REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By CHARLES HAMLIN,

REPORTER OF DECISIONS.

MAINE REPORTS,

VOLUME LXXXIV.

PORTLAND, MAINE :
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JUSTICES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

HON. JOHN A. PETERS, CHIEF JUSTICE.
HON. CHARLES W. WALTON.
HON. WILLIAM WIRT VIRGIN.
HON. ARTEMAS LIBBEY.
HON. LUCILIUS A. EMERY.
HON. ENOCH FOSTER.
HON. THOMAS H. HASKELL.
HON. WILLIAM PENN WHITEHOUSE.

Justices of the Superior Courts.

HON. PERCIVAL BONNEY,	CUMBERLAND COUNTY.
HON. WILLIAM M. ROBINSON,	AROOSTOOK COUNTY.
HON. OLIVER G. HALL,	KENNEBEC COUNTY.

ATTORNEY GENERAL.

HON. CHARLES E. LITTLEFIELD.

CHARLES HAMLIN, REPORTER OF DECISIONS.

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

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TOBIAS L. ROBERTS, and another, *vs.* FRED E. RICHARDS, and another.

Hancock. Opinion June 2, 1891.

Deed. Island. Grant,— location. Disseizin. Adverse Use. Act of Separation, June 19, 1819; R. S., 1857, p. 43; French Grant, July 23, 1688; Resolves of General Court, July 6, November 23, 1787, January 26, 1814.

Where land bounded southerly on the seashore and extending one league in width on each side of a river at its mouth, was granted together with the island of Mount Desert and "other islands on the fore part of said two front leagues;" — *Held;* that in ascertaining the location of the "other islands" mentioned, the rule governing "flats" between adjoining owners of land situated on the rear shore does not apply.

The defendants claim title to one of the six Porcupine islands in Frenchman's Bay, known as Round Porcupine, through the State of Maine from the Commonwealth of Massachusetts in 1819 and 1876. The plaintiffs contend that the Commonwealth, by Resolve in 1787 granted it with other islands to one Gregoire. It appeared that a few months thereafter a special agent of the Commonwealth and Gregoire with a surveyor proceeded to the locality and established the lines of the grant. Five years afterwards Gregoire conveyed all the land and islands granted, mentioning thirteen islands by name, but not including any of the Porcupines or others in their vicinity, and never afterwards, so far as the county registry shows, attempted to convey any of the Porcupine islands. On the other hand, the Commonwealth did subsequently authorize the location of five hundred acres on the Porcupine islands. *Held;* that in the absence of any more direct evidence of the location of the grant, these contemporaneous and subsequent acts of the parties are sufficient evidence that Round Porcupine was not included therein.

To effect the disseizin of the real owner of land, the entry under a duly registered deed from one having no title, must be followed by an open, notorious, exclusive possession, continued uninterruptedly during the statute period.

Such a deed is evidence of the extent of the grantee's claim, but the registration is constructive notice to those only who would claim under the same grantor.

The essential use and occupation by one claiming adversely must be of such unequivocal character as will reasonably indicate to the true owner visiting the premises during the statute period, that, instead of suggesting the probable invasion of a mere occasional trespasser, they unmistakably show an asserted exclusive appropriation and ownership.

The facts in this case are not such as can lay the foundation of a presumed grant from Massachusetts or Maine.

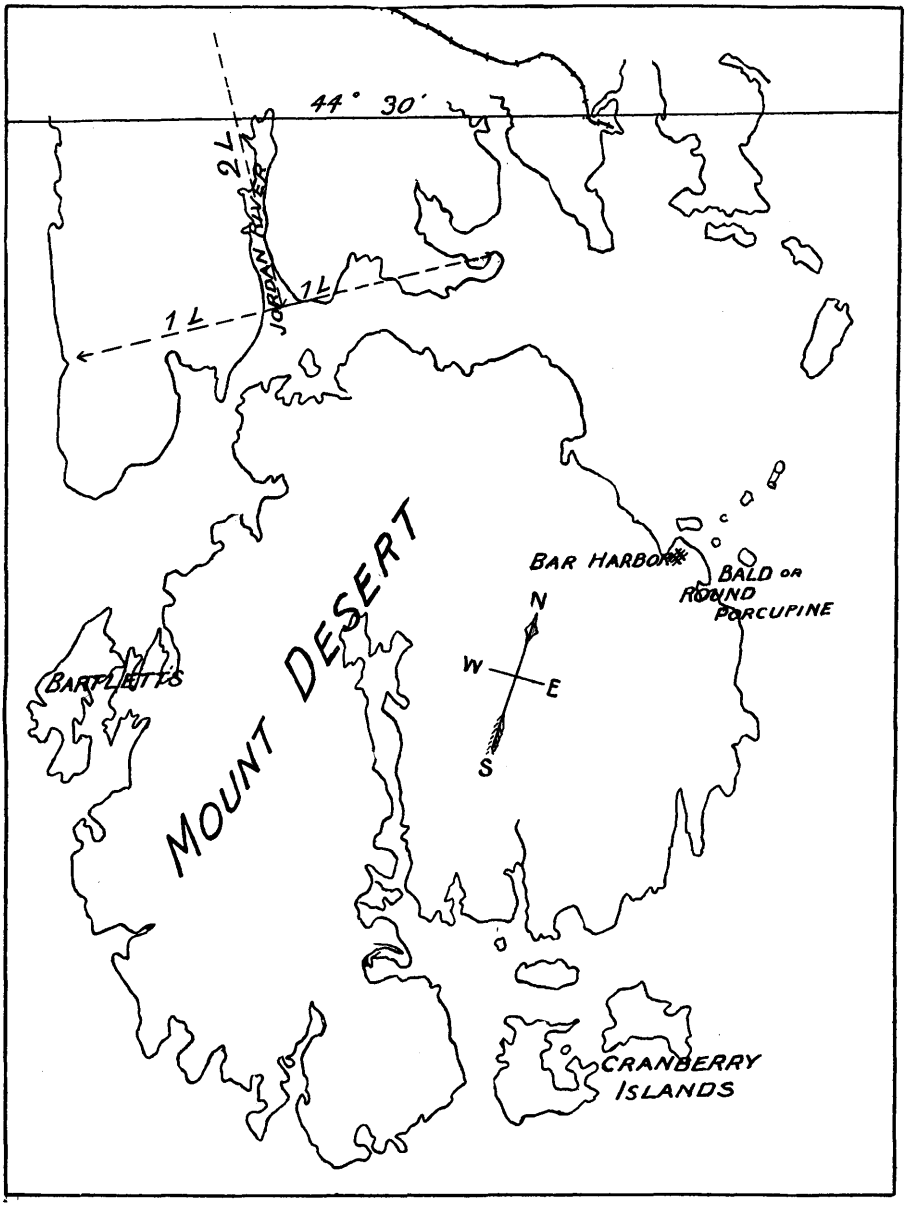
ON REPORT.

This was a real action for the recovery of an island in Frenchman's Bay, near Bar Harbor, Mt. Desert, known as Round or Bald Porcupine and Wheeler's Porcupine. Both parties agreed that the title at some time prior to the separation of Maine from Massachusetts, was in the latter State.

The case is stated in the opinion.

Deasy and Higgins, for plaintiffs.

Plaintiffs' deeds give them better title than defendants' possession admitted by the declaration; also better than defendants' earlier deeds from Massachusetts as a grantor, because she had before then parted with her title to the De Gregoires, under whom neither party claim by deed. They also have title as against all the world by adverse occupation for more than twenty years under color of recorded deeds. If locus not within the French Grant, plaintiffs entitled to have question of presumption of grant from Maine or Massachusetts, to person unknown, submitted to the jury. Grant admissible to show that defendants' grantor had no title. *Hickey* v. *Stewart*, 3 How. 750; *Rand* v. *Skillin*, 63 Maine, 104. Measuring the two front leagues of the French grant in accordance with the doctrine of *Winthrop* v. *Curtis*, 3 Maine, p. 117, and extending the side lines at right angles with the general course of the two front leagues on the shore, it includes Wheeler's Porcupine. Such side lines following the sinuosities of the river would be crooked, and if any line is to be produced to find the islands on the "fore-part" the last line is the line. Line so produced includes



Plan accompanying *Roberts* v. *Richards*.

Richardson, 46 Pa. St. 390; *Draper* v. *Short*, 25 Mo. 197; *Booth* v. *Small*, 25 Iowa, 177; 3 Wash. R. P. p. 150 (3d Ed.); *Johnson* v. *Gorham*, 38 Conn. 521; *La Frombois* v. *Jackson*, 8 Cow. 589; *Ford* v. *Wilson*, 35 Miss. 504; *Grant* v. *Fowler*, 39 N. H. 104; *Farrar* v. *Fessenden*, *Id.* 268; *Lea* v. *Polk Co. Copper Co.* 21 How. 493; *Hall* v. *Law*, 102 U. S. 461; *Bellows* v. *Jewell*, 60 N. H. 420; *Gardiner* v. *Gooch*, 48 Maine, 487; *Ament* v. *Wolf*, 1 Grant Cas. 518 (Penn.); *Eifert* v. *Reid*, 1 N. & Mc. 364; *Boynton* v. *Hodgdon*, 59 N. H. 247; *Spaulding* v. *Warren*, 25 Vt. 322; *Jackson* v. *Oltz*, 8 Wend. 440; *Webb* v. *Richardson*, 42 Vt. pp. 465–474; *Foxcroft* v. *Barnes*, 29 Maine, 131; *Blake* v. *Freeman*, 13 *Id.* 135; *Webb* v. *Hynes*, 9 B. Mon. 388; *Babson* v. *Tainter*, 79 Maine, 371. Presumption of grant: *Hillary* v. *Waller*, 12 Ves. 239, 252; *Eldridge* v. *Knott*, Cowp. 215; *Edson* v. *Munsell*, 10 Allen, 568; *Mayor of Hull* v. *Horner*, Cowp. 102; *Stevens* v. *Taft*, 11 Gray, 33; *Doe* v. *Reed*, 5 B. & A. 332; *Barnard* v. *Edwards*, 4 N. H. 321; *Garrett* v. *Jackson*, 20 Pa. St. 335; *Casey's Lessees* v. *Incloes*, 1 Gill, 503; *Williams* v. *Dowell*, 2 Head, 695–698; *Ricard* v. *Williams*, 7 Wheat. 59-110; *Goodtitle* v. *Baldwin*, 11 East, 488; *Crooker* v. *Pendleton*, 23 Maine, 341; *McIntire* v. *Thompson*, 4 Hughes, 562 (10 Fed. Rep. 531).

Nathan and Henry B. Cleaves, *Wiswell*, *King and Peters* with them, for defendants.

VIRGIN, J. Writ of entry to recover possession of Round Porcupine Island situated in Frenchman's Bay.

The plea admits the defendants to be in possession of the whole Island, claiming a freehold therein. Upon this *prima facie* evidence of title the defendants may confidently rely until the plaintiffs shall affirmatively show that possession to be wrongful as against themselves. The case is before the court on a report of the evidence; and the question is — Which of the parties does this evidence show to have the better title to all or any part of the demanded premises. R. S., c. 104, § 10; *Wyman* v. *Brown*, 50 Maine, 139; *Stewart* v. *Davis*, 63 Maine, 539, 542.

The plaintiffs' record title comes through five mesne conveyances from Richard Higgins, whose deed of December 15, 1849, to his grantee after describing the Island in controversy, specifies the source of his title as follows: "Being the same which was forfeited to me, the said Richard Higgins, by paying the taxes and cost of advertising agreeably to the statute" mentioned and then in force. The taxes paid by him were assessed in 1845 and 1846 on the Island by the assessors of the town of Eden. The Island, however, was never in that town but in Gouldsboro', as is shown by the acts of incorporation of the towns named. Higgins, therefore, obtained no legal title by the payment of taxes assessed without authority of law and his deed of warranty could convey none.

The defendants derived their record title through the State of Maine from the Commonwealth of Massachusetts which the parties admit held the title at some time prior to the Separation. By force of the Act of Separation, of June 19, 1819, incorporated into the constitution of this State, one half of the lands belonging to Massachusetts situated in Maine, became the property of Maine. Appendix R. S., 1003; Const. Maine, Art. 10 (see R. S., 1857, 43); and the other half by deed of October 5, 1853. And on December 28, 1876, the State of Maine, by its Land Agent thereunto duly authorized, conveyed "All the right, title and interest of the State" in Round Porcupine Island to the defendants and one Buffum whose interest was conveyed to the defendants on October 25, 1882.

The plaintiffs challenge the source of the defendants' record title, contending that Massachusetts had parted with her title prior to the Separation in 1819.

The report shows that, on July 23, 1688, certain officers of Louis XIV granted to one Cadillac "The place called Donaquec, consisting of two leagues on the seashore and two leagues in depth, viz., one league on each side of Donaquec [now Jordan's] River;" together with "The Island of Mt. Desert and other Islands which are on the fore part of said two front leagues;" which grant, on May 4, 1689, was confirmed by the King, specifying the land on the main land, but omitting all mention of any islands whatever.

Prior to November 6, 1786, the French grant became the property of Massachusetts. On that day, Marie Therese de Gregoire (granddaughter of Cadillac) and her husband petitioned the General Court of Massachusetts, for reasons stated in the petition, to confirm to them the territory covered by the grant. On July 6, 1787, the General Court, by resolve granted to the De Gregoires "All such parts of the Island of Mt. Desert and the other islands and tracts of land particularly described in the grant of Louis XIV to Cadillac which now remain the property of the Commonwealth," the committee to equitably quiet all claims of title in such parcels, conformable to precedents,— the Gregoires not to take possession until their naturalization, which took place November 2, 1787.

Among the first questions which confront the parties, is — Where upon the face of the earth is located so much of the grant as is material to this case, or in other words, did the grant include Round Porcupine.

It is not a question of construction relating to "flats" between adjoining owners of land situated on tide waters; but of islands described as located "on the fore part of two front leagues" definitely fixed and well known, extending along the shore and divided in the middle by the banks of a river. Had the grant been made within the lifetime and memory of recent generations, its boundaries could be readily ascertained. But it is idle to undertake to ascertain what islands lay "on the fore part of said two front leagues" two centuries ago, by making it depend upon the precise curvature of the banks of the river where it now empties into the sea. The Gregoires and the Commonwealth, with whatever facilities they had and painstaking they exercised, practically established the exterior lines of the grant in a manner satisfactory to themselves, as is amply shown by their contemporaneous, followed by their respective subsequent acts, which are much more convincing than anything of a mere speculative character. *Knowles* v. *Toothaker*, 58 Maine, 172.

On November 23, 1787, a few days after the Gregoires' naturalization, the General Court, on their petition, by a resolve appointed one Samuel Thompson "to join with them in opening

and establishing the lines between the lands granted to them by this Court and the lands belonging to the Commonwealth." The parties proceeded to the locality with a surveyor, and run out the lines on the main land finding the east line to be a due north and south course. Thompson made his report on August 13, 1789. And after describing the exterior lines on the main on both sides of Jordan's River, the report adds: "Respecting the islands lying in front I do not remember the names of all of them, but Hog Island whereon one Bartlett lives" (now known as Bartlett's Island) "I well know and remember that it lies on the front of the aforesaid patent, with Hopkins and Cranberry Islands and a number of others."

Hog, or what is now known as Bartlett's Island, lies West of Mt. Desert Island; and if Thompson's vivid recollection that that island lies in the front of the aforesaid patent be correct, then Round Porcupine will fall three or more miles east of the east line of the grant.

That Round Porcupine was not in the grant to the Gregoires is made morally certain by the fact that, on August 2, 1792, they conveyed to one Jackson all the territory including the islands as well as the main land (with certain immaterial specified exceptions) which Massachusetts conveyed to them, specifying thirteen islands each of which is named with the number of acres of each, including Bartlett's and the Cranberry Islands, all of which lie south and west of Mt. Desert Island, and the one farthest east being more than a mile west of Round Porcupine which was not named. This deed was executed within three years of the time when they went with Thompson and his surveyor and ascertained the extent and location of their property. And the fact that their deed to Jackson, purporting to convey all the land (with the exceptions named) which Massachusetts conveyed to them, did not mention any of the Porcupines or other islands east of Mt. Desert, coupled with the additional fact testified to by the Register of Deeds that the Registry of Hancock county contains no record of any deed from the Gregoires of Round or any other Porcupine Island, shows most conclusively that they did not own the island in controversy.

That the authorities of Massachusetts entertained the same view, is as conclusively shown by a resolve of the General Court of that Commonwealth, passed in January, 1814, authorizing one Meagher to locate five hundred acres of land under the direction of the agent for the sale of eastern lands, on the lands of the Commonwealth, "or on Iron Bound Island or Porcupine Islands in Frenchman's Bay."

And finally, in June, 1820, Massachusetts conveyed to one Parrott four of the six Porcupines which it would not have done if it had previously conveyed them to the Gregoires, which the latter never pretended so far as their acts disclose.

If the report of Leonard Jarvis to the General Court, made while the petition of the Gregoires was pending and before the conveyance to them might seem to conflict with Thompson's report made after actual survey, and the conveyances by the Gregoires and the Commonwealth in 1814 and 1820, its force must yield to the more conclusive character of the latter; especially as the General Court never took any action upon Jarvis' report but based all subsequent acts upon Thompson's.

The plaintiffs' record title comes through five mesne conveyances from Richard Higgins, whose deed of December 15, 1849, as before seen, conveyed no title to his grantee. But without relying solely upon their record title, the plaintiffs claim that their predecessors in interest have held the Island by open, notorious, exclusive adverse possession continuously for more than twenty years prior to the State's conveyance to the defendants in 1876; and that consequently they have a good, indefeasible title by adverse possession.

Assuming that such a title might be acquired against Massachusetts and Maine before the repeal of the statute bar in this State in 1885, the question remains, did the plaintiffs' predecessors acquire such a title.

Higgins' deed to the plaintiffs' father, Tobias Roberts, in 1849, conveyed no legal title, the grantor himself having none. But it constituted a semblance or color of title which the law recognizes as legitimate evidence on the question of adverse possession; the general rule being that an instrument purporting

by apt words to convey lands therein sufficiently described, gives the grantee color of title although the grantor, at the date of its execution, had no title whatever. *Little* v. *Megquier*, 2 Maine, 176; *Proprs. Ken. Purch.* v. *Laboree*, 2 Maine, 275; *Robison* v. *Swett*, 3 Maine, 316; *Ross* v. *Gould*, 5 Maine, 211; *Wright* v. *Mattison*, 18 How. 50; *Hall* v. *Dow*, 102 U. S. 461, 466.

Every presumption is in favor of possession being in subordination to the true title. *Codman* v. *Winslow*, 10 Mass. 146; *Ricard* v. *Williams*, 7 Wheat. 59; *Huntington* v. *Whaley*, 29 Conn. 391. If the possession be claimed to be adverse, the acts of the wrongdoer must be strictly construed and the character of the possession clearly shown. *Coburn* v. *Hollis*, 3 Met. 125, 128; *Jackson* v. *Sharp*, 9 Johns. 163.

While color of title is important evidence when coupled with possession under it as tending to show the extent of the grantee's claim, it does not of itself show possession. *Paine* v. *Hutchins*, 49 Vt. 317. Bare entry under a registered deed from one having no title works no disseizin of the true owner. *Noyes* v. *Dyer*, 25 Maine, 468; *Bates* v. *Norcross*, 14 Pick. 224. He does not become disseized even by a survey, allotment and due registration of such a deed without any open occupation or improvement of the premises. *Thayer* v. *McLellan*, 23 Maine, 417. While such a deed recorded is evidence of the extent of the grantee's claim, the registration is constructive notice only to those who would claim under the same grantor. *Tilton* v. *Hunter*, 24 Maine 29; *Spofford* v. *Weston*, 29 Maine, 145; *Roberts* v. *Bourne*, 23 Maine, 165, 169; *Veazie* v. *Parker*, 23 Maine, 170; *Little* v. *Megquier*, 2 Maine, 178. Said WILDE, J.: "To hold the proprietors of land to take notice of the records of deeds to determine whether some stranger has without right made conveyance of their land, would be a most dangerous doctrine and cannot be sustained with any color of reason or authority." *Bates* v. *Norcross*, 14 Pick. 224.

To effect a disseizin of the real owner, the entry under a registered deed from one having no title must be followed by an open, notorious, exclusive possession continued uninterrupt-

edly during the statute period; and then, in the absence of any antagonistic possession, such adverse possession is deemed to be coextensive with the boundaries described in the deed under which the grantee claims title, although he has been in the visible occupation of a part only. Maine cases, *supra; Brackett* v. *Persons Unknown*, 53 Maine, 228, 238; *Crowell* v. *Bebee*, 10 Vt. 33. And the essential notoriousness of the occupation is not lessened by the registration of the deed. *Coburn* v. *Hollis*, 3 Met. 125; *Bates* v. *Norcross*, *supra*.

The law does not undertake to specify the particular acts of occupation by which alone a title by adverse possession can be acquired. *Eastern R. R.* v. *Allen*, 135 Mass. 13, 16. Every case must from sheer necessity be determined by its own peculiar circumstances (*Webb* v. *Richardson*, 42 Vt. 465, 473); for the essential particular acts are as various as the nature and locality of real property, the purposes for which it is adapted or to which the owner or claimant may choose to apply it. *Clancy* v. *Houdlette*, 39 Maine, 451, 457; *Ewing* v. *Burnett*, 11 Pet. 41, 53.

The doctrine of adverse possession rests upon the presumed acquiescence of him against whom it is held and such acquiescence rests upon notice express or implied, which is not to be presumed by the court but may be inferred from circumstances. *Pray* v. *Pierce*, 7 Mass. 381; *Coburn* v. *Hollis*, *supra*; *Culver* v. *Rhodes*, 87 N. Y. 348; *Clark* v. *Gilbert*, 39 Conn. 94.

The essential use and occupation unless expressly brought home to the knowledge of the owner, must be of such unequivocal character as will reasonably indicate to him visiting the premises during the statute period, that instead of their suggesting the probable invasion of a mere occasional trespasser, they unmistakably show an asserted exclusive appropriation and ownership. *Tilton* v. *Hunter*, 24 Maine 32; *Ken. Proprs.* v. *Springer*, 4 Mass. 416; *Morse* v. *Williams*, 62 Maine, 446. "There must be overt acts which leave no room to inquire about intention and which amount to actual ouster." *Worcester* v. *Lord*, 56 Maine, 265, 269.

A proper application of these principles must lead to a correct

decision of this case bearing in mind that the owner of one half of the property between 1853 and 1876, was the State.

The demanded premises consist of an entire island of granite, thirty to forty acres in extent, rising out of the Bay one hundred and ninety feet and situated more than one half mile from the nearest inhabited land. About one third of it on the north side is covered with a scrubby growth, with an occasional bush on the otherwise bald portion. On the northeast side, a few feet above the bay, is a comparatively level space of one or two acres, on which natural grass grows, and which has also caught in small spots where some soil had gathered in the depressions and crevices of the elevated portions. No part of the Island was ever cultivated or had any building whatever upon it. Before the fire ran over it in 1870, or a year or two later, there was a brush fence across a portion of it, occasionally repaired with more or less poles, which was so erected as to separate the level space from the higher portion and so constructed as to facilitate the catching of sheep; and whether that was its only use is not certain from the testimony.

The testimony of several witnesses called by the plaintiffs, when taken together, if entitled to full credit, tends to show that a few sheep were placed upon the Island in the spring and removed in the fall of "about every year," from 1850 to 1876 or 1877. The only witness who undertakes to fix the number, places it at "six or eight or a dozen." That the sheep there some of the seasons belonged to the plaintiffs' father, Tobias Roberts, the grantee of Higgins, and at other seasons to other persons by his permission; that the grass on the level portion was cut many of the years by Roberts, senior, or by his permission; and that he and his successors paid taxes several years laid by the assessors of Eden.

The fact that the assessors of Eden laid a tax of fifty cents on the Island in 1845 and 1846, or in any subsequent years prior to 1876, when the defendants purchased it, and that they were paid by Roberts, senior and his successors, could have no significance so far as Maine and Massachusetts are concerned, for it was not taxable by any town against either. R. S., 1003.

Emerson v. *Washington*, 9 Maine, 88. The payment of legal taxes is in no sense an act of occupation. *Little* v. *Megquier*, *supra*; *Paine* v. *Hutchins*, 49 Vt. 314. And neither Maine nor Massachusetts had any notice of such assessment or payment or any reason to expect any such thing.

A substantial fence built round a parcel of land sought to be held by adverse possession and for the purpose of showing an adverse claim to the part enclosed, may be an act of such notoriety as to afford notice to all concerned of the builder's assertion of right (*Parker* v. *Proprs. L. and Canals*, 3 Met. 101; *Samuels* v. *Borrowscale*, 104 Mass. 207, 210); but when a brush fence is erected for the simple convenience of the builder, it can have no such significance. *Soule* v. *Burlow*, 48 Vt. 132; *Hayes* v. *Glidden*, 10 N. H. 307; *Coburn* v. *Hollis*, *supra*; *Parker* v. *Parker*, 1 Allen 245; *Slater* v. *Jepherson*, 6 Cush. 129.

All that was done upon this comparatively barren, uninhabitable rock in the sea, with no stream or spring of fresh water thereon, was to take a little hay, feed down the grass which had caught in the spots of shallow soil and among the bushes, and throw up the short fence mentioned. Nothing of any value was ever put upon it except the temporary fence, flagstaff and short flight of steps erected by the Fremonts. *Thompson* v. *Burhaus*, 79 N. Y. 98.

If the agents of the State had seen everything there including the presence of the few sheep whether in or out of their pen, the cutting of the small quantity of grass which grew there spontaneously, all of which could be of no injury to the State and but slight benefit to the harvesters, they would hardly suspect that the authors of these acts were other than harmless technical trespassers.

Moreover, after a patient examination of the testimony of the plaintiffs' witnesses we do not feel at all satisfied that, assuming that the acts of alleged occupation were all that the Island was susceptible of, they were continuous. And by this we do not refer to the fact that they were periodical and suspended during the winter season; for such a suspension might not necessarily be considered an abandonment. *Webb v. Haines*, 9 B. Mon. 388

(S. C. Am. Dec. 575). The examination-in-chief of the plaintiffs' witnesses upon this, as well as upon other points, is so markedly leading and the monosyllabic answers so implicitly respond to the obvious suggestion of the questions that a chill is cast upon the confidence of an impartial mind seeking for the real truth.

Again the plaintiffs themselves, though sons of Tobias Roberts, with all their means and opportunities of personal knowledge as well as of that derived from their father, declined to testify that the Island was occupied by him or his lessees every year before his conveyance to the Fremonts in 1870. And we are impressed with the conviction that, if they believed such to be the fact, one of them would not have gone to the auction sale so thoroughly advertised in 1876, and with the knowledge of his father who lived till 1879, and bid off the Island. Neither would they by admitted personal interviews and various letters from 1880 to 1883, have persistently tried to purchase not the defendants' interest or claim but the Island itself of the defendants, beseechingly importuning them for their price and making specific and constantly increasing offers for the "defendants' island." On the other hand they and their father would have notified the defendants when they purchased, or at some time before beginning this action thirteen years thereafter, that they took nothing by their purchase from the State. In a word, the testimony in relation to the kind and continuity of the occupation of Roberts, senior, is so general and of recent impression, and the facts as to the pasturing sheep and cutting hay by permission is so entirely hearsay that we cannot bring our minds to any other conclusion than that they are mere fungi,—of recent growth.

This court has already and recently declared that much more significant acts on wild and uncultivated land are not sufficient to disseize the real owner. *Chandler v. Wilson*, 77 Maine, 76; *Hudson v. Coe*, 79 Maine, 93.

If the plaintiffs have not been able to sustain the burden of proving by tangible facts that they have the better title of this island, whose only value consists in the market price of its granite, neither do we think they can prevail upon the intangi-

ble fiction of a presumption of a grant. The records of the Commonwealth made for the purpose of preserving and perpetuating the knowledge of its grants, have been diligently searched from the time of the adoption of its constitution down to the time of the trial, by a gentleman whose great experience in that and kindred matters is well known; and his testimony makes it morally certain that those records contain no mention of any grant of this island. Moreover, Higgins' deed to Roberts, senior, negatives such a theory. *Chase v. Alley*, 83 Maine, 537; *Doe v. Johnson*, 92 U. S. 243.

Judgment for defendants.

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

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ALMON C. SNOW *vs.* MT. DESERT ISLAND REAL ESTATE COMPANY.

Hancock. Opinion June 5, 1891.

Deed. Boundary. Shore. Upland. Flats. Colonial Ordinance, 1641-7.

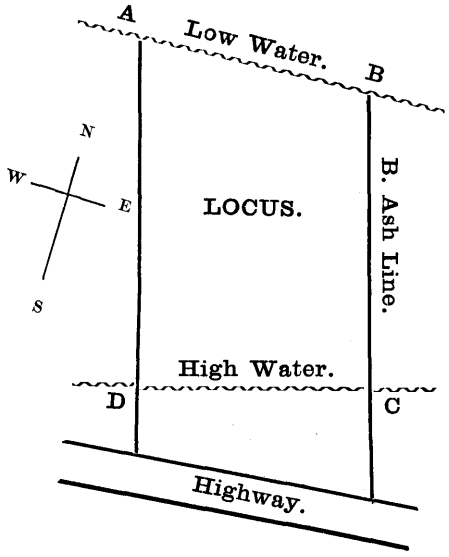
The owner of the upland adjoining tide-water *prima facie* owns to low water mark; and does so, in fact, unless the presumption is rebutted by proof to the contrary.

When the terms "the sea," or "shore," are used in a deed to designate one boundary of the parcel conveyed, they describe that side of the beach on which the sea coincides with it, and, therefore, include the beach to low water mark.

The plaintiff claimed under a deed containing the following description: "Beginning at the sea on Benjamin Ash's line; thence south on the said Ash's line to the highway; thence west on the highway ten rods to a stake; thence north to the shore parallel with said Ash's line; thence east to the first bounds mentioned." It did not appear that the grantor intended to retain the adjoining shore as distinct from the upland. *Held:* That the deed conveys to the plaintiff the flats, or shore, with the upland.

This was a real action to recover certain flats between high and low water mark at Bar Harbor. The locus as shown on the plan is marked A, B, C, and D. Both parties claimed under the same grantor whose deed is sufficiently stated in the opinion. The demandant contended that his seaward line is low water mark and the defendant that it is the high water mark. The defendant also contended that the third call in the deed stopped at D, and that, if the court should so find, the last call would

be a straight line from D to B, thus giving the demandant one half only of the locus.



Deasy and Higgins, for plaintiff.

Wiswell, King and Peters, B. E. Tracy with them, for defendants.

Beginning at the third call in the deed, viz., the stake in the highway at the northwest corner, the language is "thence north to the shore parallel with said Ash's line." This line runs to a monument, that monument is the "shore." "Shore" has a well defined and technical meaning. In *Storer* v. *Freeman*, 6 Mass. 435, the shore is defined as "that ground that is between the ordinary high water mark and low water mark." When shore is used as a boundary or monument it is the same as when any other strip or tract of land is used as a monument or boundary. The language of this deed is "to the shore." The word "to" when used in describing land is a word of exclusion. Running "to" an object excludes the object. A line running "to" land of

A, stops at his land and does not pass over any part of it. So a line running "to the shore" stops at the shore and does not pass over any portion of it. *Bradley* v. *Rice*, 13 Maine, 198; *Bonney* v. *Morrill*, 52 *Id.* 242.

There being no expression in the deed showing any intention that the north line should follow the sea or bay, as in *Pike* v. *Monroe*, 36 Maine, 309,—where the language is "bounded on said river,"—the western line of the lot terminates at high water mark. The location of the north line being doubtful, to extend it beyond would include land to which grantor had no title,—a strong circumstance showing that the true line and the intended one was the high water line.

The first monument is the "sea," but we suggest there may be a distinction between the sea as a boundary and sea as a monument. The parties used the word in its "untechnical" sense, using the language of Parsons, C. J., in *Storer* v. *Freeman*. The course of the last boundary is east. This is consistent with the point of beginning at high water mark, it is inconsistent with that point placed at low water mark. If monuments are in doubt then the course is the next guide. The starting point being uncertain and in doubt, the course should control.

EMERY, J. This is a real action, to recover possession of certain flats between high and low water mark of the sea, at Bar Harbor. The plaintiff claims under a deed containing the following description: "Beginning at the sea, on Benjamin Ash's line; thence south on said Ash's line to the highway; thence west on the highway ten rods to a stake; thence north to the shore parallel with said Ash's line; thence east to the first bounds mentioned." The report of the case states the question submitted to be whether the above deed conveys the flats or shore with the upland. That is the only question argued by counsel, and the only one we now consider.

It is said that land cannot be appurtenant to land; yet the shore or flats in front of upland are usually regarded as appurtenant to the upland. While they may be held in private owner-

ship under our law, they are yet subject to the public right of navigation and fishing. Annexed to the upland, they may be of great value to the common owner. Apart from the upland, they are rarely of any value to a private owner, who would have no access to them except by water. The colonial ordinance of 1641-7, permitting private ownership in flats, evidently contemplated their annexation to the upland in ownership. The language of the ordinance is: "It is declared that in all creeks, coves, and other places about and upon salt water where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to low-water mark," &c. It is also common knowledge that since the ordinance, the occupation of the flats has usually followed that of the upland, and that the flats are usually of no value without the upland. Conveyances of the upland are commonly supposed to convey the flats.

This principle of annexation is well stated by Chief Justice Shaw in *Doane* v. *Willicutt*, 5 Gray, 335, (cited by plaintiff's counsel,) as follows: "In a conveyance, when a line of shore is used as an abuttal, unexplained by circumstances, it may be ambiguous, leaving it doubtful whether the sea side or the land side of the shore is intended. . . . When both terms are used, 'the sea,' or 'shore,' and used to designate one boundary, it appears quite clear that they were intended to describe that side of the beach on which the sea coincides with it, and, therefore, to include the beach to low-water mark. . . . The owner of the upland adjoining tide-water *prima facie* owns to low-water mark; and does so, in fact, unless the presumption is rebutted by proof" to the contrary.

In the case before us, the deed was given in 1867 when there was no natural separableness between the upland and its attendant shore, even if there be now. Nothing appears in the case showing any motive or reason for a separation. Nothing appears showing the beach at that date to be of any value apart from the upland, of any value to reserve in granting the upland, either by reason of wharves or weirs thereon, or by reason of any other opportunity for separate occupation or quasi-cultiva-

tion like those far-reaching shores and beaches in the western part of the State, which in themselves are often more valuable than the upland.

Recurring now to the language of the deed in this case, which describes the boundary line of the conveyed parcel as "Beginning at the sea;" thence running round the parcel to "the shore;" thence to the "first bounds mentioned," and reading the words in the light of the principles and circumstances above stated, it is not difficult to determine that they were intended to describe the sea side and not the land side of the shore, and thus include the shore to low water mark. Such is our opinion. *Erskine* v. *Moulton*, 66 Maine, 280; *King* v. *Young*, 76 Maine, 76; *Stevens* v. *King*, *Id.* 197.

Of course, the owner of the upland and the adjoining shore may convey the one and retain the other. When such an intent appears, the court will give it full effect, as was done in *Storer* v. *Freeman*, 6 Mass. 435, but no such intent appears in this case. The question here submitted must be determined in the plaintiff's favor.

Judgment for plaintiff.

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

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LEWIS M. HAINES *vs.* CITY OF LEWISTON.

Androscoggin. Opinion July 23, 1891.

Way. Defect. Notice. Town. Stat. 1821, c. 118, § 17; 1825, c. 300, § 3; 1870, c. 147; 1874, c. 215; 1876, c. 97; 1877, c. 206; 1879, c. 156, § 3; R. S., c. 18, § § 52, 69.

No action at common law lies against towns for injuries caused by a defective way. Such an action is the creature of the statute.

In such cases, a nonsuit is rightly ordered when it appears that the plaintiff has produced no legal evidence tending to show that the twenty-four hours' actual notice of the defect, or want of repair, had been given in compliance with the statute.

Also, when it appears from the testimony of the plaintiff himself, that "previous to the time of the injury," he had had notice of the "condition of the way," and had not, in compliance with the statute, assuming the way to be

defective, notified one of the municipal officers of the city of the defective condition thereof.

ON EXCEPTIONS.

This was an action brought against the city of Lewiston to recover damages sustained by reason of an alleged defective condition of one of its ways. The alleged defect is "that at a point in said highway and on a curve in said way, it was not made and kept of sufficient width to allow teams meeting each other to pass with safety." And "that large quantities of snow having previously fallen in said way at divers times during the winter, then just passing, the way had not been sufficiently and reasonably broken out, nor broken out of sufficient width to allow teams to pass and repass, and meet each other upon said way, and meet each other with safety." And "that no sufficient turnouts were made and kept at or near said point." And "that said point is situated upon a curve in said way and that there are obstructions between the two termini in said curve, so that a traveler entering upon one end of said curve is unable to see to the other end thereof, nor to know if he is likely to meet any other traveler upon said curve, so that to make said way safe and convenient to travelers it should have been provided with suitable turn-outs wide enough so that travelers could meet and pass each other with safety."

The evidence in the case showed that the road in question was a curved one, so located that one terminus could not be seen from the other, there being obstructions in the way, of trees and a bluff, which would prevent a traveler as he entered upon one end of the road from seeing whether other travelers were likely to meet him coming from the other direction; that there had been heavy and repeated falls of snow in the winter prior to the occurrence of the alleged injury; that the snow was about three feet deep at the time and place of the injury; that the road at that point was only about five and a half feet in width, and that it was in precisely the condition left by the agents of the city when they broke it open the last time prior to the accident, and that there were then no turn-outs whatever upon said curved way.

On the day in question, the plaintiff, in company with others driving teams, entered upon one end of this curved way, and having proceeded to within about forty rods of the other end of the curve, they there met a loaded team. There being no turn-outs, he and his companions were obliged to pass in the safest and most convenient manner they could devise. And in attempting to pass this loaded team, plaintiff's load was overturned and he was thereby injured.

At the conclusion of the plaintiff's testimony, the presiding justice ordered a non-suit "upon the ground that the municipal officers, highway surveyors, or road commissioners, of Lewiston did not have twenty-four hours' actual notice of the defect or want of repair." And also on the ground "that the plaintiff had notice of the condition of such way previous to the time of the injury, and had not previously notified one of the municipal officers of the defective condition of such highway."

It was admitted that the plaintiff had been for several days previously over the way in question while it was substantially in the same condition as it was at the time of the accident, and that he had not given any notice to any of the municipal officers of its condition.

Savage and Oakes, for plaintiff.

Lewiston had notice of the situation of the way and the general depth of the snow; that the way was not sufficient or convenient without turn-outs. City estopped from setting up the defense of want of notice. Being caused by the city itself, it was not the kind of defect of which the statute intended the plaintiff to give notice. In *Holmes* v. *Paris*, 75 Maine, 559, this court held that when towns had left heaps and piles of dirt on the traveled way, it being their own act, they were estopped from claiming the statutory notice. The court said: "This particular provision of the statute was intended for another class of cases. Its purpose is to allow a town a reasonable opportunity to remove a defect, after receiving information of its existence. Notice of a fact to a person who already knows the fact cannot be useful. There can be no good reason for a town to have information from others of its own acts. When the reason of the

law ceases, the law ceases." *Brooks* v. *Somerville*, 106 Mass. 271. The same reasoning applies to the second ground upon which the nonsuit was granted.

Newell and Judkins, for defendant.

It was the snow upon the side of the wrought way, and not the narrowness of the way that had been wrought, which constituted the defect if any existed. "Defect or want of repair" is defined in *Davis* v. *Bangor*, 42 Maine, p. 527, to be "either inert matter left incumbering the street, upon or over it, or structural defects, endangering the public travel." The surveyor did not place the snow there. Case distinguished from *Holmes* v. *Paris*. No officer named in the statute is connected with the alleged defect. None of them knew of the condition of the way at the time it was broken out last before the accident. The required notice must be of the particular defect which caused the injury. Notice of another defect, or the existence of a cause likely to produce the defect, is not sufficient, *Smyth* v. *Bangor*, 72 Maine, p. 252. Plaintiff assumes that the condition of the way at the time of the accident was the same as when the road was broken out. If the condition at the two times was not the same, there could be no notice at all within the rule he contends for.

VIRGIN, J. Action on the case to recover damages for a personal injury caused by the plaintiff's being thrown from his load of hay while attempting to pass another team, by reason of the alleged narrowness of the way.

No action lies at common law for an injury caused by a defective way. Our first legislature provided a statutory remedy giving "double damages" to one thus injured in his person or property, "in case the town had reasonable notice of the defect." St. 1821, c. 118, § 17. Soon afterward the quantum of damages was limited to "single damages only." St. 1825, c. 300, § 3. For well understood reasons, certain limitations and restrictions were imposed upon the general remedy: (1) by limiting the time within which an action might be commenced to "three years from the date of the injury." St. 1870, c. 147; and (2)

to "one year." St. 1874, c. 215. The same statute also required the person injured, as a condition precedent to the maintenance of his action, to give the municipal officers, within sixty days after the injury, written "notice of his claim for damages, specifying the nature of his injuries." St. 1874, c. 215. Subsequently the written notice was required to specify also "the nature and location of the defect." St. 1876, c. 97. The next year the "reasonable notice of the defect" before the injury was limited to "twenty-four hours' actual notice" on the part of the "municipal officers, highway surveyors or road commissioners;" and the time for giving the written notice after the injury was changed from "sixty" to "fourteen days." St. 1877, c. 206.

To meet a comparatively larger class of claims for damages by travelers who, by personal observation and use of the way were fully cognizant of its condition, an independent statute, with no allusion in terms to the existing law was enacted; which, after limiting the amount of damages recoverable to $2000, made use of the following sweeping, positive and peremptory language: "No person shall recover damages of any town or city, in any case, on account of injury to his person and property, by reason of such defect or want of repair, who has notice of the condition of such way previous to the time of injury, unless he has previously notified the municipal officers of such town or city, or some one of them, of the defective condition of such way." St. 1879, c. 156, § 3. Prior to this statute, notice to the highway surveyor would suffice. But a highway surveyor unlike municipal officers is not a general agent of the town, bound to keep all highways, even in his own district, safe and convenient at an unlimited cost. "His duty is limited and specific." He is simply to use, at his best discretion, what he can obtain in money and labor from the persons named on his list." *Ingalls* v. *Auburn*, 51 Maine, 352. *Field* v. *Towle*, 34 Maine, 405. Not infrequently the sum appropriated to his district by the municipal officers is not sufficient; and then he can do no more without the written consent of the municipal officers. R. S., c. 18, § 69. And this is probably one of the reasons which induced the enactment in 1879.

The plaintiff's injury occurred on March 1, 1888, when there were three feet or more of snow covered by a crust outside of the road as it was broken out.

His team consisted of 1175 pounds of hay on a rack mounted upon a set of double sleds hauled by one horse. It was next behind the foremost of six similar teams all travelling in the same direction. As they were about turning such a curve in the road as, together with an intervening bluff and trees, prevented the drivers seeing a team approaching from the opposite direction, they met an ox team loaded with logs. The sleds were three to four feet wide; and the road as broken out and travelled was five and one half feet in width, with no "turn-outs" in the vicinity to facilitate loaded teams passing each other without both going out into the deep snow.

When the foremost team met the ox team, they all stopped. After considerable exertion and the mutual assistance of the several drivers, the ox team was urged out of the travelled part of the road as far as practicable. And while attempting to pass the ox team, the plaintiff's load, by reason of his right sled-runners cutting down into the snow on the side opposite the ox team, tipped over to the right and he was thrown off on the left and severely injured by coming in contact with his rack or sled.

The narrowness of the beaten track with no "turn-outs" to facilitate the passing of loaded teams on a thoroughfare to and from the city of Lewiston, is the particular defect complained of in the declaration.

The statute imposes on every town and city the duty of so constructing and keeping in repair its highways, townways and bridges, that they shall be reasonably "safe and convenient for travelers with their horses, teams and carriages." R. S., c. 18, § 52. And when they are made so narrow as to be unsafe or inconvenient for such teams to pass as have occasion to travel over them, they may well be considered defective.

Assuming this way to have been thus defective; that the road commissioner, under whose direction it was so made and left several days before the accident had the twenty-four hours' actual

notice of the defect "which caused the injury;" and that the "fourteen days" notice in proper form was duly given after the injury,—still the plaintiff would not be entitled to recover, if he himself had notice of the condition of the way, unless he had previously notified some one of the municipal officers of the city of its defective condition.

The "twenty-four hours' actual notice of the defect" on the part of the municipal officers, highway surveyors or road commissioners, before the injury, must be proved, unless the defect in the case of towns is created by the surveyor while in the act of repairing the way, in which case no such independent notice is required. *Holmes* v. *Paris*, 75 Maine, 559. But when an injured person himself knows the condition of the way before he risks himself and team thereon, the law peremptorily declares in substance that he assumes the risk thereby incurred, unless he has previously notified the mayor or one of the aldermen of the city, who have the care and general management and oversight of its affairs, of its defective condition.

That the plaintiff had a full knowledge of the actual condition of this particular way, is not disputed. He himself testified that the injury happened on the morning of March 1, 1888; that he had hauled hay over it on the twenty-fourth, twenty-seventh and twenty-eighth days of the preceding February; that he "observed the road all winter was very narrow all along there;" and that he "did not notify anybody of its narrow condition."

It is urged that some of the general expressions used by the court in illustrating the point on which the decision in *Holmes* v. *Paris*, *supra*, was placed, are equally applicable to this case. But we do not so understand them. Another clause of the statute was under consideration in that case. There the very officer to whom notice was required, created the very defect at the time of the injury which was the subject of the notice. In this case there is no evidence that any one of the municipal officers to whom the statute declares previous notice shall be given, had any notice, whatever, of the condition of the way. The road commissioner had notice for he made the road. But an additional notice is required in this class of cases.

Another answer is: "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are found. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision. The reason is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing, in all cases is seldom completely investigated." Marshall, C. J., in *Cohens* v. *Virginia*, 6 Wheat. 399.

We are of opinion that the action is not maintainable for want of previous notice to the municipal officers of the condition of the way, and that the nonsuit was properly ordered.

Exceptions overruled.

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

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FRED BUTLER, and another, Petitioners for *Habeas Corpus*,

vs.

GEORGE H. WENTWORTH.

York. Announced July 30, 1891, Law Term, Western District. Opinion November 10, 1891.

Constitutional Law. Infamous crime. Indictment. Art. I, § 7, Const. of Maine. Stat. 1891, c. 132.

Article I, sec. 7, of the Constitution of Maine, provides that "no person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury, except in cases of impeachment, or in such cases of offences as are usually cognizable by a justice of the peace."

The legislature, by public statute of 1891, c. 132, for the offense with which the petitioners were charged, imposed a penalty of five hundred dollars and costs, and in addition thereto imprisonment for one year, and in default of payment of such fine and costs, one year's additional imprisonment.

The act of the legislature in thus increasing the penalty, and rendering imperative a sentence of imprisonment for a term of not less than one year, has rendered the crime infamous within the meaning of the Constitution, and as such, no person can lawfully be held to answer for the same except upon a presentment or indictment of a grand jury.

A trial justice or municipal judge has no original jurisdiction in such cases and can only hold to bail.

ON REPORT.

This was a petition for *Habeas Corpus* presented to HASKELL, J., in chambers at Portland, who ordered notice to the County Attorney of York county, returnable before him at chambers in Portland, July 11, 1891, when and where the parties by their respective counsel appeared.

The case was docketed in Cumberland county under the act of 1887, c. 16, and upon hearing the following facts appeared.

Defendants were brought before a trial justice in York county upon a complaint for the illegal transportation of intoxicating liquors in that county in violation of the act of 1891, c. 132, sec. 2, amending sec. 31, c. 27 of R. S., and upon their arraignment pleaded not guilty, but the magistrate after hearing the evidence considered that they were guilty and sentenced each of them to "pay a fine to the use of the State of $500, and costs of prosecution taxed at $13.32, and confinement at our common jail in Alfred in said county for the term of one year from date, and in default of payment of said fine and cost an additional term of one year each, and to stand committed," &c.

Defendants were committed in execution of their sentence on the same day that it was imposed, to wit, June 22, 1891, to Alfred jail, which is not a work jail. Defendants claimed a release from their imprisonment upon two grounds: (1,) Because there is no law authorizing their commitment by a trial justice to Alfred jail, it not being a work jail. (2,) Because the Constitution of Maine, Art. I, § 7 and the Constitution of United States, Arts. V and XIV of the amendments thereto, prohibit the prosecution and imprisonment of defendants on the charge above named by any other procedure than by "indictment of a grand jury," inasmuch as the above named offense was made an infamous crime by the act aforesaid of 1891, c. 132, § 2.

The presiding justice considering the questions raised of sufficient importance to warrant the procedure, the parties agreeing thereto, reported the case to the Law Court for its consideration, in order that a final construction of the act of 1891 may be had.

Geo. F. Haley, *P. Z. Prince*, with him, for petitioners.

Charles E. Littlefield, Attorney General.

Walter P. Perkins, County Attorney, for respondent.

(1.) The question to be considered is how shall sec. 2, of c. 132, of the laws of 1891, be construed? By section 51, c. 27, of the R. S., of Maine, trial justices have original and concurrent jurisdiction with the Supreme Judicial and Superior Courts of said sec. 2, c. 132. The legislature of 1891 must have intended that the imprisonment provided for in said section should be executed in the common jail. This section should be construed as falling under the "unless otherwise specially provided," of sec. 2, c. 135, R. S., of Maine.

(2.) An infamous crime is one which works infamy in the one who has committed it. Am. and Eng. Enc. No. 10, p. 605, and note 1; Bouv. Law Dic.

(3.) It is the nature and purpose of the crime and not the punishment inflicted which makes it infamous. *The People* v. *Whipple*, 9 Cow. 708; Am. and Eng. Enc. No. 10, p. 604, and notes; 1 Phillips Evidence, 7th ed. 30; *Com.* v. *Shaver*, 3 W. & S. (Penn.) 342–343; *Lawson* v. *The Ohio and Penn. R. R. Co.* 1 Grant, 331; *Schuykill Co.* v. *Copley*, 67 Penn. 390; 1 Greenl. Ev. § 372, note 1, and § 373; *Bickel's Ex'rs*, v. *Fasig's Adm'r*, 33 Penn. 465; *Utley* v. *Merrick*, 11 Met. 303; *Com.* v. *Dame*, 8 Cush. 384; 1 Bish. on Crim. Law. § 974; *Little* v. *Gibson*, 39 N. H. 510; *State* v. *Keyes*, 8 Vt. 64; *State* v. *Randolph*, 24 Conn. 364; *U. S.* v. *Baugh*, 1 Fed. Rep. 784–7; *U. S.* v. *Yates*, 6 Fed. *Rep.* 865–6; *U. S.* v. *Block*, 4 Sawyer, 216; *U. S.* v. *Maxwell*, 3 Dill. 275.

(4.) The prohibitions contained in the amendments to the Constitution of the United States were intended to be restrictions upon the federal government and not upon the authority of the states. *Fox* v. *Ohio*, 5 How. 410; *Withers* v. *Buckley*, 20 How. 84; *Jones* v. *Robbins*, 8 Gray, 345; *Twitchell* v. *The Commonwealth*, 7 Wallace, 326; *State* v. *Keyes*, 8 Vt. 57.

(5.) Under our law the fact that an offense is a statute felony does not make it an infamous crime. Felony at common law was an offense which occasioned a total forfeiture of either lands

or goods, or both, to which capital or other punishment may be superadded. Bouv. Law Dict.; *U. S.* v. *Coppersmith*, 4 Fed. Rep. 204. Treason, felony and all comprised under *crimen falsi* were infamous crimes. The felony here meant is the common law felony.

FOSTER, J. The petitioners were arrested and brought before a trial justice in the county of York, upon a complaint for the illegal transportation of intoxicating liquors in violation of § 31, c. 27, R. S., as amended by the act of 1891, c. 132, § 2, and each sentenced to pay a fine of $500, and costs of prosecution, and to confinement in the county jail for the term of one year, and in default of payment of fine and costs, to an additional term of imprisonment one year each. The sentence by virtue of which the petitioners were committed, was in accordance with the provisions of the statute as thus amended; and the question presented by this process, is, whether the magistrate had original jurisdiction of the offense and could lawfully impose sentence in these cases.

By R. S., c. 27, § 51, it is provided that prosecutions for manufacturing liquors in violation of law, for keeping drinking houses and tippling shops, and for being common sellers of intoxicating liquors, shall be by indictment; but in all other prosecutions under that chapter judges of municipal and police courts and trial justices have by complaint original and concurrent jurisdiction with the Supreme Judicial and Superior courts.

But the petitioners contend that the offense with which they were charged and upon which they were convicted and sentenced, was an "infamous crime," and that legally no conviction could be had or sentence imposed, except upon an indictment, or presentment of a grand jury.

Article I, section 7, of the Constitution of Maine, provides that "no person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury, except in cases of impeachment, or in such cases of offences as are usually cognizable by a justice of the peace," etc. A corres-

ponding provision exists in the United States Constitution, which prohibits prosecution for "a capital or otherwise infamous crime" unless upon a presentment or an indictment of a grand jury.

The investigation by a grand jury of "a capital or infamous crime" of which a party may be accused, has been regarded for centuries, as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and bulwarks of personal liberty. The provision now found in the Federal Constitution originated as an amendment to the original Constitution, introduced in the nature of a bill of rights, at the first session of Congress in 1789, the more carefully to guard the security of the citizen against vindictive prosecutions, either by the government, political partisans, or by private enemies. Judge Story, in his work on the Constitution, says: "But though this provision of a trial by jury in criminal cases is thus constitutionally preserved to all citizens, the jealousies and alarms of the opponents of the constitution were not quieted. They insisted that a bill of rights was indispensable upon other subjects, and that upon this further auxiliary rights ought to have been secured. These objections found their way into the state conventions, and were urged with great zeal against the constitution. They did not, however, prevent the adoption of that instrument, but they produced such a strong effect upon the public mind that Congress, immediately after their first meeting, proposed certain amendments, embracing all the suggestions which appeared of most force; and the amendments were ratified by the several states, and are now become a part of the constitution." § 1782.

If, therefore, the offense of illegally transporting intoxicating liquors from place to place in this State, and for which the legislature has imposed a penalty of five hundred dollars fine and one year's imprisonment, is to be regarded as an "infamous crime," within the meaning of our Constitution, then the magistrate had no original jurisdiction, and the sentence thus imposed would be null and void. *Jones* v. *Robbins*, 8 Gray, 329. In that case the court held that a statute which purported to give

to a magistrate, or inferior tribunal, authority to try an offense punishable by imprisonment in the state prison, without presentment by a grand jury, was in violation of the Massachusetts declaration of rights, which prohibits the enactment of any law that shall subject any person to a "capital or infamous punishment," excepting for the government of the army or navy, without trial by jury.

An infamous crime is that which works infamy in the person who has committed it. And the law writers inform us that by the principles of the common law, the person thus rendered infamous by the conviction of such crime, was incompetent as a witness. The law considered his oath to be of no weight, and excluded his testimony as of too doubtful and suspicious a nature to be admitted in court to deprive another of life, liberty or property.

For a long time prior to the Declaration of Independence, and before the adoption of the Federal Constitution, there were, as then understood, two kinds of infamy,—the one based upon the opinion of the people respecting the mode of punishment, and the other in relation to the future credibility of the culprit. Eden's Principles of Penal Law, c. 7, § 5.

As the law was then administered it was considered that the infamy which disqualified the criminal from testifying, depended upon the character of his crime, and not upon the nature of the punishment inflicted. 1 Phill. Ev. 25; 2 Hawk. c. 46, § 102. *Pendock* v. *McKinder*, Willes, 665. So, in many of the earlier decisions where this question has been considered, it will be found that the courts inclined to the doctrine that it is the nature of the crime, and not the punishment inflicted, which renders it infamous. Bouv. Law Dic. Infamy. *People* v. *Whipple*, 9 Cowen, 708; *Com.* v. *Shaver*, 3 W. & S. (Penn.) 342; *Com.* v. *Dame*, 8 Cush. 384; *State* v. *Keyes*, 8 Vt. 64; *Little* v. *Gibson*, 39 N. H. 505. Thus at common law, the crimes which rendered persons incompetent were treason, felony, forgery, and any offense tending to pervert the administration of justice by falsehood and fraud, and which come within the general scope of the *crimen falsi* of the Roman law, such as perjury,

subornation of perjury, barratry, conspiracy, swindling, cheating and other crimes of a kindred nature. Co. Litt. 6; Fost. 209; 2 Rolle Abr. 886; 1 Gr. Ev. § 373; Whar. Cr. Law, § 758.

But it will be found that incompetency as a witness is not the only or proper test in the application of the term "infamous crime" to the provision of the Constitution. A mere reference to the history and adoption of this provision into the federal Constitution is sufficient to show that it was not a question of competency or incompetency to testify that the framers of our government were considering, but rather the consequences to the liberty of the individual in securing him against accusation and trial for crimes of great magnitude without the previous interposition of a grand jury.

If the nature of the crime as understood at common law, rather than the punishment inflicted, were to govern in determining whether it was infamous or not, within the meaning of the provision of the Constitution, many offenses might be held not to be infamous crimes and requiring no indictment for their prosecution. This doctrine at one time obtained considerable foothold in the federal courts. Thus the offense of stealing or embezzling from the mails (*United States* v. *Wynn*, 9 Fed. Rep. 886), passing counterfeit money (*United States* v. *Yates*, 6 Fed. Rep. 861), embezzlement as defined by the federal statutes (*United States* v. *Reilley*, 20 Fed. Rep. 46), wilfully and fraudulently omitting assets of a bankrupt from the inventory of his estate (*United States* v. *Black*, 4 Sawyer [C. C.] 211), were held not to be infamous crimes, and that no indictment was necessary for their prosecution.

But this doctrine has since been expressly disapproved by the Supreme Court of the United States, where it has been decided that any crime which is punishable by imprisonment for a term of years is an infamous crime, and cannot be prosecuted except upon indictment or presentment by a grand jury; thus repudiating the doctrine enunciated in some of the earlier decisions not only of the State, but also of the federal, courts, that the question whether the crime is infamous is to be determined solely and entirely from the nature of the act, and in

total disregard of the punishment inflicted. *Ex parte Wilson*, 114 U. S. 417; *Mackin* v. *United States*, 117 U. S. 348; *Parkinson* v. *United States*, 121 U. S. 281; *Ex parte Bain*, 121 U. S. 1, 13; *United States* v. *De Walt*, 128 U. S. 393; *Medley, Petitioner*, 134 U. S. 160, 169; *In re Mills*, 135 U. S. 263, 267; *In re Claasen*, 140 U. S. 200, 205; *Jones* v. *Robbins*, 8 Gray, 329.

In *Ex parte Wilson*, *supra*, where this question was considered in a very elaborate opinion by Mr. Justice Gray, the court say: "That no person can be held to answer, without presentment or indictment by a grand jury, for any crime for which an infamous punishment may be imposed by the court. The question is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. Where the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury."

In *Mackin* v. *United States*, *supra*, the court said: "We cannot doubt that at the present day imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment. It is not only so considered in the general opinion of the people, but it has been recognized as such in the legislation of the states and territories, as well as of congress."

And the purport of all the decisions from the highest court in this country since *Ex parte Wilson*, *supra*, is, that a crime punishable by imprisonment in the state prison or penitentiary, whether the accused is or is not sentenced to hard labor, is an infamous crime; and in determining this, the question is, whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment actually imposed is an infamous one. *In re Claasen*, *supra*.

The statute under which these petitioners were tried, convicted and sentenced, in addition to a fine of five hundred dollars and costs for each offense, rendered imperative a sentence of imprisonment for a term of not less than one year. It is

silent in respect to the place where such imprisonment is to be executed. But by R. S., c. 135, § 3, "unless otherwise specially provided, all imprisonments for one year or more shall be in the state prison," although, by another provision in the following section, where punishment provided by law may be imprisonment in the state prison for three years or less, such punishment may be inflicted by the court in its discretion, in either of the work jails.

It is not as a general rule whether the court in its discretion awards a punishment that is infamous or otherwise, but whether the statute authorizes the infliction of such infamous punishment, that is the criterion by which we must determine whether the offense charged against the petitioners constitutes an infamous crime.

We have no doubt that the statute which has authorized the court to inflict a punishment for a term of not less than one year, has thereby rendered the crime infamous for which such sentence may be imposed, within the meaning of the Constitution, and as such no person can lawfully be held to answer for the same except upon a presentment or indictment of a grand jury.

Writ of Habeas Corpus to issue.

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

JAMES FITZPATRICK *vs.* BOSTON AND MAINE RAILROAD.
MOSES SMITH *vs.* Same.

84 33
d94 373

York. Opinion August 12, 1891.

Easement. Abandonment. Change. Damages. Railroad. Eminent Domain. R. S., c. 51, § § 14, 16, 21.

In 1889, the plaintiffs sued the defendant in trespass for disturbance of their right of way, acquired by grant, across defendant's railroad. The right of way which they held was appurtenant to lands they owned northerly of the railroad. It was changed somewhat from its accustomed course by the defendant's servants upon the southerly side of the railroad. The changes alleged were as follows: (1,) In 1881, digging cellars and erecting four houses fronting upon a highway, which had been located in 1876, and which struct-

ures covered about one hundred and fifty feet along the way. (2,) In 1888, excavating the surface, along which the way ran, to the depth of five or six feet, to get a practicable grade for a spur track leading from the main track to a gravel pit belonging to the defendant.

A new and convenient way passing over the defendant's land, and connecting with a public highway, was substituted by the defendant for that part of the old way interrupted by the houses. The plaintiffs made no claim for damages but used the substituted way for seven years. *Held;* That the plaintiffs had accepted the new way in lieu of that destroyed by the cellars and houses, and had acquiesced in the change and intentionally surrendered and abandoned the old way in consideration of the new one opened for their benefit.

In making the excavations, in 1888, which deprived the plaintiffs of the use of their way for two hundred and fifty feet, the defendant invaded the plaintiffs' rights. Another suitable way about twenty feet distant was provided for the use of the plaintiffs as a substitute for the old one, and after the lapse of about two weeks was adopted and used by them. *Held;* That as it appears that the parties did not sustain any actual damage as a necessary result of this modification in the location of the way,— one of them having received satisfaction for the temporary inconvenience pending the defendant's operations,— only nominal damages should be allowed.

The plaintiffs refused for a short time to travel on the substituted way, under the impression that by so doing they would recognize a right in the defendant to make the change and thereby surrender their rights in the old location. They claimed substantial damages for this interruption. *Held;* That the law makes it incumbent on a person, for whose injury another is responsible, to use all ordinary care and to take all reasonable measures available to avoid the loss and render the damage as light as practicable; and it will not permit him to recover any damage which might have been prevented by the exercise of such care and diligence. *Also*, That the plaintiffs' right of way was not extinguished by the defendant's exercise of the power of eminent domain, and was not paid for in the estimation of land damages; and, therefore, the plaintiffs' rights were invaded in making the excavations in 1888.

ON REPORT.

Two actions of trespass for wrongfully placing and maintaining obstructions across the plaintiffs' right of way across the defendant's lands.

The defendant admitted that the plaintiffs had title, by grant, to the farm-crossing across its railroad, and also a right of access over other lands of defendant corporation, to and from the same, in every place where it did any acts which the plaintiffs in their writs charge it did; but they contended that no actual damage, remaining unsatisfied, had been done the plaintiffs; and that as the old way had been extinguished, at the

places where the changes had been made, no action for a continuing nuisance could lie.

W. S. and D. S. Pierce, for plaintiffs.

Plaintiffs have not abandoned their old way. No evidence or presumption of intention to abandon. To extinguish even a prescriptive way the evidence must clearly show intentional abandonment. *Pillsbury* v. *Moore*, 44 Maine, 154; *Williams* v. *Nelson*, 23 Pick. 141; *French* v. *Braintree Manuf. Co.* 23 Pick. 216; *Hurd* v. *Corliss*, 7 Met. 94.

Even a parol agreement between the owners of the dominant and servient estate to substitute a new way for an old prescriptive way, would not amount to an abandonment of it. *Lovell* v. *Smith*, 3 C. B., N. S. 120; *Erb* v. *Brown*, 69 Penn. St. 218; *Butt* v. *Napier*, 14 Bush (Ky.), 39; *Larned* v. *Larned*, 11 Met. 421; 2 Wash. R. P. p. 338; Wash. Ease. p. 300.

The nonuser of a right of way for the period of twenty years is evidence of an intention to abandon; but it is open to explanation, and it may be controlled by evidence that the owner had no such intention while omitting to use it. *Pratt* v. *Sweetser*, 68 Maine, 344; *Farrar* v. *Cooper*, 34 Maine, 394.

If this way has never been abandoned, it still exists, since there is no pretence that there has been any express relinquishment of it, and the defendant corporation had not even color of authority to obstruct or interfere with the plaintiffs' full and complete enjoyment of it. The laying out of the highway in 1876 near to the way in question, even had such highway extended parallel with this way, which is not assumed by the defendant, would not have operated to extinguish this way, not though it had been prescriptive. *Chadwick* v. *McCausland*, 47 Maine, 342.

Mere nonuser for more than twenty years of an easement acquired by grant, will not destroy the right if the owner of the servient estate does no act which prevents the use. 2 Wash. R. P. p. 339, and cases cited. Wash. Ease. p. 716, § 551.

G. C. Yeaton, for defendant.

WHITEHOUSE, J. The plaintiffs had a right of way across the defendant's railroad. In 1881 the defendant obstructed it

by digging four cellars and placing houses upon them, and in 1888 disturbed it at another point by making excavations for the purpose of laying a spur track to a gravel pit. November 30, 1889, the plaintiffs commenced these actions for damages. The evidence relating to both cases is presented in a single report.

The plaintiffs' right of way originated in a decree of partition made in 1805 between John Haggins and Edmund Haggins, which reserved "liberty for John to pass and repass with teams and cattle through said lot on the side adjoining Butler's and Jenkins' land by gates or bars, as the occasion may require, at all seasons of the year." Whether, by this description, the right thus reserved can be deemed to have been definitely located over a particular way with a fixed boundary "on the side adjoining Butler's and Jenkins' land," or be held as a right to have a suitable and convenient way in that portion of the lot, the precise location and limits of which on the surface of the earth were to be determined by the parties according to circumstances, it seems to be unnecessary to consider. For it is not in controversy that the right had been enjoyed and the way used by the plaintiffs and their predecessors in title continuously from the partition named until the disturbance complained of, in substantial accordance with the location existing at the latter date; and it is expressly admitted in the report of the case, that the "plaintiffs had title by grant to the farm crossing across defendant's railroad and a right of access over other lands of defendant corporation to and from the same in every place where defendant did any acts which plaintiff in his writ charges that he did."

(1.) With respect to the obstruction caused by digging the cellars and erecting the houses in 1881, the facts are undisputed. A public highway fifty feet wide was established and opened to travel in 1876, leading from a point near the beginning of plaintiffs' private way in the dividing line between Berwick and South Berwick, northerly about eight hundred feet across the defendant's location; and the houses in question were erected by the defendant across the private way and fronting on the public way. At the same time the defendant prepared for the use of the plaintiffs, as a substitute for that part of the old way

thus obstructed, a new and equally good but slightly circuitous way leading over the highway described and returning to the original private way. The effect of this change of location was to divert the course of travel about twenty feet to the north of the old way. The defendant corporation owned in fee simple, all the lands covered by the houses, the location of the highway and the plaintiffs' present private way substituted for the old way; also the lands purchased for the gravel pit, and all lands within its location from South Berwick station easterly beyond the farm crossing fixed by the commissioners at the time of the location of the road at or near stations twenty-four and thirty-nine.

A similar question was presented in *Ballard* v. *Butler*, 30 Maine, 94. This was an action for obstructing plaintiffs' easement consisting of a right to draw water from a well and to pass to and from the same. It appeared that the well had been entirely covered over by brick and wooden buildings of a permanent character. In the opinion, SHEPLEY, C. J., says: "It is obvious that it became impossible to use it as a well while it was thus covered. All access to it was thereby excluded. If an action on the case had been then commenced by the owner of the dominant estate against the owner of the servient estate to recover damages for a wilful destruction of the well and of his easement, he could have maintained it upon the proof now presented and have recovered damages for its total loss. . . . The argument is that the action is brought to recover damages for a continuance of the disturbance. But how can there be a continued disturbance of that which long since ceased to have an existence? . . . Twenty years of non-user of the easement had not elapsed when this action was commenced; but such length of time is not required to extinguish the easement when works of a permanent kind, which necessarily hindered the exercise of the right and operate to annihilate it, had been erected." See also *Rockland Water Co.* v. *Tillson*, 75 Maine, 170.

In the case at bar, the obstruction in 1881 was unquestionably of a permanent character. Four cellars were dug and completed across the way and houses of a substantial and permanent char-

acter erected upon them. It must have been understood by all the parties interested that the result of this act was not merely a temporary obstruction, but a practical extinguishment of so much of the way as was covered by the houses. It was a completed act in 1881. There was no expectation that the houses would be removed or the cellars filled up. The interruption was manifestly final. The plaintiffs then had a cause of action for an invasion of a right. The conditions were fixed and enduring and were not expected to change.

It is evident that the plaintiffs made no serious objection, if any, to the change in the way thus caused by the erection of the houses. They made no claim for damages. For seven years they used the substituted way as occasion required without complaint, and in consideration of the advantage of being connected with the highway, made safe and convenient at public expense, they evidently accepted the new way in lieu of that destroyed by the cellars and buildings. Their conduct for seven years succeeding this interruption, sufficiently indicates that there was no intention on their part to raise any question in regard to it until the excavation in 1888. It appears to have been mutually understood that that portion of the way covered by the houses was finally abandoned. The plaintiffs silently acquiesced in the change and intentionally surrendered the old way in consideration of the dedication of and an agreement for the new one opened for their benefit. "It is not the duration of the cesser to use the easement, but the nature of the act done by the owner of the easement or of the adverse act acquiesced in by him, and the intention which one or the other indicates that is material." *Pope* v. *Devereux*, 5 Gray, 412. See also, *Dyer* v. *Sanford*, 9 Met. 395; *Smith* v. *Lee*, 14 Gray, 473; *Larned* v. *Larned*, 11 Met. 421; *Smith* v. *Barnes*, 101 Mass. 278; *Leonard* v. *Leonard*, 2 Allen, 543; *Kent* v. *Judkins*, 53 Maine, 160; *Bangs* v. *Parker*, 71 Maine, 458; Washburn on Easements, 215, 709.

(2.) But a different question is raised with respect to the disturbance of the way caused by the excavation near station twenty-four in 1888. This was made for the purpose of obtain-

ing a practicable grade for a spur track leading to the defendant's gravel pit, and the defendant claims that its acts in that respect were not in excess of its chartered rights. It is not in controversy that this excavation in the way was made on defendant's land either within the original limits of the location, or upon land adjoining purchased by the defendant for a gravel pit to which it had title in fee simple; and the defendant claims that as all the land was held by it "as for public uses" by virtue of § § 14 and 16 of c. 51, R. S., and as all land damages had been regularly estimated and paid, the defendant's right to make these lands available for "necessary tracks" or the "convenient use" of its railroad was superior to any right a land owner could have to cross it; that such right was taken by the power of eminent domain and paid for in the estimation of land damages. It is true as a general rule that all property is subject to the right of eminent domain irrespective of the use to which it has already been applied or the different estates and interests held in it, and that damages will be assessed only in money unless otherwise provided by statute, and will not be reduced by reserving rights of way across the railroad. *Bost. Gas L. Co.* v. *R. R. Co.* 14 Allen, 444; Pierce on Railroads, 220, and authorities cited. But it is provided by § 21, c. 51, R. S., that "commissioners shall order the corporation to make and maintain such . . . farm crossings as they think reasonable; prescribe the time and manner of making them, and consider this work in awarding pecuniary damages."

And it is admitted in this case that the "damages were awarded with farm crossings fixed by the commissioners at or near stations twenty-four and thirty-nine;" that "neither of these crossings where they cross the track of the road and the road bed have ever been changed or altered since their original construction;" and that the plaintiffs had a "right of access to and from the same in every place where the defendant did any acts which plaintiff in his writ charges that he did." The defendant, furthermore, concedes that the plaintiffs still have a "legal right to the continuance of a suitable and convenient approach thereto over the other land of the company."

In view of this statute and of these concessions, the defendant cannot consistently claim that the "location of the road operated as an extinguishment of the right of way," or that it was taken and paid for in the estimation of land damages. On the contrary, the reasonable presumption is that the "work" of maintaining farm crossings for the benefit of the plaintiffs in connection with their right of way was "considered" by the commissioners "in awarding pecuniary damages;" and it is plain that the continued existence of the plaintiffs' right has been constantly recognized by the defendants.

In making an excavation which wholly deprived the plaintiffs of the use of the way for a distance of two hundred and fifty feet, the defendant invaded the plaintiffs' right. As soon as practicable, however, here, as in the case of the former disturbance, another suitable and convenient way only thirty feet distant was provided for the use of the plaintiffs as a substitute for the old one; and after the lapse of about two weeks, the plaintiffs adopted the new way and have since continually used it. See *Pope* v. *Devereux*, 5 Gray, and other authorities, *supra*. But before the new way was opened, on the day the excavation was commenced and before it was finished, the plaintiff, Fitzpatrick, being absent on business, was prevented by defendant's operations from reaching his home; and for this temporary interruption the defendant made satisfaction by paying him $10, August 8, 1888, "for damage sustained by reason of closing passage-way to his house at South Berwick." Beyond this it is not apparent that either of the plaintiffs necessarily sustained any actual damage as a result of the final modification in the location of the way. True, they refused for the short time named, to travel on the substituted way, under the impression that by so doing they would recognize a right in the defendant to make the change and surrender their right to the old location. Thus measured, Fitzpatrick estimates his damage at seventy dollars and Smith at twenty-five dollars. But the law makes it incumbent on a person for whose injury another is responsible to use all ordinary care and to take all reasonable measures available to avoid the loss and render the damage as light as practicable, and it will not permit

him to recover any damage which might have been prevented by the exercise of such care and diligence. *Miller* v. *Mariners' Church*, 7 Maine, 51; *Grindle* v. *Eastern Ex. Co.* 67 Maine, 325, and authorities cited. Under this rule the evidence affords no proof of actual damage; but some damage is presumed to flow from the violation of a right.

Judgment for each plaintiff for one dollar and costs.

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

PATRICK GALLAGHER *vs.* ROBERT L. PROCTOR.

84 41
85 525

Kennebec. Opinion September 16, 1891.

Negligence. Way. Sidewalk.

An action to recover damages for negligence of the defendant will not be sustained when the plaintiff's evidence fails to prove that he was in the exercise of due care, and that the defendant was in fault.

ON MOTION.

The case is stated in the opinion. After verdict for the plaintiff, the defendant filed a general motion for a new trial.

W. T. Haines, for defendant, cited: *Farrar* v. *Greene*, 32 Maine, 574; *Smith* v. *Smith*, 2 Pick. 621; *Marble* v. *Ross*, 124 Mass. 44; *Brown* v. *Kendall*, 6 Cush. 292; *Moulton* v. *Sanford*, 51 Maine, 127; *Perkins* v. *Fayette*, 68 Maine, 152; *Lovengath* v. *Bloomington*, 71 Ill. 238; *Chicago* v. *Bixby*, 84 Ill. 82; *Vicksburg* v. *Hennessey*, 54 Miss. 391; *Weisenburg* v. *Appleton*, 26 Wis. 56; *Barstow* v. *Berlin*, 34 Wis. 357; *Ryerson* v. *Abington*, 102 Mass. 526; *Smith* v. *Lowell*, 6 Allen, 39; *Owen* v. *Chicago*, 10 Ill. App. 465; *Wilson* v. *Trafalgar R. R. Co.* 93 Ind. 287; *Buesching* v. *St. L. G. L. Co.* 6 Mo. App. 85.

S. S. Brown, for plaintiff.

The question of due care was submitted to the jury under instructions not excepted to. It was a question of fact for the jury who heard the evidence and had a view of the street and sidewalk. Due care: *Stratton* v. *Staples*, 59 Maine, 94; *Williams* v. *Grealy*, 112 Mass. 79; *Schienfeldt* v. *Norris*, 115 Mass. 17; *Carland* v. *Young*, 119 Mass. 150. Any one may

walk upon the sidewalks of our streets where crowds walk daily, and where no notice is given of existing defects, without being charged with lack of due and ordinary care, because they do not keep their eyes bent downward hunting for holes allowed there by the carelessness of others.

EMERY, J. This action is for damages alleged to have been caused by what the plaintiff calls the defendant's negligence in not properly guarding an opening he had made in a sidewalk upon Main street in Waterville. The plaintiff, therefore, must establish by evidence two propositions at least. (1,) The negligence of the defendants. (2,) Due care upon his own part.

1. The evidence clearly shows the following to be the conduct of the defendant. He had excavated a trench four or five feet deep, and as narrow as a man could walk in, and some twenty feet long, from the sewer and water pipe under the street to the cellar of a store on the side of the street. The purpose of this excavation was to connect the store with the public sewer and water systems. This trench was of course excavated across and underneath the sidewalk next the store. This sidewalk was of plank, placed in short lengths, athwart stringers laid in the direction of the street.

The connecting pipes having been laid, the defendant's servant began in the afternoon of the day of the injury complained of, to fill in and pound down the earth into the trench, to fill it up.

To facilitate this work, he removed two short planks in the sidewalk directly over the trench. The open trench, — the gap in the sidewalk, — the fresh ridge of earth by the side of the trench, — were all conspicuous to the passer-by. The defendant's servant was also conspicuously there at work with his shovel and rammer, filling the trench. There were also one or two bystanders watching the work.

The work of the defendant was lawful. He opened the trench for a lawful purpose. He removed the planks in the sidewalk for a lawful purpose, that of filling the trench. He had the right to temporarily interrupt to that extent the public use of the street and sidewalk. Persons travelling on a street or side-

walk in a city must anticipate brief occasional interruptions of that kind.

What other signals or sentinels were necessary to apprise a careful traveler of this temporary interruption? There were the trench, the fresh ridge of earth, the laborer at work filling the trench, the bystanders looking on. The opening was not left unguarded. The laborer, the sentinel, was continually there. His swinging of his shovel or rammer was a constant signal of an excavation.

2. The plaintiff's wife, the person injured, says she passed down this sidewalk past this trench about four o'clock in the afternoon (while the above described condition of affairs was in full force), and saw nothing of the trench, nothing of the ridge of earth, nothing of the laborer, nothing indicating any need of care. About an hour later, she returned up the sidewalk (while the sun was still high, and the laborer still at work filling the trench), and this time saw nothing of trench, ridge or laborer. She only recalls seeing one or two persons standing idly by. On coming to the opening in the sidewalk over the trench, she fell in and was pulled out by the laborer, the defendant's servant. She gave no reason for her failure to observe what was so conspicuous. She made no suggestion of anything distracting her attention.

Her story seems incredible, but if true, it does not show her to have been in the exercise of due care. She took no heed of where she was going, nor of what was going on about her. Though possessed of the senses of sight and hearing, either of which would have given her ample warning had she attended, she closed her mind to both and went heedlessly on, unmindful of the visible dangers. Such carelessness bars the action. We think the verdict for the plaintiff cannot be the result of the sober, reasoning judgment of the jury.

Motion sustained.

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

JAMES A. JACKSON, and others, Executors, in equity,

vs.

ROBERT H. THOMPSON, and others.

Kennebec. Opinion October 10, 1891.

84 44
96 171
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98 183

Will. Trust. Residue. Trustees' Bond. R. S., c. 68, § 2.

A testator, after making certain specific legacies by his will, disposed of the rest of his estate as follows: "Item 4. At my decease, I direct my executors to hold the balance of my property that may remain after paying the amount named in this will, to each of my three daughters, for the benefit of my son, R. H. Thompson. I direct my executors to pay my son only the income of five thousand dollars during his natural life, provided, however, there should be five thousand dollars left after paying my three daughters the amount named in this will. If there should be a surplus left after paying all the above sums named in this will, I direct my executors to divide the sum if any, among my four children, one quarter to each. I will here say to my executors, that in case my son should become a sober and a man of good habits, and they should think it would be for his interest to let him have a part or the whole of the property I have left him, they may do so. I leave them to be the judges. I will here inform my executors that my son has had in cash from me, since he was twenty-one years old, upwards of five thousand dollars, the account of the same may be found in my trunk."

Held: That the five thousand dollars, specifically named, is clearly devised in trust to be held for the benefit of the son upon the terms and conditions stated; that on the settlement of the estate the executors will become trustees by operation of law; and whether they should give bond as such is a question to be first determined by the Probate Court. *Held, also,* that no trust is created as to the son's interest in the residue of the estate.

Upon a bill in equity to determine the construction of a will, the court does not decide questions relating to the validity of assignments made by beneficiaries under the will.

ON REPORT.

Bill of interpleader, heard on bill and answers, to obtain the construction of a will. The bill was brought by the executors of Robert Thompson, late of Farmingdale, deceased. All his heirs and legatees were made parties; also, the persons to whom his son, a legatee, had assigned and transferred his interest in the estate as collateral security.

It appears from the bill that of an estate of about forty-two thousand dollars there remained in the hands of the executors for distribution, under the residuary clause, about twelve thousand dollars.

The principal question was whether the son had an absolute and immediate right to one quarter of the residue after payment of the other bequests in the will, or was it to be held in trust by the executors for him in the same manner and for the same purposes as the legacy of five thousand dollars named in the same clause. The case is stated in the opinion.

Baker, Baker and Cornish, for plaintiffs.

By the first clause of item 4, the balance of the property that may remain after paying the amount named in the will to each of the three daughters, is to be held in trust by the executors for the benefit of the son. They are to hold all of the son's share. The defendants' construction ignores and rejects this clause. The trust idea in the first clause is carried out with detail in the next clause, the income only of which is to be paid to him. The natural interpretation of the third clause requires his quarter to be held in trust. Why should the father, so careful as to the five thousand dollars, have intended that the surplus be given outright? It shows in what proportions it was to be divided but does not specify the interest each child was to have in such portion. That interest was impliedly the same as in the rest of the property. The two clauses must be construed as one to obtain the general intent of the whole will. *German* v. *German*, 27 Pa. St. 116; *Metcalf* v. *Framingham Parish*, 128 Mass. 370; *Dolbears' Appeal*, 28 Conn. 590; *Wells* v. *Williams*, 136 Mass. 333; 2 Jar. Wills, p. 60 *et seq.*; *Barnes* v. *Dow*, 59 Vt. 530; *Greenwood* v. *Greenwood*, L. R. 5 Ch. Div. 954. A court of equity will look to the clear intent of the testator, and if need be, raise a constructive trust when none has been expressly declared. *Knight* v. *Knight*, 3 Beav. 148; *Lucas* v. *Lockhart*, 10 Sm. & M. 466 (S. C. 48 Am. Dec. 766 and note). The trust is reiterated in the fourth clause, revealing the father's interest in his son, desiring his executors to carefully guard his property for him. Thus construed there is no repugnancy. *Covenhoven* v. *Shuler*, 2 Pai. Ch. 73. To recapitulate: the testator puts the son's entire property in trust in general terms. He put a portion, five thousand dollars, in trust in special terms. In distributing a possible surplus he specifies the share, but does

not in terms repeat it is to be held in trust. Finally, he reaffirms the trust. An immediate beneficial interest vested in the son, the time of payment, only, being postponed. *Richardson* v. *Knight*, 69 Maine, 285; *Holden* v. *Blaney*, 119 Mass. 421; *McMichael* v. *Hunt*, 83 N. C. 344; *Millard's Appeal*, 87 Pa. St. 457.

Heath and Tuell, for defendant, Thompson, and others.

Assignment valid and not in issue by the pleadings. *Palmer* v. *Stevens*, 15 Gray, 343. Assignees not necessary parties. There should be a trustee bond. The sisters' husbands are the trustees interested to deprive their co-legatee of any part of the principal. This court will not pass now upon the question of the discretionary powers of the probate judge in excusing bond. The powers conferred upon the executors in the fourth clause of the fourth item intended to remove a limitation, not to create one. It removes a restriction imposed in the earlier part of the item. No power of investment is here given. The principal is ordered expressly to be paid the son without limitation. The testator thought the residue would be small; and willing his son should have it without limitation. Plaintiffs' theory gives the son no right to the income of the residuary fund; otherwise the testator would have given him same absolute right to the annual income of this fund as he did in the five thousand dollars. To avoid repugnancy, the court may transpose the clauses of the fourth item. 1 Redf. Wills, *447 (4th Ed.); *Chaplin* v. *Doty*, 60 Vt. 712.

LIBBEY, J. This is a bill in equity for the construction of the will of Robert Thompson, deceased. The clauses of the will involved in the contention are as follows:

"Item 1st. I give and bequeath to my daughter, Kate A. Morrell, ten thousand dollars or her heirs forever.

"Item 2nd. I give and bequeath to my daughter, Abbie C. Rich, ten thousand dollars or her heirs forever.

"Item 3rd. And as I have given my daughter, Lucy D. Jackson, my house and lot in Farmingdale, with all the buildings thereon, and also all the land in the rear of said lot, that I

owned, called the Gould lot, the value of said house and land I have given her, I consider it cheap at five thousand dollars, and in order to make my daughter's, Lucy D. Jackson's, portion equal to my other two daughters', I direct my executors to pay her five thousand dollars ($5,000), which will make her portion equal to my other two daughters', viz.: ten thousand dollars to each of my three daughters or their heirs forever.

"Item 4. At my decease, I direct my executors to hold the balance of property that may remain after paying the amount named in this will to each of my three daughters, for the benefit of my son, R. H. Thompson. I direct my executors to pay my son only the income of five thousand dollars during his natural life, provided, however, there should be five thousand dollars left after paying my three daughters the amount named in this will. And if there should be a surplus left after paying all the above sums named in this will, I direct my executors to divide the sum, if any, among my four children, one quarter to each.

"I will here say to my executors that in case my son should become a sober and a man of good habits, and they should think it would be for his interest to let him have a part or the whole of the property I have left him they may do so. I leave them to be the judges. I will here inform my executors that my son has had in cash from me since he was twenty-one years old, upwards of five thousand dollars, the account of the same may be found in my trunk.

"I hereby appoint James A. Jackson, of Farmingdale, Richard Rich, now of Washington, D. C., and George C. Morrell, now of Sharon, Massachusetts, my executors of this my last will and testament. It is my wish that my executors give no bonds as I have full confidence they will do just as I have requested them to do."

The following questions are submitted to the court by the complainants:

"First. Whether by the terms of said will any trust is created as to the specific five thousand dollars first named in said will to be held by said executors for the benefit of said Robert H. Thompson and whether your complainants are made the trustees

thereof under said will, and if yes, what are the terms of said trust, and must the trustees give bond therefor; and if no trust, then what disposition shall the executors make of said five thousand dollars, and what effect, if any, have said assignments or either of them on said R. H. Thompson's interest in the specific legacy.

"Second. Whether by the terms of said will any trust is created as to said Robert H. Thompson's interest in the residue remaining in the hands of said executors after the payment of all the specific legacies named in said will, including the five thousand dollars named in question first, and whether your complainants are made the trustees thereof under said will, and if yes, what are the terms of said trust, and must the trustees give bond therefor; and if no trust, then what disposition shall the executors make of said Thompson's interest in said residue, and what effect if any have said assignments, or either of them, on said R. H. Thompson's interest in the residue."

As to the first clause in the first question submitted, there is no contention between the parties. The five thousand dollars named in the fourth item in the will is clearly devised in trust to be held by the executors for the benefit of Robert H. Thompson, upon the terms and conditions clearly stated. On the settlement of the estate, the executors will become trustees by operation of law. Whether they should give bond as such, is a question to be first determined by the Probate Court; and it can be brought into this court only by appeal. It is not properly before this court in a bill for the construction of the will. R. S., c. 68, § 2.

Nor is the question of the validity of the assignment to Heath and Tuell properly before us on such a bill. We may say, however, that we see nothing in the will, nor is any legal reason suggested, restricting the right of the legatee to assign his interest.

The great contention between the parties is under the second question: whether by the terms of the will any trust is created as to Robert H. Thompson's interest in the residue of the estate, after payment of the special bequests.

We think not. Certainly no trust is created by the language

of the bequest, "And if there should be a surplus left after paying all the above sums named in this will, I direct my executors to divide the sum, if any, among my four children, one quarter to each." By this language, the share of Robert H. is devised to him as absolutely and unconditionally as the shares of the daughters are to them. But it is claimed that the intention of the testator to create a trust as to the whole share of his estate devised to Robert H., is apparent from other clauses of the will, for the reason which he there expressed. The first clause of item four is relied on. But while this clause in terms devises all his estate remaining after paying the special legacies to his daughters, to his executors, for the benefit of his son Robert, this is immediately followed by the limitation of the amount to be held by them to five thousand dollars, if there should be so much, and directing them to pay him the income of that sum *only* during his life, afterwards giving them the discretionary power to pay over to him a part or all of the principal on the contingency named. This, in the light of the terms of the whole item, cannot be held as conveying the whole remainder of his estate after payment of the legacies to his daughters; if so, there would be no surplus left to be devised to the four children. On a careful examination of all the terms of the will, we do not find language, clearly showing the intention to devise Robert's share of the remainder in trust. There is nothing declaring the duties of the executors as trustees, in regard to that sum. The testator may have had the intention to place it in trust; if so, he failed to express it.

Upon a full settlement of the estate by the executors, and a decree of distribution, it is their duty to pay to Robert H. Thompson, or his legal assignees, his share of the remainder.

Decree accordingly. Each party to recover his taxable costs, to be paid by the executors out of the estate.

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

ENOCH O. GREENLEAF, Administrator *de bonis non*,

vs.

GEORGE GROUNDER.

Androscoggin. Opinion October 13, 1891.

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New Trial. Impeaching witness. Practice.

When a party asks for a new trial on the ground of newly discovered evidence, the burden is upon him to satisfy the court that the evidence is credible, and that its non-production at the former trial was not owing to a want of diligence on his part.

On motion for a new trial on the ground of a newly discovered witness, who will testify to important facts, evidence impeaching the credibility of the witness is admissible.

ON MOTIONS AND EXCEPTIONS.

This was an action of trover to recover certain goods and chattels claimed by the plaintiff as adminstrator *de bonis non*, of the estate of Benjamin Lowell, deceased. The verdict was for the plaintiff, and the defendant filed exceptions and a general motion for a new trial. The exceptions were to the ruling of the presiding justice that the plaintiff could maintain the action in his capacity of administrator *de bonis non*, if the jury were satisfied that the chattels in question were the property of Benjamin Lowell, and had been converted by the defendant, and had not been administered upon by the former administrator.

The defendant claimed the goods under a bill of sale, purporting to be signed by said Lowell, the genuineness of which signature was denied by the plaintiff. Later in the term the defendant filed a special motion for a new trial on the ground of newly discovered, material evidence unknown to him or his attorneys at the time of the trial, and could not have been discovered by them in the exercise of reasonable diligence. The affidavit of the defendant, filed in support of the motion, states that the newly discovered witness called at Lowell's house some time in April, 1888, and while there saw Lowell sign a paper which the defendant believes said witness can substantially identify as the paper the signature to which is claimed by the plaintiff as not genuine, also that the witness saw said Lowell

deliver said paper to the defendant. The deposition of this witness together with the depositions of witnesses impeaching him, taken subject to the defendant's objections, were filed in the case.

H. L. Whitcomb, *D. J. McGillicuddy* with him, for defendant.

E. O. Greenleaf, *J. C. Holman* with him, for plaintiff.

WALTON, J. When a party asks for a new trial on the ground of newly discovered evidence, the burden is upon him to satisfy the court that the evidence is credible, and that its non-production at the former trial was not owing to a want of diligence on his part. *Woodis* v. *Jordan*, 62 Maine, 490.

And on motion for a new trial on the ground of a newly discovered witness, who will testify to important facts, evidence impeaching the credibility of the witness is admissible. *Parker* v. *Hardy*, 24 Pick. 246.

In the present case, the defendant claims that since the former trial he has discovered a witness who will testify to new and important facts. Of the importance of his testimony, if it is true, there can be no doubt. But we find it impossible to believe that it is true. It seems to us to be in the highest degree incredible. And the character of the witness for truth is thoroughly impeached. But, if true, no reason is perceived why the testimony could not have been produced, by the use of due diligence, at the former trial. It relates to the signing and delivery of a paper to the defendant. If such a paper was delivered to the defendant in the presence of the witness, as the latter testifies, the fact must have been known to the defendant himself as well as to the witness, and the fact was one of too much importance to the defendant for us to believe that he could have forgotten it. And the fact that the witness was not called at the former trial, and that, so far as appears, no search was made for him, or efforts made to procure his testimony, confirm us in the belief that his testimony is not true, and that it is newly invented, not newly discovered.

And we do not think the verdict is so clearly against the weight of evidence as to entitle the defendant to another trial

on that ground. On the contrary, we think the evidence fairly preponderates in favor of the verdict.

The exceptions have not been argued, and we have no doubt that the ruling excepted to was correct. Consequently, the entry must be,

Motions and exceptions overruled.
Judgment on the verdict.

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

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INHABITANTS OF EDEN, Petitioners,

vs.

COMMISSIONERS OF HANCOCK COUNTY.

Hancock. Opinion October 23, 1891.

Way. Appeal. Damages. County Commissioners. R. S. c. 18, § § 7, 8, 19; Stat. 1885, c. 359, § 7.

In an appeal to the county commissioners, by a land owner, from the location of a town way duly laid out by the selectmen and accepted by the town, the record of the commissioners sufficiently shows that they acted within their jurisdiction when, after stating a compliance with all other requirements of the statute, it recites that they, "do confirm the action of the selectmen in laying out said way."

In such case, when the land owner appealing from the location had no damages awarded him by the town, the county commissioners have jurisdiction over the subject of damages; and their award of damages to him is valid.

ON REPORT.

The case is stated in the opinion.

Deasy and Higgins, for petitioners.

No appeal from estimate of damages lies to the county commissioners, since Stat. 1885, c. 359, this being the sole appellant court. Their return should show that they acted "as is provided respecting highways," on Roberts' petition to annul selectmen's proceedings, or be allowed damages. Return must disclose the facts on which jurisdiction is founded. *Small* v. *Pennell*, 31 Maine, 267; *State* v. *Pownal*, 10 *Id.* 24; *Plummer* v. *Waterville*, 32 *Id.* 566; *Orrington* v. *Co. Com.* 51 *Id.* 572. Want of preliminary adjudication that the road is of common convenience or necessity, is fatal. *Cushing* v. *Gay*, 23 Maine,

15; *Pownal* v. *Co. Com.* 63 *Id.* 102; *Goodwin* v. *Co. Com.* 60 *Id.* 328. Return contains no description of way. *R. R. Co.* v. *Co. Com.* 65 Maine, 292. Having acted without jurisdiction certiorari will issue as a matter of right. *White* v. *Co. Com.* 70 Maine, 325, and cases cited, *Hayford* v. *Co. Com.* 78 *Id.* 153. Appeal vacates the laying out by selectmen, and there is no legal location of the way. *Winslow* v. *Co. Com.* 31 Maine, 444; *Atkins* v. *Wyman*, 45 *Id.* 399; *Hunter* v. *Cole*, 49 *Id.* 556; *Tarbox* v. *Fisher*, 50 *Id.* 236.

W. P. Foster, for defendants.

The change in 1885 providing a direct method of appeal to this court does not by implication repeal the old remedy. That is still open. The act of 1885 simply provided a new and more direct method of coming to this court, when damages are the sole question. The legislature gave rights, it did not take them away. It does not place additional burdens upon the petitioner, obliging him to prosecute suits in two tribunals, or take away jurisdiction from the commissioners. They are to act thereon "as is provided respecting highways," *i. e.* state in their return "the names of the persons to whom damages are allowed, the amount allowed to each, and when to be paid,"—with the petitioner's right to appeal from them.

No substantial injustice has been done. *Water Co.* v. *Co. Com.* 112 Mass. 212. Counsel also cited: *Levant* v. *Co. Com.* 67 Maine, 429, and cases cited; *Kingman* v. *Co. Com.* 6 Cush. 307; *Wright* v. *Tukey*, 3 Cush. 290.

LIBBEY, J. The town of Eden, in its petition for a writ of certiorari, assigns three reasons why the writ should be granted.

1. "Because said county commissioners awarded damages to said Roberts, having no jurisdiction over the question of damages and no authority by law to act thereon.

2. "Because said commissioners did not act upon said petition of the said Tobias L. Roberts as is provided in § 19, c. 18, R. S., of Maine, *i. e.* 'as is provided respecting highways;' but simply confirmed the action of the selectmen in the laying out of said way.

3. "Because said commissioners did not in their return adjudge the road described in said petition to be of common convenience and necessity, thus failing to show their jurisdiction."

We shall first consider the second and third reasons assigned, because they deny the jurisdiction of the county commissioners to act on the appeal of Roberts. These reasons are substantially alike, and the ground assigned for want of jurisdiction is that the commissioners did not adjudge the way to be of common convenience and necessity before establishing it.

We think there is no ground for this objection. The road was legally located by the selectmen of the town; they reported their doings to the town, which duly accepted it. It is admitted that the road was legally located. Roberts, over whose land it was located, duly appealed to the county commissioners, and on proceedings duly had by them, they report that they "do confirm the action of the selectmen in the laying out of said way." This is sufficient. It affirms all that it is necessary for the selectmen to affirm in locating a town way.

We think the first objection is not well taken. We are of opinion that under our statutes as they existed when the appeal was taken, the county commissioners have jurisdiction over the subject of damages on an appeal from a refusal to locate by the selectmen, or from a location by the town. An appeal from a location vacates the action of the town. If a town way is duly located by the town, and no appeal taken from the location, a party aggrieved by the estimate of damages may make his application to the Supreme Judicial Court and have them assessed as in R. S., c. 18, § 8. But an appeal from the location vacates the action of the town and confers jurisdiction on the commissioners to act as provided respecting highways. R. S., c. 18, § 19. One of their duties in locating highways is to estimate the damages sustained by one whose land is taken. *Id.* § 7. While the way located by the commissioners is a town way, it exists by their action and the record of it must be made and remain in their court. Their action is not certified to the town clerk for record, and the town cannot discontinue it for five years. *White* v. *Co. Com.* 70 Maine, 317. By

section 19 as amended by act of 1885, c. 359, § 7, when the decision of the commissioners is returned and recorded, any party interested has the same right of appeal to the Supreme Judicial Court as is provided in location of highways, and also to have his damages estimated as provided in § 8. In case of location of the way, on appeal from refusal of the selectmen to locate, if the commissioners have no jurisdiction over the subject of damages, there would be no estimate of damages or refusal to estimate by a tribunal having jurisdiction from which an appeal could be taken as provided in § 8. We are not aware that this precise question has been before this court; but we think a fair construction of the statutes referred to gives jurisdiction over the subject of damages to the county commissioners.

But if this is not so, we think the estimate of damages to Roberts, furnishes no ground for issuing the writ. The commissioners had jurisdiction to make the location, and did make it. If they went out of their jurisdiction and awarded damages, the estimate is merely void and ought not to set aside the location. The town cannot justly ask it. *White* v. *Co. Com.* 70 Maine, 317.

Writ denied. Costs for respondents.

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

STATE *vs.* ROBERT S. DONALDSON.

York. Opinion November 9, 1891.

Indictment. Labor Commissioner. Interference. Stat. 1887, c. 139.

The refusal and neglect of the employer of labor in a manufacturing or mechanical establishment to produce certificates of the ages and places of birth of children under sixteen years of age, employed, in such establishment, for the inspection of the deputy commissioner of labor, is not an interference with his duties within the meaning of c. 139, laws of 1887.

The term "interfere" as therein used relates to some action directed to the person, or some active personal obstruction or interference in the performance of his duties, and not mere non-action.

ON EXCEPTIONS.

The defendant's demurrer to the following indictment having

been overruled by the court, with permission to plead anew, if the indictment should be sustained, he excepted to the ruling.

"The jurors for said state upon their oath present that Robert S. Donaldson, of Biddeford, in the said county, laborer, on the seventeenth day of October, in the year of our Lord one thousand eight hundred and ninety, at Biddeford, in said county of York, being then and there an overseer of a manufacturing establishment, to wit: The Pepperell Manufacturing Company, a corporation duly created by the laws of the State of Maine, and having its established place of business at Biddeford in said County of York, did knowingly, willfully and unlawfully interfere with one Leonard R. Campbell of Rockland, in the county of Knox in said State of Maine, the said Leonard R. Campbell being then and there a deputy commissioner of labor for the State of Maine, and as such duly appointed by the Governor of said State of Maine, by and with the advice and consent of the Council of said State of Maine, and duly qualified to discharge and perform the duties of said office, in the performance of his duties as a deputy commissioner of labor as aforesaid, in that the said Robert S. Donaldson then and there as said overseer having in his possession and on file certain certificates of the ages and places of birth of certain children under sixteen years of age, and of the amount of their school attendance during the year next preceding their employment in the cases of children under fifteen years of age, then and there employed by the said Pepperell Manufacturing Company under said Robert S. Donaldson as overseer aforesaid, then and there being required and requested by said Leonard R. Campbell in his said capacity as a deputy commissioner of labor of the State of Maine as aforesaid, to produce for his, said Campbell's, inspection said certificates, utterly refused and neglected so to do, the said Leonard R. Campbell in his said capacity as a deputy commissioner of labor, for the State of Maine as aforesaid having at a reasonable time entered the said manufacturing establishment, to wit: The establishment of the Pepperell Manufacturing Company, for the purpose of making an inspection of said certificates as aforesaid; against the peace of said State, and contrary to the form of the statute in such case made and provided."

W. P. Perkins, County Attorney, for the State.

The utter refusal and neglect of the defendant, the only person having under the statute charge of the certificates, to produce them to the deputy commissioner required by law to furnish the information prescribed by the act,—it being also the duty of the commissioner to inquire into violations of the act,—was an interference with his duties. Upon collateral questions not considered by the court, counsel cited: *State* v. *Mace*, 76 Maine, 64; *State* v. *Hurley*, 71 *Id.* 354; *State* v. *Willis*, 78 *Id.* 74; *State* v. *Ames*, 64 *Id.* 386; *State* v. *Robbins*, 66 *Id.* 324; *State* v. *Godfrey*, 24 *Id.* 232; *State* v. *Gurney*, 37 *Id.* 149.

R. P. Tapley, for defendant.

FOSTER, J. To this indictment a general demurrer was filed and joined. Thereupon judgment was rendered overruling the demurrer, and to this ruling exceptions were taken.

The indictment is founded upon the provisions of chapter 139, laws of 1887, entitled "An act to regulate the hours of labor and the employment of women and children in manufacturing and mechanical establishments." The act, in addition to other provisions, contains the following: "Whoever interferes with said deputy commissioner or his assistants in the performance of their duties as prescribed in this act, shall be fined fifty dollars." Upon this clause and the facts set out in the indictment, it is claimed on the part of the state that the indictment is to be sustained.

The allegations are, substantially, that the defendant was an overseer of a manufacturing establishment, situate in Biddeford in the county of York, and as such had the possession of certain certificates, and being called upon by the deputy commissioner to produce them for inspection, refused and neglected so to do, and thus did knowingly, wilfully and unlawfully interfere with said deputy in the performance of his duties.

If we assume that the facts are properly alleged, yet we have no doubt they are insufficient to sustain the indictment. The refusal and neglect to produce certain certificates is not an interference within the meaning of the statute. The term "interfere,"

as therein used, relates to some action directed to the person, in the performance of his duties. It imports action and not mere non-action. Neglect to perform some act is mere non-action — a passive rather than an active condition. It partakes more of the nature of nonfeasance than misfeasance. *The Six Carpenters' Case*, 8 Coke, 146; *Hinks* v. *Hinks*, 46 Maine, 423, 428. The statute evidently contemplates some active personal obstruction, or interference, such as expulsion or exclusion of the officer or his assistants from the establishment, and acts of a kindred nature, thereby preventing them from the performance of their duties.

Exceptions sustained. Indictment adjudged bad.

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

FRANK L. PLUMMER, Petitioner for Mandamus,

vs.

EDGAR L. JONES, Mayor of Waterville.

Kennebec. Opinion November 28, 1891.

Stat. of 1891, c. 34. Registration Act. Mandamus. R. S., c. 1, § 5.

The first and second sections of the stat. of 1891, c. 34, approved February 25, 1891 (registration act), became effective, by their terms, upon the approval of the act.

The first section creates the board of registration by language *in presenti*. The second section provides for the appointment of its members immediately upon the approval of the act, in accordance with certain specified regulations.

The remaining sections of the act are administrative provisions, not to become effective until thirty days after recess of the legislature; so that, while the board might be appointed without any considerable delay, its powers and duties were not imposed until a later time, when the administrative provisions of the act should become effective and clothe the board already appointed with power of action, thereby setting the machinery of the law in motion with the greatest practicable dispatch.

ON REPORT.

This was a petition for mandamus brought to have the court determine the time when the registration act, c. 34 of 1891, became a law, and the mayors of the cities could act under it in the appointment of members of the board of registration.

The petitioner alleges that on the seventh day of May, 1891, the Republican City Committee of Waterville, in compliance with the act, gave due notice to the mayor of the city, that he had been nominated by said committee, a member of the board, and that the committee requested his appointment according to the provisions of the act; that the petitioner is a member of the Republican party, which was the political party polling the highest number of votes for governor at the preceding state election; and that the mayor had neglected and refused to make the appointment, as notified and requested to do, and as required by said act.

After notice, the respondent appeared and answered that he had in all respects complied with the act; that on the fourth day of May, 1891, the Republican City Committee having neglected to nominate any person for the board of registration, he, the mayor, in performance of his duty under said law, had selected, appointed and commissioned Reuben Foster of Waterville, to be a member of said board on the part of the Republican party, . . . and said Foster had accepted and "now holds said commission,— all before the filing of this petition."

The defendant contended that the legislature intended that sections one and two of the act, relating to the organization of the board of registration, took effect immediately, by force of their terms, upon the approval of the act; and that more than seven days thereafter having elapsed without any nomination being made by the Republican City Committee, the act required him as mayor to make the appointment.

The petitioner contended that the act, as a whole, did not go into operation until May 4, 1891, thirty days after the adjournment of the legislature, which was April 3, 1891; and, therefore, Foster's appointment was premature and invalid.

Sections one, two and fifteen of the act are as follows:

"An act to provide a board of registration in the cities of this State.

"Be it enacted by the Senate and House of Representatives in legislature assembled, as follows:

"Section 1. A board of registration is hereby established in

each city of the State which shall have the exclusive power and authority to determine the qualification of voters therein, and exclusive power to make up, correct and revise the list of voters in each of said cities, and shall perform all the duties and have, exclusively, all the powers now exercised by the municipal officers of said cities in making, preparing, revising and correcting the list of voters therein under chapter four of the Revised Statutes or any other statute relating thereto."

"Section 2. Said board shall consist of three members who shall be residents and legal voters of the city where such board is established, one of whom shall be appointed and commissioned by the governor by and with the consent of his council for a term of four years, but the first term shall expire May 1, 1895, and who shall not hold or be eligible to any elective municipal office during said term. Said member of said board shall be appointed immediately upon the approval of this act. The other two members of this board shall be chosen one from the political party polling the highest number of votes for governor in this State at the next preceding State election and one from the political party polling the next highest number of votes for governor of this State at said election and they shall each hold their office for the term of two years, but the first term shall expire May 1, 1893, and said members shall not hold or be eligible to any elective municipal office during said term. Each shall be nominated by the city committee of his own political party and upon due notice thereof in writing, the several mayors of said cities shall forthwith appoint such persons so nominated members of said board. If either or both of said political parties for the space of seven days after the approval of this act or after a vacancy occurs in such board by its said committees, neglects or refuses so to nominate a member of such board and to notify the mayor of such city thereof said mayor shall select and appoint a member of said board from the political party so neglecting and refusing to nominate. And in case any member of said board so appointed by said mayor, neglects or refuses to act as a member of said board the other two shall proceed with the business of this board as provided by this act in his absence.

And if any member of said board be absent or disqualified by sickness such mayor may fill his place for the time being by the appointment of some qualified elector of said city of the same political party as the absent member represents." . . .

"Section 15. Section forty-seven, chapter four of the Revised Statutes and all other acts and parts of acts inconsistent herewith, are hereby repealed. But the provisions of this act shall not apply to the municipal elections of the year 1891, in any of the cities in which such elections are held, or to the preparation and revision of the lists therefor."

At the hearing which took place in vacation July 31, 1891, in Kennebec, the petitioner filed in evidence, and admitted *de bene*, documentary testimony, as follows: Original draft of bill as presented to the legislature and reported from committee, copy of new draft, copy of amendments, and of original bill as passed. By the latter it appears that the words, "Section 16. This act shall take effect when approved," had been stricken out.

A preliminary question of procedure, whether the court could pass upon Foster's right to hold the office in question either on this petition or any alternative writ, was argued by counsel. The view of the case taken by the court renders a report of the argument unnecessary upon this branch. The authorities cited by counsel will be found below.

The presiding justice, finding no dispute as to the facts, reported the case to be heard at the July term of the western district of the law court.

W. T. Haines, for petitioner.

The bill passed substantially the same as the new draft, with the words, "take effect when approved," being stricken out. This shows the legislature intended to bring the act within R. S., c. 1, § 5. Documentary evidence admissible: Endlich, § § 1, 27, 30, 34, 509 and 510; Bishop Stat. Crimes, § § 70, 74; *Swift* v. *Luce*, 27 Maine, 285; *Farrell Foundry Co.* v. *Dart*, 26 Conn. 376; *Com.* v. *Churchill*, 2 Met. 118; *State* v. *Brooks*, 4 Conn. 446. If the act comes within R. S., c. 1, § 5, nothing "effective" under it can be done prior to May 4. Bish. Stat. Crim. § 31; *Prince* v. *Hopkins*, 13 Mich. 138; *McArthur* v. *Frank-*

lin, 16 Ohio St. 193; *People* v. *Johnson*, 6 Cal. 673; *Com.* v. *Fowler*, 10 Mass. 290; Endlich, § § 496, 498-9; *Gorham* v. *Springfield*, 21 Maine, 58; *Simmons* v. *Jacobs*, 52 *Id.* 158; *New Portland* v. *New Vineyard*, 16 *Id.* 69; *Holmes* v. *Paris*, 75 *Id.* 559; Sedg. Stat. & Const. Law, 2d Ed. p. 67, citing *Kennedy* v. *Palmer*, 6 Gray, 316, that a law speaks from the time of its going into effect. *Jackman* v. *Garland*, 64 Maine, 133; *Winslow* v. *Kimball*, 25 *Id.* 493; *Palmer* v. *Hixon*, 74 *Id.* 447; *Damon's Appeal*, 70 *Id.* 153; *Com.* v. *Bennett*, 108 Mass. 31; *Gray* v. *Co. Com.* 83 Maine, 429.

A statute is a nullity until it takes effect; and where there is no expressed provision in the statute itself as to when it takes effect, it must take effect by virtue of the general law. In considering the legislative intent as to when this statute would take effect, the history of its enactment as shown by the record, shows that the phrase used in § 2 providing that certain members of the board of registration should be appointed within seven days after the act was approved, was drawn with reference to a statute that should take effect when approved; and that the legislature, when it struck out the section providing that the act should take effect when approved, made that part of the act inconsistent with the terms of the general law; and while it was an oversight in the legislature in not changing § 2 to correspond with the striking out of the provision making the statute take effect when approved, yet the rule remains that the legislature had the right to presume that a court would consider it with reference to the established rules of construction of statutes; which would not be to give effect to any part of the statute until the period of thirty days after adjournment had passed. Seven days after the approval of the act must be held to mean seven days after the act took effect.

Mandamus: 3 Bl. Com. 110; *Sanger* v. *Co. Com.* 25 Maine, 259; High Ext. Leg. Rem. § § 35, 49, 80, 81, 88, 108, 113, 118, 119, 133-6, 144, 324, 688, 689, 690, and cases cited; *French* v. *Cowan*, 79 Maine, 426; Dill. Mun. Corp. 4th Ed. § § 215, 844, 846, and cases cited; *Tremont* v. *Creppen*, 10 Cal. 212 (70 Am. Rep. 711); *Hildreth* v. *McIntire*, 1 Marsh. (Ky.) 206; 19 Am. Dec. 63.

W. L. Putnam, and *S. S. Brown*, for defendant.

Mandamus: Field Corp. § 52; *People* v. *Staples*, 5 Hill, 615; *People* v. *Detroit*, 18 Mich. 338; *Denver* v. *Hobart*, 10 Nev. 28; *Meredith* v. *Supervisors*, 19 Am. Dec. 502; *Clark* v. *Winchester*, 24 Barb. 446; *Conly* v. *Calhoun Co.* 2 W. Va. 417; *French* v. *Cowan*, 79 Maine, 426; High Ext. Rem. § § 52, 53; *King* v. *Mayor of Colchester*, 2 T. R. 260. Legislative intent controls. *Jackman* v. *Garland*, 64 Maine, 133; Endlich, § 23 and cases cited; *Damon's Appeal*, 70 Maine, 156; *Stone* v. *Charlestown*, 114 Mass. 228. If § § 1 and 2, did not go into effect until the thirty days' period arrived, we could have no registration board for a long time; and the act repeals all previous statutes. And when would the seven days begin to run? Giving effect to all parts of the act, according to the authorities, it must be from the time of approval.

The last section of this act clearly indicates that the legislature intended that the organization of the boards of registration should be perfected before the thirty days' limit expired, because it specially provided that the board should not act in preparing the lists for the last spring elections in the several cities. These elections all take place in March, and if by the act it was intended that these boards should not be organized till the expiration of thirty days, at least, after the legislature adjourned, there would have been no need of this provision, because under the thirty days' theory no part of the act would take effect till May 4, which would be long after all the spring elections had taken place, as the legislature adjourned April 3, and the thirty days' period would last to the fourth of May. So we find the act, at the beginning and at the close, containing clear and unmistakable evidence that the legislature intended that the law should take effect so far as the organization of the registration board was concerned, when approved by the Governor.

HASKELL, J. The public interest requires a decision of this case upon the merits, and the result of this judgment does not call for any consideration of questions of procedure, and none is given.

By virtue of § 5, c. 1, of R. S., applicable to all statutes of the State, the registration act of 1891 took effect "in thirty days after the recess of the legislature passing it, unless a different time is named therein." No time, when the administrative provisions of the act shall become effective is named therein, and they become operative, therefore, in thirty days after the recess of the legislature, but, by special provision, do not apply to the approaching spring elections. Sections one and two, however, that create the board and provide for the appointment of its members, are said by their terms to become effective upon the approval of the act, and whether that be so is the impending question here.

There is no legal objection to different provisions of the same statute taking effect at different times at the will of the legislature passing it. *Workman* v. *Worcester*, 118 Mass. 168; *Stone* v. *Charlestown*, 114 Mass. 214.

Section one of the registration act provides: "A board of registration is hereby established in each city of the State," &c. Section two provides that it shall consist of three members, &c., "one of whom shall be appointed and commissioned by the Governor . . . immediately upon the approval of this act." Of the other two, it provides that "each shall be nominated by the city committee of his own political party, and upon due notice thereof, in writing, the several mayors of said cities shall forthwith appoint such persons, so nominated, members of said board. If either or both of said political parties, for the space of seven days after the approval of this act, . . . neglects or refuses to nominate a member of such board and to notify the mayor of such city thereof, said mayor shall select and appoint a member of said board from the political party so neglecting and refusing to nominate."

Section one begins: "A board of registration is hereby established," &c. "The use of language *in presenti* is too common in legislation to afford any indication of an intention" that the act shall then take effect; *Gorham* v. *Springfield*, 21 Maine, 58; but when coupled with other provisions of the same law that would otherwise be meaningless, the whole enactment

should be construed together, so as to give effect to the expression of the whole statute and do violence to the plain language of no part.

By holding section one operative *in presenti* by reason of the provisions of section two, no construction is given to it in violation of its plain language, and the plain provisions of section two are also thereby harmonized; for that section plainly declares that the Governor of the State shall appoint one member of the board "immediately upon the approval of this act;" and the mayors of the several cities are required, upon nomination by the requisite political parties, to forthwith appoint the other two; and if, "for the space of seven days after the approval of this act," such nominations are neglected by the requisite political parties, the act says, the "mayor shall select and appoint."

Any other construction of these two sections of the act would be in violation of their express words; and lawyers have been taught from the days of Coke: "They ought not to make any construction against the express letter of the statute, for nothing can so express the meaning of the makers of an act as their own direct words, for *index animi sermo.* And it would be dangerous to give scope to make a construction in any case against the express words, when the meaning of the makers doth not appear to the contrary, and when no inconvenience will thereupon follow." *Edriche's case*, 5 Co. 118.

Sometimes the letter of a statute may destroy the sense of it, and then, says the learned Plowden: "It is not the words of the law but the internal sense of it that makes the law, and our law (like all others) consists of two parts, viz., of body and soul; the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law, *quia ratio legis est anima legis.* And the law may be resembled to a nut, which has a shell and a kernel within, the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter,

and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter. And it often happens that when you know the letter, you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive." *Eyston* v. *Studd*, Plowd. 465.

By considering the first and second sections of the act to become operative on approval, the plain language of the legislature is regarded, and no inconvenience or absurdity flows from the result.

Indeed, we know that both the original bill and the new draft of it that came from the committee specially provided that the whole bill should take effect upon approval. During some stage of its passage, that provision was stricken out and a provision that it should not apply to the approaching spring elections added, leaving sections one and two, creating the board and providing for their appointment, to become effective as originally intended; and we think the true construction of the act is to hold those sections operative from the date of the approval of the act as originally intended.

Petition dismissed with costs.

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

ALBERT W. PAINE, and another, Trustees, in equity,

vs.

WILLIAM J. FORSAITH, and another, Trustees.

Penobscot. Opinion December 5, 1891.

Trust. Vested equitable fee. Power of disposal. Will. Widow's Allowance. R. S., c. 65, § 21; c. 74, § 35.

A deed of trust, which provides that the income of the property conveyed shall be paid in certain ways during the grantor's lifetime, and at his death go to the persons named as trustees and their heirs and assigns forever, vests in such persons a present equitable fee in the property, subject to the execution of the trusts.

This construction is not prevented by a clause in the deed that the grantees may dispose of their interests by will; nor by a clause to the effect that in

case of the death of the grantees before the grantor dies, their heirs shall succeed to the estate in right of inheritance by representation. These clauses add nothing to the devise, nor take anything therefrom.

A will devising all of one's estate, real, personal and mixed, embraces all property acquired after the date of the will, and owned by the testator at his death; a contrary intent not being visible on the face of the will.

A widow is entitled to an allowance out of assets coming to the estate of her husband some years after a previous allowance not based on the new assets.

ON REPORT.

This was a bill of interpleader to obtain the construction, by the court, of the respective rights and duties of the parties under the different trusts, set forth in the bill, which arose in the settlement of the estates of the late John W. Veazie, and his son Alfred. The complainants as executors of Alfred's will claimed that, under the will, upon the death of his father one half of his estate which had been conveyed, since Alfred made his will, in trust to his son, had passed to them.

The case, heard upon bill and answer, and in which other questions are submitted by the parties to the court, is fully stated in the opinion.

A. W. Paine, for plaintiffs.

Wilson and Woodard, for Etta H. Veazie and children.

PETERS, C. J. This bill in equity calls for a construction of clauses in the following deed of trust and amendment thereto:

"Know all persons by these presents, that I, John W. Veazie, having fully determined to retire from active participation in business, in order, whilst leaving for myself independent support during life, also to express my affection for and confidence in my two children, Alfred Veazie and Annie Veazie Forsaith; and in consideration of one dollar to me in hand paid by the said Alfred Veazie and Annie Veazie Forsaith, do hereby, sell assign, transfer and set over unto the said Alfred Veazie and Annie Veazie Forsaith, certain property and interests in property, both real, personal and mixed, as follows, namely:" (Here follows a description of the property conveyed, which appears to have been at that date wholly personal.)

"To have and to hold to them, the said Alfred Veazie and Annie Veazie Forsaith, and the suvivor of them, and his or her

heirs or assigns, in trust, for the following uses and purposes: To keep and maintain the principal of said trust estates safely invested according to their best judgment, and from the income thereof to pay to me the sum of five thousand dollars ($5,000,) each year during my natural life, provided the same is called for by me, and payable from time to time as called for.

"2d. From the annual income remaining after the above payment is made to me, to pay to Annie Veazie Forsaith, the sum of two thousand dollars ($2,000) annually during my life. . . .

"3d. From the annual income of said trust estate remaining after the annuity to myself and the one provided to be paid to Annie Veazie Forsaith, to pay to Alfred Veazie the income of said estate up to the sum of two thousand dollars ($2,000) per annum, and what remains of said income if anything, to pay and divide equally between the said Alfred Veazie and Annie Veazie Forsaith during my life. . . .

"Finally to provide from the income of the trust property or otherwise, within two years from my decease, the sum of ten thousand dollars ($10,000) which shall be subject to my appointment and distribution if I so choose by will or other written instrument, and after the execution of all the trusts herein created, that they, the said Alfred Veazie and Annie Veazie Forsaith should have and hold said property the subject of this trust in whatsoever form it may be, and wherever situated, as their absolute property discharged of said trust. To them and their heirs and assigns in fee simple forever, share and share alike, and be entitled at once to the possession of the realty and personal property constituting said trust estate.

"In case of the death of either or both of my children before the termination of this trust their respective heirs succeed in right of inheritance by representation.

"In witness of which I have hereunto set my hand and seal on this twenty-second day of February, Anno Domino eighteen hundred and seventy-nine."

"Before the final delivery of the deed and declaration of trust contained on the foregoing pages, I make the following modifications therein, to wit:

"1st. Either of my children, the said Alfred and Annie V., may dispose by will of their intrest in the estate embraced in the trust.

"2d. In case of the decease of the said Annie V. Forsaith, before my decease, I appoint William J. Forsaith, her husband, to be co-trustee in her place and stead, and in case of the death of the said Alfred during the continuance of the trust, then his wife, Etta Hodsdon Veazie, or whomsoever else he, the said Alfred, may by will or other proper instrument appoint, is appointed co-trustee in his place and stead, and the surviving trustee is to make conveyances accordingly.

"3d. The setting apart of ten thousand dollars within two years from my decease, is made conditioned and contingent upon the existence of a will or other written instrument disposing of it.

"4th. Full authority is given to the trustees to manage the trust in every respect without recourse to any court for authority, for execution of deeds or otherwise.

"Dated at Bangor, this twenty-seventh day of February, A. D., 1879. Sealed with my seal.

JOHN W. VEAZIE." (L. S.)

The two instruments were duly executed in the form of deeds and delivered to the grantees, who immediately received possession of the property described therein. Both of the grantees died before the grantor, other trustees succeeding them according to the terms of the trust. The grantor died in 1891, his death terminating the trust. All parties interested unite in asking the opinion of the court upon certain questions involved.

First: Did these instruments carry to Alfred and Annie personally, the trustees first named, a vested equitable fee in the estate described, subject to the trusts imposed thereon? We think so. The father evidently designed to rid himself of further care of his property, surrendering it to his children, who were to apply the income in certain ways during their father's lifetime, and at his death, take the remainder to themselves. It was a present, absolute right to be enjoyed in the future. Rop. Leg. *553; *Verrill* v. *Weymouth*, 68 Maine, 318; *Buck* v. *Paine*, 75 Maine, 582.

What, if anything, casts a shadow of doubt upon the correctness of this interpretation, is found in the clause which provides that, in case of the death of either or both of the children before the termination of the trust, "their heirs succeed in right of inheritance by representation." But we think in view of all parts of the document, it was not intended that the fee in Alfred and Annie would become devested upon any condition that they should not survive their father. The questionable words were evidently used however unnecessarily, to emphasise rather than to weaken the idea of an absolute and unconditional conveyance. Whilst a right of inheritance is given in the first instrument, a right to dispose of the same property by will is given to the grantees in the second, the two clauses expressing the same right that existed without the authority of such clauses. They added nothing — subtracted nothing. It could not be supposed that the fee would descend to the heirs of a trustee who should dispose of his interest differently by will. And Alfred Veazie, as is to be seen, devised his interest by his will.

Second: Does the will of Alfred Veazie, made before the trust was created, operate upon the estate which he acquired in the deed of trust afterwards?

The will, omitting formal and immaterial parts, is as follows: "All my estate, real, personal and mixed of every description, I give and bequeath to Albert W. Paine and Charles V. Lord, and their survivor and successors and their heirs and assigns forever in trust for the following uses and purposes. They will take charge of and manage the said estate as they shall think best, having full power and authority to sell and convey any part of the real estate as well as personal, whenever they desire to do so. All the proceeds and cash effects of my estate they will invest in such manner as they think advisable, including the purchase of real estate if they wish, the same to be held as such trustees. My debts they will pay as may be convenient . . . and out of any surplus or other funds on hand from earnings or sales they will pay to my widow, so long as she shall remain such, the annual sum of twenty-five hundred dollars . . and also pay whatever in their opinion may be requisite

for the support and education of our daughter Alice during her minority. . . . Upon her arrival at the age of thirty-five years the trust shall cease and the whole estate becomes hers in fee, unless her mother be then alive and my widow, in which case the trust shall continue until her death or marriage, and then cease and the property then to become our daughter's to be held by her and her heirs and assigns in fee.

"I appoint my trustees, whoever they may be, to be executors of my estate. Dated December 16, 1871."

The will was modified by codicil in 1872, so as to extend its provisions equally to two children, one having been born since the will was executed, but there is no need of extending a copy of the codicil here.

We have no doubt that the will operated upon this after acquired property. Our statute declares that real estate, owned by a testator, the title to which was acquired after the will was executed, will pass by it, when such appears to have been his intention. R. S., c. 74, § 35. And at common law personal property passes unless a contrary intent clearly appears. In this case the whole will pulsates with the intention of a full and final disposition of all property, real, personal and mixed. The implication is irresistible.

Third: The funds in question are to be paid to the persons who are both executors and trustees under Alfred Veazie's will, to be administered by them as executors until his estate be freed from claims against it, and then to be held by them as trustees according to the terms of the will.

Fourth: The widow of Alfred Veazie, clearly enough, has a claim against the estate in the executors' hands for a personal allowance. Sect. 21, c. 65, R. S., provides that a widow, although she has already received an allowance after a waiver of any testamentary provision in her behalf, may receive a further allowance if the estate, after a representation of insolvency proves to be a solvent estate, or if additional personal property comes to the knowledge of the judge, which was not calculated upon when the first allowance was made. Impelled by pressing needs and the discouraging aspect of the estate, rendered insol-

vent, the widow waived the provision made for her in her husband's will. The fact that the husband attempted to secure a liberal provision for his wife in his will, which unfortunately failed to be of benefit to her, should have great weight in estimating the amount of an additional allowance from the new assets.

The result is that the respondents, William J. Forsaith and Etta H. Veazie, present trustees and custodians of the estate, be required to pay and deliver over to the complainants, executors of Alfred Veazie's will, one-half of all the net funds and property, belonging to such estate, which may remain in their possession after the other trusts imposed upon the property shall be finally administered.

Counsel fees and compensation for disbursements may be allowed both sides out of the fund to be passed over from respondents to the complainants.

Bill sustained without costs. Decree according to the opinion.

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

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84 72
89 488

FREDERICK H. APPLETON, Assignee,

vs.

WILLIAM W. TURNBULL.

Penobscot. Opinion December 8, 1891.

Corporation. Stockholder. Unpaid Stock. Set off. Sales by pledgee. R. S., c. 46, § § 47, 48. Stat. 1821, c. 210; 1836, 200, § 3; 1851, c. 210; 1855, c. 169, § 19; 1871, c. 205.

By virtue of R. S., c. 46, § 48, debts which a stockholder has against an insolvent corporation may be set off against a debt which he owes for unpaid stock, in a suit against him by an assignee of the insolvent corporation as well as when suit is brought by a judgment creditor.

The capital stock of a corporation is a trust fund for the payment of its debts.

Unpaid stock is as much a part of the assets of the corporation as the money that has been paid in upon it.

It is a general rule that agents to sell cannot be purchasers, and that trustees of every description, who are invested with power to sell, can never directly or indirectly become the purchasers of trust property.

A pledgor may lawfully stipulate that the pledgee may purchase, and this may be done at the time of making the pledge.

The pledgor may afterwards authorize the pledgee to purchase, or he may ratify such purchase after it has been made.

Such purchases are voidable and presumably void, though not conclusively so.

The burden of showing authority for the pledgee to become the purchaser is cast upon the purchaser in such case.

AGREED STATEMENT.

Appleton and Chaplin, for plaintiff.

Wilson and Woodard, for defendant.

FOSTER, J. The Lincoln Pulp and Paper Company, a corporation existing under the laws of this State, was adjudged insolvent on petition of its creditors, and the plaintiff as assignee brings this suit to recover the sum of six thousand and twenty dollars, being the balance of forty per cent of the par value of three hundred and one shares of the company's stock issued to the defendant, and for which he paid only sixty per cent of its par value under an allotment of stock made by the directors of the corporation, November 4, 1884.

No contention is made in reference to the validity of the plaintiff's claim against the defendant, inasmuch as this court has recently decided in *McAvity* v. *Lincoln Pulp and Paper Co.* 82 Maine, 511, upon a state of facts similar in their bearing to those presented here, that the acceptance and payment of sixty per cent of the new stock allotted to the stockholders must be considered "an agreement for" those shares; and consequently those who accepted and paid the per cent named would be chargeable for the balance unpaid as having "subscribed for or agreed to take stock in said corporation" within the meaning of the statute and in accordance with the decision of *Libbey* v. *Tobey*, 82 Maine, 397, 404.

The defendant, then, being primarily liable for $6020 unpaid on his shares allotted to him, at fifty dollars a share par value, contends that he has a full defense to the plaintiff's claim by virtue of R. S., c. 46, § 48, which provides that "a defendant in such suit . . . may prove that he has *bona fide* claims in contract or tort, several, or joint with other persons, against said corporation, absolute or contingent, or which could be availed of by set-off in court or on execution, for the whole or

any part of the amounts for which he would be liable under this chapter," etc.

Assuming that the defendant has debts against the corporation equal to or greater in amount than the claim for unpaid stock which the plaintiff seeks to recover in this action, we are brought to the consideration of this important question: Can debts which a stockholder has against an insolvent corporation be set off against a debt which he owes for unpaid stock, in a suit against him by an assignee of the insolvent corporation, who represents all the creditors, and who in accordance with his duty is marshaling the assets in order to close up the affairs of the corporation and make a pro rata distribution among all the creditors?

To answer this correctly, and in its application to the present case, requires an understanding of the stockholders' rights and liabilities, both at common law and under the statute.

It is too firmly established at the present day to be questioned that the capital stock of a corporation is a trust fund for the payment of its debts. It is a substitute for the personal liability of the individual members of private copartnerships, and those who deal with the corporation have a right to rely upon its capital stock for their security. Unpaid stock is as much a part of the assets of the corporation as the money that has been paid in upon it. Creditors have the same right to insist upon its payment as upon the payment of any other debt due the corporation, so far as it is necessary to the satisfaction of debts due from the corporation. During the existence of the life of the corporation it is a trust to be managed for the benefit of the stockholders; but in the event of its dissolution, or insolvency, it becomes a trust fund for the benefit of its creditors. If, in such case, the assets are not sufficient to pay all its debts in full, each creditor is equitably entitled to receive a ratable share of the assets which remain. Hence it follows that where proceedings have been instituted to obtain a general distribution of the assets of an insolvent corporation among the creditors, the shareholders cannot, at common law, when sued for the amount due upon their unpaid stock, set off debts due to them

from the corporation. In such case the doctrine laid down by the courts for thirty years is, that they must pay up their shares in full, and are entitled only to a ratable distribution of all the company's assets, and are to receive dividends upon their claims against the corporation in common with other creditors. Morawetz on Priv. Corp. § 861; Cook on Stock and Stockholders, § 193. The rule was settled by the Supreme Court of the United States in *Sawyer* v. *Hoag*, 17 Wall. 610 (1873), where the Court say: "The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally, in equity, to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim." *Scovill* v. *Thayer*, 105 U. S. 143, 152; *Sanger* v. *Upton*, 91 U. S. 56; *Stockton* v. *Mechanics, &c. Bank*, 32 N. J. Eq. 163, 167; *Williams* v. *Traphagen*, 38 N. J. Eq. 57; *Wheeler* v. *Millar*, 90 N. Y. 353.

The same rule prevails in England, as may be seen in the leading decision of *Grissell's Case*, L. R., 1 Ch. 528 (1866).

If the defendant's rights as well as his duties were to be determined by the common law alone, it is evident that the defense interposed in this case could not prevail.

We must ascertain, then, whether the statute has altered the common law and enlarged the defendant's rights.

It is undoubtedly the intention of the statute, as manifested by sections 47 and 48, R. S., c. 46, to provide a remedy against the delinquent stockholder by two different parties toward whom he stands in entirely different relations: (1,) By an individual creditor of the corporation who has an unsatisfied judgment against the corporation in his own name and for his own personal benefit; (2,) By a trustee, receiver or other person appointed to close up the affairs of an insolvent corporation.

The contention of the plaintiff is that so much of section 48 as is quoted above applies only to the first class,—to a suit brought by an individual creditor, and not to a suit brought by a person of the second class as in the present case.

Section 47 provides that "any person having such judgment, or any such trustees, receivers or other persons appointed to close up the affairs of an insolvent corporation, may, within two years after their right of action herein given accrues, commence an action on the case or bill in equity, without demand or other previous formalities, against any persons (if a bill in equity, jointly or severally, otherwise severally) who have subscribed for or agreed to take stock in said corporation and have not paid for the same," &c. And by section 48, "a defendant in such suit may prove . . . that he has *bona fide* claims in contract or tort, several, or joint with other persons, against said corporation, absolute or contingent, or which could be availed of by set-off in court or on execution, for the whole or any part of the amounts for which he would be liable under this chapter," &c., and proof of such matters is declared to be a full or partial defense for such defendant.

What is meant by "such suit?" "Suit is applied to proceedings in chancery as well as in law, and is, therefore, more general than action, which is almost exclusively applied to matters of law." Bouvier, Suit. "Suit is a generic term, and denotes any legal proceeding of a civil kind brought by one person against another." Co. Litt. 291 a. Rapalje and Lawrence Law Dic. Suit. "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him." *Weston* v. *The City Council of Charleston*, 2 Pet. 449, 464. Chief Justice Marshall, in *Cohens* v. *Virginia*, 6 Wheat. 264, 407, defines the term in the following language: "We understand it to be the prosecution, or pursuit of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice."

In the construction of this statute, then, the term "such suit" undoubtedly must be held to apply to any action or bill in equity brought by a person having a judgment against a corporation, or by any trustee, receiver, or other person appointed to close up the affairs of an insolvent corporation. To hold that

it applies only to a suit brought by a person having a judgment against a corporation, and that it has no application where suit is brought by trustees, receivers, or other persons appointed to close up the affairs of an insolvent corporation, would violate the plain provisions of a statute whose terms are so free from ambiguity or uncertainty as to require no passing comment in reference to the general rules applicable to their interpretation.

The statute in question was enacted in 1871, c. 205, entitled, "An act fixing the liability of stockholders in corporations," and thereby important changes were made in the laws then existing in relation to the liability of stockholders. *Libbey* v. *Tobey*, 82 Maine, 397, 405. The language of the act is susceptible of no uncertainty as to its meaning. "It was intended to have effect according to its terms," says APPLETON, C. J., in *Poor* v. *Willoughby*, 64 Maine, 379, 383. And while the act seems to have been additional to the general statutes upon the subject, its manifest intention was to modify the liability of stockholders in the future, not only in relation to suits brought against stockholders by those having unsatisfied judgments against corporations, but also by trustees, receivers and other persons appointed to close up the affairs of insolvent corporations. It was in the general current of modern legislation which has been setting in the same direction for seventy years. An examination of the numerous enactments passed since this State became separated from Massachusetts shows a general tendency of modifying the more rigorous statute liability of stockholders which existed at an earlier date, and of basing such liability more upon the principles of equity.

Thus by the earliest statute (1821, c. 60, § 31) a creditor of the corporation might seize the body or estate of any member when no sufficient corporate property was to be found.

At a later day (1836, c. 200, § 3) the stockholder became liable only to the amount of his stock,—notwithstanding it was held even then that no protection was afforded the stockholder who had paid to the corporation the whole amount for which the statute made him liable. *Fowler* v. *Robinson*, 31 Maine, 189.

Afterwards however (1851, c. 210), the stockholder who had

paid and satisfied any debt of the corporation was allowed exemption from liability equal to the amount thus paid.

But more in accordance with the spirit of the present statute, (and which has become incorporated in all subsequent revisions) was that (1855, c. 169, § 19) which allowed the stockholder to prove not only the payment of any debt of the corporation in reduction of his liability, but also "any other legal cause why judgment should not be rendered against him."

The statute we are considering allows a defendant to prove that he has *bona fide* claims in contract or tort, several, or joint with other persons, against the corporation, absolute or contingent, or which could be availed of by set-off in court or on execution, for the whole or any part of the amounts for which he would be liable under this chapter. The language "for the whole or any part of the amounts for which he would be liable under this chapter" is strongly indicative of the intention of the legislature not to limit the defense to suits brought by one class of plaintiffs only. It is not for the amounts for which he would be liable under this chapter to a plaintiff having an unsatisfied judgment against the corporation only, but for the whole or any part of the amounts for which he would be liable under this chapter, including all classes of plaintiffs to whom any liability on his part is created by these statutory provisions.

Moreover, it is to be noticed that by these provisions a defendant may prove not only claims which could be availed of by set-off in any court, or on execution — and in the latter case the equitable right of set-off is very broad, *Pierce* v. *Bent*, 69 Maine, 381 — but also other claims which could not be set off under the ordinary rules of law. Hence we must look to these provisions of statute in order to ascertain a defendant's right to offer in defense to such a suit as this proof of claims clearly not within the ordinary rules of law applicable to set-off, such proof being made by statute a defence to the suit, either full or partial, as the evidence may warrant.

Has the defendant made such proof as entitles him to a full defense to this action? We think he has.

At the date of this suit he had *bona fide* claims in contract

against the corporation to the amount of $8,250, exclusive of interest, as follows: One note dated July 12, 1884, for $5,350; one dated August 21, 1886, for $1,400, and another dated November 15, 1886, for $750, and also a claim of $750 for money paid on account of the corporation as guarantor. The two last mentioned notes and the amount paid as guarantor were proved in the proceedings in insolvency against the corporation.

At the time when the debt originated for which the note of $5,350 was given, the corporation entered into a written agreement with the defendant, acknowledging itself indebted to him for that amount, and agreeing to pay interest thereon, at the rate of seven per cent until the date of payment in case the note was not paid at a specified time. As collateral security for the payment of that note, the corporation delivered to the defendant thirteen first mortgage bonds of the corporation of five hundred dollars each; and by the written agreement it stipulated that in case default should be made in the payment of the note or any part thereof, at the time specified, then it should be lawful for the defendant without notice to the corporation to sell the said bonds delivered to him as collateral security at public auction or private sale as he might think best, and for such price or sums as he could reasonably obtain therefor, and to apply the proceeds, after paying the expenses of sale, to the payment or reduction of the $5,350. Long after the expiration of the time set for the payment of the note, the defendant, after giving public notice, had the bonds sold at public auction, and no one else appearing to buy the same had them bought in for himself for the sum of $799.31.

Should this amount be allowed in reduction of the $5,350 and interest thereon? We think not. The bonds were received by the defendant as a pledge, or collateral security, and notwithstanding there was a power of sale contained in the instrument, the attempted sale and purchase in this case cannot be upheld. Without such power of sale the defendant could not at the same time act in the double capacity of seller and purchaser of the property thus entrusted to him as security merely. He stood in a fiduciary relation in reference to the property entrusted to

him. It is a salutary and sound principle that agents to sell cannot be purchasers; and it is a general rule that trustees of every description, who are invested with power to sell, can never directly or indirectly become the purchasers of the trust property. *Dyer* v. *Shurtleff*, 112 Mass. 165, 167; *Arnold* v. *Brown*, 24 Pick. 89, 96; *Remick* v. *Butterfield*, 31 N. H. 70; *Coles* v. *Trecothick*, 9 Vesey, 234, 247; *Ex parte James*, 8 Vesey, 337, 346; *Carter* v. *Palmer*, 8 Cl. & Fin. 657, 706; *Church* v. *Mar. Ins. Co.* 1 Mason, 341; *Barker* v. *Same*, 2 Mason, 369. The pledgee cannot himself purchase the pledge at the sale. *Stokes* v. *Frazier*, 72 Ill. 428; *Bank* v. *Dubuque, etc., R. Co.* 8 Iowa, 277; *Bryson* v. *Rayner*, 25 Md. 424; *Marsh* v. *Whitmore*, 21 Wall. 178, 183; *Wardell* v. *Railroad Co.* 103 U. S. 651, 658.

The case of *Bank* v. *Minot*, 4 Met. 325, carries the doctrine to the extreme limit, and further, perhaps, than justice may require in protecting the rights of the pledgor under an express power of sale. There, a bank made a loan and took a pledge of the borrower's shares in its stock, as collateral security, with a power to sell either at public or private sale, if payment should not be made according to the terms of the loan. After the borrower's decease, the bank sold the shares at auction, notice having been given, for non-payment of the loan, and became the purchaser at the sale, giving credit for the amount received, and claimed the balance of the borrower's administrator. It was held that nothing passed to the bank by this form of sale. The court say: "The plaintiffs had full authority to sell the bank shares which were pledged to them, and their sale to a third person would have passed the property. But they could not be the purchasers. Nothing, therefore, passed by the form of sale at auction, in which they purchased in the shares; and they still held the same under their original title, as collateral security for their debt."

The doctrine enunciated in this case seems too rigorous, and we think it will be found to be modified wherever circumstances are shown indicating acquiescence, ratification, or approval on the part of the pledgor. *Marsh* v. *Whitmore*, 21 Wall. 178.

The pledgor may lawfully stipulate that the pledgee may purchase; and this stipulation may be made at the time of the pledge. The pledgor may afterward authorize the pledgee to purchase, or he may ratify such purchase after it has been made. Such ratification may even be inferred from circumstances. But such purchases are certainly voidable,— and presumably void, though not conclusively so. The burden of showing authority for the pledgee to become the purchaser, or ratification, is cast upon the purchaser in such case. *Burnham* v. *Heselton*, 82 Maine, 495, 500, illustrates this principle.

In the present case there was no authority for the pledgee to become the purchaser of the bonds. Neither was there ratification or approval on the part of the pledgor. Consequently the sale and purchase must be held to be void.

No computation is, of course, necessary to show that the remaining claims of the defendant in connection with the claim before mentioned, amount to very much more than the plaintiff's claim, and consequently entitle the defendant to a full defense in this action.

Nor can the fact that these latter claims have merely been proved in the insolvency proceedings,— nothing ever having been received by way of dividends, or otherwise, on the same, — operate to debar the defendant from submitting them in proof in this action as "*bona fide* claims in contract" held by him against the corporation. The right to prove these claims in defense is given expressly by the statute provisions hereinbefore considered. There is no provision of statute by which he can be held to have waived his right to such proof. To insert such a condition where none exists, on the part of the court, would be judicial legislation.

Judgment for defendant.

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

JOHN MORRISON, Administrator of HANNAH P. MARVELL,

vs.

84 82
93 291 JOHN G. BROWN, Executor of WILLIAM MARVELL.

Franklin. Opinion December 8, 1891.

Action. Husband and wife. Limitation. R. S., c. 61, § 5; c. 81, § 88; c. 87, § 12.

Upon a promissory note given by a husband to his wife, an action may be maintained if begun within six years after her decease and within two years and six months of due notice given of the appointment of his executor.

AGREED STATEMENT.

J. C. Holman, for plaintiff.

E. O. Greenleaf, for defendant.

VIRGIN, J. The promissory note declared on, dated June 6, 1872, was given by the defendant's testator to his wife, the plaintiff's intestate. The parties thereto were married in 1858, and cohabited as husband and wife until the death of the wife in July, 1887. The husband also died in August, 1889.

There is no evidence tending to show that the note was without consideration as in *Fuller* v. *Lumbert*, 78 Maine, 325; on the contrary the only evidence upon that question is contained in the note itself which states that it was given "for value received," which is sufficient evidence, *prima facie*, of consideration. *Bourne* v. *Ward*, 51 Maine, 191.

No question is raised as to the sufficiency of the demand made under R. S., c. 87, § 12, on July 29, 1890, on the defendant. But the general statute of limitation is pleaded.

The provision in R. S., c. 61, § 5, authorizing a married woman to prosecute suits at law in her own name, as if unmarried, refers to those by the wife against third persons (*Brown* v. *Cousens*, 51 Maine, 301) and not to those against her husband. *Crowther* v. *Crowther*, 55 Maine, 358. She cannot maintain assumpsit or replevin against her husband during coverture. *Hobbs* v. *Hobbs*, 70 Maine, 383; *Crowther* v. *Crowther*, *supra*. Nor after the connubial relation has ceased by reason of divorce

can she maintain an action on the case against him or those acting under his direction, for an assault made upon her during the subsistence of that relation. *Abbott* v. *Abbott* 67 Maine, 304; *Libby* v. *Berry*, 74 Maine, 286. But after that relation has terminated she may maintain assumpsit against him on express or implied contracts made by them during the existence of the marriage relation, when the action is seasonably commenced. *Blake* v. *Blake*, 64 Maine, 177; *Webster* v. *Webster*, 58 Maine, 139; *Carlton* v. *Carlton*, 72 Maine, 115; *Gilley* v. *Gilley*, 79 Maine, 292; *Lane* v. *Lane*, 80 Maine, 570.

Was this action seasonably commenced? We think it was. It could not be brought during coverture of the plaintiff's intestate. But when that disability was removed by death, her personal representative could bring the action, at any time within the limited period thereafter (R.S., c. 81, § 88) provided it were commenced within the special limited period provided in R. S., c. 87, § 12. For the contract was legal, but its enforcement was suspended, so long as the marriage relation subsisted; and when that ceased the remedy quickened. *Wyman* v. *Whitehouse*, 80 Maine, 257, 262. This action was commenced within six years after the wife's decease, and within two years and six months after this defendant was appointed executor of the last will and testament of his testator, and had given the requisite notices of his appointment.

Judgment for plaintiff for face of note with interest from date of demand, July 29, 1890.

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

FRANK A. PAGE *vs.* WILLIAM D. ALEXANDER.

Kennebec. Opinion December 8, 1891.

Jury. Instruction. Practice.

Upon the issue whether an ox that drools is a defective animal, an instruction that the jury "may call into requisition their practical experience and knowledge relating to cattle of this kind," is erroneous.

ON EXCEPTIONS.

A verdict for the defendant having been rendered at the trial in the Superior Court, the plaintiff brought his exceptions to the rulings and instructions of the presiding justice for determination of the law court. The view taken by this court renders a full report of the bill of exceptions unnecessary.

S. S. Brown, *George W. Field* with him, for plaintiff.

Webb, *Johnson and Webb*, for defendant.

VIRGIN, J. Action on the case for deceit in the sale of a pair of oxen.

The allegation was that the defendant, at the time of sale, knowingly, designedly and falsely represented the oxen to be "all right."

The alleged defect, proved by the plaintiff and admitted by the defendant, was that one of the oxen was a "drooler." The principal question of fact submitted to the jury was whether that was a defect.

One of the instructions to the jury was that they "had a right to call into requisition, in a case of this sort, their practical experience and knowledge, if they had any, relating to cattle of this kind;" which was clearly erroneous and perhaps prejudicial to the plaintiff's right to maintain his suit, for we cannot know that the instruction did not thus injuriously influence the jury; and the plaintiff has the right to consider himself thereby aggrieved. *Douglass* v. *Trask*, 77 Maine, 35; *Gas Light Co.* v. *Graham*, 81 Am. Dec. 263 and note and cases there cited. And as this gives a new trial, we need not consider the other exceptions. *Exceptions sustained.*

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

CHARLES G. FILES *vs.* ROBERT M. STEVENS.

York. Opinion December 8, 1891.

Attachment. Exempted property. R. S., c. 81, § 62. cl. 9.

A merchant, who has plows and harrows for sale, cannot claim one plow and one harrow exempt from attachment when he is duly declared insolvent.

AGREED STATEMENT.

The facts appear in the opinion.

Fox and Gentleman, for plaintiff.

Fred V. Matthews, for defendant.

VIRGIN, J. Prior to August 6, 1890, the plaintiff was a trader. On that day his creditors filed their petition in the court of insolvency praying that he be declared insolvent. Thereupon the defendant, as messenger, under a warrant from the judge of insolvency, seized the plaintiff's stock in trade, among which were four new plows and two new harrows.

On September 3, 1890, the plaintiff was duly declared an insolvent, whereupon the defendant, on the petition of the plaintiff's creditors, was ordered by the judge of the insolvent court to sell the stock. Prior to the sale, the plaintiff claimed, under R. S., c. 81, § 62, cl. 9, that one of the plows and one of the harrows (without designating which of them) were exempt from attachment; but the defendant sold the whole of the stock and the plaintiff brought this action of trover to recover the value of one plow and one harrow.

We are of opinion that the plow and harrow were not exempt. The case finds that the plaintiff had these agricultural implements for sale simply and that he neither owned nor leased a farm. The statute of exemption is to be construed with reference to the situation and vocation of the owners of property. A merchant cannot claim such implements to be exempt, any more than he could a boat which he had no occasion to use as a fisherman, or corn or grain for himself and family when he was unmarried and had no family and was a boarder (*Blake* v. *Baker*, 41 Maine, 80); or hay for cows and sheep when he had neither. *Foss* v. *Stewart*, 14 Maine, 312. The evident object of the statute is that, not that any one may own and claim to be exempted all the various kinds of chattels therein enumerated, but that persons should not be deprived of the simple means by which they gained a livelihood in their respective vocations.

Judgment for defendant.

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

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GEORGE M. TOWER *vs.* ALVAH HASLAM.

Hancock. Opinion December 8, 1891.

Exceptions. Practice. Estoppel. Instructions. New Trial. Damages.

Generally the Law Court can act upon a bill of exceptions only in the form as made up and allowed at *nisi prius*; but the stenographer's report when expressly made a part of the bill, must control the allegations of fact if there be a conflict.

Requested instructions not based upon the facts proved, are properly refused.

Requested instructions must be complete and correct as an entirety, otherwise they are properly refused.

However well calculated the conduct of one may be to influence another to act in a particular manner, no estoppel can arise unless he who alleges it was thereby induced to and did in fact act.

Where the conditional purchaser of a buckboard gave to the plaintiff therefor one promissory note for seventy-nine dollars and a Holmes note for sixty-one dollars, and subsequently paid a part of the former and gave a new note for the balance, in trover for the conversion of the board by a third person; *Held*: That an instruction that, "the plaintiff could recover, if anything, the amount due on the Holmes note and the new note, provided such amount did not exceed the value of the buckboard at the time of the conversion," afforded the defendant no cause for exception.

A motion to set aside a verdict as being against the manifest weight of evidence, is not generally sustained, when the evidence is conflicting and the verdict is sustained by the positive testimony of two or more witnesses.

ON MOTION AND EXCEPTIONS.

This was an action of trover for a buckboard. Date of writ, October 10, 1890. The plaintiff's title was under a Holmes note from Thomas T. Dorr, dated June 25, 1887, recorded July 29, 1887. The defendant's title was under a sale and delivery of the buckboard from Dorr to one Penney and from Penney to the defendant. It was not disputed that the defendant purchased in good faith. From the bill of exceptions it appears:

1. The defendant contended that the sale and delivery of the buckboard from Dorr to Penney was prior to the date of the record of the plaintiff's note. All his witnesses so testified. Dorr and Penney, witnesses called by the defendant, also testified in effect that they made this trade for the sale of the buckboard to Penney, in the presence of the plaintiff, and that Penney asked the plaintiff if he had any claim on the buckboard, and

that the plaintiff answered in the negative. The defendant's counsel in his argument to the jury did not admit that the sale might have been after the date of the record of the note, but based his defense on the proposition that the said sale was prior to that date. The defendant's counsel, however, requested the presiding justice to instruct the jury, that if the sale from Dorr to Penney was made in the presence of the plaintiff, and the plaintiff did not disclose his claim, but said he had no claim to the buckboard, then the plaintiff was estopped from setting up any claim against Penney or his vendee, the defendant. The presiding justice did not give the requested instruction, but did instruct the jury that if the sale and delivery of the buckboard by Dorr to Penney were prior to the date of the record of the note, the plaintiff could not recover even though Penney had other actual notice of the plaintiff's claim; and further said to the jury, that the defendant has placed his defense on that proposition.

2. The defendant's counsel also requested the presiding justice to instruct the jury that if, when Dorr purchased the buckboard of the plaintiff, it was expressly agreed between them that the title should pass to Dorr, and the plaintiff should assert no claim of title or possession until maturity of the note and condition was broken, and Penney bought and sold *bona fide* without notice and for a valuable consideration, and Haslam, the defendant, likewise so bought and sold, all before the maturity of the note, then trover would not lie. This requested instruction was not given.

3. Two notes were originally given by Dorr for the buckboard and recorded. One had been partially paid, and a new note given for the balance. The other note was wholly unpaid. The presiding justice ruled that if the plaintiff was entitled to recover he could recover as damages the amount due on both notes, that is, the original second note, and the new note given in renewal of balance of first original note, provided such amount did not exceed the value of the buckboard at the time of its conversion.

The bill of exceptions states that the entire evidence is made

a part thereof. The jury rendered a verdict for the plaintiff for the full amount of his claim.

Deasy and Higgins, *E. S. Clark* with them, for plaintiff.

Hale and Hamlin, for defendant.

Estoppel: *The Brig Sarah Ann*, 2 Sum. 206; *Merchants Bank* v. *State Bank*, 10 Wall. 604; *Baker* v. *Pratt*, 15 Ill. 568; *Mills* v. *Graves*, 38 Ill. 455; *People* v. *Brown*, 67 Ill. 435; *Knoebel* v. *Kircher*, 33 Ill. 308; *Smith* v. *Newton*, 38 Ill. 230; *McCravey* v. *Remson*, 54 Am. Dec. 194; *Dezell* v. *Odell*, 3 Hill, 221; *Stonard* v. *Dunkin*, 2 Camp. 344; *Chipman* v. *Searle*, 3 Pick. 38; *Stevens* v. *Baird*, 9 Cow. 271; *Frost* v. *Ins. Co.* 5 Cow. 157; 1 Greenl. Ev. § 208; *Gregg* v. *Wells*, 10 A. and E. 90; *Pickard* v. *Sears*, 6 A. and E. 469; *Chapman* v. *Pingree*, 67 Maine, 198; Big. Est. p. 560, et seq.

Trover does not lie. *Vincent* v. *Cornell*, 13 Pick. 294; *Boobier* v. *Boobier*, 39 Maine, 406 (plaintiff did not have right of immediate possession). *Winship* v. *Neale*, 10 Gray. 382; *Newhall* v. *Kingsbury*, 131 Mass. 445, and cases cited. *Horwood* v. *Smith*, 2 T. R. 750; *Farrant* v. *Thompson*, 5 B. and A. 826. Damages: Holmes note of $61, same as a mortgage under our statute. Plaintiff not entitled to recover more than the amount due thereon. *Warren* v. *Kelley*, 80 Maine, 512.

VIRGIN, J. Trover for a buckboard delivered by the plaintiff on June 25, 1887, to one Dorr and taking back therefor a Holmes note, of the same date, for $61, on fourteen months, duly recorded on July 29, 1887.

Within a few weeks (exact date in dispute) after his conditional purchase, Dorr exchanged the buckboard for a "cut-under" with one Penney, who, in September following, sold it to the defendant, who in June, 1888 — before the commencement of this action — sold it to one Smith.

The defense was put upon three grounds:

(1.) That the defendant's vendor (Penney) purchased the buckboard some time before the Holmes note given therefor was recorded on July 29, which issue the jury found for the plaintiff.

(2.) That the plaintiff, by his acts and silence, was estopped from claiming title in the property. The testimony upon this point was in dire conflict. The bill of exceptions states that, "Dorr and Penney, witnesses called by the defendant, testified in effect that they made the trade for the sale of the buckboard to Penney, in the presence of the plaintiff, and that Penney asked the plaintiff if he had any claim on the buckboard, and that the plaintiff answered in the negative." That "the defendant's counsel requested the presiding justice to instruct the jury that, if the sale from Dorr to Penney was made in the presence of the plaintiff and the plaintiff did not disclose his claim, but said he had no claim to the buckboard, then the plaintiff was estopped from setting up any claim against Penney or his vendee, (the defendant)"—which the judge declined to give. Did he err? We think not.

While generally this court can act on a bill of exceptions only in the form as made up and allowed at *nisi prius* (*Hunter* v. *Heath*, 76 Maine, 219), still when the stenographer's report of the evidence is made a part of the bill of exceptions, it must control the allegations in the bill as to matters of fact, if there be a conflict between them. *Harmon* v. *Harmon*, 63 Maine, 437. Bills of exceptions are generally made at the heel of the session before the stenographer has extended his minutes and the report is made a part of the bill for the special purpose of correcting possible errors incident to the circumstances.

In the case at bar the reported evidence is made a part of the bill. By that it appears: (1,) That they did not make the trade in the presence of the plaintiff. (2,) Nor did they testify that Penney asked the plaintiff if he had any claim on the buckboard. (3,) Nor did they testify, as stated in the bill, but on the other hand, that, when Dorr, in the presence of Penney, informed the plaintiff that he himself "was talking of trading the buckboard for a cut-under with Penney," that "the plaintiff did not say anything about it."

Requested instructions not based upon the facts proved, are properly refused. *Brackett* v. *Brewer*, 71 Maine, 478; *Grant* v. *Libbey*, *Id.* 427; *Pillsbury* v. *Sweet*, 80 Maine, 392. The

requested instruction was not founded on facts proved, but on allegations of facts erroneous in the three particulars named.

Moreover, if the plaintiff did make the statement alleged in the bill of exceptions, the presiding justice might properly decline to give the peremptory instruction as requested. For notwithstanding the want of harmony among the authorities in their attempt to reduce the doctrine of equitable estoppel within the limits of any particular formula, they all agree that, however well calculated the conduct of one may be to induce or influence another to act in a particular manner, no estoppel can arise unless he who alleges it was thereby induced or influenced to, and did in fact act. *Titus* v. *Morse*, 40 Maine, 348; *Allen* v. *Goodnow*, 71 Maine, 420; 2 Pom. Eq. § 812, and numerous cases in notes. That element is present in all the cases on equitable estoppel cited on the defendant's brief. And that is a question of fact for the jury. *Pickard* v. *Sears*, 6 Ad. and E. 469; 1 Thomp. Tr. § 1109. So the meaning of words used in a conversation and what the parties intended thereby to express, is exclusively for the jury to determine; and it is not for the court to rule as a matter of law that they amount to an equitable estoppel. *Brubaker* v. *Okeson*, 36 Pa. St. 519. Moreover requested instructions must be complete and correct in their entirety, otherwise they are properly refused (*Grand T. R. Co.* v. *Latham*, 63 Maine, 177; *Snow* v. *Penob. R. I. Co.* 77 Maine, 55) as well as applicable to the facts proved. *Duley* v. *Kelley*, 74 Maine, 556.

(3.) Neither was the second requested instruction applicable to facts proved. The gravamen of the request is put upon the hypothesis, "that if, when Dorr purchased the buckboard of the the plaintiff, it was expressly agreed between them that the title should pass to Dorr, and the plaintiff should assert no claim, until maturity of the note and the condition was broken," &c. But no such facts were proved. Dorr testified — "Nothing was said about the note, only I was to give him my note for the board." To be sure, the plaintiff testifies that his custom was "to let men have boards and take their notes and record them, and that he never interfered with men's possession until the

notes became due and they cannot pay — sold Davis his in the same way." Such was his custom. But that is far from an "express agreement" with Dorr that "the title should pass to Dorr, and that he would not assert any claim," &c. And such as the bill of exceptions recites especially as to the passing of the title to Dorr, would be a direct contradiction of the express terms of the note itself, which is the peculiar characteristic of such a note.

The defendant takes exception to the rule of damages given by the presiding justice. Dorr gave two notes for the buckboard — one for $79, on four months, and the Holmes note for $61, on fourteen months. On October 24, 1887, $30, were paid on the former and a new note then given for the balance of $49. The presiding justice instructed the jury that, the plaintiff could recover, if anything, the amount due on the Holmes note and the new note — "provided such amount did not exceed the value of the buckboard at the time of the conversion." We think the instruction was sufficiently favorable to the defendant. *Brown* v. *Haynes*, 52 Maine, 578; *Grant* v. *King*, 14 Vt. 367.

The defendant strenuously contends that, on the issue of fact whether Dorr sold to Penney before or after the registration of the note, the finding that it was after, should be set aside as being against the manifest weight of the evidence. A careful examination of the evidence leaves a strong impression in our minds that the preponderance of evidence is against the finding. But a jury of the vicinage, with better opportunities for finding the truth in this conflicting evidence, with the issue sharply made and fully presented, have found a verdict based upon the express testimony of three witnesses, which if true makes the verdict well grounded — though the testimony of several other witnesses tends to prove the contrary. In this connection the defendant lays great stress on the improbability of the truthfulness of the testimony of the plaintiff and one Leland that about the middle of August (two weeks after the note had been received back from the recording clerk) the defendant drove to the plaintiff's premises with the buckboard and said he "was

talking of trading for the board, but did not want to trade for it and then have it taken away from him," and asked, "what about this board of Dorr's;" that the plaintiff replied, "I have got a Holmes note on it and it is recorded, and I took out the note and showed it and the record to Penney, and told him nothing had been paid on the note and I shall hold the board until it is paid for." The defendant testified that those statements were entirely false. And it is urged that the defendant's denial is true, or else he would not, with all this knowledge as to Dorr's want of title, have completed the trade and taken the risk of having "it taken away from him," which he assigned as the reason for seeking for the information. We appreciate the force of this suggestion; but we think the improbability is very materially neutralized by the testimony of Dorr that, "at the time he was good as anybody," meaning of course financially speaking.

Motion and exceptions overruled.

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

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CORISAND W. WOODBRIDGE, Administratrix.

vs.

EUNICE S. TILTON, Administratrix, *de bonis non.*

Somerset. Opinion December 8, 1891.

Probate. Plene administravit. R. S., c. 64, § 43; c. 66, § § 1, 2; c. 71, § 22.

In an action against an intestate estate, in the hands of an administratix *de bonis non*, the defense that the unadministered assets which came into her hands from her predecessors were exhausted in discharge of the preferred debts, must be sustained, if at all, by regular probate proceedings.

ON REPORT.

The case is stated in the opinion.

D. D. Stewart, for plaintiff.

Merrill and Coffin, for defendant.

VIRGIN, J. Assumpsit on a joint and several promissory note, dated January 22, 1880, given by W. T. Pettigrove and Freeman Tilton to Charles Woodbridge, for two hundred and

fifty dollars payable on demand and interest at eight per cent. The plaintiff is administratrix on the estate of the payee of the note; and the defendant is the widow and administratrix *de bonis non* on the estate of Freeman Tilton, one of the makers.

In addition to the general issue, the defendant pleaded, by way of brief statement, *plene administravit*; and the case comes up on report.

Documentary evidence from the probate court, chronologically stated, shows the following facts:

On December 14, 1887, one Charles E. Tilton was duly appointed and qualified administrator on the estate of Freeman Tilton, of which due notice was given.

At the January term, 1888, the defendant filed her petition for an allowance, alleging therein that "there are no debts and that her husband died solvent."

At the Feburary term, 1888, Charles E. Tilton, administrator, returned an inventory which showed goods and chattels valued at twelve dollars and fifty cents and three promissory notes due the estate, one for one hundred and forty-four dollars and eight cents, one for thirty-four dollars and eighteen cents, and the other for one hundred and forty-five dollars, and cash three dollars, all amounting to three hundred and thirty-eight dollars and seventy-six cents.

At the July term, 1888, Charles E. Tilton, administrator, having died, the defendant was duly appointed and qualified administratrix *de bonis non* on the estate of her husband, of which notice was duly given; but no inventory was ever returned by her.

At the August term, 1888, Charles E. Tilton having died, his first and final account of administration was duly settled by Relief G. Tilton, administrator on his estate; by which it appears that, after payment of expenses of his administration of the estate of Freeman Tilton, a balance of two hundred and ninety-eight dollars and seventy-six cents was found against her intestate as administrator, which was turned over to the defendant administratrix *de bonis non*. This balance consisted, as she testified, of the two larger notes mentioned in the inventory

returned by Charles E. Tilton hereinbefore stated, and which remained uncollected.

At the November term, 1888, after due notice on the defendant's petition for allowance filed at the previous January term, the judge of probate made the following summary decree: "That there be allowed to said widow, out of the personal estate of said deceased, all that remains after paying thirty dollars for grave stones and the expenses of administration."

The defendant as administratrix *de bonis non* is subject to the responsibilities of the original representative of her husband's estate with respect to the estate left unadministered by him. Sch. Ex. and Ad. § 409. The two larger notes described in her predecessor's inventory remaining uncollected and hence unadministered (Sch. Ex. and Ad. § 408) were turned over to her, which discharged him and made her accountable therefor. *Fay* v. *Muzzey*, 13 Gray, 53; *Cobb* v. *Muzzey*, *Id.* 57. Thereupon it became her duty to return a true inventory of them (Sch. Ex. and Ad. § 408) and of all real estate "which came to her possession and knowledge." R. S., c. 64, § 43.

As before seen, the defendant returned no inventory whatever; and this omission was a breach of her bond. *Bourne* v. *Stevenson*, 58 Maine, 499.

To enable the defendant to exonerate herself from this liability for the assets which "came to her possession" from her predecessor, it must appear from the regular probate proceedings that she has exhausted them in discharge of the preferred debts enumerated in R. S., c. 66, § 1, which include her allowance regularly decreed. "It is only by an inventory and an account and by regular proceedings in the probate court, that an administrator can defend a suit on the ground of insolvency of the estate." *Cushing* v. *Field*, 9 Met. 180; *Bates* v. *Avery*, 59 Maine, 354. If, however, the assets are sufficient only to pay the preferred debts, the statute does not require the useless ceremony of formally representing the estate insolvent. R. S., c. 66, § 2. There was no inventory filed and no account settled, and a very compendious decree for allowance made. Such a mode of settling estates cannot properly be upheld when called in question by creditors.

The case further shows that Freeman Tilton (defendant's husband,) on December 21, 1881, eleven months after giving the note in suit for the consideration mentioned of one thousand seven hundred and fifty dollars, conveyed his farm to this defendant, then his wife. That on November 8, 1882, she, in consideration of the same named sum, conveyed the same farm to Elmer D. McFarland, who on the same day, "in consideration of having a deed of conveyance of the homestead farm of Eunice S. Tilton and Freeman Tilton," mortgaged the same "to the said Eunice and Freeman, their heirs," &c., to secure their maintenance "during their natural lives."

These conveyances, the plaintiff contends, were fraudulent so far as the note was concerned, as they were made long after the note was given. Conveyances from husband to wife are to be closely scanned when the rights of his creditors are concerned. *Robinson* v. *Clark*, 76 Maine, 493. A husband, who is justly indebted to his wife, may appropriate his property to the payment of her claim, to the exclusion of his other creditors. *Ferguson* v. *Spear*, 65 Maine, 277; and a conveyance by a debtor to his wife is not to be presumed to be fraudulent. *Grant* v. *Ward*, 64 Maine, 239. But when made without consideration, they are subject to the debts of existing creditors, although no fraud was actually intended thereby (*Robinson* v. *Clark*, *supra*), and an agreement to support a grantor may be a valuable consideration, but it is not sufficient to uphold a conveyance against prior creditors even when there was no intended fraud. *Webster* v. *Withee*, 25 Maine, 326; *Sidensparker* v. *Sidensparker*, 52 Maine, 481; *Egery* v. *Johnson*, 70 Maine, 258.

And it is the duty of an administrator *de bonis non* when aware of a fraudulent conveyance to make a sale of land thus conveyed. R. S., c. 71, § 22. A refusal or neglect so to do would create such a liability as is visited upon other malfeasance or nonfeasance in the performance of his trust. Sch. Ex. and Ad. § 297; *Brown* v. *Whitmore*, 71 Maine, 65, 67. And when sold the proceeds would be assets to be administered. *Brown*

v. *Whitmore*, *supra*. The defendant knows whether or not she paid her husband the consideration named in his deed to her.

Judgment for amount due on the note.

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

MARY HOLLIS *vs.* EDMUND S. HOLLIS.

Waldo. Opinion December 9, 1891.

84	96
93	429
84	96
97	222
97	490

Mortgage. Foreclosure. Discharge. R. S., c. 90, § 5.

The attempted foreclosure of a mortgage of land by publication under R. S., c. 90, § 5, is fatally defective, if the certificate recites that the notice was given in a newspaper "published" instead of "printed" in the county where the premises are situated. It is also defective unless the "date of the newspaper in which the notice was last published" was recorded.

A mortgage and note secured thereby, was to become void either by payment of the note or "if the said mortgagee should die before the note is paid, then this deed and note are null and void." *Held;* That the mortgage became void upon the death of the mortgagee before payment of the note.

AGREED STATEMENT.

The case is stated in the opinion.

The conditions stated in the mortgage, making a part of the tenant's title, are as follows:

"Provided nevertheless, That if the said *Reuel A. Hollis, his* heirs, executors, or administrators, pay to the said *Susan Rand her* heirs, executors, administrators, or assigns, the sum of *three hundred & fifty dollars, for which the said Reuel A. Hollis has given the said Susan Rand his note on demand with interest. Now if the said Susan Rand should die before this note is paid, then this deed & note are null and void and the said Susan Rand is never to transfer this deed* then this deed, as also *a* certain *note* bearing even date with these presents, given by the said *Reuel A. Hollis* to the said *Susan Rand* to pay the sum and interest at the time aforesaid, shall both be void, otherwise shall remain in full force."

The words printed in italics are written in said mortgage with a pen.

R. F. Dunton, and F. W. Brown, for plaintiff.

W. P. Thompson, for defendant.

VIRGIN, J. Writ of entry. The question is which of the parties has the better title. Both parties claim under Susan Rand.

The demandant's title. On May 21, 1875, Susan Rand, by her deed of warranty, conveyed the demanded premises to her son Reuel, who, on the same day mortgaged back to her the same premises to secure his promissory note, of the same date, for three hundred and fifty dollars payable on demand with interest.

On June 26, 1876, Reuel quitclaimed his title to one Grant, who, on March 3, 1877, quitclaimed his interest to the demandant.

The defendant claims title through an alleged foreclosure of the mortgage by Reuel to his mother, of May 21, 1875, and the probated will of the mortgagee (Susan Rand) wherein the use and possession of all her real estate was given to the defendant and his wife during their natural lives.

The condition in the mortgage is somewhat peculiar. It consists of the mention of two distinct events by the happening of either of which the note and mortgage were both to become void. One — usually found in the printed form — that on the payment of the note at the time mentioned therein, the note and mortgage "both to become void;" and the other (written in the blank space between the clauses of the former) in these words: "Now if the said Susan Rand should die before this note is paid, then this deed and note are null and void, and the said Susan Rand is never to transfer this deed."

The intention of the mother and son as disclosed by the language of the condition seems to have been that the son was to pay the note in full, unless his mother died before that event happened, and if she died before, then the note, or the balance remaining then unpaid, should be considered as forgiven.

It appears that the note was not fully paid in December, 1875, and the mother attempted to foreclose the mortgage by publishing notice in accordance with R. S., c., 90, § 5. But the certificate is fatally defective in two particulars. It states that the notice was given in a newspaper "published," instead of "printed" in the county, as the statute requires. *Blake* v. *Dennett*, 49 Maine, 102; *Bragdon* v. *Hatch*, 77 Maine, 433. It

fails to show that the date of the newspaper in which the notice was last published, was recorded. R. S., c. 90, § 5.

The will does not mention the mortgage on the land mentioned in it; and the testator was estopped to transfer the mortgage by its express terms.

Moreover, the mother having deceased in March, 1889, the mortgage then became void.

The demandant's claim under the warranty deed of Susan Rand, shows better title than the mere possession of the defendant.

Judgment for demandant.

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

CHARLES C. POOR *vs.* DANIEL LORD.

84 98
93 540

Penobscot. Opinion December 9, 1891.

Quieting Title. Adverse claimant. R. S., c. 104, § § 47, 48.

A petition under R. S., c. 104, § § 47 and 48, praying for the respondent to bring an action to try his alleged title to certain real estate, of which the petitioner is in possession claiming the fee, will not be sustained when the respondent's claim is under a mortgage of the premises.

ON REPORT.

The case is stated in the opinion.

C. A. Bailey, for plaintiff.

P. G. White, for defendant.

VIRGIN, J. This is a petition under R. S., c. 104, § § 47 and 48, praying that the respondent be "summoned to show cause why he should not bring an action to try his alleged title" to the real estate described in the petition, in which the petitioner claims the fee and of which he claims to be in possession.

The allegation is that the respondent claims under a mortgage of the premises which has been paid. While the petition may in one sense, perhaps, bring the case within the letter of the statute, we do not think it was intended to apply to the claims of mortgagees or their assignees, and thus compel them to collect

the sum secured thereby. If the mortgage is valid and subsisting, equity affords the petitioner a full and complete remedy of redeeming his land without surrendering the possession. If it has become invalid, but simply remains undischarged and thus hangs as a cloud upon the title, still equity gives the fullest power to remove the cloud, which under the present rules, is a much more prompt and complete remedy than that of compelling the holder to bring his action at law. Such is in accordance with the decisions of Massachusetts under a like statute. *Clouston* v. *Shearer*, 99 Mass. 209, and the cases therein cited.

Petition dismissed.

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

INHABITANTS of MONSON, Petitioners,

vs.

COUNTY COMMISSIONERS.

Piscataquis. Opinion December 9, 1891.

Way. Location. Notice. Certiorari. R. S., c. 18, § § 9, 14, 19, 26.

After notice on the petition for a town way was ordered and complied with, a railroad company purchased for fuel a lot of woodland across which the road was subsequently located; *Held,* That a writ of certiorari will not be issued to quash the proceedings of the location, simply because no "notice of the time and place of hearing upon the location was served upon the station agent of the railroad in the town," as prescribed in R. S., c. 18, § 26.

ON REPORT.

The opinion states the case.

J. F. Sprague, for petitioners.

W. E. Parsons, and Henry Hudson, for defendants.

VIRGIN, J. The inhabitants of Monson ask for a writ of certiorari to quash the record of the county commissioners which located a town way wholly in that town, one terminus of which connects with a highway.

The petition for the way was presented and the statutory notice ordered thereon, at the regular session of the commissioners held on April 1, 1890.

After the notice was complied with, but prior to the time fixed for the hearing, viz.: on May 5, 1890, the Monson Railroad Company purchased and received the conveyance of a woodlot, of one hundred and ten acres, situated outside of its location. It was purchased for the sole purpose of taking the wood therefrom for the use of its locomotive engines.

The way was located across the woodlot without any notice to or objection by the railroad company then or since the location. The statute gave it a year to take off the wood covered by the location (R. S., c. 18, § 9) and it was taken off from the entire lot and the lot was then sold.

The inhabitants of Monson are the sole petitioners for the writ. Their principal objection is that the land of a railroad corporation was taken for the way, and no "notice of the time and place of hearing upon said location was served upon the station agent of the railroad within the town," as prescribed in R. S., c. 18, § 26.

Assuming, — without deciding, — that the company had the right to purchase such a lot of land outside and away from its location, we nevertheless are of opinion that, inasmuch as the conveyance was not made until after the petition had been entered and noticed ordered thereon and complied with, even the company itself could take nothing by the objection. Notice in such cases must be predicated upon the facts as they exist at the time when ordered. The notice was all that the statute required. All parties then interested were duly notified. And if the company saw fit to purchase land across which the projected way was to be located, it could not expect that the proceedings would be stayed for the purpose of having a notice ordered and "served on its station agent." Such a notice is only necessary when the railroad owns land at the time a petition for a way across it is entered and notice ordered.

It is contended that the way, in fact, is a private way, and that it is undertaken by these proceedings to obtain the location

of a private way,— the damages for which should be paid by the one specially benefited thereby,— under the guise of a town way and compel the town to respond for the damages.

But it appears from the original petition that eleven inhabitants of the town, by petition duly presented, prayed the municipal officers to locate a town way described; and that after notice and hearing thereon, the municipal officers, on August 12, 1889, refused the prayer. The petitioners, within the statute period of one year (R. S., c. 18, § 19) viz.:— on April 1, 1890, presented their petition to the county commissioners, who, after due notice and hearing "adjudged that the municipal officers unreasonably refused to lay out said town way and that common convenience and necessity required that the road prayed for in said petition be granted," &c. When municipal officers lay out a way, they are required to "determine whether it shall be a town or private way." R. S., c. 18, § 14. When appealed to in this matter they refused to lay out any way, and the petitioners took their *quasi* appeal to the commissioners who have concluded that the way should be a town way and thereby granted the prayer of the petitioners from which decision no appeal has been taken. We are not aware of any law which these proceedings contravene. *Hall* v. *Co. Com.* 62 Maine, 327, and cases cited.

Writ denied. Petition dismissed.

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

FRED S. THORN *vs.* L. M. PINKHAM, and another.

Kennebec. Opinion December 11, 1891.

Promissory Note. Consideration. Duress. Release of Surety. Chattel Mortgage. Possession.

A promissory note taken in payment of money embezzled, is not void by reason of duress, because obtained on threats of a criminal prosecution, and is held for good consideration, to wit: the money stolen.

An agreement, by the holder of a promissory note, to give time on condition to be performed by the principal, will not discharge the surety, unless the condition be performed in such a manner as to operate as an absolute agreement to extend the time of payment.

An agreement, stipulating that a mortgagor may retain possession of the chattels mortgaged until the note secured by the mortgage shall fall due, cannot be enforced against the mortgaged property prior to that time; and an instruction to the jury in such case that, "if, before the mortgage note fell due, the mortgagee was informed that the mortgagor was disposing of the property and endeavoring to put it beyond his reach, it was his duty to secure it and apply it to the payment of the note," is manifestly erroneous.

A holder of a mortgage of chattels, given by the principal debtor to secure his promissory note, will not release a surety thereon by mere forbearance to enforce the mortgage for no unreasonable length of time after the note shall fall due.

ON MOTION AND EXCEPTIONS.

The case which came from the Superior Court, for Kennebec County, on plaintiff's motion and exceptions, is sufficiently stated in the opinion.

Heath and Tuell, *Farr and Lynch* with them, for plaintiff.

L. T. Carleton and F. E. Bean, for defendants.

HASKELL, J. Assumpsit on a promissory note for three hundred and seventy dollars, payable in twelve months, given by one Frank L. Pinkham for moneys of the plaintiff that he had embezzled, and signed by the defendants, his father and a relative, as sureties. The verdict was for defendants, and the case comes up on motion and exceptions.

I. It is contended that the note was obtained by duress, and that the consideration was illegal. Suppose the embezzler had been plainly told that, unless he paid or secured the amount that he had stolen, he would be prosecuted for the theft, and thereupon gave the note. That would not have been duress. "It is not duress for one who believes that he has been wronged to threaten the wrong-doer with a civil suit. And if the wrong includes a violation of the criminal law it is not duress to threaten him with a criminal prosecution." *Hilborn* v. *Bucknam*, 78 Maine, 485. Money stolen may be recovered in assumpsit, *Howe* v. *Clancey*, 53 Maine, 130; *a fortiori* is money embezzled a good consideration for a promise to refund it.

II. It is claimed that the sureties were discharged by the giving of time to the principal debtor. It appears that when the note was given it was agreed that he might continue in the

plaintiff's service, "so long as he did well," and pay from his wages twenty-four dollars a month on the note. After three payments amounting to fifty-six dollars he was discovered short in his accounts and discharged. The agreement to accept monthly payments of twenty-four dollars each, if unconditional, would have extended payment of the balance due on the note at maturity over a period of more than three months. If these payments had been regularly made until the note fell due February 18—21, 1890, there would have remained eighty-two dollars exclusive of interest, unpaid, to be met in four monthly payments.

The pertinent inquiry is, did the agreement, assuming that it was made upon sufficient consideration, operate as an extension of time for the payment of the note? The agreement arose from the mutual promises of the parties relating to the continued employment of a servant. The master promised wages to be applied in part to an existing indebtedness of the servant, "so long as he did well." The agreement contained a stipulation for continued service like a condition precedent to the validity of a contract; and when the condition failed, the agreement failed with it; so that, as the agreement was not absolute, no agreement for extending the time of payment on the note existed when the day of payment came. Had the condition been kept, the result might be otherwise, for, when the note fell due, had the time of payment been extended for a single day, the suretyship would have no longer remained "sure" and the sureties need not "smart for it." *Berry* v. *Pullen*, 69 Maine, 101; *Gifford* v. *Allen*, 3 Met. 255.

III. It is argued that the sureties are discharged by the plaintiff's neglect to apply on the note security given by the principal. It appears that, shortly after the note was given, the principal gave to the plaintiff a mortgage of his household furniture to secure the payment of the note. The mortgage stipulated that the principal debtor, the mortgagor, might retain possession of the mortgaged chattels until the note should become due. It further appears that the plaintiff had notice, before the maturity of the note, that the mortgagor had disposed of some,

at least, of the mortgaged chattels, but took no action until the bringing of this suit against the sureties, less than thirty days after the note fell due.

Until the maturity of the note, the plaintiff had no right to the possession of the mortgaged chattels under the terms of the mortgage. He did no act to release his lien upon the security. Mere forbearance to follow the security for so short a period cannot be considered a violation of the rights of the sureties. When the note matured they could have immediately paid it and thereby become subrogated to all rights of the mortgagee. *Berry* v. *Pullen*, *supra*; *Cummings* v. *Little*, 45 Maine, 183. The plaintiff was not bound to resort to the debtor's property before calling upon the sureties. *Fuller* v. *Loring*, 42 Maine, 481. If the plaintiff had voluntarily surrendered his security he would have discharged the sureties. *Springer* v. *Toothaker*, 43 Maine, 381. If the plaintiff's lien under the mortgage had expired by his own laches, as in that case, his remedy against the sureties might be lost; but here, no act of his has impaired his title under the mortgage. Up to the time this suit was brought, the sureties, on payment of the note, could have derived as much benefit from the mortgage as the plaintiff could have obtained.

Moreover, the instruction of the presiding justice that, if before the mortgage note fell due the mortgagee was informed that the mortgagor "was disposing of the property and endeavoring to put it beyond his reach, it was his duty to secure it and apply it to the payment of the note," is manifestly erroneous. The verdict is against law.

Motion and exceptions sustained.

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

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84 104
86 480
86 483
a88 563
89 458

GEORGE W. PETTENGILL *vs.* JOHN SHOENBAR.

Hancock. Opinion December 12, 1891.

Practice. Exceptions. Judicial discretion. Finding of facts.

The decision of a presiding judge as to matters of fact, in a case referred to him with right to except, is conclusive.

A party may except to any opinion, direction or judgment of the presiding justice upon questions of law; but this does not include such opinions, directions or judgments as are the result of evidence, or the exercise of judicial discretion.

ON EXCEPTIONS.

The case appears in the opinion.

Deasy and Higgins, for plaintiff.

Hale and Hamlin, for defendant.

FOSTER, J. Assumpsit upon a note and account annexed for goods sold and delivered. The case was heard by the presiding Judge with the right of exceptions. Judgment was rendered for the full amount sued for.

The defendant claimed that there was not sufficient proof of delivery of the goods to hold him liable; but the court ruled otherwise, and this is the only question raised by the exceptions.

A full report of the evidence is not before us, but the exceptions state that the plaintiff was a country store-keeper and the only witness, and that he introduced his books containing charges against the defendant regular in form, and testified that the articles charged were given by him in his course of business to his servant engaged in running his delivery team from the store, according to his regular custom and the custom of other merchants in that locality; and that he had presented the bill to the defendant who made no objection to it but promised to pay the same.

The exceptions controvert the correctness of the Judge's decision based upon the result of evidence and upon matters of fact. His decision was in relation to the sufficiency of proof of delivery of the goods.

It is a familiar principle that the decision of a presiding Judge as to matters of fact, in a case referred to him with right to except, is conclusive. *Berry* v. *Johnson*, 53 Maine, 401; *McCarthy* v. *Mansfield*, 56 Maine, 538; and as to the effect of testimony, *Haskell* v. *Angier*, 74 Maine, 192. And in such case no exceptions lie to his finding of any matter of fact. *Curtis* v. *Downes*, 56 Maine, 24. That while a party may except to

any opinion, direction or judgment of the presiding justice, upon questions of law, this does not include such opinions, directions or judgments as are the result of evidence, or the exercise of judicial discretion. *Dunn* v. *Kelley*, 69 Maine, 145, 147; *Thompson* v. *Thompson*, 79 Maine, 286, 291; *Edmunson* v. *Bric*, 136 Mass. 189; *Sheffield* v. *Otis*, 107 Mass. 282; *Backus* v. *Chapman*, 111 Mass. 386, 387.

No question of law is presented to us, unless it is whether the facts shown in the bill of exceptions would warrant the decision arrived at by the Judge who heard the case. We think they would. There was evidence tending to support the plaintiff's case, and to show a delivery of the goods, in addition to the books of account introduced by the plaintiff. The bill had been presented to the defendant. He made no objection to it, but promised to pay the same. The weight of this evidence was a matter for the presiding Judge, trial by jury having been waived. It is not open to us to revise his conclusion in reference to the weight that may be given to it as matter of fact. His finding upon the facts and the legitimate inferences to be drawn from them are as conclusive as if determined by a verdict. The question upon exceptions to the decision of the presiding Judge it must be borne in mind, is quite different from that raised upon a motion for a new trial. The weight or sufficiency of the evidence lies with the tribunal selected by the parties. If there was any evidence which, if submitted to a jury and they could legally find a verdict for the plaintiff, upon the question in issue, we cannot sustain exceptions to the decision of the presiding Judge, who in reference to this matter has been substituted for the jury. *Heywood* v. *Stiles*, 124 Mass. 275; *Barrett* v. *McHugh*, 128 Mass. 165, 166.

It becomes unnecessary to enter upon any discussion in reference to the admissibility of the plaintiff's books, supported by the suppletory oath of the party, or the weight or credibility to be given them. They were before the court, but they were not all the evidence introduced bearing upon the question of delivery. It is not for us to assume how much weight was attached to them, or that none was given to the other evidence. All we

can properly consider is what appears in the exceptions. *Withee* v. *Brooks*, 65 Maine, 14.

Exceptions overruled.

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

EDWARD CHASE *vs.* CHARLES M. JONES, and another.

The principle of the preceding case applied.

FOSTER, J. This case was heard by the presiding justice without the intervention of a jury, with the right of exceptions. He found there was a contract of sale, and that there was no rescission of it. The bill of exceptions states that these findings "are matters of fact, made upon the whole evidence."

There was ample evidence tending to prove a sale of the ice to the defendants, and that there was no rescission of the contract.

Upon these questions the finding of the presiding justice is conclusive, and we cannot revise it. This case is governed by the law as laid down in *Pettengill* v. *Shoenbar*, *ante*, where the question in relation to exceptions to rulings upon questions of fact is fully considered and authorities cited, and by *Barrett v. McHugh*, 128 Mass. 165, 166. *Exceptions overruled.*

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

M. S. Holway, for plaintiff.

Beane and Beane, for defendants.

JOHNSON KNIGHT, Administrator, *vs.* NANCY MCKINNEY.

Waldo. Opinion December 12, 1891.

Mortgage. Presumption of Payment. Limitations. Evidence.

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

The lapse of twenty years from the maturity of a mortgage raises only a presumption of payment which may be repelled.

Relationship of the parties, as well as the pecuniary circumstances of the parties, has legitimate weight upon this question.

ON REPORT.

The case is stated in the opinion.

J. H. Montgomery, for plaintiff.

W. P. Thompson, for defendant.

FOSTER, J. Real action, brought by the administrator of the mortgagee against the defendant who claims title and right to possession of the demanded premises under a mortgage of earlier date.

The mortgage under which the plaintiff claims title was given by the defendant's husband to Henry Knight, the plaintiff's intestate, October 20, 1879. That under which defendant claims title and possession was given by her husband to Seth L. Milliken October 1, 1861, and by him assigned to her February 26, 1863.

The question upon which the rights of these parties depends is, whether or not the mortgage under which the defendant claims is a valid subsisting mortgage, or whether it has been paid in fact, or presumptively by lapse of time so that it has no longer any legal existence.

If the mortgage is still a subsisting lien upon the real estate, the plaintiff cannot maintain this action.

The plaintiff relies upon the presumption of payment raised by the lapse of twenty years.

The uncontradicted evidence satisfies us that the mortgage has never been paid. Nothing but payment of the debt or its release will discharge a mortgage. *Bunker* v. *Barron*, 79 Maine, 62. The lapse of twenty years from the maturity of a mortgage raises only a presumption which may be repelled in various ways. The defendant purchased the mortgage and note in good faith, with money of her own. The assignment was made to her by the owner of it, and it thereby remained a subsisting lien upon the premises. Her husband, the mortgagor, had gone into the army. He was in possession of the premises up to the time of entering the service, and the defendant continued in possession ever afterward. He died in 1887. Milliken had been unable to collect either principal or interest of the husband. He was virtually insolvent.

The plaintiff contends that the mortgage has become barred

by the statute of limitations, inasmuch as no steps have been taken to enforce it since it became due in October, 1862.

As bearing upon that question the relationship of the parties has considerable weight, as well as the pecuniary circumstances of the party owing the debt. *Philbrook* v. *Clark*, 77 Maine, 176. Thus in the case of *Wanamaker* v. *VanBuskirk*, 1 Saxton's Ch. (N. J.) 685, presumption of payment of a mortgage twenty-three years overdue, given by VanBuskirk to Wanamaker, his wife's father, was relied on. The court said: "Length of time may be set up to show that nothing is due, as well as to raise a presumption of payment. Still, it is but a presumption, and the fact that in this case the parties interested are nearly related, and that the collection of the money might have occasioned distress, and even the payment of interest inconvenience, is sufficient to repel it. In cases where length of time is relied upon as evidence of payment, it may be repelled by showing the fact that the party was a near relation. This presumption may be repelled by a variety of circumstances. The very situation of the parties is of itself sufficient. One ground for a presumption of payment growing out of a lapse of time is that a man is always ready to enjoy his own. Whatever will repel this will take away the presumption of payment, and for this purpose it has been held sufficient that the party was insolvent or a near relation."

In the present case the reasons for the non-enforcement of the defendant's claim against her husband, are sufficiently strong to repel the presumption of payment.

Judgment for defendant.

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

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STATE *vs.* DAVID KYER, JR.

Penobscot. Opinion December 14, 1891.

Pleading. Practice. Exceptions. Motion in Arrest.

The defendant was convicted before a magistrate for a single sale of intoxicating liquor and after sentence appealed to the Supreme Court. Upon being

arraigned in the appellate court, he filed a general demurrer, claiming that the appeal papers consisting of copies of the record of judgment, complaint and warrant were not properly certified by the court below, and concluded his demurrer as follows: "Wherefore, for want of a sufficient complaint and warrant in this behalf, the said David Kyer, Jr., prays judgment," &c. The demurrer was overruled. The defendant without moving an arrest of judgment excepted to the ruling. *Held:* That the demurrer did not reach the record of conviction, and that the complaint and warrant only were open to objection; *also*, that the defect should be raised upon motion in arrest of judgment.

ON EXCEPTIONS.

The case is stated in the opinion.

C. A. Bailey, County Attorney, for the State.

P. H. Gillin, for defendant.

FOSTER, J.* The respondent appealed from the sentence of a magistrate after conviction upon a complaint charging him with having unlawfully sold a glass of intoxicating liquor. In the appellate court he filed a general demurrer, claiming that the copies of the complaint, warrant and record of conviction were not properly certified by the magistrate. The presiding justice overruled the demurrer and adjudged the complaint and warrant good.

To this ruling the respondent excepted.

The bill of exceptions makes the complaint, warrant and demurrer a part of the case.

The exceptions must be overruled. The demurrer strikes only at the complaint and warrant. These are duly certified. For want of a sufficient complaint and warrant only, does the respondent pray judgment. The joinder on the part of the State relates solely to that. The judgment of the court in adjudging the complaint and warrant good related to the same.

The cases cited by the defense (*Com.* v. *Doty*, 2 Met. 18, *Com.* v. *Burns*, 8 Gray, 482, and *Com.* v. *Sheehan*, 12 Gray, 28) were decided upon motion in arrest of judgment after conviction, and therefore the validity of all the papers brought up and filed was for the court to pass upon.

In *Com.* v. *Doty* none of the copies filed were certified. In *Com.* v. *Burns* a copy of the warrant only bore the certificate

of the magistrate, and in *Com.* v. *Sheehan*, while the complaint and warrant were certified to be true copies, the record of conviction was wanting in that particular.

Undoubtedly in these cases the court, upon motion in arrest of judgment, was bound to take notice of the omission of certification, for jurisdiction therein being wholly appellate, must appear upon the papers filed.

Not so here. While the decision of this court might have been otherwise than that now arrived at, had the objection of want of certification, if such exists, been raised upon motion in arrest of judgment, and been brought before it for determination, no such defect can be reached by this demurrer.

Exceptions overruled. Judgment for the State.

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

FIRST NATIONAL BANK OF BAR HARBOR

vs.

STEPHEN L. KINGSLEY, and FIRST NATIONAL BANK of ELLSWORTH, Trustee.

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Hancock. Opinion December 14, 1891.

Sunday law. Restoring consideration. Judicial notice. R. S., c. 82, § § 115, 116.

A contract made on Sunday, where the transaction of such business is prohibited, is an illegal contract and void between the parties.

The indorsement of a promissory note is an act within the statute prohibiting secular business on the Sabbath.

Before a party can defend an action, based on contract, on the ground that it is a Sunday contract, he must make restoration of whatever consideration he may have received under such contract.

The court will take judicial notice of the computation of time, and upon what day of the week a certain day of the month falls, or that a certain day of the month falls upon Sunday.

ON EXCEPTIONS.

The defendant filed a general demurrer to the declaration, which was in assumpsit upon two promissory notes both of which were dated Sunday. Upon joinder by the plaintiff the court overruled the demurrer and the defendant excepted. If the excep-

tions were overruled, it was stipulated that judgment should be rendered for the plaintiff.

The case sufficiently appears in the opinion.

E. S. Clark, for plaintiff.

Wiswell, King and Peters, for defendant.

FOSTER, J. The plaintiff as indorsee of two promissory notes made payable to the defendant or his order, declares against him as indorser of the same. The defendant challenges the plaintiff's right of recovery by a general demurrer to his declaration. The rights of the parties must be determined upon their pleadings.

The plaintiff's declaration sets out the date of each note, (August 4, 1889, and January 19, 1890, respectively, both of which dates fell upon Sunday,) and that this defendant, the payee, on the same day on which they bear date indorsed and delivered them to certain parties named, who on the same day indorsed and delivered them to the plaintiff.

Among other things of which the court takes judicial notice is the computation of time, and upon what day of the week a certain day of the month falls, or that a certain day of the month falls upon Sunday. *Philadelphia, etc. R. Co.* v. *Lehman*, 56 Md. 209; *McIntosh* v. *Lee*, 57 Iowa, 356.

While the statute expressly prohibits the performance of secular business upon the Sabbath, except works of necessity or charity, it also provides that no deed, contract, receipt or other instrument in writing is void because it bears date upon the Lord's day, without other proof than the date, of its having been made and delivered on that day. R. S., c. 82, § 115. But the defendant contends that this presumption which the statute raises that the notes were made, delivered and indorsed on a secular day, is overcome by the plaintiff's allegation that they were dated, signed by all the parties, including the defendant as indorser, and delivered to and received by the plaintiff on the day of their date which was Sunday. Hence, the defendant claims that the plaintiff cannot recover inasmuch as, by his own statement of his cause of action, he sets up an illegal contract to which he him-

self is a party. *Towle* v. *Larrabee*, 26 Maine, 464; *Plaisted* v. *Palmer*, 63 Maine, 576; *Mace* v. *Putnam*, 71 Maine, 238.

A contract made on Sunday, where the transaction of such business is prohibited, is an illegal contract, and void as between the parties. In such case, any contract for the payment of money or the performance of any service cannot be enforced as between the parties, nor if money has been paid or property transferred by one party to the other under such contract, where both parties are alike in fault, can it be recovered back, because of the well settled maxim, "*Potior est conditio possidentis.*"

That the indorsement, as well as the making and delivery, of a promissory note is an act within the statute prohibiting secular business on the Sabbath, is settled in *Benson* v. *Drake*, 55 Maine, 555. The indorsement creates a new contract. It affects the liability of the maker, as well as the contract to which it is subsidiary. It is not a work of necessity or charity, but a business transaction.

But while it is the well settled doctrine that such contracts are illegal, the legislature of this State has seen fit to impose upon the party who sets up such illegality by way of defense, before he can invoke that illegality, the duty of making restoration of whatever consideration he may have received under such contract. *Berry* v. *Clary*, 77 Maine, 482; *Wentworth* v. *Woodside*, 79 Maine, 156; R. S., c. 82, § 116. The language of the statute is plain and comprehensive: "No person who receives a valuable consideration for a contract, express or implied, made on the Lord's day, shall defend any action upon such contract on the ground that it was so made, until he restores such consideration."

A defense may be made to an action as well by demurrer as in any other manner. A demurrer admits the facts set forth, and challenges their sufficiency in law upon which to maintain the action. It is the defense made to this action. But notwithstanding the illegality of the contract, not only in its inception, but also in the indorsement and delivery to the plaintiff, may be apparent upon the face of the declaration, yet it nowhere

appears that the defendant has restored the consideration which the law presumes he received for such indorsement and transfer, and thus enabled himself to interpose the defense he now undertakes to set up. Until that is done, no defense can be made that the contract is illegal by reason of its being made upon Sunday.

The statute is imperative. The object to be accomplished by it was to compel a defendant to a Sunday contract to do equity. He cannot shield himself against its provisions requiring him to make restoration of the consideration received by him before interposing such defense, by the fact that his indorsement and delivery of the notes were not to the plaintiff, but to an intermediate party who also indorsed and delivered them to the plaintiff. The law among other things presumes an indorsement of negotiable paper to be for value. That value has not been restored and this defense cannot be allowed.

In accordance with the stipulation in the bill of exceptions, the entry must be,

Exceptions overruled. Judgment for plaintiff.

PETERS, C. J., VIRGIN, LIBBEY and WHITEHOUSE, JJ., concurred. EMERY, J., did not sit.

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ALBERT WHEELDEN *vs.* FRANK LYFORD.
SAME *vs.* SAME.

Penobscot. Opinion December 16, 1891.

Sunday Law. Contract. Tort. R. S., c. 82, § 116; c. 124, § 20.

Revised Statutes, c. 82, § 116, applies to actions of assumpsit on the contract even though the consideration cannot, in the nature of things, be restored. It does not apply to actions for negligence, but leaves the Sunday law (R. S., c., 124, § 20,) in full operation as to them.

FACTS AGREED.

The parties stated their cases as follows: Two actions, one upon account annexed for horse hire, the other in tort for damage to the team, through defendant's negligence while in his possession, under said contract of hire.

The team was hired and used for pleasure on Sunday, December 21, 1890, and was injured by defendant's negligence, as aforesaid, and returned in a damaged condition.

The pleadings were the general issue in both cases, with a brief statement setting up the Sunday law as a defense.

If the actions were maintainable, or either of them, the defendant was to be defaulted, in one or both, as the case may require, and damages to be assessed at *nisi prius;* if neither of the actions could be maintained, the plaintiff was to become nonsuit.

Peregrine White, for plaintiff.

P. H. Gillin, for defendant.

EMERY, J. The defendant on Sunday or Lord's day, hired of the plaintiff a team for the purpose of pleasure driving on the same day. The defendant used the team for that purpose on that day as the plaintiff supposed he would, and while so using the team he injured it, not wilfully, but solely by his negligence. He returned the team to the plaintiff in a damaged condition on the same day and refused to pay for the injury or the hire. The plaintiff, thereupon, afterward brought these two actions, one in case for the injury caused by the defendant's negligence, the other in assumpsit for the hire. The defendant invokes in defense of both actions, the "Sunday Law," R. S., c. 124, § 20.

Before the enactment of R. S., c. 82, § 116, in 1880, the plaintiff could not have maintained either action. The contract itself was of course void under the old law; and *Parker* v. *Latner*, 60 Maine, 528, expressly decides that on these facts an action for negligence could not have been maintained.

How far has the new statute, R. S., c. 82, § 116, changed the law? It does not in terms make lawful anything which was before unlawful. It does not say that contracts made on Sunday are valid or enforceable. It does not say that men may work on Sunday or play on Sunday without offense. No inhibitions of the statute or common law against Sunday business or pleasures are repealed. The new statute does not create any new rights of actions. It simply forbids the interposition of the "Sunday law," in defense to certain enumerated actions in certain enumerated cases. Those actions and cases not enumerated in the statute remain unaffected by it. The statute is limited in terms to actions upon contracts where the defend-

ant has received a valuable consideration. In such an action and case the defendant is delayed in interposing the "Sunday law" in defense until he restores the consideration. If he restores the consideration he may then interpose that defense and defeat the action.

The hiring and using of this team on Sunday were illegal. The plaintiff was a party to that illegal transaction. The statute does not forbid the defendant defending on that ground against the action on the case for negligence. Such an action is not named nor implied in the statute. It may be a *casus omissus*, but we cannot supply it. We must recognize the defense to the action for negligence on the authority of *Parker* v. *Latner*, *supra*, and dismiss that action.

The action of assumpsit is an action on the contract. The plaintiff relinquished the use of the team to the defendant in consideration of the defendant's promise to pay for the use. This constitutes a technical valuable consideration for such promise. The only infirmity about it is the operation of the Sunday law upon it. In all other respects the consideration is valid as a foundation for a promise, and in that one respect the statute cures the defect. The contract and the action upon it are thus within the terms of the statute.

The defendant cannot now defend this action of assumpsit on the ground of the contract having been made on Sunday until he restore that consideration. That he cannot restore it — that in the nature of things it is not restorable, does not relieve him. He need not have made the contract. Having made the contract and received the consideration he must either restore the consideration or abide the contract. If he cannot do the former he must do the latter. The statute is explicit and imperative. *Wentworth* v. *Woodside*, 79 Maine, 156. We can no more curtail it to shut out this action, than we could extend it to include the action on the case for negligence.

In the action on the case for negligence, *Plaintiff nonsuit.*

In the action of assumpsit for hire, *Defendant defaulted.*

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

ELBRIDGE G. YORK, Administrator,

vs.

MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion December 16, 1891.

Negligence. Railroad. Flying-Switch. Instructions.

Whether a railroad company is negligent in severing a train into two parts, and making a flying-switch over a highway crossing, is a question for the jury.

Whether a traveler upon the highway, who sees the first section of the severed train pass over the crossing, is negligent in attempting to cross the track, without looking or listening for the rear section of the train, is also a question for the jury.

The presiding justice at a jury trial has full discretionary power to suggest to the jury possible solutions of seeming difficulties, and possible harmonies of seeming discrepancies in the evidence, even though counsel do not.

ON MOTION AND EXCEPTIONS.

This was an action on the case which Ida M. York brought against the defendant corporation to recover damages for personal injuries which she received July 31, 1888, caused by the rear division of a freight train making a flying-switch at a grade-crossing near East Newport. She having died before the trial, her administrator prosecuted the suit. The case proceeded to a trial on a plea of the general issue. The jury returned a verdict of thirteen hundred dollars for the plaintiff.

The plaintiff's declaration is as follows:

"In a plea of the case, for that the defendant corporation on the 31st day of July, A. D., 1888, was possessed of a certain railroad extending through Newport, in the County of Penobscot, aforesaid, and was then in full occupation of said railroad thereon running locomotive engines and cars, and had the control, management and direction of said railroad and the engines and cars on the same. Said railroad in its course through the town of Newport, aforesaid, at a point about one half mile west of East Newport station then crossed and now crosses at grade a public road in said Newport which leads from Newport village, so-called, easterly through Newport, aforesaid, to the town of Stetson. The crossing aforesaid is commonly known as Col-

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cord's crossing. And on the day last aforesaid, to one riding over and along said public road and having approached from the west near to said crossing, the view therefrom of said railroad westerly of and near the crossing aforesaid, and of cars upon that part of said railroad was greatly hindered and obstructed by a house, trees and bushes.

"The public road aforesaid westerly of and near to said crossing, beginning at a point about three hundred feet distant therefrom, there made for the space of two hundred feet quite a sharp descent towards the crossing aforesaid. Between the foot of the aforesaid descent and very near to the westerly side of said crossing, there then were steep embankments on each side of the travelled part of said public road and rails along each side of the public road, aforesaid, at the top of said embankment. On the day last aforesaid the defendant corporation had only a single track, to wit., its main track over said crossing and for a long distance westerly thereof, and but a single track for a considerable distance easterly from the crossing, aforesaid, to wit., nine hundred feet.

"On said last day of July, A. D., 1888, the plaintiff was riding alone in a carriage from Newport village, aforesaid, easterly over and along said public road towards said crossing and was guiding and directing the horse harnessed to said carriage. And when the plaintiff so then riding as aforesaid along said public road had got near to said crossing, a locomotive engine drawing a train of cars thereto attached, belonging to the defendant corporation and then under its management, direction and control, approached said crossing from the west over said track at considerable speed, to wit., a speed of twenty miles an hour; and when near the crossing aforesaid, to wit., one thousand feet westerly from it, the defendant corporation by its servants and agents carelessly and negligently divided said train of cars into two parts which parts were separated at said crossing by a considerable distance, to wit., three hundred feet: the engine and cars thereto attached passing over said crossing at the speed aforesaid, the cars detached from the engine passing said crossing rapidly but at somewhat less speed. The plaintiff

heard the whistle of said engine sounded for said crossing, and she having so as aforesaid approached near the aforesaid crossing waited, before driving or attempting to drive over it herself, for said engine and train of cars to pass it. She saw the engine and the cars which were, after said division of the train, attached to it pass over said crossing. She did not then know of the separation of said train of cars in two parts, and then and there believed and had good reason to believe that all the cars that were of said train, before its separation, had passed said crossing before she attempted to cross it.

"And thereupon the plaintiff, in her said carriage so drawn as aforesaid, attempted to drive in and along said public road over said crossing, and when close to it that part of the train of cars which had been so separated as aforesaid from the engine and cars attached to it came rapidly to and onto said crossing without previous warning or notice of its approach, and she in her attempts to avoid a collision with said cars was thrown with great force and violence out of her said carriage onto the ground, and thereby then and there her left clavicle was broken and she was greatly bruised, sprained and hurt in body and limbs, and thereby she then and there received a great shock and injury to her nerves, from the effects of all which she has since suffered and now suffers great pain of body and mind, and her left shoulder has been permanently injured, and her health has been destroyed, and she has been put to considerable expense for medicine and medical services and nursing in attempts at relief and cure.

"And the plaintiff says that before and at the time and place of said accident and injury she was in the exercise of due care and diligence, and that the aforesaid accident and injury was in no way her fault, or attributable to any fault or defect in her horse, harness or carriage, but was wholly caused by the fault and negligence aforesaid of the defendant corporation, to the damage of said plaintiff," &c.

The exceptions are stated in the opinion.

Jasper Hutchings, for plaintiff.

Wilson and Woodard, for defendant.

Contributory negligence: *Lesan* v. *M. C. R. R. Co.* 78 Maine, 346, 353; *Hooper* v. *B. & M. R. R.* 81 *Id.* 260, 267; *Allen* v. *M. C. R. R. Co.* 82 *Id.* 111.

An instruction to the jury inapplicable to the facts of the case, and calculated to have an influence on the verdict, although correct when applied to other facts, is an error sufficient to cause the verdict to be set aside. *Pierce* v. *Whitney*, 22 Maine, 113.

In strictness, an opinion expressed by the judge upon a question of fact on trial before a jury, is not open to exception; but if the party against whom it operates yields to it and does not choose to argue against the weight of it, the court may in its discretion grant a new trial if the opinion was incorrect. *Curl* v. *Lowell*, 19 Pick. 25.

Here there was no opportunity for the party against whom this suggestion operated to argue against the weight of it, as it was made in the closing charge of the judge to the jury.

Anything in the remarks or instructions of the presiding judge to the jury, even if it does not constitute a valid ground of exception, can be made available under a motion to set aside the verdict when it appears upon a report of the whole case that the verdict was manifestly wrong and that the suggestions of the judge may have misled the jury. *Stephenson* v. *Thayer*, 63 Maine, 143, 146.

EMERY, J. This is an action of the case counting on the defendant's negligence, in running a train past a highway crossing at East Newport, whereby the plaintiff's intestate, a traveler upon the highway, was injured. The verdict of the jury was for the plaintiff, and the defendant has moved to set aside the verdict as against evidence and has also excepted to one ruling of the presiding justice.

From the evidence reported the following facts may be gathered. The crossing is a short distance west of the East Newport station. The railroad and the highway (from Newport to Stetson) approach the crossing in gradually converging lines and for half a mile or more before reaching the crossing are nearly

parallel. Near the crossing the railroad curves gradually to the south and crosses the highway at angle of about thirty-three degrees. The grade of the railroad is descending all the way. The grade of the highway is nearly level to the brow of a hill about three hundred feet from the crossing. It there descends to within about fifty feet of the crossing, where it again becomes nearly level. The drop from the top to the bottom of the hill is about fifteen feet. About twenty rods west from the crossing, and between the highway and the railroad is the dwelling-house of Mr. Colcord.

A traveler on the highway going east had a near and plain view of the railroad on his left for upwards of half a mile before reaching the Colcord house. Near that house, the view became more or less obstructed by an orchard, the house and outbuildings, bushes, wood piles and high land, the railroad and the highway both running somewhat in a cut down the hill. At a point on the highway some seventy-five feet west of the crossing the traveler could plainly see back on the railroad track some three hundred feet westerly.

Such being the situation, Miss York, the plaintiff's intestate, was alone in a top-carriage driving along this highway easterly toward this crossing. The defendant's freight train of twenty-three cars came along at the same time at a speed of about fifteen miles an hour. She undoubtedly heard the whistle and the train coming up behind her. She may not have looked back but she was clearly apprised of the train's approach to the crossing. She drove on at a gentle trot down the hill past the Colcord house and presently saw the locomotive and several cars pass on ahead of her over the crossing, and leave the crossing clear. But some four hundred feet back from the crossing, the defendant's servants in charge of the train severed the train in order to make a flying or running switch, at East Newport station. The locomotive and tender with four cars passed rapidly on, and the remaining cars followed more slowly, impelled only by gravity and the momentum, and uncontrollable except by the ordinary hand brake. When the first section of the train passed the crossing, the rear section was from one hundred

to one hundred and seventy-five feet behind. No necessity was shown for making this flying-switch across the highway.

Miss York evidently did not see or hear this rear section, for after the passage of the first section she drove along to the seemingly clear crossing, to pass it. The rear section, however, rushed on from behind upon the crossing, causing the horse to suddenly swerve to the right and throw out Miss York to her injury. There were no gates nor flagmen at this crossing. The brakeman on the rear car of the first section testified to making signs to Miss York of the danger of crossing there; but it does not appear that she understood or even saw these signs. There was also evidence of other minor circumstances which it does not seem to us necessary to state.

Two questions of course were directly involved in the trial of this case. 1. Was it negligence in the defendant company to separate its train to make a flying-switch over that crossing? 2. Was it contributory negligence in Miss York, the plaintiff's intestate, not to look back up the track for possible cars or trains when she arrived at the crossing?

Negligence may consist of the doing an act, which a reasonable and prudent man mindful of his own conduct and of the safety and rights of others, would not ordinarily have done under all the circumstances of the situation; or it may consist of the omission to do an act which such a person under the existing circumstances would ordinarily have done. The duty to do or not to do is measured by the usual conduct of reasoning, prudent men and by the exigencies of the occasion. The standard of duty is what thoughtful, prudent men, mindful of themselves and of others, might reasonably be expected to do or not to do under all the circumstance of the particular case. The type is not the very prudent, the very circumspect man, but the man who answers to the popular conception of a prudent, reasonable man. The thing to be done or left undone is what would seem to such men to be suggested by all the appearances, probabilities and other circumstances of the time, place and events.

All such circumstances may be undisputed, and in such case the only question is whether the act or omission under consider-

ation comes up to the above stated legal standard of duty, or falls below that standard and into the class of negligent acts, or omissions. In our system of jurisprudence the determination of this last question is within the province of the jury. Not only is it the duty of the jury to ascertain what was done or omitted, and all the attendant circumstances, but it is also the duty of the jury to determine whether under all those circumstances the act or omission was up to the standard or was negligent. The theory is, that twelve men of the average of the community, conversant with every day affairs and with what men do and don't do; more or less familiar in their own experience with similar circumstances and conditions and with the usual conduct of men under them,— coming together into consultation from various modes of life, occupations and points of view,— and applying their separate experiences and observations, can by their unanimous conclusion form the best attainable judgment upon such a question. Twelve men of affairs, such as juries are supposed to be composed of, would naturally have a wider experience, and broader observation, in such matters than any single judge, however learned.

In some cases, however, the act or omission under all the circumstances, may be so plainly and indisputably negligent or otherwise, that there can be no need to ask for the judgment of the jury upon the question. As said by the Chief Justice in *Lasky* v. *C. P. R. R. Co.* 83 Maine, 470, when the facts are undisputed, and the conclusion to be drawn from them is indisputable, the question may be determined by the court.

For instance, if a railroad company should make a flying-switch across a frequented street in the night time, without providing any signal of danger or giving any notice of the approach of the rear section, such an act measured by the standard would be unmistakably and indisputably reckless or negligent. *Delaware, etc. R. R. Co.* v. *Converse*, 139 U. S. 467. Again, if a traveler upon a highway approaching a railroad crossing where there are no indications that a train may be expected, should omit to look or listen for a train, his omission, unexplained, would be so clearly negligent, the

court would not hesitate to take the case from the jury. *Chase* v. *M. C. R. R. Co.* 78 Maine, 346.

To apply these principles to the facts above stated:

1. The railroad and the highway being nearly parallel for some distance, and crossing at an acute angle, the train came up behind the traveler, so that a traveler near the crossing would have to look back over his shoulder to see what was coming on the track. There was more or less obstruction to the the view from a point fifty feet distant from the crossing back some three hundred feet on the highway. The highway was a thoroughfare between two towns, one of them at least of some importance. The men in charge of the train saw the traveler in a top carriage approaching the crossing. There was no flag man, or other means of giving warning at the crossing.

Was it a prudent act under these and all the other circumstances for the train men to make that flying-switch at that time and place? Would a prudent man be reasonably expected to do that act, assuming him to be reasonably prudent and mindful of the rights of others? The jury under full, clear and correct instructions have answered in the negative.

2. The plaintiff's intestate, Miss York, had presumably seen and heard the train as it came up behind her. She saw a locomotive and several cars pass on across the highway and leave the crossing clear. She could rightfully suppose that the railroad company did not permit trains to follow within five minutes of each other. Such indeed is the well-known rule. Seeing the crossing cleared by the passing train, she drove on in her turn. By turning her head partly round to look over her left shoulder she could have seen the rear section of cars also approaching the crossing. She did not so look back. Was it contributory negligence in her — not to do so? Was there any reason to apprehend the passing of another train, — or section of train, — at that moment, one having but just passed? Would a reasonably prudent person under all the circumstances be reasonably expected to look back? The jury has answered these questions also in the negative.

The question for us now is not whether in our opinion this

conclusion reached by the jury is right. We may not ourselves think it right, but such an opinion alone would not authorize us to reject the jury's judgment. The question for us is, whether this conclusion, this judgment, could be arrived at by fair-minded men by any reasonable inference from the evidence, even though other and contrary inferences might seem to us more reasonable. To set aside the verdict of the jury is to say that the inference drawn by the jury is indisputably wrong,— that no such inference can be fairly drawn by any fair-minded men,— that the contrary inference is not only the more reasonable inference but is the only reasonable inference.

It seems to us that the very statement of the case, and the question, shows we ought not to assume so much. In *Delaware, etc. R. R. Co.* v. *Converse*, 139 U. S. 467, above quoted, the justices of the U. S. Supreme Court declared that in their opinion, the railroad company was plainly negligent in making a flying-switch across a highway in the evening, and they declined to say that the traveler was negligent in not looking back for the rear section. In *Phillips, Adm'x*, v. *Milwaukee, &c. R. R. Co.* 77 Wis. 349, the railroad crossed the street with its main track and some switch or side tracks. The plaintiff's intestate approaching the railroad saw a train of cars pass across the street to the west. He then started across the track and was killed by two cars which had been "kicked" back without warning from the train just passed. He evidently did not look along the track to the west at the moment of crossing. The justices of the court declined to say that the jury drew wrong inferences in returning a verdict for the plaintiff. *French* v. *Taunton Branch R. R. Co.* 116 Mass. 537, was very similar in its circumstances to the case now at bar. The railroad company made a flying-switch across a highway as a traveler was approaching the crossing. The traveler (a woman), saw the locomotive and some of the cars pass over the crossing, and then started to cross in her turn, without looking up or down the track, although she could have seen some distance either way. She was struck upon the crossing by the rear section of the train and injured. The court would not say that it was

unreasonable for the jury to find the defendant guilty of negligence and the plaintiff free from contributory negligence. For further instances see: *Bonnell* v. *Delaware, etc. R. R. Co.* 39 N. J. L. 189; *Randall* v. *Conn. River R. R. Co.* 132 Mass. 269; *Brown* v. *N. Y. C. R. R. Co.* 32 N. Y. 603; *Duame* v. *Chicago, &c. R. R. Co.* 72 Wis. 523.

It is true that a traveler upon a highway before crossing a railroad should look and listen for approaching trains. It is usually clear, indisputable negligence in the traveler not to do so, as has been repeatedly held by this court. *Chase* v. *M. C. R. R. Co.* 78 Maine, 346, and cases cited. If nothing indicates to the contrary, trains of some kind or at least locomotives are liable to pass at any moment, and the traveler should be continually on his guard against them.

But sometime there may be indications that nothing will pass along the railroad for some minutes at least. The gates (where there are gates) may be up, a standing assurance to the traveler that no cars or engines are coming. *Hooper* v. *B. & M. R. Co.* 81 Maine, 260. The retiring of a flag-man from the crossing may inform the traveler that he may now cross safely. In view of the well known and necessary rule requiring considerable space and time between successive trains, the passage of one train may be an indication that no other will pass the same way for some minutes. These and other acts upon the part of the railroad may throw the usually prudent traveler off his guard, and free him from the reproach of negligence in attempting to cross at such a time.

The defendant's counsel strongly urges that the defense before the jury was unduly prejudiced by a suggestion made by the presiding justice in the course of his charge. It was one theory of the defense that Miss York's horse was frightened by the whistle and first approach of the train, and became unmanageable from the beginning, and before she could get him under control, threw her out. This theory was based on the testimony of witnesses as to Miss York's statements to that effect after the injury, as no one seems to have observed that the horse was unmanageable. The testimony by these witnesses was that she

said she heard the train and the whistle, and the horse heard the train, and started up and she could not control him. The plaintiff's theory on this point was that the horse was not frightened until he encountered the rear section at the crossing. In support of this theory, there was testimony that Miss York stopped the horse a little way from the crossing and only started him again when she saw the first section go by.

There was apparently a flat contradiction. If Miss York stopped the horse according to some witnesses, it was exceedingly improbable that she made the precise statements testified to by other witnesses. An unskilled or unreflecting person might at first conclude there was perjury somewhere. But it was the duty of the court and jury to be cautious of inferring perjury from seeming contradictions. It was the duty of both to attribute such contradictions to mistakes and misunderstandings, rather than to dishonesty. In this case, upon this point, the presiding justice said: "If she made the statements claimed by the defense, to what time do they refer? Do they refer to the time when she was driving down the hill, or do they refer to the time when she started, if she did start after stopping, and attempted to go across the crossing? It may be possible that her horse became uncontrollable after she stopped, if she did stop, and when she attempted to cross the track near the detached portion of the train."

This language was a suggestion of a possible explanation of a seeming contradiction, a suggestion of a possible harmony in the facts consistent with the integrity of all the witnesses. It was a suggestion that Miss York might have stopped her horse as testified by some witnesses, and yet have said to the other witnesses, that her horse was frightened.

The defendant's counsel contends that this explanation, this possible harmony was not suggested by anything in the evidence, and would not have occurred to the jury had it not been suggested by the presiding justice. He further contends that, as the plaintiff's counsel did not allude to any such explanation nor make any such point, it was improper for the presiding justice of his own motion to make the point, and suggest the explanation.

We think the explanation, the possible harmony, would occur to a skilled, reflecting mind in analyzing and comparing the different parts of the evidence. From what other source than the evidence could it have come to the presiding justice? We also think the presiding justice in communicating the suggestion or thought to the jury was clearly within the limits of his official power and duty. A judge presiding in a court of justice occupies a far higher position and has vastly more important duties than those of an umpire. He is not merely to see that a trial is conducted according to certain rules, and leave each contestant free to win what advantage he can from the slips and oversights of his opponent. He is sworn to "administer right and justice." He should make the jury understand the pleadings, positions and contentions of the litigants. He may state, analyze, compare and explain evidence. He may aid the jury by suggesting presumptions and explanations, by pointing out possible reconciliations of seeming contradictions, and possible solutions of seeming difficulties. He should do all such things as in his judgment will enable the jury to acquire a clear understanding of the law and the evidence, and form a correct judgment. He is to see that no injustice is done. If a valid defense is disclosed by the evidence, and is admissible under the pleadings, and yet escapes the notice of the defendant's counsel, that defense should be stated to the jury by the presiding justice. If the plaintiff's counsel omits to comment upon or urge an answer to a defense, which answer is disclosed by the evidence and is available under the pleadings, the presiding justice may properly call attention to it. He should so conduct the trial that no truth is overlooked and no right is forgotten.

To do all these things he must necessarily have a large discretion. Such discretion must exist somewhere and the law lodges it with the presiding justice of the court. It is a part of his official power, for the proper exercise of which he is responsible to the people.

Motion and exception overruled.

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

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CHARLES S. PULLEN *vs.* LEWIS J. HILLMAN.

Piscataquis. Opinion December 16, 1891.

Insolvency. Discharge. Foreign Creditor. Jurisdiction. R. S., c. 70, § 44.

A court of insolvency has no jurisdictional power to discharge an insolvent debtor, from a debt due a resident of another State, who did not prove his claim in the insolvency proceedings, even though at the time of the contraction of the debt, the creditor was a resident of this State, and the debt is payable here.

ON REPORT.

Assumpsit upon a promissory note given by the defendant at Monson, Piscataquis county, March 31, 1888, payable to the plaintiff, then a resident of the same town, at the Kineo National Bank of Dover, in said county. The writ is dated August 30, 1890. The plaintiff removed April 15, 1889, from the State to New York where he has ever since been a citizen of that State, residing at Cortland.

After the plaintiff's removal from the State and on the ninth day of January, 1890, the defendant obtained a discharge in the court of insolvency, upon his petition filed in that court June 3, 1889. This discharge was pleaded in bar of the plaintiff's action. It was admitted that the plaintiff did not prove his debt in the insolvent court nor appear in any of its proceedings.

Henry Hudson, for plaintiff.

J. F. Sprague, for defendant.

Counsel cited: *Scribner* v. *Fisher*, 2 Gray, 43; *Brigham* v. *Henderson*, 1 Cush. 430; *Converse* v. *Bradley*, *Ib.* 434; *Stoddard* v. *Harrington*, 100 Mass. 88; *Brown* v. *Bridge*, 106 Mass. 563.

EMERY, J. The contract which is the subject of this action, was made within this State between citizens of this State, and was to be performed within this State. Subsequently, the promisor, the defendant, after regular proceedings in the proper court of insolvency in this State, was granted by that court a discharge from all his debts under R. S., ch. 70, sec. 44. This

discharge was properly pleaded in bar of this action, and it is conceded that it would be an effectual bar, if the promisee, the plaintiff, who was a citizen of this State at the time of making the contract, had also been a citizen of this State at the time of the proceedings in the court of insolvency. But the plaintiff after the making of the contract, and before the beginning of the insolvency proceedings, had changed his residence from Maine to New York, and had become a citizen of the latter state and had not since been in Maine. He did not prove his claim under this contract in the insolvency court, nor in any way appear therein.

It is urged that, as the contract was made in Maine, to be performed in Maine, and both parties were citizens of Maine at the time, they must be held to have contracted with reference to the then existing insolvency law of Maine, which provided for this discharge from the contact. It is argued that the insolvent law should be read into the contract, and that therefore the contract must be held to stipulate for such a discharge as is here pleaded.

We think, however, the question is not one of the interpretation of a contract or statute, but is one of jurisdiction. Did the court of insolvency have the jurisdiction to discharge the defendant from this contract?

After much discussion by courts and jurists, and after some conflict of opinion, it must now be considered fully and firmly established as a general proposition that a state cannot give its courts any jurisdictional power to discharge a citizen of such state from his obligation to a citizen of another state, when the latter has not in anyway submitted himself or his claim to such court. This proposition is not modified by the circumstance that the contract was made and was to be performed in the State in which the debtor resides. The place of the citizenship of the parties, not the place of the making or performing the contract, defines the jurisdiction of the court. All this is now so well settled by authority, that it is not advisable to occupy space in repeating or even epitomizing the reasoning by which the courts finally reached this conclusion. The citation of a

few cases out of many, should be sufficient. *Felch* v. *Bugbee*, 48 Maine, 9; *Hills* v. *Carlton*, 74 Maine, 156; *Phoenix Bank* v. *Bacheller*, 151 Mass. 589; *Baldwin* v. *Hale*, 1 Wall. 223; *Gilman* v. *Lockwood*, 4 Wall. 409; *Denny* v. *Bennett*, 128 U. S. 489.

Does the additional circumstance in this case, that the plaintiff was a citizen of this State at the date of the contract, though not at the date of the insolvency proceedings, give the court of insolvency jurisdiction over his claim under this contract? To so hold, is to hold that one who was a citizen of this State when he acquired here contractual rights, choses in action, against another citizen of this State leaves them behind him in this State subject to be discharged by the courts of this State without notice to him after he has become a citizen of another state. It is to hold that he, who was once a citizen of this State, cannot remove himself and his property from its jurisdiction. It is to hold, that a citizen of another state coming into this State and making contracts here, to be performed here, has greater immunities than a citizen of our own State. Neither reason nor authority leads us to such a conclusion.

A state may indeed grant its courts jurisdiction over lands and goods within its limits, though the owner may reside beyond those limits. Such objects are visible and tangible, and though the title to them may follow the owner, the thing, the substance, is within the State. They have a situs. They can be taxed where they are situated. In such cases the owner may be presumed to have left such property in the possession of a local tenant or agent. But even then, the specific property to be affected by the judgment of the court must be attached upon process, and such notice given as is feasible.

Contractual rights, obligations, mere choses in action, however, are not visible nor tangible, nor local. They have no situs. They do not exist as things, as substances, within any territorial limits. They follow the person of the creditor. They are his wherever he lives. *Saunders* v. *Weston*, 74 Maine, 85. Even the taxing power of the State in which the debtor resides cannot reach them. Only the state of the creditor's

residence can deal with them, at least during the life time of the creditor. *Osgood* v. *Maguire*, 61 N. Y. 524; *Bond Tax cases*, 15 Wall. 300; *Tappan* v. *Bank*, 19 Wall. 490. The only court, therefore, that can effectually discharge such a claim, is the court that has jurisdiction over the person of the creditor himself. But unless the creditor voluntarily submits to the jurisdiction of the court, by taking some part in the proceedings before it, jurisdiction can only be acquired by service of process upon him within the territorial limits of the state establishing the court. Beyond those limits, no process of any court has any force in acquiring jurisdiction of the person. This proposition is firmly settled by authority as well as by reason. *Lovejoy* v. *Allen*, 33 Maine, 414; *Baldwin* v. *Hale*, 1 Wall. 223; *Pennoyer* v. *Neff*, 95 U. S. 714.

Ability to serve process within the State is, therefore, the test of the court's power to acquire jurisdiction in any proceeding. If at the beginning of the insolvency proceedings, the process of the court of insolvency could have been served on the plaintiff within the State, the court could have acquired jurisdiction over him by such service. The situation at that time, not at the date of the contract, is the criterion. If the plaintiff was then a citizen of this State, he could have been served with process and subjected to the jurisdiction of the court, although he may never before have been within the State, and although the contract may have been made, and was to be performed in another state. So much will be conceded by the defendant. But it follows, that if the plaintiff was not then a citizen of this State, (at the time of the insolvency proceedings,) no process could have reached him and he could not be subjected to the court's jurisdiction even though for all his life before, he may have resided within the State.

The defendant's counsel strenuously urges that such a conclusion will work great hardship upon a debtor by enabling his home creditors to avoid his insolvency proceedings by removing from the State. If this be a hardship, the remedy is with congress in the enactment of a uniform bankrupt law for all the states. The court cannot usurp the power or jurisdiction it does not have.

Counsel also relies upon *Stoddard* v. *Harrington*, 100 Mass. 88, and upon some *dicta* in later opinions of the United States Supreme Court. The *dicta* have little weight, as the precise question was evidently not in the mind of the justices writing the opinions.

The length of this opinion shows our respect for the eminent court which pronounced the judgment in *Stoddard* v. *Harrington*, but we think that decision cannot be sustained, and that it must be overruled when the same question is again presented to that court. On the other hand our conclusion is in harmony with that reached by the courts of New Hampshire and Vermont upon the same question. *Norris* v. *Atkinson*, 64 N. H. 87; *Roberts* v. *Atherton*, 60 Vt. 563.

Defendant defaulted.

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

LEONARD L. LUCE *vs.* ALBERT G. AMES.

Franklin. Opinion December 17, 1891.

Replevin. Building. Real Property.

A land owner may maintain an action of replevin for a building of his which the defendant has begun to move from his land.

There is in such case a severance of the building from the realty, so far as the defendant is concerned.

ON REPORT.

Replevin of a stable or wooden building which the defendant attempted to remove from the premises of the plaintiff. The defendant denied the taking and for a brief statement alleged, that at the time of the supposed taking the said stable was not the property of the plaintiff but was then the property of the defendant; that if not the property of the defendant then it was the property of Woodcock and Ames, whose agent the defendant then was and as whose agent he then acted, &c., and said property at the time of the supposed taking was real estate and not capable of being the subject of replevin.

E. O. Greenleaf, for plaintiff.

H. L. Whitcomb, for defendant.

EMERY, J. The plaintiff became the owner by deed of a parcel of land upon which was a small wooden building. The defendant entered upon the land and began to remove the building from the land, and had moved it nearly off the land, when the plaintiff replevied it. The building at the time of the service of the replevin writ lay about one fourth on the plaintiff's land.

The evidence clearly showed that the plaintiff was the owner of the building as well as of the land, and that the defendant made no claim to the land. The only defense now made is that the plaintiff cannot have redress by means of a writ of replevin. The argument is that the building was a part of the realty, and that the action of replevin is not available to redress an injury to real estate.

It is clear, however, that after the defendant had begun moving the building with the intent to remove it entirely from the land, he had severed it from the land and made it personal property so far as he was concerned. If one cut and remove trees from the land of another, redress can be had for the removal of the trees as personal property, as well as for cutting them down as part of the real estate. *Moody* v. *Whitney*, 34 Maine, 563; *Whidden* v. *Seelye*, 40 Maine, 247. The starting the building from its place with the intent to remove it wholly from the land, is as much a severance from the realty as is the cutting of trees. *Harlan* v. *Harlan* 15 Pa. St. 507 (53 Am. Dec. 612); *Langdon* v. *Paul*, 22 Vt. 205; *Sanders* v. *Reed*, 12 N. H. 558. Whenever trespass *de bonis* or trover will lie for the removal of property, replevin can also be maintained. *Sawtelle* v. *Rollins*, 23 Maine, 196.

Judgment for the plaintiff. Damages assessed at ten dollars.

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

STATE *vs.* ALBERT MURRAY.

Sagadahoc. Opinion December 17, 1891.

Fish. Bay. Inlet. Indictment. Evidence. Stat. 1889, c. 306.

Any portion of the sea which is bounded on three sides by the land and upon the fourth side by a line not more than three nautical miles in length which touches both opposite shores, is within the letter and spirit of c. 306 of Public Laws of 1889, prohibiting the taking of certain kinds of fish in bays, inlets, &c., where the distance from opposite shores of the same at any point, is not more than three nautical miles in width.

An allegation in an indictment under that statute that the purse or drag seine was "of more than one hundred meshes in depth," directly negatives the suggestion that it might be of less than one hundred meshes in depth.

Evidence that a seine was large enough to take in six hundred or seven hundred barrels of fish at one haul, is sufficient proof that a seine was of more than one hundred meshes.

ON EXCEPTIONS.

This was indictment under c. 306, stat. of 1889, for illegal taking of menhaden.

After verdict against the defendant he moved in arrest of judgment. The motion was overruled by the court and the defendant excepted thereto and to the instructions of the court to the jury, which are sufficiently stated in the opinion.

Chas. D. Newell, County Attorney, for the State.

Baker, Baker and Cornish, for defendant.

EMERY, J. By R. S., c. 40, § 17, as amended by c. 306 of public laws of 1889, the taking of certain kinds of fish—"by the use of purse and drag seines is prohibited in all small bays, inlets, harbors or rivers, where any entrance to the same, or the distance from opposite shores of the same, at any point, is not more than three nautical miles in width." The defendant was indicted for taking such fish with such seine, "in a small bay extending inland between Isaiah's Head and Little Morse's Mountain, headlands on the main, in said town of Phippsburg, the entrance to which said small bay between said headlands being less than three nautical miles in width." He was convicted and has brought the case to the law court on exceptions.

One question of law he now presents is, whether the place described in the indictment is a "small bay," &c., within the meaning of the statute. At the place named, is a long reach of shore or beach which curves somewhat inland from Isaiah's Head and Little Morse's Mountain, so that a straight line drawn from the shore at the head to the shore at the mountain, would be about two nautical miles in length and would include a comparatively narrow strip of water between itself and the curving shore. The beach or shore is generally in the shape of an arc of a large circumference. The subtending chord of this arc is not more than three nautical miles in length, but is several times the length of the bisecting radius between chord and circumference. The defendant's act was within this segment of the circle.

Is a body of water of this shape within the meaning of the statute? The defendant urges that such a body of water is not a "bay, harbor, inlet or river,"—that this particular place is not called by either of those names but is locally known as "Small Point Beach,"—that a "bay, inlet, harbor or river," would extend further inland while this body of water is open to the sea and is a part of the sea.

The statute is general. It applies to the entire coast line of the State. Its operation cannot be restricted in any locality by any local geographical names. Its effect upon the sea at Old Orchard is the same, whether the locality be called Old Orchard Beach, or Old Orchard Bay. The statute does not so much name, as describe the bodies of water to be affected, and that description is confined to one item. It says nothing about the length of the distance into the land, of the bay, inlet, harbor or river. The only criterion is the width of the entrance, if there be an entrance, or if not, then the distance from opposite shores at any point. Wherever the shore so bends inland that the line or chord three nautical miles long or less, will touch the opposite shores, there it meets the description in the statute. If the fisherman at any time is so near the land that a straight line not more than three nautical miles long, drawn outside of him, will touch opposite shores he is not in the open sea, but is within the waters described in the statute.

Another question of law presented is, whether the indictment sufficiently negatives the exception in the same section of the statute of nets of not more than one hundred meshes in depth for mackerel or porgies (those being the fish taken). The indictment alleges the taking the porgies "with purse and drag seines of more than one hundred meshes in depth." This allegation clearly and directly excludes the excepted nets.

The presiding justice, though requested by the defendant, declined to instruct the jury that there was no legal evidence in the case, to authorize the jury to find that the defendant's net was in fact, "more than one hundred meshes in depth." If this question can be raised by exceptions, it is readily answered by quoting the defendant's own testimony where he says, he set his seine and in his first haul got between six hundred and seven hundred barrels. A jury can properly infer that a seine of that capacity is of more than one hundred meshes in depth.

The other exceptions were not urged.

Exceptions overruled.

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

JAMES S. JORDAN *vs.* J. ROAK PULSIFER, and others.

Androscoggin. Opinion December 17, 1891.

Pleading. Waiver. Discharge in Insolvency. R. S., c. 70, § 49.

It is too late for a plaintiff to raise objections to the insufficiency in form of a plea in bar, after issue has been joined and evidence has been put in under the plea.

ON MOTION AND EXCEPTIONS.

The case appears in the opinion.

George C. and C. E. Wing, and *N. and J. A. Morrill*, for plaintiff.

Savage and Oakes, *N. W. Harris* with them, for defendants.

EMERY, J. This was an action on a promissory note against three defendants, a principal and two sureties. The principal, in addition to the general issue, filed a brief statement of special

matter in defense, alleging that since the date of said note he had received a discharge in insolvency, also stating the name of the court, the date of his petition, the date of the discharge, and that the discharge barred the plaintiff's claim, but not "setting forth a copy thereof" (R. S., c. 70, § 49).

The plaintiff did not demur to this plea, but went to trial upon it without objection at the time. During the trial the defendant put in evidence, without objection from the plaintiff, the original certificate of the discharge named in the plea.

After the evidence was all in and the arguments to the jury had been made upon both sides, the plaintiff for the first time called the attention of the presiding justice to the omission from the plea of the copy of the certificate of discharge. Thereupon the presiding justice of his own motion, without any request from the defendant, and against the objection of the plaintiff, directed the defendant's counsel to pin to his pleadings the original certificate of discharge, which he did. The presiding justice then instructed the jury that the discharge was in the case and must be given full effect as a bar to the action against the defendant. It was conceded, however, that the discharge, if properly pleaded and in evidence, would be such a bar.

The verdict being for the defendant, the plaintiff excepted to the above direction and ruling of the presiding justice.

The plaintiff's counsel argues that the pinning of the certificate of discharge to the paper upon which the plea was written did not amend or change the plea, that the language of the plea remained the same, that there was still no copy of the discharge set forth or referred to in the plea, as required by the statute, and in fine that the pinning the papers together was inoperative. The answer is, that if the act was inoperative it was harmless.

There was, however, an existing plea of a discharge in insolvency. It was defective in form only. It set forth enough to identify and describe the discharge relied upon, and to be offered in evidence. It notified the plaintiff of the special matter to be offered in defense. He did not demur to the plea. He made no objection to the admission in evidence of the original certificate of the discharge named in the plea. He thereby waived

all objections to the plea, and the evidence under it. The discharge was, therefore, properly in evidence, under a plea of such discharge, and it sustained the plea. The presiding justice only permitted the defendant to have the benefit of the discharge he had pleaded and put in evidence without objection. This ruling we think was right.

The plaintiff also moved to set aside the verdict in favor of the other defendants, the sureties, as being against evidence. We have carefully studied the evidence and the able and forcible brief of the plaintiff's counsel, but it seems to us that there is evidence enough to support the verdict, even if we might ourselves have come to a different conclusion. The coincidences and circumstances relied upon by the plaintiff's counsel do not, we think, wholly beat down the positive evidence for the defendants.

Motion and exceptions overruled.

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

OSCAR REINSTEIN *vs.* FRANK J. WATTS.

Somerset. Opinion December 17, 1891.

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Contract. Bailment. Risk against fire. Consideration.

The reception of merchandise by a bailee under an invoice distinctly stating that such merchandise is at the risk of the bailee against loss by fire or otherwise until returned, no other agreement appearing, conclusively implies a promise upon the part of the bailee to assume such risk.

The bailment is a sufficient consideration for such promise.

ON EXCEPTIONS.

This was an action of assumpsit. Besides a count upon an account annexed there were also in the declaration two counts upon special promises and a count on a special contract of bailment to the defendant to receive, make up and return at his risk a certain quantity of coats to the plaintiff, which were destroyed by fire while in the defendant's possession under the contract. This special count is as follows:—

"Also, for that on the first day of May, A. D., 1890, at said Norridgewock, said defendant was desirous of contracting with

said plaintiff to make coats for plaintiff for a consideration to be paid by said plaintiff, and as an inducement to the plaintiff to enter into such contract, and for that purpose to intrust to said defendant large quantities of plaintiff's coats from time to time, promised said plaintiff that he would keep all coats of the plaintiff so intrusted to him, insured for the plaintiff's benefit, so that if the same were lost or damaged by fire, the plaintiff would thereby recover compensation therefor. And the plaintiff, relying on said promise of the defendant and by reason thereof, entered into said contract and intrusted to said defendant as aforesaid his coats from time to time, and did not insure them because of his reliance on said promise, but the defendant, wholly disregarding his said promise, did not keep said coats of said plaintiff so intrusted to him, insured. And on the 17th day of September, A. D., 1890, at said Norridgewock, a large amount of the plaintiff's coats in the defendant's manufactory then and there being, to wit., two hundred and twenty-nine coats of the value of sixteen hundred and nineteen dollars and seventy-two cents, were burned up and destroyed, and by reason of said defendant's failure to keep his said promise were wholly lost to the plaintiff."

After the evidence was closed the presiding justice directed a verdict for the plaintiff in the sum of thirteen hundred and fifty-eight dollars and thirty-seven cents, which sum was agreed upon by the parties as the value of the goods, provided any verdict was to be rendered for the plaintiff upon the evidence in the case.

The defendant offered to prove that Mr. Nye, one of his witnesses, commenced to work for him May 6, 1889, and was in his employ up to August 25, 1889, and that during said time said Nye did not go to Boston for him, nor did he take any goods from plaintiff for him to manufacture for plaintiff, which testimony was excluded.

The defendant excepted to these directions and rulings.

The invoice under which the goods were shipped by plaintiff to the defendant is of the following form:

"NOTICE.

"We hereby give notice that we shall, in all cases, require our work both sewing and pressing, neatly and thoroughly done. Seams must be firmly and closely sewed, stitching neatly done, button-holes well worked, and but-

tons properly sewed on and wound, and firmly stayed and tacked through; and in other cases where stays are required, or seams covered, they must be done in a workmanlike manner; and where cords or bindings are used, great care must be taken in putting them on with neatness; and the whole garment, when finished, must show an air of neatness and good workmanship, as well as strength and durability.

"When work is received by us it will undergo a rigid examination, and in all cases where it does not come up to the standard of work above described, it will be rejected, and charged to the maker, or repaired at his expense, as may be for our interest.

"The maker to pay all expenses for freight and other charges, and the goods to be at his risk against loss by fire or otherwise, until returned to us.

"All errors to be reported immediately on receipt of goods.

"All the wadding sent must be put into the garments, or they will be re-wadded at your expense.

"Tickets must be strongly sewed on, and care used to put them on sizes to which they belong.

"All work to be paid for Saturday must be returned by Friday.

Boston,—— 188- Memorandum from O. Reinstein. To—— Lot—— No. of Garment—— Description—— Price——"

George C. Wing and Edward Lowe, for plaintiff.

Merrill and Coffin, *C. A. Harrington* with them, for defendant.

EMERY, J. The undisputed facts are these: The plaintiff was a wholesale clothing dealer in Boston. It was a part of his business to cut and trim garments and send them out to different shops to be made up and returned to him. The defendant had a shop in Norridgewock where he carried on the business of taking in such garments, making them up and returning them to the clothing dealers. At one time the defendant, either in person or through an agent, applied to the plaintiff for garments to be sent him to make up and return as above described. The prices for making were agreed to, and from time to time thereafter several lots of such garments were sent by the plaintiff to the defendant to be thus made up and returned. As each lot was started from Boston for Norridgewock an invoice thereof was sent by mail by the plaintiff and was received by the defendant before the arrival of the garments at Norridgewock. On the top of each invoice was the printed word "NOTICE" in large letters and under this word, among other items, was the following printed item:

"The maker to pay all expenses for freight and other charges,

and the goods to be at his risk against loss by fire or otherwise, until returned to us."

The defendant received the garments into his shop and proceeded to make them up. While engaged in this work and before he had returned all the garments a fire destroyed his shop and also the last two lots of garments sent by the plaintiff.

There was no evidence contradictory of the above and the defendant did not deny having received the invoices and read the notice on them as above stated.

The plaintiff brought an action of assumpsit to recover the value of the garments he had intrusted to the defendant and which the defendant had not sent back to him. His declaration, among several counts, contained one on a special contract of bailment to the defendant to receive, make up, and return at his own risk. The plea was the general issue. Upon these pleadings and the above undisputed evidence, the presiding justice directed a verdict for the plaintiff, and the defendant excepted.

We think the defendant's acceptance of the garments to make up and return, under the distinct notice in the previous or contemporaneous invoice, that they were "to be at his risk against loss by fire or otherwise until returned," constituted an acceptance by him of those terms of the bailment to him, no agreement to the contrary being shown. Such notice and acceptance of the bailment under it, are clear and undisputed evidence of the contract declared on, of a contract by the defendant to assume the risk of loss by fire and to be accountable in all events for the return of the garments. *Harmon* v. *Salmon Falls Mfg. Co.* 35 Maine, 447; *Maker* v. *Maker*, 74 Maine, 104; *Grace* v. *Adams*, 100 Mass. 505; *Kirkland* v. *Dinsmore*, 62 N. Y. 71; *Fonseca* v. *Steamship Co.* 153 Mass. 553.

The intrusting the garments by the plaintiff to the defendant to be made up for a given price, constituted a consideration on the plaintiff's part for the contract on the defendant's part to re-deliver at all hazards. The parties to a bailment *locatio operis faciendi* may lawfully make such a stipulation a part of the contract. Story on Bailments, 426 a. The bailor may decline to make the bailment unless the bailee will so stipulate,

and if the bailee does so stipulate in order to secure the bailment to him and does thereby obtain it, such bailment is a valid consideration for the stipulation.

There was at the trial some conflict of evidence as to whether the plaintiff also verbally notified the defendent before any garments were sent, that they would be at the defendant's risk, if sent. The defendant only contended, however, that nothing at all was said about such risk or insurance prior to the receipt of the invoices. In our view of the case, it is immaterial whether such prior verbal notice was given or not and the exclusion of evidence on that question was not prejudicial to the defendant. The written notice was undisputed.

Exceptions overruled.

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

STEPHEN H. DYER *vs.* FRED S. WALLS, and another, Executors.

Knox. Opinion December 17, 1892.

Limitations. Executors and Administrators. Agent or Attorney. R. S., c. 64, § § 9, 12, 38, 40, 41; c. 87, § § 12, 18.

When joint executors, one of whom resides out of the State, when appointed, give a joint notice only of their appointment, and omit to insert therein the name and address of the agent or attorney in the State of the latter, they cannot avail themselves of the special statute of limitations in an action against the estate of their testator.

FACTS AGREED.

To an action of assumpsit against the defendants, as executors of Moses Webster, late of Vinalhaven, deceased, they pleaded the general issue and the statute of limitations. It was admitted that at the time of the testator's death, the plaintiff was and ever since has been a resident of Vinalhaven; that during the same period the defendant, Walls, has resided there; and the other defendant, Webster, has resided at Hudson, New Hampshire. No notice was given of the appointment of any agent or attorney of defendant Webster in this State.

C. E. and A. S. Littlefield, for plaintiff.

W. H. Fogler, for defendants.

Action barred: R. S., c. 87, § 12; *Pettengill* v. *Patterson*, 39 Maine, 498; *Thurston* v. *Lowder*, 40 *Id.* 498; *Gould* v. *Whitmore*, 79 *Id.* 383. Defendants gave all the notice required by the order of probate court. Notice may be proved by oral or any competent evidence. Statute requiring appointment of an agent or attorney of non-resident executor has no reference to the statute of limitations. From 1872 until 1883, a creditor could maintain no action against an executor or administrator unless he first presented his claim in writing and demanded payment. In order that a creditor might not be precluded from seasonably presenting his demand, this statute was enacted. By the act of 1883, now incorporated in the R. S., c. 87, § 12, no presentation and demand is required. *Gould* v. *Whitmore*, *supra*.

The appointment of an agent or attorney by an absent executor is still required, and it is a proper provision of statute, convenient for those who desire to present claims and serve notices, but a failure to appoint does not prevent the enforcement of his claim by a creditor, and does not avoid the statute of limitations. A suit can be commenced against an absent executor as readily as though he were within the state. "When an executor or administrator, residing out of the state, has no agent or attorney in the state, demand or service may be made on one of his sureties, with the same effect as if made on him." R. S., c. 87, § 12.

Defendants are joint executors. Walls has been all the time, since their appointment, a resident of Vinalhaven. Two or more executors are regarded in law as one person. *Hartell* v. *Bogert*, 1 Paige, 52; *Ames* v. *Armstrong*, 106 Mass. 18; 1 Redf. Wills, 222; 1 Will. Ex. 246. Being so, if one of the executors live in the State, it would be a useless ceremony for an absent executor to appoint an agent or attorney in the State.

VIRGIN, J. Assumpsit on an account annexed against the goods and estate of Moses Webster, late of Vinalhaven, deceased, testate, in the hands of the defendants, his executors.

The defendants interpose the special limitation bar of two years and six months provided for the benefit of estates of

deceased persons and their personal representatives, by R. S., c. 87, § 12.

The defendants were duly appointed and qualified on February 15, 1887. This action was commenced on February 18, 1890, more than three years after their appointment and qualification; and hence it is absolutely barred, unless the facts of the case bring it within some exception. *Littlefield* v. *Eaton*, 74 Maine, 516; *Lancey* v. *White*, 68 Maine, 28, 30; *Gould* v. *Whitmore*, 79 Maine, 383.

The plaintiff attacks the notice of the defendants' appointment and contends that the case comes within the express provision of R. S., c. 87, § 18, viz.: "When an executor or administrator does not give legal notice of his appointment, he cannot avail himself of the limitations contained in this chapter."

The case shows that the defendants, "within three months after giving bond for the discharge of their trust, caused notices of their appointment to be posted in two public places, specified by the judge of probate, in the town where the testator last dwelt," as required by R. S., c. 64, § 38. While this fact was not proved by the affidavit of the executors filed within one year after giving bond as provided in R. S., c. 64, § 40, for that was not filed until September, 1890, but in the absence of any statutory provision to the contrary, it seems that the fact may be shown *aliunde*. *Henry* v. *Estey*, 13 Gray, 336; *Estes* v. *Wilkes*, 16 Gray, 363.

Was the notice posted a "legal notice" within the meaning of R. S., c. 87, § 18, above quoted? If both of the executors resided in this State its legality could not be questioned. But one of them, at the time of giving notice of his appointment and qualification, and ever since has resided in New Hampshire. And the statute describing the notice to be given peremptorily provides that, "executors or administrators residing out of the state at the time of giving notice of their appointment, shall appoint an agent or attorney in the state, and insert his name and address in such notice." R. S., c. 64, § 41, repeated in R. S., c. 87, § 12. The notice posted by the defendants did not contain the name of any agent or attorney whatever of the

executor who has always resided out of the State. If he were the only executor, the illegality of the notice would not be questioned. And we are of opinion that it is none the less invalid because there are two executors, one of which only resides out of the State. For the only notice given was joint, signed by each executor, and did not contain what the statute expressly requires to make it legal.

To be sure, the statute also provides that, "when an executor, residing out of the State, has no agent or attorney in the state, demand or service may be made on one of his sureties, with the same effect as if made on him" (R. S., c. 87, § 12), and it may be said that the plaintiff's rights may thus be preserved. But while such a construction might meet the particular case since this non-resident executor has given a bond, and presumably with sufficient sureties, still all executors are not required to give bond. R. S., c. 64, § § 9 and 11. And in such cases the rights of creditors of the estate would be prejudiced; and the construction must be general and in harmony with all its provisions on the subject.

While generally co-executors, unless the will under which they act directs otherwise, are to be treated in law as one and the same individual, their authority being joint and entire when acting within the scope of their powers (*Shaw* v. *Berry*, 35 Maine, 279; *Gilman* v. *Healy*, 55 Maine, 120); nevertheless the creditor has a right of action against all who have qualified or at least a majority of them. R. S., c. 64, § 12. Whether the defendants by heedlessly omitting such action on their part as will lose them and the estates under their charge the benefit of the special bar to this action, and thereby render them liable for waste, we need not now inquire. It is sufficient to remark that it behooves all such personal representatives of estates to see that their notices are made in accordance with statutory provisions enacted for their benefit and of the estates to be administered by them.

Case to stand for trial.

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

ANNIE V. KELLER *vs.* INHABITANTS of WINSLOW.

Kennebec. Opinion December 19, 1891.

Way. Defect. Notice. R. S., c. 18, § 80.

By R. S., c. 18, § 80, a person injured by a defect in the highway, is required before bringing suit therefor to give written notice, "setting forth his claim for damages."

Where the wife is injured and her husband gives written notice thereof, and that he claims damages, saying nothing of the wife's claim for damages, *Held:* That an action by the wife cannot be maintained.

ON REPORT.

The case, which came up from the Superior Court for Kennebec County, is stated in the opinion.

W. T. Haines, for plaintiff.

Webb, Johnson and Webb, for defendants.

EMERY, J. This is an action by Annie V. Keller, on R. S., ch. 18, § 80, to recover damages for personal injuries which she alleges she received through a defect in a road in the defendant town. She did not personally, within fourteen days after the reception of the injury, give to the municipal officers notice in writing "setting forth her claim for damages," but within that time her husband, Hollis Keller, with her consent and even by her authority, undertook to give the written notice required by the statute.

The husband gave two notices in writing, each purporting to be given by him and to be signed by him. The notices stated that the wife was injured, and where and how she was injured. In the first notice the only claim for damages set forth was in these words, "I [the husband] claim damages of the town of Winslow." In the second notice the only claim for damages set forth was in these words, "for which injury and damage, [to the person and clothing of the wife] I [the husband] claim damages of the town of Winslow."

It is clear from the reading the notices, that the only claim made for damages, the only claim set forth, is the claim of the husband. Neither of the notices states that the wife makes any claim for

damages. The statute requires that the claim of the plaintiff in the action for damages should be set forth in the notice preliminary to the action. In these notices we have notice that the husband claims damages, but none that the wife, the plaintiff, claims damages.

The plaintiff's counsel vigorously attacks the reasoning and conclusion in the opinion in *Hubbard* v. *Fayette*, 70 Maine, 121; but they still seem to us sound and decisive. The statute is clear and imperative, and should not be modified by construction. *Wagner* v. *Camden*, 73 Maine, 485.

Judgment for the defendants.

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

CHARLES E. GARCELON, and another,

vs.

GEORGE H. TIBBETTS, Appellant.

Androscoggin. Opinion December 22, 1891.

Broker. Commissions. Contract. Deed. R. S., c. 73, § 14.

To entitle a broker to commissions, where he is employed to sell real estate, he must produce a purchaser ready and willing to enter into a contract on the employer's terms.

This implies and involves the agreement of buyer and seller, the meeting of their minds, produced by the agency of the broker.

The defendant was the owner of a parcel of real estate which he authorized the plaintiff to sell for a certain sum. Nothing was said relative to the kind of deed to be given. The broker found a purchaser who refused to complete the transfer unless the defendant would give him a warranty deed, notwithstanding the defendant had a good title to the property. The defendant would not give a warranty deed, but offered to give a quitclaim deed, in usual form with special covenants and so the sale was not executed. *Held:* That the broker was not entitled to his commissions.

ON EXCEPTIONS.

The court ruled as matter of law that the plaintiff upon the facts, as stated in the opinion, was entitled to recover, and the defendant excepted.

Tascus Atwood, for plaintiffs.

When one employs another to act for him, the employee has a right to assume (in the absence of restrictions to the contrary)

that the business is to be executed in the way and manner such business is usually and ordinarily conducted. The defendant took this method at the last moment to avoid the sale, for, had he been so particular to execute nothing but a quitclaim deed it would have been in his mind so prominently that he would have named it to his agents.

There are many decisions to the effect that when a sale fails of consummation solely through the seller's fault the broker who has "worked up" the negotiations is entitled to his fee. Story on Agency, § 329.

It does not appear that the purchaser knew at the interview that the defendant's title was good,—a man is justified in demanding a warranty deed,—it enables one if he has occasion to bring a writ of entry to make out a *prima facie* case by its production, something he cannot do by producing a quitclaim deed. *Rand* v. *Skillin*, 63 Maine, 103.

In *Hoback* v. *Kilgore* (a Virginia case), 21 American Rep. 317 (26 Gratt. 442), the court says, "The court is further of opinion that a vendor of real estate in his own right is bound to convey the same with general warranty unless it be otherwise agreed between the parties."

The ruling was reasonable. It is a just ruling. It is consonant with law and should be sustained.

Newell and Judkins, for defendant.

FOSTER, J. Assumpsit, in which the plaintiffs as real estate brokers claim to recover a certain sum as commissions for services in negotiating the sale of a parcel of real estate belonging to the defendant.

Whether they are entitled to recover at all is the only question presented by the exceptions.

The defendant was the owner of a parcel of real estate which he authorized the plaintiffs to sell so as to net him two thousand seven hundred dollars. The plaintiffs obtained a purchaser at the price of two thousand seven hundred and twenty-five dollars. Nothing was said between the plaintiffs and defendant relative to the kind of deed which the defendant was to give the

purchaser. The purchaser met the defendant at the plaintiffs' office to pay the money and receive the transfer. The plaintiffs had made a warranty deed of the property to the purchaser to be executed by the defendant, which the defendant refused to execute, but he did offer to execute and deliver to the purchaser a quitclaim deed in usual form with covenant against any claim or title under him. The purchaser refused to complete the transfer unless the defendant would give him a warranty deed of the property, notwithstanding the defendant had good title to the property in question, and the sale was not executed.

Upon this state of facts we think the plaintiffs are not entitled to recover.

The efforts of the plaintiffs to complete the sale failed, not through any fault of the defendant, but by reason of the purchaser and the defendant not being able to agree in reference to the form of conveyance. The purchaser demanded more than the law exacts where there is no agreement, and no form of conveyance is agreed upon. The title was in the defendant. A deed of release or quitclaim of the usual form would have conveyed the defendant's title and estate as effectually as a deed of warranty, R. S., c. 73, § 14. An agreement or covenant to convey a good title does not necessarily entitle the covenantee to a warranty deed. *Kyle* v. *Kavanagh*, 103 Mass. 356, 359. In this case the contract called for a good title, but was silent as to the kind of deed, and the court held that if the contract was that the plaintiff should give the defendant a good title, "there being no agreement as to the form of the deed then the delivery to the defendant of the deed of quitclaim was a compliance with the contract on the part of the plaintiff." *Gazley* v. *Price*, 16 Johns. 267; *Ketchum* v. *Evertson*, 13 Johns. 359; *Potter* v. *Tuttle*, 22 Conn. 512.

In the case last cited the court say: "No form of conveyance was agreed upon, and therefore, any deed by force of which a clear title in fee would be vested in the plaintiff, would be a compliance with the agreement, whether a quitclaim or deed with covenants."

There is a well defined distinction between the title to real

property, and the deed by which that title is transferred. The title is the principal thing,—the deed is but the muniment or evidence of the title.

No form of conveyance having been agreed upon, and the defendant, admittedly having a good title to the real estate in question, was in no fault in not completing the sale on his part, when he offered his quitclaim deed with covenants. The purchaser, however, was not satisfied with a deed that would effectually vest in him a good title to the property. He demanded more than a title. He exacted covenants which the defendant was not willing to give. There was therefore no contract, no agreement for a sale. Consequently no commissions for sale of the property are due from the defendant to these plaintiffs.

In *Wylie* v. *Marine National Bank*, 61 N. Y. 416, it was held that to entitle the broker to commissions, he must produce a purchaser ready and willing to enter into a contract on the employer's terms. This implies and involves the agreement of buyer and seller, the meeting of their minds, produced by the agency of the broker.

In *Barnard* v. *Monnot*, 16 How. Pr. (N. Y.) 440, it was said that the duty of the broker consisted in bringing the minds of the vendor and vendee to an agreement.

The Supreme Court of the United States in *McGavock* v. *Woodlief*, 20 How. 221, say that "the broker must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commissions. Then he will be entitled to them, though the vendor refuse to go on and perfect the sale." "But in all the cases, under all and varying forms of expression," say the court in *Sibbald* v. *The Bethlehem Iron Co.* 83 N. Y. 378, 382, "the fundamental and correct doctrine is, that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue."

It is now the well settled doctrine, that in the absence of any

usage, or contract express or implied, or conduct of the seller preventing a completion of the bargain by the broker, an action by the broker for his commissions will not lie until it is shown that he has effected or procured a sale of the property. It is not enough that the broker has devoted his time, labor or money to the interests of his employer. Unsuccessful efforts, however meritorious, afford no ground of action. Where his acts effect no agreement or contract between his employer and the purchaser, the loss must be his own. He loses his labor and effort which he staked upon success. If no contract, then no reward. His commissions are based upon the contract of sale. *Viaux* v. *Old South Society*, 133 Mass. 1, 10; *Loud* v. *Hall*, 106 Mass. 404, 407; *Tombs* v. *Alexander*, 101 Mass. 255; *Kock* v. *Emmerling*, 22 How. (U. S.) 69; *Glentworth* v. *Luther*, 21 Barb. 147; *Drury* v. *Newman*, 99 Mass. 256; *Sibbald* v. *The Bethlehem Iron Co. supra*; *Cook* v. *Welch*, 9 Allen, 350; *Veazie* v. *Parker*, 72 Maine, 443; *Rockwell* v. *Newton*, 44 Conn. 337.

Of course there may be contracts between the broker and his employer, by the terms of which the broker may become entitled to his commissions even though a bargain or sale may not be effected. In such cases the terms of the contract must govern, as in *Chapin* v. *Bridges*, 116 Mass. 105, and *Rice* v. *Mayo*, 107 Mass. 550. But in the present case there was no contract other than for a sale of the property. The sale was not effected between the parties owing to a misunderstanding or disagreement in reference to the form of conveyance. It was not an act of capriciousness on the part of the defendant such as to render him liable to the brokers for their commissions, as in *Kock* v. *Emmerling*, 22 How. (U. S.) 69, 73.

Exceptions sustained.

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

WILLIAM S. JONES, and another, *vs.* LEWIS A. COBB.

Androscoggin. Opinion December 22, 1891.

Trover. Title. Mortgage. Possession. Damages.

Title to personal property is not changed by its conversion and by the bringing of an action of trover therefor by the owner.

In trover by the owner for conversion of personal property only nominal damages are recoverable, if the same property has been attached by a creditor of the owner.

ON MOTION AND EXCEPTIONS.

In this action of trover, the plaintiffs recovered a verdict for the full value of ninety-one cases of wooden toothpicks and the defendant filed a general notion for a new trial, and also excepted to the admission of evidence offered by the plaintiffs on the question of their value.

It appeared at the trial that, after this action had been brought, the same property had been subsequently attached in a suit against the plaintiffs.

The case is stated in the opinion.

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

Savage and Oakes, for defendant.

VIRGIN, J. Trover for the alleged conversion of ninety-one cases of toothpicks. The defendant now seeks to have the verdict against him set aside.

The plaintiffs' title is founded upon a mortgage given to secure a note payable in one year from February 1, 1889, the mortgagors "to continue in possession of the chattels until breach of the condition."

This action was commenced on November 2, 1889, three months before the expiration of the term of credit, during which the mortgagors were to retain possession.

It is elementary that to maintain trover the plaintiff, though the general owner, must have the right of possession at the time of conversion. 2 Greenl. Ev. § 636. And, while a mortgage of chattels vests the title conditionally in the mortgagee, and generally the right of possession follows the title; and in the

absence of any stipulation to the contrary, the right of possession is presumed to be in the mortgagee (*Holmes* v. *Sprowl*, 31 Maine, 73), and he may maintain that right by trover or replevin, even before the expiration of the term of credit given to the mortgagor (*Tibbetts* v. *Towle*, 12 Maine, 341; *Pickard* v. *Low*, 15 Maine, 48; *Ferguson* v. *Thomas*, 26 Maine, 499; *Bunker* v. *McKinney*, 63 Maine, 529); still, the mortgagee may by a valid binding agreement, deprive himself of that right and hence the power to bring an action of trover therefor, for a specific time. And that agreement may be contained in the mortgage like the one at bar (*Ingraham* v. *Martin*, 15 Maine, 373), or by parol made at the same time. *Pierce* v. *Stevens*, 30 Maine, 184.

The plaintiffs contend that they had the right of possession on November 2, 1889, when they commenced their action, notwithstanding the time stipulated in the mortgage had not expired, by reason of a formal release from the mortgagors, dated July 17, 1889. But the release was objected to and excluded until its execution was proved and there was no evidence of its execution.

It is also urged that the agent of the plaintiffs (mortgagees), by their direction, took possession of the property in June, prior to the date of the release, by taking the key to the room in which the property was stored. But there is no evidence that the mortgagors gave their consent, the mortgagees alone could not modify the stipulation in the mortgage. We do not mean, however, to decide that the mortgagee would be without remedy.

Again, the jury found as damages the whole value of the toothpicks. We are of opinion that this was contrary to law. For assuming that there was a technical conversion by the defendant (which we do not decide) the mere conversion of the property did not vest the title in the defendant. For when property has been converted and the owner, instead of replevying it, sues in trover for its value, the title does not vest in the converter, until at least judgment is recovered (*Carlisle* v. *Burley*, 3 Maine, 251; *White* v. *Philbrick*, 5 Maine, 147), and the over-

whelming weight of authority overrules these early cases and declares that nothing short of a satisfaction of the judgment transfers the title. *Murry* v. *Lovejoy*, 2 Cliff. 191, and numerous cases there cited. 2 Kent's Com. 388—9 and notes, Freem. Judgm. § 237 and notes. And the evidence shows that, before this writ was served on the defendant, the toothpicks were attached on the suit of Wood and others against these plaintiffs, which action is still pending. Hence, as the toothpicks, before the title left the plaintiffs, were taken from the defendant on a writ against the plaintiffs, they will ultimately have the benefit of them; and as the action is trover and not trespass and no damages can be recovered for injury to the possession, the verdict should have been for nominal damages only. *Pierce* v. *Benjamin*, 14 Pick. 356, 361 and cases.

Motion sustained. Verdict set aside.
New trial granted.

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

GEORGE H. M. BARRETT *vs.* ROCKPORT ICE COMPANY.

Knox. Opinion December 22, 1891.

Waters. Great Ponds. Ice. Title.

The lessee of a portion of the shores of a great pond, who without scraping the snow from the ice thereon, erects stakes with his name thereon around nearly one half the pond, does not thereby acquire such a right to the ice thus inclosed as will enable him to maintain trover against an Ice Company which, previous to the formation of the ice, removed the lily-pads, scraped off the previous snows, bored holes in the ice to let off the surface water and proceeded to harvest the ice against the written protestation of the plaintiff.

ON REPORT.

This was an action of trespass for depriving the plaintiff of an ice field on Lily Bay in Rockport and which, having been staked out by him, he claimed to have legally acquired.

The facts appear in the opinion.

W. H. Fogler, for plaintiff.

C. E. and A. S. Littlefield, for defendant.

VIRGIN, J. This is an action for cutting and carrying away more or less of fifteen acres of ice from Lily Pond. The case comes up on report with the stipulation that, if the action is maintainable it is to stand for trial, otherwise a nonsuit to be entered.

The owner of the bed of a mill pond raised by a dam across an unnavigable stream, has as an incident to such ownership the right to cut the ice therefrom whenever the exercise of such right does not appreciably diminish the head of water to the detriment of the mill owner. *Stevens* v. *Kelley*, 78 Maine, 445; *Paine* v. *Woods*, 108 Mass. 160, 173; *Higgins* v. *Kustener*, 41 Mich. 318.

But the law governing ponds of more than ten acres in extent, denominated "great ponds" by the colonial ordinance of 1641–7, is different. Of such no individual owns the subjacent soil. That and the ponds themselves are held by the state for the public. The right to take fish or ice therefrom is common and free to all, unless abridged by the legislature. *Barrows* v. *McDermott*, 73 Maine, 441; *Roxbury* v. *Stoddard*, 7 Allen, 158. Neither the shore proprietor, nor any corporation with simple charter authority to cut ice thereon, has any greater or different right in respect to that, than every other inhabitant who can gain legal access to the pond. *Brastow* v. *Rockport Ice Co.* 77 Maine, 100; *Hittinger* v. *Eames*, 121 Mass. 539; *Gage* v. *Steinkrauss*, 131 Mass. 222; *Rowell* v. *Doyle*, *Id.* 474.

As the state holds such ponds and their contents and products for the people, the legislature may regulate the essential acts of possession which shall constitute a legal appropriation of a given quantity of the ice. *Barrows* v. *McDermott*, *supra*. Although the ice business has developed so enormously within the last eight or ten years, the legislature has not yet taken the subject in hand, and hence all rights pertaining thereto necessarily rest upon judicial interpretation. *Woodman* v. *Pitman*, 79 Maine, 456, 460.

Neither have the courts fully settled the definitive rules which shall govern the rights of the public, though they have with more or less harmony laid down a few general rules pertaining

thereto. Thus this court, in an action in which this defendant was a party, has declared that the rights of individuals are equal, to be exercised in a reasonable manner, with a due regard to the rights of all who may wish to take ice from this pond. *Brastow* v. *Rockport Ice Co. supra.* So the court in Massachusetts has made a like decision, that every inhabitant who can obtain access to a great pond without trespass, may cut ice thereon for use or sale, so long as he does not interfere with the reasonable exercise by others of like rights. *Rowell* v. *Doyle*, 131 Mass. 474. And the court in Kansas has said that, "he who first appropriates and secures the ice owns it. *Wood* v. *Fowler*, 26 Kans. 682.

What is essential to constitute such an appropriation is not fully settled.

Where the plaintiff enclosed with marked stakes and with a snow-plow plowed around a certain field of ice upon the Mississippi river; had a flat-boat on the spot to remove the ice; held constant possession by a body of employees who kept it swept; and after expending more than two hundred dollars in preserving it and it was fit to cut, the defendant with a crew armed with clubs, drove the plaintiff and his employees away and cut and carried off the ice, the defendant was held liable for the ice. *Hickey* v. *Hazard*, 3 Mo. App. 480.

So, on the Detroit river, where the channel was eighteen hundred feet in width, an ice company extended a boom parallel with and fifteen feet from the shore on which its ice houses stood, the defendant was held liable for unnecessarily running its ferry-boat up and down the river so near to the boom as to break up and destroy the ice which had formed inside of it. *People's Ice* v. *Steamer Excelsior*, 44 Mich. 229.

In the case already cited, lessees of a tract of land on the bank of Kansas river were denied an injunction against the defendant's taking ice opposite and next the lessees' land. The court concluded their opinion by saying: "The one who first appropriates and secures the ice which is formed is entitled to it, and on the same principle that he who catches a fish in one of these rivers, owns it." *Wood* v. *Fowler*, *supra.*

Again, where lessees of ice houses on the shore of a great pond scraped the snow from a portion of it and then left it for a day and two nights in order that it might increase in thickness — it was held that they thereby acquired no such title thereto as would enable them to maintain an action of tort against one who cut holes through the ice for the purposes of fishing and knew the purposes for which it was cleared and the usual manner of harvesting ice. Gray, C. J., said: "At the time of the acts of which the plaintiffs complain, they had not cut any ice, nor were they engaged in cutting or otherwise in actual possession." *Rowell* v. *Doyle*, 131 Mass. 474, 476.

So, in the very late case of *People's Ice Co.* v. *Davenport*, 149 Mass. 322, it was held that, scraping the snow from about one half of the ice of a great pond, and marking it off with stakes and then suspending further active operations, give no such title as will enable the party to maintain trover against another, who five days later cut and gathered the ice. Morton, C. J., after reaffirming the previous cases decided by that court, said: "The case is not like one of capturing animals *ferœ naturœ*, or of taking possession of derelict property. It is more analogous to the case of a tenant in common attempting to take possession of the common estate, by staking it off and thus excluding his cotenants."

The latest decision which has come under our observation, is *Brown* v. *Cunningham*, decided by the Supreme Court of Iowa in May, 1891, and reported in 48 N. W. Rep. 1042. The government had meandered the shores of the unnavigable Wapsipinicon river, retaining title to the bed thereof when disposing of the adjacent lands. The plaintiff, not a riparian owner, obtained lawful access to the river, harvested a large quantity of ice, and cut and made preparations for moving more, when he was enjoined at the suit of the defendant. In an action upon the injunction bond, the court after a learned discussion of the case both on principle and authority, rendered judgment against the defendant. Beck, C. J., said: "Any citizen who may lawfully go upon the stream may gather ice from it under the regulations prescribed by law. He is entitled to the ice he

prepares by his labor to be removed. It is plain that if he cuts ice for transportation to his ice house, another cannot rob him of his labors by carrying away his ice; and it is plain that when he makes preparations to use the ice upon a certain part of the stream, prepares its surface for cutting, erects machinery to handle the ice, makes walks or ways for workmen, or in any other proper manner indicates the part of the stream which he occupies in his operations, which must be reasonable in extent and in all other respects, he has a property right to the occupation of such locality during the ice season and to the ice formed there;" and added that analogous rules were adopted by settlers and miners in every territory in the union.

In this State, in an action on the case for the value of a two-horse team of a traveler upon the Penobscot river, drowned by breaking through the thin ice formed in a place from which the thick ice had been removed by the defendant, PETERS, C. J., by way of illustration, said: "The ice fields, after they have been staked, fenced and scraped, have so far become the property of the appropriator that an action would lie against one who disturbs his possession." *Woodman* v. *Pitman*, 79 Maine, 465.

The pond in question contains about thirty-two acres, and is therefore, a "great pond." The plaintiff was in possession of seventeen rods of the shore owned by his mother. In the fall of 1889, he dug a ditch extending several rods back from the pond, through which ice could be floated to the upland. On the night of January 27, 1890, commencing at ten o'clock and finishing at six the next morning, the plaintiff run a line of stakes marked "B Ice Co." from his land diagonally across the pond then covered by four inches of snow, and thence near to the shore around one end of the pond to his land thereby inclosing some fifteen acres — or nearly one half its surface. He owned a set of ice tools which he had not used since 1884, when he last cut ice, and his ice houses were in a dilapidated condition.

The defendant had annually, for fifteen years, cut large quantities of ice, employing a large number of men and teams therefor, had and claimed possession of nearly all the accessible

shore property except the seventeen rods in possession of the plaintiff, and had cut the ice on the same territory the season before, and had commodious ice houses. Late in the fall of 1889, but before the ice began to form, the defendant cut out and removed the lily-pads which covered much of the surface and unless removed rendered the ice worthless; subsequently, as the rains fell, bored holes through the ice to let off the surface water, which otherwise injures the ice; scraped off the snow that had thus far fallen during the season, employing several men therefor on January 13, 1890, several days before the erection of the plaintiff's stakes — in that business. And after the plaintiff left the ice on the morning of January 28, 1890, the defendant's employees went upon the pond and commenced opposite the plaintiff's ditch to scrape, fit and haul the ice. They were delayed by a storm several days and finished the fore part of February.

After the defendant's employees had been at work a few hours, the plaintiff served a notice in writing on the defendant of his staking out the territory described, therein forbidding meddling with his stakes, scraping the snow or cutting the ice inclosed, and declaring the plaintiff's intention to cut the same, which the defendant ignored, but continued to cut and take away the ice, without any further action by the plaintiff.

Now, assuming that this court intended by the few clauses quoted in *Woodman* v. *Pitman*, *supra*, to define the acts essential to an appropriation of a field of ice, the plaintiff's acts, as above recited, fall far short of constituting him an appropriator. The only acts looking in that direction were his digging the ditch, his nocturnal erection of stakes, and serving the written notice. He scraped no snow; he removed no lily-pads; he ignored the surface water; made no preparations whatever to cut the ice, though twelve to fourteen inches thick. No one prevented him or forbade him.

We are of the opinion, therefore, that the action is not maintainable against the defendant who did proceed to cut without any molestation from any source. *Plaintiff nonsuit.*

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

WILFRED LANGLOIS *vs.* MAINE CENTRAL RAILROAD COMPANY.

Kennebec. Opinion January 5, 1892.

Negligence. Railroad. Fellow-servant.

An employee of a railroad company, whose duty with his co-employees is to unload from cars and stick up in piles in the company's lumber yards sawed oak timber deposited there to be used in the manufacture and repair of cars, cannot recover damages of the company for an injury received by the falling upon him of an adjoining pile caused by the negligence of himself and of his co-employees.

Acts which constitute such negligence.

ON MOTION AND EXCEPTIONS.

This was an action tried in the Superior Court, for Kennebec County, to recover damages for personal injuries sustained by the plaintiff, a workman in employ of the defendant corporation, while handling timber which fell upon him and broke his leg.

The acts of negligence set forth in the declaration are as follows: . . . "for that on the second day of May, A. D., 1889, the plaintiff was in the employ of the defendant corporation, working as a laborer in the yard adjacent to the said defendant corporation's car-shop in Waterville, in said County of Kennebec; that on said second day of May, he was directed by the defendant's foreman or outside boss in said yard, to assist in the piling of certain timbers in said yard, said foreman or outside boss designating the place in which said plaintiff was to work; that said place wherein said timbers were to be piled and said plaintiff was to work as directed was an unsafe place for the plaintiff to work in, because of the negligent and unsafe manner in which other piles of timbers had been, before said second day of May, deposited by said defendant corporation or its servants, and had been allowed to remain for a long time so piled, in the immediate proximity of the place in which the plaintiff was directed to work as aforesaid, although of the unsafety as aforesaid, the plaintiff had no knowledge; that in obedience to the orders of the said foreman or outside boss, and in the discharge of duty and ignorant of any danger, the plaintiff began the work

assigned in the place thus negligently and carelessly designated by the defendant, through its said foreman, and thereupon, without fault of the plaintiff, the timbers which had been negligently and unsafely piled as aforesaid by the defendant corporation, or its servants, fell and struck the plaintiff and severely injured him, breaking one of his legs and doing him other grievous bodily injuries and causing him great pain and anguish, whereby he has been subjected to great loss of time and incurred debts of great amount which he is bound to pay.

"Also, for that on the second day of May, A.D., 1889, while said plaintiff was in the employ of the said defendant corporation at Waterville, in the County of Kennebec, and during which time of employment said defendant was bound to provide a reasonably safe place in which the plaintiff might work while employed by the defendant as aforesaid, said plaintiff was negligently and carelessly set at work by the defendant corporation, or its foreman, in a place wholly unsafe for him to work in, although said plaintiff was ignorant of the unsafety of the place as aforesaid, whereby said plaintiff without fault on his part, became greatly injured by the negligence of the defendant corporation and suffered great pain and anguish and incurred great loss of time and became indebted in large sums of money, which he is bound to pay.

"Also, for that on the second day of May, A. D., 1889, the plaintiff being then in the employ of the defendant corporation at Waterville, in the said County of Kennebec, and the said defendant corporation being then and there bound to provide a reasonably safe place in which said plaintiff was to work while employed as aforesaid; the plaintiff was, without fault on his part and wholly through the carelessness, negligence and fault of the defendant, in providing a place for the plaintiff to work, greatly injured by reason of the falling of timber upon him, whereby his leg became broken and he suffered other grievous injuries and loss of time and incurred large debts, which he is bound to pay."

Plea, the general issue.

The jury returned a verdict for the plaintiff. The defendant moved for a new trial and also filed exceptions.

A report of the exceptions becomes unnecessary by reason of the view taken by the court of the case as presented on the motion.

W. C. Philbrook, for plaintiff.

Webb, Johnson and Webb, for defendant.

VIRGIN, J. An employee in the defendant's lumber yard connected with its repair shops, recovered a verdict of three hundred dollars for damages resulting from the fracture of his thigh bone, caused by the falling upon him a pile of lumber near which he and his co-employees were piling other lumber as it was being unloaded from a platform car — which verdict the defendant seeks to have set aside.

The report shows that, two to three hundred thousand feet of oak timber, sawed in various specified dimensions, are annually unloaded from platform cars, piled at right angles with, and alongside of a track extending across the defendant's yard to its shops and worked up into cars.

Timber of the same thickness is piled by itself in double tiers — two pieces in width. Each pile rests upon sawed oak skids placed horizontally upon the ground, with sticks an inch thick between the several layers extending across both tiers. As timber of a particular dimension is wanted for use in the shops, a pile containing it is transferred to the shops; and other timber as it arrives, is unloaded from the car and piled in the places thus left vacant.

The timber is handled by three or four men to a car under the supervision of a foreman who stands by to take account of the number and dimensions of the sticks and note the number of the car from which it is taken.

On April 30, 1889, a car of green oak timber arrived and was placed before one of the vacant spaces, four feet wide, from which a pile had been transferred, a week or two before, to the shops. On the north side of the vacant space was a pile two or three feet high. On the south side was another pile, consisting of sticks five inches thick and nine inches wide, stuck up in the usual manner, five or six feet in height, resting upon oak skids

which extended across the open space and upon which the carload there standing was to be piled.

The plaintiff, with three others and a foreman went to the car and commenced to unload it in their usual manner, by one man standing upon the car and pushing one end of a stick of timber from the car when the others would take it and deposit it upon the skids. When the end of the first stick was pushed from the car upon the ground, the other three, one at each end and the plaintiff at the middle, took it along over the skids, and (in the language of the plaintiff), "when we found it in place, let it drop three or four feet," upon the skids. "It did not fall as it should and we went to place it in line with the other piles and had not time to place it before the [south] pile fell" and broke the plaintiff's leg.

The plaintiff and his fellow laborers who handled the timber were Frenchmen. His fellows testified that the pile was not plumb, but leaned toward the open space, and they talked about it in French in the presence of the plaintiff, who says he did not hear the conversation nor notice that the pile was not perpendicular. Other witnesses declared that the pile was plumb and stood firm.

We do not think it is material whether it was or was not plumb. If it so leaned as to attract the attention of his fellow employees, the plaintiff must, or ought in the exercise of ordinary care, to have seen it. The plaintiff had worked there the entire month of April, and he testified that he "had passed this pile about every day and sometimes many times a day." Ordinary care on his part demanded that he should use his eyes when about his ordinary employment, and if the pile leaned, he had the same opportunity of seeing which others had, who were engaged there with him.

Moreover, whether it leaned or not, or whether or not he saw it if it did lean, he and his fellows were guilty of gross negligence in their manner of handling the timber which was the obvious cause of the accident. For instead of taking the stick of heavy, green oak timber along and laying it down upon the skids which they knew extended under the pile, they let it drop

three or four feet upon the skids which evidently caused the pile to topple over. The whole transaction was the result of gross carelessness on the part of all concerned and the defendant showed its humanity in letting his regular pay go on during his five months suffering.

We are of opinion that the verdict was clearly against law.

Motion sustained. New trial granted.

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

HARVEY P. WASSERBOEHR *vs.* THEODORE BOULIER.

84 165
87 521
91 277

Penobscot. Opinion January 12, 1892.

Intoxicating liquors. Sale. Constitutional law.

The plaintiff, a wholesale liquor dealer in Boston, through his agent at the defendant's shop in Old Town, contracted to send the defendant five barrels of whiskey and one barrel of port wine in original packages, and that the defendant should have ten days after receiving the liquors in which to return them if they were not satisfactory. The liquors were shipped to and received by the defendant, and a part of them returned. In an action for the price, *Held*: That the sale was made in Maine, notwithstanding the order was filled in Boston and delivery was there made to a common carrier; that the sale being conditional it became a completed contract after the arrival of the liquors at the place of their destination in Maine.

It was not a sale of liquors in original packages, inasmuch as the sale by its terms was conditional, executory and incomplete until the defendant had received, unsealed and sampled them.

That moment the sale was illegal by the laws of this State.

ON REPORT.

The parties agreed, that if the plaintiff sustained his claim at the law court, damages were to be settled by the clerk, otherwise a nonsuit to be entered.

This was an action of assumpsit, with account annexed for intoxicating liquors sold and delivered; the defendant pleaded the general issue, with brief statement, alleging that the sale was in violation of the law and statutes of this State.

The facts are fully stated in the opinion.

C. A. Cushman, for plaintiff.

First, we claim that the sale was made in Boston, Massachusetts, where the sale was legal.

Second, that the goods were imported in original packages, and that the sale having been made by the plaintiff in Boston, Massachusetts, who was duly licensed as a wholesale dealer, is entitled to recover pay for said liquors, in the courts of Maine. *Leisy* v. *Hardin*, 135 U. S. 100; *Torrey* v. *Corliss*, 33 Maine, 333; *Banchor* v. *Cilley*, 38 Maine, 553; *State* v. *Burns*, 82 Maine, 558. A bargain made for a certain quantity of liquors, to be set apart, and delivered by the seller in one state, and the liquors are accordingly separated, and put on a railway in that state, and is so transported to the purchaser in another state, the sale is no violation of the law in the latter state. *Boucher* v. *Warren*, 33 N. H. 185 and 215; *Tuttle* v. *Holland*, 45 Vt., 542.

So a sale of spirituous liquors, to be forwarded to the purchaser, in a state by railway, made by a licensed dealer, in another state, upon an order taken in the former state, by an agent having no authority to make sales, is a sale in the latter state, and a note given for the price of such liquors is valid, *Fuller* v. *Leet*, 59 N. H., 165.

Congress, may authorize a person to import intoxicating liquors, and sell the same in original packages. *State* v. *Burns*, 82 Maine, 558.

P. H. Gillin, for defendant.

FOSTER, J. The plaintiff, a wholesale liquor dealer, residing in Boston, seeks to recover a balance of two hundred and forty-one dollars and fifty-five cents for intoxicating liquors sold the defendant upon an order given to the plaintiff's agent or traveling salesman, at the defendant's shop in Old Town in this State. The contract with the agent was, that the plaintiff should send the defendant five barrels of whiskey and one barrel of port wine in original packages, and that the defendant was to have ten days after receiving the goods in which to return them if they were not satisfactory. The plaintiff filled the order and shipped the liquors to the defendant. A part of them were returned.

We do not think the plaintiff is entitled to recover for reasons which we shall state.

It is contended on the part of the plaintiff that the delivery

of the liquors, which had been ordered by the defendant, to a common carrier in Boston, the plaintiff being duly licensed to sell at wholesale, for transportation to the defendant, was in law a delivery to him there, and that this delivery was a completion of the sale in Massachusetts, and that the sale being valid by the laws of that state the defendant is liable for their value.

The first question to be considered is, whether the sale was made in Maine or Massachusetts. The validity of the sale may depend upon the decision of this question. For it is a general principle of law that the validity of a contract is to be decided by the law of the place where it was made unless either expressly or impliedly it appears that it is to be performed elsewhere. And it is also an established principle that if valid by the law of the place where made it is generally valid everywhere, and if, in the jurisdiction where made, the law would enforce it, it will be enforced in the jurisdiction to which a party may be compelled to resort for a remedy for its violation. But to this rule there is this exception, that no state or nation is bound to recognize or enforce contracts which are injurious to its own interests, or the welfare of its people, or which are in fraud or violation of its own laws. *Banchor* v. *Mansel*, 47 Maine, 58, 60; *Smith* v. *Godfrey*, 28 N. H. 379; *Hill* v. *Spear*, 50 N. H. 253.

It was in accordance with these general principles that the courts have held that the price of liquors sold and delivered in a state where such sale is legal, and nothing remains to be done by the vendor to complete the transaction, can be recovered in another state where such sale would be illegal. *Torrey* v. *Corliss*, 33 Maine, 333; *Banchor* v. *Cilley*, 38 Maine, 553; *Orcutt* v. *Nelson*, 1 Gray, 536; *McIntyre* v. *Parks*, 3 Met. 207; *Milliken* v. *Pratt*, 125 Mass. 374; *Scudder* v. *Union Nat. Bank*, 91 U. S. 406. Though it is otherwise if the contract contains any ingredient or participation on the part of the original vendor that the goods shall be illegally sold, or that he shall do any act, beyond the mere sale, to assist or facilitate the illegal act, or to aid the purchaser in his unlawful design in the subsequent unlawful disposition of the goods, or if the goods are to be delivered in the place where the sale is prohibited. *Smith* v.

Godfrey, 28 N. H. 379; *Banchor* v. *Mansel*, 47 Maine, 58; *Hill* v. *Spear*, 50 N. H. 253; *Lindsey* v. *Stone*, 123 Mass. 332; *Wilson* v. *Stratton*, 47 Maine, 120, 126, 127. This principle is illustrated in the case of *Tyler* v. *Carlisle*, 79 Maine, 210, 212, which was an action to recover money lent to be used for gambling purposes, and the distinction is there drawn between the mere loaning of money with a knowledge it is to be so used, and a loan made with the express understanding, intention and purpose that it is to be used to gamble with.

But omitting all consideration of the question whether the original vendor had knowledge of the intended illegal disposition of the liquors by the vendee, or participated in assisting or facilitating the vendee in any unlawful acts, in relation to them, we think the plaintiff cannot maintain his action for other reasons.

1. The sale was not made in Massachusetts, notwithstanding the order was filled in Boston and delivery there made to a common carrier. It became a completed contract after the arrival of the goods at their place of destination in Maine. The sale was conditional. The defendant was to have ten days in which to test the liquors, and if not satisfactory to return them. And in such case it has been held that the sale is not complete until after the delivery is made and the purchaser has had an opportunity to make his election.

Thus in *Wilson* v. *Stratton*, 47 Maine, 120, the contract was for intoxicating liquors between a vendor in Massachusetts and a purchaser in this State, in which it was stipulated that, after the goods were delivered here, the purchaser need not pay for them unless they suited him; and the court held that the sale was not complete until after delivery was made in this State and the purchaser had an opportunity to make his election. Mr. Justice RICE, in delivering the opinion of the court says: "The contract in this case was conditional; upon a condition precedent. That condition could not, under the circumstances, be determined until the goods came to the defendant's hands. Until he had determined whether the liquors were just what he wanted in all respects, or had a reasonable opportunity to do so, the contract was incomplete. *Crane* v. *Roberts*, 5 Maine,

419; *McConners* v. *McNulty*, 1 Gray, 139; *Grout* v. *Hill*, 4 Gray, 361." See also *Ballantyne* v. *Appleton*, 82 Maine, 570, where the general rule is given, that where the buyer is by the terms of the contract bound to do anything as a condition, either precedent or concurrent, on which the passing the title depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer. *Hotchkiss* v. *Hunt*, 49 Maine, 213; *Suit* v. *Woodhall*, 113 Mass. 391; *Weil* v. *Golden*, 141 Mass. 364; *Webber* v. *Doran*, 70 Maine, 140.

2. Nor can the contract be upheld as being a sale of liquors in original packages. The contract being conditional, with the right in the purchaser of ten days in which to ascertain whether the liquors were satisfactory or not, and if not to return them, must be construed as giving the purchaser the right of breaking and examining the packages. The sale was not only conditional, but was executory and incomplete until the defendant had received, unsealed and sampled the goods. That moment the sale was illegal by the laws of this State, and subjected the vendor to the penalties provided for the illegal sale of intoxicating liquors. He had no more right to complete the sale from such packages, or to sell from the packages after they were once unsealed or broken, than any other liquor seller, and neither the constitution of the United States, nor any decision of the courts can afford protection to him and shield his acts from the penalty for offenders against the laws of our own State. No importer, even under the constitution and decisions of the courts, is guaranteed the right of opening original packages which he may be allowed to import and selling the contents of such packages either in gross or by piecemeal. His right extends only to selling in the original packages. This is the doctrine enunciated not only by our own court in *State* v. *Robinson*, 49 Maine, 285; *State* v. *Blackwell*, 65 Maine, 556; and *State* v. *Burns*, 82 Maine, 558, 568, — but also by the Supreme Court of the United States in *Leisy* v. *Hardin*, 135 U. S. 100.

Plaintiff nonsuit.

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

HENRY F. ANDREWS, Executor,

vs.

IDA H. SCHOPPE, and others.

Penobscot. Opinion January 12, 1892.

Will. Choses in action. All other articles of personal property.

A testatrix, by the second item of her will made a bequest to her niece in the language following: "To my niece, ... I give all my housekeeping articles, including all my household furniture, beds and bedding, kitchen and table furnishing, books and pictures, all my wardrobe and all other articles of personal property in the house at the time of my death belonging to me."

At the time of making the will and at the time of her decease, the testatrix had four promissory notes amounting to about five hundred dollars; *Held*, that these notes did not pass to the niece by the foregoing clause, but became a part of the general assets of the estate and went under the residuary clause to residuary legatees.

The intention of a testator is to be gathered from the whole will, not from any particular clause where the language is susceptible of any doubt.

In ascertaining the intention of a testator where certain things are enumerated and a more general description is coupled with the enumeration, that description is commonly understood to cover only things of a like kind with those enumerated.

Choses in action differ from other personal property in that they have no locality but are considered as strictly following the person of the owner, and not incident to or parcel of a particular estate, locality, or pertaining to any particular house.

The circumstance of a pecuniary or specific legacy being given to the same or other parties has commonly been considered as favoring the construction adopted in this case.

ON REPORT.

Bill in equity to obtain the construction of the second item of the will of Isabella G. Andrews, deceased.

The case is stated in the opinion.

A. W. Paine, for Ida H. Schoppe.

Counsel cited, *inter alia: Martin* v. *Smith*, 124 Mass. 111; *Soulard* v. *U. S.* 4 Pet. 511; *Delassus* v. *U. S.* 9 *Id.* 117; *Smith* v. *U. S.* 10 *Id.* 326; *Holbrook* v. *Brown*, 2 Mass. 280; *Whiton* v. *Ins. Co.* 2 Met. 1; *Goreley* v. *Butler*, 147 Mass. 8; *Williston Seminary* v. *Co. Com. Id.* 427; *Sherman* v. *Dodge*, 28 Vt. 31; *Tomlinson* v. *Bury*, 145 Mass. 346–8; *B. & L. R.*

Co. v. *Salem R. R. Co.* 2 Gray 35; *Squier* v. *Harvey*, 16 R. I. 226; *Courter* v. *Stagg*, 27 N. J. Eq. 305; *Carlton* v. *Carlton*, 72 Maine, 116; *Belaney* v. *Belaney*, 2 Ch. App. Cases, L. R. 138; *Veazie* v. *Forsaith*, 76 Maine, 172; *Dole* v. *Johnson*, 3 Allen, 364; *Johnson* v. *Goss*, 128 Mass. 433; *Michell* v. *Michell*, 5 Madd. 69; *Hotham* v. *Sutton*, 15 Ves. 320, 326; *Campbell* v. *Prescott*, *Id.* 500.

H. Hudson, for residuary legatees.

Counsel cited: *Collier* v. *Squire*, 3 Russ. 467; *Wrench* v. *Jutting*, 3 Beav. 521; *Jackson* v. *Vanderspeigle*, 2 Dall. 142; 2 Jar. Wills (Randolph & Talcotts' ed.) p. 357; *Given* v. *Hilton*, 5 Otto, 591; *Penniman* v. *French*, 17 Pick. 404; *Bills* v. *Putnam*, 64 N. H. 554; *Dole* v. *Johnson*, 3 Allen, 364, and cases cited.

FOSTER, J. This bill in equity seeks the legal construction of the following clause in the last will and testament of Isabella G. Andrews, late of Bangor, deceased.

"Item 2. To my niece, Mrs. Ida H. Schoppe, I give all my housekeeping articles, including all my household furniture, beds and bedding, kitchen and table furnishings, books and pictures, all my wardrobe and all other articles of personal property in the house at the time of my death belonging to me; the same to be divided among friends and relatives of mine including herself according to instructions which I may leave on my decease."

At the time of making the will and at the time of her decease, the testatrix had four promissory notes of the aggregate sum and value of about five hundred dollars.

The only question is whether these notes passed by the foregoing clause to Mrs. Schoppe, or became a part of the general assets of the estate and went to residuary legatees under the residuary clause of the will.

It has well been said that it is extremely difficult to construe one will by the light of decisions upon other wills framed in different language. Unless the words used are very similar, they are more likely to mislead, as was remarked by the Lord

Chancellor in a recent English case, than to assist in coming to a correct conclusion. There are, however, certain general rules that are applicable in the construction of all wills, and yet considerable discretion is required in their application to particular cases. One fundamental rule that may safely be applied in the construction of every will is, the attainment of the testator's intention. That intention is to be gathered not only from the words of the particular devise, but from the whole will, from the relations of the testator to those who are the objects of his bounty, and from all the circumstances surrounding the testator. It is also a familiar rule of construction that the words of a will must receive their usual, ordinary and popular signification, technical words excepted, unless there is something in the context, or subject matter, to indicate that the testator intended a different use of the terms employed.

Applying these general principles to the case before us, we are satisfied that it was not the intention of the testatrix that Mrs. Schoppe should have the notes in question.

No one for a moment will controvert the assertion of the learned counsel that the term "personal property," in its broadest legal signification includes everything the subject of ownership, aside from lands and interest in lands, as goods, chattels, money, notes, bonds and choses in action. In its ordinary and popular use, however, it is oftentimes used in a more restricted sense, embracing goods and chattels only. And in a recent case the court said: "It is at least doubtful whether the term personal property is generally understood to include money, notes, and choses in action." *Bills* v. *Putnam*, 64 N. H. 554, 561.

But however this may be, the evident intention of the testatrix, as disclosed by the language of the will itself, taken in connection with this term, was that she understood and used the term "all other articles of personal property" in its restricted sense.

The reasons for this conclusion are apparent when we examine the connection in which the term is used.

The language of the bequest is not simply and unqualifiedly a gift of all her personal property, as much of the argument of

counsel for Mrs. Schoppe would seem to imply. The court cannot sever those words from other portions of the clause and give them a construction regardless of their connection with other and important qualifying words. The bequest must be construed by taking the whole sentence under consideration and from all the language employed, and not from a disjointed portion only. The language employed by her is "all my housekeeping articles, including all my household furniture, beds and bedding, kitchen and table furnishings, books and pictures, all my wardrobe and all other *articles* of personal property in the house at the time of my death belonging to me."

In ascertaining the real intention of a testator there is a rule applicable in the construction of wills as well as of statutes, that where certain things are enumerated, and a more general description is coupled with the enumeration, that description is commonly understood to cover only things of a like kind with those enumerated. This is because it is presumed that the testator had only things of that kind in mind. *Given* v. *Hilton*, 95 U. S. 591, 598; 1 Red. Wills, 441*; 1 Jar. Wills, 751*; *Bills* v. *Putnam*, 64 N. H. 554, 561.

Accordingly, in *Gibbs* v. *Lawrence*, 7 Jur. N. S. 137, the court held that a bequest of "all and singular my household furniture, plate, linen, china, pictures, and other goods, chattels and effects which shall be in, upon, and about my dwelling house and premises, at the time of my decease," did not include a sum of money found in the house.

So, in *Benton* v. *Benton*, 63 N. H. 289, the testator gave his wife "every article of household furniture in and on said premises, including piano, books, minerals, shells, and curiosities, and every article of personal property in and about said homestead, or wherever found belonging to my estate;" also, "the dividends and income on all my railroad shares I may own at the time of my decease, and also the interest and income on all my government and other bonds which I may possess at the time of my decease,"—and it was held that neither the money, nor promissory notes of which the testator died possessed, nor the railroad shares or government bonds passed by the will to

the wife. The court say: "The rule *ejusdem generis*, so far as it aids in the construction of this will, forbids the construction contended for by Mrs. Benton. Ordinarily it limits the meaning of general words to things of the same class as those enumerated under them. The testator's careful use of language in the disposition of his household goods and other chattels, probably of much less value than the money, bank share, and notes, is strong evidence that he would not have left his intention as to this portion of his estate [of the value of more than five thousand dollars] to be inferred from such terms as 'every other article of personal property in and about said homestead, or wherever found.' No satisfactory reason appears why he should mention books, minerals, shells, and curiosities, which would pass under the general description used, and omit to mention the bank share, money and notes."

A similar construction was adopted in *Dole* v. *Johnson*, 3 Allen, 364, where the language of the bequest to the testator's wife was, "all my household furniture, wearing apparel, and all the rest and residue of my personal property," and the court accordingly held that the case was one which properly called for the application of the rule *noscitur a sociis*, and thus restricted the words personal property to chattels *ejusdem generis* with those enumerated, and that while the widow was entitled to the household furniture, wearing apparel and other personal property of like kind, she was not entitled to money, stocks, securities or evidences of debt. The court in a later case (*Brown* v. *Cogswell*, 5 Allen, 556), while admitting the correctness of this decision, admitted that the doctrine was carried as far as it could safely extend.

But in a still later case decided in the same court, *Johnson* v. *Goss*, 128 Mass. 433, the language of the bequest was, "all my personal property, my household effects, horse and carriages, my life insurance" in a certain company, three mortgages of real estate, and certain bank stock, and to other persons were given large portions of his productive personal property. It was held by the court that the testator did not intend to use the words "all my personal property" in their ordinary sense,

because he proceeds to give his wife and other legatees large portions of his personal property. Construing the term with the words immediately following,—"my household effects, horse and carriages,"—the court say that his purpose was to describe property *ejusdem generis*, and that he used the adjective "personal" as descriptive of chattels of personal use and convenience, not intending to include stocks, securities, or other productive property.

In the late case of *Bills* v. *Putnam*, 64 N. H. 554, the bequest by a testatrix was to her two daughters of all her "wearing apparel, household furniture, and personal property of every name, nature and description," and the court held, in accordance with the rule we are discussing, that the testatrix understood and used the term "personal property" in its restricted sense. "If the language was intended to embrace everything except real estate," remark the court, "the enumeration of the wearing apparel and household furniture was superfluous."

To the same effect was the case of *Kendall* v. *Almy*, 2 Sum. (C. C.) 278, 293, where a firm made an assignment of "all the goods, wares, merchandise and personal property of every kind; and also all notes, books, accounts and debts of every kind due, it was held that the words "personal property of every kind" in this connection, signified visible, tangible property *ejusdem generis*, as goods, &c., and that an interest in contract would not pass.

A further multiplication of authorities in illustration of the rule is unnecessary. In the same line might be cited *Rawlins* v. *Jennings*, 13 Ves. 39; *Crichton* v. *Symes*, 3 Atk. 61; *Timewell* v. *Perkins*, 2 Atk. 103; *Cook* v. *Oakley*, 1 P. W. 302; *Porter* v. *Tournay*, 3 Ves. 311; *Hotham* v. *Sutton*, 15 Ves. 319; *Allen's appeal*, 32 P. F. Smith (Penn.) 302; *Regina* v. *Cleworth*, 4 B. and S. 928 (116 E. C. L. 930); *Cavendish* v. *Cavendish*, 1 Bro. Ch. Cas. 467; *Hodgson* v. *Jex*, L. R. 2 Ch. Div. 122.

Now, in this case, the testatrix commences the description of the property which it was her intention to dispose of by this clause with the use of the general term "all my housekeeping

articles." The evident desire of the testatrix, as manifested from the language used, was to give her niece everything which pertained to her household equipment, and which would render her home life and domestic duties more comfortable and agreeable. In furtherance of this purpose she adds to the general description of her bequest the specification of what her general description includes, namely all her "household furniture, beds and bedding, kitchen and table furnishings, books and pictures, all my wardrobe and all other articles of personal property in the house at the time of my death, belonging to me." These specific words of enumeration which the testatrix had used, and which precede the closing portion of the bequest, could not have added anything to the scope of her bequest, if she intended this last clause to cover and pass her entire personal property. If by the language "all other articles of personal property" she intended to embrace everything which in the broadest legal signification of the term could be the subject of ownership in personal property, the enumeration of household articles, household furniture, beds and bedding, kitchen and table furnishings, books and pictures and wardrobe, was entirely superfluous. These words, were we to adopt that understanding of her intention, would be meaningless and useless verbiage. If she had intended to give this niece her entire personal property in the house, in terms unrestricted, she might have easily said so without any specific enumeration. She would hardly have applied the term "articles" of personal property to promissory notes. It is more reasonable and consistent to believe that by the expression "articles of personal property in the house" she had in mind that class of property which, in the same sentence, she had been enumerating, movable, tangible property, rather than money or choses in action.

Not, much force can be given to the fact that she spoke of the property as being in the house, so far as these notes are concerned. The authorities hold that choses in action differ from other personal property in that they have no locality, but are considered as strictly following the person of the owner, and not as incident to or parcel of a particular estate, locality, or

pertaining to any particular house. Thus in *Fleming* v. *Brook*, 1 Sch. and Lefroy's Irish Ch. 318, a bequest of all the testator's property of whatsoever nature or kind the same may be that should be found in his house, was held not to pass a bond and several bankers' accountable receipts for large sums of money, upon the ground that choses in action have no locality. The same was true in *Moore* v. *Moore*, 1 Bro. Ch. Cas. 127, where it is admitted that a devise by one of "all his goods" would pass a bond and extend to all personal estate; but that a limitation of "all his goods and chattels in Suffolk" would not have passed a bond which was found in the testator's house in Suffolk, for the reason already mentioned. *Penniman* v. *French*, 17 Pick. 404; *Saunders* v. *Weston*, 74 Maine, 85, 90; *Hertford* v. *Lowther*, 7 Beav. 1; 2 Wm. Ex'rs 1179*, and cases cited.

But basing our conclusion on other grounds, and taking the entire clause in which this bequest is made, it seems clear that the testatrix employed the expression "and all other articles of personal property in the house," not in its broadest, legal signification, but in the limited sense of *ejusdem generis*.

Moreover, this construction is strongly enforced by the fact that a pecuniary legacy of nine hundred dollars is given to this same niece in the very next clause of the will. This circumstance of a pecuniary or specific legacy being given to the same or other parties has commonly been considered as favoring the construction adopted in this case. 1 Jar. Wills 751*, *Rawlins* v. *Jennings*, 13 Ves. 39. Here the succeeding clause in this will gives a pecuniary legacy not only to this niece, but also to the brother and sister of the testatrix.

Our conclusion is, that Mrs. Schoppe does not take the notes in question, but that they pass to the residuary legatees, it being admitted that the assets are sufficient to answer all the calls of the will.

Decree accordingly.

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

CHARLES H. MAGOON *vs.* EDMUND DAVIS.

Somerset. Opinion January 13, 1892.

Deed. Dividing Line. Town Line. Adverse Occupation. R. S., 1871, c. 3, § 43.

In a real action it appeared that the parties owned adjoining lots in the towns of Skowhegan and Cornville, and the contention was the locatiou of the dividing line, the deeds of both parties, as early as 1827, recognizing the town line as the boundary. The issue by the pleadings presented the question of title to a narrow strip of land from one to two rods wide claimed by the plaintiff and alleged to be in the defendant's possession, the defendant having duly disclaimed title to the land lying south of a certain fence and claiming only the land lying north of it by adverse possession. *Held*; that the burden was upon the plaintiff to prove that he had title to the strip of land in controversy and so entitled to judgment for its possession as against the defendant. *Held, also*, that while the proceedings of the commissioners appointed in 1877, by the Supreme Judical Court, under R. S., 1871, c. 3, § 43, to ascertain and determine the town line may be competent evidence to show the location of monuments, &c., indicating the location of that line, it is not conclusive upon adjoining owners, holding under deeds running back to 1827, and it appearing that the parties had no notice of the proceedings nor opportunity to be heard.

Of the mutual recognition of dividing lines.

ON REPORT.

This was a real action tried by the presiding justice without a jury. The matter in dispute is the dividing line between the plaintiff's land and the land of the defendant. The plaintiff's land lies in the extreme northwest corner of Skowhegan, and the defendant's in the extreme southwest corner of the adjoining town of Cornville.

The plaintiff claimed that the line between the two towns is the line between his and the defendant's land; that in 1867 the line between the two towns was ascertained and determined by commissioners appointed by the Supreme Judicial Court; and that the line so ascertained and determined is to be deemed in every court, and for every purpose, the true dividing line between the towns; that such is the express language of the R. S., c. 3, § 67.

To this the defendant replied that, while such may be the law when the line, as a town line is called in question, such is not

the law when the line between the owners of private lands is in question; and without admitting that the line established by the commissioners is the true town line, or that their proceedings were regular and according to law, he claimed that for more than forty years a fence has existed between his land and the plaintiff's, up to which he and those through whom he claims have occupied, openly, notoriously, exclusively and adversely, thereby establishing the line of said fence as the true and legal line between their lands.

The presiding justice viewed the premises, heard the evidence, and then, by consent of the parties, reported the case to the law court for decision.

Walton and Walton, for plaintiff.

The town line, between the two towns, is the true line between the parties. R. S., c. 3, § 67; *Bethel* v. *Albany*, 65 Maine, 200; and conclusive upon the parties. It has been ascertained by proper persons and under proper process. Defendant knew from his deeds he bought to the town line, recognized as the division line. Adverse possession: *Worcester* v. *Lord*, 56 Maine, 265; *Dow* v. *McKenney*, 64 *Id.* 138. Defendant has no title beyond his deed and cannot claim beyond it. *Carville* v. *Hutchins*, 73 Maine, 227.

Merrill and Coffin, for defendant.

Plaintiff has failed to show by competent evidence where the town line was. Commissioner's report not admissible. Court did not give notice to all parties concerned before appointing them, but to the selectmen only. Plaintiff has not shown that the town line is north of the fence, or that the right of entry, if one ever existed, accrued within twenty years.

Adverse possession: *Chaplin* v. *Barker*, 53 Maine, 275; *Altemas* v. *Campbell*, 9 Watts, 28 (S. C. 34 Am. Dec. 496); *Johnson* v. *Irwin*, 3 S. & R. 291; *Royer* v. *Benlow*, 10 S. & R. 303; *Prop'rs Ken. Pur.* v. *Springer*, 4 Mass. 418; *Sparhawk* v. *Bullard*, 1 Met. 100; *Barker* v. *Salmon* 2 Met. 32; *Bates* v. *Norcross*, 14 Pick. 224; *Sumner* v. *Stevens*, 6 Met. 337, approved in *Jewett* v. *Hussey*, 70 Maine, 435; *Lockwood*

v. *Lawrence*, 77 Maine, 297; *Martin* v. *M. C. R. R. Co.* 83 Maine, 100, and cases cited.

LIBBEY, J. This is a writ of entry. The parties own adjoining lots in the towns of Skowhegan and Cornville. The contention between them is the location of the dividing line between their lots. The issue as made up by the pleadings presents the question of title to a narrow strip of land from one to two rods in width, which the plaintiff alleges is a part of his lot and is in the possession of the defendant. The plaintiff takes upon himself the burden of proving that he has the title to the strip of land in controversy, and having the title has a right to a judgment for its possession as against the defendant who he says has no title but that of possession.

The title deeds to the lots of land owned by the parties recognize the dividing line to be the line between the towns of Skowhegan and Cornville. The earliest title deed put in evidence is of the defendant's lot, dated September 12, 1827. The real boundary by the title deeds, tracing the title through the several parties owning prior to the parties in this suit, is the location of the line between the towns named in 1827. Neither party has put in evidence the acts incorporating the two towns named, which we assume describe the line between the towns, so we have not that piece of evidence before us.

In 1877, proceedings were had in the Supreme Judicial Court, on the petition of the selectmen of the town of Cornville for the establishment and marking of the line between the towns of Cornville and Skowhegan under the provisions of our statute, on the ground that the two towns were not able to agree upon the location of the line. After notice to the two towns a commission was appointed by the court to examine and locate the line between the towns. They did so and made their report to the court, which was duly accepted. The plaintiff claims that the line as marked and located by that commission is conclusive evidence of its location as between himself and the defendant.

This the defendant's counsel do not admit, but maintain that the report of the commissioners is not only not conclusive

between adjoining owners but that it is not competent evidence upon that issue.

It does not appear that these parties had any notice of the proceedings of the commissioners, had any opportunity to be heard before them or in the court, and therefore, while until a new commission shall be appointed under the statute to locate the line, the line thus located is conclusive between the towns, we do not think it is conclusive between adjoining owners who are bounded by the town line by deeds running back to 1827. So far as the proceedings of the commissioners tend to show the location of monuments or objects upon the earth indicating the location of the line prior to 1877, it may be competent evidence, but it is not conclusive. To give it the force of a judgment between the parties would be binding them in regard to the location of their lines without notice and without an opportunity to be heard.

We think, therefore, that the testimony of one of the commissioners tending to show what monuments they found, tending to prove the location of the line, can be considered only as evidence with the same weight as if the evidence came from other parties than the commissioners. We must, therefore, consider all the evidence in the case tending to show the location of the line between the parties, in accordance with the deeds of their titles.

The evidence tends to show, and is we think uncontradicted, that the defendant and the owners of his lot before him had had the occupation and possession of the strip of land in controversy marked by a division fence built and maintained by the parties, some portions of it of a permanent character, for more than forty years, and that both parties in their occupation of the lots had conformed to the line as indicated by the division fence.

The burden is upon the plaintiff to prove the location of the town line by evidence strong enough to overcome the inference to be drawn from this long occupation. While if the occupation was by mistake of the location of the line, neither party claiming to own beyond the town line, it might not be conclusive

evidence of title by adverse possession, still in a case like this where the question to be determined is the location of an ancient line established when the country was new and but little settled, by surveys that were not generally accurate, being made through the woods by the use of the common compass, well known to be imperfect and more or less affected by minerals in the immediate vicinity, marked by monuments perishable in their character, liable to decay by the action of the elements, liable to be destroyed and removed in the clearing of the land for cultivation, so that at the end of forty or fifty years their original location cannot generally be established, the occupation and possession of the owners of lots by dividing fences erected soon after the establishment of the lines, when the location of the line may generally be better ascertained and understood than it can possibly be years afterwards, is entitled to great weight in determining the question. And, in cases of doubt, we think the fact of the mutual occupation of the parties, the mutual recognition of the line as indicated by their occupation and dividing fences, should prevail over the uncertainty which arises in any attempt by the running of lines so many years after the original survey, to establish the true line between the parties.

From a careful consideration of all the evidence submitted, we think the plaintiff has failed to prove a better title to the land in controversy than the defendant's possession.

Judgment for defendant.

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

JAMES WRIGHT *vs.* WARREN WORTHLEY.

Somerset. Opinion January 13, 1892.

Insolvency. Composition. Discharge. Waiver of objections. R. S. c. 70 § 62.

Where the original payee of a note proved it in insolvency under composition proceedings, and received and receipted for the percentage paid by the insolvent, and made no objections to his discharge, the grounds for which appeared by the record of proceedings in the court of insolvency, *it was held*, in a subsequent action upon the note by an indorsee that the payee had waived his right to object to the discharge being invalid as to him; and that the

plaintiff, his indorsee, taking the note after a discharge had been granted, with full knowledge of the facts, could not invoke the same objections to invalidate the discharge.

ON REPORT.

This was an assumpsit upon a promissory note, dated March 8, 1888, given by the defendant to Loantha J. Parkman and by her proved in the composition proceedings in insolvency, of the defendant, begun on his petition filed January 7, 1889, and under which he received his discharge July 11, 1889.

The writ is dated July 12, 1889. Plea, general issue and brief statement of defense setting out the discharge by the court of insolvency. It appeared that after said payee had proved her claim and had received and receipted for the dividend under the composition, she indorsed the note to the plaintiff who was her attorney in the proceedings.

The plaintiff filed a replication to the defendant's plea alleging jurisdictional irregularities in the proceedings and various frauds of the defendant, consisting of concealment of his estate, and that his schedule of creditors was knowingly false, &c.

The disposition made by the court of these issues of irregularities and fraud renders an extended report of the same unnecessary. The allegations were found not to be sustained by the evidence, which consisted in part of the insolvent's examination taken by the plaintiff.

James Wright, for plaintiff.

Counsel cited: *Thaxter* v. *Johnson*, 79 Maine, 348; *Betton* v. *Allen*, 9 Cush. 382; *Wheelden* v. *Wilson*, 44 Maine, 11; *Marston* v. *Marston*, 54 *Id.* 476; *Aiken* v. *Kilburne*, 27 *Id.* 252; *Smith* v. *Parker*, 41 *Id.* 452; *Hartshorn* v. *Eames*, 31 *Id.* 93; *Brinley* v. *Spring*, 7 *Id.* 241; *Pulsifer* v. *Waterman*, 73 *Id.* 234; *Graves* v. *Blondell*, 70 *Id.* 190; *Laughton* v. *Harden*, 68 *Id.* 208; *Howe* v. *Ward*, 4 *Id.* 200; *Bank* v. *Rich*, 81 *Id.* 164.

Walton and Walton, for defendant.

LIBBEY, J. The plaintiff brings this action as indorsee of a promissory note, dated the 8th day of March, 1888, given to

one Loantha J. Parkman, for sixty dollars, payable on demand with interest.

The defendant pleads in defense his discharge in insolvency, granted by the court of insolvency of Somerset county, on the 11th day of July, 1889. The discharge was granted by the court on composition proceedings under § 62 of Chap. 70 of the Revised Statutes.

The plaintiff contends that the discharge pleaded is not valid for several grounds, which he sets out in his replication to the defendant's plea. The grounds specified are irregularities in the proceedings, which it is claimed took from the court jurisdiction to grant the discharge, and frauds on the part of the insolvent debtor, which rendered the discharge if the court had jurisdiction to grant it, invalid as against his claim. The burden is upon the plaintiff to sustain the allegations in his plea.

We have carefully examined the evidence upon which he relies and are not satisfied that it sustains his objections to the discharge. But if it does, we think he cannot avail himself of them.

At the time of the discharge, the note in suit was held by the original payee. She received and receipted for the percentage offered and paid by the debtor under the composition proceedings. The plaintiff took the note as indorsee after the discharge and receipt of the percentage paid by the debtor, and with full knowledge of all the grounds that he now sets up for the purpose of invalidating the discharge. He claims now that all the grounds alleged by him in resistance of the discharge appear by the records and the proceedings of the court of insolvency. They were known to the holder of the note or might have been known in the exercise of due diligence, and no objection was made to the debtor's discharge by her. Having knowledge of all the grounds set up by the plaintiff, by making no objection to the allowance of the discharge and receiving the percentage paid by the debtor, we think she must be held as electing to waive the objections that were then open to her and take the sum offered by the debtor. The plaintiff, taking the note after the discharge was granted and the receipt

of the payment by the holder of the note, with full knowledge of all the facts which he now relies upon, stands in no better position than the indorser stood in. It is too late now for these objections to be invoked to invalidate the discharge. *Eustis* v. *Bolles*, 146 Mass. 413; *Blake* v. *Clary*, 83 Maine, 154.

Judgment for defendant.

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

GEORGE BRAY, and another, Executors, in equity,

vs.

ELDON H. PULLEN, and others.

84 185
86 579

Franklin. Opinion January 14, 1892.

Will. Devise. Descent. Lapsed Legacy. R. S., c. 74, § 10.

A testator by the fifth item of his will made the following bequest: "I give and bequeath to the children of Lydia Pullen, late wife of the late Alvin Pullen, deceased, and grandchildren of my late sister, Betsey S. Burbank, deceased, the sum of seven thousand dollars to be equally divided between them." Betsey S. Burbank was a sister of the testator, and she left three children living at the testator's death; also one daughter, Lydia Pullen, who was dead at the time the will was made. This daughter left one son, Eldon H. Pullen and three grandchildren, — children of another son who was deceased. *Held*, that Eldon H. Pullen takes one half, and the three grandchildren the other half, of the seven thousand dollar bequest made "to the children of Lydia Pullen."

Any legacy which was intended for the father of the three grandchildren of Betsey S. Burbank, although he was not living at the time the will was made would not lapse, but would go to his lineal descendents under R. S., c., 74, § 10, which provides that when a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendents, they take such estate as would have been taken by such deceased relative if he had survived.

The testator also bequeathed to Hiram Hackett all the neat stock, sheep, horses, colts, swine and other animals . . . which he owned at the time of his decease. *Held*, that the intention of the testator was to give not only the sheep upon the home farm, but also all those which he owned on other farms.

ON REPORT.

The case is stated in the opinion.

W. P. Fred Fogg, for plaintiff.

P. H. Stubbs, for Hiram A. Hackett.

J. C. Holman, for Freddie B. Pullen and others.
E. O. Greenleaf, for Eldon H. Pullen.

FOSTER, J. The plaintiffs, executors of the last will and testament of Israel R. Bray, deceased, seek by this bill a construction of certain provisions of the will.

The only questions presented for our consideration arise under the fifth and seventh items, which, so far as are material to this case, are as follows:

"Item Fifth. I give and bequeath to the children of Lydia Pullen, late wife of the late Alvin Pullen, deceased, and grandchildren of my late sister, Betsy S. Burbank, deceased, the sum of seven thousand dollars, to be equally divided between them. And to Benjamin B. Burbank of Freeman, State of Maine, Israel B. Burbank of the State of Minnesota and Mary J. Burbank, wife of Daniel Sedgeley, children of the said Betsy S. Burbank, my late sister, I give and bequeath seven thousand dollars each."

"Item Seventh. . . . I also give and bequeath unto the said Hiram Hackett all the neat stock, sheep, horses, colts, swine and other animals, all the household furniture and household goods of every kind, all the farming implements and farming tools, also all the carts, wagons, sleds, sleighs, plows, harrows, carriages of all kinds, chains, bows, ox-yokes and all other implements used for farming purposes, buffalo, and wolf robes, and all other carriage and sleigh furniture, and all the crops of every kind, and all the food of every kind, all books of every kind except account and memorandum books, all fire wood and down wood and lumber, also all the clothing, watches and clocks, which I may own at the time of my decease."

The other provisions in the will become important only as tending to throw light upon the questions raised in relation to the intention of the testator as disclosed by the foregoing items.

Betsy S. Burbank, mentioned in the fifth item, was a sister of the testator. She left three children living at the testator's death, viz.:—Benjamin B. Burbank, Israel B. Burbank, and Mary J. Burbank, to each of whom was bequeathed seven thousand dollars, as appears by the latter portion of the same

item. She also left one daughter, Lydia Pullen, who was dead at the time the will was made. This daughter, Lydia Pullen, left one son, Eldon H. Pullen, and three grandchildren,— children of another son, Benjamin, who was deceased. Eldon, the only living child of Lydia Pullen, claims the whole of the seven thousand dollar bequest made "to the children of Lydia Pullen,"— and the children of his deceased brother, Benjamin, claims one half of it. This is the contention arising under the fifth item.

Hereupon the following inquiry is addressed to us:

I. Who under said will is entitled to the legacy of seven thousand dollars bequeathed to the children of Lydia Pullen?

1. The decisions in other cases in the construction of wills, as a general rule, can afford but little aid, inasmuch as each case must be governed by the language of the testator and the intention as manifested by that language. It is, therefore, unnecessary to state more than those elementary principles so often laid down by the courts, that in the construction of wills the general rule is, that the intent of the testator as expressed in the will and not otherwise is to govern. In ascertaining this intention the court is not confined to any particular clause, but is at liberty to consider all parts of the will, inasmuch as one clause is often modified or explained by another. The intention of the testator in one particular paragraph, if not entirely clear, may be ascertained when other paragraphs or clauses are considered and their bearing and relation, one with another, taken into account. The intention of the testator must be the guiding star. Applying these elementary principles and general rules of interpretation to the case at bar, we are satisfied that it was the intention of the testator to give Eldon H. Pullen only one half of the seven thousand dollar bequest, and that the other half was to go to the children of his deceased brother Benjamin.

As casting some light upon the intention of the testator when he made the will, he gave in the same item seven thousand dollars to each of the children then living of his deceased sister, Betsy S. Burbank.

Eldon H. Pullen and three minor children of his deceased

brother Benjamin, were the only living lineal descendants of Lydia Pullen, the other child of Betsey S. Burbank. He had treated the living children of his late sister alike by making a bequest of seven thousand dollars to each of them. Lydia, the other child of his deceased sister was dead, but she had left one child, Eldon, then living, and there were living three minor children of Eldon's deceased brother Benjamin. These living, represented Lydia dead. May it not be properly inferred that the testator intended to give those who represented Lydia the same in amount as she would in all probability have received if alive?

Equality is strongly manifested not only in the item under consideration, but also in the third and sixth items.

Notwithstanding, the testator in express terms bequeaths seven thousand dollars to the "children of Lydia Pullen," to be "equally divided between them," Eldon claims that he was the only child of Lydia living at the date of the will, and consequently entitled to the whole sum. Such a construction as that would give Eldon, a grandchild of the testator's deceased sister, Betsy S. Burbank, a legacy equal in amount to that given to her own children in the same item of the will, and leave three small children of Eldon's deceased brother without anything. Had it been the intention of the testator to give Eldon the whole of the legacy of seven thousand dollars, there is no apparent reason why he should have used language bequeathing it "to the children of Lydia Pullen," instead of using the singular number, or designating Eldon by name.

2. Eldon and Benjamin were the children of Lydia Pullen, and relatives of the testator. Benjamin had died leaving lineal descendants. Any legacy, therefore, which was intended for Benjamin as one of "the children of Lydia Pullen," would not lapse, but would go to his lineal descendants, under the statute which provides that when a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative if he had survived. R. S., c. 74, § 10. *Nutter* v. *Vickery*, 64 Maine, 490, 498; *Moses* v.

Allen, 81 Maine, 268, 271; *Morse* v. *Hayden*, 82 Maine, 227, 230. This statue is in furtherance of what may be presumed to have been the intention of the testator, and prevents the operation of the common law, and upholds devises which would otherwise lapse. *Snow* v. *Snow*, 49 Maine, 159, 163. Thus, in *Nutter* v. *Vickery*, *supra*, it was held that upon reason, principle and authority, the lineal descendants of a relative of the testator having a bequest in the will are entitled to the legacy given to their ancestor though the original legatee was in fact, dead at the date of the will.

And it makes no difference in the application of the rule whether the bequest is made to such relative by name, or whether he is designated in the will only by his relationship. *Moses* v. *Allen*, 81 Maine, 268, 271.

II. Who under said will is entitled to said writings obligatory, and the sheep in them mentioned?

The testator was an extensive dealer in wool, and at the time of his death owned a large number of sheep. There were about one hundred and thirty upon his home farm, and five hundred and ninety-six upon other farms.

No question is raised except in relation to the sheep that were away from the home farm, and which were leased to different individuals by certain writings or obligations, fifteen in number. Copies of all these obligations have been annexed to the bill; and from them it appears that the testator was, without question, the owner of all the sheep mentioned in them. The lessees were to return the same sheep, paying for their use in wool. The offspring belonged to the lessees.

By the seventh item of the will the testator makes use of this language: "I also give and bequeath unto the said Hiram Hackett all the neat stock, sheep, horses, colts, swine and other animals . . . . . which I may own at the time of my decease."

The language of this bequest is clear, and there is no qualification or limitation of it in any part of the will. No bequest of the sheep is made to any one else. No one knew better than the testator that he was the owner of the sheep mentioned in the

several writings, and if he had intended to restrict this gift of sheep to those upon his homestead farm at the date of his will, or at the time of his decease, it would have been a very easy matter so to have expressed himself. Not having done so, but having used language that is too clear to be susceptible of any other meaning than that expressed by it, we have no doubt that Hiram Hackett is entitled to the sheep mentioned in the several writings. It is the duty of the executors to ascertain what sheep were owned by the testator at the time of his decease, whether by the aid of the writings mentioned or otherwise, and to deliver the same over to the party entitled to them.

As this bill was brought by the executors in good faith to obtain a construction of the will upon provisions in relation to which doubts might well exist, costs, including reasonable counsel fees, are allowed to all the parties to this suit, to be paid by the executors out of the assets of the estate, and charged in their administration account.

Decree accordingly.

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

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ISABELLA A. LADD *vs.* MELVINA DICKEY.

Waldo. Opinion January 14, 1892.

Deed. Tax-title. Evidence. Notice. Sale. Description. Collector's proceedings. R. S., c. 6, § § 193-198.

Recitals of the collector in a tax deed are not evidence of the facts recited.

A collector's recital that nine months had elapsed before he gave notice of a sale, is not sufficient. He should state the time when he gave the notice. Nor is his recital, that he gave notice at least six weeks before the time of sale, sufficient. He should state when he gave the notice.

It is not sufficient for him to recite in his deed that he posted up notices of his sale where warrants for town meetings are required to be posted. He should state where he posted them up.

The collector's deed should state the person, to whom as the owner or occupant, notice of the time and place of sale, and the amount of the tax due, was given. A recital that the notice was given to a person who was owner or occupant, is not sufficient evidence of the fact.

A recital in a collector's deed that he sold the premises named to the purchaser, as a whole, he being the highest bidder therefor, is not sufficient. It should appear that he exposed for sale and sought offers for a fractional

part of the premises sufficient to pay the tax and legal charges, and that he could obtain no bid therefor.

A recital that it was necessary to sell the whole amount so assessed and advertised, no person offering to pay the tax, &c., for a smaller fractional part of said real estate, is not sufficient. It must appear that he tried to obtain an offer for the payment of the tax, &c., for a fractional part of the premises, without success.

Of erroneous descriptions and time of sale.

ON REPORT.

This was an action of forcible entry and detainer brought in the Police Court, of the city of Belfast, and removed to this court on brief statement of title under R. S., c. 94, § 6. The only question presented for decision was that of title. The plaintiff's title rested upon the validity of two tax deeds.

The property in controversy, was sold by the collector of taxes of 1880 and 1883, and purchased at the tax sales by the town of Stockton, from whom the plaintiff derived title.

The deed under the second sale is as follows:

"Collector's Tax Deed. State of Maine. To all people to whom these presents shall come, I, F. R. Daggett, collector of taxes for the town of Stockton in the county of Waldo and State of Maine, for the year one thousand eight hundred and eighty-three, legally chosen and sworn, send greeting:

"Whereas, the assessors of the town of Stockton for the year aforesaid, legally chosen and sworn, have, agreeably to law, assessed the real estate hereinafter described in the sum of fourteen dollars and three cents, taxed to Melvina Dickey as resident proprietor of said real estate in said Stockton, which in their list of assessment they have committed to me, collector of said town, to collect, and whereas no person has appeared to discharge said tax, although I have advertised the same by posting notices of the non-payment of said tax after it had remained unpaid for the term of nine months from the date of said assessment, and of my intention to sell so much of said real estate as would be necessary to discharge said tax and all intervening charges, at three public places in said town where warrants for town meetings are required to be posted, six weeks before the day of sale; and have lodged with the town clerk a

copy of such notice with my certificate thereon, that I have given notice of the intended sale as required by law; and at least ten days before the sale I delivered to the owner or occupant thereof, a written notice signed by me, stating the time and place of sale and the amount of taxes due.

"Therefore, know ye, That, I, F. R. Daggett, collector of taxes, as aforesaid, in consideration of the sum of fifteen dollars and fifty-three cents, to me paid by the inhabitants of Stockton in the county of Waldo and State of Maine, have granted, bargained and sold, and do hereby grant, bargain, sell and convey to the said inhabitants of Stockton their heirs and assigns forever, the following described real estate situated in said town of Stockton, viz.:—The Melvina Dickey homestead on east side of turnpike road in Lot No. 9, eighty acres of land with buildings thereon, valued at seven hundred and fifty dollars;

"The same having been struck off to the said inhabitants of Stockton, they being the highest bidder therefor, and it being necessary to sell said amount of real estate so assessed and advertised, no person offering to pay the taxes and legal charges for a smaller fractional part of said real estate, at a public auction, legally notified and holden at the selectmen's office in said town of Stockton on the ninth day of June, 1885.

"To have and to hold the same to the said inhabitants of Stockton their heirs and assigns, to their only proper use and behoof forever, subject however to the right of redemption which the owner thereof or any other person may have at any time within the time specified by law.

"And I do covenant with the said inhabitants of Stockton their heirs and assigns, that I gave notice of the intended sale of real estate according to law, that said sale was within two years after the warrant for the collection of said taxes was delivered to me, and that in all respects in the premises I have observed the directions of law, whereby I have good right and full power to sell and convey the premises to the said inhabitants of Stockton to hold as aforesaid.

"In witness whereof, I have hereunto set my hand and seal, in my capacity as collector aforesaid, this thirteenth day of

June, Anno Domini one thousand eight hundred and eighty-five.

F. R. Daggett, Collector. (Seal)

"Signed, sealed and delivered in the presence of Alex'r Black.

"State of Maine, Waldo, ss. June 13, 1885. Then personally appeared the above named F. R. Daggett, Collector, and acknowledged the above instrument to be his free act and deed, before me, Alex'r Black, Justice of the Peace."

Other facts are stated sufficiently in the opinion.

Thompson and Dunton, for plaintiff.

The proceedings up to the time of the sale being regular and legal, the introduction of the collector's deed duly executed and recorded, and the deed from the purchaser at the tax sale to the plaintiff make a *prima facie* case for the plaintiff; and the defendant not having deposited the amount of taxes, interest and costs accruing under the sale, the evidence introduced by her was not admissible, and should not be considered; and at this stage of the case the plaintiff is entitled to judgment. R. S., chap. 6, § 205.

The homestead of Isaac George in 1880 and the homestead of Melvina Dickey in 1883, on the east side of the turnpike road, was a well known farm in Stockton. Its boundaries were indicated by fences. A person having the knowledge necessary to apply the description to the face of the earth could identify the premises with certainty and precision. He could make no mistake. In *Greene* v. *Lunt*, 58 Maine, 518, the court after holding certain descriptions to be sufficient, give the reason for so holding, in these words: "These lots are sufficiently described to enable any one to identify them by having the knowledge necessary to apply the description to the face of the earth."

The description in this case answers all the requirements of this rule, although there may be an error in the number of the lot. *Abbott* v. *Pike*, 33 Maine, 204.

W. T. C. Runnells, for defendant,

LIBBEY, J. The plaintiff's title depends upon the validity of two tax sales, one in December, 1881, on the tax assessed to

Isaac George, the other made in June, 1885, on the tax assessed to the defendant. The sales were made to the inhabitants of the town of Stockton, and the plaintiff claims under a deed from that town. The burden of proof is upon the plaintiff to show that in making these sales, or at least one of them, all the requirements of law were complied with by the collector. We think she has failed to do so.

The deeds from the collector relied on are not sufficient to make out a *prima facie* case of title. They do not show that the law was complied with. The recitals in a collector's deed are not evidence of the facts recited. *Libby* v. *Mayberry*, 80 Maine, 137.

It does not appear that nine months had elapsed before the collector gave notice of sale. His recital that nine months had elapsed is not sufficient. He should state the time when he gave notice. Nor is his recital that he gave the notice at least six weeks before the time of sale, sufficient. He should state when he gave the notice. Nor is it sufficient for him to recite in his deed that he posted up the notices where warrants for town meetings are required to be posted. He should state where he posted them up. Nor does it appear to whom he gave the ten days written notice of the time and place of sale and the amount of tax due, as the owner or occupant of the premises. His recital that he gave it at least ten days before the sale, to a person who was the owner or occupant, is not sufficient evidence of the fact.

But the more substantial objection to the sale is, we think, that he recites in his deed that he sold the premises named to the inhabitants of the town of Stockton as a whole, they being the highest bidders therefor. It should appear that he exposed for sale and sought offers for a fractional part of said premises sufficient to pay the tax and legal charges, and that he could obtain no bid therefor. It is not sufficient for him to say that it was necessary to sell the whole amount so assessed and advertised, no person offering to pay the tax and legal charges for a smaller fractional part of said real estate. It must appear that he tried to obtain an offer for the payment of the tax and legal charges for a fractional part of the premises without success.

Again, when we look into his return of his doings in making the sale of 1885, to the town clerk, as required by the statute which is made legal evidence of the facts stated therein, we find that the only description given of the land sold is, "Quantity of land sold; acres, eighty." And the return which he made to the treasurer of the town, required by statute, contained the same description of land only, "No. of acres, eighty." And the same fact exists in both his return to the town clerk and to the town treasurer of his proceedings in the sale of 1881. The only description of the land sold is, "Quantity of land; acres, one hundred and twenty." And these are the only descriptions of the lands taxed in the warrants from the assessors committing the taxes to him for collection.

Then, again, the recital in the deeds of the time of sale does not show that the sale took place at the time named in the notice. The notice of sale in 1881, specified the time of sale, the third day of December, at two o'clock in the afternoon. The notice of the sale in 1885, was the ninth day of June, at one o'clock in the afternoon. The recital in the deeds is, that one sale was made on the third day of December and the other was made on the ninth day of June. The hour of the day when the sale was made does not appear by the recitals in the deeds.

There are other defects in the proceedings, but we deem it unnecessary to specify any further.

Judgment for the defendant.

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

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MARGARETTA B. PORTER.

vs.

FRENCHMAN'S BAY AND MT. DESERT LAND AND WATER CO.

Hancock. Opinion January 15, 1892.

Equity. Specific performance. Pleading. R. S., c. 77, § 6, cl. III.

The Supreme Judicial Court has jurisdiction, in a proper case, in equity to decree upon a bill by the vendor specific performance of a contract in writing for the purchase of land; but does not take jurisdiction in equity, when the plaintiff has a plain, adequate and complete remedy at law.

To give the court jurisdiction in equity, it must appear by the allegations in the plaintiff's bill that his remedy at law is not plain, adequate and complete.

ON REPORT.

Bill in equity, heard on bill and demurrer, by a vendor seeking to enforce specific performance, against his vendee, of a written contract for the purchase of real estate. The bill alleged a tender of the deed, and all other acts required of the vendor, under the contract, and concludes thus: "but the said defendant then and there refused to accept a conveyance of said premises, or to pay to the plaintiff said one thousand dollars according to the terms and conditions of said [written] instrument."

"The said plaintiff is still seized in fee of said premises and is still in possession as owner thereof, and is ready, as she has been at all times since said fourth day of April, and will continue to be, to transfer said premises to said defendant and to receive therefor said one thousand dollars."

"Wherefore, the plaintiff prays specific performance of the said agreement hereinbefore referred to in Par. I, and that the defendant may be decreed to do and to perform all necessary acts for enabling it to perform its part of said agreement by paying to said plaintiff the said sum of one thousand dollars upon tender by the plaintiff of a good and sufficient deed of said premises which the plaintiff will always be ready to make."

The following causes of demurrer were assigned: "said bill of complaint contains no allegation that said defendant corporation is capable and has the ability of being made to comply with the requirements of a decree granting such relief as is therein asked for, . . . it doth not appear by said bill of complaint that a full and adequate remedy doth not exist through ordinary courts of law."

Deasy and Higgins, for plaintiff.

Defendant's financial ability to comply with a decree of specific performance cannot affect its legal or equitable liability. When a contract is in writing, is certain, is fair, in all its parts, is for an adequate consideration, and is capable of being performed, it is as much a matter of course for courts of equity to decree a specific performance, as for a court of law to give

damages for a breach thereof. *Chance* v. *Beall*, 20 Geo. 142; *Rogers* v. *Saunders*, 16 Maine, 92; *Hopper* v. *Hopper*, 16 N. J. Eq. 147; *Hull* v. *Sturdivant*, 46 Maine, 34. Counsel also cited: Bisp. Eq. 4 ed. § 364; *Richter* v. *Selin*, 8 Serg. & R. 425; *Kerr* v. *Day*, 2 Harris (Pa.), 114; *Brewer* v. *Fleming*, 1 P. F. Sm. 113; *Napier* v. *Darlington*, 20 *Id.* 64; *Finley* v. *Aiken*, 1 Grant's cases (Pa.), 83; *Malin* v. *Malin*, 1 Wend. 625; *McKechnie* v. *Sterling*, 48 Barb. 330; *Hall* v. *Smith*, 14 Ves. 426; *Old Colony R. R.* v. *Evans*, 6 Gray, 25; *Schroppel* v. *Hopper*, 40 Barb. (N. Y.) 25; *Story's Equity*, § 723 note; *Salisbury* v. *Bigelow*, 20 Pick. 174; *Haven* v. *Lowell*, 5 Met. 35; *Hilliard* v. *Allen*, 4 Cush. 532; *Cathcart* v. *Robinson*, 5 Pet. 278.

A vendor of land may come into a court of equity to compel specific performance of a contract of sale, although he may have a remedy at law by an action for the purchase money. *Phyfe* v. *Wardell*, 5 Pai. 268; *Springs* v. *Saunders*, Phill. (N. C.) Eq. 67; *Finley* v. *Aiken*, 1 Grant's cases (Pa.) 83; *Lamson* v. *Burt*, 4 W. & S. 27; *Brown* v. *Haff*, 5 Pai. 240; R. S., c. 77, § 6, cl. III.

Hale and Hamlin, for defendant.

The plaintiff may recover at law and cannot come into equity to obtain exactly and precisely what he can have at law. *Howe* v. *Nickerson*, 14 Allen, 400, 406; *Jacobs* v. *P. & S. R. R.* 8 Cush. 223; *Gill* v. *Bicknell*, 2 Cush. 355; *Russell* v. *Clark*, 7 Cranch, 69; *Jones* v. *Newhall*, 115 Mass. 244, 249.

Most of the cases in Massachusetts where such decrees have been rendered will be found to be cases where trusts or other subjects of equitable jurisdiction have been involved or else the question of jurisdiction is not raised. *Jones* v. *Newhall*, *supra*; Myer's Fed. Dec. Vol. 15, § 1196.

The tendency of this court by recent decisions is to hold to a limited jurisdiction, the burden being on the plaintiff to show he is without legal remedy. *White* v. *Dresden*, 70 Maine, 317; *Caleb* v. *Hearn*, 72 *Id.* 231; *Bird* v. *Hall*, 73 *Id.* 73; *Robinson* v. *Robinson*, *Id.* 170; *Titcomb* v. *McAllister*, 77 *Id.*

353, 358; *Messer* v. *Storer*, 79 *Id.* 512; *Dennison, &c. Co.* v. *Robinson & Co.* 74 *Id.* 116.

Defendant, in any event, could not perform contract unless it had property, means, capability and ability to carry out the trade. If necessary to make allegations upon these points the plaintiff has not done so. 3 Pom. Eq. § 1405.

LIBBEY, J. Bill in equity, praying for decree for a specific performance of a contract in writing, made by the defendant with the plaintiff for the purchase of a lot of land in the village of Sorrento.

It comes before this court on a demurrer to the bill by the defendant, and the question to be determined is whether upon the allegations in the bill this court has jurisdiction in equity to decree a specific performance. We think it clear that in a proper case the court has jurisdiction to decree specific performance of a contract in writing for the conveyance of land, in a bill brought by the vendor or by the vendee. R. S., § 6, c. 77, clause III. But the court in this State does not take jurisdiction in equity when the plaintiff has a plain, adequate and complete remedy in an action at law. *Milliken* v. *Dockray*, 80 Maine, 82; *Bachelder* v. *Bean*, 76 Maine, 370; *Alley* v. *Chase*, 83 Maine, 537.

And we think it must appear by the allegations in the bill, where an action at law may be maintained, that the remedy by it is not plain, adequate and complete; for it is a well established rule of equity pleading that the bill must contain allegations showing that the court has equity jurisdiction. Story's Equity Pleadings, § § 10 and 34. *Jones* v. *Newhall*, 115 Mass. 244, pp. 252, 253.

In this case, we think it perfectly clear that the plaintiff has a right to maintain an action at law for a breach of the contract. That being so, to show jurisdiction in equity, there should be some allegations in the bill showing that the remedy at law would not be adequate and complete. There is nothing of the kind in this bill. After setting out the contract, it alleges that the plaintiff was in possession of the land and has continued to be in possession of the land to the time of the filing of the bill;

no allegation that her action in regard to the land was in any way changed by the making of the contract; no allegation that anything had been done by either party in consequence of the making of the contract which could not be taken into consideration in the assessment of the plaintiff's damages.

Demurrer sustained. Bill dismissed with costs.

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

JAMES LONG, in equity, *vs.* MARY MCKAY, and others.

Hancock. Opinion January 15, 1892.

Trust. Husband and Wife. Presumption.

When a husband furnishes his wife money to be used in buying land, and she uses it for that purpose taking the title in her own name, there is no presumption that the wife holds the title in trust for the husband; but from the relationship of the parties, the presumption is that it was for her benefit.

The burden of proof is upon the husband to establish the trust by proof full, clear and convincing.

ON REPORT.

Bill in equity, heard on bill, answers and proofs, in which the plaintiff seeks a decree that the defendants, his children, may release to him two lots of land, the legal title of which they hold as heirs of their deceased mother, and which he claims that his children hold in trust for him by reason of his having furnished the money to purchase the land for him, she having taken the deed in her own name.

The facts are stated in the opinion.

Wiswell, King and Peters, for plaintiff.

W. P. Foster, for defendants.

LIBBEY, J. The plaintiff claims to maintain this bill against the defendants on the ground that his deceased wife at the time of her death held the legal title to the place described in the bill, upon which he with his family had lived for many years, in trust for him, and he claims a decree against the defendants who are daughters and heirs of the deceased wife, requiring them to convey to him the title which they claim.

The facts as he alleges them in his bill are, briefly stated, as follows: In 1863, Alfred F. Adams and Samuel Adams, Jr., copartners under the firm name of Adams & Co., held a mortgage on a part of the premises in controversy, and at the April term of the Supreme Judicial Court in the county of Hancock, recovered judgment against the plaintiff for a sum other than the mortgage debt of five hundred and forty-seven dollars and ninety-six cents; on the first day of June of that year they levied the execution which they had obtained upon said judgment upon both pieces of the lands described in the bill, receiving seizin thereof; that in March or April, 1864, he enlisted in the army of the United States, receiving as bounty the sum of four hundred dollars, which he gave to his wife to be used to purchase the place of Adams & Co., and as he alleges to take a deed of the title to him; that in 1865, when he was discharged from the service he delivered to his wife another sum received as compensation for his services, amounting, with the sums which he furnished her in 1864, to more than six hundred dollars; that on the seventeenth day of June, 1864, after the title of Adams & Co., to the premises had become absolute, his wife purchased of them the title to the premises, paying therefor the sum of six hundred dollars, the money which he had furnished her for that purpose, and took a deed in her own name, which was duly recorded; and he alleges that he did not know the fact that she had taken the deed in her own name for several years afterwards.

The defendants in their answer, deny the material allegations in the bill, and allege that the moneys which the plaintiff furnished to his wife were given to her to enable her to purchase the place of the Adamses for a home for herself and the family; that the plaintiff knew that his wife took the title in her own name and consented to it, and made no effort to induce her to convey to him the title during her lifetime.

The burden is upon the plaintiff to establish the trust by proof full, clear and convincing. *Dudley* v *Bachelder*, 53 Maine, 403; *Burleigh* v. *White*, 64 Maine, 23.

Proof that the plaintiff furnished his wife with the money with

which to make the purchase creates no presumption of trust; but the presumption arising from it, considering the relationship of the parties, is that it was furnished for her benefit. *Stevens* v. *Stevens*, 70 Maine, 92.

The proof furnished by the plaintiff to overcome this presumption and establish the trust in his wife, comes almost exclusively from him. The defendants are heirs, and whatever title they have they acquired as heirs of their deceased mother. It is claimed by the defendants that the plaintiff is not a competent witness to testify to support his case except in relation to such matters as the defendants have testified to. We do not deem it necessary to discuss this question and determine to what extent the plaintiff is a competent witness, because we are of opinion that, taking all the testimony in the case and considering it in the light of all the surrounding facts and circumstances, it is not sufficient to convince us that there was an agreement of trust on the part of the wife.

In 1864, on the plaintiff's own statement, he was a poor man, his homestead held by Adams & Co. by his mortgage, and the levy they made in 1863,—the title to become absolute in them on the first day of June, 1864. He was considerably in debt at that time to other parties. It does not appear that he possessed any other property to any amount. He determined to enlist in the army. He then had a family of a wife and seven children, the oldest one seventeen years old. He was for a time, at least, to leave his wife in the care of the family with but very little means of support, and he gave to her the money to be used in the purchase of the homestead. The uncertainty of his life was increased by his enlistment in the army. He might not return. Is it unreasonable to infer that his desire was that the money, which he received from his enlistment, should go to create and maintain a home for his wife and family if he should not return, and for himself as well, if he did? The title had just been taken from him by Adams & Co. He had other creditors. If it was purchased back in his own name, it would be subject to attachment and levy by the other creditors, and his wife and children might be deprived of a home. We think the theory that the

purpose and agreement was that the wife should take the title in her own name the more reasonable one. She waited until after the title became absolute in Adams & Co., and then made the purchase and took the deed in her own name, which was duly recorded. True, the plaintiff alleges that he did not know the fact that the title was taken by his wife in that way for several years afterwards. We cannot give credit to that statement; for in 1869, only four years after he returned from the army, his wife conveyed a portion of the premises to Haynes and others, and he signed the deed with her relinquishing what was supposed to be a right of dower. He then knew that his wife had the title, if never before. It does not appear that he made any protest against her holding the title at that time; but his act is inconsistent with any other belief than that she held the title and it was necessary for him to relinquish what was supposed to be a right of dower.

The evidence tends to show that the matter was talked over by the husband and wife at different times during her lifetime. She died in May, 1880. The plaintiff instituted no proceedings against her to require her to convey to him the title, and he delayed bringing the suit for nearly six years after her death. While we do not deem it necessary to determine the question raised by the defendants of the effect of the plaintiff's laches in asserting his claim of title for so many years as a bar to the maintenance of this bill, we think the delay is entitled to some significance as evidence in connection with what is disclosed.

Carefully considering the testimony of the plaintiff and the evidence produced by the defendants tending to contradict him and establish the theory that they set up in their answer, and applying to it the probabilities under all the circumstances disclosed, with the fact that the wife during her lifetime claimed that she rightfully held the title, and that the plaintiff delayed setting up his claim until after her death, when she cannot speak in regard to the transactions, we are not satisfied that the plaintiff has proved the trust that he claims by full, clear and convincing proof. *Bill dismissed.*

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

MORRIS GOODWIN, Administrator,

vs.

BOSTON AND MAINE RAILROAD.

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York. Opinion January 21, 1892.

Railroad. Negligence. Passenger. Contributory negligence.

The riding upon the platform of a passenger car upon a railroad is such negligence, on the part of the passenger, as will bar his recovery for injuries sustained by being thrown from the platform in rounding a curve.

ON MOTION AND EXCEPTIONS.

This was an action on the case for negligence in causing the death of plaintiff's intestate, while a passenger on train of defendant's road, by being thrown from the platform on which he was riding.

The writ alleges in the first count that, for want of "sufficient cars and reasonable accommodation," deceased was "compelled to remain standing upon the platform of the car," and while so standing, and in the exercise of due care, was thrown therefrom "wholly through defendant's negligence," his leg broken, and other injuries caused to his person and property.

In the second count, it is alleged to have been defendant's duty to provide "proper cars and sufficient and proper accommodations therein for passengers to be seated," which it failed to do; and that deceased "was unable to obtain a seat or convenient standing room in said train," and "was obliged to stand upon the rear platform of the passenger car next the locomotive;" that the track had a curve "very sharp and dangerous to be run over;" and that defendant, well knowing the premises, "ran said train upon said sharp and dangerous curve, . . . at a very high and dangerous and improper rate of speed, so that the car upon the platform of which deceased stood, was suddenly, violently, and forcibly thrown against and upon the outer rail of said dangerous and sharp curve, and thereby said car was violently jerked and jolted," whereby deceased was "thrown from the car" and received injuries of which he died some twelve hours afterward.

It was in evidence, that the deceased, August 29, 1889, became a passenger on defendant's train at York *en route* for Portsmouth; that he did not enter any car of the train, of which there were three, but stood upon the rear platform of one of them until he was thrown, or fell, from the train and received injuries of which he died early next day.

There was some slight conflict of evidence as to the rate of speed at which the train was moving at the time, several of plaintiff's witnesses describing it generally as very fast, while the train employees and others testified that the train was moving at about the usual rate of speed.

At the point where deceased fell or was thrown from the train, there was a curve, but no evidence of any dangerous character it possessed in any way was given, while engineers and train men testified generally as to its safety and not exceptional character along the line.

Defendant claimed (1) that its road, track, and curvature were in no way dangerous, but entirely safe, and that its train was not run at either an unusual or a dangerous rate of speed, and that, therefore, it was not negligent in any particular; and (2) that the deceased, by voluntarily riding upon the platform of the car while the train was in motion, assumed the extraordinary risks of such an exposed position, and thus contributed to the injuries he received.

The view taken by the court of the merits of the case on the motion renders the exceptions immaterial.

Samuel W. Emery and *H. H. Burbank*, for plaintiff.

Plaintiff's intestate was in the exercise of due care under existing circumstances. He was a lawful passenger, entitled to a seat in defendant's car, which should have been provided for him by defendant. An excursion over the road had been advertised and defendant should, and by ordinary foresight could, have furnished sufficient seats for passengers. One empty car was left at York Beach prior to the return trip on which the deceased was injured. 2 Kent's Com. 602; 2 Greenl. Ev. § 221; Story's Bailments, § 601; *Warren* v. *Fitch. Railroad*, 8 Allen, 233; *Ingalls* v. *Bills*, 9 Met. 15; *Simmons* v.

N. B. etc. St. Co. 97 Mass. 368; *Barden v. B. C. and F. Railroad*, 121 Mass. 428; *Bates* v. *O. C. Railroad*, 147 Mass. 265; *Willis* v. *L. I. Railroad*, 34 N. Y. 670.

It was a hot August day, cars more or less crowded, and there was sufficient evidence from which the jury might well find that there were no vacant seats in the cars. He was not obliged to stand in the aisle. Therefore, he was neither "voluntarily," "unnecessarily," nor "improperly" riding upon the platform. Hence, his position under the circumstances was not contributory negligence. Shear. and Redf. on Neg. § 284; Beach on Contrib. Neg. § 54; *Maguire* v. *Mid. Ry. Co.* 115 Mass. 239; *Fleck* v. *Union Ry. Co.* 134 Mass. 481; *Goodrich* v. *Penna*, R. D. Co. 29 Hun, 50; *Willis* v. *L. I. Rd. Co.* 34 N. Y. 670.

Passengers may be justified or excused by circumstances, for which railroad corporation is responsible, in that it might have prevented them by requisite care and prevision. *State* v. *B. & Me. Railroad*, 80 Maine, 433; *Hooper* v. *Same*, 81 Maine, 267.

His position was, necessarily, a condition, but not a contributing cause of his injury. *O'Brien* v. *McGlinchy*, 68 Maine, 557; *Dewire* v. *B. and Me. Railroad*, 148 Mass. 347; *Willis* v. *L. I. Ry. Co.* 34 N. Y. 670; *State* v. *Railroad*, 52 N. H. 528; *Beers* v. *Housatonic Railroad*, 19 Conn. 566.

Whether or not Goodwin was in the exercise of due care, under all the circumstances, and so, whether his act — his position — was such contributory negligence as to preclude the right of action, was a question solely for the jury. *Keith* v. *Pinkham*, 43 Maine, 501; *Dunn* v. *G. T. Ry.* 58 Maine, 193; *Plummer* v. *Railroad Co.* 73 Maine, 592; *Hobbs* v. *Eastern Railroad*, 66 Maine, 575; *Shannon* v. *B. & A. Railroad*, 78 Maine, 59; *State* v. *B. and Me. Railroad*, 80 Maine, 431; *Hooper* v. *Same*, 81 Maine, 267; *Bigelow* v. *Rutland*, 4 Cush. 247; *Spofford* v. *Harlow*, 3 Allen, 176; *Barden* v. *B. C. & F. Railroad*, 121 Mass. 426; *Treat* v. *B. & L. Railroad*, 131 Mass. 372; *Fleck* v. *Union Ry. Co.* 134 Mass. 481; *McDonough* v. *Met. Railroad*, 137 Mass. 212; *Werle* v. *L. I. Railroad*, 98 N. Y. 650.

The lack of seats, the crowded condition of the cars, the summer heat, these and other facts, were properly submitted to the jury to determine whether this passenger had sufficient excuse or justification, considering the ordinary dangers of the platform, for riding thereon, and by their verdict it must follow that he was not guilty of contributory negligence. Nor was he presumed to know of the rule forbidding riding on platform. Such knowledge must be proved. *Dunn* v. *G. T. Ry.* 58 Maine, 192; *Hanson* v. *E. and N. A. Railroad* 62 Maine, 89.

There is evidence tending to prove that Goodwin took the precaution to hold on to the rail of the car, thus exercising ordinary prudence against the ordinary risks of such a position, *i. e.*, ordinary jars and shaking of the cars. The jury were warranted in finding that Goodwin used due care to protect himself against all perceptible or reasonable anticipated dangers; care which was sufficient until some unusual, unanticipated and extraordinary acts of the defendant occurred which threw him from the train.

Defendant's negligence alone caused the injury to this passenger Goodwin.

a. No sufficient, suitable accommodations were provided for passengers in a contingency which defendant had reason to anticipate both by previous advertisement and the presence of large numbers of passengers going over the road eastward prior to the return trip train from which Goodwin was thrown.

The care, skill and foresight required of carriers of passengers are commensurate with the magnitude of the interests involved, and with the attendant or anticipated dangers; and with the increase of danger, the law is more exacting in its measure of duty and responsibility.

That measure is defined thus: the utmost skill, the most careful management, extraordinary care, the highest diligence, the greatest possible precaution. Anything short of these becomes neglect and charges carrier. *Bish. Non-Contract Law*, § § 1062, 1064; *Edwards* v. *Lord*, 49 Maine, 280; *Treat* v. *B. & L. Railroad*, 131 Mass. 371; *Werle* v. *L. I. Railroad*, 98 N. Y. 650, and cases *supra*.

b. It was the duty of defendant's conductor to show Goodwin to a seat, or a safer place, or to warn him of special dangers (the curve and rate of speed at which it was approached,) and otherwise, when needful, to direct his movements. Misfeasance in this particular, resulting in damage, is actionable. Bish. Non-Contract Law, § 1089; *Edwards* v. *Lord*, *supra*; *Knight* v. *P. S. & P. Railroad*, 56 Maine, 234; *Dunn* v. *G. T. Ry. Co.* 58 Maine, 192; *Penn. Railroad* v. *McCloskey*, 23 Pa. St. 526; *McIntyre* v. *N. Y. C. Railroad*, 37 N. Y. 287; *Foy* v. *London, etc. Railroad*, 18 C. B. (N. S.) 225; *Simmons* v. *N. B. St. Co.* 97 Mass. 361; *Pittsb. etc. Railroad*, v. *Pillow*, 76 Pa. St. 510; *Flannery* v. *B. B. & O. Railroad*, 4 Wash. (D. C.) 111; Cooley on Torts, 1st Ed. p. 646; *Kentucky Cent. Railroad Co.* v. *Thomas' Admr.* 79 Ky. 3, 160, 165; *O'Donnell* v. *Railroad*, 9 Smith (Pa.), 239; *Gonzales* v. *Railroad Co.* 39 How. Prac. Reps. 407.

c. Defendant's conductor collected fare of Goodwin on the platform; was standing near him as they approached the danger point; knew his position fully, knew (or should have known) his danger; knew of the curve and the dangerous speed of the train and consequent liability to extraordinary, unusual and necessarily violent shock, jar, jolt and lurch of the car; had the power and the obligation to seasonably warn him; had, further, the power and obligation to signal the engineer in a second's time to slacken speed; either of which acts (if seasonably done) would have averted the injury to Goodwin; failure to do either of which was negligence of the defendant subsequent to and independent of any negligence of Goodwin (if any there were), which negligence of defendant was the proximate, causal source of the injury, for which the defendant corporation is liable. Cooley on Torts, 1st Ed. p. 679; Bish. Non-Contr. Law, § § 462-4; *Hobbs* v. *Eastern Railroad*, 66 Maine, 572; *O'Brien* v. *McGlinchy*, 68 Maine, 552; *State* v. *Man. and Law. Railroad*, 52 N. H. 572; *Company* v. *Railroad*, 63 N. H. 159; *Beers* v. *Housatonic Railroad*, 19 Conn. 566; *Kerwhacker* v. *Railroad*, 3 Ohio St. 172; *Strauss* v. *Railroad Co.* 75 Mo. 185; *Morris* v. *Railroad Co.* 45 Iowa, 29.

The cases may be divided into three classes: (1,) Where negligence of plaintiff and negligence of defendant succeed each other so quickly as to be practically simultaneous; here the defendant is not liable because he could not avert the result; (2,) Where the negligence of the plaintiff is followed by the negligence of defendant, and the plaintiff by exercise of ordinary care might have averted the result, the defendant is not liable; and (3,) Where the negligence of the plaintiff is followed by negligence of the defendant, and plaintiff did not know of defendant's negligence, and was not lacking in ordinary care in not knowing it, and defendant by exercise of requisite care might have averted the result, plaintiff's negligence is not contributory, and the defendant is liable.

In other words, plaintiff's negligence is the remote, and defendant's negligence is the proximate cause of the injury, and the fact that without plaintiff's negligence the injury would not have occurred, will not discharge or excuse defendant.

Here, Goodwin would probably not have been injured if he had not been standing on the platform; defendant knew he was there, fully understood his danger, (unknown to himself,) knew of the special danger at the curve, might have ordered him to go into the car if he could get in, might have warned him to guard against the extraordinary shock at the curve, or might have checked the speed of the train by giving in a second's time the signal to reduce speed; and had it done either of these obligatory acts, it would have discharged its duty; failing to do all or any of them, it is liable. *Company* v. *Railroad*, 63 N. H. 159, and cases, *supra*. This question was properly submitted to the jury. *O'Brien* v. *McGlinchy*, *supra*, and citations; *Treat* v. *B. and L. Railroad* 131 Mass. 371; *Lapointe* v. *Mid. Railroad*, 144 Mass. 18; *Griffin* v. *B. and A. Railroad*, 148 Mass. 146; *Willis* v. *L. I. Railroad*, 34 N. Y. 670; *Werle* v. *same*, 98 N. Y. 650; *Tanner* v. *L. & N. Railroad*, 60 Ala. 621; *Ala. Gr. So. Railroad* v. *Hawks*, 72 Ala. 112.

The jury were fully warranted in finding subsequent or proximate and causal negligence of defendant, under the instructions of the court, which instructions embodied the well-founded rule

in *O'Brien* v. *McGlinchy*, 68 Maine, 557; and *Hobbs* v. *East. Railroad*, 66 Maine, 552, and other cases, *supra*.

G. C. Yeaton, for defendant.

EMERY, J. This was an action on the case, the declaration alleging that the defendant company by its negligence, in running one of its trains, injured the plaintiff's intestate, a passenger on the train. The jury returned a verdict for the plaintiff, which verdict the defendant has moved us to set aside as against law and evidence.

Reading the evidence as favorably for the plaintiff as can reasonably be done, the jury might have found the following facts. The defendant company August 22, 1889, owned and operated a branch railroad from York Beach to its main line between Portland and Boston. On that day it ran an excursion train from Portsmouth to York Beach and return. In the afternoon, this train left York Beach on its return trip, with a baggage car next the locomotive and three ordinary passenger cars following, one empty passenger car having been left at York Beach. The day was hot and the cars were uncomfortably crowded. The seats were all occupied either with passengers or baggage, and many passengers were standing in the aisles, or sitting on the arms of the seats. There was unquestionably, however, standing room in the cars for several dozen more passengers. Each car had ample standing space for several extra passengers.

The plaintiff's intestate, Daniel Goodwin, thirty years old, in possession of all his senses, and having the proper ticket, got on the rear platform of the first passenger car from the baggage car, and there stood leaning against the end window of the car, and facing to the rear. He did not enter any of the cars, or inquire for any seat, but remained standing on the platform as described, after the train started and was under full headway. The conductor took up his ticket on the platform, but did not direct him to a seat, nor caution him against standing on the platform. There was the usual notice on the car doors forbidding passengers standing on the platform, but there was no direct evidence that Goodwin saw this sign.

The train was running at speed variously estimated from thirty to forty miles an hour, and in going round a five degree curve without slackening speed, Goodwin was shaken or thrown from the platform, and suffered severe injuries of which he afterward died. As the train went round the curve, the speed caused violent concussion of the car wheels against the rails, so that there was considerable lurching of the cars. Some standing passengers were thrown against the seats, and some sitting passengers against their neighbors. The end window behind Goodwin was broken. Nothing else gave way, however, and no one else was hurt.

The jury by their verdict must have found that the above described conduct of the defendant company was negligent, and that the conduct of Goodwin, above detailed, was free from that fault. The plaintiff's counsel urges that the jury was the legal tribunal, not only to determine all the facts and circumstances, but also to adjudicate whether the acts or omissions of the parties were prudent or negligent. This is true; we have repeatedly so held. The whole subject of negligence, of the power and province of the court and jury in ascertaining the facts, and drawing inferences from them, has been so fully and lately considered, there can be no need to even restate here the propositions established. *York* v. *Maine Central R. R. Co. ante* p. 117; *Lasky* v. *Canadian Pacific Ry. Co.* 83 Maine, 461.

None of the many authorities on this subject, however, deny or question the necessary power of the court to review the judgment of the jury, and set it aside if it be found inconsistent with evidence and with reason.

Waiving for the present, the character of the defendant's conduct, we will first consider the character of the conduct of the plaintiff's intestate. Here the question is whether the judgment of the jury is, in any light, consistent with reason and truth; whether the jury's conclusion can be reached by any correct process of reasoning, by fair-minded, reasonable men; whether the opposite conclusion that Goodwin's conduct was negligent, is the only reasonable conclusion from all the facts and circumstances.

The danger of standing on the narrow platform of a passenger car, while the car is moving with the usual speed of railroad trains, is most conspicuous. No prudent man, no man ordinarily mindful of his conduct and of matters about him would occupy such a position. The greater the speed of the train, the more imminent the danger in such a place. Thoughtful people instinctively shudder when they see a person taking such risks. Curves are necessarily frequent on railroads in Maine, a fact well known to all, and a fact which makes the riding on the platform of a car most perilous.

The knowingly incurring such an imminent visible peril, the choosing to ride in such a conspicuously dangerous place, must be held by all reasonable people to be recklessness in a high degree. The danger, the chance of injury, is visibly imminent and great. No man of reason can fail to apprehend it. No prudent man would fail to avoid it. There seems to us no room for debate or question upon this proposition.

The plaintiff's counsel, however, urges that, in this case, there were circumstances which justified the jury in declaring Goodwin's conduct to be free from fault. He calls our attention to the circumstances, that the day was very hot, that the cars were dusty and uncomfortably crowded, that no train man showed him a seat, or advised him where he could find a seat, that the conductor took his ticket on the platform, and made no objection to his standing there, and that he did not see the sign on the car door.

Did all these circumstances combined hide, in the least, the danger,— make it less conspicuous and imminent? Would they in any way tend to throw a prudent man off his guard, or quiet his apprehensions of danger? All these circumstances may have made it more agreeable to ride on the platform in the open air than to stand inside the hot crowded car, but they did not in the least lessen the danger, nor the appearance of danger in so doing. That Goodwin was not ordered off the platform, could not have led him to believe it was safe to ride there. He needed no warning of such a danger. He knew the place for passengers was inside the car. The discomfort of the hot and

crowded car, did not make it any more prudent for him to ride outside upon the platform. Within the car, with all its discomforts, was safety. Without the car was obvious peril. The safe path is often more narrow and difficult than the way which leads to destruction, but no man is excused for that reason from seeking the one and avoiding the other.

Viewing all the circumstances in every light suggested by the counsel, or imaginable by us, we see no escape from the conclusion that Goodwin's conduct was far below the standard of ordinary prudence, and that such lack of prudence directly caused his injury. Such being our opinion, we must for that reason render judgment accordingly, and set the verdict aside.

We have examined every authority cited on both sides, but the above proposition seems to us so clear and simple, so consonant with reason, that we forbear to cite or explain other cases. The curious will find them cited and commented upon in the parallel case of *Worthington* v. *Cent. Vermont R. R. Co.* 23 Atl. Rep. 590, (64 Vt.) published since the above opinion was written and concurred in.

Motion sustained. Verdict set aside.

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

CITY of AUBURN *vs.* ETHER S. PAUL.

Androscoggin. Opinion February 2, 1892.

Constitutional Law. Taxes. Sewers. Notice. Acceptance of Acts. Constitution, Arts. I, § 22; IX, § § 7, 9. Stat. 1889, c. 285.

The Act of 1889, c. 285, relating to drains and sewers, is not in violation of Art. IX, of the Constitution, which requires taxes upon property to be "assessed equally, according to the just value thereof."

A land owner may be required to contribute towards the cost of a public work, a sum equal to the increased value of his property by reason of peculiar and special benefits thereby given, in addition to those bestowed upon him in common with the general public.

A tax may be recovered of a land owner when duly assessed on his land, under Stat. of 1889, c. 285, according to the benefit accruing to him from the construction of a public sewer; and ten days' notice, under that statute, of the hearing on an assessment for such benefit, is reasonable and sufficient to a resident owner, who appeared after being served with personal notice,

when the act being obscure does not provide how long before the hearing such notice is to be given.

Over-valuation cannot be set up as a defense to the tax. The statute remedy in such cases is exclusive.

Where an act is not to take effect until it has been accepted by the city council at a meeting legally called therefor, *Held:* That it may be accepted at a regular adjourned meeting duly held after a regular session of the city council; *also*, that no previous notice of the business to be acted on is necessary to render its acceptance valid.

ON REPORT.

This was an action of debt, in which the plaintiff sought to recover the amount of an assessment for benefit to the defendant's property on Western Promenade, in the city of Auburn, resulting from the construction of a public sewer in said street, in the year 1889. The assessment was levied by the municipal officers of the city of Auburn under and by the virtue of the provisions of c. 285 of the public laws of 1889.

The defendant resists payment on the ground that the statute under which the municipal officers acted in making the assessment, is unconstitutional; that said statute was never legally accepted by the city council of the city of Auburn; that the defendant had no legal and sufficient notice of the hearing before the municipal officers upon the subject matter of the assessment as provided in said statute; and that certain items of expense were erroneously included in the computation of the cost of said sewer.

J. W. Mitchell, city solicitor, for plaintiff.

Newell and Judkins, for defendant.

The act of 1889 is unconstitutional by reason of the plain phraseology of its provisions. It expressly authorizes and directs the municipal officers to assess a tax "upon the lots and parcels of land" benefited, and establishes a lien upon the same for the collection thereof, said tax not being assessed upon the real estate benefited according to the just value of the several parcels. *McBean* v. *Chandler*, 9 Heisk. 349; *Chicago* v. *Larned*, 34 Ill. 203; *Peay* v. *Little Rock*, 32 Ark. 31.

To the second and third points counsel cited: 2 Dill. Mun. Corp. § § 763, 769, 803, 804, 811; *Lowell* v. *Wentworth*, 6

Cush. 221; *Merritt* v. *Port Chester*, 71 N. Y. 309; *Henry* v. *Chester*, 15 Vt. 460; *Torrey* v. *Millbury*, 21 Pick. 65; *Boothbay* v. *Race*, 68 Maine, 351; *Stebbins* v. *Kay*, 123 N. Y. 31; *In re Eager*, 46 N. Y. 100; *Sharp* v. *Speir*, 4 Hill, 76; *Thatcher* v. *Powell*, 6 Wheat. 119; *Doughty* v. *Hope*, 3 Denio, 249; *Adams* v. *R. R.* 10 N. Y. 328.

The act in question could be adopted only at a special meeting, and called in no other way than provided in § 8 of the city charter. Every person assessed is entitled to thirty days' notice of the hearing. But it is admitted that the assessment was filed in the office of the city clerk on the seventh day of November, 1889; that the hearing was appointed on the twenty-sixth day of November, 1889; but that the defendant was not served with a copy of the assessment until November 16, 1889, so that he had not exceeding ten days' notice of the hearing held before the municipal officers, under the provisions of § 1.

The law makes the "return made upon a copy of such notice by any constable in said town, on the production of the paper containing such notice," "conclusive evidence that said notice has been given." The report contains the return of the constable, which shows that the parties assessed had not exceeding ten days' notice.

If the legislature has required notice and provided how it shall be given, that mode must be pursued. *Grace* v. *Newton Board of Health*, 135 Mass. 490 and cases cited; *Baltimore* v. *Johnson*, 62 Md. 225; *Bean* v. *Patterson*, 47 N. J. L. 15; *Lowell* v. *Wentworth*, 6 Cush. 221; Dill. Mun. Corp. § 804.

The defendant insists that it is the net cost of the sewer only that must be the basis of assessment. The assessment can not exceed "one half the cost."

The sum assessed was seven hundred and fifteen dollars. The total cost of the sewer, therefore, must be one thousand four hundred and thirty dollars, or the assessment would be illegal and void. While it is alleged that this cost was one thousand eight hundred and sixty-six dollars and fifty-five cents, no items are given showing the fact, and it is admitted that from three hundred dollars to three hundred and seventy-five dollars

worth of stone taken from the sewer trench, was used by the city in building a highway. Defendant is entitled to have these items produced. They were within the exclusive possession of the plaintiff. Their omission is injustice. The defendant should not be compelled, under the guise of local assessments, to contribute to the cost of the construction of a public highway. In the payment of his municipal tax, he makes all the contribution he can by law be compelled to make for this object.

HASKELL, J. This is an action at law, authorized by § 6, of c. 285 of acts of 1889, to recover the amount of a tax laid by the city of Auburn, as provided in said act, as a benefit to a certain parcel of the defendant's real estate, accruing from the construction of a public sewer.

I. It is objected that the act of 1889 is void because in violation of Art. IX, § 8, of the constitution, viz.: "All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof."

The constitution does not declare how the public revenue shall be raised; but it does say that: "While the public expenses shall be assessed upon polls and estates, a general valuation shall be taken, at least, once in ten years." Art. IX, § 7. It also provides: "No tax or duty shall be imposed without the consent of the people or of their representatives in legislature." Art. I, § 22. "The legislature shall never, in any manner, suspend or surrender the power of taxation." Art. IX, § 9. So that, all taxes, state, county and municipal, must be levied by the legislature directly, or under general statutes; and such taxes upon property must be assessed "equally, according to the just value thereof."

Some objects of taxation, however, that are of public utility, also operate to bestow some peculiar and special benefit upon particular interests; and, so far as this benefit is special and beyond and apart from that enjoyed by the community in general, and by the recipient as a member thereof, it is not a pub-

lic work or purpose that must be provided for from the public revenues or taxes, that the constitution declares shall be assessed on property "equally, according to the just value thereof;" but it may be charged to or assessed upon interests, according to the benefits bestowed. The purpose of the constitutional provision is to equalize public burdens and not to assume those of individuals.

By the act of 1889, the legislature determined that, at least, one half of the cost of a public drain or sewer shall be borne by the public. To that extent the utility is declared to be public; and if the cost is to be met by taxation on property, the taxes must be assessed "equally and according to the just value thereof." The constitution nowhere provides that the legislature shall not require private interests, receiving a peculiar special advantage from a public work, to contribute in a commensurate degree. And whatever is not prohibited by the constitution, that is just, reasonable and suitable for government to do, the legislature may establish by law. *State* v. *Western Union Telegraph Co.* 73 Maine, 518–526.

The legal traditions, customs, and general system of laws that pertain to Massachusetts are largely our own. From the earliest colonial period, that State has levied taxes upon specific interests or localities according to the benefits bestowed to meet the cost of public works. Instances and authorities are cited in *Dorgan* v. *Boston*, 12 Allen, 223. The doctrine of that case has become the settled law of Massachusetts, and applies to the construction of drains and sewers and other public improvements of a local character. *Butler* v. *Worcester*, 112 Mass. 541–555; *Holt* v. *Somerville*, 127 Mass. 408–412. And when the statute merely imposes a tax for benefits, like the act now considered, involving no question arising under the exercise of eminent domain, no appeal to a jury need be provided for. *Howe* v. *Cambridge*, 114 Mass. 388; *Chapin* v. *Worcester*, 124 Mass. 464.

The act of 1889 requires the municipal officers, when they have completed a public drain or sewer, to estimate and assess upon lots of land benefited by it such sum, not exceeding such benefit, as they deem just and equitable, the whole of such

assessment not to exceed one half of the cost of the drain or sewer. It is neither unjust nor inequitable, to require that a land-owner shall contribute towards the cost of a public work a sum equal to the increased value of his property by reason of peculiar and special benefits thereby given, in addition to those bestowed upon him in common with the general public. A work that is of public utility should, so far, be paid for from public funds; but it may also afford some private advantage in which the public have no concern, and assessments or taxes, to that extent, are not unjust; neither are they levied without authority of law, inasmuch as the legislature is supreme, and, in authorizing such levy or tax, does not violate any provision of the constitution. No more is taken from the taxpayer than has already been bestowed upon him. He is made to suffer no pecuniary loss. As a citizen, he should submit to such just regulations and requirements as are deemed conducive to the public health, welfare and happiness. Assessments of the nature of those imposed in this case are discussed and approved in *Dyar* v. *Farmington Village Corporation*, 70 Maine, 515.

II. It is contended that the act of 1889, was not accepted by the city council, "at a meeting legally called therefor." The act does not require its acceptance to be voted at a meeting "specially called therefor," as the defendant supposes. Special meetings of the city council of Auburn may be called by the mayor, "when, in his opinion, the interest of the city requires it." The act applies to both towns and cities, hence the phraseology applicable to both. It must be accepted at a town meeting legally warned to act on the subject. It can be accepted at no other. It may be accepted by a town or a city council at a legal meeting of either. The former must be warned for the purpose, the latter need not be. One must be called for special purposes, the other may transact any business that comes before it in the usual course. So we think this act may be accepted by a city council at a legal meeting, without previous notice of the business to be acted upon. All the members are supposed to be present and are not entitled to previous notice of the pending business.

The city council of Auburn met for organization, as they were required by law to do, and adjourned to the 25th of March, when it ordered regular meetings to be held on the second Monday evening of each month, and also that a meeting be held on the evening of the 8th of April, to act upon the acceptance of the act now in question. The meeting was then held and the act accepted. This meeting was substantially an adjourned meeting of the 25th for special business, and it is of little consequence whether it be so described in the record or as a regular stated meeting, since both were co-incident and held at the same time and place, and the business done may be noted in the same record. The acceptance of the act was voted at a legal meeting and that is all the act requires.

III. The assessment being regularly made, it is objected that the defendant did not have thirty days notice of the time and place of hearing thereon. He had ten days notice. That, in cases of this sort, is more effectual than a longer time. The meeting is less likely to be forgotten, while the notice is ample for all practical purposes. Unless the statute prescribes a longer notice, ten days notice must be held sufficient.

The act provides that, within ten days after the location of the sewer shall be filed, each person, so assessed, shall be notified of the same and of a time and place of hearing thereon, by notice in hand or at his usual place of abode in town; if he has no such abode, then in the hand or at the abode of his tenant or lessee; if he has neither, then by posting, at least, thirty days before the hearing, or such notice may be given by three successive publications in a newspaper in town, the first publication to be at least thirty days before the day of hearing.

In this case, all the persons assessed being residents, the hearing was appointed less than thirty days from the time the assessment was filed, and service was made upon each one. The act provides for the contingency of not being able to obtain personal service upon all the persons assessed by substituting therefor notice by publication or posting thirty days before the day of hearing; but it does not require personal service or its specified equivalent to be thirty days before the hearing. Upon

that subject it is silent, and reasonable notice is required and was given.

IV. The assessment appears to have been regular; and whether it was too large is not open to the defense here. An appeal is provided in the act and should have been sought, for the review of such questions. It is settled law that the only remedy for over-valuation is the procedure given by statute. Over-assessment in this case, like over-valuation in other cases, cannot be interposed in the defense of a suit for a tax. *Rockland* v. *Rockland Water Co.* 82 Maine, 188.

Defendant defaulted.

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

EMERY, J., concurred in the result.

FLORENCE H. KING, Appellant,

vs.

GEORGE F. HOLMES, and another, Executors.

Oxford. Opinion February 2, 1892.

Will. Undue influence. Evidence.

On the trial of the issue whether the execution of a will was procured by undue influence, the contestant is not aggrieved by the exclusion of evidence of threats of the testator's son, who subsequenty drafted the will, "I have injured you and Florence, [a brother-in-law and his wife,] a good deal already, and father will do what I want him to — just as I say," it not appearing that the words used related to the will and may be construed, in absence of the son's explanation, to mean no more than that the testator would follow the advice of his trusted son and legal adviser in the settlement of litigated matters between some of the testator's children, and in which he may have had some pecuniary interest.

A declaration by the testator in his will that the contestant, one of his children, had otherwise been amply provided for, must have great weight in considering whether the provisions of the will bear internal evidence that it was a free and voluntary act, and not the offspring of mental defect, obliquity or perversion.

Probate appeals are conducted under the rules of equity practice, the verdict being advisory only in settling the final decree.

ON REPORT.

This was an appeal from a decree of the Judge of Probate, for the county of Oxford, approving and allowing an instrument produced by the appellees, as the last will and testament of

Ebenezer R. Holmes, of Oxford, in said county, deceased. The appellant alleged in her reasons of appeal: First, That the instrument purporting to be the last will and testament of said Ebenezer R. Holmes, is not his will, but at the time of the execution thereof he was not in a condition of mind to understandingly and intelligently dispose of his estate. Second, That the execution of said instrument, by the said alleged testator, was procured by undue and improper influence, so that the provisions therein are not the fair, free and long and often expressed intentions of the said Ebenezer R. Holmes.

Under the direction of the court an issue was formed for the jury by submitting to them two questions, which, with the answers of the jury thereto, are as follows: "First, At the time of the execution of the instrument purporting to be the last will and testament of Ebenezer R. Holmes, was the said Ebenezer R. Holmes of sound mind?" "Answer. Yes." "Second, Was the execution of said instrument procured by the undue and improper influence of George F. Holmes and Walter E. Holmes, or either of them?" "Answer. No."

During the trial, the appellant offered evidence, some of which was excluded by the presiding justice on the ground of its remoteness and irrelevancy, and some of it for other reasons, as will more fully appear in the opinion of the court; and, at the close of the evidence, the presiding justice stated to the counsel of the parties that, in his opinion, the evidence of unsoundness of mind, or of undue influence, was not sufficient to justify the jury in returning the verdict for the appellant; and that, if the jury should be induced to return such a verdict, he should, if asked so to do, feel it to be his duty to set the verdict aside.

Thereupon, it was agreed that a *pro forma* verdict should be taken in favor of the proponents, and that the whole case should be reported to the law court; and if, in the opinion of the law court, any of the rulings of the presiding justice in excluding evidence offered by the appellant, were erroneous, and the appellant was thereby aggrieved; or, if his instructions to the jury to return a verdict in favor of the proponents of the will, were erroneous, and the appellant was thereby aggrieved; then a

new trial should be granted; otherwise a decree should be entered, affirming the decree of the Judge of Probate approving and allowing the instrument as and for the last will and testament of the deceased.

The case appears in the opinion.

J. S. Wright and *J. P. Swasey*, for appellant.

Counsel cited: Red. Wills, Part I, p. 510, § 2, and notes; p. 515, § § 12, 14; *McLaughlin* v. *McDevitt*, 63 N. Y. 213; 1 Jar. Wills, pp. 35, 36, and notes; *Tyler* v. *Gardiner*, 35 N. Y. 559; *Ray* v. *Ray*, 98 Md. 366; *Lewis* v. *Mason*, 109 Mass. 169; *Rusling* v. *Rusling*, 35 N. J. Eq. 120; S. C. 36 *Id.* 607.

George D. Bisbee and Richard Webb, for appellees.

HASKELL, J. Two questions were raised at *nisi prius*. Was the testator of sound mind, and was his supposed will obtained by undue and improper influences. The verdict finds he was of sound mind and negatives all undue and improper influence.

At the trial, the presiding justice stated that, in his opinion, no other verdict could properly be rendered, and thereupon the above verdict was taken upon stipulation by the parties, in substance, that any evidence shown to have been illegally excluded shall be considered by the law court together with that admitted, and if the verdict shall then appear to be wrong a new trial shall be granted. In other words, the case substantially comes up on report of the full evidence. This view is strengthened by the consideration that probate appeals are conducted under the rules of equity practice, the verdict being advisory only, in settling the final decree. It may be disregarded when the justice of a case so requires, although the usual practice in probate appeals in this State may be to order a re-trial of the issues framed for the jury. *Shailer* v. *Bumstead*, 99 Mass. 131; *Bradstreet* v. *Bradstreet*, 64 Maine, 204; *Larrabee* v. *Grant*, 70 Maine, 79; *McKenney* v. *Alvord*, 73 Maine, 221; *Maine Benefit Association* v. *Parks*, 81 Maine, 79.

The evidence shows that the testator left a widow eighty-four years of age, and three sons and two daughters, Florence and Louise. The eldest son and daughter were unmarried and lived at home with their parents on a farm. George was a lawyer in Portland, and Walter, the youngest son, and Florence, the youngest child and wife of a Mr. King, lived at Welchville, about three miles from their father's home. In 1880, Walter and Mr. King became partners in a general store at Welchville, and the evidence tends to show that the testator furnished some capital in the store enterprise in aid of his children by loan or otherwise. In April, 1888, before the will was made the following August, the partnership between Walter and King was dissolved and legal controversies arose between them, George being the counsel of Walter and the confidential adviser of his father.

At the trial, the appellant, Florence, called her brother Lyman as a witness and put to him the following question that was excluded, viz.: "Did you hear George say anything to any member of your family about what he would do, or any threat that he made against Mr. King and Florence, or either of them?"

Threats by a person, charged with obtaining a will by undue influence, have sometimes been admitted in evidence as showing motive for conduct that may have operated to compel the making of a will, or more frequently, perhaps, may have prevented an opportunity for changing a will already procured. Much must be left to the judgment of the presiding justice in determining whether the supposed threats in such cases are connected with or relate to the subject matter of the issue on trial; and especially so, when the answer sought, if responsive, cannot be presumed to be material evidence. Upon this ground the question put may well have been excluded, especially as it was known that the speaker of the supposed threats, from infirmity, could not testify, when, perhaps, the context might completely change the meaning of the language attributed to him and leave it harmless for any purpose.

But, assuming that the answer would have been as stated by

counsel at the time the question was put, the appellant is not aggrieved, inasmuch as the supposed threat, "I have injured you and Florence a good deal already, and father will do what I want him to,—just as I say," together with one of weaker import, sought to be proved by King, could not, even with the aid of all the other evidence excluded, have changed the verdict. At most, they show vexation and hostility from George towards King and Florence, arising out of a lawsuit between Walter and King, concerning partnership matters, wherein the testator may have had some pecuniary interest, and may fairly be construed to mean no more than that the testator, in the settlement of those matters, would follow the advice of his trusted son and confidential adviser. Nothing was said about a will, and the supposed threats cannot be said to refer to that subject, in the absence of evidence showing conduct that can be even distorted into undue or improper influence upon the testator.

The appellant offered to prove by Sheriff Wormell, who in 1888, attached the goods of King on a writ in favor of Walter, that he requested the testator to receipt for the goods so attached, and that the testator replied that he would be very glad to do it, but didn't dare to, because he was afraid George would not want him to do it. George was his adviser as well as counsel for Walter, and the testator might have given many worse reasons for his refusal. This evidence, considered in view of the lawsuit then pending between the parties, manifestly related to that controversy, and had no reference to the matter at issue here. The presiding justice upon that ground may well have excluded it. It was not offered as bearing upon the mental condition of the testator, and was irrelevant and immaterial.

The only other evidence excluded at the trial was the testimony of Florence, tending to prove that the testator furnished capital for the partnership between Walter and King. In this behalf the appellant has no cause of complaint, for the fact, if proved, would bear more strongly against her contention than in its favor. It would give cogent reasons for the attitude assumed by George, and more clearly show that his conduct and

discourse related to his father's pecuniary interest in the affairs of the partnership between Walter and King that was the cause of the litigation between them.

The partnership continued until the spring of 1888, before the supposed will was made in August, when controversies arose between the partners, that may have involved the interests of the testator, culminating in a lawsuit between them. George was the counsel of Walter as well as his father's adviser. The evidence, if that excluded be considered, tends to show vexation on the part of George, and perhaps threatening remarks towards King and Florence. The following August, George and his family visited his father, who returned to Portland with his son and executed the supposed will. The will was partly dictated and partly written by George, in his office, on the day after their return. A fair copy was made by a clerk and taken home that night by George, who brought it, with some interlineation, to the office, the next morning, where a clean draft was made by a clerk. It was then handed to the testator who deliberately read it, before witnesses were called to see its execution.

The testator, having read the draft prepared for him, being in the enjoyment of a sound and disposing mind, without compulsion or interference, signified his desire to execute it as his testament, and witnesses, men of understanding in such matters, being called, the testator then proceeded, in the form prescribed by law, to execute his will.

The facts in the case appealed to, as showing undue influence upon the testator, are the threats and conduct of George in the partnership litigation, hostile to the appellant and her husband; and the fact that the testator not long afterwards accompanied his son to Portland, perhaps for the purpose, and there made his will, aided by the fact that the appellant was given no immediate share in his estate.

It is not strange that a father should visit his son, upon whom he had relied for counsel from his youth up, more than a quarter of a century, for the purpose of finally disposing of his estate. Nor is it strange that he should seek advice from his

son in such matters, nor improper that he should do so. There is a "long stride" between any inference that can be drawn from the evidence offered at the trial, and the established fact of undue influence upon the testator. Because the appellant was disappointed and displeased with the provisions made for her is no reason for saying that her father did not understandingly and deliberately make them.

The testator was of sound mind. He charged one half of his entire estate with the support of his widow, a provision that enables her to live in the same state and condition that she had enjoyed during a long married life. He charged two-sixths of the remainder, one-sixth of his whole estate, with the support of the eldest daughter, who had always lived at home, unmarried. He charged one-sixth of the same remainder, one-twelfth of the whole estate, with the support of his eldest son, who had always had lived at home, being about fifty years of age and unmarried. He gave two-sixths of the same remainder, one-sixth of his whole estate, to Walter outright, and one-sixth, one-twelfth of the whole estate, to George. He says in the will that, Florence being amply provided for in other ways, he has purposely omitted to give her a present distributive share, but he does provide that the remainder of his estate put in trust for the support of his widow and two children, three-quarters of his whole property, shall be divided as the several trusts shall terminate among the surviving members of the family, the widow's half to be divided the same as the other half, thereby increasing the two remaining trusts by one-quarter of the whole estate, so they will comprise one half of it, and these two trusts upon their termination are to be divided equally between the four surviving children, Florence being named as one of them. And she may ultimately receive therefrom one-sixth of the whole estate. Of course, that result comes from the natural assumption that the *cestuis* survive in the order of their respective ages, and that the principal of the trusts proves sufficient to yield income to meet the purposes of them.

The purpose of the testator seems to have been, after securing the support of his widow, to divide his estate, one half to his two sons, George and Walter, Walter having twice as much as George, and the other half to a trust for the support of Lyman and Louise, this to go equally to their surviving brothers and sisters. These provisions are not unusual or extraordinary when considered with the statement of the testator that Florence had otherwise been amply provided for. No one should know that fact better than he; and his statement of it must have great weight in considering whether the provisions of the will bear internal evidence, as contended by counsel, that it was "free and voluntary and not the offspring of mental defect, obliquity or perversion." It is conceded that the testator was of sound and disposing mind and memory; and it is shown that he so continued to be for more than a year after the will was made, all the time living among and near to his children, nearer to all the others than to George, who is charged with the unnatural act of unduly influencing his aged father in the disposition of his estate to the prejudice of his youngest child, and yet, no particle of evidence shows that he had a desire or even a thought of changing his will.

A careful consideration of all the evidence offered at the trial shows that the verdict must be approved and that no other verdict could properly have been rendered.

Decree of the Probate Court affirmed. Taxable costs and reasonable counsel fees to be allowed out of the estate.

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

EBEN A. HOLMES, and others,

vs.

HENRY A. BALCOM.

Washington. Opinion February 2, 1892.

Attachment. Notice of claim. Lien. Carrier. R. S., c. 81, § § 43, 44, 45, 46.

The notice of claim upon goods attached, as provided in R. S., c. 81, § 44, is not required to be given to the attaching officer before the goods are sold by him.

When a consignee has a lien for advances upon goods on board ship, which are taken from the ship by an attaching officer on a writ against the consignor without tendering to the carrier or the consignee the amount of the lien, the carrier may maintain an action therefor against the officer.

ON REPORT.

This is an action on the case against the sheriff of Washington county to recover the value of eighty-two cases of sardines of the alleged value of more than four hundred and fifty dollars, attached August 17, 1888, on a writ against one Peter M. Kane in favor of Hiram Blanchard, and others, returnable to the October term, 1888, of this court, for said county, wherein damages were claimed to the amount of one thousand two hundred and thirty-two dollars and sixty cents.

It appeared that the plaintiffs were the owners of the schooner George P. Trigg, enrolled and licensed by the United States, then lying at the port of Eastport in said county, and that the sardines had been delivered on board the schooner by said Kane, for which a bill of lading had been given therefor, to be delivered to Hansen and Dieckman, merchants in New York City, or their assigns, which bill had been mailed to their address by Kane with notice that the same had been drawn against for the sum of four hundred and fifty dollars, and that the draft had been discounted at the bank in Eastport, and in due course was presented to Hansen and Dieckman and accepted by them August fourteenth, and afterwards paid by them.

It appeared that thereafterwards said sardines, while in the hold of said vessel, were attached on said writ and taken therefrom without the assent of the owners of said vessel, by Henry Whelpley, the defendant's deputy, who then tendered the payment of the freight thereon, which was then refused by the owners of said vessel (and subsequently, April 14, 1889, was tendered and refused); that the writ was entered in court at the return term thereof; and in regular course defaulted, but that before judgment was entered, payments had been made upon the claim sued in said writ, so that the same was reduced to eight hundred and seven dollars and sixty cents, for which judgment was entered, and for costs amounting to sixty-two dollars and thirty-nine cents, in the whole amounting to eight

hundred and sixty-nine dollars and ninety-nine cents; that thereafterwards, on the fifteenth day of October, 1888, execution issued upon said judgment, and on the twenty-ninth of the same October, said officer sold eighty-one cases of said sardines together with other property of said Kane attached on said writ, to the amount of one thousand three hundred and eleven dollars and ninety-five cents, with which the officer satisfied said execution together with the costs of keeping and sale amounting to seventeen dollars and ninety-three cents, leaving a balance in his hands of four hundred and twenty-four dollars and three cents, which, in the course of about one month, he returned and paid to said Kane.

It appeared that said Hansen and Dieckman, the consignees in the bill of lading and drawees and acceptors in said draft, after said attachment, upon the arrival of said schooner in the port of New York, libeled the same for the non-delivery of the sardines according to the terms of said bill of lading, and that said libel, having been considered in the District Court for the Southern District of New York, and carried thence by appeal to the Circuit Court for that Circuit, was finally decided, and the owners of said schooner, who were the claimants in said cause, were decreed liable to said Hansen and Dieckman, for the amount of the draft, to wit., for the sum of four hundred and fifty dollars damages, thirty dollars and fifteen cents interest, and thirty-five dollars and five cents costs of the District Court, together with the sum of thirty-eight dollars and thirty cents costs of the Circuit Court, making, in all, the sum of five hundred and fifty-three dollars and fifty cents, and that the said schooner be condemned therefor; which said decree and judgment was thereafterwards, on the same day, satisfied and paid by the said claimants, to wit., the plaintiffs in this case. The report of the case in the Admiralty Court, may be found in 37 Fed. Reporter, p. 708. Prior to the bringing of this suit the plaintiffs gave written notice and made a demand upon the said defendant and his deputy, under R. S., c. 81, § 44.

The value of said eighty-two cases of sardines at the time they were attached was four hundred and seventy-one dollars and fifty cents.

The material parts of the written notice and demand, after reciting the preliminary facts, are as follows: . . .

"Now, therefore, in accordance with the statute in such case made and provided, you are hereby notified that the property attached by said Henry Whelpley on the writ aforesaid, is claimed by us, the owners of said vessel, by virtue of the pledge and lien aforesaid, and the amount due us thereon is as follows, to wit.:

"1. The said sum of four hundred fifty dollars and interest thereon from the twenty-second day of said August.

"2. Freight as aforesaid, to wit., said sum of nine dollars and eighty-four cents.

"So, that the true amount of all the same, with interest to the day of the date hereof, is five hundred three dollars and seventy-nine cents.

"And we hereby demand of you, that within forty-eight hours after you receive this written notice, you discharge our claims as aforesaid, by paying the true amount thereon, to wit., said sum of five hundred three dollars and seventy-nine cents, or restore said property.

"Dated at Eastport this eighth day of April, eighteen hundred ninety.

By W. L. Putnam,

"Attorney for the owners of the schooner, George P. Trigg."

The statute under which notice was thus given and demand made is as follows (R. S., c. 81, § 44): "When personal property, attached on a writ or seized on execution, is claimed by virtue of such mortgage, pledge or lien, the claimant shall not bring an action against the attaching officer therefor, until he has given him at least forty-eight hours' written notice of his claim and the true amount thereof; and the officer or creditor may, within that time, discharge the claim by paying or tendering the amount due thereon, or he may restore the property."

The defendant in his brief statement of special matters of defense, denied that any written notice, &c., had been made on him before the sale on execution; and further alleged that the plaintiffs had no lien on the fish.

W. L. Putnam, for plaintiffs.

N. & H. B. Cleaves, *S. C. Perry*, *A. MacNichol* and *E. E. Livermore*, with them, for defendant.

Plaintiffs failed to protect the absent consignees and upon this ground the Trigg was held liable to the consignees for non-delivery of the goods. They had the power to give notice under R. S., c. 81, § 44. The purpose of the statute in requiring written notice of the claim and the true amount thereof, is to enable the attaching creditor to know definitely what the lien may be. The information called for is important, not merely as fixing the sum to be paid, but also as assisting the creditor in determining whether the lien is claimed in good faith, and whether it will be valuable to him if he retains his attachment and takes to himself the benefit of such lien by discharging the same. *Wilson* v. *Crooker*, 145 Mass. 571. An officer by attaching chattels and taking them into his custody, becomes personally chargeable with their value. *Phillips* v. *Fields*, 83 Maine, 350; *Fairfield Bridge Co.* v. *Nye*, 60 *Id.* 372, 379. The legislature had in view the protection of the officer as well as the claimant, and the statute distinctly provides that "The officer or creditor may . . discharge the claim by paying or tendering the amount due thereon, or he may restore the property." Meaning that the officer may restore the property, the statute contemplating that the demand shall be made while the officer is in custody of the property and before the sale of the same on the process which he holds. The statute also contemplates that the claimant shall be vigilant in the assertion of his rights, and that he shall not permit the rights of the creditor or the attaching officer to be prejudiced by his delay.

Where property is taken from the carrier by legal process and he gives due notice of the taking to the shipper, owner or consignee as the case may be, he is discharged. *Wells* v. *Maine Steamship Co.* 4 Cliff. 228; *Edwards White Line Transit Co.* 104 Mass. 159. The time has passed for plaintiffs to assert any rights against defendant. They knew or ought to have known all the facts when the attachment was made. They allowed the officer to go on and make sale on execution. They

waived their rights under the statute by resorting to their remedy in the Admiralty Court and permitting sale by the officer. *Copeland* v. *Copeland*, 28 Maine, 539; *Nichols* v. *Perry*, 58 *Id.* 32. By giving regular notice of the attachment they would have been discharged from their obligations. *Blivin* v. *Hudson River R. R. Co.* 36 N. Y. 403; *Stiles* v. *Davis*, 1 Black, 101. Notice should be given while the officer holds the property under attachment. No time being fixed by the statute, it must be a reasonable time. *Saunders* v. *Curtis*, 75 Maine, 493. Counsel also cited: *Brackett* v. *Bullard*, 12 Met. 308; *Sullivan* v. *Lamb*, 110 Mass. 169; *Ramsdell* v. *Tewksbury*, 73 Maine, 198; *Granger* v. *Kellogg*, 3 Gray, 490. Subrogation: *Gadsden* v. *Brown*, Speer's Eq. (S. C.) 37–41; *Hall* v. *R. R. Co.* 13 Wall. 370; Shel. Subrog. pp. 278, 280–284.

Estoppel: *Pickard* v. *Sears*, 6 A. & E. 469; *Piper* v. *Gilmore*, 49 Maine, 153; *Rangely* v. *Spring*, 21 *Id.* 130; *Cummings* v. *Webster*, 43 *Id.* 194. Plaintiffs were held liable to Hansen and Dieckman expressly and solely on the ground of their own laches and neglect to promptly notify them and to take the steps provided by laws of Maine, in notifying the attaching officer of the lien of Hansen and Dieckman, and in neglecting to institute legal proceeding to protect their interest in the goods. Such neglect and laches cannot give plaintiffs a valid pledge or lien, and be a legal foundation for their claim here against this sheriff. It is settled that common carriers cannot stipulate for exemption from liability for losses occasioned by the negligence of themselves or their servants. *Willis* v. *Grand Trunk R. R.* 62 Maine, 488. The law will not, therefore, imply or raise any lien on the goods attached, in favor of these plaintiffs, grounded solely on their plain neglect of duty. No one shall found a right on his own wrong.

EMERY, J. The defendant was the sheriff of Washington county. His deputy attached eighty-two cases of sardines on a writ against Peter M. Kane. At the time of this attachment, the sardines were on board ship at Eastport consigned by Kane to Hansen and Dieckman at New York, and the ship master had

delivered the usual bills of lading therefor, and Hansen and Dieckman on receipt of the bill of lading had advanced to Kane four hundred and fifty dollars on the sardines by accepting his draft for that amount.

It is conceded that, under these circumstances, Hansen and Dieckman at the time of the attachment had a valid lien on the sardines to the extent of their said advances. *Gragg* v. *Brown*, 44 Maine, 157. The attaching officer, however, did not at any time pay or tender the amount of their said lien to Hansen and Dieckman; nor did he at any time give them any written notice of his attachment as provided by R. S., c. 81, § 45.

The suit against Kane was prosecuted to judgment, and upon the execution the officer sold the sardines so attached, from the proceeds of which he satisfied the execution, and paid the balance to Kane.

It is further conceded that, if Hansen and Dieckman had given the attaching officer notice of their lien claim under R. S., c. 81, § 44, before such sale of the sardines and application of the proceeds, they could have maintained an action against the sheriff for such attachment. But no such notice was given till long afterward; and it is contended that the failure to give such notice before such sale, bars an action by the claimant against the officer for the original attachment. This is the principal question in the case.

No notice whatever at any time was required by the common law preliminary to a suit by the lienor against the attaching officer. Indeed, by the common law, there could be no lawful attachment of personal property in the situation of these sardines. *Sargent* v. *Carr*, 12 Maine, 396. The statute authorizing such attachment is R. S., c. 81, § § 43 to 46, inclusive; therefore, the lienor need only give such notice and at such time as is required by the statute. If the legislature had intended to so far abridge the common law right of action as to require a notice before the sale of the property, we think it would have made such intention clear by express words. The statute, however, does not say that the notice must be given before the property is sold by the attaching officer, nor does it limit the time

for bringing the suit. The action may be brought as before, at any time within the statute of limitations, without reference to the situation of the property, or its disposition by the officer. The notice provided is merely preliminary to the action. The only time named for the notice is that it shall precede the action by forty-eight hours. Within that limit of time, the officer can restore the property, if he then has it, or if he has it not, he can pay the claim, and in one way or the other avoid further liability.

If the officer desires to have such notice given him before he sells the property, he can give written notice of the attachment under § 45, and then if notice of the claim is not given him within ten days, he can assume there is no claim, and can sell, without fear of judgment against him. In this case, however, the officer gave no written notice of his attachment and cannot now effectually object to the delay in the notice to him of the claim.

But Hansen and Dieckman, the consignees and lienors, instead of bringing an action directly against the sheriff, libeled the vessel in the admiralty court in New York for non-delivery of the sardines according to the bill of lading, and recovered judgment for the value of their interest in the sardines, and costs. The owners of the vessel paid this judgment, and then brought the present action in their own names, against the sheriff to recover the same value.

The defendant makes two objections to the maintenance of this action by the plaintiffs, the owners of the vessel: (1,) that there is no right of subrogation inasmuch as the judge of the admiralty court in his opinion based the judgment against the present plaintiffs on the ground of their laches, in not notifying the consignees of the attachment. (2,) that the right of subrogation is equitable only, and only permits an action in the name of the original claimant.

We do not think either objection is tenable or material. The plaintiffs were common carriers, and as such, at the time of the attachment, had received and receipted for the property, and it was in their possession to be carried to Hansen and Dieckman. As such carriers they had a special ownership in the property

thus in their possession, and for which they were accountable. They were bound to protect against third parties, the respective interests of the consignor and consignee, and were bound to both these for the safe delivery of the property according to the bill of lading.

If the property had been taken from them without legal process, they could rightfully have pursued and recaptured it, or they could have maintained in their own names actions of replevin or actions for the value. If the property was taken from their possession upon legal process against the consignor, and they were prevented thereby from delivering it to the consignee according to their contract, they had the same rights and remedies in order that they might be able to answer over to the consignee for the value of his interests. Certainly, if they pay such consignee for his interest with or without suit, they succeed to all his rights of recapture, or rights of action. *Vermilye* v. *Express Co.* 21 Wall. 138.

We think the plaintiffs are entitled to recover the amount of the consignees' interest which they have paid, but are not entitled to recover the costs or expenses of the suit against them. These latter they should not have incurred. The excess in value of the sardines over the consignees' interest, was in effect paid to the consignor by being applied to his debt. A judgment for the plaintiffs, therefore, for the amount of Hansen and Dieckman's lien, four hundred and fifty dollars, with interest from the date of the attachment, August 17, 1888, seems consonant with law and equity, inasmuch as that sum is less than the whole value. *Warren* v. *Kelley*, 80 Maine, 512.

Judgment accordingly.

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

JAMES E. FERNALD *vs.* ANDREW E. CLARK.

Waldo. Opinion February 3, 1892.

Insolvency. Partnership. Proof of Debt. Discharge. R. S., c. 70, § 25.

A partner who sold his interest in the partnership to a co-partner, taking from him an agreement to pay the partnership debts, cannot recover against

such co-partner for debts which he was afterwards compelled to pay for the co-partner to partnership creditors, the co-partner having received a discharge from the same debts by insolvency proceedings in which such creditors proved their claims and received dividends thereon.

Dole v. *Warren*, 32 Maine, 94, examined.

Fernald v. *Johnson*. 71 Maine, 437, approved.

FACTS AGREED.

R. F. Dunton, for plaintiff.

The defendant's discharge in insolvency released him only from such debts, claims, liabilities and demands, as were or might have been proved against his estate in insolvency. R. S., c. 70, § 49. The case of *Fernald* v. *Johnson*, 71 Maine, 437, settles the fact that Fernald's claim under the contract was not provable against Clark in insolvency.

Counsel cited: *Fowler* v. *Kendall*, 44 Maine, 448; *Reed* v. *Pierce*, 36 *Id.* 455; *Dole* v. *Warren*, 32 *Id.* 94; *Ellis* v. *Ham*, 28 *Id.* 385; *Wells* v. *Mace*, 17 Vt. 503; *Woodard* v. *Herbert*, 24 Maine, 358; *Mann* v. *Houghton*, 7 Cush. 592; *Bennett* v. *Bartlett*, 6 Cush. 225; *Savory* v *Stocking*, 4 Cush. 607; *Murray* v. *De Rottenham*, 6 Johns. Ch. 52.

J. Williamson, for defendant.

PETERS, C. J. The facts stated show that the plaintiff and defendant had been copartners in business; that the plaintiff sold his interest in the partnership to the defendant, the latter giving the plaintiff as a part of the consideration of sale an agreement to pay the partnership debts; that the defendant afterwards went into insolvency, receiving in due time his discharge; that certain creditors named in the report as holding demands against the partnership proved their claims against the defendant's estate, receiving dividends thereon; that after the insolvency proceedings the same creditors collected of the plaintiff the balance remaining due on their demands after crediting the dividends thereon; and that this suit is prosecuted by the plaintiff in order to ascertain whether he can recover of the defendant, notwithstanding his discharge, the amount so paid by the plaintiff upon the partnership indebtedness. We think the action cannot be maintained.

Whether an insolvent is answerable after his discharge on a demand originating before insolvency depends generally on whether the demand could or not have been proved against the insolvent's estate. The tendency of both the statutes and the courts has been to construe the effect of a discharge with all reasonable liberality towards the debtor.

All contingent demands are not barred from proof against the insolvent's estate. The distinction is between contingent liabilities which may never become debts and debts payable on a contingency. The general rule deducible from the cases, although distinctions and differences are to be found in them, is that all demands which are directly capable of being valued or liquidated may be admitted to proof against an insolvent estate, and if not presented cannot be afterwards enforced against the bankrupt. At first courts were puzzled to know how contingent debts could be estimated or valued, and some of the earlier cases held that there was no way by which a surety could prove his claim against the principal's estate. But after the case of *Mace* v. *Wells*, 17 Vt. 503, was reversed by the Supreme Court of the United States, in *Mace* v. *Wells*, 7 How. 272, and a contrary doctrine established by that tribunal, the question in this country became settled.

Accordingly, a surety may protect himself by purchasing in the demand and proving it in his own name as a subrogated owner, or the court will permit him without payment to prove the demand in the name and right of the creditor for his own benefit. *In re Babcock*, 3 Story, 393; *Mace* v. *Wells*, 7 How. 272, *ante; Fowler* v. *Kendall*, 44 Maine, 448; *Spalding* v. *Dixon*, 21 Vt. 45; *Aflalo* v. *Fourdrinier*, 6 Bing. 306. Other authorities might be added.

Our statute adopts the principle in the provision on the subject, found in § 25, c. 70, R. S., as follows: "Any person liable as bail, surety, guarantor, *or otherwise*, for the insolvent, who has paid the debt, or any part thereof, in discharge of the whole, may prove such debt, or stand in the place of the creditor, if the creditor has proved the same, although such payments were made after the proceedings in insolvency were com-

menced. And any person so liable for the insolvent, and who has not paid the whole of such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits upon request to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the rules of the court, under section ten, and subject to such regulations and limitations as may be established by such rules."

Now, the precise question is, whether the plaintiff stood as a surety for his partner for the payment of the partnership debts. We think the statute is comprehensive enough to place him in that position, including, as it does, "any person liable as bail, surety, guarantor, or otherwise, for the insolvent." His position was in effect the same as that of surety. It has been frequently held that, where one of the parties bound by a joint contract, assumes the whole burden of the obligation, the other will acquire the rights of a surety, and will stand in the place of the creditor, for the purpose of proving the debt against the estate of the bankrupt, with the attendant disadvantage of being precluded from enforcing it subsequently against his person. The learned American editors of Smith's Leading Cases lay down the proposition as established by the cases without opposition. Smith Lead. Cas. 8th ed. Vol. 1, part. 2, p. 1271. In most the cases the joint debtors were partners situated as the present parties are. *Wood* v. *Dodgson*, 2 M. & S. 195; *Aflalo* v. *Fourdrinier*, *ante; Butcher* v. *Forman*, 6 Hill, 583; *Crafts* v. *Mott*, 5 Barb. 305 (S. C. 4 Coms. 604). We think all the writers on partnership concur on this point.

None of the cases in this State relied on by the plaintiff oppose this rule. They relate to instances of liability of such a contingent character that it could not be determined that there ever would be a debt. The case which nearest approaches this is *Dole* v. *Warren*, 32 Maine, 94, a case of liability between co-sureties, and depending upon a different principle altogether. And still that case has been doubted by several courts, and may perhaps be considered as somewhat questionable under the broad language of our present statute. While there may be a difficulty in estimating the measure of liability among co-sureties

there is none between a surety and his insolvent principal. Besides, in the present case the claims were actually proved by the creditors themselves, their action operating as beneficially for the surety as if he had proved them himself.

Nor is the situation changed because the plaintiff unsuccessfully attempted to prove his pretended claim in his own name, as appears in the case of *Fernald* v. *Johnson*, 71 Maine, 437. He had not paid any of the debts, nor was he attempting to prove any claim in any creditor's right or name. The distinction is clearly shown in the opinion of the court, where it is said: "Whether the claimant could prove the partnership debts as being holden therefor, 'as surety, guarantor, or otherwise,' is not a question now before the court; but the simple and only question presented is, shall the claimant be allowed to prove his own claim under and by virtue of the contract of dissolution." If he had been allowed to do so, virtually the same claims would have been doubly proved, once in his name and again in the name of the creditors.

Judgment for defendant.

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

JOHN STARBIRD *vs.* DAVID BROWN.

84 238
86 345
89 452
84 238
94 391
84 238
100 453

Androscoggin. Opinion February 3, 1892.

Statute, — repeal by implication. Lewiston Municipal Court. Actions, when returnable. R. S., c. 83, § 7; Special Laws, 1871, c. 636; 1872, c. 177; Stat. 1876, c. 138.

The general provision of the R. S., (c. 83, § 7,) which provides that writs in civil actions before any municipal or police court may be made returnable at any term thereof, to be held not less than seven nor more than sixty days from their date, applies to the municipal court for the city of Lewiston, although that court was created by special act before the general law was passed and the two acts conflict with each other.

The test whether one statute effects the repeal of another by implication is, does the subsequent act become so directly and positively repugnant to the former act, that the two cannot consistently stand together.

ON EXCEPTIONS.

This was an action of trespass entered in the Lewiston Municipal Court. The writ was sued out and served on the twenty-

sixth day of June, 1891, and made returnable to the September term of that court. The defendant duly filed a motion to dismiss the writ because it was made returnable to a term of said court more than sixty days from the day of the suing out of said writ and the date thereof.

The presiding judge sustained the motion to dismiss, as a matter of law, and the plaintiff excepted to the decision.

The bill of exceptions was certified to the Chief Justice for the decision of the law court.

McGillicuddy and Morey, for plaintiff.

What was the intention of the legislature in reference to this matter? Here is a court they had established. The salary of the judge is fifteen hundred dollars per year. The court has a clerk, a crier, a seal, and is one at which a vast amount of work is done. If the defendant's claim is correct, by this general act the legislature made it impossible for this court to act during a portion of the year. A great majority of the civil suits are brought with trustee process and generally one of the corporations is the trustee. The trustee, if a corporation, must have thirty days' notice. Any time after the first Tuesday of June suppose it is desired to trustee a person working for a corporation. It is impossible to do so during the remainder of the month of June for the reason that, there being no term of court during the month of August, and it being necessary to give a corporation thirty days' notice, the writ during that time must be made returnable at a term of court more than sixty days from the date of the writ. Are the citizens of Lewiston to be deprived of one month in the year in which to collect their bills or seek redress for their wrongs at the Municipal Court? Such a construction as claimed would be contrary to the manifest intention of the legislature.

Counsel cited: *State* v. *Cleland*, 68 Maine, 258; *Allen* v. *Somers*, *Id.* 247.

White and Carter, for defendant.

PETERS, C. J. The Municipal Court for the city of Lewiston was created by special act in 1871. See ch. 636, Special

Laws of that year. Section four of the act provides that a term of the court shall be held on the first Tuesday of each month, and all writs be made returnable to one of the two terms to be begun or held next after the commencement of the action. By ch. 177 of Private and Special Laws of 1872, the original act was amended by excepting the month of August from the list of terms of court.

In 1876 an act was passed (ch. 138, Public Laws 1876,) incorporated in the revised statutes of 1883 (R. S., ch. 83, § 7,) providing that writs in civil actions before any municipal or police court may be made returnable at any term thereof, to be held not less that seven nor more than sixty days from their date.

The present action was made returnable to a term more than sixty days from the date of the writ, and for that reason was, upon motion of the defendant seasonably made, dismissed.

The question, therefore, is whether the later general or the earlier private act governs the decision of the case. Is or not the special act amended by the general act so as to become conformable thereto? We think it is.

It is not always easy to decide questions of this kind, and for that reason cases are to be found near to the dividing line on either side of it. But the precedents are numerous in support of a general rule which is applicable when it is claimed that one statute effects the repeal of another by necessary implication.

The test is whether a subsequent legislative act is so directly and positively repugnant to the former act, that the two cannot consistently stand together. Is the repugnancy so great that the legislative intent to amend or repeal is evident? Can the new law and the old law be each efficacious in its own sphere? *Brown* v. *City of Lowell*, 8 Met. 172; Bou. Law Dic. Statute.

It is reasonably certain that the design of the general statute, invoked in the present case, was to secure uniformity of practice in the matter of serving writs returnable to police and municipal courts, and to prevent mistakes that are occasioned by too long a period lapsing between the service and return day of a writ. There was just as much purpose for including within the act the

Lewiston municipal court as any other municipal court. All of that grade of courts are created by special acts, and any one of them is as much entitled to an exemption from the operation of the later general act as any other. It applies to none or to all. Applying to any one it applies to all. The act is in its effect special as to any one court, and general as to all such courts.

The plaintiff's counsel insists that this construction might interfere with the usual procedure in that court for a little time each year, should it be necessary to sue a corporation by a writ returnable to the September term. That dilemma is caused by absence of an August term, and can be prevented by further legislative amendment. But the practical consequences cannot be much even if the act is left as it is.

The plaintiff invokes the case of *State* v. *Cleland*, 68 Maine, 258, as supporting his position. That was a close and doubtful case, as is evidenced by the fact that three members of the court united in a dissenting opinion. There is, however, this marked difference between that case and this. In that, the question was whether a general act should have general or only partial application. In this, the question is whether a general act shall have any application or not.

Exceptions overruled.

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

DARIUS H. BARTLETT *vs.* LOREN LEATHERS.

Somerset. Opinion February 4, 1892.

Promissory Note. Indorsement. Pleadings. Days of Grace. R. S., c. 32, § 9.

In an action on a note commenced by an indorsee against the indorser, the words in the common form of declaration, that the defendant became liable and in consideration thereof promised the plaintiff to pay him the note, are a sufficient allegation that the defendant indorsed the note to the plaintiff for value.

A note which without grace would become due on Sunday is not to be regarded as payable on Saturday before, so as to be with grace added due on Tuesday afterwards, but such note is due and payable on Wednesday after such Sunday.

It is only when the last day of grace falls on Sunday that the time of a note is shortened by a day.

ON EXCEPTIONS.

The case appears in the opinion.

Merrill and Coffin, for plaintiff.

D. D. Stewart, for defendant.

The declaration alleges no consideration for defendant's supposed contract, and is, therefore, defective. *Bourne* v. *Ward*, 51 Maine, 191; *Augusta Bank* v. *Augusta*, 49 *Id.* 419; *King* v. *Crowell*, 61 *Id.* 244; *Gore* v. *Gibson*, 13 M. & W. 623; *Murdock* v. *Caldwell*, 8 Allen, 309; *Burnham* v. *Allen*, 1 Gray, 500. Open to demurrer: *Thomson* v. *O'Sullivan*, 6 Allen, 303; *Murdock* v. *Caldwell*, 8 Allen, 309.

Note fell due on July 22, 1878, Sunday. Of this the court will take judicial notice, 1 Gr. Ev. (13th ed.) § 5; 1 Whar. Ev. § 282; *Brown* v. *Piper*, 91 U. S. 37. The almanac is part of the law of England, per Pollock, C. B. in *Tutton* v. *Darke*, 5 H. & N. 649; *Street* v. *U. S.* 133 U. S. 306. Note was due by the law merchant, Saturday, July 21. *Barker* v. *Parker*, 6 Pick. 80, 81; *Chaffee* v. *R. R. Co.* 146 Mass. 234. Days of Grace: Chit. Bills, c. 9. pp. 410, 411; Sto. Prom. Notes, § 220, note 3; *Perkins* v. *Bank*, 21 Pick. 485; *Bowley* v. *Bowley*, 41 Maine, 542. Is no part of the contract *per se*, but a statute allowance. Last day of grace was July 24, demand for payment not made until July 25, one day too late. Cases *supra*, and *Jones* v. *Fales*, 4 Mass. 248.

PETERS, C. J. In this action brought by an indorsee of a note against the indorser, the declaration closes in these words:

"And the said Loren Leathers thereafterwards on the same day indorsed and delivered the said note to the plaintiff; and the plaintiff avers that afterwards when the said note became payable, viz: on the 25th day of July, A. D., 1888, at Medford, aforesaid, the said note was duly presented to said George G. Holt, and payment of the said sum, according to the tenor of the said note, was then and there duly required of the said George G. Holt, who then and there refused to pay the same,

of all which the said Loren Leathers thereafterwards, viz., on the same day, had notice, by reason whereof the said Loren Leathers became liable and in consideration thereof, then and there promised the plaintiff to pay him the contents of the said note, with interest, when thereunto requested."

It is objected by defendant on demurrer to the declaration, that no consideration is alleged for his promise to pay the note in case of non-payment by the maker. We find, however, the declaration to be of a standard form in both ancient and modern use. The words "in consideration thereof" in the count apply to all preceding matter, and amount to an averment that the note was indorsed for value.

The defendant also contends that the note was not demanded of the maker on the day it became due. The note, dated July 22, 1884, on four years, appears to have been presented for payment and protested on July 25, 1888. The defendant's point is that, as July 22, 1888, came on Sunday, the note fell due on Saturday the 21st, and with grace added became payable on the 24th day of July, 1888. It may be that at common law the note would have become due as the defendant contends, but that is not the meaning of our statute on the subject. By our law the days of grace are made a part of the contract just as if written in the note itself, and a note does not in any sense fall due before the last day of grace. It is the Sunday occurring on the last day of grace, and not one occurring on the last day preceding the days of grace, that deducts a day from the running time of a note. *Demurrer overruled.*

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

ANDREW J. ERSKINE *vs.* OLIVER MOULTON.

84 243
85 298

Kennebec. Opinion February 4, 1892.

Deed. Boundary. Waters.

A description in a deed which runs down the middle of a stream in which the tide ebbs and flows, thence across the stream to the upland on the southerly side, and thence on the southerly side of such stream, conveys to the grantee the land on that side between high and low water mark.

See *Erskine* v. *Moulton*, 66 Maine, 276.

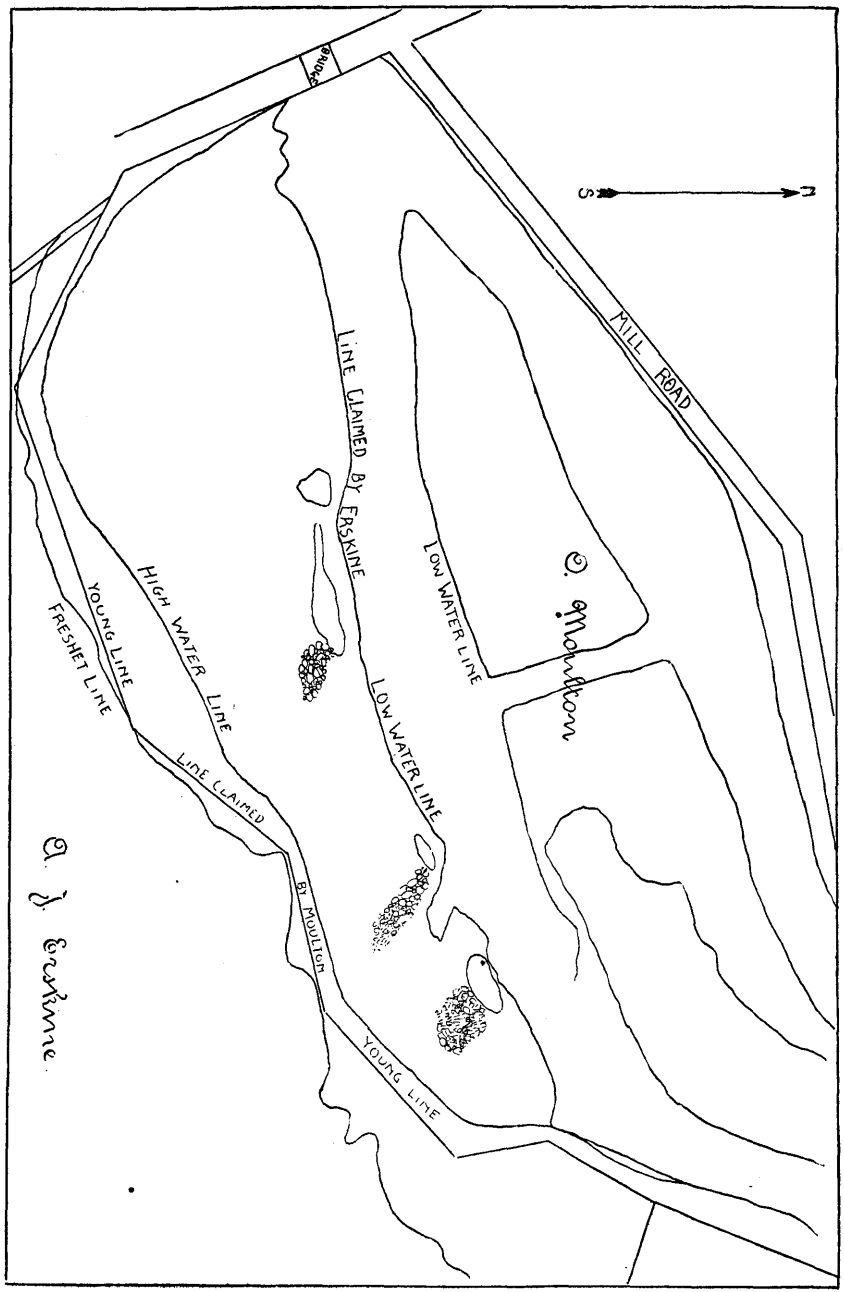
ON REPORT.

This was an action for trespass *q. c.* and the writ contained three counts. The first describes the plaintiff's premises in the same terms as the deed from Bradstreet, the former owner of the entire locus, to himself, dated December 9, 1865, and alleges the usual acts of trespass, breaking of fence, destruction of grass, &c. The second count alleges that the plaintiff's land adjoins the waters of Worromontogus stream; that defendant's logs and timber were carried upon the land and wrongfully removed without tender of compensation for damage; and sets forth a cause of action under R. S., c. 42, § § 7 and 8. The third count describes the premises as extending to low water mark and alleges that the defendant used the same for booming and piling purposes and sets forth special damage.

The case was reported to this court for determination as to the true line between the parties, with the stipulation that it be sent back to *nisi prius* for assessment of damages in accordance with such determination.

The plaintiff claimed to the low water line as marked on the accompanying plan, while defendant claimed that the true line was the high water line or one near it called the Young line, and which had been established by the parties as appears in the decision of this court reported in 66 Maine, 276, and therein confirmed.

In 1872, Bradstreet, who appears before then to have owned all of the premises north of the stream and that portion south to the Young line, conveyed to the defendant, Moulton, by deed of warranty the premises, one boundary of which came before the court, in this case, for determination. In 1871, the plaintiff, Erskine, purchased from Bradstreet a lot containing one acre, the northern line of which is described as running "on the brow of the bank of the stream." No more conveyances were made by Bradstreet. After his decease his heirs gave, in 1887, a quitclaim deed to the plaintiff of whatever they might own, either land or rights of flowage, on the south side of the stream, "said rights of flowage having been reserved by our late father" in his deed, in 1865, to A. J. Erskine, &c.



Plan accompanying *Erskine* v. *Moulton*.

The parties agreed that the premises are the same as in the case of *Erskine* v. *Moulton*, 66 Maine, 276, to which reference is made, and that the disputed premises here are shown on plan. The Young line on said plan is the line established in the former suit above referred to.

It was further agreed that neither at the time of the deed from Bradstreet to Erskine, in 1865, nor at any time since, has said Bradstreet or his heirs had any dam on the Worromontogus stream other than on the premises conveyed to the defendant in 1872, and that he owned no premises to which rights of flowage could be appurtenant except the premises north of the Young line.

Baker, Baker and Cornish, for plaintiff.

Heath and Tuell, for defendant.

PETERS, C. J. The question of this case depends for its solution upon the meaning of this call in a conveyance of land: "On the southerly side of the steam." The following facts, made a part of this case, are found in a previous case between the same parties: "The Worromontogus stream flowing westerly is a tributary of the Kennebec river flowing southerly. About twenty rods above the confluence, the stream, leaving the upland, reaches a parcel of flat land elliptical in form, three to four acres in extent, and known as the Worromontogus cove. At the upper end of the cove, the stream divides, one channel flowing along the northern and the other the southern border to the lower end where they unite, flow under a bridge (constituting a part of the highway along the bank of the river,) and thence into the river. The cove is flowed by the tide backing up from the river and by freshets. At other times the land between the channels is bare, a small portion of it being more or less covered with small bushes. Logs can be so easily floated in there from the river, that the cove has been used for many years as a safe and convenient place for securing and booming them for rafting as well as for holding them to supply the mills at the head of the cove ever since their erection." *Erskine* v. *Moulton*, 66 Maine, 276.

Further facts are of importance in a consideration of the question. Joseph Bradstreet formerly owned the cove and the land on both sides of it. In 1865, he bargained a parcel on the south side of the cove down to high water mark to the plaintiff. But it was to be high water line as run out by one Young, a surveyor. He (Bradstreet) was thus cautious and exact as he was selling upland only, intending to reserve all possible flats and water privileges to himself. The surveyor, as it turns out, ran a line not coincident with a high water line in all places, but nearly so. It may be that Bradstreet intentionally retained to himself a small strip of upland in some places for his own convenience. At all events it was held, and we think correctly, in the case cited, that the "Young line" was made the dominant boundary in the deed. The result was that Bradstreet remained the owner of the flats on the southerly side of the cove and of a fragment of upland in some places adjacent thereto.

After this, in 1872, Bradstreet conveyed to the defendant a large amount of upland on the other or northerly side of the cove or stream, together with most of the cove itself, including that portion of it adjoining plaintiff's land. The calls in this deed that may be material to the present issue, partially repeated before, are as follows: "Thence easterly on said divisional line *across* said stream [the cove] to a point six and a half rods from the east side of said mill, thence southerly and westerly on the *southerly side of the stream*" [cove] to the point begun at. By this conveyance the defendant became the owner of land on the northerly side of the cove, extending across to its southerly side, and the question is whether his purchase goes across to low water line, or to high water line, or to the "Young" line.

It cannot reach the Young line where that line is above high water mark, because the grant includes no upland on that side of the cove. It demonstrably excludes any. It is regarded by the defendant as an unlikely thing that his grantor would retain the ownership of a narrow strip, less than a rod in width, which would be worthless to him after selling the other land. But probably the difference between the two lines was not remembered by the parties when the conveyance was made.

After the death of Bradstreet, the plaintiff, in 1887, procured from his heirs a release of their title or interest in the locus between the Young line and low water mark, and hence this litigation to ascertain whether the plaintiff or defendant has a better title to the flats.

We are satisfied that the defendant owns them. The literal meaning of the questionable words does not admit of a different conclusion. The line continues "across said stream," and "to a point" shown to be upon the upland, thence it runs "on the southerly side of the stream," not on or by the stream, but on its side. The call does not say on the side of the stream at low water. If the line be at low water mark it will be, we should judge from the plans in the case, an unusual distance into the stream during all the time excepting for a few moments in every twenty-four hours.

This construction is the one most compatible with the situation of the parties and properties at the time of the conveyance. The defendant then owned and operated a mill on the stream at the head of the tide. He needed booming grounds for his logs. A privilege for such purpose that was limited to low water line would be comparatively of little value. Every time a log rested on the flats its owner would be a trespasser. Really the privilege consists mainly over and upon the flats. From the plan it would seem that, while at high water the premises appear to be a cove, at low water they are mostly flats. Besides, while valuable to the defendant, the flats cannot be little better than valueless to any one else. After the sale to the defendant they were worthless to Bradstreet. There can be no reasonable doubt that he intended to cover them by his deed. There was no reason why he should not include them.

This construction does not militate against a line of decisions which establish the principle that a grant on, by, or down a cove or stream, or by the sea, goes to low water mark or to the middle of a stream. That construction is allowed unless the description be such as to show a different intention, the cases say. The class of cases alluded to apply to a grant of upland adjoining flats. Here we have the grant of flats adjoining

upland. The rule is one of inclusion and not exclusion. It adds and not subtracts. If a grant by the cove includes the flats in the one case, why not in the other?

But the stronger ground is that the intention seems conclusively shown by the peculiar language of the deed. "On the side of" a stream is more favorable to the defendant than a boundary "on" the stream would have been. And the case assimilates more to another class of cases a few of which may serve as illustrations of the principle established by them. If land be described as running "to a cove and thence along the margin of the cove," the grant excludes adjoining flats. *Nickerson* v. *Crawford*, 16 Maine, 245. The same effect follows when the call is "on the west bank of the creek." *Bradford* v. *Cressey*, 45 Maine, 9. Also where the words are "by the bank of the stream." *Stone* v. *Augusta*, 46 Maine, 127. The principle of these cases is the principle of the present case, adapted to new facts. It matters not whether the grant comes to a boundary from the one side or the other of it, and then running along the line. There is no reason for deviation in either case.

Whilst the present case may not strictly fall within either of the above classifications, being novel in its facts, the deduction derivable from such cases tends strongly in support of the defendant's contention.

According to the terms of the report the action will stand for trial only on the first and second counts of the declaration.

Action to stand for trial.

WALTON, EMERY, HASKELL and WHITEHOUSE, JJ., concurred.

LIBBEY, J., having been of counsel, did not sit.

STATE *vs.* NOAH CLAIR.

Kennebec. Opinion February 4, 1892.

Manslaughter. Instructions. Exceptions. Practice.

On the trial of an indictment alleging an assault with intent to kill and murder, it is correct to instruct the jury that the respondent would be guilty of an attempt to commit manslaughter, if he assaulted the complainant in the heat of passion upon sudden provocation, with intent to kill him.

Definitions of law given by a judge in the trial of a criminal cause, which, although not altogether apposite to the question pending, are not unfavorable to the accused, cannot be the ground for exceptions by him.

ON EXCEPTIONS.

The defendant having been found guilty by the jury of the Superior Court for Kennebec County, of an assault with the intent to kill William P. Roundy, filed exceptions to some of the instructions of the presiding justice. They are stated in the opinion.

C. E. Littlefield, Attorney General, and *L. T. Carleton*, County Attorney, for the State.

S. S. Brown, for defendant.

PETERS, C. J. The respondent was found guilty of an assault with intent to kill, on an indictment which alleges that he assaulted one Roundy, "with intent, him the said Roundy, wilfully, feloniously and of his malice aforethought, to kill and murder."

The facts are not reported and the respective counsel do not quite agree in their recollection of them. The counsel for the respondent represents that the act complained of was the pushing of the complainant from a boat into a river, while opposite counsel affirms that it was more the act of beating him after he got him into the river. There is not, however, that we can perceive, any materiality in this difference as far as the law questions are concerned.

Several propositions of law were given by the judge in his charge to the jury, which as a whole are considered by the defense to be objectionable. We quote them in the order as delivered:

"There is, however, another kind of homicide known to the criminal law, and that is the killing of a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought.

"The crime then committed is manslaughter at common law.

"Manslaughter at common law is the killing of a person on sudden provocation, in heat of blood, without any intention to kill him.

"An assault with intent to murder, and to kill and murder means an assault with intent to murder either in the first or second degree.

"But there may be a killing under provocation and in the heat of passion, or an attempt to kill under provocation or in the heat of passion without express or implied malice, as in case of voluntary manslaughter when the intention is formed without time for deliberation.

"Now our statutes have made a distinction between that class of assaults which are denominated assaults with intent to kill and murder, and a class which are denominated assaults with intent to kill.

"But where in the heat of blood an assault is made, the result of sudden provocation, the act so closely follows the intent as to preclude the presumption of design or deliberation, and it may also exclude the presumption of malice; and yet it may be an assault with intent to kill.

"If you shall find that he is guilty of an assault with intent to kill, or rather if you shall find that in the heat of passion, under sudden provocation, he intended to kill Roundy, then your verdict would be guilty of assault with intent to kill."

It is contended that it was injurious to the rights of the accused for the judge to say that manslaughter at common law might be committed without any intention to kill. Of course, there may be such a thing, as in cases of death caused by negligence. But in the present case the issue necessarily was whether the accused intended an injury or not. Either intentionally or unintentionally he did an injury to the complainant. The point made by the defense is, that the jury, after receiving information that manslaughter might be committed without an intention to kill, may have found the accused guilty of an attempt to commit manslaughter, although he entertained no intention to kill. It would certainly be a contradiction of terms to accuse a person of an assault with intent to commit involuntary manslaughter.

But the charge, as a whole, shows that the judge could not have so intended, and that the accused could not have been prejudiced as his counsel contends. If the charge be criticiz-

able at all, it would be that the judge dealt too lengthily in explanation of principles of the law of homicide that had no immediate connection with the issue. Definitions sometimes confuse the minds of jurors. Lord Hale said of the duties of judges, that, "a jury should be told where the main question or knot of the business lies." If that limit was exceeded in this case the accused at all events was not prejudiced thereby.

The instruction which dominated the case was evidently the one informing the jury that if they should find that in the heat of passion, under sudden provocation, the accused intended to kill Roundy, then the verdict should be guilty of an assault with intent to kill. This direction was given at the close of the charge, is direct and positive, and requires proof of an intention to kill, to establish the offense of manslaughter. This is rendered even clearer by the next following sentence: "If you should conclude that he is not guilty of either of these offenses, either with intent to kill and murder or intent to kill, then you may find him guilty of an assault and battery." It appears that an assault and battery was admitted by respondent's counsel.

Other objections to the charge are discussed by counsel, but, as before intimated, we do not perceive wherein the respondent suffered from any of the alleged erroneous interpretations.

Exceptions overruled.

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

J. C. FRYE *vs.* JOHN H. PARKER.

Waldo. Opinion February 4, 1892.

Limitations. Promissory Notes. R. S., of 1871, c. 81, § 99; Stat. 1885, c. 376. Pub. Stat. Mass. 1880, c. 197.

Notes of hand not witnessed, in which the defendant is payor and the plaintiff payee, that have run before suit brought upon them for more than six years since they became due, are not barred by the statute of limitations, the parties never having lived in this State nor in the same State, territory or country for any time since the notes were given.

ON EXCEPTIONS.

This was an action of assumpsit on two promissory notes dated Boston, April 17, 1883, given by the defendant to the plaintiff, who were then and ever since have been non-residents of this State. The plaintiff resides in Massachusetts and the defendant in Missouri. Defendant's property was attached in Waldo county, and personal service of the writ was made on him. The case was tried before the presiding justice with the right to except. The only defense made was the statute of limitations. The presiding justice gave judgment for the plaintiff, and the defendant excepted.

W. P. Thompson, for plaintiff.

Jurisdiction: *Allen* v. *Caspari*, 80 Maine, 236.

Limitations: R. S., c. 81, § 103; *Sweet* v. *Brackley*, 53 Maine, 346; *Thompson* v. *Reed*, 75 *Id.* 406; *McCann* v. *Randall*, 147 Mass. 83; *Chemung Canal Bank* v. *Lowery*, 93 U. S. 72.

J. H. and C. O. Montgomery, for defendant.

Limitations: *McKenzie* v. *Wardwell*, 61 Maine, 136; *Trafton* v. *Hill*, 80 *Id.* 503; *Drew* v. *Drew*, 37 *Id.* 389.

Thompson v. *Reed*, 75 Maine, 404, leaves us to infer plaintiff was a resident of this State from 1875, to commencement of the action. *Hapgood* v. *Watson*, 65 Maine, 510, shows plaintiff a resident of this State when action was commenced and defendant a resident when note was made. *Hacker* v. *Everett*, 57 Maine, 548, shows plaintiff a resident of Maine, and defendant a resident of New Brunswick. In *Brown* v. *Nourse*, 55 Maine, 230, we are left to infer that defendant was resident of the State at making of note and moved out of the State afterwards. *Keyes* v. *Winter*, 54 Maine, 399, defendant was absent from State from date of note to 1865. *Peyret* v. *Coffee*, 48 Maine, 319, defendant left the State a few days after note was given and did not return until within two days before action commenced.

Byrne v. *Crowninshield*, 17 Mass. 55, defendant pleaded the statute of limitations of New York in Massachusetts court. *Wilson* v. *Appleton*, 17 Mass. 179, plaintiff was a foreigner. *Bulger* v. *Roche*, 11 Pick. 35, plaintiff and defendant were

foreigners. *Putnam* v. *Dike*, 13 Gray, 535, is a meager case but leaves us to infer the plaintiff became an inhabitant of the State at some time probably before the six years had expired.

The legislature intended that non-resident creditors shall not be entitled to the saving clause of the statute, as an exception is made in favor of creditors without the limits of the United States when the cause of action accrues. R. S., ch. 81, § 88. Allowing the inference, that if creditors reside in a state other than where the action is brought, the statute will apply. *Whitney* v. *Goddard*, 20 Pick. 304. Applying this inference, the saving clause would not re-instate the rights of a non-resident creditor who always has been such and so declares himself. For the constitution of the United States not only entitles the citizens of each state to all the privileges, but also to all the immunities of citizens in the several states. Therefore, when the creditor invokes the saving clause of the statute that the debtor has not lived in the state when the action is brought, the necessary six years, the debtor may reply, the creditor has not been there to receive his pay. The general policy of the law requires the debtor to seek the creditor to pay his debt. It should not oblige him to live six years in every State in the Union before acquiring the right to the statute of limitation against a non-resident creditor.

Under these circumstances, the plaintiff cannot take advantage of the saving clauses of the statute, that of the absence of the defendant from this State at the time the action on the notes accrued, or was absent from the State after it accrued. That law was passed for citizens of this State, not for strangers. Not for absent creditors.

Counsel also cited: *Beardsley* v. *Southmayd*, 3 N. J. L. (Green,) 171, approved in *Bank* v. *Lowery*, 93 U. S. 72; *Associates Jersey Co.* v. *Davison*, 5 Dutch. 424.

PETERS, C. J. The question of the case is whether notes of hand, dated in Boston, Massachusetts, in 1883, not witnessed, on a few months time, running from defendant to plaintiff, neither party now or ever residing in this State, the defendant being personally in this State in June, 1890, when the writ in this case was

served on him, — are barred by the statute of limitations or not. It may be added, as a part of the statement of facts, that since 1844, the parties have resided in different states, one in Massachusetts and the other in Missouri.

The question has been settled in the negative in the case, essentially like this, of *Thompson* v. *Reed*, 75 Maine, 404. The statute as it stood when that case was decided read thus: "If a person is out of the State when a cause of action accrues against him, the action may be commenced within the time limited therefor after he comes into the State." R. S., 1871, c. 81, § 99. These words have a clear meaning.

Then a further question arises whether the amendment of our limitations act passed in 1885, alters this construction. We think not. The amendment reads thus: "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." Stat. 1885, c. 376. This language is too plain to be misunderstood. The parties must reside in the same state at the same time. These parties have not so resided either in Maine, Massachusetts, Missouri or elsewhere.

The statute of Massachusetts, passed in 1880, (Pub. Stat. Mass. 1880, c. 197) differs from ours, but does not influence the question here. Counsel for defendant cites cases in support of his position, but they are not authorities in this State, and are contrary to our laws and decisions on the subject.

Exceptions overruled.

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

KATHERINE C. LYON, and others, *vs.* M. CAREY LEA.

Hancock. Opinion February 4, 1892.

Way. Deed. Easement. Estoppel.

The grantor in a deed conveyed certain premises to the grantee, reserving to himself for the benefit of his other land a right of way in a carriage road across the land conveyed, or, in the event of the carriage road being changed in route by the grantee, then in such substituted road, and also reserving a similar right in another road across such premises or in any new road substituted therefor. *Held;* that the grantee could substitute one

new road for the two former roads if the one be as convenient and beneficial for all the purposes of the grantor as the two would be.

ON REPORT.

This was an action on the case for disturbance of plaintiffs' rights of way which had been reserved to them in the defendant's land near Duck Brook, at Bar Harbor. The language of the reservation, providing for two distinct roads and substitutes therefor, is in a deed from plaintiffs' testator to the defendant, and is quoted in full in the opinion.

In 1884, Samuel E. Lyon, plaintiffs' testator, since deceased, being the owner of certain lands lying at Bar Harbor, and on the south westerly side of Eden Street near Duck Brook, rising abruptly from the street line, which land he had divided into lots numbered respectively one, two, three, and four, sold and conveyed to the defendant lots one and two.

Lots three and four bordered on Eden street, a public way, but the road which Lyon had been accustomed to use in reaching the reserved lots passed over the lots conveyed.

Until a short time before the conveyance to the defendant, Lyon had used an old road which passed from Eden street to his lots on the hill nearly parallel with, and near to Duck Brook. But the town had lately so lowered the grade of Eden street as to render the entrance to this old road impracticable, and to avoid this, Lyon had constructed what he called his "carriage road" starting from Eden street a little further from Duck Brook and terminating in the "old road" about half way up the hill.

At the time of the conveyance to the defendant, Lyon was accustomed to reach his lots number three and four by travelling up his carriage road to its junction with the old road and thence by the old road to his other lots. The portion of the old road below the junction was substantially if not entirely abandoned.

Since purchasing, Lea, the defendant, with the knowledge and acquiescence of Lyon and his heirs, built an expensive house upon his lot in such a position as to obstruct the so-called "carriage road," and claimed that Lyon not only acquiesced in the building of the house but actively assisted in laying it out.

The part of the old road below the junction was also obstructed (also with Lyon's knowledge and consent as contended by the defendant), and as a substitute for these narrow, steep and inconvenient ways, a broad, new road was built by the defendant.

What is now called Eden street is the county road leading northwesterly from Bar Harbor to Ellsworth and passes through a large tract of land of Lyon extending from the shore of the bay back a mile or more. Duck Brook flows northeasterly into the bay and is nearly parallel with the northwesterly side lines of lots one, and two. The land rises abruptly on the southwest side of Eden street, being both rough and hilly. Other physical conditions of the locus are stated in the opinion.

Hale and Hamlin, for plaintiffs.

Lyon gave Lea the right to change the two roads but reserved full rights in the substituted roads. Defendant has no right to obstruct either without furnishing a sufficient substitute.

Estoppel: *Steel* v. *Smelting Co.* 16 Otto, 447; *Brant* v. *Va. C. & I. Co.* 93 U. S. 327; *Crest* v. *Jack*, 3 Watts, 240 (27 Am. Dec. 354); *Henshaw* v. *Bissell*, 18 Wall. 255; *Knouff* v. *Thompson*, 16 Pa. St. 364; *Parker* v. *Barker*, 2 Met. 423; *Ferris* v. *Coover*, 10 Cal. 509; *Goodson* v. *Beacham*, 24 Geo. 150; *Hepburn* v. *McDowell*, 17 S. & R. 383.

Abandonment: *Dyer* v. *Sanford*, 9 Met. 395, 402; *Stokoe* v. *Singers*, 8 E. & B. 31; *Ward* v. *Ward*, 7 Exch. 838; *Lovell* v. *Smith*, 3 C. B. (N. S.) 120; *Jamaica, &c. Corp.* v. *Chandler*, 121 Mass. 3; *Hale* v. *Oldroyd*, 14 M. & W. 789; *Hayford* v. *Spokesfield*, 100 Mass. 491.

Deasy and Higgins, for defendant.

Estoppel and executed license: *Ballard* v. *Butler*, 30 Maine, 94; 3 Kent's Com. 448; *Pope* v. *Devereux*, 5 Gray, 409; *Smith* v. *Barnes*, 101 Mass. 278; *Larned* v. *Larned*, 11 Met. 421; *Gage* v. *Pitts*, 8 Allen, 527; *Curtis* v. *Noonan*, 10 Allen, 406; *Dyer* v. *Sanford*, 9 Met. 395; *Morse* v. *Copeland*, 2 Gray, 304. Counsel also cited: *Welland Canal Co.* v. *Hathaway*, 8 Wend. 480; *Taylor* v. *Hampton*, 4 McCord, 96; *East Ind. Co.* v. *Vincent*, 2 Atk. 83; *Veghte* v. *Water Company*,

19 N. J. Eq. 153; *Crain* v. *Fox*, 16 Barb. 184; *Winter* v. *Brockwell*, 8 East, 308; *Pope* v. *O'Hara*, 48 N. Y. 446; *Marble* v. *Whitney*, 28 N. Y. 297; *Ringe* v. *Baker*, 57 N. Y. 209; *Brooks* v. *Curtis*, 4 Lans. 283; Bigelow on Estoppel, p. 513; Angel on Water Courses, 296–308, 318–322.

PETERS, C. J. A grantor (represented by these plaintiffs as his executors and trustees) conveyed a parcel of land to the grantee (the defendant) with this reservation in the deed: "Also saving and reserving to the said Lyon, his heirs and assigns, a full and free right of way over the carriage road lately made by him [said Lyon] over the parcel herein intended to be conveyed, to lots numbered three and four on said plan, or, in the event of said carriage road being changed in route by the said M. Carey Lea, his heirs or assigns, over such new or substituted road, and also reserving to the said Lyon, his heirs and assigns, a right of way over the old road through said premises herein intended to be conveyed, near said Duck Brook, to said lots numbered three and four on said plan, or over any new or substituted road for said old road in the event of the route of said road being changed by the said M. Carey Lea, his heirs or assigns."

The case presents a question of law and also one of fact. The question of law is whether the grantee could substitute one new road for the two former roads, if the one be equally as convenient and beneficial for the purposes of the grantor as the two would be. The plaintiffs have sued the defendant for blocking up one of the roads named in the reservation and thereby rendering it impassable. The question of fact is whether or not the defendant has furnished such a substituted road. We think both questions must be decided in favor of the defendant.

It is clear that the parties to the deed were not contemplating by the reservation anything more than an outlet for travel from the grantor's remaining lands across the parcel sold to the grantee. The grantor cared nothing for the roads excepting as his convenience might be subserved thereby. And the reser-

vation was intended to be descriptive of the nature and amount of the benefit to be enjoyed. Therefore, the grantee was at liberty to establish new ways for the old, or, in other words, to establish other means by which the same kind and extent of convenience would be ensured as existed before. It was not the number of roads so much as the amount of road that was to be reserved. The grantee could substitute a new road for either of the old ones, and why not one for both of them, if one be capable of bearing the burden and dispensing the benefits of both? The grantee is not limited to any locality for the new routes. He may locate them as he pleases for his own convenience. The implication derived from the wording of the reservation is that the grantee's wants might require a change or changes. Of course, any change or substitution must be just and reasonable according to the circumstances. Each party has his rights. No one would deny that the two substituted roads could be laid out near each other, or exactly aside each other, and we do not see why the two may not be converted into one. A double road would fill the place of two single roads. Easements are of flexible adaptation. One may be laid out under, over or across another. Circumstances must govern the right and expediency of such location.

The principle thus elucidated fairly applies to the present case. It seems that the "old road," so-called, was the first one constructed, a rough, hilly and incompleted way, denominated by the witnesses a "cart-track," and rarely used after the second road was built. Finally it became impracticable to enter upon it at its termination upon Eden street on account of a change in the grade and construction of Eden street, at that point, caused by the town authorities.

The old road not suiting the proprietor (grantor), he constructed another way upon another route through his premises, called "the carriage road" in contradistinction from the "cart road" spoken of. It does not appear that he desired or needed two roads for his purposes, but a better road was desirable. He had no buildings upon the land and has none now, more than a small summer-house on an elevated point of the territory,

not intended for or used as a habitation. We infer that it was not a design of his to require two reservations, but he retained the right to use the two ways if they were kept open, or should there be no reasonable road substituted for them. He wanted the use of the two roads or an equivalent privilege.

It is hardly to be supposed that the grantor would be willing to maintain and keep in repair two roads across the grantee's land, and we do not see that the burden is cast upon the grantee to keep such roads or any road in repair for him. As it now is, however, the new substituted road, to be spoken of, will necessarily be kept in repair by the grantee as it leads to and past his own expensive structures upon the purchased property. And this is an element of consideration in an endeavor to ascertain the intention of the parties as to the reservations in the deed.

The conduct and declarations of the grantor during the progress of the work done by the grantee in constructing the new substitute-road, and in erecting costly buildings partly upon the carriage road the shutting up of which is the act in this action complained of, are strong facts indicating that the grantor construed his own rights as we now do, and that the changes now complained of were then unobjectionable to him. The defendant gave five thousand dollars for his ten acres of land outside of the village of Bar Harbor, and improved the same with structures and roads at a cost of forty thousand dollars more. His grantor saw him obstruct the carriage way in a manner that cannot be easily undone, and seemed indifferent to it. He saw the new road as it was being built and expressed no dissatisfaction with it. On the contrary, he told a workman of the defendant that he need not expend anything on the old road as he should use the new. His silence affirmed his approval of the acts done. The plaintiffs in their testimony do not express much, if any, dissatisfaction with a single road, objecting only to its location.

The defendant has constructed what is his new way — the substitute-way — commencing near the location of the carriage way at Eden street, thence running to and along the old road,

pursuing substantially the location of the old road until reaching the junction of the two former roads, and then extending to the plaintiffs' territory. The old road and carriage road united before leaving defendant's land; the location from that point onward remaining now as before. We are satisfied from the evidence that this new way, substituted for the two formerly existing ways, affords more convenience and is susceptible of a better practical use than the two others together. The objections urged against it seem to us to be imaginary and not substantial.

It is called to our attention that the new way does not preserve the terminus of either of the old ways at Eden street. But it is within a few rods of either and in a more practicable and desirable place. The object is merely to reach Eden street. If plaintiffs' land extended to that point there would be more in the objection; but it does not.

It is said that the new road is more circuitous than the carriage road. It had to be so in order to gain a regular grade up to the summit of a high hill that must be ascended; but it is not unnecessarily so. The road was constructed upon scientific principles, was costly, and is one of the best in the locality. It was constructed so as to admit of the carriage of loads which horses could not possibly haul over the old roads.

It is also said that, in that hilly region where the roads must from necessity be narrow in places, it is desirable to have one road up and another down the hill to avoid the meeting of teams. We doubt if two roads were ever built in this State for such a purpose. Even if the plaintiffs saw fit to travel in that way with their teams, the defendant would not be compelled to do so, and collisions would, perhaps, be as likely to occur if there were two roads instead of one. But the evidence shows that the single road is wide enough to make collisions avoidable.

It is also said that in the new road there is quite a length of retaining wall on the side-hill which requires a railing. The defendant does not admit that there is such requirement. While the new road may possibly now or at some later day disclose some minor imperfections, on account of which, unless

amended, the plaintiffs would be entitled to some remedy for their protection, we do not think they have shown the existence of any structural defects or omissions in the road, to entitle them to maintain this action.

Judgment for defendant.

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

TIMOTHY FINN, JUNIOR, *vs.* EDWARD A. FRINK.

Hancock. Opinion February 4, 1892.

84 261
100 326

Malicious Prosecution. Probable Cause. Evidence.

In an action for malicious prosecution based upon a warrant issued against the plaintiff at the instance of the defendant on account of an alleged threatening letter, sent to the former by the latter, in which there is an intimation that the defendant in his professional capacity as a physician had ill-treated the plaintiff, it is not admissible for the defendant to show that the treatment complained of was judicious and correct, no such issue being in any way material or legitimate to the case.

It is not a defense to an action for malicious criminal prosecution that the complaint in the criminal proceeding, for want of proper allegation, did not legally set out any criminal offense although the complainant attempted to accomplish such a purpose, the plaintiff having been regularly arrested and tried upon the warrant issued against him and discharged for the insufficiency of such complaint.

In an action for a malicious prosecution, evidence that the defendant in commencing the prosecution complained of, acted in good faith upon the advice of the trial justice who issued a warrant upon his complaint, is incompetent to prove probable cause or excuse the want of it.

ON EXCEPTIONS.

Action for malicious prosecution in which the jury rendered a verdict for the plaintiff, and the defendant excepted to the rulings and instructions of the court.

The case is stated in the opinion.

Wiswell, King and Peters, for plaintiff.

Evidence: 2 Greenl. Ev. § 449; *Williams* v. *Vanmeter*, 8 Mo. 339 (41 Am. Dec. 644); *Kline* v. *Shuler*, 8 Iredell's Law, 484 (49 Am. Dec. 402); Abbott's Tr. Ev. pp. 652, 653; *Leidig* v. *Rawson*, 1 Ill. 272 (29 Am. Dec. 354); *Mowry* v. *Miller*, 3 Leigh, 561 (24 Am. Dec. 680); *Mills* v. *McCoy*, 4 Cow. 406; *Miller* v. *Brown*, 3 Mo. 127 (23 Am. Dec. 693).

Probable cause: *Humphrey* v. *Case*, 8 Conn. 101 (20 Am. Dec. 95); *Stone* v. *Stevens*, 12 Conn. 219 (30 Am. Dec. 611); *Wheeler* v. *Nesbitt*, 24 How. 544; *White* v. *Carr*, 71 Maine, 555; *Olmstead* v. *Partridge*, 16 Gray, 381; *Brobst* v. *Ruff*, 100 Pa. St. 91 (45 Am. Rep. 358); *Strauss* v. *Young*, 37 Md. 282; *Watt* v. *Corey*, 76 Maine, 87, 90.

W. H. Fogler, *Deasy and Higgins*, for defendant.

Evidence: *Leidig* v. *Rawson*, 1 Ill. 272 (29 Am. Dec. 356); *Stewart* v. *Sonneborn*, 98 U. S. 187; *Hopkins* v. *McGillicuddy*, 69 Maine, 273; *Collins* v. *Hayte*, 50 Ill. 337 (99 Am. Dec. 521); *Dougherty* v. *Matthews*, 35 Miss. 520 (88 Am. Dec. 126); *Tempest* v. *Chambers*, 1 Stark. 55; 2 Stark. Ev. p. 677, 7th Am. Ed.

Probable cause: *Dennis* v. *Ryan*, 65 N. Y. 388; *Leigh* v. *Webb*, 3 Espin. 165; *McNeely* v. *Driskill*, 2 Blackf. (Ind.) 259; *Bennett* v. *Black*, 1 Stew. (Ala.) 494; *Burns* v. *Erben*, 1 Rob. (N. Y. Sup. Ct.) 559; *Farley* v. *Danks*, 4 E. & B. 493; *Milton* v. *Elmore*, 4 Car. & Pay. 456; *Munns* v. *Duport*, 3 Wash. C. C. Rep. 31; 1 Am. Lead. Cases and note 208; *Heyward* v. *Cuthbert*, 4 McCord, 354; 4 Wait's Actions and Defenses, 339; 2 Ad. Torts. § 856; 2 Stark. Ev. 680, note u; *Cohen* v. *Morgan*, 6 Dowl. & Ryl. 8; *Carratt* v. *Morly*, 1 Gale & Dav. 275, 282, 283; *Borger* v *Langenberg*, 97 Mo. 390; *Bartlett* v. *Brown*, 6 R. I. 37 (75 Am. Dec. 675); R. S., c. 132, § 6; 2 Greenl. Ev. § 454; *Johnstone* v. *Sutton*, 1 T. R. 545; *Humphries* v. *Parker*, 52 Maine, 502; *Fitzgibbon* v. *Brown*, 43 *Id.* 169.

PETERS, C. J. It appears from the testimony that in April, 1889, the plaintiff received an injury upon his eyes through a premature explosion of rock in a granite quarry; that he first came under the professional treatment of the defendant, a practicing physician and surgeon; that he afterwards visited an eye and ear infirmary in Portland, receiving treatment there; and that the final result to him was total blindness.

On December 3, 1889, he sent the defendant this communication:—"Dr. Frink, Dear Sir:—I will drop you a few lines to let you know through your co-treatment of my case I have lost

the use of my eyes by not having the rock taken out of them in the first of my blowing up. The rock was not taken out until I got to the hospitayle then my eye all ran out. You had me on the island and ran up a big bill. I heard you charged me $26 for what time I was there and did not help me any. I have a chance to sue you for damages. I have seen a lawyer and so I notify you, if I don't receive an answer soon. I would like an answer as soon as possible. And oblige, Timothy Finn, East Surry, Maine."

On the seventh day of the same month, the defendant procured a warrant against the plaintiff, signed by trial justice P. H. Mills, in pursuance of a complaint, signed and sworn to by the defendant, the charge in which is as follows:—

"Edward A. Frink, of Deer Isle, in the county of Hancock and State of Maine, in behalf of said State, on oath, complains that Timothy Finn, of East Surry, in the county of Hancock, State of Maine, did on the third day of December, A. D., 1889, write over his own signature a certain libelous, slanderous, threatening letter directed to Dr. Frink of Deer Isle, in said county, for the purpose of extorting money from the said complainant, which letter came duly into the hands of the said complainant through the United States mail, as he affirms for the purpose of blackmail, against the peace of the State, and contrary to the form of the statute in such case made and provided."

The case was tried before trial justice S. G. Haskell, who quashed the complaint as defective. Thereupon a new complaint was sworn to before the last named justice, made in stricter form, setting out the letter in full, and alleging an attempt by the letter to extort money as blackmail. On a warrant issued on this complaint the plaintiff was arrested, carried before a third trial justice, tried on a plea of not guilty and discharged.

Soon afterwards the plaintiff brought the present action for malicious prosecution, and in the trial of the action several questions arose, which are presented to us by the defendant's bill of exceptions.

As affecting the question of probable cause the defendant offered to show, but was not permitted to do so, that his treat-

ment of the plaintiff's injury was professionally correct and skillful. This ruling was right. There was no issue calling for such evidence, nor any assertion or presumption that the treatment was not skillful. The introduction of such evidence would have diverted the attention of the jury from the true issue, and, possibly, brought into the trial a protracted and useless collateral controversy. To be sure, the plaintiff's opinion of the treatment is implied by his letter, and the opinion of the defendant is implied by his conduct,—a matter of opinion against opinion merely.

The defendant contended at the trial that there could be no recovery against him on the count in the declaration which alleges a malicious prosecution by means of the first complaint against the plaintiff, because that complaint charges no legal offense. The same objection was urged at the argument in this court against all the counts in the writ. The idea of the defense is that an insufficient complaint is no complaint, an illegal prosecution no prosecution. The first complaint affirms that a libelous letter was sent to the complainant for the purpose of extorting money by blackmail. It undertook to charge a felony. The plaintiff was arrested and tried in the same manner he would have been if a strictly legal proceeding had been instituted. In a technical sense no crime was charged, but one was sufficiently stated to entitle the proceedings to be called a prosecution. It was deemed sufficient by the complainant and the magistrate, and would have seemed to be so perhaps to most men. It was hurtful to the plaintiff in the extreme. It was none the less a prosecution because defended on the law and not on the fact. The defendant is estopped to deny that it was a legal prosecution, excepting so far as its illegality may affect the question of damages. The reason of the thing is so strong we do not feel it necessary to invoke the aid of any authorities on the question.

The counsel for defendant requested the judge presiding to instruct the jury that, "if the defendant, in applying to the trial justices for the warrants against the plaintiff, made to the justices true statements of the facts of the case, this action cannot be maintained." The only fact in the case to be submitted

to the trial justices was the reception of the letter. If no more than that had been done, there would be no cause of action against the defendant. It is not generally actionable to tell the truth. If it were so, witnesses would not be protected for their testimony anywhere. This principle lies at the foundation of many of the cases, cited for the defense, to the effect that a person, who testifies truly before a magistrate, grand jury or court, cannot be held answerable for what others do upon the strength of his testimony.

But the defendant did more than merely to report the letter to the magistrate. He signed and made oath to the complaint. That was his own responsibility. The magistrate could not require him to do so, nor do the act in his behalf. The most the magistrate could do for him would be to advise that a complaint be made. The requested instruction, if taken literally, was properly refused, because the facts confessedly did not support it.

If, however, it was sought, as we have no doubt it was, to obtain a ruling from the court, that counsel and advice, from a trial justice in favor of the institution of a criminal prosecution, given upon a full, fair and truthful statement of the facts by the complainant, would exonerate a complainant from responsibility to the same extent and with the same effect as would follow had the advice been given by a counselor at law under the same circumstances, then, too, the ruling was right. Magistrates are not counselors. It is not a privileged duty of magistrates to advise. We know that trial justices are not learned in the law, nor safe advisers on important legal questions. Of this there can be no better evidence than these very complaints and warrants which are the foundation of this case; and, still, the persons who acted as magistrates in these proceedings are known to the court as intelligent and influential men in the community where they live.

Two things are to be investigated preliminarily to the commencement of a criminal prosecution, the facts and the law. Probable cause depends upon both. A complainant may know the facts, but not the law. He may obtain advice upon the

latter of one learned in the law, and be protected though a mistake be made by the legal adviser. If a complainant sees fit to proceed without advice from such a source, he assumes the responsibility himself. We think it would be injudicious to allow any extension of the doctrine that legal advice under certain conditions may constitute probable cause or excuse the want of it. The tendency is rather in the opposite direction. See *Olmstead* v. *Partridge*, 16 Gray, 381.

Exceptions overruled.

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

ERNESTO PONCE *vs.* AUGUSTINE D. SMITH, and others.

Cumberland. Opinion February 4, 1892.

Contract. Interpretation. Partial Performance. Damages.

An agreement by a caterer with a committee of Masonic Societies to furnish, for fifteen hundred dollars, dinners on a public occasion for two thousand Masons, and also to furnish free of charge dinners to as many musicians as might accompany the Masons on such occasion, is in effect an agreement that the caterer shall receive that sum for all the dinners to be so furnished including those partaken by the musicians.

The caterer failing to furnish as good an entertainment as he agreed to, although acting in good faith, he may recover upon the contract the stipulated price less a sum equal to what it would have cost to supply the deficiency.

If, however, the parties in an action for the price of the dinners assent to the rule (not strictly legal) that the caterer may recover for the value of the food actually consumed on the occasion, it should be the value of the food consumed by both Masons and musicians.

The contract is the guide by which the differences of the parties are to be adjusted.

ON EXCEPTIONS.

This was an action of assumpsit on a written contract to recover of the defendants a sum of money for furnishing a clam bake with the usual accompaniments, for a Masonic excursion, at Long Island, Portland, on the twenty-fourth of June, 1890.

The declaration contained, besides the common counts, including an account annexed of two thousand one hundred and sixty dollars and ninety-seven cents, a special count on the contract. Plea general issue, and brief statement of special matter

of defense, that the plaintiff failed to perform his contract and had forfeited all claim to recover; also that by the terms of the contract the defendants were not liable, &c.

The case was tried to a jury, in the Superior Court for Cumberland County, who returned a verdict of five hundred dollars for the plaintiff. During the trial, in which it appeared that one thousand eight hundred and seventy-eight Masons and three hundred and sixty-eight musicians were at the tables, the plaintiff requested rulings and instructions relating to the construction of the contract, and the measure of damages, which are found fully stated in the opinion, together with the written contract. After verdict the plaintiff alleged exceptions.

John J. Perry and D. A. Meaher, for plaintiff.

Taking defendants' contract price for each meal, seventy-five cents, the verdict should have been one thousand four hundred and eight dollars and fifty cents. Assuming there was a deficiency, plaintiff was entitled to a fair compensation, in fixing the price, having furnished all necessary tables, seats and dishes, besides the food, whether within or outside the contract. There is nothing to show that plaintiff agreed to furnish free dinners to the bands. Defendants sold one thousand eight hundred and seventy-eight tickets and kept the money instead of paying plaintiff a fair and equitable sum for the dinners eaten by them and the bands.

N. and H. B. Cleaves, Stephen C. Perry, for defendants.

All questions as to the fulfillment of this contract, and as to whether there had been a waiver, were properly left to the jury. The verdict shows, that under the instructions given by the court the jury found, there had not been a fulfillment of the contract on the part of the plaintiff. Can a party who has entered into a special contract to do or perform certain things for a stipulated price, and to do other things in connection with such special contract, without compensation, violate his contract and compel the party who is willing to carry it out in good faith, to pay a sum that he would not be required to pay had the contract been fulfilled by the defaulting party? In this case the plaintiff attempts to avoid his contract. He is seeking to avoid

the responsibilities of a written contract which he entered into with these defendants, wherein he agreed, as the party of the second part, "that all members of bands of music present, shall be entitled to their dinners at the expense of the party of the second part and without charge to the party of the first part."

The plaintiff asks the court to apply a rule of law that would punish an innocent party, on account of the plaintiff's unfaithfulness. This the law will not permit.

Damages: Where there has been no intentional departure from the contract, or failure to perform it, but the party has acted in good faith in the endeavor to fulfill it in terms, he may recover in case of failure, what his services are reasonably worth, less the damage caused by such failure. In all such cases proof of an intention, *bona fide*, to perform the contract fully, has been held indispensable to a recovery. *Wade* v. *Haycock*, 25 Penn. State, 382; *Veazie* v. *Bangor*, 51 Maine, 509; *Ladue* v. *Seymour*, 24 Wend. 60; *Hayden* v. *Madison*, 7 Maine, 76; *White* v. *Oliver*, 36 Maine, 92; *Champlin* v. *Butler*, 18 Johns. 169; *Holden Steam Mill* v. *Westervelt*, 67 Maine, 451; *Morgan* v. *Hefler*, 68 *Id.* 131; *Marshall* v. *Jones*, 11 *Id.* 54; *Jewett* v. *Weston*, *Id.* 346; Suth. Damages, pp. 507, 510, 512, 518; *Hayward* v. *Leonard*, 7 Pick. 181; *Snow* v. *Ware*, 13 Met. 42; *Bee Printing Co.* v. *Hichborn*, 4 Allen, 63; *Austin* v. *Austin*, 47 Vt. 311. In a recovery on a *quantum meruit*, there should be an apportionment of so much of the agreed compensation to the contractor as he has earned in what he has done; he should be allowed to recover such part of the entire compensation as is equal to the part he has performed of the entire contract. A contractor, as an inducement to procure a contract, may stipulate to perform certain independent items, connected with or incidental to the contract, without charge. The theory upon which the contractor acts in making such contract may be, that the compensation agreed to be paid for the performance of certain stipulated obligations is sufficient to enable him to perform certain other stipulated service without charge.

PETERS, C. J. The rights of the parties to this suit depend upon the rule of damages that should be applied for plaintiff's

partial failure to perform his part of the following contract executed by them:

"Portland, May 23rd, 1890.

"Memorandum of agreement between A. D. Smith, C. J. Farrington, Israel Hicks, M. A. Dillingham and G. E. Raymond, all of Portland, of the first part, and E. Ponce of the second part, made and entered into this twenty-third day of May, A. D., 1890, witnesseth:

"The party of the second part hereby promise and agree with the party of the first part to provide and furnish a dinner at Long Island at the Masonic celebration on the twenty-fourth day of June, A. D., 1890, for not less than two thousand persons, and the members of such bands of music as may be present in addition, at two o'clock in the afternoon, and furnish all necessary tables, seats, dishes, and waiters to serve the dinner promptly and satisfactorily. The dinner to consist of a clam bake, with the usual accompaniments of lobsters, eggs, sweet and Irish potatoes, brown bread, white bread, pilot bread, baked beans and pork, and coffee, sufficient supply of milk, sugar, butter, pepper and vinegar, salt in the cooking, to be done and the whole dinner to be got up to the satisfaction of the party of the first part. Bananas and a plenty of ice water, to be furnished by the party of the second part.

"And the party of the first part hereby promise and agree with the said party of the second part to pay him therefor the sum of fifteen hundred dollars for two thousand dinners, for all over two thousand the party of the first part agrees to pay for each person seventy-five cents, (.75) except mutually agreed that all members of bands of music present, shall be entitled to their dinners at the expense of the party of the second part and without charge to the party of the first part."

The contract was partially performed by the plaintiff, acting in good faith, but, owing to certain difficulties and disappointments encountered by him, he failed to furnish either in quality or quantity such an entertainment as he promised he would. The defendants partook of the dinner provided but expressed at the time their dissatisfaction with it. The declaration contains

a special count on the agreement and also the common counts.

The learned judge ruled in effect that, if the plaintiff failed to fully perform his contract, he could not recover at all on the special count, but might recover on the common counts for the reasonable value of the food actually furnished and partaken. This was not strictly correct. The plaintiff was entitled to recover, upon the contract, the price that was to be paid for the dinners less the amount of the deficiency. The jury should have allowed the contract price less what it would have required to make the dinners what it was agreed they should be. The deduction would be the difference between agreed value and actual value. If the plaintiff were allowed to recover actual value, he might possibly get under that rule even more than the contract price. The contract is the guide by which the differences of the parties are to be adjusted. The same rule is to be observed as in the warranty of personal property. The plaintiff warranted the entertainment to be what it professed to be. *Smith* v. *Berry*, 18 Maine, 122; *Furlong* v. *Polleys*, 30 Maine, 401; *Tufts* v. *Grewer*, 83 Maine, 407; *Morse* v. *Moore*, 83 Maine, 473.

But the theory of damages upon which the trial was conducted by the court was not objected to by either party, and no exceptions are alleged to the rulings on this point. The plaintiff, however, contended that, upon the rule of damages adopted by the court, he should be allowed for the value of the food furnished to the musicians as well as for that partaken by the Masons, and the following colloquy occurred between the plaintiff 's counsel and the court:

"Mr. Meaher. Would not the plaintiff be entitled to recover also what the band ate?

"The Court. I think not, only for what the Masons ate. He agreed to furnish the dinners free for the band anyway.

"Mr. Meaher. If any of the food was wantonly destroyed would he not be entitled to recover for that?

"The Court. I think he would if it was wantonly destroyed."

We think this was a misinterpretation of the contract by the court. It could not have been intended that the plaintiff would

furnish any dinners for nothing. Although awkwardly expressed, the meaning is plain enough that there should be no additional charge for dinners furnished the musicians. The general consideration of fifteen hundred dollars covered payment for two thousand Masons and all the musicians. Caterers rarely give away dinners on such occasions, and more rarely covenant in written agreements that they will do so. The ruling on this point was excepted to.

We think the theory of the trial as adopted by the court, with the acquiescence of the parties, should have been enforced to its logical consequences, and that if any food consumed on the occasion was to be paid for, then all food so furnished should be. If the case is to be tried upon a wrong rule, then that rule should be observed and not broken. It should not be the rule for a part of the case only. The plaintiff seems to have been fairly entitled to the instruction claimed by him.

We are satisfied that there is enough in the exceptions to authorize us to award a new trial. *Exceptions sustained.*

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

STATE *vs.* LINWOOD E. CRAM, and another, Appellants.

84 271
89 42

Cumberland. Opinion February 4, 1892.

Assault and Battery. Infamous Crime. Jurisdiction. Declaration of Rights, Art. I, § 7. U. S. Const. (Amend.) Art. 13, § I.

A complaint before a municipal court, charging an assault and battery does not necessarily imply that an infamous crime is alleged because such an offense may be punished by imprisonment for a term of years. As the statute also allows the sentence to be no more than a nominal fine the grade of the offense must be determined by the evidence adduced rather than by the fact alleged.

The Legislature is not prevented by any constitutional provision from conferring jurisdiction upon trial justices and police or municipal courts to sentence a person to confinement in jail for a period exceeding thirty days; nor from conferring a greater jurisdiction upon municipal or police courts than upon trial justices.

ON EXCEPTIONS.

The case came before this court on exceptions to the overruling by the presiding justice of the Superior Court of Cum-

berland county, of defendants' motion to dismiss the complaint, charging them with assault and battery; also to the overruling of their demurrer to the complaint. The complaint originated in the municipal court for the city of Portland, and the defendants having been found guilty and sentenced to imprisonment and labor in jail for the term of sixty days, appealed to the Superior Court.

Frank W. Robinson, County Attorney, for the State.

Frank and Larrabee, for defendants.

The offense, viewed in the light of the sentence imposed, is an infamous crime under the reasoning of the court in *Ex parte Wilson*, 114 U. S. pp. 427 *et seq.*, for when committed in execution of the sentence the convicts would be obliged to submit to all the degredation mentioned by the court in that case as constituent elements of an infamous crime.

The sentence imposed shows that the judge of a municipal court adjudged the offense to be one of a "high and aggravated nature," and being such, "trial justices and judges of municipal and police courts" have no jurisdiction to try and punish it. The accused, therefore, have a right to have the facts relating to the case investigated by a grand jury before they can be put to their defense, and the attempt by the legislature to confer, by special act, on one municipal court a right to impose a more severe sentence for the same offense, or to deprive the accused, if the crime is of such a nature as cannot in any other court be tried and punished without the interposition of a grand jury, of the right to have such preliminary examination, is a subversion of the due and impartial administration of justice and is in violation of the spirit and letter of the constitution.

Counsel cited: R. S., c. 132, § 4; Declaration of Rights, Art. I, § 7; Amendments, U. S. Const. Art. 13, § 1.

PETERS, C. J. This complaint alleges, in common form, an assault and battery. Upon trial in the municipal court for the city of Portland, the respondents were found guilty and sentenced to an imprisonment in jail, for sixty days, from which sentence an appeal was taken to the Superior Court. In the

latter court a motion was filed to dismiss the proceedings because an infamous crime is charged by the complaint, the prosecution for which should have been initiated through an indictment by the grand jury. The respondents also demurred to the complaint.

Whilst this may be an irregular way to reach the point aimed at in behalf of the respondents by their counsel, we prefer to consider the question now rather than to postpone it to a later period of the proceedings, thereby saving time and expense for all parties.

The real contention of the defense is that the municipal court cannot sentence an offender to an imprisonment for over thirty days, and that the constitution forbids it. We are unable to assent to the proposition.

It is argued that, inasmuch as the act of assault and battery may be punishable so severely as by imprisonment for five years in the state prison, any complaint for an offense of the kind legally charges an infamous crime.

It is true that the usual test of the magnitude of an offense has been considered to be the nature of the charge preferred, rather than the amount of punishment to be inflicted therefor. The crime and not the punishment renders the offender infamous according to the common law. But the innovation in the practice caused by the legislature in the punishment lately prescribed by it for the offense of assault and assault and battery necessarily creates an exception to the rule. Whilst by our statute an assault may be punished by five years' imprisonment, or by one day's confinement in jail, or by the merest nominal fine, still, the offense is now usually charged in the same terms whatever the punishment may be. And so it has been decided that the degree of the offense in any particular case must depend upon the proof adduced and not upon the facts alleged. The proof may constitute it a felony or only a petty misdemeanor. *State* v. *Jones*, 73 Maine, 280. It cannot, therefore, be anticipated that these respondents would, if sentenced by the Superior Court, be punished by more than a fine without imprisonment. Upon the proof would depend the measure of the punishment.

It has been recently decided in this State that any sentence to imprisonment for a period of one year or more conclusively implies that an infamous crime was intended to be charged, and that the offender could be so punished only upon indictment and conviction and not by conviction upon merely a complaint against him. *Butler* v. *Wentworth*, *ante* p. 25 The implication of that decision is that any sentence to punishment by confinement in jail for any time less than one year would not indicate that an infamous crime had been charged or committed.

But the defense contends that, irrespective of forms of allegation or any inferences deducible therefrom, municipal courts are or should be of the same grade as that of justices of the peace or trial justices, and that they cannot exercise a greater criminal jurisdiction than that exercisable by justices of the peace when our State constitution was adopted; which jurisdiction at that date did not empower justices of the peace to impose sentences of confinement in jail for a longer period than thirty days. In support of this position appeal is made to section seven of the declaration of rights, a part of our State constitution, which provides that "no person shall be held for a capital or infamous crime, unless on a presentment or indictment of a grand jury, except in cases of impeachment, or in such cases of offenses as are usually cognizable by a justice of the peace." The defense contends that, by force of the above exceptive clause, what justices of the peace did in 1820, they and all kindred courts can now do and no more; and that all offenses not then usually cognizable by such justices are to be denominated felonies or infamous crimes.

It will be noticed that the above qualifying clause cannot be read literally and be sensible. The literal construction would be that persons shall not be held for an infamous crime unless upon indictment, excepting such infamous crimes as are usually cognizable by justices of the peace. No such exception is contained in the corresponding declaration in the fifth amendment to the constitution of the United States, of which ours, as far as that goes, is a copy.

But the meaning is evident enough. The principal provision

was not to trench upon or in any way abridge the jurisdiction of justices of the peace as usually exercised by them. There is, however, no assertion or implication that justices of the peace may not possess an enlarged jurisdiction at a future time according to the growing requirements of the administrative law, provided always that they be not allowed to assume jurisdiction to punish infamous crimes or felonies. And an assault punished by a sentence to jail for sixty days or six month is by no means to be regarded as a felony. Can it be reasonably supposed, because the maximum jurisdiction of justices of the peace when our constitution was adopted was in civil cases twenty dollars, and in criminal cases the power to sentence for thirty days, that the legislature is prohibited from ever raising that jurisdiction to the extent of a dollar or a day? If it be so, there has been a multiplicity of infringements upon such constitutional inhibition. The clause in question was intended, not to restrict the jurisdiction of justices of the peace, but to prevent what might otherwise be a supposable restriction. And the words "usually cognizable" meant such as at any time might be usually so cognizable. It was a provision for the future. It is the language of the past speaking in the present. Construed to-day, it means "as are [now] usually cognizable by justices of the peace."

The counsel for respondents queries whether it is not unconstitutional legislation to endow municipal courts with criminal jurisdiction exceeding that allowed to justices of the peace. We think that question is settled in the negative by the principle established in the case of *Missouri* v. *Lewis*, 101 U. S. 22. A discrimination of the kind objected to may be found in different forms of legislation. There are two classes of justices of the peace, one being of the peace and quorum. Thirty years ago a grade was established between justices of the peace with ordinary powers and trial justices. We can see no constitutional or other objection against establishing grades between inferior courts so long as excessive jurisdiction is conferred upon none of them. See *In re Claasen*, 140 U. S. 200.

Exceptions overruled.

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

JOSEPH S. BRADSTREET, and another, *vs.* HENRY INGALLS.

Lincoln. Opinion February 4, 1892.

Attachment. Shipping.

A vessel at sea cannot be constructively attached, under the laws of Maine, by an officer upon the land.

An officer made return on a writ that he had attached, so far as he had power so to do, a vessel then at sea, and sought to make the attachment effective as of the date of the return by actual seizure of the vessel afterwards on her arrival in port. *Held;* that no attachment had been created by the return.

ON REPORT.

This was an action of debt brought seasonably against the defendant upon the following agreement and signed by him:

"Whereas Joseph S. Bradstreet and Frederic T. Bradstreet, of Gardiner in the county of Kennebec, doing business under the firm name of J. S. and F. T. Bradstreet, sued out a writ of attachment in their names against Isaac T. Hobson of Wiscasset in the county of Lincoln, dated May 31st, A. D., 1888, and returnable to the Supreme Judicial Court then next to be holden at said Wiscasset on the fourth Tuesday of October, A. D., 1888, on which writ it is alleged by the plaintiffs therein that an attachment was made on the first day of June, A. D., 1888, of the steamer Lincoln, of said Wiscassett, which alleged attachment and the validity thereof, the defendant in said writ denies and claims that said alleged attachment was and is void and of no effect, which said writ was served on said defendant on the 4th day of October, A. D., 1888, and the action thereon is now pending in said court, and whereas John E. Kelley, the officer who made said service, on the 4th day of May, A. D., 1889, put keepers on board of said steamer and now holds possession of the same.

"Now, therefore, I, Henry Ingalls, of said Wiscasset, not admitting but denying that there was at any time any attachment of said steamer on said writ, and alleging that said steamer is unlawfully held by said Kelley, in consideration that said Kelley will release said steamer from his custody, hereby agree that if said alleged attachment shall be held and decided by said

court as a court of law to be valid and binding, I will pay the said plaintiffs the debt and costs which may be recovered in said suit, provided an action to test the validity of said alleged attachment shall be commenced within eighteen months from this date.

"Dated at Wiscasset aforesaid, this 11th day of May, A. D., 1889. Henry Ingalls."

R. K. Sewall, for plaintiffs.

Property in ships exists in and passes by muniments of title, and the attachment in question covered the muniments of Hobson's title in the steamer Lincoln, and was a lien thereon in the nature of a marine hypothecation, in hands of the officer for the creditor's benefit, though at sea. There is no reason in law or justice why this court should not hold the attachment valid, and the possession in which it eventuated, legal. Such consideration of the law and its application in the premises, is matter of sound equitable judicial discretion, consistent with public policy, in aid of good conscience and fair dealing, and a safeguard to business integrity, against collusive attempts to defeat creditor's just rights.

Counsel cited: R. S., c. 81, § 26; 3 Kent's Com. p. 186; Pars. Mar. Law. p. 328; *Sch. Ann.* 4 Mason, 661; *Brig Fair American*, *Id.* 183; *Bicknell* v. *Trickey*, 34 Maine, 273.

George B. Sawyer, for defendant.

PETERS, C. J. The plaintiffs sued Isaac T. Hobson, and undertook to attach on the writ a steamboat, standing of record at the custom house in Hobson's name, by having the officer return a copy of his doings on the writ into the clerk's office of the town where Hobson resided; although the steamboat was not actually seized by the officer at the time of the pretended attachment nor until after the term of court had adjourned to which the writ was returnable. The boat was afterwards seized by the officer when it came within his jurisdiction, and released upon the agreement, given by the defendant in this action to the plaintiffs, to the effect that he would pay the plaintiffs' claim if their attachment should be held by this court to be valid.

The sheriff's amended return is as follows: "Lincoln, ss. On the first day of June, A. D., 1888, by virtue of this writ, I have this day, at six o'clock in the afternoon, attached the steamer Lincoln of Wiscasset, as the property of the within named defendant, valued at five thousand dollars, now at sea, so far as I have the power to make such attachment, the said steamer being at sea and so far as is known to me is not in the town of Wiscasset, or within my precinct or jurisdiction, its present location being unknown to me, and on the second day of June, A. D., 1888, within five days after said attachment as aforesaid, I filed in the office of the clerk of the town of Wiscasset an attested copy of so much of my return on this writ as relates to said attachment of said steamer, with the value of the defendant's proporty which I am by said writ commanded to attach, the names of the parties, the date of the writ and the court to which it is returnable. John E. Kelley, sheriff."

An interesting argument has been submitted by plaintiffs' counsel in support of the validity of the attachment, founded upon maritime rather than common law theories, but impressing us as being in contradiction of our statutory system on the subject of attachments, and contrary to a long settled and well approved practice. The innovation would be too great to admit the legality of such an attachment. To make an effective attachment of a vessel, or of any personal property, an officer must make an actual seizure. *Nichols* v. *Patten*, 18 Maine, 231. He cannot attach a vessel absent and afloat upon the sea while he is upon the land. The facts fail to support the action.

Plaintiffs nonsuit.

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

GEORGE W. GOODWIN *vs.* CITY of GARDINER.

Kennebec. Opinion February 4, 1892.

Town. Way. Defect. Notice. R. S., c. 18, § 80.

84 278
99 240
99 241

A notice given to a town, by a person claiming to have received an injury occasioned by a defective way in such town, that he received "severe bodily injuries" is not sufficient to sustain an action.

The statute requires the nature of the injuries to be stated.

ON EXCEPTIONS.

This was an action on the case to recover damages sustained by the plaintiff from alleged defects in the highway.

The case was tried in the Superior Court for Kennebec county. The presiding justice ruled that the plaintiff's statute notice of his injuries was insufficient and ordered a nonsuit. The plaintiff excepted to this ruling.

Farr and Lynch, for plaintiff.

A. L. Perry, and *Baker, Baker and Cornish*, for defendants.

PETERS, C. J. The plaintiff, claiming that he had received a personal injury caused by a defective highway in the city of Gardiner, seasonably sent to the city this notice:

"To the City Clerk of Gardiner: I, George W. Goodwin, of Randolph, Maine, in the county of Kennebec, on the first day of January, 1890, met with serious injuries in the city of Gardiner, on a street leading from Water street to Steamboat wharf, at a point where the railroad passes over said street, by the street having been graded up so that said street was not safe and convenient for public travel. I was caught between a load of pressed hay, and the railroad bridge at said point, and received severe bodily injuries for which I claim damages of the city of Gardiner. George W. Goodwin."

This was objected to by the defendants as insufficient, and we think the objection must be sustained. The statute requires more than a bare statement that a bodily injury was received. The nature of the injury must be stated. This notice describes with particularity the place and manner of the accident, but makes no mention of the kind of bodily injury sustained. It would have been more natural for the plaintiff, if really injured severely, to state how and to what extent the injury affected him, whether upon the head or back, upon his arms or legs, and whether general or particular. The assertion is that he met with injuries, and not one of them is named. No kind of injury is either included or excluded by the notice.

One object of the statute requiring notice within fourteen days after an injury is alleged to have been received, is that the

injured person shall thus early commit himself to a statement of his condition when he would be more likely to describe it frankly and fairly than at a later period. There is great temptation to magnify and exaggerate such personal injuries, and the town is entitled to as particular a notice as can reasonably be given. This case is virtually determined by that of *Low* v. *Windham*, 75 Maine, 113, where a very similar notice was held to be defective. There the notice was "of injuries I received in going through the bridge at Great Falls." The court regarded the implication to be that a bodily injury was received, but rejected the notice as insufficient because the nature of the bodily injuries was not stated.

The case of *Blackington* v. *Rockland*, 66 Maine, 332, does not conflict with these views. That was a close case, and the rule then estabished should not be extended beyond the point decided. In that case a statement that "my [plaintiff's] horse was injured" at a certain time and place in Rockland, was held to be a sufficient description of the nature of that plaintiff's injury. But the very reasons given for sustaining the sufficiency of that notice illustrate the deficiency of the present notice. A man can usually tell his own personal sufferings more exactly than he can describe those of a horse. A man can exaggerate, conceal or deceive; a horse cannot. A man may be able to practice an imposition as to his own personal injury, but would find it difficult to do so in respect to an injury to his horse. *Exceptions overruled.*

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

HANNIBAL G. BROWN, and another, *vs.* J. WAYLAND KIMBALL.

Oxford. Opinion February 4, 1892.

Deceit. Evidence. Stat. Frauds. R. S., c. 111, § 3.

In an action of deceit against a person for verbal misrepresentations of the financial standing of another, made in order to obtain a credit for such other person, such credit having been thereby obtained, the case is not saved from the operation of the statute of frauds by the fact that the defendant also at the same time misrepresented his own financial standing and made certain personal promises that he has not kept.

On report.

The case appears in the opinion.

J. P. Swasey and J. S. Wright, for plaintiffs.

Counsel cited: *Newton* v. *Huxley*, 13 Gray, 285; *Medbury* v. *Watson*, 6 Met. 247; *Glidden* v. *Child*, 122 Mass. 433.

Charles F. Libby and George A. Wilson, for defendant.

Peters, C. J. The plaintiffs declare against the defendant in an action of deceit, alleging that the defendant represented that a corporation, styled the J. Wayland Kimball Company, had a cash capital of forty thousand dollars paid in; that he was himself worth in property eighty thousand dollars; that the corporation was solvent and able to pay all its indebtedness and was all right; that these representations were false and known by the defendant to be so; that they were made by the defendant to induce the plaintiffs to give credit to the corporation; and that they (the plaintiffs) were induced thereby to give the credit sought for, taking the worthless notes of the corporation instead of money which would otherwise have been paid to them for goods purchased by such corporation. The representations were oral. It is also alleged that the defendant was at the time president and general agent of the corporation.

The defendant contends that the action cannot be maintained because the facts alleged bring the case within that section of the statute of frauds (R. S., c. 111, § 3), which provides that "no action shall be maintained to charge any person by reason of any representation or assurance, concerning the character, conduct, credit, ability, trade or dealings of another, unless made in writing, and signed by the party to be charged thereby or some person by him legally authorized." The defendant duly pleaded the statute in defense.

This section of the statute of frauds applies to cases where the representations are made for the purpose of obtaining a credit for the person in relation to whom the words are spoken. *Hunter* v. *Randall*, 62 Maine, 423. It is immaterial that the party making the representations has an additional purpose of obtaining an indirect benefit to himself from the transaction. *Mann* v. *Blanchard*, 2 Allen, 386. Therefore it adds nothing

to the charge that the defendant at the time of the representations was the leading officer of the corporation. In the legal sense he was representing the credit of the corporation for its benefit and not for his own. *McKinney* v. *Whiting*, 8 Allen, 207. And the defendant's objection to the declaration is that it avers that the representation made by the defendant were of another's character and credit and not of his own, and for the benefit of another and not for his own benefit. The case shows that the parties to the action agree to rely upon the declaration in the writ as a correct statement of the facts relied on by the plaintiffs to sustain their suit.

The plaintiffs, however, contend that they have averred that the defendant made false assertions concerning himself and for his own personal benefit, as contained in a clause of the declaration reading as follows: "And the plaintiffs aver that, further relying upon the correctness and truth of said representations, at the request of the defendant, they were induced to expend and did expend large sums of money, to wit, ten thousand dollars, on the purchase of materials and in labor thereon, which materials, to wit, the wooden work for chairs, the defendant then and there promised to receive when finished and pay the plaintiffs therefor."

We fail to find in these averments anything to prevent an application of the statute of frauds. The pleader is evidently, in this portion of the declaration, enumerating certain indirect injuries caused by the defendant's representations of the good credit and character of the corporation. It is also added that the defendant made certain personal promises. But that allegation is rather out of place in an action of tort for deceit. It does not appear how a representation that the defendant was himself worth eighty thousand dollars can have any effect in the case. The credit was not given to him. The assertion that the company had a paid in capital of forty thousand dollars was merely descriptive of the character and strength of the company.

The action, upon any evidence that would be admissible in support of the declaration, cannot be sustained. *Pl'ff's nonsuit.*

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

JEREMIAH KNOWLTON *vs.* CHARLES A. KNOWLTON.

Franklin. Opinion February 4, 1892.

Action. Judgment. Evidence.

In a suit on a judgment alleged to have been recovered before a trial justice, the plaintiff is not entitled to introduce secondary evidence of the contents of the record of such judgment, by showing that the original record is in the possession of a person who resides outside of the state, no other reason appearing for the failure to produce such record.

ON REPORT.

Debt on judgment. The case is stated in the opinion.

Stubbs and Fogg, for plaintiff.

When the transaction to be established is not of recent date, and only one appropriate place of deposit exists for the preservation of such instrument of record, and there is no suggestion that they may be found elsewhere, and the appropriate place of deposit is carefully examined without success, an inference of irrecoverable loss or destruction would thereupon arise. *Simpson* v. *Norton*, 45 Maine, 288.

When a paper or record is by law committed to the custody of a particular officer, proof of search and that it cannot be found in his office or custody, is *prima facie* evidence of loss, sufficient to let in secondary evidence of its contents. *Braintree* v. *Battles*, 6 Vt. 395.

H. L. Whitcomb, for defendant.

PETERS, C. J. In this action the plaintiff declares on a judgment alleged to have been recovered by him against the defendant, in 1867, before Robert Goodenow, Esquire, a trial justice, now deceased. To enable him to introduce secondary evidence of the contents of the alleged record, it became necessary to first prove that the original had been destroyed or lost. Two places would naturally be suggested as necessary to be searched for the missing record. One is the county clerk's office; because the statute requires that all official papers of a trial justice shall be deposited after his death by his executor or administrator in such office. But the record could not be found

there. The next inquiry would be of the executor or administrator of the deceased justice. The case does not inform us whether there is or ever was any administration upon his estate. But the plaintiff was allowed to produce as evidence the following affidavit: "I, Lucy B. Goodenow, of Farmington, Maine, on oath depose and say: That I am a daughter-in-law of the late Robert Goodenow of said Farmington. That I have in my custody none of the papers of said Robert Goodenow.

"That I have heretofore made diligent search for the records kept by him of his proceedings as a trial justice and have been unable to find the same. That if said records were in this State I would be likely to know it. That I have no personal knowledge of their whereabouts, but they are undoubtedly in the hands of some one out of the State. Lucy B. Goodenow."

This affidavit, instead of proving the records lost, proves the contrary, and that "they are in the hands of some one out of the State." There is in this document a very positive intimation that Mrs. Goodenow knows where and in whose hands the papers are. Now the plaintiff is not excused from further search merely because the papers are shown to be out of the State. Due search requires that he produce them or show a reasonable excuse for his failure to do so. Until that be done proof of their contents cannot properly be received. *Whar. Ev.* § 130, and cases in note. Here the deficiency of proof is not supplied, nor is it in any way legally excused.

Judgment for defendant.

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

NEW ENGLAND WIRING AND CONSTRUCTION COMPANY.

vs.

FARMINGTON ELECTRIC LIGHT AND POWER COMPANY.

Franklin. Opinion February 4, 1892.

Real Action. Deeds. Delivery. Evidence. Presumption. R. S., c, 81, § § 60, 61.

The rule, which admits as evidence in real actions office copies of deeds when the party claiming under them is not the immediate grantee therein, applies to mortgages as well as to absolute deeds.

When an office copy of a mortgage is so admitted, which purports to have been executed for a corporation by its agent, due execution and delivery of such morgage are to be presumed until something appears to show the contrary.

ON EXCEPTIONS.

This was a real action in which the jury returned a verdict for the plaintiff. The defendant excepted to rulings, and admission of evidence which are stated in the opinion.

N. and J. A. Morrill, and *F. E. Timberlake*, for plaintiff.

J. C. Holman and S. C. Belcher, for defendant.

PETERS, C. J. The plaintiffs, having sued the defendants and attached their real estate in an action of assumpsit, ascertained that the estate attached was encumbered by a mortgage to S. C. Belcher. As attaching creditors, under the authority of certain provisions of our statute (R. S., c. 81, § § 60, 61), they paid the amount due on the mortgage to the morgagee, and took from him a release of his claim on the land. By the sections of the statute above cited, the release from the mortgagee vested in the plaintiffs the mortgage estate and enables them to maintain this (real) action to recover possession of the property mortgaged.

As one step in the proof of this action the plaintiff produced in evidence an office copy of the mortgage together with the original note secured thereby. The copy, although objected to, was correctly received. The rule admitting copies of deeds in real actions applies with the same force to mortgages as it does to absolute deeds. The plaintiffs' claim is not directly under the mortgage, but under a deed from the mortgagee. A mortgage is a deed. The plaintiffs merely seek possession of the land, and the statute accords to them that right.

It appears from an inspection of the copy presented that the mortgage was executed for and in behalf of the defendants by some of its officers, and the defendants objected to its introduction in evidence without preliminary proof that such officers had authority to execute the instrument for their principals. The answer to this objection is that the instrument, although a

copy merely, proves itself. Due execution and delivery are presumed until something appears to show the contrary. *Whitmore* v. *Learned*, 70 Maine, 276. *Chamberlain* v. *Bradley*, 101 Mass. 188.

Exceptions overruled.

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

ANTHONY A. LAFARIER

vs.

GRAND TRUNK RAILWAY of CANADA.

Oxford. Opinion February 4, 1892.

Railroad. Passenger. Foreign and Interstate Commerce. R. S., c. 51, § 44.

The statute of this State which makes a ticket for a passage on any railroad binding on the railroad company for six years from its date, with the right of the holder of the ticket to stop off at usual stopping places as often as he pleases during that period, cannot apply to a ticket purchased in Canada for a continuous passage on a particular day over the defendant's road from that Province through portions of the states of Vermont and New Hampshire into Maine. Such an application of the statute would work an interference with both foreign and inter-state commerce in the carriage of passengers.

ON EXCEPTIONS.

This was an action on the case for ejecting the plaintiff from defendants' car at Oxford station in Oxford county, July 8, 1890. The material facts are stated in the opinion. At the conclusion of the plaintiff's evidence, the presiding justice directed the jury to return a verdict for the defendant, being of the opinion that the ticket and check held by the plaintiff gave him no right to ride in the defendants' car at the time he was ejected.

J. S. Wright, for plaintiff.

The ticket, and check, entitled the purchaser and holder, to a ride from Somerset, P. Q., to Portland, Maine, and at the time of the plaintiff's ejectment from the train, at Oxford, it had not been used from that station to Portland, and was therefore good, entitling him to ride the balance of his journey, at any time within six years from the date of purchase of the ticket.

The plaintiff paid full and regular fare for a ride between stations named on the ticket, and the only limitation to which he was subjected was the class of car he had the right to ride in. No restrictions placed upon the ticket, or check, were binding upon the plaintiff, because they are in conflict with the statute law of Maine.

While the law of Canada where the ticket was purchased, in the absence of proof is supposed to be the common law, as determined in *Carpenter* v. *G. T. Railway Co.* 72 Maine, 388, yet when the plaintiff got within the territorial limits of this State, he was entitled to be conveyed upon his ticket or check according to the law of Maine. And while using this ticket within this State all limitations thereon were inoperative, by force of the statute.

A. A. Strout, for defendant.

PETERS, C. J. The plaintiff purchased a ticket for a passage on defendant's road from Somerset in the Dominion of Canada to Portland in this State, the ticket reading thus:

"Issued by Grand Trunk Railway. Good for one second class passage within five days from date. Not good to stop over. Not transferable. From Somerset to Portland. Conductors will collect or exchange this ticket for check 'Z.' L. S. 6. Series B. J. Hickson, General Manager."

While on the route before passing out of Canada the conductor took up the ticket and gave the plaintiff a check, which represented the same contract that the ticket did, a matter well understood by the plaintiff who had been a frequent traveler on the road. The ticket was purchased at a cheaper rate than stop-off tickets were sold. The plaintiff passed on his ticket to Paris in this State where he stopped off for two months. At the end of that time he undertook to resume his passage to Portland when, refusing to pay any fare, he was ejected from the train by the conductor, for which act he sues the road. The case turns wholly upon the question whether our statute which makes railroad tickets good for six years, with the right of the holder to stop off at as many stopping places as he pleases, can constitu-

tionally be made to apply to a ticket sold by the Grand Trunk Railway Company for a continuous passage from a place in Canada to a place in Maine, so that the holder can rightfully stop off on such ticket and afterwards pursue the passage at any time during the period named while within the limits of this State. We think the statute, if to be applied to a case like the present, is amenable to the objection of unconstitutionality as an interference with both interstate and foreign commerce.

We regard the question as virtually determined by the case of *Carpenter* v. *Grand Trunk Railway Company*, 72 Maine, 388, although there is some difference between that case and this. In that, the ticket was purchased for a passage from Portland to Montreal, and the passenger was put off in Canada, whilst in this case the ticket was for a passage from a place in Canada to Portland, and the passenger was put off in this State. The act of the company in that case was decided to be justifiable. It is difficult, however, to appreciate any difference of principle in the two cases. It seems inconsistent that a ticket for a continuous passage should be binding while going one way but not the other; or rather, perhaps, that either contract should be valid while the passenger is riding in Canada and not valid while upon the soil of Maine. Such apparent incongruity is avoidable by construing the statute as applying to contracts for passage to be performed wholly within the State, and not to contracts performable partly within and partly without the State.

The plaintiff places great reliance upon the case of *Dryden* v. *Grand Trunk Railway Co.* 60 Maine, 512, a case much like the present, where the statute in question was held to be valid. But that was many years ago, and the point now presented was not even intimated to the court. No thought was taken of it. Questions of interstate commerce have grown to an immense national importance since the time of that decision.

It is now well settled that the principles of foreign or interstate commerce apply to persons as well as to property,—to passengers as to freight. Also that the power of the nation is paramount to that of the State on such questions. And if congress does not exercise its power upon any subject of commerce,

still the State cannot interfere with it if it be of a national rather than of a local character, or admits of a uniform system of regulation. The powers of congress in such case are exclusive. If congress does not legislate the presumption is that legislation is not deemed necessary. No legislation may be the best legislation. Not only is there a constitutional prohibition against State interference, but there is now a congressional prohibition as well, expressed by the interstate commerce act of 1887, which intrusts to a judicial commission the decision of many questions concerning carriage between states, or states and adjacent foreign countries.

These principles apply closely to the case in hand. The ticket in this instance entitled its bearer to a passage from a place in a foreign country through portions of the states of Vermont and New Hampshire into and across the State of Maine. Each state might have a policy of its own, and Canada another, affecting the contract between the railroad and the passenger, conflicting with one another. It would be even a more awkward result should there be conflicting state policies as to the carriage of freight as well as passengers. To be sure, the State of Maine does not undertake to regulate the contract beyond the limits of the State, but the trouble is that interference within the State in a case like this has the effect of interference without. There should be some uniform rule, established by each railroad for itself or by congress or the interstate commission for all roads. As said before, the absence of federal regulation is the best evidence that the management of such interstate carriage should be left free. The omission of regulation is of itself a regulation. It is enough that the subject matter is susceptible of management through some uniform plan or system. See 2 Red. Rail. (6th ed.) pp. 505, 513, notes and cases.

Nor can such an application of the statute, as the plaintiff insists upon, be justified upon the ground that it is an exercise of a portion of the police power of the State. A right conferred or protected by the federal constitution cannot be over-

thrown or impaired by any authority derived from the police power. 1 Dill. Mun. Cor. (3d ed.) § 142, and citations. Congress can best exercise its own police power on national subjects. In the matter under present discussion, the three states interested might exercise such power differently and undertake to enforce their contradictory policies with penalties, thus placing the road in an uncomfortable predicament. Whatever different views may be entertained as to the power of congress to supersede the action of a state in some particular applications of the principle of police power, no court has gone to such an extreme as to pretend that a state can, in the abused name of police power, intermeddle with the affairs of interstate carriage to the extent that the statute in question would if literally construed. It relates to no matter of life, or health, or morals. But it imposes burdens and affects or alters contracts.

Speaking of the power vested in congress over foreign and interstate commerce, in *Welton* v. *Missouri*, 91 U. S. 275, Mr. Justice Field said, "The power is unlimited." That case declared a state license act void which imposed a tax for vending from place to place goods manufactured in another state. Chief Justice Waite, in speaking on the same subject in *Pensacola Tel. Co.* v. *Western Union Tel. Co.* 96 U. S. 1, says: "The powers thus granted keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse and its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demand of increasing population and wealth." In that case a tax levied upon interstate telegraphic business by virtue of a state enactment was held to be void. In *The State Freight Tax case*, 15 Wall. 232, a statute of Pennsylvania was held void which provided for taxing a railroad corporation upon its receipts from interstate traffic. The case of *Railroad* v. *Husen*, 95 U. S. 465, is to the same effect. So is the case of *Hall* v. *DeCuir*, 95 U. S. 485, upon the strength of which the opinion in the case of *Carpenter* v. *Grand Trunk Railway*, *ante*, largely depended.

There are numerous other decisions by the federal Supreme Court, and also many decisions by state courts, to the effect that state legislation is not allowable which imposes burdens or restraint upon interstate commerce, but they are not better illustrations of the doctrine than the cases cited. The only exceptions are cases which allow of acts of legislation that are designed to obtain from railroads a reasonable and just taxation. The principle of the above cases and of all similar cases is the principle of the present case. Here no taxes were sought for. But a burden is imposed, a meddlesome interference and restraint, which the railroad corporation is not obliged to endure.

Exceptions overruled.

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

DANIEL B. STEVENS *vs.* CHARLES E. KING.

Androscoggin. Opinion February 4, 1892.

Attachment. Lien. Subrogation.

Where a grantee buys real estate, and at the request of the grantor pays the consideration due therefor to certain persons having suits pending against the grantor, with attachments on such real estate to secure lien claims due them on the same, such grantee will be subrogated to the ownership of the claims thus paid, and, with the consent of such persons, he may prosecute such suits in their names for his own benefit, to prevent the priority of later attachments placed upon the property without his knowledge after he paid out his money and before he recorded his deed.

When notice of a deed is insufficient to defeat an attachment.

Cobb v. *Dyer*, 69 Maine, 494, affirmed.

AGREED STATEMENT.

The parties agreed that, if the plaintiff was entitled to recover, the defendant should be defaulted for the amount claimed in the writ; otherwise plaintiff to become nonsuit.

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

Savage and Oakes, for defendant.

No debt legally due plaintiff, nor has he any lien. Damren took assignment of debts subject to all defenses including payment. There must be a rescission of the compromise settlement between the original parties. R. S., c. 82, § 45; *Bisbee* v. *Ham*, 47 Maine, 543; *Potter* v. *Ins. Co.* 63 *Id.* 440.

Defendant has paid seventy per cent of all these claims by his conveyance to Mrs. Damren. If Damren is allowed to prosecute these lien suits and recover judgment for the full amount, he will then have received from defendant the property for which he paid his money and have judgment against defendant for the money so paid and the thirty per cent discount which the original plaintiffs conceded. His wife will have King's property and King will be compelled to pay him one hundred dollars for every seventy dollars of the purchase money which was applied in payment of these claims. The rights of third parties have intervened, who cannot be heard in this suit.

PETERS, C. J. The defendant (King) through a real estate broker (Hunton), bargained to sell to Lavinia E. Damren certain real estate the title to which, subject to incumbrances, stood in his name. The incumbrances consisted of mortgages to a savings bank, and a number of lien claims of persons who had furnished labor and materials for constructing and repairing buildings on the premises. Attachments had been placed upon the property for the enforcement of the lien claims. In order to remove the incumbrances and pay them off out of the proceeds of the expected sale, the defendant, in pursuance of previous arrangement, lodged his deed of the property in the hands of the broker, to be delivered to the purchaser when the incumbrances should be cleared and the consideration paid. Thereupon the husband of the purchaser went with the defendant and the broker to the different lien-claimants and settled their claims for seventy-five cents on the dollar, taking receipts therefor, and also paid the mortgages at the bank. The sum so advanced was just equal to the amount to be paid for the deed, which was then delivered and recorded.

The report of the case thus continues: "While the deed remained in the possession of Hunton, and after said payments had been made, certain general creditors of King (who were not lien creditors) with the knowledge of King, but without the knowledge of either Hunton, Samuel G. Damren, the husband, or Lavinia E. Damren placed their claims in the hands of J. W.

Mitchell, Esq., and caused attachments to be made on the real estate of King. Mitchell at the time he made these attachments knew of the arrangement between King, Damren and Hunton, and that the deed was in Hunton's possession. Neither Samuel G. Damren nor Lavinia E. Damren knew of these attachments until after the delivery of the deed by Hunton to Samuel G. Damren, and only a few hours before the same was placed on record. Upon ascertaining the fact of these general attachments, Samuel G. Damren obtained to himself assignments of the various lien claims, and obtained from the attorneys of these parties the writs which had been made and served to enforce their lien claims, and entered the same in court.

"The above entitled action is one of the suits brought to enforce said lien claims, and it is agreed that the amount therein stated to be due from King to the plaintiff was correct at the date of said writ, and is correct unless the same has been discharged upon the statement of facts above made. The payments made by Samuel G. Damren, under the arrangement with Hunton, were made to the lien creditors personally and not to their attorneys. If upon the foregoing statement of facts, the plaintiff is entitled to recover, the defendant is to be defaulted to the amount claimed in the writ, otherwise plaintiff nonsuit."

We are of opinion that the action may be maintained, for the benefit of the party prosecuting it, upon the principles of the doctrine of subrogation.

Legal subrogation takes effect to its full extent for the benefit of one who being himself a creditor pays the claim of another who has a preference over him by reason of his liens and securities. Bou. Law Dic. *Subrogation.* It applies to a great variety of cases, and is broad enough to include every instance in which one party pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter; not, however, in the interest of mere volunteers and intermeddlers; nor is it allowed so as to do injury to the rights of others. It ignores the form and looks to the substance. It construes payment to be purchase and purchase to be payment, as justice may demand. It substitutes

one person for another or property for property. Sheldon on Subrogation, § 247, lays down as deducible from the cases on the subject the following rule: "And a party who has paid a debt at the request of a debtor, and under circumstances which would operate a fraud upon him if the debtor were afterwards allowed to insist that the security for the debt was discharged by his payment, may also be subrogated to the security, as to that debtor."

The present is a fit case for the application of such rule. The grantee of the deed advanced her money for the purchase of the land. It turns out that the money went, not for payment of the land, but for the discharge of certain claims upon the land. If she does not get a title to the land, she gets the claims. The transaction has the same effect as if she had purchased the claims and attempted to pay for the land by her discharge of the claims, and was prevented from doing so. It was an uncompleted transaction. She intended to do one thing and accomplished another. By this subrogation no one is injured, and Mrs. Damren is throughout the attempted sale and settlement the only sufferer.

No question arises between Mrs. Damren and the lien-claimants. They assent to her prosecution of the claims in their names.

We do not think any knowledge that Mr. Mitchell possessed would prevent the claims sued by him having priority over the deed. He knew of the negotiation, but not of a completed transaction. His clients had as much right to endeavor to obtain prior attachments as the other party had to obtain a prior deed.

The present case is in its essential character exceedingly like that of *Cobb* v. *Dyer*, 69 Maine, 494, where the doctrine of subrogation is discussed upon the authorities, and principles are there established which are applicable here. That was a decision in equity whilst the present is an action at law. Fortunately, the present situation is such that equity need not be invoked. The law is as fond of the principle as is equity,

whenever it can be made available in legal procedure. Here it can be.

Defendant defaulted.

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

FRANK STANWOOD *vs.* JOHN W. TREFETHEN.

Cumberland. Opinion February 4, 1892.

Agent. Notice. Payment.

The owner of a cargo of fish, permitting the master of the vessel on which the fish were laden to sell the same, wrote the purchaser, as follows: "Should the schooner Midnight now on Georges sell fresh fish in Portland, will you please see that the check is made payable to my order, as the captain is a stranger to me. By so doing, you will confer a favor." *Held*, that the notice was sufficient to entitle the owner to recover the price of the fish of the purchaser, who notwithstanding the notice paid the master, who absconded with the funds.

ON REPORT.

This was an action of assumpsit upon an account annexed to recover the sum of six hundred and nine dollars and forty-six cents, being the amount which the plaintiff claimed of the defendant for a fare of fish of the schooner Midnight. The fish were sold to the defendant by the master, and plaintiff was owner of the vessel. The case came up on report from the Superior Court for Cumberland County.

After the master sold the fish to the defendant he collected the money and absconded with it. The plaintiff claimed, under the facts which are stated in the opinion, that the payment of the money was wrongfully made by the defendant to the master, and that he was not bound by the payment.

F. V. Chase, for plaintiff.

Property and right of sale was in plaintiff. Captain in making the sale was merely owner's agent. Principles of agency govern. *Wickersham* v. *Southard*, 67 Maine, 595; *Lewis* v. *Chadbourne*, 54 Maine, 484, and cases cited. Plaintiff not bound by payment to the master, having notified defendant. Sto. Agency, 429; *Trainer* v. *Morrison*, 78 Maine, 160, and cases cited.

N. and H. B. Cleaves and *S. C. Perry*, for defendant.

The master is the agent of the owners of the vessel in all matters embraced in the scope of his appointment and for all purposes connected with the ordinary employment of the vessel. The owners are bound by his contract. The owners may constitute him a general agent to exercise his best judgment in the disposition of the cargo and the purchase of a return cargo. The master of a fishing vessel is agent for the owners. The master had the entire control and management of this schooner so far as related to the disposition of the fare of fish, and also the express authority and assent of the owner. *Wickersham* v. *Southard*, 67 Maine, 595; *Giles* v. *Vigoreux*, 35 Maine, 300; *Bryant* v. *Moore*, 26 Maine, 84. The case further shows the custom which exists at Portland as to dealing with fishing schooners from Gloucester, purchasing of the master and making payment to him.

Payment to the agent is same as if made to the principal. Plaintiff did not forbid defendant from paying the money to the master. The letter is not in the form of a prohibition, it authorizes the master to sell and does not revoke authority to receive payment. Defendant never agreed to make the check, as requested, to plaintiff's order. Owner liable for acts of the master. *Patten* v. *Percy*, 77 Maine, 327; *Packer* v. *Hinckley L. Works*, 122 Mass. 484. If the owner, after having put in charge of his vessel a captain whom he is unwilling to trust personally, holds him out to the general public as his authorized agent, he should not be permitted to deny his authority to the detriment of one who has dealt with him in good faith, and with reason to believe from the acts of the owner that he was justified in so doing.

The plaintiff by his acts is now estopped to deny the authority of his agent. *Stratton* v. *Todd*, 82 Maine, 149; *Taylor* v. *Mason*, 80 Maine, 496.

PETERS, C. J. The plaintiff, a resident of Gloucester, Massachusetts, and owner of a fishing vessel, allowed the master of the vessel to take her on a voyage for the purpose of

procuring a fare of fresh fish for the market. The master, after procuring the fish, sailed the vessel to Portland, sold the fare there to the defendant, a principal dealer in fish at that place, receiving full price for the same, immediately abandoned the vessel and absconded with the funds to parts unknown, and has not been heard of by any of the parties since. It was admitted at the argument that the plaintiff was the owner of the fish. He sues to recover the price for the same, and the only question is whether the defendant had such notice from the plaintiff as should have prevented his paying the money to the master.

Shortly before the vessel arrived in Portland the plaintiff wrote the defendant's house the following communication: "Office of Frank Stanwood, wholesale dealer in dry and pickled fish and smoked halibut.

"Gloucester, Mass., 189

"Messrs. J. W. Trefethen & Co., Portland, Me. Gentlemen:

"Should the sch. "Midnight," now on Georges sell fresh fish and hal. in Portland, will you please see that the check is made payable to my order, as the Capt. is a stranger to me. By so doing you will confer a favor.

"Truly yours, Frank Stanwood."

We think this was a sufficient notice, and that the defendant should have heeded it. The letter makes a request giving the writer's reason for making it. It is none the less positive because couched in courteous terms. Mercantile fairness required that the defendant should consult the owner before making payment, and he could easily have done so in a few moments' time by using the telegraphic wire. But the temptation to deal with the master rather that the owner proved too great. The defendant admits as much by his subsequent acts. The following correspondence between the parties shows it.

"Feb. 17, 1890.

"To J. W. Trefethen, Portland, Me.:

"Is the schooner "Midnight" still in Portland, and is everything right. Frank Stanwood."

"Portland, Me., Feb. 17, 1890.

"To Frank Stanwood:

"Schooner here. Captain missing with money. See letter by mail."

"Portland, Me., Feb. 15, 1890.

"Mr. Frank Stanwood:

"Dear sir: Your favor came to hand and your vessel arrived yesterday. I bought the fish. The trip amounted to $609.46. I showed the captain your letter, and he insisted upon having the bills, and as I had no power to do different than to pay him the same, I paid him the bills. He said he was going right home and that he wanted to show you that he could do the business for you. That was all I could do.

"Yours, respectfully,

"J. W. Trefethen, C. N. T."

"Portland, Me., Feb. 17, 1890.

"Mr. Frank Stanwood:

"Dear sir. You will please find enclosed a bill of the fish sold by your schooner "Midnight" to me Feb. 14. I understand the captain has cleared out this morning and your crew has telegraphed you what they shall do with the vessel.

"I want to explain to you more fully why I paid the captain in bills. Of course I had no direct orders from you to not pay the captain. You only stated that I would confer a favor by sending a check payable to your order as you were not acquainted with the captain. I showed the captain your letter and told him that I would rather send the check as you wished. He said that he wanted to show you that he was capable of doing your business for you and wanted the bills. There was a man here who I am well acquainted with and who knew the captain well, said he was all right and that he had been fishing with him a year. So on the strength of his recommendation, as you only stated he was a stranger to you, I paid him the bills not knowing how I could do differently. I went to the custom house with the captain to get a permit to get home with as his papers had run out, and he told the crew to get aboard as he was going out in twenty minutes.

"Am very sorry this thing has happened and hope you will see the position in which I was placed and not blame me.

"Yours, resp'y, J. W. Trefethen."

There is a good deal of unconscious admission in the last letter. If the defendant was induced to pay the money because a man he knew recommended it, as he says, then it was not because he had not notice from the owner. It is manifest that his own judgment was averse to his act, and that he concluded to take the risk of it, induced by the importunity of the master and the influence of his friend. His prudence was overcome too easily. The counsel for defendant calls attention to the fact that the master sent a telegraphic dispatch to the owner, inquiring the price of fresh fish in Gloucester, and exhibited the reply to the defendant. That afforded no excuse for defendant's conduct. The master could sell, but the defendant was not permitted to make payment to him. As the master could send a message, so could the defendant have sent. Much that is said in the opinion in *Knapp* v. *Bailey*, 79 Maine, 195, is pertinent here. *Defendant defaulted.*

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

PATRICK MCNAMARA *vs.* JOHN CARR.

Knox. Opinion February 10, 1892.

Review. R. S., c. 89, § 1. Attorney.

In a petition for the review of an action in which the defendant was absent from the State and had no notice of the suit, but in which an attorney at law appeared and continued to act until judgment was rendered; it is competent for the petitioner to prove by parol that the attorney's appearance was without his knowledge or authority; and if the fact is established the appearance can in no way legally affect him.

Remedial statutes should be liberally construed.

Revised Statutes, c. 89, § 1, which provides that a review may be granted "when a petition for review of an action defaulted without appearance is presented within three years after an officer having the execution . . . demands its payment of the defendant"—does not require that the defendant shall wait until an officer having the execution demands its payment of him, but he may apply for a review as soon as he has actual knowledge of the judgment against him.

ON REPORT.

This was a petition for review and came before the court upon report and exceptions. The exceptions were to the overruling of a demurrer to the petition.

The case is stated in the opinion.

W. H. Fogler, for petitioner.

C. E. and A. S. Littlefield, for respondent.

The right to maintain a petition for review is wholly a statutory one. Review may be granted of right and at the discretion of the court. If of right, it is because of a distinct statutory provision conferring that right. If at the discretion of the court, that discretion is exercised in accordance with and subject to the provisions, specifications and limitations of the statute. The court has no common law power to grant a review, and can only exercise its discretion when authorized by the statute. Otherwise, the statute specifying the different instances and conditions, under which such petitions may be entertained, would be entirely useless. *Pierce* v. *Bent*, 67 Maine, p. 408.

Assuming that the appearance by attorney was unauthorized, it was still an appearance in fact. But if unauthorized, the appearance must have been the result of "fraud, accident, mistake or misfortune," and in such case the petitioner's rights are clearly defined, and a full and adequate remedy provided for him by this same statute.

Appearance by his attorney is conclusive against petitioner. *Simmons* v. *Jacobs*, 52 Maine, 147. Action was not defaulted without appearance.

Statute provides for the special case where payment of the execution issued on the judgment is demanded of the defendant. When so demanded, if the petition is presented within three years of the demand, the review may be granted. The demand on the execution is the fact that authorizes a petition under clause one. If no demand is made, the right to maintain the petition does not obtain. Here not only was no demand made, but as the execution was returned satisfied, none ever would be made. If the demand is not the necessary condition precedent, without the existence of which a petition could not be filed, there is no

limitation of time within which a petition might be brought. If such demand is made the petition must be brought within three years from the demand. At bar it was brought more than seven years after judgment. If so, then it may be brought ten, twenty, or fifty years after judgment, as independently of demand there is no limitation provided for in this paragraph of the statute under which this petition is brought.

Statutes should be so construed as to promote the policy of the law that seeks to limit litigation and quiet titles, as well as the evident intent of this section to fix a limit within which petitions for review can be granted. When the execution is satisfied from the defendant's real estate, as it was in this case, no demand would ever be likely to be made, and to give this clause the construction contended for by petitioner would ignore these considerations.

LIBBEY, J. This is a petition for review and comes before this court on a report of the evidence. So far as important for the decision of this case, the facts proved by the evidence are as follows: On the 27th of August, 1874, the petitioner conveyed to the respondent certain real estate situated in Rockland, with a covenant that the premises were free from incumbrances. In 1878, the petitioner left the State of Maine, and was in the western territories until the 24th day of July, 1885, having no domicile in Maine and no agent or attorney here. May 3, 1880, the respondent commenced an action against the petitioner in the Supreme Judicial Court in Knox county, returnable to the September term. The only service made upon the writ was an attachment of the petitioner's real estate in the county of Waldo, on the 4th day of May, of that year. The claim sued on in that action was for covenant broken in the deed of the petitioner to the respondent before referred to, executed in 1874. The action was entered at the September term, and for some reason the plaintiff had leave to file a new writ, which was filed on the 8th of November, 1880. At the September term, when the action was entered, Mr. Pierce, an attorney at law, appeared and answered to the action for the defendant. He appeared at the

request of one White who, he supposed, had some authority from the petitioner to employ counsel for him. In point of fact, White had no authority to employ Mr. Pierce to appear in the action, and the petitioner had no knowledge of the pendency of the suit, and of course, no knowledge of Mr. Pierce's appearance for him until after he returned to Maine in 1885. At the December term, 1881, the defendant was defaulted by the consent of Mr. Pierce, and judgment was entered against him for the sum of five hundred dollars damages and fifteen dollars and forty-three cents costs. Upon that judgment execution issued January 13, 1882, and was duly levied upon the petitioner's land in Waldo county, appraised at the amount of the execution and costs. At the time of the conveyance by the petitioner to the defendant in 1874, there was an incumbrance by mortgage upon the land, or a part of the land conveyed, and on the 15th day of July, 1875, the respondent paid to the holder of the mortgage seventy-five dollars towards the payment of the mortgage debt. At the time of the rendition of judgment, the mortgage had been assigned by the mortgagee to John McNamara, a brother of the petitioner; so that when judgment was rendered in favor of the respondent in the action on the covenant in his deed he had not redeemed the mortgage, he had not been disturbed in his possession and had paid nothing on account of it except the seventy-five dollars, and that he paid in 1875.

This petition was commenced the 31st day of July, 1889. It is perfectly clear that the judgment obtained by the respondent against the petitioner was most manifestly unjust and in violation of law, for at best, the plaintiff in that action could have recovered as damages no more than the seventy-five dollars and interest, if he was legally entitled to recover that.

But two objections are raised to the maintenance of the right to review on the part of the petitioner. One is that he did not commence his petition for review in season. The other is, that an attorney at law appeared for the defendant in that action and continued to act as his attorney until judgment was rendered. And it is claimed that it is not competent for the petitioner to prove that Mr. Pierce appeared without his knowledge and

authority. But in such a case, we think it well settled that the party for whom the appearance was made may prove by parol that it was without his knowledge or authority, and if the fact is established the appearance can in no way legally affect him. It is not an attempt on the part of the petitioner to impeach the judgment and show it void by parol evidence for the irregularity alleged; but he asks the court to exercise its discretion in permitting him to have an opportunity to be heard upon the matter in issue in the original suit; and for that purpose it is competent for him to show that judgment was rendered on default without service upon him, and without his knowledge, when he was beyond the jurisdiction of the court. *Brewer* v. *Holmes*, 1 Met. 288.

One of the special cases in which a review may be granted, named in the first clause of § 1 of R. S., c. 89, is as follows: "When a petition for a review of an action defaulted without appearance is presented within three years after an officer having the execution issued on the judgment therein demands its payment of the defendant or his legal representative."

The counsel for the respondent claims that the case is not within this provision of the statute, because there has been no demand upon the defendant by an officer having the execution issued on the judgment; and that to bring the case within this provision of the statute the petitioner must wait until such demand is made upon him. We think this is not the fair construction of this statute. It is a remedial statute, designed to give the aggrieved party an opportunity to be heard after full knowledge has come to him of the rendition of the judgment. It should be liberally construed. He may delay his application for review until such knowledge is brought home to him by a demand by an officer having the execution. But we think the fair construction of the statute is, that the defendant against whom a judgment has been rendered in the manner named in the statute, may apply for a review any time within three years after actual knowledge of the judgment against him. He may not wait until the knowledge is communiated to him in the manner named in the statute. But, if he receives actual knowledge

from any other source, we think he may apply for review any time within three years.

It is not for the respondent in this petition to say that the petitioner presented his petition for review too early; that he must wait until he acquires the knowledge of the wrongful judgment against him in a manner named in the statute. This construction would authorize the plaintiff in such a judgment wrongfully obtained without notice, to wait for years without making a demand on the execution until, perhaps, the defendant loses all the evidence which he might present showing the claim in suit to be unfounded; or perhaps, until he might die, leaving no means of defense to his legal representatives, and then, the plaintiff might enforce the judgment against his estate.

Review granted, with costs for the petitioner.

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

MARY JEWELL *vs.* GEORGE F. JEWELL.

Somerset. Opinion February 11, 1892.

84 304
90 339

Jury. Disinterested. R. S., c. 1, § 6, rule 22; c. 82, § § 80, 88.

A juror was related to the plaintiff within the fourth degree and to the defendant within the fifth degree according to the rules of the civil law. But neither the plaintiff nor the defendant had knowledge of this fact, nor was the juror made aware of it, until after the verdict. *Held*, that the juror was not "disinterested" and not a legal member of the panel; and that under our statutes the plaintiff is entitled to a new trial as a matter of law.

ON MOTION.

Real action in which a verdict was rendered for the defendant. The plaintiff seasonably filed a motion to have the verdict set aside because William Ballantine, one of the jurors, was related to her within the sixth degree, and the relationship was unknown to her until after verdict; and that she never consented or waived her right to said juror sitting in the case.

The testimony of the juror, taken in support of the motion, was reported to this court by the presiding justice.

J. Wright, for plaintiff.

Walton and Walton, for defendant.

WHITEHOUSE, J. In an action against her son for the alleged failure to perform his contract for her support, the plaintiff had a verdict against her, and moved to set it aside on the ground that one of the jurors, who rendered the verdict, was disqualified by his relationship to the parties.

It appears that the juror's mother and the plaintiff's mother were sisters. The juror was, therefore, related to the plaintiff within the fourth degree, and to the defendant within the fifth degree according to the rules of the civil law.

In his classification of challenges to the polls, Lord Coke says of the challenge *propter affectum* that the right exists; "If the juror be of blood or kindred to either partie, *consanguineus*, which is compounded *ex con and sanguine, quasi eodem sanguine natus*, as it were issued from the same blood; and this is a principal challenge; for that the law presumeth, that one kinsman doth favor another before a stranger, and how far remote soever he is of kindred, yet the challenge is good. And if the plaintife challenge a juror for kindred to the defendant, it is no counterplea to say that he is of kindred also to the plaintife, though he be in nearer degree; for the words of the *venire facias* forbiddeth the juror to be of kindred to either partie." Co. Litt. 157, (a).

But there are several provisions of our statute touching this subject. Rule XXII, § 6, c. 1, R. S., provides that, "When a person is required to be disinterested or indifferent in a matter in which others are interested, a relationship by consanguinity or affinity within the sixth degree according to the civil law, or within the degree of second cousin inclusive, except by written consent of the parties, will disqualify."

Section 80, c. 82, R. S., declares that, "The court, on motion of either party in a suit, may examine, on oath, any person called as a juror therein, whether he is related to either party, has given or formed an opinion, or is sensible of any bias, prejudice, or particular interest in the cause;" and if he does not stand indifferent he may be set aside. And section 88 of the same chapter provides that, "If any party knows any objection to a

juror in season to propose it before trial, and omits so to do, he shall not afterwards make it, unless by leave of court for special reasons."

In the case at bar, the court informed the jury before the commencement of the trial who the parties to the suit were and explained that, if any member of the panel was related to the parties within the degree of second cousin, he would be disqualified to sit and must step aside. But it appears from the admissions in the report that neither the plaintiff nor the defendant had any knowledge that this kinsman was a member of the panel until after the verdict; and the juror testified that he had not seen the Jewells since his childhood, and did not recognize the parties in the court room and hence was not made aware of his relationship until after the trial had concluded.

In *Woodward* v. *Dean*, 113 Mass. 297, it appeared that Henry Macomber, one of the jurors, was the husband of the plaintiff's niece, but that the defendant was personally unacquainted with Macomber and did not know that he was on the panel until after the trial. It further appeared that the defendant had not availed himself of the opportunity offered by the Massachusetts statute (in substance the same as § 80, c. 82, R. S., *supra*) to have the members of the panel examined before the trial respecting their relationship to the parties, and the court said: "A party against whom a verdict has been rendered, who has not seasonably availed himself of the means of inquiry thus afforded him, may indeed, upon proof to the satisfaction of the court that the juror did not stand indifferent, by reason of facts unknown to the party until after the verdict, be granted a new trial or review at the discretion of the court; but he is not entitled to it as a matter of law, and has no right of exception if it is refused." But there appears to be no statute in Massachusetts which like ours rigidly prescribes one of the limits of disqualification. In the absence of such a statute, the prevailing rule of the common law undoubtedly is that a new trial will be granted only when the court, in the exercise of a sound discretion, deems it reasonable and proper in the furtherance of justice.

In such case, one of the principal inquiries would obviously

be whether the aggrieved party has exercised reasonable diligence to ascertain the qualifications of the jurors; for the rule is definitely settled that a party, who is aware of any circumstance affecting the competency of a juror, is bound to make his objection by way of challenge before that juror is sworn, otherwise he will be deemed to have waived it. *Wassum* v. *Feeney*, 121 Mass. 93; *Jefferies* v. *Randall*, 14 Mass. 205; Thompson and M. on Juries, § 302, and authority cited.

A waiver involves the idea of assent; and assent is primarily an act of the understanding. We cannot assent to a proposition without some intelligent apprehension of it. It presupposes that the person to be affected has knowledge of his rights but does not wish to enforce them. He cannot properly be said to waive that of which he has no knowledge.

In the case at bar, the juror in question was undoubtedly disqualified and would have been excused if the relationship had been disclosed at the trial and the objection been seasonably made. But the plaintiff was not apprised of the relationship until after the verdict; she could not make the objection until she had knowledge of the fact. The statute explicitly and absolutely declares that relationship within the sixth degree "will disqualify." Under that statute William Ballentine was not "disinterested," and was not a legal juror. The plaintiff had a constitutional right to a trial by a legal jury. She has not willingly submitted to a trial by any other than legal jurors and she is now entitled to a new trial as a matter of law. *Hardy* v. *Sprowle*, 32 Maine, 311; *Quinn* v. *Halbert*, 52 Vt. 353.

If the institution of trial by jury is to retain the confidence of the court and respect of the people as a reliable and efficient agency for the investigation of facts and discovery of truth, not only must the municipal authorities charged with the duty of revising the list of jurors carefully heed the requirement of the statute to "take the names of such persons only as are of good moral character, of approved integrity, of sound judgment, and well informed," and otherwise qualified under the constitution and the laws, but the courts must continue to exercise no less care to preserve all the safeguards which the law has placed

around it. "All questions touching the formation of juries," said Coleridge, J., in *O'Connell* v. *Reg.* 11 Cl. & Fin. 353, "must be examined by the judges with very critical eyes."

Verdict set aside. New trial granted.

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

ELIZABETH J. STEWARD, Administratrix, in equity,

vs.

WILLIAM H. WELCH.

Somerset. Opinion February 13, 1892.

Mortgage. Surety. Subrogation. R. S., c. 90, § § 2, 12.

If a mortgage is given to secure negotiable promissory notes, and the notes are transferred, the mortgagee and all claiming under him will hold the mortgaged property in trust for the holders of the notes.

In 1871, A bought land of B for fourteen hundred dollars and gave him a mortgage to secure the purchase money. As a part of the same transaction, C, plaintiff's intestate, advanced one half of the purchase money, taking therefor two notes signed by A, as principal, and B, as surety. The mortgage was conditioned to pay B seven hundred dollars and the two notes held by C. A occupied the premises for several years, and prior to 1882, paid the interest and part of the principal of the note held by B, and part of the interest on the two notes held by C. March 23, 1882, B foreclosed his mortgage by taking possession, the foreclosure being perfected March 23, 1885. March 1, 1883, B in consideration of six hundred dollars, assigned to the defendant, who had notice of the equities of C, his mortgage and note of seven hundred dollars, but did not assume in this assignment to transfer to the defendant any rights secured to C by the mortgage; and the two notes held by C still remained unpaid. In 1887, C sued B on these two notes and obtained judgment by compromise for three hundred dollars, which B paid and was received by C upon the mortgage debt with an agreement that C's right to enforce the balance (then outlawed against B) upon the property should not be impaired.

Held, that the equities between the plaintiff and defendant are the same as they were between B and C. To uphold the equities, the defendant must be regarded as holding the property in trust for the plaintiff in the proportion which the amount due C's estate sustains to the whole amount due on the mortgage; and the plaintiff is entitled to that part of the property which is in proportion to her debt, and also of the rents and profits received by the defendant in excess of disbursements, in the same proportion.

ON REPORT.

Bill in equity to enforce a trust under a mortgage, heard on bill and answer.

Besides the general prayer, the bill prayed that "a master may be appointed by said court, and an account taken of the profits and income received by said Welch from said mortgaged property since he took possesssion thereof; that said Welch may be required by the judgment and decree of said court to pay to your oratrix the amount due upon the note aforesaid, or such part of said amount as said court shall declare to be justly due her out of said rents and income; and that said Welch may be required to assign and deliver to her the mortgage aforesaid, or one half thereof, or such other fractional part thereof, as the court shall adjudge and order; or that said mortgaged property may be decreed by this court to be sold, and the proceeds applied to the payment of her said notes."

D. D. Stewart, for plaintiff.

D. F. Davis and V. A. Sprague, for defendant.

If by any possibility the plaintiff has any rights whatever after this lapse of time, they should be reached not by a sale of the property, but by some method, by which the defendant can be protected in all his rights as well as the plaintiff. But the plaintiff's claim has slept too long.

The principal creditor is not entitled to the benefit of a mortgage given to a surety until the liability of the latter is fixed. If the indorser is discharged by the laches of the creditor he cannot claim the benefit of the mortgage. A mortgage given to indemnify a surety or indorser does not in the first instance attach to the debt; and whatever equity may arise in favor of the creditor with regard to the security arises afterwards, and in consequence of the insolvency of the parties primarily holden for the debt. Until this equity arises the surety has a right, in equity as well as at law, to release the security. Even after such insolvency, the mortgagee may surrender the security if he does it in good faith and before any claim is made upon him for it. Jones Mort. § § 385, 387 and cases cited.

Though Knowles became insolvent, Sprague has not, and payment could have been enforced against him by Steward at any time until the statute of limitations intervened.

WHITEHOUSE, J. This case was heard on bill and answer. In 1871, B. F. Knowles purchased of V. A. Sprague the mill property at Southard's Mills in Corinna, for fourteen hundred dollars, and gave him a mortgage to secure the purchase money. As a part of the transaction, however, Stephen Steward, the plaintiff's intestate, advanced one half of the purchase money and received therefor two notes for three hundred and fifty dollars each, payable in one and two years respectively, signed by Knowles, as principal, and Sprague, as surety. The condition of the mortgage was, therefore, to pay a note of seven hundred dollars, payable directly to Sprague in three years from its date, and also to pay the two notes above named held by Steward for three hundred and fifty dollars each, signed by Knowles, as principal, and Sprague, as surety. Knowles occupied the premises for several years after his purchase; and prior to 1882 he paid the interest on the Sprague note and a portion of the principal, and also a part of the interest on the Steward notes. But, March 23, 1882, Sprague took possession of the property in order to foreclose the mortgage for condition broken, and a foreclosure was perfected March 23, 1885. In the meantime, March 1, 1883, in consideration of six hundred dollars Sprague assigned and transferred to the defendant Welch, the mortgage in question and the note for seven hundred dollars held by him and secured by the mortgage. The two notes for three hundred and fifty dollars each, signed by Sprague as surety, still remained unpaid and outstanding in the hands of Steward, and Sprague did not assume to transfer to the defendant any rights secured to Steward by the mortgage. On the contrary, he informed the defendant of the relations sustained by Steward to the mortgage and the property described; and although in addition to the assignment of the mortgage and his own note he gave the defendant a deed of warranty of the same premises, the mortgage in question was expressly excepted from the operation of the covenants. In 1887, Stephen Steward brought suit against Sprague as surety on one of the notes for three hundred and fifty dollars. The statute of limitations was invoked in defense, but, by way of compromise, Steward was allowed to

take judgment against the surety for the sum of three hundred dollars. This was paid by Sprague and received by Steward in reduction of the mortgage debt, with a written agreement that Steward's right to enforce the balance against the property should not be impaired. The second note for three hundred and fifty dollars was admitted to be outlawed as to Sprague, the surety.

The defendant, Welch, claims in answer that the premises are now held by him in fee simple, free from all claims under the mortgage, and no longer charged with a trust in favor of any person. But this result would be manifestly inequitable and the position is, therefore, untenable.

On the other hand, the plaintiff contends that the mortgage was given to Sprague primarily as one of indemnity, and although it included a debt due and payable to the surety himself, the mortgagee must be regarded in the light of a trustee for the principal creditor with respect to an indemnity, and as between himself and a principal creditor, the latter is entitled to be first paid out of the proceeds of the mortgage. But due regard to the elementary principle, that equality is equity, will require a material modification of the plaintiff's contention.

It is familiar law that, as between mortgagor and mortgagee, the title is vested in the mortgagee immediately upon the delivery of the mortgage, and the mortgagee is regarded as having all the right of a grantee in fee subject to the defeasance. *Gilman* v. *Wills*, 66 Maine, 275; R. S., ch. 90, § 2. But the equitable theory of mortgages so far prevails in this State, that the mortgage is regarded primarily as a security; the debt is the principal fact and the mortgage is collateral thereto; and the beneficial interest which it confers on the mortgagee may, therefore, be equitably transferred by an assignment of the debt without a conveyance of the land itself. 3 Pom. Eq. § § 1181, 1182. By sec. 12, chap. 90, R. S., "land mortgaged to secure payment of debts, . . . and the debts so secured are on the death of the mortgagee, or person claiming under him, assets in the hands of his executors or administrators." In *Jordan* v. *Cheney*, 74 Maine, 361, it is declared to be the settled law of

this State that "one who takes a mortgagee's title holds it in trust for the owner of the debt, to secure which the mortgage was given. If a mortgage is given to secure negotiable promissory notes, and the notes are transferred, the mortgagee and all claiming under him will hold the mortgaged property in trust for the holder of the notes. . . . If the mortgage is duly recorded, the record is notice to all the world of the character of the mortgagee's title, and one taking title from or through him will obtain only a mortgagee's title and be chargeable with notice that the notes are liable to be transferred, if they are not already transferred, and that he must hold the estate in trust for the holder of the notes to secure which the mortgage was given, whoever that holder may be." See also *Moore* v. *Ware*, 38 Maine, 496; *Buck* v. *Swazey*, 35 Maine, 41; *Johnson* v. *Candage*, 31 Maine, 28. In the last named case a mortgage of real estate was given to secure payment of five notes, one of which was indorsed and transferred to the plaintiff. The mortgage, with three other notes which remained unpaid, was assigned to the defendant, and during his ownership the proceedings for foreclosure, commenced by his predecessor in title, were perfected. The court said: "Mortgagees or assignees must hold the premises mortgaged for the benefit of the owners of the debts; for if it were otherwise their debts would be discharged upon a foreclosure so far as the value of the land might extend, while nothing would be paid to them, and the mortgagee or assignee would obtain a title to the premises without having paid a consideration for them. It results that the defendant, Candage, must be considered as holding the premises assigned to him in trust for the plaintiff in the proportion which the amount due on his notes bears to the whole sum due on the mortgage. There does not appear to be any just grounds for requiring the defendants, or either of them, to pay the plaintiff's note; for the entry to foreclose and the consummation of the foreclosure was beneficial to the plaintiff. The holders of the respective notes have an equitable interest in the land in proportion to the amount due upon them. The plaintiff can equitably claim that part of the land which is in proportion to his debt,

and he is entitled to the rents and profits, exceeding the disbursements which the defendants have obtained from the mortgaged premises, in the same proportion."

In *Eastman* v. *Foster*, 8 Met. 19, it was held that a mortgage given by the principal maker of a promissory note to his surety, conditioned that the principal will pay the note and save the surety harmless, creates a trust and an equitable lien for the holder of the note; and even after the sureties' liability to the holder of the note is barred by the statute of limitations, he holds the property subject to such trust and lien; and after he has obtained an absolute title to the property by foreclosure, the same trust still attaches to it. See also 1 Jones on Mortgages, § 387, and authorities cited.

The principles involved in these cases must be held decisive of the case at bar. The equitable interest of Stephen Steward was essentially the same as it would have been if the two notes of three hundred and fifty dollars each payable to him had originally been made payable to the order of Sprague, had been thus described in the mortgage, and for a valuable consideration had been indorsed by him to Steward before maturity. The equitable lien binds the property after an assignment of it to one who has notice of the trust. *Rice* v. *Dewey*, 13 Gray, 47. The defendant was not only chargeable with the notice afforded by the plain terms of the mortgage, but he was further explicitly informed by Sprague of the relations sustained by Steward to the mortgage; and the debt given to him by Sprague was expressly made subject to the rights of Steward. It is, therefore, obvious that the defendant is in no better condition in equity than the assignor or grantor under whom he claims; and the equities now subsisting between the plaintiff and the defendant are precisely the same as were those between Steward and Sprague. To sustain and enforce these equities, the defendant must be regarded as holding the property described in the mortgage in trust for the plaintiff in the proportion which the amount due on the notes payable to Stephen Steward sustains to the whole amount due on the mortgage, and the plaintiff is equitably entitled to that part of the property which is in proportion

to her debt, and also to the rents and profits which have been received by the defendant in excess of the disbursements in the same proportion.

The case must be submitted to a master with instructions to ascertain and report the sums due upon the several notes secured by the mortgage and the amount of the rents and profits, and also the disbursements. Upon the acceptance of his report a decree is to be rendered in accordance with this opinion.

Decree accordingly.

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

MARK W. HODGDON AND EDWARD A. HODGDON, in equity,

vs.

DEBORAH A. CLARK, and another.

Hancock. Opinion February 15, 1892.

Equity. Deed. Cloud on title. Restraint on alienation. Life Estate.

Upon a bill in equity to remove a cloud from title to real estate, it appeared that the plaintiff, Mark Hodgdon, conveyed his farm to his brother in fraud of creditors, and by a subsequent arrangement it was conveyed to the defendant with an oral agreement that it should be held for said plaintiff's support during his lifetime, and at his decease it should go to the children of his first wife. Afterwards the defendant conveyed the property to said plaintiff, and as a part of the same transaction received a mortgage back conditioned that he would not convey the premises for any other consideration than to secure his support, and in the event of such conveyance the difference between a reasonable compensation for such support and a just valuation of the property should be paid over to the children of the first wife. Still later said plaintiff conveyed the property to his co-plaintiff and took a mortgage back to secure the support of himself and wife during their natural lives.

Held, that the mortgage to the defendant is not void as being a restraint upon the alienation of property, and is not a cloud upon the title.

ON REPORT.

Bill in equity heard on bill, answers and testimony.

The case is stated in the opinion.

Deasy and Higgins, for plaintiffs.

Counsel argued that the conditions of the bond given by Mark W. Hodgdon to Deborah, are conditions in restraint of aliena-

tion and absolutely void; that if the bond was not absolutely void for the above reason, at most, it simply defines Mark's power of disposal of the property and that he had conveyed the same, acting within the power given him by the bond, in good faith, for the consideration of a life support for himself and wife, and that in either event Edward was entitled to have the bond, given as aforesaid, cancelled and annulled.

Restraint of alienation: The power of alienation is an inseparable incident of an estate in fee. *Blackstone Bank* v. *Davis* 21 Pick. 42.

Conditions in restraint of alienation, in a grant of a fee, are void as repugnant to a grant. *Hall* v. *Tufts*, 18 Pick. 455; *Jackson* v. *Schutz*, 9 Am. Dec. 195; Devlin on Deeds, § 965; *McCollough* v. *Gilmore*, 11 Pa. St. 370.

Counsel also cited: *Richardson* v. *Richardson*, 80 Maine, pp. 585, 594; *Hall* v. *Preble*, 68 Maine, 100; *Stewart* v. *Walker*, 72 *Id.* 145; *Shaw* v. *Hussey*, 41 *Id.* 495; *Starr* v. *McEwan*, 69 *Id.* 334; *Nash* v. *Simpson*, 78 *Id.* 149, and the cases there cited.

Baker, Baker and Cornish, for defendant.

WHITEHOUSE, J. Bill in equity, brought by Edward A. Hodgdon and his father, Mark W., asking for the removal of a cloud alleged to be resting on the title to the homestead of Mark, situated on the island of Mount Desert.

It appears that the legal title to this property had not been in Mark for more than forty years prior to 1877, but for many years had been vested in his brother, Wm. Wallace Hodgdon. The purpose for which Mark thus kept his farm in the name of his brother is not left in doubt by the evidence. When the testimony is examined in the light of the history of the several conveyances to Wallace, of the situation of the parties at the time, especially the financial condition of Mark, and their subsequent conduct, the fact seems to be established beyond question that it was done as stated by Wallace, "to keep the property away from Mark's creditors." Certain it is that the arrangement had that effect; for while the property was thus situated,

Mark took advantage of the bankrupt law, and this property was not surrendered to the creditors but remained undisturbed in the hands of Wallace until April 8, 1877. In the meantime, trouble had arisen between the families, especially between Wallace and Mark's second wife, and having now been discharged from all his indebtedness by proceedings in bankruptcy, Mark made repeated requests for the restoration of his property; but Wallace was unwilling to reconvey to Mark or his wife and at Mark's suggestion, a conveyance was made to the defendant, Deborah Clark, his oldest daughter by his first wife, for the "safe keeping" of the property, with an oral agreement that it should be held for her father's support during his life, and at his decease should go to the children of his first wife, Huldah B. Hodgdon. This appears to have been satisfactory to all parties, and the deed was delivered nearly a year afterwards to Mrs. Clark, charged in the minds of the parties with this trust in favor of her father. But, after the lapse of a year or more, Mark again became dissatisfied and renewed his importunities for a conveyance of the property or for some writing specifying the terms of the trust. As a result, Mrs. Clark, September 29, 1880, gave her father a quit-claim deed of the property and at the same time and as a part of the same transaction received from him a bond secured by a mortgage, containing the following condition, namely: "Whereas, I have this day taken a deed of the lot on which I now live together with another lot from the said Deborah A. Clark, I promise that I will not convey or assign said premises described in said Clark's deed, in no other way nor for any other consideration than to secure my support and maintenance during my natural life; and further, if the said premises are assigned for the purpose aforesaid, after deducting reasonable expenses for such support from a just valuation of said premises, the balance between the said compensation for said support and the just valuation of said premises shall be paid over to the children of the late Huldah B. Hodgdon, or their legal representative, in equal shares, in one year after demand is made for the same, then the above obligation to be of no effect, otherwise to be in full force and value."

March 31, 1886, Mark, whose possession of the place had never been interrupted and who was now living on it with his second wife and children, gave a deed of warranty of the place to the plaintiff, Edward A., who executed in return a bond for the support of his father and mother, secured by a mortgage of the same property, running to Mark W. and Mary J. Hodgdon. The following year a portion of the pasture lot was sold off for seven hundred dollars, Mrs. Clark releasing her interest without objection, and her father receiving all of the proceeds for the benefit of himself and family. Thus, what Wallace and Mrs. Clark had apparently sought to prevent now seemed to be substantially accomplished; the property had practically passed under the control of the second family. But the mortgage to Mrs. Clark might be a source of inconvenience and the plaintiff commenced these proceedings to have it cancelled and this "cloud" upon Edward's title removed.

In the bill as originally drawn, the plaintiffs ask that this be done on the ground that the bond and mortgage were executed under the influence of fraudulent representation on the part of Mrs. Clark, and of misapprehension and mistake on the part of her father. But the testimony fails to raise even a suspicion of fraudulent procurement or undue influence, and clearly shows that the property was originally conveyed to Mrs. Clark without her knowledge, at the request of her father, and on terms entirely satisfactory to him; and that the subsequent transaction at the time the mortgage in question was given to Mrs. Clark, was clearly understood and the result freely accepted by her father. The plaintiffs, therefore, abandoned the charge of fraud and now claim, as a matter of law that the mortgage is void, as being a restraint upon the alienation of property and repugnant to an estate in fee.

It has been seen that the conveyances made and caused to be made by Mark, which resulted in keeping the title to this property in his brother Wallace for so many years, was manifestly designed to place the property beyond the reach of creditors. "When a debtor has conveyed, assigned or in any manner transferred his property for the purpose of defrauding his creditors

and then seeks to recover from the grantee, the door is shut against him." 1 Pom. Eq. § 401, note 3 and cases cited. The fraudulent grantor parts with all his interest in the property conveyed to his grantee and the law will afford him no aid and equity, no relief in reclaiming it. *Andrews* v. *Marshall*, 43 Maine, 272. When the title to this property was vested in Wallace there was no resulting trust, or trust arising by implication of law, which could be made available to Mark in a court of law or equity. Wallace had the power to hold the property or dispose of it in any manner he deemed best. If he consented to reconvey it, or to transfer it to another for the benefit of Mark, he had a right to impose any conditions or restrictions not repugnant to established rules of law. True, deeds of real estate which are to endure as muniments of title, must have the quality of precision and permanency, and certain positive and stringent rules of law are found indispensable to secure that end. It is the rule, for instance, that a grantor cannot destroy his own grant. However much he may modify it with conditions, having once granted an estate in his deed, he cannot be allowed by a subsequent clause even in the same deed to nullify it. *Maker* v. *Lazell*, 83 Maine, 562.

It is also familiar law that alienation is incident to the enjoyment of property whether held in fee or for life. *Turner* v. *Hall. Sav. Ins.* 76 Maine, 530. But in the growth and progress of the law one rule has come to be regarded as paramount in importance to all others and is perhaps the only one that has no exception, and that is that the intention of the parties gathered from the whole instrument, or it may be from several instruments, relating to the same subject matter and being part of the same transaction, construed together, should always prevail and not be defeated when no positive rule of law or principle of sound policy is thereby violated. *Bradford* v. *Cressey*, 45 Maine, 9; *Ide* v. *Pearce*, 9 Gray, 350; *Haight* v. *Hamor*, 83 Maine, 453. The intent when apparent and not repugnant to any rule of law will ordinarily control technical terms; for the intent and not the words, is the essence of every agreement.

The manifest intention of the parties disclosed by the deed,

bond and mortgage in question, was to give Mark Hodgdon his life support from the property and the remainder if any existed to the children of his first wife. And if the scrivener had been familiar with *Stuart* v. *Walker*, 72 Maine, 145 where the different modes of creating life estates, express and implied, with qualified and unqualified power of disposal, and remainder over, are critically distinguished and aptly illustrated, he would probably have sought to effectuate this intention by a single conveyance from Mrs. Clark, giving her father a life estate in certain and express terms, with the right, however, to dispose of it in his lifetime if needed for his support, and if anything should remain unexpended at his death the balance should go to the children of his first wife. But the uncertain and precarious nature of the remainder-man's rights in such a case was pointed out in *Richardson* v. *Richardson*, 80 Maine, p. 591; for with such a power of disposal, the life tenant may sell the property as a whole in consideration of his support and in the absence of fraud his judgment will control and the reversion be extinguished. It is, therefore, questionable if the untaught scrivener by the deed to Mark Hodgdon, and bond and mortgage back to Mrs. Clark as above described, has not "builded better than he knew" and accomplished the purpose more exactly than would have been done by the ordinary method. The deed from Mrs. Clark to her father was designed as the means of accomplishing an ulterior purpose, and gave him but an instantaneous seizin; the legal title immediately passed back by virtue of the mortgage given to secure the bond. But the practical effect of the three papers was to give Mark a life estate by necessary implication with the qualified power to dispose of so much of the property as might be necessary for his support in the manner specified, and the balance if any existed, to the children of the first wife. The rule respecting the restraint of alienation is not more applicable here than in the case of the single instrument giving an express life estate with power of sale and remainder over. The property in whole or in part was to be devoted to the sole support of Mark. Two methods of accomplishing this appear to have been in contemplation. He could hold the equitable title in himself and sell off a piece of land occasionally

when necessary for his support, obtaining the consent and release of Mrs. Clark as was done in 1887. In that case there would be no breach of the mortgage; at his death it would be discharged; and as Mrs. Clark must be consulted with respect to the sale of each parcel she was content to have the portion remaining descend to all the heirs alike. But by the second method he could make a conveyance of the whole property to secure his support during his natural life without the consent of Mrs. Clark, subject, however, to the conditions of the mortgage which required the grantee to account to the children of the first wife for the balance between a reasonable compensation for the support and the just valuation of the property. Any other conveyance would violate the conditions of the mortgage and afford grounds for a foreclosure. Mark finally sought to avail himself of the benefits of the transaction by the second method. He gave his son Edward a warranty deed of the place and received a bond and mortgage for the support of himself and wife. This deed, however, conveyed only such interest as he had, and Edward took it subject to the terms of the prior mortgage to Mrs. Clark. It was not in the power of Mark and Edward at that time to make a final and conclusive agreement that the support to be furnished should be a full consideration for the conveyance. Their judgment would not control the rights of the reversioners under the Clark mortgage. Whether there will be a balance between a reasonable compensation for his support and the just valuation of the property, and if so how much, cannot be determined until the "support for his natural life" has been furnished. The fact that Edward consented to have the benefit of the arrangement extended to include the support of his mother is immaterial. The final adjustment must be made in conformity with the terms of the mortgage, and those terms do not appear to be repugnant to any established rules of law.

It is not apparent, therefore, that there is any present occasion for the interposition of the equity power of the court.

Bill dismissed without cost.

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

LIBBEY, J., concurred in the result.

GEORGE A. HOPKINS *vs.* GEORGE A. SAWYER, and others.

Washington. Opinion March 2, 1892.

Jury. Verdict. Practice.

It is not an objection to the validity of a verdict that it was agreed to an hour and more after the time designated by the judge to the officer in charge for the jury to separate if not then agreed, the jury desiring to prolong their consultation beyond the time assigned, and the officer acquiescing in their wishes.

A fortiori is the verdict valid if the judge ratifies the authority of the officer by accepting the verdict.

ON EXCEPTIONS.

The case is stated in the opinion.

H. M. Heath, Gray and McNichol, with him, for plaintiff.

At the hour fixed by the court, the authority of the jury to consider the case had ceased. *Richards* v. *Page*, 81 Maine, 563. If unlawfully held, it is not necessary for the plaintiff to show injury. *Bradbury* v. *Cony*, 62 Maine, 223; *State* v. *Fenlason*, 78 Maine, p. 503. The order of the judge to the officer was, to keep the jury out until one o'clock; then if they did not agree, to let them out. Such an order enforces itself, and when one o'clock arrived the jury were discharged from consideration of the case. A minority, at least, of the jury was illegally restrained from its liberty by an unauthorized act of the officer. This was not a legal trial by jury.

Baker, Baker and Cornish, for defendants.

PETERS, C. J. The jury having been sent out in the evening, the judge, after waiting some time without their return, proclaimed a recess of the court until the next morning, instructing the officer, in charge of the jurors, to allow them to separate at one o'clock at night if at that hour they had not agreed upon a verdict. The circumstance of the lights going out in the court house and jury room prevented the officer from executing the order of the judge until about half after one o'clock, when, on informing the jury that they could separate, the answer came that "they wanted to agree," whereupon they remained in their

room with the acquiescence of the officer until between two and three o'clock when, having agreed upon and sealed up a verdict, they separated.

At the opening of the court in the morning the verdict, in favor of the defendant, before it was read, was objected to by the plaintiff upon the ground that any verdict agreed upon after the hour appointed for the jury to separate would be without authority and void. The judge against such objection allowed the verdict to be read and affirmed.

Upon two grounds we think the verdict should stand. In the first place, such an order as that given to the officer need not be so rigidly adhered to as to admit of no qualification whatever. The judge could not anticipate the circumstances that occurred. The very nature of the order implied that the jury were not to be discharged if they were likely to agree or desired to make further effort at agreement. It is the better practice to require an officer, before discharging a jury, to enquire of them whether there is a reasonable prospect of an agreement if kept longer together, and to heed their wishes in that respect. The judge can, however, make his order peremptory and unconditional if he chooses to do so.

The other ground upon which the verdict should stand is that the act of the officer, in allowing the jury to remain out beyond the appointed hour, was accepted and approved by the judge upon full information of all the circumstances, thus establishing a ratification of the authority exercised by the officer.

Exceptions overruled.

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

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84 322
86 279

MARTIN B. SMILEY

vs.

INHABITANTS OF MERRILL PLANTATION.

Aroostook. Opinion March 2, 1892.

Pleading. Declaration. Time. Traversable facts.

The rule, that every traversable fact in a declaration must be averred as happening on some particular day, does not apply to the statutory requirement

that notice of an injury caused by a defective highway shall be given to the municipal officers of the town where such way is situated within fourteen days after the injury; it is enough if the declaration avers that such notice was given within the time named.

ON EXCEPTIONS.

This was an action on the case, which came to this court on the plaintiff's exceptions to the sustaining a special demurrer to the declaration by the presiding justice of the Superior Court for Aroostook County. The causes of demurrer assigned appear in the opinion.

Bertram L. Smith, for plaintiff.

Powers and Wilson, for defendants.

The giving written notice of the claim for damage is essential to the maintenance of the action. R. S., c. 18, § 80. It must be alleged in the declaration and proved at the trial. *Eaton* v. *Buswell*, 69 Maine, 552. It is, therefore, a traversable fact, and as such must be alleged to have taken place upon a day certain. *Shorey* v. *Chandler*, 80 Maine, 409.

PETERS, C. J. In this action to recover damages for an injury sustained by the plaintiff by reason of the alleged negligence of the defendants in not keeping in repair a highway within their limits, the declaration avers, among other things, "that the highway surveyor of said plantation had at least twenty-four hours' actual notice of said defect before the time of the said accident, and that the plaintiff, within fourteen days after said accident, notified the assessors of said Merrill Plantation in writing, setting forth his claim for damages and specifying the nature of his injuries and the nature and location of the defect which caused such injuries."

The declaration, on demurrer thereto, is objected to by the defendants as insufficient upon two grounds; first, because no place is named *where* the written notice of the injury was delivered to the assessors of the plantation; and, secondly, because no particular day is named *on which* it was so delivered.

Inasmuch as such a notice may be properly delivered to an assessor wherever he may be found, it cannot be necessary to

aver any particular place of its delivery. Such necessity exists only where the action is local, or whenever place necessarily indicates whether an action is brought in a proper jurisdiction or not. *Bean* v. *Ayers*, 67 Maine, 482; *Bank* v. *Lane*, 80 Maine, 165.

In support of the other objection to the declaration, the defendants rely on the rule, adhered to in *Shorey* v. *Chandler*, 80 Maine, 409, that all affirmative, traversable facts should be averred as occurring on some particular day. That rule applies where the contract declared upon or the tort alleged was consummated on a particular day, and does not preclude a generality of averment in respect to matters which do not affect the substance of the contract or constitute the gist of the offense. Sometimes the fact of demand, or notice, or of payment or performance, and the like, may be averred in a general way. In mixed and real actions no particular day need be alleged in the declaration. Gould Pl. c. 3, § 99. The demandant may allege his own seizin and a disseizin by the tenant as occuring within the last twenty years. R. S., ch. 104, § 2. So in complaints of forcible entry and detainer, notice to quit, and in actions on insurance policies, due notice and proof of loss, may be alleged in general terms. *Conway Fire Ins. Co.* v. *Sewall*, 54 Maine, p. 356.

We think, when a statute requires a thing to be done within a period of time, it is usually enough to allege performance within that period. A general fact may be alleged generally. In the present case a notice was to be given, not on any special occasion or day, but within fourteen days after a particular event and the required notice is so alleged. Another instance of alleging notice in general terms occurs in the further allegation in this same declaration, that the highway surveyor had twenty-four hours' notice of the defect, without averring on what day the notice was received. It seems to have been held in *Dexter Savings Bank* v. *Copeland*, 72 Maine, 220, that an allegation that an executor had written notice of a creditor's claim more than thirty days before action brought against him would be sufficient to sustain the action. It would, no doubt,

have been more exact pleading had the present plaintiff alleged on what day his notice was communicated to the assessors, but we are of opinion that the declaration, as it is, is practically sufficient.

Exceptions sustained.

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

JACOB ROBERTS, JUNIOR, and another, in equity,

vs.

WILLIAM H. H. STEVENS, and another.

84 325
98 58

Penobscot. Opinion March 10, 1892.

Will. Creditor's Bill. Equitable Attachment. Spendthrift Trust. Alienation. R. S., c. 68, § 7; c. 77, § 6, cl. 10.

A testator may so give to his son for life the annual income of a trust estate, that the life tenant cannot alienate or his creditors reach it.

To be effective such must be the clear intention gathered from the whole will construed under the light of circumstances.

ON REPORT.

This was a creditor's bill to reach, and satisfy in payment of plaintiffs' judgment, the income of the defendant Stevens in the hands of his co-defendant, executor of Stevens' father's will; also to enjoin payments from the estate to Stevens.

The case is stated in the opinion.

Laughton, Clergue and Mason, for plaintiffs.

Jurisdiction: R. S., c. 77, § 6, cl. 8, 10; 1 Sto. Eq. 33.

An absolute, vested, equitable estate is assignable and liable to claims of creditors of the *cestui que trust*; and a vested, equitable estate can be rendered non-assignable and removed from the reach of creditors only by the expressed intention of the founder of the trust. Counsel cited and commented upon: *Sparhawk* v. *Cloon*, 125 Mass. 263; *Lord* v. *Harte*, 118 Mass. 271; Perry on Trusts, § § 386, 386 a, 388; 2 Sto. Eq. § 974, 974 a; *Palmer* v. *Stevens*, 15 Gray, 343; *Ames* v. *Clark*, 106 Mass. 573; *Nichols* v. *Levy*, 5 Wall. 433; *Nichols* v. *Eaton*, 91 U. S. 716; *Hyde* v. *Woods*, 94 U. S. 523; *Spindle* v. *Shreve*, 111 U. S. 546; *Broadway Nat. Bank* v. *Adams*, 133 Mass. 170; Gray's Restraints, § § 134, 277, 279.

Appleton and Chaplin, for defendant Stevens.

VIRGIN, J. The complainants are judgment creditors of the defendant Stevens, and the executor of the will of Stevens' father is the other defendant.

The remainder of the estate of the testator, after the payment of certain legacies, was given to his executor, to hold in trust during the lives of his three sons and of certain life annuitants.

After the payment of the life annuities from the income of the trust estate, the testator directed the remainder of such income to be divided among his living sons, (of whom the defendant is one,) and the families of such of his sons as might have deceased and left one child or more, until the expiration of the trust. After the trust was terminated the remainder of his estate was to go to his grandchildren equally.

The bill, founded upon R. S., c. 77, § 6, cl. 10, seeks to reach and apply, in payment of the complainants' judgment, Stevens' income of the trust estate, as the same is received by the trustee, until their debt with interest and the costs of this suit shall be satisfied; and in the meantime to enjoin the trustee from paying the life tenant.

The decision of two questions is involved: (1,) Does a proper construction of the will disclose the testator's intention to secure to his son the life enjoyment of the income of a trust estate and its immunity from his son's creditors; and (2,) If it does, can that intention be made effectual.

The clause in the will principally relied upon by the defendant is as follows:

"And I hereby enjoin it upon all legatees, annuitants and other parties interested in the provisions of this will, not to make any arrangement or any agreement for a change in such provisions of the trust under this will, or to assign, or in any way, directly or indirectly, to transfer or make over any claim or rights they may have by virtue of this will, or to pay to any other person any legacy or annuity or any part thereof, than to such persons as are entitled to the same by virtue hereof, on the penalty of the forfeiture of the property or sum so assigned or paid, to go to that part of my estate which is applied to the

benefit of those persons interested under the residuary clauses of this will, other than such as shall make said payment or assignment."

The particular prevailing intention which permeates and pervades these verbose provisions seems to be that the testator's property shall go not only in sums as he had thereinbefore directed, but to the identical persons named and to no others. To be sure, none of the provisions declares *in totidem verbis* that his son's interest in the trust estate shall be without the reach of his creditors. Nor are such express words essential though many wills contain them. Generally, wills are to be construed in accordance with the intention of the testator gathered from the whole instrument construed in the light of circumstances. *Fox* v. *Senter*, 83 Maine, 295 ; *Postlethwaite's App.* 68 Pa. St. 477.

In the analogous cases of vesting property in a married woman for her separate use and disposal, the whole current of authority holds that no particular form of words is necessary. The intention though not expressed in terms, may be inferred from the nature of the provisions annexed to the gift. "The court will examine the whole instrument and look rather to the intent manifested than to the language employed." *Lippincott* v. *Mitchell*, 4 Otto, 770 ; *Bland* v. *Davis*, L. R. 17, Ch. D. 794, 797 ; Pom. Eq. § 1102, and notes for various expressions held sufficient in English and American cases. *Hulme* v. *Tenant*, and notes in 1 Lead. Cas. Eq. *394.

The same rule applies to equitable life estates in this country. Thus in *Baker* v. *Brown*, 146 Mass. 369, the court say that the provision securing the income of a trust against alienation voluntary or involuntary is "sufficient if the intention is clearly gathered from the instrument when construed in the light of circumstances," which is repeated in *Slatterly* v. *Wason*, 151 Mass. 266. See also *Maynard* v. *Cleaves*, 149 Mass. 307. "If it appear from the will," said Veazey, J., "that it was the intent of the testator that the beneficiary should have nothing she could dispose of, it will be as effectual to protect the trust as if there were an express claim against alienation." *Barnes* v. *Dow*, 59 Vt. 530, 543. So where the trustee was to collect the rents and

profits and "pay the same into the testator's son's own hands and not into another's whether claiming by his own authority or in any other capacity," the income was held to be free from the claims of alienees or creditors. *Smith* v. *Towers*, 69 Md. 77.

In *Grothe's App.* 135 Pa. St. 586, 596, decided in 1890, where the balance of a certain share of the testator's property, after deducting taxes, etc., was given to a trustee to pay the interest annually accruing thereon to one of his sons, named, and there was no clause protecting the income from attachment, the court, construing the will in the light of all the circumstances surrounding the testator, the son's insolvency, etc., held that the income was exempt from the son's creditors, "though such intent was not clearly expressed by the scrivener."

What did the testator intend by the verbose provisions before quoted? What did he intend to be subject to the penalty of forfeiture, and under what circumstances?

The injunction is imposed upon "all legatees and annuitants," (1,) "not to make any arrangement or agreement for a change in the provisions of the trust," or (2,) "to assign, or in any way, directly or indirectly, transfer or make over any claim or rights they may have by virtue of this will." In other words, that no one entitled to a benefit under the trust or any other provision of the will, shall make any disposition of whatever he is thereby entitled to, otherwise than as the will directs. Or, as in *Smith* v. *Towers*, *supra*, each benefit shall be received in the beneficiary's own hands and in no others. The evident design was that no beneficiary, upon whom the testator bestowed his bounty, should alienate it voluntarily or involuntarily; for involuntary alienation is an indirect assignment, transfer or making over of property. A son who needs protection from his own improvidence, or incapacity for self protection, might very readily evade the restriction by creating a formal debt and allowing his *quasi* creditor to secure it by a bill of this character upon "any claim or right" which the willing or overreached debtor might have by virtue of the will of his father, and thus "indirectly assign" what was intended for his sole personal benefit.

Moreover, the injunction is not limited to "legatees and annuitants" but it includes "all other parties interested in the

provisions of this will." Whom did the testator thereby mean? "All legatees" might well be considered as including his sons among others; for the gift of the income of a particular fund for life is a legacy. Wms. Exr's, (6th Am. ed.) 1192, 3 & 4 and note *n*. If there were any doubt that he meant thereby to include them, they were evidently included in "other parties interested," etc.

Furthermore, the answer shows that the property given to the executor in trust was stores in Bangor. And since the trustee has the responsible duties of caring for, managing the property, collecting the rents and profits thereof and paying over the net proceeds to the respective beneficiaries, the trust is an active trust (Pom. Eq. § 992); the trustee holds the legal title of the corpus of the property by virtue of the devise to him (R. S., c. 68, § 7); and he is entitled to reasonable commissions for the faithful discharge of such duties. While, therefore, the trustee may not, in the technical sense, be "interested" as a beneficiary—that term is not contained in the clause—the testator evidently did include him among the "parties interested in the provisions of the will."

The very next clause in the injunction would seem to make it reasonably certain that the testator had the trustee in his mind when he dictated it. For not only does he enjoin the "legatees, annuitants and other parties not to assign, transfer," etc., but he then goes further and enjoins somebody among those thus designated, not to "pay any part of the legacy or annuity" to any person other than such as are entitled under the will. That language was selected by the testator to carry out some purpose which he had in view, and it must be given some meaning. No one mentioned in the will other than the trustee could "pay" any part of a legacy or annuity to any person other than the rightful beneficiary. Payment of a legacy could only be made from the income of the trust property, and the trustee alone had the control of the funds. When a legacy or annuity was once paid by him to the party entitled, the latter might then use the money as he saw fit. It was then, and not before then, the beneficiary's absolute property. *Broadway Nat. Bank* v.

Adams, 133 Mass. 170. It was no longer a legacy or an annuity or any part thereof. Its identity was gone. For whatever purpose, or to whomsoever the beneficiary might upon receiving it thereafter dispose of it, his act could in nowise be deemed in contravention or an evasion of the injunction. That was fully complied with when the beneficiary received what belonged to him, and it was no longer subject to any provision of the will.

Again, the earlier provision in the will directing his executors to "pay to" certain persons named, "any amount that may be due them from" his two other sons, "said sums so paid to be deducted from their interest in his estate," affords additional evidence that the testator did not intend that the trustee should pay the defendant-son's debts.

But it is said that this construction would empower the trustee *suo motu* to forfeit the interests of all the particular beneficiaries to the residuary legatees. Not so. For such an act on the part of the trustee would be a gross violation of his trust and a fraud upon such beneficiaries. *Draper* v. *Stone*, 71 Maine, 175, 178; *Ash* v. *Hare*, 73 Maine, 401, 403; *Smith* v. *Bowen*, 35 N. Y. 83. Any such attempt could be enjoined. Adams Eq. 207. No act of a trustee can operate to destroy the interest of the *cestui que trust*, without the latter's consent. *Hatz's Appeal*, 40 Pa. St. 209. If the trustee should, with the defendant's consent, pay, when due and payable, any part of the latter's interest, to another person, the sum so paid might possibly become forfeited in accordance with the provision of the will. But if paid without such consent, such payment would be a violation of the trust on the part of the trustee and the sum so paid would not become forfeited, but the trustee would be obliged to make it good. Sto. Eq. § 1263. We are of opinion, therefore, that the testator did intend to restrain not only his defendant son from alienating his interest under the will, but also the trustee from paying any part thereof to any other person. Such being the fair construction of the will, this court will not direct the trustee to act in contravention of such construction, and thereby substitute its own will for that of the

testator, unless these provisions of the will shall be found to be unwarranted by the law.

Are they unlawful? There is neither any decision of this court nor statutory provision in this State pertaining to the subject. There is a conflict among the authorities in this country, though in England they all seem to be opposed to any such restrictions as the testator made. The latter authorities hold in substance that the interest of a life tenant cannot continue to exist without its incidents among which is that of alienation; and that a creditor of a *cestui que trust* can reach in equity whatever the latter has the right to demand from his trustee. In *Brandon* v. *Robinson*, 18 Ves. 429, money was invested in the names of trustees, the income to be paid into A's own hands to the intent that the same should "not be grantable, transferable or otherwise assignable by way of anticipation," with a gift over on A's death. On A's becoming bankrupt, the assignees were held entitled to his interest. This decision was preceded and followed by numerous others to the same purport.

But while the decisions in several of the state courts are in accord with the English rules, others together with two of the federal Supreme Court uphold such trusts. And the legislatures of four or five states sanction their validity by express statutes, though Kentucky by legislative enactment forbids them. *Parson* v. *Spencer*, 83 Ky. 386. But whatever may be the decisions in England and some of the state courts, the other view held by the United States Supreme Court and other state courts is more in accordance with our own which we think may be properly based upon either of two grounds.

The general rule, that rights incidental to ownership of property attach alike to equitable and legal estates, has been materially modified by equity. In direct antagonism to, and for the avowed purpose of evading what were deemed certain, harsh and unjust dogmas of the law, equity called into existence an estate which enabled a married woman to hold equitable interests in property independently of her husband's control. But as this estate brought with it the enjoyment of all its incidents including the right of alienation, an unsatisfactory and imperfect pro-

tection was thereby afforded her because of the influence and moral coercion of her husband. It was, therefore, deemed essential to go further and modify this estate by inserting in settlements and wills a clause restraining the wife from anticipating or alienating her separate property. This was first done in a certain settlement by advice of Lord Thurlow, who was a trustee. *Pybus* v. *Smith*, 3 Bro. C. C. *340 (Perkins' ed.), and note. And the reason why she can thus be restrained, as stated by Cotton, L. J., is "because equity can modify the incidents of a separate estate which is the creation of equity." *Pike* v. *Fitzgibbon*, L. R. 17 Ch. D. 454. This doctrine has been repeatedly stated in numerous cases. In *Tullett* v. *Armstrong*, 4 Myl. and Cr. 377, Lord Cottenham, C., said: "The power to prohibit anticipation could only have been founded upon the power of this court to model and qualify an interest in property which itself had created." . . . "The separate property and the prohibition of anticipation are equally creatures of equity and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other." . . "When this court first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial and it prevailed. It being once settled, that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to the new estate; and it was found, as part of such law, that the power of alienation belonged to the wife and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property, supported the validity of the prohibition against alienation." Thus the doctrine was placed upon the long, and well recognized, broad ground that a court of chancery had the inherent power to modify estates of its own creation.

In the absence of any statute or decision in this State to the contrary, we have no hesitation in extending the principle to cases like the present. This view is sustained by a very able opinion of the Supreme Court in Missouri; and in closing this branch of the case we can do no better than adopt the language of Sherwood, J., in that case: "If a court of equity, in order

to protect one class of trusts, creatures of its own creation, and by so doing to effectuate the intention of the author of the gift, exercises its own inherent power to model and qualify an interest in equitable property without regard to the rules which the law has established for regulating the enjoyment of property in other cases, it is difficult to see why, with a like object in view, *i. e.*, the effectuation of the gift just as its author intended it to be effectuated, such court may not lay down and declare a rule, in such a case as this, which shall be equally effectual in preventing the intention of the donor from being thwarted — a rule which injures or defrauds no one, which violates no rule of public policy, and which gives stability and protection to a provision which, originating in the warmest ties of affection, seeks to afford to the beneficiary a sure and unfailing refuge against the vicissitudes of fortune. If a court of equity, as already seen, will guard such a trust in one case with jealous solicitude, why should it fail to do so in another, in circumstances equally meritorious?" *Lampert* v. *Haydel*, 96 Mo. 439.

Another view, arriving at the same result, is taken by the highest court in the country as well as by the Supreme Courts of several of the states in the Union. Thus Miller, J., said: "We see no reason, in the recognized nature and tenure of property and its transfer by will, why a testator who *gives* without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life and the vicissitudes of fortune, and even his own improvidence or incapacity for self-protection, should not be permitted to do so." *Nichols* v. *Eaton*, 91 U. S. 716, 727. See also *Hyde* v. *Woods*, 94 U. S. 523.

"Spendthrift trusts" were created in Pennsylvania in Chief Justice Gibson's time and have been approved by numerous decisions in that state, among the latest of which is *Grothe's App. supra.*

The court, in Massachusetts, has frequently held that the founder of a trust may give an equitable life tenant a qualified estate in income which he cannot alienate and his creditors cannot reach. In *Broadway Nat. Bank* v. *Adams*, 133 Mass. 170, 173, the court said: "By the creation of a trust like this, the property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation; the *cestui que trust* takes the whole legal title to the accrued income at the moment it is paid to him." . . . "We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary." See also *Baker* v. *Brown*, 146 Mass. 369; *Sears* v. *Choate*, 146 Mass. 395, 398; *Maynard* v. *Cleaves*, 149 Mass. 307, 308; *Slatterly* v. *Wason*, 151 Mass. 266. To the same purport see also *Smith* v. *Towers*, 69 Md. 77; *Barnes* v. *Dow*, 59 Vt. 530, 543.

Our opinion, therefore, is that this bill must be dismissed. No costs for either party.

Bill dismissed.

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

MARY A. MOSHER *vs.* INHABITANTS OF SMITHFIELD.

Somerset. Opinion March 15, 1892.

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Town. Way. Negligence. Burden of proof.

In an action against a town to recover for injuries received in consequence of a defect in the highway, it is incumbent on the plaintiff to prove that he was in the exercise of due care at the time the injury was received.

It is an affirmative fact to be established, as an essential part the plaintiff's case, and before the defendants are required to set up a defense, that at the time of the accident the party himself, or, as in this case, the driver, was in the exercise of ordinary care; and if on the whole testimony on this point the weight of evidence is clearly against the plaintiff, a new trial will be granted.

The fault of the town must be the sole cause of the injury.

Where different inferences are deducible from the same facts, equally consistent with those facts, it cannot be said that a plaintiff has maintained the proposition upon which alone he would be entitled to recover.

In such case the inference of negligence is as consistent as the inference of due care.

ON MOTION.

Action on the case to recover damages alleged to have been been sustained by a defective highway in the town of Smithfield. The jury returned a verdict for the plaintiff of two thousand dollars.

The case is stated in the opinion.

Baker, Baker and Cornish, for plaintiff.

Walton and Walton, for defendants.

FOSTER, J. This is an action to recover damages for personal injuries claimed to have been occasioned by a defective highway in the defendant town. A verdict was rendered for the full amount which the law allows, and the defendants ask to have the verdict set aside because there is no evidence of due care on the part of the plaintiff, or her father who was driving the team, at the time the injury was received.

The alleged defect consisted of a hole in the plank on the Smithfield bridge across Great Meadow stream, which is the dividing line between the towns of Smithfield and Rome. The bridge is about thirteen feet in length. The hole was variously estimated by plaintiff's witnesses from one foot to two and a half feet in length, and from two to four inches in width in the widest part, and was situated on the northerly side of the horse-path,— some of the witnesses locating it even northerly of the north wheel track. The road at that point runs easterly and westerly and descends as the bridge is approached from the east or Smithfield side.

The plaintiff was riding in a single wagon with her father who was driving, and the horse was trotting as they descended the hill from the east in approaching the bridge.

The only direct evidence as to the occurrence appears in the plaintiff's deposition. Her own account of what happened up to the time she was thrown out and injured is this: "We were coming to the Smithfield bridge,— there is a descending,— coming down the hill. The horse was trotting down the hill,— the horse, she touched on the bridge,— she was on the bridge

somewhere, either the sixth or seventh plank, I can't exactly tell which. I saw the horse when she pitched forward and I didn't see anything more at all." She then goes on to relate what occurred after the accident. She says, the horse fell down upon the bridge, and in answer to a question by her counsel, whether she saw what it was that caused the horse to go down, she replies that she did not. She states that as the horse stepped on to the bridge, that is the last she knew about it.

The plaintiff founds her right of recovery upon allegations which it is essential for her to maintain by evidence having legal weight. Among other allegations which she must support by proof, in order to entitle her to recover, is that of ordinary care. It is an affirmative fact to be established by her as an essential part of her case, and before the defendants are required to set up a defense, that at the time of the accident the party herself, or, as in this case, the driver, was in the exercise of ordinary care; and if on the whole testimony on this point, the weight of evidence is clearly against the plaintiff, a new trial will be granted. This principle is supported by numerous decisions, a few only of which need be cited. *Merrill* v. *Hampden*, 26 Maine, 234; *Gleason* v. *Inhab. of Bremen*, 50 Maine, 222; *Dickey* v. *Maine Tel. Co.* 43 Maine, 492, 496; *Benson* v. *Titcomb*, 72 Maine, 31; *Wormell* v. *Maine Central R. R. Co.* 79 Maine, 397, 406, 407; *Murphy* v. *Deane*, 101 Mass. 455; *Trow* v. *Vermont Central R. Co.* 24 Vt. 487; *Birge* v. *Gardiner*, 19 Conn. 507.

The defendants are not bound to show that plaintiff's carelessness or want of ordinary care was the cause of the injury. It must affirmatively appear that ordinary care was exercised in passing over the highway, or that the injury was in no degree attributable to any want of care on her part or that of the driver. The fault of the town must be the sole cause of the injury.

In this case, there is no direct evidence either of care at the time of the accident, or the contrary. Nor are the circumstances of the accident sufficiently disclosed to warrant any inference either of care or negligence. Without evidence, or such a disclosure of the facts and circumstances attending the trans-

action, from which due care could properly be inferred as a fact, the burden resting on the plaintiff to establish this fact, the plaintiff would not be entitled to a verdict. All the circumstances which appear are equally consistent with negligence or care in the manner of driving at the time of the accident. No such legitimate conclusions can be drawn from the evidence disclosed as to warrant the inference that due care was in fact exercised. *Crafts* v. *Boston*, 109 Mass. 519, 521.

And where different inferences are deducible from the same facts which appear, and are equally consistent with those facts, it cannot be said that the plaintiff has maintained the proposition upon which alone she would be entitled to recover. This doctrine is clearly enunciated in the case last cited, which was for personal injuries occasioned by a defect in a highway. The same principle is laid down in *Smith* v. *Bank*, 99 Mass. 605, 612.

In the present case the plaintiff's father was driving the horse. It was incumbent on the plaintiff to establish the fact that he was driving with due care. This rule applies because the action is against a town, a statutory action, unlike the case of *State* v. *B. & M. R. R. Co.* 80 Maine, 430, 447. He was sitting at the right of the plaintiff,—on the side nearest to the alleged defect. He was not called, was not in attendance at court, and no claim is made that he was unable to attend, and no reason assigned why his testimony was not procured. He is the very person who could throw light upon what occurred immediately prior to and at the very time the injury was received by this plaintiff. It lay with him, in a great measure, to disclose facts as to the manner of his driving, from which the jury might have drawn a conclusion either of due care or negligence on his part. But his lips remained silent, notwithstanding the burden of proving due care as an affirmative proposition rested on the plaintiff. How did this accident happen? No reason is assigned other than from inference. Nobody testifies that the horse went into the hole. The driver is not produced to testify to his manner of driving. For aught that appears, he may not have controlled the horse at all, or tried to do so. We do not

know what he did or whether he did anything,— or whether he saw the hole or not.

There is evidence in the case that there was the appearance of a horse having fallen in the road just before entering upon the bridge. Two witnesses testify to this, and to finding a small strap in the road at that point, a short time after the accident. The plaintiff says the horse fell upon the bridge. But whether the horse ever came in contact with the alleged defect, thereby causing the injuries to this plaintiff, is left to conjecture. The horse may have stumbled from some cause entirely independent of the alleged defect. The case was left, therefore, to be decided by mere inference, without facts to determine which of the inferences, was correct. *Smith* v. *Bank*, *supra*.

For the reasons stated, the court is of the opinion that the verdict must be set aside.

Motion sustained. New trial granted.

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

CHARLES T. FOX, Administrator, *de bonis non*,

vs.

JOHN BENNETT, and another, Executors.

York. Opinion March 18, 1892.

Pleading. Demurrer. Leave to plead anew.

When a defendant at the time of the filing a demurrer to the declaration subsequent to the first term, expressly stipulates that he shall have leave to plead anew upon payment of costs, if the demurrer be overruled, and the court assents to such stipulation in the presence of and without objection from the plaintiff, the court has the power to carry out its stipulation and receive the plea.

ON EXCEPTIONS.

This was an action of trover for the conversion of two promissory notes, and comes into this court upon the defendants' exceptions as appears in the opinion.

Fox and Gentleman, *with G. F. Clifford*, for plaintiff.

Fairfield and Moore, for defendants.

EMERY, J. This was an action against two defendants as executors. The writ was served on only one defendant before entry, and was entered at the return term, when that defendant appeared. At the return term the plaintiff obtained an order of notice upon the other defendant to appear at the then next term. This notice was served upon the other defendant and he appeared at the then next term as required by the order.

At this latter term, both defendants having appeared, their attorney desired to demur to the declaration, and claimed that under the above circumstances the then term was the first term for that purpose; and that he could plead anew if the demurrer should be overruled. But to guard against the possibility that the court might rule otherwise, he stipulated "for leave to plead anew upon payment of costs, if the demurrer should be overruled." The court granted such leave as stipulated for, plaintiff's attorney being present and making no objection; and the attorney for the defendants filed a general demurrer to the declaration.

The demurrer was then joined and presented to the court, and overruled. The defendants' attorney thereupon paid into court the plaintiff's costs and tendered a plea of the general issue with a brief statement, under the stipulated leave to plead anew; and also moved for leave to file the same. The court ruled as matter of law, that it had no discretionary power, under the circumstances, to allow the defendants to plead anew, and that it could not, if it would, receive the plea. The defendants excepted.

Without the stipulation at the time of filing the demurrer for such leave to plead anew, the court might have had no power to permit a plea to be filed after demurrer overruled, assuming that the term at which it was filed was the second term. *Fryeburg* v. *Brownfield*, 68 Maine, 145. Without passing upon the question whether the demurrer was filed at the first term, we think that under the stipulation, the court had the power to receive the plea in its discretion.

The attorney for the defendants was desirous of having the sufficiency of the declaration determined before going to trial,

and yet was apprehensive that the court might not only overrule his demurrer but also rule that the demurrer was filed too late, and so award final judgment against him without a hearing on the merits. To guard against this possible peril, he at the time of filing the demurrer, stated the doubt and danger, and stipulated for leave to plead anew in case his demurrer was overruled. To this stipulation the court expressly, and the plaintiff impliedly assented. From his standing by and making no objection to the order, the plaintiff must be held to have assented thereto. An objection from him would undoubtedly have prevented the order. He should have made his objection known if he had any. His silence gave consent.

Without the stipulation and assent, the attorney for the defendants presumedly would not have filed the demurrer; with the stipulation and assent he did file it. The matter being one of procedure only, the court having full jurisdiction of the cause and the parties, there must be some power in the court to relieve the party who has trusted it,— some power to rectify errors in procedure. *Lothrop* v. *Page*, 26 Maine, 121; *Woodcock* v. *Parker*, 35 Maine, 138. The most appropriate exercise of that power would be to carry out the order or stipulation, made with the assent of one party, and relied and acted upon by the other party. We think the court has the power to do so.

We only hold, however, that under the circumstances of this case the court has the power to permit the defendant to plead anew. Whether it is proper to exercise that power is for the justice presiding at *nisi prius*. The other exceptions are overruled but the exception above considered must be sustained.

Exception sustained.

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

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JOSHUA G. HUBBARD *vs.* EVERARD H. GREELEY, and others.

Hancock. Announced at July term, 1891, Western Law District. Opinion March 24, 1892.

Deed. Delivery. Escrow. Attorney.

A deed cannot be delivered directly to the grantee himself, or to his agent or attorney, to be held as an escrow.

Delivery to the attorney as such is equivalent to a delivery to the grantee himself, and it is not competent for the grantor, or those claiming under him by a subsequent conveyance, to show by oral evidence that a condition was annexed to the delivery, for the non-performance of which the deed never became operative.

The record of a deed, the original being lost, describes a parcel, with metes and bounds beginning thus: "undivided half of one and also one other parcel of land," &c. There was evidence that the words "undivided half of" were interlined. *Held*: That one undivided half of the parcel was conveyed by the deed, and not the whole.

ON REPORT.

This was a real action for the recovery of a tract of land on Mt. Desert Island containing over forty-six acres, and called the Smallidge lot. Writ dated February 28, 1888. The defendants claimed title by a regular chain of deeds, all seasonably recorded. Among other deeds they introduced one from Seavy and Clark to T. and R. W. Boyd, dated January 26, 1878, and recorded July 15, 1878, which the plaintiff claimed had been placed in escrow and was improperly delivered.

The plaintiff claimed title from deed of the Boyds, dated May 27, 1876, recorded September 24, 1887; deed of Seavy to Crowell dated September 15, 1874, but not recorded; deed of Clark and Crowell to himself, dated October 1, 1878, recorded August 25, 1879; and deed from Seavy to himself dated September 6, 1887, recorded September 9, 1887.

It was admitted that the premises in 1872, belonged to one Swazey, under whom both parties claimed title. By *mesne* conveyances the title stood February 12, 1874, in Seavy, Clark and Boyds, one third each. The principal issue between the parties turned on the question whether the plaintiff could properly show that the deed of Clark and Seavy, dated January 26, 1878, had been placed in escrow and was improperly delivered. The defendants claiming that they were *bona fide* purchasers, for value and without notice, objected to the admission of the evidence offered by the plaintiff on this point. The facts are found in the opinion.

A question of construction of this deed also arose, which is stated in the head note, relating to the quantity of interest in the land conveyed.

It was conceded that if the court decided against the plaintiff on the first question and in favor of the plaintiff upon the second question (one half of the "Smallidge" lot conveyed by that deed, making five-sixths in the Boyds), the plaintiff would be entitled by reason of his conveyances to the remaining one sixth.

The parties also stipulated in the report that the case should be sent back for trial upon questions of fact, if deemed expedient by the law court.

Wiswell, King and Peters, for plaintiff.

A deed delivered without the consent of the grantor is absolutely void; it is like a forged or a stolen deed and passes no title to the grantor which he can part with. The principle, that where one of two innocent parties must suffer, he whose act has caused the loss must bear it, does not apply, because, principally, the depositary is not the agent of the grantor any more than of the grantee, he is simply a person agreed upon by both parties to hold the escrow until the happening of a particular event. Even if he was the agent of the grantor, as has often been insisted upon in argument, but not sustained by the authorities, he would be an agent only with limited authority, which authority is particularly understood by the grantee. There is no negligence upon the part of a person in placing a deed as an escrow in the hands of a responsible person agreed upon by the parties. There is no more equity in favor of the innocent purchaser than there is in favor of the person whose deed has been delivered without his knowledge and against his consent. The case is similar to that of a person who makes a deed, executes it and keeps it in his possession ready for delivery when certain conditions have been complied with. If such a deed should be stolen for or by the grantor, it couldn't for a moment be claimed that it would pass any title to the grantee which he could convey to an innocent purchaser. We think the whole distinction lies in the difference beween a voidable deed and a void deed. If a deed is delivered with the consent of the grantor, even if that consent is obtained by fraud or even perhaps by duress, and under such circumstances that the grantor could reinvest himself with the title, yet until the deed is avoided, the title

passes and the grantee can transfer that title to a purchaser for value, without notice, who can hold against the person who has been defrauded of his property; this is not true as to a forged deed, a stolen deed, or a deed delivered without the consent of the grantor.

Counsel cited: *Everts* v. *Agnes*, 4 Wis. 343; *Tisher* v. *Beckwith*, 30 Wis. 55 (11 Am. Rep. 546); *Chipman* v. *Tucker*, 38 Wis. 43 (20 Am. Rep. 1); *Taft* v. *Taft*, 59 Mich. 185 (60 Am. Rep. 291); *Harkreader* v. *Clayton*, 56 Miss. 383 (31 Am. Rep. 369; *Smith* v. *Bank*, 32 Vt. 341 (76 Am. Dec. 179); *VanAmringe* v. *Morton*, 4 Wheat. 382 (34 Am. Dec. 517); *Crocker* v. *Belangee*, 6 Wis. 645 (70 Am. Dec. 489); *Stanley* v. *Valentine*, 79 Ill. 548; *Black* v. *Shreve*, 13 N. J. Eq. 455; *Shirley* v. *Ayres*, 14 Ohio, 308 (45 Am. Dec. 546); *Rhodes* v. *School District*, 30 Maine, 110; *Jackson* v. *Sheldon*, 22 Maine, 570; 3 Wash. R. P. pp. 321–323.

Hale and Hamlin, for defendants.

WALTON, J. Whether the grantee named in a deed delivered as an escrow, who has wrongfully obtained it and put it on record, can convey a good title to a *bona fide* purchaser, is a question in relation to which the authorities are in conflict.

In *Blight* v. *Schenck*, 10 Pa. St. 285 (51 Am. Dec. 478), the court held, in a full and well reasoned opinion, that the title of a *bona fide* purchaser could not be defeated by proof that one of the deeds through which he claimed title was a wrongfully-obtained and a wrongfully-recorded escrow. The court rested its decision on the fact that the custodian of an escrow is the agent of the grantor as well as the grantee, and if one of two innocent persons must suffer by the wrongful act of the agent, he who employs an unfaithful agent, and puts it in his power to do the act, must bear the loss; that the agent has the power to deliver the deed, and, if he delivers it contrary to his instructions, he will be answerable to his principal, and it is, therefore, reasonable that the latter, and not the innocent purchaser should bear the loss.

In *Everts* v. *Agnes*, 4 Wis. 343 (65 Am. Dec. 314), the con-

trary was held. But in the latter case the court appears to have acted in ignorance of the decision in the former case, and in ignorance of the equitable doctrine upon which it rests, although the former decision was made six years before the latter. This, as it seems to us, was an unfortunate oversight; for the former decision is supported by reasoning so strong, and, as it seems to us, so satisfactory, we cannot resist the conviction that if the attention of the court had been called to it, and the principles on which it rests, a different conclusion would have been reached; and the subsequent decisions, which have followed the lead of that, would have no existence.

But, be this as it may, the authorities all agree that a deed cannot be delivered directly to the grantee himself, or to his agent or attorney, to be held as an escrow; that if such a delivery is made, the law will give effect to the deed immediately, and according to its terms, divested of all oral conditions. The reason is obvious. An escrow is a deed delivered to a stranger, to be delivered by him to the grantee upon the performance of some condition, or the happening of some contingency, and the deed takes effect only upon the second delivery. Till then the title remains in the grantor. And if the delivery is in the first instance directly to the grantee, and he retains the possession of it, there can be no second delivery, and the deed must take effect on account of the first delivery, or it can never take effect at all. And if it takes effect at all, it must be according to its written terms. Oral conditions can not be annexed to it. It will, therefore, be seen that a delivery to the grantee himself is utterly inconsistent with the idea of an escrow. And it is perfectly well settled, by all the authorities, ancient and modern, that an attempt to thus deliver a deed as an escrow, can not be successful; that in all cases, where such deliveries are made, the deeds take effect immediately and according to their terms, divested of all oral conditions.

And it is equally well settled that, if the delivery is to one who is acting at the time as an agent or attorney of the grantee, the effect is the same. In *Worral* v. *Munn*, 5 N. Y. 229, the delivery was to an agent of the grantee; and in *Duncan* v.

Pope, 47 Ga. 445, the delivery was to the attorneys of the grantee; and it was held in both cases that the deeds took effect immediately, divested of all oral conditions.

And the same principle has been extended to official bonds. *Ordinary of N. J.* v. *Thatcher*, 12 Vroom, 403 (32 Am. Rep. 225); *State* v. *Peck*, 53 Maine, 284. These are instructive cases upon this branch of the law; for they illustrate the danger of letting in oral testimony to control the delivery of written instruments. In both cases witnesses were ready to swear to enough to render the instruments as worthless as so much waste paper. But in the New Jersey case the bond had been delivered to the county surrogate, and the court held that he was the agent of the obligee, and that a delivery to him, in contemplation of law, was equivalent to a delivery to the obligee, himself; and, on that ground, the court held that the evidence was inadmissible. The law reasonably provides, said the court, that the instrument delivered shall be conclusive with respect to its contents, and the intention of the parties; and in the same manner, and in view of the same considerations, that the act of delivering the instrument shall be equally conclusive; that the danger to be apprehended from fraud and false swearing, as well as from the infirmity of human memory, are as great in the one case as in the other; that if a condition could be annexed to the delivery of a deed, when made to the obligee himself, or to his agent or attorney, the very essence of the transaction would be left to depend on the memory and truthfulness of the bystanders; and that there is manifest wisdom in the rule that in such transactions the law will regard, not what is said, but what is done.

It is easy to see, said the court, in *Miller* v. *Fletcher*, 27 Gratt. 403 (21 Am. Rep. 356), that the most solemn obligations given for the payment of money would be of but little value as securities, if they might, at a future day, be defeated by parol proof of conditions annexed to their delivery, and not performed; and that a doctrine of this kind would, perhaps, be still more mischievous, if applied to deeds of real estate; that if such a doctrine should prevail, the title of the grantee would be liable

to be defeated at any time by evidence of non-performed parol conditions annexed to the delivery of the deed; and that in such cases there would be no safeguards against perjury or the mistakes of "slippery memory," and all titles would be as unstable as sand upon the seashore.

The principal contention in the present case is whether one of the deeds through which the defendants have derived their title was legally delivered. The deed is from George E. Seavey and Nathaniel H. Clark to Thomas Boyd and Robert W. Boyd. It is dated January 26, 1878, was acknowledged the same day, and recorded July 15, 1878.

The plaintiff claims that this deed was delivered as an escrow; and, although acknowledged and recorded, never became operative. Upon the proofs in the case, we do not think such an attack upon the defendants' title is permissible. The proof is that the deed was made and accepted in part payment of a debt owing from the grantors to the grantees, and that it was in fact delivered to one G. C. Bartlette, an attorney at law, who had been employed by the grantees to collect the debt; that Bartlette afterward sent the deed by mail to the grantees, and that they caused it to be recorded; and that, at the time of the defendants' purchase, the deed had been on record for more than eight years, its validity apparently uncontested and unchallenged. And it is admitted that the defendants are innocent purchasers for value, and, at the time of their purchase, had no notice of the condition of the title other than that disclosed by the record. Under these circumstances, and for the reasons already given, we think the plaintiff is estopped to deny that the deed was legally delivered. We rest our decision upon the ground that the deed was, in fact, delivered to the grantees' attorney as such, and that such a delivery is equivalent to a delivery to the grantee himself; and that when such a delivery is made, it is not competent for the grantor, or those claiming under him by a subsequent conveyance, to show by oral evidence that a condition was annexed to the delivery, for the non-performance of which the deed never became operative. It seems to us that to hold otherwise would render all deeds of little value as evidence of title.

In *Somes* v. *Brewer*, 2 Pick. 184, a deed of real estate had been obtained by means so fraudulent that the court conceded that, as between the immediate parties, it would be null and void. But the deed had been recorded, and the grantee had conveyed to an innocent purchaser for value, and the court held that the title of the latter must be protected. It is a just rule, said the court, that when a loss has happened, which must fall upon one of two innocent persons, it shall be borne by him who was the occasion of the loss, even without any positive fault committed by him; and the court calls attention to the fact that in Massachusetts (and the law is the same in this State) a deed made in proper form, and duly acknowledged and recorded, is to all intents and purposes equivalent to a feoffment with livery of seizin,—that a transfer of the property is complete by the registry of the deed; that registry is a substitute for livery of seizin, and gives all the notoriety which the law requires. And the court held that a deed, which is in form legal, and apparently complete, if acknowledged and recorded, can not, as against a *bona fide* purchaser from the grantee, be avoided by the grantor, or those claiming under him by a subsequent conveyance. And the court held further that, when a deed has been acknowledged and recorded, if the grantor intends to avoid it for any cause, he must move promptly, and counteract the notoriety of the registry by a public notice of the defect; and, if he fails to do so, that the omission may be regarded as such negligence as will estop him, and those claiming under him by a subsequent conveyance, from contesting the title of a *bona fide* purchaser from the grantee; that if the law were otherwise, there would be no safety in deeds, records, or any other evidence of property.

In *Fletcher* v. *Peck*, 6 Cranch, 133, the opinion of the court was by Chief Justice Marshall. He said: "If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties. But the rights of third persons, who are purchasers without notice, and for a valuable consideration, can not be disregarded. Titles which, according to every legal test, are perfect,

are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect arising from the conduct of those who held the property before he acquired it, of which he had no notice, such concealed defect can not be set up against him. He has paid his money for a title good at law, and he is innocent, whatever may be the guilt of others; and equity will not subject him to the penalties of others' guilt. All titles would be insecure, and the intercourse between man and man seriously obstructed, if this principle were overturned."

It seems to us that this reasoning is sound, and that it is as applicable to a deed delivered to be held as an escrow, as to a deed the execution of which has been fraudulently obtained. *Quick* v. *Milligan*, 108 Ind. 419 (58 Am. Rep. 49).

Escrows are deceptive instruments. They are not what they purport to be. They purport to be instruments which have been delivered, when in fact they have not been delivered. They clothe the grantees with apparent titles which are not real titles. Such deeds are capable of being used to enable the grantees to obtain credit which otherwise they could not obtain. They are capable of being used to deceive innocent purchasers. And the makers of such instruments can not fail to foresee that they are liable to be so used. And when the maker of such an instrument has voluntarily parted with the possession of it, and delivered it into the care and keeping of a person of his own selection, it seems to us that he ought to be responsible for the use that may in fact be made of it; and that in no other way can the public be protected against the intolerable evil of having our public records encumbered with such false and deceptive instruments.

Another question is whether the deed conveys the whole or only an undivided half of the grantor's interest in the demanded premises. We think it conveys only an undivided half. The original deed is not before us. It is said to be lost. We have only an office copy. This copy contains these words: "undivided half of one and also one other parcel of land, situated in said Eden," etc. This is a bad sentence; but there is evidence tend-

ing to show that in the original deed the words "undivided half of" were interlined; and it is not improbable that in recording the deed, they were misplaced. It seems to us that such must have been the fact. But whether so or not, we have the words "undivided half" in the deed, and we can not doubt that they were put there for a purpose, and that that purpose was to describe the interest conveyed. This construction of the deed entitles the plaintiff to judgment for one undivided sixth part of the demanded premises.

Judgment for plaintiff for one undivided sixth part of the demanded premises, and no more.

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

JOSEPH BRECKENRIDGE *vs.* MARY A. H. LEWIS.

Cumberland. Opinion March 23, 1892.

84 349
85 351

Promissory Note. Innocent Holder. Accommodation Indorser. Agency.

One, who intrusts his signature to another for commercial use, that is, to have some business obligation written over it, becomes holden upon a negotiable promissory note fraudulently so written by the person so intrusted with it, and negotiated to an innocent holder.

An accommodation indorser of such note, without notice of its infirmity, who takes it up at maturity in discharge of his own debt to the holder or in consideration of his own note given therefor, may recover the contents thereof from the maker.

An innocent holder, in such case, is one, who has received the note before maturity for value, and without actual knowledge of its fraudulent inception.

ON MOTION AND EXCEPTIONS.

This was an action of assumpsit upon a promissory note. The defendant is the maker, and the plaintiff an accommodation indorser, who, after its dishonor, took up the note and brought suit to recover thereon. The note with the indorsements is as follows: "Boston, November 1, 1887. One year after date I promise to pay to the order of John S. Morse, three thousand dollars, value received.

Witness, Lucretia M. Lewis. Mary A. Lewis."

[Indorsements.] "Waiving demand and notice. October 24, 1888. John S. Morse. Waiving demand and notice. October 25, 1888. Joseph Breckenridge."

The case was tried in the Superior Court, for Cumberland county, and a verdict was returned for the plaintiff. The defendant took exceptions and filed a general motion for a new trial.

There was testimony offered by the plaintiff tending to show that the note in suit was given by the defendant to one John S. Morse, the payee named in said note, on the day before the defendant's departure for Europe, and in settlement of an account alleged to exist between the defendant and the said Morse. And there was testimony tending to show that no such account existed or was settled on that day, or at any other time, and that the note in suit was never given in settlement of any account, or for any valuable consideration. There was testimony offered to show that the defendant was the widow of George Lewis, who deceased in Portland, Maine, in 1883; that said Lewis left to the defendant and an only daughter, the sum of fifty thousand dollars; that the defendant had very little business experience, and that said Morse acted for her in the investment of the funds of the estate with the plaintiff and one other party to the amount of about thirty-seven thousand five hundred dollars, thirty-three thousand dollars of which the plaintiff had received from time to time, and given his note and a mortgage of real estate therefor. That on two occasions more than a year before November 1, 1887, the defendant had occasion to go to Isle au Haut where she remained a part of the summer months; that said Morse suggested to her the advisability of placing in his hands blank pieces of paper, signed by her and witnessed by her daughter, in order to enable said Morse to draw money from the savings bank, from time to time, to pay over to said Breckenridge as he should need it, and that accordingly the defendant placed in the hands of said Morse certain blank sheets of note paper signed by herself and witnessed by her daughter, which resembled in form the paper upon which the note in suit was written; that she gave him no authority to use said blank sheets for any other purpose whatever, except to draw the money from the savings bank for the purpose of paying the same to the plaintiff. The defendant testified that she never

gave the note in suit and never intentionally signed such note, and the daughter testified that she never witnessed any such note as the note in suit; both testified that the signatures resembled their signatures, but that they were never signed to any note whatsoever, or any note given in settlement of any account. The defendant further offered testimony to show that, just prior to her departure for Europe, she notified the plaintiff not to give Morse any money for any purpose or under any circumstances.

The plaintiff introduced testimony that Morse presented to him the note in suit in December, 1887, and requested him to get it discounted, upon the ground that he wanted to provide for drafts which the defendant might draw upon him while in Europe; that the plaintiff took said note to the Maverick Bank and was told the time of payment was so long that the bank would not take the paper; that he then took it a to note broker, who said that he was not sufficiently acquainted with the parties and declined to purchase; that he then sent the note or a letter relating to it to Portland, Maine, and that he was unable to get it discounted there, and returned it to said Morse. That a short time afterwards, said Morse, and one Francis, to whom said Morse was indebted, came to the plaintiff with the note; that Francis asked the plaintiff whether the signer was good and whether he was willing to indorse the note; that thereupon the plaintiff wrote his name upon the back of the note, and that said Morse and Francis took the same away with them. That said Breckenridge received no compensation for signing the note, but simply signed for the accommodation of Morse, and in order that Francis would discount it for Morse. That Francis paid to Morse the sum covered by said note, less the indebtedness of Morse to Francis. That before said note became due it was deposited in the bank for collection, and said Morse and the plaintiff waived demand and notice thereon.

Morse testified that he indorsed the note before Breckenridge placed his name on the back of the same. About three months after the note became due, Breckenridge gave his note upon demand in place of the note in suit, and the note in suit was delivered to him by said Francis.

The defendant contended that the plaintiff was a mere accommodation guarantor upon said note; that he did not take the note for value, nor purchase or hold said note either as an indorser or holder for value before it became due, or in the regular course of business. That the signatures to said note were forged by said Morse, or that the body of the note was written over said signatures by said Morse without the knowledge, authority or consent of the defendant, and after she had left for Europe. That the plaintiff signed said note at the request of said Morse and Francis; and that under the facts shown by the testimony in the case, the plaintiff when he received the note, received it subject to all equities that would exist between the maker and said Morse. That if the jury should find that the note was wrongfully written over the signature of the defendant, witnessed by her daughter, it was a forgery and void in the hands of third persons, whether they received the same for value without notice, and in the regular course of business, or not. That if the jury found that the note was written over the signature of the defendant, witnessed by her daughter, upon a blank piece of paper, that was instrusted to him for the purpose of writing an order on the savings bank, as above stated, that they must further find that in so intrusting such blank signatures to said Morse, the defendant was guilty of negligence and that the plaintiff suffered thereby; and that this question was a question of fact for the jury.

The defendant requested the court to instruct the jury as follows; but the court refused except as appears in the opinion.

1. That if Morse filled in the blank paper bearing the signature of Mrs. Lewis witnessed by the daughter, given him by Mrs. Lewis to draw money from the savings bank, by inserting the body of the note in suit, without the knowledge and consent of Mrs. Lewis, and without fault on her part, then it would be void in the hands of the plaintiff in this case and he cannot recover.

2. That Breckenridge being an accommodation indorser, if he indorsed the note for the benefit of Morse, and not of the defendant in this case, and did not pay the note until three months after the note became due, then he was not a *bona fide*

holder for value before the maturity of the note, and the defense that the note was fraudulently obtained or was without consideration is open to the defendant in this case.

F. V. Chase, for plaintiff.

Edward Avery and A. A. Strout, for defendant.

The defendant not having made, signed or authorized the signing or making of a note, she did not and could not employ any one to issue a note; nor at the time the defendant indorsed or took the note was Morse in her employment; but she had notified the plaintiff that Morse was no longer authorized to do for her anything that he had done; that when the plaintiff indorsed the note Morse was not her agent nor her representative. This was one of her contentions of fact. She admitted that Morse had acted for her in the matter of the mortgages given by the plaintiff to her, and in collecting the interest, but before she left for Europe she says that the mortgages had been all made, and she arranged with the plaintiff to keep the accruing interest until her return, and not pay any money to Morse. The application of the rule stated by the court assumed the fact and concluded her from having it determined in advance. *Gibbs* v. *Lanabury*, 22 Mich. 479, 491; *Taylor* v. *Atchison*, 54 Ill. 196; *Walker* v. *Ebert*, 29 Wis. 194.

Not a case of alteration, a mere breach of trust, but of forgery. The case is not to be decided on the authority of that class of cases which deal with written signatures affixed to some form of a promissory contract, with an intent implied from the existing words, or, in fact, on the part of the signer to be bound in some form, and which intent is varied by a person to whom is intrusted the duty of perfecting the contract. As when a blank note is signed or indorsed. *Putnam* v. *Sullivan*, 4 Mass. 45; *Abbott* v. *Rose*, 62 Maine, 194. The reasoning in *Greenfield Bank* v. *Stowell*, 123 Mass. 196, and the authorities cited and examined, however, furnish a closer approximation to the true rule. *Whittemore* v. *Clark*, 125 Mass. 496; *Bank* v. *Burnes*, 129 Mass. 596; *Foster* v. *Mackinnon*, 4 L. R. (C. P.) 704.

Under the instructions given by the court, if the jury found, (*a*,) that the signatures had been affixed to a blank piece of paper for the purpose of having an order on the savings bank written over them and delivered to Morse; (*b*,) and Morse, after having executed that commission, without using the blank, at any time, even after all employment on the part of the defendant had ceased, forged the note above the signature; (*c*,) and the plaintiff, before maturity of the note thus forged, indorsed it, without notice of the forgery, the defendant would be liable to the plaintiff,— then under this ruling the jury was to take the act of signing as conclusive on the defendant, without considering the question of negligence on her part. This, we submit, is not the law. *Caulkins* v. *Whister*, 29 Iowa, 495; *Foster* v. *Mackinnon*, 4 L. R. (C. P.) 704; *Cline* v. *Guthrie*, 42 Ind. 227–236, and authorities cited; *DeCamp* v. *Hamma*, 29 Ohio, 467; 34 Mich. 43; *Taylor* v. *Addison*, 54 Ill. 196; *Whitney* v. *Sugden*, 2 Lansing, 477; *Rousevelt* v. *Pease*, 45 Wis. 509; *Washington S. Bank* v. *Ecky*, 51 Mo. 274.

The true rule seems to be that, unless one is guilty of culpable carelessness or negligence in writing or issuing a signature, which is always a question for the jury, he cannot be held liable on any contract written over the signature. Cases *supra*. This question was not submitted to the jury.

HASKELL, J. The plaintiff indorsed the defendant's promissory note for the accommodation of one Morse, the payee, who then negotiated the same, and, when it fell due, the plaintiff paid it and now sues to recover the amount of the note from the defendant.

I. The signature of defendant to the note was claimed to be a forgery. The court ruled that, a defense.

II. The note was claimed to have been fraudulently written by the payee, Morse, over the defendant's name, signed on blank paper, to enable Morse to write an order on a savings bank, where defendant had funds, as the necessities of her business intrusted to Morse might require; and the court ruled that contention no defense.

It is contended that defendant's negligence in the premises should have been submitted to the jury; but that was not necessary, inasmuch as the question of negligence, as matter of fact, need not be considered an element, required to charge the defendant under the facts of this case. The payee of the note, Morse, was intrusted with defendant's name in blank, to draw funds necessary to meet the calls of her business, intrusted to the care of her agent, Morse. He was authorized to write an order above defendant's signature, but instead of so doing he wrote a promissory note, and obtained the amount of it from a stranger. He fraudulently used his apparent authority for his own gain instead of his principal's. His relation to his principal is the same as if he had procured the money on an order that he was authorized to write and then embezzled it. The defendant may be held under the plain rules of agency. By intrusting her signature to her agent for use, the defendant gave him an apparent authority to use it in the manner he did. The limited authority, only known to themselves, cannot be held to reach strangers, who neither knew, nor had means of knowing of that secret limitation. The note, when presented for discount, gave no suggestion of infirmity. The signature was genuine and, apparently, the payee, defendant's agent, who indorsed it, had authority to negotiate it. It was apparently the defendant's genuine promise, and she, by intrusting her name to her agent for commercial purposes, held him out as an agent with general powers in relation to it. She clothed him with apparent authority, and cannot now deny it to the loss of any person who innocently relied upon it. It is better that she bear the consequences of misplaced confidence, than that an equally innocent person shall suffer. She selected the agent, the plaintiff did not. The apparent authority of the agent makes his act her own, in this case, as effectually as if her authority had been real. That is the doctrine of *Young* v. *Grote*, 4 Bing. 253; and of *Putnam* v. *Sullivan*, 4 Mass. 45, cited with approval in *Wade* v. *Withington*, 1 Allen, 562; and in *Bank* v. *Stowell*, 123 Mass. 198–9, where all the cases, both English and American, are reviewed. See also *Redlon* v. *Churchill*, 73 Maine, 146.

The same doctrine is held in the *Earl of Sheffield's case*, 13 App. Cas. 333 (1888). The Earl authorized his agent to procure a loan for a limited amount, and transferred to him in blank certain stocks, and delivered to him certain bonds for the purpose. The agent procured the loan, and delivered the securities to a broker, who in turn pledged them for his entire indebtedness to certain banks. The Earl sought to redeem; but the banks (the broker being insolvent) refused him, relying upon their legal title to the securities. At the first trial, redemption was denied upon the ground that the agent was master of the stocks, and had actual authority to convey them. On appeal, it was held that the agent had not actual authority to dispose of the stocks as he pleased; that his actual authority was limited to the amount of the loan authorized, but that the banks became owners of the stocks and bonds, having acquired the legal title, without notice of infirmity, through an agent who apparently had full authority to give it. On final appeal, the Lords approved the doctrine of the Court of Appeals, that if the banks as purchasers of the stocks took the legal title from an agent having apparent authority to give it, without notice of his actual limited authority, such title would become absolute; but reversed the judgment of the Court of Appeals, for the reason that the banks had actual notice of the limited authority of the broker over the stocks, and allowed the Earl to redeem. See also *Colonial Bank* v. *Cady*, 15 App. Cas. 267.

It is the same doctrine held where the signature is placed to a blank instrument to be filled by the person intrusted with it, only the blank is a patent limitation of the agent's authority. He may fill the blank as may suit him best, and the principal will be held. The blank form carries with it an implied authority to complete it, but not to alter it. *Russell* v. *Langstaffe*, 2 Doug. 514; *Violett* v. *Patton*, 5 Cranch, 142; *Bank* v. *Neal*, 22 How. 96; *Bank* v. *Kimball*, 10 Cush. 373; *Angle* v. *Ins. Co.* 92 U. S. 330; *Abbott* v. *Rose*, 62 Maine, 194, approved in *Kellogg* v. *Curtis*, 65 Maine, 61.

III. It is denied that the plaintiff is a *bona fide* holder of the note, so that equitable defenses must be shut out. That

question was submitted to the jury under instructions, in substance:

a. If plaintiff wrote his name upon the note before maturity under the name of the payee and for his accommodation, without notice of any infirmity in the note, and paid the same in the hands of an innocent holder at maturity, he may recover of the defendant the contents of the note, even if the plaintiff paid the note partly by the discharge of his own debt to the holder, and partly by his own note given for the balance.

When the plaintiff indorsed the note for the accommodation of the payee, he became liable thereon, subject to mercantile usage, and held the same relation to the maker, as if he had discounted the note himself, instead of indorsing it. The payee received the money on the note from the holder, to whom the plaintiff became contingently liable for its payment; and, when the plaintiff became absolutely liable to pay the note, and did pay it, the promise of the maker, negotiable in form, transferred by the payee's indorsement, ran to him; and it could make no difference to the maker, by what means, or for what consideration, the plaintiff gained title to the note. He then held it with the same rights in regard to it, as if he had given the payee the money on the note, instead of an accommodation indorsement, that afterwards compelled the payment of money, or an equivalent agreed to between him and the holder, to whom it had been negotiated. *Green* v. *Jackson*, 15 Maine, 136; *Eaton* v. *McKown*, 34 Maine, 510; *Roberts* v. *Lane*, 64 Maine, 108; *Barker* v. *Parker*, 10 Gray, 339. "A pre-existing debt constitutes a valuable consideration in the transfer of negotiable paper." *Lee* v. *Kimball*, 45 Maine, 174; *Norton* v. *Waite*, 20 Maine, 175; *Holmes* v. *Smith*, 16 Maine, 177; *Swift* v. *Tyson*, 16 Pet. 1; *Blanchard* v. *Stevens*, 3 Cush. 162. By his indorsement, the plaintiff engaged that the note should be paid according to its tenor. He engaged that it was genuine, and the legal obligation that it purported to be, *Furgerson* v. *Staples*, 82 Maine, 159; and it would be absurd to say that, when he met his indorsement to the satisfaction of the holder, he could not sue the maker.

b. It is a question of fact whether the plaintiff, when he took the note, had knowledge of its fraudulent origin. "Mere negligence on his part is not sufficient to show it; nor is it sufficient if the facts are simply enough to put a prudent man on his guard. It must appear that the plaintiff had knowledge of the fraudulent inception of the note."

Exception to this instruction is not pressed by briefs of counsel. It seems to be in accord with the rule laid down in *Farrell* v. *Lovett*, 68 Maine, 326, and approved in *Kellogg* v. *Curtis*, 69 Maine, 212. Applying this rule to the evidence, it cannot be said that the plaintiff had knowledge of the fraudulent inception of the note.

Motion and exceptions overruled.

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

JARVIS WOODS *vs.* INHABITANTS of BRISTOL.

84 358
92 347

Lincoln. Opinion March 23, 1892.

School District. Agent. Void Election. Warrant. Evidence. R. S., c. 11, § 43.

Neither a school district warrant nor the agent's return thereon can be contradicted collaterally. If they are genuine documents, they are conclusive evidence, of what they appear to show, in all collateral proceedings.

An agent of a school district, chosen at an election wholly void, is not an officer *de facto*, although he attempts to exercise the office.

ON REPORT.

This was an action of assumpsit in which the plaintiff sought to recover wages, as a teacher in the town of Bristol, by virtue of an employment by one Little, who claimed to be the agent of the school district and elected at a special meeting called by the selectmen of the town.

The facts are sufficiently stated in the opinion.

L. M. Staples, for plaintiff.

George B. Sawyer, for defendants.

HASKELL, J. One Robert Oram was school agent in district number ten, Bristol, for the year 1889. In March, 1890, he

issued his notice as required by law for the choice of school agent for the ensuing year, and personally made return thereon as to the notice given, that complies with the requirements of law in that particular. At the meeting, one Horace Poole was chosen agent, sworn and entered upon the duties of his office.

In May, another meeting was called by the selectmen on request of citizens of the district, and one James H. Little was chosen agent and sworn, and attempted to perform the duties of his office, but met with resistance from Poole. In the fall, Little obtained possession of the school house and employed the plaintiff as teacher for two months, at forty dollars per month, and for that service this action is brought.

The last supposed agent cannot fairly be said to have held the office *de facto*. He obtained possession of the school house by force. He employed the plaintiff with notice that his authority was disputed. When the plaintiff's service ended, he advanced him twenty-five dollars as a loan. If the plaintiff may recover at all, it must be upon the ground of a legal employment; and that depends upon whether Little, his employer, was the legal agent of the district; and that again depends upon whether the office was vacant and whether he was lawfully chosen. He appears to have been lawfully chosen, and became the legal agent of the district, if his choice was authorized by law. Of course, if the March meeting was illegal, then Poole was not legally chosen, and, although agent *de facto*, might be displaced by the choice of a legal agent; but if the March meeting was legally warned and held, then he was the legal agent, and in the performance of his duties could not be lawfully interfered with by any attempt to usurp the duties of his office.

"A mere claim to be a public officer, and exercising the office, will not constitute one an officer *de facto*. There must be, at least, a fair color of right, or an acquiescence by the public in his official acts so long, that he may be presumed to act as an officer by right of appointment or election." *Brown* v. *Lunt*, 37 Maine, 429.

Little had no legal right. His election was wholly void for

want of authority in the district to elect him, they having already elected another. His supposed election alone gave him no color of right, as it was absolutely void. The first duty he attempted to perform was to forcibly get possession of the school house and hire the plaintiff, knowing the condition of affairs. Little's authority had not been acquired or given, so as to raise any presumption in his favor. Out of a district quarrel, he attempted to gain an office and control expenditure of the public funds. The plaintiff must have known all this. There is no good reason for applying the doctrines of an officer *de facto* to this case, and it is not done.

School district discords are not conducive to the public good, and should be discouraged. Sufficient public notice was given of the March meeting. Voters of the district had ample opportunity to attend, and did generally attend. So far as the case shows, the meeting was a fair one, and its doings should have been regarded by the district. No money was raised, or other business of importance transacted, beside choosing a moderator, clerk, and agent. Even if there were technical objections to the manner of calling the meeting, as no harm could follow, they should have remained unquestioned, and a neighborhood turmoil would have been prevented.

But the court is of opinion that there were no such irregularities in the calling of the meeting as to require it to be adjudged illegal.

The first objection to its legality is that Oram, the agent of the district for 1889, who called the March meeting, had vacated his office by removal from the town and State; but the evidence does not sustain the contention. He went to Massachusetts for work, but without an intention of changing his domicile. He attended to his official duties as agent, and called the annual meeting in March, 1890, as he was required by law to do.

The second objection is that he actually wrote and signed the warrant in Massachusetts, while it appears to have been drawn, signed and dated in Bristol, Maine. Upon its face it is regular. It appears to answer the requirements of law. When posted,

it had all appearance of regularity, and voters of the district had a right to so regard it. It bore the genuine signature of the agent, and, unless it be held sufficient, a precedent would be established, from which there might come no end of mischief. The regularity of the warrant cannot be contradicted in a collateral proceeding, by parol proof, any more than the return of an officer.

The third objection is that, although the form of the return of the agent under his own hand, stating the notice given of the meeting, complies with the law, yet it is insufficient, because untrue. Not untrue as to the notice actually given; but untrue in stating that he personally posted the notices, when in fact he intrusted that duty to another, and did not personally perform it himself.

The statute, R. S., c. 11, § 43, says that the agent "shall cause notices . . . to be posted," &c. There can be no objection to his doing it by his own hand. His certificate "returned at the time and place of the meeting is evidence that the notice therein stated" had been given. The return of the certificate is a personal duty, and must be personally attended to. *Parker* v. *Titcomb*, 82 Maine, 180. Not that it must be personally produced at the meeting; but it must be there produced under the signature of the agent. The certificate must be a personal certification of the facts stated in it; and of these facts it is conclusive evidence in all collateral proceedings. *Starbird* v. *Dist. No. 7 in Falmouth*, 51 Maine, 101. If an agent makes a false return, he is liable in damages to any person injured thereby; but the return, in all collateral matters, for the safety of the public, must be considered verity.

Poole, therefore, became the legal agent of the district. He performed his duties so far forth as he could without violating peace and good order, and his authority should have been respected. The plaintiff's remedy is against his employer, which the district was not.

Plaintiff nonsuit.

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

JENNIE B. ROBERTS *vs.* FREDERICK C. MCINTIRE, and others.

Sagadahoc. Opinion March 24, 1892.

Deed. Married woman. Joinder of Husband. R. S., c. 61, § 1; c. 65, § 6; c. 103, § 14; Gen. Stat. Mass. 1860, c. 108, § 3.

Under R. S., c. 61, § 1, it is a sufficient joinder of a husband in his wife's deed of real estate directly conveyed to her by him, if he gives his written assent thereto by joining in the *testimonium* clause under his hand and seal "in testimony of his relinquishment of his right of dower," and acknowledges the instrument to be his free act and deed.

AGREED STATEMENT.

Real action, in which the facts are stated in the opinion.

Heath and Tuell, for plaintiff.

George E. Hughes, for defendants.

Deed, at common law inoperative and void. Legislature did not intend by subsequent acts that a joinder should bear any other than its accepted signification. *Brown* v. *Wood*, 1 Met. 542; *Lithgow* v. *Kavenagh*, 9 Mass. 161; *Lufkin* v. *Curtis*, 13 *Id.* 223; *Learned* v. *Cutler*, 18 Pick. 9. In statute 1841, c. 17, the two words "joinder or assent" are used. The latter word is omitted in all subsequent legislation. Parties bound by their recitals. The law will not make an exposition against the express words and intent of parties. Smith Com. c. 12, § 505.

WHITEHOUSE, J. This is a writ of entry. The plaintiff derives title under a deed from Mary D. McIntire, wife of William H. McIntire, to Elbridge Randall, dated November 3, 1879. The defendants are heirs of Mrs. McIntire and contend that this deed was inoperative because the husband did not join in it.

Under our statutes real estate directly or indirectly conveyed to a married woman by her husband, or paid for by him, or given or devised to her by his relatives, "cannot be conveyed by her without the joinder of her husband." R. S., c. 61, § 1.

The property in question was directly conveyed to Mrs. McIntire by her husband, by deed of June 10, 1879. It could not be conveyed by her without his joinder.

In the deed in question from Mrs. McIntire to Randall, the husband did not join with the wife as grantor, but he signed and sealed the instrument and acknowledged it to be his "free act and deed." His name first appears in the *testimonium* clause as follows: "And William H. McIntire, husband of the said Mary D. McIntire, in testimony of his relinquishment of his right of dower in the above described premises, have hereunto set our hands," &c. If this constitutes a "joinder of the husband" under our statute, it is conceded that the plaintiff is entitled to recover; otherwise judgment must be entered for the defendants. This is the sole contention between the parties.

The precise question has never been directly determined in this State, but the correct solution of it is only a corollary from the principles established by our decisions respecting the true intent and meaning of this statute.

In Massachusetts, it was the express requirement of the statute of 1857 upon this subject, that the wife's deed should have the "assent in writing of her husband." Gen. Stat. Mass. 1860, c. 108, § 3. In several other states the husband's "assent" or "written assent" or "consent" is made a prerequisite to the validity of the deed. See Devlin on Deeds, § § 100 to 107; Kelley Cont. Mar. Wom. c. 5, § 6; and c. 9, et. seq.

In *Perkins* v. *Morse*, 78 Maine, 17, convincing reasons were given why our statute should receive a liberal interpretation for the sake of upholding honest conveyances; and the construction placed upon it in *Bray* v. *Clapp*, 80 Maine, 277, renders it precisely the same in effect as the Massachusetts statute of 1857. In the latter case it was declared by our court that, "no more than written assent was really intended by our own statute, the difference in phraseology being accidental rather than essential;" and it was accordingly held to be sufficient for the husband to sign the deed "in token of his assent to the conveyance."

In the case at bar, the deed recites that: "In witness whereof" the husband signed the deed "in token of his relinquishment of his right of dower." But he had no right of dower in real estate legally conveyed by her in her life-time. By R. S., c. 103, § 14, "the husband of a deceased wife, whose estate is solvent,

shall have the use for life of one third of her real estate, to be recovered and assigned in the manner and with the rights of dower;" but this means the real estate of which she died seized. R. S., c. 65, § 6. At the decease of the wife the husband has no right whatever in property legally conveyed by her in her life-time. As stated in *Bray* v. *Clapp*, *supra*, "the statute exacts the joinder of her husband not as a grantor, because he has nothing to grant, but as an assenter merely, for he has only the power to withhold or give his assent." What effect then are we authorized to give to the husband's signature to this deed, considered in its relation to the *in testimonium* clause and the acknowledgment before the magistrate? Can it be legitimately construed as an "assent in writing" to the wife's conveyance? We think it can and should.

There are certain elementary principles applicable to the construction of written contracts which are matters of such common knowledge and universal acceptance as to render the citation of authorities a profitless task. There are pregnant legal maxims which are the deductions of reason and the conclusions of common sense approved by the wisdom of ages. But their practical application must, in some instances, be qualified or restricted by technical rules which ascribe definite meanings to particular expressions, in order to secure uniformity and to enable parties to understand the effect of the language employed in contracts made or accepted by them. All agree, however, that it is the constant desire of the law to uphold a contract rather than destroy it, to effectuate the intention of the parties and not to defeat it. All breathe the beneficent spirit of this rule, and the two great cardinal maxims of the common law clearly express it: "*verba ita sunt intelligenda ut res magis valeat quam pereat; verba debent intentioni inservire.*" This intention, however, must be gathered from the contract itself, construed with reference to the subject matter, the motive and purpose of the parties in making the contract, and the object to be accomplished.

But, with respect to conveyances of real estate, courts in modern times have shown more consideration for the substance

of the contract than for the shadow, for the passing of the estate according to the intention of the parties than for the manner of passing it; and wherever the rules of language and of law will permit, that construction will be adopted which will make the contract legal and operative in preference to that which would have an opposite effect.

There is no presumption against the validity of Mrs. McIntire's conveyance. It is not to be presumed that her husband performed an idle and useless ceremony for the purpose of defrauding an innocent purchaser. But he affixed his signature and seal and made the acknowledgment before the magistrate for some purpose. It cannot be questioned that the deed was executed, delivered and recorded as and for a legal instrument. It cannot be doubted that the husband intended to do whatever was needful to render the deed effectual as a conveyance of the wife's real estate. He intended to relinquish whatever interest he had in the property; and the only possible interest he had was the right to dissent from the conveyance. He clearly had no desire to exercise that right, but a manifest purpose to waive it and to express his assent to the deed.

But it is said, that the deed itself contained a plain unambiguous recital that the husband signed it for the purpose of releasing his right of dower; and thereupon the defendants' counsel invokes the familiar principle that in law there can never be an implication of a purpose in opposition to that which the parties have clearly expressed for themselves; that the express mention of one purpose in the deed excludes the idea that he signed it for any other purpose. It has been seen, however, that the purpose expressed by the parties was impossible and absurd. The language used was an erroneous statement or "false description" of the purpose intended, and is utterly without force or effect. But, words legally devoid of sense and meaning, in the connection in which they are used, may be rejected as surplusage; and *falsa demonstratio non nocet.*

The reported cases in different jurisdictions disclose numerous instances where similar errors have been corrected by an appli-

cation of the principles of equitable construction, in order that the contract might be preserved and not destroyed.

But *Hills* v. *Bearse*, 9 Allen, 403, is an authority exactly in point. There the husband signed the deed "in token of his release of all right and title of and to both dower and homestead." But there was no right of dower or homestead in the husband. The effect to be given to the signature was accordingly brought directly in question, and it was decided that the "insensible" words might be rejected and the husband deemed to have signed and sealed the deed "in witness" that his wife had executed it. This was held to be a sufficient "assent in writing" of the husband. This decision has been referred to as an authority and cited with approval in three subsequent cases. See *Cormerais* v. *Wesselhoeft*, 114 Mass. 550; *Child* v. *Sampson*, 117 *Id.* 62; and *Chapman* v. *Miller*, 128 *Id.* 269. In *Child* v. *Sampson*, the husband simply affixed his signature to the instrument as a subscribing witness, and the court held that it was a sufficient "assent in writing." See also *Elliot* v. *Sleeper*, 2 N. H. 525; *Woodward* v. *Seaver*, 38 N. H. 29; *Pease* v. *Bridge*, 49 Conn. 58; *Schley* v. *Car Co.* 25 Fed. Rep. 890; *Friedenwald* v. *Mullen*, 10 Heisk. 226; *Evans* v. *Summerlin*, 19 Fla. 853.

Judgment for plaintiff.

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

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CHARLES P. STETSON, and others, in equity,

vs.

WILLIAM H. H. EASTMAN, and others.

Penobscot. Opinion March 25, 1892.

Will. Lapsed Legacy. Joint-Tenants. Descent. Grandchildren. R. S., c. 73, § 7; c. 74, § 10; c. 75, § 1, cl. 3; Stat. 1852, c. 295. Stat. of Mass. March 7, 1786; Plymouth Colony Laws, 1643, Ed. 1836, p. 75.

A bequest of personal property, to two or more persons individually named as legatees, without words indicating the nature of the tenancy to be created thereby, will be construed as creating a tenancy in common, and not a joint-tenancy. The law presumes that a tenancy in common was intended unless a different intention of the testator be manifested by the terms of the will.

A testatrix, in addition to other bequests, made to each of two persons a separate pecuniary legacy, and then gave the rest of her estate, mostly money and personal effects, to both of such persons, by a residuary clause in these words: "All the rest and residue of my estate I give to [the persons named] and I appoint them executors of this, my will." One of such legatees died in the lifetime of the testatrix. *Held:*

1. That the separate gift to such deceased legatee lapses into the residue of the estate.

2. That the surviving legatee takes half of the residue as thus increased.

3. And that the other half lapses, and goes to the heirs of the testatrix, no other disposition being made of it by her will, subject to the expenses incurred to obtain a construction of such bequests.

Our statute limits the rights of collateral inheritance by representation to the grandchildren of a deceased brother or sister, another brother of the intestate being alive. In such case the inheritance does not extend to the children of grandchildren.

On report.

Bill in equity by the administrators of the estate of Abigail J. Stetson, with the will annexed, to determine the construction of the will. By agreement of the parties, the case was reported to the law court to be heard on bill and answers under R. S., c. 77, § 43. Two questions were presented for decision, (1,) whether the legacy of six thousand dollars to Hattie May Bachelder had lapsed by reason of her death before that of the testatrix, and (2,) to whom the administrators should pay the rest and residue of the estate.

The facts are stated in the opinion.

J. W. Symonds, for Bernice M. Batchelder, as a residuary legatee.

Practice: *Bachelder, Pet'r*, 147 Mass. 470.

Lapsed legacy: *Thayer* v. *Wellington*, 9 Allen, 295; *Prescott* v. *Prescott*, 7 Met. 145; *Drew* v. *Wakefield*, 54 Maine, 291; *Kenniston* v. *Adams*, 80 Maine, 290; *Elliott* v. *Fessenden*, 83 Maine, 204; *Bigelow* v. *Gillott*, 123 Mass. 102; *Tindall* v. *Tindall*, 24 N. J. Eq. 513; *Burnett* v. *Burnett*, 30 N. J. Eq. 599.

The gift, contained in the residuary clause, of the rest and residue of the estate to two persons named, without any words of severance whatever, passes to the survivor of the two upon the death of the other before the decease of the testator; and

Bernice M. Bachelder, as survivor of the two, took the whole residue of the estate, consisting as it did, of personal property.

Joint Tenancy: *Crooke* v. *De Vandes*, 9 Ves. 204; 2 Williams Ex'ors, 1463; *Morley* v. *Bird*, 3 Ves. 629; *Decamp* v. *Hall*, 42 Vt. 83; 1 Rop. Leg. 330; 2 *Id.* 494; Schoul. Wills, § 566; 3 Jar. Wills, pp. 1, 2; *Gilbert* v. *Richards*, 7 Vt. 203; 2 Kent Com. p. *351, 12th ed; 2 Jar. Wills, 368; *Hooper* v. *Hooper*, 9 Cush. 130.

Revised Statutes, c. 73, § 7, relates to devises of land, leaving the common law rule, as to personalty in force. *Jones* v. *Crane*, 16 Gray, 308; *Anderson* v. *Parsons*, 4 Maine, 486; *Putnam* v. *Putnam*, 4 Bradf. 308; *Butler* v. *Butler*, 2 Mackey, (D. C.) 96.

S. F. Humphrey, for W. H. H. Eastman.

After the death of Hattie May Batchelder before the testatrix, her moiety of the rest and residue was held by her as tenant in common, and remains undisposed of by the will. R. S., c. 73, § 7; *Jones* v. *Crane*, 16 Gray, 308.

"Grandchildren" does not embrace more than children's children. Stat. 1852, c. 295; *Quinby* v. *Higgins*, 14 Maine, 309; Am. & Eng. Encyl. Title, Grandchild. *Oxford* v. *Churchill*, 3 Ves. & B. 59; 2 Williams Ex'ors, 1103; *Hone* v. *Van Schaick*, 3 Barb. Ch. 505.

H. R. Chaplin and Peregrine White, for others.

PETERS, C. J. Abigail J. Stetson, a resident of this State, by her will made and probated here, left numerous money legacies among which was one of six thousand dollars to Hattie M. Bachelder and one of three thousands dollars to Bernice M. Bachelder, and in addition she made those two persons her executors and residuary legatees. The residuary clause reads as follows: "All the rest and residue of my estate I give to Bernice M. Bachelder and Hattie M. Bachelder of Bangor, and I appoint them executors of this will." Her effects consisted mostly of personal property, evidently moneyed securities, there being only about two hundred dollars worth of real estate.

Hattie M. Bachelder dying in the lifetime of the testatrix, three days before the testatrix died, the inquiry is made by this

bill in equity, to which all persons possibly interested are made parties, whether the legacies to Hattie M. lapsed; and if so, what disposition is to be made of them.

Undoubtedly the legacy of six thousand dollars lapsed, and sinks into the general residue of the estate. It was by implication conditional upon the event that the legatee survived the testatrix. The law presumes that just so much was taken from the general legatees for the benefit of the particular legatee, and the particular intent failing the general intent prevails. The deceased legatee leaving no lineal descendant, section ten of chapter seventy-four of the Revised Statutes, does not alter this result.

There can be no doubt that, by the same rule, the deceased legatee's portion of the general residue of the estate also lapses, and that this portion falls to the heirs of the testatrix under the laws of descent and distribution, no other disposition of it being either expressly or impliedly provided by the terms of the will; unless this result be prevented by construing the residuary clause as having the effect to constitute between the legatees named therein a joint-tenancy with the incident of survivorship, instead of a tenancy in common. And it is contended in behalf of the surviving residuary legatee that the latter is the true construction of the clause in question.

Although it may be that the English courts would regard a clause like this as creating a legacy in joint-tenancy, and thus giving the whole of the residue to the surviving tenant, we cannot believe that such would be the construction in many of the states of this country, and we are convinced that such should not be the construction in our own State. We think the presumption here is exactly the reverse of that recognized by the English courts. Whilst in that country a devise or bequest to two or more persons implies a joint-tenancy unless the contrary appears, here it implies a tenancy in common unless a different intention is indicated by the will and the attending circumstances. Our institutions and policies are averse to the doctrine of survivorship as applied to tenants holding in their own right, although there may be meritorious exceptions. We

have as a people inherited a feeling of opposition to the principle from early legislative manifestations against it.

As early as in 1643, the general court of the Plymouth Colony expressed its disfavor of the principle by an act providing as follows: "That where lands or tennements fall in joynt partnership either by guift, graunt or purchase or otherwise, that if any of the partners do dye before the devision thereof shalbe made, That the heires & assignes of such as shall so decease shall not be deprived of the right title and interest into such said lands and tennements but shall have his or their proporcon as duly & equally as any of the survivors or their heires or assignes any act ordinance custome or provision made to the contrary in any wise notwithstanding as fully and amply as if devision thereof had been formally made." Plymouth Colony Laws, ed. of 1836, p. 75.

By force of the sixth clause of the sixth section of the constitution of the commonwealth of Massachusetts, this enactment continued to be the law of the commonwealth until its scope was enlarged by an act, passed on March 7, 1786, which provided that all grants and devises of real estate to a plurality of persons should be construed as creating tenancies in common, unless a contrary intention be indicated by the terms of the devise or grant. Our own statute is to the same effect, first enacted in 1821, now continued in R. S., c. 73, § 7, and running as follows: "Conveyances not in mortgage, and devises of land to two or more persons, create estates in common [and not joint estates], unless otherwise expressed. Estates vested in survivors on the principle of joint tenancy shall be so held."

There would be no question in the present case, on this point, if the gifts were of real estate and not of personal property; but the argument for the person claiming as survivor is, that the statute was designed to include realty within its operation and exclude all other property. It seems incredible to us that any such distinction could have been contemplated. There is more reason for rejecting the offensive doctrine in its application to chattels or moneyed securities than in its application to landed estates. And great incongruity and inconvenience must

arise if applied to the one class of property and not to the other. The explanation of the apparent omission to embrace all kinds of property within the legislative interdiction is that the law-makers did not understand that the principle ever applied to any property other than real estate. Nor were they, in our judgment, mistaken in that supposition. The principle of survivorship was not extended to tenancies in chattels by the English courts until after the Massachusetts act of 1786, an act as binding on us as upon the courts in that commonwealth until we virtually adopted its provisions by an act of our own passed in 1821. Our ancestors little dreamed that any vitality was left in the principle after the colonial law of 1643.

The acts of 1643 and 1786 were intended more as declarations of principle, or declarations against a principle, than as undertaking to repeal any acknowledged and binding law. The English cases give no reason for maintaining the doctrine of joint-tenancy in chattels, excepting that of the analogy which exists between devises and bequests, and the very reason given for the adoption of the doctrine in that country forbids its adoption here. It exists there because there it is the law as applicable to real estate. It does not exist here because here it is not the law as applicable to real estate. It gained an ascendency in the English courts in about the beginning of the present century, having before that time been repeatedly doubted or denied. It never had growth or life in most of the American courts.

Mr. Jarman (2 Jar. Wills *253) considers the doctrine of survivorship, so far as applicable to money legacies and residuary bequests, as having been questionable until settled by Lord Eldon in *Crooke* v. *De Vandes*, 9 Vesey, 204, a case determined in 1803. The same author describes the instability of the general doctrine of joint-tenancy thus significantly: "A devise or bequest to several persons 'equally amongst them,' or 'equally,' or 'in equal moities,' or 'share and share alike,' or 'respectively,' or with a limitation to their heirs 'as they shall severally die,' or 'to each of their respective heirs,' or 'to their executors and administrators respectively,' or to several 'between' or 'amongst' them, or 'to each' of several persons,

has been held, in contradiction of some of the very early cases, to make the objects tenants in common." And the author adds: "The preceding cases evince the anxiety of later judges to give effect to the slightest expressions affording an argument in favor of a tenancy in common; an anxiety which has been dictated by the conviction that this species of interest is better adapted to answer the exigencies of families than a joint-tenancy, of which the best quality is that the right of survivorship may, at the pleasure of either of the co-owners (if personally competent), be defeated by a severance of the tenancy." Such is the English view of the doctrine. All other English writers on the subject seem to entertain the same opinion. It is said by Mr. Williams, the able English commentator, that the principal use of joint-tenancy in England now is for the purpose of creating estates in trustees, who are generally joint-tenants. Williams Real Prop. 111.

But the American view is much more emphatic than that expressed by English authors. Mr. Bigelow, the American editor of Jarman's work (4th ed. p. *251), says: "In America, the title by joint-tenancy is much reduced in extent, and the incident of survivorship is still further cut down, and generally limited to cases in which it is proper and necessary; as to cases of titles held by trustees, and to cases of conveyance or devise to husband and wife." This language is partially adopted from Chancellor Kent (4 Com. 400), who led off in stating similar views over sixty years ago, and other American authors, following in the same track, have conspired to enlarge rather than diminish the scope and extent of the American policy as advocated by him. Mr. Perry, perhaps, states the same thing as satisfactorily as any one, when he says: "In this country, title by joint-tenancy is very much reduced in extent and the incident of survivorship is almost entirely destroyed by statutes, except in the case of trustees, executors and others, in whom such a tenancy is necessay for the execution of their trusts." Perry Trusts (4 ed.), Vol. 1, § 136.

The doctrine of joint-tenancy and survivorship has many oppositions in its way. The law itself never creates joint-

tenancy. It never comes through the steps of descent or distribution. Parties alone can create the tenancy. The law in this respect allows parties to do what the law declines to do itself. The principle is emasculated by the privilege extended by the law to either joint-tenant to terminate the tenancy by a conveyance to a third person. As already seen, the law catches at straws to prevent its application to cases. Equity refuses to apply the principle except in clear cases. It is under legislative condemnation in most of the states, Maryland and South Carolina being, perhaps, the only exceptions. In this connection the words of Lord Hardwicke, uttered in 1742, are apropos: "It is true that, in this court, joint-tenancies are not favored, because they are a kind of estates that do not make provision for posterity; neither do I take it that courts of law do at this day favour them; although Lord Coke says that joint-tenancy is favoured because the law is against the division of tenures, but as tenures are many of them taken away, and in a great measure abolished, that reason ceases, and courts of law incline the same way with this court." *Hawes* v. *Hawes*, 1 Wilson (K. B.), 165.

The present question has not directly appeared in any adjudicated case in Massachusetts or Maine, that we know of. But there are a few cases approaching towards the question which bear unfavorably on the rule of joint-tenancies. Legislative grants to two or more persons vest the estate in such persons as tenants in common. *Higbee* v. *Rice*, 5 Mass. 344. The statute abolishing joint-tenures applies to estates created before as well as to those created after the enactment, if not vested estates. *Miller* v. *Miller*, 16 Mass. 59. A present of sandal wood from the King of the Sandwich Islands to the master of a vessel for its owners vests the title of the article in such owners as tenants in common. *Thorndike* v. *De Wolf*, 6 Pick. 120. A grant of land to two persons "jointly, to be equally divided between them," creates a tenancy in common by the statute if not at common law. *Burghardt* v. *Turner*, 12 Pick. 534.

Two cases in the Vermont reports are very much relied on by counsel as supporting the contention for joint-tenancy in the

present case. The cases evidently lean in that direction, although to our minds precisely the same results could have been reached in the cases without the aid of any presumption of joint-tenancy, and in fact in spite of any contrary presumption. The facts disclosed in *Gilbert* v. *Richards*, 7 Vt. 203, strongly indicate an intention of the testatrix in that case to create a joint-tenancy and not a tenancy in common, and the court says as much. It appeared that a testatrix gave to her three step-daughters, naming them, however, severally, certain family plate, pictures and musical instruments that came to her possession from her deceased husband who was their father. Two of the step-daughters died in the life-time of the testatrix, after which she made a codicil giving all lapsed legacies in her will to another person, making no reference to this bequest, and evidently not supposing her codicil applicable to this bequest. It was reasonable to suppose that she gave the articles to her husband's children as a class of persons, as a family, not intending any severance of the articles between them. The articles were of peculiar rather than of pecuniary value, and hardly capable of any just and perfect division, the court said. And the court further said: "It was, therefore, altogether desirable that these sisters should have the property as joint-tenants and that it should not be subject to a division. And furthermore it is not to be believed that, at the time of the making the codicil, when two of the sisters were dead, the testatrix could have intended that the property so valuable to the children and of so little comparative value to any one else should be divided between the surviving daughter of her husband and a relation of hers not of kin to that daughter." The other case in the same state is *Decamp* v. *Hall*, 42 Vt. 83, in which it appears that a testator gave an estate to a person for his life-time and then over to the two sons of such person. The court said that, if the estate to the two sons were to be regarded as a tenancy in common, the queer spectacle would be presented of a legatee having, by the death of his son, an absolute fee in an estate, although his interest was expressly limited by the testator to a life-estate therein.

We are not to be understood as opposing or deprecating the maintenance of joint estates, created by devise or deed, when the testator or donor intentionally constructs such an estate. On the contrary, it is the actual intention that we would ascertain if possible and be governed by it. The case of *Anderson* v. *Parsons*, 4 Maine, 486, cited by counsel, is an illustration of the extent to which the court may go to carry the intention of a testator into effect, in which case the theory of a joint-tenancy of real estate prevailed as having been actually intended by the testator. And still, we should not regard that as so strong a case in its facts for the application of the principle of survivorship as either of the cases cited from the Vermont reports. The divergence between the learned court of that state and ourselves is that, whilst the principle of survivorship is by them apparently admitted, although as appears to us, not necessary to the results arrived at in their cases, we do not admit that the principle, as interpreted by the English courts, now exists or ever did exist in our jurisdiction. We do not contend that the doctrine is never applicable, but that it is not generally so. There are special cases where the principle has a most useful adaptation. Where the will speaks, that governs; but where the will is silent the law speaks and declares the intention of the testator. It declares for tenancies in common — in equality.

In the present case, there is nothing of any amount that could be construed as having a tendency to overcome the presumption of a tenancy in common, although there are facts which appear to confirm such presumption. The residuary legatees were not related to each other, one being a relative of the testatrix and the other the wife of another relative of hers. They lived separately and were of different families. Besides the bounty to be received by them through the residuary clause, each was separately made a legatee for another large sum by the will. And the amounts to be thus receivable were not alike.

The other question, as to who shall be the inheritors of the lapsed fund, is not difficult. The testatrix had no child. At her death, she had neither husband, father, mother nor sister

living. One brother survived her. There were no children or grandchildren of any deceased brother or sister. One great-grandchild of a deceased sister was living. The testatrix also left cousins. No claimants appear excepting the brother of the testatrix and her deceased sister's great grandchild. The brother must receive the fund, as the other relationship is excluded from participation on account of its remoteness. The statute limits the right of inheritance by representation to the grandchildren of a deceased brother or sister, another brother being alive. R. S., ch. 75, § 1, clause 3. Formerly grandchildren were excluded from such right of representation. *Quinby* v. *Higgins*, 14 Maine, 309. See Laws 1852 ch. 295. The term children, as used in our statute, does not comprehend grandchildren, nor does the latter term comprehend the children of grandchildren. The statute means just what it says. It would have said more if more had been intended. Sometimes a testator uses the word children, meaning issue, and it is difficult even in that case to effectuate the intention of such testator. The proof of it, to be collected from the whole will, must be plenary. No such latitude is allowable in construing a statute.

The result is that the lapsed legacy of six thousand dollars will be added to the residuary fund, and that such fund thus increased will be equally divided between the living residuary legatee and William H. H. Eastman, the brother of the testatrix.

We think the portion thus falling to Eastman can well afford to pay the costs and expenses of this litigation, which will comprise counsel fees on both sides and disbursements expended by any of the parties. *Decree accordingly.*

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

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SILAS H. BOWLER *vs.* WESTON BROWN.

Waldo. Opinion March 26, 1892.

Tax. Tax Sale. Ditto Marks. Sworn. R. S., c. 1, § 6, cl. 20; c. 3, § 24; c. 6, § 193.

A tax sale of real estate is invalid when the copy of the notice, filed by the collector with the town clerk, does not have upon it the required certificate,

that the collector had posted the notice of the sale as required by R. S., c. 6, § 193.

Also, when it appears that the assessors were not sworn.

ON REPORT.

Real action, in which the case appears in the opinion.

W. H. Fogler, for plaintiff.

H. Bliss, Jr., for defendant.

EMERY, J. This is a real action for the recovery of a parcel of land, in Palermo, and is reported to the law court for determination upon so much of the evidence as is competent and legally admissible. The plaintiff's claim of title is under tax deeds and tax sales for non-payment of taxes assessed in Palermo against the resident occupant of the land in 1882 and 1883.

The proceedings, which are intended to work a forfeiture of lands for non-payment of taxes, are to be construed strictly in a controversy between the purchaser at a tax sale, and the original owner. The title acquired under such a sale is founded solely on the statute provisions and these must be strictly complied with. *Greene* v. *Lunt*, 58 Maine, 518; *Tolman* v. *Hobbs*, 68 Maine, 316.

In this case the proceedings for two years, 1882, and 1883, are put in evidence, and in each set we find what seem to us fatal omissions or lack of evidence.

I. (1882.) The statute, R. S., chapter 6, § 193, requires the collector of taxes, as one step in the procedure, to "lodge with the town clerk, a copy [of his notice of intended sale], with his certificate thereon," that he has given notice of the intended sale as required by law. The plaintiff put in evidence the copy of notice thus lodged with the town clerk in 1882, upon which copy the only certificate is as follows, "I hereby certify the following to be a true copy of the notice of the aforesaid as required by law." There is a total lack of any "certificate that he has given notice of the intended sale as required by law," or that he has given any notice. The paper he lodged with the town clerk is merely certified to be a copy of another paper, which latter may, or may not have been posted as required by

law. The statute further provides that the "copy and certificate shall be recorded by the clerk, and the record so made, shall be open to the inspection of all persons interested." The land owner by inspecting this record would not learn that any notice had been posted or otherwise given. The statute plainly requires the certificate above described, and the omission to make it is the omission of a necessary step in the procedure.

II. (1883.) It must appear in evidence that the assessors of taxes were duly sworn. *Williamsburg* v. *Lord*, 51 Maine, 599. The only evidence of such necessary fact in this case is an extract from the record of the doings of the inhabitants of Palermo in their March meeting, in 1883. By R. S., ch. 3, § 24, the town clerk is required to record such fact, by recording the name of the officer, and of his office, by whom sworn, and the time of taking the oath. By R. S., ch. 1, § 6, cl. 20, the word "sworn" used in the record shall refer to the oath required in the particular case, and imply all the terms of that oath. It seems essential, therefore, either that the words of the oath be recorded, or that it should be expressly alleged in the record that the officer was "sworn." The administration of the qualifying oath is matter of substance, and should appear in the record as a substantive transaction, and not as a mere note to some other transaction.

The extract is as follows: "Palermo, March 12, 1883.

"Then met the legal voters of the town of Palermo, and voted as follows, to wit:

"Art. 1. Chose Eli Carr, Moderator. Sworn by John Greely.

* * * * * * * * * *

"Art. 4. Chose Hollis F. Foy, 1st assessor. " " "
" George W. Carr, 2d, " " " "
" Woodbury Tibbetts, 3d, " " " "

* * * * * * * * * *

"Art. 7. Chose S. B. Jones, Collector of taxes. Sworn by John Greely."

One of the acts of the legal voters at that meeting was the election of assessors. The clerk undertook to make a record of that act. The ditto marks used by him in making that record

may, perhaps, be safely held to be equivalent to the words under which they are placed in the record of that particular act.

The record of the assessors being sworn, (if record evidence alone is offered, as here,) should be as clear and full as the record of their election. But the clerk used no words indicative of their being sworn. At the most, he only added to the record of their election sundry other ditto marks. These clearly do not refer to any words in the record concerning the assessors. The plaintiff, however, contends that these other ditto marks refer to words in the record of the election and qualification of the moderator, viz, "sworn by John Greely," and should be held equivalent to such words. We do not think so. The qualification of the moderator was an act by itself. Other acts evidently intervened between that and the election of the assessors, the records of which are omitted from the extract. The extract itself plainly so indicates. The ditto marks in question may, and most likely do, refer to some words in the omitted record of the act next preceding, words which so far as we know may be entirely different from those in the record concerning the moderator. We do not think the record of an essential transaction can be made up wholly with ditto marks, unless, indeed, the words to which they refer are unmistakable.

For lack of sufficient evidence that the assessors were in fact duly sworn, we must hold that the tax sale of 1883 passed no title.

It is sometimes said that it is difficult to so assess a tax, and make a tax sale, as to pass a title to the purchaser. It should not be so. Every necessary step is named in the statute, and it is only necessary to have competent evidence that such steps were taken.

The plaintiff does not claim that his case is supported by R. S., ch. 6, § 205.

Judgment for defendant.

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

JOHN W. MANSON, Executor,

vs.

WILLIAM K. LANCEY, and another.

Somerset. Opinion March 28, 1892.

84 380
88 478
84 380
100 559

Promissory Note. Limitations. Payment. R. S., c. 81, § § 97, 100.

An indorsement on a promissory note of the value of a quantity of lumber delivered to the payee by the maker, made by express agreement of the parties four years after the delivery of the lumber, will be deemed a payment on the note, as of the date of the indorsement, which will prevent the operation of the statute of limitations, it not appearing that there was any agreement, express or implied, to appropriate the lumber to the payment of the note at the time of the delivery.

ON REPORT.

Assumpsit on a promissory note. The defendants pleaded the general issue and statute of limitations.

The case is stated in the opinion.

D. D. Stewart, *J. W. Manson*, with him, for plaintiff.

S. S. Brown, for defendants.

It is the payment, and not the indorsement of the payment, that extends or renews the note. If payment was not such, when the boards were delivered, no payment has ever been made. The indorsement recites it was same as if made when the boards were delivered, and to draw interest from that time, thus recognizing the equity of such construction as to time of payment. *Sargent* v. *Southgate*, 5 Pick. 311; *Robinson* v. *Perry*, 73 Maine, 168. Uncertainty as to amount of boards received does not destroy the effect of payment. *Dinsmore* v. *Dinsmore*, 21 Maine, 433; *Barnard* v. *Bartholomew*, 22 Pick. 391. The act of indorsing payment was plaintiff's, defendants' consent not established. *Blanchard* v. *Blanchard*, 122 Mass. 558; *Brightman* v. *Hicks*, 108 *Id.* 246.

WHITEHOUSE, J. Assumpsit upon a promissory note of which the following is a copy:

"Pittsfield, Feb. 22, 1875.

"For value received of J. C. Manson I promise to pay him or

order four thousand dollars in one year from date and interest at the rate of eight per cent, semi-annually until paid.

"W. K. Lancey.

"Isaac H. Lancey, Surety."

The following indorsements appear upon the note, viz:

"March 6, 1876, received three thousand dollars."

"May 3, 1880, rec'd of I. H Lancey five hundred forty-one dollars and twenty-five cents."

"Jan'y 21, 1881, rec'd check by Robert Dobson & Co. $328.86 by hand of I. H. Lancey."

"Oct. 16, 1885, by 2226 feet of boards at $15.00 per thousand, delivered about June 1, 1881, to be indorsed with interest on same from that time to now, by order of I. H. Lancey. Boards were had of W. K. L."

The defendants admitted the first three indorsements, but denied the last one and claimed that the action was barred by the statute of limitations. The writ was dated February 23, 1888.

Section 97, of chapter 81, R. S., provides that no acknowledgment or promise takes the case out of the operation of the statute, "unless the acknowledgment or promise is express, in writing, and signed by the party chargeable thereby." But section 100, of the same chapter says that, "nothing herein contained alters, takes away or lessens the effect of payment of any principal or interest made by any person. But no indorsement or memorandum of such payment, made on a promissory note, by or on behalf of a party to whom such payment is made, or purports to be made, is sufficient proof of payment to take the case out of the statute of limitations; and no such payment made by one joint contractor affects the liability of another." It is well recognized and familiar law that the "effect of payment of any principal or interest" made and intended as part payment of a debt is an acknowledgment of that debt and a renewal of the obligation to pay it. *Sinnett* v. *Sinnett*, 82 Maine, 278.

In other words, while a mere acknowledgment or promise must be in writing and signed by the party chargeable, to render

it valid, a new promise is implied from the fact of a partial payment of principal or interest. *Sibley* v. *Lumbert*, 30 Maine, 253.

But, it is the fact of payment that operates as a renewal of the promise and removes the statutory bar, and not merely the indorsement on the note. The indorsement is simply evidence of payment, and sufficient evidence only when made by the party liable to pay the note. The indorsement may never be made, but if the fact of payment is satisfactorily established by other evidence, it is equally effectual to save the case from the operation of the statute. It is well settled that such payment may be proved by parol. *Egery* v. *Decrew*, 53 Maine, 392; *Evans* v. *Smith*, 34 Maine, 33; Wood on Limitations, sections 105, 115; *Blanchard* v. *Blanchard*, 122 Mass. 558.

In the last named case, the question was carefully considered and the leading authorities bearing upon it were critically examined and distinguished. In that case there was an indorsement on each note in the defendant's handwriting to the effect that fifty dollars had been received on it. It appeared, however, that no money was in fact paid. But, the plaintiff offered to prove that it was agreed between the parties, when the indorsements were made, that they should be deemed payments sufficient to save the note from the statute of limitations. This evidence was held inadmissible. The court said, "Payment, within the meaning of the statute, must be the actual payment of money or its equivalent; it therefore necessarily follows, that an indorsement, which it is agreed does not represent such a payment, and is not signed by the party to be charged, cannot be made, by force of an oral agreement, evidence of a new and continuing contract. . . . There can be no question that oral agreements are competent to prove that certain payments of money, or that a note, or the transfer of property, or settlement of accounts, or the assuming of certain obligations of a pecuniary character actually performed, are, as between the parties, to be taken as payments on account of, or in reduction of, a particular note within the meaning of the statute; but we are of opinion that such oral agreements must conform to and relate and give color to some actual transaction, whereby something of value passes between the parties."

In *Bodger* v. *Arch*, 10 Exch. 333, it was agreed between plaintiff and defendant that the future maintenance of the plaintiff's child by the defendant should be taken in part payment of the interest on the defendant's note held by the plaintiff; and it was held that such maintenance of the child must be deemed part payment within the statute. Baron Parke said: "The part payment need not be in money, but in any mode which the parties agree shall be treated as equivalent to a payment in money. Therefore, the settlement of accounts in 1839, whereby it was agreed between the plaintiff and defendant that the interest up to that time should be considered as paid and discharged, is such a payment as took the case out of the statute. My brothers are all of opinion that the maintenance of the child, part of which took place within six years before the commencement of the action, being the agreed mode of payment of interest, was a payment within the meaning of the exception." Baron Martin was of opinion that any facts which would prove a plea of payment of interest, in an action brought to recover it, would be sufficient to bar the statute.

In *Amos* v. *Smith*, 1 H. & C. (Exch.) 238, the plaintiffs were trustees of a marriage settlement, and lent to the husband, in 1833, some of the trust money which was settled to the separate use of the wife, upon the security of a bond, executed by him and the defendant as surety, conditioned for the payment of eight hundred and sixteen pounds and interest. No interest was paid by the husband, and in 1847, it was arranged between the plaintiffs, the husband and the wife, that she should give the plaintiffs a receipt for the interest due to that date, which she did; and she afterwards gave receipts to the plaintiffs for each half year's interest until 1860. No money passed between the parties, and it was held that the transaction amounted to a payment or satisfaction of the interest so as to take the case out of the statute of limitations. It was a mode of settlement of accounts between the parties, and Baron Bramwell was of opinion that the wife could not maintain a suit against the trustees to enforce payment of interest to her. "If," said he, "the money had been paid by the husband to the trustees

and immediately handed over by them to the wife, that would have been a mere idle ceremony. There are numerous cases which establish that there may be a payment by settlement of accounts. When two persons indebted to each other meet and agree to set off their respective debts, that is not a mere settlement of accounts, but is as much a payment as if the money had passed between them."

In the case before us, the question presented for the decision of the court on the evidence reported, is whether the boards mentioned in the last indorsement are to be deemed a payment on the note made when they were delivered in 1881, or as a payment made at the date of the indorsement.

If the boards were received under a mutual agreement, express or implied, that they were to be then appropriated in part payment of the note, and the party from whom they were received had authority at the time of the delivery to make such appropriation, they must be deemed a payment made at the date of the delivery. The boards in question appear to have been a part of a lot which originally belonged to William K. Lancey, the maker of the note. It is satisfactorily shown by the testimony that the entire lot of lumber was under a mortgage to the defendant, Isaac H. Lancey, and two others, as indemnity for signing this and other notes. William K., therefore, had no authority to apply any part of this lumber to the payment of a particular note without the consent of Isaac. Nevertheless, he assumed to deliver to the plaintiff's father, the payee of the note, the amount in question without the consent of the mortgagee. Isaac testifies that he had no knowledge whatever of the original transaction. There is no evidence in the case showing any express agreement between William K., and J. C. Manson that the boards were to be applied in payment of the note. The only person living who has any knowledge of that transaction is William K. He was not called as a witness, and his absence has significance upon this point. Nor can any such original agreement, to apply the boards to the note, be implied from the circumstances and situation of the parties, for William K., had no authority to make such an arrangement at that time. Furthermore, it

appears that Isaac exercised acts of ownership and control over the entire lot of lumber and claimed that it was his property. He personally sold a quantity of it to Dobson, received the check in his own name and applied it to the payment of the note as shown by the first indorsement. It appears, however, that after Isaac learned of the delivery of the lumber to Manson, he had several interviews with him in regard to the amount, but there was a dispute in relation to it, and no agreement to indorse the amount on the note was ever made during the life-time of J. C. Manson.

The indorsement of October 16, 1885, is in the handwriting of the plaintiff, and there is a conflict of testimony respecting the circumstances under which it was made. The plaintiff testifies that Isaac expressly authorized and directed him to indorse the amount on the note according to his figures, and that thereupon he wrote the indorsement as it now stands, in Isaac's presence; that he read it to him and that Isaac distinctly assented to it. Isaac denies that he ever authorized it or consented to it. But the plaintiff's testimony upon this point is corroborated by other witnesses and by all the circumstances and probabilities connected with the transaction. It was for Isaac's interest to have the indorsement made, both to reduce the debt, and to avoid a threatened suit. He admits that he was present when the indorsement was made, and that it was read to him. It recites the fact that it was done "By order of I. H. Lancey;" and it is highly improbable that the plaintiff would have the hardihood to read a false statement to him, and after hearing him repudiate it still rely upon it as a valid indorsement, and remain inactive until the note was barred by the statute of limitations.

The language of the indorsement is in entire harmony with the plaintiff's theory. It was not worded with studied accuracy but the meaning is plain. It is in the form of an entry of credit: "By 2226 feet of boards which were delivered about June 1st, 1881; and it is agreed that they are now to be indorsed with interest on same from that time." Such is the obvious pur-

port. It does not mean that they were delivered to be indorsed in 1881, for it would be manifestly absurd to say that it was agreed in 1881, that they should be then indorsed with interest "to now."

The conclusion is, therefore, irresistible, that on October 16, 1885, Isaac, with a full understanding of the facts, ratified the act of William in delivering this lumber, and intentionally assented to the indorsement in question as representing a settlement of the account and a valuable consideration passing from him to the plaintiff at the time of the indorsement. The lumber had been delivered generally on the credit of the plaintiff's testator. He was liable to account to the defendant, Isaac, for the value of it. By the settlement, Isaac received that value in reduction of the debt which he was liable to pay. It was a transaction which would have supported a plea of payment in an action on the note. William K., was interested in the property as mortgagor and made no objection to the indorsement.

The long delay has been at the instance of the defendant and for his accommodation. The plaintiff's forbearance should not inure to his prejudice; and while the sound public policy which underlies the statute of limitations, regarded as a statute of repose, is not to be questioned, the position of the defendant in this case is not so meritorious as to justify the court in giving less than its full value to all the evidence tending to support the plaintiff's contention.

The note is not barred by the statute of limitations.

Judgment for plaintiff.

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

HENRY A. NEELY *vs.* SARAH A. HOSKINS, and others.

Penobscot. Opinion March 29, 1892.

Deed. Trust. Condition.

Where a grantor conveyed a parcel of land with a church edifice thereon with a warranty against claims through or under himself, to the Bishop of the Protestant Episcopal church for the diocese of Maine, receiving five hundred

dollars therefor, not an extremely inadequate price under the circumstances for the interest actually conveyed, the money paid having been collected through contributions from friends of the church, the conveyance being made to the bishop "and his successors in office, upon the condition that it [the property conveyed] shall be forever held for the use of the Protestant Episcopal church in Old Town," the grantor having at the date of the conveyance a technical fee in the estate subject to a right of perpetual use by the church, excepting as to a basement hall in the building, in which the grantor had a qualified right of use: *it was held*, that the deed is not upon a condition that can be the foundation for any forfeiture to the grantor or his heirs, and that the instrument of conveyance merely creates a trust in the bishop for the benefit of the parish at Old Town, and enforceable in equity only in its behalf.

On report.

This was a writ of entry brought by the plaintiff as the successor of George Burgess, late Bishop of the Protestant Episcopal church in the Diocese of Maine, to recover possession of a certain lot of land and edifice thereon known as St. James' church and lot in Old Town.

The writ is dated December 18, 1888. Plea, general issue, with a brief statement alleging that one Ira Wadleigh conveyed the premises to George Burgess and his successors upon condition, and that the condition had been broken and the estate forfeited to the defendants as sole heirs of said Wadleigh.

Other facts stated in the opinion.

The defendants claimed that the property was conveyed on condition that it should be occupied and used for religious services by the local parish, or possibly by the bishop; that it has been abandoned by the parish; and that this abandonment is proved, partly by the church's being allowed to fall into decay, partly by a transfer of the religious services by the officers of the parish to a building other than the church, and partly by other evidence. They did not appear to deny the bishop's title, but contended that his estate was forfeited by breach of the condition under which they allege he holds.

From the evidence introduced by the plaintiff, it appeared that up to the 21st November, 1886, the premises were occupied by the parish, under the bishop, for religious services and other uses. The church was not in thorough repair, but was tenantable. The parish had gradually accumulated a sum of money,

with which, as soon as it should seem advisable, it intended to repair or to rebuild the church. This repairing or rebuilding was delayed, in part because the members had not fully agreed upon which should be done,— repairing or re-building,— and in part because it was desirous of letting the fund grow a little larger before it did either. In November, 1886, the parish officers, by reason of the difficulty of warming the church properly during the winter, transferred the services temporarily by invitation of one of its wardens, to a room in his newly-built dwelling-house, where he had a front room which he had not furnished, and which it was thought, would afford a sufficiently convenient place for the services through the winter, — the intention being to resume service in the church the next spring or summer. The parish, is a small one, the average number of persons worshipping with it being about thirty.

The services were not resumed in the church the following spring or summer; the reason given by the parish officers being that, although they always intended to go back, they let matters run along as men often do; and that this inaction was aided by their idea that they would thus avoid a double removal, for they hoped that during the year the old church would be either re-built or repaired. In November, 1887, the two defendants, who are granddaughters of Wadleigh entered on a claim of breach of condition; and in April, 1888, they seized the possession of the church, thus preventing the return of the parish. During all this time, the parish officers held the keys of the church, and much of the parish property was kept in the church, where it had been left when the services were transferred to the dwelling-house.

Geo. T. Sewall, and N. & H. B. Cleaves, for plaintiff.

Conveyance in fee, upon trust or in restriction: 2 Wash. R. P. § *447; *Gray* v. *Hussey*, 83 Maine, 329; *Stanley* v. *Colt*, 5 Wall. 165; *Wright* v. *Wilkins*, 2 Best & Smith, 248; 1 Sug. Powers, 122, 7th ed; *Hoyt* v. *Kimball*, 49 N. H. 322; *Fuller* v. *Arms*, 45 Vt. 400; *Chapin* v. *Harris*, 8 Allen, 596; *Sohier* v. *Trinity Church*, 109 Mass. 19; *Rawson* v. *School District*, 7 Allen, 125; *Episcopal City Mission* v. *Appleton*, 117 Mass.

329; *Stone* v. *Houghton*, 175 Mass. 135; *Ayling* v. *Kramer*, 133 Mass. 12; *Saltonstall* v. *Propr's*, 7 Cush. 201; *Ayer* v. *Emery*, 14 Allen, 70; *Brown* v. *Caldwell*, 23 W. Va. 187; *Paschell* v. *Passmore*, 15 Pa. St. 295–301; *McKnight* v. *Krentz*, 51 Pa. St. 333; *Homer* v. *Chicago Ry. Co.* 38 Wis. 165; *Carter* v. *Branson*, 79 Ind. 14; *Wier* v. *Simmons*, 55 Wis. 637; *Jackson* v. *Brownson*, 7 Johns. 235; *Austin* v. *Cambridgeport Parish*, 21 Pick. 215; *Post* v. *Weil*, 115 N. Y. 366; *Bac. Abr.* (Covenant, A.); Shep. Touch, 161; 4 Kent. Com. 132; *Clement* v. *Burtis*, 121 N. Y. 709; *Mason* v. *Manchester*, 9 Wheat. 55; *Crane* v. *Hyde Park*, 135 Mass. 147; *Lynde* v. *Hough*, 27 Barb. 415; *Hadley* v. *Hadley M'f'g Co.* 4 Gray, 145; *Osgood* v. *Abbott*, 58 Maine, 81; *Emerson* v. *Simpson*, 43 N. H. 475; *Mead* v. *Ballard*, 7 Wall. 290; *Voris* v. *Renshaw*, 49 Ills. 425; *McKissick* v. *Pickle*, 16 Pa. St. 140; *Mills* v. *Evansville Seminary*, 58 Wis. 135.

Waiver of condition: *Hooper* v. *Cummings*, 45 Maine, 359; *Hubbard* v. *Hubbard*, 97 Mass. 192; *Ludlow* v. *R. R. Co.* 12 Barb. 440; *Andrews* v. *Senter*, 32 Maine, 397; *Guild* v. *Richards*, 16 Gray, 309.

Right to enforce forfeiture lost by conveyance after alleged breach of condition: *Craig* v. *Franklin County*, 58 Maine, 479; *Nicoll* v. *R. R. Co.* 12 Barb. 460; 1 Add. Cont. *261; *Rice* v. *R. R. Co.* 12 Allen, 142; 5 Vin. Abr. Condition, I, d, 11; *Bowen* v. *Bowen*, 18 Vt. 534; *Peaks* v. *Blethen*, 77 Maine, 510.

Charles P. Stetson, for defendants.

Counsel cited: *Austin* v. *Cambridgeport Parish*, 21 Pick. 215; *Hayden* v. *Stoughton*, 5 Pick. 528; *Allen* v. *Howe*, 105 Mass. 241–2; *French* v. *Old South Soc.* 106 Mass. 479; *Tilden* v. *Tilden*, 13 Gray, 104.

PETERS, C. J. This is a real action to recover a lot of land with a church edifice thereon, situated in Old Town, the demandant claiming under a deed to himself from Ira Wadleigh, dated November 21, 1885, which, omitting formal parts and description of premises, is as follows:

"Know all men by these presents, that I, Ira Wadleigh, now of Sacramento in the state of California, formerly of Old Town, Maine, by Joseph B. Moor, of Bangor, my lawful attorney duly and legally authorized to make and execute and deliver these presents, in consideration of five hundred dollars to me in hand paid by George Burgess, of Gardiner, Bishop of the Protestant Episcopal church for the Diocese of Maine, the receipt whereof is hereby acknowledged, do hereby give, grant, sell and convey unto the said George Burgess, Bishop as aforesaid, upon the condition that it shall be forever for the use of the Protestant Episcopal Church at Old Town, and to his successors in said office forever, a certain lot of land on the east side of Marsh's Island in Old Town, county of Penobscot, Maine, and all the buildings, fixtures and property thereon at the date hereof, known as St. James' church and lot, to wit: . . . Reserving and excepting from said conveyance, to said Wadleigh and to J. H. Hilliard, their heirs and assigns, the occupation of three pews, to wit, to said Wadleigh pews numbered eleven and thirteen, and to said Hilliard the pew heretofore conveyed to him by deed from said Wadleigh or the parish of St. James' church. . . .

"To have and to hold the aforegranted premises, with all the privileges and appurtenances thereof, to the said George Burgess and his successors in said office forever. And I do covenant with said grantee and his successors that said premises are free of all incumbrances created by me, and that I and my heirs shall and will warrant and defend the same to the said grantee and his successors forever, against the lawful claims and demands of all persons claiming by, through or under me.

"In witness whereof, I, the said Wadleigh, by Joseph B. Moor, my attorney, authorized as aforesaid, for the consideration aforesaid, have hereunto set my hand and seal this day of , in the year of our Lord one thousand eight hundred and sixty-five."

The defendants are grantees and heirs of Ira Wadleigh, now deceased, and claim that the foregoing is a deed upon condition subsequent, that the condition has been broken, and that the estate has reverted to themselves as such heirs.

Upon the question of forfeiture and reverter, and of estoppel and waiver, much evidence is adduced on both sides and many arguments urged. The demandant's counsel, however, deny that the conveyance is upon condition, contending that it is to be construed as a deed of trust merely. If this position be tenable, and we feel constrained to so hold, all the other questions that have appeared in the case become superseded thereby.

It is not expressed in the deed that the estate shall be revertible for any cause, but it is contended that the idea is implied. The term condition does not necessarily import it. Condition may mean trust and trust mean condition, oftentimes. The construction must depend upon the context and any admissible evidence outside of the deed.

An examination of certain prior instruments of conveyance to Wadleigh, from the parish, named in his deed to the Bishop, will very much assist in showing the intention of the parties as contained in the deed in question.

The parish, having a full title to the property, excepting as encumbered by mortgage, conveyed, on July 8, 1852, to Wadleigh certain pews in the house by a deed of the following form:

"Know all men by these presents, that we, the undersigned, wardens of St. James' church, in Old Town, being duly authorized in the premises, in consideration of large claims against the parish given up to us in said capacity by Ira Wadleigh, Esq., which we do hereby acknowledge, have bargained, sold and conveyed, and by these presents do hereby bargain, sell and convey unto said Wadleigh and his heirs and assigns forever the right to occupy, use and enjoy forty-five pews in St. James' church, in Old Town aforesaid, and the privileges to said pews belonging, said pews being numbered as below.

"This conveyance is on the condition that neither the said Wadleigh nor his heirs or assigns shall change the worship in said church to any other denomination than that of the Protestant Episcopal Church, or in any manner consent that it may be changed, and it shall be void and the property revert, if so changed either wholly or in part.

"To have and to hold the rights aforesaid to him, said Wadleigh and his heirs and assigns forever upon the condition aforesaid. And we do hereby in our said capacity covenant with said Wadleigh that said pews are free of all incumbrances, and that we in our said capacity will, and the wardens of said church shall, warrant and defend said pews on the condition aforesaid, to him, said Wadleigh and his heirs and assigns forever against the lawful claims and demands of all persons.

"In testimony whereof, we the wardens of the church aforesaid, have set their hands and affixed their seals this eighth day of July, A. D., 1852, in our capacity of wardens.

"The pews hereby conveyed are numbered as follows: . . .

"Signed, sealed and delivered in the presence of us.

"D. C. Weston. Ira Wadleigh, (L. S.)
Cony Foster." (L. S.)

On the same day the parish made to him another deed, (omitting a part of the description of the premises) as follows:

"Know all men by these presents, that we, Ira Wadleigh and Cony Foster, wardens of the parish of St. James' Church in Old Town, Maine, being duly authorized in the premises, in consideration that Ira Wadleigh, Esq., of said Old Town, has given to the said parish a receipt in full of all demands, and has also given to said parish a full release and discharge of a mortgage against said parish, recently assigned to said Wadleigh by Samuel Blake, Esq,, do hereby give, remise, release, sell and forever quit claim unto the said Wadleigh, his heirs and assigns, a certain parcel of land, with the church and one other building thereon, lying on the east side of Marsh Island in said Old Town, viz: Lot numbered fourteen, according to Herrick's plan of part of lot numbered fifteen, Holland's survey and plan, and bounded as follows: . . . being the same lot conveyed to the parish by Turner Cowing and James Green, November 26th, 1849.

"To have and to hold the aforementioned premises with all the privileges and appurtenances to the same belonging, to the said Wadleigh and to his heirs and assigns forever, subject to the following reservations and conditions:

In view of all the circumstances, the witness Sewall, who would be perhaps more likely than any other person to be informed on the question, testifies that the five hundred dollars paid was an adequate consideration for the interest purchased. At all events, that sum was satisfactory to the grantor, who had removed from Old Town and was then in California. The parish was evidently poor and the pews neither valuable nor salable. Of course, if the premises were worth no more than that sum to sell, there would be no more value in them to the grantor upon a reverter. The heirs are mistaken in supposing, if such be their view, that a forfeiture of the interest to them would discharge the conditions imposed upon the property by prior deeds. In the light of these facts, it seems unreasonable to believe that the grantor Wadleigh would have asked for conditions of forfeiture, or that the grantee would have submitted to any.

Furthermore, there is every reason to believe that the grantor never conceived the idea of inserting any condition for his own benefit in his conveyance. The deed was executed in his name and for him by Joseph B. Moor, a son-in-law, under the authority of a general power of attorney to take possession of all his real and personal property in Penobscot county, and any property in which he was interested, and sell the same or any part thereof, for such sums or prices and on such terms as to him should seem meet. The same grantor sells to Charles Wadleigh a balance of the church lot not covered by his deed to the Bishop, describing it as "all the land west of the premises heretofore by me conveyed to George Burgess, Bishop of the Diocese of Maine, *in trust for the parish* of St. James."

He not only thus describes the conveyance as a trust, but the Bishop does the same thing, who undoubtedly dictated the form of the deed by the following written communication:

"Gardiner, May 3, 1865.

"My Dear Sir: I have written to Mr. Joseph B. Moor, of Bangor, who Mr. Wadleigh authorized, by his power of attorney, to make a deed of his interest in the church at Old Town; and have informed him that I would request you, as Mr. Wad-

leigh suggested, to prepare the deed, and would have the money, $500, in readiness at the time of its execution.

"The deed, it appears to me, should be made to me, as Bishop of the Protestant Episcopal church in Maine, and to my successors in office, *in trust for the parish* of St. James' church, Old Town.

"You will judge best whether it should be a quit-claim deed or more. You will also satisfy yourself, I presume, by examination, that there is no other incumbrance.

"Mr. Wadleigh reserves five pews; and they should be designated. He fixes the boundary at twenty-five feet west of the church. If you will send me the draft of the deed before it is executed, I will send it back with a check for the money.

Respectfully yours, George Burgess."

Hon. G. P. Sewall."

If it be inquired why there were inserted in the deed to the Bishop the words, "upon the condition it shall be forever held for the use of the Protestant Episcopal church in Old Town," the answer is that the Bishop was buying the interest for the parish and not for himself. He collected the money paid for the purpose for the parish and not for himself. Therefore he was to hold the property for the benefit and use of the parish. Had the bishop taken a deed to himself in unqualified terms, the parish would have stood in the same relation towards him as they had before stood with Wadleigh. The object was to extend relief to the parish and obtain its freedom from such claim in the hands of Wadleigh or any one else. It was not to have the claim of Wadleigh assigned, but to extinguish it.

Undoubtedly the deed contains a condition for the benefit of the parish, but not for Wadleigh's benefit. It operates between the parish and the Bishop, and is not available otherwise. Every trust implies a condition that the trustee will faithfully administer the trust. Equity would enforce this trust at the instance and for the benefit of the parish. But the heirs of Ira Wadleigh could not complain. *Sohier* v. *Trinity Church*, 109 Mass. 1.

Judgment for demandant.

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

ANDREW P. WISWELL, and others, Trustees,

vs.

JOHN H. BRESNAHAN.

Hancock. Opinion March 29, 1892.

Contract. Condition. Assent. Alteration.

A stipulation, that the trustees of a certain fund, to be raised by subscription, should signify their acceptance of the trust in writing, is a condition precedent to their right to enforce such subscriptions.

ON REPORT.

Action of debt. The case appears in the opinion.

A. W. King, *F. L. Mason* with him, for plaintiffs.

J. B. Redman, for defendant.

WHITEHOUSE, J. This was an action of debt on a contract to recover the amount due on the defendant's subscription to a "shoe-factory fund," in the city of Ellsworth.

It appears from the evidence reported that the defendant signed a subscription paper by which he promised to pay the amount of his subscription to the plaintiffs, who were therein named as trustees of the fund, "when there shall have been subscribed an amount sufficient, in the judgment of the trustees, to carry out the purposes of this trust." This paper further states that "the purposes of the trust and the rights, powers and authority of said trustees are as set forth in the following articles which we, the subscribers, severally agree to, and said trustees shall in writing signify their acceptance of the trust according to said articles." Art. II, directs the trustees to expend such sums as they might deem expedient for the purchase of lands and the erection of buildings; and Art. V, is as follows: "The balance not expended as provided in Art. II, of the whole sum hereby subscribed and collected, not exceeding twelve thousand dollars, may be given by said trustees to any persons, firms or corporations who shall take a lease or leases of said property, said gift or gifts to be made on such terms and conditions as shall be determined upon by said trustees."

The plaintiffs never signified in writing their acceptance of the trust according to the articles of this agreement, but after subscriptions aggregating some three hundred dollars, including the defendant's, had been obtained upon it, this paper was withdrawn and another one circulated in its stead of substantially the same tenor, with the exception of Art. V, which is as follows: "The said trustees may in their discretion at any time convey to any persons, firms, or corporations, the lot, buildings or machinery purchased or erected, as provided in Art. II, upon such terms as they may decide, and with or without consideration, as they may deem for the best interests of the city of Ellsworth and of these subscribers." The plaintiffs formally signified in writing their acceptance of this trust by an indorsement over their signatures, and thereupon further subscriptions were obtained on this second agreement aggregating nearly twenty-five thousand dollars, a sum sufficient, in the judgment of the trustees, to carry out the purposes of the trust.

If the defendant is liable in this action, it is by virtue of the contract which he signed. But it is an elementary principle common to all contracts that there must be a mutual assent of the parties to the same subject matter in the same sense. No contract is completed until each party has accepted every proposition of the other without modification or the addition of new matter. There must be a clear accession on both sides to one and the same set of terms. 1 Chit. Con. 15–21; Met. Cont. 18; 1 Pars. Cont. 476; *Jenness* v. *Iron Co.* 53 Maine, 20; *Railroad* v. *Unity*, 62 Maine, 153. The result of the authorities is all embraced in the simple principle that only when the wills of the parties so unite in the same thing as to exactly coincide, does the law recognize a contract. Bish. on Cont. § 334.

But it appears from a comparison of the two papers that after the defendant's subscription had been obtained on the first one, and before the plaintiffs had signified their acceptance of the trust, a material alteration was made in Art. V. The terms of Art. V, in the second paper disclose an esssential modification of Art. V, in the paper declared on in the writ. The authority conferred upon the trustees respecting the disposition of the

funds is widely different. There appear to be two separate and distinct trusts. The trust accepted by the plaintiffs in writing is not the one set forth in the contract signed by the defendant.

The acceptance of the trust by the plaintiffs according to the articles of the agreement must be deemed an essential term of the contract. The defendant might well repose special confidence in the integrity, ability and discretion of the plaintiffs, and willingly contribute to a fund to be employed at their discretion, when he would decline to subscribe if others were named as trustees. Acceptance by the plaintiffs was, therefore, a condition precedent to their right to enforce payment of the subscriptions.

But it is insisted in behalf of the plaintiffs that, though they omitted to signify their acceptance in writing on the paper signed by the defendant, they did in fact accept the trust and enter upon the execution of it. Of this however there is no satisfactory evidence. They did not signify their acceptance in writing on the first paper, and after subscriptions to an insignificant amount had been obtained upon it, it was superseded by another and a different one, on which is written the plaintiffs' formal acceptance of the trust "according to the articles thereof." The inference from this is irresistible that the plaintiffs decided not to accept the trust set forth in the agreement declared on. The amount which in the judgment of the plaintiffs was sufficient to carry out the purposes of the trust was subscribed on the second paper and not on the first. The plaintiffs entered upon the discharge of the the trust which they accepted and not of the trust which they did not accept. The facts reported establish no contract by which the defendant is bound. *Railroad* v. *Unity*, *supra*.

Plaintiffs nonsuit.

PETERS, C. J., VIRGIN, LIBBEY and FOSTER, JJ., concurred. EMERY, J., did not sit.

84 400
e99 501

WILLIAM E. MANN, and another, in equity,

vs.

HELEN S. JACKSON.

Penobscot. Opinion March 29, 1892.

Will. Condition. Limitation. Restraint of Marriage.

A testator devised his homestead to an unmarried daughter, "for and during her natural life, unless she shall be married, in which case her life estate shall cease. So long as she shall live and remain unmarried she is to have the exclusive right of occupation, use and enjoyment of said homestead." *Held*; that the intention of the testator, as manifested by the whole instrument, was not to promote celibacy by imposing a condition in restraint of his daughter's marriage, but only to create a limitation of her estate in the homestead until by her marriage another home should be provided; and that the daughter's exclusive right to the possession and enjoyment of the entire homestead accordingly ceased upon the marriage.

ON REPORT.

Bill in equity, heard by agreement upon the facts stated in the bill including the will itself, brought to obtain the legal construction of the will, of the late William Mann, as affecting the rights of the defendant in her father's homestead, she having married since his death.

The facts and material parts of the will are stated in the opinion.

A. W. Paine, for plaintiffs.

C. H. Bartlett, for defendant.

The provision in the will by which the life estate of the testator's daughter was to cease, if she married and the homestead go to his three children, is a condition subsequent in general restraint of marriage, without a valid limitation over, and therefore void. But if not, yet in a devise to trustees to pay over the net income to the testator's grandson, "so long as he shall remain unmarried," the condition was held void and the grandson was entitled to the income after his marriage. *Otis* v. *Prince*, 10 Gray, 581. Unqualified restrictions on marriage are void on grounds of public policy, 2 Jarm. Wills. 572, (5th Am. ed.). A condition was held void where the testator did not regard his daughter as being in a fit state of

health to marry on account of a supposed nervous affection. *Morley* v. *Rennoldson*, 2 Hare, 570 (24 Eng. Ch. 571). A condition subsequent annexed to a devise or conveyance of real estate, if of a general character, is void. *Randall* v. *Marble*, 69 Maine, 310; *Otis* v. *Prince*, *supra*. Most courts (not all) admit the doctrine that a condition in restraint of marriage will be upheld when there is a valid gift or limitation over. *Randall* v. *Marble*, *supra*. The limitation over to the testator's heirs is void. *Randall* v. *Marble*, *supra*; *Otis* v. *Prince*, *supra*; 4 Kent Com. *506. It is also void because the estate limited over is incorporated with the whole residue of the testator's estate. *Parsons* v. *Winslow*, 6 Mass. 167, pp. 179, 181. When a subsequent condition is annexed to a gift of land, if general, it is void, and although broken, the estate of the donee continues. 2 Pom. Eq. § 933.

WHITEHOUSE, J. This is a bill in equity brought for the purpose of obtaining a judicial construction of the following will:

"1. I will that the money which may come from the policy of insurance, which I hold on my own life, be appropriated to the payment and discharge of any and all mortgages, then existing on my homestead house and lot on Cedar street, in said Bangor, so that said homestead may be free from all incumbrances, and any balance to be applied to pay any taxes then due or unpaid, on said homestead, and any balance to go with my other estate.

"2. My said homestead, house and lot aforesaid, I give and devise to my unmarried daughter, Helen S. Mann, for and during her natural life, unless she shall be married, in which case her life estate shall cease. So long as she shall live and remain unmarried she is to have the exclusive right of occupation, use and enjoyment of said homestead, but subject to the duty of keeping it in good repair at her expense and paying all taxes and keeping the property well insured. If all parties interested see fit to sell the property, they may do so, in which case said Helen is to receive the net income from the proceeds of sale, the same to be well invested for that purpose, and if

the buildings are burned in whole or part, the insurance money shall be applied to repair or rebuild, unless all agree to a different appropriation of the money, viz, all parties interested.

"3. All other estate, real and personal, of all kinds which I may own or possess at death, including the remainder of my homestead, house and lot aforesaid, my farm on the Odlin road so-called, and all other property, I give in equal shares to my three children, William E. Mann, Mrs. Augusta S. Harden and Helen S. Mann, to have and to hold the same to them and their heirs and assigns forever."

After the death of the testator Helen S. Mann married and is the defendant in this suit.

The language of the second item of the will is specially brought in question. The plaintiff says that the defendant's "life estate" in the homestead was terminated by her marriage, while the defendant contends that the clause limiting her exclusive title by her marriage, is void as being a condition in restraint of marriage, and that she is entitled to the sole use and occupation of the homestead during her natural life.

It is undoubtedly an established rule of law that, even with respect to devises of real estate, a subsequent condition which is intended to operate in general and unqualified restraint of marriage, or the natural effect of which is to create undue restraint upon marriage and promote celibacy, must be held illegal and void, as contrary to the principles of sound public policy. It appears from the early English cases that this doctrine was borrowed by the English ecclesiastical courts from the Roman civil law which declared absolutely void all conditions in wills restraining marriage, whether precedent or subsequent, whether there was any gift over or not. But the courts of equity found themselves greatly embarrassed between their anxiety on the one hand to follow the ecclesiastical courts, and their desire on the other to give more heed to the plain intention and wish of the testator as manifested by the whole will. Thereupon the process of distinguishing commenced for the purpose of preventing obvious hardships arising from the application of that technical rule to particular cases. As a

result there has been engrafted upon the doctrine a multitude of curious refinements and subtle distinctions respecting real and personal estate, conditions and limitations, conditions precedent and conditions subsequent, gifts with and without valid limitations over, and the application of the rule to widows and other persons. Indeed, it may be said of the decisions upon this subject with even more propriety than was observed by Lord Mansfield in regard to another branch of law, that, "The more we read, unless we are very careful to distinguish, the more we shall be confounded." The whole subject as to what conditions in restraint of marriage shall be regarded as valid and what as void, would seem to be involved in great uncertainty and confusion both in England and in this country. There is clearly discernible, however, through all the decisions of later times, an anxiety on the part of the judges to limit as much as possible the rule adopted from the civil law. "The true rule upon the subject is," says Mr. Redfield, "that one who has an interest in the future marriage and settlement of a person in life, may annex any reasonable condition to the bequest of property to such person, although it may operate to delay or restrict the formation of the married relation, and so be in some respect in restraint of marriage. . . . . Where there are hundreds of conflicting cases upon a point and no general principle running through them by which they can be arranged or classified, what better can be done than to abandon them all and fall back upon the reason and good sense of the question, as the courts have of late attempted to do." 2 Red. Wills, 290, § 20, and note. See also *Id.* 297, and 2 Jar. Wills, 569. Beyond the general proposition first stated, the cases seem finally to resolve themselves for the most part into the mere judgment of the court upon the circumstances of each particular case. 2 Red. Wills, 297, § 31; 2 Pom. Eq. 933; *Coppage* v. *Heirs*, 2 B. Mon. 313, and note to same, 38 Am. Dec. 153.

But the rule was so far modified and relaxed that conditions annexed to devises and legacies restraining widows from marrying have almost uniformily been pronounced valid. 2 Pom.

Eq. *supra*. From the numerous decisions upon the subject in the United States, the conclusion is fairly to be drawn that such conditions will be upheld in the case of widows whether there is a gift over or not. 2 Jar. Wills, 563, note 29; 2 Red. Wills, 296; Sch. Wills, 603. See also recent cases of *Knight* v. *Mahoney*, 152 Mass. 523, and *Nash* v. *Simpson*, 78 Maine, 142.

In 2 Red. Wills, 296, the author says, "We apprehend there is no substantial reason either in law or morals why a man should be allowed to annex an unreasonable condition in restraint of marriage, one merely *in terrorem*, in case of a wife more than of a child or any other person in regard to whose settlement in life he may fairly be allowed to take an interest; but the cases certainly, many of them, maintain such distinction."

It is unecessary, however, to enter upon an elaborate discussion of the subject. The existence of the rule as recognized in *Randall* v. *Marble*, 69 Maine, 310, is not here questioned. In that case the rule was applied to a "crude and ill-defined" proviso in a deed of real estate. We have no occasion to question the soundness of that decision. It was the judgment of the court upon a particular set of words in that deed. It is not an authority to control the judgment of the court respecting the construction of an entirely different set of words in a testamentary gift of real estate.

There is a recognized distinction between *conditions* in restraint of marriage annexed to testamentary dispositions, and restraints on marriage contained in the very terms of the *limitation* of the estate given.

In *Heath* v. *Lewis*, 3 DeG. M. &. G. 954, (1853) a testator made a gift of thirty pounds a year to an unmarried woman during the term of her natural life "if she shall so long remain unmarried." Lord Justice Knight Bruce said, "It must be agreed on all hands that it is, by the English law, competent for a man to give to a single woman an annuity until she shall die or be married, whichever of these two events shall first happen. All men agree that if such a legatee shall marry, the annuity would thereupon cease. 'During the term of her natural life, if

she so long remain unmarried,' is the technical and proper language of limitation as distinguished from a condition."

Lord Justice Turner said, "It may either be a gift for life defeated by a condition, or it may be a gift to her so long as she remains unmarried, that is, for life, if she be so long unmarried; and the question, is therefore, purely one of intention, in which of the two senses the words were used."

Jones v. *Jones*, 1 L. R. Q. B. Div. 279, (1876) is an important authority. It related to a devise of real estate, the testator's language being as follows: "Provided said Mary remains in her present state of single woman; otherwise if she binds herself in wedlock she is liable to lose her share of the said property immediately and her share to be possessed by the other parties mentioned." Blackburn, J., said, "A number of cases have been referred to, from which it appears that the courts of equity have adopted from the ecclesiastical or civil law, it is unnecessary to say to what extent, the rule that conditions in general restraint of marriage are invalid. The attempt to escape from the consequences of this rule led to decisions in which a great many nice distinctions were established as to whether the bequest amounted to a condition or only a limitation. If this point had been as to a bequest of personal estate, it would have been necessary to look at these decisions. But this is a devise of land which is governed by the rules of the common law, and it is admitted that there is no case which extends the rule as to conditions or limitations to devises of land.

"There is, I admit, strong authority, that when the object of the will is to restrain marriage and promote celibacy, the courts will hold such a condition to be contrary to public policy, and void. But here there appears to be no intention to promote celibacy. Now here, I think, when one sees the scope of the testator's dispositions it comes to this: 'I have left to three women enough to live upon, and if one of them dies I bring in Jemima and Mary. But if Mary (I suppose as the youngest she was most likely to change her state) happens to marry, her husband must maintain her, and her share shall pass to the rest.' Now, if

he had said this in express words, could it have been contended that his provision was contrary to public policy? I think not. It is admitted that the limitation to Mary until she marries is perfectly good, but it is said that here, because the disposition is in the form of a condition, it is bad."

Lush, J., said, "We ought to take the words in such a sense as to carry out the object of the testator, unless it is illegal; and as I read the words, the testator only meant to provide for her while she was unmarried. There is nothing in these words which compels us to think it was the testator's object that this niece should never marry at all; he probably supposed that she would be maintained by her husband, and did not mean to provide for husband and wife." See also Hotz's Estate, 2 Wright, 422 (38 Pa. St.); *Connell* v. *Executors*, 11 Casey, 100; *Graydon* v. *Graydon*, 23 N. J. Eq. 230; *Courter* v. *Stagg*, 27 N. J. Eq. 305.

It is the enlightened policy of courts of equity, when not restrained by compulsory rules, to seek to discover the intention of the testator from the whole instrument rather than from any particular form of words.

In the case before us, the testator makes careful provision in the first item of the will for the appropriation of so much of the proceeds of his life insurance as might be necessary to discharge all mortgages on the homestead. In the second item he devises the homestead to his unmarried daughter "for and during her natural life, unless she shall be married, in which case her life estate shall cease. So long as she shall live and remain unmarried she is to have the exclusive right of occupation, use and enjoyment of said homestead." In case all parties interested agree to a sale of the property, this daughter is to receive the net income of the proceeds, "the same to be well invested for that purpose;" and in the event of the destruction of the buildings by fire, the insurance money shall be applied in rebuilding them. In the third item he gives the residue including the remainder of his homestead to his three children in equal shares.

Here, then, is the case of a parent who has a recognized right and was under a moral obligation to interest himself in the

settlement of his daughter. To the ordinary mind untrammeled by the "mediævalism of the law," there is nothing in the will indicating any other thought or feeling than an affectionate regard for the welfare and happiness of a beloved daughter, and an anxious desire to provide for her a permanent and comfortable home. The modern court, free from the incubus of arbitrary legal dogmas, must fail to discover in the language of this will any suggestion of a purpose on the part of the father to impose a condition *in terrorem* in restraint of his daughter's marriage. It discloses no other disposition than a praiseworthy desire to secure to the daughter the continued occupation and enjoyment of the old homestead until by reason of her marriage she should cease to need it; then she was to share equally with her sister and brother in the entire estate. It is manifest from the whole tenor of the will that nothing was more remote from the real purpose of the testator than the idea of discouraging the marriage of this daughter. The intention was not to promote celibacy, but simply to furnish support until other means should be provided. Because of the inadvertent use by the scrivener of the word "unless" this court is not compelled to impose upon this instrument an intention which it is manifest from the context the testator never had. There is no such inflexible rule; the rights of the parties are not to be determined by an application of such a Procrustean method. The provision is in no respect *contra bonos mores*. It is not violative of any principle of sound policy. And if it is here necessary and proper to recognize and maintain the distinction between a limitation and a condition subsequent, the language of this will should be held to constitute a valid limitation and not an illegal condition.

The defendant's exclusive right to the possession and enjoyment of the entire homestead, ceased upon her marriage.

Decree accordingly.

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

WILLIAM G. NEWBERT *vs.* FRANK FLETCHER.

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89 230

Waldo. Opinion March 29, 1892.

Insolvency. Attachment. Prosecution of Action. R. S., c. 70, § § 33, 34, 52; c. 73, § 8. Gen. Stat. Mass. c. 118, § 44.

Sections 33 and 34 of the Insolvent Law (R. S., c. 70) are to be interpreted so as to give a field of operation to each, and construed with reference to the established principle that an assignee in insolvency stands in the place of the insolvent debtor, and takes only the property which he had subject to all valid liens and equities.

Under § 34, an assignee is not entitled to prosecute an action to final judgment in order to preserve, for the benefit of all creditors, an attachment made within four months before the commencement of proceedings in insolvency, as against a mortgage given before such attachment, more than four months before the commencement of such proceedings, and recorded more than three months before the filing of the petition in insolvency but not until after the record of the attachment.

In such case, the general creditors are only entitled to the property subject to the mortgage.

AGREED STATEMENT.

The defendant having been adjudged an insolvent, his assignee appeared and asked leave to prosecute this action for the benefit of the general body of creditors.

The case is stated in the opinion.

Thompson and Dunton, for assignee.

W. H. Fogler, for defendant.

WHITEHOUSE, J. This is an action of assumpsit on two promissory notes, dated April 21, 1884, one for two hundred dollars and the other for thirty dollars, signed by the defendant and payable to the order of the plaintiff. The action was commenced November 16, 1889, and an attachment of the defendant's real estate made and recorded the same day.

December 17, 1888, the defendant mortgaged the same real estate to secure payment of two notes amounting to five hundred and fifty dollars, but the mortgage was not recorded until November 25, 1889.

March 10, 1890, the defendant was adjudged an insolvent debtor on his own petition filed the same day, and April 9, 1890,

an assignee was duly appointed and the defendant's property assigned to him. The plaintiff proved the claim in this suit against the estate of the defendant in insolvency, but no dividend was paid.

October 15, 1890, a discharge in insolvency was granted to the defendant and is duly pleaded in defense of this action.

At the October term of this court held in Waldo county in 1890, the assignee entered his appearance on the docket and asked to be admitted to prosecute the action to final judgment in order to render the attachment available for the benefit of the estate of the insolvent by virtue of section 34, chapter 70, Revised Statutes.

The case comes before the court on an agreed statement of facts; and the question presented for determination is whether the application of the assignee to be admitted to prosecute the suit for the benefit of all the creditors shall be granted or refused.

It is now well recognized and familiar doctrine that in the absence of fraud the assignee in insolvency stands in the place of the insolvent debtor, and takes only the property which he had, subject to all valid claims, liens and equities. *Hutchinson* v. *Murchie*, 74 Maine, 187; *Deering* v. *Cobb*, *Id.* 332; *Herrick* v. *Marshall*, 66 Maine, 432, and cases cited. He has only the insolvent's interest in the property and no right or title to the interest which other parties have in it, further than is expressly given to him by the insolvency laws to aid in the preservation of the estate for the benefit of the creditors. The "established rule," said Harlan, J., in *Yeatman* v. *Sav. Inst.* 95 U. S. 764, "is that, except in cases of attachment against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens or incumbrances, whether created by operation of law or by the act of the bankrupt, which existed against the property in the hands of the bankrupt." See also *Stewart* v. *Platt*, 101 U. S. 731, and *Donaldson* v. *Farwell*, 93 U. S. 631.

Sections 33 and 34 of our insolvent law (Ch. 70, R. S.,) must be interpreted with reference to this well-settled rule, and construed, if practicable, so as to leave a clear and definite field of operation to each. Section 33 declares, without exception or qualification, that the assignment "dissolves any such attachment made within four months, and any such mortgage not recorded at least three months preceding the commencement" of insolvency proceedings. But § 34 provides that in case of such suit and attachment within four months, the assignee "may be admitted to prosecute such suit to final judgment or decree, and may in his own name levy upon or sell the property, effects or estate so attached in the same manner as the creditor might have done had no proceedings in insolvency been commenced, and such attachment and the proceeds of the property so attached shall be held for the benefit of the estate of such insolvent; . . . and such creditor may prove his debt or claim upon which such suit is brought, in the same manner as if a suit had not been commenced."

When the language of a single section, considered by itself, raises an apparent conflict or incongruity as compared with other portions of the statute, it is often necessary and proper to refer to other sections of the same statute and construe the several portions with reference to each other. "Possibly the most important purpose of the construction of all the parts of a statute together is that of giving, by the means of such comparison, a sensible and intelligent effect to each without permitting any one to nullify any other, and to harmonize every detailed provision of the statute with the general purpose or particular design which the whole is intended to subserve." Endlich on Int. of Stat. § § 40–41. In construing any part of a law the whole must be considered. The different parts reflect light upon each other, and it should be so expounded, if practicable, as to avoid any contradiction or inconsistency and give some effect to every part of it. Sedgwick on Stat. Const. 238; *Gray* v. *Co. Com.* 83 Maine, 429, and cases cited.

The obvious purpose of an insolvency law is to enforce an equal and impartial distribution of the property of insolvents among their creditors, with certain specified exceptions, and to

relieve honest debtors of their debts and contracts. In furtherance of this object, § 33 provides for the dissolution of any attachment made within four months in order to deprive the attaching creditor of the exclusive benefit that he sought to obtain from it, and to vest the title to the property in the assignee for the benefit of all the creditors. Ordinarily this result is fully secured when the attachment is dissolved, but it frequently happens where subsequent purchases or other valid liens have supervened, that the object of the statute would be defeated by dissolving the attachment; the lien of the attaching creditor being discharged, the property would pass to the subsequent purchaser or creditor having a subsequent valid lien, and not to the general creditors. The provisions of § 34, were manifestly designed to remedy this difficulty. When it appears to the court that the effect of dissolving such an attachment may be that property which should pass to the assignee for the benefit of the insolvent's estate would vest in subsequent purchasers or creditors, whose rights were acquired subject to the attachment, the assignee may be admitted to prosecute the suit to final judgment, and "such attachment and the proceeds of the property so attached shall be held for the benefit of the estate of the insolvent." Thus construed there is no conflict between the two sections, but there is scope for the operation of each.

The two corresponding sections of the insolvent law of Massachusetts are more explicit on this point and are harmonized by their own express terms. Section 44, chapter 118, Gen. Stat. Mass. (1860), declares that the assignment shall "dissolve any such attachment subject to the provisions of the following section;" and the following section provides that in case of a subsequent conveyance by the debtor of the property attached, or "if a dissolution of an attachment under the preceding section might prevent the property attached from passing to the assignee . . . the court . . . may, upon application made on or before the day of holding the third meeting of the creditors, . . order the lien created by the attachment to continue. The action may be continued or execution stayed until the assignee is chosen and takes charge of the action; and

the amount recovered, exclusive of costs due to the original plaintiff, shall vest in the assignee. (Pub. Stat. 1882, Ch. 157, § § 46–47.) But it cannot be doubted that the general purpose sought to be accomplished is the same in both statutes.

It appears, however, that in Massachusetts prior to 1857 there was no limitation of time within which the order continuing the attachment might be made. "The result was that, in many cases where the attached property was claimed under a subsequent purchase or lien, the title to the property was uncertain and unsettled for an indefinite period of time." *Nelson* v. *Winchester*, 133 Mass. 437. To obviate this difficulty the provision above quoted was enacted, that the order continuing the attachment "shall be obtained or applied for on or before the day of holding the third meeting of creditors."

It will be preceived that in our statute there is no express limitation of time within which the assignee may be admitted to prosecute the suit to final judgment; but assuming, without deciding, that when deemed necessary for the fulfillment of the object of the insolvent law, as above stated, the assignee may be admitted, under § 34, to prosecute the suit to final judgment, and that the attachment may be thus preserved, even after a discharge has been granted to the insolvent, is there in the case at bar any interest in the mortgaged property beyond the equity of redemption, which should pass to the assignee for the benefit of the general creditors? We think not.

The mortgage in question was given nearly fifteen months before the commencement of the insolvency proceedings and eleven months before the date of the attachment. It was not fraudulent as against the creditors of the insolvent debtor. There is no suggestion that it was fraudulent in fact, and it was not made within four months before the filing of the petition with a view to give a preference to any creditor under § 52. It had been recorded more than three months before the filing of the petition and was not dissolved or discharged by the conveyance to the assignee under the provisions of § 33. It is not impeachable upon any ground recognized by our insolvent laws. True, the mortgage was not recorded until after the plaintiff's attachment, and if there had been no insolvency proceeding the

plaintiff's lien would have taken precedence of the mortgage. But under our statute the mortgage was effectual against the mortgagee and his heirs without record. R. S., c. 73, § 8. The mortgagor was estopped to deny his deed as against the mortgagee. The assignee has no greater interest or better right than the insolvent himself could have asserted against the mortgagee. The law vests in him only the property which belonged to the debtor and not that which did not belong to him.

In *Smythe* v. *Sprague*, 149 Mass. 310, it was held that land conveyed by an insolvent debtor to a *bona fide* purchaser by a deed not recorded until after his assignment in insolvency, is not "property of the debtor" within the meaning of the insolvency law, and will not pass to his assignee. The court said: "Such a deed conveys the title to the grantee. A creditor of the grantor, without notice of the deed, may take the land on execution; but he has this right not because it is the property of the grantor, but because the grantee, in violation of our registry laws, has failed to record his deed, has thereby committed a constructive fraud upon the purchaser or creditor, and is therefore estopped to set up his title against him. The right of an attaching creditor is a personal right of estoppel against the grantee which enures to his own benefit solely and not to the benefit of other creditors. . . We do not think that such a personal right in a creditor of estoppel against a third person was intended to pass to the assignee, and to enure for his benefit."

By the dissolution of the attachment in the case before us, an incumbrance was removed from the property, and the debtor's right to redeem from the mortgage passed to the assignee for the benefit of all the creditors. They are entitled to no more. If they had desired a different result they could have seasonably filed a petition against the debtor and caused the mortgage as well as the attachment to be discharged. According to the agreement of the parties the entry must be,

Application refused.

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

WILLIAM D. ATKINSON *vs.* FRANCIS E. PARKS, and others.

Somerset. Opinion March 29, 1892.

New Trial. Jury. Irrelevant Evidence.

Where a mass of evidence, principally documentary, has been introduced against objection, in the trial of a cause, and such evidence, although inapplicable and irrelevent to the issue, is of a character plainly calculated to mislead the jury or prejudice them against the losing party, a new trial will be granted.

ON MOTION AND EXCEPTIONS.

The case appears in the opinion.

D. D. Stewart, for plaintiff.

S. S. Brown, for defendants.

PETERS, C. J. The subject of this litigation is a promissory note reading as follows: "Pittsfield, Maine, August 29, 1881. Four months after date I promise to pay the order of myself twenty-five hundred dollars at any bank in Waterville, value received, F. E. Parks." The note was indorsed by the persons and in the order as follows: F. E. Parks, W. D. Atkinson (plaintiff), F. E. Parks Bros. The members of the firm of Parks Bros., were F. E. Parks, Llewellyn Parks, Warren L. Parks and Daniel M. Parks.

The note was discounted by the People's Bank of Waterville at the request of F. E. Parks, and the proceeds, first credited to the firm, were afterwards drawn out in the firm name by F. E. Parks, and credited by the bank to his private account. The latter had frequent transactions with the banks in his own name, and also did most of the business of the firm with the banks. At the time the note was discounted differences had arisen between F. E. Parks and his brothers, of which more will be said presently. When this note became due it was protested for non-payment; and suits were immediately commenced thereon by the bank against all the parties thereto, the result of which was a collection by the bank, upon executions, of a portion of their claim from F. E. Parks, another portion from the plaintiff (Atkinson), and the balance from the firm of Parks Brothers.

The present action was instituted by the plaintiff to recover upon the note the amount paid by him to the bank, he alleging that the defendants (Parks Brothers) were prior indorsers to himself, although his own name is written on the back of the note over their name. The question of the case is whether plaintiff really indorsed the note as an accommodation for the firm, or for F. E. Parks individually. On this question a great mass of evidence was produced legitimately bearing on the issue.

In addition to this, a large amount of documentary materials and other evidence were woven into the case by the plaintiff against the objection of the defendants, the bulk of which was in our judgment inadmissible.

It seems that in 1882, about a year after the note transaction, a bill in equity was brought by the brothers against F. E. Parks to obtain a settlement of their partnership affairs, which bill went to final judgment through the various stages incident to such a proceeding, the complainants recovering a large judgment against the respondent. The papers, the introduction of which, into this trial, it is contended by the defendants, offended against the legal proprieties of the case, are as follows: papers in People's Bank against F. E. Parks, including writ, judgment, execution and proceedings of officer thereon, deed of officer conveying the real estate of F. E. Parks, and these papers accompanied by oral testimony that the land so sold was worth more than it sold for; and all the papers in the equity case, comprising the bill with writ attached, the return thereon, defendant's answer, appointments of master and receiver, report of master asking instruction, receiver's sale of real and personal property of firm, receiver's conveyance to the complainants of property bid off by them, decree of court on master's report, payments to complainants under order of court and their receipts for same, the final decree, and the levy made by the complainants against respondent upon the execution awarded them by court. In addition to the admission of the papers in People's Bank against the plaintiff (Atkinson), which was proper enough in order to show a judgment against him on the note and his payment of it, plaintiff was allowed to show that the complainants in the bill

bid off Atkinson's real estate sold by the officer and resold the same to one Shaw for more than they gave for it.

Now, for what purpose were those papers introduced in evidence? The position taken at the law argument by the learned counsel for the plaintiff, if properly appreciated by the court, was that there was a conspiracy between the brothers of F. E. Parks to cheat and injure their brother, and perhaps commit a similiar wrong upon the plaintiff, and that the brothers have in their hands through the fraud thus perpetrated money and means enough of these parties with which they could and should have paid the note in question.

We feel assured, however, that the papers, any and all of them, do not show any such thing and have no tendency to that effect, and that it is a groundless charge so to characterize them. The complainants in the bill recovered against the respondent a proper judgment. All the proceedings were orderly. Money was paid over to the complainants because it belonged to them, and land deeded to them because they were the highest bidders therefor. The plaintiff produces the former proceedings of court which can legally show only just what they purport to show, merely to condemn them.

The papers as a bulk had not any application to the case in hand. There is no pretense that any evidence existed in them to show that any money was to be found among the partnership assets that belonged to this plaintiff, or that was ever provided for or appropriated upon this claim. Those proceedings were only between the present defendants themselves, and were not commenced until a year after the note was made.

It appears that the counsel for plaintiff claimed the right to introduce the receiver's report to show, among other things, that the receiver paid to the People's Bank that part of the note in suit which remained unpaid after the collections by the bank out of the property of Atkinson and F. E. Parks. Why should not the receiver make the payment? How was such payment avoidable? The firm were indorsers on the note, and had no reason to contest their liability upon it. F. E. Parks and Atkinson failing to pay the note in full the firm must in any

view pay the rest. The plaintiff also produced the master's accounts to show that the amount so paid by the firm was charged over and allowed against F. E. Parks in their favor. Why not so? It was in accordance with the position always taken by them that the note was the brother's private transaction and not the firm's. If the firm had not charged the amount over to F. E. Parks, the argument could have been raised that it was because the note was not for F. E. Parks to pay. There is just one purpose for which any partnership papers and proceedings might be admissible, and that would be to show from them an admission by these defendants that the note was for the firm and not for F. E. Parks to pay. But nothing of the kind is indicated in them, but clearly the contrary.

But, if the documentary evidence and the accompaniment of oral testimony were immaterial and irrelevant, were they harmful? We can have no doubt of it. The jury would naturally be prejudiced by such an array of pretended evidence. We should infer from the report that the papers were deliberately read to the jury and flaunted before them at the argument. The sound and glare of such an exhibition would impress and mislead a jury. They would hardly believe that such a bulk of matters was proper to be introduced for their examination and still have no bearing on the issue. The materials so produced and used required the defendants' counsel to explain and defend them, and gave counsel closing for the plaintiff an undue advantage.

In our judgment the great mass of the documentary evidence was inapplicable and inadmissible, and most emphatically so was the testimony to show that the levies or sales of land on the executions were below the market value of such land.

Exceptions sustained.

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

SUSAN A. CARTER *vs.* CITY OF AUGUSTA.

Kennebec. Opinion March 31, 1892.

Pauper. Removal. Overseers. Instructions. R. S., c. 24, § 43.

In an action under R. S., c. 24, § 43, to recover pauper supplies furnished, after notice, to a child of tender years, the defendant contended that the overseers of the poor offered to remove the child to the almshouse, and that the plaintiff having refused to allow it to be done, could not thereafterwards charge the defendant with its support. *Held*: whether the plaintiff voluntarily assumed the support of the child, on offer of defendant to remove it from her custody, was a question for the jury.

Held, also, that the removal or offer of removal must be the act of the board, and not the individual, personal act of one member alone, unauthorized by the board.

When further instructions to the jury, or more explicit language, are desired to convey the proper meaning of the reply of the court to a question by a juryman, at the close of the charge, they should be requested at the time.

ON MOTION AND EXCEPTIONS.

This was an action of assumpsit, in which the plaintiff sought to recover for supplies furnished by her, a resident of Augusta, to a child of two or three years of age, after notice to the overseers of the poor.

It was not denied by the defendant at the trial of the case before a jury in the Superior Court, for Kennebec County, that the child was supported by the plaintiff, nor that the proper statute notice to the overseers was given. The defendant, however, contended that the notice was not given in good faith; and that, shortly after the notice given, one of the overseers offered to take the child to the almshouse, but was prevented from doing so by the plaintiff; and that he notified the plaintiff that the defendant city would not be liable, and would not pay the plaintiff for supplies which might thereafter be furnished by her to the child.

At the close of the presiding justice's charge and before the jury had retired for deliberation, one of the jurors requested further instruction from the court, to wit:

"Whether, after the liability of the town for support and maintenance of the pauper is established, the action of one of the board, or three or five be sufficient to terminate that liability."

In reply to which the presiding justice instructed the jury as follows:

"I don't think that the action of one would be sufficient to terminate the liability after the liability had attached. If you shall find in this case that the termination of the obligation of the city depended upon the action of one of the overseers of the poor alone, I don't think that that would be sufficient."

The presiding justice had previously given the jury general instructions, to which no exceptions were taken, that: "If, for any portion of the time covered by this bill, you shall find that the child was not a pauper, for so much of the time the plaintiff cannot recover. If you shall find that at any time during the period covered by this account the child was a pauper, and that the plaintiff refused to deliver it to the overseers of the poor on proper demand, to be provided for by them, then she cannot recover for the support and care after such demand and refusal until another notice and request to the overseers of the poor." . . . "On the other hand, the defendant's witnesses, testified that she refused to give up the child, December 12, 1887, and Mr. Hoyt testified that the whole board of overseers met the plaintiff on the street in the spring of 1888, when she said, as Mr. Hoyt states, that she would not give up the child, and they testify that at each of these interviews she was positively informed that the city would not be responsible for taking care of the child if kept by her." . . . "An offer merely of the overseers of the poor to send a team for the child would not relieve the city from liability unless notified by the plaintiff, and are you satisfied from the evidence, that she was not willing to surrender it, having the ability to care properly for it herself?" A verdict being returned for the plaintiff, the defendant took exceptions to the instruction given by the court in answer to the inquiry made by one of the jury.

E. W. Whitehouse, *C. L. Tanner* with him, for plaintiff.

Exceptions: Defendant not aggrieved. *Reed* v. *Canal Corp.* 65 Maine, 53; *Merrill* v. *Merrill*, 67 *Id.* 79.

A. M. Goddard, for defendant.

Motion: The statute on which this action is founded has always received a strict construction. *Gross* v. *Jay*, 37 Maine, 9. Town under this statute is liable only for necessaries furnished by an inhabitant to a person in distress and standing in immediate need. *Knight* v. *Fort Fairfield*, 70 Maine, 500; *Lamson* v. *Newburyport*, 14 Allen, 30. In order for the plaintiff to maintain her action she must show that the expenses were "necessarily incurred" in the relief of a pauper. None of the expenses incurred by the plaintiff subsequent to the offer of removal by the father and mother of the child and the like offer by the overseers of the poor could be considered necessary. *Ib.*

A town which provides a suitable almshouse for the support of its poor is not liable to an inhabitant for the support of a pauper who is physically able to transport himself to such almshouse. *Ib.*

Exceptions: The presiding justice practically instructed the jury that the offer of the overseer on the 12th day of December, 1887, and his subsequent offers in behalf of the city to take the pauper child to the city almshouse were of no effect in law; were a mere nullity and could not relieve the defendant city from liability to the plaintiff for supplies subsequently furnished to this pauper child, because the offer was made by a single member of the board. The jury were given to understand that this offer to be availing in defense must have been made by more than one member, though the presiding justice did not go so far as to prescribe the number necessary to make such an offer binding. Where a city has provided a suitable almshouse for its poor and maintains it for that purpose, as in this case, upon notice from an inhabitant, it is sufficient for one member of the board of overseers of the poor to offer himself to remove a pauper to such almshouse, and it does not require the joint action of the board nor even the concurrence of a majority of such board.

HASKELL, J. Assumpsit for pauper supplies. It is admitted that the pauper, a child of tender years, fell into distress and that the defendant became liable thereafter to the plaintiff for its support. But it is contended, in defense, that the overseers

of the poor, of defendant city, offered to remove the child to the city almshouse, and the plaintiff, having refused to allow it to be done, could not thereafterwards charge the defendant with its support.

Whether the plaintiff voluntarily assumed the support of the child, on offer of the defendant to remove it from her custody, was a question of fact for the jury. The testimony was conflicting, and the jury found the issue for the plaintiff. It is not clear that the weight of evidence fails to support the verdict. But it is contended that the judge misdirected the jury upon that issue. At the close of the charge, a juror asked the court, in substance, whether a single member of the board of overseers could terminate the liability of the city to the plaintiff, by offering to remove the child from her care to the city almshouse. The court replied, "I don't think that the action of one would be sufficient to terminate the liability after the liability had attached. If you shall find in this case that the termination of the obligation of the city depended upon the action of one of the overseers of the poor alone, I don't think that that would be sufficient."

Taken in connection with the charge, the fair meaning of the court's answer is, that the removal or offer to remove the child must be the act of the board and not the individual, personal act of one member alone, unauthorized by the board. If more explicit language had been desired to convey the proper meaning, it should have been requested at the time. The offer of a stranger to remove the child from the plaintiff's further care might not, in all cases, remove its necessities as a pauper. Very much would depend upon the circumstances and conditions of each case.

Overseers of the poor are required to determine and direct their action as a body. The action of one overseer is the action of the board when authorized by them; and, in many cases, when consistent with implied authority, although no express authority had been given, becomes the action of the board, when approved or ratified. *Linneus* v. *Sidney*, 70 Maine, 114; *Smithfield* v. *Waterville*, 64 Maine, 412.

The child was five years of age. The doctrine of *Lamson* v. *Newburyport*, 14 Allen, 30, relied upon by defendant does not apply. There, the supposed pauper was an adult, and lived in the plaintiff's tenement, and might at any time have been ejected therefrom, and was not incapable of going to the almshouse. So in *Knight* v. *Fairfield*, 70 Maine, 500, another case cited by the defendant, it was held the duty of the agent of the town to remove a boy ten years old from the plaintiff's house, where he was in distress, if he would relieve the town from his support, the time of year being winter, and the agent's house five and one half miles away. A mere direction by the agent to the plaintiff to send the boy to his house was held insufficient, although more a question of fact than of law.

The child, for whose support this action is brought, was of tender years and a pauper at the plaintiff's house. The defendant might have removed it. Whether the mere offer so to do, if made by the defendant, met by the alleged refusal of the plaintiff to surrender the child, relieved the defendant from its further support, need not be considered here, inasmuch as the controversy is, not what effect legally results from the act done, but whose act it was. The ruling treats particularly of the authority of the actor, not of the effect of the act. The verdict assumes that the act done was not the act of the city, but that, if it had been, it would have worked its release from further liability to support the child. The ruling is, that the unauthorized and unratified act, of one overseer, cannot operate as the act of the board, so that the city shall reap the benefit of it. Until the board attempted the removal of the child, it could not be known what course the plaintiff might have chosen to pursue.

If it be said that the refusal of the plaintiff to part with the child was evidence showing the want of distress, the answer is that was a question of fact, and must have been settled by the jury in her favor; so the ruling excepted to, as matter of law, was well enough, inasmuch as it did not take from the jury the question of the further necessity of the child's support as a pauper. It merely held that want of authority, in one overseer of the poor, to act for defendant, failed to give his attempted interference

with the pauper the same legal force and effect it would have had, if he had been authorized by the board, so that his act would be their act. They had the right to remove the child to the almshouse; he had not.

Motion and exceptions overruled.

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

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101 273

ALFRED ELA, Appellant, *vs.* LUCIA ELA, Guardian.

Sagadahoc. Opinion March 31, 1892.

Probate. Guardian and Ward. Account.

Probate procedure, in this State, should be conducted upon the rules of the broadest equity, whenever the statute does not conflict with that view.

A release from a ward to his guardian, made after the ward's majority, may be interposed as a defense in the probate court, either in answer to a citation to settle his account as guardian, or as a voucher upon the settlement of the same.

The release in this case was given by a ward four years after his majority, to his mother, who had been his guardian. No fraud is shown, and the ward, a man of liberal education and of several years' experience in active business, then twenty-five years of age and fully understanding his rights, made a full settlement with his mother as his guardian, receiving from her property of considerable value which he still holds. For seven years he did not question the fairness or validity of the settlement. *It was held*, that he must be content therewith, and be absolutely bound thereby.

ON REPORT.

This was an appeal from the decree of the probate court, for Sagadahoc county, allowing the account of Lucia Ela, guardian of her son Alfred, the appellant. The account presented and allowed is as follows:

"The first and final account of Lucia Ela, guardian of Margaret K. Ela, Walter Ela, Richard Ela and Alfred Ela minors of—— in the county of Sagadahoc. Said accountant charges herself as follows, viz:

"By amount of personal estate, as by inventory $54,397.25

By sums received as by Schedule A, on file herewith, on account of adjustments made with the wards, books and papers have not been preserved and it is impossible for guardian to make any

statement of receipts or income and of changes in investments, - - - -	$54, 397.25

"Said accountant asks allowance as follows, viz: To sums paid as by Schedule B, on file herewith. The wards having made full settlement and executed releases to the guardian, namely: Richard Ela, Margaret K. Ela and Walter Ela, dated March 7, 1873, and Alfred Ela November 27, 1882, the guardian claims full credit for the entire amount of the estate without further accounting, - - - $54,397.25

$54,397.25

Amount charged, -	$54,397.25
Amount allowed, -	$54,397.25
Balance due,	$0000.00"

The appellant filed to the account the following objections: (1st,) because the said statement is not such a just and true account as the court has a right to require and ought to require in compliance with the conditions of the guardian's bond; (2d,) because the allegations that books and papers have not been preserved furnishes no lawful excuse for a failure to render a full and proper account; (3rd,) because the account is not made up in detail and in items; (4th,) because this court has no jurisdiction to excuse the guardian from making an account.

And answering to the allegations contained in said statement: (1st,) he denies that any adjustment was ever made with him by said guardian; (2d,) he says that the books and papers relating to the dealings of said guardian with the funds belonging to him, so far as there were any such, have been preserved; (3rd,) he says that the said guardian is as well able to make an account of her doings as such as she was when he arrived at his majority or at any time since; (4th,) he says that it is the fault of the said guardian that she is unable to make an account of her doings as such, and cannot make any statement of

changes in investments and receipts of income; (5th,) he denies that he has ever made any settlement with the said guardian; (6th,) he says that the release made by him dated November 27, 1882, is of no effect, having been made in ignorance of his rights, under extraneous influence, without explanation and without counsel.

A decree, *in extenso*, was thereupon made by the judge of probate, after a full hearing, the material parts of which are as follows:

"After fully hearing the evidence and arguments in this case, I find that Mrs Lucia Ela was appointed guardian of her minor children, Walter, Richard, Margaret and Alfred, April 4, 1864, and that she returned an inventory, showing $54,397.25 of personal estate, belonging to said minors, at the May term, 1864. At the April term of probate court, 1875, she petitioned for license to transfer bonds, which was granted. Nothing further appears to have been done in this court, until November term, 1889, when petition was presented by Alfred Ela, for an order of court, to cite the guardian into court, to settle an account, and an order was granted, ordering said guardian to render her account of guardianship on or before the first Tuesday of February, 1890, and on that day the foregoing account was rendered into court. Said Alfred at said term objected to said account, and gave his reasons, which are stated in writing. The matter was continued from term to term in order to procure evidence on the one side and the other, and to accommodate the parties.

"From the evidence I find that Walter, Margaret and Richard Ela, gave a release to their guardian, November 7, 1873, paper marked "B," and Alfred Ela did likewise, November 27, 1882. This manner of effecting a settlement by a guardian with his wards is not the proper and legal method of settling estates in probate, in general; still each case must depend on its merits. No charge of fraud has been made, and no evidence given tending to show fraud. All the parties in interest but Alfred desire that their settlement and release with their guardian shall stand as made. Alfred, who is evidently a man of much more intellectual ability than the average man, has freely entered into

this settlement and release with his eyes open. It appears to me from the evidence that he had a chance to know whether the settlement was fair and just, and the guardian filed her account as ordered, claiming that it is the best she can do, and states her reasons therein. It appears to me that Alfred had a full knowledge of the estate, and what had become of it, and how it had been managed, and should not, at this late day, eight years after giving the release, now that his guardian, his mother, is in failing health, object to her settling this account, and using his said release as a voucher, until he has made restitution to her of the property which he has received from her, which, from the evidence in the case, was not definitely stated, but which, I am led to believe, must have been quite an amount in value. He was of tender age when his mother assumed said trust. Through all the years of his minority, she cared for and educated him, and paid his bills. No doubt hundreds and thousands of dollars have been so expended by her, and mother-like, she kept no account, and, on his arriving at full age, she took his release, as she had previously done from her other children, and for seven years thereafter, the matter slumbered. I, therefore, approve this account; the vouchers B and C are satisfactory vouchers, and, in my opinion, they operate as an estoppel as between these wards and the guardian and I do allow the same, and order it recorded."

Williams and Wood, for appellant.

1. The paper filed is not an account. An account is defined to be "a detailed statement of the mutual demands in the nature of debt and credit between parties arising out of contracts or some fiduciary relation." Bouvier's Law Dict. 85, Account. Also it is said, "an account is no more than a list or catalogue of items whether of debts or credits." *Factory* v. *Reid*, 5 Cow. 593. It is not a "just and true" account to state a general sum and say that it has been paid. This has been decided where a statute for enforcing a mechanic's lien required the filing of a "just and true" account and it was held that the setting out a balance due was not stating such an account. *Mc Williams* v. *Allan*, 45 Mo. 573. In a case in which the definition from Bouvier is adopted,

this very apt remark is found in the opinion: "There is a broad distinction between an account and the mere balance of an account resembling the distinction in logic between the premises of an argument and the conclusions drawn therefrom." *Mc Williams* v. *Allan*, 45 Mo. *supra*. This view is sustained by the equity rule, that "a single matter cannot be the subject of an account. There must be a series of transactions on one side, and of payments on the other." *Porter* v. *Spencer*, 2 Johns. Ch. 171; *Blakeley* v. *Briscoe*, 1 Hempst. 115. A general statement that the proceeds of the property in the hands of the guardian is about equal to the expenses incurred in its management is not a report or account answering to that required of a guardian. *Whitney* v. *Whitney*, 15 Miss. 740.

2. Every guardian shall settle his account with the judge, &c; and neglect or refusal to do so is a breach of his bond; R. S., c. 67, § 22; *Wing* v. *Rowe*, 69 Maine, 282, 284. A settlement out of court is not a compliance with the conditions of the bond. *Stark* v. *Gamble*, 43 N. H. 465, 466. Instances wherein a settlement out of court between parties standing in a fiduciary relation to one another has been held no bar to an accounting are *Wing* v. *Rowe*, 69 Maine, 282; *Wade* v. *Lobdell*, 4 Cush. 510, cited in 69 Maine, 284; *Bard* v. *Wood*, 3 Met. 74; *Harris* v. *Ely*, 25 N. Y. 138; *Rieben* v. *Hicks*, 4 Brad. (N. Y.) 136; *Fraenzuick* v. *Miller*, 1 Dem. (N. Y.) 136; *Reilly* v. *Duffy*, 4 Dem. (N. Y.) 366; *Say* v. *Barnes*, 4 S. & R. 112; *Kenny* v. *Jackson*, 1 Haggard (Ecc.) 105; *Morgan* v. *Lewes*, 4 Dow. 29, 35; *Affrey* v. *Affrey*, 10 Beav. 353; *Purcell* v. *Cole*, L. & T. 449, 455; *Barton* v. *Fuson*, 47 No. West. Rep. (Ia.) 774; *Gregory* v. *Orr*, 61 Miss. 307; *Harris* v. *Carstarphen*, 69 N. C. 416; *Voltz* v. *Voltz*, 75 Ala. 555; *Briers* v. *Hackney*, 6 Ga. 419; *Wellborn* v. *Rogers*, 24 Ga. 558; *Clay* v. *Clay*, 3 Met. (Ky.) 552.

3. Vouchers should accompany a guardian's account. Thus it is said "There is no proof or vouchers to sustain these items. They were therefore properly refused as credits by the court on the trial." *Newman* v. *Reed*, 50 Ala. 300; *Poullain* v. *Poullain*, 76 Ga. 420, 445.

4. The fact that the guardian has never rendered any regular accounts and her admission that she has kept no accounts avoid her plea of a release from Alfred Ela. *Briers* v. *Hackney*, 6 Ga. 419. It is the imperative duty of an accounting party, such as an agent, trustee, receiver, executor, or guardian, to keep his accounts in a regular manner, and to be always ready with them. *Poullain* v. *Poullain*, *supra*; *Hardwick* v. *Vernon*, 14 Ves. 510; *Chicago Mut. Life Ind. Ass.* v. *Hunt*, 127 Ills. 286; *Re Gaston trust*, 35 N. J. Eq. 60, 64; *Stocker* v. *Hutter*, 134 Pa. St. 19; *Rieben* v. *Hicks*, 4 Brad. 137.

The validity of a release depends upon the fairness of the settlement or transaction upon which it is founded. It can therefore be no bar to a discovery or an accounting, for upon that discovery or accounting will depend the validity of the release itself. *Roche* v. *Morgell*, 2 Sch. & Lef. *726. In a transaction between persons standing in confidential relations to one another, the burden of showing that the transaction was open, fair, voluntary, and well understood, is on the person who stood in the position of protector. *Wade* v. *Pulsifer*, 54 Vt. 45; *Fish* v. *Miller*, 1 Hoff. Ch. (N. Y.) 267; *Adair* v. *Brimner*, 74 N. Y. 539, 554; *Traphagen* v. *Voorhees*, 44 N. J. Eq. 21, 32; *McConkey* v. *Cockey*, 69 Md. 286, 289; *Waller* v. *Armistead*, 2 Leigh, 11, 15 (21 Am. D. 594). Instances: (guardian and ward,) *Carter* v. *Tice*, 120, Ill. 277; *Gillett* v. *Wiley*, 126, Ill. 310; *Line* v. *Lawder*, 122 Ind. 548; *Wade* v. *Pulsifer*, 54 Vt. 45; *Williams* v. *Powell*, 1 Ired. Eq. 460; *Waller* v. *Armistead*, 2 Leigh, 11 (21 Am. Dec. 594); *Wellborn* v. *Rogers*, 24 Ga. 558; *Womac* v. *Austin*, 1 S. C. 428; *Voltz* v. *Voltz*, 75 Ala. 555; (brother and brother,) *Gordon* v. *Gordon*, 3 Swanston. 400; (brother and sister,) *Jones* v. *Jones*, 120 N. Y. 589, 599; (parent and child,) *Berkmeyer* v. *Kellerman*, 32 O. St. 239 (30 Am. Rep. 577); (trustee and *cestui que trust*,) *Waldrop* v. *Leaman*, 30 S. C. 428; (executor and legatee or heir,) *Chapman* v. *Allen*, 56 Conn. 152; *Wheeler* v. *Smith*, 9 How. (U. S.) 55; (agent and principal,) *Moxon* v. *Payne*, 43 L. J. (N. S.) Ch. 240; *Brooks* v. *First Church*, 128 Pa. St. 408; *Tompkins* v. *Hollister*, 60 Mich.

470. Laches: *Hemmich* v. *High*, 2 Watts, 159; *Butler* v. *Hyland*, 26 Pac. Rep. 1108; *Cocking* v. *Pratt*, 1 Ves. 400, 401; *Turner* v. *Collins*, L. R. 7 Ch. 229, 339-342; *Murray* v. *Palmer*, 2 Sch. & Lef. *486, 487; *Seavey* v. *King*, 5 H. L. Cas. 627, 666; *Kempton* v. *Ashbee*, L. R. 10 Ch. 15; *Hatch* v. *Hatch*, 9 Ves. *292; (great lapse of time,) *Charter* v. *Trevelyan*, 11 Clark & F. 714, 740; *Archbold* v. *Scully*, 9 H. L. Cas. 360, 383; *DeBussche* v. *Alt*, 8 Ch. Div. 286, 314.

W. L. Putnam, for guardian.

HASKELL, J. One question is, whether a guardian may interpose the release of his ward, given after he is of age, as a defense in the probate court, to a citation for the settlement of his account.

Probate procedure, in this State, should be conducted upon the rules of the broadest equity, whenever the provisions of statute do not conflict with that view. Substantial justice should be awarded by methods conducive to economy and dispatch, and without unnecessary circuity of action or prolixity in procedure.

Probate appeals give opportunity for the settlement of issues of fact by a jury, as in actions at law, as well as afford complete consideration of the cause under the beneficent rules of chancery procedure, elastic enough to meet the varied conditions likely to arise in such matters; so that, from inability to properly deal with the defense here set up, there is no necessity of requiring it to await an action at law on the bond, and compel prolix and perhaps vexatious litigation over the settlement of probate accounts, that in the end may amount to naught. It is much better, in the first instance, to determine the guardian's liability to account, than, after a long struggle at accounting, to hold it need not have been done at all.

Failure to account when required by statute or by the judge of probate is a breach of a guardian's bond. *Pierce* v. *Irish*, 31 Maine, 254. When such account is offered for settlement or the guardian has been cited to account, the whole matter is within the jurisdiction of the probate court, and must there be dealt with. It is of no consequence whether the rights of the

parties are determined upon an issue raised on answer to the citation, as in *Wade* v. *Lobdell*, 4 Cush. 510, or upon a statement of account filed in pursuance of a decree thereon, requiring an account. In either case, the whole matter is open for the consideration of the judge of probate; for, if the issue be raised upon the citation, and a settlement with the ward be interposed or his release pleaded, it is pertinent that the court consider the actual condition of the estate as bearing upon the fairness of the settlement or the validity of the release. All such settlements should be subjected to the closest scrutiny, to make sure that the ward has not been overreached or defrauded; so in *Wade* v. *Lobdell*, *supra*, the receipt in full settlement having been allowed as a bar to the citation without requiring the guardian to testify as to its consideration, on appeal, the case was remanded to the probate court with directions to hear evidence touching the validity of the receipt and to require the guardian to testify respecting his "account and the items thereof." The same doctrine is approved in *Wing* v. *Rowe*, 69 Maine, 284.

Lucia Ela, in 1864, was appointed guardian of her four minor children, Margaret, now dead, Walter, Richard, and Alfred the appellant. In 1873, the three oldest children, then of age, settled with their guardian. To Richard was intrusted the family estate, including that belonging to Alfred, the appellant. It was invested in manufacturing business in Cambridge, Massachusetts. The business did not prove remunerative, and came to the hands of a trustee, who transferred it to Alfred in 1879, the next year after he became of age. He managed it until 1882, when, tired of it, he transferred it to his brother Walter, together with his supposed claim against Richard for losing his property, and released his mother from all liability to him as guardian, and received from her the deed of her house in Washington, D. C., of considerable value, which property he still holds under a conformity deed, received by him in 1890, while these proceedings were in progress. The appellant's release is under seal; when he made it, he was twenty-five years of age, and aware of the financial straits of his family. He had been educated at Harvard, and had studied abroad. Three years'

active business must have given him some experience in the realities of life. He has neither inexperience nor ignorance to offer in excuse. He must have well understood the effect and purpose of the release set up in defense. No fraud appears, and for seven years he slept on his rights.

A careful consideration of the whole evidence leads to the irresistible conclusion that the appellant should be held to abide the stipulations of his own deed, solemnly and understandingly made, without fraud or deceit.

Decree of probate court affirmed, but without costs.

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

EPHRAIM BRAGDON *vs.* INHABITANTS of FREEDOM.

84 431
f94 542

Waldo. Opinion March 31, 1892.

Taxes. Recoupment. Penalty. Limitation. R. S., c. 6, § 146; c. 81, § 94; c. 82, § 17.

The penalty imposed by R. S., c. 6, § 146, cannot be interposed by way of recoupment in defense to an action, by a collector of taxes to recover of the town his agreed compensation for collecting the town's taxes.

Money voluntarily paid with a full knowledge of all the facts cannot be recovered back.

ON REPORT.

The facts are stated in the opinion.

W. H. Fogler, for plaintiff.

J. Williamson, for defendant.

Recoupment: *Claflin* v. *Cheney*, 4 Pick. 118; *Adams* v. *Moulton*, 7 Pick. 287; *White* v. *Chapman*, 1 Stark, 113; *Fletcher* v. *Dycke*, 2 T. R. 32; *Day* v. *Frank*, 127 Mass. 497; *Van Epps* v. *Harrison*, 40 Am. Dec. 328, note; *Roberge* v. *Burnham*, 124 Mass. 277; *Duckworth* v. *Alison*, 1 Ex. 412; *Sanger* v. *Fincher*, 27 Ills. 346; *Bunyan* v. *Nichols*, 11 Johns. 609; *Reab* v. *McAlister*, 8 Wend. 109; *Batterman* v. *Pierce*, 3 Hill, 177; *Austin* v. *Foster*, 9 Pick. 341; *Dodge* v. *Tileston*, 12 Pick. 328; *Harrington* v. *Stratton*, 22 Pick. 510; *Sawyer* v. *Wiswell*, 9 Allen, 39; *Miller* v. *Mariners' Church*, 7 Maine,

51; *Lufburrow* v. *Henderson*, 30 Ga. 482; *Stow* v. *Yarwood*, 14 Ills. 424; Wat. Set-Off. § § 464, 543, 588. Plaintiff being insolvent, judgment should be stayed until defendants can procure judgment for forfeiture to set off against this claim. *O'Connor* v. *Varney*, 10 Gray, 231; *Chapman* v. *Derby*, 2 Vernon, 117.

HASKELL, J. By special contract, the plaintiff engaged to collect defendant's taxes for 1888, at a stipulated compensation. The taxes were committed to plaintiff July 1st. He collected the entire tax, tardily perhaps, and paid the last installment to the town treasurer July 1, 1890. He was required to pay, and did pay, in addition to the taxes collected, seventeen dollars and forty-three cents, "to reimburse the town for withholding the money not seasonably paid in." It may have been for items of interest equitably chargeable to the plaintiff. His stipulated compensation became due, and was demanded and refused, prior to this suit to recover the same and the over-payment of seventeen dollars and forty-three cents. That item, however, the plaintiff voluntarily paid with a full knowledge of all the facts, and it cannot be recovered back. *Jenks* v. *Mathews*, 31 Maine, 318; *Norris* v. *Blethen*, 19 Maine, 348; *Norton* v. *Marden*, 15 Maine, 45. The plaintiff is entitled, therefore, to judgment, for his compensation only.

But it is contended that defendants may recoup, against the plaintiff's claim, certain forfeitures that accrued to the town under R. S., c. 6, § 146. "Every collector of taxes shall once in two months at least exhibit to the municipal officers, or where there are none, to the assessors of his town, a just and true account of all moneys received as taxes committed to him, and produce the treasurer's receipt for money by him paid; and for neglect, he forfeits to the town two and one half per cent of the sums committed to him to collect."

The first part of the statute imposes a public duty upon all collectors of taxes. The last part inflicts a penality for violation of that duty, that accrues primarily to the particular town, but not exclusively; for R. S., c. 81, § 94, limits suits for penalties or forfeitures under a penal statute in behalf of the person

"to whom the penalty is given in whole or in part," to one year; but provides that "if no person so prosecutes, it may be recovered by suit, indictment, or information, in the name and for the use of the State," within two years.

These statutes, taken together, show that the defendant might recover the penalty by action of debt, authorized by R. S., c. 82, § 17, within one year, or it would then accrue to the State. Defendants' particular remedy is named by statute, and then is only at their disposal for one half the time before it becomes barred altogether. No statute authorizes the defendants to enforce the forfeiture here set up in any other way than by action of debt, brought within a year. Had the plaintiff paid the forfeiture without suit, or authorized the amount of it to be charged against the compensation due him, it would then have operated as payment, and the plaintiff could not repudiate it; the plaintiff's compensation became due, and the defendants seek to cancel it by a forfeiture that he resists,— a forfeiture that they can only enforce in the statute method, and within the statute period. There is neither reason nor authority for allowing the defense here set up. The numerous cases cited fall far short of sustaining it; and the rules of law forbid it. *Fletcher* v. *Harmon*, 78 Maine, 465; *Bank* v. *Jackson*, 67 Maine, 570.

The defendants ask that, if their defense be not sustained, the case be held until they recover a judgment for the forfeiture, that may be set off against the judgment in the case; but we think substantial justice does not require such action. The plaintiff collected and paid over the entire tax committed to him for collection. He may have not done his work swiftly; but he did it honestly, and the record fails to show any good reason for enforcing a penalty, larger than his entire compensation, given by a severe statute, that is not generally observed, and which in this case, would seem to work a punishment, more than is deserved.

Defendants defaulted for $108.22 and interest.

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

GEORGE R. HEWES *vs.* STATIRA COOMBS.

Waldo. Opinion March 31, 1892.

Real Action. Disseizin. R. S., c. 104, § § 2, 4.

In a writ of entry tried upon the plea of *nul disseizin*, the plaintiff must prove that he was seized within twenty years before the bringing of his writ.

Under that plea, the defendant cannot defeat the action by showing title in a stranger under whom he does not show title in himself, unless such title proves that the plaintiff was not seized within twenty years. *It was held, accordingly*, that if the plaintiff claims under a deed received from the owner more than twenty years before he brought his writ, any evidence, that shows that he parted with that title to anybody before the twenty years began to run, will defeat the action.

ON REPORT.

This was a real action to recover possession of one eighth of the land described in the writ, and which the plaintiff claimed as heir of Charles W. Hewes, late of Islesborough, deceased. Writ dated April 1, 1870. Plea, general issue with brief statement in which the defendant alleged that she, and those under whom she claimed, had been in actual possession for more than forty years of the demanded premises, claiming to hold them by adverse, open, peaceable, notorious and exclusive possession in their own right.

Plaintiff introduced in evidence a quitclaim deed from Jairus Coombs, husband of the defendant, to Charles W. Hewes, dated April 14, 1846, and proved that he was heir of Hewes, deceased.

The defendant introduced evidence which showed that her husband had resided upon the premises, his homestead in Islesborough, from his birth until his death in 1882, a period of seventy years; that April 14, 1846, he conveyed the same to his nephew Charles W. Hewes, then just of age and without property or means, who left his home in October following and never returned. The conveyance made without consideration, and intended only for safe keeping in view of apprehended difficulty produced no change in the occupation. The grantor, Coombs, continued to pay the taxes and to make improvements, &c., and his heirs have done the same since his decease. Among the improvements made were repairing and rebuilding the house and planting an orchard.

J. H. and C. O. Montgomery, for plaintiff.

Possession, after deed given by Coombs, does not ripen into title, however long continued. Grantor is presumed to be tenant of his grantee. *Sherburne* v. *Jones*, 20 Maine, 70; *Currier* v. *Earl*, 13 *Id.* 216; *Larrabee* v. *Lumbert*, 34 *Id.* 79. Family's possession after death of grantor is only a continuance of his possession under permission of grantee. *Page* v. *McGlinch*, 63 Maine, 472. Possession must be surrendered before defendant can commence to hold adversely. *Brannon* v. *Brandon*, 75 Am. Dec. 655; *Longfellow* v. *Longfellow*, 61 Maine, 590.

J. Williamson, for defendant.

HASKELL, J. Writ of Entry. Plea, *nul disseizin*. Plaintiff must recover upon the strength of his own title; not upon the weakness of defendant's. *Chaplin* v. *Barker*, 53 Maine, 275. He must show seizin and right of entry within twenty years before the date of his writ. R. S., c. 104, § § 2, 4. When that is shown, plaintiff may recover, unless defendant shows a better title in herself, not in another, under whom she does not claim. Title in another may be shown to rebut plaintiff's seizin within twenty years. A deed from the plaintiff to a stranger, within that time, under whom the defendant does not claim, would not do it; but a deed from the plaintiff to such stranger more than twenty years prior to his writ would do it; because, having parted with his title before the twenty years began to run, he would not have been seized within the twenty years, a prerequisite, under the statute, for the maintenance of a writ of entry against anybody, even a trespasser in possession, without any pretense of title. *Walcott* v. *Knight*, 6 Mass. 418; *Shapleigh* v. *Pillsbury*, 1 Maine, 290; *Stanley* v. *Perley*, 5 Maine, 369; *Bussey* v. *Grant*, 20 Maine, 281; *Wyman* v. *Brown*, 50 Maine, 144; *Morse* v. *Sleeper*, 58 Maine, 335–6.

The plaintiff claims as heir of the grantee in a quitclaim deed, given in 1846, by defendant's husband, who then owned the property, a small farm on which he lived. That husband did not surrender the possession, but retained it from that day until his death, in 1882, almost forty years. After giving the deed,

he was presumed to retain his possession as tenant of the grantee; but that presumption may be rebutted. It may be shown that he did not so retain it. It may be shown, and we think it is sufficiently shown to rebut the contrary presumption, that he immediately repudiated his deed and became a disseizor of the plaintiff, and thereafterwards held the land openly, exclusively and adversely, until he died. Such disseizin, by arbitrary rules of law, continued for twenty years, worked a seizin, that is, a title; and, if that title became complete more than twenty years before the plaintiff brought his writ, it rebutted the plaintiff's seizin within twenty years, the same as a deed would have done. The twenty years began to run in 1870. The deed was given in 1846, twenty-four years earlier. The plaintiff's ancestor, after he took the deed, never claimed the land. He soon departed from the neighborhood and never returned. Defendant's husband lived there and paid taxes and treated the property as his own until he died. His conduct was inconsistent with a submission to title in another. Possession has been retained by him and his family for more than forty years.

After a careful consideration of the evidence, and the inferences to be drawn from it, the court considers that defendant's husband's presumed submission to the title of his grantee is rebutted; and that the husband acquired title by disseizin to the land more than twenty years before plaintiff brought his writ, whereby his proof of seizin, within twenty years, is destroyed, and his action defeated, although the defendant may not have shown any title in herself. Her right, if any, is the inchoate right to dower, yet unassigned. *Judgment for defendant.*

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

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98 435

STATE *vs.* SAMUEL FARMER.

Franklin. Opinion April 7, 1892.

Evidence. Witness. Credibility. Former Conviction. Intoxicating Liquors.

It is not an objection to the admission of evidence, pertinent for one purpose only, that it is susceptible of being used for another purpose to the prejudice

of a respondent on trial in a criminal prosecution; the protection against any perversion of the evidence being in such explanation of the matter as the presiding judge may impart to the jury.

In the trial of a respondent for unlawfully selling spiritous liquors, the record of his conviction for a similiar offense, however ancient it may be (in this case twenty-seven years old), is admissible in evidence to affect his credibility as a witness, he having testified in his own behalf in such trial.

ON EXCEPTIONS.

This was an indictment under R. S., c. 17, § 1, for keeping and maintaining a liquor nuisance at two different places in Phillips, Franklin County. The indictment is in the common form used in the State. The jury returned a verdict of guilty for both offenses. After the verdict, the defendant moved an arrest of judgment, and filed the following reasons: (1st,) said indictment sets out no offense against the respondent; (2d,) every thing alleged may be true, and consistent with the innocence of the accused; (3d,) the two counts in the indictment are inconsistent with each other; (4th,) it does not appear on what provision of the statute the indictment is found; (5th,) there was an attempt to set out distinct offenses in the two counts, and the record cannot show under which the verdict was found; (6th,) the record can not show whether the verdict was found for using said building for the illegal sales of liquor, for the illegal keeping of liquors, for keeping a place of resort where liquors were drank, given away or in any manner dispensed; (7th,) the indictment is otherwise defective and insufficient in law.

The presiding justice overruled the motion and the defendant excepted. A witness, called by the State, was allowed to testify, against respondent's objection, and to read to the jury from a small diary, the following, which he testified he copied from a book of records in the office of the Collector of Internal Revenue comprising the District of Maine, at Portsmouth, New Hampshire, viz: "Samuel Farmer, R. L. D., Phillips, date of payment, June 30, 1890, $20.83, from July, 1890, to April 30, 1891. Serial No. of Stamp 190338." In his testimony the defendant admitted the facts disclosed by the "examined copy" of the record from the office of the Collector of Internal Revenue.

After the defendant had testified as a witness in his own behalf, the government was allowed, against respondent's objection to introduce a record of conviction of respondent at the October term, of said Court 1864, as a common seller of intoxicating liquors on the first day of November, A. D., 1863, and on various other days and times (with a *continuando*) to which the respondent pleaded guilty and was fined one hundred dollars and costs taxed at sixty-nine dollars and ninety-nine cents.

In his charge to the jury the presiding justice *inter alia*, said:

"The counsel for the State says in the first place, in substance, that taking the literal translation of a familiar latin maxim, the thing itself speaks; that the situation found by this officer speaks of the intent of the accused with a power that overbalances and silences all explanations that can be or have been given. He says that it is important for you to consider what the conduct and the expressions of the accused were at the time of the search; that when a person is first confronted with a charge of violating the law his conduct and language may be significant and of weight in determining the question of guilt or innocence, for it is said that the language of innocence is always instinctively the language of truth. . . .

"The legislature simply affirmed a principle of evidence in enacting this statute, they expressed their opinion in regard to what force and effect ought to be given to a piece of testimony of that kind; that if unexplained and uncontradicted it ought to be held satisfactory proof of the guilt of the accused; that you ought to consider the usual motives which operate upon and control men who are engaged in business, and that men who are carrying on any business for gain would not expend the sum of $25 to authorize them, as far as the government of the United States can authorize them, to carry on any business unless they intend to engage in that business, unless they were about to carry on that traffic. But I cannot say to you that you are compelled to find any person guilty who has paid the sum of $25 for the stamp to prove that he has paid this tax. I cannot say to you that you are compelled to do so for the reason I have indicated; he is entitled to the judgment of the jury and it is

your duty to consider as reasonable and practical men what force ought to be given, what inference you feel authorized to draw as a matter of fact from such conduct as that. It is for you to say as a matter of fact and not for me as a matter of law."

The respondent requested the court to instruct the jury that the statute on which this indictment is founded is in conflict with the amendment to the Constitution of the United States, Article VIII, and with Article I, § 9, of the Constitution of Maine, which the court declined to do. A second motion in arrest of judgment was then filed and overruled by court, and the respondent excepted.

On motion of the attorney for the State, the presiding justice adjudged the exceptions to be frivolous and intended for delay; and the case was, thereupon, certified to the Chief Justice.

F. E. Timberlake, County Attorney, for the State.

Indictment: *State* v. *Lang*, 63 Maine, 216; *State* v. *Ryan*, 80 *Id.* 107; *State* v. *Dorr*, 82 *Id.* 157.

Evidence: *State* v. *O'Connell*, 82 Maine, 33; R. S., c. 82, § 105; *State* v. *Watson*, 63 Maine, 128; *State* v. *Lang*, *supra*; *State* v. *Watson*, 65 Maine, 79.

Charge: *State* v. *Reed*, 62 Maine, 133; *State* v. *Benner*, 64 *Id.* 267; *State* v. *Smith*, 65 *Id.* 262.

H. L. Whitcomb, for defendant.

Indictment: *State* v. *Dodge*, 78 Maine, 439; *Com.* v. *Stahl*, 7 Allen, 304; *Mains* v. *State*, 42 Ind. 327; 13 Am. Rep. 364; 2 Bish. Crim. Proc. § § 593, 864; Whar. Crim. Law, § § 2379–80; *Com.* v. *Lambert*, 12 Allen, 177; *Com.* v. *Calef*, 10 Mass. 153; *State* v. *Stevens*, 36 N. H. 59; *Ludwick* v. *Com.* 6 Harris (Pa.), 172.

Evidence: *State* v. *O'Connell*, 82 Maine, 33; *Com.* v. *Billings*, 97 Mass. 405.

The court erred in instructing the jury in regard to the weight to be given to the fact of the respondent's having paid a U. S. revenue tax. This is the language used,—"That if unexplained and uncontradicted, it ought to be held satisfactory proof of the guilt of the accused."

PETERS, C. J. An exception was taken, at the trial, to the admission of a record of the conviction of the respondent as a common seller of intoxicating liquors, recovered twenty-seven years ago, and introduced for the purpose of impeaching the credibility of the respondent as a witness in his own behalf in the present prosecution for a similiar offense. It is claimed that so ancient a record is not admissible for such purpose, and that it was introduced more to create a prejudice against the respondent than to affect his credibility.

That evidence, properly admissible for one purpose may be so perverted in its use as to effect a different and illegitimate purpose, is not altogether preventable. But such evidence cannot on that account be wholly rejected. The correction of its abuse lies in such explanation as the presiding judge may feel required to give to the jury concerning it. Then, too, when the ill-concealed purpose of its introduction becomes obvious to the jury it often reacts against the party attempting to profit by the irregularity.

We see no cause for rejecting the record of conviction in this case in the fact that it is an ancient record. Time may soften the effect of such a record but cannot destroy its applicability. At the common law, a person convicted of a crime unless pardoned, could never afterwards be allowed to testify as a witness. And pardon could restore only partial competency. The record was still admissible to impeach the credibilty of such person. And, certainly, lapse of time would not be more efficacious for washing out the legal blot than a pardon would be. But a witness against whom a conviction of a criminal offense is produced, however ancient or modern it may be, is not without means for vindicating his character for truthfulness. He may produce general evidence to sustain his present reputation for veracity.

The brief of counsel for the respondent imputes declarations to the presiding judge not uttered by him. Stating the theories of the government, or of the legislature in passing a statute, did not make such propositions his own. Such an implication was expressly disclaimed.

The questions raised upon the sufficiency of the indictment have been lately settled in another similiar case, — *State* v. *Stanley*, *post*. *Exceptions overruled*.

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

EDWARD B. RODICK *vs.* DAVID A. BUNKER.

Hancock. Opinion April 11, 1892.

Insolvency. Discharge. Lease. R. S., c. 70, § § 25, 49.

A discharge of an insolvent debtor who was lessee of real estate for a term of years, with covenant to pay rent at periods stated, is no bar to an action by the lessor on the covenant in the lease for rent accruing subsequent to the date of his insolvency.

ON REPORT.

Action of covenant on a lease. Writ dated August 4, 1890. The case is stated in the opinion.

E. S. Clark, for plaintiff.

W. P. Foster, for defendant.

Lease passed, by the insolvency, to the assignee. Defendant was freed from further obligation to pay rent, unless he actually occupied the premises. *Hoyt* v. *Stoddard*, 2 Allen, 442; *Gray* v. *Bennett*, 3 Met. 525; *Comegys* v. *Vasse*, 1 Pet. 193; *Shelton* v. *Codman*, 3 Cush. 318; *Bemis* v. *Wilder*, 100 Mass. 446.

LIBBEY, J. This is an action on a covenant in a lease of real estate for the payment of rent by the defendant. In defense he relies upon his discharge in insolvency by the court of insolvency of Hancock county, from the payment of all his debts which existed on the eighth day of October, 1888, the day on which he was declared an insolvent, in accordance with the terms of chapter 70 of the revised statutes. The lease sued on was executed by the parties on the fourteenth day of July, 1888, for the term from the thirteenth of March, 1888, to the twenty-first day of February, 1892, for which the defendant covenanted to pay rent of two hundred dollars per year in two semi-annual payments of one hundred dollars each.

The plaintiff does not claim the rent that had accrued prior to the insolvency of the defendant; and the contention between the parties is, whether the defendant is liable to pay the rent which he covenanted to pay in the lease, subsequent to his insolvency. The defendant claims that his rights under the lease passed to the assignee in insolvency, by the assignment executed by the judge of the court of insolvency, and that he had no estate under the lease after that assignment; and therefore, he claims that he is not responsible for the payment of the rent.

As the case comes before the court there is nothing that tends to show whether the assignee accepted the estate of the insolvent under the lease or had any control over it. It does not appear whether the defendant ceased to occupy after the assignment, or continued to occupy to the end of the lease. The assignment would convey the estate of the insolvent under the lease if the assignee elected to accept it. But until it is shown that he did elect to accept it, it does not appear that he has any estate under it. The insolvent may require him to elect within a reasonable time whether he will accept his estate as lessee or not; and if he does not accept it within a reasonable time, the insolvent may continue to occupy under it as if there had been no assignment made. This is the doctrine of the English courts under their bankruptcy act, as determined in *Mills* v. *Auriol*, 1 H. Black. 433, and 4 T. R. 94. The case is also found in Smith's Leading Cases, Vol. 1, Part II, 1227, Seventh American Edition, with notes by Hare and Wallace collecting the American decisions upon the same subject.

The English rule as determined by the courts of that country goes farther, and holds that the assignment does not relieve the lessee from the payment of rent accruing subsequent to the assignment, without some additional statutory provision or covenant in the lease. We understand the rule as determined by the courts in this country under the bankruptcy act of 1867, is to the same effect. *Treadwell* v. *Marden*, 123 Mass. 390.

The provisions of chapter 70 of our statutes, involved in the determination of this question, are as follows:

"Section 46. A discharge in insolvency duly granted shall, subject to the limitations in the two preceding sections," (which are not important here) "within this State, release the insolvent from all debts, claims, liabilities and demands, which were or might have been proved against his estate in insolvency."

"Section 25. All debts due and payable from the debtor at the time of the filing of the petition by or against him, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the insolvent." . . . . "In all cases of contingent debts and contingent liabilities, contracted by the insolvent, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed with the right to share in the dividends if the contingency happens before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court orders, and he may prove for the amount so ascertained." . . . . . "Where the insolvent is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the insolvency as if the same fell due from day to day, and not at such fixed and stated periods. No debts other than those specified in this section, shall be proved or allowed against the estate."

The claim in suit is not a contingent debt or contingent liability, contracted by the insolvent. *Fernald* v. *Johnson*, 71 Maine, 437; but it falls under the last section of the clause quoted. It is very clear, then, that no claim for the rent covenanted to be paid under the lease in suit could have been proved against the insolvent's estate, which had not accrued at the time of the insolvency. True, the case of *Treadwell* v. *Marden*, before cited, arose under the bankruptcy act of the U. S. of 1867; but the provisions of our statute before quoted are the same in substance, if not in precise words, that are found in that act. And we think the same construction should be put

upon our statute in determining the question before us, as is found in *Treadwell* v. *Marden*, *supra*.

We think it follows, then, that the rent sued for, which accrued after the insolvency of the defendant, was not provable against his estate, and is therefore, not barred by his discharge. The defendant must be defaulted for the rent from the date of his insolvency to the first day of August, 1890, with interest from the date of the writ.

Defendant defaulted.

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

STATE *vs.* STILLMAN TOWER.

Washington. Opinion April 15, 1892.

Constitutional Law. Fish. Waters. U. S. Const. Art. IV, § II, Part I. R. S., c. 40, § 48.

The State has the exclusive jurisdiction to regulate and control the fisheries in the waters of the State, both tidal and interior waters.

The right to fish in its waters is not a privilege of the citizens in the several States; and granting to citizens of this State the right to fish for and take fish in a manner and for a purpose described in R. S., c. 40, § 48, is not a discrimination against the "privileges" of citizens of the several States within the meaning of Art. IV, § II, Part I, of the Constitution of the United States.

Chapter 40, § 48, of R. S., is valid.

ON EXCEPTIONS.

The case is stated in the opinion.

C. E. Littlefield, Attorney General, for the State.

G. M. Hanson, for defendant.

Counsel cited: Morse on Citizenship, p. 248, and cases cited; *Pearson* v. *Portland*, 69 Maine, 278; *State* v. *Furbush*, 72 *Id.* 493.

LIBBEY, J. Indictment charging that the defendant, on February 17, 1891, did fish for land-locked salmon, trout and togue in Grand Lake, Washington county, in violation of c. 40, § 48 of R. S. Upon his arraignment he pleaded guilty, unless the court shall be of opinion that he was not guilty by

reason of his being an American citizen resident in the Province of New Brunswick. The presiding judge ruled that his citizenship of the United States was no protection to the acts charged against him, as he was not a citizen of Maine. To this ruling exception was taken, which brings the question before this court.

The contention of the counsel for the defendant is, that this statute is void, inasmuch as by its proviso during February, March and April, citizens of the State may fish for and take land-locked salmon, trout and togue, and convey the same to their own homes but not otherwise, it discriminates between citizens of this State and citizens of the United States residing out of the State; that it gives to the citizens of the State a privilege which it denies to the citizens of the United States not residing here, and is therefore, in violation of the Constitution of the United States, Art. IV, § II, Part I. "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

If the right to fish in the interior waters of this State is a privilege of citizens in the several states, his contention would seem to be well founded. But we think the right to fish in the waters of this State is not a privilege to which citizens in the several states are entitled. The question raised here appears to be fully decided by the Supreme Court of the United States in *McCready* v. *Virginia*, 94 U. S. 391. In the opinion of the court in that case, by Mr. Chief Justice Waite, the court declares that, "The principle has long been settled in this court that each state owns the beds of all tide waters within its jurisdiction, unless they have been granted away. *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Smith* v. *Maryland*, 18 How. 74; *Mumford* v. *Wardwell* 6 Wall. 436; *Weber* v. *Harbor Commissioners* 18 *Id.* 66. In like manner, the states own the tide waters themselves and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin* v. *Waddell*, 16 Peters, 410." . . . . "The right which the people of the State thus acquire comes not from their citizenship alone, but from their

citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."

After stating the definition which the court had given in several previous cases to the words "privileges and immunities" as used in the constitution, and stating that it had come to the conclusion that the better practice was not to attempt to give an abstract definition to the words, but leave it to be determined in every particular case as it might arise, the opinion farther declares that, "Following, then, this salutary rule, looking only to the particular right which is here asserted, we think we may safely hold that the citizens of one state are not invested by this clause of the constitution with any interest in the common property of the citizens of another state."

We deem it unnecessary to cite any further authorities. It is the duty of this court to follow the decisions of the highest Federal Court in determining the meaning of the constitution of the United States. The section of the statute under which the defendant is indicted is not in conflict with the provision of the constitution relied on, and is valid.

Exceptions overruled. Judgment for the State.

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

HATTIE M. THOMAS *vs.* THOMAS CHURCHILL.

Waldo. Opinion April 15, 1892.

Way. Record. County Commissioners. Jurisdiction.

The judgment of the county commissioners in locating a private way cannot be impeached in an action of trespass by a land owner, unless their record shows that they exceeded their jurisdiction.

AGREED STATEMENT.

The case appears in the opinion.

W. P. Thompson, for plaintiff.

W. H. McLellan, for defendant.

LIBBEY, J. Trespass for entering upon the land of the plaintiff, which was within the limits of a private way located for the defendant by the county commissioners. There is no

contention between the parties as to the jurisdiction of the county commissioners upon the defendant's petition. He had applied to the municipal officers of the town to locate the private way from his land near his house a short distance over the plaintiff's land to the county road. They had laid out the way on his petition, as a private way, and made their report to the town at its annual town meeting as required by the statute. But the town refused to accept the way. Thereupon, the defendant within the year thereafter presented to the commissioners his petition for the location of the way by them. The petition alleges that a private way from the house of said Thomas Churchill, easterly to the road leading from Lincolnville center to Dickey's Mills, so called, in said Belmont, would be a great convenience to said Churchill and to parties having occasion to go to and from his house. It sets out the other facts that have been stated, that are essential to give to the commissioners jurisdiction.

After giving due notice to all parties interested as required by statute, the commissioners report that they met the parties at the place named in their notice, which was the house of the defendant, and proceeded "with the parties and viewed the route described in said petition, immediately after which view, on the fourteenth day of December, A. D., 1889, a hearing of the parties and their testimony was had before us at the dwelling house of Thomas Churchill in said Belmont, it being a convenient place in the vicinity of said route; after a full hearing and mature consideration, we, the said commissioners, adjudged and determined that the said town of Belmont did unreasonably refuse to accept the private way as laid out by the selectmen of said town; and considering the petitioners to be aggrieved thereby do grant the prayer of the petition and proceeded to locate a private way as follows: Beginning at a stake standing near the line between lands of Thomas Churchill and Eugene M. Thomas, (said stakes bearing south eighty-five degrees east, eight rods twenty-three links from the southeast corner of the dwelling of Thomas Churchill, aforesaid) thence south eighty-five degrees east three rods and fourteen links to stake, marked,

standing in the westerly line of the county road, leading from the Dickey mills, so-called, in said Belmont, to Lincolnville. All on the land of Eugene M. Thomas aforesaid." The way located is two rods in width.

The case comes before the court on an agreed statement of facts, in which it is agreed that the land named by the commissioners as taken for the way was owned by the plaintiff, the wife of Eugene M. Thomas, but occupied by them; and that the defendant, at the time he petitioned the county commissioners, and also the selectmen, to lay out said way, occupied and controlled the farm on which he lived. The stipulation of the parties upon which the case is sent forward is, "If upon the foregoing statement of facts the court are of opinion that said private way was legally laid out or that the legality of said laying out cannot be determined in this action the plaintiff is to be nonsuited, otherwise the defendant is to be defaulted and damages assessed at one dollar."

By this statement of the case and of the stipulation of the parties, it is seen that if the location by the county commissioners is not void upon the face of their record this action cannot be maintained. It is not claimed by the counsel for the plaintiff that the commissioners had no jurisdiction to act upon the defendant's petition. That is admitted. But his contention is that, by the return of the commissioners, it appears that the way located by them is not connected with the defendant's land, and therefore, in locating it the commissioners acted outside of their jurisdiction, so that their action is void upon the face of their record. Having jurisdiction to act upon the petition, the court will not in an action of trespass determine the location to be void for any irregularities in the proceedings of the commissioners; but their judgment must be held to be binding until reversed by proper proceedings therefor. *Cyr* v. *Dufour*, 62 Maine, 20. We must presume that they acted within their jurisdiction until the contrary is made to appear.

Does it appear by the return of the location that the way is not connected with the defendant's land? We think not. They commenced at a stake, they say, standing near the dividing line,

a certain distance named, by a certain course, from the defendant's house, and from that point made their location. The petition under which they acted was for a location of a way from the house of said defendant easterly to the road. They were acting in the presence of the parties. If the fact is as contended that the point of beginning was not connected with the defendant's land, it was one that might have been easily proved. We cannot assume from the description, that it was not connected with the defendant's land.

Another objection relied on by the plaintiff's counsel is, that it does not appear that the way, prayed for by the defendant and located by the commissioners, was from the defendant's improved land to the county road. We think this objection is untenable. The point of beginning is only a few rods from the defendant's dwelling house. In the agreed statement, upon which the case comes forward, the parties agree that the defendant occupied the land upon which the dwelling-house stood at the time, as a farm; and it sufficiently appears that the way is connected with the improved land of the defendant. The cases relied on by the counsel for the plaintiff as decisive of the case, (*Hall* v. *County Commissioners*, 62 Maine, 325, and *Lyon* v. *Hamor*, 73 Maine, 56) we think are not in point.

Plaintiff nonsuit.

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

GEORGE W. ABBOTT *vs.* GEORGE E. B. JACKSON, and others.

Cumberland. Opinion April 19, 1892.

Negligence. Way. Landlord and Tenant.

Where a driveway from a lumber shed, across a railroad track to the carriage way extending up and down a wharf, was an appurtenance belonging exclusively to the shed and the land on which it stood, *Held*: that it was the duty of the lessee of the land, who was owner of the shed, to maintain a reasonably safe means of access to the shed over the driveway.

The responsibility and burden of providing such driveway, or means of access, to his lessee's place of business does not rest upon the lessor or the owner of the land over which such access lies.

ON MOTION AND EXCEPTIONS.

This was an action on the case to recover damages for personal injury to the plaintiff caused by a loose plank in a crossing in the private railroad track on the west side of Brown's wharf in Portland; which crossing the plaintiff alleged the defendants negligently allowed to get out of repair, so that while driving over the same, the plaintiff was thrown from his jigger and his leg was broken. The action was tried before a jury in the Superior Court, for Cumberland County, and a verdict of two thousand dollars was rendered for plaintiff.

The case came to this court upon exceptions to the rulings of the presiding justice, in admitting testimony against defendant's objections; to the refusal of the presiding justice to give requested instructions; and to a specific portion of the judge's charge; also on a general motion for new trial.

The plaintiff in his declaration alleged that the defendants "owned, possessed, occupied and permitted others to use" Brown's wharf in Portland, over which the defendants had established, controlled and maintained a carriage way for the use of the public and persons rightfully passing over the same. That on the southwesterly side of said passageway, the defendants controlled and maintained a railroad track, which extended from Commercial street to the lower end of the wharf and "near a certain shed upon said wharf, which said shed was occupied by one Emery, a tenant of said defendants;" that the defendants had established and controlled a crossing over said track for truck wagons for the use of the public and all persons rightfully passing over the same, extending from said way to said shed occupied by said Emery; which said wharf, way, railroad track and crossing "the defendants were bound to keep in a safe and suitable condition and repair for such purposes and uses for all persons properly and rightfully upon and using the same;" that the defendants so negligently maintained "said track and crossing over the same" that the same were unsafe by reason of a plank therein, which plank was not spiked down as it ought to have been; that the plaintiff having occasion to pass over said "track and crossing," and having the right to pass over the same, and being in the exercise of due care drove over the

same "from said shed occupied as aforesaid by said Emery," to said way, was injured in consequence of the defect in said plank.

It appeared from the testimony of the parties that Brown's Wharf, on which the accident happened, was owned by J. B. Brown for many years, and ever since his death has been held by the defendants,— trustees under his will. From Commercial street, the passageway for teams extends down the middle and to the lower end of the wharf. On the west side of the passageway, a private railroad track extends from Commercial street to near the lower end of the wharf.

Prior to his death, Brown leased to Mark P. Emery, as tenant at will, but with no agreement to make repairs, a vacant lot on the west side and near the lower end of the wharf; which tenancy continued from that time until after the time of the accident to the plaintiff. The lot leased to Emery was mostly earth filling, and on it Emery erected four sheds, known as "Emery's sheds," which were used solely for Emery's private business for storage purposes. Each shed was numbered, No. 4 being farthest down the wharf. Each shed had a wide doorway in the side next the passageway, and Emery had a right of way from the sheds to the passageway up the wharf.

When first constructed, the track on the west side did not extend down the wharf to the Emery sheds, but, some years after he had built his sheds, at his request and for his exclusive benefit the track was extended in front of and to the lower end of his sheds, and he caused crossings to be laid in front of his shed doors which he paid for, both the planks and the labor of laying. The track in front of Emery's sheds was used solely for Emery and for his private business. The crossings were on Emery's right of way into his sheds, and were used exclusively as a means of access thereto, and in connection therewith, by him and persons there on his private business.

No repairs to the crossings, or any agreement therefor, were ever made by the lessor, or by the defendants — trustees under his will, or by their orders; but it was always understood that the lessee was to make repairs.

Some years before the accident, the track above Emery's sheds

was raised by defendants' men and new planks were laid and spiked between the rails and on the outside of the rails, but without any authority or orders from the defendants or their agent, simply of their own accord, leaving the crossings in good order. Other than that Brown's men made no repairs upon the crossings.

Emery occasionally employed teams in hauling heading stock from his sheds to the brick mill farther up the wharf. Plaintiff had worked on the wharf for fourteen years, and was at work there when the track was laid in front of Emery's sheds; and testified that he knew every foot of the wharf. For some time previous to the day of the accident the plaintiff was employed by one Shaw, a truckman, as a driver, and had occasion frequently to go on to the wharf.

December 17th, 1888, the day of the accident, Shaw began work for Emery, hauling heading stock from the No. 4 shed to the brick mill. When Shaw arrived at the shed, on that morning, there was no plank on the outside of the rail next the passageway in the crossing in front of the shed door, and he went into the shed and brought out a three-inch plank some eight or ten feet long, and laid it down loosely outside of and against the rail.

To get into the shed so as to drive out and up the wharf, it was necessary to drive down past the door and gee off and then back into the shed. The loose plank being only ten feet long, it was necessary to move it down the wharf before backing in, and up the wharf before driving out. About one o'clock the same day, the plaintiff came to the wharf with another jigger and replaced Shaw's other driver. The horse, the plaintiff was using, was somewhat quick and nervous, especially about backing.

The plaintiff rode down the passageway past the door, and after backing and filling three times, suceeded in getting into the shed, the hind wheels having gone over the loose plank each time in backing on and driving off the crossing. When loading, the jigger and horse were entirely inside the shed. The plaintiff loaded the jigger, and mounting the seat, drove out of the shed

over the crossing and up the wharf. Coming back again, the plaintiff drove down past the shed door, got off, and went back to the crossing, and moved a piece of joist that was in the crossing so the wheels would come right, and then, getting on to the seat, backed and filled again several times and finally got into the shed. In backing in, however, the plank was moved, so that the plaintiff complained of it to Shaw, and said the plank was loose and ought to be fastened down, and Shaw told him that he ought to take his horse by the head and back him in.

After loading the second time, knowing the planks were decayed badly and worn between the rails, he got upon the seat of the jigger, and, with only one foot resting on the toe-rail, and the other hanging loose, he drove out of the shed on to the crossing and turned to the left to go up the wharf. The horse moved quickly over the crossing, and the wheels going upon the loose plank lifted up or canted the jigger and the plaintiff was thrown or jumped off the jigger, and his leg was broken.

The plaintiff, while lying on the ground, told a witness that he "thought it was a bad piece of business, that the plank couldn't be spiked on, that they were loose and it was an unsafe place to go over."

Neither of the defendants personally, nor any of their agents or workmen, knew that the plank was missing, nor that a loose plank had been placed against the outside rail at the time of the accident. Neither Brown nor the defendants ever gave their agent any orders, nor did their agent ever give any orders or authority to any of the workmen to make any repairs on the leased premises or on the planks or crossings in front of Emery's sheds; and that it was always understood that Emery was to make all such repairs.

It was claimed by the defendants, upon the evidence in the case, that the railroad track along the easterly front of the sheds, owned and occupied by said Emery, was built entirely for his convenience and planked at his own expense at the crossings in front of the doors and elsewhere; and that the crossings in front of the doors of those sheds were used solely by Emery

as appurtenances of the leased premises and part of the same, and for no other purpose; and that the crossings in front of the doors of the sheds were as much in the occupancy of Emery as any part of the leased premises. It was also claimed, beyond this, by the defendants, that the whole track, not only at the crossings, but in front of the whole length of the Emery sheds, was no part of the travelled way down the wharf but was used solely by Emery and was included in his occupancy; and that there was no duty or liability upon the defendants to keep the same in repair; and further, that this was true in any event as to the plaintiff, who, they claimed, was upon the premises at the time of the accident on business solely with Emery and was using the crossing merely as the means of access to Emery's sheds.

The defendants submitted several requests for rulings based upon their claims as above stated, but the view taken by the law court renders a report of them unnecessary.

The defendants excepted to the following portion of the presiding justice's charge: "The owner is not exonerated from the consequences of his neglect to maintain an access to his place of business safe and convenient because the property may be in the possession of his tenant. Within the limits of the tenancy a tenant is under obligation to repair and maintain the property occupied by him in a reasonably safe and convenient manner, but he is not obliged legally, as far as the public is concerned, to maintain in a reasonably safe and convenient manner, access to it over the property owned by another; that responsibility rests upon the owner himself. So if the spot upon the wharf where the accident occurred was not within the limits of Emery's tenancy, not within the limits of the territory occupied by him, then the owners of this property having leased it to Mr. Emery, are under the duty to all persons who do business with Mr. Emery, to provide a reasonably safe and convenient access to that property. In other words, having leased this property at the foot of the wharf to Mr. Emery, they are bound to provide reasonably safe and convenient access over their own property at the head of the wharf down to the property leased by Mr. Emery, and are under a duty to all persons having business

with Mr. Emery to maintain that access in a reasonably safe and convenient manner."

The plaintiff contended that the railroad track at the point opposite number four shed and opposite the other sheds of Emery, was under the control and in the occupancy of the defendants themselves. He claimed that this was shown by the action and conduct of the defendants and their servants in the repair and control of and their conduct toward that track. He claimed to have shown that the place where the accident occurred, the place where the plank lay outside of the eastern rail of the western track, was under the control of the defendants, and not of Emery.

The court in its instructions to the jury left the question, whether the crossing was included in the premises leased to Emery, as a fact for them to determine.

Drummond and Drummond, *W. H. Looney* with them, for plaintiff.

Whether certain premises are parcel of and included under those demised is matter of evidence. Taylor L. & T. 3d ed. § 163; *McIntire* v. *Talbot*, 62 Maine, 312, and cases cited; *Elliott* v. *Pray*, 10 Allen, 378: *Cunningham* v. *Bank*, 138 Mass. 480; *Priest* v. *Nichols*, 116 Mass. 401; *Cram* v. *R. R. Co.* 45 A. & E. R. R. Cases, 544. That negligence may be regarded as the proximate cause of an injury, of which it may not be the sole or immediate cause: *Lake* v. *Milliken*, 62 Maine, 240; *Ricker* v. *Freeman*, 50 N. H. 420; *Eaton* v. *R. R. Co.* 11 Allen, 500; *Powell* v. *Deveney*, 3 Cush. 300; *Lane* v. *Atlantic Works*, 111 Mass. 136; *Cayzer* v. *Taylor*, 10 Gray, 274; *Grand Trunk Ry.* v. *Cummings*, 106 U. S. 700; *Elmer* v. *Locke*, 135 Mass. 575; Sher. & Red. Neg. 3d ed. § 10; Whar. Neg. 2d ed. § 145; 2 Thomp. Neg. p. 1088, § § 5, 6. Counsel also cited: *Low* v. *Ry. Co.* 72 Maine, 313; *Tobin* v. *R. R. Co.* 59 Maine, 183; *Campbell* v. *Sugar Co.* 62 Maine, 564; *Stratton* v. *Staples*, 59 Maine, 94; *Barrett* v. *Black*, 56 Maine, 498; *Buzzell* v. *Laconia Co.* 48 Maine, 113; *Wendell* v. *Baxter*, 12 Gray, 294.

Instructions: Leasing wharf to different tenants gave tenants

right only to use passage way in common without liability to repair. *Sawyer* v. *McGillicuddy*, 81 Maine, 318, citing cases, *supra; Milford* v. *Holbrook*, 9 Allen, 17; *Shipley* v. *Associates*, 101 Mass. 251; S. C. 106 Mass. 194; *Larue* v. *Hotel Co.* 116 Mass. 67; *Looney* v. *McLean*, 129 Mass. 33; *Watkins* v. *Goodall*, 138 Mass. 533; *Learoyd* v. *Godfrey*, *Id.* 315; *Readman* v. *Conway*, 126 Mass. 374.

Motion: Counsel cited cases *supra* and Sher. & Red. Neg. 3d ed. § 414; *Whittaker* v. *West Boylston*, 97 Mass. 273; *Mahoney* v. *R. R. Co.* 104 *Id.* 73; *Lyman* v. *Amherst*, 107 *Id.* 339; *Gaynor* v. *R. R. Co.* 100 *Id.* 208–212; *Chaffee* v. *R. R. Co.* 104 *Id.* 108–115.

H. R. Virgin, *J. W. Symonds* with him, for defendants.

WALTON, J. The plaintiff has obtained a verdict for two thousand dollars against the trustees of the estate of the late John B. Brown, for injuries claimed to have been received through their negligence. The case is before the law court on motion and exceptions.

We think the exceptions must be sustained. The negligence complained of was the omission to keep in repair a railroad crossing on Brown's wharf in Portland. The crossing led into a lumber shed owned by one Mark P. Emery, and the crossing was built for and used exclusively as a means of entrance to the shed. It was admitted that the shed stood on land owned by the Brown estate; but it was denied that the estate or the trustees were under any obligation to keep the crossing leading into the shed in repair. Upon this point the jury were instructed as follows:

"Within the limits of the tenancy, a tenant is under obligation to repair and maintain the property occupied by him in a reasonably safe and convenient manner; but he is not obliged legally, as far as the public is concerned, to maintain in a reasonably safe and convenient manner, access to it over the property owned by another; that responsibility and burden rests upon the owner himself; so if the spot upon the wharf where the accident occurred was not within the limits of Emery's

tenancy, not within the limits of the territory occupied by him, then the owners of this property having leased it to Mr. Emery, are under the duty to all persons who do business with Mr. Emery, to provide a reasonably safe access to that property."

This ruling seems to be the exact opposite of what the law is. The law requires every one having a place of business to which he expressly or impliedly invites others to come to do business with him, to maintain a reasonably safe means of access to it, notwithstanding such place of business is upon leased land, and notwithstanding the means of access to it is over the land of another. And the responsibility and burden of providing such means of access to his lessee's place of business does not rest upon the lessor or the owner of the land over which such access may pass. And in these particulars the ruling seems to be the exact opposite of what the law is.

A way, *ex vi termini*, implies a right of passage over another's land. As an easement, it cannot exist without a servient as well as a dominant estate. "The way must be kept in repair by the owner of the easement, and not by the owner of the land over which it passes." Per Morton, J., in *Jones* v. *Percival*, 5 Pick. 485.

"The owner of the soil was under no obligation to repair the road, as that duty belonged to the party for whose benefit it was constructed." Per Ruger, C. J., in *Herman* v. *Roberts*, 119 N. Y. 37 (1890).

The lessor of a building is not liable to one who, in passing along a walk leading from the street to a building for the purpose of transacting business with the tenant, is injured for want of a railing, although the premises were in that condition prior to the letting. "The occupier of a building, who negligently permits the building, *or the access to it*, to be in an unsafe condition, is liable for an injury occasioned thereby to a person whom he by invitation, express or implied, induces to enter upon it." Per Morton, J., in *Mellen* v. *Morrill*, 126 Mass. 545.

"The duty of the tenant to keep in safe condition the demised premises extends to all the appurtenances connected therewith, and this includes steps, stairways, and other approaches." Per Elliot, J., in *Purcell* v. *English*, 86 Ind. 34.

It is suggested by the plaintiff's counsel that the ruling may be sustained upon the ground that when there is but one stairway or passage leading to several tenements, the duty of keeping such stairway or passage in repair remains with the landlord.

It is impossible to sustain the ruling upon that ground; for, in the first place, the ruling was not placed on that ground; it was placed on an entirely different ground; and, in the second place, the evidence would not have justified resting it on that ground, if it had been the intention of the presiding justice to do so.

The plaintiff claims to have been hurt while using the crossing leading out of Emery's shed; and the exceptions state and the evidence shows that this crossing was constructed for no other purpose than to furnish a convenient way to and from the shed, and that it was never used for any other purpose. It was not a way used in common with other tenants. It was an appurtenance belonging exclusively to Emery's lumber shed, and used exclusively as such. And the fact must not be overlooked that this crossing was something separate and distinct from the railroad passing by the shed, and something separate and distinct from the carriage road leading down the wharf. It was constructed of planks and extended only about ten feet from the shed. And it is claimed that, as the plaintiff was driving out of this shed with a load of lumber, a loose plank in the driveway tipped up on to its edge, and, as the fore wheels of the jigger passed over it, caused a jolt, which threw the plaintiff from his seat and broke his leg. Now, if it had been conceded that it was the duty of the defendants to keep the railroad in front of the shed in repair, and if it had been conceded that it was their duty to keep the carriage road leading down the wharf in repair, still, the question would have remained whether it was their duty to keep the entrance into Emery's lumber shed in repair; and we fail to see how, upon the evidence, there could have been but one answer. No contract to keep it in repair was proved, so as to bring the case within the principle on which the decision rested in *Campbell* v. *Sugar Company*, 62 Maine, p. 564. No tenancy in common, or use by several tenants, was proved, so as to bring the case within the principle on which

the decision rested in *Sawyer* v. *McGillicuddy*, 81 Maine, 318. Whether the driveway leading into Emery's shed was or was not wholly within the territory leased to him, was unimportant. It was a question that in no way affected his liability to keep the way in repair. It seems to us perfectly plain that the driveway from the lumber shed across the railroad track to the carriage way extending up and down the wharf, was one of the appurtenances belonging exclusively to the shed and the land on which it stood; and that it was as clearly the duty of the owner of the shed and lessee of the land on which it stood, to keep that driveway in repair as it was to keep the shed itself in repair; and that it was no more the duty of these defendants to watch that approach to the shed, and see that it was kept safe for use, than it was to watch the shed itself and see that that was kept in a safe condition. We think that upon this point the ruling was wrong, and that the verdict returned would have been wrong, if the ruling had been correct. We think that upon the evidence reported, the jury might have been very properly instructed to return a verdict for the defendants. *McKenzie* v. *Cheetham*, 83 Maine, 543, and cases cited. And very full notes upon this branch of the law will be found in *Lowell* v. *Spaulding*, 50 Am. Dec. 776; *Godley* v. *Hagerty*, 59 Am. Dec. 733; *Zoebisch* v. *Tarbell*, 87 Am. Dec. 661; *Welch* v. *Wilcox*, 100 Am. Dec. 114; *Elliott* v. *Rhett*, 57 Am. Dec. 759; *Purcell* v. *English*, 44 Am. Rep. 262; *Bowe* v. *Hunking*, 46 Am. Rep. 474; *Herman* v. *Roberts*, 16 Am. St. Rep. 803; *Edwards* v. *Railroad*, 50 Am. Rep. 659; *Wolf* v. *Kilpatrick*, 54 Am. Rep. 672.

Motion and exceptions sustained. New trial granted.

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

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STATE *vs.* JAMES BUSHEY.

Kennebec. Opinion April 22, 1892.

Indictment. Pleading. Venue. Intoxicating Liquors. R. S., c. 131, § 2.

An indictment which avers an illegal transportation of intoxicating liquors from a place in Waldo county to Clinton and Waterville in Kennebec county,

does not charge the commission of any part of the offense within Kennebec county; the latter places being towns in Kennebec county on the line between the two counties, and there being no other averment of venue in the indictment.

ON EXCEPTIONS.

The case is stated in the opinion.

L. T. Carleton, County Attorney, for the State.

F. A. Waldron, for defendant.

PETERS, C. J. The case finds that the respondent was tried upon the second count in an indictment, in which count it is alleged that he unlawfully transported liquors on a certain day "from Burnham in the county of Waldo to Clinton in the county of Kennebec." The only variation from this in either of the other counts is in the third, in which a distinct and different offense is alleged of the transportation of liquors "from the Maine Central Railroad depot in Burnham in Waldo county to Clinton and Waterville in the county of Kennebec."

A motion in arrest was filed and overruled, and exceptions taken. The question on such motion is whether any part of the offense is alleged to have been committed in the county of Kennebec. Upon the rules of criminal pleading, we think not. The *termini* named are border towns in different counties. The transportation was "to" the town of Clinton, not into or within it. Going to a line is not going beyond it,— is not crossing the line. The description is of the territory of towns and not of villages or settlements. Kennebec county is excluded from the transportation. Very likely there is a route for travel from one of the towns named to the other without crossing into Kennebec county.

To, from, or by, are terms of exclusion, unless by necessary implication they are manifestly used in a different sense. Such is the rule of construction even in civil cases. *Bradley* v. *Rice*, 13 Maine, 198. And that which would not be *ex proprio vigore* a good description in a deed would not be such in a complaint or indictment. *State* v. *Burke*, 66 Maine, 127. "From" an object or "to" an object excludes the terminus referred to. *Bonney* v. *Morrill*, 52 Maine, 252. But, in all matters of

criminal pleading, the want of a direct and positive allegation in the description of the substance, nature or manner of the offense, cannot be supplied by any intendment, argument or implication whatever. The charge must be laid positively and not inferentially. *State* v. *Paul*, 69 Maine, 215 and cases cited.

The other points presented by the case need not be discussed, as they are superseded by the point decided. The provision of R. S., c. 131, § 2, does not apply here. That relates to the admission of proof, and not to the effect of allegation, in certain cases. *Commonwealth* v. *Gillon*, 2 Allen, 502.

Exceptions sustained.

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

STATE *vs.* THOMAS LIBBY.

Kennebec. Opinion April 26, 1892.

Indictment. Intoxicating Liquors, Pleading. Place.

In an indictment charging the illegal transportation of intoxicating liquors from place to place, the places must be named and proved as named. The offense being local, place is an essential part of the description of the offense.

ON EXCEPTIONS.

This was an indictment found in the Superior Court, for Kennebec county, charging the defendant with the illegal transportation of intoxicating liquors, and upon trial he was found guilty.

The defendant requested the court to give certain instructions, found in the opinion, but which were refused. He, thereupon, filed exceptions.

L. T. Carleton, County Attorney, for the State.

W. C. Philbrook, for defendant.

PETERS, C. J. This indictment charges the illegal transportation of intoxicating liquors from the town of Fairfield in the county of Somerset to the city of Waterville in the county of Kennebec, and also from the depot of the Maine Central Railroad in Fairfield to the house of Edward Libby in Waterville.

At the trial, in the Superior Court for Kennebec county, the

counsel for the respondent requested that the following instruction be given to the jury: "An allegation in the indictment, designating from what place and to what place in the State the liquors were being transported, is an essential allegation. Being essential the allegation must be proved as laid. If the State has not proved this allegation then the case for the State is not made out, and it is your duty to bring in a verdict of not guilty." The judge declined to give the instruction requested, but on the contrary instructed the jury on this point as follows: "While it is necessary that the State should set out in the indictment the place from which and the place to which the liquors were to be carried, yet it is not absolutely necessary that the place should be proved as laid. The identical places do not themselves constitute what is known as the gravamen or the substance of the charge. Yet it is necessary that some place should be stated in the indictment. It is only necessary to prove that they were carried from place to place and were being carried in this county, in order to sustain the indictment, so far as that is concerned. It is necessary, for instance, that the indictment should contain a specific date, but the government is never held to prove the precise time of the offense as alleged in the indictment. Now, then, the essence of the charge in this case is that Thomas Libby transported from place to place in this State intoxicating liquors to aid in their sale."

This was error. The learned judge evidently had in mind the question of venue merely, not remembering for the moment that the allegation of place is a part of the description of the offense, and that the indictment charges a local offense.

Mr. Wharton, in his work on criminal evidence, basing his statement on numerous pertinent cases cited in his notes, states the effect of the decisions in the following terms: "Where the place is stated as matter of local description and not as venue, it becomes necessary to prove it as laid. Thus, for instance, on an indictment for stealing in the dwelling-house, &c., for burglary, for forcible entry, or the like, if there be a material variance between the indictment and the evidence in the name

of the parish or place where the house is situate, or in any other description given of it, the defendant must be acquitted. In an indictment, also, for not repairing a highway, the situation of the highway is material. In an action also for a nuisance in erecting a weir, if it be described in the declaration to be at H., and it proved to be at a lower part of the same water called T., the error is material; and this rule is generally applicable to indictments for nuisances." Whar. Cr. Ev. 8th ed. 109.

Where the offense is in its nature local, and the place is stated by way of local description, and not as venue merely, the slightest variance between the description in the indictment and the evidence will be fatal. Archb. Cr. Pr. & Pl. Vol. 1, p. 85, note. In an indictment for arson, where the tenement was averred to be in the sixth ward of New York city, when it was in the fifth, the indictment was held bad. *People* v. *Slater*, 5 Hill (N. Y.), 401. The place where a crime is alleged to have been committed, when a matter of essential description, must be particularly and truly stated and proved as stated. *State* v. *Cotton*, 24 N. H. 143. There is a general concurrence in the books and among the cases on this point.

State v. *Lashus*, 79 Maine, 541, really settles the present case. It was adjudged in that case that an indictment for the illegal transportation of liquors should describe the places between which the transportation took place. But there can be no necessity of such an averment unless the averment is to be proved. The offense charged in both that case and this is nuisance or of the nature of nuisance. All the offenses arising from the illegal possession of liquors are local. *State* v. *Roach*, 74 Maine, 562; *State* v. *Kelleher*, 81 Maine, 346. Locality is an inseparable part of the offense. The offense cannot be described without averring locality. Under the ruling at the trial evidence would have been admissible to prove that the transportation was between any places within the county of Kennebec.

Even if descriptive facts are laid with more particularity than need be, still as a general rule they must be proved as laid.

They become essential facts because they are alleged. They differ from unessential and superfluous details which enlarge rather than limit the scope of the principal allegation. "All allegation," says Professor Greenleaf, "which narrows and limits that which is essential is necessarily descriptive; and all matters of description are matters of substance when they go to the identity of anything material to the offense intended to be alleged." 1 Greenl. Ev. § 58. In the New York case cited, there was no necessity of averring that the crime was committed in any particular ward of New York city, but the proof had to be confined to its commission in the sixth ward because the indictment in effect averred that it was not committed in any other ward. The indictment excluded all localities other than the one particularly named. So, in *State* v. *Lang*, 63 Maine, 215, it was held that the building where a liquor nuisance was maintained need not be described any more definitely than to name the town and county where situated. But the case of *State* v. *Lashus*, 67 Maine, 564, decides that if an indictment be particular enough to allege the nuisance to be kept upon one street in a town, evidence is not admissible to prove its existence upon another street in the same town. And transportation between two particular places cannot possibly be transportation between other and different places.

The government, having positively asserted in its indictment against the respondent that the carriage of liquors was between Fairfield and Libby's house in Waterville, and thereby in effect just as positively asserting that it was not upon any other route or direction, must be confined to the proof of the transportation as alleged. Had the averment of localities been too general, a specification might have been called for, and, if furnised, would have been binding. No less binding is the specification when incorporated in the indictment itself, and in such form tendered as a notice to the party prosecuted. The report of the evidence and of the judge's charge shows that the question raised in behalf of the respondent was relevant to the case.

Other questions have been argued by counsel for the defense, but as they will be examined in the case of another respondent

in this indictment, the co-respondents having been tried separately, we omit any consideration of such questions here.

Exceptions sustained.

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

STATE *vs.* PETER NEWELL.

Washington. Opinion April 19, 1892.

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Indians. Treaties. Fish and Game.

The Indians resident within this State are not "Indian Tribes" within the treaty making powers of the Federal government.

Nor are they in political life, or territory, the successors of any of the various "Eastern Tribes of Indians" with whom treaties were made by the crown, or the colonies, in colonial times; and, hence, they cannot effectually claim any privileges or exemptions under such treaties.

While they have a partial organization for tenure of property and local affairs, they have now no separate political organization, and are subject as individuals to all the laws of the State.

ON REPORT.

This was an indictment charging that the defendant, one of the Passamaquoddy Tribe of Indians, did on the fourteenth day of January, 1891, during close time, at township number six, middle division, an unincorporated place in said county, with force and arms kill and destroy two deer, against the peace, &c., and contrary to the statute in such case made and provided.

Upon arraignment, the defendant pleaded that he was guilty of the offense charged against him, unless the court should be of opinion that he had a lawful right to do the acts with which he was accused by reason of the following treaties, viz: Of 1725, 1713, 1717, of 1727, of 1749, of 1752, all printed in the Maine Historical Society's publications.

Also treaty of 1794, and other treaties printed in Acts and Resolves of 1843; also treaty of 1780.

It was agreed by the parties that the case should be reported to the law court to be there decided as the legal rights of the parties might require. They also agreed that printed copies of the treaties above named might be referred to and used as contained

in any of the publications of the States of Maine and Massachusetts, or in the publications of any one of the Historical Societies.

Charles E. Littlefield, Attorney General, and *F. I. Campbell*, County Attorney, for the State.

George M. Hanson, for defendant.

EMERY, J. The defendant admittedly killed two deer in this State contrary to the form, letter and spirit of the statute for the preservation of deer and other game animals. The only matter of fact he interposes in defense is, that he is an Indian, one of the Passamaquoddy tribe, a tribe living on and near Lewey's Island in the eastern part of the State.

Whatever the status of the Indian tribes in the west may be, all the Indians of whatever tribe, remaining in Massachusetts and Maine, have always been regarded by those States and by the United States as bound by the laws of the State in which they live. *Danzell* v. *Webquish*, 108 Mass. 133; *Murch* v. *Tomer*, 21 Maine, 535. Their position is like that of those Cherokees who remained in North Carolina. It was said of them by the United States Supreme Court, in "*Cherokee Trust Funds*," 117 U. S. 288, that they were inhabitants of North Carolina and subject to its laws.

Indeed, the defendant concedes that he is bound by all the laws of the State, except those restricting the freedom of hunting and fishing. As to these restrictive statutes, he contends they must give way as to him before certain "Indian Treaties," named in the report of the case. He claims that these treaties are made by the fifth section of the Act of Separation (incorporated into our Constitution) a constitutional restraint upon the power of the Legislature, to limit the freedom of the Passamaquoddy Indians in hunting and fishing.

The defendant's counsel, with much zeal and industry, has furnished us with many and interesting papers concerning the various treaties with the Indians of Maine and the East. The treaty of 1713 was "the submission and agreement of the eastern Indians" to and with Governor Dudley at Portsmouth. It purported to be executed by delegates from "all the Indian plantations on the rivers of St. John, Penobscot, Kenybeck, Amascogon, Saco and Merrimack." The conference of 1717 was

simply a confirmation of the same treaty. The treaty of 1725 was after the French and Indian wars of that period, and was between the Governors of Nova Scotia, New Hampshire and Massachusetts Bay on the one hand, and "the several tribes, viz: the Penobscot, Norridgewock, St. Johns, Cape Sable and other tribes inhabiting within New England and Nova Scotia," on the other hand. This treaty was further confirmed in 1727. In 1749, after another Indian war, commissioners from Governor Phipps made a treaty of peace with "the Indians of the tribes of Penobscot, Norridgewock, St. Francois and other Indians inhabiting within his Majesty's territory of New England." The conference in 1752 was only a confirmation of the treaty of 1749. What is called in the report, "the treaty of 1780," appears to be (so far as any papers or citations are furnished us) simply a letter of thanks and kind assurances from Governor Bowdoin to the "different tribes of Indians under Col. John Allan." It contains no mention of hunting and fishing.

We do not find that the Federal government ever by statute or treaty recognized these Indians as being a political community, or an Indian tribe, within the meaning of the Federal Constitution. The defendant's counsel calls our attention to the mission of Col. John Allan, as an envoy from the Continental Congress to these Indians. Col. Allan was appointed by congress in 1777, "Agent for Indian affairs in the Eastern Department," and held that office till 1784. He was instructed to visit "the tribes of Indians, inhabitants of St. John and Nova Scotia," and by threats, persuasions and arguments of various kinds, to endeavor to convince them it would be for their interest not to take part against the United States in the war then raging. He made his headquarters at Machias and assumed a general supervision and a *quasi*-control over the various tribes of Indians from the St. John to the Penobscot. Many of his letters have been preserved by the Indians, and by them submitted to the court. They are full of kindly assurances of protection, including hunting and fishing, but it cannot be seriously claimed that they amount to a treaty between two political communities, however savage one of them may have been.

In the treaties of 1713, 1725, 1749, the contracting Indians reserved to themselves "and their natural descendants respectively, the privilege of fishing, hunting and fowling as formerly." These treaties were made by the crown with actual political communities, which had an internal government, however rude, and an external responsibility, however unsatisfactory, which could wage war and make peace. But, whatever may have been the original force and obligation of these treaties, they are now *functus officio*. One party to them, the Indians, have wholly lost their political organization and their political existence. There has been no continuity or succession of political life and power. There is no mention in the treaties of a tribe called "Passamaquoddy," and we cannot say that these present Indians are the successors in territory, or power, of any tribe named in the treaties, or are their natural descendants.

Though these Indians are still spoken of as the "Passamaquoddy Tribe," and perhaps consider themselves a tribe, they have for many years been without a tribal organization in any political sense. They cannot make war or peace, cannot make treaties; cannot make laws; cannot punish crime; cannot administer even civil justice among themselves. Their political and civil rights can be enforced only in the courts of the State; what tribal organization they may have is for tenure of property and the holding of privileges under the laws of the State. They are as completely subject to the State as any other inhabitants can be. They cannot now invoke treaties made centuries ago with Indians whose political organization was in full and acknowledged vigor.

What the report calls "the treaty of 1794," was simply a grant by the commonwealth to the Passamaquoddy tribe of Indians of certain lands and the privilege of fishing in the Schoodiac river, in consideration of their releasing all claims to other lands in the commonwealth. Clearly the defendant gains no right to hunt under that grant. *Judgment for the State.*

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

INHABITANTS of WALDOBOROUGH

vs.

KNOX AND LINCOLN RAILROAD COMPANY, and others.

Lincoln. Opinion April 30, 1892.

Railroad. Sale. Lease. Right of Majority. R. S., c. 51, § 54.

No sale or lease of a railroad in this State can be made without the consent of the Legislature.

When such consent is obtained, and there is no provision in the charter, nor in any public statute, nor in any by-law of the corporation, to the contrary, it is the right of the majority in interest to determine whether or not a sale or lease shall be made.

The same principle applies to the holders of railroad bonds secured by a joint mortgage.

The plaintiff town held about one twentieth of the bonded debt of a railroad and a much less proportion of its stock. The defendant towns held the balance and voted to sell the road. The plaintiff declined. *Held*, that it was the right of the majority to control, such action of the majority not being fraudulent, collusive or oppressive.

ON REPORT.

Bill in equity, heard on bill, answers and testimony, filed by the plaintiff, to prevent by injunction the sale of the Knox and Lincoln railroad. The plaintiff town is a stockholder and also a holder of mortgage bonds issued by the railroad. A principal allegation in the bill is that the transfer of the railroad, its property and purchase, is without the authority of law, and plaintiff's consent as a stockholder therein; also in violation of the rights of the plaintiff town and the holders of the bonds.

Other grounds for equitable relief are stated in the bill. The view taken by the court renders a report of them unnecessary. The bill did not ask for the appointment of a receiver, although the insolvency of the railroad corporation was admitted.

Heath and Tuell, for plaintiffs.

W. L. Putnam, *N. and H. B. Cleaves* with him, for Knox and Lincoln Railroad Company, Penobscot Shore Line Railroad Company, and Knox and Lincoln Railway Company.

C. W. Larrabee, for the city of Bath.

H. Ingalls, for Wiscasset and other towns.

J. E. Moore, for Thomaston.
W. H. Fogler, City Solicitor of Rockland.

WALTON, J. We think the injunctions prayed for in this case can not be granted. We think that, under the circumstances, it was the right of the towns and cities holding a majority of the stock of the Knox and Lincoln Railroad, they being also a majority in interest under the mortgages of the road, to determine whether or not the road should be sold or leased. No sale or lease of a railroad can be made in this State without the consent of the legislature. (R. S., c. 51, 54.) But when such consent is obtained, and there is no provision in the charter of the road, nor in any public statute, nor in any by-law of the corporation, to the contrary, we think it is the right of the majority in interest to determine whether or not the sale or lease shall be made. We are now speaking of sales and leases only. We are not speaking of contracts by the terms of which attempts are made to compel stockholders against their wills to enter into new or different enterprises, or to become members of another corporation. The cases are very numerous in which it has been held that such contracts, or contracts of sale or lease which embrace such stipulations, can not be forced upon minorities, however small such minorities may be. But when a proposed sale or lease is not embarrassed by any such stipulations, the law seems to be perfectly well settled that it is the right of the majority in interest to determine whether or not the sale or lease shall be made.

Thus, in *Lauman* v. *Railroad*, 30 Pa. St. 42 (72 Am. Dec. 685), one of the cases cited by the plaintiffs' counsel, the court held that a dissenting stockholder could not be compelled, against his will, to accept stock in another railroad in payment for his stock in the road sold; but the court held distinctly that whether or not the road might be sold, was a question which it was the right of a majority of the stockholders to decide.

In *Durfee* v. *Old Colony Railroad*, 5 Allen, 230, the question was fully considered, and the court held that every member of a corporation aggregate, by the very act of becoming a member,

impliedly agrees to be bound by the will of the majority, unless the charter, or some public statute, or by-law of the corporation, otherwise provides. And see, to the same effect, *Treadwell* v. *Salisbury Manf. Co.* 7 Gray, 393.

And we think the same principle applies to the holders of railroad bonds secured by a joint mortgage. Such bonds are often held by a great many persons; and when they differ as to the best mode of rendering their security available, we think it is the right of the majority in interest to determine. The court so held in *Shaw* v. *Railroad*, 100 U. S. 605. The court there said that, to allow a small minority to defeat the wishes of an overwhelming majority of those associated with them in the benefits of the common security, would be to ignore entirely the relations which bondholders, secured by a railroad mortgage, bear to each other; and that, if differences of opinion exist among them, the voice of the majority ought to govern.

And it seems to us that this conclusion is sustained by the plainest dictates of natural justice. When there are differences of opinion, aggregate bodies of men must act by majorities, or they can not act at all. It is true that this doctrine subjects minorities to the will of majorities; but it is equally true that the contrary doctrine subjects majorities to the will of minorities; and since one side or the other must yield, it seems to us to be more in harmony with the principles of natural justice that it should be the minority.

In this case, the plaintiff town holds only about one twentieth of the bonded debt of the Knox and Lincoln Railroad, and a much less proportion of its stock. The defendant towns and cities hold the balance. The latter all voted to sell the road. The plaintiff town (Waldoborough) declined. We think it was the right of the majority, and especially of so large a majority, to control.

The court will at all times protect a minority of the stockholders of a corporation against a fraudulent, collusive, or oppressive exercise of power by the majority. And if in this case, the court could see in the action of the majority anything fraudulent, collusive or oppressive, the relief prayed for would

be granted. But nothing of the kind is discoverable. Nothing is seen but an honest difference of opinion as to the expediency of accepting an offer to purchase or lease the railroad and its franchises and take an assignment of the mortgages upon it. Upon such a question, we think it was the right of the majority in interest to decide.

Bill dismissed with costs.

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

ROCKLAND WATER COMPANY *vs.* JAMES ADAMS.

Knox. Opinion May 12, 1892.

Corporation. Water Company. Unreasonable Rates.

A regulation of a water company providing that takers of water shall be liable to pay rent for the whole year, whether they actually use it for that length of time or not, and to make payment yearly in advance, without special agreement, is unreasonable.

One cannot be held to have made a special contract, to pay according to such regulations, merely by showing that he has knowledge of the regulation; but the company must show that he expressly assented to it and agreed to be bound by it.

The power under a charter of a water company to establish prices and rents to be paid for water, subject to the control of the Legislature, does not deprive the Court of its jurisdiction to adjudicate between parties upon their legal rights.

AGREED STATEMENT.

The case is stated in the opinion.

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

There was an express contract. 1 Pars. Cont. 7th ed. 477; *Cornish* v. *Abington*, 4 H. & N. 549; *Smith* v. *Hughes*, 6 L. R. Q. B. 597; *Cambridge* v. *Lexington*, 17 Pick. 222; *Day* v. *Caton*, 119 Mass. 513, 515; *Newmarket M'f'g Co.* v. *Coon*, 150 Mass. 566. Estoppel: Both parties bound as to knowledge of regulation. *Train* v. *Gold*, 5 Pick. 379; *Stagg* v. *Ins. Co.* 10 Wall. 589. Contract good for the year. *Taylor* v. *Lambertville*, 43 N. J. Eq. 107. Presumption: *Huntingdon* v. *Claflin*, 38 N. Y. 182; *Vail* v. *M'f'g Co.* 32 Barb. 564; *Ranck* v. *Albright*, 36 Pa. St. 367; *Tatterson* v. *M'f'g Co.* 106 Mass. 56. Abandonment of contract must be mutual. *Robinson* v.

Page, 3 Russ. 122. Burden on defendant; he must prove rescission: *Webber* v. *Dunn*, 71 Maine, 331. No waiver by plaintiff: *Royal* v. *Aultman-Taylor Co.* 116 Ind. 424; *Thayer* v. *Wadsworth*, 19 Pick. 349, 352. Contract entire: *Sutherland* v. *Wyer*, 67 Maine, 64, 68, and cases cited; *Hurd* v. *Gill*, 45 N. Y. 341.

C. E. and A. S. Littlefield, for defendant.

LIBBEY, J. This is assumpsit to recover for the alleged use of water furnished by the plaintiff corporation to the defendant in the city of Rockland, from July 1, 1885, to July 1, 1886. It comes before this court upon an agreed statement of facts.

The defendant in fact took and used the water from the first day of July, 1885, to the fourth day of November, 1885, when he notified the plaintiff corporation that he had ceased taking and should use it no more. The plaintiff claims to recover for the whole year, on the ground that under its charter it had the power to establish regulations "for the use of said water and establish, subject to the control of the legislature, the prices and rents to be paid therefor." The defendant had taken the water from the plaintiff for several years prior to 1885, for which he had paid at or near the beginning of each year, taking a receipted bill therefor containing, printed upon the back thereof, the regulations which it had established, by virtue of which it claims to recover for the full year in this case.

The regulations relied upon are numbers six and seven. They read as follows: "Section six. One year's rent will be required in all cases." "Section seven. All water rates shall be payable at the office of the company one year in advance, on the 1st day of July in each year, and if not paid within ten days after the same are due, the water shall be shut off without further notice, and not let on again except on the payment of two dollars."

The case does not show that there was any demand made by the plaintiff for the payment of the rent prior to the commencement of the suit. The contention between the parties is whether, in the absence of an express contract to pay for the whole year, the defendant can be held liable to pay for the whole year when he in fact used the water for four months and four days only.

We think the result must depend upon the question whether the regulation adopted by the company, that one year's rent will be required in all cases and shall be payable at the office of the company one year in advance, on the first day of July, in each year, is a reasonable regulation by the company which should bind the taker of the water to pay for a whole year if he wants to use it and does use it for a third only of the year, as in this case. If this is a reasonable regulation, and was known by the defendant, it would bind him to pay in accordance with its terms. If it is not a reasonable regulation, then, the defendant could not be bound by it; but, to recover for the full year the plaintiff must prove a special agreement to pay for a year whether the taker used the water for that time or not. The defendant cannot be held to have made a special contract to pay according to the regulations of the company relied on, merely by showing that he had knowledge of the regulation; but the plaintiff must show that he expressly assented to it and agreed to be bound by it. *Fillebrown* v. *Grand Trunk R. R.* 55 Maine, p. 468. *Gott* v. *Dinsmore*, 111 Mass. 45, 52.

By its charter the plaintiff corporation was charged with the duty of supplying to all persons and corporations a reasonable amount of water for the uses specified in the charter on demand, for a reasonable compensation. It had the right to take the water from a large pond, over which the legislature had jurisdiction. It had the right of eminent domain, the taking of lands for the laying of its main and pipes for the purpose of supplying water, and was charged with the corresponding duty to the public to furnish and supply the water on reasonable terms.

We do not think that a regulation providing that every taker of the water should be liable to pay rent for the whole year, whether he actually uses it for that length of time or not, and to make the payment in advance on the first day of July, without a special undertaking therefor, is reasonable. It casts upon the public, who have occasion to use the water for a short time only, an unjust and unreasonable burden. True, it is said that by the charter they have the power to establish subject to the

control of the legislature, the prices and rents to be paid for the water, and that the legislature never has attempted to control this regulation. But we do not think that takes the power from the court when called upon to adjudicate between the parties upon their legal rights. Then, if the regulation is unreasonable and must be declared void so that no action can be maintained in this case upon the force of it, is there any ground upon which the plaintiff can recover for a longer period of time than that during which the defendant took and used the water? We think there is nothing in the case as presented, which would authorize the court, in determining what is justly and equitably due, to charge the defendant for anything more than the value of the water during the time that he used it, which is six dollars and sixty-one cents, with interest from the date of the writ.

Defendant defaulted.

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

ADAH L. FULLER, and another, in equity,

vs.

ALBERT T. FULLER, and others.

Kennebec. Opinion May 26, 1892.

84 475
86 61
90 466
92 187

Will. Devise. Life Tenant. Full possession. Trust. R. S., c. 74, § 16.

A testator gave, by his will, to his wife, the use of his homestead, furniture, &c., for life, and to his son John an undivided third of the homestead and added this clause, "If the said John, after the death of my wife, will pay to his brother and sisters, then living, one hundred dollars each, he shall then come in full possession of the house, lot and furniture, including crockery and other household-ware." *Held*; that the acceptance of the devise creates an obligation to pay the legacies to his brother and sisters; that upon their payment, they being a charge on the real estate, he will then take an absolute title to the property.

Also, no duty implying a trust being imposed on the executors respecting the furniture, &c., the legatee (being the widow,) having a right to its use for life, is entitled to its use and possession without giving security to the remainder man.

A testator gave his widow such portion "of his money and credits," or the whole of it, as she might deem necessary for her comfort and support without being restricted in any manner from receiving the same, her receipt being all the voucher required. He then gave what "shall remain in the estate," after the widow's death, to be equally divided among the then living

heirs, with a provision that such shares which might go to certain minors were to be deposited in the savings bank until their majority. *Held*; that the money and credits are to remain in the custody of the executors, who are to supply the demands of the widow accordingly, holding the property in trust to be accounted for and distributed after her death.

ON REPORT.

Bill in equity, heard on bill and answers to obtain the construction of the will of Thomas Fuller, late of Augusta, deceased, testate. The material portions of the will are as follows:

"After the payment of my just debts, funeral charges and expenses of administration, I dispose of my estate as follows:

"1st. To my beloved wife, Adah L. Fuller, the use of the house, garden connected therewith, and the furniture, and crockery and other household-ware now in the house occupied by me as residence, or which may be there at the time of my death, during her life.

"2nd. From any money standing to my credit in any bank or of moneys due me from other parties after my death, which are collectible, the said Adah L. Fuller shall be permitted to take such portion of the whole of it as she may deem necessary for her comfort and support, without being restricted in any manner from receiving the same; her receipt for any such amount shall be all the voucher required in accounting for the same.

"3rd. To my son, John G. Fuller, I will and bequeath one undivided third of the lot of land bought of John Dorr by Arthur Hall, T. Fuller and A. T. Fuller, and being the same lot of land on which my present residence on North street in this city is located; and if the said John G. Fuller after the death of my said wife, Adah L. Fuller, will pay to his brothers and sisters then living, the sum of one hundred dollars each, he shall then come in full possession of the house, lot and furniture, including crockery and other household-ware, which are now in my possession or may be in the house at my death or at the death of the said Adah L. Fuller if she survives me, my present residence as above named. . . .

"5th. I also bequeath to Eida Fuller, Elbert Fuller and Hattie Fuller, my grandchildren, jointly, the sum of five dollars

to be placed in the savings bank by the executors for them until they reach the age of twenty-one, when each one of them as it arrives at that age shall receive its accumulated share, and if either of them should die before reaching the age of twenty-one years, the survivors shall share the portion of the deceased between them. Also any portion of my estate which in like manner should come to them as heirs after the death of my wife, Adah L. Fuller, shall also be deposited in the savings bank until they reach the age of twenty-one years and then divided as above stated. . . .

"7th. Any money or property not herein devised which after my death and the death of Adah L. Fuller aforesaid, shall remain in the estate, shall be equally divided amongst the then living heirs in the manner heretofore stated, with particular reference to the share of my grandchildren, Eida, Elbert and Hattie Fuller, that they may enjoy the full benefit of their portion of this inheritance.

"8th. For the faithful carrying out of my wishes expressed in this, my last will and testament, I appoint as my executors my beloved wife, Adah L. Fuller, and my son, John G. Fuller, to act as such jointly, and having the fullest confidence in their integrity and ability I desire that no bonds be required of them, and that they shall give no bonds for the faithful performance of this trust.

"In testimony whereof, I hereunto set my hand and seal, and declare this to be my last will and testament, this fifteenth day of January, in the year one thousand eight hundred and ninety.

Thomas Fuller."

The plaintiffs submitted questions to the court inquiring whether John G. Fuller took under the will a fee simple in the homestead, unincumbered by a life estate in Adah L. Fuller. If not, what title did he take? Whether he will take a fee simple in the homestead after Adah's death upon paying his brother and sisters one hundred dollars each. If not, what title will he take?

Whether, by the terms of said will, the duties of the complainants as executors, &c., continue until after the death of the said

Adah and until they as such shall have paid to the heirs of the testator any portion of the estate remaining after the death of said Adah.

Whether, by the terms of said will any trust is created as to the furniture, crockery and other household-ware mentioned in the first item of said will, and whether the complainants are made the trustees thereof under said will; and if yes, what are the terms of said trust and must the trustees give bonds therefor, and if no trust, have the complainants done all that can be required of them under the will when they have delivered all of said furniture, crockery and other household goods to the said Adah L. Fuller.

Whether, by the terms of said will any trust is created as to any portion of the estate of said testator that may come to Eida Fuller, Elbert Fuller and Hattie Fuller, at the decease of said Adah L. Fuller, if at the death of said Adah, said Eida, Elbert and Hattie shall not have arrived at the age of twenty-one years, and whether the complainants are made the trustees under said will; and if yes, what are the terms of said trust and must the trustees give bonds therefor; and in case of the decease of either said Eida, Elbert and Hattie or more than one of them does the share, or do the shares, of the one or more deceased go to the survivor or survivors and in case of the death of all of them said Eida, Elbert and Hattie, then what disposition shall be made of their portion of this estate.

What disposition shall be made of any property not bequeathed or devised in said will and belonging to said estate that shall remain after the death of said Adah.

E. S. Fogg, for plaintiffs.

WHITEHOUSE, J. This is an amicable proceeding in equity for the purpose of obtaining a judicial construction of the will of Thomas Fuller. It is presented on bill and answer, the defendants admitting as true all the statements of fact in the bill.

The will is inartificially drawn, but it is not difficult to discern the real purpose of the testator pervading the instrument. And although certainty and security in the disposition of landed

property suggest a reasonable regard for settled rules of construction, as aids in discovering the intention, still when that intention can be gathered from the whole will taken together, the law will not suffer it to be defeated because in a particular clause an estate is not described with technical accuracy.

By the first item of the will the testator gives to his wife, Adah L. Fuller, the "use" of the homestead "during her life." It is a familiar principle that the gift of the income of real estate is a gift of the real estate itself, and that a gift of the use of real estate for life, is the gift of a life estate. *Sampson* v. *Randall*, 72 Maine, 111. The effect of the plain and unambiguous language of this item is, therefore, to give the widow a life estate in the entire homestead, and the estate created in favor of the son, John G. Fuller, in the homestead, is subject to the life estate of the widow.

By the third item of the will, the testator first "wills and bequeaths" to his son, John G. Fuller, an undivided third of the homestead, and then adds: "If the said John G., after the death of my wife, Adah L. Fuller, will pay to his brother and sisters then living the sum of one hundred dollars each, he shall then come in full possession of the house, lot and furniture, including crockery and other household-ware." The quantity of interest thus devised must be determined with reference to the provision of the statutes (R. S., c. 74, § 16,) that, "A devise of land conveys all the estate of the devisor therein, unless it appears by his will that he intended to convey a less estate," and to the great maxim of testamentary construction already noticed, that the obvious "will" of the testator shall govern, and not fail for want of apt phrases or conventional formulas.

According to etymology the word "possess" means to sit upon; hence to occupy in person, to have and to hold. Thus the first lexical meaning given to the word in the Century Dictionary is, "To own; have as a belonging, property." The second definition in Webster's dictionary is, "To have legal title to." In popular usage the word "possessions" includes real and personal property to which one has title; as "his

landed possessions," "the French possessions." So in Scripture, "The house of Jacob shall possess their possessions." The legal idea of "possession" though varying according to circumstances, still embraces the conception of right as well as that of physical control. In the first clause of this item, the testator had already willed to John G. an undivided third of the same homestead, and when it is considered that a life estate had already been given to the widow and that John G. could only come into "full possession" of this property upon the payment of legacies amounting contingently to five hundred dollars, the conclusion is irresistible that the testator intended to give this son, on payment of the legacies named, the same estate in the entire homestead which he had already given in the undivided third part, and that in both instances he contemplated a remainder in fee after the termination of the widow's life estate. Whether the provision respecting the payment of these legacies was intended as a condition precedent or as a condition subsequent is not important to this inquiry. If, as the language of this clause implies, the property was intended to be devised on a condition precedent, no further security for the payment of the legacies could be necessary; if on a condition subsequent the estate would, indeed, vest in the devisee immediately on the termination of the life estate only to be defeated by failure to pay the legacies within a reasonable time; or even if the provision is construed as merely imposing upon the devisee the duty of paying the legacies, thus making them a charge upon the real estate the result in either view, so far as the point under discussion is concerned, is substantially the same. An acceptance of the devise in either case involves the obligation to pay the legacies, and the situation is, therefore, equally expressive of a purpose to give the devisee a remainder in fee. *Bugbee* v. *Sargent*, 23 Maine, 269; *Merrill* v. *Bickford*, 65 Maine, 119; *Drew* v. *Wakefield*, 54 Maine, 291; 2 Redf. Wills, 304, 323; 3 Jarm. Wills, 22 *et seq.*; 2 Perry on Trusts, § § 571, 572.

It is, therefore, the opinion of the court that, "if John G. Fuller after the death of Adah L. Fuller will pay to his brother and sisters then living the sum of one hundred dollars each" he

will then own the house and lot in fee simple and have an absolute title to the furniture including crockery and other household-ware described in the third item of the will.

The second item of the will provides that the widow "shall be permitted to take such portions" of his money and credits, "or the whole of it, as she may deem necessary for her comfort and support, without being restricted in any manner from receiving the same. Her receipt for any such amount shall be all the voucher required in accounting for the same." The seventh item further provides that any money or property not herein devised, which "shall remain in the estate" after the death of the widow, shall be equally divided among the then living heirs.

It is undoubtedly a settled rule in this State to allow the donee for life to have the actual possession of personal property thus bequeathed unless the will otherwise provides. And it is now equally well settled that personal property may be limited over by way of remainder after the expiration of a life interest. *Sampson* v. *Randall*, *supra*; *Starr* v. *McEwan*, 69 Maine, 334; *Warren* v. *Webb*, 68 Maine, 133. But where the property consists of money which may be easily lost or wasted the general rule is that a legatee must give some reasonable security to preserve the funds for the remainder-man, or the money may go into the hands of a trustee of whom a bond may be required. *Whittemore* v. *Russell*, 80 Maine, 297.

While the testator was here careful to secure to his widow not only the income of his money and credits, but the principal also, if she deemed it necessary for her comfort and support, he was no less careful to provide in subsequent items that any balance not expended by the widow should be divided among his heirs, and that the share which might thereby come to three grand-children named, should be "deposited in the savings bank until they reached the age of twenty-one years" and then divided as therein specified. In these provisions, and that declaring the widow's receipt to be the only voucher required in accounting for the funds, it is clearly implied that the money and credits were to remain in the custody of the executors who

were to supply without restriction all the demands of the widow and at her decease the surviving executor was to render an account of what was left that it might be distributed among the heirs. The share belonging to the minors named, was to be deposited in some bank to be selected by the executor.

It was evidently contemplated by the testator that the authority of the surviving executor should be thus continued after the death of his wife for the purposes named; and such a course is expedient and desirable. Whenever any duty implying a trust is created by a will and there is no special designation of the executor or any other person as trustee, nor any provision in the will for the appointment of the trustee, it devolves upon the executor as such to administer the estate according to the provisions of the will. *Nason* v. *Church*, 66 Maine, p. 108; *Richardson* v. *Knight*, 69 Maine, p. 288. By the express desire of the testator, the executors are relieved from giving bonds; but when it appears necessary or proper the judge of probate on application of any party interested may require them to give bonds as in other cases. R. S., c. 64, § 8.

The "furniture including crockery and other household-ware" mentioned in the first and third items of the will do not belong in the category of articles *quae ipso usu consumuntur*. 2 Will. Exrs. 1397; *Marston* v. *Carter*, 12 N. H. 159. They may depreciate by using, but as they are not necessarily consumed in that way, the legatee having a right to the use of them for life is under ordinary circumstances entitled to have and retain possession of them upon signing and delivering to the executor an inventory of them without giving security to the remainder-man for their preservation. 2 Will. Exrs. 1396; *Whittemore* v. *Russell*, *supra*. No duty implying a trust is imposed on the executors with respect to the "furniture including crockery and other household-ware" in this case. As one of them has a life estate in those articles and the other the remainder, the matter is easily adjusted between them.

All parties being equally desirous of obtaining the opinion of the court, no costs are to be allowed to any of them; but the executors may charge in their administration account such

expenses as have been necessarily incurred by them in these proceedings, and the judge of probate will make such allowance as may be deemed just and reasonable.

Decree accordingly.

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

CHARLES E. WARREN, administrator, in equity,

vs.

MARY A. PRESCOTT, and others.

Somerset. Opinion May 27, 1892.

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Adoption. Devise. Lineal Descendant. Lapsed Legacy. R. S., c. 67, § 35; c. 74, § 10.

A legally adopted child is a lineal descendant of its adopting parents within the meaning of the R. S., c. 74, § 10; and, as such, may take a legacy given by will to one of its adopting parents, and thus prevent the legacy from lapsing, when the legatee dies before the testator.

ON REPORT.

This was a bill in equity, brought by an administrator with the will annexed, of Martha H. Wright, to obtain a judicial construction of the will. The essential facts, which were admitted by the respondents to be correctly set forth in the bill, are as follows: The will after providing for the payment of debts, funeral charges and expenses of administration, disposed of the residue of her estate to various relatives, share and share alike, each of the legatees being entitled to one-eleventh part. She named Charles H. Brick, of Augusta, as one of her legatees. He died before the death of the testatrix, leaving no issue of his body, but leaving an adopted daughter, Alice P. Brick.

This child was adopted by Charles H. Brick and his wife, by virtue of a decree of the Probate Court for Kennebec County, made upon regular proceedings, under R. S., c. 67, § 35, at the September term, 1885. The decree of adoption is as follows: "State of Maine. Kennebec County: In Probate Court, held at Augusta, on the fourth Monday of September, 1885.

"In the matter of the petition of Charles H. Brick, and Mary Emma Brick, his wife, of Augusta in said County, for leave to adopt Alice, a minor child under the age of fourteen years, of

unknown parents, abandoned by them, and now in custody of petitioners; being satisfied of the identity and relations of the parties, of the ability of the petitioners to bring up and educate the child properly, having reference to the degree and condition of said child's parents, and of the fitness and propriety of the adoption prayed for, and written consent to said adoption having been given by H. M. Heath, appointed by the judge to act in the proceedings as the next friend of said child, upon proof that its parents have long since abandoned her and ceased to provide for her support, and that she has no legal guardian and no next of kin in this State.

"Ordered; That from the date hereof, the said child shall be to all legal intents and purposes, for the custody of the person and all rights of inheritance, obedience and maintenance, the child of the aforesaid petitioners, the same as if born to them in lawful wedlock, except that said child shall not inherit property, expressly limited to the heirs of the body of her adopters, nor property from their lineal or collateral kindred by right of representation, and said child shall hereafter take the name of Alice Prescott Brick."

It was admitted by the parties that, unless this adopted daughter took this share of Charles H. Brick under the will, said share became a lapsed legacy, and should be distributed as intestate property. This was the question submitted for the decision of the court.

Merrill and Coffin, for plaintiff.

Two questions arise, the determination of either of which adversely to the claim made by Alice P. Brick, will be decisive of this case.

First: Is Alice P. Brick a "lineal descendant" of Charles H. Brick, within the meaning of R. S., c. 74, § 10?

Second: Does the legacy to Charles H. Brick fall within the exception in R. S., c. 67, § 35, which prohibits the adopted child from inheriting property from lineal or collateral kindred of the adopters, by right of representation?

1st. Alice is not a lineal descendant within the meaning of R. S., c. 74, § 10.

The terms "descendants" and "lineal descendants" have uniformly been construed to mean the same as "issue." 2 Red. Wills, 3d ed. p. 77; *Hamlin* v. *Osgood*, 1 Redf. Sur. Rep. 409; *Baker* v. *Baker*, 8 Gray, 101; *Osgood* v. *Lovering*, 33 Maine, 469; *Mowatt* v. *Carow*, 7 Paige Ch. 339.

See also, *Wister* v. *Scott*, 105 Pa. St. 200, where it is said that the word "issue" in legal parlance means lineal descendants.

As bearing upon the construction of this term, we quote R. S., c. 1, § 6, cl. IX. "The word issue as applied to the descent of estates, includes all lawful lineal descendants of the ancestor." Here "lineal descendants," the very term under consideration, are treated as identical with "issue."

In *Morse* v. *Hayden*, 82 Maine, 137, occurs this language: "While the devisee in the case at bar was a relative of the testator, he did not leave any 'lineal descendants,'— that is, any 'issue,' which is synonymous with 'lineal descendants'— hence would not include his mother."

This statute in its original form and in all revisions, these same words, "leaving lineal descendants," are found, and there is no suggestion that they are to bear a different meaning from their ordinary legal signification. Prior to 1880, our law gave an adopted child no rights of inheritance whatever,—that is, no right to inherit from its adopters.

2d. The intention of the legislature, as expressed in R. S., c. 67, § 35, is plain. They meant to give the adopted child the power to take such of the property of his adopters as the latter did not voluntarily divert into other channels, (except property limited to the heirs of the body of the adopters) and nothing more. But property coming from lineal or collateral kindred of the adopters is not to be diverted from its natural course, and cast upon one who is not of their blood. Therefore, an adopted child does not take by right of representation the property of its adopters, relatives, whether descending to them as heirs-at-law, or by devise or bequest. Argument that "inherit," as used in the exception, is to be strictly construed, in the sense of taking as heir, is suicidal; because "inheritance," in the same section, must also be so construed; and it follows that if the claim-

ant cannot take as heir she must take as a sort of statute devisee. *Fisher* v. *Hill*, 7 Mass. 86. In *Sewall* v. *Roberts*, 115 Mass. 262, an adopted child took the fund because the court held that the settlement was to be regarded as made by the foster-father himself.

Walton and Walton, for Mary A. Prescott.

Lapsed legacy: R. S., c. 74, § 10; *Kimball* v. *Story*, 108 Mass. 382; 1 Jar. Wills, pages 618–622. By the terms of the decree of adoption, claimant was not to inherit property from the adopters' lineal or collateral kindred by right of representation.

Heath and Tuell, for Alice P. Brick.

WALTON, J. The question is whether an adopted child can take a legacy given to one of its adopting parents, and thus prevent the legacy from lapsing, when the legatee dies before the testator. There is no doubt that a child born in lawful wedlock can so take. But, in this particular, does an adopted child possess the same right? We think so. With two exceptions, neither of which is applicable to such a case, an adopted child becomes, "to all intents and purposes, the child of his adopters, the same as if born to them in lawful wedlock." Such is the express language of our statute in relation to the adoption of children. R. S., c. 67, § 35.

The exceptions are, first, that an adopted child shall not inherit property expressly limited to the heirs of the body of the adopters; and, secondly, that an adopted child shall not inherit property from their (the adopters') lineal or collateral kindred by right of representation. R. S., c. 67, § 35.

It is plain that neither of these exceptions is applicable to the question now under consideration. They relate to the right to inherit as heirs at law, and not to the right to take under a will. To illustrate, we will suppose that one of the adopting parents is possessed of an estate expressly limited to the heirs of his body. By virtue of the first exception, an adopted child cannot inherit,—that is cannot take as an heir at law,—this estate, or any portion of it. It must go to those to whom it is expressly limited. But an adopted child may rightfully inherit an estate

not so expressly limited. With respect to such an estate, he must be regarded as a child, an heir, and a lineal descendant of his adopting parents, the same as if he had been born to them in lawful wedlock. By force of the second exception, an adopted child cannot be regarded as an heir at law of his adopting parents' kindred. By adoption, the adopters can make for themeslves an heir, but they cannot thus make one for their kindred. To this extent, the two exceptions named operate as a limitation upon the rights of an adopted child. But in all other particulars, he is the child, the heir, and a lineal descendant of the adopting parents, to all intents and purposes, the same as if he had been born to them in lawful wedlock. And within the rights and powers thus conferred upon him, and without infringement of either of the exceptions referred to, an adopted child may take a devise or legacy given by will to one of his adopting parents, and thus prevent the devise or legacy from lapsing, in case the parent dies before the testator, precisely the same, and with the same limitations, as if he were a child born to such parent in lawful wedlock.

In such a case, a child born in lawful wedlock does not "inherit" the devise or legacy from his parents' kindred. One who takes under a will does not "inherit." To inherit is to take as an heir at law, by descent, or distribution. To take under a will is not to inherit. And when an adopted child takes a legacy given by will to one of his adopting parents, he does not take as an heir at law of the parent's kindred. He does not "inherit" the legacy from the testator. He takes as a lineal descendant of the legatee, by force of the statute. R. S., c. 74, § 10. Not as a lineal descendant by birth; but as a statutory lineal descendant; and as lawfully in the line of descent as if he were placed there by birth.

It is as competent for the legislature to place a child by adoption in the direct line of descent as for the common law to place a child by birth there. And that is precisely what the legislature has done, and what it undoubtedly intended to do, when in strong and emphatic language, it declared that a legally adopted child becomes to all intents and purposes, the child of the

adopters, the same as if he were born to them in lawful wedlock, with the two exceptions named, neither of which, as we have already seen, is applicable to such a case. This conclusion is, in our judgment, as indisputable as a mathematical demonstration. We cite, not as directly in point, but as having a bearing on the question, *Ross* v. *Ross*, 129 Mass. 243 (37 Am. Rep. 321), and *Humphries* v. *Davis*, 100 Ind. 274 (50 Am. Rep. 788).

Our opinion, therefore, is, that Alice P. Brick, the adopted daughter of Charles H. Brick, is entitled to the estate, real and personal, given to the latter by the will of Martha H. Wright, and which the said Charles H. Brick would have taken if he had survived the testatrix. And, as the question was new, and the parties seem to have acted in good faith in taking the opinion of the court, the costs of the litigation, including moderate counsel fees, may be paid by the administrator, and charged to the estate in his administration account.

Bill sustained.

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

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STATE *vs.* MARTIN MCDONOUGH, Appellant.

Sagadahoc. Opinion May 27, 1892.

Intoxicating Liquors. Pleading. Scienter. R. S., c. 27, § 31.

A complaint for the illegal transportation of intoxicating liquors is fatally defective if it omits to state that the defendant knew that the liquors transported by him were intoxicating.

ON EXCEPTIONS.

The defendant having been convicted upon a complaint before the municipal court, for the city of Bath, which alleged that, on the fourth day of December, A. D., 1890, he "did then and there, at said Bath, in said county, transport intoxicating liquors from the office of the N. E. Dispatch Express Company, in said Bath, to the building numbered 152 on the west side of Commercial street, with intent that said liquors shall be sold in this State by some person or persons to the complainant unknown, in violation of law, and to aid such person or persons in such sale, against the peace of the State," &c., appealed

to the Supreme Judicial Court, for the county of Sagadahoc, where the case was submitted to a jury, and a verdict of guilty rendered.

The defendant thereupon moved an arrest of judgment alleging that the complaint was insufficient in law, inasmuch as the statute provides that, "No person shall knowingly bring into the State, or knowingly transport from place to place in the State any intoxicating liquors, with intent to sell the same in the State in violation of law:" whereas in said complaint no scienter was averred. The motion was overruled and the defendant took exceptions.

C. D. Newell, County Attorney, for the State.

George E. Hughes, for defendant.

WALTON, J. All unnecessary prolixity in criminal as well as civil pleadings ought to be avoided. But it is a fundamental rule of the criminal law, from which no departure can be allowed, that no one shall be convicted of a crime unless the complaint or indictment upon which he is tried contains a direct allegation of every material fact which it is necessary to prove in order to establish his guilt. In other words, whatever it is necessary to prove must first be averred; and averred directly, and not by way of argument, implication, or inference merely. *State* v. *Philbrick*, 31 Maine, 401; *State* v. *Paul*, 69 Maine, 215. In the case first cited the implication was exceedingly strong; but the allegation was not direct, and the indictment was held insufficient.

In the present case, the complaint alleges that the defendant transported intoxicating liquors from the office of the N. E. Dispatch Express Company, in Bath, to the building, Number 152, on the west side of Commercial street, with intent that said liquors should be sold in this State in violation of law. But it will be noticed that the complaint omits to allege that the defendant knew that the liquors were intoxicating. This was a fatal omission. The statute upon which the complaint was founded (R. S., c. 27, § 31), declares that no person shall "knowingly" transport, etc. Knowledge that the liquors were

intoxicating is thus made important. It is the very essence of the offense and should be directly averred.

True, the complaint avers an intent on the part of the defendant that the liquors should be sold in this State in violation of law, and this may seem to imply a knowledge on his part that they were intoxicating liquors; but this is not a necessary inference, and clearly not such a direct and positive averment of the fact, as the rules of criminal pleading require. We think the complaint is fatally defective, and that the motion in arrest of judgment must be sustained.

Exceptions sustained. Judgment arrested.

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

HIRAM A. DOW

vs.

PORTLAND STEAM PACKET COMPANY.

Cumberland. Opinion May 28, 1892.

Common Carrier. Burden of proof.

Although a common carrier insures the arrival of the property at the point of destination against everything, but the act of God and the public enemy, yet the condition in which it shall arrive there must depend upon the nature of the article to be transported. He does not absolutely warrant live stock against the consequences of its own vitality.

But when the animal is delivered to him in a sound, healthy condition, and when delivered at the place of destination is found to be lame or diseased, if the carrier would excuse himself, the burden is upon him, to prove that the injury to the animal was from the cause above stated, and without his fault.

ON MOTION AND EXCEPTIONS.

This was an action brought to recover the value of one horse and one donkey which were delivered by the plaintiff on board the defendant company's steamboat, Tremont, at Boston, March 20, 1889, to be carried to Portland. The steamer sailed from Boston on the morning of March 22d, and arrived at Portland the same afternoon. The donkey was delivered to the plaintiff the same day of its arrival, and led away by him; but he refused to take away the horse from the company's wharf, and

it was allowed to remain there some seven or eight days, when it died from pneumonia.

The case was tried to a jury in the Superior Court, for Cumberland county, and they returned a verdict of eighty dollars damages for the plaintiff.

The plaintiff contended that the animals had been injured by the negligence of the defendant, and the defendant contended that they were sick when taken on board, and that they died from natural causes over which he had no control and for which he was not liable. The exception taken to the charge of the presiding justice is stated in the opinion.

John C. and T. H. Cobb, for plaintiff.

Benjamin Thompson, for defendant.

Counsel cited: *Smith* v. *R. R. Co.* 12 Allen, 531; *Penn* v. *R. R. Co.* 49 N. Y. 204; *Blower* v. *Ry. Co.* Law Rep. C. P. cases, 655; *Hussey* v. *The Saragossa*, 3 Woods, 380; *Kendall* v. *Ry. Co.* 7 L. R. Ex. 373; *Nugent* v. *Smith*, 1 L. R. C. P. Div. 423; *Ocean Steamship Co.* v. *McAlpin*, 69 Ga. 437, cited in Schoul. Bail. & Carriers, 578, note 2.

LIBBEY, J. The plaintiff claims to recover of the defendant company the value of a horse and a donkey which he delivered to the defendant, a common carrier by water, at Boston, to be carried to Portland. He claims that when delivered to the defendant the animals were in a good condition, and when landed at Portland, the horse was paralyzed and the donkey sick, and both died in a few days from their injuries.

There was no contention between the parties as to the rules of law by which the liability of the company must be determined. The contention between them is upon the instruction of the judge as to the burden of proof in regard to the diseased condition of the animals when landed.

The portion of the charge excepted to by the defendant was as follows: "The burden, in the first instance, is on the plaintiff to satisfy you that he delivered the animals to the defendant company in good condition, and that they were not deposited on the wharf here in as good condition. When he has done that, he has *prima facie* made out a good case against the com-

pany. The burden then rests upon the company to satisfy you that they have fulfilled their duty as common carriers in the transportation of the animals; that they have taken good care of them, and that their sickness and death were caused by something outside of their duties and over which they had no control."

The learned counsel for the defendant contends that this was error; that to charge it, the burden is still on the plaintiff to prove that the sickness and death of the animals were caused by the fault of the defendant.

We think this is not so. "Although the carrier insures the arrival of the property at the point of destination against everything but 'the act of God and the public enemy,' yet the condition in which it shall arrive there must depend on the nature of the article to be transported. He does not absolutely warrant live stock against the consequences of its own vitality." *Smith* v. *New Haven & Northampton R. R. Co.* 12 Allen, 531. But in that case the court held that if the carrier would excuse himself, he must prove that the loss or injury was from that cause and without his fault. The same rule was held in this State, in *Shaw* v. *Berry*, 31 Maine, 478.

The rule is so stated in Story on Bailments, § § 574 and 576. So in Wharton on Evidence, § 365.

We have carefully examined the evidence on the motion to set aside the verdict, and see no such cause as courts require to disturb it. The damages assessed by the jury are not large, eighty dollars, probably for the horse only.

Exceptions and motion overruled.

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

HANNIBAL G. BROWN, and another, in equity,

vs.

THE J. WAYLAND KIMBALL COMPANY, and others.

Oxford. Opinion May 27, 1892.

Equity. Fraudulent Conveyance. Creditor's Bill. R. S., c. 77, § 6, cl. 10.

The statute (R. S., c. 77, § 6,) allows a creditor to collect, by a bill in equity a debt out of property fraudulently conveyed by his debtor, although such property can be come at to be attached on writ or seized on execution.

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On exceptions.

This was a bill in equity brought to set aside alleged fraudulent conveyances of personal property, and to have the same applied in payment of plaintiffs' claims as creditors, to which the defendants filed the following demurrer: "First: That the said complainants have not alleged, nor does it appear by their said bill, that they have obtained judgment upon the notes and claims set forth in said bill on account of which they claim to be creditors of the said J. Wayland Kimball Company, nor do the said complainants allege, nor does it appear by said bill, that the said complainants have exhausted their legal remedies in the collection of any debt, if such there be, which is owed to them by the said J. Wayland Kimball Company. Second: That the said complainants have not by their said bill made such a case as entitles them to the relief prayed for, or to any relief, against said defendants."

At the hearing upon the bill and demurrer, the presiding justice overruled the demurrer, and to this ruling the defendants took exceptions.

J. S. Wright and J. P. Swasey, for plaintiffs.

Counsel cited: *Sanger* v. *Bancroft*, 12 Gray, 366; *Bresnihan* v. *Sheehan*, 125 Mass. 11; *Tucker* v. *McDonald*, 105 Mass. 423; *Phoenix Ins. Co.* v. *Abbott*, 127 Mass. 558; *Barry* v. *Abbott*, 100 Mass. 398; *Donnell* v. *R. R. Co.* 73 Maine, 570; *Taylor* v. *Taylor*, 74 Maine, 582.

Symonds and Libby, for defendants.

The words "and any property or interest conveyed in fraud of creditors" must be construed as meaning property situated similarly to the other two classes provided for in the same paragraph, either that it is secreted, or situated so that it cannot be reached except by the peculiar process *in personam* available in equity. We contend that it was not intended to change the old rule existing in equity, so far as the general class of cases is concerned, which relates to proceedings by creditors to reach property conveyed in fraud of creditors. That is, that all legal remedies must first be exhausted and only a judgment creditor is entitled to the aid of a court of equity. This construction

gives meaning and purpose to the enactment and is consistent with the character of the legislation embodied in this paragraph. Applying the law as thus construed to the facts of this case, as shown in the bill, and we find that the acts complained of were the transfer of visible chattels open to attachment, and no pretense or allegation that they have been concealed or withdrawn by any one so that they could not be come at to be attached or taken on execution. There is no need upon the facts stated in this bill to apply to a court of equity for relief. It is well settled that property, real or personal, conveyed in fraud of creditors, may be attached as the property of the vendor in an action brought by a creditor. Freem. Exons. § 136. Under our procedure, all property which may be seized on execution may be attached and held on the writ in the action.

This attachment may be made by trustee process. R. S., c. 86, § 63, under which provision the proceeds of property fraudulently conveyed may be attached, if the property itself has been disposed of. No need is shown for any resort to a court of equity, especially in view of the well settled principle that appeal to a court of equity is only justified where there is not "a plain, adequate and complete remedy at law," which principle is recognized in R. S., c. 77, § 6, cl. 11, conferring general jurisdiction in equity upon this court.

Only a judgment creditor is entitled to resort to a court of equity for aid in reaching property conveyed in fraud of creditors. *Webster* v. *Clark*, 25 Maine, 313; *Webster* v. *Withey*, 25 Maine, 326; *Skeele* v. *Stanwood*, 33 Maine, 307; *Dockray* v. *Mason*, 48 Maine, 178; *Corey* v. *Greene*, 51 Maine, 114; *Fletcher* v. *Holmes*, 40 Maine, 364; *Hartshorn* v. *Eames*, 31 Maine, 93; *Call* v. *Perkins*, 65 Maine, 439. *Donnell* v. *R. R. Co.* 73 Maine, 570, recognizes the doctrine that the property or interest must be "of such a nature or so situated that it cannot be reached by common law process against the debtor" and thus favors the construction of the statute for which we contend.

Mr. Libby, in reply.

All the Massachusetts cases cited by the plaintiffs have no reference to the paragraph of the Massachusetts statute relating

to "property conveyed in fraud of creditors" but to the paragraph authorizing a bill in equity to be brought to reach property "which cannot be come at to be attached," and one of the cases cited (*Phoenix Ins. Co.* v. *Abbott*, 127 Mass. 561,) reaffirms an earlier case, *Vantine* v. *Morse*, 104 Mass. 275, which held that, "when it appeared that the property sought to be reached could be attached at law, the bill could not be maintained."

PETERS, C. J. The complainants undertake, by this bill in equity, to collect a debt due them from the J. Wayland Kimball Company, a corporation doing business in this State, out of certain personal property mortgaged by that company, it is alleged, in fraud of creditors. The mortgagees and others in present possession of the property are made, with the mortgagors, parties defendant, all of whom demur to the bill.

The proceeding is instituted under a section of the statute (R. S., c. 77, § 6,) which enumerates the different classifications in which the equity jurisdiction of this court may be exercised, the tenth clause of such section reading as follows: "In suits for re-delivery of goods or chattels taken or detained from the owner, and secreted or withheld, so that the same cannot be replevied, and in bills in equity, by creditors, to reach and apply in payment of a debt, any property, right, title or interest, legal or equitable, found within this State, of a debtor or debtors, which cannot be come at to be attached on writ, or taken on an execution, in a suit at law, and not exempt from such attachment and seizure, *and any property or interest conveyed in fraud of creditors.*"

The last words here quoted, namely, "any property or interest conveyed in fraud of creditors," were not originally a part of the section, but were added by an amendment in 1877.

The only question presented by the demurrer is as to the meaning and effect of those words. The defendants contend that the complainants are not entitled to the remedy granted by the statute unless it appears that the property, sought to be reached by the equitable process, cannot be come at to be attached on writ or seized on execution in a suit at law, and

that the same condition attaches to this kind of claim as in the other cases enumerated in the same connection. The complainants contend for the opposite construction.

A literal rendering of the statute sustains the position of the complainants, and a careful consideration of the question induces us to believe that the legislature intended just what it literally said. We think the design of the amendment was to afford the equitable remedy in cases where property cannot be attached or seized, and also in cases of property fraudulently conveyed whether attachable and seizable or not.

There certainly was a good deal of expediency in extending the equitable remedy to cases like the present. The legal remedy is slow and expensive compared with the equitable, and much more hazardous. In the legal procedure the method is circuitous. An action must be pushed to judgment and execution, a seizure or levy made, and then another action instituted to settle the title of the property so attached or seized. Equity settles all questions with all parties in a single suit. *Donnell* v. *Portland & Ogdensburg R. R. Co.* 73 Maine, 567.

Property that cannot be come at so as to be attached and property fraudulently conveyed, stand in principle upon the same footing. In one sense the latter cannot be come at to be attached, that is, it cannot be attached so that a lien will be secured upon it beyond question. The apparent title is not attached. There is contingency and uncertainty about it.

Furthermore, if the construction is to be as the defendants insist it should be, then the amendment to the statute is entirely nugatory. The statute as it was without the amendment extended to property conveyed in fraud of creditors, if so situated that it could not be reached by attachment or seizure. The amendment would add nothing to the statute.

The equity powers committed to the court by the statute before quoted are not restricted by a later clause of the same section, which provides that full equity jurisdiction shall be exercised by the court "in all other cases" where there is not a plain, adequate and complete remedy at law. The general provision applies not to all cases, but to all cases other than those

previously enumerated. In particular cases the court has special jurisdiction. The general powers of the court are in addition to those, and not in conflict with them. *Demurrer overruled.*

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

JENNIE LEWIS *vs.* MORRIS K. DWINELL.

Kennebec. Opinion May 28, 1892.

Physician. Actionable Negligence.

The failure of a physician of ordinary skill to discover a serious rupture of the perineum after repeated examinations for the purpose *is held* actionable negligence.

ON MOTION.

This was an action tried at the September term of the Superior Court, for Kennebec county, 1890, and a verdict of four hundred and fifty dollars was given the plaintiff for alleged malpractice of the defendant, a physician, in a case of obstetrics. The plaintiff proved that she was under the professional care of the defendant from February 10, 1889, the date of her confinement, until March 25th following; and alleged that she sustained a rupture of the perineum through the defendant's negligent and unskillful treatment; also that he failed to make the proper examination in order to discover the laceration, or repair the same as he should have done. The evidence disclosed that inflammation of the cellular tissue of the pelvis ensued, which confined the plaintiff to her bed for several months, and caused her great suffering.

W. T. Haines, for plaintiff.

Webb, Johnson and Webb, for defendant.

HASKELL, J. No suggestion of error or misdirection on the part of the presiding justice is made, but the case is presented upon a report of the evidence; so the only consideration is whether the verdict is supported by the weight of evidence, and

that depends upon what testimony was believed by the jury, and whether they were justified in believing it.

It is a common learning that the credit to be given witnesses is a matter peculiarly suited for a jury to decide. They see them upon the stand, note their appearance and observe many indications of truth or falsehood, accurate memory or indistinct and unreliable impressions, helps wholly wanting in the perusal of cold type.

It is not disputed that the plaintiff, at some time, suffered, at child-birth, a severe rupture of the perineum; but it is denied that it occurred while she was under the professional care of the defendant. However that may be, he either failed to discover the lesion while she was under his care during her sickness at and for some weeks after the birth of her last child, or discovering it, concealed it from her.

If the plaintiff's story be true, she repeatedly complained to the defendant of local suffering, and, after repeated examinations, he assured her that she was "all right." The last examination was some four weeks after the birth of the child.

Although it cannot be surely asserted that the plaintiff's rupture was received at the birth of her last child, yet much of the evidence sustains that view, and it cannot be considered that the jury erred in finding that fact to have been proved.

If the defendant knew of the rupture and concealed it from the plaintiff, neither taking measures for its repair or relief himself, nor giving an opportunity for other professional skill to be employed, little can be said in his excuse. But, if the defendant neither discovered the lesion, nor had any knowledge of it, a different question arises. Was he professionally negligent in his examinations? He was a physician of seven years' practice, a graduate of Boston University, and must have possessed that ordinary skill and learning required in such cases. His failure then to discover, after repeated examinations, the serious injury from which the plaintiff was suffering, must be held to be actionable negligence. Reasonable attention from a physician of ordinary intelligence would have discovered so palpable an injury.

Other complications may have caused or increased much of

the plaintiff's suffering. Damages in that behalf are not chargeable to the defendant's negligence; but the verdict is moderate and cannot be considered excessive compensation for the suffering caused by the defendant's failure to exercise that degree of care and skill required from one assuming to practice the healing art.

Motion overruled.

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

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ROBERT GODDARD *vs.* INHABITANTS OF HARPSWELL.

Sagadahoc. Opinion May 31, 1892.

Towns. Way. Municipal officers,— their torts, and liabilities of towns.

It is settled law that when a public officer, in the line of his duty does a public work within a town for the public benefit or use, the town, in the absence of any directions to him, is not liable for his misconduct in such work, even though it appointed him and is obliged to pay the cost of the work.

The distinction between cases of liability and non-liability of towns for the torts of its officers is to be found, on the one hand, where the municipality has interfered by giving directions, or taking charge of the work by its own agents; and, on the other hand, where it has not interfered, but has left the work to be done by the proper public officers, in the methods provided by the general laws.

Small v. *Danville*, 51 Maine, 359, and *Woodcock* v. *Calais*, 66 Maine, 234, affirmed.

ON MOTION AND EXCEPTIONS.

This was an action of trover, begun November, 1888, and tried on the general issue, at the December term, 1890, in this court sitting in Sagadahoc county. The verdict was for the plaintiff for two hundred and fifty-two dollars, and the defendant filed a general motion for a new trial. Exceptions were also taken, but they became unimportant by the disposition made of the motion by the law court.

The case is stated in the opinion.

C. W. Larrabee, for plaintiff.

Counsel cited: *Doherty* v. *Braintree*, 148 Mass. 495, and cases cited; *Woodcock* v. *Calais*, 66 Maine, p. 236. We do not know positively how this road was built, but the records

and plaintiff's evidence are sufficient to sustain the verdict and the finding of the jury, that defendants built, or rebuilt the the bridge; and if they had built it by any town official, or by any means tending to divert their liability, it was for the defense to show it, the *onus* was not on the plaintiff.

Weston Thompson, for defendants.

EMERY, J. The County Commissioners of Cumberland county, upon an appeal from the refusal of the selectmen, laid out a town road in Harpswell. This action of the commissioners was upon appeal affirmed by this court, and the certificate of affirmance sent down May 31, 1886. Within the limits of the road thus located, the plaintiff had prior to the location placed some amount of stone, timber and earth, with the consent of the owners of the land, for the purpose of constructing a road and bridge, along the same line afterward located by the commissioners.

After the location and establishment of the road by the commissioners, as affirmed by this court, the road and the necessary bridge therein were constructed, and the stone, timber and earth of the plaintiff, found within the limits of the location, were used in such construction. The plaintiff, assuming that this taking and using of his material were by the direction of the town, or by its authorized agents, brought this action of trover against the town for such conversion. He recovered a verdict which the town has moved the court to set aside as against law and evidence.

There is no evidence in the case, that the town ever voted to open or build the road, or bridge,— or appropriated any money, or appointed any agents for that purpose, or gave any instructions to any officers, or in any way ever even considered the question. Nor is there any evidence that the municipal officers ever in any way took any direction or cognizance of the matter. Counsel and witnesses spoke incidentally of the road and bridge having been built by the town, and now the plaintiff asks us to assume that the town built the road and bridge, inasmuch as it was the town's duty to do so, and we may assume that it did its duty. He means for us to assume that the town directly by vote

assumed charge, appointed agents, and gave directions in the matter.

But in the absence of any evidence showing any action of the town or its municipal officers in the premises, we cannot assume anything more than that the road and bridge were built by the usual public officer, (in this case the highway surveyor of the district) in accordance with the directions of the statute and the commissioners. This assumption gives full effect to any presumption of duty done, and, indeed, such acts of public officers are commonly spoken of as acts of the town, though not technically or legally so.

Giving the plaintiff the full benefit of this assumption, is the town proven guilty of the unlawful conversion of his material?

It is settled law that when a public officer, in the line of his duty, does a public work within a town, for the public benefit, or use, the town in the absence of any directions to him is not liable for his misconduct in such work, even though it appointed him, and is obliged to pay the cost of the work. *Small* v. *Danville*, 51 Maine, 359; *Mitchell* v. *Rockland*, 52 Maine, 118; *Cobb* v. *Portland*, 55 Maine, 381; *Woodcock* v. *Calais*, 66 Maine, 234; *Farrington* v. *Anson*, 77 Maine, 406; *Bulger* v. *Eden*, 82 Maine, 352.

A highway surveyor is a public officer, charged with a public duty, "to open and keep in repair" public ways legally established within his district. He is appointed and paid by the town, and the town supplies him with the necessary funds for the performance of his duty. But the town does all this, as a public duty, not for its own peculiar gain. It has no proprietorship in the roads and bridges built and maintained by taxes upon its inhabitants. The roads and bridges belong to the public.

In appointing highway surveyors, in raising and expending money for roads and bridges, the town acts simply as the political agent of the State, and should have no more pecuniary liability for the misconduct of such officer, than should the Governor for the misconduct of a public officer bearing his commission. Of course, the statute may impose such a liability on a town, as it may on the Governor, but no such statute is invoked or cited in this case.

It was in accordance with these principles that *Small* v. *Danville*, 51 Maine, 359 was decided. In that case the plaintiff had some split stones lying upon the land taken for a highway, when the way was located. In building a culvert in this highway the highway surveyor of the town used this split stone, and the plaintiff brought an action of trespass against the town. It was conceded that the using of the stone constituted a trespass, but it was held that the town was not liable. That case was very like this in its facts. The surveyor was evidently opening and making a road just located. The principle there established is decisive of this case.

The plaintiff cites several cases from Massachusetts, which should be noticed. In *Hawks* v. *Charlemont*, 107 Mass. 414, the town voted to take charge, and appointed its selectmen as agents with full discretion. It did not leave the work to the highway surveyors. In *Deane* v. *Randolph*, 132 Mass. 475, the town voted to put the selectmen in charge of the work and they assumed such charge, hiring men, &c. In *Waldron* v. *Haverhill*, 143 Mass. 582, the city "instead of leaving the duty of keeping the highways in repair, to be performed by the officers and in the methods provided by the general laws," assumed to perform it by means of its own agents. In *Doherty* v. *Braintree*, 148 Mass. 495, the town voted to take charge of the work, and appointed a committee of five to act with the selectmen, all as agents of the town.

On the other hand, in the later case in the same State, *Prince* v. *Lynn*, 149 Mass. 193, the same court re-iterated the doctrine that the municipality was not liable for the misconduct of its highway surveyors while engaged in their public duties. In the still later case of *Hennessey* v. *New Bedford*, 153 Mass. 260, the city voted a specific sum of mony for the improvement of a particular street. The mayor and street commissioner without special instructions, assumed the care of the work. *Held*, that the city was not liable for their misconduct in the premises.

The distinction between the two classes of cases is clear. In the one class the municipality has interfered by giving directions or taking charge of the work by its own agents, as in *Wood-*

cock v. *Calais*, 66 Maine, 234. In the other class, the municipality has not interfered "but has left the work to be performed by the proper public officers, in the methods provided by the general laws."

Upon a new trial the plaintiff may be able to adduce evidence which will bring the case within the former class, but upon the evidence now before us, the case is clearly within the latter class.

The exceptions do not need to be considered.

Motion sustained. New trial granted.

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

CITY of ROCKLAND *vs.* FRED T. ULMER.

Knox. Opinion May 31, 1892.

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Taxes. Valuation. Listing of Appraisals. Suit. R. S., c. 6, § 175.

In an action under the statute to recover taxes due a city or town it is not a defense that the assessors made only one valuatiou for each tax, State county and town, and blended together the several sums to be thus levied, making but one assessment for the whole.

It is not a defense to such action that the assessors made and listed one appraisal in gross of three separate lots of land not adjoining, nor in any way connected with one another, instead of making and listing a separate appraisal for each lot.

Much greater particularity and precision are required when a forfeiture is sought to be enforced than when a simple recovery of a tax by suit is asked for.

ON REPORT.

This was a statutory action of debt to recover a tax of the defendant, an inhabitant of Rockland, assessed for 1888, and amounting to three hundred and eighteen dollars, with interest from October 15, 1888. The writ is dated August 29, 1890. The plaintiff admitted, at the argument, that an abatement of twelve dollars from the tax had been allowed the defendant after application to the county commissioners; and, also, consented to waive all right to recover, in this action, thirteen dollars and fifteen cents as the defendant's proportion of the sum raised in reduction of the debt on a new school house. It appeared that when the tax of 1888 was raised, the city had previously raised

by loan seven thousand five hundred dollars for building the school house, and then voted to raise three thousand five hundred dollars to pay a part of this loan. The defendant claimed that this loan was illegal because the indebtedness of the city then exceeded the constitutional limit of five per cent upon its regular valuation.

The other contentions of the defendant appear in the opinion.

W. H. Fogler, City Solicitor, for plaintiff.

C. E. and A. S. Littlefield, for defendant.

In *Jennings* v. *Collins*, 99 Mass. 29, the court say, "but where lands are separated, either by the use or purpose to which they are devoted, or by the mode of their occupation, a tax levied generally upon an entire valuation cannot be made a lien upon each separate parcel, even when they are all owned or occupied by the same person." Assessment void: *Young* v. *Joslin*, 13 R. I. 675; *Howe* v. *People*, 86 Ills. 288; *Cadwalader* v. *Nash*, 73 Cal. 43; *Allegahny Co. Com.* v. *Union Mining Co.* 61 Md. 545; Cool. Tax. p. 280; *Torrey* v. *Milbury*, 21 Pick. 64–67.

Statutes do not authorize blending State, county and town taxes in one assessment; their provisions are inconsistent with such course. State and county tax not payable to the city or town; if separately assessed as pointed out by the statute they could not be claimed as due the city or town. It is not perceived how merely combining them in the warrant can change the legal status of the tax and the party to whom it is due. That the collector has paid the State and county tax out of other money collected on the taxes commited to him, cannot affect the status as it was an act over which the city had no control. Not only does the town not owe the State for the State tax, but its money cannot legally be used by the treasurer for that purpose. *Wellington* v. *Lawrence*, 73 Maine, 125.

This would hardly be the case if the State tax were the property of or "due" to the town, as it could not be successfully contended that its own funds could not be used to pay its own liability. The language of the statute is significant. "In addi-

tion to the foregoing provisions for the collection of taxes legally assessed, the mayor and treasurer of any city . . . . . to which a tax is due." Here is a clear distinction suggested between taxes legally assessed in a city and taxes "due" to a city. Through their instrumentality State and county taxes are legally assessed, and the city taxes are due to the city.

Counsel cited: *Thayer* v. *Stearns*, 1 Pick. 482; *State* v. *Falkinburge*, 3 Green, (N. J. L.) 320; *Camden & Amboy R. R.* v. *Hillgas*, 18 N. J. L. 11; *State* v. *Bishop*, 34 N. J. L. 45; Cool. Tax. p. 294; *State* v. *Plainfield*, 38 N. J. L. 94; *Folkerts* v. *Powers*, 42 Mich. 283. Counsel commented on *Fairfield* v. *Woodman*, 76 Maine, 550; *Norridgewock* v. *Walker*, 71 *Id.* 184; *Hayford* v. *Belfast*, 69 *Id.* 64, and other cases cited in them.

EMERY, J. The city of Rockland has brought this action of debt under R. S., ch. 6, § 175, to recover the State, county and city taxes assessed against the defendant for the year 1888 by the tax assessors of Rockland. The defendant concedes his liability to be taxed that year as an inhabitant and property owner in Rockland, but makes some objections to the mode of the assessment which he claims should bar recovery in whole or in part.

I. The assessors of taxes did not make three separate valuations and assessments, one for each tax, State, county and municipal, but made only one valuation, and then blending together the several sums to be levied for State, county and municipal purposes, made one assessment for the whole. The defendant claims that there is no authority for such blending of the three taxes: that this combined tax, not being all for municipal purposes does not belong to the city, or in the language of the statute above cited, is not "due" to the city, and hence is not recoverable by the city.

We may concede that, strictly, the taxes assessed for State and county purposes do not belong and are not "due" to the city. Neither, strictly, do the taxes levied for city purposes belong to the city. Strictly, a municipality has no absolute right in municipal property, or municipal taxes. It holds

municipal property, and levies, collects and expends municipal taxes for public purposes only. While the municipality has by authority of the Legislature considerable control over municipal taxes, it is not as owner, but rather as agent or trustee for the public. The public can at any time through the Legislature take to itself the municipal property, and the proceeds of municipal taxation. It is true, as urged by the defendant, that at the time of this assessment, the collector of taxes was required by statute to pay directly to the State and county treasurers the taxes assessed for State and county purposes, and warrants would issue from such treasurers directly against the collectors for any delinquency, nevertheless, the tax was levied by the State upon the municipality, and the latter was in the end responsible for its payment in full. The municipality was the agency through which State and county taxes were assessed and collected.

Viewing the municipality in the light of an agent or trustee of the public, all the taxes to be assessed and collected through its agency, may be said to be "due" to it as such agent or trustee. The right of action against the delinquent inhabitant, or property owner, was given to the municipality to enable it to perform its duties as such agent, or trustee. We think the State and county taxes assessed upon the municipality are within the purview of the statute granting this remedy.

But, the defendant goes further and insists that the blending of these taxes as above described, being unauthorized by statute, vitiates the whole assessment, and that hence the city cannot recover that part of the tax assessed for municipal purposes.

We understand that just such a blending of the different taxes has been for years and is now almost, if not quite, universally practiced in the different municipalities of the State. Such a general and long continued practice without objection, under a statute, goes far to settle the proper construction of the statute, there being as in this case, no words of prohibition. A construction the people themselves have placed upon a statute of their own making, a construction under which they have long acted without question, should not be disregarded or overturned by the court, unless, indeed, it is found to work a manifest injustice.

We do not see how this mode is unjust to the tax-payer. It does not increase the relative valuation of his property, nor increase the amount of his tax. In answer to the suggestion, that under this mode he cannot elect which tax to pay, and which to resist, it may be said that State, county and town are not separate political taxing powers. All the various taxes are levied and collected by the authority of the State, and are all for the benefit of the people of the State. If any political agency errs, the injured tax-payer has ample remedy, but should not refuse to bear his share of the public burden.

The defendant admits that this mode of assessing taxes has never been before assailed in the courts of this State, but calls our attention to decisions of courts in other States, holding that such a practice or mode is not authorized in those states. Some of these cases came before the court on *certiorai*. Some were cases of sales of property for taxes. None seems to have been like this case, a suit at law for the taxes. Those courts, however, were construing their own statutes as applicable to the cases before them. The practice of their people may have been different or there may have been no general practice. At any rate, those decisions cannot compel us to construe our statute contrary to the general practice and understanding of our people. We must hold that the mode of assessment followed here is sufficient to maintain this action.

II. In his inventory returned to the assessors, the defendant listed three separate lots of land not adjoining, nor in any way connected with one another. Instead of making and listing a separate appraisal for each lot, the assessors made and listed one appraisal for the three in gross. The defendant claims that this was unauthorized and erroneous and avoids the tax on these lots. He cites from other states several decisions in support of his contention. All the cases cited, however, were cases arising from a sale of the property for the non-payment of taxes.

Much greater particularity and precision are always required when a forfeiture is sought to be enforced, than when a simple recovery is asked for. The grouping of these three lots of land in one appraisal may, perhaps, prevent a tax lien attaching to

either, but it did not increase the valuation nor the burden of the tax-payer. The amount of the tax is not affected. The defendant's share of the public burden is the same. The judgment against him in a suit for recovery will be neither more nor less.

The processes heretofore used for the collection of taxes have been somewhat summary. Not judgment, but payment was demanded by them. The citizen was made to stand and deliver, however much he might question his liability. In such cases, the courts have been properly scrupulous about the regularity of all anterior proceedings. This new remedy by suit is of a different nature. It seeks for judgment before execution. It gives the citizen a day in court in which to show cause why he should not pay. The anterior proceedings, therefore, do not need to be scrutinized so closely. If it appear that the citizen was liable to taxation, and that the assessors had proper authority and jurisdiction which they did not exceed, minor irregularities in mere procedure, which do not increase his share of the public burden, nor occasion him any other loss, should not prevent a recovery.

In this case, the defendant was liable to taxation in Rockland. The assessors had full jurisdiction. His share of the year's taxes was ascertained by them. No question is made here about that share. None of the irregularities complained of has varied that share in the least, and we see no good reason why he should not be adjudged bound to pay it.

The plaintiff consents to the deductions claimed by the defendant, viz: Twelve dollars, and thirteen dollars and fifteen cents, and also makes no claim for interest prior to the date of the writ. Hence we have no need to consider those claims.

Costs are recoverable. The collector not only sent the defendant a notice of the amount of his tax, but afterward "demanded payment of him" twice. This was enough to apprise him that a suit or something worse would ensue if he did not pay.

Defendant defaulted for $292.85 with interest from date of writ.

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

STATE *vs.* WILLIAM HOLT.

Waldo. Opinion June 2, 1892.

Obstruction of Justice. Witness. Indictment. Pleading.

A wilful and corrupt attempt to prevent the attendance of a witness before any lawful tribunal organized for the administration of justice is an indictable offense at common law. The essence of the offense consists in a wilful and corrupt attempt to interfere with and obstruct the administration of justice.

Intentionally and designedly to get a witness drunk, for the express purpose of preventing his attendance before the grand jury, or in open court, is such an interference with the proceedings in the administration of justice as will constitute an indictable offense.

In an indictment for such an offense, it is not necessary to aver that the witness had been summoned, or that a summons had been issued, or that a cause was pending requiring the attendance of a witness.

ON EXCEPTIONS.

The defendant was indicted for obstructing the due course of justice by enticing, soliciting and persuading a witness, Treat, who had been summoned to appear before the court at Belfast, to become intoxicated, and by then and there removing and abducting the witness, whereby he did not appear and give evidence.

The defendant filed a general demurrer to the indictment, which was joined by the attorney for the State. The presiding justice overruled the demurrer and sustained the indictment, and the defendant took exceptions.

The indictment is sufficiently stated in the opinion.

C. E. Littlefield, Attorney General, and *W. T. C. Runnells*, County Attorney, for the State.

W. H. Fogler, for defendant.

The indictment should aver, (1,) that there was pending a cause or proceeding in which Treat was required as a witness; (2,) that process requiring his attendance was issued by competent authority; (3,) that such process was duly served upon him.

Counsel cited: 1 Whar. Crim. Law, § 285; *State* v. *Philbrick*, 31 Maine, 403; *People* v. *Gates*, 13 Wend. 311; *State* v. *Paul*,

69 Maine, 215–217, 218; Whar. Prec. of Ind. & Pleas, § § 602, 606; *Com.* v. *Reynolds*, 14 Gray, 87; *State* v. *Learned*, 47 Maine, 433; *Lambert* v. *People*, 9 Cow. 624.

WALTON, J. A wilful and corrupt attempt to prevent the attendance of a witness before any lawful tribunal organized for the administration of justice is an indictable offense at common law. The essence of the offense consists in a wilful and corrupt attempt to interfere with and obstruct the administration of justice. And when the act and the motive are first directly averred, and then clearly proved, punishment should follow.

In this case, the indictment alleges that the defendant, "well knowing that one Fred N. Treat, had been summoned in due form of law to appear before the Supreme Judicial Court holden at Belfast within and for the county of Waldo, on the thirtieth day of April aforesaid, then and there to give evidence in said court in behalf of the State, and contriving and intending to obstruct the due course of justice, did then and there unlawfully and corruptly prevent, and attempt to prevent the said Treat from appearing at said court to give evidence as aforesaid, by then and there soliciting, enticing, and persuading the said Treat to become intoxicated, and by then and there removing and abducting him the said Treat, whereby the said Treat did not appear at said court and give evidence," etc.

It is objected that this indictment is not sufficient, because it does not aver that the witness had been summoned, or that a summons had been issued, or that there was a cause pending requiring the attendance of the witness.

We do not think that either of these objections can be sustained.

In *State* v. *Keyes*, 8 Vt. 57 (30 Am. Dec. 450), in a well considered opinion by Mr. Justice Redfield, the court held that it had always been an indictable offense at common law to attempt to prevent the attendance of a witness before a court of justice, although no subpœna for the witness had been served or issued. It will not do for a moment, said the court, to admit that witnesses may be secreted, or bribed, or intimidated, and

the guilty parties not be liable unless a subpœna has been served upon the witnesses. The doing of any act, continued the court, tending to obstruct the due course of public justice, has always been held to be an indictable offense at common law; and bribing, intimidating and persuading witnesses, to prevent them from testifying, or to prevent them from attending court, has been among the most common and the most corrupt of this class of offenses; and whether the witness has been served with a subpœna, or is about to be served with one, or is about to attend in obedience to a voluntary promise, is not material; for any attempt, in either case, to prevent his attendance, is equally corrupt, equally criminal and equally deserving of punishment.

In *Com.* v. *Reynolds*, 14 Gray, 87, the court held it to be an indictable offense at common law to dissuade, hinder, or prevent a witness from attending before a court of justice; and that an indictment for such an offense need not allege in whose behalf the witness had been summoned, nor that his testimony was material. The offense, said Mr. Justice Metcalf, is the obstruction of the due course of justice; and the obstruction of the due course of justice means not only the due conviction and punishment, or the due acquittal and discharge, of an accused party, as justice may require; but it also means the due course of the proceedings in the administration of justice; that, by obstructing these proceedings, public justice is obstructed.

Intentionally and designedly to get a witness drunk, for the express purpose of preventing his attendance before the grand jury, or in open court, is such an interference with the proceedings in the administration of justice as will constitute an indictable offense, and one for which the guilty party ought to be promptly and severely punished. And it is important that it should be understood that the suppression of evidence by such, or by any similarly wicked and corrupt means, can not be practiced with impunity.

Exceptions overruled. Indictment adjudged sufficient.

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

CHRISTINA R. PARKER

vs.

HUMPHREY N. LANCASTER, and another.

Waldo. Opinion June 2, 1892.

84 512
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Payment. Duress. Compromise.

Money voluntarily paid cannot be recovered back.

Money obtained by fraud or duress, or under such circumstances of oppression actual or threatened, as renders it unconscionable for the one receiving it to retain it, may be recovered back.

When one demands money under a claim of right, and uses no other means to obtain it than importunity and persistency, or a threat expressed or implied, of resort to litigation to obtain it if it is not voluntarily paid, and the one of whom the money is demanded has time for consideration and deliberation, and to obtain the advice of counsel or friends, and the money is then voluntarily paid to settle the demand, it cannot be recovered back, though the demand is illegal and unjust.

The law favors the compromise of doubtful claims, and does not allow settlements arrived at by mutual concessions to be lightly set aside.

When both parties possess equal knowledge of the facts, or possess equal means of obtaining such knowledge, and one of them voluntarily pays a claim made against him by the other, the money so paid cannot be recovered back.

ON MOTION.

This was an action of assumpsit, in which the plaintiff recovered a verdict of one hundred and sixty-one dollars and thirty-six cents for money, and interest thereon, which she claimed that she had left in the hands of the defendants to be paid by them to one Marshall, and that they had never paid it to him.

The plaintiff is executrix of Henry S. Parker, deceased, who had been a partner with the defendants, and was cashier and general business manager of the firm. It appeared that, before Parker's death, June 14, 1880, one Malady was an employee of the firm and lived in a house belonging to Marshall, and the firm was responsible to him for the rent. At the time of Parker's death, there was due to Marshall from the firm on account of Malady's rent, the sum of one hundred and fifty-five dollars. February 15, 1883, after several days' negotiations, in which the parties were assisted and represented by their counsel, a settle-

ment of the partnership business was effected, the plaintiff having previously sold her interest in the firm to the defendants, who assumed all its debts, etc.

During this settlement, the defendants claimed that Parker in settling with Malady, from time to time, had deducted from his wages the full amount of the rent due Marshall, but in his account with the firm had charged it with the full amount of these wages; also, inasmuch as Parker had charged the firm with one hundred and fifty-five dollars, as paid to Malady, which he had not in fact paid, either directly or indirectly, he had in hand money of the firm to that amount, and the plaintiff in the settlement should account therefor.

The claim, as above stated, was allowed by the plaintiff, and she paid the defendants three hundred and forty dollars, upon compromise of this and other claims. Date of writ, February 15, 1889.

R. W. Rogers, for plaintiff.

Defendants admit that they deducted, and retained this sum that they otherwise would have paid plaintiff, expressly and solely in consequence of the Marshall bill, with her consent, and as a provision by her for its payment; and do not pretend that they ever paid it over, yet contend that it was all part and parcel of a general settlement. Plaintiff understood from the defendants that this was a matter wholly between herself and Marshall, and not between her and them. She states it as follows:

"They said that my husband did the business and that I was personally holden for this bill; that it had been credited to the company and they were free from it, but that I was personally held for the bill to Mr. Marshall. With this understanding, and upon the representation of Mr. Harriman, I paid the one hundred and fifty-five dollars."

February 15th, 1883, the Marshall bill had been barred by the six years statute of limitations for more than three years; and further, all claims against Henry S. Parker's estate, had been barred more than two years and six months.

The misrepresentation was a fraud upon the plaintiff, and

would have vitiated a settlement, had there been one, and entitled her to recover back the money.

W. H. Fogler, *J. S. Harriman* with him, for defendants.

February 15, 1889, just six years after the settlement was made, when the books of the firm had been destroyed by fire, the plaintiff sues the defendants for the sum of one hundred and fifty-five dollars. She claims to go behind the settlement and to recover back a portion of the amount which she allowed the defendants upon final settlement. She does not deny that her husband, in fact, withheld money from Malady's wages to the full amount claimed; nor does she claim that her husband ever paid the rent or otherwise ever accounted to the firm or to any one for the money. Nor does she deny that the firm was indebted to Marshall to the amount claimed.

But if she did not understand the exact nature of the claim, the fact remains that her husband, at the time of his death, had money in his hands that belonged to the firm, and this money was the basis of the claim made by the defendants and properly included in the settlement. The plaintiff has neither paid, nor been called upon to pay any money to Marshall or any one else on account of the Malady rent since the settlement. The fact that there has been no final settlement between Marshall and the defendants does not prejudice the plaintiff. That is a matter which only concerns the defendants and Marshall. It appears from Marshall's testimony that there is an understanding that bills of the firm, of which the defendants are now sole owners, against certain members of Marshall's family are to be allowed in settlement.

The parties made a final settlement and passed receipts. The settlement so made must stand unless it is shown that it was procured through mistake or fraud. The burden of proof is upon the plaintiff.

When a compromise takes place and receipts are given as final discharges between the parties, upon deliberate consideration and good faith, there is the greatest ground for upholding them. *Cunningham* v. *Batchelder*, 32 Maine, p. 318.

WALTON, J. This is an action to recover back money paid by the plaintiff, as executrix, to settle a claim against the estate of her deceased husband. She has obtained a verdict for one hundred and fifty-five dollars, and interest from the date of her writ; and the only question is whether the verdict is not so clearly wrong as to require the court to set it aside. We think it is.

It is a settled rule of law that money voluntarily paid cannot be recovered back. Money obtained by fraud, or duress, or under such circumstances of oppression, actual or threatened, as renders it unconscionable for the one receiving it to retain it, may be recovered back. But when one demands money under a claim of right, and uses no other means to obtain it than importunity and persistency, or a threat, expressed or implied, of resort to litigation to obtain it if it is not voluntarily paid, and the one of whom the money is demanded has time for consideration and deliberation, and to obtain the advice of counsel or friends, and the money is then voluntarily paid to settle the demand, it can not be recovered back, though the demand is illegal and unjust. The reason of the rule is obvious. If a claim is to be litigated at all, it ought to be litigated promptly. By delay, the recollection of witnesses is liable to become indistinct, and documentary evidence is liable to become lost or destroyed, and witnesses are liable to die. And on many accounts, it may be important to the claimant to have the validity of his claim determined promptly and without delay; and if the other party should be allowed to pay a claim first and then litigate it afterwards, it would give him the power to select his own time for the litigation; and, by delaying it, to place his adversary at a great disadvantage. Hence, the rule that while compulsory payments, if illegal and unjust, may be recovered back, voluntary payments can not be. The law favors the compromise of doubtful claims, and does not allow settlements arrived at by mutual concessions to be lightly set aside. As said in *Barlow* v. *Ins. Co.* 4 Met. 270, "to disturb such settlements, instead of promoting the ends of justice, would enlarge the field of discord, and raise new obstacles to compromises, and

be a just cause of regret." A lawyer can render no more valuable service to his client, and none for which he should be better paid, than when, by his efforts, he succeeds in procuring the settlement of a controversy without litigation.

In *Rawson* v. *Porter*, 9 Greenl. 119, a suit was compromised before entry in court, and the plaintiff's attorney taxed as part of his costs a commission of two and a half per cent on the debt. The attorney had no legal right to charge such a commission to the debtor, and the court so held. And it appeared that the reasonableness of the charge was much discussed between the attorney and the debtor, the former affirming it and the latter denying it. But the debtor was anxious to obtain a release of the attachment of his property, and, although at first refusing, he finally paid the amount claimed, including the two and a half per cent commission, and afterward commenced the action to recover back the amount of the commission. But the court held that the action was not maintainable; that there was no such fraud, imposition, deceit, compulsion, oppression, or extortion, as would justify him in repudiating the compromise, and enable him to recover back the money which he had thus voluntarily paid.

In *Smith* v. *Readfield*, 27 Maine, 145, the rule is stated to be that when money is claimed as rightfully due, and is voluntarily paid, it can not be recovered back. And in *Gooding* v. *Morgan*, 37 Maine, 419, Chief Justice SHEPLEY stated the rule as follows: "The law is regarded as settled in this State, if one with full knowledge of all the facts, or with the means of knowledge, voluntarily pays money, under a claim of right, that he can not recover it back." In *Fellows* v. *School District*, 39 Maine, 559, Mr. Justice RICE stated the rule to be that, " where money is claimed as rightfully due, and is paid voluntarily, and with a full knowledge of all the facts in the case, it can not be recovered back, if the party to whom it has been paid may conscientiously retain it."

As definitions, perhaps neither of these statements is entirely accurate. It seems to us, that it would be a nearer approach to a correct statement of the rule to say that when both parties

possess equal knowledge of the facts, or possess equal means of obtaining such knowledge, and one of them voluntarily pays a claim made against him by the other, the money so paid can not be recovered back. The fact must not be overlooked that jump settlements and compromises of doubtful claims are often made for the express purpose of avoiding the trouble of investigating the facts; and if such compromises or settlements are deliberately and understandingly agreed to, neither party should be allowed to plead ignorance of the facts as a ground for avoiding them. Whether, in any case, ignorance of the law is a sufficient ground for recovering back money paid in consequence of such ignorance, is a question in relation to which the decisions are conflicting. It has been held in this State that it is not.

In *Norris* v. *Blethen*, 19 Maine, 349, money had been paid apparently in ignorance of the law and in ignorance of a material fact, and the court held that it could not be recovered back. In that case, a receiptor for property attached paid its value to a deputy sheriff in ignorance of the fact that the property had not been demanded within thirty days from the rendition of judgment, and in ignorance of the rule of law that his liability was thereby discharged; and the court held that the payment having been voluntary it could not be recovered back. The court admitted that it might be regarded as a hard case, but denied that the decision was open to the charge of being unjust, for the reason that justice can only be answered by adhering to the rules of law, without bending them to accommodate what are called hard cases; that one may suffer serious loss through ignorance of the law, and yet have no just cause to charge the law with injustice.

In the case now under consideration, the plaintiff's husband had for several years before his death been a partner with the two defendants in the livery business; and they claimed that he died indebted to the firm. They claimed that, at the time of his death, he had in his hands one hundred and fifty-five dollars of the firm's money with which to pay a bill due to William C. Marshall for the rent of a house which had been occupied by

one of the employees of the firm, and for which the firm had agreed to be responsible; and that not having used the money for that purpose, his estate was indebted to the surviving partners for that amount. There was no pretense that the deceased partner had paid the rent, and the only question was whether he had the money in his hands with which to pay it at the time of his death. The surviving partners claimed that he had, and the executrix was not satisfied of the justice of the claim. Both parties employed counsel. The counsel examined the books carefully, and we infer from their testimoney that they became satisfied that the claim was a just one. Still, the plaintiff refused to allow it, and the defendants refused to settle unless she would allow it. But, finally, they compromised. The defendants surrendered some other claims, and the plaintiff consented to allow this; and she paid them three hundred and forty dollars in full of all claims of the surviving partners against the estate of her deceased husband, and assigned to them all the estate's interest in demands due to the firm, and they gave her an indemnity against all demands due from the firm.

Thus matters stood for six years. And during that time the account books of the firm were accidentally destroyed by a fire, and the recollection of the witnesses had become indistinct by the lapse of so much time. But the plaintiff seems to have never been entirely satisfied with the settlement; and, at the end of six years, she commenced this suit to recover back one hundred and fifty-five dollars of the three hundred and forty dollars paid by her, and, as already stated, has obtained a verdict for that amount and interest from the date of her writ.

The plaintiff's counsel does not controvert the general rule of law that money voluntarily paid can not be recovered back, but he endeavors to rescue his client's case from the operation of the rule by claiming that the one hundred and fifty-five dollars was delivered to the defendants, not as a payment, but as a deposit merely; that the money was left in their hands to be paid by them to Marshall, and that they have never paid it to him.

The transaction will not bear this construction. Some of the plaintiff's answers, if standing alone, are susceptible of an

interpretation which would sustain this hypothesis. But even her testimony, when examined as a whole, shows conclusively that the money sued for was left with the defendants, not as a deposit, but as a payment. And the testimony of her other witnesses, including the testimony of Messrs. Thompson and Dunton, who acted as her attorneys at the time of the settlement, shows conclusively that it was a payment.

One other ground on which the plaintiff's counsel endeavors to hold the verdict is that the plaintiff was induced to pay the one hundred and fifty-five dollars by the misrepresentation of the defendant's attorney; that he represented to her that the Marshall bill was a valid and enforceable claim, when in fact it was barred by the statute of limitations. We do not think this is an available ground for sustaining the verdict. The representation, if made, was not important. If Marshall's bill was not enforceable, that fact might have furnished the deceased partner with an excuse for not paying it, but it could furnish him with no excuse for not returning the money which he held with which to pay it. It neither strengthened nor weakened the defendant's claim against the estate of the deceased partner, and was therefore wholly unimportant. Besides, it was not the assertion of any particular fact. It was no more than the expression of an opinion on a question of law, and, for that reason, could furnish the plaintiff with no valid ground for rescinding the settlement. And, furthermore, the plaintiff, in making the settlement, had the assistance of able, faithful and experienced counsel, and it is in the highest degree improbable that either she or her counsel relied upon the opinion of the adverse counsel as to the validity or invalidity of either Marshall's claim against the firm, or of the firm's claim against the estate of the deceased partner. The settlement was one which, as it seems to us, was exceedingly desirable for the parties to make. It included not only the matter of the Marshall claim, but many other matters. It was, in fact, a compromise settlement of all matters between the parties. And the evidence leaves no doubt that the settlement was an entirety; and that it must stand or fall as a whole; that the law will not allow either party to affirm it in part and

disaffirm it in part. And it seems to us that the evidence fails utterly to disclose any ground on which either of the parties can rightfully disaffirm or rescind it in whole or in part; and we are forced to the conclusion that the verdict must be regarded as clearly and unmistakably wrong; and that it is the duty of the court to set it aside and grant a new trial.

Motion sustained. New trial granted.

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

JAMES M. TREAT, in equity, *vs.* ABEL PARSONS, and another.

Waldo. Opinion June 2, 1892.

Fish. Deed. Flats. Partition.

If a party having constructed a weir for no other purpose than to take such fish as are named in his grant, finds other fish therein, and he is the first taker of them, such other fish become his property the same as if taken by other means.

Fish before they are taken are the property of no one. When taken, like all animals, *feræ naturæ*, they belong to the taker.

See *Matthews* v. *Treat*, 75 Maine, 594.

ON REPORT.

Bill in equity, heard on demurrer.

The bill alleges, after setting out plaintiff's title to the premises, that he is entitled under the deeds to "all the right of taking salmon, shad and alewives on the whole of the shore frontage of said land, together with all the privileges necessary for carrying on said fishery."

The plaintiff asks the court, sitting in equity, to interpose and regulate the enjoyment of said shore frontage, for the following reasons:—

"That said shore frontage is two hundred and twenty rods in extent, and that while in the weirs erected thereon by the defendants for the purpose of taking salmon, shad and alewives, they cannot avoid taking and do annually take mackerel, herring, porgies or menhaden, and many other kind of fish now of great value, to which they have no right, and which properly belong to the plaintiff; on the other hand the plaintiff is prevented from erecting any weirs for taking said other fish, because salmon, shad and alewives would necessarily be taken therein,

and because there is no feasible way of taking said other fish, except by means of weirs constructed in the same manner as those for the three kinds of fish mentioned in the deed to the defendants."

J. Williamson, for plaintiff.

Where one conveyed an undivided half part of a certain lot of land described by metes and bounds, "and including the salmon fishery contiguous to said land," it was held that but an undivided half of the fishery passed. *Duncan* v. *Sylvester*, 24 Maine, 488.

If then, the parties are tenants in common, the remedy of the plaintiff is to be sought under the equity jurisdiction of the court. "Where the subject matter of the suit is an incorporeal hereditament, a partition may be had in equity." 3 Pom. Eq. § 1388.

Counsel also cited: *Kier* v. *Peterson*, 41 Pa. St. 363; Co. Lit. 54, b; *Id.* 1; 165, a; *Canfield* v. *Ford*, 28 Barb. 336.

W. H. Fogler, for defendant.

WALTON, J. This is a bill in equity to which the defendants have demurred. It appears by the allegations in the bill that the plaintiff owns land bounded by the shore of Penobscot Bay, and that the defendants have obtained by grant "all the right of taking salmon, shad, and alewives, on the whole of the shore frontage of said land, together with all the privileges necessary for carrying on the said fishing." And the plaintiff avers that by means of weirs the defendants take, and can not avoid taking fish other than the kinds named in the grant; and he claims that these other fish properly belong to him; and it is upon this ground that he asks for the interposition of the court.

We do not think the relief prayed for can be granted. Fish, before they are taken, are the property of no one. When taken, like all animals, *ferœ naturœ*, they belong to the taker. The plaintiff's claim that the fish taken by the defendants, other than the ones named in the grant, properly belong to him, has no foundation in law or equity. The defendants have no right to attach to the plaintiff's land fixtures for the express purpose of taking fish other than those mentioned in the grant; but if, hav-

ing constructed weirs for no other purpose than to take such fish as are named in the grant, they find other fish therein, and are the first takers of them, we think such fish become their property, the same as if taken by other means, and that the owner of the shore has no property in them. See *Matthews* v. *Treat*, 75 Maine, 594, an action in which the plaintiff in this suit was defendant, and the rights of the parties under the grant in question were fully considered and defined.

Bill dismissed, with costs.

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

OSCAR G. DOUGLASS, Administrator, *vs.* MAHALA PARKER.

Androscoggin. Opinion June 4, 1892.

Life Insurance. Premiums. R. S., c. 64, § 48, cl. 4; c. 75, § 10.

Where a life policy is payable to the widow, it does not become assets of the estate; and the administrator can neither collect it, nor maintain an action against her, under R. S., c. 64, § 48, to recover the premiums paid by the insured within three years of his death, as belonging to the estate.

Cragin v. *Cragin*, 66 Maine, 517, affirmed.

ON REPORT.

This was an action by the administrator of the estate of James S. Parker, deceased, to recover certain sums of money from his widow, which were claimed as premiums, with interest thereon, of life insurance or benefits paid to the defendant after the death of her husband, by the Odd Fellows Mutual Relief Association of Maine, and the Manufacturers and Mechanics Lodge, No. 62, I. O. O. F.

It appeared that the deceased, James S. Parker, was a member of both associations; and that under their by-laws, to which the contracts conform, the benefits are payable to the widow, in the absence of any direction for a different disposition; or are payable as a funeral benefit to the widow, orphans, or dependent relatives.

The plaintiff claimed that, under the statutes of the State, the premiums paid by the deceased Parker to any life insurance company within three years prior to his death were assets of the

estate, and constituted a fund out of which the debts of the deceased Parker might be paid.

F. A. Morey, for plaintiff.

Defendant claims that the premiums paid for three years do not become assets for the payment of debts, but go to the beneficiary. If such be the rule, then the statute is practically rendered void; for it must be admitted that in the majority of contracts of life insurance some person or persons are designated as beneficiaries in case of death. If such was the intention why does the statute not contain that very important exception?

This amount of premiums was set apart in justice to the creditors, by the statute; and no contract between the parties to the insurance can divest the creditors, or their representatives, of this fund so created by law for their benefit.

This court has decided in case of *Hathaway* v. *Sherman*, 61 Maine, 477, where several policies of life insurance were made payable to wife and child and also some to the legal representatives of deceased, that the premiums and interest paid three years prior to deceased's death must be paid to his executor, saying, "Our conclusions are, in the case at bar, that it is not competent for the executor to use any part of the moneys accruing from life insurance policies, save the premiums and interest excepted by statute, for the payment of debts, allowance to widow, or legacies bequeathed in the will."

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

WALTON, J. This is an action by the administrator of James S. Parker to recover from his widow a portion of the money that has been paid to her as insurance on the life of her husband. The plaintiff claims that by force of the statutes of this State the premiums paid by the deceased Parker within three years of his death belong to the estate as assets for the payment of debts.

We do not think this claim can be sustained. It was decided in *Cragin* v. *Cragin*, 66 Maine, 517, that the statutes referred to (R. S., c. 64, § 48, cl. 4, and R. S., c. 75, § 10), are not applicable to a case like this; that these provisions refer only to the distribution of money received on a life policy belonging

to the estate; that when by the terms of the policy or the contract of insurance, the money is payable directly to the widow, or to the widow and children, it does not belong to the estate, and can not be collected by the administrator; and that the beneficiaries take the money, not as distributees, but as donees; and not in the proportions provided by the statute, but in the proportions provided by the contract of insurance.

Such being the law, the conclusion is inevitable that this action is not maintainable. None of the money paid to the defendant by the two societies mentioned in the plaintiff's declaration can be regarded as assets belonging to the estate of her deceased husband. By the terms of the contracts with the societies, as shown by the proofs, the insurance money was payable directly to her, and could not have been recovered by the plaintiff from the societies; nor can any portion of it now be recovered by him from her.

Judgment for defendant.

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

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HARRY HARTWELL *vs.* CALIFORNIA INSURANCE COMPANY.

Androscoggin. Opinion June 4, 1892.

Insurance. Merchandise. Exceptions. Practice.

The term "merchandise" in a policy of insurance against fire, may be used to describe property intended for use, and not for sale.

In jury waived cases, when a party wishes to take exceptions to the illegal introduction, or the improper use, of evidence, he should have the purpose for which the evidence is admitted or used distinctly stated in the record; for illegality is not to be presumed, it must be made to appear.

ON EXCEPTIONS.

This was an action upon a policy of insurance, wherein the defendant insured the plaintiff in the sum of four hundred dollars "on his stock of paints, oils, brushes, blinds, and such other merchandise, while contained in second story of frame building situate east side of Miller street, Auburn, Maine."

The defendant contended that certain articles, consisting of set tackle and fall and ropes, sanding machine, fresco stencil

patterns, tools, knives, cans, pair of scales, measures, etc., amounting to one hundred and eighty-nine dollars and fifty cents, were not covered by its policy of insurance, because, according to the testimony of the plaintiff, they were not merchandise within the meaning of the law; they were articles kept for use and not for sale.

The case was tried before the presiding justice with the same right of exception as if tried before a jury.

The defendant seasonably objected to all testimony of the plaintiff as to his conversation with O. J. Hackett, who wrote the policy for the company's agent, relative to the intention of the parties as to what was to be covered and protected by the policy previous to the time it was issued; but the following testimony of the plaintiff was admitted by the presiding justice, subject to the defendant's objection:

"I was coming from the shop and met Hartwell on Main street. I said,—'I want to get my things insured down at the shop.' He said,—'We will go right down and insure them.' We went to the shop, went in, and I said,—'I want a policy to cover all the stuff I use in my business;' he looked around and we went out.

"Ques. Did he go into your place of business? Ans. He did.

"Ques. Later did he bring you the policy that you have identified? Ans. He did.

"Ques. What inquiry if any did you make on receiving the policy? Ans. I asked him if it was all right, if he had made out the policy to cover all the stuff I used in carrying on the business. He said he had."

The defendant also seasonably objected to the following testimony of N. I. Jordan, agent of the defendant company, which was admitted by the presiding justice, subject to objection:

"Ques. Is Mr. Hackett authorized by you to solicit risks and issue policies? Ans. He is.

"Ques. This particular policy signed N. I. Jordan,— that is not your signature? Ans. No, sir.

"Ques. Has Mr. Hackett, both prior to the issuing of this

and subsequently, been in the habit of signing your name to policies by your sanction? Ans. He has.

"Ques. These acts of his you have ratified? Ans. Yes, sir."

The defendant also seasonably objected to the following testimony of O. J. Hackett, which was admitted, subject to defendant's objection:

"Ques. Did Mr. Hartwell, in the summer of 1890, approach you and ask to have a policy written upon his stock? Ans. Yes, sir.

"Ques. Did you prior to writing this policy go to his (Hartwell's) place of business? Ans. I did.

"Ques. And looked the property over? Ans. Yes, sir.

"Ques. State what he said? Ans. I think he showed me round through the shop, and showed me several different things and principally said that he wished a policy that would cover everything that he had in the business.

"Ques. Did you later write this policy No 5288? Ans. Yes, sir.

"Ques. Did Mr. Hartwell dictate to you at all the phraseology of the policy Ans. He did not.

"Ques. That is your own language, is it? Ans. Yes, sir."

The presiding justice ruled and found, as matter of law, that all the articles which the defendant claimed did not fall within the policy were covered by it, and gave the plaintiff judgment for the full amount sued for. To these rulings, findings and refusals the defendant took exceptions.

Tascus Atwood, for plaintiff.

Evidence: If the language in the policy is ambiguous, the conversation between plaintiff and the agent is admissible to learn the intention of the contract; and defendant is not aggrieved. 1 May Ins. § § 172, 175; *Tarr* v. *Smith*, 68 Maine, 97; *Harriman* v *Sanger*, 67 *Id.* 442; *Mussey* v. *Mussey*, 68 *Id.* 346; 47 N. Y. 597; (Jordan's testimony) *Bodine* v. *Ins. Co.* 51 N. Y. 117; *Allen* v. *Ins. Co.* 85 N. Y. 473; 1 May Ins. (3d ed.) § § 154, 154 a. Interpretation of policy: *Kratzenstein* v. *Ins. Co.* 116 N. Y. 54; *Hoffman* v. *Ins. Co.* 32 N. Y. 405.

N. and H. B. Cleaves, and *S. C. Perry*, for defendant.

"Merchandise" only covers property kept for sale, and excludes that kept for use. Wood Fire Ins. p. 123; *Burgess* v. *Ins. Co.* 10 Allen, 221; *Medina* v. *Ins. Co.* 120 Mass. 225; *Kent* v. *Ins. Co.* 26 Ind. 294. Evidence: *Honnick* v. *Ins. Co.* 20 Mo. 82; Wood Fire Ins. p. 126.

WALTON, J. The question is whether the term "merchandise" can, in any case, be used to describe property not intended for sale. We think it can. The word not only may be, but often is, used as the synonym of goods, wares, and commodities. It is so defined in Webster's dictionary. If used in an insurance policy to describe the goods of a merchant, it might, perhaps, be very properly limited to goods intended for sale. If used for the same purpose to describe the goods of a painter, we think it might be held to cover property intended for use and not for sale.

In *Kent* v. *Insurance Company*, 26 Ind. 294 (89 Am. Dec. 463), the court held that the meaning of the term "merchandise," when used in a contract, must depend in a great measure upon the context; that it has no fixed legal or technical signification; that when applied to the goods of a merchant, it might include such articles only as are kept for sale; but if applied to the goods of one not a merchant, it might include articles not intended for sale. "A policy of insurance, like any other contract, is to be read in the light of the circumstances that surround it; and is to be interpreted most strongly against the company whose contract it is." (19 Am. St. Rep. 596, and note.)

In the present case, the plaintiff was not a merchant. He was a house and fresco painter. He kept nothing for sale except as he first used it and then charged for it in connection with his labor. And yet the defendant company issued to him an insurance policy on his paints, oils, varnish, brushes, and "such other merchandise," in the second story of a building on Miller street in Auburn. And the evidence shows that the agent of the company first went and examined the property and then wrote the policy himself. Can there be any doubt as to the

sense in which the agent employed the phrase, "and such other merchandise?" We think not. We think he used it to describe such other articles of convenience or necessity as were used by the plaintiff in his business, and had not already been specially mentioned; and that he did not use it in the narrow and technical sense contended for in defense. Such in effect was the decision of the presiding justice before whom the case was tried in the court below without the aid of a jury, and we think his decision was correct.

Complaint is made that oral evidence was admitted to show the intention of the parties, and to explain the terms of a written instrument, where there was no ambiguity. Some of the testimony received would bear that interpretation. But we do not think it was admittted or used for such a purpose. At any rate, the exceptions do not state that it was admitted or used for such a purpose. And when a case is tried by the court without the aid of a jury, and a party wishes to take exception to the illegal introduction, or the improper use, of evidence, he must take care to have the purpose for which the evidence was admitted or used, distinctly stated in the record; for illegality must not be presumed, it must be made to appear. Most of the evidence objected to was admissible to enable the court to read the contract in the light of the surrounding circumstances, and to explain the circumstances under which the policy was issued, and to identify and locate the property insured, and there is nothing in the record to lead us to believe that any portion of it was used for an illegal purpose. We feel confident that it was not. *Exceptions overruled.*

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

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FRANKLIN LAND, MILL AND WATER COMPANY *vs.* WILLIAM H. CARD, Appellant.

Hancock. Opinion June 17, 1892.

Landlord and Tenant. Lease. Holding over. R. S., c. 73, § 10; c. 94, §§ 1, 2.

By statute, a tenant under a written lease, who holds over, becomes a tenant at will unless the peculiar stipulations in the lease clothe him with superior rights.

A tenant in possession of land at the expiration of a written lease, who had erected a mill on it that the landlord had agreed to purchase at the expiration of the term, may retain his possession until such purchase shall be performed, but not without, meantime, being chargeable with rent.

ON REPORT.

This was an action of forcible entry and detainer. The writ was dated December 3, 1890, and alleged that "the said defendant at Franklin, in said county of Hancock on the 31st day of October, A. D., 1890, having before that time had lawful and peaceable entry into the lands and tenements of the plaintiff, situated in said Franklin, at the foot of Donnell's Pond and on Alderbrook stream, the former being known as the upper dam and the latter as Card's mill and Card's dam, and whose estate in the premises was determined on the thirtieth day of October, A. D., 1890, then did and still does forcibly and unlawfully refuse to quit the same; although the plaintiff avers that it gave notice in writing to said William H. Card thirty days before the thirtieth day of October, aforesaid, to terminate his estate in the premises." Plea, general issue, with brief statement as follows:

"And for brief statement the said defendant says that, at the time the plaintiff's notice to quit was served upon him, he was not a tenant of that portion of the property described in said notice to quit, as the Upper Dam at the foot of Donnell's pond.

"And he further says that he built the mill described in said notice as Card's Mill, and the dam described in said notice as Card's Dam, under and by virtue of a certain written lease and agreement between him, the defendant, and the plaintiff company, dated January 1st, 1867.

"That he has continued to maintain and operate said Card's mill and Card's dam, since the expiration of said written lease to the service of said notice to quit, in the same manner and under the same conditions as he did during the period mentioned in said lease. That he has been ready to sell said mill and said dam to said plaintiff company at a fair valuation and in accordance with the conditions stated in said written lease, and that he is still ready so to do.

"That he claims to be the owner of said mill and of said dam subject to the terms and conditions of said written lease."

The clause in the lease referred to is as follows:

"At the expiration of this lease said Franklin Land, Mill and Water Company are either to renew the same for another term of years, at the present or a then fair rate, as the respective parties may then agree upon; or said company are to buy said mill at such price as they, the said parties of the first and second parts, may agree upon, or at such valuation as two disinterested parties may decide upon as fair and equitable. And whenever said Card may or shall relinquish said leased and granted premises, he shall deliver said premises to said company in at least as good condition as they now are, and without any cost or expense whatever to said company."

December 29, 1889, the company gave to Card a lease for one year of its mill and water privileges and dam situated above the Card mill at the foot of Donnell's pond, and also the right to tolls on lumber passing through the dam. This lease also contained these words, "and the right to maintain his own dam and mill on said stream."

Other material facts appear in the opinion.

C. H. Bartlett, for plaintiff.

The defendant was a tenant of the Upper Dam at the foot of Donnell's pond, at the time of the service of the notice to quit upon him, September 30, 1890, by holding over after the lease of 1889–90, and by election of the plaintiff. The premises were an entirety and Card could not abandon the upper dam and hold over as to the lower dam and his mill, without the consent of the company and a new contract. The testimony shows that the mill is practically worthless without this upper dam, and the case discloses that the upper dam served as a reservoir dam for this mill. Under such circumstances as these, a conveyance of the mill would have passed an easement in the upper dam as the premises would be considered entire. *Baker* v. *Bessey*, 73 Maine, 472; *Perrin* v. *Garfield*, 37 Vt. 304.

A tenant for years who holds over after the expiration of his term without paying rent or otherwise acknowledging a continuance of the tenancy, becomes either a trespasser or a tenant at the option of the landlord. Very slight acts on the part of

the landlord, or a short lapse of time, are sufficient to conclude his election and make the occupant his tenant. But the tenant has no such election; the mere continuance in possession fixes him as tenant. Tay. L. & T. § 22, p. 18, 7th ed.; *Schuyler* v. *Smith*, 51 N. Y. 309; *Conway* v. *Starkweather*, 1 Denio, 113.

The company permitted Card to keep the mill at the lower dam, after January 1, 1890 (and as the premises were indivisible, the upper dam as well), without bringing any process of forcible entry and detainer within seven days after the lease expired, as it might have done.

The lease of 1867, was in the alternative, to renew or buy. Card made no demand at its expiration for a new lease, or payment for his mill. This was a waiver.

By taking the lease of 1889–90, he then waived any such rights, and the plaintiff had satisfied all covenants of the old lease. *Rutgers* v. *Hunt*, 6 Johns. Ch. 215. The new lease makes no provision in regard to the mill. Even if the plaintiff were bound by the covenants in the old lease, yet the defendant has no defense to this action. 19 Am. and Eng. Enc. of Law, Title Lease, p. 1016, 6, note 5, citing *Speers* v. *Flack*, 34 Mo. 101.

Wiswell, King and Peters, for defendant.

The contracting parties understood that Card would not be obliged to quit and deliver up the property at the end of the term as an ordinary lessee is bound to do, but that he secured by the agreement a right which he might relinquish, not one which expired with the term named.

The company was providing a profitable outlet for its property, protected from competition, and Card on his part was laying a foundation for a permanent business for himself. The lessee was to build an expensive structure on the lessor's land which, unless provided against, would become its property. The distinction between the effect of holding over in a case of a covenant of renewal where there is no question between lessor and lessee about the value of improvements, and a case where there is question is this, in the former case a holding over might be considered, and perhaps would be, as a fulfillment or satis-

faction of the covenant; while in the latter case the holding over would not amount to a satisfaction or performance of the covenant, because the question as to the value of the buildings and the respective rights of the lessor and lessee therein are not provided for. *House* v. *Burr*, 24 Barb. 525.

Payment and receipt of rent implies a continuation of the same rights as the parties had under the old lease. *Schuyler* v. *Smith*, 51 N. Y. ; *Clark* v. *Howland*, 85 *Id.* 204.

Card's holding over, in this case, could not be considered as a waiver of his right to compensation for the building when the lessor should terminate the lease. There is nothing to show any consideration for such a waiver. He was paying an adequate price for the privilege; indeed, during this holding over the company advanced on his rent.

The lease of 1888–89, did not change Card's rights. It pertains to property and rights other than those covered by the lease of 1867.

HASKELL, J. The plaintiff seeks to eject defendant from certain real estate, held by tenancy at will that was terminated by notice on October 30, 1890. The defendant was in under a lease for one year that expired December 31, 1889. The evidence fails to show a surrender of the possession at the expiration of the term. The defendant thereafterwards, by force of statute, R. S., c. 73, § 10, held as tenant at will, who might be ejected within seven days without notice, but thereafterwards only on thirty days notice to quit. R. S., c. 94, § § 1–2. *Wheeler* v. *Cowan*, 25 Maine, 283; *Kendall* v. *Moore*, 30 Maine, 327; *Lithgow* v. *Moody*, 35 Maine, 214; *Longfellow* v. *Longfellow*, 54 Maine, 240.

Two parcels of real estate were included in the lease, viz., the upper dam on Alderbrook stream at the foot of Donnell's pond, and Card's mill and dam on the stream below. The lease was for one year, at a stipulated rental, and the demise, as to the latter parcel, was "the right to maintain his own dam and mill," meaning the defendant's dam and mill.

Defendant contends that holding over at the expiration of the

lease did not constitute him a tenant at will of "his own dam and mill," inasmuch as he held that under a former lease that gave him the right to perpetual possession, until certain conditions relating to the purchase of his mill should be complied with by the plaintiff. The court considers this contention to be sound; and that, if he had held possession under the terms of a former lease, that secured to him, conditionally, the right to continued possession of "his own dam and mill," the terms of the last lease cannot be construed as an abandonment or waiver of his antecedent rights. The peculiar language of it makes it plain that the parties must have so understood their respective rights. The defendant, being in possession of "his own mill," procured a lease of the dam above, and stipulated a gross rental for the two properties for a single year; and the expression of the demise, "the right to maintain his own dam and mill," shows the only effect intended by the lease was to include the ground rent for "his dam and mill" in that stipulated in the lease. The old lease required the plaintiff to relet or purchase the defendant's improvements on the power. The last lease cannot fairly be said to be such a re-letting as contemplated by the parties, making reasonable provisions for the defendant's outlay on the property, and not working a forfeiture of it altogether. The reasoning of *Mosely* v. *Allen*, 138 Mass. 83, is in point.

But it is contended that defendant had no rights in the property, when the new lease was executed, beyond those of a mere tenant at will. In 1867, the plaintiff let a mill-site to defendant for the term of five years, at an annual rental, upon which to build a mill, with a stipulation that plaintiff, at the expiration of the term, should either "renew the same for another term of years, at the present or then fair rate, as the respective parties may then agree upon;" or the plaintiff shall "buy said mill at such price as they, the said parties of the first and second parts, may agree upon, or at such valuation as two disinterested parties may decide upon as fair and equitable;" and whenever said defendant "shall relinquish said leased and granted premises, he shall deliver said premises to 'the plaintiff' in, at least, as good condition as they now are and without any cost or expense whatever to said company."

The effect of this agreement is, that defendant might elect, at the expiration of the term, to have a new lease, or have the plaintiff purchase his mill. Neither was done; but the defendant held over, paying the yearly rental until and including 1880, when it was increased fifty dollars a year, which increase defendant paid up to the termination of the new lease, January 1, 1890. Now it is considered that the defendant lost no rights by reason of the new lease; so, of course, he lost none by the increase of rent in 1880. What, then, are the rights of defendant under the lease of 1867? At its expiration did he become a tenant at will, liable to ejectment within seven days without notice, and thereafter on thirty days notice? By our statute, a tenant under a written lease, who holds over, becomes a tenant at will, unless the peculiar stipulations in the lease clothe him with superior rights, so as to exempt him from the statute provisions.

The very terms of the lease imply a continued tenancy until the defendant shall be paid his authorized outlay whereby an idle mill-site was transformed into valuable property. It should be noticed that the lease does not require the estate to be surrendered at the end of the term, but only that, when surrendered, it shall be "in as good condition as they now are," that is, when the lease was made.

The lease authorized the construction of the mill. That became fixed to the soil and immovable, and gave the tenant a right to require fair indemnity for his outlay at the end of a term, when he would be left in possession with a claim upon the property. When that claim should be extinguished his right to possession would cease. He held a lien for authorized expenditure, and the landlord had a right to redeem. Their respective rights resembled those of the parties to an equitable mortgage.

In *Scruggs* v. *Railroad*, 108 U. S., 368, the tenant in possession of a hotel that he had built on land of the lessor under a perpetual lease, stipulating, in effect, that the lessor should purchase the hotel at the option of either party, it was decreed, by the Supreme Court of Mississippi, that the lessor should pay

to the tenant the value of the improvements made under the terms of the lease and fixed by the court, and that, upon its payment, the tenant should surrender her possession to the lessor. Upon an attempt by the tenant to enforce the decree by execution, a bill was brought in chancery, afterwards removed to the District Court, from where it went on appeal to the Supreme Court of the United States, to require the tenant, who had become insolvent, to deduct from the amount required to redeem, reasonable ground rent while she had been in possession. The Supreme Court held the relation of the tenant to the lessor to be that of a mortgagee in possession, liable to be dispossessed upon the payment of his debt, but charging him with rents and profits. The terms of that lease were similar enough to the one under consideration to make the same rules of law applicable to both.

The well reasoned case of *Holsman* v. *Abrams*, 2 Duer, 435, squarely holds that a tenant in possession at the expiration of a lease, who had made authorized improvements, that the landlord had engaged to purchase at the expiration of the term, may retain his possession until such purchase shall be performed; but not without, meantime, being chargeable with rent.

Undoubtedly, cases of this sort are proper matters for the consideration of courts of equity, where specific performance may be required, or the rights of the parties may otherwise be determined as equitable principles may require.

The plaintiff should have,

Judgment for the upper dam only.

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

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JOSEPH A. COFFIN *vs.* WILLIAM FREEMAN.

Washington. Opinion June 24, 1892.

Real Action. Levy. Attachment. Death. R. S., c. 76, § § 23, 38; c. 81, § 59; c. 94, § 10.

In a real action, both parties claimed title under the same grantor; the plaintiff by conveyances from judgment creditors whose attachments were made prior to the record of the defendant's deed. The defendant sought to overcome the plaintiff's superior title by showing that the proceedings, by the

judgment creditors, were invalid by reason of irregularities; but he failed so to do. *Held;* that the plaintiff is entitled to judgment,

Where land seized on execution is described as "subject to a mortgage given by A to B & Co.," stating accurately the record thereof in the proper registry, and it appeared that there were several mortgagees, but who were not co-partners, *Held;* that the identity of the mortgage is sufficiently stated.

It is a sufficient specification of the nature and amount of the plaintiff's claim, and a compliance with the statute creating a lien on real estate, in an action on account annexed, to charge the defendant "to one year's damage for flowage of intervale on my home lot, &c., from September 1, 1873, to September 1, 1874, agreed price."

A judgment rendered thereon cannot be collaterally impeached.

A levy is not avoided by an error in the computation of interest less than one per cent of the amount for which it should be made,— the error arising from a clerical mistake in the execution itself being issued for one dollar too much for the debt and costs when added together.

Where an execution issues after judgment and the land is seized and advertised for sale by the sheriff during the life of the judgment debtor, and the sale is made and the proceedings completed after his death, *Held;* that the proceedings are not arrested by the debtor's death.

ON REPORT.

Real action, in which the case is stated in the opinion.

George Walker and Charles Peabody, for plaintiff.

C. B. Rounds and A. MacNichol, for defendant.

WHITEHOUSE, J. This is a writ of entry in which the plaintiff demands possession of township No. Eighteen, Middle Division, Bingham Purchase, in the county of Washington. The defendant disclaims all interest in the premises except a lot situated in the south west corner of the township, comprising fifty acres of upland and all that part of Schoodiac pond lying in township Eighteen. Both parties claim to own this fifty acre lot in fee simple, and both derive title from Otis S. Tibbetts. The plaintiff seeks to establish his claim by conveyances from two different judgment creditors of Tibbetts: first, by a conveyance from Gowen Wilson who purchased, at an execution sale July 5th, 1879, the right in equity which Tibbetts had September 1st, 1877, the date of the attachment on mesne process, to redeem the entire township from a mortgage to George Harris and others, dated December 1st, 1869; and second, by a conveyance from Horatio N. Bridgham who caused a levy to be

made on the entire township by virtue of an execution issued on a judgment in his favor against Tibbetts, pursuant to an attachment made in the original suit September 22, 1874.

The defendant claims to hold under a quit claim deed of this fifty acre lot alone, executed by Tibbetts April 24, 1877, in consideration of fifty dollars; but this deed was not recorded until February 7, 1878. It thus appears that the attachment in favor of Gowen Wilson, as well as that in favor of Bridgham, was prior to the record of the defendant's quit claim deed; and the plaintiff accordingly claims that he shows a title superior to the defendant's, either by the sale of the Tibbetts' equity on the Wilson execution or by the levy on the Bridgham execution. The defendant attacks the legality of the proceedings in both cases and denies that the plaintiff acquired any title from either source.

The deeds from Gowen Wilson, William H. Knowles and L. A. Knowles were sufficient to vest in the plaintiff whatever title Wilson acquired by the sheriff's deed under the sale on his execution, and if all the proceedings which culminated in that sale as well as the officer's return and the deed to the purchaser were in accordance with the statute, regular and valid, the plaintiff's title to the fifty acre lot would have priority over that of the defendant.

But the defendant interposes and elaborates with painstaking industry thirty objections to the validity of the sale on the Wilson execution. He claims in the first place and offers parol evidence tending to show that, as a part of the consideration of a deed received by them January 12, 1880, from the administrator on the estate of Otis S. Tibbetts, deceased, Knowles and Coffin agreed to pay and discharge all the incumbrances on the real estate purchased by them, including the Harris mortgage, the Wilson sale and the Bridgham levy. But the nature and effect of that proceeding are readily comprehended without the aid of parol evidence. Knowles and Coffin purchased the interest of the Tibbetts estate in that property. This was all the administrator could sell. The purchasers received their deed subject to existing liens with the obvious understanding that they must

discharge the incumbrances or lose the benefit of their purchase; but, as they did not elect to avail themselves of this right under the administrator's deed and do not now seek to make title by virtue of that deed, the transaction is no longer material to this inquiry respecting the validity of the sale on the Wilson execution.

In the officer's return of the seizure and sale of Tibbett's right to redeem from the Harris mortgage, it is represented that the real estate is "subject to a mortgage recorded in Washington County Registry of Deeds, book 124, page 84, given by Otis S. Tibbetts to George Harris and company." There were in fact eighteen individual mortgagees and no partnership existing among them; and it is, therefore, suggested that this designation is erroneous and misleading. But, the express reference to the record of the mortgage, by book and page, considered in connection with the description of the property and the names of the mortgagor and the first named mortgagee, leaves no room for doubt respecting the identity of the mortgage.

It is next claimed that the writ in the action *Wilson* v. *Tibbetts*, did not contain such a specification of the nature and amount of the plaintiff's claim as would authorize an attachment of real estate. But an inspection of the account annexed to the writ shows that this suggestion is not warranted by the record. The account gave the defendant definite notice of the nature and amount of the plaintiff's demand and was a sufficient compliance with the statute to create a lien on real estate. *Jordan* v. *Keen*, 54 Maine, 417.

The "agreed price" per year for the right to flow the plaintiff's land was legally recoverable in that action of assumpsit. Such a right is not even an interest in land but is in the nature of a license to do certain acts upon the land of another, as, to cut trees upon or pass over the land of another. *Clement* v. *Durgin*, 5 Maine, 9. But, for aught that appears, the compensation may have been fixed by written agreement or lease. R. S., c. 94, § 10.

It is, therefore, sufficient that under the declaration and specifications in that writ, evidence was admissible upon which the

judgment in question may have been legally rendered. That judgment has not been impeached for fraud, want of jurisdiction or error in law, but has stood unreversed and unquestioned, for more than twelve years, conclusive evidence of the existence and amount of the defendant's indebtedness to the plaintiff in that suit. None of the objections here raised respecting the origin and character of that indebtedness are now open to this defendant. A judgment cannot be thus collaterally impeached. *Smith* v. *Keen*, 26 Maine, 423; *Granger* v. *Clark*, 22 Maine, 128; *Banister* v. *Higginson*, 15 Maine, 73; *Sidensparker* v. *Sidensparker*, 52 Maine, 481; *Crafts* v. *Ford*, 21 Maine, 417; *Jordan* v. *Keen*, *supra*.

It is provided by R. S., c. 76, § 23, that, "when by an error of the officer the amount for which the levy was made exceeds the amount of debt or damage, costs, interest and cost of levy, by a sum not greater that one per cent thereof, it is valid if otherwise legally made." In this case the alleged error of the officer of one dollar and seventy cents in the computation of interest is much less than one per cent of the amount for which the levy should have been made. Before the passage of this statute, it had been repeatedly held in this State that a levy is not to be avoided because an officer has taxed and caused to be satisfied in the extent, fees not authorized by law. *Sturdivant* v. *Frothingham*, 10 Maine, 100; *Keen* v. *Briggs*, 46 Maine, 467. The officer in such case is liable to the debtor but the creditor is not to suffer by any extortion of the officer. The levies in which illegal fees may have been charged remain unaffected by the statute and are not to be defeated for that cause. *Wilson* v. *Gannon*, 54 Maine, 385.

But, as the result of an obvious clerical error in adding the debt and cost in the execution, the officer was commanded to collect an excess of one dollar. If this does not come within the provision of the statute as an error of the officer, it must fall under the principle of the decisions above cited respecting the taxation of excessive fees by the officer. It does not avoid the levy. The creditor was not responsible for the error and there was no intentional wrong on the part of any one. An exactly

similar question arose in *Avery* v. *Bowman*, 40 N. H. 453, and the court said: "All the reasoning which the courts have suggested for not avoiding a levy when the excess is attributable entirely to the mistake or misconduct of the levying officer, applies with full force to a levy made excessive entirely through the fault of the clerk who issued the execution." This case is cited with approval in *Prescott* v. *Prescott*, 62 Maine, 430, and *Corthell* v. *Egery*, 74 Maine, 44. This objection to the validity of the sale is therefore untenable.

The officer's return on the execution is in substantial compliance with the requirements of the statutes. His statements of fact respecting the posting of notices in adjoining towns are confirmed by the judicial notice which the court takes of the geographical position of counties and towns. *Harvey* v. *Wayne*, 72 Maine, 430.

But, it appears from the evidence that Otis S. Tibbetts died June 28, 1878, and that the sale on the execution did not take place until July 5, 1879. It is, therefore, argued that a sale thus made after the decease of a judgment debtor without further notice is unauthorized and void. But it is provided by R. S., c. 76, § 38, that, "the seizure on execution is considered made on the day when notice of the sale is given." In this case the execution was issued May 23, 1879, and the notices of the time and place of sale were given May 31, 1879. The seizure was, therefore, made and the writ partially executed during the life-time of the judgment debtor. There is no process known to our law by which a party can have any judgment for completing, against the debtor's representatives, the service of an execution thus regularly commenced against the debtor himself; and, if after the sale has been advertised, the execution is abated or all further proceedings arrested by the decease of the judgment debtor, it is obvious that the attachment on mesne process in such case would be dissolved. There is no provision of the statute by which, in such a contingency, a judgment creditor can make his attachment available unless the sale can be legally made as advertised. At common law an *elegit* bearing teste in the defendant's life-time may after his death be

extended on his real estate, and the same is true of any other writ so tested, which may be employed to make real estate answerable for the defendant's debt. *Lessee* v. *Dundas*, 4 How. 58; Freeman on Ex'ons, § 37, and cases cited. The precise question here raised was directly involved and expressly determined in *Wood* v. *Morehouse*, 45 N. Y. 373. The court said: "The execution upon the judgment had issued and the premises had been advertised for sale by the sheriff during the life of the judgment debtor, but the sale was made and the proceedings completed after his death. The execution of the process was not arrested by the death of the judgment debtor. The sheriff could lawfully complete the execution of the process thus commenced." The defendant's contention upon this point cannot be sustained.

All other objections to the regularity of the proceedings involved in the sale upon the Wilson execution appear to be without substantial merit. All interest which Tibbetts had in the premises September 1st, 1877, was by the sheriff's deed conveyed to Gowen Wilson and by subsequent conveyances vested in the plaintiff. The Harris mortgage was discharged February 13, 1880. The title acquired by the Bridgham levy was vested in the plaintiff by appropriate conveyances, and it is not in controversy that all other incumbrances antedating the Wilson attachment were paid and discharged. It is, therefore, immaterial that the Harris mortgage in question was discharged instead of being assigned to the plaintiff. This conclusion renders it unnecessary to consider the numerous other questions discussed by the counsel. *Judgment for the plaintiff.*

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

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HIRAM W. BERRY, Administrator, in equity, *vs.* ALBION K. P. BERRY, and another.

Oxford. Opinion June 25, 1892.

Husband and Wife. Equity. Pension money. R. S., c. 61, § 1; R. S., of U. S. § 4747.

By virtue of R. S., c. 61, § 1, property conveyed to the wife, but paid for by the husband, may be taken as the property of her husband, to pay his debts contracted before such purchase.

Proceeds from the sale of farm products arising from the joint labor of husband and wife on lands of the husband are the property of the husband.

It is no defense to a bill in equity, seeking payment of the husband's pre-existing debt from lands conveyed to the wife by him, that the purchase was made with his pension money.

The burden is upon the appellant to show error in the decision of a single justice in matters of fact, in an equity hearing.

Sampson v. *Alexander*, 66 Maine, 185, affirmed.

Young v. *Witham*, 75 Maine, 536, affirmed.

Friend v. *Garcelon*, 77 Maine, 25, affirmed.

ON APPEAL.

Hearing in equity on bill, answers, and testimony, a decree in favor of the plaintiff having been rendered by the single justice, who heard the cause in the court below.

The bill, after reciting the recovery of a judgment by the plaintiff's intestate at the September term, A. D., 1875, of this court in Oxford county, alleges "that on the third day of May, A. D., 1883, the said Albion K. P. Berry contracted for and purchased a farm of John J. Holman of Dixfield, in the county of Oxford, to wit: The farm on which the said Albion K. P. Berry now resides with his family, &c., for the consideration of twelve hundred dollars, and then and there paid the said John J. Holman the sum of nine hundred dollars for the same farm with his own money or caused and furnished the money to be so paid, and then and there caused the said real estate to be conveyed by said John J. Holman to said Lizzie T. Berry, who then was, ever since has been and now is the lawful wife of said Albion K. P. Berry, with intent to cheat and defraud the said plaintiff in his said capacity of his said debt or judgment, and she the said Lizzie T. Berry, well knowing the premises but intending to aid her said husband in so cheating and defrauding the plaintiff and then having no property of her own gave her promissory note to said John J. Holman for the sum of three hundred dollars and a mortgage of said real estate to secure the same, as the balance of the consideration of said purchase. Also on the tenth day of September, A. D., 1883, a second writ of execution was issued on said judgment which was put into the hands of Oscar F. Trask, an officer duly qualified to serve the same, who afterwards returned the same into said

court in no part satisfied, with his indorsement thereon that he was unable to find any goods or estate of the said debtor in his precinct wherewith to satisfy the same; and whereas your petitioner has no remedy at law by which he can obtain the interest of said Albion K. P. Berry in said real estate to satisfy his judgment and execution, he prays that he may be heard in equity and that the court will decree a conveyance of so much of said real estate as may be necessary for the payment of said execution and judgment, in case it shall be ascertained that said mortgage is paid, or decree that the right of redeeming the same real estate from said mortgage may be levied upon and sold at auction, and such other relief as the plaintiff may be entitled to in equity." [Decree] . . . "If the respondents neglect and refuse to pay the plaintiff the amount of said judgment and costs of this suit on or before said first day of August, then a master shall be appointed who shall appraise and set off to the plaintiff so much of the estate, described in the plaintiff's bill as will be equal in value to the sum due on said judgment and costs of this suit above the mortgage existing upon said premises; a suitable conveyance from respondents to the complainant to be made, unless an amount equivalent to the amount of the appraisal shall be paid to the complainant, or secured to him, by the respondents, upon such terms as a single judge may settle when the master's report comes in. WILLIAM WIRT VIRGIN,

Justice S. J. C. Presiding."

L. H. Ludden, for plaintiff.

H. A. Randall, for defendants.

The husband may prefer his wife as a creditor. Money thus coming to her from him and paid towards the farm cannot be disturbed by the bill. *Ferguson* v. *Spear*, 65 Maine, 277; *French* v. *Motley*, 63 *Id.* 326. Pension money exempt. R. S., of U. S., § 4747, 2d ed. 1878. There is no evidence showing the debt of the husband to the wife was not genuine, and one which he had a right to pay as against creditors.

WHITEHOUSE, J. This is a bill in equity, in which a creditor asks that real estate, conveyed to a wife but alleged to have

been paid for by her husband, be made available for the payment of a judgment recovered against the husband prior to the purchase of such real estate.

The cause was heard by a single justice sitting in equity and a decree rendered in favor of the plaintiff in accordance with the form suggested by the court in *Sampson* v. *Alexander*, 66 Maine, 185. The case now comes to this court by appeal from that decree.

The decision of a single justice upon matters of fact, in an equity hearing, should not be reversed unless it clearly appears that such decision is erroneous; and the burden to show the error falls upon the appellant. *Young* v. *Witham*, 75 Maine, 536; *Paul* v. *Frye*, 80 Maine, 26.

The allegations in the plaintiff's bill sufficiently meet the substantial requirements of the statute, as well as the principles of equity and rules of procedure established by the recent decisions of this court. *Sampson* v. *Alexander*, *supra; Call* v. *Perkins*, 65 Maine, 439; *Hamlen* v. *McGillicuddy*, 62 Maine, 268; *Gray* v. *Chase*, 57 Maine, 558; *Winslow* v. *Gilbreth*, 50 Maine, 90.

The proof fully sustains the allegations. The consideration of the conveyance of the farm to the wife with a small amount of personal property, was twelve hundred dollars; and it was not in controversy that the whole amount paid was nine hundred dollars derived from the money received by the husband as a pensioner of the United States, the wife's note, secured by mortgage being given for the balance of the consideration. But in view of the decision in *Friend* v. *Garcelon*, 77 Maine, 25, it is not claimed that the federal statute respecting the exemption of pension money from attachment affords the defendants any protection in this case. It is contended, however, that this sum of nine hundred dollars had been received by the wife from her husband in payment of a prior indebtedness to her, and was her property when invested in the farm. But the only basis of this pretended indebtedness disclosed by the evidence is the alleged interest of the wife in the proceeds from the sale of poultry, butter, cheese and dried apples produced by

the joint labor of husband and wife on places rented by the husband prior to the purchase of the farm in question. By the well settled principles of the common law such earnings are the property of the husband, and there is no statute in this State making any part of them the property of the wife. This contention is, therefore, wholly without merit. *Sampson* v. *Alexander*, *supra*, and cases cited.

The appellant not only fails to show that the decision of the presiding justice was clearly wrong, but it affirmatively appears that his decision was clearly right.

Decree below affirmed with costs.

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

CHARLES P. MATTOCKS, Appellant,

vs.

AUGUSTUS F. MOULTON, Administrator.

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88 166
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100 154

Cumberland. Announced March 19, 1892.

Opinion August 5, 1892.

Trustee. Investment. Probate. R. S., 68, § 11; c. 77, § 6, par. VII; Stat. 1891, c. 49.

In the investment of trust funds the trustee must exercise sound discretion as well as good faith and honest judgment.

It is not within the limits of sound discretion to invest trust funds in the notes or shares of a business corporation which has no surplus, nor working capital, but is doing business wholly upon credit; nor in second mortgages.

A trustee, under a will, with power to take, hold, manage and invest all the estate in such manner as he shall deem for the best interest of all concerned, is not thereby relieved from the observance of the well known principles applicable to the investment of trust funds.

The propriety of investments by an executor, who is also trustee, is not concluded by his settlement of an account in probate, and transfer of the listed investment to him in his subsequent account as trustee.

ON REPORT.

The case is stated in the opinion.

Strout, Gage and Strout, for appellant.

So far as the report shows, the investment in stock of the corporation was a sound one at the time it was made. It also

appears that the trustee acted with good judgment and a sound discretion and in good faith which would be all that could be required of him under the terms of an ordinary will. *Lovell* v. *Minot*, 20 Pick. 117. A savings bank investment. R. S., c. 47, § 99. Perry Trusts, § 459; *Clark* v. *Garfield*, 8 Allen, 427; *Emery* v. *Batchelder*, 78 Maine, 233. The English rule of investing in government funds is not law in this country except in New York and Pennsylvania. 1 Lewin Trusts, Am. notes (Ed. of 1888). The doctrine laid down in *Har. Coll.* v. *Amory*, 9 Pick. 446, authorizing investment of trust funds in the capital stock of a manufacturing corporation has now been followed since 1830. It must be borne in mind that the investments complained of were not the result of disposing of previous investments at the caprice of the trustee and reinvesting the proceeds, and the same principle must apply as to cases where trustees invest interest accruing, in which case they are not held to so strict an account as in the case of the investment of capital sums. Perry Trusts, § 462; *Barney* v. *Saunders*, 16 How. 545.

The present is like the case of a trustee retaining an investment made by the testator even when falling in value. *Bowker* v. *Pierce*, 130 Mass. 262. In the absence of directions in the will the trustee must exercise his best judgment in good faith. *Amory* v. *Green*, 13 Allen, 413; *N. E. Trust Co.* v. *Eaton*, 140 Mass. 532; *Kinmonth* v. *Brigham*, 5 Allen, 270; *Hunt, Appellant*, 141 Mass. 515; and *Brown* v. *French*, 125 Mass. 417; and *Lovell* v. *Minot*, 20 Pick. 119, *supra*. In *Harvard College* v. *Amory*, *supra*, the stock came from the trustees to themselves as executors of the same estate; and the court held that the party attacking the account must affirmatively prove an abuse of the trust. Objection, if any, should have been taken when the executor's account was filed, three years before the trustee account was offered. Where trustees act *bona fide*, and to the best of their discretion, they are entitled to the protection of the court. 3 Red. Wills, 560 (c. 12, § 2,) and cases *supra*; *Brown* v. *French*, 125 Mass. 417; *In re Maxwell*, 21 N. Y. Sr. Rep. 139; 3 N. Y. Sup. Ct. 422. Nothing short of a breach of trust, or want of good faith, would invalidate an

investment made by a trustee clothed with the ample powers and full discretion accorded to him by this will.

A. F. Moulton, for appellee.

EMERY, J. Cynthia C. Beale, in her last will after making sundry particular legacies, devised the remainder of her estate to the executor and trustee therein named, "in trust, however, for the following purposes, that is to say: said trustee shall take, hold, manage and invest all the estate which shall come to his hands and possession under this clause of my will, in such manner as he shall deem for the best interest of all concerned therein, and shall keep the same so invested till Edmund Kimball shall reach the age of thirty years," at which date the trustee was to turn the estate over to him.

In the same will she appointed the appellant to be executor and trustee under the will. Upon her death the will was duly proved, and the appellant commissioned as executor in October, 1885. His final account as executor was filed in November, 1886, and, after the usual public notice, was allowed as presented, by the Probate Court for Cumberland county. In this account the executor charged himself with the amount of the inventory, and with sundry other amounts "as per schedule A;" and claimed credit for disbursements "as per schedule B." In schedule B, was this item of credit, viz: "amount transferred to my hands as trustee under the provisions of the will of the deceased to balance this account, as per schedule C, filed herewith." This item balanced the account leaving nothing to the debit of the executor. Schedule C, (filed with schedule B,) was a list of various notes, stocks, bonds, &c., among which was a note of the Union Packing Company of Portland, collateralled by stock of the same company, and also a note of one Nutter secured by a second mortgage of real estate in Scarborough. These two investments had not been made by the testatrix, but were made by the executor from cash of the estate in his hands.

After settling the above account, the appellant (the executor) qualified as trustee under the will, but filed no new inventory. He filed his account as trustee in November, 1889. In this

account he charged himself as trustee in schedule A, with the same amount he had claimed credit for in his executor's account as transferred to trustee. He claimed credit as trustee in schedule B for numerous items of disbursements, &c., and also for the following item, viz: "Personal property in hands of trustee as per schedule D, filed herewith." In this last schedule D were listed among other items, the following, viz:

1.	50 shares stock Union Packing Co. (par value $50,)	$2500 00
2.	Note of Union Packing Co. for dividend,	158 19
3.	Nutter Note, collateralled by 10 shares stock Union Packing Co.	401 63

It will be noticed that the appellant had changed the security of the Nutter note from a second mortgage on real estate to shares in the stock of the Union Packing Company, and had also changed the note of that company into its stock.

This company was organized in August, 1884, at Portland, under the general law, for the purposes of canning and packing fruits, meats, fish and vegetables and for dealing in the product. Its capital was fixed at fifty thousand dollars of which thirty dollars only was paid in. The company did not begin business till 1885, and it then fixed the par value of its shares at fifty dollars. Ninety-five shares only were ever issued. Sixty shares were issued in payment for real estate and plant in Scarboro', which, at that time for that business, were worth three thousand dollars. The remaining thirty-five shares were issued at various times at their par value for the purchase of machinery and tools for leased factories. The whole of the capital stock issued was thus absorbed in real estate, machinery and tools, leaving nothing for a working capital. The company owned one factory in Scarboro'; and had leased two others, one at Hallowell, and one at Winterport. It carried on business on credit, as was usually done by such companies in the packing business. The stock of the company was never offered, nor quoted, nor did it have any selling value in the open market.

At the times the appellant made the investment of the trust funds in the notes and stock of this company, its business was in healthy condition as regards payments and credits. It has

paid no dividends, however, since 1888. In making these investments of the trust funds, the appellant acted in good faith after a personal examination, and in the belief that the investments were for the best interest of all concerned; but without consulting any outside parties as to the standing of the company, the value of its stock, or the propriety of such an investment for trust funds.

At the February term of the Probate Court, Mr. Moulton, the administrator of the original *cestui que trust*, then deceased, appeared and objected to the allowance of the three items above quoted from the trustee's schedule D. The Probate Court sustained the objections, and the trustee appealed to the Supreme Court of Probate. Evidence was then put in before the appellate court, of which the above narrative is an abridgement, and the cause was then reported to the law court for determination.

The appellant now contends that the original investments made by him as executor in the notes of Nutter, and in the note of the Union Packing Company, were adjudicated by the Probate Court to be proper investments, by the allowance of his final account as executor, in which account these investments were listed in schedule C; and that the *cestui que trust*, not having appealed from that adjudiction, is now bound by it.

We do not think that the Probate Court, in settling the executor's account in the form in which it was presented, had any occasion to adjudicate, or even consider the propriety of the investments made by him of the funds of the estate. The purpose of the account was simply to show the balance, if any, remaining in the hands of the executor after paying debts, expenses, &c. It is, at least, questionable whether the Probate Court had the power to allow the item in Schedule B, of "amount transferred to trustee to balance account." To do so was to adjudicate that the trustee was entitled to receive the balance. This was assuming to construe the will and to determine who was the residuary legatee, a jurisdiction not at that time conferred upon Probate Courts. *Hanscom* v. *Marston*, 82 Maine, 288. Even the statute ch. 49, Laws of 1891, passed since this matter came before the court, does not authorize such a determination until after the account is settled and the balance ascertained.

But, in his account, the executor made no claim to be allowed for any loss or depreciation in these particular assets or investments. By listing them in his schedule C, he alleged them to be of full face value. He only claimed credit for having turned them over to the trustee at their par value. By claiming such credit, he alleged that the trustee had received them at such valuation, thereby acquitting the executor. The two offices of executor and trustee, though held in this case by the same person, were legally as distinct as though held by different persons. *Plimpton* v. *Richards*, 59 Maine, 115.

Under the circumstances above stated, it is difficult to see how the question of the propriety of these investments arose, or was adjudicated in the proceedings upon the executor's account.

It is again urged, however, that these items in the executor's account cannot be reviewed in this examination of the trustee's account. It is argued that the only way to reach them is by re-opening the executor's account, the two offices of executor and trustee being distinct, and this proceeding concerning only the trustee. But, if these items were not adjudicated, or even considered in the allowance of the executor's account (and we have held above that they were not) there can be no occasion to re-open that account in order to reconsider them and disallow them.

The executor (whether regularly or otherwise) claimed and received credit for "amount transferred to trustee." He claimed and received the benefit of it as though paid in cash. The trustee was entitled to receive it in cash. The executor was liable to him for cash. If he took anything else in discharge of the executor's liability to him, he assumed it as cash. He practically invested the money of the estate in whatever he took in lieu of cash from the executor. In taking from the executor the note of Nutter and the note of the Union Packing Company, as part of the money to be transferred, he thereby in effect invested the trust funds in those notes. The trustee having taken them in discharge of the executor's liability, when he need not have done so, we must regard them as investments made by the trustee, and examinable in this, his account.

Coming to the consideration of the trustee's account, must he be charged with the amount of these investments in the note of Nutter and in the stock of the Union Packing Company (now conceded to be worthless) as having been unlawfully made at the time? It will be recalled that the testatrix put no limits to his discretion,—that he acted in good faith, after a personal examination, and in the sincere belief that the investments were for the best interest of all concerned. Having, before the event, thus acted in good faith and with honest judgment under a will without limitation upon his discretion, the appellant claims he has faithfully and fully performed his duty as trustee, and should not be held responsible, after the event, for mere errors in judgment.

The law does not hold a trustee responsible for errors in judgment when he has been careful to enlighten that judgment, but we think the law does require of a trustee, even under a will like this, more than good faith and honest judgment. We think it must be assumed that the testatrix made this part of her will with reference to the well known legal and equitable rules governing trustees, and that she intended the trustee of her appointment to be mindful of them. True, she left the investment of the trust estate to his judgment, but it was to his judgment as trustee, enlightened and guided by the approved rules applicable to the investment of trust funds, not to his uninformed, personal judgment exercised without reference to legal rules and principles. We do not think the language of the will was intended, or has the effect, to relieve the trustee from the observance of the well known principles applicable to the investment of trust funds. *King* v. *Talbot*, 40 N. Y. 87; *Kimball* v. *Reding*, 31 N. H. 352 (64 Am. Dec. 333).

He must always bear in mind that he is dealing with trust funds, which were not given him to be used in developing or furthering business enterprises, but to be guarded carefully and invested cautiously, so that principal as well as interest may be forthcoming at the appointed time. While he must be as diligent and painstaking in the management of the trust estate, as the average prudent man is in managing his own estate he may

not always place the trust funds where he, or the average prudent man, would place his own funds. In measuring the duty of the trustee with the usual conduct of the man of average prudence in the care of his own estate, reference is to be had to the conduct of such a man in making permanent investments of his savings outside of ordinary business risks, rather than to his conduct in taking business chances. There are often occurring good business chances in which a man may invest some of his own money without danger of being called imprudent, whatever the result. But it will be generally conceded that a mere business chance or prospect however promising is not a proper place for trust funds.

While, of course, all investments, however carefully made, are more or less liable to depreciate and become worthless, experience has shown that certain classes of investment are peculiarly liable to such depreciation and loss. These, of course, would be avoided by every prudent man who was investing his own money with a view to permanency and security, rather than chance of profit. A trustee should therefore avoid them even though he sincerely believes a particular investment of that class to be safe as well as profitable. Shares in the stock of new mining companies are conspicuous examples of this class.

In the light of experience, various kinds of investments have come to be regarded by intelligent and prudent men as unsuitable for trust funds. The courts have simply given expression to this general sentiment. Second mortgages are considered unsuitable, as they subject the trust estate to the possible necessity of raising funds to pay off the first mortgage. *Gilmore* v. *Tuttle*, 32 N. J. Eq. 611. So are bonds and stocks of new corporations where the success of the business has not become established. *Adair* v. *Brimmer*, 74 N. Y. 539; *Tucker* v. *State*, 72 Ind. 242; *Kimball* v. *Reding*, 31 N. H. 352; *Dickinson's Appeal*, 152 Mass. 184; *Simmons* v. *Oliver*, 74 Wis. 633. So are loans upon personal credit only. *Clark* v. *Garfield*, 8 Allen, 427; *Barney* v. *Saunders*, 16 How. 538. The result of many decisions is summed up in Pom. Eq. Jur. § 1074 as follows: "It is the settled rule in equity, in the

absence of express directions in the instrument creating the trust, or of statutory permission, that trustees or executors cannot invest trust property upon any mere personal security, nor upon the stocks, bonds or other securities of private business corporations."

The appellant calls our attention to several Massachusetts cases. While the law of that State seems more indulgent to trustees than is the law in other jurisdictions, we do not think it lets down much from the principles above stated. In *Harvard College* v. *Amory*, 9 Pick. 446, the trustee was expressly authorized to invest "in public funds, bank shares or other stocks." He invested part of the trust funds in the stock of the Boston Manufacturing Company, and in the stock of the Merrimack Manufacturing Company. Both of these were well established manufacturing corporations, engaged in the manufacture of cottons. Each had a large surplus, and had for a long time made large dividends. The stock of each was marketable. The testator had himself largely invested in the same stocks, and the appraisers of his estate appraised them at a premium. *Held*, that the trustee was justified. In *Lovell* v. *Minot*, 20 Pick. 116, the trustee lent trust funds on a note collateralled by stock of the Nashua Manufacturing Company at about seventy-five per cent of its par value. The corporation was well established and its stock was selling in the market above par. *Held*, that the trustee was to be excused. In *Brown* v. *French*, 125 Mass. 410, the trustee invested part of the trust funds in first mortgage bonds of the then Portland and Ogdensburg Railroad. The capital stock of the railroad fully paid up in cash was equal to the bonds issued. The bonds were in high repute, and were being purchased by men of reputed good judgment, for permanent investment. The trustee made careful inquiry and was generally advised that the bonds were safe. *Held*, that he was not liable for loss on them. In *Bowker* v. *Pierce*, 130 Mass. 262, the trustee retained the investment his testator had made in the stock of the then Eastern Railroad. The stock was appraised at par but afterwards began to gradually decline. The trustee made inquiries, and, among

other things, was informed that the treasurer and one of the directors of the railroad were advising their friends to buy. He decided upon the whole not to sell on the declining market. *Held*, that he was not liable for the subsequent loss.

On the other hand, it was held in the same jurisdiction, in *Dickinson's Appeal*, 152 Mass. 184, that a trustee was not justified in making investments of trust funds in the stock of the Union Pacific Railroad Company, although he did so in entire good faith after much inquiry and consultation. In a late case in Wisconsin, *Simmons* v. *Oliver*, 74 Wis. 633, the trustee, having full discretion, invested trust funds in the note of a manufacturing corporation, indorsed by its president and secretary. The corporation was in good financial standing, and the indorsers were reputed to be men of ample means. *Held*, that such an investment of trust funds was not authorized.

It remains to determine whether in making the investments complained of in this case, the appellant exercised the sound discretion required of him by the law as above expounded, his good faith and integrity being unquestioned. In doing this, we must be scrupulous not to measure his discretion exercised before the event, by our discretion called into action after the event. We are to measure it by the law,—we are only to determine whether the disputed investments are of those kinds generally rejected by the law as unsuitable for trust funds.

The original loan to Nutter upon a second mortgage of real estate was clearly an unsuitable investment of trust funds. Reflection, study and inquiry would at once have convinced the appellant of the inexpediency and danger of such an investment. The investments in the notes and stocks of the Union Packing Company seem also to be within those classes of investments adjudged unsuitable for trust funds. The company was comparatively a new corporation, doing a somewhat risky business solely upon credit. It had assumed obligations by leasing two factories in addition to the one it owned. The business, thus spread out, was sensitive to changes in the markets, the crops, the migrations of fish, the weather, etc., which are always variable and uncertain elements. It had accumulated no surplus.

It had no working capital. It was liable to be overwhelmed at the first unfavorable turn in affairs. This condition of things seems to have been recognized by the investing public, for the stock of the company had no selling value in the market.

The business may have promised well. The chance of making money and building up a business was probably excellent. The appellant, a man of well known energy and enterprise, after personal investigation, formed a favorable opinion of the company's prospects. But however favorable and glowing those prospects, we think that in the light of the decisions of the courts, and in the light of general experience, the appellant could and should have seen that he had no authority to invest trust funds in them.

It was suggested at the argument, that if the above views of the law prevailed, a trustee is always in peril and that no prudent person would undertake the office. The law, however, only excludes from the discretion of the trustee certain kinds of investments which experience has shown to be too uncertain for trust funds. There are many other kinds of investments of which the law does not disapprove, and in which a trustee may in an honest discretion place trust funds without fear of personal loss. Still further to relieve and protect the trustee in the choice of investments, the law in this State has provided that he may call the *cestuis que trust* before the proper court, and have the proposed investments discussed and assented to by the parties, or authorized by the court. R. S., ch. 68, § 11; R. S., ch. 77, § 6, par. VII.

Decree of the Probate Court affirmed with costs.

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

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84 441
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98 400

STATE *vs.* EDWARD STANLEY.

Franklin County. Announced June 9, 1892. Opinion August 8, 1892.

Intoxicating Liquors. Nuisance.. Indictment. Evidence. R. S., c. 17, § § 1, 2.

The defendant having been indicted under R. S., c. 17. § § 1 and 2, for keeping a liquor nuisance in his dwelling-house, contended that this statute covers

eleven distinct offenses. *Held;* that only one offense, viz: a statutory nuisance, is thereby created, but it may be proved by the commission of any one of the various acts therein specified.

It is not necessary, in such an indictment, to allege in terms that the illegal practices mentioned were carried on with the knowledge or consent of the defendant. It is sufficient to allege that the defendant kept and maintained such a nuisance, after setting out the different acts, &c., which by the statute constitute a common nuisance.

The sale of intoxicating liquors, on two different occasions in a dwelling-house, does not as a matter of law constitute it a common nuisance under R. S., c. 17, § 1.

The word "used" in that section implies habitual action.

Evidence of such sales is for the jury to weigh; and if it satisfies them beyond reasonable doubt that the occupant of the dwelling-house was in the habit of thus selling therein, they may thereby find it a nuisance.

State v. *Lang*, 63 Maine, 215, affirmed.

ON EXCEPTIONS.

This was an indictment for a nuisance found under R. S., c. 17, which reads as follows: "All places used as houses of ill-fame, or for the illegal sale or keeping of intoxicating liquors, all houses, shops or places where intoxicating liquors are sold for tippling purposes, all places of resort where intoxicating liquors are kept, sold, given away, drank or dispensed, in any manner not provided for by law, are common nuisances."

(Indictment.) "State of Maine.— Franklin, ss. At the Supreme Judicial Court begun and holden at Farmington, within and for the county of Franklin, on the fourth Tuesday of September, in the year of our Lord, one thousand eight hundred and ninety, the grand jurors for said State upon their oath present, that Edward Stanley, otherwise Ed. Stanley, of Farmington in said county of Franklin, laborer, on the first day of May, in the year of our Lord, one thousand eight hundred and eighty-nine, and on divers other days and times between that day and the day of the finding of this indictment, at Farmington aforesaid, in the county of Franklin, aforesaid, did keep and maintain a certain place, to wit: a dwelling house on the southerly side of the road leading from West Farmington village in said Farmington to Walton's Mills, and being near the brick yard, and the same during said time occupied by said Stanley, there situate then and there and on said divers other days and

times there used as a house of ill-fame, and then and on said divers other days and times there resorted to for lewdness and then and on said divers other days and times there used for the illegal sale and for the illegal keeping of intoxicating liquors, and where on that day and on said divers other days and times intoxicating liquors were sold for tippling purposes, and which said place was then and on said divers other days and times there a place of resort where intoxicating liquors then and on said divers other days and times were there unlawfully kept, sold, given away, drank, and dispensed, and which said place, being so used as aforesaid, was then and there a common nuisance, to the great injury and common nuisance of all good citizens of said State, against the peace of said State, and contrary to the form of the statute in such case made and provided."

The defendant was found guilty by the jury and moved an arrest of judgment for the following reasons, viz: (1,) the respondent is charged with no crime; (2,) everything set forth in the indictment may be true and consistent with the defendant's innocence; (3,) the indictment is insufficient in law.

The motion was overruled by the presiding justice, and the defendant took exceptions. The defendant also took exceptions to following portions of the presiding justice's charge:

"The house where these offenses are alleged to have been committed is set forth with sufficient particularity as to its description and location. The great question therefore, is, whether this respondent has been guilty of using the house described in the indictment as a place for the illegal sale or keeping of intoxicating liquors within the time specified in that indictment. If he has, then I instruct you that he would be guilty of the offense charged.

"A further provision of this same statute which I have read to you provides that all houses, shops, or places where intoxicating liquors are sold for tippling purposes are common nuisances. If this respondent had this shop or house and intoxicating liquors were sold for tippling purposes there, which means sold and drank upon the premises in the house, then I instruct you that he would be guilty; or thirdly, as the statute provides

'all places of resort where intoxicating liquors are kept, sold, given away, drank, or dispensed in any manner not provided for by law, would be a common nuisance.' The government relies upon the evidence of this man whose testimony you have heard, who testifies that he purchased liquor on two different occasions of this respondent in the house described in this indictment.

"If you believe the testimony of Humphrey Skidmore, that he purchased the liquor as he testified, of this respondent in that house, then I instruct you that this respondent would be guilty under this indictment. If you do not believe that evidence then you would not be authorized to convict this respondent. . . . This evidence is introduced to corroborate the fact as claimed by the government, and whether true or not is for you to say that this man has kept this house there for the illegal sale of intoxicating liquors to a greater or less extent. It does not say in the statute how much liquor a man shall sell to constitute a common nuisance. . . . Has this law been violated by the respondent? Has he kept this house there for the illegal sale of intoxicating liquors, or is this a house where intoxicating liquors are sold for tippling purposes, sold to be drank upon the premises in the house? What is the evidence? What does it satisfy you as to either one of these propositions? or furthermore, is this a place of resort where intoxicating liquors are kept, sold, given away, or dispensed in any manner not provided by law? If you are satisfied that it was so kept by this respondent, then I instruct you that he would be guilty under this statute, and the indictment upon which he stands charged."

F. E. Timberlake, County Attorney, for the State.

Counsel cited: *State* v. *Lang*, 63 Maine, 217; *State* v. *Buck*, 78 *Id.* 193; *State* v. *Hall*, 79 *Id.* 502; *State* v. *Ryan*, 81 *Id.* 108; *State* v. *Dorr*, 82 *Id.* 158.

H. L. Whitcomb, for defendant.

Chapter 17, section 1, was intended to cover eleven distinct offenses; and there seems to have been an effort to enumerate ten of these offenses in the one count in this indictment — the word "gambling" being omitted. But all of these terms used

in the statute as offenses, in the indictment are merely used as descriptive of the place or dwelling-house kept and maintained by the respondent — *descriptio loci.*

There is no allegation that the respondent used or maintained the house, described in the indictment, for any illegal purpose, or that it was so used with his knowledge, consent or approbation during the time alleged.

If, during any part of the time named, the house was used or maintained for any of the prohibited purposes enumerated in the statute, the respondent is not charged with so using it, for he may have used and occupied the premises under such circumstances as to have been entirely ignorant of the fact of such illegal acts.

A person's business may keep him from home so much of the time that he is ignorant of what is being done at his dwelling, and still it may be the house, in contemplation of law, kept, maintained and occupied by him, but these illegal practices may be carried on without his knowledge or consent.

Respondent should be charged with keeping the premises for such illegal purposes, or that they are so kept with his knowledge, consent or approbation, or there is no statute charge against him. *State* v. *Dodge*, 78 Maine, 439; *Com.* v. *Stahl*, 7 Allen, 304.

The indictment only charges that on and during a certain time the respondent kept and maintained a certain place (particularly described), but he is not charged with keeping or maintaining it for any other than a lawful purpose.

The distinction between a *private* and a *public* nuisance should plainly appear in the indictment. There should be so much of the fact set out as to make the criminal nature of what is charged against the respondent fully appear. It must be alleged in the indictment that the *public* are affected by the respondent's acts, by some appropriate language. The indictment does not allege that the house which the respondent is charged with maintaining was situated in any public place as a village or city, nor near any public street or highway; nor does it allege that any person resided near thereto, or was in the habit of passing thereby. For aught that the indictment reveals, it may have

been in the wilderness, away from the vicinity of any inhabitant or habitation — in no manner affecting the public.

If it was rendered a nuisance by the manner in which it was used and maintained, it should be alleged that it was in a public place, or that people resided near thereto, or other similar circumstances showing that the public was affected thereby.

The conclusion of the indictment, that it "was then and there a common nuisance, to the great injury and common nuisance of all good citizens of said State," etc., does not cure the defect. *Mains* v. *State*, 42 Ind. 327; 13 Am. Rep. 364; 2 Bish. Crim. Proc. § 864; Whar. Crim. Law, § § 2379 and 2380.

Instructions: If an inn-keeper lodges a guest over night, who has in his pocket or valise a flask of liquor that he intends to sell or give away (to treat his friend to) he would be clearly amenable under the instructions here given. For an inn is a place of resort, and so is every store, shop, office and many dwellings, according to the true definition of the term.

One or two acts of selling do not, as matter of law, necessarily make the place a common nuisance. *Com.* v. *Lambert*, 12 Allen, 177; *Com.* v. *Calef*, 10 Mass. 153; *State* v. *Stevens*, 36 N. H. 59; *Ludwick* v. *Com.* 6 Harris, Pa. 172.

VIRGIN, J. The defendant was convicted on an indictment for keeping a liquor nuisance in a building comprising a portion of his dwelling-house. His motion in arrest of judgment having been overruled at *nisi prius*, he urges his objection against the indictment and challenges the correctness of one instruction to the jury.

1. Revised Statutes, c. 17, § § 1 and 2, do not "cover eleven distinct offenses," as contended, but a single offense, viz: a statutory nuisance which may be proved by a commission of any one of the various acts therein specified. *State* v. *Lang*, 63 Maine, 215, 218; *Com.* v. *Foss*, 7 Gray, 330.

2. The indictment need not allege in terms that the illegal practices mentioned were carried on with the knowledge or consent of the defendant. After setting out the different acts and conditions which, by the statute, constitute a common nuisance, the indictment alleges that the defendant kept and maintained

such a nuisance, which is sufficient. *State* v. *Ryan*, 81 Maine, 107.

The only claim made that the defendant kept or maintained a nuisance was that his dwelling-house was "used" by him "for the illegal sale of intoxicating liquor."

In this connection the presiding justice called the attention of the jury to the testimony of one Skidmore, who testified that, on two different occasions, he purchased intoxicating liquor of the defendant in the house described. Thereupon he gave the following instruction: "If you believe the testimony of Skidmore, that he purchased the liquor, as he testified, of this respondent, in that house, then I instruct you that this respondent would be guilty. If you do not believe that testimony, then you would not be authorized to convict him."

We think the court withdrew from the jury what was within their province alone to decide. While the word "used" may sometimes mean "employed for a particular purpose on a single occasion or on two several occasions," we do not think it was intended to have that restricted sense in this criminal statute. The sale of a glass of liquor, in a dwelling-house, on two different occasions, was not intended *per se* to constitute the house a "common nuisance." The word "common" strongly indicates such a construction to be erroneous. But the intention was to declare "all places" to be "common nuisances" whenever they should habitually or customarily be appropriated for, or converted to the purpose of the illegal sale of such liquor. Two sales would not as matter of law constitute it a nuisance. The evidence of such sales would be competent for the jury to consider upon the issue whether or not the house was habitually employed by the defendant for the purpose of selling contrary to law. And if it satisfies them beyond reasonable doubt that the defendant was in the habit of so selling therein, they might so find. The weight or value of such testimony was within their exclusive province, and it was erroneous for the court to fix the weight or value which they should give it. *Com.* v. *McArty*, 11 Gray, 456. *Exception sustained.*

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

STATE *vs.* ERASTUS C. PHILBRICK.

84 562
98 386

Lincoln. Announced at May Law Term, Middle District, Opinion July 21, 1892.

Elections. Double Voting. School District. Indictment. Pleading.

Illegal voting is an offense at common law.

Wilfully depositing more than one vote during the same balloting for a town officer, or a school district officer, is an indictable offense.

ON EXCEPTIONS.

The defendant upon being arraigned for trial in this court, sitting in Lincoln county, demurred to the following indictment:

"The jurors for said State, upon their oath present, that Erastus C. Philbrick of Edgecomb in said county of Lincoln, at Edgecomb in said county of Lincoln, on the twelfth day of April in the year of our Lord one thousand eight hundred and ninety, being admitted as a legal voter at a legal meeting of school district number three (3) in said town of Edgecomb, held on the twelfth day of April, aforesaid, for the choice of school agent, did then and there at said meeting wilfully, fraudulently, knowingly and designedly give in more than one vote, to wit: two written ballots for the choice of agent of said school district, at one time of balloting, to the great destruction of the freedom of elections, to the great prejudices of the rights of the other qualified voters in said school district, to the evil example of others in like case to offend, and against the peace and dignity of the State."

The demurrer was joined on the part of the State. The demurrer was thereupon overruled by the presiding justice, who adjudged the indictment good, and the defendant excepted.

O. D. Castner, County Attorney, for the State.

G. W. Heselton, for defendant.

The indictment should conclude "*contra formam statuti.*" The words are essential in the description of statutory offenses. 1 Chit. Crim. Law, 173; Bish. Crim. Proc. § 602; Bish. Stat. Crim. § 377. The statute, R. S., c. 4, § 72, for punishment of misconduct of electors, supersedes the common law. Indictment should be under the statute. *Com.* v. *Cooley*, 10 Pick. 37; *Com.* v. *Springfield*, 7 Mass. 9.

WALTON, J. Illegal voting is an offense at common law. One who wilfully deposits more than one vote during the same balloting for a town officer is guilty of an offense for which he may be indicted and tried, and, if found guilty, be punished by fine or imprisonment, at the discretion of the court. So held in *Com.* v. *Silsbee*, 9 Mass. 417. And we think it is equally an offense for one to so vote for a school district officer at a school district meeting. It is equally corrupt, equally a fraud, and should receive the same punishment. We think the indictment in this case is good, that the demurrer thereto was properly overruled, and that the entry must be,

Exceptions overruled.

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

THE FIRST FREE-WILL BAPTIST PARISH of FARMINGTON

vs.

MOSES PERHAM.

Franklin. Opinion July 21, 1892.

Evidence. Contracts. Subscription Paper.

Oral evidence cannot be admitted to alter or vary a written contract, nor to engraft thereon conditions inconsistent with its terms.

In an action to recover the defendant's subscription for building a meeting-house, he offered to prove that when he signed the paper it was the understanding on his part that another person should subscribe an equal amount, and that he, the defendant, should not be required, in any event, to pay any more than such other person. The court at the trial excluded the offered evidence, and also other offers of oral proof of what was said, or understood, at the time of signing the paper. *Held;* correct.

ON EXCEPTIONS.

This was an action of assumpsit brought by the plaintiff against the defendant to recover a subscription of five hundred dollars, given as claimed by the plaintiffs to help build a church in West Farmington. After the conclusion of the testimony, the presiding justice ordered a *pro forma* verdict for the plaintiffs for the amount of said subscription with interest from date of the writ.

Plea, general issue, and brief specification of grounds of defense as follows: 1st: The said defendant says, that if any

promise was made by him with said plaintiffs, or their authorized agent or agents, it was not for the payment of five hundred dollars, but only to pay so much as T. McL. Davis should pay. 2nd: That if the said plaintiffs have any promise of said defendant in writing, it was given upon the condition that he should only pay what the said T. McL. Davis paid. 3d: That the said promise, if any was made in writing, it was made upon the representations of one Manly Bean, assuming to act as agent of the Free Baptist society of Farmington, and not to these plaintiffs, that said T. McL. Davis was to pay five hundred dollars, which representations the said defendant believed and by reason of which he promised whatever sum he did subscribe, if anything, and which representations the said Bean knew were not true. 4th: That the plaintiffs, in this suit were organized, if at all, as a parish, for the sole purpose of maintaining a church and parsonage in Farmington Centre Village; and that they have no lawful right to build or maintain a church at any other place or to expend money for the same.

The presiding justice excluded the evidence offered by the defendant under these specifications of his defense. The defendant excepted to the orders and exclusions of evidence.

S. Clifford Belcher, for plaintiff.

J. C. Holman and J. P. Swasey, for defendant.

The action is not maintainable and the *pro forma* verdict should be set aside for the following reasons:

First: Because the case fails to show any authority on the part of the plaintiffs to build or maintain a church at West Farmington; but on the contrary, the case does show that the society was incorporated, if at all, for the purpose of maintaining a church at Farmington Centre Village and that they have and are still so doing.

Secondly: That there was no consideration for the promise, inasmuch as the case does not show that the money had been pledged or expended by the promisees before the promise was revoked and notice given by the defendant to the plaintiffs' agent that he should not pay. *Cottage Street Church* v. *Kendall*, 121 Mass. 528; *Amherst Academy* v. *Cowls*, 6 Pick. 427; *Maine Cent. Institute* v. *Haskell*, 73 Maine, 140.

At no time during the building of the church was the subscription paper in the hands or possession of the plaintiffs, but the money subscribed thereon was paid to and the paper retained by Bean who solicited the subscription and, at no time, while the transactions and agreements and representations offered and suggested by the defense were taking place and made, was the paper out of the hands or control of said Bean; and before the plaintiffs had ever had possession of it, the defendant had notified him of the fact that he should pay only sixty dollars, as he had agreed to pay only what Davis paid, and had tendered him the money.

The evidence of the conversation and representations of Bean at the time of Perham's signing the paper should have been admitted; for "if they were falsely intended to induce Perham to believe in the existence of some other material fact and it had the effect of producing such belief to his injury, it was a fraud." If the representations made by Bean as to the amount of Davis' subscription were false and known to Bean to be so, and by reason of them Perham was induced to sign for five hundred dollars instead of sixty dollars, it was such a fraud on Perham as would relieve him from his contract if it was otherwise legal and binding, and for the purpose not of changing the contract, but to show the fraudulent representations and inducement, it was admissible and material. *Tripp* v. *Hathaway*, 15 Pick. 47; *Trambly* v. *Ricard*, 130 Mass. 259; *Jewett* v. *Carter*, 132 Mass. 335; 1 Bigelow on Frauds, 1, pp. 174 and 497.

WALTON, J. This is an action to recover five hundred dollars subscribed by the defendant towards the building of a meeting house. At the trial in the court below, the defendant offered to prove that, when he signed the paper declared on, it was with the understanding on his part that a Mr. Davis should subscribe for an equal amount, and that he (the defendant) should not be required in any event to pay more than Mr. Davis paid. This, and similar offers, the effect of which would have been to engraft upon the written contract oral conditions inconsistent with its terms, were rejected by the presiding

justice; and no valid ground of defense being otherwise shown, he instructed the jury to return a verdict for the plaintiff for the amount of the subscription with interest from the date of the writ. We think the ruling was correct. We have carefully examined all the offers of evidence made by the defendant. They all contain the vice of an attempt to alter or add to the terms of a written contract by oral proof of what was said, or understood, at the time of signing it. And we think the offers were all properly rejected.

Exceptions overruled. Judgment on the verdict.

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

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90 109

STATE *vs.* EDWARD MCCORMICK.

Kennebec. Announced May 27, 1892, May Term.
Middle District. Opinion August 8, 1892.

Jury. Sealed Verdict. Criminal Case. Felony. Practice.

In capital cases and cases in which the accused, if found guilty, is liable to be punished by imprisonment for life, it is error to allow the jury to seal up their verdict and then separate before returning it into court.

Rape is a crime for which a person, if found guilty, is liable to be punished by imprisonment for life; and in such a case it is error to allow the jury to seal up their verdict and then separate before returning it into court.

In cases not capital, and cases in which the accused is not liable to be punished by imprisonment for life, a sealed verdict is allowable; but such a verdict must be in proper form and be signed by the foreman of the jury; and a piece of paper having nothing upon it but the word "guilty," and not signed by the foreman, is not a legal verdict, and can not be legally accepted and affirmed.

If an illegal verdict is affirmed against the protest of the accused in a criminal case, he may file a motion in arrest of judgment, and if his motion is overruled, exceptions will lie.

In proper cases a sealed verdict may be returned and affirmed in criminal as well as civil cases; or, in criminal cases, if a sealed verdict is returned, an oral verdict may be taken and affirmed, the difference being merely a matter of form; and the verdict will be legal whether taken and affirmed in the one form or the other, provided the proceedings are in other particulars regular and according to law.

ON EXCEPTIONS.

This was indictment for rape upon a child under the age of fourteen years. The case was tried to a jury in the Superior Court, for Kennebec County.

The defendant filed a motion in arrest of judgment and for a new trial, which was overruled by the presiding justice, and he thereupon took exceptions. The motion is as follows:

"And now comes the respondent in the above entitled indictment, after the verdict and before sentence, and moves an arrest of judgment and for a new trial, for the following reasons, to wit:

"1st. Because the jury, after hearing the case and the judge's charge, retired to the jury-room, found a verdict, wrote the word "guilty" on a piece of paper, sealed the same up, then separated over night without returning the verdict to the court and the next morning came into court and against the objection of the respondent, delivered the envelope containing the word "guilty" to the clerk of court, and said clerk against the objection of the respondent opened the envelope in the presence of the jury and respondent, and in the usual form put the question to the jury as to their verdict who then and there announced their verdict as guilty.

"2nd. After taking the case under the instruction of the presiding justice to seal up their verdict in case they should not agree before adjournment of court, given in the absence of the respondent's counsel and without consultation of the respondent, the jury retired to the jury-room, wrote the word "guilty" upon a piece of paper, sealed up the same and without first communicating the tenor of the same to the presiding justice or imparting privately to the court what the verdict was, were, under the instruction of the judge, allowed to and did separate over night and returned into court the next morning the sealed verdict so made out and against the protest of the respondent; the envelope containing the word "guilty" was broken open by the clerk who then and there put the usual question to the jury who answered that the respondent was guilty, and this against the respondent's protest was taken as the jury's verdict and so entered upon the records of the court.

"3rd. Because no verdict was rendered according to law."

L. T. Carleton, County Attorney, for the State.

The rule is universal in its application that a motion in arrest of judgment reaches errors only that are apparent on the face of

the record. *State* v. *Murphy*, 72 Maine, 435, and cases there cited.

Any matter appearing in evidence at the trial, any facts then proved, any defect in the process for bringing the defendant into court, or in its service, are not reached by this motion. *Com.* v. *Gregory*, 7 Gray, 498. The court must judge in motions of this kind from the record, and that only, and not from what took place at the trial. *Bedell* v. *Stevens*, 28 N. H. 118. This complaint is of matters of purely formal procedure, which defendant insists should be carried on after strict ancient forms; and the gist of his complaint is that the jury was allowed to separate before returning the verdict into court and there affirming it.

E. W. Whitehouse, for defendant.

WALTON, J. In capital cases and cases in which the accused, if found guilty, is liable to be punished by imprisonment for life, it is error to allow the jury to seal up their verdict and then separate before returning it into court.

In cases not capital, and in which the accused, if found guilty, is not liable to be punished by imprisonment for life, the jury may be allowed to seal up their verdict, if it is agreed upon during an adjournment of the court, and return it into court when the court is again in session.

But such a verdict must be in proper form and signed by the foreman of the jury. A piece of paper with nothing but the word "guilty" upon it, and not authenticated by the signature of the foreman, is not a proper verdict, and can not properly be affirmed as such.

To secure accuracy and a uniformity of practice in such cases, this court prepared a suitable form for sealed verdicts in criminal cases, with instructions in relation to the cases in which they could properly be used, and the manner in which they should be received, opened, read and affirmed, and caused the same to be published in its official reports. See 63 Maine Reports, 590. And when, in a proper case, a jury is allowed to seal up their verdict, they should be furnished with a proper blank, and be instructed how to use it.

In the case now under consideration, the exceptions state that the defendant was tried on an indictment for rape. Rape is one of the highest crimes known to the law. It is not many years since it was punishable by death. And it is now a crime for which a person, if found guilty, is liable to be punished by imprisonment for life. The punishment may be for a term of years, or it may be for life, at the discretion of the court. It was not, therefore, a case in which the jury could properly be allowed to separate after agreeing upon a verdict and before returning it into court. No one now knows, and no one can know, till after the sentence is passed, that it will not be a sentence for life. And yet the jury was allowed to separate after agreeing upon a verdict and before it was returned into court; and the exceptions state that this was done without the knowledge or consent of the defendant. And the exceptions further state that the verdict which was returned was a piece of paper with nothing upon it but the word "guilty." It did not state the name of the defendant, nor was it authenticated by the signature of the foreman. Clearly such a verdict could not be accepted. And we do not understand that it was accepted. We understand from the exceptions that an oral verdict was taken and affirmed in the usual way, and as would have been proper in this case if the jury had not separated before returning it.

It is urged in behalf of the State that rape ought not to be regarded as a crime punishable by imprisonment for life, because it is not necessarily so punished. Precisely the same argument has been urged in cases arising under the statute defining felony. The statute declares that the term "felony" includes every offense punishable by imprisonment in the state prison. And it has been several times urged upon the court that unless the offense is necessarily so punished, it should not be regarded as a felony. But the court has uniformly held that an offense that is liable to be so punished must be regarded as a felony, although not necessarily so punished. And we think these decisions are sound; for no one can know till sentence is passed that the offense will not be so punished. As it is liable to be so punished, the only

safe and proper course to pursue, is to try the offender precisely as if it were certain to be so punished. And by parity of reasoning, the only safe and proper way to try a man charged with rape, is to proceed as if it were certain that his punishment, if he should be found guilty, would be imprisonment for life. *State* v. *Smith*, 32 Maine, 369; *Smith* v. *State*, 33 Maine, 48; *State* v. *Mayberry*, 48 Maine, 218.

This conclusion is not in conflict with *State* v. *Fenlason*, 78 Maine, 495. It is true that in that case the defendant was on trial for an offense liable to be punished by imprisonment for life; and it is true that the jury were allowed to seal up their verdict and return it into court after a separation. But the direction to the jury that they might seal up their verdict and then separate before returning it into court, was in the presence of the defendant and his counsel, and the direction was impliedly, if not expressly, assented to by the defendant and his counsel; and the verdict was afterward received and affirmed in their presence without objection. Under these circumstances, the court held that the objection must be regarded as waived. In the present case, the direction to the jury, that they might seal up their verdict, was not in the presence of the defendant or his counsel; and, of course, was neither expressly nor impliedly assented to by either. Nor was the verdict received and affirmed without objection. On the contrary, the action of the court in both particulars was vigorously objected to. Under these circumstances it is impossible to hold that the proceedings were assented to, or the errors waived. The case cited is not, therefore, opposed to our conclusion in the present case.

The proceedings in the reception and affirmation of sealed verdicts, in both civil and criminal cases, may be, and usually are, as follows: After the court is opened, and the jurors are in their seats, the clerk, by the direction of the court, inquires of the jury if they have agreed upon a verdict. Upon receiving an answer in the affirmative, the clerk directs the jury to pass it in. The foreman of the jury then delivers the sealed verdict to the officer in attendance upon them, and he hands it to the clerk. The clerk then opens the verdict and reads it aloud, so

that all present can hear what it is. Then, after a short pause, if no objection is made to the verdict, and it appears to the court to be in proper form, he directs the clerk to affirm it. The clerk then addresses the jury as follows: "Gentlemen of the jury, hearken to your verdict as the court has recorded it." The clerk then reads the verdict to the jury, and concludes by saying, "So say you, Mr. Foreman? So say you all, gentlemen of the jury?" To these inquiries, the foreman, and other members of the panel, sometimes respond vocally, but more usually by an affirmative gesture, such as a nod or a slight inclination of the head or body. The verdict is regarded as affirmed by the jury, if no dissent is expressed.

The proceedings in Massachusetts appear to be somewhat different. It appears that their practice is to require an oral verdict in addition to the sealed verdict. The difference seems to us to be no more than a mere matter of form. In this State verdicts are often so taken. A verdict in either form will be legal.

It is further urged in behalf of the State that the case is not properly before the law court. We think it is.

In *Commonwealth* v. *Tobin*, 125 Mass. 203, a case almost precisely like this, where a sealed verdict had been improperly affirmed in the Superior Court, and a motion had been made to have the verdict set aside, which motion had been overruled by the court, and the defendant had excepted, Chief Justice Gray said that the verdict received and recorded by the court not being a legal verdict, it was the right of the defendant, upon motion duly filed, to have it set aside; and that the order of the Superior Court overruling his motion and denying him this right, was a decision upon a question of law which could not have been raised before verdict, and was therefore a proper subject of a bill of exceptions.

In this case, the defendant moved for an arrest of judgment, and for a new trial, because an illegal verdict was received and affirmed. There being no dispute in relation to the facts, whether or not his motion should be sustained was a pure question of law. The decision was against him. We think he

had a right to except, and that his exceptions are properly before the law court. The defendant's motion is not simply for an arrest of judgment. It is also a motion asking for a new trial for an error in law. We think he is entitled to a new trial.

There is one other ground on which the court is urged not to grant a new trial; and that is that the errors were in matters of form merely. When a man's liberty for life, or for a term of years even, is involved in a trial, it is his right to insist that all the proceedings shall be strictly according to law. If one of the safeguards which the law throws around a man's liberty may be disregarded to-day, another may be to-morrow, and another the next day, and so on till they are all swept away. The proper place to stop is at the beginning.

Exceptions sustained. New trial granted.

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

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BETSEY B. KNOWLTON *vs.* CITY OF AUGUSTA.

Kennebec. Opinion August 4, 1892.

Town. Way. Defect. Railings. Notice. R. S., c. 18, § 80.

In an action to recover damages alleged to have been sustained through a defective highway in the city of Augusta, the plaintiff described the defect as follows: that the road-bed was narrow and unsafe, being but thirteen and one half feet wide and that, along the westerly edge, the road-bed dropped abruptly three and one half feet, and was not provided with any railing.

The evidence showed that, in order to have the road-bed level it was necessary, as the land sloped to the west, to make an excavation on the east side and an embankment on the west side. The embankment was only two and a half feet high and it had a slope of four feet in width, smooth and grassed over, the grass extending some distance into the carriage way. Besides a smooth and level road-bed, the ditch on the east side was only five or six inches deep and smooth up to the edge of a concrete sidewalk, giving an available width of more than seventeen feet over which carriages could be driven in safety. At the place of the accident three such carriages as the one in which the plaintiff was riding, could have been driven abreast. *Held;* that such a street is not unsafe or out of repair; nor was a railing necessary.

Railings are sometimes necessary; but not on the sides of such roads as this, where more accidents would be likely to happen by driving against them than by driving into the ditches.

As the plaintiff and her husband were riding at night in a covered buggy, they came up behind a jigger standing on the east side of the street; and in attempting to pass the jigger, the husband drove over the embankment on the west side of the street, and the carriage was upset, and the plaintiff thereby injured. *Held;* that the upsetting of the carriage was caused by careless driving; or, if not, then as the result of those dangers which all must encounter when driving in the dark.

Where the plaintiff and her husband had notice of the condition of the street prior to the accident, and it was admitted that the plaintiff did not give the statutory notice (R. S., c. 18, § 80), *Held;* that the plaintiff cannot maintain an action against the town.

ON MOTION AND EXCEPTIONS.

This was an action on the case tried to a jury in this court, sitting in Kennebec county, in which the plaintiff recovered a verdict of nine hundred and eighty-three dollars for injuries which she sustained through an alleged defective highway in the city of Augusta, in the night of October 9, 1889.

The defect is thus alleged in the declaration: . . . "and that on said ninth day of October, 1889, said street was not in repair as aforesaid, but was defective, out of repair, unsafe, inconvenient and dangerous for travelers with their horses, teams and carriages in the part of said Gannett street directly opposite the house and lot of Mrs. M. A. Tobey, and on the west side of said street at the point above mentioned, in that the road bed from the east side to the westerly edge thereof was very narrow, to wit, thirteen and one half feet wide, and unsafe, and along the westerly edge of the street at the point herein specified, the road-bed dropped abruptly to a great depth, to wit, to the depth of three and one half feet, making a steep and dangerous embankment which was not provided with any railing or other means to protect travellers with their horses, teams and carriages from going over said embankment; that said street was not, at said point above specified, of sufficient width for travelers with their horses, teams and carriages to pass and repass safely and conveniently."

The case is sufficiently stated in the opinion.

Heath and Tuell, for plaintiff.

The insufficient width, the sharp and unnecessary shoulder, the negligence to turnpike further to the west, saying nothing

of the want of railing, were the sole reasons why plaintiff went over the shoulder. No four-wheeled carriage going north could pass between the jigger and the ditch striking in northwesterly, and turn to the north in season to hold the front wheels in the road. The west front wheel went down the side of the ditch. The road was defective. *Flagg* v. *Hudson*, 142 Mass. 280. What is a sufficient width or method of construction is for the jury. The husband's previous knowledge of the defect would not defeat the wife's action (*Street* v. *Holyoke*, 105 Mass. 83), nor was it contributory negligence for her to permit him to drive through, using due care. The jury have found that both used due care. Notice: *Holmes* v. *Paris*, 75 Maine, 561; *Buck* v. *Biddeford*, 82 *Id.* 438; *Brooks* v. *Somerville*, 106 Mass. 274; *Lyman* v. *Amherst*, 107 Mass. 346.

A. M. Goddard, City Solicitor, for defendant.

Road originally constructed, thirty years ago, sufficiently wide for two carriages to safely pass, is all that can be reasonably expected of such by-way constructed and maintained chiefly for convenience of adjacent dwellings. It has ever since been maintained of same dimensions and conditions, without complaint of its insufficiency. Such facts are suggestive and worthy of consideration. Court will determine whether the road is defective. *Witham* v. *Portland*, 72 Maine, 539. Railing not necessary. *Spaulding* v. *Winslow*, 74 Maine, 528. Jigger unhitched and unattended, the proximate cause of the accident. R. S., c. 19, § 4. Notice: It must proceed from the plaintiff, "the sufferer," to the municipal officers, and to them only, and not as in the other notice, giving the alternative of highway surveyors or road commissioners.

WALTON, J. During the evening of October 9, 1889, as the plaintiff and her husband were riding in a covered buggy, they came up behind a jigger standing on the easterly side of Gannett street in Augusta; and, in attempting to pass the jigger, the husband drove over an embankment on the westerly side of the street, and the carriage was upset, and the plaintiff thereby injured. For this injury she has recovered a verdict against the

city for nine hundred and eighty-three dollars; and the case is before the law court on motion and exceptions by the city.

We have carefully examined the evidence, and we think the verdict must be regarded as clearly wrong; and for several reasons:

1. We do not think the street was defective or out of repair. It was comparatively narrow, but not so narrow as to be unsafe or unreasonably inconvenient. The land sloped to the west; and, in order to make the road-bed level, it was necessary to make an excavation on the easterly side of the street, and an embankment on the westerly side. But this embankment was only two and a half feet high, and it had a slope of four feet in width, and this slope was smooth and grassed over, the grass extending some distance into the carriage way. The road bed was smooth and level, and thirteen and a half feet wide. The ditch on the easterly side was only five or six inches deep, and was smooth up to the edge of a concrete sidewalk, giving an available width of not less than seventeen feet over which carriages could be driven in safety. At the place of the accident, three such carriages as the one in which the plaintiff was riding could have been driven abreast.

We do not think such a street can be regarded as unsafe or out of repair. Nor do we think a railing was necessary. As already stated, the embankment was not over two and a half feet above the level of the ground, and it had a slope of not less than four feet in width, and this slope was smooth and grassed over. So far as appears, no one had ever complained of the want of a railing; and we can not believe that any man of good judgment would for a moment have entertained the idea that a railing was necessary. It seems to us that there must be hundreds and, perhaps, thousands of miles of roads in this State which are turnpiked to a height of two and a half feet or more above the bottoms of the ditches at their sides, and yet have no railings to prevent people from driving into the ditches. On such roads, railings would create more danger than they would avoid. More accidents would be likely to happen by driving against the railings than by driving into the ditches.

Railings are necessary in many places; but not on the sides of a road turnpiked only two and a half feet above the bottoms of its ditches, with slopes as wide and as smooth as existed in this case.

2. We think the upsetting of the carriage in which the plaintiff was riding was caused by careless driving; or, if not, then it must be regarded as the result of those dangers which all must encounter when driving in the dark. The street was lighted by an electric lamp. But the lamp was at a considerable distance, and the plaintiff and her husband both testify that at the place of the accident was a dark shadow, so that when they came up behind the jigger they did not see it till within fifteen or twenty feet of it, and that they came up directly behind it. This condition of things required great care in order to pass the jigger in safety. And yet, so far as appears, no care at all was used. The plaintiff's husband reined his horse to the left, and drove by the hind end of the jigger, hitting the hind wheel as he passed it, and then the horse and carriage went over the embankment, and the horse was thrown down and the carriage upset. It would seem as if a moment's consideration must have warned him that such would be the result. Being so near to the jigger, and directly behind it, his course was necessarily almost directly across the street. Certainly, at a very sharp angle with it. And it would seem as if he ought to have known that, if he drove on that course far enough to pass the jigger with his carriage, his horse must go over the embankment. And he drove, as he admits, into a shadow of impenetrable darkness. He could not see where he was driving. Is not such driving heedless and careless? He knew of the existence of the embankment, and he knew that the street was comparatively narrow, for he had passed over it many times. Or, if he did not know, it must have been the result of inattention. In either case, it seems to us that the driving must be regarded as extremely careless; and especially in a top buggy, which, as every one knows, is a carriage very easily upset. If he did know the width and condition of the road, it was careless thus to drive out of it; and if he did not know, or did not remember its

width and condition, to thus drive diagonally across it, and into impenetrable darkness, was equally careless. And, upon this ground, we think the verdict is clearly wrong.

3. And it is now statutory law in this State that, one who, knowing the condition of a road, voluntarily drives over it, and receives an injury, can not recover for it against the town or city, unless he had notified one of the municipal officers of its defective condition. R. S., c. 18, § 80. And this is not the "twenty-four hours' actual notice of the defect," required to render the town or city liable. It is another and independent notice. And it is one that can not be dispensed with. It is a condition precedent to a right of recovery, and must be complied with. It has been decided that the "twenty-four hours' actual notice of the defect" exists, when one of the officers of the town or city to whom such notice may be given, has himself created the defect. *Holmes* v. *Paris*, 75 Maine, 559. *Buck* v. *Biddeford*, 82 Maine, 433. But the notice of which we are now speaking can not be thus supplied, as this court held in *Haines* v. *Lewiston*, p. 18, *ante*.

That the plaintiff and her husband had notice of the condition of Gannett street prior to the time of the accident must be regarded as proved. They had passed over it many times, and if they did not know its condition, it must have been owing to gross inattention,—a fault which the law will not allow them to profit by. That the plaintiff did not give the statutory notice is admitted. In fact, no one appears to have ever made any complaint of its narrowness, or the want of a railing. But the want of the statutory notice is fatal to a recovery. And, upon this ground, the verdict must be regarded as contrary to law. This conclusion renders it unnecessary to consider the exceptions.

Motion sustained. New trial granted.

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

ARTHUR M. BURNHAM *vs.* GEORGE W. HESELTON.

Kennebec. Opinion August 6, 1892.

Client and Attorney. Champerty. R. S., c. 112, § 12.

An agreement, to be champertous, must stipulate for the prosecution or defense of a suit. Litigation is an essential element of champerty.

Where the defendant, an attorney, agreed in writing "to endeavor to collect a note." belonging to the plaintiff, who was to have seventy-five dollars, if that amount should be collected, and the defendant to have all over that sum, and to pay all expenses incurred in the collection; but no mention was made of a suit as one of the means to be employed in the collection, and no suit was in fact employed. *It was held*: after the note had been collected that the plaintiff can not maintain a suit for recovery upon the ground that the agreement was champertous.

Such an agreement between an attorney and his client is *prima facie* fraudulent; and the burden is upon the attorney to satisfy the jury, by a fair preponderance of evidence, that he acted with all due fidelity towards his client.

See *Burnham* v. *Heselton*, 82 Maine, 495.

ON MOTION AND EXCEPTIONS.

This was an action of assumpsit tried a second time to a jury in the Superior Court, for Kennebec county, and in which the jury returned a verdict for the defendant. The plaintiff moved for a new trial and also took exceptions.

The facts will be found in the former report of the case in 82 Maine, 495.

(Exceptions). The plaintiff requested the presiding justice to instruct the jury in regard to the validity of the agreement between the parties, as follows:

"1. That an agreement by an attorney to institute or maintain legal proceedings at his own expense for the collection of a debt due another in consideration of a share in the fruit thereof, is in law invalid."

"2. If the note mentioned in this agreement was exhibited in an answer to a bill in equity pending in the Supreme Judicial Court, praying for a dissolution of the corporation, and it is alleged in the bill that there are no corporate debts, and in the answer that the note is a debt of the corporation, and the appointment of a receiver of the assets of the corporation is prayed for, the validity of such note is judicially put in issue in the pending suit," and "In the light of the admitted facts in this

case the agreement of May twenty-sixth, may be fairly interpretated to contemplate the institution or maintenance of legal proceedings by the defendant at his own expense for the collection of the note mentioned, in consideration of a share of the proceeds. Such an agreement, whether verbal or written, is illegal."

Upon these points the presiding justice instructed the jury:

"I may say that it is contended on the part of the plaintiff, regardless of the question of good faith on the part of the defendant as an attorney, that the very contract itself upon its face is in violation of the established principles of law of this State and would not be binding in any event. This principle has not been invoked by counsel for the plaintiff until the close of the trial, and I presume it was not expected that I should give you that rule, because you will perceive that if I should your function would be at end and there would be nothing for you do. I deem it of great importance that the issue of fact raised here by the evidence, the question of good faith, should be settled by you. And I say to you for the purposes of this trial,— and you will be governed by the law I give you of course, as in all other cases,—that this contract introduced before you in reference to the collection of this note, or for sale of the note, whether construed with reference to the terms appearing upon its face, or interpreted in the light of uncontroverted facts before you, is not necessarily in violation of any law of the State of Maine, and that if, upon the principles I shall more particularly state, you find there has been no want of good faith or good fidelity on the part of the defendant, no want of faithful discharge of duty on his part towards his client, the plaintiff can not recover in this action. If there is any error in this, the plaintiff will have his rights hereafter. You will not be responsible for that."

The plaintiff's counsel also requested the presiding justice to charge the jury as follows:

"It being admitted in this case that the plaintiff and defendant were attorney and client; that the note in evidence was left by the plaintiff for the defendant to collect in March, 1888, and that the amount due on said note was afterwards collected by

the defendant and one hundred eighty-seven dollars and sixty-seven cents retained by him under the agreement of May twenty-sixth, 1888.

"1. I instruct you that the presumption of law is against the validity of such an agreement and unfairness will be inferred and presumed and this presumption must be overcome by clear and cogent proof on the part of the defendant.

"2. That independent of that instrument, concerning the bargain made by the defendant with the plaintiff under which he retained the greater portion of the proceeds of the note, the burden of proof is upon the defendant to establish by a preponderance of evidence (1,) the most perfect and good faith on his part, (2,) the absence of any undue influence exercised upon the plaintiff by himself or any person in collusion with him, (3,) that the consideration was fair and adequate, (4,) that the plaintiff had full knowledge of the true situation and of the parties with whom he was dealing, and (5,) that with such knowledge he made the bargain, (6,) that the plaintiff had entire freedom of action, (7,) that he gave his client full information and disinterested advice, and it must be as full as the defendant could with diligence have obtained, (8) he must show that he was as diligent to do the best he could for his client as much as if he had been making the bargain for his client with a stranger."

But the presiding justice instructed the jury as follows:

"I deem it of great importance that the issue of fact raised here by the evidence, the question of good faith, should be settled by you. What are the duties and responsibilities imposed by the law upon a member of the legal profession who establishes himself in the community as competent to transact legal business and advise business men? Because, of course, there must be recognized principles of law with reference to such familiar subjects, with reference to members of the legal profession, as much so as with reference to members of the medical profession. When a person holds himself out to the public as competent to transact legal business, as an attorney and counsellor at law, he impliedly says to the public whom he invites to employ him:

I guarantee to you, if you employ me, that I possess a reasonable and ordinary degree of knowledge and skill with reference to the duties of my profession; not the highest degree known to the most eminent members of the profession, but reasonable and ordinary degree of knowledge and skill; that I will discharge my duties with reasonable and ordinary degree of diligence, prudence and care. I will apply this knowledge and skill with reasonable and ordinary diligence, care and skill. Not the very highest degree which might possibly be exercised, but a reasonable and ordinary degree of knowledge, care, skill and diligence. I further guarantee that I will give you the benefit of my best judgment. I will give you honest advice. I will act with all due fidelity towards you. And the law does require that he shall act with all due fidelity towards his client under all circumstances, and apply this knowledge and skill with a reasonable and ordinary degree of diligence, prudence and care, and at all times to exercise his best judgment. I say it may not always be sound judgment, but he is to give his client the benefit of the best judgment he has. Now these are the general principles applicable to the duties of an attorney and counsellor at law under all circumstances.

"But what are the further duties and responsibilities of the attorney as between him and the client? What are the rights of the client as between him and his attorney? You have not inferred, I trust, from arguments of counsel upon one side and the other that a member of the legal profession is prohibited from the fact of his employment from doing business even with his client. There is no such law. He is not prohibited from doing business with his client; he is not prohibited even from purchasing the subject matter of his employment, or of litigation, when employed by a client. But the law is watchful of the rights of a client as between him and his attorney, and it does say to an attorney that when you have been employed by a client, after the relation of client and attorney has been established, if you see fit, if you are requested even by the client, if he specially solicits and desires you, to purchase the subject matter of the employment, or litigation even, if that has been commenced,

you shall take no advantage of your confidential relations with your client. You shall still in a sense regard him as your client. Indeed, I may say that he shall regard him as his client in every sense, giving him the same advice that he would if the client were going to deal with a third party, a stranger. He shall impart to him, in other words, all the information he has which is material to the subject matter, give him all the knowledge he has that the client may understand the situation precisely as he does, acting, in a word, as I have already said, with all due fidelity towards his client. This is what the law requires of him, and whenever the good faith of such a transaction is brought in question, the burden is upon the attorney to show by a preponderance of evidence that he has done all these things, acted with all due fidelity in all the respects which I have named, and given all the information to the client, and treated him as his client. Because if he collects money after the relation of attorney and client has been established, the law presumes that he has collected it for his client, and the burden is upon him to show that he has been relieved by some valid and binding contract from paying it over to his client. I say the plaintiff claims to recover of this defendant the full amount collected by him, because the contract set up by the defendant, even if valid in any event under the laws of this State, was procured under circumstances and attended with such a history as ought to satisfy you that he did not act with good faith, did not do his duty as an attorney, as I have described to you; that he has been guilty of a fraud in other words, upon the the plaintiff, for if the plaintiff's contention is correct it must come to that.

"Now what is fraud? It is a word of Latin origin, and upon its face indicates an intention to deceive. Fraud may be defined, therefore, as deception deliberately practised by one party for the purpose of obtaining an advantage over another to which he is not entitled. Deception deliberately practised. And when a person is accused of fraudulent representations for the purpose of obtaining an advantage in the purchase of any article of personal property, it must appear that he has made representations

as a matter of fact as of his own knowledge in relation to some material matter for the purpose of inducing the other party to make that trade, to enter into that contract, and must appear that it has been effectual; that the other party has been induced thereby to enter into the contract; that that representation was false and known by the party making it to be false, then it is a fraudulent representation. I am now speaking of the rule generally between parties, without regard to the relation of attorney and client. So where a party has in his possession material facts which, if communicated to the other side, would lead the mind to a different conclusion, and he intentionally withholds those facts, conceals them from the other side when it is his duty to communicate them, that is known as fraudulent concealment, and is a fraud, precisely the same as an affirmative representation, in law. You will perseive that I have said the intentional concealment of material facts. And they are material wherever, if communicated, they would change the result or would be calculated to change the result. And I have already told you that the duty resting upon an attorney is always to communicate to the client, when he is dealing with him, all that he knows of the subject matter. But nevertheless, it is a fraud precisely the same for the attorney to do this as for any person who is not a member of the legal profession to do it. So I say that, if the plaintiff's contention is correct, it is not seriously in controversy here that the defendant must be adjudged guilty of a fraud, and that is the issue which I propose to submit to you.

"I have called your attention to the great issues of fact between these parties, I have said that the burden of proof is only upon the plaintiff to show you that this defendant received the money. He admits that he received it. Then the burden of proof is upon the defendant to show you that he has acted with all due fidelity towards this plaintiff under the full instructions and explanations I have given you of the duty of an attorney and counselor at law towards his client. The burden is upon him in that respect.

"Of course, it is to be decided upon the principle of preponderance of evidence. If the defendant has given you a preponderance of the evidence in the case in favor of his contention,

he is entitled to a verdict at your hands, and it is for you to say,— and there is no power outside of you that can tell you anything differently,— it is for you to say what is a preponderance of evidence."

To these rulings and instructions, and refusals to instruct, the plaintiff took exceptions.

W. F. Lunt, for plaintiff.

The defendant, soon after receiving the note, took proper legal steps to collect it. It was his duty to sue out all proper process for that purpose. *Dearborn* v. *Dearborn*, 15 Mass. 318; *Cox* v. *Sullivan*, 7 Ga. 44. The plaintiff says that the agreement under which the defendant withheld the money collected by him is champertous at common law. In the light of all the circumstances of this case and by the very terms of the agreement, it was a champertous contract. In champerty the compensation to be given for the assistance rendered is a part of the thing in suit, or some profit growing out of it. *Hovey* v. *Hobson*, 51 Maine, 63; 2 Bish. Crim. L. § 131, and note. The offense may be committed, though there has been no suit actually commenced. 2 Bish. Crim. L. 131.

A common instance of champerty is where an attorney at law agrees with a client to make collections, receiving for his compensation a part or percentage of the money. Such an agreement is void. *Ibid.* § 132, and notes. The parties to the agreement being attorney and client, the fair inference from the agreement is, that legal proceedings should be begun or maintained. The case of *Ackert* v. *Barker*, 131 Mass. 436, appears to be a case precisely like this. See also *Belding* v. *Smith*, 138 Mass. 530. The common law, in regard to champerty, is in force in this State, *Hovey* v. *Hobson*, 51 Maine, 65, 66, and § 12, c. 122, R. S., does not restrict or change it. *Wing* v. *Hussey*, 71 Maine, 185.

Heath and Tuell, for defendant.

Plaintiff has no reason to complain, because his first request was not good as a whole. *Larrabee* v. *Sewall*, 66 Maine, 376.

The court properly instructed the jury that the presumption of law was against the validity of the agreement and that the

burden of proof was on the defendant to show its fairness, and this was all the plaintiff was entitled to. He could not ask the court to use the language of his request, that "the presumption must be overcome by clear and cogent proof." The instruction that it must be overcome by proof on the part of the defendant was sufficient. To hold the defendant to clear and cogent proof would be to mislead the jury and cause them to believe that a higher degree of proof was required than is usual in civil cases.

The second request has eight subdivisions. To sustain the exceptions, the court must find that the plaintiff was entitled to his entire request with each and all of its eight subdivisions; some were material, some not; some were given, some withheld. We contend that the plaintiff was certainly not entitled to all of his request. The court did instruct the jury that the burden of proof was upon the defendant to show good faith on his part, but the request demands that the instruction should be "the most perfect and good faith." The simple rule, given by the court, of good faith and due fidelity included this subdivision.

The second subdivision has no bearing upon the facts of the case. There was no claim in argument, and no evidence to support it, that any undue influence was exerted upon the plaintiff by any person. Undue influence, as well defined, must mean coercion and the argument upon the motion most clearly demonstrates that no such claim was set up in the trial of the case.

The third subdivision was substantially given; so, too, of the fourth, fifth and sixth, and, substantially, the seventh and the eighth.

Agreement: If unlawful, it can only be so held under the the R. S., c. 122, § 12. This agreement was simply "to endeavor to collect." The statute prohibits an agreement to bring any action upon shares. It is a familiar rule of construction that contracts are to receive the construction that will uphold their validity, if possible. There is no rule of law that would authorize or require an agreement "to endeavor to collect" to be construed as an agreement to bring suit. The words used are not to be extended beyond their plain meaning. To agree to collect would not, of itself, be an agreement to bring suit. Collections

are made in various ways, through the banks, through express companies, by dunning letters, by personal interviews. The qualifying word, "endeavor," limits materially the defendant's undertaking. That the parties did not intend that defendant should bind himself to bring an action is further evidenced by the fact that any suit so brought would be prosecuted in Massachusetts. The defendant, again, could not bring and prosecute an action in the courts of Massachusetts. The next clause is equally significant, "to pay all expenses incurred in collection." The defendant did not agree to pay any costs of suit. Expenses incurred in collection, by no means, necessarily mean costs of suit. An agreement between attorney and client, where the relation was to continue would have used the phrase, "costs of suit," and the phrase used is in harmony with the limited undertaking of the defendant to endeavor to collect.

The contract has been executed, and a full settlement made. The verdict finds that the defendant treated Burnham with all good fidelity and that Burnham, with a full knowledge of all the facts, acknowledged in writing that he had received full "payment for the note," the contract being executed. Whether a sale or collection contract, it is now too late to invoke the statute, even if it applied. *Miller* v. *Larson*, 19 Wis. 466. If a sale, it is not within the statute, *Thompson* v. *Ide*, 6 R. I. p. 218.

Counsel also cited: *Taylor* v. *Gilman*, 58 N. H. 418; *Fowler* v. *Callan*, 102 N. Y. 395; *Manning* v. *Sprague*, 148 Mass. 18.

Without rescission, assumpsit cannot be maintained. The action should be deceit.

WALTON, J. This is an action against an attorney at law to recover money collected by him on a promissory note. After the money was collected, and before this suit was commenced, the plaintiff settled with the defendant, accepted part of the money collected and gave a receipt in full. But the plaintiff says that this settlement was made in pursuance of an agreement between him and the defendant which was champertous; and that the agreement was procured by the fraudulent suppression

by the defendant of material facts known to him and not known to the plaintiff. The presiding justice refused to instruct the jury that the agreement (which was in writing) was champertous; but instructed them that such an agreement between an attorney and his client was *prima facie* fraudulent; and that the burden was upon the defendant to satisfy them by a fair preponderance of evidence that he acted "with all due fidelity towards the plaintiff." With the burden of proof thus resting heavily upon him, the defendant met the plaintiff face to face, and each told his story to the jury; and the jury returned a verdict for the defendant. A careful examination of the evidence fails to satisfy us that it is the duty of the court to set this verdict aside. The evidence was conflicting, and we think the case came fairly within the province of the jury to decide.

Nor do we think the presiding justice erred in refusing to instruct the jury that the agreement was champertous. An agreement, to be champertous, must stipulate for the prosecution or defense of a suit. An agreement, which does not provide for the prosecution or defense of a suit, may be fraudulent; or, for some other reason, it may be illegal; but, champertous it can not be. No definition has been found in any dictionary, or in any text book, or in any judicial opinion, which does not make litigation an essential element of champerty. Our statute (R. S., c. 122, § 12), which makes the procurement of "any account, note, or other demand, for the profit arising from its collection by a suit at law or in equity; or brings, prosecutes, or defends, or agrees to bring, prosecute, or defend, any suit at law or in equity, upon shares," a penal offense, is based on the same essential element. It is, therefore, immaterial whether we look to the common law or our statute for a definition of champerty, for both make a stipulation for the prosecution of a suit, either at law or in equity, an essential element of the offense. An agreement to collect a demand, or to endeavor to collect one, or to enforce a claim, no mention being made of a suit at law or in equity as one of the means to be employed, is not champertous. Such a contract may be fully performed without the commencement or prosecution of a suit, either at law or in equity. *Scott* v. *Har-*

mon, 109 Mass. 237. In the case cited, the agreement was to give the attorney the first fifty dollars that should be collected by him in the enforcement of a mechanic's lien for labor on a house, and the court held that inasmuch as the agreement disclosed no undertaking to carry on a suit, it was not champertous. Champerty, said the court, is defined to be, "the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it," "whereupon the champertor is to carry on the party's suit at his own expense." And the court cites Hawkins and Blackstone as authorities for this definition. Webster's Dictionary defines champerty as "An agreement by a stranger, having otherwise no interest, with the plaintiff or defendant in a suit, to supply money, services, information, or evidence, by which to aid in maintaining and carrying on a suit in consideration that he shall receive a part of the matter in suit, as commission or otherwise, if the party with whom the agreement is made prevails; the purchasing a suit, or right of suing; maintenance, with the addition of an agreement to divide the thing in suit."

In the present case, the agreement of the defendant was "to endeavor to collect a note," the plaintiff to have seventy-five dollars, if that amount should be collected, and the defendant to have all over that sum, and pay all expenses incurred in the collection; but no mention was made of a suit as one of the means to be employed in the collection; and no suit was in fact employed. The money due upon the note was collected without suit, the plaintiff accepted the seventy-five dollars, which by the terms of the agreement, he was to have, permitted the defendant to retain the balance and gave a receipt in full. What was before an executory agreement then became an executed agreement. If the defendant was guilty of fraud, of course the plaintiff is entitled to redress. But, clearly, he can not maintain his suit upon the ground that the agreement was champertous.

The charge of the presiding justice was full and clear, and, in our opinion, free from error. And the jury having found,

upon competent evidence, that there was no fraud, we think the entry must be,

Motion and exceptions overruled.

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

HASKELL, J., did not concur.

ALONZO L. GROTTON *vs.* JOHN S. GLIDDEN.

Knox. Opinion August 13, 1892.

Action. Assault and Battery. Damages. Verdict.

If two persons engage voluntarily in a fight, either can maintain an action against the other to recover damages for the injuries he may receive.

The fact that the fight was voluntary is admissible in evidence, as are many other facts, to keep down the amount of the punitive damages, but not to reduce the actual damages.

Where the jury return a verdict irregular in form it is within the power of the court to require them before it is affirmed to retire and reduce their finding into the proper form.

ON MOTION AND EXCEPTIONS.

This was an action of trespass for an assault and battery tried to a jury in this court sitting in Knox county.

The jury returned into court, after the case had been committed to them, with a verdict in the following form:

"The jury find that the defendant is not guilty in manner and form as the plaintiff has declared against him but assess damages for the plaintiff in the sum of fifty dollars for excessive treatment."

Before affirming the verdict, the presiding justice instructed the jury that the verdict was not in proper form and gave them directions in full as to how it should be made out. The jury came in a second time when the following colloquy took place:

"Court: You simply were to return and make your verdict in form on the proper blank.

"Foreman: The idea was that we considered this defendant guilty of excessive treatment.

"Court: I simply instruct you this: if you find for the plaintiff, under any circumstances, you must fill out the verdict in

favor of the plaintiff and state the damages you find. If you do not find anything for the plaintiff under the instructions which I have given you, and the evidence in the case, you simply say "not guilty."

"Foreman: After making the report we did, have the jury a right to change their verdict?

"Court: Was the verdict which you brought into court the one which you agreed upon?

"Foreman: Of course.

"Court: Then I instruct you to put it in form as I have instructed you before."

The jury thereupon retired and returned into court a verdict for the plaintiff in regular form, assessing damages at fifty dollars.

The defendant excepted to the instructions of the court.

H. Bliss, Jr. and W. A. Fogler, for plaintiff.

Verdict: Counsel cited: *Ward* v. *Bailey*, 23 Maine, 318; *Goodwin* v. *Appleton*, 22 *Id.* 453; *Doe* v. *Scribner*, 36 *Id.* 168; *Beal* v. *Cunningham*, 42 *Id.* 362; *Readfield* v. *Shaver*, 50 *Id.* 36; *Hoey* v. *Candage*, 61 *Id.* 257; *Blake* v. *Blossom*, 15 *Id.* 394; *Bolster* v. *Cummings*, 6 *Id.* 85; *Pritchard* v. *Hennesey*, 1 Gray, 294; *Capen* v. *Stoughton*, 16 Gray, 364; *Root* v. *Sherwood*, 6 Johns. 68; *Blackley* v. *Sheldon*, 7 Johns. 32.

L. M. Staples, for defendant.

The jury after hearing the testimony said the defendant was not guilty. They said so a second time, and that verdict should have been affirmed and recorded. The finding by the jury was changed by the instructions from what they intended. It was not their verdict.

WALTON, J. This is an action to recover damages for an assault and battery. The plaintiff has obtained a verdict for fifty dollars, and the case is before the law court on motion and exceptions by the defendant.

The evidence satisfies us that the plaintiff's injuries were received while he and the defendant were engaged in a voluntary fight. The defendant contends that he acted only in self-defense. But the evidence satisfies us that the fight was voluntary on the

part of both parties. This brings us to the question whether, if two persons engage voluntarily in a fight, either can maintain an action against the other to recover damages for the injuries he may receive. We think he can. It seems to be settled law that each may maintain an action against the other. It is familiar law that each may be punished criminally. And it seems to be equally well settled that, by the rules of the common law, each may have an action against the other and recover full damages for all the injuries he received. The fact that the fight was voluntary is admissible in evidence, as are many other facts, to keep down the amount of the punitive damages, but not to reduce the actual damages.

In *Boulter* v. *Clark*, cited in Buller's Nisi Prius, p. 16, the court held that the fighting being unlawful, the consent of the plaintiff to fight, if proved, would be no bar to his action, and that he was entitled to a verdict for the injury done him.

In *Matthew* v. *Ollerton*, Comb. 218, the court held that "if a man license another to beat him, such license is void, because it is against the peace."

In *Stout* v. *Wren*, 1 Hawks, 420 (9 Am. Dec. 653), the court held that where two fight by consent, the one who is beaten may recover damages; for, fighting being an unlawful act, the consent is void. In that case the plaintiff and the defendant quarrelled and agreed to fight, the defendant asking the plaintiff if he would clear him of the law, and the latter answering yes. Mr. Justice Hall thought that, upon principle, the maxim, *volenti non fit injuria*, ought to apply; but conceded that the law seemed to be the other way, and acquiesced in the opinion of Chief Justice Taylor, that the action was maintainable.

In *Dole* v. *Erskine*, 35 N. H. 503, the court held that a recovery may be had in cross-actions for the same affray; by the party assailed for the assault first committed on him, and by the assailant for the excess of force beyond what was necessary for self-defense.

In *Adams* v. *Waggoner*, 33 Ind. 531 (5 Am. Rep. 230), the jury were instructed that if they should find from the evidence that the plaintiff and the defendant fought by agreement

or by mutual consent, such agreement would be no bar to the plaintiff's recovery of damages, but might be considered in mitigation of damages, but not to the extent of preventing the plaintiff's recovery of such damages as he actually sustained by the acts of the defendant; and the law court sustained the instruction. The same doctrine is held in *Logan* v. *Austin*, 1 Stew. 426; *Bell* v. *Hansley*, 3 Jones, N. C. 131; and *Com.* v. *Colberg*, 119 Mass. 350.

In *Shay* v. *Thompson*, 59 Wis. 540 (48 Am. Rep. 538), the plaintiff and defendant were neighbors, quarrelled about their line fence and had a fight. And it is stated in the opinion of the court that, although they were both old men, it was but just to say that they fought with great spirit and brutality. Both of the plaintiff's eyes were gouged, and the sight of one of them permanently impaired. He recovered a verdict for five hundred dollars which the court sustained, holding that where two fight in anger, by consent, each is liable to the other for actual damages.

In the present case, the evidence shows that the plaintiff and the defendant had been on unfriendly terms for many years. The defendant had fastened upon the plaintiff the name of "Hog Back," and had expressed great satisfaction on learning that the latter was about to move out of the neighborhood. The plaintiff had called the defendant a hypocrite in religion, and expressed a long felt desire to punch his head. They met in the highway, and the result was, first an altercation, and then a fight, each one being as ready and as willing to enter into the fight as the other. The plaintiff got the worst of it. The defendant testified that he escaped with no other damage than a torn shirt collar. The plaintiff went home with two black eyes, a scratched face, a bruised head, a lame back, and a kick on the lower part of his abdomen, which caused him to pass bloody urine. Surely, if the defendant escapes with a verdict against him of only fifty dollars, he may think himself lucky. His plea of "self-defense" makes quite as feeble an impression on the court as it seems to have made on the jury.

It appears from the bill of exceptions that the presiding

justice had considerable difficulty in making the jury understand that they could not give the plaintiff damages, and by the same verdict find the defendant not guilty. But he finally succeeded, and obtained a verdict in proper form. The course pursued by the presiding justice was entirely proper.

Motion and exceptions overruled.
Judgment on the verdict.

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

MITCHELL WILLIS *vs.* SUMNER FRENCH, and another.

Franklin. Opinion August 13, 1892.

Indorsement. Town Order. Action. Limitations.

The payee of a negotiable promise in writing, who transfers the same by indorsement, thereby guarantees both the genuineness of the writing and the validity of the promise.

If the writing be forged, or the promise void, as *ultra vires*, the indorsee may elect to repudiate the contract of indorsement and sue for the consideration paid, or treat it as valid, so far as the indorser is concerned, and hold him according to its tenor.

If such indorsee repudiates the contract, and sues to recover the money paid for it, his cause of action ordinarily accrues at the time he paid his money, and becomes barred after a lapse of six years; but, if he stands by his contract and elects to hold the indorser to his warranty and to payment according to the terms of the indorsement, then his cause of action accrues when the indorsed promise falls due.

A town order, calling for the payment of money agreeable to a vote of the town specifically mentioned, with interest annually, falls due at the time specified in such vote of the town, the same as if such vote had been recited in the order itself.

ON EXCEPTIONS.

In this action of assumpsit against indorsers of town orders, the writ was dated May 31, 1886. The defendants, among other defenses, pleaded the statute of limitations.

April 25, A. D., 1870, the town of Kingfield passed the following vote:

"Voted. That the town loan to Sumner French and Charles W. French, proprietors of the saw and shingle mill privileges,

the sum of two thousand dollars ten years without interest, in orders or bonds to be issued by the selectmen payable to S. & C. W. French, or order, in ten years from date, with interest annually, upon conditions and with the understanding that said S. & C. W. French obligate themselves to rebuild their proportion of the dam, abutments, headworks and canal, erect and complete a saw mill including a shingle mill on their privileges at said village in and within eight months from the first day of June next; and that said S. & C. W. French shall make, execute and deliver their promissory notes for the said sum of two thousand dollars to the inhabitants of the town and a mortgage deed of their said privileges, mills and interest in dam, abutments and headworks for the security of payment, such notes to be paid at the expiration of said ten years. Orders or bonds for one fourth part of said sum to be issued to them on the first day of June next, one fourth part when said dam and abutment and headworks are completed, and the remainder when their said mill shall be erected and boarded."

Under this vote, two town orders for five hundred dollars each, dated June 1, 1870, payable to the order of S. & C. W. French, were issued by the selectmen of Kingfield, accepted by the town treasurer, and delivered to the payees. Subsequently the payees, the defendants in this action, indorsed and delivered both orders, for value, to the plaintiff. The annual interest on the orders was paid by the town to the plaintiff until June 1, 1875, when the town defaulted and thereafterward refused to pay interest. After June 1, 1880, the plaintiff demanded payment of the principal from the town treasurer and payment was refused.

The defendants fulfilled all the conditions imposed upon them by vote of the town and executed and delivered to the town the notes and mortgage referred to in the vote above set forth. At the commencement of this action no part of the notes, principal or interest, had been paid by the defendants. The mortgage and notes were then held, and continued to be held by the town unpaid, undischarged and without action of any kind. The presiding justice, in his charge, instructed the jury that the

plaintiff's cause of action accrued at the date of the first failure of the town to pay the annual interest. The plaintiff seasonably requested an instruction that the cause of action accrued at the maturity of the orders, June 1, 1880, and that no right of action for the principal accrued until that date. Both of these requests were refused. The verdict was for the defendants and the plaintiff took exceptions.

Besides the common money counts, the plaintiff declared specially as follows:

"Also, for that whereas the inhabitants of Kingfield by Solomon Stanley, 2d, and Alonzo Knapp, selectment of said Kingfield, duly authorized by a vote of the town for that purpose, on the first day of June, 1870, at Kingfield in said county of Franklin, made their order in writing and thereby then and there ordered the treasurer of the town of Kingfield to 'pay to S. & C. W. French, or order, five hundred dollars, it being for money loaned agreeable to a vote of the town passed April 25, A. D., 1870, and interest annually,' said vote being to loan said money for the term of ten years, which said order was thereafterwards on the same day duly presented to the treasurer of the said town of Kingfield and accepted; and thereupon on the day first aforesaid, in consideration that the plaintiff at the request of the defendants would accept and receive of the said S. & C. W. French the said order, the defendants by their indorsement thereon, there guaranteed the payment of the said sum of money and promised the plaintiff to pay him the same according to the tenor and effect of the said order, if the said inhabitants of Kingfield should not so pay the same. And the plaintiff avers that thereupon he, confiding in the said undertaking of the defendants, then and there accepted and received of the said S. &. C. W. French the order aforesaid; and that although the day of payment in the said order specified has elapsed, the said inhabitants of Kingfield did not nor would on that day, or any other time, pay to the plaintiff the amount of the said order and interest or any part thereof but refused so to do; whereof the defendants on the day last aforesaid had notice."

The town orders and indorsements were in the following form:

"$500.00. Selectmen's Office,
June 1, 1870.

"Pay to S. & C. W. French or order five hundred dollars and . . . cents, it being for money loaned agreeable to a vote of the town passed April 25, A. D., 1870, and interest annually.

Solomon Stanley, 2d,
"To the Treasurer. Alonzo Knapp,
No. 250. Selectmen of Kingfield."

(Indorsements.)

"Accepted June 1, 1870.
C. W. Gilbert, Treasurer. S. & C. W. French.

"June 14, 1872. Received on the within order two years' interest, $61.80.

"August 6, 1873. Received one year's interest on the within order.

"June 27, 1874. Received one year's interest."

H. M. Heath and *J. C. Holman*, for plaintiff.

Under *Allen* v. *Jay*, 60 Maine, 126, the obligation to pay interest could not be collected by taxation. There being no fund for its payment other than taxation, it follows that the promise to pay interest accruing before the maturity of the orders was *ultra vires*.

When the town, June 1, 1875, declined to pay the annual interest then apparently due, it was under no legal or equitable obligation to pay. We contend that there was a valid obligation against the town to pay the principal June 1, 1880, so far as by due diligence it could realize a fund therefor from the mortgage notes by it held and due June 1, 1880.

As contracts to pay so much money, as might be received from the mortgage notes, the orders were clearly enforceable; by suit at law, if the notes were paid, to recover the amount actually paid, or, if not paid, by equitable trustee process to reach the notes or by bill in equity to enforce specific performance of the town's contract to collect the mortgage notes for the benefit of the holders of the orders.

If the orders have the force contended and are good as promises to pay out of a particular fund to the extent of the amount

realized by due diligence from the fund, the liability of the defendants as indorsers is clear and well settled.

Statute would not begin to run until the liability of the indorser is fixed. *Hunt* v. *Taylor*, 108 Mass. 508; *Bank* v. *Fearing*, 16 Pick. 534.

If absolutely void, the defendants may be held as parties without demand and notice. *Furgerson* v. *Staples*, 82 Maine, 163; Daniel Neg. Ins. § § 669, 675, 1113; Parsons' Notes & Bills, 444; *Burrill* v. *Smith*, 7 Pick. 291; *Edwards* v. *Dick*, 4 Barn. & Ald. 212; *Bowyer* v. *Bampton*, 2 Str. 1155; *Knights* v. *Putnam*, 3 Pick. 184; *Copp* v. *McDougall*, 9 Mass. 5.

Estoppel: Defendants' contract by note to furnish a fund to meet the orders at maturity being a part of the orders and distinctly referred to therein is by necessary implication also a part of their contract of indorsement.

J. H. Thompson, for defendant.

Action barred. R. S., c. 81, § 82, cl. IV; *Sturgis* v. *Preston*, 134 Mass. 372.

The indorsement of the orders in suit was a contract of guaranty by the defendants that the orders were legally issued and constituted a valid contract against the town of Kingfield.

This contract of guaranty was broken at the time it was entered into, and at once a right of action accrued to the plaintiff against these defendants.

This right of action was barred by the statutes of limitations in six years after said right of action accrued, or in six years after the indorsement. *Blethen* v. *Lovering*, 58 Maine, 438; *Perkins* v. *Whelan*, 116 Mass. 542.

The illegal character of these orders was well known to the plaintiff for more than six years prior to the commencement of his action. At least the refusal of the town to pay the interest on these orders was a notice to him of their illegal character.

Upon the face of these orders no time of payment is named, therefore by force of law they become payable upon demand. *Young* v. *Weston*, 39 Maine, 492; Daniel on Neg. Ins. 3d ed. Vol. I, § 88; *Porter* v. *Porter*, 51 Maine, 376. The following

phrase used in the orders,—"it being for money loaned agreeable to a vote of the town passed April 25, A. D., 1870,"—does not constitute the vote of the town a part of the orders, and thereby control the time of payment. *Pease* v. *Cornish*, 19 Maine, 191.

HASKELL, J. The payee of a negotiable promise in writing, who transfers the same by indorsement, either before or after maturity, whether it be strictly commercial paper or *quasi* such, that is, negotiable in form but lacking some elements of such paper, as town orders, always subject to equitable defenses whosoever the holder may be, thereby guarantees both the genuineness of the writing and the validity of the promise. If the writing be forged, or the promise be void, as *ultra vires*, the indorsee may elect to repudiate the contract of indorsement and sue for the consideration paid, or treat it as valid so far as the indorser is concerned, for he is estopped from denying its validity, and hold him according to its tenor. *Furgerson* v. *Staples*, 82 Maine, 159.

If the indorsee repudiates the contract and sues to recover the money that he paid for it, his cause of action ordinarily accrues at the time he paid his money, and becomes barred after the lapse of six years. *Blethen* v. *Lovering*, 58 Maine, 437; but, if he stands by his contract and elects to hold his indorser to his warranty, to payment according to the terms of the indorsement, then, of course, his cause of action accrues when the indorsed promise falls due.

In this case, the defendants, as payees, transferred by indorsement to the plaintiff, for value, two town orders, more than six years prior to the date of his writ; so that, his action is barred, unless the orders are held to have been given on ten years' time.

The orders bear date June 1, 1870, and were directed to the town treasurer, requesting him: "Pay to S. & C. W. French or order five hundred dollars, it being for money loaned, agreeable to a vote of the town passed April 25, 1870, and interest annually." They were signed by the selectmen and accepted by the treasurer of the town on the day of their date. A plain

construction of these orders is a request to the town treasurer to pay agreeable to a vote of the town, they having been given for money loaned. The vote became a part of these orders, and, if they were given according to its provisions, its terms, as to payment, fixed the time when the orders should fall due. The vote authorized a loan of two thousand dollars to the defendants for ten years, without interest, in town orders payable to their order, at the expiration of that time, with interest annually, upon condition that they should rebuild their mill, &c., and mortgage it to the town to secure their notes to the town for two thousand dollars, payable in ten years, without interest. The defendant complied with all the conditions to entitle them to the orders in suit.

In short, the town gave its notes to the defendants on ten years with interest annually, in exchange for their notes of the same amount, on the same time, without interest; or, in other words, promised to give them interest upon two thousand dollars for ten years, as an inducement to continue their manufacturing business in the town.

The plaintiff bought these orders from the defendants in good faith, for valuable consideration. They have had the plaintiff's money, and the use of it for ten years until the orders were supposed to fall due, and why should they not be held to repay the same? Certainly, as between the plaintiff and the defendants, there are no equities to shield the latter from payment. They had the money and should account for it to some one; and, if they pay it to the plaintiff, they cannot be held to pay it again upon their notes to the town. Because the town may not be held by law to give the defendants interest upon two thousand dollars for ten years, it is hard to require the plaintiff to give them both principal and interest.

Suppose the vote of the town had been printed upon the backs of these orders, as customary in many cases, would it be contended that the terms of the votes did not fix the time when the orders should become payable? The liability of these defendants is the same as though the orders were valid obligations of the town. Their indorsement of them guarantees their validity.

The orders refer to the vote in specific terms as controlling the transaction. They recite the date of its passage, making its identity certain.

The court considers that a fair construction of the orders, controlled by the terms of the vote of the town, makes them payable at the expiration of ten years, and not before. That all parties so considered the contract is clearly shown by their acts. Town orders are not strictly commercial paper; but, when negotiable, may be transferred as if they were. They are ordinarily drawn and negotiated by plain men, and should be given a sensible construction. By apt punctuation these orders read: Pay five hundred dollars, it being for money loaned, agreeable to a vote of the town passed April 25, 1870; or, to put it more plainly: Pay five hundred dollars agreeable to a vote of the town, it being for money loaned.

The action is not barred by the statute of limitations.

Exceptions sustained.

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

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ADOPTION.

ADVERSE USE.

See DEED, 10. TITLE.

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See DEED, 14, 15. EXECUTORS AND ADMINISTRATORS, 2.

ALLOWANCE TO WIDOW.

APPEAL.

ASSAULT AND BATTERY.

2. Although a common carrier insures the arrival of the property at the point of destination against everything, but the act of God and the public enemy, yet the condition in which it shall arrive there must depend upon the nature of the article to be transported. He does not absolutely warrant live stock against the consequences of its own vitality. *Dow* v. *Packet Co.* 490.
3. But when the animal is delivered to him in a sound, healthy condition, and when delivered at the place of destination is found to be lame or diseased, if the carrier would excuse himself, the burden is upon him, to prove that the injury to the animal was from the cause above stated, and without his fault. *Ib.*

CASES EXAMINED, ETC.

CERTIORARI.

After notice on the petition for a town way was ordered and complied with, a railroad company purchased for fuel a lot of woodland across which the road was subsequently located; *Held*, That a writ of certiorari will not be issued to quash the proceedings of the location, simply because no "notice of the time and place of hearing upon the location was served upon the station agent of the railroad in the town," as prescribed in R. S., c. 18, § 26. *Monson* v. *Co. Com.* 99.

CHAMPERTY.

1. An agreement, to be champertous, must stipulate for the prosecution or defense of a suit. Litigation is an essential element of champerty. *Burnham* v. *Heselton*, 578.
2. Where the defendant, an attorney, agreed in writing "to endeavor to collect a note." belonging to the plaintiff, who was to have seventy-five dollars, if that amount should be collected, and the defendant to have all over that sum, and to pay all expenses incurred in the collection; but no mention was made of a suit as one of the means to be employed in the collection, and no suit was in fact employed. *It was held*: after the note had been collected that the plaintiff can not maintain a suit for recovery upon the ground that the agreement was champertous. *Ib.*

3. Such an agreement between an attorney and his client is *prima facie* fraudulent; and the burden is upon the attorney to satisfy the jury, by a fair preponderance of evidence, that he acted with all due fidelity towards his client. *Ib.*

See *Burnham* v. *Heselton*, 82 Maine, 495.

CHOSES IN ACTION.

See WILL, 9.

CITY COUNCIL.

Where an act is not to take effect until it has been accepted by the city council at a meeting legally called therefor, *Held:* That it may be accepted at a regular adjourned meeting duly held after a regular session of the city council; *also*, that no previous notice of the business to be acted on is necessary to render its acceptance valid. *Auburn* v. *Paul*, 212.

CLIENT AND ATTORNEY.

See CHAMPERTY.

CLOUD ON TITLE.

See EQUITY, 3.

COLONIAL ORDINANCE.

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See ACTION, 6. TRUST, 7. WILL, 17.

CONSIDERATION.

See BAILMENT, CONTRACT, 3. DURESS.

CONSIGNEE.

See CARRIER.

CONSTITUTIONAL LAW.

See SALES.

1. Article I, sec. 7, of the Constitution of Maine, provides that "no person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury, except in cases of impeachment, or in such cases of offences as are usually cognizable by a justice of the peace." *Butler* v. *Wentworth*, 25.

2. The legislature, by public statute of 1891, c. 132, for the offense with which the petitioners were charged, imposed a penalty of five hundred dollars and costs, and in addition thereto imprisonment for one year, and in default of payment of such fine and costs, one year's additional imprisonment. *Ib.*

3. The act of the legislature in thus increasing the penalty, and rendering imperative a sentence of imprisonment for a term of not less than one year, has rendered the crime infamous within the meaning of the Constitution, and as such, no person can lawfully be held to answer for the same except upon a presentment or indictment of a grand jury. *Ib.*

CONTRACTS.

See DURESS, 2.

CORPORATION.

See RAILROAD. WATER COMPANY.

COUNTY COMMISSIONERS.

See APPEAL. DAMAGES, 1.

CRIMINAL LAW.

See INDICTMENT. INTOXICATING LIQUORS. PLEADING. PRACTICE, 9. VERDICT.

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See ACTION, 5. ASSAULT AND BATTERY, 3. EASEMENT, 3, 4.

DAYS OF GRACE.

DEATH.

DECEIT.

DEMURRER.

See PLEADING, 5.

DESCENT.

EASEMENT.

2. In 1889, the plaintiffs sued the defendant in trespass for disturbance of their right of way, acquired by grant, across defendant's railroad. The right of way which they held was appurtenant to lands they owned northerly of the railroad. It was changed somewhat from its accustomed course by the defendant's servants upon the southerly side of the railroad. The changes alleged were as follows: (1,) In 1881, digging cellars and erecting four houses fronting upon a highway, which had been located in 1876, and which structures covered about one hundred and fifty feet along the way. (2,) In 1888, excavating the surface, along which the way ran, to the depth of five or six feet, to get a practicable grade for a spur track leading from the main track to a gravel pit belonging to the defendant.

Fitzpatrick v. *R. R.* 33. *Smith* v. *Same*, 33.

2. A new and convenient way passing over the defendant's land, and connecting with a public highway, was substituted by the defendant for that part of the old way interrupted by the houses. The plaintiffs made no claim for damages but used the substituted way for seven years. *Held;* That the plaintiffs had accepted the new way in lieu of that destroyed by the cellars and houses, and had acquiesced in the change and intentionally surrendered and abandoned the old way in consideration of the new one opened for their benefit. *Ib.*

3. In making the excavations, in 1888, which deprived the plaintiffs of the use of their way for two hundred and fifty feet, the defendant invaded the plaintiffs' rights. Another suitable way about twenty feet distant was provided for the use of the plaintiffs as a substitute for the old one, and after the lapse of about two weeks was adopted and used by them. *Held;* That as it appears that the parties did not sustain any actual damage as a necessary result of this modification in the location of the way,— one of them having received satisfaction for the temporary inconvenience pending the defendant's operations,— only nominal damages should be allowed. *Ib.*

4. The plaintiffs refused for a short time to travel on the substituted way, under the impression that by so doing they would recognize a right in the defendant to make the change and thereby surrender their rights in the old location. They claimed substantial damages for this interruption. *Held;* That the law makes it incumbent on a person, for whose injury another is responsible, to use all ordinary care and to take all reasonable measures available to avoid the loss and render the damage as light as practicable; and it will not permit him to recover any damage which might have been prevented by the exercise of such care and diligence. *Also*, That the plaintiffs' right of way was not extinguished by the defendant's exercise of the power of eminent domain, and was not paid for in the estimation of land damages; and, therefore, the plaintiffs' rights were invaded in making the excavations in 1888. *Ib.*

5. The grantor in a deed conveyed certain premises to the grantee, reserving to himself for the benefit of his other land a right of way in a carriage road across the land conveyed, or, in the event of the carriage road being changed in route by the grantee, then in such substituted road, and also reserving a similar right in another road across such premises or in any

EXCEPTIONS.

See CRIMINAL LAW, 12. PRACTICE.

FISH.

See INDIANS.

FLATS.

See DEED, 1. FISH, 6.

"Beginning at the sea on Benjamin Ash's line; thence south on the said Ash's line to the highway; thence west on the highway ten rods to a stake; thence north to the shore parallel with said Ash's line; thence east to the first bounds mentioned." It did not appear that the grantor intended to retain the adjoining shore as distinct from the upland. *Held*; That the deed conveys to the plaintiff the flats, or shore, with the upland. *Ib.*

FORBEARANCE.

A holder of a mortgage of chattels, given by the principal debtor to secure his promissory note, will not release a surety thereon by mere forbearance to enforce the mortgage for no unreasonable length of time after the note shall fall due. *Thorn* v. *Pinkham*, 101.

FORECLOSURE.

See MORTGAGE, (Real,) 1.

FOREIGN CREDITOR.

See INSOLVENCY, 2.

FOREIGN AND INTERSTATE COMMERCE.

The statute of this State which makes a ticket for a passage on any railroad binding on the railroad company for six years from its date, with the right of the holder of the ticket to stop off at usual stopping places as often as he pleases during that period, cannot apply to a ticket purchased in Canada for a continuous passage on a particular day over the defendant's road from that Province through portions of the states of Vermont and New Hampshire into Maine. Such an application of the statute would work an interference with both foreign and inter-state commerce in the carriage of passengers. *Lafarier* v. *R. R. Co.* 286.

FORMER CONVICTION.

See EVIDENCE, 14.

FRAUDULENT CONVEYANCE.

See EQUITY, 4.

By virtue of R. S., c. 61, § 1, property conveyed to the wife, but paid for by the husband, may be taken as the property of her husband, to pay his debts contracted before such purchase. *Berry* v. *Berry*, 541.

FRAUDS, STATUTE OF.

In an action of deceit against a person for verbal misrepresentations of the financial standing of another, made in order to obtain a credit for such other person, such credit having been thereby obtained, the case is not saved from the operation of the statute of frauds by the fact that the defendant also at the same time misrepresented his own financial standing and made certain personal promises that he has not kept. *Brown* v. *Kimball*, 280.

GRANT.

See DEED, 2.

LIFE TENANT.

See WILLS, 23.

LIMITATIONS.

NEW TRIAL.

See JURY, 2.

NOTICE.

See CITY COUNCIL. LIEN. TAXES, 2, 3, 4, 8.

PAYMENT.

See MORTGAGE (REAL), 3, 4, 5.

1. An indorsement on a promissory note of the value of a quantity of lumber delivered to the payee by the maker, made by express agreement of the parties four years after the delivery of the lumber, will be deemed a payment on the note, as of the date of the indorsement, which will prevent the operation of the statute of limitations, it not appearing that there was any agreement, express or implied, to appropriate the lumber to the payment of the note at the time of the delivery. *Manson* v. *Lancey*, 380.
2. When one demands money under a claim of right, and uses no other means to obtain it than importunity and persistency, or a threat expressed or implied, of resort to litigation to obtain it if it is not voluntarily paid, and the one of whom the money is demanded has time for consideration and deliberation, and to obtain the advice of counsel or friends, and the money is then voluntarily paid to settle the demand, it cannot be recovered back, though the demand is illegal and unjust. *Parker* v. *Lancaster*, 512.
3. The law favors the compromise of doubtful claims, and does not allow settlements arrived at by mutual concessions to be lightly set aside. *Ib.*
4. When both parties possess equal knowledge of the facts, or possess equal means of obtaining such knowledge, and one of them voluntarily pays a claim made against him by the other, the money so paid cannot be recovered back. *Ib.*

PENALTY.

1. The penalty imposed by R. S., c. 6, § 146, cannot be interposed by way of recoupment in defense to an action, by a collector of taxes to recover of the town his agreed compensation for collecting the town's taxes. *Braydon* v. *Freedom*, 431.
2. Money voluntarily paid with a full knowledge of all the facts cannot be recovered back. *Ib.*

PENSION.

It is no defense to a bill in equity, seeking payment of the husband's pre-existing debt from lands conveyed to the wife by him, that the purchase was made with his pension money. *Berry* v. *Berry*, 541.

Friend v. *Garcelon*, 77 Maine, 25, affirmed. *Ib.*

PERSONAL PROPERTY.

See REPLEVIN.

PHYSICIAN.

The failure of a physician of ordinary skill to discover a serious rupture of the perineum after repeated examinations for the purpose *is held* actionable negligence. *Lewis* v. *Dwinell*, 497.

PLEADING.

See INDICTMENT, 10.

1. It is too late for a plaintiff to raise objections to the insufficiency in form of a plea in bar, after issue has been joined and evidence has been put in under the plea. *Jordan* v. *Pulsifer*, 137.

PLEDGE.

POSSESSION.

See MORTGAGE (CHATTEL).

PRACTICE.

See EXCEPTIONS, 8. INTOXICATING LIQUORS, 12. PLEADING, 1.

1. When a party asks for a new trial on the ground of newly discovered evidence, the burden is upon him to satisfy the court that the evidence is credible, and that its non-production at the former trial was not owing to a want of diligence on his part. *Greenleaf* v. *Grounder*, 50.
2. Upon the issue whether an ox that drools is a defective animal, an instruction that the jury "may call into requisition their practical experience and knowledge relating to cattle of this kind," is erroneous. *Page* v. *Alexander*, 83.
3. Generally the Law Court can act upon a bill of exceptions only in the form as made up and allowed at *nisi prius*; but the stenographer's report when expressly made a part of the bill, must control the allegations of fact if there be a conflict. *Tower* v. *Haslam*, 86.
4. Requested instructions not based upon the facts proved, are properly refused. *Ib.*
5. Requested instructions must be complete and correct as an entirety, otherwise they are properly refused. *Ib.*
6. A motion to set aside a verdict as being against the manifest weight of evidence, is not generally sustained, when the evidence is conflicting and the verdict is sustained by the positive testimony of two or more witnesses. *Ib.*
7. The decision of a presiding judge as to matters of fact, in a case referred to him with right to except, is conclusive. *Pettengill* v. *Shoenbar*, 104.
8. A party may except to any opinion, direction or judgment of the presiding justice upon questions of law; but this does not include such opinions, directions or judgments as are the result of evidence, or the exercise of judicial discretion. *Ib.*
9. The defendant was convicted before a magistrate for a single sale of intoxicating liquor and after sentence appealed to the Supreme Court. Upon being arraigned in the appellate court, he filed a general demurrer, claiming that the appeal papers consisting of copies of the record of judgment, complaint and warrant were not properly certified by the court below, and concluded his demurrer as follows: "Wherefore, for want of a sufficient compaint and warrant in this behalf, the said David Kyer, Jr., prays judgment," &c. The demurrer was overruled. The defendant without moving an arrest of judgment excepted to the ruling. *Held*: That the demurrer did not reach the record of conviction, and that the complaint and warrant only were open to objection; also, that the defect should be raised upon motion in arrest of judgment. *State* v. *Kyer*, 109.
10. The presiding justice at a jury trial has full discretionary power to suggest to the jury possible solutions of seeming difficulties, and possible harmonies of seeming discrepancies in the evidence, even though counsel do not. *York* v. *R. R. Co.*, 117.
11. Definitions of law given by a judge in the trial of a criminal cause, which although not altogether apposite to the question pending, are not unfavorable to the accused, cannot be the ground for exceptions by him. *State* v. *Clair*, 248.

PRESCRIPTION.

See ADVERSE USE.

PRESUMPTION.

See EVIDENCE, 10.

1. The owner of the upland adjoining tide-water *prima facie* owns to low water mark; and does so, in fact, unless the presumption is rebutted by proof to the contrary. *Snow* v. *Mt. Desert, &c., Co.* 14.
2. The lapse of twenty years from the maturity of a mortgage raises only a presumption of payment which may be repelled. *Knight* v. *McKinney*, 107.
3. When a husband furnishes his wife money to be used in buying land, and she uses it for that purpose taking the title in her own name, there is no pre. sumption that the wife holds the title in trust for the husband; but from the relationship of the parties, the presumption is that it was for her benefit. *Long* v. *McKay*, 199.

PROBATE.

1. In an action against an intestate estate, in the hands of an administratix *de bonis non*, the defense that the unadministered assets which came into her hands from her predecessors were exhausted in discharge of the preferred debts, must be sustained, if at all, by regular probate proceedings. *Woodbridge* v. *Tilton*, 92.
2. Probate appeals are conducted under the rules of equity practice, the verdict being advisory only in settling the final decree. *King* v. *Holmes*, 212.
3. Probate procedure, in this State, should be conducted upon the rules of the broadest equity, whenever the statute does not conflict with that view. *Ela* v. *Ela*, 423.
4. A release from a ward to his guardian, made after the ward's majority, may be interposed as a defense in the probate court, either in answer to a citation to settle his account as guardian, or as a voucher upon the settlement of the same. *Ib.*
5. The release in this case was given by a ward four years after his majority, to his mother, who had been his guardian. No fraud is shown, and the ward, a man of liberal education and of several years' experience in active business, then twenty-five years of age and fully understanding his rights, made a full settlement with his mother as his guardian, receiving from her property of considerable value which he still holds. For seven years he did not question the fairness or validity of the settlement. *It was held*, that he must be content therewith, and be absolutely bound thereby. *Ib.*
6. The propriety of investments by an executor, who is also trustee, is not concluded by his settlement of an account in probate, and transfer of the listed investment to him in his subsequent account as trustee. *Mattocks* v. *Moulton*, 545.

PROMISSORY NOTES.

See ACTIONS, 3.

1. A promissory note taken in payment of money embezzled, is not void by rea-

3. The remaining sections of the act are administrative provisions, not to become effective until thirty days after recess of the legislature; so that, while the board might be appointed without any considerable delay, its powers and duties were not imposed until a later time, when the administrative provisions of the act should become effective and clothe the board already appointed with power of action, thereby setting the machinery of the law in motion with the greatest practicable dispatch. *Ib.*

REGULATION.

See WATER COMPANY.

REPLEVIN.

1. A land owner may maintain an action of replevin for a building of his which the defendant has begun to move from his land. *Luce* v. *Ames*, 133.
2. There is in such case a severance of the building from the realty, so far as the defendant is concerned. *Ib.*

RESTRAINT OF ALIENATION.

See MORTGAGE, (REAL) 8. WILLS, 13, 14.

RESTRAINT OF MARRIAGE.

A testator devised his homestead to an unmarried daughter, "for and during her natural life, unless she shall be married, in which case her life estate shall cease. So long as she shall live and remain unmarried she is to have the exclusive right of occupation, use and enjoyment of said homestead." *Held*; that the intention of the testator, as manifested by the whole instrument, was not to promote celibacy by imposing a condition in restraint of his daughter's marriage, but only to create a limitation of her estate in the homestead until by her marriage another home should be provided; and that the daughter's exclusive right to the possession and enjoyment of the entire homestead accordingly ceased upon the marriage.

Mann v. *Jackson*, 400.

REVIEW.

1. In a petition for the review of an action in which the defendant was absent from the State and had no notice of the suit, but in which an attorney at law appeared and continued to act until judgment was rendered; it is competent for the petitioner to prove by parol that the attorney's appearance was without his knowledge or authority; and if the fact is established the appearance can in no way legally affect him. *McNamara* v. *Carr*, 299.
2. Revised Statutes, c. 89, § 1, which provides that a review may be granted "when a petition for review of an action defaulted without appearance is presented within three years after an officer having the execution . . . demands its payment of the defendant"—does not require that the defendant shall wait until an officer having the execution demands its payment of him, but he may apply for a review as soon as he has actual knowledge of the judgment against him. *Ib.*

RULE OF COURT.

See DEED, 10.

SABBATH.

See SUNDAY LAW.

SALES.

See NUISANCE. PLEDGE. RAILROAD, 7.

1. The plaintiff, a wholesale liquor dealer in Boston, through his agent at the defendant's shop in Old Town, contracted to send the defendant five barrels of whiskey and one barrel of port wine in original packages, and that the defendant should have ten days after receiving the liquors in which to return them if they were not satisfactory. The liquors were shipped to and received by the defendant, and a part of them returned. In an action for the price, *Held*: That the sale was made in Maine, notwithstanding the order was filled in Boston and delivery was there made to a common carrier; that the sale being conditional it became a completed contract after the arrival of the liquors at the place of their destination in Maine.

Wasserboehr v. *Boulier*, 165.

2. It was not a sale of liquors in original packages, inasmuch as the sale by its terms was conditional, executory and incomplete until the defendant had received, unsealed and sampled them. *Ib.*

3. That moment the sale was illegal by the laws of this State. *Ib.*

SALES ON EXECUTION.

See DEATH.

SCHOOL DISTRICT.

See ELECTIONS.

1. Neither a school district warrant nor the agent's return thereon can be contradicted collaterally. If they are genuine documents, they are conclusive evidence, of what they appear to show, in all collateral proceedings.

Woods v. *Bristol*, 358.

2. An agent of a school district, chosen at an election wholly void, is not an officer *de facto*, although he attempts to exercise the office. *Ib.*

SEA OR SHORE.

See DEED, 1, 7, 8, 9.

SET OFF.

By virtue of R. S., c. 46, § 48, debts which a stockholder has against an insolvent corporation may be set off against a debt which he owes for unpaid stock, in a suit against him by an assignee of the insolvent corporation as well as when suit is brought by a judgment creditor.

Appleton v. *Turnbull*, 72.

TAXES.

TRUSTEE.

See PLEDGE.

VERDICT.

WIFE.

See HUSBAND AND WIFE.

WILL.

See ADOPTION. DESCENT.

WITNESS.

WORDS AND PHRASES.