REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By CHARLES HAMLIN,

REPORTER OF DECISIONS.

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VOLUME LXXXIII.

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WILLIAM W. ROBERTS.
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PRESS OF CHARLES E. NASH, AUGUSTA, MAINE.

JUSTICES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

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HON. OLIVER G. HALL,	KENNEBEC COUNTY.

ATTORNEY GENERAL.

HON. CHARLES E. LITTLEFIELD.

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

MARY G. WALKER, appellant from decree of Judge of Probate.
JOHN E. WALKER, appellant from same.
Knox. Opinion June 3, 1890.

Probate. Allowance to widow. R. S., c. 65, § 21.

The probate court, in making an allowance to a widow out of her husband's estate, may properly take into consideration the amount of private estate the widow is possessed of, not received from the property of her husband.

There is such a variety of circumstances to be considered in awarding allowances to widows, that no rule in any considerable degree general can be framed to govern them. All depends upon the exercise of a reasonable, judicial discretion.

The complicated circumstances of the present case reviewed in the opinion of the court.

ON REPORT.

These were two appeals from probate tried together. In the first, the petitioner appealed from a decree in that court granting her an allowance of two thousand dollars, from her deceased husband's estate. The appeal alleged that the allowance was not in accordance to the degree and estate of her husband, and the state of the family under her care, and, therefore, inadequate and much smaller in amount than it should be.

In the second case, the appellant, one of the heirs by a former marriage, alleged in his reasons of appeal that the sum allowed by the probate judge was excessive and unjust; that the situation of the widow, as regards her own private estate, not requiring any allowance to be made; that her degree and her husband's estate, and the condition of the family under her care, with what she had received as an advancement, were such that no allowance should have been made to her.

T. P. Pierce, for Mary G. Walker.

C. E. Littlefield, for John E. Walker.

Allowance is a matter of discretion and not of right. *Kersey* v. *Bailey*, 52 Maine, 198; *Gilman* v. *Gilman*, 53 *Id.* 192. Statute has been re-enacted in the revisions of 1871 and 1883, and is a legislative adoption of the construction placed upon it prior to the revision. *Tuxbury's Appeal*, 67 Maine, 267, and cases cited.

PETERS, C. J. The only question of law arising on the facts reported, and it is not really of much consequence in the present proceeding, is, whether the court in awarding an allowance to a widow out of her husband's estate, has a right to take into consideration the amount of private estate the widow is possessed of, not received from the property of her husband. We think it has. It would be unnatural to exclude such evidence, and difficult for a court to shut its eyes against it. The statute prescribes that an allowance is to be made "according to the degree and estate of her husband and the state of the family under her care." She is a part of the family and her own condition and necessities are to be considered. Certainly, her poverty may be proved, and why not the absence of poverty, or her wealth? Her poverty or her wealth would be an essential part of her condition. An extreme case may illustrate the rule. Suppose a widow has hundreds of thousands of dollars in her own right, and her husband has left but thousands merely, with dependent children not her children. It might amount to cruelty in such case, to decree as much allowance to the widow as would

be proper if she were poor and absolutely without any estate of her own.

And such we have supposed the practice to be. The cases in this state seem to indicate this view. *Gilman* v. *Gilman*, 53 Maine, 192; *Kelsey* v. *Bailey*, 52 Maine, 200. In *Hollenbeck* v. *Pixley*, 3 Gray, 521, 525, Chief Justice Shaw said, on this question: "It is a question solely of her actual necessities. . . . . The amount of the property left by the husband, and the amount of the separate property and means of the wife, are also important circumstances bearing on the question of necessities."

There is such a variety of circumstances to be taken into consideration in allowance cases, that no rule in any considerable degee general can be framed to govern them. All depends upon the exercise of a reasonable, judicial discretion.

In the case at bar the following facts appear. The widow is forty-one. She was married in 1882, her husband dying in 1889. He was many years older than she, having left two children by a former wife, son and daughter, thirty years and upwards old. He occupied, during the second marriage life a commanding position in his profession of medicine, held a good rank in society generally, and lived in a style comporting with his social position. She was accustomed before and during her married life to easy circumstances. She is now feeble, and possesses less than the average health of one of her age. The husband left in her possession their boy six years old. To his son by the first wife he furnished a complete collegiate and professional education, expending money generously to that end, and that son is now prosperously situated in business, occupying the professional field vacated by the father. The daughter is fortunately married and well situated in the world, and has received since her marriage some aid towards the support of herself and her child from her father.

On a careful examination of the evidence, the following computations are deducible: The husband left a dowable real estate worth four thousand seven hundred and fifty dollars; personal property worth seven thousand two hundred and fifty dollars; and rights and credits worth three thousand two hundred and fifty dollars. His debts may be estimated at three

thousand five hundred dollars. After an allowance is deducted she will have her distributive share of the personal estate, including rights and credits, one third thereof, and her child will inherit one third of the residue. It should not be overlooked, however, that, should her child die during minority, leaving any estate, it would descend to his brother and sister.

The widow's separate estate is in personal assets, just about ten thousand dollars, coming from the estate of her father, the late A. P. Gould of Thomaston. Her husband gave to her and her son, by manual delivery, in bonds one thousand eight hundred dollars, and a note for four hundred dollars, in all two thousand two hundred dollars, and the allowance we make is upon the supposition and condition that this gift is valid, and not to be disturbed by the representatives of the husband's estate.

Other questions have arisen affecting the husband's estate, but we are unable to give them much of a practical footing in the calculations made by us. The widow claims six hundred and fifty dollars for money alleged to have been received from her father and lent to her husband. Of this there appears to be no outside evidence, and she can not for herself be a witness. *Preble* v. *Preble*, 73 Maine, 362. She further claims that she put into her husband's hands, but whether as a loan or gift is left uncertain, another sum of one thousand dollars, received by her from her father, and of this she has some evidence, but upon the validity of this claim we make no intimation, either for or against it. On the other hand, the two oldest children allege a claim against the estate, of from eight hundred dollars to twice that sum, for money in the hands of their father, received from their mother's private estate, and belonging to them. They can not be witnesses for the same reason that the widow can not testify.

Under all these apparent uncertainties and complications, we can only approximately and somewhat arbitrarily fix any result. The judge of probate allowed two thousand dollars to the widow. We reduce that sum to one thousand five hundred dollars.

The decree to be accordingly.

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

ELIZA J. WOODROFFE *vs.* ELIZA A. JONES.

Cumberland. Opinion June 3, 1890.

Evidence. Contradicting negative statements.

The negative statement of a witness relative to the issue on trial, but having no probative force, can not be contradicted by showing his statement to the contrary out of court, neither to impeach his credibility, nor to prove the fact denied.

ON EXCEPTIONS.

The case is stated in the opinion. A verdict was rendered in favor of the defendant, and the plaintiff excepted to the rulings of the superior court, for Cumberland county, in admitting testimony offered by the defendant to contradict certain statements of the plaintiff's husband made on cross-examination.

Drummond and Drummond, for plaintiff.

Henry C. Peabody, for defendant.

HASKELL, J. Case for negligence in maintaining a defective walk, whereon plaintiff sprained her ankle. Defendant contended that plaintiff was negligent herself, in wearing a pair of high-heeled shoes that contributed to the accident.

On cross-examination, the plaintiff's husband, who, on direct-examination, had identified a pair of shoes produced as the shoes worn at the time of the accident, denied that he had spoken to his wife about the heels of her shoes; and denied that he told any one that he had done so; thereupon, defendant called a witness, who was allowed, against plaintiff's objection, to testify that just after the accident he heard the husband say "that he told his wife about wearing such high-heeled boots." The case comes up on exception to the admission of this testimony.

I. The testimony admitted is incompetent to prove, either that the plaintiff wore high-heeled shoes, or that her husband had cautioned her about wearing them, because it is hearsay;

and yet, although it does not tend to prove any material fact in the case, and may, therefore, be said to be immaterial, it is of that mischievous character, likely to be taken by the jury to prove both, and cannot be considered harmless. *Royal* v. *Chandler*, 81 Maine, 118.

II. Nor is the testimony admissible as contradicting the denial of the witness, and thereby tending to impeach his credibility; for the witness testified to a negative that had no probative force in the case; and his testimony, sought to be contradicted, was entirely irrelevant and immaterial; and, moreover, was brought out by the defendant's counsel. Professor Greenleaf says: "But, it is only in such matters as are relevant to the issue that the witness can be contradicted." 1 Gr. § 462.

Immaterial testimony and testimony collateral to the issue should not be confounded; for the former is not always collateral. In the case at bar, the questions bringing out the answers sought to be contradicted are relevant, and not concerning collateral matters; but the answers to them are immaterial, inasmuch as they tend to prove no fact having the slightest bearing upon the issue on trial, viz: the plaintiff's negligence in wearing high-heeled shoes. It was of no more consequence to prove that the witness had not spoken to his wife, the plaintiff, about wearing them, than it would have been to have proved that each of her hundred neighbors had not done so. The test is, does the evidence sought to be contradicted, tend to prove or disprove any issue on trial. Could the plaintiff, in this case, have proved her own care and prudence in wearing high-heeled shoes by showing that her husband had never told her that they were unsafe? If not, then the testimony of her husband denying that he had so told her, by whomsoever drawn out, was immaterial and worthless in the case, and, therefore, not to be contradicted by showing that the husband had stated the contrary out of court. Were it not so, as said by this court, "a party has only to procure some one to assert the facts essential to his case, out of court, in the presence of others, call him as a witness, and, when he refuses to confirm his assertions under oath, call those who heard him make them

to impeach his denial or want of recollection,—Q. E. D. the witness is fairly proved, by reputable witnesses, to have lied when he told the truth in court, and the ready inference is, that he told the truth out of court when, in fact, he lied." *State* v. *Reed*, 60 Maine, 555; *Coombs* v. *Winchester*, 39 N. H. 13; *Smith* v. *Royalton*, 53 Vt. 604; *Beardsley* v. *Wildman*, 41 Conn. 515; *Eames* v. *Whittaker*, 123 Mass. 342; *Shurtleff* v. *Parker*, 130 Mass. 293.

III. It is not the opinion of a majority of the justices, however, that the evidence admitted is incompetent to contradict the testimony-in-chief of the witness, that the shoes produced were those worn at the time of the accident; and for that reason the order is

Judgment on the verdict.

All concur.

ANGELINE GRANT and others, petitioners for partition,

vs.

WILLIAM MITCHELL and others.

Washington. Opinion June 4, 1890.

Illegitimacy. Adoption. Statute acknowledgment. Evidence. Presumption of legitimacy. R. S., c. 75, § 3.

Upon a petition for partition, two of the respondents claimed title not as legitimate children of the decedent, but as illegitimate, adopted and made his heirs, by virtue of R. S., c. 75, § 3. *Held*: that it must first appear that, in thus claiming, they were illegitimate. The statute operates only in cases of illegitimacy.

Nor can the subsequent marriage, adoption, or acknowledgment be taken as proof of the illegitimacy, as between the decedent's legitimate heirs and those claiming to be his illegitimate heirs.

The presumption of legitimacy of a child, born in wedlock, is so strong that it can not be overcome by proof of the wife's adultery, while cohabiting with her husband; much less by the mere admission of the adulterer.

The fact of illegitimacy is for the jury. It would be error to assume in the case of children born before the marriage of the mother with the decedent, that the statute acknowledgment is effectual to establish their claim as his heirs.

ON MOTION AND EXCEPTIONS.

This was a petition for partition, brought by five of the heirs

of William Mitchell late of Machiasport, deceased, against their co-heir William Mitchell, Jr., for the partition of the real estate of which their father died seized and possessed. In the petition it was alleged that the petitioners and the said respondent are each seized of one undivided sixth part of said real estate as heirs-at-law of said William Mitchell. Before trial, one Linnie A. Cooper, and one Corris E. Mitchell filed their joint petition for leave to appear and defend on the ground that they were heirs of said Mitchell, and as such entitled to participate in the partition of his real estate. Thereupon, by leave of court, they appeared and filed their several pleas alleging that they each were seized of one undivided eighth part of the premises described in the petition. This was denied by the petitioners. The original respondent, William Mitchell, Jr., did not appear and was defaulted. The verdict was that the said two respondents, together with the original parties, each were seized of one undivided eighth part of the premises described in the petition.

Besides a motion for a new trial, the petitioners excepted to certain portions of the charge to the jury which are found enclosed in brackets below, in the charge. The principal issue in the case was whether Linnie A. Cooper and Corris E. Mitchell, co-respondents, were legal heirs of William Mitchell.

The material portions of the charge to the jury are as follows: . . . "It is admitted that William Mitchell was seized in fee of the premises described in the petition. It is admitted that all the petitioners were his children and lawful heirs.

"It is admitted that one of the defendants, William Mitchell, was also his lawful heir.

"It is denied that the two respondents, Corris Mitchell and Linnie Cooper, were his lawful heirs, and therefore it is denied that they are entitled to share in the partition of this property.

"It is admitted that William Mitchell was divorced from his first wife, and that, by his second wife, Ellen, he had one child, William.

["It is admitted that both of the other respondents, Corris and

Linnie, were born out of lawful wedlock. That is, they were born before William Mitchell, Sr., married his second wife.]

"The statute of this State provides, so far as is material to this case, that:

" 'An illegitimate child is the heir of any person who acknowledges himself to be his father, in writing signed in the presence of, and attested by, a competent witness.'

"Now, gentlemen, two documents have been read here, the execution of which is admitted, and I instruct you that they both bear a sufficient acknowledgment on the part of William Mitchell to comply with the provision of the statute which I have just read."

The statute further provides:

" 'And if his parents intermarry and have other children before his death, or after his father so acknowledges him, or adopts him into his family, he shall inherit from his lineal and collateral kindred, as if legitimate; but not otherwise.'

["Now, gentlemen, from the admissions, and from the two documents which are admitted, and which I am of opinion are sufficient to acknowledge the paternity of these children, I instruct you that they are entitled to share in the partition of this land, 'if their parents intermarry and have other children before their death, or their father so acknowledges them or adopts them into his family.' So I do not suppose there is any controversy about the facts, and under these rulings of law you will answer these questions]:—

"Of what share, in the land described in their petition, is each of the petitioners seized? Of course, if they all have a share, they would be seized each of one eighth; if only six of them, they would be seized each of one sixth." . . .

The petitioner also excepted to the admission in evidence of the two documents referred to in the charge.

C. B. Donworth and A. MacNichol, for petitioners.

All the testimony and every presumption applicable to the facts proved point to the lawful birth of both respondents. The onus is on them to prove their illegitimacy. Whart. Ev. § 1298, and cases cited: *Hemmenway* v. *Towner*, 1 Allen, 209;

2 Stark. Ev. (Ed. 1826) 218; *Bury* v. *Phillpot*, 2 Myl. & K. 349; *Sullivan* v. *Kelly*, 3 Allen, 148. Counsel also cited: Whart. Ev. § § 608, 1299; Bishop Mar. & Divorce, § § 447, 448; *Phillips* v. *Allen*, 2 Allen, 453; Schoul. Dom. Rel. 306; Greenl. Ev. (Ed. 1842) § 28; *Haddock* v. *Boston & Maine R. R.* 3 Allen 300; *Bowles* v. *Bingham*, 2 Munf. 442; *Egbert* v. *Greenwalt*, 44 Mich. 245; *Goodright* v. *Moss*, Cowp. 591; *Northrop* v. *Hale*, 76 Maine, 313.

The written acknowledgments of William Mitchell are not admissible for the purpose of proving illegitimacy. Such instruments are creatures of the statute and must be limited in their effect to the purpose for which they were designed. Their object is just what their name implies and their sole office is to locate the paternity of illegitimate children. They possess no intrinsic evidence of illegitimacy and are wholly without evidential force until the spurious origin of the alleged illegitimate child is proved *aliunde*. Their admission for the purpose of establishing illegitimacy would be a gross violation of the strongest rules of evidence. They are not admissible as hearsay testimony. The declarations of an alleged father, as to the paternity of his illegitimate child, are inadmissible to show pedigree and ought to be rejected. Family declarations are admissible to show pedigree only when it appears by evidence *dehors* the declarations, that the declarant was lawfully related by blood or marriage. But the declaration must come from one lawfully related.

J. F. Lynch, for the two respondents, cited: 2 Whart. Ev. 1122; *Howe* v. *Howe*, 99 Mass. 88; *White* v. *Loring*, 24 Pick. 319; *Bosworth* v. *Sturtevant*, 2 Cush. 392; *Hodges* v. *Hodges*, 2 *Id.* 455; Wash. R. P. (4th Ed.) 497; *Winslow* v. *Kimball*, 25 Maine, 493: *Gaines* v. *New Orleans*, 6 Wall. 642; 1 Greenl. Ev. § 106; 3 Stark. Ev. pp. 1099, 1114.

DANFORTH, J. The only question at issue in this case is whether the two female respondents are the legal heirs of William Mitchell, deceased, under whom all the parties claim.

If so, the petitioners will be entitled to one eighth part each in the premises described in their petition, instead of the one sixth claimed.

These two respondents do not claim as the legitimate children of the decedent, but as illegitimate, adopted and made his heirs by virtue of the provisions found in R. S., c. 75, § 3. Whether their rights depend upon the statute cited, or the amendment found in chapter fourteen in the acts of 1887, or whether the heirship depends upon the subsequent marriage, or the written acknowledgment of the decedent, is immaterial as bearing upon the question now raised. In either case it must first appear that the child is illegitimate. The statute does not, nor does it purport to act upon any other. Nor does the subsequent marriage, adoption or acknowledgment have any tendency to prove this fact. Whatever may be the effect of the acknowledgment in showing the paternity of one proved to be illegitimate, it can not be taken, as proof of the illegitimacy.

This case presents a good illustration of these principles. If these two respondents were the children of the decedent, they were undoubtedly illegitimate. But the proof is very strong that one at least was born while the mother was in wedlock with another man, and under circumstances showing that the husband might have been the father. Hence the child was born in wedlock and the presumption of legitimacy is so strong that it can not be overcome by proof of the wife's adultery while cohabiting with her husband, much less by the mere admission of the adulterer. *Hemmenway* v. *Towner*, 1 Allen, 209, and cases cited.

Hence this fact of illegitimacy was for the jury upon the testimony in the case. But the court took it from them, assuming that the admitted fact that the children were born before the marriage of the mother with the decedent, was sufficient to make the written acknowledgment effectual in establishing their claims as heirs. This was error.

Exceptions sustained.

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

WILLIAM BLASTOW, appellant from decree of Judge of Probate,

vs.

JOHN J. HARDY, administrator *de bonis non* of PETER HARDY, Jr.

Hancock. Opinion June 4, 1890.

Probate. Appeal. Parties interested.

A grantee of real estate from the residuary legatee under a will, where there is no property of the testator which can be reached to satisfy the debts and claims against his estate, except such real estate, is interested in the settlement of the account of the executor or administrator of the estate, and has a right of appeal from the decree of the Judge of Probate allowing the account.

ON REPORT.

The following facts appeared: — Peter Hardy, Jr., died in 1859, testate, his will containing, after certain minor bequests, the following: —

"Sixthly.—I do direct that after the payment of my just debts and the expense of executing this, my last will and testament, and the payment of the foregoing legacies, that the remainder of all my estate, both real and personal, of every description, be given and bequeathed to my son, George W. Hardy, and he is to provide for my beloved wife, Joanna Hardy, a good and sufficient maintenance during her life, in such place as she may see fit, and to defray the expenses of her last sickness and burial, which support and expenses shall constitute a lien upon my estate." Said George W. Hardy was made executor by the will.

George W. Hardy died in 1871, and in April, 1872, his wife, Anjanette J. Hardy, was appointed administratrix of his estate.

In 1875, John J. Hardy was appointed administrator with the will annexed, of the said Peter Hardy, Jr's, estate. At the April probate term, 1876, said John J. Hardy resigned and petitioned for a discharge, representing that no estate, real or personal, came into his hands, and he was discharged. On November 22d, 1875, said Joanna Hardy, the widow of Peter,

released by quit-claim deed to Anjanette Hardy, (under the name of Anjanette J. Parsons, formerly Hardy) all her interest in the real estate left by said Peter Hardy, Jr., under the following description:

"All my right, title and interest in and to all the estate of which my late husband, Peter Hardy, Jr., died seized and possessed, meaning and intending hereby to release and quit-claim to the said Anjanette all the right and interest I have in and to said estate by, through or under the will of said Peter Hardy, Jr., or in any other way as widow, hereof releasing all claim upon said estate for support and maintenance, and discharge said estate from all liabilities therefor, and the lien upon said estate for my support and maintenance, created in the will of my said husband is hereof forever discharged."

Under the same date, there was another writing under the hand and seal of Joanna Hardy, running to said Anjanette J. Parsons, as follows: "In consideration of the sum of two hundred dollars, to me paid by Anjanette J. Parsons of Deer Isle, the receipt whereof I hereby acknowledge, I, Joanna Hardy of Deer Isle, hereby release and discharge the said Anjanette and the heirs of the late George W. Hardy, and the estate of Peter Hardy, Jr., my late husband, from all claim that I may in any way have upon her, or upon the said heirs, or upon said estate, for support and maintenance by the terms and conditions of my said husband's will, or in any other way, and from all claim for expenses incurred for my support and maintenance heretofore, for which the said Anjanette, or said heirs, or said estate may have been liable by, through, or under said will, or in any other way, and the lien upon said estate for my support and maintenance is hereby discharged, meaning and intending hereby to release and discharge said estate, and said Anjanette, and said heirs, from all and every liability whatever on my account." These instruments were both recorded at about their date. The said Anjanette, prior to the date of these two instruments, having become married, was appointed again administratrix *de bonis non* upon her first husband's estate, at the January term, of the probate court, 1880. Mrs. Parsons, as administratrix, was

granted a license to sell eight hundred dollars' worth of the real estate of George W. Hardy, and on October 9th, of the same year, she sold at private sale to William Blastow, certain real estate, which was Peter Hardy, Jr.'s estate, and devised to said George W. Hardy. In October, 1888, the said John J. Hardy, as administrator, with the will annexed, rendered an account against the estate of Peter Hardy, Jr., amounting to seven hundred and forty-two dollars and two cents, which was allowed by the decree of the probate court, from which decree the said William Blastow appealed. The account allowed, consists, among other items, for the support of said Joanna, by the said John J. Hardy, a portion of which support was rendered by him prior to the two instruments aforesaid given by her, and a portion afterwards. The appellee, at the entry of the appeal, filed a written motion that it be dismissed, and the case was reported to the full court to decide whether the said appellant is entitled to an appeal or not. It was admitted that said account, if allowed, can not be satisfied without recourse in full or in part to the land conveyed by the administratrix of George W. Hardy to this appellant.

If the court was of opinion that the appellant was not entitled to an appeal because the estate conveyed to him can not be taken towards payment of the account of the appellee if allowed; or that, for any other cause the appellant was not an interested party entitled to an appeal, the appeal was to be dismissed with costs to appellee; but if otherwise the appeal to stand.

E. P. Spofford, for appellant.

Counsel cited: R. S., c. 63, § 23; *Deering* v. *Adams*, 34 Maine, 44; *Veazie Bank* v. *Young*, 53 *Id.* 555; *Dexter* v. *Codman*, 148 Mass. 421; *Wiggin* v. *Swett*, 6 Met. 197; *Smith* v. *Bradstreet*, 16 Pick. 264; *Bryant* v. *Allen*, 6 N. H. 116; *Tillson* v. *Small*, 80 Maine, 90; *Bryant* v. *Erskine*, 55 Maine, 153; *Daniels* v. *Eisenlord*, 10 Mich. 454.

E. W. Whitehouse, for appellee.

Appellant not entitled to an appeal. *Smith* v. *Bradstreet*, 16

Pick. 264; *Wiggin* v. *Swett*, 6 Met. 197; *Veazie Bank* v. *Young*, 53 Maine, 555; *Bradley* v. *Davis*, 14 *Id.* 44; *Downing* v. *Porter*, 9 Mass. 385; *Swan* v. *Picquet*, 4 Pick. 443; *Penniman* v. *French*, 2 Mass. 139; *Tillson* v. *Small*, 80 Maine, 90; *Farwell* v. *Jacobs*, 4 Mass. 634; *Blake* v. *Dexter*, 12 Cush. 559.

LIBBEY, J. This is an appeal from the decree of the judge of probate for Hancock county, allowing the account of the appellee, as administrator with the will annexed, of the estate of Peter Hardy, Jr., deceased.

At the term when the appeal was entered, the appellee filed a motion to dismiss it, on the ground that the appellant had no legal right to appeal; and the case comes before this court for the determination of that question.

Peter Hardy, Jr., died in 1859, testate; and by his will, after certain minor legacies, he gave all the rest and residue of his estate to his son George W. Hardy, imposing upon him the obligation to maintain his wife, Joanna Hardy, during her life, creating a lien upon the estate devised him to secure that support. George W. Hardy died in 1871; and in April, 1872, Anjanette J. Hardy was appointed administratrix of his estate.

In January, 1880, said Anjanette, as administratrix, was granted a license to sell eight hundred dollars' worth of the real estate of said George W. Hardy, and in October of the same year she sold to the appellant, William Blastow, as the estate of her deceased husband, certain real estate which was devised by Peter Hardy, Jr. to said George W. Hardy. In October, 1888, said John J. Hardy, as administrator, with the will annexed, rendered an account against the estate of Peter Hardy, Jr., amounting to seven hundred and forty-two dollars and two cents, which was allowed by the decree of the probate court.

The largest portion of the account is for support alleged to have been furnished to said Joanna Hardy, with several items for counsel fees alleged to have been paid to several different lawyers for consultation. It is admitted that there is no property in the estate of Peter Hardy, Jr., except the land devised to George W. Hardy and conveyed to the appellant as above

stated; and if proceedings are had for the payment of the account, it must be for the sale of those lands under a license from the probate court.

We think the appellant stands in the position of George W. Hardy, and has a legal interest in the amount which should be allowed the appellee by the judge of probate, and therefore has the right to appeal. We can see no difference in principle between this case and *Paine* v. *Goodwin*, 56 Maine, 411, in which the law is carefully discussed and the right of appeal sustained.

We do not undertake to determine whether under the deed and release executed by Joanna Hardy to Anjanette Hardy on November 22, 1875, the land of the appellant can or can not be taken under a license for the payment of the account of John J. Hardy. That question will properly arise on a petition by him for license to sell it. No petition has been filed so far as the case finds, and therefore the question is not properly before the court. From the examination of the account that was allowed, it appears to us clear that it ought to be revised in this court, for it appears by said account that there are ten items for counsel fees paid to as many lawyers, amounting to nearly ninety dollars.

Appeal sustained. Case to stand for trial.

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

LUCY A. CORSON *pro ami*, *vs.* ELLSWORTH DUNLAP and others.

Somerset. Opinion June 13, 1890.

Bastardy. Bond. Damages. Scire Facias. R. S., c. 82, § 32.

The statutory rule, which requires, in actions on penal bonds, that judgment shall go for the penalty and execution issue for the damages sustained, when such bonds are given to secure the performance of covenants or agreements, is not restricted to cases where there is a written agreement separate from and independent of the bond itself; the agreement may be implied from the nature of the covenant in the bond; may be inferential only.

It applies to bonds where there may be several breaches at different times, *scire facias* being the proper remedy to obtain execution for damages accruing from subsequent breaches; but does not apply to cases where there can be but a single breach and a single assessment of, damages, though of harmless effect if so applied.

It applies to an action on the bond given by a respondent in bastardy proceedings, in which the order of court requires that payments be made by the principal in the bond to the complainant in installments, and there may be breaches after the first suit.

The rule of practice as indicated in *Philbrook* v. *Burgess*, 52 Maine, 271, so far as inconsistent with the rule of the present case, not to be followed in future cases.

ON EXCEPTIONS.

This was a suit on a bastardy bond. The writ is dated October 9, 1886.

Judgment was rendered for the plaintiff in the original suit at the September term, 1886, and a final decree entered, as follows: "The defendant is adjudged the father of the complainant's child, and is to stand charged with the maintenance thereof, with the assistance of the mother. The sum which he is charged with, for such support to the present time, is assessed at seventy-five dollars; and he is ordered to pay to the complainant one dollar a week towards such support in the future, to be paid at the end of each eight weeks; and he is ordered to give a bond to the complainant in the penal sum of five hundred dollars, with sureties to be approved by the court, conditioned for the performance of the foregoing decree; and he is to stand committed till this order is complied with."

At the March term, 1887, the suit was carried to the law court, for the Middle District, (see *Corson* v. *Dunlap*, 80 Maine, 354) and at the May session of this court judgment was given for the plaintiff for the penal sum of the bond; execution to issue for such damages as accrued under the order of court.

Said action was brought forward to the September term, 1888, when, with the understanding that either party should have the right to except to the ruling of the court, the presiding justice assessed the damages, as follows: "Heard in damages by the presiding justice; judgment for penalty of the bond; execution to issue for the amount assessed by the court in the original

action, including all sums due under the decree to last day of this term, with costs of that suit, . . . and interest on said sums, amounting to, . . . with costs of this action."

From this assessment, and the rule of assessment, the plaintiff excepted.

J. F. Holman, *Walton and Walton*, for plaintiff.

The assessment of damages as made by the court, after the rescript handed down from the May term of the law court, contemplates, without doubt, a further assessment under the order of the law court. That can not be done under the decision in *Brett* v. *Murphy*, 80 Maine, 358.

Merrill and Coffin, for defendant.

If plaintiff is aggrieved, it is by the order of the law court, and she should have petitioned for a rehearing. Assessment of damages is correct and furnishes no ground for exception. Accords with the general rules and practice relating to the measure of damages in suits on bonds. It is common practice to chancer bonds and issue execution for only the sum really due. 2 Sedg. Dam. 207; *Philbrook* v. *Burgess*, 52 Maine, 271. Bastardy bonds: *Jordan* v. *Lovejoy*, 20 Pick. 86. Assessment properly limited to last day of term. To include what might accrue after would be error, injustice and inequity. *Non constat*, whether the child would live after judgment entered; if it did not, no further damages could arise by breach of bond. In *Brett* v. *Murphy*, the real questions were: 1, Was the respondent surrendered by his sureties in season to discharge them from their bond. 2, Should the damage, in a suit on the bond, be reduced by the insolvency of the principal? There is a radical difference between the two classes of cases, *Philbrook* v. *Burgess*, and *Brett* v. *Carter*.

The former was an action on a bond for the support and maintenance of the obligee; damages must from the nature of the case be assessed once for all, so much depending on personal and sentimental considerations, &c. The case does not show, even assuming that damages should be assessed once for all, that the presiding justice did not regard the amount fixed by him as an "equivalent for full performance."

PETERS, C. J. The question is, whether, in an action on a penal bond given in bastardy proceedings, the judgment should be for the penalty, and damages be assessed so far as they have accrued at the time of the assessment, future damages to be recovered by after-process of *scire facias*, or whether judgment must be given, once for all, for all the damages that will ever be sustained, both past and prospective, where the liability of the principal in the bond is by the order of court a continuing liability.

We are of the opinion that the first named is the proper procedure. We are induced to give an explanation for such opinion, on account of some adverse expressions on the point, to be found in our own cases.

The decision of the question depends on the construction to be given to a section of our statutes, and upon the scope and effect of such section, in view of the equity powers anciently accorded to courts of law, in this branch of practice. The section referred to, R. S., c. 82, § 32, is as follows: "In actions on bond or contract in a penal sum, for the performance of covenants or agreements, . . . when the jury finds the condition broken, they shall estimate the plaintiff's damages, and judgment shall be entered for the penal sum, and execution shall issue for such damages and costs."

This provision applies to actions on bonds containing a penal clause, where there may be breaches of the bond at different times. The portion of the section which requires a judgment for the penalty does not apply to a bond conditioned to pay a single sum on a day certain, because in such case there can be but one breach and one assessment; and no necessity exists for retaining the penalty as a security for future breaches. But even in such case a judgment for the penalty would not be injurious to any party; and such (merely inaccurate) judgments are to be seen occasionally on our records.

Nor does the statute extend to certain statutory bonds, bail bonds, recognizances, bonds for good behavior, bonds to do or not to do some collateral act, and the like. These bonds, and some others, are not money or business bonds, and are not

conditioned for the security of covenants and agreements in the sense of the statute, and can be chancered by the court with much more propriety than by a jury.

In *Philbrook* v. *Burgess*, 52 Maine, 271, although the case was correctly decided, we think an erroneous opinion was expressed. That was an action of debt upon a bond which, by its terms, was to be void on condition that the defendant should maintain the plaintiff during her life. The jury were allowed to assess such damages as had accrued up to the date of the verdict, the defendant contending that damages should not have been assessed for any dereliction beyond the date of the writ. The defendant's exceptions were correctly overruled, but the court took occasion to say in the opinion that even more damages might have been legally assessed, and that all past and prospective damages should have been assessed; and that the bond did not come within the statute for the reason that the defendant was not a party to, and personally bound by, some agreement outside of and separate from the condition of the bond itself. The decisions do not sustain that position. Much reliance was placed in the opinion upon the reasoning of the court, in *Hathaway* v. *Crosby*, 17 Maine, 448. But in the latter case the argument of the court was merely to the effect that a poor debtor's bond was not a bond in any sense securing a covenant or agreement, and that the damages should be assessed by the court, instead of by the jury, for its forfeiture. That was undoubtedly a statutory bond which, at that day, belonged to a class of obligations not coming within the particular statute in question.

No heed was paid in *Miller* v. *Miller*, 64 Maine, 484, to the rule advocated in *Philbrook* v. *Burgess*, *ante*, and judgment was entered up for the penalty of a bond given by order of court for the support of certain parties, the support to be furnished by installments, although there was no covenant or agreement except the mere condition of the bond in common form.

The case of *Brett* v. *Murphy*, 80 Maine, 358, was an action on a bastardy bond, where judgment was entered for the past

and estimated future damages, and not for the penal sum. But no attention was bestowed upon the point further than following without challenge the form of procedure indicated in *Philbrook* v. *Burgess, ante.* And the case now before us is also reported in the same volume (*Corson* v. *Dunlap*, 80 Maine, 354,) where it was ordered that judgment be entered for the penal sum; the cases accidently standing opposed to each other.

The original legislation on this form of procedure, from which our own statute was in great measure copied, was Stat. 8 & 9 W. 3, c. 11, § 8, passed nearly two centuries ago. The act, a very long one, and in that respect within the fashion of its day, extends its provisions "in all actions upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements, in any indenture, deed, or writing contained." In Tidd's Practice, it is said, citing cases in approval of the statement, that this statute was made in favor of defendants, was intended to be highly remedial, and has received a very liberal construction. The author further says that where covenants or agreements are contained "in the condition of a bond," that is, implied by the condition, they are held to be within the statute just as much as where they are in a different instrument. This construction was strongly maintained by Lord Mansfield, in 1759, in *Collins* v. *Collins*, 2 Burr. 820. In that case the penalty of the bond was to be forfeited if the defendant did not support the plaintiff and pay him a small sum annually during his life. There was no covenant or agreement outside of the bond, and none in it except such as was inferable from a penal clause and condition in ordinary form. There was no personal promise. It was there objected that the statute of William did not apply, because the action was not brought upon a penalty for non-performance of an agreement or covenant contained in any indenture, deed, or writing. Lord Mansfield is reported as making this reply: "This (bond) is an agreement between the parties, and an agreement in writing; the condition of the bond is an agreement in writing; and people have frequently gone into courts of equity, upon conditions of bonds, as being agreements in writing, to have a specific performance of them."

The law has ever since stood as Lord Mansfield enunciated it. We do not find that the statute has been differently interpreted where the point has been directly presented for the decision of any court. Of course, there have been numerous cases where it has been controverted whether a particular bond involves the subject matter of an agreement or not, either expressly or by implication. But we think no modern case requires, in order to bring a bond within the statute, such as our own is, that the covenant or agreement shall be an express personal obligation of the maker. The text books, digests and law dictionaries seem uniformly to express the same view. In *Gainsford* v. *Griffith*, 1 Saund. 58, note, Mansfield's doctrine is accepted, and it is there said that the statute was meant to meet cases where covenants are to be performed at different times, or moneys to be paid by installments. The question pending in the present case, though on different facts, arose in *Marvin* v. *Bell*, 41 Vt. 607, and it is there held, in a clear and cogent discussion, that the condition in the bond, in its legal effect and operation, amounts to an agreement,— is its equivalent.

Mr. Bishop, in his work on Contracts, § 1458, aptly describes the English legislation, and its effect, in the following: "For shortening the processes of justice, in 1697, the English statute of 8 & 9, Will. 3, ch. 11, § 8, provided, that, on a recovery of judgment for a penal sum in any court of record, inquiry should be made by a jury as to the amount of damages suffered from breaches which had already transpired, on payment whereof the judgment should simply remain a security against further breaches. And on there being such, the actual damage should, on *scire facias*, be in like manner ascertained. Then, in 1705, it was enacted by 4 Anne, c. 16, § 13, that, in an action on a bond with a penalty for the payment of money, if the defendant shall bring into the court where the action shall be depending all the principal money, and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of said bond. The date of these statutes is subsequent to the

earliest settlements in this country; still, being highly remedial and beneficial, they were accepted as common law in Maryland and Pennsylvania; and, it is believed, in nearly all of our other States. And there has been more or less American legislation to the like effect." Massachusetts and Maine were governed by legislation of their own of similar effect. *Bailey* v. *Rogers*, 1 Maine, 186, 190.

But these acts had been preceded by the judicial thought. The courts had in great measure adopted devices to the same end before these acts were passed; and, although at first the practice was to invoke the aid of a chancery court for the purpose, courts of law had gradually taken the power to chancer bonds and relieve against penalties into their own hands. Though in ancient days judgment would go for the penalty of a bond, motions were resorted to, to restrain the collection of more money than a plaintiff was equitably entitled to. Many authorities illustrating the old practice are cited in Paine and Duer's Practice and in Tidd's Practice under the head of Judgment. Both before and after the statute of Anne, the practice was to allow the defendant, on his motion, to bring the whole amount of the penalty into court, and the proceedings were thereupon stayed. The plaintiff would receive only the amount of the principal, interest and costs; and, if this did not consume the amount of the penalty, the defendant was allowed to take out the remainder. It was denominated "an equitable motion to be relieved against the penalty." *Gregg's case*, 2 Salk. 596. And see cases cited, in note, in 3 Pars. Con. (6 ed.) * 157.

And in no class of cases was the privileged proceeding more invoked than in instances of bonds given to a parent or a parish against the burden of a bastard child. In *Wilde* v. *Clarkson*, 6 Term R. 303, which was an action brought on a bond given for indemnity against expense that might be suffered by reason of the then expected birth of a bastard child, Lord Kenyon, Ch. J., permitted the penalty to be paid into court, and, in the course of his opinion, remarked: "Suppose the plaintiff proceeds in this action, the judgment would be for the penalty of the bond, and one shilling nominal damages for the

detention of the debt. In actions on bonds or on any penal sums for performance of covenants, &c., the act of Parliament expressly says that there shall be judgment for the penalty; and that the judgment shall stand as a security for further breaches." The only agreement in that case was the bond itself.

In Massachusetts, where the statute is substantially like our own, the practice accords with our view on this question. *McGrath* v. *Conway*, 116 Mass. 360, and *Barnes* v. *Chase*, 128 Mass. 211, are cases where judgment was given for the penalty in bastardy bonds, and damages were assessed for so much as was due at the date of assessment under the order of court. See *Battey* v. *Holbrook*, 11 Gray, 212. In *Sevey* v. *Blacklin*, 2 Mass. 541, the court used this language: "When it shall appear in the court that the penalty is forfeited, then the equity powers of the court commence; and the judges are authorized to enter judgment for so much money as in equity and good conscience the plaintiff can claim, *unless the condition of the bond be such that further damages may arise to him by future breaches.* In such case judgment is rendered for the penalty, and execution is awarded for the damages already accrued; and the judgment is to stand as a security for future damages to be recovered by *scire facias*." There could not be, in our judgment, a better statement of the law than the above. The procedure ordained or approved by the statute should apply where it is fitting.

And such was the intention of the English act, and of our own act. Its meaning is greater than its words. The bond itself is a covenant or agreement in all cases where the procedure fittingly applies. The bond does in effect contain a covenant or agreement though there be no remedy except by a suit on the bond, — it implies an agreement, — assumes one. It is the nature of the condition which decides whether the statute attaches to the bond or not. Some judge has said a promise may be considered as implied from the joint effect of condition and penalty. We are to look at the nature and reason of the thing. What difference of procedure should there be, in an action on the bond, whether it be conditioned to secure a written promise

or only an oral promise, as long as the penalty assures that the promise will be kept? The penalty is the effectual security, not the promise. What difference should it make, in assessing damages under a bond, whether the defendant is also liable for the same cause in some other form of action or not? What difference should there be, in assessing damages in a conditional judgment on mortgage, whether the mortgage secures written promises or merely certain sums named in the conditional clause? What difference can there be whether a penal bond be given to secure a judgment of court based on a promise or a judgment based on a tort? The judgment is as definite in the one case as the other. The statute was intended to have a wide and beneficent and not narrow operation.

The rule we act upon is not only the true exposition of the statute, but is equitable and just for all cases, and especially beneficial to both parties in the present case. If the plaintiff have a full allowance at once, there are chances that it would be improvidently expended. If the assessment of prospective damages be made in advance of the needs of the plaintiff, the defendant may be required to pay a much larger sum than may turn out to be necessary. Payment of damages as often as damages accrue, is in accordance with the original order of court, with the policy of the law, and adapted to the situation of the parties.

We regard this a suitable opportunity for changing the rule of practice followed in this State since the case of *Philbrook* v. *Burgess*, *ante*, so far as it is inconsistent with the present decision, inasmuch as no principle touching the title to property is effected by the change, and the ruling made below is not overruled thereby. After the present case has been published that case will not govern us as an authority on the point involved in this discussion.

Exceptions overruled.

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

SUSAN S. CONANT, appellant from decision of County Commissioners.

Cumberland. Opinion June 21, 1890.

Way. Damages. Right of appeal, R. S., c. 18, § 11.

A land owner, whose real estate is damaged by the action of county commissioners in locating and defining the limits and boundaries of a highway under R. S., c. 18, § 11, can appeal to the supreme judicial court from the county commissioners' award of damages.

ON EXCEPTIONS.

The hearing in this case was on a motion, at *nisi prius*, to dismiss an appeal from the decision of the county commissioners for Cumberland county.

It appeared that in pursuance of a petition of the municipal officers of Westbrook, the county commissioners proceeded to make and establish the existing boundaries of an existing highway, in that town, called the Stroudwater road. They awarded the appellant no damages. She claimed that she was aggrieved by this decision and had the right to appeal. Counsel for the county denied her right to appeal, and moved that the appeal be dismissed.

The presiding justice overruled the motion and the county excepted to the ruling.

The appeal, filed in this court, after stating the proceedings taken by the municipal officers and county commissioners, alleges that, "said Stroudwater road has been used within substantially the same boundaries and limits for a long time, to wit, for fifty years; and the land of your complainant adjacent thereto was enclosed with a sufficient and substantial fence; and that said commissioners have included within their boundaries, established as aforesaid, a large quantity of your complainant's land situated between the line of said road as heretofore used and fenced and the limits defined in their said return, to wit, two acres of land.

"That the land so taken and included is of great value, and

that by such taking she will wholly lose the use thereof, and will be put to great expense to build and maintain new fences thereon, and, that by such taking, her remaining land is greatly reduced in value. All which is to the damage of your complainant," &c.

The motion to dismiss alleged, "1, That this court has no jurisdiction of said appeal upon the facts recited in the complaint filed by the appellant in this cause. . . . 3, That the decision of the county commissioners upon the question of damages caused to real estate adjoining highways by the action of said county commissioners in locating and defining the limits and boundaries of such highways, is final and not subject to an appeal to this court."

Coombs and Neal, for respondents.

The appellant is not deprived of any lawful use or possession, but is simply ejected from the public way upon which she has trespassed. It is presumed that the land owner at the original taking received compensation for all damages, present and prospective, and has no ground of complaint on account of the present action, defining the limits and boundaries of the same way. The statute provides a remedy where none before existed; no rights of abutters are affected by the proceedings. The remedy provided is the only one open; gives no right of appeal, and none will be implied.

Damages, if any, nominal. *Stetson* v. *Bangor*, 60 Maine, 313; *Bartlett* v. *Bangor*, 67 *Id.* 460; *Stetson* v. *Bangor*, 73 *Id.* 357. Abutters can suffer no damage in simply locating and defining the limits and boundaries, of an existing and duly located highway, in accordance with the original location. The allegations in regard to the fences are surplusage. If they had existed for more than forty years, the fact should have been presented at the hearing and claim made under R. S., c. 18, § 95. It is to be presumed that the fact was otherwise determined, or attention not called to it. This proceeding is not an extension over additional territory. No change of boundaries is contemplated by it. It is not to be presumed that the

commissioners proceeded to alter and widen the way under a proceeding to locate original boundaries of a highway.

F. M. Ray, for appellant.

Land has been actually taken and included within the new location. Compensation is sought for direct and not indirect injury. Statute, construed in connection with other portions of same chapter, gives the right of appeal. It may exist although not given in express terms. *Cole* v. *Co. Com.* 78 Maine, 532; *Wells* v. *Co. Com.* 79 *Id.* 522. When the true boundaries are lost, &c., the statute gives commissioners authority to proceed to hear the parties, &c., and if land is taken, they must follow the requirements of existing laws in reference to the laying out of ways. Such construction is required to keep it within the provisions of the constitution, both state and national. *Howe* v. *Cambridge*, 114 Mass. pp. 390-391. The commissioners' return shows a new location four rods wide; does not show the width of the original road, or that they conformed to the original boundaries. Fences named in complaint, by statute, must be presumed to have been the true boundaries, &c. Going inside such fences, they took land of private owners for public uses, for which damages should have been awarded. Amount of damages awarded is not involved in the right of appeal. Counsel also cited: *Holbrook* v. *Holbrook*, 1 Pick. p. 254; *Mendon* v. *County of Worcester*, 10 Pick. 234.

EMERY, J. By R. S., c. 18, § 11, (the chapter on ways) when the true boundaries of a duly located highway become uncertain, &c., the county commissioners, upon petition of the municipal officers of the town, and upon specified notice, are to hear the matter, and to locate and define the limits and boundaries of the highway within the town, and erect durable monuments; and if any real estate is damaged by such action, they "shall award damages to the owner as in laying out new highways." The statute says nothing more about an appeal in such cases.

The appellant does not question the regularity of the proceedings in this case,—that they were according to the statute.

She claims, however, that her real estate was damaged by this action of the county commissioners, and that they did not award her sufficient damages therefor. Upon this question of damages only, she claims an appeal to this court, being content to abide the action of the commissioners in other respects. The county objects to the appeal being entertained, placing its objection on the ground that the statute does not provide for an appeal.

The question presented is, whether the legislature by the language of this statute, intended that the owner of land injured by such proceedings should abide by the judgment of the county commissioners, as to the amount of his injury, without right of appeal. We do not think it did.

The legislature expressly declared, that if any real estate was damaged by such action of the commissioners, damages should be awarded to the owner. Assuming the injury such as would entitle the sufferer to compensation under the legal principles governing such cases, the legislature declared that compensation should be made in these cases, as well as in those where a new way was located. It would be unreasonable to assume, in the absence of express words, that the legislature intended to deprive the land owner of the usual facilities for obtaining full and just compensation.

Whether the public exigency requires the damage to be done for the public good, is often left to be determined by a special, limited tribunal without appeal. *Banks, app'lt*, 29 Maine, 288; *Freeman* v. *Co. Com'rs*, 74 Maine, 326. As just compensation is to be paid him for the injury, it can not matter much to the citizen what tribunal shall finally adjudicate upon the necessity of the damage. But it does matter greatly to the citizen, what tribunal shall finally conclude him upon the amount of his compensation. The Bill of Rights declares that in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it had theretofore been otherwise practised. This right should be recognized in all such controversies between the citizen and the government. The spirit of legislation upon the subject has always been in harmony with this principle, and, whatever the omission of

words in this statute, we should be slow to infer any intention to violate the principle.

Our conclusion is, that in providing for an award of damages "as in laying out new highways," the legislature intended that the citizen should have the same right of appeal, as in cases of laying out new highways; and hence that this appeal should be entertained. The refusal to dismiss was correct.

Whether the damage is such as entitles the appellant to any compensation, is of course another question.

Exceptions overruled.

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

HARLAN P. SYLVESTER *vs.* SARAH V. SYLVESTER.

Hancock. Opinion September 2, 1890.

Real Action. Right of Entry. Life Estate and Remainder-man. R. S., c, 104, § 5.

One entitled to an estate in remainder only, subject to an existing life estate in another, can not maintain a writ of entry against one rightfully in possession under the life estate.

To sustain such an action the plaintiff must not only prove that he has such an estate in the demanded premises as he claims, but he must also prove that at the time of suing out his writ he had a right of entry into the demanded premises. R. S., c. 104, § 5.

ON REPORT.

This was a real action to determine the rights of parties under the following provision in the will of Joseph W. Sylvester, deceased.

"1st. I give and bequeath to my beloved wife, Martha A. Sylvester, all of my real estate with all the appurtenances belonging thereto, to have and to hold during life or as long as she remains my widow. She is not to sell or dispose of the land or buildings unless in case of the death of all my children or extreme need." By the same provision he disposed of the remainder to such of the children as should be living at the time.

The widow, December 12, 1868, by quit-claim conveyed the premises claimed in this suit to Joseph H. Sylvester, her son,

who by his deed of December 22, 1873, conveyed them to the defendant, Sarah V. Sylvester. The defendant, also, claimed title by a deed from George M. Warren, to her, dated September 1, 1883, he having title by virtue of a levy and sale on execution issued upon a judgment against said Martha. The plaintiff claimed title by a deed from Martha A. Sylvester, to him, dated March 18, 1885. This deed of the said Martha purports, in express terms, to be given for the purpose of fully and completely executing the power vested in her, by said will, to sell and dispose of the land.

There were four children, all of whom are still living, and the widow remains unmarried.

By the agreement of counsel the court was requested to determine the respective estates of the parties to the property in question, in addition to the decision of the case, &c.

The view taken by the court and its disposition of the action renders a further report of facts, touching the rights of the parties under the last named deed, unnecessary.

C. E. Littlefield, for plaintiff.

Martha A. Sylvester, took a life estate under the will with power to sell expressly confined to the fact of her being in "extreme need." *Hall* v. *Preble*, 68 Maine, 100; *Warren* v. *Webb*, *Id.* 133; *Paine* v. *Barnes*, 100 Mass. 470; *Hoyt* v. *Jacques*, 129 *Id.* 286. Questions of fact to be determined are: first, was said Martha in a condition of "extreme need," December 12, 1868, and if not; second was she in such condition March 18, 1885. The first deed, an ordinary quit-claim, indicates no intention by the parties to execute the power conferred upon the grantor by the will. It conveyed only a life estate, and is not a sufficient execution of the power, &c. *Dunning* v. *Vanduzen*, 47 Ind. 423, (S. C. 17, At. Rep. 709;) *Brown* v. *Phillips*, 18 At. Rep. (R. I. 1889). It contains no reference to the will by which the power is given. The facts show that the grantor was not then in such a condition of "extreme need" as to justify or authorize a conveyance of the fee. If the deed were adequate in form for that purpose, it

could not have such effect unless the intention was mutual. Grantor not the sole judge of the question of necessity for a sale. *Stevens* v. *Winship*, 1 Pick. 325-6-7; *Larned* v. *Bridge*, 17 *Id.* 342, approved in *Warren* v. *Webb*, 68 Maine, p. 136. Whether a power has been executed is wholly a question of intention to be gathered from all the facts and circumstances. *Sewall* v. *Wilmer*, 132 Mass. 131.

A. P. Wiswell, for defendant.

The action can not be commenced until plaintiff's right of entry has accrued, and he must also have the exclusive right of possession. Chit. Pl., title, Ejectment. R. S., c. 104, § 5. The quit-claim of December 12, 1868, given seventeen years before the deed to plaintiff, under our statutes conveyed all the grantor's interest, (R. S., c. 75, § 5,) and a sufficient execution of her power under the will. *Hall* v. *Preble*, 68 Maine, 100. She is the sole judge of the question whether the necessity of disposal had arrived or not. *Richardson* v. *Richardson*, 80 Maine, p. 591; *Ramsdell* v. *Ramsdell*, 21 *Id.* 288; *Shaw* v. *Hussey*, 41 *Id.* 495; *Warren* v. *Webb*, 68 *Id.* 133; *Hale* v. *Marsh*, 100 Mass. 468. The remedy of remainder-men, in case there was fraud, is in equity. *Copeland* v. *Barron*, 72 Maine, p. 211; *Richardson* v. *Richardson*, *supra*. She was in a condition of "extreme need" in 1868. This question to be determined by what she then thought, said and did; not by what she now says, &c. We, also, have title under a sale upon judgment of October 20, 1882. Deed of March 18, 1885, to plaintiff is invalid; it was made not for her support, &c., but for the purpose of attemping to defraud the defendant.

WALTON, J. This action is not maintainable. One entitled to an estate in remainder only, subject to an existing life estate in another, can not maintain a writ of entry against one rightfully in possession under the life estate. To sustain such an action the plaintiff must not only prove that he has such an estate in the demanded premises as he claims, but he must also prove that at the time of suing out his writ, he had a right of

entry into the demanded premises. R. S., c. 104, § 5. This he can not have while another is rightfully in possession under an unexpired life estate.

The evidence in this case shows that Martha A. Sylvester, (who is still living) by virtue of her husband's will, had a life estate in the demanded premises. And it is claimed that the will also gave her power to sell the remainder in case of extreme need. But the view we take of the case renders this latter proposition immaterial; for whether she had a power to sell the remainder or not, she was undoubtedly possessed of a life estate which she could sell at her own will and pleasure. And the evidence shows that in 1868, she executed a quit-claim deed of all her right, title, and interest in the demanded premises to her son, Joseph H. Sylvester, and that he subsequently conveyed the same to his wife, who is the defendant in this suit.

The evidence tends to show that the conveyance by Martha, was made to protect the property from attachment; but this is immaterial; for the plaintiff is not an attaching creditor, nor does he claim through an attaching creditor. As against this plaintiff, the effect of the conveyance by Martha to her son Joseph, and by the latter to his wife (the defendant,) was to vest in the latter the life interest of Martha, and entitle her to the possession of the demanded premises so long as Martha should live. And if it be true, as the plaintiff claims, that he is entitled to the remainder, his right of entry will not accrue till the life estate expires; and till then, a writ of entry by him can not be maintained to obtain possession of the premises. This view of the case renders it unnecessary to determine who will have the better title and be entitled to the possession of the demanded premises when the life estate expires; and upon that question we express no opinion.

Plaintiff nonsuit.

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

ALEXANDER D. CAMPBELL *vs.* JOHN H. EVELETH.

Penobscot. Opinion September 3, 1890.

Negligence. Moster and Servant. Personal Injuries. Defective Machinery. Questions for the jury.

An inexperienced servant does not assume the risk of perils which he knows not of, and which are not called to his attention; but of such only as he knows, or by the exercise of ordinary care ought to know.

When the negligence of neither party can be conclusively established by a state of facts from which different inferences may be fairly drawn, or upon which fair-minded men may reasonably arrive at different conclusions, the case, under proper instructions, should be submitted to the jury.

A majority of the court are of the opinion that the case falls within this principle. WALTON and EMERY, JJ., dissenting.

ON REPORT.

The parties agreed, that if the action can be maintained on the plaintiff's evidence, it should stand for trial; otherwise judgment to be entered for the defendant.

The action was to recover damages for the loss of the plaintiff's right hand while at work in the defendant's saw mill operating a lath machine, which he alleged was defectively constructed, and in the use of which he had not been properly instructed, &c.

The declaration is as follows:—

Amended count, charging negligence, inexperience of plaintiff and defendant's omission to give him proper instructions, &c.

Also, in a plea of the case, for that the said defendant, on the ninth day of April, 1888, was the owner, possessor and operator of a certain saw-mill and fixtures, situate in the town of Shirley, in the county of Piscataquis, then and there used by him for the manufacture of laths and other lumber, which said mill and fixtures, and saws, machines, machinery, tools and appliances placed therein, he was then and there bound to have and maintain in a safe, suitable and well-constructed condition for the safety of his employes therein employed; but the said defendant neglecting his duty in this behalf, did not then and there have and maintain said mill and fixtures, saws, machines, machinery,

tools and appliances in a safe, suitable and well constructed condition, for the safety of his employes therein employed; but on the contrary, said defendant did then and there have and maintain in said mill, a lath machine, composed of a circular saw, gearing, saw bench, and sluice or passageway, to carry off the sawdust, and other refuse from said saw and mill, which said lath machine was, then and there through the carelessness and negligence of the said defendant, defectively constructed and maintained in this, that there were no sufficient guards to said saw to protect the person operating the same with due and reasonable care from coming in contact with it while in motion, and that said sluice or passageway was so narrow, crooked, angular and otherwise improperly and defectively constructed and maintained as to cause the sawdust, and other refuse from said saw to clog in the mouth and other parts of said passageway, necessitating its frequent clearing out by the lath sawyer, which said clearing out could only be effectively and expeditiously done by a short stick or other implement in the hand of the lath sawyer, necessarily in close proximity to said saw in rapid motion.

"And the said plaintiff was then and there employed by said defendant at sawing laths with said lath machine. And the said plaintiff was then and there in the employ of said defendant, operating said lath machine, he the said plaintiff, being inexperienced in such work, and ignorant of the said dangerous and defective condition of said saw and sluice or passageway, of which said plaintiff's inexperience and ignorance the said defendant was fully aware; yet the said defendant then and there neglected to inform the said plaintiff of said dangerous and defective condition of said lath machine, sluice or passageway, and of the danger of working at said unguarded saw in motion, and said defendant also then and there neglected to inform the said plaintiff of the danger of clearing out said sluice or passageway when the same should become clogged by reason of the defective condition aforesaid of the same.

"And while the said plaintiff was so engaged in operating said lath machine, viz: in removing with due and reasonable

care on his part, by means of a short stick held in his right hand, the sawdust and other refuse that had clogged in the mouth of said sluice or passageway by reason of its said defective construction and condition, his said right hand was then and there drawn on to said unguarded saw, and so badly cut and mangled that it had to be amputated at the wrist, which caused the said plaintiff great and long continued mental and physical suffering, and put him to great expense for nursing, medicine, medical and surgical attendance, and permanently disabled him.

"Which said injury to said plaintiff was caused by reason of said defective condition of said lath machine, sluice or passageway and said plaintiff's said ignorance of the same and his said inexperience, and the said neglect of the said defendant, having knowledge of the said ignorance and inexperience of said plaintiff, to acquaint said plaintiff with said defective condition of said lath machine and said sluice or passageway, and of the danger of working at said unguarded saw, and of the danger of clearing out said passageway or sluice when the same should become clogged as aforesaid."

Peregrine White, *M. Laughlin*, with him, for plaintiff.

To justify the court in taking the case from the jury, it must be "perfectly clear" that the plaintiff has not shown that he used due care; otherwise the case must be submitted to the jury. *Hackett* v. *Middlesex Manf. Co.* 101 Mass. 104. "It must be evidence having some legal weight. A mere *scintilla* of evidence is not sufficient." Per FOSTER, J., in *Wormell* v. *Maine Cent. R. R. Co.* 79 Maine, 397; *O'Connor* v. *Adams*, 120 Mass. 431; *Coombs* v. *New Bedford Cordage Co.* 102 *Id.* 600. Duty to instruct plaintiff: *Sullivan* v. *India Mfg. Co.* 113 Mass. 399. Cannot escape by delegating this duty to a servant. Whar. Neg. § 859. Plaintiff inexperienced and could not appreciate the danger. Nothing said to him about the necessity and difficulty of clearing out the shute or sawdust spout, or danger attending the doing it. Defendant's machinery defective; dangerous in construction, saw was improperly exposed and sawdust shute improperly made.

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

Defendant having introduced no evidence, the question, the facts being undisputed, is one of law, for the Court. *Grows* v. *M. C. R. R. Co.* 67 Maine, 100; *Burns* v. *B. & L. R. R.* 101 Mass. 50. There was no danger known by the defendant that was not equally well known by the plaintiff. *Wheeler* v. *Wason Mfg. Co.* 135 Mass. 294. Plaintiff must show an omission to inform him of something which he needed to know in order to be safe. *Ciriack* v. *Merchants' Woolen Co.* 146 Mass. 190.

VIRGIN, J. The gravamen of the plaintiff's complaint in his amended count is that he lost his hand while running the defendant's lath machine, on account of his inexperience and the defendant's omission to give him such information and instruction as were reasonably necessary and sufficient to enable him to appreciate the perils to which he would be exposed by using the faulty machinery in the course of his employment, and, with reasonable care on his part, to safely perform his work.

The plaintiff engaged to perform carpenter work upon the defendant's boarding house, already erected but unfinished, to commence as soon as the weather would permit. He had never run a circular saw or other machinery, but had tailed at a rotary three days. Being short of hands in his mill, the defendant, while waiting for the weather to moderate so that work could be resumed upon his boarding house, requested the plaintiff to work his lath machine which required two persons. After being shown for fifteen to thirty minutes how to work it, the plaintiff, on March 27, was put in charge of his new employment with another employe to do the tailing.

From two to six times a day, the sawdust, accumulating at the bottom of the spout in the edge of the water under the mill or sticking in the angle of the spout a short distance below the floor, filled it up; when it became necessary to clean it out by one going down and removing the obstructing accumulation at the lower end and the other pushing the sawdust down the spout with a stick.

While being instructed in sawing, the spout did not happen to become clogged, and the plaintiff received no instruction as to the mode of clearing it.

During the first day or two, whenever the spout became choked, he stopped the saw and removed the sawdust in the manner described, which required some fifteen minutes.

On April 9, after having prosecuted his work ten or eleven days without stopping the saw and while pushing the sawdust down the spout with a stick some two feet in length, his hand which held the stick came in contact with the lower edge of the revolving saw under the saw-bench which was about twenty-two inches above the mouth of the spout in the floor, and was so severely lacerated as to necessitate amputation at the wrist.

This is not the case of an experienced workman set to operating machinery dangerous and demanding care which, nevertheless, he fully understands and voluntarily assumes the risk incident thereto. The usual danger of contact with such a dangerous implement as a circular saw in rapid motion is obvious to the eyes of all who have reached the years of discretion, when it is in plain sight. But the plaintiff's injury was not caused by the revolving saw above the bench, but by the two or three inches of it which protruded through and underneath it and which was less than two feet from the floor and so hidden from view by the length of the bench and the upper horizontal strip three or four inches wide which secured in place the legs of the bench, as not to be visible to the workman's eyes unless they were within eighteen or nineteen inches of the floor.

The inexperienced servant does not assume the risk of perils which he knows not of, and which are not called to his attention; but of such only as he knows, or by the exercise of ordinary care, ought to know. *Hull* v. *Hall*, 78 Maine, 114.

We cannot decide, as matter of law, that the machinery under that saw-bench which the plaintiff was obliged to use in the course of his employment, was in such a condition that a jury would not be authorized to find it unsafe and improper for a new beginner to be put to work upon without proper notice and reasonable instructions relating thereto.

Nor can we say, as matter of law, that a jury would not be warranted by the evidence in finding that contributory negligence was not imputable to the plaintiff. It would be absurd to suppose that the plaintiff recklessly destroyed his right hand. There is

evidence that would warrant the finding that, if the spout had been constructed in accordance with the suggestion of the witness who had built forty mills besides this one,—though he did not complete this; or if the machine had been boarded up as he suggested; or if instead of either, a guard had extended down from the under side of the bench on each side of the saw,— then this injury could not have happened. Nor in all probability would it have occurred, if the defendant had not omitted to inform the plaintiff of that which he needed to know in order to be safe (*Sullivan* v. *India Manf. Co.* 113 Mass. 396) and had notified him of the danger to be incurred so frequently each day, in undertaking to aid a defective spout in carrying away the sawdust which it would do without assistance if properly constructed.

The mere fact that the plaintiff shut down the saw the first two or three times does not conclusively prove that he appreciated the peril of not doing so. Numerous explanations suggest themselves when taken in connection with the time required to stop, and set in motion again the saw. And even if he did know the danger, such knowledge would not, as a matter of law, impute contributory negligence to him such as would forbid the finding to the contrary; for it would be mere evidence of such negligence to be considered along with the other facts and circumstances in the case. *Kane* v. *Northern Centr. R. R. Co.* 128 U. S. 91. *Guthrie* v. *Me. Centr. R. R. Co*, 81 Maine, 572.

Moreover, without expressing our own opinion as to what the verdict should be, the fact that fair-minded men,— as seen by the want of unanimity on the part of this court,— might reasonably reach different conclusions upon the issues whether the injury was caused by the contributory negligence of the plaintiff, or by the negligent omission of the defendant to inform and reasonably instruct the plaintiff as to the peril to which he might be exposed in attempting to clear the defective spout without stopping the saw; we think that it was a question which under proper instructions should be submitted to the jury. *Nugent* v. *B. C. & M. R. R. Co.* 80 Maine, 70.

Case to stand for trial.

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

Dissenting opinion by

EMERY, J. Mr. Justice WALTON and myself are unable to concur in the opinion prepared by Mr. Justice VIRGIN, as it seems to us to conflict with legal principles well established by repeated decisions of this Court. The importance of these principles to the industries of this State impels us to express our dissent.

We think the plaintiff's evidence clearly discloses two insuperable bars to the prosecution of his suit.

1. His own inattention, or want of ordinary care,— his neglect to take proper and available precautions against the danger,— contributed in causing the injury. *Buzzell* v. *Laconia Co.* 48 Maine, 113; *Shanny* v. *Androscoggin Mills*, 66 Maine, 420; *State* v. *Maine Central R. R. Co.* 76 Maine, 357; *Lesan* v. *Same*, 77 Maine, 85; *Wormell* v. *Same*, 79 Maine, 397; *State* v. *Same*, 81 Maine, 84.

2. The danger of injury was known to him, or would have been known to him, had he made proper use of the senses, intelligence and understanding he possessed. In either case the risk fell upon him. He had the choice whether or not to encounter the danger. *Beaulieu* v. *Portland Co.* 48 Maine, 291; *Osborne* v. *Knox & Lincoln R. R. Co.* 68 Maine, 49; *Coolbroth* v. *M. C. R. R. Co.* 77 Maine, 165; *Wormell* v. *Same*, 79 Maine, 397; *Judkins* v. *Same*, 80 Maine, 417.

Conceding, as stated in the majority opinion, that the defendant might have constructed his lath machine and its appurtenances so that the sawdust would not clog and pile up,— and might have so enclosed the saw that an employe could not come in contact with its under edge; yet under our law, as declared in the cases above cited, the owner or manager of a business plant affording employment to labor, properly if not necessarily, enjoys some liberty of judgment in constructing his mill, machinery and appliances, and in managing his business. He must not construct nor leave any pitfalls or mantraps. He must not make nor tolerate a semblance of security where there is really danger. Still he is not required to anticipate or provide against the heedlessness of others. No one can successfully do that, for no one can foresee what the heedless may do.

As was said in *Wormell* v. *Maine Cent. R. R. Co.*, *supra*, the employer is not bound to furnish the safest machinery, instrumentalities or appliances with which to carry on his business, nor to provide the best methods for their operation in order to save himself from responsibility resulting from their use. If they are of an ordinary character, and such as can with reasonable care be used without danger, except such as may be reasonably incident to the business, it is all that the law requires. Every employer has the right to judge for himself in what manner he will carry on his business as between himself and his employes, and each of these having knowledge of the circumstances must judge for himself, whether he will enter the service, or, having entered, will remain. In this case, the lath machine and all its appurtenances appear to have been substantial and solid. Nothing broke or gave way. The saw remained in its proper place. The dust spout may not have been convenient in form, or location, but it was not structurally weak, nor in any way dangerous.

The majority opinion, however, holds that the defendant may be in fault in not giving the plaintiff such information and instruction as was reasonably necessary to enable him to appreciate the perils to which he would be exposed in the course of his employment, and to enable him, with proper care on his part, to safely do his own work. The only omission that can be material in this case, was the omission to give the plaintiff information of the danger attending his reaching his hand with a stick under the saw table under the whirling saw,— and to instruct him to stop the saw before undertaking to push down the sawdust.

Conceding that the employer should inform a new employe of such dangers of the employment as are not apparent, and should give him sufficient instruction to enable him to avoid the danger,— it is also a reasonable and well-established principle, that the employer may assume that his new employe is not a senseless, mindless machine, but that he possesses and will use for the benefit of his employer as well as of himself, the ordinary senses, intelligence and understanding of one of his age, unless

indeed some lack of these is apparent, which however is not claimed here. The employer need not inform his new employe of what he must know if he uses his eyes or his reason. The employe has duties as well as the employer. By undertaking any service, as running a lath machine, he engages that he has sufficient intelligence and capacity for that service. He engages to give not only his time, but his attention to the work,— to acquaint himself so far as he can, with the proper and safe modes of doing it. He is also bound to be watchful of his own health and safety. He cannot place these duties wholly upon his employer. He is bound to use his own senses, intelligence and understanding in providing for his own safety, as much as in any part of his employer's service. Wherever placed and at whatever work, he must be ordinarily observant and mindful of possible or probable attending perils. He must not assume the service to be without danger merely because of an omission to tell him of danger. He must of his own volition look for such dangers as are open to observation, and must apprehend such invisible dangers as are likely to attend known conditions and circumstances. When danger is seen, or is suggested by the known conditions and circumstances, he should not wait for directions, but himself should seek the best safe-guards, and use the best precautions. He should affirmatively use his own faculties to discern danger, and protect himself from it. He must not be indolent, nor thoughtless. He must think as well as act. In fine, the law holds, and the employe should remember, that he is a man, not a machine,— that he is a free man, bound to use his own faculties for his own preservation, and not a slave to rest slothfully under the care of a master.

These principles are so fully and clearly stated in *Wormell* v. *Maine Central R. R. Co.*, *supra*, and the cases there cited, that further citation of authority in their support is unnecessary.

Now to apply these various principles to the evidence in this case, let us review the situation, and in doing so, we may need to state some evidence not noticed in the majority opinion. The plaintiff was a young man twenty-three years old, of somewhat varied experience as an employe, and, from general observation,

somewhat familiar with saw mills and circular saw machinery. He had worked in a shingle mill, bunching shingles and occasionally running a bolt through the saw. He had noticed lath machines, and testified that he had a general notion of how they worked. There is no suggestion of any infirmity of any sense, nor of any lack of intelligence or understanding. After working some three or four days in tailing after the rotary in the defendant's mill, he was asked to take charge of the lath machine, a machine not at all complex, and of which he had a general notion, as he told the foreman. After receiving instruction for some thirty minutes in its practical operation, he undertook to run the machine with a helper. After sawing for some time, he found that the sawdust piled up so under the saw-table as to be likely to hinder the work. He undertook to remove this accumulation without asking for directions. He first very properly stopped the saw, which projected a few inches below the lower surface of the saw-table. Then one of the pair went below to clear away obstructions at the out-flow, while the other remained above, and assisted by pushing down with a stick through the opening in the floor under the saw. This operation was repeated several times, the same precautions being taken. With the saw at rest there is no suggestion of any danger attending it.

After the first few times, however, the plaintiff omitted to stop the saw, and the succeeding clearings of the sawdust were made while the saw was in rapid motion. After some ten days in all of work at this machine, on one occasion (the time of the accident) the sawdust piled up, and the plaintiff, sending his helper below, undertook himself to reach under the whirling saw, which was revolving within two feet of and over the opening in the floor, and undertook to push the sawdust down through the opening with a stick held in his hand. He did not bend, or crouch down to look under the table, but worked with the saw and his hand hid from sight. The upper end of the stick struck the saw, the rapid motion of which caught up the plaintiff's hand against its teeth, — whence the injury.

It is true he was not told of the danger of such an operation

with the saw left in motion. It is true he was not instructed how to avoid the danger as by first stopping the saw. It may be conceded that the defendant might have so constructed his dust spout, as to avoid any accumulations of sawdust. It is also true, that this act of the plaintiff with the saw in motion, was attended with great and certain danger. But as between employer and employe it is a well-settled and undisputed principle in our law, under the decisions cited, that all these omissions on the part of the employer, will not give the employe a cause of action, if it appear that the latter actually knew the danger, or that he might have known it, by the ordinary exercise of his senses and faculties. In such case, if he remains in the service he accepts the peril.

It seems to us that the plaintiff's evidence proves both of these alternative propositions so unmistakably and conclusively, that no verdict in his favor ought to stand. Coupled with his previous general knowledge, his ten days of running a machine, so simple as a lath saw, must have made him familiar with its construction and operation. He stated in his testimony the diameter of the saw, and he must have known the thickness of the saw table. He had constructed models of them from memory. He must have known that a saw of that diameter would project through and below a table of that thickness. That he appreciated the danger, at first, seems undeniable, for he then stopped the saw before putting his hand under the table. He was not told to do so, and we can imagine no other reason for his doing so, than an apprehension of danger if it were left running. But all possible doubts of his knowledge of the danger, should be put at rest by his own declaration in his testimony, "I knew the saw was above my hand." The danger then was known and visible,— visible to the mind's eye,— the understanding, if not to the bodily sense.

This danger might have been easily avoided. The plaintiff need only have continued to observe the precautions he observed at first. His omission to do so seems to us unaccountable upon any other ground than heedlessness. The evidence discloses no other reason, and we do not see what other reason can be

even imagined. There was no change in the conditions. He had no precept or example to do so. No other machine, or employe was hindered, or embarrassed by the stoppage of the lath saw. The saw itself was running idly the while.

If it be urged, as an excuse, that he forgot, or did not think of the danger, that he was thinking about the sawdust, &c., the answer is, that it was his duty to think and remember,— his duty to his employer as well as to himself. Forgetfulness, thoughtlessness, however common are no legal excuses. The law requires prudence and care, even though most men may be imprudent and careless. Men in all walks in life are necessarily left by the law to suffer for their want of thought and care. No one is allowed to recover of another for injuries which he might himself have avoided by ordinary care.

Whatever the omissions of the defendant, the plaintiff must prove affirmatively that he was ordinarily careful, and was honestly and excusably ignorant of the danger. We think the plaintiff's evidence is irresistibly against him on both these points. It shows clearly that he knowingly, needlessly and carelessly put his hand in dangerous proximity to a circular saw in rapid motion. It also shows as clearly, that he must have known the danger, and that he chose to risk it, rather than take the trouble to avoid it. We think the court could and should say, as matter of law, that such facts appearing in his own evidence, effectually and doubly bar the plaintiff's suit.

WALTON, J., concurred.

ROSCOE F. CROSS and others, in equity

vs.

ALPHEUS S. BEAN and RUFUS G. A. FREEMAN.

Oxford. Opinion September 16, 1890.

Equity. Vendor and Purchaser. Specific Performance.

When the owner of a lot of land agrees to sell it for an agreed price to another who agrees to pay it, equity treats the vendee as the equitable owner and the vendor as holding the legal title in trust for him; which trust follows

the land until it reaches some *bona fide* purchaser for valuable consideration without notice of the original vendee's equitable title.

(See *Cross* v. *Bean*, 81 Maine, 525.)

IN EQUITY.

On appeal, by defendant Bean, from a decree in favor of complainants after hearing on bill amended, answers and proofs.

The complainants amended their bill after the opinion of this court, announced May 20, 1889, by the following allegations:

"That said deed from Freeman to Bean, dated November 6th, 1886, was either given with the intention to convey said lot No. 4, and, so as aforesaid, by mistake of the parties thereto, described said lot No. 5, known as the "Cross Lot," instead thereof,—or said Bean well knowing that said Freeman intended to convey to Cross and Gerrish, and that Cross and Gerrish intended to receive under said deed to them, said lot No. 5, known as the 'Cross Lot,' and of which they took possession under said deed, having ascertained the mistake in said deed to Cross and Gerrish,—procured the said deed from Freeman of said Lot. No. 5, known as the 'Cross Lot,' to himself in fraud of the rights of the plaintiffs, knowing of the mistake aforesaid, of the claim of the plaintiffs to the lot so occupied by them and of their possession thereof claiming under their said deed.

"Whereupon the plaintiffs charge and say that in either case said Bean is not a *bona fide* holder for a valuable consideration of said lot No. 5, known as the 'Cross Lot,' and occupied by the complainants and is not entitled in equity to hold the same against the plaintiffs."

The defendant, Freeman, withdrew his appeal March 21, 1890.

R. A. Frye, for defendant Bean.

Action to reform a deed is in the nature of an action for specific performance. Wat. Sp. Per. § § 360, 371; *Petesch* v. *Hambach*, 48 Wis. 447. The mistake must not be the fault of the party complaining. Wat. Sp. Per. § 358. The complainants cannot misrepresent facts, or make false statements to induce the defendant to purchase. Wat. Sp. Per. § § 304, 305; *Doggett* v. *Emerson*, 3 Story, 773; *Tyson* v. *Passmore*, 2

Pa. St 122; *Graves* v. *Bank*, 10 Bush. (Ky.) 23; *Sims* v. *Ferrill*, 45 Ga. 585. A party seeking equity must do equity, and it must not be owing to a want of reasonable diligence. Relief is granted only to the vigilant, and not where the mistake is imputable to the party's own improvidence and inattention. Wat. Sp. Per. § 358; *Quirk* v. *Thomas*, 6 Mich. 77; *Railroad* v. *Babcock*, 6 Met. 352; *Rogers* v. *Saunders*, 16 Maine, 92; *Low* v. *Treadwell*, 12 Maine, 441. The complainants must prove notice; they have charged it on Bean. He paid a valuable consideration, therefore considered an innocent purchaser of a title perfect on its face. *Jewett* v. *Palmer*, 7 Johns. 65. When both parties are innocent and their opportunities were equal, or even if that fact is doubtful, and the parties have acted with good faith courts of equity do not interpose. *McCobb* v. *Richardson*, 24 Maine, 82; *Bigley* v. *Jones*, (Pa.) 5 Cent. 674.

When a party seeking equity has made false statements and misrepresented to the defendant the facts, but not intentionally, ignorance is no excuse or apology. *Lumbert* v. *Hill*, 41 Maine, 483; *Covell* v. *Bank*, 1 Paige, 131; *McFerran* v. *Taylor*, 3 Cranch, 580; *Morss* v. *Elmendorf*, 11 Paige, 277; *Smith* v. *Richards*, 13 Pet. 26; *Whitman* v. *Weston*, 30 Maine, 288; *Bean* v. *Herrick*, 12 *Id.* 266.

The general rule is, when one of two innocent persons must suffer by the wrongful act of a third party, the one who by his negligence has enabled such third party to do the injury must bear the loss. *Hartell* v. *Bogart*, 9 Paige, 52; *Durkee* v. *Durkee*, N. E. R. Vol. 4, 134, (Vt.)

A. E. Herrick, for plaintiffs.

VIRGIN, J. Bill in equity to reform a deed describing land in Fryeburg Academy Grant as "lot No. 6 in range 5 according to the plan of said Grant," instead of "lot No. 5 in range 6."

The case is before us on appeal by the defendant Bean, from the decree of the justice who heard it on bill, answer and proof. The findings of the facts by the presiding justice must stand, unless they are clearly shown to be erroneous. *Young* v. *Witham*, 75 Maine, 536; *Paul* v. *Frye*, 80 Maine, 26; *Gilpatrick* v.

Glidden, 81 Maine, 137. A careful examination of the reported evidence satisfies us that the facts as found and reported in the opinion filed in the case are fully established.

Viewed from a legal standpoint, a simple agreement by the owner to sell and convey a certain lot of land to another for an agreed price, is wholly executory. Until executed, the vendee acquires no legal interest in the land. The legal title remains in the vendor who may convey it to any person other than the vendee against the latter's protestations.

But equity, regarding what ought to be done as done (*Gardiner* v. *Gerrish*, 23 Maine, 46, 51; *Hubbard* v. *Johnson*, 77 Maine, 139; *Ricker* v. *Moore*, 77 Maine, 292,) considers the agreement, so far as the interest in the land is concerned, as executed; and treats the vendee as the equitable owner of the land, and the vendor as owning the consideration. The consideration draws to it the equitable right of property in the land, and he who pays it becomes the true beneficial owner and a trust is thereby created in his favor. And while the contractor or vendor still holds the legal title, he holds it as the trustee for the vendee. And this naked trust, impressed upon the land, follows it into whosever hands it may go by subsequent conveyances, until it reaches some holder who is a *bona fide* purchaser thereof for a valuable consideration without notice of the original vendee's equitable title; and then it becomes relieved of the trust. *Gilpatrick* v. *Glidden*, 81 Maine, 137, 151; 1 Pom. Eq. § 368; 1 Spence Eq. Jur. 451, 452 and 3.

As between Cross and Gerrish, (now represented by the plaintiffs) and the defendant Freeman, there is no doubt that the lot bargained and paid for was the one thereafter universally known as the "Cross lot." The purchasers forthwith entered upon it before the deed was delivered, and thereafter, for several years, continued to cut the black growth. All knew the lot's distinguishing characteristics and its location upon the face of the earth; but, as it seems, none knew its number as designated on the plan of the Grant. And the result, as might be expected, was that, when the deed was made, it described another lot, one

which the purchasers did not think of buying or the seller (through his local agent) of selling. The deed was received and consideration paid, the parties believing that it described the land bargained and paid for, and having no reason to suspect otherwise.

Applying the foregoing rules of equity, the equitable title passed to Cross and Gerrish, although the legal title remained in Freeman. But he held the legal title in trust for his vendees. And inasmuch as the mistake was mutual and established beyond fair and reasonable controversy (*Andrews* v. *Andrews* 81 Maine, 337, 341), equity would reform the deed, so as to correctly speak the actual intention of both parties thereto and thus perpetuate their actual and undisputed agreement, if the parties to the deed were the only persons interested in the land. *Andrews* v. *Andrews*, *supra*.

But as Freeman and Cross and Gerrish supposed, although erroneously, that the deed did accurately describe the land bargained for in 1873, Freeman subsequently conveyed the real lot to the other defendant Bean, who now claims to hold it upon the alleged ground that he is a *bona fide* grantee for a valuable consideration paid without notice of the equitable interest of Cross and Gerrish. And if his allegation is true, equity will withhold its hand from him. *Whitman* v. *Weston*, 30 Maine, 485; *Knight* v. *Dyer*, 57 Maine, 174.

But Bean never actually bought or intended to buy the "Cross lot." On the contrary after making himself entirely familiar with the lot, its location and growth by personal examination of it, and declaring that "he knew all about it and did not wish to see the deed," he purchased of Cross and Gerrish, the birch stumpage on it at fifty cents per cord, and paid twenty dollars in advance. And after operating some time under such purchase and making roads and building camps thereon, he concluded to purchase the lot next above the "Cross lot," bargained therefor with Freeman's agent for twenty-five dollars and afterward received a deed which he and Freeman's agent supposed and believed conveyed the lot bargained for and lying next above the "Cross lot." But, to

complete the comedy of errors, it turned out, upon a subsequent survey, that his deed from Freeman described the "Cross lot" itself instead of the one next above it; and that the deed from Freeman to Cross and Gerrish described "lot 6 in range 5" instead of "lot 5 in range 6"—the "Cross lot." Thereupon when Cross and Gerrish sought from Bean the equity of his releasing to them the legal title of the "Cross lot," which he knew that they in fact had bought and that he had not, and offered to do equity by paying to him the twenty-five dollars he had paid for it and also for his trouble he absolutely declined; declaring that it was his good luck and he should hold it; and satisfied his conscientious scruples,— if he had any,—by telling them—"they would do so if they had the chance." The transaction shows that he was not a *bona fide* but a *mala fide* grantee.

If Bean had incidentally heard that Cross and Gerrish had bought the lot in controversy, and, upon examining their deed or its registry, ascertained that they had only bought another lot, and therefore thinking that his original information was erroneous, purchased it himself, then his *fides* might be different; but such is not this case. For he never saw their deed, and it never was recorded. He had personal knowledge that they had in fact purchased the lot in controversy; and he availed himself of that knowledge by purchasing the stumpage on it and making what he declared to be a good trade. If he had been as proficient in the efficient rules of equity as he seems to have been in the vigorous rules of law, he would not have yielded to the temptation of attempting to reap the benefits of a contract which he never made.

Our opinion, therefore, is that the decree below shall be affirmed in its result as follows: Bean, at his own expense, within thirty days after the announcement of this opinion, to release his title to lot 5, range 6 to the plaintiffs, such release to have the full effect to preserve to the plaintiffs all rights as though no mistake had been made in the deed of February 20, 1873, from Freeman to Cross and Gerrish and no conveyance thereof had been made by Freeman to Bean. The plaintiffs, within the same time, at their own expense, to release all interest in lot 6,

range 5 to Freeman. Freeman within the same time to refund to Bean the twenty-five dollars paid by the latter to the former for lot 5, range 6,—less the expense of said deed.

Freeman to neither recover nor pay costs in this suit. Plaintiffs to recover costs from Bean.

Decree accordingly.

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

EDSON H. BUKER *vs.* EDWARD C. BOWDEN and another.

Hancock. Opinion September 18, 1890.

Parol Award. Title to real estate. License. Disputed Line.

Title to real estate can not be settled by a parol award.

Where a disputed line was attempted to be settled by a parol award, and the plaintiff thereupon told the defendant to go on and cut the wood on the latter's side of the line thus established, and he did so until forbiden by the plaintiff and subsequently hauled away the wood cut before being forbidden; *Held*: that the facts did not constitute a license to enter and cut on what proved to be the plaintiff's land, though the parol award determined it be the defendant's land.

ON EXCEPTIONS.

The action was trespass *q. c.* Plea, general issue. It appeared that there was a disputed boundary line between the parties which had been settled by parol agreement prior to the alleged trespass. The plaintiff being, at the time, satisfied with the parol award, paid for wood which he had cut on the defendants' side of the line, and subsequently moved his fence in accordance with the line so established. He, also, told the defendants to go on and cut the wood now in question, as it was theirs by the decision under the award. It was admitted by the plaintiff that this wood was cut on the defendants' side of the line, as settled by the verbal award, and before they had been forbidden by the plaintiff, or knew that he claimed to own it. They did not cut any wood after they had been forbidden by the plaintiff; but did haul off, afterwards, what they had cut up to that time.

The verdict was for the plaintiff. The defendants requested the court to instruct the jury that, if all the wood and lumber sued for was cut by them before they were forbidden by the plaintiff, they yet had the right to enter upon the land and take it off. This request being denied, the defendants took exceptions.

G. M. Warren, for defendants.

It was lawful for the defendants to cut wood before being forbidden, and afterwards to haul it off. 2 Wat. Tresp. 204; *Woodbury* v. *Parshley*, 7 N. H. 237; *Ameriscoggin Bridge* v. *Bragg*, 11 *Id.* 103; *Sampson* v. *Burnside*, 13 *Id.* 264; *Miller* v. *Tobie*, 41 *Id.* 84; *Liggins* v. *Inge*, 7 Bing. 682; *Taylor* v. *Waters*, 7 Taunt. 373; *Ricker* v. *Kelley*, 1 Maine, 117; *Dewey* v. *Bordwell*, 9 Wend. 65.

Parol award, until revoked, operated as a license, giving the right to remove the wood. Right of possession, at the time of the trespass, the only question at issue. *Giles* v. *Simonds*, 15 Gray, 441; *Nettleton* v. *Sikes*, 8 Met. 34; *Nelson* v. *Nelson*, 6 Gray, 385; 2 Wat. Tresp. 204.

Wiswell, King and Peters, for plaintiff.

We contend that no license was given, and if given, should be specially pleaded; 1 Chit. Pl. 16th (Am. Ed.) 540; *Hollenbeck* v. *Rowley*, 8 Allen, 473; *Ward* v. *Bartlett*, 12 Allen, 419; *Mann* v. *Tuck*, *Id.* 420; *Snow* v. *Chatfield*, 11 Gray, 12; *Ruggles* v. *Lesure*, 24 Pick. 189; *Spear* v. *Bicknell*, 5 Mass. 125; *Strout* v. *Berry*, 7 *Id.* 385; *Waters* v. *Lilley*, 4 Pick. 148; *Chase* v. *Long*, 44 Ind. 427; *Hamilton* v. *Windolf*, 36 Md. 301; *Snowden* v. *Wilas*, 19 Ind. 10; s. c. 81 Am. Dec. 370. Statutes have not relieved defendant from setting forth in his pleadings special matters of defense which by common law must be specially pleaded. R. S., c. 82, § 22, allowing general issue and brief statement, only relieves defendant from technical nicety and exactness. *Moore* v. *Knowles*, 65 Maine, 493. Plaintiff not estoppel: 1 Chit. Pl. (16th Am. Ed.) 543; *Gray* v. *Pingree*, 17 Vt. 345, (44 Am. Dec. 345;) *Isaacs* v. *Clark*, 12 *Id.* 692, (36 Am. Dec. 392;) *Hansom* v. *Buckner*, 29 Am. Dec. 401. No equitable estoppel: *Bryant*

v. *Va. Coal Co.* 93 U. S. 326; *Henshaw* v. *Bissell*, 18 Wall. 255; Big. Estop. 437; *Brewer* v. *R. R.* 5 Met. 478.

VIRGIN, J. Trespass *quare clausum* for breaking and entering the plaintiff's close and carrying away therefrom certain wood and lumber which the defendants had previously cut thereon.

The disputed boundary line between the parties' adjoining lands having been settled by a parol award, with which the plaintiff both by words and acts expressed satisfaction, he thereupon told the defendants to go on and cut the wood and timber in controversy, as it was theirs by the decision of the referees. Whereupon they went upon their side of the parol line and cut all the wood and timber mentioned in the writ before either of them was forbidden by the plaintiff or knew that he claimed to own it. However, they ceased cutting immediately on being forbidden, but subsequently entered and hauled away what they had cut before forbidden.

The defendants having waived, at the argument, their exception relating to the validity and effect of the parol award, they rely solely upon that taken to the refusal to give the requested instruction: "If all the wood and lumber sued for was cut by the defendants before they were forbidden by the plaintiff, they yet had the right to enter upon the land and take it off."

In support of this requested instruction the defendants contend that, they were justified in entering and taking away the wood and timber severed before being forbidden, on the alleged ground that the plaintiff's telling them to go on and cut it as it was theirs by the award, constituted a license; that forbidding further cutting was a revocation of the license; and that having cut none thereafter, they had the right to enter and haul off such as they had cut before the revocation.

We are of opinion that the declaration of the plaintiff to the defendants did not, under the circumstances, constitute a license.

To be sure, a license may be a simple authority conferred by the owner of land upon another to do certain acts thereon which without such authority would be acts of trespass. 3 Kent Com. 452; *Pitman* v. *Poor*, 38 Maine, 237, 240. And if the plaintiff had contracted to sell the wood and lumber upon this particular

parcel of land to the defendants who in accordance therewith went on and cut a portion of it before being forbidden, the contract would have constituted a license which would have been revocable at the pleasure of the plaintiff in relation to so much of the wood and timber as had not been severed from the soil at the time of the *revocation*; but unrevocable as to that already severed. *Russell* v. *Richards*, 10 Maine, 429; S. C. 11 Maine, 371; *Folsom* v. *Moore*, 19 Maine, 252; *Drake* v. *Wells*, 11 Allen, 141, 2 and 3; *Giles* v. *Simonds*, 15 Gray, 441; 1 Sug. Vend. (8th Am. Ed.) 183-4 where cases are collected in note *n*. In such a case the trees severed at once become the personal property of the licensee by virtue of the contract, and he would have an implied license to enter peaceably if not forbidden or resisted and haul it away without being guilty of trespass for so doing. Cases *supra*.

In the case at bar there was no pretense of any contract in respect of the wood or timber on the lot. And the mere telling the defendants to go on and cut it for it was theirs under the parol award passed no title to the wood cut. The remark was obviously made under the mistaken belief that the land belonged to the defendants, and as an expression of such an opinion and of submission on the part of the plaintiff; and just as obviously the defendants so understood it. It cannot be considered for a moment, when viewed in the light of the attending circumstances, that the plaintiff intended thereby to give the defendants authority to cut the growth upon the land which he then supposed to be his.

As the jury must have found the land belonged to the plaintiff notwithstanding the parol award, and the defendants obtained no title to the wood, they had no right to enter the plaintiff's premises and haul it away, especially if forbidden. *Wheelden* v. *Lowell*, 50 Maine, 499; *Kallock* v. *Perry*, 61 Maine, 273.

Exceptions overruled.

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

BENOT FRISON *vs.* JEAN DE PEIFFER.

Sagadahoc. Announced at July Law Term, Western District, 1890. Opinion September 18, 1890.

Reference. Rule of Court. Award and Effect.

Where parties to an action submit the same to a referee under an unrestricted rule of court, his authority extends to, and, in the absence of any improper motive on his part, his direct, unconditional award is conclusive of all questions of law and fact involved.

ON EXCEPTIONS.

The action having been referred, under a rule of court, when the referee's report was offered for acceptance, the defendant filed objections to its allowance. He offered proof to substantiate his objections; which having been heard and considered by the court, were overruled, and the report being accepted, he took exceptions.

The case appears in the opinion.

Geo. B. Sawyer, for defendant.

A. N. Williams, for plaintiff.

VIRGIN, J. Exceptions to the overruling of the defendant's objections to an award of a referee under a rule of court, and to its acceptance.

The defendant "does not claim that there was any fraud, conscious collusion or other intentional wrong-doing on the part of the referee;" but does claim that, "he failed to comprehend the law and the facts in the case, or to apply the established principles of law to the facts which he might have ascertained by a more careful attention to the evidence," &c.

The general rule established in this state is that, when the parties to an action submit it to a referee under an unrestricted rule of court, his authority extends to, and, in the absence of any improper motive on his part, his direct, unconditional award is conclusive of all questions of law and fact involved. *Brown* v. *Clay*, 31 Maine, 518; *Hall* v. *Decker*, 51 Maine, 31;

Mitchell v. *Dockray*, 63 Maine, 82; *Hagar* v. *N. E. Ins. Co.* 63 Maine, 502; *Morse* v. *Morse*, 62 Maine, 443. The result is the same when, by the terms of the rule, the referee is "to decide the action on legal principles;" for the referee is under no obligations,—even if requested,—to report the facts and submit questions of law for the consideration of the court. *Sweeny* v. *Miller*, 34 Maine, 388; *Plummer* v. *Stone*, 65 Maine, 410.

This meets and disposes of the first, second, fourth and fifth objections urged against the acceptance of the award.

Some of the evidence before the referee consisted of sixteen printed pages of letters in the French language which the defendant requested the referee to cause to be translated into English; and in consequence of his omission to do so, the objection is made that he failed to understand, comprehend and consider their contents which were material to the issue. The answer is twofold: (1,) It was no part of the duty of the referee to cause the letters to be translated; and (2) the referee testifies that, with the aid of his grammar and dictionary, he refreshed his collegiate knowledge of the language and understood the purport of the letters; and hence this objection is not proved.

The only bias or prejudice apparent in the case on the part of the referee is that his decision was against the defendant.

Exceptions overruled.

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

CAMDEN SAVINGS BANK *vs.* JONATHAN P. CILLEY.

Knox. Opinion September 18, 1890.

Promissory Note. Interest. Voluntary Payments.

If the maker of a promissory note payable in one year with interest at seven and three-tenths per cent, continues voluntarily to pay the same rate after

maturity, he can not, in the absence of any fraud, have the excess then deducted from the principal.

ON REPORT.

The facts are stated in the opinion.

Montgomery and Montgomery, for plaintiff.

J. O. Robinson and J. F. Libby, for defendant.

Interest is not to be computed at more than six per cent after maturity of note. Plaintiff entitled to interest by operation of law, at legal rate only, and not by terms of contract. *Deshler* v. *Holmes*, 18 At. Rep. 75, (N. J. 1888.)

Banks forbidden, since 1873, (R. S., c. 47, § 31,) from taking more than six per cent, "unless by agreement in writing."

VIRGIN, J. Assumpsit on the defendant's promissory note to the plaintiff bank, dated June 29, 1872, for $2000, payable in one year after date, at the rate of seven and three-tenths per cent in advance, — the court "to determine the amount due upon the note and to render such judgment as the legal rights of the parties require."

The bank could have collected six per cent only as interest on this note after it matured, if no interest thereon had been paid. But there is no law in this state which forbids the maker of a note paying more than six per cent; and if he does in fact voluntarily pay more, although his note does not in terms require it, he cannot, in the absence of fraud practiced upon him, legally claim to have the excess deducted from the principal. *Lindsay* v. *Hill*, 66 Maine, 212; *Holmes* v. *French*, 68 Maine, 525.

The reported evidence shows that, the defendant continued, for twelve years after the maturity of the note, to pay interest at the rate specified therein, sometimes a year in advance and at other times six months in advance; and with a few exceptions, they were made by the defendant's check inclosed in letters therein expressly appropriating the payments "on account of interest on my [his] note."

The payments were not always made on the precise day the interest was due, but if a few days had intervened, the indorsements on the back of the note would be made on such day for convenience. For instance: In the defendant's letter bearing date January 3, 1875, the year was erroneous and obviously should have been 1876. There were two other subsequent indorsements of interest in 1875, and there was none due in January of that year. And being so early in the new year, the defendant evidently wrote the old year by mistake. The payment was indorsed on December 29, 1876.

All the interest was paid until December 29, 1884. On January 10, 1887, (indorsed January 11, 1887,) defendant inclosed his check for $150, "to be indorsed on my note at your bank, the note originally $2000,"—nothing in regard to appropriating it to the payment of interest as in all his letters of previous dates. This sum should be appropriated as a general partial payment on the note.

All the interest and no more, having been paid to December 29, 1884, and no further payments of interest as such having been subsequently made, interest from and after that date should be computed at the rate of six per cent in accordance with the rule established in *Leonard* v. *Wildes*, 36 Maine, 265, and the clerk is appointed master to compute the sum due under that rule on the last day of the March term, 1890, for which sum judgment is to be rendered.

Deshler v. *Holmes*, 44 N. J. Eq. 581, cited by the defendant's counsel, is not applicable to this case; for here the defendant is a member of the bar, and was not ignorant of the law.

Judgment for the plaintiff for the amount due on the note.

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

INHABITANTS OF SEARSMONT *vs.* INHABITANTS OF LINCOLNVILLE.

Waldo. Opinion September 18, 1890.

Pauper. Verdict. Exceptions. New Trial. R. S., c. 24, § 35.

When a single sentence in a charge is excepted to, which was used simply as an illustration of an extreme proposition of law but when considered in connection with the remainder of the charge upon the same topic it appears that the jury could not have been misled, the exceptions will not be sustained.

When a verdict is well founded on testimony, although conflicting on a principal issue, it is not sufficient for setting it aside as against evidence that the law court on reading a report of the evidence might and, perhaps, would come to a conclusion different from a jury of the vicinity who saw and heard the witnesses and rendered their verdict without bias or prejudice.

ON MOTION AND EXCEPTIONS.

The case is stated in the opinion.

Thompson and Dunton, for plaintiffs, in support of the motion, &c.

This is peculiarly a case in which the claim to a home is restricted to the house and family of a particular person. The pauper could not have had a home in Clark's family without his permission. We search in vain for any evidence of such permission in the case. *Corinth* v. *Lincoln*, 34 Maine, 314.

The verdict is wrong; against the law and evidence and the weight of evidence in the case; and should be set aside.

The instructions to which exceptions are taken are wrong, and misled the jury to the prejudice of the plaintiffs.

In this case, there is no claim or pretense that the pauper had a home at any place in Searsmont prior to his last marriage, except at George H. Clark's house, and as a member of his family. There is no evidence that the pauper claimed the town of Searsmont, as such, to have been his home; but on the contrary he expressly negatives any such claim.

Now as applied to this case, the jury must have understood from the instructions, that it was only necessary for the pauper to claim a home at Clark's to establish it by his presence, and only necessary for him to intend to return to the town of Searsmont as his home, in order to retain it during his absence.

The important element of Clark's consent to such home at his house is excluded.

"The legal correctness of instructions must be determined in some measure by the propositions of fact attempted to be supported by the evidence at the trial," say the court in *Corinth* v. *Lincoln*, 34 Maine, 314, a case identical with the case at bar, in the leading question in controversy. In that case the judge instructed the jury that, in order for them to find that the pauper had gained a settlement in Corinth by five years residence, they must be satisfied that she had voluntarily and by mutual consent of her parents and herself made herself a member of his family." And the instruction was held to be correct, as applicable to that case, those being the propositions of fact attempted to be established on the one side, and disproved on the other.

The instructions given are not applicable to the facts in the case, and wrought mischief. Neither are the instructions correct, when considered to have been given as abstract rules of law. The town as such is made prominent as the home. No place of abode, no house or particular place to which the person has a right to return is necessary. In fact, no home, in its usual and ordinary signification, is necessary. "He may sleep out doors if he desires."

No reported case goes to this extent. The case of *Parsonsfield* v. *Perkins*, 2 Maine, 411, the strongest reported case in support of the instructions, only holds that one may be considered as dwelling and having his home in a town, though he has no particular house as the place of his fixed abode.

Can a person be considered as having his home in a town when there is no house in that town, no particular place, in which he has a right to stop? Possibly the Court may hold that he can, while personally present with the intention of remaining and claiming the town as his home. Can he retain a home in the town during his longer or shorter absence, if when he passed out of that town there was no house or place in the town to which he intended to return or had a right to return, and no vestige of a home remaining in the town?

W. H. Fogler, for defendants.

The exception to instructions now relied on, is that, "A person may be considered as having his home in a certain town, although he has no particular house there as the place of his particular abode," &c. The presiding justice had before given the jury the elements necessary to make a person a resident in a town. "It is made up of two elements, presence and intention." "Presence and intention are both necessary. A person must be personally there to commence this residence, but that personal presence must be coupled with the intention to fix that as an abiding place, and where these two elements, personal presence and intention, are combined, that instant he has a residence, a home in the town." Having defined and illustrated what is necessary to constitute a home within the meaning of the statute, the presiding justice proceeded to instruct the jury upon the effect of absences from a home. He said, "When a home is once gained, an absence from it for a longer or a shorter period for temporary purposes does not change his residence. When a sailor goes to sea, or a soldier to war, or a juryman to court, it does not necessarily change his residence. A person may be gone ever so long for a temporary purpose and with no intention of abandoning his home, and not lose his residence. The home, I say, must be a permanent one." In this connection, discussing the effect of a temporary absence the instruction complained of was given. Two propositions were distinctly and clearly stated to the jury. First, that to gain a home, a residence, in a town there must be bodily presence in the town with the intention of remaining there; second, that having in that way, by bodily presence and intention, acquired such home, absence for a temporary purpose would not change or abandon it. This is the sum and substance of the entire instruction, and of its correctness, no doubt can be entertained.

In *Parsonsfield* v. *Perkins*, 2 Maine, p. 415, Chief Justice MELLEN says of the pauper, "Since that time he has generally resided there, though he has had no particular house in that town as his place of fixed abode." This language of that distinguished jurist reported nearly seventy years since, has not

even been criticized by any justice of this court, but on the contrary, has been recognized and adopted as a true exposition of law. Mr. Justice KENT, in *Ripley* v. *Hebron*, 60 Maine, p. 395, says, "When a man has thus left a town, and has, to human view, no habitation there, and no visible hold on it" . . . "the law . . . leaves it to the jury to determine, upon all the evidence and all the circumstances and all the probabilities, what his intention and purpose were in fact." If this instruction is erroneous, then a man's residence is broken up if his landlord ejects him from the home in which he has been living and he has no other house engaged; if his boarding house keeper turns him away, if he have not another boarding place engaged; if his house is burned in the night; if by reason of poverty or misfortune a man "hath not where to lay his head," though his attachment to the town and his intention of remaining there be ever so strong. "Bodily presence and intention of remaining," would be no complete definition if a man must have "a particular house there as the place of his particular abode."

VIRGIN, J. Assumpsit founded on R. S., c. 24, § 35, for pauper supplies, furnished on March 21, 1889, to a man and his family whose settlement was alleged to be in Lincolnville.

Having admitted that the pauper had a settlement in their town in 1862, when he became twenty-one years of age, the law imposed upon the defendants the burden of satisfying the jury that thereafter he acquired a new settlement in Searsmont by having his home therein for "five successive years without receiving supplies as a pauper," and that any absences therefrom during the five years were of such a character as not to interrupt his residence. *Ripley* v. *Hebron*, 60 Maine, 379.

This burden the defendants claim to have sustained,— and the jury have so found,— by testimony tending to show that he acquired such a settlement by having his home therein between the years 1868,— when his former wife was divorced from him,— and 1879, the date of his second marriage. Among other witnesses introduced for that purpose, the pauper himself testifies in the most unqualified manner that he worked several seasons at a Mr. Clark's in Searsmont during these years, and

had his washing and mending done there while working at other places; that he always went there when returning from his various vocations of fishing, coasting, pressing hay and threshing; that he considered Clark's house his home, and he had no other,

On the contrary, Mr. and Mrs. Clark testify that they did not recollect that the pauper ever left any clothing at their house or the house of their father when away, or that any washing or mending was done there for him when not at work there, or that he came there when returning from his business at other places. Mr. Clark, who had charge of his father's place after 1864, testified also that the pauper worked for him the whole or parts of the seasons of 1868, 1874, 1878 and 1879; that the pauper never asked consent to make his (Clark's) house his home; that he never gave his consent to do so; and that never to his knowledge did the pauper ever have a home there except when there at work.

There was also testimony that the pauper worked several falls and winters at pressing hay for a Mr. Frohawk in Searsmont.

On the principal issue of fact the testimony was conflicting. The jury who saw and heard the witnesses, without any suggestion of bias or prejudice, found by their verdict that the pauper did acquire a settlement in Searsmont; and while by reading the testimony we might and probably should come to a different conclusion, still we have not the facilities which a jury of the vicinity had for arriving at the truth. And as there is ample testimony if true to sustain the verdict, we think the motion must be overruled.

The charge was very full and explicit upon the law and the only exception taken and now relied upon is to the following extract therefrom: "A man may claim to have, and have his residence in a town, if he does not break the criminal law, and no man can shut him out of that town or deprive him of that residence if he has that intention, although there is not a roof in that town that he has a right to lie under and call his own. He may sleep out doors if he desires."

Had this been all that the charge of the presiding justice contained, upon the subject of residence, the plaintiffs' complaint

that the jury were misled might have some foundation. But the copy of the whole charge which was expressly made a part of the bill of exceptions, shows that the charge was very full on this subject, and the portion excepted to is a single sentence selected from it. After explaining to the jury the distinction between a fixed and permanent residence and that of a temporary character, and that one may have a home in a town although he has no particular house there as the place of his particular abode, he made the remark to which exception is taken as an illustration simply of an extreme case. And then after declaring that the want of a house or shelter is a circumstance affecting the question whether he really has a residence in a town or not he then called the attention of the jury directly to the issue as follows: "When a person's residence in a town depends wholly upon his having a home in a particular house or with a particular family, he must have a right to dwell there with such family for such a period of time as he sees fit to be there. It may be based upon the permission of the owner granted by direct promise to allow him to stay, or by implication growing out of the situation of the parties, as where one labors for another," &c. And the presiding judge also called the attention of the jury to the testimony of the witnesses upon the one side and the other upon this point.

Motion and exceptions overruled.

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

ANN J. MOORE *vs.* WILLIAM A. MCKENNEY.

Androscoggin. Announced at July Law Term, Western District. Opinion September 30, 1890.

Forbearance. Consideration. Guaranty. Verdict. Practice.

A promise to forbear and give further time for the payment of a debt, although no certain or definite time be named, if followed by actual forbearance for a reasonable time, is a valid and sufficient consideration for a promise guarantying its payment.

When a promise to forbear is made in general terms, no certain or definite time being named, the law implies that the forbearance shall be for a reasonable time.

The court may properly instruct the jury to return a verdict for either party when it is plain that a contrary verdict can not be allowed to stand.

ON EXCEPTIONS.

This was an action of assumpsit brought against the defendant as guarantor of the payment of a certain promissory note.

Writ dated January 1, 1889.

(Declaration.) "In a plea of the case; for that whereas Isaac A. Johnson and Charles E. Johnson, on the first day of January, 1885, at said Auburn, was indebted to the plaintiff in the sum of one hundred dollars, with interest therefor, according to the note of the said Isaac A. and Charles E. Johnson, under their hands, given to the plaintiff long before, to wit, on the twelfth day of August, 1880, and being so indebted, the plaintiff was about to sue the said Isaac A. and Charles E. Johnson, for the recovery of said sum, with the interest thereon due; and the said McKenney, the defendant, on said first day of January, 1885, at said Auburn, in consideration that the plaintiff would then and there, at the special request of the said McKenney, forbear * to sue the said Isaac A. and Charles E. Johnson, for the purpose and cause aforesaid, promised the plaintiff to pay her the said sum of money and the interest thereon due, owing to the plaintiff as aforesaid, by the said Isaac A. and Charles E. Johnson; and the plaintiff avers, that confiding in the said promise of the said McKenney, she hath hitherto forborne to sue the said Isaac A. and Charles E. Johnson, and never commenced an action against the said Isaac A. and Charles E. Johnson, in this behalf; and, although a reasonable time for the payment of the said sum of money and interest, so owing by the said Isaac A. and Charles E. Johnson, hath long since elapsed, yet the said McKenney, though requested, has never paid the same, but wholly neglects and refuses so to do; and the said sum of money and interest, so owing from the said Isaac A. and Charles E. Johnson, as aforesaid, is still unpaid and in arrears to the plaintiff.

"Also, for that Isaac A. Johnson, and Charles E. Johnson, on

* *For a reasonable time.* REPORTER.

the twelfth day of August, 1880, at said Auburn, by their promissory note in writing, under their hands, of that date, for value received, jointly and severally promised the plaintiff to pay her, or her order, one hundred dollars on demand, with interest at seven per cent per annum, until paid; and the said McKenney, the defendant, thereafterwards, on the first day of January, 1885, by his writing under his hand, on the face of said note, for value received, then and there promised the plaintiff to guaranty to her the payment of the contents of said note, agreeably to the tenor of the same; and the said sum of money and interest so owing from the said Isaac A. and Charles E. Johnson, as aforesaid, is still unpaid and in arrears to the plaintiff.

"Also, for that Isaac A. Johnson and Charles E. Johnson, on the twelfth day of August, 1880, at said Auburn, by their promissory note in writing, under their hands, of that date, for value received, jointly and severally promised the plaintiff to pay her, or her order, one hundred dollars on demand, with interest at seven per cent per annum until paid; and the said McKenney, the defendant, thereafterwards, on the first day of January, 1885, by his writing under his hand, on the face of said note, in consideration that the plaintiff would forbear the said Isaac A. and Charles E. Johnson, and give them further time for the payment of said note and interest, then and there promised the plaintiff to guaranty to her the payment of the contents of said note, agreeably to the tenor of the same; and the plaintiff avers, that confiding in the promise of the said McKenney, she hath hitherto foreborne to sue the said Isaac A. and Charles E. Johnson, and never commenced an action against them in this behalf; and, although a reasonable time for the payment of the said sum of money and interest hath long since elapsed, yet the said McKenney, though requested, has never paid the same, but wholly neglects and refuses so to do; and the said sum of money and interest, so owing from the said Isaac A. and Charles E. Johnson, as aforesaid, is still unpaid and in arrears to the plaintiff.

(Money count.) "In support of the above count the plaintiff

will claim to prove that Isaac A. Johnson and Charles E. Johnson, on the twelfth day of August, 1880, at said Auburn, by their promissory note in writing, under their hands, of that date, for value received, jointly and severally promised the plaintiff to pay her, or her order, one hundred dollars on demand, with interest at seven per cent per annum until paid; and the plaintiff avers, that thereafterwards, on the first day of January, 1885, she went with the said note to the said Isaac A. and Charles E. Johnson, and demanded payment thereof, which was refused, and that further time was asked by the said Isaac A. and Charles E. Johnson, in which they might make payment of said note, and the interest due thereon; and she avers that she was unwilling to extend the time of payment thereof, and was about to bring suit on the same; and the said McKenney, on said day of January, 1885, at said Auburn, in consideration that the plaintiff would then and there, at the special request of the said McKenney, forbear to sue the said Isaac A. and Charles E. Johnson, for the purpose and cause aforesaid, and give them further time for the payment of said note and interest, then and there promised the plaintiff to guaranty to her the payment of the contents of said note, agreeably to the contents of the same; and the plaintiff avers, that confiding in the promise of the said McKenney, she hath hitherto foreborne to sue the said Isaac A. and Charles E. Johnson, and never commenced an action against them in this behalf; and, though a reasonable time for the payment of said sum of money and interest, so owing by the said Isaac A. and Charles E. Johnson, has long since elapsed, yet the said McKenney, though requested, has never paid the same, but wholly neglects and refuses so to do; and the said sum of money and interest, so owing from the said Isaac A. and Charles E. Johnson, as aforesaid, is still unpaid and in arrears to the plaintiff; and the plaintiff will also offer in support of the above count the above mentioned note, of which the following is a true copy — viz:

"'Auburn, August 12th, 1880.

"'For value received we jointly and severally promise to pay

Ann J. Moore, or order, one hundred dollars on demand, with interest at seven per cent per annum until paid.

Isaac A. Johnson,
Charles E. Johnson.

"'For value received, I hereby guarantee the payment of the money above mentioned, to Ann J. Moore.

Wm. A. McKenney.'

"Yet the said defendant, though requested," &c.

The defendant offered no evidence, and thereupon the presiding justice instructed the jury as follows:

"This is an action of assumpsit upon a written guaranty on a promissory note, — the note being dated August 12, 1880, for one hundred dollars on demand, with interest at seven per cent per annum until paid, the note being signed by Isaac A. Johnson and Charles E. Johnson. The alleged guaranty reads as follows: 'For value received I hereby guarantee the payment of the money above mentioned, to Ann J. Moore. Signed: William A. McKenney.' It is admitted that the words of the alleged guaranty above the name of McKenney have been written in since the signature of McKenney. No evidence is offered in defense, and the only defense set up is that there was no sufficient consideration therefor. For the purposes of this trial I direct you to return a verdict for the plaintiff for the amount due on the note."

The jury returned a verdict for the plaintiff, and the defendant took exceptions to these instructions.

Savage and Oakes, for defendant.

To hold defendant as guarantor upon a note signed and delivered a long time previous to defendants so signing, the plaintiff must prove a consideration, and one known to the defendant. *Tenney* v. *Prince*, 4 Pick. 385; *Mecorney* v. *Stanley*, 8 Cush. p. 88.

Mere forbearance to sue is not a sufficient consideration. There must be not only a forbearance, but an agreement to forbear, which suspends the right of action so that suit can not be brought for some time. *Mecorney* v. *Stanley*, *supra*; *Manter* v. *Churchill*, 127 Mass. 31; *Turner* v. *Williams*, 73 Maine, p.

470; *Lambert* v. *Clewley*, 80 *Id.* 480; *Smith* v. *Bibber*, 82 *Id.* 34; *Veazie* v. *Carr*, 3 Allen, 14.

McGillicuddy and McCann, for plaintiff.

"Where one puts his name in blank to a negotiable promissory note, as a guarantor, he leaves it to the holder of the note to write anything over his name not inconsistent with the nature of the transaction. Parker, C. J., in *Moies* v. *Bird*, 11 Mass. 436; *Tenney* v. *Prince*, 4 Pick. p. 387; *Ulen* v. *Kittredge*, 7 Mass. 233; *Josselyn* v. *Ames*, 3 Mass. 273. Consideration: 1 Pars. Con. Book II, p. 440, *et seq.* 1 Chit. Con. p. 40, *et seq.*

Counsel also cited: *King* v. *Upton*, 4 Maine, 387; *Robinson* v. *Gould*, 11 Cush. 55; *Wheeler* v. *Slocumb*, 16 Pick. 52.

WALTON, J. This is an action on a negotiable promissory note on the back of which the defendant, not being the payee, had written his name in blank, and over which the plaintiff's counsel, at or before the trial, wrote the words, "for value received I hereby guarantee the payment of the money above mentioned, to Ann J. Moore."

No evidence being offered in defense, the only question is whether the plaintiff's evidence was sufficient to entitle her to a verdict.

We think it was. The note itself was sufficient to establish a *prima facie* case. *Colburn* v. *Averill*, 30 Maine, 310; *Lowell* v. *Gage*, 38 Maine, 35; *Childs* v. *Wyman*, 44 Maine, 433. And the oral evidence offered by the plaintiff in no way weakened her case. It merely substituted fact for presumption. It proved what the actual transaction was instead of leaving it to be inferred. The evidence showed that the defendant wrote his name on the back of the note declared on, intending thereby to guaranty its payment; that he did this in consideration of the plaintiff's promise to forbear and give further time for the payment of the note; and that the plaintiff, in consideration of the defendant's guaranty, did forbear and give further time, and as much time as could reasonably be required of her. True, the evidence failed to show that a definite time was agreed upon. But this was not necessary.

A promise to forbear and give further time for the payment of a debt, although no certain or definite time be named, if followed by actual forbearance for a reasonable time, is a valid and sufficient consideration for a promise guarantying its payment. *King* v. *Upton*, 4 Maine, 387; *Elton* v. *Johnson*, 16 Conn. 253; *Howe* v. *Taggart*, 133 Mass. 284, and authorities there cited.

And in *Lambert* v. *Clewley*, 80 Maine, 480, (a case cited and relied upon by the defendant's counsel,) the court did not hold otherwise. Nothing was decided in that case except that the alleged contract to forbear was not proved. The court did not decide that such a contract, if proved, would not be valid, unless a definite time of forbearance was agreed upon. In *Smith* v. *Bibber*, 82 Maine, 34, (also cited and relied upon by the defendant's counsel,) the head note does so state; but the opinion of the court does not justify the statement. The word "definite" was inadvertently inserted in the rescript announcing the decision of the court, and this rescript was adopted by the reporter for his head-note. But the error is corrected in the *errata* at the end of the volume, by stating that the word "definite" in the head-note should be erased.

It is undoubtedly true, as stated in the opinion of the court in the case last cited, that to constitute a legal contract to forbear, there must be a valid promise to do so, so that for *some* time the creditor will have no right to sue. But this result may be secured without the naming of any particular time. If the promise is in general terms, no particular time being named, the law implies that the forbearance shall be for a reasonable time. Such is the legal construction of such a promise. The authorities already cited so state. The debtor, therefore, by such a promise, does obtain a right, not only to some delay, but to a reasonable delay, such as under all the circumstances he is reasonably entitled to. We therefore repeat that, a promise to forbear, although for an indefinite time, if followed by actual forbearance for a reasonable time, is a valid and sufficient consideration for a promise guarantying the payment of a debt.

The uncontradicted evidence in this case clearly entitled the plaintiff to a verdict in her favor; and it is the opinion of the court that the jury were properly instructed to return such a verdict. Prevention is better than cure. And the court may properly instruct the jury to return a verdict for either party when it is plain that a contrary verdict can not be allowed to stand. *Jewell* v. *Gagné*, 82 Maine, 430, and cases there cited.

It is very clear that, upon the evidence reported, a verdict against the plaintiff could not be sustained. It was, therefore, the right of the plaintiff to have the jury instructed not to return such a verdict.

Exceptions overruled.

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

ARCHIBALD MACNICHOL *vs.* ALEXANDER B. SPENCE and another.

Washington. Announced at July Law Term, Western District, 1890. Opinion September 30, 1890.

Statute of Limitations. Foreign Contracts. Stat. 1885, c. 376.

The Act of 1885, c. 376, which declares that, "no action shall be brought by any person whose cause of action has been barred by the laws of any state, territory, or country, while all the parties have resided therein," does not apply to a negotiable promissory note held by a citizen of this state at the time of its passage.

The Act should be construed as prospective only; and not applicable to causes of action accruing from contracts, already made and held by citizens of this state, at the time of its passage.

ON REPORT.

This was an action brought by the plaintiff, who is a citizen of this state, upon two joint and several promissory notes, dated December 10, 1874, and given by the defendant, Spence, with one McKenzie for whom he was a surety, at St. Stephen, N. B. and payable one year after date to Douglass Hyslop, or order. These persons were all citizens of the Dominion of Canada.

The plaintiff purchased the notes February 10, 1885, and began his action April 13, 1885. Interest up to December 10, 1883, had been paid by McKenzie who moved away in May, 1884, and died in the following fall. Spence testified that he had never been called upon to pay the notes until after McKenzie's removal, that he had not paid anything on them directly or indirectly, and had received no benefit from them.

It was admitted that the notes were not barred by the statutes of New Brunswick, as against McKenzie.

The defendant, Spence, besides the general issue, filed a brief statement of defense alleging that the cause of action, against him upon the notes, was barred by the laws of New Brunswick while all the parties thereto resided in said Province; and before they were negotiated; also that the action was barred by R. S., c. 81, § 103, as amended by the act of 1885, c. 376. The provisions of the act are quoted in the opinion by the court.

A. MacNichol for plaintiff.

The case finds the note was not barred by the laws of New Brunswick as against McKenzie, This fact takes the case out of our statute which, to be operative as a bar, requires the note to be barred in New Brunswick, "while all the parties resided therein." Besides, the plaintiff, the indorsee, was a "party" March 6, 1885, when the act was passed, at which time the action was not barred by the Maine statutes. Under the act of 1885, the action not being barred as to defendant and plaintiff, it was not barred as to "all the parties." The act of March 6, 1885, was never intended to be retrospective; otherwise it would be unconstitutional. *Call* v. *Hagger*, 8 Mass. 423; *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Props. Ken. Pur.* v. *Laboree*, 2 Maine, 275; *Sampson* v. *Sampson*, 63 *Id.* 329.

Harvey and Gardner, for defendants.

The cause of action here litigated is the obligation of A. B. Spence and no other. It was barred while he and Hyslop both lived in New Brunswick. It will not be pretended that a new cause of action arose fron the purchase of the note by plaintiff, when ten years old. If so, parties might make a new cause

once in five years and nine months and avoid the statute indefinitely. It is enough that indorsers of negotiable paper before maturity take it free from infirmities unknown to him.

He does not, and ought not to, stand better in any respect than the original party after maturity, and especially after it is known to be barred between the parties in their own country and can have no value except such as can be infused into it by its transfer to another jurisdiction foreign to it.

Hyslop had no claim by virtue of the contract to bring an action in this state against his fellow-citizen and was barred in his own courts. No such right attached to it in his hands that he can object to our statute denying the remedy because it gave him no time to avail himself of his remedy.

He could convey no better right than he had and, at most, that was the chance of suing his fellow-citizen, beyond the jurisdiction, if he ever came here, for a cause barred in the country of the domicil of both.

The objection that the law of 1885 is retroactive and unconstitutional does not apply. That objection only attaches to a law that acts on vested rights. This statute does not cut off a right vested in anybody; it simply recognizes and adopts a shield that a foreign state has spread over its citizen to protect him from his fellow-citizen.

The attitude of our law toward a foreigner is this: We say, You had a right, the remedy to enforce which by the legislative wisdom of this and of your own government your own neglect has justly forfeited. You shall not revive it by catching him when he comes from your country to ours.

Defendant was not in the state when the statute was passed nor when the plaintiff bought the notes. What right vested in him? The exemption from suit on the notes had vested in defendant; our law protects that right.

It is competent for the legislature to take away a remedy given by express statute by the simple repeal of the enabling statute though the action be pending at the time of the repeal; and such is the effect of such repeal without a saving clause. See *Plantation* v. *Thompson*, 36 Maine, 365.

The right of action in our courts against one dwelling in a foreign country does not become vested till he comes or in some way brings himself within the jurisdiction. The legislature has unquestionably power to take away a remedy so long as no right has vested in the remedy, that is, so long as no action has been commenced; much more while such a state of things exists that no action could be commenced.

See *Coffin* v. *Rich*, 36 Maine, 511, where DAVIS, Justice, in the opinion says there can be no doubt legislatures have power to pass retrospective statutes if they relate only to the remedy. Story Confl. Laws, § § 576-7, and cases cited in notes.

WALTON, J. The question is whether the act of 1885, c. 376, which declares that "no action shall be brought by any person whose cause of action has been barred by the laws of any state, territory or country, while all the parties have resided therein," is applicable to a negotiable promissory note held by a citizen of this state at the time of its passage.

Clearly not. To so construe the act would render it unconstitutional. Statutes of limitation may be made applicable to existing contracts, provided a reasonable time is allowed for the commencement of actions before the right to do so is barred. But, it is well settled that the legislature can not enact a law declaring that all remedies, for the breach of existing contracts, shall become instantly barred. Such a law, say the court, in *Call* v. *Hagger*, 8 Mass. 423, would necessarily impair the obligation of such contracts, and the courts would be bound to consider it a void act. And in *Brigham* v. *Bigelow*, 12 Met. 268, the court say that such a law would destroy the contract within the jurisdiction of the state, and be a mere abuse of power. And in this state, in a case in which the validity and effect of statutes of limitation were very exhaustively examined, the court held that an act which should at once deprive creditors of all legal remedy for the recovery of existing demands would unquestionably violate the constitution by impairing the obligation of contracts; and that the courts would be bound to consider it as void. *Pro. Ken. Pur.* v. *Laboree*, 2 Maine, 275.

The act, therefore, must be construed as prospective only. It

must not be construed as applicable to causes of action accruing from contracts already made and held by citizens of this state at the time of its passage. So limited, very clearly, it is no bar to the plaintiff's action. *Thompson* v. *Reed*, 75 Maine, 404, and cases there cited.

Judgment for plaintiff.

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

SAMUEL WHITEHOUSE *vs.* JOSEPH S. CUMMINGS.

Kennebec. Opinion October 2, 1890.

Way. Grant. Requested Instructions. Practice. Easement.

When property in land has been severed by voluntary conveyance, one portion of which is inaccessible except by passing over the other or by trespassing on the lands of a stranger, a grant of a way by necessity is presumed between the parties.

A way of necessity ceases when the necessity from which it results ceases.

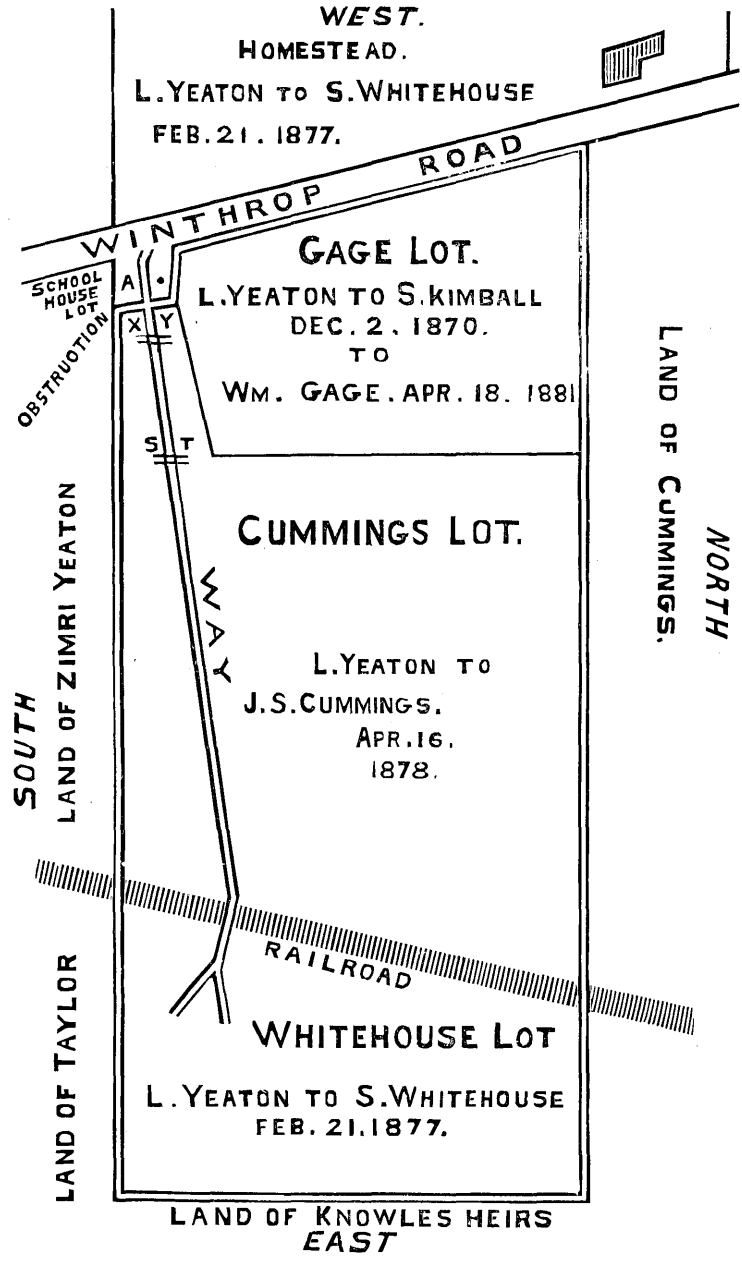
An instruction to the jury is to be tested by the facts on which it is predicated.

Trask v. *Patterson*, 29 Maine, 499, considered.

ON EXCEPTIONS.

This was an action on the case, tried in the Superior Court for Kennebec County, to recover damages for obstructing an alleged right of way from the plaintiff's wood lot over and across the defendant's land to the highway. Plea, general issue. The verdict was for the plaintiff.

It appeared from the bill of exceptions, that one Leander Yeaton was the former owner of a lot of land in Belgrade, lying east of a certain highway called "The Winthrop Road," bounded as follows: west, by a school-house lot and by said highway; said school-house lot being two rods square, lying between said Yeaton's land and said highway at Yeaton's south-west corner; south, by land of Zimri Yeaton and land of one Taylor; east, by land of Knowles' heirs, and north by land of J. S. Cummings.


WEST.
HOMESTEAD.
L. YEATON TO S. WHITEHOUSE
FEB. 21. 1877.
WINTHROP ROAD
SCHOOL HOUSE LOT
OBSTRUCTION
A
X
Y
S
T
GAGE LOT.
L. YEATON TO S. KIMBALL
DEC. 2. 1870.
TO
WM. GAGE. APR. 18. 1881
CUMMINGS LOT.
WAY
L. YEATON TO
J. S. CUMMINGS.
APR. 16.
1878.
SOUTH
LAND OF ZIMRI YEATON
LAND OF CUMMINGS.
NORTH
RAILROAD
WHITEHOUSE LOT
L. YEATON TO S. WHITEHOUSE
FEB. 21. 1877.
LAND OF TAYLOR
LAND OF KNOWLES HEIRS
EAST

Said lot, originally owned by Leander Yeaton, is shown by the double line on the "chalk plan." Said Yeaton also owned a homestead on the west side of said road and opposite the lot above described.

Said Yeaton sold a part of said lot of land, extending from said school-house lot on the south to land of said Cummings on the north, on December 2d, 1870, to one Kimball, who conveyed April 18th, 1881, to William Gage. This lot, so sold, was identified at the trial, and shown on the chalk plan as "Gage Lot."

Said Yeaton subsequently sold, on February 21, 1877, the homestead above mentioned, and the east end of the original lot to the plaintiff, as described and bounded in the deed, and shown on the plan as "The Whitehouse Lot." He subsequently sold, on April 16, 1878, the remaining middle portion of said original lot marked on the plan "Cummings' Lot," to the defendant.

There was no evidence that Leander Yeaton owned the lot known as the school-house lot, or had ever claimed to cross it as a matter of right; but the plaintiff introduced evidence tending to show that said Yeaton and his predecessors and successors in title for a period of more than twenty years, had, as a matter of fact, crossed said school-house lot at pleasure in making use of the way delineated on said plan, to and from the Whitehouse lot to the road. There was evidence tending to prove that at various times during different years, wood had been hauled from said Whitehouse lot to the highway, as a matter of convenience, and by permission from the adjoining owners, south over Taylor's land; west and south over Zimri Yeaton's land; west across the school-house lot; west across the Gage lot; and north across the Cummings lot. The defendant did not claim, nor was there any evidence to prove any right of way by prescription over any of the adjacent lots of Taylor on the south, Knowles on the east, or Cummings on the north, or of any way in use over said Gage lot at the time of the purchase by plaintiff.

The plaintiff also introdnced evidence tending to show that at the time of the purchase of the Whitehouse lot and the home-

stead by the plaintiff, there was in existence and use, and had been for many years, a well-defined way from said Whitehouse lot to the county road; that this road crossed the railroad at grade at the only practicable place, there being a deep cut on the south and an embankment or dump on the north, and extended substantially as delineated on the plan, westerly through bars at the points S, T, and X, Y, and across the school-house lot to the county road; and there was no other way than this in existence or use except that there was evidence on the part of the defendant tending to show indications of travel at other points across land of strangers.

The plaintiff also claimed that the Whitehouse lot was entitled to a way of necessity over the Cummings lot to the county road and that this way as used was a reasonably convenient and practicable one.

It was admitted that the plaintiff used this way until it was obstructed by the defendant's building a strong fence across the head of the lane at the points X, Y, in the summer of 1886, and that the defendant has never designated any other way across his lot to the county road for plaintiff's use.

In this action, the plaintiff sought to recover damages for the building a fence by defendant, in 1886, across the east line of the school-house lot as shown on the chalk plan marked Obstruction.

1. The court instructed the jury: "Whatever rights the plaintiff Whitehouse acquired by the deed from Leander Yeaton with respect to this middle parcel, whatever right of way he had, if any, at the time he took his deed and at the time the title of this middle piece was in Leander Yeaton, he would have after the title was transferred to this defendant Cummings; that the defendant Cummings would take the land notwithstanding he had a warranty deed, subject to any lawful easement that Mr. Whitehouse, the plaintiff, had by virtue of his deed."

The court also instructed the jury:

2. "Where the land conveyed by one person to another is surrounded partly by the land of strangers and partly by the land of the grantor, and where the grantee, the person who

purchases the land thus surrounded has no means of access to his land thus purchased except over the land of his grantor, or by committing a trespass on the land of strangers, or by relying upon the capricious favor or uncertain permission of those surrounding owners from time to time, or subjecting himself to actions of trespass in case they refuse to give him permission,— I say to you,—that under such circumstances if the land is worth occupying, if benefit is to be derived by occupying it so that a way is necessary at all to its occupation, a way by necessity exists in favor of the grantee."

The court also instructed the jury:

3. "So far as that school-house lot is concerned, that is a matter with respect to which the plaintiff himself assumed all responsibility and risks, and it is a matter in respect to which the defendant is not required to assume any responsibility whatever. If the plaintiff is entitled to the right of way as claimed by him, although he might have difficulty in getting from the school-house lot if anybody objected, it is entirely immaterial so far as this inquiry is concerned. That is a matter to be adjusted between him and other parties and not a matter with respect to which the defendant has any concern. Now then, you will determine upon this, I may say uncontroverted testimony, whether the plaintiff had any other lawful means at the time he received his deed or at the time of the alleged obstruction, for reaching this wood land. If not, I say to you that, by implication of law the plaintiff's grantor, Leander Yeaton, conveyed to him as an incident to his deed, a right over the middle lot that Leander Yeaton subsequently conveyed to this defendant, and that after it was conveyed to the defendant, the plaintiff would still have the same right, if the necessity still existed, and it would not be removed."

The defendant requested the court to instruct the jury:

1. "That if Leander Yeaton, the original owner of the land comprised in the three lots known as the Gage lot, the Cummings lot, and the Whitehouse lot, had legal access to the road only over the part known as the Gage lot first sold, Yeaton's right of way by necessity to and from the other two

lots was over the Gage lot, and the legal right of his grantees by necessity from the back lots must be over the Gage lot and there can be no damage resulting from building a fence against the land of any other present owner than the owner of the Gage lot."

2. "That where the owner of land, entirely surrounded by land of other owners, has himself no right of way across his adjoining owners, sells a part of his estate to a grantee who is not one of the surrounding owners, such grantee takes by necessity no right of way over his grantor's remaining land."

Which requested instructions the court refused to give, except as appears in the charge. To which instructions, and refusals to instruct, the defendant excepted.

S. and L. Titcomb, for defendant.

No right of way by necessity exists in favor of the granted premises unless they are wholly surrounded by land of the grantor; and no such right exists if they are surrounded partly by land of grantor and partly by land of strangers. *Trask* v. *Patterson*, 29 Maine, 499; *Kahlman* v. *Hecht*, 77 Ills. 570; Dev. Deeds, § 863, and cases cited. No case holds that such grantee takes a right of way to the highway, if, in fact, his grantor himself had no such right. Yeaton had no legal right to cross the school-house lot, at any time. If plaintiff has any right of way by necessity, it must be over the Gage lot. Counsel also cited, *Patton* v. *Quanier*, 18 West Va. 447.

Baker, Baker and Cornish, for plaintiff.

VIRGIN, J. This is an action on the case for obstructing the plaintiff's alleged right of way of necessity across the defendant's land and a school district lot to a highway.

The defendant contends, contrary to the instruction to the jury, that the plaintiff was not entitled to a right of way of necessity over his grantor's remaining land, for the reason that, when his parcel was conveyed to him, it was bounded in part by the land of strangers and not wholly by that of his grantor. We are of opinion, however, that his contention is contrary to principle and the overwhelming current of authority.

Such a right of way of necessity as the law recognizes and upholds, is found among the numerous applications and illustrations of the old, thoroughly established general principle that, the grant of a thing is presumed to include and carry with it, as an incident of the grant, whatever right the grantor had in connection with it and could convey by apt words, without which the thing granted would prove practically useless to the grantee. It results from a grant or reservation implied from the existing circumstances in which the grantee,— or in case of a reservation,— the grantor, is thereby placed. When a landowner conveys a portion of his lot, the law will not presume it to have been the intention of the parties that the grantee shall derive no beneficial enjoyment thereof in consequence of its being inaccessible from the highway, or that the other portion shall, for like reason, prove useless to the grantor. This species of right of way, therefore, in the absence of anything to the contrary contained in the deed, becomes an incident to the grant indicative of the intention of the parties. *Pomfret* v. *Ricroft*, 1 Wm. Saund. 323, a note 6; *Clark* v. *Cogge*, Cro. Jac. 170; *Warren* v. *Blake*, 54 Maine, 276, 286; *Trask* v. *Patterson*, 29 Maine, 499.

Every right of way of necessity being founded on a presumed grant, none can be presumed over a stranger's land and hence none can be thus acquired. *Bullard* v. *Harrison*, 4 M. & S. 387; *Howton* v. *Frearson*, 8 T. R. 50; *Pernam* v. *Wead*, 2 Mass. 202; *Allen* v. *Kincaid*, 11 Maine, 155; *Collins* v. *Prentice*, 15 Conn. 39; *Seeley* v. *Bishop*, 19 Conn. 128; *Myers* v. *Dunn*, 49 Conn. 71; *Holmes* v. *Seely*, 19 Wend. 507; *Smyles* v. *Hastings*, 22 N. Y. 217; *Nichols* v. *Luce*, 24 Pick. 102; *Pettingill* v. *Porter*, 8 Allen, 1; *Schmidt* v. *Quinn*, 136 Mass. 575; *Oliver* v. *Hook*, 47 Md. 301; *Dunklee* v. *Wilton R. R. Co.* 24 N. H. 489, 505; *Pingree* v. *McDuffie*, 56 N. H. 306; *Cooper* v. *Maupin*, 6 Mo. 624; *Mead* v. *Anderson*, 40 Kans. 203. When, therefore, property in land has been severed by voluntary or statutory conveyance, one portion of which is inaccessible except by passing over the other,

or by trespassing on the lands of a stranger, a grant of a right of way of necessity is presumed between the parties. Godd. Ease. (Ben. Ed.) 268; Wash. Ease. (3d Ed.) 233 and cases *supra*. Any language in the opinion in *Trask* v. *Patterson*, 29 Maine, 499, which seems to militate with this doctrine can not be sustained.

But the way must be from the circumstances one of strict necessity and not one of mere convenience. *Doliff* v. *B. & M. R. R.* 68 Maine, 173; *Stevens* v. *Orr*, 69 Maine, 323; *Stillwell* v. *Foster*, 80 Maine, 333; *Allen* v. *Kincaid*, 11 Maine, 155. And as it results solely in consequence of necessity, it ceases or varies with the necessity. *Holmes* v. *Goring*, 2 Bing. 76; *Rumill* v. *Robbins*, 77 Maine, 195; *Seeley* v. *Bishop*, 19 Conn. 128; *Viall* v. *Carpenter*, 14 Gray, 126; *Abbott* v. *Stewartstown*, 47 N. H. 230.

Applying these principles to the facts it is seen that when Yeaton, owning the entire lot, conveyed the front parcel in 1870 to Kimball, he would have had no means of access from his homestead and the highway to the remainder of his lot,— presumably pasture and woodland,— provided the parcel conveyed extended across the entire width of the lot, unless the right to cross this parcel had been expressly or impliedly reserved, or unless he could pass over the land of the bounding strangers,— which latter alternative he could not claim without permission.

But the front parcel did not extend across the entire width of the lot. On the contrary, a narrow strip of land, extending along the south side of it to the school-house lot, was not included in the conveyance. This fact strongly indicates that this strip of land was intentionally excepted from the conveyance of Yeaton to Kimball, as for a way for the benefit of the remainder of the lot, so as not to burden the front parcel with a right of way across its entire length at any rate,— provided permission could be obtained to continue it across the two rod school-house lot. Moreover, that such was their actual and well-understood intention and concurred in by the school district, seems to be made certain by the contemporaneous and long continued and unobstructed acts of all concerned; for the

use of this way,— the only one in existence or use,— had been so constant and of so many years duration, including eight years of the defendant's occupation, without any objection from any source until the defendant's acts complained of, that it had become a well-defined way on the face of the earth.

2. Whatever might be urged against the soundness of the instruction concerning the school-house lot, had it been made applicable to the lands of all the surrounding owners over which the plaintiff could claim no lawful right without their permission, still as its application was confined to the school-house lot and the facts in this case, we think the defendant has no just cause of complaint,— especially as there was no way across the defendant's parcel other than the one which had been used so long and which, from the acts of the owners concerned and the acquiescence of the school-district, it may be inferred was agreed upon; and that no other way has been designated by the defendant. *Rumill* v. *Robbins*, 77 Maine, 193; *Schmidt* v. *Quinn*, 136 Mass. 575. Until the school-district interrupts the plaintiff's long-used way over its two rod lot, or the defendant designates some new way over his land for the plaintiff's use,— neither of which has been done,— we fail to perceive how the defendant can complain of the doctrine contained in the instruction. Moreover, assuming that the lane was intentionally reserved by Yeaton and Kimball as a way to and from the remainder of the lot, and the school-district should, at this late day, prevent any further use of its small territory, the plaintiff might, in the absence of any new way better suited to the interest and convenience of the defendant and designated by him, extend his old one across the southwest corner of the front lot next to the school-house lot.

So much of the first and second requested instructions, as is applicable to the facts in the case, was given in the charge, and the exceptions to the requested instructions, do not seem to be urged by the defendant.

Exceptions overruled.

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

GEORGE A. MARTIN *vs.* MAINE CENTRAL RAILROAD COMPANY.

Hancock. Opinion October 10, 1890.

Adverse Possession. Oral Exchange of Lands. Title. Estoppel. R. S., c. 105, § 10.

Title by possession will become absolute after twenty years of open, notorious and exclusive occupation as owner, under a claim of right or color of title, whether such claim was originally based on a written or parol contract, or no contract at all.

An oral agreement for the exchange of lands, followed by an occupation thereunder, which has all the elements of adverse possession, will ripen into an absolute title, although mutual deeds were never given.

Where the plaintiff, with such a possessory title, knew and approved of a deed, given by one holding the record title, conveying a right to enter the premises, together with a perpetual easement of water and water-rights therein,— himself receiving the consideration named in the deed,— and afterwards saw the defendant, a subsequent grantee, expending large sums of money in improving the easement, but gave no warning to the defendant to desist and made no assertion of title until the completion of the work, and in which he was employed; *Held*: that he was equitably estopped from asserting any title to the disturbance of the defendant's easement.

ON MOTION.

This was an action for the diversion, &c., of the water, &c., from the plaintiff's land. The writ is dated August 24, 1888. The defendant company pleaded the general issue; and alleged in its brief statement that the plaintiff was estopped by his acts, his deed, and by his silence in not denying the defendants' title on the premises at the time of the alleged trespass.

The verdict was for the plaintiff. The defendants, thereupon, filed a general motion for a new trial.

The facts are sufficiently stated in the opinion.

J. R. Mason, *F. H. Clergue*, with him, for defendants.

Plaintiff estopped by deed. After some acts of alleged trespasses, and before suit, he procured and accepted a warranty deed from heirs of Dudley Martin, February 20, 1885, who held the record title, except so far as Dudley had previously conveyed to Frenchman's Bay Steamboat Co., the defendants' grantor. Plaintiff estopped from denying the seizin of his grantor. *Hains* v. *Gardner*, 10 Maine, 383. Estoppel *in pais*: *Dixfield* v. *Newton*, 41 Maine, 221; *Wilton* v. *Harwood*, 23 *Id.* 131; *Matthews* v. *Light*, 32 *Id.* 305.

G. P. Dutton, for plaintiff.

Plaintiff says the premises are his by adverse possession; the license he gave to Walton a personal, parol license, not assignable, and limited to the Steamer Electa; that Dudley Martin's deed to Walton, in terms, does not cover the *locus*, and the *locus* was not his to convey; that he is not estopped by that deed because he never knew of it, and he never authorized or acquiesced in it; that he has not acquiesced but protested from the beginning of the trespass and, has been damaged by the diversion of the water, &c.

WHITEHOUSE, J. Motion to set a side a verdict for the plaintiff in an action for making excavations, laying pipes and diverting water from springs on the plaintiff's land.

The plaintiff claims title by adverse possession. The defendant contends that the acts complained of were performed in the enjoyment of a private easement acquired by deed of August 23, 1883, from Dudley Martin, the plaintiff's uncle, to the Frenchman's Bay Steamboat Line and a deed from that company to the defendant of November 25, 1883; and further says that the former deed was executed under circumstances which constitute an equitable estoppel on the plaintiff.

I. With respect to the claim of adverse possession the testimony was uncontradicted. The plaintiff's father, John Martin, and uncle, Dudley Martin, owned adjoining farms. In 1843, the *locus* known as the "lower field" was a part of Dudley Martin's farm under a valid record title. But in that year there was an oral agreement for an exchange of lots between the brothers whereby the "lower field" in question was to become the property of John Martin. In pursuance of this agreement John Martin entered into actual possession of the "lower field" and thereafter continued to occupy it without interruption, as a part of his own farm, until his decease in 1871. Mutual deeds were never executed, but some years after the exchange, Dudley Martin sold the lot received by him, and it is said that John Martin then gave a deed of it. After the decease of the latter, the plaintiff succeeded him in the exclusive occupation of the homestead, including the *locus*, under an oral arrangement with

the widow and two sisters that he should have the farm for taking care of his mother. Dudley Martin died in the latter part of 1883, and February 20, 1885, the plaintiff obtained from his heirs a warranty deed of the "lower field."

Some of the abstruse doctrines and curious subtleties and refinements of the early common law respecting disseizin are now, in the language of Mr. Stephen, "like exploded shells, buried under the ruins which they have made." In the famous case of *Taylor* v. *Horde*, 1 Burr. 60, Lord Mansfield, observed: "The more we read, unless we are very careful to distinguish, the more we shall be confounded." But "notwithstanding this remark," says Judge Story, "what constitutes disseizin is, at least in this country, well settled." *Prescott* v. *Nevens*, 4 Mason, 329. And it is believed that the law applicable to the facts of this case is not uncertain or difficult to be understood under the statute and decisions of this state. "To constitute disseizin or such exclusive and adverse possession of lands as to bar or limit the right of the true owner thereof to recover them, such lands need not be surrounded with fences; . . . but it is sufficient if the possession, occupation and improvement are open, notorious and comporting with the ordinary management of a farm." R. S., c. 105, § 10. It was obviously not the design of this enactment, however, to make such occupancy conclusive, but only presumptive evidence of disseizin. If the occupancy is "satisfactorily indicative of such exercise of ownership as is usual in the improvement of a farm *by its owner*," (original act, 1821, c. 62, § 6), it will be sufficient evidence of adverse possession in the absence of controlling evidence to the contrary. It must appear as a fact that the possession is adverse and not under a tenancy or otherwise in subordination to the title of the true owner. *Worcester* v. *Lord*, 56 Maine, 265. But the word "adverse" does not necessarily imply any wrongful act or intent in effecting the entry or actual hostility in maintaining possession as against the true owner. Bracton's familiar antithesis, "*omnis disseisina est transgressio, sed non omnis transgressio est disseisina*," is now no better law than Latin. It is misleading. But his further statement; "*Quaerendum est a judice quo animo hoc fecerit*," is still an apt direction.

Co. Litt. 153, *b*; 8 Mod. Rep. 55. The intention guides the entry and fixes its character. It may be immaterial whether the occupant obtains his seizin as a purchaser or a trespasser. *Jewett* v. *Hussey*, 70 Maine, p. 435. His title will become absolute after twenty years of open, notorious and exclusive occupation as owner, under a claim of right or color of title, whether such claim was originally based on a written or parol contract or no contract at all. *Sch. Dist.* v. *Benson*, 31 Maine, 381; *Moore* v. *Moore*, 61 Maine, 417; Tyler on Ad. Enjoyment, 851 *et seq.*; Buswell on Lim. and Ad. Poss. 264. So if a son enters upon land under a parol gift thereof from his father and has the sole and exclusive possession for twenty years under a claim of ownership he thereby acquires title. *Sumner* v. *Stevens*, 6 Met. 337. In the opinion, Ch. J. Shaw, says: "a grant, sale or gift of land by parol is void by the statute. But when accompanied by an actual entry and possession, it manifests the intent of the donee to enter and take as owner and not as tenant; and it equally proves an admission on the part of the donor that the possession is so taken. Such possession is adverse." See also *Abbott* v. *Abbott*, 51 Maine, 575; *Webster* v. *Holland*, 58 Maine, 168; *Hitchings* v. *Morrison*, 72 Maine, 331; *Ricker* v. *Hibbard*, 73 Maine, 105.

If, therefore, the jury believed the evidence of the plaintiff on this point, they were authorized to find that the occupation of the plaintiff's father, having all the elements of adverse possession, ripened into a title during his life time. At his decease, the plaintiff became legally a tenant in common with the other heirs; in fact, however, he had the sole and exclusive possession under the arrangement stated.

II. But if it be assumed that the plaintiff's title was such as to authorize the maintenance of this action, as the pleadings stood, (R. S., ch. 95, § 19; *Hobbs* v. *Hatch*, 48 Maine, 55,) a more serious obstacle presents itself arising from the plaintiff's conduct respecting the deed of the easement from Dudley Martin, and his subsequent acquiescence in the defendants' operations on the land. It is earnestly contended that the plaintiff is equitably debarred from setting up any claim against the defendants inconsistent with that conduct.

Estoppels were formerly characterized as odious and not to be favored in the law. And it must be admitted that the definition of Lord Coke, was well designed to suggest a technical and arbitrary rule of evidence merely. The name "estoppel," was given, he said, "because a man's own act stoppeth up his mouth to allege or plead the truth." Co. Litt. 352, a. n. 1. But the equitable estoppel of to-day is essentially and widely different from the legal estoppel *in pais* of Lord Coke. "Equitable estoppel in the modern sense arises from the *conduct* of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything." Pom. Eq. § 802. Legal estoppels exclude evidence of the truth and the equity of the particular case to support a strict rule of law on grounds of public policy. Equitable estoppels are admitted on exactly the opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. *Horn* v. *Cole*, 51 N. H. 287. Though pre-eminently a creature of equity, the doctrine has been incorporated into the law, and there is now an increasing tendency to apply it in the decision of legal controversies in courts of law. *Kirk* v. *Hamilton*, 102 U. S. 68. It is no longer regarded as merely a technical rule of evidence, but a part of the substantive law which regulates rights and duties. It is "the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." Pom. Eq. § 804. Mr. Stephen's definition contains the rule laid down in the leading English case of *Pickard* v. *Sears*, 6 Ad. and E. 469, as interpreted and limited in *Freeman* v. *Cook*, 6 Bing. 174. See Stephen's Dig. of Ev. Art. 102; Bigelow on Estoppel, 483 – 485.

It is now familiar law that the owner of real or personal property may, by his conduct in inducing others to deal with it without informing them of his claim, debar himself from asserting his title to their injury. "No principle," says Chancellor Kent, in *Wendell* v. *Van Rensalaer*, 1 Johns. Ch. 344, "is better established or founded on more solid considerations of equity and public utility than that which declares that if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice and his conscience is bound by this equitable estoppel." But it is not necessary that the original conduct creating the estoppel should be characterized by an actual intention to mislead and deceive. This principle is well illustrated in the important case of *Storrs* v. *Barker*, 6 Johns. Ch. 166, (10 Am. Dec. 316). The defendant claimed to enforce his title as heir at law of his daughter, and the plaintiff claimed under a devise from the daughter which proved void in law. In the opinion, Ch. Kent, says: "Here then, is the case of a defendant knowing and approving at the time of his daughter's devise of real estate to her husband, and of that husband's retaining possession for a year after her death, and then selling the land to a third person with the advice of the defendant. He afterwards permitted that buyer to make improvements and exercise acts of ownership upon the land for the space of three years. If the case rested on these facts alone, it would fall within the rule in equity that, when one having title acquiesces knowingly and freely in the disposition of his property for a valuable consideration by a person pretending to title and having color of title, he shall be bound by that disposition, and especially if he encouraged the parties to deal with each other in such sale and purchase. But the defendant claims that he mistook the law of the land, and for three years did not know that his title was good and that the devise was void. The presumption is that every person is acquainted with his own rights, provided he has had reasonable opportunity to know

them; and nothing can be more liable to abuse than to permit a person to reclaim property, in opposition to all the equitable circumstances stated, upon the mere pretense that he was at the time ignorant of his title." See also Pom. Eq. § 805, and authorities cited; *Dixfield* v. *Newton*, 41 Maine, 221; *Cady* v. *Owen*, 34 Vt. 598.

Thus, while it is well established that the owner of land may by his conduct preclude himself from asserting his legal title, "it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is opposed to the letter of the statute of frauds, and it would greatly tend to the insecurity of titles, if they were allowed to be affected by parol evidence. It should appear that there was either actual fraud, or fault or negligence equivalent to fraud on his part in concealing his title, or that he was silent when the circumstances would impel an honest man to speak, or that there was such actual intervention on his part as in *Storrs* v. *Barker*, *supra*." *Trenton Banking Co.* v. *Duncan*, 86 N. Y. 221; *Shaw* v. *Beebe*, 35 Vt. 205.

In the case at bar, there is some conflict of testimony in regard to the circumstances under which the deed of the easement from Dudley Martin was executed. Alfred Walton testified for the defendant that as president of the "Frenchman's Bay Steamboat Line," he made a bargain with the plaintiff for the right to take water from the springs as described in the deed, agreeing to pay him ten dollars down and ten dollars at the end of a year if the water proved sufficient; and give him employment in connection with the water-works. He further testified: "When I came to mention the matter of a deed, he says, 'I cannot give it to you. I don't own the land,—that is I cannot give you a deed of it.' I says, 'Who does own it?' Dudley Martin owned it,— was what he told me. He said he occupied it, but his uncle owned the land. I says, 'Can't we see your uncle and see if he will sell the land for you or transfer it.' He says, 'We will.'" And thereupon according to the testimony of this witness, "the next day or the day after," the deed was executed in the presence and under the immediate direction of the plaintiff. In his testimony

the plaintiff denied that he ever made an oral agreement to the extent asserted, claiming that it was only a license for the company to take water for the Steamer Electa. He also denied that he ever authorized Dudley Martin to execute the deed in question, or that he ever had any knowledge of it whatever until the defendants entered upon the land under its deed. It was admitted, however, that the plaintiff received the two installments of ten dollars each, and payment for his labor, according to the terms of the agreement, in the aggregate "something over fifty dollars," and that he did state to Dr. Walton that his uncle had a deed of the land.

It appears from the report of the plaintiff's evidence that, for thirty years after the exchange of lots as stated, Dudley Martin had never exercised any acts of ownership over the "lower field," but had always spoken of it as "John's field." He knew that the plaintiff succeeded his father in the exclusive occupation of it as his own. And it is highly improbable that Dudley Martin would give a warranty deed of a permanent easement in his nephew's land, unless by his direction or, at least, with his knowledge and approbation. The suggestion that the description in the deed was intended to comprise, not the springs in question, but other springs on land actually owned and occupied by Dudley Martin, is equally without merit. It is improbable that he would convey an easement in his own land for a consideration paid to his nephew. The conclusion is irresistible that the deed was made in accordance with the agreement between the plaintiff and Dr. Walton. This view is corroborated by the plaintiff's conduct after the easement was transferred to the defendants. He had full knowledge of the defendants' operations in digging trenches and laying pipes on the land in 1884, and neither objected to the work nor claimed title to the land. After he had obtained his deed from the heirs of Dudley Martin, in 1885, he labored three weeks in the defendants' employment in the further prosecution of the work of laying pipes and building a catch-basin, and only protested against the construction of a dam, "because the deed gave no such right." He saw large sums of money expended by the defendants to make

the easement available for the purposes for which it was acquired, and neither gave warning to desist, nor made any assertion of title until the completion of the work. He was silent when he ought to have spoken and can not be heard to speak when he ought to be silent.

Nor can negligence justly be imputed to the defendants or its grantor. At the time of the execution of the deed from Dudley Martin all the facts respecting adverse possession, upon which the plaintiff now relies, were peculiarly within his knowledge. It is immaterial that he did not then appreciate their force and significance or apprehend the legal state of the title. He was in the occupation of the land, assumed to make a bargain for the sale of the easement, received the only consideration that was paid for it, and, we cannot doubt, assented to a conveyance of it from one having the record title. The defendants hold under a record title for valuable consideration without notice of the plaintiff's claim.

Under these circumstances, we think the plaintiff is now equitably estopped from asserting any title to the disturbance of the defendants' easement, acquired under the deed from Dudley Martin, and that the verdict is so manifestly against the evidence as to require the intervention of the court.

Motion sustained.

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

SIDNEY P. SMITH *vs.* JOSEPH E. FRENCH and another.

Somerset. Announced May Law Term, Middle District, 1890. Opinion October 24, 1890.

Negligence. Master and Servant.

If cattle which are being driven in the highway run against a traveler in consequence of careless and improper driving, the driver will be liable; and if he is not the owner, nor the agent or servant of the owner, an action against the latter can not be maintained.

ON EXCEPTIONS.

An action on the case to recover damages for personal

injuries. At *nisi prius*, after the plaintiff had put in his evidence, on motion, the presiding justice ordered a nonsuit. To this ruling the plaintiff excepted and the case comes to this court on his exceptions.

The facts are sufficiently stated in the opinion.

Walton and Walton, for plaintiff, cited: *Lord* v. *Wormwood*, 29 Maine, 282; *Jewett* v. *Gage*, 55 Maine, 538; *Decker* v. *Gammon*, 44 Maine, 322; *Wells* v. *Howell*, 19 Johns. (N. Y.) 385; *Fallon* v. *O'Brien*, 12 R. I. 518, 521; *Clark* v. *Adams*, 18 Vt. 425; *Davis* v. *Campbell*, 23 Vt. 236; *Wood* v. *Lerne*, 9 Mich. 158; *Cory* v. *Little*, 6 N. H. 213; *Humphrey* v. *Douglass*, 10 Vt. 71; S. C. 11 Ver. 22; Shearm. & Red. Neg. 235, 242, 243; 1 Thomp. Neg. 272, § 29; *Beckwith* v. *Shordike*, 4 Burr. 2094; *Bigelow* v. *Reed*, 51 Maine, 325, 332; *Lane* v. *Atlantic Works*, 111 Mass. 136; *Eaton* v. *Boston & Lowell, R. R. Co.* 11 Allen, 500; *Ricker* v. *Freeman*, 50 N. H. 420; *Illidge* v. *Goodwin*, 5 Car. & P. 190; *Slater* v. *Mersereau*, 64 N. Y. 147; 1 Thomp. Neg. 216; *Boston & Albany R. R. Co.* v. *Shanly*, 107 Mass. 568; *McCahill* v. *Kipp*, 2 E. D. Smith, (N. Y.) 413; *Gilman* v. *E. & N. A. R. R. Co.*, 60 Maine, 235; *McDonald* v. *Snelling*, 14 Allen, 290; *Lake* v. *Milliken*, 62 Maine, 240; *Powell* v. *Deveney*, 3 Cush. 300, 305; *Higgins* v. *Dewey*, 107 Mass. 494; *Lynch* v. *Nurdin*, 1 Adolph. & E. N. S. 29 (41, E. C. L. 422); *Griggs* v. *Fleckinstein*, 14 Maine, 81; *Thomas* v. *Winchester*, 6 N. Y. 397; *Noyes* v. *Colby*, 10 Foster, (N. H.) 143.

Merrill and Coffin, for defendants, cited: *Mosher* v. *Jewett*, 59 Maine, 453; S. C. 63 Maine, 84; Shearm. & Red. Neg. § 10; *Hill* v. *Winsor*, 118 Mass. 251; *McGrew* v. *Stone*, 53 Pa. (State), 436; Field, Dam. § 11; 4 Field's Lawyers' Briefs, § 715; *O'Brien* v. *McGlinchy*, 68 Maine, 552, 557; *Scribner* v. *Kelley*, 38 Barb. 14; *Lyons* v. *Merrick*, 105 Mass. 71, 76; *Scott* v. *Shepherd*, 2 Wm. Bl. 892; *Carter* v. *Towne*, 103 Mass. 507; *Tisdale* v. *Norton*, 8 Met. 388; *Marble* v. *Worcester*, 4 Gray, 395; *Tutein* v. *Hurley*, 98 Mass. 211; *Davidson* v. *Nichols*, 11 Allen, 514; *Salem Bank* v. *Gloucester Bank*, 17

Mass. 1; *Shieffelin* v. *Ins. Co.* 9 Johns. 21; *Ins. Co.* v. *Sherwood*, 14 Cow. 351, 363; *Peters* v. *Ins. Co.* 14 Peters, 99; *Lake* v. *Milliken*, 62 Maine, 240; *McDonald* v. *Snelling*, 14 Allen, 290; *Powell* v. *Deveney*, 3 Cush. 300; *Lane* v. *Atlantic Works*, 111 Mass. 136, 140; *Vandenburgh* v. *Truax*, 4 Denio, 467. Case at bar is not controlled by *Cory* v. *Little*, 6 N. H. 213; *Wood* v. *LaRue*, 9 Mich. 158; *Humphrey* v. *Douglass*, 10 Vt. 71; *Clark* v. *Adams*, 18 Vt. 425; *Davis* v. *Campbell*, 23 Vt. 236; as in these cases, the action is brought by the owner of the cattle against owner of land, upon which they were trespassing, and, who turned them into the highway. *Thomas* v. *Winchester*, 2 Seld. 397; *Langridge* v. *Levy*, 2 M. & W. 519; *Cox* v. *Burbridge*, 52 Law Journ. (N. S.) C. P. 89; *Lee* v. *Riley*, 34 Law Journ. (N. S.) C. P. 212; *Mangan* v. *Atterton*, 1 Exch. L. R. 239.

WALTON, J. It is the opinion of the court that the plaintiff has sued the wrong parties.

If cattle are negligently permitted to stray into the highway, and they run against a traveler and injure him, the owner, or the one having the care and custody of them at the time of the escape, will be liable. But if cattle which are being driven in the highway run against a traveler in consequence of careless and improper driving, the driver will be liable; and if he is not the owner, nor the agent or servant of the owner, an action against the latter can not be maintained. In such a case, the question is not, who was the owner, but who was the driver.

In this case, the plaintiff was run against by a pair of oxen (yoked together) which were being driven in the highway. The oxen had been trespassing in a neighboring field, and the owner of the field told his hired man to drive them out and drive them home. While so doing, the hired man set a dog on them, and the dog bit one of the oxen, and this frightened them and caused them to run against the plaintiff's wagon, and the plaintiff was thrown out and injured. Clearly, the cause of the collision was the manner of driving the oxen. And, as the driver was neither an owner, nor the agent or servant of the

owners, it is the opinion of the court that this action, which is against the owners of the oxen, can not be maintained. The liability, if any, was with the driver or his employer.

The plaintiff has alleged in his declaration that at the time of the collision the oxen were unlawfully in the highway. But the evidence does not sustain this allegation. They had before that time been unlawfully in the adjoining field. But at the time of the collision they had been driven out of the field and were in the highway for the purpose of being driven home; and surely it was lawful to use the highway for that purpose. Collisions in the highway have been a fruitful source of litigation; but it is believed that no case can be found in which it has been held that the negligence of a driver is imputable to the owner, unless the former was the servant of the latter. See last edition (1888) of Shearman & Redfield on Negligence, § § 144 – 147; and the numerous cases cited in the notes.

Exceptions overruled. Nonsuit confirmed.

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

PERLEY S. BROWN *vs.* STEPHEN H. MOSHER.

Somerset. Opinion November 3, 1890.

Replevin. Warrant of Distress. Officer. Way. Agent. County Commissioners. Jurisdiction. Amendment. R. S., c. 14, § 11; c. 18, § § 2, 3, 4, 37; c. 78, § § 6, 8, 18.

A warrant of distress against the inhabitants of a town does not *per se* protect an officer, distraining the goods and chattels of one of its inhabitants, when it does not affirmatively appear on the face of the warrant that the court of county commissioners had jurisdiction of the subject matter of the judgment on which it was issued.

If, however, the record of the judgment shows such jurisdiction in fact, the officer's legal execution of the warrant may be justified notwithstanding that fact does not affirmatively appear on the face of it.

A petition for the appointment of an agent to open and make passable a highway under the provisions of R. S., c. 18, § 37, duly entered at a regular session of the court of county commissioners, may be ordered to be heard and heard, after proper notice therefor, in the vicinity of the location; and the court may adjourn the session, at which the petition was entered, to the time and place ordered.

If such adjournment does not appear of record, the court of county commissioners may, at any regular session, amend its record so that it may accord with the facts.

ON REPORT.

This was an action of replevin. It was admitted that the plaintiff was the owner of the chattels, that they were not exempt from attachment; and that the defendant, at the time of the taking, was a deputy of the sheriff for Somerset County authorized to serve civil process.

The defendant justified the taking by virtue of a warrant of distress, issued by the county commissioners of Somerset County against the inhabitants of Detroit, upon which he had seized the property to satisfy the warrant.

It appeared that the county commissioners had laid out a way, called Peltoma bridge, across the Sebasticook river between Pittsfield and Detroit, and it not having been opened within two years they caused it to be done, and the bridge to be built, by an agent appointed by them. The proceedings of the commissioners ended in issuing a warrant of distress against Detroit to enforce their judgment rendered thereon, and to collect the proportional part of the cost of building that portion of the bridge lying within the limits of the town.

The plaintiff, an inhabitant of Detroit, contended that the warrant of distress was void, and opening of the way invalid, for the reasons which appear in the opinion of the court.

S. S. Hackett, for plaintiff.

Counsel cited: *Longfellow* v. *Quimby*, 29 Maine, 196; *Toll Bridge, Pet'rs*, 11 *Id.* 263; *Waterville* v. *Barton*, 64 *Id.* 321; *Bangor* v. *Co. Com.* 30 *Id.* 270; *Levant* v. *Co. Com.* 67 *Id.* 429; *Machias River Co.* v. *Pope*, 35 *Id.* 19; *Sumner* v. *Co. Com.* 37 *Id.* 112; *Harkness* v. *Co. Com.* 26 *Id.* 353; *Waterhouse* v. *Co. Com.* 44 *Id.* 368; *Bethel* v. *Co. Com.* 60 *Id.* 535; *State* v. *Co. Com.* 78 *Id.* 100; *State* v. *Hall*, 49 *Id.* 412; *White* v. *Riggs*, 27 *Id.* 114; *Ferger* v. *Wesler*, 35 Ind. 53; *Pillsbury* v. *Springfield*, 16 N. H. 565; *Lancaster* v. *Pope*, 1 Mass. 85; *Com.* v. *Metcalf*, 2 *Id.* 118; *Com.* v. *Chase*, 2 *Id.* 170; *Com.* v. *Cambridge*, 4 *Id.* 627; *Com.* v. *Egremont*,

6 *Id.* 491; *Com.* v. *Cambridge*, 7 *Id.* 158; *Cent. Turnpike, Pet'rs*, 7 Pick. 13; *Hinckley, Pet'r*, 15 *Id.* 447; *Porter* v. *Co. Com.* 13 Met. 479; *R. R. Co.* v. *Co. Com.* 51 Maine, 36; *Williams, Pet'r*, 517 *Id.* 517; *Fairfield* v. *Co. Com.* 66 *Id.* 385; *Buffum* v. *Ramsdell*, 55 *Id.* 252; *Winslow* v. *Lambard*, 57 *Id.* 356; *Walton* v. *Greenwood*, 60 *Id.* 356; *Holmes* v. *Holmes*, 63 *Id.* 420; *Prentiss* v. *Parks*, 65 *Id.* 559; *Leonard* v. *Motley*, 75 *Id.* 418; *Small* v. *Pennell*, 31 *Id.* 267; *Miller* v. *Brinkerhoff*, 4 Denio, 118; *Woodman* v. *Somerset*, 25 Maine, 300; *Matter of Ferguson*, 9 Johns. 239; *Dixon* v. *Highway Com.* N. W. Rep. (Mich. 1889), 814; *Snyder* v. *Goodrich*, 2 E. D. Smith, 84; *Germond* v. *People*, 1 Hill, 343; *Guptill* v. *Richardson*, 62 Maine, 257, 264; *Gurney* v. *Tufts*, 37 *Id.* 130; *Savacool* v. *Boughton*, 5 Wend. 171; cited by WALTON, J., in *Nowell* v. *Tripp*, 61 Maine, 429; *Green* v *Elgin*, 5 A. & E. (N. S.) 100.

Court should refuse a return. *Wheeler* v. *Train*, 4 Pick. 168; *Martin* v. *Bayley*, 1 Allen, 381; *Ingraham* v. *Martin*, 15 Maine, 373.

S. C. Strout, H. W. Gage, and C. A. Strout, J. W. Manson with them, for defendant.

Warrant of distress sufficient: Freem. Exon. § 101, p. 128; R. S., c. 3, § 1; c. 18, § 37; c. 78, § § 6, 7, 9, 18; c. 80, § 10; *Bryant* v. *Johnson*, 24 Maine, 307; *Stevens* v. *Roberts*, 121 Mass. 555; *Eames* v. *Savage*, 77 Maine, 212; *Waterville* v. *Barton*, 64 *Id.* 331; *Grover* v. *Howard*, 31 *Id.* 548; *Caldwell* v. *Hawkins*, 40 *Id.* 528; *Gray* v. *Kimball*, 42 *Id.* 307; *Seekins* v. *Goodale*, 61 *Id.* 404; *Nowell* v. *Tripp*, *Id.* 428; *Carville* v. *Additon*, 62 *Id.* 461; *Ford* v. *Clough*, 8 *Id.* 342; *Judkins* v. *Reed*, 48 *Id.* 386; *Elsemore* v. *Longfellow*, 76 *Id.* 130; *Small* v. *Orne*, 79 *Id.* 82; *Warren* v. *Kelley*, 80 *Id.* 531; *Chase* v. *Ingalls*, 97 Mass. 529; *Twitchell* v. *Shaw*, 10 Cush. 46; *Wilmarth* v. *Burt*, 7 Met. 256; *Donahue* v. *Shed*, 8 Met. 326; *Fisher* v. *McGirr*, 1 Gray, 45; *Clark* v. *May*, 2 Gray, 410.

Chattels in the custody of the law can not, at common law, be replevied: *Illsley* v. *Stubbs*, 5 Mass. 283; *Thompson* v. *Button*, 14 Johns. 84; *Clark* v. *Skinner*, 20 Johns. 471; *Hall* v. *Tuttle*,

2 Wend. 476; *Gardner* v. *Campbell*, 15 Johns. 401; *Musgrav* v. *Hall*, 40 Maine, 499.

Nor by statute: Laws of 1821, c. 80, § 6; *Hinds* v. *Allen*, 55 Maine, 116; *Stringer* v. *Coombs*, 62 *Id.* 165.

Officer serving the writ violated its express commands. Writ should be dismissed. The case shows the chattels had been taken and detained upon a warrant of distress, as the plaintiff's property.

All the proceedings, ending with the issuing of the warrant of distress, are regular and legal in form and substance: *Woodman* v. *Somerset*, 25 Maine, 301; *Sumner* v. *Co. Com.* 37 *Id.* 123; *Waterville* v. *Barton*, 64 *Id.* 323: *Chapman* v. *Co. Com.* 79 *Id.* 269; *Ipswich* v. *Petitioners*, 24 Pick. 345.

Defendant entitled to a return: R. S., c. 96, §§ 11, 12; *Moulton* v. *Bird*, 31 Maine, 298; *Greeley* v. *Currier*, 39 *Id.* 516; *Bath* v. *Miller*, 53 *Id.* 316.

VIRGIN, J. This is an action of replevin. The defendant sets up a justification of the taking as a deputy sheriff, by virtue of a warrant of distress, issued on an alleged judgment rendered by the court of county commissioners, in favor of one Connor, against "the inhabitants of Detroit," of which this plaintiff is one.

The plaintiff challenges the justification under the warrant for the alleged reason that it does not disclose the jurisdiction of the commissioners.

A warrant of distress in due form issued by a court of county commissioners, like the final process of other inferior tribunals, affords *per se* full protection to the officer serving it, whenever it appears on its face that the court had jurisdiction of the subject matter and no want of authority in other respects appears thereon. *Gurney* v. *Tufts*, 37 Maine, 130, 133; *Gray* v. *Kimball*, 42 Maine, 299, 307; *Nowell* v. *Tripp*, 61 Maine, 436; *Elsemore* v. *Longfellow*, 76 Maine, 128; *Winchester* v. *Everett*, 80 Maine, 535, 537; *Chase* v. *Ingalls*, 97 Mass. 529.

The legislature has prescribed the form of several mesne and final processes, civil and criminal (St. 1821, c. 63, R. S., c. 27), but a warrant of distress is not found among them. Com-

missioners have general authority to enforce, by such warrants, judgments legally rendered by them, (R. S., c. 78, § 18,) and express authority to issue them against unsuccessful petitioners under R. S., c. 18, § 3; and specific power, by such process, to collect from a town the regularly allowed amount of expenditures and expenses of a duly appointed agent in opening and making passable a highway, which the town itself was bound by law but neglected to build. R. S., c. 18, § 37.

The cases in which it is issuable are few; and if issued in cases not authorized, it is invalid. The one in hand discloses on its face no intimation of the subject matter of the judgment on which it was issued and which it was intended to enforce. For aught that appears in the warrant itself, the judgment may have been rendered upon a special contract, a tort or some other cause entirely foreign to the jurisdiction of such a court. Under the rule of law above mentioned, therefore, as the warrant on its face fails to show that the commissioners had jurisdiction of the subject matter of the judgment, it alone can not be held to justify the defendant's taking of the plaintiff's property.

If, however, the commissioners had jurisdiction in fact and the record of the judgment, on which it was issued, so shows, then the defendant was justified, unless he transcended his authority in executing it,— of which there is no suggestion.

The judgment also is attacked upon the ground of want of jurisdiction,— that the hearing upon the petition for the appointment of the agent, whose account of expenditures and expenses is the subject matter of the judgment, should have been had at the shire town of Skowhegan, and not in Pittsfield, one of the towns in which a part of the located bridge is situated.

The petition was in due form and was duly filed at the "annual session" of March, 1888, in Skowhegan; whereupon legal notice thereon, so far at least as time is concerned, was duly ordered and subsequently served. Both towns appeared by their respective counsel, when the town of Detroit objected, and now urges the objection, that the court had no legal authority to have the hearing in Pittsfield, in the immediate

vicinity of the location, but in the shire town of Skowhegan only. "Annual sessions," by reason of the positive requirements of the statute, must be held in the shire town, (R. S., c. 78, § 6,) except when a malignant infectious distemper prevails there. R. S., c. 14, § 11. But hearings on petitions for laying out, altering or discontinuing ways are required to take place at the place of meeting fixed at the discretion of the commissioners, or at a place in the vicinity. R. S., c. 18, § § 2 and 4. While the petition for the appointment of an agent to build a legally located way, which the town liable has neglected to open, is a new process and the foundation of a judgment which does not become a part of the recorded proceedings of the location, nevertheless it is a subsequent stage of the same subject matter, being one of the modes of executing the decision of the commissioners. When the petition for location was before them, the statute required of them a personal view, in order that they might thereby acquire a full knowledge of the nature and situation of the premises; and a hearing on its merits in the vicinity for the obvious accommodation and convenience of all the parties and persons interested, and thereby save the unnecessary expense and trouble of traveling to and from the shire town. Like reasons with many others, which readily suggest themselves in connection with the construction of a bridge across a river forming the boundary line between towns, would seem to render essential a view and hearing at or near the *locus*. The mere duty of fixing the time, when the bridge and its approaches shall be completed involves the careful consideration of numerous facts and circumstances of which a view would afford the best possible evidence, supplemented by the knowledge of residents thereon as to the nature of the bed and the action of the current in high and low water. At such a place all could be heard, accommodated and convened, and at the least expense practicable and none injured.

It is urged, however, that while the statute authorizes a hearing in the vicinity on a petition for the location, it does not on the petition for the appointment of an agent. True, there is no express statutory authority therefor. Neither is there any

statutory provision affirmatively authorizing commissioners to hold any sessions even in the shire town, on any days other than the three designated for their annual sessions. No adjourned sessions are mentioned in the statute, although when only one of the commissioners is present, "he may adjourn to a convenient time and place." R. S., c. 78, § 8. But so long as there is no statute prohibiting the court from adjourning from time to time, and holding adjourned sessions to accommodate the business of the people of the county, we have no doubt they have the inherent right to do so. Moreover it has been the universal custom and practice, especially in the more populous counties, to keep the regular sessions open by adjournments; and petitions and applications for their action have always been considered as entered at a "regular session," whenever they were presented at a session held by adjournment from a regular session. *Parsonsfield* v. *Lord*, 23 Maine, 515; *Harkness* v. *Co. Com.* 26 Maine, 353; *Waterville* v. *Co. Com.* 59 Maine, 80; *Bethel* v. *Co. Com.* 60 Maine, 535. And agents may be appointed at an adjourned term, because, says SHEPLEY, C. J., "the statute does not require that commissioners should act upon such proceedings at the times prescribed by law." *Sumner* v. *Co. Com.* 37 Maine, 112.

We are of opinion, therefore, that in the absence of any statutory prohibition, the commissioners had discretionary power, on proper notice to the parties, to have the hearing in the vicinity of the *locus*, and acted wisely in thus ordering it. The place was more convenient for all concerned than the shire town; much expense saved and no one could possibly be prejudiced thereby; and no one has attempted to impugn the wisdom of the appointment.

From that point forward, the record shows a careful compliance with the statutory provisions regulating such proceedings and no objection has been made thereto.

If the record does not show the hearing to have been held at an adjourned session, it was such a session in fact, and the county commissioners have full authority over their record, and

can, at any session, correct their record to accord with the facts.

Judgment for the defendant. Property to be returned. Damages to be settled at nisi prius.

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

JOHN E. TIBBETTS *vs.* FERDINAND PENLEY.

Androscoggin. Opinion November 3, 1890.

Exceptions. Practice. Way. Deed. Evidence. R. S., c. 18, § § 14, 17.

An exception to the refusal to give a requested instruction not based upon the facts proved, can not be sustained.

A question not raised at *nisi prius* can not be argued at the law court.

Revised Statutes, c. 18, § 17, authorizing towns to "discontinue private ways," relates to such only as they may lay out, alter or widen under R. S., c. 18, § 14, and not to those created by express grant in a deed.

Where the owner of land conveyed the northern portion to the plaintiff, and "also a right of passage-way in the most direct and convenient place from the county road to the granted premises," and subsequently conveyed the southerly portion to the defendant, "subject to the right of way granted by" the former deed to the plaintiff, and in an action on the case for obstructing the right of way wherein one of the issues was whether the way had been laid out across the corner of the land of the defendant, who denied that it touched his land; *Held*, that the deed to the defendant was legitimate evidence to be considered by the jury with the other evidence material to that issue.

ON EXCEPTIONS.

This was an action on the case, in which there was a verdict against the defendant for obstructing a private right of way, over his premises, vested in the plaintiff, and created by an express grant.

In 1866, one Knight, owned a lot of land in Auburn, containing one acre, situated on the easterly side of the county road leading from Lewiston bridge to Farmington, as the road ran in 1835. Between 1835 and 1846, this road had been changed by the county commissioners, and the northern end swung off to the west, creating a heater-piece between the road as it existed in 1835 and as it existed in 1846.

April 20, 1866, said Knight conveyed to the plaintiff a piece of land eighty-three feet by sixty-three feet, situated in the northwest corner of the acre lot, together with the privileges of Barron brook, (lying northerly) flowage rights, and other water privileges; "Also, the right of passage-way for himself and others with or without teams from the county road to the aforegranted premises in the most direct and convenient place."

The county road, in 1835, ran along the whole westerly line of the one-acre lot; and after it was discontinued, by the alteration above referred to, no town or county way existed giving access to any part of the acre until 1889, when the city of Auburn located and built a town way, known as Knight street, from the county road, as altered and known as Turner street, northerly along the whole westerly line of the acre-lot.

It was conceded at the trial that in 1866, Knight owned not only the acre-lot, but the heater-piece lying next westerly of it.

September 21, 1885, said Knight conveyed to the defendant a lot lying next south of the plaintiff, the deed containing this clause: "Said premises are subject to a right of way granted by said Knight to said John E. Tibbetts, by the aforesaid deed of April 20, 1866."

The plaintiff contended that, soon after he took his deed, the way in question was located by agreement between the plaintiff and Knight, from a point on the southerly line of his lot easterly from Knight street and over the northwesterly corner of defendant's land to the location of the old county road, now Knight street, and thence on said location to the new county road, known as Turner street; and introduced evidence sustaining his contention.

The defendant contended that the passage-way had not been legally located across his land as claimed by the plaintiff; that if the acts and declarations of Knight and the plaintiff amounted to a legal location, such location, was over the old location of the county road, now known as Knight street, and not upon the defendant's land; also, that if not located on Knight street, there had been no legal location of the passage-way.

It was admitted that on December 10, 1889, after Knight

street had been built and opened for travel, the defendant erected a shed on the northwesterly corner of his lot, obstructing the passage-way leading to his mill as claimed by the plaintiff, but not obstructing Knight street.

The case was submitted to the jury upon these issues, and they found for the plaintiff.

The defendant offered in evidence the petition for the location of Knight street, and the proceedings of the city council thereon. He also proved that the petition was drafted by the request of the plaintiff, who obtained the signatures of others, and paid a portion of the expense of building the street. He requested the court to instruct the jury that "if Knight street was located and built substantially on the location of the way previously used by the plaintiff and those having occasion to go to his mill, the private way of the plaintiff is merged in the public way and extinguished."

The presiding justice declined to give the requested instruction, but instructed the jury as follows:

"Then, it is claimed again, that the location of the public street along by the plaintiff's property extinguished his right of way; that it no longer exists. I instruct you that that is not so. The public street may be discontinued at any time; but that would not extinguish the grant to the plaintiff. He holds it by grant, and it can be taken from him only in some legal mode. Locating a public street by the premises would not extinguish his right by grant, and especially it would not, you will perceive at once, if it was located over any portion of the grantor's premises east of Knight street, and the premises involved here are admitted to be east of Knight street. So you may pay no attention and importance to the location of the public street, no weight at all, any further than the conduct of the plaintiff tends to aid you in determining whether his way was located where he claims it or not. So far as that gives you any light, you have a right to consider it as a piece of evidence, and no further."

The defendant further contended that the clause in his deed of September 21, 1885, "said premises are subject to a right of

way granted by said Knight to said John E. Tibbetts," &c.,— did not enlarge the plaintiff's rights, nor affect those of the defendant; that while the plaintiff was entitled to a way, under the terms of the deed, somewhere over land owned by his grantor at the date of his deed, yet the defendant's deed did not show that such a way had, or had not been, legally located.

Upon this point the presiding justice instructed the jury as follows: "You have in the deed, put in by the defendant, at least a piece of evidence which you may regard as important. My own opinion is, that as a matter of law, it is an estoppel upon the defendant to deny the existence of the way over the premises conveyed to him by Knight. But that point has not been made; and I do not so instruct you. But I do say that it is important evidence upon that issue, because the deed recites that the remaining portion of the acre retained by Knight, and conveyed to Penley, the defendant, is subject to the right of way granted to the plaintiff in 1866. The declaration is that the premises conveyed, are subject to the right of way granted to the plaintiff in 1866. That is a declaration that the right of way is located upon that land and exists there in the plaintiff, and the defendant has taken his deed containing such a declaration or fact. I say to you, if he is not estopped by it to deny the fact that it does not exist upon his land, it is of important weight in considering the question whether the road was located at the point, or substantially at the point, claimed by the plaintiff."

The defendant also requested other instructions, but as they were not urged in argument, they are omitted. To the instructions as given above and refusal to instruct, the defendant took exceptions.

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

The record in terms refers to the private way, and the location of the town way was "over said way substantially as the same is used and travelled." This extinguished the private way, or substituted therefor the way so located, and discontinued such portions of the private way as were outside the new location. Following the petition promoted by plaintiff, the city council

located Knight street directly upon the existing way for almost the whole distance of six hundred and ninety-five feet, only varying from it for about thirty feet before reaching plaintiff's land, and then continuing the same course instead of making an angle around the corner of the Hackett house. Interpretation of this record: *Goodwin* v. *Marblehead*, 1 Allen, 37, 40. Private right of way merged in the public easement: *Leonard* v. *Adams*, 119 Mass. 366. Damages allowed therefor: *Ford* v. *Co. Com.* 64 Maine, 408; *Bridge Corp.* v. *Lowell*, 15 Gray, 110. New way substituted for the old, as a whole, and portions outside, lying east of Knight street, discontinued. *Hyde Park* v. *Co. Com.* 117 Mass. 422. Record shows such was the intention. Same result in straightening crooked ways: *Cyr* v. *Dufour*, 68 Maine, 499; *Bowley* v. *Walker*, 8 Allen, 22. Plaintiff renounced his easement and by his acts is estopped: *King* v. *Murphy*, 140 Mass. 254, and cases cited; *Dyer* v. *Sanford*, 9 Met. 395; *Pope* v. *Devereux*, 5 Gray, 409; *Canny* v. *Andrews*, 123 Mass. 155; *Corning* v. *Gould*, 16 Wend. 531; *Crain* v. *Fox*, 16 Barb. 184; *Snell* v. *Levitt*, 110 N. Y. 595; *Curtis* v. *Noonan*, 10 Allen, 406; *Smith* v. *Lee*, 14 Gray, 473, 480; *Taylor* v. *Hampton*, 4 McCord, 96; *Liggins* v. *Inge*, 7 Bing. 682, 692.

Construction of defendant's deed: Its terms are not "subject to a way" but to "a right of way." It was conceded that same clause in plaintiff's deed of 1866, did not imply a location then made, but that one was to be made after the grant by the parties.

A. R. Savage and H. W. Oakes, for plaintiff.

VIRGIN, J. This is an action on the case for obstructing a private way claimed by the plaintiff across the northwest corner of the defendant's lot lying next south of the plaintiff's.

We do not think that the refusal to give the defendant's requested instruction, relating to the alleged effect of the location of Knight street upon the private way in controversy, afforded him any cause for complaint. It was not based upon facts proved. The street was not located and built substantially

upon the location of the plaintiff's passage way to his mill. To be sure, so far as the passage way extended along the western line of the "acre lot" (if at all) the street covered the same territory; but so much of it as extended east of that line to the plaintiff's mill was entirely outside of and away from Knight street.

Whether, if the street had extended over the whole distance of the passage-way, the latter, having been acquired by express grant, would have become extinguished is not certain; though so much of it as was actually covered by the street might perhaps become merged therein and be revived whenever the street should be discontinued. *Reg.* v. *Chorley*, 12 Q. B. 515; *Leonard* v. *Adams*, 119 Mass. 366, 368; Godd. Ease. 75, 76, 445.

Undoubtedly in straightening public ways by alterations authorized by R. S., c. 18, such strips of land in an old location as are not covered by the new, would become *ipso facto* discontinued. Such is the natural and desired object sought by the proceeding. *Cyr* v. *Dufour*, 68 Maine, 492, 499. So under statutory provisions "towns may discontinue private ways." R. S., c. 18, § 17. But the private ways therein referred to are such only as the municipal officers are authorized, after due preliminary proceedings, to "lay out, alter or widen" by R. S., c. 18, § 14, and not those which are created by express grant. If the plaintiff's passage-way were one of necessity simply, the location of the street along the western line of the plaintiff's land, would operate a discontinuance of it across the defendant's land, on the well-settled doctrine that the necessity from which the way resulted having ceased, the right of way ceased. *Whitehouse* v. *Cummings*, *ante* p. 91.

The mere fact that, the street was laid out and built at the instigation of the plaintiff who would be benefited by it, would not of itself be conclusive evidence of his abandonment of his passage-way. Whether or not there was an abandonment on his part depended largely upon his intention which must be shown by evidence of such facts as clearly indicate it. *Jamaica P. & A. Corp.* v. *Chandler* 121 Mass. 3; *King* v. *Murphy*,

140 Mass. 254. In the case at bar the street was not laid out between termini of the passage. Moreover no question of abandonment was raised at *nisi prius*.

First exception. Knight's deed, of April 20, 1866, to the plaintiff conveyed not only the land therein described, but "also, the right of passage-way for himself and others, with or without teams, from the county road to the aforegranted premises in the most direct and convenient place." Knight's deed, of September 21, 1885, to the defendant of the land adjoining on the south that conveyed to the plaintiff above-mentioned, contained the clause: "Said premises are subject to a right of way granted by said Knight to said John E. Tibbetts, by the aforesaid deed of April 20, 1866."

This language contains no intimation that the way thus defined in general terms had been located in fact by Knight and the plaintiff; and independent of the facts elicited at the trial, it could have no special significance upon that question. But one of the principal issues submitted to the jury by the parties was — whether the passage-way, mentioned in Knight's deed to the plaintiff, was ever located by the parties thereto across the northwest corner of the land conveyed by Knight to the defendant. The plaintiff claimed that it was thus and there located immediately after the receipt of his deed. On the other hand, the defendant contended that the way was over the land directly west of the plaintiff's,— then owned by Knight and now covered by Knight street,— and that it did not touch the land retained by Knight and subsequently conveyed to the defendant in September, 1885. In addition to various items of evidence bearing upon that issue, the presiding justice called the attention of the jury to the clause above quoted in Knight's deed to the defendant, and among other instructions, gave the one to which exception was taken.

We think the defendant has no cause for complaint. The grantee in a valid and operative deed poll under which he desires and enjoys a title by its acceptance, becomes bound by the restrictions, limitations, reservations and exceptions contained in it; and it does not lie in his mouth to impeach it or

reject the burden it imposes. *Winthrop* v. *Fairbanks*, 41 Maine, 307; *White* v. *Bradley*, 66 Maine, 254, 256. While the language itself had no particular significance in establishing the alleged fact of location of the private way, nevertheless when taken in connection with the other facts relating to the issues — that the way did not touch the defendant's land, his deed contained an admission that he was in error. And as the way over the northwest corner of his land, was the only one which had ever existed from the plaintiff's mill, the jury might well be told that, the clause in the deed was important evidence on the question.

The second and fourth exceptions were not pressed at the argument.

Exceptions overruled.

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

JEROME F. MANNING *vs.* SAMUEL BORLAND.

Lincoln. Opinion November 29, 1890.

Client and Attorney. Evidence. Practice. Rule of Court X.

In a suit to recover for services claimed to have been rendered by the plaintiff in the prosecution of an "Alabama" claim, the defendant was permitted to prove that, subsequent to the time when the services sued for were claimed to have been performed, the plaintiff was expelled from the court and prohibited from prosecuting claims therein. *Held*; that this evidence was not admissible, or relevant to the issue.

A paper purporting to be a contract between the defendant and a third party, by the terms of which the latter was to have twenty per cent of the amount recovered from the government, was held inadmissible.

Proof of the execution of this document, which was executed in the presence of an attesting witness, does not appear to be governed by rule X of this court.

ON EXCEPTIONS.

This was an action of assumpsit for services rendered in prosecuting a claim in the court of commissioners of Alabama claims, the petition for which was filed January 13, 1883. At the trial, plaintiff was asked on cross-examination, if he was expelled from the court of Alabama claims July 29, 1885. The

plaintiff's counsel objected to the admission of this question on the ground that the record would be the better evidence and that the inquiry was wholly immaterial, as plaintiff claimed that his services were wholly performed before he was expelled. The presiding justice admitted the testimony.

The defendant was also permitted to introduce in evidence, against the plaintiff's objection, the following document, marked exhibit B.

"Alabama Claims.

AGREEMENT FOR FEES.

"I hereby promise and agree to allow and pay to Joshua Nickerson or his order, executors, administrators, or assigns, an amount of money equal to twenty per centum of any sum, or sums, of money awarded, decreed, and paid to me, my order, executors, administrators, or assigns, by the government of the United States, or any person, court, commission, convention, or tribunal by said government authorized to award, decree, and pay, on account and in satisfaction of our my claim or claims against said government for damages, losses, or disbursements, on account of the payment of increased insurance, or so-called war premiums paid by said Samuel Borland.

"This is in consideration of certain expenses and services by the said Joshua Nickerson, or his order, to which we hereby bind ourselves, our executor, administrators, and assigns. No payment is due and payable to the said Joshua Nickerson, his order, executors, administrators, or assigns, until the amount is awarded and decreed to me, on said claim or claims by the said government, or on its order, or account; and this payment, when due and payable to said attorney, is made a first lien on the award and decree therein. Witness our hands and seals, interchangeably, this 13th day of January, A. D., 1883.

Samuel Borland, by J. A. Borland, Attorney in fact. Seal.

Joshua Nickerson. Seal.

"Executed in duplicate.

"Witness: P. E. O'Connor.

"Received, New York, January 4th, 1888, from B. F. Metcalf,

twenty dollars for commissions as per contract in Alabama claim No. 5532, Samuel Borland *vs.* the United States.

J. Nickerson, & Son."

The verdict was for the defendant, and the plaintiff filed exceptions to the admission of the evidence admitted.

O. D. Castner, *Jerome F. Manning* with him, for the plaintiff.

The execution of any instrument to which there are subscribing witnesses must, if such instrument is used in aid of a suit, or defense, or is directly in issue, be proved by the evidence of such subscribing witness, or one of them, or proof of their signature be given. *Kinney* v. *Flynn*, 2 R. I. 319; *Jones* v. *Phelps*, 5 Mich. 218; *Hollenback* v. *Flemming*, 6 Hill, (N. Y.) 303; *Melcher* v. *Flanders*, 40 N. H. 139; *Davis* v. *Alston*, 61 Ga. 225; *Barry* v. *Ryan*, 4 Gray, 523; *Ayres* v. *Hewett*, 19 Maine, 281, 286. This rule is universal, and applies to a simple receipt as fully as to a more formal instrument. *Pearl* v. *Allen*, 1 Tyler, 4; Best. Ev. § 31, p. 215. It is immaterial that the party against whom such instrument is offered as evidence has admitted its execution. *Storey* v. *Levett*, 1 E. D. Smith, 153; *Brigham* v. *Palmer*, 3 Allen, 450; *Fox* v. *Reil*, 3 Johns. 477; *Ellis* v. *Smith*, 10 Ga. 253. The defendant could promise to pay as many as he liked; but such promise could not affect in any way plaintiff's claim. Counsel also cited: *Manniny* v. *Sprague*, 148 Mass. 18; *Ins. Co.* v. *U. S.* 112 U. S. 193; *Froxcroft* v. *Crooker*, 40 Maine, 308; Wharton Ev. 1 § § 644, 646, 619, 197; *Whiton* v. *Ins. Co.* 109 Mass. 24; *Fuller* v. *Princeton*, Dane Abr. 333, 334; *Morris* v. *Edwards*, 1 Ohio, 189, 209; *Morris* v. *Harmer*, 7 Pet. 554; *Houghton* v. *Gilbert*, 7 C. & P. 701; Best Ev. (Chamberlayn,) pp. 454–457 and notes; *Leavitt* v. *Leavitt*, 4 Maine, 161; *Handley* v. *Call*, 27 Maine, 35; *Kelley* v. *Merrill*, 14 Maine, 228; *Woodman* v. *Segar*, 25 Maine, 90; *Gage* v. *Wilson*, 17 Maine, 378; *Whittemore* v. *Brooks*, 1 Maine, 57, 59; *Pullen* v. *Hutchinson*, 25 Maine, 249; Abbott's Trial Ev. 391; *Paine*

v. *Tucker*, 21 Maine, 138; *Meth. Corp.* v. *Herrick*, 25 Maine, 354; *Tyng* v. *B. & M. R. R.* 12 Cush. 277.

True P. Pierce, for defendant.

The paper offered in evidence was properly admitted; as it was executed in the presence of a witness not within the jurisdiction of the court, its execution could be proven "in any manner." 1 Green. Ev. § 572.

WALTON, J. This is a suit to recover for services claimed to have been rendered in the prosecution of an "Alabama Claim." The defendant was permitted to prove that subsequent to the time when the services sued for were claimed to have been performed, the plaintiff was expelled from the court and prohibited from prosecuting claims therein. We think this evidence was not admissible. Although well calculated to create prejudice against the plaintiff and the validity of his claim, still, it was wholly irrelevant to the issue then being tried. And the evidence was specifically objected to on the ground of irrelevancy. We think the objection should have been sustained.

The defendant was also permitted to introduce into the case as evidence a paper purporting to be a contract between himself and one Joshua Nickerson, by the terms of which the latter was to have twenty per cent of the amount recovered of the government. See defendant's exhibit B. We can discover no valid ground for the admission of this paper. The plaintiff was not a party to it; and, so far as appears, had no knowledge of its existence. Its execution was not proved, and we think it was not admissible if its execution had been proved. It could not properly affect or invalidate the plaintiff's claim.

Exceptions sustained.

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

CALVIN BLAKE *vs.* DAVID SAWYER.

Somerset. Opinion December 15, 1890.

Statute of Limitations. Appropriation of Payments.

The debtor may determine to which of several debts a payment made by him shall be applied, but if he omits to exercise the right, the creditor may make the appropriation, and apply it to a debt already barred.

Such application of the payment will not remove the statutory bar with respect to the balance of the debt. To have that effect, the appropriation must be made by the debtor himself; but the creditor may apply the payment to a debt not already barred by the statute of limitations and thereby prolong the running of the statute from the time of such payment.

ON EXCEPTIONS.

This was an action of assumpsit on a promissory note given by the defendant December 3d, 1879, for one hundred ninety-eight dollars and seventy-two cents, with interest, payable on demand, to Fuller, Buck & Co., or order. Said note became the property of Andrew H. Buck, one of the members of the firm of Fuller, Buck & Co., at the dissolution of the firm, February 22d, 1880. It bears on its back the indorsement, "Fuller Buck & Co.," in the handwriting of Josiah L. Fuller, member of said firm; also an indorsement as follows: "Jan. 26, 1881. Rec'd $12.30 in work." On that date, January 26th, 1881, it appeared in evidence that the defendant was owing Andrew H. Buck a store account, and the note in suit. The writ is dated January 18, 1887.

The pleadings were the general issue, and statute of limitations by a brief statement.

The plaintiff introduced evidence tending to show that three unreceipted bills, amounting to twelve dollars and thirty cents, for labor performed by defendant for Andrew H. Buck, were brought to said Buck on January 26th, 1881, by defendant's minor son George, with no direction on the part of defendant as to which debt the amount of these bills should be applied to; that Buck did at this time indorse that amount on the note in suit, and that defendant never after called on Buck for payment of these bills.

The defendant introduced evidence tending to show that, at the time the last of the three bills was presented to Buck, defendant's son George directed said Buck to apply the amount of the three bills to the payment of the store account, and refused to consent to its being indorsed on the note; also that these bills were due from Buck to the firm of David Sawyer & Son. Plaintiff introduced evidence tending to disprove the existence of the partnership.

The plaintiff's counsel claimed before the jury that if on January 26th, 1881, the defendant was owing said Buck the note in suit, and also a store account, and caused these bills, amounting to twelve dollars and thirty cents, to be presented to Buck for payment, with no direction as to which debt they should be applied to, Buck could apply them on the note if he saw fit, and thereby interrupt the running of the limitation.

On this branch of the case the presiding justice, among other things, instructed the jury as follows:

"Now the issue that you are to pass upon in this case is whether a payment of twelve dollars and thirty cents, was made upon this note as claimed by the plaintiff, and whether it was made by the defendant upon the note. As I understood the position of counsel for the plaintiff, he claims, that if the defendant caused the bills to be passed in to Buck, giving no directions as to how they should be applied, Buck, who then held the note, had the right to treat them as a payment upon the note, and apply the amount as part payment of the note. I instruct you that that is not the law. What must be shown to take the case out of the statute is a payment by the maker of the contract. It must be his act of affirmance of the contract. The holder of a contract is not permitted in a case like this to apply a payment on any contract he pleases, because it was not appropriated by the party who made a payment. But he must show you that the party making the payment made it and applied it, or made it to be applied upon the particular contract in suit. Then, you have his act upon that contract, his act of recognition of the validity of that contract, and that is what takes it out of the statute of limitation."

The verdict was for the defendant, and the plaintiff excepted to these instructions to the jury.

J. O. Bradbury, for plaintiff.

Merrill and Coffin, for defendant.

The transaction relied upon by plaintiff, as a part payment to take the case out of the statute of limitations, was in fact no payment at all, on the demand sued, or on any other demand, because there was no concurring intention on the part of defendant and Buck, nor was there any agreement to offset claims.

If the transaction referred to was a payment, it was only a general payment by a debtor owing his creditor several demands, and under such circumstances an implied promise to pay the balance of one particular claim can not be raised. For, in order to raise an implied promise the part payment must be made upon the very debt which plaintiff seeks to take out of the statute. The payment must be an unequivocal acknowledgment of the particular debt sued, not a general acknowledgment of indebtedness, for part payment can be given no greater force than any other form of acknowledgment. The general rule as to application and appropriation of payments here meets with a marked exception, and should be given no force in this particular case. The defendant cannot have intended to make a payment on this note, on January 26, 1881, for the note was originally given to a firm and indorsed to Buck, and there is no evidence that defendant, on that date, knew that Buck was the owner of the note.

WALTON, J. The right of a debtor to determine to which of several debts a payment made by him shall be applied is unquestionable. But if he omits to exercise the right, the law allows the creditor to make the appropriation. And the latter may apply it to a debt already barred by the statute of limitations. But such an application of it will not remove the statutory bar with respect to the balance of the debt. To have that effect, the appropriation must be made by the debtor himself.

But the creditor may apply the payment to any debt not already barred by the statute of limitations, and thereby prolong the running of the statute for six years from the time when the payment is made.

Apparently this distinction between a debt already barred and one not already barred was overlooked by the presiding judge in the trial of this cause; for the indorsement in question was made on the note declared on long before it would have become barred by the statute of limitations; and yet the presiding judge instructed the jury that, to take the case out of the operation of the statute, the plaintiff must show that the party making the payment made it, *and applied it*, or *made it to be applied*, upon the particular contract in suit. This would have been correct if the indorsement had been made upon a note then barred by the statute. But the instruction being given with reference to a payment made before the note on which it was indorsed had become barred, was clearly erroneous.

This distinction between debts barred by the statute at the time when the payment is made, and those not then barred, is recognized in *Pond* v. *Williams*, 1 Gray, 630, and expressly sanctioned in *Ramsey* v. *Warner*, 97 Mass. 8. And the law is so stated in Buswell on Limitations, § 81.

Exceptions sustained.

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

THOMAS M. BAKER *vs.* JOHN CARTER.

Kennebec. Opinion December 25, 1890.

Husband and wife. Agency. Supplies.

A husband is liable for articles furnished and delivered to his wife while residing with her husband, necessary and proper, though charged to herself.

A wife while living with her husband is presumed to be vested with an agency authorizing her to purchase on his credit such supplies as were necessary for herself and family.

ON MOTION.

The defendant moved for a new trial after a verdict was rendered against him in the Superior Court, for Kennebec

County, in an action to recover for groceries furnished by the plaintiff, and, as appeared by the testimony, were ordered by his wife and consumed in his family.

It was admitted that the account was originally opened with the wife previous to her marriage, under the name of Fowler, and that it was continued subsequent to her marriage with the plaintiff, in her married name.

There was also evidence, on the part of the defendant, that he never authorized his wife to make the purchases; that he knew nothing of or about it; and that the wife owned the farm where they resided. It also appeared that the defendant is a pensioner of the United States and had received a large sum for back pay, &c.

E. W. Whitehouse, for defendant.

Counsel cited: *Parker* v. *Simonds*, 1 Allen, 258; *Yates* v. *Lurvey*, 65 Maine, 221.

F. E. Southard, for plaintiff.

The jury found, under an appropriate charge, that the goods furnished were necessaries. Husband is liable although the wife expressly promise to pay for them.

FOSTER, J. During cohabitation a wife has ordinarily a *prima facie* agency to purchase on her husband's credit such supplies as are necessary for herself and family. This rule of law is based largely on the fact that it is customary to intrust a wife with the management of the household. While living together the law presumes the husband's assent to contracts made by the wife for necessaries. This agency, however, is limited to articles that are reasonably necessary for her or the family, and does not extend to business contracts, nor to purchases beyond what may be regarded as suitable to their situation and condition in life.

In *Furlong* v. *Hysom*, 35 Maine, 332, it was held that the husband was liable for articles furnished and delivered to a married woman residing with her husband, necessary and proper for her, though charged to herself, and that the jury were

authorized to infer an authority to the wife from the husband to purchase the goods on his credit.

True, the agency of the wife to purchase necessaries, is only presumptive and may be disproved by the husband by showing that he had abundantly supplied the house with all things necessary and suitable; or that he had furnished the wife with ample ready money for the purpose, and requested her not to purchase on credit; or had provided suitable places where all things necessary could be had, and forbidden her to purchase elsewhere. Though the mere fact that he privately forbade her to act for him will not relieve him from liability where it appears that he has recognized her agency, or has in some way allowed her to appear to have charge of his house. The husband in the view of the law is the head of the house, and has a right to control the affairs of his own household. Nevertheless, while he has a right to say when and how his house shall be supplied, he can not repudiate his obligation altogether.

In the present case he had made no such provision as would relieve him from liability for the acts of the wife in making the purchases. The jury might very properly infer such agency. The case falls within that of *Furlong* v. *Hysom*, *supra*.

Motion overruled, judgment on the verdict.

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

HALLET R. DURLING *vs.* AARON H. GOULD, and HOTEL "MANOR INN."

Hancock. Opinion December 29, 1890.

Lien. Notice. R. S., c. 91, § § 30, 32, 33.

When a laborer has once acquired a statute lien on a building, for labor performed thereon with the consent of the owner, that section of the statute requiring notice of the lien to be given should be construed liberally in favor of the laborer, so far as the form of the notice is concerned.

If, from the notice filed, it can be fairly and reasonably inferred—1, that a lien is claimed; 2, by whom it is claimed; 3, what is the balance due, and that no credits are to be given; 4, what is the particular building upon which the labor was performed and to which the lien has attached; 5, that the name of

the owner is not known to the claimant when no owner is named; and the notice is verified by the signature and affidavit of the claimant, it is sufficient though not symmetrical in form.

ON EXCEPTIONS.

This was an action of assumpsit to enforce a lien for labor. The owner of the building appeared and objected to the sufficiency of the statement filed with the town clerk. The presiding justice having ruled that it was sufficient, he filed exceptions to the ruling.

The facts appear in the opinion of the court.

Wiswell, King and Peters, for owner of building.

No statement however full and complete would answer the requirements of the statute unless "subscribed" by the claimant. Therefore in considering the sufficiency or insufficiency of the statement filed in this case we are only to look at what the claimant has subscribed to. Any statement that may appear in the oath written above the magistrate's signature cannot be considered as forming a part of the claimant's statement because it is not subscribed to by the claimant. If every requirement of the statute was set forth in the oath, which the magistrate subscribes, it would not entitle the claimant to a lien, unless that had been subscribed by him.

The statement does not show "the amount due." It is merely a debit charge, one side of an account; it may be true in every respect as the debit side of the account. There is a distinction, between a debit charge and a statement that a specific sum is "due."

The statute requires "a true statement of the amount due, with all just credits given." It may be that, if there are no credits to be given, that an omission to state that fact would not render the statement insufficient, but it is claimed that it should be so drawn as to leave no doubt that the sum specified is due. A mere debit charge does not preclude the idea that there may not be credits. The statement does not give a description of the property "intended to be covered by the lien." There is no mention whatever made of the fact that the plaintiff claims any lien. It is merely a statement of labor on a certain building.

The object of the statement, and the record thereof is to give notice, to all persons interested, of the claim. If the statement contains no mention whatever that a lien is claimed it does not fulfill the purpose of the statute.

It does not contain the name of the owner of the building, or the fact that the name of the owner was not known to the claimant if such was the fact. This requirement of the statute is not complied with. The case of *Ricker* v. *Joy*, 72 Maine, 106, is the only case that we have been able to find in this state where the sufficiency of the statement filed with the town clerk has been before the court. But it will be found by an examination of that case that the statement there in question specified the amount "due" the claimant; that it was due for labor which entered into a building; there was a sufficient description of the property; and the name of the owner was given.

A. F. Burnham, for plaintiff.

EMERY, J. The plaintiff, being in the employ of Aaron H. Gould, contractor, performed fifty-seven and nine-tenths days' labor in erecting the Hotel "Manor Inn" at Sullivan Harbor, with the consent of the owner, Clyde D. V. Hunt. For this labor, the plaintiff admittedly acquired a lien on the Hotel by R. S., c. 91, § 30.

To preserve that lien, the same statute (section 32) required the claimant, within thirty days after he ceased to labor, to file in the office of the clerk of the town in which the building is situated, "a true statement of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien sufficiently accurate to identify it, and the names of the owners, if known." The plaintiff ceased to labor July 27, 1889, and within thirty days thereafter filed in the office of the clerk of the town of Sullivan, in which the building is situated, the following paper:

"Sullivan, July 27, 1889.

"Mr. Aaron H. Gould, to Hallet R. Durling, Dr.

"To 57 9-10 days labor on Hotel "Manor Inn," at Sullivan Harbor, at $2.25 per day. $130.18

Hallet R. Durling.

"State of Maine, Hancock, ss. On this 26th day of August, 1889, personally appeared the above Hallet R. Durling and made oath in due form that the above bill by him subscribed, is just and true in all its parts for which he wishes to secure a lien as provided by law. CYRUS EMERY, Justice of the Peace."

Seasonably thereafter he brought this suit to enforce his lien claim on the Hotel. Mr. Hunt, the owner, appeared to defend against the lien claim, and rested his defense solely on the ground, that the above notice was insufficient in form to preserve the lien, in the following particulars. First, that it does not state in terms, "the amount due," but only states a debit charge, without any statement as to credits. Second, that it does not state that the Hotel "Manor Inn," is intended to be covered by the lien. Third, that it does not state the names of the owners nor that the names were unknown. It appeared that the plaintiff did not know who was the owner, though he supposed the Sullivan Harbor Land Company to be.

The presiding justice overruled these objections, and ruled that the notice was sufficient to preserve the lien. The owner excepted.

Mechanics' liens on buildings and land, though recognized and favored by the civilians, had no place in the common law, which from its feudal character, was reluctant to subject realty to the payment of any claims other than feudal. They were introduced into the law by positive statute in this country. These statutes were naturally at first deemed by the courts to be in derogation of the common law, and hence to be construed narrowly and strictly. They have now, however, become an integral part of our law, and their justice and beneficence have become apparent. They now form recognized principles of remedial justice, and should receive broad and liberal construction.

A lien once acquired by labor on a building by the consent of the owner, should not be defeated by technicalities, when no rights of others are infringed, and no express command of the statute is disobeyed. The purpose of section 32, is to secure to owners and prospective purchasers of the property, notice of the

amount and nature of the lien, to which it is subject, and in whose favor the lien has accrued. If that notice is fairly and fully given under the sanction of the claimant's signature and affidavit, the interests of others are protected and the purpose of the section is fulfilled. It would be too rigorous to insist upon formal and technical accuracy from a laborer in giving such notice. The legislature has declared in section 33, that inaccuracies in the statement shall not invalidate, unless they be willful or leave the notice obscure. The court should give this section full play.

In this case, we think that the owner or prospective purchaser of the "Manor Inn," by inspecting the notice on file in the town clerk's office would be clearly notified, that Hallet R. Durling (the plaintiff), claimed to have furnished labor to the amount of one hundred and thirty dollars and eighteen cents on that hotel; that one hundred and thirty dollars and eighteen cents was the "amount due;" that there were no credits to be given and that a lien was claimed on the hotel for that sum. The mere filing of the paper could not fail to give notice that a lien was claimed. *Ricker* v. *Joy*, 72 Maine, 106. All the above information was verified by the signature and affidavit of the claimant.

If the name of the owner of the property is unknown to the claimant, the statute does not require him to formally allege his ignorance. His very omission to state the name of the owner would give notice that the name was unknown, as was the fact in this case. It would be unreasonable to insist that a laborer's notice of his lien once acquired, shall have all the formal precision of allegation used in an indictment for crime.

We think the notice in this case is a substantial compliance with the requirements of the statute.

Exceptions overruled.

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

JAMES F. HOLMES *vs.* A. B. DANFORTH.

Kennebec. Opinion January 2, 1891.

Deed. Covenant. Incumbrance. Way.

When land conveyed, by deed with covenant of warranty against incumbrances, is bounded by the center of a public road, and is so described in the deed, so that knowledge of the fact is brought home to the grantee, without resort to oral or other extraneous evidence, he must accept the land *cum onere*, and can not complain of that incumbrance as a breach of the covenant in his deed.

ON EXCEPTIONS.

The plaintiff excepted to the ruling of the Superior Court, for Kennebec County, in sustaining the defendant's demurrer to the following declaration:

"In a plea of covenant broken; for that the said defendant on the eleventh day of January, A. D., 1887, at Albion in said county, by his deed of that date, duly executed, acknowledged, recorded, and in court to be produced, in consideration of the sum of seventy-five dollars, paid him by the plaintiff, conveyed unto the plaintiff a certain lot or parcel of land situated in said Albion, bounded and described as follows, to wit: On the north, by the town road leading from Wellington's corner to Drake's corner; east, by land of B. F. Abbott; south and west, by land of the defendant; containing one half acre from the centre of said road, and is to be ten rods south from said road, and eight rods on said road — 8x10 rods from the centre of said road.

"To hold to him and his heirs; and the said defendant, did therein, among other things, covenant with the plaintiff, that said lot or parcel of land was free of all incumbrances.

"Now the plaintiff in fact says, that at the time of making and executing said deed, the said bargained premises were not free from incumbrances, but on the contrary, before the making of said deed, for a long time, there had been, and then was, and ever since hath been, a public road running through, over, and across said land, to the use of which road the public generally had at that time acquired, and have continued to exercise, this right, which the defendant is unable to prevent; which said public road is the southerly half of the town road named in said

deed — to wit: said southerly half of said road being eight rods long, two rods wide."

E. F. and A. Webb, for plaintiff.

Plaintiff's knowledge of the existence of the highway does not preclude a recovery for breach of covenant against incumbrance, however it may be for a breach of the covenant of seizin. *Kellogg* v. *Malin*, 50 Mo. 496, (S. C. 11 Am. Rep. 426,) approving *Kellogg* v. *Ingersoll*, 2 Mass. 101, that a public highway does constitute a breach of the covenant against incumbrances. *Harlow* v. *Thomas*, 11 Pick. 66; *Townsend* v. *Weld*, 8 Mass. 146.

A public road is an easement, for the existence of which over a part of a lot of land conveyed by deed with covenants of warranty, is a breach of those covenants. *Haines* v. *Young*, 36 Maine, 557; *Lamb* v. *Danforth*, 59 *Id.* 322. So is a mere location of a road. *Herrick* v. *Moore*, 19 Maine, 313. Deed covers all title, and covenants against incumbrances. The land was at the time subject to the easement of the highway.

A. M. Goddard, for defendant.

There is no grant of land included in the road inconsistent with or adverse to the public easement of the highway. The grant of the land included in the road, is expressly, or by sufficiently strong and clear implication, made subject to the easement. The covenant being thus qualified and limited in effect, does not enlarge the grant. *Coe* v. *Pers. Unknown*, 43 Maine, 432; *Bates* v. *Foster*, 59 *Id.* 157; *Stinchfield* v. *Gerry*, 64 *Id.* 200. Counsel also cited: *Oxton* v. *Groves*, 68 Maine, 371; *Nobleboro* v. *Clark*, *Id.* 87; *Abbott* v. *Abbott*, 51 *Id.* 575; *Pike* v. *Munroe*, 36 *Id.* 309; *Webber* v. *Overlock*, 66 *Id.* 177.

WALTON, J. This action is for an alleged breach of a covenant against incumbrances in a deed of land. The deed describes the land as bounded on the north by the centre of a town road; and inasmuch as this description renders the fact certain that one half of the width of the road must be on the land conveyed to him, the plaintiff claims that the existence of this road is a

breach of the covenant against incumbrances contained in his deed. In other words, he claims that the deed itself, by its covenants and its recitals, secured to him an immediate right of action to recover back the whole, or a portion at least, of the consideration paid for the land.

We think this can not be. We think that when the deed itself, by which land is conveyed, describes it as bounded on one side by the centre of a public road, the right of way is impliedly reserved. That such must have been the intention of the parties no one can doubt. The effect of such a description is the same as if so much of the interest in the land as is included in the right of way had been excluded from the conveyance; and the covenants apply only to the residue of the estate. That is, the interest covered by the incumbrance was not conveyed, and does not purport to have been conveyed, and the covenants do not apply to it.

Thus, in *Freeman* v. *Foster*, 55 Maine, 510, where land was conveyed subject to a mortgage, and it was contended that notwithstanding the mortgage was thus mentioned in the deed, it constituted a breach of the covenant against incumbrances, the court held that "the interest covered by the mortgage was not conveyed," and that the covenant against incumbrances did not apply to that incumbrance.

So, as held in *Montgomery* v. *Reed*, 69 Maine, 510; if the land conveyed is described as "flats," this term alone implies that the public have a right to use the land for the purposes of navigation, and the existence of the right is not a breach of the covenant against incumbrances.

So, in *Prescott* v. *Williams*, 5 Met. 429, where the estate conveyed was described as land through which the water from a mill passed, the court held that the right of the mill owner to enter upon the land and cleanse the channel of the stream was implied, and would not constitute a breach of the covenant against incumbrances.

The principle on which these and many other similar decisions rest is that, when the estate conveyed is so described that the parties must have understood that it was subject to a

servitude, the grantee takes it *cum onere*, and will not be allowed to complain of that servitude as a breach of the covenants in his deed. In all such cases the conclusion is irresistible that, if the incumbrance was a damage to the estate, that fact was taken into account in fixing the price; and that the grantee has obtained all that he bargained for and all that he paid for.

In defining the term *cum onere* in Bouvier's Law Dictionary, it is said that "a purchaser with knowledge of an incumbrance takes the property *cum onere*." And the law seems to be so held in Pennsylvania. In a recent case in that state (*Memmert* v. *McKeen*, 112 Pa. St. 315), the court held that one who purchases a house-lot, upon which steps leading into a building on the adjoining lot are standing, is presumed to have assented to the price in view of a continuance of the steps upon his land, and will not be allowed to complain of them as the breach of a covenant against incumbrances. And the law seems to be so held in some other states.

But we do not go so far as that. We do not hold that oral evidence of the grantee's knowledge is admissible to control the covenants in his deed. But we hold that when land conveyed is bounded by the centre of a public road, *and is so described in the grantee's deed*, so that knowledge of the fact is brought home to him without resort to oral or other extraneous evidence, he must accept the land *cum onere*; and will not be allowed to complain of that incumbrance as a breach of the covenants in his deed. To that extent we consider the rule just and reasonable and well settled by authority.

Exceptions overruled. Judgment for defendant.

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

WILLIAM D. GOWER *vs.* INHABITANTS OF JONESBORO'.

Washington. Opinion January 2, 1891.

Tax. Personal Property,—employed in trade. R. S., c. 6, § § 13, 14, cl. 1.

The plaintiff, a resident of Sedgwick, caused to be cut from a tract of wild land owned by him and situated in the defendant town, fire wood, pulp wood, and

kiln wood, aggregating eleven hundred cords, and two hundred piles, all of which wood and piles he caused to be conveyed to the landing at the shore on said tract, before April 1, 1888, there to remain until sold in small quantities or by the whole lot, to local or other parties, as might thereafterwards be found expedient.

The piles were disposed of during the year by occasional shipments to other ports, as was also the greater part of the wood, partly by such shipments, and partly by sales from time to time to local parties, whenever there was a demand therefor.

In a suit brought by the plaintiff against the town, where the same was cut and conveyed, to the landing therein, to recover the amount of tax paid under protest by the plaintiff; *Held*: That the wood and piles were "personal property employed in trade," and for which the plaintiff was legally taxable, in the defendant town, under the first paragraph of § 14, c. 6, R. S., which provides that "All personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, shall be taxed in the town, where so employed, on the first day of April; provided that the owner, his servant, sub-contractor or agent, so employing it, occupies any store, shop, mill, wharf, landing place, or shipyard therein, for the purpose of such employment."

FACTS AGREED.

The case, which is stated in the opinion, was submitted without argument.

The agreed statement of facts is as follows:

"Plaintiff is, and was on the first day of April, A. D. 1888, and long before, a resident of Sedgwick, in the County of Hancock. In the winter of 1887-8, plaintiff, by his agent, George R. Crandon, caused to be cut from a tract of wild land owned by the plaintiff, and situated in the defendant town, fire wood, pulp wood, and kiln wood, aggregating eleven hundred cords and two hundred piles, all of which wood and piles, said agent caused before April 1, A. D., 1888, to be conveyed to the landing at the shore on said tract, to remain until sold by piecemeal, or by the whole lot, to local or other parties as might thereafterwards be found expedient. Said operations by Crandon were by virtue of a contract made with said Gower, in the fall of 1887, said Crandon's compensation therefor being stipulated monthly wages; and said operations were fully performed and completed on the 28th day of March, A. D., 1888. On or about April 15, of that year, said Crandon was again employed by said Gower to care for, manage, sell to local parties or ship

said wood and piles, without any express agreement as to term of service or amount of compensation therefor. Said agent has ever since continued to perform services, having disposed of said piles by occasional shipments to other ports, and of the greater part of said wood, partly by such shipments, and partly by sales from time to time to local parties whenever there was demand therefor. Part of said wood still remains on said landing unsold and in charge of said agent. All of this wood and piles, so cut as aforesaid, was on said landing on April 1, 1888.

"Plaintiff was taxed for said wood and piles by the assessors of taxes in defendant town for the year 1888. . . . The tax was paid in full by plaintiff under protest on March 15, 1890, he retaining and reserving his full legal rights to recover back said sum, or any part thereof, provided it be found that he was not legally taxed for said property or any part thereof. Said tax has been paid into the treasury of the defendant town. The plaintiff was not taxed for said wood and piles, in the town of Sedgwick, in 1888."

F. I. Campbell and E. E. Livermore, for plaintiff.

C. B. Donworth, for defendants.

FOSTER, J. Action to recover a sum of money, paid under protest to the defendant town, on the ground that the property on which the tax was laid was not taxable to the plaintiff in the defendant town.

The case comes up on an agreed statement, by which it appears that the plaintiff, a resident of Sedgwick, caused to be cut from a tract of wild land owned by him and situated in the defendant town, fire wood, pulp wood, and kiln wood, aggregating eleven hundred cords, and two hundred piles, all of which wood and piles he caused to be conveyed to the landing at the shore on said tract before April 1, 1888, there to remain until sold by piecemeal, or by the whole lot, to local or other parties as might thereafterwards be found expedient.

The piles were afterwards disposed of during the year by occasional shipments to other ports, as was also the greater part of the wood, partly by such shipments, and partly by sales from

time to time to local parties whenever there was a demand therefor.

All the wood and piles so cut were on the landing on April 1, 1888 — the year for which the tax was laid.

The only question submitted for our consideration is whether the plaintiff was legally taxable in the defendant town for the wood and piles cut and upon the landing as before stated.

By R. S., c. 6, § 13, the plaintiff was taxable for all his personal property in Sedgwick, the town in which he resided, unless within one of the exceptions named in the following section. The tax, to be sustained by the town of Jonesboro', must appear to be upon property included in one of these exceptions. The defendant town claims it was "personal property employed in trade," and for which the plaintiff was legally taxable under the first paragraph of § 14, which reads as follows: "All personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, shall be taxed in the town where so employed on the first day of April; *provided* that the owner, his servant, sub-contractor or agent, so employing it, occupies any store, shop, mill, wharf, landing place or shipyard therein for the purpose of such employment."

That the plaintiff occupied a landing place within the town of Jonesboro', on the first day of April, 1888, for the purpose of selling the wood and piles, may be regarded as unquestioned upon the agreed statement.

The only question, then, about which there can be the slightest contention, is this, — was the property "employed in trade," within the meaning of the statute? We think it was. It was upon the plaintiff's landing to be sold or disposed of either in small quantities or by the whole lot, as might be found expedient. The disposition of it after it was hauled to the landing is evidence that it was employed in trade. It was sold to various parties from time to time in greater or less quantities, whenever there was a demand for the same. The appropriate meaning of "trade," as used in the statute, as defined by Bouvier, embraces "any sort of dealings by way of sale or exchange; commerce; traffic." Webster, Trade.

It is the policy of the law that all property, with certain exceptions, should bear its just proportion of the public burdens. The statute contemplates that it should be taxed to the owner, either in the town where he resides, or the town where it is situated. This statute is to be construed liberally in order to effectuate the object to be accomplished by its provisions, instead of placing such a construction upon it as would leave it in the power of the owner of such property successfully to evade taxation for it anywhere. Were we to apply the same degree of strictness in its construction as is usually applied to the term "trader," under the provisions of the insolvent law, there can be little doubt that the plaintiff would fall within its provisions. *In re Merryfield*, 80 Maine, 233; *Groves* v. *Kilgore*, 72 Maine, 489; *Sylvester* v. *Edgecomb*, 76 Maine, 499.

The conclusion at which we have arrived disposes of the case, and in accordance with the stipulation in the agreed statement the entry must be,

Plaintiff nonsuit.

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

LULA E. MANN *vs.* DELBERT E. MAXWELL.

Androscoggin. Opinion January 2, 1891.

Bastardy. Evidence. Practice. Exceptions.

The statute, in bastardy proceedings, requires an accusation during travail of the complainant as a condition precedent to the right of recovery. The court admitted evidence of the fact by the testimony of an attendant at the time of travail.

When evidence is offered by a party, and at the time, in the light of what has been developed, the presiding justice thinks it incompetent and excludes it, but on further developments he concludes to admit it, and so informs counsel before the evidence is closed, and he declines to put it in, but elects to take his chance with the jury without it, it is too late for him to insist on exceptions after the verdict is against him.

ON EXCEPTIONS.

This was a proceeding under R. S., c. 97, relating to bastardy.

The complainant having filed, under section five of that chapter and before trial, her declaration, she next introduced the deposi-

tion of Mrs. Jenkins, to meet the requirements of section six of the same chapter. The respondent objected to the fifth interrogatory and to interrogatories and answers numbered six and seven, which were as follows:

"*Int.* 5. Did the said Lula E. Mann, during her travail, make any statement to you as to who was the father of the child, with which she was then confined? If yes, what was her statement? *Ans.* Yes, sir. She said it belonged to Delbert Maxwell.

"*Int.* 6. If yes, state what conversation you had with her in regard to this subject? *Ans.* I don't remember of anything more.

"*Int.* 7. Was the statement, above referred to, made during the continuance of her pains of labor, if so, at what time, as nearly as you can state? *Ans.* Yes, sir. Well, it was somewhere between five and six o'clock in the afternoon of the 2d of May, 1889, as near as I can remember."

The presiding justice overruled the objections and the complainant was allowed, without other objections to become a witness.

There was evidence tending to show that the complainant, in the fall of 1888, was keeping company with a man by the name of Jones, and had been for about a year prior thereto; and complainant was asked on cross-examination if she had not on the 13th day of March, 1889, sent for Jones to come to her house, which was objected to by complainant's counsel, but admitted by the presiding justice, and in answer to this question she stated that she had. Thereupon, she was further asked on cross-examination if she did not at this time ask Jones to marry her, which being objected to by complainant's counsel, together with all conversation relative to her proposed marriage was excluded by the court. The complainant had previously testified that she had kept company with said Jones for more than a year; that she knew at this time she was pregnant with child; and that on the afternoon of the same day that she sent for Jones, she served a complaint against the respondent.

Before the testimony was closed, the presiding justice informed one of the respondent's counsel that he might recall the com-

plainant and further cross-examine her by putting the said questions, but he declined to do so, saying he preferred the matter to remain as it was.

There was a verdict for the complainant, and the respondent filed exceptions to the above rulings.

George C. Wing, *W. H. White* with him, for respondent.

While, as the exceptions show, there was no formal objection made to the complainant's becoming a witness, we submit that the objections to the testimony which qualified her to be a witness should operate in the place of a formal objection. The case shows that Dr. Kendrick was the attending physician upon the complainant, and that he arrived about sundown and left the next morning between eight and nine o'clock. It is certainly very remarkable that although he was present and testified at the trial, and a man of long experience as a physician, that no statement was made to him of this most important matter; and we further submit that the declaration to Mrs. Jenkins was too remote from the time of the birth of the child to answer to the requirements of the statute.

The conversation relative to complainant's proposed marriage was admissible. This evidence was admissible as affecting her credibility. *Burgess* v. *Bosworth*, 23 Maine, 573. Not sufficient, that respondent afterwards might recall witness. Thomp. on Trials, 3680.

A. R. Savage and H. W. Oakes for complainant.

Questions to Mrs. Jenkins are admissible. Statute requires an accusation during travail as a condition precedent to the right of recovery. Complainant's voluntary statement sufficient, without showing any inquiry addressed to her before making accusation. *Totman* v. *Forsaith*, 55 Maine, 360; *Wilson* v. *Woodside*, 57 *Id.* 489. Interrogatory five not leading. Interrogatory six covers preceding question. Interrogatory seven and answer more definitely covered by next question and answer admitted without objection.

Admissibility of complainant as a witness not open to respondent. She was competent, as the law now stands, without

preliminary testimony by another. Credibility and weight only affected: *Payne* v. *Gray*, 56 Maine, 317. Question to complainant, if she had not asked Jones to marry her, properly excluded. An affirmative answer could have no material bearing upon the issue of the paternity of this child. Discretion of court to exclude such questions: *Grant* v. *Libby*, 71 Maine, 427; *State* v. *Rollins*, 77 *Id.* 380; *Miller* v. *Smith*, 112 Mass. 470, and cases cited. Exception not tenable: *Mudget* v. *Kent*, 18 Maine, 349; *Thomson* v. *R. R. Co.* 81 Maine, 40.

LIBBEY, J. This is a complaint for bastardy. The verdict was for the plaintiff, and the defendant brings the case here on two exceptions.

The first is to the admission of three questions, numbered five, six and seven, in the deposition of Mrs. Jenkins. No objection was made to them when the deposition was taken. We think they were clearly competent.

The second is to the exclusion of a question put to the plaintiff on cross-examination. It is unnecessary to discuss the competency of the inquiry proposed, as during the trial and before the evidence was closed, the court concluded to admit the proposed questions, and so informed one of the defendant's counsel, and told him he might have the plaintiff recalled, and further cross-examine her by putting the questions which had been excluded; but he declined to do so, saying he preferred the matter to remain as it was.

When evidence is offered by a party, and at the time, in the light of what has been developed, the judge thinks it incompetent, and excludes it, but on further developments he concludes to admit it, as frequently occurs during a trial, and so informs counsel, and he declines to put it in, but elects to take his chance with the jury without it, it is too late for him to insist on exceptions after verdict against him.

Exceptions overruled.

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

BENJAMIN M. ROYAL *vs.* CYRUS CHANDLER.

Androscoggin. Opinion January 2, 1891.

Real action. Evidence. Boundaries. Declarations. Practice.

The declaration of ancient persons, made while in possession of land owned by them, pointing out their boundaries on the land itself, and who are deceased at the time of the trial are admissible evidence, where nothing appears to show that they were interested in thus pointing out their boundaries; and it need not appear affirmatively that the declarations were made in restriction of, or against, their own rights.

When there is some doubt as to whether the acts and declarations were before or after the persons conveyed the land, it is a question in the first instance to be determined by the judge, in his discretion; and in this case was properly determined.

See *Royal* v. *Chandler*, 81 Maine, 118.

ON EXCEPTIONS.

This was a real action brought to settle the location of the dividing line between the parties.

The exceptions, by the defendant, relate to the admissibility of certain questions and answers in the deposition of one Tinker, offered by the plaintiff and admitted by the court against the defendant's objections.

These questions and answers contained the declarations of one Enoch Jones, who at the time of the trial, and also when the deposition was taken was deceased, made in his lifetime while he owned and occupied certain land bounded by the line in dispute, while upon his land in the act of pointing out to the witness then negotiating a purchase, its boundaries and certain monuments as marking the line in controversy. Prior to these declarations, Jones owned the land on both sides of this line, but at the time of pointing out these monuments he owned only the land upon its northeasterly or northerly side.

The defendant, among other objections, contended that Jones made the declarations after he had conveyed the disputed premises; that when making them he was not upon them, but was on the ten-acre piece; and did not accompany his statement with any act referring to them.

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

Jones' declarations not made in presence of defendant, and are hearsay; are those only of a former owner. *Morrill* v. *Titcomb*, 8 Allen, 100; *Osgood* v. *Coates*, 1 *Id.* 77; *Blake* v. *Everett*, *Id.* 248. Admissible only against declarant and those in privity of title with him. Plaintiff not in privity with Jones or his grantees. *Allen* v. *Holton*, 20 Pick. 458; *Papendick* v. *Bridgewater*, 5 El. & Bl. 176; *Whitney* v. *Bacon*, 9 Gray, 206; Counsel also cited: *Daggett* v. *Shaw*, 5 Met. 223, 228; *Wood* v. *Foster*, 8 Allen, 24; *Ware* v. *Brookhouse*, 7 Gray, 454; *Sullivan Granite Co.* v. *Gordon*, 57 Maine, 520; *Niles* v. *Patch*, 13 Gray, 254; *Flagg* v. *Mason*, 8 *Id.* 556; *Long* v. *Colton*, 116 Mass. 415; *Bartlett* v. *Emerson*, 7 Gray, 176; *Hall* v. *Mayo*, 97 Mass. 418; 1 Green. Ev. § 145.

LIBBEY, J. This is a writ of entry. The parties are owners of adjoining lands, in Auburn, which are parts of original lot number one, formerly in Poland, according to Bakerstown survey. In 1820, said lot was owned by Josiah Little, who, February 14, 1822, conveyed to Jonathan Chandler, Jr., father of the defendant, fifty acres off of the northeasterly end of said lot, bounded on the southwest by a line parallel with the northeast line of the lot, and sixty-six rods distant therefrom. The contention between the parties is the true location of this line. February 3, 1829, said Chandler conveyed to Jonathan Lane ten acres of land on the northwest side of said fifty acres, and on the same day he conveyed the balance of the fifty acres to Rachel Chandler, and on April 10, 1848, said Rachel conveyed to Rufus C. Lane five acres of the remaining portion of the fifty acres, lying southeasterly of said ten acres, and Rufus C. Lane acquired the title to the ten acres. January 9, 1864, said Rachel conveyed the balance of the fifty acres to the defendant.

January 9, 1850, Josiah Little, or his heirs, conveyed the balance of said lot number one to Rufus C. Lane, who conveyed it, with the ten acres and five acres to Enoch Jones, May 28, 1860. Jones conveyed all, except the ten and five acre lots, to Lane and Hicks, December 25, 1860. July 3, 1871,

Lane and Hicks conveyed a portion of said land to the defendant, bounding it on the northeast by the land of the defendant before described. Said Jones conveyed the ten and five acre lots to Mary Tinker, by deed dated March 14, 1863. By this statement, it will be seen that the southwest line of the defendant's, and of the ten and five acre lots, and the northeast line of the plaintiff's land, is the continuous line of the fifty acres conveyed by Little to Jonathan Chandler, Jr. Both parties claimed that sometime after the conveyance, the line was run and marked.

The defendant's exceptions are to the admission of the testimony of Hosea W. Tinker, husband of Mary J. Tinker, who acted for her in negotiating the purchase of the ten and five-acre lots, of said Enoch Jones. The testimony states the acts and declarations of Jones, to the witness in regard to the location of the southwest line of said lots,—the line in dispute,—during the negotiations and while on the land. We think the testimony was competent and properly admitted.

In *Daggett* v. *Shaw*, 5 Met. 223, the rule is declared to be, in cases like this "that the declarations of ancient persons, made while in possession of land owned by them, pointing out their boundaries on the land itself, and who are deceased at the time of the trial, are admissible in evidence, where nothing appears to show that they were interested in thus pointing out their boundaries; and it need not appear affirmatively that the declarations were made in restriction of, or against, their own rights." Many authorities are cited in the opinion in support of the rule. We do not deem it necessary to repeat them here.

This rule has since been affirmed in Massachusetts, in *Bartlett* v. *Emerson*, 7 Gray, 174; *Ware* v. *Brookhouse*, *Ib.* 454; *Wood* v. *Foster*, 8 Allen, 24; and in *Niles* v. *Patch*, 13 Gray, 254, is fully recognized in an opinion by C. J. Shaw, and extended to the acts and declarations of one in possession of the land under a contract of purchase, but who had no title.

We think this rule has been recognized and acted upon in cases like this in this state. It is an exception to the general rule of evidence, that hearsay evidence is incompetent. Landmarks in the early surveys are usually formed of perishable

materials, frequently destroyed in clearing and the improvement of the land, and pass away with the generation in which they were made. In such cases, when no direct proof can be made as to the location and character of the monuments, we are forced to secondary evidence; and the acts of the owner of the land when upon it, pointing out the monuments and location of his line, and his declarations, made at the time in regard to them, when no controversy exists, are competent to be submitted to the jury, after his death, as having some tendency to prove the location of the line.

In this case, the testimony objected to by the defendant tends to prove that Jones, the owner of a part of the lot on one side of the disputed line, while upon it, negotiating a sale to Tinker, pointed out the location of the line at the southwest end of his lots, and the landmarks upon it. It is not suggested that Jones had any interest to locate the line further east than it really was. In fact that would curtail the length of his lots. It is clearly within the rule settled in the Massachusetts cases, *supra*.

True, it is contended by the defendant's counsel that the testimony of the witness tends to show that Jones' declaration, while pointing out the marked hemlock tree, was after he had conveyed to Mrs. Tinker, because on cross-examination he said it was after March 20, 1863, and the date of the deed to her is March 14th, of that year. But in his direct examination, he said it was before the purchase was made, and while he was negotiating for the purchase. The evidence was in deposition, and these apparently conflicting statements raised a question to be determined by the judge, in the exercise of his discretion, whether the acts and declarations referred to were while Jones held the title. We think the discretion was properly exercised. The witness would be much more likely to remember accurately the fact of examining the land and its lines during the negotiations than the precise day of the month; and then it is within our general knowledge that the date of the deed is not always identical with the date of the closing of the sale.

Exceptions overruled.

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

HERBERT Q. BLAKE, appellant from the decree of Judge of Insolvency annulling his discharge in insolvency,

vs.

CHARLES H. CLARY and another.

Kennebec. Opinion January 3, 1891.

Insolvency. Annulling Discharge. Fraud. Knowledge of Creditor. Attorney. R. S., c. 70, § 49.

An insolvency debtor's discharge, if fraudulently obtained, may be annulled on petition of a creditor who, at the time of granting the discharge, had no knowledge of the fraud.

Such a petition can not be maintained by a creditor who had such knowledge. His remedy is to resist the granting of the discharge.

When knowledge of the attorney is imputable to his client.

Bank v. *Chase*, 72 Maine, 226, approved.

ON MOTION.

This was a proceeding by petition of the appellees, Clary and Quinn, filed September 28, 1887, in the Court of Insolvency for Kennebec County, to annul the discharge of the appellant Blake. There was a hearing thereon in that court and in February, 1888, a decree was made that the discharge be annulled. The petition alleged that Blake, or some one in his behalf, had obtained the assent of one Carter, and H. S. Brown and Co., creditors, to his discharge by a pecuniary consideration.

Blake appealed from this decree to the Supreme Judicial Court, Kennebec County, where it was tried to a jury, who returned a verdict in his favor. At the trial, the presiding justice framed the followlng issue: Did H. Q. Blake, the debtor, or some one in his behalf, procure the assent of one or more of his creditors to his discharge by any pecuniary consideration or promise of future preference, without the knowledge of the petitioners, until after the granting of the discharge? The jury answered, No.

It appeared that, at the time of the commencement of the proceedings in insolvency by the debtor, Blake, November 25, 1885, Clary and Quinn, appellees, had entered an action against him in the Superior Court, Kennebec County, and that the suit

was pending at the time of the trial of this case; and that Beane and Beane were their counsel. After due proceedings in the Court of Insolvency, a decree was ordered October 11, 1886, granting Blake a discharge from his debts, and on the 13th and 15th days of the same month, Carter, and Brown and Co., appealed therefrom and entered their appeals in this court.

There was evidence at the trial, in the appellate court, tending to show that the claims of these creditors had been settled and adjusted, and their assent to his discharge thereby obtained. Some of this evidence consisted of the creditor's written receipts acknowledging payments by one Yeaton, and directing the withdrawal of objections to Blake's discharge.

These receipts, &c., were filed in the appellate court by the debtor in support of his written motion, at the October term, 1886, to dismiss the appeals. The motion to dismiss is entitled, *Henry S. Brown et al. appellants*, v. *H. Q. Blake*, and the debtor alleges in it: . . .

"That on October 21, 1886, said appellant's claim was fully satisfied, and they directed their attorneys in writing, to withdraw all objection to said insolvent's receiving a full discharge by said Insolvency Court; and that said attorneys are now prosecuting said appeal without authority and against the wishes of the appellants." From the docket entries it appeared that Beane and Beane, were counsel of Brown and Co., in the prosecution of this appeal. The motion to dismiss was overruled, but being renewed by other counsel, at the following March term, under written instructions of Brown and Co., the appeal was dismissed.

On August 27, 1887, the appeal of Carter, one Atherton, an intervening creditor having been admitted to prosecute it, but whose claim was settled, was withdrawn, and the appellate court affirmed the decree of the court below granting a discharge.

One of the counsel of the debtor during the pendency of these appeals, but who had withdrawn before the trial, testified that he was in court when the matters were discussed; that the discussion was on the dismissal of these cases because the claims had been settled; the case in which Atherton was a party, was

discussed; that one of the firm, Beane and Beane, was in court and took part in the discussion. The debtor's son, a member of the bar, testified that he recollected the October term, when Atherton filed his petition to prosecute Carter's claim against his father; that Mr. Beane took part in that discussion; and that the discussion was in regard to the dismissal of the appeals on the ground they had been settled.

The appellee, Clary, testified that the fact of the settlement of the claims of Carter and Brown and Co., did not come to his knowledge until after the discharge to Blake had been granted.

Beane and Beane, for Clary and Quinn, appellees.

We were read out of court by the letter of Brown and Co., dated March 14, 1887, which was after the receipts, given upon payment of the two claims, had been filed in court. After this date we were out of court as counsel for anybody; with no right to appear, speak or object; our rights taken from us by the fraudulent acts of the debtor. We had done nothing for Clary and Quinn in the Insolvent Court prior to this. The assent of two other creditors to the discharge was obtained by the payment of money as evidenced by their receipts used in obtaining a dismissal of the pending appeals.

The court will not sustain the position that because an attorney of Brown and Co. had knowledge of a certain fact in one court, that such knowledge became, as a matter of law, the knowledge of Clary and Quinn in the prosecution of another and different case in another, and different court, but against the same party.

The discharge had been granted, as matter of fact, October 11, 1886, and before the settlement in either case had been made. The statute word "assent" applies to something done, "consent" being the proper word applicable to anything to be done. Impossible for Clary and Quinn to have known of an assent being given until it was done; therefore, they could not have had actual or constructive knowledge of the assent before the discharge was granted.

J. H. Potter, for appellant.

Blake did not procure the assent of creditors to his discharge. No evidence connecting him with the receipts, &c., filed in the case. Jury so found. No discharge granted until the final decree of appellate court, August 27, 1887, ten months before which time these appellees knew of the alleged fraudulent acts and had knowledge of the settlements with Carter, and Brown and Co. Beane and Beane opposed Blake's discharge, appearing for Brown and Co., and appealed from the decree, whilst prosecuting the suit in the Superior Court for Clary and Quinn. Knowledge of counsel is knowledge of his client.

WALTON, J. An insolvent debtor's discharge, if fraudulently obtained, may be annulled on petition of a creditor who, at the time the discharge was granted, had no knowledge of the fraud. But such a petition can not be maintained by a creditor who had such knowledge. His remedy is to resist the granting of the discharge. R. S., c. 70, § 49. And the knowledge of an attorney is the knowledge of his client. *Rogers* v. *Palmer*, 102 U. S. 263; *Sartwell* v. *North*, 144 Mass. 188. And see *Bank* v. *Chase*, 72 Maine, 226, where the authorities are collated and the doctrine of imputed notices fully discussed.

It is claimed that in this case the insolvent debtor settled with several of his creditors, and thereby induced them not to prosecute appeals which had been taken from a decree granting him a discharge; and that by these means he obtained a discharge in the appellate court which he otherwise would not have obtained. And it is claimed that these settlements were a fraud upon the petitioners and entitle them to have the discharge annulled.

There is no direct evidence that these petitioners had personal knowledge of these settlements before the debtor obtained his discharge. But the evidence leaves no doubt that their attorneys had such knowledge some nine or ten months before the discharge was finally obtained in the appellate court. And this knowledge was not obtained by confidential communications or other means which would justify them in withholding it from their clients. It was obtained in open court. The insolvent

debtor's counsel moved to have the appeals dismissed on the ground that the appellants, and others who had become parties to the appeals, had been settled with; and they produced and placed on file the written evidence of such settlements; and the petitioners' counsel were present and had knowledge of the proceedings, and took part in the discussions which followed. This knowledge on their part, thus obtained, is imputable to their clients, and bars the latters' right to maintain their petition to have the discharge, subsequently obtained by the debtor, annulled on account of these settlements.

And on this ground we think the verdict of the jury sustaining the discharge was clearly right; and that the motion to have the verdict set aside and a new trial granted must be overruled.

Motion overruled.

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

STATE *vs.* INTOXICATING LIQUORS, BOSTON AND MAINE RAILROAD, CLAIMANT AND APPELLANT.

York. Announced at July Law Term, Western District.

Opinion January 3, 1891.

Intoxicating Liquors. Search and Seizure. Interstate Commerce. Common Carrier. R. S., c. 27, § 42.

To sustain a prosecution for crime, it must be shown that the crime had been committed when the prosecution was commenced.

Where it appeared that, at the time of seizure upon a warrant, a package of intoxicating liquors was in the possession of a common carrier, and in transit from another state, to this state, for delivery here; *Held:* That it was commerce, "among the several states," and as such was under the exclusive jurisdiction of Congress. *Held, also,* that the package not having been broken nor delivered to the consignee, the state process for its seizure, while in that condition, was void

Such common carrier has a special title which gives it a legal right to the custody of the property, before delivery to the consignee, as against one having no right.

ON REPORT.

A locked and sealed box-freight car, laden with miscellaneous merchandise, consigned to different persons, among which were

ten kegs of whiskey, left Boston, at 7 :20 P. M., April 28, 1890, on defendant's railroad, way-billed for Old Orchard, in this state. Claimant is a common carrier of passengers and freight for hire, and as such received the kegs and entered them regularly on its way-bill, which accompanied the car into Maine.

The car did not enter the state until 12 :35 A. M., April 29, and reached Old Orchard about 2 :55 A. M., of the 29th, when it was set off on a siding and there left with its contents undisturbed, still locked and sealed. It had not been unlocked or unsealed since it left Boston the night before. By virtue of the warrant issued upon a search and seizure process about 8 P. M., April 28, the car was forcibly broken into about 3 :30 A. M., April 29, the kegs seized and with their contents libelled for destruction. Defendant corporation filed its claim in writing, in the municipal court of the city of Saco, for the return of the kegs and their contents to it, as such common carrier, claiming that the merchandise was still in its lawful possession as such, and still undelivered and in transit. The decision of the municipal court being adverse to the claimant, it appealed to this court.

G. C. Yeaton, for claimant.

Warrant illegally issued. Allegations in complaint untrue. Process alleges existing facts, when there were none such. *Heywood* v. *Tillson*, 75 Maine, p. 234; *State* v. *Grames*, 68 *Id.* p. 421; R. S., c. 27 § § 40, 41. *Com.* v. *Intox. Liquor*, 107 Mass., p. 392; *State* v. *Howley*, 65 Maine, 100; *State* v. *Dunphy*, 79 *Id.* 104; warrant could only issue, if at all, under R. S., c. 27, § 40. *State* v. *Roach*, 74 *Id.* 562. Transit not ended. 2 Benj. Sales, § 1246, *et seq.* (note 12); *Keeler* v. *Goodwin*, 111 Mass., 490; *Allen* v. *R. R.*, 79 Maine, 327; *Tufts* v. *Sylvester*, *Id.* 213.

Liquors not seizable under domestic statute when in the original package and part of interstate commerce. *Leisy* v. *Hardin*, 135 U. S., 100; *State* v. *Burns*, 82 Maine, 558. Possession of claimant sufficient. *State* v. *Liquors*, 69 Maine, 524.

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

Libel conforms to statute. R. S., c. 27, § 41; *State* v. *Bartlett*, 47 Maine, 401; *State* v. *Liquors*, 80 *Id.* 91. Liquors not in original packages; no importer claims them. Burden on claimant to show they were not intended for unlawful sale, or that they were within the exemptions of statute. R. S., c. 27, § § 33, 42; *State* v. *Robinson*, 49 Maine, 285; *State* v. *Blackwell*, 65 *Id.* 556. Warrant authorized the seizure. *Andro. R. R.* v. *Richards*, 41 Maine, 233. Claimant has no right of possession, title or lien, as against the state, for liquors. *State* v. *Liquors*, 50 Maine, 513; *Same* v. *Same*, 69 *Id.* 524; *State* v. *Cobaugh*, 78 *Id.* 403.

LIBBEY, J. This case comes here for decision on report. By the report, it appears that the Boston and Maine Railroad was a common carrier of travelers and merchandise by rail, from Boston through New Hampshire to Portland, in this state. On the 28th of April, 1890, a box containing ten five-gallon kegs of whiskey was delivered to the Railroad to be carried to Old Orchard, in this state, and there delivered to the consignee. The train containing the package started from Boston, about 7:30 P. M., of that day and arrived at Old Orchard, at 2:55 A. M., of the 29th of April. The package remained in the cars, undelivered to the consignee, till 3:30 A. M. of that day, when the car was opened by the officer and the liquors were seized. The complaint and warrant by virtue of which the seizure was made were issued at 8 P. M., April 28th. The train carrying the liquors did not enter this state till past twelve P. M., of that day, so that when the complaint was made and the warrant issued, the liquors were not kept and deposited at Old Orchard, nor were they in this state.

After the liquors were libelled, the defendant corporation duly filed its claim for their possession, claiming it had the legal possession of them as a common carrier for the purpose of delivery to the consignee.

We think the package was unlawfully seized, and that the

claim for their possession must be sustained, for the following reasons:

1. It is a familiar and well-established rule of law in criminal procedure, that, to sustain a prosecution for crime, it must be shown that the crime had been committed when the prosecution was commenced. This rule is so familiar that no authorities need be cited. The facts reported show that the offense alleged in the complaint in this case had not been committed when it was made.

2. When the prosecution was commenced and the package of liquors was seized on the warrant, it was in the possession of the defendant corporation as a common carrier of merchandise, and in transit from Massachusetts through New Hampshire to Maine for delivery to the consignee, and was commerce "among the several states," and as such was under the exclusive jurisdiction of Congress. This state had no power over it. The package had not been broken, nor had it been delivered to the consignee. The state process for its seizure while in that condition was void. The question has, so recently, been carefully considered and decided by our highest Federal Court, (*Leisy* v. *Hardin*, 135, U. S. 100,) and in this state, (*State* v. *Burns*, 82 Maine, 558), that no further discussion of principles or authorities can be useful.

But, it is claimed that the claimant as a common carrier has not sufficient title to the liquor under the statute, R. S., c. 27, § 42. We think this contention is not sound. A common carrier has a special title which gives a legal right to the custody of the liquors, before delivery to the consignee, as against one having no right.

Claim sustained. An order to issue from the court in York County for the return of the liquors seized, to the claimant.

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

JOHN H. JACKSON *vs.* SAMUEL J. ESTEN and another.

Knox. Opinion January 23, 1891.

Real Action. Levy. Amendment. Fraudulent Conveyance. Bona Fide Purchaser.

In a writ of entry both parties claimed to derive title from Elisha Brown; the plaintiff by a series of quit-claim deeds originating with Brown, and the defendants by a warranty deed from the grantee of six levying creditors of Brown. The levies were defective: one because it did not appear with certainty that the debtor, whose estate was taken, selected one of the appraisers, or was notified and neglected so to do; and the other because made as upon land held by the debtor in fee simple and in severalty and no reason assigned for levying on an undivided share instead of levying on a portion by metes and bounds. The defendants offered evidence to impeach the plaintiff's title as acquired in fraud of creditors; and also filed a petition from the officer who made the levies asking to supply the omissions named by amendments to the returns. *Held*: that such amendments are to be allowed or disallowed, as may best tend to the furtherance of justice. They may be permitted, irrespective of the time which has elapsed, provided they are clearly in conformity with the facts, and do not prejudice the rights of third persons acquired *bona fide* without notice.

Unless the equities of the applicant are superior to those of the contestant, the court will refuse to interpose to make that valid which was before invalid. They are properly allowable against the execution debtor himself, and his fraudulent grantee and all those deriving title from him, and standing in no better condition in equity.

The defendants should be permitted to impeach the plaintiff's title; and if the jury find that the original conveyance from Brown was fraudulent as to creditors, and that the plaintiff was not a *bona fide* purchaser for value, without notice of the fraud, the proposed amendments, being satisfactorily shown to be in conformity with the truth, are to be allowed and regarded as made. Otherwise not.

(See *Morse* v. *Sleeper*, 58 Maine, 329.)

ON REPORT.

The case is sufficiently stated in the opinion.

J. E. Moore, for plaintiff.

J. O. Robinson and J. F. Libby, for defendants.

WHITEHOUSE, J. Writ of entry to recover two thousand one hundred and ninety-three two thousand two hundred and sixty-five thousandths parts of a piece of real estate known as the "Owl's Head Stand," in South Thomaston. Both parties claim to derive

title from Elisha Brown. The demandant seeks to establish his title by virtue of the following deeds duly recorded, viz: quit-claim deed from Elisha Brown to Isaac Tolman, 3d, dated October 12, 1855, consideration, ten thousand dollars; quit-claim deed from Tolman to Joseph Jackson, dated December 10, 1858, consideration six hundred dollars; warranty deed of one-fifth of premises from Joseph Jackson to Mary C. Carver, November 14, 1872, and deed of same from Mary C. Carver, to the demandant August 13, 1873; quit-claim deed of the entire premises from Joseph Jackson to the demandant September 4, 1875, consideration one hundred dollars; also deed of same premises from Joseph Williamson, assignee in bankruptcy of Joseph Jackson to Geo. E. Wallace, September 4, 1875, consideration ten dollars, and deed from Wallace to the demandant September 6, 1875, consideration ten dollars.

The tenants claim under a warranty deed from Jeremiah Sleeper who holds conveyances from seven different levying creditors of Elisha Brown.

The validity of these seven levies was brought directly in question in the case of *Morse* v. *Sleeper*, 58 Maine, 329. That of Sidelinger only, on seventy-two two thousand two hundred and sixty-fifths of the property was found to be valid. With respect to the other the court say: "Of the seven levies, under which the tenant claims title in himself, five were made November 21, 1856, as upon land held by the debtor, Brown, in fee simple, and in severalty, and no reason is assigned in either of them for levying upon an undivided share instead of making the levy upon a portion of the property by metes and bounds. It is essential to the validity of such a levy, under c. 94, § 13, R. S., 1841, that it should appear therein, that the premises to be levied on could not be divided without damage to the whole. *Mansfield* v. *Jack*, 24 Maine, 98. The omission must be held fatal to these five levies."

But the levy in favor of Hammond against Brown and others, was held defective, because it did not appear with certainty that the debtor whose estate was taken, selected one of the appraisers, or was notified to choose one and neglected.

The question of the validity of these levies having thus been once tried and determined by a court of competent jurisdiction, the judgment is conclusive between the parties and their privies. *Sibley* v. *Rider*, 54 Maine, 463.

Thereupon, the officer who made the levies, files a petition in this court asking for leave to amend his returns on the executions by inserting, in that of the last named levy, the statement that one of the appraisers was in fact chosen by Elisha Brown whose estate was taken; and by reciting in the other returns, the following, viz: "And being of opinion that the said real estate can not be divided without damage to the whole, and the same being more than sufficient to satisfy this execution;" averring the amendments to be in accordance with the truth.

It will be seen that the deed from Elisha Brown to Isaac Tolman, 3d, in which the demandant's title originates, bears date prior to any of the attachments which ripened into these different levies. But the defendants contend that the conveyance to Tolman was unquestionably made to hinder, delay and defraud the creditors of Brown; and that the demandant himself is not an innocent purchaser for value, and stands in no better condition than Brown's fraudulent grantee. And they offer evidence in support of this contention.

The questions now presented for the determination of the court are, therefore, the justice and propriety of allowing the defective levies to be amended as proposed, and the admissibility and effect of the evidence offered by the tenants.

The broad principle regulating amendments of the character above-described is familiar and easily stated. It is commonly said that they are to be allowed or disallowed "as may best tend to the furtherance of justice." *Johnson* v. *Day*, 17 Pick. 106; *Hobart* v. *Bennett*, 77 Maine, 401; *Hayford* v. *Everett*, 68 Maine, 505. But this does not purport to be a statement of a definite rule, which may serve as a practical guide in particular cases, but only the declaration of an evident truth comprising other subordinate truths. It is an obviously sound, general principle from which more specific rules may be derived. The practice illustrated by the authorities seems to permit such

amendments, irrespective of the time which has elapsed, provided the amendment is clearly in conformity with the facts and does not prejudice the rights of third persons acquired *bona fide* without notice. But where the record of the extent does not show that it was valid, and strangers have in good faith, for a valuable consideration, become vested with the title, their equity is equal to that of the creditor. And unless the equities of the applicant are superior to those of the contestant, the court will refuse to interpose to make that valid which was before invalid. Freeman on Executions § § 360, and 388, and authorities cited. An officer's return of a levy can not be amended according to the facts after having been recorded, if the rights of intervening *bona fide* purchasers are thereby impaired. *Boynton* v. *Grant* 52 Maine, 220; *Lumbert* v. *Hill*, 41 Maine, 482. No amendment of an officer's return should be permitted when such amendment would destroy or lessen the rights of third persons, acquired *bona fide*, and without notice by the record or otherwise. *Fairfield* v. *Paine*, 23 Maine, 498.

It is true that the doctrine laid down in *Whittier* v. *Varney*, 10 N. H. 291, has been frequently invoked, in this and other states, as authority for permitting certain amendments to the record of levies even as against *bona fide* purchasers for value. *Peaks* v. *Gifford*, 78 Maine, 362, and cases cited. The rule in *Whittier* v. *Varney*, is thus stated: "The subsequent purchaser or creditor being chargeable with constructive notice of what is contained in the record, if he has there sufficient to show him that all the requisitions of the statute have probably been complied with, and he will, notwithstanding, attempt to procure a title, under the debtor, he should stand chargeable with notice of all facts, the existence of which is indicated and rendered probable by what is stated in the record, and the existence of which can be satisfactorily shown to the court. And in such cases amendments should be allowed, notwithstanding the intervening interests of such purchaser or creditor. . . . But, if there is an entire omission of anything in the return to indicate that some particular requisition of the statute has been complied with, and there is thus nothing to amend by,—as, for

instance, if there is nothing tending to show that the appraisers had been sworn, or that the debtor had notice where he was entitled to it,—subsequent purchasers, or creditors, have good right to regard such omission as evidence of a fatal defect."

It is important to observe, however, that in this case the jury had found for the plaintiff on an issue of fraudulent collusion between the defendant and his father. It will be found, too, that all the cases in this state, in which an amendment has been allowed against an intervening purchaser for a valuable consideration without notice, are readily distinguishable from the case at bar, either in respect to the character of the omission and the nature of the amendment, or other material points affecting the equities of the parties.

But all the authorities agree that the amendments here proposed are properly allowable against the execution debtor himself, and all those deriving title from him and standing in no better condition in equity. In *Glidden* v. *Philbrick*, 56 Maine, 222, the court say: "If the conveyance under which the demandant derives his title is fraudulent and void as to creditors, the grantee can not expect that the law will protect his claim. He can be in no better condition than his fraudulent grantor. An amendment, which would be allowable against his grantor, should be equally permitted as against him. The deed, under which the demandant claims title, is long prior in time to the levy of the tenant. Being prior in time, if *bona fide*, it must prevail, whether the levy is good or bad. An amendment in such case could have no effect. If the deed was fraudulent, the creditors of the fraudulent grantor should be permitted to impeach it. The amendment, therefore, should be allowed as against the judgment debtor and against his fraudulent grantee. Such grantee, and all deriving their title from him, with notice of the fraudulent conveyance, should stand in no better condition than the judgment debtor through whom they claim." See also *Marston* v. *Marston*, 54 Maine, 476; *Wellington* v. *Fuller*, 38 Maine, 61. In the last named case the court say: "The levy is defective, but as the rights of the creditors are to be preferred to those of Gifford, and of all claiming under him with notice of this defec-

tive title, the officer may have leave to amend his return in accordance with the facts."

With respect to the demandant's title, the language of the court in *Morse* v. *Sleeper*, *supra*, is equally applicable to the evidence now introduced and offered: "The proof is plenary and uncontradicted," say the court, "that the conveyance from Brown and Tolman, whose title Jackson holds, was made for the express purpose of delaying and defrauding creditors. . . It may be worthy of remark that, the deed from Tolman to Jackson is a mere quit-claim of his (Tolman's) right, title and interest, made upon a nominal consideration which contrasts strangely with that named in the two deeds from Brown to Tolman, and that there is no evidence that either Tolman or Jackson ever had any possession under these conveyances of the Owl's Head Stand, which would seem to have passed from the possession of Brown into that of the levying creditors. Tolman's deed to Jackson does not purport to convey the land, but only the right, title and interest of the grantor in it, and that (upon the testimony here presented) was the right, title and interest of a fraudulent grantee. If the tenant held Jackson's title as well as his own, it would certainly be incumbent on him at least to show a purchase by Jackson in good faith, for value without notice, when the first link in the chain is invalidated by fraud."

Our conclusion, therefore, is that the tenants in possession representing the levying creditors, and holding under a warranty deed for a valuable consideration, should be permitted to impeach the title of the demandant; and that the evidence reported which is material to that issue, and otherwise admissible under the rules of evidence, would authorize a jury to find that the original conveyance from Brown to Tolman was fraudulent as to the creditors of Brown; that Tolman was cognizant of Brown's fraudulent design; and that Joseph Jackson and the demandant were not *bona fide* purchasers, for a valuable consideration, without notice of the fraud. If such should be the finding of the jury, the amendments proposed, being satisfactorily shown to be in conformity with the truth, are to be allowed and

regarded as made. Otherwise the amendments are not to be allowed.

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

Action to stand for trial.

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

BODWELL GRANITE COMPANY *vs.* FRANCIS M. LANE.

Knox. Opinion January 27, 1891.

Mortgage for support. Sale of Mortgagor's Interest. Deed. Fee not limited. Notice to Quit.

A mortgagor's interest in land, mortgaged to secure the support of the mortgagee by the mortgagor, can be sold upon execution against the mortgagor.

Where a deed contains all the necessary words for a conveyance of the fee, and shows an intention to convey the fee, a clause in the deed indicating the motive or purpose of the conveyance will not limit its effect as a conveyance of the fee.

When the occupant of land denies the title of the owner, he is not entitled to any notice to quit, before suit against him for the possession.

ON REPORT.

The facts are stated in the opinion.

C. E. Littlefield, for plaintiff.

Plaintiff attached and sold, not the right to redeem from mortgage to Rebecca C. Lane, but the mortgage to Kittredge, the last mortgage prior to attachment. The sale of that right draws after it all the rest, (*Bartlett* v. *Stearns*, 73 Maine, 22,) and defendant estopped from denying its validity. Big. Estop. 326, 327.

There is a distinction between a personal contract to support for life and a mortgage of real estate to secure performance of such contract. Plaintiff as grantee of mortgagor not seeking to perform that contract. The beneficiary under the contract is dead. Cases cited by defendant are those where parties, claiming under one of contracting parties, endeavored to make performance, or compel other party to perform.

The clause in deed, from Susan F. Lane to defendant, merely

a declaration of the legal effect of deed. It does not add to or take from the deed. Deed would so operate to mortgagees under the covenant of warranty in their mortgages. *Pike* v. *Galvin*, 29 Maine, 183; Jones Mort. § § 561, 682.

J. O. Robinson and *J. F. Libby*, for defendant.

Lane had no attachable interest in the premises at the time of attachment. The mother of defendant was then living. Counsel cited: *Flanders* v. *Lamphear*, 9 N. H. 201; *Eastman* v. *Batchelder*, 36 *Id.* 141, 152; *Barker* v. *Cox*, *Id.* 344; *Bethlehem* v. *Annis*, 40 *Id.* 34; 1 Wash. R. P., p. 498; *Clinton* v. *Fly*, 10 Maine, 292; *Bryant* v. *Erskine*, 55 *Id.* 153. Sheriff's sale a nullity, and passed no title to purchaser, the mortgage being discharged after attachment and before levy, the equity to redeem ceased to exist. *Hackett* v. *Buck*, 128 Mass. 369; *Mansfield* v. *Dyer*, 133 *Id.* p. 376; *Gardner* v. *Barnes*, 106 *Id.* 505, and cases cited. Plaintiff acquired by the sale no right of entry. R. S., c. 104, § 5. The language in wife's deed to defendant shows that in no contingency was it to become the property of the defendant. It was only "to make good" those mortgages. Defendant having been suffered to remain in possession has become tenant at will, and entitled to notice to quit. *Sherburne* v. *Jones*, 20 Maine, 70; *Larrabee* v. *Lumbert*, 34 *Id.* 79.

EMERY, J. Writ of entry. On report. Eliminating the immaterial matters, the story is this: The defendant at one time owned the demanded premises in fee. In 1873, he mortgaged them to his mother, Rebecca C. Lane, to secure her maintenance during life, by him or his heirs, executors or administrators. There was no provision in this mortgage, that his assigns might perform the condition. In 1881, he again mortgaged them to one Kittredge. In 1884, the plaintiff attached all the defendant's real estate, by a general attachment in a suit against him, and having recovered judgment in that suit, the plaintiff, in 1888, made a sale upon the execution of "all the right in equity which . . (the defendant had at the time of the attachment. . .)to redeem the following described

mortgaged real estate"— (describing the demanded premises). The plaintiff was the purchaser, and received a sheriff's deed of said equity of redemption. The regularity of these proceedings is not questioned. Rebecca C. Lane, the first mortgagee, died in 1888, before the sale. In 1889, the plaintiff brought this writ of entry against the defendant.

1. The defendant contends that, at the time, he had no equity of redemption which could be attached or sold. He claims that after his mortgage to his mother, Rebecca, for her maintenance, his remaining interest could not be conveyed by him, nor attached by his creditors, without Rebecca's consent, which does not appear to have been given. He says, for that reason his mortgage to Kittredge, in 1881 was invalid, and the attachment in 1884 was ineffectual. He further says that Rebecca's death, before the execution sale, discharged her mortgage, and left the fee in him, which might have been taken by a sale of the fee, but not by a sale of an equity of redemption.

His argument is briefly this: The condition in his mortgage to Rebecca could only be performed by himself, or his heirs or executors; Rebecca, the first mortgagee, was entitled to his personal care, and could not be assigned to the care of any other person. Hence, the right to perform the condition could not be assigned or conveyed by him, and,—as a conveyance by a mortgagor is in effect only a conveyance of a right to perform the condition in the mortgage,—any attempt by him to so convey must be ineffectual, and can vest no interest in his grantee.

But, after his mortgage to Rebecca for her maintenance, the defendant still had an actual interest in the mortgaged land. He owned it in fee subject to Rebecca's mortgage. If he could not assign or convey any right to perform the condition in the mortgage, he could divest himself of all his interest in the land. That interest was his own, to be disposed of as he saw fit. His grantee might not have acquired the right to perform the condition, but he acquired the land subject to the condition. If the condition should never be performed by the mortgagor, his grantee might lose the land. If the condition should be

performed, the grantee of the mortgagor would hold the land free of the condition. We think, therefore, that the defendant's deed to Kittredge, in 1881, did mortgage the premises to him in fee subject to Rebecca's mortgage. When Rebecca's death discharged her mortgage, Kittredge then held a valid mortgage, relieved of the prior incumbrance. The defendant then had a right of redemption from the Kittredge mortgage, and had nothing more. This right of redemption became vested in the plaintiff by the execution sale of such right; and is sufficient to maintain a writ of entry against the defendant. *Hoyt* v. *Bradley*, 27 Maine, 242; *Bryant* v. *Erskine*, 55 Maine, 153; *Bartlett* v. *Stearns*, 73 Maine, 22.

We think none of the cases cited by the defendant's counsel, will be found, upon examination, to conflict with the above proposition.

2. The defendant interposes another defense as to part of the premises. He had conveyed this part to his wife in 1872. In 1874, the wife, by a quit-claim deed in the ordinary form of a deed of the fee, conveyed the same part back to the defendant. In this last deed, immediately after a description of the premises, is the following clause: "The object and intention of this conveyance being to make good three mortgages, given by my said husband, (naming them,) by having my title inure to the benefit of said mortgagees." These three mortgages were all paid before the mortgage to Kittredge.

The defendant now contends that this deed from his wife conveyed no title to him, but only operated as a confirmation of his mortgages, and that the payment of these mortgages restored the wife's interest to her. We think it clear, however, that, whatever was the motive or purpose of the wife, her deed was effectual to convey her title to her husband, the defendant. The deed contains all necessary words for a conveyance of the fee, and shows a clear intention to convey the fee. The motive for making such a conveyance is immaterial here.

3. The defendant, now in the last ditch, interposes a last defense,—that having been allowed by the plaintiff to remain in possession for a year after the sale, he has become a tenant

at will to the plaintiff, and is entitled to thirty days' notice to quit, before being ejected. As he has all along denied the plaintiff's title, it is difficult to see how he has become the plaintiff's tenant, or is entitled to a tenant's right of notice.

Judgment for the plaintiff.

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

CORA M. PIERCE and another, in equity,

vs.

HARRIET L. ROLLINS and another.

Waldo. Opinion February 16, 1891.

Equity. Partition. Witness.—"Heir of deceased Party." Widower's Dower. R. S., c. 82, § 98; c. 103, § 14; c. 104, § § 47, 48; c. 105, § 3, cl. 1; § 7; Stat. 1821, § 18.

To entitle complainants in equity to a decree in partition, they must show a clear legal title.

When the complainants claim title by descent from their mother, the respondent is a competent witness, for they are not "made parties as heirs of a deceased party."

The bill ordered to be retained a reasonable time to allow the complainants opportunity to establish their title at law, if they desire to do so,—otherwise it will be dismissed with costs. See *Nash* v. *Simpson*, 78 Maine, 143, 150.

ON REPORT.

Bill in equity for partition, heard on bill, answer and testimony.

The bill alleges that the plaintiffs are each seized in fee of one undivided part of certain real estate, situate in Belmont, Waldo County, containing one acre and ninety-six square rods, with the buildings thereon.

"That said Harriet L. Rollins, is seized in fee of one undivided third part of said described premises, and that said Noah B. Allenwood, has an estate by curtesy, in and to one undivided third part of said premises during his life, and that the estate of said complainants and said Harriet L. Rollins, are subject to said life estate of said Noah B. Allenwood. That said Noah B. Allenwood's estate in said premises have never been set out and assigned to him. That the buildings on said premises consist

of a dwelling-house and barn suitable for the occupation of one family only.

"That said Noah B. Allenwood, is now and ever since complainants derived their title to said premises, to wit: April 12, 1861, has been in the exclusive use and possession of all of said premises and refuses to account to them for any part of the rents and profits thereof, although thereto requested.

"That said premises can not be divided without being greatly depreciated in value, and can not be occupied in common by complainants and respondents. That said respondents refuse to sell their interest in said premises to the complainants or to purchase their interest therein of said complainants.

"Wherefore, said complainants pray that said Noah B. Allenwood may be ordered to account for the rents and profits of said premises; that the court may order and decree that said premises may be sold and the proceeds thereof be divided among complainants and respondents according to their respective interests in said premises; that a receiver may be appointed to take charge of said premises and to dispose of the same in pursuance of such order and decree; and that said complainants may have such other and further relief as equity may require, and to your honors may seem meet."

Belfast, September 11, 1889.

Answer of Harriet L. Rollins: "She denies that the plaintiffs are each seized in fee of one undivided third part of the real estate described in the plaintiffs' bill, but on the contrary says that the whole of said premises belong to Noah B. Allenwood, her co-defendant.

"She disclaims any right, title or interest in said premises as against said Noah B. Allenwood."

The answer of Noah B. Allenwood, who says: "That the plaintiffs are not each seized in fee of one undivided third part of the real estate described in said bill or of any portion of the same; but on the contrary, he has an undefeasible title to the whole premises by open, notorious, exclusive and adverse possession continued since 1854, up to the date of said bill, and acquired under the following circumstances, viz:

"In 1854 he made a verbal contract to purchase said land, then unimproved, with one Asa Allenwood, the owner thereof, for the sum of fifteen dollars, and immediately dug and stoned a cellar on the same, and during the following year erected the dwelling-house named in the bill; that on the 9th of December, 1856, he paid the purchase money to said Asa, who at the same time conveyed said land to Sarah A. Allenwood, the wife of him, the said defendant, and the mother of the plaintiffs; that said Sarah was not present when said deed was made; that the same was never delivered to her, but has since remained in his possession, and according to his best recollection and belief, she never saw it; and that he did not intend said conveyance as a provision for, or a gift to her adversely to himself, but that it was made to her instead of himself upon a suggestion that it would save expense. That his wife had no property at the time of her marriage, and never earned nor inherited nor became possessed of any except that which she received from him; that she never assumed or claimed any management or control of said land, and that since her death on the 12th of April, 1861, he, as he had previously, had; planting an apple orchard thereon in 1862, erecting an L in 1870, a barn in 1878, and making other improvements and paying the taxes, which have always been assessed to him up to the present time. That the plaintiffs, who are his daughters, and who are both married, became of age respectively in 1874 and 1876, and since their majority have been treated by him in the same manner and with the same affection as when they were under age, returning to his house whenever they pleased, staying months at a time, and always receiving from him all they asked for.

"That the first intimation which he ever had from them or from any one that they claimed the described land was during the spring of 1889."

The deposition of the defendant, Allenwood, in support of his answer was used subject to the objection that he was not a competent witness. The plaintiffs put in evidence a warranty deed of the premises from Asa Allenwood, father of the defendant, Noah B. Allenwood, to Sarah A. Allenwood, defendant's

wife, dated December 9, 1856, and witnessed and acknowledged by defendant as a justice of the peace. The defendant testified that he paid the purchase money for the deed.

Thompson and Dunton, for plaintiffs.

Plaintiffs' claim for a decree of sale, &c., is based on R. S., c. 77, § 6, and *Wilson* v. *R. R.*, 62 Maine, 112. Noah B. Allenwood is not a competent witness, R. S., c. 82, § 98; *Higgins* v. *Butler*, 78 Maine, 520. If he paid for the deed to his wife the presumption is that it was for her benefit, and no trust in his favor is presumed. *Lane* v. *Lane*, 80 Maine, 570; *Stevens* v. *Stevens*, 70 Maine, 92; *Melvin* v. *Whiting*, 13 Pick. 184. Deed executed more than thirty years before date of bill presumed to be properly executed and delivered. *Lawry* v. *Williams*, 13 Maine, 281; *Loomis* v. *Pingree*, 43 Maine, 299. Title by adverse possession can not be acquired against minors, (R. S., c. 100, § 7,) and does not begin while a right by curtesy exists. *Poor* v. *Larrabee*, 58 Maine, 543; *Mellus* v. *Snowman*, 21 Maine, 201; *Dunham* v. *Angier*, 20 Maine, 242.

J. Williamson, for defendants.

Plaintiffs have no seisin, right of entry, or possession to the described premises which would authorize a judgment for partition. Plaintiffs' only claim of title is based upon a deed running to their mother, Sarah A. Allenwood, who died in 1861. Her husband, Noah B. Allenwood, one of the defendants, who entered upon the premises in 1856, has since constantly enjoyed and used them. His uninterrupted possession, therefore, comprises a period of twenty-eight years, since the death of his wife. Has his possession been of such a character as to be adverse to the plaintiffs? This case differs materially from that of *Clarke* v. *Hilton*, 75 Maine, 426; where the plaintiff's father held in submission to the acknowledged title of his children, and relying only upon a right of dower, claimed betterments in a real action brought against him by them. Here, no such acknowledgment is even intimated.

No person shall commence any real action for the recovery of land unless within twenty years after the right to do so first accrued; and when such right of action accrues, if the person

thereto entitled is a minor, ... he may bring the action at any time within ten years after such disability is removed, notwithstanding twenty years have expired. R. S., c. 105, § § 1, 7.

If the mother of the plaintiffs had any title it accrued at the date of the deed, September 9, 1856. The disability of the oldest daughter was removed June 24, 1874, and of the youngest July 1, 1876. The bill is dated September 11, 1889. Over ten years, therefore, have elapsed, and as the plaintiffs would be barred of any right of action at law to recover the premises, so they are barred by proceedings in equity to obtain partition. Same in writ of error. *Eager* v. *Com.* 4 Mass. 182. Resulting trust in defendants' favor. Counsel cited: Lewis Tr. § 169; Perry Tr. 147; Pom. Eq. § 1040; *Edgerly* v. *Edgerly*, 112 Mass. 175; *Cormerais* v. *Wesselhoeft*, 114 Mass. 550.

VIRGIN, J. Bill in equity by two children of a deceased mother against their father and sister, praying for a partition of the homestead by a sale and distribution of the proceeds and for an account.

The bill alleges, *inter alia*, that each of the complainants and their defendant sister is seized in fee of one undivided third of the premises; and that their father "has an estate by curtesy in and to one undivided third part of the same which has never been set out and assigned to him." We do not understand this to mean that the father is "tenant by the curtesy," as that phrase is commonly used. For prior to the change wrought by our statutory provisions, a husband and wife, even before any children were born to them, were jointly seized during their joint lives of a freehold in her lands held in fee. And after the birth of a child who could inherit her lands, he became tenant by the curtesy initiate of the whole and not of one third of her lands; and upon the death of the wife his tenancy became consummate and vested without any assignment, and was subject to be taken in execution of his debts. St. 1821, c. 38, § 18. 1 Wash. R. P. 166. *Witham* v. *Perkins*, 2 Maine, 400; *Day* v. *Bishop*, 71 Maine, 132, 144; *Foster* v. *Marshall*, 22 N. H. 491.

The allegation simply means that the father is entitled to the 'use for life of one third" of the homestead in controversy — a 'widower's dower. R. S., c. 103, § 14. Moreover, the deed to her shows that the wife was not seized until long after "March 22, 1844," and hence he could not be tenant by the curtesy therein. Same statute.

In his answer, the father denies the complainants' title and claims the fee in himself acquired by adverse possession beginning in 1854, though his wife died in April, 1861. The defendant sister also makes the same denial against the complainants and the same claim in behalf of the father, and disclaims all title in herself as against him.

Courts of equity do not generally settle the conflicting titles of parties in their suits for partition. Hence, to entitle the complainants to a decree for partition, they must show a clear legal title. *Nash* v. *Simpson*, 78 Maine, 142, 150. And especially when, as in this case, the delivery of the deed to the wife, from whom the complainants derive their title, is denied in the answer and by the testimony of the father. *Nichols* v. *Nichols*, 28 Vt. 228.

But it is said that the father is not a competent witness for the alleged reason that the complainants were "made parties as heirs of a deceased party," within the meaning of R. S., c. 82, § 98. We do not consider this objection tenable. For the complainants do not prosecute this suit as heirs of their deceased mother, as they would a proceeding to redeem a mortgage given to her (*Cary* v. *Herrin*, 59 Maine, 361); or as they would defend a bill against them to recover land held by their mother in her life time, in trust for her husband. *Burleigh* v. *White*, 64 Maine, 23. They do not in this case represent their mother but themselves. They set up a title in themselves. If their title had come by deed or devise from their mother, they would not then claim that they were made parties as heirs of their deceased mother. No more can they now that it came by descent. They are heirs in fact whichever way the title may come. But they do not bring this suit because they are heirs, but because they claim to hold the homestead in their own individual right. *Wentworth* v. *Wentworth*, 71 Maine, 75.

We think, therefore, that a partition can not be decreed at the present stage of the suit, nor at any other time unless the complainants can, by some proceeding at law, establish their legal title. *Nash* v. *Simpson*, *supra*.

They can not clear up their title by petition under R. S., c. 104, § § 47 and 48; for possession on their part is essential by the very terms of the statute. *Oliver* v. *Look*, 77 Maine, 585. And they are not in possession, for their bill alleges that the father "is now, and ever since the decease of their mother in April, 1861, has been in the exclusive use and occupation of all said premises," which is fully corroborated by the testimony of the father.

Whether they can do it by a real action remains to be seen. If they have at any time been disseized by their father, then their "right of action first accrued at the time of such disseizin," R. S., c. 105, § 3, clause 1. If, when such right of action first accrued they were minors, they can commence their action "within ten years after that disability is removed." R. S., c. 105, § 7; *Coombs* v. *Persons Unknown*, 82 Maine, 326, 329.

The bill will be retained a reasonable time to allow the complainants to establish their legal title, if they desire so to do; otherwise it will be,

Dismissed with single costs.

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

STATE *vs.* GEORGE H. DUNNING.

Cumberland. Opinion February 18, 1891.

Indictment. Pleading. "Catch and have in possession." Short Lobsters. Pub. Laws, 1889, c. 292.

In an indictment for not liberating short lobsters, when it sets forth the accusation in substantial accordance with the requirements of law; *Held*: That

(1.) A material averment may sometimes be introduced with as much clearness and certainty by means of the participial clause commenced by the word "being" as in the form of the direct proposition of a declarative sentence.

(2.) The words "catch and have in possession" may relate to the same acts and describe the same transaction. They constitute but one offense.

(3.) It is sufficiently alleged that the lobsters were alive when caught. The word "catch" is not aptly employed to express the idea of obtaining possession of inanimate or motionless things, but of taking captive living and moving ones.

(4.) It appears from the use of the pronoun "his" that the lobsters were not liberated at the respondent's risk and cost.

The desire to introduce greater directness and simplicity or otherwise promote reforms in legal literature must always be subordinate to the interests of justice. Courts are not permitted to be finically exacting respecting the construction of sentences or the graces of style.

ON EXCEPTIONS.

The defendant excepted to the ruling of the Superior Court, for Cumberland County, in overruling his demurrer to the indictment, which charged that the defendant "between the first day of July in the year of our Lord one thousand eight hundred and eighty-nine, and the first day of May in the year of our Lord one thousand eight hundred and ninety, to wit, on the twenty-eighth day of April in the year of our Lord one thousand eight hundred and ninety at Harpswell, in the County of Cumberland, unlawfully did catch and have in his possession one hundred and eleven lobsters, each of said lobsters then and there being less than ten and one half inches in length, said length of each of said lobsters being then and there measured by extending each lobster on the back its natural length, and taking the length of its back measured from the bone of the nose to the end of the bone of the middle flipper of the tail, which said lobsters when caught being shorter than ten and one half inches in length, measured in manner aforesaid, were not then and there liberated alive at his risk and cost: against the peace of said State, and contrary to the form of the statute in such case made and provided."

Thomas M. Giveen, for defendant.

Time for measurement not sufficiently alleged, the statute requiring the lobsters to be not less than ten and one half inches in length, when caught.

Indictment, in selecting from the statute the two offenses of catching and of having in possession, is defective. Statute contemplates that the person taking the lobsters shall liberate them

alive,—an impossibility for one having dead lobsters in his possession.

It alleges that the lobsters were not liberated alive, when in no part of it relating to their possession, is there any allegation that the lobsters, said to be in defendant's possession, were alive. It does not properly allege at whose risk and cost the lobsters should be liberated alive.

Frank W. Robinson, county attorney, for state.

The use of the word "being" to introduce a material allegation, directly adjudged good in *Rex* v. *Moore*, 2 Mod. 128, 129, and used in approved precedents. Bishop's Directions and Forms, § § 148, 150, 203, 215; Whart. Prec. Form 204, *et seq.* 248, 461, *et seq*; also in indictment for adultery, aggravated assaults, embezzlement, &c. *State* v. *Hutchinson*, 36 Maine, 261; *State* v. *Jackson*, 39 *Id.* 291; *State* v. *Weatherby*, 43 *Id.* 258; *Com.* v. *Elwell*, 2 Met. 90; *Com.* v. *Squire*, 98 Mass. 259; *State* v. *Parker*, 57 N. H. 123; *State* v. *Bridgman*, 49 Vt. 202; *State* v. *Palmer*, 35 Maine, 9; *Com* v. *Creed*, 8 Gray, 387. Counsel also cited: 1 Bishop's Crim. Proc. (3d. Ed.) § § 356, 355, 512, and cases cited; *State* v. *Beason*, 40 N. H. 367; *Com.* v. *Call*, 21 Pick. 515; *Jeffries* v. *Com.* 12 Allen, 152; *Miller* v. *State*, 107 Ind. 152. Words "at his risk or cost" may be rejected as surplusage.

WHITEHOUSE, J. Exceptions to the overruling of a demurrer to an indictment based on chap. 292 of the public laws of 1889, regulating the lobster fisheries.

The second section of the act provides that "it is unlawful to catch . . . . or possess for any purpose" between the dates named "any lobsters less than ten and one half inches in length, alive or dead, ... and any lobsters shorter than the prescribed length when caught shall be liberated alive at the risk and cost of the parties taking them, under a penalty of one dollar for each lobster so caught . . . . or in possession, not so liberated."

The indictment alleges that the respondent "did catch and have in his possession one hundred and eleven lobsters, each of

said lobsters then and there being less than ten and one half inches in length, ... which said lobsters when caught being shorter than ten and one half inches . . . were not then and there liberated alive at his risk and cost."

It is not difficult to understand, from the language of this indictment, that the prosecution was instituted to recover of the respondent the penalty imposed by law for not liberating alive the short lobsters caught by him; and reasonably construed we think it sets forth the accusation in substantial accordance with the requirements of law. But the objections will be considered in detail.

1. The indictment sufficiently alleges that the lobsters were less than the prescribed length *when caught*. A material averment may sometimes be introduced with as much clearness and certainty by means of the participial clause commenced by the word "being," as in the form of the direct proposition of a declarative sentence. This practice is too familiar and well-established to require the citation of the numerous precedents found on the county attorney's brief.

2. The allegation that the respondent did "catch and have in his possession" the lobsters named does not render the indictment amenable to the objection of duplicity. The acts are alleged to have been committed at one time and in one place. The operation of catching lobsters necessarily involves at least a momentary possession. "The penalty is for not liberating certain lobsters caught or in possession, or in other words for destroying them." *State* v. *Bennett*, 79 Maine, 55. And the penalty is the same whether the lobsters not liberated alive are "caught" or "caught and possessed" by the respondent. Both words may relate to the same act, and describe one transaction. They constitute but one offense. *State* v. *Burgess*, 40 Maine, 593; *State* v. *Lang*, 63 Maine, 215; *State* v. *Haskell*, 76 Maine, 399; *State* v. *Willis*, 78 Maine, 70; 1 Bishop's Crim. Proc. § § 434, 435, 436, and authorities cited.

3. It is immaterial whether the lobsters were "alive or dead" when found in the possession of the respondent. But the allegation that he *caught* them sufficiently indicates that they

were alive at that time. It is common knowledge that they must be alive to be caught by the device uniformly adopted for that purpose. Again, the word "catch" is not aptly employed to express the idea of obtaining possession of inanimate or motionless things, but of taking captive, living and moving ones. Under statutes making it unlawful to "fish for and catch" certain kinds of fish between specified dates, it would be hypercritical to require an explicit averment in the indictment that the fish were alive when caught. See Bishop's Directions and Forms, § § 438, 439.

4. It is objected finally that there is no proper allegation "at whose risk and cost the lobsters should be liberated alive." But it appears with reasonable certainty from the use of the pronoun "his" that they were not liberated at the respondent's risk and cost.

It may properly be observed, in conclusion, that the desire to introduce greater directness and simplicity, or otherwise promote reforms in legal literature, must always be subordinate to the interests of justice. Courts are not permitted to be finically exacting respecting the construction of sentences or the graces of style. "The doctrine is general," says Mr. Bishop, "that the court will consult sound sense to the disregard of captious objections in looking for the meaning of the allegations in the indictment." 1 Bishop's Crim. Proc. § 356.

Exceptions overruled. Judgment for the state for one hundred and eleven dollars and costs.

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

WILLIAM A. JOHNSON

vs.

MAINE AND NEW BRUNSWICK INSURANCE COMPANY.

Penobscot. Opinion February 23, 1891.

Insurance. Life Policy. Application. False Statements. Insanity.

Unless otherwise apparent from the context, the word "insanity" in statutes and contracts means inability to reason and will intelligently.

When a party makes unqualified statements in a contract, and therein stipulates

that they are full, complete and true, he stipulates for actual, absolute truth, and not for truth according to his belief or understanding.

When a party stipulates in a contract that all his statements therein are material, and that falsity in any of them shall avoid the contract, the court can not, without an enabling statute, pronounce any of them immaterial.

In a life insurance contract, one of the statements by the assured, stipulated by him to be material and true, viz: that his brother never had insanity, was untrue. *Held*: that it avoided the contract.

ON REPORT.

This was an action brought by the plaintiff, as one of the beneficiaries named in a certificate or policy of life insurance issued by the defendants, to recover the money payable to him after the death of the insured, who was his half-brother. Plea was the general issue with brief statement alleging fraud and a breach of warranty by the insured in his application. The case is stated in the opinion.

A. W. Paine, for plaintiff.

Counsel argued that the answer, in the application complained of, was the truth, weak-mindedness not being insanity. Applicant answered honestly, according to his understanding of the meaning of the question. The question related to a third person, the answer was immaterial unless it first appears that insanity was hereditary in the family. Defendants must show that the brother of the insured had insanity, and was hereditary. If not hereditary, it was not material and afforded no defense.

Counsel cited: *McCoy* v. *Mut. Ins. Co.* 133 Mass. 82-85; *Campbell* v. *N. E. M. L. Ins. Co.* 98 Mass. pp. 390, 391; *Hinckley* v. *Ger. Ins. Co.* 140 Mass. pp. 38, 45, 46; *Ring* v. *Phœnix Ins. Co.* 145 Mass. 426-8; *Ins. Co.* v. *Gridley*, 100 U. S. 614; *Brockway* v. *Mut. Ben. L. Ins. Co.* 9 Fed. Rep. 249; *Cen. Ins. Co.* v. *Thœna*, 26 Ills. 495; *Me. Ben. Asso.* v. *Parks*, 81 Maine, 80; *Diebold* v. *Phœnix Ins. Co.* 33 Fed. Rep. 807; *Fisher* v. *Crescent Ins. Co. Id.* 549; *McGurk* v. *M. L. Ins. Co.*, 56 Conn. 528; *Clapp* v. *Mass. B. Asso.* 146 Mass. pp. 519, 530-1; *Moulor* v. *Am. L. Ins. Co.* 111 U. S. pp. 343-5; *Mark* v. *Rochester Ins. Co.* 106 N. Y. 560; *Grattan* v. *M. Ins. Co.* 92 N. Y. 274; *O'Brien* v. *Home Ben. Soc.* 117 N. Y. 310, and cases cited; *Nat. Bank* v. *Ins. Co.*,

95 U. S. 673; *Grace* v. *Am. L. Ins. Co.* 109 U. S. pp. 278, 282; *St. George* v. *Biddeford*, 76 Maine, pp. 593-6; *Darrow* v. *Family Fund Soc.* 6 Lawyers' Rep. Annotated, 495-8, and cases cited: *Wright* v. *M. B. L. Asso.* 118 N. Y. p. 243.

Baker, Baker and Cornish, for defendants.

EMERY, J. On report. The material facts established by the admissions and evidence are these:—James H. Smith and the Maine and New Brunswick Insurance Company made a contract of insurance upon the life of Smith by the company, partly payable upon Smith's death to the plaintiff, his half-brother. This contract was evidenced by two written instruments,—one, called the "application," signed by Smith, the other, called the "policy," signed by the proper officers of the company. All the terms and conditions of the contract were embraced in these two writings.

The application contained various statements, and questions and answers thereto, and at the end were the following certificates signed by the applicant Smith.

1. "I have verified the foregoing answers and statements, and find them to be full, complete and true. I do also adopt as my own, whether written by me or not, each foregoing statement, representation and answer, and I agree that they are all material." . .

2. "I do hereby declare and warrant that the foregoing answers and statements are full, complete and true; and I agree that this declaration and warranty together with the preceding agreements shall form the basis of the contract between the undersigned and the Maine and New Brunswick Insurance Company, and are offered to said company by me, as a consideration of the contract applied for, and are hereby made a part of the certificate to be issued on this application; and if there be any concealment, misrepresentation, or false statement or statement not true, made herein then the certificates to be issued hereon, shall be null, and void." . .

The policy (or certificate) contained a stipulation that it was issued upon the condition that the statements and declarations

made in the application were true, and that the application was a part of, and the basis, of the contract of insurance.

In the application, among others, was the following question and answer:

No. 16. "Have either of your parents, brothers, or sisters, ever had insanity, consumption, chronic cough, or any scrofulous, contitutional or hereditary disease?

"Answer. No."

At the time of making this application, however, (July 8, 1888,) the applicant Smith had a brother, John T. Smith, who was then an inmate of the Central Lunatic Asylum, Va., having been committed to that asylum, in 1880. He was a monomaniac, made so by religious excitement. He was quiet, peaceable, and harmless. He was employed daily at the pump-house, assisting the firemen, and did other light work. His mental disease was of the class called by physicians "chronic dementia." His physical health was good, and so far as appears, was unaffected by his mental condition.

James H. Smith, the applicant, had full knowledge of the mental condition of his brother John, as above described (so far as a person unskilled in mental disease, would observe, or appreciate it,) at the time of the making of this contract upon his own life, but made no other statement about it in his application than his above answer to question No. 16.

James H. Smith, the applicant, died March 16, 1889, of acute mania in the Westboro' (Massachusetts) Insane Hospital, to which he had been committed February 25, 1889. While in the hospital he was noisy, incoherent, untidy, destructive, and delirious. The immediate cause of his death was "exhaustion of acute mania." The plaintiff, a beneficiary under the policy, having observed all the legal preliminaries, brought this action against the company to recover the amount specified in the policy to be paid to him upon the death of the insured. The defendant company defend the action contending, under the proper pleadings, that the applicant's negative answer to question No. 16, in the application and above quoted, was erroneous; and that such error of answer or statement rendered the con-

tract void, under the express stipulations in the application and policy. The plaintiff opposes this contention of the company, with various counter propositions, which we now proceed to consider.

1. The plaintiff contends first, that the answer was not in fact erroneous,—that the applicant's brother John, was not insane in the sense in which the word "insanity" was used in question No. 16. His argument is, that the word "insanity," used in that connection in an application for life insurance, only means such forms of insanity as affect physical health, and tend to shorten physical life; and does not include in its meaning, a case of chronic dementia, where the patient is quiet and harmless, and in physical good health.

Etymologically, insanity signifies unsoundness. Lexically, it signifies unsoundness of mind, or derangement of the intellect. Medical science with its usual zeal has deeply investigated the various forms, symptoms, causes, results, and manifestations of mental unsoundness, or disease, and has discovered numerous kinds of such diseases to which it has given appropriate technical names. Dr. Hammond (late Surgeon General U. S. Army,) for instance, classifies these kinds into seven classes, and thirty-three sub-classes (not claiming, however, this to be a natural classification). Dementia, and mania, are both specified in this classification. But however necessary such an analysis and classification of mental diseases may be to the science of medicine, they are impracticable and unnecessary in legal science. In law, every mind is sound that can reason and will intelligently, in the particular transaction being considered; and every mind is unsound or insane that can not so reason, or will. The law investigates no further. Whether this last named mental condition be congenital, or the result of arrested mental developement, or of religious excitement, or of physical disease, or of dissipation, or of old age, or of unknown causes; whether it be casual, temporary, or permanent; whether it be personal or hereditary; whether it be manifested in the mildest dementia, or the wildest mania, it is expressed in law by the same word, "insanity." When this word occurs, unexplained, or unlimited,

in any statute, contract, or other legal literature, it signifies any derangement of the mind, that deprives it of the power to reason or will intelligently. The mind of John T. Smith, the brother, suffering from chronic dementia, as described, had unquestionably lost that power of reasoning or willing, and to say in the application that he had no insanity was clearly untrue. *St. George* v. *Biddeford*, 76 Maine, 596.

2. The plaintiff contends again, that whatever be the legal meaning of the word "insanity" in the application, the applicant did not understand it to include his brother's case,—that although the applicant knew the facts as to his brother's mental condition, he did not know that such condition was one of insanity,—hence that his negative answer was correct according to his best knowledge and belief. If the applicant was sincere in such a belief, it would acquit him of fraud in so answering, but his sincerity is not enough to uphold a contract stipulated to be based on the actual correctness of his answers. He stipulated absolutely, in his application, that his answer was "full, complete and true." Such a stipulation calls for truth in fact, not merely for the applicant's knowledge and belief. His answer was unqualified. It purported to state an absolute fact. He did not qualify it, by any reference to belief, or understanding. The other party was to rely upon the language used, the outward expression, without inquiring into the inward belief. Had he stated his answer to be merely according to his belief, and such answer had been accepted, his belief might be material and sufficient, as in *Insurance Company* v. *Gridley*, 100 U. S. 614, cited by plaintiff's counsel; but as the answer stands in this case, the applicant's belief and sincerity are clearly immaterial and insufficient.

3. The plaintiff contends still, again, that the answer can not affect the contract, because, if untrue, it was immaterial. His argument here is, that the insanity of the brother did not affect his physical health,—is not shown to be a family taint,—did not in any way increase the risk of insuring the applicant's life, and hence was an immaterial matter not in any way affecting the contract. We do not think, however, the question of the

materiality of the answer is now open for consideration. That question was closed by the parties themselves. They stipulated that this answer, with all other answers, was material. The company was under no obligation to insure the life of the applicant. It was a private corporation doing a private business. It could admit or reject applicants at will. It could impose such terms and conditions, (not illegal,) as it pleased, however immaterial or trivial they might appear to the court. It had a right to stipulate that it would not insure the life of any person whose brother had ever had any kind or degree of insanity. It had a right to stipulate that any insanity, in any relative, should be regarded as material to the risk. The applicant could decline to enter into a contract for insurance on those terms and conditions, or he could accept them and close the contract.

The legislature of this state has interposed to some extent in fire insurance contracts, and enacted that certain representations or statements in the application, must be shown to be in fact material, before they shall be held to avoid the contract. It is not competent, in such cases, for the parties to conclude for themselves a question which the statute declares shall remain open for the court. There is no such statute affecting life insurance contracts. The parties to these contracts are left free to agree upon their own terms, conditions and stipulations, (except as to forfeiture for non-payment of premiums, there being a statute regulating that.) Until a statute shall intervene, a court of law must recognize the contract the parties make, and not venture to change it in any way. Whatever the parties say and agree in their contract shall be material, (always assuming it not to be unlawful,) the court can not declare to be immaterial. *Jeffries* v. *Life Insurance Co.* 22 Wall. 47; *Aetna Life Insurance Co.* v. *France*, 91 U. S. 510.

The other contentions of the plaintiff, are simply different statements of those above considered. The plaintiff's counsel has argued his several propositions in a very full and elaborate brief which we have thoroughly studied. He has cited many authorities which we have painstakingly examined, as, however clear our own views, we would hesitate to run counter to the

general current of judicial decisions. We think, however, that in every seemingly similar case, where a different result has been reached by a court, it will be found that the language of the application, or policy, was materially different from the language in this case, or else some statute intervened to modify the language. Thus in *Moulor* v. *Am. Life Insurance Co.* 111 U. S. 335, so confidently cited by the plaintiff's counsel as conclusive, there was no stipulation in the contract, that each question and answer should be regarded as material. The court naturally held that, in the absence of such a stipulation, the company must show to the court the actual materiality of the statement complained of. We do not think any court in the absence of a modifying statute, has gone to the extent of expunging from a contract, or disregarding in its construction, any statement or item, which the parties distinctly and in terms agreed should be regarded as material, and essential to the contract.

In this case, it was agreed by the parties, that the 16th question and answer were material, and that an untrue answer should vitiate the contract. The answer was untrue, and we must give effect to the agreement of the parties, and declare the policy for that reason, void.

Judgment for the defendant.

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

ENOCH MERRILL AND OTHERS, IN EQUITY,

vs.

SAMUEL L. WASHBURN.

Androscoggin. Opinion February 25, 1891.

Equity. Practice. Pleadings. Defective Bill. Chancery Rule 27, (1881). R. S., c. 77, § 23.

Equity causes should not be reported to the law court until the pleadings are sufficiently perfected to enable the law court to make a final decision upon the merits.

In equity causes thus reported, if the bill does not contain sufficient allegations, it must be dismissed without any consideration of the evidence.

When the plaintiff in equity seeks relief from the effects or results of some

fraud, accident or mistake, he should in his bill fully and explicitly state the circumstances, so as to present a clear picture of the particulars,—of how the fraud was committed and how the plaintiff was misled,—of the character and causes of the accident or mistake, and how it occurred.

ON REPORT.

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

The court having sustained the defendant's demurrer, inserted in the answer, renders a report of the facts unnecessary. The case is otherwise sufficiently stated in the opinion.

Argument for the plaintiffs is omitted, no brief being furnished.

Tascus Atwood, for defendant.

Counsel cited: R. S., 104, § 47; *Wright* v. *Dame*, 22 Pick. 55; *Boynton* v. *Brastow*, 38 Maine, 577; *Stover* v. *Poole*, 62 Maine, 217; Pom. Eq. § § 850, 859; *Bryant* v. *Mansfield*, 22 Maine, 362; *Norris* v. *Laberee*, 58 *Id.* p. 266; *Young* v. *McGown*, 62 *Id.* 56.

EMERY, J. This is an equity cause reported direct to the Law Court, under the statute, (R. S., ch. 77, § 23,) without any hearing before a single justice.

The case stated in the bill is substantially this: Moses C. Merrill died intestate, without issue, leaving certain real estate in Portland, and a widow. These plaintiffs, in default of issue of Merrill, were his legal heirs. They executed and delivered to the widow, for a nominal consideration, a quit-claim deed of the said real estate thus inherited by them from Merrill. This deed was in the usual form of a quit-claim deed of a fee,—a conveyance to her and her heirs and assigns forever. There was inserted in the deed, however, next after the description of the land, the following clause: "To the foregoing conveyance, we hereby attach the following conditions: First, the said Elizabeth A. Merrill, (the widow,) shall have the entire management and control, and receive the entire rents and profits of said real estate, during her life-time, she paying the taxes and necessary repairs on said property and estate. Second, if the said Elizabeth A. Merrill shall during her life-time sell and convey her interest in said property, then she may use, expend and appropriate whatever portion of the amount she may receive

for her said interest, for her personal benefit and comfort and living, she being the sole judge of the amount to be so expended, and at her decease, whatever amount remains (if any) from the proceeds of said sale, shall revert to us and our legal representatives in equal shares, and be paid to us by her executors or administrators."

The widow went into occupation of the premises and had the use of them until her death, "but never claimed to own the same, but that her right was to the use thereof during her life, and such was the intention," of the widow and the plaintiffs. The widow died without having conveyed any of the land. Her heirs, except this defendant, quit-claimed the land back to the plaintiffs, but this defendant, one of the heirs, refuses to quit-claim, and hence this bill in equity. The prayer in the bill is for a decree, "in accordance with the intentions of the parties to said deed, when the same was executed, namely: That at the death of said Elizabeth A. Merrill, whatever remained of said property, mentioned in said deed, should revert to said plaintiffs,"—and for general relief.

The defendant inserted in his answer a general demurrer, to the bill on the ground that it does not state a case entitling the plaintiffs to the relief prayed for. This the defendant could do under Chancery Rule, No. 27 (1881).

Good pleading is as essential upon the equity side, as upon the law side, of the court. Full, clear, direct and orderly statements are required by the chancery rules, and by the very nature of equity procedure. Equity decrees must be based upon the allegations in the bill. Prayers for relief must be unavailing, unless preceded by allegations showing a complete case, authorizing the exercise of equity jurisdiction. The most ample evidence is useless without sufficient statements in the pleadings. Evidence without allegation is as futile as allegation without evidence. *Grosholz* v. *Newman*, 21 Wall. 481.

The plaintiffs, in this case state in their bill that they gave to Mrs. Merrill, the widow, a deed in fee of certain real estate inherited by them from her husband, and now after her death, they ask, in effect, to be relieved from the operation of their

deed, and have the property back,—on the ground that it was the intention of all parties to the deed for her to have only a life estate. If the deed operates to convey the fee as they seem to concede, it is evident they can obtain relief from their deed only on the ground of some fraud, accident or mistake in the transaction.

They, however, do not allege either or any of such grounds of relief. They do not state how they came to give a deed of the fee. There is no reason or excuse given in the bill for executing such a deed. For all that appears in the bill, the form of conveyance actually used may have been the precise form the parties desired to use and intended to use. They may have preferred it to any other instrument, for some reasons satisfactory to them, if unknown to us,—as in *Hunt* v. *Rousmanier*, 1 Peters, 1.

Bills in equity seeking relief on the ground of fraud, accident or mistake, must directly charge the grounds relied upon. The statement should be so full and explicit as to show the court a clear picture of the particulars of the fraud,—the manner in which the party was misled, or imposed upon,—the character and causes of the accident, or mistake, and how it occurred. Without such a statement in the bill, the court can not grant relief, or even hear evidence in the matter. *United States* v. *Atherton*, 102 U. S., 372; *Scudder* v. *Young*, 25 Maine, 153; *Stover* v. *Poole*, 67 Maine, 217; *Stevens* v. *Moore*, 73 Maine, 559.

We take this occasion to repeat, what we have said in former opinions, that, under our present system of equity procedure, the law court is an appellate court, a court of last resort. Parties desiring a speedy adjudication of a cause in equity should not present it to the law court, until it is in such shape, that the opinion of the law court will be a final decision. The court held by a single justice is now the equity court of original jurisdiction, where the sufficiency of the pleadings can be promptly considered, amendments readily made, and the cause then speedily heard on its merits. In this case the plaintiffs were advised by the answer, that their bill would be assailed as

defective in statement. Instead of making proper amendments, they have submitted their cause to this court of last resort, upon their original allegations. These allegations, for the reasons before given, are clearly insufficient to justify the exercise of the court's equity powers.

Bill dismissed with costs but without prejudice.

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

ELIJAH W. CRAM, in equity, *vs.* NICHOLAS GILMAN.

Waldo. Opinion March 5, 1891.

Equity. Final Decree. Appeal. Practice. Chancery Rule 28; R. S., c. 77, § 20.

In equity there is no affirmative decree to be appealed from until the decree is signed, entered and filed. Unless the record shows such a signing, and filing, an appeal will be dismissed.

IN EQUITY.

On appeal by defendant. The case appears in the opinion.

J. W. Knowlton, for plaintiff.

W. H. Fogler, for defendant.

EMERY, J. An equity appeal. The defendant asks the law court to entertain his appeal from what he assumes to be a final decree against him in the cause. The plaintiff asks that the appeal be dismissed as not claimed within ten days after the decree was made. On this motion to dismiss we are furnished with the docket entries in the case.

By our equity procedure statute, R. S., ch. 77, § 20, an appeal from a final decree in equity may be taken within ten days after such decree is "signed, entered and filed." When the court has finally established and defined the rights of the parties in an equity suit, and indicated what relief should be awarded, it remains to embody this judgment in a suitable

decree, which when properly authenticated and enrolled shall be the authoritative expression of the judgment of the court. In our practice, decrees are sufficiently enrolled by being "entered and filed."

Drafts of such decrees are to be prepared by the prevailing counsel, and filed. Corrections of such drafts, if any are desired, are to be prepared by the other counsel, and filed. In case of final disagreement among counsel as to the correct form of the decree, all the drafts are to be submitted to a justice of the court to settle the form. Chancery Rule 49 (1881,) (Rule 28, 1891). The mere draft of a decree, however, even though agreed upon by counsel, and filed, is not the decree of the court. There is no decree, and consequently no appeal from it as a decree until the draft is authenticated and enrolled, or in the words of our statute, "signed, entered and filed." *Gilpatrick* v. *Glidden*, 82 Maine, 201. Such a formal decree, however, is not always necessary to dismiss a suit after judgment of dismissal by the law court. *Thurston* v. *Haskell*, 81 Maine, 303.

The docket entries of the filing of decrees in this case, are as follows:

"February 15, 1888. Decree filed. . . . . .

"May 24, 1889. 2nd Decree filed. . . . . .

"July 11, 1889. Amended Decree filed." . . . . . .

This appeal was claimed June 18, 1889.

The docket does not show, in terms, whether these papers were mere drafts of decrees prepared by counsel, and filed under the rule, or were "signed, entered and filed," as decrees of the court. If they were the former, there is as yet no decree to appeal from. If they were the latter, this appeal is too late to affect the decrees of February 15, 1888, and May 24, 1889, (more than ten days having elapsed,) and is too early to affect the decree of July 11, 1889. In either case, this appeal must be dismissed.

Appeal dismissed with costs.

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

JUDGE OF PROBATE *vs.* JOHN R. TOOTHAKER and another.

Franklin. Opinion March 12, 1891.

Guardian. Surety. Bond. Judgment.

The sureties on a guardian's bond, given at the time of the appointment of the guardian, are not liable for money received for real estate sold by him under a special license. On obtaining such a license, the guardian is required to give a special bond, and the sureties on this special bond are the ones liable for money so obtained by the guardian. Consequently, in a suit on the original bond, it is competent for the sureties to show the source from which the funds remaining in the hands of the guardian, and not accounted for, were received.

ON EXCEPTIONS.

This was an action upon a guardian's bond.

The cause came on for a hearing upon a motion to chancer the penalty of the bond, and, in determining the amount equitably and justly due, the plaintiff read in evidence a judgment of this court, showing that the principal in the bond in suit was charged upon his final account with the sum of thirty-four hundred dollars, and it was agreed by the parties, that, of that sum, one thousand seven hundred thirty-eight dollars and ninety-three cents had been accounted for and paid, leaving a balance due of one thousand six hundred sixty-one dollars and seven cents.

The defendants offered to show that the original guardian, during the administration of his trust, had sold certain parcels of real estate by license from the Probate Court, wherein he had given the bonds required by statute, and that he had received the proceeds of such sales, and been charged to account for them in the judgment of this court, before read in evidence. This evidence the court excluded as incompetent, and assessed the amount equitably due at the aforesaid sum of one thousand six hundred sixty-one dollars and seven cents, with interest from the date of said judgment, amounting in all to the sum of one thousand eight hundred eleven dollars and ninety-four cents; for which it ordered execution to issue.

To the exclusion of the evidence before-mentioned the defendants filed exceptions.

P. A. Sawyer, for defendants.

S. Clifford Belcher, for plaintiff.

In probate bonds, judgment against the principal is conclusive against the sureties, in absence of fraud. *Heard* v. *Lodge*, 20 Pick. p. 58; *Bourne* v. *Todd*, 63 Maine, p. 432; *Baker* v. *Moor*, *Id.* p. 445; *Masser* v. *Strickland*, 17 S. & R. 354; *Judge of Probate* v. *Claggett*, 36 N. H. 281. By R. S., c. 67, § 10, Spec. IV, the condition of the bond is: "At the expiration of his trust, to deliver all money and property, which, on a final and just settlement of his accounts, appear to remain in his hands."

This final settlement is to be made in Probate Court. The surety expressly undertakes that his principal shall deliver all moneys and property, which, upon such final settlement, appear to remain in his hands.

The suit upon the bond is founded as well upon the judgment as upon the bond, for the condition of the bond is that the surety shall be bound by the judgment. The surety is bound by the judgment, even if not a party in the proceeding in which the judgment was rendered, for the simple reason that he agreed to be bound by it when he signed the bond; for the law said if he entered into the bond he should be bound by the judgment of the Probate Court. *Woodbury* v. *Hammond*, 54 Maine, 332 (340 and 341); *Ralston* v. *Wood*, 15 Ill. 159; *Gillett* v. *Wiley*, 126 Ill. 310. See also *Hobbs* v. *Middleton*, 115 J. J. Marsh (Ky), 176-169; *Deobold* v. *Opperman*, 111 N. Y. 531. The statute upon which this suit was brought is based upon this principle. R. S., ch. 72, § 10.

The interest of the plaintiff must be specifically ascertained by decree of Judge of Probate, or judgment of court before he can commence his action on the bond. If the interest of plaintiff can again be inquired into, it is not specifically ascertained.

Unless the decree fixing the amounts due is conclusive both upon the principal and the sureties in the bond, it would seem

that no suit can ever be maintained under the provisions of this section of the statute.

WALTON, J. The sureties on a guardian's bond, given at the time of the appointment of the guardian, are not liable for money received for real estate sold by him under a special license. On obtaining such a license, the guardian is required to give a special bond, and the sureties on this special bond are the ones liable for money so obtained by the guardian. Consequently, in a suit on the original bond, it is competent for the sureties to show the source from which the funds remaining in the hands of the guardian, and not accounted for, were received. We think the evidence offered and rejected, should have been received. *Williams* v. *Morton*, 38 Maine, 47; *Lyman* v. *Conkey*, 1 Met. 317; *Mattoon* v. *Cowing*, 13 Gray, 387.

Exceptions sustained.

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

JOHN S. ELLIOT, Executor, in equity,

vs.

MARY T. FESSENDEN and others.

Cumberland. Opinion March 12, 1891.

Lapsed Legacy. Relative. R. S., c. 74, § 10.

By R. S., c. 74, § 10, it is provided that, "when a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative, if he had survived." *Held:* that the word, "relative," in this section of the statute means one connected with the testator by blood; a blood relation. It does not include within its meaning one connected with the testator by marriage only.

ON REPORT.

Bill in equity, heard on bill, answers and proofs, and brought by the executor of the will of Sarah H. Jenks, late of Bath, deceased, to obtain a construction of the same, and to ascertain whether, under its residuary clause in favor of John Patten, the property therein should go to his heirs, by right of representa-

tion, or be distributed as an intestate estate, said Patten having died before the testatrix.

The case shows that Sarah H. Jenks made her will November 28, 1885. She died July 20, 1887, and her will was admitted to probate on the first Tuesday of September, 1887. She left as her next of kin and only heirs, Mary T. Fessenden, and other defendants in the bill, who were her cousins.

The residuary clause of the will provides that: "All the rest, residue and estate, real, personal or mixed, of which I may die possessed, and all estate, real personal or mixed, of which I may have the right of disposal at the time of my decease, I give, devise and bequeath to John Patten, of Bath, his heirs and assigns, to his and their own use forever."

John Patten, the residuary legatee, died February 24, 1887, leaving as his only heirs, John O. Patten, and Clara Patten Goodwin, grandchildren of himself and his wife, Betsey, none of whom were blood relatives of the testatrix. After the death of his wife, Betsey, John Patten married March 22, 1830, Mary, the sister of Sarah H. Jenks. No issue of the second marriage was living at the date of the will, the wife, Mary, having died March 30, 1862.

Marcia G. Lord was a legatee in the will. She was a sister of Caleb S. Jenks, husband of the testatrix. Both died before the making of the will. Marcia G. Lord, left as her only heir a daughter, Annie Louise Lord, one of the parties defendant.

The executor having settled his account in probate, has still on hand a large sum as the residue of the estate. He, thereupon, alleges in his bill:

"And your orator further complaining showeth unto your honors, that grave and important questions have arisen as to the construction and effect of said will and the duties and liabilities of your orator, as such executor, among which are the following, to wit:

"1. Whether or not the legacy of one thousand dollars given by said will to said Marcia G. Lord, shall be paid by the executor of said will to said Annie Louise Lord.

"2. Whether or not the rest and residue of the estate, real,

personal or mixed, and all other estate given by said will to said John Patten, shall be distributed as intestate estate, or shall be paid over by the executor to said John O. Patten, and Clara Patten Goodwin, grandchildren of said John Patten.

"By reason of which questions your orator is greatly hindered and embarrassed in the performance of his duty as such executor.

"And in order that your orator may bring before the court all matters within his knowledge, information or belief which may bear on the questions aforesaid, or which either of the parties aforesaid may claim bear on the same, your orator charges, and saith unto your honors, that, at the time said will was drawn, said testatrix passed the scrivener a list of pecuniary legacies and said to the scrivener that she wished to give the residue of her estate to said John Patten; that thereupon the scrivener asked her wishes in the event said John Patten should decease before herself, to which she replied in substance as follows: 'I suppose in that event I could make some addition to my will;' and added: 'perhaps it will not be much;' that, after the death of said John Patten, said testatrix was by her infirmities disabled from thus adding to her said will, if she had desired so to do; that, as hereinbefore set out, she, as also her husband from the time of her marriage until his decease, had for over fifty years been resident in the family of said John Patten; that her relations to said Gilbert E. R. Patten and to his children, said John O. Patten and Clara Patten Goodwin, were always of the most friendly and affectionate character, and the habitual form of address from one to the other was that of persons connected by blood; that said testatrix was also on friendly and affectionate terms with each of the defendants herein named as her next of kin; that some of them were at the date of said will in very moderate pecuniary circumstances, as was well known to said testatrix; and that the following of them are among the persons to whom legacies were given by said will, to wit: Charles A. Stewart, named in said will Charles Stewart; Thomas H. Stewart, named in said will Thomas Stewart; Mary A. Stewart, Mary T. Fessenden, Wealthy B. Sawyer, Sarah P. Bosworth, named in said will Sarah Bosworth; Elizabeth A. Bosworth,

named in said will Elizabeth Bosworth; Lincoln Patten, Sarah J. Holmes, Mary R. P. Stockbridge and Helena F. Troup, named in said will Helena Troup," &c. . . .

Extracts from the answer of Mary T. Fessenden, and others, defendants:

"And these defendants further answering and protesting that the allegations in complainant's bill of complaint, as to the relations of friendship existing between the said testatrix and Gilbert E. R. Patten, John O. Patten, Clara Patten Goodwin and other defendants, named in complainant's bill of complaint, and as to the habitual form of address existing between said parties, or any of them, and the said testatrix, and as to the pecuniary circumstances of said parties, or any of them, are not material, and believe it is unnecessary to make further answers thereto; . . . that said allegations set forth on page five (*ante* p. 199) of complainant's bill of complaint, are immaterial and can not be admitted or allowed to defeat the general principles of law, applicable to the construction of wills, or affect the rules of law, by which testamentary dispositions are to be governed, and these defendants claim that all that portion of said estate of said Sarah H. Jenks, devised to said John Patten, in said will, is intestate estate, and pray that it shall be so declared by this Honorable Court, and that the executor shall transfer and pay to said Mary T. Fessenden, Wealthy B. Sawyer, Mary A. Stewart, Helena F. Troup and John P. Delano, administrator of Thomas H. Stewart and Charles A. Stewart, deceased, their several shares in and to the rest and residue of the estate, real, personal and mixed, and in all other estates given by said will, to the said John Patten, and that the same shall be distributed as intestate estate."

Extracts from the answer of John O. Patten and Clara Patten Goodwin: . . .

"These defendants further say that they have no knowledge as to the alleged conversation that passed between the testatrix and the scrivener, at the time of the execution of said will, and shall call for proof of the same if it is material and pertinent to the issue, but they deny that it is either material or pertinent,

and respectfully ask that it be struck from the bill, and that it be not regarded by the court.

"These defendants have no knowledge, whether, after the death of said John Patten, said testatrix was, by her infirmities, disabled from adding to her will, if she had desired so to do, and deny the materiality or the pertinency of this averment. They admit that said testatrix, as also her husband and two children from the time of her marriage until his decease, had for over fifty years been resident in the family of these defendants' grandfather, said John Patten, and aver that neither she nor her husband ever made compensation therefor, or were requested or desired so to do; they admit that her relations to their said father, Gilbert E. R. Patten, and to themselves, and, as they aver, to their said grandfather, John Patten, were always of the most intimate and affectionate character, and they admit and aver that their habitual form of address from one to the other was that of persons connected by blood.

"They admit that said testatrix was on friendly, but, so far as their knowledge goes, not on intimate terms with the kindred mentioned in said bill, and they admit that legacies were given by said will to the several other defendants named in said bill, and aver that said legacies were carefully proportioned by the testatrix, and were intended by her as the sole benefit said other defendants should take under said will.

"And these defendants further aver that said testatrix always insisted on the mutual use, as aforesaid of the appropriate address of blood relationship, and was very sensitive touching its omission even by accident.

"And in order that your Honorable Court may be informed, so far as is possible, of the peculiarly intimate relations between said testatrix on the one part, and said John Patten and his heirs, said Gilbert E. R. Patten and these defendants, on the other part, and in order that the court may be placed in the situation of the testatrix, herself, when said will was made, these defendants further answering show to your Honors that when said Caleb S. Jenks, husband of the testatrix, died, on the 6th day of July, 1870, said Gilbert E. R. Patten, administra-

tor in his estate under due appointment from the Probate Court of Sagadahoc County, and as such administrator, paid off and satisfied out of his own means, debts against said estate to the amount of two thousand five hundred seventeen dollars and four cents, in excess of all assets received by him from said estate, and though there still remained in said estate certain vessel-property and real estate in Bath, sufficient in value to satisfy his said claim against said estate for money thus advanced, he voluntarily released to said testatrix all said debt and all his claim upon said property, on the 7th day of March, 1874; that afterward on the 6th day of November, 1879, said Gilbert E. R. Patten, made and duly executed a will, making said testatrix joint and equal legatee with his own children, these defendants, in the use and income for life of all his property, real and personal, except what he gave to his wife; and that on the death of said Gilbert, on the 12th day of January, 1882, said will was duly admitted to probate as his last will and testament; these defendants are informed and believe that the property left by said testatrix at her death came almost wholly, if not wholly, by gift from said John Patten, and from his prospective heir, said Gilbert E. R. Patten, and from the accumulations from said gifts under the management of said John and Gilbert, rendered without charge; that said John Patten, in his lifetime was opposed to the making of any will and in fact made none, but that in recognition of the facts herein recited, and of the sources of her said property, and in pursuance of a mutual agreement or understanding between her and said John Patten, the latter on or about the 24th day of November, 1879, made provision for the said testatrix, in lieu of a will, by deed whereby she was to have, at the decease of said John Patten, during her natural life, the use and income of his homestead in said Bath, together with the use of all furniture, bedding, plate, pictures, ornaments, musical instruments, fuel and provisions; also the horse, cow, carriage, sleigh, harness, robes, hay, grain and stable utensils contained in and about his said mansion house, ell and stable of which he might die possessed; with the right to sell and dispose of the horse, cow, carriage, sleigh and harness, at her

option and for her own benefit; the taxes and repairs on the premises aforenamed not to be borne and paid by the said Sarah H. Jenks, but from the other property and estate of the said John Patten; and on the death of said John, she came into possession thereof, and held the same till her death, and on her part said testatrix was to and did make the will set forth by this bill making said John Patten and these defendants, as his heirs and the heirs of said Gilbert, her residuary legatees.

"These defendants, therefore, claim that said testatrix has always treated and called said John Patten and his heirs, said Gilbert and these defendants, as blood relations, and that she fully intended that these defendants should succeed said John in the title to all said undistributed residue of her estate, real and personal, and that such is the legal construction of said will, and they pray the court that they will direct the executors to pay it over to them in accordance with the terms of the will and the intent of the testatrix."

N. and H. B. Cleaves, *Stephen C. Perry* with them, for Mary T. Fessenden, and others.

John Patten was not a relative of Sarah H. Jenks, and dying before her, the legacy to him became void. The residuary legacy lapsed, and the testatrix, as to that, died intestate. *Ballard* v. *Ballard*, 18 Pick. 43; Am. Law of Adm. p. 934, § 435, and cases cited. The word "relative," in R. S., c. 74, § 10, an exception to the general rule, applies to persons in the line of consanguinity, and not those connected by marriage. 2 Will. Exors. 1004; Jar. Wills, 666; *Ennis* v. *Pentz*, 3 Brad. 385; Am. Law of Adm. 936; *Maitland* v. *Adair*, 3 Ves. 231; *Worsely* v. *Johnson*, 3 Atk. 761; *Moses* v. *Allen*, 81 Maine, 268; *Estate of Pfuelb*, 48 Cal. 643; *Esty* v. *Clark*, 101 Mass. 36; *Prather* v. *Prather*, 58 Ind. 141; *Cleaves* v. *Cleaves*, 39 Wis. 96; *Kenniston* v. *Adams*, 80 Maine, 294. The words, "his heirs and assigns, to his and their use forever," in the residuary clause, do not enlarge the rights of John Patten's descendants. They do not indicate an intention to take by substitution. Those taking by representation are not entitled

to what the person they represent never had. *Kimball* v. *Story*, 108 Mass. 384; *Dickinson* v. *Purvis*, 8 S. and R. 71; *Barnet's Appeal*, 104 Pa. St. 342; *Maxwell* v. *Featherstone*, 83 Ind. 339; Am. Law of Adm. p. 936, § 434, and cases cited.

Baker, Baker and Cornish, for John O. Patten and Clara Patten Goodwin.

The intention of the testatrix was to leave the residue to John Patten and his heirs, these defendants. She wished to dispose of all her property, and not to die intestate as to any. These respondents have no other bequests under the will, while all others, except one, have legacies varying from one hundred to one thousand dollars. She did not intend to remember remote relatives and forget members of her own household, whose parents were to her as brother and sister from birth, and the source of a large part of her property.

John Patten, brother-in-law of Mrs. Jenks, was a "relative," within the meaning of the statute. Its ordinary and usual meaning embraces connections by blood or by marriage. It is not confined to kindred, but is a broader term, applying to both. Webster and Worcester give the same meaning, a person connected by blood or alliance. Kindred, defined as "relatives by blood," implies that there can be relations other than by blood. *Kenniston* v. *Adams*, 80 Maine, 290, simply holds that a husband and wife are not relatives within the meaning of this statute.

WALTON, J. This is a suit in equity, instituted by the executor of the last will and testament of Sarah H. Jenks, asking the court to determine the construction of the will, and whether certain legacies therein mentioned lapse or go to the lineal descendants of the legatees, the legatees themselves having died before the testatrix.

Generally, if a legatee dies before the testator, the legacy lapses. But to this rule there is an exception in favor of relatives.

"When a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descend-

ants, they take such estate as would have been taken by such deceased relative, if he had survived." R. S., c. 74, § 10.

The word "relative," in this section of the statute has already been defined by the court. It means one connected with the testator by blood; a blood relation. It does not include within its meaning one connected with the testator by marriage only. So held in *Keniston* v. *Adams*, 80 Maine, 290. And such is generally held to be its meaning, when used in similar statutes, although it may sometimes be used in a more extended sense. *Esty* v. *Clark*, 101 Mass. 36.

Such being the law, the conclusion is inevitable that the bequests to John Patten and Marcia G. Lord, mentioned in the will of Sarah H. Jenks, are void. They both died before the testatrix. And being connections of hers by marriage only, they were not relatives within the meaning of the law, and their legacies lapsed; and the residuum of the estate, after paying all other legacies and the expenses of administration, must be paid to the heirs at law of the testatrix.

Costs, including reasonable counsel fees, are allowed to all the parties to this suit, to be paid by the executor out of the assets of the estate, and charged in his administration account.

Decree accordingly.

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

INHABITANTS of PHILLIPS *vs.* INHABITANTS of MADRID.

Franklin. Opinion March 12, 1891.

Pauper. Husband and wife. Foreign Divorce.

Where the husband obtains a divorce from his wife, for her fault, by a decree of the court of another state, which prohibits the wife from remarrying, the wife still residing here, *Held:* that the prohibition to remarry is in the nature of a penalty, and has no force as a disability to remarry in another state Such disability does not attach to the person of the wife in this state. *Held, also*; That the prohibition upon the guilty party to remarry, by the statute of this state, does not attach in such case. That statute. applying only to divorces granted here, has no reference to divorces granted in another state.

FACTS AGREED.

The case is stated in the opinion.

P. A. Sawyer, for plaintiffs.

H. L. Whitcomb, for defendants.

LIBBEY, J. Assumpsit for pauper supplies furnished by the plaintiff town for the relief of Lorestein Hinkley, Ella R. Hinkley as his wife, and Barnard C. Hinkley and Harry L. Hinkley, their sons.

By the agreement of the parties, it appears that Lorestein Hinkley had his legal settlement in the defendant town; and the right to recover for what was furnished him is admitted. The right to recover for the supplies furnished Ella R. and the two sons depends upon the legality of the marriage of said Lorestein and Ella R.

By the agreed facts it appears that said Ella R. was legally married to one Wardwell, of Clinton, in this state, May 25, 1879; that she and her husband afterwards moved to Massachusetts, where they separated and she returned to this state; that while she was residing here, a libel for divorce was commenced by her husband, in the court of Massachusetts, duly served on her in this state, and that a decree *nisi* of divorce was granted by the court there, in November, 1882, for the adultery of the wife, which was duly made absolute in November, 1883. Said Ella R. remained in this state, and on the 6th of September, 1884, was duly married to said Hinkley, in said town of Phillips.

It is claimed by the defendants that by the statute of Massachusetts, and of this state, in 1883, a husband or wife for whose fault a divorce was granted could not marry again within two years from the decree of divorce, and as that time had not elapsed when the paupers were married, in September, 1884, their marriage was illegal, and that Ella R. and her two sons do not take the pauper settlement of said Lorestein.

We think this contention is not sound. When the divorce was granted, Ella R. was no longer the wife of Wardwell. *Burlen* v. *Shannon*, 115 Mass. 438; *Com.* v. *Putnam*, 1 Pick. 136. The prohibition to remarry within the time named was in the nature of a penalty. It had no force as a disability to

remarry out of the state of Massachusetts. It did not attach to the person of the wife in this state. This rule is held in many courts. *Cox* v. *Coombs*, 8 B. Monroe, 351; *People* v. *Chase*, 28 Hun, 310; *Pansford* v. *Johnson*, 2 Blachford, 51; *Moore* v. *Hegeman*, 47 Sick. 521; *Van Voorhees* v. *Brintnall*, 41 Sick. 18; *Thorp* v. *Thorp*, 45 Sick. 602; *Vanstook* v. *Griffin*, 71 Pa. 240; *Com.* v. *Lane*, 113 Mass. 458.

Nor does the prohibition upon the guilty party to remarry by the statute of this state, attach to said Ella R. Our statute applies only to divorces granted by the courts in this state. It has no reference to a decree granted in another state. *Bullock* v. *Bullock*, 122 Mass. 3.

We think the marriage of said Lorestein and Ella R. was legal, and that the plaintiffs are entitled to judgment for the full amount claimed.

Defendants defaulted.

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

EBENEZER M. STAPLES and others, *vs.* JESSE W. PEABODY.

Hancock. Opinion March 12, 1891.

Fish. Lobsters. Fish and Game Warden. Repeal. St. 1887, c. 144, § 6; 1889, c. 292, § 5.

Section 6, c. 144, Statute of 1887 is repealed by Statute of 1889, c. 292 § 5. The defendant, a fish and game warden, seized and sold several barrels of lobsters belonging to the plaintiffs, each barrel containing some short lobsters, and which he claimed it was his duty to liberate as provided by Statute of 1889, c. 292, § 5. In an action of trespass the defendant justified the taking and selling of the lobsters of lawful length, legally taken, under the Statute of 1887, c. 144, § 6. *Held:* that the last-named statute had been repealed, and, therefore, was not a justification.

ON REPORT.

This was an action of trespass *de bonis* against the defendant, who justifies the taking as a fish warden.

The plaintiffs introduced testimony tending to show that, on the day alleged in the writ, they were the owners and possessors of the lobsters sued for, which were alive; and that the defendant,

at the time and place set forth, seized them, and sold them without notice to the plaintiffs; and that they have been deprived of them and all benefit from them.

The defendant introduced testimony tending to show that, at the time of the alleged seizure, he was a fish and game warden, legally appointed and qualified; that thirteen of the barrels mentioned in the writ were marked in the name of W. W. Staples, nine in the name of E. M. Staples and six in the name of C. W. Stockbridge; that upon examination of the lobsters contained in the barrels mentioned, he found in each and every barrel some lobsters less than ten and one half inches in length, measured as the law provides, and others of the length prescribed by law, not being female lobsters in spawn or with eggs attached, with the exception of one lobster in spawn or with eggs attached; that these lobsters were in transit from Swan's Island, Maine, to Boston, having been shipped by the plaintiffs in the season for legal shipping for lobsters; that thereupon he liberated alive all the short lobsters so found by him, and, no owner thereof appearing within twenty-four hours, after the expiration of twenty-four hours, he sold, at private sale, all of such lobsters found in said barrels, which were of a length more than ten and one half inches, measured in the manner prescribed by law; and caused the proceeds of said sale to be paid to Knox County where such seizure and sale was made by him.

C. E. Littlefield, for defendant.

Counsel argued that the statute, under which defendant justified, was constitutional. Forfeiture not a judicial, but a ministerial proceeding, and notice of sale not necessary. *Blazier* v. *Miller*, 10 Hun, 437; *Bouton* v. *Neilson*, 3 John. 474. Case distinguishable from *Dunn* v. *Burleigh*, 62 Maine, 24. Warden has no discretion. Lobsters when seized were a public nuisance; not necessary for statute to so designate them when having all the essential elements of a nuisance. They were seized while the prohibited act was being committed with them. *Lawton* v. *Steele*, 6 N. Y. S. 15. Plaintiffs' property not an absolute but qualified and limited right; divested by violating the conditions under which they held it. Can not

maintain this action because they have mingled lobsters, otherwise properly held, with those of forbidden length and thereby lost their right of property. The state which gave them the property can withdraw it when they use it unlawfully.

J. O. Robinson and J. F. Libby, for plaintiffs.

It does not appear, and it is not alleged that there was no intent of plaintiffs to liberate the lobsters alive. *State* v. *Bennett*, 79 Maine, 55; *Thompson* v. *Smith*, *Id.* 160. Defendant had no right under Statute of 1889, to retain and sell those of legal length. It gives no direction for their seizure, and § 6, c. 144, Statute of 1887, relating to their forfeiture, was repealed by implication. *Knight* v. *R. R.* 67 Maine, p. 293; *Smith* v. *Sullivan*, 71 *Id.* p. 153; *Com.* v. *Kelliher*, 12 Allen, p. 482. If Statute of 1887 is in force, as concerns lobsters of legal length, that provision is unconstitutional. It deprives plaintiffs of property without notice, hearing or adjudication. Forfeiture without any process of law, and without regard to the "law of the land." *Davidson* v. *New Orleans*, 95 U. S. 97; *Murray's Lessee* v. *Hoboken, &c. Co.* 18 How. 276; *Green* v. *Briggs*, 1 Curt. C. C. 311; *Stuart* v. *Palmer*, 74 N. Y. 191; *Lowry* v. *Rainwater*, 70 Mo. 152 (S. C. 55 Am. Rep. 420); *Varden* v. *Mount*, 78 Ky. 86 (S. C. Am. Rep. 208); Cooley's Con. Lim. 362; *King* v. *Hayes*, 80 Maine, 206.

LIBBEY, J. This is trespass against the defendant for taking and selling twenty-eight barrels of lobsters. The title of the plaintiffs is not questioned; but the defendant admitting the taking and conversion, claims to justify as a fish and game warden; that he made the seizure as such on the ground that there were some short lobsters in each barrel which it was his duty to liberate as provided in Act of 1889, c. 292, § 5. He justifies the taking and selling of the lobsters of lawful length, legally taken, by virtue of Act of 1887, c. 144, § 6.

Two objections are made to the validity of the defendant's justification. 1, That § 6 of the Act of 1887 was repealed by the Act of 1889, above cited. 2, If not repealed, section 6 of the Act of 1887 is unconstitutional.

Upon the first point the settled rule of construction of statutes as to repeal by implication is, an existing statute may be repealed in this way on two grounds; "where the latter one covers the whole subject-matter of the former, especially when additional remedies are added, and when the latter one is inconsistent with or repugnant to the former." *Smith* v. *Sullivan*, 71 Maine, 150 and cases cited.

Applying these rules to the case at bar, we think it clear that the statutory provision under which the defendant claims to justify was repealed by the Act of 1889. The Act of 1887 is entitled, "An Act for the better protection of the Lobster Fisheries." It takes the place of the provisions of R. S., c. 40, upon the same subject. The Act of 1889 is entitled, "An Act for the regulation of the Lobster Fisheries." It embraces the same subject-matter as the Act of 1887. It omits some of the provisions of that Act, and adds some new provisions. The Act of 1887 establishes a close-time for taking lobsters from the first day of August to the fifteenth day of September. The Act of 1889 omits that provision. The first Act makes it unlawful to buy, sell, expose for sale, or possess any lobsters less than ten and one half inches in length, measured as therein provided, during the year. The second Act contains the same inhibition from the first day of July to the next May, but makes it lawful to catch, buy, sell or expose for sale, or possess for any purpose lobsters nine inches and more in length, during May and June.

Section six of the first Act, under which the defendant claims to justify provides, that "in case of seizure, by any duly authorized officer, of any barrels, boxes, or other packages in transit, containing lobsters less than the prescribed limit in length, such lobsters as are alive and less than the prescribed limit shall be liberated, and all such lobsters as are of the prescribed length found in such barrels, boxes or packages, in the season for legal fishing for lobsters, shall be forfeited, and sold by the officer making the seizure thereof, at such time and in such manner as shall by him be deemed proper;" but gives to the owner the right to appear within twenty-four hours from the time of seizure and redeem them by paying to the officer a

fine of one dollar for each lobster less than the prescribed length.

Section five of the second Act is as follows: "All barrels, boxes or other packages in transit containing lobsters shall be marked with the full name of the shipper, and in case of seizure by any duly authorized officer of any barrels, boxes or other packages, in transit containing lobsters, which are not marked by the full name of the shipper, or in case of seizure by such officer, of barrels, boxes or other packages in transit, containing lobsters of less than the required length, such lobsters as are alive and less than the prescribed length shall be liberated."

It will be seen that section five in the Act of 1889 covers the same subject-matter embraced in section six of the Act of 1887, omitting the provision for the forfeiture of the lobsters of the required length, and embracing the new requirement of marking the barrels, boxes, &c., by the name of the shipper. We think this must be taken as the last declaration of the will of the legislature.

The same rule of construction is declared by the court of Massachusetts, in *Commonwealth* v. *Kelliher*, 12 Allen, 480.

This determination of the first point, in contention against the defendant, renders it unnecessary to consider the second.

Defendant defaulted. Damages to be assessed at Nisi Prius.

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

JOSEPH DUBE *vs.* CITY of LEWISTON.

Androscoggin. Opinion March 17, 1891.

Negligence. Master and Servant. Fellow-Servant. Law and Fact.

A laborer, engaged in the service of a city under the direction of a foreman, can not recover against the city for personal injuries resulting from the negligence of the foreman, who is his fellow-servant, in the absence of evidence that the foreman was incompetent, or that the city was negligent in employing him or in providing suitable apparatus for the work in which they were employed.

The foreman, superintendent or overseer of a job of work, is not on that account to be regarded as other than a fellow-laborer.

Whether an employe occupies the position of a fellow-servant to another employe depends upon whether the person, whose status is in question, is charged with the performance of a duty which properly belongs to the master.

What he is employed to do is a question of fact; in what capacity an employe acts is an inference of law. Where the facts are not disputed the question is one of pure law.

ON MOTION AND EXCEPTIONS.

This was an action on the case to recover damages for injuries received by the plaintiff, on the 27th day of July, 1888, while employed with others in excavating a trench for a sewer on Ash Street, in the city of Lewiston.

(Declaration.)

"In a plea of the case; for that the said defendant municipal corporation, on the 27th day of July, in the year of our Lord one thousand eight hundred and eighty-eight, at said Lewiston, and for a long time prior thereto, had, through its street commissioners and other servants, made and constructed divers sewers and drains, and, on the day and year aforesaid, at Lewiston, aforesaid, in a street called "Ash Street," nearly opposite where the fire engine house stands, was constructing a sewer for the use and private gain of said defendant, the City of Lewiston, and having a pit dug for the same, and was then and there bound and obliged by law to suitably construct said pit, and keep the same in a safe manner, so that defendants' servants, having been before that time directed to dig and work in and about the said pit, could then and there do so, without danger of their lives. And the plaintiff avers that on the said 27th day of July, aforesaid, he was employed by said defendant corporation, in and about said pit; and that his business and employment was to dig out and remove the earth from the bottom of said pit, which was, at that time, constructed to a great depth, to wit, the depth of nine and one half feet, and of a width of four feet; that the place where said pit was dug was in land that had been changed from its original structure, to wit, that it was "made" land, and that the defendant corporation provided no means of preventing the sides of said pit from

caving in. The plaintiff further avers that said pit and trench was unfit and unsafe for the work which the plaintiff was then and there directed, by the servants and agents of said city, to do in and upon, and in connection therewith; that the same should have been boarded up, or its sides, in some way, supported to prevent accidents, and the fall of the same, and the caving in thereof; that the formation of the ground where said pit was dug was insufficient in strength to sustain its own weight,—all of which was without the knowledge of the said plaintiff before the injury, hereinafter set forth, was received by him. But the defendants' agents and servants in charge of said work knew the aforesaid conditions and had their attention called to them. The plaintiff further avers that he was directed by said defendant corporation and its agents to go into said pit and remove the earth therein, and that no notice was given to him of its unsafe condition; and that he was not instructed or informed that the same was unsafe, but on the contrary, was informed by said defendant corporation, through its servants and agents, acting in its place, that the same was safe and sufficient, and that no harm could come to him from the use of the same. The plaintiff further avers that on the said 27th day of July, aforesaid, about half-past two o'clock in the afternoon, he was employed in and about said pit, removing the earth from the same, and while, in the exercise and use of due care, and without fault in the premises,—unsafe, through the defective condition of said pit, and the quality of the land out of which the same was dug, and the sides of the same not being supported and prevented from caving in,—the earth suddenly caved in, and he was caught and covered up with earth from the sides of said pit, over the whole of his body and over his head; and that he remained there until he was shoveled out by persons who came to his assistance, and laborers, employed upon said work with him; and that by reason of the caving in of said earth upon him, he sustained severe external and internal injuries; his body and bowels were crushed, and his system was shocked, and his general health injured and impaired, and he received such injuries to his person that he has been for a long time confined to his bed, in

consequence, and has lost the use of his limbs, suffered great pain and inconvenience, been put to great expense for nursing, and has become a cripple for life, and can never recover from his said injuries; by reason whereof he has lost his employment and means of livelihood, and suffered great anguish of mind and body, not having been able to do an hour's work from thence hitherto, and is informed that he will never be able to labor, in any capacity, again—all of which was caused by the negligence of said defendants in the premises, without fault on the part of said plaintiff, as he says, to the damage of twenty thousand dollars." Plea, general issue.

The jury rendered a verdict of four thousand and thirty-three dollars, for the plaintiff. Defendants' counsel requested the presiding judge to give the following, among other instructions, to the jury: "There is no evidence in the case for the jury to consider that Edmund Cloutier, (the foreman in charge of the work,) was anything more than a fellow-servant with the plaintiff in the work in which they were engaged at the time and place of the accident." The presiding justice declined to do so, and the defendants excepted.

The defendants, among other defenses, contended that the city did not authorize, adopt or ratify the construction of the sewer. The view taken by the court renders a report upon this branch of the case unnecessary. The facts are sufficiently stated in the opinion.

Newell and Judkins, for defendants.

Counsel argued in support of the exception, and the following issues upon the evidence: The street commissioner neither had charge nor supervision of the work; defendants furnished suitable materials for the work; Cloutier was foreman; was not negligent; and was a fellow-servant with the plaintiff, &c.

Competency of the servants employed not in issue by the pleadings. They are presumed to be reasonably competent. *Lawler* v. *Androscoggin R. R.* 62 Maine, 463; *Blake* v. *R. R.* 70 *Id.* p. 64. Master's duty to use reasonable care, to furnish suitable materials and appliances; *Coombs* v. *New Bedford Cordage Co.* 102 Mass. p. 584; *Zeigler* v. *Day*, 123 *Id.* 152; *Floyd*

v. *Sugden*, 134 *Id.* p. 566; *Colton* v. *Richards*, 123 *Id.* 484; *Kelley* v. *Norcross*, 121 *Id.* 508; *Daley* v. *R. R.* 147 *Id.* 104; *Beaulieu* v. *Portland Co.* 48 Maine, p. 295; *Clark* v. *Soule*, 137 Mass. 386; *Farwell* v. *R. R.* 4 Met. p. 60; *Holden* v. *R. R.* 129 Mass. 268; *Johnson* v. *Tow-Boat Co.* 135 *Id.* p. 113. Fellow-Servants: *Doughty* v. *Pen. L. D. Co.* 76 Maine, 143; *Farwell* v. *R. R.* 4 Met. 49; *McAndrew* v. *Burn*, 39 N. J. 115; *Beaulieu* v. *Portland Co.* 48 Maine, 295; *Holden* v. *R. R.* 129 Mass. 268; *Albro* v. *Agawam Canal Co.* 6 Cush. 75; *Zeigler* v. *Day*, 123 Mass. 152; *Walker* v. *R. R.* 128 *Id.* 8; *Conley* v. *Portland*, 78 Maine, 218; *O'Connor* v. *Roberts*, 120 Mass. p. 228; *McDermott* v. *Boston*, 133 Mass. 349; *Flynn* v. *Salem*, 134 *Id.* 351; 2 Thomp. Trials, p. 1239, § 1694, and cases in note 1, p. 1694. Master not liable for negligence of fellow-servant. *Farwell* v. *R. R.* 4 Met. 49; *Lawler* v. *Andro. R. R.* 62 Maine, 463; *Conley* v. *Portland*, 78 *Id.* 217. City received no profit or gain from the sewer. *Hill* v. *Boston*, 122 Mass. 344. Damages excessive. Verdict at simple interest would give an annuity larger than plaintiff could earn, and leave the principal to his heirs. The law does not contemplate such compensation.

George C. Wing, for plaintiff.

City was to derive revenue from the sewer by entrance fees. *Deane* v. *Randolph*, 132 Mass. 475; *Oliver* v. *Worcester*, 102 *Id.* 489; *Emery* v. *Lowell*, 104 *Id.* 15; *Darling* v. *Bangor*, 68 Maine, 108; *Bulger* v. *Eden*, 82 *Id.* 352. Fellow-Servant: Shear. & Redf. Neg. p. 102; *Mayhew* v. *Sullivan M. Co.* 76 Maine, 100; *Doughty* v. *Pen. L. D. Co. Id.* 143 and cases cited; Thomp. Neg. § 1021; *Shanny* v. *Andro. Mills*, 66 Maine, 420; *Wheeler* v. *Mason*, 136 Mass. 294, and cases cited; *Smith* v. *Penin. Car Works*, 1 Am. State Rep. p. 542 and note; *Wormell* v. *R. R.* 79 Maine, 397.

WHITEHOUSE, J. The plaintiff was engaged with Edward Cloutier and five other laborers in digging a trench for a pipe sewer about one hundred feet in length, on Ash Street, in Lewiston. No shoring was employed to support the sides of

the trench, and when the excavation had reached a depth of eight or nine feet one side caved in and a large quantity of earth fell upon the plaintiff, and injured him. In this action against the city to recover damages the jury found in favor of the plaintiff.

The construction of sewers authorized by the city council was under the general supervision of the street commissioner, but the crew in which the plaintiff was at work, at the time of the injury, was under the immediate direction of Edward Cloutier, who was foreman in charge of that particular job, the street commissioner incidentally inspecting the work from time to time as it progressed. In the city tool-house, thirty rods distant, was deposited a quantity of lumber designed to be used for shoring in the construction of sewers, and suitable and available for that purpose. Cloutier had full knowledge of this. He had been directed by the street commissioner to pile the lumber there to be used for that purpose when required.

At the time of the accident, the street commissioner was personally engaged in the work of paving in another part of the city, and the operations on Ash Street were entrusted to Cloutier. The commissioner had no special knowledge of the character of the road bed, or the nature of the soil at that point. Nothing had been disclosed, before the commencement of the work, indicating a necessity for any mechanical contrivance to protect the workmen against falling earth. The location and erection of any such structures necessarily devolved upon the workmen, acting under the direction of their foreman, as the digging progressed. The duty of determining when the exigency of the situation required such protection had not been assumed by the street commissioner. He did not undertake to give this piece of work his immediate supervision, and did not have the personal knowledge of its character required to form a correct judgment upon that question. The prosecution of this kind of work was not fraught with any peculiar perils not well understood by the plaintiff and Cloutier. If there were exceptionally dangerous conditions attaching to the soil on Ash Street they were open to the observation and knowledge of experienced workmen, or

ascertainable by the exercise of reasonable care and attention on their part. The commissioner discharged his duty when he assigned to the work an experienced and competent foreman, and furnished him with suitable and sufficient materials for any appliances necessary for the safe conduct of the work. The use and application of the materials formed a part of the duty of the workmen. *Kelley* v. *Norcross*, 121 Mass. 508; *Zeigler* v. *Day*, 123 Mass. 152; *Floyd* v. *Sugden*, 134 *Id.* 563; *Clark* v. *Soule*, 137 *Id.* 380; *McDermott* v. *Boston*, 133 *Id.* 349.

The evidence discloses no omission of duty on the part of the street commissioner which would render the city liable in this action. And if Cloutier's failure to place shoring against the side of the trench where the earth fell can be deemed negligence, it was clearly the negligence of a fellow-servant. The plaintiff and Cloutier were employed by the same master, received their compensation from the same common source, and were subject to the same control. They were not only engaged in the same general business and common employment, but were employed in the same kind of work and laboring on the same section. They were occupied in service of such a kind that each could reasonably be expected to foresee that he would be exposed to the risk of injury in case of negligence on the part of the other. Neither was Cloutier required to perform any duty which legally belonged to the province of the master. "The true test, it is believed, whether an employe occupies the position of a fellow-servant to another employe, or is the representative of the master, is to be found, not from the grade or rank of the offending or of the injured servant, but is to be determined by the character of the act being performed by the offending servant, by which another employe is injured; or in other words, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master." McKinney on Fellow-Servants, pages 53, 23. See also Thompson on Negligence, § § 1026-1031. Beach on Contrib. Neg. page 338. Shearman and Redfield on Negligence, 109. Deering on Negligence, § 204. Cooley on Torts, page 541, note 1.

The recent decisions in our own state are in accord with these principles. *Doughty* v. *Penob. Log D. Co.* 76 Maine, 143; *Cassidy* v. *M. C. R. R. Co. Id.* 488; *Conley* v. *Portland*, 78 Maine, 217; *Nason* v. *West*, *Id.* 253.

In *Doughty* v. *Penob. Log D. Co.*, the court say: "The general rule that a master is not liable for an injury caused to a servant by the carelessness of a fellow-servant, in the same common employment, unless the master is negligent in some matter he expressly or impliedly contracts with the servant to do, is the well-settled law of this state." In *Conley* v. *Portland*, *supra*, a case directly in point, the court say: "It is settled law in this state, that an employer is not responsible to an employe for an injury received through the carelessness of a fellow-laborer; and it is equally well settled that the foreman, superintendent or overseer of a job of work, is not on that account to be regarded as other than a fellow-laborer with those who are at work under him. Such an employment does not elevate him to the dignity of a vice-principal." See also Wood's Master and Servant, § 437.

In the case at bar, there was no controversy in relation to the service which Cloutier rendered and was directed to render. "What he was employed to do was a question of fact; the capacity in which he acted was an inference of law. As the facts were not disputed the question submitted to the jury was one of pure law." *Johnson* v. *Boston Toll-Bridge Co.* 135 Mass. 209. 2 Thompson on Trials, page 1239, § 1699.

The jury should have been instructed, in accordance with the request of the defendant, that there was no evidence to show that Cloutier was anything more than a fellow-servant with the plaintiff; and even if the injury occurred through his negligence, the city was not liable.

Motion and exceptions sustained.

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

INHABITANTS of LYMAN *vs.* INHABITANTS of KENNEBUNKPORT.

York. Opinion March 17, 1891.

Pauper. Overseers of the Poor. Selectmen. R. S., c. 3, § 12; c. 24, § 10; Stats. March 19, and 21, 1821, § 1.

Towns have the discretionary power to choose any number of overseers of the poor not exceeding twelve; but if they deem the election of separate overseers unnecessary, the duties pertaining to those officers are to be discharged by the selectmen, of whom there must be three, five or seven. *Held*, accordingly, that the election of only one overseer of the poor is valid.

ON MOTION AND EXCEPTIONS.

In the case, which was a pauper suit between the towns, it appeared that the plaintiffs had elected but one overseer of the poor, who was in office at the time the supplies were furnished. The defendants contended that one overseer was not sufficient, as the law requires the election of three, five or seven; and, therefore objected to the notice of the supplies given to them, which was signed by only one overseer. The presiding justice instructed the jury that it was regular and sufficient in form. The defendants excepted to the instruction.

R. P. Tapley, *N. B. Walker*, with him, for defendants.

The statute has provided for a board of overseers, consisting of three, five or seven persons. It is the judgment of the board which adjudicates questions of pauper supplies. No burden is cast upon defendants if plaintiffs neglect to elect such board, and pursue a course not warranted by statute. Plaintiffs can not dispense with statute so far as defendants are concerned. Defendants have the right to insist upon full performance of all statute requirements. *Boothby* v. *Troy*, 48 Maine, 560; *Williamsburg* v. *Lord*, 51 *Id.* 599. It is only a board of at least three officers, elected and sworn as overseers, that could lay the foundation of the claim in this case. Notice a nullity. *Dover* v. *Deer Isle*, 15 Maine, 169. One overseer could not perform the duties described in R. S., c. 24, § § 12, 15; bind out apprentices or servants under § § 21, 22; bring suit as in

§ 23; bind to service as in § 27; complain as in § § 42, 44; take charge of property as in § 46; grant licenses as in c. 124, § 9; give consent as in c. 71, § 11. These contemplate the board required to be elected at the annual meeting. C. 24, § 10, allowing overseers not exceeding twelve in number does not repeal c. 3, § 12, or otherwise modify it, as to numbers, except to allow an increase in the number to twelve if they choose. The two provisions must be construed together. There must be, at least, three in number, and there may be as many as twelve.

B. F. Hamilton and G. F. Haley, for plaintiffs.

WHITEHOUSE, J. Action to recover for the support of a pauper whose legal settlement is alleged to have been in the defendant town.

The written notice to the overseers of the defendant town was signed by "James B. Roberts, overseer of the poor of Lyman." It appeared from the town records in evidence that pursuant to articles in the warrant therefor, three inhabitants of the town other than Roberts were chosen selectmen and assessors and James B. Roberts overseer of the poor for the municipal year in question. No other overseers were chosen. Thereupon it is contended in behalf of the defense that, inasmuch as the liability of one town to reimburse another for expenses thus incurred in support of a pauper is created solely by the express terms of legislative enactment, the plaintiff town must strictly observe all these statutory requirements to authorize a recovery; that by section 12 of chapter 3 of the Revised Statutes, towns shall choose three, five or seven inhabitants to be selectmen and overseers of the poor; that the election of one overseer is not a compliance with this statute; and that when the varied and responsible duties imposed upon these officers by law are in fact performed by a single inhabitant chosen to that office, it will not be sufficient to charge another town with the expense of the support of a pauper having a settlement therein.

If the premises are correct the conclusion will be difficult to resist.

But it is provided by section 10 of chapter 24, R. S., that towns may at their annual meeting choose not exceeding twelve legal voters therein to be overseers of the poor, and section 12 of chapter 3, above referred to, provides for the election of three, five or seven selectmen and overseers of the poor *when other overseers are not chosen*. Are these two enactments to be construed together so that the requirement in chapter 3 to choose three, five, or seven, must be held at the same time to be a special designation of the number of overseers of the poor to be chosen under chapter 24? Clearly not. This more plainly appears from an examination of the original enactments of 1821 in this state, which were but slight modifications of the corresponding statutes in Massachusetts of 1786 and 1794.

It is provided in section 1 of the Act approved March 19, 1821, that in the month of March or April annually "the citizens in any town shall choose . . . three, five, or seven able and discreet persons of good conversation inhabiting in the town to be selectmen and overseers of the poor where other persons shall not be particularly chosen to that office, (which any town may do if they shall think it necessary and convenient)." And by section 3 of Act approved March 21, 1821, it is provided that "any town may also at their annual meeting choose any number not exceeding twelve suitable persons dwelling therein to be overseers of the poor; and where such are not specially chosen the selectmen shall be overseers of the poor." It is manifest that when the town exercised the power conferred by the latter section and chose any number not exceeding twelve overseers of the poor, the direction in the former section to choose three, five, or seven inhabitants to be selectmen, applied only to selectmen and not to overseers of the poor; for the express condition was fulfilled, and "other persons were particularly chosen to that office."

The language employed in both sections leaves no doubt that with respect to the number of officers they were to be construed separately; "where such (overseers) are not specially chosen the selectmen shall be overseers of the poor." The limitation as to numbers referred primarily to selectmen who should, however, be *ex-officio* overseers of the poor in case the privilege

of choosing any number of separate overseers had not been exercised. Any attempt to construe the enactments together and apply the limitations, in regard to numbers, to the choice of overseers in both sections at the same time, would render their provisions incongruous and absurd and the acts mutually destructive. The privilege of choosing "any number" not exceeding twelve is destroyed by restricting the choice to three, five, or seven. Nor are we required to impute any such contradictory purpose to the legislature. Construed according to their plain terms and express conditions, the two enactments were obviously designed to give towns discretionary power to choose any number of overseers not exceeding twelve; but if they deemed the election of separate overseers unnecessary the duties pertaining to those officers were to be discharged by the selectmen of whom there must be three, five, or seven. These separate enactments have been preserved through all the revisions of our statutes and in their present condensed form have precisely the same import. The right to choose not exceeding twelve, is the right to choose any number not exceeding twelve. When the functions of selectmen and overseers are combined in the same persons, there must be three, five, or seven; if a separate board of overseers is constituted, there may be any number not exceeding twelve.

The election of James B. Roberts as sole overseer of the poor of Lyman was in compliance with the statutes. His official action as such is binding on the defendant town. The notice signed by him was sufficient to charge the defendant town with liability for the support of the pauper if he had a legal settlement therein. That question was submitted to the jury under instructions to which no exceptions were taken. There was evidence sufficient to authorize the verdict of the jury, and the case discloses no just cause for reversing their finding upon that issue.

But excessive interest was evidently allowed. If the plaintiff shall within thirty days from the entry of this decision remit four dollars and eighty-eight cents and accept judgment for

seventy-three dollars aud forty-eight cents as of September 24, 1889, the entry must be,

Motion and exceptions overruled.

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

JOHN L. THOMPSON *vs.* BENJAMIN M. LEWIS.

Lincoln. Opinion March 17, 1891.

Fish. Smelts. Repeal. Pleading. Joinder of Counts. Special Laws of 1867, c. 190; Stat. of 1878, c. 23; c. 75.

Chapter 19 of Private and Special Laws of 1867, which provides a penalty for taking smelts from Damariscotta river, has not been repealed, either expressly or by implication.

A misjoinder of counts must be specially demurred to. If any one of the counts is good, the declaration must be sustained on general demurrer.

ON EXCEPTIONS.

This was an action of debt under chapter 190 of the Private and Special laws of 1867, entitled, "An act to regulate the taking of fish in the Damariscotta river."

The writ was dated April 3d, 1890,—and contains eleven counts. The first count is as follows: "To answer unto John L. Thompson, of Newcastle, in the county of Lincoln, a fish and game warden, who sues this action as well for the State of Maine, as for himself, in a plea of debt; for that the said Benjamin M. Lewis, did on the 11th day of December, 1889, at said Bristol, take by the use of a net, a large number of fish called smelts, to wit: ten thousand smelts from the tide waters of the Damariscotta river, in said county of Lincoln, other than, and not from, so much of the waters of said river as are west of the railroad bridge near Damariscotta Mill, contrary to and in violation of an act of the Legislature of the State of Maine, entitled, "An act to regulate the taking of fish in the Damariscotta river," which act was approved January 25, 1867; whereby and by force of said act, the defendant has forfeited the sum of fifty dollars, one half thereof to the plaintiff's own use, and one half thereof to the use of the State of Maine."

The second, third, fourth, fifth and sixth counts are like the first except that the dates of the alleged offenses are named as the 23rd day of December, 1889; 24th day of December, 1889; 4th day of January, 1890; 6th day of January, 1890, and 7th day of January, 1890, respectively, and in each of said counts after the first, alleging that the defendant has thereby forfeited one other sum of fifty dollars, &c.

The seventh count is as follows: "Also, for that the said Benjamin M. Lewis, did on the 11th day of December, A. D. 1889, take by the use of a seine, a large number of fish, called smelts, to wit: ten thousand fish called smelts, from the tide waters of the Damariscotta river, in the county of Lincoln, other than, and not from, so much of the waters of said river as are west of the railroad bridge, near Damariscotta Mills, contrary to and in violation of an act of the Legislature of the State of Maine, entitled, 'An act to regulate the taking of fish in the Damariscotta river,' which act was approved January 25, 1867; whereby and by force of said act the defendant has forfeited one other sum of fifty dollars, one half thereof to the plaintiff's own use, and one half thereof to the use of the State of Maine."

The eighth, ninth, tenth and eleventh counts are like the foregoing (7th,) except that the dates of the alleged offenses are named as the 23rd day of December, 1889; 24th day of December, 1889; 4th day of January, 1890, and 7th day of January, 1890, respectively; excepting also that the ninth count contains the words, "at said Bristol," after the date of taking, and in each of said counts, alleging that the defendant has thereby forfeited one other sum of fifty dollars, &c.

The declaration concludes as follows: "Yet though requested, the said defendant has not paid said sums, or any or either of them, but has neglected and refused so to do, and unjustly detains the same."

The defendant filed a general demurrer, which was joined by the plaintiff.

The presiding justice sustained the demurrer and adjudged the declaration bad; and the plaintiff excepted.

George B. Sawyer, for defendant.

The original act, c. 190 of 1867, was printed among the private and special laws. It was a public law because it limited the rights of the public, and applied to the whole of Damariscotta river.

In 1869, in the general revision of the fishery laws, the Damariscotta river was exempted "from the operation of the provisions relating to the migratory fishes." Public Laws, 1869, c. 70, § 30. Smelts are migratory fishes. But for this exemption of the "Damariscotta river," the local act of 1867, would have been repealed by the act of 1869, *supra*, as inconsistent with it. The additional act of 1870, (c. 171,) made the same exemption of Damariscotta river. Both these acts contain numerous provisions in regard to migratory fishes, inconsistent with the local act of 1867. See act 1869, § 14, also § 13; act of 1870, § § 4, 5, prescribing different penalties and different periods of time. In 1878, c. 23, public laws of that year, the general exemption of the Damariscotta river, was repealed and the exemption was limited to, "so much of Damariscotta river as is west of the railroad bridge, near Damariscotta Mills,"—and such has been the law ever since. R. S., c. 40, § 31. That part of the Damariscotta river in which the alleged offense was committed is not within the exempted part. When the exemption was repealed, the general law,—all the general laws applicable to "smelts," or "migratory fishes,"—took effect as to the part not exempted, and thereby necessarily repealed the previously existing local and inconsistent act of 1867.

These restrictive fish laws are all in derogation of the common law, and of public right (*Moulton* v. *Libbey*, 37 Maine, 472,); and nothing should be presumed in their favor. Since the "smelt" first became a subject of legislation, various laws have been enacted, groping and experimenting to find what legislation, if any, the smelt needed, always repealing everything inconsistent, and generally inconsistent with all that had preceded.

In 1878, when the exemption of the lower Damariscotta river was removed, and only a week later, another general fishery

law was passed, containing provisions alike inconsistent with the local act of 1867. Public Laws, 1878, c. 75.

The multiplicity of counts in plaintiff's declaration, and the uncertainty, in the absence of specification as to whether he intends to declare on one violation under different dates and in slightly varying form, or on a succession of distinct violations, makes his writ demurrable. In a *qui tam* action, as in criminal practice, separate offenses should not be charged in one suit or prosecution.

The conclusion of plaintiff's writ is not appropriate to an action of debt.

W. H. Hilton, for plaintiff.

WHITEHOUSE, J. General demurrer to the writ containing eleven counts in an action based on Chap. 190, of the Private and Special Laws of 1867, to recover the penalty for taking smelts from the Damariscotta river, by the use of nets and seines, in December, 1889, and January, 1890.

The first objection interposed by the defense is that the act above-named has been repealed by subsequent legislation. The first section of the act provides that during the months of December, January, February and March, of each year, no person shall "take fish by the use of nets or seines, from the Damariscotta river, so far up said river as the tide-waters extend."

There is no law which in terms repeals this act by express reference to it, but it is a well-settled rule of interpretation that when a new statute covers the whole subject matter of an old one, adds offenses and prescribes different penalties for those enumerated in the old law, the former statute is repealed by implication, and the most recent expression of the legislative will regarded as the only one having the force of law. *Norris* v. *Crocker*, 13 How. 438; *Commonwealth* v. *Kelliher*, 12 Allen, 481. So, also, when the latter act is inconsistent with or repugnant to the former. *Smith* v. *Sullivan*, 71 Maine, 152. But no subsequent enactment exists which can be held under these rules to operate as a repeal of this act of 1867. There is

no subsequent act necessarily inconsistent with it and no act which can be deemed a substitute for it as embracing all of its provisions. The Damariscotta river, was expressly exempted from the operation of the provisions of Chap. 70, Laws of 1869, Chap. 161, Laws of 1870, and of Chap. 40 of the R. S., of 1871, by force of sections 30, 12, and 50, of those chapters, respectively. It appears, however, that by Chap. 23 of the Public Laws of 1878, this general exemption of Damariscotta river, was limited to so much of the waters of Damariscotta river as are west of the railroad bridge in Damariscotta Mills; and it is contended in behalf of the defendant that, as to the part not exempted, all the general laws applicable to the subject immediately took effect and thereby repealed the antecedent enactment of 1867, with which it is claimed they were inconsistent. But the laws relating to the subject-matter in force at that time were not inconsistent with the act of 1867. Chapter 23 of the Public Laws of 1878, did not become effective as a law until March 23, 1878, thirty days after the adjournment of the legislature passing the act; while the general revision of the fishery laws found in Chap. 75 of the Laws of the same year, took effect when approved, February 21, 1878. Thus it appears that, when the exemption of Damariscotta river was limited by chap. 23 of the Laws of 1878, the only law applicable to the subject, then in force, was chap. 75 of the Laws of 1878; and it will be seen on examination that this act contains no provisions relating to smelts inconsistent with Chap. 190 of the Private and Special Laws of 1867. The prohibition of the latter act extends only to the months of December, January, February and March. It contains no restrictions with respect to the remainder of the year; while section 11 of Chap. 75 of the Laws of 1878, prohibits the taking of smelts otherwise than by hook and line between the first day of April and the first day of November in each year. With respect to time the two acts are exact complements of each other, and together embrace the whole year. They are not in conflict. Section 11 of Chap. 75 of the Laws of 1878, was amended in 1881, by substituting October for November, and as thus amended it now appears as

section 46 of the Revised Statutes. But this obviously had no effect to render the provision repugnant to the act of 1867. It simply left one month unguarded.

The objection that there are several counts joined in the plaintiff's declaration can not prevail as a cause for demurrer. *Allen* v. *Ham*, 63 Maine, 535; *Mitchell* v. *Tibbetts*, 17 Pick. 298. If any one of the counts is good, the declaration must be sustained on general demurrer. *Nat. Ex. Bank* v. *Abell*, 63 Maine, 348; *Blanchard* v. *Hoxie*, 34 Maine, 376.

Exceptions sustained. Demurrer overruled.

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

CITY OF ROCKLAND *vs.* MARY C. FARNSWORTH.

Knox. Opinion March 17, 1891.

Tax. Debt. Evidence. Practice. R. S., c. 6, § § 12, 175.

In an action of debt to recover a tax assessed upon personal property, it is a material averment that the defendant was an inhabitant of the plaintiff town, &c., and it is incumbent upon the plaintiff to establish it by competent evidence.

Where such an action was submitted on report to the law court, and the evidence did not disclose any testimony to prove that allegation, the plaintiff moved to have the report discharged. *Held*, that as no injustice can result from allowing the plaintiff an opportunity to supply the omission, if the evidence exists, the motion should be granted, and the case remanded for trial.

ON REPORT.

E. K. Gould, C. E. Littlefield with him, for plaintiffs.

J. O. Robinson, and J. F. Libby, for defendant.

The case is stated in the opinion.

WHITEHOUSE, J. Action of debt to recover the amount of a tax assessed on the personal property of the defendant for the year 1885.

It is provided by section 12, of chap. 6, R. S., that "all personal property within or without the state, . . . shall be assessed to the owner in the town where he is an inhabitant

on the first day of each April." And it is alleged in the plaintiffs' declaration, that "the said Mary C. Farnsworth, on the first day of April, 1885, was an inhabitant of said City of Rockland." This is a material averment, and it is incumbent upon the plaintiff to establish it by competent evidence as a necessary part of the city's case. It is true that in *Nowell* v. *Tripp*, 61 Maine, 426, an action against a collector for an arrest alleged to be illegal, it was held that in determining what persons are to be taxed, the assessors were no more acting outside of their jurisdiction than in determining what property shall be taxed, and that an "error of the assessors in taxing one as an inhabitant of their town when in fact he was not an inhabitant, forms no exception to the rule that a collector's warrant is his protection against all errors and illegalities but his own." But in *McCrillis* v. *Mansfield*, 64 Maine, 198, an action by a collector to recover a poll tax assessed upon the defendant, it appeared that the defendant was not an inhabitant of the town at the time the tax was assessed, and a nonsuit was entered, the court holding that the doctrine of *Nowell* v. *Tripp*, should not be extended to apply to such a case.

But this action is brought directly by the City of Rockland, in its own name, to collect a tax by virtue of the authority conferred by section 175, of chap. 6, R. S.; and *a fortiori* the plaintiff is bound to prove the defendant's residence in that city at the time in question. If she was not an inhabitant of that city on the first day of April, 1885, she was not liable to be taxed there for personal property, and this action cannot be maintained.

But patient and careful scrutiny of the report not only fails to disclose direct and positive evidence of such residence in Rockland, but any evidence whatever from which that fact can be legitimately inferred. There are indeed remote intimations that might form the basis for a plausible conjecture, but no facts or circumstances entitled to be received as competent evidence to establish a material proposition in a court of justice. Whether this fatal omission was occasioned by inadvertency or necessity does not distinctly appear. But the entire absence of

any allusion to the question in the report, and the plaintiffs' motion filed in this court asking to have the report discharged if the evidence is deemed insufficient upon this point, suggest the probability that counsel either wholly overlooked the point or too confidently assumed that it would not be raised. As no injustice can result from allowing the plaintiffs an opportunity to supply the omission, if the evidence exists, we think the motion should be granted and the case remanded for trial.

Report discharged.

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

EMMONS W. KINGSBURY *vs.* JOSHUA D. SARGENT and another.

Penobscot. Opinion March 18, 1891.

Attachment. Receipt. Duress. Fraud.

Where an officer with a writ against one person attaches personal property claimed by another person, the latter is under no duress; and a receipt signed by him, to obtain a release of the property from the officer's custody, can not be avoided for duress.

Where the officer does not undertake to state the terms or conditions of the receipt written by him to be given by the claimant, but only states his opinion of its legal effect, (the claimant having the opportunity to read the receipt, but signing without reading) the receipt can not be avoided on the ground of fraud, even though the officer misstated its legal effect.

ON REPORT.

The case is stated in the opinion.

Peregrine White, for defendants.

Receipt void. Ad. Torts, (abridged ed.) pp. 369-373; *Pen. Boom Corp.* v. *Wilkins*, 27 Maine, 345.

Representation fraudulently made; relied on by defendants. Pollock Cont. 477. Defendants not negligent. Damages nominal: *Edmunds* v. *Hill*, 133 Mass. 445; *Sawyer* v. *Mason*, 19 Maine, 49.

G. W. Howe, for plaintiff.

Counsel cited: 2 Greenl. Ev. § 301; *Harmon* v. *Harmon*, 61 Maine, p. 231; *Abbott* v. *Treat*, 78 *Id.* p. 126; *Severance* v. *Ash*, 81 *Id.* 281.

EMERY, J. On report. The action is assumpsit by an officer against receiptors upon their written receipt for property attached by him on a writ against John D. Sargent, one of the receiptors and husband of Mary Sargent, the other receiptor. The receipt was in the usual form upon a printed blank, with this concluding printed clause: "And we further agree that this receipt shall be conclusive evidence against us as to our receipt of said property, its value before-mentioned, and our liability under all circumstances to said officer for the full sum above mentioned." Judgment was obtained in the suit against Joshua, and execution issued thereon, upon which execution the officer seasonably made demand on the receiptors for the attached property. Delivery was refused. In this action upon the receipt, the defendants under proper pleadings rest their defense solely upon their contention that the receipt was obtained from them by duress or fraud on the part of the officer.

The defendants' evidence, giving it all reasonable effect, amounts to this: The plaintiff, a deputy sheriff, having a writ against Joshua, and having orders to attach thereon the cattle on his farm, waited upon him at his farm for that purpose. Joshua told the officer that the cattle belonged to his wife, who was sick in her chamber from recent child-birth, (the child being two days old,) and asked the officer to go with him to the wife's room, that she might formally forbid the attachment. The officer went with the husband to the wife's room, and there she forbade the attachment, claiming the cattle as her own. The officer replied that he must nevertheless attach the cattle according to his instructions, he having a good bond. He then left the house, and with his assistant began gathering the cattle together to take away. In doing this, there was much shouting at and whipping of the cattle to keep them in place. This disturbed and excited the wife, and her nurse told the husband he must get rid of those men somehow or other. Mr. Sargent spoke to the officer, who advised him to have the cattle receipted for, and the ownership determined. A neighbor, Mr. Frees, was called in, but he declined to sign the receipt. Then all

three went into the house, to the wife's room. The officer there said that if they wanted to keep the cattle from being driven away, they must sign a receipt for them. The wife at first refused to sign any receipt, declaring she would not give up her claim. The officer said she would not be signing away her claim to the cattle, but only becoming security for them until the ownership could be determined. She then appealed to her husband and her neighbor, Mr. Frees, both of whom advised her to sign it. She thereupon took the paper from the officer and signed it with her husband. She did not read the paper, nor hear it read, and did not know the contents of it. The husband heard it read over after the signing, but did not notice the clause above quoted.

The officer's version is entirely opposed to that of the defendants, but we have no occasion to consider it.

1. As to duress. A comparison of this case with *Harmon* v. *Harmon*, 61 Maine, 227; *Higgins* v. *Brown*, 78 Maine, 473; and *Hilborn* v. *Bucknam*, 78 Maine, 482, must make it evident that here was no legal duress, such as would avoid the receipt. The officer used no unlawful threats,— exercised no unlawful force. The peculiar circumstances of the wife's illness and weakness made the occasion painful, and the emergency perhaps severe; but the officer was within the line of his duty. He did not seek the wife, and, indeed, she did not sign at his request, but only after seeking the advice of her husband, and neighbor.

2. As to fraud. In considering this defense, it is to be borne in mind that no fiduciary relation existed between the parties. The defendants from the first regarded the officer as antagonistic. The situation was this: The defendants desired to withdraw the cattle from the custody of the officer. There were several ways open to them. They could pay the debt,— replevy the cattle,— or receipt for them. They could also abandon the cattle, and hold the officer for all damages. They chose to receipt for them. The receipt was prepared and presented to them. No statement was made to them of its contents, or terms. At the most, there was only a statement of an opinion,

that the receipt would not operate in law to estop the wife from asserting her own claim. Perhaps it would not, had she returned the cattle to the officer, and thus satisfied the receipt. Its terms and contents were fully open to them, however. It fully stated the obligations they assumed by signing it. They signed it without duress, and thereby obtained their object, the release of the cattle from the officer's custody.

They can not now, after having attained their purpose, avoid their own reciprocal engagement by showing that they did not read the paper,—did not know its terms,—or were misled by the officer's erroneous opinion as to its legal effect. They should have re-delivered the property according to their engagement, and having fulfilled that, they would have been relieved. They stipulated, however, that they would not question their liability in an action on the receipt, and by that stipulation they must now abide.

This rule may seem severe upon the weak, thoughtless, or unlearned; but reflection will satisfy the mind that the rule is essential to the certainty and security of titles, and to the faith and value of contracts. Without such a rule, business could not be carried on. *Grant* v. *Grant*, 56 Maine, 573; *Insurance Co.* v. *Hodgkins*, 66 Maine, 109; *Thompson* v. *Insurance Co.* 75 Maine, 55; *Abbott* v. *Treat*, 78 Maine, 121; *Upton* v. *Tribilcock*, 91 U. S. 50.

By their receipt, the defendants also stipulated that if they did not re-deliver the property, they would pay the value, one hundred and fifty dollars. By failing to re-deliver the cattle they have now become liable to pay that sum. Whether or not the wife owned the cattle is immaterial in this action. Rather than re-deliver the cattle, and pursue such remedies as might then be open before her, she elected to retain the cattle, and thus allow her liability upon the receipt to become fixed. *Penobscot Boom Co.* v. *Wilkins*, 27 Maine, 345; *Drew* v. *Livermore*, 40 Maine, 266. The officer, however, only asks for damages enough to satisfy the execution on the judgment against Joshua, which appears to be $113.07, with interest from

date of judgment, May 12, 1888. Hence damages will be limited to that amount.

Judgment for plaintiff.

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

WALTER R. MCPHETERS and others, *vs.* EDWIN J. PAGE.

Penobscot. Opinion March 24, 1891.

Trover. Conversion. Agent and Servant.

In an action of trover, it is no defense that the defendant acted as the agent or servant of another who was himself a wrong-doer.

Any act of dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it, amounts to a conversion.

Nor is it necessary to constitute a conversion that the wrong-doer has applied the property to his own use; if he has exercised such dominion over it, it will in law amount to a conversion whether it be for his own use or another person's use.

ON REPORT.

The case is stated in the opinion.

Jasper Hutchings, for plaintiffs.

Counsel cited: *Cram* v. *Thissell*, 35 Maine, 86; Cooley's Torts. pp. 127, 448; *Kimball* v. *Billings*, 55 Maine, 147; *Galvin* v. *Bacon*, 11 *Id.* 28; *Burditt* v. *Hunt*, 25 *Id.* 419.

Barker, Vose and Barker, for defendant.

Defendant an innocent bailee. One who receives goods in his possession and control, knowing that they were not lawfully in the possession of the person who brought them to him, and afterwards allows them to be taken away by the same person, is not thereby guilty of a conversion. *Loring* v. *Mulcahy*, 3 Allen, 575; *Polley* v. *Lenox Iron Works*, 2 *Id.* 182; *Smith* v. *Colby*, 67 Maine, 171; *Burditt* v. *Hunt*, 25 *Id.* 419; *Fifield* v. *R. R.* 62 *Id.* 77; *Leonard* v. *Tidd*, 3 Met. 6. Counsel also cited: *Nanson* v. *Jacob*, 3 Am. State Rep. 536; *Hale* v. *Ames*, 15 Am. Dec. 151, and notes.

FOSTER, J. Trover to recover the value of one carcass and two saddles of deer.

It is admitted that the deer were lawfully killed by the plaintiffs and that they owned the carcass and saddles for which this suit is brought.

The only question involved is whether there has been a conversion of the property by the defendant.

The carcass and saddles were, during open season, put on board the cars to be transported to Boston for sale. Upon their arrival at Bangor, they were seized by a constable and two police officers for some supposed violation of law on the part of the plaintiffs, in attempting to transport them out of the state. They were taken and carried by these officers to the defendant's meat market in the city, and there left with him. He knew the officers' possession came by seizure. The officers had no precept and procured none either against the property or the plaintiffs. They were not justified in seizing them, or in afterwards doing what they did with them. Nor have we any doubt that the acts of the defendant with reference to the property in question amounted to a conversion. The evidence is uncontradicted that he skinned the carcass and saddles, cut them into steaks and roasts, let one of the officers "have paper to do the pieces up to distribute them round to his friends," and sent a few of the orders out with his own team. This he admits. He used none of the meat himself; neither was any of the meat sold.

The defendant sets up no justification by his pleading. It would not avail him were he to do so with the facts before us. Notwithstanding he may have acted as the agent or servant of the officers in what he did, it furnishes him no legal justification. "It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrong-doer, the agent is a wrong-doer also." *Kimball* v. *Billings*, 55 Maine, 147, 151.

It is established as elementary law by well-settled principles, and a long line of decisions, that any distinct act of dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it, amounts to a conversion. It is not

necessary to a conversion that it be shown that the wrong-doer has applied it to his own use. If he has exercised a dominion over it in exclusion, or in defiance of, or inconsistent with, the owner's right, that in law is a conversion, whether it be for his own or another person's use. Cooley on Torts, 448; *Webber* v. *Davis*, 44 Maine, 147, 152; *Miller* v. *Baker*, 1 Met. 27; *Fernald* v. *Chase*, 37 Maine, 289. "He who interferes with my goods, and without any delivery by me, and without my consent, undertakes to dispose of them, as having the property, general or special, does it at his peril to answer me the value in trespass or trover." *Gibbs* v. *Chase*, 10 Mass. 125, 128.

In this case the defendant was more than a mere naked bailee. He exercised a dominion over the property destructive of it, and inconsistent with the plaintiff's ownership. The fact that he was the servant of others who were themselves wrong-doers, and acted under their authority, can not avail him though he may have been ignorant of their want of title to the property in question. *Kimball* v. *Billings*, *supra*; *Coles* v. *Clark*, 3 Cush. 399, and cases there cited. *Hoffman* v. *Carow*, 22 Wend. 285; *Gilmore* v. *Newton*, 9 Allen, 171; *Freeman* v. *Underwood*, 66 Maine, 229, 233.

The stipulation of parties has settled the amount of damages to be recovered.

Judgment for the plaintiffs for $43.73, with interest thereon from the date of the writ.

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

GEORGE W. BENNETT *vs.* AMERICAN EXPRESS COMPANY.

Penobscot. Opinion March 24, 1891.

Game. Common carrier. Interstate Commerce. Constitutional law. Officer. Express Company. R. S., c. 30, § 12.

Ownership of property by the plaintiff, its delivery to and acceptance by a common carrier for transportation, and its non-delivery to the consignee, are *prima facie* evidence of negligence. The burden then rests upon the carrier to show facts exempting it from liability.

The property of the plaintiff, while lawfully in the possession of the defendant as a common carrier, was seized unlawfully by an officer, without any warrant or legal process, nor was any afterwards obtained. *Held*: That the officer was a trespasser, and that the common carrier was liable in the same manner as if it had allowed any other trespasser to take the property out of its custody.

Revised Statutes, c. 30, § 12, which imposes a penalty for killing, destroying or having in possession, during certain portions of the year, "more than one moose, two caribou or three deer," does not apply to common carriers in the performance of their duties.

When property is rightfully delivered to a common carrier to be transported to a point outside the limits of the State, the duty of the carrier is not merely to transport the property in the State, but to such point outside the limits in another State.

Where such property has lawfully commenced to move as an article of commerce from one State to another, that moment it becomes the subject of interstate commerce, and as such is subject only to national regulation.

The same is true in relation to whatever agency may be used as the means of transporting such commodities as may lawfully become the subject of purchase, sale or exchange, under the commerce clause of the Constitution of the United States.

AGREED STATEMENT.

This was an action on the case to recover the value of the saddles of three deer. Plea, general issue. The facts appear in the opinion.

F. J. Whiting, for the plaintiff.

Barker, Vose and Barker, for the defendants.

FOSTER, J. It is undisputed that the plaintiff was lawfully possessed and the owner of the saddles of three deer, which were legally killed under the laws of this State; that the same were closely boxed in good condition for shipment, and delivered by the plaintiff on to the platform of the Maine Central Railroad Company, at Newport Station, plainly marked to the consignees in Boston. The defendants' agent was notified that the box was left for transportation, and thereupon he delivered it into the defendants' car, on the arrival of the train, but no receipt or bill of lading was ever given to the plaintiff. Upon the arrival of the train at Augusta, the saddles were seized by a game warden, and by him removed from the defendants' car, without any search warrant or other legal process, and without objections

from the defendant company or their agents, and have never since been delivered either to the consignees or the Express Company.

Upon the facts thus stated the defendants' liability is fully established. The plaintiff's ownership of the property, its delivery to the defendants for transportation, and their acceptance for that purpose, and its non-delivery to the consignees, are *prima facie* evidence of negligence. The burden is, therefore, upon the defendants to show facts exempting them from liability. *Little* v. *Boston and Maine Railroad*, 66 Maine, 241.

The property of the plaintiff while in the hands of the defendants as common carriers, *in transitu*, was seized by an officer, without any warrant or other legal process. Nor does it appear that any was ever obtained. The officer was, therefore, a mere trespasser, and the defendants were liable under the rule of the common law, in the same manner as if they had allowed any other trespasser to take the property out of their custody. *Edwards* v. *White Line Transit Company*, 104 Mass. 163. As against the plaintiff, the seizure was of no more validity than a trespass by an unofficial person. There has never been any adjudication from any tribunal that the property seized was contraband, or other than the lawful property of the plaintiff. The common carrier is not relieved from the fulfilment of his contract, or his liability as such carrier, any more than if the loss had occurred from fire, theft, robbery or accident. He stands in the relation of insurer, where, as in this case, no special contract is shown; and upon grounds of public policy is liable for all losses resulting from accident, trespass, theft or any kind of unlawful dispossession of the property intrusted to him to carry,—excepting only such as arise by the act of God or public enemies. *Adams* v. *Scott*, 104 Mass. 166; *Kiff* v. *Old Colony and Newport Railway*, 117 Mass. p. 593; *Fillebrown* v. *Grand Trunk Railway Company*, 55 Maine, 462.

In the case of *Edwards* v. *White Line Transit Company*, *supra*, it was held that while the carrier was not liable in trover for conversion of the property, he was, nevertheless, liable on his contract or obligation as common carrier, where the officer

seizing the property was a trespasser. "The owner may, it is true," say the court, "maintain trover against the officer who took the property from the carrier; but he is not obliged to resort to him for his remedy. He may proceed directly against the carrier upon his contract, and leave the carrier to pursue the property in the hands of those who have wrongfully taken it from him."

But the defendants claim exemption from liability in this action, on the ground that the property was put into their possession fraudulently; that having had in their possession, and transported during the year, after the first day of October, and before the time when this property was delivered to them, three deer from Newport Station, to places beyond the limits of the State, they directed their agents not to receive for transportation any deer or parts thereof, and that this fact was known by report to the plaintiff before he delivered the box to the defendants' agent.

Notwithstanding these facts may all be true, they constitute no defense to this action. The statute invoked by the defendants, (R. S., c. 30, § 12,) is as follows: "Whoever kills, destroys, or has in possession between the first days of October and January, more than one moose, two caribou or three deer, forfeits one hundred dollars for every moose, and forty dollars for every caribou or deer killed, destroyed or in possession in excess of said number, and all such moose, caribou or deer, or the carcasses or parts thereof, are forfeited to the prosecutor. Whoever has in possession, except alive, more than the aforesaid number of moose, deer or caribou, or parts thereof, shall be deemed to have killed or destroyed them in violation of law."

The defendants claim that, under this statute, they could not lawfully take any more deer, or parts thereof, into their possession for transportation before the following January.

But we can not adopt such a construction of this statute as would make it apply to common carriers. Such construction as claimed by the defendants would make it unlawful for the carrier to transport, between the first days of October and January, the carcasses of moose, caribou or deer, lawfully killed

before the first day of October. Laying aside all constitutional questions, for the present, in relation to the doctrine of interstate commerce, it is sufficient to say that it was not the intention of the legislature so to apply it. The statute, like many others, may in general terms be broad enough to embrace corporations as well as natural persons within its prohibition. But its construction must be such as was evidently intended by the legislature. That intention, to some extent, may be ascertained by taking into consideration the evil sought to be remedied. Such was the decision of this court in its construction of the section following the one now under consideration. *Allen* v. *Young*, 76 Maine, 80. In that case it was held that the transportation of the hide or the carcass of a deer, from place to place in this State, is not unlawful if the deer was killed at a time when it was lawful to do so, notwithstanding the statute in express terms provides that whoever carries or transports from place to place the carcass or hide of any such animal, or any part thereof, during the period in which the killing of such animal is prohibited, shall forfeit the sum of forty dollars. Certainly that language is as broad, comprehensive and imperative as that of the statute invoked it this case. Yet the court aptly remarked that it could see no possible motive for making such transportation a crime. To the same effect was the decision in *State* v. *Beal*, 75 Maine, 289. "The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed." *United States* v. *Freeman*, 3 How. (U. S.) 557, 565; *Holmes* v. *Paris*, 75 Maine, 559, and authorities there cited.

The box was delivered to and received by the company. No information was asked concerning its contents, and none given. If the plaintiff knew by report when he delivered the property to the defendants that their agents had been directed not to receive any deer or parts thereof, yet there was no limitation of the company's responsibility by special contract, or such knowledge brought home to this plaintiff, and assented to by him as would be necessary to limit such responsibility. *Fille-*

brown v. *Grand Trunk Railway Company*, 55 Maine, 462. "A carrier may limit his responsibility for property intrusted to him," says Bigelow, C. J., in *Buckland* v. *Adams Express Company*, 97 Mass. 125, "by a notice containing reasonable and suitable restrictions, if brought home to the owner of goods delivered for transporation, and assented to clearly and unequivocally by him. It is also settled that assent is not necessarily to be inferred from the mere fact that knowledge of such notice on the part of the owner or consignee of goods is shown. The evidence must go further, and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered."

It is undoubtedly the right of the carrier to require good faith on the part of those who deliver goods to be carried, or enter into contracts with him. The degree of care to be exercised as well as the amount of compensation for the carriage of property depends largely on its nature and value, and no fraud or deception should be used which would mislead the carrier as to the extent of his duties or the risks which he assumes. But we fail to see any such evidence of fraud or deception in this case as would exonerate these defendants.

This property was lawfully the property of the plaintiff; it was delivered to and accepted by the defendant company for transportation to a point beyond the limits of this State. Their liability as common carriers held them to a strict fulfilment of their obligation in relation to the property in their charge. That obligation was not merely to transport the property in this State, but to a point outside of its limits in another State. It had lawfully commenced to move as an article of commerce from one State to another. From that moment it became the subject of interstate commerce, and as such was subject only to national regulation, and not to the police power of the State. The same is unquestionably true in relation to whatever agency or instrumentality may be used as the means of transporting such commodities as may lawfully become the subject of purchase, sale or exchange, under the commerce clause of the Constitution

of the United States. The transportation of the subject of interstate commerce, where it is such as may lawfully be purchased, sold or exchanged, is, without doubt, a constituent of commerce itself, and is protected by and subject only to the regulation of Congress. *The Daniel Ball*, 10 Wall. 557, 565; *Bowman* v. *Chicago and North Western Railway Company*, 125 U. S. 465, 485; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Welton* v. *Missouri*, 91 U. S. 275; *Coe* v. *Erroll*, 116 U. S. 517; *Leisy* v. *Hardin*, 135 U. S. 100.

Defendants to be defaulted; damages to be assessed at nisi prius.

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

EARNEST B. HALL *vs.* ELBRIDGE A. FLANDERS.

Piscataquis. Opinion March 27, 1891.

Bills and notes. Acceptance. Order. Assignment. R. S., c. 32, § 10.

No person shall be charged as an acceptor of a bill of exchange, draft, or written order, unless his acceptance is in writing signed by him or his agent (R. S., c. 32, § 10); nor is a drawee made liable as an acceptor by retaining an order in his possession.

To make an order operate as an assignment, it must be upon a particular fund. It is not enough that it is drawn upon a debtor by a creditor in general terms.

ON REPORT.

The case is stated in the opinion.

Henry Hudson, for plaintiff.

Crosby and Crosby, for defendant.

WHITEHOUSE, J. The plaintiff performed labor for S. B. Nutter, and received from him in payment a written order requesting the defendant to pay to the bearer the amount specified, and charge the same to the drawer. The plaintiff duly presented the order to the defendant for payment. The defendant inspected it, promised to pay it, and carried it away with him. He never paid the plaintiff the amount named in the order but

retained possession of it, and produced it at the trial. It was not accepted in writing.

It is a well-settled rule of the common law that an oral acceptance of a bill of exchange will bind the acceptor in the absence of any statutory provision to the contrary. *Phillips* v. *Frost*, 29 Maine, 77; 3 Kent's Com. (10 Ed.) 109; *Pierce* v. *Kittredge*, 115 Mass. 374; *Clark* v. *Cock*, 4 East, 37. But doubts having been expressed in some of the English cases respecting the wisdom of this rule it was provided by statute, 1 and 2, Geo. IV. c. 78, that "no acceptance of any inland bill of exchange is sufficient to charge any person unless such acceptance be in writing on the bill." In this State it was provided by ch. 80, of the laws of 1867, that "no person shall be charged as an acceptor of a bill of exchange, draft, or written order, unless his acceptance is in writing signed by him or his lawful agent." This now appears in ch. 32, section 10, of the revised statutes.

In this case, an examination of the evidence reported discloses nothing which can give the defendant's promise to pay the plaintiff any other character or effect than an oral acceptance of the order; and by the express enactment of the legislature, it is seen that the defendant can not thus be made legally chargeable as an acceptor.

Nor is the defendant made liable by retaining the order in his possession. Even at common law the mere detention of a bill for an unreasonable time by the drawee would not ordinarily amount to an acceptance. *Jeune* v. *Ward*, 2 Stark. 326; Chitty on Bills, 175; Byles on Bills, 314; 1 Parsons on Bills and Notes, 284; Daniel on Neg. Instrs. § 499; *Overman* v. *Hoboken City Bank*, 2 Vroom, 563; *Holbrook* v. *Payne*, 151 Mass. 383. And in *Luff* v. *Pope*, 5 Hill, 413, under a statute requiring a written acceptance, it was held that where a bill of exchange was presented for acceptance, and the drawee refused to accept but promised to pay the person in whose favor it was drawn by a given day, the latter could maintain no action against the drawee though he had funds of the drawer in his his hands at the time of the promise, and ought in justice to have accepted.

In the case at bar, it will be observed that there is no evidence expressly showing any funds in the defendant's hands belonging to the drawer at the time of the promise relied upon.

Nor can the order operate as an assignment of the amount named in it so as to avail the plaintiff in this action. Even a check, drawn against a fund deposited in a bank, is not deemed an assignment in an action at law. *Bullard* v. *Randall*, 1 Gray, 605; *Dana* v. *Third National Bank*, 13 Allen, 445; *Attorney General* v. *Cont. Life Ins. Co.* 71 N. Y. 325; *Holbrook* v. *Payne*, *supra*. Much more is this true of an unaccepted draft which does not necessarily "import the existence of a debt from the drawee to the drawer, but leaves the mode of the drawee's reimbursement to such private arrangement as may exist between the drawer and himself." *Holbrook* v. *Payne*, *supra*, and authorities cited. To constitute an assignment, the order must be upon a particular fund. It is not enough that it is drawn upon a debtor by a creditor in general terms as in the case at bar. *Exchange Bank* v. *McLoon*, 73 Maine, 511; *Gibson* v. *Cooke*, 20 Pick. 15; *Kingman* v. *Perkins*, 105 Mass. 111; *Whitney* v. *Eliot National Bank*, 137 Mass. 351.

The result is that the plaintiff can not have judgment in this action for the amount of the order. It appears, however, that there is a small item of eighty-five cents in the account annexed to the writ, which it is admitted the plaintiff is entitled to recover.

Judgment for plaintiff accordingly.

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

EDWARD S. FERNALD *vs.* AULICK PALMER.

Hancock. Opinion March 28, 1891.

Way. Damages. Estoppel. Assignment. R. S., c. 18, §§ 14, 18, 40; 1841, c. 25, § 31; 1857, c. 3.

Damages for land taken for a private way are to be paid by the person at whose request, and for whose benefit, the way is laid out.

When a private way has been laid out for such petitioner, and has been used by him, he is estopped from denying the regularity of the proceedings in such

laying out, in an action by the land owner to recover the awarded damages. It is no defense to such an action that the land owner has assigned his claim to third parties.

FACTS AGREED.

The case is stated in the opinion.

Wiswell, King and Peters, for plaintiff.

Sufficiency of description of way: *State* v. *Beeman*, 35 Maine, p. 246; Bolster's Town Officer; *Jones* v. *Portland*, 57 Maine, 42; *Packard* v. *Co. Com.* 80 *Id.* 43, and cases cited; *Cassidy* v. *Bangor*, 61 Maine, p. 439.

W. P. Foster, for defendant.

Sufficiency of notice: *Harlow* v. *Pike*, 3 Maine, 438; *Howard* v. *Hutchinson*, 10 *Id.* 335. Certainty of award: *Colcord* v. *Fletcher*, 50 Maine, 398; *Lincoln* v. *Whittenton*, 12 Met. 31.

EMERY, J. Fernald, the plaintiff, was the owner of a parcel of land in Eden, lying between the public road (a town road) and a parcel of land belonging to Palmer, the defendant. Palmer's land lay between Fernald's land and the sea. In passing and repassing from his land to said public or town road, Palmer had used a roadway across Fernald's said land. The land of Palmer was the only land at that end of the roadway, as beyond his land was the sea.

In 1886, Palmer, (other citizens of the town joining with him,) petitioned the municipal officers of the town to lay out under the statute, "a private way from land of Aulick Palmer to the town road." The municipal officers gave notice of this application as one for "a private way for the use of Aulick Palmer," and in the notice described the way as "beginning at the land of said Palmer, and ending at the town way," &c., and appointed their meeting at Palmer's house. On the day appointed, they met at that house, and after hearing and inspection, adjudged that the way was proper, and laid it out across the plaintiff's land over the former roadway, as "a private way for the use of Aulick Palmer as proposed," and assessed the damages of the plaintiff at sixty dollars, to be paid by the defendant, Aulick Palmer. They made a report of their doings, filed it with the town clerk,

and called a town meeting to see if the town would accept "a private way as laid out by the selectmen, beginning on the line between land of Aulick Palmer and land of E. S. Fernald, and ending at the town road near Otter Creek." At the meeting, the town voted "that the private way for Aulick Palmer at Otter Creek as laid out by the selectmen be accepted."

This was the end of the proceedings. No appeal was taken by either party on any question. Since these proceedings, Palmer has used the road so laid out, as the road from his land to the public road. It has also been used by others, but presumably only as they had occasion to go to Palmer's land. In 1889, Fernald made the statute demand on Palmer for the damages awarded which remained unpaid, and after thirty days began this action of debt under R. S., c. 18, § 40, to recover the awarded damages. The case was then reported to the law court for determination upon a statement of facts of which the foregoing is an abridgement.

The defendant, Palmer, now interposes several objections to paying the awarded compensation.

1. Because the petition did not state that the way was to be for the benefit of Aulick Palmer, but did state that it, "would be of great public convenience for the use of said town." The petition was in the following words. "Humbly shows the undersigned, that a private way from the land of Aulick Palmer to the town way, . . . would be of great public convenience for the use of said town. Wherefore your petitioners pray that the same may be duly laid out, as by statute is provided." Aulick Palmer was the first signer. He now argues that by the statute, R. S., c. 18, § 18, damages can only be awarded against "those for whose benefit it (the way) is stated in the petition to be,"—in this case, the town,— and hence no award could be made against him under this petition, as it is not stated therein that the way is for his benefit.

The statute cited says: "The damages for a town way shall be paid by the town; for a private way by those for whose benefit it is stated in the petition to be, or wholly or partly by the town if, under an article in the warrant to that effect, it so

votes at the meeting accepting such private way." The original statute as condensed in R. S., 1841, c. 25, § 31, provided that damages for laying out a way by the selectmen, "shall be paid by the town, if it is a town way, which fact the selectmen shall determine; but if it be a private way, by the person for whose benefit it is laid out." By that statute it was plainly enacted that the fact of the benefit, and not the allegation of it in the petition, determined who should pay the damages for a private way. By statute of 1857, c. 3, it was provided that towns might, under a proper warrant, vote to pay all or part of the damages for a private way. In the revision of 1857, first appears the phraseology of the present statute, that damages "for a private way shall be paid by the person for whose benefit it is alleged in the petition to be."

It is evident that, under this statute, the town cannot be held for payment of damages for laying out this way. The selectmen determined it was not a town way. The selectmen did not lay out, nor undertake to lay out, a town way. The town did not accept a town way, nor did it vote to pay any damages, for a private way. The way was asked for as a private way,— was laid out as a private way,— was accepted as a private way. It was unmistakably and undeniably asked for, laid out, and accepted for the benefit of Aulick Palmer. The town has not voted to pay any part of the damages sustained by Fernald, and hence Fernald has no claim on the town. He should have compensation, however, for the land taken from him, and he should in natural justice have that compensation from the person on whose petition and for whose benefit in fact, the land was taken. This was the evident intent of the original statute, and we do not think that the change of phraseology, in the revision, should be construed to abridge the rights of the land owner to compensation, or make them dependent on the words, the petitioner for a private way chooses to use or omit in his petition. We think the statute still means that damages for a private way shall be paid by the person at whose request, and for whose benefit in fact, the way is laid out, unless the town shall properly vote to assume the burden; and we do not think the

statute enables such person to avoid that duty, by any allegations or omissions in his petition.

It would seem clear, therefore, that if this way was legally and effectually laid out, it is a private way for the benefit of Aulick Palmer, and that the damages should be paid by him. The defendant, however, insists that the way is a town way, or no way at all. He insists that it is a town way, because the petitioners in their petition, allege that "a private way, &c., would be of great public convenience for the use of the town." Private ways are often of public convenience, as a private way to a hotel, or a wharf, or mill, but that does not make them technical town roads. A perusal of the proceedings will make it clear that no town way was laid out.

If not a town way, the defendant insists that no private way could lawfully be laid out under this petition since it does not state the person for whose benefit it was to be, and hence there is no lawful claim for damages.

The petition for a private way should now undoubtedly state in terms and truly, the person for whose benefit the way is to be, and the municipal officers, perhaps, might properly decline to proceed without such a statement in the petition. Perhaps they should decline; we do not say. In this case, however, they did not decline, but proceeded to lay out the private way asked for. They did this at the defendant's instance. He set the tribunal in motion. It had jurisdiction of the subject-matter if properly applied to. He continued the proceedings through the municipal officers and the town to the end. The defendant made no objections to any steps or omissions in the procedure. He might have withdrawn his petition and stopped the proceedings at any time before the town's action. *Goodwin* v. *Merrill*, 48 Maine, p. 285. He accepted and used the road thus laid out for him. All the imperfections and omissions he now complains of in the procedure, are his own,— made by himself. Can he lawfully derive any advantage from these, his own wrongs?

The United States Supreme Court in *Daniels* v. *Tearney*, 102 U. S. 420, said: "The principle of estoppel thus applied has

its foundation in a wise and salutary policy. It is a means of repose. It promotes fair dealings. It can not be made an instrument of wrong or oppression, and it often gives triumph to right and justice, where nothing else known to our jurisprudence can by its operation secure those ends. Like the statute of limitations, it is a conservator, and without it society could not well go on." This seems to us a correct characterization of the principle of estoppel, and we think that principle applies to this case. We think the defendant should not now be heard to make objections arising from his own remissness. The plaintiff, by a recovery in this action, will be estopped from denying the validity of the proceedings in laying out the way, hence no injustice can be done the defendant by refusing to consider the effect of his own errors upon the judgment he obtained, and made use of.

There are cases in which it has been held that a party, seeking for and obtaining a seeming judgment, may impeach it collaterally if void, but in all such cases we think it will be found that the tribunal had no jurisdiction of the subject-matter, — was incompetent to render any judgment in the premises, upon the most regular procedure. On the other hand, it was held in *White* v. *Clapp*, 8 Met. 365, that the parties having applied for and obtained a judgment of partition from the Probate Court, cannot question its validity, that court having jurisdiction of the subject-matter. It has also been repeatedly held that those who have procured the enactment of an unconstitutional statute, or have obtained any advantage under it, shall not be heard to question its validity. *Daniels* v. *Tearney*, 102 U. S. 415, and cases there cited on page 421. In *Sherman* v. *McKeon*, 38 N. Y. 266, the plaintiff's land had been taken under statute proceedings for opening a street, and the plaintiff accepted the money awarded him therefor in the proceedings. He afterward brought an action for the land on the ground that the statute, under which the land had been taken, was unconstitutional, and hence all the proceedings under it were utterly void. The court refused to hear him on that question, holding him to be estopped by his acceptance of the fruit of the proceedings from saying they were void.

It is familiar law that a person obtaining an appointment as administrator, or guardian, or trustee, and acting under it, can not question the validity of his appointment in proceedings arising out of his acts under such appointment. Corporations having committed torts, or having received the benefit of contracts, can not avoid liability by showing such acts, or contracts, to be entirely outside of and beyond their charter powers.

II. The defendant again objects because the notice did not contain any description of the proposed way nor state whose land it was to cross. In support of this objection, he relies upon R. S., c. 18, § 14.

The notice followed the description in the defendant's petition. It did not mislead the defendant. He has not been injured by any vagueness of description. He obtained the road he asked for, and has made use of it. The statute requirement of a description of the way in the notice is for the benefit of those persons whose land may be taken for the road. If the person whose land is taken, does not complain of insufficiency of notice, the person who takes the land should not be heard to complain.

We do not find, in the statute cited, anything requiring to be inserted in the notice the names of the owners of the land, that may be crossed by the proposed road.

III. The defendant again objects on the ground that it is so uncertain to whom the damages were awarded, he can not safely pay them to the plaintiff, Fernald. The report of the municipal officers states that the way was laid out across "the land of E. S. Fernald, or unknown," and that damages were awarded therefor to "E. S. Fernald or unknown." The defendant says he is in doubt whether the damages belong to E. S. Fernald, or some other person unknown. If the words "or unknown" in the report were not to be disregarded as surplusage, (*Lancaster* v. *Richmond*, *post*,) the case explicitly states that E. S. Fernald was the owner of the land, and hence that the compensation is due to him.

IV. The defendant again objects that this suit is prematurely brought, as by the terms of the report the damages are to be paid "before the way is opened," that is, the defendant

argues, "not until the way is opened." We think a use of the way for three years is a sufficient opening of the way to render the awarded compensation payable.

V. Lastly the defendant objects that this plaintiff has assigned his claim.

If this objection needs any answer, it is sufficient to say that the suit is for the benefit of the assignees.

Judgment for the plaintiff.

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

LOREN F. BREWER *vs.* RALPH HAMOR and others.

Hancock. Opinion April 2, 1891.

Illegitimacy. Adoption. Inheritance. R. S., c. 75, § 3.

By R. S., 1883, c. 75, § 3, an illegitimate child born after March 24, 1864, is the heir of parents who intermarry; and such child, born at any time, is the heir of his mother, and of any person who acknowledges himself to be his father in a writing signed in the presence of and attested by a competent witness; and if his parents intermarry and have other children before his death, or his father so acknowledges him, or adopts him into his family, he shall inherit from his lineal and collateral kindred, and they from him, as if legitimate; but not otherwise.

In an action brought to determine the title to the father's real estate, after his decease, it was *held:*

1. That the provisions of statute in force at the time of his decease must determine the rights of the heirs to the inheritance of his real estate.
2. That, inasmuch as the illegitimate child in this case was born prior to 1864, and there was no acknowledgment in writing by the father, the rights of the parties must be determined by the remaining portion of the section of statute in question.
3. That under that, the first requisite to enable an illegitimate child to inherit from the father, is an intermarriage of the parents.

And in addition thereto one of the following things must be shown to have taken place, viz.:

1. Either that his parents have had other children before his death; or:
2. That his father has acknowledged him in writing; or:
3. That the father has adopted him into his family.

Where the illegitimate child has been legitimatized in accordance with the terms of the statute, such child inherits, "as if legitimate;" and in case of the death of such child leaving children, such children of the illegitimate inherit from their grandfather—the father of the deceased illegitimate—such portion as their mother would have inherited from his estate.

The case of *Hunt* v. *Hunt*, 37 Maine, 333, distinguished.

REPORT, ON FACTS AGREED.

The facts are stated in the opinion.

Wiswell, King and Peters, for the plaintiff.

The facts are undisputed. The sole question is, can the issue of this daughter, Isephine, inherit from her father any part of the real estate? They can not unless they bring themselves within the provision of some positive statute enactment. *Cooley* v. *Dewey*, 4 Pick. 93, 95; 1 Bl. Com. 459. Statute enabling them to inherit should be strictly construed. *Dwelly* v. *Dwelly*, 46 Maine, 377; *Pratt* v. *Atwood*, 108 Mass. 41. Counsel also cited: *Hunt* v. *Hunt*, 37 Maine, 333, 334; *Curtis* v. *Hewins*, 11 Met. 294; *Kent* v. *Barker*, 2 Gray, 535.

W. P. Foster, for the defendants, cited: *Monson* v. *Palmer*, 8 Allen, 551; *Collins Granite Company* v. *Devereux*, 72 Maine, 422; *Winslow* v. *Kimball*, 25 Maine, 493; *Gibson* v. *Jenney*, 15 Mass. 205; *Kent* v. *Barker*, 2 Gray, 535, 537; *Barden* v. *Crocker*, 10 Pick. 383; *Reynolds* v. *Hanrahan*, 100 Mass. 313; *Com.* v. *Bralley*, 3 Gray, 457: *Whitney* v. *Whitney*, 14 Mass. 88; *Bull* v. *Loveland*, 10 Pick. 9, 13; *Somerset* v. *Dighton*, 12 Mass. 383; *White* v. *The Mary Ann*, 6 Cal. 462; *United States* v. *Freeman*, 3 How. (U. S.) 556; *Smith* v. *Chase*, 71 Maine, 164; *Church* v. *Crocker*, 3 Mass. 17, 21; *Com.* v. *Munson*, 127 Mass. 459, 461; *Com.* v. *Bailey*, 13 Allen, 541, 545; 2 Kent, 213; 3 Wash. R. P. (4th ed.) 41; *Ash* v. *Way*, 2 Gratt. (Va.) 203; *Safford* v. *Houghton*, 48 Vt. 236; *Miller* v. *Miller*, 18 Hun, (N. Y.) 507; *Hawbecker* v. *Hawbecker*, 43 Md. 516; *Drain* v. *Violett*, 2 Bush. 155; *Barwick* v. *Miller*, 4 Desaus. Eq. 434; *Stover* v. *Boswell*, 3 Dana, 233; *Loring* v. *Thorndike*, 5 Allen, 257, 263; *Killam* v. *Killam*, 39 Pa. (St.) 120; *Cooley* v. *Dewey*, 4 Pick. 93; *Crane* v. *Crane*, 31 Iowa, 296.

FOSTER, J. The plaintiff, Loren F. Brewer, brings this writ of entry against the defendants, four children of Isephene who was an illegitimate child of the plaintiff's father and mother, (Otis Brewer and Rebecca Ann Higgins,) who were married on the 21st day of February, 1847.

On the 26th day of January, 1847, less than one month prior to said marriage, Isephene, the illegitimate child, was born, and on April 7, 1853, the plaintiff in this suit was born.

The infant child, Isephene, was brought into the room immediately after the ceremony of the marriage of its parents, and was adopted into and brought up in the family of her father, who many times, before witnesses, and at the time of the marriage, verbally acknowledged her to be his daughter. She was never acknowledged in writing by him to be his child. No difference was made by the father in his treatment of the two children, Isephene and this plaintiff.

Isephene was married, and died March 7, 1883,—the defendants being her four children.

The father of Isephene and this plaintiff died April 20, 1884, intestate, leaving the real estate claimed by the plaintiff in this action. The mother died a year later.

This action is brought to test the title to the real estate left by Otis Brewer, and the question involved is whether the issue of Isephene can inherit any portion thereof. To do so they must bring themselves within the provisions of same positive statute enactment. At common law an illegitimate child has no inheritable blood, and no rights to property can be traced through him.

In this State, the provisions of statute in force at the time of the decease of a person intestate must determine the rights of the heirs to the inheritance or descent of his real estate. The decision in this case, then, depends upon, and we must be governed in our determination as to the respective rights of these parties by the proper construction of the statute in relation to the rights of illegitimate children in force at the time of Otis Brewer's death, or R. S., 1883, c. 75, § 3, which is as follows: "An illegitimate child born after March twenty-fourth, eighteen hundred and sixty-four, is the heir of parents who intermarry; and such child, born at any time, is the heir of his mother, and of any person who acknowledges himself to be his father in a writing signed in the presence of and attested by a competent witness; and if his parents intermarry and have other children

before his death, or his father so acknowledges him, or adopts him into his family, he shall inherit from his lineal and collateral kindred, and they from him, as if legitimate; but not otherwise."

Inasmuch as the illegitimate child in the present case was born prior to 1864, the rights of the defendants must be determined by the construction and meaning of the remaining portion of the section in question. In arriving at the proper construction and the true meaning of this statute we should seek to ascertain the intention of the legislature, and when that is found it should govern. To ascertain this, the court may look not only to the object in view and the remedy intended to be afforded, but to the whole history of legislation on the subject, whether repealed or unrepealed. *Com.* v. *Munson*, 127 Mass. 461. It is always to be presumed that the legislature intended the most beneficial construction of their acts when the design of them is not manifestly apparent. Notwithstanding the well-established doctrine that a statute made in derogation of the common law is to be construed strictly, it is equally well settled that it is to be construed sensibly, and with a view to the object aimed to be accomplished by the legislature. These principles are but different illustrations of the rule which courts repeatedly act upon, and which is too familiar to require any citation of authority to sustain it, that the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed.

Examining the statute, then, in the light of these principles, and in view of the fact that there is, in this case, no written acknowledgment of the paternity of the child, the rights of these defendants must be determined by the third clause of the section under consideration, which reads thus: "And if his parents intermarry and have other children before his death, or his father so acknowledges him, or adopts him into his family, he shall inherit from his lineal and collateral kindred, and they from him, as if legitimate."

The first requisite to enable an illegitimate child to inherit

under this clause, is, that his parents intermarry. Under the civil law this alone was sufficient to enable him to inherit from his father. But under the statute it is not enough, and one of three additional things, equal in importance in determining the heirship, must be shown to have taken place; either (1,) that his parents have had other children before his death; or (2,) that his father has acknowledged him in writing; or (3,) that the father has adopted him into his family.

Intermarriage of the parents being the first requisite, the three additional elements have been made equivalents, and the concurrence of either one of them with intermarriage is legally sufficient to enable the illegitimate to inherit. It is not necessary that, in addition to intermarriage, all these elements should concur before the illegitimate is entitled to inherit.

In the present case, more than the conditions required by the statute have been fulfilled. The parents of Isephene, under whom the defendants claim, intermarried and had another child before her death; and in addition to that her father adopted her into his family. With these conditions fulfilled, the statute expressly provides that she shall inherit from her lineal and collateral kindred, and they from her, as if legitimate. Her lineal kindred are those from whom she traces her descent, and the line must begin with her father. *Hardy* v. *Sprowle*, 32 Maine, 312, *note*. It is not her lineal kindred on her mother's side. There is no such limitation. Neither does the pronoun "his"—or her—refer as its antecedent to the father or mother, but to the illegitimate. By representation she is to inherit from the brothers and sisters of her father, her collateral kindred. It is not to be supposed that the legislature intended to impose a severer condition to enable her to inherit from her own father, than from her uncles or other collateral kindred, nor does the language of the statute support any such inference. A different interpretation of the statute, which would require stronger evidence of affiliation and a more formal acknowledgment to make a child the heir of his own father, than to make that child the heir of his father's brothers and sisters, would be unreasonable.

It is unnecessary to wander outside of the statute itself to come to the unavoidable conclusion that she, under whom the defendants claim, must inherit from her father. Any other construction would seem incongruous, arbitrary, and an exceptional distortion of language that is plain, consistent and harmonious. It seems to have been the intention of the legislature in enacting this statute, in the form in which it existed at the death of the father of this child, to make illegitimate children, adopted and recognized by the father, joint heirs with their more fortunate brothers and sisters, born of the same mother under the sanction of marriage. This construction is not only reasonable, but just; it is in the direction of the march of modern legislative enactments, not only in this but other states and countries, and in the direction of humanity and liberality. It is true that the English law has always strongly opposed the whole doctrine of legitimation, and most English jurists have stubbornly maintained the superiority of their own maxims, which place the immutability of the marriage relation above the tender promptings of humanity towards innocent and unoffending sufferers. But by the civil and canon law, legitimation by subsequent marriage placed the illegitimate child to all intents and purposes on the same footing as the subsequent offspring born in lawful wedlock. This system of legitimation, so abhorrent to the common law of England, but so consistent with justice, has been introduced into Scotland, and prevails, with different modifications, in the codes of France, Spain, Germany, and most other countries in Europe. It is founded upon considerations of equity and justice, and, as maintained by the Scotch courts, it tends to advance what was at first irregular and injurious to society, into the honorable relation of lawful matrimony, preventing those unseemly disorders in families which are produced where the elder-born child of the same parents is left under the stain of bastardy, and the younger one enjoys the status of legitimacy. *Munro* v. *Munro*, 1 Rob. H. L. Scotch App. 492.

This doctrine of the civil law has found great favor and been adopted in many of the states of the Union. The history of

legislation upon this subject in this country shows a continual advancement, and a breaking away from those antiquated English maxims, in the direction of human progress and liberal thought. This is true not only in relation to legislation in other states but to legislation in this state, and the statute under consideration.

The construction which we have given is warranted by the language used. The *first* clause of the section relates to illegitimate children born after a certain date, and none others; the *second* clause prescribes the manner in which the guilty father may make his illegitimate child his heir, where no marriage has taken place between the parents; and the *third* clause adds another requirement to the intermarriage required in the first clause, and under these circumstances the illegitimate child, born at any time, shall inherit from his kindred, *as if legitimate.*

The statute as first enacted in 1838, afterwards incorporated into the revision of 1841, existed until 1852. By c. 266, of that year, the legislature directed that the statute should be so construed, "as to make illegitimate children therein mentioned heirs of the father, as well as of the brothers and sisters, and in the same manner, as if they had been born in lawful wedlock, whenever their parents shall have intermarried and acknowledged them or adopted them."

This statute should not be overlooked, for it has never been repealed, and is entitled to consideration upon the question of legislative intention. "To discover the true meaning of a statute," says Chief Justice Parsons, "it is the duty of the court to consider other statutes made *in pari materia*, whether they are repealed or unrepealed;" *Church* v. *Crocker*, 3 Mass. 21. "And if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *United States* v. *Freeman*, 3 How. (U. S.) 565.

The same construction seems to have been given to this statute

by BARROWS, J., in *Inhab. of Livermore* v. *Inhab. of Peru*, 55 Maine, 472. In that case, speaking of the illegitimate child, he says: "Though illegitimate by birth, in consequence of the subsequent intermarriage of her parents, the birth of other children, and her own adoption into the family, is to be deemed legitimate."

But the plaintiff's contention is against the construction. of this statute as we now view it, and he relies upon the case of *Hunt* v. *Hunt*, 37 Maine, 333, as sustaining his position.

While it is not necessary to criticise the correctness of that decision, inasmuch as it was based upon the statute of 1841, it is proper to remark that the decision went to the extreme limit of strict construction. It was decided under a statute entirely different, in our view, from the law governing the present case. The legislative declaration of heirship from the father by an illegitimate, (Act of 1852, c. 266,) was not considered by the learned Judge who drew the opinion as having any legitimate bearing upon the decision in that case, inasmuch as the father of the illegitimate had deceased, and the rights of the other children had become vested, prior to its enactment. There was a strong dissenting opinion in that case, even as the law then stood. If we compare the statute of 1883, with that under which the case of *Hunt* v. *Hunt*, was decided, our belief is strengthened that the change in the statutes was made, not for the purpose merely of a more condensed and clearer statement of the law as it existed in the statutes of 1841, but for the purpose of conferring upon the illegitimate the right of inheritance denied in the last mentioned case. The legislative declaration of heirship from the father has been added where before it did not exist. The negative form of expression in the last clause of the former statute has been changed to an affirmative; not so much is now required. Where before, in addition to the intermarriage of parents, it was necessary that other children should be born *and* the illegitimate adopted into the family of his father, the law now requires, besides such intermarriage, the birth of other children *or* adoption into the family. The clause is more general, the wording more simple and comprehensive. The pronoun

"his," preceding "kindred," which in the former statute referred to the father as its antecedent, now refers to the illegitimate. "He,"—the illegitimate,—"shall inherit from *his* lineal and collateral kindred, and they from him, as if legitimate." The right of the father to inherit from his illegitimate child is here given, —no where else is it given.

The death of the illegitimate previous to the death of the father could make no difference in the right of inheritance, under the laws of descent. It would make no difference in the case of a legitimate child; and this statute plainly says that the illegitimate, legitimatized according to its terms, shall inherit "as if legitimate."

If, then, Isephene was, at the time of her decease, a lawful heir to her father, her children, the defendants in this case, inherit one half their grandfather's estate. It is well settled that even bastards transmit property to their own offspring. That was the rule even at common law. And in *Ash* v. *Way*, 2 Gratt. (Va.) 203, it was held that where a bastard married and died, leaving a legitimate child, and the father of the bastard had in her lifetime recognized her as his child, the child of the bastard may inherit through her from its grandfather.

But it is claimed by the plaintiff that, even if the court should hold that Isephene had been legitimated, and thereby, might inherit from her father, these defendants, her legitimate children, can not inherit through her from their grandfather, there being no provision of statute, allowing them to do so; and the case of *Curtis* v. *Hewins*, 11 Met. 294, is cited and relied upon as sustaining this position. This is altogether too strict a construction to be applied to the statute in the present case. The decision in that case was based upon a statute very different from that by which this case is governed. The opinion is very brief, embracing but two lines; the head note is misleading, as it states only half the provision of statute, and omits the clause by which the court was evidently governed in its decision, and which in express terms prohibited the grandchild from inheriting through the mother any part of the grandfather's estate, viz: "but he shall not be allowed to claim, as representing his mother, any

part of the estate of any of her kindred, either lineal or collateral." *Kent* v. *Barker*, 2 Gray, 537.

While the opinion, therefore, in *Curtis* v. *Hewins*, *supra*, may be regarded as a correct exposition of the law in that jurisdiction, and by the tribunal rendering it at the time it was given, it can not be considered as authority governing this court in the interpretation of a statute from which such express prohibition has long since been eliminated, and so apparently humane and remedial as this seems to be.

The defendants were born legitimate; the mother was made legitimate through the law; thus both are made whole. "This relaxation in the laws in so many states," says Chancellor Kent, "of the severity of the common law, rests upon the principle that the relation of parent and child, which exists in this unhappy case, in all its native and binding force, ought to produce the ordinary consequences of consanguinity." 2 Kent Com. 214. By the statute the illegitimate, after certain conditions have been fulfilled by the father as we have herein mentioned, is made to inherit from his kindred, and they from him, as if legitimate. If these defendants are not to be considered as inheriting through their mother from her father what she herself might have inherited, then the "ordinary consequences of consanguinity" spoken of by Chancellor Kent, become shorn of half their meaning. To be sure, such considerations, while they ought not to change the construction of a statute whose meaning is plain and free from doubt, may, as in the history of legislation on the same subject, be of aid in determining the intention of the law makers, and throw light upon the meaning and application of terms used. *Smith* v. *Chase*, 71 Maine, 165; *Eaton* v. *Green*, 22 Pick. 531.

In accordance with the stipulation in the case the entry must be,

Judgment for demandant for one half undivided of the real estate described in his writ, and for no more, without costs.

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

STATE OF MAINE *vs.* SOLOMON SCHWARZSCHILD.

Cumberland. Opinion April 6, 1891.

Life Insurance. Rebate. Indictment. Pleading. Stat. of 1889, c. 281.

The true construction of the act of 1889, c. 281, is to require life insurance companies to give equal terms to those persons whom it insures that are of the same class, and to stipulate the terms of insurance in their policies, and to accord to none any other.

An indictment under this statute, charged that the defendant allowed a rebate premium payable on a policy that he issued, but failed to aver that such rebate was not stipulated in the policy. *Held*, that the indictment charges no violation of the statutes.

ON EXCEPTIONS.

This case was presented upon exceptions to the overruling of respondent's general demurrer to an indictment in two counts, drawn under so much of § 1, Chap. 281, Pub. Laws, 1889, as reads as follows: "Nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premiums payable on the policy or other benefits to accrue thereon."

The indictment is as follows: . . . "That Solomon Schwarzschild, otherwise called Solomon Schwarzchild, late of Portland, in the County of Cumberland, laborer, at said Portland, in said County of Cumberland, on the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-nine, being then and there an agent of the Mutual Life Insurance Company of New York, a life insurance company then and there legally admitted to do business in this State and then and there doing business in this State, and said Solomon Schwarzschild, otherwise called Solomon Schwarzschild, being then and there lawfully licensed to do business in this State as agent of said Mutual Life Insurance Company of New York, did unlawfully offer to pay, and allow to one Frank B. Milliken, as an inducement for the taking by said Frank B. Milliken, of a policy of insurance for the sum of ten thousand dollars upon the life of said Frank B. Milliken, in said Mutual Life Insurance Company of New York, a rebate of premiums payable on said

policy, to wit :— fifty per cent of the amount of the first annual premium payable on said policy, said rebate then and there amounting to the sum of two hundred and forty-one dollars and fifty cents, against the peace of said state, and contrary to the form of the statute in such case made and provided.

"And the Grand Jurors aforesaid upon their oath aforesaid, do further present, that the said Solomon Schwarzschild, otherwise called Solomon Schwarzschild afterwards, to wit :— on the 15th day of October, in the year of our Lord one thousand eight hundred and eighty-nine, at Portland aforesaid, in the County of Cumberland aforesaid, being then and there an agent of the Mutual Life Insurance Company of New York, a life insurance company then and there legally admitted to do business in this State, and then and there doing business in this State, and said Solomon Schwarzschild, otherwise called Solomon Schwarzschild, being then and there lawfully licensed to do business in this State, as agent of said Mutual Life Insurance Company of New York, did unlawfully pay, and allow to one Frank B. Milliken, as an inducement for the taking by said Frank B. Milliken, of a policy of insurance for the sum of ten thousand dollars, upon the life of said Frank B. Milliken, in said Mutual Life Insurance Company of New York, a rebate of premiums payable on said policy, to wit ;— fifty per cent of the amount of the first annual premium payable on said policy, said rebate then and there amounting to the sum of two hundred forty-one dollars and fifty cents ; against the peace of said state, and contrary to the form of the statute in such case made and provided."

Statute of 1889, c. 281, reads as follows :

"Section 1. No life insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life, in the amount of payment of premiums, or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contract it makes. Nor shall any such company or any agent thereof make any contract

of insurance or agreement as to such contract, other than as plainly expressed in the policy issued thereon; nor shall any such company or agent pay, or allow or offer to pay, or allow as inducement to insurance, any rebate of premiums payable on the policy or other benefits to accrue thereon, on any valuable consideration or inducement whatever not specified in the policy contract of insurance.

"Section 2. Any company or officer or agent thereof, violating any of the provisions of this act shall be punished by a fine of not more than five hundred dollars for each offense; and the insurance commissioner may revoke the license of any agent convicted of a violation of the provisions of that act."

N. and H. B. Cleaves, for defendant.

A regulation made for a class of our citizens, arbitrary in its character, restricting their rights or privileges, or legal capacities, in a manner before unknown to the law, should not be sustained. The unconstitutionality of an act may be taken advantage of on a general demurrer. *State* v. *Merrill*, 45 Maine, 330.

The legislature has no more power to regulate the price for the sale of a policy of insurance than it has to regulate the price of commodities sold by other private business corporations. The general impression seems to be that the life insurance companies doing business in the state, are not doing it at a loss. Should an individual be prohibited by legislative enactments from making as favorable a contract as possible as to premiums on a policy of insurance on his life? Can a person be required by law to pay the advertised schedule rate, and prohibited from making a contract on more favorablo terms, when the parties are agreed. Has the legislature power to pass a law prohibiting the agent of a life insurance company from giving to the assured a portion of the premium which the agent of the company receives as his pay for procuring the risk?

The act in controversy does not fix the maximum rate that shall be charged by insurance companies, but it does declare in effect that an individual shall pay the rate named in the written contract and shall not be permitted to make a different contract.

The further question arises, is not every policy issued under this law, where a rebate is given or accepted, void? It would be difficult to state any principle of law more plainly founded on common sense and true policy than that which declares that a plaintiff must not appear, from his own showing, to have infringed the law of the land, and if he does, he can not avail himself of the law to enforce a contract made in opposition to law. *Schmidt* v. *Barker*, 87 Am. D. 527.

The indictment charges no offense known to the law. The facts set out do not constitute an unlawful act. If the acts alleged be legal, stating them to be unlawful will not make them so.

Where the same section of an act prohibits an offense, and specifies the acts of which it consists, an indictment for its violation must, by express words, bring the offense substantially within the statute description. In such case, the circumstances mentioned in the statute, to make up the offense, can not be dispensed with, by the general conclusion *contra forman statuti*. *State* v. *Casey*, 45 Maine, 435.

Frank W. Robinson, county attorney, for the state.

The word "on," at the beginning of the clause last mentioned, should be read "or." It is a clerical error in the enactment, which becomes manifest upon examination of § 68, Chap. 214, Mass. Acts of 1887, the so-called "anti-rebate" section of the insurance law of that state, of which the Maine statute is an almost literal transcript. As thus corrected the clause should stand by itself as a general provision enacted to prevent other methods of working out the discriminations in insurance, which the preceding provisions of the section may not have effectually covered.

"As in an indictment, so in a statute, clerical errors do not avoid what to the common understanding is plain. If the true reading is evident, and the meaning is, notwithstanding the errors, certain, the statute stands, and is to be interpreted as though they were corrected." Bishop Stat. Crimes (2 ed), § 79; *Woodworth* v. *Grenier*, 70 Maine, 242.

To correct an obviously clerical error, "on" may be read as "or," even in the strict construction of a penal statute. Bishop

Stat. Crimes (2 ed.), § 243; *Follett* v. *Thomas*, Law Rep. 6 Q. B., 514-518.

Nothing can be plainer than the duty of the state to see to it that these great insurance companies, which it has invested with corporate powers, and permitted to enter into contract relations of the greatest importance with its citizens, shall not oppress or impose upon them. Indeed, the history of the enactment under consideration shows that the companies themselves, as well as the insurants, stood greatly in need of legislative protection.

See 35th Annual Report of Insurance Commissioner, of Massachusetts, Part 11, page 12, *et seq.*, where he refers to the origin of the law.

All ordinary contracts are subject to this general legislative power of the state. Nor are corporations and their contracts exempted therefrom. Morawetz Priv. Corp. (2 ed), Vol. II, § § 1065-1075.

HASKELL, J. The true construction of the act of 1889, c. 281, is to require life insurance companies to give equal terms to those persons whom it insures that are of the same class, and to stipulate the terms of insurance in their policies, and to accord to none any other.

The indictment charges that the defendant did allow, to an assured, a rebate of premiums payable on his policy; but fails to allege that such rebate was not stipulated in the policy. If it was, then no offense under the statute has been committed.

Rebate, says Webster, is "to abate or deduct from; to make a discount from for prompt payment." Now, it is not inconsistent, that a policy should provide a discount from the stated premiums upon certain conditions that might be thought just and desirable; nor would such stipulation in a policy be in violation of the statute; therefore, its non-existence should be negatived in order to charge a violation of the statute. The allegation "unlawfully and contrary to the form of the statute" is not equivalent to such negation. *State* v. *P. S. & P. Railroad*, 58 Maine, 46.

Exceptions sustained. Indictment adjudged bad.

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

ENOCH O. GREENLIEF *vs.* JOHN R. WATSON.

Franklin. Opinion April 6, 1891.

Promissory Notes,—payable at a "place certain." R. S., c. 32, § 10.

A promissory note payable at "Mt. Vernon" is not payable at a place certain, within the meaning of R. S., c. 32, § 10, so as to require that a demand of payment should be averred and proved, as a prerequisite to the maintenance of a suit thereon.

ON EXCEPTIONS.

Action by an indorsee upon the two following promissory notes:

"$23.86. Mt. Vernon, March 8, 1884.

On demand after date I promise to pay to the order of M. S. Mayhew, twenty-three and 86-100 dollars at Mt. Vernon, with interest. Value received. John R. Watson."

[Indorsed:] "Harriet A Mayhew, Admr'x."

"$14.00. Mt. Vernon, October 18, 1883.

On the first day of March after date I promise to pay to the order of M. S. Mayhew, fourteen dollars at Mt. Vernon, with interest after. Value received. John R. Watson."

[Indorsed:] "Harriet A. Mayhew, Adm'x."

The defendant contended, among other defenses, that the action could not be maintained without proof of a demand of payment, made at the place of payment, prior to bringing his suit; and relied on R. S., c. 32, § 10, which reads: "In an action on a promissory note payable at a place certain, either on demand, or on demand at or after a time specified therein, the plaintiff shall not recover, unless he proves a demand made at the place of payment prior to the commencement of the suit." . . . The presiding justice ruled that the action could be maintained, holding that Mt. Vernon was not a "place certain" within the meaning of the statute. The verdict was for the plaintiff, and the defendant excepted to the ruling of the court.

E. O. Greenleaf, for plaintiff.

H. L. Whitcomb, for defendant.

HASKELL, J. Assumpsit on two promissory notes payable "at Mt. Vernon;" one on demand, and the other upon a day certain. No demand of payment of either note was averred or proved. The law did not require it. Neither note was made payable at a place certain, within the meaning of R. S., c. 32, § 10; and, if they were, the latter was not made payable there on demand. *Stone* v. *Colburn*, 30 Maine, 32; *Patterson* v. *Vose*, 43 Maine, 552.

"At Mt. Vernon" cannot be considered, in this case, as a place certain. It is the name of a town in this state, of which the court takes judicial notice. If it were the name of a residence, or place of business, it would be otherwise. Had George Washington made a note payable at Mt. Vernon, it would doubtless have been payable at his residence. Where the maker of this note resided or did business does not appear. The note is dated at "Mt. Vernon" and made payable there. Where in the town should demand have been made? The maker is neither shown to have lived there, nor to have had a place of business there.

There would be no utility in requiring a note, payable in Portland, or Augusta, or Bangor, to be presented in either of those places for payment, before suit could be brought upon it. It would be unnecessary trouble and a meaningless performance. The other questions were not argued and are waived.

Exceptions overruled.

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

ROCKLAND WATER COMPANY *vs.* CITY OF ROCKLAND.

Knox. Opinion April 6, 1891.

Way. Easement. Water. Towns. Water Companies. Private Laws, 1850, c. 381.

Where a water company has a right under its charter to lay its pipes through the streets of a city, "in such manner as not to obstruct or impede travel thereon," *Held*; that the city retained the right to repair its streets in the ordinary manner although in so doing the pipes of the water company may thereby become exposed, and it is compelled to sink them deeper, to protect them from frost and other dangers, it appearing that such repairs are not made in an improper manner.

ON REPORT.

This was an action on the case to recover damage alleged to have been done the plaintiffs' easement as is more fully set forth in the writ, a copy of the declaration in which is set forth below. For the purpose of determining the law applicable to the case, it is admitted that Rankin street, is a street within the City of Rockland opened to the public, and was used as such street before any of the acts mentioned herein; that plaintiffs' charter was duly accepted by the corporation, and that under its authority the plaintiffs' water pipe, being a part of its aqueduct, was laid along and under the surface of Rankin street, and on one side of the traveled part thereof as alleged in the writ. The plaintiffs introduced testimony tending to show that in the repairs of said street by the city road-commissioners from time to time earth and soil have been removed from and over the plaintiffs' water pipe, scraped up into the center of the road and away from the side where plaintiffs' pipe was laid, and the earth and covering of said pipe taken away to such an extent that it was necessary for the plantiffs to sink their pipe deeper to protect it from frost and other dangers; by reason of which, large expense was incurred, and of which the defendant had due notice.

The city council has not within six years past authorized any change in the grade of said street.

(Declaration.) "In a plea of the case; for that whereas the plaintiff before and at the time of the committing of the grievances by the said defendant as hereinafter set forth, was and from thence hitherto hath been and still is lawfully possessed of a certain right to, and interest in all that land in said City of Rockland, used and occupied for streets, roads or ways, to wit, the right to carry and conduct their aqueduct under any street and highway or other way in said City of Rockland, in such manner as not to obstruct or impede travel thereon, and to enter upon and dig up any such road, street or way for the purpose of laying down pipes beneath the surface thereof, and for maintaining and repairing the same, and to maintain said pipes under said road, street and way without hindrance, disturance or interference with the same.

"And plaintiff avers that under and by virtue of said right and authority of law, it had long before the time aforesaid been in the occupation and possession of said lands, and still is in the possession and occupation thereof, and had laid its aqueduct for the conducting of water to the said City of Rockland from Tolman's pond, so-called, along and beneath the surface of the street called Rankin street in said City of Rockland, so that it did not impede travel thereon, and had kept and maintained the same in and under the suface of that part of said Rankin street called Rankin hill.

"And by reason thereof the plaintiff ought during all the time aforesaid, to have maintained, and still of right ought to have and maintain its aqueduct beneath the surface of said street free from all disturbance and interference, yet the said defendant well knowing the premises, but wrongfully and unjustly intending to injure the said plaintiff in that behalf and to deprive it of the use and benefit of its said pipes and aqueduct so sunk beneath the surface of said street as aforesaid, on the first day of January, A. D., 1884, and on divers other days and times between that day and the day of the date hereof, by its servants and agents, wrongfully, unlawfully and injuriously did then and there dig up, remove and carry away the earth and soil covered over and upon said aqueduct at said Rankin hill, so that the same was exposed and rendered unsuitable and unsafe for the carrying of water from the pond of said plaintiff to the said City of Rockland, and rendered of little use and value to the plaintiff.

"Whereby, and by reason whereof, the plaintiff was put to great expense, to wit, the sum of seven hundred dollars in sinking said aqueduct to a lower depth, and covering the same so that it should be secure and safe and suitable for the conducting of water to said city as aforesaid.

J. O. Robinson and J. F. Libby, for plaintiffs.

Parties are each owners of an easement in the same land. Wash. Ease. (2d. Ed.) 601; *Prov. Gas Co.* v. *Thurber*, 2 R. I. 15; *Rock. Water Co.* v. *Tillson*, 69 Maine, 255. One can not disturb the other without corresponding liability for damages. Our charter provides that no person "shall obstruct the water

works of said corporation." Legislature may make express grant with prohibition for its disturbance. *People* v. *R. R.* 117 N. Y. 155. A municipality has no authority over its streets except as delegated to it. *Ingraham* v. *R. R.* 34 Iowa, 249; *Met. City R. Co.* v. *Chi. R. Co.* 88 Ill. 317; *Branson* v. *Phila.* 47 Pa. St. 349; *Atl. R. Co.* v. *St. Louis*, 66 Mo. 228; *Council Bluffs* v. *R. R.* 45 Iowa, 338. City has no right to cut down hills, or fill valleys to injury of plaintiff's property without showing a necessity and making compensation, as they have paid damages required for their easement. City liable for acts of its road-commissioner. *Stock* v. *Boston*, 149 Mass. 414; Plaintiffs' easement in part carved out of that of defendants, which has thus become the servient estate.

E. K. Gould, *C. E. Littlefield* with him, for defendants.

Acts complained of were usual and ordinary repairs by public officers, were not performed unskilfully, or with intent to injure, or acting under the direction or instruction of defendants. City not liable. *Bulger* v. *Eden*, 82 Maine, 356, and cases cited. Commissioners made proper use of materials in the street, scraping them from the side to the center. *Callender* v. *Marsh*, 1 Pick. 426, 431-2; *Denniston* v. *Clark*, 125 Mass. p. 222; Plaintiffs have no greater right than an abutter. Dill. Mun. Corp. § 697. Charter does not exempt them from public control. Change of grade would give them, without some statute, no claim for damages,—standing the same as abutter. *Hovey* v. *Mayo*, 43 Maine, 332; *Jamaica Pond Corp.* v. *Brookline*, 121 Mass. 5; *National Water Works Co.* v. *City of Kansas*, 28 Fed. Rep. 921.

To keep the streets safe and convenient is a duty expressly imposed upon towns. Here is no contract and nothing in plaintiffs' charter divesting or abridging the city's control of the streets. City exercised no control as to how or where the pipes should be laid. Plaintiffs must be held, when they so laid their pipe, that such repairs of the street were inevitable, and to take the chances.

HASKELL, J. The plaintiff had a right under its charter to lay its pipes through the streets of defendant city "in such

manner as not to obstruct or impede travel thereon." The city, of course, retained the right to repair its streets in the ordinary manner. In picking one of such streets, it is charged with so uncovering one of the plaintiff's pipes as to expose it to frost. Suppose it did. In the absence of any improper method in so doing, it incurred no liability to the plaintiff. The latter should have laid its pipes in such manner that ordinary and suitable repairs of the road would not affect them. The defendant has violated no law, nor has it invaded any right of the plaintiff.

Judgment for defendant.

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

EUNICE WEBSTER *vs.* JOHN TUTTLE.

Franklin. Opinion April 6, 1891.

Constitutional Law. Quieting Title. Adverse Claimants. R. S., c. 104, §§ 47, 48.

Sections 47, and 48, of c. 104, R. S., enabling those in possession of real estate claiming free hold, or an unexpired term of not less than ten years therein, to quiet their title against adverse claimants by petition requiring such claimants to bring suit within such time as the court may order,— are constitutional.

ON EXCEPTIONS.

This was a petition in which the defendant was summoned to show cause why he should not bring an action to try his alleged title to certain real estate situate in Freeman, Franklin County, and which the plaintiff averred she owned and possessed in fee simple. The petition concludes: "And the said Eunice Webster, further avers and says that she is credibly informed and believes that John Tuttle, of said Freeman, makes some claim adverse to her estate in said premises, to wit, that he owns said land and premises in fee simple."

The defendant filed the following answer:

"And now comes the said defendant and says that he ought not to be compelled to bring an action to test his title to the described premises, because such compulsion is contrary to the Bill of Rights, which provides that "every citizen may freely

speak, write and publish his sentiments on any subject, being responsible for the abuse of this liberty."

"That he ought not to be compelled to bring such action, nor ought a decree to be entered against him debarring him from bringing such action hereafter if he should see fit to do so, for the statute making such provision is oppressive and unconstitutional.

"The defendant conscientiously believes that he has title to the premises in question, and claims that he has the constitutional right to say so, but denies the right of the legislature to compel him to bring an action against his neighbor, if he prefers not to do so; and denies the right of the legislature to authorize a decree to be entered against him depriving him of any interest that he may have in the premises, even though he does not see fit to assert his right to the same.

"At the present time the defendant does not feel like incurring the expense of a law suit, but may be in better condition to do the same at some future time."

The defendant at the September term, 1889, was ordered to bring an action returnable at the next (March 1889,) term, when not having complied with the order of court, the following decree was made:

"This cause came on for hearing and it appearing that the court has full jurisdiction, and that the defendant appeared and has disobeyed the order of court to bring an action and try his title to the real estate described in plaintiff's petition, and the court having maturely considered the matter: *It is ordered and decreed*, that the said John Tuttle shall be, and hereby is, forever debarred and estopped from having or claiming any right or title adverse to the petitioner in the premises described in her petition."

The defendant thereupon excepted to the decree. The case was submitted without argument.

S. Clifford Belcher, for plaintiff.

H. L. Whitcomb, for defendant.

HASKELL, J. The only question presented in this case is, whether § § 47 and 48, of c. 104 of R. S., to enable those in

possession of real estate, claiming a freehold, or an unexpired term of not less than ten years therein, to quiet their title to the same against adverse claimants by petition to this court and decree thereon, are constitutional.

No case has been cited at the bar tending to the contrary. A similar statute was enacted in Massachusetts, in 1852, c. 312, § 52, as a substitute for the more effectual remedy in equity to quiet titles, that the court of that state then had no power to give. *Clouston* v. *Shearer*, 99 Mass. 209.

The latter is common in courts of equity, and no good reason appears why the former should not be held to be within the power of the legislature to establish. It has not been given as a matter of right where the respondents appear and claim title and show cause in the premises, for then the court is to make such decree as seems equitable and just; or, in other words, act in the exercise of a sound discretion. Whether that discretion was properly exercised is not a pending question, for no exceptions were taken to the exercise of it. The decree requiring suit to be brought was entered at a prior term and by another judge. The decree now complained of, barring the respondent's claim, was entered as peremptorily required by statute in case of disobedience of the order to bring suit. The legislature ordained the power, and the court has exercised it. The decree is valid and must stand. *Exceptions overruled.*

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

IN RE, REPORT AND DECISION OF RAILROAD COMMISSIONERS, on petition of municipal officers of KENNEBUNK, asking them to determine the manner and conditions in which a certain town way may cross a track of the BOSTON AND MAINE RAILROAD, in said town.

York. Opinion April 6, 1891.

Railroad. Way. Crossing. R. R. Commissioners. R. S., c. 17, § 5; c. 18, § 27; c. 51, § § 14, 15, 18; Stat. 1889, c. 282.

Railroad commissioners have no jurisdiction to regulate the crossing of railroad tracks and public ways unless the former are laid under charter authority

so as to be maintained in the exercise of eminent domain, and become a railroad for public use, because when not so laid they are a mere convenience to be used or disused at pleasure, to be maintained or removed at the will of their owner; they are private property, subject to be taken in the exercise of eminent domain by the laying out of a public way, and are protected by the same rights of compensation.

ON EXCEPTIONS.

From the bill of exceptions it appeared that the Railroad Commissioners having declined to make any determination or award upon the terms and conditions for crossing the track of the Boston and Maine railroad, with a town way, in Kennebunk, the petitioners, the municipal officers of the town, upon the coming in of the report of the commissioners, moved its acceptance by the court. This motion was opposed by the railroad and it asked for a recommittal with directions from the court that "the commissioners take jurisdiction in the premises; and determine if such railroad track was in fact constructed before the way, described by the petitioners in their petition, was located; whether said way (1,) shall be permitted to cross said track at grade therewith, or not; and (2,) the manner and condition of crossing the same; and (3,) apportion the expense of building and maintaining so much thereof as is within the limits of such railroad, between said inhabitants of Kennebunk and said Boston and Maine Railroad. And if otherwise, then to determine the manner and conditions of the crossing of said way by said railroad."

The court ordered the report to be accepted, and denied the motion to recommit. The railroad thereupon filed its exceptions to the ruling and refusal by the court.

The Railroad Commissioners give, in their report, the reasons for declining to take jurisdiction, which are as follows:

"It appeared from the view aforesaid and from the evidence elicited at said hearing, that the Boston and Maine Railroad prior to the location and establishment of said townway, had, at the request of the Mousam Manufacturing Company and others, and by permission of the land owners, constructed a spur track from their main line near the station in Kennebunk, to the manufacturing establishment of said company and others in said

village; that the town way aforesaid, as located, crosses said spur track near a shoe factory recently erected there.

"It is not the province or duty of the board to determine the legal rights of the parties interested; neither is it necessary to give any opinion relative thereto, further than to state the views of the board as to their jurisdiction of the subject matter.

"Section 18, of Chapter 51 of the Revised Statutes, is as follows:

"'Any railroad corporation, under the direction of the railroad commissioners, may locate, construct and maintain branch railroad tracks to any mills, or manufacturing establishments, erected in any town or township, but not within any city through which the main line of said railroad is constructed, without the consent of the city council, and for that purpose said corporation shall have all the powers and rights granted, and be subject to all the duties imposed upon it by its charter.'

"That a railroad company may construct a spur track on their own land or over that of any other, by permission, to a manufacturing establishment, or elsewhere, provided the public interests are not concerned, we do not doubt; but if the public have in such lands, or thereafter acquire, rights or interests therein, we doubt if such track would be legally established, except by special charter or by the mode above prescribed. It did not appear that the Boston and Maine Railroad had ever been granted by charter, or otherwise, the right to locate and construct said spur track, except from the land owners above mentioned.

"Under these circumstances have the Boston and Maine Railroad by merely constructing a line of spur track, as above set forth, acquired 'all the powers and rights granted and are they subject to all the duties imposed upon them by their charter?' If not, then, as we view it, the town had the right to lay out and establish the town way without regard to such railroad track or the location of it. True, there is a track laid there, but is such track, placed there in the manner the evidence discloses it to have been, a railroad track within the meaning of the statutes?

In other words, does the mere laying down of sleepers and rails over a certain territory, by the permission of the land owners, constitute it a railroad within the meaning of the statute, so as to require town and cities in laying out ways over land where such tracks have been laid, to ask the Board of Railroad Commissioners to adjudicate upon the manner and conditions of crossing such track? This petition is based upon the provisions of Section 27 of Chapter 18 of the Revised Statutes as amended by Chapter 282 of the Public Laws of 1889, which provide that 'town ways and highways may be laid out across, over or under any railroad track, except that before such ways shall be constructed the Railroad Commissioners, on application of the municipal officers of the city or town, wherein such way is located, or of the parties owning or operating the railroad, shall upon notice and hearing, determine whether the way shall be permitted to cross such track at grade therewith or not, and the manner and conditions of crossing the same, and the expense of building and maintaining so much thereof, as is within the limits of such railroad shall be borne by such railroad company or by the city and town in which such way is located, or shall be apportioned between such company and city or town as may be determined by said Railroad Commissioners.' Evidently the legislature, in using the words 'railroad track,' intended it to be one having a legal location, established under prescribed forms of law; and that the company operating it 'shall have all the powers and rights granted, and be subject to all the duties imposed upon it by its charter.'

"So far as appears, this spur track has no defined location or legal limits upon the face of the earth. How then can the Board of Commissioners 'determine the manner and conditions,' this town way shall cross it, or how the 'expense of building and maintaining so much thereof as is within the limits of such railroad shall be borne?' From all the facts disclosed at said hearing, to our minds it is clear that the Board of Railroad Commissioners have no jurisdiction of the subject matter set forth in the petitioners' application, and therefore must decline to make any determination or award under same."

G. C. Yeaton, for Boston and Maine Railroad.

W. L. Dame, for Kennebunk.

HASKELL, J. Railroads for public use are creatures of the legislature, either by charter or by organization under the statute. They are public highways; great thoroughfares of public travel and commerce; endowed with the right of eminent domain subject to the laws of the State. *Spofford* v. *B. & B. Railroad*, 66 Maine, 26.

By R. S., c. 51, § 14, "A railroad corporation, for the location, construction, repair and convenient use of its road, may take and hold, as for public uses, land and all materials in or upon it; but the land so taken shall not exceed four rods in width, unless necessary for excavation, embankment, or materials.

Section 15, requires a location according to the charter, to be filed and recorded with the County Commissioners, that may be amended by filing a new description.

Section 18, permits railroad corporations to locate branch tracks to mills or manufacturing establishments, in certain cases, under the direction of the railroad commissioners, with the powers granted by, and subjected to the duties imposed under their charters.

Revised Statutes, c. 18, § 27, as amended by c. 282 of 1889, permits public ways to be laid across railroad tracks, subject to regulation by the railroad commissioners, who may determine the manner of crossing, and the expense of building and maintaining the way within the limits of the railroad. This act refers to the tracks of railroad companies located under authority of eminent domain, either by the purchase of the right of way, or by the taking of it under the provisions of statute; for, in either case, the lands are held, as for public use. R. S., c. 51, § 14. That is, lands covered by the location required by § 15, are held, as for public use, under the exercise of eminent domain, whether purchased, or taken under process of law; and, in regard to them, the corporation "shall be subject to all the duties imposed upon it by its charter." § 18. There is no occasion to apply the act to railroad tracks not laid under charter

authority, so as to be held in the exercise of eminent domain and become a railroad for public use, because they are a mere convenience, to be used or disused at pleasure; to be maintained or removed as the owner wills to do.

They are exactly like private tramways or any other private estate, subject to be taken in the exercise of eminent domain. They, like other property, may be severed in two by the laying of a public way, and are protected by the same right of compensation. If their owner be a corporation, endowed with the exercise of eminent domain, it can proceed to locate such tracks across the public way, that has interfered, under the provision of statute expressly provided for such cases.

There is force in the argument that public safety requires that the intersection of railway tracks and roads should be under the control of the railroad commission. But, unless both are public ways, that is, constructed and maintained under the authority of law, or for public use, the public has no rights to be affected. If either be wanting in its public quality, the conflict is between public and private rights; and as the former are paramount, the laws regulating private rights are ample in such case. A railroad track not legally laid across a public way may be a nuisance, and not permitted to remain. R. S., c. 17, § 5. *State* v. *P. S. & P. Railroad*, 58 Maine, 46. If not a nuisance, nor prohibited by statute, it is the same as any other private crossing of a public way, to be used so as not to unreasonably endanger or impede public travel.

In the case at bar, the town located the way through the railroad track that was mere private property of the B. & M. Railroad, not clothed with a public quality under the provisions of its charter, for want of location as provided by statute.

It could be operated or disused; taken up or maintained by its owner at pleasure. It had no limits, within which the railroad commissions could adjudicate upon the conflicting rights and uses. The railroad rights in the premises are in no sense public, but only private. The railroad commission had no occasion to interfere. *Exceptions overruled.*

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

OWEN WHITE *vs.* PHŒNIX INSURANCE COMPANY.

Androscoggin. Opinion April 6, 1891.

Insurance. Vacant Buildings. Presumption. Evidence. R. S., c. 49, § 20.

To avoid a policy of fire insurance, stipulating that whenever the buildings insured shall become vacant, the insurance thereon shall cease, it must be shown that, not only have the buildings become vacant in violation of the terms of the policy, but that the risk was thereby increased. R. S., c. 49, § 20.

It is common knowledge of which courts take judicial notice, that vacant buildings, as a class, are more exposed to damage from fire than they would be if occupied. The testimony of witnesses, therefore, tending only to establish such fact, already known is unnecessary and inadmissible.

When the vacancy of buildings insured is shown, a presumption arises of an increased hazard from fire, but the peculiar condition, construction and surroundings may rebut such presumption and even show that such hazard is decreased.

Under the statute, the burden is upon the insurance company to show an increase of risk; and when the vacancy is shown, it has such presumption in its favor that, if not rebutted, is sufficient to prove the fact; but, when other facts appear, it is for the jury to say, whether the presumption shall still prevail, or whether it has been rebutted, and whether, on the whole evidence, the risk is shown to have been increased.

When the building destroyed had been left vacant for nearly a year, and the defendant company seems to have had neither the presumption of increased hazard accorded it at the trial, nor to have been permitted to show it, *Held*; that it was entitled to one or the other; and that a new trial should be ordered.

ON MOTION AND EXCEPTIONS.

This was an action of assumpsit on a policy of the fire insurance. Plea, general issue with a brief statement that the policy had been rendered void, because of the premises becoming vacant and unoccupied and so remaining until the time of the fire, a space of about ten months, without the written consent of the company indorsed on the policy; and that by the vacancy and non-occupancy, the risk on the premises was materially increased. The verdict was for the plaintiff.

In the course of the trial, witnesses were called by the defendant to show that non-occupancy increases the hazard; and they were asked whether or not it is the usage of insurance companies,

generally, to charge extra premiums on houses intended or known to be unoccupied.

The defendant, also, offered to prove by its witnesses that the usage and custom of the insurance business is, first, not to insure, at all, vacant farm-buildings except for a temporary vacancy; and, second, if they insure, at all, an extra premium is charged; and they were asked what is the usage or custom of insurance companies, generally, as to insuring, at all, unoccupied farm dwellings or buildings, for any period beyond a temporary vacancy, such as thirty or sixty days. The court, upon objection, excluded the questions and testimony offered. The defendant excepted to the rulings of the court and the exclusion of the testimony thus offered.

The testimony on the motion is omitted.

Baker, Baker and Cornish, for defendant.

Thayer v. *Prov. Ins. Co.* 70 Maine, 531, relied upon at the trial, does not touch the question put in the case at bar. The opinion at p. 539, shows that the exact evidence offered was the opinion merely of an expert as to what would materially increase the risk, and as to what influence non-occupancy would have upon the action of insurance companies. The first element was inadmissible because it called for an expert opinion on what was a matter of common knowledge; the second element because it is generally incompetent for a witness to give an opinion as to the effect of an assumed fact on the mind or action of a third person. *Joyce* v. *Ins. Co.* 45 Maine, 170. The question excluded was not one of opinion but a fact, within the knowledge of experts, and not within the common knowledge of juries. *Merriam* v. *Ins. Co.* 21 Pick. 164; *Chrisman* v. *Ins. Co.* 16 Ore. 283; *Ins. Co.* v. *Miller*, 39 Ind. 474. This question admitted in *Luce* v. *Ins. Co.* 110 Mass. 363. Counsel also cited: *Ins. Co.* v. *Rowland*, 66 Md. 236; May on Ins. §§ 580, 582; *Hawes* v. *N. E. Co.* 2 Curtis, C. C. 229; Rogers' Expert Test. § 110.

A. R. Savage and H. W. Oakes, for plaintiff.

HASKELL, J. The removal of tenants from the farm buildings insured and burned did not avoid the policy, unless the risk

was thereby increased; R. S., c. 49, 20; and the increase of risk is a fact for the jury, and must be shown, in order to work a forfeiture of the policy. *Lancy* v. *Home Ins. Co.* 82 Maine, 492; *Luce* v. *Dorchester Insurance Co.* 105 Mass. 297.

That vacant buildings are more exposed to danger from fire than they would be if occupied is a fact of common knowledge, to prove which, therefore, the opinions of witnesses are incompetent and unnecessary. *Mulry* v. *Mohawk Valley Ins. Co.* 5 Gray, 541; *Lyman* v. *State Ins. Co.* 14 Allen, 329; *Luce* v. *Dorchester Ins. Co. supra*; *Joyce* v. *Maine Ins. Co.* 45 Maine, 168; *Cannel* v. *Phœnix Ins. Co.* 59 Maine, 582; *Thayer* v. *Providence Ins. Co.* 70 Maine, 531.

When the building insured is shown to be vacant, the risk of fire is presumed to be increased; but this presumption is not conclusive, for the peculiar condition, construction and surroundings of the building may be such that the presumption will be completely destroyed and show that the risk is not increased, or even that it is decreased.

Under the statute, the burden is upon the defendant to show an increase of risk. When the vacancy is shown, it has the presumption of increase in its favor, and, unless rebutted, is sufficient to prove the fact; but, when all the facts that picture the particular building appear, the jury must say, whether the presumption shall still prevail, or whether it is rebutted, and whether, on the whole evidence, the risk is shown to have been increased. This view is substantially illustrated by the judgment of this court in dealing with the facts in *Lancy* v. *Home Ins. Co.* 82 Maine, 492.

The evidence offered and excluded tended simply to prove that vacant buildings, as a rule, are more exposed to loss by fire than if occupied, inasmuch as the cost of their insurance is universally fixed at higher rates of premium. If the court failed to take judicial notice of the fact that the evidence tended to prove, its exclusion might have been error, for the reasons stated in *Luce* v. *Dorchester Ins. Co. supra*; but, when the fact is known and recognized as within the common knowledge of all well-informed persons, it is useless to waste the time of a trial in proving it.

The buildings destroyed in this case had been left vacant for nearly a year. Upon the trial, the defendant should have been allowed either to count the presumption from vacancy in its favor, or to show facts tending to prove it. We fear the trial did not proceed upon that theory, and therefore are of opinion that a new trial should be ordered.

Motion sustained.

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

STATE OF MAINE by information of the ATTORNEY GENERAL,

vs.

SAMUEL K. WELLMAN and others, COUNTY COMMISSIONERS.

Franklin. Opinion April 6, 1891.

Mandamus. Summons. Service. Way. Opening. Discontinuance. R. S., c. 77.

When proceedings for the laying out of a way have been by the Commissioners "confirmed, closed and recorded," such way is thereby located and established, and a petition to discontinue the same is a subsequent, new proceeding that does not in any way seek to annul or reverse such judgment of the County Commissioners, and therefore, does not interrupt and can not, in any way, enlarge the time specified within which such way should be built.

The time having expired within which the town interested, should have built the road when the Commissioners were petitioned to appoint an agent to construct the same, it was their duty to have so done instead of refusing to so do, and it, therefore, becomes the duty of this court, in the exercise of its plenary power over all inferior courts, to require the Commissioners to proceed and cause the road to be constructed as required by law.

When an order of court required that County Commissioners be summoned by serving them with an attested copy of a petition, *Held*; that the order was complied with by delivering the same to their chairman while the board was in session.

Coombs v. *Co. Com.* 71 Maine, 239, criticised.

ON EXCEPTIONS.

Petition for mandamus to the Commissioners of Franklin County. Upon a hearing, the court granted the petition and ordered an alternative writ to issue, returnable at the next term. The defendants excepted to the ruling and order.

The case is stated in the opinion.

E. O. Greenleaf for plaintiff.

The defendants contend that mandamus should not be granted,

as they say the petitioner has a clear remedy at law, etc., but they suggest none, nor have they any to suggest.

The writ of mandamus is of very ancient origin and was formerly regarded purely as a prerogative, but courts of more modern times have come to treat it more as a writ of right, and though applied to civil remedies, is usually instituted in the name of the state when the enforcement of public rights is sought. *Sawyer* v. *Co. Com.* 25 Maine, 291; *Weeks* v. *Smith*, 81 Maine, 538.

Mandamus lies to the person or the body whose legal duty it is to perform the required act. High's Extr. Legal Remedies, (Ed. of 1874,) pp. 316, 317; *People* v. *Com. Council of New York*, 3 Keyes, 81.

It has been urged that there is no appeal from the decision of the County Commissioners, that it is in their discretion to appoint an agent,— even if this be so, (which complainant denies,) that discretion must not be abused, nor be influenced by passion, adverse interest or prejudice.

One of these commissioners resides in one of the towns affected by the result of this case, and during a portion of the time since 1882, one of the municipal officers of the town of Chesterville, and as such officer has been vigorously resisting this road.

The word "may" in a statute is to be construed, "must" or "shall" whenever it can be seen that the legislative intent was to impose a duty, and not simply a privilege or discretionary power, and the same rule prevails where third persons or the public have, a right *de jure* that the power conferred shall be exercised. *Low* v. *Dunham*, 61 Maine, 566; *Worcester* v. *Schlesinger*, 16 Gray, 166; *Com.* v. *Smith*, 111 Mass. 407. Even after a change of the statute from "shall" to "may." *Phillips* v. *Fadden*, 125 Mass. 198.

The exceptions in this case do not show that defendants are aggrieved by the rulings or decision of the court and must be overruled on that general ground if none other.

J. C. Holman, *F. E. Timberlake and J. H. Thompson*, for defendants.

When the petition to discontinue was presented to them, the

time for opening the road stopped, was suspended, and did not begin to run again till proceedings were finally closed on the petition to discontinue. The court in *Coombs* v. *Co. Com.* 71 Maine, 239, say, "The original proceedings were vacated by the subsequent action of the parties litigant. The time for opening a road must run from the final action of the tribunal having jurisdiction. While the result is in doubt and in controversy, neither the town is required to act nor are the Commissioners to intervene."

A writ of mandamus will only go where no other legal remedy exists, such as indictment. Heard's Shortt. Extr. Rem. pp. 238, 240, and cases cited. Will not be granted to cause inferior courts to retrace steps, when they have once acted. Proceedings should be by appeal, review, *certiorari*, etc. Mandamus not a writ of right. The general rule is, when a question is submitted to the discretion of a judicial officer, his judgment is conclusive. He is not to be controlled by any discretion except his own. Where an inferior court has discretion in the relation to the proceedings pending before it and proceeds to exercise that discretion, the court will not control that discretion by mandamus. The exercise of that discretion is not to be revised by any other tribunal.

HASKELL, J. Proceedings for the laying out of a highway in the County of Franklin were "confirmed, closed and recorded" by the court of county commissioners on the 26th of December, 1883. The way was thereby laid out in the towns of Jay and Chesterville, and three years from that date allowed those towns to build and open the same.

August 13, 1889, the county commissioners, upon proper petition, after due notice to the parties interested, refused to appoint an agent to open and make the road, the towns charged by law with that duty not having done so, as they were required in such case by statute to do; therefore, a petition for mandamus was presented to this court, to compel the county commissioners to perform the duty imposed upon them by statute. At *nisi prius* the writ was ordered to issue, and exceptions to that order are now presented.

I. It is objected that the county commissioners were not

summoned as required by order of court. The order required that they be served with an attested copy of the petition, and such copy was delivered to their chairman while the full board was in session. It is hard to see how a more complete service could have been made.

II. It is objected that the three years within which the road should have been built by the towns liable to build it had not elapsed prior to this proceeding, inasmuch as a petition to discontinue the same intervened, thereby, meantime, interrupting the running of the statute.

When the commissioners, pursuant to the mandate of the appellate court, on the 26th of December, 1883, entered up their judgment that the proceedings on the petition for the laying out of the way "be confirmed, closed and recorded," "the located way became an established fact. *Hallock* v. *Franklin*, 2 Met. 559.

"In the absence of any statutory limitation relating thereto, we perceive no legal objection to the commissioners entertaining a petition for the discontinuance of a legally located highway at any time after the location has become an established fact. The subsequent discontinuance of the highway, whether very soon after it has been established by the adjudication, or after a long lapse of time, is a new, substantive, distinct, official act. It does not rescind or annul the former proceeding, but it assumes its continued existence as the basis of the discontinuance." *Millett* v. *County Commissioners*, 80 Maine, 429. In that case it was held that the petition to discontinue the road, now interposed as a defense, might be considered upon the ground that it was a new proceeding, that in no way affected the original laying-out of the way; and that it could be presented the same as though the road had already been built. If this be so, it could not suspend or interrupt the running of the statute time, within which the road should have been built and opened. There could be no assurance that the way already laid out, already "an established fact," would be discontinued, and the result shows that it was not discontinued. The original proceeding has not been affected in the least by the subsequent proceedings seeking a discontinuance of the way; and it could

not be, for the foundation stone of the latter is the existence of a way. It seeks to destroy the way, not the judgment that established it.

It may be said that it would be imprudent for commissioners to order a road built, which they intended, on proper proceedings, to discontinue. Until actual discontinuance, their duty is unchanged. The law does not wait for inaction, or assume the final result of their proceedings. If, in such case, this remedy be sought, the exercise of a sound discretion, that always governs the extraordinary remedy by mandamus, will afford complete and exact justice. "Sufficient unto the day is the evil thereof."

More than three years had elapsed from the time when the way was laid out before the commissioners entered their discontinuance of it, that an appeal shows should not have been entered at all. Instead of attempting to discontinue the way, they should have ordered it built.

The case of *Coombs* v. *County Commissioners*, 71 Maine, 239, if rightly reported, is confused in statement, and is not an authority against the doctrines of this case.

The plenary power of this court, under R. S., c. 77, over the proceedings of all inferior courts, by appropriate process, so clearly authorizes this procedure by the Attorney General, that further consideration of it is unnecessary.

Exceptions overruled.

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

JOHN L. PEABODY *vs.* CITY OF LEWISTON, appellant.

Androscoggin. Opinion April 6, 1891.

Wages. Assignment. Record. R. S., c. 111, § 6.

An assignment of wages, duly recorded, will prevail against an order of the assignor, earlier in date, but neither accepted in writing nor recorded, to pay the same wages to a third party.

ON EXCEPTIONS.

This was a suit by the plaintiff, as assignee of Charles Souther, to recover wages of the said Souther to the amount of sixty dollars

and ninety cents. The defendant admitted its liability but not to the full amount, and filed an offer to be defaulted. The case was heard by the presiding justice, subject to right of appeal by either party, upon an agreed statement of facts, and judgment was ordered for the plaintiff for the full amount claimed, to which ruling the defendant excepted.

(Agreed statement of facts.) "This is an action on the case wherein the plaintiff claims to recover of the defendant the amount due one Charles Souther, December 19, 1888, and the earnings of said Charles Souther while in the employ of said defendant from December 19, 1888, up to and including a part of the month of February, 1889, amounting as follows:

Earnings of December, . .	$22 00
Earnings of January, . .	22 00
Earnings of February, (part) .	16 90
	$60 90

"The plaintiff claims to recover the full amount of such earnings under an assignment of wages from said Souther, dated December 19, 1888, and recorded in the Lewiston City Clerk's office, December 19, 1888.

"The defendant claimed the right to deduct ten dollars from each month's earnings, as stated above, by reason of an order from said Souther to David Farrar, City Treasurer, to pay said amounts to Nealey & Miller, dated November 20, 1888.

"Said order was presented to said David Farrar on the day of its date, and he verbally accepted it and promised the said Nealey & Miller that he would pay them the contents of said order according to its terms, and pursuant to this arrangement he paid said Nealey & Miller ten dollars on the 10th day of December, and settled with the said Souther for the balance of his wages due up to that time.

"The written acceptance of the order was not placed thereon until after the assignment to the plaintiff had been executed and recorded, and the said Farrar had notice thereof.

"The said Farrar was the duly elected and qualified Treasurer of the City of Lewiston, and had the powers pertaining to that office, but had no special authority to bind the city by said

verbal or written acceptances. At the date of said order and long prior thereto, he acted as paymaster, by the direction of the city government, of all workmen employed by the city, and had sole charge of paying them their wages to the amounts appearing on the pay-rolls made up by heads of the several departments in which they worked.

"The order and the assignment were each given for a valuable consideration, and the payments indorsed on the order were made as there indorsed.

"Notice of the assignment to the plaintiff was given to the defendant, December 19, 1888, and demand for the payment of the earnings of said Souther duly made and refused so far as the thirty dollars paid to Nealey and Miller for the months of December, January, and February are concerned, but the defendant admitted its liability to the plaintiff so far as the balance of said earnings are concerned, and the defendant claimed to be bound to pay said ten dollars per month to said Nealey & Miller by reason of said order."

A. R. Savage and H. W. Oakes, for plaintiff.

The City of Lewiston could not be charged by a verbal acceptance of the written order. R. S., c. 32, § 10.

If not, then no contract on the part of the city existed, if at all, prior to the time when David Farrar indorsed the written acceptance on the order, as it appears.

This acceptance, if it was otherwise of any value to charge the city, was made after the plaintiff's assignment, after its record, and after notice to Mr. Farrar of the same. It was manifestly too late then to get up a contract which would deprive the plaintiff of his rights under the assignment.

But we say the order was worthless to charge the city any way it can be considered. First, it was for part of the wages to be earned only. *Getchell* v. *Maney*, 69 Maine, 442; *Bank* v. *McLoon*, 73 Maine, 498, 510.

Secondly: The order was directed to David Farrar, the acceptance was signed by David Farrar, and David Farrar, if any one, and not the City of Lewiston, would be bound by it. *Rendell* v. *Harriman*, 75 Maine, 497; *Ross* v. *Brown*, 74

Maine, 352; *Simpson* v. *Clark*, 72 Maine, 40; *Nobleboro* v. *Clark*, 68 Maine, 93; *Mellen* v. *Moore*, 68 Maine, 390; *Sturdivant* v. *Hull*, 59 Maine, 172.

Thirdly: David Farrar could not by any act of his, however complete in form, bind the City of Lewiston by a contract of this nature. There was only a small amount involved and all parties amply able to back up any liability which might be incurred by assuming such a contract to be valid, but if the treasurer could accept an order and bind the city, why could he not sign a note, or any other contract, not for thirty or sixty dollars but for thousands? The law does not recognize such power in public officers. *Ross* v. *Brown*, 74 Maine, 352; *Parsons* v. *Monmouth*, 70 Maine, 262. Unless the city entered into some binding contract by which it could be forced to pay the sum mentioned in the order accepted by David Farrar, the order affords no defense to the city against the claim of the plaintiff.

W. H. White and Seth M. Carter, for defendant.

Peabody took only the right which Souther had under the assignment at its date. The promise of city treasurer not void by R. S., c. 32, § 10. It is only for the protection of the party to be charged and voidable at his election. The effect of this statute on the contract is the same as that of the statute of frauds. *Cahill* v. *Bigelow*, 18 Pick. 369; *Beal* v. *Brown*, 13 Allen, 114; *Swett* v. *Ordway*, 23 Pick. 266; *Townsend* v. *Hargraves*, 118 Mass. 336; *Ames* v. *Jackson*, 115 Mass. 512.

But even if this order to Nealey & Miller were an assignment of wages it makes no difference. Peabody took by the terms of his assignment only Souther's right. What was that right? The same as in the ordinary quitclaim deed which the courts have defined, viz: all the interest he ever had less that with which he had legally parted. *Adams* v. *Cuddy*, 13 Pick. 463; *Jam. Pond, &c.*, v. *Chandler*, 9 Allen, 169.

Souther had parted with the ten dollars per month with the consent of the city and one payment had been made under the arrangement.

That such assignment was not recorded is of no consequence

here for Peabody's assignment don't cover the same money. Its legal construction would have been no different, so far as this ten dollars per month is concerned, had the assignment been written, "The balance due me after paying Nealey & Miller ten dollars per month." Peabody has nothing to do with the ten dollars per month in any event, and hence it is no concern of his whether the order was recorded or not.

The terms of his assignment put him upon inquiry at his peril as to what Souther's rights would be.

HASKELL, J. The question is, who has the better right to demand of the city of Lewiston the wages of one in its employ, the plaintiff, by virtue of an assignment, or a third party, under an order upon the city, earlier in date, but not accepted in writing until after the assignment had been duly recorded.

The order could not operate as an assignment, for want of record; R. S., c. 111, § 6; nor to charge the city as acceptor, for want of acceptance in writing prior to the recording of the assignment; R. S., c. 32, § 10. The plaintiff, therefore, claiming under the assignment, must prevail.

Exceptions overruled.

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

NAHUM MORRILL, in equity,

vs.

CHARLES A. EVERETT, and another.

Piscataquis. Opinion April 6, 1891.

Equity. Redemption of lands sold on Execution. Possession. Legal Title. R. S., c. 76, § 42; c. 77, § 6; c. 84, § 31.

Jurisdiction in equity is conferred by statute for the redemption of lands sold on execution the same as for the redemption of estates mortgaged, and the actual possession by the plaintiff of the lands sought to be redeemed, is not a necessary prerequisite to the maintenance of his bill.

Courts in equity consider equitable rights and award equitable relief. With legal titles they have no occasion to deal. In controversies over them there is a plain and adequate remedy at law. It is only where equities are equal that the law shall prevail.

Where the defendant's title under a sale of lands on execution within the time

limited by statute is subject to redemption, and the plaintiff is shown to be, at least, the equitable owner of the land sought to be redeemed, and when he has seasonably tendered the defendants, the amount of their purchase money, charges and interest, *Held*; on a bill to redeem, that their equities are extinguished, and the plaintiff's equity thereafterwards, being superior, is entitled to be upheld and protected as against the defendants' claim. Whether the plaintiff has a legal title to the land, it is unnecessary in these proceedings to consider.

ON REPORT.

This was a bill in equity brought by the plaintiff as owner of certain lands in Mayfield, Somerset County, to redeem the same from execution sale. The sale was made December 17, 1886, on an execution against Mayfield, and in favor of Greenville, Piscataquis County, under R. S., c. 84, § §30, 31, which provides that "all executions or warrants of distress against a town shall be issued against the goods and chattels of the inhabitants thereof, and against the real estate situated therein, whether owned by such town or not," . . . "and where the names of the proprietors are not known, he (the officer) shall publish the numbers of the lots, or divisions of said lands," . . . "He shall give a deed to the purchaser of said land in fee, expressing therein the cause of the sale." . . . "The proprietor of the land so sold may redeem it within a year after the sale," &c. . .

At the sale, the defendant, Everett, bid off the lots in controversy, and afterwards conveyed one undivided half to the other defendant. A tender was made to the defendants, for the purpose of redeeming the lots from this sale, on December 9, 1887; which being refused, a bill was brought and filed April 9, 1888.

The principal question at issue was one of title. The plaintiff claimed title under two deeds; one from Adams, dated August 25, 1873, who derived title by deed from the selectmen and treasurer of the town of Mayfield, dated December 30, 1865, made in pursuance of a vote of the town passed at a meeting held previously; and the other from the trustees of the ministerial and school funds of the town, dated September 30, 1873; and is a warranty deed. It also appeared that, by a resolve of the legislature, approved March 3, 1874, the land agent was authorized to convey to the town of Mayfield such interest as the state had in

the lots; and on October 2, 1874, he made a conveyance to the town agreeably to the resolve.

The defendants relied upon the judgment in favor of Greenville against Mayfield, and the sale of the lots on the execution. They also denied the tender.

The plaintiff, in his brief, admitted that there is no record of the location of public lots in Mayfield, to be found either in the state land-office, or in the registry of deeds in Somerset County; he introduced a plan identified as being in the hands of the late Abner Coburn, a former proprietor of lands in the town, as early as 1850. Mayfield was incorporated as a town in 1836. On this plan the lots in question are marked "Public Lots." The plaintiff offered further proof showing that the lots had been known as public lots for forty years; that the town had been in possession of them and occupied them during that time, selling stumpage as early as 1854, and continuing so to do until the sale to Adams in 1865; that he and his grantors since 1854, a period of thirty-six years, had been in actual occupation without interruption; and that there were, in 1854, well-marked and defined lines around the lots, &c.

Merrill and Coffin, for plaintiff.

As the statutes stood prior to 1830, public lots might be located, in unincorporated places, by proprietors, without the location being recorded. The township was part of the Bingham Purchase E. K. R. in 1790, hence the testimony offered would be all the evidence of location we should be likely to have. It can not be shown by living witnesses present at the specific allotment. The presumption is that the town and its officers had possession rightfully and lawfully, all others yielding to their claim.

The lots could not have been known as public lots by chance or accident. Evidence establishes a location by the proprietors. *Hedrick* v. *Hughes*, 15 Wall. 123; *State* v. *Cutler*, 16 Maine, 349; *Dillingham* v. *Smith*, 30 *Id.* 370. Deed from land agent inures to plaintiff.

Henry Hudson, for defendants.

Plaintiff not being in possession can not maintain his bill.

Gammage v. *Harris*, 79 Maine, 531; *Russell* v. *Barstow*, 144 Mass. 130. He has a plain and adequate remedy at law. Tender, if sufficient, revests property without a deed. *Legro* v. *Lord*, 10 Maine, 161. Question of title can not be settled in equity. *Robinson* v. *Robinson*, 73 Maine, 170; *Lewis* v. *Cocks*, 23 Wall. 466; *White* v. *Thayer*, 121 Mass. 226; *Boardman* v. *Jackson*, 119 *Id.* 161; *Spofford* v. *R. R.* 66 Maine, 53; *Clouston* v. *Shearer*, 99 Mass. 211 and cases cited. Plaintiff must prove that the public lots have been located as the law provided. Plan no evidence of this. Statute proceedings must be strictly followed. *Argyle* v. *Dwinel*, 29 Maine, 46. No title passed by deed to Adams; the reserved lots had not been located and could not be conveyed in severalty; town had no authority to vote the conveyance. *Warren* v. *Stetson*, 30 Maine, 231. State had no interest in the land after Mayfield, in 1836, was incorporated, and no title passed under land agent's deed. Deed of trustees, &c., dated September 30, 1873, void, because town meeting was not held on the day named in warrant; treasurer gave no bond; trustees no power to authorize conveyance, in severalty, of lots not located. No title acquired by possession as case shows the lots are wild land.

HASKELL, J. Bill in equity to redeem lands sold on execution under R. S., c. 76, § 42, the amount for which the lands were sold, together with necessary charges and interest, having been seasonably tendered to the defendants, one being the purchaser at the sale, and the other his grantee of an undivided fraction of the same.

I. It is objected that the court has no jurisdiction of the subject-matter, and especially, because the plaintiff, at the time of bringing his bill, was not and never had been in possession of the lands.

Revised Statutes, c. 77, § 6, confers jurisdiction in equity "for redemption of estates mortgaged." R. S., c. 76, § 42, under which the lands in question were sold, provides for their sale, as "rights of redeeming real estate mortgaged are taken on execution and sale," and "the same right of redemption from such sales;" so that jurisdiction in equity over the subject-matter of this bill is expressly given by statute.

The actual possession of the lands by plaintiff, at the time of bringing his bill to redeem, is not required by law as a pre-requisite thereto. The rights of the parties to this suit are the same as mortgagor and mortgagee; and it has always been held that the former, although not in possession of the land, might maintain his bill to redeem against the latter. *Parsons* v. *Welles*, 17 Mass. 419; *McQuesten* v. *Sanford*, 40 Maine, 116; *Pratt* v. *Skolfield*, 45 Maine, 386; *Crooker* v. *Frazier*, 52 Maine, 405; *Stinchfield* v. *Milliken*, 71 Maine, 567.

II. It is objected that the plaintiff has no title to the lands and therefore has no right to redeem.

Courts of equity consider equitable rights and award equitable relief. With legal titles they have no occasion to deal, for, in controversies over them, there is a plain and adequate remedy at law. It is only where equities are equal that the law shall prevail.

The land sought to be redeemed is a portion of the lands reserved for public uses in the town of Mayfield. These lands are not shown to have been set apart in severalty by any statute or other proceeding, although certain specific lots seem to have been recognized and dealt with as public lots for more than half a century. The defendants claim under a sale on execution against the inhabitants of Mayfield, levied upon certain of these public lots, the proprietors of which are stated in the officer's return to be unknown. Their title is, therefore, obtained under R. S., c. 84, § 31, and c. 76, § 42, subject to redemption, within one year, as in cases of estates mortgaged.

The plaintiff appears to be, at least, the equitable owner of the lands he seeks to redeem. When the defendants were seasonably tendered or paid the amount of their purchase money with necessary charges and interest, their equity in the premises was extinguished and the plaintiff's equitable right to redeem became the superior equity, that should give him relief in this cause. Whether his title at law is sufficient to recover the land from a disseizor, it is now unnecessary to decide.

III. The sufficiency of the tender is denied; but the evidence clearly proves it. The money was paid into court with the filing

of this bill, and can be taken out by the defendants at their pleasure.

Bill sustained with costs. Defendants to release to the plaintiff.

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

FREDERICK FOX, EXECUTOR, in equity

vs.

ELIZABETH P. SENTER and others.

Cumberland. Opinion April 6, 1891.

Will. Life Insurance. Devise. Life Estate.

A devise of the use of all the testator's property, real and personal, to the widow for life, no reason to the contrary being shown, gives her the custody and control of the same; and it should be inventoried and paid to her for use under the terms of the will.

A solvent testator, leaving a widow, may dispose of life insurance, by will, to persons other than his widow. Policies, payable by their terms to the testator's legal representatives, if specifically devised by the will become a part of his estate and not the property of the widow; but where it is clear that he intended by his will, to dispose of his entire property, including the life insurance as a part of his estate, *Held*; that the widow will take the life insurance, specifically devised in general terms to her use for life, as effectually as if the insurance had been specifically named in the will.

ON REPORT.

This was an amicable bill in equity, heard on bill and answer, brought by the plaintiff, as executor of the will of William Senter, of Portland, deceased, to determine the disposition of moneys received by the executor upon policies of life insurance on the life of said Senter.

The answer contained an express admission of the several averments of the bill, and submitted the determination of all questions involved to the judgment of the court thereon.

The questions submitted are as follows:—

"First. Shall your orator consider the money, or any portion thereof by him received as executor of the will of William Senter, of said several life insurance companies, or any one of said companies, and account therefor as a portion of the

estate of William Senter? or shall the same, in whole or in part, be adjudged as the sole property of Elizabeth P. Senter, widow of William Senter, under and by force of Section 10, Chapter 75, of the Revised Statutes?

"Shall the premiums paid by William Senter, within three years from his death with interest make a part of his estate?

"Second. If said insurance money is adjudged to be a portion of the estate of William Senter, and upon the death of Elizabeth P. Senter to descend by the terms of his will one third to the heirs of Elizabeth P. Senter, and two thirds to the heirs of William Senter as therein mentioned, shall your orator retain said fund in his hands the use of the same to be paid by him to Elizabeth P. Senter during her life, or shall said insurance money be delivered to her, she to have the use and control thereof during her life?"

The terms of the will, and other facts, are sufficiently stated in the opinion.

Frederick Fox, pro se.

The contract of insurance, or the will, must show what has been, or is to be done with the money. Failing these, it goes under the statute, in this case, to the widow; and no portion, excepting the last three premiums with interest, shall be taken for debts, nor constitute a part of his estate. R. S., c. 75, § 10. No more can it be taken for legacies unless so appropriated by the testator. Policies, except perhaps one, the Union Mutual, do not show any particular appropriation and must be controlled by the statute, unless testator has directed their disposition by his will, or the words in the Union Mutual "for the use and benefit of my estate," specially divert that amount in another direction. The statute says, money obtained from life insurance may be disposed of by will although the estate is insolvent. Is not the meaning of this, that money so received shall be disposed of by will, otherwise it shall descend to the widow, &c? How can it be disposed of by will unless the testator designates it as money from life insurance? Testator makes a distinction as to whom his remaining property shall descend, but none as to the property itself. Can "property" mean life insurance

money? Does it pass by will under the name of "property" when it does not come into existence until proof of death, and when the statute says it shall not be taken as part of his estate? "Estate" held, under certain circumstances, not to include "rights and credits." *Longfellow* v. *Patrick*, 25 Maine, 18.

Symonds and Libby, for defendants.

Testator has expressly made the funds arising from his insurance a part of his estate, and then disposes of all his estate by will. Unless the court is to hold to the technical doctrine that life insurance money must be mentioned in terms in a will in order to be disposed of by the will, a doctrine that would defeat justice and prevent the actual intent of testators from taking effect, and would do this unnecessarily, we submit that, under the circumstances disclosed, the terms of this will make it sufficiently clear that Mr. Senter intended to give the income and use of the life insurance fund to his widow for life, and then to have the principal divided as part of his estate under the terms of his will. If such was Mr. Senter's intent, reasonably and clearly shown from the will, as a whole, and all the facts of the situation, we submit it should not be defeated because he failed to express it in specific terms. It seems to us that Mr. Senter's intent is easily and clearly gathered from all the facts of the situation; and that he intended his widow to have the use of the money arising from the life insurance policies, together with the other property mentioned in the will, during her life, and her heirs one third and his heirs two thirds of it upon her death; and that any other construction would be doing violence to the will and would be a departure from the intent of the testator. It is true, that the life insurance money is not expressly mentioned in the will, but there was no occasion for it. He supposed he had made the funds, arising from the insurance, a part of his estate; and that his will had disposed of them together with the other portions of his estate.

HASKELL, J. William Senter died solvent leaving thirty or forty thousand dollars, exclusive of life insurance amounting to eleven thousand one hundred and eighty-six dollars and twenty

cents. He left a widow and no children. He bequeathed to charity twenty-five hundred dollars, and devised the use of all "the remainder" of his property, a house in Portland inventoried at five thousand dollars, being his only real estate, to his widow during life, and at her decease the "remaining property," one third to her heirs and two thirds to his heirs; and the question is who takes the life insurance?

I. It is settled law, that a solvent testator, leaving a widow, may dispose of life insurance, by will, to persons other than his widow. *Hamilton* v. *McQuillan*, 82 Maine, 204.

II. The insurance policies were payable to his legal representatives; and one policy specifies, "for the sole use and benefit of his estate." It is clear that he intended to give his widow, now well-advanced in years, the use of his entire property, including life insurance, save the small bequest to charity, to secure to her a continued home, where, for so many years, they had happily dwelt together. There were no debts, and the intent seems so plain that the testator meant to dispose of the life insurance, by will, as a part of his property, that it must be held to have been specifically devised in general terms, as effectually as if specifically named in the will.

III. The devise of the use of all the property, real and personal, to the widow, no reason to the contrary being shown, gives her the custody and control of the same, and it should be inventoried and paid to her for use under the terms of the will. *Starr* v. *McEwan*, 69 Maine, 334.

Decree accordingly. Expenses to be paid out of the estate.

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

WILLIAM J. ROBERTS *vs.* BOSTON AND MAINE RAILROAD.

York. Opinion April 6, 1891.

New Trial. Railroad. Defective Car. Due Care. Verdict. Jury.

Upon a motion for a new trial, in an action where the plaintiff obtained a verdict for injuries received by means of an alleged defective car, it appearing that the overwhelming weight of evidence was in favor of a sound car; that

the plaintiff's account of the manner of his injury was improbable; and his admissions to others, before the action was brought, differing therefrom; *Held*: that the jury must have been influenced by some improper motive in rendering a verdict for the plaintiff, and a new trial should be ordered.

ON MOTION.

This was an action in which the jury returned a verdict of $5,564.60, in favor of the plaintiff, for personal injuries received while in the employ of the defendant corporation.

It appeared that the plaintiff, a brakeman on a freight train which left Portland for North Berwick, December 5, 1887, was injured at Pine Point by being crushed between the engine and a car which he was uncoupling to leave on a side track. He was middle brakeman (so called) and with the engine and a single box-car, cut loose from a longer train, while all were in motion some distance easterly from the station, and ran ahead over the switch to set the car off, leaving the remainder of the train still in motion. From the time he severed the single car with the engine from the remaining cars, he was in charge of the train so severed and on top of the car until it had passed westerly of the switch, and he descended between the tender and car to draw the pin as the engine "kicked" it upon the side track. He attempted twice to draw the pin, failing the first time; the second time he succeeded. He testified that both engine and car were stationary when he made the first attempt, but both in motion when he made the second, and was injured by being crushed between the rear end of the tender and forward end of the car.

He based his claim to recover upon the alleged defective condition of the car, in that the "springs of the draw-bar were weak, insufficient, useless," the "dead-wood worn, insufficient, useless," and "other parts of the draw-bar weak, worn, useless;" and his writ alleged that, because of such defects, the draw-bar was pushed in by the engine in "kicking" the car further than it would have been if it had been sound, whereby he was injured.

Plea was the general issue with brief statement, &c., alleging that plaintiff's injuries were caused by his own negligence, or that of his fellow-servants; that the defendant was not in any manner negligent either in its selection or retention of its

servants, or in the construction, equipment, care or condition of repair of its engines or cars; that this particular car was not defective or out of repair or worn beyond reasonable prudence to use, and the draw-bar of said car was in good, sufficient and sound condition as to its springs, &c.

The view taken by the court renders a report of the testimony, bearing on the issues of contributory negligence, &c., argued by counsel, unnecessary.

H. Fairfield, for plaintiff.

Counsel argued that the car was defective in that the dead-wood was worn, and the spring was weak or broken, or that the draw-bar was too short, so that, after the pin was pulled, the draw-bar shoved under the car and allowed the tender and car to come together more nearly than if the dead-wood or spring had been sound, and the draw-bar long enough. The defects were of such a nature that the defendant did have or should have knowledge.

Plaintiff was in the exercise of ordinary care. Engineer and car inspectors not co-employes (*Shanny* v. *Androscoggin Mills*, 66 Maine, 420,) or if co-employes the defendant's negligence would still be proximate cause of injury. *Cin. & R. R.* v. *McMullen*, 117 Ind. 439 (S. C. 10 Am. St. Rep. 311); *Griffin* v. *Boston & R. R.* 148 Mass. 143; *Tierney* v. *R. R.* 33 Minn. 311; (S. C. 53 Am. Rep. 35;) *Rogers* v. *Ludlow M'fg. Co.* 144 Mass. 198.

G. C. Yeaton, for defendant.

Whatever the actual condition of the car and its draw-bar, defendant corporation having employed suitable car inspectors and having caused each car of the train, including this one, to be inspected by such, immediately prior to the time the train started, did its whole duty, and can not be said to have been negligent.

That the duty of supplying cars in proper repair, and of preserving them thus, is not an absolute one, but one which is always in the case of cars without original structural defects, to be performed by employes, is both by usage and necessity equally well-established.

Whether those employes, whose specific duty it is to examine cars, are or not fellow-employes with train-hands in such sense that the latter are precluded from recovery for injuries caused by the neglect of the former, has not been decided alike in all American courts.

Those of Kansas, Minnesota, Wisconsin, Iowa, and possibly some others have said no, while those of Massachusetts, Michigan, Ohio, Illinois, and perhaps others, have said yes.

The cases are collected in Patterson's Railway Accident Law, § 322 *et seq.*, and in an extended note to *Darracutts* v. *Ches. & Ohio R. R. Co.* 31 Am. &. Eng. R. R. cases, 157, 163, 168; and note in vol. 39 same series, pp. 334, 346. See also *C. & A. R. R.* v. *Bragonier, Adm.* 11 Ap. Ct. Ill. 516; *Smith* v. *Flint & Pere Marquette R. R. Co.* 46 Mich. 258; *Columbus & Zenia R. R. Co.* v. *Webb, Adm.* 12 Ohio St. 475; *Mackin* v. *B. & A. R. R.* 135 Mass. 201. In the last three cases cited, the precise point seems to have been the only point considered in the cases. *Vide* cases cited by counsel in *Judkins* v. *M. C. R. R.* 80 Maine, 417. Not directly decided in this state unless in *Osborne* v. *K. & L. R. R.* 68 Maine, 49.

If it was dangerous to attempt to uncouple while descending from the top of the car and while both locomotive and car were in motion, as he says he did, and not so to uncouple while both were stationary, or if he could have attempted it from the ground while both were stationary, his choice of the dangerous method, or of the more dangerous method, instead of the safe or less dangerous method, was a failure on his part to use that degree of caution the law required of him, and will defeat his recovery.

Exactly this has been decided in many cases, among others in *Muldowney* v. *Central R. R. of Iowa*, 39 Iowa, 615; *Williams* v. *Central R. R. of Iowa*, 43 Iowa 396; *Henry* v. *Bond*, 34 Fed. Rep. 101, and cases collected in note; *Railroad* v. *Ryan*, 69 Tex. 663; *Georgia Pacific R. R. Co.* v. *Probst*, 83 Ala. 518; *Tuttle* v. *Detroit, Gr. Haven & Mil. Ry.* 122 U. S. 189. See also cases in this state cited *post.*

It has even been held that railroad corporations are negligent if they omit to prescribe rules relating to "flying switches,

shunting and kicking cars." *Vose, Adm.* v. *Lon. & York Ry. Co.* 2 Hurls. & Nor. 728; *Chic. & N. W. R. R. Co.* v. *Talyor et al. Adm.* 69 Ill. 461; *Reagan* v. *St. L. Kas. & N. R. R. Co.* 93 Mo. 348. See a full case, *Penn. Co.* v. *Whitcomb, Adm.* 111 Ind. 212.

Can it be held that the corporation is negligent if its fails to make such a rule, and at the same time a train employe may decline to read it when made, although open to his daily inspection on a spindle in the car in which he always rides when not elsewhere engaged?

No reported case in this state has given any countenance to the doctrine that a brakeman of experience, with knowledge actual or constructive of a rule of the road prohibiting it, may in broad daylight attempt to uncouple a car from a locomotive while both are in motion while he could wait until both were stationary, and recover for injuries so received from alleged defects which were apparent to the eye. *Osborne* v. *Knox & Lincoln R. R.* 68 Maine, 49; *Wormell* v. *M. C. R. R.* 79 Maine, 397; *Judkins* v. *M. C. R. R.* 80 Maine, 417; *Guthrie* v. *M. C. R. R.* 81 Maine, 572; fully discuss and apply nearly all the principles defendant invokes here. See also *Hull* v. *Hall*, 78 Maine, 114; and *Nason* v. *West, Id.* 253; 2 Thomp. on Negligence, notes pp. 982-1020, and the numerous citations collected in Deering on Neg. 196, 212; Beach on R. R. 971.

Damages: Assuming that plaintiff's present disability is all he claims, and will continue unabated for the full term of his natural life, and giving him all the expectancy the tables allow (about twenty-three years,) and assuming also that he can never acquire dexterity enough to increase his earnings from what they now average (sixty cents per day,) then his daily loss could be but one dollar and fifteen cents (he did earn one dollar and seventy-five cents,) his annual loss at the very maximum possible of three hundred and thirteen days per annum, would be less than three hundred and sixty dollars; and a capitalized amount sufficient (according to standard published tables) to have this annual value, would be some twelve hundred dollars less than the amount of this verdict.

HASKELL, J. The plaintiff claims damages for bodily injury received, by reason of a defective draw-bar, in uncoupling a freight box-car from the tender of a locomotive, while the former was being pushed upon a siding, whereby he was caught and jammed between the two.

The plaintiff says that, having descended over the front end of the car next to the tender, while they were at a stand-still, he tried to pull the coupling-pin, but that it would not come out on account of a crook in it; that he turned it so that the crook was lengthwise of the hole in the draw-bar, and then pulled it out and laid it upon the deadwood; and that, meantime, the engine and car had begun to move towards the siding, and were in motion when he pulled the pin; that he then attempted to ascend the ladder on the end of the car and was caught and jammed against it by the tender; that while hanging to the ladder, after his limb had been crushed, he saw that the deadwood had been eaten out on the lower edge by chafing from the head of the pin, and that the draw-bar had shoved under the car, so that the pin-hole was out of sight.

The fireman, who was discharged from the company's service before the trial, says that, after the accident, he saw the car and the deadwood had been "champered out," where the pin had gone underneath it.

On the other hand, it is conclusively shown that the lower front edge of the deadwood was protected by an iron plate three fourths of an inch thick and two inches wide, bolted on, that would naturally make the chafing testified to by the plaintiff and fireman impossible.

Moreover, the conductor and a car-inspector of seventeen years experience both testify that they examined the car after the accident and on the same day of it, and that the deadwood and draw-bar were were sound and perfect, and that the couping gear was in no way defective or out of repair. This same inspector and another of seven years experience and the foreman of defendant's car department, within ten days after the accident, all testify that they examined the car and found the coupling gear sound and in good order.

The car was being shoved backward, up a slight incline, when

the plaintiff pulled the pin, and it is hard to see how he could have done so, if, as he says, the draw-bar had been defective as indicated by an eaten condition of the deadwood, so that pressure would shove the head of the pin two or three inches under the deadwood, for there is no evidence to show that greater pressure was put upon the draw-bar after the car began to move than at the inception of its momentum, and such is not the natural result of moving a single car on a nearly level track.

Mr. Meritt, defendant's superintendent of many years standing, and a man well-known, testifies that, after the accident, the plaintiff called at his office in Boston and told him that, when he "reached down to pull the pin, he lost his balance and fell over between the draw-bars."

The conductor testifies that, on the same day of the accident, he asked the plaintiff "how he got in there," and he replied that "he didn't know."

The plaintiff does not pretend to have observed the eaten condition of the deadwood, while drawing the pin, indicating a defective draw-bar; and it is very improbable that, after he had been so severely injured and while he was hanging to the ladder for his life to prevent falling under the moving train, he should have observed the condition of the draw-bar to determine whether it was defective or not.

Considering, then, the overwhelming weight of evidence in favor of a sound car, and the improbability of the plaintiff's account of the manner of his injury, together with the testimony of two witnesses as to the plaintiff's own account, of how it occurred, before he had become stimulated with the zeal of a lawsuit, showing that he either received his injury in an entirely different way from that now claimed, or that he did not know exactly how he did receive it, which is quite probable, it seems as if the jury must have been influenced by some improper motive in rendering a verdict for the plaintiff; it is, therefore, considered that a new trial should be ordered.

Motion sustained.

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

GUSTAVUS C. KILGORE *vs.* FRANK U. RICH.

Waldo. Opinion April 7, 1891.

Infant. Minor. Necessaries. Contracts.

A board bill contracted by an infant to enable him to attend school, is a necessary, the payment for which may be recovered of him by suit.

If the infant procure another to pay the bill for him, that payment is regarded as the furnishing of necessaries, for which a suit may be maintained against the infant for the reasonable value to him of the amount so paid.

ON EXCEPTIONS.

This was an action of assumpsit on an account annexed. The defendant pleaded the general issue, with a brief statement averring his infancy. The case is stated in the opinion.

Joseph Williamson, for plaintiff.

An infant may bind himself to pay for his good teaching and instruction, whereby he may profit himself afterwards. Co. Lit. 172. Money paid for an infant for necessaries is recoverable from him. Chit. Con. 142; Metc. Con. 79; *Swift* v. *Bennett*, 10 Cush. 436; *Randall* v. *Sweet*, 1 Den. 460; *Conn* v. *Coburn*, 7 N. H. 368; 3 Bac. Abr. 394; *Robinson* v. *Weeks*, 56 Maine, 102.

William H. Fogler, for defendant.

If an infant has lived with his parents or guardian who have duly cared and provided for him, he can not bind himself for necessaries. *Wailing* v. *Toll*, 9 Johns. 141; *Swift* v. *Bennett*, 10 Cush. 436; *Hull* v. *Connelly*, 3 McCord, 6; 2 Bl. R. 1325; 1 Esp. 211. Counsel also cited: *Hoyt* v. *Casey*, 114 Mass. 397; Sch. Dom. Rel. 555; 1 Bl. Com. 466, note; *Kline* v. *L'Amoreux*, 2 Pai. Ch. 419; *Conn* v. *Coburn*, 7 N. H. 368; *People* v. *Moores*, 4 Den. 518, 519.

PETERS, C. J. The jury found that, at the request of the defendant, then an infant, the plaintiff paid for him a board bill which he had previously contracted while attending school. It

was ruled at the trial that the expense of an infant's board while attending school might be regarded as necessaries. The correctness of this ruling is perhaps unquestioned. At all events, Coke's enumeration of the kinds of necessaries has always been accepted as true doctrine, which are these: "Necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise his good teaching, or instruction, whereby he may profit himself afterwards."

It was also ruled at the trial, that an infant being liable to one person for such a bill, could make himself liable to another who should pay such bill for him at his request; the liability to such other person not to be measured by the amount actually paid, but limited, irrespective of the contract price, to such sum as would be a reasonable compensation for the board. This ruling does not appear to infringe against any legal principle, and an examination of the cases satisfies us that it is well supported by the authorities.

The infant's liability is in no way enlarged by owing the debt to one rather than to another. The rule lends no temptation to create a debt as it is already created. The right to transfer the liability from one to another might be a great convenience to a minor. One creditor might be unable or unwilling to wait for payment, while a friend and acquaintance, as a substituted creditor, might be accommodating in that respect. It would give a self-supporting minor more facilities for support. We have not, in our examination of authorities, noticed any case that opposes the principle. In *Clarke* v. *Leslie*, 5 Esp. 28; it was held that an infant who was threatened with arrest upon a process sued out against him on a debt for necessaries, would be liable to a person who, at his request, advanced money to release him. In that case there was legal pressure, but in many instances moral pressure would be great. *Swift* v. *Bennett*, 10 Cush. 436, is a case where an infant bought an outfit for a whaling voyage, drawing for the amount of the bill on the plaintiffs, who accepted the bill and paid it when it became due. They were allowed to collect of the infant what the goods were reasonably worth to him, in an action for money paid on his

account. So in *Conn* v. *Coburn*, 7 N. H. 368, a person who signed an infant's note, given for necessaries, as a surety, was allowed after payment of the note to recover the amount paid, not upon the note, but as money paid for the benefit of the infant. *Randall* v. *Sweet*, 1 Denio, 460, is precisely in point with the present case.

The defendant relies on the rule generally prevailing in the cases that money is not a necessary, though lent to an infant who afterwards purchases necessaries with it. "But," says Mr. Bishop, "one who pays money at his (infant's) request to a third person for necessaries can recover it." Bish. Con. § 914. The difference is between lending or paying. Mr. Wharton, (Whar. Con. § 72,) finds the doctrine adopted in late American cases, that a person who lends money to an infant to purchase "specific" necessaries stands in the position of the tradesman who furnishes the necessaries. In the case at bar the plaintiff could have taken an assignment of the claim, and been entitled to recover it, and there really is no good reason to defeat his claim as it is here presented.

Exceptions overruled.

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

IVORY LITTLEFIELD *vs.* JAMES WATERHOUSE.

SAME *vs.* SAME and another.

York. Opinion April 7, 1891.

Arbitration. Award,—divisible.

It is not an objection to an award that the referee has decided a matter not submitted to him, if he has decided the matter that was submitted, the matters being distinct and separable; one part of the award may be taken and the other left.

ON EXCEPTIONS.

The defendants excepted to the ruling of the presiding justice who ordered that the following award of the referee be accepted :

"That there is now and was at the date of the plaintiff's writ, and on the first day of June, A. D. 1889, as appurtenant to the land of the plaintiff as described in said writ, a right of way over the land of the defendant described in said writ. following the path or road now visible thereon to the public road; and that for the obstruction of said way as alleged in said writ, the said plaintiff recover against the said defendant, three dollars as damages, with costs of reference taxed at fifteen dollars and twenty-six cents, and costs of court to be taxed by the court." Upon the above report being recommitted the referee amended the same by adding "That I find said right of way above-found, to be subject to gates and bars as heretofore maintained by the occupiers of the servient estate."

The case is stated in the opinion.

H. H. Burbank, for defendants.

The referee should only have found that defendants were (or were not) guilty, and, if guilty, assessed damages.

He had no right, nor power, nor authority, under the pleadings, to do more. And yet, he has attempted to define a way with limitations which are both uncertain and indefinite by the terms of the award, namely: "subject to gates and bars as heretofore maintained by the occupiers of the servient estate."

No allegation in the writ, nothing in the award, defines or makes certain any way "heretofore maintained."

No owner of the dominant estate can trace, from the record, nor be confined to, any particular way over the servient estate. *Banks* v. *Adams*, 23 Maine, 259; *Colcord* v. *Fletcher*, 50 *Id.* 398; *Lisbon* v. *Bowdoin*, 53 *Id.* 327.

The referee exceeded his powers in making these awards in that he has awarded to plaintiff a right of way, or some other right, whereas the actions are brought not to recover any right, nor to define or determine any right, but merely to recover damages for an alleged obstruction of an alleged right.

As in trespass, money is the only remedy here sought, and money only should have been awarded.

"Guilty" or "not guilty," "and no more," would have met the

legitimate allegations of the writ and pleadings; and to award more was an excess of power given to the referee.

To define the limitations of any way or right, and determine liabilities of owners, present and future, was, manifestly, *ultra vires*; an exercise of authority not delegated nor intended to be granted or assumed.

Especially forcible is this point in the second action, wherein a third person, not a party, is an alleged owner of the servient estate. *Wyman* v. *Hammond*, 55 Maine, 534; *Littlefield* v. *Smith*, 74 *Id.* 387; *Walker* v. *Simpson*, 80 *Id.* 148. The awards are invalid altogether. *Walker* v. *Sanborn*, 8 Maine, 288; *Boynton* v. *Frye*, 33 *Id.* 216.

B. F. Hamilton and G. F. Haley, for plaintiff.

Counsel cited: *Strong* v. *Strong*, 9 Cush. 561; *Tallman* v. *Tallman*, 5 Cush. 325; *Karthaus* v. *Ferrer*, 1 Peters, 223; *Sperry* v. *Ricker*, 4 Allen, 17; *Byers* v. *Van Deusen*, 5 Wend. 268; *McKinstry* v. *Solomons*, 2 Johns. 57; *Solomons* v. *McKinstry* 13 Johns. 28; *Mt. Desert* v. *Tremont*, 75 Maine, 252; *Clement* v. *Durgin*, 1 *Id.* 300; *Gordon* v. *Tucker*, 6 *Id.* 247.

An award may be good in part, and bad in part, and if separable, the good will be affirmed. *Stanwood* v. *Mitchell*, 59 Maine, 121. May be good in part and void in part, when the part which is void, is not so connected with the rest as to affect the justice of the case. *Orcutt* v. *Butler*, 42 Maine, 83; *Banks* v. *Adams*, 23 *Id.* 259; *Day* v. *Hooper*, 51 *Id.* 178; *Rawson* v. *Hall*, 56 *Id.* 142; *Boynton* v. *Frye*, 33 *Id.* 216; *Peters* v. *Peirce*, 8 Mass. 398; *Skillings* v. *Coolidge*, 14 Mass. 43; *Harrington* v. *Brown*, 9 Allen, 579; *Gilmore* v. *Hubbard*, 12 Cush. 220; *Barrows* v. *Capen*, 11 Cush. 37; *Warner* v. *Collins*, 135 Mass. 26; *Martin* v. *Williams*, 13 Johns. 265; *Cox* v. *Jagger*, 2 Cowen, 638.

PETERS, C. J. These actions were instituted by the plaintiff for disturbing his right of way over land adjoining land of his own, and servient to his land for purposes of passage. In one

instance the alleged obstruction was the erection of a building upon the way, and in the other the removal of a causeway and locking up a gateway which existed across the way.

The award of the referee sustains each action, assessing damages and costs. It also finds that the right of way shall be subject to gates and bars as heretofore maintained by the occupiers of the servient estate. The plaintiff is content with the special finding which seems to be unfavorable to him, casting a burden upon his right, while the defendant, who would seem to be benefited by the finding, objects to it.

The objection specified by the defendant is that, in making the special award, the referee exceeded his jurisdiction. As the rules are not made a part of the exceptions, and are not produced, we can not know whether they conferred special authority on the referee or not. But if he has acted in excess of the power conferred on him, the act will be merely a harmless error. The general award, which is distinct and separable from the special, will be sustainable, whether the other be rejected or not.

Exceptions overruled.

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

STATE OF MAINE *vs.* ELIZABETH MINNEHAN, appellant.

Androscoggin. Opinion April 7, 1891.

Intoxicating Liquors. Warrant. Description of premises. Pleading.

A liquor warrant against a dwelling-house sufficiently describes the premises by an averment that the house is occupied by the defendant, and situated on the east side of Blake street; the house being in fact so occupied and situated east of Blake street, but not adjoining it; although there be another house between that of the defendant and the street, and access to defendant's house be by an alley running from the street past the other tenement.

ON EXCEPTIONS.

After verdict against the defendant, she excepted to the instructions of the presiding justice, and which are stated in the opinion.

Frank L. Noble, for defendant.

The offense is local by nature, and the description of the place to be searched must be particular, special and specific. Const. of Maine, Article 1, § 5; *State* v. *Roach*, 74 Maine, 563; *State* v. *Kelleher*, 81 *Id.* 346. Description must be so accurate by metes and bounds that officer can find the place without reference to what persons he may find in it, or any knowledge he may have outside the complaint and warrant, and legally sufficient to convey by deed. *State* v. *Robinson*, 33 Maine, 564; *Jones* v. *Fletcher*, 41 *Id.* 254.

J. M. Libby, county attorney, for the state.

PETERS, C. J. This is a search and seizure process wherein the premises to be searched are described as follows: "The dwelling-house and its appurtenances occupied by her, said Elizabeth Minnehan, and situated on the east side of Blake Street, in said Lewiston."

In the trial, evidence was introduced tending to show that the premises searched were those actually occupied by the defendant as a dwelling-house; that said dwelling-house was east of Blake Street; that said house was not next to Blake Street on its easterly side; but that between said house and said Blake Street was another house, not occupied by the defendant, and a space of about twelve feet between the two houses; that the approaches to the dwelling-house occupied by the defendant were by a passage or alley-way running to it from Blake Street; and that all the doors of the premises searched opened on to the alley way.

The counsel contended that there was a fatal variance between the description in the warrant and the description of premises proved. The judge ruled, substantially, that the jury would be authorized to find that there was no variance, if the evidence be believed.

There is really no variance. At most, there is a slight diminution of description in the warrant, not misleading at all. The warrant does not necessarily call for a location of the house immediately upon the street, but on the east side of it. It is

on the east side of Blake Street, and is the house occupied by the respondent. The description as a whole would lead the officer serving the warrant to the correct house. The description would have been practically perfect had these words been added to it, "and connected with Blake Street by an alley running from the house thereto." But that fact was easily ascertainable upon an examination of the locality.

Exceptions overruled.

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

LUCY A. BARRON and another, in equity, *vs.* EDGAR M. PAINE.

SAME *vs.* HOWARD F. WHITCOMB.

SAME *vs.* CHARLES C. LARRABEE.

SAME *vs.* SAMUEL L. TREAT, JUNIOR.

Hancock. Opinion April 7, 1891.

Corporation. Stockholder. Unpaid Stock. Mortgage Debt. Judgment. Presumption. R. S., c. 48, § 47.

By the statutes pertaining to corporations, stockholders who have not fully paid in their subscriptions for stock are liable to pay the deficiency to any creditors of the corporation who may institute proceedings to recover the same, excepting creditors whose claim consists of a mortgage debt of the corporation; *Held*: That an agreement of the corporation to pay a mortgage debt of another, does not make it a mortgage debt of its own. Its own debt is not secured by mortgage.

A judgment regularly obtained against a corporation is conclusive evidence of its indebtedness in a suit by one of its creditors against stockholders to recover the amount remaining unpaid upon their stock, unless it be shown that such judgment was procured by collusion or fraud.

A stockholder in a business corporation is presumed to continue to be a stockholder until the contrary is shown.

The correctness of the decision in *Burbank* v. *Gould*, 15 Maine, 118, questioned.

ON REPORT.

Bills in equity, heard on bills, answers and proofs, brought under R. S., c. 48, § § 44 to 48, to collect a judgment of the defendants as stockholders of the Bar Harbor Land Company, and which the plaintiffs had recovered against the corporation.

The material portions of the bill against the defendant, Paine, are as follows:

1. That your complainants, under their writ dated September 7th, A. D. 1889, entered in the Supreme Judicial Court, holden at Ellsworth, within and for said County of Hancock, on the second Tuesday of October, A. D. 1889, recovered a lawful and *bona fide* judgment against the Bar Harbor Land Company, on the thirtieth day of January, A. D. 1890, for the sum of $3196.29 debt or damage, and $16.29 costs of suit, upon which said judgment execution was duly issued, dated January 31st, A. D. 1890, and placed in the hands of one William Fennelly, a deputy sheriff of the said County of Hancock, who, on March 8th, A. D. 1890, made return thereon, in substance, that after diligent search therefor he could find no property of said corporation in his precinct and he duly returned said execution in no part satisfied; which said judgment was based upon a claim in contract against said Bar Harbor Land Company, in favor of your complainants, expressed and implied; and that said judgment is still held by your complainants in full force and not satisfied, reversed or annulled.

2. That said Bar Harbor Land Company is a corporation with a capital stock fixed at three hundred thousand dollars, divided into sixty thousand shares of the par value of five dollars each, organized, created and established under the laws of Maine, on the twenty-seventh day of May, A. D. 1887, and from then to and at the date of this bill duly existing and having an established place of business at said Bar Harbor.

3. That your complainants are informed and believe that on a certain day, to wit, June fourth, A. D. 1887, the said Edgar M. Paine, under the name of Edgar Paine, subscribed for, agreed to take and did take stock in said corporation to a large amount, to wit: one hundred shares; that the said respondent has not paid for the stock so taken by him, either in cash or in any other matter or thing at a *bona fide* and fair valuation thereof, or made payment in any manner required by law. (Amended by striking out the words in the first and second

lines so as to read: "That, on the fourth day of June, A. D. 1887, said respondent subscribed for," &c.)

4. That the cause of action, upon which the said judgment of the complainants against said corporation was founded, was contracted wholly during the ownership by the said respondent of his said stock.

5. That the proceedings of the said complainants to obtain their said judgment against said corporation were commenced on the 7th day of September, A. D. 1889, as by the date of the writ above mentioned appears; and that your complainants are informed and believe, (amended by inserting the words "and therefore allege,") that their said proceedings to obtain judgment were thus commenced during the ownership by the said respondent of his said shares of stock, or within one year after the transfer of such stock was recorded on the books of said corporation.

Wherefore your complainants believing that the respondent in the premises has become liable to pay said judgment and costs to the extent of his said unpaid stock, pray:

(1.) That a subpœna in the usual form required issue unto the said Edgar M. Paine, commanding him to appear at a certain day and make full answer to this bill, but not under oath, answer under oath being hereby waived.

(2.) That it may be ordered and decreed by this Honorable Court that the said respondent pay your complainants such sum as may be found justly due them in the premises, in such manner as to this Court may seem proper.

(3.) That this Honorable Court may grant such other and further relief in the premises as may be necessary and proper.

Dated this 14th day of March, A. D. 1890.

LUCY A. BARRON,
GEORGE A. BARRON.

(Defendant's Answer.)

The answer of Edgar M. Paine, who says:

1. That as to the allegations contained in paragraphs Nos. 1, 2, and 4, of the complainants' bill, the respondent has no

knowledge or information in the premises, and neither admits nor denies said allegations, but calls for proofs.

2. That on the date alleged, the respondent did agree to take and did take one hundred shares of the capital stock of said Bar Harbor Land Company; but that the respondent did pay for the same in cash at the rate of three and fifty-one hundredths dollars per share; in all paying to said company for said stock three hundred and fifty dollars in cash.

3. The respondent admits that the proceedings of the complainants to obtain their said judgment against said company were commenced on the seventh day of September, A. D. 1889, but avers that it is nowhere alleged, as a matter of fact in the complainants' bill, that said proceedings to obtain judgment were thus commenced during the ownership by said respondent of his said shares of stock or within one year after the transfer of said stock was recorded upon the books of the Bar Harbor Land Company aforesaid. And the respondent insists on this special matter of defense and asks to have the same benefit therefrom as if he had demurred specially to said bill.

4. The respondent further avers that the debt, upon which said judgment against said Bar Harbor Land Company was obtained, was a mortgage debt of said company, as appears by the following statement: On June 14th, 1887, the complainants owning certain real property in the town of Eden, Hancock County, Maine, subject to a mortgage for three thousand dollars and interest at six per cent, until paid, given August 3rd, 1886, to James Eddy, conveyed the said property to said company; and as a part consideration for said conveyance, the said company promised, covenanted and agreed with the complainants to assume and pay said mortgage; and that this agreement is the same contract referred to in paragraph 1, of the complainants' bill as the basis for the judgment herein described.

And the respondent prays that the complainants' bill may be dismissed and that he, the respondent, may have decreed to him his reasonable costs in this behalf most wrongfully sustained.

EDGAR M. PAINE.

Respondent's answer was amended in the following particulars, on such terms, if any, as the law court should see fit to impose.

After paragraph 4, is added: "The respondent further avers that the debt which is the foundation of this proceeding was not contracted during his ownership of said unpaid stock, and he further avers that said judgment is invalid in particulars which could avail the corporation on a writ of error."

Plaintiffs' proofs: Writ in action, Lucy A. Barron and George A. Barron *vs.* Bar Harbor Land Company, dated September 7, 1889. In the declaration are the following allegations:—

. . . "That on said date of said sale, the said plaintiffs executed and delivered to the defendant a good and sufficient warranty deed of said lots, which said deed was then and there accepted by the defendant and by it caused to be recorded in said Registry, in Book 216, Page 250.

"That prior to the date of said conveyance, to wit, on August the third, A. D. 1886, the plaintiffs mortgaged the first lot aforesaid to James Eddy, of Providence, Rhode Island, to secure the payment of three thousand dollars on or before four years from date at the option of the mortgagors, with interest at six per centum per annnm, which said mortgage was existing and in force according to said terms at the date of the said sale. That at the date of the sale aforesaid, and as a part of the consideration paid for the land conveyed, the defendant assumed said mortgage and agreed to take up and pay the same forthwith; and in a mortgage of the said two lots given back by the defendant to the plaintiffs on the date of said sale, and as a part of the same transaction, the said defendant expressly assumed said mortgage to James Eddy and promised to pay the same and the sum and interest secured thereby forthwith. And the plaintiffs allege that the defendant has not taken up said mortgage to James Eddy nor paid the sum secured thereby nor any part thereof."

The above writ was entered at the October Term, A. D. 1889, when and where the defendant (Bar Harbor Land Company) appeared by its counsel and the case was continued to the January Term, A. D. 1890, of said court, at which term

judgment was rendered for the plaintiffs by agreement of counsel for three thousand one hundred and ninety-six dollars and twenty-nine cents. The date of said judgment is January 30th, A. D. 1890. Execution issued in due form, January 31st, A. D. 1890, for amount stated in complainants' bill, which execution was, on the 8th day of March, A. D. 1890, returned in no part satisfied.

Plaintiffs also put in extracts from the records of the Bar Harbor Land Company proving its officers, their powers, duties, &c., and votes relating to the purchase of the lands of the plaintiff, the payment and security therefor.

They next put in their deed of the two lots of land to the Bar Harbor Land Company dated June 14, 1887, containing, next after the description this clause :—

"The first hereinbefore-described being herein conveyed subject to a certain mortgage to James Eddy dated, August 3rd, A. D. 1886, recorded in said Registry, in Vol. 208, Page 217, and the second lot herein above-described being herein conveyed subject to a mortgage given the Hancock County Savings Bank, dated September 7, A. D., 1885, recorded in said Registry in Vol. 202, Page 97, and by acceptance of this deed the grantee herein assumes and promises to pay all sums now or hereafter due under both said mortgages and debts secured thereby." The covenants in this deed make no mention of any incumbrances, but are full covenants. Also, the mortgage of the Bar Harbor Land Company, dated June 14, 1887, to the plaintiffs, securing payment of ten thousand dollars, and which excepts from the covenants against incumbrances the two mortgages above-named by the following terms : . . . "except two certain mortgages, one to James Eddy, and the other to the Hancock Savings Bank, both of which said mortgages said company has assumed and hereby covenants to pay ;" . . .

Also, the mortgage deed from Lucy A. and George A. Barron to James Eddy, dated August 3rd, 1886. The condition of this mortgage, which is mentioned in the plaintiff's writ, was to pay three thousand dollars, on or before four years from its date, at the option of the mortgagors, with interest at six per

cent per annum. Said mortgage covered the first lot described in plaintiff's writ.

Also, the mortgage from plaintiffs to Hancock County Savings Bank, of the second lot described in plaintiff's writ, dated September 7th, 1885, with condition to pay eight hundred dollars in one year from date with interest at eight per cent per annum. One year redemption clause. This mortgage was foreclosed by publication, the last publication being July 4th, 1889.

Also, mortgage from plaintiffs to Fannie D. Burrill, of all plaintiff's real estate in Hancock County, dated November 30, 1886, with condition to pay one thousand dollars, in one year from date with interest at eight per cent per annum. This mortgage was foreclosed, and paid by the plaintiffs prior to the date of their bill.

George A. Barron testified:

"I reside at Bar Harbor. My wife, Lucy A. Barron, and I owned the property described in this bill prior to June 14th, 1887. I made the contract of sale to the Bar Harbor Land Company of that property. I think the first conversation in regard to the sale was June 14th, 1887, the same day the papers were made. The papers were passed and the deed was passed the same day. I made the contract with Mr. Burrill. He was president of the company. I saw him first on the premises. (The conversation between Mr. Burrill and the witness was objected to by the defendant, but was received, and, with all the rest of the testimony in the case, to be considered by the full Court if admissible, and if not, to be rejected.)

"I think Mr. Burrill asked me if I wanted to sell my place, and I told him that I had said that I would sell it, and he asked me what I asked for it, and I told him $20,000. He asked me if I thought that was a fair price, and I told him I considered it so, and that I had been offered that week $18,000, by a New York party, and I did not take it, and I thought it was well worth what I asked. Then he asked me how I wanted my pay, and I told him I would trade for one half down and for the other half I would take a mortgage; or he proposed to me about

the mortgage, that he wanted to give a mortgage for a part of it; and I told him I would take $10,000 down and he could keep back a sufficient sum to cover these mortgages which he knew all about. I said I thought it amounted to about $5000; it proved to be a little more than that when the interest was figured. He said he would take it, and he said: "you have your wife come up this afternoon and we will have the deeds made and the papers passed." We went up; we went into the office of the Land Co. in Mr. Hamor's building, and we agreed that this money should be deducted out for these mortgages and interest up to the time of the sale, and I was to give a receipt for having received that much, the amount of the mortgages and interest, three mortgages altogether, two to Mr. Eddy, and one to him and his wife. We executed the papers at the office of the Land Co. that afternoon. I think I was paid $4,818, in money. There was a check for $3,000. At the time I was paid I received a mortgage from the corporation. Mr. Burrill asked me if Mr. Eddy would take his money, in the first part of the conversation, and I told him I thought he would without doubt. These mortgages were to be paid right away; Mr. Burrill said he would attend to his matter right away. They were not paid. I have been obliged to pay a portion of them. I have paid a mortgage for one thousand dollars,—Fannie Burrill's,— and two hundred and nine dollars interest, making one thousand two hundred and nine dollars in all. He foreclosed on his mortgages. I don't know that Mr. Eddy foreclosed but Mr. Burrill foreclosed on the eight hundred-dollar mortgage."

(Cross-Examined.) "The three thousand-dollar mortgage to Mr. Eddy has not been paid. I learned that it was not from the agent, Mr. Brown. It was on the agreement to pay that mortgage that this action was brought, this one against Mr. Paine. The eight hundred-dollar mortgage to Burrill has not been paid; I presume it will have to be soon. I have forgotten, though, what time the foreclosure runs out."

"This suit was brought on the agreement of the Bar Harbor Land Co. to assume and pay the mortgage to James Eddy, and the agreement upon which the suit was brought is the agreement

contained in the deed to the Bar Harbor Land Company, from me."

It was admitted that the mortgage on which suit was brought and judgment recovered, has not been paid by anyone.

Defendants offered no evidence.

Wiswell, King and Peters, for plaintiffs.

Amendments are matters of form only. Courts of equity more liberal in allowing amendments than courts of law. *Hewitt* v. *Adams*, 50 Maine, 276.

Judgment conclusive of the debt. *Gaskill* v. *Dudley*, 6 Met. 556; *Johnson* v. *Somerville Co.* 15 Gray, 218; *Thayer* v. *N. E. Litho. Co.* 108 Mass. 528, and cases cited; *Milliken* v. *Whitehouse*, 49 Maine, 527; *Cole* v. *Butler*, 43 *Id.* 401; *Sidensparker* v. *Sidensparker*, 52 *Id.* 481; Cook on Stock, &c. § 209, and cases cited. A contract to pay a mortgage may be enforced before the promisee has paid it. 1 Jones Mort. (3d Ed.) § 769; *Locke* v. *Homer*, 131 Mass. 93. Defenses should have been set up in original suit. Error will not lie. *Weston* v. *Palmer*, 51 Maine, 73; *Denison* v. *Portland Co.* 60 *Id.* 519. Debt recovered in the judgment, not a mortgage debt of the corporation. A mortgage debt of a corporation can not mean anything else than an obligation of the corporation, the performance of which is secured by a conveyance of some property from the corporation.

This Land Company promised the plaintiffs to pay certain debts amounting to over five thousand dollars; but it gave the plaintiffs no security for the fulfilment of that promise, or conveyance of property by way of pledge to become void upon performance of their agreement. The corporation gave up no rights and parted with nothing. On the contrary, the corporation became possessed of over five thousand dollars, in cash of the plaintiffs' money for the purpose of taking up certain mortgage debts of the plaintiffs, and has converted it to its own use. The plaintiffs took without security the naked promise of the corporation to pay the money over at once to the holders of certain mortgages, thinking that it would be for the interest of

the corporation to do so to protect its equity of redemption; and so it would, had the corporation kept on and tried to reap the benefits of its bargain. But instead of this, on the decline of prices of land, it allowed this land to fall back to Barron, held on to the five thousand dollars, which was a part of the cash to be paid Barron under the original sale, and delivered him over to be devoured by his mortgagees. Could not be made a mortgage debt of the corporation if plaintiffs had paid the mortgages and claim subrogation thereby. Subrogation would only result in forcing payment out of plaintiffs themselves. *Kinnear* v. *Lowell*, 34 Maine, 302. There are three methods by which stockholders seek to avoid their liability to corporate creditors: first, by a cancellation or withdrawal from the contract; second, by release from their obligation to pay the full par value of the stock; third, by a transfer of the stock. In each of these cases, however, a court of equity does its utmost to protect the corporate creditors, and a rigid scrutiny will be made in the interest of creditors into every transaction of such a nature. Cook on Stock, &c., § 199.

Deasy and Higgins, for defendants.

The debt is a mortgage debt of the corporation, for which stockholders are not held. It is a "mortgage debt." A mortgage debt is a debt secured by a mortgage. The corporation, by entering into the agreement aforesaid, became liable to the mortgagee directly. *Dearborn* v. *Parks*, 5 Maine, 81. This debt (from the corporation to the mortgagee,) is secured by mortgage. This debt is certainly a mortgage debt. It will not be contended that the mortgagee could have recovered of the stockholders on the ground that the contract constituted a non-mortgage debt. But the company not only became liable to the mortgagee but might have become liable to the plaintiffs. No liability to the plaintiffs accrued, however, because they, the plaintiffs, did not pay the debt. *Burbank* v. *Gould*, 15 Maine, 120. That they did recover judgment by default without paying the debt is immaterial in this connection.

Their legal right was to pay the debt and be subrogated to the rights of the mortgagee, and to have the benefit of his claim and his security. This debt thereby would have been secured by a mortgage and, therefore, a mortgage debt. Jones Mort. § § 768, 879; *Kinnear* v. *Lowell*, 34 Maine, 299. As between these parties, the corporation became the principal debtor, the plaintiffs merely sureties. Jones Mort. § § 741, 769, note 2; *Locke* v. *Homer*, 131 Mass. 109.

Second. It does not appear that the debt was contracted during the defendant's ownership of stock. This is one of the elements that must be made to appear affirmatively by the plaintiffs. *Grindle* v. *Stone*, 78 Maine, 178. The only evidence on the subject is the admission in the answer that the defendants did take stock on June 4th, 1887. Assuming that the debt was contracted on June 14th, 1887, (which we deny) there is no evidence that the defendants owned any stock on that day. But we say that there was no debt at all. Barron had not paid the mortgage debt even at the time of the trial, and, therefore, there was no debt due to him. *Burbank* v. *Gould*, *supra*. The judgment is conclusive evidence of the existence of the debt only at the date of its rendition. It does not prove that a debt has existed even for one day prior. The corporation, then, owed the debt on January 30th, 1890. But it is not proved that the defendants owned any stock at that time; the only proof, touching the point, is the admission in the defendants' answers that they did take some stock on June 4th, 1887.

PETERS, C. J. These are suits in equity to recover certain amounts from stockholders, who have not fully paid for stock taken by them in a corporation against which the complainants have an unsatisfied judgment. The complainants have carefully pursued all the steps requisite for recovery, according to the procedure approved in the similar case of *Grindle* v. *Stone*, 78 Maine, 176; and we see no obstacle in the way of sustaining either of the suits. There can be no need of our noticing any points in opposition to the contention of the complainants, except such as we find upon the brief of the learned counsel of the respondents. What is not contested is admitted.

The first objection alleged is that the debt due the complainants is a mortgage debt of the corporation, the statute (R. S., ch. 48, § 47,) providing that stockholders shall not be personally liable to contribute to the payment of a mortgage debt of the corporation. The facts are that the complainants sold to the corporation real estate upon which was a mortgage given by the complainants to secure their note, and, as a part payment of the consideration of the conveyance to it, the corporation agreed to pay the mortgage note, holding the complainants indemnified against the same. That was not a mortgage debt of the corporation. Their liability is upon a contract with the complainants to pay that debt. The corporation owed the complainants a sum of money equal to that debt, and agreed to pay them by paying such debt. Paying the debt would pay the complainants. Not paying it, the corporation owed the complainants the amount. The policy of the statute is only to exempt stockholders in a corporation from liability on a debt which the corporation itself has secured by mortgage; the presumption being that in such case the creditor has security enough, at all events, security he is satisfied with.

The next objection is that the complainants are not entitled to recover, because they have not themselves first paid the mortgage debt before proceeding against the corporation or its stockholders. The case of *Burbank* v. *Gould*, 15 Maine, 118, is cited upon this point, and it tends to sustain the view that such a defense, had it been made, would have prevented a recovery against the corporation. That case, however, has been much shaken by the course of decision since its day, and whether it would stand against the weight of authority now in opposition to it, may be questionable. The more modern doctrine seems to be that the grantor can recover the debt of the grantee, who has agreed to pay it, in order to have the means with which to pay it himself, and be discharged from his obligation. Equity can be resorted to, in such case, to require a proper appropriation of the money recovered. *Locke* v. *Homer*, 131 Mass. 93, embodies a mass of citations on the question.

But the disadvantage of the defense in the present case is that

the complainants already have a judgment against the corporation for the amount of the debt, obtained without opposition, and that the respondents as stockholders, in the absence of fraud or want of jurisdiction, and wrong is not in this case pretended, are concluded thereby. *Milliken* v. *Whitehouse*, 49 Maine, 527. This is a common principle in the law, found in many analogous cases. This point of defense comes too late. It should have been before judgment against the corporation if at all.

Another point only is taken, evidently not much relied on, and that is that there is not evidence showing that the respondents were stockholders at the time the debt against the corporation was contracted. They were original stockholders, commencing their ownership with the inception of the corporation. It does not appear that they have ever conveyed. Owners at the beginning, nothing to the contrary appearing, owners till the end, is the presumption of continuance in circumstances like these; *Grindle* v. *Stone*, *ante*.

Complainants were allowed to make a formal amendment. The respondents amended and added on their side also. The amendments were not of a character that require the imposition of terms.

Bills sustained with costs.

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

JOSIAH H. GOODRICH, administrator, *vs.* EDWIN G. COFFIN.

Somerset. Opinion April 7, 1891.

Account Stated. Evidence. Admissions. R. S., c. 41, § 21.

Where parties agree upon a settlement of accounts by an amount stated, having at the time a particular sum in mind and alluding to the sum without naming it, it is competent to prove by other evidence (here by the admission of defendant) what the amount of the agreed indebtedness was.

When a defendant sets up in an action on an account stated that, in the accounts computed, there were items of lumber sold illegally because the lumber had not been officially surveyed, the burden is on him to prove the facts.

ON MOTION AND EXCEPTIONS.

This was an action of assumpsit to recover for lumber and sawing the same. The declaration was in a single count upon account stated. The account annexed to the plaintiff's writ was as follows:

E. G. Coffin to John D. Baker, Dr.

January 20, 1886, to balance due on lumber and sawing lumber as agreed on settlement between the parties, $110.00

Interest, 13.20

$123.20

Plea, general issue.

When the cause came on for trial, the plaintiff introduced no evidence of an accounting, or a statement of their accounts, had between the defendant and the plaintiff's intestate in the life-time of plaintiff's estate, or of an agreement between them that the sum mentioned in the account annexed, or any other specific sum, was due from defendant to plaintiff's intestate, except as appears in the evidence reported and made part of the exceptions; nor was there any evidence that the lumber mentioned in the account annexed to plaintiff's writ was ever surveyed by a sworn surveyor, as required by R. S., c. 41, § 21.

After the plaintiff's evidence was all out, the defendant's counsel moved for a nonsuit; whereupon the plaintiff asked leave to amend the declaration in the writ by striking out the item thirteen dollars and twenty cents in the account annexed, and to amend the declaration so as to read one hundred and ten dollars instead of one hundred and twenty-three dollars and twenty cents; which amendment was allowed by the court against the defendant's objections.

The defendant then moved for a nonsuit on the ground that there was a variance between the declaration and the proof, and also upon the ground that there was no evidence of a survey of the lumber by a sworn surveyor, and that thus the claim sued for was founded on an illegal transaction; which motion was overruled by the court.

The court instructed the jury, among other things, as follows:

"If you are not satisfied that the proof in this case which has been offered sustains this declaration and the amount as claimed, you are not authorized to return a verdict for the plaintiff. In other words, you must be satisfied so far as the amount is concerned that, from all the evidence introduced here, and it all comes from the plaintiff's side, this defendant owed the deceased in his lifetime $110.00 for lumber and for sawing. You have heard the testimony of the administrator as to what was said to him by the defendant, and you have also heard the testimony of one or two other witnesses as to what they heard Mr. Coffin say in regard to the amount that was due. If, from this evidence, you are satisfied that the defendant did owe that amount, $110.00, then you would be authorized to return a verdict for that amount, provided no provision of statute is in the way."

To these rulings and instructions the defendant excepted.

The jury returned a verdict in favor of the plaintiff for $116.33.

In one of the conversations between the plaintiff and defendant, the latter stated that the bill was all right, that John, meaning the plaintiff's intestate, had "sent him a bill, and that he," Coffin, "had paid him something on it;" and when the plaintiff told him it was twenty-five dollars and that the same had been credited to him, he said it was all right, and repeatedly stated that he would pay the bill. The defendant, also, admitted to one Dinsmore, that there was due the Baker estate, one hundred and ten dollars for the lumber. In the presence of one Burke, the defendant said to the plaintiff, "You haven't received that bill yet." The plaintiff said "No." "Well," he said, "it should have been paid long ago. I was expecting some money, but I didn't receive it. I will fix it shortly."

There was evidence to show that the lumber was used in building a stable for the defendant, and that John D. Baker, delivered part of the lumber.

The defendant offered no testimony.

Merrill and Coffin, for defendant.

An account stated is an agreement between persons who have

had previous transactions, fixing the amount due in respect of such transactions, and promising payment. See note to *Lockwood* v. *Thorne*, 62 Am. Dec. 85; Abbott's Tr. Ev. 458. The admission must be of some certain and fixed amount due. 1 Chit. Pl. 359; 2 Greenl. Ev. § 128; *Seagoe* v. *Dean*, 3 C. & P. 170. Not sufficient without naming or referring to a sum certain. *Bernasconi* v. *Anderson*, 1 Mood. & Malk. 183; note to *Wiggins* v. *Burkham*, 10 Wall. 129; Lawyer's Coop. Ed. Vol. 19, 885. Admission must be to plaintiff or his agent, Chit. Pl. and Greenl. Ev. *supra*; *Hughes* v. *Thorpe*, 5 M. & W. 667; *Bates* v. *Townley*, 2 Exch. 152; *Hoffar* v. *Dement*, 5 Gill, 132 (S. C. 46 Am. Dec. 628); *Breckon* v. *Smith*, 1 A. & E. 488; *Thurmond* v. *Sanders*, 21 Ark. 255; note to *Lockwood* v. *Thorne*, *supra*; *Anding* v. *Levy*, 57 Miss. 61 (S. C. 34 Am. Rep. 435). Only exception to the rule, is in favor of merchants. Cases, *supra*. Plaintiff testifies to no admission by defendant of any fixed and certain balance. Dinsmore not agent of plaintiff, or his intestate. Burke testifies to no specific sum. There is no evidence of a survey of the lumber. Without it, plaintiff has no basis on which to rest his account stated. *Richmond* v. *Foss*, 77 Maine, 590. A promise to pay for a past consideration for which there is no legal liability, does not make a binding contract. *Hooker* v. *Knab*, 26 Wis. 511; *Smith* v. *Ware*, 13 Johns. 257; *Western Bank* v. *Mills*, 7 Cush. 539; *Chenery* v. *Barker*, 12 Gray, 345.

Walton and Walton, for plaintiff.

PETERS, C. J. The plaintiff's intestate, in his life-time, had an account against the defendant for lumber, upon which a balance was due when he died. After his death the plaintiff, his administrator, and the defendant had frequent conversations about the bill. The administrator relies on an agreement upon an account stated between himself and the defendant, and we are unwilling to say that an agreement of the kind was not proved by such conversations. The frequent admissions and promises of payment made by the defendant to plaintiff may not

unreasonably be considered as having established an understanding in their minds that a certain balance was due and should be paid.

It is contended by the defendant that the testimony of the plaintiff, who testifies to the declarations of the defendant, is not sufficient to establish an agreement, because it does not identify any fixed and certain sum, as the balance to be paid; and, further, that any deficiency in that respect cannot be supplied by evidence outside of the parties themselves.

It is true that the amount of the bill was not named by either party in the interviews sworn to by plaintiff, for the reason, probably, that the sum was so clearly fixed in their minds that there was no occasion to speak of it. The promises were to pay *the* bill, *that* bill, *the* balance, and the like. Each party knew exactly what was referred to. The sum was implied as clearly as if spoken.

It is not true, however, that the amount of the bill cannot be legally proved by other evidence. Mr. Greenleaf says, on this exact point, 2 Ev. § 126, "If the amount is not expressed but only alluded to by the defendant, it may be shown by other evidence that the sum referred to was of a certain and agreed amount." This seems a consistent rule. Suppose the agreement referred to a note of hand, or written contract, or article of personal property, and allusion should be to *that* note, contract, or article, it would certainly be natural to rely on any satisfactory evidence to prove the identity of the thing alluded to. In the present case defendant's words spoken to a third person are the proof of amount.

And in this connection another objection is taken against the plaintiff's proof. The testimony of third persons was received revealing declarations made by the defendant to them. The defense contends that the peculiar contract, relied on in this case, cannot be made with a stranger to the contract. That is very true, but strangers may testify to declarations of the defendant which corroborate the testimony of the plaintiff, or prove any independent fact having relevancy to the issue. For such purpose only was such testimony received.

A further objection presented by the defense is that there is an absence of proof that the lumber originally sold was ever surveyed by a sworn surveyor as required by law. The statute requires official survey only when lumber is sold by the thousands of feet, and not when sold by quantity without survey. *Richmond* v. *Foss*, 77 Maine, 591.

The action not being prosecuted on an account for lumber sold, but on an agreement upon an account stated, although involving a lumber account, we think the burden rests on the defendant to show that any illegality taints the account. The statute is very severely penal, and illiberal constructions of it need not be cultivated. The lumber may have been sold in lump or by quantity, without necessity of survey.

Motion and exceptions overruled.

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

CATHERINE BRAY *vs.* MARCELLUS L. HUSSEY and another.

Piscataquis. Opinion April 8, 1891.

Deed. Condition. Reservation. Waiver.

A deed of land containing a reservation of pasturage for two cows during the life-time of the grantor, or, in lieu thereof, the grantee's personal obligation to fit her yearly fuel for the stove, and, in aid of the reservation, the stipulation that the grantee "is not" to incumber or convey the land meantime, does not create an estate on condition, but conveys a fee subject to the reservation.

ON REPORT.

This was a real action. Plea, *nul seizin*. The plaintiff put in a deed from one Lombard, given in 1854, which, it was admitted, covers the *locus*, and rested.

The defendants put in a warranty deed from the plaintiff, dated July 1, 1881, duly recorded, to John Roberts covering the same premises. The material parts of this deed, next after the description, and upon which the parties were at issue are given in the opinion.

It was admitted that Roberts, the grantee, filed his petition in insolvency, in Piscataquis County, February 12, 1887, and

Calvin B. Kittredge was appointed his assignee; that said assignee, under a proper license, sold and conveyed by quit-claim July 16, 1887, the insolvent's interest in the premises to one Micajah Hudson, who sold and conveyed the same to the defendants on July 27, 1887.

The insolvent, Roberts, mortgaged the same premises February 12, 1887, to Joseph B. Peaks, for seventy-five dollars, to secure the fees, expenses, &c., incident to his proceedings in insolvency. This mortgage was purchased July 9, 1887, by Hudson who having taken an assignment of it, transferred it July 27, 1887, to the defendants. Joseph B. Peaks testified that, on September 27, 1887, he went upon the *locus* at the request of Catherine Bray, the plaintiff, and took possession of the premises, at her request, under a claim of condition broken in her deed to Roberts. It was admitted that the plaintiff was never prevented from, nor interfered with, in pasturing her cows upon the premises in question.

J. B. Peaks, for plaintiff.

Plaintiff says her deed to Roberts is a conditional deed, that having entered for condition broken, the title has revested in her. The condition is limited and restrictive only, and not void. 1 Wash. R. P. (Ed. 1860) p. 448; *Blackstone Bank* v. *Davis*, 21 Pick. 43; *Gray* v. *Blanchard*, 8 Pick. 287, 289. Defendants are attempting to hold a title from Robert's assignee in violation of the condition plainly expressed in plaintiff's deed to him. *Thomas* v. *Record*, 47 Maine, 500. Robert's mortgage of February 12, 1887, was in violation of the condition. Entry sufficient. *Jenks* v. *Walton*, 64 Maine, 100; *Brickett* v. *Spofford*, 14 Gray, 519. Such conditions have been upheld. 4 Kent. Com. 123; Shep. Touch. 117; *Dorr* v. *Harrahan*, 101 Mass. 531; *Linzee* v. *Mixer*, 101 Mass. 512.

Henry Hudson, for defendants.

HASKELL, J. The contention is, whether certain words, inserted in a warranty deed between the description and *habendum*, create a condition subsequent that may work a forfeiture of the grant. The words are:

"Said Catherine Bray [the grantor] reserves the right in the above described farm to pasture two cows in the pasture or pastures, used as such for the benefit of said Catherine Bray during her lifetime; or, if she does not use the pastures as above, said John Roberts [the grantee] is to fit her year's wood up for the stove. Said John Roberts is not to place any incumbrance on said land, or convey the same to anyone during the life of said Catherine Bray."

Conditions subsequent are not favored in law; and "an estate on condition cannot be created by deed except when the terms of the grant will admit of no other reasonable interpretation;" *Ayer* v. *Emery*, 14 Allen, 70; and the grantor's own language must be most strongly construed against him. *Hooper* v. *Cummings*, 45 Maine, 359.

It should be considered too, that, since the time of Coke, certain appropriate words have been universally understood to create a conditional estate. Co. Litt. *Lib.* 3, chap. 5. These are, "provided," "on condition," "so as." "To every good condition is required an external form." Shep. Touch. 126.

"In devises, a conditional estate may be created by the use of words which declare that it is given or devised for a certain purpose, or with a particular intention. But this rule is applicable only to those grants or gifts which are purely voluntary, and where there is no other consideration moving the grantor or donor besides the purpose for which the estate is declared to be created. But such words do not make a condition when used in deeds of private persons." *Rawson* v. *Uxbridge*, 7 Allen, 128. *Labaree* v. *Carleton*, 53 Maine, 211. *Duke of Norfolk's case*, Dyer, 138, b. *Mary Portington's case*, 10 Co. 42, a.

Apt words, even, do not always create a conditional grant where the intent of the grantor, as shown by the whole deed, was otherwise. *Episcopal City Mission*, v. *Appleton*, 117 Mass. 326; *Sohier* v. *Trinity Church*, 109 Mass. 1; *Stanley* v. *Colt*, 5 Wallace, 119.

The grant in question was for the expressed consideration of five hundred dollars. The reservation is pasturage for two cows

during the lifetime of the grantor, or in lieu thereof the grantee's personal obligation to fit her yearly fuel for the stove. In aid of the reservation, the grantee "is not" to encumber or convey the land meantime. That is, he stipulates two things; to fit the wood for the stove, if required, and to not sell the land during the lifetime of the grantor. Suppose the grantee dies before the grantor, does the land descend charged with the grantee's agreements expressed in the deed? *Parish* v. *Whitney*, 3 Gray, 516; *Newell* v. *Hill*, 2 Met. 180.

Moreover, the forfeiture is now claimed by reason of the grantee's mortgage to the plaintiff's attorney contrary to the supposed condition in the deed. The mortgage, for description, refers to the deed in question, and secured seventy-five dollars for the expenses of the mortgagor's insolvency proceedings. The mortgagee, now the plaintiff's attorney, would not have taken the mortgage and enforced it as a valid security, knowing it to have been worthless. It is more probable that the plaintiff, who admits in her brief that she is the grandmother of the mortgagor, knowing that he had become involved with pressing debts and needed money to avail himself of the beneficent provisions of the insolvent law, assented to the mortgage. She might waive conditions in her deed if there were any. *Hooper* v. *Cummings*, *supra*. The defendants are assignees under the mortgage and grantees of the equity under a deed from the assignee in insolvency of the mortgagor.

The absence of apt words creating a conditional estate, the rule of law requiring a construction of the deed most strongly against the grantor, and the reluctance of courts to declare forfeitures, and the peculiar relation and conduct of the parties in interest, lead the court to consider the deed in question as the conveyance of a fee, and not merely a conditional estate. The result leaves the plaintiff in the full enjoyment of the reservation in her deed. *Stone* v. *Houghton*, 139 Mass. 175; *Ayling* v. *Kramer*, 133 Mass. 12; *Kennedy* v. *Owen*, 136 Mass. 199.

Judgment for the defendants.

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

ENOCH O. GREENLEAF, Administrator, *vs.* GILBERT ALLEN.

Franklin. Opinion April 8, 1891.

Costs. Puis Darrein Continuance. Pleadings waived.

Where a defendant sets up payment under a plea *puis darrein continuance*, and the defense prevails, the plaintiff recovers the costs up to the date of the plea, and the defendant recovers them afterwards.

The same result properly enough follows where all the facts involving such a defense are submitted to a judge at *nisi prius* for his decision upon them without pleadings. In such case formal pleadings are impliedly waived.

ON EXCEPTIONS.

This was as action of assumpsit for money had and received and referred to the presiding justice with leave to except. The original action was brought by Lucretia Coolidge, plaintiff's intestate. In that action reported to the full court, there was a decision in favor of the plaintiff and the following rescript sent down :—

"Whether the defendant was appointed guardian under the 5th or 6th Section of Chapter 67 of R. S., the appointment was void for want of jurisdiction in the Probate Court. The records fail to show that the plaintiff was a married woman as required in one case or that an inquisition was had as required in the other.

"But as the defendant appears to have acted in good faith, though he is required to account for all the property received from or for the plaintiff, he is entitled to have deducted therefrom 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. For the balance, if any, the plaintiff will be entitled to judgment. If none, judgment will be for defendant. Damages to be assessed at *nisi prius*."

See *Coolidge* v. *Allen*, 82 Maine, 23.

For the purposes of this case it was admitted that the defendant, under the decision of the law court, was indebted to plaintiff, at the date of the writ, in a greater sum than twenty dollars; but had before her death, and at this term, paid over the entire amount to her legal guardian, who was authorized to and did

receive the same. The presiding justice assessed the damages at one cent, and ordered judgment for plaintiff for that sum. To this assessment and order the defendant excepted.

H. L. Whitcomb, for defendant.

E. O. Greenleaf, for plaintiff.

Costs follow as a natural consequence in assumpsit where the plaintiff has the right to recover. If defendant's theory be correct, the plaintiff may recover the debt and the defendant the costs in the same action. In other words, the plaintiff may be entitled to bring his action but must pay the defendant damage for so doing,—thus both parties recover in the same action.

It was the duty of the defendant to have turned over to Mrs. Coolidge her property when demanded; that duty he neglected. Where there is a neglect of duty the law presumes damages. *Laflin* v. *Willard*, 16 Pick. 64.

This defendant had no legal control of the property of plaintiff's intestate, could not be considered her personal representative, and really stood in the place of an executor *de son tort*, and could not legally settle any account of her estate. *Campbell* v. *Sheldon*, 13 Pick. 24.

The rights of the plaintiff were invaded by the defendant, and some damages follow as a matter of course, though she may not show that she has sustained any actual damage.

At the entry of this action the defendant was indebted to the plaintiff's intestate for over twenty-five hundred dollars; that would give her full costs, and the plaintiff here submits that there is no reason why the defendant should not pay such damages as the court at *nisi prius* assessed with full costs. No tender was ever made, and none pleaded. The process was a valid one, and costs must follow. It seems to be well settled that where judgment is rendered for the penalty of a bond, being large enough to carry full costs, and execution issues for a nominal sum in damages, the plaintiff is entitled to full costs. *Howard* v. *Brown*, 21 Maine, 385.

And it is submitted that the reasoning is equally good that the plaintiff, here, be governed by the same rule and have nominal damages and full costs.

PETERS, C. J. When this suit was brought there was a cause of action for money had and received exceeding the sum of twenty dollars. The case went to the law court, and was sent back, after the decision of some questions, for an assessment at *nisi prius* of damages for the plaintiff. During vacation before the cause came on for trial, the sum due the plaintiff was paid to another party authorized by law to accept payment of the same, leaving the plaintiff without further foundation for his action. The case was referred, upon these facts, to the judge at *nisi prius* for decision of all questions, who ordered a judgment for the plaintiff for nominal damages without costs.

Had the defendant set up payment under a plea *puis darrein continuance*, the facts would have supported the plea, and judgment must have been for the defendant, the plaintiff recovering costs up to the date of the plea and the defendant afterwards.

After such plea a plaintiff has an option to submit to it, or to proceed with his action. He recovers costs until such plea is interposed, because until then his action is well founded. But after that it would be wrongfully prosecuted. Up to that time he is the prevailing party, while after that the defendant becomes the prevailing party. *Lyttleton* v. *Cross*, 4 Barn. & Cress. 117; *Coffin* v. *Cottle*, 9 Pick. 287; *Staples* v. *Wellington*, 62 Maine, 9. It has already been so decided in this state. *Leavitt* v. *School District*, 78 Maine, 574.

No such plea was presented. But we are disposed to think the result should be the same, upon the ground that a reference to the sitting justice for a settlement of all the questions of the case would be regarded as a waiver of formal pleadings. Substituting this result for the entry made would give to each party his legal right.

Exceptions sustained so far as to modify the decision of the judge by allowing full costs to the plaintiff up to the first day of the March term, 1890, and full costs to the defendant afterwards.

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

ALEXANDER C. HAGERTHY *vs.* HOSEA B. PHILLIPS.

Hancock. Opinion April 8, 1891.

Contribution. Promissory Notes. Indorsers. Evidence.

A, being in financial straits, made a note to his own order, signed by his firm as makers and indorsed by him, and procured three of his friends to indorse the same with him in blank for his accommodation. Before making the note he applied to the three separately and each promised to indorse if the others would. Nothing was said by or to either of them about the order of indorsement, or the share of liability to be assumed. The note was sent around for them to sign severally, just as they happened to be found, without any design as to the precedence of signatures. *Held:* That the jury was justified in finding that, as between themselves, it was a joint accommodation indorsement, such as renders them liable to contribute equally in the payment of the note, they having, on account of the insolvency of the makers, to pay the same.

ON MOTION AND EXCEPTIONS.

This was an action of assumpsit in which the plaintiff recovered a verdict for the amount due him from the defendant as a joint accommodation indorser of a note which the plaintiff had paid. It appeared that the note, thus paid by the plaintiff, was a renewal by the same parties of another note of the same amount. The defendant objected to the admission of the first note in evidence, and all evidence relating to it, as immaterial. The court admitted it as showing the terms of indorsement, and permitted the plaintiff to introduce the second note and show what was done with it, against the defendant's objection that, whether or not it was a renewal, was a legal proposition. The court, also, permitted the plaintiff to prove, subject to the defendant's objection, conversations between the maker of the note and his accommodation indorsers.

The case is stated in the opinion.

G. P. Dutton, for defendant.

The presumption of law is, on accommodation paper, that parties indorse in the order in which they appear on the note; that their liability is regulated thereby; that a subsequent indorser is not liable to one who stands above him on the note;

that a prior indorser, if he would compel contribution, must show clearly an express or implied contract of joint indorsement, and that nothing is to be presumed. 1 Dan. Neg. Ins. § 703.

There is no evidence that defendant exchanged words with plaintiff, or that the understandings between the maker and other indorsers were brought home to him. He promised to indorse if the other two would, and as a fact was the last indorser. He would not indorse until the other two had signed. This was a several contract. Their evidence proves that defendant so understood it. First note not admissible. A written contract cannot be explained by another written contract. How parties went on to note A is not admissible to show how they went on to note B. Any agreements, &c., between maker and other indorsers of second note not brought home to defendant.

Wiswell, King and Peters, for plaintiff.

Counsel cited: *Coolidge* v. *Wiggin*, 62 Maine, p. 568.

PETERS, C. J. The plaintiff having paid a note on which he was an indorser with two others, sues the defendant, another indorser, for contribution, claiming that the three indorsers, as between themselves, were, by parol understanding amounting to agreement, joint indorsers holden alike. The note, running from the firm of Mason & Cushman, to the order of H. B. Mason, a member of the firm, stood indorsed in blank, in the following order of names: H. B. Mason, A. G. Hagerthy, George A. Phillips, H. B. Phillips (defendant).

By the reading of the note all previous indorsers would be liable to the defendant thereon, and not he to them. The plaintiff, however, contends that the apparent phase of liability is changed by the facts.

While oral evidence is admissible to prove the contention of the plaintiff, it should be clear and satisfactory, inasmuch as there is easily a temptation to attempt to pervert the truth in such a matter, and the note is itself strong evidence that it represents the contract correctly. The burden of proof lies heavily upon the plaintiff.

The note in question was undoubtedly the renewal of a

previous note, with the same signers and indorsers and made on the same terms and conditions. All facts touching the first note were, therefore, admissible in the controversy over the second, the two notes really constituting but one transaction.

As to the first note Mason testified that his firm needed money; that he conceived the idea of raising it on a note to be indorsed by his friends, having in mind the three persons whose names were afterwards obtained; that he saw these persons separately, and asked each if he would indorse a two thousand dollar note for him if the two others would, and all consented to do so; that nothing was said by him or them in relation to the order of indorsement; that he afterwards obtained the indorsements, calling upon the parties just as he happened to find them, having no design as to who should sign first or last; and that all that was said touching the manner of signing was an assurance to the first signers that the note should not be used until signed by all. Hagerthy and George A. Phillips corroborate this statement, testifying that each of them promised to indorse if the other two would; that the note was not to be used until the three indorsed it; that nothing was said about the order of indorsement; and that no design was entertained by them excepting that the note should have the triple indorsement to complete the transaction.

The defendant testifies differently, not asserting that it was expressly stated that he was to indorse the note only upon the liability of a last indorser, but claiming as much. He seems to have preferred to sign last on the second note, presumably, lest the note would be used without the other signatures. The plaintiff brought out considerable testimony in rebuttal of the defendant's, which had a very strong tendency to show that some of defendant's material statements were mistakes.

There is much evidence on the question of renewal that is important in itself, but not necessary to be quoted in an examination more especially of the legal features of the case. It may be added, however, that the evidence alluded to hardly strengthens or weakens that more especially applicable to the history of the first note.

The jury in finding for the plaintiff, have declared that the indorsers assumed a joint liability, and that any loss sustained should be apportioned between them.

Does the evidence justify the conclusion? Not a word was spoken by one indorser to another during negotiation. The facts were communicated through Mason. Each promised to sign if others would. If the act done was the act promised to be done, the order of signing was immaterial, because it was not a qualification of the promise. Each indorser made precisely the same promise. Either was as much entitled to sign last as the other. The first and second signers required assurance that the third would sign, a useless formality if their risk was not lessened thereby. They understood that the indorsers were to be holden alike, basing their conclusion on precisely the same facts that were presented to the defendant to induce him to sign. The request of Mason was that the defendant would indorse for him, not for others. The idea was to divide the risk among his friends. The defendant's promise was not to indorse last, but to indorse. He was not to do an act alone,—the three were to do the act. The three did it, sharing obligation and risk alike. If the defendant be let out, the result would be that he did not assist his friend. Others furnished the assistance, who were sufficiently responsible to make the note good without defendant's name.

We are constrained to say we do not feel at liberty to set the verdict aside.

The exceptions become immaterial.

Motion and exceptions overruled.

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

IN RE, LAURISTON D. BURGESS, appellant from decree of Court of Insolvency, estate of SHERIDAN F. IRELAND, INSOLVENT.

Penobscot. Opinion April 8, 1891.

Insolvency. Provable Debts. Retiring Partner. Amendment of Proof of Debt. R. S., c. 70, § 25.

Where a partner sells his interest in the partnership property to his co-partner, who agrees as a part of the consideration of purchase to pay the partnership

debts and hold his partner harmless therefrom, and such partner in good faith afterwards pays a debt of the firm to save his own credit, he may prove the payment as an individual claim of his own against the private estate of the co-partner, who after such payment has gone into insolvency.

A creditor who has, by mistake of either fact or law, proved a debt against a partnership estate, when more properly provable against the private estate of one of the partners, may be allowed in the discretion of the court to withdraw his proof from the proceedings in the one estate and present it against the other.

On exceptions.

This was a proceeding in insolvency in the estate of Sheridan F. Ireland, adjudged an insolvent, individually and as member of the firm, Burgess & Ireland, by the Court of Insolvency for Penobscot County, on his petition filed October 19, 1887. The case comes into this court by bill of exceptions to the rulings, and orders of the presiding justice, filed thereto by Haynes, Pillsbury & Company, and other creditors, who objected to the plaintiff's right to withdraw his proof of debt which had been allowed as a claim against the firm, Burgess & Ireland, consisting of the plaintiff and the insolvent, and having the debt allowed against Ireland's individual estate. The exceptions were certified to the full court under R. S., c. 70, § 13.

The principal facts are disclosed by the following extracts from the appellant's petition in the Court of Insolvency: "That in the month of April, 1887, he dissolved partnership with said Ireland, under an agreement then made by which he, the said Ireland assumed and agreed to pay all the debts, &c., of the said partnership; and said Ireland then and there received all the assets of said firm; that said Ireland thereafter conducted business on his own account until about the 20th of June, following, when he suspended payment owing debts both individually and as a member of said firm; that on the 16th of August, Bacon & Company, of Boston, were creditors of said firm in the amount of $532.58, and of Ireland, individually, in the sum of $49.13, and that on that day the appellant was compelled to pay said firm debt, and procured the same to be assigned to himself to his own use and benefit, being now the sole owner thereof; that said debt was proved as a partnership debt in the insolvency proceedings of said Ireland in the name of Bacon &

Company, but alleging the assignment in the deposition for the proof of debt. . . . That said claim thus proved should be withdrawn and proved as an individual claim against said Ireland, as in the deposition herewith presented is more specifically stated. Dated November 15, 1888."

Haynes, Pillsbury & Company, intervened and having filed objections to the petition, a hearing was had thereon, March 28, 1889, in the Court of Insolvency which on May 9, 1889, made a decree ordering that "the claim as presented in the proof of debt, referred to in the foregoing petition, be and the same is hereby wholly rejected and disallowed."

From this decree an appeal was taken to the next term of the Supreme Judicial Court, where, after hearing, the presiding justice ordered that the decree of the Court of Insolvency be reversed, and the appellant allowed to prove his claim, the partnership debt; finding as a fact that the appellant had paid it to Bacon & Company; and ruling that it could be proved as a claim for money paid under said agreement of Ireland to pay the partnership debts of Burgess & Ireland.

To this order and ruling the objecting creditors filed exceptions.

Barker, Vose and Barker, for objecting creditors.

The claim having been once allowed and not withdrawn, expunged or reconsidered, the decree of disallowance was not responsive to the petition, was without foundation; a nullity, and should be dismissed by this court. This is not an objection to the allowance of a claim, as in *Tibbetts* v. *Trafton*, 80 Maine, 264. Burgess' claim stands proved and allowed. Shall there be two proofs of the same claim against the same estate?

Under the contract between Burgess and Ireland, upon the dissolution of the firm, Burgess' claim must be for damages for breach of the contract, and not for money paid. *Morton* v. *Richards*, 13 Gray, 17. The damages must be assessed; agreement applies to all the partnership debts and not a particular debt. There has been no accounting between the partners. *Fernald* v. *Johnson*, 71 Maine, 439; R. S., c. 70, § 25; *In Re*, *Clough*, 2 B. R. 59.

Charles Hamlin, for appellant.

PETERS, C. J. The court is of the opinion that the ruling at the trial of this case was correct.

One partner sells his interest in the partnership property to his co-partner, the latter promising as a part of the transaction to pay the partnership debts. This promise constitutes a direct and personal obligation of the one to the other. If the retiring partner pay a debt which his late associate agreed to hold him harmless of, he immediately has a claim against the latter for money paid. He can at once bring suit upon the claim. We do not feel the force of the argument that the action must be special on the contract of indemnity, and not maintainable until all the partnership debts have been paid. There may or may not be other defaults, and if there are it may be difficult to anticipate whether they will occur or not, and long periods may lapse between defaults. Such a remedy might turn out to be a very inadequate indemnity. We think that as often as money is paid on distinct and independent debts by the retiring partner, on account of default of payment by the other partner, suits are maintainable therefor in the common form of action for money paid. *Fay* v. *Guinon*, 131 Mass. 31; *Stevens* v. *Record*, 56 Maine, 488.

It follows, we think, that such a claim may be presented against the private estate of the defaulting partner, if his estate be in process of settlement in insolvency, provided that when the partners contracted between themselves, no conspiracy or wrongful intention existed in relation to such estate. A partner may contract in good faith with a co-partner as he may with any one else.

In the case before us, it appears that the partner, who purchased the property and business, sometime afterwards carried both the partnership estate and his own private estate into insolvency for settlement. The other partner, present claimant, having been required, sometime prior to the insolvency, to pay a debt against the firm, took an assignment of it to himself, and had it proved for his benefit, in the name of the assignor, against

the partnership estate. This was an irregular proceeding. In law he could not take an assignment to himself of a claim against himself, although against himself and another. The act was payment of the debt, and the original creditor had no claim to be proved.

The claimant now asks that the proof of claim against the partnership estate be withdrawn, and he allowed to present his claim against the private estate of the debtor. *Re, Golder*, 2 Hask. p. 33. Judge Lowell, in the case of *In re Edward Hubbard, Junior*, 1 Low. 190, held that a creditor who has proved his debt in bankruptcy may be permitted to withdraw his proof, if it was made under a mistake of law or fact. Much more allowable should it be regarded when the first proof was improperly made. The case of *Ex parte Lake*, 2 Low. 543, substantially like the present, is favorable to the claimant's contention. We think it would be a matter of justice to allow the claimant to withdraw his claim in one form and present it in the other, as prayed for by him. The estate is in a condition not to suffer injury by the change, as no confusion of assets will be created thereby. Fraud is not suggested. The claimant paid the debt in good faith in August, 1887, and his partner did not go into insolvency until October afterwards.

The appellee cites *Morton* v. *Richards*, 13 Gray, 15, as inconsistent with the practice approved by Judge Lowell. It is to be noticed that that case was decided on the peculiar terms of the Massachusetts statute, not liberal enough to embrace a case like the present, though the court in the opinion intimate that it might have been better if the statute had not been limited as it was. Our statute is of much wider effect. By ch. 70, § 25, R. S., all debts due and payable from the debtor at the time of filing the petition for insolvency proceedings are provable. The Massachusetts case, therefore, fails of influence on the present question.

Exceptions overruled.

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

JAMES H. HAYNES, and others, *vs.* ARTHUR R. GOULD.

Penobscot. Opinion April 8, 1891.

Insolvency. Parties. Limitations. Judgment. Common Law Action. R. S., c. 70, § 62.

In an action on the case against the defendant for fraudulently procuring a resolution of composition, under the insolvent law, in which it appeared that the plaintiffs were creditors but did not become parties to the proceedings; and no fraud or deceit towards the plaintiffs was shown; neither were they induced to do or omit to do any act whatever; nor to forego any right against their debtor, *Held:* that the plaintiffs have no legal cause of action.

Under R. S., c. 70, § 62, creditors in composition proceedings, who desire to avoid them for fraud, must bring their suit within two years, or they will be barred.

ON EXCEPTIONS.

(Declaration.) "In a plea of the case; for that one James H. Oak, of Presque Isle, in the County of Aroostook, was, on the twenty-third day of March, A. D. 1887, owing the plaintiffs for merchandise before that time sold and delivered to him, the sum of two hundred and sixty-two dollars and fifty-six cents, which said debt was wholly unsecured, and was owing other creditors whose claims were wholly unsecured, large sums, to wit; in all the sum of $18,123.41, and said Oak was then and there insolvent, having assets available to said creditors, to the value of $15,000.

"That on the 23d day of said March, Howes, Hilton & Harris, Charles McLaughlin & Co., both of Portland, in the County of Cumberland, and Oscar Holway & Co., of Auburn, in the County of Androscoggin, creditors of said Oak, filed in the Insolvent Court in Houlton in the County of Aroostook, a petition in due form, representing that they believed and had reason to believe that said Oak was insolvent, and that it was for the best interest of all the creditors that the assets of such debtor should be distributed as provided by law; and upon hearing on said petition said Oak was, on the fifth day of April, A. D, 1887, adjudged insolvent, and thereupon the warrant required by law issued to

the messenger, returnable April 27th, A. D. 1887, for the proof of claims and choice of assignee.

"That on the eleventh day of said April, said Arthur C. Gould, for the purpose of influencing said insolvency proceedings bought and took the absolute title by assignment of the claims of the three petitioning creditors above-named and of ten other creditors, aggregating in all the sum of $9,271.26, and having acquired the title and ownership of said claims which, together with a debt due by said insolvent to him of $169.06, was then a creditor representing more than one half of said insolvent's unsecured debts.

"That on the 27th day of said April the said defendant for the purpose of securing the title to the assets of said insolvent, and of defrauding the plaintiffs and the other unsecured creditors, secured the election of himself as assignee of said insolvent, and thereupon, by a conveyance by the judge of said Insolvent Court, took title to, and the possession of all the real and personal estate, books, notes, accounts and memoranda of said insolvent.

"That thereupon, said defendant, with intent and purpose of defrauding said plaintiffs and other creditors, set himself to procure a composition under Section 62, of Chap. 70, of the Revised Statutes, for twenty-five per cent of the actual net claims against said estate, representing to the creditors, that such per cent was all that could be realized out of the assets thereof, and himself signed the affidavit provided in said section, as the attorney, duly authorized, the several names of the fourteen original creditors whose claims he had before that time purchased and taken an assignment of, and then owned, and was himself the sole creditor therefor, aggregating, with his own claim, the sum of $9,440,52, and further represented to the creditors that the large creditors (meaning the creditors whose claims he had purchased as aforesaid) had examined the assets and had signed off for that per cent; by which individual efforts and false representations and unlawful use of the names of fourteen persons, not creditors, instead of one, he secured the requisite number of creditors and the requisite amount in value

required by said section; and said insolvent on the 29th day of June, 1887, took the oath required and was thereupon discharged.

"And the plaintiffs aver that said defendant took and appropriated the assets of said insolvent estate for his own use, which if properly administered, as it was the defendant's duty to have done, would have paid much more than twenty-five per cent to all the creditors; and that said defendant received from said assets, directly and indirectly, a much larger dividend than twenty-five per cent on his own debt of $169.06 and on the claims purchased by him as aforesaid, which excess plaintiffs aver they, with the other creditors, were deprived of by the false representations and fraudulent and unlawful acts of said defendant as aforesaid.

"And they further aver that all and singular, the representations made by the defendant, as aforesaid, were false, and that said defendant then and there knew them to be false, and that they were made with the intent to defraud the plaintiffs and the other creditors, and did so injure and defraud them, to their damage as they say the sum of five hundred dollars."

Upon the reading of the writ, the presiding justice ruled that, upon proof of the facts as alleged in the writ, the plaintiffs could not recover, and ordered a nonsuit. To this ruling the plaintiffs excepted.

Barker, Vose and Barker, for plaintiffs.

Writ discloses an infringement of plaintiffs' legal rights. Having a legal remedy, equity will not lie to avoid multiplicity of suits. R. S., c. 70, does not abridge any common law right; it enlarges the remedy. Plaintiffs attack no judgment or decree which defendant can invoke in his defense. They had the right to presume that all the proceedings in insolvency would be open, fair and in good faith. They allege that defendant has by fraudulent acts and false oaths imposed upon the court; that he bought claims for the purpose of influencing the proceedings.

F. A. Wilson and C. F. Woodard, for defendant.

Plaintiffs' remedy is by bill under R. S., c. 70, § 13, if dissatisfied with any decision of the Insolvency Court. *Harris* v. *Peabody*, 73 Maine, p. 266. Have had their day in court and declined it.

Proceedings cannot now, after distribution and long delay, be attacked collaterally. There is nothing wrong or illegal in purchasing claims after bankruptcy or insolvency, and they may be proved by the purchaser in his own name, or of the assignor. *Re, Murdock*, 1 Low, 362; *Re, Davenport, Ib*, 384; *Re, Pease*, 6 B. R. 173; *Re, Strachan*, 3 Biss. 181. This objection should have been taken in the Court of Insolvency as well as the election of the assignee, voting on each claim, assent to composition, &c., and subject to revision by this court. Cannot raise these questions originally in this court while the judgments and and decisions below are in force. *Bird* v. *Cleveland*, 78 Maine, 524. Plaintiff's real complaint is the action of other creditors. Their action lawful; immaterial what led to it. *Heywood* v. *Tillson*, 75 Maine, 225.

HASKELL, J. Case against Arthur R. Gould, for that Arthur C. Gould fraudulently contrived to procure a resolution of composition under the insolvent law in the matter of James H. Oak, of whom the plaintiffs were unsecured creditors.

Unless the defendant and Arthur C. Gould are identical, of which there is no proof, of course the action cannot be maintained. But, assuming that they are the same, no fraud or deceit is shown towards the plaintiffs. They were not parties to the insolvency proceedings; neither were they induced to do or omit to do any act whatever, nor to forego any right against their debtor. If the insolvency proceedings were fraudulent, they were void as to plaintiffs, who have stood by and without protest allowed their debtor's estate to be apportioned among his creditors, and who, for two years at least, might have sued for and recovered their debt of Oak. R. S., c. 70 § 62. When this suit was brought does not appear. The plaintiffs have no legal cause for their action. Their grievance is *damnum absque injuria*.

If the insolvent proceedings were not fraudulent and void, the plaintiffs, residents of this state, are bound by the record in the insolvent court, and will be so long as it stands undisturbed.

Exceptions overruled.

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

HOSEA B. PHILLIPS *vs.* DOREPHUS L. FIELDS.

Hancock. Opinion April 8, 1891.

Chattel Mortgage. Attachment. Account. R. S., c. 81, § § 44, 45.

The mortgagee of chattels attached must deliver a true account of the amount due on his claim to the attaching officer, and not to the attaching creditor, before he can bring an action against such officer.

A written notice by a mortgagee stating, in substance, it is "impossible for me to know the amount of my mortgage claim, but if I am correct it is somewhere about twenty-three hundred dollars," is not a compliance with the statute.

FACTS AGREED.

On the 27th day of November, A. D., 1888, one Herbert F. Emery was owner of a certain building, being personal property on leased land at Bar Harbor, subject to a chattel mortgage running to and held by Hosea B. Phillips, the plaintiff in this suit. Said mortgage had been duly recorded prior to said date.

On said 27th of November, said building was attached as the property of said H. F. Emery, by the defendant Dorephus L. Fields, sheriff of Hancock County, and taken from the possession of said Phillips and said Emery, by said Fields, by virtue of said attachment in a suit wherein said H. F. Emery, was defendant.

On the third day of December, A. D., 1888, the sheriff gave the said Phillips written notice of said attachment in accordance with the statute. Said Phillips, within ten days thereafter, to wit: on the 4th day of December, A. D., 1888, mailed to Deasy & Higgins, the attorneys of the attaching creditors in said suit against said Emery, the following postal card:

"Ellsworth, Dec'r 4th, 1888.

Dear Sir: I understand you want to know how much I have against Emery store. Will say it is impossible for me to know, but if I am correct it is somewhere about $2300.

Truly, H. B. PHILLIPS.

To Deasy & Higgins."

It was admitted that this card was intended as a response by

Mr. Phillips to the officer's aforesaid demand; was addressed to Deasy & Higgins, Bar Harbor, Maine, and was duly received by them December 4th, 1888.

The case was reported to the full court to determine:

1st. If sending by mail to the attorneys of attaching creditor was a compliance with statute.

2. If the form of words above set forth, as used on the postal card, was a sufficient compliance with requirements of Chap. 81, § 45, Revised Statutes.

Judgment to be rendered accordingly.

If for the plaintiff, damages to be assessed at *nisi prius*.

G. P. Dutton, for plaintiff.

Counsel cited: *Nichols* v. *Perry*, 58 Maine, 29.

The officer can have no higher rights than the principal, and notice to one is notice to both. It cannot be argued that the notice should be given directly to the officer, in order that he might have immediate information to guide him in his action. His work is accomplished,— he has attached,— and the only use of any kind which he can make of the notice, is to turn it over to the creditor. Neither can it be contended, that notice to the attorney is not a compliance with the law. The attorney and the officer are the agents of the creditor, and the true account rendered to one, is rendered to all.

The statute does not restrict the manner of "giving" the true account. If the mortgagee chooses to take the chances of sending by mail and of proof of delivery thereby, it is not becoming in the creditor to object, when, as in the case at bar, he admits that he received it within the time specified in the statute.

Plaintiff says it is impossible for him to know the amount due. Can, or does the defendant dispute this? Can, or does the law require what is impossible? Is not the mortgagee justified in a cautious statement, when a penalty follows a false statement? Is it contrary to reason and experience that in cases of complicated dealings, covered by a mortgage, it may be absolutely impossible for the mortgagee to tell, save approximately, how much there may be due him? He fixes the amount as nearly as possible, and more definitely than in *Nichols* v. *Perry*.

As the creditor is the party who is to furnish the money for the tender and the only party in interest, he certainly cannot complain if the notice is given to him rather than to the officer. The officer cannot complain, because his attachment is already made, and because no action can be brought against him under § 44. And in the case at bar there is no wish nor intention to hold the officer for damages but simply to settle the question as to the sufficiency of the notice. The creditor has made no tender and the design of the creditor seems to be to strip the plaintiff of his security for twenty-three hundred dollars rather than to protect his attachment by paying the mortgage debt. No right of the creditor is lost, he can still pay his twenty-three hundred dollars and hold the plaintiff to the truth of his statement.

Deasy and Higgins, for defendant.

Counsel cited: *Fairfield Bridge Co.* v. *Nye*, 60 Maine, 378; *Nichols* v. *Perry*, 58 Maine, p. 32; *Moriarty* v. *Lovejoy*, 23 Pick. 321; *Sprague* v. *Branch*, 3 Cush. 575.

HASKELL, J. Two questions are submitted. Is notice from a mortgagee to the attaching creditor, instead of the attaching officer, a compliance with § 45 of R. S., and is such notice, stating in substance, it is impossible for me to know the amount of my mortgage claim, "but, if I am correct, it is somewhere about $2300," sufficient.

The mortgagee had received from the attaching officer notice of the attachment, and was required by the statute as a prerequisite to his suit, within ten days thereafter, to "deliver to the officer a true account of the amount due on his claim."

An officer, by attaching chattels and taking them into his custody, becomes personally chargeable with their value. If they appear to be mortgaged, upon notice to the mortgagee of his attachment, he is entitled to receive from the mortgagee a true account of the amount due on his claim, in order that he may save himself by releasing the attachment, or paying the mortgage, or demanding indemnity from the attaching creditor if he insists upon disputing the mortgage. The liability is a personal one, and the officer is entitled to receive the notice. A notice

to the attaching creditors, who may be pecuniarily irresponsible, might serve him no good purpose. They might suppress the notice and allow the ten days to elapse, and leave the officer to take care of himself; for, if a notice to the attaching creditor is a compliance with § 45, it would seem that the notice required by § 44 might also be given to the creditor, instead of the officer; and, when notice had been given to the creditor under § 45, after the lapse of forty-eight hours, the officer could not invoke the protection of § 44. So the irresistible conclusion is, that the officer, who has sureties for the faithful discharge of duty, is entitled to personally receive the notices specified in both § § 44 and 45, of R. S.

Moreover, an attaching officer is entitled to a definite statement of the amount due on a mortgage of the chattels attached. That is, the statement of a definite sum that is claimed to be due. In *Nichols* v. *Perry*, 58 Maine, 29, upon which the plaintiff rests his case, the notice to the officer stated: "There is actually due me . . exceeding nine hundred dollars, as at the time said mortgage was given." The court considered this notice as a statement of nine hundred dollars due, for which the property could be redeemed. The notice relied upon here, says: "It is impossible for me to know, but if I am correct, it is somewhere about $2300." This gave no definite information. From it no tender of less than $2300, could safely have been made, and yet, there might not have been so much due.

It is said that a remedy is given by suit for false statement in such case. What would such remedy be worth in a case like this? The officer had a right to redeem the mortgage, and he had a right to know definitely how much the mortgagee claimed to be due, then, a false claim would make a case for damages. It may be said that in some cases it would be impracticable to state the exact amount due. There is no element of that sort in this case. The mortgagee says: "It is impossible for me to know" the amount due; but he does not take the trouble to give any statement whatever as an excuse for his inability to know. Had the mortgage been to secure a liability that was contingent and that could not be correctly stated in a gross sum, he might

have stated an amount that he believed would be just indemnity. This matter is by no means without difficulty; but attaching creditors must be considered, as well as mortgagees; and to guard against dishonest and fraudulent mortgages, the mortgagees should be required to state the amount due, or excuse the statement by such full, particular, detailed account as it is in their power to give, that the officer may have all the information upon which to act, that is practicable for the mortgagee to have.

Judgment for defendant.

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

THOMAS A. HUSTON, appellant, *vs.* LUCINDA F. WORTHLY.

Somerset. Opinion April 8, 1891.

Insolvency. Proof of Debt. Appeal. Composition. R. S., c. 70, § § 25, 62.

One creditor has no right of appeal from the allowance of the claim of another creditor against the estate of a debtor who makes a settlement by composition proceedings in insolvency.

ON EXCEPTIONS.

The debtor's wife having proved a debt against him, in his composition proceedings in insolvency, the appellant, Huston, a creditor, thereupon applied for a re-examination of the claim by the Court of Insolvency which resulted in a dismissal of the objection to its allowance. The creditor then appealed to this court, where upon hearing, the presiding justice ruled, in substance, that no appeal lies in relation to the allowance of claims in composition proceedings.

The appellant excepted to the ruling.

James Wright, for objecting creditor.

The claim offered for proof is not a debt due and payable. *Woodward* v. *Spurr*, 141 Mass. 283; *Abbott* v. *Abbott*, 67 Maine, 304.

An appeal, in cases of this kind, is provided for by § § 12 and 25, c. 70, R. S. The legislative intent is indicated by the

provision limiting the time, for hearing exceptions, to ten days, &c. If otherwise, creditors are without means of redress in fraudulent compositions.

Walton and Walton, for appellee.

PETERS, C. J. We think that one creditor has not a right of appeal from the allowance of the claim of another creditor against the estate of a debtor who makes a settlement by composition proceedings in insolvency. If such an appeal were allowable, the settlement of an estate that is intended to be expeditious and not hampered by many of the forms usual in other classes of cases, might become, by the wilfulness of parties, a protracted and expensive litigation. The creditor is deprived of no right in disallowing his claim to prosecute an appeal. It is not possible to see how an appeal could be useful to him. His own claim would be neither increased nor decreased thereby. The conception is impracticable.

This conclusion is within the rule of several cases touching similar questions. *Ex parte, Haynes*, 76 Maine, 394; *Ex parte, Morgan*, 78 Maine, 36; *Messer* v. *Storer*, 79 Maine, 512.

The creditor has remedy enough by an action on his own debt, if any fraud be committed by the insolvent, by virtue of section sixty-two of chapter seventy of the Revised Statutes.

Exceptions overruled.

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

IN RE, JAMES A. TOLMAN, appellant from decree of JUDGE OF INSOLVENCY COURT.

Knox. Opinion April 8, 1891.

Insolvency. Discharge. Trader. Books of Account. R. S., c. 70, § 46.

A person must be regarded as a trader, in the meaning of the insolvent law, who in addition to carrying on a milk farm for the purpose of retailing milk among his customers, increased his business by taking the product of his brother's farm, and purchasing from other sources from four to twelve cans of milk daily, each can containing eight quarts, for a period of eight months and more next prior to his going into insolvency.

Such an extent of purchasing, if necessitated by temporary causes, and continued for a short time might not have the effect to constitute a business of trading; but otherwise, continued for so many months.

A trader cannot be said to keep proper books of account, who keeps merely memorandum books, containing deliveries of milk to customers, some informal accounts and settlements, an occasional inventory of farm stock and products, but barely any charges of money paid out, and nothing to indicate where or how the principal proceeds of his business have been expended.

ON REPORT.

This was an appeal from the decision of the judge of the Insolvency Court, for Knox County, refusing a discharge to the petitioner on the ground that he was a merchant or trader and had not kept proper books of account. Upon hearing of the appeal the case was certified, on report, to the chief justice for the decision of the full court, under R. S., c. 70, § 13.

The material facts elicited from the insolvent's examination are stated in the opinion.

C. E. Littlefield, for appellant.

The facts summarized are: that the debtor was running a milk farm, producing and intending to produce, and arranging to produce all the milk sold, but by reason of unavoidable accident, he was obliged to buy some milk to supply his route for about eight months before he went into insolvency. These facts do not bring this insolvent within any definition of the term trader yet adopted by the court. The definition has already been extended artificially beyond the evident meaning and intent of the law. If a halt is not called in the extension of its application, it will soon be impossible for the average farmer to buy his seed and sell his crops, or to buy stock to fatten and sell, or colts to raise and sell, without becoming a trader. The construction of the statute hitherto adopted by the courts has been exceedingly technical and artificial, rather than remedial and in accordance with its beneficial intent. The underlying purpose of the insolvent law, is to relieve and not to oppress an honest debtor; to mitigate and not create financial distress. It should be construed with reference to its real purpose and objects, that they may be accomplished; not solely with reference to

arbitrary technical distinctions. To illustrate: A livery-stable keeper is held to be a trader because, "he bought hay and grain and sold it by keeping horses to bait and board at his stable." (*Groves* v. *Kilgore*, 72 Maine, 492.) A decision following precedents, but resting upon, at least, finical reasoning. The purchase and sale of one lot of cattle made a person a trader, yet if he killed only such as he reared himself, he would not have been. (*Sylvester* v. *Edgecomb*, 76 Maine, 499.) "But if he buy them and kill and sell them with a view to profit, he is a trader. A farmer, who in addition to his usual business, occasionally bought a horse to sell again for a profit, and continued the practice for one or two years, was held to be a trader."

Where will the court stop with reference to farmers? May a farmer buy a yoke of oxen in the fall and improve them during the winter to sell again in the spring, "with a view to profit," and continue to do this for years, as many of them do, without being a trader? Can he buy a horse or colt and keep them in the same way for the same purpose, without being a trader? Must a butcher raise all the stock he kills in order not to be a trader, or can he buy and fat calves and young stock without being a trader? Whether it is done "with a view to profit," cannot be the distinguishing element as one cannot conceive of the raising and killing of cattle except with a "view to profit." The business is, if we understand it, carried on "with a view to profit." Now although a farmer who bought a few horses to sell again "with a view to profit," was held a trader, a merchant who bought and sold in many transactions, mining stock, "with a view to profit," to the extent of $3500 was held not to be a trader because, mining stocks were not "merchandise or goods and chattels" under the authorities. *Ex parte Conant*, 77 Maine, 275. Thus the gambler in stock, the most dangerous man to the business community, is relieved of all restraint, and the farmer who, in the most incidental manner and semi-occasionally, tries to eke out his income, by a legitimate method, is visited with all the penalties of the insolvent law. This seems to be the practical effect of the law as now administered.

Judge Lowell held that the words merchant and trader were

almost penal, and that their construction was not to be extended. *In re*, *Cote*, 2 Low. 374 (S. C. 10 N. B. R. 503). In the same case he held that a farmer who visited Canada several times a year, usually buying horses or cattle and sometimes hay, partly for use on his own farm and partly for sale, was not a tradesman. If the term "trader" and "tradesman" are identical, and they are held to be, this case is in point in our favor. Upon the construction and application of the act, Judge Lowell uses this language, which may well apply at bar: "Taking then the classes of traders, did congress really expect that a farmer, who sometimes incidentally, whether more or less often, bought and sold farm stock in addition to his own, and who would not be fitted by education to keep books and who could not afford to have a clerk, should become an accountant? I think not. And yet if 'tradesman' means 'trader' in the largest sense, and if occasional trading makes a trader, no doubt this defendant was a tradesman."

Did the legislature really expect that a farmer who sold milk in connection with his other business, would be held to be a trader? Clearly not.

Account books: He produces a full account of his sales, also an account of stock. Pages in cipher easily explainable. Invoices of purchases sufficient. *In re*, *Reed*, 12 N. B. R. 390. What are proper books is to be determined from the circumstances and nature of the business. Bump Bankruptcy, (10th Ed.) p. 727.

J. O. Robinson and J. F. Libby, for appelles.

Counsel cited: *In re*, *O'Bannon*, 2 B. R. 15; *In re*, *Cowles*, 1 B. R. 280; *In re*, *Odell*, 17 N. B. R. 73; *In re*, *Cocks*, 3 Ben. 260; *Sutton* v. *Weeley*, 1 East, 442; *Jones* v. *Bank*, 79 Maine, 191; *In re*, *Merryfield*, 80 Maine, 233 and cases cited; *In re*, *Gay*, 2 B. R. 358; *In re*, *George & Proctor*, 1 Low. 409; *Wilkins* v. *Jenkins*, 136 Mass. 38.

PETERS, C. J. The conclusion cannot be avoided, without disregarding previous decisions on virtually the same question, that the insolvent was a trader within the meaning which attaches to that term in our insolvent law. He styles himself a

farmer, carrying on a milk farm in the vicinity of Rockland, and supplying milk to his customers in that city. He commenced the business in the spring of 1886, and went into voluntary insolvency in the spring of 1889. During the period between these dates he was the tenant of a divided half of his father's farm, selling farm products, occasionally buying and selling horses and cows, but making the delivery of milk a constant and his most important business. He kept a herd of cows, varying in number from eight to fourteen, having the latter number at the date of his petition in insolvency.

In May, 1888, the product from his own herd being insufficient for his business, he began to purchase milk from his neighbors to supply the deficiency. His business increased to such an extent that, between August, 1888, and April, 1889, he made regular outside purchases, the amount varying, according to the demand of the market, from four to twelve cans a day; each can containing eight quarts of milk. The purchases were a continuous though not strictly a daily business, because the twelve cans were sometimes a two-days' supply. For several months, during the period above-named, he took all the milk which could be furnished him by his brother who carried on the other half of the same farm, a large amount comparatively considered, but he also continuously purchased during the same time of other persons.

Certainly, the insolvent's occupation was more than that of farming. He was engaged in a regular, constant and extensive business of buying and selling milk. Although he produced from his own herd more than he bought of others, still the purchases contributed largely to the amount of his sales. The insolvent offers in explanation of such purchases, that they were of a temporary character; that he was all the while intending to add to his stock of cows, which had become reduced by disease and accident, but had been delayed in so doing by financial embarrassment; and that he had been expecting that, at the approach of spring, natural causes would increase the product from the stock he had; thereby relieving him from the necessity of procuring milk outside of the production on his farm. This

explanation would be good, no doubt, had the delay in procuring new stock existed for a few days merely, or, in some circumstances, for a considerably longer time; but when the same condition of things continues for an unbroken period of six months and more, it looks like a regular rather than a merely temporary or exceptional thing. Taking as favorable view of the facts as we can, we feel constrained to declare the insolvent to have been a trader in the article of milk. *Sylvester* v. *Edgecomb*, 76 Maine, 499; *Merryfield's Appeal*, 80 Maine, 233.

Did the insolvent keep proper books of account, as required by statute? He kept no regular book account. He used a book in which was entered deliveries of milk, containing, under printed headings, names, dates and amounts. He also had a small hand-book, in which were some informal accounts with different persons, rather in the nature of memoranda to supply personal memory than anything else. Some of these entries are in cipher, to prevent persons about him prying into his affairs. On his book are several inventories of his stock and property, and also some credits of money. But he nowhere enters in any book, in a single instance even, any purchases of milk or money paid or settlements made therefor. This important test of book-keeping fails. He has an account rendered by his brother for milk, but it is not carried upon any book. No one can ascertain from the insolvent's books the condition of his affairs. The law does not heed excuses for not keeping books,—it requires them to be kept. Here there was a failure to comply with the law.

The counsel for the insolvent thinks it a hardship to require an honest debtor in such limited and humble business, without education in the matter of books and accounts, to keep books of account as a condition of a discharge from debt in case of his financial misfortune. There can be no remedy but by an appeal to the legislature.

The decree below refusing a discharge must be affirmed.

Decree affirmed.

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

BERTHA A. KNIGHT *vs.* LEMUEL DUNBAR.

Kennebec. Opinion April 9, 1891.

Superior Court. Jurisdiction. Case. Trespass.

The Kennebec Superior Court has jurisdiction of an action on the case which charges that the defendant deposited earth upon his own land close to plaintiff's fence in such a careless manner that the action of the elements pressed the earth and fence partly over upon plaintiff's land to his damage; although that Court has not jurisdiction of real actions nor of actions *quare clausum fregit.* Such an action is not of the nature of *quare clausum*, nor its equivalent.

ON EXCEPTIONS.

The action arose in the Superior Court for Kennebec County. On the second day of the term, the defendant moved to dismiss the action for the reason that: "While the plaintiff in her writ states her action to be in case, the facts set forth in her declaration constitute and make an action of trespass *quare clausum* of which this court has no jurisdiction." The presiding justice overruled the motion and the defendant excepted. The case proceeded to trial on plea of general issue. The jury returned a verdict for the plaintiff.

The declaration in the plaintiff's writ is as follows:

"In a plea of the case; for that whereas the plaintiff, on the first day of June, A. D. 1889, was the owner in her own right, in fee simple, of a lot of land, with the appurtenances, and with a dwelling-house thereon, situate on the west side of Main street in said Waterville, and in the occupation of one Lyman Shaw, as tenant thereof, in the right of the plaintiff, and the defendant owned and occupied a certain lot adjoining the plaintiff's said lot, and lying next southerly thereto, and on the west side of said Main street in said Waterville, and by agreement between the plaintiff and defendant, the plaintiff and her grantors had built at her own expense, a tight board-fence on the dividing line between the plaintiff's and the defendant's said lots, which fence was and is the property of said plaintiff,

and the defendant well knowing the premises and contriving and intending maliciously to injure the plaintiff in her estate and in the reversion thereof of said lot and dwelling-house and appurtenances, on the first day of June, A. D. 1889, at said Waterville, hauled and deposited loam, (adjoining the plaintiff's said lot,) to the depth of two feet, and negligently, wrongfully and unjustly deposited the same upon the defendant's said lot, and upon and against the aforesaid fence in such a negligent and careless manner, that the said loam, sand and gravel, fell upon the plaintiff's said lot, and pressed with such force against said fence that it tipped, pushed and crowded said fence off said line, over and upon the plaintiff's said lot, so that said fence was greatly injured and the plaintiff's said tenant was greatly discommoded and annoyed in the occupation of said lot, and the same was unsightly, and the value of the plaintiff's said lot was greatly diminished, and portions of it rendered of no value; and the plaintiff avers that said defendant hath continued said loam, gravel and sand upon the plaintiff's said lot and against said fence from thence hitherto."

Brown and Johnson, for defendant.

Statute establishing and regulating the Kennebec Superior Court in terms excludes from its jurisdiction actions of trespass *q. c.* This exclusion is intended to be something more than a numerical division of causes of litigation between that court and the Supreme Judical Court. The latter cannot be ousted of its jurisdiction by entitling an action in case when the facts, as in this declaration, disclose a case of trespass *q. c.* Matters of flowage and trespass are left in that court because involving questions of title. The main claim is that defendant deposited loam "upon and against plaintiff's fence," and allowed it to remain. This is trespass because the fence is real estate. *Taylor* v. *Townsend*, 8 Mass. 410; *Elwes* v. *Mawe*, 3 East, 38, S. C. 2 Smith Lead. Cas. 228, and cases cited. *Sawyer* v. *Goodwin*, 34 Maine, 419. Trespass maintainable by reversioner. *Davis* v. *Nash*, 32 Maine, 411, and cases cited.

Webb and Webb, for plaintiff.

PETERS, C. J. The parties in this case were respectively owners of adjoining lots of land, with titles unquestioned. The plaintiff had erected a close board-fence on a part of the line between them. The defendant undertook to raise up the level of the land on his side of the fence by carting in a quantity of earth upon it. He did the job so unskilfully and carelessly that, by the action of the elements, the new earth pressed the fence over upon the plaintiff's land, carrying a portion of the newly deposited material with it. The plaintiff sues in an action of case for the injury.

The defendant contends that the action should have been trespass *quare clausum*, and that, however brought, an action for injury to real estate, cannot have day in the Kennebec Superior Court, where the suit was instituted.

That court has jurisdiction in causes generally, "except complaints for flowage, real actions, and actions *quare clausum*." The present action is not one of *quare clausum* either in form or substance. It is properly brought in case. The gist of the charge against the defendant is for his improper or neglectful use of his own land, the consequence of which was an injury to the land of the plaintiff. The action is not within the causes of action above excepted. We do not think the Superior Court is inhibited from entertaining actions merely because some question touching real estate may be involved in them. The title to real estate may be brought in question in collateral and incidental ways in any personal action. The title to personal property may depend on the title to real estate. An assault may be justified as having been committed in defense of one's real estate. This view is well sustained by the reasoning and result, upon somewhat similar facts, in the case of *Hatch* v. *Allen*, 27 Maine, 85.

Exceptions overruled.

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

ELLEN TROTT, executrix,

vs.

WOOLWICH MUTUAL FIRE INSURANCE COMPANY.

Sagadahoc. Opinion April 9, 1891.

Insurance. Insurable Interest. Husband and Wife. Waiver.

An insurance policy issued on a dwelling-house in the name of a husband when the title was in his wife, the company not being informed that the husband was not the legal owner, is void.

Validity is not imparted to the policy by the fact that the company, still uninformed of the true state of the title, indorsed on the policy its consent that the policy might continue in force notwithstanding a temporary non-occupation of the premises. That act waived forfeiture on one ground only, —not on all grounds.

Clark v. *Dwelling-House Insurance Company*, 81 Maine, 373, affirmed.

ON EXCEPTIONS.

This was an action on a fire policy issued to James H. Trott, husband of the plaintiff, and was tried by the presiding justice with right of exceptions. The presiding judge found as follows: "Policy declared on, issued November 4, 1886, on application in writing of the insured, the blanks, filled up in writing, were in the hand-writing of the clerk of the company, but the blanks for statement of title were not filled up.

"The premises were purchased by the insured, February 1, 1872, paid for by him, but at his request, the deed was given to the wife of the insured, the plaintiff; and the title stood in her name till the fire. There was no agreement between the said husband and wife in regard to the manner in which she should hold the title, but the premises were occupied by husband and wife and their family as a homestead, till 1887, when they moved to Boston, vacating the buildings. James H. Trott, died August 12, 1888.

"It is not shown that the defendant company, or any of its officers, knew that the title was in the wife till after the fire, which occurred twentieth of September, 1889. No question is made as to regularity of proof of loss.

"The company was notified June 13, 1889, that the buildings were vacant, and indorsed in writing, its consent that the insurance should continue, the secretary who made the indorsement knowing that James H. Trott was dead.

"Upon the foregoing facts I rule as matter of law, that the insured had no insurable interest in the buildings and that the defendant is not estopped from making that defense, and order judgment for the defendant."

To this the plaintiff excepted.

J. M. Trott, for the plaintiff, cited: *Stock* v. *Inglis*, 12 Q. B. D. 564; *East. R. R. Co.* v. *Ins. Co.* 98 Mass. 423; *Williams* v. *Insurance Co.* 107 Mass. 379; Field's Lawyers' Briefs, 283, 284; *Looney* v. *Looney*, 116 Mass. 286; *Harris* v. *Insurance Co.* 50 Penn. 341; Wood Ins. § § 255, 278.

C. W. Larrabee, for the defendants, cited *Clark* v. *Insurance Co.* 81 Maine, 373; *Troup* v. *Appleman*, 9 Md. 179.

PETERS, C. J. James H. Trott, husband of the plaintiff, in 1872, with his own money, purchased a farm in Woolwich, with buildings upon it, taking the title in the name of his wife. There was no agreement between the husband and wife as to the manner in which she should hold or use the property, but they with their family occupied it as a homestead until 1887, when they vacated it, removing out of the state. In 1886, he procured an insurance on the buildings in his own name, as if his own property. He died in 1888. It does not appear that the insurance company, or any of its officers, knew that the title of the property was in the wife, and not in the husband, until the buildings were consumed by fire in September, 1889.

The action upon the policy is in the wife's name as executrix of the estate of her husband. We see no way to escape the conclusion that the case must be controlled by the decision in *Clark* v. *Dwelling-House Insurance Co.* 81 Maine, 373, which declares such a policy void. So far the cases are absolutely alike.

The plaintiff's counsel cites several cases from other states, claiming that they tend to affirm the validity of the present

policy. Those cases, if not arising upon facts different from present facts, must be founded, we apprehend, upon statutory provisions, unlike our own, affecting the rights growing out of the marital relation.

The plaintiff contends that a circumstance affecting the policy, distinguishes this case from the one we have cited. It appears that in June, 1889, several months before the fire occurred, the company, upon notice that the buildings were vacant, indorsed upon the policy its consent that it should continue in force notwithstanding the non-occupancy, the secretary who made the indorsement having had notice that the husband was then deceased. This act is relied upon by the plaintiff as an estoppel against the company, and a waiver of all error before existing, giving perfection to the original contract.

We do not perceive that an estoppel was created by this fact. The officers of the company were not at the time aware that the wife held the legal title of the property. As the policy was void at first it was just as much so afterwards. There was no new contract or alteration of contract. The company merely waived a forfeiture for non-occupation of the property,—for nothing else. The policy itself is absolute in its terms, although void, and no indorsement upon it in less absolute terms than those of the policy itself can impart to it validity.

Exceptions overruled.

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

HENRY M. PRENTISS and others,

vs.

DANIEL F. DAVIS and others.

Aroostook. Opinion April 9, 1891.

Plantations,—their organization. Record. Evidence. Presumptions. Stat. 1840, c. 89.

The contents of a lost record of the organization of a plantation organized for election purposes may be proved by parol evidence.

Where such an organization was created nearly fifty years ago; and the principal steps taken for that purpose are testified to by one who participated

in the proceedings; and his recollection of the event is fortified by a certificate of organization, sent at the time to the Secretary of State, as required by law; and the plantation continued under such organization for upwards of fifteen years, raising money annually for plantation purposes, and voting at all presidential and state elections during that period; having been all the time recognized by the legislature and state officials in different ways as an existing plantation; and the missing proof is only as to the details of a posted notice calling the inhabitants together to effect a proposed organization,—the presumption is that the proceedings of organization were sufficiently complete to accomplish the purpose intended.

Under the statute authorizing "the qualified electors of unincorporated places to organize themselves into plantations for election purposes," it was allowable for two adjoining townships to be organized together into one plantation, the State having affirmed the propriety of the act by its recognition of numerous plantations organized under similar circumstances.

The organization was valid, even if it may be inferred from the return made to the Secretary of State that the form of the proceeding was to incorporate the inhabitants of the two townships into a plantation, making no special mention of the territorial limits included therein. The implication was unmistakable.

ON REPORT.

The facts are stated in the opinion.

Wilson and Woodard, for plaintiffs.

Copy of land-agent's records admissible by R. S., c. 82, § 102, as a conveyance of an interest in real estate, and being more than a license or parol sale. *White* v. *Foster*, 102 Mass. 375, 379. Similar conveyances appear in *Plantation* v. *Bean*, 40 Maine, 218, and *State* v. *Shaw*, 64 *Id.* 263. It is an estate of inheritance and an interest in the soil that was conveyed. *Clapp* v. *Draper*, 4 Mass. 266; *White* v. *Foster*, *supra*; *Putnam* v. *Tuttle*, 10 Gray, 48; *Howard* v. *Lincoln*, 14 Maine, 122; *Goodwin* v. *Hubbard*, 47 *Id.* 595.

Deed not defeated by the organizing of a plantation, whose limits were not defined. *Plantation* v. *Bean*, *supra*. The records give only a *descriptio personarum*, and show that the inhabitants of two townships were, contrary to the statute, organized into one plantation, (Stat. 1840, c. 89,) and under proceedings void for several reasons.

Deed not defeated by second organization of plantation under R. S., 1883, c. 3. Copy of proceedings transmitted to Secretary

of State not a certified copy. Failure to comply with statute renders organization void. *State* v. *Shaw*, 64 Maine, 263 and cases cited. Organized, if at all, for "election purposes" not sufficient to defeat plaintiffs' deed which holds until township is organized for "plantation purposes." *Bragg* v. *Burleigh*, 61 Maine, 444, 450.

Davis and Bailey, for defendants.

Trespass *q. c.* not maintainable. Plaintiffs have only the right to cut and carry away timber and grass; but no interest in the land was conveyed to them by land-agent's permit in 1853. *Putnam* v. *White*, 76 Maine, 555.

No statute for recording permits until 1857. Copy of records inadmissible in actions not touching the realty, or when title is not material to the issue. Action is brought under R. S., c. 95, § 18, which applies only to tenants in common, &c., of lands. Plaintiffs are part owners only. All owners should join. *Brooks* v. *Byam*, 2 Sto. 546-557. Amendment of declaration from trespass to case as in *Mathews* v. *Treat*, 75 Maine, 594, would defeat the action as all the partes reside beyond Aroostook County.

Counsel argued that both organizations of the plantation were valid, and cited: *Plantation* v. *Bean*, 40 Maine, 218; *State* v. *Woodbury*, 76 *Id.* 457. A *de facto* organization sufficient, in 1853, to exclude plantation from land-agent's power.

PETERS, C. J. In this action of *quare clausum* for cutting logs, in 1885, on the public lots in township A, R. 5, Aroostook County, the plaintiffs claim title to the lots under a deed from the land-agent of Maine, dated in 1853, and the defendants justify their cuttings by a license to cut given in 1883, by the land-agent, acting in behalf of the inhabitants of the township.

The deed of 1853, spoken of, confers on the grantee named therein, the right to cut and carry away the timber and grass from such lots until the township in which the lots are reserved should be incorporated into a plantation for election purposes. It is not claimed, nor can it be, that any such conveyance would be operative when the township became incorporated. The de-

fense to the action is that the township was already incorporated at the date of the deed. Whether that be so or not is the main question presented.

Section one of the elections act, passed at an extra session of the legislature on October 2, 1840, published in an appendix to the revised statutes of 1841, p. 771, reads as follows:

"An act in relation to elections. [Chap. 39.]

"Section 1. Be it enacted by the Senate and House of Representatives in Legislature assembled: That the qualified electors of unincorporated places may organize themselves into plantations, for the purpose of elections, in the following manner:— Any three or more of the inhabitants of any unincorporated place may apply, in writing, to one or more county commissioners of the county in which such place is situated, whose duty it shall be to issue his warrant to one of said applicants, directing him to notify and warn a meeting of the electors of said place, within such limits as shall be described in such warrant, at some specified central place, by posting up notice thereof and of its object, in two or more public places in said unincorporated place, seven days before the day of said meeting. And at the time and place appointed, a moderator shall be chosen by ballot, whose duty it shall be to preside at said meeting. And three assessors and a clerk shall also be chosen by ballot at the same time, who shall be sworn by the moderator or a justice of the peace. And the limits of all plantations, so organized, shall be described by said assessors, so chosen, and forwarded to the Secretary of State, and by him recorded."

The defendants allege that in 1844, the township in question and another township adjoining it were organized together into a plantation by the name of Molunkus; and that the regular record of such organization has been accidentally lost.

There can be no doubt that an organization was at least attempted to be made. Very strong evidence of it is afforded by the certificate produced from the office of the Secretary of State, received there October 21, 1844, of the following tenor:

"Aroostook, ss. To the Secretary of State: This is to notify you that the inhabitants of township No. 1, range 4, and letter

A, range 5, west of the east line of the State, have this day, by virtue of a warrant issued by Jeremiah Trueworthy, one of the county commissioners within and for the County of Aroostook, organized ourselves into a plantation by the name of Molunkus, and we, as assessors of said plantation, respectfully notify you of the same, and request you to take cognizance of the same.

JAMES B. CURRIER,
CHARLES C. KIMBALL,
WILLIAM MARTIN,
} Assessors of Molunkus Plantation."

Further evidence of both the existence and subsequent loss of the record is found in a mutilated book of records produced from a lot of old and neglected papers of a deceased clerk of the plantation, accompanied by the explanation of it given by witnesses. It contains a continuing record of the plantation elections and other matters, commencing in 1845, and extending into the year 1861, a book a good deal battered and worn, the covers gone, its leaves torn out from the beginning and at its end. It may be seen at a glance that the book has been in the hands of children for scribbling purposes, although there is no indication of intentional spoliation.

That there was an organization and a record of it, and a loss of such record, there cannot be a doubt. The missing portion of the book must have contained the records. The important question is whether the organization was a legal one or not.

In this condition of things oral evidence is admissible to prove the contents of the lost record. That is an undoubted principle. 1 Green. Ev. § 509. *Gore* v. *Elwell*, 22 Maine, 442. It happens that one of the first assessors of the plantation, James B. Currier, the only survivor of all the inhabitants who participated in the organization of 1844, evidently a person of memory, and intelligence, is enabled to be a witness on the subject. His fairness of statement seems to entitle his story to credence, corroborated as it is in partial respects by other evidence. He has no interest in the question, having removed from the plantation to Corinna, in 1847, where he has ever since resided. He clearly recapitulates the different steps taken to perfect the organization. He appears to have been an active and much interested

participator. Space cannot be spared to incorporate herewith his extended testimony, and notice need only be taken of such objections as the opposing counsel, who has thoroughly investigated the case, urges against it.

It is objected against the sufficiency of Currier's testimony, that it does not appear therefrom that the warrant from the county commissioner described any plantation limits; or that the notice for the meeting was posted seven days prior to the meeting; or that it contained any notice of the object of the meeting. Although the witness does not testify especially to these matters, his attention not being called to them, he says, after stating his memory of many things, "I know well enough, we had our meeting in regular shape, and followed it up as long as I lived there." And the assessors communicated to the Secretary of State the fact of a completed organization, describing the territory organized. It is reasonable to presume that such omissions did not exist. The presumption of regularity in official proceedings comes in aid of the sufficiency of the acts done. Regular in all things seen, regular in all things incidental thereto not seen is a natural deduction, in many conditions and circumstances. It would be a strange notice of a public meeting that did not describe its purpose, and a very uncommon one in any municipal business that did not give at least seven days advertisement of the meeting. The law requiring these steps reads plainly, and must have been examined as a guide for the forms to be observed in the proceedings undertaken.

The doctrine of presumption is commended by the law when applicable to a case like the present. Irregularities in the proceedings to organize a corporation are not favored when set up long afterwards to defeat the corporate existence. 1 Dill. Mun. Cor. § 84, and cases in note. After the lapse of thirty years, the presumption of regularity may be conclusively presumed in many cases. *Freeman* v. *Thayer*, 33 Maine, 76; *Bassett* v. *Porter*, 4 Cush. 487, a case in which the existence of a school district was denied because no record of its formation could be

found, and the doctrine of presumption was successfully invoked to supply a record; and the court among other things which would be apropos here, said: "Deeds and even records may be presumed to exist, or to have existed without any direct proof of their existence. Indeed, it may perhaps be maintained, that there cannot be any matter of fact, which a jury may not presume from other facts and circumstances. It is in truth but the exercise of sound reason, in inferring from facts which are shown, an existence of other facts which are not directly shown. The proof of certain facts, in a chain of events, leads directly and forcibly to the conclusion of the existence of the facts, which naturally and properly and usually precede those which are known and established." In that case not a vestige of any record was discovered, but the district had in fact existed for very many years.

The case at bar is a strong one for the application of the same principle, to supply, if need be, any partial deficiency of proof of organization. Here were proceedings to organize the plantation nearly half a century ago. The plantation, not then a month old, voted in the presidential election of 1844, and at all presidential and State elections until 1861, occasionally voting after that time; for a long period raised money for the support of schools and other purposes; was for many years recognized as a political division of the State, by receiving its portion of school money and mill tax, and in other ways; and recognized as an organized place by the United States, by enrolling its able-bodied subjects on the lists from which drafts were made for the late war, and by enumerating its inhabitants in the census for several decades, that of 1880 showing the number of inhabitants to have been sixty-seven. It has always had a post-office called Molunkus. There are not many corporations or organizations whose records have been lost that could give better proofs of existence than these.

Other objections claimed by counsel to be of a more radical character than those already disposed of, are urged. It is contended that such objections are fatal to the validity of the organization even though all other requirements in its formation

may have been correctly observed. The first is that one plantation could not comprise more than one township. The statute says "the qualified electors of any incorporated place" may apply to have such place organized as a plantation. It does not say township, but place. This is a very strict objection. Here was a little village in the corners of two townships touching each other. The small community combined could support a school and bear other burdens of an organization,— if divided they could not. It was convenient to associate together. The statute was mindful of inhabitants rather than territory. Its purpose was to serve the interests of settlers rather than to devise any scheme touching territory. For that reason the word place should be liberally construed. Webster defines place as "an area,"— "any portion of space regarded as distinct from all other space." Certainly, two tracts of land are together an area, and can be regarded as a portion of space distinct from other space. Two adjoining places are but one place when consolidated. But the double township system had legislative sanction from 1844 to 1859, in which latter year an act was passed repealing all such organizations, on account of the supposed opportunity for practices of fraud in elections in plantations that consisted of such extended territory. It is historically known that many plantations consisted of more than one township, those in upper Aroostook covering the territory of several townships each. Even parts of townships were organized together, attention being given to natural rather than artificial boundaries, in order to group together different settlements. The State in various ways accepted and ratified this mode of organization until 1859, by repeatedly and in many ways recognizing them as distinct political divisions of the State. And the repealing act of 1859 is an admission that such organizations were valid until repealed. The State alone could complain of them.

The last alleged defect is that the warrant issued by the county commissioner did not describe any territorial limits of the proposed plantation, but merely recited that the inhabitants of two particular townships had applied for proceedings of organiza-

tion. It is only an inference of the counsel for plaintiffs that the warrant so read, an inference deduced from the language of the return to the Secretary of State by the assessors, in which they use the language imputed to the warrant. It does not follow that the warrant and the assessors' certificate were alike in this respect. The commissioner might be more skillful in executing his official act than the assessors were in describing what had been done. The assessors did not pretend to represent the form of either warrant or record, but only the result. And they made their certificate in the tone of the enabling act itself, denominated "An act in relation to elections," which provides that "the qualified electors of unincorporated places may *organize themselves into plantations*, for the purpose of elections."

Relying on the presumption that the lost papers were of a general correctness, there is nothing in the certificate sufficient to overturn the presumption.

But we are willing to go farther than that, and to express our opinion that the description of plantation limits in both warrant and record would be sufficient if they were the same as in the certificate. What can a certificate that the inhabitants of townships 1 and A have been organized as a plantation possibly mean unless that those townships are the territorial part of the plantation? It is impossible to organize electors or inhabitants alone into a plantation. The legislature understood the certificate and accorded to the organization all the privileges of a plantation. Its vote was never rejected or questioned. Although not in the mould of fashion or technical form, the meaning is just as unmistakable as if more directly expressed. Suppose it should be disclosed that certain towns in this State were a quarter or half century ago incorporated by the legislature in the same form as appears in this case, would anyone suggest that such legislative incorporations were not valid?

Although the form used in this State has been that certain territory, together with the inhabitants thereon, is hereby incorporated, Mr. Dillon gives the form differently in this way: "The inhabitants of a certain town (naming it) are hereby

incorporated as a body corporate by the name of——&c." "The charter then defines," he says, "the territorial boundaries of the town or city thus incorporated." The author further says: "Although corporations in this country are created by statute, still the rule is here also settled that not only private corporations aggregate, but municipal or public corporations, may be established *without any particular form of words, or technical mode of expression*, though such words are commonly employed." He also says: "The settled doctrine is that a corporation may be created by implication, as well as by the use of words." 1 Dill. Mun. Cor. § 39, *et seq.* The form of incorporation for towns has never in this State been adapted to the incorporation of a city from a town. In the incorporation of any city in the State, the following formula has been adopted: "The inhabitants of the town of (Brewer), shall continue to be a body politic and corporate, by the name of the city of (Brewer), and as such, shall have, exercise and enjoy all the rights, immunities, powers, privileges, and franchise, and be subject to all the duties and obligations now appertaining to, or incumbent on said town as a municipal corporation," &c. Here the inhabitants are declared to be incorporated. The territory is constructively included. But the limits of Brewer were no more definitely known than were the boundaries of the two townships constituting the plantation of Molunkus.

It becomes unnecessary to examine the questions raised upon a later organization of township A, now Molunkus, after the State repealed the first organization, the defense resting upon either organization, inasmuch as the legality of the first plantation rendered the deed, under which the plaintiffs' right descends to them unauthorized and void.

Plaintiffs nonsuit.

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

KENNEBEC SAVINGS BANK, in equity,

vs.

JOHN B. FOGG, executor, AND EMERY O. BEANE, administrator, claimants.

AUGUSTA SAVINGS BANK, in equity,

vs.

SAME, claimants.

Kennebec. Opinion April 10, 1891.

Savings Bank. Deposit. Husband and Wife. Evidence.

The entries upon the books of a savings bank, and upon the pass-books issued by such bank to a depositor, are not conclusive evidence of the ownership of a deposit in the bank.

Where the question of ownership is between the estates of deceased husband and wife, and the books show deposits in the name of the wife, evidence of the following circumstances is admissible:—The husband's ability and the wife's inability to earn and accumulate; the depositing and withdrawing of sums in and from the accounts by the husband; the transfer of sums between the accounts in question, and other accounts of the husband; that the husband in fact opened the account; that he had prior accounts which had run up to two thousand dollars, the legal limit for a single depositor; that after the wife's death the husband continued the account as his own; that no administration was taken out on the wife's estate for four years; that before her death she had given her husband an order for the whole sum; that she had never had any other account; that the wife had never personally deposited or withdrawn a single sum; that she was unknown to the officers of the bank; that the pass-book was usually in the husband's possession or else in their joint possession.

In this case the evidence is considered by the court to establish the ownership of the husband.

ON REPORT.

These were two bills of interpleader, heard together on bills, answers and proofs; the court below having ordered the defendants to interplead.

The case is stated in the opinion.

Heath and Tuell, for John B. Fogg.

Not a gift, *inter vivos*, to wife. *Carleton* v. *Lovejoy*, 54

Maine, 446; *Robinson* v. *Ring*, 72 *Id.* 140; *Drew* v. *Haggerty*, 81 *Id.* 231; *Parcher* v. *Sav. Inst.* 78 *Id.* 473; *Taylor* v. *Henry*, 48 Md. 550, (S. C. 30 Am. Rep. 486); *Towle* v. *Wood*, 60 N. H. 434; *Pope* v. *Burlington Sav. Bank*, 56 Vt. 284, (S. C. 48 Am. Rep. 781). Not a declaration of trust, for want of notice to *cestui que trust*. *Smith* v. *Sav. Bank*, 64 N. H. 231; *Marcy* v. *Amazeen*, 61 N. H. 131; *Jewett* v. *Shattuck*, 124 Mass. 590; *Clark* v. *Clark*, 108 Mass. 522; *Scott* v. *Bank*, 140 Mass. 157. Attempted gifts testamentary and void. *Sherman* v. *Bank*, 138 Mass. 581; *Nutt* v. *Morse*, 142 Mass. 1; *Basket* v. *Hassell*, 107 U. S. 602; 108 U. S. 267; *McCord* v. *McCord*, 77 Mo. 166 (S. C. 46 Am. Rep. 9); *Pope* v. *Bank*, *supra*. Books No's 2640 and 1573: *Robinson* v. *Ring*, 72 Maine, 140; *Northrop* v. *Hale*, 73 *Id.* 66; *Stone* v. *Bishop*, 4 Cliff. 593. Orders of May 22, 1882: *Exchange Bank* v. *McLoon*, 73 Maine, 499; *Robbins* v. *Bacon*, 3 *Id.* 346; *Wing* v. *Merchant*, 57 *Id.* 383. No consideration necessary to support them. *Johnson* v. *Thayer*, 17 Maine, 403; *Kimball* v. *Leland*, 110 Mass. 325; *Putnam* v. *Story*, 132 Mass. 205; *Ensign* v. *Kellogg*, 4 Pick. 1; *Robertson* v. *Gardner*, 11 Pick. 146; *Clark* v. *Downing*, 1 E. D. Smith, 406; *Mills* v. *Fox*, 4 *Id.* 223; *Beach* v. *Raymond*, 2 *Id.* 496; *Arthur* v. *Brooks*, 14 Barb. 535; *Richardson* v. *Mead*, 27 Barb. 178; *Carpenter* v. *Soule*, 88 N. Y. 251; *Ellis* v. *Secor*, 31 Mich. 185, (S. C. 18 Am. Rep. 178); *Briscoe* v. *Eckley*, 35 Mich. 112; *Fortescue* v. *Barnett*, 3 M. & K. 36; *Bennett* v. *Cooper*, 9 *Beav.* 252; *Blakeley* v. *Brady*, Dr. & Wal. 311; *Gannoy* v. *White*, 2 Ir. Eq. 207; *Collinson* v. *Pattrick*, 2 Keen, 134; *Penfold* v. *Mould*, L. R. 4 Eq. 562; *White* v. *Kilgore*, 77 Maine, 571; *Grymes* v. *Horne*, 49 N. Y. 17, (S. C. 10 Am. Rep. 17). Notice to bank, after assignor's death, not necessary. *Wood* v. *Partridge*, 11 Mass. 491; *Dix* v. *Cobb*, 4 Mass. 512; *Wakefield* v. *Martin*, 3 Mass. 558; *Porter* v. *Bullard*, 26 Maine, 448; *Thayer* v. *Daniels*, 113 Mass. 129. Counsel also cited: *Fogg* v. *Dearborn*, 82 Maine, 538; *Hatch* v. *Atkinson*, 56 Maine, 324; *Cooper* v. *Burr*, 45 Barb. 9; *Noble* v. *Smith*, 2 Johns. 52 (S. C. 3 Am. Dec. 399); *Blake* v. *Jones*, 1 Bailey Eq. (S. Ca.) 141, (S.C. 21 Am. Dec.

530); *Jones* v. *Selby*, Prec. Chan. (Finch's Prec.) 300; *Stephenson* v. *King*, 81 Ky. 425 (S. C. Am. Rep. 172); *Marsh* v. *Fuller*, 18 N. H. 360; *Coleman* v. *Parker*, 114 Mass. 30; *Phipard* v. *Phipard*, 29 N. Y. 294; *Parnie* v. *Capewell*, 45 Pa. St. 89; *Lane* v. *Lane*, 76 Maine, 521.

Beane and Beane, for Emery O. Beane.

Title to the money and banks' liability rest upon depositor's books and entries of the banks. Orders of May 22, 1882, made the husband the wife's agent only. Her death was a revocation. Both on equal footing as to property at the outset. Business at banks mostly done by the husband even when wife owns the deposit. Money presumed to be the person's in whose name is the deposit. *Drew* v. *Haggerty*, 81 Maine, 231. Bank books controlled in *Northrop* v. *Hale*, 73 Maine, 66. Counsel also cited: *Barker* v. *Frye*, 75 Maine, p. 33; *Sullivan* v. *Lewiston Inst. Sav.* 56 Maine, p. 507; *Parcher* v. *S. & B. Sav. Inst.* 78 Maine, 470; *Sweeney* v. *Boston, &c. Bank*, 116 Mass. 384. Limit of $2000, applies to wife as well as husband. No gift to husband by wife, intention and delivery wanting. *Dresser* v. *Dresser*, 48 Maine, 67; *Bank* v. *Dearborn*, 82 Maine, 538, and cases cited in briefs; *Lane* v. *Lane*, 76 Maine, 521; *Trowbridge* v. *Holden*, 58 Maine, 117.

EMERY, J. The Kennebec Savings Bank, and the Augusta Savings Bank, each filed a bill in equity to have John B. Fogg, Executor of the will of Amos C. Hodgkins, deceased, and Emery O. Beane, Administrator of the estate of Mary J. Hodgkins, deceased, interplead as to the ownership of certain sums of money on deposit in each bank. By agreement of all parties, the cases are reported to the law court, to be there heard and determined as a case between the two estates.

In determining the ownership of these deposits, the first inquiry naturally is,—what is shown by the books of the banks and by the pass-books they issued? The Kennebec Savings Bank has one deposit only. The signature or deposit-book in the bank has this entry: "November 8, 1870, Mary J. Hodgkins. Birth place Mt. Vernon; residence, Readfield. $100,

No. 270." The depositor's pass-book has this heading: "Kennebec Savings Bank in account with Mary J. Hodgkins. No. 270." In the Augusta Savings Bank are three deposits. The signature or deposit-books, contain the following entries: "No. 2640, Mary J. Hodgkins, Vienna, March 17, 1864." "No. 15753, Mrs. Amos C. Hodgkins; Winthrop, January 1, 1878." "No. 13149. Amos C. Hodgkins, October 15, 1875, $91.69, Transferred August 1st."

The depositor's pass-books had these headings: "No. 2640, Augusta Savings Bank in account with Mary J. Hodgkins." "No. 15753, Augusta Savings Bank in account with Mrs. Amos C. Hodgkins." "No. 13149, Augusta Savings Bank in account with Amos C. Hodgkins. Payable to Mary J. Hodgkins."

From the books alone, it would appear very clearly that all these deposits belonged to the estate of Mary J. Hodgkins, (Mrs. Amos C. Hodgkins being the same person,) except perhaps the last-named deposit, No. 13149, in the Augusta Savings Bank. It was held, however, in *Northrop* v. *Hale*, 72 Maine, 275, that, in cases of this kind, evidence *aliunde* was admissible to vary the effect of the entries in the bank and depositor's pass-books. Both parties have accordingly introduced much extraneous evidence.

By a comparison and study of the material and relevant parts of the evidence we are reasonably satisfied of the following facts: Amos C. Hodgkins and Mary J. Hodgkins were husband and wife, having lived together, housekeeping for many years in one or more towns in Kennebec County. They had no children. Mary died February, 1883, and Amos died July 30, 1887, both at an advanced age. He was an industrious, economical man, and was reputed to have saved considerable money. She had no separate property at the time of her marriage, and had no chance to accumulate any except from sale of eggs, &c., from knitting and other kindred sources open to a housewife. He had made deposits in both banks prior to those now in question. He made deposits also in the name of other parties, before and during the time of these deposits in question. Some of these prior deposits had run up to the legal limit of $2000 for one

depositor. A large part of these deposits now in question were made up of transfers from deposits in his name. The deposits now in question in the Augusta Savings Bank were made by him, and he appeared to manage them, by making deposits of new sums, and occasionally withdrawing sums, and by transferring sums between these accounts and other accounts. The signatures in the signature-book of the Augusta Savings Bank were made by him. There is much less evidence of his control of the deposit in the Kennebec Savings Bank, and indeed the treasurer of that bank, thinks the signature is in Mary's own hand writing. There is no evidence that any other deposits were in her name at any time.

The various pass-books according to some witnesses were seen occasionally in a tin box, kept in a trunk in the sleeping room of the husband and wife. The keys of this trunk and box were kept by Amos, except that when leaving home he left the keys with his wife. We do not find any evidence that she ever mentioned that she had any money in either or any bank, nor that she ever alluded to, or was seen to have, or make any use of the pass-books. None of the officers of the banks have any recollection of her, except that the venerable treasurer of the Augusta Savings Bank thinks she may have been in the bank a few times with her husband, but not to do any business. Although she died four years and more before her husband, and although her heirs, or many of them, lived in her neighborhood, they made no move for an administration upon any estate of hers until after her husband's death, and the banks' hesitation about these deposits. No one seems to have supposed that she left any estate to be administrated.

In May, 1882, some nine months before her death, at her husband's request she signed and delivered to him three written orders covering three of the deposit accounts, No. 270, in the Kennebec Savings Bank, and Nos. 2640 and 15753, in the Augusta Savings Bank. These three orders were of the following tenor, *mutatis mutandis*.

"Winthrop, May 22, 1882.

"To the Treasurer of the Kennebec Savings Bank.

"Pay to Amos C. Hodgkins the full amount of deposits and interest on my account when called for."

"No. 270. Mary J. Hodgkins."

"Witness to signature, Eliza D. Paul."

There was no order covering deposit No. 13149.

The various pass-books were in the possession of Amos after the death of Mary, and he made deposits and withdrawals on all the accounts after her death and nearly up to his own, as if they were his own accounts.

It remains to draw the proper inferences from the foregoing, and to determine to which estate each deposit belongs. No. 13149, in the Augusta Savings Bank, was deposited by Amos C. Hodgkins, in his own name. It was undoubtedly his money at the time. The words "Payable to Mary J. Hodgkins," on the books, do not import a completed gift, vesting title in her. At the most they only import an intention to give. It does not appear that this deposit pass-book was ever given to her, or that she ever knew of the deposit. The evidence falls short of showing a completed gift. *Robinson* v. *Ring*, 72 Maine, 140; *Northrop* v. *Hale*, 73 Maine, 66, 71; *Sherman* v. *Savings Bank*, 138 Mass. 581.

The other three deposits may be considered together. The fact that his prior deposits in his own name were overrunning the legal limit of $2000 to one depositor, goes far to show a reason for making these deposits in different names. *Brabrook* v. *Savings Bank*, 104 Mass. 228; *Parkman* v. *Savings Bank*, 151 Mass. 218. The fact that the deposits in the Augusta Savings Bank were largely made up by transfers from other accounts of his tends strongly to show that they were his own. The three written orders covering these three accounts, under all the circumstances, lead us to believe that those accounts were in her name only for his convenience, and that the money was really his. Similar orders under similar circumstances in *Scott* v. *Savings Bank*, 140 Mass. 157, were held to be weighty evidence of an original ownership of the funds by the recipient of the orders. We can find no other satisfactory reason for her giving them in this case. They just fit the three accounts in

her name. There is no order for account No. 13149, which was in his name payable to her. It was held in *Kimball* v. *Leland*, 110 Mass. 325, and in *Foss* v. *Savings Bank*, 111 Mass. 285, that such an order, the pass-book being delivered to the donee, was more than a power of attorney, and was an assignment of the fund, and valid after the death of the donor or assignor. It is not necessary to decide whether in this case the written orders effected an assignment, as we here only take them into account as circumstances of great force tending to prove that the money originally belonged to Amos.

Without going further into details, we readily infer and believe from all the circumstances, that all the money in the four accounts came from, and belongs to the estate of Amos C. Hodgkins.

Amos C. Hodgkins, however, by his peculiar manner of doing this business, has occasioned this litigation, and we think his estate should pay all the taxable costs of all parties, and reasonable counsel fees for the counsel of each estate; and also the usual probate fees for taking out administration upon the estate of Mary J. Hodgkins, up to the date of filing these bills. The details can be settled by a single justice.

Decrees according to the foregoing opinion.

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

EDWARD W. GROSS and another, *vs.* W. B. JORDAN.

Androscoggin. Opinion April 10, 1891.

Sale. Lease. Foreign Chattel Mortgage. Contract. Lex Fori. Replevin. R. S., c. 81, § 44. Mass. Genl. Stat. c. 192, § 13.

Writing an agreement in the form of a lease does not alter the character of an instrument which by its more essential terms discloses itself to be a conditional sale of personal property.

As the statutes of Massachusetts allow the redemption of a conditional sale of personal property in the same manner that mortgages of personal property

are redeemable, that provision becomes a part of all such contracts made in that commonwealth, and is entitled to enforcement in this state when the contract is to be executed here.

As our own remedies are to be applied in litigations here, it follows that, if property thus conditionally sold in Massachusetts is attached in this State as belonging to the vendee, the vendor or his assignee, before he can maintain replevin therefor against the attaching officer, must notify the officer of his claim and the amount due upon it, as required by R. S., c. 81, § 44.

ON EXCEPTIONS.

This was an action of replevin, brought against the defendant, who is a deputy sheriff, to recover the possession of one butcher-wagon, which the defendant had attached as the property of one Greenfield T. Jordan, of Lisbon, and held on execution issued upon judgments against him. G. T. Jordan purchased the wagon of Henderson Bros., North Cambridge, Mass., April 18, 1888, according to an agreement which appears in the opinion. On June 18, 1889, Henderson Bros. executed the following assignment to the plaintiffs.

"No. Cambridge, June 18, 1889.

"We transfer all out right and title on wagon leased to G. T. Jordan of Lisbon, Maine, to Messrs. Gross & Briggs of Lewiston, Me.

Henderson Brothers."

"Witness: W. E. Henderson."

The plaintiffs were creditors of G. T. Jordan and took this assignment, paying Henderson Bros. the amount due them, with his consent, for the purpose of securing their claim. They claimed to hold the cart free from all right of redemption by Jordan or any attaching creditor.

The notice of the amount due on the wagon, as required by R. S., c. 81, § 44, was not given to the attaching officer.

George C. Wing, for the plaintiffs.

The contract does not fall within the provisions of R. S., c. 111, § 5. The contract is a lease and an agreement for sale in the future and R. S., c. 91, § 7, does not apply. Counsel also cited *Morris* v. *Lynde*, 73 Maine, 88.

N. and J. A. Morrill, *A. P. Moore* with them, for the defendant.

The plaintiffs' claim under the assignment of the lease was only for amount unpaid thereon, and defendant was entitled to notice of this amount in accordance with R. S., c. 81, § 44. The transaction was made in Massachusetts, and the rights and obligations of the parties are governed by the law of that State. *Stickney* v. *Jordan*, 58 Maine, 106; *Milliken* v. *Pratt*, 125 Mass. 374; *Peabody* v. *Maguire*, 79 Maine, 572. Counsel also cited: *Singer* v. *Cole*, 4 Lea. 439 (S. C. 40 Am. R. 20); *Hine* v. *Roberts*, 48 Conn. 267 (S. C. 40 Am. R. 176); *Loomis* v. *Bragg*, 50 Conn. 228 (S. C. 47 Am. R. 638); *Singer* v. *Graham*, 8 Oreg. 17 (S. C. 34 Am. R. 572); *Lathram* v. *Sumner*, 89 Ill. 233 (S. C. 31 Am. R. 79 and note); *Wyman* v. *Dorr*, 3 Maine, 183; *Ingraham* v. *Martin*, 15 Maine, 373; *Pierce* v. *Stevens*, 30 Maine, 184; *Wheeler* v. *Train*, 3 Pick. 255, 258; *Fairbank* v. *Phelps*, 22 Pick. 535, 539.

PETERS, C. J. G. T. Jordan of Auburn, in this State, purchased of persons residing in Massachusetts, where the contract was made and delivery under it took place, a butcher-wagon, according to the following agreement:—

"(Lease of Personal Property.)

"North Cambridge, April 18, 1888.

"Received of Henderson Brothers the following described property, to wit:

"One butcher wagon, red gear, Sarvin wheels.

"And I am to hold the above-described property solely as the property of said Henderson Brothers, for the use of which I promise to pay said Henderson Brothers the sum of fifteen dollars per month, and agree that all payments made by me for the use of said property shall be endorsed on this receipt, and when the sum so paid by me shall amount in the aggregate to the sum of one hundred and sixty-five dollars ($165 — cents,) with interest from date of this receipt, then said Henderson Brothers shall sell and deliver to me the property above-described, but until such payment is made by me, I neither claim, nor can I acquire any title whatever, to the property above named. I

also promise to return the above-named property to said Henderson Brothers, on demand, without costs to them.

G. T. Jordan."

This paper, which calls itself a lease, is a conditional sale of property, the title passing when the price shall have been paid. That would be the contract had it been made in this State. *Morris* v. *Lynde*, 73 Maine, 88. Its own terms are the true test of the nature of a contract, whatever its framers may denominate it.

The contract having been made in Massachusetts, it is to be interpreted according to the laws of that commonwealth. It is a general principle applicable to contracts made, rights acquired, or acts done, relative to personal property, that the law of the place of making the contract, or doing the act, is to govern the contract, and determine its meaning and validity. This principle of construction applies whether the contract is to be performed in such place, or performed generally without reference to place.

We find exceptions to this general rule, and a trackless forest of cases touching the different doctrines having relation to them, but we need not notice any of them, as the general rule governs in this case.

Now Massachusetts has by statute fixed in one respect the rights of parties in a contract like this. By her General Statutes, ch. 192, § 13, it is provided that, in conditional sales of personal property, the vendee shall have a right of redemption by paying the amount due and unpaid with interest and charges; virtually the same right of redemption as exists in this State in mortgages of personal property. When, therefore, such an agreement is made in Massachusetts, that statute is supposed to be in the minds of the parties, and becomes a part of their contract. The law infuses itself into the contract, as a part of it, with the same effect as if expressly incorporated therein. Redeemable in Massachusetts, the wagon was redeemable in Maine. When it was attached one hundred and fifty dollars had been paid towards it, leaving but fifteen dollars due.

The plaintiff became owner of the vendors' right in the

wagon, and the defendant, an officer, attached it as the property of the vendee. Had the plaintiff disclosed the amount due to him, the officer, no doubt, would have paid it and cleared the wagon from incumbrance. The officer was entitled to notice of the amount due on the quasi mortgage claim, before the plaintiff could maintain replevin against him. The statute requiring notice of the amount of a mortgage claim before maintaining a suit against an officer who has attached the property, applies to an irregular mortgage such as this. *Monaghan* v. *Longfellow*, 82 Maine, 419. As the officer received no notice of any lien on the property from the plaintiff, the action against him cannot be maintained.

Exceptions overruled.

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

NANCY P. LINSCOTT, in equity,

vs.

JOHN S. LINSCOTT and another.

Waldo. Opinion April 10, 1891.

Deed. Reformation. Mistake. Evidence.

The law requires great caution to be observed in accepting oral evidence to effect the alteration of such important instruments as deeds, especially when the testimony comes from parties, and persons in close affinity with them; and the evidence to prevail should be clear and strong, satisfactory and conclusive.

The proof falls short of the required standard, when the allegation is that a deed, made in 1868, omitted by mistake to include two parcels of land that were bargained for with those conveyed, the complainant and her husband asserting that they did not discover the mistake until lately, although the deed was read over to them at its date, and although some years ago, it was ascertained that the deed included a parcel that was not intended to be conveyed, a mistake that was corrected by a reconveyance for a consideration paid for it; it further appearing that the circumstances favoring the complainant's contention are no stronger than those making against it, and that the testimony on the two sides is equally positive, that for the complainant being greater in amount, but of no greater weight or probability than the testimony produced by the defendant.

ON REPORT.

Bill in equity heard on bill, answer and proof.

The case is stated in the opinion.

J. Williamson, for plaintiff.

W. H. Fogler, for defendant.

PETERS, C. J. We are of the opinion that this bill should not be sustained. It seeks to reform a deed of a farm in Palermo, made as long ago as 1868, from defendant to complainant, by incorporating into the description two parcels of adjacent land alleged to have been omitted from the deed by mutual mistake.

The case discloses that the grantor was at the time a resident in California, having an agent here in the person of his brother, who, though temporarily here, also belonged in California. The agent made the bargain and executed the deed under the authority of a power of attorney to sell any of the real estate of the defendant in Waldo county. The complainant and her husband and a female relative testify that the deed was to include the two omitted parcels, as the bargain was talked between the parties. Another witness, a family friend, heard declarations to that effect from the agent. The witnesses swear strongly, and still there is lacking in their testimony that manner of statement which impresses belief. The husband and wife both say that the deed and mortgage back, neither of them including the parcels in question, were read in their presence by the magistrate who wrote them, now deceased, and that they did not notice the omission, though they do not tell us why they did not. The parcels are known as parts of lots nine and ten. They say that they did not discover that the two pieces were not included in the conveyances until about three years ago.

For the defendant, the brother who acted as negotiator and executed the deed, denies the material statements of complainant's witnesses, giving a straightforward account of the transactions, and a neighbor of the complainant testifies that her husband several times said to him, he wanted either to purchase the two parcels or sell a parcel of his own adjoining them.

It appears that the two tracts, when the deed was made, were in possession of the step-mother of the defendant, having been

set off to her for her dower, and she was living on one of them. She died in January, 1876. The complainant alleges that she, (complainant) with her husband has been in possession of the places ever since January, 1876, paying taxes on them. The possession may be accounted for by the fact that the absent owner neglected it, though there was not much to possess outside of a wooded growth, and it does not satisfactorily appear that any taxes were paid by complainant. The tracts were not assessed at all when the widow occupied them, as the cultivation had run out and the buildings were nearly good for nothing. The complainant was taxed for all her land by the quantity or acres, not by particular description, and if she paid taxes on this property it was because she and her husband assumed ownership to themselves. They were appropriators, not owners.

But the case is not without circumstances, pointing a way to the proper solution of the conflicting evidence. The deed in question is one of warranty. The defendant would probably not have given such a deed of legally incumbered premises. And if the reversion only was to be conveyed, it would be the more noticed if not described in the deed. Then the scrivener, used to such business, writing the deed at the dictation of both parties, would hardly make a mistake, if he understood the parties correctly. But the significant circumstance, not easily explainable on complainant's theory, is that, in 1874, it was discovered that the defendant had included in his deed a part of lot 19, which he did not own, and the parties rectified the mistake by the complainant releasing that tract and receiving as compensation for it a deed of lot fifteen, another parcel owned by defendant in the same vicinity. And the complainant and husband undertake to say that even then they were not aware of the alleged error in their deed which they now seek to have corrected.

The caution which the law requires to be observed in accepting oral evidence to effect the alteration of written instruments of so high a character as deeds, especially where the testimony comes from parties and those in affinity with them, adds strength to the argument against the claim of the complainant. As was

said in *Parlin* v. *Small*, 68 Maine, 289; and the same idea of expediency may be found expressed in several of our cases. "A deed should not be battered down for alleged deceits or misunderstandings, unless the proof of them is clearly and abundantly established. The plaintiff must prevail, not only upon a preponderance of evidence, but such preponderance must be based on testimony that is clear and strong, satisfactory and convincing." The present case falls short of such requirement.

Bill dismissed with costs.

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

THOMAS STORER *vs.* WINFIELD H. TABER.

Waldo. Opinion April 10, 1891.

Contract. Warranty. Alteration. Estoppel. Evidence.

Parties, who have bound themselves in an executory contract of sale of personal property without warranty, are not precluded thereby from superseding such contract afterwards by an executed sale of the same property with warranty, and other change from the terms of the first contract.

In an action on the warranty of such property the vendee is not estopped, to show that it was worthless, by his admission in the first written agreement that it was worth one hundred and twenty-five dollars. The admission would be evidence but not conclusive evidence of the value.

ON MOTION AND EXCEPTIONS.

The case appears in the opinion.

W. H. McLellan, for plaintiff.

Thompson and Dunton, for defendant.

PETERS, C. J. This is an action on the alleged warranty of the soundness of a Spanish Jack sold by defendant to the plaintiff, the animal proving to be utterly worthless for the use for which he was purchased. At first the plaintiff bought one half interest in the Jack under the following agreement between the parties:

"Belfast, Maine, August 26, 1885.

"Know all men by these presents that we, Thomas Storer and Winfield H. Taber, enter into the following agreement, as follows:

That I, Winfield H. Taber, of Cambridge, Mass., sell to the said Storer one half interest in a Spanish Jackass for the sum of one hundred and twenty-five dollars paid this 26th day of August, 1885. That I, the said Thomas Storer of Morrill, Maine, feel disposed to pay the said Taber on or before January 1, 1886, the sum of one hundred and seventy-five dollars, he the said Storer is to have the one half interest now owned by the said Taber. He, the said Storer, has the privilege of paying at the time stated the sum stated above, or keeping the property and allowing the said Taber one half the income for services of mares, for one year from January 1, 1886, and at the expiration of said year said Storer, is to have the same for one hundred and twenty-five dollars. Said Taber is to pay the sum of twenty-five dollars for the keeping of one year, the year of 1886.

W. H. TABER,
THOS. STORER."

It was correctly ruled, at the trial, that the written agreement did not contain a warranty of soundness, and that none could be affixed to it by parol; thus disposing of the first count in the declaration favorably for the defendant.

The plaintiff further contended, according to the second count in his declaration, that, in January, 1886, he purchased of the defendant the second half interest in the Jack by verbal sale with warranty. The defense contends that, as the written agreement gives the option of a purchase in January, 1886, the sale at that date must be considered as made in pursuance of such agreement, and that the plaintiff is estopped to deny that it was so made.

Whilst the proposition of the defense would be a strong argument to the jury against the likelihood that the parties entered into a new, at variance with the old contract, still, as a matter of law it is untenable. They could, as they pleased, make a new contract differing from the original. Parties may by contract amend, waive or reconstruct a previous contract, though the first be in writing and the last by parol. Parties may contract about a contract as well as concerning anything else. *Adams* v. *Macfarlane*, 65 Maine, 143.

On the question of damages the counsel for defendant takes quite a specious, though, we think, not a tenable position. He interprets the contract as declaring that plaintiff should take the second half interest in the Jack in January, 1887, if not purchased before that time, for the sum of one hundred and twenty-five dollars. The argument is that the general rule of damages, the difference between actual value and represented value, does not apply; that the rule should be the difference between one hundred and twenty-five dollars and the represented or warranted value, and that the plaintiff is estopped to call the actual value of half the Jack to be less than that sum. This proposition loses sight of the idea that the old contract has been superseded, not in one provision only, but in all its provisions. It has losts its life.

We are a good deal inclined to believe that a different verdict should have been rendered on the facts, but hardly feel willing to set the verdict aside.

Motion and exceptions overruled.

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

EBENEZER E. CHAPMAN and others, in equity,

vs.

JEDEDIAH T. KIMBALL and others, TRUSTEES.

Oxford. Opinion April 10, 1891.

Death,—proof of. Evidence. Presumptions. Trusts.

A young man, in 1866, then about twenty-five years old, left his father's home in this state to go to the Western states in search of business or work. He had made such a trip before, returning after a short time. Going this time with acquaintances, he accompanied them to Missouri, settling in the town of Liberty, in that state. In 1869, he had a long and severe sickness at that place, during which he wrote home for funds, which were sent him. Up to that time he had habitually written to his family friends, and there had never been any alienation of affection on either side. In the last letter received from him by the family he wrote he was going to visit an uncle in Indiana, but he did not go there. Getting up poorly from his sickness,

having naturally a weak constitution and suffering from a lung complaint, he left Liberty for Chico, California, hoping the climate there would benefit him. He was a single man, not very successful in the affairs of life, not rising above working at labor in different employments. Chico and Liberty, have been thoroughly searched, the missing man inquired for through the newspapers at those places, and no trace of him has been discovered, and no person found who has seen or heard from or of him since 1870, over twenty years ago. *Held*: That the reasonable presumption is that he is dead, leaving no children to succeed to his inheritance.

This being a complaint in equity by the relatives of the person alleged to be deceased against parties who hold in trust under the will of a grandfather of such person the fund which the complainants seek to have distributed, it is within the power of the court, for the greater protection of the trustees, to order the fund to be transferred from their keeping to the keeping of inheritors, imposing such terms of liability upon the latter as substituted trustees as may be deemed reasonable.

ON REPORT.

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

This was a bill in equity brought against the defendants, trustees under the will of Ebenezer Eames, by the plaintiffs, his grandchildren and their survivors, claiming that a certain portion of the trust estate which otherwise would go to Leander T. Chapman, a grandchild, should be distributed to them, as his survivor under the will, by reason of his death without issue.

The principal issue was whether the said Leander was dead. The plaintiffs claimed that his unexplained absence from the state for twenty years, under the facts stated in their bill, was presumptive evidence sufficient to be conclusive of the fact.

The plaintiffs allege in their bill:

"Third. The plaintiffs further say that the said Leander T. Chapman, named in the will, went away from his home in Bethel, aforesaid, before the death of his said grandfather, Ebenezer Eames, and went out of this State, but that he continued to write to his relatives and friends in Bethel, from time to time and as often as once in two months but never returned to this State.

"In the month of August, A. D. 1869, he was in Liberty, Clay County, State of Missouri, and was at that time suffering from rheumatism and from disease of the lungs. That his life was despaired of for many weeks. Money was sent by his

friends in Bethel, for his aid and support, and during the latter part of the year 1869, he went to Chico, in the State of California, for the purpose of benefiting his health. The plaintiffs have been informed that the said Leander reached Chico, in due course of travel, but neither they nor any of the friends of the said Leander have ever heard from him since, although about twenty years have elapsed.

"Fourth. The plaintiffs further say that they have caused a diligent search to be made for said Leander, and have caused advertisements and notices to be published in newspapers in said Liberty and Chico, and that he cannot be found; by means and on account of all which the plaintiffs have been informed and believe and, therefore, allege that the said Leander is dead.

"Fifth. The plaintiffs further say that the defendants were duly appointed and accepted the trust created by said will and that the one half of the said residue and remainder of the said estate bequeathed in said will for the benefit of said grandchildren has been received by said defendants as said trustees, and they, acting in that capacity, have divided and distributed the same among said grandchildren according to the provisions of said will excepting the share that would go to the said Leander, were he now living. That said defendants hold said Leander's share of the legacy named in said will and refuse to distribute and pay the same to the plaintiffs. That said share amounts to the sum of nineteen hundred and twenty dollars and eight cents ($1920.08,) which sum the plaintiffs claim should be distributed to them according to the provisions of said will."

Defendants answer, admitting the other facts:

"Second. As to the statements in paragraphs three and four of the plaintiffs' bill, the defendants have no knowledge whether they are true or false and, in particular, the defendants do not know whether said Leander T. Chapman is dead, or not, nor whether he has lawful issue living.

"Third. The said defendants are ready and willing to pay said legacy given in said will to said Leander T. Chapman, to any person or persons to whom they lawfully or properly can pay it without risk to themselves.

"If this Honorable Court can make such decree as will fully protect the said defendants, in case it be true that either said Leander T. Chapman or any of his lawful issue be living, then the said defendants are ready and willing, when protected by such decree, to pay said legacy as they may be therein directed.

"If however, this Honorable Court cannot make such a decree as will fully protect the said defendants, in case said Leander T. Chapman or any lawful issue of his be living, then said bill should be dismissed."

The facts are found in the opinion.

A. E. Herrick, for plaintiffs.

Presumptions: *Stevens* v. *McNamara*, 36 Maine, 176; *White* v. *Mann*, 26 *Id.* 361; *Loring* v. *Steineman*, 1 Met. 204; 1 Greenl. Ev. (4th Ed.) § 41; 2 *Id.* § 278-f; *Davie* v. *Briggs*, 97 U. S. 628; 3 Redf. Wills, 4; *Wentworth* v. *Wentworth*, 71 Maine, 74; *Prudential Assur. Co.* v. *Edmonds*, 2 App. Cas. 487; *Rowe* v. *Hasland*, 1 W. Bl. 404; *Doe* v. *Griffin*, 15 East, 293.

Jurisdiction: R. S., c. 77, § § 6, 7; *Loring* v. *Steineman*, 1 Met. 208; *Miller* v. *Beates*, 3 S. & R. 490; *Faulk* v. *Dashiell*, 101 Pa. St. 273; *Johnson* v. *Merithew*, 80 Maine, 111; *Wentworth* v. *Wentworth*, 71 *Id.* 72.

No refunding bond: *Stockbridge, Pet'rs*, 145 Mass. 517.

A. H. Wellman, of Boston bar, for defendants.

It is admitted that there is no direct evidence of Leander T. Chapman's death. To be presumed, plaintiffs must show: That he left his usual home or place of residence more than seven years since. *White* v. *Mann*, 26 Maine, 361, 370; *Loring* v. *Steinman*, 1 Met. 204, 211; *Stinchfield* v. *Emerson*, 52 Maine, 465; *McMahon* v. *McElroy*, 5 Ir. Rep. Eq. 1; *McRee* v. *Copelin*, 2 Cen. L. J. 813. That he left for temporary purposes of business or pleasure intending to return. *White* v. *Mann*, *supra*; *Wentworth* v. *Wentworth*, 71 Maine, 72, 74; *Johnson* v. *Merithew*, 80 *Id.* 111, 115. That all persons who would naturally have heard from him, if he was living, have not heard from him, during a period of seven years. Cases, *supra*:

Prudential Assur. Co. v. *Edmonds*, 2 App. Cas. 487, 509; *In re, Miller's Estate*, 9 N. Y. S. 639; *Bowen* v. *Henderson*, 2 Sm. & G. 366.

The presumption of death is rebutted by evidence that the person, who is claimed to be dead, has been heard from within seven years; nor does it matter whether the intelligence is from persons in or out of the family. *Wentworth* v. *Wentworth*, *supra*; *Flynn* v. *Coffee*, 12 Allen, 133.

If anything has been heard, which would raise a reasonable doubt as to whether the person was dead or not, the presumption of death is overthrown. *Prudential Assur. Co.* v. *Edmonds*, *supra*.

The presumption of death from absence should not, in this country, be readily established, especially where the person supposed to be dead had acquired or intended to acquire a domicile in a distant state. *Smith* v. *Smith*, 49 Ala. 156; *McRee* v. *Copelin*, *supra*.

Plaintiffs must not only prove the death but also that he died without lawful issue. *Stinchfield* v. *Emerson*, *supra*; *Mullaly* v. *Walsh*, 6 Ir. Rep. C. L. 314, 319.

The rights of Leander T. Chapman and his lawful issue cannot be concluded by this bill or any decree made in this proceeding, they not being parties thereto. *Bailey* v. *Myrick*, 36 Maine, 50, 52; *Brown* v. *Johnson*, 53 Maine, 246; *Sears* v. *Hardy*, 120 Mass. 524, 529; *Williams* v. *Gibbs*, 17 How. (U. S.) 255. Story's Eq. Pl. § 106.

If the court should order the defendants to pay over to the plaintiffs the trust funds in their possession there seems to be no decision, either in Maine or Massachusetts, holding that such decree would protect the defendants if either Leander T. Chapman or any lawful issue of his should turn out to be living.

Where a savings bank paid the money to the administrator of a depositor who had been absent more than seven years without being heard from, the bank was nevertheless still liable to the depositor for the amount of his deposit. *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87.

A refunding bond should be required. Lewin on Trusts, *348, or Text Book Series, (Blackstone Pub. Co. Ed.) Vol. 1, p. 487.

PETERS, C. J. Ebenezer Eames by his will dated in February, 1870, bequeathed to the defendants, in trust, a portion of his estate, to remain in their hands for a period not exceeding fifteen years after his decease, and then to be distributed among the survivors of certain grandchildren whom he names as entitled to shares. He died in November, 1870. Among those named was Leander T. Chapman, whom the other heirs allege to have been a long time deceased, whose share they seek by this bill in equity to have distributed to themselves. They have received the other shares of the estate.

Whether Leander shall be presumed to be deceased or not is the question presented. The trustees only ask protection against a liability to pay over the fund twice, making otherwise no objection to the bill.

The following facts are deducible from the testimony: Leander, who would now be, if alive, fifty years old, leaving his father's home, in Oxford County, in 1866, went to Kidder, Missouri, and thence to Liberty, in that state, where he remained some time engaged at work in different employments. In 1869 he was taken ill in the latter place, having a long and severe sickness. During his absence he habitually wrote home to different members of his father's family, there never having been any alienation of affection on either side. During his sickness, August 24, 1869, he wrote home for money and it was sent him. Since 1869 or 1870, none of the family or friends have ever heard from him. He wrote that he should go to Indiana, where an uncle lived, but he did not go there. No person has given any trace of him since that time, excepting that one Judge Jones, of Liberty, in response to a newspaper advertisement inquiring for his whereabouts, writes that he worked awhile for him, was in poor health at the time from lung complaint, and went to Chico, California, thinking it might be of benefit to his health, from which place he last heard from him in 1870. Up to the

time when any trace of him was had, he had not been married. His friends have thoroughly searched over Liberty and Chico, and do not obtain any clue to him since 1870, in any place.

Do these facts create a presumption that the man is dead? The general rule is familiar. If a person leaves his usual home for temporary purposes, and is not heard of or known to be living, for the term of seven years, by those persons who would naturally have heard from him during the time had he been alive, the presumption is that he is dead. The rule does not confine the intelligence to any particular class of persons; it may be persons in or out of the family. *Wentworth* v. *Wentworth*, 71 Maine, 72, and cases there cited.

In what respect, if any, do the facts of the present case present either a weaker or stronger case than that defined by the general rule? It may be said that he did not have an avowed intention of returning to Oxford County,— that his absence was not intended to be merely temporary. But he had no home or family or business away from home to induce a permanent absence. He was seeking labor, and was probably attracted to Liberty, because an Oxford man lived there, with whom he hired. He had been out West before, returning to his Oxford home. In poor health, the instinctive disposition would be to return at some time to his father's home. The person who took care of him wrote during his severe sickness, "He always says he wants to die in his father's house." He kept up family relations by frequent letters. It is significant that when his letters ceased in 1870, all persons ceased to have any intelligence of him. There was no cause, if alive, for his breaking off the habit of writing to his friends at home. He had reason possibly to suppose that this very inheritance would be awaiting him. If not at his father's house, where was his home? If in Liberty or Chico, his absence from those places for twenty years, without any trace of him elsewhere, is just as unaccountable. But the present facts are in several respects stronger than those of the general rule.. The unexplained absence from all known friends for so long a period as twenty years, instead of seven, very greatly strengthens the presumption. Superadded is the important fact that he was a

man of ill-health and weak constitution. During his sickness he writes his father that his weight was ninety-six pounds. He had congestion of the lungs, according to the nurse's account, and Judge Jones, writes that his health was impaired by a bad lung affection. We think the bill must be sustained. It makes no difference that personal and not real estate is involved. *Stockbridge, Petitioner*, 145 Mass. 517.

The defendants take the point that it must be shown that the missing man is deceased, leaving no children to succeed to his inheritance. The burden is the other way. The defendants may show he left direct heirs. If the man cannot be found or his fate ascertained, it would be a difficult hunt to find children. *Loring* v. *Steineman*, 1 Met. 211.

The defendants would like the security of bonds of idemnity from the complainants. The proof is so conclusive it would not be reasonable to require sureties from them, or even that they shall stand bound for one another. But, as the court has the power to take the fund from the defendants and commit it to the complainants as provisional trustees, each complainant who is *sui juris* giving his own bond for the portion coming to his hands, a decree may be constructed, if the defendants desire that measure of protection, to that effect. The infant complainant, cannot give a bond, and the guardian ought not to be required to give one for her.

We think counsel fees for each side and complainants' costs should be allowed out of the fund, the amount of which may be determined by a single judge. *Bill sustained.*

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

WILLIAM H. FOGLER

vs.

CHARLES S. MARSTON and RALPH R. ULMER, TRUSTEE.

Knox. Opinion June 11, 1891.

Insolvent Law. Sale of property in dispute. Assignee. Trustee Process. R. S., c. 70, § § 36, 37.

The assignee of an insolvent debtor, representing that there were different claimants of certain personal property found in the possession of such

debtor, obtained leave to sell the same on common account, by proceedings under R. S., c. 70, § 36. A portion of the proceeds of the sale belonged to a person other than the insolvent debtor. *Held*: That such portion was attachable in the hands of the assignee as trustee of the owner thereof, by trustee action against such owner instituted within the sixty days allowed by R. S., c. 70, § 37, for the assertion of any claim in such case against an assignee by suit.

On exceptions.

Trustee process. The presiding justice ruled *pro forma* that, upon the facts alleged in his disclosure, the trustee should be discharged. The plaintiff excepted to this ruling.

The case is stated in the opinion.

W. H. Fogler, for plaintiff.

This suit was commenced within the time limited by the statute. It is true, it is not commenced by the claimant himself; but it is brought by his creditor, who, by his attachment, succeeds to the rights of the claimant. The plaintiff and the trustee became adverse parties, the same as the principal defendant and the trustee would have been had the suit been between them. *Dennison* v. *Benner*, 36 Maine, 227; *Webster* v. *Adams*, 58 Maine, 317.

The principal defendant was personally served with process. He is bound by the judgment in this suit. If he had commenced suit against the trustee, within the sixty days, it would have been of no effect, as his action would have been continued, to await the disclosure and judgment in this suit; and, unless there should be a balance left in the hands of the trustee, after satisfying the judgment in this suit, he would fail in his suit and be liable for costs. R. S., c. 86, § 56; *Ladd* v. *Jacobs*, 64 Maine, 347.

It could not have been the intention of the legislature to put it within the power of a debtor to defeat an attachment of his property by a creditor by his own refusal or neglect to bring an action in his own behalf, especially when an action, if commenced, would be of no avail to himself, and would only result in useless expense, and subject him to costs. An attachment of the funds in the hands of the assignee by a creditor of the claimant, in a suit commenced within the time limited against the

claimant as principal defendant, and against the assignee as trustee, is a compliance with the statute referred to.

J. O. Robinson and J. F. Libby, for defendant.

Claimant must assert his rights, under § 37, by euit against the assignee, not by trustee process. Tort, and not trustee process, is the appropriate action when the principal defendant's right vests in a claim for unliquidated damages. Marston might waive the tort and sue in assumpsit; his creditor has no such election.

Trustee must be discharged because, as appears by his disclosure, Marston's estate is in insolvency in Massachusetts, and the title of his estate in his assignee there, who alone could recover this property. These facts are conclusive upon the plaintiff. *Fay* v. *Sears*, 111 Mass. 154, and cases cited.

PETERS, C. J. The trustee in this case is the assignee of W. T. Robinson's estate in insolvency. Among the possessions of the insolvent were nine hundred and nineteen pairs of pants which he had manufactured for Charles S. Marston, the principal defendant, there being due the insolvent the sum of two hundred and fifty-nine dollars for manufacturing the same, for which sum he had a lien thereon.

The assignee (alleged trustee) regarding the property as in dispute among different claimants asked for an order of sale under the authority of section 36 of chapter 70 of the Revised Statutes, and license having been given him by the court of insolvency, after observing all the formalities required by the section, he sold the goods at public auction for the sum of four hundred and sixty dollars. Deducting the lien claim and costs of sale (thirty dollars) from the proceeds of sale left one hundred and eighty-one dollars in the trustee's hands belonging to the defendant Marston. Thereupon the sum was trusteed by the plaintiff in this action against Marston.

The question is on the liability of the trustee. The objection urged against the liability of the trustee is that section thirty-seven of the chapter before cited provides that any claimant of

such funds in an assignee's hands, shall sue him for them within sixty days from the date of the order of sale, or be precluded ever after from maintaining any action either at law or in equity for their recovery; the trustee contending that, inasmuch as no action by the principal defendant has been instituted within that time, the right of claim has been lost. Bringing an action is not, as seems to be argued, a condition upon which a claimant's title depends. An action does not produce the cause of action. A claimant in such case has the title and a right of action. He is limited to a certain time within which he must assert his title or lose it. Here the plaintiff asserts the claim for him, and is entitled to the same right to the fund, the defendant having submitted to a default, that the defendant had. The plaintiff stands himself in the attitude of claimant, bringing his action seasonably, in which any defense can be set up that the trustee would have been entitled to in an action against him by the defendant himself. The claim is to be made by any one entitled. The plaintiff is legally entitled. If not, the fund will be retained, through accidental title, by those who never set up any claim to it. The object of the statute is that all questions of title may be expeditiously settled. That may be attained as well by this action as any. The attaching creditor in a trustee suit has all the right to protect and recover the fund attached that the owner would have were he pursuing his claim in his own name. The plaintiff becomes a substituted owner. *Sawyer* v. *Sawyer*, 74 Maine, 580; *Holt* v. *Libbey*, 80 Maine, 329.

The briefs of counsel seem to conflict in their understanding of the facts of the case in respects other than upon the question which has received our attention, and as the Judge ruled, simply on the facts alleged (not proved) by the plaintiff, that the trustee should not be charged, the case should be remanded for further proceedings.

Exceptions sustained.

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

NATHANIEL T. SHAW *vs.* GEORGE D. BISBEE, EXECUTOR.

Oxford. Opinion April 11, 1891.

Deed. Warranty. Description. Corenant. Incumbrance.

A grantor conveyed to the plaintiff a hotel and lot by the following description: "A parcel of land situated in Buckfield village, and the buildings thereon, known as the Buckfield House and stand, containing one acre more or less, meaning to convey the same premises F. A. Warren conveyed to me." Warren's deed conveyed the premises by the same general description. Adjoining the hotel lot was a small triangular parcel that had been many years unfenced and unused by its owner, forming a common ground with the hotel lot, there being no visible line between the lots excepting at one corner on the divisional line a granite post was set, and people were in the habit of driving across this common ground when approaching the hotel from a certain direction. The plaintiff was deceived by the situation and use of the premises, supposing the small parcel to be a part of his purchase, and conveyed the two parcels by metes and bounds to a third person as the hotel property. Having suffered upon the warranty in his own deed, he sues the executor of his grantor upon the warranty in his grantor's deed. Had he investigated the meaning of the granite post, or explored the registry of deeds far enough back to have found the first conveyance of the hotel lot by metes and bounds, his error would have been prevented. *Held*: That the action cannot be maintained.

Covenants of warranty in a deed are not qualified by a phrase at the end of the description of the land, "being the same premises F. A. Warren conveyed to me," even if through Warren's deed an incumbrance was discoverable. The reference was designed to help identify the premises conveyed, and not to determine the quantity or quality of title.

FACTS AGREED.

Action of covenant broken. From the agreed statement it appeared that the action was brought against the defendant as executor of Nathan Morrill, deceased, for alleged breaches of the covenants contained in a warranty deed of certain premises in Buckfield, given by said Morrill to the plaintiff on the third day of April, 1880.

The breaches alleged were, first, an incumbrance on that part of the premises called the garden lot, in the nature of an easement owned by the proprietor of an adjoining lot that no buildings should ever be erected or placed on said garden lot so that the prospect from a certain dwelling house on said adjoining lot should be obstructed; also, second, that defendant's testator,

at the time of the execution and delivery of said deed, was not seized in fee of, nor had he the right to convey a certain triangular piece of land alleged by the plaintiff to be a part of the premises described in said deed.

The parties stated their case as follows :—

"It is agreed that said Morrill is deceased, and that said George D. Bisbee has been duly appointed executor of his will and qualified as such; that said deed from Nathan Morrill to the plaintiff was duly executed and delivered to the plaintiff at the date thereof and was, therefore, properly recorded in the registry of deeds for Oxford County; that said garden lot was at the date of said deed, and had been for fifty years, a part and parcel of the premises described in said deed; that the record title to said triangular piece was not at the date of said deed in said Nathan Morrill, but that said piece lay between the garden lot and the Paris road without any bounds or distinguishing marks between the two pieces excepting a stone post standing at the northwest corner of said garden lot, so-called, and the northeast corner of said triangular piece, and had thus laid for nearly fifty years and nothing to distinguish it from the hotel grounds proper excepting said stone post.

"It is further agreed that, on the delivery of said deed, the plaintiff entered into the possession of the said premises conveyed to him by the same and occupied same until the eleventh day of May, 1882, when he duly executed to Messrs. Rawson and Tobin his warranty deed of certain premises including said garden lot and said triangular piece; that on the ninth day of December, 1886, said Rawson and Tobin commenced an action against the plaintiff for a breach of the covenants in his deed to them of said garden lot and triangular piece, the breaches alleged being the same alleged in the declaration in this case, and for the same incumbrance and want of title; that said action was duly entered in the Supreme Judicial Court for Oxford County; that while said action was pending in said court on the 27th day of September, 1887, said defendant as Executor of said Nathan

Morrill's will, by order of said court was duly summoned in to defend said action, but he neglected to appear and defend same; that thereupon said action was referred to Hon. William Wirt Virgin, the presiding judge, Benjamin Spaulding and Charles B. Atwood; that the said referees heard said case and returned their award to court; that said award was accepted and judgment entered upon the same; that by the judgment of said court in said case the plaintiff was required to pay, and did pay, the sum of ninety-nine dollars and seventy-five cents on account of the said incumbrance on said garden lot, and the further sum of ninety-nine dollars and seventy-five cents for want of title to said triangular piece, with costs of court taxed at seventeen dollars and thirty-seven cents, and has paid an additional sum of forty dollars for counsel fees and expenses in defending said action; that whatever incumbrance on the garden lot was proved in that case existed the same at the time of the execution and delivery of the deed from Morrill to the plaintiff. . . .

"It is further agreed that in case the court shall find the defendant responsible for either breach alleged, then the damage for the same shall be the amount found by the referees for such breach, in the former case, with such sum added thereto for costs and counsel fees in the former suit as the court may award." . . .

Geo. A. Wilson, for plaintiff.

Counsel cited: *Hardy* v. *Nelson*, 27 Maine, 526; *Hamilton* v. *Cutts*, 4 Mass. 349; 3 Wash. R. P. (3d Ed.) p. 334; *Carpenter* v. *Millard*, 38 Vt. 9; *Woodman* v. *Smith*, 53 Maine, 79; *Cilley* v. *Childs*, 73 Maine, 133.

Geo. D. Bisbee, for defendant.

The triangular piece not conveyed to plaintiff. Says SHEPLEY, J., in *Field* v. *Huston*, 21 Maine, p. 72, "It is true that when reference is made in a deed of conveyance to other deeds by any definite description they are to be regarded as parts of the conveyance. The intention of the parties that they should be is clearly made known." Morrill in his deed followed this rule. He distinctly stated that he conveyed the same premises con-

veyed to him by F. A. Warren in February, 1880. This makes the Warren deed to Morrill part of the description of the deed from Morrill to Shaw.

Garden lot not conveyed to plaintiff free from incumbrance.

By a chain of title commencing with this plaintiff, following back step by step from grantor to grantor, each deed either containing a general description and being a reference deed or a quit-claim deed, we are brought to an original deed, properly executed and duly recorded, which fully describes the land conveyed and does not convey the garden lot free and clear of all incumbrances; but specifically makes a reservation of the right to erect any buildings on this garden lot that may obstruct the view from the Long stand, or in other words, fully recognizes the easement over this piece of ground that the Long stand legally enjoys, and makes the western bounds of the land conveyed, the eastern bounds of the triangular piece, then called the "Zadoc Long land on the Paris road," thereby positively excluding the triangular piece from the land conveyed.

PETERS, C. J. Nathan Morrill, by his deed of warranty, conveyed a hotel and land surrounding it to the plaintiff, the description in the deed being general and not by metes and bounds. The plaintiff undertaking to convey to another the same premises with a description of metes and bounds, by mistake included in the description a triangular parcel of land adjoining the hotel lot but not a part of it. Having been sued on his covenants for the value of the parcel not belonging to him, and paying the damages to his grantee, he now seeks to recover equivalent damages from the executor of his grantor.

The ground of the claim is that the general description in Morrill's deed apparently, if not really, embraced the adjoining parcel, and that the plaintiff, not unreasonably, was deceived by the description. The parcel alluded to formed a sort of common with the lot surrounding the hotel, having been for many years unfenced and unused by its owner, and the public were accustomed to drive over it considerably, as a convenient cut-across to the hotel. There was nothing to distinguish any line between the two lots, excepting at one corner of the triangle there had

been for many years a granite post on the line between them. The triangular parcel was not a necessary adjunct of the hotel for any purpose, but added to its convenience.

The description of premises in Morrill's deed to the plaintiff is this: "A parcel of land situated in Buckfield village, and the buildings thereon, known as the Buckfield House and stand, containing one acre more or less, meaning herein to convey the same premises deeded by F. A. Warren to me." Warren's deed also contained the same general description, but the person who first conveyed the land for a hotel lot, as the records show, bounded it accurately by metes and bounds. Had the plaintiff inquired out the meaning of the granite post, plainly seen, or looked back in the registry of deeds, he would not have been misled. The error seems to have been his own, and he cannot recover for his loss. The case of *Woodman* v. *Smith*, 53 Maine, 79, relied on by the plaintiff, on close examination will not be regarded as supporting his claim.

On the other count in the writ, the plaintiff presents an unanswerable claim. It appears that there was in a coterminous owner a right of unobstructed look-out over the premises, a negative easement, reserved to him in some afar-back deed, which Morrill was not aware of during his ownership, the easement constituting an incumbrance under his unqualified warranty. The only defense pretended against this claim, is that, if Morrill had looked back to a record of the early conveyance, each deed since in the line of title referring to a preceding deed, he would have discovered that such an easement rested on the land. But a reference in deeds to the registry of prior deeds, unless expressly appearing otherwise, is only intended to help identify the premises conveyed, and not to determine the quality or quantity of the title. Otherwise it would be hazardous to accept deeds containing such references. Grantees would be too easily deceived by them. *Hathorn* v. *Hinds*, 69 Maine, 326.

Defendant defaulted.

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

EDMUND F. WEBB, ADMINISTRATOR, in equity,

vs.

EDMUND A. FULLER and another.

Waldo. Opinion April 11, 1891.

Equity. Statute of Limitations. Practice. R. S., c. 77, § 34.

It is generally too late in a suit in equity to interpose a plea of limitations after the master's report is in, where the point was not taken on demurrer or in answer, although it is within the power of the court, in the furtherance of justice, to allow the plea in an extreme case at any time.

(See *Webb* v. *Fuller*, 77 Maine, 568.)

IN EQUITY.

On appeal, by defendants, from the decree of the presiding justice who heard the case upon the master's report. The appeal was declared to be frivolous and intended for delay, and the case was thereupon certified under R. S., c. 77, § 34, to the Chief Justice.

After a demurrer to the bill was overruled as appears in the former report of this case, *Webb* v. *Fuller*, 77 Maine, 568, where the opinion of the court states the nature of the complaint, issues of fact were submitted to a jury who found in favor of the plaintiff.

Jasper Hutchings, Esq., was appointed master and he reported that the defendants were indebted to their mother's estate in the sum of $8188.41, with interest from March 20, 1878. The defendants filed the following exceptions to the report of the master:

"That said finding is against law in this, that the transaction upon which said finding is based and the question whether the defendants are indebted to said Ann S. Fuller's estate on account of said transaction are not in issue in this suit under the pleadings.

"That said finding is against evidence and law in this, that the evidence is insufficient to warrant the finding that the defendants were ever indebted to said Ann S. Fuller on account of said transaction.

"That said finding is against law in this, that if defendants ever promised to pay said Ann S. Fuller, said sum or any sum

whatever on account of said transaction, the claim therefor is barred by the statute of limitations."

The presiding justice overruled the exceptions, and the defendants appealed.

W. H. Fogler, for defendants.

Webb and Webb, for plaintiff.

PETERS, C. J. This case was heard on demurrer (77 Maine, 568), afterwards presented on special issues to a jury, they rendering a verdict for the complainant which was sustained by the full court, then sent to a master who made a report, and lastly heard by a judge sitting in chancery, who filed a decree for the complainant. The respondents appealed from the decree, when, upon motion of the complainant the sitting judge declared such appeal to be frivolous and intended for delay, and certified the case to the court under the provision of R. S., ch. 77, § 34, in order that the pending questions may receive a speedy determination.

We have examined and considered all matters legitmately presented, and think that only a single position taken for the defense need be spoken of. The statute of limitations is relied on in defense of some of the items of claim allowed by the master. The point having been unnoticed on demurrer, and in the answers setting up a general defense to the bill, it comes too late at this stage of the case to be favored, although the court is not without power, in the furtherance of justice, to allow the plea, even as late as this, to be interposed.

The character of the case forbids our extending any such indulgence to the defendants, and the plea would be unavailing, if it were allowed to be made. Whilst the property sought to be recovered from the defendants was received by them more than six years before the complainant's intestate died, there having been no assertion of claim by her in her life-time, the jury found that it was gotten from her by undue influence, that she had not mental capacity to act in the matter for herself, and that she continued in such condition until she died. *Decree affirmed with costs.*

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

JAMES W. TUFTS *vs.* WILLIAM GREWER.

Cumberland. Opinion April 11, 1891.

Sale. Contract. Measure of damages.

For a vendee's refusal to accept and pay for goods he has contracted to buy, the vendor may recover for damages the difference between the market value of the goods at the time and place stipulated for delivery and the contract price, together with the expenses of reselling the same; and this rule prevails whether the articles are merely some of the manufactures of the vendor which he has on hand, or are manufactured in some particular way especially for the vendee at his request; nor does the rule yield when the action declares specially on the contract for the full price. The nature of the facts, rather than the form of the action, rules the damages.

ON EXCEPTIONS.

This was an action of assumpsit brought in the Superior Court, for Cumberland County, for a breach of contract for sale of a soda fountain, and tried by the justice without the intervention of a jury, subject to exceptions, in matters of law. Plea, the general issue.

It was admitted that the contract was performed on the part of the plaintiff; that the fountain was made to the order of the defendant for his own use and especially for him; and the breach of the contract as alleged in the writ is admitted. The defendant further admitted that the fountain was offered to be delivered or tendered to him on the day set forth in the writ and was in charge of the transportation company subject to the defendant's acceptance.

The plaintiff claimed that the measure of damages is the contract price. The defendant contended that the measure of damages is the difference between the contract price and the market price upon the day of the breach of the contract.

It was further agreed that if the court sustained the contention of the defendant the damages should be assessed at twenty-five dollars.

The plaintiff declared specially on the contract.

The declaration after setting out the contract, alleges: . . .

"And the plaintiff further alleges that the defendant signed an order in writing for the purchase of the above-described goods, with terms and conditions as aforesaid, therein stated, which said order in writing signed by the defendant, plaintiff will produce in court. And plaintiff further avers that said order in writing was thereupon, to wit:—on said twenty-eighth day of June, 1889, accepted by the plaintiff, and that in pursuance thereof, and in consideration of the promise of defendant to pay for the same as aforesaid, said apparatus was made, prepared and finished, and was so made, prepared and finished in accordance with the description contained in said written order, and that said apparatus so made, prepared and finished was delivered to the defendant on June twenty-eighth, A. D., 1889, and the bill of lading therefor delivered to defendant, and said contract fully performed by plaintiff in his behalf, and plaintiff thereupon requested the defendant to pay to him, the said defendant, said sum of two hundred and seventy-five dollars in cash, and to deliver to plaintiff said five notes for fifty dollars each, in pursuance of said order and contract. But said defendant, unmindful of his said order and contract, then and there refused to accept said apparatus, and still refuses to accept the same, and then and there refused and still refuses to pay plaintiff said sum of two hundred and seventy-five dollars in cash, and then and there refused and still refuses to sign and deliver to plaintiff, said five notes for fifty dollars each, for said deferred payments."

Clarence Hale, for the plaintiff.

This action is not brought for goods sold and delivered, but is brought for breach of the special contract. In the cases where the courts have decided the measure of damages to be the difference between the contract price and the market price, the actions have been brought upon account annexed, or for goods sold and delivered. *Atwood* v. *Lucas*, 53 Maine, 508. Where goods are prepared for the vendee, of a particular description, when vendor has performed his part of the contract and tenders the articles, and the vendee refuses to accept, the vendor may recover the full contract price. *Gordon* v. *Norris*, 49 N. H.

376; *Newmarket Iron Foundry* v. *Harvey*, 23 N. H. 395; *Bement* v. *Smith*, 15 Wend. 493; *Shawhan* v. *Van Nest*, 25 Ohio, 490; Sedg. Dam. 339; *Thoms* v. *Dingley*, 70 Maine, 102.

Counsel also cited: *Dustan* v. *McAndrew*, 44 N. Y. 72, 78; 1 Sedg. Dam. (7th Ed.) 596; *Bookwalter* v. *Clark*, 10 Fed. Rep. 793; (S. C. 8 Myers Fed. Dec. 746); *Thorndike* v. *Locke*, 98 Mass. 340; *Pearson* v. *Mason*, 120 Mass. 53; *Hanna* v. *Mills*, 21 Wend. 90; *Dunlop* v. *Grote*, 2 C. & K. 153; *Hutchinson* v. *Reid*, 3 Camp. 330; *Dutton* v. *Solomonson*, 3 B. & P. 582; *Barrows* v. *Mullen*, 21 Minn. 374; 1 Chit. Pl. 345; Suth. Dam. 356; *Mussen* v. *Price*, 4 East. 147; *Messer* v. *Woodman*, 22 N. H. 172; *Stoddard* v. *Mix*, 14 Conn. 12; *Worthy* v. *Jones*, 11 Gray, 168; Sedg. Dam. § 283; *Graham* v. *Jackson*, 14 East, 498; Benj. Sales, § 315.

Drummond and Drummond, for defendant.

The test to be applied is whether title has passed; this governs not only the form of action but also the rule of damages. If title has passed, then an action for goods sold and delivered can be maintained, and the contract price recovered; if it has not passed, the action must be upon the contract for the damages suffered, and the rule of damages is the difference between the contract price and the market value. Measured by any other rule than the general one, he recovers not his actual damages,— not his real loss,— but an amount which allows him double the benefit of his contract.

The seller has the three remedies, mentioned by text writers, only in case title has passed; if title has not passed and still is in the vendor, then his remedy is for the breach of the executory contract, and he can recover only his damages for such breach, namely: the difference between the contract price and the market value of the article; these may range from the contract price to nominal damages, according as the market value is nothing or equal to the contract price.

If the plaintiff attempts to take the case out of the general rule on the ground that the apparatus was manufactured especially for the defendant, and that therefore a different rule (an exception to the general rule) prevails, the defendant's answer is: (1,) That

the contract in this case is not a contract to manufacture upon the special order of the defendant, but is a contract of sale. (2,) But if it is a contract to manufacture upon a special order, still the measure of damages is the same as in the case of the sale of an existing chattel; and (3,) That if the defendant is incorrect in his first two positions, the title to the fountain never having passed to the defendant by the terms of the contract itself, the case does not come within the exception, as that rule of damages is only applied in cases where title is passed. *Goddard* v. *Binney*, 115 Mass. 450; *Lamb* v. *Crafts*, 12 Met. 353; *Old Colony R. R.* v. *Evans*, 6 Gray, 25; *Griswold* v. *Sabin*, 51 N. H. 167; *Porter* v. *Travis*, 40 Ind. 566; *Thompson* v. *Alger*, 12 Met. 428; *Bookwalter* v. *Clark*, 11 Biss. 126 (S. C. 10 Fed. Rep. 793); *Rhodes* v. *Cleveland Rolling Mill Co.* 17 Fed. Rep. 426.

Cases in which contrary doctrines have been supported arise where title has passed to the vendee, or where the manufactured article has no value; and in some cases in Ohio, where a rule exactly contrary to the one uniformly adopted elsewhere, prevails. *Bement* v. *Smith*, 15 Wend. 493; *Ballentine* v. *Robinson*, 46 Penn. St. 177; *Gordon* v. *Norris*, 49 N. H. 376; *Shawhan* v. *Van Nest*, 18 Am. Rep. 313; *Allen* v. *Jarvis*, 20 Conn. 38; Sedg. Dam. (2 Ed.) 281; 2 Pars. Con. 484; Field Dam. § 299; Benj. Sales, (4 Am. Ed.) § 1117, n. 1; *P. C. & S. L. R. R.* v. *Heck*, 50 Ind. 303. The manufacture of an article pursuant to an order of a customer does not transfer the title unless there be an acceptance of it. *Moody* v. *Brown*, 34 Maine, 107.

PETERS, C. J. It becomes immaterial whether the writing signed by the parties in this case be considered a contract of sale, or a contract to manufacture an article upon the order of the defendant, inasmuch as we feel convinced that the rule of damages would be the same in this State whether it be the one or the other kind of contract.

The defendant ordered a soda fountain of the plaintiff, which was manufactured and tendered to him and the price demanded.

It is admitted that the plaintiff performed all the requirements of the contract resting on him, and that the defendant without legal excuse failed to perform his part of the obligation, utterly refusing to pay for or accept the property. The action is special, reciting that, although the plaintiff has performed his promise, the defendant refuses to perform his, the plaintiff claiming to recover for the breach the full contract price of the article sold.

The general rule is familiar, that for the vendee's failure to receive and pay for the goods he has contracted for, the vendor may recover the difference between the market value at the time and place stipulated for delivery and the contract price, together with the expenses of reselling the property. The general rule is not questioned, but the plaintiff contends that a special and more equitable rule governs when a vendor has manufactured the article after a particular pattern upon the order of the vendee, who refuses without excuse to accept the same. The plaintiff says, I have done all I bargained to do and now the defendant should be compelled to do what he bargained to do, namely, to pay the contract price.

We feel that there is force in the plaintiff's position, supported as it is by considerable authority, but we are inclined to believe that there should be but one rule of damages in cases where a vendee refuses to accept goods which he has agreed to purchase, whether the article to be delivered to the vendee is already in existence or is to be manufactured on his account. Wherein does the general rule fail to furnish an efficacious remedy? The vendor was to receive in this case money and notes. While the law fully recognizes the obligation of the vendee, and cannot require specific performance, it undertakes to make full reparation by allowing recovery for all the damages sustained. What difference, practically, can there be between a seller receiving the consideration wholly from the vendee or partly from him and the balance from some one else? The law in its own way obtains for the vendor an equivalent for a full execution of the contract.

There are courts which have held that, in all cases where a vendee refuses to accept the goods contracted for by him, the vendor may recover the contract price as damages. There is a

stronger leaning among judges towards the distinction, set up in the present case, in favor of applying such a principle only when the contract calls for an article to be manufactured especially for the vendee. The ground upon which this doctrine is defended by its advocates is that the peculiarly manufactured article is of little value to any one besides the vendee, if of any marketable value whatever. The answer to this position is, of course, that the less the goods are worth to sell in the market the more the plaintiff recovers, and if they are worth nothing at all, then he recovers the full contract price. But such a result is just as logically attainable under the application of the general as by any special rule. The great ground of objection to the rule invoked by the plaintiff is that where there has been no acceptance of the property, the title still remains in the vendor, liable to be taken for his debts, or pass to his assignee in bankruptcy, or be sold by him to another purchaser. A tender does not in our law transfer the title to the vendee. The facts show that the plaintiff was to retain title to the fountain until the price should be paid. But the defendant refused to make the partial cash payment called for by the terms of sale, or to accept any possession or control of the property, so that even an equitable title to the property did not pass to him.

The rule invoked here has not been much noticed in the English law, but finds its principal support in this country, and, still, even here it will be found, we think, to be in contradiction of most of the authorities. The first case in this country sustaining this special rule, was *Bement* v. *Smith*, 15 Wend. 493. In *Dustan* v. *McAndrew*, 44 N. Y. 72, although the case called for no such classification, the opinion formulates the law on the point in question in the following manner: (1) The vendor may store or retain the property for the vendee and sue him for the entire purchase price; (2) or he may sell the property, acting as agent of the vendee, and recover the difference between the contract price and the price obtained on such resale; (3) or he may keep the property as his own and recover the difference between market price and the contract price. This formulary seems to have crept into several text-

books, receiving more or less approbation from the authors. The special rule was approved in Massachusetts, as limited to cases where the article to be sold was stock in a corporation, the vendor having tendered the certificate made out in the name of the vendee. *Thompson* v. *Alger*, 12 Met. 428. The court there said in response to a suggestion that the general rule should apply: "Such would be the general rule as to contracts for the sale of personal property, and such rule would do entire justice to the vendor. He would retain the property as fully in his own hands as before and a payment of the difference between the market price and that stipulated would fully indemnify him." The most exhaustive case cited in plaintiff's behalf is *Shawhan* v. *Van Nest*, 25 Ohio, 490, reported also with a lengthy editorial note in 15 Am. Law Reg. N. S. 153. The opinion relies for support largely on the case of *Bement* v. *Smith*, *ante*, and *Ballentine* v. *Robinson*, 46 Penn. St. 177. The author of the note referred to, after quoting from *Laubach* v. *Laubach*, 73 Penn. St. 392, as holding a doctrine at variance with the preceding Pennsylvania case, closes his observations with the following: "It must be admitted that *Ballentine* v. *Robinson*, and *Bement* v. *Smith*, and the principal case, can only be reconciled with what appears to be the general line of the authorities, by saying that in them, tender by the vendor, or conduct amounting to an acceptance upon the part of the vendee, was considered to have passed the property in the goods to the latter. In the contract upon which the principal case was brought, the plaintiff's shop was fixed as the place of delivery, and it might be argued that the completion of the carriage, at the time and place appointed, amounted to delivery. But the unqualified position laid down in the rule that when the vendee refuses to receive the goods upon tender, the vendor may store or retain them and sue for the contract price, though adopted by Sedgwick and Parsons, does not seem borne out by the authorities." Since this note was written the editors of the seventh edition of Sedgwick on Damages say in note, Vol. 1, 596: "We do not think the distinction taken in *Shawhan* v. *Van Nest*, can be supported." It is also said in note on same

page: "This, (the doctrine of the text,) now is held to be the proper rule only where the title has passed." See numerous cases cited in note, Benj. Sales, (7th Ed.) § 758.

A formidable barrier against the plaintiff's recovery upon the theory of damages claimed by him is that the question has been virtually decided in this State against such theory. In *Atwood* v. *Lucas*, 53 Maine, 508, it was held that an action of assumpsit for goods sold and delivered cannot be sustained where the goods have not been accepted by the vendee. In *Moody* v. *Brown*, 34 Maine, 107, it was held that such an action would not lie although the articles claimed to be sold were manufactured after a peculiar pattern for the special use of the vendee, who refused to accept them when tendered to him. In the latter case, the action did not, as the present action does, allege a claim against the defendant for damages for not accepting and paying for the goods, but went upon the theory of goods sold and title passed. But no question of pleading was discussed in the case, and the opinion, taking no objection to the declaration, determines that upon the facts in proof no more damages were recoverable than the difference between contract price and market value. The case was decided on the legitimate effect of the facts, and not upon the form of the action. The court dissents from the doctrine of the case of *Bement* v. *Smith*, 15 Wend. 493, before cited, as wrong in principle and contradictory "to the result of the best considered cases."

But then we are confronted with the case of *Oatman* v. *Walker*, 33 Maine, 67, where the plaintiff was allowed to recover against the defendants the contract price of land which they had agreed to purchase of the plaintiff, afterwards repudiating their contract. The facts do not appear to be fully reported, but it looks like a case where the defendants were to repurchase a parcel of land they had conveyed to the plaintiff, thereby rescinding a former contract. Such a case may be an exception to the general rule. *Laubach* v. *Laubach*, 73 Penn. St. 367, before cited. The opinion in a few words merely follows the case of *Alna* v. *Plummer*, 4 Maine, 258, where the

same rule was adopted without argument or explanation and barely with words from either counsel or court. In both cases the decision was an assumption merely. The case of *Old Colony R. R. Co.* v. *Evans*, 6 Gray, 25, strongly antagonizes those cases, the opinion in the case citing a long list of authorities in support of a contrary doctrine.

Exceptions sustained.

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

WILLIAM J. BREMNER *vs.* INHABITANTS OF NEWCASTLE.

Lincoln. Opinion April 15, 1891.

Way. Defect. Evidence.

On the trial of an action against a town for an injury occasioned by a defect in a highway, when one of the issues in the case was the position of a plank at the end of a bridge, and whether it rendered the way unsafe for travelers, evidence that other persons with their vehicles had received injuries at the place of the alleged defect is not admissible to show that the way is defective.

ON MOTION AND EXCEPTIONS.

This was an action to recover damages sustained by plaintiff through a defective highway. The jury returned a verdict of two hundred dollars for the plaintiff.

The facts are sufficiently stated in the opinion.

Arguments of counsel upon the motion are not reported, as the court express no opinion thereon.

W. H. Hilton, for defendants.

Counsel cited: *Collins* v. *Dorchester*, 6 Cush. 396; *Robinson* v. *R. R.* 7 Gray, 96; *Merrill* v. *Bradford*, 110 Mass. 505, and cases cited; *Bunker* v. *Gouldsboro'*, 81 Maine, 188, and cases cited.

L. M. Staples, for plaintiff.

Exceptions immaterial. Result not affected by the admission of the evidence of the defect as noticed by other parties. *State* v. *Kingsbury*, 58 Maine, 238; *School District* v. *Ins. Co.* 62

Id. 330; *Mathews* v. *Fisk*, 64 *Id.* 101; *Canterbury* v. *Boston*, 141 Mass. 215, and cases cited.

LIBBEY, J. This is an action against the defendant town to recover damages alleged to have been received by a defect in a highway in said town. The alleged defect was the position of a plank at the Newcastle end of the bridge across the river between that town and Damariscotta. One issue involved in the case was, whether the plank rendered the way unsafe for travelers.

The plaintiff called one Dexter Sanborn as a witness, who, after describing the position of the plank, was asked by plaintiff's counsel, against the objection of the defendant, this question: "In passing from the Newcastle side on to that bridge, what effect did it have upon your carriage?" The question was admitted and the witness answered: "Go quick enough and it would yank you some." He was further asked: "Didn't you break a spring there?" to which he was permitted to answer under defendant's objection: "I broke a spring going over that plank." He was further asked: "What kind of a carriage was it this spring was broken on?" To this, objection was made, but it was admitted and the witness answered: "A hack. I was driving the hack."

We think this was error. This court has quite recently held that such evidence in this class of cases, is not competent. The practice in this state has been in accordance with this rule. *Branch* v. *Libbey*, 78 Maine, 321, and cases cited.

The same rule prevails in Massachusetts. See cases cited in *Branch* v. *Libbey*, *supra*; and in New Hampshire, *Hubbard* v. *Concord*, 35 N. H. 52.

We are aware that courts in some other jurisdictions hold this class of evidence competent, but we think our rule is wise, and we must adhere to it.

Exceptions sustained.

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

STATE *vs.* JOHN W. SULLIVAN.

Cumberland. Opinion April 15, 1891.

Intoxicating Liquors. Nuisance. Principal and Servant. Stat. 1887, c. 140, § 34.

One who participates in the commission of the misdemeanor of keeping a liquor nuisance to such an extent as to render himself criminally liable at all, is liable as a principal, and may be indicted, convicted and punished as such, although the capacity in which he acted was that of a clerk, agent or servant merely.

ON EXCEPTIONS.

The case appears in the opinion.

C. P. Mattocks and W. H. Looney, for defendant.

Frank W. Robinson, county attorney, for state.

WALTON, J. The defendant has been tried and convicted of keeping a liquor nuisance. The exceptions state that the government introduced evidence tending to show that the defendant "assisted in keeping the nuisance described in the indictment," and that the presiding justice instructed the jury that if the defendant "was assisting the proprietor in keeping the shop, he would be equally guilty with the actual owners."

The defendant's counsel insist that this instruction was wrong. They claim that when one is indicted for keeping a nuisance, he can not be rightfully convicted upon proof that he merely assisted in keeping it; that the distinction between a keeper and an assistant is in such a case material, and should not be disregarded in preparing the indictment.

There is certainly good sense in the suggestion that things ought to be called by their right names; and if it were a new question, it would be worthy of consideration whether a mere clerk, agent, or servant, ought, in any case, to be indicted and convicted as a principal. But the question is not a new one. We regard the law as perfectly well settled that one who participates in the commission of a misdemeanor, to such an extent as to render himself criminally liable at all, is liable as

a principal, and may be indicted, convicted and punished as such, although the capacity in which he acted was that of a clerk, agent, or servant merely.

Thus, in *Com.* v. *Dale*, 144 Mass. 363, the defendant was charged with keeping open his shop on the Lord's day. The proof was that the shop and the business were owned by another, and that the defendant was only a clerk or servant. And it was insisted in defense that upon such a complaint and such proof, the defendant could not be rightfully convicted. But the court held otherwise.

"In misdemeanors," said Chief Justice Morton, "all who knowingly and intentionally participate in the offense are principals, and may be convicted thereof either jointly or severally. Thus, it has been held that a man who is not the owner of the house or tenement, or of the business conducted therein, but manages it as the agent of another, may be convicted of keeping a bawdy house, or a liquor nuisance, or of maintaining a coal-yard which is a nuisance, or of keeping liquors with intent to sell." And he cites: *Com.* v. *Kimball*, 105 Mass. 465, and cases therein cited; and *Com.* v. *Dowling*, 114 Mass. 259, and *Com.* v. *O'Reilly*, 116 Mass. 15. And we may add *State* v. *Murdoch*, 71 Maine, 454, in this state.

It has been decided in Massachusetts, that under their law a servant can not be convicted of keeping a liquor nuisance upon evidence that he sold liquor, if the sales were made in the presence of his employer, and under his direct personal supervision and control. *Com.* v. *Churchill*, 136 Mass. 148; *Com.* v. *Galligan*, 144 Mass. 171. And on the strength of these decisions a similar decision has been made in Rhode Island. *State* v. *Gravelin*, 16 R. I. 407.

But such is not the law in this state. Our statute (Amendatory Act of 1887, chap. 140,) expressly declares that any clerk, agent, or other person, in the employment or on the premises of another, who violates, or in any manner aids or assists in violating, any act relating to intoxicating liquors, is equally guilty with the principal, and shall suffer like penalties. And if such were the law in Massachusetts, there is no reason to

doubt that their courts would hold that any one aiding or assisting in the keeping of a liquor nuisance, might be indicted, convicted and sentenced, as if he were the principal.

It is the opinion of the court, that, in this case, the rulings of the justice of the Superior Court were correct, and that the motion in arrest of judgment was rightly overruled.

Exceptions overruled.

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

STATE *vs.* JAMES H. LEIGHTON.

Washington. Opinion April 16, 1891.

Way. Bridge. Navigable Waters. Nuisance. Special Laws. February 27, 1821.

A State may, until legislation on the subject by Congress, authorize the erection of a bridge across a navigable river within the State. Until action has been taken by Congress, such Act of the State is not repugnant to the power to regulate commerce.

The defendant was indicted for destroying a bridge across Little River, in the town of Perry, constructed under an Act of the legislature of the State. He claimed that the legislature did not have the power to authorize its construction; and, as it to some extent interfered with the navigation of the river, it was a public nuisance, and of special injury to him; and, therefore, he had a right to remove it. *Held*: That the legislature had power to authorize its construction, that it was a part of the public highway, and the defendant had no power over it.

ON REPORT.

The case is stated in the opinion.

E. B. Harvey, *E. K. Smart* with him, for defendant.

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

LIBBEY, J. The defendant was indicted at the October term, 1887, in Washington county, for obstructing and incumbering a public highway in the town of Perry, by cutting down and destroying a public bridge leading across Little River in said town, which was a portion of the highway. He was tried at said term, and after the evidence was all out, the presiding judge ruled that there were no facts proved in the case which

would justify a cutting down of the bridge by the defendant; and upon this ruling the jury returned a verdict of guilty. The case comes into this court on a report of the evidence and the proceedings at the trial, with the stipulation that if the ruling of the judge is right the verdict is to be sustained; if incorrect, to be set aside and a new trial granted.

The defense claimed that Little River, at the point where the bridge was constructed, was a tidal river, and before the construction of the bridge was navigable at that point by boats and small vessels at high tide. The bridge was built by the town of Perry in 1821, and has remained there and been used as a part of the public highway from that time to the time when it was cut down by the defendant.

It is claimed that it was constructed under the authority of an act of the legislature of this state which is as follows:—

"Sec. 1. Be it enacted by the Senate and House of Representatives in legislature assembled, that John Dudley, Peter Golding, and Moses Lincoln, selectmen of the town of Perry, in the county of Washington, their successors or assigns, be and they are hereby authorized to build a bridge across Little River from land owned by Robinson Palmer, on the northeast side of said river to land on the southwest side of said river, owned by John Mahar, in said town of Perry; provided that said bridge shall always be kept open and free at all times for the accommodation of travelers and no toll shall ever be demanded of any person for passing the same."

"Sec. 2. Be it further enacted that every person who shall cut away or otherwise injure said bridge shall be liable to pay double damages in any court proper to try the same, one half to be appropriated to the use of the owners of said bridge, the other half to the benefit of the person that may prosecute the same."

At the trial it was admitted that the bridge was built across Little River, from land owned by Robinson Palmer on the northeast side of said river to land on the southwest side of said river owned by John Mahar in said town of Perry. The evidence shows that the bridge was built by Dudley, Golding

and Lincoln named in the act as selectmen of the town of Perry, by the authority of the town, and that it was paid for by the town, and from that time down has been maintained and repaired from time to time by the town as a part of the highway. The defendant claims that he had occasion to navigate Little River at that point by his small schooner loaded with lumber, and that the bridge was a nuisance to the public, and of special damage to him, and for that reason he had a right to cut it down and remove it. This contention raises the question, at once, of the power of the legislature to grant the authority to construct the bridge across tide waters under the peculiar circumstances and situation. It is claimed by the defendant's counsel, that no such authority existed in the state; that the authority was vested in Congress alone, in the clause of the constitution vesting in Congress the power to regulate foreign commerce.

We think this contention is not sound. It has been held by the Supreme Court of the United States, that while the general power to regulate commerce with foreign nations is vested in Congress, still where the subject-matter involved is a tidal river so situated as not to be in the line of general commerce, and Congress has not exercised its power over it, the state may exercise the power of authorizing the erection of bridges or dams across it for the public convenience and necessity. *Willson* v. *Blackbird Creek Marsh Co.* 2 Peters, 245. The doctrine of this case has been affirmed by the same court in *Pound* v. *Turck*, 95 U. S. 459, 463; and in *Willamette Bridge* v. *Hatch*, 125 U. S. 1, 8-12. The same doctrine has been held by several of the state courts; but we do not deem it necessary to cite state authorities.

Our conclusion is that the bridge was constructed, maintained and used by legal authority as a part of the public highway, and that the defendant has no justification in destroying it.

The verdict is to stand.

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

CITY OF BANGOR *vs.* MELBOURNE P. SMITH and others.

Penobscot. Opinion April 16, 1891.

Constitutional Law. Commerce. Common Carriers. Removal of Paupers. U. S. Const. Art. 1, § 8, cl. 3. R. S., c. 24, § 50.

The statute of this State, (R. S., c. 24, § 50,) requiring common carriers who bring into the State persons not having a settlement therein, to remove them beyond the State, if they fall into distress within a year, &c., is a regulation of foreign and interstate commerce, and is in violation of Article 1, § 8, clause 3, of the Constitution of the United States, and is therefore void.

ON REPORT.

The case is stated in the opinion.

H. L. Mitchell, city solicitor, for plaintiff.

Support applied for and received as pauper supplies. R. S., c. 24, § 35; *Smithfield* v. *Waterville*, 64 Maine, 412; *Linneus* v. *Sidney*, 70 *Id.* 114; *Fayette* v. *Livermore*, 62 *Id.* 229. Statute framed to prevent the introduction of a class of persons who become public charges. Stat. of 1874, c. 259, as amended by Stat. of 1875, c. 41. Same men were tendered to defendants just ten days after they were landed in Bangor, and been supported four days by the city.

Presumptions that statute is constitutional: *Donahue* v. *Richards*, 38 Maine, 379; *Moore* v. *Veazie*, 32 *Id.* 343; *State* v. *Lunt*, 6 *Id.* 412. Statute not a regulation of commerce. *Bowman* v. *R. R.* 125 U. S. p. 490; *License Cases*, 5 How. 504; *Cooley* v. *Port Wardens*, 12 How. 299, 318; *New York* v. *Miln*, 11 Peters, 132; *Robbins* v. *Shelby County*, 120 U. S. 489; *Smith* v. *Alabama*, 124 U. S. 465; *Powell* v. *Penna.* 127 U. S. 678; *R. R.* v. *Alabama*, 128 U. S. 96; *Kidd* v. *Pearson*, *Id.* 1-26; *G. R.* & *B. Co.* v. *Smith*, *Id.* 174-182; *R. R.* v. *Beckwith*, 129 U. S. 26-36.

Wilson and Woodard, for defendants.

Statute unconstitutional because a regulation of commerce, &c. Counsel cited: *County of Mobile* v. *Kimball*, 102 U. S. 691, 702; *Gloucester Ferry Co.* v. *Penna.* 114 U. S. 196, 203;

Case of State Freight Tax, 15 Wall. 232, 279, 281, 286; *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 148; *Bowman* v. *R. R.* 125 U. S. 465, 482; *Hall* v. *De Cuir*, 95 U. S. 485, 489; *Crandall* v. *Nevada*, 6 Wall. 35, 40, 48, 49. Statute not a legitimate exercise of the police power. *R. R.* v. *Husen*, 95 U. S. 465, 469, 470-472; *Bowman* v. *R. R.* 125 U. S. 465, 489, 493; *Henderson* v. *Mayor of New York*, 92 U. S. 259, 269, 275; *Chy Lung* v. *Freeman*, *Id.* 275, 280, 281.

LIBBEY, J. The defendants were the owners of the steamer Caroline Miller, in December, 1887, and January, 1888, which they used as common carriers for passengers and merchandize between the city of New York, in the state of New York, and Bangor, in this state; and by said steamer brought from New York into Bangor on the 9th of December, 1887, fifty-six Italians, who came into this state to work as laborers on the Canadian Pacific Railroad. But for some reason they ceased to work on said road and on the 14th of December, 1887, returned to the city of Bangor, and it is alleged by the plaintiff were destitute and in need of relief, and the overseers of the poor of said city on application therefor took charge of them and furnished them with relief as paupers. And on the 19th day of said December, it is claimed by the plaintiff that the city through its officers tendered to the defendants at their wharf and at their steamer in Bangor, the alleged paupers, and requested that the defendants should receive them and carry them back to New York. This the defendants declined to do, and thereupon the city paid their passage on board said steamer from Bangor to New York.

This action is brought to recover for the necessary supplies furnished said alleged paupers after they were tendered to the defendants, and to recover the money paid for their fare for transportation to New York. The plaintiff claims to recover by virtue of Sec. 50 of Chap. 24, of the Revised Statutes of this state, which reads as follows: "Any common carrier who brings into the state a person not having a settlement therein, shall remove him beyond the state, if he falls into distress within a year; provided, that such person is delivered on board a boat

or at a station of such carrier, by the overseers or municipal officers requesting such removal; and in default thereof, such carrier is liable in assumpsit for the expense of such person's support after such default."

The defendants claim that this statute is unconstitutional and void, and furnishes the plaintiff no ground for the maintenance of this action. And this is the question for our determination.

Congress has power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." Constitution of the United States, Art. 1, § 8, Clause 3. That the carrying of persons from a foreign country into the United States, or from state to state is commerce within the meaning of this clause of the constitution is too well settled to justify the citation of authorities. The bringing of persons by common carriers, then, from another state into this state is commerce between the states. Is the state statute which we have quoted a regulation of commerce? We think it is. In *Railroad Co.* v. *Husen*, 95 U. S. 465, the court says: "Transportation is essential to commerce, or rather it is commerce itself and every obstacle to it or burden laid upon it by legislative authority is a regulation." It is imposing an additional duty upon the carrier. It makes the commerce more burdensome to the carrier; for after a person is landed in this state, it imposes upon the carrier the responsibility for his pecuniary condition for a year.

But it is claimed that this is the exercise of the police power of the state. That the State in the exercise of its police power may, indirectly to some extent, affect commerce between foreign countries and the United States or between States, may be conceded. Just what the police power of the state embraces, and how far it extends does not appear to have been definitely determined. It may exercise it to require quarantine or inspection before landing, of persons brought from abroad. It may exercise it to prevent the landing of passengers infected with contagious disease. It may exercise it over the landing of convicted felons from abroad. It may exercise it over persons who have been subject to contagious disease so as to be liable

to be infected by it and communicate it to others, and thereby endanger the health of the community. But, it cannot exercise it to prevent commerce, nor can it exercise it over the carrying and landing of persons who are not at the time they are brought into the state in a condition to be dangerous to the public. *Railroad Co.* v. *Husen*, *supra*; *Henderson et al.* v. *Mayor of the City of New York et als.* 92 U. S. 259; *Chy Lung* v. *Freeman*, *Id.* 275. It cannot exercise it over persons who are free from contagion, who have not been subject to any danger of contagious disease, on the ground that they may become dangerous in that respect within a year or any other fixed period of time, after landing. It has been said that it may exercise it to prevent the bringing into the state of paupers, persons who have no means of support, who are destitute and dependent upon public charity. But it cannot exercise it over a person who is not a pauper when landed, on the ground that he may become a pauper within some fixed period of time. While we do not undertake to determine just where the police power of the state in regard to these matters terminates, it is safe to say that it does not embrace the subjects that we have last pointed out.

This statute is broad and general in its terms. It embraces all persons brought into the state, having no settlement in the state; and as it is found in the pauper statute, the term settlement must be held to mean a pauper settlement, without regard to the fact whether the person is poor at the time when he is brought into the state, or wealthy. He may be worth thousands and hundreds of thousands of dollars, when he is landed in the state, and from the various vicissitudes that men are subject to, within a year from that time may not have a dollar, may be destitute and in need of support as a pauper. He may when brought into the state be a citizen of the state, having no settlement in it; and still under the terms of the statute if he becomes a pauper within a year, it is the duty of the carrier who brings him here to take him and carry him out of the state. By what authority may it be done? A citizen of the state has the legal right to come into it, either with the aid of a common carrier or without such aid. Every citizen of the United States has the

right to enter every other state for temporary purposes or to become a citizen of such state. Suppose the carrier who brings him in undertakes to sieze him and carry him out of the state because he has lost his property within a year and become needy. Would not the courts interfere at once on application therefor, and discharge him from such unlawful restraint? We think it is clearly so. Then again, what right would the carrier have, if he is a pauper and the police power of the state extends to the extent to prevent the landing of paupers within it, to carry him out of this state and land him in another state?

But it is unnecessary to discuss the effect of this statute further. Its provisions are too broad and sweeping to be considered within the power of the state. It is the exercise of a power granted solely to the United States, which the state cannot exercise. It is so general that, as we have said, it applies to all persons brought into the state by a carrier, without regard to wealth or poverty when brought in; but undertakes to impose upon the carrier the burden of removing or supporting him, if he shall within the time named, become destitute.

It is said by counsel that it is aimed against pauperism and may be sustained as valid as to persons who are paupers when brought into the state. Its terms are general. It cannot be divided and held to be valid as to one class of persons and invalid as to others.

Judgment for defendants.

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

HENRY H. CLARK *vs.* INHABITANTS OF TREMONT.

Hancock. Opinion April 16, 1891.

Towns. Way. Damages. Vote. Action.

A claim against a town for damages occasioned by a defective highway therein is without legal validity when no notice in writing, as required by the statute, has been given to its municipal officers.

The plaintiff brought an action upon a vote of the town to pay him damages under such circumstances. *Held:* That no controversy existed between

him and the town as to its legal liability; and that the vote is not binding upon the town, whereby an action can be maintained upon it.

ON REPORT.

This was an action against the town of Tremont for a sum of money promised the plaintiff, by its vote, on account of damages to his horse, claimed to have been caused by a defect in the highway in that town.

The writ contained a count on the town's promise in consideration of promise of, and actual forbearance by plaintiff, to sue; a similar count on the vote of the town, also account annexed, and the omnibus count. It was admitted by the plaintiff that he gave no written notice of the injury, &c., to the defendants, as required by R. S., c. 18, § 80.

After the plaintiff's evidence was closed, the presiding justice ordered a nonsuit to be entered, with an agreement that, if upon the evidence the law court should say the action could be maintained, the nonsuit should be taken off, and the case continued for trial.

Hale and Hamlin, for plaintiff.

Town may waive the statute notice. A meritorious claim, honestly made is a good consideration for a promise to forbear, &c., although a suit may not be maintained upon the original claim. *Turner* v. *Whidden*, 22 Maine, 121; *Wilton* v. *Eaton*, 127 Mass. 174; *Howe* v. *Taggart*, 133 *Id.* 284; *Nye* v. *Chace*, 139 *Id.* 380; *Brown* v. *Ladd*, 144 *Id.* 310; *Whitney* v. *Clary*, 145 *Id.* 156.

Same principle applicable to towns. *Bean* v. *Jay*, 23 Maine, 117; *Augusta* v. *Leadbetter*, 16 *Ib.* 45; 1 Dill. Mun. Corp. (3d Ed.) § 477; *Nelson* v. *Milford*, 7 Pick. 18; *Bancroft* v. *Lynnfield*, 18 Pick. 566; *Friend* v. *Gilbert*, 108 Mass. 408; *Matthews* v. *Westborough*, 131 *Id.* 521, p. 522; S. C. 134 *Id.* 555. Money voted to pay the claim, and not as a gratuity.

Wiswell, King and Peters, for defendants.

Counsel cited: *Hooper* v. *Emery*, 14 Maine, 375; *Westbrook* v. *Deering*, 63 *Id.* 231; *Tinsman* v. *Belvidere R. R.* 2 Dutcher (N. J.), 148 (S. C. 69 Am. Dec. 565); *St. Paul* v. *Laidler*,

2 Minn. 190 (S. C. 72 Am. Dec. 89); *Stetson* v. *Kempton*, 13 Mass. 272; *Opinion of the Justices*, 52 Maine, 598; *People* v. *Lawrence*, 6 Hill, 244; *Clark* v. *Des Moines*, 19 Iowa, 199 (S. C. 87 Am. Dec. 423).

LIBBEY, J. The plaintiff seeks to recover of the defendant town the sum of two hundred dollars, which he alleges the town at its annual meeting in March, 1888, voted to pay him for damage to his horse, received as he alleges through a defect in the highway in said town. The vote upon which his action is brought is as follows: "Voted to pay H. H. Clark two hundred dollars ($200,) for damage done his horse in April last in District No. 8."

It is not claimed by the plaintiff that he gave to the municipal officers of the town any notice in writing of the injury to his horse, and of his claim for damages, as required by the statute; so that the claim against the town for damages was without any legal validity. Nothing had been done to render the town liable for damages. At the time when the vote was passed, it is not claimed here that the legal liability existed against the town. And the question presented is whether such a vote by a town when no legal claim exists,— when no controversy exists between the plaintiff and the town as to the legal liability,— is binding upon the town so that an action may be maintained upon it.

When a real controversy exists between a man and a town in regard to the facts necessary to be shown to create a liability on the part of the town, or the law that may arise upon the facts, the town may bind itself by its vote to compromise the existing controversy upon any question within its corporate powers. But where no controversy exists between the town and an individual as to existing facts necessary to be shown, or upon the law involved, a town cannot by its vote bind itself by giving any particular sum to be raised by taxation upon its inhabitants, because it would be a mere gratuity, entirely outside of the power of the majority, and would have no binding force. So that the question involved here is whether there was a real

controversy between the plaintiff and the town in regard to the facts necessary to be shown by the plaintiff to constitute a legal liability on the part of the town.

To create such legal liability for damages resulting to person or property by reason of a defect in a highway, one of the essential facts necessary to be proved by the plaintiff is that he gave notice in writing to the municipal officers of the town, within fourteen days after the injury, stating the place where the accident occurred, the defect that had caused it, the nature and extent of his injuries and his claim for damages. Without such notice in writing, no liability exists. Here it is not claimed that the plaintiff claimed as matter of fact that any such notice had been given. There was no controversy, then, over an essential fact which must have been proved by the plaintiff to constitute a liability on the part of the town. The plaintiff in his testimony does not pretend that he made any claim to the town that he had given the notice required by the statute. Whatever claim he presented was presented without any claim of existing facts necessary to support it. Whatever vote was passed, then, giving to him any sum was passed without any controversy between the parties as to the legal liability of the town, and must be held to be a gratuity, voted by the majority to be satisfied by a tax upon the property of the inhabitants of the town. This was beyond the powers of the town and is not binding. Upon this point see *Matthews* v. *Westboro*, 131 Mass. 521; *Same* v. *Same*, 134 Mass. 555. The whole doctrine in regard to the power of the town to bind its inhabitants by a vote, like the one involved here, is fully discussed by this court in *Thorndike* v. *Camden*, 82 Maine, 39. And we think the doctrine therein declared is decisive of this case. *Nonsuit to stand.*

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

INHABITANTS OF GRAY *vs.* COUNTY COMMISSIONERS.

Cumberland. Opinion April 18, 1891.

Way. Appeal. R. S., c. 18, § 48. Stat. 1885, c. 359, § 7.

Statutes are to be interpreted with reference to their subject-matter, the

antecedent and subsequent legislation, and the difficulties sought to be remedied.

The court will give effect to the legislative intent, and not defeat it by adhering too rigidly to the letter of the statute.

The meaning of a remedial statute may be extended beyond the precise words of the act, when the reason on which the legislature proceeded, the end in view, or the purpose designed, is made clear.

Held: That the right of appeal, from the location of a town way by the County Commissioners on the unreasonable refusal of the municipal officers, was restored by statute of 1885, c. 359, § 7; and the provisions of § 48, c. 18, of R. S., instead of § § 49 to 51, must apply to such appeals; also that the same section respecting the time for taking the appeal must prevail over section (19) nineteen.

ON EXCEPTIONS.

This was an appeal from the decision of the county commissioners, for the County of Cumberland, in locating a town way in the town of Gray.

The municipal officers having on petition of these petitioners, refused to locate said way, they within one year thereafter presented their petition to the county commissioners, who after due notice viewed the way, heard the parties and adjudged the way to be of common convenience and necessity, and located the same and made due return of their doings at their next regular session after the hearing, which was on the first Tuesday of January, A. D., 1889.

The appellants appeared at that session, claimed and filed their claim for appeal, and then took their appeal to the term of the Supreme Judicial Court for said county, begun and holden on the second Tuesday of January, A. D., 1889, when they entered their appeal.

The petitioners appeared on the first day of said January term and moved that the appeal be dismissed, which motion was overruled by the court.

Thereupon, against the objections of the petitioners, the court proceeded to appoint a committee to examine and report whether the judgment of the commissioners should be in whole or in part affirmed or reversed, to which rulings of the court at said January term, these petitioners excepted, and their exceptions were then filed and allowed by the court, and the same were again taken and urged, and made a part of these exceptions.

When said committee met pursuant to notice, the petitioners, before the committee had taken any action, filed their objections to the proceedings and their protest and objections to the right of the committee to act in the premises; and expressly reserved all rights of objection, and waived no rights in taking part in opposing the claims of the appellants before said committee; which protest and objections were reported in full by the committee.

The committee, notwithstanding the objections of the petitioners proceeded, heard the parties and made their report to the October term, 1889, of the Supreme Judicial Court, reversing in whole the judgment of the county commissioners, and that the costs from the time of the appeal and their fees be paid by the appellants; to the acceptance of which report, the petitioners filed their written objections. The court, however, overruled the objections and accepted the report. To these rulings, &c., the petitioners excepted.

Frank and Larrabee, for petitioners.

The question whether there was an appeal or not, and if there was, whether it was properly taken in this case, is purely a judicial one. So far as the act, c. 251, Stat. 1889, attempts to affect that question, it invades the province of the judiciary and is unconstitutional. *Lewis* v. *Webb*, 3 Maine, 326; Const. of Maine, Art. III, § 2. R. S., c. 1, § 5.

At the time the ruling in question was made, January term, 1889, the right of appeal, if any, rested upon the provisions of § 10, c. 18, R. S., as amended by § 7, c. 359, statutes of 1885, which is that the party interested "has the same right of appeal as is provided in § § 49 to 51 inclusive." By neither of these or the inclusive sections, is a "right of appeal provided." The provision of an appeal is made by § 48.

As this appeal is purely a statute proceeding, the provisions of statute relating to it should be construed strictly; and if the statute fails to provide an appeal in explicit and direct terms, no appeal should be allowed, especially as the court of county commissioners in such matters, is itself an appellate court.

In the case of highways where the county is supposed to be

interested, and there might be reason in some cases to believe that the commissioners would be influenced to act in accordance with what they regarded as the interest of the county rather than for the general public interest, there is good reason for providing a revisory board; but in the case of town ways, no such reason could exist.

It may be said that the reference to § § 49 and 51 inclusive, was an error. The legislature so regarded it, for they corrected it by c. 251, Stat. 1889. But this court is not responsible for the errors of the legislature, and will not undertake to correct them.

The appeal was premature and should have been dismissed. If allowable it was only under § 19, R. S., c. 18. *Webster* v. *Co. Com.* 63 Maine, 27.

If it be claimed that all these errors are cured by c. 251, Stat. 1889, which is declared to be retroactive and to affect pending cases, our reply is, aside from the question whether the fixed and vested rights of parties litigant can be affected by such enactments, that the ruling in question was made, and the exceptions to it were taken and allowed before Chap. 251 was enacted, and the question now to be considered is, was that ruling correct.

W. H. Vinton, for appellants.

WHITEHOUSE, J. The county commissioners located a town way which it was alleged the municipal officers unreasonably refused to lay out, and made return of their doings at their next regular session after the hearing. The appellants appeared at that session and took an appeal to the next term of the Supreme Judicial Court. The motion to dismiss the appeal was overruled by the court and a committee appointed to determine whether the judgment of the county commissioners should be in whole or in part affirmed or reversed. At the next term of that court, the report of the committee reversing the judgment of the county commissioners was presented, and against objection accepted by the court. To all of these rulings the petitioners have exceptions.

It is contended, in the first place, that there was no statute in existence at that time authorizing such an appeal from the county commissioners, and secondly, if the appeal was allowable it was prematurely taken and allowed.

An examination and comparison of the several legislative enactments applicable to this subject, taken in chronological order, will clearly show that the right of appeal from the county commissioners in this class of cases, at the time in question, may be sustained without a violation of any of the established principals controlling the interpretation of statutes.

It was provided by ch. 123, Laws of 1862, as an amendment to § 22, ch. 18, Revised Statutes of 1857, respecting town ways, that when the decision of the county commissioners "is returned and recorded, parties interested have the same right to appeal to the Supreme Judicial Court in said county, and also the same right to have their damages estimated by a committee or jury as is provided in this chapter respecting highways." As thus amended the statute appears as section 23 of chapter 18 of the Revised Statutes of 1871. Section 37 of the same chapter provided, respecting the location of the highways, that the appeal from the decision of the county commissioners might be taken "at any time after it has been entered of record before the next term of the Supreme Judicial Court." Thus it will be seen that sections 23 and 37 of chapter 18, R. S., 1871, were in harmony respecting the time for taking the appeal, both requiring it to be done after the decision of the county commissioners was recorded. But section 37 was amended by chapter 91 of the Laws of 1873, so as to authorize the appeal at any time "after their return has been placed on file;"— and thus the provision stands in the Revised Statutes of 1883, chapter 18, section 48. But a corresponding change was not made in section 23, the appeal being still authorized by that section only after the decision was "returned and recorded." These conflicting provisions were permitted to remain on the statute books until the revision of 1883; but the amendment of 1873 authorizing the appeal after the return had been placed on file, being the latest expression

of the legislative will, was presumably deemed to be the only one having the force of law, and hence the apparent inconsistency seems never to have been brought directly in question before the court.

The right of appeal "as provided respecting highways," thus given by the act of 1862, and incorporated in the Revised Statutes of 1871, was never expressly or designedly taken away or modified by any subsequent legislation; but as the result of an effort to condense and improve the language of this section in the revision of 1883, the appeal was inadvertently restricted to the question of damages, and the right to appeal from the decision of the county commissioners respecting location was lost altogether. (See last sentence of section 19, chapter 18, R. S., 1883.)

The next legislature sought to remedy this serious defect and restore the right of appeal as it had existed under the act of 1862. Section 19, chapter 18, R. S., 1883, was accordingly amended by section 7, of chapter 359, Laws of 1885, so as to provide that a party interested should have the same right to appeal to the Supreme Judicial Court "as is provided by sections 49 to 51 inclusive." These sections prescribed in detail the mode of prosecuting the appeal which is first mentioned and expressly authorized in section 48 respecting highways; and if the amendment had been drawn with verbal accuracy, it would have specified section 48 instead of 49 as the place of beginning and given the right to appeal "as provided in sections 48 to 51 inclusive." All these verbal incongruities were removed by chapter 251 of the Laws of 1889,— but of this act we take no note in this case except as an illustration of the intention of the legislature of 1885, which however was already sufficiently obvious. The purpose of the enactment of section 7 of chapter 359, Laws of 1885, cannot for a moment be questioned. When the language is interpreted with reference to the subject matter, the antecedent and subsequent legislation touching the same matter and the difficulties sought to be remedied, it discloses beyond the shadow of a doubt an intention on the part of the legislature to restore the right of appeal from the county com-

missioners, in this class of cases, as provided respecting highways. And guided by familiar rules of interpretation recognized and approved by our state and federal courts, we are fortunately enabled to give such a construction to the enactment as will effectuate and not defeat the legislative purpose.

party interested may appeal from the decision of the county com-

Section 48 provides respecting the location of highways that any missioners at any time after it has been placed on file, . . . and before the next term of the Supreme Judicial Court, at which term such appeal may be entered. Sect. 49 provides that if "the appeal" is then entered, not afterwards, the court may appoint a committee to revise the action of the county commissioners, and with sections 50 and 51, continues to give a full description of the method of making the appeal available to the appellant. "The appeal" named in sections 49 to 51 inclusive is the appeal authorized by section 48. It can reasonably refer to no other appeal. The amendment of 1885 declares that the "party interested has the same right to appeal to the Supreme Judicial Court as is provided in sections 49 to 51 inclusive." The right to appeal thus given is the right given in section 48 respecting highways. The language of the amendment construed in connection with the provisions of the sections expressly named in it, must be held to carry with it by implication a reference to and adoption of the provisions of section 48. Sedgwick on Stat. and Con. Constr. 196, 226, 291–306; and for Vattel's Rules, *Id.* 266; Lieber's Hermeneutics, 283; Endlich on the Interpretation of Statutes, § § 295, 296 and 302.

In *Oates* v. *National Bank*, 100 U. S. 239, the court say, "The duty of the court, being satisfied of the intention of the legislature clearly expressed in a constitutional enactment, is to give effect to that intention and not to defeat it by adhering too rigidly to the mere letter of the statute or to technical rules of construction. *Wilkinson* v. *Leland*, 2 Pet. 627. And we should discard any construction that would lead to absurd consequences. *U. S.* v. *Kirby*, 7 Wall. 482. We ought rather, adopting the language of Lord Hale to be 'curious and subtle to invent reasons and measures' to carry out the clear

intent of the law-making power when thus expressed. A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. *Suckley* v. *Furse*, 15 Johns. 338; *The People* v. *Utica Ins. Co. Id.* 358."

In *U. S.* v. *Freeman*, 3 How. p. 554, the court say, "The correct rule of interpretation is that if divers statutes relate to the same thing they ought all to be taken into consideration in construing any one of them, as it is an established rule of law that all acts *in pari materia* are to be taken together as if they were one law. . . "The meaning of the legislature may be extended beyond the precise words used in the law from the reason or motive upon which the legislature proceeded from the end in view or the purpose which was designed." So in *Murray* v. *Baker*, 3 Wheat. 541, it was held that the words "beyond seas" in a state statute of limitations, incautiously borrowed from an English act, was construed by the federal court to mean "out of the state."

In many cases involving similar discrepancies the decision is based on the maxim, *falsa demonstratio non nocet*, and an equitable construction given to the language of the act in question, *ut res magis valeat quam pereat.* For instance, in *People* v. *King*, 28 Cal. 273, an amendment in 1863 expressly referred to section 293 of an earlier act, when the manifest intention was to make the reference to section 296, the latter being the only one to which, in view of the subject-matter, the amendment could properly refer. It was accordingly treated by the court as a case of "false description," and the act construed as though the reference had been expressly to section 296. See also *Sch. Directors* v. *Sch. Directors*, 73 Ill. 244; *Gibson* v. *Belcher*, 1 Bush. (Ky.) 145; *Blake* v. *Brackett*, 47 Maine, 28.

In *Garby* v. *Harris*, 7 Exch. 591, where one section of an act provided that if the plaintiff recovered a sum "not exceeding" five pounds he should have no costs, and another that if he recovered "less than" five pounds, he should have the costs; the act literally construed being inoperative when the sum recovered was exactly five pounds, it was held that the words

"less than" should be read as equivalent to "not exceeding."

See also *Holmes* v. *Paris*, 75 Maine, 559; *Bennett* v. *Express Co. ante*, *p.* 236.

Nor was the appeal prematurely taken and entered. We have seen that the manifest purpose of the legislature was to restore the appeal as provided respecting highways. This includes the time of taking and entering the appeal and the mode of prosecuting it. By section 48, chapter 18, R. S., it may be taken at any time after the decision has been "placed on file." True, section 19 authorizes it to be taken when the decision is returned and recorded, but if two laws conflict with each other that must yield the effect of which is less important. Lieber's Rule, 14. A statute provided that when an assignment was made to the judge of probate, all payments, etc., made within three months next before said assignment and after the passage of this act and before the first of September next, shall be void. And in *Leavitt* v. *Lovering*, 64 N. H. 607, the court say in relation to this statute, "The unmistakable intent of the statute was to make all payments void after the passage of the act and within three months next before the date of the assignment. No effect consistent with this intent can be given to the words 'and before the first of September next,' and they must be rejected as without meaning."

The provision in section forty-eight respecting the time for taking the appeal must prevail over that in section nineteen.

Exceptions overruled.

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

MYRON J. WEYMOUTH *vs.* SAMUEL M. GILE.

Penobscot. Opinion April 21, 1891.

Promissory Notes. Time of Payment. Limitations.

In an action brought upon the following promissory writing, viz: "For value received I promise to pay Myron J. Weymouth, fifty dollars in sawing at my mill in Sangerville village. Sangerville, Oct. 3d, 1885," *it was held*; that as the time of performance is not named in the contract, either party may request performance by the other within a reasonable time; and that the

statute of limitations will not begin to run until the expiration of a reasonable time of performance after such demand.

The promisee is not required to be the owner of the logs presented for sawing under the contract. It is sufficient if he has the authority from any owner to so present them.

ON MOTION AND EXCEPTIONS.

This was an action of assumpsit in which the plaintiff declared upon the writing given by the defendant, and which appears in the head-note. The concluding part of the count is as follows:

"And the plaintiff avers that the said payment was to be made at any reasonable time, and whenever the plaintiff should choose, and at the customary prices for sawing lumber, at said mill. Now the plaintiff in fact says, that the said S. M. Gile, though often requested and furnished with logs at said mill for that purpose, has never paid said sum of fifty dollars as above mentioned, nor otherwise, but unjustly neglects and refuses so to do," &c.

Plea, general issue. The jury returned a verdict of $59.00 for the plaintiff.

The case sufficiently appears in the opinion.

Henry Hudson, for defendant.

Rules governing promissory notes not being applicable, the defendant contends that plaintiff should have furnished the lumber to be sawed, within a reasonable time. The contract was made with plaintiff to saw his logs, and not those of any one that might haul to the mill.

Counsel cited: *Dennett* v. *Goodwin*, 32 Maine, 44; and cases cited; *Bunker* v. *Athearn*, 35 Maine, 364; Broom's Com. 4th Ed. 473, and note cited, and p. 476; Kent's Com. 6th Ed. vol. 3, pp. 74, 76; *Chapman* v. *Wight*, 79 Maine, 695; *Thomas* v. *Roosa*, 7 Johns. 460; *Attwood* v. *Clark*, 2 Maine, 253; *Nunez* v. *Dautel*, 19 Wall. 560; *Kingsley* v. *Wallis*, 14 Maine, 57; *Atwood* v. *Cobb*, 16 Pick. 227; *Farnum* v. *Virgin*, 52 Maine, 578; *Smith* v. *Berry*, 18 *Id.* 122.

L. B. Waldron, *Crosby and Crosby* with him, for plaintiff.

LIBBEY, J. This action is brought on a contract between the parties which reads as follows:

"For value received I promise to pay Myron J. Weymouth, fifty dollars in sawing at my mill in Sangerville village.

"Sangerville, October 3d, 1885. S. M. Gile."

Exceptions were taken and come here on the construction of the contract by the presiding judge. The defendant contended that it was incumbent on the plaintiff to furnish the logs for sawing within a reasonable time after the date of the promise, and that a reasonable time had elapsed before any were furnished, and that the defendant for that reason was excused from sawing. The judge overruled this contention, and instructed the jury that the plaintiff might claim the sawing any time within six years, and that if the defendant wished to pay his debt before, he could tender it in money.

The defendant also contended that the defendant was only bound to saw the plaintiff's own logs. The judge overruled this contention and instructed the jury that the plaintiff might require the defendant to saw the logs of any other party which he should cause to be delivered at the mill to be sawed under the agreement.

We think the defendant was not aggrieved by either of the rulings. As to the first, the contract is silent as to time of performance. In such case the rule is that either party may require a performance by the other within a reasonable time. If the defendant desired the plaintiff to furnish the logs for sawing in a reasonable time, it was his right to demand it. If the plaintiff desired a performance by the defendant within a reasonable time, he had the right to furnish the logs or cause them to be furnished at the defendant's mill and demand it.

The report of the evidence on a motion to set aside the verdict is made a part of the exceptions, and by it, it does not appear that the defendant claimed a performance by the plaintiff by furnishing the logs to be sawed at any time prior to the commencement of this suit. In such case we think the defendant cannot complain of the instruction that the plaintiff might demand performance at any time within six years. This rule may not be correct as to the plaintiff's rights, as no cause of action would accrue till the lapse of a reasonable time for

performance after demand. The limitation would not be perfected till six years from that time; but the instruction was not injurious to the defendant.

On the second point, we think it perfectly clear that the plaintiff was not required to own the logs presented for sawing. It was sufficient if by arrangement with the owner he had the right to present them for sawing under the contract. It could be of no interest to the defendant whether the title was in the plaintiff or another party.

The contention between the parties upon the facts was whether the plaintiff demanded performance by the defendant under the construction we have given to the contract, either in the winter of 1885-6, or in the winter of 1887-8. Upon these issues the evidence was conflicting. The jury seem to have found that performance was requested by the plaintiff in 1886, as they assessed interest for three years, prior to April term, 1889, when the case was tried. We cannot say that the verdict is against the evidence.

Exceptions and motion overruled.

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

LUCY C. FARNSWORTH and others, appellants,

vs.

THE LIME ROCK RAILROAD COMPANY.

Knox. Opinion April 21, 1891.

Corporations. Railroads. Charter. Acceptance. Amendment. Eminent Domain. Location. Land Damages. Const. of Maine, Art. IV. Part 3, § 14.

The constitutional amendment which took effect in 1875, requiring the formation of corporations to be under general statutes, does not apply to a charter granted by the legislature before the amendment, although amended by it afterwards.

The four years, at the expiration of which a charter of incorporation becomes by the statute forfeited unless the company be organized and its business commenced within that time, do not run against a corporation observing the statutory requirement within that time after its charter has been amended. The amendment is a legislative waiver of any forfeiture.

A petition praying county commissioners to assess damages for land taken for a railroad, need not aver the inability of the parties to agree on the amount of damages, although the charter of the railroad confers jurisdiction on the commissioners in case the parties cannot agree on the amount. The presumption is that they cannot agree.

A railroad charter may be considered as presumptively accepted at its date without any record evidence of the fact, when it appears that the grantees afterwards asked for and obtained amendments to their charter and have fully constructed the road.

The right of eminent domain is available by legislative grant to a railroad corporation which has constructed a railroad for the carriage of freight to and from the lime kilns in Thomaston and Rockland, and goods to and from stores in the latter place, connecting with the Knox and Lincoln railroad and running over a portion of its track under a contract between the two corporations, being eight miles in length, of standard guage, operated by steam power, and costing nearly a half million dollars obtained from the sale of stock and bonds.

On report.

The Lime Rock Railroad Company having applied to the County Commissioners for Knox County by petition, dated June 18, 1888, to assess the damages caused by their taking the lands of the appellants, under their charter, for railroad purposes, notice was accordingly given. The appellants appeared under protest, moved to have the petition dismissed; and reserving all objections, &c., denied the Commissioners' jurisdiction and contested their right to act upon the petition for the following, among other reasons:—

"That under the constitution and laws of Maine, the said company was not and is not a corporation, and under said laws not authorized to procure a condemnation of said land in any form.

"That the individuals or company doing business under the name of the Lime Rock Railroad Company have never duly organized as a corporation under said constitution and laws.

"That the alleged railroad which said individuals or company propose to construct across the respondents' land is not for such use as gives them the right or authority under said laws to procure a condemnation thereof; and that they had not filed any location of said road in form or substance as required by law, before the date of this petition.

"That whether said petitioners are a corporation or not, all of the proceedings taken to obtain title to or right to cross said premises are under the said constitution and laws of Maine invalid.

"That said company has no right to construct a railroad over respondents' land, and that said company has no right or authority under said laws to procure a condemnation of land for that or any other purpose."

After the view and a hearing, the Commissioners overruled the motion to dismiss and made, on October 17, 1888, an award of the damages sustained by the appellants, who took their appeal to the Supreme Judicial Court.

J. H. Montgomery and W. H. Fogler, for appellants.

Counsel cited upon the questions of legal corporate existence, public use, and compliance with all conditions necessary for the power of eminent domain, the following cases: *In re, Brooklyn, W. & N. Ry. Co.* 72 N. Y. 245; Const. of Maine, Art. 4, Pt. 3, § 14; *Id.* § 13; R. S., c. 51; *Oregon Ry. Co.* v. *Oregonian Ry. Co.* 130 U. S. 1; Stat. 1864, c. 333; Stat. 1873, c. 333; Morawetz Corp. § § 6, 14, 16, 316, 648; *State* v. *Bull*, 16 Conn. 179–191; *Coffin* v. *Collins*, 17 Maine, 440; *R. R.* v. *Smith*, 47 Maine, 34; *U. S.* v. *Dandridge*, 12 Wheat. 70; *Middlesex Soc.* v. *Davis*, 4 Met. 133; *Lincoln & Ken. Bank* v. *Richardson*, 1 Maine, 79; *Dartmouth College* v. *Woodward*, 4 Wheat. 688; 1 Redf. Railways, 70; *State* v. *Dawson*, 16 Ind. 40; R. S., c. 1, § 26; Stat. 1871, c. 185; Stat. 1887, c. 137; *San Francisco* v. *Water Works*, 48 Cal. 493; *St. Paul Ins. Co.* v. *Allis*, 24 Minn. 75; *Katzenberger* v. *Aberdeen*, 121 U. S. 172; *Comanche Co.* v. *Lewis*, 133 U. S. 198; Stat. 1889, c. 418; *Talbot* v. *Henderson*, 16 Gray, 417–421 *Nickolson's Succession*, 37 La. An. 346; *Thomas* v. *West Jersey R. R.* 101 U. S. 71; Cooley Con. Lim. 669; *Wadells' Appeal*, 84 Pa. St. 90; *Wild* v. *Deig*, 43 Ind. 455; *Bankhead* v. *Brown*, 25 Iowa, 540; *Memphis Freight Co.* 4 Coldw. (Tenn.) 419; *In re, Eureka Co.* 96 N. Y. 42; *Consol. Channel Co.* v. *R. R.* 51 Cal. 269; *Warner* v. *Martin*, 21 W. Va.

534; *R. R. Co.* v. *Iron Works*, 2 Lawyer's Rep. No. 5; *Gilman* v. *Lime Point*, 18 Cal. 229; *Castor* v. *The Tide Water Co.* 3 C. C. Green (N. J.), 54; Opinion, DICKERSON, J. 58 Maine, 593, 605; *Gas Light Co.* v. *Richards*, 63 Barb. 437; *In re, Union Ferry Co.* 98 Ind. 139, 153; *Reeves* v. *Treasurer*, 8 Ohio, 333; *In re, Association*, 66 N. Y. 569; *Salt Co.* v. *Brown*, 7 W. Va. 191; *Sharp* v. *Speir*, 4 Hill, 76; *Spofford* v. *R. R.* 66 Maine, 39: *Water Co.* v. *Water Co.* 80 Maine, 363; *R. R.* v. *McComb*, 60 Maine, 295; *Gilman* v. *Lime Point*, 19 Cal. 47; *Ritenburgh* v. *R. R.* 21 Penn. St. 100; *Leavitt* v. *Eastman*, 77 Maine, 117, 120; *R. R.* v. *Smith*, 47 *Id.* 46.

C. E. Littlefield, for defendants.

Charter constitutional. *Com.* v. *Breed*, 4 Pick. 460; *Bankhead* v. *Brown*, 25 Iowa, 540; *Talbot* v. *Hudson*, 16 Gray, 422. Public use: *Jordan* v. *Woodward*, 40 Maine, 324; Cooley's Const. Lim. pp. 657–6, 659; Mills Em. Domain, § 12; Pierce, R. R. 143; *Talbot* v. *Hudson*, 16 Gray, 423–425; *Gt. Falls M'fg. Co.* v. *Fernald*, 47 N. H. 444; *Olmstead* v. *Camp*, 33 Conn. 352; *Patterson* v. *Boom Co.* 3 Dill. C. C. 465; *Head* v. *Amoskeag M'fg. Co.* 113 U. S. 893; *Vennard* v. *Cross*, 8 Kans. 261; *Hand Gold Mining Co.* v. *Seawell*, 11 Nev. 394; *Bloodgood* v. *R. R.* 8 Wend. 13; *Gas Co.* v. *Richardson*, 63 Barb. 437; *Tide Water Co.* v. *Coster*, 18 N. J. Eq. 518, citing *Beekman* v. *R. R.* 3 Paige, 73; *Ross* v. *Davis*, 97 Ind. 79; *McQuillan* v. *Hatton*, 42 Ohio 202; *Brown* v. *Beatty*, 34 Miss. 240; *Cotton* v. *Boom Co.* 22 Minn. 372; *R. R.* v. *Greely*, 17 N. H. 47; *Shaver* v. *Starrett*, 4 Ohio, 494; *Sherman* v. *Brick*, 32 Cal. 241; *Brewer* v. *Bowman*, 9 Ga. 37; *Mt. Wash. R. R.* 35 N. H. 134; *Bonaparte* v. *R. R.* 1 Baldw. 223; *Gilman* v. *Lime Point*, 18 Cal. 229; *Seacombe* v. *R. R.* 23 Wall. 108; *Tyler* v. *Beacher*, 44 Vt. 648; *Freight Co.* v. *Memphis*, 4 Coldw. 419; *Harvey* v. *Lloyd*, 3 Barr. (Penn.) 331; *Shoenberger* v. *Wall*, 8 Barr. 146; *Harvey* v. *Thomas*, 10 Watts, 63; *Hayes* v. *Ricker*, 32 Pa. St. 169; *Cent. Coal Co.* v. *Georges Creek Co.* 37 Md. 537; *Phillips* v. *Watson*, 63 Iowa, 28; *W.*

Va. Transp. Co. v. *Oil Co.* 5 W. Va. 382; *De Camp* v. *R. R.* 47 N. J. L. 43; *Perrine* v. *Farr*, 2 Zab. 356, 363; *Allen* v. *Stevens*, 5 Dutch. 509, 511.

PETERS, C. J. The charter of the railroad company, whose acts are called in question in this controversy, was granted by the legislature in 1861, amended in 1873 and again in 1889. The location was filed and the road built in 1888.

It is argued against its legality, that the original charter became lost by non-acceptance before the constitutional amendment of 1875, requiring railroad and other corporations to be formed under general laws, and that any act of revivor passed since 1875 is unconstitutional, in view of decisions of the Supreme Court of the United States, and especially by force of the doctrine of the case of *Oregon Ry. Co.* v. *Oregonian Ry. Co.* 130 U. S. 1. The charter and amendments were expressly accepted by the corporation in 1889, but the facts clearly enough indicate an implied acceptance before that time, and prior to the date of the constitutional amendment. This court has held that no vote of the corporation is necessary, and that acceptance may be implied by circumstances. *Smith* v. *Railroad*, 47 Maine, 34. The charter in question is for peculiar purposes, and no class of persons but those incorporated would want it. The charter was asked for,— not tendered to them. They desired it for future use, hoping and expecting all the time that the day would be at hand when the road would be built. A very strong evidence of acceptance is that in 1873, they applied for an amendment of the charter. Subsequent events confirm that evidence. The fact of spending several hundred thousand dollars in constructing the road confirms it. Late events show the earlier intention.

The constitutional amendment does not apply to legislative amendments of charters granted before 1875. The legislature having granted a charter before 1875 may amend it after that date, the amendment being germane to the original act.

A further objection urged against the validity of the charter is that the company was not organized within four years after

the date of its incorporation, forfeiture following for such lapse by the provision of R. S., ch. 1, § 6, article 26. The answer is that the legislature waived forfeiture by the amendments which it granted.

It is objected against the validity of the proceedings of the corporation, in its application to have the land damages ascertained, that the application does not allege that the parties themselves could not agree upon the amount of damages, the charter providing for an assessment in case of disagreement. The presumption is that parties cannot agree who do not agree. Were the proceedings at common law, it would be proper pleading to insert in the petition a negative averment to satisfy the condition embodied in the charter. But it would hardly seem necessary in proceedings before county commissioners, and if it were, the omission could readily be supplied by amendment.

The question of the case, evidently, is whether the principle of eminent domain applies to the purposes for which the charter was granted. Is it an enterprise where the public good is sufficiently subserved to justify the condemnation of private property by the corporation, under legislative permission for its use?

There must be enterprises occupying such middle ground on this question, so near to the boundary line between public use and private use, that it may be difficult to say on which side of the line the facts would place them. There must be instances at either extreme and all the way between extremes. We think the enterprise designed by the company which is virtually the party in this case, though not so significant an example as many railroad enterprises, falls on the side of public use. It is of that stamp.

It is not deniable that a scheme may be more profitable to private owners than it is valuable to the public, and still be a public enterprise. Capitalists are not expected to embark in enterprises which are of public concern unless there be an adequate private gain. It has frequently been determined that the public use may be limited to place and persons. Not many,

compared with the great body of men, participate directly in the use of the telegraph and telephone, the common sewers, public ferries, or the railroads. A street railroad may be a benefit to some persons and work an injury to others. But the community as a body are benefited by such enterprises.

Great liberality has prevailed in granting the use of the public power for the construction of railroads and all kinds of ways. The statutes of our State afford facilities for laying out town ways and private ways, and go so far as to confer power on municipal officers to lay out over private land winter-ways simply for the transportation of merchandise, hay and grain, and lumber.

The charter of the Lime Rock Railroad Company declares the purpose of the corporation to be "the transportation of lime-stone from the quarries in the city of Rockland and town of Thomaston to the various lime-kilns in said city and town, together with other freight, with convenient branches to accommodate such kilns, including all quarries and kilns now opened or that may be hereafter opened in said city and town." And there are general provisions such as are usually inserted in railroad charters, concerning organization, rates, obligations and liabilities to be assumed.

The road is not designed to carry passengers, it is said. Neither is a street railroad designed to carry freight, each being, however, a common carrier in its sphere. It is also said by counsel that the charter does not provide that the road shall begin or end at any railroad or highway, and that we cannot go beyond the charter to ascertain that such *termini* were intended. We should suppose that details of location would not usually be inserted in a charter. While exact designs are not paraded in the charter itself, they are supposed to have been sufficiently represented to the legislature as a justification for its action.

The plan of location produced as a part of the case, shows that the road connects with the Knox & Lincoln railroad, running over a portion of its track, crossing several highways in the course of its route, running in the rear of numerous stores in Rockland and making close connections with them for delivery of

freight, entering the city of Rockland at its south end and terminating at the north end, so as to become a link in a projected line of railroad running northerly to Camden and elsewhere.

It has a transportation contract with the Knox & Lincoln Railroad Company for a term of years. The road is eight miles in length, to be ten to twelve miles when completed, of standard guage, is operated by steam power, has a capital stock of $300,000 and a bonded indebtedness of $200,000, has in present use two locomotives and two hundred and sixty-five freight cars, and transports rock from forty-five different quarries, owned by seventy-five persons and firms. When completed the capacity of the road and its business will be very much increased, and the road is designed to reach every kiln and quarry in the vicinity of its general route. The public usefulness of such an enterprise may be seen at a glance. The city of Rockland and town of Thomaston are greatly benefited thereby. It will give development and add value to the principal business of the two places, and increase the prosperity of their people.

We have not deemed it best to fortify our positions by authorities, being content to cite a single case, like this case in some respects, but occupying a position considerably in advance of the doctrine promulgated in this opinion. *Talbot* v. *Hudson*, 16 Gray, 417. In that case the general question is thoroughly examined.

The case to stand for the assessment of damages.

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

JAMES R. FARNSWORTH, and another, ADMINISTRATORS,

vs.

CHARLES W. PERRY.

Knox. Opinion April 21, 1891.

Deed. Exception. Base Fee. Real Property.

A conveyed to B a parcel of land reserving a store thereon, "with the privilege of remaining as long as the store stands." *Held*; That the reservation (more strictly exception) constitutes a base or qualified fee in so much of

the land as is necessary for the reasonable use of the store, determinable when the store ceases to remain upon the premises conveyed.

ON REPORT.

The case is stated in the opinion.

J. H. Montgomery and W. H. Fogler, for plaintiffs.

The store being a part of the thing conveyed amounts to an exception. 3 Wash. R. P. (4th Ed.) p. 432; *Stockbridge Iron Co.* v. *Hudson Iron Co.* 107 Mass. 322; *Howard* v. *Lincoln*, 13 Maine, 122; *Hatch* v. *Brier*, 71 *Id.* 542. Being an exception remains in the grantor and descends to his estate. *Sanborn* v. *Hoyt*, 24 Maine, 118; *Wood* v. *Boyd*, 145 Mass. 176. Being an exception it becomes personal property as if specially conveyed. *Davis* v. *Emery*, 61 Maine, 140. The railroad company never condemned the building.

C. E. Littlefield, for defendant.

Plaintiffs have no interest in the building unless it is personal property. It is real property. 4 Kent. Com. p. 27; 1 Wash. R. P. p. 116; *Hurd* v. *Cushing*, 7 Pick. 169; *Esty* v. *Currier*, 98 Mass. 500; *Richardson* v. *Copeland*, 6 Gray, 536; *Burk* v. *Hollis*, 98 Mass. 56; *Gibbs* v. *Estey*, 15 Gray, 589. Defendant cut only that part within the location. The taking carried with it all the erections, &c., upon it.

PETERS, C. J. This is an action of trespass *de bonis* for the destruction of a store alleged by the plaintiffs to have been personal property belonging to the estate of the late W. A. Farnsworth, upon whose estate they are administrators. The defense is that the defendant, in the removal of the store, was acting under the authority of the Lime Rock Railroad Company, whose road is located over the exact spot on which the store was situated; that the store was not personal property but real estate; and that the owner's remedy is not by action, but by petition to the county commissioners for an assessment of damages. The case is reported for a decision of the question whether the store was real or personal estate.

The case shows that W. A. Farnsworth, more than twenty years ago, conveyed to the Cobb Lime Company, a wharf in the

city of Rockland, making a reservation of the store in question in the following words: "Reserving the store on said premises occupied by J. R. Farnsworth, with the privilege of remaining as long as said store stands."

We think the store was real estate. The reservation retains the store and an interest in the soil beneath and about it for the use of the store as long as it stands. It might stand almost perpetually unless destroyed by some casualty. The store was probably located on some street or road, which gave it a chance for ingress and regress, as such privileges seem to have been carefully provided for other structures reserved in the same deed. It was an exception perhaps rather than a reservation. The title which the grantor retained was a qualified, base or determinable fee; an estate which is subject to a reverter, and continues until the qualification annexed to it is at an end. Such an estate is both descendible and assignable. This case is very similar in its facts to that of *Moulton* v. *Trafton*, 64 Maine, 218, where the doctrine of such an estate is discussed upon the authorities. The language there which was held to constitute a limited fee, was an exception of mills "as long as said Trafton occupies said privilege with mills." That case governs this.

Plaintiffs nonsuit.

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

LIZZIE E. MCNERNEY *vs.* INHABITANTS OF EAST LIVERMORE.

Androscoggin. Opinion April 21, 1891.

Way. Damages. Verdict. New Trial.

The powers of the court to set aside verdicts against towns, in actions for damages occasioned by defective highways, and its duty to do so when the verdicts are clearly wrong, or the damages are clearly excessive, are unquestionable.

But it is a well-settled rule of law that this power is not to be exercised simply because the court would have decided differently from the jury. To authorize an exercise of the power, the court must feel that the verdict is clearly and unmistakably wrong.

ON MOTION.

This was an action on the case brought by the plaintiff to recover for personal injuries, both external and internal, which she received in the evening of the sixth of September, 1889, by reason of an alleged defective sidewalk in the village of Livermore Falls, in the defendant town.

The plaintiff gave the following statute notice:

"To the Municipal Officers of East Livermore, in the County of Androscoggin:

"You are hereby notified that I claim damages for bodily injuries received by me, by reason of a defective sidewalk or crossing on Depot street, in Livermore Falls Village, in the evening of the 6th day of September, A. D. 1889. The nature of the injury which I received was a bruise upon my right leg and knee, a wrench of the same, and an injury to my back.

"The nature and location of the defect was a settling and displacement of the sidewalk over the causeway or near the end of the causeway opposite the Ezra Hilton block, and in passing over the same without previous notice of the defective condition, I stepped between the end of the crossing and the sidewalk, and received the injuries above described.

"Amount of damages claimed $2000.

"Dated this 14th day of September, A. D., 1889, at Livermore Falls.

MRS. LIZZIE MCNERNEY."

The plaintiff's declaration alleged the defect, &c., as follows: "That the said sidewalk by reason of its rotten and defective condition which caused a settling and displacement of the planking or walk over the causeway, or near the end of the causeway, leaving an opening at, or near, the end of said causeway covering without any sufficient railing or notice thereof," . . . that "passing along said sidewalk, on foot, she stepped into, and through, said opening between the sidewalk and the stone of the causeway aforesaid, occasioned by the defective condition of said sidewalk, (and not by any snow or ice, or slippery condition of said walk) and thereby was thrown down," &c.

The plaintiff and her witnesses testified that the defect complained of was that substantially set out in the written notice

and declaration; a settling or displacement of the timbers of the sidewalk on Depot street, in said village, at or near the end of the stone crossing, leaving a hole or opening between the end of the crossing and the sidewalk; that she stepped into the opening and was thrown down, severely bruising her leg, spraining her knee and injuring her hip and spine so that she was prostrated, confined to her bed, and remained so ever since.

The plaintiff claimed that the town had twenty-four hours' actual notice of the defect by the testimony of one Severy, who testified that he called the attention of the road commissioner, who passed over it almost daily, to this piece of the sidewalk. Severy testified: "I told him I thought it was very bad, in a dangerous condition, and ought to be fixed, and he says, 'I am going to fix that. Let this go until after haying and we will fix it up.'" She also claimed that its exact condition as alleged by her was known to the road commissioner and one of the selectmen who made temporary repairs upon the sidewalk during the season of 1889.

The defect was denied by the defendants who also contended that the proper officers did not have actual notice of the defect; that the defect was not the sole cause of plaintiff's injuries; that her condition was due to causes other than the result of any injury, and were greatly magnified; and that she did not exercise due care and was guilty of contributory negligence by stepping off the sidewalk.

Upon the issue of due care, the testimony for the plaintiff tended to show that she was going home from the depot grounds between the hours of nine and ten o'clock in the evening, at an ordinary pace, over the usual way of the travel. Immediately in front of her, behind her, and on one side of her were several others walking over the same crossing and upon the same sidewalk. There were no guards, and no lights from adjacent buildings. She did not see the hole, although she was over the sidewalk the day of the injury. Much evidence was introduced upon the issues between parties.

The view taken by the court renders a report of it unnecessary. The jury returned a verdict of one thousand dollars for the plaintiff.

E. O. Greenleaf, C. Knapp with him, for defendants.

Counsel cited: *Smyth* v. *Bangor*, 72 Maine, 249; *Holmes* v. *Paris*, 75 *Id.* 559; *Brooks* v. *Somerville*, 106 Mass. 271; *Davis* v. *Bangor*, 42 Maine, 522; *Garmon* v. *Bangor*, 38 *Id.* 443; *Spaulding* v. *Winslow*, 74 *Id.* 528, and cases cited.

J. P. Swasey, E. M. Briggs with him, for plaintiff.

Counsel cited: *Weeks* v. *Parsonfield*, 65 Maine, 285; *Morse* v. *Belfast*, 77 *Id.* 44; *Monies* v. *Lynn*, 119 Mass. 273; *Welch* v. *Portland*, 77 Maine, 384; *George* v. *Haverhill*, 110 Mass. 506; *Haskell* v. *New Gloucester*, 70 Maine, 305; *Hunter* v. *Heath*, 67 *Id.* 507; *Smith* v. *Brunswick*, 80 *Id.* 189.

WALTON, J. As the plaintiff was walking along one of the public streets at Livermore Falls, she stepped into a hole between the sidewalk and the carriage-way, and received injuries for which she has recovered a verdict of one thousand dollars against the town. The case is before the law court on a motion for a new trial, filed by the town, on the ground that the verdict is clearly against the weight of evidence and the damages manifestly excessive.

We have examined the evidence with care, and while we have a strong feeling that the plaintiff may have been guilty of contributory negligence, and that the injuries received by her are by no means so severe as she claims them to be, still, we do not think the verdict is so clearly wrong, or the damages so clearly excessive, as to require the court to set the verdict aside and grant a new trial.

The power of the court to set aside verdicts in this class of cases, and its duty to do so when the verdicts are clearly wrong, or the damages are clearly excessive, are unquestionable.

But it is a well settled rule of law that this power is not to be exercised simply because the court would have decided the case differently. To authorize an exercise of the power, the court must feel that the verdict is clearly and unmistakably wrong. *Motion overruled.*

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

MARY ELLEN HAIGHT *vs.* ELIHU T. HAMOR.

Hancock. Opinion May 23, 1891.

Deed. Monument. Watercourse. Evidence.

The general presumption respecting the extension of a riparian grant to the centre of a non-navigable stream does not apply, when there is a clear intention in the deed to make the side of the brook, and not the centre of its channel, the monument.

Where the language of a deed, in such case, shows a manifest intention to stop at the water's edge, it will prevail over the general rule in the construction of deeds that when a grant of land is bounded on such a water course, above the ebb and flow of the tide, the stream is to be regarded as a monument equally upon the land granted and the land adjoining, and that the boundary line will be in the centre of such monument.

In a deed, defining the boundary line between two coterminous riparian owners, it appeared that the brook was of sufficient capacity for saw-mills; that in the description of the boundary lines, two saw-mills were located upon it, and three mill privileges mentioned in connection with it; that the brook itself was not made a boundary line between the parties, the line crossing the brook three times, dividing it into four sections and leaving to each party the whole stream and land on both sides of it in his respective section; and that the first call in the deed expressly gave four rods of land on the southern side of the brook, the other calls showing a strong probability that the several strips of land were intended to be of uniform width, essential to the convenient and profitable enjoyment of the mill privileges; *Held*; that the brook is made the *terminus a quo*, and not the *terminus ad quem*; *Also*, that the four rods should be measured from the side and not from the centre of the stream.

In a deed of real estate a line is thus described: "Following down the brook four hundred and fifty-six feet, with four rods of land on the southern side of the brook; thence crossing the brook at right angles northerly and down the stream within four rods of the brook one thousand three hundred and sixty-eight feet; thence crossing the stream at right angles southerly, and following down the stream within four rods of the brook one thousand three hundred and sixty-eight feet; thence crossing the stream at right angles northerly and following the stream within four rods of it seventy-six feet below the spiling of the old mill-dam." *Held*; that the northerly line of the two four-rod strips of land lying on the northerly side of the brook is four rods from the side of the brook, above the ebb and flow of the tide, and not from the centre of the channel.

A written agreement between the grantor and a third party, made two years before in contemplation of a conveyance of the same lot of land, is not admissible to explain any supposed ambiguity in this description of the line.

ON REPORT.

This was a real action. Plea, general issue, and a disclaimer of all the *locus* except so much as is covered by the strips described in the defendant's deeds, measuring them according to the defendant's contention.

The question for the determination of the court was as to the construction of deeds, which sufficiently appear in the opinion. The plaintiff claimed that the four rods mentioned in the deeds should be measured from the thread of the stream or centre of the channel.

The defendant claimed that the measurement should be from the side of the stream, above the ebb and flow of the tide, and from high water mark where the tide ebbs and flows.

It was admitted that the tide flows into the stream, for a portion of its length, opposite the land of the defendant; and at low water the tide ebbs entirely out of the stream.

The other facts of the case appear in the opinion.

Hale and Hamlin, *Deasy and Higgins*, with them, for plaintiff.

Counsel cited: 2 Devlin on Deeds, § 1024, and cases there cited; *Lunt* v. *Holland*, 14 Mass. 149; Ang. Wat. (7th Ed.) § 23, *et seq.* citing *ex parte*, *Jennings*, 6 Cow. 518; *Harlow* v. *Fisk*, 12 Cush. 306; Gould on Waters, § 196; *Herring* v. *Fisher*, 1 Sandf. 344; *Bennett* v. *Plotter*, 6 Ohio, 504, 508; 3 Kent Com. 433-4; *Boston* v. *Richardson*, 13 Allen, 154; *Gove* v. *White*, 20 Wis. 425; *Hicks* v. *Coleman*, 25 Cal. 122; *Jackson* v. *Louw*, 12 Johns. 252; *Rowe* v. *Bridge Corp.* 21 Pick. 344: *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 430; *Newhall* v. *Ireson*, 8 Cush. 595; *Paul* v. *Carver*, 26 Pa. St. 223.

The real intent of the conveyances was to divide the stream, split it in the centre or thread, the land being a secondary consideration.

Boundary: *Lowell* v. *Robinson*, 16 Maine, 357; *Adams* v. *R. R.* 11 Barb. 452; *Seneca Nation* v. *Knight*, 23 N. Y. 500; *Lincoln* v. *Wilder*, 29 Maine, 169; *Robinson* v. *White*, 42 Maine, 209; *Nickerson* v. *Crawford*, 16 Maine, 245; *Pike* v. *Munroe*, 36 Maine, 309; *Winslow* v. *Patten*, 34 Maine, 26; River or brook navigable: *Brown* v. *Chadbourne*, 31 Maine,

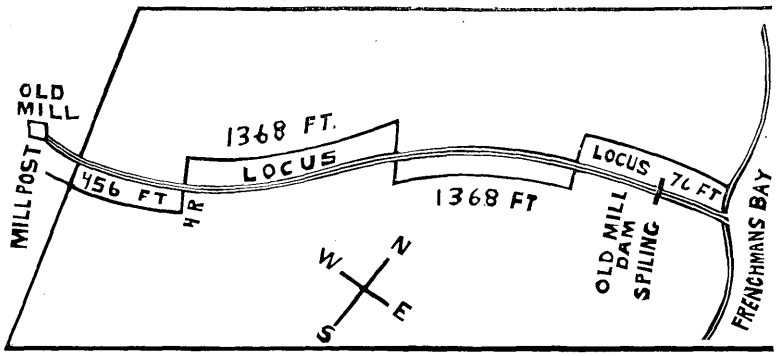
22; Ang. Tide Waters, 89; *Rowe* v. *Bridge Corp.* 21 Pick. 344; *Parsons* v. *Clark*, 76 Maine, 478; Gould on Waters, § 43; *Com.* v. *Charlestown*, 1 Pick. 185; *Charlestown* v. *Co. Com.* 3 Met. 202; *Atty. Genl.* v. *Woods*, 108 Mass. 436; *U. S.* v. *New Bedford Bridge*, 1 Wood. and M. 401, 487; *Weathersfield* v. *Humphrey*, 20 Conn. 218; *Burrows* v. *Gallup*, 32 Conn. 501; *Glover* v. *Powell*, 10 N. J. Eq. 211; *Flanagan* v. *Phila.* 42 Pa. St. 219; *People* v. *Platt*, 17 Johns. 211: *Benson* v. *Morrow*, 61 Mo. 345; *Wis. River Co.* v. *Lyons*, 30 Wis. 61; *Braxon* v. *Bressler*, 64 Ill. 488; *Barney* v. *Keokuk*, 94 U. S. 324; *Sparhawk* v. *Bullard*, 1 Met. pp. 107-8.

Wiswell, King and Peters, for defendant.

WHITEHOUSE, J. Writ of entry to recover two parcels or strips of land situated on the northerly side of Duck Brook, in the town of Eden. Both parties seek to derive title from John A. Hotchkiss, who was at one time owner of the land on both sides of Duck Brook;—the plaintiff by a series of conveyances commencing with a deed from John A. Hotchkiss to Richard Higgins, dated September 19, 1838;—and the defendant by a deed from Addie R. Hawley, the sole heir of John A. Hotchkiss, dated September 16, 1882. The contention between the two involves a construction of these two deeds.

By the former deed, given in 1838, John A. Hotchkiss conveyed to Richard Higgins one hundred acres of land, more or less, situated principally on the northerly side of Duck Brook. In this deed the description of the line "on the southeast by Duck Brook" is as follows: "Beginning at the southern corner of the lot and runs northerly to the saw mill on said brook including three fourths of the upper saw-mill privilege and the whole saw-mill thereon; thence from the lower southerly mill-post following down the brook four hundred and fifty-six feet with four rods of land on the southern side of the brook; thence crossing the brook at right angles northerly and down the stream within four rods of the brook, thirteen hundred and sixty-eight feet; thence crossing the stream at right angles southerly and

following down the stream within four rods of the brook, thirteen hundred and sixty-eight feet; thence crossing the stream at right angles northerly and following the stream within four rods of it, seventy-six feet below the spiling of the old saw-mill dam; thence at right angles to the brook and following the same to its mouth." It will be seen that by the line thus established with reference to Duck Brook, Higgins gave to the grantee two strips of land on the south side of the brook, and retained in himself two similar strips on the north side, as illustrated by the lines of the accompanying plan.



John A. Hotchkiss made no further conveyances of any part of this property during his life-time, and at the time of his decease had title to these four-rod strips on the north side of the brook, the first being thirteen hundred and sixty-eight feet in length, and the second beginning at a point thirteen hundred and sixty-eight feet below the first and originally extending to a point "seventy-six feet below the spiling of the old saw-mill dam."

The plaintiff claims that the four rods mentioned in the deeds are to be measured from the thread of the stream, and the defendant claims that the measurement should be from the side of the stream, above the ebb and flow of the tide, and from high water mark where the tide ebbs and flows.

According to the terms of the report, the only question presented for the determination of the court is whether the

northerly line of these four-rod strips is four rods from the centre of the channel, or four rods from the side of the brook.

It is not in controversy that Duck Brook is a small unnavigable stream; and it appears from an admission, in the report, that the tide flows into it for a portion of its length opposite the land of the defendant, and at low water ebbs entirely out of it.

There is a well-known, general rule in the construction of deeds that, when a grant of land is bounded on such a water-course, above the ebb and flow of the tide, the stream is to be regarded as a monument located equally upon the land granted and the land adjoining, and the boundary line will be in the centre of such monument. In such case the land of the owner on each side of the stream is presumed to extend *ad medium filum aquae*, unless the language of the deed shows a manifest intention to stop at the water's edge. It is of course competent for the grantor to limit his grant as he will; he may include or exclude the entire width of the "monument," by employing terms apt for that purpose.

In the interpretation of conveyances of land as of other written instruments the intention of the party is the real object sought. If the meaning is not clear, resort is had to rules of construction. *Bradford* v. *Cressey*, 45 Maine, 9; *Erskine* v. *Moulton*, 66 Maine, 276; Ang. Wat. § 23, and authorities cited. But there is no better principle in regard to all rules of construction wherever applied than to use them as assistants toward reaching the intention of the party, and to abandon them whenever it is apparent that they lead one side of that object. *Small* v. *Allen*, 8 T. R. 497. "It is difficult to say that there is more than one rule of construction that has not its exceptions; and that is, taking the whole instrument together, what does it mean?" *Ide* v. *Pearce*, 9 Gray, 350. If the intention is still doubtful, the deed may be examined in the light of the circumstances attending its execution, such as the actual condition, situation and occupation of the property granted. *Salisbury* v. *Andrews*, 19 Pick. 250. It may also be interpreted with reference to the reason, or motive, upon which the grantor proceeded in giving the description in question, and from the end in view or the purpose

which was designed. 2 Devlin on Deeds, § 838. But the intent when apparent and not repugnant to any rule of law will control technical terms, for the intent and not the words is the essence of every agreement. In the exposition of deeds the construction must be upon the view and comparison of the whole instrument. Kent, C. J., in *Jackson* v. *Myer*, 3 Johns. 383.

In the case at bar, it is suggested by the defendant that, if the language of the deed can be said to be applicable either to the measurement from the centre line or from the side line of the brook, then evidence *aliunde* is admissible to show which was intended, on the familiar principle that latent or objective ambiguities may be explained by extrinsic evidence *Abbott* v. *Abbott*, 51 Maine, 581. And a preliminary question is raised respecting the admissibility for this purpose of a written agreement made between Hotchkiss and Edward Brewer, in 1836, and recorded in 1878. It has frequently been held that other instruments, which were executed between the same parties at the same time and respecting the same subject-matter, may be considered in aid of the construction of any particular instrument, the terms of which are ambiguous. *Cloyes* v. *Sweetser*, 4 Cush. 403; *King* v. *King*, 7 Mass. 496. But the rule does not apply if the instruments are not between the same parties or do not relate to the same transaction. *Cornell* v. *Todd*, 2 Denio, 130; *Putnam* v. *Steward*, 97 N. Y. 411; *Rexford* v. *Marquis*, 7 Lans. 249.

This agreement, between Hotchkiss and Brewer, would seem to have been made in contemplation of a conveyance to Brewer of the same property described in this deed to Higgins, and for the purpose of establishing a division line with respect to Duck Brook stream. There is a remarkable similarity between the description of this line in the agreement and that in the deed to Higgins. The distances on the several courses given are the same, and it is contended by the defendant that its language removes all possible doubt respecting the meaning of the terms used in the deed. But Higgins does not appear to have had any connection with that agreement or even knowledge of it, and there is no allusion to it in his deed. It was not recorded

until 1878. Furthermore it does not appear that the conditions were fulfilled so that it ever became operative to establish any line on Duck Brook. It was not an instrument required by law to be recorded, and no subsequent purchaser is chargeable with notice of it. True, Brewer acquired title to the same property from Higgins seven years later, but there is no evidence that Brewer had any interest in the conveyance from Hotchkiss to Higgins. This agreement is, therefore, irrelevant and inadmissible.

But placing ourselves in the seats occupied by the parties at the time this instrument was executed and reading it in the light of the internal evidence afforded by the deed itself, is its meaning doubtful? It appears from the deed that Duck Brook was deemed to be a stream of sufficient capacity to be made available for the erection of water power for the operation of saw-mills. In the description of the boundary lines, two saw-mills are located upon it and three mill privileges mentioned in connection with it. It is also a fact of special significance to be noted in this connection that Duck Brook itself is nowhere made by this deed a boundary line between the parties. The question is thus removed from the ordinary class of cases where land is bounded on a stream. The general presumption respecting the extension of a riparian grant to the centre of the stream does not apply. The line in the deed crosses the brook three times, dividing it into four sections and leaving to each party the whole stream and land on both sides of it in his respective section. Thus the value of the stream for water power and mill privileges was greatly enhanced. Each could erect a dam entirely across the stream in his own section without infringing upon the rights of the opposite owner. A narrow margin of land on each side of the stream is obviously an appurtenance well-nigh indispensable to the convenient and profitable enjoyment of a mill privilege, and it is known to be a common practice to make a reservation or other provision for such an appurtenance. A strong probability respecting the intention of the parties is thus raised by the reason or motive from which this extraordinary line manifestly originated. It was unquestionably designed that each

should have land sufficient at least for a passage-way on each side of the stream. There is no evidence showing the ordinary width of Duck Brook. But if the four rods are to be measured from the centre of the stream, and as often happens on low and nearly level sections, the stream expands into small basins or flows sluggishly along for considerable distances in a broad and shallow stream, it might at such points become eight rods in width and and no land whatever uncovered by water would pass or be reserved by the deed for use in connection with the mills.

But the language of the deed in the first call, "following down the brook," speaks with no uncertain sound upon this point: "thence from the lower southerly mill-post following down the brook four hundred and fifty-six feet *with four rods of land on the southerly side of the brook*." In the other courses following, the line runs "within four rods of the brook." The word "of" as well as the word "from" is used as a term of exclusion. *Bonney* v. *Morrill*, 52 Maine, 256. There is nothing, therefore, in the language of the other calls inconsistent with the theory that the measurement was to be taken from the side of the stream. It is wholly improbable that the grantor intended to convey a strip of varying width on the same side, or of different widths on the two sides of the stream. It is most reasonable and consistent to believe that the strips in the different sections were intended to be of uniform width.

In the case of *Dodd* v. *Witt*, 139 Mass. 63, after citing several cases in support of the general rule that a boundary on a way includes the soil to the centre of the way, the court add: "Not one of these cases, however, considers the construction to be given to a deed in which a highway is a point of departure of a measured line. . . The rule is well established when the road is the terminus *ad quem*, but there is little authority when it is the terminus *a quo*, and there is no monument at the other end of the line. A majority of the court is of opinion that it is a common method of measurement in the country where the boundary is a stream or way, to measure from the bank of the stream or the side of the way, and that there is a reasonable presumption that the measurements were made in this way

unless something appears affirmatively in the deed to show that they began at the centre line of the stream or way."

In the case at bar nothing "appears affirmatively in the deed to show that they began at the centre line of the stream," and the implication is wholly to the contrary.

By a natural and legal interpretation of the language of this deed the line in question is, therefore, found to be four rods distant from the northerly side of the brook, above the ebb and flow of the tide.

The language of the deed from Addie R. Hawley to the defendant, plainly and aptly describes this four-rod strip and in connection with the terms of the agreement between Hotchkiss and Brewer, referred to in the deed as "Hancock Registry, book 163, page 49," shows a manifest intention to measure from the side and not from the centre of the stream. This deed also expressly refers to a survey made four years before that date, by Eben M. Hamor, and the description in the deed is identical with that of the survey. The testimony of the surveyor offered by the plaintiff that the measurements of that survey were made from the centre of the stream and not from the side, is clearly inadmissible. It would have the effect to contradict the unambiguous language of the deed. According to the stipulations in the report, the entry must be, *Plaintiff nonsuit.*

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

CHARLES H. LASKY

vs.

THE CANADIAN PACIFIC RAILWAY COMPANY.

Penobscot. Opinion May 25, 1891.

Railroad. Negligence. Superintendent. Train-Dispatcher. Law and Fact.

A railroad corporation is not liable to an employee (in this case an engineer) for an injury happening to him in executing an errand of danger, upon which he is sent by the superintendent of the corporation, unless the superintendent be guilty of negligence in ordering the dangerous act to be performed.

Where a train-dispatcher habitually performs in the name of the superintendent of a railroad, certain duties of such superintendent in his absence, with the assent of the corporation, any order to an employee from such train-dispatcher, within the limit of his delegated authority, imposes upon both

the corporation and employee the same duties and liabilites as if issued directly by the superintendent himself.

The rule that undisputed facts present a question of law rather than of fact is more adapted to questions of contract than to questions of tort.

In negligence cases the rule applies only when the facts are undisputed, and the conclusion to be drawn from the fact is so far indisputable that men could not reasonably differ in their interpretation of them.

ON MOTION AND EXCEPTIONS.

This was an action on the case in which the plaintiff, a locomotive engineer in the defendant's employ, sought to recover damages for personal injuries sustained by him. He claimed that while in the execution of a written special order, regularly issued, and bearing the name of the company's general superintendent requiring him to run his engine regardless of all trains to a certain point west of Moosehead station and rescue a disabled train, he encountered the disabled train not at or near the point stated in the order, to wit: one mile east of Mackamp, but five miles away and easterly of it; and that in attempting to escape from imminent peril of the impending collision he jumped from his engine and was injured.

The plaintiff contended that the issuing of the order by the superintendent was an act of negligence on the part of the corporation.

The material allegations of the declaration are as follows: . . . "And on the line of said railroad in said Somerset County there was on said July 1st, and still is a station called Mackamp, and another station named Moosehead, situated sixteen and two-tenths miles east of said Mackamp; and on said July 1st, a train proceeding and running easterly on said railroad and under the care and control of said defendant, called the Montreal Express and No. 201, became disabled at a point on the line of said railroad six miles east of said Mackamp, and was unable without assistance from an engine other than the engine attached to said train to proceed further. And on said July 1st, the plaintiff was in the employ of said defendant corporation, in the capacity of a locomotive engineer, and on said day had charge and control of, and was with locomotive No. 13, belonging to said defendant, at the said station called Moosehead; and it was

the duty of said plaintiff so as aforesaid in the employ of said defendant, to act in obedience to the orders of said defendant, and it was the duty of said defendant to use due care in regard to its servant, said plaintiff, and not negligently, carelessly or recklessly to expose him to danger and peril unknown to said plaintiff; yet said defendant unmindful and in total disregard of its duty in the premises negligently, carelessly and recklessly sent to said plaintiff, who was ignorant of the location of said disabled train, on the morning of said July 1st, and said plaintiff received from said defendant on the morning of said July 1st, while said plaintiff was so in the employ of said defendant as aforesaid, at said Mooschead, peremptory orders in writing that he (said plaintiff) was required immediately to go and bring said train No. 201, from one mile east of said Mackamp, to said Moosehead, also at the same time, further peremptory orders in writing to run (meaning for said plaintiff to run said engine so under his charge and under his control as aforesaid) from Moosehead aforesaid, to one mile east of said Mackamp, regardless of all trains, and to look out for No. 201, (meaning said disabled train) one mile east of said Mackamp; and said plaintiff not knowing the location of said disabled train, but relying on said written orders, as he had a right so to do, that said disabled train was one mile east of said Mackamp, and that the line of said railroad was free from all obstructions, especially and particularly all obstructions from said disabled train, from said Moosehead to one mile east of said Mackamp, in pursuance and in obedience to said peremptory written orders to him aforesaid, on said July 1st, was running his said engine from said Moosehead to one mile east of said Mackamp, with due care and diligence and without any negligence on his part, and without any warning whatever, came upon said disabled train so situated aforesaid six miles east of said Mackamp, and in a cut which concealed it from view, so suddenly, that it was impossible for him to check the speed of his said engine, in time to prevent a collision with said disabled train, and a collision did then and there occur between his said engine so being run as aforesaid on said July 1st, by plaintiff with due care and diligence and without any negli-

gence on his part and in obedience to said peremptory written orders, and said disabled train, and plaintiff was thereby placed in a situation of imminent peril to his life and limbs, and immediately before said collision actually took place and while his said engine so being run by him as aforesaid was in motion and in close proximity to said disabled train, without any negligence on his part in attempting to escape from this situation of imminent peril to his life and limbs so brought upon him by the negligence, carelessness and recklessness of said defendant as aforesaid said plaintiff jumped from said train so being run by him as aforesaid and thereby then and there was thrown down and over an embankment and into a deep ravine, and then and there by reason thereof was greatly and permanently injured," &c. . . . *Second count*, for not having made and promulgated suitable rules and regulations for flagging or signaling in front of disabled trains.

Under the instructions as given by the court, the defendant's liability under the first count only, was passed upon by the jury.

The order in question, issued in the name of the general superintendent, appeared by the evidence to have been issued by the train-dispatcher from the office of the assistant superintendent of the Moosehead section, at Brownville Junction. The defendant contended, at the trial, that the plaintiff and train-dispatcher were fellow-servants.

Upon this branch of the case, the presiding justice instructed the jury as follows:

"Now, in this case, the general superintendent may be regarded by you as a principal and not as a co-servant, and whatever was done under his direction, under his order, was not done under the order of a co-servant. So, then, in the first place, you will inquire if this order which the plaintiff received from the telegraph office at Moosehead, was the order of the general superintendent. It appeared to be. It was delivered to him as coming from the general superintendent. He received it through the usual channel for orders of that sort to come. The person who gave it to him has testified that he was the train-dispatcher. Rule 31 of the company provides that, "no

special train or engine shall be run without orders from the general superintendent through the train-dispatcher." Now this order came through the train-dispatcher. Was it the order of the general superintendent? I instruct you that, if the superintendent was accustomed to allow the train dispatcher to issue orders of this sort in his name, coming from his office, this order, if issued in accordance with that usage and custom, known and permitted by the general superintendent of the company, would be the order of the general superintendent. In other words, it would be the order of the general superintendent's office, and would have the same effect as though his name was personally signed to it. If he sees fit to allow the business that particularly appertains to him, his particular corporate functions, to be exercised in that way, the persons who act under him must have the same protection as though each one was his own individual and personal act. So then, gentlemen, under these rules I have given you, if you are satisfied that the order was the order of the general superintendent, I instruct you that it was the order of the corporation; and, if the plaintiff received his injury without any fault on his part, while acting under this order and within its scope, then he is entitled to recover."

The jury was also further instructed upon the defendant's liability in issuing the order as follows:

"But if, on the other hand, you are satisfied by a preponderance of the evidence, he was running under the order of the superintendent of this company to one mile east of Mackamp, having due regard to all the information which was in his power and at hand, with due and proper care and caution, and was not in fault himself, then I instruct you that he is entitled to recover."

The defendant excepted to these instructions. There were other exceptions which the full court did not find it necessary to consider.

The jury returned a verdict of $3000, for the plaintiff.

Wilson and Woodard, for defendant.

Collision caused by error and mistake, as to location of dis-

abled train, by conductor Cole, a fellow-servant for whose fault the master is not liable. *Gibson* v. *R. R.* 2 Am. Rep. 497-9; Pierce, R. R. 358, 359, 362; *Blake* v. *R. R.* 70 Maine, 60; Wood, Mast. & Ser. § 345, p. 705; *Adams* v. *West Roxbury*, 1 Hask. 576. No want of care by defendant. *Warner* v. *R. R.* 39 N. Y. (12 Tiffany) 468, 471. Wood, Mast. & Ser. § 344, p. 705; *Clarke* v. *Holmes*, 7 Hurl. & Nor. 937, 947. Reasonable care in issuing the order. *Slater* v. *Jewett*, 85 N. Y. 61, 71. No fault in selection of its agents or giving sufficient information, &c. *Ladd* v. *R. R.* 119 Mass. 412, 413; *Buzzell* v. *Laconia M'fg. Co.* 48 Maine, 113, 121; *Cassidy* v. *R. R.* 76 Maine, 488, 489; *Shanny* v. *Andro. Mills*, 66 Maine, 420, 427. Defendant had same knowledge as employer. *Wright* v. *R. R.* 25 N. Y. 526, 566; understood the nature of the risk, *Clark* v. *Holmes*, *supra*; *Coombs* v. *N. B. Cordage Co.* 102 Mass. 572, 585-6; *Hayden* v. *Smithville M'fg. Co.* 29 Conn. 548, 557-8-9, 560, and cases cited. *Wormwell* v. *R. R.* 79 Maine, 397, and cases cited. No negligence of defendant intervened between the plaintiff and fault of the conductor. Consequences which plaintiff must have forseen, and due care by defendant could not prevent, should not be visited on defendant. *Farwell* v. *R. R.* 4 Met. 49, 60-1. Exceptions: Plaintiff knew the order came from Brownville Junction train-dispatcher. Its issue not an act towards plaintiff which the master owes to his employ to perform personally, but the act of a fellow-servant; and plaintiff assumed risks incident to it. *R. R.* v. *Fort*, 17 Wall. 553, 558; *Walker* v. *R. R.* 2 Hask. 96. Questions of negligence are for the jury. Pierce, R. R. 384, and cases cited.

Appleton and Chaplin for plaintiff.

General superintendent is a vice-principal, and not a fellow-servant. Patterson, Ry. Accidents, p. 323; Pierce, R. R. p. 368. Order issued was the act of defendant. Regular in form, coming from proper source. Defendant estopped by its rules to show it was the act of train-dispatcher only. Rules are part of plaintiff's contract of service. Obedience to the order exacted of employees. If issued by the servant in the master's

name, held to be defendant's act. Patterson Ry. Accidents, p. 329, § 308. As between a conductor and the superintendent the latter is representative of the company; his orders are the orders of the employer. *R. R.* v. *McLallen*, 84 Ill. 109; Patterson Ry. Accidents, p. 323 and cases cited.

Order was peremptory and extraordinary. *McLeod* v. *Ginther*, 80 Ky. 399. Company bound to know that the statements in it were true. Its issuance an act of negligence *per se*. Bound to furnish a safe road-bed to one mile east of Mackamp as it was safe appliances. Cole's negligence was to the company and not to plaintiff. When the master states as true what is not true to his servant, and the servant relying on such statement as true, acts with less caution then he would if such untrue statement had not been made and is injured, the master is liable. Same, where risks are largely increased by act of master, without knowledge of the servant. Order induced plaintiff to relax his vigilance, and not expect to meet disabled train as soon as he did. Company liable although a fellow-servant contributed to the injury. Pierce, R. R. p. 379. Company negligent for not making further inquiry of Cole, before issuing the imperative order. Could have easily located disabled train opposite mile-post No. 238. Due inquiry and investigation are means of protection to employees in perilous occupations. Defendant guilty in these respects.

Aside from the question of due care on plaintiff's part, there were but two questions of fact, (1) was the order, the order of the company; and (2) was the company liable in consequence of such order. In its charge the court says, "The plaintiff charges the defendant with negligence, whereby he received bodily hurt. The defendant corporation denies its negligence and calls upon the plaintiff to prove it. So the plaintiff, before he can recover a verdict at your hands, must satisfy you by a preponderance of the evidence in the case that, he did receive his bodily injuries solely from the negligence of the defendant corporation."

The order being the thing that caused the injuries, and it being found by the jury under proper instructions to be the

order of the company, the only remaining question for the jury was, was it negligently issued; and that fact was duly submitted when the court declared that the plaintiff could not recover unless the injury was caused by the negligence or the fault of the company.

PETERS, C. J. The plaintiff, on July 1, 1889, was a locomotive engineer in the employ of the Canadian Pacific Railway Company, in charge of a ballasting train at a station on the road called Moosehead. On the early morning of that day the regular express passenger train running from Montreal to St. John became disabled by an accident to its engine, and was detained at a place about six miles east of another station on the road called Mackamp. The latter station is about sixteen miles west of Moosehead. The nearest telegraph station to the disabled train being Moosehead, Cole, the conductor of the train went to that place, and there sent to Brownville Junction, the principal office on that division of the road, the following dispatch: "From Moosehead, July 1, 1889. J. H. Van Zile (assistant superintendent). Broken journal on engine one seventy-four, one mile east of Mackamp. Please arrange for assistance. Cole."

Somehow unaccountably the distance was given as one mile instead of the true distance, six miles.

After some preliminary action to prevent misunderstanding or mistake, the plaintiff, whose engine was number thirteen, received the following final order: "Canadian Pacific Railway Company. Train order from O. S. Brownville Jct.—July 1, '89.

Eng. Eng. 13.

Moosehead.

Run from Moosehead to one (1) mile east Mackamp regardless of all trains. Look out for number two ought one (201) with disabled engine, one mile east of Mackamp.

T. A. MacKinnon."

Among the dispatches that were sent preparatory for the final order, the plaintiff had received the following: "You are required immediately to go and bring train No. 201 from one (1) mile east of Mackamp to Moosehead. Eng. No. 174 on No.

201, disabled. Conductor Cole will go with you from Moosehead."

All the preliminary dispatches sent from Brownville Junction were signed in the name of an assistant superintendent, whilst the final order was in the name of MacKinnon, the superintendent of the road; the reason for it being that the printed rules of the company prescribe that no special engine shall be run upon the road unless by the latter's authority.

The plaintiff with five other men, conductor Cole included, proceeded with his engine in execution of the order committed to him, running at the rate of about twenty miles an hour until he suddenly came upon the disabled train, which was somewhat hidden from his view by an embankment at a curve in the road, and the two engines came in collision, thereby causing plaintiff's injury.

The action charges negligence against the corporation, the jury, under the direction of the court, sustaining the charge. To some of the rulings of the court the defendants take exception. Undoubtedly the issuing of the order, whether a rightful or wrongful act, was, as between these parties, the proximate cause of the accident. The plaintiff contends that the evidence shows the act was negligence *per se*, the defense, on the other hand, contending that it proves legal justification. The question of defendants' negligence was not submitted to the jury, the judge, ruling *pro forma*, as a matter of law, that the facts proved negligence. We think this erroneous, and that the most favorable position possible to be accorded the plaintiff, would be to allow the jury to determine that question for themselves.

The defendants are not liable for the result of the accident unless their superintendent was guilty of negligence. While Cole's mistake was one of almost criminal carelessness, the corporation would not be subjected to liability on that account, inasmuch as engineers and conductors are regarded in this state as fellow-servants. The best cases on this branch of the law do not subject a master to liability to his servant except for the consequences of his own negligence or misfeasance. It is not an absolute, unconditional liability. But the act of a superin-

tendent is the act of the corporation. His negligence is the negligence of the corporation.

It is contended in behalf of plaintiff that the issue on the question of negligence was one of law rather than of fact, for the reason that the testimony was undisputed. But this position leaves out of view the important consideration that the deductions of fact to be drawn from the evidence were disputed. The more correct statement of the rule is that, when the facts are undisputed, and the conclusion to be drawn from the facts is indisputable, the question may be controlled by the court. The parties differed widely on the interpretation of the evidence. The rule invoked by the plaintiff is more adapted to commercial cases than to those of negligence. In any case where intention is to be discovered, exigencies weighed, or matters of expediency considered, although the testimony may not be conflicting, still unless the case is so palpably right or wrong that there can be but one opinion about the case, the question is for the jury and not the court. Such interpretations arise more often in negligence cases than any other. The negligence of neither party can be conclusively established by a state of undisputed facts from which different inferences may be fairly drawn, or upon which fair-minded men may arrive at different conclusions. *Nugent* v. *Boston C. & M. R. Co.* 80 Maine, 62, and cases cited.

The text writers declare the rule that in cases of negligence the question is especially one of fact for the jury. The judge may decide whether there is any evidence of negligence at all to go to the jury; a mere scintilla of evidence not being enough. 2 Thompson, Neg. 1235; Cooley, Torts. 669; Shearman, Neg. 19; Whittaker's Smith on Neg. 38, and numerous citations in note.

In the present case the defense, as before said, contends that the act of the superintendent was not a negligent act, either as a matter of fact or of law. Certainly the circumstances to be considered in justification of the conduct of the superintendent are of great weight. Relief must be sent to the disabled train. The news of the accident and of the location of the train came from an intelligent and trusted conductor. There is nothing

doubtful or equivocal in the words of his dispatch. On the contrary, it gives definite information that the train is east of Mackamp and one mile therefrom. No other person could be consulted to confirm his statement, as no one knowing anything of the accident was within telegraphic reach. The superintendent must rely upon such information as could be obtained. His mind perhaps would naturally be more intent upon the distress of the train than its precise location. He ordered the plaintiff to go to the disabled train with his engine, requiring the conductor to accompany him. He had a right to expect that the engineer on the disabled train would be on a proper look-out for the approaching locomotive, and that the plaintiff would proceed on his mission with unusual carefulness as no special train or engine should be run without such precaution. He knew that the conductor would be upon the engine to direct or advise the plaintiff should he be running into danger. No rate of speed was dictated by the order, the plaintiff having a general discretion in the premises. No one would construe the order as meaning an exact mile, but only that distance by estimation. A strange thing it is, if plaintiff's story be true, that he and the conductor never passed a word with each other while the engine was on its passage or at any other time. The conductor, by his silence, exposed his own life to danger with his eyes open to it, as he must have known the lay of the land and the whereabouts of his train on the road. But we do not get the conductor's version of the events of the day as he was not a witness. Such a mistake might not occur once in a thousand times. It was reasonably expected that by the presence and assistance of the conductor the plaintiff would go safely to the train. How many men would have acted more judiciously than did the superintendent? It is urged on the plaintiff's side of the case that the order was couched in terms too peremptory, and that the superintendent should have made more searching inquiry of the conductor in order to test the reliability of the information conveyed by his dispatch. But it is to be remembered that the superintendent and conductor were many miles apart, and that the superintendent prepared the opportunity for

a personal interview between the plaintiff and the conductor, by which the plaintiff could ascertain fuller particulars than the superintendent had. And it is a remarkable fact, reluctantly disclosed in the plaintiff's testimony, that he had substantially all the information that the superintendent had to act upon. He knew that conductor Cole brought the news of the accident to Moosehead; that he communicated it to Brownville Junction; that there was no other source of information, and still he obeyed the order apparently without apprehension of danger. His own judgment suggested neither fear nor hesitation. The defendants contend that the plaintiff was himself guilty of negligence in his omission to communicate personally with the conductor, and that, if the superintendent could telegraph for particulars, the plaintiff could, at least, have asked for them.

The defendants assail the plaintiff's case from another position. Inasmuch as the dispatch to the plaintiff was really sent in the superintendent's name by the train-dispatcher at Brownville, the superintendent not being there at the time and not conusant of it, the plaintiff himself being fully aware of the facts, it is contended that the plaintiff cannot prevail in the action because he and the train-dispatcher were fellow-servants in the same employment. We do not assent to this position. It appears that it was customary for the train-dispatcher thus to use the superintendent's name, and that the practice was acquiesced in by the superintendent and other officials connected with the road. An act done for the superintendent by his authority, either general or special, is his act. The employee is not required nor permitted to investigate the question of authority. The superintendent's name conclusively imports authority, unless it be forged. The servant must obey or be discharged from his employment. It would greatly demoralize the service if it were otherwise. Performance of duty to the road places all consequent liabilities upon the road. The claim set up by the defense in this particular is repelled by the tenor of numerous cases from which has been deduced the following general declaration: "The master may by withdrawing himself from the management of his business, and putting it in the hands of another with full

power to act for him, make such substitute's act his own, and become liable for his injuries to servants in like manner as if they were committed by himself." Pierce Railroads, 367, and cases cited.

The other questions of the case easily dispose of themselves. On the first point only do we think the defendants have a cause for complaint.

Exceptions sustained.

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

JOHN A. MORSE and others, *vs.* WARNER MOORE.

Sagadahoc. Opinion May 26, 1891.

Sale. Warranty. Acceptance. Waiver. Damages.

Where a seller contracts to deliver at a certain time and place good, clear, merchantable ice, it is a warranty, or a condition precedent of the nature and effect of warranty, that the ice afterwards delivered is of the kind and quality described in the contract.

The warranty survives acceptance; the vendee by accepting the ice is not precluded, in an action by the vendor for the contract price, from setting up a breach of the warranty or condition, in partial or total defense of the action.

The fact of acceptance by the vendee may be evidence tending to show complete performance of the contract by the vendor or to show a waiver of more exact performance, the force and effect of the fact as evidence depending upon the circumstances peculiar to each case.

The doctrine that, in an executory contract for the sale of goods, an acceptance by the vendee is a waiver of deficient performance by the vendor, applies only where the deficiency of performance is formal rather than essential, such as may relate to the time, place or manner of delivery, or affect the taste and fancy of the purchaser merely, or consist of some omission that produces no substantial loss or injury.

A vendor delivered under a contract to sell clear, merchantable ice, deliverable at a seaport in Maine, two cargoes of ice, to be shipped to Richmond, Va., which were taken at the place of delivery by vessels procured by the vendee, who did not inspect the ice at the place of shipment, although there was sufficient opportunity to do so; *Held*: that in an action for the contract price the vendee can set up the vendor's failure to deliver as good ice as the contract called for, in reduction of the damages recoverable.

ON EXCEPTIONS.

This was an action of assumpsit to recover for two cargoes of ice, under a written contract which appears in the opinion of the court. The verdict was for the plaintiffs, for the full contract price

with interest. The defendant contended, at the trial, that the ice shipped was not such as was called for by the contract; and that its quality was such, on account of excessive sap, that it had no market value and was worthless when loaded on board the vessels in this State, or was at least worth very much less than the contract price. Both cargoes were discharged in March, 1888, at Richmond, Va., and placed by the defendant in his ice-house. He denied that the ice was accepted. Upon the question of acceptance, the defendant offered the following letters and telegram, which were received by the plaintiffs. The telegram and the parts of the letters enclosed in brackets were admitted by the court; and the rest of the letters were excluded.

"[Richmond, Va., March 13, 1888.

"Mr. Jno. A. Morse, Bath, Maine:

"Dear Sir: The 'Hyde's' cargo is worse as it goes down. The sap averages five inches on each cake. Please telegraph me what to do about 'Crockett' cargo. She is due, and if as bad as 'Hyde' I do not want it.] Do not send any more unless you can send ice up to contract. Please wire me on receipt of this what you will do. It is not only a loss on cost of ice but freight also and storing; the top tiers as white as snow as soon as the sun strikes it. Yours, WARNER MOORE."

"Received at Bath, Maine, March 22nd, 1888."

"Dated at Richmond, Va., 21."

"To J. A. Morse:

"Crockett arrived; more sap than 'Hyde's'. What shall I do with it? Answer. WARNER MOORE."

"[Richmond, Va., March 21, 1888.

"Mr. J. A. Morse, Bath:

"Dear Sir: I telegraphed you, 'Crockett arrived. More sap than Hyde's. What shall I do with it? Answer.' I wrote you several days ago about the ice but no reply.] I measured several cakes and they have from four to six inches of sap. Haley of Gardiner, is here and I am sorry to say he has seen it, and is using his influence against my wagons. It is awful. Why did you send me such stuff? My manager, Mr. Gaubert,

came from Gardiner. He was with Haynes and DeWitt Co. for years and he never saw such ice shipped before. I am sorry you unload this bad ice on me. My contract calls for prime quality. Answer by first mail. Oblige,

WARNER MOORE."

The defendant was called as a witness to prove that he had not accepted the ice, and was asked what he did with the cargoes after they were discharged at Richmond, and after the telegram and letter dated March 21st; but upon objection the court excluded the questions.

Upon this point the following instructions were given to the jury: "Was it clear, merchantable ice, within the meaning of the term as used among merchants? If so, then perhaps that may end any further consideration of the case; because it was delivered on board the defendant's vessel and carried away by him, and you may be satisfied from the evidence, that has been submitted to you, was used by him in some way.

"If, under the circumstances he takes the commodity and carries it away to a distant state and unloads it from the vessels and puts it into his own ice-house and commences to deliver that as his own property, what would you, and what do you, infer as to the question of acceptance under the contract?"

The defendant claimed that the ice in controversy had from three to four inches of sap or snow ice upon it as an average and that quite a portion of it had from six to eight inches of sap upon it, and that for these reasons it was not merchantable and was valueless. This was denied by the plaintiffs. The defendant contended, also, that he could receive the ice and if it was not of the quality required by the contract, that in this action against him for the price, he could prove the fact, either in diminution of damages, or in full answer to the action, if the ice was of no value. Upon this branch of the case the presiding justice instructed the jury as follows:

"He cannot under a contract like this receive the property called for by the contract and accept it, and then turn round and say that he is not bound to pay the price which the contract calls for. . . . . .

"It has been contended to you by counsel, that the defendant might receive this property and keep it, use it and sell it, and still it is open to him to show that it was of no value when he received it and, therefore, that he is not required to pay anything. I do not understand that to be the law. That may be and is the rule of law, when a contract of sale is executed with a contract of warranty of the thing sold; then the warranty goes to the purchaser as his protection against defects that may be discovered in the thing sold. But this is not an executed contract, this written contract between the parties. It was executory." "It is like a contract for sale by sample, where a merchant agrees to sell a certain commodity which shall conform to a sample which he delivers to the purchaser. . . . . Still if he finds it does not in all respects conform to the sample he has the right of accepting it, and if he does accept it as a compliance with the contract, he is bound to pay the contract price.

"Considering all the facts as shown to you, you must determine, if you are not fully satisfied that the ice in all respects conformed to the terms of the contract, whether this defendant accepted it under the contract so as to preclude him from throwing it back onto the hands of the plaintiff.

"When he took the property and carried it away the property passed to him."

"If you do find an acceptance under the rules I have given you, I say to you that the defendant is bound to pay the contract price."

"If you find an acceptance of the property by the defendant, then he is liable for the contract price."

The defendant excepted to these rulings and instructions.

C. E. Littlefield, for defendant.

Warranty: *Bryant* v. *Crosby*, 40 Maine, 18; *Randall* v. *Thornton*, 43 Maine, 230; *Gould* v. *Stein*, 149 Mass. 570; *Henshaw* v. *Robins*, 9 Met. 83; *Weimer* v. *Clement*, 37 Penn. 147 (S. C. 78 Am. Dec. 411); *Shippen* v. *Bowen*, 122 U. S. 575; 2 Sch. Per. Pro. (2 Ed.) § 331; *Filley* v. *Pope*, 115 U. S. 213; 2 Benj. Sa. § § 932, 966, and cases cited.

Remedy: In instructing the jury the court may have had in mind the principle formerly held in England, that where the vendee has the right of rescission and fails to exercise that right, he waives his right to other remedies against the vendor. The contrary rule is now held in England, and it is now well settled there as well as in this country, that in such cases the vendee has three courses open to him, any one of which he may pursue. He may refuse to receive the article at all; he may receive it and bring a cross action for the breach of the warranty; or he may, without bringing a cross action, use the breach of warranty in reduction of damages in an action brought by the vendor for the price. *Pope* v. *Allis*, 115 U. S. 363 (S. C. Coop. Ed. Book 29, p. 393, and note). Sales by sample: Camp. Sa. 305, and note to *Pope* v. *Allis*, *supra*; Benj. Sa. (4th Am. Ed.) § 877 and note. Acceptance: 2 Sch. Per. Pro. (2d. Ed.) § 583; Benj. Sa. § 1356, and note. *Cutler* v. *Gilbreth*, 53 Maine, 178; 1 Pars. Con. (6th Ed.) p. 591, and note; *Babcock* v. *Trice*, 68 Am. Dec. 560; *Early* v. *Chippewa Log. Co.* 68 Wis. 112; *Marshall* v. *Perry*, 67 Maine, 84. Defense relied on, open to defendant. 2 Sch. Per. Pro. § 581; *Perley* v. *Balch*. 23 Pick. 283; *Fisk* v. *Tank*, 12 Wis. 276; *Smith* v. *Mayer*, 3 Cal. 207; *Camors* v. *Gomila*, 9 Mo. App. 205.

A. N. Williams, for plaintiffs.

Place of rejection or acceptance is Water Cove, Maine. *Brownlee* v. *Bolton*, 44 Mich. 218; *Pease* v. *Copp*, 67 Barb. 132; *Lincoln* v. *Gallagher*, 79 Maine, 189. Defense relied on by defendant not open to him. *Norton* v. *Dreyfuss*, 106 N. Y. 90; *Brown* v. *Foster*, 108 N. Y. 387; *Parks* v. *O'Conner*, 70 Tex. 377; *Copelay Iron Co.* v. *Pope*, 108 N. Y. 232; *Smith* v. *New Albany Rail Mill Co.* 50 Ark. 31; *Sprague* v. *Blake*, 20 Wend. 61. Counsel also cited: *Whitmore* v. *South Boston Iron Co.* 2 Allen, 52; Chit. Con. 450; *Dutton* v. *Gerrish*, 9 Cush. 89; *Chanter* v. *Hopkins*, 4 Mees. and Wel. 399; *Ottawa &c. Co.* v. *Gunther*, 31 Fed. Rep. 208; Benj. Sa. 4th Am. Ed. (Corbin,) § § 985-989.

PETERS, C. J. The controversy in this case grows out of an agreement between plaintiffs and defendant made and delivered in this State, which runs as follows: "This agreement made and entered into this seventh day of January, 1888, by and between Morse & Sawyer, of Bath, Maine, of the first part, and Warner Moore, of Richmond, Va., of the second part, Witnesseth:

"That the said parties of the first part for and in consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, do hereby sell and agree to deliver at their wharves at Water Cove, (Cape Small Point, opposite Burnt Coat Island, as seen in Coast Chart No. 6, from four to six miles west of Seguin Island light-house,) Maine, after the ice has become twelve inches in thickness, of good quality, during the months of January or February, 1888, two thousand tons of *good, clear, merchantable ice not less than twelve inches in thickness*, to be weighed by a sworn weigher, with all the proper fitting material necessary for the voyage included, at the price or rate of forty cents per ton, of two thousand pounds. Each cargo to be paid for on presentation of sight draft or note for thirty days or sixty days as may suit party of second part for the amount accompanying bill of lading and weigher's certificate of said cargo. Cakes to be twenty-two by thirty inches."

The ice delivered under this contract was shipped to Richmond, Va., where the defendant resides, to be sold in that market to his customers. It was to be paid for according to its weight and quality at the port of shipment in Maine, any deterioration of the article during transit being at the risk of the purchaser.

The first question submitted to the jury was whether the ice had been accepted by the defendant or not, and that was decided in favor of the plaintiffs.

That brought up the question, whether, having accepted the ice, the defendant could rely on a breach of the warranty of the quality of the ice to reduce the claim of the plaintiff, who sues in this action of *indebitatus assumpsit* for the contract price; the defendant alleging that the ice was not, at the time and place of delivery in Maine, of the quality called for by the contract.

The judge presiding, being of the impression that such a defense might be admissible in case of an executed agreement containing warranty, but not where the agreement is executory, ruled out the defense as a matter of law. It is to be noticed that the ruling was without qualification, admitting of no inquiry into the circumstances in which the ice was accepted. It determines that an acceptance in a case of this kind (in the absence of fraud of course) absolutely terminates the obligation of the vendor. The judge further ruled that "when the defendant took [that is by a hired carrier] the property and carried it away the property passed to him."

Our examination of this question leads us to the conclusion that the position of the defendant was well taken, and that the alleged defense should have been permitted to him.

That there is a warranty or a condition precedent amounting to warranty in the contract, there can be no doubt. Such a warranty will be found to be variously characterized in the books, as executory warranty,—a condition precedent amount-to warranty,—in the nature of warranty,—with the effect of warranty,—equal to warranty, and the like. It is immaterial, for, present purpose, whether it be regarded as an express warranty or an express condition implying warranty, as the effect must be the same. One kind within its limit is not a more potential ingredient in a contract than the other, the difference between them being only in the style of agreement to which they may be annexed. An express warranty may be also special, however. It is now well settled by the authorities generally, our own cases included, that a sale of goods by a particular description of quality imports a warranty that the goods are or shall be of that description; a warranty which becomes a part of the contract if relied upon at the time by the purchaser. *Bryant* v. *Crosby*, 40 Maine, 9; *Randall* v. *Thornton*, 43 Maine, 226; *Hillman* v. *Wilson*, 30 Maine, 170; *Gould* v. *Stein*, 149 Mass. 570, and cases cited. Here there is a clear description of both the kind and quality of the ice, the quality to be merchantable.

It was conceded at the trial that the position relied on by the defense would be legitimate were it an executed instead of

executory contract that contained the warranty. Why should there be the difference? Certain early New York cases, which will be further considered hereafter, by which the rule given at the trial is more or less supported, give as a reason for the rule, that in an executory contract *any* article of a particular quality may be tendered in the performance of the contract and the vendee must see if the article agrees with the terms of the contract, while in an executed sale the agreement is that a particular article actually delivered possesses the quality stipulated for. This undoubtedly expresses correctly the distinction between the classes of contract, but it does not impress us that there should be such an essential difference in their effect. The reason is not palpable why the vendee in the one case more than in the other should have to see that he receives only merchantable articles when a delivery is made. It seems inconsistent that the warranty, which is a part of either contract, should terminate at delivery in one contract and not in the other. Each vendor makes virtually the same warranty, and the two vendors at the point of delivery would appear to stand upon common ground. The seller in an executory contract agrees to do what the seller in an executed contract has already done. When he tenders the articles that he has agreed to deliver, such articles become particularized and identified, and he then represents that such particular and identified articles possess the quality stipulated for by his executory agreement. The terms of the contract of sale become the terms of the sale. The condition precedent becomes a warranty. Professor Wharton (Whar. Cont. § 564,) expresses the idea in these words: "A substantial, though partial (defective) performance of a condition precedent, followed by acceptance on the other side, transmutes the condition precedent into a representation (implying warranty), not barring a suit on the contract, though leaving ground for a cross-action for damages."

Executory and executed contracts are very much alike in the elements that enter into them. There are executory steps in all executed contracts. A bargain precedes the sale. If there be a warranty, that is usually first a part of the bargain and after-

wards of the sale. So in an executory contract the warranty is part of the agreement of sale, and at delivery a part of the sale. Many contracts commonly spoken of as executed contracts are really wholly or partially executory. All orders for goods whether for present or future delivery are of an executory nature. All sales by sample are such. The author of Smith's Leading Cases (8th ed. 1 Vol. part 1, p. 339), says in discussing this distinction: "Where the vendor agrees to sell goods of a certain kind, without designating or referring to any specific chattel, the contract is essentially executory, whether it purports to be a present transfer, or a mere undertaking to deliver at a future period, and the right of property does not pass until the merchandize is delivered to, or set apart for the purchaser." Every contract is executory on the one side or the other until the party has done what he has agreed to do.

The fact of acceptance, however, as a matter of evidence, may have great weight on the question of satisfactory or sufficient performance. In the first place, it raises considerable presumption that the article delivered actually corresponded with the agreement. In the next place, it is some evidence of a waiver of any defect of quality, even if the article did not so correspond, evidence of more or less force according to the circumstances of the case. If the goods be accepted without objection at the time or within a reasonable time afterwards, the evidence of waiver, unless explained, might be considered conclusive. But if, on the other hand, objection is made at the time, and the vendor notified of the defects, and the defects are material, the inference of waiver would be altogether repelled. But acceptance accompanied by silence is not necessarily a waiver. The law permits explanation and seeks to know the circumstances which induced acceptance. It might be that the buyer was not competent to act upon his own judgment, or had no opportunity to do so, or declined to do so as a matter of expediency, placing his dependence mainly, as he has a right to do, upon the warranty of the seller. Upon this question the facts are generally for the jury under the direction of the court.

The law of waiver more commonly applies to things that are not essential to a substantial execution of the contract; often such as relate to the time, place or manner of performance, or that affect merely the taste or fancy perhaps, and are such departures from literal performance as do not bring loss or injury upon the purchaser. *Baldwin* v. *Farnsworth*, 10 Maine, 414; *Lamb* v. *Barnard*, 16 Maine, 364.

We think the rule invoked by the defendant a just one. Speaking generally, it is the safer rule for both buyer and seller. The opposite rule imposes on either of them very great responsibility and risk. It might be ruinous to a vendee, who is in urgent need of an article, not to accept it, although even much inferior in quality to the description contained in the contract. Certainly, it should not be considered a hardship to a seller to require of him a compliance with his contract, or damages for his non-compliance.

The present case illustrates the justness of the rule, if the facts are proved as the defendant alleges them. The plaintiffs agreed to deliver ice which they warranted should be good, clear and merchantable. Two cargoes were loaded for shipment to a southern port. Defendant furnished the vessels, though they were probably chartered by the plaintiffs on the defendant's account. There is nothing in the charge of the judge, in the exceptions, or on briefs of counsel intimating that the defendant ever saw the ice, either by agent or personally, until it arrived in Virginia, or that he was notified to be present or knew of the delivery at the time of it. It would seem to be a rather stringent construction of the contract that the defendant must watch the loading of the cargoes, upon the penalty, if he failed to do so, of having to pay full price for whatever defective ice might be delivered behind his back, after he had taken for his protection, and paying for it in the consideration of the contract, an agreement of warranty in such positive terms. Still it may be that the plaintiffs could legally refuse to deliver the ice unless the defendant after notice should be present to receive it. The cargoes, after reasonable passages, arrived in a very unmerchantable condition. There was no lack of objection or protest from

the defendant. He wrote repeatedly and telegraphed the plaintiffs, expressing his disappointment and asking their advice as to the disposition of the ice. But no satisfactory answer came. What should he do? There was no possibility of re-shipment, nor could the ice be preserved in that climate without the protection that his own ice-houses would afford for such purpose. Storage in any ordinary manner could not possibly save the property. He stored the ice and sold it by enterprising expedients as rapidly as possible. He alleges that it was late spring ice, of poor texture and in proximately worthless condition when shipped from Maine. If that can be shown by witnesses and in court at the home of the plaintiffs, it would seem to be an injustice if the defendant is not permitted to make the defense.

Mr. Benjamin, (Sales, 3rd Am. ed. p. 888) in allusion to the buyer's remedies after receiving possession of the goods, says he has three remedies against the seller for a breach of the warranty of quality. *First*, the right to reject the goods if the property in them has not passed to him. *Second*, a cross-action for damages for the breach. *Third*, the right to plead the breach in defense to an action by the vendor, so as to diminish the price. These remedies are mentioned without any distinction between kinds of sales. The propositions are general, without any intimation that the procedure does not apply to warranties in executory sales. In the text such a distinction is not even noticed. In the notes to the text, however, it is remarked by the American editor that there are New York decisions inconsistent with the rule stated in the text. The first of these remedies, that of rejecting the goods, seems especially applicable to executory and inapplicable to executed sales, because it precedes acceptance, while in executed sales there has been acceptance and the title has passed. It is only in executory contracts and contracts that are merely *prima facie* executed that the title has not passed.

Mr. Benjamin states further that the buyer's remedies are not dependent on his return of the goods, nor is he bound to give notice to the vendor, "but," he adds, "a failure to return the goods, or complain of the quality raises a strong presumption

that the complaint of defective quality, is not well founded." Prof. Parsons, in the text and notes of his work on Contracts, lays down the same legal propositions that Mr. Benjamin does, making not a word of allusion to there being any difference in the application of them between sales executed and sales executory. He also states that if the buyer accepts goods inferior to such as are stipulated for, his continued possession without complaint will be a presumption against him on the question of damages. Pars. Con. (6th ed.) *591, and notes.

Mr. Smith, in Leading Cases, in notes to the case of *Chandelor* v. *Lopus*, discusses and fully indorses the same rules, as deducible from the authorities, and he and the editors in the last American edition of that work cite and compare a great many of the decided cases on the subject, and they give no recognition to a distinction between executed and executory contracts in the application of such remedies. We quote a few passages from their comments: "When specific property is referred to, still, if the reference be through the medium of a sample, the contract will be so far executory, as to fail of effect unless the bulk of the commodity corresponds with the sample."—"Nor will his [buyer's] right to indemnity or compensation necessarily end on his acceptance and use of the goods with full knowledge of the defect, but he will be entitled to bring suit on the contract, and receive damages for the breach of the implied engagement that the bulk of the commodity should correspond with the sample exhibited at the time of the sale." In the case at bar there was an ideal or descriptive sample,—a description equivalent to the exhibition of a sample. There can be no doubt that if the vendee may bring an action of his own on the contract, he can as well defend against an action brought upon the contract by the vendor. "The right of the vendee to rely on the breach of warranty, or a failure to comply with the terms of an executory contract, as a defense to an action for the purchase money may now be regarded as established in England and in most of the courts in this country."—"The course of decision at the present day tends towards the position that a partial failure of consideration may be given in evidence in mitigation of damages,

even when the original contract remains in full force, and the suit is expressly or impliedly founded upon it." "In the case of *Withers* v. *Greene*, 9 How. 203, the Supreme Court of the United States receded from the ground taken in *Thornton* v. *Wynn*, 12 Wheat. 183, by holding that a partial failure of consideration growing out of fraud or breach of warranty, may be set up as a defense to an action brought by the vendor. The same rule applies to sales under an executory contract, or by sample, and the buyer may rely on the deficiency of value resulting from the failure of the property sold to correspond with the terms of the contract, as a reason why he should not be compelled to pay the price in full: *Mandel* v. *Steel*, 8 M. & W. 858; *Babcock* v. *Trice*, 18 Ill. 420; *Dailey* v. *Green*, 15 Penn. St. 118."

We are unable to find in the English cases much support for any discrimination in the application of the above doctrine between sales executed and sales executory, although very many of the modern English cases arise out of sample-sales and other contracts of an executory nature. The principal support for it is found in some of the New York cases and in those of a few other States that have followed the lead of the New York court in this respect. There are cases which hold to a modification of some of these forms of remedy, having no bearing, however, on the decision of the present case. Some courts have held, that a rejection or rescission is not allowable if the goods tendered are of the kind or species contracted for, even though the quality be inferior. But in this State the doctrine of rescission in cases of warranty has been fully established. *Marston* v. *Knight*, 29 Maine, 341. In a few cases there is a leaning towards the doctrine that an acceptance becomes a waiver after a long continued acquiescence on the part of the vendee. (Smith's Lead. Cas. 8th ed. Vol. 1, part 1, pp. 324, 326, 360, 362, *et seq.*)

It is noticeable that in the more modern English cases the court have preferred to regard executory contracts as based upon a condition precedent rather than upon warranty. No essential difference of remedy follows from it, though a different style of

pleading may be apposite. Instead of a breach of warranty and a suit upon warranty, it becomes, on the new idea, a failure to perform a condition precedent and a suit on the contract. In Leading Cases, before cited, the commentator expresses the theory in an alternative way in these words: "The right of a vendee to rely on the breach of a mere warranty, or a failure to comply with the terms of an executory contract, as a defense to an action for the purchase-money may now be regarded as established in England, and in most of the courts in this country." But the editor at the same time says (p. 334) that "such cases have generally proceeded on the ground of an express or implied warranty." See also in Vol. 2, part 1, Smith's Leading Cases, the discussion under case of *Cutter* v. *Powell*, at pp. 18, 20, 22, *et seq.* Mr. Benjamin inclines to the view taken in the English cases, quoting Lord Abinger as deprecating the prevalent habit of treating a condition precedent as a warranty. Other writers incline favorably towards the views of Lord Abinger as expressed by him in the case of *Chanter* v. *Hopkins*, 4 Mees. & Wel. 399, although admitting that the prevailing theory continues the other way.

The length of this opinion reasonably precludes further discussion of points that may be regarded as merely theoretical. Whether in the present case it be a condition or a warranty, and that might be at the election of the defendant to determine as he pleased, we think the defense set up to the action should have been heard upon the ground of a breach of condition, or of warranty, or upon both grounds.

The main question for our decision has not been the subject of much discussion in our own State, although the principle involved has been acted on in a great number of instances, and there have been judicial expressions and rulings affecting it. In *Folsom* v. *Mussey*, 8 Maine, 400, it is allowed that evidence of consideration may be received in actions between the parties to a contract, to reduce the damages. In *Herbert* v. *Ford*, 29 Maine, 546, the doctrine is approved. *Rogers* v. *Humphrey*, 39 Maine, 382, directly applies to the present facts. It is there held that "when a party seeks to recover payment for articles

delivered under a special contract which he has not fully performed, the damages suffered by such breach may legally be deducted in the same suit." The case of *Peabody* v. *Maguire*, 79 Maine, 572, in its effect sustains the same principle. It is there decided that in a conditional sale the mere fact of delivery by the vendor without performance by the vendee, nothing being at the time said about the condition, might afford presumptive evidence of the waiver of the condition, but that the fact may be explained and controlled, and whether it be a waiver of the right of title or not would be a question of fact to be ascertained from the testimony. So in the present case whether acceptance be a waiver of the full performance of the condition precedent or not is likewise a question to be settled upon testimony. The position of parties is reversed in the two cases, but the principle is the same.

The first case in this country, except a Maryland decision to the same effect, and perhaps the leading case in the recognition of the principle that affirmation of quality establishes warranty, is *Hastings* v. *Lovering*, 2 Pick. 214, where oil then in Nantucket was sold to be delivered in Boston in ten days, the vendor describing the same to be "prime winter oil." That was in fact as much of an executory contract as is the one under discussion, although not in form such. The point was taken in the trial that the contract although executory was settled by a bill of parcels given at delivery, the executory agreement having no further effect. But the court overruled the position. The case is effective on the present question as showing that acceptance has no greater effect as an estoppel in executory than in executed sales. Other Massachusetts cases bear, either directly or indirectly upon the question. In none of them is there any judicial utterance indicating that executory and executed sales do not on this question stand alike. *Perley* v. *Balch*, 23 Pick. 283; *Dorr* v. *Fisher*, 1 Cush. 215; *Henshaw* v. *Robins*, 9 Met. 83; *Mixer* v. *Coburn*, 11 Met. 559; *Morse* v. *Brackett*, 98 Mass. 205. Several Connecticut cases that are often cited as supporting the theory that description imports warranty, and that the defendant may recoup damages for a breach of contract if the vendor

brings a suit, were cases of executory contracts or sales. *McAlpin* v. *Lee*, 12 Conn. 129; *Kellogg* v. *Denslow*, 14 Conn. 411. And of the same character is the leading case in the Supreme Court of the United States on the same question. *Lyon* v. *Bertram*, 20 How. 150. In that case the vendor was to deliver a cargo of flour within three weeks, the price to be according to an inspection to be made at delivery. The contract was in form a sale, but in effect a contract for future sale and delivery. The same deduction may be made from the cases of so many of the States that the rule may be fairly characterized as general. And the same result is producible from the English cases.

The New York court held in earlier cases that warranty in an executory contract did not in ordinary circumstances survive delivery and acceptance. But the doctrine grew up from the theory of law, maintained for a great while by that court, that description of quality is not a warranty of quality. In Leading Cases, before cited, it is said, in distinguishing the New York theory from that of Massachusetts and Pennsylvania: "The authorities in New York assume that calling a thing by a particular name, or designating as of a certain quality, is no evidence of a warranty or contract that it should be as described." Certainly a thing cannot survive that does not exist. Wilde, J., in *Marshall* v. *Robins*, 9 Met. 90, declared upon that ground that the authorities in New York were without influence upon the question of effect of acceptance in Massachusetts, saying: "Opposed to these authorities are the cases in New York; but these were determined on the assumption that there was no warranty express or implied, and they, therefore, have no bearing on the question as to the effect of the inspection of the goods sold by the purchaser."

The last named rule of the New York cases was found to be so much at variance with the authorities elsewhere, that in the case of *White* v. *Miller*, 71 N. Y. 118, all previous cases which held that warranty did not follow from description of quality, were overruled. And, as a natural if not necessary consequence thereof, the tendency of that court seems in later cases to have been progressive towards the adoption of the other rule that

acceptance in cases of executory sales with warranty does not preclude the vendee from afterwards claiming damages against the vendor for a breach of the warranty; if the court has not already arrived at that point. There are late cases, in that State, of express warranties, the doctrine of which seems to completely vindicate the position of the defendant in the present case, even should he be obliged to stand or fall upon the interpretation of the law of his contract according to the New York authorities. In *Brigg* v. *Hilton*, 99 N. Y. 517, and in *Fairbank Canning Co.* v. *Metzger*, 118 N. Y. 260, it is declared that an express undertaking to deliver in the future articles of a certain quality was an express warranty of such quality when the articles were afterwards delivered, a warranty that survived an acceptance of the articles delivered; and that the rule would be the same whether the goods were in existence at the time of contract of sale or were to be manufactured.

Upon the authority of these cases the contract in the case at bar contains an express warranty. An express undertaking to produce a thing is an express warranty of the thing produced.

Exceptions sustained.

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

WILLIAM DEAN, PETITIONER to be admitted to citizenship.

York. Announced at July Term, Middle District, 1890.

Opinion May 29, 1891.

Naturalization. Biddeford Municipal Court. St. 1855, c. 151; St. 1887, c. 247; Act of Congress, April 14, 1802; R. S., of U. S. § 2165.

The Municipal Court of the city of Biddeford, January 24, 1888, did not have a clerk within the intent and meaning of the federal statute, (R. S., of U. S., § 2165) and, therefore had no jurisdiction over applications for naturalization of aliens; and no authority to receive and record their declarations of intention to become naturalized.

ON EXCEPTIONS.

This was a petition of William Dean, an alien, praying for admission to citizenship. The petitioner came to the United States from England after he was eighteen years of age and more

than five years before the date of his petition, intending to become a citizen, and has ever since resided in the United States. More than two years prior to this hearing he had made and filed a declaration of his intention to become a citizen. By the declaration it appeared to have been made before Edwin J. Cram, Recorder of the Municipal Court of the City of Biddeford.

Upon this petition the presiding justice ruled:

(1.) That the Municipal Court of the City of Biddeford, on the twenty-fourth day of January, 1888, was not a court of competent authority under the laws of the United States to admit aliens to naturalization and had no jurisdiction over the application therefor.

(2.) That if said Court at said date had power to naturalize aliens, it does not appear that the petitioner's declaration of intention made before Edwin J. Cram, Recorder of the Municipal Court of Biddeford, on said twenty-fourth day of January, 1888, was made in compliance with the laws of the United States requiring a declaration of intention to be made by such aliens desiring to be admitted to citizenship.

(3.) That for the reason aforesaid the petition be dismissed.

To these rulings the petitioner excepted.

W. F. Lunt, for petitioner.

Counsel argued that the court exercised common law jurisdiction. It is not necessary that it should be full and complete; it is enough if it may exercise any part of the common law jurisdiction. Counsel cited: 2 Whar. Digest International Law, p. 346; *U. S.* v. *Lehman*, 39 Fed. Rep. 49; *ex parte*, *Conner*, 39 Cal. 98; *State* v. *Whittemore*, 50 N. H. 245; *ex parte*, *Gladhill*, 8 Met. 168; *ex parte*, *Craig*, 2 Curt. C. C. 98; *U. S.* v. *Power*, 14 Blatch. 223; *ex parte*, *Tweedy*, 22 Fed. Rep. 84; *People* v. *McGowan*, 77 Ill. 644, (S. C. 20 Am. Rep. 254); *Morgan* v. *Dudley*, 68 Am. Dec. 735.

H. H. Burbank, *contra*.

The clerk or recorder, within the meaning of the U. S. statute, must be a person other than the judge. By statute and at common law, the clerk's functions are limited to purely clerical work, and his duties are fixed and imposed by law. They do

not act judicially, and are distinct from an amanuensis, or persons rendering service voluntarily. In his sphere, he is a responsible and independent official. The recorder is, here, a vice-judge. He has no function, clerical or judicial, when the judge is present holding court.

It is impossible for a declaration to be lawfully made by an alien, before a clerk of the Biddeford Municipal Court, because, if done in the court-room, there is but one official authorized to act judicially or clerically, at any particular time; namely, the judge or the recorder when acting as judge, and so there is no clerk distinct from the judge. If done away from the court-room, it might be that the judge was acting in the room and the recorder would be acting without authority.

R. P. Tapley, in reply.

The requirements of congress are only to insure a competent tribunal, and a record of its proceedings, so that the evidence may be preserved, &c. This being done, the real purposes of the statute are accomplished; all other things a matter of form. Whether clerk, or recorder, it cannot matter by what name he is called. His powers and duties are defined by the law. There is no absolute requirement that the recording officer shall be a person distinct from the judge. Here, there is an independent recording officer. The court has the means of recording and authenticating its proceedings in all cases. The federal law makes no provision concerning the manner of conducting the business in the court. *Stephens, Pet'r* 4 Gray, 559. The oath of intention may be made before any qualified officer of the court. R. S., of U. S., § 2165; filed before the clerk. Act of 1876. In those cases where the judge performs his judicial functions, and requires the recorder to make the record, it has such clerk, distinct from the judge, and doing that which the judge cannot do, viz: receiving the applications.

WHITEHOUSE, J. This is an application by an alien seeking to become a citizen of the United States. As evidence of the previous declaration of his intention to be naturalized, required by the Act of Congress, the applicant produced a copy of a dec-

laration made by him January 24, 1888, before Edwin J. Cram, Recorder of the Municipal Court of the City of Biddeford, attested by "Edwin J. Cram, Recorder." Under the federal statutes, only those courts that are authorized to naturalize, are authorized to receive and record this declaration of intention. The question here presented, therefore, is whether the Municipal Court of Biddeford was a court of competent authority under the laws of the United States to admit aliens to citizenship. The presiding judge ruled that it was not, and for that reason dismissed the petition.

The federal constitution confers upon Congress the power "to establish an uniform rule of naturalization." In the exercise of this authority Congress enacted the statute of April 14, 1802, prescribing the conditions of naturalization. By that act the preliminary declaration might be made on oath or affirmation "before the Supreme, Superior, District or Circuit court of some one of the States." Then follows this provision in the third section of the act: "*And whereas doubts have arisen* whether certain Courts of Record in some of the States are included within the description of District or Circuit Courts: *Be it further enacted* that any Court of Record in any individual State having common law jurisdiction and a seal and clerk or prothonotary, shall be considered a District Court within the meaning of this act." In section 2165 of the last revision of the United States statutes the courts thus authorized to naturalize aliens are specified and described as follows: "A Circuit or District Court of the United States, or a District or Supreme Court of the Territories, or a Court of Record of any of the States having common law jurisdiction and a seal and clerk."

I. Was the Municipal Court of the City of Biddeford, January 24, 1888, a "Court of Record having common law jurisdiction" within the meaning of the Act of Congress of April 14, 1802?

Section one of chapter 151 of the Public Laws of 1855, and acts amendatory thereof, establishing the Municipal Court of Biddeford as constituted January 24, 1888, provide that it "shall be a Court of Record with a seal; and said court shall consist of one judge to be appointed, qualified and hold his office

according to the constitution; and shall exercise concurrent jurisdiction with justices of the peace and quorum over all matters and things, civil and criminal, within the county of York, as are by law within the jurisdiction of justices of the peace and quorum in said county; and original jurisdiction concurrent with the Supreme Judicial Court in all civil actions in which the debt or damages shall not exceed the sum of one hundred dollars: and shall have original jurisdiction concurrent with the Supreme Judicial Court over crimes, offences and misdemeanors committed in said county which are by law punishable by fine not exceeding twenty dollars and by imprisonment in the county jail not exceeding three months."

Section four provides that "it shall be the duty of the judge of said court to make and keep the records of said court, or cause the same to be made and kept, and to perform all other duties required of similar tribunals; and copies of the records of said court, duly certified by the judge, shall be legal evidence in all courts."

Section five is as follows: "The judge shall appoint a recorder who shall be a justice of the peace and of the quorum, duly qualified, who shall be sworn by said judge and who shall keep the records of said court when requested so to do by said judge, and in case of absence from the court-room or sickness of the judge, or whenever requested by him so to do, or when the office of judge shall be vacant, the Recorder shall have and exercise all the powers of the judge and perform all the duties required in this act of the judge, and generally shall be fully empowered to sign and to issue all processes and papers and do all acts as fully and with the same effect as the judge could do were he acting in the premises; and the signature of the Recorder, as such, shall be sufficient evidence of his right to act instead of the judge without any recital of the act hereinbefore named authorizing him to act. When the office of judge is vacant the Recorder shall be entitled to the fees; in all other cases he shall be paid by the judge." Chapter 247 of the Special Laws of 1887, provides that the judge shall receive an annual salary of fourteen hundred dollars which shall be in full for all his services and the services of the recorder.

The "Court of Record" required by the federal statute is not simply a tribunal that has a recording officer and seal, and in fact keeps a permanent record of its proceedings; for the probate court and the court of the county commissioners would fulfill all of these requirements, and yet neither of these tribunals is deemed to be technically a court of record. It must be an organized judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law. It is distinguishable from the case of a justice of the peace on whom personally certain judicial powers are conferred by law. *Ex parte Gladhill*, 8 Met. 168; Anderson's Law Dict.

Two centuries ago, in the case of *Groenvelt* v. *Burwell*, 1 Salk. 200, Chief Justice Holt said: "Whenever a power is given to examine, hear and punish, it is a judicial power, and they in whom it is reposed act as judges; and wherever there is jurisdiction erected with power to fine and imprison, that is a court of record, and what is there done is matter of record." Blackstone adopts this statement, adding that the proceedings of a court of record are enrolled for a perpetual memorial; and then distinguishes a "court not of record" as one that can "hold no plea of matters cognizable by the common law unless under the value of forty shillings, nor of any forcible injury whatever." 3 Bl. Com. 24. Thus in *Woodman* v. *Somerset*, 37 Maine, 38, Chief Justice SHEPLEY says: "A court of record is one which has jurisdiction to fine or imprison, or one having jurisdiction of civil cases above forty shillings and proceeding according to the course of the common law." It was a distinguishing feature of it that at common law its judgments were reviewable only by writ of error. Accordingly in the matter of *Gladhill*, petitioner, 8 Met. *supra*, Chief Justice Shaw says of the police court of Lowell in 1844: "We are of opinion that it is a court of record coming within the description in the Act of Congress. It possesses all the characteristics of a court of record. Section six directs the keeping of a fair record. It is not necessary to decide here whether a justice's court is a court of record. The point is left undecided in *Smith* v. *Morrison*, 22 Pick. 430.

That a writ of error will lie on a justice's judgment is well settled; and the object of a writ of error is to remove a record. It will not lie to a judgment of a probate court because not technically a court of record. Probably the result may be, from an examination of all the statutes regulating the jurisdiction of justices of the peace, that their courts will be regarded as courts of record for some purposes, but not in all respects. But we think the decision in this case does not depend upon the legal character of the courts held by justices of the peace. Many powers are vested in the police court of Lowell not conferred on justices of the peace; its constitution is different and its mode of proceeding is different. That this court exercises a common law jurisdiction there is no doubt; it is authorized to hear and determine all complaints and prosecutions in like manner as justices of the peace, and has jurisdiction of all civil suits and actions cognizable by a justice of the peace." In *ex parte, Craig*, 2 Curtis C. C. 98, Judge Curtis says: 'We see no sound reason to doubt that the Police Court of Lynn was a court of record having common law jurisdiction." But it was held that the court did not have a clerk and therefore did not possess authority to naturalize. To the same effect was the decision in *State* v. *Whittemore*, 50 N. H. 245, holding that the police court of Nashua was a court of record having common law jurisdiction, but not having a clerk did not have jurisdiction over applications for naturalization. See also *Wheaton* v. *Fellows*, 23 Wend. 375; and *Hutkoff* v. *Demorest*, 103 N. Y. 386.

But does the Municipal Court of Biddeford have "common law jurisdiction" to the extent contemplated by the federal statute? With respect to this inquiry it is proper to remark that we have no national common law in the United States, distinct from that adopted by the several States, each for itself, except so far as the history of the English common law may be involved in the interpretation of the federal constitution. The judicial decisions, the usages and customs of the respective States determine to what extent the common law has been introduced. What is common law in one state may not be so considered in another. *Wheaton* v. *Peters*, 8 Pet. 658; *Smith* v. *Alabama*, 124 U. S.

478. It must also be remembered that we have no State courts in this country deriving their existence from the common law. They are all established either by the provisions of the organic law or by legislative enactment. Their jurisdiction is not uniform. Some of them have only a special jurisdiction limited as to amounts or subjects in controversy. Of this character are the Superior Courts of this State; yet it would not be questioned that they have "common law" jurisdiction. "By 'suits at common law' in the Constitution," says Judge Story in *Parsons* v. *Bedford*, 3 Pet. 443, "is meant not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those where equitable rights alone were recognized and equitable remedies administered."

Courts of "common law jurisdiction" are such as "exercise their powers according to the course of the common law. It was not meant that they should have all common law jurisdiction over every class of subjects, including all civil and criminal matters. If so, few courts could be found in this country having the requisite common law jurisdiction." *The People, ex relatione, Brackett* v. *McGowan*, 77 Ill. 644 (20 Am. Rep. 254). So also in the matter of *Martin Conner*, 39 Cal. 98 (2 Am. Rep. 427), the court says: "The term 'common law jurisdiction' is capable of no other meaning than jurisdiction to try and decide causes which were cognizable by the courts of law under what is known as the common law of England. The act does not require that courts shall have all the common law jurisdiction which pertains to all classes of actions. It is enough if it has 'common law jurisdiction.'" Again in *U. S.* v. *Power*, 14 Blatch. 223, the court says: "The statute of the United States does not require of courts, authorized to entertain applications for naturalization, that they shall have all the jurisdiction possessed by any court of law. If the court may exercise any part of that jurisdiction, it is within the language of the statute and its meaning as well." To the same effect is *Morgan* v. *Dudley*, 18 B. Mon. (68 Am. Dec. 735). See also *The People* v. *Pease*, 30 Barb. 588; *Ex parte, Burkhart*, 16 Tex. 470, and *Mills* v. *McCabe*, 44 Ill. 194.

II. It is admitted that the Municipal Court of Biddeford had a seal; and assuming without deciding that it was a court of record having common law jurisdiction within the meaning of the act of Congress, did it also have a clerk within the meaning of the federal statute? The language of this statute seems to imply that there may be courts of record having common law jurisdiction and a seal without a clerk, and that such courts are not embraced by the terms of the act. And this is the construction which it has received from eminent judicial authority. The court must have a clerk distinct from the judge; not necessarily an officer denominated clerk, but a permanent "recording officer charged with the duty of keeping a true record of its doings and afterwards of authenticating them." Shaw, C. J., in *ex parte*, *Gladhill*; *Ex parte*, *Craig*, and *State* v. *Whittemore*, *supra*. The court contemplated by the act of Congress has an organized existence. It is impersonal. The judge is one of the constituent parts of the organization; the clerk is another and a separate and an independent element. The essential function of the clerk is to make and keep the records and give them legal verification by his attestation and the use of the seal.

By those sections of the act establishing the Municipal Court of Biddeford above quoted, the responsible duty of making and keeping the records of the court is imposed upon the judge and not upon the recorder. There is no duty of making and keeping the records imposed upon the recorder by law. He is to keep the records of the court only when requested so to do by the judge. Furthermore, the recorder of this court cannot authenticate by his attestation any copies of records "made and kept" by the judge or kept by himself at the request of the judge. Only such copies of the records as are "duly certified by the judge shall be legal evidence in all courts." The authority to appoint a recorder was conferred upon the judge, not for the purpose of creating a fixed and permanent clerical office distinct and separate from that of the judge, but primarily to provide for the judge a substitute who should be empowered to act in

his stead in the contingencies named in the act. "His signature as recorder is sufficient evidence of his right to act instead of the judge." When thus acting in a judicial capacity, exercising the powers and performing the duties of the judge, the recorder is the court and must personally make, keep and authenticate the records of the court. The recorder's court has no clerk other than the recorder himself. Accordingly in the attestation of the copy of William Dean's declaration of intention, the signature of "Edwin J. Cram, Recorder," by the very terms of the act, is presumptive evidence that he was acting instead of the judge in some of the contingencies named in the act.

The process of naturalization, in the mode it is required to be performed by the federal statutes, is a judicial act. *Spratt*, v. *Spratt*, 4 Pet. 393. And "the importance and value of this privilege of citizenship, which is conclusively and finally bestowed by the act of the court having jurisdiction, should prevent us from allowing less than its full weight to any requirement by Congress which tends to restrict this power to those tribunals which may be supposed most competent to exercise it. Certainly, there would seem to be no propriety in intrusting to a court which in the exercise of its common law jurisdiction cannot pass finally on any matter of law or fact affecting property to the amount of one dollar, to make a final decision upon all questions of law or fact involved in an application for this great right, so as to make an absolute and unimpeachable grant of it." Curtis, J., in *ex parte*, *Craig*, above cited.

We are accordingly of opinion that the Municipal Court of the City of Biddeford, January 24, 1888, did not have have a clerk within the intent and meaning of the federal statute, and therefore had no jurisdiction over applications for naturalization and no authority to receive and record the declaration of intention made by William Dean. The application for admission to citizenship was properly dismissed.

Exceptions overruled.

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

GEORGE L. WESCOTT

vs.

DAVID A. BUNKER, and buildings and lot.

Hancock. Opinion May 29, 1891.

Lien. Notice. Sub-contractor. Pleadings. R. S., c. 91, § § 30-32.

The statute relating to liens and their enforcement upon buildings makes no distinction between a contractor and a sub-contractor, as regards the "statement of the amount due with all just credits given."

Where a contractor agrees to furnish labor and materials under an entire contract for a specified sum, it is sufficient for the preservation of the lien under R. S., c. 91, § § 30-32, to file a statement of the amount due, without stating the items making up such amount. *Held*, accordingly, that it need not appear what part of the amount due is for labor as distinguished from the amount due for materials.

The underlying principle of a mechanic's lien is that of consent or contract. The lien acquired by attachment under R. S., c. 81, § 59, which requires certain specifications in order to create it, is wholly *in invitum*. The method of procedure in the one case is separate and independent from that of the other.

In a suit to enforce a lien for both labor and materials, it was objected that in the descriptive part of the plaintiff's certificate there was no allegation of materials furnished, (the amount thus alleged to be due being solely for labor done,) but the items in the formal statement of account, made and recorded as a part of the certificate, were for labor and materials furnished, and the account annexed to the writ was identical with that recorded. *Held*; that the objection should not be sustained.

Ricker v. *Joy*, 72 Maine, 106, affirmed.

ON EXCEPTIONS.

Action of assumpsit to enforce a lien claim. The plaintiff was a mason, and this action was brought to enforce his alleged lien claim against buildings and land. Mrs. M. J. Van Doren, the owner of the buildings and land, appeared in defense.

The verdict was for the plaintiff, that he had a lien as alleged in the sum of four hundred and sixty-six dollars and fifty-seven cents, and thereupon the principal defendant was defaulted for that amount.

After the evidence for the plaintiff was in, counsel for the defense claimed that the writ, declaration, and the thirty days' notice filed with town clerk were defective, and that under the testimony introduced, a valid lien judgment against the real

estate could not be given. The court ruled otherwise and that such judgment could be given. To this ruling the defendant owner excepted.

The writ was dated December 31st, A. D., 1888.

The declaration is as follows: "In a plea of the case, for that the said defendant at said Eden, to wit, Ellsworth, on the day of the purchase of this writ, being indebted to the plaintiff in the sum of four hundred thirty-two dollars and eighty-two cents, according to the account annexed, then and there in consideration thereof, promised the plaintiff to pay him the same sum on demand.

"David A. Bunker, to George L. Wescott, Dr.

"To labor and materials furnished upon Whiting Cottage, from July 1, 1887, to and including October 10, 1888,		$4550 00
"To extra plastering,		6 50
"To putting in rollway to cellar,		50 00
"To stone work under tower windows,		65 00
		$4671 50
"Cr. By order,	$1150 00	
"By cash,	3088 68	
	$4238 68	
Balance due,		$432 82"

"Which account the plaintiff avers is for labor by him performed and materials by him furnished, in the erection of said building above described under a contract by him made with the said David A. Bunker, who is not the owner thereof, the last of which materials were furnished and the last of which labor was performed within ninety days before the purchase of this writ, and that within thirty days after he ceased to furnish said labor and to furnish said materials on said building, he filed in the office of the town clerk of said Eden, a true statement, subscribed and sworn to by him, of the amount due him, with all just credits given, together with a description of said property sufficiently accurate to identify it, and the name of the owners

so far as known to him; and this suit is brought to enforce the said plaintiff's lien for said labor and materials upon said house and land above described."

"Thirty Days' Notice.

"I, George L. Wescott, of Eden, in the County of Hancock, and State of Maine, certify on oath that the following is a true statement of the amount due me with all just credits given for labor done by contract with David A. Bunker, of said Eden, upon the dwelling-house, the owner of which is to me unknown, situated at Hull's Cove, in said Eden, upon the point known as 'Hull's Cove Point,' or Cape Levi, and at the junction of the roads leading around said Point, and upon the north and east sides of said roads, being the house with stone tower, known as the 'Whiting House.' Also upon the stable situated north-easterly in the woods beyond said house, to wit:" . . . . [Items, same as in account annexed to writ.] "For which I claim a lien on said buildings and land.

George L. Wescott."

"Subscribed and sworn to October 24, 1888, and filed October 25, 1888, in the office of the town clerk of Eden."

The owner of the building objected that the declaration did not contain any allegation of a claim for labor furnished, and that the descriptive statement of the thirty days' notice alleged no claim for materials furnished, it being for labor only.

The testimony of the plaintiff and defendant, Bunker, showed that twenty-five to thirty men were employed on the building by the plaintiff, who contracted with Bunker to do certain mason work for $4550.

Hale and Hamlin, for owner of building.

Revised Statutes, c. 91, provides for enforcement of mechanic's lien by attachment. Plaintiff cannot recover without amendment, and amendment will dissolve attachment. (1.) If work was on contract, such contract should have been declared upon. (2.) Plaintiff in his writ alleges only that matter is for "labor by him performed and materials by him furnished;" makes no claim for laborers by him hired and paid *i. e.* "labor furnished." The thirty days' notice contains no allegation that

matter therein was for "materials furnished,"—contains only an allegation for "labor done."—Query: does labor done refer to plaintiff, his employees or both? Or is it too indefinite?

Testimony discloses that plaintiff commenced work in August, 1887, and continued till October, 1888. He says he had men there all the time, often having as many as twenty-five or thirty employees, and was there once or twice a day at work looking after matters himself while he had men there. It is submitted that under writ, notice and this testimony he could not recover without amendment of his writ, (and especially as to labor furnished by him,) so that it should contain all necessary averments or allegations. Nor could he recover for materials furnished, at least, under the thirty days' notice. Specification, then, in writ would be entirely insufficient under R. S., c. 81, § 59. *Briggs* v. *Hodgdon*, 78 Maine, p. 518, and cases cited.

No date is attached to a single item. An itemized account in detail could have been readily given, as plaintiff kept time and other books. If there was a binding contract for price at a lump sum, plaintiff does not so declare. The way he declares misled others to suppose it was not so, but otherwise.

W. P. Foster, for plaintiff.

WHITEHOUSE, J. The defendant Bunker made a contract to build the "Whiting cottage" and stable appurtenant at Hull's Cove, in Eden, for $15,000 and orally sublet to the plaintiff the stone work and masonry for the sum of $4550. The plaintiff furnished labor and materials to complete his original undertaking, and also performed extra work at the request of the owner of the premises of the value of $121.50. The payments credited amounted to $4238.68, leaving a balance due of $432.82, and interest. The case shows that, under the instructions of the court, there was a finding by the jury that the plaintiff had a lien to secure payment of this balance of $466.57, on the buildings described for the labor and materials thus furnished in their erection. But it was contended in behalf of the owner, who appeared in defense, that this lien was dissolved by reason of the plaintiff's failure to observe the requirements

of the statute in his proceedings to preserve and enforce his lien, and hence that no valid judgment can be rendered against the real estate. The court ruled otherwise, and the defendant took exceptions.

It is provided by section 30, ch. 91, R. S., that "whoever performs labor or furnishes labor or materials in erecting, altering or repairing a house, building or appurtenances by virtue of a contract with or by consent of the owner, has a lien thereon, and on the land on which it stands," &c. By section 32 of the same chapter: "The lien mentioned in the preceding sections shall be dissolved unless the claimant within thirty days after he ceases to labor or furnish materials as aforesaid, files in the office of the clerk of the town in which such building is situated, a true statement of the amount due him with all just credits given," etc. It is further provided by section 33, that "no inaccuracy in such statement relating to said property, if the same can be reasonably recognized, or in stating the amount due for labor or materials, invalidates the proceedings unless it appears that the person making it wilfully claims more than his due."

Seeking to comply with these provisions the plaintiff duly filed the following statement of his account, alleging in the language of the statute that it was a "true statement of the amount due with all just credits given:"

"To labor and materials furnished upon Whiting Cottage from July 1, 1887, to and including October 10, 1888,

		$4550 00
To extra plastering,		6 50
To putting rollway to cellar,		50 00
To stone work under tower windows,		65 00
		$4671 50
Credit by order,	$1150 00	
Credit by cash,	3088 68	
	$4238 68	
Balance due,		$432 82"

The contract was an entirety. The plaintiff was to perform certain work for a round sum. His statement of the amount due him does not comprise a detailed and itemized account of the labor performed and materials furnished, but gives only the aggregate price of the undertaking as stipulated in the contract.

The plaintiff was a sub-contractor. His contract was not made with the owners of the real estate; and it is contended *in limine*, that in case of a sub-contractor, such a general statement of the amount of his claim is not sufficient to preserve the lien, but that a particular account of the transactions which are the foundation of it should be required.

It might be sufficient to observe upon this point that the legislature has not seen fit to require such a specification of items. The section of the statute quoted (Sec. 32,) is applicable to all claimants. It makes no distinction between a contractor and a sub-contractor. It is proper to be reminded that the office of the court is *jus dicere*, not *jus dare*; and it might well be deemed an assumption of legislative powers to impose on the sub-contractor a burden not required by the express terms of the statute.

But numerous adjudications may be found in other jurisdictions based upon statutes having a scope and purpose closely resembling our own, making a distinction between the case of an original contractor and a sub-contractor with respect to the degree of particularity required in filing the lien account, and holding that a sub-contractor is bound to set out the items of his claim for the information and protection of the owner and of purchasers and others who may become interested in the property subjected to the lien. In Maryland, for instance, where the first attempt appears to have been made in this country to create a mechanic's lien on buildings it was held, in case of a sub-contractor, that the notice or claim of lien should be specific as to the labor performed and materials furnished, to prevent fraud and collusion between contractor and sub-contractor and to enable the owner to ascertain the correctness and reasonableness of the demand. *Carson* v. *White*, 6 Gill, 17. So also in Pennsylvania, the second state to enact

a lien law in favor of mechanics, when the claim filed under the act of 1845, was based on a special contract with the owner, the contractor was not required to set out the nature or kind of work done or the kind or amount of materials furnished, as provided in other cases under the act of 1836. But in *Lee* v. *Burke*, 66 Penn. 336, Sharswood, J., says: "The act of 1845, was intended to provide for the case of a special contract made by a mechanic with the owner for the erection of a building. The reason for requiring these particulars to be filed does not exist in the case of a special contract for a round sum of money. *Cessante ratione cessat et ipsa lex.* But it is entirely different when the contract of the mechanic, though it may be for a round sum is not with the owner, but with a contractor under him. The contractor cannot bind the building by any special contract for more than the materials furnished and the work done at their fair market price." And in *Gray* v. *Dick*, 97 Penn. 142, it was held that the statute of 1849, which allows the filing of a statement of the aggregate price of the work and materials where there is a contract for a stipulated sum, applies only to the original contractor notwithstanding its general terms. The Court says: "The sub-contractor is entitled to no more than the fair market value of the work done and the materials furnished on the credit of the building, and hence the owner should be informed by the claim filed as to the particulars of the claim that he may make the necessary inquiries to satisfy himself as to its justice as a lien on his property. The agreement between the contractor and sub-contractor is not the measure of the owner's responsibility; his building is bound for no more than the value of the work done and the materials furnished by the sub-contractor." See also *Rude* v. *Mitchell*, 97 Mo. 365, and notes in American Law Review, Vol. 24, No. 5, page 857; Phillips on Mechanic's Liens, sections 349-352; 2 Jones on Liens, sections 416-467.

The several kinds of *privilegium* recognized and allowed by the provisions of the civil law evidently formed the ground-work of the more complete and beneficent systems which have gradually been adopted in the American States. See Domat's Civil Law, Strahan, sections 1742, 1744, and 1745. The

mechanic's lien on real property was entirely unknown to the English law. It is wholly a creature of statutes in derogation of the common law. But whether a given enactment shall receive a liberal construction as a remedial act or a strict interpretation, as one conferring a special privilege upon a favored class, must be determined by a consideration of the provisions and operations of the act in question.

The statute invoked by the plaintiff is a just and reasonable one. It seems designed to protect the rights of the land-owner as well as to afford security for the contractor and laborer. It must appear that the labor and materials were furnished either by virtue of a contract with or by consent of the owner of the property affected. If not furnished by a contract with the owner he may prevent the lien by giving written notice that he will not be responsible. These provisions are distinguishable from those in the other States named. Here, the sub-contractor and original contractor occupy essentially the same situation with respect to the owner, and the authorities are substantially uniform in holding that, in case of a contract with the owner to perform an entire contract for a specified sum, it is sufficient to file a statement of the amount due unless a specification of items is expressly required by statute. In such a case every source of information is equally open to contractor and owner, and it would ordinarily be utterly impracticable for a contractor who may be engaged in erecting several buildings at the same time to make an accurate apportionment of the contract price for each building between labor and materials, or between the different classes of labor and different kinds of materials. And it would ordinarily serve no useful purpose. Under our statute there is nothing in the situation of a sub-contractor requiring the application of a different rule. In *Ricker* v. *Joy*, 72 Maine, 106, the plaintiff filed a statement that there was one hundred and nineteen dollars and forty cents due him from the defendant for labor and materials which went into a house owned by a third person. This was held sufficient, and although the question of the relative obligations of the original contractor and sub-contractor to the owner was not discussed, it may be assumed that it was not overlooked by the court. The statute requires the claimant to file a true state-

ment of the amount due him with all just credits given. The true amount and not the items that make it up is the material thing to be done. *Sexton* v. *Weaver*, 141 Mass. 274. The plaintiff's statement of the amount due him filed in the office of the town clerk of Eden, October 5, 1888, is in this respect a sufficient compliance with section 32 of chapter 91, R. S.

The provisions of section 59, chapter 81, R. S., making certain specifications necessary to *create* a lien by attachment are entirely distinct from the requirements of the lien chapter respecting the statement of account necessary to *preserve* a lien already acquired. The operation of the one is radically different from that of the other. The underlying principle of the mechanic's lien is that of consent or contract. The process of acquiring a lien by attachment is wholly *in invitum*. They are separate and independent methods of procedure.

But it is further objected that, in the descriptive part of the plaintiff's certificate, there is no allegation of materials furnished; that the amount is alleged to be due solely for labor done. But the four items in the formal statement of the account, which was made and recorded as a part of the certificate, is for labor and materials furnished; and the account annexed to the writ is identical with that recorded. All parts of the certificate being considered together the statement is neither indefinite nor its meaning obscure. Trifling discrepancies between the different parts of the certificate are not to be regarded when the import of the whole is plain and obvious. It was not intended by the legislature that these statements should be strangled by technicalities. Section 33, ch. 91, R. S., *supra*; *Durling* v. *Gould and Manor Inn*, *ante*, p. 134.

When the labor and materials are furnished for several buildings on the same lot and under an entire contract for an entire price, the labor and materials furnished for each building create a lien upon the whole estate and, therefore, upon all the other buildings. *Wall* v. *Robinson*, 115 Mass. 429; *Worthley* v. *Emerson*, 116 Mass. 374; *Batchelder* v. *Rand*, 117 Mass. 176.

Exceptions overruled.

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

MARY C. FARNSWORTH *vs.* CITY OF ROCKLAND.

Knox. Opinion June 1, 1891.

Deed. Boundary. Way. Use. Damages. R. S., c. 18, § 95.

The statute which declares that when buildings, which have for more than twenty years fronted upon a public way or street shall be deemed the bounds thereof, means that portion of the building which rests upon the ground, and does in fact bound and limit the way, and not the cornices or other projections which far above the heads of travellers may happen to overhang the sidewalk.

When land is conveyed by deed and a building is one of the boundaries, the parties are presumed to intend that such line shall be wholly on one side of every portion of the building. But, in the case of a right of way, even if created by express grant, it is not an unreasonable presumption that it was intended to extend under the projecting finish of a building.

The owner of land over which a public way passes has the right to occupy the land above and below its surface to any extent that will not impair its usefulness for a way. The public must not be made to suffer any real inconvenience, nor should the owner be deprived of any such reasonable use of his land as will not incommode the public.

The plaintiff was the owner of a building, which for more than thirty-five years had fronted on the street, and was conceded to be one of its boundaries. In proceedings taken by the city for the widening of the street, under which the plaintiff was compelled to move the building back, *Held*; that in order to ascertain the amount of land so taken, and for which damages should be allowed, the measurement should commence on a line with the side of the building, and not on a line with the cornice on the gable-end of the building which projected beyond it into and over the street.

ON EXCEPTIONS.

This was an appeal by complainant from an award of damages in a proceeding by the city of Rockland to locate and establish the bounds of Main street in said city, which had never been legally established.

The complainant owned a lot of land on the west side of said street on which a building had been erected and which had remained in the same location and condition for at least thirty-five years. The walls of said buildings were not on a line with the walls of the adjoining buildings on either side of it, but projected fourteen and one half inches further toward said street, though the eaves or gable-end finish of said building did not extend further into or toward said street than the eaves of the

other adjoining buildings on the same side. The city of Rockland had, during all said time, maintained a sidewalk clear up to said face-wall and up to the sill of said building.

The city contended that the complainant was not entitled to recover for any part of the land over which said gable-end finish projected, while the complainant claimed to recover for all the land included in a perpendicular line from the outer end of said gable-end finish. The land taken upon the theory of the city, was a strip averaging fourteen and one half inches in width and about thirty feet long. Upon the theory of the complainant the strip was twenty-two inches in width, and about thirty feet long. Upon this point the presiding judge instructed the jury as follows:

"I instruct you as a matter of law, that wherever those eaves would fall on the sidewalk, there is the outside line of her land. They have been standing there thirty-five years as I understand the testimony, and while, if it was not for the statute, she could not obtain any title to that land simply in that way, the statute makes that hers for all practical purposes, inasmuch as the building has stood there for that number of years. How far then does the line go inside of the building or through it? I understand the testimony to show, that it is about fourteen and one half inches, that only including from the outside wall. Now you would add to that the width of the projecting finish of the building, and that would be the width of the land taken, and the length by taking it up and down the street. In that way you would get the number of square feet, which would be fifty-six or fifty-seven square feet."

To this ruling and instruction exceptions were taken by the defendant. The damages assessed by the city were $400.00 and those allowed by the jury, $506.25.

E. K. Gould, *C. E. Littlefield* with him, for defendant.

(1.) If the rights of the parties are to be determined upon the principles that apply between private parties, the assumption most favorable to the complainant, the boundary of Main street, by sufficient user, is the end wall of the building of complainant; and if by projecting her eaves over the street

complainant has acquired any rights, at most it is an easement to project from her building a gable-end, as now built, over the street, which would undoubtedly allow her to continue the same projection of gable, if the building is moved back bodily to the new line of the street, or if the end is torn down and reconstructed on a new line. Like an easement of a right of way, it is not material as to the exact geographical location the easement is enjoyed, so long as the same easement is enjoyed. If a right of way is obstructed or closed, temporarily or permanently for any purpose, the owner of the easement enjoys the full right when he uses a way in some other equally convenient place. So the complainant would enjoy as well her whole rights as to the gable of the building whether it projects over the street where it now stands or projects, in the same manner and for the same purpose, fourteen and one half inches further back. Over just what precise locality in the street she exercises this easement is of no consequence so long as it can be freely exercised.

(2.) If the other rule applies, and the legal principles involved between the public, using land for a street, and the abutting owners having the exclusive title to the soil, and all rights over and below the soil, not inconsistent with the public use, then it is clear that in projecting this gable over the street complainant was in the exercise of her legal rights, of which the city could not complain and which it necessarily follows they do not and cannot invade by any taking of a strip off the front end of this lot; and that when the building is moved back, or its end reconstructed, the complainant can exercise the same right of projecting this gable-end, and of its exercise the city cannot complain.

Counsel cited: Dill. Mun. Cor. § 1012, and note; Stat. 1885, c. 482, § 19; *Lawrence* v. *Mt. Vernon*, 35 Maine, 100; *Hinks* v. *Hinks*, 46 *Id.* 423; *Millett* v. *Fowle*, 8 Cush. 150; *Carbrey* v. *Willis*, 7 Allen, p. 371; *Sherman* v. *Williams*, 113 Mass. p. 484; *Bloch* v. *Pfaff*, 101 Mass. p. 539; *Randall* v. *Sanderson*, 111 Mass. p. 119; *Keats* v. *Hugo*, 115 Mass. p. 204; Wash. Ease. (4th Ed.) pp. 430, 535 and notes; *Dunham* v. *Gannett*, 126 Mass. p. 154; *Holbrook* v. *McBride*, 4 Gray, 215; 2

Smith Lead. Cas. (8th Ed.) p. 167; *Stinson* v. *Gardiner*, 42 Maine, p. 254; *O'Linda* v. *Lothrop*, 21 Pick. p. 297; *Richardson* v. *Pond*, 15 Gray, 390; High Inj. § 824; *City of Phila. Appeal*, 78 Pa. St. 33.

Mortland and Johnson, for complainant.

WALTON, J. The Revised Statutes, chap. 18, § 95, provide that, "when buildings or fences have existed more than twenty years fronting upon any way, street, lane, or land appropriated to public use, the bounds of which can not be made certain by records or monuments, such buildings or fences shall be deemed the true bounds thereof."

The plaintiff owns a building which for more than thirty-five years has fronted on one of the principal streets in the city of Rockland, and it is conceded that it must now be regarded as one of the boundaries of the street. But it is not on a line with the adjoining buildings, and the city has taken measures to compel her to move it back. It is conceded that she will be entitled to damages, and the only question is how much.

The plaintiff contends that in order to ascertain the amount of land taken for the widening of the street, the measurement should commence on a line with the cornice on the gable-end of the building. The city contends that the measurement should commence on a line with the side of the main building.

The cornice projects about eight inches; and if the plaintiff's method of measuring is adopted, she will be entitled to compensation for a width of twenty-two and a half inches. If the city's method is adopted, she will be entitled to compensation for a width of only fourteen and a half inches.

We think the city's method is the correct one. For more than thirty-five years the city has maintained a sidewalk close up to the side of the building. The exceptions so state. The side of the building, and not the projecting cornice of the roof, has, during all that time, in fact bounded the street. And the street has in fact been widened only fourteen and a half inches. And the plaintiff will be obliged to move her building no more than that. For that amount of land she is undoubtedly entitled to

recover compensation, and we fail to discover any reason why she should recover compensation for a greater width than that. It may be true, as she contends, that when a building is the boundary of land conveyed by deed, the boundary is the outermost portion of the building.

In *Millett* v. *Fowle*, 8 Cush. 150, the court held that, where a deed described one of the boundaries of the land as four feet from the "northerly side" of a building, the boundary was four feet from the extremest part of the building, which in that case was the edge of the eaves.

But in this State, in *Calais* v. *Bradford*, 51 Maine, 414, where a deed described one of the boundaries as eight feet four inches from the "south side" of a building, the court held that the measurement should be made from the corner board on the side of the building.

These decisions are in conflict. They can not be reconciled. In each case the measurement was to commence at the "side" of the building. In the one case, the court held that that meant at the edge of the eaves. In the other, at the boarding on the side of the building.

But it is unnecessary to determine which is the more sensible conclusion; for we are not now bounding land, we are bounding a right of way. Presumptively the plaintiff owns the land to the centre of the street. But the exceptions state that for over thirty-five years the city has maintained a sidewalk close up to the sill of the building, and its right to that portion of the way which is under the overhanging cornice of the roof is as valid as its right to any other portion of the way.

The building is two stories high, and the cornice is on the gable-end of the building, and projects only about eight inches. Similar projections are very common. Not only cornices, but small balconies and bay-windows, often overhang sidewalks. And if they do not in any way interefere with or incommode the public travel, such structures are not unlawful. The owner of land over which a public way passes has a right to occupy the land above and below its surface to any extent that will not impair its usefulness for a way. Of course, a bay-window, or a

balcony, or a cornice even, may be so low down, and project so far into a street, as to obstruct or incommode the public travel; and in such a case, the structure would be a public nuisance, and its removal could be compelled. But an eight-inch cornice on the gable-end of a two story building could never be so regarded. And whether in any particular case such a structure is or is not a nuisance is to be decided in the exercise of sound practical common sense, and not on merely imaginary or theoretical grounds. The public must not be made to suffer any real inconvenience, nor should the owner be deprived of any such reasonable use of his land as will not incommode the public.

The difference between land when bounded by a building, and a way when thus bounded, is very obvious. When land is bounded by a building, it would be unreasonable to assume that the parties to the conveyance intended that the main portion of the building should be on one side of the line, and the cornices, and other projecting finish, on the other. Hence the rule that, in such a case, the line shall be regarded as wholly on one side of every portion of the building. Not so a right of way. There is nothing unreasonable in the assumption that a mere right of way, even if created by an express grant, was intended to extend under the projecting finish of a building. Hence, the rule invoked by the plaintiff is not applicable; and especially not applicable, when, as in this case, the right of way is acquired by adverse use, and not by express grant. In the class of cases, where the extent of the way is determined by the use, its extent is necessarily co-extensive with its use. At least, such is the general rule; and there is nothing in this case to take it out of the general rule.

If we should adopt the construction of the statute for which the plaintiff contends, and hold that all the bay-windows, and balconies, and cornices, which have for twenty years overhung our sidewalks, have become the boundaries thereof, we should have some very crooked and jagged side lines, and it would be difficult for our street commissioners to determine to what width it would be their duty to keep them in repair. We do not think

the statute can be rightfully so construed. We think that when it declares that buildings which have for more than twenty years fronted upon a public way or street shall be deemed the bounds thereof, it means that portion of the building which rests upon the ground and does in fact bound and limit the way, and not the cornices or other projections which, far above the heads of travelers, may happen to overhang the sidewalk.

As the construction of the statute contended for by the plaintiff was sustained by the court at the trial in the court below, it is the opinion of the law court that the exceptions must be sustained and a new trial granted.

Exceptions sustained.

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

WALTER E. MANSUR, PETITIONER for CERTIORARI,

vs.

COUNTY COMMISSIONERS of AROOSTOOK COUNTY.

Aroostook. Opinion June 1, 1891.

Way. Commissioners. Assessments. Regular Session. Stat. 1821, c. 118, § 24; R. S., 1841, c. 25, § § 47, 48; 1857, c. 18, § 33; Stat. 1868, c. 191; R. S., 1871, c. 6, § 51, c. 18, § 32; Stat. 1876, c. 85, R. S., 1883, c. 6, § 78; c. 18, § § 4, 5, 41.

The statute (R. S., c. 6, section 78) provides that, when a road is laid over lands not within any town or plantation required to raise money to make and repair highways, the county commissioners shall at their first regular session thereafter assess thereon, and on adjoining townships benefited thereby, such an amount as they judge necessary for making and opening the road. *Held*; That the assessments are to be made at the same regular session at which the location of the road is filed; the object of the statute being to prevent their being made at an adjourned term of such regular session.

Such regular session will be the first occurring after the road is laid over the lands.

Appleton v. *Co. Com.* 80 Maine, 284, explained.

ON EXCEPTIONS.

Petition for *certiorari*.

The petition dated February 26, 1887, for the laying out of a road from New Sweden to Fort Kent, in Aroostook county, under the provisions of § 41, chapter 18, of Revised Statutes,

was presented to the County Commissioners, at their adjourned January term, 1887, held on March 14, 1887, when they determined that there ought to be a hearing on said petition, and ordered notice to be given for a hearing on June 6, 1887, which notice was duly given. On said June 6, they had a hearing, and proceeded to view the route, and on June 13, 1887, they adjudged the road to be of common convenience and necessity, and went on and laid it out on the surface of the earth.

The regular sessions of the County Commissioners for the county of Aroostook, as provided by law, are held on the first Tuesdays of January and July, in each year.

The January term, 1887, of said Commissioners was finally adjourned on the first day of June, 1887.

At the July term, 1887, the Commissioners' report of the laying out said road was made and placed on file, and thereafter, at the same term, they proceeded to make an assessment upon the lands over which said road was laid, under the provisions of § 78 of chapter 6 of the Revised Statutes.

The cause of error assigned in the petition for *certiorari* was that such assessment was not made at the first regular term of the County Commissioners after said road was laid out, but at the same term; and the answer of the Commissioners was that the assessment was made at their first regular term after the road was laid out.

The foregoing facts being argued, the presiding justice ruled *pro forma* as a matter of law, that the assessment was made at the first regular session of the County Commissioners after said road was laid over the lands, and that the petition for *certiorari* should be denied.

To this ruling the petitioner excepted.

Wilson and Woodard, for petitioner.

The road is not laid over wild lands under the provisions of § 41 of chapter 18, of R. S., within the meaning of § 78 of chapter 6, until the County Commissioners shall have made a return and file of their doings relating thereto required by law.

Sections four and five of chapter 18, apply to roads laid over wild lands as well as to roads laid in incorporated towns, and

the requirements of these sections must be complied with before a road can be regarded as laid, and among these requirements is that of making and filing the return.

The provisions of statute relating to the time of making assessments for benefits are analogous to provisions of statute relating to the time when an appeal from the decision laying out the road can be made. It cannot be held that an appeal from a decision laying out a road should be made before that decision is made known by the filing the return of the laying out; and so it should not be held that assessments for benefits can be made until the first regular term after the return of the laying out of the road is made and filed.

Parties are entitled to an inspection of the records in order to determine what course of action they will pursue in relation to these assessments. If the Commissioners should never make or file their return, could it be said that a road was ever laid within the meaning of § 78 of chapter 6? If not, it must follow that the laying out by the Commissioners on the face of the earth is not the laying out referred to in said § 78. *Appleton* v. *Co. Com.* 80 Maine, 234, should be conclusive on the question raised in this case. The language of the court, in the opinion in that case, shows conclusively that the construction of the statutes claimed by the petitioners is the true one. See also Anderson's Dictionary of Law, page 605; *Wolcott* v. *Pond*, 19 Conn. 590; *Cone* v. *Hartford*, 28 Conn. 363; *Foster* v. *Park Commissioners*, 133 Mass. 321.

If the assessment involved in this case was not made at the regular session of the County Commissioners after the road was laid out, their action was wholly without jurisdiction and the writ prayed for should be granted. *Hayford* v. *Co. Com.* 78 Maine, 153; *Monticello* v. *Co. Com.* 59 Maine, 391.

Powers and Powers, for County Commissioners.

The road is "laid over the lands," within the meaning of R. S., c. 6, § 78, when the Commissioners having adjudged it to be of common convenience and necessity actually locate and mark it out upon the face of the earth; and that "their first

regular session" named in said § 78, is that next following said actual manual location and marking out of the road.

As no one of the three appeals allowed by law is either taken away or abridged by an assessment made at the time this one was made, no one can be injured by making the assessment at the first regular session after the road is located and marked out over the lands on the surface of the earth. Every right to be heard and every right to appeal on the questions of location, damages and benefits is preserved to every person interested exactly the same whether the assessment is made at the one term or the other. Such being the case the statute should be so construed as to make it best effect the objects for which it was intended and not so as to hinder and delay the accomplishment of those objects. Endlich on Interpretation of Statutes, § 29. The object of this statute is to subserve public convenience and necessity, with due regard for individual rights, to build roads when and where public convenience and necessity require them.

In *Appleton* v. *Co. Com.* the reported case does not show when the location or the assessment was made, but the printed case and records show that the road was located on July 22nd, 1886, and the assessment made at the next regular session thereafter, to wit: the August term, 1886, being the same term at which the return was filed. Exactly as was done in this case. The assessment was prematurely made simply and solely because an appeal from the location was thereafterwards taken.

PETERS, C. J. By R. S., c. 18, § 41, county commissioners may lay out roads through lands not within any town or plantation required to raise money to make and repair highways, all expenses for making the same to be paid by the owners of the lands. The mode of proceeding in such case is pointed out in succeeding sections. By R. S., c. 6, § 78, provision is made for assessing the expenses upon such lands and for their collection.

The clause of the section that is questioned in this case, reads

thus: "When a road is laid over lands under section forty-one of chapter eighteen, the county commissioners shall at their first regular session thereafter, assess thereon and on adjoining townships benefited thereby such an amount as they judge necessary for making and opening" the road.

The present proceeding is a petition for *certiorari*, seeking to annul the record of a road, established by the commissioners of Aroostook county, leading from New Sweden to Fort Kent. There was no appeal either from the act of laying out the road or of levying the assessments. The defect alleged to exist in the proceedings is that the assessments were prematurely made. The exact question is, whether "the first regular session after a road is laid over" lands, may be the same session at which a report of the establishment of the road is filed. The petitioner claims the assessments should be made at a subsequent session. The respondents claim that they should be made at the first regular session after the action of the commissioners in locating the road upon the face of the earth, which would necessarily be the session at which their report is filed. In other words, one party claims it must be the session next after the report of location, while the other claims it to be the next after the fact of location; one act being the evidence of the thing done, the other the thing itself.

The question is not free of doubt, and difficulty. Our opinion, however, is that the commissioners committed no mistake in adhering to a literal version of the text of the statute, such opinion being derived principally from an examination of the different preceding statutes out of which the present statute has descended. The history of a statute gives great aid in determining its construction.

The statute in question had its origin in § 24, chapter 118 of the laws of 1821, by which section the liability of owners was established for the expense of constructing roads across unincorporated lands. It provides that the court of sessions "may proceed to lay out such highway in the manner prescribed by law, and shall cause an assessment to be made on such tracts of land" sufficient to defray the cost of the road and other expenses.

The mode of enforcing collection of the assessments is also set out in the section. At that day no appeal was allowed either from the act of laying out the road or from the assessment of benefits to land owners. It was considered as the matter of levying a tax over which the court of sessions should have exclusive authority while acting legally.

The system of appeals in such proceedings is a more modern growth. All the provisions of the act of 1821, were explicit and clear. Some difficulty has been experienced in giving a construction to later statutes on the subject, from the fact that different rights of appeal have been superadded to them, which, in their practical operation, have not been entirely consistent with other provisions. Can there be any doubt, that in the act of 1821, the location of the road and the levying of the assessments were regarded as one act, one result, all the consecutive steps being parts of one adjudication?

The act of 1821, became embodied in chapter 25 of revised statutes of 1841, in the two following sections:

"Section 47. Whenever any highway shall be laid out by the county commissioners, through any unincorporated tract of land, the said commissioners shall decide, whether, in their opinion, such tract, or any part thereof, will be thereby enhanced in value. Said commissioners may, upon a plan of said tract, whether consisting of one or more townships, make as many divisions, as they may think equitable, conforming, as near as convenient, to known divisions, or separate ownerships; and they may assess upon each division, which they shall consider to be enhanced in value, towards the expense of making and opening such road, such sum, as, in their judgment, shall be proportionate to the value, and the benefits likely to result to it, from the establishment of such road.

"Section 48. Said commissioners shall, thereupon, cause an assessment to be made on such tracts of land, township or plantation, or divisions thereof as aforesaid, if they see cause, at such rates per acre, as they shall judge necessary for making or opening such highway, and defraying the necessary expenses attending the same."

Can it be controverted that the various steps described in these sections were intended to comprise a single proceeding? Of course, some things precede others in the order of doing them, the assessment necessarily coming last. "Thereupon," the assessment is to be made, that is, "immediately without delay," say the lexicographers. The word implies close connection, not disconnection. No period of time is to intervene between the steps to be taken. It is not implied that any report shall be filed before the whole work is consummated.

Next comes the revision of the statutes in 1857, before which date an appeal from location had become allowable by law. The phraseology of the provision touching assessments is again changed, the substance of it remaining unimpaired, § 33, chapter 18, reading as follows:

"When a way is laid out over such lands, they shall decide whether any tract or part thereof will thereby be enhanced in value; and they may make as many divisions as are equitable, conforming as nearly as convenient to known divisions or townships; and assess upon each division adjudged to be enhanced in value a sum proportionate to the benefits likely to result to it from the establishment of the way. The assessments may be made at such rates per acre as they judge to be necessary for making and opening the way, and for paying the expenses attending it."

The phrase here is, when a way is "laid out over" such lands. This section instructs the commissioners what to do in connection with the act of locating the road as a necessary part thereof or adjunct thereto. The words "laid out" do not imply that a location has been made by any written report, because certain questions are to be considered after the road is "laid out," the decision of which is to be made a part of the report. In locating a road it is indispensable that the commissioners decide at whose expense the road shall be made, and whether the lands crossed by the road will be benefited thereby, and their report must show these facts. *Pingree* v. *County Commissioners*, 30 Maine, 351.

The act of 1868, ch. 191, constituted a more radical change,

two appeals being allowable, instead of the one existing before that time, an appeal from location and also from assessment, in each instance the appeal to be entered and heard at the first term of the Supreme Judicial Court held after the decision by the commissioners, neither party having any right of exceptions. This act provided that "when a road is so laid out over such lands, the commissioners shall immediately thereafter assess thereon such an amount as they judge to be necessary for making and opening the road and paying the expenses attending it." There was to be no lapse of time between the location and assessment more than that one act would precede the other, all the different acts constituting a continuous proceeding. To require the commissioners to do one act immediately after another act would necessitate that both acts be done at the same session, for otherwise such a result could not possibly be accomplished. A future session would not be immediately afterwards.

The revision of 1871 retains substantially the provisions of the act of 1868, to be found in sections of two chapters of the statutes instead of in one as before that time. R. S. of 1871, c. 18, sec. 32; c. 6, sec. 51. Then for the first time appears the phrase as in the present statutes, "when a road is laid over," —the previous phrasing having been "laid out over."

Then came the act of 1876, which laid the foundation for the present controversy, in amending section fifty-one of chapter six of the revised statutes of 1871, by striking out the word "immediately" and inserting instead the words "at their first regular session;" the substituted requirement being that the commissioners, when they lay a road over unincorporated lands, shall at their first regular session afterwards levy the necessary assessments. The meaning of this amendment is the key of the question to be solved.

The present revised statutes repeat the provision in the same words. The words are, at the *first* regular session, not the *next*, after the road is laid over the land. In the light of previous legislation, does this not mean that the assessments are to be made as soon as the work can be done at any regular session of the commissioners occurring or existing after their report is

filed, if the assessments are not, though they might be, made a part of the report itself? It will be remembered that, from 1821 to 1876, through all the changes of the statute, the idea of expeditious assessments is retained. Did the amendment presuppose that the assessments would not be made as seasonably as before? Inasmuch as before 1876 any delay had been so often peremptorily forbidden, can it be that a prolonged delay (in this case, six months) was then intended? Our impression is that the idea of the change was not to dispense with the customary promptness required but to preserve it, not to create delay but to prevent it, by ensuring action at the first regular session instead of at some adjournment of such session. We are informed that a practice had grown up to some extent of making the assessments after short adjournments of the regular sessions. The amendment would correct that practice. An advantage may have been supposed to be also promoted by ensuring a certainty of time and place for the hearing and decision on the question of benefits. If the assessments be made at the first session, as done in this case, it will inevitably be immediately or soon after the road is run out over the land. The commissioners are required to make their return at their next regular session after the hearing is had. R. S., ch. 18, sec. 5.

What expediency would there be in the delay that a continuance would entail? Commissioners can exercise a better judgment on the questions presented for their decision, acting immediately after hearing the parties and examining the land. It is an advantage to all parties to have an early knowledge of the result on the questions of both location and assessment. The latter may be so satisfactory that there will be no disposition to appeal from either decision. If no appeal be entered, a delay of six months before other proceedings following assessment can be instituted, which consume a long period for their accomplishment, would seem to be time inconsiderately lost. It has always been required to include an assessment of damages in a report of laying out a highway, and why not important to assess benefits as expeditiously? In the case of this road, if there were damages as well as benefits to be assessed, the commissioners were

obliged to state in their return the amount of damages, to whom allowed, and when payable. R. S., ch. 18, sec. 4. Why assess damages in July and benefits in January afterwards?

It is urged that persons interested had no notice that the assessments were to be made. They had as much notice as they would have, whether the proper occasion for their appearance be at one regular session or another. Only one notice is ever given in any case, and that brings parties into court, where they are supposed to be in attendance during all subsequent stages of the proceeding.

The meaning of the words "laid out" has been discussed in the arguments. The words here are "laid over," and it is very likely the latter phrase was intentionally used as better expressing the idea to be conveyed. The words "laid out" used in reference to ways do not always have the same signification. They will be found to be used as descriptive of all conditions of a way, such as a way voted to be built, a way being built, or a way built. The context usually determines the meaning of the expression.

It is urged by the petitioner that the case of *Appleton* v. *County Commissioners*, 80 Maine, 284, makes in his favor on this question. We think it may have that tendency in a portion of the argument of the court, but the result of the case does not necessarily have such a bearing. The question presented in this case was not considered or noticed in that, although slumbering in the papers of that case. The court hesitated, in the determination of that case, which of two theories to adopt as best applicable to it. One theory was that the statute requires the commissioners to proceed with the question of benefits and decide it independently of other issues and questions, so that their determination would stand, unless modified upon appeal therefrom, or rendered nugatory by the location failing to be sustained on appeal. By that mode the commissioners would perform finally all the duties incumbent on them in the premises. That mode would have its advantages, as readily seen in the light of the present investigation. The assessments would be conditionally made, dependent on the validity of the location.

The other theory was that an appeal from location not only suspends that branch of the proceedings, but nullifies all assessments already made, and postpones the authority for making them until after the appeal from location has been finally disposed of. Inasmuch as the commissioners are required, when they assess benefits upon the land, to appoint a time, not exceeding two years from the date of the assessment, within which the road is to be made and opened, and are to do certain other things named in section seventy-eight, before cited, and as the prolonged proceedings now allowed on an appeal from location might exceed such time or consume the greater portion of it, and, further, as there seems to be an incompatibility in the two appeals pending at the same time, we came to the conclusion that we should avoid more difficulties by adopting the policy of construction upon which the case of *Appleton* v. *Commissioners* is based.

But, as before said, that case and this, in their results, will be found not to disagree. On the contrary, the rules of procedure deducible from them will be consistent and practicable.

Petition denied with costs.

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

ALBERT STIRK *vs.* SAMUEL C. HAMILTON,

York. Opinion June 1, 1891.

Chattel Mortgage. Record. Validity. Lex loci contractus. Pub. Laws, Mass. 1882, c. 192, §§ 1-3; R. S., c. 91, § 1.

In an action of trover against an officer for attaching the outfit of a circus company, it appeared that the plaintiff claimed title to it by virtue of two mortgages, one made in Biddeford, and the other in Boston. There being no evidence that, when the mortgage was made in Biddeford, the mortgagor resided within the State, or that the property had been delivered to and retained by the mortgagee, or that the property was then in Biddeford, *Held*; that the burden of proof was on the plaintiff to show that the property was in Biddeford, when the mortgage was made; that failing to do so, the court correctly excluded the mortgage from the case and the jury were properly instructed to disregard it. *Held*; also, that the validity of the mortgage made in Boston, is to be determined by the *lex loci contractus*.

An instruction to the jury that the burden of proof was on the plaintiff to

satisfy them that, at the time of making the mortgage in Boston, the mortgagor not only resided there, but that Boston was the place where he then principally transacted his business, or followed his trade or calling; and that if the plaintiff had not so satisfied them, then, as against an attaching creditor, the mortgage would not be valid, *was held* to be correct.

ON MOTION AND EXCEPTIONS.

This was an action of trover, brought by Albert Stirk of Boston, against the sheriff of York county for the conversion of a lot of circus property by one of his deputies who had attached the goods on a writ in favor of one Yates against one Wood. The plaintiff claimed title by two mortgages designated in the trial, one as the "Boston mortgage," the other as the "Biddeford mortgage." He gave forty-eight hours written notice of his claim and the true amount thereof to the attaching officer before bringing this action.

The jury found for the defendant, and the plaintiff excepted to the following portions of the charge of the presiding justice:

"I therefore state to you that the evidence in this case would not warrant you in finding that the property was in Biddeford, as the statute contemplates, at the time the mortgage was made, and so you will understand that that comes out, the Biddeford mortgage comes out, and then we fall back upon the Boston mortgage, and if that suffers the same fate all you have to do is to sign and fill in a verdict for the defendant.

"He must satisfy you that Mr. Woods, the mortgagor, at that time, to wit, April 25, 1889, resided in Boston, and he must also show you, that at that time Mr. Woods principally transacted his business or followed his trade or calling in Boston. The burden is upon him to do it. If he does not show that, no matter what he shows, he fails.

"He may have shown that this man had no business in any other town whatsoever but he must go further and show that he resided in Boston on that day, and that on that day Boston was the place where Mr. Woods followed his principal trade or calling, where he principally transacted his business."

"If you do not find in this case the evidence to make it reasonably clear to you that, at the time of the giving of this mortgage, Mr. Woods both resided in Boston and had his prin-

cipal place of business in Boston, or was following his trade or calling, whatever it was, in Boston at that time, whatever he may have done before or since does not matter, then this is not a valid mortgage against Mr. Yates."

The case otherwise sufficiently appears in the opinion.

Hamilton and Haley, for plaintiff.

It was for the jury, under proper instructions, to say whether, upon the evidence as to the previous agreement, and the acts of the parties, they were satisfied that the making of the mortgage and the delivery of the same to the town clerk, was an act authorized by the plaintiff, and was done in pursuance of a previous agreement and authorized so to do. *Jordan* v. *Farnsworth*, 15 Gray, 517.

It is well settled, that under an agreement between the parties, that one shall make a deed for the other, and deliver the same to the register of deeds for registry, and for the benefit of the grantee, the making of such deed and leaving the same with the register, for such purpose, constitutes a good delivery of the deed to the grantee without any further act. *Thayer* v. *Stark*, 6 Cush. 11.

It is not necessary that the deed should be delivered to the grantee personally. *Hatch* v. *Hatch*, 9 Mass. 308; *Hedge* v. *Drew*, 12 Pick. 141; *Harrison* v. *Phillips Academy*, 12 Mass. 456.

If the question of delivery arises, the authorities above cited show that, as the mortgage was made in pursuance of a previous agreement, and assented to by Stirk before any attachment, that there was a sufficient delivery.

The Court ruled that, from the evidence, the jury would not be justified in finding that the property was in Biddeford, at the time the mortgage was made as the statute contemplates. The mortgage was not made until it was delivered. It was delivered to the city clerk and recorded at 3.35 P. M.

The Biddeford mortgage was valid as between the parties, whether recorded or not. Stirk could maintain an action of tort against a wrong-doer, who unlawfully took, or kept possession of the goods covered by the mortgage.

The sheriff is responsible for all official neglect or misconduct of his deputy, and also for his acts not required by law, when the deputy assumes to act under the color of his office. *Harrington* v. *Fuller*, 18 Maine, 277; *Knowlton* v. *Bartlett*, 1 Pick. 270; *Grinnell* v. *Phillips*, 1 Mass. 536; *Marshall* v. *Hosmer*, 4 Mass. 60; *Esty* v. *Chandler*, 7 Mass. 464; *Dyer* v. *Tilton*, 71 Maine, 413: *Hamilton* v. *Goding*, 55 Maine, 419.

H. Fairfield, for defendant.

Where a statute requires a mortgage to be recorded in the place of a mortgagor's residence and a case discloses nothing as to the place of his residence, the validity of the mortgage, though recorded, is not established. Boone Chat. Mort. § 248.

So, where the statute requires a mortgage to be recorded in the mortgagor's place of business, and the case discloses nothing as to the place of his business, the mortgage though recorded is not established.

In *Bither* v. *Buswell*, 51 Maine, 601, plaintiff claimed a horse under a mortgage and defendant by a subsequent sale. The question was, was the mortgage recorded according to our statute, requiring it to be recorded in the place of residence of mortgagor. It appeared that the mortgage was made in Lincoln and recorded in Medway Plantation, but it did not appear where mortgagor resided. The Court said the burden was on plaintiff to sustain his mortgage and to prove that the mortgagor resided in Medway,—he had failed to do it and judgment was given against him.

In this case it cannot be inferred that mortgagor's place of business was in Boston, for there is no fact from which an inference can be drawn.

Our statute is that, if the mortgagor, as in this case, resided out of the State, the mortgage must be recorded where the property is when the mortgage is made.

Woods was a resident of Boston. The mortgage so declares him. Tibbetts, the lawyer, who drew the mortgage, says it was made between ten and eleven in the forenoon. The goods did not arrive in Biddeford till between three and half past, P. M. They were then immediately, in a hurry, moved to Saco, where

an exhibition was had that evening. The goods were not in Biddeford, in the statute sense, at any time of the day on which the mortgage was made and recorded. They were there only *in transitu*. They started that morning from Great Falls, N. H., and were continually in transit, till they reached Saco, their destination, where they were used and remained three days. Saco was the only place in this State, where the goods were, in the statute sense, on that day.

WALTON, J. This is an action of trover against an officer for property attached on a writ. At a trial in the court below, the jury returned a verdict for the defendant, and the case is before the law court on motion and exceptions by the plaintiff.

The property attached was a part of the outfit of a circus company, and the plaintiff claimed title to it by virtue of two mortgages, one made in Boston and the other in Biddeford. The validity of the mortgages was denied on the ground that neither of them had been legally recorded.

The mortgage made in Biddeford had been there recorded; but the defendant denied that the property was in Biddeford at the time the mortgage was made. The company had exhibited at Great Falls on Friday and Saturday, and the property attached arrived at the station in Biddeford between three and four o'clock in the afternoon of the following Monday, and was immediately transported by teams into Saco, where the company exhibited that evening. The mortgage was made the same day, but it was made in the forenoon, and the property did not arrive at the station till after three o'clock in the afternoon.

Under our law, when all the mortgagors reside without the State, a mortgage of personal property will not be valid against any other person than the parties thereto, unless possession of the property is delivered to and retained by the mortgagee, or the mortgage is recorded in the city, town, or plantation, "where the property is when the mortgage is made." R. S., ch. 91, § 1.

And, there being no evidence that, when the Biddeford mortgage was made, the mortgagor resided within the state, or that the property had been delivered to and retained by the mort-

gagee, or that the property was in Biddeford when the mortgage was made, the presiding justice ruled the mortgage out of the case altogether, and instructed the jury to disregard it.

The plaintiff complains of this ruling on the ground that, whether or not the property was in Biddeford at the time the mortgage was made, was a question of fact for the jury, and should have been submitted to them.

We think the ruling was correct. The burden of proof was on the plaintiff to show that the property was in Biddeford when the mortgage was made. This he failed to do. A careful examination of the evidence shows that beyond a doubt the property was not in Biddeford when the mortgage was made. Probably it was not then within the limits of this State. It would, therefore, have been an idle ceremony to submit the question of fact to the jury; for if they had returned a verdict for the plaintiff based on a finding that the mortgage property was in Biddeford when the mortgage was made, it would have been the duty of the court to set the verdict aside.

We now come to a consideration of the mortgage made in Boston. Of course the validity of that mortgage must be determined by the *lex loci contractus*. And it appears that by the law of Massachusetts, a mortgage of personal property must be recorded not only in the city or town where the mortgagor resides when the mortgage is made, but also "on the records of the city or town in which he then principally transacts his business, or follows his trade or calling," and if not so recorded within fifteen days (unless the property has been delivered to and retained by the mortgagee) the mortgage will not be valid against any person other than the parties thereto. And it not appearing that the mortgage made in Boston had been recorded in any other city or town, or that the mortgaged property had been delivered to or retained by the mortgagee, the presiding justice instructed the jury that the burden of proof was on the plaintiff to satisfy them that, at the time of making the mortgage, the mortgagor not only resided in Boston, but that Boston was the place where he then principally transacted his business, or

followed his trade or calling; that if the plaintiff had not so satisfied them, then, as against the attaching creditor, the mortgage could not be regarded as valid. We fail to discover anything erroneous in these instructions. See Public Laws of Massachusetts, 1882, chap. 192, § § 1, 2, and 3, put into the case by the defendant's counsel, and referred to by the presiding justice in his charge to the jury.

We think the exceptions must be overruled. And we do not think the motion to have the verdict set aside as against the weight of evidence can be sustained. In fact we do not see how upon the evidence the verdict could have been otherwise.

Motion and exceptions overruled.

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

COLEMAN F. LORD *vs.* JOSEPH W. PARKER, appellant.

Oxford. Opinion June 1, 1891.

Tax. Assessment. Oath. Overlay. Warrant. Suit. Village Corporation. R. S., c. 6, § § 99, 141. Stat. 1850, c. 406, § 3.

An action of debt to recover a tax may be maintained in the name of the collector of a village corporation. Such officers are included within R. S., c. 6, § 141.

It is not a bar to such an action that the collector, in a settlement with the treasurer, has paid all the taxes due including the tax sued for, before the action was commenced; it appearing that the defendant did not authorize the payment, nor that it was made by the plaintiff with an intent to extinguish the tax, or to relieve the defendant from his liability to pay it.

Informalities in a warrant for the collection of a village corporation tax, legally and regularly assessed, will not bar such an action, even although the warrant might not, perhaps, be sufficient to authorize an arrest of the defendant, or a distraint of his property.

An overlay, it being less than five per cent, does not render the assessment of a village corporation tax illegal or void, where by the terms of its charter, such assessments are to be made in the same manner as county assessments.

In the absence of any known statute requiring the assessors of a village corporation to be sworn, the fact that the oath was administered to them by the corporation clerk does not render an assessment of taxes illegal or uncollectible.

FACTS AGREED.

This was an action of debt brought in the Norway Municipal

Court, under R. S., c. 6, § 141, to recover a tax of the defendant, who appealed from the judgment rendered against him by that court to the Supreme Judicial Court, where the parties submitted the case to the full court upon the following statement of agreed facts:

"Norway Village Corporation is legally organized under the act creating said corporation, and the acts amendatory thereof. Joseph W. Parker, the defendant, is an inhabitant of said Norway Village Corporation, and the owner of real and personal estate therein, for which he is legally taxable. Coleman F. Lord, the plaintiff in this action, was elected collector of taxes for said Norway Village Corporation for the year 1886. He took the oath of office before C. S. Tucker, who administered the same as corporation clerk,— no collector's bond for the collection of the corporation tax being given or required of said Lord. At the same meeting, . . . were elected assessors of said Norway Village Corporation, and took the oath of office before C. S. Tucker, who administered said oath in his capacity as corporation clerk.

"Said assessors thereafterwards, on the 17th day of August, A. D., 1886, committed to said Lord, under their hands, the list of assessments for said Norway Village Corporation for said year and among others the several sums sued for in this action by the plaintiff in his capacity as collector for said village corporation.

"The said plaintiff on several occasions called upon the defendant to pay the tax, and the defendant refused, positively asserting that he would not pay the tax.

"The plaintiff on 20th day of February, A. D., 1889, settled with C. G. Mason, the corporation treasurer, for the year 1886, paying him all taxes due for the year A. D., 1886, including the taxes sued for in this action, and being long prior to the commencement of this action.

"On the 13th day of May, A. D., 1889, more than twelve days prior to the date of the writ in this action, the plaintiff demanded of the defendant the payment of said tax, by written demand. . . .

"Upon the foregoing statement of facts, the parties agree to submit this case for the determination of the court, in accordance with the legal principles involved." . . .

The writ, pleadings, written demand, commitment of the tax, the record of corporation meetings, act of incorporation, &c., were made a part of the case. The informalities in the collector's warrant are sufficiently stated in the opinion.

Bearce and Stearns, for plaintiff.

Suit maintainable by village corporation collector, R. S., c. 6, § 141. "Any collector" and in latter part of section, "parish, or place in the state." Stat. 1850. c. 406, § 4. Assessment not void. R. S., c. 6, § 142.

A. S. Kimball, for defendant.

Overlay renders assessment void, it being unauthorized. R. S., c. 6, § 142, does not apply, there being no error or mistake. *Mayberry* v. *Mead*, 80 Maine, 27; *Libby* v. *Burnham*, 15 Mass. 144; *Alvord* v. *Collin*, 20 Pick. 418; *Elwell* v. *Shaw*, 1 Maine, 339; *Huse* v. *Merriam*, 2 Maine, 375. Plaintiff paid the tax and assumed personally the risk of collection. He became a voluntary creditor. Commitment void. Warrant not a legal instrument. Oath of assessors a nullity and assessment void. *Dresden* v. *Goud*, 75 Maine, 298; *Orneville* v. *Palmer*, 79 *Id.* 472.

WALTON, J. This is an action of debt, brought in the name of the collector of the Norway Village Corporation, to recover a tax assessed against the defendant. The action is before the law court on facts agreed.

1. The first question is whether such an action can be maintained in the name of the collector of a village corporation. We think it can. The Revised Statutes (chap. 6, § 141) declare that "any collector of taxes, or his executor or administrator, may sue in his own name for any tax, in an action of debt." This language is sufficiently comprehensive to include village corporation collectors, and we perceive no reason why it should not be applied to them as well as to town collectors. It is a better and more convenient remedy than an arrest of the person

or a distraint of property, and it should not be unnecessarily restricted in its application.

2. The next question is whether the overlay, it being less than five per cent, renders the assessment illegal and void. We think not. An overlay not exceeding five per cent is authorized in the assessment of state, county, and town taxes. R. S., chap. 6, § 99. And by its charter, the assessments of the Norway Village Corporation are to be made in the "same manner" as county assessments. Special Laws, 1850, chap. 406, § 3. Such an overlay is allowed to avoid inconvenient fractions, and should be permitted in the assessment of village corporation taxes as well as state, county, and town taxes.

3. Another question is whether the fact that the collector, in a settlement with the treasurer, paid all the taxes due, including the tax sued for, before this action was commenced, is a bar to a recovery. Clearly not. There is no pretense that the defendant authorized the payment, or that it was made by the plaintiff with intent to extinguish the tax or relieve the defendant from his liability to pay it. In equity, such a payment subrogates the plaintiff to the rights of the corporation, and strengthens his right to maintain an action in his own name, while, as matter of strict law, it has no influence whatever upon his right to maintain such a suit. It was an act to which the defendant was an entire stranger, and it neither helps him nor hurts him.

4. Another question is whether certain informalities found in the collector's warrant are a bar to the recovery of the tax in this suit. We think not. These informalities might have been troublesome if the collector had attempted to collect the tax by means of his warrant, as by arrest of the defendant, or distraint of his property. But if in all other particulars the tax is legal and regular, we fail to see why an informality in the warrant should defeat an action of debt for the recovery of the tax. The informalities in the plaintiff's warrant were evidently occasioned by the use of a blank intended for a town collector's warrant, and are more ludicrous than serious in their character. We do not think they constitute a bar to a recovery of the tax by an action of debt.

5. The fifth and last question presented is, whether the fact that the assessors were sworn by the corporation clerk renders their assessment illegal and void. It is claimed that there is no statute authorizing the clerk to swear them. This is true. But it is also true that there is no statute to which we have been referred, or which, after a diligent search, we can find, which authorizes any one else to swear them. In fact, we can find no statute which requires them to be sworn at all. The charter of the Norway Village Corporation does not require any of its officers to be sworn. And we can find no general law which requires the assessors of a village corporation to be sworn. The assessors of towns and cities must be sworn. The statutes expressly require them to be sworn. And it is well settled that a tax assessed by them without their being sworn, is illegal and not collectible. And, perhaps, it is equally desirable that the assessors of a village corporation should be sworn. And in this case they were sworn. And in the absence of any known statute requiring any one else to swear them, or, in fact, requiring them to be sworn at all, we hold that the fact that the oath was administered to them by the corporation clerk is not sufficient to render the assessment illegal and the taxes uncollectible.

Judgment for plaintiff.

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

DANIEL LANCASTER *vs.* INHABITANTS OF RICHMOND.

Sagadahoc. Opinion June 1, 1891.

Record. Judgment. Debt on judgment. Pleadings.

In an action of debt upon judgment, where the defendant pleads *nul tiel record*, claiming that the record varies materially from the statement of the judgment declared on, the only question to be determined is whether such a judgment in fact exists as is alleged. If there is a material variance it will be fatal.

Where a judgment was rendered upon the award of a committee appointed to determine the amount of damage in consequence of the laying out of a town way across the plaintiff's land, and the award stated that the committee "do adjudge, determine and award to Daniel Lancaster of Richmond, or whoever may be the legal owner or owners of the land, the sum of nine hundred and

twenty-five dollars," *Held;* that under the plea of *nul tiel record* there was a valid judgment in favor of the plaintiff, and that the words "or whoever may be the legal owner or owners of the land," may be properly rejected as surplusage; and that any matter of defense existing prior to the rendition of the judgment cannot be interposed while such judgment stands unreversed.

ON EXCEPTIONS.

The case is stated in the opinion.

C. W. Larrabee, for the plaintiff.

The merits of a judgment can never be impeached or questioned in a counter action, by the judgment debtor, either directly or collaterally. *Pease* v. *Whitten*, 31 Maine, 117. Although judgment may be collaterally impeached when erroneously rendered to the prejudice of the rights of third parties, who have neither right to review nor to reverse judgment by writ of error, the rule does not extend to parties to the judgment. *Sidensparker* v. *Sidensparker*, 52 Maine, 481; *Granger* v. *Clark*, 22 Maine, 128; *Webster* v. *Reid*, 11 How. 437, 460; *Thatcher* v. *Gammon*, 12 Mass. 268, 269.

Spaulding and Buker, for the defendants, cited: *Minot* v. *Co. Com.* 28 Maine, 121, 125; *Thurston* v. *Portland*, 63 Maine, 149, 150; *Clark* v. *Insurance Company*, 81 Maine, 373.

FOSTER, J. Debt on judgment. A committee having been appointed in accordance with R. S., 1871, c. 18, § § 22 and 8, to determine the amount of damages in consequence of the laying out of a town way across the plaintiff's land, made their report which was subsequently accepted, and judgment entered on their award, together with costs. By that award the committee "adjudge, determine and award to Daniel Lancaster, of Richmond, or whoever may be the legal owner or owners of the land, the sum of nine hundred and twenty-five dollars."

The plaintiff declares upon a judgment in favor of Daniel Lancaster. The defendants plead *nul tiel record*, claiming that the record varies materially from the statement of the judgment in the plaintiff's declaration.

Whether such a judgment as is alleged by the plaintiff in fact exists is the only question to be determined under this plea. If there is a material variance it will be fatal. But if substantially proved as alleged it will suffice. The averments and proof

should be substantially identical, though it is not absolutely essential that the precise words of the record be followed. "Surplusage, or immaterial omissions not matters of substance," as the court remarks in *Whitaker* v. *Bramson*, 2 Paine, C. C. 209, "are attended with no other consequences than in other cases."

In the case before us we think there is no such substantial variance between the record and the plaintiff's declaration as to defeat his recovery. The award made and judgment rendered are in favor of Daniel Lancaster. True, the record discloses this additional statement,—"or whoever may be the legal owner or owners of the land." But this langauge may properly be treated as surplusage, and the omission of which in the declaration cannot be regarded as a material variance, or, if alleged, it might be treated as an unnecessary allegation. As said by the court in *Stoddart* v. *Palmer*, 3 B & C. 2, (10 E. C. L. 13,) "it is an unnecessary allegation, and may be rejected as surplusage; and if it can be altogether struck out of the declaration without injury to the plaintiff's cause of action, the proof necessary to support such an allegation (when material) need not be given."

The record discloses a valid judgment in favor of the plaintiff, and nobody else. It is subsisting and unreversed. It cannot as between the parties be impeached under the plea of *nul tiel record*. While it was undoubtedly proper for the committee making the award, to decide upon the title so far as it respects damage, (*Inhab. of Minot* v. *County Commissioners, Cumb. Co.* 21 Maine, 121,) there is nothing in the record which shows any such determination as against this plaintiff. The presumption is that they passed upon the title before judgment rendered. It is too late to interpose any matter of defense, so long as this judgment stands unreversed, which existed anterior to its rendition. At most, the record discloses, in addition to a valid judgment in favor of the plaintiff, only slight irregularities, but not such as to vitiate the judgment. The rights of parties ought not to be and as a general rule are not, defeated by mere harmless irregularities or clerical defects. *Exceptions overruled.*

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

IRENE O. ALLEY, and another, in equity, *vs.* SARAH A. CHASE.

Hancock. Opinion June 1, 1891.

Equity. Injunction. Judgment. Estoppel.

It is a settled rule in equity that when a party has an adequate remedy at law, a suit in equity to enforce the same right cannot be maintained.

A court of equity will refuse relief when it appears that the same right, which the plaintiff seeks to enforce, has been adjudicated adversely to him in a suit at law between the same parties.

Upon a bill to restrain the defendant from prosecuting her action of dower, it appeared that the full court, since the filing of the bill, had sustained the ruling of the presiding justice in the action at law,—holding that the complainants' evidence, giving it the most favorable construction possible, did not constitute a defense to the action. *Held*: That the bill should be dismissed.

(See *Chase* v. *Alley*, 82 Maine, 234.)

ON REPORT.

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

This was a suit in equity to restrain the defendant from prosecuting her suit at law to recover dower in certain real estate, situated at Bar Harbor, known as the St. Sauveur Hotel. Since the filing of the bill, the action at law was decided by the full court in favor of the defendant, and sustaining her claim for dower. See *Chase* v. *Alley*, 82 Maine, 234, where the opinion of the court states the material facts.

Besides the defenses relied upon by the complainants, in the action at law, they also allege in their bill:

"That from the thirtieth day of January, A. D., 1865, after the death of her said husband, down to the twenty-second day of June, A. D., 1888, a period of more than twenty years, the respondent well knowing the facts that said St. Sauveur Hotel lot deeded as aforesaid was in the possession of persons claiming to own it, and who had made and were making valuable and costly improvements upon it, made no claim or demand to dower in said estate, from which delay the respondent should be presumed to have released her right of dower by deed or that her dower has been legally assigned to her out of said premises."

The respondent filed a general denial in which among other things she says:

"She admits that after the death of her husband down to the 22nd of June, 1888, she made no demand to have her dower assigned or set off to her, but she denies that she had any knowledge until four or five years previous to making her said demand that valuable improvements were being made upon the St. Sauveur Hotel lot by said complainants who were in possession thereof, and she further denies that from such delay she should be presumed to have released her right of dower by deed or that her dower had been legally assigned to her out of said premises. . . .

"And the said respondent further answering says, that all of the defenses to her said action of dower against the complainants in said bill, and all of the reasons alleged by said complainants in their said bill why her said action of dower against them should not be maintained can be shown and taken advantage of, so far as the same are true, in defense to said action and that as fully as in this proceeding in equity, and that all of the matters in said complainants' bill mentioned and complained of, are matters which may be tried and determined at law.

"And she further says, that on the 19th day of September, A. D., 1888, she commenced her action of dower against the complainants in said bill to recover of them her dower in a portion of the premises of which her husband was seized during coverture as described in said bill, that a trial of said action was had at the April term of the Supreme Judicial Court, A. D., 1889, for Hancock County, and that in said trial all of the defenses now alleged by the complainants in their bill and the reasons why her action against the said complainants should not be maintained, were made and taken advantage of in the trial of her said action; that said trial resulted in a verdict for the said respondent, the demandant in said action, for her dower, and that upon exception taken to the rulings of the presiding justice to the Law Court, said exceptions were overruled, said defenses and reasons why her suit should not be maintained were adjudged insufficient and the said verdict sustained by the

decision of the justices of the said Court, whereby all of the matters and things stated in said bill have been adjudicated by a court of competent jurisdiction, by reason whereof she says, that she believes that said complainants should be and are estopped and barred from maintaining their said bill in equity."

Deasy and Higgins, for complainants.

Jointure: *Worseley* v. *Worseley*, 16 B. Mon. 469; *Tevis* v. *McCreary*, 3 Met. (Ken.) 151; *Vizard* v. *Longdale*, Kelynge Ch. Cas. 17; *Couch* v. *Stratton*, 4 Ves. jr. 391; *Hamilton* v. *Jackson*, 2 Jones and La. T. 295; *Dygert* v. *Remerschneider*, 39 Barb. 417; *Gould* v. *Womack*, 2 Ala. 83; R. S., c. 103, § 9; 1 Wash. R. P. p. 317; 1 Cruise Dig. 199. Estate deeded to defendant at request of her husband was a jointure because it took effect as early as upon her husband's death. It was for her own life. It was made to herself and not to another in trust for her. It was a freehold estate in lands.

Equitable estoppel, by acceptance of a collateral satisfaction. *Couch* v. *Stratton*, *supra*; *Adsit* v. *Adsit*, 2 Johns. Ch. 448; *Swaine* v. *Perine*, 5 *Id.* 482; 1 Roper H. & W. 450; *Munday* v. *Munday*, 2 Ves. jr. 120; *Hunter* v. *Jones*, 2 Rand. 541; *Shotwell* v. *Sedam*, 3 Ohio, 5; *Jones* v. *Powell*, 6 Johns. Ch. 194; *Warfield* v. *Castleman*, 5 B. Mon. 517; *Bullock* v. *Griffin*, 1 Strobh. Eq. 60; *Hunter* v. *Jones*, 2 Rand. 541. Estoppel by acts and omissions: 1 Johns. Ch. 344; *Hatch* v. *Kimball*, 16 Maine, 148; *Deshley* v. *Beery*, 4 Dall. 300; *Hill* v. *Hill*, 5 Ark. 608; *Edmonson* v. *Montague*, 14 Ala. 370. Limitation: 2 Sto. Eq. § § 15, 20; *Ralls* v. *Hughes*, 1 Dana, 407; *Tuttle* v. *Wilson*, 10 Ohio, 24. Relief: *O'Brien* v. *Elliot*, 15 Maine, 125; *Dougherty* v. *Creary*, 30 Cal. 290; *Lining* v. *Geddes*, 1 McCord, Ch. (S. C.) 304.

Wiswell, *King and Peters*, *B. E. Tracy*, with them, for defendant.

WALTON, J. This is a suit in equity presenting substantially the same question litigated in *Chase* v. *Alley*, 82 Maine, 234. That was an action of dower. It was defended on substantially

the same grounds on which this suit is prosecuted. The plaintiff (Mrs. Chase) prevailed. The court is now asked to enjoin her against enforcing her judgment. The court declines to do so, or to furnish the plaintiffs in this suit with any other remedy which will defeat Mrs. Chase's right to have her dower, as determined in that action. And for the following reasons:

1. It is a settled rule in equity that when a party has an adequate remedy at law, a suit in equity to enforce the same right can not be maintained. There are a few exceptions to the rule; but none of them apply in this case. The same right which the parties seek to enforce in this suit, not only could have been, but actually was, presented as a ground of defense in the action of dower, and was passed upon by the court. It not only might have been, but it was in fact litigated in that suit. And for that reason alone, if for no other, it would be the duty of the court to refuse the relief asked for in this suit. *Batchelder* v. *Bean*, 76 Maine, 370; *Milliken* v. *Dockray*, 80 Maine, 82.

2. But there is another reason. In the action of dower, the justice presiding at the trial in the court below, instructed the jury that the evidence offered in defense, giving to it the most favorable construction of which it was susceptible, did not constitute a defense to the action; and the law court sustained the ruling. And this ruling was not based on formal or technical defects in the evidence; it was based on its inherent weakness and utter insufficiency to establish the facts on which the defense rested. And for this reason, if there were no other, the court would feel compelled to refuse the relief asked for in this suit.

Bill dismissed with costs.

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

SYLVANUS JORDAN, in equity, *vs.* SARAH A. CHASE.

WALTON, J. This is a suit in equity presented at the same time and supported by the same evidence as the foregoing suit of *Alley* v. *Chase*. And for one of the same reasons,—namely,

the inherent weakness and utter insufficiency of the evidence in support of the facts on which the right to the relief asked for rests,—the same entry must be made.

Bill dismissed with costs.

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

G. P. Dutton, for complainant.

Wiswell, King and Peters, B. E. Tracy, with them, for defendant.

INHABITANTS OF PHILLIPS, PETITIONERS for CERTIORARI,

vs.

COUNTY COMMISSIONERS of FRANKLIN COUNTY.

Franklin. Opinion June 1, 1891.

Way. Appeal. Committee. Certiorari.

Where an appeal has been taken from the decision of county commissioners in laying out a highway, all objections to their jurisdiction or their otherwise invalid proceedings may be taken when the report of the committee is offered for acceptance. If not then taken no writ of certiorari will be sustained to quash their proceedings.

ON EXCEPTIONS.

This was a proceeding on a writ of *certiorari*, granted on the petition of the inhabitants of Phillips wherein they asked the court to quash the records of the court of county commissioners, for Franklin county, of the location by the commissioners of a highway in said town on petition of Scott Hodgkins and others.

The petition for the writ was dated August 17, 1889, and alleged that the proceedings in laying out the road were not according to the statute, but were defective in several particulars. By an order dated August 21, 1889, the commissioners were directed to appear at the following September term of the Supreme Judicial Court, at Farmington, to show cause, if any, why the writ should not issue. After due notice, the commissioners appeared and objected to the issuing of the writ, and upon which the court after hearing ordered the writ to issue return-

able at the following term in March. At that term, upon due service of the writ, the commissioners certified the tenor of the record of their proceedings and their judgment thereon.

In their answer to the petition for the writ, the commissioners denied the allegations of error, defective proceedings, &c.

After full hearing, the presiding justice made the following order, decree and ruling: "Writ of *certiorari* quashed with costs. Disposition of writ to be certified to the County Commissioners." To this order, decree and ruling the petitioners excepted.

A brief resume of the history of this road is as follows:—

The first move in the matter of securing the establishment of a more convenient and an easier road between Phillips and Madrid was made in 1882, and the commissioners located this road; the petitioners in this case then appealed, and a committee was agreed upon who confirmed the doings of the commissioners; objections were filed to the acceptance of the report of the committee, which were overruled and exceptions allowed, which, after being argued, were overruled by this court; next, a petition for discontinuance was presented, a hearing had by the commissioners, being partially, if not an entirely new board; they refused to discontinue; an appeal was taken and a committee agreed upon, who again confirmed the doings of the commissioners in refusing to discontinue the road; objections were filed to the acceptance of the report of the committee, which were overruled, and exceptions were taken, and again were overruled, when, the present proceedings were begun.

F. E. Timberlake, for petitioners.

P. A. Sawyer, for respondents.

VIRGIN, J. When an appeal has been taken from the decision of county commissioners in laying out a highway, all objections to their jurisdiction or their otherwise invalid proceedings may be taken when the report of the committee is offered for acceptance in the Supreme Judicial Court. *Small* v. *Pennell*, 31 Maine, 267; *Scarboro'* v. *Co. Com.* 41 Maine, 605; *Goodwin* v. *Co. Com.* 60 Maine, 328; *Hodgdon* v. *Co. Com.* 68 Maine,

226; *White* v. *Co. Com.* 70 Maine, 317, 325. And if not then taken no writ of *certiorari* will be sustained to quash their proceedings. *Monaghan* v. *Longfellow*, 82 Maine, 419.

Exceptions overruled.

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

ALEXANDER MCKENZIE *vs.* LINNEUS CHEETHAM.

Androscoggin. Opinion June 1, 1891.

Landlord and Tenant. Unsafe Premises. Negligence. Implied Invitation.

One who visits a dwelling-house on the express or implied invitation of the tenant at will cannot be deemed as present therein on the implied invitation of the landlord.

ON EXCEPTIONS.

This was an action on the case in which the plaintiff declared as follows:

"For that the said defendant, at said Lewiston, on the 10th day of January, 1889, was the owner of a certain building situated on the easterly side of Lisbon Street, in said Lewiston, and numbered 292; that a certain tenement in said building was then and there let by the defendant to one Sampson, who occupied the same as a dwelling-house; that said tenement was up-stairs, and the way of ingress and egress to and from the same was over a short flight of stairs, with a short flight of stairs joining a second flight of stairs, with a short wooden landing between said stairs; that said stairway and landing were provided by said defendant as a means of ingress and egress as aforesaid for said tenant and for those lawfully going in and out of said tenement; that said stairways and landing were under his control and charge, and that he was bound to keep the same in a safe condition for the purposes aforesaid; that wholly unmindful of his duty as aforesaid, the defendant neglected to keep said landing in safe and suitable repair, and negligently allowed the timbers and boards of the same to become rotten and unsafe to pass over as aforesaid; that the said landing at the time of the aforesaid letting was rotten, unsafe and danger-

ous to pass as aforesaid, and was then and there a nuisance; that the plaintiff on the 10th day of January aforesaid, in the evening, was lawfully at said building in the tenement occupied by said Sampson as a guest of said Sampson, that on leaving he was obliged to go over said stairways and landing and then and there undertook to do so; that while going down from the upper stairway upon the landing between said stairways, being wholly ignorant of the dangerous condition of said landing and wholly unable to ascertain its dangerous condition by the exercise of due care and caution, and being then and there in the exercise of due care and caution, by the breaking of said landing was suddenly precipitated downwards, striking against the flooring and timbers of said landing and other hard objects, and thereby received severe bruises upon his hip and thigh and at the lower extremity of his spine, together with severe internal injuries, . . . and the plaintiff further says that said injuries were caused by the negligence of said defendant as aforesaid."

The evidence tended to show that the tenement was let to Sampson on the 24th day of November, 1888, as a tenant at will, and was occupied by said tenant as a dwelling-house from that time forward; that there was no agreement between the defendant and Sampson as to the making of any repairs on said tenement after the letting, except such as it was conceded were made by him; that there were no other tenants occupying said premises and having occasion to use said stairway, and that said stairway was the only means of access to and from said tenement and defendant claimed it was under the exclusive control of said tenant and a part of the tenement hired by him; that said defendant occupied the store under said tenement, as a grocery store, that the stairway and landing led up on the outside of the building to the flat roof of the ell over the store, and thence by a walk along the roof of this ell to the outer door leading into the tenement in question, and that the roof of the ell was used by the tenant for various purposes; that the tenement in question had been unoccupied for a period of about a year prior to the letting to Sampson, and that the landlord had owned the building for many years; and the plaintiff claimed that the

landing was a nuisance and was defective and dangerous at the time of the letting to Sampson, on November 24th, and introduced evidence tending to show such condition; and that the plaintiff with his wife and child were making a friendly social call on the Sampson family in the evening of January 10, and while leaving said tenement, and in the exercise of due care stepped on the landing of said stairs, which broke by reason of its rottenness, and the plaintiff was thereby thrown to the ground and injured.

The presiding justice in order to give progress to the case upon the question of damages ruled *pro forma*, as matter of law, that under the facts, as developed by the evidence, the defendant impliedly, at least, invited the plaintiff to pass over the premises on the occasion of his injury,— that there was an implied invitation.

To this ruling and instruction, the defendant excepted. The jury returned a verdict for the plaintiff, and assessed the damages at two hundred and fifty dollars.

White and Carter, for defendant.

There is no allegation of knowledge on the part of the landlord of the alleged defective and dangerous condition of the stairway, nor was there any evidence of knowledge on his part as to its condition at the time of letting.

The case distinctly discloses that there was no agreement on the part of the landlord to make repairs. It was a case of ordinary letting, the tenant taking the premises as they were.

This plaintiff was a mere guest of the tenant, and was upon the premises making a friendly and social call upon the Sampsons. He was not there at the request of the landlord.

Savage and Oakes, for plaintiff.

There attaches to every dwelling-house, let for that purpose, an implied invitation to all persons to visit it in the usual manner for social calls or for business. The tenant or any member of his family would have been able to recover against

the defendant for injuries resulting from any such concealed danger. *Cowen* v. *Sunderland*, 145 Mass. 364.

If, on the other hand, the plaintiff was a stranger in the eyes of the law, two questions are involved: whether the liability of one who erects a nuisance continues after he demises the premises; and if so, in favor of what parties. In case of an injury to a stranger by the defective repair of premises let to a tenant, the landlord is liable in case of his misfeasance; as for instance, where he lets premises in a ruinous condition. *Nelson* v. *Liverpool*, L. R. 2 C. P. Div. 311.

Where an owner of land demises it with a nuisance upon it, he is presumed to authorize its continuance by putting it in the power of another person to continue it, and he is liable to a third person subsequently injured thereby, notwithstanding the demise. *Clancy* v. *Byrne*, 56 N. Y. 134; *Waggoner* v. *Jermaine*, 3 Denio, 306; *Swords* v. *Edgar*, 59 N. Y. 37; *House* v. *Metcalf*, 27 Conn. 631; *McAlpin* v. *Powell*, 70 N. Y. 126; note to *Todd* v. *Flight*, 9 C. B. (N. S.) 390; *Dalay* v. *Savage*, 145 Mass. 40.

In the last case, the court says "the reason of the rule that, if a landlord lets premises in a condition which is dangerous to the public, or with a nuisance upon them, he is liable to strangers for injuries suffered therefrom, is that by the letting he has authorized the continuance of the nuisance." The court also say in the same case "that it seems to be settled that, if the landlord lets premises abutting upon the way which are from their condition or construction dangerous for persons lawfully using the way, he is liable to such persons for injuries suffered thereupon, although the premises are those occupied by a tenant." In that case, neither the landlord nor the tenant were liable to each other for keeping the coal-hole in repair, but it was defective when the demise was made, and the plaintiff, in the exercise of due care, fell into it.

The plaintiff was a stranger. He was not an inmate of the house. He neither ate nor slept there. He had no contract relations to the dwelling-house. Was only a casual visitor for an evening; only a guest for an hour. In modern society, social calls are so frequent

that they must be recognized by the law. They are so common and so universal that people, who let houses, must be understood to let them with an expectation that they, and the approaches to them, shall be used among other things for the purpose of making friendly, social calls.

If plaintiff was a stranger and in the exercise of a lawful right, he was there in connection with a use for which the house was rented, and not as a mere licensee. Had the defendant rented to the tenant a store fronting upon the street, and had the approaches to the store been rotten and defective, so as to constitute a nuisance, and had any person gone into the store over such an approach, and been injured by its defective or dangerous condition, the landlord would undoubtedly have been liable; because, by letting a store or shop with approaches thereto he gives an invitation to the public to visit that store or shop over those approaches, for the purpose of business. *Campbell* v. *Portland Sugar Co.* 62 Maine, 562.

But the courts have never drawn any line between the purpose of business and the purpose of pleasure; between barter or gain, and social calls. One is just as lawful a purpose as the other. To go to the store or shop for business purposes, of course, accords with the design for which the store or shop was rented. To go to a dwelling-house rented, with the approaches rented with it for social purposes accords equally well for the purposes for which that dwelling-house was rented. The use in either case is one which grows out of the demise of the property. So that a stranger, approaching either the store or the house for the purpose of visiting it for business or pleasure, is not a mere licensee; but is there upon the implied invitation contained in the use to which the building is put.

In *Sweeny* v. *O. C. R. R. Co.* 10 Allen, 373, the court says, "the gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure and for motives to which no act or sign of the owner or occupant contributed; but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers. . . . That it was in accordance with the intention

and design with which the way or place was adapted and prepared or allowed to be so used. A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability, but if he directly or by implication induces persons to enter on or pass over his premises, he thereby assumes an obligation that they are in a safe condition and suitable for such use."

The defendant is liable because of a breach of duty. To whom did he owe that duty? He rented a house. The only approaches to it were in such dangerous condition as to constitute a nuisance, He knew it was to be used by the tenant and by any persons who might lawfully visit the tenant. His duty was to repair the same, not only for his tenant's use, but for any others who might lawfully have occasion to use the same.

VIRGIN, J. Action on the case by a guest of the sole tenant of a second-story tenement, occupied as a dwelling-house, against the landlord to recover damages for a personal injury caused by the defective landing of a stairway which was the only means of ingress and egress to and from the tenement.

The tenancy commenced in October, 1888. On the evening of January, 10, following, the plaintiff made a social call on the tenant; and when in the act of leaving, he reached the landing it fell and caused the injury for which damages are sought.

The foundation of the action is alleged negligence on the part of the defendant; that he did or omitted to do an act in violation of a legal duty or obligation which he owed the plaintiff and consequent damages.

In the purchase of real as well as of personal estate, parties make their own contracts which the law construes and enforces. When one is negotiating for the lease of a dwelling-house the same as when bargaining for a personal chattel, it is his privilege to inspect and ascertain for himself its actual quality and conditions; and the parties make such express agreements relating thereto as they think fit. If the lessee, instead of exacting from the lessor any warranty of its present or future state of repair, elects to rely upon his own judgment, the law in the absence of

any fraud or concealment on the part of the lessor, leaves the lessee to the operation of the maxim *caveat emptor* and he takes the premises as he finds them for better or worse. *Hill* v. *Woodman*, 14 Maine, 38, 42; *Gregor* v. *Cady*, 82 Maine, 131; *Keates* v. *Cadogan*, 10 C. B. (70 E. C. L.) 591. For the mere letting, without additional stipulations by the lessor, simply implies that he holds the title and that the lessee shall quietly enjoy the use and occupation during his tenancy; and not that the premises are or shall be in any particular condition or state or repair, or that they are suitable for the purpose for which they were let. *Arden* v. *Pullen*, 10 M. & W. 321; *Sutton* v. *Temple*, 12 M. & W. 52; *Hart* v. *Windsor*, 12 M. & W. 68, 85; *Libbey* v. *Tolford*, 48 Maine, 316; *Gregor* v. *Cady*, *supra*; *Foster* v. *Peyser*, 9 Cush. 242; *Willis* v. *Castle*, 3 Gray, 356; *Jaffe* v. *Harteau*, 56 N. Y. 398, 401; *Bowe* v. *Hunking*, 135 Mass. 383; *Tuttle* v. *Gilbert Manf. Co.* 145 Mass. 169, 176. Such is the general rule of law in this country as between lessor and lessee. If a lessee in this State would have the result otherwise, he must bring it about by some express stipulation in the lease, until the rule shall become modified by the legislature as it was in England, in 1885, by St. 48 & 49, Vict. c. 72; *Walker* v. *Hobbs*, (L. R.) 23 Q. B. D. 458. It does not apply to premises over which the lessor retains control, as a common passageway by which several tenements are reached. *Toole* v. *Beckett*, 67 Maine, 544; *Sawyer* v. *McGillicudy*, 81 Maine, 318.

The rule is subject to an exception arising from a duty which the law, under certain circumstances, imposes upon the lessor because of the relation subsisting between him and his lessee. For if, at the time of the letting, there is some latent or concealed defect in the premises, consisting of original structural weakness, decay or infectious disease, which the lessor knows renders their occupation dangerous and is not known to the lessee or discoverable by his careful inspection, the law makes it the duty of the lessor to disclose it; and a failure to do so is actionable negligence if injury results. *Cowen* v. *Sunderland*, 145 Mass. 363; *Bowe* v. *Hunking*, 135 Mass. 380, and cases

there cited; *Scott* v. *Simons*, 54 N. H. 426, 431; *Walden* v. *Fitch*, 70 Pa. St. 460; *Edwards* v. *N. Y. & H. R. Co.* 98 N. Y. 245; *Minor* v. *Sharon*, 112 Mass. 477; *Cesar* v. *Karutz*, 60 N. Y. 229; *Wallace* v. *Lent*, 1 Daly, 481.

While the rule *caveat emptor* applies to lessees for the reason that they can, if they will, protect themselves by inspection and contract, no such reason exists for applying it to such third persons as the law denominates strangers and do not stand on the same footing with the lessee. But when a lessee enters into a dwelling-house under a lease for years or as a tenant at will, he, in the absence of any stipulation to the contrary, has full possession and sole control thereof and it is practically his own private property *pro hac*. No one, not even the lessor himself, can lawfully enter without the lessee's permission or invitation express or implied. *Mellen* v. *Millett*, 126 Mass. 545. The law leaves it to the tenant to say who shall be his guest in his private dwelling-house. And if a guest does so enter and while there is injured, without his own fault, by some defect therein, he must seek his damages from him whose invitation impliedly assured him he could enter safely and who alone is responsible for the defect which caused the injury. In such a case the guest can have no greater claim against the lessor than the lessee himself and the members of his family have. *Robbins* v. *Jones*, 15 C. B. (N. S.) 221; *Bowe* v. *Hunking*, 135 Mass. 380, 383; *Burdick* v. *Cheadle*, 20 O. St. 393 (S. C. 20 Am. R. 767); *Moore* v. *Logan, I. & S. Co.* 4 Cent. R. 505-6; *O'Brien* v. *Capwell*, 59 Barb. 497; *Nelson* v. *Liv. B. Co.* (L. R.) 2 C. P. D. 311; 1 Thomp. Neg. 323; Shear. & R. Neg. § 503.

If when let, premises are in a condition which is dangerous to the public, or with a nuisance upon them, the landlord may be liable to strangers for injuries resulting therefrom; for by the letting of them in that condition and receiving rent therefor he is considered as authorizing the continuance of the nuisance. *Nugent* v. *B. C. & M. R. R.* 80 Maine, 62, 77, 78, and cases cited; *Godley* v. *Hagerty*, 20 Pa. St. 387; *Stratton* v. *Staples*, 59 Maine, 94; *Burbank* v. *Bethel, S. M. Co.* 75 Maine, 373, 383; *Nauss* v. *Brua*. 107 Pa. St. 85; *Fow* v. *Roberts*, 108 Pa.

St. 489; *Dalay* v. *Savage*, 145 Mass. 38; *Joyce* v. *Martin*, 15 R. I. 558; *Ahern* v. *Steele*, 115 N. Y. 203.

Our opinion, therefore, is that the exceptions must be sustained.

Exceptions sustained.

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

BENNING C. ADDITON, in equity,

vs.

HARRIET N. SMITH, and others.

Penobscot. Opinion June 1, 1891.

Will. Annuities. Dower. Presumption of equity. Fixed Charge. R. S., c. 103, § 10.

Where a testator gives annuities to his widow and niece as general legacies, each being a simple bequest, an absolute gift of a definite quantity, there is a presumption of intended equality, unless the will contains unequivocal evidence of an intention to give a preference.

This rule applied to a case where the annuity given to the widow was in addition to her dower, and that to the niece by a codicil exhibiting a thoughtful solicitude for her condition; the testator providing that, by the payment of the taxes, insurance and repairs of his homestead, "None of the gifts, or bequests, or rights to my said wife and to my said niece shall be impaired or diminished;" and finally providing that "It shall be the duty of my said executors to so dispose of and invest my estate that there shall be, from year to year, a sufficient income to meet all said legacies and bequests."

A demonstrative legacy has a prior right to payment out of the fund charged, but is payable at all events out of the principal of the estate if the fund proves inadequate.

ON REPORT.

Bill in equity, heard on bill and answers, brought by the trustee to obtain the construction of the will and codicils of Jacob C. Smith, late of Bangor, deceased.

E. Walker, for Harriet N. Smith.

H. C. Goodenow, for Addie Hill.

Complainant submitted the case without argument.

WHITEHOUSE, J. By the provisions of his will and codicils Jacob C. Smith gave to his wife, Harriet N. Smith, the use of the homestead and furniture and an annuity of $500.00, during

her widowhood, in addition to her right of dower in his real estate; to his niece, Addie Hill, an annuity of $100.00; and to his adopted daughter, Emma Smith Cushing, and her heirs, the residue and remainder.

The will was dated April 27, 1876, and the last codicil, February 21, 1877. The testator died March 30, 1878, and in December following, the estate was inventoried as follows: real estate, $7,900.00; goods and chattels, $564.50; rights and credits, $8,483.93;—total, $16,948.53. At the date of the complainant's bill the widow had received in the aggregate $3,600.00, being $300.00 a year for twelve years, on account of her annuity, while the niece, Addie Hill, had received but $50.00 in the aggregate, being two payments of $25.00 each in the year 1878. It now appears that by reason of *devastavit* on the part of a former representative of the estate, and from other causes, the entire property in the hands of this complainant as trustee under the will is as follows: homestead, $2,500.00; undivided Grant store, $800.00; land, $450.00; furniture for widow, $164.50; rights and credits estimated, $5,300.00. It further appears that the income from the estate, available for that purpose under the terms of the will, is not sufficient to pay the annuity to the widow irrespective of that bequeathed to Addie Hill. The trustee, therefore, seeks by his bill to obtain a judicial construction of the will and codicils, and to have the rights of the legatees determined and declared, propounding two questions as follows:

1. Whether under said will and codicils, annuities therein specified, or any of them, are an absolute charge on the estate of said testate, regardless of the income.

2. What are the respective rights of the legatees under the provisions of said will and codicils?

It is elementary law that all codicils or "little wills" being but expositions of the testator's afterthoughts, are to be regarded as parts of the original will, and together with the will are to be construed as one instrument. They should be so interpreted as to harmonize with the leading purpose declared in the body of the will whenever this can be done without a violation of

established rules; but when a clause in the will and one in the codicil are entirely inconsistent and both cannot be executed, the latter clause must prevail. Redf. on Wills, 1, *287. *Pickering* v. *Langdon*, 22 Maine, 413.

In the cardinal rules of testamentary construction it is also constantly affirmed by courts and text writers to be of fundamental importance that the obvious intention of the testator, as expressed by the words of the will itself, shall be allowed to prevail unless some principle of sound policy is thereby violated; that this intention shall be collected from the whole will taken together, all its parts being construed in relation to each other so as to form if possible one consistent whole, every word receiving its natural and common meaning; but where several parts are absolutely irreconcilable the latter must prevail; and that while the language of the will is thus to be deemed the primary source from which the testator's intention is to be gathered, and this is not to be controlled by mere conjectures based on considerations respecting the condition of his property or the objects of his bounty, still these extrinsic circumstances are admissible in aid of the construction of wills to the extent of explaining doubts or removing uncertainties when with that aid the intent is clear. 2 Jarman on Wills, page 762, and rules VII and X; 1 Redf. on Wills, page *429–432, and authorities cited; Schouler on Wills, § 466; *Shaw* v. *Hussey*, 78 Maine, 495; *Emery* v. *Bachelder*, 78 Maine, 233. But while these general principles declared by the experience of courts to be helpful in the majority of cases are not to be lightly disregarded, they are not to be blindly followed as inflexible and conclusive rules in each particular case. They are to be employed as servants and not accepted as masters. *Small* v. *Allen*, 8 T. R. 497.

It is ably and ingeniously argued, in the first place, that the annuity to the widow should have priority over that to the niece, Addie Hill; and secondly, it is contended that the widow should receive the full amount of her annuity each year, although it is conceded to be necessary to intrench upon the *corpus* of the estate to supply the deficiency.

1. It is important to observe that this annuity to the widow

is not a testamentary gift founded upon a valuable consideration, such as the relinquishment of the widow's right of dower in her husband's estate. In such case it is a familiar and well-settled rule that she does not take strictly as a beneficiary, but as a purchaser for a valuable consideration, and hence her gift will have a preference over all other unpreferred legacies. 2 Redf. on Wills, 452–4; *Towle* v. *Swasey*, 106 Mass. 100; *Moore* v. *Alden*, 80 Maine, 301. But here the annuity was not given or accepted in lieu of dower. On the contrary in the original will it is expressly declared to be in addition to her dower; the first codicil gives her the use and income of the entire homestead through her widowhood, and the second codicil after increasing her annuity from $300 to $500, carefully provides that this additional bequest "shall not take away any of the gifts, bequests or rights, given to her under my said last will and first codicil." She is entitled to her dower as well as to the provisions made for her in the will, because in the words of the statute, chapter 103, § 10, "it appears by the will that the testator plainly so intended." True, by accepting the provisions of the will, she relinquished the privilege of applying to the probate court for an allowance, but she surrendered no fixed and absolute interest in the estate in exchange for the annuity, and cannot be deemed to have received it in the character of a purchaser.

An annuity given by a will is a legacy charged on the whole estate not specifically devised. 2 Williams on Exrs. 1051. The annuities to the widow and niece are in the nature of general legacies; neither of them amounts to a bequest of any particular portion of, or article belonging to, the personal estate of the testator. Each is a simple bequest of an annuity, an absolute gift of a definite quanity. And the general rule is, that among legacies in their nature general, there is no preference of payment, and the burden is on the party seeking priority to make out clearly and conclusively that such priority was intended. 2 Williams on Exrs. 1364; *Miller* v. *Huddlestone*, 3 Macn. and Gord. 503; 2 Redf. on Wills, 454. In the absence of clear proof to the contrary the testator must be deemed to have acted on the belief that his estate would be sufficient to answer the

purposes to which he devotes it. If the chances of deficiency are anticipated and provided for by the terms of the will, then the directions of the testator must govern, *Towle* v. *Swasey*, *supra*; "but in the common case of a direction in the will of a testator to pay several pecuniary legacies out of his estate," says Chancellor Walworth, "the presumption is that the testator intended that all the legacies should be paid equally. Such presumption of intended equality will not be repelled by any ambiguous expressions in the will but must be allowed to prevail unless the will contains unequivocal evidence of the testator's intention to give some of the legatees a preference in case the fund should be found insufficient to pay all. *Shepherd* v. *Guernsey*, 9 Paige, 357. See also 1 Roper on Leg. 421-425; *Emery* v. *Bachelder*, *supra*.

It is not questioned that by the terms of the original will the widow's annuity had priority over the "residue and remainder" given to Mrs. Cushing. The name of the nieces Addie Hill, is not there mentioned. But during the succeeding eight months a thoughtful solicitude respecting the condition of Addie Hill, awakened by causes of which we have no knowledge, prevailed with the testator to make her an object of his care and bounty. Thereupon, in the first codicil after giving to the widow, in addition to the annuity given in the will, the use and income of the homestead and furniture, he proceeds in the second clause as follows: "I hereby give and bequeath to my niece, Addie Hill, . . . the sum of one hundred dollars per annum during her natural life, to be paid to her by the executors of my said will, in installments of fifty dollars every six months after my decease and during her natural life; and it is my will, and said executors are hereby directed to invest immediately after my decease a sum sufficient to yield an annual income of one hundred dollars, which investment shall be so made that the said semi-annual interest of fifty dollars shall be paid to said Addie Hill, at the end of every six months during her natural life; the same *so* to be invested from that part of my estate which would have gone to Emma Smith Cushing, had not this codicil to my said will been made, that at the decease

of said Addie Hill, the sum so invested for her benefit shall then be disposed of according to the terms of my said will."

All the provisions of the will and codicils, viewed in the light of the probable condition of his property, clearly indicate that the testator had no doubt whatever that his estate would be amply sufficient to respond to these two annuities with a residue for Mrs. Cushing. The chances of a deficiency are not anticipated or provided for by the terms of the will. He accompanies the bequest to the niece with explicit directions to his executors "to invest immediately after my decease a sum sufficient to yield an annual income of one hundred dollars." True, he adds, that the sum was *so* to be invested from the portion which would have gone to Mrs. Cushing that, at the decease of Addie Hill, it should be disposed of according to the terms of the will. This was obviously designed to re-affirm the provisions of the will in favor of Mrs. Cushing, as modified by the codicil. By the will she was to have the residue and remainder subject to the bequest to the widow. By the will and codicil she is only to have the residue subject to both annuities. The clause in the codicil giving the annuity to Addie Hill is to be examined in connection with the original will and construed as it would have been if inserted between the first and second items of the will. Its relative force and effect would then be readily apprehended. The testator carves two annuities from his estate, one for his wife and one for his niece, and then gives the residue to the adopted daughter, Emma Smith Cushing, and her heirs. This is the effect of all the clauses taken together.

The provisions of the second codicil are strongly confirmatory of this view. After increasing the widow's annuity from $300 to $500, the testator declares "that this additional bequest shall not take away any of the gifts, bequests, or rights, given to her under said last will and first codicil." He then provides that the cost of insurance, taxes and repairs on the homestead shall be paid from the income of his estate, but that "by the payment of the same none of the gifts or bequests or rights to my said wife and to my said niece, Addie Hill, shall be impaired

or diminished." Finally he provides that "it shall be the duty of my said executors to so dispose of and invest my estate that there shall from year to year be sufficient income to meet all said legacies and bequests."

"The presumption of intended equality" between the two legatees in question is not overcome by "unequivocal evidence of the testator's intention to give a preference;" on the contrary there is clearly discernible through the language of the codicils a positive intention to place the two annuities upon that equality in which "equity delighteth."

2. Are the annuities to the widow and niece made an absolute charge on the estate or dependent for payment exclusively upon the income?

The general rule is, that after certain legacies are given without any express provision of means of payment, a residuary gift blending the real and personal property of the testator creates a charge of the legacies upon the entire estate, the word residue implying that such payments are first to be made. 3 Jarman on Wills, 426–427; *Reynolds* v. *Reynolds*, 16 N. Y. 257, and authorities cited; *Taylor* v. *Dodd*, 58 N. Y. 375. It is manifest that, by the terms of the original will, the annuity of the widow under the above rule was a charge upon the whole estate; but it is claimed that the language of the codicils indicates an intention to restrict the payments to the income of the property.

It is not controverted that, if there is a simple bequest of an annuity, whatever the income of the testator's property may be, the annuity must be paid in full to the last dollar of the property; but the provisions of the will, as to the payment of the annuity, may be such as to show an intention on the part of the testator that the annuity shall only come out of the income of the fund or estate, and not out of the *corpus* or *capital*. 2 Williams on Exrs. 1360.

In *Croly* v. *Wells*, 3 DeGex, M. & G. 995, the income was insufficient to pay the annuity and all legacies named in the will, and in holding that the annuity was payable out of the capital, Bruce, V. C., says: "The question may be put thus; does the subsequent language show a clear intention otherwise, for if

a clear intention be shown in an earlier part of the will, that can only be displaced or changed by an intention equally clear in another part. If there is anything in the rest of the will derogating from an intention to be collected from the words of this will, it does no more than create a doubt and the doubt is not sufficient to prevail against the clear effect that would have to be given to the words of the gift standing alone." In *Baker* v. *Baker*, 7 DeGex, M. & G. 681, the assets proved insufficient to provide a capital sum which would yield a clear annual income of £200 given by the will, and it was held that the widow was entitled to have the amount paid in full out of the capital.

The predominant idea of the cases seems to be that, where the testator bequeaths a sum of money or, which is the same thing, a life annuity, in such a manner as to show a fixed and independent intention that the money shall be paid to the legatee at all events, that intention will not be permitted to be overruled merely by the direction in the will that the money is to be raised in a particular way or out of a particular fund, such direction being a secondary thought. *Pierpont* v. *Edwards*, 25 N. Y. 128; *Mann* v. *Copland*, 2 Mad. 223. If it be manifest that there was such intent separate and distinct from the property designated as the source of payment the legacy will be deemed general or demonstrative, though accompanied by a direction to pay it out of a particular estate. *Walls* v. *Stewart*, 16 Pa. St. 280. In *Smith* v. *Fellows*, 131 Mass. 20, the testator gave to his widow an annuity of $1000, during life to be paid from the income of all his property, and the court says: "The annuity given to the wife was no more a specific legacy than a legacy charged generally upon real estate. It is rather in the nature of a demonstrative legacy which has a prior right to payment out of the fund charged, but is payable at all events out of the principal of the estate if the fund proves inadequate." In *Moore* v. *Alden*, 80 Maine, 301, the annuity was made payable "from the earnings of my individual and partnership property," and it was held that the full annuity should be paid to her until the estate was exhausted. In the opinion the Chief Justice says: "The gift is unconditional and

absolute, although, as is often the case, he overestimates the sources of suppy which were to assure its payment. The sources indicated turning out to be insufficient, others must be taken to suppy the deficiency."

In the light of these principles and authorities, it is the opinion of the court that the testator's directions respecting the investment of his estate, and his allusions to income as a source of payment, are not sufficient to overcome his clearly expressed desire and purpose to make definite provision for the support of the two annuitants by bestowing upon each the gift of a fixed sum to be paid semi-annually, during the widowhood of the one and the natural life of the other. The conclusion, therefore, is that the annuities bequeathed to Harriet N. Smith and Addie Hill, standing on a basis of equality in relation to each other and to the estate, must be held a charge upon the entire property; that they are not contingent upon the sufficiency of the income, but if that proves inadequate they are payable at all events out of the entire principal available under the terms of the will, suffering proportional abatement, however, whenever there are not available fund sufficient to make full paymensts.

Decree accordingly.

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

ASA P. ST. CLAIR *vs.* JAMES S. CLEVELAND.

Knox. Opinion June 1, 1891.

Insolvency. Mortgage. Record. Prior Creditor. R. S., c. 70, § 33.

A receipt and bill of sale of chattels were given *bona fide* for money loaned, and subsequently a promissory note and a formal mortgage of the same chattels, of the latter date, were given for the same loan. *Held*; that the latter were a renewal and not given by a "debtor to secure a debt to a prior existing creditor" within the meaning of R. S., chap. 70, § 33; and to be valid against the assignee in insolvency of the mortgagor the mortgage need not be "recorded three months at least prior to the commencement of the mortgagor's proceedings in insolvency."

ON EXCEPTIONS.

This was an action of replevin brought by the plaintiff, as assignee in insolvency of A. F. Cleveland, against the defend-

ant, to recover the possession of a soda-fountain and other articles of personal property. He claimed they were kept and detained by the defendant, by virtue of a mortgage, void under the insolvent law because not seasonably recorded.

The defendant contended that the mortgage was properly recorded, and further claimed title under a prior writing which appears in the opinion of the court. Defendant in his plea denied the taking, and for brief statement of defense alleged he was the owner of the property and had the right of possession.

The defendant testified, among other things, that he had the possession of the property all the time from February 26, 1889, when the loan was made to the insolvent and for which the mortgage was given in October following.

There was a *pro forma* ruling against the validity of the mortgage and the court gave judgment for the plaintiff. Thereupon the defendant excepted to the ruling.

C. E. Littlefield, for plaintiff.

Nothing like § 33 of chapter 70 is found in the bankrupt law, and all the authorities cited by the defendant are cases construing § 52 of chapter 70, or a similar clause of the bankrupt law and have no application or pertinence in the determination of a case arising under § 33, as at bar. The case of *Hutchinson* v. *Murchie*, 74 Maine, 187, discusses only the question of fraudulent preference and does not anywhere allude to § 33, or to the element of record as in any way affecting the question. The facts were such that § 33 would have had no application, and the question was not raised in the case.

The rights of the defendant depend upon the mortgage recorded November 1, 1889. This morgage was "given by the debtor to secure the debt of a prior existing creditor" and "it has not been recorded at least three months prior to the commencement of insolvency proceedings;" hence the title to the property was vested by the assignment in the assignee.

Counsel also cited: *In re, Wynne*, 4 B. R. 23; *In re, Jordon*, 9 N. B. R. 416.

J. H. and C. O. Montgomery, for defendant.

Plaintiff says § 52 does not act as a limitation upon § 33.

Section 52 says: "nothing in this chapter shall invalidate," etc. It places its limitations upon the entire chapter in whatever the provisions of any section are in conflict with it, § 33 with the others. And wherein § 33 requires all conveyances to be recorded in a certain time, § 52 excepts from those requirements, "security taken in good faith on the occasion of making such loan." Section 33 itself specially relates, to securities given to a prior existing creditor.

The cases relied upon by plaintiff are not in point. *In re, Jordon*, 9 B. R. 416, is a case where the first security was a preference. It was given for a pre-existing debt when the debtor was insolvent. The second could be no better. In fact it included additional property. It deals with security tainted with fraud. But in the discussion of that case, the court makes a distinction between such securities and securities made on the occasion of a cash loan. *In re, Wynne*, 4 B. R. 25, the court say: "We do not doubt that the assignee takes the property in the same plight in which it was held by the bankrupt when his petition was filed (*Bradshaw Klein*, 1 B. R. 542) subject to such liens or incumbrance as would effect it if no adjudication in bankruptcy had not been filed. . . . . This is what the act means when it vests in the assignee all property conveyed in fraud of creditors. It does not make any conveyance or incumbrance fraudulent."

These cases are not in conflict with the rules of this court and all courts that have dealt with securities given on the occasion of a cash loan.

VIRGIN, J. Replevin by the assignee of an insolvent estate.

On February 26, 1889, the defendant loaned seven hundred dollars to his son (the insolvent) who, at the same time executed and delivered to him a written instrument of the following tenor: "$700. Received of J. S. Cleveland, $700 to pay notes of G. W. Glover and D. H. Bisbee, for which I give the following as security; one soda-fountain, three marbles and fixtures, four oval front show-cases, one square show-case and one Morris and Ireland Safe."

On October 1, 1889, the son gave to the defendant his promissory note of that date for seven hundred dollars payable in five years with interest annually and at the same time executed and delivered to him a mortgage in the usual extended form, of the same chattels.

The instrument of February, 1889, was never recorded or surrendered in fact, but the formal mortgage was recorded on November 1, 1889.

On November 16, 1889, the son filed his petition in insolvency, the plaintiff was subsequently appointed assignee and received the statutory assignment.

After due demand on the defendant and his refusal to deliver the chattels, the plaintiff, as assignee, on February 24, 1890, replevied them.

The presiding justice who tried the action without a jury, ruled in substance, that the mortgage of October 1, 1889, was "given by the debtor to secure a prior existing creditor;" and it not having "been recorded at least three months prior to commencement of insolvency proceedings" as provided by R. S., c. 70, § 33, was invalid as against the assignee.

But the court are of opinion that the note was but a renewal of the loan, and the mortgage was not given to secure a debt to a prior existing creditor but simply as a renewal of the former instrument of February 26, 1889; and therefore did not come within the provisions of R. S., c. 70, § 33. *Hutchinson* v. *Murchie*, 74 Maine, 187; R. S., c. 70, § 52.

Exceptions sustained.

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

GEORGE S. MAKER, PETITIONER, *vs.* FRANCES L. LAZELL.

Waldo. Opinion June 2, 1891.

Deed. Repugnant Clause. Title. Construction. R. S., c. 73, § 14.

While a grantor may modify, limit and condition his grant, he cannot destroy his grant by words in other parts of his deed of grant.

A grantor in the granting clause of his deed expressly conveyed *all* his right, title and interest in a parcel of land, and then added the following clause:

"This deed is intended to convey the title which was conveyed to me by the deed of B," &c. In fact no title passed to the grantor by the deed of B, but he had a title to the parcel from another source. *Held*; that all the title of the grantor passed by his deed from whatever source his title was derived.

ON EXCEPTIONS.

This was a petition for partition of an island in Penobscot Bay.

The case was tried by the presiding justice, without a jury, and he gave judgment for the plaintiff and ordered partition of the island as prayed for. To this decision and the exclusion of certain evidence offered in defense, and to be found in the opinion, the defendant excepted.

The case is stated in the opinion.

J. H. and C. O. Montgomery, for petitioner.

J. P. Cilley, for defendant.

EMERY, J. The plaintiff by this petition for partition seeks to have two-sevenths of Lassell Island in Penobscot Bay set off to him in severalty. The defendant denies the plaintiff's title.

Both parties claim under Carver and Ames, who, at the time of their deed to the plaintiff, were the admitted owners of the whole island in fee. Their deed to the plaintiff was the earlier deed, and was in the usual form of a quitclaim deed, with covenants of warranty against all persons claiming under them, and was duly executed, acknowledged and recorded. The granting clause and description were in the following words: "We [Carver and Ames] . . . do hereby remise, release, bargain, sell, and convey and forever quitclaim unto the said Maker and his heirs and assigns forever, all our right, title and interest in and to, two-sevenths of an Island known as Lassell Island in Penobscot Bay. . . . . This deed is intended to convey two-sevenths of the title which was conveyed to us by deed of Edwin C. Burleigh, of said Island, and agreeably to clause in said Burleigh's deed should the title of the State in said Island be found not to be in the State, and the consideration money be repaid to us, we agree to refund to said Maker two-sevenths of the amount received back from the State, and deducting charges and expenses of obtaining the same. To have and to hold," &c.

The plaintiff put the foregoing deed to him in evidence and rested.

The defendant claimed title under a subsequent deed of the same island from the same grantors. The defendant then asked the court to take judicial notice that Edwin C. Burleigh, was at the time, the State Land Agent; and that his deed referred to in the deed to the plaintiff, was a deed of the State's title, if any. He then offered to show by various kinds of evidence *aliunde*, that the State had no title to convey; that no title passed to Carver and Ames by the Burleigh deed; that the State by legislative resolve had, for that reason, repaid to Carver and Ames the consideration money under that deed; and that Carver and Ames had settled with Maker for two-sevenths of the same, the latter accepting the settlement in full for his claim under their deed to him.

The presiding justice ruled that all the defendant's offered evidence was immaterial, and that, the title of Carver and Ames from other sources being admitted, their deed to the plaintiff vested in him two-sevenths of the island. Partition was ordered accordingly. To these rulings the defendant excepted.

The defendant's contention is substantially as follows: The language of the deed to the plaintiff, especially the clause beginning "this deed is intended," &c., (as before quoted,) read in the light of the attending circumstances (which they offered to show) would make it manifest that the deed was only intended to assign to the plaintiff two-sevenths of whatever title Carver and Ames acquired under the Burleigh deed,—they retaining all title they may have acquired from any other source. The offered evidence would have shown that the Burleigh deed conveyed no title and hence that the deed of Carver and Ames to the plaintiff conveyed to him none of their title. In other words, the defendant contends that all the language of the deed and the facts to be shown by his offered evidence, would have destroyed the deed as an instrument of conveyance of an interest in land, and left it with all its formalities a mere promise to account for money.

In support of this contention, the defendant invokes the broad

proposition that, in considering written instruments, courts should always seek for the actual intent of the parties, and give effect to that intent when found, whatever the form of the instrument. The proposition has been stated perhaps as broadly as this in text books and judicial opinions, but it is not universally true. It is hedged about by some positive rules of law which the parties must heed, if they would effectuate their intent, or avoid consequences they did not intend. Muniments of title especially are guarded by positive rules of law to secure their certainty, precision, and permanency. If, in the effort to ascertain the real intent of parties, one of these rules is encountered it must control, for no positive rule of law can be lawfully violated in the search for intent.

Some of these rules prevent an intent from becoming effectual, however clearly expressed, because the language required by the rule was not used. A deed of conveyance will not ordinarily operate to convey an estate of inheritance, unless it contains the word "heirs," however clearly the grantor may have expressed that intent in other words. Some of the rules will give a deed a different effect from that which the grantor plainly expressed. The famous rule in Shelley's case is an example. In *Thong* v. *Bedford*, 4 M. & S. 362, a testator devised lands to his daughter for her life, remainder to the heirs of her body, and then explicity declared it to be his "will and meaning" that his daughter should only have an estate for life. It was held, however, by the King's Bench, per Lord Ellenborough, C. J., that the daughter nevertheless took an estate tail.

There is one rule pertaining to the construction of deeds, as ancient, general and rigorous as any other. It is the rule that a grantor cannot destroy his own grant, however much he may modify it or load it with conditions,—the rule that, having once granted an estate in his deed, no subsequent clause even in the same deed can operate to nullify it. 11 Bacon's Ab. 665. Shep. Touch. 79, 102. We do not find that this rule has ever been disregarded or even seriously questioned by courts. We find it often stated, approved, and sometimes made a rule of decision. In *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. Sr. 74,

Lord Chancellor Hardwicke, "in whose judgments equity shone resplendent," declared that the courts either of law or equity, should not adopt such a construction of an instrument of devise as would defeat the interests given. In *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 84, which was a case most elaborately argued and considered, it was said by the court that, where a limitation in a deed is perfect and complete, it cannot be controlled by intention collected from other parts of the same deed.

The rule has been recognized and acted upon in the United States. In *Budd* v. *Brooke*, 3 Gill, 198 and *Winter* v. *Gorsuch*, 57 Md. 180, the Maryland Supreme Court, distinguished for its opinions on real estate law, declared that a grantor cannot contradict, or retract in any subsequent part of his deed a grant made in the premises. In *Ackerman* v. *Vreeland*, 14 N. J. Eq. 23, the equity court of New Jersey, recognized the rule by giving a deed of release full effect as a conveyance, although actually intended only as a partition. In *Wilder* v. *Davenport*, 58 Vt. 642, the grantor in a deed described the land conveyed by metes and bounds, and then added the clause, "Intending hereby to convey the same lands *and no other*, which passed to me by virtue of" (a certain mortgage). The court found, as matter of fact, that the parties only contemplated the land acquired by the mortgage. The metes and bounds description, however, included other land. The court held that the additional land, included in the first description, passed by the deed. In *Cutler* v. *Tufts*, 3 Pick. 272, the grantor conveyed in terms an undivided moiety, and then added words which it was afterwards claimed clearly showed that he really intended to convey an undivided fourth only. The court held that, if such was the meaning, the clause should be rejected for repugnance. In *Wilcoxson* v. *Sprague*, 51 Cal. 640, the grantor (Howard) conveyed in terms, in the granting clause of his deed, all his "right, title and estate in and to all," the tract of land described, and then next inserted the following clause, "It is expressly agreed that the interest hereby conveyed by the said Howard is that only which he acquired by conveyance from S. C. Bruce." It was found, however, that Howard had acquired no interest

by the conveyance to him from S. C. Bruce. The court held, nevertheless, that the quoted clause could not destroy the grant, and that all of Howard's interest was conveyed. In *Green Bay Co.* v. *Hewett*, 55 Wis. 96, the grantor (Martin) "released, quitclaimed, and conveyed [to the plaintiff] all his claim, right, title and interest of every name and nature legal and equitable in and to"—the described property. The deed, however, contained after the description this clause, "The interest and title intended to be conveyed by this deed is that, and that only, acquired by said Martin by virtue of a deed" from one Evarts. The deed from Evarts conveyed only half the land. It was held that this declaration of intent could not weaken the force of prior words of grant.

We think no case has arisen before in Maine, calling for the application or rejection of the rule. The court, however, has occasionally referred to the rule as an existing and binding rule. See *Pike* v. *Munroe*, 36 Maine, 316; *Bates* v. *Foster*, 59 Maine, 160; *Bodwell Co.* v. *Lane*, *ante*, p. 168.

This rule in no way hampers the court in seeking for the real intention of the parties, as to what, or how much land was intended to be conveyed, or as to the extent and duration of the estate intended to be created or transferred, or as to the various conditions, reservations, or exceptions in a deed. It gives full effect to all words in a deed explanatory of a grant. It refuses effect only to language destructive of the grant.

In the deed under consideration, the grantors expressly and in terms declared that they did, "remise, release, bargain, sell and convey, and forever quitclaim . . all their right, title and interest" in the land. They used words, which for centuries have been used in similar instruments to effect a conveyance of title. The words, in themselves, and by ancient association, as plainly and explicitly import an intention to convey title as any in the language. The statute, R. S., ch. 73, § 14, enacts that such words (being the usual words in a quitclaim deed), shall convey the grantor's title as effectually as any other form of words.

No question is raised as to the identity or amount of land,

as to the nature or duration of the estate, as to any condition, reservation or exception. It is contended, however, that the next paragraph, (the clause in relation to the Burleigh deed, and quoted in the statement of the case) with the circumstances offered in evidence completely nullifies the grant thus explicitly and formally made, and destroys as an instrument of conveyance the deed thus solemnly framed and executed. If such be the meaning and intention of that paragraph, if such was the purpose of its insertion in the deed, we think the rule above stated prevents our giving it any such effect, and compels us to reject it as repugnant to the grant.

If it be true that the grantors, in spite of their explicit words, did not in fact intend their instrument to operate as a grant; the remedy, if any, is on the equity side of the court by way of a cancellation, or reformation of the instrument. So long as the deed remains in its present form, uncancelled, it must stand as a muniment of title in the plaintiff, his heirs and assigns. Titles to real estate are more certain and secure by being thus moored to an ancient and well known rule, than by being left to drift in a whirlpool of conflicting expressions of intention.

Exceptions overruled.

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

EVELYN L. HUSSEY *pro ami*, *vs.* CARL C. KING.

Aroostook. Opinion June 2, 1891.

Dogs. Pleading. Due Care. Superior Court. R. S., c. 30, § 1.

In an action under R. S., ch. 30, § 1, to recover for an injury done by a dog kept by the defendant, the plaintiff need not allege and prove in the first instance, his own due care in the matter. The plaintiff makes out a *prima facie* case by proving that he was injured in person or property by a dog kept by the defendant.

The Superior Court for Aroostook County has jurisdiction of personal actions and may award judgment therein for the plaintiff to the amount of five hundred dollars; although the jury returned a verdict for single damages which upon being doubled, under the statute, exceeds that sum.

ON MOTION AND EXCEPTIONS.

This was an action of trespass tried in the Superior Court, for

Aroostook County, to recover damages sustained by a child of tender years, who had been attacked and bitten by the defendant's dog.

(Declaration.) "In a plea of trespass; for that the said defendant, at said Caribou, on the 2d day of July, 1889, was the owner and keeper of a certain bull-dog, and while the said plaintiff was lawfully in the house of the said defendant, under the care of her mother and nurse, she was suddenly set upon, attacked and assaulted by said bull-dog, and violently thrown about, and then and there bitten in the face, neck, and arms by said dog, and torn and lacerated, and then and there greatly frightened and excited by the sudden assault and violence of said dog, and greatly injured thereby, and by reason of said injuries caused by said bull-dog of said defendant, the plaintiff became sick and disordered, and suffered great pain in the parts injured and in other parts of her body, and has become greatly disabled from the time she was so injured by said bull-dog to the present time, and by reason of said injuries said plaintiff has been permanently injured and is disfigured for life; whereby, and by force of the statute in such cases made and provided, an action hath accrued to the plaintiff to have and recover of said defendant double the amount of damage done as aforesaid.

"Also for that the said defendant, at said Caribou, on the 2d day of July, A. D., 1889, was the keeper of a certain dog, and while the said plaintiff was lawfully in the house of the said defendant, under the care of her mother and nurse, she was suddenly set upon, attacked, and assaulted by said dog, and violently thrown about, and then and there bitten in the face, neck, and arms by said dog, and torn and lacerated, and then and there greatly frightened and excited by the sudden assault and violence of said dog, and greatly injured thereby, and by reason of said injuries caused by said dog of said defendant, the plaintiff became sick and disordered and suffered great pain in the parts injured and in other parts of her body, and has become greatly disabled from the time she was so injured by said dog to the present time, and by reason of said injuries said plaintiff

has been permanently injured and is disfigured for life; whereby," &c. *Ad damnum*, $500.

The jury returned a verdict of single damages under the direction of the court, for three hundred and seventy-nine dollars and sixteen cents. Thereupon the court ordered, under the statute, the damages to be doubled to the extent of five hundred dollars, being the limit of the jurisdiction of the court.

Upon the issue of due care, as claimed by the defendant, and after the court had given the jury instructions upon this part of the case, the defendant requested the presiding justice to give the following instructions, but which he declined to do.

"That the plaintiff is incapable of taking care of herself, was entitled to the care of the mother, and that if there was lack of due care upon the part of the mother, by which the child was exposed to the risk of the injury sustained, then the plaintiff cannot recover.

"It is a question for the jury to determine whether the striking, kicking, or pulling the dog, or tempting him to play with paper or other object, by one of such tender age and helplessness, was or not in some degree negligence; and if so, the burden of proof is on the plaintiff to satisfy you that there was no such act or acts contributing.

"If the parent knew that the child was exposed to danger of being bitten or scratched by the dog to its injury, the child was chargeable with like knowledge, and if, without due care on the part of the mother to prevent such injury, the child was injured, she cannot recover.

"If the mother knew that the child was exposed to danger of being bitten or scratched to its injury by the dog and failed to remove it from the danger, the child cannot recover; and that it is a question for the jury to determine whether, if the mother had within a few minutes been frightened for the safety of the child, it was not her duty to have removed and kept the child from exposure to the danger; and that the burden of proof as to whether the mother performed her duty in this respect is on the plaintiff."

L. R. King, for defendant.

Motion to dismiss: If plaintiff recovers, she is entitled to

recover double the damages sustained. The *ad damnum* is laid at five hundred dollars, which if established would entitle her to a judgment of one thousand dollars. Jurisdiction determinable by amount of damages sustained or recoverable as distinguished from the damages demanded. Exceptions to evidence: Shear. & Red. Neg. pp. 56, 57; Abbott's Trial Ev. p. 597. Burden of proof: *Searles* v. *Ladd*, 123 Mass. 580; *Dickey* v. *Maine Tel. Co.* 43 Maine, 492; Shear. & Red. Neg. pp. 49, 50; *Plumley* v. *Birge*, 124 Mass. 58; *Quimby* v. *Woodbury*, 63 N. H. 370; *Holly* v. *Boston Gas Light Co.* 8 Gray, 132. Knowledge of the exposure: *Gibbons* v. *Williams*, 135 Mass. 333.

L. C. Stearns, *Powers and Powers*, with him, for plaintiff.

EMERY, J. This is an action of trespass, in the Superior Court for Aroostook County, and is under the statute R. S., ch. 30, § 1, which provides that when a dog does damage, his owner or keeper forfeits to the person injured double the amount of the damage done; to be recovered by action of trespass. The verdict was for the plaintiff, and under instructions to assess single damages, the jury assessed them at three hundred seventy-nine dollars and sixteen cents. These damages were doubled by the court, up to five hundred dollars, the limit of its jurisdiction, and judgment was ordered for the plaintiff for that sum.

The presiding justice instructed the jury that it was not incumbent on the plaintiff in the first instance to prove her own due care, but that she made out a *prima facie* case by proving simply an injury to her person by a dog owned or kept by the defendant. To this instruction the defendant excepted.

In all actions based on negligence,—in which the defendant's negligence is the gist of the action,—the plaintiff to make out a *prima facie* case, must affirmatively prove his own due care, and the defendant's negligence in the premises. This is a reasonable rule, for when an injury occurs from somebody's negligence, there is no presumption that it was not from the negligence of the sufferer. Indeed, there is some presumption that the sufferer by the exercise of ordinary care might have

avoided the injury. Hence the rule that, where a plaintiff charges negligence as the basis of his action, he should show that he himself was free from the fault of which he complains.

This rule applies not only to actions given by the common law, but also to those given solely by statute, where the gist of the action is the default, omission, or carelessness of the defendant. Statute actions against towns for injuries caused by defects in ways are in this class. They are based on the omission, the fault of the town in not keeping its ways safe and convenient. The town's negligence is the gist of the action.

There is, however, another class of actions in tort not based on negligence, in which the defendant's care or want of care is not in issue; in which some direct, positive act of the defendant makes the cause of action. In this class of actions, there is no reason nor place for such a rule. The plaintiff makes a *prima facie* case by proving the defendant's act, and the consequent injury. He has no occasion to prove the defendant's negligence, and hence has no occasion to prove his own due care in the first instance. In actions for assault upon the person, the plaintiff proves in the first instance only the defendant's blow. *Son assault demesne* must be shown by the defendant.

We think actions for injuries caused by dogs, or other dangerous animals, are of this latter class. By the common law, the keepers of wild animals were unqualifiedly liable for all injuries done by such animals. No matter how carefully the keeper restrained and guarded his animals, his care did not exempt him, if they did damage. The owners or custodians of animals not wild were liable for injuries done by them, if they knew of the injurious propensity of the animal. The most scrupulous care would not excuse them. One kept a wild animal at his peril, and also kept at his peril any animal, which he knew to have an injurious disposition. He was practically an insurer against injury by them. His care or negligence was immaterial.

In actions for injuries caused by such animals, the plaintiff had only to prove the keeping and the scienter. After much research we do not find it directly held in any English case,

ancient or modern, that, in such actions, the plaintiff must allege and prove the defendant's negligence, and his own due care. In *Blackman* v. *Simmons*, 3 Car. & Payne, 138, the plaintiff struck the bull over the head with a stick, whereupon the bull gored him. The plaintiff recovered, and there was no suggestion that he was to prove his own due care. In *Jones* v. *Perry*, Norris' Peake, 487, the plaintiff, a child, irritated the dog, which thereupon bit the child. It was held that the keeper was nevertheless liable, he having notice of the dog's vicious temper. *May* v. *Burdett*, 9 Ad. & El. 99, (58 Eng. C. L. 99) was an action for the bite of a monkey kept by the defendant. Objection was made to the declaration, on the ground that it did not allege any negligence or default of the defendant in the care of the animal. The question was exhaustively argued by eminent counsel, Cockburn being for defendant. It was urged by the defendant that, consistently with the declaration, the injury might have been entirely occasioned by the carelessness of the plaintiff. The court held that the declaration was sufficient,—that the gist of the action was the keeping the animal at all, after knowledge of its mischievous propensities. In the opinion, Lord Denman, C. J., said: "The precedents both ancient and modern with scarcely an exception, merely state the ferocity of the animal, and the knowledge of the defendant, without any allegation or want of care." He further said: "It may be that, if the injury were solely occasioned by the wilfulness of the plaintiff after warning, that may be a ground of defense by plea of confession and avoidance; but it is unnecessary to give any opinion as to this, for we think the declaration is good upon its face, and shows a *prima facie* liability in the defendant." Lord Coleridge concurred in the opinion. This case of *May* v. *Burdett*, was affirmed in *Jackson* v. *Smithson*, 15 M. & W. 563, by all the Barons of the Exchequer, including Pollock and Maule; and has never since been questioned in England, so far as we have searched.

The same distinction has been recognized in this country. *Woolf* v. *Chalker*, 31 Conn. 121, was an action for the bite of a dog. It was urged in defense that the plaintiff's own fault

brought about the biting. The court said that the rule of contributory negligence, applicable to actions founded upon the negligence of the defendant, was not applicable to that case, and that "the questions made in the court below in bar of the action, relative to the character of the dog, the supposed trespass of the plaintiff, and negligence of either party, were immaterial." This statement was supported in an elaborate opinion. *Muller* v. *McKesson*, 73 N. Y. 195, was an action for the bite of a dog, and was exhaustively argued and considered. The plaintiff was in the employ of the defendants when he was bitten by the dog they kept on the premises. The defendants urged in defense of the action: 1, that the plaintiff was guilty of contributory negligence; 2, that the plaintiff knew the character of the dog, and by remaining in the defendants' employ he assumed the risk of such injury; 3, that the injury was occasioned by the fault of the plaintiff's fellow-servant in neglecting to chain up the dog. The court overruled all these defenses, holding they were not applicable to an action of this kind. In the course of an elaborate opinion citing many English and American authorities, Church, C. J., gave the point as to contributory negligence special consideration and came to this conclusion: "As negligence in the ordinary sense is not the ground of the liability, so contributory negligence in its ordinary meaning is not a defense. These terms are not used in a strictly legal sense in this class of actions, but for convenience. . . . . The owner cannot be relieved from liability by any act of the person injured, unless it be one from which it can be affirmed that he caused the injury himself, *with a full knowledge of its probable consequences*." The question again came before the same court in *Lynch* v. *McNally*, 73 N. Y. 347. The justice presiding at the trial charged the jury "that the rule as to contributory negligence does not apply to accidents of this description [the sudden bite of a dog]." The Court of Appeals sustained the ruling, saying it was established that contributory negligence, as that term is understood in law, is not a defense to such actions.

In these two cases, Chief Justice Church emphasizes and makes clear the distinction suggested by Lord Chief Justice Denman,

in *May* v. *Burdett*, between the mere negligence of the plaintiff, and his wilful act, as a contributing cause. Mere negligence, like the careless, unintentional stepping on a dog's tail, would not bar a recovery; while a wilful meddling with a dog with a full knowledge of the probable consequences, might be a defense. Lord Denman, however, also said that even the wilful act was to be interposed by plea.

Pleadings in cases are often good evidence of the law at the time. If the omission of particular allegations from pleadings is not questioned by the adverse party or by the court, it is evidence that the allegations are immaterial. In *Decker* v. *Gammon*, 44 Maine, 322, which was an action on the case for an injury done by a vicious horse, there was in the declaration no allegation of the plaintiff's care or of the defendant's negligence. The defendant's vigilant counsel though strongly attacking the declaration, did not complain of such omission. In *Smith* v. *Montgomery*, 52 Maine, 178, which was an action for an injury by a dog, there was no allegation in the declaration, of the defendant's negligence. The distinguished counsel for the plaintiff did not base his action upon negligence. Though his declaration was assailed on other points, it was not on this, and was sustained.

Such being the common law, the statute now comes in and in the case of dogs, removes the need of alleging and proving even the scienter. It makes the owner or keeper of a dog *prima facie*, absolutely liable for an injury done by the animal. It leaves him where the common law left the keeper of a wild animal,— in the position of an insurer. It removes from the keeper of a dog, the protection of want of notice, which the common law allowed. He now keeps a dog at his peril. If the dog does an injury, the injured party has an action both at common law, and under the statute. At common law, as said by Lord Denman, in *May* v. *Burdett*, the gist of the action was the keeping the animal after notice of his injurious propensities. Under the statute, the gist of the action is simply the keeping of the dog. The statute has made all else immaterial. An attack upon person or property by a dog is a trespass, for

which the keeper of the dog must now answer as fully and unconditionally, as for his own trespass.

Our conclusion from reason and authority is, that in an action under R. S., ch. 30, sec. 1, for an injury done by a dog, the plaintiff need not allege and prove in the first instance either his own care, or the defendant's negligence. We are aware that the courts of some other states have held to the contrary (whence the length of this opinion), but we think ours is the more reasonable and correct conclusion.

It should be noticed, however, that we only decide that, in such actions, as this, the plaintiff need not allege and prove in the first instance his own care. Whether the plaintiff's want of care may be successfully shown in defense, or whether only the plaintiff's wilful provocation of the animal will bar his action, we do not decide, as that question is not presented by the exceptions.

We have carefully examined the other exceptions by the defendant, and do not find any of them tenable. The motion to set aside the verdict as against evidence must be overruled. The evidence supports the verdict. The objection to the jurisdiction of the Superior Court of Aroostook County cannot prevail, even if seasonably made. The action is personal. Only five hundred dollars were claimed, and no more than that sum was awarded. Whatever the jury did, the court kept within its jurisdiction.

All motions and exceptions overruled.

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

FIRST NATIONAL BANK OF SKOWHEGAN

vs.

SAMUEL A MAXFIELD.

Somerset. Opinion June 3, 1891.

Bills. Protest. Payment. Assignment. National Bank. Mortgage. R. S., c. 32, § 10.

Waiver of demand and notice by the indorser of a foreign bill of exchange is invalid under R. S., c. 32, § 10, unless in writing and signed by him or his agent.

When commercial paper has been paid by the party whose debt it appears to be, it becomes commercially dead, but is evidence in the hands of the payor to charge the real debtor.

A foreign bill, presented for payment by the holder, a Boston bank, to the acceptors, on the last day of grace and surrendered to them, as paid, in exchange for their check, on another bank where they had funds, but who failed before the check was there presented on the next day, was thereby paid and became commercially dead.

Such bill thereafter remained evidence in the hands of the acceptors, who had so paid it, of "money paid" for the accommodation of the payee, shown to be merely a borrower of the acceptor's credit and not a holder for value.

The acceptor's claim for money so paid may well be assigned in equity to the bank, that originally cashed the bill, by a delivery of it, so as to be a good consideration for a mortgage to such bank to secure the debt from the payee, the real debtor.

The payee, by giving such mortgage, merely secured his own debt, and a representation to him, by the bank, as inducement to give the mortgage, that the bill was unpaid, though untrue, is harmless and not fraudulent.

A national bank, under the laws of the United States, may take and hold such mortgage.

ON REPORT.

The case is stated in the opinion.

Merrill and Coffin, for plaintiffs.

Counsel cited: *Marrett* v. *Brackett*, 60 Maine, 527; *Olcott* v. *Rathbone*, 5 Wend. 490; *Strang* v. *Hurst*, 61 Maine, 9; *Dana* v. *Third National Bank*, 13 Allen, 445; *Robbins* v. *Bacon*, 3 Maine, 346; *Adams* v. *Robinson*, 1 Pick. 462; *Bullard* v. *Randall*, 1 Gray, 605; *Gibson* v. *Cooke*, 20 Pick. 15; *Schuler* v. *Laclede Bank*, 27 Fed. Rep. 424; *Bradford* v. *Fox*, 38 N. Y. 289; *Kelty* v. *Second National Bank of Erie*, 52 Barb. 328; R. S., of U. S. § 5136, Art. 7; *Reynolds* v. *Crawfordsville National Bank*, 112 U. S. 405; *Bank* v. *Matthews*, 98 U. S. 628; *Bank* v. *Whitney*, 103 U. S. 99; *Swope* v. *Leffingwell*, 105 U. S. 3; *Silver Lake* v. *North*, 4 Johns. Ch. 370.

Walton and Walton, *Barker*, *Vose and Barker*, with them, for defendant.

Counsel cited: *Whitney* v. *Esson*, 99 Mass. 308; *Fernald* v. *Bush*, 131 Mass. 591; *Warden* v. *Tucker*, 7 Mass. 449; *Phœnix Bank* v. *Hussey*, 12 Pick. 483; *Ocean Nat. Bank* v.

Williams, 102 Mass. 143; *Ticonic Bank* v. *Stackpole*, 41 Maine, 304; *Green* v. *Jackson*, 15 Maine, 136; *Freeman's Bank* v. *Perkins*, 18 *Ib.* 292; *Mechanics Bank* v. *Merchants Bank*, 6 Met. 13; *Fabens* v. *Mercantile Bank*, 23 Pick. 330; *Mer. Nat. Bank* v. *Samuel*, 20 Fed. Rep. 664.

HASKELL, J. The controversy is between two creditors of the same debtor striving to collect their respective debts out of property insufficient to pay both, the plaintiff under a mortgage, and the defendant under an assignment growing out of an attachment made subsequent to the mortgage; so, the question is, whether the plaintiff's mortgage is valid.

It is admitted by the record and by briefs of counsel that the title to certain wool covered by the mortgage was in one Tinkham, the mortgagor, at the time the mortgage was given; and the case must be considered in the light of this admission that the parties have solemnly made, regardless of considerations that might arise from the record without it.

August 2, 1889, Tinkham, the owner of the wool, received from one Buckley, the agent of Brown, Steese & Clark, wool merchants in Boston, a sight draft upon them for $4000 drawn by Buckley, payable to Tinkham's order, to put him in funds for the purchase of wool that should ultimately become the property of that firm. The draft, therefore, was a loan of credit by Brown & Co. to Tinkham, a pure accommodation, for, it is admitted that the wool he purchased with the funds became his own.

August 2, the same day, Tinkham discounted the draft at plaintiff bank, which sent it for collection to its correspondent, the National Exchange Bank in Boston. On the next day, that bank presented the draft to Brown & Co., and they accepted it, so that it fell due on the last day of grace, August 6. That day, Brown & Co., the acceptors, took the draft from the bank and gave in exchange their check on the National Bank of Redemption in Boston, where they had funds. The draft was stamped by the bank "paid," before it was delivered to the acceptors, as customary in such cases. The

Exchange Bank retained the check until the next day, August 7, when, on presentment, payment of it was refused, meantime, Brown & Co., the makers, having failed; thereupon, the Exchange Bank regained from Brown & Co. the draft, agreeing that, on three days notice, it would either return the draft or the check as it might elect to do. No such notice appears to have been given, nor does either the draft or check appear to have been returned.

August 8, the next day after the Exchange Bank regained the draft, the plaintiff bank received it by mail with a letter of advice, saying that it was unpaid and returned without protest, trusting "that you can arrange the matter without loss to us." Thereupon, plaintiff's cashier, who says he did not notice the stamp of "paid" on the draft, the impression being indistinct, informed Tinkham that the draft had not been paid, and he, supposing that to be the truth, on the 14th gave his note for $4000 to the plaintiff bank and a mortgage on the wool to secure the same. Afterwards, the defendant sued Brown & Co. and trusteed Tinkham as their debtor, who transferred and delivered the wool to the defendant, he having full knowledge of plaintiff's mortgage then duly recorded. The plaintiff sues for the defendant's trover of the wool.

The draft was a foreign bill of exchange, being drawn in one state and made payable in another. Tinkham appeared to be an indorser, whose liability was contingent, to become fixed by protest only. It is provided by R. S., c. 32, § 10, "No waiver of demand and notice by an indorser of a promissory note or bill of exchange is valid, unless it is in writing and signed by him or his lawful agent."

When commercial paper is paid by the party whose debt it appears to be, it becomes *functus officio*, commercially dead, and no longer retains the character that it originally had. It is then but evidence of the transactions of its commercial life; and the party seeming to be the promisor, who has paid it, may use it as evidence, in connection with other proof, to compel the real debtor to pay it. So, in this case, if Brown & Co. paid the draft, it ceased to be commercial paper, and became evidence in

their hands to hold Tinkham for the amount of it, actually but a loan to him.

It is urged that the draft was not paid by Brown & Co., the acceptors; but, that contention cannot prevail. When it matured, the holder, the bank, acting as correspondent for the plaintiff, upon receipt of the acceptors' check for the amount of it, stamped it "paid" and delivered it to them. The Exchange Bank took the check as payment, as money, instead of money. The draft was surrendered and not protested. It could not truthfully have been protested, for it had been paid. It is no good answer, that the Exchange Bank used reasonable diligence in that it complied with an established usage in such cases; for, should such usage obtain in Boston, it has been there adjudged not to be a reasonable usage "that one, who collects a draft for an absent party, should be allowed to give it up to the drawee, and sacrifice the claim which the owner may have on prior parties, upon the mere receipt of a check, which may turn out to be worthless." *Whitney* v. *Esson*, 99 Mass. 308; *Fernald* v. *Bush*, 131 Mass. 591.

The case of *Marrett* v. *Brackett*, 60 Maine. 524, is not in point; for there, the plaintiff received in payment of his note, that he did not surrender, the check of a friend of the maker, who had furnished the friend with funds for the purpose. The friend failed before the check, according to the custom of merchants, had been presented for payment; and it was held to be no payment of the note. The plaintiff was the holder of the note. He received from the defendant the check of a third party, did not surrender the note, used customary diligence in collecting the check, and, without his fault, it turned out worthless, and might well be held no payment.

The doctrines applied in the case at bar are in accord with the law as stated in *Sandy River National Bank* v. *Miller*, 82 Maine, 137. The rules of mercantile law are arbitrary. Business could not be safely done unless they were. The draft in question, in the eye of the law, was paid at maturity, and became dead to the commercial world.

When, therefore, the draft had been paid by the acceptors,

Tinkham's liability on it as indorser ceased, and they alone had a claim against him for money paid to his use, in satisfaction of their accommodation loan of credit to him. He was their debtor; not as indorser of the draft, for he could not so be. The draft shows that they paid their own debt; but the truth is, they paid his debt, and he became their debtor for doing so.

Now Tinkham became the debtor of Brown & Co., for the wool is admitted to be his, and he could not both own the wool and not owe for the money borrowed to purchase it with. The draft is evidence of the amount of the debt; and as Brown and Co. had become liable to the bank on their check for the amount of it, it was competent for them to assign their debt against Tinkham to the bank as security for their unpaid check. This, in equity, they did by the redelivery of the draft, and the bank transferred the same equity to the plaintiff, that it might collect the debt from Tinkham, the original debtor, who, in giving the note and mortgage to the plaintiff bank, merely paid his own debt. He took up the draft, and his liability as debtor in the premises became extinguished. No one can ever collect the debt of him again. He paid his debt and received the only evidence that, in the hands of another, could make him a debtor in the premises. *White* v. *Kilgore*, 77 Maine, 571.

But, the defendant says that he was induced to give the mortgage by deceit, in that he was told the draft was unpaid. Suppose he was. If the draft was unpaid and had not been his own debt he was relieved from liability upon it for want of protest, and he is presumed to have known the law. If it was his own debt, then he was liable to pay it to some one, and it could make no difference to him whether he paid it to Brown and Co. or to their equitable assignees. He paid it to the latter; and the deceit set up is immaterial. It worked no injury to Tinkham, for he did no more than he was legally bound to do. He voluntarily transferred property to the plaintiff, of which he was the absolute owner, to secure his own debt, as he might lawfully do; and he could not effectually convey the same property, afterwards, to the defendant.

That the bank was authorized, under the laws of the United States, to take and hold its mortgage is too well settled to require further consideration.

For the rule of damages, see *Warren* v. *Kelley*, 80 Maine, 512.

Judgment for plaintiff for $4000, and interest from August 6, 1889.

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

LYDIA B. ATTWOOD, and another,

vs.

CITY OF BANGOR.

Penobscot. Opinion June 17, 1891.

Municipal Corporation. Sewers. Ratification. Damages.

In an action on the case to recover damages for the alleged unlawful location, construction and maintenance of the extension of a sewer below low-water mark in the Penobscot River, in the city of Bangor, whereby the plaintiffs claimed that their dock was rendered less valuable from the liability of vessels grounding on the end of the sewer, and on the sediment flowing out of it, also a diminution of rents of the plaintiffs' wharf because of the noxious smells arising from the sewage, it appeared that the wharf and dock, during all the time, were in the possession and use of the plaintiffs' tenants who had suffered no diminution of rents. *Held*; that the city had a legal right to extend its sewer over the plaintiffs' flats to a point below low-water mark; that in locating the sewer the city council acted judicially and that the city would be liable only for an improper construction or maintenance of it.

Held, also, that if the sewer was improperly constructed, it was a temporary injury for which the plaintiffs could not recover in this action.

ON REPORT.

The case appears in the opinion.

The Ferry-way referred to by the court, leads from Union street, as used by the public, across the flats to Penobscot river at low-water mark. The defendants, among other grounds of defense, claimed that the sewer was constructed through Union street, as it had been laid out, and as they contended to low water mark, in 1833. The view taken by the court renders a report of the testimony upon this branch of the case unnecessary.

C. H. Bartlett, for plaintiffs.

Plaintiffs' title. Counsel cited: *State* v. *Wilson*, 42 Maine, 9, 42; *Deering* v. *Long Wharf*, 25 *Id.* 51, 65; *Sewall & Day Cordage Co.* v. *Boston. Water Power Co.* 147 Mass. 61. County Commissioners had no power to lay out a street below high-water mark. *State* v. *Wilson*, *supra*; *Kean* v. *Stetson*, 5 Pick. 492. No legal Union street for low-water mark to intersect with. *Tebbetts* v. *Estes*, 52 Maine, 566. Title includes wharf above low water and where end of sewer rests. *Low* v. *Tebbetts*, 72 Maine, 92; *Field* v. *Huston*, 21 Maine, 69; 3 Wash. R. P. (5th Ed.) 413. Adverse use by plaintiffs: *Ricker* v. *Hibbard*, 73 Maine, 105; *Blanchard* v. *Moulton*, 63 *Id.* 434; Gould, Wat. p. 85; *Nichols* v. *Boston*, 98 Mass. 39; Wash. Ease. (4th Ed.) 674. Wharf limits: Stats. 1854, c. 202, c. 337.

Defendants' liability: *Haskell* v. *New Bedford*, 108 Mass. 208, 218; *Boston Rolling Mills* v. *Cambridge*, 117 Mass. 396. Sewer built not under statute, but under head of repairs by order of city: *Emery* v. *Lowell*, 104 Mass. 13, 16; 2 Dill. Mun. Corp. (2d. Ed.) 937.

Private dock. If public dock, the plaintiffs may recover special damage: *Brayton* v. *Fall River*, 113 Mass. 218; *Richardson* v. *Boston*, 19 How. 263; *Franklin Wharf* v. *Portland*, 67 Maine, 46.

H. L. Mitchell, city solicitor, for defendants.

Counsel cited: R. S., of 1871, c. 16, § 2; Stat. 1871, c. 717; *Estes* v. *China*, 56 Maine, 407; *Franklin Wharf* v. *Portland*, 67 Maine, 46; *Wash. & M. Co.* v. *Worcester*, 116 Mass. 460.

Burden on plaintiffs to show illegal location of sewer. *Bennett* v. *New Bedford*, 110 Mass. 433. Ferry-way continuation of Union street as used by public since 1833: *Heald* v. *Moore*, 79 Maine, 271; dedicated to public: *Stetson* v. *Bangor*, 60 Maine, 313, and cases cited; *Masonic Asso.* v. *Harris*, 79 Maine, p. 250. Way by prescription: *Valentine* v. *Boston*, 22 Pick. 78; *State* v. *Belding*, 13 Met. 10; *Treat* v. *Chapman*, 35 Maine, 34; *Cole* v. *Sprowle*, *Id.* p. 161; *Masonic Asso.* v. *Harris*, *supra*. Remedy is by appeal: *Cambridge* v. *Middlesex*,

117 Mass. 79. Defendants not negligent: *Haskell* v. *New Bedford*, 108 Mass. 208. Counsel also cited: *Blood* v. *Bangor*, 66 Maine, 154; *Child* v. *Boston*, 4 Allen, 41; *State* v. *Portland*, 74 Maine, 268.

LIBBEY, J. This is an action on the case to recover damages for the location, construction and maintenance of an addition or extension of a sewer in the "Ferry-way," so-called, in the city of Bangor, with its terminus below low water mark in the Penobscot river, whereby the plaintiffs' berth or dock was rendered of less value by reason of vessels lying at said dock being in danger of getting aground on the end of said sewer, on the materials used in its construction, and on the sediment from the sewage coming therefrom; and by reason of noxious smells arising from said sewage, by reason of all which the rents of the plaintiffs' wharf are decreased.

The case comes before this court for determination upon a report of the evidence. We think the plaintiffs' title to their wharf is sufficiently proved. After describing the location of the sewer as extended, and the manner in which it is constructed, the plaintiffs state their claim for damages as follows: "That by reason of the negligent and improper location of said sewer, the terminus being in an eddy in said river, the sewage from said sewer is not carried away by the tide, and said sewage is deposited on the plaintiffs' flats and in their dock, by reason whereof noxious and unhealthy odors arise, and said dock is being rapidly filled up by said sewage, by reason of all which the plaintiffs' wharf is rendered of much less value in that they are deprived of large sums of money which would otherwise be paid them for wharfage by vessels and steamboats lying at said wharf." The sewer as originally constructed leads down Union street to the shore of the Penobscot river. It discharged its sewage upon the flats above low-water mark, and at certain seasons of the year created a nuisance, to abate which the city council of Bangor passed the following order: "That the superintendent of sewers be and he is hereby directed to cause the Union street sewer to be extended from its present terminus

to low-water mark in Penobscot river." Acting under that order, the superintendent of sewers extended the sewer not in its direct course, but by an angle placed it nearer the plaintiffs' wharf than it would have been if directly extended. The counsel for plaintiffs contends that the extension in that manner was not authorized by the city and is therefore illegal. If that contention is correct, then, the action cannot be maintained against the city, because it was without the authority of the city. *Woodcock* v. *Calais*, 66 Maine, 234.

Independent of any evidence tending to show ratification of the acts of the superintendent of sewers, it may be doubtful if the extension was directly within the authority of the city council. But the evidence satisfies us that the city council with full knowledge of the manner in which the extension was made, ratified the act of the superintendent of sewers, so that we shall pass this objection as not affecting the plaintiffs' right, one way or the other, to recover.

It is well settled that the city had a right under the law of this state to extend its sewer across the flats of the river to a point below low-water mark. *Franklin Wharf Co.* v. *Portland*, 67 Maine, 46. In the performance of its duty to the public in locating sewers for the drainage of the city, the city council acts judicially, and for that judicial act, the city is under no common law liability. But if the construction is improperly and unskilfully made, it is a ministerial act for which the city may be liable to any party injured thereby. *Darling* v. *Bangor*, 68 Maine, 108.

The plaintiffs had no remedy, then, growing out of the location of the sewer. If they are entitled to recover at all, they must show that the sewer was improperly and unskilfully constructed, and that they have suffered special injury thereby. They claim that the sewer was improperly constructed inasmuch as some portion of it is above the surface of the flats. The evidence tends to show that the fact, in regard to the manner of its construction, is to some extent as claimed by the plaintiffs. Assuming that the sewer is improperly constructed, the burden is upon the plaintiffs to show that they have been

damaged thereby. The only damage which their evidence tends to prove, growing out of the improper construction of the sewer, is that it makes it more inconvenient and hazardous for vessels at certain stages of the tide to lie at one part of their wharf. They do not claim that they have suffered any special damage to vessels by reason of it. But they claim that it lessens the rental value of their wharf. To recover on this ground, they must show that the rental value of the wharf to them has been diminished, and that they have not been able to receive so much for the use of their property as they might have received if the sewer had been properly constructed. The evidence shows that the plaintiffs' wharf was leased before the construction of the extension of the sewer, and has been in the possession and use of the lessees ever since, with no diminution of the rent to the plaintiffs. To recover on this ground, the burden is upon the plaintiffs to allege their loss of rents specially in their declaration and to prove the allegation. *Plimpton* v. *Gardiner*, 64 Maine, 360. There is an entire failure in the evidence to support this ground of claim.

They cannot recover in this suit on the ground that the sewer permanently diminishes the value of their estate, because the improper construction is a temporary wrong liable to be removed at any time; and an action for damages may be maintained for the injury sustained by the occupant of the property, from time to time. *Williams* v. *Camden & Rockland Water Co.* 79 Maine, 543; *C. & O. Canal Co.* v. *Hitchings*, 65 Maine, 140; *Dority* v. *Dunning*, 78 Maine, 381.

A careful examination of the evidence fails to prove that any damage has been sustained by the deposit of the sewage in the plaintiffs' dock. It does not prove that any offensive and noxious odors have arisen from it to the injury of the plaintiffs. Nor does it prove that their dock has been materially filled up by the action of the sewer, so as to occasion any damage to the plaintiff's property prior to the commencement of the suit.

Plaintiffs nonsuit.

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

IN MEMORIAM.

PROCEEDINGS OF THE PENOBSCOT BAR IN RELATION TO THE DEATH OF THE

HONORABLE JOHN APPLETON.

WHO WAS AN ASSOCIATE JUSTICE OF THIS COURT FROM MAY 11, 1852, UNTIL OCTOBER 24, 1862, WHEN HE BECAME CHIEF JUSTICE AND SERVED AS SUCH UNTIL SEPTEMBER 20, 1883; RETIRING FROM THE BENCH AFTER MORE THAN THIRTY-ONE YEARS' SERVICE. HE DIED AT HIS RESIDENCE, IN BANGOR, FEBRUARY 7, 1891.

A meeting of the Penobscot Bar was held at the Court House, in Bangor, at ten o'clock, A. M., on Saturday, June 20, 1891, to hear the report of a committee on resolutions previously appointed and consisting of Messrs. H. Hamlin, Paine, Humphrey, Wilson and Stetson. The resolutions were unanimously adopted.

The court having assembled, took their places upon the bench. Present: PETERS, C. J., VIRGIN, LIBBEY, EMERY, FOSTER and WHITEHOUSE, JJ.

Hon. ALBERT W. PAINE presented the resolutions and said: May it please your Honors:

As representative of the bar and by direction of its members, I rise to present to the court their resolutions on occasion of the death of our late Chief Justice and venerable brother, Honorable JOHN APPLETON. In doing so, I cannot but be strongly reminded of the many and frequent exercises of a similar kind which have taken place here, as members of the bar have one after another passed away, when response from the bench has been made by him in whose memory these services are now per-

formed. Probably no one of the judges of our State has so often and so many times performed that duty, certainly no one at this bar. Notably among these occasions have been those which have taken place upon the occurrence of deaths of his brothers of the bench, KENT and HATHAWAY, as well as that of his predecessor in the Chief Justiceship, WESTON.

The name of our departed brother, at this solemn exercise, comes charged with reminiscences of the most vivid and interesting kind, especially as connected personally with him and myself. Though he preceded me a few years in practice, yet for fifty-six years we have trod the path of professional life together constantly, term after term, meeting each other on this floor and before this bench which your honors now occupy, until his retirement, either as contesting attorneys for our respective clients or as judge and counsel in the trial of causes. Such has been the unbroken course of life with us until the few years ago when his judicial labors closed. Both of us at the beginning, young in life and practice, were accustomed at almost every term to meet each other as counsel for our respective contesting clients, and this for the seventeen years before he was advanced to a seat on the bench. From that time forward during the thirty-one years of judicial life, at every term here when he presided, more or less of his attention was called to the interests of those whom I represented. And it gives me great pleasure to be able to testify with truth to the fact that, during all those fifty-six years, never a word of unpleasantness passed between us.

And not only do these exercises remind one of the facts now detailed, but they come charged with many other reminiscences of interest connected with the bar and its members, with whom we have, during these many years, been intimately associated in practice within these walls, but who have long since passed hence to that higher bar for which the teaching here was a most fitting preparation.

To say nothing of the scores of a later day, who have filled these seats and occupied the floor on which we now stand, taking active part in the performance of their duties, but who

have since passed away and their names forgotten, how freshly come to mind the forms of those whom in early days, we were accustomed to find filling these seats and addressing the court and jury from the very stand which I now occupy. How distinctly come before my mind's eye at this moment the venerable forms of our old brothers Williamson and Gilman, Rogers and Cooley, Norton and Hatch, the Hills, Thomas A. and John B., the McGaws, Jacob and Thornton, the Parks, Gorham and Rufus, Abbott and Godfrey, the Allens, Elisha and Frederick, Chandler and Jewett, Moody and LeBreton, Hathaway and Hobbs, Poor and Starrett, and scores of others, all but two or three of whom have long since preceded our now missing brother to their long home.

Passing from the bar to the bench, how many have been the occupants of the seats you now fill and whom we have had occasion to address in the course of our legal duties, or to be associated with at the bar. How vividly arise in memory the familiar faces of MELLEN and WESTON, PREBLE and EMERY, WHITMAN and SHEPLEY, TENNEY and GOODENOW, WELLS and HOWARD, HATHAWAY and DICKINSON, DAVIS and MAY, RICE and BARROWS, and our familiar brothers, KENT and CUTTING and DANFORTH, before or with all of whom our professional duties have so often called for us to act. How have all, in their turn, passed along the path of judicial duty to their final retirement from life here to life beyond, and all during our short term of professional service at the bar. And now the name of APPLETON is added to the list.

That speaking picture which graces the walls of many of our offices, where the faces of Judges Tenney and Goodenow, Kent and Cutting, May and Davis, Rice and Appleton, are so distinctly photographed, tells a story to their old friends, which would almost fill a volume in its details. The peculiar feature which has for the few last years distinguished the picture and rendered it particularly noticeable, has been the erect posture of our late brother standing in position to look down upon his seven departed brothers, speaking as it were in audible tone, "I

alone am left." And now he has gone, leaving the ornament a memento of the past, to decorate the wall.

Few subjects are more impressive of the shortness of human life, and, if this life here were our only life, of its utter futility, than such a brief review as I have now indulged in. How quickly have the thirty-one years of our brother's judicial life passed away, and yet the longest of any judicial life in Maine. But how full have these years been filled with useful and important work on his part, as counsel and judge, as evidenced by the sixty-eight volumes of our reports, from nine to seventy-six, inclusive, in which his name is so often noted.

Respecting the character and personal characteristics of our now absent brother, it is hardly necessary for me to add a word of comment, so lately has he been with and among us and so familiar to all in social and professional life. As an example of industry and temperance, of honesty and faithfulness to duty, of legal ability and learning, of literary taste and integrity of purpose, it may be truthfully said of him that he had no superior and but few if any equals. Nature and a kind Providence, as a token of his deserts, seem to have borne testimony to these virtues by bestowing on him an unusual length of years and enjoyment of bodily and mental vigor. His strength at four score years was far from that curse of "labor and sorrow" which the Psalmist relates as the accompaniment of that period of life. Although almost a decade of years had been added to his four score, yet he lived to enjoy them all free from the infliction which this notable text teaches.

His interest in the literature of the day and in the multiplied events of the world's passing history, as well as in the acquirement of legal knowledge, knew little decline from that of earlier years. Death found him still a student deeply interested in everything pertaining to these various subjects.

To him, the Bar of Maine, and the profession generally are largely indebted for his learning and skill in the application of legal principles to the constantly changing phases of the business world, and for the exposition of law as presented in the decisions of the almost innumerable reports of the independent courts of

our own and other nations, as well as in the multitudinous treatises of authors on all subjects connected with the law and practice.

In bidding our brother a final good-bye, we cannot but feel that he carries with him to his new home a character and real life which assure to him a future of eminent happiness and enjoyment.

I have now to present to the court the resolutions, adopted by a vote of the members of our bar, expressive of their estimate of the character of our brother, and to ask of the court their approval of the same.

RESOLUTIONS.

Honorable JOHN APPLETON, late Chief Justice of the Supreme Judicial Court of Maine, whose death occurred at his home in this city, on the 7th of February last, was born at New Ipswich, N. H., July 12, 1804; graduated at Bowdoin, in 1822; was admitted to the bar in 1826; appointed to a seat on the bench in 1852; promoted to the Chief Justiceship in 1862, and retired at the termination of his sixth appointment in 1883, having thus served as a member of the bench for thirty-one years, and previously as member of the bar for twenty-six years, thus fifty-seven years in all of active professional work.

Resolved: That we place on our records an expression of our appreciation of his long and useful service, as now detailed, both as Judge and Counsel, and of the faithful manner in which he discharged the duties of his office to both the public and his clients, giving to his brethren an example of great and lasting benefit.

Resolved: That as a member of the Bar, he was justly distinguished for his skill and learning, for his integrity of practice, and for his natural courtesy towards all his brethren, without distinction of age or legal qualification, as also for his many social virtues, which ever made him a valuable member of society, highly esteemed by all who had the pleasure of his acquaintance.

Resolved: That as a member of the Bench, he was distinguished for his many eminent judicial qualities, for his legal

acquirements and familiarity with the authorities, for his impartial performance of duty and urbanity of manners, whereby all were assured of a fair hearing, and a carefully prepared legal decision; that the Bar of Maine, and the profession generally are deeply indebted to him for his effective work in defining the principles of law, in their application to the ever changing phases of business, and the complications of conflicting statutes.

Resolved: That we deeply sympathize with the surviving members of his family in their affliction, and that a copy of these resolutions be presented to them and published in the papers of the city.

Remarks of Ex-Vice President, Hannibal Hamlin.

I am truly grateful that I am able to be present here to-day, if only for the purpose of seconding the resolutions presented. The time is a fitting one in which words of eulogy should be uttered to his memory and his worth. He so long, by his wealth of learning adorned this honorable court that there could be no more fitting place or time, in which to speak of him in terms of praise, except before the full court.

I am the oldest member of the Bar now living, dating from the time of my admission, although I am the junior in years of two other members. If my physical powers were but equal to the occasion, it would be gratifying to me to speak of the late Chief Justice Appleton as I knew him these long years,— to speak of his distinguished legal learning, his eminent and varied abilities; to say something of what he so well and ably did to broaden the field of evidence and make more certain the administration of justice; to speak of him as a neighbor and as a personal friend; but, alas! the state of my health prompts me to make no such attempt. I can only testify, by my presence here, my unqualified appreciation, in the broadest sense, of Judge Appleton. I knew him thoroughly and well in all the relations of life; and in addition to what I have said, I would have spoken of the Christian virtues which adorned his life; but I am unable to do more than to indorse the resolutions offered and the words of eulogy spoken and not attempt to

speak of him myself; but by my presence tender my sincere tribute to his memory and worth. My physical strength to-day is such that I deeply regret that I cannot do more.

REMARKS OF HON. S. F. HUMPHREY.

May it please your Honors:

My personal acquaintance with Judge APPLETON commenced a little more than forty years ago; but when I came to the bar, in 1853, he had already become a Justice of this Court. I never saw him conduct the trial of a cause as counsel, except that I happened to hear him argue one cause of some note before the jury, and this was in Piscataquis county, where he commenced his professional life. I, therefore, leave it to others to speak of him as a practicing lawyer. We have all known him as a Justice and a Chief Justice of this Court, during the more than thirty-one years he held a seat on the Bench. He was a model Judge. Learned in the law beyond most lawyers who are distinguished for their legal learning, he possessed in addition and always exhibited a rare tact and facility in conducting the trial of a cause. He was in an eminent degree rapid and fruitful in suggestions which would tend to a wise disposition of the case in hand. He had rare equanimity and patience; his temper was never ruffled, so that it was always easy and pleasant to try a cause before him, and his kindly suggestions to the youthful and inexperienced were always helpful and gratefully received. The large amount of work he would cause to be accomplished at a single term of the Court was always a subject of remark and commendation.

As a Judge he was always desirous, in the trial of a cause, that right and justice should prevail, and he was specially solicitous that no technicality should stand in the way of substantial justice. He was too good a lawyer, however, not to stand by, and be governed by, the decisions.

His conduct of a case was always just and impartial, but his insight into the merits of a cause was always rapid and clear.

He generally knew where the right was, and if he ever seemed to lean in his charges to the jury it was only in favor of what he clearly deemed to be the right.

With Judge APPLETON'S written opinions we are all familiar. They are clear and thorough, and show the literary as well as the legal instinct. The Maine Reports from 1852 to 1883, bear ample testimony to his great learning, his thorough knowledge of legal principles, and his rare facility of statement and discussion. These volumes will remain a lasting record of his wisdom and his great industry and ability.

It has been my pleasant fortune to know Judge APPLETON intimately during the last twenty years, and especially during the last eight years, since he left the bench. As a friend and companion he was most pleasing and winning. His daily greetings were always a benediction. Whilst he was growing old there was almost nothing about him suggestive of old age. His interest, his sympathies and his conversation were of the present. He dwelt comparatively little upon the past, as is sometimes the case with the aged. His interest in current events and current history continued unabated to the last day of his life.

Judge APPLETON was a native of New Hampshire. He first came to Maine in 1818, when only fourteen years old, to enter Bowdoin College. He rode to Brunswick from his native town of New Ipswich with his distinguished uncle, Jesse Appleton, then President of Bowdoin College. They made what was then the long journey of several days in an old fashioned chaise. Ever after that, with the exception of about a year, he lived in Maine. He loved his adopted State, and he served it faithfully and well. But he never forgot the home of his nativity.

Often he spoke with interest and affection of the pleasant hills and mountains and beautiful scenery of his own native Hillsborough county.

His life glided along through its last years, varied and made pleasant by his daily attention to his numerous matters of business, and his intercourse with his hosts of friends.

He had passed his eighty-sixth birthday, and he had lived more than another half year in excellent health and intellect

still bright, active and quick. We reasonably expected there might be yet added years to his life, but on the 7th day of February, at his home in Bangor, after a brief and slight illness not supposed to be serious, without premonition or pain, he was translated from this to the unseen world. If he was fortunate in his life, so also he was not unfortunate in the manner of his death, for his frequently expressed wish had been that he might be permitted to go as he did. We see him no more in this presence. We shall experience no more his friendly and genial greetings in our daily walks of life.

His earthly career is finished, his life's work accomplished and well done.

We regretfully bid him farewell, but we shall not cease to regard him with profound respect and affection.

Remarks of F. A. Wilson, Esq.

Forty-three years ago I entered this court-room to listen to the argument of counsel in a case of unusual interest.

My curiosity specially centered in John Appleton, Esq., then a lawyer practicing at this bar, the leading advocate in this section of the State. He was in the full vigor and prime of life, graceful in motion, eloquent in speech, persuasive and successful, and to my youthful mind he seemed to be pre-eminent in a bar, which contained lawyers of such ability and learning as Edward Kent and Jonas Cutting, both of whom were afterwards associated with Chief Justice Appleton upon the bench of the Supreme Judicial Court of this State.

The effects of his argument at that time upon me I easily recall, and I did not fail to notice similar effects in the case of the spectators around me, as well as upon jurors. His services were in demand upon one side or the other of almost every case tried in the Court at that time.

He was industrious and tireless. A physical system, naturally strong and well cared for, enabled him to accomplish great tasks professionally without apparent fatigue.

From that period up to the day of his death, during the remainder of his professional career, and all his judicial life, as

well as during the period of his well-earned rest and retirement from judicial labors, I was first his acquaintance, then his young friend, his younger brother in the profession, and always his admirer.

As the presiding Judge upon the bench, he kindly steadied my first feeble, timid efforts in the much dreaded jury trial, and always afterwards, as then, I felt, as we have probably all felt many times since, that if we tripped, our clients' interests would not suffer; for Judge APPLETON, in the interest of justice, sometimes felt it to be his duty to shield a litigant as well from the blunders of his own counsel as from the unjust assaults of his opponent.

Judge APPLETON'S mind, whilst presiding in the trial of causes, was ever alert to comprehend where right and justice lay, and no pains were spared by him to give effect to his convictions, within the recognized limits allowed to the presiding Judge upon the bench.

The Chief Justice was a man of great learning, and his acquirements were by no means confined to legal lore, but he was wont to store his mind with the thoughts of others upon theological and political questions, as well as to refresh his heavily taxed mental powers by resort to the best fiction of our own and ancient times.

The record of his faithful labors as a jurist is imperishably preserved in the volumes of Reports upon our shelves, and also in the text books, which contain his contributions to the law of the land, always indicating development on progressive lines.

The temper of Judge APPLETON was judicial, his manner dignified. If one had been cruel enough to have contemplated an insult to him, the native dignity of the Judge would have protected him. Large minded, large hearted and urbane, his influence was refining and his atmosphere elevating.

Although Judge APPLETON was a devourer of cases, so to speak, he was not merely a "case lawyer."

The forward movement which he called, relating to the enlargements of the sources from which truth was to be sought in the trial of causes, looking to the admission to the witness-stand

of parties in civil causes, and persons accused of the commission of crimes, indicates the originality of his legal conceptions, and the boldness of his character.

Though a disciple of Bentham he was not content to be a theorist merely, but ardently and successfully set in motion the forces which engrafted upon our statutes his advanced ideas, now universally acknowledged to be indispensable to the elucidation of the truth and the promotion of justice.

Jurists and writers on political economy, in this country and abroad, were his correspondents, and seemed to receive as much as they bestowed in the association.

A person may, I suppose, be honest, and possess a large share of what are generally styled the Christian virtues, and not be witty, or have a sense of humor, but one would not say that a person destitute of these latter qualities would be the life of the social circle. Judge APPLETON was most charming as a companion and conversationalist, and many of our professional jokes trace their paternity or preservation from oblivion to the keen sense of the humorous or ludicrous which Judge APPLETON possessed.

The capacity for labor, and the love of labor were a marked feature in the character of Judge APPLETON. He seemed to be always at work. He suffered severe domestic afflictions at several periods of his life, and his domestic life was so harmonious and happy, his affection went out so fully and unreservedly to those of his family, that the blows he received seemed destined to crush, but as he himself said, in increased devotion to his life work he found consolation and support for the trials which came upon him.

Why then may we not take, as one of the lessons of his life, the value of labor?

It is not given to all lawyers, as it was to our greatest federal Chief Justice Marshall, to hew out of the native rock, with tools for the most part fashioned by himself, a system of constitutional jurisprudence, admiration for which increases as time passes. Opportunity would be lacking if intellectual limitations did not forbid, but adequate rewards to honest pro-

fessional effort are quite sure to follow, and whilst all cannot become great lawyers, all who labor can avoid becoming very small ones.

To the lamented friend, in whose honor we meet to-day, to revel in sensual pleasures, or to rest forever in inglorious ease, would be no heaven. He looked forward to a condition when, freed from the impediment of this mortal body, he might by labor approach nearer and nearer the great source and fountain of knowledge, of whose waters he had been permitted to partake here, as he said sparingly, but as we thought bountifully.

The full time allotted to these services could be filled with descriptions of the beautiful home-life of our friend and of the depth and tenderness of his affection for wife and children, but this is a subject too sacred for public mention. The tribute which we pay shall be to those qualities which we enjoyed in common with all, and least of all would we invade the sanctity of private grief.

We have had in this city four Judges of the Supreme Judicial Court of the State, now deceased, HATHAWAY, KENT, CUTTING, APPLETON. Men of very diverse characteristics, and temperament, of different gifts indeed, but all graced their high office, and as I think of them, I am thankful as a lawyer, that we have been thus far mercifully spared from an elective judiciary, for with the elective system I fear may come naturally, perhaps not certainly, a lack of that independence characterized as follows by Chief Justice Marshall:

"The Judicial department comes home in its effects to every man's fireside. It passes on his property, his life, his all. Is it not to the last degree important, that the Judge should be rendered perfectly and entirely independent, with nothing to control him but God and his conscience?

"I have always thought, from my earliest youth till now, that the greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary."

In the crucible of life, the adventitious aids of noble birth, which are accidental; of genius, which is bestowed and not ac-

quired; of wealth, which is as often acquired by the practice of the meanest arts as by the exercise of the noblest efforts; and political fame most ephemeral,—all are consumed; and in the final analysis, character is the sole residuum.

In the contemplation of this fact, what pride and satisfaction comes to the family of Judge APPLETON, to us as members of this bar, and to the citizens of our city and of our State, for his bright, untarnished record is the heritage of all connected with him by ties of consanguinity, brotherhood and citizenship.

REMARKS BY THE REPORTER OF DECISIONS.

Judged by results accomplished, the recognized,—and I had almost said, the supreme test of character and abilities,—the place of Chief Justice APPLETON in the judicial history of Maine must be unchallenged. He was a veritable chief. His masculinity of intellect, combined with an indomitable capacity for labor, could hardly fail of success in any of life's callings. This we know and appreciate from what has been said to-day.

Such a mind, too, keeps abreast with the times upon all the moving questions of the day. We do not wonder that, beginning as early as his admission to the bar, he is found actively engaged in considering those changes in the law of evidence, with which his name has become so well known; corresponding with Sumner and Mill on questions of national and international interest; not hesitating to speak of the duty of citizenship, upon slavery and war; partaking as Burke says of "that spirit of observation and censure which modifies and controls the whole government;" and with all, cultivating daily his love of classical and current literature.

But I prefer to speak of the Chief Justice as a friend and neighbor of thirty years. Such an intercourse with him is a liberal education of itself. The genial welcome, the constant courtesy, the instructive talk, the friendly interest, the encouraging advice, the sympathy ever tender and true,—all mingled with a simplicity never failing,—

. . . . . "will live alone,
In all our hearts, as mournful light,

That broods above the fallen sun,
And dwells in heaven half the night."

What wonder that he loved young men and was, in turn, by them beloved! What wonder that to him should flow the love and trust and affectionate admiration of the people! One, to whose benevolent face and bland and mild manners, and "firm administration of the whole learning of the law," we became accustomed.

Besides his vast labors, which of themselves have given him a permanent place in the judicial records, an enduring monument, this side of his character to which I have only briefly alluded, his interest in and love of young men is worthy of perpetual remembrance. Such is the opinion of another fully competent to speak and whose letter I subjoin.

Lewiston, November 11, 1890.

Hon. Charles Hamlin.

Dear Sir:—One of the loveliest traits of the character of Judge APPLETON, was exhibited in his uniform courtesy towards younger members of the profession.

I never shall forget how he lifted me once from the slough of despond. I had never tried a case in court, was exceedingly nervous about making the attempt, and relied entirely upon my partner, Mr. Fessenden. One day a case was called in which we were counsel, and, to my horror, word was brought to the court house that Mr. Fessenden was sick and would not be able to be present. I asked for a continuance, which the Judge, in the kindliest manner possible, declined to grant; called me to him and said: "Now, Frye, this is your opportunity. You can, if you please, try a case as ably as any man at this bar. I will see that you have perfectly fair play, and it will be a little strange if you and I together fail to secure for your client justice." We succeeded, and in his charge to the jury, Judge APPLETON paid me a very high and, undoubtedly, an entirely undeserved compliment.

After that experience, I tried my own cases, and whatever success I may have achieved, has been largely due to the Judge.

From that day to this I have been his constant and enthusiastic friend and admirer. Very truly,

WM. P. FRYE.

Several letters from distinguished members of the Bar, from various sections of the State were presented. Among them are the following.

LETTER FROM ATTORNEY-GENERAL LITTLEFIELD.

Rockland, Maine, June 18, 1891.

Hon. A. W. Paine, Bangor, Maine.

Brother Paine:—Yours of the 17th inst. inviting me, on the part of the Bar, to take part in the exercises on the occasion of the death of our late Chief Justice APPLETON, is at hand.

Please accept my thanks for the invitation. I do not expect to be able to be present, although it would give me great pleasure to join in the memorial services, as a formal expression of my profound appreciation of the virtues and services of one who will always be considered one of our most eminent and distinguished jurists. It was vouchsafed to him, to serve his State long and well; and although his term of service extended beyond the time allotted to ordinary men, he left the bench, not only full of years and honors, but in the full possession of his physical and mental vigor.

He carried with him the unalloyed respect and esteem of the Bar. Forty-two volumes of Maine Reports contain the evidence of the obligations of the profession to him, who was indefatigable in his judicial labors. In them he built and fashioned, with his own hands, his worthiest monument, that will more enduringly perpetuate the memory of his great legal ability and industry, than though "graven with an iron pen and lead in the rock forever." His life was well-rounded out, and like the shock of well-ripened corn, he was ready for the harvest. May our "last end be like his." Very respectfully,

CHARLES E. LITTLEFIELD.

LETTER FROM HON. JAMES W. BRADBURY.

Augusta, June 18, 1891.

Hon. Albert W. Paine.

My Dear Sir: Please convey to the Penobscot Bar my thanks for the honor of the kind invitation which you have conveyed to me to take part in the services on the occasion of the death of our late Chief Justice APPLETON before the Court on Saturday next, and my regret that a prior engagement, with which I cannot dispense, will deprive me of the privilege of being with you on that occasion.

I have long known our distinguished friend. I well remember the first time I saw him. Sixty-nine years ago I went to Brunswick to enter college. It was commencement day, and the exercises had begun when I entered the old meeting house, and I saw a graceful young man upon the stage delivering his oration or commencement part. He was very young. The catalogue gave his name, JOHANNES APPLETON. The last time I saw him was also at Brunswick, where I met him on the assembling of the Board of Trustees of the College, at the last commencement, wearing gracefully the honors he had won,—venerable for his age, his virtues and his distinguished career, yet retaining in his green old age the genial kindness, vivacity and social power that had endeared him to his friends and to all who had the pleasure of his acquaintance, undimmed by the frost of years.

How well he filled the space in life, between the first and the last time that I saw him, you and your associates at the Bar are well prepared to portray.

I renew the expression of my regret that I cannot be with you. Very truly yours, etc., etc.,

JAMES W. BRADBURY.

CHIEF JUSTICE PETERS, in behalf of the Court, then responded as follows:

Gentlemen of the Bar:

It gives the court great satisfaction to join the bar in this

expression of regard and respect for the memory of our lamented and beloved friend, Chief Justice APPLETON.

His career at the bar and upon the bench, extending over a period of more than sixty years, was remarkable and admirable. His first case in the books was *Lombard* v. *Ruggles*, printed in the ninth volume of Maine Reports, an important and leading authority, the memory of which was pleasant to him. It was his victory. I will venture to say that, as counsel or judge, no name appears so frequently as his throughout the sixty or seventy volumes of our reports succeeding that time.

By the oldest of us, he is remembered as a prominent member of the bar before going upon the bench. I have a vivid impression of him, and other leaders of this bar, as I first saw them during a trial term of this court in the autumn of 1844. There was at that period but one trial term of the court during a year, and that would necessarily be prolonged and arduous. In that year I was admitted to the bar, and became much interested in observing the lawyers and the trial of cases. There were distinguished lawyers and advocates in this bar at that time, with some illustrious as well as unique figures in the group, but no one of them possessed a better professional aptitude or had attained a better professional fame than JOHN APPLETON.

His professional efforts were characterized not so greatly by much variation in the exhibition of ability, as by an even and uniform excellence. His management of causes was reliable, safe and successful. He was deeply interested in the work in hand. The court room seemed a home to him, and the trial of a cause an apparent delight, Possessing then, as ever afterwards, fine physical health, his powers of both mental and bodily endurance were simply marvelous. He would pass from case to case, entering upon one trial with the same zeal and vigor he had just expended upon another, whether his previous efforts had been attended with victory or defeat. He did not forget that a battle well prepared is half won, and he was a master of the principle of promptness to the end of his life. He was active in both the preparation and the execution of business. I should doubt if he ever asked for the continuance or post-

ponement of a case in court for his own personal convenience.

Industry can accomplish all possibilities, and the key to industry is the love of work. "To business that we love we rise betime, and go to 't with delight," are the words of the master poet. And still neither at the bar nor upon the bench was Judge APPLETON impatient with the movements of others because slower than his own; nor was he hasty or hurried in the performance of his own tasks. He kept, however, constantly employed, catching the inspiration of Goethe's motto, "Haste not, rest not." He was distinguished for his preparation of the law of a case, as well as of its facts, and his opponents learned to be on the look-out against his assaults and surprises. He continued the same studious, active, attentive and successful lawyer until he exchanged his duties at the bar for those of the bench.

But a wider field for fame and usefulness was awaiting him. He had for some time espoused the scheme of consolidating the District and Supreme Judicial Courts, by abolishing the one and concentrating in the other the jurisdiction belonging to both. He also advocated, if he did not originate, the plan of having all law questions heard in judicial districts instead of in all the counties of the State. Having been the chairman of a commission authorized by the legislature to consider and report upon the questions, he earnestly contended for a reconstruction of the then system of courts, although opposed by a minority of the commission and other adverse influence. Principally by his efforts the present system was established by the legislature of 1852, a system remaining, though not without some objection and criticism, substantially unchanged to this day. Although a Whig in his political preferences, he was appointed by a Democratic State administration to one of the new places upon this bench created by the bill. I have every reason to suppose that neither he, nor any of his friends, anticipated or even thought of the likelihood of the appointment until after his duties on the commission had been fully performed. In this position, first as associate justice, afterwards as chief justice, he remained for an almost unexampled period of more than thirty-one years. Nor

was his capacity for great usefulness in the judicial seat expended or apparently even abated when his term of office expired. He left not a stitch of his own work for a successor. Duty performed, fully, satisfactorily, grandly performed, was the spontaneous exclamation of the State, as it reluctantly and sorrowfully yielded to the supposition that his great age, then nearly eighty years, rendered it probable that his health and strength would not endure through an additional term of seven years.

For an appointment to the bench Judge APPLETON was eminently fitted by education, experience, temperament and habits of mind. In this arena, by his own hand, has he established a record that stands as a monument in honor of his memory. His labors as a trial judge and member of the law court were absolutely immense. It is said that of all the creations of man a book is the only immortality. Certain it is that the vast mass of opinions contributed by Judge Appleton to the jurisprudence of his State, contained in its judicial volumes, touching a multitude of questions, relating to vast private interests and great public concerns, constitutes a record that will last so long as lasts our commonwealth. He has impressed upon the law of the State, as contained in its printed reports, a good deal of his own individuality. His learning, both legal and literary, his style of thought and expression, his love of research and exploration into the hidden corners of the law, his industry and earnestness, his delight in new adaptations of old principles, his love of right and justice, are there distinctly visible. He was progressive in his views of the law, having been an early and persistent advocate of a rule allowing parties in all cases, civil and criminal, to testify, a rule removing all ground of either exclusion or excuse. It was a satisfaction to him to see in the end some of his advanced views adopted either by legislative enactment or judicial decision.

He brought to the judicial work the same industry and promptitude that characterized his life at the bar. While not impatient and never weary at *nisi prius* terms, he loved to be busy in the disposition of cases. His tact and success in clearing dockets was notable throughout the State. He was very popular

with all who had business at his terms. During my own thirty years practice in the profession, I never knew a judge before whom it was more agreeable or satisfactory to try a cause than before him.

The same zeal animated him in the preparation of his written opinions. No sooner was a case argued than, if assigned to him for an opinion, his mind and hands were at work upon it. He was very rapid in constructing an opinion after his views of the law of the case had become fixed. Though his opinions were often quickly written, the style of them indicated no want of care. In careful matters he worked rapidly. His current of thought flowed evenly as well as quickly, and memory readily supplied words fitting the thought. His style of writing was a good transcript of his mind. It was a free, but clear and forcible style, indicating an easy mastery of expression and the extensive reading of books. He possessed in an uncommon degree a spontaneous grace of composition.

In my estimation of Judge APPLETON, his most conspicuous mental trait was quickness of perception. His mental processes worked with an almost phenomenal rapidity. The sensitiveness of his own mind was so keen as to be very quickly touched by any communication from the mind of another. He would seize upon the idea indicated before it could be half-expressed. This quick-sighted faculty, though occasionally, perhaps, leading to incorrect first impressions, was a most fortunate faculty for the administration of business at a *nisi prius* term. It enabled its possessor to do a great amount of business in a short time. This quick perception, aided, as it was in his case, by a very retentive and responsive memory, became a still more valuable and practical endowment.

Another dominant element in Judge APPLETON's character — both an intellectual and moral power — was temperament. This is a product of all the elements of character blended together,— a balance-wheel that guides them all,— an indicator of the general character. He was a person of even and unruffled temper, courteous and kindly in all places and conditions. He was

utterly unconscious of prejudice or resentment against any one. He was more likely to see the good side of men than their faults. He was tolerant of the views of those who did not agree with his own. During the almost half-century that I knew him I never heard an angry word from his lips. Charity, sympathy, liberality, courtesy, forbearance, lenity, and kindred qualities were elements in his disposition. Not that he did not have firmness. Gentleness is the sure evidence of firmness. He possessed good-natured firmness and perseverance in an uncommon degree. The secret of his calmness and self-control was the happy instinct born in him not to be worried at what could not be helped. He used to say, when he had affliction or trouble, it was providential that he could become absorbed in work. More the trouble, more the work. It is worry more than work that wears a man out. "It is not the revolution that wears out the machinery, but the friction," says some writer. The life-work of Judge APPLETON was a machinery that run without much chafe or friction.

Few persons indulge in reading more than he did. I do not know that he inclined to the investigation of subjects other than that of law by any systematic course of reading, but he never saw a book new to him without craving the reading or examination of it. His reading was his principal recreation, and extended to all subjects from science and reason to romance. He found diversion also in games of cards, excelling as a player at euchre and whist.

In all the social relations his influence was deeply felt. His manners were simple and pleasing. He was agreeable and companionable. His heart responded as quickly as his mind. He was tenderly attached to his judicial associates, as were they to him. He had a fondness for the members of the bar, and was beloved by them. To his family he rendered a most pathetic devotion.

As the time was nearly at hand when his connection with the bench was to be terminated, he had some misgiving as to the effect such a radical change would have upon him. But his apprehension proved unfounded, as his own affairs and his

books and the enjoyment of the society of friends were employment sufficient and satisfactory to him. His last years abounded in graceful contentment and enjoyments, the sure current of time all the while slowly and gradually, and almost imperceptibly wearing away the bodily strength until at last, his life-work completely ended and all its happiness fully enjoyed, the final summons came; and "death smiled upon him, as smiles a silent and peaceful night upon the exhausted laborer."

And so there has gone from us the learned and upright judge, the eminent citizen, the beloved friend. The State, the bar, and all classes of society will remember him for his great public services and private virtues. His life has added to the common weal. The bar and bench unite on this interesting and solemn occasion in expressing their admiration of his services and character, and for paying the last honors to his memory. And it falls to me to speak the last, sorrowful word — farewell!

The court concurs cordially in the resolutions, and orders them to be spread upon the records. And in further honor of the memory of the deceased the court will now be adjourned.

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ACCOUNT STATED.

1. Where parties agree upon a settlement of accounts by an amount stated, having at the time a particular sum in mind and alluding to the sum without naming it, it is competent to prove by other evidence (here by the admission of defendant) what the amount of the agreed indebtedness was. *Goodrich* v. *Coffin*, 324.

2. When a defendant sets up in an action on an account stated that, in the accounts computed, there were items of lumber sold illegally because the lumber had not been officially surveyed, the burden is on him to prove the facts. *Ib.*

ACTION.

See ATTACHMENT, 3.

1. In an action on the case against the defndant for fraudulently procuring a resolution of composition, under the insolvent law, in which it appeared that the plaintiffs were creditors but did not become parties to the proceedings; and no fraud or deceit towards the plaintiffs was shown; neither were they induced to do or omit to do any act whatever; nor to forego any right against their debtor, *Held:* that the plaintiffs have no legal cause of action. *Haynes* v. *Gould*, 344.

2. The Kennebec Superior Court has jurisdiction of an action on the case which charges that the defendant deposited earth upon his own land close to plaintiff's fence in such a careless manner that the action of the elements pressed the earth and fence partly over upon plaintiff's land to his damage; although that Court has not jurisdiction of real actions nor of actions *quare clausum fregit.* Such an action is not of the nature of *quare clausum*, nor its equivalent. *Knight* v. *Dunbar*, 359.

3. A claim against a town for damages occasioned by a defective highway therein is without legal validity when no notice in writing, as required by the statute, has been given to its municipal officers. *Clark* v. *Tremont*, 426.

4. The plaintiff brought an action upon a vote of the town to pay him damages under such circumstances. *Held:* That no controversy existed between him and the town as to its legal liability; and that the vote is not binding upon the town, whereby an action can be maintained upon it. *Ib.*

5. An action of debt to recover a tax may be maintained in the name of the collector of a village corporation. Such officers are included within R. S., c. 6, § 141. *Lord* v. *Parker*, 530.

6. It is not a bar to such an action that the collector, in a settlement with the treasurer, has paid all the taxes due including the tax sued for, before the action was commenced; it appearing that the defendant did not authorize the payment, nor that it was made by the plaintiff with an intent to extinguish the tax, or to relieve the defendant from his liability to pay it. *Ib.*

7. In an action on the case to recover damages for the alleged unlawful location construction and maintenance of the extension of a sewer below low-water mark in the Penobscot River, in the city of Bangor, whereby the plaintiffs claimed that their dock was rendered less valuable from the liability of vessels grounding on the end of the sewer, and on the sediment flowing out of it, also a diminution of rents of the plaintiffs' wharf because of the noxious smells arising from the sewage, it appeared that the wharf and dock, during all the time, were in the possession and use of the plaintiffs' tenants who had suffered no diminution of rents. *Held*; that the city had a legal right to extend its sewer over the plaintiffs' flats to a point below low-water mark; that in locating the sewer the city council acted judicially and that the city would be liable only for an improper construction or maintenance of it. *Attwood* v. *Bangor*, 582.

8. *Held, also*, that if the sewer was improperly constructed, it was a temporary injury for which the plaintiffs could not recover in this action. *Ib.*

ADOPTION.

1. Upon a petition for partition, two of the respondents claimed title not as legitimate children of the decedent, but as illegitimate, adopted and made his heirs, by virtue of R. S., c. 75, § 3. *Held*: that it must first appear that, in thus claiming, they were illegitimate. The statute operates only in cases of illegitimacy. *Grant* v. *Mitchell*, 23.

2. Nor can the subsequent marriage, adoption, or acknowledgment be taken as proof of the illegitimacy, as between the decedent's legitimate heirs and those claiming to be his illegitimate heirs. *Ib.*

3. The presumption of legitimacy of a child, born in wedlock, is so strong that it can not be overcome by proof of the wife's adultery, while cohabiting, with her husband; much less by the mere admission of the adulterer. *Ib.*

4. The fact of illegitimacy is for the jury. It would be error to assume in the case of children born before the marriage of the mother with the decedent, that the statute acknowledgment is effectual to establish their claim as his heirs. *Ib.*

5. By R. S., 1883, c. 75, § 3, an illegitimate child born after March 24, 1864, is the heir of parents who intermarry; and such child, born at any time, is the heir of his mother, and of any person who acknowledges himself to be his father in a writing signed in the presence of and attested by a competent witness; and if his parents intermarry and have other children before his death, or his father so acknowledges him, or adopts him into his family, he shall inherit from his lineal and collateral kindred, and they from him, as if legitimate; but not otherwise. *Brewer* v. *Hamor*, 251.

6. In an action brought to determine the title to the father's real estate, after his decease, it was *held:*

(1.) That the provisions of statute in force at the time of his decease must determine the rights of the heirs to the inheritance of his real estate.

(2.) That, inasmuch as the illegitimate child in this case was born prior to 1864, and there was no acknowledgment in writing by the father, the rights of the parties must be determined by the remaining portion of the section of statute in question.

(3.) That under that, the first requisite to enable an illegitimate child to inherit from the father, is an intermarriage of the parents.

7. And in addition thereto one of the following things must be shown to have taken place, viz.:

(1.) Either that his parents have had other children before his death; or:

(2.) That his father has acknowledged him in writing; or:

(3.) That the father has adopted him into his family. *Ib.*

8. Where the illegitimate child has been legitimatized in accordance with the terms of the statute, such child inherits, "as if legitimate;" and in case of the death of such child leaving children, such children of the illegitimate inherit from their grandfather,—the father of the deceased illegitimate,—such portion as their mother would have inherited from his estate. *Ib.*

ADVERSE USE.

See TITLE, 8.

1. Title by possession will become absolute after twenty years of open, notorious and exclusive occupation as owner, under a claim of right or color of title, whether such claim was originally based on a written or parol contract, or no contract at all. *Martin* v. *Me. Cent. R. R. Co.* 100.

2. An oral agreement for the exchange of lands, followed by an occupation thereunder, which has all the elements of adverse possession, will ripen into an absolute title, although mutual deeds were never given. *Ib.*

3. Where the plaintiff, with such a possessory title, knew and approved of a deed, given by one holding the record title, conveying a right to enter the premises, together with a perpetual easement of water and water-rights therein,— himself receiving the consideration named in the deed,— and afterwards saw the defendant, a subsequent grantee, expending large sums of money in improving the easement, but gave no warning to the defendant to desist and made no assertion of title until the completion of the work, and in which he was employed; *Held*: that he was equitably estopped from asserting any title to the disturbance of the defendant's easement. *Ib.*

AGENT.

See WAY, 4

1. A wife while living with her husband is presumed to be vested with an agency authorizing her to purchase on his credit such supplies as are necessary for herself and family. *Baker* v. *Carter*, 132.

2. In an action of trover, it is no defense that the defendant acted as the agent or servant of another who was himself a wrong-doer.
McPheters v. *Page*, 234.

3. One who participates in the commission of the misdemeanor of keeping a liquor nuisance to such an extent as to render himself criminally liable at all, is liable as a principal, and may be indicted, convicted and punished as such, although the capacity in which he acted was that of a clerk, agent or servant merely. *State* v. *Sullivan*, 417.

ALLOWANCE TO WIDOW.

1. The probate court, in making an allowance to a widow out of her husband's estate, may properly take into consideration the amount of private estate the widow is possessed of, not received from the property of her husband.
Walker, Appellant, 17.

2. There is such a variety of circumstances to be considered in awarding allowances to widows, that no rule in any considerable degree general can be framed to govern them. All depends upon the exercise of a reasonable, judicial discretion. *Ib.*

3. The complicated circumstances of the present case reviewed in the opinion of the court. *Ib.*

AMENDMENT.

See COUNTY COMMISSIONERS, 4.

1. In a writ of entry both parties claimed to derive title from Elisha Brown; the plaintiff by a series of quit-claim deeds originating with Brown, and the defendants by a warranty deed from the grantee of six levying creditors of Brown. The levies were defective; one because it did not appear with certainty that the debtor, whose estate was taken, selected one of the appraisers, or was notified and neglected so to do; and the other because made as upon land held by the debtor in fee simple and in severalty and no reason assigned for levying on an undivided share instead of levying on a portion by metes and bounds. The defendants offered evidence to impeach the plaintiff's title as acquired in fraud of creditors; and also filed a petition from the officer who made the levies asking to supply the omissions named by amendments to the returns. *Held*: that such amendments are to be allowed or disallowed, as may best tend to the furtherance of justice. They may be permitted, irrespective of the time which has elapsed, provided they are clearly in conformity with the facts, and do not prejudice the rights of third persons acquired *bona fide* without notice. *Jackson* v. *Esten*, 162.

2. Unless the equities of the applicant are superior to those of the contestant, the court will refuse to interpose to make that valid which was before invalid. They are properly allowable against the execution debtor himself, and his fraudulent grantee and all those deriving title from him, and standing in no better condition in equity. *Ib.*

3. The defendants should be permitted to impeach the plaintiff's title; and if the jury find that the original conveyance from Brown was fraudulent as to creditors, and that the plaintiff was not a *bona fide* purchaser for value, without notice of the fraud, the proposed amendments, being satisfactorily shown to be in conformity with the truth, are to be allowed and regarded as made. Otherwise not. *Ib.*

4. A creditor who has, by mistake of either fact or law, proved a debt in insolvency against a partnership estate, when more properly provable against the private estate of one of the partners, may be allowed in the discretion of the court to withdraw his proof from the proceedings in the one estate and present it against the other. *In re, Burgess,* 339.

5. An amendment of a charter *was held* to be a legislative waiver of any forfeiture. *Farnsworth* v. *R. R. Co.* 440.

ANNUITIES.

See WILLS.

APPEAL.

See EQUITY, 8. PROBATE, 2.

1. A grantee of real estate from the residuary legatee under a will, where there is no property of the testator which can be reached to satisfy the debts and claims against his estate, except such real estate, is interested in the settlement of the account of the executor or administrator of the estate, and has a right of appeal from the decree of the Judge of Probate allowing the account. *Blastow* v. *Hardy,* 28.

2. A land owner, whose real estate is damaged by the action of county commissioners in locating and defining the limits and boundaries of a highway under R. S., c. 18, § 11, can appeal to the supreme judicial court from the county commissioners' award of damages. *Conant, Appellant,* 42.

3. One creditor has no right of appeal from the allowance of the claim of another creditor against the estate of a debtor who makes a settlement by composition proceedings in insolvency. *Huston* v. *Worthly,* 352.

4. Statutes are to be interpreted with reference to their subject-matter, the antecedent and subsequent legislation, and the difficulties sought to be remedied. *Gray* v. *Co. Com's.,* 429.

5. The court will give effect to the legislative intent, and not defeat it by adhering too rigidly to the letter of the statute. *Ib.*

6. The meaning of a remedial statute may be extended beyond the precise words of the act, when the reason on which the legislature proceeded, the end in view, or the purpose designed, is made clear. *Ib.*

7. *Held:* That the right of appeal, from the location of a town way by the County Commissioners on the unreasonable refusal of the municipal officers, was restored by statute of 1885, c. 359, § 7; and the provisions of § 48, c. 18, of R. S., instead of § § 49 to 51, must apply to such appeals; also that the same section respecting the time for taking the appeal must prevail over section (19) nineteen. *Ib.*

8. Where an appeal has been taken from the decision of county commissioners in laying out a highway, all objections to their jurisdiction or their otherwise invalid proceedings may be taken when the report of the committee is offered for acceptance. If not then taken no writ of certiorari will be sustained to quash their proceedings. *Phillips* v. *Co. Com.* 541.

ARBITRATION.

See AWARD.

ASSESSMENT.

See TAX.

ASSIGNEE.

See INSOLVENCY.

ASSIGNMENT.

See DAMAGES, 7. PROMISSORY NOTES, 11.

1. To make an order operate as an assignment, it must be upon a particular fund. It is not enough that it is drawn upon a debtor by a creditor in general terms. *Hall* v. *Flanders*, 242.

2. An assignment of wages, duly recorded, will prevail against an order of the assignor, earlier in date, but neither accepted in writing nor recorded, to pay the same wages to a third party. *Peabody* v *Lewiston*, 286.

3. An accommodation acceptor's claim for money paid may well be assigned in equity to the bank, that originally cashed the bill, by a delivery of it, so as to be a good consideration for a mortgage to such bank to secure the debt from the payee, the real debtor. *Skowhegan Nat. Bank* v. *Maxfield*, 571.

4. The payee, by giving such mortgage, merely secured his own debt, and a representation to him, by the bank, as inducement to give the mortgage, that the bill is unpaid, though untrue, is harmless and not fraudulent. *Ib.*

ATTACHMENT.

1. Where an officer with a writ against one person attaches personal property claimed by another person, the latter is under no duress; and a receipt signed by him, to obtain a release of the property from the officer's custody, can not be avoided for duress. *Kingsbury* v. *Sargent*, 230.

2. Where the officer does not undertake to state the terms or conditions of the receipt written by him to be given by the claimant, but only states his opinion of its legal effect, (the claimant having the opportunity to read the receipt, but signing without reading) the receipt can not be avoided on the ground of fraud, even though the officer misstated its legal effect. *Ib.*

3. The mortgagee of chattels attached must deliver a true account of the amount due on his claim to the attaching officer, and not to the attaching creditor, before he can bring an action against such officer.
Phillips v. *Field*, 348.

4. The underlying principle of a mechanic's lien is that of consent or contract. The lien acquired by attachment under R. S., c. 81, § 59, which requires certain specifications in order to create it, is wholly *in invitum*. The method of procedure in the one case is separate and independent from that of the other. *Wescott* v. *Bunker*, 499.

ATTORNEY.

When knowledge of the attorney is knowledge of the client.
Blake v. *Clary*, 154.

AWARD.

1. Title to real estate can not be settled by a parol award.
Buker v. *Bowden*, 67.

2. Where a disputed line was attempted to be settled by a parol award, and the plaintiff thereupon told the defendant to go on and cut the wood on the latter's side of the line thus established, and he did so until forbiden by the plaintiff and subsequently hauled away the wood cut before being forbidden; *Held*: that the facts did not constitute a license to enter and cut on what proved to be the plaintiff's land, though the parol award determined it be the defendant's land. *Ib.*

3. Where parties to an action submit the same to a referee under an unrestricted rule of court, his authority extends to, and, in the absence of any improper motive on his part, his direct, unconditional award is conclusive of all questions of law and fact involved. *Frison* v. *DePeiffer*, 71.

4. It is not an objection to an award that the referee has decided a matter not submitted to him, if he has decided the matter that was submitted, the matters being distinct and separable; one part of the award may be taken and the other left. *Littlefield* v. *Waterhouse*, 307.

BASTARDY.

See BOND, 1, 2, 3, 4.

1. The statute, in bastardy proceedings, requires an accusation during travail of the complainant as a condition precedent to the right of recovery. The court admitted evidence of the fact by the testimony of an attendant at the time of travail. *Mann* v. *Maxwell*, 146.

2. When evidence is offered by a party, and at the time, in the light of what has been developed, the presiding justice thinks it incompetent and excludes it, but on further developments he concludes to admit it, and so informs counsel before the evidence is closed, and he declines to put it in, but elects to take his chance with the jury without it, it is too late for him to insist on exceptions after the verdict is against him. *Ib.*

BIDDEFORD MUNICIPAL COURT.

3. The Municipal Court of the city of Biddeford, January 24, 1888, did not have a clerk within the intent and meaning of the federal statute, (R. S., of U. S., §

2165) and, therefore had no jurisdiction over applications for naturalization of aliens; and no authority to receive and record their declarations of intention to become naturalized. *Dean, Pet'r*, 489.

BILLS AND NOTES.

See PROMISSORY NOTES.

BOND.

1. The statutory rule, which requires, in actions on penal bonds, that judgment shall go for the penalty and execution issue for the damages sustained, when such bonds are given to secure the performance of covenants or agreements, is not restricted to cases where there is a written agreement separate from and independent of the bond itself; the agreement may be implied from the nature of the covenant in the bond; may be inferential only. *Corson* v. *Dunlap*, 32.

2. It applies to bonds where there may be several breaches at different times, *scire facias* being the proper remedy to obtain execution for damages accruing from subsequent breaches; but does not apply to cases where there can be but a single breach and a single assessment of, damages, though of harmless effect if so applied. *Ib.*

3. It applies to an action on the bond given by a respondent in bastardy proceedings, in which the order of court requires that payments be made by the principal in the bond to the complainant in installments, and there may be breaches after the first suit. *Ib.*

4. The rule of practice as indicated in *Philbrook* v. *Burgess*, 52 Maine, 271, so far as inconsistent with the rule of the present case, not to be followed in future cases. *Ib.*

5. The sureties on a guardian's bond, given at the time of the appointment of the guardian, are not liable for money received for real estate sold by him under a special license. On obtaining such a license, the guardian is required to give a special bond, and the sureties on this special bond are the ones liable for money so obtained by the guardian. Consequently, in a suit on the original bond, it is competent for the sureties to show the source from which the funds remaining in the hands of the guardian, and not accounted for, were received. *Judge of Probate* v. *Toothaker*, 195.

BOUNDARY.

See DEED, 10.

BRIDGE.

See WAY, 20.

CARE.

See NEGLIGENCE.

CATTLE.

See NEGLIGENCE, 4.

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1. *Appleton* v. *Co. Com.* 80 Maine, 284, explained, 514.
2. *Bank* v. *Chase*, 72 Maine, 226, approved. 154.
3. *Burbank* v. *Gould*, 15 Maine, 118, questioned. 312.
4. *Coombs* v. *Co. Com.* 71 Maine, 239, criticised. 282.
5. *Hunt* v. *Hunt*, 37 Maine, 336, distinguished. 251.
6. *Philbrook* v. *Burgess*, 52 Maine, 27, modified. 33.
7. *Ricker* v. *Joy*, 72 Maine, 106, affirmed. 499.
8. *Trask* v. *Patterson*, 29 Maine, 499, considered. 91.
9. *Clark* v. *Dwelling-House Ins. Co.* 81 Maine, 373, affirmed. 362.

CERTIORARI.

Where an appeal has been taken from the decision of county commissioners in laying out a highway, all objections to their jurisdiction or their otherwise invalid proceedings may be taken when the report of the committee is offered for acceptance. If not then taken no writ of certiorari will be sustained to quash their proceedings. *Phillips* v. *Co. Com.* 541.

CHARTER.

See WATER COMPANY. RAILROADS.

CLIENT AND ATTORNEY.

1. In a suit to recover for services claimed to have been rendered by the plaintiff in the prosecution of an "Alabama" claim, the defendant was permitted to prove that, subsequent to the time when the services sued for were claimed to have been performed, the plaintiff was expelled from the court and prohibited from prosecuting claims therein. *Held*; that this evidence was not admissible, or relevant to the issue. *Manning* v. *Borland*, 125.
2. When knowledge of the attorney is inputable to his client. *Blake* v. *Clary*, 154.

COMMERCE.

See COMMON CARRIER. INTOXICATING LIQUORS, 2.

A State may, until legislation on the subject by Congress, authorize the erection of a bridge across a navigable river within the State. Until action has been taken by Congress, such Act of the State is not repugnant to the power to regulate commerce. *State* v. *Leighton*, 419.

COMMON CARRIER.

1. Where it appeared that, at the time of seizure upon a warrant, a package of intoxicating liquors was in the possession of a common carrier, and in transit from another state, to this state, for delivery here; *Held:* That it was commerce, "among the several states," and as such was under the

exclusive jurisdiction of Congress. *Held, also*, that the package not having been broken nor delivered to the consignee, the state process for its seizure, while in that condition, was void *State* v. *Intox. Liquors*, 158.

2. Such common carrier has a special title which gives it a legal right to the custody of the property, before delivery to the consignee, as against one having no right. *Ib.*

3. Ownership of property by the plaintiff, its delivery to and acceptance by a common carrier for transportation, and its non-delivery to the consignee, are *prima facie* evidence of negligence. The burden then rests upon the carrier to show facts exempting it from liability.
Bennett v. *Am. Exp. Co.* 236.

4. The property of the plaintiff, while lawfully in the possession of the defendant as a common carrier, was seized unlawfully by an officer, without any warrant or legal process, nor was any afterwards obtained. *Held*: That the officer was a trespasser, and that the common carrier was liable in the same manner as if it had allowed any other trespasser to take the property out of its custody. *Ib.*

5. Revised Statutes, c. 30, § 12, which imposes a penalty for killing, destroying or having in possession during certain portions of the year, "more than one moose, two caribou or three deer," does not apply to common carriers in the performance of their duties. *Ib.*

6. When property is rightfully delivered to a common carrier to be transported to a point outside the limits of the State, the duty of the carrier is not merely to transport the property in the State, but to such point outside the limits in another State. *Ib.*

7. Where such property has lawfully commenced to move as an article of commerce from one State to another, that moment it becomes the subject of interstate commerce, and as such is subject only to national regulation. *Ib.*

8. The same is true in relation to whatever agency may be used as the means of transporting such commodities as may lawfully become the subject of purchase, sale or exchange, under the commerce clause of the Constitution of the United States. *Ib.*

9. The statute of this state, (R. S., c. 24, § 50, requiring common carriers who bring into the State persons not having a settlement therein, to remove them beyond the State, if they fall into distress within a year, &c., is a regulation of foreign and interstate commerce, and is in violation of Article 1, § 8, clause 3, of the Constitution of the United States, and is therefore void.
Bangor v. *Smith*, 422.

CONDITION.

See DEED, 4.

CONSIDERATION.

1. A, promise to forbear and give further time for the payment of a debt although no certain or definite time be named, if followed by actual forbearance

for a reasonable time, is a valid and sufficient consideration for a promise guarantying its payment. *Moore* v. *McKenney*, 80.

2. An accommodation acceptor's claim for money paid may well be assigned in equity to the bank, that originally cashed the bill, by a delivery of it, so as to be good consideration for a mortgage to such bank to secure the debt from the payee, the real debtor. *Skowhegan Nat. Bank*, v. *Maxfield*, 576.

3. The payee, by giving such mortgage, merely secured his own debt, and a representation to him, by the bank, as inducement to give the mortgage, that the bill was unpaid, though untrue, is harmless and not fraudulent. *Ib.*

CONSTITUTIONAL LAW.

See INTOXICATING LIQUORS, 2.

1. The Act of 1885, c. 376, which declares that, "no action shall be brought by any person whose cause of action has been barred by the laws of any state, territory, or country, while all the parties have resided therein," does not apply to a negotiable promissory note held by a citizen of this state at the time of its passage. *MacNichol* v. *Spence*, 87.

2. The Act should be construed as prospective only; and not applicable to causes of action accruing from contracts, already made and held by citizens of this state, at the time of its passage. *Ib.*

3. When property is rightfully delivered to a common carrier to be transported to a point outside the limits of the State, the duty of the carrier is not merely to transport the property in the State, but to such point outside the limits in another State. *Bennett* v. *Am. Exp. Co.* 236.

4. Where such property has lawfully commenced to move as an article of commerce from one State to another, that moment it becomes the subject of interstate commerce, and as such is subject only to national regulation. *Ib.*

5. The same is true in relation to whatever agency may be used as the means of transporting such commodities as may lawfully become the subject of purchase, sale or exchange, under the commerce clause of the Constitution of the United States. *Ib.*

6. Sections 47, and 48, of c. 104, R. S., enabling those in possession of real estate claiming freehold, or an unexpired term of not less than ten years therein, to quiet their title against adverse claimants by petition requiring such claimants to bring suit within such time as the court may order,— are constitutional. *Webster* v. *Tuttle*, 271.

7. The Statute of this State, (R. S., c. 24, § 50,) requiring common carriers who bring into this State persons not having a settlement therein, to remove them beyond the State, if they fall into distress within a year, &c., is a regulation of foreign and interstate commerce, and is in violation of Article 1, § 8, clause 3, of the Constitution of the United States, and is therefore void. *Bangor* v. *Smith*, 422.

8. The constitutional amendment which took effect in 1875, requiring the formation of corporations to be under general statutes, does not apply to a charter granted by the legislature before the amendment, although amended by it afterwards. *Farnsworth* v. *R. R. Co.* 440.

CONSTITUTION OF MAINE.

Art. IV, Part 3, § 14. General Corporation Law, 440.

CONSTITUTION OF UNITED STATES.

Art. I, § 8, cl. 3. Commerce, 419, 422.

CONTRACTS.

See FORBEARANCE, 1. FOREIGN CONTRACTS. SALE, 5-9.

1. When a party stipulates in a contract that all his statements therein are material, and that falsity in any of them shall avoid the contract, the court can not, without an enabling statute, pronounce any of them immaterial.
Johnson v. *Me. & N. B. Ins. Co.*, 182.

2. In a life insurance contract, one of the statements by the assured, stipulated by him to be material and true, viz: that his brother never had insanity, was untrue. *Held*: that it avoided the contract. *Ib.*

3. A board bill contracted by an infant to enable him to attend school, is necessary, the payment for which may be recovered of him by suit.
Kilgore v. *Rich*, 305.

4. If the infant procure another to pay the bill for him, that payment is regarded as the furnishing of necessaries, for which a suit may be maintained against the infant for the reasonable value to him of the amount so paid. *Ib.*

5. Parties, who have bound themselves in an executory contract of sale of personal property without warranty, are not precluded thereby from superseding such contract afterwards by an executed sale of the same property with warranty, and other change from the terms of the first contract. *Storer* v. *Taber*, 387.

6. In an action on the warranty of such property the vendee is not estopped, to show that it was worthless, by his admission in the first written agreement that it was worth one hundred and twenty-five dollars. The admission would be evidence but not conclusive evidence of the value. *Ib.*

7. For a vendee's refusal to accept and pay for goods he has contracted to buy, the vendor may recover for damages the difference between the market value of the goods at the time and place stipulated for delivery and the contract price, together with the expenses of reselling the same; and this rule prevails whether the articles are merely some of the manufactures of the vendor which he has on hand, or are manufactured in some particular way especially for the vendee at his request; nor does the rule yield when the action declares specially on the contract for the full price. The nature of the facts, rather than the form of the action, rules the damages.
Tufts v. *Grewer*, 407.

8. In an action brought upon the following promissory writing, viz: "For value received I promise to pay Myron J. Weymouth, fifty dollars in sawing at my mill in Sangerville village. Sangerville, Oct. 3d, 1885," *it was held*; that as the time of performance is not named in the contract, either party may request performance by the other within a reasonable time; and that the

statute of limitations will not begin to run until the expiration of a reasonable time of performance after such demand. *Weymouth* v. *Gile*, 437.

9. The promisee is not required to be the owner of the logs presented for sawing under the contract. It is sufficient if he has the authority from any owner to so present them. *Ib.*

10. The underlying principle of a mechanic's lien is that of consent or contract. The lien acquired by attachment under R. S., c. 81, § 59, which requires certain specifications in order to create it, is wholly *in invitum*. The method of procedure in the one case is separate and independent from that of the other. *Wescott* v. *Bunker*, 499.

CONTRIBUTION.

See PROMISSORY NOTES, 4.

CORPORATION.

See RAILROADS.

1. By the statutes pertaining to corporations, stockholders who have not fully paid in their subscriptions for stock are liable to pay the deficiency to any creditors of the corporation who may institute proceedings to recover the same, excepting creditors whose claim consists of a mortgage debt of the corporation; *Held*: That an agreement of the corporation to pay a mortgage debt of another, does not make it a mortgage debt of its own. Its own debt is not secured by mortgage. *Barron* v. *Paine*, 312.

2. A judgment regularly obtained against a corporation is conclusive evidence of its indebtedness in a suit by one of its creditors against stockholders to recover the amount remaining unpaid upon their stock, unless it be shown that such judgment was procured by collusion or fraud. *Ib.*

3. A stockholder in a business corporation is presumed to continue to be a stockholder until the contrary is shown. *Ib.*

4. The correctness of the decision in *Burbank* v. *Gould*, 15 Maine, 118, questioned. *Ib.*

5. The constitutional amendment which took effect in 1875, requiring the formation of corporations to be under general statutes, does not apply to a charter granted by the legislature before the amendment, although amended by it afterwards. *Farnsworth* v. *R. R. Co.*, 440.

6. The four years, at the expiration of which a charter of incorporation becomes by the statute forfeited unless the company be organized and its business commenced within that time. do not run against a corporation observing the statutory requirement within that time after its charter has been amended. The amendment is a legislative waiver of any forfeiture. *Ib.*

COSTS.

1. Where a defendant sets up payment under a plea *puis darrein continuance*, and the defense prevails, the plaintiff recovers the costs up to the date of the plea, and the defendant recovers them afterwards.

Greenleaf v. *Allen*, 333.

2. The same result properly enough follows where all the facts involving such a defense are submitted to a judge at *nisi prius* for his decision upon them without pleadings. In such case formal pleadings are impliedly waived. *Ib.*

COUNTY COMMISSIONERS.

See RAILROADS, 3.

1. A warrant of distress against the inhabitants of a town does not *per se* protect an officer, distraining the goods and chattels of one of its inhabitants, when it does not affirmatively appear on the face of the warrant that the court of county commissioners had jurisdiction of the subject-matter of the judgment on which it was issued. *Brown* v. *Mosher*, 111.

2. If, however, the record of the judgment shows such jurisdiction in fact, the officer's legal execution of the warrant may be justified notwithstanding that fact does not affirmatively appear on the face of it. *Ib.*

3. A petition for the appointment of an agent to open and make passable a highway under the provisions of R. S., c. 18, § 37, duly entered at a regular session of the court of county commissioners, may be ordered to be heard and heard, after proper notice therefor, in the vicinity of the location; and the court may adjourn the session, at which the petition was entered, to the time and place ordered. *Ib.*

4. If such adjournment does not appear of record, the court of county commissioners may, at any regular session, amend its record so that it may accord with the facts. *Ib.*

5. When proceedings for the laying out of a way have been by the Commissioners "confirmed, closed and recorded," such way is thereby located and established, and a petition to discontinue the same is a subsequent, new proceeding that does not in any way seek to annul or reverse such judgment of the County Commissioners, and therefore, does not interrupt and can not, in any way, enlarge the time specified within which such way should be built. *State* v. *Wellman*, 282.

6. The time having expired within which the town interested, should have built the road when the Commissioners were petitioned to appoint an agent to construct the same, it was their duty to have so done instead of refusing to so do, and it, therefore, becomes the duty of this court, in the exercise of its plenary power over all inferior courts, to require the Commissioners to proceed and cause the road to be constructed as required by law. *Ib.*

7. When an order of court required that County Commissioners be summoned by serving them with an attested copy of a petition, *Held*; that the order was complied with by delivering the same to their chairman while the board was in session. *Ib.*

8. *Coombs* v. *Co. Com.* 71 Maine, 239, criticised. *Ib.*

9. The statute (R. S., c. 6, section 78) provides that, when a road is laid over lands not within any town or plantation required to raise money to make and repair highways, the county commissioners shall at their first regular session thereafter assess thereon, and on adjoining townships benefited

thereby, such an amount as they judge necessary for making and opening the road. *Held*; That the assessments are to be made at the same regular session at which the location of the road is filed; the object of the statute being to prevent their being made at an adjourned term of such regular session. Such regular session will be the first occurring after the road is laid over the lands. *Mansur* v. *Co. Com.* 514.

10. *Appleton* v. *Co. Com.* 80 Maine, 284, explained. *Ib.*

COVENANT.

See DAMAGES, 1-4. DEED, 8.

When land conveyed, by deed with covenant of warranty against incumbrances, is bounded by the center of a public road, and is so described in the deed, so that knowledge of the fact is brought home to the grantee, without resort to oral or other extraneous evidence, he must accept the land *cum onere*, and can not complain of that incumbrance as a breach of the covenant in his deed. *Holmes* v. *Danforth*, 139.

DAMAGES.

See JUDGMENT, 3. RAILROADS, 3. SEWERS. VERDICT, 6. WAY, 21.

1. The statutory rule, which requires, in actions on penal bonds, that judgment shall go for the penalty and execution issue for the damages sustained, when such bonds are given to secure the performance of covenants or agreements, is not restricted to cases where there is a written agreement separate from and independent of the bond itself; the agreement may be implied from the nature of the covenant in the bond; may be inferential only. *Corson* v. *Dunlap*, 32.

2. It applies to bonds where there may be several breaches at different times, *scire facias* being the proper remedy to obtain execution for damages accruing from subsequent breaches; but does not apply to cases where there can be but a single breach and a single assessment of, damages, though of harmless effect if so applied. *Ib.*

3. It applies to an action on the bond given by a respondent in bastardy proceedings, in which the order of court requires that payments be made by the principal in the bond to the complainant in installments, and there may be breaches after the first suit. *Ib.*

4. The rule of practice as indicated in *Philbrook* v. *Burgess*, 52 Maine, 271, so far as inconsistent with the rule of the present case, not to be followed in future cases. *Ib.*

5. Damages for land taken for a private way are to be paid by the person at whose request, and for whose benefit, the way is laid out. *Fernald* v. *Palmer*, 244.

6. When a private way has been laid out for such petitioner, and has been used by him, he is estopped from denying the regularity of the proceedings in such laying out, in an action by the land owner to recover the awarded damages. *Ib.*

7. It is no defense to such an action that the land owner has assigned his claim to third parties. *Ib.*

8. For a vendee's refusal to accept and pay for goods he has contracted to buy, the vendor may recover for damages the difference between the market value of the goods at the time and place stipulated for delivery and the contract price, together with the expenses of reselling the same; and this rule prevails whether the articles are merely some of the manufactures of the vendor which he has on hand, or are manufactured in some particular way, especially for the vendee at his request; nor does the rule yield when the action delares specially on the contract for the full price. The nature of the facts, rather than the form of the action, rules the damages.

Tufts v. *Grewer*, 407.

9. A vendor delivered under a contract to sell clear, merchantable ice, deliverable at a seaport in Maine, two cargoes of ice, to be shipped to Richmond, Va., which were taken at the place of delivery by vessels procured by the vendee, who did not inspect the ice at the place of shipment, although there was sufficient opportunity to do so; *Held*: that in an action for the contract price the vendee can set up the vendor's failure to deliver as good ice as the contract called for, in reduction of the damages recoverable.

Morse v. *Moore*, 473.

10. The plaintiff was the owner of a building, which for more than thirty-five years had fronted on the street, and was conceded to be one of its boundaries. In proceedings taken by the city for the widening of the street, under which the plaintiff was compelled to move the building back, *Held*; that in order to ascertain the amount of land so taken, and for which damages should be allowed, the measurement should commence on a line with the side of the building, and not on a line with the cornice on the gable-end of the building which projected beyond it into and over the street.

Farnsworth v. *Rockland*, 505.

DEATH.

A young man, in 1866, then about twenty-five years old, left his father's home in this state to go to the Western states in search of business or work. He had made such a trip before, returning after a short time. Going this time with acquaintances, he accompanied them to Missouri, settling in the town of Liberty, in that state. In 1869, he had a long and severe sickness at that place, during which he wrote home for funds, which were sent him. Up to that time he had habitually written to his family friends, and there had never been any alienation of affection on either side. In the last letter received from him by the family he wrote he was going to visit an uncle in Indiana, but he did not go there. Getting up poorly from his sickness, having naturally a weak constitution and suffering from a lung complaint, he left Liberty for Chico, California, hoping the climate there would benefit him. He was a single man, not very successful in the affairs of life, not rising above working at labor in different employments. Chico and Liberty, have been thoroughly searched, the missing man inquired for through the newspapers at those places, and no trace of him has been discovered, and no

person found who has seen or heard from or of him since 1870, over twenty years ago. *Held*: That the reasonable presumption is that he is dead, leaving no children to succeed to his inheritance.

Chapman v. *Kimball*, 389.

DEBT.

See ACTION, 5.

1. In an action of debt upon judgment, where the defendant pleads *nul tiel record*, claiming that the record varies materially from the statement of the judgment declared on, the only question to be determined is whether such a judgment in fact exists as is alleged. If there is a material variance it will be fatal. *Lancaster* v. *Richmond*, 534.

2. Where a judgment was rendered upon the award of a committee appointed to determine the amount of damage in consequence of the laying out of a town way across the plaintiff's land, and the award stated that the committee "do adjudge, determine and award to Daniel Lancaster of Richmond, or whoever may be the legal owner or owners of the land, the sum of nine hundred and twenty-five dollars," *Held;* that under the plea of *nul tiel record* there was a valid judgment in favor of the plaintiff, and that the words "or whoever may be the legal owner or owners of the land," may be properly rejected as surplusage; and that any matter of defense existing prior to the rendition of the judgment cannot be interposed while such judgment stands unreversed. *Ib.*

DEED.

1. Where the owner of land conveyed the northern portion to the plaintiff, and "also a right of passage-way in the most direct and convenient place from the county road to the granted premises," and subsequently conveyed the southerly portion to the defendant, "subject to the right of way granted by" the former deed to the plaintiff, and in an action on the case for obstructing the right of way wherein one of the issues was whether the way had been laid out across the corner of the land of the defendant, who denied that it touched his land; *Held*, that the deed to the defendant was legitimate evidence to be considered by the jury with the other evidence material to that issue. *Tibbetts* v. *Penley*, 118.

2. When land conveyed, by deed with convenant of warranty against incumbrances, is bounded by the center of a public road, and is so described in the deed, so that knowledge of the fact is brought home to the grantee, without resort to oral or other extraneous evidence, he must accept the land, *cum onere*, and can not complain of that incumbrance as a breach of the covenant in his deed. *Holmes* v, *Danforth*, 139.

3. Where a deed contains all the necessary words for a conveyance of the fee, and shows an intention to convey the fee, a clause in the deed indicating the motive or purpose of the conveyance will not limit its effect as a conveyance of the fee. *Bodwell G. Co.* v. *Lane*, 168.

4. A deed of land containing a reservation of pasturage for two cows during the life-time of the grantor, or, in lieu thereof, the grantee's personal obligation to fit her yearly fuel for the stove, and, in aid of the reservation, the stipulation that the grantee "is not" to incumber or convey the land meantime, does not create an estate on condition, but conveys a fee subject to the reservation. *Bray* v. *Hussey*, 329.

5. The law requires great caution to be observed in accepting oral evidence to effect the alteration of such important instruments as deeds, especially when the testimony comes from parties, and persons in close affinity with them; and the evidence to prevail should be clear and strong, satisfactory and conclusive. *Linscott* v. *Linscott*, 384.

6. The proof falls short of the required standard, when the allegation is that a deed, made in 1868, omitted by mistake to include two parcels of land that were bargained for with those conveyed, the complainant and her husband asserting that they did not discover the mistake until lately, although the deed was read over to them at its date, and although some years ago, it was ascertained that the deed included a parcel that was not intended to be conveyed, a mistake that was corrected by a reconveyance for a consideration paid for it; it further appearing that the circumstances favoring the complainant's contention are no stronger than those making against it, and that the testimony on the two sides is equally positive, that for the complainant being greater in amount, but of no greater weight or probability than the testimony produced by the defendant. *Ib.*

7. A grantor conveyed to the plaintiff a hotel and lot by the following description: "A parcel of land situated in Buckfield village, and the buildings thereon, known as the Buckfield House and stand, containing one acre more or less" meaning to convey the same premises F. A. Warren conveyed to me." Warren's deed conveyed the premises by the same general description. Adjoining the hotel lot was a small triangular parcel that had been many years unfenced and unused by its owner, forming a common ground with the hotel lot, there being no visible line between the lots excepting at one corner on the divisional line a granite post was set, and people were in the habit of driving across this common ground when approaching the hotel from a certain direction. The plaintiff was deceived by the situation and use of the premises, supposing the small parcel to be a part of his purchase, and conveyed the two parcels by metes and bounds to a third person as the hotel property. Having suffered upon the warranty in his own deed, he sues the executor of his grantor upon the warranty in his grantor's deed. Had he investigated the meaning of the granite post, or explored the registry of deeds far enough back to have found the first conveyance of the hotel lot by metes and bounds, his error would have been prevented. *Held*: that the action cannot be maintained. *Shaw* v. *Bisbee*, 400.

8. The general presumption respecting the extension of a riparian grant to the centre of a non-navigable stream does not apply, when there is a clear intention in the deed to make the side of the brook, and not the centre of its channel, the monument. *Haight* v. *Hamor*, 453.

9. Where the language of a deed, in such case, shows a manifest intention to stop at the water's edge, it will prevail over the general rule in the construction of deeds that when a grant of land is bounded on such a water course, above the ebb and flow of the tide, the stream is to be regarded as a monument equally upon the land granted and the land adjoining, and that the boundary line will be in the centre of such monument. *Ib.*

10. In a deed, defining the boundary line between two coterminous riparian owners, it appeared that the brook was of sufficient capacity for saw-mills; that in the description of the boundary lines, two saw-mills were located upon it, and three mill privileges mentioned, in connection with it; that the brook itself was not made a boundary line between the parties, the line crossing the brook three times, dividing it into four sections and leaving to each party the whole stream and land on both sides of it in his respective section; and that the first call in the deed expressly gave four rods of land on the southern side of the brook, the other calls showing a strong probability that the several strips of land were intended to be of uniform width, essential to the convenient and profitable enjoyment of the mill privileges; *Held*; that the brook is made the *terminus a quo*, and not the *terminus ad quem*; *Also*, that the four rods should be measured from the side and not from the centre of the stream. *Ib.*

11. In a deed of real estate a line is thus described: "Following down the brook four hundred and fifty-six feet, with four rods of land on the southern side of the brook; thence crossing the brook at right angles northerly and down the stream within four rods of the brook one thousand three hundred and sixty-eight feet; thence crossing the stream at right angles southerly, and following down the stream within four rods of the brook one thousand three hundred and sixty-eight feet; thence crossing the stream at right angles northerly and following the stream within four rods of it seventy-six feet below the spiling of the old mill-dam." *Held*; that the northerly line of the two four-rod strips of land lying on the northerly side of the brook is four rods from the side of the brook, above the ebb and flow of the tide, and not from the centre of the channel. *Ib.*

12. A written agreement between the grantor and a third party, made two years before in contemplation of a conveyance of the same lot of land, is not admissible to explain any supposed ambiguity in this description of the line. *Ib.*

13. While a grantor may modify, limit and condition his grant, he cannot destroy his grant by words in other parts of his deed of grant. *Maker* v. *Lazell*, 562.

14. A grantor in the granting clause of his deed expressly conveyed *all* his right, title and interest in a parcel of land, and then added the following clause: "This deed is intended to convey the title which was conveyed to me by the deed of B," &c. In fact no title passed to the grantor by the deed of B, but he had a title to the parcel from another source. *Held*; that all the title of the grantor passed by his deed from whatever source his title was derived. *Ib.*

15. Covenants of warranty in a deed are not qualified by a phrase at the end of the description of the land, "being the same premises F. A. Warren conveyed to me," even if through Warren's deed an incumbrance was discoverable. The reference was designed to help identify the premises conveyed, and not to determine the quantity or quality of title. *Shaw* v. *Bisbee*, 400.

16. A conveyed to B a parcel of land reserving a store thereon, "with the privilege of remaining as long as the store stands." *Held*; That the reservation (more strictly exception) constitutes a base or qualified fee in so much of the land as is necessary for the reasonable use of the store, determinable when the store ceases to remain upon the premises conveyed.
Farnsworth v. *Perry*, 447.

17. The statute which declares that when buildings, which have for more than twenty years fronted upon a public way or street shall be deemed the bounds thereof, means that portion of the building which rests upon the ground, and does in fact bound and limit the way, and not the cornices or other projections which far above the heads of travellers may happen to overhang the sidewalk. *Farnsworth* v. *Rockland*, 508.

18. When land is conveyed by deed and a building is one of the boundaries, the parties are presumed to intend that such line shall be wholly on one side of every portion of the building. But, in the case of a right of way, even if created by express grant, it is not an unreasonable presumption that it was intended to extend under the projecting finish of a building. *Ib.*

19. The owner of land over which a public way passes has the right to occupy the land above and below its surface to any extent that will not impair its usefulness for a way. The public must not be made to suffer any real inconvenience, nor should the owner be deprived of any such reasonable use of his land as will not incommode the public. *Ib.*

20. The plaintiff was the owner of a building, which for more than thirty-five years had fronted on the street, and was conceded to be one of its boundaries. In proceedings taken by the city for the widening of the street, under which the plaintiff was compelled to move the building back, *Held*; that in order to ascertain the amount of land so taken, and for which damages should be allowed, the measurement should commence on a line with the side of the building, and not on a line with the cornice on the gable-end of the building which projected beyond it into and over the street. *Ib.*

DEVISE.

See WILLS.

A devise of the use of all the testator's property, real and personal, to the widow for life, no reason to the contrary being shown, gives her the custody and control of the same; and it should be inventoried and paid to her for use under the terms of the will. *Fox* v. *Senter*, 295.

DIVORCE.

Where the husband obtains a divorce from his wife, for her fault, by a decree of the court of another state, which prohibits the wife from remarrying, the

wife still residing here, *Held:* that the prohibition to remarry is in the nature of a penalty, and has no force as a disability to remarry in another state. Such disability does not attach to the person of the wife in this state. *Held, also*; That the prohibition upon the guilty party to remarry, by the statute of this state, does not attach in such case. That statute. applying only to divorces granted here, has no reference to divorces granted in another state. *Phillips* v. *Madrid*, 205.

DOGS.

1. In an action under R. S., ch. 30, § 1, to recover for an injury done by a dog kept by the defendant, the plaintiff need not allege and prove in the first instance, his own due care in the matter. The plaintiff makes out a *prima facie* case by proving that he was injured in person or property by a dog kept by the defendant. *Hussey* v. *King*, 568.
2. The Superior Court for Aroostook County has jurisdiction of personal actions and may award judgment therein for the plaintiff to the amount of five hundred dollars; although the jury returned a verdict for single damages which upon being doubled, under the statute, exceeds that sum. *Ib.*

DOWER.

See EQUITY, 17.

DRAINS AND SEWERS.

See SEWERS.

DURESS.

1. Where an officer with a writ against one person attaches personal property claimed by another person, the latter is under no duress; and a receipt signed by him, to obtain a release of the property from the officer's custody, can not be avoided for duress. *Kingsbury* v. *Sargent*, 230.
2. Where the officer does not undertake to state the terms or conditions of the receipt written by him to be given by the claimant, but only states his opinion of its legal effect, (the claimant having the opportunity to read the receipt, but signing without reading) the receipt can not be avoided on the ground of fraud, even though the officer misstated its legal effect. *Ib.*

EASEMENT.

See TITLE, 6. WATER COMPANY. WAY, 2, 3.

The owner of land over which a public way passes has the right to occupy the land above and below its surface to any extent that will not impair its usefulness for a way. The public must not be made to suffer any real inconvenience, nor should the owner be deprived of any such reasonable use of his land as will not incommode the public. *Farnsworth* v. *Rockland*, 508.

EMINENT DOMAIN.

The right of eminent domain is available by legislative grant to a railroad corporation which has constructed a railroad for the carriage of freight to

and from the lime kilns in Thomaston and Rockland, and goods to and from stores in the latter place, connecting with the Knox and Lincoln railroad and running over a portion of its track under a contract between the two corporations, being eight miles in length, of standard guage, operated by steam power, and costing nearly a half million dollars obtained from the sale of stock and bonds. *Farnsworth* v. *R. R. Co.* 440.

EQUITY.

See WILL.

1. When the owner of a lot of land agrees to sell it for an agreed price to another who agrees to pay it, equity treats the vendee as the equitable owner and the vendor as holding the legal title in trust for him; which trust follows the land until it reaches some *bona fide* purchaser for valuable consideration without notice of the original vendee's equitable title. *Cross* v. *Bean*, 61.

2. To entitle complainants in equity to a decree in partition, they must show a clear legal title. *Pierce* v. *Rollins*, 172.

3. When the complainants claim title by descent from their mother, the respondent is a competent witness, for they are not "made parties as heirs of a deceased party." *Ib.*

4. The bill ordered to be retained a reasonable time to allow the complainants opportunity to establish their title at law, if they desire to do so,—otherwise it will be dismissed with costs. See *Nash* v. *Simpson*, 78 Maine, 143, 150. *Ib.*

5. Equity causes should not be reported to the law court until the pleadings are sufficiently perfected to enable the law court to make a final decision upon the merits. *Merrill* v. *Washburn*, 189.

6. In equity causes thus reported, if the bill does not contain sufficient allegations, it must be dismissed without any consideration of the evidence. *Ib.*

7. When the plaintiff in equity seeks relief from the effects or results of some fraud, accident or mistake, he should in his bill fully and explicitly state the circumstances, so as to present a clear picture of the particulars,—of how the fraud was committed and how the plaintiff was misled,—of the character and causes of the accident or mistake, and how it occurred. *Ib.*

8. In equity there is no affirmative decree to be appealed from until the decree is signed, entered and filed. Unless the record shows such a signing, and filing, an appeal will be dismissed. *Cram* v. *Gilman*, 193.

9. Jurisdiction in equity is conferred by statute for the redemption of lands sold on execution the same as for the redemption of estates mortgaged, and the actual possession by the plaintiff of the lands sought to be redeemed, is not a necessary prerequisite to the maintenance of his bill. *Morrill* v. *Everett*, 290.

10. Courts in equity consider equitable rights and award equitable relief. With legal titles they have no occasion to deal. In controversies over them there is a plain and adequate remedy at law. It is only where equities are equal that the law will prevail. *Ib.*

11. Where the defendant's title under a sale of lands within the time on execution limited by statute is subject to redemption, and the plaintiff is shown to be, at least, the equitable owner of the land sought to be redeemed, and when he has seasonably tendered the defendants, the amount of their purchase money, charges and interest, *Held*; on a bill to redeem, that their equities are extinguished, and the plaintiff's equity thereafterwards, being superior, is entitled to be upheld and protected as against the defendants' claim. Whether the plaintiff has a legal title to the land, it is unnecessary in these proceedings to consider. *Ib.*

12. The proof falls short of the required standard, when the allegation in a bill to reform a deed is that the deed, made in 1868, omitted by mistake to include two parcels of land that were bargained for with those conveyed, the complainant and her husband asserting that they did not discover the mistake until lately, although the deed was read over to them at its date, and although some years ago, it was ascertained that the deed included a parcel that was not intended to be conveyed, a mistake that was corrected by a reconveyance for a consideration paid for it; it further appearing that the circumstances favoring the complainant's contention are no stronger than those making against it, and that the testimony on the two sides is equally positive, that for the complainant being greater in amount, but of no greater weight or probability than the testimony produced by the defendant. *Linscott* v. *Linscott*, 284.

13. In a proceeding in equity by the relatives of the person alleged to be deceased against parties who hold in trust, under the will of a grandfather of such person, the fund which the complainants seek to have distributed, it is within the power of the court, for the greater protection of the trustees, to order the fund to be transferred from their keeping to the keeping of inheritors, imposing such terms of liability upon the latter as substituted trustees as may be deemed reasonable. *Chapman* v. *Kimball*, 386.

14. It is generally too late in a suit in equity to interpose a plea of limitations after the master's report is in, where the point was not taken on demurrer or in answer, although it is within the power of the court, in the furtherance of justice, to allow the plea in an extreme case at any time. *Webb* v. *Fuller*, 405.

15. It is a settled rule in equity that when a party has an adequate remedy at law, a suit in equity to enforce the same right cannot be maintained. *Alley* v. *Chase*, 537.

16. A court of equity will refuse relief when it appears that the same right, which the plaintiff seeks to enforce, has been adjudicated adversely to him in a suit at law between the same parties. *Ib.*

17. Upon a bill to restrain the defendant from prosecuting her action of dower, it appeared that the full court, since the filing of the bill, had sustained the ruling of the presiding justice in the action at law,—holding that the complainants' evidence, giving it the most favorable construction possible, did not constitute a defense to the action. *Held*: That the bill should be dismissed. *Ib.*

ESTOPPEL.

See WARRANTY, 1, 2.

1. Where the plaintiff, with a possessory title, knew and approved of a deed, given by one holding the record title, conveying a right to enter the premises, together with a perpetual easement of water and water-rights therein,— himself receiving the consideration named in the deed,— and afterwards saw the defendant, a subsequent grantee, expending large sums of money in improving the easement, but gave no warning to the defendant to desist and made no assertion of title until the completion of the work, and in which he was employed; *Held*: that he was equitably estopped from asserting any title to the disturbance of the defendant's easement.

Martin v. *Me. Cent. R. R. Co.* 100.

2. When a private way has been laid out for a petitioner, at whose request, and for whose benefit, the way is laid out, and has been used by him, he is estopped from denying the regularity of the proceedings in such laying out, in an action by the land owner to recover the awarded damages.

Fernald v. *Palmer*, 244.

EVIDENCE.

See ACCOUNT STATED, 2. DEED, 12. INDORSEMENT. PROMISSORY NOTES, 4. See WARRANTY, 1, 2.

1. The negative statement of a witness relative to the issue on trial, but having no probative force, can not be contradicted by showing his statement to the contrary out of court, neither to impeach his credibility, nor to prove the fact denied. *Woodroffe* v. *Jones*, 21.

2. The subsequent marriage, adoption, or acknowledgment of illegitimate children cannot be taken as proof of the illegitimacy, as between the decedent's legitimate heirs and those claiming to be his illegitimate heirs.

Grant v. *Mitchell*, 23.

3. The fact of illegitimacy is for the jury. It would be error to assume in the case of children born before the marriage of the mother with the decedent, that the statute acknowledgment is effectual to establish their claim as his heirs. *Ib.*

4. Where the owner of land conveyed the northern portion to the plaintiff, and "also a right of passage-way in the most direct and convenient place from the county road to the granted premises," and subsequently conveyed the southerly portion to the defendant, "subject to the right of way granted by" the former deed to the plaintiff, and in an action on the case for obstructing the right of way wherein one of the issues was whether the way had been laid out across the corner of the land of the defendant, who denied that it touched his land; *Held*, that the deed of the defendant was legitimate evidence to be considered by the jury with the other evidence material to that issue. *Tibbetts* v. *Penley*, 118.

5. In a suit to recover for services claimed to have been rendered by the plaintiff in the prosecution of an "Alabama" claim, the defendant was permitted to prove that, subsequent to the time when the services sued for were claimed to

have been performed, the plaintiff was expelled from the court and prohibited from prosecuting claims therein. *Held*; that this evidence was not admissible, or relevant to the issue. *Manning* v. *Borland*, 125.

6. A paper purporting to be a contract between the defendant and a third party, by the terms of which the latter was to have twenty per cent of the amount recovered from the government, was held inadmissible. *Ib.*

7. Proof of the execution of this document, which was executed in the presence of an attesting witness, does not appear to be governed by rule X of this court. *Ib.*

8. The statute, in bastardy proceedings, requires an accusation during travail of the complainant as a condition precedent to the right of recovery. The court admitted evidence of the fact by the testimony of an attendant at the time of travail. *Mann* v. *Maxwell*, 146.

9. The declarations of ancient persons, made while in possession of land owned by them, pointing out their boundaries on the land itself, and who are deceased at the time of the trial are admissible evidence, where nothing appears to show that they were interested in thus pointing out their boundaries; and it need not appear affirmatively that the declarations were made in restriction of, or against, their own rights. *Royal* v. *Chandler*, 150.

10. When there is some doubt as to whether the acts and declarations were before or after the persons conveyed the land, it is a question in the first instance to be determined by the judge, in his discretion; and in this case was properly determined. *Ib.*

11. When the complainants claim title by descent from their mother, the respondent is a competent witness, for they are not "made parties as heirs of a deceased party." *Pierce* v. *Rollins*, 172.

12. In an action of debt to recover a tax assessed upon personal property, it is a material averment that the defendant was an inhabitant of the plaintiff town, &c., and it is incumbent upon the plaintiff to establish it by competent evidence. *Rockland* v. *Farnsworth*, 228.

13. Where such an action was submitted on report to the law court, and the evidence did not disclose any testimony to prove that allegation, the plaintiff moved to have the report discharged. *Held*, that as no injustice can result from allowing the plaintiff an opportunity to supply the omission, if the evidence exists, the motion should be granted, and the case remanded for trial. *Ib.*

14. Ownership of property by the plaintiff, its delivery to and acceptance by a common carrier for transportation, and its non-delivery to the consignee, are *prima facie* evidence of negligence. The burden then rests upon the carrier to show facts exempting it from liability.
Bennett v. *Am. Exp. Co.* 236.

15. It is common knowledge of which courts take judicial notice, that vacant buildings, as a class, are more exposed to damage from fire than they would be if occupied. The testimony of witnesses, therefore, tending only to establish such fact, already known is unnecessary and inadmissible.
White v. *Phœnix Ins. Co.*, 279.

16. When the vacancy of buildings insured is shown, a presumption arises of an increased hazard from fire, but the peculiar condition, construction and surroundings may rebut such presumption and even show that such hazard is decreased. *Ib.*

17. Under the statute, the burden is upon the insurance company to show an increase of risk; and when the vacancy is shown, it has such presumption in its favor that, if not rebutted, is sufficient to prove the fact; but, when other facts appear, it is for the jury to say, whether the presumption shall still prevail, or whether it has been rebutted, and whether, on the whole evidence, the risk is shown to have been increased. *Ib.*

18. A judgment regularly obtained against a corporation is conclusive evidence of its indebtedness in a suit by one of its creditors against stockholders to recover the amount remaining unpaid upon their stock, unless it be shown that such judgment was procured by collusion or fraud.
Barron v. *Paine*, 312.

19. Where parties agree upon a settlement of accounts by an amount stated, having at the time a particular sum in mind and alluding to the sum without naming it, it is competent to prove by other evidence (here by the admission of defendant) what the amount of the agreed indebtedness was.
Goodrich v. *Coffin*, 324.

20. When a defendant sets up in an action on an account stated that, in the accounts computed, there were items of lumber sold illegally because the lumber had not been officially surveyed, the burden is on him to prove the facts. *Ib.*

21. The contents of a lost record of the organization of a plantation organized for election purposes may be proved by parol evidence.
Prentiss v. *Davis*, 364.

22. The entries upon the books of a savings bank, and upon the pass-books issued by such bank to a depositor, are not conclusive evidence of the ownership of a deposit in the bank. *Savs. Banks* v. *Fogg & Beane*, 374.

23. The law requires great caution to be observed in accepting oral evidence to effect the alteration of such important instruments as deeds, especially when the testimony comes from parties, and persons in close affinity with them; and the evidence to prevail should be clear and strong, satisfactory and conclusive. *Linscott* v. *Linscott*, 384.

24. The proof falls short of the required standard, when the allegation is that a deed, made in 1868, omitted by mistake to include two parcels of land that were bargained for with those conveyed, the complainant and her husband asserting that they did not discover the mistake until lately, although the deed was read over to them at its date, and although some years ago, it was ascertained that the deed included a parcel that was not intended to be conveyed, a mistake that was corrected by a reconveyance for a consideration paid for it; it further appearing that the circumstances favoring the complainant's contention are no stronger than those making against it, and that the testimony on the two sides is equally positive, that for the complainant being greater in amount, but of no greater weight or probability than the testimony produced by the defendant. *Ib.*

25. A young man, in 1866, then about twenty-five years old, left his father's home in this state to go to the Western states in search of business or work. He had made such a trip before, returning after a short time. Going this time with acquaintances, he accompanied them to Missouri, settling in the town of Liberty, in that state. In 1869, he had a long and severe sickness at that place, during which he wrote home for funds, which were sent him. Up to that time he had habitually written to his family friends, and there had never been any alienation of affection on either side. In the last letter received from him by the family he wrote he was going to visit an uncle in Indiana, but he did not go there. Getting up poorly from his sickness, having naturally a weak constitution and suffering from a lung complaint, he left Liberty for Chico, California, hoping the climate there would benefit him. He was a single man, not very successful in the affairs of life, not rising above working at labor in different employments. Chico and Liberty, have been thoroughly searched, the missing man inquired for through the newspapers at those places, and no trace of him has been discovered, and no person found who has seen or heard from or of him since 1870, over twenty years ago. *Held*: That the reasonable presumption is that he is dead, leaving no children to succeed to his inheritance.

Chapman v. *Kimball*, 389.

26. On the trial of an action against a town for an injury occasioned by a defect in a highway, when one of the issues in the case was the position of a plank at the end of a bridge, and whether it rendered the way unsafe for travelers, evidence that other persons with their vehicles had received injuries at the place of the alleged defect is not admissible to show that the way is defective. *Bremner* v. *Newcastle*, 415.

EXCEPTIONS.

1. When a single sentence in a charge is excepted to, which was used simply as an illustration of an extreme proposition of law but when considered in connection with the remainder of the charge upon the same topic it appears that the jury could not have been misled, the exceptions will not be sustained.

Searsmont v. *Lincolnville*, 75.

2. An exception to the refusal to give a requested instruction not based upon the facts proved, can not be sustained. *Tibbetts* v. *Penley*, 118.

3. When evidence is offered by a party, and at the time, in the light of what has been developed, the presiding justice thinks it incompetent and excludes it, but on further developments he concludes to admit it, and so informs counsel before the evidence is closed, and he declines to put it in, but elects to take his chance with the jury without it, it is too late for him to insist on exceptions after the verdict is against him. *Mann* v. *Maxfield*, 146.

FELLOW-SERVANT.

See MASTER and SERVANT.

FENCE.

See WAY, 1, 28.

FISH LAW.

1. In an indictment for not liberating short lobsters, when it sets forth the accusation in substantial accordance with the requirements of law; *Held*: That--

(1.) A material averment may sometimes be introduced with as much clearness and certainty by means of the participial clause commenced by the word "being" as in the form of the direct proposition of a declarative sentence.

(2.) The words "catch and have in possession" may relate to the same acts and describe the same transaction. They constitute but one offense.

(3.) It is sufficiently alleged that the lobsters were alive when caught. The word "catch" is not aptly employed to express the idea of obtaining possession of inanimate or motionless things, but of taking captive living and moving ones.

(4.) It appears from the use of the pronoun "his" that the lobsters were not liberated at the respondent's risk and cost. *State* v. *Dunning*, 178.

2. Section 6, c. 144, Statute of 1887, is repealed by Statute of 1889, c. 292 § 5. *Staples* v. *Peabody*, 207.

3. The defendant, a fish and game warden, seized and sold several barrels of lobsters belonging to the plaintiffs, each barrel containing some short lobsters, and which he claimed it was his duty to liberate as provided by Statute of 1889, c. 292, § 5. In an action of trespass the defendant justified the taking and selling of the lobsters of lawful length, legally taken, under the Statute of 1887, c. 144, § 6. *Held:* that the last-named statute had been repealed, and, therefore, was not a justification. *Ib.*

4. Chapter 19 of Private and Special Laws of 1867, which provides a penalty for taking smelts from Damariscotta river, has not been repealed, either expressly or by implication. *Thompson* v. *Lewis*, 223.

FORBEARANCE.

1. A promise to forbear and give further time for the payment of a debt although no certain or definite time be named, if followed by actual forbearance for a reasonable time, is a valid and sufficient consideration for a promise guarantying its payment. *Moore* v. *McKenney*, 80.

2. When a promise to forbear is made in general terms, no certain or definite time being named, the law implies that the forbearance shall be for a reasonable time. *Ib.*

FOREIGN COMMERCE.

1. When property is rightfully delivered to a common carrier to be transported to a point outside the limits of the State, the duty of the carrier is not merely to transport the property in the State, but to such point outside the limits in another State. *Bennett* v. *Am. Exp. Co.*, 236.

2. Where such property has lawfully commenced to move as an article of commerce from one State to another, that moment it becomes the subject of interstate commerce, and as such is subject only to national regulation. *Ib.*

3. The same is true in relation to whatever agency may be used as the means of transporting such commodities as may lawfully become the subject of purchase, sale or exchange, under the commerce clause of the Constitution of the United States. *Ib.*

FOREIGN CONTRACTS.

See INTOXICATING LIQUORS, 2. LIMITATIONS, 1, 2.

1. As the statutes of Massachusetts allow the redemption of a conditional sale of personal property in the same manner that mortgages of personal property are redeemable, that provision becomes a part of all such contracts made in that commonwealth, and is entitled to enforcement in this state when the contract is to be executed here. *Gross* v. *Jordan*, 380.

2. As our own remedies are to be applied in litigations here, it follows that, if property thus conditionally sold in Massachusetts is attached in this State as belonging to the vendee, the vendor or his assignee, before he can maintain replevin therefor against the attaching officer, must notify the officer of his claim and the amount due upon it, as required by R. S., c. 81, § 44. *Ib.*

3. In an action of trover against an officer for attaching the outfit of a circus company, it appeared that the plaintiff claimed title to it by virtue of two mortgages, one made in Biddeford, and the other in Boston. There being no evidence that, when the mortgage was made in Biddeford, the mortgagor resided within the State, or that the property had been delivered to and retained by the mortgagee, or that the property was then in Biddeford, *Held*; that the burden of proof was on the plaintiff to show that the property was in Biddeford, when the mortgage was made; that failing to do so, the court correctly excluded the mortgage from the case and the jury were properly instructed to disregard it. *Held*; also, that the validity of the mortgage made in Boston, is to be determined by the *lex loci contractus*. *Stirk* v. *Hamilton*, 254.

4. An instruction to the jury that the burden of proof was on the plaintiff to satisfy them that, at the time of making the mortgage in Boston, the mortgagor not only resided there, but that Boston was the place where he then principally transacted his business, or followed his trade or calling; and that if the plaintiff had not so satisfied them, then, as against an attaching creditor, the mortgage would not be valid, *was held* to be correct. *Ib.*

FRAUD.

See DURESS. REAL ACTION, 6.

1. An insolvency debtor's discharge, if fraudulently obtained, may be annulled on petition of a creditor who, at the time of granting the discharge, had no knowledge of the fraud. *Blake* v. *Clary*, 154.

2. In an action on the case against the defendant for fraudulently procuring a resolution of composition, under the insolvent law, in which it appeared that

the plaintiffs were creditors but did not become parties to the proceedings; and no fraud or deceit towards the plaintiffs was shown; neither were they induced to do or omit to do any act whatever; nor to forego any right against their debtor, *Held:* that the plaintiffs have no legal cause of action. *Haynes* v. *Gould*, 344.

3. Under R. S., c. 70, § 62, creditors in composition proceedings, who desire to avoid them for fraud, must bring their suit within two years, or they will be barred. *Ib.*

GAME AND GAME WARDEN.

See FISH LAW. TROVER.

Revised Statutes, c. 30, § 12, which imposes a penalty for killing, destroying or having in possession during certain portions of the year, "more than one moose, two caribou or three deer," does not apply to common carriers in the performance of their duties. *Bennett* v. *Am. Ex. Co.*, 236.

GUARDIAN AND WARD.

See PROBATE, 5.

HEIR.

See ADOPTION.

HEIR OF DECEASED PARTY.

See *Pierce* v. *Rollins*, 172.

HUSBAND AND WIFE.

1. A husband is liable for articles furnished and delivered to his wife while residing with her husband, necessary and proper, though charged to herself. *Baker* v. *Carter*, 132.

2. A wife while living with her husband is presumed to be vested with an agency authorizing her to purchase on his credit such supplies as are necessary for herself and family. *Ib.*

3. Where the husband obtains a divorce from his wife, for her fault, by a decree of the court of another state, which prohibits the wife from remarrying, the wife still residing here, *Held*: that the prohibition to remarry is in the nature of a penalty, and has no force as a disability to remarry in another state. Such disability does not attach to the person of the wife in this state. *Held, also*; That the prohibition upon the guilty party to remarry, by the statute of this state, does not attach in such case. That statute, applying only to divorces granted here, has no reference to divorces granted in another state. *Phillips* v. *Madrid*, 205.

4. An insurance policy issued on a dwelling-house in the name of a husband when the title was in his wife, the company not being informed that the husband was not the legal owner, is void. *Trott* v. *Ins. Co.* 362.

5. Validity is not imparted to the policy by the fact that the company, still uninformed of the true state of the title, indorsed on the policy its consent that the policy might continue in force notwithstanding a temporary non-occupation of the premises. That act waived forfeiture on one ground only, —not on all grounds. *Ib.*

6. Where the question of ownership of savings bank deposits is between the estates of deceased husband and wife, and the books show deposits in the name of the wife, evidence of the following circumstances is admissible:— The husband's ability and the wife's inability to earn and accumulate; the depositing and withdrawing of sums in and from the accounts by the husband; the transfer of sums between the accounts in question, and other accounts of the husband; that the husband in fact opened the account; that he had prior accounts which had run up to two thousand dollars, the legal limit for a single depositor; that after the wife's death the husband continued the account as his own; that no administration was taken out on the wife's estate for four years; that before her death she had given her husband an order for the whole sum; that she had never had any other account; that the wife had never personally deposited or withdrawn a single sum; that she was unknown to the officers of the bank; that the pass-book was usually in the husband's possession or else in their joint possession.
Savs. Banks v. *Fogg and Beane*, 374.

7. In this case the evidence is considered by the court to establish the ownership of the husband. *Ib.*

ICE.

See SALES, 5.

ILLEGITIMACY.

1. Upon a petition for partition, two of the respondents claimed title not as legitimate children of the decedent, but as illegitimate, adopted and made his heirs, by virtue of R. S., c. 75, § 3. *Held*: that it must first appear that, in thus claiming, they were illegitimate. The statute operates only in cases of illegitimacy. *Grant* v. *Mitchell*, 23.

2. Nor can the subsequent marriage, adoption, or acknowledgment be taken as proof of the illegitimacy, as between the decedent's legitimate heirs and those claiming to be his illegitimate heirs. *Ib.*

3. The presumption of legitimacy of a child, born in wedlock, is so strong that it can not be overcome by proof of the wife's adultery, while cohabiting, with her husband; much less by the mere admission of the adulterer. *Ib.*

4. The fact of illegitimacy is for the jury. It would be error to assume in the case of children born before the marriage of the mother with the decedent, that the statute acknowledgment is effectual to establish their claim as his heirs. *Ib.*

5. By R. S., 1883, c. 75, § 3, an illegitimate child born after March 24, 1864, is the heir of parents who intermarry; and such child, born at any time, is the heir of his mother, and of any person who acknowledges himself to be his father in

a writing signed in the presence of and attested by a competent witness; and if his parents intermarry and have other children before his death, or his father so acknowledges him, or adopts him into his family, he shall inherit from his lineal and collateral kindred, and they from him, as if legitimate; but not otherwise. *Brewer* v. *Hamor*, 251.

6. In an action brought to determine the title to the father's real estate, after his decease, it was *held:*
(1.) That the provisions of statute in force at the time of his decease must determine the rights of the heirs to the inheritance of his real estate.
(2.) That, inasmuch as the illegitimate child in this case was born prior to 1864, and there was no acknowledgment in writing by the father, the rights of the parties must be determined by the remaining portion of the section of statute in question.
(3.) That under that, the first requisite to enable an illegitimate child to inherit from the father, is an intermarriage of the parents.
And in addition thereto one of the following things must be shown to have taken place, viz.:
(1.) Either that his parents have had other children before his death; or:
(2.) That his father has acknowledged him in writing; or:
(3.) That the father has adopted him into his family. *Ib.*

7. Where the illegitimate child has been legitimatized in accordance with the terms of the statute, such child inherits, "as if legitimate;" and in case of the death of such child leaving children, such children of the illegitimate inherit from their grandfather,—the father of the deceased illegitimate,—such portion as their mother would have inherited from his estate. *Ib.*
8. The case of *Hunt* v. *Hunt*, 37 Maine, 333, distinguished.

IMPORTER.

See INTOX. LIQUORS, 1, 2, 3.

INCUMBRANCE.

See DEED, 2, 7, 8.

INDICTMENT.

1. In an Indictment for not liberating short lobsters, when it sets forth the accusation in substantial accordance with the requirements of law; *Held:* That
(1.) A material averment may sometimes be introduced with as much clearness and certainty by means of the participial clause commenced by the word "being" as in the form of the direct proposition of a declarative sentence.
(2.) The words "catch and have in possession" may relate to the same acts and describe the same transaction. They constitute but one offense.
(3.) It is sufficiently alleged that the lobsters were alive when caught. The word "catch" is not aptly employed to express the idea of obtaining

possession of inanimate or motionless things, but of taking captive living and moving ones.

(4.) It appears from the use of the pronoun "his" that the lobsters were not liberated at the respondent's risk and cost. *State* v. *Dunning*, 178.

2. The desire to introduce greater directness and simplicity or otherwise promote reforms in legal literature must always be subordinate to the interests of justice. Courts are not permitted to be finically exacting respecting the constructing of sentences or the graces of style. *Ib.*

3. The true construction of the act of 1889, c. 281, is to require life insurance companies to give equal terms to those persons whom it insures that are of the same class, and to stipulate the terms of insurance in their policies, and to accord to none any other. *State* v. *Schwartzschild*, 261.

4. An indictment under this statute, charged that the defendant allowed a rebate premium payable on a policy that he issued, but failed to aver that such rebate was not stipulated in the policy. *Held*, that the indictment charges no violation of the statutes. *Ib.*

INDORSEMENT.

See PROMISSORY NOTES, 7–11.

A, being in financial straits, made a note to his own order, signed by his firm as makers and indorsed by him, and procured three of his friends to indorse the same with him in blank for his accommodation. Before making the note he applied to the three separately and each promised to indorse if the others would. Nothing was said by or to either of them about the order of indorsement, or the share of liability to be assumed. The note was sent around for them to sign severally, just as they happened to be found, without any design as to the precedence of signatures. *Held:* That the jury was justified in finding that, as between themselves, it was a joint accommodation indorsement, such as renders them liable to contribute equally in the payment of the note, they having, on account of the insolvency of the makers, to pay the same. *Hagerthy* v. *Phillips*, 336.

INFANT.

1. A board bill contracted by an infant to enable him to attend school, is a necessary, the payment for which may be recovered of him by suit. *Rich* v. *Kilgore*, 305.

2. If the infant procure another to pay the bill for him, that payment is regarded as the furnishing of necessaries, for which a suit may be maintained against the infant for the reasonable value to him of the amount so paid. *Ib.*

INJUNCTION.

Upon a bill to restrain the defendant from prosecuting her action of dower, it appeared that the full court, since the filing of the bill, had sustained the ruling of the presiding justice in the action at law,— holding that the complainant's evidence, giving it the most favorable construction possible, did

not constitute a defense to the action. *Held*: that the bill should be dismissed. *Alley* v. *Chase*, 537.

INSOLVENCY.

1. An insolvency debtor's discharge, if fraudulently obtained, may be annulled on petition of a creditor who, at the time of granting the discharge, had no knowledge of the fraud. *Blake* v. *Clary*, 154.

2. Such a petition can not be maintained by a creditor who has had such knowledge. His remedy is to resist the discharge. *Ib*.

3. When knowledge of the attorney is imputable to his client. *Ib*.

4. Where a partner sells his interest in the partnership property to his co-partner, who agrees as a part of the consideration of purchase to pay the partnership debts and hold his partner harmless therefrom, and such partner in good faith afterwards pays a debt of the firm to save his own credit, he may prove the payment as an individual claim of his own against the private estate of the co-partner, who after such payment has gone into insolvency. *In re Burgess*, 339.

5. A creditor who has, by mistake of either fact or law, proved a debt in insolvency against a partnership estate, when more properly provable against the private estate of one of the partners, may be allowed in the discretion of the court to withdraw his proof from the proceedings in the one estate and present it against the other. *Ib*.

6. In an action on the case against the defendant for fraudulently procuring a resolution of composition, under the insolvent law, in which it appeared that the plaintiffs were creditors but did not become parties to the proceedings; and no fraud or deceit towards the plaintiffs was shown; neither were they induced to do or omit to do any act whatever; nor to forego any right against their debtor, *Held*: that the plaintiffs have no legal cause of action. *Haynes* v. *Gould*, 344.

7. Under R. S., c. 70, § 62, creditors in composition proceedings, who desire to avoid them for fraud, must bring their suit within two years, or they will be barred. *Ib*.

8. One creditor has no right of appeal from the allowance of the claim of another creditor against the estate of a debtor who makes a settlement by composition proceedings in insolvency. *Huston* v. *Worthly*, 352.

9. A person must be regarded as a trader, in the meaning of the insolvent law who in addition to carrying on a milk farm for the purpose of retailing milk among his customers, increased his business by taking the product of his brother's farm, and purchasing from other sources from four to twelve cans of milk daily, each can containing eight quarts, for a period of eight months and more next prior to his going into insolvency. *In re, Tolman*, 353.

10. Such an extent of purchasing, if necessitated by temporary causes, and continued for a short time might not have the effect to constitute a business of trading; but otherwise, continued for so many months. *Ib*.

11. A trader cannot be said to keep proper books of account, who keeps merely memorandum books, containing deliveries of milk to customers, some informal accounts and settlements, an occasional inventory of farm stock and products, but barely any charges of money paid out, and nothing to indicate where or how the principal proceeds of his business have been expended. *Ib.*

12. The assignee of an insolvent debtor, representing that there were different claimants of certain personal property found in the possession of such debtor, obtained leave to sell the same on common account, by proceedings under R. S., c. 70, § 36. A portion of the proceeds of the sale belonged to a person other than the insolvent debtor. *Held*: That such portion was attachable in the hands of the assignee as trustee of the owner thereof, by trustee action against such owner instituted within the sixty days allowed by R. S., c. 70, § 37, for the assertion of any claim in such case against an assignee by suit. *Fogler* v. *Marston*, 396.

13. A receipt and bill of sale of chattels were given *bona fide* for money loaned, and subsequently a promissory note and a formal mortgage of the same chattels, of the latter date, were given for the same loan. *Held*; that the latter were a renewal and not given by a "debtor to secure a debt to a prior existing creditor" within the meaning of R. S., chap. 70, § 33; and to be valid against the assignee in insolvency of the mortgagor the mortgage need not be "recorded three months at least prior to the commencement of the mortgagor's proceedings in insolvency." *St. Clair* v. *Cleveland*, 559.

INSURANCE, (FIRE.)

1. To avoid a policy of fire insurance, stipulating that whenever the buildings insured shall become vacant, the insurance thereon shall cease, it must be shown that, not only have the buildings become vacant in violation of the terms of the policy, but that the risk was thereby increased. R. S., c. 49, § 20. *White* v. *Phœnix Ins. Co.* 279.

2. It is common knowledge of which courts take judicial notice, that vacant buildings, as a class, are more exposed to damage from fire than they would be if occupied. The testimony of witnesses, therefore, tending only to establish such fact, already known is unnecessary and inadmissible. *Ib.*

3. When the vacancy of buildings insured is shown, a presumption arises of an increased hazard from fire, but the peculiar condition, construction and surroundings may rebut such presumption and even show that such hazard is decreased. *Ib.*

4. Under the statute, the burden is upon the insurance company to show an increase of risk; and when the vacancy is shown, it has such presumption in its favor that, if not rebutted, is sufficient to prove the fact; but, when other facts appear, it is for the jury to say, whether the presumption shall still prevail, or whether it has been rebutted, and whether, on the whole evidence, the risk is shown to have been increased. *Ib.*

5. When the building destroyed had been left vacant for nearly a year, and the defendant company seems to have had neither the presumption of increased hazard accorded it at the trial, nor to have been permitted to show it, *Held*; that it was entitled to one or the other; and that a new trial should be ordered. *Ib.*

6. An insurance policy issued on a dwelling-house in the name of a husband when the title was in his wife, the company not being informed that the husband was not the legal owner, is void. *Trott* v. *Ins. Co.*, 362.

7. Validity is not imparted to the policy by the fact that the company, still uninformed of the true state of the title, indorsed on the policy its consent that the policy might continue in force notwithstanding a temporary non-occupation of the premises. That act waived forfeiture on one ground only, —not on all grounds. *Ib.*

8. *Clark* v. *Dwelling-House Insurance Company*, 81 Maine, 373, affirmed. *Ib.*

INSURANCE, (LIFE.)

1. Unless otherwise apparent from the context, the word "insanity" in statutes and contracts means inability to reason and will intelligently. *Johnson* v. *Me. & N. B. Ins. Co.*, 182.

2. When a party makes unqualified statements in a contract, and therein stipulates that they are full, complete and true, he stipulates for actual, absolute truth, and not for truth according to his belief or understanding. *Ib.*

3. When a party stipulates in a contract that all his statements therein are material, and that falsity in any of them shall avoid the contract, the court can not, without an enabling statute, pronounce any of them immaterial. *Ib.*

4. In a life insurance contract, one of the statements by the assured, stipulated by him to be material and true, viz: that his brother never had insanity, was untrue. *Held:* that it avoided the contract. *Ib.*

5. Revised Statutes, c. 49, § 20, held not to apply to life insurance policies. *Ib.*

6. The true construction of the act of 1889, c. 281, is to require life insurance companies to give equal terms to those persons whom it insures that are of the same class, and to stipulate the terms of insurance in their policies, and to accord to none any other. *State* v. *Schwarzschild*, 261.

7. An indictment under this statute, charged that the defendant allowed a rebate premium payable on a policy that he issued, but failed to aver that such rebate was not stipulated in the policy. *Held*, that the indictment charges no violation of the statutes. *Ib.*

8. A solvent testator, leaving a widow, may dispose of life insurance, by will, to persons other than his widow. Policies, payable by their terms to the testator's legal representatives, if specifically devised by the will become a part of his estate and not the property of the widow; but where it is clear that he intended by his will, to dispose of his entire property, including the life insurance as a part of his estate, *Held*; that the widow will take the life

insurance, specifically devised in general terms to her use for life, as effectually as if the insurance had been specifically named in the will.
Fox v. *Senter*, 295.

INTEREST.

If the maker of a promissory note payable in one year with interest at seven and three-tenths per cent, continues voluntarily to pay the same rate after maturity, he can not, in the absence of any fraud, have the excess then deducted from the principal. *Camden Sav. Bank* v. *Cilley*, 72.

INTERSTATE COMMERCE.

See INTOXCATING LIQUORS. COMMON CARRIERS.

INTOXICATING LIQUORS.

1. To sustain a prosecution for crime, it must be shown that the crime had been committed when the prosecution was commenced.
State v. *Intox. Liquors*, 158.

2. Where it appeared that, at the time of seizure upon a warrant, a package of intoxicating liquors was in the possession of a common carrier, and in transit from another state, to this state, for delivery here; *Held:* That it was commerce, "among the several states," and as such was under the exclusive jurisdiction of Congress. *Held, also*, that the package not having been broken nor delivered to the consignee, the state process for its seizure, while in that condition, was void. *Ib.*

3. Such common carrier has a special title which gives it a legal right to the custody of the property, before delivery to the consignee, as against one having no right. *Ib.*

4. A liquor warrant against a dwelling-house sufficiently describes the premises by an averment that the house is occupied by the defendant, and situated on the east side of Blake street; the house being in fact so occupied and situated east of Blake street, but not adjoining it; although there be another house between that of the defendant and the street, and access to defendant's house be by an alley running from the street past the other tenement.
State v. *Minnehan*, 310.

5. One who participates in the commission of the misdemeanor of keeping a liquor nuisance to such an extent as to render himself criminally liable at all, is liable as a principal, and may be indicted, convicted and punished as such, although the capacity in which he acted was that of a clerk, agent or servant merely. *State* v. *Sullivan*, 417.

JUDICIAL NOTICE.

See EVIDENCE, 15.

JURY.

See PRACTICE, 6. NEW TRIAL.

JUDGMENT.

See INSOLVENCY, 6.

1. A judgment regularly obtained against a corporation is conclusive evidence of its indebtedness in a suit by one of its creditors against stockholders to recover the amount remaining unpaid upon their stock, unless it be shown that such judgment was procured by collusion or fraud.
Barron v. *Paine*, 312.

2. In an action of debt upon judgment, where the defendant pleads *nul tiel record*, claiming that the record varies materially from the statement of the judgment declared on, the only question to be determined is whether such a judgment in fact exists as is alleged. If there is a material variance it will be fatal. *Lancaster* v. *Richmond*, 534.

3. Where a judgment was rendered upon the award of a committee appointed to determine the amount of damage in consequence of the laying out of a town way across the plaintiff's land, and the award stated that the committee "do adjudge, determine and award to Daniel Lancaster of Richmond, or whoever may be the legal owner or owners of the land, the sum of nine hundred and twenty-five dollars," *Held;* that under the plea of *nul tiel record* there was a valid judgment in favor of the plaintiff, and that the words "or whoever may be the legal owner or owners of the land," may be properly rejected as surplusage; and that any matter of defense existing prior to the rendition of the judgment cannot be interposed while such judgment stands unreversed.
Ib.

4. A court of equity will refuse relief when it appears that the same right, which the plaintiff seeks to enforce, has been adjudicated adversely to him in a suit at law between the same parties. *Alley* v. *Chase*, 537.

5. Upon a bill to restrain the defendant from prosecuting her action of dower, it appeared that the full court, since the filing of the bill, had sustained the ruling of the presiding justice in the action at law,—holding that the complainants' evidence, giving it the most favorable construction possible, did not constitute a defense to the action. *Held*: That the bill should be dismissed. *Ib.*

JURISDICTION.

1. A warrant of distress against the inhabitants of a town does not *per se* protect an officer, distraining the goods and chattels of one of its inhabitants, when it does not affirmatively appear on the face of the warrant that the court of county commissioners had jurisdiction of the subject-matter of the judgment on which it was issued. *Brown* v. *Mosher*, 111.

2. If, however, the record of the judgment shows such jurisdiction in fact, the officer's legal execution of the warrant may be justified notwithstanding that fact does not affirmatively appear on the face of it. *Ib.*

3. The Kennebec Superior Court has jurisdiction of an action on the case which charges that the defendant deposited earth upon his own land close to plaintiff's fence in such a careless manner that the action of the elements

pressed the earth and fence partly over upon plaintiff's land to his damage; although that Court has not jurisdiction of real actions nor of actions *quare clausum fregit*. Such an action is not of the nature of *quare clausum*, nor its equivalent. *Knight* v. *Dunbar*, 359.

4. The Municipal Court of the city of Biddeford, January 24, 1888, did not have a clerk within the intent and meaning of the federal statute, (R. S., of U. S., § 2165) and, therefore had no jurisdiction over applications for naturalization of aliens; and no authority to receive and record their declarations of intention to become naturalized. *Dean, Pet'r*, 489.

LEVY.

See REAL ACTION, 4.

LANDLORD AND TENANT.

1. When the occupant of land denies the title of the owner, he is not entitled to any notice to quit, before suit against him for the possession. *Bodwell G. Co.* v *Lane*, 168.

2. One who visits a dwelling-house on the express or implied invitation of the tenant at-will cannot be deemed as present therein on the implied invitation of the landlord. *McKenzie* v. *Cheetham*, 543.

LEASE.

See SALE, 1, 2, 3.

LEGACY.

See WILLS.

LICENSE.

Where a disputed line was attempted to be settled by a parol award, and the plaintiff thereupon told the defendant to go on and cut the wood on the latter's side of the line thus established, and he did so until forbiden by the plaintiff and subsequently hauled away the wood cut before being forbidden; *Held*: that the facts did not constitute a license to enter and cut on what proved to be the plaintiff's land, though the parol award determined it be the defendant's land. *Buker* v. *Bowden*, 67.

LIEN.

1. When a laborer has once acquired a statute lien on a building, for labor performed thereon with the consent of the owner, that section of the statute requiring notice of the lien to be given should be construed liberally in favor of the laborer, so far as the form of the notice is concerned. *Durling* v. *Gould*, 134.

2. If, from the notice filed, it can be fairly and reasonably inferred—1, that a lien is claimed; 2, by whom it is claimed; 3, what is the balance due, and that no credits are to be given; 4, what is the particular building upon which the labor was performed and to which the lien has attached; 5, that the name of

the owner is not known to the claimant when no owner is named; and the notice is verified by the signature and affidavit of the claimant, it is sufficient though not symmetrical in form. *Ib.*

3. The statute relating to liens and their enforcement upon buildings makes no distinction between a contractor and a sub-contractor, as regards the "statement of the amount due with all just credits given." *Wescott* v. *Bunker*, 499.

4. Where a contractor agrees to furnish labor and materials under an entire contract for a specified sum, it is sufficient for the preservation of the lien under R. S., c. 91, § § 30-32, to file a statement of the amount due, without stating the items making up such amount. *Held*, accordingly, that it need not appear what part of the amount due is for labor as distinguished from the amount due for materials. *Ib.*

5. The underlying principle of a mechanic's lien is that of consent or contract. The lien acquired by attachment under R. S., c. 81, § 59, which requires certain specifications in order to create it, is wholly *in invitum*. The method of procedure in the one case is separate and independent from that of the other. *Ib.*

6. In a suit to enforce a lien for both labor and materials, it was objected that in the descriptive part of the plaintiff's certificate there was no allegation of materials furnished, (the amount thus alleged to be due being solely for labor done,) but the items in the formal statement of account, made and recorded as a part of the certificate, were for labor and materials furnished, and the account annexed to the writ was identical with that recorded. *Held*; that the objection should not be sustained. *Ib.*

7. *Ricker* v. *Joy*, 72 Maine, 106, affirmed. *Ib.*

LIFE-ESTATE.

See REAL ACTION.

A devise of the use of all the testator's property, real and personal, to the widow for life, no reason to the contrary being shown, gives her the custody and control of the same; and it should be inventoried and paid to her for use under the terms of the will. *Fox* v. *Senter*, 295.

LIMITATIONS.

1. The Act of 1885, c. 376, which declares that, "no action shall be brought by any person whose cause of action has been barred by the laws of any state, territory, or country, while all the parties have resided therein," does not apply to a negotiable promissory note held by a citizen of this state at the time of its passage. *MacNichol* v. *Spence*, 87.

2. The Act should be construed as prospective only; and not applicable to causes of action accruing from contracts, already made and held by citizens of this state, at the time of its passage. *Ib.*

3. The debtor may determine to which of several debts a payment made by him shall be applied; but if he omits to exercise the right, the creditor may make the appropriation, and apply it to a debt already barred. Such applica-

tion of the payment will not remove the statutory bar with respect to the balance of the debt. To have that effect, the appropriation must be made by the debtor himself; but the creditor may apply the payment to a debt not already barred by the statute of limitations and thereby prolong the running of the statute from the time of such payment.

Blake v. *Sawyer*, 129.

4. Under R. S., c. 70, § 62, creditors in composition proceedings, who desire to avoid them for fraud, must bring their suit within two years, or they will be barred. *Haynes* v. *Gould*, 344.

5. It is generally too late in a suit in equity to interpose a plea of limitations after the master's report is in, where the point was not taken on demurrer or in answer, although it is within the power of the court, in the furtherance of justice, to allow the plea in an extreme case at any time.

Webb v. *Fuller*, 405.

6. In an action brought upon the following promissory writing, viz: "For value received I promise to pay Myron J. Weymouth, fifty dollars in sawing at my mill in Sangerville village. Sangerville, Oct. 3d, 1885," *it was held*; that as the time of performance is not named in the contract, either party may request performance by the other within a reasonable time; and that the statute of limitations will not begin to run until the expiration of a reasonable time of performance after such demand. *Weymouth* v. *Gile*, 437.

LOBSTERS.

See FISH LAW.

LUMBER.

See ACCOUNT STATED, 2.

MANDAMUS.

See WAY, 14.

MASTER AND SERVANT.

See AGENT, 2.

1. An inexperienced servant does not assume the risk of perils which he knows not of, and which are not called to his attention; but of such only as he knows, or by the exercise of ordinary care ought to know.

Campbell v. *Eveleth*, 50.

2. When the negligence of neither party can be conclusively established by a state of facts from which different inferences may be fairly drawn, or upon which fair-minded men may reasonably arrive at different conclusions, the case, under proper instructions, should be submitted to the jury. *Ib.*

3. A majority of the court are of the opinion that the case falls within this principle. WALTON and EMERY, JJ., dissenting. *Ib.*

4. If cattle which are being driven in the highway run against a traveler in consequence of careless and improper driving, the driver will be liable; and

if he is not the owner, nor the agent or servant of the owner, an action against the latter can not be maintained. *Smith* v. *French* 108.

5. A laborer, engaged in the service of a city under the direction of a foreman, can not recover against the city for personal injuries resulting from the negligence of the foreman, who is his fellow-servant, in the absence of evidence that the foreman was incompetent, or that the city was negligent in employing him or in providing suitable apparatus for the work in which they were employed. *Dube* v. *Lewiston*, 211.

6. The foreman, superintendent or overseer of a job of work, is not on that account to be regarded as other than a fellow-laborer. *Ib.*

7. Whether an employe occupies the position of a fellow-servant to another employe depends upon whether the person, whose status is in question, is charged with the performance of a duty which properly belongs to the master. *Ib.*

8. What he is employed to do is a question of fact; in what capacity an employe acts is an inference of law. Where the facts are not disputed the question is one of pure law. *Ib.*

9. One who participates in the commission of the misdemeanor of keeping a liquor nuisance to such an extent as to render himself criminally liable at all, is liable as a principal, and may be indicted, convicted and punished as such, although the capacity in which he acted was that of a clerk, agent or servant merely. *State* v. *Sullivan*, 417.

MINOR.

See INFANT.

MISTAKE.

See EQUITY, 12. INSOLVENCY, 5.

MORTGAGE, (CHATTEL.)

See CONSIDERATION, 2, 3. FOREIGN CONTRACTS.

1. The mortgagee of chattels attached must deliver a true account of the amount due on his claim to the attaching officer, and not to the attaching creditor, before he can bring an action against such officer. *Phillips* v. *Field*, 348.

2. A written notice by a mortgagee stating, in substance, it is "impossible for me to know the amount of my mortgage claim, but if I am correct it is somewhere about twenty-three hundred dollars," is not a compliance with the statute. *Ib.*

3. In an action of trover against an officer for attaching the outfit of a circus company, it appeared that the plaintiff claimed title to it by virtue of two mortgages, one made in Biddeford, and the other in Boston. There being no evidence that, when the mortgage was made in Biddeford, the mortgagor resided within the State, or that the property had been delivered to and retained by the mortgagee, or that the property was then in Biddeford, *Held*;

that the burden of proof was on the plaintiff to show that the property was in Biddeford, when the mortgage was made; that failing to do so, the court correctly excluded the mortgage from the case and the jury were properly instructed to disregard it. *Held*; also, that the validity of the mortgage made in Boston, is to be determined by the *lex loci contractus*.

Stirk v. *Hamilton*, 524.

4. An instruction to the jury that the burden of proof was on the plaintiff to satisfy them that, at the time of making the mortgage in Boston, the mortgagor not only resided there, but that Boston was the place where he then principally transacted his business, or followed his trade or calling; and that if the plaintiff had not so satisfied them, then, as against an attaching creditor, the mortgage would not be valid, *was held* to be correct. *Ib.*

5. A receipt and bill of sale of chattels were given *bona fide* for money loaned, subsequently a promissory note and a formal mortgage of the same chattels, of the latter date, were given for the same loan. *Held*; that the latter were a renewal and not given by a "debtor to secure a debt to a prior existing creditor" within the meaning of R. S., chap. 70, § 33; and to be valid against the assignee in insolvency of the mortgagor the mortgage need not be "recorded three months at least prior to the commencement of the mortgagor's proceedings in insolvency." *St. Clair* v. *Cleveland*, 559.

6. A national bank, under the laws of the United States, may take and hold chattel mortgage, to secure an antecedent debt.

Skowhegan Nat. Bank v. *Maxfield*, 576.

MORTGAGE, (REAL.)

1. A mortgagor's interest in land, mortgaged to secure the support of the mortgagee by the mortgagor, can be sold upon execution against the mortgagor. *Bowdell G. Co.* v. *Lane*, 168.

2. Where a deed contains all the necessary words for a conveyance of the fee, and shows an intention to convey the fee, a clause in the deed indicating the motive or purpose of the conveyance will not limit its effect as a conveyance of the fee. *Ib.*

3. When the occupant of land denies the title of the owner, he is not entitled to any notice to quit, before suit against him for the possession. *Ib.*

MUNICIPAL CORPORATION.

See SEWERS.

1. Under the statute authorizing "the qualified electors of unincorporated places to organize themselves into plantations for election purposes," it was allowable for two adjoining townships to be organized together into one plantation, the State having affirmed the propriety of the act by its recognition of numerous plantations organized under similar circumstances.

Prentiss v. *Davis*, 364.

2. The organization was valid, even if it may be inferred from the return made to the Secretary of State that the form of the proceeding was to incorporate the inhabitants of the two townships into a plantation, making no special

mention of the territorial limits included therein. The implication was unmistakable. *Ib.*

NATIONAL BANK.

A national bank, under the laws of the United States, may take and hold a chattel mortgage to secure an antecedent debt.
Skowhegan Nat. Bank v. *Maxfield*, 576.

NATURALIZATION.

The Municipal Court of the city of Biddeford, January 24, 1888, did not have a clerk within the intent and meaning of the federal statute, (R. S., of U. S., § 2165) and, therefore had no jurisdiction over applications for naturalization of aliens; and no authority to receive and record their declarations of intention to become naturalized. *Dean, Pet'r*, 489.

NECESSARIES.

See HUSBAND AND WIFE. INFANT.

NEGLIGENCE.

See NEW TRIAL. RAILROADS, 2.

1. An inexperienced servant does not assume the risk of perils which he knows not of, and which are not called to his attention; but of such only as he knows, or by the exercise of ordinary care ought to know.
Campbell v. *Eveleth*, 50.

2. When the negligence of neither party can be conclusively established by a state of facts from which different inferences may be fairly drawn, or upon which fair-minded men may reasonably arrive at different conclusions, the case, under proper instructions, should be submitted to the jury. *Ib.*

3. A majority of the court are of the opinion that the case falls within this principle. WALTON and EMERY, JJ., dissenting. *Ib.*

4. If cattle which are being driven in the highway run against a traveler in consequence of careless and improper driving, the driver will be liable; and if he is not the owner, nor the agent or servant of the owner, an action against the latter can not be maintained. *Smith* v. *French*, 108.

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6. The foreman, superintendent or overseer of a job of work, is not on that account to be regarded as other than a fellow-laborer. *Ib.*

7. Whether an employe occupies the position of a fellow-servant to another employe depends upon whether the person, whose status is in question,

is charged with the performance of a duty which properly belongs to the master. *Ib.*

8. What he is employed to do is a question of fact; in what capacity an employe acts is an inference of law. Where the facts are not disputed the question is one of pure law. *Ib.*

9. Ownership of property by the plaintiff, its delivery to and acceptance by a common carrier for transportation, and its non-delivery to the consignee, are *prima facie* evidence of negligence. The burden then rests upon the carrier to show facts exempting it from liability.
Bennett v. *Am. Exp. Co.*, 236.

10. A railroad corporation is not liable to an employee (in this case an engineer) for an injury happening to him in executing an errand of danger, upon which he is sent by the superintendent of the corporation, unless the superintendent be guilty of negligence in ordering the dangerous act to be performed.
Lasky v. *C. P. Ry. Co.*, 461.

11. Where a train-dispatcher habitually performs in the name of the superintendent of a railroad, certain duties of such superintendent in his absence, with the assent of the corporation, any order to an employee from such train-dispatcher, within the limit of his delegated authority, imposes upon both the corporation and employee the same duties and liabilites as if issued directly by the superintendent himself. *Ib.*

12. The rule that undisputed facts present a question of law rather than of fact is more adapted to questions of contract than to questions of tort. *Ib.*

13. In negligence cases the rule applies only when the facts are undisputed, and the conclusion to be drawn from the fact is so far indisputable that men could not reasonably differ in their interpretation of them. *Ib.*

14. One who visits a dwelling-house on the express or implied invitation of the tenant at-will cannot be deemed as present therein on the implied invitation of the landlord. *McKenzie* v. *Cheetham*, 543.

15. In an action under R. S., ch. 30, § 1, to recover for an injury done by a dog kept by the defendant, the plaintiff need not allege and prove in the first instance, his own due care in the matter. The plaintiff makes out a *prima facie* case by proving that he was injured in person or property by a dog kept by the defendant. *Hussey* v. *King*, 568.

NEW TRIAL.

See VERDICT, 5, 6.

1. When a verdict is well founded on testimony, although conflicting on a principal issue, it is not sufficient for setting it aside as against evidence that the law court on reading a report of the evidence might and, perhaps, would come to a conclusion different from a jury of the vicinity who saw and heard the witnesses and rendered their verdict without bias or prejudice.
Searsmont v. *Lincolnville*, 75.

2. Upon a motion for a new trial, in an action where the plaintiff obtained a verdict for injuries received by means of an alleged defective car, it appearing that the overwhelming weight of evidence was in favor of a sound car; that the plaintiff's account of the manner of his injury was improbable; and his admissions to others, before the action was brought, differing therefrom; *Held*: that the jury must have been influenced by some improper motive in rendering a verdict for the plaintiff, and a new trial should be ordered.
Roberts v. *B. M. R. R.*, 298.

NOTICE.

See CLIENT AND ATTORNEY, 2. LIEN, 3-7.
MORTGAGE (CHATTEL), 2.

NUISANCE.

See INTOXICATING LIQUORS, 5.

The defendant was indicted for destroying a bridge across Little River in the town of Perry, constructed under an Act of the legislature of the State. He claimed that the legislature did not have the power to authorize its construction; and, as it to some extent interfered with the navigation of the river, it was a public nuisance, and of special injury to him; and, therefore he had a right to remove it. *Held*: That the legislature had power to authorize its construction, that it was a part of the public highway, and the defendant had no power over it. *State* v. *Leighton*, 419.

OFFICER.

See ATTACHMENT, 3. RECEIPT, 1, 2. TOWNS, 1. WARRANT OF DISTRESS.

1. The property of the plaintiff, while lawfully in the possession of the defendant as a common carrier, was seized unlawfully by an officer, without any warrant or legal process, nor was any afterwards obtained. *Held*: That the officer was a trespasser, and that the common carrier was liable in the same manner as if it had allowed any other trespasser to take the property out of its custody. *Bennett* v. *Am Exp. Co.*, 236.

2. In the absence of any known statute requiring the assessors of a village corporation to be sworn, the fact that the oath was administered to them by the corporation clerk does not render an assessment of taxes illegal or uncollectible. *Lord* v. *Parker*, 530.

ORDER.

See ASSIGNMENT, 1.

ORDER OF COURT, SERVICE.

When an order of court required that County Commissioners be summoned by serving them with an attested copy of a petition, *Held*; that the order was complied with by delivering the same to their chairman while the board was in session. *State* v. *Wellman*, 282.

OVERSEER OF THE POOR.

See TOWNS, 1.

PARTITION.

See EQUITY, 1-4.

PARTNERSHIP.

Where a partner sells his interest in the partnership property to his co-partner, who agrees as a part of the consideration of purchase to pay the partnership debts and hold his partner harmless therefrom, and such partner in good faith afterwards pays a debt of the firm to save his own credit, he may prove the payment as an individual claim of his own against the private estate of the co-partner, who after such payment has gone into insolvency. *In re, Burgess*, 339.

PAUPER.

See DIVORCE. TOWNS, 1.

The Statute of this State, (R. S., c. 24, § 50,) requiring common carriers who bring into this State persons not having a settlement therein, to remove them beyond the State, if they fall into distress within a year, &c., is a regulation of foreign and interstate commerce, and is in violation of Article 1, § 8, clause 3, of the Constitution of the United States, and is therefore void. *Bangor* v. *Smith*, 422.

PAYMENT.

See COSTS. PROMISSORY NOTES, 1-3.

1. The debtor may determine to which of several debts a payment made by him shall be applied, but if he omits to exercise the right, the creditor may make the appropriation, and apply it to a debt already barred. *Blake* v. *Sawyer*, 129.

2. Such application of the payment will not remove the statutory bar with respect to the balance of the debt. To have that effect, the appropriation must be made by the debtor himself; but the creditor may apply the payment to a debt not already barred by the statute of limitations and thereby prolong the running of the statute from the time of such payment. *Ib.*

PERSONAL PROPERTY.

See MORTGAGE (CHATTEL.)

PETITION FOR PARTITION.

See ADOPTION.

1. Upon a petition for partition, two of the respondents claimed title not as legitimate children of the decedent, but as illegitimate, adopted and made his heirs, by virtue of R. S., c. 75, § 3. *Held*: that it must first appear that, in thus claiming, they were illegitimate. The statute operates only in cases of illegitimacy. *Grant* v. *Mitchell*, 23.

2. To entitle complainants in equity to a decree in partition, they must show a clear legal title. *Pierce* v. *Rollins*, 172.

PLANTATIONS.

21. The contents of a lost record of the organization of a plantation organized for election purposes may be proved by parol evidence. *Prentiss* v. *Davis*, 364.

2. Where such an organization was created nearly fifty years ago; and the principal steps taken for that purpose are testified to by one who participated in the proceedings; and his recollection of the event is fortified by a certificate of organization, sent at the time to the Secretary of State, as required by law; and the plantation continued under such organization for upwards of fifteen years, raising money annually for plantation purposes, and voting at all presidential and state elections during that period; having been all the time recognized by the legislature and state officials in different ways as an existing plantation; and the missing proof is only as to the details of a posted notice calling the inhabitants together to effect a proposed organization,— the presumption is that the proceedings of organization were sufficiently complete to accomplish the purpose intended. *Ib.*

3. Under the statute authorizing "the qualified electors of unincorported places to organize themselves into plantations for election purposes," it was allowable for two adjoining townships to be organized together into one plantation, the State having affirmed the propriety of the act by its recognition of numerous plantations organized under similar circumstances. *Ib.*

4. The organization was valid, even if it may be inferred from the return made to the Secretary of State that the form of the proceeding was to incorporate the inhabitants of the two townships into a plantation, making no special mention of the territorial limits included therein. The implication was unmistakable. *Ib.*

PLEADINGS.

See Costs.

1. In an indictment for not liberating short lobsters, when it sets forth the accusation in substantial accordance with the requirements of law: *Held*: That:—

(1.) A material averment may sometimes be introduced with as much clearness and certainty by means of the participial clause commenced by the word "being" as in the form of the direct proposition of a declarative sentence.

(2.) The words "catch and have in possession" may relate to the same acts and describe the same transaction. They constitute but one offense.

(3.) It is sufficiently alleged that the lobsters were alive when caught. The word "catch" is not aptly employed to express the idea of obtaining possession of inanimate or motionless things, but of taking captive living and moving ones.

(4.) It appears from the use of the pronoun "his" that the lobsters were not liberated at the respondent's risk and cost. *State* v. *Dunning*, 178.

2. The desire to introduce greater directness and simplicity or otherwise promote reforms in legal literature must always be subordinate to the interests of justice. Courts are not permitted to be finically exacting respecting the construction of sentences or the graces of style. *Ib.*

3. When the plaintiff in equity seeks relief from the effects or results of some fraud, accident or mistake, he should in his bill fully and explicitly state the circumstances, so as to present a clear picture of the particulars,—of how the fraud was committed and how the plaintiff was misled,—of the character and causes of the accident or mistake, and how it occurred.
Merrill v. *Washburn*, 189.

4. A misjoinder of counts must be specially demurred to. If any one of the counts is good, the declaration must be sustained on general demurrer.
Thompson v. *Lewis*, 223.

5. The true construction of the act of 1889, c. 281, is to require life insurance companies to give equal terms to those persons whom it insures that are of the same class, and to stipulate the terms of insurance in their policies, and to accord to none any other. *State* v. *Schwarzschild*, 261.

6. An indictment under this statute, charged that the defendant allowed a rebate premium payable on a policy that he issued, but failed to aver that such rebate was not stipulated in the policy. *Held*, that the indictment charges no violation of the statutes. *Ib.*

7. A promissory note payable at "Mt. Vernon" is not payable at a place certain, within the meaning of R. S., c. 32, § 10, so as to require that a demand of payment should be averred and proved, as a prerequisite to the maintenance of a suit thereon. *Greenlief* v. *Watson*, 266.

8. A liquor warrant against a dwelling-house sufficiently describes the premises by an averment that the house is occupied by the defendant, and situated on the east side of Blake street; the house being in fact so occupied and situated east of Blake street, but not adjoining it; although there be another house between that of the defendant and the street, and access to defendant's house be by an alley running from the street past the other tenement.
State v. *Minnehan*, 310.

9. Where a defendant sets up payment under a plea *puis darrein continuance*, and the defense prevails, the plaintiff recovers the costs up to the date of the plea, and the defendant recovers them afterwards. *Greenleaf* v. *Allen*, 333.

10. The same result properly enough follows where all the facts involving such a defense are submitted to a judge at *nisi prius* for his decision upon them without pleadings. In such case formal pleadings are impliedly waived.
Ib.

11. A petition praying county commissioners to assess damages for land taken for a railroad, need not aver the inability of the parties to agree on the amount

of damages, although the charter of the railroad confers jurisdiction on the commissioners in case the parties cannot agree on the amount. The presumption is that they cannot agree. *Farnsworth* v. *R. R. Co.*, 440.

12. In a suit to enforce a lien for both labor and materials, it was objected that in the descriptive part of the plaintiff's certificate there was no allegation of materials furnished, (the amount thus alleged to be due being solely for labor done,) but the items in the formal statement of account, made and recorded as a part of the certificate, were for labor and materials furnished, and the account annexed to the writ was identical with that recorded. *Held*; that the objection should not be sustained. *Wescott* v. *Bunker*, 499.

13. In an action of debt upon judgment, where the defendant pleads *nul tiel record*, claiming that the record varies materially from the statement of the judgment declared on, the only question to be determined is whether such a judgment in fact exists as is alleged. If there is a material variance it will be fatal. *Lancaster* v. *Richmond*, 534.

14. Where a judgment was rendered upon the award of a committee appointed to determine the amount of damage in consequence of the laying out of a town way across the plaintiff's land, and the award stated that the committee "do adjudge, determine and award to Daniel Lancaster of Richmond, or whoever may be the legal owner or owners of the land, the sum of nine hundred and twenty-five dollars," *Held*; that under the plea of *nul tiel record* there was a valid judgment in favor of the plaintiff, and that the words "or whoever may be the legal owner or owners of the land," may be properly rejected as surplusage; and that any matter of defense existing prior to the rendition of the judgment cannot be interposed while such judgment stands unreversed. *Ib.*

15. In an action under R. S. ch. 30, § 1, to recover for an injury done by a dog kept by the defendant, the plaintiff need not allege and prove in the first instance, his own due care in the matter. The plaintiff makes out a *prima facie* case by proving that he was injured in person or property by a dog kept by the defendant. *Hussey* v. *King*, 568.

PRACTICE, (EQUITY.)

1. A bill in equity for partition was ordered to be retained a reasonable time to allow the complainants opportunity to establish their title at law, if they desire to do so,—otherwise to be dismissed with costs. See *Nash* v. *Simpson*, 78 Maine, 143, 150. *Pierce* v. *Rollins*, 172.

2. Equity causes should not be reported to the law court until the pleadings are sufficiently perfected to enable the law court to make a final decision upon the merits. *Merrill* v. *Washburn*, 189.

3. In equity causes thus reported, if the bill does not contain sufficient allegations, it must be dismissed without any consideration of the evidence. *Ib.*

4 .When the plaintiff in equity seeks relief from the effects or results of some fraud, accident or mistake, he should in his bill fully and explicitly state the circumstances, so as to present a clear picture of the particulars,—of how the fraud was committed and how the plaintiff was misled,—of the character and causes of the accident or mistake, and how it occurred. *Ib.*

5. In equity there is no affirmative decree to be appealed from until the decree is signed, entered and filed. Unless the record shows such a signing, and filing, an appeal will be dismissed. *Cram* v. *Gilman*, 193.

6. Upon a bill in equity by the relatives of the person alleged to be deceased against parties, who hold in trust under the will of a grandfather of such person the fund which the complainants seek to have distributed, it is within the power of the court, for the greater protection of the trustees, to order the fund to be transferred from their keeping to the keeping of inheritors, imposing such terms of liability upon the latter as substituted trustees as may be deemed reasonable. *Chapman* v. *Kimball*, 389.

7. It is generally too late in a suit in equity to interpose a plea of limitations after the master's report is in, where the point was not taken on demurrer or in answer, although it is within the power of the court, in the furtherance of justice, to allow the plea in an extreme case at any time.
Webb v. *Fuller*, 405.

PRACTICE, (LAW.)

See BOND, 4. COSTS. PLEADINGS, 9. VERDICT, 6.

1. The fact of illegitimacy is for the jury. It would be error to assume in the case of children born before the marriage of the mother with the decedent, that the statute acknowledgment is effectual to establish their claim as his heirs. *Grant* v. *Mitchell*, 23.

2. When the negligence of neither party can be conclusively established by a state of facts from which different inferences may be fairly drawn, or upon which fair-minded men may reasonably arrive at different conclusions, the case, under proper instructions, should be submitted to the jury.
Campbell v. *Eveleth*, 50.

3. When a single sentence in a charge is excepted to, which was used simply as an illustration of an extreme proposition of law but when considered in connection with the remainder of the charge upon the same topic it appears that the jury could not have been misled, the exceptions will not be sustained.
Searsmont v. *Lincolnville*, 75.

4. When a verdict is well founded on testimony, although conflicting on a principal issue, it is not sufficient for setting it aside as against evidence that the law court on reading a report of the evidence might and, perhaps, would come to a conclusion different from a jury of the vicinity who saw and heard the witnesses and rendered their verdict without bias or prejudice.
Ib.

5. The court may properly instruct the jury to return a verdict for either party when it is plain that a contrary verdict can not be allowed to stand. *Moore* v. *McKenney*, 80.

6. An instruction to the jury is to be tested by the facts on which it is predicated. *Whitehouse* v. *Cummings*, 91.

7. A question not raised at *nisi prius* can not be argued at the law court. *Tibbetts* v. *Penley*, 118.

8. An exception to the refusal to give a requested instruction not based upon the facts proved, can not be sustained. *Ib.*

9. Proof of the execution of a document, which was executed in the presence of an attesting witness, does not appear to be governed by rule X of this court. *Manning* v. *Borland*, 125.

10. When evidence is offered by a party, and at the time, in the light of what has been developed, the presiding justice thinks it incompetent and excludes it, but on further developments he concludes to admit it, and so informs counsel before the evidence is closed, and he declines to put it in, but elects to take his chance with the jury without it, it is too late for him to insist on exceptions after the verdict is against him. *Mann* v. *Maxfield*, 146.

11. When in a real action there is some doubt as to whether the acts and declarations of ancient persons while in possession were before or after the persons conveyed the land, it is a question in the first instance to be determined by the judge, in his discretion. *Royal* v. *Chandler*, 150.

12. The desire to introduce greater directness and simplicity or otherwise promote reforms in legal literature must always be subordinate to the interests of justice. Courts are not permitted to be finically exacting respecting the construction of sentences or the graces of style. *State* v. *Dunning*, 178.

13. A misjoinder of counts must be specially demurred to. If any one of the counts is good, the declaration must be sustained on general demurrer. *Thompson* v. *Lewis*, 223.

14. In an action of debt to recover a tax assessed upon personal property, it is a material averment that the defendant was an inhabitant of the plaintiff town, &c., and it is incumbent upon the plaintiff to establish it by competent evidence. *Rockland* v. *Farnsworth*, 228.

15. Where such an action was submitted on report to the law court, and the evidence did not disclose any testimony to prove that allegation, the plaintiff moved to have the report discharged. *Held*, that as no injustice can result from allowing the plaintiff an opportunity to supply the omission, if the evidence exists, the motion should be granted, and the case remanded for trial. *Ib.*

16. A promissory note payable at "Mt. Vernon" is not payable at a place certain, within the meaning of R. S., c. 32, § 10, so as to require that a demand of payment should be averred and proved, as a prerequisite to the maintenance of a suit thereon. *Greenleaf* v. *Watson*, 266.

17. The rule that undisputed facts present a question of law rather than of fact is more adapted to questions of contract than to questions of tort. *Lasky* v. *C. P. Ry. Co.*, 461.

18. In negligence cases the rule applies only when the facts are undisputed, and the conclusion to be drawn from the facts is so far indisputable that men could not reasonably differ in their interpretation of them. *Ib.*

19. An instruction to the jury that the burden of proof was on the plaintiff to satisfy them that, at the time of making a chattel mortgage in Boston, the mortgagor not only resided there, but that Boston was the place where he then principally transacted his business, or followed his trade or calling; and that if the plaintiff had not so satisfied them, then, as against an attaching creditor, the mortgage would not be valid, *was held* to be correct.
Stirk v. *Hamilton*, 524.

PRESCRIPTION.

See ADVERSE USE.

PRESUMPTIONS.

1. The presumption of legitimacy of a child, born in wedlock, is so strong that it can not be overcome by proof of the wife's adultery, while cohabiting, with her husband; much less by the mere admission of the adulterer.
Grant v. *Mitchell*, 23.

2. When property in land has been severed by voluntary conveyance, one portion of which is inaccessible except by passing over the other or by trespassing on the lands of a stranger, a grant of a way by necessity is presumed between the parties. *Whitehouse* v. *Cummings*, 91.

3. When the vacancy of buildings insured is shown, a presumption arises of an increased hazard from fire; but the peculiar condition, construction and surroundings may rebut such presumption and even show that such hazard is decreased. *White* v. *Phœnix Ins. Co.* 279.

4. Under the statute, the burden is upon the insurance company to show an increase of risk; and when the vacancy is shown, it has such presumption in its favor that, if not rebutted, is sufficient to prove the fact; but, when other facts appear, it is for the jury to say, whether the presumption shall still prevail, or whether it has been rebutted, and whether, on the whole evidence, the risk is shown to have been increased. *Ib.*

5. A stockholder in a business corporation is presumed to continue to be a stockholder until the contrary is shown. *Barron* v. *Paine*, 312.

6. Where a plantation, organized for election purposes, was created nearly fifty years ago; and the principal steps taken for that purpose are testified to by one who participated in the proceedings; and his recollection of the event is fortified by a certificate of organization, sent at the time to the Secretary of State, as required by law; and the plantation continued under such organization for upwards of fifteen years, raising money annually for plantation purposes, and voting at all presidential and state elections during that period; having been all the time recognized by the legislature and state officials in different ways as an existing plantation; and the missing proof is only as to the details of a posted notice calling the inhabitants together to effect a proposed organiz-

tion,— the presumption is that the proceedings of organization were sufficiently complete to accomplish the purpose intended.
Prentiss v. *Davis*, 364.

7. A young man, in 1866, then about twenty-five years old, left his father's home in this state to go to the Western states in search of business or work. He had made such a trip before, returning after a short time. Going this time with acquaintances, he accompanied them to Missouri, settling in the town of Liberty, in that state. In 1869, he had a long and severe sickness at that place, during which he wrote home for funds, which were sent him. Up to that time he had habitually written to his family friends, and there had never been any alienation of affection on either side. In the last letter received from him by the family he wrote he was going to visit an uncle in Indiana, but he did not go there. Getting up poorly from his sickness, having naturally a weak constitution and suffering from a lung complaint, he left Liberty for Chico, California, hoping the climate there would benefit him. He was a single man, not very successful in the affairs of life, not rising above working at labor in different employments. Chico and Liberty, have been thoroughly searched, the missing man inquired for through the newspapers at those places, and no trace of him has been discovered, and no person found who has seen or heard from or of him since 1870, over twenty years ago. *Held*: That the reasonable presumption is that he is dead, leaving no children to succeed to his inheritance.
Chapman v. *Kimball*, 389.

8. A railroad charter may be considered as presumptively accepted at its date without any record evidence of the fact, when it appears that the grantees afterwards asked for and obtained amendments to their charter and have fully constructed the road. *Farnsworth* v. *R. R. Co.*, 440.

9. The general presumption respecting the extension of a riparian grant to the centre of a non-navigable stream does not apply, when there is a clear intention in the deed to make the side of the brook, and not the centre of its channel, the monument. *Haight* v. *Hamor*, 453.

10. Where a testator gives annuities to his widow and niece as general legacies, each being a simple bequest, an absolute gift of a definite quantity, there is a presumption of intended equality, unless the will contains unequivocal evidence of an intention to give a preference. *Additon* v. *Smith*, 551.

PRINCIPAL.

See AGENT, 4.

PROBATE.

1. The probate court, in making an allowance to a widow out of her husband's estate, may properly take into consideration the amount of private estate the widow is possessed of, not received from the property of her husband.
Walker, Appellant, 17.

2. There is such a variety of circumstances to be considered in awarding allowances to widows, that no rule in any considerable degree general can

be framed to govern them. All depends upon the exercise of a reasonable, judicial discretion. *Ib.*

3. The complicated circumstances of the present case reviewed in the opinion of the court. *Ib.*

4. A grantee of real estate from the residuary legatee under a will, where there is no property of the testator which can be reached to satisfy the debts and claims against his estate, except such real estate, is interested in the settlement of the account of the executor or administrator of the estate, and has a right of appeal from the decree of the Judge of Probate allowing the account. *Blastow* v. *Hardy*, 28.

5. The sureties on a guardian's bond, given at the time of the appointment of the guardian, are not liable for money received for real estate sold by him under a special license. On obtaining such a license, the guardian is required to give a special bond, and the sureties on this special bond are the ones liable for money so obtained by the guardian. Consequently, in a suit on the original bond, it is competent for the sureties to show the source from which the funds remaining in the hands of the guardian, and not accounted for' were received. *Judge of Probate* v. *Toothaker*, 195.

PROMISSORY NOTES.

See LIMITATIONS, 1, 2.

1. If the maker of a promissory note payable in one year with interest at seven and three-tenths per cent, continues voluntarily to pay the same rate after maturity, he can not, in the absence of any fraud, have the excess then deducted from the principal. *Camden Sav. Bank* v. *Cilley*, 72.

2. No person shall be charged as an acceptor of a bill of exchange, draft, or written order, unless his acceptance is in writing signed by him or his agent (R. S., c. 32, § 10); nor is a drawee made liable as an acceptor by retaining an order in his possession. *Hall* v. *Flanders*, 242.

3. A promissory note payable at "Mt. Vernon" is not payable at a place certain, within the meaning of R. S., c. 32, § 10, so as to require that a demand of payment should be averred and proved, as a prerequisite to the maintenance of a suit thereon. *Greenleaf* v. *Watson*, 266.

4. A, being in financial straits, made a note to his own order, signed by his firm as makers and indorsed by him, and procured three of his friends to indorse the same with him in blank for his accommodation. Before making the note he applied to the three separately and each promised to indorse if the others would. Nothing was said by or to either of them about the order of indorsement, or the share of liability to be assumed. The note was sent around for them to sign severally, just as they happened to be found, without any design as to the precedence of signatures. *Held:* That the jury was justified in finding that, as between themselves, it was a joint accommodation indorsement, such as renders them liable to contribute equally in the payment of the note, they having, on account of the insolvency of the makers, to pay the same. *Hagerthy* v. *Phillips*, 336.

5. In an action brought upon the following promissory writing, viz: "For value received I promise to pay Myron J. Weymouth, fifty dollars in sawing at my mill in Sangerville village. Sangerville, Oct. 3d, 1885," *it was held*; that as the time of performance is not named in the contract, either party may request performance by the other within a reasonable time; and that the statute of limitations will not begin to run until the expiration of a reasonable time of performance after such demand. *Weymouth* v. *Gile*, 437.

6. The promisee is not required to be the owner of the logs presented for sawing under the contract. It is sufficient if he has the authority from any owner to so present them. *Ib.*

7. Waiver of demand and notice by the indorser of a foreign bill of exchange is invalid under R. S., c. 32, § 10, unless in writing and signed by him or his agent. *Skowhegan Nat. Bank* v. *Maxfield*, 576.

8. When commercial paper has been paid by the party whose debt it appears to be, it becomes commercially dead, but is evidence in the hands of the payor to charge the real debtor. *Ib.*

9. A foreign bill, presented for payment by the holder, a Boston bank, to the acceptors, on the last day of grace and surrendered to them, as paid, in exchange for their check, on another bank where they had funds, but who failed before the check was there presented on the next day, was thereby paid and became commercially dead. *Ib.*

10. Such bill thereafter remained evidence in the hands of the acceptors, who had so paid it, of "money paid" for the accommodation of the payee, shown to be merely a borrower of the acceptor's credit and not a holder for value. *Ib.*

11. The acceptor's claim for money so paid may well be assigned in equity to the bank, that originally cashed the bill, by a delivery of it, so as to be a good consideration for a mortgage to such bank to secure the debt from the payee, the real debtor. *Ib.*

12. The payee, by giving such mortgage, merely secured his own debt, and a representation to him, by the bank, as inducement to give the mortgage, that the bill is unpaid, though untrue, is harmless and not fraudulent. *Ib.*

13. A national bank, under the laws of the United States, may take and hold such mortgage. *Ib.*

PUIS DARRIEN CONTINUANCE.

See COSTS.

QUIETING TITLE.

See TITLE, 8.

RAILROADS.

See CONSTITUTIONAL LAW, 8. DEED, 9.

1. Railroad commissioners have no jurisdiction to regulate the crossing of railroad tracks and public ways unless the former are laid under charter authority

so as to be maintained in the exercise of eminent domain, and become a railroad for public use, because when not so laid they are a mere convenience to be used or disused at pleasure, to be maintained or removed at the will of their owner; they are private property, subject to be taken in the exercise of eminent domain by the laying out of a public way, and are protected by the same rights of compensation. *In re, R. R. Com'rs*, 273.

2. Upon a motion for a new trial, in an action where the plaintiff obtained a verdict for injuries received by means of an alleged defective car, it appearing that the overwhelming weight of evidence was in favor of a sound car; that the plaintiff's account of the manner of his injury was improbable; and his admissions to others, before the action was brought, differing therefrom; *Held*: that the jury must have been influenced by some improper motive in rendering a verdict for the plaintiff, and a new trial should be ordered. *Roberts* v. *B. & M. R. R.*, 298.

3. A petition praying county commissioners to assess damages for land taken for a railroad, need not aver the inability of the parties to agree on the amount of damages, although the charter of the railroad confers jurisdiction on the commissioners, in case the parties cannot agree on the amount. The presumption is that they cannot agree. *Farnsworth* v. *R. R. Co.*, 440.

4. A railroad charter may be considered as presumptively accepted at its date without any record evidence of the fact, when it appears that the grantees afterwards asked for and obtained amendments to their charter and have fully constructed the road. *Ib.*

5. The right of eminent domain is available by legislative grant to a railroad corporation which has constructed a railroad for the carriage of freight to and from the lime kilns in Thomaston and Rockland, and goods to and from stores in the latter place, connecting with the Knox and Lincoln railroad and running over a portion of its track under a contract between the two corporations, being eight miles in length, of standard guage, operated by steam power, and costing nearly a half million dollars obtained from the sale of stock and bonds. *Ib.*

6. A railroad corporation is not liable to an employee (in this case an engineer) for an injury happening to him in executing an errand of danger, upon which he is sent by the superintendent of the corporation, unless the superintendent be guilty of negligence in ordering the dangerous act to be performed. *Lasky* v. *C. P. Ry. Co.*, 461.

7. Where a train-dispatcher habitually performs in the name of the superintendent of a railroad, certain duties of such superintendent in his absence, with the assent of the corporation, any order to an employee from such train-dispatcher, within the limit of his delegated authority, imposes upon both the corporation and employee the same duties and liabilites as if issued directly by the superintendent himself. *Ib.*

8. The rule that undisputed facts present a question of law rather than of fact is more adapted to questions of contract than to questions of tort. *Ib.*

9. In negligence cases the rule applies only when the facts are undisputed, and the conclusion to be drawn from the fact is so far indisputable that men could not reasonably differ in their interpretation of them. *Ib.*

REAL ACTION.

See TITLE, 8.

1. One entitled to an estate in remainder only, subject to an existing life estate in another, can not maintain a writ of entry against one rightfully in possession under the life estate. *Sylvester* v. *Sylvester*, 46.

2. To sustain such an action the plaintiff must not only prove that he has such an estate in the demanded premises as he claims, but he must also prove that at the time of suing out his writ he had a right of entry into the demanded premises. R. S., c. 104, § 5. *Ib.*

3. The declaration of ancient persons, made while in possession of land owned by them, pointing out their boundaries on the land itself, and who are deceased at the time of the trial are admissible evidence, where nothing appears to show that they were interested in thus pointing out their boundaries; and it need not appear affirmatively that the declarations were made in restriction of, or against, their own rights. *Royal* v. *Chandler*, 150.

4. When there is some doubt as to whether the acts and declarations were before or after the persons conveyed the land, it is a question in the first instance to be determined by the judge, in his discretion; and in this case was properly determined. *Ib.*

5. In a writ of entry both parties claimed to derive title from Elisha Brown; the plaintiff by a series of quit-claim deeds originating with Brown, and the defendants by a warranty deed from the grantee of six levying creditors of Brown. The levies were defective; one because it did not appear with certainty that the debtor, whose estate was taken, selected one of the appraisers, or was notified and neglected so to do; and the other because made as upon land held by the debtor in fee simple and in severalty and no reason assigned for levying on an undivided share instead of levying on a portion by metes and bounds. The defendants offered evidence to impeach the plaintiff's title as acquired in fraud of creditors; and also filed a petition from the officer who made the levies asking to supply the omissions named by amendments to the returns. *Held*: that such amendments are to be allowed or disallowed, as may best tend to the furtherance of justice. They may be permitted, irrespective of the time which has elapsed, provided they are clearly in conformity with the facts, and do not prejudice the rights of third persons acquired *bona fide* without notice. *Jackson* v. *Esten*, 162.

6. Unless the equities of the applicant are superior to those of the contestant, the court will refuse to interpose to make that valid which was before invalid. They are properly allowable against the execution debtor himself, and his fraudulent grantee and all those deriving title from him, and standing in no better condition in equity. *Ib.*

7. The defendants should be permitted to impeach the plaintiff's title; and if the jury find that the original conveyance from Brown was fraudulent as to creditors, and that the plaintiff was not a *bona fide* purchaser for value, without notice of the fraud, the proposed amendments, being satisfactorily shown to be in conformity with the truth, are to be allowed and regarded as made. Otherwise not. *Ib.*

REAL PROPERTY.

See TITLE.

RECEIPT.

1. Where an officer with a writ against one person attaches personal property claimed by another person, the latter is under no duress; and a receipt signed by him, to obtain a release of the property from the officer's custody, can not be avoided for duress. *Kingsbury* v. *Sargent*, 230.
2. Where the officer does not undertake to state the terms or conditions of the receipt written by him to be given by the claimant, but only states his opinion of its legal effect, (the claimant having the opportunity to read the receipt, but signing without reading) the receipt can not be avoided on the ground of fraud, even though the officer misstated its legal effect. *Ib.*

RECORD.

See JUDGMENT.

1. The contents of a lost record of the organization of a plantation organized for election purposes may be proved by parol evidence. *Prentiss* v. *Davis*, 364.
2. A receipt and bill of sale of chattels were given *bona fide* for money loaned, subsequently a promissory note and a formal mortgage of the same chattels, of the latter date, were given for the same loan. *Held*; that the latter were a renewal and not given by a "debtor to secure a debt to a prior existing creditor" within the meaning of R. S., chap. 70, § 33; and to be valid against the assignee in insolvency of the mortgagor the mortgage need not be "recorded three months at least prior to the commencement of the mortgagor's proceedings in insolvency." *St. Clair* v. *Cleveland*, 559.

REFERENCE.

Where parties to an action submit the same to a referee under an unrestricted rule of court, his authority extends to, and, in the absence of any improper motive on his part, his direct, unconditional award is conclusive of all questions of law and fact involved. *Frison* v. *DePeiffer*, 71.

RELATIVE.

Relative,— when a blood relation. *Elliot* v. *Fessenden*, 197.

REPLEVIN.

See WARRANT OF DISTRESS. SALE, 1, 2.

RULE OF COURT.

See REFERENCE. PRACTICE, 9.

REMAINDER-MAN.

See REAL ACTION.

SALE.

1. Writing an agreement in the form of a lease does not alter the character of an instrument which by its more essential terms discloses itself to be a conditional sale of personal property. *Gross* v. *Jordan*, 380.

2. As the statutes of Massachusetts allow the redemption of a conditional sale of personal property in the same manner that mortgages of personal property are redeemable, that provision becomes a part of all such contracts made in that commonwealth, and is entitled to enforcement in this state when the contract is to be executed here. *Ib.*

3. As our own remedies are to be applied in litigations here, it follows that, if property thus conditionally sold in Massachusetts is attached in this State as belonging to the vendee, the vendor or his assignee, before he can maintain replevin therefor against the attaching officer, must notify the officer of his claim and the amount due upon it, as required by R. S., c. 81, § 44. *Ib.*

4. For a vendee's refusal to accept and pay for goods he has contracted to buy, the vendor may recover for damages the difference between the market value of the goods at the time and place stipulated for delivery and the contract price, together with the expenses of reselling the same; and this rule prevails whether the articles are merely some of the manufactures of the vendor which he has on hand, or are manufactured in some particular way, especially for the vendee at his request; nor does the rule yield when the action declares specially on the contract for the full price. The nature of the facts, rather than the form of the action, rules the damages. *Tufts* v. *Grewer*, 407.

5. Where a seller contracts to deliver at a certain time and place good, clear, merchantable ice, it is a warranty, or a condition precedent of the nature and effect of warranty, that the ice afterwards delivered is of the kind and quality described in the contract. *Morse* v. *Moore*, 473.

6. The warranty survives acceptance; the vendee by accepting the ice is not precluded, in an action by the vendor for the contract price, from setting up a breach of the warranty or condition, in partial or total defense of the action. *Ib.*

7. The fact of acceptance by the vendee may be evidence tending to show complete performance of the contract by the vendor or to show a waiver of more exact performance, the force and effect of the fact as evidence depending upon the circumstances peculiar to each case. *Ib.*

8. The doctrine that, in an executory contract for the sale of goods, an acceptance by the vendee is a waiver of deficient performance by the vendor, applies only where the deficiency of performance is formal rather than essential, such as may relate to the time, place or manner of delivery, or affect the taste and fancy of the purchaser merely, or consist of some omission that produces no substantial loss or injury. *Ib.*

9. A vendor delivered under a contract to sell clear, merchantable ice, deliverable at a seaport in Maine, two cargoes of ice, to be shipped to Richmond, Va., which were taken at the place of delivery by vessels pro-

cured by the vendee, who did not inspect the ice at the place of shipment, although there was sufficient opportunity to do so; *Held*: that in an action for the contract price the vendee can set up the vendor's failure to deliver as good ice as the contract called for, in reduction of the damages recoverable. *Ib.*

SALES ON EXECUTION.

1. Jurisdiction in equity is conferred by statute for the redemption of lands sold on execution the same as for the redemption of estates mortgaged, and the actual possession by the plaintiff of the lands sought to be redeemed, is not a necessary prerequisite to the maintenance of his bill. *Morrill* v. *Everett*, 290.

2. Courts in equity consider equitable rights and award equitable relief. With legal titles they have no occasion to deal. In controversies over them there is a plain and adequate remedy at law. It is only where equities are equal that the law will prevail. *Ib.*

3. Where the defendant's title under a sale of lands within the time on execution limited by statute is subject to redemption, and the plaintiff is shown to be, at least, the equitable owner of the land sought to be redeemed, and when he has seasonably tendered the defendants, the amount of their purchase money, charges and interest, *Held*; on a bill to redeem, that their equities are extinguished, and the plaintiff's equity thereafterwards, being superior, is entitled to be upheld and protected as against the defendants' claim. Whether the plaintiff has a legal title to the land, it is unnecessary in these proceedings to consider. *Ib.*

SAVINGS BANK.

1. The entries upon the books of a savings bank, and upon the pass-books issued by such bank to a depositor, are not conclusive evidence of the ownership of a deposit in the bank. *Savs. Banks* v. *Fogg & Beane*, 374.

2. Where the question of ownership of savings bank deposits is between the estates of deceased husband and wife, and the books show deposits in the name of the wife, evidence of the following circumstances is admissible:— The husband's ability and the wife's inability to earn and accumulate; the depositing and withdrawing of sums in and from the accounts by the husband; the transfer of sums between the accounts in question, and other accounts of the husband; that the husband in fact opened the account; that he had prior accounts which had run up to two thousand dollars, the legal limit for a single depositor; that after the wife's death the husband continued the account as his own; that no administration was taken out on the wife's estate for four years; that before her death she had given her husband an order for the whole sum; that she had never had any other account; that the wife had never personally deposited or withdrawn a single sum; that she was unknown to the officers of the bank; that the pass-book was usually in the husband's possession or else in their joint possession. *Ib.*

3. In this case the evidence is considered by the court to establish the ownership of the husband. *Ib.*

SEARCH AND SEIZURE.

See INTOXICATING LIQUORS.

SEWERS.

1. In an action on the case to recover damages for the alleged unlawful location, construction and maintenance of the extension of a sewer below low-water mark in the Penobscot River, in the city of Bangor, whereby the plaintiffs claimed that their dock was rendered less valuable from the liability of vessels grounding on the end of the sewer, and on the sediment flowing out of it, also a diminution of rents of the plaintiffs' wharf because of the noxious smells arising from the sewage, it appeared that the wharf and dock, during all the time, were in the possession and use of the plaintiffs' tenants who had suffered no diminution of rents. *Held*; that the city had a legal right to extend its sewer over the plaintiffs' flats to a point below low-water mark; that in locating the sewer the city council acted judicially and that the city would be liable only for an improper construction or maintenance of it. *Attwood* v. *Bangor*, 582.

2. *Held, also*, that if the sewer was improperly constructed, it was a temporary injury for which the plaintiffs could not recover in this action. *Ib.*

SMELTS.

See FISH LAW, 4.

SPECIFIC PERFORMANCE.

See EQUITY, 1.

STATUTES, (INTERPRETATION.)

1. Statutes are to be interpreted with reference to their subject-matter, the antecedent and subsequent legislation, and the difficulties sought to be remedied. *Gray* v. *Co. Com'rs*, 429.

2. The court will give effect to the legislative intent, and not defeat it by adhering too rigidly to the letter of the statute. *Ib.*

3. The meaning of a remedial statute may be extended beyond the precise words of the act, when the reason on which the legislature proceeded, the end in view, or the purpose designed, is made clear. *Ib.*

4. *Held:* That the right of appeal, from the location of a town way by the County Commissioners on the unreasonable refusal of the municipal officers, was restored by statute of 1885, c. 359, § 7; and the provisions of § 48, c. 18, of R. S., instead of § § 49 to 51, must apply to such appeals; also that the same section respecting the time for taking the appeal must prevail over section (19) nineteen. *Ib.*

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See LIMITATION.

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STOCKHOLDER.

See CORPORATION.

SUB-CONTRACTOR.

See LIEN.

SUMMONS.

See ORDER OF COURT.

SUPERIOR COURT.

1. The Kennebec Superior Court has jurisdiction of an action on the case which charges that the defendant deposited earth upon his own land close to plaintiff's fence in such a careless manner that the action of the elements pressed the earth and fence partly over upon plaintiff's land to his damage; although that Court has not jurisdiction of real actions nor of actions *quare clausum fregit*. Such an action is not of the nature of *quare clausum*, nor its equivalent. *Knight* v. *Dunbar*, 359.

2. The Superior Court for Aroostook County has jurisdiction of personal actions and may award judgment therein for the plaintiff to the amount of five hundred dollars; although the jury returned a verdict for single damages which upon being doubled, under the statute, exceeds that sum. *Hussey* v. *King*, 568.

SURETY.

See PROBATE, 5.

SURVEYOR.

See ACCOUNT STATED, 2.

TAX.

1. The plaintiff, a resident of Sedgwick, caused to be cut from a tract of wild land owned by him and situated in the defendant town, fire wood, pulp wood, and kiln wood, aggregating eleven hundred cords, and two hundred piles, all of which wood and piles he caused to be conveyed to the landing at the shore on said tract, before April 1, 1888, there to remain until sold in small quantities or by the whole lot, to local or other parties, as might thereafterwards be found expedient. *Gower* v. *Jonesboro'*, 142.

2. The piles were disposed of during the year by occasional shipments to other ports, as was also the greater part of the wood, partly by such shipments, and partly by sales from time to time to local parties, whenever there was a demand therefor. *Ib.*

3. In a suit brought by the plaintiff against the town, where the same was cut and conveyed, to the landing therein, to recover the amount of tax paid under protest by the plaintiff; *Held*: That the wood and piles were "personal property employed in trade," and for which the plaintiff was legally taxable, in the defendant town, under the first paragraph of § 14, c. 6, R. S., which provides that "All personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, shall be taxed in the town, where so employed, on the first day of April; provided that the owner, his servant, sub-contractor or agent, so employing it, occupies any store, shop, mill, wharf, landing place, or shipyard therein, for the purpose of such employment." *Ib.*

4. In an action of debt to recover a tax assessed upon personal property, it is a material averment that the defendant was an inhabitant of the plaintiff

town, &c., and it is incumbent upon the plaintiff to establish it by competent evidence. *Rockland* v. *Farnsworth*, 228.

5. Where such an action was submitted on report to the law court, and the evidence did not disclose any testimony to prove that allegation, the plaintiff moved to have the report discharged. *Held*, that as no injustice can result from allowing the plaintiff an opportunity to supply the omission, if the evidence exists, the motion should be granted, and the case remanded for trial. *Ib.*

6. An action of debt to recover a tax may be maintained in the name of the collector of a village corporation. Such officers are included within R. S., c. 6, § 141. *Lord* v. *Parker*, 530.

7. It is not a bar to such an action that the collector, in a settlement with the treasurer, has paid all the taxes due including the tax sued for, before the action was commenced; it appearing that the defendant did not authorize the payment, nor that it was made by the plaintiff with an intent to extinguish the tax, or to relieve the defendant from his liability to pay it. *Ib.*

8. Informalities in a warrant for the collection of a village corporation tax, legally and regularly assessed, will not bar such an action, even although the warrant might not, perhaps, be sufficient to authorize an arrest of the defendant, or a distraint of his property. *Ib.*

9. An overlay, it being less than five per cent, does not render the assessment of a village corporation tax illegal or void, where by the terms of its charter, such assessments are to be made in the same manner as county assessments. *Ib.*

10. In the absence of any known statute requiring the assessors of a village corporation to be sworn, the fact that the oath was administered to them by the corporation clerk does not render an assessment of taxes illegal or uncollectible. *Ib.*

TIME.

See FORBEARANCE, 2. PROMISSORY NOTES, 6.

TITLE.

See MORTGAGE (CHATTEL), 3, 4. SALE, 1, 2, 3. SAVINGS BANK.

1. One entitled to an estate in remainder only, subject to an existing life estate in another, can not maintain a writ of entry against one rightfully in possession under the life estate. *Sylvester* v. *Sylvester*, 46.

2. To sustain such an action the plaintiff must not only prove that he has such an estate in the demanded premises as he claims, but he must also prove that at the time of suing out his writ he had a right of entry into the demanded premises. R. S., c. 104, § 5. *Ib.*

3. Title to real estate can not be settled by a parol award. *Buker* v. *Bowden*, 67.

4. Where a disputed line was attempted to be settled by a parol award, and the plaintiff thereupon told the defendant to go on and cut the wood on the

latter's side of the line thus established, and he did so until forbiden by the plaintiff and subsequently hauled away the wood cut before being forbidden; *Held*: that the facts did not constitute a license to enter and cut on what proved to be the plaintiff's land, though the parol award determined it be the defendant's land. *Ib.*

5. An oral agreement for the exchange of lands, followed by an occupation thereunder, which has all the elements of adverse possession, will ripen into an absolute title, although mutual deeds were never given.
Martin v. *Me. Cent. R. R. Co.*, 100.

6. Where the plaintiff, with a possessory title, knew and approved of a deed, given by one holding the record title, conveying a right to enter the premises, together with a perpetual easement of water and water-rights therein,— himself receiving the consideration named in the deed,— and afterwards saw the defendant, a subsequent grantee, expending large sums of money in improving the easement, but gave no warning to the defendant to desist and made no assertion of title until the completion of the work, and in which he was employed; *Held*: that he was equitably estopped from asserting any title to the disturbance of the defendant's easement. *Ib.*

7. Title by possession will become absolute after twenty years of open, notorious and exclusive occupation as owner, under a claim of right or color of title, whether such claim was originally based on a written or parol contract, or no contract at all. *Ib.*

8. Sections 47, and 48, of c. 104, R. S., enabling those in possession of real estate claiming freehold, or an unexpired term of not less than ten years therein, to quiet their title against adverse claimants by petition requiring such claimants to bring suit within such time as the court may order,— are constitutional. *Webster* v. *Tuttle*, 271.

9. Jurisdiction in equity is conferred by statute for the redemption of lands sold on execution the same as for the redemption of estates mortgaged, and the actual possession by the plaintiff of the lands sought to be redeemed, is not a necessary prerequisite to the maintenance of his bill.
Morrill v. *Everett*, 290.

10. Courts in equity consider equitable rights and award equitable relief. With legal titles they have no occasion to deal. In controversies over them there is a plain and adequate remedy at law. It is only where equities are equal that the law shall prevail. *Ib.*

11. Where the defendants' title under a sale of lands within the time on execution limited by statute is subject to redemption, and the plaintiff is shown to be, at least, the equitable owner of the land sought to be redeemed, and when he has seasonably tendered the defendants, the amount of their purchase money, charges and interest, *Held*; on a bill to redeem, that their equities are extinguished, and the plaintiff's equity thereafterwards, being superior, is entitled to be upheld and protected as against the defendants' claim. Whether the plaintiff has a legal title to the land, it is unnecessary in these proceedings to consider. *Ib.*

12. The assignee of an insolvent debtor, representing that there were different claimants of certain personal property found in the possession of such debtor, obtained leave to sell the same on common account, by proceedings under R. S., c. 70, § 36. A portion of the proceeds of the sale belonged to a person other than the insolvent debtor. *Held*: That such portion was attachable in the hands of the assignee as trustee of the owner thereof, by trustee action against such owner instituted within the sixty days allowed by R. S., c. 70, § 37, for the assertion of any claim in such case against an assignee by suit. *Fogler* v. *Marston*, 396.

13. A conveyed to B a parcel of land reserving a store thereon, "with the privilege of remaining as long as the store stands." *Held*; That the reservation (more strictly exception) constitutes a base or qualified fee in so much of the land as is necessary for the reasonable use of the store, determinable when the store ceases to remain upon the premises conveyed.
Farnsworth v. *Perry*, 447.

14. A deed of land containing a reservation of pasturage for two cows during the life-time of the grantor, or, in lieu thereof, the grantee's personal obligation to fit her yearly fuel for the stove, and, in aid of the reservation, the stipulation that the grantee "is not" to incumber or convey the land meantime, does not create an estate on condition, but conveys a fee subject to the reservation. *Bray* v. *Hussey*, 329.

15. While a grantor may modify, limit and condition his grant, he cannot destroy his grant by words in other parts of his deed of grant.
Maker v. *Lazell*, 562.

16. A grantor in the granting clause of his deed expressly conveyed *all* his right, title and interest in a parcel of land, and then added the following clause: "This deed is intended to convey the title which was conveyed to me by the deed of B," &c. In fact no title passed to the grantor by the deed of B, but he had a title to the parcel from another source. *Held*; that all the title of the grantor passed by his deed from whatever source his title was derived.
Ib.

TOWNS.

See PLANTATIONS. WAY, 26.

1. Towns have the discretionary power to choose any number of overseers of the poor not exceeding twelve; but if they deem the election of separate overseers unnecessary, the duties pertaining to those officers are to be discharged by the selectmen, of whom there must be three, five or seven. *Held*, accordingly, that the election of only one overseer of the poor is valid. *Lyman* v. *Kennebunkport*, 219.

2. Where a water company has a right under its charter to lay its pipes through the streets of a city, "in such manner as not to obstruct or impede travel thereon," *Held*; that the city retained the right to repair its streets in the ordinary manner although in so doing the pipes of the water company may thereby become exposed, and it is compelled to sink them deeper, to protect them from frost and other dangers, it appearing that such repairs are not made in an improper manner. *Rockland Water Co.* v. *Rockland*, 267.

3. On the trial of an action against a town for an injury occasioned by a defect in a highway, when one of the issues in the case was the position of a plank at the end of a bridge, and whether it rendered the way unsafe for travelers, evidence that other persons with their vehicles had received injuries at the place of the alleged defect is not admissible to show that the way is defective. *Bremner* v. *Newcastle*, 415.

4. A claim against a town for damages occasioned by a defective highway therein is without legal validity when no notice in writing, as required by the statute, has been given to its municipal officers. *Clark* v. *Tremont*, 426.

5. The plaintiff brought an action upon a vote of the town to pay him damages under such circumstances. *Held:* That no controversy existed between him and the town as to its legal liability; and that the vote is not binding upon the town, whereby an action can be maintained upon it. *Ib.*

6. In an action on the case to recover damages for the alleged unlawful location, construction and maintenance of the extension of a sewer below low-water mark in the Penobscot River, in the city of Bangor, whereby the plaintiffs claimed that their dock was rendered less valuable from the liability of vessels grounding on the end of the sewer, and on the sediment flowing out of it, also a diminution of rents of the plaintiff's wharf because of the noxious smells arising from the sewage, it appeared that the wharf and dock, during all the time, were in the possession and use of the plaintiff's tenants who had suffered no diminution of rents. *Held*; that the city had a legal right to extend its sewer over the plaintiffs' flats to a point below low water mark; that in locating the sewer the city council acted judicially and that the city would be liable only for an improper construction or maintenance of it. *Attwood* v. *Bangor*, 582.

7. *Held, also*, that if the sewer was improperly constructed, it was a temporary injury for which the plaintiffs could not recover in this action. *Ib.*

TRADER.

1. A person must be regarded as a trader, in the meaning of the insolvent law who in addition to carrying on a milk farm for the purpose of retailing milk among his customers, increased his business by taking the product of his brother's farm, and purchasing from other sources from four to twelve cans of milk daily, each can containing eight quarts, for a period of eight months and more next prior to his going into insolvency. *In re, Tolman*, 353.

2. Such an extent of purchasing, if necessitated by temporary causes, and continued for a short time might not have the effect to constitute a business of trading; but otherwise, continued for so many months. *Ib.*

3. A trader cannot be said to keep proper books of account, who keeps merely memorandum books, containing deliveries of milk to customers, some informal accounts and settlements, an occasional inventory of farm stock and products, but barely any charges of money paid out, and nothing to indicate where or how the principal proceeds of his business have been expended. *Ib.*

TRAVELER.

See NEGLIGENCE, 4.

TRESPASS.

See FISH LAW, 3. ACTION, 2.

TROVER.

See MORTGAGE (CHATTEL), 3, 4.

1. In an action of trover, it is no defense that the defendant acted as the agent or servant of another who was himself a wrong-doer.
McPheters v. *Page*, 234.

2. Any act of dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it, amounts to a conversion. *Ib.*

3. Nor is it necessary to constitute a conversion that the wrong-doer has applied the property to his own use; if he has exercised such dominion over it, it will in law amount to a conversion whether it be for his own use or another person's use. *Ib.*

See *Skowhegan Nat. Bank* v. *Maxfield*, 576.

TRUSTEE PROCESS.

The assignee of an insolvent debtor, representing that there were different claimants of certain personal property found in the possession of such debtor, obtained leave to sell the same on common account, by proceedings under R. S., c. 70, § 36. A portion of the proceeds of the sale belonged to a person other than the insolvent debtor. *Held:* That such portion was attachable in the hands of the assignee as trustee of the owner thereof, by trustee action against such owner instituted within the sixty days allowed by R. S., c. 70, § 37, for the assertion of any claim in such case against an assignee by suit. *Fogler* v. *Marston*, 396.

TRUSTS.

In a complaint in equity by the relatives of the person alleged to be deceased against parties, who hold in trust under the will of a grandfather of such person the fund which the complainants seek to have distributed, it is within the power of the court, for the greater protection of the trustees, to order the fund to be transferred from their keeping to the keeping of inheritors, imposing such terms of liability upon the latter as substituted trustees as may be deemed reasonable. *Chapman* v. *Kimball*, 389.

VENDOR AND PURCHASER.

See EQUITY, 1. REAL ACTION, 4.

VERDICT.

1. When a single sentence in a charge is excepted to, which was used simply as an illustration of an extreme proposition of law but when considered in

connection with the remainder of the charge upon the same topic it appears that the jury could not have been misled, the exceptions will not be sustained. *Searsmont* v. *Lincolnville*, 75.

2. When a verdict is well founded on testimony, although conflicting on a principal issue, it is not sufficient for setting it aside as against evidence that the law court on reading a report of the evidence might and, perhaps, would come to a conclusion different from a jury of the vicinity who saw and heard the witnesses and rendered their verdict without bias or prejudice. *Ib.*

3. The court may properly instruct the jury to return a verdict for either party when it is plain that a contrary verdict can not be allowed to stand. *Moore* v. *McKenney*, 80.

4. Upon a motion for a new trial, in an action where the plaintiff obtained a verdict for injuries received by means of an alleged defective car, it appearing that the overwhelming weight of evidence was in favor of a sound car; that the plaintiff's account of the manner of his injury was improbable; and his admissions to others, before the action was brought, differing therefrom; *Held*, that the jury must have been influenced by some improper motive in rendering a verdict for the plaintiff, and a new trial should be ordered. *Roberts* v. *B. & M. R. R.*, 298.

5. The powers of the court to set aside verdicts against towns, in actions for damages occasioned by defective highways, and its duty to do so when the verdicts are clearly wrong, or the damages are clearly excessive, are unquestionable. *McNerney* v. *Ea. Livermore*, 449.

6. But it is a well-settled rule of law that this power is not to be exercised simply because the court would have decided differently from the jury. To authorize an exercise of the power, the court must feel that the verdict is clearly and unmistakably wrong. *Ib.*

VILLAGE CORPORATION.

1. An action of debt to recover a tax may be maintained in the name of the collector of a village corporation. Such officers are included within R. S., c. 6, § 141. *Lord* v. *Parker*, 530.

2. It is not a bar to such an action that the collector, in a settlement with the treasurer, has paid all the taxes due including the tax sued for, before the action was commenced; it appearing that the defendant did not authorize the payment, nor that it was made by the plaintiff with an intent to extinguish the tax, or to relieve the defendant from his liability to pay it. *Ib.*

3. Informalities in a warrant for the collection of a village corporation tax, legally and regularly assessed, will not bar such an action, even although the warrant might not, perhaps, be sufficient to authorize an arrest of the defendant, or a distraint of his property. *Ib.*

4. An overlay, it being less than five per cent, does not render the assessment of a village corporation tax illegal or void, where by the terms of its charter, such assessments are to be made in the same manner as county assessments. *Ib.*

5. In the absence of any known statute requiring the assessors of a village corporation to be sworn, the fact that the oath was administered to them by the corporation clerk does not render an assessment of taxes illegal or uncollectible. *Ib.*

WAGES.

See ASSIGNMENT, 2.

WAIVER.

See COSTS, 2. DEED, 4, INSURANCE, (FIRE) 7. PLEADINGS, 9.

1. The four years, at the expiration of which a charter of incorporation becomes by the statute forfeited unless the company be organized and its business commenced within that time, do not run against a corporation observing the statutory requirement within that time after its charter has been amended. The amendment is a legislative waiver of any forfeiture.
Farnsworth v. *R. R. Co.*, 440.

2. The fact of acceptance by the vendee may be evidence tending to show complete performance of the contract by the vendor or to show a waiver of more exact performance, the force and effect of the fact as evidence depending upon the circumstances peculiar to each case. *Morse* v. *Moore*, 473.

3. The doctrine that, in an executory contract for the sale of goods, an acceptance by the vendee is a waiver of deficient performance by the vendor, applies only where the deficiency of performance is formal rather than essential, such as may relate to the time, place or manner of delivery, or affect the taste and fancy of the purchaser merely, or consist of some omission that produces no substantial loss or injury. *Ib.*

4. Waiver of demand and notice by the indorser of a foreign bill of exchange is invalid under R. S., c. 32, § 10, unless in writing and signed by him or his agent. *Skowhegan Nat. Bank* v. *Maxfield*, 576.

WARRANT.

A liquor warrant against a dwelling-house sufficiently describes the premises by an averment that the house is occupied by the defendant, and situated on the east side of Blake street; the house being in fact so occupied and situated east of Blake street, but not adjoining it; although there be another house between that of the defendant and the street, and access to defendant's house be by an alley running from the street past the other tenement.
State v. *Minnehan*, 310.

WARRANT OF DISTRESS.

1. A warrant of distress against the inhabitants of a town does not *per se* protect an officer, distraining the goods and chattels of one of its inhabitants, when it does not affirmatively appear on the face of the warrant that the court of county commissioners had jurisdiction of the subject-matter of the judgment on which it was issued. *Brown* v. *Mosher*, 111.

2. If, however, the record of the judgment shows such jurisdiction in fact, the officer's legal execution of the warrant may be justified notwithstanding that fact does not affirmatively appear on the face of it. *Ib.*

WARRANTY.

1. Parties, who have bound themselves in an executory contract of sale of personal property without warranty, are not precluded thereby from superseding such contract afterwards by an executed sale of the same property with warranty, and other change from the terms of the first contract. *Storer* v. *Taber*, 387.

2. In an action on the warranty of such property the vendee is not estopped, to show that it was worthless, by his admission in the first written agreement that it was worth one hundred and twenty-five dollars. The admission would be evidence but not conclusive evidence of the value. *Ib.*

3. A grantor conveyed to the plaintiff a hotel and lot by the following description: "A parcel of land situated in Buckfield village, and the buildings thereon, known as the Buckfield House and stand, containing one acre more or less, meaning to convey the same premises F. A. Warren conveyed to me." Warren's deed conveyed the premises by the same general description. Adjoining the hotel lot was a small triangular parcel that had been many years unfenced and unused by its owner, forming a common ground with the hotel lot, there being no visible line between the lots excepting at one corner on the divisional line a granite post was set, and people were in the habit of driving across this common ground when approaching the hotel from a certain direction. The plaintiff was deceived by the situation and use of the premises, supposing the small parcel to be a part of his purchase, and conveyed the two parcels by metes and bounds to a third person as the hotel property. Having suffered upon the warranty in his own deed, he sues the executor of his grantor upon the warranty in his grantor's deed. Had he investigated the meaning of the granite post, or explored the registry of deeds far enough back to have found the first conveyance of the hotel lot by metes and bounds, his error would have been prevented. *Held*: that the action cannot be maintained. *Shaw* v. *Bisbee*, 400.

4. Covenants of warranty in a deed are not qualified by a phrase at the end of the description of the land, "being the same premises F. A. Warren conveyed to me," even if through Warren's deed an incumbrance was discoverable. The reference was designed to help identify the premises conveyed, and not to determine the quantity or quality of title. *Ib.*

5. Where a seller contracts to deliver at a certain time and place good, clear, merchantable ice, it is a warranty, or a condition precedent of the nature and effect of warranty, that the ice afterwards delivered is of the kind and quality described in the contract. *Morse* v. *Moore*, 473.

6. The warranty survives acceptance; the vendee by accepting the ice is not precluded, in an action by the vendor for the contract price, from setting up a breach of the warranty or condition, in partial or total defense of the action. *Ib.*

7. The fact of acceptance by the vendee may be evidence tending to show complete performance of the contract by the vendor or to show a waiver of more exact performance, the force and effect of the fact as evidence depending upon the circumstances peculiar to each case. *Ib.*

8. The doctrine that, in an executory contract for the sale of goods, an acceptance by the vendee is a waiver of deficient performance by the vendor, applies only where the deficiency of performance is formal rather than essential, such as may relate to the time, place or manner of delivery, or affect the taste and fancy of the purchaser merely, or consist of some omission the produces no substantial loss or injury. *Ib.*

9. A vendor delivered under a contract to sell clear, merchantable ice, deliverable at a seaport in Maine, two cargoes of ice, to be shipped to Richmond, Va., which were taken at the place of delivery by vessels procured by the vendee, who did not inspect the ice at the place of shipment, although there was sufficient opportunity to do so; *Held*: that in an action for the contract price the vendee can set up the vendor's failure to deliver as good ice as the contract called for, in reduction of the damages recoverable. *Ib.*

WATERS.

See DEED, 12. WAY, 20.

A State may, under legislation on the subject by Congress, authorize the erection of a bridge across a navigable river within the State. Until action has been taken by Congress, such Act of the State is not repugnant to the power to regulate-commerce. *State* v. *Leighton*, 419.

WATER COMPANY.

Where a water company has a right under its charter to lay its pipes through the streets of a city, "in such manner as not to obstruct or impede travel thereon," *Held*; that the city retained the right to repair its streets in the ordinary manner although in so doing the pipes of the water company may thereby become exposed, and it is compelled to sink them deeper, to protect them from frost and other dangers, it appearing that such repairs are not made in an improper manner.

Rockland Water Co. v. *Rockland*, 267.

WAY.

See JUDGMENT, 3.

1. A land owner, whose real estate is damaged by the action of county commissioners in locating and defining the limits and boundaries of a highway under R. S., c. 18, § 11, can appeal to the supreme judicial court from the county commissioners' award of damages. *Conant, Appellant*, 42.

2. When property in land has been severed by voluntary conveyance, one portion of which is inaccessible except by passing over the other or by trespassing on the lands of a stranger, a grant of a way by necessity is presumed between the parties. *Whitehouse* v. *Cummings*, 91.

3. A way of necessity ceases when the necessity from which it results ceases. *Ib.*

4. A petition for the appointment of an agent to open and make passable a highway under the provisions of R. S., c. 18, § 37, duly entered at a regular session of the court of county commissioners, may be ordered to be heard and heard, after proper notice therefor, in the vicinity of the location; and the court may adjourn the session, at which the petition was entered, to the time and place ordered. *Brown* v. *Mosher*, 111.

5. If such adjournment does not appear of record, the court of county commissioners may, at any regular session, amend its record so that it may accord with the facts. *Ib.*

6. Revised Statutes, c. 18, § 17, authorizing towns to "discontinue private ways," relates to such only as they may lay out, alter or widen under R. S., c. 18, § 14, and not to those created by express grant in a deed. *Tibbetts* v. *Penley*, 118.

7. Where the owner of land conveyed the northern portion to the plaintiff, and "also a right of passage-way in the most direct and convenient place from the county road to the granted premises," and subsequently conveyed the southerly portion to the defendant, "subject to the right of way granted by" the former deed to the plaintiff, and in an action on the case for obstructing the right of way wherein one of the issues was whether the way had been laid out across the corner of the land of the defendant, who denied that it touched his land; *Held*, that the deed to the defendant was legitimate evidence to be considered by the jury with the other evidence material to that issue. *Ib.*

8. When land conveyed, by deed with covenant of warranty against incumbrances, is bounded by the center of a public road, and is so described in the deed, so that knowledge of the fact is brought home to the grantee, without resort to oral or other extraneous evidence, he must accept the land *cum onere*, and can not complain of that incumbrance as a breach of the covenant in his deed. *Holmes* v. *Danforth*, 139.

9. Damages for land taken for a private way are to be paid by the person at whose request, and for whose benefit, the way is laid out. *Fernald* v. *Palmer*, 244.

10. When a private way has been laid out for such petitioner, and has been used by him, is he estopped from denying the regularity of the proceedings in such laying out, in an action by the land owner to recover the awarded damages. *Ib.*

11. It is no defense to such an action that the land owner has assigned his claim to third parties. *Ib.*

12. Where a water company has a right under its charter to lay its pipes through the streets of a city, "in such manner as not to obstruct or impede travel thereon," *Held*; that the city retained the right to repair its streets in the ordinary manner although in so doing the pipes of the water company may thereby become exposed, and it is compelled to sink them deeper, to protect them from frost and other dangers, it appearing that such repairs are not made in an improper manner. *Rockland Water Co.* v. *Rockland*, 267.

13. Railroad commissioners have no jurisdiction to regulate the crossing of railroad tracks and public ways unless the former are laid under charter authority so as to be maintained in the exercise of eminent domain, and become a railroad for public use, because when not so laid they are a mere convenience to be used or disused at pleasure, to be maintained or removed at the will of their owner; they are private property, subject to be taken in the exercise of eminent domain by the laying out of a public way, and are protected by the same rights of compensation. *In re, R. R. Com'rs*, 273.

14. When proceedings for the laying out of a way have been by the Commissioners "confirmed, closed and recorded," such way is thereby located and established, and a petition to discontinue the same is a subsequent, new proceeding that does not in any way seek to annul or reverse such judgment of the County Commissioners, and therefore, does not interrupt and can not, in any way, enlarge the time specified within which such way should be built. *State* v. *Wellman*, 282.

15. The time having expired within which the town interested, should have built the road when the Commissioners were petitioned to appoint an agent to construct the same, it was their duty to have so done instead of refusing to so do, and it, therefore, becomes the duty of this court, in the exercise of its plenary power over all inferior courts, to require the Commissioners to proceed and cause the road to be constructed as required by law. *Ib.*

16. When an order of court required that County Commissioners be summoned by serving them with an attested copy of a petition, *Held*; that the order was complied with by delivering the same to their chairman while the board was in session. *Ib.*

17. *Coombs* v. *Co. Com.* 71 Maine, 239, criticised. *Ib.*

18. On the trial of an action against a town for an injury occasioned by a defect in a highway, when one of the issues in the case was the position of a plank at the end of a bridge, and whether it rendered the way unsafe for travelers, evidence that other persons with their vehicles had received injuries at the place of the alleged defect is not admissible to show that the way is defective. *Bremner* v. *Newcastle*, 415.

19. A State may, until legislation on the subject by Congress, authorize the erection of a bridge across a navigable river within the State. Until action has been taken by Congress, such Act of the State is not repugnant to the power to regulate commerce. *State* v. *Leighton*, 419.

20. The defendant was indicted for destroying a bridge across Little River in the town of Perry, constructed under an Act of the legislature of the State. He claimed that the legislature did not have the power to authorize its construction; and, as it to some extent interfered with the navigation of the river, it was a public nuisance, and of special injury to him; and, therefore he had a right to remove it. *Held*: That the legislature had power to authorize its construction, that it was a part of the public highway, and the defendant had no power over it. *Ib.*

21. A claim against a town for damages occasioned by a defective highway

therein is without legal validity when no notice in writing, as required by the statute, has been given to its municipal officers.
Clark v. *Tremont*, 426.

22. Statutes are to be interpreted with reference to their subject-matter, the antecedent and subsequent legislation, and the difficulties sought to be remedied. *Gray* v. *Co. Com'rs*, 429.

23. The court will give effect to the legislative intent, and not defeat it by adhering too rigidly to the letter of the statute. *Ib.*

24. The meaning of a remedial statute may be extended beyond the precise words of the act, when the reason on which the legislature proceeded, the end in view, or the purpose designed, is made clear. *Ib.*

25. *Held*: That the right of appeal, from the location of a town way by the County Commissioners on the unreasonable refusal of the municipal officers, was restored by statute of 1885, c. 359, § 7; and the provisions of § 48, c. 18, of R. S., instead of § § 49 to 51, must apply to such appeals; also that the same section respecting the time for taking the appeal must prevail over section (19) nineteen. *Ib.*

26. The powers of the court to set aside verdicts against towns, in actions for damages occasioned by defective highways, and its duty to do so when the verdicts are clearly wrong, or the damages are clearly excessive, are unquestionable. *McNerney* v. *East Livermore*, 449.

27. But it is a well-settled rule of law that this power is not to be exercised simply because the court would have decided differently from the jury. To authorize an exercise of the power, the court must feel that the verdict is clearly and unmistakably wrong.

28. The statute which declares that when buildings, which have for more than twenty years fronted upon a public way or street shall be deemed the bounds thereof, means that portion of the building which rests upon the ground, and does in fact bound and limit the way, and not the cornices or other projections which far above the heads of travelers may happen to overhang the sidewalk. *Farnsworth* v. *Rockland*, 508.

29. When land is conveyed by deed and a building is one of the boundaries, the parties are presumed to intend that such line shall be wholly on one side of every portion of the building. But, in the case of a right of way, even if created by express grant, it is not an unreasonable presumption that it was intended to extend under the projecting finish of a building. *Ib.*

30. The owner of land over which a public way passes has the right to occupy the land above and below its surface to any extent that will not impair its usefulness for a way. The public must not be made to suffer any real inconvenience, nor should the owner be deprived of any such reasonable use of his land as will not incommode the public. *Ib.*

31. The plaintiff was the owner of a building, which for more than thirty-five years had fronted on the street, and was conceded to be one of its boundaries. In proceedings taken by the city for the widening of the street, under which the plaintiff was compelled to move the building back, *Held*; that in

order to ascertain the amount of land so taken, and for which damages should be allowed, the measurement should commence on a line with the side of the building, and not on a line with the cornice on the gable-end of the building which projected beyond it into and over the street. *Ib.*

32. The statute (R. S., c. 6, section 78) provides that, when a road is laid over lands not within any town or plantation required to raise money to make and repair highways, the county commissioners shall at their first regular session thereafter assess thereon, and on adjoining townships benefited thereby, such an amount as they judge necessary for making and opening the road. *Held*; That the assessments are to be made at the same regular session at which the location of the road is filed; the object of the statute being to prevent their being made at an adjourned term of such regular session. Such regular session will be the first occurring after the road is laid over the lands. *Mansur* v. *Co. Com.* 514.

33. *Appleton* v. *Co. Com.* 80 Maine, 284, explained. *Ib.*

34. Where an appeal has been taken from the decision of county commissioners in laying out a highway, all objections to their jurisdiction or their otherwise invalid proceedings may be taken when the report of the committee is offered for acceptance. If not then taken no writ of certiorari will be sustained to quash their proceedings. *Phillips* v. *Co. Com.* 541.

WIDOW.

See PROBATE, 1, 2, 3.

WIDOWER'S DOWER.

See *Pierce* v. *Rollins*, 172.

WIFE.

See HUSBAND AND WIFE.

WILLS.

1. By R. S., c. 74, § 10, it is provided that, "when a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative, if he had survived." *Held:* that the word, "relative," in this section of the statute means one connected with the testator by blood; a blood relation. It does not include within its meaning one connected with the testator by marriage only. *Elliott* v. *Fessenden*, 197.

2. A devise of the use of all the testator's property, real and personal, to the widow for life, no reason to the contrary being shown, gives her the custody and control of the same; and it should be inventoried and paid to her for use under the terms of the will. *Fox* v. *Senter*, 295.

3. A solvent testator, leaving a widow, may dispose of life insurance, by will, to persons other than his widow. Policies, payable by their terms to the testator's legal representatives, if specifically devised by the will become a part of his estate and not the property of the widow; but where it is clear

that he intended by his will, to dispose of his entire property, including the life insurance as a part of his estate, *Held*; that the widow will take the life insurance, specifically devised in general terms to her use for life, as effectually as if the insurance had been specifically named in the will.

Ib.

4. Where a testator gives annuities to his widow and niece as general legacies, each being a simple bequest, an absolute gift of a definite quality, there is a presumption of intended equality, unless the will contains unequivocal evidence of an intention to give a preference. *Additon* v. *Smith*, 551.

5. This rule applied to a case where the annuity given to the widow was in addition to her dower, and that to the niece by a codicil exhibiting a thoughtful solicitude for her condition; the testator providing that, by the payment of the taxes, insurance and repairs of his homestead, "None of the gifts, or bequests, or rights to my said wife and to my said niece shall be impaired or diminished;" and finally providing that "It shall be the duty of my said executors to so dispose of and invest my estate that there shall be, from year to year, a sufficient income to meet all said legacies and bequests."

Ib.

6. A demonstrative legacy has a prior right to payment out of the fund charged, but is payable at all events out of the principal of the estate if the fund proves inadequate. *Ib.*

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ERRATA.

In third line from bottom p. 124, read *derives* for *desires*.

Insert *Tascus Atwood*, for plaintiff, at p. 151.

In third line from top, p. 271, for *picking* read *piking*.

In *Additon* v. *Smith*, p. 559, strike out the name of Mr. Justice LIBBEY, as one of the concurring justices.

In eleventh line from top p. 512, for 51 Maine, 414, read 51 Maine, 514.