candidate and his friends were at liberty to place in the boxes such amounts of money as they saw fit. At the end of twenty minutes, from the time the boxes were opened, they were to be closed. Each candidate had two men stationed beside his box to see that his candidate's money was put in the right box. When the boxes were closed the money was to be counted in the presence of the candidates and their representatives, and the candidate having the most money was to receive the watch. The candidates' friends went to work, soliciting money for their respective candidates; and all the money deposited in the plaintiff's box, with the exception of twenty-five dollars, was contributed by his friends.

At twenty minutes of 10, P. M., the boxes were opened. At 10 P. M., they were closed, and the two representatives of each candidate, who watched the money deposited in the boxes, saw the money counted. In the plaintiff's box there was $147.00. In the box of LaChance there was, in addition to the money, a check. Counting the check, LaChance had the most money, and the committee decided that the watch belonged to him.

The jury returned a verdict for the plaintiff.

The material parts of the statute, on which the action was brought read as follows:—

Sec. 13. Every lottery, scheme, or device of chance, of whatever name or description, whether at fairs or at public gatherings, or elsewhere, and whether in the interests of churches, benevolent objects or otherwise, is prohibited and declared a nuisance; * * *.

Sec. 15. Payments, compensations, and securities of every description, made directly or indirectly, in whole or in part, for any such lottery or ticket, certificate, share or interest therein, are received without consideration and against law and equity, and may be recovered back.

B. F. Hamilton and G. F. Haley, for defendant.

In the revision of the statutes of 1883, the words that made schemes or devices of chance, of whatever name or description, at fairs or public gatherings, whether in the interest of churches,

benevolent societies or otherwise, liable to all penalties affixed to lotteries, were omitted. This omission is not to be revived by construction. *Pingree* v. *Snell*, 42 Maine, 53. No presumption that the omission was by mistake. *Ellis* v. *Paige*, 1 Pick. 44.

Lottery in § 13 means the commonly accepted use of the word, otherwise "schemes and devices of chance" would not have been used in the same section. If any offense, it was because it was a scheme or device of chance.

It was not a scheme or device of chance. Plaintiff could have received the watch if he had put in money enough,—thus removing all uncertainty and hence not a game of chance. Only twenty-five dollars was the plaintiff's money. Verdict should not exceed that sum.

R. P. Tapley, *C. S. Hamilton*, with him, for plaintiff.

The purpose of the transaction was to obtain money and not render a full equivalent therefor. It was a scheme to entice the two parties to enter into chances of obtaining a watch without paying the full value for it. The participants understood it was a drawing. All knew but one could win, and that by secret acts,—the mainspring of the proceeding. Without varying chances no stimulation for action was offered. Without secrecy it would be but an auction. When made the subject of chance and uncertainty, the stimulation arises. It has all the mischiefs which the statute was made to correct.

The statute covers all devices and schemes of "whatever name or description."

This proceeding is against the party holding the fund, and the watch ; the statute declares such funds are held without consideration.

In the revision of 1883, instead of using the words of the act of 1887 with reference to fairs and public gatherings, whether in the interest of churches or benevolent objects, a portion is incorporated into R. S., c. 128, § 12, and then provided in § 15, that all payments in any such lottery, etc., may be recovered back. "Any such lottery," etc., must mean such games of chance as are there provided for.

The action is sustained by the common law. *Stacy* v. *Foss*, 19 Maine, 335; *House* v. *McKenney*, 46 Id. 94; *Jordan* v. *McKenney*, 48 Id. 104, 107; *Ball* v. *Gilbert*, 12 Met. 402.

PETERS, C. J. It is not readily perceived how the verdict for plaintiff can stand, in view of several objections that are urged against it.

If it stands, the verdict will return to the plaintiff not only the money of his own which went into the box provided for the reception of votes cast in his favor, but also all the money that was supplied for the same purpose from all other sources. He evidently tries by his testimony to carry the impression that all the money paid in indirectly on his account, was his money. But the facts, when understood, show that the money contributed by his friends was not given by them to him, and that it was intended as a gift to the defendant society.

Again, there is doubt whether the present statute allows a recovery back, unless the money be expended in a lottery of some kind, which the scheme in this case was not. The counsel for plaintiff contends that the defendants were a stakeholder or trust-holder of the contributions, and that at common law the money may be recovered back. It is a perversion of the facts to style the defendants a stakeholder. They were the principal. The money was passed to them, not to hold for others, but to keep on their own account,—to become their money.

But we pass these points, after this mention of them as having a possible bearing on another question, and place our decision of the case upon a more important ground, which is, that the thing complained of was not "a lottery, scheme or device of chance," within the intent of the statute. Everything is not a game of chance that chances may attach to. The refinement of illustration indulged in by counsel for plaintiff to demonstrate this matter to be a game of chance, would apply with well nigh equal force to the general transactions of life. The scheme, at this time one of the fashions of society to obtain aid for charitable purposes, seems to amount to this: The charitable association offers an article for presentation to the person, in some profession, office or occupation, in whose name the most money is con-

tributed for the article. The article is not drawn by any ticket nor by any person; the only possible chance, if it can be called such, connected with the affair, being whether one person's admirers or another's will give the most money to charity, in order to obtain the prize for their favorite or friend; the affair usually arousing sentiment enough to render the game profitable. No contributor expects to get any personal benefit from his contribution, nor can he, beyond a merely sentimental enjoyment, unless he immodestly and clandestinely votes (pays in) money for himself, as this plaintiff avers he did, and that would be an imposition upon the decencies of the occasion. From the nature of the plan, no one would attempt to carry it on for any private gain. There could be no motive to sustain it for any such purpose. It is impossible that all persons engaged in such a scheme are guilty of gambling and liable to imprisonment for it. Such a construction of the statute is illegal and unjust.

Motion sustained.

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

ELIZA J. BRIDGHAM, and another, appellants from the decree of the judge of probate.

Androscoggin. Opinion February 11, 1890.

Evidence. Will. Sanity. Deposition. Striking out answer. Practice.

In a case where the question was whether a testator had or not capacity to make a will, a deponent, being asked what opportunities he had had for observing the condition of the testator, answered the interrogatory fully and added: "He was just as sane as you or I." *Held*, that it was within the discretion of the judge to refuse to have the last clause of the answer stricken out, the motion therefor not being made until after the whole answer had been read without objections, and the objecting counsel knowing in advance what the answer would be.

A deposition was taken to be used before the probate court, and by written agreement of parties it was to be used at any other trial of the same case. The deposition contained principally competent testimony. *Held*, that such an agreement would not imply that a portion of the deposition, containing incompetent testimony, is to be received, if seasonably objected to.

ON EXCEPTIONS.

This case was an appeal from the decree of the judge of probate, for Androscoggin county, admitting to probate the last will and testament of Samuel Stearns. Issues of sanity, etc., were submitted to the jury. At the trial before the jury the proponents offered and used in evidence the deposition of Eliza Stearns, mother of the testator, but she was not a subscribing witness to the will. The deposition was taken on interrogatories, both parties being represented, to be used and was used at the hearing before the judge of probate; and by written agreement of counsel it was agreed, that it with others might be used at any and all trials, to be had in the same case.

Appellants excepted to the ruling of the presiding justice who admitted part of an answer contained in the deposition. All the particulars of the question and answer appear in the opinion.

Tascus Atwood, for appellants.

The jury should have been instructed to disregard the expression of opinion by witness. *Collagan* v. *Burns*, 57 Maine, 449, 473. Opinion of witness not admissible. 1 Greenl. Ev. § 440; *Cilley* v. *Cilley*, 34 Maine, 162; *Hastings* v. *Rider*, 99 Mass. 625. Objection seasonably made. *Polleys* v. *Ins. Co.*, 14 Maine, 141; *Lord* v. *Moore*, 37 Id. 208; *Ins. Co.* v. *Fitzpatrick*, 2 Gray, 280; *Talbot* v. *Clark*, 8 Pick. 55; *Palmer* v. *Crook*, 7 Gray, 419. Not estopped from objecting by the agreement. *Allum* v. *Perry*, 68 Maine, 234; *Ins. Co.* v. *Fitzpatrick*, 2 Gray, 280; *Canal Co.* v. *Hathaway*, 8 Wend. 481; *Lux* v. *Haggin*, 69 Cal. 255. Incompetent testimony should be stricken out on request at the time it was read. *Smith* v. *Whitman*, 6 Allen, 564; *Selkirk* v. *Cobb*, 13 Gray, 313; *Hawes* v. *Gustin*, 2 Allen, 402; *Batchelder* v. *Batchelder*, Id. 105; *Goodnow* v. *Hill*, 125 Mass. 587; *Whitney* v. *Bayley*, 4 Allen, 173; *Jacques* v. *Bridgeport Horse R. R. Co.*, 41 Conn. 61. We can never know how much the jury was influenced by this particular clause complained of. *Ellis* v. *Short*, 21 Pick. 142, 145.

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

Case does not show appellant was aggrieved. *Harriman* v.

Sanger, 67 Maine, 442. Answer waived by written agreement. Spaulding's Prac., c. 22, § 20; *Woodman* v. *Coolbroth*, 7 Maine, 181; *Rowe* v. *Godfrey*, 16 Id. 128; *Brown* v. *Foss*, Id. 257; *Parsons* v. *Huff*, 38 Maine, 137.

Within the discretion of the court, whether the answer should be stricken out. *Parsons* v. *Huff*, *supra*, 144; 1 Thompson's Trials, §§ 701, 718.

PETERS, C. J. The following question and answer are contained in a deposition used, on an issue, before the jury, whether a testator had mental capacity to make a will or not: "What opportunities did you have for knowing the condition of the mind of said Samuel Stearns prior to the 23d day of November, 1887, and on or about that time? State fully." Answer: "I saw him every day; heard him talk about his affairs, about making his will with Mr. Dunn; saw him settling with men who were owing him money, Mr. Bartlett and Mr. Cobb. He was just as sane as you or I."

The deposition was taken to be used before the probate judge, and by written agreement of parties it was to be used at any other trial of the same case. The interrogatory and answer were read without objection, and thereupon the counsel for contestants moved that the last clause in the answer be stricken out, and the motion was denied. It does not appear in the bill of exceptions upon what ground the denial by the judge was based.

It could not have been upon the ground that no objection was noted when the deposition was taken, for, if the evidence is incompetent and not merely informal, the objection need not be noted in the deposition itself. *Lord* v. *Moore*, 37 Maine, p. 217.

Nor could it well be upon the ground that the written agreement to allow the deposition to be used was a waiver of any objection to the incompetency of the evidence. Where the deposition contains principally competent testimony, such an agreement would not imply that a portion of the deposition containing incompetent testimony is to be received, if objected to.

It is to be inferred that the judge considered the request for an amendment of the answer as coming too late. The counsel for the contestants knew of the objectionable clause, if it be such,

in the answer, and made no request or objection until after it was read. At all events, we think the evidence was not important enough to deprive the judge of the power to exercise such a discretion. The deponent was not testifying as an expert, but as a person who had observed the daily conduct of another, and that was his way of expressing himself. Although the rule in this state excludes witnesses from testifying directly to their opinion of the sanity or insanity of another, when that question is the issue to be decided, very many things short of that are admissible, though in the nature of opinion, and the rule has been a good deal liberalized, as will be noticed by an examination of the case of *Fayette* v. *Chesterville*, 77 Maine, 28, and the cases cited in that case.

Exceptions overruled.

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

JOHN H. COOMBS, petitioner for partition *vs.* Persons Unknown.

Androscoggin. Opinion February 11, 1890.

Partition. Deed of assignee. Non-resident minor. R. S., c. 70, § 35; c. 88, §§ 7, 19, 20, 23, 24; c. 105, § 7. Act of 1878, c. 74, § 29. Act of 1883, c. 186.

In proceedings for partition of land among tenants in common, where any person claims a portion of the premises in severalty, his right may be first tried, if he becomes a party, in order to ascertain what premises will be left subject to partition.

The deed of an assignee in insolvency is not invalid because such assignee made some mistake in his notice of appointment. The requirement to give notice is merely directory.

Where the title of the insolvent is conveyed to an assignee, and he conveys it to another, the grantee holds the title, notwithstanding any irregularity in the mode of administering his duties as assignee. Third persons having no interest in the title can not make complaint, though tenants in common with the holder of the insolvent title.

In proceedings for partition, the petition sought for can not be prevented by respondents who set up the objection that a share in the estate, not however in conflict with their shares, is owned by minors out of the state, who

have not become parties to the record. The interests of absent parties are reasonably protected by statutory provisions and the care of the court.

R. S., c. 88, § 7, which requires that a guardian be appointed in such proceedings by the court, does not apply in the case of infants living out of the state. The court has jurisdiction for that purpose only of infants living within the state.

ON REPORT.

Petition for partition. The law court were to determine the rights of the parties and order such entry or judgment as the law, facts and admissions warrant.

The report shows the following statement of facts: Daniel Edgecomb died possessed of a homestead farm situated in the town of Lisbon, and leaving as heirs-at-law, a wife and ten children, one of whom was John R. Edgecomb, through whom the petitioner, Coombs, claims title to one tenth of said homestead farm, described in the petition; that the said John R. Edgecomb was duly adjudged an insolvent debtor upon the petition of his creditors; that Samuel Sylvester was appointed assignee and accepted said trust; that an assignment of the debtor's property was made by the judge of insolvency to the assignee and the same recorded in the registry of deeds for the county of Androscoggin; and that the assignee gave notice of his appointment, and under license of court sold said John R. Edgecomb's one tenth interest in said homestead farm, to Coombs, the petitioner.

Several objections were made to the maintenance of the petition, by the respondents, which appear with the facts in the opinion.

Newell and Judkins, for petitioners.

Dana and Esty, for respondent, Jesse Davis, cited *Brackett* v. *Persons Unknown*, 53 Maine, 228.

Asa P. Moore, for other respondents.

Edgecomb was an involuntary insolvent. Assignee's notice of appointment, besides wrong dates in it, is the form adopted for voluntary cases.

It is admitted that the assignee gave no bond, or notice of publication of this sale to petitioner Coombs; and purchaser at the only sale which was advertised did not take a deed. Assignee

exceeded his powers and authority. His acts are void. *Ryan* v. *Griffin*, 6 B. R. 235; Bump Bankruptcy, p. 549. Sale should have been approved by the court after a return on license by assignee. *In re*, *O'Fallon*, 2 Dillon, 548.

Petition and license call for one thing, deed conveys another. Deed void because it conveys the debtor's right, etc., but not the assignee's right. R. S., c. 70, § 33; Bump Bankruptcy, p. 550; *Baker* v. *Vining*, 30 Maine, 121. Rights of respondents to ten-acre lot regulated by statute, not affected by these proceedings. An agent should be appointed for Emily K. Cotton or her heirs. R. S., c. 88, § 7.

PETERS, C. J. The petitioner seeks a division of the homestead left by Daniel Edgecomb at his death, who died intestate in 1865. There were ten heirs, and the petitioner claims the share of one of the heirs, which came to him from an assignee of such heir, whose estate was in insolvency. Notice was given of this petition for partition by publication, the other owners being unknown. In response to the published notice eight of the heirs have appeared as respondents, each claiming one tenth of the homestead by inheritance.

Notice was ordered by the court, on whose motion it does not appear, upon Jesse Davis, a suggestion having been entered on the docket that he was a party interested, and he also appears and pleads ownership to a parcel of the homestead, called the ten-acre lot, in severalty. If Davis had not been made a party, he would not have been bound by the proceedings of partition. R. S., c. 88, § 24. But being a party, there may first be a separate trial on the question of his right, to ascertain what premises shall remain for division among those who are tenants in common. R. S., c. 88, § 9. The first question, therefore, for our determination, is whether Jesse Davis' claim is sustained. It is clear that it is. It seems that in February, 1866, after Daniel Edgecomb's death, his wife, Charity, by warranty deed, conveyed the ten-acre parcel in severalty to one Hewey, under whom Davis holds the title, (she apparently supposing that her husband's death made her owner of the homestead), and the lot has been in the possession of Hewey, and his successors down to

Davis, ever since. Their possession has been continuous, exclusive and adverse, and the disseizin is complete.

When Hewey, Davis' predecessor, first entered into possession, several of the heirs were minors, but any claim which they could have asserted has now become barred by the lapse of the period which the statute allows to minors within which to assert their claim after coming of age. R. S., c. 105, § 7. The evidence leaves no doubt that the ten-acre lot must be separated from the general premises, and partition be made of only the portion afterwards remaining.

Then the question is, shall one tenth of the premises remaining be set out to the petitioner. The evidence shows that the petitioner's claim does not affect the title of either of the eight respondents, nor does the claim of any one respondent affect that of any other. But it is asserted in behalf of the heirs that the petitioner's interest obtained through the insolvency of one of the heirs, not a party to this proceeding, was not obtained by due formalities of law; and some other objections are urged against division.

It is contended that the assignee's deed to the petitioner is invalid, because the notice of appointment which the assignee published was defective. The notice was not perfect in the matter of form, but the error does not lessen the efficacy of the deed. The requirement to give notice of his appointment is merely directory, and a disobedience of the order does not invalidate the deed. *Boothbay* v. *Race*, 68 Maine, 351. *In re*, *Littlefield*, 3 Nat. Bank. Reg. 58; S. C. 1 Lowell, 331.

It is urged by the respondents that, in several respects, the assignee did not strictly follow the prescribed forms which would authorize him to convey by deed. This class of objections may be disposed of with the remark that the proceedings were regular and sufficient enough to pass the title to the assignee, and it was in fact conveyed to him, and that his deed must necessarily pass the title to the petitioner. It is not the privilege of the respondents to urge the objection that the title came to the petitioner by irregularity. They have no interest in the title themselves. It is enough for the purposes of this proceeding that he really has the legal title.

That the assignee's deed conveys the title there can be no doubt. The counsel for respondents places reliance on objections which might be important under the late national bankruptcy law. That law differs from our insolvency law. Under that law, since the act of Congress approved June 22, 1874, the assignee could sell only by order of court, for the court. Under our law, the assignee holds the title, and may convey it without an order of court. R. S., c. 70, § 35, *Dwinel* v. *Perley*, 32 Maine, 197. The assignee gave no bond. He was not required to give a bond then. Laws 1883, c. 186. Laws of 1878, c. 74, § 29.

It is objected that the assignee's deed conveyed an undivided tenth of the farm, less the ten-acre lot, and not a tenth of the farm entire. That question, it will be seen, is rendered entirely immaterial, by our determination, already expressed, that no more than the lesser amount of territory is subject to partition among the owners and heirs.

The objection evidently most relied on to prevent partition, is that one share of the estate, one tenth, is not represented on either side of this proceeding, and that the share is owned by persons who are not of age. It is admitted that the share not represented belonged to Emily K. Cotton, one of the heirs of Daniel Edgecomb, and that she died since the petition in this case was filed, leaving behind her, in Prescott, in the state of Wisconsin, two minor children, aged respectively sixteen and eighteen years.

Section 7, c. 88, R. S., relied on to defeat partition does not meet this case. It is there provided that, "when an infant or insane person, *living in the state*, has no guardian and appears to be interested, the court shall appoint a guardian *ad litem* for him." But these infants do not reside in the state, so as to give the court jurisdiction of them. Of course, it would be better to have their appearance as parties, were it practicable.

The interest of the minors will not, however, be without protection. No one is claiming their share. It will remain to them. The presumption is that sworn commissioners will not do them injustice. The eight respondents, in their vigilance to protect

themselves against the petitioner's claim, will at the same time extend protection to the minors, their friends and relatives. Where a wrongful partition is made, absent parties may have a new partition within a limited time, if they have not been heard. R. S., c. 88, §§ 19, 20, 23. There can be no doubt that the court might appoint a person to appear for the minors when a partition is made.

The respondents cannot very well be injured by the absence of the minors; nor will the judgment of partition be void because of their absence. If so, then it must follow that many such judgments on our records, against persons unknown, where the notice has been by a general publication, will turn out to be void for the same reason. In *Austin* v. *Charlestown Female Seminary*, 8 Metc. 196, it was held that the omission of the court to appoint a guardian *ad litem* for an infant tenant in common, who is made a respondent in a petition for partition, does not render void a judgment establishing a partition; and that such judgment is voidable only, and can be avoided by no one except by the infant or his privies in blood. In that case the infant was an actual party. Here he is not.

We think, in view of all the circumstances affecting the situation of all the parties, that partition should be allowed for the premises described in the petition, less the ten-acre parcel; and for that the respondent Davis has judgment of possession.

Judgment for partition accordingly.

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

JOHN A. STOYELL *vs.* HIRAM B. STOYELL.

Franklin. Opinion February 11, 1890.

Evidence. Promissory note. Receipt. Fraud.

A maker of a note, in a suit thereon by the payee, is not allowed to testify against the note, that it was given for the purpose of a receipt, or was understood by the parties as having only the effect of a receipt, as that would be the verbal contradiction of a written promise. He could testify that he supposed he was signing a paper that was in fact a receipt, and that he was induced to suppose so, not himself reading the paper, or noticing its terms, by the fraud of the payee.

ON MOTION.

This was an action upon a promissory note of the following tenor:

$155. Farmington, Nov. 9, 1886.

For value received I promise to pay John A. Stoyell or order one hundred and fifty-five dollars with interest at — per cent.

H. B. STOYELL.

The defense was that the note was without consideration, that the defendant signed the note in suit for the purposes of a receipt, and that he did not intend to sign it as a note.

The defendant was an heir-at-law, and a legatee under the will of his mother, and the plaintiff, his brother, executor of their mother's will.

The plaintiff was about to leave the state [pretending to go to Boston and soon return, but it proved to be for his home in Bismarck, where he ever since has been], and take with him the funds of the estate, and the defendant requested his share of his legacy under the will.

The plaintiff claimed that he could not pay him all, but would let him have one hundred dollars, a part of it; they went into the Sandy-River National Bank together; the plaintiff got a check cashed and paid the defendant one hundred dollars on account and took from him a receipt, which now turns up in the form of a promissory note.

The defendant testified to the transaction with his brother, that "It was the morning he started ostensibly for Boston, but it turned out for the west. He was in a hurry and had to take the train over the west side and I had a horse hitched up. I asked him for my share of the interest money. He said he couldn't let me have it all, but would let me have a hundred dollars to pass through the winter. He paid me one hundred dollars and I signed the receipt as I supposed, and I carried him over the river and he took the train."

He also testified that he received, at or about this time, no other money from his brother; was not owing him; had no occasion for giving him any note; and did not read it when it was passed to him.

In rebuttal it was admitted that the plaintiff has made no charge in his probate account of the $100, paid defendant November, 1886, or for $155, or for any sum as part of his legacy.

The verdict was for defendant.

P. H. Stubbs, W. Fred P. Fogg, and F. E. Timberlake, for plaintiff.

E. O. Greenleaf, for defendant.

The jury did not mistake their duty, and comprehended the law as given them by the court. The verdict should not be set aside. *Farnum* v. *Virgin*, 52 Maine, 576; *Folsom* v. *Skolfield*, 53 Id. 171; *Darby* v. *Hayford*, 56 Id. 246; *Enfield* v. *Buswell*, 62 Id. 128; *Purinton* v. *R. R. Co.*, 78 Id. 569; *Smith* v. *Brunswick*, 80 Id. 189, and cases there cited; *Martin* v. *Tuttle*, Id. 310; *Baker* v. *Briggs*, 8 Pick. 122 and cases cited on p. 126; *Coffin* v. *Ins. Co.*, 15 Pick. 291.

PETERS, C. J. The defendant is sued on his promissory note for one hundred and fifty-five dollars given to the plaintiff, his brother. The defense is that he signed the paper as a receipt and not as a note, receiving from his brother, as executor of their mother's estate, one hundred dollars at the time of signing,—and no more at any time.

If the defendant received one hundred dollars in money and

knowingly gave a note therefor, he cannot set up that the note was understood to be in effect a receipt, or a substitute for a receipt, so as on that ground to wholly avoid the note. That would be the verbal contradiction of his written contract. *Shaw* v. *Shaw*, 50 Maine, 94.

But the defendant states the transaction more favorably to himself than that. He swears that the money was paid to him as a portion of a legacy due to him from his brother as executor of his mother's estate, and that the brother induced him to sign the note by falsely pretending that it was a receipt, instead of a note, and that he did not read the paper at the time. If this statement be true it is a defense on the ground of fraud, and is permissible between the original parties to the note.

His testimony is opposed by the existence of the note itself, a strong presumption of validity always attaching to such an instrument as against mere oral evidence, especially when, as in this case, the defendant is an intelligent person and possesses at least a knowledge of common business transactions. But in the defendant's favor it may be said that his testimony does not appear to have been weakened by the cross-examination, and that no request was made for continuance or delay to obtain the deposition of the plaintiff, who was not present to testify. Though we have entertained doubt what our determination should be, on the motion to set aside a verdict which nullifies the note, the conclusion is to allow the verdict to stand.

Motion overruled.

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

GILMAN B. INGRAHAM, and others, in equity,

vs.

CAMDEN AND ROCKLAND WATER COMPANY.

Knox. Opinion February 11, 1890.

Eminent domain. Water. Legal taking. Remedy. Private Laws, 1880, *c.* 212; 1885, *c.* 522. *Public laws*, 1889, *c.* 284.

The complainants recovered judgment against the defendants as trespassers in preventing the natural waters of a brook flowing through their lands, for a period before the defendants had proceeded to take the waters, under the authority given to them by the legislature. That did not prevent the defendants acting under their charter afterwards, thus remitting the complainants to the statutory remedy provided for their future damages instead of the former remedy at common law.

The defendants' charter authorizes them to "take, detain and use the water of Oyster River Pond, and all streams tributary thereto in the town of Camden." This gives them the authority to detain the water in the pond, thus flowing the lands of proprietors on the pond and streams above, and lessening the natural flow below; all proprietors both above and below, having a statutory remedy specially provided for the damages sustained by them.

A taking by the defendants of so much water from Oyster River Pond as may be required by them, "not exceeding 750,000 gallons every 24 hours, and no more" is a sufficiently definite taking, and damages to proprietors below the pond are allowable upon the presumption that the defendants will consume that amount. This is what they are entitled to take.

ON REPORT.

This was a bill for an injunction to restrain the defendants from maintaining a dam at the outlet of Oyster River Pond, in Camden, and diverting the water of the pond from a brook below. The case was submitted to the law court upon the bill, answer and proofs.

The facts are stated in the opinion.

Montgomery and Montgomery, for plaintiffs.

Special laws of 1885 do not give the corporation a right to build a dam, or divert the natural flow of the water. The act gives it only the right of an individual over the surplus water

of the pond. The grant is to be taken most strongly against the grantee. *Water Co.* v. *Water Co.*, 80 Maine, 544, 563; *R. R. Co.* v. *R. R. Co.*, 118 Mass. 392. The charter does not say a dam may be built or a reservoir made of the pond. It does not mention the brook, property in which cannot be taken from plaintiffs except by specific grant. *Lee* v. *Pembroke Iron Co.*, 57 Maine, 488. A lawful dam will not be allowed to produce any unnatural condition of the pond. *Cowdrey* v. *Woburn*, 136 Mass. 413. No defense that dam is built on defendant's own land. Wash. Easements, 280, 281; High Injunc. § 794; *Barrett* v. *Parsons*, 10 Cush. 367.

Certificate shows a taking of somewhere between one and 750,000 gallons per day. Not a legal taking of surplus which would naturally flow to the pond. *R. R. Co.* v. *R. R. Co.*, *supra.* If defendant answers, to a claim for damages, that plaintiffs have not sustained substantial injury, we should be obliged to resort to the uncertainty of conflicting testimony to prove the invasion of our water rights and its extent. There must be written evidence of amount taken. *Hamor* v. *Bar Harbor Water Co.*, 78 Maine, 127; *Warren* v. *Spenser Water Co.*, 143 Mass. 9. The right to interfere with the natural flow from the pond to the brook should be stated with certainty in the certificate.

C. E. Littlefield, for defendant.

Certificate of taking, filed in registry of deeds and with county commissioners, sufficient; but made valid by act of 1889, c. 284. Act applies to this case. *Read* v. *Frankfort Bank*, 23 Maine, 322; *Coffin* v. *Rich*, 45 Id. 514; *Miller* v. *Graham*, 17 Ohio, 1; *Collins* v. *Spicer*, 99 N. Y. 225. No injunction should issue. Act in force at the time of hearing on the bill. Injunctions should conform to facts existing at time of hearing, (*Trulock* v. *Merte*, 72 Iowa, 510), and vacated when reasons for granting have ceased to exist. *Welmore* v. *Low*, 34 Barb. 515. High Injunc. § 1577; Pom. Eq. § 1337. New vote and new filing June 29, 1889, brings the case within *Woodbury* v. *Marblehead Co.*, 145 Mass. 509. When injunctions will not issue: *Haskell* v. *Thurston*, 80 Maine, 132; *Morse* v. *Machias Water Power Co.*, 42 Id. 127; Story Eq. § 956 a. b. and n. 1; *Swift* v. *Jenks*, 19 Fed. Rep. 641.

Conditional injunctions: High Injunc. § 830; Story Eq. (11th Ed.), § 727 n. 2; *McLeary* v. *Kansas City*, 21 Fed. Rep. 257; *Field* v. *Caernarvon Ry. Co.*, L. R. 5 Eq. 190.

A city and two towns dependent on defendants for their supply of water for domestic, fire and other purposes.

PETERS, C. J. The complainants allege that they have parcels of land through which the waters of Oyster River Pond brook, running from Oyster River Pond, were accustomed naturally to flow, and that they have enjoyed a beneficial use of the waters of the brook until lately deprived of such use by the acts of the defendants; that the defendants have erected a dam at the outlet of the pond which supplies the brook, thereby lessening the natural flow in the brook and diverting it into other channels, to the complainants' injury. They further allege that they have already established, by legal judgments in their favor, that the erections at the outlet of the pond are a nuisance as against the right of the complainants; and they pray for the mandate of this court to effect a removal of the alleged nuisance.

The defendants justify their acts as done by legislative authority, which allows them to appropriate the waters of Oyster River Pond and its tributaries, for the purpose of creating a water-supply for the use of the inhabitants of Camden, Rockland, Thomaston, and other places; and the defendants allege that, if the complainants have been injured in any way by the institution or operation of their works, a special statutory remedy is provided by which the complainants may obtain their damages therefor. The acts affecting the rights of the parties, are: Private laws of 1880, c. 212, private laws of 1885, c. 522, and public laws of 1889, c. 284.

The counsel for the defendants discusses several anticipated points on his brief, which are not made against the defendants by complainants' counsel, and we do not imagine it necessary that we should consider them.

The point taken by the complainants that the legal judgments establish conclusively that the dam, which obstructs the water of the brook from flowing in its natural channel, is a nuisance, as

against their present right, is not tenable. In those cases (see *Williams* v. *Cam. & Rock. Water Co.*, 79 Maine, 543), the defendants did not undertake to justify under any legislative authority. They were not in condition to do so. They had not up to that time undertaken to act under any such authority, and were obliged to submit to an assessment of damages in consequence of it. The obstruction was then illegal. But regular proceedings since in taking the land and water necessary for their purposes, and in spreading due notice of their taking upon the public records, have now rendered the obstructions complained of legal. The judgments could not, any more than could the title of the complainants by their deeds, prevent a legal taking by subsequent proceedings, and by such proceedings the statute remedy for the recovery of damages suffered by the complainants has become substituted as an equivalent for the former remedy at common law.

The complainants contend that the legislative authority is not extensive enough to cover all the acts of the defendants that are complained of. Section three in the act of 1885, provides that the defendant corporation, for their purposes, "may take, detain and use the water of Oyster River Pond, and all streams tributory thereto in the town of Camden;" and further provides among other things, that the corporation may erect and maintain dams and reservoirs, and lay down and maintain pipes and aqueducts necessary for the proper accumulating, conducting, discharging, distributing and disposing of water "and forming proper reservoirs thereof," and may take and hold, by purchase, or otherwise, any lands or real estate necessary therefor.

It is contended for the complainants that, inasmuch as the act allows an appropriation of the waters of the pond and its tributaries above the pond, and makes no mention of the brook below the pond, the implication is that the natural flow of the brook is not to be prevented, and that the corporation are to take only such surplus of water as can be diverted without injury to a beneficial use of the flow in the brook as heretofore customarily enjoyed. And it is contended that the intention of the act was, not that the corporation would detain the waters wholly within the limits of the pond, but that they would carry its surplus, in a

state of high water, off into reservoirs to be established in other places. We think it a strained construction of the act to say that the defendants must divert the waters of the pond in such a manner, and to such an extent, and at such times, that there will be no interference with any rights of proprietors on the brook below. The act authorizes the corporation to detain the waters of the pond,—not merely a portion,—but all of them. No words qualify the amount to be taken. The grant is absolute. The complainants have a full remedy and ample protection for all their injury, by the provisions of § 4, of the act of 1885. The act does not prescribe literally where the waters of the pond shall or may be detained, but the meaning is apparent. The company are liable for all damages "occasioned by flowage," and any flowage caused by them must be upon the margin of the pond or on the shores of the tributaries above. Certainly, a detention of water in the pond would be a benefit to proprietors below the outlet of the pond, for it will be inevitable that they will get some use of the water which is not carried away by the pipes of the company.

But, if the legislative acts sufficiently authorize the corporation to take land and water, it is contended by the complainants that there has not been a legal taking.

The taking is in these words:

"Notice is hereby given to all that may be concerned, that the Camden & Rockland Water Company, by virtue of the authority conferred upon it by its charter approved March 4th, 1885, and all amendments thereof, has taken and appropriated so much of the water of Oyster River Pond, and all streams tributary thereto, in the town of Camden, in the county of Knox, as may be necessary and required, for the purpose of conveying to, and continually hereafter supplying the towns of Camden, Thomaston, South Thomaston, and the city of Rockland, in said county of Knox, and the inhabitants thereof with pure water for all purposes authorized by its said charter and any amendments thereof; and the said Camden & Rockland Water Company hereby takes and appropriates, and will take, appropriate, and continually use hereafter from said Oyster River Pond, for the purposes aforesaid, so much of said water as may be necessary and required for the

purposes aforesaid, not exceeding seven hundred and fifty thousand gallons of water, every twenty-four hours and no more. And the said Camden & Rockland Water Company, for the purposes aforesaid, and for the purpose of preserving and holding said water, taken and appropriated, and to be taken, appropriated and used as aforesaid, has erected a dam at the outlet of said pond, and on land owned by said Company, with proper gates and waste ways therein."

The objection relied on by the complainants is that there is indefiniteness in the certificate that the company takes *not exceeding* seven hundred and fifty thousand gallons every twenty-four hours. There is, of course, an uncertainty whether the company will make a daily use of the maximum quantity or measure. In all probability they will not ordinarily use so much. But any loss or inconvenience to be occasioned by this uncertainty is assumed by the company itself. The taking may be an uncertainty to the company, but will be a certainty to all others interested in the question. The company actually takes the maximum measure of water, whether they use it at all times or not. They are liable to land owners below upon the basis of a daily diversion of that amount of water from the pond. The complainants are not in any position to complain against such a kind or extent of appropriation. It will follow, from necessity, that they will be benefitted thereby. They will be paid, if their allegations of injury be true, for more loss of water than they will actually lose. And the company cannot use more than the maximum stated, to the injury of proprietors, without an additional taking.

The complainants call attention to the certificate, that no land other than water is taken by its terms. None need to have been taken, as the company owns what it uses. The cases cited on the brief submitted for the complainants do not apply to the present facts, but relate to the taking of land in contradistinction from water, or to the taking of water without any definiteness of measure. Here the quantity of water to be diverted from its natural stream is fixed with practically a mathematical certainty.

Bill dismissed with costs.

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

STATE OF MAINE *vs.* JOHN DORR.

Waldo. Opinion February 15, 1890.

Intoxicating liquors. Indictment. Pleading. Prior conviction.
R. S., c. 131, § 12.

That an offense is alleged to be contrary to the form of the "statue" instead of the "statute," does not vitiate an indictment.

It is not necessary that an indictment for a single sale of intoxicating liquor, should specify the particular variety of intoxicating liquor sold.

Stating a prior conviction to have been in the year 1088 is not a sufficient allegation of a prior conviction.

An insufficient allegation of a prior conviction, does not vitiate the indictment as to the new offense therein charged.

ON EXCEPTIONS.

The indictment charged that the defendant had sold "a quantity of intoxicating liquors" without lawful authority, and that he had been convicted of a prior single sale at a term of court held in the year one thousand and eighty-eight.

The respondent filed a general demurrer to the indictment, which was joined by attorney for the state. The presiding justice overruled the demurrer and adjudged the indictment sufficient. To this ruling the respondent excepted.

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

Allegation of former conviction should correctly describe term of court, when such conviction was had.

The indictment concludes, contrary to the form of the "statue," this is bad, as "statue" cannot be construed to mean "statute." *State* v. *Soule*, 20 Maine, 19, 20.

Indictments should allege the kind of liquors sold. R. S., c. 27, § 33; 5th Const. Amendment.

Albert F. Sweetser, county attorney, for the state.

The substitution of the word "statue" for "statute" in the printed form of the indictment is evidently a clerical error, and, as such, cannot vitiate the indictment.

Bouv. Law Dic.; 1 Bish. Cr. Proc. 354, 357. The defendant is not prejudiced by error in the spelling of a single word in the formal part of the indictment, as the allegations of the substantial facts are sufficiently full and particular to identify the offense and the offender. R. S., c. 131, § 12.

Counsel also cited:

R. S., c. 27, § 57. *State* v. *Hurley*, 69 Maine, 573, 576; *State* v. *Gorham*, 65 Maine, 270; *State* v. *Wentworth*, Id. 234, 247; R. S., c. 27, § 33; Bish. Stat. Cr. 1038; *Com.* v. *Conant*, 6 Gray, 482; *Com.* v. *Ryan*, 9 Gray, 137; *State* v. *Wyman*, 80 Maine, 117, 118.

EMERY, J. The respondent makes several objections to the indictment:—

1. That his offense is alleged to be contrary to the form of the "statue," instead of contrary to the form of the "statute." If this objection could ever have prevailed, it cannot now, since the enactment of R. S., c. 131, § 12, which provides that the entire omission of the words "contrary to the form of the statute, etc.," shall not vitiate the indictment.

2. That the indictment does not specify the particular kind of intoxicating liquor he unlawfully sold. No such specification is necessary. The statute in terms forbids the sale of intoxicating liquor. Proof of sale of any intoxicating liquor, proves the offense. The state need not allege more than it need prove. *State* v. *Wyman*, 80 Maine, 117, 118.

3. That in alleging a prior conviction of a similar offense, the time of such prior conviction is stated to be in the year 1088, and hence before any state of Maine existed to be offended by such a sale. This clearly is not a sufficient allegation of a prior conviction. It is an allegation of an impossibility. There could not have been any such conviction. The conviction alleged being impossible, the whole allegation should be disregarded.

But the insufficiency of the allegation of a prior conviction, does not vitiate the indictment as to the main offense charged. The sale of liquor now complained of is sufficiently alleged. By his demurrer, he has confessed an offense properly charged against

him; and no reason appears why he should not be adjudged guilty of that offense, whatever may have been the fact as to prior conviction. The offense he now stands charged with, is the same in kind and grade in either case. There might be a difference in the degree, but not in the nature of the penalty.

The indictment therefore can be sustained, but the state can not have any judgment that the respondent has been before convicted. *State* v. *Conwell*, 80 Maine, 80.

Exceptions overruled. Judgment for state for first offense.

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

WILLIAM L. RICHARDS *vs.* ALFRED H. WARDWELL.

Waldo. Opinion February 15, 1890.

Trover. Crops. Hiring. Lease. Remedy.

Where the plaintiff contracted to carry on the defendant's farm, for one half of the crops, *Held*, that until a division of the crops, the plaintiff's rights are in contract; and, therefore, he cannot maintain trover for such half against the defendant.

ON EXCEPTIONS.

Trover for hay and other farm products.

After the plaintiff had introduced his evidence, the presiding justice ordered a non-suit, on the defendant's motion, and the plaintiff excepted to the ruling.

The facts appear in the opinion.

Montgomery and Montgomery, for plaintiff.

Plaintiff was lessee. *Warner* v. *Abbey*, 112 Mass. 355, 357–361. Defendant was in possession of the premises, and refused to let plaintiff have his share. This was a conversion. *Moody* v. *Whitney*, 34 Maine, 563; *Fernald* v. *Chase*, 37 Id. p. 291.

Plaintiff proves a settlement and leaving the property with

defendant, to be taken, (his half) when he chose; when he went to take it defendant denied his right.

If defendant claimed the right to hold the hay and produce, he should have given his reasons for refusing to comply with plaintiff's request. 2 Greenl. Ev., § 645, n. *Ingalls* v. *Balkley*, 15 Ill. 224. Where the violation of the terms of the bailment tends to show the assumption of dominion over, and ownership of the chattels, it is evidence tending to show a conversion. *Goell* v. *Smith*, 128 Mass. 238; *Dodge* v. *Myer*, 61 Cal. 405.

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

The contract was for service and not a letting for rent. 1 Wash. R. P., p. 364; *Chandler* v. *Thurston*, 10 Pick. 205; *Walker* v. *Fitts*, 24 Pick. 191. Waiving the distinction between the two forms of contract, plaintiff was only tenant in common. *Moulton* v. *Robinson*, 7 Fost. 550; *Daniels* v. *Brown*, 34 N. H. 454. Both being equally entitled to possession and use, plaintiff must prove defendant's act was tortious, having the effect of a destruction of the property, as regards the plaintiff. 2 Greenl. Ev., § 646; *Kilgore* v. *Wood*, 56 Maine, 150. Possession was voluntarily surrendered to defendant. A lawful division of the crops could only be made by agreement of the parties, or by a decree of an equity court.

EMERY, J. The plaintiff occupied the defendant's farm one farming season, and raised thereon hay, potatoes, turnips, apples and cabbages, which he harvested and placed in the barns and cellar bins on the farm. He then left the farm, and the defendant had possession of the farm and the products. Soon afterwards, the plaintiff came to the defendant at the farm, and demanded that one half of the produce, which had been so raised and stored, be delivered to him. The defendant declining to deliver any of the produce, the plaintiff brought this action of trover for one half of the same. There had not been any division of the produce.

Whatever may be the plaintiff's rights against the defendant, he, to maintain the action of trover, must affirmatively show that

there has become vested in him the superior title to the specific articles, to the exclusion of any legal title of the defendant. If they were co-owners, tenants in common, or partners in the title, the plaintiff cannot maintain trover for any part of the articles. *Dain* v. *Cowing*, 22 Maine, 347; *Crabtree* v. *Clapham*, 67 Maine, 326.

Title commonly depends upon the contract of the parties concerned with the thing. The title to the crops raised by one man on another man's farm, depends largely, if not entirely, upon the contract between the two men. If the contract amounts to a lease or demise of the farm by the owner to the occupier, then clearly the crops belong to the occupier, whether he pays rent in money, or in kind by a share of the crops. The occupier in such case becomes the owner *pro hac vice*, and has title to the products of the farm until division. *Bailey* v. *Fillebrown*, 9 Maine, 12; *Jordan* v. *Staples*, 57 Maine, 352. If the contract, however, does not amount to a lease, but is instead a contract for hiring the occupier to carry on the farm, the owner to pay him one half of the products as compensation, then the occupier is not owner *pro hac vice*, but is the servant of the owner, entitled to receive one half of the products as compensation,—while the title to the products remain in the owner of the farm. *Kelley* v. *Weston*, 20 Maine, 232. Of course the contract may be greatly varied, and vest the title in one, or the other, or both, as co-owners, tenants in common, partners or in any mode or proportion, at the will of the parties.

In this case the plaintiff states the contract as follows: "I took the place that year at the halves. Mr. Wardwell (the defendant) was to give me one half of what I raised, and one half of the hay and pasturing to pasture my stock, and also one half of the dairy products. I told him I would remain upon the farm six months." Such a contract does not amount to a demise of the farm to the plaintiff. He has not shown anything more than a contract for hiring him to carry on the farm and receive his pay in a proportion of the products. Whatever interest such a contract may give him in the products, it does not give him a superior right to the defendant to possess and control them be-

fore division. Without such superior right, he cannot maintain trover. He has mistaken his remedy.

Exceptions overruled. Non-suit confirmed.

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

PLINY P. DAVIS *vs.* MATTAWAMKEAG LOG DRIVING COMPANY.

Penobscot. Opinion February 15, 1890.

Charter. Dam. Flowage. Remedy. R. S., 141, *c.* 126. *Private Laws,* 1849, *c.* 269.

Legislative grants of franchises or privileges to persons or corporations are never to be extended by construction beyond the plain terms in which they are conferred.

A corporation built a dam across a river, below one of its branches, on which the plaintiff's land is situated, and several miles below the place where the charter authorized the dam to be erected. This dam caused the water to flow back upon the plaintiff's land, and he sued in trespass for the damage occasioned thereby. The defendant corporation claiming that the dam was authorized by its charter admitted the damage, but contended that the remedy provided in its charter therefor, was exclusive of all other remedies. It being found by the court that the charter did not authorize the dam to be built at such place; *Held*, that parties whose lands were flowed by the dam may maintain trespass.

AGREED STATEMENT.

This was an action of trespass submitted to the law court upon an agreed statement of facts.

The material facts as stated by the parties are as follows:

The Mattawamkeag Dam Company was incorporated under c. 269 of the private laws of 1849, and was authorized to erect and maintain a dam across the Mattawamkeag River above Gordon Falls, near a place called Jimskitticook, for the purpose of facilitating the transportation of logs and lumber down said river; and to improve the falls below said dam for the running of logs by the erection of dams, etc., and was empowered to flow lands so far as necessary for the purpose; and it was provided

that the proprietors might obtain damages, sustained by flowing lands, in the same mode and manner and extent, and under the same conditions and limitations as were provided in c. 126 of R. S. of 1841, for damages where lands were flowed by the erection of mills.

Chapter 441 of the private laws of 1851, purported to alter and amend said chapter 269, of the private laws of 1849.

The Mattawamkeag Log Driving Company was incorporated under c. 91 of the private laws of 1853, and was authorized to drive all logs and other timber that might be in the Mattawamkeag river, from Skitticook to Mattawamkeag Point, to the Penobscot boom, and for the purpose clear out, and improve the navigation of the river, and build dams, etc., where the same might be lawfully done.

By c. 288 of the private laws of 1863, the Mattawamkeag Dam Company was authorized and required to assign and convey by deed all its dams, works and improvements, and its franchise, to the Mattawamkeag Log Driving Company, and by deed dated August 6, 1863, recorded in Penobscot registry of deeds, vol. 330, p. 242, did convey all its dams, works and improvements and its franchise to the Mattawamkeag Log Driving Company.

By c. 169 of the private laws of 1867, the legislature recognized and ratified said conveyance.

In 1886, the Mattawamkeag Log Driving Company built the dam, complained of, for the purpose of improving the falls below it for the running of logs, which dam is four or five miles below the original dam built by the Mattawamkeag Dam Company.

Gordon Falls are four or five miles below the dam built in 1886.

It was agreed that the original dam built at Jimskitticook is not in existence, and that the Molunkus stream, a branch of the Mattawamkeag, upon which the flowage complained of was had, enters the Mattawamkeag river below where the original dam stood and above the present dam of 1886.

The defendant claimed as an inference from the foregoing private laws and statement of facts, that the dam complained of was built under the franchise of the Mattawamkeag Dam Company,

conveyed as aforesaid to the defendant company; and further claimed that, if so built under the franchise of the Dam Company, this action cannot be maintained, because damages for flowing land must be sought in the manner pointed out in the charter of the Dam Company.

It was also agreed that the action, if it can be maintained, should stand for trial for an assessment of damages; otherwise a non-suit should be entered.

Barker, Vose and Barker, for plaintiff.

If the dam was built under defendants' own charter, it is not disputed that the remedy sought is proper, since it contains neither right of eminent domain, nor provisions for a remedy. If built under the old charter of the M. Dam Co., the remedy there provided is cumulative, and not restrictive. The damages "may" be collected, etc. *Milford* v. *Orono*, 50 Maine, p. 533; *Low* v. *Durham*, 61 Id. p. 569; *Weymouth* v. *Pen. Log D. Co.*, 71 Id. 29; Potter's Dwarris, p. 220, n. 27; *Gouch* v. *Stevenson*, 13 Maine, 371; *Reynolds* v. *Hanrahan*, 100 Mass. 313; *Coffin* v. *Field*, 7 Cush. 355; *Chesley* v. *Smith*, 1 N. H. 20; *Williams* v. *People*, 24 N. Y. 409; *Warner* v. *Burr*, 23 Wend. 155-6; *People* v. *Cook*, 14 Barb. 490; *People* v. *Schermerhorn*, 19 Barb. 558; *Train* v. *Boston Disinfecting Co.*, 144 Mass. 523.

F. A. Wilson and C. F. Woodward, for defendant.

Defendant had the right to build this dam, under the transfer of the charter from the M. D. Co., and having thus built it, the presumption is that it was so done rightfully and not wrongfully.

The M. D. Co. charter authorized the building a dam above Gordon Falls; the improvement of the falls below such dam by the erection of other dams; taking of lands, property and materials, not only for the dam at Jimskitticook but for other dams; and flow lands so far as necessary to accomplish its purposes, which were not only to build the dam at Jimskitticook but to improve the falls below. It expressly mentions Gordon Falls; hence it was intended to authorize the improvement of all falls below the dam to be erected down to and including Gordon Falls,

which are four or five miles below this dam. This dam is not a substitute for the old one, but one authorized to be erected for improving the falls below, down to and including Gordon Falls. The agreed facts expressly show this. The legislature knowing as appears by the charter, that, there were falls in the river, down as far as Gordon Falls, intended the corporation should have all the necessary power to improve all that might be an obstacle to driving; otherwise the powers granted would be worse than useless.

Upon the question of remedy counsel cited: *Underwood* v. *Scythe Co.*, 41 Maine, 291, 296; *Stowell* v. *Flagg*, 11 Mass. 364, 365; *Monmouth* v. *Gardiner*, 35 Maine, 247–253; R. S., 1841, c. 126.

EMERY, J. The plaintiff's land is upon the Molunkus Stream, a branch of the Mattawamkeag river. The defendant company has built a dam across the Mattawamkeag below the Molunkus, which dam backs the water up the Mattawamkeag and the Molunkus, and upon the plaintiff's land. The plaintiff says such flowage is wrongful, and he brings this action of trespass. The defendant company admits the plaintiff's right to compensation, but say the flowage is rightful, and does not subject it to an action of trespass as for a wrong.

The defendant company say, that it has from the state a franchise and authority to erect and maintain this dam, and cause this flowage. The counsel frankly admits it has no such franchise in its own charter, and he bases the claim solely upon a franchise and authority which he says were granted to the Mattawamkeag Dam Company in its charter in 1849, and to which the defendant company has lawfully and effectually succeeded. The first question therefore is, whether there was granted by the state to the Mattawamkeag Dam Company the franchise and authority to erect and maintain the dam below the Molunkus.

The franchise and authority of the Mattawamkeag Dam Company were expressed in these words (special laws of 1849, c. 269, § 2): "Said corporation shall have the right to erect and main-

tain a dam across the Mattawamkeag river above Gordon's Falls, and near a place called "Jimskitticook" for the purpose of facilitating the transportation of logs and lumber down said river;—and said corporation may improve the falls below their dam for the running of logs, by the erection of dams, and side-booms and the removal of rocks and other obstructions; * * * and they are empowered to flow lands as far as may be necessary to accomplish their object." Provision is then made for compensation to land owners for flowage as under the mill act.

"Jimskitticook" is above the mouth of the Molunkus and some four or five miles above the present dam, now complained of, and some eight or ten miles above Gordon Falls. The Mattawamkeag Dam Company under its said charter built a dam at Jimskitticook, and above the Molunkus. This dam is not now in existence. In 1886, the defendant company built the present dam some four or five miles below the dam first built at Jimskitticook. Does the language of the Dam Company's charter, above quoted, extend its franchise so far as to authorize the building of the last dam at such a distance below the Jimskitticook, the place of its first dam?

Legislative grants of franchises or privileges to persons or corporations are never to be extended by construction beyond the plain terms in which they are conferred. No rule is better settled than that charters of incorporation are to be construed strictly against the corporators. The just presumption in every such case is, that the state has granted in express terms all it designed to grant. Cooley, Const. Lim. 394, 395, 396 and cases there cited. (The citations will be found to sustain the text.) The U. S. Supreme Court in *Fertilizing Co.* v. *Hyde Park*, 97 U. S. p. 666, used this strong language: "The rule of construction in this class of cases is, that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

When the holders of a legislative franchise claim that it

authorizes them to exercise the sovereign prerogative of eminent domain to take or flow the land of a citizen against his consent, the principles of construction above stated should be applied with all their force. The court is the bulwark of the citizen, and will scrutinize carefully and even jealously every claim of right to take his property against his will. It will also test every step of the procedure in exercising such right, and insist on the strictest regularity. Cooley, Const. Lim. 530. *Leavitt* v. *Eastman*, 77 Maine, 117; *Hamor* v. *Water Co.*, 78 Maine, 127.

Recurring now to the language of the charter under which the authority is claimed in this case, and reading it in the light of these principles of construction, we think the legislature did not intend to give the Dam Company a roving franchise up and down the Mattawamkeag river, but rather intended to locate it and its works in one locality, "near the place called Jimskitticook." The company is first authorized to build a dam, (note the singular number), and the place for the dam is designated. Of course the company could not build that dam anywhere else. Then it is authorized to "improve the falls below its dam." We think this authority is confined to the falls next below, and near the dam. The word "falls," though plural in form, usually means only one locality, and when the designation is of falls below a dam, it usually means the falls immediately below. Dams are usually built upon or near falls.

We think the company's authority cannot be rightfully extended so far beyond the vicinity of the dam near the Jimskitticook. It may be useful and perhaps necessary for the purposes of the company that its authority to build dams should extend down the river four or five miles, and include its present dam. If so, it is for the legislature to grant the authority, but as was said in *Penn. R. R.* v. *Canal Commissioners*, 21 Pa. St. 22, in doing so, the legislature should use direct, plain English words that will leave no doubt. In this case we have at least a doubt, and "a doubt is fatal to the claim."

Defendant defaulted. Damages to be assessed at nisi prius.

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

ALFRED G. BULGER *vs.* INHABITANTS OF EDEN.

Hancock. Opinion February 17, 1890.

Towns. Drains and sewers. Municipal officers,—their torts, and liabilities of towns. R. S., c. 16, §§ 2, 9; Laws of 1844, c. 94; 1860, c. 153.

Provision being made by general statute law for the laying out and construction of public drains and sewers by municipal officers, a town has no such authority incidental to its corporate powers, or in the exercise of its corporate duties.

The municipal officers in the performance of these duties act not as agents of the town but as public officers, and do not therefore render their town liable for their acts.

It is only when such drains have been constructed and persons have paid for connecting with them, as provided by R. S., c. 16, § 9, that a town becomes responsible in regard to maintaining and keeping the same in repair, and assumes responsibilities in reference thereto.

The liabilities of municipal corporations, for the torts or negligent acts of their officers, stated.

ON REPORT.

This was a special action on the case against a town for creating and maintaining a nuisance in a public street, by means of a drain or sewer built there by its municipal officers. If the action could be maintained upon the facts in the declaration, it was to stand for trial; otherwise the plaintiff was to become non-suit.

(Declaration.)

In a plea of the case; for that the plaintiff alleges that he is, and for a long time prior to Dec. 12th, A. D. 1887, has been in lawful possession and occupation of a certain building used for a store and tenement and situated on Cottage street, in said Bar Harbor, and in the lawful enjoyment of the use, profits and emoluments thereof; that said Cottage street is a town way of said town of Eden, legally laid out, accepted and used by said town, and one which the said town is obliged by law to keep in repair; that said Cottage street is the only way leading to said building and the only approach to and from the same for the plaintiff and his customers with horses, teams and carriages to pass to and from said building.

That on said twelfth day of December, 1887, the said town while in the course of constructing a public sewer in the middle and throughout the length of said Cottage street, under and by virtue of the statutes of this state, unlawfully and unjustifiably and without sufficient cause, entered upon said street and dug up, destroyed and ploughed the same to a great depth, to wit: to the depth of eight feet and for the whole width thereof, and extending from Main street, so called, along said Cottage street the whole length thereof.

And the surface of said street so dug up and destroyed, said town filled with farm dressing; and the said street so dug up and destroyed and made offensive, was left so remaining by said town for a great and unreasonable space of time, to wit: for the space of five months. And the plaintiff alleges that the destruction and filling with dressing of the whole length of said street, as aforesaid, at one time and the allowing said street to remain in said condition for the time aforesaid, while building said sewer, was a great and unwarrantable nuisance and caused the plaintiff great damage in his comfort, property and in the enjoyment of his estate, in that his progress to and from his said property was impeded, and his personal comfort injured, the use of his said store embarrassed and he deprived of his legitimate profits and emoluments from the use of his said store property, to the damage of said plaintiff, etc. * * *

Wiswell, King and Peters, for plaintiff.

Such use of the street was a nuisance. R. S., c. 17, § 5. Damages to an abutter are peculiar, direct and substantial. Dill. Mun. Corp. § 730 and cases cited in note. Angell Highways, p. 265.

Non-liability of towns for neglect of corporate duty, not of universal application. Dill. Mun. Corp. § 964. This rule of law is of limited application. *Bigelow* v. *Randolph*, 14 Gray, 541.

This case within the exceptions. Town liable for nuisance done within the scope of its municipal powers. *Seele* v. *Deering*, 79 Maine, 346; *Rowe* v. *Portsmouth*, 56 N. H. 291; *Pennoyer* v. *Saginaw*, 8 Mich. 534. Laying out of sewers and drains a corpor-

ate right within the general powers conferred on towns. Built by selectmen as agents, but not so far agents of the state, as to relieve towns of all liability for their acts. *State* v. *Portland*, 74 Maine, 272. Towns held liable where public officers entrusted with care of streets violate the law in carrying out the directions of the corporation. *Woodcock* v. *Calais*, 66 Maine, 234; *Thayer* v. *Boston*, 19 Pick. 511.

These exceptions apply to officers laying out sewers as well as laying out ways. Acts complained of not naked trespasses outside the line of duty, but within the powers and duties of *quasi* corporations, and actively to a branch of their executive government. Otherwise, towns could throw all liability on irresponsible officers, and retain advantage of improvements. Town liable if it interferes, authorizes and directs such a nuisance, as here. *Woodcock* v. *Calais*, *supra*. Also, liable if the acts were done in forwarding the private advantage of the town. *Small* v. *Danville*, 51 Maine, 359. The declaration will permit us to prove the acts complained of were to save cost in construction of a sewer. *Bailey* v. *Mayor*, 3 Hill, 531; *Conrad* v. *Trustees*, *etc.*, 2 Smith, 158; *Mayor* v. *Furze*, *etc.*, 3 Hill, 612.

Deasy and Higgins, for defendant.

FOSTER, J. The facts stated in the plaintiff's declaration present an action on the case against the defendant town for damages caused by the negligent construction of a public sewer in a public street. The alleged negligence consists in the great length of time during which the street was dug up, and in filling the excavation with farm dressing, thereby creating a nuisance by which the plaintiff suffered special damages in his business, comfort, property and the enjoyment of his estate, and for which he claims to be entitled to recover of the defendant town. If the town is liable upon the facts set out in the declaration, the action is to stand for trial; otherwise the plaintiff is to become non-suit.

It is not denied that whatever was done, and for which it is claimed that the town should be held liable, was done by the municipal officers. The allegation in the writ is that the "town

while in the course of constructing a public sewer in the middle and throughout the length of said Cottage street, under and by virtue of the statutes of this state, unlawfully, unjustifiably and without sufficient cause, entered upon said street and dug up, destroyed and ploughed the same," etc.

While admitting the general doctrine that no private action can be maintained against a town or *quasi* public corporation for a neglect of corporate duty unless such right of action be given by statute, the plaintiff's contention is, that if a town, while acting within the scope of its municipal power, creates a nuisance to the injury of an individual, it is liable in damages therefor.

If we concede the correctness of the plaintiff's proposition, then the difficulty of maintaining this action is by no means removed, inasmuch as the allegations contained in the declaration do not bring the acts complained of within scope of the corporate powers of the town; nor is there any allegation that such acts were performed by its officers in the discharge of any corporate duty imposed by law upon the town. *Seele* v. *Deering*, 79 Maine, 347; *Anthony* v. *Adams*, 1 Met. 284. The town has no duty whatever in relation to the construction of public drains or sewers which renders it liable in an action like the present. The municipal officers of towns are constituted a tribunal by the statutes of this state, whose duty it is, whenever they deem it necessary for public convenience or health, to construct public drains or sewers along or across any public way at the expense of the town, and to have control of the same. R. S., c. 16, § 2. Laws of 1844, c. 94. Laws of 1860, c. 153. *Estes* v. *China*, 56 Maine, 410.

The earlier enactments, of which the present statute is only a condensation, upon examination will be found to contain directions to the municipal officers as to the manner in which they shall construct such drains. There is no general statute authorizing towns in their corporate capacity to lay out or construct drains or sewers, as there is respecting ways. It is only when such drains have been constructed and persons have paid for connecting with them, as provided in § 9, that the town becomes responsible in regard to maintaining and keeping the same in repair, and assumes responsibilities in reference thereto.

Blood v. *Bangor*, 66 Maine, 154; *Darling* v. *Bangor*, 68 Maine, 110. Provision being made by general statute law for the laying out and construction of public drains and sewers by the municipal officers, no such authority can properly be claimed as necessarily incident to the town in the exercise of its corporate powers, or the performance of its corporate duties. The municipal officers in the performance of these duties and in the exercise of the authority with which they are invested by general law, act not as agents of the town but as public officers, deriving their power from the sovereign authority. They act upon their own responsibility and are not subject either to the control or direction of the inhabitants of the town, "but are an independent board of public officers, vested by law with the control of all matters within their jurisdiction, and performing duties imposed by general law." *Brimmer* v. *Boston*, 102 Mass. 22; *Burrill* v. *Augusta*, 78 Maine, 118; *Woodcock* v. *Calais*, 66 Maine, 235; *Estes* v. *China*, *supra*; *Lemon* v. *Newton*, 134 Mass. 479; *Child* v. *Boston*, 4 Allen, 41; *Tindley* v. *Salem*, 137 Mass. 173-4; *Cushing* v. *Bedford*, 125 Mass. 528.

Though chosen and paid by the town, and for many purposes its agents, (as in making contracts within the scope of their authority about the affairs of the town, or acting under the direction of the town in matters pertaining to its corporate duties, *Deane* v. *Randolph*, 132 Mass. 475,) yet these officers do not sustain this relation in reference to these particular duties in question. In this respect they are a part of the municipal government, in the performance of their public duties, and are not servants or agents of the municipality by whom they are chosen and paid, rendering their principals liable for their acts, any more than are officers of a fire department, (*Burrill* v. *Augusta*, 78 Maine, 118; *Hafford* v. *New Bedford*, 16 Gray, 297); or surveyors of highways and street commissioners when making, repairing or otherwise performing their official duties upon highways or streets, (*Small* v. *Danville*, 51 Maine, 359; *Woodcock* v. *Calais*, 66 Maine, 235; *Walcott* v. *Swampscott*, 1 Allen, 101; *Barney* v. *Lowell*, 98 Mass. 570); or health officers, or municipal officers in the discharge of their duties in relation to contagious diseases,

(*Mitchell* v. *Rockland*, 52 Maine, 118; *Brown* v. *Vinalhaven*, 65 Maine, 402; *Barbour* v. *Ellsworth*, 67 Maine, 294); or police officers, (*Cobb* v. *Portland*, 55 Maine, 381; *Buttrick* v. *Lowell*, 1 Allen, 172); or overseers of the poor, (*Farrington* v. *Anson*, 77 Maine, 406; *New Bedford* v. *Taunton*, 9 Allen, 207); in all of which there is an absence of corporate liability; nor can third persons, injured either by the negligence, carelessness or unskilfullness of such officers while in the performance of duties imposed upon them by the statutes in such cases, invoke against their municipality the rule of *respondeat superior*.

The liabilities of municipal corporations for the torts or negligent acts of their officers are fixed by statute. They are to be held liable for the negligence or misconduct of their officers only when made so by express statute, or the act out of which the claim originates was within the scope of their corporate powers, and was directly and expressly ordered by the corporation. *Burrill* v. *Augusta*, *supra*; *Woodcock* v. *Calais*, *supra*; *Anthony* v. *Adams*, *supra*; *Deane* v. *Randolph*, 132 Mass. 475; *Seele* v. *Deering*, *supra*.

A case very analagous to this in principle is *Cushing* v. *Bedford*, 125 Mass. 526. There by statute the selectmen of towns were authorized to establish and maintain such public drinking troughs and fountains, within the public highways of their towns, "as in their judgment the public necessity and convenience may require;" and the towns were authorized to raise and appropriate money to pay the expense thereof. "These provisions," say the court, "make the selectmen a board of public officers charged with this duty; they are not agents of the town, but they represent the general public." And the court further held that the towns, in their corporate capacity, had not been given the right by statute to construct drinking troughs in the public highways, and that the "town cannot therefore be charged with having created a nuisance, from which the plaintiff suffered special injury."

Of course, the rule we have been considering has no application and does not exempt municipal corporations from liability to which other corporations are subject, for negligence in managing or dealing with property held by them for their own advantage

or emolument, and not in the discharge of public duty, nor for the direct and immediate use of the public. *Moulton* v. *Scarborough*, 71 Maine, 269, and cases there cited; *Thayer* v. *Boston*, 19 Pick. 511; *Hand* v. *Brookline*, 126 Mass. 324.

Nor is this case governed by the principles, enunciated in another class of decisions, where cities and other municipalities have been held chargeable for negligence in the construction of sewers, or other particular works, on account of some provision in their charter or ordinances,—or where authorized by some special statute to construct such works and from which to receive profits as a private corporation might, and when they have, therefore, assumed duties and liabilities by the acceptance of obligations not imposed by general law, as in the case of *Murphy* v. *Lowell*, 124 Mass. 564; *Emery* v. *Lowell*, 104 Mass. 15; *Child* v. *Boston*, 4 Allen, 41, 52; *Merrifield* v. *Worcester*, 110 Mass. 218; *Oliver* v. *Worcester*, 102 Mass. 500. And see also *Hill* v. *Boston*, 122 Mass. 358, 359; *Tindley* v. *Salem*, 137 Mass. 172; *Bigelow* v. *Randolph*, 14 Gray, 543. In such cases the work is not purely for the direct and immediate use of the public alone, but partly commercial in its character, in which some benefit accrues to the municipality by way of consideration for the conveniences afforded to those who are willing to pay for them.

Thus in *Emery* v. *Lowell*, *supra*, Gray, J., says: "A municipal corporation, voluntarily accepting a statute which authorizes it to make common sewers and to assess the expense thereof on lands benefited thereby, is not exempt from liability to private actions by persons injured by its negligence in exercising the power so granted and accepted, to the same extent as it is in the performance of duties imposed upon it by general law, exclusively for public purposes, and without its corporate assent."

It is there held, as also in *Child* v. *Boston*, *supra*, that after a common sewer has been constructed, and become the property of the municipality under special authority conferred and accepted, it then becomes the duty of such municipality to maintain and keep the same in repair, and for any neglect of which it would be liable to any person injured.

And such have been the decisions of our own court in *Blood* v.

Bangor, 66 Maine, 154; *Darling* v. *Bangor*, 68 Maine, 110, and *Estes* v. *China*, 56 Maine, 407, in reference to the liability of towns in maintaining and keeping in repair public drains and sewers after the same have been constructed by the municipal officers, and the town has received compensation from persons for connecting with the same under § 9, c. 16, R. S., which provides that "After a public drain has been constructed, and any person has paid for connecting with it, it shall be constantly maintained and kept in repair by the town," etc.

The allegations in the plaintiff's declaration have reference only to the acts of the "town while in the course of constructing a public sewer, * * * * under and by virtue of the statutes of this state," and not to any dereliction of duty, on the part of the town, in maintaining or keeping the same in repair after its construction by the tribunal authorized by general statute to construct it.

The town is not liable in tort for damages resulting to the plaintiff from the work done by its officers in the discharge of a public duty imposed upon them by a general law.

Plaintiff nonsuit.

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

JAMES M. JAMESON, in equity, *vs.* JAMES E. EMERSON.

Penobscot. Announced February 17, 1890.

Equitable mortgage. Appeal in equity. Decree.

A deed absolute on its face, if intended by the parties as security for a debt, is a mortgage.

The decision of a single justice, upon matters of fact in an equity hearing, will not be reversed unless it clearly appears that the decision is erroneous. The burden to show the error lies on the appellant.

Upon a bill in equity to remove a cloud upon the plaintiff's title, the defendant claimed that he had acquired title to a parcel of the premises in dispute by disseizin, and that the injunction in the court below precluded him from setting up such claim; *Held*, that as the decree only enjoined the defendant from claiming title under a certain deed it did not have that effect; *also*, that the claim being a possessory right may be settled at law.

IN EQUITY.

On appeal by defendant from a decree in favor of plaintiff after hearing on bill, answer and proofs.

The facts are stated in the decision.

C. A. Bailey, *H. R. Chaplin*, with him, for plaintiff.

The deposition of Charles Hayward shows that no title was ever claimed by True & Hayward in the premises in controversy, and the deeds from them under which defendant claims, virtually disclaim any interest in them.

On the other hand under the Frost and St. Clair levy, made January 7, 1850, the plaintiff and his predecessors have been continuously exercising ownership.

The plaintiff contends that the deed from Ira Fish to True & Hayward although absolute in form was in fact a mortgage, (if ever delivered for any purpose), and when True & Hayward, satisfied their judgment by a levy on the Aroostook lands June 22, 1848, this mortgage title became defunct,—a mere naked trust,—and under the circumstances of this case equity presumes that a reconveyance was made to their grantor. Perry on Trusts (2 Ed.) §§ 351, 354.

At the hearing the question was mooted, whether even this presumption gave any vitality to the Frost and St. Clair levy; whether the court could go to the extent of presuming a reconveyance before the levy. Otherwise, it was contended, the levy was made upon an equitable estate, and inefficient to pass any title, (*Russell* v. *Lewis*, 2 Pick. 508); and if inoperative for that reason, the title remained in Ira Fish and his heirs and was conveyed by their deed to defendant Emerson.

But any possible question on this point is now set at rest by the new evidence, introduced since the appeal, by which it appears that Ira Fish years ago conveyed by deed his interest in the premises to plaintiff's predecessors in title.

By this deed any possible title remaining in Ira Fish the debtor after that levy, or acquired afterward, was released in aid of the levy title, and whether the levy was good or bad plaintiff has all the title of said Fish, and defendant none.

C. P. Stetson, *W. C. Clark*, with him, for defendant.

The testimony is not sufficient to authorize the finding that the deed of January 10, 1848, was for security, and title under it extinguished by payment of the indebtedness.

A deed absolute in form, with general warranty, will not operate as a mortgage unless it is clearly shown to have been intended as security for a loan or debt. The proof must be clear, unequivocal and convincing. *Coyle* v. *Davis*, 116 U. S. 108, 112; *Howland* v. *Blake*, 97 U. S. 624, 626; *Cadman* v. *Peter*, 118 U. S. 73, 80; *Wallace* v. *Johnstone*, 129 U. S. 58, 64.

The testimony of Ira D. Fish, "I never understood it," (the deed of his father to True & Hayward,) "as security." "My father represented it as an absolute deed," negatives plaintiff's position that the deed was for security.

Defendant as alleged in his answer and sustained by proof, has occupied and cultivated for twenty-five years some ten acres of the premises as a part of his farm and is entitled to hold same by possession. Decree does not pass upon this.

HASKELL, J. Bill in equity to remove a cloud from the title of land situated in Lincoln, Penobscot county.

The plaintiff is in possession and claims title under a levy made in 1850. The defendant under a release from True & Hayward, made in 1884, to whom the judgment debtor in the levy, under which plaintiff claims, quit-claimed by deed with special covenants of warranty, etc., in 1848.

The decree below found that if the quit-claim deed to True & Hayward was ever delivered, that it could only have been given as security for a debt that was afterwards paid. It is now contended that the finding is not supported by the evidence, and should be reversed on appeal.

Charles Hayward testifies that he and John True, under the firm of True & Hayward, did business in Bangor from 1843 to 1856, and during that time furnished Fish & Perley, lumbermen, with supplies; that Fish lived in Lincoln, and Perley in the Province; that they became embarrassed in 1847 or 1848, and were indebted to True & Hayward for supplies to the amount of $1,500 or $1,800; that the books of that firm were

destroyed by the fire of 1869, and that he testifies wholly from memory. He says, in substance, we were informed that Fish & Perley were in a failing condition, and Fish gave us the firm note for all that was then due us, $1,600 or $1,700. We sued this note and attached their lands in Aroostook county, and took them on execution in full satisfaction of our debt. We never had any other claim against Fish & Perley, so far as I know. I feel confident that we did not. I never knew that we had dealings in lands in Lincoln, and so far as I remember, we never purchased of Fish & Perley lands in that town. "I have no recollection of True & Hayward or either of us, or Mr. True's heirs (Mr. True being dead) owning any lands in Lincoln, from Fish & Perley after their failure." I always had charge of the books of the firm of True & Hayward, and kept them after Mr. True moved to Portland, until they were burned in 1869. Never, to my knowledge, did the firm of True & Hayward exercise any ownership over lands in Lincoln that were conveyed to us by Fish & Perley or either of them.

About January 1884, Mr. Sprague Adams called and informed me that True & Hayward, by reason of inaccurate surveys, held the record title to certain lands in Lincoln that rightfully belonged to Mr. Emerson, the defendant, and asked if we had any claim upon them, and I told him no. He then asked if I would give a deed of them. I told him yes, and volunteered to get the deeds signed by Mr. True's heirs, and did so. I told him that I had no moral right to lands in Lincoln. We received no consideration for the deeds.

It was proved that the plaintiffs and their grantors had held control of the lands in dispute since 1850, and treated them as their own, until this controversy arose, less than six years ago. There was other evidence bearing upon the issue; and we think the court below might well hold defendant's title under the deed of Fish to True & Hayward to be invalid. There is little, beside the presumption from lapse of time, in favor of that deed. The original has not been produced. The only surviving grantee never knew of it, until told of its existence in 1884, and he then said that he had no moral right to any land conveyed by it, and released his interest as a matter of favor—little supposing that

he was parting with title to a very large tract of land, of great value, as a mere favor to a stranger. At any rate, the evidence does not show the decree below to have been clearly wrong and, therefore, fails to overturn it. *Young* v. *Witham*, 75 Maine, 536; *Paul* v. *Frye*, 80 Maine, 26.

It is contended, as the record title was not in the judgment debtor at the date of the levy, that nothing passed thereby. If this be so, the objection has been cured by deeds introduced since the appeal, showing a conveyance from the judgment debtor in aid of the levy.

It is contended that defendant has acquired title to a parcel of the premises in dispute by disseizin, and that the decree below precludes his claim. That is not the effect of the decree. Possessory rights may be settled at law. The decree only precludes him from claiming title under the deed from Fish to True & Hayward in 1848.

Decree below affirmed with costs.

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

MARY A. HUTCHINS *vs.* CHARLES W. FORD.

Lincoln. Opinion February 19, 1890.

Marine insurance. Barratry. Negligence. Shipping. Evidence. Expert.

The policy written by the Portland Lloyds covers barratry of the mariners, but not of the master when the insured is an owner of the vessel.

In a suit upon such policy, it is not necessary to negative in the declaration the limitation clause which exonerates the subscribers from liability beyond the contributed capital paid in and the undivided premiums. That is a matter to be used in defense.

As bearing upon the seaworthiness of a vessel engaged in the coastwise trade, it is competent for the master to testify in relation to the selection of his mate, "I had every reason to suppose the man was sufficient for a coasting mate. I believed at the time he was capable."

The master of a ship who is a part-owner may be guilty of barratry towards his co-owners, so as to avoid a policy of insurance written in their favor, that does not cover the risk of barratry of the master.

A marine policy covers negligence of the master and mariners.

A verdict will not be disturbed when the evidence sustains it, and shows that the stranding of a vessel did not result from the barratrous acts of the master, but rather from his irresponsible condition occasioned by temporary insanity, resulting from exposure, potent drugs, loss of sleep, or excessive drinking of liquors, or by all of them combined.

The conduct of the mate in not assuming command when the master thus became incapacitated, is excusable, upon the ground of erroneous judgment of his duty.

Semble, that barratry of the mate upon whom the command of a ship devolves by the incapacity of the master, during a voyage, will not avoid insurance covering barratry of mariners, but not that of the master.

Held, that the statements of the master, as he was about to go below at the end of a storm, giving his reason therefor, are admissible as a part of his act in relinquishing command of the deck for the time being.

The testimony of an experienced seaman, relative to proper measures which should be taken to prevent stranding, is competent as bearing upon the proper navigation of a vessel,—a question wholly for the jury to consider.

The opinion of a physician, called as an expert, who has not made a special study of mental diseases, may be excluded in questions of insanity.

ON MOTION AND EXCEPTIONS.

This was an action upon a policy of marine insurance issued by the association known as the Portland Lloyds. The plaintiff's interest, as part owner of the brig Emily T. Sheldon, was covered by a policy thereon for fifteen hundred dollars; and she sought to recover from the defendant, as one of the subscribers to the policy, his proportional part.

The first count in the declaration alleged that the defendant and others, in consideration of the premium therefor paid "made a policy and entered into an agreement and contract of insurance in writing, wherein is contained, that the plaintiff on account of whom it concerned, did make insurance and cause herself to be insured, lost or not lost, the sum of fifteen hundred dollars, to be paid in case of loss to the plaintiff or her order on said brig, at and from said Boothbay to Annapolis, in the state of Maryland. And the defendant thereby promised to insure for the plaintiff said sum, upon said brig for said voyage, against the perils of the sea, and other perils in said policy and agreement mentioned."

The second count alleged that the defendant, in consideration of the premium therefor paid to him by the plaintiff, "made a

policy of insurance on said brig from said Boothbay to Annapolis, in the state of Maryland, and thereby, in his own proper name, promised to insure the plaintiff thirty dollars, and by the name of Charles W. Ford, attorney, promised to insure the plaintiff other thirty dollars, being sixty dollars in the whole, upon said brig, for said voyage against the perils of the seas, etc."

The material portions of the policy are as follows:—

"Touching the adventures and perils which the said assurers are contented to bear, and take upon them in this voyage, they are of the seas, fire, barratry of the master (*unless the insured be owner of the vessel*), and of the mariners, and all other sea perils and misfortunes which have or shall come to the damage of said vessel, or any part thereof, to which insurers are liable by the rules and customs of insurance in Boston."

"And whereas, the said several assurers hereinafter named as subscribers, have originally subscribed and paid in, or caused to be secured, the sum of one thousand dollars each, to be held as a fund for the payment of losses upon policies issued by said assurers, it is hereby agreed between said assurers, each for himself, and said assured that in no event shall the said several assurers named in this policy, or either of them, be liable to the insured in case of loss under this policy, in a sum greater than such amount of the said sum of one thousand dollars so subscribed by said assured, and his proportional part of the premiums held for the payment of losses as shall at the time such loss shall finally be decided to be due and payable, remain undivided, and unexpended for the payment of losses; and when said fund and accrued premiums remaining undivided, shall be expended in the payment of losses upon risks taken by the assurers, no further claim shall be made or recovered by said assured against the assurers named in this policy, or either of them."

The defendant objected to the admission of the policy, at the trial before the jury, because it had no probative force; and contended that the two clauses above recited constituted a limitation and condition of insurance different from the contract set out in the writ; also that there was a variance between the contract and the proof.

The presiding justice overruled the objections, and the defendant excepted.

The case was submitted to the jury upon two issues. First, whether the vessel insured was seaworthy. Second, whether she was lost from a peril of the sea. The verdict was for the plaintiff and the jury specially found, under the directions of the court, that drunkenness of the master was not the proximate cause of the disaster.

The defendant contended:—

1. That inasmuch as the insured was an owner, the policy did not insure against the barratry of the master or his barratrous acts, and that these would arise either from the wilful act of the master who was the agent of the insured, or by such gross misconduct and negligence, in the management of the vessel, as to constitute a fraud upon the insured if the vessel was lost in consequence thereof.

2. That if the claim of the master that he became insane by taking quinine was true, and the vessel was lost by reason of his acts during his insanity, that such insanity was not a peril insured against in the policy, and the plaintiff could not recover.

3. That the drunkenness of the master, so long as the insured was the owner, was the act of the owner and constituted such gross misconduct as to afford a defense to this policy;—in other words that it was not a peril insured against.

4. That if the condition of the captain was such as he claims, it was clearly the duty of the mate to take charge of the vessel when he saw that it was to be wrecked through the acts of the master; that if he was not competent such incompetency affected the seaworthiness of the vessel; and if the vessel was improperly manned in this respect, then the plaintiff could not recover.

The defendant's exceptions to the admission of testimony and the charge of the presiding justice are stated in the opinion.

A. A. Strout, *L. M. Staples*, with him, for defendant.

If the vessel was lost through the insanity of the master the defendant was not liable. 1 Parsons, on Marine Ins. 574. *Lawton* v. *The Sun Mutual Ins. Co.*, 2 Cush. 500.

Gross and culpable negligence on the part of the master con-

stitutes a barratry, and is a defense. 1 Parsons on Marine Ins. 568. *Ellery* v. *Ins Co.*, 8 Pick. 21; *Levi* v. *New Orleans Ins. Co.*, 2 Wood, 63.

Insanity, caused by taking quinine or by drinking intoxicating liquors is not a peril of the sea, insured against by a policy like the present. *Cleveland* v. *Ins. Co.*, 8 Mass. 308; *Dixon on Marine Ins.*, 163; *Ins. Co.* v. *Sherwood*, 14 Howard, 351; *Schooner Reeside*, 2 Sumner, 567; *Coles* v. *Marine Ins. Co.*, 3 Washington, 159; *United States* v. *Hunt*, 2 Story, 125.

O. D. Castner, *W. Gilbert*, with him, for plaintiff.

Counsel cited: *Nelson* v. *Suffolk Ins. Co.*, 8 Cush. 496; *Copeland* v. *N. E. Marine Ins. Co.*, 2 Met. 432; *Waters* v. *Ins. Co.*, 11 Pet. 213; *Ins. Co.* v. *Transportation Co.*, 12 Wall. 194; *Ins. Co.* v. *Glasgow*, 41 Am. Dec. 661, 668, 670; *Street* v. *Ins. Co.*, 75 Am. Dec. 714-6-7; *Parkhurst* v. *Ins. Co.*, 100 Mass. 301, 305. The general tendency of modern decisions is, not to hold the owner, who has complied with the warranty of seaworthiness, responsible for the negligence of the master or crew, upon the voyage.

Exceptions to evidence: *Com.* v. *Rogers*, 5 Met. 500, 505; *Com.* v. *Rich*, 14 Gray, 335; 1 Greenl. Ev. § 440.

HASKELL, J. Assumpsit on what is known as a Boston policy of marine insurance, written on the plaintiff's interest in the brig Emily T. Sheldon, to recover two fractions of the amount insured thereon. Among the risks underwritten were perils of the seas, including barratry of the master, unless the assured be an owner. The policy was signed by fifty associates, known as the Portland Lloyds. They respectively promised severally and not jointly,—each for his specified fraction of the sum insured; so that a suit upon the policy cannot be maintained against the underwriters jointly, but each one must be sued severally for his fraction of the insurance. The verdict is for two fractions or fiftieths of the sum insured, on account of the loss of the vessel from stranding.

I. It was objected at the trial that the policy should not be admitted in evidence for the want of "probative force." It is now contended that it was erroneously admitted, because a limi-

tation contained in the policy, of each subscriber's liability to $1,000 paid in and premiums undivided, was not covered by proper averments in the declaration, showing the defendant's liability.

The contract of insurance is absolute. The limitation relied upon is not a condition precedent to be complied with before the policy becomes operative and, therefore, to be met by apt averment before a case could be stated showing the defendant's liability under it; but rather a stipulation to excuse liability already incurred. At the date of the policy, the limitation clause might not exonerate the underwriter from liability, while at the time of loss, perhaps months or years afterwards, it would afford an ample defense; meantime, the assets provided by the underwriter for the payment of losses may have been completely absorbed.

II. It was denied at the trial that the vessel insured was seaworthy at the inception of the voyage. As bearing upon this issue, exception was taken to the testimony of the master, in substance, that he acted in good faith in selecting his mate and believed him competent for the place. The integrity of the master seems to have been assailed throughout the whole trial, and his discretion and good faith in fitting and manning the vessel for sea is so clearly connected with, and so nearly becomes an element in the fact of seaworthiness of the vessel, that the testimony could not properly have been excluded. He testified: "I had every reason to suppose the man was sufficient for a coasting mate. I believed at the time he was capable." This testimony tends to show the good faith of the master, and, while it may not prove the competency of the mate, it negatives any reckless or corrupt action of the master in selecting him, and bears strongly upon the issue of the seaworthiness of the vessel.

III. It is contended that the vessel was stranded and lost by the fraud of the owners, inasmuch as the master was part-owner and incapable of barratry. Now barratry of the master was not a peril insured; and if he was incapable of committing that crime, because he was a part-owner, then the insurance holds, unless his acts as owner destroyed the insurance of his co-owners, who were

innocent of personal fraud. No case has been cited at the bar sustaining such doctrine.

Barratry has been defined to be knavery towards the owners. It is plain that the master of a ship, who is the sole owner, cannot commit a fraud upon himself. He cannot act without his own knowledge and consent, and, therefore, cannot commit barratry. *Wilson* v. *Ins. Co.*, 12 Cush. 363. But, when he is a part-owner only, the same reasons do not hold, although the contrary is held in the case last cited. That case, however, stands alone, without authority in its support, so far as we have been able to discover. The judgment of the court of the exchequer in *Jones* v. *Nicholson*, 10 Exc. 28, rendered in 1854, the next year after the Massachusetts case, by Pollock, C. B., and Alderson, Platt, and Martin, BB., is the better reason. The court says:— "Some expressions of modern authors to the contrary have been cited, but they are in truth no authority whatever since the doctrine laid down is not supported by any decided case. A master who is sole owner cannot commit barratry, because he cannot commit a fraud against himself, but there is no reason why the fact of a master being part-owner should prevent the other part-owners from insuring their interest in the ship, or the freighters from insuring their goods. If a master being part-owner makes away with the ship, that, in my opinion is barratry. The whole principle on which the doctrine rests supports that view. * * * Whenever it is a fraudulent act on the part of the master, it is barratry; but it cannot be a fraudulent act when he is sole owner. * * * Because the master happens to be a part-owner, how can it be said that the barratry committed by him is not a fraud against the other owners, who have separate shares in the vessel?" The same doctrine is approved in *Phoenix Ins. Co.* v. *Moog*, 78 Ala. 284, s. c. 56 Am. R. 31, and in Par. M. Ins. 571. The recent statute of the United States, severing the liability of ship-owners, weighs against the doctrine of their joint liability and accountability in all cases.

IV. It is familiar law, that insurance becomes payable upon loss from a peril insured; but it is not always easy to determine the precise peril that works the mischief. In this case, the policy

covered perils of the seas, except barratry of the master. There was an implied warranty on the part of the owners that the brig was seaworthy at the inception of the voyage, that is, tight, staunch, strong, properly manned and provisioned, and suitably equipped for the voyage. This implied warranty was a condition precedent to any liability of the insurer, although the burden was upon the defendant to establish its breach, since seaworthiness of the brig at the inception of the risk is presumed. The presumption of seaworthiness at the inception of a risk under a marine policy may be rebutted, either by direct evidence of the ship's actual condition, or by proof of facts from which unseaworthiness may fairly be inferred; and when the latter is shown, the insurance is destroyed, for the policy does not attach, and the premium would be without consideration, and may be recovered back. *Taylor* v. *Lowell*, 3 Mass. 347; *Paddock* v. *Franklin Ins. Co.*, 11 Pick. 226; *Swift* v. *Union Mutual Ins. Co.*, 122 Mass. 573.

The implied warranty of seaworthiness required that the brig should have a competent master and mate, and a sufficient crew for the particular voyage to be entered upon. The jury were so instructed, and must have found all these pre-requisites to have been complied with. Nor can we say that the evidence fails to prove the issue. The master was beyond middle age, and of long and varied experience. The mate had sailed with him once before as second officer, and appears to have been competent to serve as mate for a short coasting voyage. His competency must be determined in relation to the particular service to be performed. The wages usually paid to a coasting mate cannot be expected to command the skill and proficiency that would be required of a competent first officer of a ship, bound upon a long and perilous voyage to a remote part of the globe. No error, therefore, either in law or fact, appears from the record on this branch of the case.

V. The law is now well settled, that disaster, caused by a peril insured against, as stranding or collision, resulting from the negligence of the master or mariners, is covered by a policy of marine insurance. *Liverpool Steam Co.* v. *Phoenix Ins. Co.*, 129

U. S. 397; *Orient Ins. Co.* v. *Adams*, 123 U. S. 67; *General Mutual Ins. Co.* v. *Sherwood*, 14 How. 351; *Waters* v. *The Merchants' Louisville Insurance Co.*, 11 Pet. 213; *Whorf* v. *Equitable Marine Insurance Co.*, 144 Mass. 68; *Nelson* v. *The Suffolk Ins. Co.*, 8 Cush. 477; *Lawton* v. *The Sun Mutual Ins. Co.*, 2 Cush. 500; *Copeland* v. *New England Marine Ins. Co.*, 2 Met. 432; *Street* v. *Augusta Ins. & Banking Co.*, 12 Rich. 13, S. C. 75 Am. Dec. 714; *St. Louis Ins. Co.* v. *Glasgow*, 8 Mo. 713, S. C. 41 Am. Dec. 661; *Enterprise Ins. Co.* v. *Parisot*, 35 O. St. 35; *Henderson* v. *Western Marine and Fire Ins. Co.*, 10 Rob. 164; *Busk* v. *Royal Exchange Assurance Co.*, 2 B. & A. 73; *Walker* v. *Maitland*, 5 B. & A. 171.

VI. When loss from barratry of the master is no part of the risk taken, as in this case, it becomes necessary to distinguish between barratrous acts and acts of negligence, or misconduct not fraudulent, to determine the proximate cause of the disaster; whether it is the direct result of a peril insured against, as stranding, or whether culpable conduct in its nature barratrous, that results in stranding, is the real cause. *Causa proxima non remota spectatur.* Stranding may be the apparent cause, but barratry the real cause. So, in determining the proximate cause, the conditions under which the stranding came about must be considered; and if it cannot be accounted for, but from conduct seemingly designed to produce that result, the conclusion logically follows that design was the proximate cause after all. If, however, the conduct indicating the design be shown to be the act of an insane person, whose reason has departed, then responsibility for the act is excused, and in contemplation of law is not barratrous. It matters not from what cause the insanity comes, nor how permanent it may be. It may result from excessive drinking of spirits, as delirium tremens; or it may come from being deprived of such drinks; or from exposure and loss of sleep; or from the taking of potent drugs. Any one of these causes and many others may dethrone the reason and render a man incapable of rational conduct; and, when so visited, his acts are not those of a responsible person, and bind neither him nor his principals, although, such acts, if done by a sane person, would be

criminal. *Lawton* v. *Ins. Co.*, *supra; United States* v. *Drew*, 5 Mason, 28.

VII. The master, in this case, sailed from Boothbay on the 18th of March, 1886, for Annapolis, Md., and on the 19th encountered a storm of wind, rain, hail and snow, that lasted until midnight of the 21st. Throughout the storm he had no sleep. As the storm wore on it developed into a gale, and the brig was damaged in her sails, and had her rudder-post split, although that was not known until the forenoon of the 22d. Early in the morning of that day, the master, having made Thatcher's Island light, seeing indications of better weather, directed the mate, if the wind came in to the west or southwest, to make sail for Cape Cod lights, and if possible fetch through the south channel and go to sea; and went below for nourishment and sleep. He says that being threatened with fever and ague, contracted in southern latitudes, he took a dose of quinine, fifteen grains, and laid down upon the lounge for sleep; that he has no recollection of anything after that until he found himself in the life-saving station on Cape Cod.

After the master went below, the wind came westerly, the weather cleared, the sea became smooth, but had a heavy swell and strong undertow. The mate made sail, as directed, and headed the brig off the land. The mainsail had been split in the gale, and without it and for the want of it, as the mate supposed, the vessel steered badly. She would hold her course steadily for awhile, and then, without apparent cause, other than the want of her mainsail, would come into the wind and shake her sails. She continued in this fashion until, along in the middle of the forenoon, the captain of a tug hailed the mate: "Your rudder is gone." The mate thereupon went down over the stern in a bowline and found the rudder-post split, so that the wheel had no control over the rudder, and he, not being able to repair the damage, sent for the master to come on deck. The steward called him, and he replied: "All right, I will be up," but did not move. In the course of a half-hour, the steward called him again; he replied: "All right, all right, I will be up there," but did not get up. The steward being directed to call him the third time, seeing

that something was wrong, pulled him off the lounge, got him on his feet, put his overcoat onto him, and helped him on deck about noon. He took the ship's glasses and began to look around. A seaman says: "He acted like a man who was dizzy,—seemed out of his head." He ordered up the topmast stay-sail, being told the rudder was gone. That brought the vessel into the wind and headed her for the shore. The mate ordered it down, thereupon, the master threatened the crew with the penalties of mutiny and ordered it up. Two tugs successively offered aid, but the master refused both. The captain of one told him that his rudder was broken and that his vessel would not steer, he replied that he knew all about that and did not want any of his help. He refused to eat any dinner, but went below and got a muffler, and the steward helped him wind it about his neck. He remained in charge of the deck until the brig stranded on Peaked Hill Bar, on the back side of Cape Cod, at about three o'clock in the afternoon, under sail and without having let go her anchors. Witnesses from other vessels in the vicinity report the brig as heading in all directions, as the sails that went up and down might steer her. The testimony is conflicting as to what took place on board the brig after the master came on deck, but indicates the conditions before stated. The evidence shows that the master seemed wrong for two or three days after the disaster; that he acted strangely, although he assumed the charge of the wreck. There is no evidence of the smell of liquor about the master, nor that he had drank any, other than what might be inferred from finding two or three empty bottles in his cabin, supposed to have once contained it.

It was contended at the trial that the master was drunk and therefore responsible for the stranding; and, although the court instructed the jury that drunkenness of the master was no defense to the action, the jury found specially, that it was not the proximate cause of the disaster.

Now drunkenness *per se* was an immaterial issue in the case. As an abstract rule of law the instruction was correct; but consider the instruction to relate to such conduct of the master as shown in this case, and it may be or may not be correct. Its

correctness depends upon the construction given to the acts of the master. If they show design to strand the vessel, then drunkenness does not excuse them, and they are a defense, and the drunkenness of the master becomes immaterial. If they fail to show design, but only negligence, as bad seamanship or mistake, then drunkenness is no defense. Intoxication may cloud the brain, dull the perception, confuse the mind, and impair the judgment, and still not absolve the insurer from paying a loss resulting from the misconduct of a ship-master, while in that condition, not shown to be criminal. Bad seamanship of a drunken master counts for no more than bad seamanship of a sober man in cases of this sort. The test is: Was the act wilful, and does it indicate fraud? If yes, no matter whether done by a sober man or an intoxicated man, the crime is the same. Insanity, only, can excuse it.

It is not pretended in defense but that the master was either drunk or insane. Either responsible or excusable, as the issue may be found. That was the issue tried by the jury, and they negatived the former. It follows, therefore, that the general verdict for the plaintiff stands upon the fact of the master's temporary insanity. And, the more closely the evidence is studied, the more rational the verdict appears to be. In the first place, it is incredible that a sane master, on the outside of Cape Cod, in March, without mainsail or rudder, would have attempted either to go to sea or make Provincetown harbor against a head wind and ebb tide; especially, when tugs were at hand and offered assistance. It is also equally incredible that a sane master, in broad day, in the presence of other vessels, would sail his vessel straight for the shore, and strand her without any attempt to shorten sail or use his anchors swinging at the bows. The circumstances of the stranding point to design as the cause, but not the design of a rational man.

The master rode out a storm from the night of the 19th, until the morning of the 22d, with little sleep on the night of the 19th, and none on the nights of the 20th and 21st. During this time he had taken little nourishment, and on the morning of the 22d, being threatened with fever and ague, to which he was subject, took 15

grains of quinine, not an extraordinary dose for persons afflicted with that disease, and, without food, laid down to sleep. On being called twice, he answered, but rose not. At the third call, the steward found him "wrong," pulled him off the lounge, got a coat on him and helped him on deck. He was told of the disabled rudder, but did not seem to comprehend it. He appeared dizzy,—like a man out of his head. He refused aid from two tugs that successively offered to relieve his peril. He ordered sail, heading the vessel for a dangerous shore. When that sail was shortened by the crew, who must have seen the danger, he charged them with mutinous conduct, and ordered the sail reset; and finally, he sailed the brig onto a bar of sand, in full view, on the dangerous shore of Cape Cod, where no sane man would have put her, unless he were a knave. He had to be coaxed from his vessel on a life-boat, and for two or three days seemed unnatural while at the life-saving station. This whole conduct and demeanor of the master is so unreasonable and unnatural, and the evidence shows such insane conduct, that the court cannot say that the verdict was wrong, and that the acts of the master, resulting in the stranding of his brig, were those of a rational mind.

VIII. Barratry of the mariners was a peril insured. If, therefore, the conduct of the mate in neglecting to assume command in season to prevent the stranding, when it had become plain that the master was incapacitated and incompetent for command, be considered culpable negligence, or fraudulent even, still, the insurance of the plaintiff will hold.

Had the vessel been lost from the fraud, or crime of the mate, while the master was competent and in command, the insurance would have become payable to the plaintiff, because the vicious conduct of the mate was a peril covered by the policy, and a risk that had been paid for. He bore no confidential relation to the owners. They had neither appointed him to the command of their ship, nor made him their agent. Necessity clothed him with cumulative duties, but he still retained the station and grade affixed to him by the ship's papers. He was still mate,—mate in command, acting master *pro hac vice*. He still

retained his lien as a mariner for his wages, enforceable in the admiralty. *The Brig George*, 1 Sum. 151; *Reed* v. *Chapman*, 2 Stra. 937; *The Favorite*, 2 Rob. Adm. 192; *Tate* v. *Protection Ins. Co.*, 20 Conn. 481; *The Fanny Gardiner*, 5 Bissell, 209; *Copeland* v. *N. E. M. Ins. Co.*, 2 Met. 432. Seemingly *contra*, *Hanson* v. *Royden*, 3 Com. Pleas. 47.

But, if this were not so, although it may have been the duty of the mate to have seasonably assumed command and saved the brig from her peril, his act, if it be considered the act of a master, is not shown to have been of that culpable character to be considered barratrous, and work a destruction of the plaintiff's insurance.

The mate's failure to interfere may have been a breach of duty; but, if it resulted from negligence, from erroneous judgment of duty, it could not have been fraudulent and absolve the insurer. Did he, being aware of the peril, purposely refrain from command to allow a stranding of the brig? If he did, then his act was criminal and barratrous; and if it be considered the act of the master, within the meaning of the policy, then the insurer is discharged from liability under it.

It must be remembered that the verdict finds the vessel to have been seaworthy at the inception of the voyage. The jury were expressly told that, if the brig sailed without a competent mate, she was unseaworthy, and the plaintiff could not recover. The conduct of the mate, before the stranding, is evidence strongly tending to show his incompetency; but on the other hand, the whole evidence satisfied the jury of his competency, and the court considers the verdict sustained by the evidence; so that, assuming the competency of the mate, it is to be considered whether his conduct, after the command had been cast upon him, was simply negligence and not criminal; and it must be noticed, that no motive has been shown to induce a criminal act. It must be considered, too, that the mate was placed in an embarrassing position. It was a delicate matter for him to assume command in contempt of the master's authority, and might result seriously to himself, should he misjudge the matter, and take to himself authority that could not be justified by proof, at the end of the

voyage, when the master's reason might return, and not aware of his own previous condition, accuse the mate of mutinous conduct, as he did do on the deck, when the mate ordered a sail to be lowered that the master had just ordered up. The whole evidence indicates that the mate misjudged his duty, rather than that he wilfully and fraudulently connived at allowing an irresponsible and deranged master to cast the vessel on shore.

The words of Chief Justice Shaw, in *Copeland* v. *New England Insurance Co.*, 2 Met. p. 449, are apposite. He says: "It is very clear, in this case, that the immediate cause of the loss was stranding, * * which is one of the perils insured against; and the case supposed is, that this was caused by the mate in not assuming the command. This default must consist either in a want of judgment in perceiving and determining that the master had become so deranged, or incapacitated, as to authorize and require him to interfere, or in negligence in the performance of his duty, when the case occurred. Such a case may occur in every voyage, and must be considered as one of the contingencies incident to navigation. It may often present questions of great difficulty, in acting on which, mistakes, on the part of the officer second in command, may occur. * * I cannot distinguish the negligence of the mate in the case supposed from his failure in the performance of any other duty as a nautical man. * * For the performance of these duties, we are of opinion that the owners, as between themselves and the underwriters, are not responsible. A contrary doctrine would lead to questions of great difficulty, involving numerous questions of fact, of very difficult proof, as to the skill and seamanship of all the nautical measures taken in the whole conduct of the voyage. Besides, these mistakes of judgment and instances of negligence are incident to navigation, and constitute a part of the perils that attend it; and they can no more be restrained, prevented, or guarded against, by the owners, than by the underwriters. The most cautious foresight can only enable owners to provide a competent crew of officers and seamen at the commencement of the voyage. What reasons, then, are there of justice or policy, what considerations growing out of the nature of this contract, or the relations of the

parties, which should prevent the owners from insuring themselves against this peril?"

IX. Exception is taken to the admission of the master's statement as he was about to go below on the morning of the 22d: "I feel tired and am worn out. I think I will take some quinine and see if I can't get a chance to sleep. I have not,—slept for three days." This was clearly a part of the *res gestae*, and admissible as such.

X. Exception is taken to the testimony of one of the seamen, a man of four years' experience, serving as cook and steward.

Q. "Now I will ask you to state whether there was any thing different from what the mate did that could have been done to keep the vessel from running ashore?

A. No sir. I do not know what could have been done. I do not know that the mate could have done anything else."

The witness was of sufficient experience to give his opinion as to what nautical measures might have been taken to prevent stranding; and to these, the question and answer wholly relate. The weight of the testimony was for the jury. Directly in point is the case of *Union Ins. Co.* v. *Smith*, 124 U. S. 400–423.

XI. Exception was taken to the exclusion of a question put to a physician as an expert on insanity. The question might have been excluded for two reasons.

First, it was complicated and involved, covering a half octavo page, and contained matter not pertinent to expert testimony; and, second, the witness does not appear to have been an expert on insanity. He says: "I have not made it [diseases of the mind—mental diseases] a special study, only as a general practitioner." This is one ground given by the court below for the exclusion of the testimony, and does not require revision here. *Fayette* v. *Chesterville*, 77 Maine, 28.

Motion and exceptions overruled.

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

SARAH R. AMES *vs.* JOSEPH P. SHAW.

York. Opinion February 19, 1890.

Way. Easement. Gates and bars.

A way for agricultural purposes, whether created by grant or adverse use, may properly be subjected to gates and bars not unreasonably established.

The nature of the easement gained determines its character, and not the particular manner of the use that created the right.

ON MOTION.

This was a motion for a new trial on the ground of newly-discovered evidence, in a case submitted to the presiding justice without the intervention of a jury, and in which judgment was ordered for the plaintiff.

The action was case. The plaintiff alleged that the defendant negligently and carelessly left open a gate, which plaintiff had built across a private way over his own land. It was conceded that the defendant was legally entitled to use the private way for agricultural purposes. One of the principal contentions, on the defendant's part, was whether the way could be made subject to gates or bars.

The first count in the declaration is as follows:—

In a plea of the case; for that the plaintiff at York, in the county of York, on the first day of June A. D. 1887, was seized and possessed of a certain farm there situate adjoining the highway and also land of the defendant, across which said farm the defendant then and there had the right to pass and repass with carts and teams from said highway to defendant's said land, doing as little damage as possible.

That the plaintiff's said farm was then and during the days and time hereinafter mentioned, divided into pasture, field and tillage land and occupied and used by the plaintiff for agricultural purposes. That the way over which the said defendant then and there had the right to pass and repass as aforesaid, crosses the said pasture, field and tillage land of the plaintiff, and

between which said pasture, and said field and tillage land the plaintiff then and there maintained a fence to protect his field and tillage land from his cattle, pastured on his said pasture land, and in which said fence at said way, the plaintiff set and provided a suitable and convenient gate-way and gate, through which said gate-way the said defendant could pass and repass as aforesaid, which said fence and gate were necessary and proper to enable the plaintiff to enjoy and use his said farm for the purposes aforesaid.

And the plaintiff avers, that whenever in the reasonable use by the defendant of said right to pass and repass over said way, the said defendant and those claiming under him opened the said gate, he and they were bound to close said gate and not leave the same open to admit the plaintiff's cattle to enter from the plaintiff's said pasture land into the plaintiff's said field and tillage land. And the plaintiff avers that the said defendant, at said York, on said first day of June A. D. 1887, and on divers other days and times between said first day of June and the day of the purchase of this writ, by himself and his servants passing along said way, opened the gate and negligently and carelessly left the same open, whereby the plaintiff was put to great trouble and inconvenience in guarding his said field and tillage land against his cattle aforesaid, and was then and there obliged to close said gate, and was greatly vexed and annoyed in the enjoyment of his premises aforesaid.

There was a second count alleging the gate was wrongfully and wilfully left open by the servants of the defendant.

Plea was the general issue, and a brief statement of special matter of defense that the way was an ancient one, and of necessity; defendant claiming a right to use the way unobstructed by gates, bars or other hindrances; and denying that the gate was necessary to the enjoyment of the plaintiff's premises, etc.

The plaintiff having introduced evidence in support of her title to the land, over which the way ran, and proof of the acts of defendant complained of concerning the leaving open the gate, next claimed that the defendant's right of way originated under a deed of one of her predecessors in title to a predecessor in the

title of the defendant, dated February 14, 1817. The particular clause in the deed thus relied on was as follows: "Lower half of Godfrey's cove pasture, with the privilege of passing and repassing to said premises with carts and horses through said Daniel's land, the most convenient way at all times and seasons doing as little damage as possible."

Other evidence was admitted showing that the premises, over which the way was claimed, were used as a farm for agricultural purposes; that the plaintiff had built a farm-house and barn thereon; enclosed about three acres of the pasture adjacent to the buildings and including the place where the way ran; and erected a slight swing-gate across the way.

The presiding justice ruled, as a matter of law, that the grantor of a way over agricultural land retains the right to erect gates across it in the reasonable use of the land; and found, as matter of fact, the conduct of the plaintiff was reasonable.

The case was argued and decided upon the assumption that the right of way arose under the grant in the deed above recited.

The defendant then moved for a new trial on the ground of surprise and newly-discovered evidence, alleging that he had no knowledge before the trial of the grant of way in said deed, and that he has since discovered that the way created by said deed was entirely different and distinct from the way now used by him, and that his right of way where the new gate stands arose by adverse user.

A report of the testimony taken in support of the motion is omitted.

Woodman and Thompson, for plaintiff.

James Barr Ames, of counsel.

Laches of defendant: *Atkinson* v. *Connor*, 56 Maine, 546, 550; *Hunter* v. *Randall*, 69 Id. 183, 191, and cases cited; *Morgan* v. *Stearns*, 25 Vt. 570; *Weimer* v. *Lowery*, 11 Cal. 104, 113; *Simpkins* v. *Wilson*, 11 Ind. 541; *Shiels* v. *Lamar*, 58 Ga. 590, 594; *Metcalf* v. *Williams*, 104 U. S. 93, 95–6.

Ira T. Drew, *Charles G. Keyes and Rufus P. Tapley*, for defendant.

The deed of February 14, 1817 did not establish this right of way in controversy. The fact is established that the rights of the parties were determined, under an instrument having no relation to them.

Remedy: *Norton* v. *Marden*, 15 Maine, 45; *Starbird* v. *Curtis*, 43 Id. 352; *Millet* v. *Holt*, 60 Id. 169; *Appleton Bank* v. *McGilvery*, 4 Gray, 522; *Quimby* v. *Carr*, 99 Mass. 463; *Talbot* v. *Bank*, 129 Mass. 67.

The power given to the court, to set aside findings is to correct errors and promote justice.

HASKELL, J. The motion is grounded upon evidence tending to establish a way by adverse use, distinct and separate from the one described in the Raynes deed that was supposed, at the trial, to be the way in dispute.

Suppose this contention be established, the respective rights of the parties are the same. The deed grants an agricultural way, and the evidence reported shows no more than a way of the same kind, a way for agricultural purposes. It is true that a way gained by adverse use gives rights commensurate with the adverse use, but if the use be for agricultural purposes only, then the way becomes a way for that use, a use to be exercised in a reasonable manner; and reasonable use of a way for agricultural purposes, whether created by grant or adverse user, may properly be subjected to gates and bars not unreasonably established. The way may be gained without being so obstructed at all, but it is nevertheless a way for a particular use, and in the enjoyment of that use, unreasonable obstructions only are prohibited. The nature of the easement gained determines its character, and not the particular manner of the use that created the right. *Short* v. *Devine*, 146 Mass. 119; *Bean* v. *Coleman*, 44 N. H. 539; *Bakeman* v. *Talbot*, 31 N. Y. 366; *Brill* v. *Brill*, 108 N. Y. 511; *Maxwell* v. *McAtee*, 9 B. Mon. 20.

Since the case shows the defendant entitled to a way for agricultural purposes only, it is immaterial whether his rights arise under the deed or by adverse user, and a new trial could do him no good. The decision in either case would be the same. The

plaintiff did not unreasonably obstruct the defendant's way, and he must use it subject thereto.

Motion overruled.

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

HENRY S. CRAVEN, and others, *vs.* MABEL O. TURNER.

York. Opinion February 20, 1890.

Removal of causes. Citizenship. Jurisdiction. Act of Congress, March 3, 1875; *March* 3, 1887; *August* 13, 1888. *Pleas in abatement. R. S., c.* 104, § 6.

When a petition for removal of an action to a circuit court of the United States is filed in a case pending in the state court, on the ground of diversity of citizenship of the parties, the only question then for the state court to determine is the question of law whether, admitting the facts stated in the petition to be true, it appears on the face of the record, including the petition and pleadings down to that time, that the petitioner is entitled to a removal.

If an issue of fact is raised upon the petition that issue must be tried in the circuit court instead of the state court.

By the act of congress of March 3, 1887, (amended by act of August 13, 1888) the petition may be filed, "at the time, or any time before the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff."

Pleas in abatement, or other dilatory pleas which do not reach the merits of the cause, are not pleas or answers to the declaration within the meaning of the act; and, until they are disposed of, the time of filing a petition for removal has not expired.

A cause between citizens of different states, neither of whom is a resident or citizen of the state where the action is brought, may be removed into the circuit court of the United States for that district, although such court could not have jurisdiction of an original suit between the parties.

ON EXCEPTIONS.

The defendant, a non-resident of this state, filed a petition and bond under the laws of the United States for the removal of this action to the United States circuit court, on the ground of the

diversity of citizenship of the parties to the cause. The court having denied the petition, the defendant excepted.

The points of the case are fully stated in the opinion.

William D. Turner, *M. A. Safford and A. L. Allen*, with him, for defendant.

G. C. Yeaton, for plaintiff.

Exceptions being to a ruling which did not finally dispose of the case in the court below are prematurely here, and should be dismissed.

Petition rightfully dismissed because not seasonably filed. *Warehouse Co.* v. *Loomis*, 122 Mass. 431; *Malley* v. *Ins. Co.*, 51 Conn. 486; *Preston* v. *Ins. Co.*, 58 N. H. 76; *Gregory* v. *Hartley*, 113 U. S. 742; *Exchange* v. *Tel. Co.*, 16 Fed. Rep. 289; *Wedekind* v. *Pac. Co.*, 36 Fed. Rep. 279; Dillon Rem. Causes, § 64.

Neither plaintiff nor defendant reside in the district of Maine, hence U. S. circuit court for this district has no jurisdiction. *Tiffany* v. *Wilce*, 34 Fed. Rep. 230.

FOSTER, J. Real action to recover a certain messuage in the town of Kittery in this state, with damages alleged at five thousand dollars. The action was returnable at the May term of the supreme judicial court, for York county, at which the defendant appeared specially, and filed a motion to dismiss for want of proper service of the writ. Thereupon the court ordered notice of the pendency of the suit returnable at the September term following. At that term a general appearance was entered for the defendant, and the case was continued to the January term, 1889. On the first day of that term, a petition and bond were filed by the defendant for the removal of the action to the circuit court of the United States, next to be held within and for the district of Maine, on the ground of the diversity of citizenship of the parties to the cause.

The petition embraced the requisite averments in a case of removal on the ground of diversity of citizenship. It set forth the fact that the controversy was wholly between citizens of different states and which could be fully determined as between them,

alleging that the defendant was, at and before the commencement of the suit and ever since had been, and then was a citizen of the state of Mississippi, and a non-resident of this state, and that the plaintiff was a citizen of Massachusetts,—and praying that no further proceeding be had in the cause except an order for removal, and the acceptance and approval of the bond filed in the cause.

The court approved the bond but refused to grant the prayer for removal of the cause to the circuit court.

To the order of the court, denying the petition for removal, exceptions were duly taken and allowed.

According to the practice in this state, these exceptions to the order of the justice presiding, refusing the petition for removal of the suit to the circuit court, are properly before this court. The question of law raised by these exceptions is to be determined, in the first instance, by this court, subject, however, to revision on writ of error by the supreme court of the United States. *Edwards Mfg. Co.* v. *Sprague*, 76 Maine, 53, 63. If the case is one embraced within the act of congress, and the proper petition, affidavit and bond are filed in the "state court at the time, or any time before the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending," then it is "the duty of the state court to accept said petition and bond, and proceed no further in such suit." Act of congress of March 3, 1887, § 3. In such case, remarks Gray, C. J., in *Stone* v. *Sargent*, 129 Mass. 503, 506, "the jurisdiction of the federal court over a cause in which the conditions of the act of congress have been complied with cannot be defeated by any action or omission of the state court." If the suit is removable, and the defendant has complied with the statute pertaining to the removal of causes into the circuit court of the United States, a judgment obtained by the plaintiff in the state court would be fruitless. *C. & O. R. Co.* v. *White*, 111 U. S. 134.

In the present case, the petition sets forth the conditions re-

quired by the act of March 3, 1887,—it stated in positive terms the nature of the action, wherein the matter in dispute exceeded two thousand dollars; that the controversy was wholly between citizens of different states, and which could be fully determined as between them; and that the defendant, at the beginning of the suit and at the time when the petition was filed, was a citizen of a different state from the party plaintiff. With these facts existing, if the petition was seasonably filed, the cause was one which was properly removable from the state to the circuit court. All issues of fact arising upon the petition for removal are to be tried in the circuit court. The state court is only at liberty to inquire whether, on the face of the record, a case has been made to appear which requires it to proceed no further. *Stone* v. *South Carolina*, 117 U. S. 430; *Carson* v. *Hyatt*, 118 U. S. 279; *Carson* v. *Dunham*, 121 U. S. 421; *Railway Co.* v. *Dunn*, 122 U. S. 513.

In the case last cited, it was held that when a petition for removal of the cause to a circuit court of the United States is filed in a case, pending in the state court, the only question left for the state court to determine is the question of law whether, admitting the facts stated in the petition to be true, it appears on the face of the record, including the petition, the pleadings and the proceedings down to that time, that the petitioner is entitled to a removal; and that if an issue of fact is raised upon the petition, that issue must be tried in the circuit instead of the state court.

The court, also, took occasion to review some of the earlier decisions of the supreme court upon this question, and which, as there remarked, "had not always been as clear and distinct as they might have been," and affirmed the doctrine laid down in *Stone* v. *South Carolina*, *supra*, and with several subsequent decisions,—that it was error in the state court to proceed further with the suit after the petition for removal was filed, because the circuit court alone had jurisdiction to try the questions of fact involved. "The theory on which it rests," the court say in discussing this question, "is, that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished." From that time

the state court is "without jurisdiction" to proceed further in the suit. *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 141; its rightful jurisdiction comes to "an end." *Railroad Co.* v. *Koontz*, 104 U. S. 5, 14; or, as was said in *Steamship Co.* v. *Tugman*, 106 U. S., 118, 122, "the jurisdiction of the state court absolutely ceased, and that of the circuit court of the United States immediately attached."

But the authorities that establish the foregoing principle in reference to the termination of the jurisdiction of the state court, also hold that, "a state court is not bound to surrender its jurisdiction of the suit on a petition for removal, until a case has been made which on its face shows that the petitioner has a right to the transfer;" and that "the mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the state court in the case ends, and that of the circuit court begins." *Stone* v. *South Carolina*, *supra*; *Railroad Co.* v. *Koontz*, *supra*; *Crehore* v. *Ohio & Miss. Railway Co.*, 131 U. S. 240, 243.

In the case now before us, the petition, as we have remarked, embraced the requisite averments, and was accompanied by a bond conformable to the statute, affording ample security and protection to the plaintiff in case the circuit court should decide that the cause was wrongfully or improperly removed thereto. Upon the filing of the petition and bond, the jurisdiction of the state court ceased; and it was the duty of the court to proceed no further in the cause, provided this was done within the time mentioned in the statute.

We think the petition was seasonably filed.

Under the act of March 3, 1875, such petition had to be filed "before or at the term at which said cause could be first tried and before the trial thereof." The decision of *Dresden School District* v. *Ætna Ins. Co.*, 66 Maine, 370, was rendered while that act was in force. Since then, however, by the act of March 3, 1887, amended by the act of August 13, 1888, (25 St. at Large,

433) the law in relation to the time of filing such petition has been changed, and the petition may be filed, under the existing law, in the state court, "at the time, or any time before the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff."

There is no general law of the state, or rule of this court, fixing the time in which the defendant shall answer or plead to the plaintiff's declaration. The defendant may, at any time before trial, file a plea of the general issue, when there has been no special order of the court for pleadings to be filed at an earlier date. The general issue is the plea which challenges the merits of the plaintiff's declaration, and under which the real struggle is to see which party can show the better title in himself. True, if the defendant, instead of meeting the plaintiff upon the merits under the plea of *nul disseizin* and trying the title under that issue, desires to interpose a special plea of non-tenure, or disclaimer, it must be done, according to the practice in this court, within the time allowed for filing pleas in abatement,—within the first two days of the return term;—but in either case the *statute* authorizes the court in its discretion, even in such cases, to enlarge the time and allow the defendant to make such special answer. R. S., c. 104, § 6. *Ayer* v. *Phillips*, 69 Maine, 50; *Hatch* v. *Brier*, 71 Maine, 542, 543. Moreover, it has been held in the federal courts that pleas in abatement, or other special pleas which do not reach the merits of the cause, are not pleas or answers to the "declaration" within the meaning of the act; and that until such pleas are disposed of, the time for filing a petition for removal has not expired. *Lockhart* v. *Memphis & L. R. Co.*, 38 Fed. Rep. 274; *McKeen* v. *Ives*, 35 Fed. Rep. 801; *Gavin* v. *Vance*, 33 Fed. Rep. 84; *Whelan* v. *New York L. E. & W. R. Co.*, 35 Fed. Rep. 849; *Tenn. Coal, Lumber & Tan-Bark Co.* v. *Waller*, 37 Fed. Rep. 545.

But the plaintiff contends that, upon the face of the record, the defendant seeks for the removal of the cause to a district in which neither the plaintiff nor defendant resides, and, therefore, that the circuit court can not take cognizance of the suit.

It is not disputed that the state court, at the time the petition for removal was filed, had jurisdiction over the parties, as well as the subject matter of the suit. There had been a general appearance by the defendant. The real estate in controversy was situated within the jurisdiction of the court.

The question is not whether the circuit court could, by original process, take cognizance of a suit brought against a party in a district of which he is not an inhabitant,—but whether the action in such case is removable to the circuit court, within the district where such suit is brought, by proceedings other than original.

A careful examination of this question leaves no doubt in our minds that the action in such case is removable. The great weight of authority in the federal courts is in harmony with this view, and with this construction of the act of March 3, 1887, notwithstanding a different construction was given in the case of *County of Yuba* v. *Pioneer Mining Co.*, 32 Fed. Rep. 183, in which it was held, that the circuit court could not take cognizance of a suit brought against a party, in a district of which he was not an inhabitant; and that the removal of a suit was not authorized from a state court to a circuit court of the United States, which could not have been originally brought in that court.

But this decision has been criticised and disapproved in the more recent cases of *Fales* v. *Chicago & C. R. Co.*, 32 Fed. Rep. 673; *Short* v. *R. R. Co.*, 33 Fed. Rep. 115; *Gavin* v. *Vance*, 33 Fed. Rep. 84,—denied in the still later decisions of *Loomis* v. *N. Y. & Cleveland Gas Co.*, 33 Fed. Rep. 353; *St. Louis, V. & T. H. R. Co.* v. *Terre Haute & I. R. Co.*, 33 Fed. Rep. 385; *Pitkin*, &c., *Co.* v. *Markell*, 33 Fed. Rep. 386,—and expressly overruled in the circuit court of the United States for the northern district of California by Justice Field in the case of *Wilson* v. *Telegraph Co.*, 34 Fed. Rep. 561. See also *Claflin* v. *Ins. Co.*, 110 U. S. 81; and the very recent case of *Sheffield First Nat. Bank* v. *Merchants Bank*, (C. C. N. D. Ga.) 37 Fed. Rep. 657, in which it is held expressly, that a cause between citizens of different states, neither of whom is a resident or citizen of the state where the action is brought, may be removed into the circuit court of the

United States for that district, although such court would not have jurisdiction of an original suit between the parties.

Furthermore, the defendant is not the party, in the present case, raising the objection to the jurisdiction of the court. He has been brought into this jurisdiction, and the jurisdiction of the circuit court for this district, by the plaintiff's act in bringing the suit in this court. Had he raised the objection, it would not have been available at this stage of the proceedings. He has, by his general appearance, and filing his petition and bond, waived all objection to the jurisdiction, even if such objection had otherwise been open to him.

Thus, in *Kelsey* v. *Penn. R. R. Co.*, 14 Blatch. 89, the court say: "The defendant having appeared and answered generally in the action, can not now insist that this court never acquired jurisdiction because process was not served upon it in the district whereof it was an inhabitant at the time of service. Jurisdiction of the person of a defendant may be conferred by consent or waiver." And in *Kansas City & T. R. Co.* v. *Interstate Lumber Co.*, 37 Fed. Rep. 3, the court held, that the fact that both parties were non-residents of the district to which the cause was removed from the state court, did not oust the circuit court of the United States of jurisdiction, where the cause was removed by the non-resident defendant; and that the fact that no suit could have been originally commenced against him in that district, did not prevent the removal, notwithstanding the right of removal is given by act of March 3, 1887, in suits of which the court would have original jurisdiction, inasmuch as the objection to the jurisdiction of the court for that reason is a mere personal privilege, which he could waive,—and overruling *Harold* v. *Mining Co.*, 33 Fed. Rep. 529.

In *Ex Parte Schollenberger*, 96 U. S. 369, Chief Justice Waite, in construing the provision in the act of 1875, says: "The act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases."

In harmony with this doctrine, the court, in *Sayles* v. *Ins. Co.*, 2 Curtis, C. C. 212, held that when a defendant not an inhabitant of or found within the district was sued in a state court, the fact that he appeared and gave bond to remove the cause into the circuit court, was a waiver of his personal privilege and gave the circuit court jurisdiction. *Toland* v. *Sprague*, 12 Peters, 300, 331.

The case was properly removable to the circuit court, and the entry must be

Exceptions sustained.

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

INHABITANTS OF CHARLOTTE *vs.* PEMBROKE IRON WORKS.

Washington. Opinion February 21, 1890.

Ways. Nuisance. Rights and remedy of towns. Prescription. R. S., c. 18, § 95.

As incident to the duties which devolve upon towns and other municipalities as auxiliaries of the sovereign power in the administration of civil government, they have the supervision and control of public ways and streets within their borders, and are to preserve and maintain the rights of the public therein.

These rights of passing upon such ways and streets are public rights, and the whole community have an equal interest and right to all the privileges and advantages of the same, and an equal right to complain of any infringement upon such rights. Encroachments upon such rights which amount to public nuisances, may be prosecuted in behalf of the public.

No length of time, unless there be a limit by statute, will legalize a public nuisance.

A town, suffering special damage from a public nuisance in relation to the highway which it is bound to maintain, may sustain an action for the recovery of such damages against the party maintaining such nuisance.

The statute (R. S., c. 18, § 95) in relation to buildings and fences fronting upon ways and streets, has no application where the act complained of consists in maintaining a dam, whereby the water is caused to overflow the highway, and injure the same.

ON REPORT.

This was an action on the case to recover damages of the defendants for erecting and maintaining a dam on the Pemaquam river, in 1874 and ever since, whereby the county road in the plaintiff town was overflowed, the road-bed injured, and the plaintiffs thereby put to expense for its repair, etc.

The case was referred to a referee who made a report in favor of the plaintiffs,—awarding the sum of five dollars as damages. He also specially reported as follows:

"But I further find and award that the defendants and their grantors have flowed the water upon the road in the same manner and to the same extent, as during the time covered by the plaintiffs' declaration, for more than twenty years prior to the time embraced in this suit; and if, in the opinion of the court, they can acquire a right by prescription to do so as against the plaintiff town, then I determine that the defendants have such right, and that the plaintiffs recover nothing, etc. * * *"

The question, as to which party was entitled to judgment on the referee's report, was submitted by agreement to the decision of the law court.

Rounds and McKusick, for plaintiffs.

McNichol, for defendants.

FOSTER, J. The defendants and their grantors had maintained a dam on the Pemaquam river, in the town of Charlotte, on account of which the waters in the outlet of Round pond were raised so that, during portions of the year, they overflowed the highway passing near the foot of the pond, and washed out, gullied and otherwise injured the same, thereby causing the town to incur expenses from year to year in repairing the same. The water had overflowed the road in the same manner and to the same extent, as during the time covered by the plaintiffs' declaration, for more than twenty years prior to the time embraced in this suit.

The only question presented in this case is, whether the defendants have acquired a prescriptive right thus to overflow and

injure the highway which the town was bound by law to maintain and keep in a condition safe and convenient for public use.

We are satisfied that, as against the town or the public, the defendants have acquired no prescriptive right, which, from mere lapse of time, could render the acts complained of legal, and thus authorize their continuance.

The cases are exceptional which hold that the rights of the municipality or of the public may be lost either by non-user, or by adverse possession, where no statutory enactment intervenes to govern the common law as understood and applied with reference to public rights. The doctrine that to the sovereign power the maxim, "*nullum tempus occurrit regi*," applies, has long been understood. It is a maxim of the common law which we have inherited from our English ancestors, substituting the public or state for the king. Towns and other municipalities are regarded as public agencies, exercising, in behalf of the state, public duties in the administration of civil government, and as such are but the auxiliaries of the sovereign power.

Highways and streets, where there is no special restriction when acquired, are for the public use and not alone for the people of the town or municipality in which they are located. The use is none the less for the general public because they are situated within such municipality, and because the legislature may have given the supervision and control of them to the local authorities. The whole community have an equal interest and right to all the privileges and advantages of the public ways, and have an equal right to complain of any infringement upon such privileges and advantages.

The rights which the public have are of an easement merely, or the right of passing upon such ways. Although the easement is a public one, and the town, in the distribution of the public burdens and as incident to its recognized duties in connection with the government of the state, is bound to preserve and maintain such easement, yet it cannot be considered in any legal point of view as the easement or property of the town. The town is but the trustee for the public in reference to such easements. "To the commonwealth here," says Chief Justice Gibson,

in *O'Connor* v. *Pittsburg*, 18 Penn. St. 187, "as to the king in England, belongs the franchise of every highway as a trustee for the public." Unauthorized obstructions or erections, which encroach upon these rights, are deemed public nuisances and may be prosecuted in behalf of the public. No length of time, unless there be a limit by statute, will legalize a public nuisance, and in the absence of a grant from competent authority, no presumption from mere lapse of time can be made to support a nuisance which is an encroachment upon the public right.

Principles analogous to the question now before us have been decided by the courts, and whenever they have arisen the current of authority is in one direction.

Thus in the very early case of *Arundel* v. *McCulloch*, 10 Mass. 70, which was for trespass in removing a bridge built across a navigable stream, where it had remained for fifty years, the court held that "public rights cannot be destroyed by long continued encroachments; at least, the party who claims the exercise of any right inconsistent with the free enjoyment of a public easement or privilege must put himself upon the ground of prescription, unless he has a grant or some valid authority from the government; and a right by prescription does not exist in this case."

In Pennsylvania, several cases have arisen involving the principle under discussion, and in *Com.* v. *Alburger*, 1 Whart. 469, 488, the supreme court of that state thus gives expression upon this subject: "These principles pervade the laws of the most enlightened nations, as well as our own code, and are essential to the protection of public rights, which would be gradually frittered away if the want of complaint or prosecution gave the party a right. Individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have an interest sufficient to make them vigilant. But in public rights of property, each individual feels but a slight interest, and rather tolerates even a manifest encroachment than seeks a dispute to set it right."

The same doctrine is discussed and affirmed in *Barter* v. *Com.*, 3 Penn. (Pen. & Watts) 253, where the question arose in relation to the ownership of wells in a public street; *Com.* v. *McDonald*,

16 Serg. & Rawl. 390; and *Ring* v. *Schoenberger*, 2 Watts, (Pa.) 23, claim of ownership in a public square; *Penny Pot Landing Case*, 16 Penn. St. 79; *Phila.* v. *Railroad Co.*, 58 Penn. St. 253. In New Jersey, in *Jersey City* v. *Morris Canal Co.*, 1 Beasl. 547, where the doctrine of prescriptive right as against the public was rejected and characterized as eminently disastrous to the public interests; *Smith* v. *State*, 3 Zab. 712. In Rhode Island, in *Simmons* v. *Cornell*, 1 R. I. 519. In New York, in *St. Vincent Orphan Asylum* v. *Troy*, 76 N. Y. 108; *Mills* v. *Hall*, 9 Wend. 315, wherein the court held that "there is no such thing as a prescriptive right or any other right to maintain a public nuisance;" *Milhau* v. *Sharp*, 27 N. Y. 611. In Mass., see *Stoughton* v. *Baker*, 4 Mass. 522; *Com.* v. *Blaisdell*, 107 Mass. 234, 235. And see *Franklin Wharf* v. *Portland*, 67 Maine, 46, 55; *Dwinel* v. *Barnard*, 28 Maine, 554, 570; *Knox* v. *Chaloner*, 42 Maine, 150, where it was said that a public nuisance can never be legitimated by lapse of time.

There are decisions which hold that the inclosure and occupation of land within the limits of a highway for twenty years under a claim of right give title by prescription to the land so inclosed and occupied, as against the public. Such are the cases of *Knight* v. *Heaton*, 22 Vt. 480; *Beardslee* v. *French*, 7 Conn. 125; *Rowan's Exrs.* v. *Portland*, 8 B. Mon. (Ky.) 232; *Webber* v. *Chapman*, 42 N. H. 326, and others to which we have no occasion to allude, as they have no application to the decision of this case.

In *Cutter* v. *Cambridge*, 6 Allen, 20, where it was held that such occupation or inclosure under a claim of right gave the owner an absolute right as against the public, the decision of the court was based upon the statute provision of that commonwealth which was held to be an innovation upon the common law. The language of that statute, the court say, recognizes as an existing rule of law, that fences maintained under a claim of right for forty years within the limits of the highway gave the owner an absolute right to continue them there as against the public.

A similar statute exists in our own state (R. S., c. 18, § 95) in which it is provided that where the limits of ways, streets, or

land appropriated to public use, *can* be ascertained by records or monuments, a period of at least forty years must elapse to give any adverse right of possession, and "buildings or fences" fronting upon such land are the only erections mentioned in the statute which will be deemed the true boundaries, even to give an adverse right of possession, as against records or monuments; and that no adverse rights can be acquired, as against the public, in such ways or lands where the boundaries thereof *can not* be made certain by records or monuments, without such erections existing for a period of at last twenty years.

This statute, remark the court, in *Stetson* v. *Bangor*, 73 Maine, 357, 359, "is the only one in this state which in this respect limits the common law force of the maxim, *nullum tempus occurrit regi*."

In the case before us, there was no such occupancy of the way by any fences or buildings as would give the defendants any rights under the statute. The acts of the defendants in flowing the highway constituted a public nuisance, and, as we have said, the maintaining of a public nuisance for twenty years does not afford any prescriptive right to maintain it. In *New Salem* v. *Eagle Mill Co.*, 138 Mass. 8, the plaintiffs complain of a public nuisance by reason of which they have suffered special damages, as in *Calais* v. *Dyer*, 7 Maine, 155; *Andover* v. *Sutton*, 12 Met. 182, and *Freedom* v. *Weed*, 40 Maine, 383. The referee by his report has awarded such damages as in his judgment the plaintiffs had sustained.

It may be proper to state that, although this action was brought in 1881, the long delay in determining the rights of the parties should not be attributed to the court, for though entered in the law court in 1884, it was not submitted to the court until June, 1889.

Judgment of the referee affirmed.

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

ABIAL LIBBY *vs.* FRANK E. TOBEY.

Sagadahoc. Opinion February 21, 1890.

Corporation. Stockholder. Creditor. Unpaid stock. R. S., c. 46, §§ 45, 46, 47.

When a judgment creditor of a corporation seeks to recover the amount of such judgment or any part thereof, from a stockholder who has not fully paid for his stock, he must bring his case within the provisions of R. S., c. 46, §§ 46, 47, by showing:—

(1.) A lawful and *bona fide* judgment, recovered within two years next prior to his action against the stockholder.

(2.) That the defendant subscribed for or agreed to take stock in the corporation, and has not paid for the same as defined in § 45.

(3.) That his original cause of action was contracted during the defendant's ownership of such unpaid stock.

(4.) That the proceedings to obtain such judgment against the corporation were commenced during the defendant's ownership of such unpaid stock, or within one year after its transfer was recorded on the corporation books.

To relieve a stockholder from liability for stock subscribed, or agreed to be taken, payment therefor must be made *bona fide* in cash, or in some other matter or thing at a *bona fide* and fair valuation thereof.

Payment of stock in anything except money will not be regarded as payment, except to the extent of the true value of the property received in lieu of money.

The individual liability of a stockholder for the debt of the corporation depends entirely upon express provisions of statute law. There being no contract express or implied between him and the plaintiff, the statute is to be construed strictly.

The remedy now provided by statute exists only against those "who have subscribed for or agreed to take stock in said corporation and have not paid for the same," etc.

The statute contemplates a transaction or contract with the corporation in accepting, subscribing for, or agreeing to take stock, and not one between individuals in the purchase of stock in open market.

A purchaser of stock assessable upon its face, or by the charter or by-laws of the corporation and payable by instalments, is liable for the amount remaining unpaid as if an original subscriber, and chargeable with notice of any such unpaid balances, whether purchased of the corporation or in open market.

The defendant having transferred all the stock subscribed for by him, except four hundred shares, prior to the date when the plaintiff's original cause of action against the corporation was contracted, is liable in this action only for the balance remaining unpaid upon those four hundred shares, and not upon the additional one thousand shares which he purchased in open market, and which were issued by the corporation as fully paid stock.

ON REPORT.

This was an action on the case, under R. S., c. 46, §§ 46 and 47, to recover from the defendant the amount of a judgment obtained against the Deer Isle Silver Mining Company, a corporation existing under the laws of this state, and in which the defendant was a subscriber and owner of stock not fully paid.

(Declaration.)

"In a plea of the case; for that the said plaintiff on the twenty-ninth day of May, A. D. 1886, by the consideration of the justices of the superior court of the county of Cumberland, at a term of said court begun at Portland, on the first Tuesday of May aforesaid, recovered judgment against the Deer Isle Silver Mining Company, a corporation established by law and having a place of business in said Portland, for the sum of five thousand six hundred thirty-four dollars and sixty-nine cents, debt or damage, and one hundred sixteen dollars and ten cents costs of suit as by the record thereof, now remaining in said court, appears, which said judgment is in full force, and not reversed, annulled or satisfied.

And the plaintiff avers that said judgment was rendered in an action of assumpsit on a contract of affreightment, made and entered into by the said Deer Isle Silver Mining Company and the plaintiff, on the eighteenth day of November, A. D. 1882, and performed by the plaintiff between that time and the third day of March, 1883.

And the plaintiff further avers, that at the organization of said Deer Isle Silver Mining Company on the sixteenth day of August, A. D. 1879, at said Portland, the defendant subscribed for or agreed to take stock in said corporation to the extent of two thousand two hundred and fifty shares of the par value of five dollars each, and the defendant never paid said company the par

value of said shares *bona fide* in cash nor in any other matter or thing at a *bona fide* and fair valuation thereof.

And the plaintiff further avers, that the said defendant continued a stockholder in said company from the time of its organization, as aforesaid, to the third day of March, A. D. 1883, and was a stockholder and owner of said unpaid stock, to wit, of fourteen hundred shares at the time the indebtedness was contracted, upon which said judgment was rendered.

And the plaintiff further avers, that at the time his proceedings to recover his judgment aforesaid, against said corporation, were commenced, to wit: on the twentieth day of October, A. D. 1883, the said defendant still remained the owner of said fourteen hundred shares of unpaid stock, or had remained the owner thereof up to a time within one year prior thereto, so that said proceedings were commenced during the defendant's ownership of said unpaid stock, or within one year after its transfer was recorded in the corporation books.

Whereby, and by virtue of the statutes in such cases made and provided, an action hath accrued to the plaintiff to have and recover of the defendant, and the defendant became liable and promised to pay the plaintiff the sum of five dollars a share for each of said fourteen hundred shares or so much thereof as may be required to pay that portion of said judgment of $5,750.79 with interest from said twenty-ninth day of May, A. D. 1886, as may remain unsatisfied and unpaid at the time of the rendition of judgment in this suit.

Yet the said defendant, though requested, etc. * * *"

The case was reported to the full court, by agreement under R. S., c. 77, § 43, to render such judgment upon the competent and admissible testimony as the legal rights of the parties required.

The facts are sufficiently stated in the opinion.

Spaulding and Buker, *Holmes and Payson*, for plaintiff.

Defendant's statement that, though the books showed 1400 shares in his name when the debt was incurred, he did not own any shares, is not admissible;—the books being the only competent evidence. A transfer of stock is not valid, except as between

the parties thereto, until the same is so entered on the books of the corporation as to exhibit the names and residences of the parties, the number of the shares, and the date of their transfer. R. S., c. 46, § 12; *Fiske* v. *Carr*, 20 Maine, 301, 305; *Fowler* v. *Ludwig*, 34 Id. 455; *Dane* v. *Young*, 61 Id. 160.

Statutory rule and estoppel: Lowell, Transfer of Stock, § 191; Cook, Stock and Stockholders, § 262; Morawetz, Corp. § 170; *Johnson* v. *Underhill*, 52 N. Y. 203. To the defense that defendant is not liable on the 1000 shares bought in open market, we say, he was one of the original members, and so continued. He knew the company was not paid the par value for stock issued. He purchased with knowledge of all the facts.

A purchaser of shares succeeds to all rights and liabilities of the original holder. *Upton* v. *Hansbrough*, 3 Biss. 428; *Seymour* v. *Sturges*, 26 N. Y. 134; *Sagory* v. *Dubois*, 3 Sandf. Ch. 466; *H. & N. H. R. R. Co.* v. *Boorman*, 12 Conn. 530; *Armstrong* v. *Wheeler*, 9 Cow. 88; *Ward* v. *Griswoldville Manf. Co.*, 16 Conn. 593; *Mann* v. *Cooke*, 20 Conn. 178.

It is only when a person, who is a purchaser of stock issued as fully paid, is without notice that it was not in fact fully paid, that he cannot be assessed for the unpaid portion of the shares for the benefit of creditors. *Waterhouse* v. *Jamieson*, L. R. 2 Sc. Ap. 29; *Guest* v. *Worcester, etc., R. Co.*, L. R. 4 C. P. 9; *Spargo's Case*, L. R. 8 Ch. 410; *Nicholl's Case*, 26 W. R. 334; *Canal Co.* v. *Sansom*, 1 Binn. 70; *Palmer* v. *Ridge Mining Co.*, 34 Pa. St. 288; *Franklin Oil Co.* v. *McCleary*, 13 P. F. Smith, 317; *Franklin Glass Co.* v. *Alexander*, 2 N. H. 380; *Seymour* v. *Sturges*, 26 N. Y. 134; *Jay Bridge Corp.* v. *Woodman*, 31 Maine, 573.

This last case was before enactment of present statutes as was *K. & P. R. R. Co.* v. *Kendall*, 31 Maine, 470.

R. S., c. 46, §§ 45, 46 and 47 were first enacted in 1871, c. 205. *Foreman* v. *Bigelow*, 4 Cliff. 508; Cook, Stockholders, § 257; *Henkle* v. *Salem Mfg. Co.*, 39 Ohio St. 547.

W. L. Putnam, *G. C. Wing*, with him, for defendant.

The associates were justified in placing the value they did on their property. The mine would yield thirty tons of ore daily, a profit of $100 per day, taking the lowest bids, above cost of

operating. Assays made in large numbers by different persons ran thirty to forty dollars per ton. Sales offer or lowest bid was from six to twelve dollars,—there being no reduction works here for treating refractory ores. It was regarded as a valuable and particularly good property. Capital stock as fixed, was the result of information obtained relative to the value of the property. In a legal sense, the value actually existed, and subsequent failure no evidence of want of good faith in thus fixing the valuation. There was no need of imaginary valuation. They believed the ore was of value shown by assays; mine would pay large dividends upon capital stock as fixed, and capable of permanent operation.

Sales of stock for less than par, not conclusive as to value put upon it. Contributions of shares for working capital, made what was retained more valuable. Stock ledger shows defendant had in Nov. 1882 only 400 shares of stock issued to him by the company. But they had been sold previously and then stood only in his name as custodian. *Eaton* v. *Tel. Co.*, 68 Maine, 63, 68.

Liability of stockholder. R. S., c. 46, § 45, does not require payment should be made in property at its proper value, nor its market value. It only requires "fair valuation,"—not true value,—a fair appraisal or estimate made in good faith.

Property at its value: *Schenck* v. *Andrews*, 57 N. Y. pp. 133, 142; *Lake Superior Iron Co.* v. *Drexel*, 90 N. Y. p. 87; *Coit* v. *Gold Co.*, 14 Fed. Rep. pp. 15, 18; Cook, Stock and Stockholders, § 34, citing *Boynton* v. *Andrews*, 63 N. Y. 93, 94. Sales of treasury stock illustrate the market value only, which is not what the statute calls for. The twenty club shares of 2250 each were reduced by one fifth (450) for treasury purposes. Hence only 1800 shares were issued to defendant. Company realized on this treasury stock from forty-five to eighty-six cents per share. Defendant not owner of these 450 shares when plaintiff's debt was contracted. A transfer of them had been accomplished. *Whitney* v. *Butler*, 118 U. S. p. 655. Parties receiving this from the company became liable by substitution for the defendant. *Burke* v. *Smith*, 16 Wall. 390, 395. Plaintiff makes up the 1400 shares, alleged in his writ, by adding to the 400 issued to defend-

ant by the company, the 1000 shares he bought in the market. These 1000 shares did not come either directly or indirectly from the corporation to the defendant,—hence he was not a person who had "subscribed for or agreed to take stock" in the corporation. These words limit the remedy to persons dealing with the corporation itself. Defendant not liable thereon. Cases cited by plaintiff to this point rest upon different and peculiar statute provisions.

Plaintiff's declaration does not set out any liability of defendant for any stock,—except what he took originally, as unpaid stock,—hence, there can be no recovery for stock purchased on the open market, or any stock not specifically set out in the declaration.

Mr. Spaulding, in reply.

FOSTER, J. This case comes before the court on report. The plaintiff having recovered judgment against the Deer Isle Silver Mining Company for $5,634.69 debt, and $116.10 costs of suit, claims the right to enforce his judgment against this defendant as a stockholder of the corporation by force of R. S., c. 46, §§ 46, 47.

The liability sought to be enforced is a statutory one; and in order to prevail the plaintiff must bring his case within the statute by proving that he has a lawful and *bona fide* judgment against the corporation "based upon a claim in tort or contract, or for any penalty" recovered within two years next prior to this action,—that the defendant subscribed for or agreed to take stock in the corporation, and has not paid for the same as defined in § 45,—that the cause of action, upon which his judgment against the corporation was founded, was contracted during the defendant's ownership of such unpaid stock,—and that the proceedings to obtain this judgment against the corporation were commenced during the defendant's ownership of such unpaid stock, or within one year after its transfer was recorded on the books of the corporation. *Grindle* v. *Stone*, 78 Maine, 176.

That there was a valid judgment in favor of the plaintiff against the corporation, recovered within two years next prior to the commencement of this action, is not in controversy.

By the certificate of organization, it appears that the corporation was organized in August 1879, with what purported to be a paid up capital of $300,000, divided into shares of the par value of $5 each, and that this defendant subscribed for and agreed to take 2,250 shares. An examination of the evidence satisfies us that payment, for the stock thus subscribed, was not made in cash or in any matter or thing at a *bona fide* and fair valuation thereof within the purview of § 45.

It appears that the associates voted to purchase the mineral right on Dunham Point, Deer Isle, for the sum of $240,000, and to issue stock to the several owners for their respective shares.

It becomes material to ascertain how this capital was paid up; whether it was a payment in a "matter or thing at a *bona fide* and fair valuation thereof."

The case shows that twenty persons, of whom the defendant was one, joined together for the purpose of purchasing, opening and developing this mineral right, and paid the owner for three fourths of the property $5,000,—or at a valuation of $6,666.67 for the whole. It was this property alone for which the corporation paid $240,000 in its stock at par.

After the organization of the company the land was put in at $240,000, and the owners of three fourths ratably returned 12,000 shares amounting to $60,000 to the corporation as a working capital. Under that arrangement this defendant returned six hundred shares as his proportion, and received a certificate of 1650 shares of paid up stock. The total actual cost to these associates, including $2,500, expended in improving and developing the property, was not over $375 each, or a fraction less than twenty-three cents a share for 1650 shares each.

That the property was not actually worth the sum of $240,000, at the time it was purchased is too evident to require discussion. The price paid, as well as the acts of the purchasers immediately after the organization in voting to sell the capital stock of the company to the amount of $45,000, at fifty cents a share, or at one tenth its par value,—the sale of a considerable portion of the treasury stock within sixty days of the organization at that figure,—the fact that the whole $60,000 of treasury stock was

sold at prices ranging from fifty cents to one dollar and fifty cents a share,—and the very low figure at which many of the stockholders sold their stock,—is evidence from which we may well infer that the value of $240,000, placed upon this property by the corporation, was not a "*bona fide* and fair valuation thereof."

The payment of stock in anything but money will not be regarded as a payment except to the extent of the true value of the property or thing received in lieu of money. R. S., c. 46, § 45. Thomp. on Liability of Stockholders, §§ 127, 201. *Boynton* v. *Hatch*, 47 N. Y. 225; *Nathan* v. *Mohawk Ins. Co.*, 3 Ed. Ch. 215.

The cause of action against the corporation was contracted on the 18th day of November, 1882. On that day the defendant had standing in his name four hundred shares only of the original stock for which he had subscribed, the balance having been transferred by him before that date. He, also, at that time had one thousand shares purchased in the market from Richardson, Hill & Co., of Boston, on March 23, 1882.

The defendant claims that, if liable at all, he is liable only upon this four hundred shares of original stock.

This position we think is correct.

The individual liability of members for the debt of a corporation is a departure from the established rules of law, and is founded solely upon grounds of public policy, depending entirely upon express provisions of statute law. The defendant, if chargeable at all, is chargeable upon a statute liability, as having "subscribed for or agreed to take stock in said corporation," and who has "not paid for the same." The contract was not made with him, or on his account. There was no contract express or implied between him and the plaintiff. Such liability is "therefore to be construed strictly, and not extended beyond the limits to which it is plainly carried by such provisions of statute." *Gray* v. *Coffin*, 9 Cush. 192; *Erickson* v. *Nesmith*, 4 Allen, 233, 235; *Knowlton* v. *Ackley*, 8 Cush. 93, 96.

As early as 1836, the legislature of this state saw fit to provide a remedy in favor of creditors of corporations, whereby the stock-

holders of all corporations were made liable individually for the corporate debts to the amount of their several shares. The history of the numerous and somewhat complicated enactments upon this branch of the law may be found in an opinion by TENNEY, C. J., in *Milliken* v. *Whitehouse*, 49 Maine, 527, and it is unnecessary to enter upon any extended review of the legislation on this subject here. It is sufficient to say that, up to 1871, the liability existing by general statute (R. S., 1871, c. 46, §§ 24, 26,) had been against the "stockholders," to the amount of their stock, in case of deficiency of attachable corporate property. But, by the act of 1871, c. 205, the statute in relation to the liability of stockholders in corporations was modified, and the word "stockholders" which had existed in previous statutes was omitted, and the remedy therein provided now exists only against persons "who have subscribed for or agreed to take stock in said corporation, and have not paid for the same," etc.

Referring to this act, APPLETON, C. J., in *Poor* v. *Willoughby*, 64 Maine, 379, 383, says: "The language of the act of 1871, c. 205, is clear and explicit. No room is left for any doubt as to its meaning. It was intended to have effect according to its terms. The past liability of stockholders had been fixed by previous legislation. This act was to fix their liability in future. So far as it modifies, changes, restricts or limits the then existent liability of stockholders, it must be regarded as a repeal of any law, which is thus modified, changed, restricted or limited by its provisions."

The defendant having sold and transferred all the original stock for which he had subscribed, except the four hundred shares, at the time this cause of action was contracted, can not be held upon the one thousand shares which he had purchased in the market. They were not shares he had "subscribed for or agreed to take" within the meaning of the statute. *Thames Tunnel Co.* v. *Shelden*, 6 B. & C. 341 (13 E. C. L. 194.) A fair inference to be drawn from the language of the statute is that of a transaction or contract with the corporation in accepting, subscribing for or agreeing to take stock, and not one between individuals in the purchase of stock in open market. Had the legislature intended

to make the remedy as broad as that contended for by the plaintiff, and thus render the defendant liable as a "stockholder" upon all stock held or owned by him, regardless of the manner in which he may have obtained it, it would have been an easy matter to have so expressed its meaning. Not having done so, it is not the province of the court to extend the remedy beyond the express provisions of positive enactment, especially in cases where the statute is to be construed strictly.

But it is claimed, on the part of the plaintiff, that inasmuch as the defendant was a stockholder in the corporation and knew the circumstances under which the stock was originally issued by the corporation, he was a purchaser with notice, and therefore liable on the thousand shares purchased in the market as well as on the four hundred shares of original stock.

We do not think this doctrine can properly be extended to the facts existing in this case. The authorities relied on in support of this proposition will be found to differ essentially from the case at bar, and relate to cases influenced by some peculiar statute provision differing essentially from that of our own state, or to cases where the certificates for stock were assessable upon their face or by the charter or by-laws of the company, and payable by instalments. In such case the stock, either upon its face, or by the charter or by-laws being liable to assessments, and transferred while the company is solvent, the transferee is substituted for the original subscriber or holder of the stock as to the rights of the company in demanding and collecting assessments. *Upton* v. *Tribilcock*, 91 U. S. 45; *Pullman* v. *Upton*, 96 U. S. 328; Angell and Ames on Corp. § 534.

The same was true in *Seymour* v. *Sturges*, 26 N. Y. 134, where the stock was assessable on its face, or by the by-laws of the corporation; and in *Hartford & New Haven R. R. Co.* v. *Boorman*, 12 Conn. 530, and *Ward* v. *Griswoldville Mfg. Co.*, 16 Conn. 593, the transferee voluntarily assumed the liabilities of the original stock. So in *Mann* v. *Cooke*, 20 Conn. 178, the defendant dealt directly with the corporation, the action being brought by a receiver upon a subscription which was special in its terms, and the case turned partially upon the construction and effect of a statute of the state of New York.

Cook on Stock and Stockholders, § 257, lays down no affirmative rule, the discussion there relating to cases where the corporation itself had a right to enforce calls or assessments on the stockholder, notwithstanding this did not always appear on the face of the certificates.

In the case at bar, the stock was issued by the corporation itself as fully paid stock, and the corporation had no right of assessment or future calls upon the stockholders, and no right of action existed in favor of the corporation against any stockholder for assessments or calls. *Scoville* v. *Thayer*, 105 U. S. 143, 153, 154; Cook on Stock and Stockholders, § 38. Whatever, therefore, may be the rule of law governing cases where the stock is assessable on its face, as in *Upton* v. *Tribilcock*, *supra*, and where in such cases, the transferee with notice is personally liable for the unpaid part-value of the stock, it has no application to the case before us, where fully paid stock was issued for property, though the property was put in at an overvaluation. There was no promise to the corporation to pay any deficiency, either express or implied. No obligation could, therefore, be transferred by novation from the original holder of the stock to the transferee.

The defendant being liable on the four hundred shares is liable only for so much as remains unpaid thereon. That would be the difference between the par value of $5, and the amount which the evidence shows he has paid, namely, twenty-three cents per share, amounting to $1,908.

Judgment for plaintiff for $1,908, *with interest thereon from date of writ.*

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

PAMELIA B. FREEMAN *vs.* HENRY J. FOGG.

Somerset. Opinion February 22, 1890.

Action. Amendment. Evidence. Attorneys. Practice. Damages. Rule of Court, 42.

In an action on account annexed to recover $1,000, the consideration for a conveyance of land at the defendant's request, the plaintiff was permitted to amend by adding a special count alleging a sale, the defendant's promise in consideration thereof to give the plaintiff a life-support, a breach of the promise, and the damages thereby occasioned. The amendment was allowed on the condition that a greater sum should not be recoverable. The elements of both counts being in substance the same; *Held*, that the amendment was properly granted.

The defendant had been previously divorced from his wife, the plaintiff's daughter. As bearing on the improbability that the plaintiff and defendant would contract for the former's support in his family, a question upon which the parties were at issue, the fact and date of the divorce is admissible in evidence; but otherwise of the allegations in the libel upon which the divorce was decreed,—they being too remote, and introducing collateral matters foreign to the issue.

Attorneys may testify, in causes in which they are engaged, by leave of court, and without leave of court by afterwards withdrawing from the trial. It is proper to instruct the jury that they should not draw unfavorable inferences against parties for omitting to call their attorneys as witnesses, and to require counsel from commenting, in argument, upon such omission.

The damages for the breach of a contract for a life-support are such a sum, which if invested at a reasonable rate of interest, will yield an annual income during the plaintiff's life sufficient for his support, leaving nothing remaining at the time of his death.

ON MOTION AND EXCEPTIONS.

The plaintiff having recovered a verdict, the defendant excepted to the rulings and instructions of the court, as appears in the opinion. The motion was not pressed at the argument, there being no report of the defendant's evidence.

Merrill and Coffin, *D. D. Stewart*, of counsel, for defendant.

Amendment introduced a new cause of action.

Newall v. *Hussey*, 18 Maine, 249; *Vancleef* v. *Therasson*, 3 Pick. 12; *Ball* v. *Claflin*, 5 Pick. 304. The two contracts differ

in date, consideration, acts to be done by defendant, and measure of damages. *Cooper* v. *Waldron*, 50 Maine, 80; *Sawyer* v. *Goodwin*, 34 Id. 419; *Annis* v. *Gilmore*, 47 Id. 152; *Milliken* v. *Whitehouse*, 49 Id. 527.

Walton and Walton, for plaintiff.

To allowance of amendment, counsel cited:—

Cummings v. *R. R.*, 35 Maine, 478; *Dodge* v. *Haskell*, 69 Id. 429; *Ball* v. *Claflin*, 5 Pick. 303; *Bishop* v. *Williamson*, 11 Maine, 495; *Haynes* v. *Morgan*, 3 Mass. 208; *Cuminge* v. *Rawson*, 7 Mass. 440; *Selden* v. *Beale*, 3 Maine, 178; *Tenney* v. *Prince*, 4 Pick. 385; *Loring* v. *Proctor*, 26 Maine, 18; *Wilson* v. *Widenham*, 51 Id. 566; *Holmes* v. *Robinson Mfg. Co.*, 60 Id. 201; *Ripley* v. *Hebron*, Id. 379; *Rand* v. *Webber*, 64 Id. 191; *Starbird* v. *Henderson*, Id. 570; *Ward* v. *Kimball*, 65 Id. 308; *Walker* v. *Fletcher*, 74 Id. 142; *Matthews* v. *Treat*, 75 Id. 594; *Kelley* v. *Bragg*, 76 Id. 207; *Basford* v. *Pearson*, 9 Allen, 387; *Smith* v. *Palmer*, 6 Cush. 513; *Hill* v. *Haskins*, 8 Pick. 83; Spaulding's Prac. p. 313; *Bank* v. *White*, 17 N. H. 389; N. H. Rules of Court, 38 N. H. 583; *Stevenson* v. *Mudgett*, 10 N. H. 338; *Taylor* v. *Dustin*, 43 N. H. 493; *Chase* v. *Tufts*, 58 N. H. 43; *McIntire* v. *R. R.*, Id. 137.

PETERS, C. J. In the account annexed, the plaintiff's claim is alleged in this form: "To consideration for my conveyance to you (defendant) of one sixth interest in your farm in Cornville—$1,000.00." After the trial had proceeded at some length, the plaintiff was allowed to amend his writ by adding a special count, alleging a sale to defendant of one sixth of the farm, a promise of the defendant, in consideration of such conveyance, to render to the plaintiff a life-support at his home, a breach of the promise, and the damages occasioned thereby,—a condition of the amendment to be that no more than one thousand dollars should be recoverable under such new count.

The propriety of this amendment is denied. We are unable to perceive that its allowance transcended the legal limit. The elements of the unamended and of the amended declaration are in substance the same,—those of the latter being elaborated. By

the writ as it was, the plaintiff sues for a thousand dollars for her interest in land. By the writ as it is, she sues for the value of something worth one thousand dollars, for her interest in land. It will be noticed that the declaration, as it originally stood, does not claim the value of the land, but an amount agreed to be paid therefor. The plaintiff now asserts that the consideration which she was to receive, instead of being one thousand dollars in money, was something actually worth one thousand dollars, if reduced to or converted into money. At first it was the skeleton bare,—now it is the skeleton clothed.

As bearing on the improbability that plaintiff and defendant would contract for her support in his family after he had been divorced from his wife, plaintiff's daughter, the defendant denying such agreement, the counsel for the defendant offered in evidence the libel and its allegations, upon which the divorce was decreed. The judge admitted the fact of divorce, and its date, but not the causes alleged for a divorce. This was undoubtedly correct. The evidence excluded was too remote, and had it been admitted, would have introduced collateral matter very foreign to the issue.

The case discloses that, when a contract was made by the parties, which plaintiff says was for her support, the defendant denying it, and contending that it was altogether a different transaction which then took place, Mr. Walton and Mr. Merrill, opposite counsel in this trial, were present at the time. Neither of the counselors was called as a witness, and neither offered to testify, nor asked the privilege. In the course of the closing argument, another counsel for the defense, Mr. Stewart, was proceeding to comment upon the omission of the plaintiff to call her own counsel, Mr. Walton, to corroborate her testimony, and to contradict the defendant's as to that transaction, when the presiding judge interrupted the argument with the remark that such comment was not allowable; and the judge in his charge told the jury they were not at liberty to draw any unfavorable inference against the plaintiff for omitting to call Mr. Walton as a witness, nor against the defendant for not calling Mr. Merrill, as they were not competent witnesses. This remark was not literally correct. The attorneys

could have testified by leave of court, and without leave by afterwards withdrawing from participating further in the trial of the cause. Rule 42, 72 Maine, 581. While it may not be that the attorneys were incompetent to testify, they did not testify, and the testimony having been closed with no word spoken about their testifying, we think it was proper for the judge, as the case then stood, to prevent comment on the omission. Such a course is in harmony with the rule which the court has established to discourage lawyers from identifying themselves with their causes as witnesses. We think the defendant is not aggrieved by this direction.

The rule of damages, given in the charge, is excepted to in one particular. After stating that the damages recoverable by the plaintiff would be the value of her life-support, she to contribute towards such support in reasonable ways by her own exertions and labor, and explaining the usual mode of ascertaining her expectation of life, which was admitted to be between nine and ten years, the judge added these propositions: "But you must remember that it is a sum of ready money which if she receives it, she may invest and receive an income upon it. It is such a sum as if invested at a reasonable rate of interest would yield an annual income during her lifetime sufficient to support her, leaving nothing remaining at the time of her death. But they could not exceed $1000 and interest from date of writ."

It is contended that an element was omitted from the true rule, and that the statement would more properly be, that she should have a sum which together with its income would support her for the lifetime. But did not the judge say that substantially? Could not the jury understand him as so meaning, by the expression, "leaving nothing remaining at her death?" We think so.

Motion and exceptions overruled.

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

CHARLES S. PULLEN *vs.* LEMUEL MONK,

WILLIAM MCKENZIE, and another, trustees,
and
WILLIAM PAINE, claimant.

Piscataquis. Opinion February 22, 1890.

Trustee process. Wages. Commorant. Assignment. Record. Plantation clerk. Judgment lien. R. S., c. 111, § 6.

An assignment of wages, in order to give the assignee a priority over attachments, must be recorded in the organized plantation in which the assignor is commorant while earning such wages, although he may have a legal residence in some other place.

A man may be a resident in one place and a commorant in another, at the same time.

The legislature used the term "commorant," in R. S., c. 111, § 6, in the sense of a temporary abiding place, to avoid the difficulty of ascertaining the legal residence of a great mass of laboring men; and because many of that class of people have no legal residence within the state.

The unexplained temporary absence of a plantation clerk does not effect the disorganization of the plantation.

Where it appears by the account annexed to a writ in a trustee suit and made a part of the case submitted on report for decision of the law court, that necessaries were furnished the defendant exceeding the amount attached; *Held*, that a few articles in the account which are not necessaries do not establish an exemption from trustee process as to such articles as are necessaries. It is not a case where a lien is lost by mixing, in a judgment, lien and non-lien claims together.

Of the assignment of wages earned, or to be earned.

The case of *Wright* v. *Smith*, 74 Maine, 495, distinguished.

AGREED STATEMENT.

This was a trustee suit in which the liability of the trustees was submitted to the decision of the law court. The facts appear in the opinion.

J. F. Sprague, for plaintiff.

Counsel cited: R. S., c. 111, § 6; c. 3, § 77; private and special laws of Maine, 1887, c. 178. *Augur* v. *Couture*, 68

Maine, 428; *Stinson* v. *Caswell*, 71 Maine, 512; *Wade* v. *Bessey*, 76 Maine, 414; Rapalje's Law Dictionary, p. 245; *Ames* v. *Winsor*, 19 Pick. 248; *Abington* v. *No. Bridgwater*, 23 Pick. 170.

E. Flint, for claimant.

Assignment valid: *Emerson* v. *R. R.*, 67 Maine, 392; *Wade* v. *Bessey*, 76 Id. 413; *Hartley* v. *Tapley*, 2 Gray, 566; *Emery* v. *Lawrence*, 8 Cush. 151.

"Commorant" does not apply to a laborer doing work in a plantation, though it adjoins the town of his residence. He could not be regarded a commorant of the plantation more than a portion of his time, and not the whole; hence his commorancy is in the town of his residence as well as in the plantation where he labors; and statute does not apply.

The term commorant as used in the statute cited, applies to a laborer whose residence is unknown, or so uncertain as to create a doubt as to where it may be, or where the distance from his place of residence is such as to render it impracticable for him to visit such place during the time of performing his labor. The term does not apply to a laborer as designating him a commorant of a plantation while performing work therein, if his well known and undisputed residence is so near the place where his labor is performed that he visits his home and family weekly, remaining over Sundays.

If the fact of performing labor in an incorporated plantation makes the laborer a commorant therein, he must be so considered, though he should have his whole board and lodging at his own home in an adjoining town of his known and undisputed residence.

The writ is for the balance of account, and shows no evidence that it is for the recovery of necessaries for the defendant or his family.

While a large portion of the items in the bill of particulars evidently could not have been for necessaries, some of the items indicate articles which would be necessaries if proved to be for the use of the defendant or his family; but whether such articles were for such use or for the use of some employe of the defendant, or for supplies carried to a lumbering camp is left in doubt,

and at least is uncertain. Though the plaintiff claims that his account is in part for necessaries for the defendant and his family, the remaining portion of it evidently is not for such necessaries; and the whole having been sued in one writ, the whole account must be regarded as if no part was for necessaries so far as relates to attachment by trustee process. That portion of his account for necessaries, the collection of which could not be defeated by trustee process, must be regarded superior to that portion subject to that process. The lien of a laborer is defeated if the judgment recovered includes non-lien claims. *Reed* v. *Woodman*, 4 Maine, 400; *Quimby* v. *Dill*, 40 Id. 528; *Holmes* v. *Farris*, 63 Id. 318.

PETERS, C. J. In this (trustee) action, the question is whether the funds, admitted to be in the trustees' hands, shall be held by the plaintiff's attachment, or go to the claimant by force of an assignment to him from the principal defendant.

The funds consist of an amount due the defendant as wages for working by the month, in the plantation of Elliotsville, with a steam drill, under contractors who were constructing the Canadian Pacific railroad; the defendant working in that capacity continuously from the spring of 1887, for a year and more. His legal residence during that time was in the town of Monson where his homestead and family were, but he lived all the time in camp in Elliotsville during the period of his working there, excepting that on most of the Sundays, not all of them, he visited his home in Monson, going there on Saturday afternoon and returning to Elliotsville on the afternoon of Sunday.

Process was served on the trustees March 15, 1888. The written assignment from defendant to claimant is dated August 27, 1887, was recorded in the town records of Monson, August 29, 1887, and in Elliotsville, March 30, 1888.

The railroad workmen received their pay as made out on monthly-roll bills, and the trustees disclose $59.50 due the defendant on the February (1888) rolls, and $30.95 due on the March (1888) rolls up to March 15th.

It will be observed that the assignment to claimant was seasonably recorded to obtain priority over the attachment, if Monson

was the proper place, and too late for priority if Elliotsville was the proper place, for recording the assignment. The evidence establishes the fact that Elliotsville was an organized plantation.

The statute relied on by the plaintiff as governing the question (R. S., c. 111, § 6), reads as follows: "No assignment of wages is valid against any other person than the parties thereto, unless such assignment is recorded by the clerk of the city, town or plantation organized for any purpose in which the assignor is commorant, while earning such wages."

Was the defendant, Lemuel Monk, commorant in Elliotsville while working there in February and March 1888? We can see no escape from the conclusion that he was. It cannot be doubted that a man may be a resident in one place and commorant in another at the same time. The distinction is between a permanent and a temporary home. *Ames* v. *Winsor*, 19 Pick. 248. A commorancy may be all the residence a man has, but usually it is not. In Webster's dictionary, commorancy is defined as meaning, in American law, "residence temporarily, or for a short time." The term, from its derivation from the Latin, implies something less than a regular residence, such as a staying, a sojourning, and more literally, a tarrying. It was to express these minor degrees of residence that the word got in vogue in our jurisprudence, though not often used. Blackstone says in his commentaries, vol. 4, p. 273, that all freeholders within the precinct of Court Leet, "as well as all persons commorant there, which commorancy consists in usually lying there," were obliged to attend the sessions of that court. We think the legislature used the term commorant in the sense of a temporary abiding place, to avoid the difficulty of ascertaining the legal residence of a great mass of laboring men, and because many of that class of people have no legal residence within the state. But the law must be general in its application. It was immaterial that the debtor in this case had a legal and well defined home in Monson, as he was as much commorant in Elliotsville as were the hundreds of laborers associated in the same employment. The record should have been made there.

It is contended for the claimant that the assignment, though

not seasonably recorded, should be upheld, because for a period of three months, from January 1, till April 1, 1888, the clerk was away from the plantation, and there was no one there to receive and record the assignment. Upon that ground, it is denied that there was an organized plantation during those three months. There is no suggestion that the assignment could not have been recorded at any time after its date, in August 1887, up to January 1, 1888, nor are we informed where the clerk was whilst absent, nor what efforts were made to reach him, but it appears that somehow a recording of the assignment was effected March 30, 1888. We think this position does not give relief to the claimant.

It is further contended that the claimant had also a verbal assignment, of a date earlier than the attachment, of that portion of the wages of the defendant which were earned in February, and that the statute requirement does not extend to that amount of the wages. The position taken is that the February wages were fully earned. In *Wright* v. *Smith*, 74 Maine, 495, it was held that the statute did not apply to a case where the work had been completed and the wages fully earned. The laborer was then no longer at work. But in the present case, though the wages for February were payable at the end of February, still it was a continuing employment and the engagement was not ended. We should be afraid that the distinction called for, if allowed to prevail, would make the statute uncertain in its operation, depriving it of much or most of its useful effect.

It is objected that the wages were not due when attached. But the disclosure admits that they were due, though not payable until a later day.

It is contended that the trustee can retain twenty dollars of the wages as exempted from attachment, because it does not appear that the articles sued for were necessaries furnished the defendant and his family. The learned counsel for the defense, has overlooked a statement in the beginning of the report: "This is an action for articles furnished the defendant and his family, as more fully appears by the plaintiff's writ, to be copied." The writ seems to be submitted to the court for inspection, to

enable it to see that the articles thus furnished were necessaries. By the account annexed to the writ, it appears that there is an amount furnished as necessaries exceeding the amount of wages attached. The few articles in the account which were not necessaries do not establish an exemption as to such articles as were necessary. The cases cited, where a lien is lost by mixing lien-claims and non-lien claims together, do not apply. Those were cases of judgments, where the unprivileged claim can no longer be identified, and is drowned in the common mass. Here the identification is not lost, and a separation of the items can be made, a matter to be settled before and not after judgment. The true question is whether in the account as it stands, and no objection is made to any of the items, the plaintiff is entitled to recover for an amount of necessaries, sufficient to absorb the funds attached.

Trustees charged.

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

STATE *vs.* WILLIAM G. COX.

Waldo. Opinion February 22, 1890.

Intoxicating liquors. Indictment. Nuisance. Place.

In an indictment for the offense of maintaining a liquor nuisance, an allegation that the nuisance was carried on in a certain room in a building particularly identified, is a sufficient averment of place.

State v. *Lang*, 63 Maine, 215, affirmed.

ON EXCEPTIONS.

The respondent filed a general demurrer to the indictment, which was joined by attorney for the state. The presiding justice overruled the demurrer and adjudged the indictment sufficient. To this ruling the respondent excepted.

William H. Fogler, for defendant.

The indictment charges the respondent with maintaining a

liquor nuisance, to wit: "A certain room in the Windsor Hotel, in said Belfast." The *descriptio loci* is insufficient. The alleged nuisance is not the Windsor Hotel, but "a certain room." It does not appear which room is intended. *State* v. *Lashus*, 67 Maine, 564; *Com.* v. *McCaughey*, 9 Gray, 296.

Case not like *Com.* v. *Shattuck*, 14 Gray, 23, in which it was proved that defendant occupied whole building, and used part for illegal purposes.

Albert F. Sweetser, county attorney, for the state.

The allegation that the nuisance on which this indictment is based, was a certain room, etc., is sufficient. Had it been alleged that the nuisance was a certain building in said Belfast, it would clearly have been good. *Com.* v. *Logan*, 12 Gray, 136; *Com.* v. *Lamb*, 1 Gray, 493; *State* v. *Lang*, 63 Maine, 215; *Com.* v. *Gallagher*, 1 Allen, 592; 2 Bish. Cr. Proc. 111.

Counsel also cited: *Com.* v. *Howe*, 13 Gray, 26; *Com.* v. *Donovan*, 16 Gray, 18. In *Com.* v. *McCaughey*, 9 Gray, 296, the decision was based upon a distinction between the words "building" and "tenement," found in the Mass. statutes.

In *State* v. *Lashus*, 67 Maine, 564, there was a variance between the indictment and proof.

PETERS, C. J. On demurrer, to an indictment for maintaining a nuisance in the sale of liquors, it is contended by the respondent that an avernment that the nuisance was maintained "in a certain room in the Windsor Hotel in said Belfast," in Waldo county, is not a sufficient description of place,—not definite enough,—inasmuch as the room is not further described by numbers or location.

In *State* v. *Lang*, 63 Maine, 215, it was held to be sufficient to allege that the nuisance was maintained in a certain shop or store in a certain town named. But it would seem to be just as definite, if not more so, to declare that the business was carried on in a certain room in a building particularly identified. Had the process been for search and seizure, a description of place, like this, might not be exact enough to ensure safety to an officer who should forcibly search a room other than the one intended by the

process. But in the trial of an indictment for the offense of nuisance, whether an allegation like the present will avail the government or not, depends wholly on the proof.

Exceptions overruled.

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

HUGH MONAGHAN *vs.* ISAAC P. LONGFELLOW.

Washington. Opinion February 22, 1890.

"Holmes note." Chattel mortgage. Replevin. Notice. Waiver. Practice. R. S., c. 81, § 44; c. 91, § 7; c. 111, § 5.

A promissory note containing a stipulation that the personal property for which it is given, shall remain the property of the payee until the note is paid, (or a "Holmes note") is so much of the nature of a chattel mortgage, that the holder cannot maintain an action of replevin against an attaching officer until he has given to the officer forty-eight hours' notice in writing of his claim and its amount, as required by R. S., c. 81, § 44.

In such action, if the defendant waives the necessity of the statute notice, the plaintiff will not be required to prove it has been given.

In matters submitted for the decision of the law court, it is the duty of counsel to see that the bill of exceptions contains all necessary facts and statements; their omission will be considered a waiver.

A case should not be sent to the law court, when several law questions are presented at *nisi prius*, to decide one of such questions at a time, and be sent up as many times as there are questions presented.

ON REPORT.

Replevin of a buggy wagon. Case was submitted to the full court upon certain agreed facts and the testimony of the counsel at the trial of the case.

The note described in the opinion, is as follows:

$65.00. WESLEY, Aug. 7th, 1886.

Ten months after date, for value received I promise to pay Hugh Monaghan or order sixty-five dollars with interest at six per cent., the same being for a buggy wagon which I have this day bought of said Hugh Monaghan, said buggy to remain the

property of said H. Monaghan until said sum and interest are paid. JOHN W. ELSEMORE.

Attest:—S. Hawkins, Town Clerk. Entered Nov. the 8th, 1886. Recorded in Book No. 2, page 181.

INDORSEMENT.

On the back of the aforesaid note is the following: Entered Nov. the 8, 1886. Recorded in book No. 2, page 181.

S. HAWKINS, *Town Clerk.*

The facts are stated in the opinion.

J. F. Lynch, for the plaintiff.

Notice to officer was not necessary as wagon was not claimed by virtue of mortgage, pledge or lien; plaintiff owned the wagon, title had not passed from him. The note made a conditional sale. The record of note required by statute does not change nature of transaction. *Peabody* v. *Maguire*, 79 Maine, 585; *Brown* v. *Haynes*, 52 Maine, 580.

Counsel also cited: *Tibbetts* v. *Towle*, 12 Maine, 341; Shep. Touch. 118.

C. B. Donworth, *A. McNichol*, with him, for the defendant.

A "Holmes note" is invariably treated by the courts as a chattel mortgage. Defendant's right to claim the lack of notice as a defense has not been waived.

The notice required by statute is a condition precedent and need not be specially pleaded. *Fairfield Bridge Co.* v. *Nye*, 60 Maine, 378.

PETERS, C. J. This case is between the holder of a Holmes note and an officer who attached a wagon upon which the Holmes note was secured. After the attachment, the holder of the note possessed himself of the wagon by a replevin writ against the officer.

One question is whether a Holmes note is so much of the nature of a chattel mortgage, that the holder cannot maintain an action of replevin for the property against an attaching officer until he has given to the officer forty-eight hours' notice in writing of his claim and the amount of it, as required by R. S., c. 81,

§ 44. No notice is shown to have been given in the present instance. We think notice was necessary. The language of the section is broad. It covers property, "mortgaged, pledged, or subject to any lien created by law, and of which the debtor has the right of redemption." A Holmes note has been placed by the statutes in all respects on the footing of a mortgage. Without form of a mortgage, it is in effect a mortgage. The condition precedent contained in the note is by statute substantially converted into a condition subsequent. It must be recorded, and may be foreclosed or redeemed in the same manner that common mortgages may be. R. S., c. 91, § 7; R. S., c. 111, § 5. There is exactly as much propriety in requiring a notice to the officer, in a case like this, as where the instrument is in the literal form of a mortgage.

Then comes the question whether, in the present case, the necessity of a notice has been waived. When the case came up at the first trial, two questions of a technical character arose, and it appears that some discussion occurred between the counsel and court in relation to the disposition of the questions. The two questions were whether the notice to the officer was necessary, and whether the note had been legally recorded or not. The counsel for the plaintiff contends that, as the first point stood in the way of a decision on the second point, being preliminary to it, the first point was expressly waived by counsel. The counsel for the defendant denies this and contends that there was no waiver and no intention on his part to admit any such thing. The counsel on both sides have testified about the matter and understand it differently. The presiding justice ruled that the record of the note in the town book of mortgages was not legal on account of informality, and ordered a nonsuit on that point. Exceptions were filed and sustained, and a new trial was ordered, as may be seen in *Monaghan* v. *Longfellow*, 81 Maine, 298.

Now, while we are not satisfied that the counsel for the defendant expressly consented to a waiver of any objection presented by him, nevertheless we are of opinion that the point has been in effect waived by the course of the trial. The counsel for defense examined the plaintiff's bill of exceptions before they

were presented for allowance, and made no objection against them to the court. It does not change the matter that the plaintiff's counsel induced, if he did, the counsel of the defendant to permit the exceptions to be allowed, omitting therein all mention of the objection that notice was not given, and all facts on which such objection could be founded. It was the duty of the defendant's counsel to see that the bill of exceptions contained all necessary facts and statement. A case should not be sent to the law court, when several law questions are presented at *nisi prius*, to decide one of such of questions at a time, and be sent up as many times as there are questions presented. Both questions could have been as well disposed of at *nisi prius*, and in this court as one matter, as in any other way. This result involves no more than the question of costs, inasmuch as the plaintiff could have returned the property to the officer, and then given the required notice, and brought his action anew.

Judgment for plaintiff for one cent damages and costs.

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

JULIA N. ANDERSON *vs.* EMERY ROBBINS.

Waldo. Opinion February 27, 1890.

Mortgage. Lease. Rent. Attornment. Apportionment.

Where a mortgagor in possession verbally leases the premises at a rent payable quarterly, and the mortgagee fifteen days before the expiration of a current quarter, duly enters and takes possession for condition broken, whereupon the tenant, on demand by the mortgagee, agrees to, and at the expiration of the current quarter does pay to him the rent for the whole quarter; *Held*, that the mortgagor cannot recover from the lessee for the two and one half months' use and occupation next preceding the mortgagee's entry and the lessee's attornment to him.

AGREED STATEMENT.

This was an action of assumpsit on account annexed to recover

$31.25 for rent of a house on Congress street, Belfast, from September 22, 1888, to December 7, 1888, being two months and fifteen days.

It appeared that prior to September 22, 1888, the plaintiff had leased, verbally, the premises named in the account annexed to the defendant at an agreed rental of $150 per year, payable quarterly. The defendant had paid the plaintiff the agreed rent to September 22, 1888, which was the end of a quarter. At the time when the defendant leased said premises, and for a long time before, the Belfast Savings Bank held a mortgage of the leased premises. December 7, 1888, said Savings Bank entered and took possession of said premises under said mortgage, in the manner provided by clause 3, § 3, c. 90, R. S., for the purpose of foreclosing the same for breach of condition. At the time of taking such possession, said Savings Bank notified the defendant that he must thereafter pay his rent to said Savings Bank, and the defendant agreed so to do. At the close of the quarter ending December 22, 1888, the Savings Bank demanded of the defendant the full quarter's rent from September 22, 1888, to December 22, 1888, and the defendant paid to said Savings Bank said full quarter's rent before the commencement of this suit. The plaintiff demanded of the defendant, before such payment to the Savings Bank, the rent sued for. The Savings Bank agreed to indemnify the defendant against loss and costs by reason of said payment.

Thompson and Dunton, for plaintiff.

W. H. Fogler, for defendant.

VIRGIN, J. Assumpsit by a mortgagor of real estate against his tenant under a verbal lease, made after the mortgage, at a rent payable quarterly, for the recovery of two and one half months' rent.

The principal question presented is: When a mortgagor in possession verbally leases the premises at a rent payable quarterly, and the mortgagee, fifteen days before the expiration of a current quarter, duly enters and takes possession for condition broken,

whereupon, on demand by the mortgagee, the tenant agrees to pay, and, at the end of the current quarter, does pay to him the rent for the whole quarter,—can the mortgagor recover from the lessee for the two and one half months' use and occupation next preceding the mortgagee's entry and the lessee's attornment to him.

We are of opinion that he can not.

To be sure, a verbal lease of land creates only a tenancy at will which can be terminated by the parties thereto only in the mode prescribed by R. S., c. 94, § 2; still until determined, it is sufficient to establish between them the relation of landlord and tenant, the amount of rent to be paid, and the times when payable. *Cameron* v. *Little*, 62 Maine, 550. But while such a tenancy can be determined by the parties only in the mode mentioned, it may be by one holding the paramount title of mortgagee at any time. *Crosby* v. *Harlow*, 21 Maine, 499; *Hill* v. *Jordan*, 30 Maine, 367.

For the legal title vests in the mortgagee upon the delivery of the mortgage, and thereupon he is regarded as having all the rights of a grantee in fee, subject to the defeasance. Hence in the absence of any express or implied agreement in the mortgage or other writing between the parties, the mortgagee has the right of immediate possession before as well as after condition broken. *Gilman* v. *Wills*, 66 Maine, 273, R. S., c. 90, § 2.

On account of the peculiar relation subsisting between the parties to a mortgage, the mortgagor, though the title be in the mortgagee, can not be required to pay rent to the latter so long as he is allowed to remain in possession, since his contract is to pay interest and not rent (*Chase* v. *Palmer*, 25 Maine, 341, 346; *Noyes* v. *Rich*, 52 Maine, 115; *Long* v. *Wade*, 70 Maine, 358); "nor has he any power, express or implied," said Lord Mansfield, "to let leases not subject to every circumstance of the mortgage." *Keech* v. *Hall*, Doug. 21, S. C. 1 Smith's Lead. Cas. 801; *Pope* v. *Biggs*, 9 B. & Cr. 254, Jones Mort. §§ 703, 776. And if a lease is made by the mortgagor, the lessee becomes liable to the mortgagee for rent accruing due after the latter's entry and the lessee's promise to pay; but not for rent due before such entry

and promise, as prior thereto there would be no privity between them. *Evans* v. *Elliott*, 9 Ad. and Ell. 159; *Crosby* v. *Harlow*, *supra*; *Hill* v. *Jordan*, *supra*; *McKircher* v. *Hawley*, 16 Johns. 289; *Stone* v. *Patterson*, 19 Pick. 476; *Smith* v. *Shepard*, 15 Pick. 147; 2 Washb. R. P. (3d ed.) 131 and cases *in notis*.

After entry by the mortgagee the lessee cannot be liable to the mortgagor for rent which should thereafter accrue, for rent payable quarterly is in no part due until the stipulated quarter day. *Countess of Plymouth* v. *Throgmorton*, Salk. 65; *Fitchburg Man'f Corp.* v. *Melven*, 15 Mass. 268; *Wood* v. *Partridge*, 11 Mass. 488; *Perry* v. *Aldrich*, 13 N. H. 343; *Russell* v. *Fabyan*, 23 N. H. 543. And while there may be an apportionment of rent as to estate (*Salmon* v. *Matthews*, 8 Mees. & W. 825; *B. & W. R. R. Corp.* v. *Ripley*, 13 Allen, 421) there can be none as to time. *Ex parte Smith*, 1 Swanst. note *A*; 2 Greenl. Cruise, tit. XXVIII, c. III; 3 Kent's Com. 470, for the contract is entire,—the rent for the period of time agreed upon is regarded as an indivisible item. *Cameron* v. *Little*, 62 Maine, 550. Hence at common law if a tenant at will determines the tenancy before rent day, he is bound to pay the whole sum which would have been payable had he continued tenant till that day, *Aleyn*, 4. Whereas if the lessor himself determines before the rent day, no rent will be due. Bac. Ab. 573, *Robinson* v. *Deering*, 56 Maine,357; *Cameron* v. *Little*, 62 Maine, 550.

But it is urged that the lessor did not terminate this tenancy and that hence the rule last mentioned does not apply; and furthermore that the *dicta*, in *Fitchburg Manf. Corp.* v. *Melven*, *supra*; and in *Zule* v. *Zule*, 24 Wend. 76, 78, suggesting that a count on *quantum meruit* might be maintained for use and occupation enjoyed by the lessee prior to the mortgagee's entry, should apply. But the tenancy between the mortgagor and his lessee was completely determined by the mortgagee's entry and the lessee's attornment to him which was equivalent to an eviction by a paramount title. 3 Kent's Com. 464. *Smith* v. *Shepard*, 15 Pick. 147; *Welch* v. *Adams*, 1 Met. 494; *Knowles* v. *Maynard*, 13 Met. 352; *Nicholson* v. *Munigle*, 6 Allen, 215; *Fuller* v. *Swett*, 6 Allen, 219.

The tenant's attornment to the mortgagee was no violation of the principle which estops a lessee from denying his lessor's title. *Ryder* v. *Mansell*, 66 Maine, 167. By promising to pay to the mortgagee upon the latter's rightful entry, the tenant saved the trouble and expense of ejection which he could not lawfully prevent, and thereby became tenant of the mortgagee and paid to him the subsequently accruing rent; and neither law nor equity requires him to pay any part of it over again. *Kimball* v. *Lockwood*, 6 R. I. 138, 140.

Moreover, the lease having been made after the mortgage, it was subject to it, and to the entry at will by the mortgagee. Still it was an express agreement and excluded an implied one. It was not mutually rescinded, but so long as it continued the parties were bound by its terms. No rent became due under its provision which was not paid by the lessee to the lessor. For a part of the last quarter's rent there was no express or implied promise on the part of the lessee to pay to the lessor. *Knowles* v. *Maynard*, 13 Met. 352, 355, is expressly in point.

Judgment for the defendant.

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

STATE OF MAINE *vs.* JAMES E. CADY.

Cumberland. Opinion March 3, 1890.

Intoxicating liquors. Nuisance. Evidence. Exceptions—waived.

Exceptions to overruling a motion in arrest of judgment based on the insufficiency of an indictment, will be overruled for want of prosecution, when no copy of the indictment is furnished to the law court, and they are abandoned in the defendant's argument.

When the evidence in support of a criminal prosecution is so defective or so weak that a verdict of guilty based upon it can not be sustained, the jury should be instructed to return a verdict of not guilty.

Such instructions will, however, be withheld when there is no variance between the allegations and the proof; or when the evidence though weak or defective will justify the jury in finding the defendant guilty.

ON EXCEPTIONS.

The respondent was indicted at the May term, 1889, in the superior court for Cumberland county, for keeping and maintaining a liquor nuisance on the corner of Danforth street and Sisk lane, in Portland. The officers testified that the place was fitted up with the usual appliances for a bar, and that they had found tumblers on the counter smelling strong of whiskey with some drainings in them. In the cellar was found a box of lager beer. Three officers testified to seeing the defendant there at different times, and at one time he shut the door quickly in the officer's face and undertook to bar him out. At another time Cady was found alone in the bar-room.

The defendant put in no testimony, but asked the court to instruct the jury that there was not sufficient evidence to support the indictment and their verdict should be not guilty. The court refused to so instruct, and directed the case to proceed. The counsel for defendant then argued the case to the jury and the verdict was guilty.

The defendant excepted to this refusal of the court to rule as requested. The defendant also moved in arrest of judgment for insufficiency of the indictment. This motion was overruled by the court, and the defendant excepted. No copy of the indictment appears in the bill of exceptions.

W. H. Looney and Geo. M. Seiders, for defendant.

When the evidence is insufficient in law to support a verdict, the refusal of the court to so instruct the jury, is good ground for exceptions. The jury was left to infer that the state's evidence was sufficient to warrant and support a conviction. Although the court may not, on a bill of exceptions, set aside a verdict as against evidence, the question of law, whether the refusal to rule as requested was a correct ruling, is fairly presented to this court to decide. *Chase* v. *Breed*, 5 Gray, 443; *Com.* v. *Merrill*, 14 Gray, 418; *Com.* v. *Packard*, 5 Gray, 101; *Denny* v. *Williams*, 5 Allen, 4; *Polley* v. *Iron Works*, 4 Allen, 329.

The evidence must be sufficient to support the allegations beyond a reasonable doubt; first, that a liquor nuisance was kept on the premises; second, the defendant so kept the premises.

If the evidence fails to support either allegation, the exceptions should be sustained. There is no testimony of sales, or that the place was resorted to for liquor traffic.

The evidence, taken as a whole and given due weight and no more, should to a moral certainty, exclude every hypothesis other than the guilt of the respondent. *Com.* v. *Webster*, 5 Cush. p. 319. Counsel also cited: *Com.* v. *Dunbar*, 9 Gray, 298; *Com.* v. *Welsh*, 1 Allen, 1; *State* v. *Garing*, 74 Maine, 152; *Com.* v. *Lambert*, 12 Allen, 177; *Com.* v. *Farrand*, 12 Gray, 177.

Frank W. Robinson, county attorney, for state.

The form of objection to the verdict presents the question of sufficiency of the whole evidence; not that of the weight of evidence. Verdict may be against the weight of evidence and defendant not entitled, on these exceptions, to have it set aside. If there was any evidence which could properly be submitted to the jury, and upon which they could legally find a verdict of guilty, the court below was right in submitting it to them. *People* v. *Bennett*, 49 N. Y. 143; *Denny* v. *Williams*, 5 Allen, 4.

Circumstantial evidence sufficient to show the defendant's guilt, —a question of fact and not of law,--properly submitted to the jury. *Com.* v. *Gillon*, 2 Allen, 505; *People* v. *Bennett*, *supra*. Evidence as to use of premises: *Com.* v. *Wallace*, 143 Mass. 88, 91; *Com.* v. *Pierce*, 107 Mass. 487; *Com.* v. *McCullow*, 140 Mass. 370.

The question is not whether this court would be satisfied to draw the same inference which the jury did from the evidence, but whether the inferences drawn by the jury were proper ones. *Com.* v. *Briant*, 142 Mass. 463, 464; *Doyle* v. *R. R.*, 145 Mass. 387; *Com.* v. *Doherty*, 137 Mass. 245-247; *Com.* v. *Hughes*, 2 Allen, 518.

WALTON, J. When the evidence in support of a criminal prosecution is so defective or so weak that a verdict of guilty based upon it can not be sustained, the jury should be instructed to return a verdict of not guilty. Such a case arises when there is a material variance between the allegations and the proof, as when one is indicted for stealing a black horse and the proof is

that he stole a white one; or when one is indicted for maintaining a nuisance in one place and the proof is that he kept a nuisance in another and an entirely different place; or when there is a total want of evidence to support some material allegation, or the evidence in support of it is so slight that a verdict based upon it could not be allowed to stand. In all such cases it would undoubtedly be the duty of the court to instruct the jury to return a verdict of not guilty; and a refusal to so instruct them would be a valid ground of exception.

But we do not regard the case now before us as one in which such an instruction could properly be given. There is no variance between the allegations and the proof; nor is the evidence so defective or so weak that a verdict of guilty resting upon it could not be allowed to stand. On the contrary, we think the evidence was amply sufficient to justify the jury in finding the defendant guilty. The exception to the refusal of the court to instruct the jury to return a verdict of not guilty must, therefore, be overruled.

And the exception to the overruling of the motion in arrest of judgment must be overruled. The motion is based on the alleged insufficiency of the indictment. But the law court has not been furnished with a copy of the indictment, and has no means therefore of judging of its sufficiency. And this exception is not alluded to in the argument of the defendant's counsel. This exception may, therefore, be regarded as waived and overruled for want of prosecution.

Exceptions overruled.
Judgment for the state.

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

MILTON A. JEWELL, and another, *vs.* NELSON GAGNÉ.

Androscoggin. Opinion March 3, 1890.

Bond. Pleadings. Verdict. Instructions. Evidence.

In an action of debt on a bond the defendant pleaded *non est factum*, but during the trial admitted that he signed the bond declared on, and relied for his defense upon an allegation of fraud. It appearing to the court, that the evidence offered in support of the allegation was insufficient to sustain a verdict for the defendant, *Held*, that the jury were properly instructed to return a verdict for the plaintiff.

The power of the court to give such instructions rests upon the rule, that it is better not to allow a jury to return a verdict, which can not be sustained, than to set it aside after it has been returned.

The admission or exclusion of testimony which can not affect the result, is not subject to exception.

Heath v. *Jaquith*, 64 Maine, 433, re-affirmed.

ON MOTION AND EXCEPTIONS.

This was an action upon a joint and several bond in the penal sum of one thousand dollars, given by one Harvey L. Sawyer, as principal, and Joseph Beliveau and Nelson Gagné as sureties, to M. A. Jewell & Co., the plaintiffs.

The defense was the general issue, *non est factum*, and a brief statement that the said sureties were induced to sign said bond by the fraud of the obligees.

The signing of the bond by the defendant was not denied, but he testified that he signed it.

In the course of the trial a certain letter purporting to be signed by Harvey L. Sawyer, the principal in said bond, and sent by him in the ordinary course of mail, to Jewell & Co., was offered by the plaintiffs in rebuttal of the testimony of the defendant, as to the time when said bond was executed. Said Sawyer was not a witness or a party in said action. The defendant objected to the admission of said letter, but it was admitted and read to the jury.

After the evidence was all in, the presiding judge instructed the jury that under the pleadings, the signing of the bond by de-

fendant being admitted, there was not sufficient evidence of fraud in the procurement of said bond to warrant a verdict for defendant, and ordered them to return a verdict for the plaintiffs.

To the admission of the letter, and these instructions of the presiding judge, the defendant excepted. He also moved to set aside the verdict as against evidence, etc.

Frank L. Noble, for defendant.

Letter inadmissible in evidence. 1 Greenl. Ev., 11th Ed. p. 150. Counsel also cited: *Franklin Bank* v. *Cooper*, 36 Maine, 179; 2 Chitty Con., 11th Ed. p. 1041 and note; *Otis* v. *Raymond*, 3 Conn. 413; *Matthews* v. *Bliss*, 22 Pick. 48; *Nickley* v. *Thomas*, 22 Barb. 652; 2 Kent Com. 482; *Prentiss* v. *Russ*, 16 Maine, 30; 3 Add. Con. (Morgan's Ed.) pp. 155-156.

Dana and Estey, for plaintiffs.

WALTON, J. The old doctrine that where there is any evidence, however slight, tending to support an issue of fact, its sufficiency must in all cases be submitted to a jury, no longer prevails either in this country or in England. The modern and more reasonable doctrine is that there is always a preliminary question for the court, namely, whether a verdict resting upon the evidence can be sustained. If not, then the jury must be instructed not to return such a verdict. The reason on which this rule rests is that it is better to prevent a wrong than to furnish a remedy for it after it has been committed,—that it is better not to allow a jury to return a verdict which can not be sustained than to set it aside after it has been returned. The power to set aside a verdict clearly wrong has always existed. It is a better and a wiser exercise of the power not to allow such a verdict to be returned. The modern practice is not an enlargement of the power of the court, it is only an earlier and a wiser exercise of it. *Heath* v. *Jaquith*, 68 Maine, 433, and authorities there cited.

In this case, the defendant had pleaded *non est factum*, but when the action was being tried, he admitted that he signed the bond declared on, and relied for his defense on an allegation of fraud. Very clearly, the evidence offered in support of this al-

legation was insufficient to sustain a verdict for the defendant. The jury were properly instructed, therefore, to return a verdict for the plaintiffs.

The defendant excepted to the admission in evidence of a letter written by one Sawyer. The turn which the case took rendered the latter of no importance. Neither its admission nor its exclusion could have possibly affected the result. Its admission, if erroneous, was a harmless error.

Motion and exceptions overruled.

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

ROBERT O. DUNNING *vs.* GEORGE B. STAPLES.

Androscoggin. Opinion March 3, 1890.

Verdict. New trial. Evidence.

When the evidence is conflicting, and its weight to a great extent depends upon the credibility of the witnesses, and it is difficult to determine on which side it preponderates, a verdict will not be disturbed.

ON MOTION.

Swasey and Briggs, for defendant.

I. and H. A. Randall, for plaintiff.

WALTON, J. When a verdict is clearly against the weight of evidence, it is the duty of the court to set it aside and grant a new trial; but when the evidence is conflicting, and its weight to a great extent depends upon the credibility of the witnesses, and it is difficult to determine on which side it preponderates, the finding of the jury will not be disturbed; the parties must abide by the result.

In this case, the evidence is conflicting. It is an action to recover for poplar wood sold by the plaintiff to the defendant.

The plaintiff's evidence tends to show that the quantity was ninety-six cords; that the quality was good; and that the defendant agreed to pay $3 a cord for it. The defendant's evidence tends to show that the quantity was very much less than ninety-six cords; that the quality was inferior; and much of it not worth more than $1 a cord. The jury returned a verdict for the plaintiff for $235.22. This was considerable less than the amount claimed by the plaintiff. And a careful examination of the evidence fails to satisfy the court that the verdict is wrong, or that the amount is excessive. We think the parties must abide by the result; and that the motion for a new trial must be overruled, and judgment entered on the verdict.

Motion overruled.
Judgment on the verdict.

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

ELIJAH BUCK *vs.* CITY OF BIDDEFORD.

Announced at Law Term, Western District, July 1889.

York. Opinion March 3, 1890.

Sunday law. Way. Defect. Notice. Due care. R. S., c. 124, § 20.

Travelling on the Lord's day may be justified on the ground of necessity or as a deed of charity.

A woman visiting at the plaintiff's house informed him on the Lord's day that she had got to go home that night, a distance of some two miles, on a cold windy day in December. He thereupon took her home with his horse and sleigh. *Held*, that the act was not unlawful.

A way is defective when there is a cesspool in it, with an iron grating or cover having between its bars and rim a space wide enough to receive a horse's foot.

In an action to recover damages by reason of a defective way, it appearing that the cover to a cesspool, which created the defect, was placed there by a street commissioner, *Held*, that no other or further notice is necessary.

A traveller has the right to presume that he may drive with safety over all parts of a street which is a public thoroughfare of a city. He is not required to leave his team in the middle of the street while stopping, but may drive to the side of the street and near the curbing.

ON REPORT.

The plaintiff sought, in this action, to recover damages for injuries to his horse, received on Sunday, the 26th of December 1886, by reason of a defect in Elm street, in the city of Biddeford.

The defect and injury described in the plaintiff's notice of claim, were as follows: "My horse stepped upon the grate, crossing the cesspool, at said place, the bars of said grate being so far apart that the horse's foot was wedged between them in such a way that, in endeavoring to extricate it from said grate, the hoof was thrown from the foot, rendering said horse wholly useless.

The defect as described in the declaration was:—"By reason of the rods in the cover of the sewer manhole being so far apart that it was dangerous for a horse to be driven across said cover."

Plea, general issue, with brief statement that the way was not defective; and that plaintiff's negligence was the sole cause of the injury.

Hamilton and Haley, for plaintiff.

The facts bearing upon the construction of the grate are unquestioned.

If the accident had been caused by the elevation of the grate in its usual construction or depression, doubtful if it would be a defect in a legal sense; but here it was so constructed that it caught the horse's foot until he fell and his foot was released. *Witham* v. *Portland*, 72 Maine, 541.

Safety and convenience for travellers, their horses, carts and carriages is the rule by which it is to be determined whether or not there be any defect. *Stinson* v. *Gardiner*, 42 Maine, 248.

The accident occurred on Elm street, in the thickly settled part of the city, and the space from curb stone to curb stone constitutes the travelled path; and it is a question of fact whether at that place it was safe and convenient, and the location of the

grate affected the security of travellers. *Bryant* v. *Biddeford*, 39 Maine, 193.

The town is liable for injuries occasioned by obstructions even in a highway though not on the travelled path. *Bryant* v. *Biddeford*, *supra*; *Dunham* v. *Rackliff*, 71 Maine, 345.

There can be no fixed rule defining proximate cause; must depend on the circumstances in each case. *Spaulding* v. *Winslow*, 74 Maine, 535; *Page* v. *Bucksport*, 64 Maine, 53.

Much depends on the common sense of the thing. *Willey* v. *Belfast*, 61 Maine, 575.

The defect was created by the city. It was not necessary that they should have twenty-four hours actual notice. *Holmes* v. *Paris*, 75 Maine, 559.

The plaintiff had no knowledge of the actual defect in the grate. Surely, a grating over a cesspool leading to a sewer, is not so unusual, in Biddeford, as to attract any particular attention.

The plaintiff was not travelling within the meaning of the R. S., c. 124, § 20, which provides that "whoever travels on the Lord's day, except for works of necessity or charity shall be punished by a fine not exceeding ten dollars."

His wife's sister was at his house to pay a friendly visit. This is not unlawful under the statute, or against public policy. It was not unlawful for her to travel for that purpose. *Barker* v. *Worcester*, 139 Mass. 74, and cases there cited. *Cronan* v. *Boston*, 136 Mass. 384; *Hamilton* v. *Boston*, 14 Allen, 475; *O'Connell* v. *Lewiston*, 65 Maine, 34; *Davidson* v. *Portland*, 69 Maine, 116; *Gorman* v. *Lowell*, 117 Mass. 65.

The act of driving her to her home, at her special request, was not in violation of law. *Crosman* v. *Lynn*, 121 Mass. 301.

His duty to his sister-in-law was not made subservient to his secular business.

The purpose of the statute is only to prevent the carrying on of the usual and ordinary callings and occupations of men, by which they gain a livelihood and acquire property, and the doing of acts such as usually belong to, or are connected with worldly affairs and the common transactions of business. *Burnett* v. *Brooks*, 9 Allen, 118.

If his sister-in-law, Mrs. Lord, was travelling within the meaning of the statutes, it does not necessarily follow that the plaintiff was. There was a moral fitness and propriety in the act. *Com.* v. *Knox*, 6 Mass. 76; *Pearce* v. *Atwood*, 13 Mass. 324; *Flagg* v. *Millbury*, 4 Cush. 243.

Statutes should be equitably interpreted. There must be some flexibility in their interpretation and application to facts, &c. *Holmes* v. *Paris*, 75 Maine, 559.

E. Stone, for defendants.

Plaintiff was familiar with the street. He knew there were grates in the ditches. Had seen this one.

Way not defective. *Morse* v. *Belfast*, 77 Maine, 44, and cases cited; *Farrell* v. *Old Town*, 69 Id. 72; *Blake* v. *Newfield*, 68 Id. 365. Cover was in the ditch, outside the way prepared for the public's use.

Injury was caused by accident. *Nichols* v. *Athens*, 66 Maine, 402; *Perkins* v. *Fayette*, 68 Id. 152. Plaintiff's negligence and illegal conduct in travelling on Sunday: *Aldrich* v. *Gorham*, 77 Maine, 287; R. S., c. 18, § 80; *Hinckley* v. *Penobscot*, 42 Maine, 89; *Cratty* v. *Bangor*, 57 Id. 423; R. S., c. 124, § 20; *Tillock* v. *Webb*, 56 Maine, 100; *Smith* v. *B. & M. R. R.*, 120 Mass. 490, and cases cited; *Davis* v. *Somerville*, 128 Mass. 594; *Hall* v. *Corcoran*, 107 Mass. 251.

WALTON, J. As the plaintiff was driving along one of the streets of the city of Biddeford, his horse's foot slipped into the grating covering a cesspool, and the horse was thereby thrown down and so badly injured that it was necessary to kill him. The plaintiff claims that the city is liable for the value of his horse. The city denies its liability.

1. The accident occurred on Sunday. And it is claimed that on this account the plaintiff is precluded from recovering. We think not. It is true that all unnecessary travelling on the Lord's day is prohibited. So are all other kinds of worldly business. And it has been decided that when one receives an injury through a defect in a highway while unlawfully travelling on the Lord's day, a recovery for the injury can not be had. *Cratty* v.

Bangor, 57 Maine, 423. But all travelling on the Lord's day is not unlawful. If it was, one could not visit the sick, nor go to church, nor attend a funeral, on that day, without being guilty of a crime. And it was held in *O'Connell* v. *Lewiston*, 65 Maine, 34, that one might lawfully travel on the Lord's day for exercise in the open air. And it was held in *Crosman* v. *Lynn*, 121 Mass. 301, that to go after a domestic on the morning of the Lord's day and bring her home to assist in the preparation of the morning meal was not unlawful. That such an act might properly be regarded as a work of necessity. In this case, a woman had been visiting at the plaintiff's house, and she informed him on the Lord's day that she had got to go home that night. It was in December. The day was cold and windy, and the distance was two miles. He thereupon took his horse and sleigh and was carrying her home at the time of the accident. We do not think the act was unlawful. We think it may be justified on the ground of necessity or as a deed of charity.

2. It is claimed that the way was not defective. We think it was. It had a cesspool in it with an iron cover; and the evidence shows that between one of the outside bars and the rim was a space wide enough to receive a horse's foot; and that such was the width of the space is demonstrated by the fact that the foot of the plaintiff's horse did slip into it, and was there held so fast as to throw him down. And it was with great difficulty that his foot was extricated. And when it was extricated, it was so torn and injured that the horse was ruined and had to be killed. We think the street must be regarded as having a very dangerous defect in it.

3. Another question is whether the city had sufficient notice of the defect. We think it did. It was decided in *Holmes* v. *Paris*, 75 Maine, 559, that when one of the officers of a town to whom notice of a defect may be given, himself creates a defect by placing some object dangerous to travellers within the limits of the highway and leaving it there, the statutory notice of twenty-four hours is unnecessary; that "notice of a fact to a person who already knows the fact can not be useful." And this case falls within the principle of that case. The cover to

the cesspool which created the defect was placed there by a street commissioner of the city. He knew its condition from the beginning, and no other or further notice was necessary.

4. It is claimed that at the time of the accident the plaintiff was not in the exercise of due care. We think he was. It is true that he was not in the middle of the street. He had driven to the side of the street and was near the curbing. But he was properly there. He had reached the end of his journey and was about to stop. Surely he could not be required to leave his horse and sleigh in the middle of the street while stopping. And this was not a road in the country, the sides of which had been left unprepared for travel. It was one of the public thoroughfares of a city over all parts of which a traveller had a right to presume that he could drive with safety. We think the plaintiff was in the exercise of reasonable care.

5. Damages. The plaintiff's horse was so badly injured that, after keeping him nine or ten days, and finding that a cure was probably impossible, it was deemed advisable to kill him, and he was killed. The evidence satisfies us that he was worth before the injury $150; and we think the plaintiff is entitled to recover that amount.

Judgment for plaintiff for $150 *damages.*

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

HENRY P. DORMAN, and another, *vs.* BATES MANUFACTURING COMPANY.

SAME *vs.* MAINE CENTRAL RAILROAD COMPANY.

Androscoggin. Opinion March 3, 1890.

Way. Deed. Plan. Estoppel. Dedication.

When a grantor sells land by reference to a plan, and the plan bounds the land sold on a street, the purchaser thereby obtains a right of way in the street which neither the grantor, nor his successors in title, can afterwards

impair. But where the sale is not made by reference to a plan, the purchaser can not invoke such rule as to a right of way in the street.

If land be conveyed as bounded on a street, and the grantor at the time of the conveyance owns the land over which the supposed street passes, he and his successors in title may be estopped to deny to the grantee, and his successors in title, the use of it as a street. But one claiming the benefit of such an estoppel must rest his claim on his own title-deed, and not on the deed of another, through which he has not derived his title.

The Franklin Company in 1880, conveyed a tract of land, one side of which was bounded by "Mill street as at present defined and located by the Franklin Company." The grantee claimed that, being bounded on Mill street,he was entitled to an unobstructed way throughout the entire length of the street as it was laid down on the plan of a former owner, but not his grantor, recorded in 1855, and showing Mill street on it with a greater length than the one defined and located by the Franklin Company. In an action by the grantee for obstructing a part of Mill street, as contemplated on such plan of 1855, lying beyond the grantee's lot, and outside of the street as defined and located by the Franklin Company, it appeared that the company did not own that part of the street, at the date of its deed to the grantee. *Held*, that the grantee had failed to establish a title to the way so claimed. The way can not be held under deeds to other parties, for, to such deeds, he is a stranger; nor under his own deed, for, at the time of the conveyance to him, his grantor had no power to create or convey such right.

An incipient dedication of a street to the public, does not convey a right of way, until it has been accepted.

ON REPORT.

These were actions on the case for obstructing a private right of way, claimed by the plaintiffs, over a strip of land in Lewiston, forty feet wide, lying between Main and Chestnut streets, and known as Mill street. The plaintiffs' title is by deed from the Franklin Company, dated March 24, 1880. This deed conveyed to them a lot fronting three hundred feet on Mill street and ninety-two and a half feet on Cedar street; also all said company's right, title and interest in a strip on the west side of Mill street forty feet wide, adjoining the above lot, and of the same length. The plaintiffs' land and the way claimed by them is delineated on the accompanying plan.

The following is the description of the east line of plaintiffs' lot first mentioned above:—"Beginning at the southeasterly corner of the premises herein conveyed, at the northwesterly corner of Cedar and Mill streets, as at present defined and located by

the Franklin Company; thence northerly by the westerly line of said Mill street about three hundred (300) feet to land belonging to the Union Water Power Company. * * *"

The deed, with special covenants of warranty, etc., contained a provision, "that said covenants shall not extend to said last described land ('the forty foot strip in Mill street') in respect to any rights in said Mill street heretofore conveyed."

It appeared from the evidence and admissions of the parties, that the Lewiston Water Power Company formerly owned the land over which this street was projected; and June 11, 1855, caused to be recorded, in the registry of deeds, a plan of its land, having thereon this street, sixty-seven feet wide. This way called "Mill" street extended from the Lincoln mills, north of Main street, in a southerly direction, crossing Main, Chestnut and Cedar streets towards the Androscoggin mill,—thus traversing the business section of the city.

After recording this plan, the Water Power Company sold various lots of land, and in 1857, the title to that company's land passed to the Franklin Company, which, later on, sold lots on the westerly side of Mill street, bounding them on the east by this contemplated street, but not referring to the above plan, or granting in express terms any rights of way in Mill street.

That part of this projected street or way, over which a right was claimed by the plaintiffs, was never opened, used, or wrought by the public or by private persons as a way, but was under the control of the Franklin Company, who owned the fee.

The Androscoggin Railroad, constructed prior to 1860, now Maine Central Railroad, from Brunswick to Lewiston enters Lewiston over the land originally intended as Mill street, taking twenty-seven feet along the easterly side of it for its location, and passes by the plaintiffs' land. The plaintiffs in their writ claim a right of way between Chestnut and Main streets forty feet wide, or that part of Mill street which was left after the railroad location had been taken.

Prior to the deed to the plaintiffs, and as early as June 23, 1879, the defendants, the Bates Company had, by purchase possessed itself of the legal title to all the land, including Mill

street, lying north of Chestnut for a distance of six hundred and ninety-four feet, and erected a brick building thereon;—which is one of the obstructions complained of by the plaintiffs.

It was admitted that on June 29, 1871, all the property of the Androscoggin R. R. Co., was leased to the Maine Central R. R. Co., the defendants, for nine hundred and ninety-nine years, and that the lessee corporation took possession and has since occupied and managed the same. It further appeared, that after the Bates Company had, by the deed of June 27, 1879 above referred to, purchased of the Franklin Company its unoccupied land, situated on that portion of the street together with the fee of Mill street and all interest of the Franklin Company therein, it likewise purchased the lots of all the abutters on the street. The defendant railroad, by deed dated December 8, 1881, purchased the fee of the Franklin Company in that portion of Mill street on the upper or northerly end of the disputed right of way, and has since occupied it for station and other railroad purposes.

It was contended in defense that these conveyances, and the building of the store-house had closed up this portion of Mill street, both on paper and on the earth, prior to the plaintiffs' title; also that all the abutters or parties interested in this upper portion of Mill street, north of Chestnut street, having released to one another their interests therein, the defendant railroad became possessed of the portion of Mill street in controversy, in this suit, discharged of all rights therein which might have accrued to any party owning land north of Chestnut street, by virtue of his deed.

The obstructions on this part of the disputed right of way erected by the railroad, as alleged by the plaintiffs, are buildings, fences, platforms, awnings and tracks.

The defendants were notified in writing December 21, 1888, to remove the obstructions.

Upon so much of the evidence as was legally admissible, the full court were to determine the rights of the parties, and pass such judgment and orders, as the legal rights of the parties required.

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

The Franklin Company after acquiring the land in 1857, has from time to time sold and conveyed lots, bounding them on Mill street, thus making an irrecoverable dedication of the street to public uses. *Bartlett* v. *Bangor*, 67 Maine, 464; *Heselton* v. *Harmon*, 80 Id. 326; *Stetson* v. *Dow*, 16 Gray, 372, and cases cited; *Fox* v. *Union Sugar Refinery*, 109 Mass. 292; *Wyman* v. *Mayor*, 11 Wend. 486; *Cincinnati* v. *White*, 6 Pet. 431; *Farnsworth* v. *Taylor*, 9 Gray, 162. Estopped from denying its existence for the entire length. *Tobey* v. *Taunton*, 119 Mass. 404. Purchasers of a lot bounded upon such a street secures an indefeasible right of way over it. *Sutherland* v. *Jackson*, 32 Maine, 80; *O'Linda* v. *Lothrop*, 21 Pick. 292; *Baxter* v. *Arnold*, 114 Mass. 577; *Ins. Co.* v. *Cousens*, 127 Mass. 258; *Rodgers* v. *Parker*, 9 Gray, 445; *In Re* 39*th St.*, 1 Hill, 191; *In Re* 32*d St.*, 19 Wend. 128; 2 Dill. Mun. Corp. § 640, note (3d Ed.); *Zearing* v. *Raber*, 74 Ill. 412; *Carter* v. *Portland*, 4 Ore. 339. Same, street not actually opened. *Livingston* v. *Mayor*, 8 Wend. 85; *In Re Lewis St.*, 2 Wend. 472; *In Re* 17*th St.*, 1 Wend. 262. Railroad took land by purchase and not by condemnation. *Sutherland* v. *Jackson*, 32 Maine, 80; *Tuttle* v. *Walker*, 46 Id. 280. Proof of actual damage not necessary. *Bolivar Co.* v. *Neponset Co.*, 16 Pick. 241; *Tuttle* v. *Walker*, *supra*; 2 Greenl. Ev. § 474. Plaintiffs entitled to an order of abatement. R. S., c. 17, § 13; *Davis* v. *Weymouth*, 80 Maine, 307, 310; *Cadigan* v. *Brown*, 120 Mass. 493; *Nash* v. *Life Ins. Co.*, 127 Mass. 91; *Tucker* v. *Howard*, 128 Mass. 362; *Atty. General* v. *Williams*, 140 Mass. 329. Plaintiffs not estopped by their silence or acquiesence. *Gray* v. *Bartlett*, 20 Pick. 193; *Brant* v. *Virginia C. & I. Co.*, 3 Otto, 326; *Solberg* v. *Decorah*, 41 Iowa, 501. Obstructions by plaintiffs, removed since decision of *Dorman* v. *Lewiston*, 81 Maine, 411, no defense. *Ricker* v. *Barry*, 34 Maine, 116, 122; *Sutherland* v. *Jackson*, 32 Maine, 80, 84; *Bartlett* v. *Bangor*, 67 Id. 460, 461. Easement not abandoned. *Barnes* v. *Lloyd*, 112 Mass. 224, 231, and cases cited; *Arnold* v. *Stevens*, 24 Pick. 106; *Bartlett* v. *Bangor*, *supra*; *Hoffman* v. *Savage*, 15 Mass. 130; *Smyles* v. *Hastings*, 22 N. Y. 217; *Dana* v. *Valentine*, 5 Met. 8, 14; *Dyer* v. *Sanford*,

9 Met. 395, 402; *Hayford* v. *Spokesfield*, 100 Mass. 491, and cases cited.

White and Carter, for defendants.

Way not one of necessity. Dedication to the public is one thing, the rights of a purchaser by virtue of his deed quite another. *Farnsworth* v. *Taylor*, 9 Gray, 162. A man can not have a right of way over his own land. *Clark* v. *R. R.*, 24 N. H. 114. Where a party sells lots by reference to such plan, owning the fee of the streets marked on the plan, the purchaser takes a right of way to be used in common with such others as may gain a right of way therein by future deed, but the general owner can not be said to own the unsold lots with such way attached. He owns the whole, subject only to the rights of way already granted, and at the time of any future sale of a lot he may carve out of this whole such right of way to go therewith as he thinks proper, and may limit it or restrict it as he thinks best. It is only when he does not limit or restrict it but sells generally by reference to the plan, that it is presumed that he intended to grant such way in all the street thereon delineated. If the deed enlarge or extend the way beyond that which the grantee would have gained by implication, the deed must control; likewise, if the deed limit or restrict the way in such a manner as to make it less than the grantee would have gained by implication, still the deed will control.

This is simply the general rule of law that, when parties have entered into contracts fully executed and expressed, the law will not interfere to modify their rights; it is only incomplete or partly-expressed contracts to which the law undertakes to supply the missing terms. It is simply a question of the intention of the parties. Judged by these rules the plaintiffs fail in either view that can be taken of their case.

Their deed is plain and unambiguous, defining the street to be Mill street as at present located and defined by the Franklin Company. As to what that location was there can be no doubt under the evidence in the case. In the broadest construction possible to be given to the deed of the plaintiffs it restricts them to the Mill street south of Chestnut street, but it is doubtful if

the deed can be held to grant them any right of way in Mill street whatever, when taken as a whole; for in its latter part it conveys to these plaintiffs the fee in so much of that street as is opposite this land, and that is of itself contradictory to the idea of a right of way. Can it be said that these parties intended that these plaintiffs should get the fee in that part of Mill street opposite their land and have the privilege of closing up that much, and yet have the right of way to themselves up and down through the remaining length of this street as originally marked out on the old plan?

But if we take the ground that the definition in the plaintiffs' deed is insufficient to determine the extent of the way, and it will depend on the extrinsic facts as they existed at the time of the conveyance, the case is still stronger for the defendants. The year before, the Franklin Company had released that portion of Mill street north of Chestnut street, up beyond the lot on which the Bates store-house was afterwards built, and it had been closed up on the plan, and the street itself had been effectually blockaded by the building of the store-house. All this had been accomplished before these plaintiffs had any interest in these lands, and they had both actual and constructive notice of it. As against a title, which these plaintiffs or any other subsequent purchaser might thereafter acquire, the Franklin Company had a perfect right to close up and sell that portion of Mill street. *Regan* v. *Boston Gas Light Co.*, 137 Mass. 37.

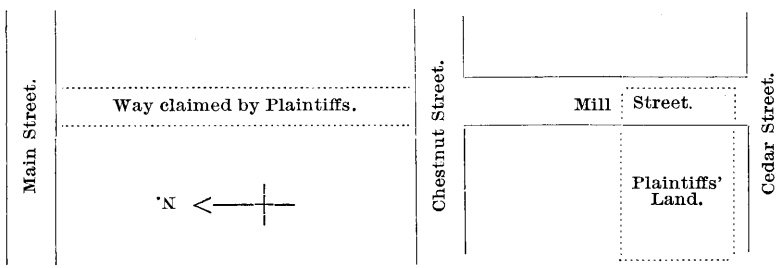
Having so sold and closed it up these plaintiffs could, at the time of the purchase of the land, get no right of way over the property of the Bates Company, for that company had acquired a good title to the land as against the Franklin Company, who were then the owners of the Dorman lot. In order for the estoppel to work, the Franklin Company must have been the owner of the land over which the way was to be located. *Fogarty* v. *Kemmell*, 105 Mass. 264.

Not being able to hold a right of way in this portion of the street by estoppel, and there being no such right appurtenant to the lot while in the hands of the Franklin Company, it seems that in any event the plaintiffs could get no right of way in that portion of the street deeded to the Bates Company.

The land owned by the defendant railroad is still further up beyond that of the Bates Company. The lot purchased by the plaintiffs has Cedar street running as a boundary for the whole length of one side, which is a public street, and Hines Alley extending the entire distance on another side, which is a public passage-way, and Mill street as then defined by the Franklin Company extended along another side of their lot and through from Cedar street to Chestnut street; and Chestnut and Cedar streets are two of the three principal streets running east and west in Lewiston, and connecting the lower level with the upper. The plaintiffs themselves took by their deed a conveyance of the fee of Mill street, which they were then occupying and continued to occupy, thereby acquiescing in the common judgment as to the needlessness of the way, and attempting on their part to close up the lower end of this way, which they now claim to have opened for the entire length of the city. What the actual intention of the parties was cannot be doubted; but if they failed to express it, and the law is to define a way by necessary implication, what reasonable ground can the plaintiffs have to ask that it be extended to the portion of the street, as laid down on the old plan, which these defendants own, and which is cut off from their lot by that portion of the way which the Bates Company has effectually closed up, and which never could have been of any use to the owners of the Dorman lot, even before that; for it was traversed by two unbridged canals, and was obstructed by a railroad bridge which has existed for years, and contained unfilled sags or gullies, so that it was not and could not be, safely used for the passage of teams? And to-day, were the Bates store-house out of existence, the way could be of no use to the owners of this lot unless accepted and opened as a street, and the canal bridged. They can only get on to this land of the defendants at the present time, in starting from their lot, by a route through Chestnut or Cedar streets to Lincoln street, and thence up Main street to the northerly end of the defendants' lot, where they might turn in and go down over this lot of land, and turn about and return to Main street. Can it be that any one would seriously claim that such a right was necessary, or even convenient, or profitable,

to the owner of the plaintiffs' lot. And much less reasonably might they claim that such way was necessary to extend the way opposite their lot, to such outlet or termination, as will make the way available for its intended purpose.

These plaintiffs, having joined with all the various parties interested in Mill street to close it up, down by their own lot, as appears by the various deeds in the case, and by their resistance to the laying out thereof by the city, and having failed to receive the public sanction for such closing of the westerly side of the street opposite their own lot, now seek to compel these defendants to open the land in question as way for them, contrary to the expressed intention of all parties concerned.



WALTON, J. Two actions are before the court involving substantially the same question. One is against the Maine Central Railroad Company, and the other is against the Bates Manufacturing Company. The question is in relation to a right of way.

The plaintiffs own land bounded on and extending across Mill street, in Lewiston. Mill street as it now exists, extends from Cedar street northerly to Chestnut street, a distance of about six hundred feet. As marked on a plan of the Lewiston Water Power Company, made in 1855, it extended northerly to Main street, a distance of over two thousand feet. The contention is in relation to that portion of the street which lies between Chestnut and Main street.

The plaintiffs obtained a title to their land by a deed from the Franklin Company, dated March 24, 1880; and they claim that being bounded on Mill street, they are entitled to an unobstructed way throughout the entire length of the street as it was laid

down on the plan of the Lewiston Water Power Company in 1855.

The defendants contend that the plaintiffs obtained at most only a right of way as far north as Chestnut street, that being the recognized and defined length of Mill street in that direction at the time of the conveyance to them. And they contend further, that at the time of the conveyance to the plaintiffs, their grantor did not own the land north of Chestnut street for more than six hundred feet, and therefore could not convey a right of way over it to any one.

We think the defendants are right in both positions.

We think the Mill street, referred to as a boundary in the plaintiffs' deed, is not the Mill street laid down on the old plan of the Lewiston Water Power Company. The old plan is not mentioned or referred to in any way. On the contrary, the language of the deed is, "Mill street, as at present defined and located by the Franklin Company." Not as located and defined by the old Water Power Company, but "as at present defined and located by the Franklin Company." This language implies that there had been a change in the location, and seems to have been employed on purpose to negative the idea that the old location was the one referred to. And we can not doubt that the plaintiffs so understood it. They knew that the Bates Company had purchased the land over which the old location passed immediately north of Chestnut street, and had erected expensive buildings upon it, one of which was a brick store-house costing $28,000. We are satisfied by the evidence that the plaintiffs must have known at the time of taking their deed that Mill street, "as defined and located by the Franklin Company," did not extend northerly of Chestnut street. The language of their deed warned them of a change, and what they had seen with their own eyes must have informed them of the extent of the change. It is undoubtedly true, as stated in *Bartlett* v. *Bangor*, 67 Maine, 460, that when a grantor sells land by reference to a plan, and the plan bounds the land sold on a street, the purchaser thereby obtains a right of way in the street which neither the grantor nor his successors in title can afterwards impair. But the conveyance to the plain-

tiffs can not be brought within this principle, for the reason that the sale to them was not made by reference to a plan. No plan of any kind is mentioned in their deed. A street was referred to; but the reference was to a street as then defined and located by the Franklin Company; and we are satisfied that that street did not extend north of Chestnut street. Other grantees may have obtained rights by a reference in their deeds to the plan of the Lewiston Water Power Company; but it is clear that the plaintiffs secured no rights by such a reference, for the reason that their deed contains no such reference.

But, suppose the plan of the Lewiston Water Power Company had been referred to in the plaintiffs' deed, and suppose the deed had contained, not merely an implied covenant, but an express covenant, that the grantees should have a right of way throughout the entire length and breadth of Mill street as thereon laid down, —what then? It is perfectly plain that they would not have obtained such a right of way. One can not convey what he does not own. One can not convey land, nor create an easement in it, unless he owns it. An attempt to do so may render him liable on the covenants in his deed; but neither the land nor the easement will pass. At the time of the conveyance to the plaintiffs, their grantor did not own the land over which they thereby claim to have obtained a right of way. Not only the land adjoining, but the road-bed itself, north of Chestnut street for a distance of 694 feet, had before that time been conveyed to the Bates Company, and been built upon, as already stated. It was, therefore, impossible for them to obtain, by a conveyance from the Franklin Company, the right of way claimed. The Franklin Company was then powerless to convey such a right. Before its conveyance to the Bates Company, it might have done so. After that conveyance, it was powerless to do so. *Oliver* v. *Pitman*, 98 Mass. 46, is a case directly in point. In that case, it was held that where the owner of land lays out a way through it, with lots on each side, and then conveys one of these lots with a right of way over the whole of it, and then conveys another lot together with the fee of the street in front of it, and then conveys a third lot bounding it on the same street opposite to the two lots before sold, the purchaser of the third lot gets no right of way in that portion

of the street, the fee of which had been conveyed to the second purchaser; and for the reason that his grantor was then powerless to place such an additional burden upon it; and the third purchaser could claim no rights under the deed to the first, because to that deed he was a stranger. So, in this case, the way in dispute can not be held by the plaintiffs under the deeds to other parties, for, to such deeds, they are strangers. They can not hold it under their own deed, for, at the time of the conveyance to them, their grantor had no power to create or convey such a right. And, furthermore, we are satisfied by the terms of their deed, when read in the light of the surrounding circumstances, that it was never intended to convey such a right, and can not be legally so construed as to convey it, either expressly or by implication, or by way of estoppel.

And, of course, the incipient dedication of the street to the public, does not convey a right of way to the plaintiffs, or to any one else, till accepted; and the evidence shows that that portion of the street north of Chestnut street, and in relation to which this litigation has arisen, has never been accepted, and probably never will be.

The whole extent of the doctrine in this class of cases is that, if land be conveyed as bounded on a street, and the grantor at the time of the conveyance owns the land over which the supposed street passes, he and his successors in title will be estopped to deny to the grantee and his successors in title the use of it as a street. But each one claiming the benefit of such an estoppel must rest his claim on his own-title deed, and not on the deed of another, through which he has not derived his title. *Howe* v. *Alger*, 4 Allen, 206; *Oliver* v. *Pitman*, 98 Mass. 46; *Fogarty* v. *Kemmell*, 105 Mass. 264; *Regan* v. *Boston Gas Light Co.*, 137 Mass. 36; *Bartlett* v. *Bangor*, 67 Maine, 460; *Heselton* v. *Harmon*, 80 Maine, 326.

The plaintiffs having failed to establish their title to the way claimed in their writs, judgment must be rendered for the defendants in each action.

Judgment for defendants.

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

LOVEY A. PILLSBURY *vs.* IRVING J. BROWN, and others.

York. Opinion March 3, 1890.

Way. Location de facto. Width. Adverse use. Presumption. Dedication. Pleading. Practice.

The use of ways, commenced under an actual and recorded location which clearly and distinctly defines their width, though the proceedings may not have been in all particulars strictly conformable to law, is presumed to be co-extensive with the location.

After the lapse of twenty years, accompanied by an adverse use, a location of a way *de facto* becomes a location *de jure*.

Thus, where a way was originally laid out three rods wide, *Held*, that the public is entitled to a way of that width, notwithstanding the wrought part and the part actually used by travellers may have been less than that; *also*, that the travelled path may from time to time be widened or otherwise improved, as the growing wants of the public may require, provided such improvements are kept within the limits of the way as originally laid out.

When a case is submitted to the law court on a report of evidence, or on an agreed statement of facts, technical questions of pleading will be considered as having been waived, unless the contrary appears.

ON REPORT.

This was an action of trespass for entering the plaintiff's close, at Old Orchard, bounded on its southerly side by Old Orchard road, and removing a retaining wall next to the road, and part of the steps from the Revere House standing on her lot, cutting into the bank about nineteen feet and removing the soil.

The defendants, street commissioner and selectmen of the town, removed the wall and earth for the purpose of repairing and improving the street. They cut up to within six or eight inches of a line which they claimed is the southerly line of plaintiff's lot, and the northerly line of Old Orchard road.

The rights of the parties depended upon the question, where was the northerly line of the road in front of the plaintiff's land.

The defendants relied upon proof that the way was established by the town in 1844. The plaintiff contended that the proceedings in laying out were defective and void; also that the way was

not built upon the location as established. The defendants further contended that one Whittemore, the plaintiff's grantor, in 1875, having divided up his land into lots, streets and parks, and sold thirty-two lots and then two to the plaintiff, all by reference to a recorded plan, had thereby fixed the line in dispute, and made an irrevocable dedication of the land marked "Old Orchard road" to public use.

S. C. Strout, H. W. Gaye and C. A. Strout, for plaintiff.

Dedication: The grant is full, definite, by metes and bounds, and goes to Old Orchard road. It is well settled law that such a grant is not qualified or limited by a reference to a deed or plan which does not cover the entire grant. *Dana* v. *Middlesex Bank*, 10 Met. 255; *Gould* v. *Eastern Railroad*, 142 Mass. 89; *Frost* v. *Angier*, 127 Mass. 212; *Harlow* v. *Thomas*, 15 Pick. 68; *Stearns* v. *Rice*, 14 Pick. 411.

The reference in these deeds to Old Orchard road, was to the road existing on the face of the earth, and not to an unknown and unapparent record line, of which neither the plaintiff nor Whittemore had any knowledge, as they both testify. *Sproul* v. *Foy*, 55 Maine, 162; *Tebbetts* v. *Estes*, 52 Maine, 567.

It is claimed by defendants that Whittemore dedicated to the public, as a way, all southerly of the southerly line of Whittemore's lots as delineated on Dennett's plan. To constitute a dedication, in the first instance, the owner must intend to dedicate. Such intention never existed in Mr. Whittemore's mind. He had no knowledge of any record location of the road; no knowledge whether the plan line corresponded with the road line or not; and had no intention to throw into the road any portion of his land. Upon these facts the initial fact of an intention to dedicate fails. If there had been such intention it does not become effectual until acceptance by the town, or the public. Angell on Highways, §§ 143, 149. *Bangor House* v. *Brown*, 33 Maine, 309; *Cole* v. *Sprowl*, 35 Maine, 161; *State* v. *Bradbury*, 40 Maine, 154; *State* v. *Wilson*, 42 Maine, 9; *White* v. *Bradley*, 66 Maine, 254; *Muzzey* v. *Davis*, 54 Maine, 361.

Nothing in *Bartlett* v. *Bangor*, 67 Maine, 460, establishes a different doctrine.

Whittemore's plotting was in 1875. He sold to plaintiff in 1880. She entered into possession and built, and neither the public nor town authorities ever accepted by act or word, any supposed dedication by Whittemore; nor made any claim or use of any of the land northerly of the constructed way until this cutting in 1887.

If therefore Whittemore had offered to dedicate, and nothing had been done by way of acceptance, by use or otherwise, and in 1880 he sold the land to plaintiff, bounding by the road as it existed, it was too late for the town to accept such offer after said sale.

The attempted location in 1844 was invalid and void, and defendants can not justify under that. They are not in the position to make any claim from lapse of time, as the road as built and used, is not upon the record location.

There being no legal location made in 1844, then the only road existing was one by prescription, or dedication or permissive use, and extended no farther northerly than the actual travelled way, which makes the northerly line of the road at the southerly side of the ditch, or twenty feet southerly of the cut by defendants. Dill. Mun. Corp. § 502, note 1. *Lawrence* v. *Mt. Vernon*, 35 Maine, 100; *Sprague* v. *Waite*, 17 Pick. 317; *Hollenbeck* v. *Rowley*, 8 Allen, 476; Washburn on Easements, pp. 72, 73, 130 and 188.

No presumption of a legal location, the record of which is lost, can arise, because the way near plaintiff's land did not exist until the attempted location in 1844, and the record of that location is in the case, and the evidence shows, that the road was built, under and by virtue of that attempted location.

Location of way invalid and void. Burden on defendants to show legal way. *Southard* v. *Ricker*, 43 Maine, 576. Counsel also cited: *Waterford* v. *Co. Com.*, 59 Maine, 452; *Baker* v. *Runnels*, 12 Id. 237; *Christ's Church* v. *Woodward*, 26 Id. 178; *Lancaster* v. *Pope*, 1 Mass. 88; *Davis* v. *Maynard*, 9 Mass. 245; *Wellington* v. *Gale*, 13 Mass. 488; *Burns* v. *Annas*, 60 Maine, 288; *Clark* v. *Wardwell*, 55 Id. 61, 66; *State* v. *Williams*, 25 Id. 561; *Fossett* v. *Bearce*, 29 Id. 526; *R. R.* v. *Bolton*, 48 Id. 454; *Allen* v. *Archer*, 49 Id. 351; *Brown* v. *Witham*, 51 Id. 30; *Hamilton* v. *Phipsburg*, 55 Id. 195; R. S., 1840, c. 25, §§ 1, 27, 28, 31.

Hampden Fairfield, for defendants.

Counsel cited: R. S., c. 18, §§ 65, 66; *Esty* v. *Baker*, 50 Maine, 325; *Erskine* v. *Moulton*, 66 Id. 276; 2 Wash. R. P. p. 276; *Tuttle* v. *Cary*, 7 Maine, 434; *Ford* v. *Clough*, 8 Id. 334; *Gilmore* v. *Holt*, 4 Pick. 260; *Houghton* v. *Davenport*, 23 Pick. 235; *Wallace* v. *Townsend*, 109 Mass. 263; *Brackett* v. *Persons Unknown*, 53 Maine, 236; *Todd* v. *Rome*, 2 Id. 61; *Sprague* v. *Waite*, 17 Pick. 317; *Seeley* v. *Bridgeport*, 53 Conn. 1; *Hannum* v. *Belchertown*, 19 Pick. 312; *Bartlett* v. *Bangor*, 67 Maine, 465, 466; *Cole* v. *Sprowl*, 35 Id. 161; Dill. Mun. Corp. § 642 n. 2; *Ham* v. *Ham*, 14 Maine, 351; *Copeland* v. *Copeland*, 28 Id. 525; *Stevens* v. *McNamara*, 36 Id. 176; *Cummings* v. *Webster*, 43 Id. 192; *Denniston* v. *Clark*, 125 Mass. 216.

WALTON, J. The defendants, acting in behalf of their town, widened the street in front of the plaintiff's hotel at Old Orchard, and built a sidewalk. She claims that in so doing they did not keep within the limits of the street, but extended it on to her land, and she has sued them in an action of trespass for breaking and entering her close.

We do not think the action is maintainable. We think the defendants did keep within the limits of the street. The street was laid out three rods wide; and we have the testimony of one of the selectmen by whom it was laid out, and of others who assisted in building it, and of others who have always known it, that the widening is within its limits as originally located. And we have other important evidence. It appears that when the plaintiff's grantor caused the land to be surveyed into building lots, the surveyor placed the hubs by which her lots were bounded on the line within which the defendants kept in widening the street; and, if limited to that line, the plaintiff will get the full quantity of land and the full length of lines mentioned in her deed. It is possible that this line may be wrong. But we think the evidence is overwhelmingly in favor of its accuracy.

But the plaintiff claims that the location was not legal, and that only so much of its width as was actually prepared for travel and had been so used for twenty years or more at the time of the widening, could then be held for a street.

We do not think this proposition can be maintained. It was long ago held in a very able opinion by Chief Justice Shaw, that, where a way is established by adverse use alone, a jury might be justified in finding that the way extended beyond the part wrought and actually used for travel, and might include land which by reason of its formation or the existence of obstacles could not have been used for travel. *Sprague* v. *Waite*, 17 Pick. 309. Still, we do not doubt that it is generally true that when an easement of any kind is obtained by adverse use alone, its extent must be measured by its use. But this rule does not apply to ways which have commenced under an actual and a recorded location which clearly and distinctly defines their width, though the proceedings may not have been in all particulars strictly conformable to law. In such cases, the use is presumed to be co-extensive with the location, precisely as possession under an invalid deed is presumed to be co-extensive with the land purporting to have been conveyed by it. This result is sometimes reached by the presumption of a dedication, and sometimes by the presumption that the proceedings were all regular. In this state, the latter mode has been adopted. Thus, in *Gibbs* v. *Larrabee*, 37 Maine, 506, where the records of the town failed to show a compliance with all the requirements of the law, still, inasmuch as the location had been acquiesced in for a long series of years, the court held that an inference might fairly be drawn that all the requirements of the statute had in fact been complied with; and sustained the location on that ground. The point, to be particularly noticed in this decision, is the fact that it was the way originally located that was sustained, not such a way merely as had been used. It is the location *de facto* that by the lapse of time ripens into a location *de jure*. To rest such a result on the presumption of regularity is to rest it on a fiction. And to rest it on the presumption of a dedication would be equally so. We think it would be better to avoid these unnecessary fictions, and let the result rest on a positive rule of law, which, like all limitation laws, has the public good and the public convenience for a foundation. The rule of law is this, that after the lapse of twenty years, accompanied by an adverse use,

a location *de facto* becomes a location *de jure*. This way, at the time of the alleged trespass, had been located, and opened, and used by the public, for more than forty years. The location *de facto*, if not in all particulars regular, had become by lapse of time, and use, and the acquiescence of all parties adversely interested, a location *de jure*. Where, said Chief Justice Shaw, in the case cited, a tract three or four rods wide, such as is usually laid out as a highway, has been used as a highway, although twenty or thirty feet only have been used as a travelled path, still, this is such a use of the whole as constitutes evidence of the right of the public to use it for a highway, by widening the travelled path, or otherwise, as the increased travel and the exigencies of the public may require. This seems to us to be sound law as well as good sense; and we hold in this case that the public is entitled to a way three rods wide, as originally laid out, notwithstanding the wrought part of it, and the part actually used by travellers, may have been very much less than that; and that the travelled path may from time to time be widened or otherwise improved, as the growing wants of the public may require, provided such improvements are kept within the limits of the way as originally laid out. And, in this case, the evidence satisfies us that in widening the travelled path and building the sidewalk, the defendants did keep within the limits of the way as originally laid out, and were not, therefore, guilty of a trespass upon the plaintiff's land.

One other point remains for consideration. The plaintiff's counsel claim that there is a variance between the defendants' pleadings and the proof, the defendants having averred in their pleadings that the way in question was a highway, while the proof is that it was a town way. We do not think this point is open to the plaintiff. It is generally considered, when a case is submitted to the law court on a report of evidence, or on an agreed statement of facts, that all technical questions of pleading are waived, unless the contrary appears. (*Gardiner* v. *Nutting*, 5 Maine, 140; *Moore* v. *Philbrick*, 32 Maine, 102; *Machias Hotel Co.* v. *Fisher*, 56 Maine, 321.) In this case, it was agreed that if the court should find that the defendants were justified in

what they did, judgment should be ordered in their favor. We do so find. Under this agreement and this finding, we think the defendants are entitled to the judgment stipulated for, without regard to the pleadings, no question of pleading appearing by the report to have been raised or reserved in the court below.

Judgment for the defendants.

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

THOMAS E. BRASTOW, and others, *vs.* GEORGE H. M. BARRETT.

Knox. Opinion March 3, 1890.

Action. Mortgage. Lease. Possession. Pleading. R. S., c. 90, § 2.

In a real action to recover land under mortgage the plaintiff then held a mortgage and a written lease of the demanded premises both in full force. The defendant having admitted by his plea of *nul disseizin*, that he was in possession of the demanded premises, holding the plaintiff out; *Held*, that the plaintiff was entitled to judgment for possession, and that the lease is not a bar to the action.

ON REPORT.

This was a real action to recover possession of land described in a mortgage deed, dated November 28, 1887, from defendant to the plaintiffs. Plea, the general issue.

The defendant contended that the plaintiffs could not set up the mortgage against a lease of the premises signed and accepted by them from him; that an action for possession under a mortgage, before breach of condition, can be maintained only when, according to R. S., c. 90, § 2, there is no agreement to the contrary; and that a lease, in which the plaintiffs covenant to pay rent and surrender the premises at the end of the term, amounts to an agreement that the mortgagor shall retain possession during the term.

C. E. Littlefield, for plaintiffs.

J. E. Hanly, for defendant.

WALTON, J. A mortgagee immediately upon the execution of his mortgage may enter and take possession of the mortgaged premises, or maintain an action therefor, without waiting for a breach of the condition of the mortgage, when there is no agreement to the contrary. This right is secured to him in this state by a legislative enactment. R. S., c. 90, § 2.

This is such an action. And it appears that, at the time of its commencement, the plaintiffs held three mortgages and a written lease of the demanded premises; and that these instruments were then in full force; and the defendant admits by his plea (*nul disseizin*) that he was then in possession of the demanded premises holding the plaintiffs out. And yet he denies the right of the plaintiffs to maintain their action. He insists that the acceptance of the lease bars such an action. And he cites *Newall* v. *Wright*, 3 Mass. 138, in support of the position. It was decided, in that case, that if the holder of an existing mortgage accepts from the mortgagor a lease of the mortgaged premises, covenanting therein to pay rent, he can not resist payment of the rent before breach of the condition. That is, when the mortgage is made first and the lease afterward. The law is otherwise when the lease is made first and the mortgage afterward. But neither in the case cited, nor, so far as we are aware, in any other case, has it been held that the acceptance of a lease of the mortgaged premises will bar the mortgagee's right to maintain an action to recover possession of them, whether the action is commenced before or after breach of the condition of the mortgage, or whether the lease or the mortgage is made first. And we can perceive no reason for so holding. We are satisfied that such is not the law.

Judgment for plaintiffs.

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

SHERMAN W. KNEVALS, and others, *vs.* JAMES H. BLAUVELT,
UNION MUTUAL LIFE INSURANCE COMPANY, trustee,
and
ASA D. DICKENSON, claimant.

Cumberland. Opinion March 10, 1890.

Trustee process. Assignment. What passes. Contingent debt. Defective schedule.

It is the well settled law of this state that a contingent debt founded on an existing contract is assignable.

The principal defendant, a resident of New York, made an assignment, under the laws of that state, to another resident of the same state. The assignment was in general terms, and included, "all and singular the lands, tenements, hereditaments, appurtenances, goods, stocks, bonds, promissory notes, debts, claims, demands, property, and effects of every description," belonging to the assignor; *Held*, that the assignment passed to the assignee commissions on renewal premiums, due the assignor from an insurance company of which he was an agent, under a contract by which such commissions did not accrue until after the date of the assignment.

The laws of New York require the assignor to file a schedule of assets within twenty days, and if he neglect to do so the assignee must file one. If no such list is filed within thirty days the assignment becomes void. A list was seasonably filed by the assignee, the assignor failing to file one, but no claim for commissions on renewal premiums was found upon it. *Held*, that the assignment was not void for such omission, and that the claim passed to the assignee, whether specified in the schedule or not.

The plaintiffs, having proved their debt for the purpose of receiving dividends under the assignment, cannot now contest its validity.

AGREED STATEMENT.

This was an action of debt, commenced by trustee process, on a judgment recovered October 11th, 1886, by the plaintiffs against the principal defendant, in the city court of New York. All the parties to the action, except the trustee, were inhabitants of that state.

The facts are sufficiently stated in the opinion.

Wilford G. Chapman, for plaintiffs.

At the date of the assignment there was nothing due Blauvelt

under the contracts. The receipt of premiums was a condition precedent to any liability of the trustee. May Insurance, 314 a, 342.

Whether or not there would ever be any liability on the part of the company depended on the life and option of each of the policy-holders. It was not a mere question of time when the company would receive these premiums. It was contingent on the voluntary action or life of the policy-holders. The funds attached were not *in esse* at the time of the assignment. There was nothing in the hands of the company that by any possibility could ever come to Blauvelt. There was simply the executory agreement that, on the happening of the uncertain event, the company would pay percentages and commissions as specified in the contracts. This agreement gave Blauvelt no lien on the funds now attached. It was a mere personal agreement by the company to do a certain thing on the happening of an uncertain event. On the happening of the event Blauvelt might have sued the company: but that was his only remedy. *Rogers* v. *Hosack's Ex'rs*, 18 Wend. 334; *Woodard* v. *Herbert*, 24 Maine, 361.

Blauvelt's interest was not a claim or demand. Contract not assignable, and was not in fact assigned. *Kendall* v. *Almy*, 2 Sumn. 293; Bur. Ass. 524, and cases cited: Pom. Eq. § 1280; *French* v. *Morse*, 2 Gray, 111; *Woodard* v. *Herbert*, 24 Maine, 358, 361; *Riggin* v. *Maguire*, 8 N. B. R., 484, S. C., 15 Wall. 549; *Kingsbury* v. *Mattocks*, 81 Maine, 310.

Creditor not prevented from recovering judgment and proceeding against any property not assigned. *Lawrence* v. *McVeagh*, 106 Ind. 210; *Sanborn* v. *Norton*, 59 Tex. 308.

Harry R. Virgin, for claimant.

Claims for commissions assignable. *Crocker* v. *Whitney*, 10 Mass. 319; *Cutts* v. *Perkins*, 12 Mass. 210; *Masters* v. *Miller*, 4 Durn. & E. 343; *Tripp* v. *Brownell*, 12 Cush. 376; *Farnsworth* v. *Jackson*, 32 Maine, 422; *Devlin* v. *Mayor*, 63 N. Y. 15; *Hall* v. *Buffalo*, 2 Abb. Ct. of App. Dec. 301; *Augur* v. *Couture*, 68 Maine, 428; *Wade* v. *Bessey*, 76 Maine, 413; *Garland* v. *Harrington*, 51 N. H. 409; *Brackett* v. *Blake*, 7 Met. 339; *Weed* v. *Jewett*, 2 Met. 608; *Hartley* v. *Tapley*, 2 Gray, 566; *Taylor* v. *Lynch*, 5

Gray, 50; *Macomber* v. *Doane*, 2 Allen, 542; *St. Johns* v. *Charles*, 105 Mass. 262; *Low* v. *Pew*, 108 Mass. 350.

Claims for commissions included in assignment: Bur. Ass. §§ 95, 100, 102, 122; *Pingree* v. *Comstock*, 18 Pick. 46; *Brashear* v. *West*, 7 Pet. 608, 614; *Platt* v. *Lott*, 17 N. Y. 478; *Nye* v. *Van Husan*, 6 Mich. 329, S. C. 74 Am. Dec. 690; *Kellogg* v. *Slauson*, 15 Barb. 56; *Turner* v. *Jaycox*, 40 N. Y. 470; *Couch* v. *Delaplaine*, 2 N. Y. 397; *Whipple* v. *Thayer*, 16 Pick. 25.

Assignment valid as against the attachment. *May* v. *Wannemacher*, 111 Mass. 202; *Burlock* v. *Taylor*, 16 Pick. 335; *Daniels* v. *Willard*, 16 Pick. 36; *Whipple* v. *Thayer*, 16 Pick. 25; *Train* v. *Kendall*, 137 Mass. 366; *Thayer* v. *Daniels*, 113 Mass. 129; *Swan* v. *Crafts*, 124 Mass. 453; *Ingraham* v. *Geyer*, 13 Mass. 146; *Fall River Iron Works* v. *Croade*, 15 Pick. 11; *May* v. *Breed*, 7 Cush. 42; *Martin* v. *Potter*, 11 Gray, 37; *Bank* v. *Chafee*, 71 Maine, 522.

Plaintiffs assented to assignment: *Thompson* v. *Frye*, 57 Hun. (N. Y.) 296.

PETERS, C. J. The contest in this case is between the plaintiffs, who attach by trustee process a fund in the hands of the Union Mutual Life Insurance Company of Portland, and a person who claims the fund as an assignee of the principal defendant under the general assignment law of the State of New York. The plaintiffs, defendant, and claimant are residents of New York. The insurance company has no interest except as a stakeholder.

The fund grew up out of a contract between the insurance company and the defendant, who was the New York agent of the company for procuring applications for insurance in their company. By the contract, the agent (principal defendant) was entitled to a percentage on each policy issued on applications obtained by him, including commissions on premiums annually paid on such policies, styled in the contract "renewal premiums," the company's liability to pay the annual commissions to continue for six years or until prior lapse of policy. The agency of this defendant ceased April 16, 1885. The assignment was made October 15, 1886. At the date of the assignment about $400.00 were due as commissions under the contract, and this sum was

paid to the assignee upon a demand for it upon the company signed jointly by assignor and assignee. The contest is now over commissions which have accrued under the contracts (there were several of them) since the date of the assignment and prior to the writ, amounting to $642.22.

The first question is whether such a contract can be legally assigned. Is it assignable? The attaching creditors' position is that commissions which have accrued since the assignment could not be assigned at the date of the assignment, because at that time it would depend upon circumstances whether any commissions would be earned in the future or not, and that therefore the assignor's claim was then uncertain and contingent. The persons insured might die or allow their policies to lapse, thus preventing further annual renewals or commissions. We do not concur in the proposition.

Probably the insurance company could not assign its side of the contract at any time, and it had nothing at the date of the assignment to assign. But the agent then had a contract fully executed on his side, and had expectation of a good deal of further payment for his services already rendered. He assigns his contract as an entirety, under which moneys were then due and other moneys were reasonably expected to become due. His assignment was of the contract as well as of all dues under it. All that had accrued or would accrue attached to the contract. The contract itself was not contingent or uncertain, though it might have been uncertain, as it is under thousands of contracts, how much its earnings or profits would be. The contract or demand did not depend on a contingency, but whether an action would ever accrue on it or not might so depend. It was long ago adjudged in our jurisprudence that a contingent debt founded on an existing contract is assignable. The present is a good deal like the case of an assignment of a contract of affreightment, which has been held to be valid, though whether any freight will be earned or not depends upon considerable contingency. It is expected that freight will be earned, and that makes foundation enough to uphold an assignment. As said in *Cutts* v. *Perkins*, 12 Mass. p. 212, "it makes no difference, if instead of (an assign-

ment of) a debt now due, it is of money expected to become due at some future time to the assignor, it appearing that there was an existing contract upon which the debt might arise." The contract is a certainty, its amount of earnings the only uncertainty. As illustrative authorities on this point, see: *Crocker* v. *Whitney*, 10 Mass. 316; *Gardner* v. *Hoey*, 18 Pick. 168; *Farrar* v. *Smith*, 64 Maine, 74; *Emerson* v. *Railroad*, 67 Maine, 387.

The next question is whether the contract or claim is in fact assigned by the instrument of assignment. We can have no doubt that the language of the instrument is sufficient for such purpose. The assignment is in general terms, and includes "all and singular the lands, tenements, hereditaments, appurtenances, goods, stocks, bonds, promissory notes, debts, claims, demands, property and effects of every description," belonging to such assignor. This language covers this claim. It is a claim and it is property. A debtor might have his all, and a valuable property, in this form. The general words are not to be construed in a restrained sense in these instruments. The law required the debtor to assign all property, and he undertakes to do so, using all the general terms descriptive of property to attain the end. In our own late assignment law, the requirement was that the debtor should assign "all his property real and personal," and the assignment had the effect to include every sort of property whether specified or not. "In such instruments of conveyance the larger intent is evident and governs the construction." Bish. Cont. § 409, and citations. In *Leonard* v. *Nye*, 125 Mass. 455, it was decided, following the doctrine of *Comegys* v. *Vasse*, 1 Pet. 193, that money, recovered before the court of Commissioners of Alabama Claims for a vessel destroyed by a rebel cruiser, belonged to the assignee of the owner, who went into bankruptcy after the destruction of the vessel, but before the treaty between England and the United States which gave reparation for such claims. Those cases establish the assignability of a claim like the present, and establish further that the bankruptcy of the owner operates *per se* as an assignment of such a claim.

Another question is presented. This contract or claim is not in the list of assets filed by the assignee. The law of New York requires the assignor to file a schedule of assets within twenty

days, and if he neglect to do so the assignee must file one. If no such list is filed within thirty days the assignment becomes void. A list was seasonably filed by the assignee, the assignor failing to file one, but this claim is not found upon it.

Was the assignment void for this omission, or is the claim lost to the assignee on that account? Our opinion is that the assignment stands, and that it operates to assign the claim. All property passes whether specified in the schedules or not. Otherwise the bad faith of assignor or assignee, and especially of the two combined, might be most detrimental to innocent creditors. Ordinarily creditors would have no knowledge or even suspicion of omissions. If no schedule at all be filed within the thirty days, all creditors will have notice alike, and can protect themselves. But a schedule, formally and apparently correct, being seasonably filed, the assignment takes effect from its inception. This view is favored by the language of the New York assignment act, which provides that the assignee shall file, on failure of the assignor to do his duty, "such schedule and inventory as he can;" the implication being that perfection might not be attained or expected. But some schedule must be filed. The statute provides certain means and aids to assist the assignee in ferreting out property hidden by the assignor. The plaintiffs cannot consistently claim the assignment to be void, under which, as the case shows, they have proved their debt and have come in under it for the purpose of receiving thereon dividends. And, if the assignment stands, the claim in question stands with it as the property of the assignee for the benefit of all the creditors.

As all the interested parties have their domicil in New York, there can be no objection to allowing their rights to be determined according to the law of that state, especially as we do not appreciate any difference between their judicial opinion and our own upon the pending questions. *Platt* v. *Lott*, 17 N. Y. 468. The trustee must be discharged for the reason that the fund, attempted to be intercepted by the plaintiffs' attachment, belongs to the claimant.

Trustee discharged. Judgment for the claimant for costs against plaintiffs.

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

EDISON UNITED MANUFACTURING COMPANY, in equity,

vs.

FARMINGTON ELECTRIC LIGHT and POWER COMPANY

and

NEW ENGLAND WIRING and CONSTRUCTION COMPANY.

Franklin. Opinion March 7, 1890.

Insolvency. Corporation. Public duties. Eminent domain. R. S., c. 70, §§ 13, 61. *Laws of* 1885, c. 378.

Corporations engaged in business involving public duties and obligations, including corporations engaged in supplying cities and towns with gas and water, and other corporations of like character, are expressly exempted by the statutes of this state from the operation of the insolvent law.

An electric light and power company, organized under the general laws of the state, exercising the power of eminent domain, regularly engaged in lighting public streets, and furnishing lights for public halls, churches, hotels, banks, post-office and private houses, is such a corporation and, therefore, not amenable to the insolvent law.

Its general public utility is an evidence that such a company is engaged in business involving public duties and obligations.

In determining whether the use is a public one, by reason of the company exercising the right of eminent domain, there is no difference in this respect between companies incorporated by general statutory provision, and those by special act, although the former under the general laws of 1885 (c. 378) receive no monopoly of the power of eminent domain, and it is delegated to them by the official action of persons designated for the purpose by the legislature.

IN EQUITY.

Bill in equity, brought under R. S., c. 70, § 13, to revise a decree of the court of insolvency, for Franklin county, by which that court dismissed a petition filed by the plaintiffs, praying to have the Farmington Electric Light and Power Company decreed insolvent.

The material portions of the bill, charging that the petition in insolvency was erroneously dismissed for an alleged want of jurisdiction, are as follows:—

Your petitioner further represents, that its debts against said

defendant provable under c. 70 aforesaid, amounted and did then amount to more than one fourth part of the debts provable against said defendant, and that said defendant was then insolvent, and that it was for the best interests of all the creditors that the assets of said defendant should be divided as provided in said chapter, and it was satisfactorily made to appear to said judge that the allegations made in said application were true and that said defendant was insolvent. The petitioner further alleges that said court had jurisdiction of said defendant corporation and of said petition to have the same adjudicated insolvent, and that the provisions of c. 70, aforesaid, did and do apply to said defendant corporation, and that it is not in any way exempted or excepted therefrom; that on said 3d day of July said defendant corporation appeared by its officers and attorneys and resisted said petition, and alleged and claimed that said court had no jurisdiction over it upon said petition. Whereupon the judge of said court passed and made the following decree, to wit,

Ordered: that the within petition be dismissed, and that the warrant of attachment and injunction issued thereon be revoked for want of jurisdiction.

And your petitioner further alleges, that all the estate and property of said defendant has been attached by sundry creditors of said defendant within four months prior to the date of the filing of said petition, and that said creditors unjustly seek to obtain thereby, a preference over your petitioner, and that said corporation and its officers by objecting to the aforesaid petition seek to aid in furthering said unjust preference, and thereby to prevent your petitioner from receiving any portion of the assets of said corporation in payment of its said debt, so that unless relieved, your petitioner will be defrauded and lose the entire amount of its aforesaid claim.

Wherefore your petitioner prays this honorable court to review this aforesaid order and decree, dismissing said petition for want of jurisdiction, and correct the same, and cause said decree to be made as it ought to have been made, and to give such other and further relief to your petitioner in the premises, as justice and equity require.

The petition in insolvency was filed June 14, 1889, and dismissed July 3, 1889. The bill in equity was filed July 9, 1889. The New England Wiring and Construction Company, an attaching creditor, having filed a motion praying to be allowed to become a party defendant, also filed an answer by leave of court.

The case was heard at the January rules, 1890, upon bill, answer, proofs and oral testimony taken before the court.

The following decree was thereupon entered:

Upon hearing of this case the presiding justice found as a matter of fact from the evidence introduced, that the Farmington Electric Light and Power Company was, at the time of the filing of the petition by the Edison United Manufacturing Company in insolvency, to wit, on the 14th day of June, 1889, insolvent, and that said Edison Manufacturing Company represented at least one fourth part of the debts provable against the Farmington Electric Light and Power Company under c. 70 of R. S., and that due proceedings in insolvency were had upon the petition of said Edison United Manufacturing Company at time of the filing of the said petition in insolvency, and thereupon the presiding justice, before whom final hearing was had, upon the request of both parties in this proceeding certifies to the full court for decision as a question of law involved in the proceedings in this case, in accordance with c. 70, § 13, of the R. S., the following question of law, namely: Whether the Farmington Electric Light and Power Company was, at the time of said proceedings in the court of insolvency, and still is a corporation "engaged in business involving public duties and obligations, among which are railroads, banks, corporations engaged in supplying cities and towns with gas or water, and other corporations of like character," embraced within the exception to § 61, c. 70, R. S. And for determining that question, the presiding justice certifies to the full court, for its consideration, all the evidence and admissions bearing upon the question as to the nature of the business and the extent of the same of this said Farmington Electric Light and Power Company.

F. E. Timberlake, *A. R. Savage*, of counsel, for plaintiffs.

The burden is on the defendants to show that the case falls within the exceptions in the statutes. A corporation to be within the exception, as one having "public duties and obligations," must be one upon which the state, in addition to the right to exist, has conferred some franchise or right in derogation of the right of the organic public or individuals, some portion of its own powers, the right of eminent domain or exclusive privileges. There is a distinction between ordinary business corporations and those having "public duties and obligations." The legislature did not mean those ordinary duties and obligations, that devolve upon all natural as well as artificial persons, to perform all contracts by them made with municipalities and corporations, as well as with individuals, or the duties and obligations that rest upon all alike to observe the laws of the land, as that would exempt all corporations. Would a corporation, merely because it was operating a grain elevator, grist mill, running a stage line, hacks or omnibuses, keeping an inn, or engaged as a common carrier, or express, etc., be beyond the reach of this law?

There is a difference between public uses and public duties and obligations. Almost any kind of business in which a corporation could engage, in some degree serves a large number of the individual members of society, but it does not follow that nearly all have public duties and obligations. Mor. Corp. (1st Ed.) § 496. Same (2d Ed.) § 1117; *Allen* v. *Jay*, 60 Maine, 124; *Rogers, etc., Works* v. *R. R.*, 20 N. J. Eq. 385; *Messenger* v. *R. R.*, 36 N. J. Law, 407; *Palmer* v. *R. R.*, 4 M. & W. 749.

The right to be a corporation is itself a separate, distinct and independent franchise. *R. R.* v. *Orton*, 6 Saw. 187. If it receives nothing from the state but the right to exist, it is under no obligations to the public that are not imposed on every natural person. The company could furnish light for individuals and not for the streets, or for both, and not furnish power, or it could at any time stop business altogether. Eminent domain is an attribute of sovereignty. It is the right to seize and appropriate private property for public use, to secure some benefit to the pub-

lic at large. Mor. Corp. (2 Ed.) § 1057 and cases cited. *Allen* v. *Jay*, 60 Maine, 134. In return therefor, the corporation has certain "public duties and obligations" to perform. *Lumbard* v. *Stearns*, 4 Cush. 60; 2 Mor. Corp. (2d Ed.) § 1114.

The granting of a mere franchise of existence or what amounts to the same thing, the organizing of a corporation under c. 48, R. S., does not take away any of these rights of the people. They could be created indefinitely. It gives the corporation no authority to take private property and it has no right in its dealings with the public that any one of the corporators did not possess in his individual capacity; and it carries with it no public duties and obligations that can be enforced against it, and the law only regulates its affairs so long as it sees fit to continue in business, the same as it does those of the individual.

So far as the evidence in this case shows, instead of having special rights and privileges, it is a trespasser in the highways and townways of Farmington, and liable at any time to have its poles and wires removed as a nuisance. Chapter 378, laws of 1885, says such plants shall not be erected without permit from the municipal officers. Although the right to erect its lines in the streets may have been named as one of the considerations for furnishing Farmington Village Corporation with light, the Village Corporation had no power to grant them that privilege.

This corporation was organized under the general law and takes nothing from the state but mere corporate existence. It has no right of eminent domain or exclusive privilege. It has no power or privilege any citizen of Farmington does not possess. Any natural person might start another electric light plant in Farmington, and contract to supply a part or all of the individuals and societies now furnished with light by this corporation.

S. Clifford Belcher, for Farmington E. L. & P. Company.

Counsel cited: *Patterson Gas Light Co.* v. *Brady*, 3 Dutcher, (N. J.) 245; *McCune* v. *Norwich City Gas Co.*, 30 Conn. 521; *New Orleans Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683; *Shepard* v. *Milwaukee Gas Light Co.*, 6 Wis. 539; *Chicago Gas Light Co.* v.

Peoples' Gas Light Co., 121 Ill. 530; *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396; *Williams* v. *Mutual Gas Co.*, 52 Mich. 499.

Definition of corporations intended to be exempted cannot be confined to those having the right of eminent domain, because banks are included in the enumeration. The peculiar characteristic of all the corporations enumerated is that their customers are the general public. Statute does not profess to enumerate all the excepted corporations. The excepted corporations are not those subject to or having, but those engaged in "business involving" public duties and obligations.

The legislature believe the public had interests in corporations of this character and, therefore, excepted them from the operation of the statute of insolvency.

N. & J. A. Morrill, for N. E. Wiring & Construction Co.

This electric light company is *ejusdem generis* with a gas company, as telephone companies are with telegraph companies, although the telephone was unknown when the ordinance in question was enacted. *St. Louis* v. *Bell Tel. Co.*, 9 Am. St. Rep. 370. A horse railroad was held to be exempted under the term railroad in Mass. insolvent law. *Bank* v. *Horse R. R. Co.*, 13 Allen, 105. Gas companies, excepted by the statute, may be organized under the same general law as this electric light company, and yet possess no power of eminent domain or rights greater than this company.

Another test is that a corporation to be within the exception must be "actually engaged in business." It has been held that the common carrier, (*N. J. Steam Nav. Co.* v. *Bank*, 6 How. 382; *R. R.* v. *Iowa*, 4 Otto, 155); miller, (*Burlington* v. *Beasley*, 94 U. S. 314; *Jordan* v. *Woodward*, 40 Maine, 317; *Mill Corp.* v. *Newman*, 12 Pick. 467); ferryman, (*Day* v. *Stetson*, 8 Maine, 365); baker, (*Mobile* v. *Yuille*, 3 Ala. N. S. 140); hackney coachman, (*Com.* v. *Gage*, 114 Mass. 328; *Com.* v. *Matthews*, 122 Mass. 60); water companies, (*Water Works* v. *Schottler*, 110 U. S. 354; *Lumbard* v. *Stearns*, 4 Cush. 60), pursue a public employment; and the reason rests not upon any grant of power, but upon the character of the business, and the public consequence attaching to it.

The plaintiffs' right to have the assets of this electric light company distributed in insolvency rests upon the statute alone.

PETERS, C. J. The single question presented by this case is, whether the Farmington Electric Light and Power Company belongs to the class of corporations made subject to the insolvency laws of the state. A petition of its creditors, to subject the company to insolvency proceedings, was rejected by the insolvency judge upon the ground that he had not jurisdiction to administer its affairs in that court. And this is a bill in equity seeking to correct the alleged error of the judge in that respect. Our opinion is that the company is excluded from the operation of the insolvent law.

The statute, it seems to us speaks plainly on the question, when it says in § 61, c. 70: "This chapter (on insolvency) applies to all corporations created by the law of the state, carrying on manufacturing, trading, mining, building, insurance or other private business, but does not apply to corporations engaged in business involving public duties and obligations, among which are railroads, banks, corporations engaged in supplying cities and towns with gas and water, and other corporations of like character."

The statute pronounces that a gas company, engaged in supplying a town with light is doing a business involving public duties and obligations. Certainly an electric light company performing the same general service that the gaslight company does, is as nearly like the latter company, in the sense implied by the statute, as two companies can be alike, unless both be gaslight companies. The two companies do the same kind of business, and perform the same service, only through somewhat different agencies. Each supplies a town with artificial light. Each manufactures its power. Each transmits a current produced by its power along the public ways; the one under and the other over them; one through pipes and the other through insulated wires. The evidence shows that, at the time of the hearing on the bill in this court, the defendant corporation was regularly engaged in lighting the public streets within the limits of the Farmington Village Corporation by contract between the company and that corpora-

tion, and was furnishing light for the public halls, churches, hotels, banks, post-office and many private houses in that village.

One evidence that a company, such as this, is engaged in a business involving public duties and obligations is that its work is of general public utility. The entire public participate in and enjoy its benefits. Its light is for all.

Another and a decisive test is that there is committed to it, for its use, a portion of the power of eminent domain possessed by the people, in allowing it to use the public streets for its poles and wires. The legislature alone can grant this privilege. And when granted it is subject to an implied condition that the company accepting it assumes some obligation and duty to the public therefor. The obligation may be equitably more or less according to circumstances. There cannot be doubt, we think, that the statute under discusssion assumes that gas companies should be exempted from the operation of the insolvency chapter on account of their using, necessarily, the power of eminent domain.

It makes no difference, in the application of the test we are speaking of, that the company is incorporated by general statutory provision, rather than by special act of the legislature. The incorporation is effective however accomplished. It is in either way a legal creation. Nor does it exonerate the corporation from public obligation, because under the general laws of 1885, (ch. 378) it receives no monopoly of the power of eminent domain, nor because the power is delegated to it by the official action of persons designated for the purpose by the legislature. The principle is the same whether the company receives a partial or exclusive delegation to itself of the public power. *Pierce* v. *Drew*, 136 Mass. 75. The framers of the constitution and the legislature have deemed it wise to delegate an exercise of the public power under general restrictions and conditions, to prevent improvident grants and monopolies. The case of *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, in its discussion and citations, touches this case closely.

The complainants make the point that the evidence does not disclose that the defendant company was licensed by the select-

men of Farmington to occupy the public streets. It is not pretended, however, that a license was not in fact granted; and the defendants exhibit with their brief a copy of the license. That does not avail the complainants. Their bill contains no allegations of a want of license. The presumption is that the judge below acted upon proper grounds, until the complainants allege and prove the contrary.

Bill dismissed with costs.

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

STATE *vs.* DAVID L. STAIN and OLIVER CROMWELL.

Penobscot. Opinion March 12, 1890.

New trial. When denied. Rule. Civil and criminal cases. Newly-discovered Evidence.

In regard to the supervisory power of the court over verdicts, and in relation to the granting of new trials, the same rule should be extended to criminal cases as in civil actions.

Notwithstanding the discretion of the court is very broad in cases where the motion for new trial is based on newly-discovered evidence, and will be exercised whenever a proper case is presented, yet there are well-settled rules by which the court should be governed.

In order to warrant a new trial upon the ground of newly-discovered evidence it should be made to appear that injustice is likely to be done by refusing it; and therefore it becomes necessary for the court to take into consideration the weight and importance of the new evidence, its bearing in connection with the evidence on the former trial, and even the credibility of witnesses.

This rule is applicable not only to civil but criminal cases.

A motion for a new trial should not be granted on the ground of newly-discovered evidence unless the evidence is such as ought to produce on another trial an opposite result upon the merits.

In considering the motion the court will not inquire whether, taking the newly-discovered evidence in connection with that exhibited on the trial, a jury might be induced to give a different verdict, but whether the legitimate effect of such evidence would require a different verdict.

The legitimate effect of the entire body of new evidence in this case, taken in connection with all the other evidence introduced at the trial, is not such as would warrant a jury in arriving at a different conclusion from that already found by them.

ON MOTION.

The defendants were indicted at the February term, 1888, of this court, in Penobscot county, for the murder of John Wilson Barron, treasurer of the Dexter savings bank, on the 22d day of February, 1878. The trial was begun on the twelfth day of term before a drawn jury, the chief justice presiding.

O. D. Baker, attorney general, and *F. H. Appleton*, county attorney, appeared for the state, and *L. A. Barker* and *P. H. Gillin*, for the defendants.

The case was committed to the jury on the 23d day when a verdict, guilty of murder in the second degree, was returned.

On the next day, the defendants filed a general motion to set the verdict aside as against evidence, and for a new trial. They also filed, several days later in the term, a second motion for a new trial on the ground of newly-discovered evidence. The latter motion, followed subsequently by others of the same kind, at different intervals, related largely to offers of evidence purporting to show an *alibi* on the part of the defendants; that they were not at Dexter February 22, 1878, but were in Medfield, Mass., their home; also to contradict the evidence of Charles F. Stain, a witness for the prosecution, who testified to having been in the state at certain times with the defendants. A commissioner to take the depositions of witnesses, many of whom resided in Massachusetts, was appointed by the court. To afford time to take this testimony,—the presiding justice having overruled the general motion to set aside the verdict as against evidence and the defendants having appealed to the full court,—by consent of all parties, the appeal was entered and heard at the law term, for the western district held in July following, at Portland. The motion for a new trial based on newly-discovered evidence not being ready for a hearing at *nisi prius*, was not then passed upon by the presiding justice, but was argued and heard upon a report of the evidence before said law term, as a matter to be considered

by it, if belonging to it to decide, otherwise as a matter to be considered and acted upon by the justice sitting at the argument, whose duty it might be to pass upon the same. An entry was made to this effect upon the docket at *nisi prius*,—neither party by such entries admitting to the other any right not then possessed by such party, nor to be thereby deprived of any right.

The case was thereupon argued and heard before the full court at the July term, 1888, at Portland.

In behalf of the defense, *Mr. Barker* contended that the newly-discovered evidence and accompanying motion was cognizable by the law court alone under R. S., c. 134, § 27, which is as follows: "If a motion for a new trial in a capital case is denied by the justice before whom the same is heard, the respondent may appeal from said decision to the next law term for such district; and the concurrence of but three justices shall be necessary to grant such motion."

This statute, by c. 152 and c. 173, public laws of 1889, approved January 25, and February 8, 1889, has been amended so that a person convicted of murder, "or of any offense for which the punishment may be imprisonment for life," may appeal from the decision of the justice by whom the motion for a new trial is denied; and the amendment was made to "apply to all pending cases in which an appeal has been or may be taken."

In behalf of the state, *Mr. Baker*, attorney general, contended that the statute was expressly confined to a capital case; and that at the time of the murder, in 1878, and at the time of the defendants' arrest and conviction, the death penalty did not exist.

Counsel for the defense also argued in support of both motions, and were followed by *Mr. Baker*, who replied with a brief, covering the various issues of fact.

The law court declined to take jurisdiction of the motions based on newly-discovered evidence, and they were remitted to *nisi prius*, where they came up for consideration by the chief justice, at the February term, 1889, in Penobscot.

At that term, for the reasons given in an elaborate opinion by the chief justice, and recently published, the motions were over-

ruled by him, and the defendants appealed to the full court. The appealed was transferred, by consent and agreement, from the law term for the eastern to the western district, where the case was re-argued at the July term, 1889.

C. E. Littlefield, attorney general, appeared for the state, who argued in support of the verdict, with a brief, containing a full analysis of the evidence.

L. A. Barker and P. H. Gillin, for defendants.

Mr. Gillin submitted an oral argument upon the general motion for a new trial. *Mr. Barker* argued the other motion, and contended that not until the news was received from Massachusetts, too late to be of use at the trial, that Charles Hamant had a horse stolen the day of Barron's death, was it, that there was any event that could be brought to the minds of witnesses by which they could remember the defendants with the 22d day of February, 1878, as being in Medfield. When the date of the Barron tragedy and the Hamant horse robbery were found to be the same, then it became capable of demonstration by credible witnesses that these men could not have been in Dexter that day. Counsel contended further that Barron's death was an unintentional suicide, and therefore accidental.

A brief upon the questions of law, arising on the motion for a new trial on account of newly-discovered evidence, was also submitted by *Mr. Barker* for the defendants. Counsel argued, that a new trial will be granted if the testimony, though cumulative, will make a doubtful case clear. *Barker* v. *French*, 18 Vt. 460; *Guyot* v. *Butts*, 4 Wend. 579; *Gardner* v. *Gardner*, 2 Gray, 443; *Watts* v. *Howard*, 7 Met. 480; *Chatfield* v. *Lathrop*, 6 Pick. 417; *Gardner* v. *Mitchell*, Id. 113; *Schlenker* v. *Risley*, 38 Am. Dec. 100; *Myers* v. *Brownell*, 16 Am. Dec. 731; *Parker* v. *Hardy*, 24 Pick. 246. New trial, in case of perjury. *Great Falls Mfg. Co.* v. *Mathes*, 5 N. H. 574. Other grounds. *Morrell* v. *Kimball*, 1 Maine, 324; *Strout* v. *Stewart*, 63 Id. 227; *Putnam* v. *Woodbury*, 68 Id. 58; *Ludlow* v. *Parks*, 4 Ohio, 44; 1 Bish. Cr. L. § 1273; *People* v. *Sanford*, 64 Cal. 27; *Hayward* v. *People*, 96 Ill. 492;

Atkins v. *State*, 11 Tex. App. 8; *Lindley* v. *State*, 5 Tex. L. J. 249; *People* v. *Keenan*, 104 Ill. 305; *Dennis* v. *State*, (Ind.) Cr. L. M. & R., vol. 7, p. 172, (1886); Gra. & Wat. New Trials, 1043, 1044, note 3.

FOSTER, J. On the evening of February 22d, 1878, John W. Barron, cashier of the Dexter savings bank, was found within the vault of the bank, wounded, gagged, handcuffed, unconscious and in a dying condition. A few hours later death resulted. Ten years from that time the respondents were indicted, tried and convicted of the murder of this man. Thereupon a general motion to set aside the verdict was filed, and also a motion for a new trial on the ground of newly-discovered evidence. These motions were addressed to and heard by the chief justice of this court who presided at the trial. The motions having been denied, an appeal was taken to this court; and the question before us relates to the correctness of his decision in denying these motions for a new trial. Our determination must be based upon the record which has been presented before us, and which is very voluminous, comprising about twelve hundred printed pages of testimony from more than one hundred and fifty witnesses. Upon the combined evidence thus presented does the guilt or innocence of the respondents depend. With the utmost care and diligent research, in the investigation of this case, have we examined this vast volume of testimony; and the conclusion to which this court, by unanimous opinion, has ultimately arrived is, that the decision of the court below, denying these motions, was correct.

While it is practically impossible within the limits of this opinion to give any analysis, or even an extended summary, of the evidence introduced before the jury and upon the motions, it may be proper, in this connection, to say that, in a very lengthy and elaborate opinion by the learned justice who presided at the trial, and before whom the motions were afterwards heard, a very thorough, complete and exhaustive analysis of the evidence has been furnished as the basis upon which his denial of the motions was founded; and that opinion will undoubtedly be filed in the proceedings.

An examination of the record discloses two classes of evidence relied on by the government as fastening the guilt upon these respondents. These classes consist of the alleged confessions of both respondents in relation to the crime,—and their identification and presence within the state and in the immediate vicinity of these operations on two previous occasions the year before, and also their identification and presence in Dexter, and in and about the bank building, on the day on which the murder was committed. These two classes of evidence, while not in any sense dependent upon each other, are nevertheless in a most remarkable and striking degree in all their essential particulars entirely consistent, and in harmony with each other.

The story as told by Charles F. Stain of his father's confessions to him, and as to what occurred on two former trips of exploration from Massachusetts into Maine in 1877, was the starting point from which the government was able to develop, by testimony entirely independent of this witness, a chain of evidence of such strength as left no doubt in the minds of the jury of the commission of the crime charged and of the guilt of these respondents. That evidence when discovered stands upon its own merit, inasmuch as it is entirely disconnected with the testimony of young Stain, which was but the key which unlocked the chambers of this crime and made plain all the evidence of these men's guilt. However much of truth or fiction the disclosures of this man may be supposed to contain, there is certainly one fact which stands out transcendently above all others, and that is that these disclosures have led to the discovery of most important evidence against the accused, which would never have been discovered without his aid. While a large part of the testimony discloses evidence whose only object and purpose is to impeach this witness, it is a most striking and significant phase of the government's case, that it is in no sense dependent upon the credibility of this witness. The government's case does not rest upon the testimony of Charles F. Stain alone. It is not whether the story of this man, standing alone, is to be fully believed or not. The conviction of these men was not based upon that. Yet one of the most forcible demonstrations of the

substantial truth of the testimony of young Stain, in all the material elements of the case, is, that it is so completely in harmony with so many independent facts and circumstances, and the testimony of so many independent and distinct witnesses. Affirmations and denials by word of mouth may be fabricated; but circumstances and the happening of facts cannot. The latter is the crucible wherein to test the truth or falsity of the former. The corroborations of this witness in his accusation against the prisoners are not few or accidental, but many and various, each imparting and receiving strength from the other. It is not within the proper scope of this opinion to set forth in detail these numerous corroborations, which are disclosed by the vast volume of other testimony, introduced both to support and impeach the accusation made by this witness. It is sufficient to say that the record discloses these corroborations. They exist in reference to many matters, the evidence of which could not possibly have been anticipated by him, if his story were a fabrication. His story was told,—and in all its essentials the same as repeated from the witness stand,—long before he knew, so far as can be perceived, that a single witness or a single circumstance would be brought in confirmation of his accusation. As remarked by the chief justice in the opinion to which we have referred, "The story is full of details connected with each other, and of collateral facts, many of them of minor consequence, consistent with each other, which naked falsehood would hardly attempt to include in its manufacture. Truth weaves without effort a finer web than falsehood can with all its art and cunning."

With the story of young Stain as the starting point, the government next sought corroborative information from John F. Harvey, who for years was an associate of the respondents, but who for a long time had lived apart from them. He is a brother-in-law of the defendant Stain, and testified to statements and confessions made to him by Cromwell five years before the trial, and before the story of Charles F. Stain. This information was not volunteered on his part, nor did he confess any knowledge of the affair until a second interview made on behalf of the government

in June or July, 1887. This witness is also supported in the details and circumstances of this confidential admission confided by Cromwell to him, in the fall of 1882, and by the subsequent statements of Cromwell to another government witness tending strongly towards confession, and which Cromwell upon the stand found it very difficult to deny. Very many of the details given in the story of young Stain in relation to circumstances and transactions prior to this tragedy, are also given by Harvey, with little chance of confederation between them.

But how is this testimony and the case of the government met on the part of the defense? It is not one of confession and avoidance,—not one which admits that there had been excursions from Medfield into Maine prior to 1878, in which young Stain had accompanied these respondents for proper and legitimate purposes, but that the father never confessed that he was in Dexter in February, 1878,—or that Cromwell, although admitting other crimes to Harvey, his former associate, had never acknowledged his guilt in this affair. No. The defense strikes deeper and bolder than that. It is this: That Barron died by his own hand, and that the prisoners had no connection whatever with his death; that they never made any preliminary excursions into Maine prior to his death; and that they were never in Dexter in their lives, and that the testimony of young Stain and Harvey is wholly false and devoid of any foundation.

That these respondents had not only made two former excursions of exploration into Maine, and into Dexter,—once in the summer and once in the fall before this tragedy,—and had been transported across the country from this point to Corinna and Madison, there can be no shadow of doubt, as the evidence from numerous witnesses upon that point, detailing facts and circumstances, is both convincing and conclusive. Upon this question the testimony of Charles F. Stain is incontrovertibly corroborated. While his testimony is attacked upon minor matters of details, and to some extent in relation to dates given by him, it is nevertheless supported and fortified by an array of facts and circumstances too strong to be overcome. The essential question was not over dates but over events. It was not so much what month

these trips were made, as whether or not they were made; and whether these respondents were in Dexter and were carried across the country to other points on two occasions prior to this tragedy. This was a strong point in behalf of the government. It was so conclusively proved, independently of the testimony of young Stain, that its effect was materially felt by the defense, which asserted as boldly that the prisoners were never in Dexter in their lives, as that they had no connection with the death of Barron.

But the most important evidence, perhaps, in the case is that which was offered to prove that the prisoners were seen in Dexter during the day of Barron's death. Upon this, as well as in explanation and corroboration of the other evidence, depended the great power of the government's case. The important and convincing facts which overthrow all defense in connection with the fact, that these respondents had made other and previous visits into Maine, and which went to prove the guilt of these two men, were, that witness after witness of intelligence and respectability saw and identified them under a great variety of circumstances; sometimes singly, sometimes together; and picked them out as being two of the men, and strangers, whom they saw in the town of Dexter on that fatal day. This evidence in relation to identification is both direct and circumstantial. It comes from a large number of witnesses. Some saw them while going to Dexter, others saw them in Dexter, and others identify them in their flight on the evening of the day of the tragedy, and still others in the early morning and in the forenoon of the next day, still in their flight from town. Some witnesses positively identify these men, while others do this indirectly and corroborate numerous witnesses by the description of their manner and bearing, by the color of their dress, and the appearance of the horse driven by them. All the witnesses give reasons for their remembering as they do, and state circumstances. The proof of identity is not confined to the single fact of the recognition of the faces of the prisoners. There are many circumstances and coincidences combining with that, which have great weight on the question of identification, and which are detailed in connection

with the general statement of the witnesses. It may seem strange at first thought that the witnesses are enabled to remember and identify these men after so long a time. Under ordinary circumstances this would be true. But it must be borne in mind, that in consequence of the sudden and dreadful shock produced by the death of Barron, every person in the community immediately sought to reproduce in his own mind the presence and appearance of any strangers seen on that eventful day, and the impressions then received, by those who saw strange persons in town and in that vicinity, have been vividly retained in their minds ever since. The startling event, shrouded in mystery during all these years, has served to stamp indelibly upon their minds and memories the impressions received at the time; and their testimony is but the reproduction of what they saw and noted, and even discussed, when every circumstance was fresh in their recollection,—when every incident was carefully treasured up in the storehouse of their memories. It was an old picture brought out into clear light after having been laid away for years. The presence of strangers in a village of the size of Dexter, and in sparsely settled towns, is much more readily noticed than in cities or larger places.

It is a significant fact that the identification of these men is not dependent upon the testimony of one witness, but upon many and different witnesses, who differ among themselves only in slight and not in essential respects. It is not whether one witness may be mistaken, nor several, but whether twenty or more witnesses, testifying independently of each other, who saw the prisoners at different places, at different hours, and whose testimony is fully supported and fortified by other facts and circumstances, can be mistaken. Nor is it whether they may be mistaken as to one man, but as to two men seen under the same circumstances; they would be much more likely to be mistaken as to one man than they would as to two men, with the very marked characteristics pertaining to these two men. They differed in height, in dress, in the manner of their bearing, one being short, stout and erect, the other one taller and stooping or round-shouldered. It would be remarkable, to say the least, if the persons

are not the strangers who were seen and identified by so many different witnesses; and if so many different witnesses have been mistaken about their identity, when the facts and circumstances corroborating them are so varied and numerous. The witnesses appear to be people of business standing and respectability. But the defense is, that this is all a mistake and error on their part; that they have mistaken the prisoners for some other persons. No one, however, with such a body of evidence, can say that there were not two or three persons, strangers to all, in the town of Dexter on the day of the murder. One class of witnesses identify David L. Stain as one of those strangers; another class identify Oliver Cromwell as another of those strangers; and still another and the more numerous class identify both Stain and Cromwell as two of the strangers. If there is any force in human testimony it must be admitted that two of those strangers, whoever they were, happened to look not only like one man but they happened to look like two different men. If it be true that two casual strangers, who happened to be in Dexter on that particular day, bore this striking and remarkable resemblance, one to Stain and the other to Cromwell, and it was a case of mistaken identity, would not, long before this time, at least one of the originals have been found? Would not at least one of the men, or both, who bore this curious and remarkable resemblance, so as to deceive everybody who saw him, have been discovered? It is reasonable to believe that the energy and exhaustless fertility and thoroughness of research, which has characterized this defense, would have been directed towards this vital branch of it, if there had been a possibility of success. The defense has had the free use of the county treasury for the payment of every witness called at the trial and since the trial, the expenses of commissioners, of printing, and miscellaneous bills up to the time the case was laid before this court. But no witnesses have ever appeared to account for these strangers, except those introduced by the government who identify them with the prisoners.

From the great mass of testimony upon this question of identification, the conclusion to be drawn is irresistible that two of the strangers were these prisoners, and that they were seen in the

village of Dexter, and around the savings bank, upon the day of Barron's death. No more appropriate language can express the conclusion to be drawn from the testimony upon this question of identification than that of the justice who saw the witnesses and heard their testimony: "It is about as morally certain as human evidence can establish a thing, that on the 22d of February, 1878, there were in Dexter three strangers, two of them having been more prominently noticed than the third one. These persons were about the streets seen by many men, and known to no one unless to Maddox. They were well dressed, and not common looking persons, possessed of a valuable team, and carrying luggage. There can be no doubt that they were not in Dexter for any honest purposes, or upon any honest business, for it would have been known to somebody in Dexter, or the fact would have been afterwards easily ascertained. They visited no house, stopped at no hotel, entered no store, but for crackers and cheese, and were in no shop excepting Dustin's, where there were mechanical tools, only one of them appearing at such places at a time. They are not known to have spoken to a human being in Dexter during the day, excepting in the store and shop named, and to Maddox, at whose inconspicuous and retired place they stabled their team. They were prospecting around the bank building a good deal of the day. They were seen in the building with no business in either bank. They decamped as suddenly as they came. Two of them travel all night with hardly a stopping moment for their horse, seeking when the day came roads exposed to but little observation, until they go out of sight. There can be no doubt that the persons who drove the team into Dexter drove it out. The horse which Maddox describes is described by those who saw the fleeing team. The same men he saw were seen all along the route. It is impossible that the strangers in Dexter should not have been discovered before this, if they were persons other than the prisoners, and were innocent persons. The trial of this case has advertised in all the papers of the land for their discovery, and no response comes. No other persons than the prisoners have been suspected of being the strangers in Dexter. No person turns up to explain the presence of the

strangers at Mrs. Miller's at Bangor, or at Dexter, or on the road, out side of the prisoners."

Nor is this chain of evidence weakened by the theory of suicide set up in defense. To dispose of that theory requires but a passing word. A candid and careful examination of the evidence can not fail to convince the mind, seeking after truth and unbiased by prejudice, that such a theory is groundless,—if not fanatical. It ignores consistent and convincing facts and all reasonable presumption, and grasps at trivial circumstances and groundless suspicion. The brief summary of facts to which we have already alluded,—facts which left no reasonable doubt in the minds of the jury who heard them,—militates absolutely against any such theory as suicide. There is no reasonable or consistent hypothesis developed from the evidence in the case upon which it can be based. Barron was not a defaulter of the moneys of the bank at the time of his death. The evidence nowhere indicates it. Nor was this attempted to be shown at the trial. Years before, the books of the bank had been subjected to a most thorough and critical examination, by auditors of business experience and ability appointed by this court, and while there was found a technical deficiency, it was of a sum so small that it could have been easily supplied by Barron at any time. No man had better credit in the community, and he had sufficient means of his own with which to make good any sum that might be shown to be due from him. He was treasurer of the town as well as cashier of the bank, and was custodian of moneys for other people. No suggestion is to be found that he was ever guilty of default or fraud towards any of them for the slightest amount. If his death resulted from suicide, what a remarkable coincidence of events surrounded it. Why should it happen at the exact moment when strangers, not only to him and his designs, but to every person in that community, were in town for the very purpose of robbing the bank? Why should it happen that if, as claimed by the defense, he committed suicide to give the appearance of robbery, strangers were upon the very premises at the same time for the purpose of committing a real robbery,—or murder,—or both? But to go a step further. What a wonderful

concurrence of events, that, on the very day and hour that Barron killed himself to give the impression to the world that he had been robbed, there were three strangers on the spot,—seen by many but unknown to all,—upon whom suspicion fell at once as soon as Barron was found, and yet of whose business and whereabouts, from that time to the present, not an iota of information has been discovered. Strangers disclosing no business to any one, though in town, upon the streets, and in and around the bank building, the greater part of the day, speaking to but two persons, stopping at no house, and disappearing as mysteriously as they came on the very hour Barron was lying unconscious and dying within the vault of the bank. If these strangers were innocent of Barron's death, it adds to the mystery that they should flee at the very moment when they would have fled if guilty either of robbery or of murder. And what can we say of the additional coincidence of facts and events, if this be suicide, when we consider the proof of identification of these strangers with that of these two respondents, and to which we have before alluded? It is inexplicable to say the least.

This theory of suicide presents no sufficient motive for such an act. While it is an axiom, as true as it is old, that all the actions of sane men depend upon motive as the power which prompts or propels them to the performance of those acts, in this case the evidence, mostly introduced by the defense, indicates any thing but motive, and furthermore, disproves any intention of suicide in Barron's mind on that fatal day. It needs no summary of the facts to establish this. We have already spoken of the fact that no financial embarrassment was pressing upon him. The alleged irregularities upon the books of the bank, and which to some extent is relied on as the excuse for the origination of the theory of suicide, in no way affected the bank or any of the depositors. The four depositors in whose accounts the apparent irregularities exist, testify that in no instance have they lost anything by these seeming irregularities. That there were some changes and peculiarities in the manner of keeping the accounts of the bank is obvious; but that either the bank or any depositor was in any way injured thereby is not established by the evidence.

Nor is there any motive even for the alleged act of apparent unintentional suicide, or having thrown himself into a stupefied condition by the use of some narcotic, as if by some act of burglars, and that in so doing death resulted unintentionally. This theory is as groundless as the former. It not only lacks motive but evidence to support it. The inference legitimately deducible from such a theory can be no other than that there was no motive sufficient to induce intended death. The two theories are totally inconsistent with each other. In defending Cœlius against the charge of attempting to poison Clodia, Cicero asks,—"Is it likely so great a crime would be committed without any motive whatever?"

For more than a year after this tragedy, the theory of suicide, either intentional or unintentional, was not suggested by any person. With the same evidence substantially as now exists, the officials of the bank as well as the public believed it murder. The evidence which is now claimed to support suicide, was accepted as the evidence of murder. A coroner's jury, at the head of which sat one of the bank officials who has, as the evidence shows, been active and zealous in advancing the suicide theory, declared that Barron had been murdered. The trustees issued circulars soliciting subscriptions and donations from banks and individuals, for the purpose of defraying the expenses of "ferreting out the criminals," of erecting a suitable monument to the memory of Barron, and as a gift to his widow. Six thousand dollars were thus raised and given to the widow of the murdered man. The president and trustees also by public advertisement announced a reward of $1,000 for the "detection of the murderers, or any one of them."

On the day of Barron's death he was busy in making writings for his neighbors, paying depositors, settling accounts with the town collector, working at his desk up to five o'clock that afternoon. There was nothing unusual in his appearance upon this day. To believe that he committed suicide, in the way and manner set up in defense, would require a belief that he had deliberately contemplated it and planned its execution, even to the details, for it is not contended but that it would require time and

method if done by his own hand. But if the defense is correct it would require quick work on his part. His bank associates were with him till past five o'clock, and when last seen there he was busy with his ordinary duties. If he died by his own hand he must have accomplished the deed with all its incidents within an hour from that time. It could have been done in much less time by three assailants. But his work would not only require time but deliberation. If resolved on death, why such torture prolonged for hours before death relieved him of his sufferings? If resolved on death, what need of artifice on his part to conceal the cause of his taking his life? There are many reasons why suicide is inconsistent with the facts and circumstances surrounding the transaction. There is nothing in the facts and circumstances inconsistent with murder. More than that, they are consistent with and indicative of murder, and the government presents a strong case upon that point. The evidence is overpowering, and crushes the theory of suicide.

Another branch of the defense relied upon, in answer to the evidence on the part of the government, is the alleged *alibi*. For it is admitted by the defense, that if the prisoners were in Dexter on the day of Barron's death, the inference of their guilt cannot be resisted; but it is contended that they were at their homes in Massachusetts on that day. And no pains have been spared in attempting to establish the presence of both Stain and Cromwell in Medfield on the 22d day of February, 1878. Both were witnesses, and each endeavors to account for himself on that day. Unfortunately for Cromwell he is not able to fix upon any individual besides his wife whom he saw that day. It is upon this branch of the defense, that the great bulk of the alleged newly-discovered evidence has been introduced, since the trial, and in support of the motion. Here we meet a very different class of witnesses, and the great majority of them, if we are to judge anything by their testimony, are deeply interested in the result of the case; and many of them friends and associates of the prisoners, without much character or position, who seem to be willing to do anything within their power in their behalf. This testimony we have examined with great care, and while it might be

somewhat interesting to analyze it, for the purpose of showing its numerous discrepancies and inconsistencies, it would not be advantageous or practicable so to do within the limits of this opinion. As regards this testimony introduced by the defense to show the prisoners in Medfield on that day, it need only be said that, when carefully analyzed, it is so contradictory in itself, and so entirely overborne by the testimony on the part of the government, that it can have no moral or legal weight in sustaining the motion for a new trial. It is contradictory as between the witnesses upon the same side,—it is contradictory to Stain himself who lacks neither in power of memory nor ability of narration, and who it may properly be assumed, ought to know more of his whereabouts on that day than any one else. The testimony in defense, upon this question of *alibi*, shows affirmatively an absence of the prisoners from Medfield upon the day of this tragedy. The government conclusively establishes their presence in Maine. The fact that Hamant's horse was stolen in Medfield on the night of February 21, 1878, has been put forward as a circumstance to enable persons to remember seeing Stain upon the day following. But that circumstance, as shown by the government not only upon cross-examination but by independent witnesses, was a potent factor in establishing the fact most conclusively that the prisoners were absent from that town at the time, and that they were not suspected of the theft because of their absence. There is not a witness who swears that Stain or Cromwell was seen upon the street in Medfield on the 22d day of February, 1878, when the excitement was rife and search was being made for the discovery of the stolen horse. Not a witness for the defense was engaged in the search. Nor did they hear of any suspicion being cast upon Stain of stealing the horse. But five witnesses, among whom was the secretary and one of the directors in the Medfield Thief Detective Association and active in the investigation, testify positively that Stain was not in the search nor seen by them during the day, although Stain himself claims, to have taken part in the search, and mentions seeing one of these witnesses. They further testify that upon inquiry Stain was found to be away from home. While the motion alleges that the de-

fense will show that Stain was suspected of being guilty of stealing the horse, and that public attention was turned to him on the 22d, on that account, the evidence introduced shows no such facts, but, on the contrary, the opposite is shown,—that suspicion did not attach to him, and for the reasons before stated.

The only witnesses introduced under the motion and who claim to have seen Stain at his house on the day in question, are contradicted by Stain himself, by other witnesses, and by circumstances. The defense, in its attempt to prove that Stain was in Medfield, has failed to succeed, while the government in the new evidence, has succeeded in proving the exact contrary. It is unnecessary to attempt to summarize the evidence upon this point. Upon these questions of fact the court can only state conclusions to which it has arrived, and which are fully supported by the evidence. To attempt more than that would require the introduction of so much of the record, that any opinion would be little more than a full and detailed statement of the evidence.

We have now considered the different phases of the case as presented by the government, and the several positions assumed by the defense.

The question whether a new trial shall be granted, having been once passed upon by the tribunal, whose duty it was to hear and decide the matter in the first instance, it now becomes the duty of this court in its final determination carefully to weigh and consider the question thus presented. This we have done. We have carefully taken into view, not only the great mass of testimony, but all the circumstances of the case, with as favorable a consideration for the prisoners, as may be consistent with a due regard to the rights of the public, and sound principles of justice. From no standpoint on which we have been able to view the evidence before us, whether it be that given at the trial, or in connection with that subsequently produced in support of the motion, are we satisfied that a new trial should be granted.

In regard to the supervisory power of the court over verdicts, and in relation to the granting of new trials the uniform and unquestioned practice in this country has been, with a very few

exceptions to be found in the earlier cases, to extend to criminal cases the same principles which are applicable to civil actions. In the application of that rule to the present case, upon the evidence submitted to the jury, no sufficient grounds are shown whereby the verdict should not be permitted to stand.

But the principal reliance of the defense is based upon what is claimed to be the newly-discovered evidence in the case. Notwithstanding the discretion of the court in such cases is very broad, and will be exercised by the court in granting a new trial, whenever a proper case is presented, yet there are well-settled rules by which the court in this as in all other cases should be governed. In order to warrant a new trial upon the ground of newly-discovered evidence, it should be made to appear that injustice is likely to be done by refusing it, and therefore it becomes necessary for the court to take into consideration the weight and importance of the new evidence, its bearing in connection with the evidence on the former trial, and even the credibility of witnesses. And this rule is applicable not only to civil but criminal cases. *Ordway* v. *Haynes*, 47 N. H. 10; *State* v. *Carr*, 21 N. H. 166, 169, 173; *Parker* v. *Hardy*, 24 Pick. 246; 2 Whart. Crim. Law, § 3061. An eminent English judge, noted for his learning and wisdom has said: "Such applications should be cautiously admitted, as it would be a great inlet of perjury." *Vernon* v. *Hankey*, 2 T. R. 120.

And it is a well-established rule that a motion for a new trial should not be granted on the ground of newly-discovered evidence, unless the evidence is such as ought to produce, on another trial, an opposite result upon the merits. Thus in Pennsylvania, in the case of *Com.* v. *Flanagan*, 7 Watts & Serg. 423, upon a motion for a new trial after conviction in a capital case, the supreme court of that state gives expression upon this question in the following language: "After verdict," say the court, "when the motion for a new trial is considered, the court must judge not only of the competency, but of the effect of the evidence. If, with the newly-discovered evidence before them, the jury ought not to come to the same conclusion, then a new trial may be granted; otherwise they are bound to refuse the applica-

tion. And in *Lewellen* v. *Parker*, it is ruled that, in considering the motion, the court will not inquire whether taking the newly-discovered testimony in connection with that exhibited on the trial, a jury might be induced to give a different verdict, but whether the legitimate effect of such evidence would require a different verdict. The question, therefore, is (supposing all the testimony, new and old, before another jury) not whether they might, but whether they ought to give another verdict." This doctrine is affirmed in numerous decisions by the highest courts in this country. *Handly* v. *Call*, 30 Maine, 10; *Snowman* v. *Wardwell*, 32 Maine, 275; *Todd* v. *Chipman*, 62 Maine, 189; *Trask* v. *Unity*, 74 Maine, 208; *Halsey* v. *Watson*, 1 Caines (N. Y.) 24; *Thompson* v. *Com.*, 8 Gratt, (Va.) 637; *Carr* v. *State*, 14 Ga. 358; *Ludlow* v. *Park*, 4 Hammond (O.) 5; *Ewing* v. *McConnell*, 1 A. K. Marsh (Ky.) 188; *Sheppard* v. *Sheppard*, 5 Halst. (N. J.) 250; *Morris* v. *Hadley*, 9 Mich. 278; *State* v. *Burge*, 7 Iowa, 255; *Middletown* v. *Adams*, 13 Vt. 285; *Harris* v. *Thompson*, 23 Kan. 372; *Brown* v. *Lurhs*, 95 Ill. 195.

The learned judge who heard these motions presided at the trial. He heard the testimony given on that trial from the mouths of the witnesses, was enabled to observe their conduct and demeanor, and to some extent had better means of weighing the credibility of their conflicting statements, than the full court can have from an examination of their printed testimony. He also saw many of the witnesses introduced since the trial and heard their statements and observed their appearance and deportment. After a full and deliberate consideration of all the evidence in the case, and with a most thorough and exhaustive analysis of the same, he denied the motions. It is a rule that prevails not only on the equity side of the court, but also in actions at law, that the decision of a single justice upon matters of fact decided by him is entitled to proper weight, when the case is heard by the whole court, upon a full report of the evidence adduced at the original hearing. The courts of last resort, both in this country and England, in the application of this rule, hold that such decision should not be reversed unless it clearly appears that such decision is erroneous, and that the burden to

show error falls upon the appellant. *Young* v. *Witham*, 75 Maine, 536; *Reed* v. *Reed*, 114 Mass. 372; *U. S.* v. 112 *Casks of Sugar*, 8 Pet. 278, 279; *The Glannibanta*, 1 L. R. P. Div. 283. But in the case before us there is no necessity for the application of that rule. For laying aside all weight to which the decision of the sitting justice is properly entitled, it is the opinion of this court that upon a careful, thorough and impartial consideration of the evidence before it, no new trial should be granted. It does not appear that any injustice will be done in refusing it. The legitimate effect of the entire body of new evidence, to which we have had occasion to allude in another part of this opinion, taken in connection with the other evidence, is by no means such as ought in the opinion of this court, to produce an opposite result on another trial. Nor would the jury be warranted, from anything that appears in the case, in arriving at a different conclusion from that already found on account of it. Without this, it is the duty of the court to deny the motion and allow the verdict of the jury to remain undisturbed.

Motions overruled. Judgment for the state.

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

WILLIAM K. LANCY, and another, *vs.* HOME INSURANCE CO.

Somerset. Opinion March 14, 1890.

Fire insurance. Non-occupancy. Increase of risk. R. S., c. 49, § 20.

A policy of fire insurance upon a dwelling-house becomes void, when the risk is materially increased, by non-occupancy without the consent of the insurer.

ON REPORT.

It was admitted that defendants are a foreign fire insurance company, and were legally admitted before March 26, 1875, as

required by law, to transact insurance business in the state of Maine, and have been so legally admitted annually since.

The case is sufficiently stated in the opinion.

S. S. Hackett, for plaintiffs.

Non-occupancy does not avoid the policy unless risk is materially increased. Testimony of insurance men that risk is generally increased by non-occupancy is not admissible. *Joyce* v. *Ins. Co.*, 45 Maine, 168; *Cannell* v. *Ins. Co.*, 59 Maine, 582; *State* v. *Watson*, 65 Maine, 74.

The defendants' right to invoke limitation clause as a defense waived. *Little* v. *Ins. Co.*, 123 Mass. 380.

Counsel also cited: *Lewis* v. *Ins. Co.*, 52 Maine, 492; *Blake* v. *Ins. Co.*, 12 Gray, 265; *Freeman* v. *Morey*, 45 Maine, 50; *Augusta* v. *Vienna*, 21 Maine, 298; *Groton* v. *Lancaster*, 16 Mass. 110; Greenl. Ev. § 47; Whar. Ev. § 1323; Best Ev. § 43; *Bank* v. *McNeagle*, 69 Penn. St. 159; *Bank* v. *Crafts*, 4 Allen, 447; *Bailey* v. *Ins. Co.*, 56 Maine, 474; *Patterson* v. *Ins. Co.*, 64 Maine, 500; *Winslow* v. *Kimball*, 25 Maine, 493; *Merrill* v. *Crossman*, 68 Maine, 412; *Church* v. *Crocker*, 3 Mass. 17; *Holbrook* v. *Holbrook*, 1 Pick. 248; *Thayer* v. *Dudley*, 3 Mass. 296; *Somerset* v. *Dighton*, 12 Mass. 383; *People* v. *Utica Ins. Co.*, 15 Johns. 358; *Jackson* v. *Collins*, 3 Cow. (N. Y.) 87; *Amesbury* v. *Ins. Co.*, 6 Gray, 596; *Dolbier* v. *Ins. Co.*, 67 Maine, 180; R. S., c. 49, § 86; c. 34, § 1, laws of 1861; (c. 49, § 62, R. S. of 1871,) c. 44, laws of 1875; *Hughes* v. *Farrar*, 45 Maine, 72; *French* v. *Co. Com.*, 64 Maine, 583; *Staniels* v. *Raymond*, 4 Cush. 316.

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

Policy provides that suit shall be commenced within twelve months after loss shall occur. Provision contained in R. S., c. 49, § 87, does not apply to defendants as they were admitted before March 26, 1875, c. 44, § 3, laws of 1875.

After the loss shall occur means the same as if it read after the loss shall "accrue." *Mayor* v. *Hamilton Fire Ins. Co.*, 39 N. Y. 45.

C. 222, laws of 1889, repealing proviso in R. S., c. 49, § 87, does not affect this action, because it was pending at the time of

its passage. R. S., c. 1, § 5; *Phinney* v. *Phinney*, 81 Maine, 450; 2 Rorer on R. R. 1096; *Dolbier* v. *Ins. Co.*, 67 Maine, 180, was decided without reference to the statute.

Risk greatly increased by non-occupation, R. S., c. 49, § 20.

Counsel also cited: *Luce* v. *Ins. Co.*, 105 Mass. 297, 301; *Lewis* v. *Ins. Co.*, 52 Maine, 492; *Davis* v. *Ins. Co.*, 49 Maine, 282.

PETERS, C. J. The question of recovery for a loss by fire under this policy is referred to the court, as a question of law and fact. The defenses set up are the statute of limitations, a want of proof of loss, and increased risk occasioned by non-occupancy. The title is also questioned. It is doubtful if any proof of loss was ever sent to the company, or to any of its agents. We need not consider any of the questions, however, excepting that of non-occupancy, which will be decisive of the case.

It is agreed in the policy that, "should the premises become vacant or unoccupied without notice to, and consent of, the company, in writing, the policy shall be void."

The insurance was for $300 on the house and $200 on barn. The buildings were of a poor class, situated on a cheap farm, in a remote settlement, without near neighbors, in the town of Pittsfield. The buildings were insured in January 1885, and burned down in April next afterwards. It is well enough proved that the premises were not occupied at the time of the fire, nor had they been for weeks before, and that the fire was incendiary. The plaintiffs feel assured that they know who set the fire. No notice was given that the house would be vacated, nor assent asked, by the insured.

By statute of this state, mere non-occupancy does not create a forfeiture of the policy. The company must show that the risk was materially increased by the non-occupancy. We think the facts in this case do show it. We all know that old, dilapitated buildings on the roads, in secluded places, are exposed to some risk of destruction by fire from their very situation. In all probability the torch would not have been applied to these buildings had they been occupied at the time. The increased risk was fatal to the safety of the property. The result shows it. It

behooves men who take policies to pay some heed to the conditions contained in them. The plaintiffs were not unaware of the provisions in this policy, and suffer only from their own neglect to comply with them.

Judgment for defendants.

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

ARTHUR M. BURNHAM *vs.* GEORGE W. HESELTON.

Kennebec. Opinion March 15, 1890.

Client and attorney. Purchase. Presumption. Burden of proof.
R. S., c. 122, § 12.

The law deprecates the purchase by an attorney of the subject matter of litigation, or any speculative bargain in relation thereto; and casts upon the attorney the burden of proving the perfect fairness, adequacy and equity of the transaction.

Such proof, like that of any other affirmative proposition, must be by evidence.

The presumption of innocence, or the improbability of wrong-doing by the attorney is not affirmative evidence; and the jury should not be instructed that they may consider such presumptions as tending to discharge the burden of proof.

The presumption is that the transaction was invalid, which presumption must be overcome by evidence.

ON EXCEPTIONS from the superior court.

This was an action of assumpsit to recover from the defendant, a counselor and attorney, money which he had collected on a promissory note and which appeared, at one time, to belong to the plaintiff. It had been left with the defendant for collection. On May 26, 1888, the parties made the following agreement:— "Said Heselton agrees for consideration hereafter mentioned to endeavor to collect a note due said Burnham from the Burnham Shutter Worker Co., of Brockton, Mass., to pay all expenses incurred in collecting and to pay said Burnham seventy-five dollars if that sum is collected. Said Burnham in consideration of the

above agrees to allow said Heselton all moneys above seventy-five dollars for collection." The original paper, said to be obscure in certain places on account of the writing being illegible, did not come into the reporter's hands ; and it would seem that the closing words "for collection" should read "if collected."

On July 4, 1888, the parties having settled, the plaintiff gave the defendant a receipt in full as follows :—

"Recd. full payment of Geo. W. Heselton for note from Burnham Shutter Works Co., according to agreement."

The case was tried to a jury, in the superior court for Kennebec county, and they returned a verdict for the defendant.

The plaintiff excepted to some of the instructions of the presiding justice to the jury. These instructions will be found in the opinion of the court.

The plaintiff also requested that the jury be instructed that "the written agreement between plaintiff and defendant for the collection of the note on terms is unlawful and void." To this request the presiding justice replied, "That, I suppose, has reference to the statute, relative to which I have already given the rule, and which I do not modify, for the reason that the statute does not apply to this case." The plaintiff excepted to the refusal to give this instruction.

W. Gilbert, *W. C. Fletcher*, with him, for plaintiff.

To the burden of proof and dealings between client and attorney, counsel cited: *Dunn* v. *Record*, 63 Maine, 17; Story's Eq. §§ 308, 481, 1049 ; Willard's Eq. 172; Wait's Actions and Defenses, vol. 7, p. 72, § 2, and cases cited: *Harper* v. *Perry*, 28 Iowa, 57, and cases cited in Pom. Eq. § 960 ; *Low* v. *Hutchinson*, 37 Maine, 196.

Agreement not valid. R. S., c. 122, § 12. It promises to pay all expenses ; to pay $75, if so much is collected. These two promises are within the prohibition of the statute, forming "liabilities to pay something." It is a promise to collect on shares.

Heath and Tuell, for defendant.

There being no request for instruction that the agreement is

void at common law, exceptions do not lie. There was a waiver of the point. *Robinson* v. *Edwards*, 70 Maine, 158; *Harpswell* v. *Phipsburg*, 29 Id. 313; *State* v. *Knight*, 43 Id. 11; *Bird* v. *Bird*, 40 Id. 398; *Tenney* v. *Butler*, 32 Id. 269. Request not good as a whole. *Larrabee* v. *Sewall*, 66 Id. 376. The agreement is for a sale, and not to bring, prosecute or defend any suit at law, etc., "upon shares." Case so treated throughout the trial, and jury so instructed without exception. Collecting a note "on terms" violates no statute forbidding suits "upon shares."

Statute does not apply. Defendant's agreement was simply an "endeavor to collect," and not to bring suit. He did not bind himself to bring an action. The words "upon shares" means at the halves (*Winsor* v. *Cutts*, 7 Maine, 263; *Sims* v. *Howard*, 40 Id. 276; *Bonzey* v. *Hodgkins*, 55 Id. 98; *Manter* v. *Holmes*, 10 Met. 402;) but Burnham was to receive the first $75, if collected. An agreement to charge a bill measured by the amount recovered is not illegal. *Blaisdell* v. *Ahern*, 144 Mass. 393. Contract being executed, statute cannot be invoked. *Miller* v. *Larsom*, 19 Wis. 466.

To adjudge a contract illegal, it must be clearly so; all doubts will be resolved in favor of its legality. Statutes of a penal character always to be strictly construed. *Butler* v. *Ricker*, 6 Maine, 298; *Perley* v. *Jewell*, 26 Maine, 101; *Abbott* v. *Wood*, 22 Maine, 541.

The contract will bear a construction that is legal, (a sale) and the plaintiff now contends that it can be construed as illegal. If it will bear a legal construction, the universal rule is to adopt the construction which will render it legal. See *Souhegan Bk.* v. *Wallace*, 61 N. H. 24; *Hamden* v. *Merwin*, 54 Conn. 418.

The plaintiff is not aggrieved, if this court applies this rule, and construes the agreement as a sale; in so doing it adopts the plaintiff's construction, in his opening and during the trial.

Agreement, if a sale, not within the statute. *Thompson* v. *Ide*, 6 R. I., p. 218; *Taylor* v. *Gilman*, 58 N. H. 418; *Fowler* v. *Callan*, 102 N. Y. 395.

We assumed, at the trial, the burden of proof resting on the defendant to establish the fairness of the transaction, and over-

whelmingly established the fact. Its honesty has been established by the jury.

EMERY, J. The plaintiff held a note of $250 against the Burnham Shutter Worker Company, which on the 23d day of March 1888, he committed to the defendant, an attorney at law, for collection. The defendant ascertained that one Stone had for a consideration assumed and agreed to pay all the company's debts, and that Stone was amply able financially, and entirely willing to pay this note on presentation. After ascertaining these facts, the defendant, on the 26th day of May 1888, made an agreement in writing with the plaintiff, by which the defendant was to collect what he could of the note at his own expense, and pay the plaintiff $75, if so much was collected, and retain for his services and risks all he should collect over $75. A short time after this agreement, the defendant caused the note to be presented through a bank to Stone, who paid it in full with interest, to the bank for the defendant. July 4, 1888, the defendant paid the plaintiff $75 and took his receipt in full "for the note according to agreement." The next fall, November 20, 1888, the plaintiff brought this action of assumpsit for money collected and money had and received by the defendant to his use. The object was to recover the balance of the money collected on this note by the defendant. The defendant pleaded the general issue only, and at the trial, put the above agreement and receipt in evidence, in defense. The plaintiff contended these were not valid against him, on the ground that he was not informed of the facts known to the defendant, in relation to the note, and the chances of its speedy and full collection. Whether the plaintiff was so informed of those facts, was the real issue before the jury.

The presiding justice instructed the jury, in the first instance, that the burden was on the defendant, to establish the affirmative of the proposition, that the plaintiff made the agreement, or sale, with full knowledge of all the facts known to the defendant, his attorney, and without concealment or suppression on the defendant's part. But in the same connection, he used this further language: "But, gentlemen, while the burden is upon the de-

fendant to do this, there is another principle which it is always the right and duty of the jury to consider in determining the question of burden of proof, and that is the question of presumption; that is, the probability or improbability involved in the charge of fraud. * * * In other words, there is in these cases you will perceive, whether in civil or criminal procedure, where a fraud is charged, where something wrong is charged, an opposing presumption, an improbability, which you have a right to consider in determining when the burden of proof has been discharged. * * * * * You have a right to consider the element of the presumption of innocence, and the element of improbability, that is involved, if it is involved in your judgment. It is for you to say when the burden of proof is discharged." Again, in commenting on the credibility and bearing of the several testimonies, the presiding justice, after reminding the jury of the legal presumption of the innocence of the defendant, further said, "Gentlemen, I do not think it necessary to remind you that the time has not yet come, when a fair and honorable character, which has been built up in the county by the process of years of worthy endeavor and honorable dealing, shall not count for something in a court of justice as well as out of it."

There was no evidence in the case touching the general character of the defendant, nor anything relating to his character at all, except the relations of the witnesses on the one side and the other, touching the transactions of the defendant in these premises. To the language above quoted, the plaintiff excepted, the verdict being for the defendant.

The law hates fraud or deception of any kind. It will uphold no contract or seeming right, obtained through fraud. When the parties to the contract are upon equal footing, each dealing for himself, without any relation of trust or confidence between them, the law will not permit any misleading, any deception of one party by the other. It will not enforce any advantage so gained. But in such cases the law will not presume there was fraud. It will assume that each party acted for himself, upon his own judgment without being misled by the other party, until such

misleading is proved. Any such party, seeking to avoid any contract or other transaction on the ground of fraud, has the burden of proving the fraud. Such transactions are presumed to be valid, until proved to be invalid.

When, however, the parties are not upon an equal footing, each acting for himself, but some relation of trust or confidence exists between them, touching the subject matter of the contract, the law is not so considerate or trustful. Where such relations exist, it views the transaction with caution, if not with suspicion. In such cases, it will not assume in favor of the agent, or fiduciary, that the contract was fairly made, and that there was no abuse of confidence. It waits for such party to satisfy it affirmatively, —to affirmatively show that there was in fact no abuse of confidence,—that the contract was in fact fairly made,—that the other party was in truth made acquainted with all the material facts and reasons known to the fiduciary. The very making of the contract is incongruous,—*prima facie* inconsistent, with the fiduciary relation. The transaction may be valid, but there is no presumption in its favor. The presumption is of invalidity, which can only be overcome, if at all, by clear evidence of good faith, full knowledge, and of independent consent and action. Pom. Eq. Jur. § 945, 956, 957, Adam's Eq. § 61, and notes; Story Eq. Jur. § 310.

Especially does the law require the highest degree of honor and good faith, from its own ministers. It insists that the confidence of the suitor in the faithfulness and disinterestedness of his attorney and counsellor, shall be fully deserved. It deprecates any purchase of any matter of litigation by an attorney from his client. It greatly desires that the attorney should be satisfied with a reasonable compensation, without seeking to obtain speculative bargains from his client. As said by one writer, such a transaction may be valid but it is presumptively invalid. Where any such bargain is made, the burden of sustaining it is on the attorney. No presumption will avail him. He cannot get behind the presumption of innocence, and await the coming of hostile evidence. He must be aggressive, and advance against the presumption of invalidity, and overcome it, if he can, by evidence of "the perfect

fairness, adequacy, and equity of the transaction," and particularly must he show that his client was informed of all material facts known to himself. *Dunn* v. *Record*, 63 Maine, 17; *Arden* v. *Patterson*, 5 Johns, Ch. 44; *Rogers* v. *Marshall*, 3 McCrary, 76, 4 Kent's Com. notes to, § 449. Weeks on Attorneys at Law, § 268, and notes. It has even been held by high authority, that such transactions are conclusively invalid,—that the presumption of invalidity cannot be overcome. *Newman* v. *Paine*, 3 Ves. 203; *Wallis* v. *Loubat*, 2 Denio, 607; Wayne, J., in *Michoud* v. *Girod*, 4 How. p. 555.

Recurring now to the language of the instructions to the jury, and reading them as a whole, in the light of the principles above stated, it will be seen, we think, that the presiding justice gave the jury to understand that the presumably good character of the attorney,—the presumption of innocence,—the improbability of fraud,—might in themselves be evidence and perhaps sufficient evidence to sustain the attorney's burden of proof, and hence establish the validity of the transaction in question. The whole charge is made a part of the bill of exceptions, and it intensifies rather than lessens the force of the language excepted to. The jury would naturally receive the impression, from the language quoted and from the whole charge, that the attorney was protected by the presumption of innocence and the presumption of improbability, which presumptions were to be regarded as greatly strengthened by the general good character of the attorney. The jury also might understand that they could, if they would, regard these presumptions as wholly sustaining, or at least balancing the burden of proof, and as relieving the attorney of any further duty of showing that the transaction was fair, adequate and equitable.

We do not think the attorney had any such presumptions in his favor in this action. He was not on trial for any crime. He was not charged in the declaration with any fraud. The action was the equitable one of assumpsit for money had and received by him to his client's use. In defense, he set up a transaction with his client which the law does not favor, and holds to be *prima facie* invalid. It was the law, not the plaintiff, that charged the fraud. The character of this particular transaction, not that of the attorney, was in issue. The act, not the person,

was then on trial. The character of the attorney might aid him as a witness, but it could not prove his case for him as a party. While one may invoke the presumption of innocence in negation, and wait for the prosecution to overcome it by evidence, he can not successfully invoke it in affirmation, as tending to prove any proposition cast upon him to prove. That presumption is a shield, not a weapon. To illustrate:—it is wrong not to pay one's promissory notes, and yet when one is sued upon such a note, and the note is produced, he cannot rely upon the presumption of his innocence of wrong, as proving or tending to prove payment of the note.

As to the presumption of improbability,—the law says it is against the attorney,—that it is improbable that the client had the same knowledge, and stood on the same footing as the attorney. Hence the requirement that the attorney shall affirmatively prove these propositions. In this case, however, the jury were in effect told, that the presumption of improbability supported the attorney,—that it was improbable that the transaction was invalid. If that were so,—if it were improbable that the transaction was invalid,—then of course it was probably valid, and must have been held valid until proved otherwise, and there was no burden on the defendant to establish its validity. There was, however, clearly no improbability that the bargain in this case (by which the client, the owner of the note, got only $75, and the attorney got $187 out of it,) was unequal and inequitable.

It must be evident that the instructions excepted to deprived of all force and virility the correct and wholesome rule that was first laid down. Their effect was to relieve the attorney of a burden which the law plainly says he must bear, if he will make such contract. It may be that this contract, while *prima facie* invalid, was in truth, "perfectly fair, adequate and equitable." We hope it was. But the attorney must prove it so; and as he would prove any other affirmative proposition, by evidence, and not by invoking presumptions of his innocence, and of the improbability of his doing wrong.

Exceptions sustained.

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

DOE *vs.* ROE.

York. Opinion March 27, 1890.

Married Woman. Crim. con.

A wife can not maintain an action against another woman, for debauching and carnally knowing her husband.

ON EXCEPTIONS.

The defendant demurred to the declaration which charged her with having alienated the affections of plaintiff's husband, etc.

James A. Edgerly, for plaintiff.

W. L. Putnam and W. S. Pierce, for defendant.

WALTON, J. This is an action by a married woman against another woman. The plaintiff has alleged in her declaration that the defendant debauched and carnally knew her husband, thereby alienating his affection and depriving her of his comfort, society, and support.

The question is whether such an action is maintainable. For such a wrong the law does not leave the injured wife without redress. She may obtain a divorce and a restoration of all her property, real and personal, and in addition thereto, alimony or an allowance out of her husband's estate. And the law will punish the guilty parties criminally. But does the law, in addition to these remedies, secure to her a right of action to recover a pecuniary compensation from her husband's paramour? We think not. We have been referred to no reliable authority for the existence of such a right, and we can find none.

It is true that a husband may maintain an action for the seduction of his wife. But such an action has grounds on which to rest that can not be invoked in support of a similar action in favor of the wife. A wife's infidelity may impose upon her husband the support of another man's child. And what is still worse, it may throw suspicion upon the legitimacy of his own

children. A husband's infidelity can inflict no such consequences upon his wife. If she remains virtuous, no suspicion can attach to the legitimacy of her children. And an action in favor of the husband for the seduction of his wife has been regarded as of doubtful expediency. It has been abolished in England. (Bouv. Dict., title, Crim. Con.) And the trials we have had in this country of such actions are not very encouraging. They seem to be better calculated to inflict pain upon the innocent members of the families of the parties than to secure redress to the persons injured. And we fear such would be the result if such actions were maintainable by wives. Such a power would furnish them with the means of inflicting untold misery upon others with little hope of redress for themselves. At any rate, we are satisfied that the law never has, and does not now, secure to wives such a power, and if it is deemed wise that they should have it, the legislature and not the court must give it to them.

Exceptions overruled.
Demurrer sustained.
Declaration adjudged bad.

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

JAMES H. MCAVITY, appellant, *vs.* LINCOLN PULP AND PAPER COMPANY.

Penobscot. Opinion March 28, 1890.

Insolvency. Corporation. By-laws. Salary. Operative's priority and assignment. Unpaid stock. R. S., c. 46, § 45, c. 70.

The law raises no implied promise to pay the president of a private corporation for his official services; and a by-law providing that the directors shall fix the compensation, will not entitle him to recover for such services until the directors take the necessary action; nor then, if they do not act before the corporation is adjudged insolvent.

An operative's assignment of his wages transfers to the assignee all the rights of priority which the assignor had. If wages earned within six months pre-

ceding the filing of the petition in insolvency amount to $50 or less, then the whole has priority; and if to more than that sum and none has been paid, then the $50 last earned and unpaid have the priority.

When, on payment of 60 per cent of its par value, as many shares of new stock as they already have of old, are duly allotted to stockholders, the unpaid 40 per cent is a part of the assets of the corporation, and "stands for the security of all creditors thereof" within the meaning of R. S., c. 46, § 45.

When the business of a corporation is to be closed up by insolvency proceedings, a creditor thereof holding such new stock thus unpaid, must pay in the balance and then take his percentage with the other creditors.

ON REPORT.

The appellant, McAvity, having made a proof of debt for $16,648.41 against the defendant corporation adjudged an insolvent upon petition of its creditors filed January 28, 1887, in Penobscot county, the assignee objected to its allowance, and a hearing was had in the court of insolvency.

From the account annexed to the proof of debt, it appeared that the appellant claimed a salary due him as president of the company for several years, under a by-law, and under which it was voted February 1, 1887, at a meeting of the directors to allow him $12,550 for his services in that capacity.

Besides interest on that sum, he claimed to be subrogated in place of several operatives of the company, whose labor performed within six months preceding the filing of the petition were priorities, and to be paid in full to an amount not exceeding fifty dollars. The company not being able to pay the operatives, he did so, at different times within that period, and took a written assignment of their accounts. They continued in the employ of the company afterwards, and either proved the accounts for their subsequent labor, or sold and assigned them to other persons by whom they were proved. The aggregate of these wages thus proved, in several instances, exceeded the limit of fifty dollars. It, therefore, became a question to whom such priorities were payable, it being conceded that the remainder of the claim, above the fifty dollars, should share in the general dividend.

The assignee claimed that there should be set off against the proof of debt the sum of $6,020, and interest since November 19, 1884, it being forty per cent on the par value of 301 shares of

the capital stock of the company allotted by it to McAvity at that date, and for which he had paid only sixty per cent, leaving forty per cent and interest thereon due.

The court of insolvency disallowed the claim for salary, sustained the set-off claimed by the assignee, and ruled that the right to priority follows the labor last performed, in preference to that performed within the six months, next preceding the commencement of proceedings, whether assigned or not.

The creditor appealed to this court by which it was reported to the full court.

Jasper Hutchings, for appellant.

Salary: The corporation was strictly a private corporation; it subserved no public use. It was in no sense charitable or benevolent. It existed for no purpose other than to make money for its stockholders. The case differs from most cases in the books wherein questions as to officers' salaries have arisen.

In *Sawyer* v. *Pawners' Bank*, 6 Allen, 207, the court lay stress upon the fact that the objects of the bank were partly charitable.

In *Smith* v. *Everett*, 61 N. H. 632, the defendants were directors chosen, not to continue the business, but to sell the property of the corporation and to close out its business. By their neglect of duty the corporation lost heavily, and the money sued for was received by the defendants, as such directors, with a full knowledge at the time of the insolvent condition of the corporation; and was a preference and its payment and receipt was, therefore, in fraud of the insolvent law.

Hall v. *Ry. Company*, 28 Vt. 401, tends to support the contention of the appellant rather than that of the defendant. In it the court allows a corporator to recover for services, in attending meetings before the organization of the corporation, as upon an implied promise by the company afterwards formed. The items of charge for services, that were disallowed by the court, were for services performed after an express vote by the directors not to pay for such services.

All the cases, and all except one, found in the books differ from the case at bar in one most important respect, viz: that in none of them, one only excepted, was there a by-law of the com-

pany making any mention of compensation to officers. Article 7 of the by-laws of this company, in force when the services charged for were performed, shows that it was the intention of the company that its president, secretary and treasurer, should be paid for their services. It is, in force and effect, a promise by the corporation itself of payment therefor.

No salary was voted to the president of this corporation earlier, and none was received by him, because the company in want of money and means, was all the time waging a life and death fight for existence; and the president, wanting to help, was, to this end, willing to give the company credit for his salary.

The court in *Missouri* v. *R. R. Co.*, 8 Kansas, 101 (1871) says that, "When the by-laws of a corporation provide the officers shall receive such compensation as the board of directors shall fix and allow, and the board has not fixed any compensation, a secretary who has rendered services is entitled to recover therefor, unless there was an understanding that he was to render the services without compensation; and when the compensation or salary of such clerk or officer is not fixed by contract or law, he may recover such sum as he may by competent evidence prove his services worth."

The court finds that McAvity's services were worth what he has charged, viz: $2500 a year. And it cannot reasonably be supposed, under all the circumstances of this case, that either party thought that McAvity was rendering the company services worth that amount gratuitously. If it is necessary for the appellant to resort to an implied promise in order to recover for his services as president, the facts in this case bring it fairly within the general rule entitling one to compensation, as laid down by the court in *Sawyer* v. *Pawners' Bank*, *supra*, p. 209.

Assigned claims: Claims against an insolvent debtor may be bought and sold, even after proceedings in insolvency have been begun, and the purchaser, the assignee, like the purchaser of a statute lien-claim takes all the rights including priorities that the vendor had, and he, the assignee, may prove them and in his own name. *Re Murdock*, 1 Low. 362; *Ex parte Davenport*, *Re Fortune*, idem, 384; *Ex parte Jewett*, *Re Morris*, 2 Low. 393; *In re*

Stephen Brown, U. S. Dist. Court (S. D. N. Y.) Blatchford, J., 3 B. R. 720 (177, folio). *Murphy* v. *Adams*, 71 Maine, 113; R. S., c. 82, § 130. Common law liens, dependent for their validity upon possession of the property, are personal privileges and not generally assignable; but statute liens, which do not require the possession of property to support them, go with an assignment of the debt. Jones on Liens, § 990.

Priorities: The rule set up by the judge of the insolvent court carried to its logical conclusion would seem to lead to this, that if an operative were paid for the last fifty dollars worth of work done by him, within the six months, he would lose altogether his priority for any unpaid balance due him for work, within that time, of an earlier date. That can hardly be a sound rule of law which like this rule leads to an unsound condition. It would be more in accord with the general principles of law to hold that the operative, having sold his claim for wages and with it, by implication, a right to a priority, provided the debtor should within six months become insolvent, could thereafter do nothing to impair the value of what he had sold, and so to hold in the case at bar, that the appellant McAvity has the first and best right to the priority. If the court should think that the right to priorities is, as between these different claimants, like that of different owners of mortgage debts secured by one common mortgage, then the priorities would be apportioned between the claimants according to amounts.

Set-off: Corporation may sell its stock for less than its par value without liability of purchaser to pay more than the agreed price. Sixty per cent was more than its market value. Company could not maintain a suit against McAvity for this forty per cent. He owes the company no debt by contract or otherwise on account of it.

Nor is there any liability to creditors for this forty per cent or any part of it. A liability to creditors to pay for stock subscribed for, and to pay for it, at its par value, wherever it exists, is grounded upon a promise, a contract, to do so. The promise to do so having been made, the statute takes care, so far as creditors are concerned, to see that it is kept in good faith, and provides a

remedy for a breach of the promise. But this statute obligation to creditors may be, and if it exists in the case at bar, is for a part only of the debts owed by the corporation. It is conditional and contingent and cannot be set off against appellant's proof of debt. It is now barred by lapse of time. R. S., c. 46, § 47. If it were not so barred, the statute remedy must be pursued; or at any rate, a remedy of a character that would, in this and other similar cases in its enforcement, apportion the burdens fairly and equitably upon all the solvent shareholders who are or might be debtors, for or on account of, an unpaid balance for their stock. This cannot be done by simple set-off. *Grindle* v. *Stone*, 78 Maine, 176; Mor. Corp. §§ 315, 822.

F. H. Appleton and H. R. Chaplin, for defendant.

Salary claim not a legal indebtedness of company at the commencement of proceedings. Vote of directors illegal and *ultra vires*. Counsel cited: *Sawyer* v. *Pawners' Bank*, 6 Allen, 207; *Smith* v. *Everett*, 61 N. H. 632; *Hall* v. *Ry. Co.*, 28 Vt. 409; *R. R.* v. *Ketchum*, 27 Conn. pp. 170, 182; Bump, B'k'cy, pp. 78, 176; Hamlin's Insol. Law, p. 21; *Upton* v. *Hansbrough*, 10 N. B. R. 369; 2 Mor. Corp. § 787; *Craig's Appeal*, 92 Pa. St. 396.

Set-off: Acceptance of stock by McAvity equivalent to a "subscription to" or "an agreement for" the shares. R. S., c. 46, § 45. Liable to the assignee for the unpaid balance. *Bullard* v. *Bell*, 1 Mason, p. 299; 2 Mor. Corp. § 819, note 2; *Sawyer* v. *Upton*, 91 U. S. 60. At law and in equity, the liability to contribute capital is treated as a debt due the corporation; and such debt passes by the assignment to the assignee.

VIRGIN, J. Where the directors of a bank voted a certain salary to its president for three successive years, but omitted to vote any sum for his fourth year's official services, this court held that, he could not maintain an action of assumpsit on a *quantum meruit* for such services. *Holland* v. *Lewiston F. Bank*, 52 Maine, 564. That case is decisive of the one at bar so far as the appellant's claim for salary is concerned, unless the vote of the directors passed at their special meeting of February 1, 1887,— several days after their corporation was duly adjudged insolvent,

—made the claim valid against the insolvent's estate. And we are clear that it did not; for the debt had no existence when the petition was filed against the corporation and hence cannot be proved against its estate. R. S., c. 70, § 25, Bump, Bank'cy, (9th Ed.) 82; *Morton* v. *Richards*, 13 Gray, 15.

The assignment of their respective wages by numerous operatives to the appellant transferred to him all the right of priority which the several assignors themselves respectively had under R. S., c. 70, § 40. *Phillips* v. *Vose*, 81 Maine, 134; *Re Murdock*, 1 Low. 362; *Re Fortune*, 1 Low. 384; *Re Brown*, 3 B. R. 720.

The reported facts, relating to the assigned wages, are so vague that we fail to perceive the practical bearing of the ruling contained in the fourth paragraph of the decree. That is to say: the fifth objection made to allowing the appellant's priority claim of wages of the persons named in "Exhibit B." is because other creditors claim the wages of the same persons,—but it does not allege that the wages claimed by the appellant and the other creditors are identical although the wage-earners are the same. And the decree declares: "Upon the fifth objection * * the court rules that the right of priority follows the labor last performed in preference to that first performed within six months whether assigned or not," and thereupon proceeds to make the application to "Exhibit B." which contains neither dates nor sums of wages earned to enable us to understand the application.

As already seen, the assignee has the same right of priority as the assignor; and hence the fact of assignment is immaterial. The statute limits the priority of operatives' wages in two respects,—time when earned and the amount. No wages are entitled to priority unless earned "within six months preceding the filing of the petition;" and only fifty dollars of those then earned, provided there had been no partial payment of the amount of wages earned within that time. If the wages earned within the specified time amount to fifty dollars or less, then the whole has priority; if to more than the sum specified and none has been paid, then the fifty dollars last earned and remaining unpaid, has the priority. Presuming this to be the meaning of the decree relating to the fifth objection and that it was correctly applied to

the facts before the court of insolvency, we pass to the next and last objection.

On November 4, 1884, the stockholders authorized the directors to allot to each stockholder as many shares of stock as he already had, on payment therefor sixty per cent of its par value which was fifty dollars per share. The appellant accepted two hundred and thirty-one shares. R. S., c. 46, § 45 provide: "The capital stock subscribed for any corporation is declared to be and stands for the security of all creditors thereof, and no payment upon any subscription to or agreement for the capital stock of any corporation, shall be deemed a payment within the purview of this chapter unless *bona fide* made in cash, or in some other matter or thing at a *bona fide* and fair valuation thereof." The acceptance and payment of sixty per cent of the new stock allotted to him must be considered as "an agreement for" those shares within the meaning and intention of the statute. Thereupon those shares of capital stock stood "for the security of all creditors of the corporation." And the unpaid forty per cent of the par value of that new stock, viz: $4,620 is as much a part of the assets of the corporation as the cash which has been paid in, and is liable to be collected if the affairs of the corporation are to be wound up or it becomes necessary to pay the debts. Statute above cited. *Sawyer* v. *Upton*, 91 U. S. 60; *Hatch* v. *Dana*, 101 U. S. 205. The appellant has no occasion to complain of the ruling of the court below, for thereby he obtains dollar for dollar for his debt to the extent of his unpaid capital stock. Whereas if the corporation is really to close up its business, he would be obliged to pay in the forty per cent and then take his per centage with the other creditors. *Sawyer* v. *Hoag*, 17 Wall. 610; *Scoville* v. *Thayer*, 105 U. S. 143, 152, and cases there cited. If there are no other creditors, then there is no reason why the appellant should not be exonerated to the extent of his debt against the corporation.

Decree accordingly.

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

ASA H. NICKERSON *vs.* WILLIAM W. GOULD.

Somerset. Opinion April 3, 1890.

Evidence. Collateral facts. Relevancy. Promissory note. Facts proving forgery.

Evidence to prove collateral facts is not admissible. It must be relevant to the facts put in issue by the pleadings.

Evidence that has any legitimate tendency to prove the issue in controversy between the parties, however slight its bearing, is competent and admissible.

If, in an action upon a promissory note, the defense set up is forgery, then all the facts which are conditions of forgery are relevant and admissible, as tending to show the probability or improbability of the defendant having signed the note.

ON EXCEPTIONS.

This was an action on a promissory note, the defense being forgery. After a verdict for the plaintiff, the defendant excepted to the rulings of the presiding justice excluding certain evidence offered by him.

The case is stated in the opinion.

D. D. Stewart, for defendant.

Walton and Walton, for plaintiff.

FOSTER, J. Action to recover upon a promissory note for $500, dated February 9, 1876, payable on demand to E. B. Nickerson or bearer.

The defense was that the note was a forgery; that the defendant never signed it, and never had any dealings with the alleged payee out of which this note grew or could grow; that he never received any money or any property of any kind from him, except possibly a harness, and that was allowed on rent due the defendant.

The plaintiff, son of E. B. Nickerson, testified that he acquired title to the note in the fall of 1887.

The exceptions show that much evidence was introduced by

both parties tending to show the transactions and the nature of them between E. B. Nickerson and the defendant, in the years 1875 and 1876, as bearing upon the probability or improbability of the defendant having given the note in suit.

It was claimed, on the part of the plaintiff, that the note in suit was given to take up a $300 note and interest, and a balance in cash at the time sufficient to make up the sum for which the note was given; and that the $300 note was made up of forty dollars loaned defendant to pay for a mowing machine, fifty dollars cash loaned at another time, and a sufficient amount at the time the note was given to make up the $300.

It appeared in evidence that in the latter part of May, 1888, in response to a letter, E. B. Nickerson went to the defendant's house, and there he and the defendant talked over the matter of the note; that at that interview, as the defendant and his wife testified, the defendant said he did not remember of ever having a dollar of him in his life; that Nickerson then asked the defendant if he did not remember of his paying him a note of $200 at the Russell house; to which the defendant replied that he never did; that Nickerson then said to the defendant, "Don't you remember my paying Henry Sawyer fifteen dollars for you?" And to this the defendant replied, "No, sir, I don't remember it, and you never did."

The defendant then called the said Henry Sawyer as a witness, and asked him if Nickerson at any time paid to him fifteen dollars for the defendant. This item did not constitute any part of the consideration of the note in controversy.

To this inquiry and the answer thereto the plaintiff's counsel objected, and the court excluded the answer.

The defendant then offered to show by the same witness that Nickerson never paid him the fifteen dollars for the defendant, and objection being interposed by the counsel for the plaintiff, the court excluded the evidence.

To this ruling, excluding the answer and the evidence offered, the defendant duly excepted.

After the evidence had been offered and excluded, the plaintiff called E. B. Nickerson, and he testified in relation to the inter-

view at the defendant's house substantially as related by the defendant and his wife; but the defendant did not thereafter recall the witness Sawyer, nor again offer his testimony.

If the only bearing of the evidence offered was to prove a collateral fact, it was not relevant and was properly excluded. The question is whether it was relevant or not. Collateral facts are not admissible. The evidence must be relevant to the issue, that is, to the facts put in controversy by the pleadings. This rule prohibits the trial of collateral issues,—of facts not put in issue by the pleadings,—and excludes evidence of such as are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. It is oftentimes difficult to decide what is and what is not relevant. It depends somewhat upon the nature of the issue involved. The relevancy of evidence of other facts, as bearing upon the probability or non-probability of the main fact in issue, has been one of the most troublesome questions for the courts to decide.

Relevancy, as defined by the text writers upon evidence, "is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being one which, if sustained, would logically influence the issue. * * * If the hypothesis set up for the defense is forgery, then all facts which are conditions of forgery are relevant. A party, for instance, sued on a bill sets up forgery; to meet this hypothesis, it is admissible for the plaintiff to prove that the defendant, at the time of the making of the bill, was trying to borrow money. Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable." 1 Whar. Ev. §§ 20, 21. And in accordance with this principle it was held by this court, in *Trull* v. *True*, 33 Maine, 367, that "testimony cannot be excluded as irrelevant, which would have a tendency, however remote, to establish the probability or improbability of the fact in controversy." *Tucker* v. *Peaslee*, 36 N. H. 167, 168. So in *Huntsman* v. *Nichols*, 116 Mass. 521, where it was held that, although the authenticity of the note in suit was the only issue, yet the business transactions between the parties had some bearing upon the probability of the indorsement having actually been made by the

defendant, and were therefore admissible in evidence. This same principle is established in *Eaton* v. *Telegraph Co.*, 68 Maine, 63, 67; *State* v. *McAllister*, 24 Maine, 139; *State* v. *Witham*, 72 Maine, 531, 537; *Marcy* v. *Barnes*, 16 Gray, 161. Accordingly, where the issue is whether a certain contract was made between the parties, and the evidence is conflicting as to what the contract was, it has been held competent for the defendant to show the value or character of the property which he was to receive, as compared with that in the contract claimed by the plaintiff, as tending to show the improbability of the defendant having made the contract as alleged by the plaintiff. *Upton* v. *Winchester*, 106 Mass. 330; *Norris* v. *Spofford*, 127 Mass. 85; *Bradbury* v. *Dwight*, 3 Met. 31; *Parker* v. *Coburn*, 10 Allen, 82.

Moreover, in cases where knowledge or intent of the party was a material fact, evidence of other facts happening before or after the transactions in issue, have been received in evidence, although they had no direct or apparent connection with it. Such facts, if they tend to establish knowledge or intent, when that is material, although apparently collateral and foreign to the main issue, nevertheless, have a direct bearing and are admissible. Thus in *Cook* v. *Moore*, 11 Cush. 213, 216, Bigelow, J., says: "Whenever the intent of a party forms a part of the matter in issue, upon the pleadings, evidence may be given of other acts, not in issue, provided they tend to establish the intent of the party in doing the acts in question." And see *Nichols* v. *Baker*, 75 Maine, 334; *Jordan* v. *Osgood*, 109 Mass. 457; 1 Gr. Ev. § 53; 1 Whar. Ev. §§ 30-33.

Applying these principles to the question before us, we think the evidence offered was admissible.

The pleadings denied the genuineness of the note, and all dealings with the alleged payee out of which the note could grow, or the receipt of any money from him. True, the central point of the issue was whether or not the note was a forgery. Around this revolved other facts, introduced by both parties, bearing on the probability or improbability of the defendant having signed the note in suit.

Such evidence was admissible as tending to lead the mind of

the jury to a correct conclusion upon the real issue presented. The dealings of the parties, both prior and subsequent to the date of the note, became a proper subject of inquiry in this connection. The defendant denied that he ever signed the note, or had any dealings whatever with the alleged payee out of which the note originated. He gives an interview with Nickerson and states what he claims was said at that interview by Nickerson. At the interview Nickerson virtually asserted a fact, although in an interrogatory form,—that he had paid one Henry Sawyer fifteen dollars for the defendant. He asserted it as a transaction with the defendant. This, the defendant claims, was a fraudulent assertion to obtain an admission from him of what was not true in order to affect the main issue before the jury. It was, in effect, the assertion of a fact to the defendant bearing on the issue of the genuineness of the note, and was not collateral. Either party had a right to prove the truth or falsehood of the assertion. If it was not true, the defendant had a right to show that the statement made to him was false, and in support of his own testimony in denial of its truth, he had a right to call the man as a witness, to whom Nickerson claimed he made the payment. Its tendency in establishing the probability or improbability of the main fact in controversy may have been remote, but it was nevertheless admissible. Its weight was for the jury.

Exceptions sustained.

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

ALICIA C. CAREY *vs.* JONATHAN I. MACKEY.

York. Opinion April 15, 1890.

Bond. Husband and wife. Separate support. Contract. Validity. Place of performance. Divorce.

No set form of words is necessary to make a penal bond, *e. g*:—"If I by deed, covenant or promise to do a thing, and then say, to perform which promise I bind myself in twenty pounds," this is a good obligation in law.

An agreement between husband and wife, for the separate support of the wife, is valid in this state, when there is good cause for the separation and the contract does not offend public policy.

Such a contract entered into by residents of another state, who are temporarily abiding here, is legally enforceable in this state, when it appears that, it having been delivered and partly performed here, it was their intention to be governed by our laws, and that no evasion of the laws of their residence was intended, and the contract is not criminal by the laws of that state.

While it is the general rule that contracts are to be interpreted according to the law where performance is to be had; *Held*, that this rule is more applicable to commercial contracts than to agreements of this kind,—the question pertaining rather to its validity than to the meaning of its provisions.

A decree of divorce, of its own force, does not terminate a prior agreement for separate support, when the decree is silent upon the matter.

All contracts of this kind, which equity would uphold before divorce, the law recognizes after divorce.

ON REPORT.

This was an action of debt on the bond of the defendant, made and given to the plaintiff, then his wife, September 12, 1882, for her separate support. Besides a general count in the declaration for the penal sum of the bond, the plaintiff also declared for forty-five monthly payments of thirty dollars each.

April 13, 1883, a divorce "*a vinculo*" with a decree for a gross sum $690.00, as alimony, and the right to resume her maiden name, was granted to the plaintiff, by the court in Florida, where both parties had their domicil.

The case was considered by the law court, on stipulation of the parties, with jury powers; and were to enter such judgment as the law and the facts warranted, upon the legally admissible evidence.

G. C. Yeaton, *H. H. Burbank*, with him, for plaintiff.

Wife may contract with her husband, and maintain an action upon it after divorce. *Webster* v. *Webster*, 58 Maine, 139; *Guptill* v. *Horne*, 63 Id. 405; *Carlton* v. *Carlton*, 72 Id. 115; *Lane* v. *Lane*, 76 Id. 521.

Validity of bond: *Van Valkenburgh* v. *Smith*, 60 Maine, 97. Divorce proceedings judicially establishes a "legally sufficient cause" for separation and divorce existed at date of bond. Laws

of Florida, c. 93. Such bonds (payable to trustee) good at common law. May now be payable to wife. R. S., c. 61, § 1. *Blake* v. *Blake*, 64 Maine, 177; *Clark* v. *Ins. Co.*, 81 Maine, 373. Russell & Russell's Macqueen's H. & W., 3d ed. (1885) c. 13, § 1, p. 337, and citations; Peachey's Settlements, c. 20; *Vansittart* v. *Vansittart*, 2 DeG. & J. 249, and citations; Kelly's Cont. Mar. Women, c. 6, § 9; 1 Bish. Mar. & Div. Book 5, c. 32; Id., Law Mar. Women, § 760; Schouler's H. & W. part 9, c. 1; Reeve's Dom. Rel. (Eaton's 4th ed.) 131; Stewart's H. & W. § 105; Cord's L. & E. Rights of Mar. Women, (2d ed.) 114-152; Endlich & Richard's Rights and Liabilities of Mar. Women in Penn. 219-221, 266, n. 3, and citations; *Mann* v. *Hurlburt*, 38 Hun. 27-30; *Carpenter* v. *Osborne*, 102 N. Y. 552 and citations; *Paye* v. *Trufant*, 2 Mass. 159; *Ayer* v. *Ayer*, 16 Pick. 327, 332, 335; *Hollenbeck* v. *Pixley*, 3 Gray, 521; *Albee* v. *Wyman*, 10 Gray, 222; *Holbrook* v. *Comstock*, 16 Gray, 109; *Comstock, Admr.* v. *Holbrook*, U. S. C. Court (R. I.) not reported; *Fox* v. *Davis*, 113 Mass. 255; *Alley* v. *Winn*, 134 Mass. 77; *Merrill* v. *Peaslee*, 146 Mass. 460; *Miller* v. *Miller*, 64 Maine, 484, approving *Carson* v. *Murray*, 3 Paige, 483.

Validity and construction of agreement governed by the law of Maine: *Stickney* v. *Jordan*, 58 Maine, 106; *Milliken* v. *Pratt*, 125 Mass. 374; *Tennant* v. *Tennant*, 110 Pa. St. 478; *Ryan* v. *R. R.*, 65 Tex. 13; *Jackson* v. *Green*, 112 Ind. 341; *Gibson* v. *Serblett*, 82 Ken. 596; *The Brantford City*, 29 Fed. Rep. 373, 394-396; *Blackwell* v. *Webster*, 30 Fed. Rep. 614; Story's Confl. Laws, § 102; Whar. Confl. Laws, § 504, n; *Phinney* v. *Phinney*, 81 Maine, 450, 460.

Damages: *Holbrook* v. *Tobey*, 66 Maine, 410; *Maxwell* v. *Allen*, 78 Maine, 32; *Chase* v. *Allen*, 13 Gray, 42; *Lynde* v. *Thompson*, 2 Allen, 456; Suth. Dam. § 6.

R. P. Tapley, *H. Fairfield*, with him, for defendant.

Counsel cited upon the question of consideration: *Fuller* v. *Lumbert*, 78 Maine, 325; Bigelow, Estop. pp. 301-303. Where made and to be performed: Story Confl. Laws, §§ 280, n. 299, 301, 304; Whar. Confl. Laws, § 401; Pars. Notes & Bills, 324; *Milliken* v. *Pratt*, 125 Mass. 374; *Lawrence* v. *Bassett*, 5 Allen,

140; *Bell* v. *Packard*, 69 Maine, 105; *Bank* v. *Wood*, 142 Mass. 563; *Hill* v. *Chase*, 143 Mass. 129. Validity and obligation: Story Confl. Laws, §§ 242, 296-301, b.; 304, 305; 2 Kent's Com. p. 574; Whar. Confl. Laws, §§ 401, 498, 504; *Akers* v. *Demond*, 103 Mass. 318, (common law) *Martin* v. *Martin*, 1 Greenl. 394; *Johnson* v. *Stillings*, 35 Maine, 427; *Allen* v. *Hooper*, 50 Maine, 371; laws of Florida, c. 138, § 7; *Pritchard* v. *Norton*, 106 U. S. p. 136; *Kennedy* v. *Cochrane*, 65 Maine, 594.

Capacity to make the contract: *Hobbs* v. *Hobbs*, 70 Maine, 381; *Libby* v. *Berry*, 74 Id. 286. There is no law of this state or Florida authorizing a husband to make such a contract with his wife, and be bound in law.

Damages: *Fisk* v. *Gray*, 11 Allen, 132; *Dwinel* v. *Brown*, 54 Maine, 468.

PETERS, C. J. The plaintiff declares on the instrument adduced below, as a penal bond, and also upon the covenants expressed in it:—"This agreement made this twelfth day of September 1882, between Jonathan I. Mackey and Alicia C. Mackey, both of Florida and residents of Jacksonville in said Florida, witnesseth that, whereas my wife, Alicia C. Mackey, has this day expressed her desire to me that a separation of relations of man and wife between ourselves might be effected, and for good reasons known to herself, be it known that I hereby consent to said separation, and, in consideration of my duty to her as her husband, I hereby agree to pay to her monthly, through the Hon. M. A. McLain of Jacksonville aforesaid, the sum of thirty dollars per month, on the first day of each month, the first installment or payment being and to become due November 1, 1882. And I hereby bind myself to the well and true payment of thirty dollars aforesaid monthly, so long as she shall maintain good behavior and shall (not) have remarried, and this I bind myself to do under a penalty of five thousand dollars, to be recovered by her in any court of law by attachment upon my property and of myself, which sum of five thousand dollars aforesaid I hereby agree shall be considered a forfeiture upon my part to her. And this thirty dollars per month is in addition to the one hundred and fifty dol-

lars which I have already paid her at the making of this agreement. And this I do freely and understandingly.

Witness my hand and seal this 12th September, 1882.

J. I. MACKEY, (seal)."

The instrument was acknowledged before H. M. Sylvester, a notary public, and witnessed by him.

The plaintiff cannot recover on both forms of declaration.

She elects to recover the penal sum. We have no doubt the instrument declared on is a penal bond. It contains all the elements of one, though perhaps not expertly put together.

"If I by deed, covenant or promise to do a thing, and then say, to perform which promise I bind myself in twenty pounds, this is a good obligation in law." No set form of words is necessary, as see numerous illustrations in Bacon's and Dane's Abridgments; Title, Obligation. We are of opinion that the five thousand dollars are a penalty and not liquidated damages.

Passing the points made on the pleadings, an important question arises whether an agreement for separate support is valid in this state. We do not see why not. It is said in argument that there has never been a judicial decision in the state touching the question. That indicates that the danger of a frequency of such cases must be small indeed.

Certainly such an agreement comes within the spirit of our late statute which provided for a divorce from bed and board, the marital tie remaining. There never has been any judicial expression in this state against an agreement for separate support. The doctrine is upheld in an early Massachusetts case when this state was a part of that commonwealth, and the precedent is, therefore, as binding here as it is there.

In *Page* v. *Trufant*, 2 Mass. 159, decided in 1806, it was held that "a bond from the husband to the father of the wife for her maintenance, after a voluntary separation, is a valid contract." According to the practice of that day, each judge sitting expressed his opinion on the question, and all favored the doctrine. Parsons, C. J., closed the discussion in these words: "It in fact appears on the record that the consideration was legal and meritorious, as it was made to secure a separate maintenance for the

wife, who separated from her husband for their mutual comfort, to avoid the effect of jealousies and animosities that existed between them."

In *Fox* v. *Davis*, 113 Mass. 255, the doctrine is fully recognized, and was applied in that case. Mr. Bishop, in 1 Bish. Mar. & Div. (6th ed.) book 5, c. 39, enumerates the states, citing their cases, where the doctrine is either allowed or disallowed; and it appears to have been accepted by most of the states. In England it is established by act of Parliament. The condition on which it rests is that separation has already taken place, or that the agreement is made in contemplation of an immediate separation which takes place as contemplated.

The only objection to such contracts is the encouragement which may be afforded for married parties to separate from each other. We think that amounts to little or nothing under our liberal divorce system. Parties greatly prefer divorce and alimony to mere separation.

There may be a distinction to be observed. Some contracts of separation might offend public policy, and others not. Certainly there are cases where a wife would be justified in separating from her husband, and asking a support from him notwithstanding the separation. There was undoubtedly good cause for separation in the present case. The evidence in the divorce case, to be alluded to hereinafter, which is a part of the record of this case, shows that the separation was caused by cruelties inflicted by him upon her. He had frequently choked her severely, and habitually abused her in different ways. She proves that she has been a person of good behavior since separation, as the contract requires of her, and that she has not married again.

It is contended, however, by the defendant that the contract is to be interpreted, not by the law of Maine, but by the law of Florida where by its terms it was to be performed, and that such a contract is invalid by the law of the latter state.

While it may be admitted that the general rule is, that contracts are to be interpreted according to the law of the place where performance is to be had, there are some exceptions when the question pertains to the validity of the contract rather than

to the meaning of its provisions. We are satisfied that the general rule invoked by the defendant's counsel, does not govern the case before us. That rule is more applicable to commercial contracts than to agreements like this.

Professor Wharton lays down, and supports with authorities, this proposition: "That parties who enter into a contract are presumed to do so *bona fide*, intending the contract to be performed; and that they are supposed, if two systems of law are before them, by one of which the contract would be good, by the other of which it would be bad, to incorporate in the contract the law which would make the contract operative." Whar. Ev., 2d ed. § 1250. The same author states the same proposition again, (Whar. Confl. Laws, 2d ed. § 429), in these words: "It is always to be presumed that persons agree effectually to do that which they contract, and if so, this agreement becomes a part of the contract, overriding such local law as does not rest on a ground distinctively moral or political. And when there is a conflict of possible applicatory laws, the parties are presumed to have made part of their agreement that law which is most favorable to its performance."

Professor Parsons (Par. Con. 6th ed., 2 vol. 583), accepts and strongly advocates this view. There are also late cases supporting it. In *Hart* v. *Jones*, 12 R. I. 265, it is held, that, when a vender sold goods in Rhode Island to be delivered in New York, and the contract was valid in Rhode Island, and void in New York on account of the statute of frauds in that state, the sale should be regarded as a Rhode Island contract. A note made in Connecticut on Sunday after sunset, was held to be valid, though had it been made in the same circumstances in Rhode Island it would have been invalid. *Brown* v. *Browning*, 15 R. I. 422; *Blackwell* v. *Webster*, 23 Blatch. 537; and *Scudder* v. *Union Nat. Bank*, 91 U. S. 406, bear with weight on this question.

There are strong circumstances, features in the contract and facts about it, which strengthen the presumption that the parties intended to be governed by the laws of Maine in their contract. The paper was made here (at Portland), and delivered here. It was partly performed here, one hundred and fifty dollars having

been paid at its delivery. The cause producing the agreement occurred in Maine, being principally his treatment of her while temporarily residing at Old Orchard. The separation took place in Maine, and there was nothing preventing her thereafterwards residing in Maine, or out of Florida.

The parties were not at the time merely travelling through the state, but were temporarily abiding here. No evasion of the law of Florida was intended, nor is the contract a criminal one under her laws. It is merely contended that that state has adopted a part of the old common law which disapproves such agreements upon grounds of public policy.

That state has no statute on the subject, and no case touching it has ever been in any form before any of its courts.

We think the contract is legally enforceable in this state.

It is contended for the defendant that the agreement for separate support was terminated by the divorce obtained by the plaintiff in a court in Florida in 1883. The agreement does not provide for its rescission or termination upon the wife's divorce. A failure of good behavior or remarriage are the only causes provided for its termination. The promised support would be just as much needed after divorce as before. There is no agreement of parties in the provisions of the divorce, nor was there any in the negotiations preceding divorce, that the contract should be annulled thereby, although the defendant attempted to prove such an understanding. The court could have imposed such condition, a not uncommon thing, but failed to do so. Nor does the decree of divorce, of its own force, have the effect of terminating the prior agreement for separate support. On this point the doctrine is stated by Mr. Bishop, and the authorities fully cited. 1 Mar. & Div. 6th ed. § 637; 2 same, §§ 55, 717-722, 741.

The counsel for the defendant argue at great length that an action cannot be maintained on the agreement because not of legal form in all respects, very properly contending that all contracts made between husband and wife do not become valid merely because the marital tie has been sundered by a decree of divorce. But all contracts of the kind which equity would uphold before divorce, the law recognizes after divorce.

This agreement is substantially a legal agreement, and at all events a good equitable agreement. Had the promise in it been made to the plaintiff's agent as her trustee, it would have been a perfectly formal instrument at law. But the promise is to her, though the delivery of the money was to be to the agent for her. Equity would have readily supplied formality.

In the divorce proceedings the plaintiff received allowances towards her support of $690.00, the terms of divorce having been arranged by the counsel of the parties. Here then was a decree of court for support, and also an agreement of parties for the same purpose. It does not clearly appear what was in the minds of the parties about a double allowance, but from what was said and done in the negotiation, and because there would be much apparent justice in thus interpreting the transaction, we think we are justified in concluding that it was the tacit understanding of the parties that the allowances, in the divorce suit, should be a credit to that extent upon the amounts payable by the contract. *Albee* v. *Wyman*, 10 Gray, 222.

The result must be that judgment is to be entered for the penal sum of the bond, execution to issue for the sum due on the bond, less the credit of six hundred and ninety dollars.

Defendant defaulted for the penal sum.
Damages to be assessed at nisi prius.

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

INHABITANTS OF BELMONT *vs.* INHABITANTS OF VINALHAVEN.

Waldo. Opinion May 7, 1890.

Pauper. Evidence. Declaration. Voting lists. Presumption of law and facts.

One of the issues of fact was, whether a pauper, who went from Belmont to Vinalhaven in 1860, gained a settlement in the latter town by residing there five years, continuously between 1860 and 1866.

Between 1866 and 1880 his residence was not very fixed, living at different periods in Vinalhaven, Belmont and other places; he falling in distress in Belmont in 1886. His declarations between 1880 and 1884, as he was going from or back to Belmont, that he was going from or to his home there, would not be admissible as tending to show his home in that town at so remote a period as prior to 1866. But his declarations of the kind, made before the expiration of the five years in 1865 or 1866, or made soon after that period, the conditions of his residence remaining unchanged, would be admissible for such purpose.

The pauper's declarations made after 1880 with acts done in pursuance of such declarations, tending to show a disposition on his part to acquire a settlement in Vinalhaven, and avoid one in Belmont, thereby implying that his settlement was not before that time in Vinalhaven, were admissible to show his bias and prejudice when testifying as a witness (in 1887) to his intention, between 1860 and 1866, of making his permanent home in Vinalhaven; it being admitted that no new settlement was ever acquired by him after 1866.

The voting lists of a town, on which the name of a voter is checked with a cross, are *prima facie* evidence in a case against the town for the support of such voter as a pauper, that the pauper voted at the elections at which such lists were used.

If a person goes from the place of his home to another place for the purpose of laboring in the other place, there is not a presumption of law that he intends to return to the former place when his laboring has ended. There may be some presumption of fact to that effect, an argumentative presumption, stronger or weaker according as it may be, in the belief of the jury, supported by circumstances.

ON EXCEPTIONS.

This was an action to recover for pauper supplies furnished one Daniel Shirley, whose home and pauper settlement, in 1860, were in Belmont. He was never married and his father and mother were dead. His only relatives residing in Belmont were a married sister and her husband. In April or May 1860, he went to Vinalhaven, where, as he testified, he lived from that time until the fall of 1865; having voted there at the state and presidential elections in 1860, and every state election following until 1865; also having paid taxes there during those years. The records of the town of Vinalhaven show that he was taxed there in 1862, 1864 and 1865; and the check lists prepared in August 1860, in August 1863, and in May 1866, contain his name. No absences from Vinalhaven, except such as were temporary, were shown during the above named period; and since the fall of

1865, he lived and worked in various places, sometimes in Belmont, and sometimes in Vinalhaven. He was taxed on the poll list in Belmont in 1867, 1868, 1869, 1870, 1871 and 1874; and chosen a surveyor of lumber in Belmont in 1871 and in 1873.

There was a verdict for the plaintiffs.

The defendants excepted to the instructions of the presiding justice, and to his refusal to give requested instructions, and to the exclusion of testimony offered by the defendants.

The exceptions are stated in the opinion.

C. E. Littlefield, for defendants.

There was no evidence that the "check" was the mark used to indicate the man had voted. Check lists required to be kept only one year. R. S., c. 4, § 26. Law first enacted in 1864. All the lists but that of 1866 were prior to that act. The last one not required, it not being for a September election.

Requested instructions: *Knox* v. *Waldoborough*, 3 Maine, 455; *Worcester* v. *Wilbraham*, 13 Gray, 590.

Excluded testimony: *State* v. *Kingsbury*, 58 Maine, 238; (showing bias, prejudice, partial feeling, interest, etc.) *Drew* v. *Wood*, 26 N. H. 363; *Bersch* v. *State*, 13 Ind. 434; *Folsom* v. *Brawn*, 25 N. H. 114; *Martin* v. *Farnham*, 24 N. H. 191; S. C. 25 N. H. 195; *State* v. *Montgomery*, 28 Mo. 590; *Bishop* v. *State*, 9 Ga. 121; *Hutchinson* v. *Wheeler*, 35 Vt. 330; *Johnson* v. *Wiley*, 74 Ind. 233; *Nation* v. *People*, 6 Park, (N. Y.) Cr. 258; *Howell* v. *Ashmore*, 22 N. J. L. 261.

W. H. Fogler, for plaintiff.

Check lists admitted without objection; their effect being left to the jury.

Requested instructions: *Ripley* v. *Hebron*, 60 Maine, 395.

Excluded testimony: Questions not confined to period 1860 to 1865; answers not tending to discredit witness nor disprove plaintiffs' case; Shirley's statement as to his pauper settlement was an opinion merely.

Shirley, the pauper, testified that from the spring of 1860, to the fall of 1865, his home was in Vinalhaven. He stated with particularity at what places he worked and at what places he

boarded at Vinalhaven during that period. Of course testimony on the part of the defense tending to contradict this testimony is admissible. Upon cross-examination Shirley was interrogated in relation to his pauper settlement. The question and answer which the defendants' counsel makes the text of his argument upon this part of the case relates to that question of pauper settlement, and in no respect to the question of the pauper's home from 1860 to 1865.

An examination of the excluded testimony will show that none of it tended to contradict Shirley upon any point material to the issue.

PETERS, C. J. There was an exclusion of the testimony of several witnesses, at the trial of this case, offered on the question whether Daniel Shirley, a pauper, had a settlement in Vinalhaven, gained between the years 1860 and 1866. This testimony may be examined in classifications.

One portion of it consists of statements of the pauper, made occasionally between the years 1880 and 1886, on his leaving Vinalhaven, the defendant town, to go to Belmont, the plaintiff town, that he was going home, or going home to Belmont. This testimony was no doubt excluded for its remoteness, though no ground of exclusion is stated.

It appears that the pauper never was married, and never possessed much more property than his clothes, always acquiring his living by working out; that he went to Belmont, in 1822, with his father, residing there until the spring of 1860, when he went to Vinalhaven to work, leaving his sister in Belmont, his only relative left there, with whom he had for sometime previously lived. He was in Vinalhaven from 1860 to 1866, and voted there during most of that period, though usually returning to Belmont, once a year at least, on a visit. After the fall of 1866, he was in different places, some years in Vinalhaven, some years in Belmont, and at other times in other places in the vicinity of Belmont, and finally fell in distress in Belmont in 1886. He was taxed on the poll list, in Belmont in 1867, 1868, 1869, 1870, 1871 and 1874. He was chosen a surveyor of lumber in Belmont in 1871 and in 1873.

It will be seen that the situation of the pauper, as to his home, in the period after 1880, was different from what it appears to have been between 1860 and 1866. His declarations after 1880, tending to show a residence at that time in Belmont, would not have much tendency to prove where his residence and home were twenty years prior to that time. The conditions were changed. The pauper had not remained continuously in Vinalhaven from 1860.

Then there is another class of testimony of the same character, but applying to a time so near the period, if not a part of it, relied on by the plaintiffs as fixing the pauper's settlement in Vinalhaven, that we think it should have been admitted. It must be considered that this kind of evidence may have great weight in pauper cases. In close cases, dependent very much upon what may have been the intent of the pauper as to residence, his own testimony, often biased by his wishes and whims at the time he testifies, is apt to have a very controlling effect, unless overcome by other evidence. It is difficult to counteract the pauper's influence as a witness. To do so, a good many acts and expressions of his, when a part of the *res gestae*, have to be woven together, making a web illustrating the pauper's intention, instead of taking his testimony for it. And such evidence should be received with reasonable liberality.

Now, the pauper says he went to Vinalhaven in the spring of 1860, to work for the summer, and that he remained continuously, excepting visits to Belmont, until October 1865. He says he did not intend to stay longer than he had work. It will be reasonably inferred that he did not intend that town as his domicil until some time after his arrival there, and how long after he does not seem able to inform us himself. Mr. Calderwood, called by the defense, says that, when the pauper left town both in the fall of 1865, and in the fall of 1866, he said he was going home to Belmont, and should be back in the spring, if nothing happened more than he knew about. This witness locates the pauper in Vinalhaven during the year 1866 in the same condition and surroundings as in 1865. It is fair to assume that if the pauper had an intentional home in Vinalhaven from any time in 1860 to any

time in 1865, his home continued there, on his own statement, until October 1865, and, on other testimony, until he left in the fall of 1866. His home was just as much in Vinalhaven the day he left, as the day he went there, or as on any day between his going and leaving. This testimony not only proves a fact bearing affirmatively on the issue, but also directly contradicts the pauper, who swears to a continuous home in defendant town until October 1865.

Another class of testimony was offered and refused, which we think should have been admitted, to show the motive and bias under which the pauper testified. Mr. Vinal and Mrs. Vinal testified in their depositions, which were not admitted, that, in 1884, the pauper said he needed two more winters in Vinalhaven to gain a settlement there; and that he should like to gain a residence in Vinalhaven, for when he got poor he should have to be helped, and that they kept their poor better in Vinalhaven than the farmers did theirs in Belmont, and that he expected soon to become a charge. At about the same time he expressed an interest to Mr. Manson, in having his name on the Vinalhaven voting lists, and got Mr. Manson to have his name entered; speaking of the matter in connection with a statement about his becoming a town charge. In one or two years after that he becomes a public charge.

This testimony was offered, the case finds, among other purposes, "to show the motive of the pauper in testifying to his intent, and the locality where he intended to gain a residence;" and for such purpose we deem it admissible. As a witness, the pauper shows a good deal of intelligence about the terms settlement, residence, and intention of residence, and evidently had a leaning for the plaintiffs in the suit. If he expressed an anxiety, in 1884, to become a charge upon Vinalhaven, it would be reasonable to believe he would feel the same anxiety when he testified in 1887,—and that that feeling of preference might color his testimony.

Influences of all kinds are equally objects of consideration in determining how far credibility exists. Says a writer on logic, quoted by Wharton in his book on evidence: "The teacher,

physician, historian and judge have daily occasion to observe how little men are accustomed to describe the simple facts, and how very much they mix up in the statement, unconsciously and unintentionally, their own opinions and interests. It is inconceivably hard, I had almost said impossible, to describe what has been seen or heard wholly as it has been seen and heard. We often introduce our own feelings without anticipating it, and although we have the strongest and purest love of truth." In the case before us, the pauper would not be likely to entertain any motive in 1860 to select Vinalhaven as a residence because a good place to be supported in as a pauper, but the motive would be conceived at the much later period when it seems to have been confessed.

It is competent to impeach a witness by showing his bias. For this purpose it is admissible to prove sympathy, and prejudice as to the particular case, so far as is exhibited by words and acts. Whar. Ev. § 566; and numerous cases cited in note. *Davis* v. *Roby*, 64 Maine, 427. Such evidence is direct and not collateral. Says Wells, J. in *Day* v. *Stickney*, 14 Allen, p. 258: "The credit of a witness, upon whose testimony in part the issue is to be determined, is not merely collateral, and cannot be immaterial. The weight of his testimony with the jury may depend entirely upon their supposition that he is under no influence to prevaricate. If he is prejudiced for or against one of the parties to the suit, or has a strong purpose or feeling of interest in relation to the matter in controversy, it is a circumstance which may materially affect his testimony; and his state of mind ought to be known to the jury. His prejudices can be known only by his expressions of them; and therefore such declarations are the legitimate evidence of their existence. They may be proved in any mode as a direct impeachment, or, if denied by the witness himself, may be proved by other testimony as a contradiction in a material point; which is one mode of impeaching the credit of a witness." This felicitously states the rule and the reason of it.

We think it is not, in this state, necessary to first inquire of the witness whether he has any bias, or has uttered unfavorable expressions, to lay the foundation for the admission of the testi-

mony. But the witness was inquired of very pointedly, and denied all alleged declarations.

There are several points beyond those already discussed, which it may be well to consider, inasmuch as they must appear again upon a new trial.

Some of the check lists of Vinalhaven were introduced by the plaintiffs, on which the name of the pauper appeared as a voter, with the name checked. The court remarked to the jury that the check is the ordinary official indication that the man whose name is on the voting list has voted. That must be correct. The law requires that the name of a voter shall be marked as he votes. R. S., c. 4, § 25. We all know that the usual mark is a dot or a cross at the name, and that such mark is the usual indication that a voter has voted. The town officers are presumed to have done their duty. Whether the marking was a correct one or not in the present case, was for the jury to determine from an inspection of the lists; and any pertinent evidence to explain or contradict them would be competent. The risk of such a rule cannot be much, as the lists are in the possession of the party which would have no motive to tamper with them by adding checks to names.

The defendants' counsel asked for the following instruction: "If the pauper left Belmont and went to Vinalhaven for the purpose of laboring, the legal presumption is, that when the act of laboring is past, he was there with the intention of returning to Belmont, rather than remaining in Vinalhaven." There are but few strictly and purely legal presumptions. It is difficult to divest a merely theoretical proposition of the circumstances that attach to it in the particular case. Most presumptions are mixed of law and fact, or are presumptions of fact which the law may allow a jury to find. The request in this case is so strongly worded as to admit of no qualification or condition. Whether the pauper would return to Belmont would depend upon what Belmont was to him. He might have reason never to return there, or great reason to return. As it was difficult to present the idea as a naked proposition to the minds of the jury, who were already acquainted with all the circumstances, the judge

could not be required to rule as requested. It was a strong argumentative proposition, and a question of presumption arising on the evidence, which the jury could find or not, as they pleased.

Exceptions sustained.

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

PETER BISHOP *vs.* LLOYD B. CLARK.

Penobscot. Opinion May 19, 1890.

Use and occupation. Landlord and tenant. Contract of purchase. Rent.

One who by parol, purchases a lot of land and by consent of the seller takes and holds possession of it, making improvements, with no express agreement to pay rent, is not liable for rent while the contract of purchase remains executory between the parties.

ON EXCEPTIONS.

Assumpsit on account annexed, the items and amount of which were not disputed. Date of writ, September 17, 1887.

Defendant filed an account in offset, for rent or use and occupation of a lot of land in Kingman from April 1, 1885, to date of writ; the only question in dispute being the legal liability of plaintiff to have said account in offset allowed. The case was referred to the court with leave to except.

The presiding justice found that some eighteen years ago, soon after the Kingman tannery was built, under the ownership of F. Shaw & Bros., one of the workmen, with their knowledge and assent, entered upon the lot in question and built a house and made other improvements thereon, not adversely however, the Shaws being then the legal owners of the lot; that he afterwards sold the house and improvements to another, who some ten years ago sold same to plaintiff.

Before plaintiff purchased the house and improvements, he made a verbal agreement with Wm. Shaw, one of the owners of the land for a conveyance of the lot to him for $27.50, should he

purchase, and after he purchased, Shaw sent on a surveyor to run out the land and put stakes at the corners, the plaintiff being present and assisting in the survey. This was soon after he purchased the improvements eight or ten years ago.

In August, 1882, Wm. Shaw died, and in August, 1883, the firm failed and made assignment of all of their property, including the lands and tannery at Kingman, to one F. A. Wyman, trustee, who subsequently conveyed the same to Charles W. Clement, trustee, after which by deed, dated April 1, 1885, the land in Kingman, including the lot in question was conveyed by said Clement to this defendant who has since owned the same. In the meantime plaintiff continued in possession of the lot claiming as a verbal purchaser, and making extensive improvements, paying taxes, but nothing more.

Plaintiff was ready to pay the $27.50 and interest, and, to save questions, even more for a deed of the lot. The lot increased considerably in value since the original occupancy commenced, and according to the evidence, the fair rentable value of the lot independent of the improvements was ten dollars per year. This amount defendant claimed in offset from the time of his purchase to the commencement of suit.

The court having decided adversely to defendant's claim in offset, and rendered judgment for plaintiff for the amount of his claim, independent of the offset, defendant excepted to such decision.

A. W. Paine, for defendant.

The agreement for sale was verbal only, without legal force or effect. When one occupies the land of another, by consent of the owner, under a verbal agreement to purchase, recognizing the ownership of the party, he is regarded in law as a tenant at will; and the law implies a promise to pay a reasonable price for the use and occupancy. *Cheever* v. *Pearson*, 16 Pick. 266, 271; *Delano* v. *Montague*, 4 Cush. 42, 45; *Boston* v. *Binney*, 11 Pick. 1; *Brewer* v. *Dyer*, 7 Cush. 337; *Merrill* v. *Bullock*, 105 Mass. 486, 490; *Lucier* v. *Marsales*, 133 Mass. 454; *Central Mills* v. *Hart*, 124 Mass. 123, 125; *Gould* v. *Thompson*, 4 Met. 224, 227, 228, 229; *Welch* v. *Andrews*, 9 Met. 78, 81; *Jordan* v. *Jordan*, 4

Maine, 175; *Porter* v. *Hooper*, 11 Id. 170, 172; *Rogers* v. *Libbey*, 35 Id. 200; *Larrabee* v. *Lumbert*, 34 Id. 79; *Roxbury* v. *Huston*, 39 Id. 312; *Fox* v. *Corey*, 41 Id. 81; *Patterson* v. *Stoddard*, 47 Id. 355; *Goddard* v. *Hall*, 55 Id. 579; *Bank* v. *Getchell*, 59 N. H. 281; *Kelley* v. *Davis*, 49 N. H. 187; *Barron* v. *Marsh*, 63 N. H. 107; *No. Haverhill Water Co.* v. *Metcalf*, 63 N. H. 427; *Swift* v. *Durham Lumber Co.*, 64 N. H. 53; *Dunnell* v. *Emery*, 64 N. H. 223; Taylor's L. & T. § 371, p. 240; *Swain* v. *Ayers*, 20 Q. B. Div. L. R. 585.

The only exceptions to above general proposition are when the agreement exempts the tenant from such payment; when the agreement has ripened into a conveyance; when the possession was adverse, or in denial of the owner's title.

A. W. Weatherbee, for plaintiff.

LIBBEY, J. We think the decision of the presiding judge at *nisi prius* upon the facts reported, correct. When the plaintiff entered into possession of the lot of land for which the defendant claims rent, he entered under a verbal contract with the owner for the purchase of it at a price agreed upon, and the owner of the land caused a survey of the lot to be made and corners to be erected. The plaintiff has remained in possession of the lot under this agreement for more than ten years, and made extensive improvements upon it. At the time of the trial he had not paid the sum agreed upon for the land, and it does not appear that he had been requested to do so.

The owners of the land, F. Shaw & Brothers, in 1883, failed and assigned their property to an assignee for the benefit of their creditors, and the assignee conveyed the lot in controversy, with other lands to the defendant. There was no agreement by the plaintiff to pay rent, and from the facts reported, it must be inferred that the parties did not contemplate the payment of rent. In equity, upon the facts reported the verbal agreement to convey, is still binding as against the defendant, who took his title from the assignee of the Shaws, and would be enforced on the payment of the price agreed with interest, by the plaintiff.

We think the case is clearly within the rule as held in *Jewell*

v. *Harding*, 72 Maine, 124, and recognized in *Harkness* v. *McIntire*, 76 Maine, 201.

Exceptions overruled.

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

OLIVER P. SHEPHERD *vs.* INHABITANTS OF CAMDEN.

Knox. Opinion May 27, 1890.

New trial. Damages. Jury. Practice.

Upon a general motion to set aside a verdict as against evidence, in a case where the plaintiff claimed that he had suffered damage to his land by a change in the grade of a street, and there has been a view by the jury, the full court will not sustain the motion, although the reported evidence may preponderate in favor of the plaintiff for some damages, there being evidence on both sides submitted to the jury; and the preponderance of evidence not being so great as to satisfy the court that the verdict was the result of bias, prejudice or mistake of the jury.

Neither the testimony of jurors, nor their declarations out of court, are competent evidence to prove misconduct by them while having the case under consideration, after they have retired to their room, and while they were together during the view of the premises.

ON MOTION.

This was a complaint by land owner to the court for Knox county, under R. S., c. 18, § 68 as amended by c. 97, of the public laws of 1887, for a view and assessment of damages caused by raising the street in front of the plaintiff's premises, in the village of Rockport, town of Camden. The defendants contended that the benefits were equal to the damages. There was a view by the jury who returned a verdict for the defendants.

Besides the general motion to set aside the verdict, as against law and evidence, the plaintiff filed a special motion for a new trial on the ground of alleged misconduct of jurymen, during the view, and after they had retired to deliberate upon their verdict. In this motion, the plaintiff alleged that one of the jurymen,

whose knowledge of the premises had been acquired more than fifteen years before the trial, and before they had been used for the purposes which gave them their value, had declared in the jury room that he had worked teaming there; and that in his opinion the way out from the wharf was no worse than when he teamed there; that said statement influenced the mind of one other jury man in finding a verdict for the plaintiff. The motion also alleged similar declarations made during the view with like effect upon the minds of jurors. Affidavits of the jury and others, with depositions taken by a commissioner, appointed by the court, were filed with a report of the evidence at the trial.

D. N. Mortland, for plaintiff.

The verdict was against evidence and the weight of evidence. *Pollard* v. *Grand Trunk Ry.*, 62 Maine, 93. Equal benefits: *Briggs* v. *Horse R. R. Co.*, 79 Maine, 363.

Misconduct of jurymen: *Woodward* v. *Leavitt*, 107 Mass. 466; *Heffron* v. *Gallupe*, 55 Maine, 563; *Bowler* v. *Washington*, 62 Id. 302; *Winslow* v. *Morrill*, 68 Id. 362; *Perkins* v. *Knight*, 2 N. H. 474; *Cilley* v. *Bartlett*, 19 N. H. 312; *Patterson* v. *Boston*, 20 Pick. 166.

C. E. Littlefield, for defendants.

Misconduct of jurymen: Evidence taken subject to objection and inadmissible. *Heffron* v. *Gallupe*, 55 Maine, 566; *State* v. *Pike*, 65 Id. 117; *Trafton* v. *Pitts*, 73 Id. 408; *Woodward* v. *Leavitt*, 107 Mass. 453; *Rowe* v. *Canney*, 139 Id. 41; *Warren* v. *Spencer Water Co.*, 143 Id. 165.

If admissible, no misconduct shown. Moving party for new trial confined to facts set out in motion. (*Lennox* v. *R. R. Co.*, 62 Maine, 324) and must prove them to have prejudiced the party complaining. *Com.* v. *Desmond*, 141 Mass. 200; *Newell* v. *Ayer*, 32 Maine, 334; *State* v. *Flint*, (Vt.) 14 Atl. Rep. 186; *Dana* v. *Roberts*, 1 Am. Dec. 36, 37, note.

LIBBEY, J. This case was tried at *nisi prius*, on the petition of the plaintiff for damage to his lands by reason of a change of grade, in the street passing by them. The verdict was for the defendant. The case comes before this court on two motions.

First, to set aside the verdict as against evidence. Second, for a new trial on the ground of newly-discovered evidence.

As to the first motion, we think the evidence reported preponderates in favor of the plaintiff for some damages. But there was evidence on both sides, submitted to the jury, and the preponderance is not so great as to satisfy us that the verdict was the result of bias or prejudice of the jury, or of any mistake made by them. Furthermore, we have not before us all the evidence which the jury had to act upon. They properly viewed the premises; and they had a right to take into consideration what they saw of their situation,—to what extent, in their judgment, the change of the grade in the street affected the value of the plaintiff's premises. In such a case, the court hesitates to set aside the verdict.

As to the second motion, it is based wholly upon alleged misconduct of jurors while having the case under consideration after they retired to their room, and while they were together during the view of the premises. It is alleged that two of the jurors communicated to their fellows, facts known by them which influenced their action. The evidence offered to support the motion is the testimony of the two jurors in regard to the alleged misconduct, and of several witnesses, who testify to the declarations of the two jurors to them out of court and after the verdict was rendered. The evidence was taken after the adjournment of the court before a commissioner appointed for the purpose, subject to any legal objection that might exist to it.

We think it clearly settled that neither the testimony of the jurors, nor their declarations out of court after the verdict are competent evidence to prove the irregularities alleged in the motion. *Commonwealth* v. *White*, 147 Mass. 76; *Greeley* v. *Mansur*, 64 Maine, 211; *State* v. *Pike*, 65 Maine, 111.

With this evidence excluded there is no evidence to sustain the allegations in the motion. We think both motions must be overruled.

Motions overruled.

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

AUGUSTA SAVINGS BANK, in equity, *vs.* JOHN B. FOGG, EXR.
and
DOROTHY J. DEARBORN.

Kennebec. Opinion May 27, 1890.

Gift. Delivery. Bank deposit. Imperfect gift.

The gift of a savings bank book, *inter vivos*, to be valid must be completed by an actual delivery from the donor to the donee, or to some one for the donee.

A gift, *inter vivos*, will not be sustained if the agent was not to deliver the property until after the death of the donor. Such a disposition would be inoperative under the statute of wills.

ON REPORT.

This was a bill of interpleader brought by the Augusta Savings Bank to ascertain the legal title to a deposit of $1,323.22, made by one Amos C. Hodgkins, the claimants being John B. Fogg, as executor of said Hodgkins' estate, and Dorothy J. Dearborn, a sister of the testator, as his donee.

Answers were duly filed, and after a decree of interpleader, they were by agreement taken as the pleadings; and the case was reported to the law court on the pleadings and testimony. The evidence consisted of the testimony of Fogg, the executor, and of Mrs. Paul, at whose house Hodgkins lived six months prior to his death, the deposit book itself, and book entries in the bank.

It appeared that Hodgkins died testate at Monmouth, July 29, 1887. During his lifetime, he had deposited in the Augusta Savings Bank in the name of "Dorothy J. Dearborn or Amos C. Hodgkins" various sums of money beginning July 6, 1885, and continuing the deposits till shortly before his death. Many of the items of deposit were dividends transferred to this account from other accounts of his in the same bank.

The question for the court to determine was whether, at the time of his death, the title to the sum represented by the bank book was in Dorothy J. Dearborn, who claimed it as a gift *inter vivos*, or in his estate.

The material parts of the answer of Fogg, the executor, are as follows:—

That all said moneys deposited by said testator, as aforesaid, were the sole property of said testator at the time when the same were deposited, and that he caused the same to be deposited in the manner specified in the bill of complaint and the depositor's book to be issued as therein specified, in order that he might draw interest thereon and might avoid the rule of said bank and provisions of revised statutes limiting the amount of deposit from any one person to two thousand dollars, and for no other purpose, inasmuch as during all of said time said testator had in said bank in his own name a deposit of two thousand dollars.

He further alleges and affirms that said Amos C. Hodgkins during the whole of his lifetime after he made said deposits had and exercised the absolute and unqualified ownership, possession and control of said depositor's book and of the funds specified therein and the interest accruing thereon; and that neither Dorothy J. Dearborn, nor any other person, ever had any right whatsoever to said book or said property or any part thereof, during the lifetime of said Amos C. Hodgkins.

He further claims that said Amos C. Hodgkins made no disposition whatever of said deposits or any part thereof in his lifetime, and at his decease the same became and still are a part of his estate and as such should be transferred to said John B. Fogg, executor as aforesaid, to be disbursed by him according to said will and testament.

The material portions of the answer of Dorothy J. Dearborn are as follows:

That said funds were deposited in said bank, in the name and manner before set out, for the express purpose and with the legal effect of creating a trust therein by which the same should be held by said Hodgkins from the date of said deposit in trust for his own use during his lifetime, so far as the same might be necessary, and all that should remain undrawn at the decease of said Hodgkins, to be held in trust for said defendant absolutely. That at the decease of said Hodgkins, there remained undrawn in said bank, on said deposit, the sum of one thousand three

hundred twenty-two and thirty-three one hundredths dollars, which then and there under the terms of said trust became the absolute property of said Dorothy J. Dearborn.

That she is a sister of said Hodgkins, and, as she is informed and believes, said Hodgkins deposited said money in said bank, and had the book issued as above, for the use and benefit of said defendant, and with the full intention and purpose of transferring to her said funds and the absolute ownership and title thereto. That a few days prior to his decease, said Hodgkins delivered said bank book to John B. Fogg, the executor named in his last will and testament, with full and complete instructions to hold the same for, and to deliver the same to this defendant as her own goods and property, as he wished to give this defendant more than his other brothers and sisters.

That at the time of said delivery to said Fogg, said Hodgkins parted with all control over said bank book and the funds in said bank thereby represented, and then and there transferred said funds to this defendant and the absolute ownership therein, and title thereto, and that now and ever since said time, said property has belonged solely and exclusively to this defendant. That said Fogg, after the decease of said Hodgkins, and in accordance with his instructions, delivered said bank book to this defendant, and she now holds and claims by virtue of the gift aforesaid, to retain the same as her own proper goods and chattels.

That by virtue of the facts hereinbefore stated and by virtue of the gift of said moneys to her by said Hodgkins in his lifetime, this defendant now claims the same and denies the right, title and claim of said John B. Fogg as executor aforesaid, or of said estate to any part thereof.

The testimony discloses that a few days before Hodgkins died he sent for Fogg to come to the house of Mrs. Paul, where he was living. Fogg had been previously informed by him that he had been nominated executor of his will. For nearly a year Hodgkins had kept a portion of his valuables in a locked tin trunk, inside of a locked travelling-trunk at Fogg's house, going to it when he pleased.

Fogg, at this interview, carried the tin trunk to Hodgkins' bed. The book in controversy was not in this tin trunk but was in a wooden trunk in another room at Mrs. Paul's house, and neither the book nor the trunk was produced. On Fogg's arrival he sat up in bed took the tin trunk and called on Mrs. Paul for the key. He then unlocked it and said, "I am going to deliver you this property. There is quite an amount of it, quite a large amount, there are thousands here." He then delivered to Fogg the tin trunk with the key containing all his valuables except the book in dispute. He stated that he had another book in the house that was for his sister, the defendant, and requested Fogg to deliver it to her after his death. He had sent for Mrs. Dearborn to come and visit him, and he expected to be able to deliver her the book himself. He had previously expressed his intention to Fogg to give her more than the others. Fogg received the tin trunk and key, but did not find the book in question in it. He found it after the testator's death in the wooden trunk at Mrs. Paul's and delivered it to Mrs. Dearborn in accordance with his instructions.

Both parties claimed the funds and gave notice accordingly to the bank.

At the argument it was contended in behalf of Mrs. Dearborn, that the testator delivered the key of the wooden trunk to Fogg; while it was denied by the other defendant, who contended that it was returned to Mrs. Paul, who had his keys for several days previous to the testator's death, and that she kept them until called for by the executor.

No evidence was offered to prove that Mrs. Dearborn ever had any knowledge or notice of the fact of the deposit until after the testator's death.

Heath and Tuell, for John B. Fogg, Exr.

That Hodgkins retained dominion and control of the funds during his lifetime is fatal to his sister's claim that an equitable title passed to her. Aside from the terms of the entry there is no evidence to prove the terms of the trust. *Nutt* v. *Morse*, 142 Mass. 1. Notice to the *cestui que trust* is essential, if the depositor retains the deposit book and there is no delivery to a

third party for the *cestui que trust.* *Barker* v. *Frye*, 75 Maine, 29; *Northrop* v. *Hale*, 73 Id. 66; *Smith* v. *Savings Bank*, 64 N. H. 231; *Marcy* v. *Amazeen*, 61 N. H. 131; S. C. 60 Am. Rep. 320; *Bartlett* v. *Remington*, 59 N. H. 364; *Geary* v. *Page*, 9 Bosw. 290; *Blasdell* v. *Locke*, 52 N. H. 238; *Kerrigan* v. *Rautigan*, 43 Conn. 17; *Stone* v. *Bishop*, 4 Cliff. 593; *Sherman* v. *Bank*, 138 Mass. 581; *Scott* v. *Bank*, 140 Mass. 157; *Jewett* v. *Shattuck*, 124 Mass. 590; *Clark* v. *Clark*, 108 Mass. 522; *Burton* v. *Bank*, 52 Conn. 398; S. C. 52 Am. Rep. 602; *Brabrook* v. *Bank*, 104 Mass. 228; *Parcher* v. *Saco & B. Sav. Inst.*, 78 Maine, 470; *Robinson* v. *Ring*, 72 Id. 140; *Taylor* v. *Henry*, 48 Md. 530; S. C. 30 Am. Rep. 486; *Pope* v. *Bank*, 56 Vt. 284; S. C. 48 Am. Rep. 781; *Eastman* v. *Bank*, 136 Mass. 208. These cases hold that such deposit indicates nothing more than a possible intention to give. The beneficiary must have a present right to reduce to possession. *Basket* v. *Hassell*, 107 U. S. 602; S. C. 108 U. S. 267. A gift to take effect *in futuro* is nothing but a promise without consideration and invalid. *Barker* v. *Frye*, *supra*, in form of entry and notice differs from pending case. Cases where notice was given and acceptance proved: *Minor* v. *Rogers*, 40 Conn. 512; *Ray* v. *Simmons*, 11 R. I. 266; S. C. 23 Am. Rep. 477; *Gerrish* v. *New Bedford Sav. Inst.*, 128 Mass. 159; *Alger* v. *Bank*, 146 Mass. 418; *Eastman* v. *Bank*, 136 Mass. 208. All the N. E. courts hold that the mere fact that A. deposited in his own name for B. is insufficient; a deposit by A. in the name of B. of itself does not create a trust; such entries indicate no more than an intention to give; the title, legal or equitable, must pass during the life of the donor; and in the absence of delivery of any kind, notice to the beneficiary is essential, as the equivalent of delivery.

Martin v. *Funk*, 75 N. Y. 134; S. C. Am. Rep. 446, is practically overruled in *Young* v. *Young*, 80 N. Y. p. 422; S. C. 36 Am. Rep. 634.

Assuming a gift was intended, there was no act save the form of entry. Such entry alone is not a gift. Hodgkins' request was to deliver "at his decease." Until death the gift was revocable, and of no avail. Such request or direction was testamentary and void. *Sherman* v. *Bank*, 138 Mass. 581; *Curry* v. *Powers*,

70 N. Y. 212; S. C. 26 Am. Rep. 577; *Nutt* v. *Morse*, 142 Mass. 1; *Newton* v. *Snyder*, 44 Ark. 42; S. C. 51 Am. Rep. 587; *McCord* v. *McCord*, 77 Mo. 166; S. C. 46 Am. Rep. 9; *Wilcox* v. *Matterson*, 53 Wis. 23; S. C. 41 Am. Rep. 312; *Case* v. *Dennison*, 9 R. I. 88; S. C. 11 Am. Rep. 222; *Dunbar* v. *Dunbar*, 80 Maine, 152; *Drew* v. *Hagerty*, 81 Id. 231. This deposit was made "Dorothy J. Dearborn or Amos C. Hodgkins" to avoid the rule limiting deposits at $2000. The $40 dividends declared on the book from which they were transferred are two per cent on $2000. Equity does not perfect imperfect gifts.

Baker, Baker and Cornish, for Dorothy J. Dearborn.

Delivery to Fogg was as valid as if to Mrs. Dearborn herself. Delivery to a third person to hold as agent for the donee is valid. *Kilby* v. *Goodwin*, 2 Del. Ch. 61; *Clough* v. *Clough*, 117 Mass. 83; *Turner* v. *Esterbrook*, 129 Mass. 425; *Hill* v. *Stevenson*, 63 Maine, 364.

It may be said that Hodgkins might have sent for the Dearborn book and delivered that. True, but when, having neither the book nor the wooden trunk that contained it, in his immediate possession, but having the key that controlled it, he passed that key and therefore all control over the book with it to Fogg together with the instructions to give it to Mrs. Dearborn, his own possession both actual and constructive ceased, and the delivery was complete.

As examples of constructive delivery we would cite the following:

Delivery of a key of a warehouse in which furniture donated was locked, was held to be a good delivery of the furniture. *Smith* v. *Smith*, 2 Str. 955. Delivery of the key of a locked room in which was an unlocked trunk containing securities was held a good delivery of the securities. *Penfield* v. *Thayer*, 2 E. D. Smith, 305.

And also the delivery of the key of a trunk was held to be a valid delivery of the trunk and its contents in the old case of *Jones* v. *Libby*, Prec. Chan. 300.

In *Hatch* v. *Atkinson*, 56 Maine, 324, the gift claimed was a *donatio causâ mortis*, and as Judge WALTON remarks (p. 376)

such a claim is always viewed with suspicion, a doctrine restated in *Drew* v. *Hagerty*, 81 Maine, 231. That claim does not arise here.

In the second place, there is a strong flavor of fraud throughout that whole case. The court say that the testimony of the alleged donee was so at variance with her conduct and declarations that it was not to be credited. The evidence here comes from witnesses untainted with even a suspicion of fraud, in fact summoned by the other side.

The donee, in that case, had the trunk before him and had the valuables in his hand, and delivered neither trunk nor valuables to the plaintiff, but on the contrary directed that it be placed in the clothes press of his own room where it remained till his decease, under his immediate dominion and control, and clearly in the possession of the donor. There the securities and money the donor had in his very hands and could have delivered them. Here the bank book was locked in a trunk in another room in the house, and the delivery of the key was as good and perfect as the nature of the case would require; moreover in that case the trunk was kept after the alleged gift in the donor's closet, under his very eyes and almost within reach. Here it was in another part of the house, and he neither had dominion nor control over it after delivering the key to Fogg, nor did he attempt to have.

The Hatch case is by no means conclusive of our rights; we admit that the rule of law is that unless the donor completely divests himself of all power or control over the article, if he retains any custody or exercises any acts of dominion over it the delivery of a key will not be a sufficient delivery to perfect the gift; but we claim that the facts here, square up to that rule. In *Coleman* v. *Parker*, 114 Mass. 30, it was held that taking the key of a trunk from the place where it is kept, and putting goods into the trunk and returning the key to its place at the request of the owner in his last sickness, apprehending death and expressing the desire to make a gift of the trunk and contents *causâ mortis*, is not a delivery sufficient for that purpose.

The ground on which the decision was made was that there had been no such change in the possession of the key as would

constitute an effectual delivery of the trunk, but the court in their opinion say:

"We have no doubt that a trunk with its contents might be effectually given and delivered, in such a case" (when inconvenient or impracticable) "by a delivery of the key, not as a symbolical delivery of the property, but as a means of taking possession. If the key in this case had been placed in the hands of the witness, the donor relinquishing all dominion and control over it, and parting with it absolutely, or if by direction of the donor the witness had taken it into her possession and exclusive control, there would have been a sufficient delivery to make out a full title in the plaintiff."

The delivery, there supposed, in this case actually took place.

Mr. Heath, in reply.

There is no dispute about the directions Fogg received from Hodgkins. He was not to deliver the book to Mrs. Dearborn until after Hodgkins' death. Where property is delivered to a third person by the donor with authority to deliver it to the donee, such custodian is and continues the donor's agent until delivery to the donee has been consummated according to the directions; in the meantime the donor may revoke the gift. The property continues that of the donor until the order is complied with. Such agency terminates by death. It lacks the essential element of parting with dominion. *Allen* v. *Polereczky*, 31 Maine, 338; *Phipps* v. *Hope*, 16 Ohio St. 586; *People* v. *Johnson*, 14 Ill. 342; *Picot* v. *Sanderson*, 1 Dev. (N. C.) 309; *Craig* v. *Kittredge*, 46 N. H. 57 and cases cited.

Counsel also cited to the question of delivery:—

Carleton v. *Lovejoy*, 54 Maine, 446; *Dresser* v. *Dresser*, 46 Id. 48; *McGrath* v. *Reynolds*, 116 Mass. 566; *French* v. *Raymond*, 39 Vt. 623; *Camp's Appeal*, 36 Conn. 88; S. C. 4 Am. Rep. 39; *Headley* v. *Kirby*, 18 Pa. St. 326; *Powell* v. *Helicar*, 26 Beav. 261; *Bunn* v. *Markham*, 7 Taunt. 224.

HASKELL, J. Bill of interpleader sent up on report to determine the title to a deposit in the Augusta Savings Bank.

It appears that one Hodgkins, now dead, in his lifetime made

the deposit in account with Dorothy J. Dearborn, the claimant, or Amos C. Hodgkins, himself; that the deposit was made with the intention that, at his death, it should become the property of the claimant; that the book was not delivered to her until after his decease; that, until his death, it remained in a trunk in Mrs. Paul's house, where he lived and died, and then was taken by his executor and delivered to the claimant, pursuant to the testator's direction; that a few days before his death, conscious that his end was near, he called the executor, delivered to him a tin trunk, with directions as to the contents, and the key to the trunk in which the bank book was kept, with directions to give it to his sister after his decease; that his sister, the claimant, did not know of the intended gift to her during his lifetime, nor did the executor, when he received the key to the trunk that contained the book, know that the book was in it; he did not ascertain that fact until after the testator's death.

The learned counsellors for the claimant set up her claim, "not by reason of any trust, nor of a *donatio causâ mortis*, but of a valid gift *inter vivos*."

The evidence shows an intention to give, but not during life. The gift would have been complete upon the delivery of the bank book. The testator retained the possession of it beyond all question, until a few days before he died. He then delivered the key of a trunk containing the book, not to the claimant, nor to any person to be forthwith delivered to her, but to the executor named in his will, for her, "at his decease." Had he recovered, would the title of the deposit have gone from him? Was the gift complete in his lifetime?

By giving the evidence the most favorable consideration, of which it is susceptible, in the claimant's favor, she was only entitled to receive the bank book upon the contingency of the supposed donor's decease. The end of his life was made a condition precedent to a complete transfer of the deposit to the supposed donee. Even, if the substituted delivery of the key to the trunk could take the place of an actual delivery of the bank book, which is stoutly denied, no gift *inter vivos* is shown. A gift of that sort must be complete between the living. It cannot be con-

summated after the death of a supposed donor. Such a disposition would be inoperative under the statute of wills. *Donatio perficitur possessione accipientis.*

The authorities have been so diligently collected and thoroughly discussed by counsel, that it is unnecessary to cite them anew.

The bank should be allowed its costs from the deposit, and, on payment of the balance to the executor, should be discharged from all liability to both parties on account thereof. No further costs to be allowed.

Decree accordingly.

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

ANN M. GILMORE *vs.* WILLIAM B. BRADFORD.

Sagadahoc. Opinion May 28, 1890.

Remedy. Deceit. Assumpsit. Principal and agent.

The only remedy against one who undertakes to act as an agent without authority, or in excess of his authority, is an action on the case for deceit.

The gist of such an action, the contract being necessarily void, is not a failure to keep and perform the promise, but a false representation; and assumpsit does not lie.

In an action of assumpsit, brought after a loss by fire, the plaintiff alleged that he had negotiated and completed an oral contract of insurance on his property in a certain insurance company, through the defendant as its agent. The defendant denied making the contract, or that, for want of authority, the company was bound. The plaintiff requested the court to instruct the jury, "that if the defendant undertook to insure for the company, and had no authority to do so, he would be liable for that reason, under proof of other essential requisites." *Held*, that in this form of action, such instruction would be erroneous.

ON MOTION AND EXCEPTIONS.

This was an action of assumpsit, in which the plaintiff alleged that the defendant, being an agent of the Phœnix Insurance Company, for a valuable consideration undertook and promised

to effect insurance for her upon her mill property by said insurance company; that the property was destroyed by fire; and that the defendant never did effect such contract, etc.

The declaration also contained a count alleging that the plaintiff undertook and promised to procure such insurance with some good, sufficient and proper insurance company; and another count that the defendant himself promised and undertook to insure and did insure the plaintiff, etc.

The defendant contended that no contract in fact was made; that, as a broker, he was to be furnished with a measurement of distance between certain buildings before placing the risk, and this was not done before the fire. The plaintiff contended that the defendant accepted $3,000 on the property and agreed to examine it and see about placing another $1,000 on it. The defendant also contended that, if any contract of insurance was effected, it was with his company and not himself.

The case was submitted to the jury on these and other issues of fact. They returned a verdict for the plaintiff, and the defendant moved for a new trial.

At the close of the charge, upon the plaintiff's request, the presiding justice instructed the jury, in substance, that, "if the defendant had no authority to take such risk for the Phœnix Company, or other underwriter, and did not actually place the risk anywhere, the defendant is held in damages." The defendant excepted to this ruling.

Savage and Oakes, for defendants.

W. Gilbert, for plaintiff.

An agent who transcends his authority, or undertakes to contract without authority binds himself.

WALTON, J. The plaintiff's mill, containing circular saws and other machinery, was burned September 18, 1887. Her son, Augustus R. Gilmore, testifies that, three days before the fire, he negotiated and completed an oral contract of insurance on the mill in the Phœnix Insurance Company, through the defendant as its agent. The defendant denies the making of such a contract,

and says further that if he did, such a contract will not support an action against him. The plaintiff replies that if the defendant undertook to insure for the Phœnix Company, and had no authority to do so, he would for that reason be liable under proof of other essential requisites. The defendant, still protesting that he did not undertake to insure for the Phœnix Company, contends that if he did, and if for want of authority the company was not bound, still, this action, which is an action of assumpsit, can not be maintained against him; that the only remedy against him would be an action on the case for deceit.

The defendant is undoubtedly right. It is settled in this state and Massachusetts, by a series of decisions commencing as far back as 1814, that the only remedy against one who undertakes to act as agent without authority, or in excess of his authority, is an action on the case for deceit. *Noyes* v. *Loring*, 55 Maine, 408. Affirmed in *Teele* v. *Otis*, 66 Maine, 329; *Abbey* v. *Chase*, 6 Cush. 54; *Jefts* v. *York*, 10 Cush. 392; *Ballou* v. *Talbot*, 16 Mass. 461; *Long* v. *Colburn*, 11 Mass. 97.

"When one who has no authority to act as another's agent, assumes so to act, and makes either a deed or a simple contract, in the name of the other, he is not personally liable on the covenants in the deed, or on the promise in the simple contract, unless it contains apt words to bind him personally. The only remedy against him, in this commonwealth, is an action on the case for falsely assuming authority to act as agent." *Per* Metcalf, J., 6 Cush. 54.

"If one falsely represents that he has an authority, by which another, relying on the representation, is misled, he is liable; and by acting as agent for another, when he is not, though he thinks he is, he tacitly and impliedly represents himself authorized without knowing the fact to be true, it is in the nature of a false warranty, and he is liable. But in both cases, his liability is founded on the ground of deceit, and the remedy is by action of tort." *Per* Shaw, C. J., 10 Cush. 395.

"The remedy against one who fraudulently represents himself as the agent of another, and in that capacity undertakes to make a contract binding upon his principal, is an action on the case for

deceit, and not an action of assumpsit upon the contract. The gist of the action in such cases is not a failure to keep and perform a promise, but a false representation. * * * The contract is necessarily void. It is not the contract of the principal, for the pretended agent had no power to bind him. It is not the contract of the agent, for in making it he did not attempt to bind himself. How then can such a contract be the basis of a suit? Very clearly it cannot." 55 Maine, 411.

In this case, the exceptions show that at the close of the judge's charge, at the special request of the plaintiff's attorney, the court instructed the jury, "that if the defendant undertook to insure for the Phœnix Company, and had no authority to do so, he would for that reason be liable, under proof of other essential requisites." This was clearly erroneous. In an action on the case for deceit, such an instruction might be proper. In this action, it was clearly improper. The exceptions, therefore, must be sustained.

We will now consider the motion. In *Kidder* v. *Flagg*, 28 Maine, 477, the court held that, where a declaration is on a special contract, the contract must be proved as set forth, or the plaintiff can not recover; that if the evidence, in reference to the contract, and the supposed breach thereof, is altogether variant from what is set out in the declaration, a verdict for the plaintiff, not being warranted by the evidence, must, on motion, be set aside and a new trial granted.

In this case, the declaration contains three counts, each purporting to be upon a special contract, and the evidence supports no one of them. The first count alleges that the defendant promised to insure the plaintiff's mill in the Phœnix Insurance Company, but did not do so. The evidence of the plaintiff's son (and he is the only witness to the alleged contract) is, not of an executory contract, leaving something to be performed in the future, but of an executed contract, a contract completed, leaving nothing further to be done to complete the insurance, and furnish the plaintiff with a remedy against the Phœnix Company, in case of loss; for it is well settled that an oral contract of insurance, made with an agent, is binding on the company (*Walker* v. *Ins. Co.*, 56 Maine, 371), even if the agent in making it dis-

obeyed his instructions (*Packard* v. *Fire Ins. Co.*, 77 Maine, 144). The same objections exist with respect to the second and third counts,—namely, that the plaintiff does not offer a scintilla of evidence of the making of such contracts as are therein set forth. The only contract, of which the defendant offers any evidence, is the one already described ; and that is a contract with the insurance company, made by its agent, and can not be made to support an action of assumpsit against the defendant. If the agent lacked authority to bind the company, still, it is not his contract; and the only remedy against him is an action on the case for deceit.

At our consultation, immediately after the argument of this cause, we were unanimously of the opinion that the verdict was clearly wrong. But as the case was one of considerable importance, and involved important questions of law, it was deemed advisable not to announce the decision then, but to take time and give the case a more careful examination. We have done so, and our convictions, that the verdict must be regarded as clearly and most manifestly against the weight of evidence, have been confirmed. On such a question it is never profitable to review the evidence in detail, and we shall refrain from doing so in this case. It is sufficient to say that, after a most careful examination of the evidence, such is the conclusion to which the court has arrived.

Motion and exceptions sustained.

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

GEORGE L. SNOW, in equity, *vs.* ANDREW PRESSEY.

Knox. Opinion May 28, 1890.

Equity. Mortgage. Foreclosure. Certificate. R. S., c. 90, § 3, cl. 3.

When a grantee in an absolute deed of real estate, at the same time, executes an instrument to reconvey the premises to his grantor on payment of certain specified debts, such instrument is a defeasance within the meaning of the law, and converts what would otherwise be an absolute deed into a mortgage.

The foreclosure of a mortgage, by peaceably and openly taking possession in the presence of two witnesses, as provided in R. S., c. 90, § 3, cl. 3, will not be effectual, if the witnesses fail to state the time of the entry in their certificate.

IN EQUITY.

An appeal by defendant from a decree in favor of plaintiff after hearing on bill, answer and proofs.

This was a bill in equity to redeem a mortgage. At the hearing at *nisi prius* the presiding justice ordered the bill to be sustained, and that the defendant account, etc.

The defendant contended that he held the premises under an absolute deed; and that his agreement to reconvey them to the plaintiff did not render the transaction a mortgage.

The bill alleged, "that this conveyance and deed of quitclaim to the defendant, appearing on its face to be absolute, and with a separate instrument of defeasance, which the complainant here in court will produce, and which was then and there executed and delivered by the said Andrew Pressey to your complainant as part of the same transaction, constituted a mortgage."

It appeared that on August 16, 1878, the plaintiff quitclaimed the premises, then subject to a mortgage given by him March 3, 1874, to the defendant and one Candee his partner, to this defendant, who on the same day executed to the plaintiff the following instrument:—

"Know all men by these presents, that I, Andrew Pressey, of Brooklyn, Kings County, New York, in consideration of a conveyance of certain real estate this day made to me by George L.

Snow, of Rockland, in the county of Knox and state of Maine, to wit, a quitclaim of all of said Snow's interest in and to the premises described in a mortgage deed from said Snow to said Pressey and another, recorded in Knox Registry of Deeds in book 36, page 252, I do hereby covenant and agree with the said Snow and his heirs or legal representatives that on the receipt of the amount of the said mortgage claim of G. W. Candee of New York city and said Andrew Pressey, or an amount equal thereto, together with the interest thereon, with the amount of all other legal claims due said Candee and Pressey, I will reconvey the premises aforesaid to the said George L. Snow, his heirs or legal representatives, by a good and sufficient deed, including the interest of said G. W. Candee therein.

In witness whereof I have hereunto set my hand and seal this 16th day of August, A. D. 1878.

ANDREW PRESSEY. [L. S.]"

Candee's interest in the mortgage of March 3, 1874, was assigned and transferred May 1, 1884, to the defendant; and it was admitted by the parties that on August 16, 1878, there was a breach of the condition of this mortgage.

The plaintiff in his bill also alleged, "that the said defendant, at said Rockland, during said year of 1878, but the precise date is to him unknown, entered into said land and premises and took possession of an undivided portion thereof, viz: one lime kiln, a portion of the lime sheds and other buildings, structures and wharves, by the consent of the complainant, and as the result of an agreement and understanding between them, and has remained in possession thereof * * *."

The defendant claimed, on the other hand, that he took possession of the premises under the mortgage of March 3, 1874, for the purpose of foreclosure; and put in evidence the following certificate, which he claimed was a full compliance with R. S., c. 90, § 3, cl. 3:—

"Know all men by these presents, that I, Andrew Pressey, of Brooklyn, Kings county, state of New York, one of the mortgagees of mortgage herein described, on this sixteenth day of August, A. D. 1878, in presence of J. H. Flint and Charles H.

Pressey, openly and peaceably, not being opposed, for condition of mortgage broken, entered upon certain premises situate in Rockland, in the county of Knox and state of Maine, fully described in a mortgage deed from George L. Snow, of Rockland, to G. W. Candee, of New York, and Andrew Pressey aforesaid, dated March third, A. D. 1874, and recorded in Knox Registry of Deeds, book 36, page 252, and for the purpose of foreclosing all the right in equity of said George L. Snow to redeem the same, and that I, then and there, did in the presence of two witnesses foreclose the same in manner and form required by law.

ANDREW PRESSEY.

We, J. H. Flint and Charles H. Pressey, certify that Andrew Pressey above-named, entered upon the above described premises, for the purpose set forth in the foregoing certificate, peaceably and without opposition in our presence, and took possession of said premises for the purpose of foreclosure of said mortgage for condition broken.

J. H. FLINT.
C. H. PRESSEY.

State of Maine—Knox, ss. August 16, 1878.

Then personally appeared J. H. Flint and Charles H. Pressey and made oath that the above certificate by them subscribed is true. Before me,

T. P. PIERCE,
Justice of the Peace."

Recorded, book 1, page 183, Knox Registry.

Received August 17, 1878, 9 h., A. M.

Since August 16, 1878, the plaintiff or his wife has paid rent to the defendant for the use of the premises occupied by them.

November 11, 1887, the plaintiff made separate written demands on the defendant for an account, which was refused. The bill was filed January 5, 1888.

Symonds and Libby, *J. O. Robinson*, with them, for plaintiff.

The last mortgage is within R. S., c. 90, § 1, a conveyance appearing on its face to be absolute with a separate instrument of defeasance executed at the same time. The instrument is by deed. "It recites the deed it relates to, or the most material part thereof. It is made between the same persons that were

parties to the first deed. It was made at the time or after the first deed, and not before." *Shaw* v. *Erskine*, 43 Maine, 371, 373; *Bailey* v. *Myrick*, 50 Id. 171; *Bayley* v. *Bailey*, 5 Gray, 505; *Reed* v. *Reed*, 75 Maine, 264, 272. Says Story, J., in *Flagg* v. *Mann*, 2 Sum. 486, "the true question is, whether there is still a debt subsisting between the parties capable of being enforced in any way, *in rem* or *in personam*." *Harrison* v. *Phillips Academy*, 12 Mass. 456. If not a legal mortgage, it is an equitable mortgage. *Stinchfield* v. *Milliken*, 71 Maine, 567. The bond for reconveyance contains no provision making an independent contract.

In equity there is a subsisting equity of redemption. *Linnell* v. *Lyford*, 72 Maine, p. 284, citing *Babcock* v. *Wyman*, 2 Curt. 386.

T. P. Pierce and W. H. Fogler, for defendant.

The right to redeem, being all plaintiff's interest in the premises, was extinguished by the deed of August 16, 1878. That deed absolute in form was intended to be absolute in fact. Bill treats the transaction of that date as a legal mortgage. Agreement to reconvey is under seal. The proper legal import of the transaction must be gathered from the papers, which can not be varied, explained or controlled by parol.

The three essentials to constitute a mortgage are, 1st, a particular estate, definitely described; 2d, mutuality; 3d, the defeasance must defeat, undo, render void the exact conveyance or principal deed. Greenl. Cruise, vol. 1, p. 124, vol. 2, (book 1,) p. 79; Wash. R. P. vol. 2, p. 36; Kent, Com. vol. 4, pp. 144, 147; *N. O. Nat. B'kg. Asso.* v. *Adams*, 109 U. S. 211; *Mitchell* v. *Burnham*, 44 Maine, 299; *Goddard* v. *Coe*, 55 Id. 388; *Erskine* v. *Townsend*, 2 Mass. 493; Shep. Touch. vol. 2, p. 396; Bl. Com., book 2, p. 327; Jones Mort. vol. 1, § 241; Bouv. Law Dict. and Rap. & Law. Dict. "Defeasance;" *Fuller* v. *Pratt*, 10 Maine, 197; *Shaw* v. *Erskine*, 43 Id. 371; *Kelleran* v. *Brown*, 4 Mass. 444; *Conway* v. *Alexander*, 7 Cranch, 237; *Chase's Case*, 1 Bland, 296, S. C. 17 Am. Dec. 292; *Henley* v. *Hotaling*, 41 Cal. 36, S. C. 17 Am. Dec. 304, 305; *Bodwell* v. *Webster*, 13 Pick. 415; *Horbach* v. *Hill*, 112 U. S. 144; Jones Mort. §§ 265, 269, 270,

272; *Bunker* v. *Barron*, 79 Maine, 62; *Reed* v. *Reed*, 75 Id. 264; *Bayley* v. *Bailey*, 5 Gray, 505. Snow conveyed only a right to redeem from his mortgage to Candee and Pressey. The agreement to reconvey is a guaranty that he shall have the whole premises, to do which required defendant to get the title of another's interest and convey that to Snow. 2 Wash. R. P. p. 47; *Capen* v. *Richardson*, 7 Gray, 364. Conduct does not indicate relation of mortgagor and mortgagee. No settlement, or fixing upon amount due, time or terms of payment;—but Snow becomes a tenant and begins to pay rent. *Woodman* v. *Carman*, 43 Iowa, 504. Snow did not record the agreement until after nine years; defendant now ready to reconvey according to its terms. Defendant does not claim grantor's rights are extinguished *in toto*, being thus willing to reconvey, and such claim is required to furnish grounds for equitable relief.

Foreclosure valid: *Hawkes* v. *Brigham*, 16 Gray, 561; *Thompson* v. *Kenyon*, 100 Mass. 108. Witnesses' certificate refers to the part which precedes it. Quitclaim deed was an assignment of the equity of redemption. *McIntier* v. *Shaw*, 6 Allen, 85; and foreclosure of first extinguishes the equity of the second. Jones Mort. § 1047; *Weiss* v. *Alling*, 34 Conn. 60.

WALTON, J. Mortgages of real estate include not only those made in the usual form, in which the condition is set forth in the deed itself, but also those in which an absolute deed is given and a separate instrument of defeasance is executed. R. S., c. 90, § 1. And if the instrument of defeasance is, in other respects sufficient, the fact that it provides for a reconveyance instead of declaring that the absolute deed shall become void is immaterial. The cases are numerous in which such instruments have been held to be valid defeasances. *Bunker* v. *Barron*, 79 Maine, 62; *Knight* v. *Dyer*, 57 Maine, 174; *Smith* v. *Ins. Co.*, 50 Maine, 96; *Bayley* v. *Bailey*, 5 Gray, 505; *Newhall* v. *Burt*, 7 Pick. 156; and other cases cited on the plaintiff's brief. In none of these cases was the "separate instrument of defeasance" other than an obligation to reconvey.

And to foreclose a mortgage made in either of these forms, by

peaceably and openly taking possession of the premises in the presence of two witnesses, as provided in R. S., c. 90, § 3, cl. 3, the certificate of the witnesses must state the time of the entry. It is not enough for the mortgagee to make a certificate in which he states the time of the entry. It is not enough for the magistrate to state the time when the witnesses made oath to the truth of their certificate before him; for the oath may have been administered long after the entry. The statute expressly requires that a certificate of the "time of such entry" shall be made, signed and sworn to by the witnesses. And a certificate which omits to state the time, though in other particulars sufficiently full and accurate, is fatally defective and will not effect a foreclosure. The statute must be strictly complied with. So held in *Freeman* v. *Atwood*, 50 Maine, 473.

Such being the law, the objections urged against the decree made in the court below can not be sustained. The instrument given by the defendant to the plaintiff, at the time of the execution of the absolute deed, was clearly an instrument of defeasance within the meaning of the law, and had the effect to convert what would otherwise have been an absolute conveyance into a mortgage. It shows very clearly that the object of the conveyance was security. It declares that upon the receipt of the amount due upon a former mortgage given by the plaintiff to the defendant and one Candee, and all other legal claims due from the plaintiff to the defendant and said Candee, the defendant "will reconvey the premises" to the plaintiff. The instrument contains all the essential elements of a defeasance, and necessarily converts the absolute deed into a mortgage.

And the attempted foreclosure of the mortgage, from the plaintiff to the defendant and Candee, fails for the reason that the certificate of the witnesses to the entry of the defendant is fatally defective in not stating the time of the entry.

The record before us discloses no error in the proceedings in the court below, and the entry must be,

Decree affirmed.

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

STATE *vs.* INTOXICATING LIQUORS, MICHAEL BURNS, claimant.

STATE *vs.* MICHAEL BURNS, common nuisance.

Kennebec. Opinion May 29, 1890.

Intoxicating liquors. Constitutional law. R. S., c. 17; *c.* 27.

The undisputed facts show that the liquors which the state claims to confiscate, as being in the possession of the respondent Burns for unlawful sale, were imported by him from England, were his property, were in the original and unbroken packages, and in the same condition as when imported; and that, at the date of the seizure, he had them in his possession with the intent to sell the same only in such original and unbroken packages, and in the same condition as when imported; and had established himself in a place of business in the city of Augusta for that purpose. The respondent contended that such possession and intent to sell was rightful under the laws of the United States. The court below ruled and decided that it was illegal under the statutes of this state. R. S., c. 27.

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Held, that the decision of the supreme court of the United States in the case, *Leisy* v. *Hardin*, on full consideration settles the question, and requires this court, bound on such questions by the law as determined by that court, to reverse the rulings below and sustain the law according to the respondent's contention.

Notwithstanding the opinion of the minority of that court may commend itself to many as containing the better conclusion, obedience on the part of this court, however, is due to the judgment which prevails; not that our statute is unconstitutional, for it prohibits only the "unlawful sale" of intoxicating liquors; but that its interpretation must be constitutional.

ON EXCEPTIONS.

The first case was a libel against fifty-six cases of rum and thirteen cases of whiskey seized, at Augusta, by the sheriff of Kennebec county, and by him libelled under R. S., c. 27. The claimant seasonably filed his claim as required by law. The libel was filed in the municipal court of Augusta, and upon the decision of that court disallowing the claim, the case came by appeal to the superior court for Kennebec county.

At the trial in that court it was admitted that the claimant owned the liquors; that he bought them in England in May, 1887, in the original package, and imported them into this state in the original package; said liquors at the time of the seizure

were in said original packages, which said original packages, at the time of said seizure, had not been opened, but were unbroken and in the same condition as when imported as aforesaid; that he then owned the liquors and the box and bottles containing the same, having never parted with his title thereto; that the claimant's business, at the time of the importation and seizure, was that of an importer of intoxicating liquors. At the time of the seizure thereof, said liquors were kept and deposited in said Augusta by said claimant, and he, as an importer thereof, intended to sell them in the original packages in said Augusta.

The presiding judge ruled that upon the foregoing facts the claimant had no right to the possession of the liquors seized, and that the liquors were kept and deposited by the claimant for unlawful sale within this state, as alleged in the libel and monition.

Thereupon the jury rendered a verdict against the claimant, and he excepted to the ruling.

The second case was an indictment against the respondent, Burns, under R. S., c. 17, § 1, for keeping and maintaining a common nuisance. The verdict was guilty. It was not in controversy that the respondent, during the time alleged, occupied and used the building described in the indictment for the keeping and sale of intoxicating liquors. Three witnesses testified that, during the said time, they purchased from the respondent, in the building aforesaid, certain packages of intoxicating liquors. The respondent admitted the sales. It was established in defense, and the facts were not controverted, that all the intoxicating liquors, so kept and thus sold as aforesaid by the respondent, were imported from England by the respondent in the manner provided by the laws of the United States; that all the sales so made were sales of imported liquors in the original packages as imported by the respondent; that all the intoxicating liquors kept as aforesaid were imported liquors in the original packages as imported by the respondent; that no broken packages of such liquors had been kept or sold by the respondent during the time alleged; that the respondent had not, during the time alleged, kept any such packages with an intent to break them, or with any intent to sell them other than in the unbroken and original packages as

imported by him; that the respondent, during the time alleged, had made no sales of intoxicating liquors except unbroken, original packages of liquors imported by him; that the respondent, during the time alleged, had kept no intoxicating liquors except unbroken, original packages of liquors imported by him, and kept with the intention to sell the same only in the unbroken and original packages as imported.

Among other instructions the presiding justice instructed the jury as follows:

"And, therefore, I say to you as a matter of law in this case that, although you find upon the evidence introduced before you, that the defendant sold only intoxicating liquors imported by himself, and in the original packages in which they were imported, still it is in violation of the law of the state of Maine, and he had no lawful right to use the building occupied by him for that purpose, and that he is guilty of maintaining a common nuisance."

The respondent also excepted to other parts of the charge of the presiding justice and which are found in the brackets as follows:

* * * It is true that the constitution of the United States has vested in Congress the power to regulate commerce with foreign nations, and it is a matter of common knowledge that Congress, at an early period in the history of the nation, enacted general statutes authorizing any person to import merchandise from a foreign country on payment of certain duties; and the defendant in this case claims that he has exercised the authority thus conferred by the statute of the United States; that he has paid for the exercise of this privilege certain duties to the United States; that in this manner he has introduced into the state of Maine certain intoxicating liquors which he claims he had a right to sell in the packages in which they were imported by him.

[Now, gentlemen, you have perceived from the language of the statute I have read to you that, in the state of Maine, importers are not excepted by the language of our law. "*No person* shall *sell any* intoxicating liquors," except for medicinal purposes as provided in our law. It does not except or exempt importers from the operation of it. But you will perceive that our legis-

lature has not presumed, for a moment, to say that no person shall import liquors into the state of Maine. It has not presumed for a moment, to interfere with the prerogative of Congress to regulate commerce in terms. It has said that "No person shall *sell*," not that no person shall *import*.]

Now, on the other hand, my attention has not been called to any act of Congress, and I assume that no act of Congress exists any where, which says that any person may sell intoxicating liquors in the state of Maine. There is no such law, and I therefore assert that there is no necessary conflict in terms between the law of Congress and the law of the state of Maine. And a question arises here, whether there is a necessary conflict in the operation of these two laws, Federal and State. It is not in controversy that the defendant is not protected by this law of Congress in selling, in his place of business in Augusta, intoxicating liquors of domestic origin. It is not claimed that he is protected in selling liquors imported by himself, otherwise than in the original packages. He is not protected in keeping the liquors in original packages with the intent to break them, and sell in any quantity less than the original package. He is not protected in selling any liquors which he might purchase of another importer; but it is claimed that he is protected in selling those, which he himself has purchased in a foreign country and himself imported, and which he sells in the original package. This is the only contention of the defendant.

[Now, while it is the prerogative of Congress thus to regulate commerce, to prescribe the regulations concerning the importation of merchandise from a foreign country, it is a universally acknowledged power inherent in the states, always possessed by the states, still retained by the states, reserved to them in the constitution, to establish, to maintain and to enforce all such laws and police regulations as they may deem essential for the preservation of the health and the morals of the people of those states, for the protection of the lives and property of the citizens, and for the maintenance of the best interests of society in those states. This is known familiarly as the police power of the states, and it has been by virtue of this so-called police power, this power to

govern persons and things within their own dominions, that from the early history of the states of this union, from colonial times, legislation has been justified and enforced respecting the traffic and excessive indulgence in intoxicating liquors. And, surely, this is no time or place to recapitulate the evils resulting from the excessive use of ardent spirits. The appalling record of vice, crime, pauperism and every form of suffering and misery, resulting from the unrestrained traffic and excessive indulgence in intoxicating liquors, you might say, would surely justify the most stringent legislation and the most vigorous enforcement of such legislation, for the suppression of such traffic. We are to assume that the legislature of Maine has acted in good faith in this matter; that in enacting this legislation and the provisions with special reference to the enforcement of it, it has sought only the welfare, the well-being of the people of the state of Maine, and has not sought in any manner to interfere with the regulations of commerce with foreign nations, or with the prerogative of Congress.

Now the question arises, whether there is any necessary conflict between this state and Federal law to which I have called your attention; whether this acknowledged power of the state thus to suppress any common nuisance within its borders, known and acknowledged to be destructive of the manhood of its people and the highest and best interests of its society, shall be absolutely surrendered, and for what? Solely in the interests of foreign commerce. For it can not be denied that, if the contention of the defendant here is correct, then this constitutional power to regulate commerce, and the laws of Congress enacted in pursuance of it, must be absolutely destructive of the whole operation of the prohibitory law of Maine. Congress has said that wines, brandy and other spirituous liquors imported in bottles, shall be packed in packages containing not less than one dozen bottles in each package, and on all such bottles shall be paid an additional duty of three cents for each bottle. This is what Congress has thus far seen fit to do in regard to this matter by virtue of this power to regulate commerce. If it can say that an original package shall consist of only twelve bottles, each of one pint,

it may say that the original packages shall consist of only one bottle of one pint, and thus in effect every importer becomes protected as a retail dealer of intoxicating liquors within the borders of Maine. Is this a necessary result? Is it a just interpretation of the constitution and laws of the country, and a salutary or wise adjustment of the respective powers of the state and nation? * * *

Sixty years ago, in the state of Maryland, there was a law requiring an importer of foreign merchandise to pay the sum of fifty dollars for a license, and a merchant was indicted and convicted under that law of Maryland for selling a package of dry goods, without having paid this license of fifty dollars. The case was carried to the supreme court of the United States, and the law of Maryland was held unconstitutional, among other reasons, as interfering with the regulation of commerce with foreign nations. And the question was there discussed, where the right of the importer, which he had acquired by paying a duty to the government for bringing goods into the country, must be regarded as terminating; when he must be deemed to have fully exercised the privilege which he paid for, after he had paid duties to the government. And it was there apparently determined that, until the goods had become mingled with the general mass of property in the country, they were protected by this law of congress, and that they might be considered as mingled with the general property if the package in which they were introduced had been broken, or if the original package had been sold to some other person; but that so long as the package remained in its original form in the hands of the importer, it was not mingled with the general mass of property and was therefore protected. But it was held that the right to sell in that original package must be considered as an ingredient of the right to import. It will be observed, however, that the question of police regulations was not involved in that case at all. There could be no suggestion that the introduction or indiscriminate and unrestricted sale of dry goods in any way affected the health or morals of the people, or was destructive of the interests of society. But it is significant that the learned chief justice Marshall, in that

case, in answering the objections raised on the other side, expressly admitted this great police power of the states to prohibit the introduction, into the state, of any article destructive of the health or the lives of its people.]

It is not in controversy here that the defendant imported the liquors sold by him, in the city of Augusta, during the time named in the indictment. He paid to the government certain duties for the privilege of importing those liquors; and when an importer has done that, he has simply paid for the privilege of selecting the port where he will introduce his goods. Every importer is presumed to consider and calculate the opportunities for finding a market in the community where he introduces his goods; he is expected to consider the tastes, the habits, moral tendencies and physical necessities of the people where he proposes to seek a market. Then when he pays this duty he simply brings his goods in search of a market, and he must, at his peril it would seem to me, determine, whether in the particular state where he brings his goods, there are police regulations deemed by the people of that state essential to the manhood and the well-being of their society which prohibit the sale of those articles and prevent him from finding a market there. He has obtained, in other words, all he has paid for when he brings the articles into the state in search of a market. The right of the importer ends where the law of self-preservation necessarily begins.

The defendant in this case saw fit to select the port of Portland in the state of Maine. He may transfer those articles from that port to another state, or to another country, without violation of the laws of the state of Maine. [He might have brought them in here for the purpose of sale to an authorized commissioner of the state of Maine if they were such pure and unadulterated liquors as are required by law. Therefore, he does acquire something without raising any conflict between these laws of the state and nation, when he pays for the privilege of bringing goods into the port of Portland; there is no necessary conflict between the two laws.] * * *

* * * It is a well-recognized rule of procedure that a judge of our state court, especially at jury trials, will give validity and

force to the state law, unless it has been definitely declared by the law court of the state to be unconstitutional. * * *

And, therefore, I say to you as matter of law in this case that, although you find upon the evidence introduced before you, that the defendant sold only intoxicating liquors imported by himself and in the original packages in which they were imported, still it is in violation of the law of the state of Maine, and he had no lawful right to use the building occupied by him for that purpose, and that he is guilty of maintaining a common nuisance.

H. M. Heath, *J. H. Potter*, with him, for defendant.

The right of an importer to sell in the original packages has been sustained by the court of Maine. *State* v. *Robinson*, 49 Maine, 285; *State* v. *Blackwell*, 65 Id. 557; *State* v. *Intox. Liquors*, (Chandler case) 69 Id. 524. Constitutional rights (U. S. Const. Art. 1, § 8, c. 3; § 10, cl. 2, and Art. 6, cl. 2), construed in *Brown* v. *Maryland*, 12 Wheat. 419, approved by a long line of decisions, and binding upon state courts. U. S. Supreme Court cases: *New York* v. *Miln*, 11 Pet. 110; *License Cases*, 5 How. 504; *Almy* v. *California*, 24 How. 173; *Pervear* v. *Com.*, 5 Wall. 479; *Crandall* v. *Nevada*, 6 Wall. 35; *Woodruff* v. *Parham*, 8 Wall. 123; *Hinson* v. *Lott*, Id. 148; *Waring* v. *Mayor*, Id. 121; *Downham* v. *Alex. Council*, 10 Wall. 173; *Low* v. *Austin*, 13 Wall. 29; *State Tax on Gross Ry. Receipts*, 15 Wall. 284; *Welton* v. *Missouri*, 91 U. S. 275; *Henderson* v. *Mayor*, 92 U. S. 271; *R. R. Co.* v. *Husen*, 95 U. S. 465; *Beer Co.* v. *Mass.*, 97 U. S. 25; *Cook* v. *Penn.* Id. 566; *Guy* v. *Baltimore*, 100 U. S. 443; *Brown* v. *Houston*, 114 U. S. 622; *Walling* v. *Michigan*, 116 U. S. 446; *Coe* v. *Erroll*, 116 U. S. 522; *Mugler* v. *Kansas*, 123 U. S. 623; *Phila. S. S. Co.* v. *Penn.* 122 U. S. 326; *Bowman* v. *R. R. Co.*, 125 U. S. 465.

Power of congress to regulate foreign commerce is exclusive. If the importer may import he may sell free from state restrictions, whether license, tax, or police power. *Smith* v. *Alabama*, 124 U. S. 473; *Sands* v. *Manistee, etc. Co.* 123 U. S. 288; *Robbins* v. *Shelby Co.*, 120 U. S. 489; *Morgan S. S. Co.* v. *La. Board of Health*, 118 U. S. 455; *Walling* v. *Michigan*, 116 U. S. 446;

Brown v. *Houston*, 114 U. S. 623; *Wilson* v. *McNamee*, 102 U. S. 572.

If congress has acted, then all courts agree that no state law can regulate the same matter, even under a claim of police power. The police powers of a state do not attach, until by sale or breaking, the packages have ceased to be a part of foreign commerce. The power of congress to regulate foreign commerce is exclusive whenever the subjects are national, or require a uniform system or plan of operation. This power and a co-existent power in the states to prohibit sales by importers, by tax, license or prohibition is an anomaly not permitted by the federal decisions.

State cases: *Fisher* v. *McGirr*, 1 Gray, 1; *Erie Ry. Co.* v. *State*, 2 Vroom, (N. J.) 531; *State* v. *Amery*, 12 R. I. 65; *Hinson* v. *Lott*, 40 Ala. 123; *State* v. *Pratt*, 59 Vt. 590; *Wynehamer* v. *People*, 13 N. Y. 378; *Tracy* v. *Missouri*, 3 Mo. 3; *Crow* v. *State*, 12 Mo. 237; *State* v. *Shapleigh*, 27 Mo. 344; *State* v. *North*, Id. 464; *Jones* v. *Hard*, 32 Vt. 481; *Niles* v. *Rhodes*, 7 Mich. 384; *Bode* v. *State*, 7 Gill, Md. 326; *State* v. *Wheeler*, 25 Conn. 294; *State* v. *Pinckney*, 10 Rich. (S. C.) 475; *Daniel* v. *Trustees of Richmond*, 78 Ky. 544; *State* v. *Kennedy*, 19 La. Ann. 394; *McCreary* v. *State*, 73 Ala. 480; *Wynne* v. *Wright*, 1 Dev. & Batt. (N. C.) 19; *Sears* v. *Warren Co.*, 36 Ind. 267; *Santo* v. *Iowa*, 2 Iowa, 165.

States excepting, in terms, in their legislation, sales by importers in the original package: N. H., Mass., Vt., R. I., Conn., New York, Del., Penn., Mich., Missouri, Wis., Iowa and Kansas.

Legal authors: Story, Com. Const. (3d ed.) vol. 2, § 1072; 1 Kent. Com. (12th ed.)* 439 and note c.

Resume of decisions: A statute requiring an importer to pay a license fee, before selling his imports in the original package, (*Brown* v. *Maryland*, 12 Wheat. 419,) or to pay a state tax upon liquors so held, (*Hinson* v. *Lott*, 8 Wall. 148,) or a municipal tax (*Low* v. *Austin*, 13 Wall. 29,) is a regulation of foreign commerce, and void.

A state statute discriminating against intoxicating liquors manufactured in another state or country, is an unconstitutional exercise of the police power of the state. *Walling* v. *Michigan*, 116 U. S. 446; *Tiernan* v. *Rinker*, 102 U. S. 125.

But, such statute prohibiting all sales of intoxicating liquors, and excepting sales by importers in the original package, is a constitutional exercise of the police powers of the state. *Mugler* v. *Kansas*, 123 U. S. 623.

A state statute prohibiting the introduction of intoxicating liquors into the state, without a certificate that they are not intended for unlawful sale within the state, enacted as a part of a prohibitory system, is a regulation of interstate commerce, and an unconstitutional exercise of the police powers of the state. *Bowman* v. *R. R. Co.*, 125 U. S. 465.

Principles deduced as settled law: Congress has power to regulate foreign commerce. This power whether exercised or not is exclusive. No state can enact any law the effect of which is to regulate foreign commerce. Congress has regulated foreign commerce in intoxicating liquors by providing for their importation upon payment of duty. Commerce includes the sale by the importer of the import in the original package. The right to import carries with it a right of sale by the importer. To prohibit such sales would be a regulation of foreign commerce. That the prohibitory statute is called and is a police regulation is immaterial. Being, in effect, a regulation of commerce, it is void. The police powers of the state do not attach until the goods cease to be a part of foreign commerce. The sale by the importer in the original package marks the terminus of state jurisdiction. Until such sale no state can tax, prohibit, license or in any manner interfere with such sales. That the imports are intoxicating liquors in no wise changes the rule.

L. T. Carleton, county attorney, for the state.

PETERS, C. J. The undisputed facts in these cases show that the liquors, which the state claims to confiscate as being in the possession of the respondent Burns for unlawful sale, were imported by him from England, were his property, were in the original and unbroken packages, and in the same condition, as when imported; and that, at the date of the seizure, he had them in his possession with the intent to sell the same only in such original and unbroken packages, and in the same condition as

when imported; and had established himself in a place of business in the city of Augusta for that purpose.

There is no doubt, that formerly it was both the judicial and legislative opinion in this state, that such liquors could be legally sold by the importer in the condition as when imported, notwithstanding any general enactments against liquor-selling in the state where sold.

In *State* v. *Robinson*, 49 Maine, 285, DAVIS, J., (in 1862) speaking for the court, said: "Upon this point, the line of division between the power of the general government and that of the state, has been settled. Under the power granted by the constitution to regulate commerce with other nations, congress may authorize a person to import intoxicating liquors, and to sell the same in the original packages. But here the power of congress ceases, and the jurisdiction of the state begins. *Brown* v. *State of Maryland*, 12 Wheat. 419. No one but the importer himself has the right to sell, except as allowed by the laws of the state; and he can sell only in the original packages. The power of the state is plenary to regulate or prohibit all sales, except such as are thus made by the importer himself. Those who purchase from him have no such right to sell. *The License Cases*, 5 Howard, 504." Concurrence in this view will be found in other cases. *State* v. *Blackwell*, 65 Maine, 556; *State* v. *Intoxicating Liquors*, 69 Maine, 524. *Nisi prius* rulings to the same effect were frequently made.

The idea entertained formerly by the legislature on this subject is seen in several legislative acts.

Chapter 205 of the laws of 1846, contains the first prohibitory enactment in this state. Prior thereto different license laws had been maintained. Section 2 of that chapter is as follows: "The provisions of this act shall not extend to wine or spirituous liquors, which shall have been imported into the United States, from any foreign port or place, when not sold in less quantities than the revenue laws of the United States prescribe for the importation into this country, and delivered and carried away at one time."

The foregoing provision remained in the law until a more

intensified act was passed in 1851, in which it was substantially retained with different phraseology. The new act placed a stronger burden of proof upon a respondent, rendering him liable to punishment, for selling liquors or for having them in his possession for sale; "unless he can show by positive proof that such liquors are of foreign production, that they have been imported under the laws of the United States, and in accordance therewith, that they are contained in the original packages in which they were imported, and in quantities not less than the laws of the United States prescribe." The following was added to the new act, § 11, c. 211: "But custom-house certificates of importation and proof of marks on the packages corresponding thereto shall not be received as evidence that the identical liquors contained in said packages and casks were actually imported therein."

The exemption from liability for selling imported liquors stood through different enactments until the year 1858, when it was in most part dropped from the statutes touching the sale of intoxicating liquors, there being left only the clause relating to what should not be taken as evidence that liquors were imported, the same that is now embodied in § 55, of c. 27 of our present revised statutes. Laws of 1858, c. 33, § 25.

After these decisions of the court and enactments of the legislature, so much change had been wrought in the public sentiment on this and kindred questions, that it became in the public mind a debatable point whether the rule as laid down in *Brown* v. *Maryland*, so far as affecting the sale of imported liquors in a state in which the sale of intoxicating liquors is by its laws forbidden, would on reconsideration be adhered to by the supreme court of the United States. The ruling in the present cases, in the court below, was in a measure to test the question whether the principle of the case alluded to would be sustained as applicable to the facts of the present record.

But the case of *Gus. Leisy et als.* v. *Hardin*, just decided by the supreme court of the United States on full consideration, seems to clearly settle the question, and to require us, as we are bound on such questions by the law as determined by that court,

to reverse the rulings below, and sustain the law according to the respondent's contention. The opinion of a minority of the judges sitting in that case appears to be very elaborate and exhaustive of the questions involved, and may commend itself to many as containing the better conclusion. Our obedience is due, however, to the judgment which prevails; not that our statute is unconstitutional, for it prohibits only the "unlawful sale" of intoxicating liquors; but that its interpretation must be constitutional.

Exceptions sustained.

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

ROBERT R. BALLANTYNE *vs.* FREDERICK H. APPLETON, Assignee of LINCOLN PULP & PAPER CO., Insolvent.

Penobscot. Opinion May 30, 1890.

Sales. Conditions. Recision. Assignee's title.

Where the buyer is by the terms of the contract bound to do anything as a condition, either precedent or concurrent on which the passing the title depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.

When payment is to be concurrent with the survey and delivery, and none of these conditions have been complied with, nor waived by either seller or purchaser; *Held*, that the title to the goods will not pass.

The plaintiff contracted to furnish the defendant an entire quantity of wood within a specified time. After a small portion had been hauled, and before any survey required by the terms of the contract had been made, the defendant became insolvent; thereupon the plaintiff notified the defendant not to survey the wood, claiming it as his own, and the defendant replied, "all right." *Held*, that the facts would support the inference of a recision of the contract.

Held, that the defendant, as assignee in insolvency, took no better title than the insolvent corporation had.

ON REPORT.

This was an action of trover for thirty-six cords of poplar wood, which the plaintiff had hauled and landed on the premises of the Lincoln Pulp and Paper Company, of which the defendant is the assignee in insolvency, under a contract to furnish the company with one hundred and twenty-five cords in all. The terms of the contract and other material facts are stated in the opinion.

Charles Hamlin and Jasper Hutchings, *J. F. Robinson*, with them.

Recision: *Seed* v. *Lord*, 66 Maine, p. 582. Conditional sales: *Whitney* v. *Eaton*, 15 Gray, p. 225; *Kein* v. *Tupper*, 52 N. Y. p. 555; 1 Benj. Sales, book 2, c. 3, § 360 (Kerr's ed. 1888); *Stone* v. *Peacock*, 35 Maine, 385; *Stephens* v. *Santee*, 49 N. Y. 35; *Cornell* v. *Clark*, 104 N. Y. 451; *Fuller* v. *Bean*, 34 N. H. p. 301; *Acraman* v. *Morrice*, 8 C. B. 449; *Rugg* v. *Minett*, 11 East, 210.

Entirety: *Miller* v. *Goddard*, 34 Maine, 102; *Kein* v. *Tupper*, *supra*; *Elgee Cotton Cases*, 22 Wall, 180; *Anderson* v. *Morice*, 7 L. R. Q. B. 436; 1 Benj. Sales, book 2, c. 3, § 371, (Kerr's ed.).

F. H. Appleton and H. R. Chaplin, for defendant.

Principle of conditional sales, relied on by plaintiff, requires an express reservation of title, by the seller, until performance of the condition. Benj. Sales, § 425, (Corbin's ed.); *Everett* v. *Hall*, 67 Maine, 497; *Brown* v. *Haynes*, 52 Id. 578; *Angier* v. *Taunton Paper Mfg. Co.*, 1 Gray, 621.

Entirety: Chitty Con. p. 599 and cases cited. *Paige* v. *Ott*, 5 Denio, 406; *Hunt* v. *Thurman*, 15 Vt. 336.

Contract silent as to specification, inspection or culling. *Gardner* v. *Lane*, 9 Allen, 492, 500.

Delivery to buyer will pass the property though the goods are afterwards to be weighed or counted. *Macomber* v. *Parker*, 13 Pick. 175; *Riddle* v. *Varnum*, 20 Pick. 280; *Cushman* v. *Holyoke*, 34 Maine, 289; *Odell* v. *R. R. Co.*, 109 Mass. 50; *McNeil* v. *Keleher*, 90 U. C. C. P. 470; *Burrows* v. *Whitaker*, 71 N. Y. 291; *Wyoming Nat. Bank* v. *Dayton*, 102 U. S. 59.

LIBBEY, J. This is trover to recover the value of thirty-six

cords of poplar wood, which the defendant took and sold as the assignee in insolvency of the Lincoln Pulp and Paper Company. The issue involved between the parties is, whether as between the plaintiff and the company the title to the wood had passed to the company, or remained in the plaintiff.

It was hauled by the plaintiff and piled up on the lands of the company, in December 1886, and January 1887, under a written contract between the parties, the material part of which reads as follows: "For the consideration hereafter stipulated to be paid by party of the first part, the said R. R. Ballantyne, party of the second part, agrees to furnish and deliver on the company's land at mill in Lincoln, one hundred and twenty-five cords peeled, green, poplar wood, to be cut four feet long from point to scarf and generally cleft; to be sound and merchantable; to contain no logs unsplit larger than seven inches in diameter, and no sticks larger than seven by eight inches, no small wood less than three inches in diameter, when peeled. All to be delivered by the first day of May next. Said wood to be well peeled, knotted, cleaned and fitted for the chipper, and to be well piled, bottom tiers to be protected. Said wood shall be surveyed by some competent surveyor, when so peeled, to be appointed and paid by said company.

And it is further agreed that a deduction shall be made in the survey for wood cut short, and for decayed, crooked and small wood. And the party of the first part agrees to pay therefor at the rate of four dollars ($4.00) per cord when said wood shall be delivered and surveyed as aforesaid."

This contract is dated the twentieth day of November 1886. The facts which we deem it necessary to consider, in determining the question in contention between the parties, are as follows: The plaintiff commenced hauling his wood, in the performance on his part of the contract recited, in December 1886; and as he hauled it, piled it upon the land of the company at a point designated by the company's agent. When he learned of the insolvency of the company in January, he went to the company's office and informed its agent, whom he found there, that he did not wish to have the wood scaled, and that he claimed it as his.

And to that, the agent replied, "all right." The wood hauled was never scaled by any surveyor; nothing was paid for it, and no part of it used by the company.

Upon these facts, we think the title did not pass to the company under the contract between the parties. The general rule of law applicable to cases like this is, "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Benj. Sales, vol. 1, book 2, c. 3, § 360. *Houdlette* v. *Tallman*, 14 Maine, 400; *Hotchkiss* v. *Hunt*, 49 Maine, 213.

Sometimes the facts of the case may take it out of this rule; but we discover nothing in this case which should do so. Here, the contract particularly describes the wood that was to be delivered under it, the kind of wood, its length; that it should be generally cleft, sound and merchantable, containing no logs unsplit larger than seven inches in diameter, and no sticks larger than seven by eight inches; no small wood less than three inches in diameter when peeled. It was to be well peeled, knotted, cleaned and fitted for the chipper; and to be well piled. A deduction was to be made in the survey for wood cut short and for decayed, crooked and small wood. It was to be surveyed by some competent surveyor, *when so delivered*, to be appointed and paid by said company. And the company was to pay for it, "when said wood shall be *delivered* and *surveyed* as aforesaid."

From the language of the contract, we think it must be held that the parties contemplated that these acts should be done and the wood paid for before the title passed to the purchaser. It was to be surveyed according to the terms of the contract by a competent surveyor. The quantity could be ascertained only by measurement. But a mere survey by measurement would not comply with the terms of the contract. The duty of the surveyor would require him to carefully inspect the wood and determine whether it complied with the terms of the contract in kind, quality and dimensions, and to determine what deduction should

be made if any portion of it was found not to comply with the terms of the contract. *Berry* v. *Reed*, 53 Maine, 487. And the payment by the purchaser was to be concurrent with the survey and delivery. None of these conditions had been complied with, nor had they been waived by either party.

But there is another ground on which we think the same result would be reached. The contract was for an entire quantity of one hundred and twenty-five cords, to be delivered within a specified time. When a small portion of it had been hauled, and before any survey had been made, the company became insolvent, and the plaintiff thereupon gave to its agent notice that he would not have it surveyed, but claimed the wood as his, to which an answer was given, "all right."

We think these facts would authorize the inference that the contract was rescinded.

The defendant took no better title than the company had.

Judgment for the plaintiff for $135.00, *and interest from May* 12, 1887, *as agreed by the parties.*

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

WILLIAM B. PINKHAM, and another, *vs.* FREDERICK H. APPLETON, Assignee of LINCOLN PULP & PAPER COMPANY, Insolvent.

Penobscot. Opinion May 30, 1890.

Sale. Conditions. Waiver. R. S., c. 41, § 2.

Where there is a condition precedent attached to a contract of sale and delivery, the property does not vest in the vendee on delivery, until he performs the condition, or the seller waives it.

An absolute and unconditional delivery is regarded as a waiver of the condition.

ON REPORT.

This was an action of trover to determine the question of title and ownership in seventy cords of furnace-wood, forty-eight cords of poplar wood, and four and one-half cords of spruce wood, which the defendant took and sold as the property of the company, of which he is the assignee.

The defendant was found liable, for the poplar and spruce wood, upon the same state of facts existing in the preceding case, *Ballantyne* v. *Appleton*.

It appeared that the plaintiffs, June 26, 1886, made another contract with the company to furnish and deliver on its lands, four to five hundred cords of furnace wood. The contract provided that the wood was "to be good quality, mostly hard wood, four hundred to five hundred cords, to be cut four feet long from point to scarf, and generally cleft; to be sound and merchantable; to contain no logs unsplit larger than six inches in diameter, and no sticks larger than six by seven inches, no small wood less than three inches in diameter, when peeled. All to be delivered by first day of May next, and when so delivered to be well piled. Said wood shall be surveyed by some competent surveyor, when so delivered, to be appointed and paid by said company. And it is further agreed that a deduction shall be made in the survey for wood cut short, and for decayed, crooked and small wood. And the party of the first part agrees to pay therefor at the rate of two 25-100 dollars per cord when said wood shall be delivered and surveyed as aforesaid; surveys to be made on first of each month, when sufficient amount has been hauled to warrant it."

The plaintiff, Pinkham, testified that he ceased hauling when the company stopped payment, and before the appointment of the assignee he permitted a quantity of the furnace-wood,—some twenty-six cords,—to be used by one of the trustees of the bondholders who had taken possession of the mill property. He also testified that he let two or three teams drive up and throw off wood at the furnace, to accommodate the company, as they were then burning green wood. A clerk of the company, Richardson, testified that he surveyed the wood and that the plaintiffs were

credited on the company's books with seventy-eight and five-eighths cords,—sixty-one cords having been used.

The defendant having agreed to account to the plaintiffs for whatever the trustees had paid him, the plaintiffs reduced their claim to seventeen and five-eighths cords.

The plaintiffs contended that Richardson was not a competent surveyor, it appearing that he had not been chosen by the town and sworn.

When the company suspended payment, the plaintiffs claimed the wood and gave notice to the messenger, in insolvency, forbidding him to scale or meddle with it.

Charles Hamlin and Jasper Hutchings, *J. F. Robinson*, with them for plaintiffs.

Plaintiffs' claim to the furnace-wood stands upon two grounds; first, the wood was not surveyed, and inspected as required by the contract; second, if Richardson undertook to survey it, he was not a "competent" surveyor; his acts being *quoad hoc* a nullity. *Richmond* v. *Foss*, 77 Maine, 590; *Sands* v. *Sands*, 74 Maine, 240. Survey means more than mere measuring. *Berry* v. *Reed*, 53 Maine, 487; R. S., c. 41, § 2.

F. H. Appleton and H. R. Chaplin, for defendant.

Richardson in his testimony says, that the furnace-wood delivered was surveyed and entered on the books of the company, and that sixty-one cords out of seventy-eight and five-eighths cords then delivered was actually used and consumed by the company. The contract calls for four hundred to five hundred cords of furnace-wood. We find the company actually using the furnace-wood, to the knowledge of the seller, when less than one-fourth of it had been delivered; and we point to this as a circumstance of weight in support of our position that the wood, when landed on the company's land in pursuance of the terms of the contract, became the property of the company when so landed; and that, at that time, the property and risk passed to the company.

And Ballantyne admits the same to be true as to some furnace-wood.

The contracts make no distinction between poplar and furnace-

wood as to when the title should pass. The acts of the parties show that it was the intention that title to the furnace-wood should pass when delivered on company's land, and the intention is the same as to both kinds of wood.

If our statute relative to surveyors of wood has any bearing on this case, the purchaser, as provided by the statute, agreed to a different arrangement. R. S., c. 41, § 2.

LIBBEY, J. The plaintiff's claim for the poplar and spruce wood falls within the rule declared in *Ballantyne* v. *Appleton*, *supra*.

But we think the dry furnace-wood for which the plaintiffs claim does not. It appears that this wood was hauled and delivered near the furnace of the company, for its accommodation, was surveyed by Richardson, appointed by the company, and sixty-one cords of it used by the company from time to time before its insolvency. True, Richardson was not a duly appointed and sworn surveyor; still we think his survey was with the knowledge of the plaintiffs, and that the wood was delivered by them to the company to be used by it as it had occasion to. And as to this wood, we think the title passed to the company, and the plaintiffs cannot recover for it of the defendant. *Mixer* v. *Cook*, 31 Maine, 340.

Judgment for the plaintiffs for $198, *with interest from the* 12*th day of May* 1887.

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

JOSEPH A. COFFIN *vs.* WILLIAM FREEMAN.

Washington. Opinion May 30, 1890.

Real action. Pleadings. General issue. Practice.

In a real action, the plea of general issue admits the defendant to be in possession of all the land not specially disclaimed.

In such case, the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of the defendant.

Under the general issue, the defendant may rest upon his possession until the plaintiff has shown some right to disturb it.

ON REPORT.

The case is stated in the opinion.

George Walker and Charles Peabody, for plaintiff.

William Freeman, for defendant.

VIRGIN, J. Writ of entry brought to recover possession of township No. 18, middle division, in Washington county. The defendant pleaded the general issue and disclaimed all of the demanded premises except a certain parcel of fifty acres described by metes and bounds.

When the plaintiff had introduced in evidence his chain of paper title, he inconsiderately stopped; whereupon the defendant submitted the case upon plaintiff's evidence alone, and the case was withdrawn from the jury and reported to the law court.

The plea admits the defendant to be in possession of all the demanded premises not disclaimed (*Perkins* v. *Raitt*, 43 Maine, 280) on which he may safely rest until the plaintiff shall show a right to disturb it. *Wyman* v. *Brown*, 50 Maine, 139; *Tebbetts* v. *Estes*, 52 Maine, 566; *Chaplin* v. *Barker*, 53 Maine, 275.

The plaintiff introduced a quitclaim deed, dated September 1, 1869, wherein George Harris and eighteen other joint grantors named, release to one Otis S. Tibbetts, "all their right, title and interest in and to" various kinds of real property, and large tracts of land and among them "township numbered eighteen, middle division, containing 21,400 acres more or less, the same conveyed by" four several grantors named, with the dates and places of record of the respective deeds specified, "with all such reservations and exceptions as are expressed in said deeds of conveyance," the premises of the deed concluding as follows: "Meaning herein and hereby, to convey to the said Tibbetts, the same title and no more which is conveyed by the several deeds above referred to, that is to say, we the said grantors hereby release

and quitclaim unto the said Tibbetts, all and singular the right, title and interest which was conveyed to us, the said grantors or either of us, by the above described deeds of conveyance, with the exceptions and reservations therein contained."

None of the deeds referred to were introduced and they do not appear in the report. If introduced they might appear to be deeds of warranty and thus *prima facie* pass the title to one under whom the plaintiff derives title; and also furnish the essential information whether or not the fifty acres in controversy were among the "reservations and exceptions" expressed in said deeds. Until those facts appear, we fail to perceive how the plaintiff can sustain the burden of showing that he has the better title.

There is no necessity of examining the thirty-five objections raised by the defendant to the plaintiff's title. We think the proper entry, therefore, is

Plaintiff nonsuit.

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

ISAAC JACKSON *vs.* WILLIAM P. CASTLE.

Waldo. Opinion June 3, 1890.

Pleading. Declaration. Negligence. City ordinance.

The averment, in a declaration, that defendant's sliding with boisterous demeanor in a street, contrary to the city ordinance and to the damage and common nuisance of the public, whereby the plaintiff's horses became frightened, ran away and were injured, sets out no cause of action.

The calling of an act a nuisance does not make it so, when the nature of the act does not show it; nor does the averment of an act contrary to a city ordinance necessarily charge negligence; it may be evidence of negligence, but not proof of it.

ON EXCEPTIONS.

The presiding justice sustained a demurrer to the following declaration as being insufficient in law, and the defendant excepted.

(Declaration.)

For that the plaintiff, to wit, on the fifteenth day of December, A. D. 1884, at said Belfast, while in the exercise of his vocation as a soap-dealer, was then and there lawfully in and upon a certain public way or street in said city, called Miller street, with his two horses and cart, and the said defendant and others, to the number of seven or more, were then and there sliding and coasting upon two or more sleds connected together, upon and down the sidewalk on and in said street, contrary to an ordinance of said city in that case made and provided; and then and there cried out and halloed in a noisy, boisterous and improper manner, contrary to an ordinance of said city in that case made and provided: said sliding and coasting, and said crying out and halloing all being to the great disturbance, damage and common nuisance of all the citizens of the state there being; and that solely by reason of said unlawful sliding and coasting, and said unlawful crying out and halloing, the horses of him the said plaintiff, became frightened, escaped from his control, and ran furiously down said street and struck against a tree with such force that his cart and harness were much injured, his load scattered and destroyed, and one of his said horses killed, to the damage of said plaintiff, etc.

J. Williamson, for plaintiff.

Where there is sufficient matter substantially alleged to entitle the plaintiff to his action, the declaration will be good. *Dole* v. *Weeks*, 4 Mass. 451. Declaration as broad as the indictment in *Com.* v. *Oaks*, 113 Mass. 8.

Persons using public highways must use them with care, and have due regard to the rights of others. Those using them for travel and passage, have the first right. Ways must not be obstructed except under exceptional circumstances. *Burford* v. *Grand Rapids*, 53 Mich. 98.

If plaintiff had been walking on the sidewalk, and sustained injury by being knocked by defendant's sled, etc., the act would not be excusable for the reason defendant had equal rights with a foot-passenger. Same rule applies to all illegal use of the side-

walk. The unlawful crying out and halloing, a public nuisance, sufficient without alleging the sliding.

Private persons may recover for a nuisance. 2 Bl. Com. 220.

W. H. Fogler, for defendant.

The averment "contrary to an ordinance of the city" cannot strengthen the declaration. It is no stronger allegation than "contrary to law."

The averment "to the common nuisance," etc., does not help the declaration because the facts do not support the averment.

HASKELL, J. A declaration in this case, substantially like the present one, has been adjudged bad on demurrer. *Jackson* v. *Castle*, 80 Maine, 119. It was there said: "Sliding in a street accompanied with boisterous conduct is not necessarily unlawful. Nor is it necessarily a public nuisance." The additional averment that it was done contrary to the city ordinance and to the common nuisance of citizens there being does not cure the defect in the former declaration.

The obstruction of or use of a street, so as to unreasonably impede travel and render its use inconvenient or dangerous to the traveller, may become a common nuisance, and a person suffering special injury, without fault on his part, might recover damages. *Holmes* v. *Corthell*, 80 Maine, 31. The plaintiff here makes no such complaint. In short, he says the defendant's sliding with boisterous demeanor, contrary to the city ordinance, frightened his horses. He does not say whether the ordinance prohibits sliding altogether in the street, or only in a particular manner. "One doing a lawful act in a manner forbidden by law is not absolutely liable for an injury caused to a third party by the act; nor is the violation of law in doing it conclusive evidence of negligence." *Burbank* v. *Steam Mill Co.*, 75 Maine, 382; *Gilmore* v. *Ross*, 72 Maine, 194. The plaintiff does not aver that defendant's negligence frightened his horses, nor that he was in the exercise of proper care himself.

Exceptions overruled.

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

IN MEMORIAM.

PROCEEDINGS OF THE KENNEBEC BAR IN RELATION TO THE DEATH OF

HONORABLE CHARLES DANFORTH,

WHO WAS AN ASSOCIATE JUSTICE OF THIS COURT, FROM JANUARY 5, 1864 TO MARCH 30, 1890, AND WHO DIED AT HIS RESIDENCE, IN GARDINER, MARCH 30, 1890.

A meeting of the Kennebec Bar was held in Augusta at 2 o'clock, on the afternoon of Thursday, May 29, 1890, to hear a report of a committee on resolutions, on his death. The resolutions submitted were unanimously adopted. The meeting was then adjourned and the members of the Bar awaited the coming in of the law court, which soon after assembled. PETERS, C. J., WALTON, VIRGIN, LIBBEY, EMERY and FOSTER, JJ., being present.

Hon. JAMES W. BRADBURY, the senior member of the Bar, said:

May it please your Honors:—Since your last assembly at this place, your ranks have been invaded, and your revered associate, Judge DANFORTH, has been removed by death.

The bar, in sympathy with you on this solemn occasion, and mingling its sorrow with yours, has adopted a memorial and resolutions expressive of its sense of the loss it has sustained, which will be presented to you.

To your Honors who were so long associated with the deceased, and held him so warmly in your affections, words of commendation from others seem almost superfluous. They can add nothing to your knowledge of his worth, or your appreciation of his

character. Still, the bar desires the privilege of recording its tribute of affection and esteem for him who was formerly one of its members, who has reflected upon it so much honor by his life and character; and it prays your HONORS, that the memorial and resolutions may be received and entered upon the records of the court.

The death of such a man is a public loss,—a loss to the court,—a loss to the bar,—a loss to the community. But all is not lost. He leaves a priceless legacy in his character and his life, from which lessons may be drawn for the instruction and inspiration of the young, and especially for those who are preparing to enter, or have entered the profession, in which he attained his distinction and usefulness.

After obtaining such education as was afforded in the common school, and academy, Judge DANFORTH commenced and pursued his professional studies in the office of the late CHIEF JUSTICE TENNEY, and was admitted to the bar in Somerset county in 1838. He then entered upon the practice of his profession at Gorham, and remained there until 1841, when he removed to Gardiner and became a member of the Kennebec Bar. This bar was then, and had long been a strong one, containing many members of marked ability. I recall amongst them George Evans, Frederick Allen, Samuel Wells, Timothy Boutelle, Henry W. Paine, Williams Emmons, Daniel Williams, John Potter, Richard H. Vose, B. A. G. Fuller, Joseph Baker, Sewall Lancaster, John Otis, S. W. Robinson, Hiram Belcher and others. Peleg Sprague, one of the most eloquent lawyers in New England, and Ruel Williams, confessedly at the head of the bar in the state, in the important branch of the law relating to real estate, had withdrawn from the bar a few years previous. About this time, and soon afterwards, important additions were made to its numbers and strength, some of whom are still living to grace the court and the bar, and some have deceased. Amongst the latter, Richard D. Rice, Lot M. Morrill and Wyman B. S. Moor will be remembered by many members of the present bar.

During his practice at the bar Judge DANFORTH always felt and maintained its dignity and honor. He could do that only

for a client which could be done consistently with honor and right. He ever kept a good conscience. While he was true to his clients he was true also to his own convictions.

He appreciated the true vocation of the lawyer. He realized that civilization is the offspring of law. It is the law that protects our persons and possessions, and secures to us the inestimable blessings of intelligent, social life and religious freedom; but the law must be rightly administered to accomplish its mission.

To secure this just administration we need not only learned but upright judges, but an able and honorable bar. The causes of the feeble and ignorant as well as those of the influential and intelligent need to be prepared, and the principles of law involved, considered and discussed in order to a just decision. Here is the field for the bar, to aid the court, in reaching a just decision in administering justice between man and man, and between the state and those charged with violating its laws.

Judge DANFORTH continued loyal to his chosen profession, with only occasional brief interruptions until he went upon the bench. He served as the representative of his town during four sessions of the legislature, filled sundry municipal offices, was a member of the executive council, and filled the office of county attorney from 1858 until his appointment as judge.

In 1864 he received the appointment to the office of justice of the supreme judicial court, which by three re-appointments upon the expiration of the terms, he continued to hold until the day of his death.

It is upon the able and faithful discharge of the duties of this high office for an uninterrupted period of a quarter of a century, constituting the principal part of his life work, that his reputation and fame are to rest.

It is certain that with limited advantages of early education, with intellectual powers well-balanced and strong rather than brilliant, by persevering application and fidelity he earned the character of a good and able judge in our highest court of judicature, and secured the affectionate regard of the bar and the unstinted confidence of the public.

He had character. It was said by Emerson, I think, "Charac-

ter is higher than intellect." His integrity, honor and fairness were undoubted, and when he entered upon the trial of a cause it was felt that it was his desire and purpose to have justice done without partiality or prejudice.

The bar will bear witness to his uniform courtesy, his patience, his calm demeanor; never for a moment losing his self-control amidst the annoyances that will sometimes occur at *nisi prius* trials from the perversity of a witness, or the undue pertinacity of an over-excited, inexperienced attorney.

My personal knowledge of Judge DANFORTH was more intimate, while he was a member of the bar and during the earlier portion of his judicial career, before I had retired from active practice, having been eleven years his predecessor at the bar in this county; and I leave it for other members, who had better opportunity to witness his high qualities in the maturity of their power, to do more ample justice to him who was so warmly loved and revered.

Hon. HERBERT M. HEATH presented the memorial and resolutions, and said:

For a quarter of a century Judge DANFORTH lived before men, an upright judge. He exemplified God's noblest work, an honest man. Endowed with a remarkable purity of character, his nature a harmony of gentleness and firmness, kind to the weak, sympathetic to the unfortunate, he was ever just to the wrong-doer and merciful when justice tempered with mercy was consistent with public duty.

He loved justice for its own sake. Ambition never warped his judgment, nor could the fear of man swerve him from the path where duty called. He feared God and kept his commandments. He believed that the law had its birth in the precepts of Holy Writ, and so believing he administered justice with the dignity, the rectitude, the impartiality of the judges of Israel. Patient, industrious, painstaking, his sole ambition was to do right. If he erred, no litigant ever had a momentary thought that, in his decisions, injustice could be intentionally or carelessly committed. When the hour came for him to wrap his cloak

around him, he could affirm that he had scrupulously kept the covenant:

"*Tros Tyriusve mihi nullo discrimine agetur.*" The world is better because he lived.

His wisdom, his learning, his ripe knowledge of the law as a science are all written in the Reports. To him no monument is necessary. Modest and unassuming he would ask no plaudits to-day from the world. He was content to satisfy his own conscience. Crowned with the laurels of a well-spent life, he faced his Creator prepared to enter the mysteries of the hereafter without fear and without reproach. Well might he have said:

"*Exegi monumentum aere perennius.*"

Mindful of our great loss, grateful for the inspiration of his character and his life, the Kennebec Bar presents to his associates the following resolution and prays that it may be inscribed upon the records of the court.

Resolved: That the memory of our friend and brother, the HONORABLE CHARLES DANFORTH, will ever serve as an example for his fellow men to lead them to emulate the public and private virtues, that made his name in the state he loved and served, the synonym of honesty, of integrity and of justice.

Hon. SAMUEL TITCOMB said:

But few public men have been more generally or more enduringly beloved in private life than Judge DANFORTH. Benevolent and affectionate, enjoying social intercourse, he retained his friendly relations with the associates of his earlier years, and in later years made numberless new friends, by whom he will ever be held in grateful remembrance.

In the discharge of his judicial duties, his conscientious and patient action secured the confidence and esteem of the bar and the public at large.

The evenness and placidity of his temper undoubtedly gave him great advantages. He was never, even under strong provocation, betrayed into ebullitions of temper. The affability and courtesy of his general demeanor towards the bar was not in any degree lessened after his elevation to the bench. Complete self-

possession apparently characterized his action as a presiding judge.

In the different official positions,—as a member of the city council of his city, as its representative in the legislature, as a member of the executive council and as county attorney,—although identified with one of the political parties, he had no taste for the arena of politics; was never in any sense a politician, and upon his appointment as judge, labored not under the disadvantages of those who make politics their study and their profession.

His personal character, and his scrupulous regard for justice and fair dealing between suitors, irrespective of his eminent station, were of themselves sufficient to command for him, no ordinary degree of respect and consideration.

Judge DANFORTH honored his eminent position, not by making its distinctions and emoluments his sole object, but by combining with the diligent, painstaking and conscientious discharge of its duties, a large proportion of those acquirements and qualities which are appreciated in society, and which live the longest in the recollection of friends.

For his social and domestic virtues, for his integrity and impartiality as a presiding judge, and for those most essential qualities that illustrate the character of a virtuous man, he received the merited tribute of respect of all with whom he came in contact.

Hon. ORVILLE D. BAKER, followed Judge TITCOMB and said:

May it please your Honors: I had till this moment intended to be a silent sorrower at these memorial services, and I only speak now lest silence seem ungrateful to the memory of the dead. To-day, when the honored name of your associate is for the last time linked with yours on the records of this Court, I cannot sit unmoved and silent.

Save to my own father, to no man do I owe more of gentle and kindly counsel than to him who was my father's life-long associate and friend.

When I first began the practice of law, his ripened knowledge had long adorned this bench, and never yet did I or any young

practitioner seek in vain the encouragement of his sympathy or the aid of his advice. The kindliness of his counsel always outran the asking. If simple devotion to duty, a character transparent as a crystal, a gentle life and a holy death, if these things are aught, then the life-candle that has just burned out was fed by no common oil.

Judge DANFORTH was a simple man, no man ever more so. He dwelt with substance and had no care for show. In bearing, in character, in life, he was unaffected and true.

His dress, his speech, all his tastes, all his pleasures were quiet and modest. Simple himself, he loved most the things that were simple, nature and his God, and he lived ever close to both. Long walks in the woods and by the streams, long looks at the mountains and the sky brought him that deep refreshment which others vainly seek from cards and wine. Nay, they brought him more, for he looked "through nature up to nature's God" and with his own unobtrusive reverence, was simple because God was simple.

He was a just man. No man ever followed more implicitly the line of duty, yet no defeated suitor ever felt that his defeat was due to the bias of the judge, and no criminal but knew that the judge who sentenced him would rather have set him free had justice permitted it.

As a presiding judge he was patient, considerate, conscientious, never leaping at conclusions, never in a hurry for results, treating all with unvarying courtesy. I think none ever saw him ruffled in court, or moved from his quiet dignity.

As a jurist the analysis of his characteristics will come most fittingly from the Bench which he adorned.

Yet after a quarter of a century of service the powers and limitations of his intellect could not fail to impress themselves upon the bar. He was solid rather than brilliant, slow rather than rapid. He relied less on intuition than on industry, and perhaps from that very fact was the safer in his conclusions. He was a tireless and conscientious worker, and when he had fully studied out his subject, he had a strong and comprehensive grasp of legal principles. He built up his opinions with great

blocks hewn from the common law. He loved equity and hated injustice. He was not fond of being turned aside from the merits by any technicality, and the astutest pleader found it hard to stay him from what he believed to be the right of the case.

Above all he was a gentleman. I do not know that any man ever heard him speak harshly, and I am certain that no man ever did or could speak harshly to him, any more than to the disciple whom Jesus loved. Even his learning, of which he had accumulated much, sat softly on him, and in all his living gentleness became him like a flower. The peace of virtue and a calm mind was his, and even when the snows had gathered, the years of his life still unrolled behind him

"Like long, blue, summer hours serenely flowing."

He left life gently, even as he lived it. He was pure in heart; and he shall see God forever and forever.

CHIEF JUSTICE PETERS, in behalf of the court then responded as follows:

Gentlemen of the Bar: The court cordially concurs in the sentiments expressed by your resolutions in honor of the memory of Judge DANFORTH. His private character and public services have been so eloquently and fittingly spoken of at the bar, that the occasion might seem complete with ever so brief a response from the bench. But I would do injustice to my own feelings, should I fail to express, not only the sincere respect felt by all the members of the court for the memory of our late associate, but in a few words my own estimate and admiration of his career and character. I have always felt a nearness of acquaintance and friendship with Judge DANFORTH. We knew each other early in life, having been personally acquainted more than half a century ago, at Gorham in this state, where he was then a young practitioner in the law, and I a boy at the old academy, fitting for college. Our acquaintance was quite intimate ever after that, first as lawyers, afterwards he the judge and myself a lawyer, and lastly for the past seventeen years as judicial associates.

The elements of character were gently mixed in Judge DAN-

FORTH. In private life and in all personal relations, his manners and actions were marked by gentleness. His amiable disposition, affected as it was by his other mental temperament, was one of nature's best gifts to him. Malice or envy or hatred never found repose in his bosom. There was no harshness in his thought or speech. He was personally social and agreeable, kind and sympathetic, just and generous to all persons. He filled a large space in the hearts of the lawyers and people of this state with whom he came in contact. They knew that his mind and heart were honest; that inwardly and outwardly he was unaffected and true, a plain, natural man.

His private character was conspicuous in his public life. His virtues as a man manifested themselves in the character of the judge. The calm and dignified demeanor, maintained by him in all places, impressed itself upon the atmosphere of the court room where he presided. There were but few storms and lulls,—flows and ebbs,—in his *nisi prius* experience. He commanded and controlled himself beyond the power of most men to do, and influenced the conduct of those about him by the mildness of his example. He thought much of, and often quoted in my presence, a saying that "the unspoken word never does harm." His *nisi prius* terms were long and arduous, excellent examples of successful legal administration. The lawyers were fond of trying their causes at his terms, knowing that no matter, large or small, would be decided by him inconsiderately or pettishly. The bar and the public were equally confident that his motives were pure. The practitioners felt at home in his court.

His intellectual abilities were of a superior order, and he possessed attainments equal to any judicial task ever devolving upon him. His chief mental power was sound judgment,—practical sense,—a faculty without which no judicial career can be successful; but with which, though his principal intellectual endowment, its possessor may attain the highest fame. There are all grades of judgment, as of other mental qualities, we all know. It may amount to genius,—in some an instinct,—in others well nigh a blank. It has been compared to a clock or watch, "where the most ordinary machine is sufficient to tell the

hours, but the most elaborate alone can point out the minutes and seconds, and distinguish the smallest differences of time." Our late associate possessed the faculty of judgment in a rare degree. His was a sagacious, practical conception,—a strong and an instinctive judicial sense,—such as is not easily acquired unless in some degree naturally possessed,—nor acquired more by a study of the written law of the books, than by an understanding of the unwritten law of the human heart,—a knowledge of the world. His judgment, never eccentric or capricious on any question, was his great working forge, which never tired out in its steady, even and constant operation.

Let it not be supposed that his gentleness of disposition had any tinge of weakness. It was force, not weakness. It had endurance and strength, character and personality. The natural elements work out more potent results when silently operating, than when gathered in the blustering storm; and gentleness accomplishes better results than vehemence.

This predominating mental trait was developed and strengthened by other characteristics happily blended with it.

His moral nature worked in unison with the intellectual. The love of truth and justice was an instinct with him. He was remarkable for promptness in all matters and on all occasions. He had a zeal of industry. His quiet energies were well nigh always at work. I doubt if he ever neglected a duty in his life. I know that he rarely ever postponed the execution of any work to the future, which could in any reasonable way be accomplished in the present. He was ever willing to do more than his share of judicial work. And, for that reason, I think less than his share was never allotted to him. He may not have indulged enough in recreation and amusements, the counterweights which help to balance the burdens of the mind. But there were sunny spots in his heart, which brought enjoyments. He was fond of friends and social company. He was a lover of nature and delighted in rambling over fields and through the woods, "his eye craving the spectacle of the horizon, of mountain, ocean, river and plain, the clouds and stars."

Judge DANFORTH, in the practical rather than metaphysical

sense, possessed a good degree of analytical and constructive skill. He had a faculty, and abundance of patience for fostering the faculty, for mastering details in complicated cases, as his numerous able opinions in our published reports will attest; and for applying old principles to new conditions and facts, where the results worked out are quite novel and satisfactory. The style of writing in his printed opinions is the style of the man, plain and unostentatious; in literary quality more perhaps of the character of masonry than architecture. The real was his ideal.

He was a very helpful associate in judicial consultations. His temperament and thoughtfulness and appreciation of questions as they were argued, were important aids. He never allowed first impressions or first expressions to hold him to indefensible positions; never being so wedded to his own opinions as to love them better than he loved the truth. Not that he was deficient in will or courage, for there was ample development of both in his character. He exhibited great firmness and undaunted courage in maintaining what he believed to be right; while never acting rashly. His convictions ruled his conduct, the will following rather than leading the conviction. Such a man often possesses an unusual degree of what may be called reserve power, a power only occasionally called into action,—power behind power,—the waters that linger in the eddy until some condition arises to sweep them into the general stream. He possessed such power.

There can be, I suppose, little doubt that Judge DANFORTH lost his life by his too great fidelity to duty, in remaining at his post too long while holding a term of court in Somerset, his native and dearly loved county, after a disease then prevalent had become fastened upon him, which his physical energies were not strong enough successfully to resist. After several months of lingering but not painful sickness, he passed *from* earth as quietly as he had lived *upon* it.

> "Like a shadow thrown
> Softly and sweetly from a passing cloud,
> Death fell upon him."

To attempt to penetrate the veil that is now drawn between our departed friend and ourselves would not be the part of wis-

dom in us. But if "the best preparation for the future is the present well seen to, the last duty done,"—his spirit is with the blessed.

It had not seemed to us that his life was so soon to be terminated. The frosts of age had not silvered his locks, nor had time made marked furrows upon his brow. But the inevitable edict came, and we are never to grasp the cordial hand or feel his genial presence again. We miss him to-day,—for the first time absent at this term of the court since he came upon the bench.

He will be missed by the people of the state, who are indebted to him for most valuable judicial services extending over a period of more than a quarter of a century; and for the example of judicial honor and virtue which he has set before those who may fill judicial places after him. The niche which he will occupy in the portrait gallery of the eminent judges and jurists in this state who have deceased before him, will present a conspicuous figure.

He acted eminently well the part chosen by him. His life was well lived—well ended. It was a success, a happiness to himself, a blessing to others. The poet best describes him:

> "The man
> Who knew himself and knew the ways before him,
> And from amongst them chose considerately,
> With a clear foresight, not a blindfold courage,
> And, having chosen, with a steadfast mind
> Pursued his purposes."

The clerk will enter the resolutions upon the records of the court, and in further respect for the memory of the deceased the court will now be adjourned.

CHANCERY RULES

OF THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE,

ADOPTED AT GENERAL LAW TERM, MAY, 1890, TO GO INTO EFFECT JANUARY 1, 1891.

THE COURT AND CLERK.

I.

The court, held by one justice, may sit in equity in any county upon any day not prohibited by statute.

II.

The clerks of the court shall act as clerks in chancery, and may, as of course, issue such processes and make and enter such orders as do not require the consideration of the court. They may keep for equity causes a separate docket upon which they shall minute in detail all proceedings in the cause, with the date, and by whom each order is made.

RULE-DAYS.

III.

Rule-days shall be held the first Tuesday of each month at 10 o'clock in the forenoon, at the court house in each county, for

the proper despatch of equity business, when and where all processes shall be returnable, unless otherwise ordered by the court or directed by statute.

THE BILL.

IV.

Bills shall be drawn succinctly and in paragraphs numbered seriatim, and without prolixity or unnecessary repetition. The confederacy clause, the charging part, and the jurisdictional clauses may be omitted.

The prayer for answer may be omitted, unless discovery is sought or answer upon oath is desired. The prayer for relief shall state the specific relief sought, and may also ask for general relief. The prayer for process shall contain sufficient information for the proper frame thereof.

Bills shall be addressed:

"To the Supreme Judicial Court. In Equity.

A. B. of————————complains against C. D. of————————and says:

First:—" &c.

V.

Bills for discovery and those praying for injunction must be verified by oath.

PROCESS.

VI.

Process shall not issue until the bill be filed, unless the bill be inserted in a writ, when no special process shall issue until the writ be filed.

Upon the filing of a bill, subpœna shall issue and be returnable as provided by statute, or as the court may order.

VII.

Whenever it shall appear that a defendant resides out of the state, the clerk, on application of the plaintiff, at any time after

the filing of the bill, shall enter an order requiring such defendant to appear and answer the bill, if in any part of the United States east of the Mississippi River, or in the States of Louisiana, Missouri, Iowa or Minnesota, within one month; if within any other of the United States or New Brunswick, Nova Scotia or Canada, within two months; if elsewhere in the territory of the United States, or in Great Britain, Ireland, or France, within three months; and if in other foreign parts, within six months, from the rule-day next succeeding the date of such order. The order shall state the title of the suit, and shall set forth briefly the substance of the plaintiff's bill. A copy of the order shall be served on such defendant personally, or published three times in different weeks, within thirty days after the date of the order, in some newspaper published in the county where the suit is pending; and proof of such service shall be made by affidavit, or in such other manner as the court may order.

APPEARANCE AND PLEADINGS IN DEFENSE.

VIII.

Appearance shall be entered on the docket by the party or his counsel, or filed with the clerk.

IX.

Pleadings in defense may omit formal clauses not essential to the merits of the cause.

X.

Answers shall be concise and direct in statement, and particularly answer each paragraph of the bill; and shall be paragraphed and numbered, so far as may be, to conform thereto.

Answers shall be addressed:

"In the Supreme Judicial Court. In Equity.

A. B. vs. C. D.

The answer of C. D., who answers and says:
First:—" &c.

XI.

If the defendant desires any issues of fact to be submitted to a jury, he shall at the close of his answer make such claim, and succinctly state such issues.

XII.

Oaths to bills and answers shall be upon the affiant's own knowledge, information or belief; and, so far as upon information and belief, that he believes his information to be true.

XIII.

Discovery and answer, when necessary to the entering of a proper decree, may be required; and to enforce the same a writ of attachment may issue by special order of the court, on which the defendant will be bailable on a bond with sufficient sureties given to the plaintiff in such sum as the court may order, which is to be returned with the writ. In case of neglect of the defendant to enter his appearance according to the statute, the bond shall be forfeited, and may be enforced by petition and notice thereon; and on a summary hearing, damages may be assessed and an execution issue therefor; and a new writ of attachment may issue on a special order therefor, on which he will not be bailable.

XIV.

Defenses by demurrer or plea may be inserted in an answer; and unless the plaintiff sets such defenses for hearing before a single justice in order that proper amendments may be speedily had, (and such defenses prevail in the law court,) no amendment on account thereof shall then be allowed, except upon terms.

XV.

Demurrers and pleas shall not be filed until certified by counsel to be in good faith, and that they are not intended for delay; and if pleas, that they are true in fact.

XVI.

The answer to a cross-bill shall not be required before answer is made to the original bill.

REPLICATIONS.

XVII.

The replication shall state in substance that the allegations in the bill are true, and those in the answer are not true. If the plaintiff desires any issues of fact submitted to a jury, he shall make such claim at the end of his replication, and briefly state the issues.

XVIII.

Counsel shall sign all pleadings as a guaranty of good faith.

EXCEPTIONS TO BILLS.

XIX.

Exceptions to bills may be filed within twenty days after return day, and to answers within ten days after notice that they have been filed; and the exceptions shall be disposed of by reference to a master, or otherwise, as the court may direct. Costs, double and treble, may be awarded on exceptions, and execution issued therefor as the court may order.

AMENDMENTS.

XX.

Amendments as to parties shall be made under order of court. Other amendments may be made before issue as of course. After issue, amendments may be allowed by the court with or without terms.

XXI.

Amendments may serve the purpose of bills of revivor or bills supplemental, or bills of that nature, but they shall be served as such bills should be served.

HEARINGS.

XXII.

After demurrer, either party may set the cause for hearing; and after plea or answer, the plaintiff may set the cause for hearing upon bill, answer or plea; and after replication day, no replication being filed, the defendant may so set the cause for hearing, or move to dismiss the bill, as circumstances may require.

XXIII.

A defense interposed in one form and overruled, shall not afterwards be sustained in subsequent pleadings in the same cause.

XXIV.

After the time for taking evidence shall have expired, (and publication ordered as required by statute, if evidence has been taken) the court on motion shall set the cause for hearing at a stated day or term. If a jury trial has been asked for in the answer or replication, and is moved for in the motion for a hearing, the court may in its discretion in setting the cause for hearing, order a jury trial, and frame issues therefor.

EVIDENCE.

XXV.

All documentary evidence not requiring proof by the testimony of witnesses shall be filed with the clerk before the publication of testimony and notice thereof given. Deeds executed in due form and recorded, or copies of them, and other instruments in writing, may be so filed and used without proof of execution, unless the due execution be denied, or fraud in relation thereto be alleged, of which notice shall be given within ten days after notice that they are filed.

Copies of any votes, entries or papers found on the books of any corporation and attested by its clerk, may be received as evidence instead of the books, unless it shall appear that the opposite counsel has been refused access to such books at reasonable hours.

XXVI.

When books, papers or written instruments material to the issue are in possession of the opposite party, and access thereto is refused, the court upon motion, notice and hearing, may require their production for inspection. Extracts from any books, papers or instruments thus produced, verified by counsel, may be filed as documentary evidence by either party, instead of the originals.

XXVII.

All allegations of fact well pleaded in bill, answer or plea, when not traversed, shall be taken as true.

DECREES.

XXVIII.

When a party is entitled to a decree in his favor, he shall draw the same and file it, and give notice.

If corrections are desired, they shall be filed within five days after receipt of notice. If the corrections are adopted, a new draft shall be prepared and submitted to the court for approval. If they are not adopted, notice shall be given of the time and place when the matter will be submitted to the court for decision, in person or by sending the papers to some justice, who shall settle and sign the decree.

XXIX.

Drafts of orders and decrees shall be entitled with the name of the county, the date of the hearing, the docket number of the cause, and the names of the parties, and may then proceed substantially as follows: "This cause came on to be heard (or, to be further heard, as the case may be), this day and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed, as follows, viz: (Here insert order or decree.) No part of the pleadings, the master's report, or any prior proceeding, need be recited or stated.

MASTER.

XXX.

When any matter shall be referred to a master, he shall, upon the application of either party, assign a time and place for a hearing, which shall be not less than ten days thereafter; and the party obtaining the reference shall serve the adverse party, at least seven days before the time appointed for the hearing, with a summons signed by the master requiring his attendance at such time and place, and make proof thereof to the master; and thereupon, if the party summoned shall not appear to show cause to the contrary, the master may proceed *ex parte;* and if the party obtaining the reference shall not appear at the time and place, or show cause why he does not, the master may either proceed *ex parte*, or the party obtaining the reference shall lose the benefit of the same at the election of the adverse party.

XXXI.

The compensation to be allowed to masters for their services shall be fixed by the court in its discretion in each case, having regard to all the circumstances thereof; and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when it is allowed he shall be entitled to an attachment for the amount against the party ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

XXXII.

When exceptions shall be taken to the report of a master, they shall be filed with the clerk at once, and notice thereof be forthwith given to the adverse party; and the exceptions shall then be set for argument. In every case the exceptions shall briefly and clearly specify the matter excepted to, and the cause thereof; and the exceptions shall not be valid as to any matter not so specified.

COSTS.

XXXIII.

When a party is entitled to costs, his counsel will tax each item of the bill in a fair handwriting, referring to the documents on file or inclosed with it as proofs, and give notice thereof. The opposing counsel may, within two days after notice, make his objections to the same in writing and give notice. A reply may be made in writing and the bill filed with these inclosed papers for the decision of the clerk, who will make his decision in writing, from which either party may appeal and submit the papers to a justice of the court for decision. The clerk may regard costs as correctly taxed, when the opposing counsel certifies in writing on the back of the bill that he does not find cause to object, or when no objections are made within two days after notice of taxation.

XXXIV.

The attorney making the application will be personally responsible for the payment of fees to commissioners, examiners, stenographers, or magistrates taking testimony; to the clerk for his fees; and for costs imposed as terms of amendment or relief. When it shall be made to appear by the affidavit of a person interested, that an attorney who is so liable has, after request, neglected to pay, he will, unless good cause is shown for such neglect, be suspended from practice in chancery cases, until payment is made. When any attorney or counsel shall violate the great confidence reposed in him by these rules, he will be suspended in like manner, until the further order of court.

XXXV.

Copies required by these rules may be verified by signature of counsel, for the accuracy of which they will be held responsible. When found to be inaccurate or badly written, they must be withdrawn, and others correctly made furnished without additional charge.

NOTICES.

XXXVI.

Notices required by these rules will be served in writing, and signed by counsel, and delivered to the opposing counsel, or left at his office, when he has one in the same city or village; and in other cases to be properly directed to him and placed in the post-office and postage paid. Copies are to be preserved and produced, and the original will in all cases be regarded as received when the counsel giving the notice produces a memorandum, made at the time on the copy retained, of its having been delivered or sent by mail on a day certain, unless the reception is positively, and not for a want of recollection, denied on affidavit. Either party may designate on the docket the name of his counsel to whom notices are to be given, and in such case no one will be good unless given to him. And in case of a change of such counsel, notice will be given thereof, and the change noted on the clerk's docket.

MISCELLANEOUS.

XXXVII.

When an application for an injunction, or for any order or decree under the statute or these rules, is made to one justice of the court, and the same has been acted upon by him, it shall not be presented to any other justice.

XXXVIII.

Writs of injunction, preliminary, pending the suit, or perpetual, may be granted according to the principles of equity procedure and as authorized by the statute; to be in the form annexed with such changes as the case may demand.

XXXIX.

Applications to the discretion of the court for a re-hearing may be made on petition, verified as required by rule XII, and setting forth particularly the facts, and the name of each witness,

and the testimony expected from him. The petitioner can examine only witnesses named, except to rebut the opposing testimony. The petition having been presented to a justice of the court, and by him allowed, may be filed, and the same proceedings may be had thereon as on an original bill. If the decree has not been executed, such justice of the court may suspend its execution until the further order of court, by a writ of *supersedeas* or order, on the petitioner's filing a bond, with sufficient sureties, in such sum and to be approved in such manner as he may direct, conditioned to perform the original decree, in case it shall not be materially modified or reversed, and pay all intermediate damages and costs.

XL.

When the decision of a justice is desired upon any interlocutory matter, the clerk may forward to him the papers in the cause and enter his decision as soon as received.

XLI.

When sitting in equity, the court may require the attendance of a stenographer and order him paid from the county treasury.

XLII.

These rules shall be published in Vol. 82 Maine Reports, shall take effect January first, A. D. 1891, and shall repeal all former rules in equity. All proceedings not provided for by the statute or these rules, shall be acccording to the usual course of chancery proceedings.

FEE BILL.

The following fees may be taxed and allowed to the party entitled to costs, when no fees are provided by statute for the like service.

ATTORNEYS.

Drawing and filing bill,	$5.00
" " answer,	5.00
" interrogatories, each set,	1.00
But in all cases not to exceed $10.00.	
Drawing and filing decree when not requiring material alteration,	1.00
Drawing and filing each rule,	.25
Each notice given, not to be taxed also as copy,	.25

Copies at the rate of ten cents for each page of 100 words.

The postage paid on notices and papers transmitted.

All papers transmitted to a member of the court to be free from charge to him.

For an amendment of the bill or answer, when such an amendment is occasioned by an amendment made by the opposing party, half the fee for drawing a bill or answer.

CLERK.

For filing each paper required to be filed on the back, and noting the same on the docket, and carrying it forward each term,	.05

COMMISSIONER, EXAMINER OR MAGISTRATE.

For each jurat to bill, answer or other page requiring a like certificate,	.20
For each deposition not exceeding one page of 224 words,	1.00
and for each additional page,	.25

Upon exceptions to a bill or answer, travel and attendance shall be taxed as follows: for every ten miles' travel of a party to attend a hearing before one of the justices, or before a master, thirty-three cents; but no more than forty miles travel shall be taxed in any case, unless the party shall make an affidavit that

he actually travelled a greater distance for the purpose of attending such hearing; for each day's attendance at a hearing before a justice or before a master, two dollars shall be taxed.

FORMS.

WRIT OF ATTACHMENT.

{SEAL.} *State of Maine.*

To the Sheriffs of our Counties and their Deputies:

We command you to attach the body of A. B. of————in our county of ———, so that you have him before our Supreme Judicial Court, at———, within and for our county of———, on the———Tuesday of———next, to answer for an alleged contempt in not (*here insert the cause*) and you may take a *bond with sufficient sureties to C. D., the party injured, in the sum of ———, conditioned that he then and there appear and abide the order of Court. Hereof fail not and make due return thereof and of your proceedings, at the time and place aforesaid.

Witness, J. A., Justice of our said Court, the———day of———, in the year of our Lord, 18—.

———, Clerk.

(*When the party is not bailable, that part of the writ is to be omitted.)

WRIT OF INJUNCTION.

{SEAL.} *State of Maine.*

To the Sheriffs of our Counties and their Deputies:

We command you to make known to A. B. of———, in our county of——— that C. D. of———, in the county of———, has filed his bill in equity before our Supreme Judicial Court, therein alleging (*here insert the allegations in the bill showing the cause for issuing the writ*) and that in consideration thereof, he, the said A. B., and his attorneys and agents, are strictly enjoined and commanded by our said court, under the penalty of———, absolutely to desist and refrain from (*here insert the acts enjoined*) and from all attempts, directly or indirectly, to accomplish such object until the further order of our said court. Hereof fail not and make due return thereof, and of your proceedings, to our next court, where the bill is pending.

Witness, J. A., Justice of our said Court, the———day of———, in the year of our Lord, 18—.

———, Clerk.

(When the injunction is to be perpetual, the writ is to be varied accordingly.)

FORM OF SUBPŒNA.

{SEAL.} *State of Maine.*

————, ss.

To A. B. of———— Greeting.

We command you to appear before our Supreme Judicial Court, at———in the county of———, on———Rules, viz., Tuesday, the———day of———next (instant), then and there to answer to a bill of complaint, there exhibited against you by C. D. of———, and abide the judgment of said Court thereon.

And we further command you to file with the clerk of said Court for said county of———within——days after the day above named for your appearance, your demurrer, plea or answer to said bill, if any you have.

Hereof fail not under the pains and penalties of the law in that behalf provided.

Witness,———Justice of our said Court, at———, the———day of———, in the year of our Lord——.

——— ———, Clerk.

FORM OF OATH.

————, ss. ———18—.

Then personally appeared————and made oath that he has read the above———and knows the contents thereof, and that the same is true of his own knowledge, except the matters stated to be on information and belief, and that, as to those matters, he believes them to be true.

Before me, ——— ———

FORM OF SUMMONS TO SHOW CAUSE.

To be Used on Application for Interlocutory Orders.

{SEAL.} *State of Maine.*

————, ss.

To the Sheriffs of our several Counties, or either of their Deputies : Greeting.

We command you that you summon————(if he may be found in your precinct) to appear before———the Supreme Judicial Court of the State of Maine, to be holden———at———in the State of Maine on———the———day of———, A. D. 18—, at ———o'clock, —M., then and there to show cause, if any he have, why an injunction———should not be granted as prayed for in the bill of complaint———of———.

Hereof fail not, and make due return of this writ, with your doings thereon, into our said court.

Witness, the Honorable———a Justice of said Court, at———aforesaid, the ———day of———in the year of our Lord one thousand eight hundred and ninety———.

——— ———, Clerk.

RULES

OF THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

AT KENNEBEC, MAY TERM 1890.

Ordered, that the 36th RULE OF COMMON LAW RULES be amended so as to read as follows:

XXXVI.

WRITS OF VENIRE FACIAS.

Every *venire facias* shall be made returnable into the clerk's office by ten o'clock in the forenoon of the first day of the term, and the jurors shall be required to attend at that time; unless some justice of the court shall designate a different day or hour, and in such case the *venire* shall specify such day and hour. *Venires* issued in term time may be made returnable forthwith or upon any day or hour as ordered by the court.

INDEX.

ACCOUNT.

See GUARDIAN, 2. EXECUTORS, &c., 6, 7, 8.

ACTION.

See AMENDMENT, 1. REAL ACTION, 1, 2.
CRIM. CON.

ADMINISTRATOR.

See EXECUTORS and ADMINISTRATORS.

ADVERSE USE.

See WAY, 18.

AGENCY.

AMENDMENT.

See PRACTICE, (EQUITY,) 1, 7. EQUITY, 6.

APPEAL.

BARK.

BARRATRY.

BAY.

BILLS AND NOTES.

BOND.

BREACH OF PROMISE OF MARRIAGE.

BURDEN OF PROOF.

BY-LAWS.

See CORPORATIONS, 10.

CAPITAL STOCK.

See CORPORATIONS. RAILROADS, 1, 2.

CASES EXAMINED, ETC.

CHARTER.

1. Legislative grants of franchises or privileges to persons or corporations are never to be extended by construction beyond the plain terms in which they are conferred. *Davis* v. *Matta. L. D. Co.*, 346.

2. A corporation, built a dam across a river, below one of its branches, on which the plaintiff's land is situated, and several miles below the place where the charter authorized the dam to be erected. This dam caused the water to flow back upon the plaintiff's land, and he sued in trespass for the damage occasioned thereby. The defendant corporation claiming that the dam was authorized by its charter admitted the damage, but contended that the remedy provided in its charter therefor, was exclusive of all other remedies. It being found by the court that the charter did not authorize the dam to be built at such place; *Held*, that parties whose lands were flowed by the dam may maintain trespass. *Ib.*

CHURCH-FAIRS.

See LOTTERY.

CLIENT AND ATTORNEY.

1. The law deprecates the purchase by an attorney of the subject matter of litigation, or any speculative bargain in relation thereto; and casts upon the attorney the burden of proving the perfect fairness, adequacy and equity of the transaction. *Burnham* v. *Haselton*, 495.
2. Such proof, like that of any other affirmative proposition, must be by evidence. *Ib.*
3. The presumption of innocence, or the improbability of wrong-doing by the attorney is not affirmative evidence; and the jury should not be instructed that they may consider such presumptions as tending to discharge the burden of proof. *Ib.*
4. The presumption is that the transaction was invalid, which presumption must be overcome by evidence. *Ib.*

CLOUD ON TITLE.

See EQUITY, 2, 3, 12.

COASTING ON PUBLIC STREET.

See PLEADINGS, 17, 18.

COLLATERAL SECURITIES.

See PROMISSORY NOTES, 1, 2.

CONSIDERATION.

See CONTRACT, 1, 2, 3, 4.

CONFLICT OF LAWS.

See CONTRACTS, 8, 9.

CONSTABLE.

See TOWNS, 5.

CONSTITUTIONAL LAW.

1. No repeal of existing laws in reference to the suppression of the sale of intoxicating liquors was intended by the adoption of the Fifth Amendment

CONSTITUTION OF MAINE.

CONTRACTS.

CONTRIBUTION.

See WILLS, 12.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CORPORATIONS.

COSTS.

See PROMISSORY NOTES, 7. TOWNS, 18.
NEW TRIAL, 12.

DEBT.

DELIVERY.

DOWER.

DRAINS AND SEWERS.

DUE CARE.

See WAY, 12.

EASEMENT.

See DEED, 8, 9, 10, 11.

EMINENT DOMAIN.

EQUITY.

ESTOPPEL.

EVIDENCE.

See NEW TRIAL.

EXCEPTIONS.

FENCES.

See WAY, 9.

FISH AND FISHERIES.

FIXTURES.

FLOWAGE.

See REMEDY, 1, 2.

FORBEARANCE.

FORECLOSURE.

FORFEITURE.

See INSURANCE, (Fire,) 1.

FORGERY.

See PROM. NOTES, 3.

FRAUD.

GAME.

GATES AND BARS.

See WAY, 5, 6.

GIFT.

GOOD-WILL.

See TRADE-MARK.

GREAT PONDS.

See WATERS, 3.

GUARDIAN.

INDORSEMENT.

INFANT.

INSOLVENCY.

INTEREST.

See TAXES, 7.

INTERPLEADER.

See GIFT, 1, 2.

INTOXICATING LIQUORS.

11. Notwithstanding the opinion of the minority of that court may commend itself to many as containing the better conclusion, obedience on the part of this court, however, is due to the judgment which prevails; not that our statute is unconstitutional, for it prohibits only the "unlawful sale" of intoxicating liquors; but that its interpretation must be constitutional. *Ib.*

See INDICTMENT, 9, 10, 11. NEW TRIAL, 1. PLEADINGS.

JOINTURE.

A conveyance to a married woman is not deemed a jointure, unless such intention is expressed in the deed or appears by necessary implication from its contents. *Chase* v. *Alley*, 234.

JUDGMENTS.

1. In debt upon judgment of this court tried upon the issue of *nul tiel record*, the record must stand or fall of itself. Papers and documents filed, and not incorporated into the record, constitute no part of it. *Treat* v. *Maxwell*, 76.

2. If the record shows such judgment to have been rendered as described in the declaration, the issue is sustained by the plaintiff, and he may recover, notwithstanding the record fails to show jurisdictional facts, and is otherwise so defective as to be cause for writ of error; for this is a court of general jurisdiction according to the course of the common law, and is presumed to have had jurisdiction to award the judgment rendered by it. *Ib.*

3. *Sidensparker* v. *Sidensparker*, 52 Maine, 481, distinguished. *Ib.*

4. Where it appears by the account annexed to a writ in a trustee suit and made a part of the case submitted on report for decision of the law court, that necessaries were furnished the defendant exceeding the amount attached; *Held*, that a few articles in the account which are not necessaries do not establish an exemption from trustee process as to such articles as are necessaries. It is not a case where a lien is lost by mixing, in a judgment, lien and non-lien claims together. *Pullen* v. *Monk & Trs.*, 412.

5. The defendant had been previously divorced from his wife, the plaintiff's daughter. As bearing on the improbability that the plaintiff and defendant would contract for the former's support in his family, a question upon which the parties were at issue, the fact and date of the divorce is admissible in evidence; but otherwise of the allegations in the libel upon which the divorce was decreed,—they being too remote, and introducing collateral matters foreign to the issue. *Freeman* v. *Fogg*, 408.

6. The decision of the supreme court of the United States in the case, *Leisy* v. *Hardin*, on full consideration settles the question of the right of an importer of intoxicating liquors to import and sell the same in unbroken pack-

LACHES.

See PROMISSORY NOTES, 4.

LANDLORD AND TENANT.

1. A landlord, who at the solicitation of his tenant, gratuitously undertakes to repair the premises leased, but does it so unskilfully as to subsequently cause an injury thereby to the tenant, is liable therefor.

Gregor v. *Cady*, 131.

See LEASE, 2, 3.

LEASE.

1. Where the plaintiff contracted to carry on the defendant's farm, for one half of the crops, *Held*, that until a division of the crops, the plaintiff's rights are in contract; and, therefore, he cannot maintain trover for such half against the defendant. *Richards* v. *Wardwell*, 343.

2. Where a mortgagor in possession verbally leases the premises at a rent payable quarterly, and the mortgagee fifteen days before the expiration of a current quarter, duly enters and takes possession for condition broken, whereupon the tenant, on demand by the mortgagee, agrees to, and at the expiration of the current quarter does pay to him the rent for the whole quarter; *Held*, that the mortgagor cannot recover from the lessee for the two and one half months' use and occupation next preceding the mortgagee's entry and the lessee's attornment to him.

Anderson v. *Robbins*, 422.

3. One who by parol, purchases a lot of land and by consent of the seller takes and holds possession of it, making improvements, with no express agreement to pay rent, is not liable for rent while the contract of purchase remains executory between the parties. *Bishop* v. *Clark*, 532.

See MORTGAGE, (Real.) 5.

LEGACY.

See WILLS, 6, 7, 8.

LIBEL.

See INTOXICATING LIQUORS.

LIENS.

Where it appears by the account annexed to a writ in a trustee suit and made a part of the case submitted on report for decision of the law court, that

MARRIAGE SETTLEMENT.

See JOINTURE.

MARRIED WOMAN.

MASTER AND SERVANT.

See FELLOW-SERVANT.

MILLS.

See WATERS.

MINOR.

See PARTITION.

MORTGAGE, (CHATTEL.)

NEWLY-DISCOVERED EVIDENCE.

See NEW TRIAL.

NEW TRIAL.

NOTICE.

PLEADINGS.

POSSESSION.

PRACTICE, (EQUITY.)

PRACTICE, (LAW.)

PRESCRIPTION.

PRESUMPTIONS.

PRINCIPAL AND SURETY.

PROMISSORY NOTES.

RAILROADS.

REFERENCE.

Where a case was referred, under rule of court, and the report awarded the plaintiff less than twenty dollars and "legal costs of court to be taxed by the court," and the defendant claimed that quarter costs only should be taxed; *Held*, that by R. S., c. 82, § 120, in such cases it is provided "full costs may be allowed unless the report otherwise provides." In this case the report did not otherwise provide, and, therefore, the plaintiff was entitled to full costs. *Stevens* v. *Spear*, 184.

RELEASE.

When a surety is not notified of the forgery of his name to a renewal note for nearly three months after discovery of the forgery, and no demand on him is made for several days after that, an action against the surety on the original note will not be sustained, unless it clearly appears that the unreasonable delay will not prejudice his legal interest.

Sandy River Nat. Bank v. *Miller*, 137.

REMEDY.

1. The complainants recovered judgment against the defendants as trespassers in preventing the natural waters of a brook flowing through their lands, for a period before the defendants had proceeded to take the waters, under the authority given to them by the legislature. That did not prevent the defendants from acting under their charter afterwards; thus remitting the complainants to the statutory remedy provided for their future damages instead of the former remedy at common law.

Ingraham v. *Camden, &c. Water Co.*, 335.

REMOVAL OF CAUSES.

REPLEVIN.

RENT.

See LEASE.

SALE.

SHIPPING.

See INSURANCE, (MARINE).

STATUTE OF FRAUDS.

See MARRIED WOMAN, 1, 2.

STATUTES OF LIMITATIONS.

See LIMITATIONS.

STATUTES, (REVISION.)

Usually a revision of the statutes simply iterates the former declaration of legislative will. *Cummings* v. *Everett*, 260.

STATUTES, (REPEAL).

See CONSTITUTIONAL LAW, 1.

STATUTE OF WILLS.

1. The gift of a savings-bank book, *inter vivos*, to be valid must be completed by an actual delivery from the donor to the donee, or to some one for the donee. *Augusta Sav. Bank* v. *Fogg & Dearborn*, 538.

2. A gift, *inter vivos*, will not be sustained if the agent was not to deliver the property until after the death of the donor. Such a disposition would be inoperative under the statute of wills. *Ib.*

STATUTES CITED, EXPOUNDED, ETC.

ACTS OF CONGRESS.

ENGLISH STATUTES.

SPECIAL LAWS OF MAINE.

PUBLIC LAWS OF MAINE.

REVISED STATUTES.

STOCKHOLDER.

SUNDAY LAW.

SURETY.

See PRINCIPAL AND SURETY. See BOND, 1, 2.

SURVEYOR.

See SALES, 7.

TAXES.

TIME.

See PLEADINGS, 1, 5, 11.

TITLE.

TOWNS.

TRUSTS.

VENDOR AND PURCHASER.

See SALES.

VERDICT.

WARRANT.

See TOWNS, 5.

WARRANTY.

See PROMISSORY NOTES, 6.

WATERS.

machinery and appurtenances to be built on said privilege, said factory building to be ninety-eight feet in length and forty-eight feet in width with all necessary appurtenances and machinery for working the same up to its full capacity."

Held: That this language is to be construed as a measure of the quantity of water to which the plaintiffs are entitled, and not as a limit of the use of the water to carry only such machinery as might be in the main building. *Carleton Mills Co.* v. *Silver*, 215.

8. When from the terms of the grant it is doubtful whether the kind of mill or particular machinery mentioned indicates the quantity of water and measures the extent of power intended to be conveyed, or is referred to as a limit of the use to the particular kind of a mill or machinery, the former construction will be favored as more favorable to the grantee, more for the general interest of the public, and as being more probably the intention of the parties. *Ib.*

9. And if some of the machinery required in such a factory is located in an annex instead of being in the main building, and no more power is required to propel it than if it was situated in the main building, it would be within the terms of the plaintiff's deed. *Ib.*

10. *Held, also*, that the following requested instruction by the defendants was rightfully denied:—"the plaintiffs' deed does not give them a preference to operate their factory more than a reasonable time; and ten hours per day of week days through the year is a reasonable time." The deed contains no such restriction. *Ib.*

11. The complainants recovered judgment against the defendants as trespassers in preventing the natural waters of a brook flowing through their lands, for a period before the defendants had proceeded to take the waters, under the authority given to them by the legislature. That did not prevent the defendants from acting under their charter afterwards; thus remitting the complainants to the statutory remedy provided for their future damages instead of the former remedy at common law.
Ingraham v. *Camden, etc. Water Co.*, 335.

12. The defendants' charter authorizes them to "take, detain and use the water of Oyster River Pond, and, all streams tributory thereto in the town of Camden." This gives them the authority to detain the water in the pond, thus flowing the lands of proprietors on the ponds and streams above and lessening the natural flow below; all proprietors both above and below, having a statutory remedy specially provided for the damages sustained by them. *Ib.*

13. A taking by the defendants of so much water from Oyster River Pond as may be required by them, "not exceeding 750,000 gallons every 24 hours, and no more" is a sufficiently definite taking, and damages to proprietors below the pond are allowable upon the presumption that the defendants will consume that amount. This is what they are entitled to take. *Ib.*

See WAY, 9.

WATER COMPANIES.

See WATERS, 11, 12, 13.

WAY.

WITNESS.

See EVIDENCE.

WOOD.

See SURVEYOR.

WORDS AND PHRASES.

ERRATA.

Strike out the word *definite* in the seventh line of the head note in *Smith* v. *Bibber*, p. 34.

In 22d line from top p. 278, read *defendant*, instead of *plaintiff*.

In 5th line from top p. 589, read *gentle man* instead of *gentleman*.